CLE ACCREDITATION PACKET

International Insolvency Institute 26th Annual Conference

Montreal, Canada
June 14, 2026

Judges' Panel Discussion
"Hot Topics in Cross-Border Restructuring"

Moderator:

Lisa Laukitis
Milbank LLP

Panelists:

Chief Judge Martin Glenn
Southern District of New York Bankruptcy Court

Justice Kannan Ramesh
Supreme Court of Singapore

The Honourable Geoffrey B. Morawetz
Formerly of the Ontario Superior Court of Justice

Judge Andréa Galhardo Palma
São Paulo State Court

Table of Contents

Speaker Biographies

Moderator:

Lisa Laukitis
Milbank LLP

Lisa Laukitis is a partner in the New York office of Milbank LLP and a member of the firm's Financial Restructuring Group. For over 25 years, Ms. Laukitis has advised clients on all aspects of corporate restructurings. Ms. Laukitis is a frequent lecturer and author on restructuring topics. She has been repeatedly selected for inclusion in Chambers USA, IFLR1000, Ms. Laukitis is a Fellow of The American College of Bankruptcy. She previously served on the Committee on Bankruptcy and Corporate Reorganization of the Association of the Bar of the City of New York and the Lincoln Center Business Council.

Panelists:

Chief Judge Martin Glenn
Southern District of New York Bankruptcy Court

Chief Judge Glenn has served as a United States Bankruptcy Judge since 2006 and was appointed Chief Judge in 2022. He received his B.S. from Cornell University and his J.D. from Rutgers Law School, where he served as an Articles Editor of the Rutgers Law Review. Judge Glenn served as a law clerk to Hon. Henry J. Friendly, Chief Judge of the U.S. Court of Appeals for the Second Circuit. Until his appointment to the Bankruptcy Court, Judge Glenn practiced law with O'Melveny & Myers LLP. Judge Glenn is a Fellow of the American College of Bankruptcy and an Adjunct Professor at Columbia Law School, where he teaches International Insolvency Law. After many years of remarkable service, Judge Glenn will retire from the bench in September.

Justice Kannan Ramesh
Supreme Court of Singapore

Justice Kannan Ramesh was appointed Judge of the Appellate Division on 1 November 2022. He was appointed Judicial Commissioner in May 2015, and Judge of the High Court in April 2017. He was also appointed as a Judicial Commissioner of the Supreme Court of Brunei Darussalam SCBD on a part-time basis from 2019 to 2023 where he heard both commercial and civil cases. He received his Bachelor of Laws with Honors from the National University of Singapore. Before his judicial appointment, Justice Ramesh was Managing Partner of Messrs Tan Kok Quan Partnership, where he specialized in dispute resolution, insolvency and restructuring, and international arbitration. He was one of the founding members of the Judicial Insolvency Network. In 2022, he was appointed by the Chief Justice as the co-chair of the Commercial Practice Panel of the Supreme Court, to develop best practices for the management of commercial cases. He was the first Singaporean Judge recognized as an International Fellow of the American College of Bankruptcy and was conferred the Emeritus Fellowship of the Insolvency Law Academy of India in recognition of his global thought leadership in international insolvency. Justice Ramesh served as the President of the III from 2023 to 2025.

The Honourable Geoffrey B. Morawetz
Formerly of the Ontario Superior Court of Justice

Mr. Morawetz began his judicial career on the Ontario Superior Court of Justice in 2005 and was appointed Chief Justice in 2019. He is a graduate of the University of Western Ontario Faculty of Law. Prior to his judicial career, Mr. Morawetz practiced insolvency and restructuring law for 25 years. Since his appointment to the Superior Court, he has been named three times as one of the "Top 25 Most Influential Lawyers in Canada." Mr. Morawetz serves as an advisor to the Canadian Delegation at the UNCITRAL insolvency law working group and, until recently, he was the chair of the Judicial Insolvency Network. After over 21 years of judicial service, Mr. Morawetz retired from the bench in May. He was awarded the 2026 III Outstanding Service Award at this year's conference.

Judge Andréa Galhardo Palma
São Paulo State Court

Judge Palma has served on the São Paulo State Court since 2000, and currently presides over the 2nd Regional Corporate, Insolvency and Arbitration Court in São Paulo City. She holds a law degree from the University of São Paulo, an L.L.M. from the University of Pennsylvania, and a specialization in international commercial arbitration from Columbia University and in domestic arbitration from FGV Law São Paulo. She is a PhD candidate at FGV Law in Business Law and Innovation. Judge Palma is a member of UNCITRAL's Working Group II in Arbitration and Conciliation and Working Group V in Insolvency.

Appendix

Cases Cited

In *Salford Estates*, a landlord presented a winding-up petition against its tenant after a dispute over service charges and insurance rent under a lease containing a wide arbitration clause. The Court of Appeal held that a winding-up petition was not a "claim" subject to the mandatory stay provisions of section 9 of the Arbitration Act 1996, but that the court should exercise its discretion consistently with the policy favoring arbitration. As a result, where the petition debt fell within the arbitration clause and was not admitted, the petition generally would be stayed or dismissed, absent wholly exceptional circumstances, without requiring the court to decide whether the debt was disputed on genuine and substantial grounds.

In *Lasmos*, the petitioner sought to wind up Southwest Pacific Bauxite for a debt allegedly arising under a management services agreement containing an HKIAC arbitration clause. The company disputed the debt and invoked the contractual dispute resolution process. The court departed from earlier Hong Kong authority and held that a winding-up petition should generally be dismissed where the debt is disputed, the contract contains an arbitration clause covering the dispute, and the company has taken the steps required to commence the contractually mandated dispute resolution process. The court emphasized, however, that the arbitration clause does not oust the insolvency court's jurisdiction and that exceptional cases may justify a stay or interim insolvency relief, such as provisional liquidation.

In *Sunac China Holdings,* the debtor was a Hong Kong based holding company incorporated in the Cayman Islands. Its principal activity was financing subsidiaries operating in mainland China. Ultimately, the court decided that its COMI was in Hong Kong, despite the statutory assumption that it would be in the Cayman Islands. The court focused especially on the expectations of creditors in determining the debtor's COMI, stating, "[c]reditor expectations, and creditors' overwhelming approval of the Debtor's Hong Kong restructuring, further support this conclusion."

In re Silicon Valley Bank was a decision regarding a Cayman Islands entity's eligibility for Chapter 15. In 2023, the Cayman Islands Grand Court filed a winding-up order for the Cayman Islands branch of SVB, and shortly after, the joint official liquidators for SVB Cayman filed a Chapter 15 petition. In 2024, the court held that SVB Cayman was ineligible to be a debtor under section 109(b), and therefore under Chapter 15, as a branch of an FDIC-insured U.S. bank. The court's decision was appealed to the circuit court and affirmed.

In *Sian Participation*, the Privy Council considered whether the BVI court should dismiss or stay a liquidation application where the alleged debt was subject to a broad LCIA arbitration clause and was denied but not genuinely disputed on substantial grounds. The Board rejected the *Salford*

Estates approach and held that, for a generally worded arbitration or exclusive jurisdiction clause, the ordinary test remains whether the debt is disputed on genuine and substantial grounds. The Board reasoned that a creditor's winding-up or liquidation application does not determine the petitioner's claim to be owed money and therefore does not breach the obligation to arbitrate disputes over the debt. The Board dismissed the appeal and directed that *Salford Estates* should no longer be followed in England and Wales.

Several months after initially filing under Chapter 15, InterCement Brasil started a new insolvency proceeding in Brazil, requiring a new Chapter 15 filing. An ad hoc group objected to the recognition of the proceeding for a Dutch-subsidiary SPV, arguing that its COMI was not in Brazil. However, the court held that it was Brazilian, as the subsidiary's primary business activity was limited to debt repayment and "its success depended on" mediation and insolvency proceedings in Brazil.

In *Crédito Real*, the court considered the procedural fairness of the debtor's foreign proceeding and whether recognition of the releases would severely harm a U.S. constitutional or statutory right. In upholding the releases, the court noted, "lack of specific availability in U.S. courts does not equate to manifest contrariness to U.S. public policy, especially where, as here, the contested relief is available in other contexts and could be made available more broadly by a simple act of Congress."

In *Odebrecht*, the court ultimately found that the contested language did not clearly create nonconsensual third-party releases. However, the court did consider whether such relief would be available and stated, "*Purdue* only held that *chapter 11* of the Code does not give courts the power to grant such releases, and did not say anything about limitations on the power of courts to act as ancillaries to foreign proceedings under chapter 15."

In *Altice France*, the debtor, France's second largest telecommunications company, restructured more than €24 billion of debt through a French accelerated safeguard proceeding and chapter 15 recognition in the United States. The company first used French conciliation proceedings and obtained support from more than 90% of its creditors for a transaction that eliminated €7.5 billion of debt and extended maturities to 2028 and beyond. The Paris Commercial Court sanctioned the plan on August 4, 2025, and the French approval orders were given full force and effect in the United States on September 30, 2025. Although no objections were raised, the court declined to approve releases exceeding the scope of the French plan and required additional evidence regarding French disclosures for the contemplated U.S. dollar-denominated bond issuance.

The 2025 SDNY decision in *In re Giftcraft* concluded that US-incorporated affiliates of a Canadian debtor were eligible for Chapter 15 relief because each entity's COMI was determined to be in Canada. A DLA Piper article commented: "In the aftermath of *Giftcraft*, an uptick in chapter 15 proceedings by entities organized in the US is possible. The US–Mexico–Canada Agreement, which replaced [the] North American Free Trade Agreement as of July 1, 2020, abolished all requirements in the affected countries that an entity engaged in cross-border transactions must maintain a representative office or be a resident of a country in order to conduct business there. As a result, an enterprise engaged in business in the US and Canada (or Mexico) need not maintain an office in both countries. This could lead to scenarios where an entity is organized in the US but has its headquarters outside the US – as was the case with the Giftcraft entities."

In *Fossil*, a U.S.-listed retailer pursued a U.K. restructuring plan to address $150 million of senior unsecured notes due 2026 after an out-of-court exchange proved difficult because approximately 40% of the notes were widely held "baby bonds" and the notes were subject to the Trust Indenture Act. The company used a "Stapled Exchange" that paired an exchange offer with a backstop U.K. Restructuring Plan under Part 26A of the Companies Act, allowing class approval by 75% in value without a chapter 11-style numerosity requirement. Fossil and the majority noteholders changed the governing law of the notes to English law and formed Fossil (UK) Global Services Ltd. as the plan company and guarantor to establish English jurisdiction. The English court sanctioned the Restructuring Plan on November 10, 2025, and Judge Lopez recognized and enforced it in chapter 15 proceedings in the Southern District of Texas on November 12, 2025.

In *Singapore Commodities*, the Singapore Court of Appeal reaffirmed that the *AnAn* and *Founder Group* approach remains the law in Singapore notwithstanding the Privy Council's contrary reasoning in *Sian Participation*. Where a debt subject to a valid arbitration agreement is disputed, the winding-up applicant ordinarily cannot establish standing as a creditor unless the dispute has been resolved in arbitration, subject to a narrow abuse-of-process exception. The court clarified that abuse based on resiling from an admission requires a clear and unequivocal admission of both liability and quantum, followed by a change of position without a clear and convincing explanation. On the facts, the respondent had not established standing because the prior arbitration did not determine that the alleged debt was owed, the appellant had not made a clear admission, and the appellant had not abused the process of the court; the winding-up order was set aside and the application dismissed.

Case 64
Altomart Ltd
v
Salford Estates (No. 2) Ltd

[2014] 6 Costs LR 1013

Neutral Citation Number: [2014] EWCA Civ 1408
Court of Appeal (Civil Division)
29 October 2014

Before:
Moore-Bick LJ, Ryder LJ
and David Richards J

Headnote

The court considered an application for an extension of time in which to file a respondent's notice under CPR 52.5(2)(b) and provided guidance on the correct approach to be adopted to applications for extensions of time where there is no specified sanction for having missed a deadline. Application granted. CPR 3.9 does not apply to applications where there are no sanctions specified by the rules, practice directions or court order. However, given that the application was made after the time prescribed by the rules had already expired, the *Mitchell* principles were held to "apply with equal force". On the facts of this case, although the period of delay in making the application was substantial, it had had little effect on the course of proceedings and could not be regarded as serious or significant.

Cases Cited

A-G of Trinidad and Tobago v *Matthews* [2011] UKPC 38

Baho and Others v *Meerza* [2014] 4 Costs LR 620; [2014] EWCA Civ 669
Chartwell Estate Agents Ltd v *Fergies Properties SA and Another* [2014] 3 Costs LR 588; [2014] EWCA 506
Denton and Others v *TH White Ltd and Another*; *Decadent Vapours Ltd* v *Bevan and Others*; *Utilise TDS Ltd* v *Davies and Others* [2014] 4 Costs LR 752; [2014] EWCA Civ 906
Marcan Shipping (London) Ltd v *Kefalas* [2007] EWCA Civ 463; [2007] 1 WLR 1864
Mid-East Sales Ltd v *United Engineering and Trading Company (PVT) Ltd and Another* [2014] 4 Costs LO 605; [2014] EWHC 1457 (Comm)
Mitchell v *News Group Newspapers Ltd* [2013] 6 Costs LR 1008; [2013] EWCA Civ 1537; [2014] 1 WLR 795
Robert v *Momentum Services Ltd* [2003] EWCA Civ 299
Rusant Ltd v *Traxys Far East Ltd* [2013] EWHC 4083 (Ch)
Sayers v *Clarke Walker* [2002] EWCA Civ 645; [2002] 1 WLR 3095

Judgment

1. **MOORE-BICK LJ:** This is an application for an extension of time in which to file a respondent's notice under CPR 52.5(2)(b). An application of this kind would normally be determined by a single judge in advance of the hearing of the appeal, or by the court at the hearing, but in this case the Vice-President directed that it be heard in advance by a full court in order to give guidance on the approach to be adopted to applications of this kind in the light of the court's decision in *Mitchell* v *News Group Newspapers Ltd* [2013] EWCA Civ 1537; [2014] 1 WLR 795. At the conclusion of the hearing we announced our decision to grant the application and indicated that we would give our reasons for doing so at a later date. I now give my reasons for concurring in that order.

2. In order to put the matter in context it is necessary to describe briefly the nature of the proceedings and the events which have

occurred since His Honour Judge Bird made the order dated 4 March 2014, which is the subject of the appeal.

3. On 29 April 1974 a lease was executed of premises comprising part of a shopping precinct in Salford, Greater Manchester. The appellant, Salford Estates (No. 2) Ltd ("Salford"), is the successor in title of the original landlord; the respondent, Altomart Ltd, is the successor in title of the original tenant. As tenant Altomart undertook to pay in addition to the rent service charges and sums expressed as insurance rent. The lease contained an arbitration clause couched in wide terms and in due course a dispute arose which was referred to arbitration. Following the publication of an award in its favour, on 3 February 2014 Salford presented a winding up petition against Altomart claiming the amount due under the award, a sum due in respect of service charges and a sum due in respect of insurance rent. By the time the petition was presented Altomart had already sent Salford a cheque in respect of the sum due under the award, which was cashed immediately on receipt.

4. Once it learned that Salford had started winding up proceedings Altomart applied to have the petition stayed or dismissed on the grounds that the amount due under the award had been paid and that there was a bona fide and substantial dispute about the amounts said to be due in respect of service charges and insurance rent. The disputes in relation to those claims, it was said, should be referred to arbitration, but in any event made it inappropriate for the petition to proceed.

5. In support of its argument that the disputes should be referred to arbitration Altomart relied on *Rusant Ltd* v *Traxys Far East Ltd* [2013] EWHC 4083 (Ch) in which Warren J had held that s 9 of the Arbitration Act 1996 applies to proceedings in the form of a winding up petition and that once a dispute falling within the arbitration clause has arisen, it must be referred to arbitration regardless of its merits. The judge expressed some doubt about the correctness of that decision, but decided that he ought to follow it in the interests of consistency. He concluded that there was no bona fide and substantial dispute in relation to either the service charges or the insurance rent, but stayed the winding up petition in order for the matter to be determined in arbitration in accordance with the decision in *Rusant* v *Traxys*.

6. With the permission of the judge Salford appealed against that

decision. Its notice of appeal is dated 6 March 2014 and was served on 10 March 2014. Accordingly, time for filing a respondent's notice expired on 24 March 2014. At that stage junior counsel (who had not appeared on behalf of Altomart below) was asked to consider whether a respondent's notice should be filed. He advised that there were no grounds for doing so and as a result no further steps were taken in that respect. Altomart's skeleton argument was due to be filed by 22 April 2014 and in the absence of junior counsel on holiday Mr Peter Knox QC was instructed at short notice to settle it. He took the view that there were grounds for challenging the calculation of both the services charges and the insurance rent claimed by Salford and that, if the court on appeal held that the dispute should not be referred to arbitration, Altomart should ask the court to uphold the judge's order on those grounds. It is unnecessary for the purposes of this application to describe in any greater detail the nature of Altomart's case, which was fully set out in the skeleton argument filed on 22 April 2014 and served on Salford the same day. On 24 April 2014 the substantive appeal was listed for hearing on 10 or 11 November 2014. On 29 April 2014 Altomart filed a respondent's notice formally setting out the additional grounds on which it wished to rely. At the same time it applied for the necessary extension of time.

7. Salford opposed Altomart's application for an extension of time relying on the court's more rigorous approach to compliance with the rules in accordance with the guidance given by this court in *Mitchell*. The question thus arose whether those principles ("the *Mitchell* principles") apply to an application of this kind. Mr Knox submitted that the decision in *Mitchell* was primarily concerned with applications under CPR 3.9 for relief from specified sanctions. A good example is an order which directs that the claim be struck out in the event of failure to comply with its terms: see *Marcan Shipping (London) Ltd* v *Kefalas* [2007] EWCA Civ 463; [2007] 1 WLR 1864. He accepted, however, that similar principles apply in cases where the consequences of a failure to comply with the Rules or an order of the court automatically results in the termination of the proceedings, for example an application to file a notice of appeal out of time. However, he submitted that although in some cases the Rules impose a specific sanction for non-compliance, in most cases they prescribe how proceedings are to be conducted without prescribing the consequences of a failure to comply. For example, CPR 15.4 contains general rules

prescribing the time for filing a defence, but contains no sanction for failing to do so. (The claimant may be entitled to enter judgment in default, but that is a matter for him.) Mr Knox submitted that in cases of that kind it is for the court to decide whether time should be extended having regard to all the circumstances of the case and in accordance with the overriding objective. Since rule 52.5(2)(b), with which this appeal is concerned, prescribes no sanction for a failure to file a respondent's notice in time, it is for the court to decide, having regard to all the circumstances of the case, whether to extend time for doing so. The fact that the order can include terms that will prevent the respondent suffering undue prejudice is usually of considerable significance. However, he submitted that even if the *Mitchell* principles do apply to an application of this kind, in the light of the further guidance given in *Denton* v *TH White Ltd, Decadent Vapours Ltd* v *Bevan* and *Utilise TDS Ltd* v *Davies* [2014] EWCA Civ 906 it would not be appropriate to refuse relief having regard to the seriousness and significance of the default and the circumstances of the case as a whole.

8. Miss Anderson QC submitted that where there has been a failure to file a respondent's notice in time, the consequent need to obtain an extension of time to enable the grounds to be argued is, or is at any rate analogous to, a sanction and that the application should attract the same degree of rigorous scrutiny. She submitted that the courts have now become less tolerant of failures to comply with the Rules and have adopted a more robust attitude towards them. She submitted that the delay in this case had not been adequately explained and was by no means insignificant. The appellant would be prejudiced by having to deal with additional arguments that had not been raised below or at the proper time. The court should have regard to the importance of adhering to the Rules. It should therefore take a robust approach and refuse the application.

Do the Mitchell Principles Apply to an Application of This Kind?

9. Although the principles governing the court's approach to applications for relief from sanctions have been explained and refined in *Denton*, it is convenient in this case to continue to refer to them as the *Mitchell* principles, since that is how they were referred to in the course of argument. Since the present application is simply an application under rule 3.1(2)(a) for an extension of time, albeit one made after the time prescribed by the rules had already expired, and is

not an application for relief from any sanction imposed by the rules, practice directions or any order of the court, the first question for consideration is whether the *Mitchell* principles apply at all. Rule 3.8(1) provides as follows:

> "Where a party has failed to comply with a rule, practice direction or court order, any sanction for failure to comply imposed by the rule, practice direction or court order has effect unless the party in default applies for and obtains relief from the sanction."

Rule 3.9(1) provides as follows:

> "On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, ..."

10. In my view it is clear from the language of rule 3.8 that it is concerned with a sanction imposed by the very rule, practice direction or order of which the applicant is in breach, hence the use of the words "imposed by the rule, practice direction or court order". In such cases the consequences of default are spelled out; a classic example is an "unless" order. Rule 3.9 does not repeat the words "by the rule, practice direction or court order", but rule 3.8 provides the context in which rule 3.9 has to be read and in my view it is also directed to sanctions in the sense of consequences imposed by the rule, practice direction or order of which the applicant is in breach. Most rules, practice directions and orders, however, do not provide specific sanctions for their breach, leaving it to the court to decide what, if any, consequences should follow. In my view rule 3.9 does not, therefore, apply to such cases and an application for an extension of time is not one that falls within the scope of rule 3.9, either expressly or by analogy. Such applications are governed by rule 3.2(1)(a).

11. This very question arose for consideration in *A-G of Trinidad and Tobago* v *Matthews* [2011] UKPC 38, to which Mr Knox drew our attention. In that case the Privy Council considered rules 26.6 and 26.7 of the Civil Procedure Rules of Trinidad and Tobago, which were materially the same as CPR 3.8 and 3.9. The defendant had applied, after time had expired, for an extension of time for filing his defence. The claimant argued that, since the application had been made out of time, it was necessary for the defendant to apply for relief from

sanctions under rule 26.7. The Privy Council rejected that submission. Lord Dyson giving the opinion of the Board pointed to the similarity of language used in rules 26.6 and 26.7, which were materially indistinguishable from that used in CPR 3.8 and 3.9, and held that both were directed to rules which themselves imposed or specified the consequences of a failure to comply. "Sanctions imposed by the rules", he said, "are consequences which the rules themselves explicitly specify and impose."

12. In *Mitchell* itself, however, the sanction from which relief was sought had not been prescribed as a consequence of default by any rule, practice direction or previous order of the court. It was a sanction imposed by the court in the exercise of its discretion for a failure to comply with a rule that itself prescribed no sanction for default. To that extent it might be thought that the case did not fall within the natural ambit of rules 3.8 and 3.9. Liberty to apply for relief from that sanction appears to have been given in order to allow fuller argument at a later date when more time could be made available; otherwise one might have thought that an appeal against the order imposing it would have been the more appropriate course. Nonetheless, the application proceeded under rule 3.9 and laid down principles which are intended to govern applications under that rule. The question remains, however, whether they were intended to govern applications, such as the present, for extensions of time where no sanction is prescribed for the default.

13. The consequences of failing to file a respondent's notice within the prescribed time are not spelled out in the rules, so on the face of it there is no sanction within the meaning of that expression in rules 3.8 and 3.9 from which the respondent needs relief. However, in a number of cases dating back more than a decade the courts have recognised the existence of implied sanctions capable of engaging the approach contained in rule 3.9 and therefore now the *Mitchell* principles. The first was *Sayers* v *Clarke Walker* [2002] EWCA Civ 645; [2002] 1 WLR 3095, in which the court considered the approach to be adopted to applications for permission to appeal out of time. The notice of appeal in that case, which included an application for an extension of time, should have been filed within 14 days of the decision, but was nearly eight weeks out of time. Brooke LJ, with whom Kay LJ and Sir Christopher Staughton agreed, noted that the court's power to extend time is contained in CPR 3.1(2)(a), which is worded in broad terms,

giving judges little help in identifying relevant considerations. It appears that over the course of time judges had begun to formulate their own "check lists" of relevant factors, leading to inconsistency of decision-making and a distortion of the Rules. Having referred to rule 3.9 Brooke LJ said:

> "21. In my judgment, it is equally appropriate to have regard to the check-list in CPR 3.9 when a court is considering an application for an extension of time for appealing in a case of any complexity. The reason for this is that the applicant has not complied with CPR 52.4(2), and if the court is unwilling to grant him relief from his failure to comply through the extension of time he is seeking, the consequence will be that the order of the lower court will stand and he cannot appeal it. Even though this may not be a sanction expressly 'imposed' by the rule, the consequence will be exactly the same as if it had been, and it would be far better for courts to follow the check-list contained in CPR 3.9 on this occasion, too, than for judges to make their own check-lists for cases where sanctions are implied and not expressly imposed."

14. Miss Anderson submitted that the court in that case was equating an application for an extension of time in which to file a notice of appeal with an application for relief from sanctions. I think that is correct, as far as it goes, although the court's purpose in doing so was to ensure that judges adopted a consistent approach to applications of that kind, rather than to equate applications for extensions of time with applications for relief from sanctions for all purposes. Until the more rigorous approach to applications under rule 3.9 was approved in *Mitchell*, it was of little significance in practice whether an application for an extension of time under rule 3.1(2)(a) was regarded as analogous to an application for relief from sanctions, since similar factors fell to be considered in similar ways in both cases. However, the passage has since been treated as equating an application for an extension of time for appealing as tantamount to an application for relief from sanctions. That was the view expressed by this court in *Robert* v *Momentum Services Ltd* [2003] EWCA Civ 299, although it declined to import the check-list in rule 3.9 into rule 3.2(2)(a) in a case where an application for an extension of time had been made before the expiry of the relevant time limit, since at that stage there had been no default and therefore no implied sanction.

15. In *Mitchell* itself the court made it clear at paras 49–51 that it

considered that similar principles applied in other cases of failure to comply with the rules, describing an application for an extension of time for service of particulars of claim as being in substance an application for relief from sanctions under CPR 3.9, and since then the concept of the implied sanction has played a prominent part in a number of decisions, as noted by Burton J in *Mid-East Sales Ltd* v *United Engineering and Trading Co (PVT) Ltd* [2014] EWHC 1457 (Comm), whose judgment contains a useful survey of the earlier authorities, including *A-G of Trinidad and Tobago* v *Matthews*. In *Baho* v *Meerza* [2014] EWCA Civ 669 the appellant sought an extension of time to file a notice of appeal. The court (Treacy and Underhill LJJ) held that the *Mitchell* principles applied to such an application and declined to grant relief, even though the application was no more than seven days out of time. Accordingly, I think it is now established that an application for permission to appeal out of time is analogous to an application under rule 3.9 and is therefore to be decided in accordance with the same principles.

16. The reason given by Brooke LJ in *Sayers* v *Clarke Walker* for treating an application for permission to appeal out of time as analogous to an application for relief from sanctions was that without such an extension the appeal could not proceed. Mr Knox submitted that an application for permission to file a respondent's notice out of time is different because the proceedings will continue in any event. That is certainly true, but in my view that is not a significant ground of distinction. The purpose of the respondent's notice is to enable Altomart to rely at the hearing of the appeal on grounds for upholding the judgment that were not before the court below. If an extension of time is not granted it will be unable to do so. To that extent that area of dispute will not come before the court. In my view for a respondent to be prevented from pursuing the merits of a case it wishes to pursue on the appeal is no more or less of an implied sanction than it is for an appellant to be prevented from pursuing its case on appeal. In my view, therefore, the *Mitchell* principles apply with equal force to an application for an extension of time in which to file a respondent's notice.

The Mitchell Principles

17. In *Mitchell* itself the court was concerned with the claimant's failure to file a costs budget seven days before the hearing at which it

was due to be considered. The pilot scheme then in force in relation to defamation proceedings contained in Practice Direction 51D prescribed no sanction for a failure to comply with its requirements, but an amendment to the Rules which became effective on 1 April 2013 and extended costs management to claims of all kinds provided that, if a party fails to file a costs budget within the prescribed time, it would be treated as having filed a budget comprising only the applicable court fees: see rule 3.14. The Master considered that that was the appropriate sanction for the claimant's default and made an order in those terms. At a subsequent hearing she dismissed his application for relief against the sanction she had by her earlier order imposed. An appeal against her orders was dismissed. In relation to the approach to applications for relief from sanctions the court emphasised that greater weight should be given to the two considerations specifically mentioned in rule 3.9, namely, the need for litigation to be conducted efficiently and at proportionate cost and the need to enforce compliance with the rules. A debilitating accident or illness might provide a good reason for the delay, but not excessive pressure of work, much less mere oversight.

18. Nonetheless, in subsequent cases the courts recognised that enforcing compliance with the rules is not an end in itself and that it is not part of their function to impose sanctions merely for punitive purposes. Thus, in *Chartwell Estate Agents Ltd* v *Fergies Properties SA* [2014] EWCA 506 this court upheld an order giving relief from sanctions for failing to serve witness statements in time, even though the defaults were not trivial and there was no good reason for them, because it considered that the interests of justice must ultimately prevail.

19. More recently the rigour of the decision in *Mitchell* has been tempered by the decision in *Denton*. In that case the court recognised that *Mitchell* had been the subject of criticism and, while holding that the guidance it provided remained substantially sound, sought to explain in rather more detail how it should be interpreted and applied. In doing so it identified three stages of enquiry: (i) identifying and assessing the seriousness and significance of the default which engages rule 3.9; (ii) identifying its cause; and (iii) evaluating all the circumstances of the case, including those specifically mentioned, so as to enable the court to deal with the application justly. The court clearly contemplated that if the default is not serious and significant, relief is

likely to be granted. For these purposes a default which does not disrupt the progress of the litigation or the business of the courts more generally may well not be regarded as serious or significant. The court did not consider it appropriate to elaborate on the second stage, given the range of circumstances likely to arise. One of the most significant aspects of the decision, however, is to be found in para 31, in which the Master of the Rolls makes it clear when dealing with the third stage that, even if there is a serious and significant default for which no good reason can be given, the application will not automatically fail. Although the factors mentioned in rule 3.9 are of particular importance, they are not of overriding significance.

20. The approach that is now to be taken to an application under rule 3.9 is summarised in paras 35–36 as follows:

> "35. Thus, the court must, in considering all the circumstances of the case so as to enable it to deal with the application justly, give particular weight to these two important factors. In doing so, it will take account of the seriousness and significance of the breach (which has been assessed at the first stage) and any explanation (which has been considered at the second stage). The more serious or significant the breach the less likely it is that relief will be granted unless there is a good reason for it. Where there is a good reason for a serious or significant breach, relief is likely to be granted. Where the breach is not serious or significant, relief is also likely to be granted.
>
> 36. But it is always necessary to have regard to all the circumstances of the case. The factors that are relevant will vary from case to case. As has been pointed out in some of the authorities that have followed *Mitchell,* the promptness of the application will be a relevant circumstance to be weighed in the balance along with all the circumstances. Likewise, other past or current breaches of the rules, practice directions and court orders by the parties may also be taken into account as a relevant circumstance."

The Application of the Mitchell Principles to This Case

21. A number of points of some significance emerge from the history of the present proceedings. The first, and most obvious, is that the respondent's notice was issued well out of time; it was 36 days late, a substantial delay, given that 14 days is allowed for that step. The second, however, is that when the application for an extension of time

was made the appeal was unlikely to be heard for some months. There was no application for expedition and in the event it was listed for hearing over six months later. The third, which follows close on the heels of the second, is that there is no reason to think that Salford would then, or indeed will now, suffer any undue prejudice if the extension of time is granted, other than having to meet arguments on the merits that were not advanced before the judge. There is no reason to think that it will be any less able to respond to them than would have been the case if the respondent's notice had been filed in time. The question for us, therefore, was whether Altomart should be granted an indulgence in order to enable it to take advantage of the advice of newly-instructed counsel, or whether the application should be refused in the interests of encouraging more rigorous compliance with the requirements of the rules and promoting a more disciplined approach to litigation generally.

22. Applying the *Mitchell* principles as expounded in *Denton*, the first question for consideration was the seriousness and significance of the breach of the rules which had given rise to the need for the application. In terms of the lapse of time the delay was considerable, but it was clear that it was likely to have had little, if any, effect on the course of the proceedings. Neither party suggested, for example, that it would lead to an adjournment of the hearing and there was no reason to think that the need to allow additional time for argument would be likely to interfere with the court's other business. In those circumstances I did not think that the delay could properly be regarded as serious or significant in the sense in which those expressions were used in *Denton*. That suggested that relief should probably be granted: see *Denton*, para 28.

23. As I have already said, it did not seem to me that the explanation given for the delay was very persuasive, but, since the delay itself had had no real effect on the proceedings and had caused no substantive prejudice to Salford, I did not consider that to be of great significance. Altomart accepted that it should bear the costs occasioned by its need to seek the court's indulgence. There was nothing else in its conduct of the proceedings or in the circumstances more generally that militated against granting relief and it would not have been appropriate to refuse relief simply as a punitive measure. I was therefore satisfied that the application should be granted.

24. **Ryder LJ:** I was of the same opinion.

25. **David Richards J:** I was also of that opinion.

Peter Knox QC (instructed by Vyman Solicitors Ltd) appeared for the respondent.

Lesley Anderson QC (instructed by Woodcocks Haworth & Nuttall) appeared for the appellant.

HCCW 277/2017
[2018] HKCFI 426

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

COMPANIES WINDING-UP PROCEEDINGS NO 277 OF 2017

IN THE MATTER of the Companies (Winding Up and Miscellaneous Provisions) Ordinance, Cap 32, sections 178(1)(a), 177(1)(d) and 177(1)(f)

and

IN THE MATTER of Southwest Pacific Bauxite (HK) Limited

BETWEEN

LASMOS LIMITED — Petitioner

and

SOUTHWEST PACIFIC BAUXITE (HK) LIMITED — Respondent

Before: Hon Harris J in Court

Date of Hearing: 18 January 2018

Date of Decision: 22 January 2018

Date of Reasons for Decision: 2 March 2018

REASONS FOR DECISION

The application

1. On 27 October 2017 Lasmos Ltd ("**Lasmos**"), the Petitioner, issued a petition to wind up Southwest Pacific Bauxite (HK) Ltd, ("**Company**") on the grounds of insolvency relying on a statutory demand dated 24 July 2017. The statutory demand sought payment of US$259,700.48 ("**Debt**") said to arise under a management services agreement dated 24 July 2013 ("**Agreement**"). On 30 October 2017 the Company issued a summons to strike out the Petition. I heard the summons on 18 January 2018 and made an order on 22 January 2018 that the Petition be struck out. These are my reasons.

Background

2. The Company is a joint venture owned by a number of shareholders including Lasmos, which owns 32.5%. The relationship between the shareholders is governed by a shareholders agreement dated 24 July 2014. The Company's purpose is to hold 75% of Solomon Bauxite Ltd ("**SBL**"). The other 25% is held by Lasmos. SBL's main asset is the lease of a bauxite mine in the Solomon Islands. The Company's board at the relevant times consisted of two directors representing Lasmos, Keith Douglas and Efstratis Kirmos, two directors representing another shareholder, Breakaway Private Equity, Bruce Hills and Stephen Bartrop, and Andrew White and Lawrence Chin representing respectively two other shareholders.

3. On 24 July 2013 as well signing the shareholders agreement Lasmos also signed the Agreement. Under the Agreement Mr Douglas was appointed Chairman of SBL and Mr Kirmos was appointed

General Counsel. The Debt is said by Lasmos to represent the payment it is entitled to pursuant to the Agreement for the services provided by Mr Douglas and Mr Kirmos.

4. The Company has declined to pay the Debt on the grounds that the fees have not been agreed and in particular there has been no agreement as to the rate to be charged. The Company has not suggested that nothing is payable and it has already paid US$100,000. The Company's initial position before me was that there was a "*bona fide* dispute on substantial grounds" as to what further sums were payable. The phrase in parentheses represents what a company faced with a winding-up petition generally has to demonstrate in order to have it struck out.[1] However, the Agreement contains in clauses 17.2 and 17.5 the following provision for arbitration:

> "**17.2 Notification of Dispute**
>
> A party claiming that a Dispute has arisen must notify each other party to the Dispute giving details of the Dispute."
>
> "**17.5 Arbitration**
>
> If the Dispute is not settled by mediation within 10 Business Days of the start of the mediation process in clause 17.4, any party may by written notice to the other parties refer the dispute to arbitration. The arbitration will be conducted by a sole arbitrator in accordance with the Hong Kong International Arbitration Centre Administered Arbitration Rules in force at the date of this agreement. The decision of the arbitrator will be binding on the parties. Any arbitration proceedings must be held in Hong Kong and in English. The appointing authority for the purposes of the arbitration shall be the Hong Kong International Arbitration Centre which shall also administer the arbitration. The parties agree to waive any objection to the conduct of such arbitration on the grounds that a mediator was appointed in accordance with clause 17.4(a)(ii)."

---

1 *Neo Telemedia Limited* (unrep., CACV 132/2015) (19 October 2015) at [31], citing with approval my judgment in *Yueshou Environmental Holdings Ltd* (unrep., HCCW 142/2013) (16 July 2014) at [8].

5. A number of recent authorities in both England and Singapore have considered the impact the presence of an arbitration clause in an agreement giving rise to a debt relied on to support a winding-up petition, has on the exercise of the court's discretion to make a winding-up order. I asked to be addressed on the authorities and whether Hong Kong law should develop in a similar manner. I consider this question in the next section of this decision.

The Hong Kong authorities

6. The first reported case in Hong Kong in which the court considered what, if any, relevance an agreement to arbitrate had on the determination of a winding-up petition is *Hollmet AG v Meridian Success Metal Supplies Ltd*.[2] Rogers J (as he then was) says this at 347B–H:

> "… The procedure of winding up is to wind up an insolvent company. What the court is concerned to see is whether or not the company is insolvent. The basis upon which that may be presented, may be under s 178 or it may be on a different basis but at the end of the day, the court must consider whether the company is insolvent.
>
> One then turns back to art 8(1), one sees that a winding up proceeding is not a matter which is the subject of an arbitration agreement, it is the underlying contract which is the subject of an arbitration agreement. It is common ground between the parties that in all other types of winding up cases when the court is faced with the question of whether a debt is owing, the test it applies is whether there is a bona fide dispute on substantial grounds.
>
> If there is an agreement which provides that disputes should go to arbitration, until the court is satisfied that there is a dispute, it seems to me that it can still be said that money is due and owing under the contract. It is only once the dispute has arisen that the arbitration comes into being. So whether one looks upon the test, under s 177 as considering whether the company is a debtor or whether one applies the other approach

2 [1997] 4 HKC 343.

> and considers whether there is a bona fide dispute on substantial grounds, it seems to me that until it is properly established that there is a dispute, the debt would exist.
>
> It is not sufficient in the Companies Court for a person merely to hold up his hand and say there is a dispute. He must establish that there is a bona fide dispute on substantial grounds. …
>
> … If a company wishes to obtain a stay of winding up proceedings on the basis that the underlying debt upon which the statutory notice is founded is disputed, it must establish in the normal way that there is a bona fide dispute on substantial grounds. …"

7. The reasoning we find in these passages gives no weight to the agreement between the parties as to how any dispute between them is to be resolved. Although not expressly stated the thinking behind this approach focuses on what a creditor is doing when presenting a petition, namely, invoking a class right to have an insolvent company wound up. The creditor is not seeking an order that the company pay the debt that the creditor relies on as demonstrating that he has *locus* to present a petition and that the company is insolvent. I address this in more detail in later paragraphs.

8. A similar argument was advanced in 2002 before Yuen J (as she then was) in *Re Sky Datamann (Hong Kong) Limited*.[3] As Yuen J explains in [10] and [11], article 8(1) of the UNCITRAL Model Law which by virtue of *section 6* of the *Arbitration Ordinance*, Cap 341, applied to domestic arbitrations and required a court before which an action is brought to refer a dispute to arbitration if one party so requests, does not apply to a winding-up petition because it does not come within the definition of "action". Although the statutory arbitration scheme has

---

[3] (unrep., HCCW 487/2001) (29 January 2002).

changed since 2002 the relevant provisions[4] similarly do not include winding-up petitions. Although Yuen J goes on in her judgment to consider whether a *bona fide* dispute on substantial grounds had been demonstrated, and found that it had, in [12] of the judgment Yuen J states that an arbitration agreement is relevant to the exercise of the court's wide discretion found in *section 180(1)* of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance*, Cap 32 ("**CWUMP**"), although, Yuen J does not discuss how it impacts on the decision making process:

> "Accordingly, it is clear that the court is not obliged to strike out or stay a petition merely because the petitioner and the company had entered into a contract with an arbitration clause, or even if the company has commenced arbitration. It is a matter for the discretion of the court in each case. In exercising its discretion, the court will consider all relevant circumstances, including the financial position of the company, the existence of other creditors, and the position taken by them."

9. In 2003 in *Re Jade Union Investment Limited*[5] it was argued, amongst other things, that the existence of an arbitration clause is a matter to which very great weight should be given when the court comes to exercise its discretion, and that the court should only consider the merits of a company's defence to a debt in very limited circumstances, normally, where there is evidence of actual insolvency. Barma J (as he then was) rejected this argument in [18], [19] and [21] to [23] of his judgment:

> "18. … A petition for the winding up of a company is quite different from an action between parties, in which the parties seek the court's determination as to their respective rights and liabilities. By a winding up petition, a creditor invokes the court's jurisdiction under the Companies Ordinance to wind up a company on one or more of the grounds set out in section 177(1) of that Ordinance. In doing so, it exercises a class right available to all of the company's creditors. If a winding up order is made, the creditor will not necessarily have established any right to be

---

4 *Section 20* of the *Arbitration Ordinance*, Cap 609.
5 (unrep., HCCW 400/2003) (5 March 2004).

paid, or to be admitted to proof in respect of, any particular amount. This is because it will not necessarily have obtained any adjudication from the court of its right to recover any particular amount from the company. It will still be obliged to submit a proof of debt, along with other creditors of the company, and following the adjudication of its proof by the liquidator, it will rank *pari passu* with all other creditors of the same class for a dividend to be paid out of the assets of the company.

19. That being so, it seems to me that the court, in exercising its winding up jurisdiction, in cases such as this, where the company asserts that the debt on which the petition is founded is disputed, is concerned first to determine whether or not the petitioner is to be regarded as a creditor of the company so that it is entitled to present the petition. This it does by considering whether or not the debt is bona fide disputed on substantial grounds. Neither the existence of an arbitration clause in a contract between the petitioner and the company, nor the existence of an arbitration commenced pursuant to it, of themselves demonstrate that the debt is in fact bona fide disputed on substantial grounds. It remains necessary for the company to discharge its burden of establishing this, by placing before the court the evidence from which the court can see that such a dispute exists. …

…

21. This brings me to the third strand of Mr Harris' argument. I am afraid that I am unable to agree with it. If, having considered the evidence, the court concludes that there is no bona fide dispute of substance in relation to the debt relied upon by the petitioner, I see no good reason why the existence of an arbitration clause should be regarded nonetheless as somehow relevant to the court's exercise of its discretion as to whether or not to make a winding up order. There being, in the view of the court, no dispute of substance, the mechanism by which the parties may have resolved to resolve any disputes between themselves is neither here nor there. Moreover, the question of whether or not there is a dispute of substance would appear to be one which logically arises prior to the point at which the court is called upon to exercise its discretion as to whether or not to make a winding up order.

22. Further, it is difficult to see why the making of a winding up order in cases in which an arbitration clause exists in a contract between petitioner and company should, as a matter of discretion, be done only where there is evidence of 'actual insolvency'. By this expression, I understood Mr Harris to mean that the insolvency of the company should be proven by some means other than its failure to meet a statutory demand. Given

> that section 178(1)(a) of the Companies Ordinance deems a company which does not comply with a valid statutory demand to be insolvent, I see no warrant for requiring a petitioner whose contract with the company contains an arbitration clause to be deprived of the benefit of that provision and to be required to establish by positive evidence, which may seldom be available to it, that the company is insolvent.
>
> 23. None of this is, of course, to say that the court does not, having concluded that the debt is not bona fide disputed on grounds of substance, go on to consider whether or not it ought to exercise its discretion by making a winding up order in the particular case before it. It remains necessary to exercise this discretion, as Yuen J said, in the light of all the relevant circumstances."

10. From the time of Barma J's decision it has been understood that the Companies Court determines a petition based on a disputed debt arising from an agreement containing an arbitration clause in the same way that it does any other petition based on non-payment of a disputed debt, namely, by requiring a company that opposes a winding up to demonstrate that it has a *bona fide* defence on substantial grounds: see, for example, Kwan J (as she then was) in [7] of *Re Southern Materials Holding (H.K.) Co Ltd* [6] and [18] of my own decision in *Re Quiksilver Glorious Sun JV Ltd*,[7] which arose from a shareholders dispute, in which I summarise *obiter* the state of the law as explained in the decisions to which I have referred as follows:

> "Commonly a winding-up petition issued on the grounds of insolvency relies on a statutory demand to prove insolvency. If it does so in order for the company to defeat the petition it must demonstrate that it has a *bona fide* defence on substantial grounds to the claim for the underlying debt. That determination is undertaken by the court. The petition will not be stayed to arbitration if the debt arises under an agreement which contains an arbitration clause: see the decision of Yuen J (as she then was) in *Re Sky Datamann (Hong Kong) Ltd*.[8] This is consistent with

[6] (unrep., HCCW 281/2007) (13 February 2008).
[7] [2014] 4 HKLRD 759.
[8] (unrep., HCCW 487/2001, [2002] HKLRD (Yrbk) 22) (29 January 2002).

> the nature of winding-up proceedings. The creditor does not seek to recover the sum due to him under the agreement containing the arbitration clause; rather he seeks to put an insolvent company into liquidation for the benefit of all its creditors."

11. The issue in *Quiksilver* was whether the petition should be stayed to allow the underlying dispute between the shareholders to be determined in accordance with the arbitration agreement in the shareholders agreement that they had signed, and which covered the subject matter of the complaints in the petition, although an arbitrator could not order that the company be wound up, which was the relief sought by the petitioner. I concluded for the reasons contained in [17] to [22] of that judgment that it should be. In [22] I summarise my analysis:

> "I have already rejected the objection that because of its nature a just and equitable winding-up petition cannot be stayed to arbitration. I have also explained why the fact that the precise relief sought in a petition is not available from an arbitrator is not a critical consideration, although it is relevant. In my view the correct approach is to identify the substance of the dispute between the parties and ask whether or not that dispute is covered by the arbitration agreement."

12. Although this was said specifically with reference to a petition brought by a shareholder on the just and equitable ground,[9] in my view it is also relevant in the insolvency context and more so than some of the earlier authorities recognise. In *Hollmet*[10] Rogers J says this at 347A: "*Although in many instances, people may regard winding up petitions as a means of enforcing a contract, that is not what it is*." In *Jade Union* Barma J is to similar effect in [18] of the judgment quoted earlier. As far as they go the statements are correct, but they are misleading. A petitioner is seeking to recover a debt. He does not do so by suing for a judgment,

---

9 See also the Court of Appeal in *Joseph Ghossoub v Team YR Holdings Hong Kong Ltd* [2017] HKEC 1532, [24], [29]–[30].

10 *Supra*.

he does so by invoking the court's insolvency jurisdiction, which will allow him to prove for the debt in a liquidation. The difference is material, but the difference goes to jurisdiction and the principles and considerations which inform how it is exercised, not the substantive nature of what the petitioner is seeking to achieve. The collective nature of the jurisdiction requires, where relevant, the court to consider the interests and views of other creditors, if any, once the court is satisfied that the petitioner is a creditor and before making a winding-up order. The question of whether or not a winding-up order should be made is not arbitrable. It does not, however, follow that a dispute between a petitioner and a company over a debt relied on to establish *locus* to present a winding-up petition is not. This is not a distinction which is drawn in the Hong Kong cases to which I have referred. As I will demonstrate when considering the English and Singaporean authorities it is a distinction which the courts in those jurisdictions have identified and consider important in determining whether a creditor should be required to arbitrate a disputed debt before presenting a petition.

The development of the law in England and Singapore

13. In *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [11] a lessor claimed payment of certain service charges and insurance rent that an arbitrator had found was payable by the company lessee. The lessor claimed payment of the amount found payable and amounts for the same items for a subsequent period. The amount determined to be payable by the arbitrator was paid on the day the petition was issued. The company objected on the grounds that the additional sums were disputed and that

---

[11] [2015] Ch 589.

the dispute should be referred to arbitration. Judge Nigel Bird QC agreed and dismissed the petition. The petitioner appealed.

14. Sir Terence Etherton C, with whom the other members of the Court of Appeal agreed, dismissed the appeal. The Court found that the mandatory stay provisions in *section 9* of the *Arbitration Act 1996* did not apply to a petition but went onto uphold the First Instance decision on the following grounds at [39] to [41]:

> "39 My conclusion that the mandatory stay provisions in section 9 of the 1996 Act do not apply in the present case is not, however, the end of the matter. Section 122(1) of the 1986 Act confers on the court a discretionary power to wind up a company. It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 Act. This was the alternative analysis of Warren J in the *Rusant* case, at para 19.
>
> 40 Henry and Swinton Thomas LJJ considered in *Halki Shipping Corpn v Sopex Oils Ltd* [1998] 1 WLR 726 that the intention of the legislature in enacting the 1996 Act was to exclude the court's jurisdiction to give summary judgment, which had not previously been excluded under the Arbitration Act 1975. It would be anomalous, in the circumstances, for the Companies' Court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration. Exercise of the discretion otherwise than consistently with the policy underlying the 1996 Act would inevitably encourage parties to an arbitration agreement—as a standard tactic—to bypass the arbitration agreement and the 1996 Act by presenting a winding up petition. The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding up petition, of satisfying the Companies Court that the debt is bona fide disputed on substantial grounds. That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act.

> 41 There is no doubt that the debt mentioned in the Petition falls within the very wide terms of the arbitration clause in the Lease. The debt is not admitted. In accordance with the decision in the *Halki Shipping* case, that is sufficient to constitute a dispute within the 1996 Act, irrespective of the substantive merits of any defence, and, were there proceedings on foot to recover the debt, to trigger the automatic stay provision in section 9(1) of the 1996 Act. For the reasons I have given, I consider that, as a matter of the exercise of the court's discretion under section 122(1)(f) of the 1986 Act, it was right for the court either to dismiss or to stay the Petition so as to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds.
>
> 42 The judge stayed the Petition because, contrary to my conclusion, he thought that the mandatory stay provisions in section 9 were engaged. I consider that it would have been better to have dismissed the Petition rather than to stay it in the absence of any evidence that there was another creditor of Altomart who was willing to be substituted as the petitioner. That is not, however, a point taken by Salford Estates on this appeal."

15. As in England, the Legislature in Hong Kong has enacted legislation advancing a policy encouraging and supporting party autonomy in determining the means by which a dispute arising between them should be resolved. This is expressly stated in *section 3* of the *Arbitration Ordinance*, Cap 609:

> "**Object and principles of this Ordinance**
>
> (1) The object of this Ordinance is to facilitate the fair and speedy resolution of disputes by arbitration without unnecessary expense.
>
> (2) This Ordinance is based on the principles—
>
> (a) that, subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how the dispute should be resolved; and
>
> (b) that the court should interfere in the arbitration of a dispute only as expressly provided for in this Ordinance."

16. The courts of Hong Kong have, as is the case in other common law jurisdictions, been strongly supportive of the development of arbitration and the policy underlying the *Arbitration Ordinance*. Mimmie Chan J, at the time the judge in charge of the Arbitration List, summarised the position in September 2015 in [1] of her judgment in *KB v S*:[12]

> "The attitude of the Hong Kong Court towards enforcement of arbitration awards and parties' agreements to submit their disputes to arbitration has been made demonstrably clear in the authorities. In summary:
>
> (1) The primary aim of the court is to facilitate the arbitral process and to assist with enforcement of arbitral awards.
>
> (2) Under the Arbitration Ordinance ('Ordinance'), the court should interfere in the arbitration of the dispute only as expressly provided for in the Ordinance.
>
> (3) Subject to the observance of the safeguards that are necessary in the public interest, the parties to a dispute should be free to agree on how their dispute should be resolved.
>
> (4) Enforcement of arbitral awards should be 'almost a matter of administrative procedure' and the courts should be 'as mechanistic as possible' (*Re PetroChina International (Hong Kong) Corp Ltd* [2011] 4 HKLRD 604).
>
> (5) The courts are prepared to enforce awards except where complaints of substance can be made good. The party opposing enforcement has to show a real risk of prejudice and that its rights are shown to have been violated in a material way (*Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2012] 4 HKLRD 1 (CA)).
>
> (6) In dealing with applications to set aside an arbitral award, or to refuse enforcement of an award, whether on the ground of not having been given notice of the arbitral proceedings, inability to present one's case, or that the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement, the court is concerned with the structural integrity of the arbitration proceedings. In this regard, the conduct complained of 'must be serious, even egregious', before

---

12 (unrep., HCCT 13/2015) (15 September 2015).

the court would find that there was an error sufficiently serious so as to have undermined due process (*Grand Pacific Holdings Ltd v Pacific China Holdings Ltd* [2012] 4 HKLRD 1 (CA)).

(7) In considering whether or not to refuse the enforcement of the award, the court does not look into the merits or at the underlying transaction (*Xiamen Xingjingdi Group Ltd v Eton Properties Limited* [2009] 4 HKLRD 353 (CA)).

(8) Failure to make prompt objection to the Tribunal or the supervisory court may constitute estoppel or want of bona fide (*Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111).

(9) Even if sufficient grounds are made out either to refuse enforcement or to set aside an arbitral award, the court has a residual discretion and may nevertheless enforce the award despite the proven existence of a valid ground (*Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKCFAR 111, 136A-B).

(10) The Court of Final Appeal clearly recognized in *Hebei Import & Export Corp v Polytek Engineering Co Ltd* that parties to the arbitration have a duty of good faith, or to act bona fide (p 120I and p 137B of the judgment)"

17. As Sir Terence Etherton C observes "*it would be anomalous, in the circumstances, for the Companies' Court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration*" thus giving no weight to the policy underlying the *Arbitration Ordinance*.

18. In *Revenue and Customs Commissioners v Changtel Solutions UK Ltd*[13] the issue for determination concerned whether or not the Companies Court when presented with a petition by the Revenue to wind up on the grounds of insolvency should defer in the determination of the prospects of success of an appeal over the decision said by the Revenue to

[13] [2015] EWCA Civ 29; [2015] 1 WLR 3911.

give rise to a debt on which it relied to the First-tier Tribunal (an appeal tribunal). David Donaldson QC sitting as a deputy judge of the Companies Court held that it should. The Court of Appeal allowed the Revenue's appeal. Vos LJ in addressing submissions by counsel for the company drawing by analogy support from the reasoning of the Court of Appeal in *Salford Estates* [14] says this:

> "48 Finally, Ms Kyriakides referred in this connection to the very recent decision of the Court of Appeal in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] 3 WLR 491 where Sir Terence Etherton C (with whom Longmore and Kitchin LJJ agreed) upheld Judge Bird's decision to stay (or dismiss) a petition where the debt on which it was based arose under a contract subject to an arbitration clause, and section 9(1)(4) of the Arbitration Act 1996 required the court to stay legal proceedings 'in respect of a matter which under the agreement is to be referred to arbitration'. At para 26, Sir Terence Etherton C made clear that section 9 did not apply to a winding up petition where what was in issue was whether a debt was outstanding and due. In that case, however, the debt fell within the wide ambit of the arbitration clause, and Sir Terence Etherton C thought it was right as a matter of discretion for the court to stay or dismiss the petition so as to compel the parties to resolve their dispute, as to whether, in effect, summary judgment on the debt was appropriate, by their chosen method of dispute resolution rather than requiring the court to investigate whether the debt was disputed in good faith on substantial grounds: paras 40–41. In my judgment, the decision in the *Salford Estates* case supports the conclusion I have reached. Section 9 did not operate to deprive the Companies Court of jurisdiction. But the fact that the parties had agreed an alternative method of dispute resolution was, as a matter of discretion, relevant to whether it was appropriate to allow the petitioner to proceed with a winding up before having it determined that the debt was due by the method that it had agreed. Likewise in this case, as I have said, the existence of the tax appeal and the decision of Judge Poole were relevant, but not necessarily conclusive, to the judge's decision on the petition."

19. *Salford Estates* was followed and applied by Alan Steinfeld QC sitting as a deputy High Court judge in the

---

[14] *Supra*.

Chancery Division in *Eco Measure Market Exchange Ltd v Quantum Climate Services Ltd*[15]. The deputy judge explained the effect of *Salford Estates* in [10] of his judgment:

> "The result of *Salford* (above), it seems to me, is to place a very heavy obstacle in the way of a party who presents a petition claiming sums due under an agreement that contains an arbitration clause. The problem for such a petitioner is that the company is entitled to have the petition dismissed without having to show, as would normally be the case, that the debt upon which the petition is based is, to use the time-hallowed expression, bona fide disputed on substantial grounds. What the Court of Appeal decided in clear terms in the *Salford Estate* case was that, where there is an arbitration clause, it is sufficient to show that the debt is 'disputed' and for that it is sufficient to show that the debt is not admitted. In this case it is clear that the debt is disputed and indeed the dispute goes beyond a mere non-admission."

20. It would appear that the present position in England is that if an alleged debt arising under an agreement containing an arbitration clause is not admitted the petition should be dismissed.

21. In 2016 Aedit Abdullah JC considered the same question in *BDG v BDH*.[16] In June 2016 the defendant served a statutory demand for payment of a debt arising under two contracts to supply drilling units for fossil fuel production in Nigeria. The contracts contained arbitration agreements, which covered any dispute about the sums payable under the contracts. The company applied for an injunction to restrain presentation of a petition on the grounds that there was a dispute over the debt that was governed by an arbitration clause, which the judge granted. The judge held the approach of the English Court of Appeal in *Salford Estates*[17] was

---

[15] [2015] BCC 877.
[16] [2016] 5 SLR 977.
[17] *Supra*.

consistent with Singaporean decisions granting stays of proceedings in favour of arbitration explaining in [9]:

> "However, where an arbitration agreement governs the dispute, the relevant standard is whether *prima facie* there is an arbitration clause and if so, the dispute is governed by that clause: *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589 ('*Salford Estates*'); Eco Measure Market Exchange Ltd v Quantum Climate Services [2015] BCC 877. The position in England and Wales should be adopted in Singapore as well as it gives due recognition to the upholding of arbitration agreements. Using the summary judgment standard of triable issues would result in the courts usurping the functions of the arbitral tribunal and condoning breach of the arbitration agreement. The English approach in *Salford Estates* would be consistent with Singapore decisions granting stay of proceedings in favour of arbitration. There is also a strong leaning in Singapore towards upholding arbitration agreements."

22. In [19] to [23] Abdullah JC considers the standard to be applied in determining whether or not a dispute exists and, as I read the judgment, holds that although accepting "*the broad approach in Salford Estates*" [22] it is necessary for the company to demonstrate that there is a *prima facie* dispute. The court is not concerned with the strength of the company's defence.

23. In addition the judge held in [28] that it is necessary for the company to demonstrate *prima facie* compliance with the dispute resolution clause.

Discussion

24. It can be seen from a careful reading of the authorities that there is a difference of emphasis in the Hong Kong authorities and the more recent ones in England and Singapore. The Hong Kong authorities assume that once a creditor invokes the court's insolvency jurisdiction by issuing

a petition (possibly also by issuing a statutory demand, although the cases do not discuss whether a different test might apply on an application to enjoin a creditor from issuing a petition) the character of the exercise the court undertakes when considering whether the petitioner is a creditor where this is in issue is different from the exercise the court undertakes when faced with a claim in a writ action over a disputed debt arising under a contract, which contains an arbitration clause that covers such a dispute. In the case of the latter the dispute is only of concern to the contracting parties. In the case of the former the Hong Kong authorities reason that because what the creditor seeks is a winding-up order, which is a class remedy, the determination of whether or not there is a dispute over the debt is not subject to the normal consequences of the parties having agreed that any dispute between them be resolved by arbitration. This view elides what in my view are a number of relevant elements of the process, which properly understood have different characteristics.

25. *First*, a creditor issues a petition for the purpose of recovering his debt,[18] not out of some altruistic concern for the creditors of the company generally. The creditor does so because he believes (or for present purposes must reasonably be assumed to do so) this to be the most efficacious method of obtaining payment. Although one can find in the Hong Kong authorities including *Hollmet*[19] statements that winding-up proceedings are not a means of enforcing a debt[20] this does not alter the purpose for which a petitioner issues a petition, namely, to recover payment of his debt, albeit through the collective insolvency regime that is

---

[18] *New Hampshire Insurance Co v Rush & Tompkins Group plc* [1998] 2 BCLC 471 (CA), Millett LJ, 474 c–d.

[19] *Supra*.

[20] See, for example, *Credit Lyonnais v SK Global Hong Kong Ltd* [2003] 4 HKC 104, Rogers VP, [14] and the more comprehensive discussion in *Re International Tin Council* [1989] Ch 308, Nourse LJ, 331–334; my own decision in *Yueshou Environmental Holdings Ltd*, unrep., HCCW 142/2013, [11].

engaged when a winding-up order is made. In my view there is a material distinction between the purpose for which a creditor presents a petition and the interests of the general class of unsecured creditors, who have an interest in a potential winding up. This is illustrated by the impact the presentation of a petition has on limitation periods. It is well established that presentation of a petition stops time running in respect of debts relied on by a petitioner, but not other creditors. As Judge Paul Baker QC explains in the following passage in *In re Cases of Taffs Well Ltd*: [21]

> "Mr. Phillips submitted that the presentation of the petition was the initiation of a class remedy on behalf of all the creditors whose rights are thus suspended until the order is made which quantifies their rights. He thus argues that time stops running against all the other creditors as from the date of the petition. I am quite unable to accept this view of the presentation of petition. In my judgment, the petitioning creditor does not bring an action on behalf of all the other creditors of a company known and unknown so as to stop time running against them. Indeed, some of them may be owed debts not then due and so could not bring actions at that point. Against them, time has not *started* to run. A petitioning creditor does not petition for the general good but rather in the hope of recovering his own debt or part of it. As Mr. Mortimore pointed out in his reply, it would be strange if, by presenting a petition, a petitioner must be considered as saving creditors whose time was about to run out, and thus contrary to his own interest increase the number of claims to the fund. Finally, the right of creditors to come in and support or oppose the petition is inconsistent with the idea of a class action, for why should that be necessary if the petition is being presented on their behalf?"

26. *Secondly*, in order to assess how the remedy sought is relevant, it is necessary to understand its nature. The classic statement of the nature of winding up as a class remedy is to be found in the judgment of Buckley J in *In re Crigglestone Coal Co Ltd*:[22]

---

[21] [1992] Ch 179, 188–189.
[22] [1906] 2 Ch 327, 331–332.

> "But then comes another consideration, viz., that the order which the petitioner seeks not an order for his benefit, but an order for the benefit of a class of which he is a member. The right ex debito justitiæ is not his individual right, but his representative right. If a majority of the class are opposed to his view, and consider that they have a better chance of getting payment by abstaining from seizing the assets, then, upon general grounds and upon s. 91 of the Companies Act, 1862, the Court gives effect to such right as the majority of the class desire to exercise. This is no exception. It is a recognition of the right, but affirms that it is the right not of the individual, but of the class; that it is for the majority to seek or to decline the order as best serves the interest of their class. It is a matter upon which the majority of the unsecured creditors are entitled to prevail, but on which the debtor has no voice."

27. There is a material difference between establishing: (a) that the petitioner is a member of the class; and (b) that the class remedy of a winding-up order should be granted. The former issue does not concern considerations relevant to the class generally and there is my view no reason in principle why the fact that what is sought is a class remedy should be relevant to the method by which it is determined whether or not a debt is owed.

28. *Thirdly*, it may be objected that requiring a creditor to arbitrate a dispute without first determining whether the company has a *bona fide* defence on substantial grounds is regressive, because it deprives a creditor of an advantage that he has under the existing authorities. In my view this criticism is not justified. The Companies Court would be holding a creditor to his contractual bargain, namely, to resolve any dispute by arbitration. The reasons for requiring a shareholder to abide by an arbitration, which have been approved by the Court of Appeal in *Joseph Ghossoub v Team YR Holdings*,[23] apply equally to a creditor. Further for

---

[23] See [11] & [12] and note 9.

the reasons explained in the next paragraph this approach does not deprive a creditor of the opportunity to access the insolvency regime immediately if the circumstances justify it.

29. *Fourthly*, the fact that the agreement pursuant to which a debt is said to arise contains an arbitration clause with the consequence that the Companies Court will require any dispute over the debt to be determined by arbitration does not mean, as perhaps the earlier Hong Kong decisions assume, that a creditor cannot invoke the collective insolvency process prior to the arbitration being determined if the circumstances justify it. As the English Court of Appeal explains in the passage I have quoted from *Salford Estates*,[24] the presence of an arbitration clause does not oust the Companies Court's jurisdiction. The presence of an arbitration clause is relevant to how the Companies Court exercises its discretion. In *Jinpeng Group v Peak Hotels and Resorts* [25] the Eastern Caribbean Court of Appeal decided not to apply *Salford Estates* because it thought the British Virgin Islands' ("**BVI**") law on the need for *bona fide* dispute was already too entrenched to be changed, although in reaching this decision the Court of Appeal did not suggest that it considered the reasoning in the English decision to be wrong. For present purposes the case is significant, because the Court of Appeal also held that assuming *Salford Estates* applied in the BVI, the circumstances of the cases were exceptional enough to justify the appointment of provisional liquidators. Assets had gone missing and the Court was satisfied that there was an urgent need to appoint independent

24 *Supra*.
25 (unrep., BVIHCMAP 2014/25 and 2015/0005) (8 December 2015). The Cayman Islands Court of Appeal *Deutsche Bank & others v Kenneth Krys* (unrep., CICA 6/2015) (2 February 2016) on appeal from Sir Andrew Morritt sitting in the Financial Services Division agreed with the *Salford Estates* and applied it.

persons to be responsible for investigating what had happened with a view to recovering the company's assets.

30. As *Jinpeng* [26] illustrates as a consequence of a winding-up order's character as a discretionary class remedy there may be circumstances in which a creditor whose debt is disputed would be justified in issuing a petition before an arbitration had been concluded. If a creditor can demonstrate a *prima facie* case for a winding up and a risk of misappropriation of assets or some other matter, which would normally justify the court appointing provisional liquidators, a petition could be issued and stayed other than for applications relevant to the provisional liquidation pending determination of the arbitration. Another example would be circumstances which justify early presentation of a petition in order to engage the referral back provisions in *section 184(2)* of the *CWUMP*, because of substantiated concerns that there had been fraudulent preferences or to engage the avoidance provisions in *section 182*.

31. For these reasons I have concluded that I would depart from the approach in the earlier Hong Kong decisions that I have discussed earlier in this judgment and hold that:

(1) if a company disputes the debt relied on by the petitioner;

(2) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and

(3) the company takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process (which might include preliminary stages

---

[26] *Supra*.

such as mediation) and files an affirmation in accordance with *Rule 32* of the *Companies (Winding Up) Rules*, Cap 32H, demonstrating this;

the petition should generally be dismissed. I say generally, because for the reasons that I have discussed in the previous paragraph there may be exceptional cases in which it will be appropriate to stay the petition. I would add this, that failure to comply with *Rule 32* may have the same consequences even where there is an arbitration clause as would be the case where there is not. The Companies Court may take the view in the exercise of its discretion that in the absence of any evidence being filed in time by the company it should be wound up immediately or a condition imposed for allowing the necessary evidence to be filed out of time such as a payment into court.[27]

32. In the present case the Company disputes the debt and requires the dispute to be resolved in accordance with the arbitration clause in the Agreement. It should, therefore, be dismissed. In case this matter goes further and if I am wrong in my conclusions on the legal issue I will deal briefly with the defence.

Bona fide defence on substantial grounds

33. The Agreement contains the following payments provisions in clause 8.2:

> "**8.2 Management fee**
>
> (a) Commencing from the Payment Commencement Date, the Manager shall be entitled to the Management Fee payable by SWPBHK in the sum of $750,000 per annum. In the

---

[27] See *HK Zexin Resources Co Ltd* [2018] HKCFI 298 and authorities referred to in [6] of the judgment.

> event that bauxite ore production reaches 2.0 Million Tonne (MT) per annum the Management Fee shall be the sum of $1,000,000 for each subsequent year or part year thereof that bauxite ore production is maintained at least in 2.0MT. The Management Fee shall be payable by monthly instalments in arrears.
>
> (b) The payment of the Management Fee is subject to the Manager carrying out the functions and duties set out in clauses 3 and 7 of this agreement and performing in accordance with the business plan for the Production Phase.
>
> (c) From the Effective Date until the Payment Commencement Date, the parties may agree such remuneration for services requested from time to time."

34. The Effective Date was the date the shareholders agreement and subscription agreements were executed (clause 2.1). The position was that until the Payment Commencement Date (which is the period we are concerned with) Lasmos was entitled to be paid for such services as it provided such sum as were subsequently agreed or a *quantum meruit*.

35. A statutory demand can only be served in respect of a liquidated sum. [28] Similarly, the petitioner's claim at the time of presentation of a petition must be in respect of a "debt', which is not defined in the *CWUMP* and has generally been understood to mean a monetary claim, which in England would have been recovered in an action for debt during the period when it was necessary to take proceedings in a "specific form of action",[29] although (unlike the position in respect of a statutory demand[30]) it may be payable in the future or be contingent. What

---

[28] French, *Applications to wind up Companies* (3rd ed) [7.161]; *Reinsurance Australia Corp Ltd v Odyssey Re (Bermuda) Ltd* (2000) 36 ACSR 348.

[29] *Applications to wind up Companies*, *ibid*, [7.314].

[30] *Ibid*, [7.161].

is clear is that the claim must be in respect of a liquidated amount. Cheung JA explains in [6.5] of his judgment in *Re Grande Holdings Ltd*:[31]

> "In my view, a more useful statement on the meaning of a debt for a liquidated sum is that it is a pre-ascertained liability under the agreement of the parties. This includes a contractual liability where the amount due is to be ascertained in accordance with a contractual formula or contractual machinery. This can be found in the judgment of Patten LJ in *McGuinness v Norwich and Peterborough Building Society* [2012] 2 All ER (Comm) 265. After reviewing the authorities, Patten LJ stated that:
>
> > [36] These authorities indicate and I think establish that a *debt for a liquidated sum must be a pre-ascertained liability under the agreement which gives rise to it. This can include a contractual liability where the amount due is to be ascertained in accordance with a contractual formula or contractual machinery which, when operated, will produce a figure. Ex p Ward* is the obvious example of that. Claims in tort are invariably unliquidated because they require the assistance of a judicial process to ascertain the amount due by way of damages. In some cases the calculation of the award will be straightforward and obvious but the unliquidated nature of the claim excludes it from being a good petitioning creditor's debt which satisfies the requirements of s.267.
> >
> > [37] The most obvious use of the term 'liquidated' has been in relation to liquidated damages. 'Liquidated' has been defined judicially as meaning the sum which the parties have by their contract assessed as the damages to be paid for its breach: see *Wallis v Smith* (1882) 21 Ch D 243 at 267 *per* Cotton LJ. If a genuine pre-estimate of loss the provision is enforceable according to its terms. I would therefore regard a claim for liquidated damages as one for a liquidated sum within the meaning of s.267 unless a claim in damages is excluded by the use of the word 'debt'. (Emphasis added.)"

36. The Company says that although there were discussions about the amount to be paid for the services, and there is no dispute that the

[31] [2016] 1 HKLRD 435.

services were provided at the Company's request, an agreement was never concluded about how they were to be paid and, consequently, there is no debt due, which can found a petition.

37. Lasmos's case is that all that needed to be agreed was the hourly rate to be charged by Lasmos and that it can be seen from an email written by Mr Hills dated 7 January 2015 that a rate of A$1,500 per day was agreed. The minutes of a meeting of the directors of the Company on 13 August 2015 record that "the invoice" for Lasmos's services was referred to and there is no suggestion that there is anything remaining to be agreed other than the timing of the payment; the minutes record that subject to Lasmos's board's approval Lasmos had agreed to accept an immediate payment of US$130,000 and defer payment of the balance. However, the minutes state that "*Lasmos were working on their invoice which would be for the period to 30 June 2015….*" The invoice is dated 28 August 2015 and refers to the board meeting and the agreement to pay US$130,000 immediately.

38. It does not seem to me clear that all that clause 8.2(c) required to be agreed is a daily rate. There is nothing in the language of clause 8.2(c) or any other part of the Agreement to which I have been taken, which requires this reading. Neither is there anything to suggest that once a daily rate (and the rate used in the invoice was A$1,250) had been agreed Lasmos's record of days worked did not remain to be agreed. There is no record, for example, of how many hours work constituted a day's work or how Lasmos was to be paid for part of a day. Neither was there any agreed mechanism for recording or reporting the amount of time spent. It seems to me that at this stage it is certainly arguable that the parties' discussions

fell short of arriving at a binding agreement on fees that results in the claim being for a liquidated debt.

39. The subsequent contemporaneous communications between the other shareholders are also consistent with an agreement not having been reached. For example, in an email of 24 September 2015 Lawrence Chin states that he does not recall the US$130,000 payment being agreed, but would defer to others on this point. He then goes on to suggest that the invoice lacks supporting descriptions of the services provided and is inadequate. Mr Chin's comments are inconsistent with an agreement that the amount of the invoice that was to be submitted had been reached and his comments read as a genuine record of what he thought at the time. They were in reply to an email of 23 September 2015 from Mr Hills, which sought board approval of payment of the invoice, and recommended the payment of US$130,000 "*discussed at the last Board meeting as a progress payment….*" This also suggests the board had not agreed to pay any particular sum other than the progress payment.

40. In conclusion it seems to me that there is a *bona fide* dispute on substantial grounds and if I had not decided to dismiss the petition for the reasons discussed in the earlier sections of the judgment I would have done so on this ground.

(Jonathan Harris)
Judge of the Court of First Instance
High Court

Mr Toby Brown, instructed by Hart Giles, for the petitioner

Mr Christopher Chain, instructed by Bird & Bird, for the respondent

The attendance of the Official Receiver was excused

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re: Sunac China Holdings Limited,[1] Debtor in Foreign Proceeding.	Chapter 15 Case No. 23-11505 (PB)

ORDER GRANTING (I) RECOGNITION OF FOREIGN MAIN PROCEEDING, (II) RECOGNITION OF THE FOREIGN REPRESENTATIVE, AND (III) RELATED RELIEF UNDER CHAPTER 15 OF THE BANKRUPTCY CODE

Upon the motion (the "Motion")[2] of Mr. Gao Xi, in his capacity as the authorized foreign representative (the "Foreign Representative" or "Petitioner") for the above-captioned debtor (the "Debtor") that is subject to a restructuring proceeding entitled *In the Matter of Sunac China Holdings Limited* (the "Hong Kong Proceeding"), concerning a scheme of arrangement (the "Scheme") between the Debtor and Scheme Creditors currently pending before the Court of First Instance of the High Court of the Hong Kong Special Administrative Region of the People's Republic of China (the "Hong Kong Court"), case number HCMP382/2023, pursuant to sections 105(a), 1504, 1507, 1509, 1510, 1515, 1517, 1520, 1521 and 1522 of title 11 of the United States Code, 11 U.S.C. §§ 101–1532 (the "Bankruptcy Code"), for entry of an order (this "Order"), among other things: (i) finding that the Debtor is eligible to be a "debtor" under chapter 15 of the Bankruptcy Code; (ii) recognizing the Hong Kong Proceeding as a "foreign main proceeding;" under section 1517 of the Bankruptcy Code and granting all relief afforded to foreign main proceedings under section 1520 of the Bankruptcy Code; (iii) recognizing the Petitioner as a duly

[1] The Debtor is incorporated in the Cayman Islands as an exempted company with limited liability and registered with registration number 186588. The Debtor's principal place of business in Hong Kong is Room 1517, Level 15, West Exchange Tower, 322 Des Voeux Road Central, Sheung Wan, Hong Kong.

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Motion.

appointed "foreign representative," as defined in section 101(24) of the Bankruptcy Code in respect of the Hong Kong Proceeding; (iv) granting full force and effect and comity to the Scheme and the Hong Kong Orders, including the releases and discharge(s) contained therein and the additional relief set forth herein pursuant to section 1521(a) and/or 1507(a) of the Bankruptcy Code, including granting the Foreign Representative the right to administer the Debtor's assets; (v) permanently enjoining all parties from commencing or continuing any action or proceeding that is inconsistent with the Scheme in the United States; (vi) entrusting Petitioner with the administration of any and all of the Debtor's assets within the territorial jurisdiction of the United States; (vii) authorizing the Existing Notes Trustee, Existing Notes Agents, Existing Agents, and New Trustees to take any and all actions necessary to give effect to the terms of the Restructuring and discharge(s); and (viii) granting such other and further relief as this Court deems just and proper; and upon this Court's review and consideration of the Chapter 15 Petition, the Foreign Representative Declaration and the Counsel Declaration, each filed contemporaneously herewith, the Supplemental Declaration of Ang Chee Khian Desmond in Support of the Motion filed on October 13, 2023, the Supplemental Declaration of Sidley Austin as Hong Kong Counsel to the Debtor in Support of the Motion filed on November 7, 2023, all other pleadings filed by or on behalf of the Foreign Representative in support of the Chapter 15 Petition, and the evidence admitted at the hearings on October 13, 2023, and November 15, 2023 (the "Hearings") to consider the Chapter 15 Petition; and due and proper notice of the Chapter 15 Petition having been provided; and no other or further notice being necessary or required; and no objections or other responses having been filed; and all interested parties having had an opportunity to be heard at the Hearings; and after due deliberation and sufficient cause appearing therefor,

THE COURT HEREBY FINDS AND CONCLUDES THAT:

A. The findings and conclusions set forth herein constitute this Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

B. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, section 1501 of the Bankruptcy Code, and the *Amended Standing Order of Reference* dated January 31, 2012, Reference M-431, *In re Standing Order of Reference Re: Title 11*, 12 Misc. 00032 (S.D.N.Y. Feb. 2, 2012) (Preska, C.J.).

C. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P) and this Court may enter a final order consistent with Article III of the United States Constitution.

D. Venue is proper in this district pursuant to 28 U.S.C. § 1410.

E. The Debtor has intangible property and property rights within this district and, therefore, the Debtor is eligible to be a debtor in a Chapter 15 case pursuant to sections 109 and 1501 of the Bankruptcy Code.

F. This case was properly commenced pursuant to sections 1504, 1509, and 1515 of the Bankruptcy Code.

G. The Chapter 15 Petition meets the requirements of section 1515 of the Bankruptcy Code and Bankruptcy Rules 1007(a)(4) and 2002.

H. The Hong Kong Proceeding is a "foreign proceeding" within the meaning of section 101(23) of the Bankruptcy Code.

I. The Hong Kong Proceeding is located in Hong Kong, which is the country where the Debtor's center of main interests is located and, as such, the Hong Kong Proceeding is entitled to recognition as a "foreign main proceeding" pursuant to sections 1502(4) and 1517(b)(1) of the Bankruptcy Code.

J. The Scheme was sanctioned by the Sanction Order of the Hong Kong Court dated October 5, 2023. In a November 6, 2023 ruling entitled Reasons For Decision, the Hong Kong Court set forth its reasons for issuing the Sanction Order.

K. The Hong Kong Proceeding is entitled to recognition by this Court pursuant to sections 1515 and 1517(a) of the Bankruptcy Code and is entitled to all relief afforded to a foreign main proceeding under section 1520 of the Bankruptcy Code.

L. The Foreign Representative is a person within the meaning of section 101(41) of the Bankruptcy Code and is the duly appointed foreign representative of the Debtor within the meaning of section 101(24) of the Bankruptcy Code.

M. The relief granted hereby is warranted pursuant to sections 105(a), 1507(a), 1509(b)(2)-(3), 1515, 1517, 1520, 1521(a) and 1525(a) of the Bankruptcy Code, is necessary and appropriate to effectuate the purposes of Chapter 15, to protect the Debtor and the interests of its creditors and other parties in interest, and is consistent with the laws of the United States, international comity, public policy, and the policies of the Bankruptcy Code. The relief granted hereby will not cause hardship to the creditors of the Debtor or other parties in interest that is not outweighed by the benefits of granting that relief.

N. The Debtor is eligible in the exercise of the Court's discretion for all of the relief and additional assistance set forth herein under sections 1507 and 1521(a) of the Bankruptcy Code.

O. Absent the relief granted herein, the Debtor may be subject to the prosecution of judicial, quasi-judicial, arbitration, administrative, or regulatory actions or proceedings in connection with the claims against them or their property that are subject to the Hong Kong Proceeding, thereby interfering with and causing harm to, the Debtor, its creditors and other parties in interest in the Hong Kong Proceeding and, as a result, the Debtor, its creditors and such other parties in interest would suffer irreparable injury for which there is no adequate remedy at law, a result contrary to the purposes of Chapter 15.

P. The injunctions contained here (i) are within the Court's jurisdiction, (ii) are essential to the success and objectives of the Hong Kong Proceeding and the Scheme, and (iii) confer material benefits on, and is in the best interests of, the Group and the Scheme Creditors.

Q. Appropriate notice of the filing of, and the Hearings on, the Chapter 15 Petition was given, which notice was deemed adequate for all purposes, and no further notice need be given.

R. In accordance with section 1507(b) of the Bankruptcy Code, the relief granted herein will reasonably assure: (i) the just treatment of all holders of claims against or interests in the Debtor's property; (ii) the protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in the Hong Kong Proceeding; (iii) the prevention of preferential or fraudulent dispositions of property of the Debtor; and (iv) the distribution of proceeds from the Debtor's property substantially in accordance with the order prescribed in the Bankruptcy Code.

S. All creditors and other parties in interest, including the Debtor, are sufficiently protected in the grant of the relief ordered hereby in compliance with section 1522(a) of the Bankruptcy Code.

NOW THEREFORE, IT IS HEREBY ORDERED THAT:

1. The Motion and requested relief therein is granted for the reasons set forth herein and in the bench ruling read into the record at the hearing on November 17, 2023.

2. The Hong Kong Proceeding is granted recognition as a foreign main proceeding as defined in section 101(23) of the Bankruptcy Code and pursuant to section 1517 of the Bankruptcy Code.

3. The Foreign Representative is the duly appointed and authorized representative of the Hong Kong Proceeding within the meaning of section 101(24) of the Bankruptcy Code, is authorized to act on behalf of the Debtor in this Chapter 15 Case and is established as the exclusive representative of the Debtor in the United States.

4. The Petitioner is entrusted with the administration of any and all of the Debtor's assets within the territorial jurisdiction of the United States, including prosecution of any causes of action belonging to the Debtor.

5. The Hong Kong Proceeding, the Scheme, and the Hong Kong Orders, including the Restructuring and releases contained therein, are recognized, granted comity, and entitled to full force and effect in the United States against all entities (as that term is defined in section 101(15) of the Bankruptcy Code) in accordance with their terms, and such and such terms shall be binding and fully enforceable on the Scheme Creditors, as well as their respective heirs, successors, assigns, trustees, subsidiaries, affiliates, officers, directors, agents, employees, representatives, attorneys, beneficiaries, guardians and similar officers, or any persons claiming through or in the right of any such persons or entities (collectively, the "Related Parties") whether or not they actually agreed to be bound by the Hong Kong Scheme or participated in the Hong Kong Scheme.

6. All Scheme Creditors and Related Parties are permanently enjoined and restrained from taking any actions in the United States inconsistent with the Scheme or the Hong Kong Orders, or interfering with the enforcement and implementation of the Scheme or the Hong Kong Orders.

7. All Scheme Creditors and Related Parties are permanently enjoined and restrained from asserting or seeking to enforce any debt, claim, or interest that is released, discharged, or modified by the Hong Kong Orders, the Scheme, and this Order, including, without limitation, with respect to any such debt, claim or interest:

(i) executing against any of the Debtor's assets;

(ii) commencing or continuing, in any manner, directly or indirectly (including by way of counterclaim), any action, suit, or other proceeding (including, without limitation, arbitration, mediation, or any judicial, quasi-judicial or administrative action, proceeding, or process in any judicial, arbitral, administrative or other forum) or employing processes to recover such debt, claim, or interest against the Debtor, any other Released Person, their property, any direct or indirect transferee of or successor to such property, or any property of such transferee or successor, which in each case is in any way inconsistent with, relates to, or would interfere with, the administration of the Debtor's estate in the Hong Kong Proceeding, Hong Kong law or the implementation or consummation of the Hong Kong Orders or the Scheme (including releases contained therein);

(iii) taking or continuing any act to create, perfect or enforce a lien or other security interest, setoff, or other claim against the Debtor, any other Released Person, or any of their property or proceeds thereof, which in each case is in any way inconsistent with, relates to, or would interfere with the administration of the Debtor's estate in the Hong Kong Proceeding, Hong Kong law, or the implementation or consummation of the Hong Kong Orders or the Scheme (including the releases contained therein);

(iv) transferring, relinquishing or disposing of any property of the Debtor to any entity other than the Foreign Representative and his authorized representatives and agents or taking or continuing any act to obtain possession of, commingle, or exercise control over, such property, which in each case is in any way inconsistent with, relates to, or would interfere with, the administration of the Debtor's estate in the Hong Kong Proceeding, Hong Kong law or the implementation or consummation of the Hong Kong Orders or the Scheme (including the releases contained therein);

(v) commencing or continuing in any manner, directly or indirectly, an action or proceeding concerning the Debtor's assets, rights, obligations or liabilities, or to resolve any dispute arising out of any provision of the Scheme (including the releases contained therein); and

(vi) declaring or considering the filing of the Hong Kong Proceeding, the Scheme, the Sanction Order, or this Chapter 15 Case a default or event of default under any agreement, contract or arrangement;

provided, such injunction applies solely within the territorial jurisdiction of the United States and only to the extent that commencing or continuing such action or employing such process is inconsistent with the Hong Kong Scheme and/or applicable law; *provided, further*, that nothing herein shall prevent any entity from (a) filing claims against the Debtor in the Hong Kong Scheme, (b) seeking relief from the Hong Kong court in the Hong Kong Proceeding or this Court in this Chapter 15 Case, as applicable, from the injunctions contained in this Order or (c) seeking relief from this Court to enforce this Order.

8. For the avoidance of doubt, all debt that is discharged pursuant to the Scheme, the Hong Kong Orders, or this Order, including any debt governed by New York state law, is hereby discharged as a matter of federal and New York state law.

9. As of the Restructuring Effective Date, any judgment, wherever and whenever obtained, to the extent such judgment is a determination of the liability of the Debtor or any other parties who receive relief from the Scheme, including with respect to any debt cancelled, discharged, or restructured under the Scheme, or as a result of Hong Kong law relating to the Scheme, is unenforceable in the United States, in each case, to the extent inconsistent with the Scheme, the Sanction Order, or such law.

10. The Foreign Representative, the Debtor, and their respective agents are authorized to serve or provide any notices required under the Bankruptcy Rules or local rules or orders of this Court.

11. No action taken by the Foreign Representative, the Debtor, or their respective successors, agents, representatives, advisors, or counsel in preparing, disseminating, applying for, implementing, or otherwise acting in furtherance of or in connection with the Hong Kong Proceeding, this Order, this Chapter 15 Case, or any adversary proceeding herein, or any further proceeding commenced hereunder, shall be deemed to constitute a waiver of the rights or benefits afforded such persons under 306 and 1510 of the Bankruptcy Code.

12. This Order shall be served by electronic mail to the extent email addresses are available and otherwise by U.S. mail, first-class postage prepaid or overnight, upon: (i) the Chapter 15 Notice Parties (as defined in the *Motion Pursuant to Federal Rules of Bankruptcy Procedure 2002 and 9007 Requesting Entry of an Order (I) Scheduling the Recognition Hearing and (II) Approving the Form and Manner of Service of Notice* (ECF No. 6) (the "Scheduling Motion")) and (ii) those parties requesting notice pursuant to Bankruptcy Rule 2002. Kroll Restructuring Administration LLC, in its capacity as the Debtor's noticing agent, shall serve this Order in the manner described in the Scheduling Motion. Such service and notice is good and sufficient service and adequate notice for all purposes.

13. The Foreign Representative and the Debtor are authorized and empowered to, and may in their discretion and without further delay, (i) execute and deliver documents to effectuate the Scheme (including any releases) and take any action and perform any act necessary to implement and effectuate the terms of this Order, the Sanction Order, and the Scheme and (ii) exercise all consent and approval rights provided for in the Scheme in the manner set forth in the Scheme to take all actions necessary to carry out this Order.

14. Each of the Existing Notes Trustee, Existing Notes Agents, New Trustees, Existing Agents, and New Agents is hereby authorized to take any actions or execute any documents it

believes appropriate in furtherance of or in connection with consummating the transactions contemplated by the Hong Kong Orders and the Scheme, including, among other things, the cancellation and discharge of the Existing Debt and the Existing Finance Documents. For the avoidance of doubt, all Scheme Creditors and Related Parties are permanently enjoined and restrained from taking any actions in the United States against the Existing Notes Trustee and Existing Agents in connection with the cancellation and discharge of applicable Existing Debt and applicable Existing Finance Documents.

15. The Debtor is authorized to reimburse the Ad Hoc Group, Existing Notes Trustees, Existing Notes Agents, and/or Existing Agents for all reasonable fees, costs and expenses, including reasonable fees and expenses of their respective counsel, that each incurs in taking such actions, in accordance with the terms of the Scheme upon the Restructuring Effective Date, as applicable.

16. No party shall incur any liability for following the terms of this Order (whether by acting or refraining from acting), except in the case of the party's own gross negligence or willful misconduct.

17. Nothing herein shall enjoin, impair, or otherwise supplement or modify in any manner the right of any party granted under the Scheme, and nothing herein shall modify the exclusive right of the Hong Kong Court to hear and determine any suit, action, or proceeding and to settle any dispute which may arise out of the Explanatory Statement or any provision of the Scheme or Hong Kong Orders, or out of any action to be taken or omitted to be taken under the Scheme or Hong Kong Orders or in connection with the administration of the Scheme or Hong Kong Orders.

18. Notwithstanding any provision in the Bankruptcy Code or the Bankruptcy Rules to the contrary, including, but not limited to Bankruptcy Rules 1018, 3020(e), 6004(h), 7062 and 9014, (i) this Order shall be effective immediately and enforceable upon its entry, (ii) the Foreign Representative is not subject to any stay in the implementation, enforcement, or realization of the relief granted in this Order and (iii) this Order shall constitute a final order within the meaning of 28 U.S.C. § 158(a).

19. This Court shall retain jurisdiction to hear and determine all matters arising from or related to interpretation or implementation of this Order.

: November 17, 2023
New York, New York

/s/ Philip Bentley
Hon. Philip Bentley
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

---x

In re:

SILICON VALLEY BANK (CAYMAN ISLANDS BRANCH) (in Official Liquidation),

Debtor in a Foreign Proceeding.

FOR PUBLICATION

Chapter 15

Case No. 24-10076 (MG)

---x

MEMORANDUM OPINION AND ORDER DISMISSING CHAPTER 15 PETITION

A P P E A R A N C E S:

HOLLAND & KNIGHT LLP
Counsel for the Joint Official Liquidators of Silicon Valley Bank (Cayman Islands Branch) (in Official Liquidation)
31 West 52nd Street
New York, New York 10019
By: Warren E. Gluck, Esq.
John J. Monaghan, Esq.
Paul M. Aguggia, Esq.
Marie E. Larsen, Esq.
Richard A. Bixter, Jr., Esq.

DENTONS US LLP
Counsel to the Federal Deposit Insurance Corporation, in its corporate capacity and its capacity as Receiver for Silicon Valley Bank, Santa Clara, and as Receiver for Silicon Valley Bridge Bank, N.A.
1221 Avenue of the Americas
New York, New York 10020
By: Lynn P. Harrison III, Esq.
Stephen S. Kudenholdt, Esq.

1900 K Street, NW
Washington, D.C. 20006
By: Sam J. Alberts, Esq.

MARTIN GLENN
CHIEF UNITED STATES BANKRUPTCY JUDGE

As has been widely publicized, Silicon Valley Bank (the "Bank"), a California-incorporated bank that was insured by the Federal Deposit Insurance Corporation ("FDIC"), failed and the FDIC was appointed as its receiver on March 10, 2023. The unregulated parent company, SVB Financial Group, filed a chapter 11 case on March 17, 2023 that is pending in this Court. (*See generally* Case No. 23-10367.) While FDIC deposit insurance is ordinarily limited to $250,000 for insured deposits, in the case of the Bank, the Secretary of the Treasury, the Chairman of the Federal Reserve Board and the Chairman of the FDIC invoked the "systemic risk exception" and announced that the Bank's depositors would be repaid the full amount of their deposits. Certain depositors, including the holding company of the Bank, have not been repaid the full amount of their deposits and are currently litigating the legal effect of the systemic risk exception. This opinion concerns depositors in the Bank's Cayman Island branch that are *not* being repaid any amount from FDIC insurance and are treated as unsecured creditors of the Bank in the receivership proceeding.

At the time the Bank failed, the Bank had a branch in the Cayman Islands ("SVB Cayman") that was *not* separately incorporated, but was a branch of the Bank that was licensed by the Cayman Islands Monetary Authority ("CIMA") to operate in the Cayman Islands. SVB Cayman had a mail drop but no employees in the Cayman Islands.

SVB Cayman offered its customers three types of Eurodollar deposit accounts. When the Bank failed, customers of SVB Cayman had deposited a total of $866 million in the three types of accounts—SVB Eurodollar Sweep Accounts, SVB Eurodollar Money Market Accounts, and SVB Eurodollar Operating Accounts. Under the SVB Eurodollar Sweep Account opening agreement, when the depositors opened a Sweep Account (but not a Money Market or Operating

Account), a parallel deposit account was automatically opened in their name in the Bank's California office, into which the Cayman Sweep Account deposits were periodically swept. Deposit accounts in the Bank's California office were *not* opened for the Money Market or Operating Accounts. The deposit agreements for all three types of Cayman accounts made clear that deposits in those Cayman accounts were *not insured* by the FDIC.

Many of the SVB Cayman account holders filed claims in the FDIC receivership. With respect to deposits in the Sweep Accounts, the FDIC determined that the depositors would be repaid in full from FDIC insurance. With respect to the deposits in the Money Market or Operating Accounts, the FDIC denied insurance coverage and only allowed the depositors' claims as unsecured creditors that would be paid only after higher priority (insured) claims are paid in full. In what seems characteristic of the FDIC, the FDIC rejected the claims filed by the JOLs (defined below) and the depositors in the Money Market and Operating Accounts with a short statement, without any further explanation, that the claim "[was] not proved to the satisfaction of the receiver."[1]

The rejection of the insurance coverage claims by the SVB Cayman depositors led them to search for another means to press their claims for insurance coverage, as it seems doubtful that SVB Cayman depositors' unsecured creditor claim will receive *any* recovery.[2] As discussed

[1] The language of the denial tracks the language in 12 U.S.C. § 1821(d)(5)(D)(i): "The receiver may disallow any portion of any claim by a creditor or claim of security, preference, or priority which is not proved to the satisfaction of the receiver." Another subsection of FIRREA relating to expedited consideration of claims provides that the FDIC shall "(ii) notify the claimant of the determination, and if the claim is disallowed, provide a statement of each reason for the disallowance and the procedure for obtaining agency review or judicial determination." 12 U.S.C. § 1821(d)(8)(B)(iii). One would ordinarily expect an administrative agency that rejects claims that in this case exceed $500 million would explain more than that the claim "is not proved to the satisfaction of the Receiver." The FDIC's denial brings to mind a quote from Kafka: "'And why am I under arrest?' he then asked. 'That's something we're not allowed to tell you. Go into your room and wait there. Proceedings are underway and you'll learn about everything all in good time.'" FRANZ KAFKA, THE TRIAL (1914).

[2] The JOLs indicate that, to date, they have received claims from 295 Cayman creditors totaling $284,457,173.26 in the Cayman Proceeding, which represents a subset of the overall Cayman creditors.

below, in the hope of obtaining a better result, SVB Cayman depositors responded by filing a winding-up application in the Cayman Islands court. The Cayman court granted the application and appointed three joint official liquidators ("JOLs") who now seek recognition and other relief under Chapter 15 of the Bankruptcy Code.

For the reasons explained below, this effort fails, and the Chapter 15 petition is **DISMISSED**.

I. BACKGROUND

Pending before the Court is the (I) the *Verified Petition for Recognition of Foreign Insolvency Proceeding Pursuant to Sections 1504, 1509, 1515, 1517, 1520, and 1521 of the Bankruptcy Code* of the JOLs (the "Verified Petition," ECF Doc. # 1) seeking, among other things, recognition of the Cayman winding-up proceeding (the "Cayman Proceeding") as a foreign main proceeding and the JOLs as the foreign representatives of SVB Cayman pursuant to section 1517 of the Bankruptcy Code, and (II) the application of Andrew Childe, Niall Ledwidge, and Michael Pearson in their capacities as the duly appointed JOLs of SVB Cayman for provisional relief seeking discovery from the FDIC pursuant to section 1519(a)(3) and 1521(a)(4). SVB Cayman is in official liquidation under the supervision of the Grand Court of the Cayman Islands, Financial Services Division (the "Grand Court") in Cause No. FSD 163 of 2023 (DDJ) pursuant to the Cayman Islands Companies Act (2023 Revision) (the "Companies Act") and associated regulations. (Verified Petition at 2.)

In connection with the initial provisional relief sought, the JOLs filed (i) a memorandum of law in support of provisional relief (ECF Doc. # 4) and (ii) the declaration of Michael Pearson, one of the JOLs, in support of recognition and provisional relief (the "Pearson Declaration," ECF Doc. # 2).

On January 19, 2024, the Court entered an order to show cause ("OSC," ECF Doc. # 6), scheduling a hearing on provisional relief for January 31, 2024. (OSC ¶ 4.) The JOLs sought discovery from the FDIC, focused on learning the basis for the FDIC's denial of the JOLs' claim. On January 26, 2024, the FDIC filed an objection (the "FDIC Provisional Relief Objection," ECF Doc. # 12) to provisional relief, along with the declaration of Luis Mayorga, a Senior Complex Financial Institution Resolution Specialist at the FDIC, in support of the FDIC Provisional Relief Objection (the "Mayorga Provisional Relief Declaration," ECF Doc. # 13). On February 5, 2024, the JOLs filed an amended reply in further support of provisional relief (ECF Doc. # 26).

The FDIC argued, among other things, that even if Cayman Islands Proceeding is recognized as foreign main proceeding, the Bankruptcy Court cannot order discovery from the FDIC because the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183, *reprinted in* 1989 U.S.C.C.A.N. 183 ("FIRREA"), 12 U.S.C. § 1821, *et seq.,* and related regulations limit the power of any court (other than a district court in which review of the denial of a claim may be maintained) to permit discovery. The JOLs explained that they needed discovery in order to draft a fulsome complaint challenging the FDIC's denial of their claim. None of the books and records of SVB Cayman that are needed to draft the complaint, the JOLs argue, are located in the Cayman Islands or are otherwise available to them.

The Court held a hearing on provisional relief on January 31, 2024, in accordance with the OSC. After the hearing, the Court entered an order scheduling a consolidated hearing on provisional relief and recognition of the Cayman liquidation proceeding for February 14, 2024 (the "Scheduling Order," ECF Doc. # 22). As set forth in the Scheduling Order, assuming that the bankruptcy court could not or would not order the requested discovery, it was not clear whether the Court could grant the JOLs standing without first ruling on recognition.[3] (Scheduling Order at 2.) If the Cayman Proceeding was recognized as a foreign main or nonmain proceeding, the JOLs would have standing under section 1509 and could seek discovery in any district court action they filed seeking to review denial of their claim.

The FDIC contends that SVB Cayman is not eligible to be a debtor in a chapter 15 case, because it is *not* a separate corporation, but rather a branch of Silicon Valley Bank, a California-incorporated bank, which is in an FDIC receivership. Silicon Valley Bank is ineligible to be a debtor pursuant to section 109(b) of Bankruptcy Code ("A person may be a debtor under chapter 7 of this title only if such person is not . . . (2) a . . . bank . . . which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act . . . ."). 11 U.S.C. § 109(b). Section 109(b) indisputably applies to Silicon Valley Bank, making the Bank ineligible to file a bankruptcy case under Chapters 7 or 11. Section 109(b) also applies in a case under Chapter 15, making the Bank ineligible for Chapter 15 as well. *See Drawbridge Special Opportunities Master Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238, 249–50 (2d Cir. 2013) (concluding that Congress intended for Chapter 1 of the Bankruptcy Code, which includes section 109, to apply to Chapter 15). That result is *not* changed because the Bank closed and ceased any ongoing business in California or the Cayman Islands. The SVB Cayman branch is not a separate business entity.

On February 9, 2024, the FDIC filed an objection to recognition (the "FDIC Recognition Objection," ECF Doc. # 30). In support of the FDIC Recognition Objection, the FDIC also filed the (i) second declaration of Luis Mayorga (the "Mayorga Recognition Declaration," ECF Doc. # 31); (ii) declaration of Terrance D. Holmes (the "Holmes Declaration," ECF Doc. # 32), a senior

---

[3] Sections 1519(a)(3) and, by its reference, 1521(a)(4) permit discovery as provisional remedy before recognition.

claims administration analyst with the Division of Resolutions and Receiverships at the FDIC; and (iii) declaration of Thomas Lowe KC, a barrister and King's Counsel at Wilberforce Chambers (the "Lowe Declaration," ECF Doc. # 41).

On February 12, 2024, the JOLs filed a reply memorandum of law in support of recognition (ECF Doc. # 38). In connection with the relief sought, the JOLs filed the (i) affirmation of Dr. Riz Mokal, (the "Mokal Affirmation," ECF Doc. # 39) providing Dr. Mokal's opinion regarding Cayman Islands law in support of the Provisional Relief Application; (ii) supplemental declaration of Niall Ledwidge in support of recognition and provisional relief (the "Supplemental Ledwidge Declaration," ECF Doc. # 40); and (iii) declaration of Niall Ledwidge (the "Ledwidge Declaration," ECF Doc. # 42) in support of recognition and provisional relief.

On February 14, 2024, the Court held a hearing on provisional relief and recognition. At the hearing, the Court admitted into evidence the JOLs' exhibits 1 and 2, the Ledwidge Declaration, the Supplemental Ledwidge Declaration without attached exhibits 4 through 6, and the Mokal Affirmation. The Court also admitted the FDIC's exhibits OO and PP, the Holmes Declaration, the Mayorga Provisional Relief and Recognition Declarations, and the Lowe Declaration. In total, six witnesses—Regis Dale, Thomas Mills, Niall Ledwidge, Dr. Riz Mokal, Thomas Lowe, and Luis Mayorga—were cross-examined in court. This Opinion includes the Court's findings of fact and conclusions of law based on the record during the February 14 hearing.

A. SVB Cayman

1. Generally

The Bank was an FDIC-insured, state-chartered bank founded in 1983 and headquartered in California, established to provide banking services to technology companies in the Silicon

Valley region. (Verified Petition ¶ 25.) On August 16, 2007, the Bank registered in the Cayman Islands as a foreign company under Part IX of the Companies Act. (*Id.* ¶ 26.). The Bank applied for and was granted a Class "B" banking license from CIMA under the Cayman Islands Banks and Trust Companies Act (2021 Revision) (the "BTC Act") on August 30, 2007. (*Id.* ¶ 27.) Following the Bank's registration in the Cayman Islands and obtaining of a Class "B" license from CIMA, SVB Cayman was established as the Bank's active branch in the Cayman Islands. (*Id.* ¶ 28.)

As a holder of a "B" class banking license under the BTC Act, SVB Cayman was not permitted to take deposits from any person residing in the Cayman Islands, "other than another licensee or an exempted or ordinary non-resident company that is not carrying on business in the Cayman Islands." (*Id.* ¶ 27.) While the Bank maintained affiliate relationships and joint ventures with foreign banks in China and the United Kingdom, the JOLs indicate that SVB Cayman was the only "deposit-taking foreign branch" maintained by the Bank and its primary purpose was for deposit products. (*Id.* ¶¶ 25, 29.)

Before the FDIC commenced the receivership proceeding, SVB Cayman had maintained a registered office at Cainvest Bank & Trust, 103 South Church St., 5th Floor, Georgetown, Grand Cayman, Cayman Islands. (*Id.* ¶ 30.) Since the appointment of the JOLs, SVB Cayman's registered office relocated to FFP Cayman, 2nd Floor Harbour Centre, 159 Mary Street, Georgetown, Grand Cayman, Cayman Islands, which, to date, remains SVB Cayman's registered office. (*Id.*)

2. <u>Cayman Regulation of SVB Cayman</u>

SVB Cayman was "at all times overseen, regulated, and licensed by CIMA." (*Id.* ¶ 32.) CIMA serves as the Cayman Islands' primary financial services regulator and SVB Cayman was otherwise subject to the Cayman Islands Banking laws. (*Id.*) The BTC Act, as well as the Cayman Island Monetary Authority Enforcement Manual ("Enforcement Manual") promulgated thereunder, provides CIMA with broad authority to regulate a foreign branch in the Cayman Islands (such as SVB Cayman), including but not limited to the authority to seek the involuntary winding up of the foreign branch. (*See id.* ¶ 34 ("The BTC Act provides express statutory authority for CIMA to seek liquidation of a foreign branch which falls under the regulatory authority of CIMA."); *id.* ¶ 37 ("The Enforcement Manual provides CIMA with broad powers to regulate the holders of banking licenses in the Cayman Islands.").)

3. Intra-Group Service Level Agreement

The relationship between the Bank and SVB Cayman was governed by an Intra-Group Service Level Agreement (the "SLA," Pearson Declaration, Ex. 8), entered into by and between SVB Cayman, as recipient, and Silicon Valley Bank (US Head Office), as provider. (*Id.* ¶ 49.) Pursuant to the terms of the SLA, the Bank's California office fulfilled SVB Cayman's staffing needs in select areas such as finance, IT services, and legal and risk management, which the JOLs refer to as the "shared services." (*Id.* ¶ 51.) The SLA provides that SVB Cayman is regulated by CIMA while the Bank is separately regulated by the California Department of Business Oversight and the Federal Reserve. (*Id.* ¶ 50.) Notwithstanding the foregoing, the SLA acknowledged, however, that the Bank and SVB Cayman were in fact one legal entity. (*See* Pearson Declaration, Ex. 8 § 31.1 ("Whilst this Agreement has been written based on the principles of the law, both Parties recognize that it is an *intra-entity* agreement and therefore has no formal legal basis.") (emphasis added).)

4. <u>SVB Cayman Deposit Products</u>

SVB Cayman offered three types of accounts to customers: (i) the SVB Eurodollar Sweep Account; (ii) the SVB Eurodollar Operating Account; and (iii) the SVB Eurodollar Money Market Account (collectively, the "SVB Cayman Deposit Accounts"). (*Id.* ¶ 39.) As of the Bank's collapse in March 2023, an aggregate total of approximately $866 million was deposited in all three accounts. (*Id.*) The governing account agreements for each of the SVB Cayman Deposit Accounts contained identical language indicating that deposits were (i) "deposits of [SVB Cayman] and [were] subject to the laws of the Cayman Islands" and (ii) "NOT domestic deposits, [were] NOT insured by the FDIC and [were] NOT guaranteed in any way by the United States government or any government agency thereof." (*Id.* ¶¶ 42, 44, 46.) Each of the SVB Cayman Deposit Accounts is addressed in turn.

a. SVB Eurodollar Sweep Account

The SVB Eurodollar Sweep Account was a business account maintained at SVB Cayman. (*Id.* ¶ 40; *see* Pearson Declaration, Ex. 5 (the "Sweep Agreement").) At the time of the Bank's collapse, there were 44 active SVB Eurodollar Sweep Accounts with $389,562,086 in total account balances. (Verified Petition ¶ 40.) The Sweep Agreement also provided that deposits in the SVB Eurodollar Sweep Accounts would be transferred or "swept" to deposit accounts opened at the Bank in the depositor's name. (*See* Sweep Agreement at 3 (defining "Deposit Account" to refer to the individual depositor's "demand deposit account at a U.S. office of Silicon Valley Bank").)

b. SVB Eurodollar Money Market Account

The SVB Eurodollar Money Market Account was a "traditional, interest-bearing business money market account" for SVB Cayman customers established "at [SVB Cayman's] branch office." (Verified Petition ¶ 43; *see* Pearson Declaration, Ex. 6.) There were 106 active SVB Eurodollar Money Market Accounts with an aggregate total of $108,400,111 in account balances as of March 2023. (Verified Petition ¶ 43.) No doubt reflecting the absence of FDIC insurance and other U.S. regulatory controls, the SVB Eurodollar Money Market Accounts earned interest higher rates than most U.S.-regulated accounts.

c. SVB Eurodollar Operating Account

Lastly, the SVB Eurodollar Operating Account was a non-interest bearing "traditional business operating account" also established "at [SVB Cayman's] branch office." (*Id.* ¶ 45; Pearson Declaration, Ex. 7.) As of March 2023, there were 484 active SVB Eurodollar Operating Accounts, containing a total of $368,212,751 in account balances. (Verified Petition ¶ 45.)

5. <u>SVB Cayman's Domestic Account</u>

The JOLs state that before the Bank's collapse, it was the "regular practice for SVB Cayman to deposit all of its cash with [the Bank] in a deposit account located in the United States." (*Id.* ¶ 47.) The Verified Petition also alleges that this account was a domestic account (the "SVB Cayman Domestic Account") held at the Bank's main headquarters "with account number xxxx0000 and the notation 'non-interest bearing deposits' and 'foreign offices,' under circumstances where it was made clear that this was only SVB Cayman's bank account (as there were no other foreign deposit taking branches) and that the credits located in this domestic account were SVB Cayman's sole asset and located in the United States." (*Id.*)

The JOLs contend that the Bank's main headquarters also maintained "domestic, United States sitused accounts for each and all of the three products offered at SVB Cayman" and all "credits were geographically located in the United States." (*Id.* ¶¶ 47, 48.) The accounts are comprised of: (i) the SVB Cayman Sweep (xxxx5000); (ii) the Cayman Eurodollar MMA (xxxx6000); (iii) the SVB Cash Sweep Clearing Purchases-Foreign Offices (xxxx1940); (iv) the Interest Payable on SVB Cayman Sweep (xxxx0500); and (v) the Interest Payable – Cayman Eurodollar MMA Deposits (xxxx0600). (*Id.* ¶ 48.)

B. SVB's Collapse and Sale to First Citizens Bank

The Bank collapsed in March 2023 after customers withdrew more than $40 billion, resulting in a negative cash balance of $958 million at the close of business as of March 9, 2023. (*Id.* ¶ 58.) On March 10, 2023, the California Department of Financial Protection and Innovation ordered that the Bank's property and business be placed into a receivership. (*Id.* ¶ 59.) Accordingly, the FDIC has been acting as receiver for the Bank and its successor bridge bank since March 2023 (the "SVB Receivership"). (*Id.* ¶ 60.)

On March 12, 2023, the Secretary of the Treasury Janet L. Yellen, Federal Reserve Board Chair Jerome H. Powell, and FDIC Chairman Martin J. Gruenberg released a joint statement, which announced that (i) all assets of the Bank were transferred to FDIC-R; (ii) all depositors of the Bank would have full access to their money on Monday morning, March 13, 2023; and (iii) all depositors of the Bank would be made whole, beyond the standard insured amount of $250,000. (*Id.* ¶ 64.) The JOLs assert that the joint statement press release removed the $250,000 insurance cap and requirement that the insured accountholder be a "[U.S.] person within the meaning of the Federal Deposit Insurance Act," leaving only "the geographic credit situs limitation intact." (*Id.* ¶ 65.)

On March 13, 2023, the FDIC-R transferred all deposits, both insured and uninsured, and substantially all assets of the Bank and SVB Cayman to Silicon Valley Bridge Bank, N.A. (the "Bridge Bank"). (*Id.* ¶ 61.)

On March 27, 2023, the FDIC entered into a purchase and assumption agreement with First Citizens Bank & Trust Company ("First Citizens"), which provided for, among other things, (i) the purchase of approximately $72 billion of the Bridge Bank's assets at a discount and (ii) the express option for First Citizens to purchase the Canadian, German, and Hong Kong foreign branches of the Bank. (*Id.* ¶ 67.) SVB Cayman was not purchased or transferred to First Citizens and was "excluded from the [SVB] Receivership and its process." (*Id.*)

C. Alleged "Orphaning" of Certain SVB Cayman Accounts and Treatment of the SVB Cayman Domestic Account

On March 31, 2023, depositors holding SVB Eurodollar Money Market Accounts and SVB Eurodollar Operating Accounts received a notice that balances held by customers in accounts at SVB Cayman were "not deposits" and therefore, the depositors were deemed "general unsecured creditors" with priority "junior . . . to both insured and uninsured depositors." (*Id.* ¶ 68.) Meanwhile depositors holding SVB Eurodollar Sweep Accounts were granted "insured deposit status." (*Id.* ¶ 69.) The JOLs state that the stated justification for this treatment was that certain amounts of the funds associated with the SVB Eurodollar Sweep Accounts had "swept back" into an FDIC-insured deposit account located in the United States at or around the time of the Bank's entry into receivership.[4] (*Id.* ¶ 70.)

The JOLs also indicate that the FDIC did not provide them with notice concerning the "status of the SVB Cayman Domestic Account," which constitutes a "depository liability owed by [the Bank] to SVB Cayman" and is located in the U.S. (*Id.* ¶ 78.) The JOLs assert that, given the foregoing, the SVB Cayman Domestic Account would "appear to fall within the fully-insured accounts covered by Secretary Yellen's invocation of the [systemic-risk exception]." (*Id.*)

[4] The FDIC clarified at the hearing held on February 14 that the depositors were compensated as they had "U.S. parallel accounts . . . [that] were actually based in the United States . . . [and] not . . . in the Caymans" and such accounts were held "in the name of the individual depositors." (Feb. 14, 2024 Hr'g Tr. 42:10–21.)

The JOLs argue that the "insured depositor" treatment of holders of SVB Eurodollar Sweep Accounts was a "discretionary" and "arbitrary decision" on the part of the FDIC, particularly in light of the fact that "all of the accounts' credits were located in SVB accounts located in the United States at all times." (*Id.* ¶¶ 71, 72.) Accordingly, the JOLs assert that this treatment was "wrong." (*Id.* ¶ 72.) Notably, they indicate that their investigations have revealed that "more than 90% of the uninsured depositors of SVB Cayman are of Chinese origin or China-investment connected, while the demographics of the SVB Cayman insured depositors are mixed." (*Id.* ¶ 73.)

D. Commencement of the Cayman Proceeding

On June 13, 2023, certain SVB Cayman customers classified as uninsured, general creditors of the SVB Receivership, submitted a Winding Up Petition to the Grand Court seeking, *inter alia*, the winding up of SVB Cayman under the Companies Act, and the appointment of joint official liquidators for SVB Cayman. (*Id.* ¶ 79.) On June 30, 2023, the Grand Court of the Cayman Islands issued the Winding Up Order (the "Winding Up Order"). (*Id.* ¶ 80.)

The Winding Up Order provided for the following:

- the wind up of the Bank under provisions of the Companies Act; and
- the appointment of the JOLs as joint official liquidators of the Bank *but limited their powers to "acting in respect of the assets and affairs of the Cayman Islands branch of [the Bank] and its creditors."*

(Pearson Declaration, Ex. 14 ¶¶ 1, 2 (emphasis added).)

Subsequently, on July 21, 2023, the Grand Court entered a judgment explaining the justifications for the Winding Up Order (the "July 2023 Opinion," Pearson Declaration, Ex. 15). In the July 2023 Opinion, the Grand Court found that "jurisdiction existed under section 91(d)(iv) of the Companies Act for the Grand Court to order SVB Cayman's winding up, *notwithstanding* the SVB Receivership, and confirmed that doing so is just and equitable given the public interest in investigating and understanding its depositors-creditors' position relative to [the Bank], and to protect their interests." (Verified Petition ¶ 83 (emphasis in original).) The July 2023 Opinion also made clear that the Winding Up Order relates to the Bank, the "foreign company [as] the relevant legal entity," and that the Bank maintained an "active branch" in the Cayman Islands. (Pearson Declaration, Ex. 15 ¶¶ 53–56.)

E. JOL's Government Outreach and SVB Cayman's Provisional Proof of Claim

On July 10, 2023, the FDIC-imposed bar date to file claims in the SVB Receivership, the JOLs filed a provisional and placeholder proof of claim (the "Provisional POC"). (*Id.* ¶ 90; *see also* Pearson Declaration, Ex. 17 (reflecting that the provisional proof of claim was filed on July 10, 2023).) The JOLs indicate that the FDIC "agreed to consider a supplement to the Provisional POC at a later date," notwithstanding the July 10 bar date. (*Id.* ¶ 90.)

The JOLs sought to have a "high-level meeting" with the FDIC in January 2024 and, pending such, "neither commenced a Chapter 15 recognition application nor supplemented the [Provisional POC]." (*Id.* ¶¶ 94, 95.) While parties were still engaged in scheduling the "high-level meeting," the FDIC mailed a Claim Denial Letter to SVB Cayman on December 26, 2023 (the "Claim Denial Letter"), which was received on January 3, 2024 by counsel who filed the Provisional POC. (*Id.* ¶ 96.) The FDIC-R indicated in the Claim Denial Letter, in a single sentence, that it was disallowing SVB Cayman's Provisional POC as it was "not proven to the satisfaction of the Receiver." (*Id.*; *see also* Pearson Declaration, Ex. 18 at 1.) No further explanation was provided.

The JOLs indicate the Claim Denial Letter appears to constitute a "final resolution" and "trigger[s] a 60-day window to commence litigation in response to the Claim Denial Letter." (Verified Petition ¶ 97.) They state that they requested to speak with the FDIC to discuss the

Claim Denial Letter, but the FDIC has "declined to discuss the Claim Denial Letter or its implications further." (*Id.* ¶¶ 97, 98.)

F. SVB Cayman's Former Clients

In addition to the JOLs and the Provisional POC, the FDIC indicates that "[m]any Cayman [former clients] have filed claims in the SVB Receivership, some of which have been allowed." (Mayorga Provisional Relief Declaration ¶ 14.) Specifically, all but 11 of the approximately 615 of SVB Cayman's former clients with positive balances in the SVB Cayman Deposit Accounts have submitted claims to the FDIC-R in its capacity as receiver for the Bank. (FDIC Recognition Objection at 2 n.5.) Of the 605 claims filed by such creditors, the FDIC indicates that 501 have been fully allowed, 18 have been partially allowed, and 76 have been disallowed. (*Id.*) Of the remaining 10 timely filed claims, six were duplicative claims and four were ultimately withdrawn. (*Id.*) Additionally, of the 94 claims that were fully or partially disallowed, 67 holders of such claims are currently challenging the FDIC's denial of their claims in the SVB Receivership in the case captioned *Knight League Limited v. FDIC*, Case No. 23-cv-03063-APM, U.S. Dist. Ct., Dist. of Colum., seeking determinations on a *de novo* basis. (*See* Mayorga Provisional Relief Declaration ¶ 15; FDIC Recognition Objection at 2 n.5.)

G. The Provisional Relief Application

After filing the Chapter 15 petition but before scheduling the recognition hearing, the JOLs sought discovery from the FDIC as provisional relief under sections 1519(a)(3) and 1521(a)(4) of the Bankruptcy Code,[5] arguing that discovery is necessary and appropriate under

[5] Section 1519(a)(3) provides as follows:

> From the time of filing a petition for recognition until the court rules on the petition, the court may, at the request of the foreign representative, where relief is urgently needed to protect the assets of the debtor or the interests of the creditors, grant relief of a provisional nature, including— . . .

the circumstances to prepare a pleading of the causes of action that SVB Cayman is required to file on or before February 23, 2024 in a district court seeking review of the FDIC's denial of the JOLs' claims. (*See generally* ECF Doc. # 3.) Discovery is often granted as provisional relief before a recognition hearing. Here, however, the JOLs acknowledge that under FIRREA they must seek judicial review of the FDIC's denial of their claim in one of two district courts. The JOLs may be entitled to discovery, but even if the SVB Cayman Proceeding could be recognized as a foreign main proceeding (which the Court has concluded it cannot), discovery, if it is permissible, must be authorized by the district court in which the JOLs' soon-to-be-filed district court action is pending.

H. The FDIC Objection to Provisional Relief

The FDIC opposed the provisional relief sought on several grounds. First, the FDIC asserts that the Court lacks subject matter jurisdiction pursuant to section 1821(j) of FIRREA (12 U.S.C. § 1821(j)), and that venue is improper. (FDIC Provisional Relief Objection at 16, 18–19.) Specifically, section 1821(j) provides that, "[e]xcept as provided in this section, no court may take any action, except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." 12

> > (3) any relief referred to in paragraph (3), (4), or (7) of section 1521(a).

11 U.S.C. § 1519(a)(3).

> Section 1521(a)(4) provides as follows:
>
> (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— . . .
>
> > (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities.

11 U.S.C. § 1521(a)(4).

U.S.C. § 1821(j). Accordingly, the FDIC argues that governing law mandates that claims disputes and any related discovery against FDIC receiverships must comply with the requirements and procedures set forth in FIRREA. (FDIC Provisional Relief Objection at 16–18.)

Aside from subject-matter jurisdiction and venue, the FDIC further argues that the JOLs bear the burden to establish that provisional relief is warranted and have failed to do so. (*Id.* at 19, 21.) In support of its contention, the FDIC argues that SVB Cayman cannot show likelihood of success on the merits as (i) it is not permitted to be a Chapter 15 debtor under either sections 109(a) or 109(b) of the Bankruptcy Code; (ii) the Cayman Proceeding cannot be recognized as a "foreign main proceeding" as SVB Cayman's "center of main interests" ("COMI") is in the United States; and (iii) the Cayman Proceeding does not meet the Bankruptcy Code's definition of "foreign proceeding" generally. Moreover, the FDIC maintains that irreparable harm will not result if the Court ultimately declines to grant provisional relief and that, on the whole, the balance of harms weighs in factor of the FDIC. Lastly, the FDIC argues that, granting the relief sought would also not be in the public interest, which in this instance is the "interest to conduct a fair claims assessment and allowance process pursuant to the law established by Congress in the [Federal Deposit Insurance] Act." (*Id.* at 42.)

The FDIC also argues that any discovery the JOLs seek from the FDIC must be done in compliance with the regulations promulgated pursuant to the Supreme Court's ruling in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951), which govern litigation-related requests for FDIC-held material. (*Id.* at 43–44; *see* 12 C.F.R. § 309.6(b)(8) (providing that an administrative request for records or testimony must be made to the FDIC's general counsel who determines whether to "disclose or authorize . . . disclosure . . . in response to a valid judicial subpoena, court order, or other legal process"); 12 C.F.R. § 309.7(c) (indicating that the FDIC may not provide the requested information or testimony absent authorization from its general counsel).)

I. The FDIC Objection to Recognition

The FDIC argues that the Court lacks subject matter jurisdiction to grant recognition as FIRREA establishes a "comprehensive, mandatory claims process" and does not permit judicial oversight of a bank receivership. (FDIC Recognition Objection at 5.) Granting recognition, the FDIC argues, would run afoul of FIRREA's prohibition on courts interfering with the ability of the FDIC to act as the receiver of a failed financial institution. (*Id.* at 6 (stating that section 1821(j) of FIRREA "makes clear that no court may take an action that restrains of [sic] affects the powers or functions of the FDIC as receiver of a failed financial institution").)

In addition, the FDIC asserts that recognition of the Cayman Proceeding is improper since SVB Cayman neither qualifies as a "person" under section 109(a) of the Bankruptcy Code nor, as a branch of a U.S. bank, a debtor under section 109(b). (*Id.* at 8–13.) The FDIC further argues that the Cayman Proceeding cannot be recognized as a foreign main or nonmain proceeding because SVB Cayman's COMI is in the United States and there is otherwise no basis for nonmain recognition. (*Id.* at 14–17.) Finally, as for the Cayman Proceeding itself, the FDIC states that it is not a collective proceeding and that granting recognition generally would be contrary to public policy and the public interest. (*Id.* at 17, 22–23.)

II. LEGAL STANDARD

A. Eligibility to be a Chapter 15 Debtor

A gating issue to granting Chapter 15 relief is whether a foreign debtor seeking relief under Chapter 15 satisfies the debtor eligibility requirements set forth in section 109(a) of the Bankruptcy Code. *See In re Ocean Rig UDW Inc.*, 570 B.R. 687, 698 (Bankr. S.D.N.Y. 2017) (citing *In re Barnet*, 737 F.3d at 247–51). Section 109(a) provides that "only a person that resides or has a domicile, a place of business or property in the United States, or a municipality, may be a debtor" under the Bankruptcy Code. 11 U.S.C. § 109(a). The Bankruptcy Code defines a "person" to include an "individual, partnership, and corporation, but does not include [a] governmental unit." 11 U.S.C. § 101(41).

Courts in this Circuit have held that section 109(a) can be satisfied by bank accounts in the United States, including by an undrawn retainer, or via a debtor's contract rights. *See, e.g., In re U.S. Steel Canada Inc.*, 571 B.R. 600, 610 (Bankr. S.D.N.Y. 2017) ("Some courts, including this one, have held that an undrawn retainer in a United States bank account qualifies as property in satisfaction of section 109(a)."); *In re Berau Capital Res. PTE Ltd.,* 540 B.R. 80, 83–84 (Bankr. S.D.N.Y. 2015) ("Contracts create property rights for the parties to the contract. A debtor's contract rights are intangible property of the debtor . . . . The Court concludes that the presence of the New York choice of law and forum selection clauses . . . satisfies the section 109(a) 'property in the United States' eligibility requirement") (internal citations omitted).

In addition, section 1501(c) of the Bankruptcy Code also provides in relevant part that "[Chapter 15] does not apply to— (1) a proceeding concerning an entity, other than a foreign insurance company, identified by exclusion in section 109(b)." 11 U.S.C. § 1501(c)(1). In other words, Chapter 15 does not apply to entities that are ineligible for relief under section 109(b). 8 COLLIER ON BANKRUPTCY ¶ 1501.05 (16th ed. 2023).

Section 109(b)(2) excludes the following from qualifying as a debtor:

> [A] domestic insurance company, *bank*, savings bank, cooperative bank . . . or industrial bank *or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act*, except that an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 [1] of the Federal Deposit

> Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System.

11 U.S.C. § 109(b)(2) (emphasis added). Section 3(h) of the Federal Deposit Insurance Act defines an "insured bank" to mean "any bank (including a foreign bank having an insured branch) the deposits of which are insured in accordance with the provisions of [the Federal Deposit Insurance Act]." 12 U.S.C. § 1813(h).

Moreover, section 109(b)(3) also excludes "a foreign bank, savings bank, cooperative bank . . . that has a branch or agency (as defined in section 1(b) of the International Banking Act of 1978) in the United States" from qualifying as a debtor. 11 U.S.C. § 109(b)(3)(B). The effect of these exclusions is that "foreign representatives of foreign banks which are subject to foreign proceedings will not be eligible for Chapter 15 recognition if the foreign banks have a branch or agency in the United States." 8 COLLIER ON BANKRUPTCY ¶ 1501.05 (16th ed. 2023).

B. Recognition of a Foreign Proceeding

Where a debtor meets the foregoing eligibility requirements and is not otherwise excluded from Chapter 15, a foreign proceeding may be recognized if the requirements of section 1517(a) are satisfied. *In re Ocean Rig UDW Inc.*, 570 B.R. at 698. Subject to the public policy exception contained in section 1506 of the Bankruptcy Code, a foreign proceeding must be recognized if the following requirements are met:

> (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;
>
> (2) the foreign representative applying for recognition is a person or body; and
>
> (3) the petition meets the requirements of section 1515.

11 U.S.C. § 1517(a).

Additionally, a Chapter 15 case is properly commenced by the filing of a petition for recognition by a "foreign representative." *See* 11 U.S.C. §§ 1504, 1515(a). The Bankruptcy Code defines a "foreign representative" as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24).

C. Provisional Relief Under Section 1519 of the Bankruptcy Code

Section 1519 of the Bankruptcy Code permits the Court to grant certain forms of provisional relief "where relief is urgently needed to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1519(a). Specifically, section 1519 provides, among other things, that the court may grant "any relief referred to in paragraph (3), (4) or (7) of section 1521(a)." 11 U.S.C. § 1519(a)(3). In relevant part, paragraphs (4) of section 1521(a) provides that upon recognition of a foreign proceeding, whether main or nonmain, a court may grant any appropriate relief at the request of the foreign representative "providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities." 11 U.S.C. §§ 1521(a)(4).

In deciding whether to grant provisional relief in a Chapter 15 case under section 1519(a) of the Bankruptcy Code, a court will apply the "standards, procedure, and limitations" applicable for the entry of a preliminary injunction. 11 U.S.C. § 1519(e); *see also In re Beechwood Re*, No. 19-11560 (MG), 2019 WL 3025283, at *2 (Bankr. S.D.N.Y. July 10, 2019) ("[T]he Court applies the standards for issuance of a preliminary injunction to determine whether the provisional relief should be granted."). Therefore, in the context of a Chapter 15 proceeding, provisional relief is warranted when: (1) there is a likelihood of success on the merits (*i.e.*, obtaining recognition of the foreign proceeding); (2) there is risk of "imminent irreparable harm" in the absence of relief; (3) the balance of the harms tips the movant's favor; and (4) the public interest weighs in favor of an injunction. *In re Andrade Gutierrez Engenharia S.A.*, 645 B.R. 175, 181 (Bankr. S.D.N.Y. 2022) (quoting *Lyondell Chem. Co. v. Centerpoint Energy Gas Servs. (In re Lyondell Chem. Co.)*, 402 B.R. 571, 588–89 (Bankr. S.D.N.Y. 2009)).

III. DISCUSSION

A. SVB Cayman is Ineligible for Chapter 15 Relief

As a threshold matter, SVB Cayman is ineligible in be in Chapter 15 pursuant to sections 109(b) and 1501(c) of the Bankruptcy Code. It possessed no separate legal existence outside of the Bank, which was indisputably U.S.-incorporated and ineligible for bankruptcy relief pursuant to section 109(b)(2) as a domestic FDIC-insured bank. (*See* Verified Petition ¶ 25 ("Founded in 1983, [the Bank] was an FDIC-insured, state-chartered bank headquartered in California").) Moreover, the closing of the Bank and the commencement of the SVB Receivership did not result in the Bank's and, consequently, SVB Cayman's transmogrification into an entity eligible for bankruptcy.[6] Rather, SVB Cayman remains, for all intents and purposes of this proceeding, what Silicon Valley Bank has always been—a bank that is ineligible to be a debtor under the Bankruptcy Code.

1. SVB Cayman Was Not a Separate Legal Entity

The JOLs themselves acknowledge that SVB Cayman was not a separate legal entity from the Bank. Niall Ledwidge, one of the JOLs, testified before this Court that SVB Cayman was part and parcel to the Bank and possessed no legal existence outside of the Bank itself. (*See* Feb. 14, 2024 Hr'g Tr. 118:19–119:2 ("Q: Mr. Ledwidge . . . it's correct that the entity that is

---

[6] This is unlike Gregor Samsa who, in Kafka's *The Metamorphosis*, "awoke one morning from uneasy dreams [and] found himself transformed." FRANZ KAFKA, THE METAMORPHOSIS (1915).

registered—or was registered in the Cayman Islands was Silicon Valley Bank, correct? A: Correct. Q: All right. There's no separate entity called Cayman Islands Branch, or the branch was not separately incorporated? A: I believe there was just one legal entity . . . There wasn't—there was no subsidiary . . . in the Cayman Islands."); *id.* at 120:5–13 ("Q: [Y]ou agree the branch was part of the [B]ank, correct? A: I agree. Q: And you agree that the [B]ank is in a receivership in the United States, correct? A: Yes. Q: And you would agree that the FDIC is administering the assets and liabilities of the [B]ank; is that correct? A: Yes.").)

Moreover, SVB Cayman's operations were that of the Bank's. Mr. Ledwidge testified that SVB Cayman itself possessed no employees. (*See* Feb. 14, 2024 Hr'g Tr. 96:3–5 ("Q: [T]he Cayman Islands branch had no employees within the Cayman Islands itself? A: Not that I'm aware of.").) Rather, as set forth in the Verified Petition, SVB Cayman "looked to [the Bank's] California office for staffing needs in select service areas such as finance, IT services, legal and risk management" pursuant to the SLA. (Verified Petition ¶¶ 49, 51.) The JOLs, in fact, refer to these "select service areas" as "shared services." (*Id.* ¶ 51.) Notably, the SLA, which the JOLs indicate govern the "relationship between [the Bank] and SVB Cayman," provides that it is an "*intra-entity* agreement and therefore has no formal legal basis." (*Id.* ¶ 49; Pearson Declaration, Ex. 8 § 31.1 (emphasis added).) Additionally, all transfers were done electronically and via wire. Thomas Mills—a SVB Cayman depositor and witness for the JOLs—testified that, to his knowledge, transfers from his fund's account were all done electronically. (Feb. 14, 2024 Hr'g Tr. 80:6–10 ("Q: Is it correct that this was all done electronically? A: I believe so. Q: Okay. So nobody actually went to the Cayman branch and withdrew funds, whether it was by check or cash, correct? A: I believe that's correct.").)

Accordingly, the JOLs have not shown that SVB Cayman possessed anything more than a mail-drop presence in the Cayman Islands. *See In re Serviços de Petróleo Constellation S.A.*, 600 B.R. 237, 277 (Bankr. S.D.N.Y. 2019) ("[A]s a prerequisite for any relief under Chapter 15, a base level connection between the foreign debtor and the foreign jurisdiction that prevents a debtor from commencing a case in a jurisdiction where it has nothing more than a mail-drop presence" is required.) (quoting William H. Schrag, William C. Heuer, and Robert E. Cortes, *Cross-Border Insolvencies and Chapter 15: Recent U.S. Case Law Determining Whether a Foreign Proceeding Is "Main" or "Nonmain" or Neither*, 17 J. BANKR. L. & PRAC. 5 Art. 4 (Aug. 2008)); *see e.g., In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 338–39 (S.D.N.Y. 2008) (concluding that auditing activities, preparation of incorporation papers by a third party, and alleged review of insider transactions at the time of filing were insufficient to establish presence or "nontransitory economic activity" in the Cayman Islands, particularly where there was a lack of assets in the Caymans). SVB Cayman's existence was inseparable from that of Silicon Valley Bank and, by virtue of such, is a bank.

2. *Irish Bank* and *Colorado Industrial Bank* Are Distinguishable

In support of their proposition that SVB Cayman may nonetheless qualify for Chapter 15 relief notwithstanding its status as a bank, the JOLs rely on *In re Irish Bank Resolution Corp. Ltd.*, 538 B.R. 692 (D. Del. 2015) ("*Irish Bank I*") and *In re Colorado Indus. Bank of Fort Collins*, 84 B.R. 735 (Bankr. D. Colo. 1988). Both are distinguishable from the case here.

In *Irish Bank I*, the District Court of Delaware reviewed the Delaware bankruptcy court's Chapter 15 recognition of the Irish liquidation proceedings of Irish Bank Resolution Corporation Limited ("IRBC"), an Irish-incorporated company located in Dublin, Ireland. *Irish Bank I*, 538 B.R. at 694–95. It affirmed the bankruptcy court's conclusion that IRBC qualified to be a

Chapter 15 debtor solely on grounds that IRBC did not have a branch or agency in the U.S. as required under section 109(b)(3)(B) at the time its Chapter 15 petition filing. *Id.* at 696–97 (quoting *In re Irish Bank Resolution Corp. Ltd.*, 2014 WL 9953792, at *11 (Bankr. D. Del. 2014) ("*Irish Bank II*")); *see also* 11 U.S.C. § 103(b)(3)(B) (identifying by exclusion a "foreign bank . . . that has a branch or agency (as defined in section 1(b) of the International Banking Act of 1978) in the United States"). In contrast, unlike IRBC, which was a standalone Irish company, SVB Cayman was a branch of the U.S.-incorporated and FDIC-insured Silicon Valley Bank and, as the JOLs conceded, was not a separate legal entity. Accordingly, the *Irish Bank* ruling does not apply.

In *Colorado Industrial Bank*, the Colorado bankruptcy court held that a state-chartered industrial bank was eligible to be a debtor in Chapter 11 since it was undisputed that the bank was not an "insured bank" under section 3(h) of the Federal Deposit Insurance Act as it lacked FDIC insurance. *See Colorado Indus. Bank of Fort Collins*, 84 B.R. at 737–38. In light of the foregoing, the Court concluded that the bank was not excluded from Chapter 11 since section 109(b)(2) was limited to, in relevant part, an "industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act." *Id.* at 737 (quoting 11 U.S.C. § 109(b)(2)). Here, the JOLs concede that Silicon Valley Bank was FDIC insured. (*See* Verified Petition ¶ 25 (stating that Silicon Valley Bank "was an FDIC-insured, state-chartered bank headquartered in California").) Accordingly, *Colorado Industrial Bank* is inapplicable as well.

3. <u>The Court Need Not Address SVB Cayman's Eligibility Pursuant to Section 109(a)</u>

Given the Court's conclusion that SVB Cayman is prohibited from being in Chapter 15 under section 109(b)(2), the Court need not reach the issue whether SVB Cayman satisfies the eligibility requirements set forth in section 109(a) of the Bankruptcy Code. Section 109(b)(2) serves as an exclusionary provision, carving out certain entities from seeking and obtaining certain relief under the Bankruptcy Code. As the Court has already concluded that SVB Cayman is excluded pursuant to section 109(b)(2), it need not go further.

Accordingly, the Chapter 15 petition of SVB Cayman must be dismissed.

B. While Recognition and Provisional Relief Cannot be Granted, the JOLs Are Not Without Remedy

While recognition and provisional relief cannot be granted as SVB Cayman is prohibited from seeking Chapter 15 relief generally, the JOLs are not without remedy. Section 1509(f) of the Bankruptcy Code provides that "[n]otwithstanding any other provision of this section, the failure of a foreign representative to commence a case or to obtain recognition under this chapter does not affect any right the foreign representative may have to sue in a court in the United States to collect or recover a claim which is the property of the debtor."[7] 11 U.S.C. § 1509(f).

---

[7] While section 1509(f) permits a foreign debtor to sue in a U.S. court to collect or recover on a claim involving property of the debtor even in the absence of recognition, a broader question exists whether comity applies to allow courts to recognize foreign judgments in insolvency cases absent Chapter 15 recognition. It remains an unsettled question. The legislative history of Chapter 15 provides that it is the "exclusive door to ancillary assistance to foreign proceedings." H.R. REP. NO. 109-31, at 110 (2005). However, courts, turning to principles of international comity, have nonetheless given deference to foreign courts and their judgments without recognition of a Chapter 15 case. *See e.g.*, *Bartlett v. Société Générale de Banque au Liban SAL*, No. 19-CV-00007, 2021 WL 3706909, at *3–4 (E.D.N.Y. Aug. 6, 2021) (concluding that Chapter 15 applied "only in limited circumstances" and therefore, the lack of a Chapter 15 petition did not preclude a representative of a foreign bank from intervening in pending litigation); *Moyal v. Münsterland Gruppe GmbH & Co. KG*, 539 F. Supp. 3d 305, 309 n.1 (S.D.N.Y. 2021) (deeming "absurd" the notion that Chapter 15 recognition should be a prerequisite to seeking relief as it would "fly in the face of comity principles"); *Trikona Advisers Ltd. v. Chugh*, 846 F.3d 22, 30–31 (2d Cir. 2017) (finding that "Chapter 15 [did] not apply when a court in the United States simply gives preclusive effect to factual findings from an otherwise unrelated foreign liquidation proceeding" in light of its "limited purpose").

The Third Circuit recently sought to offer clarity on the matter in *Vertiv, Inc. v. Wayne Burt PTE, Ltd.*, 92 F.4th 169 (3d Cir. 2024), setting forth a "refreshed" version of the test it articulated in *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, 44 F.3d 187 (3d Cir. 1994) to "govern adjudicatory comity with regard to pending foreign bankruptcy proceedings." *Vertiv*, 92 F.4th at 169. Generally, adjudicatory comity is a "discretionary act of deference to a foreign court" and examines whether a court should "decline to exercise jurisdiction over matters more appropriate adjudged elsewhere." *Id.* (quoting *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014)) (quotation marks omitted). The case, which involved a defendant company in liquidation proceedings in Singapore, explored the question whether dismissal of a breach of contract action was appropriate in light of principles of international comity. While the parties disagreed over the appropriate test to apply when

Whether or not SVB Cayman can be in Chapter 15, (i) the JOLs are likely proper "foreign representatives" with respect to SVB Cayman and (ii) the Cayman Proceeding was properly commenced and would have otherwise likely constituted a "foreign proceeding."

With respect to the JOLs, the Bankruptcy Code defines "foreign representative" to be a "person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24). Here, the JOLs are "persons" as defined under 11 U.S.C. § 101(41) and, pursuant to the Winding Up Order, were appointed as the joint official liquidators of [the Bank] with powers to "act jointly and severally in their capacity as liquidators of [the Bank]" but "limited to acting in respect to the assets and affairs of the Cayman Islands branch of [the Bank] and its creditors." (Pearson Declaration, Ex. 14 ¶¶ 2, 3.) Accordingly, the JOLs are likely "foreign representatives" within the definition set forth in section 101(24).

Additionally, as both the JOLs' and the FDIC's Cayman law experts testified, the Cayman Proceeding was properly commenced under Cayman law and, therefore, would have otherwise likely constituted a "foreign proceeding." (*See* Feb. 14, 2024 Hr'g Tr. at 131:6–8 (Dr. Mokal testifying that a "careful delimitation of the terms of [Justice Doyle's] order [left him] no doubt whatsoever that . . . Justice Doyle made a standard, ancillary winding up order"); *id.* at 184:20–25 (Mr. Lowe testifying that the Court need not sit in a court of review of the Winding Up Order as what Justice Doyle "did was entirely correct" and he was "not suggesting [Justice

addressing international comity, the district court ultimately decided in the affirmative, holding that extension of comity to the Singaporean court proceedings was appropriate under either. Without ruling on the merits, the Third Circuit "clarified the standard courts should apply when deciding whether to abstain from adjudicating a case in deference to what is essentially a pending foreign bankruptcy proceeding" and remanded the case to the district court to apply its guidance. *Id.*

Doyle] did anything wrong").) Section 101(23) defines a "foreign proceeding" as (1) a collective judicial or administrative proceeding under a law relating to insolvency or adjustment of debt, (2) pending in a foreign country, (3) in which the assets and affairs of the debtor are subject to control or supervision of a foreign court, and (4) for the purpose of reorganization or liquidation. 11 U.S.C. § 101(23). As this Court has previously recognized, Cayman liquidation proceedings commenced under Part V of the Companies Law, which governs the winding up of companies in the Cayman Islands, are "collective judicial proceedings." *See In re Ocean Rig UDW Inc.*, 570 B.R. at 701–02 (concluding, among other things, that the Cayman liquidation proceedings commenced under Part V of the Companies Law are unquestionably collective judicial proceedings); *see also id.* at 702 (citing to other cases in the same district that held that insolvency or debt adjustment proceedings, including provisional liquidations and schemes of arrangement under Cayman Islands laws, qualify as foreign proceedings under Chapter 15 of the Bankruptcy Code).

Here, it is undisputed that the Cayman Proceedings are pending in the Cayman Islands, a foreign country, and that SVB Cayman, as part of the Bank, is to be wound up under the supervision of the Grand Court. (*See* Pearson Declaration, Ex. 14 ¶ 1 (stating that the Bank is to be "wound up by the Court under the provisions of the [Companies Act]").) Indeed, the FDIC's own expert witness testified that Justice Doyle's Winding Up Order was correctly issued. (*See* Feb. 14, 2024 Hr'g Tr. at 257:8–13 (The Court pointing out that Mr. Lowe "testified at length [and] acknowledged that Justice Doyle was correct in his order . . . [and] acted correctly in entering his judgment").) However, as SVB Cayman was unable to overcome the gating section 109(b)(2) issue, the Court cannot grant recognition or provisional relief at this juncture and must dismiss the Chapter 15 petition.

IV. CONCLUSION

Accordingly, for the reasons discussed, the Chapter 15 petition is **DISMISSED**.

IT IS SO ORDERED.

Dated: February 22, 2024
New York, New York

Martin Glenn

MARTIN GLENN
Chief United States Bankruptcy Judge

Trinity Term
[2024] UKPC 16
Privy Council Appeal No 55 of 2023

JUDGMENT

Sian Participation Corp (In Liquidation) (Appellant) *v* Halimeda International Ltd (Respondent) (Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Reed
Lord Lloyd-Jones
Lord Briggs
Lord Hamblen
Lord Burrows

JUDGMENT GIVEN ON
19 June 2024

Heard on 19 March 2024

Appellant

James Morgan KC

Paul Fradley

Phillip Kite

André McKenzie

Jhneil Stewart

(Instructed by Harney Westwood & Riegels LLP (London))

Respondent

Paul Lowenstein KC

Andrew Willins

Rupert Hamilton

Michal Hain

(Instructed by Candey (London))

LORD BRIGGS AND LORD HAMBLEN:

1. Introduction

1. This appeal is about the dividing line between two areas of public policy in the British Virgin Islands ("the BVI"), namely insolvency and arbitration. Put in the broadest terms, it is in the public interest that there should be a relatively simple means whereby a company which is insolvent, because it is unable to pay its debts in full as they fall due, should (unless it can be reconstructed) be placed without undue delay into an insolvency process whereby its assets are divided fairly (mainly pari passu) between all its creditors. At the same time there is a public policy that those who agree together to resolve their disputes by arbitration should be held to that agreement without interference from the courts.

2. It is at first sight not easy to see how those two aspects of public policy could ever conflict. This is because the court does not generally allow a creditor to seek the winding up of a company on the basis of a disputed debt. The petitioning creditor must generally have an undisputed debt if its non-payment is to constitute the requisite evidence that the company is insolvent. If there is no dispute as to the debt, then there is no dispute to attract the policy that those who agree to resolve their disputes by arbitration should arbitrate.

3. The simplicity of this picture has unfortunately been obscured by disagreement between the courts of a number of countries, which apply the same two public policies, as to what really amounts to a dispute about a debt. Leaving aside arbitration for a moment, it is virtually common ground in all those countries that whether a debt is disputed, so as to remove it from the class of unpaid debts sufficient to ground a winding up petition, depends upon whether it is genuinely disputed by the company on substantial grounds. But where a dispute about a relevant debt is covered by an agreement to arbitrate then, generally speaking, if the creditor wishes to pursue a claim for payment he must arbitrate rather than make a claim in court, if the debt is denied or even not admitted, leaving any issue about the genuineness of grounds for dispute to the arbitrator, rather than to a judge.

4. Some countries have adopted that much wider definition of a disputed debt as the test for whether the creditor should be permitted to petition for the debtor company to be wound up. If the debt is merely not admitted by the company, without that non-admission having to be either genuine, or based upon any grounds at all, substantial or otherwise, the creditor will

be likely to have its winding up petition dismissed, or at least stayed pending arbitration. Other countries have adopted a position somewhere in between those two alternatives.

5. Thus far, the courts of the BVI have set their face against the adoption of this wider definition of disputed debt as the test for whether the creditor should be permitted to apply for the appointment of a liquidator over the debtor company (which has the same effect as an order for winding up in England), preferring to adhere to the requirement for the debt to be genuinely disputed on substantial grounds before a creditor's application can be dismissed or stayed because of an agreement to arbitrate: see *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd* BVIHCMAP2014/0025 (8 December 2015) ("*Jinpeng*"). By contrast the courts of England and Wales have adopted the wider definition as the applicable test where a supposed dispute about the debt is raised between parties to an arbitration agreement. This is the practical result of the decision of the Court of Appeal in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575; [2015] Ch 589 ("*Salford Estates*").

6. This appeal is about a very large unpaid debt incurred by the appellant company which falls squarely into the gap between those two definitions. As a result of the decisions by the courts below it has been established beyond further challenge that the debt, although denied by the company, is not genuinely disputed on substantial grounds. The contract creating the debt included a widely drawn arbitration clause. Nonetheless the result thus far is that the debt was successfully relied upon in a petition for the compulsory winding up of the appellant, both at first instance and upon appeal.

7. The appellant says that the courts of the BVI should have followed *Salford Estates* and dismissed or stayed the application to appoint a liquidator, requiring the respondent first to establish its debt by an arbitration award. It is submitted that the BVI courts should have followed *Salford Estates*, because there is no difference between England and the BVI, either in the two public policies or in the legislation by which they are implemented, to justify taking a different approach to what is, in substance, a common problem. In response the respondent says that (i) the arbitration-based defence to the liquidation application was properly refused on case management grounds, (ii) even applying *Salford Estates* it would still have succeeded, (iii) the BVI is different from England and Wales, and entitled to pursue its own different approach, and (iv) that in any event *Salford Estates* was wrongly decided.

8. For reasons which follow, the Board has not been persuaded that any of the respondent's points (i) to (iii) offer a satisfactory solution to this appeal. The result is that

although the Board is of course sitting as the final court of appeal of the BVI, not England and Wales, it is necessary to resolve the question of principle as to whether *Salford Estates* was wrongly decided. The Board has concluded that it was, and that it was therefore correct for the courts of the BVI not to follow it. Its reasons for that conclusion occupy most of the rest of this opinion.

9. The Board has also been invited to rule upon the question whether the appellant had an appeal to the Board as of right. That is, in the event, an academic question because, after the Court of Appeal refused leave to appeal as of right, the Board granted permission to appeal on the basis that it raised an arguable point of law of great general or public importance. Nonetheless the Board acceded to the invitation to rule upon the question, and has concluded that, for the reasons which follow, the appellant did not enjoy an appeal as of right.

2. The facts and procedural history

10. The respondent is a wholly owned subsidiary of Far-Eastern Shipping Co PJSC ("FESCO"). FESCO is the parent company of a very substantial Russian transportation and logistics group with operations in ports, rail, logistics, and shipping.

11. The appellant forms part of the corporate structure through which 49.9997% of the shares in FESCO were held ("the SGS Investment Branch"). The ultimate beneficial owner of the majority shareholding in the SGS Investment Branch is Mr Ziyavudin Magomedov ("Mr Magomedov").

12. Pursuant to a Facility Agreement dated 7 December 2012 ("the Facility Agreement"), the respondent advanced a term loan of USD 140m to the appellant.

13. The Facility Agreement includes at clause 14.1 an arbitration agreement which provides that "any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement" shall be referred to arbitration at the London Court of International Arbitration or LCIA ("the Arbitration Agreement").

14. The loan has not been repaid. On 12 February 2020, the respondent sent a letter to the appellant demanding payment of the debt ("the Debt"). As at 15 December 2020, the total sum claimed was USD 226,365,598.31.

15. The appellant disputes that the Debt is due and payable on the basis of a cross-claim and/or set-off. The appellant alleges that, beginning in late 2019 or early 2020, a "corporate raid" backed and instigated by the Russian State has been mounted against the SGS Investment Branch targeting its shareholding in FESCO. The SGS Investment Branch alleges that the respondent has been an active participant in the corporate raid. The respondent denies the existence of the corporate raid and its involvement in it.

16. On 29 September 2020, the respondent applied to have liquidators appointed in respect of the appellant on the basis that it was both cash flow and balance sheet insolvent ("the liquidation application").

17. The liquidation application was heard by Wallbank J on 20-21 April and 13 May 2021. On 19 May 2021, Wallbank J delivered an oral judgment. He held that the appellant had failed to show that the Debt was disputed on genuine and substantial grounds or that there were other reasons why the liquidation application ought to be dismissed or stayed. By an order dated 19 May 2021, he appointed liquidators and ordered the appellant to be put into liquidation. The appellant appealed against that decision. That appeal was dismissed by the Court of Appeal (Pereira CJ, Webster and Henry JJA) in a judgment given on 11 November 2022.

18. The Court of Appeal dismissed the appeal against Wallbank J's finding that there was no prima facie case of a cross-claim. This is not the subject of any challenge on this appeal. The appellant did not argue before the Court of Appeal that the Debt itself (even taking into account the cross-claim issue) was disputed on genuine and substantial grounds.

19. On 2 December 2022, the appellant applied to the Court of Appeal for leave to appeal as of right under section 3(1)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 (the "1967 Order") and leave to appeal under section 3(2)(a) of the 1967 Order, on the basis that there was a point of law of great general or public importance. Under section 3(1)(a) of the 1967 Order an appeal lies as of right from a decision of the BVI Court of Appeal if: (a) the decision is a final decision, and (b) the appeal "involves directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards".

20. The application for leave to appeal to His Majesty in Council was dismissed by Michel, Price-Findlay and Farara JJA on 24 April 2023.

21. On 15 November 2023, the Board gave permission to appeal, stating that the parties should also address the issue as to whether the appellant was entitled to appeal as of right.

22. The matters said by the appellant to constitute the alleged corporate raid have been the subject of other proceedings.

23. On 28 January 2021, proceedings raising the allegation were issued in the BVI High Court ("the BVI Proceedings"). Those proceedings were ongoing at the time of the hearing before Wallbank J at first instance and at the time of the appeal hearing before the Court of Appeal and were relied upon as giving rise to a cross-claim that exceeded the amount of the Debt.

24. On 20 July 2023, a claim was commenced in the English High Court in the tort of unlawful means conspiracy, further or alternatively the tort of conspiracy to injure, and in the further alternative a claim under Russian law for causing harm unlawfully ("the English Proceedings"). The respondent is a defendant to the English Proceedings and the appellant is a claimant, although the appellant does not itself advance a claim against the respondent in the English Proceedings.

25. On 24 July 2023, the BVI Proceedings were discontinued.

3. The Issues

26. The agreed issues for determination on the appeal are:

> (1) As a matter of BVI law, what is the correct test for the court to apply to the exercise of its discretion to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement and is said to be disputed and/or subject to a cross-claim (notwithstanding that dispute is not on genuine and substantial grounds)?

(2) Was the relevant test met or should the matter be remitted to determine whether this was the case?

(3) Did Wallbank J conclude that the court should refuse to consider the impact of the arbitration agreement because it had been raised too late and, if he did so find, was he wrong to do so?

(4) Does the appeal fall within section 3(1)(a) of the 1967 Order? In particular, does "the appeal [involve] directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards"?

4. Issue (1): as a matter of BVI law, what is the correct test for the court to apply to the exercise of its discretion to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement and is said to be disputed and/or subject to a cross-claim (notwithstanding that dispute is not on genuine and substantial grounds)?

(1) The relevant public policies

(i) Insolvency

27. The BVI inherited its insolvency jurisdiction from the United Kingdom. Its jurisdiction to bring about the liquidation of a company on the ground of insolvency is now to be found in the Insolvency Act 2003 ("the 2003 Act"). Section 162(1) provides that the court may appoint a liquidator of a company if:

> "(a) the company is insolvent".

The other two grounds are that it is just and equitable, or in the public interest, that a liquidator should be appointed. Although section 162(2) (now) lists some eight classes of person who may apply under subsection (1) for the appointment of a liquidator, overwhelmingly the main class of applicant under the insolvency ground is that of creditor. For that reason, petitions for winding up and liquidation applications on the insolvency ground are generally called creditors' petitions or applications, both in the UK and in the BVI.

28. A creditor is defined by section 9 of the 2003 Act as a person who has a claim against the debtor which would be an admissible claim in the debtor's liquidation (if a company). Insolvency is defined in section 8 of the 2003 Act as including both balance sheet and commercial insolvency, the latter meaning an inability of the company to pay its debts as they fall due (see section 8(1)(c)(ii)). A company is by section 8(1)(a) deemed to be insolvent if it fails to comply with the requirements of a statutory demand which has not been set aside under section 157 of the 2003 Act. Section 157(1)(a) provides that the court must set aside a statutory demand if (inter alia) it is satisfied that there is a substantial dispute as to whether the debt is owing or due.

29. Section 167 of the 2003 Act gives the court a range of discretionary powers on the hearing of a liquidation application, including making the appointment, adjourning or dismissing the application (even if a ground for appointment has been proved) and making such interim or other order as it thinks fit. Section 168 requires a liquidation application to be determined within six months after filing, subject to a power to extend. An application which has been neither determined nor extended is deemed to have been dismissed.

30. The UK's Insolvency Act 1986 achieves substantially the same outcomes in relation to a creditor's petition, albeit by the use of slightly different language and structure: see in particular sections 122 (grounds for winding up); 123 (inability to pay debts); 124 (application for winding up) and 125 (powers of court on hearing of petition). Nothing in the differences between the two statutory structures points to any difference in underlying policy, and the English authorities about the essential nature and effect of the winding up petition are in the Board's view in principle fully applicable to the equivalent process in the BVI.

31. In both jurisdictions the date of the presentation of the winding-up petition (or, in the BVI the issue of the liquidation application) plays an important part in the liquidation process that follows, as marking the date of the commencement of the liquidation with important statutory consequences for the admissibility of debts and claims and the setting aside of transactions.

32. For present purposes the following aspects of the nature and effect of the process for the initiation of an insolvent liquidation may be said to be common to both the UK and the BVI. First and foremost it is a process which exists for the benefit of a class rather than just the individual applicant (or petitioner). The liquidation that it triggers is a statutory process

designed and evolved over more than a century to bring about an efficient realisation of the company's assets and their fair distribution among all its stakeholders, generally pari passu as between unsecured creditors. For that purpose it is accompanied by a stay of individual claims, so as to avoid a rush to judgment or a race by competing creditors to seize or attach assets for payment of their own debts. For the same reason, payment in full of an applicant creditor's debt by the company while the application (or petition) is pending does not necessarily bring it to an end. The court may permit another unpaid creditor to be substituted as applicant or petitioner: see section 166 of the 2003 Act. Nor is it a private procedure. The rules provide for an application or petition to be advertised before it is heard, so that any stakeholder in the company can attend to support or oppose it: see section 165 of the 2003 Act.

33. Secondly the process of seeking and obtaining an order for the appointment of a liquidator (or a winding up order in the UK) does not require or involve any pursuit or adjudication of the applicant's claim to be a creditor, either as to liability or quantum. Thus for example the court's order creates no res judicata as between the applicant and the company: see *In re Vitoria* [1894] 2 QB 387, p 392 (a bankruptcy case, but reflecting the applicable general principle). The successful outcome of a winding up petition is not a judgment which can be executed: *In re A Company (No 000928 of 1991), Ex p City Electrical Factors* Ltd [1991] BCLC 514, 517. The liquidator is free to reject the applicant's proof of debt, in part or in whole: *In re Menastar Finance Ltd* [2002] EWHC 2610 (Ch); [2003] BCC 404, paras 44 to 45. If the debt is disputed by the liquidator that dispute may be referred to court or to arbitration: *Tanning Research Laboratories Inc v O'Brien* [1990] HCA 8; (1990) 169 CLR 332, pp 342–343.

34. Thirdly the court proceeds to appoint a liquidator (or to make a winding up order) only on a provisional assumption that the company is insolvent, which may turn out to be untrue, without that invalidating the liquidation process. Probably the most spectacular recent example of such an outcome is the distributing administration (which is akin to a modern form of liquidation) of Lehman Brothers International Europe Ltd, which turned out to have a substantial net surplus for distribution to members after all its creditors had been paid in full, with interest.

35. Fourthly, and in sharp contrast with the role of the court (or arbitrator) in proceedings for the enforcement of a debt, the court's powers on the hearing of a liquidation application (or winding up petition) are discretionary. That is not to say that the court's discretion is entirely unfettered. In principle, a petitioning creditor with an unpaid debt which is not

genuinely disputed on substantial grounds is often described as being in substance entitled to an order, as a statutory right, ex debito justitiae: see *Bryanston Finance Ltd v de Vries* [1976] Ch 63, 78; *In re Crigglestone Coal Co Ltd* [1906] 2 Ch 327, p 337; and *In re Southard & Co Ltd* [1979] 1 WLR 1198, 1203, approved in *Ebbvale Ltd v Hosking* [2013] UKPC 1, para 25.

(ii) Arbitration

(a) The legislative background

36. Arbitration in the BVI is governed by the Arbitration Act 2013 ("the Arbitration Act") which came into force on 1 October 2014.

37. The Arbitration Act is heavily based on the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"). The Arbitration Act primarily applies to arbitrations where the place of arbitration is in the BVI. However, sections 18, 19, 43, 58 and 59 apply where the place of arbitration is outside the BVI (see section 6(3)).

38. Section 18 gives direct effect to article 8 of the Model Law which provides:

> "*Article 8. Arbitration agreement and substantive claim before court*
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> (2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court."

39. Under section 18(4) where "the Court refers the parties in an action to arbitration, it shall make an order staying the legal proceedings in that action."

40. Article 8 of the Model Law is itself based on article II(3) of the New York Convention 1958 which provides:

> "3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".

41. The BVI acceded to the New York Convention on 25 May 2014.

42. In England and Wales the equivalent of section 18 of the Arbitration Act is section 9 of the Arbitration Act 1996 ("1996 Act"). It provides, so far as is relevant, as follows:

> "(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> (2) ...
>
> (3) ...
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

43. As both article 8 of the Model Law and article II(3) of the New York Convention recognise, arbitration agreements have both positive and negative aspects. The positive aspect is an obligation to arbitrate (rather than litigate) matters which fall within the arbitration agreement. The negative aspect is an obligation not to commence proceedings in respect of such matters in the courts or any other legal forum. As Lord Mance stated in *AES Ust-Kamenogorsk Hydropower Plant LLP v Ust-Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35; [2013] 1 WLR 1889, para 1:

> "A party seeking relief within the scope of the arbitration agreement undertakes to do so in arbitration in whatever forum is prescribed. The (often silent) concomitant is that neither party will seek such relief in any other forum".

(b) The approach to the interpretation of section 18

44. The approach to the interpretation of provisions such as section 18 of the Arbitration Act was addressed by the Board in *FamilyMart China Holding Co Ltd v Ting Chuan* [2023] UKPC 33; [2024] Bus LR 190 ("*FamilyMart*") at para 31 in an advice delivered by Lord Hodge. That case was concerned with the equivalent Cayman Islands legislation, but what was there said may be adapted to apply to the Arbitration Act as follows:

> "31. Many countries which are contracting states to the New York Convention have implemented provisions like [section 18 of the Arbitration Act] in accordance with their obligations under the New York Convention. In *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP* [2023] Bus LR 1305 ('*Gol Linhas*') the Board, in a judgment delivered by Lord Hamblen and Lord Leggatt, addressed the correct approach to the interpretation of [such provisions]. In para 21 of its judgment the Board referred to the judgment of the UK Supreme Court in *Enka Insaat* at para 126 in which it observed that more than 160 states had signed the New York Convention and stated:
>
>> 'The essential aim of the Convention was to establish a single uniform set of international legal standards for the

> recognition and enforcement of arbitration agreements and awards. Its success is reflected in the fact that … the New York Convention has been implemented through national legislation in virtually all contracting states.' (Citations omitted)

The Board went on to observe (para 74) that the meaning of a [BVI] statute is a question to be decided by applying the law of the [BVI] but that the international origin of the provision necessitated a particular approach to its interpretation. The Board stated (para 75):

> 'As with any statute which incorporates into domestic law the text of an international treaty, the interpretation and application of the statutory language must take account of its origin in an international instrument intended to have an international currency. That entails that, as Lord Macmillan put it in *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, 350, in the interests of uniformity the words should not be given a local interpretation controlled by what he called "domestic precedents of antecedent date", but rather should be construed "on broad principles of general acceptation"; see also *James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1978] AC 141, 152 (Lord Wilberforce); *Fothergill v Monarch Airlines Ltd* [1981] AC 251, 281-282 (Lord Diplock). This principle is just as relevant in determining the scope of application of rules incorporating an international convention as it is in interpreting their linguistic meaning.'

It is appropriate therefore to consider the jurisprudence of several countries as guides to the interpretation of [section 18 of the Arbitration Act] in so far as they have statutory provisions which are worded in a similar way to the [BVI] provision."

45. One of the issues addressed in detail in *FamilyMart* was the meaning of a "matter" which has been agreed to be referred to arbitration, or, in the language of section 18 of the Arbitration Act, "which is the subject of an arbitration agreement".

46. At paras 34 to 56 Lord Hodge reviewed the international authorities, concluding at para 57:

> "... the Board considers that there is now a general consensus among leading arbitration jurisdictions in the common law world that the domestic courts of countries that are signatories of the New York Convention respect and give priority to the autonomy of the parties to arbitration agreements. The statutory provisions of those countries provide for a mandatory stay of legal proceedings at the request of a party to an arbitration agreement when a matter in those proceedings is referrable to arbitration. There is also a broad consensus on how to approach the determination of matters which must be referred to arbitration".

47. Whilst recognising that "no judicial formula encapsulating the meaning of 'matter' should be treated as if it were a statutory text", Lord Hodge expressed the broad consensus on approach as follows:

> (1) "The court in considering such an application adopts a two-stage process. First, the court must determine what the matters are which the parties have raised or foreseeably will raise in the court proceedings, and, secondly, the court must determine in relation to each such matter whether it falls within the scope of the arbitration Agreement" (para 58).
>
> (2) "The court must ascertain the substance of the dispute or disputes between the parties. This involves looking at the claimant's pleadings but not being overly respectful to the formulations in those pleadings which may be aimed at avoiding a reference to arbitration. It involves also a consideration of the defences, if any, which may be skeletal as the defendant seeks a reference to arbitration, and the court should also take into

account all reasonably foreseeable defences to the claim or part of the claim" (para 59).

(3) "A 'matter' is a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute. If the 'matter' is not an essential element of the claim or of a relevant defence, it is not a matter in respect of which the legal proceedings are brought. The Board agrees with the statement of Sundaresh Menon CJ in para 113 of *Tomolugen* [2016] 1 SLR 373 that a 'matter' requiring a stay does not extend to an issue that is peripheral or tangential to the subject matter of the legal proceedings. The Board agrees with Foster J's third proposition in *WDR Delaware* that a 'matter' is something more than a mere issue or question that might fall for decision in the court proceedings or in the arbitral proceedings" (para 61).

(4) "The exercise involving a judicial evaluation of the substance and relevance of the 'matter' entails a matter of judgment and the application of common sense. It is not a mechanistic exercise. It is not sufficient merely to identify that an issue is capable of constituting a dispute or difference within the scope of an arbitration agreement without carrying out an evaluation of whether the issue is reasonably substantial and whether it is relevant to the outcome of the legal proceedings of which a party seeks a stay" (para 65).

48. A similar statement as to the proper approach is set out in Lord Hodge's judgment in the Supreme Court decision in *Republic of Mozambique v Privinvest Shipbuilding SAL (Holding)* [2023] UKSC 32; [2023] Bus LR 1359, paras 71 to 77. The judgment in that case was handed down on the same day as the advice in *FamilyMart.*

(c) The approach to interpretation of arbitration agreements

49. There is a broad international consensus that the approach to the interpretation of arbitration agreements should be pro-arbitration and expansive. As stated in *FamilyMart* at para 26:

> "… case law on interpretation is indicative of the respect which the courts of many jurisdictions give to the autonomy of parties to choose how they wish their disputes to be resolved. In *Enka Insaat ve Sanayi AS v OOO 'Insurance Co Chubb'* [2020] UKSC 38; [2020] 1 WLR 4117, ('*Enka Insaat*') Lord Hamblen and Lord Leggatt, giving the leading judgment of the court, stated (para 107):
>
>> 'In *Fiona Trust & Holding Corpn v Privalov* [[2007] UKHL 40;] [2007] Bus LR 1719, the House of Lords affirmed the principle that "the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal" (see para 13, per Lord Hoffmann).
>>
>> Contrary to a submission made on behalf of Chubb Russia, this is not a parochial approach but one which, as the House of Lords noted in the *Fiona Trust* case, has been recognised by (amongst other foreign courts) the German Federal Supreme Court (Bundesgerichtshof), the Federal Court of Australia and the United States Supreme Court and, as stated by Lord Hope at para 31, "is now firmly embedded as part of the law of international commerce". In his monumental work on *International Commercial Arbitration,* 2nd ed (2014), p 1403 Gary Born summarises the position as follows:
>>
>> "In a substantial majority of all jurisdictions, national law provides that international arbitration agreements should

> be interpreted in light of a 'pro-arbitration' presumption. Derived from the policies of leading international arbitration conventions and national arbitration legislation, and from the parties' likely objectives, this type of presumption provides that a valid arbitration clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims. That is particularly true where an arbitration clause encompasses some of the parties' disputes and the question is whether it also applies to related disputes, so that all such controversies can be resolved in a single proceeding (rather than in multiple proceedings in different forums).""

(d) Application of these principles

50. The Arbitration Agreement provides as follows:

> "The Parties agree that any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement (including a claim, dispute or difference regarding its existence, termination or validity or any non-contractual obligations arising out of or in connection with this Agreement) (a 'Dispute'), shall be referred to and finally settled by arbitration in accordance with the London Court of International Arbitration ('LCIA') Rules (the 'Rules') as in force at the date of this Agreement and as modified by this clause, which Rules shall be deemed incorporated into this clause."

51. The clause is drafted in broad terms intended to cover a wide range of disputes arising in connection with the Facility Agreement. It does not, however, seek to bar ancillary legal proceedings.

52. The Arbitration Agreement should be interpreted in a pro-arbitration and expansive manner and whether a "matter" is subject to that agreement should be approached following the guidance set out in *FamilyMart.*

53. The first point to be made is that it is common ground that a creditor's winding up petition is not an "action" within the meaning of section 18 (or a "claim" within the meaning of section 9 of the 1996 Act). The mandatory stay provisions do not therefore apply to the liquidation application.

54. This reflects the decision in *Salford Estates* which, on this issue, has been followed by the BVI courts. In particular, it reflects para 31 of Sir Terence Etherton C's judgment in *Salford Estates* in which he explained that a creditor relies on non-payment of a specific debt in a winding-up petition "as *evidence*" that the company "is unable to pay its debts as they fall due"; the petition "is not a claim for payment of the debt".

55. This distinguishes the present case from *FamilyMart* in which it was not disputed that applications to wind up a company on the just and equitable ground were "legal proceedings" so as to fall within the mandatory stay provisions of the equivalent Cayman Islands statute (see para 33).

56. *FamilyMart* recognises, however, that there may in appropriate cases be a pro tanto stay of proceedings (see para 60). It follows that even though the bringing of the proceedings may not engage the mandatory stay provisions, it is possible that issues may arise in the proceedings which do. The most obvious example would be if the proceedings involved the determination of a claim which was subject to the arbitration agreement.

57. In general, arbitration agreements are concerned with dispute resolution. They resolve disputes between the parties through the arbitration tribunal's determination of disputed rights and obligations, including remedial rights. As *FamilyMart* makes clear, this may include claims for declaratory relief.

58. The general need for a determination of disputed rights and obligations is reflected in the approach in *FamilyMart* as to what constitutes a "matter" in respect of which legal proceedings are brought. As there stated at para 61:

> "A 'matter' is a substantial issue that is legally relevant *to a claim or a defence*, or foreseeable defence, in the legal proceedings, and is susceptible to be *determined* by an arbitrator as a discrete dispute" (emphasis added)."

59. The focus is on issues which are legally relevant to a claim or the defence to a claim – ie substantive issues. The focus is also on the issues which may be "determined" by the arbitration tribunal.

60. This is consistent with the stated object of the Arbitration Act which is to facilitate and obtain the fair and speedy "resolution of disputes" by arbitration (section 3(1)). A foundational principle of the Arbitration Act is that the parties to a dispute should be free to agree on "how the dispute should be resolved" (section 3(2)(a)). Further, as the heading of article 8 of the Model Law makes clear, it applies where there is a "substantive claim before court".

61. If no such "matter" arises in the legal proceedings then the mandatory stay provisions do not apply. If they do not apply, then the policy underlying them equally does not apply. That policy is to enforce the positive and negative aspects of arbitration agreements. Those are only engaged, however, in respect of a "matter" which is subject to the arbitration agreement.

62. It is not the policy of the Arbitration Act, or arbitration law more generally, to fetter the rights of parties in respect of matters which fall outside the scope of the arbitration agreement. The parties' freedom to choose to resolve their disputes by arbitration and how to do so is to be respected but that also means respecting the boundaries of the choice made. That is another important aspect of party autonomy.

63. Unless an arbitration agreement provides otherwise, it is not the policy of the Arbitration Act, or its English equivalent, to require a creditor to obtain an arbitration award before enforcing a debt which is completely undisputed, by a claim in court. Nonetheless the English courts have set a very low threshold for the identification of a dispute sufficient to require arbitration, and therefore a mandatory stay of any claim in court to enforce the debt, under section 9 of the 1996 Act. All that is necessary is that the debt should not be admitted. It need not be denied, nor need any, let alone any substantial, grounds to be shown for disputing the debt: see *Halki Shipping Corpn v Sopex Oils Ltd* [1998] 1 WLR 726 ("*Halki Shipping*"). The judgments of Henry LJ at p 750 and Swinton Thomas LJ at pp 762-763 explain that this low threshold was introduced in the 1996 Act on the deliberate policy ground of preventing the avoidance of a mandatory stay by the creditor seeking summary judgment in court proceedings to enforce the debt, on the assertion that there was no sufficient dispute of substance to require a trial (or therefore an arbitration). Since 1930, the

predecessors to the 1996 Act had permitted this to happen because the predecessor to section 9 had included as a ground for resisting a stay the assertion that "there is not in fact any dispute between the parties with regard to the matter agreed to be referred". Thus a creditor could resist a mandatory stay on a basis very similar to that used to resist the dismissal of a winding up petition on the grounds that the debt was disputed, ie by showing that the debt was not genuinely disputed on substantial grounds. This was removed from what became section 9 in 1996. It was to take until 2013 (in *Rusant Ltd v Traxys Far East Ltd* [2013] EWHC 4083 (Comm) ("*Rusant*")) for the possible implications of this change in the threshold for a mandatory stay to seep through to the context of winding up.

(iii) Exclusive jurisdiction agreements

64. There are no equivalent mandatory stay provisions applicable to exclusive jurisdiction clauses. However, such clauses also have positive and negative aspects and the established approach under English law is to enforce that contractual bargain in the absence of strong reasons for departing from it – see *Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749 ("*Donohue*"). As Lord Bingham of Cornhill there stated:

> "24. If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum".

65. Under English law the approach to interpretation of such clauses will be expansive for very much the same reasons as in relation to arbitration clauses. In particular, the presumption in favour of one-stop adjudication will generally equally apply – see, for example, Briggs, *Civil Jurisdiction and Judgments,* 7th ed (2021) at para 23-08.

66. Although there is no statutory context, in considering whether a creditor's winding-up petition should be stayed as it involves a claim which falls within the scope of an exclusive jurisdiction clause, similar issues will arise as in relation to an arbitration agreement. In particular, does the bringing of the petition, or the resolution of issues within the petition proceedings, involve a breach of the exclusive jurisdiction clause? This will depend on the proper interpretation of the exclusive jurisdiction clause. The reason for granting a stay in relation to such clauses is the parties' contractual bargain - pacta sunt servanda. If there is no breach of the clause then there is no basis for a stay. As with arbitration agreements, most generally worded exclusive jurisdiction clauses are concerned with dispute resolution and the determination of disputed rights and obligations. As Lord Bingham stated in *Donohue* their function is to confer exclusive jurisdiction "to rule on claims" between the parties.

(2) The Threshold Question: what is a Disputed Debt?

67. As already noted, the courts of the UK and the BVI are at one on the question what is a disputed debt, so as to disable the creditor from seeking winding up (or the appointment of a liquidator) on the insolvency ground, relying upon non-payment. The debt must be the subject of a genuine dispute on substantial grounds. If it is, then the winding up petition (or the liquidation application) will generally be dismissed (unless a substitute petitioner or applicant with an undisputed debt is available to carry it forward). *Mann v Goldstein* [1968] 1 WLR 1091 is usually cited as the leading English authority for this test. It is based upon dicta of Lord Greene MR in *In re Welsh Brick Industries* [1946] 2 All ER 197.

68. In the BVI the same test was laid down in *Sparkasse Bregenz Bank AG v In the matter of Associated Capital Corporation* BVIHCVAP2002/0010 (18 June 2003) ("*Sparkasse*"), following *In re Taylor's Industrial Flooring Ltd* (1990) BCC 44. It has been adopted in most, if not all, those common law countries which operate a winding up jurisdiction similar to that of the UK.

69. A similar test has been applied where the contract creating the debt contains an exclusive jurisdiction clause providing for disputes to be litigated in a jurisdiction other than that of the insolvency court. In *BST Properties Ltd v Reorg-Apport Penzugyi RT* [2001] EWCA Civ 1997 ("*BST Properties*"), the Court of Appeal held that the presence of an exclusive jurisdiction clause in favour of Hungary did not preclude the Companies Court in England from deciding whether a debt created by a contract which included the exclusive jurisdiction clause was genuinely disputed on substantial grounds. In particular, it was

irrelevant that the company might have been able to have stayed an English action to enforce the debt on the basis of the exclusive jurisdiction clause.

70. A similar threshold had also been applied, at least in England between 1930 and 1996, to determine when proceedings to enforce a debt covered by an arbitration clause should be subjected to a mandatory stay. But, as noted above, this threshold was deliberately lowered in 1996, so as to enable the defendant to a debt enforcement claim to obtain a mandatory stay in favour of arbitration by the mere non-admission of the debt. And the same statutory intent may be discerned in the Arbitration Act since section 18 closely follows the rubric of the English section 9.

(3) Salford Estates

71. *Salford Estates* was the first occasion when the (by then) different threshold tests for a mandatory stay under section 9 of the 1996 Act and the dismissal of a winding up petition on the ground of a disputed debt came into collision at an appellate level. The claimant was the lessor seeking to recover service charges under a lease which contained an arbitration clause. The lessor had already obtained a detailed arbitration award resolving various issues of construction under the lease and quantifying the amount then due, which the lessee eventually paid. The lessor demanded further sums falling due thereafter, based upon the resolution of those issues, to which there was no genuine defence on substantial grounds, but the lessee company failed to pay, so the lessor presented a winding up petition. The lessee sought a stay under section 9 of the 1996 Act.

72. At first instance the judge held that section 9 applied to the winding up petition. Applying *Halki Shipping* and *Rusant* he dismissed the petition. In the latter case Warren J had held that a creditor's winding up petition necessarily involved a claim by the petitioner to be a creditor, and therefore fell within section 9 of the 1996 Act. He therefore restrained presentation of the petition. Alternatively he would have exercised a discretion not to wind up the company.

73. On appeal in *Salford Estates* the Court of Appeal held that a creditor's winding up petition neither was nor included a claim within the meaning of section 9. The only judgment was given by Sir Terence Etherton C. His reasoning, which is not challenged on this appeal, may be shortly summarised. First, the basis of a creditor's petition is that the company is either balance sheet insolvent or unable to pay its debts. Secondly, the assertion

by the petitioner that it has an unpaid debt owing by the company is only by way of evidence of the company's inability to pay, not a claim to recover the debt. Thirdly, the making of a winding up order might or might not lead to the creditor being paid the amount stated to be due in the petition. That would depend upon the outcome of the liquidation. Fourthly, it is an abuse of process to present a petition to put pressure on a company to pay a genuinely disputed debt, whereas no such stigma attached to a claim for payment of a debt. Fifth, where a petition was based upon a series of debts, only some of which were subject to an arbitration clause, section 9 would be unworkable. Finally:

> "it seems highly improbable that Parliament, without any express provision to that effect, intended section 9 of the 1996 Act to confer on a debtor the right to a non-discretionary order striking at the heart of the jurisdiction and discretionary power of the court to wind up companies in the public interest where companies are not able to pay their debts." (para 35).

74. But at para 39, he continued:

> "My conclusion that the mandatory stay provisions in section 9 of the 1996 Act do not apply in the present case is not, however, the end of the matter. Section 122(1) of the 1986 Act confers on the court a discretionary power to wind up a company. It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 Act. This was the alternative analysis of Warren J in the *Rusant* case, at para 19."

75. Embodied within that passage is the primary reasoning for it, which is that the legislative policy embodied in the 1996 Act extends to prohibiting the continuation of proceedings to which the mandatory stay provided by section 9 does not apply. It is also implicit that the discretion to wind up would be virtually illusory where the debt relied upon by the petitioner was merely not admitted, even if not genuinely disputed on substantial grounds. There would in such circumstances be, in substance, virtually a mandatory stay of the petition, unless a different petitioner could be substituted.

76. The Chancellor added the following additional reasoning. First, that it would be anomalous for the Companies Court to undertake a "summary judgment type analysis" to see whether the debt was genuinely disputed on substantial grounds if, in the light of *Halki Shipping*, it was a purpose of the 1996 Act to prohibit claims in court based upon summary judgment. Secondly, exercising a discretion to wind up would encourage parties to arbitration agreements to bypass the arbitration agreement and the 1996 Act as a standard tactic by presenting a winding up petition. Finally:

> "The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding up petition, of satisfying the Companies Court that the debt is bona fide disputed on substantial grounds. That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act." (para 40).

(4) Subsequent judicial and academic treatment of Salford Estates

77. As a binding decision of the Court of Appeal, *Salford Estates* has generally been followed at first instance in England, albeit not without occasional misgivings. There is brief reference to it by the Court of Appeal in *Revenue and Customs Comrs v Changtel Solutions UK Ltd* [2015] EWCA Civ 29; [2015] 1 WLR 3911, para 48, but that was a case about whether the question whether a petitioner's debt was genuinely disputed on substantial grounds should be determined in the Tax Tribunal or in the Companies Court.

78. In *Fieldfisher LLP v Pennyfeathers Ltd* [2016] EWHC 566 (Ch) Nugee J applied *Salford Estates* to a petition for administration because, like a creditor's winding up petition it required the creditor to show that the company was unable to pay its debts. The petitioning solicitors were suing on a conditional fee agreement containing an arbitration clause. Nugee J accepted that, even though section 9 was not engaged, in accordance with *Salford Estates* the policy of the 1996 Act favoured a discretionary stay save in exceptional circumstances, but he did so without much enthusiasm: see para 37.

79. English courts at first instance have differed over whether the *Salford Estates* principle applies where a winding up petition is opposed on the grounds of an exclusive jurisdiction clause. In *Al Kuwari v Cantervale Ltd* [2022] EWHC 3490 (Ch), ICC Judge Prentis regarded the policy imperatives to be identical as between an arbitration clause and an exclusive jurisdiction clause, and followed *Salford Estates* in preference to the earlier *BST Properties* case. By contrast in *Hex Technologies Ltd v DCBX Ltd* [2023] EWHC 537 (Ch); [2023] ILPr 35 Deputy Insolvency and Companies Court Judge Addy KC declined to stay the petition, on the basis that there was no policy behind exclusive jurisdiction clauses sufficiently like that which *Salford Estates* identified in the 1996 Act to detract from the authority of *BST Properties.* The same course was followed more recently in *City Gardens Ltd v Dok82 Ltd* [2023] EWHC 1149 (Ch).

80. The insolvency courts of Malaysia and Singapore have largely followed *Salford Estates* on the basis of similarly worded legislation, but without contributing further to the reasoning: see (in Malaysia) *Awangsa Bina Sdn Bhd v Mayland Avenue Sdn Bhd* [2019] MLJU 1365 and *V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd* [2023] 7 MLJ 155 (and in Singapore): *AnAn Group (Singapore) PTE Ltd v VTB Bank* [2020] SGCA 33 and *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] SGCA 40.

81. In Hong Kong by contrast there have been divergent decisions. In *In re Southwest Pacific Bauxite (HK) Ltd* [2018] HKCFI 426 (commonly known as *Lasmos*) Harris J applied the *Salford Estates* analysis, but with the added condition for a stay that the company should actually have taken the requisite steps to start the arbitration process. In *Guy Kwok-Hung Lam v Tor Asia Credit Master Fund LP* [2023] HKCFA 9 ("*Guy Lam*") the Hong Kong Court of Final Appeal applied substantially the same approach where there was an exclusive jurisdiction clause, subject to exceptions if there was a risk of prejudice to other creditors or where the supposed dispute about the debt bordered on the frivolous or abusive. This approach has been endorsed by two recent Hong Kong Court of Appeal decisions – *In re Simplicity & Vogue Retailing (HK) Co Ltd* [2024] HKCA 299 ("*Simplicity*") and *In re Shandong Chenming Paper Holdings Ltd* [2024] HKCA 352 ("*Shangong*").

82. In *Dayang (HK) Marine Shipping Co Ltd* v *Asia Master Logistics Ltd* [2020] HKCFI 311 ("*Dayang*") William Wong SC siting as a deputy judge held that what he called the "*Salford Lasmos*" approach should not be adopted. His decision on that point was obiter since the company seeking a stay had not taken steps to commence an arbitration. His reasoning was that, first, the presentation of a winding up petition is not a claim seeking the

determination of any dispute about the debt, so that it is not in breach of the agreement to have disputes determined by arbitration. Secondly, the process by which the Companies Court decides whether the petitioner has standing to present the petition is not analogous to summary judgment proceedings in a claim to enforce a debt by action. Thirdly, the risk of an abusive petition (where there is a genuine dispute as to the debt) can be met by an order for indemnity costs. Fourthly, the *Salford Estates* approach imposes an unprecedented fetter upon the court's discretion to wind up.

83. *But Ka Chon v Interactive Brokers LLC* [2019] HKCA 873 was another Hong Kong case in which the company with the benefit of an arbitration clause failed to have a winding up petition stayed due to failure to take steps to commence an arbitration. Nonetheless the Court of Appeal expressed its own doubts about the *Salford Lasmos* approach. The particular reasons given (obiter) by Kwan V-P were, first, that nothing in the Hong Kong Arbitration Ordinance, nor in its travaux preparatoires, contemplated a large curtailment of the court's existing statutory discretion to wind up, where no mandatory stay was provided. Secondly the Eastern Caribbean Court of Appeal had in *Jinpeng* declined to follow *Salford*, within a statutory and policy framework indistinguishable from that applicable in Hong Kong.

84. In the recent decisions of *Simplicity* and *Shandong* the Court of Appeal held that the approach set out in *Guy Lam* in relation to petition debts covered by an exclusive jurisdiction clause should also apply to debts covered by an arbitration agreement.

85. *Jinpeng* was of course an appeal from the BVI. It is the leading authority there for the continued adoption of the traditional approach that a liquidator should ordinarily be appointed on the application of an unpaid creditor in the absence of a genuine dispute about the debt on substantial grounds, and was followed both by the judge and the Court of Appeal in the present case. The only judgment was given by Webster JA (Ag). He held that there was a dispute between the company and the applicant which fell within an arbitration clause in an agreement between them, but that it fell short of a genuine dispute on substantial grounds. Accordingly, pursuant to the *Sparkasse* case, liquidators ought to be appointed. He agreed with the conclusion in *Salford Estates* that a creditor's application for the appointment of a liquidator did not fall within section 18 of the Arbitration Act, so that it was not subject to a mandatory stay. Having cited passages in the Chancellor's analysis he continued:

> "The position outlined by the Chancellor in these passages comes close to the automatic stay position which is now firmly a part of the learning in connection with section 18 of the Arbitration Act. He is saying in very clear terms that a winding up application based on a debt that is covered by an arbitration agreement will be stayed unless there are exceptional circumstances. However, I do not think that a creditor should have to prove exceptional circumstances. This Court's judgment in the *C-Mobile* case sets out and distinguishes the BVI court's statutory jurisdiction to wind up a company based on its inability to pay its debts as they fall due unless the debt is disputed on genuine and substantial grounds. This principle is too firmly a part of BVI law to now require a creditor exercising the statutory right belonging to all the creditors of the company to apply to wind up the company, to prove exceptional circumstances to establish his status to apply. The statutory jurisdiction under section 162(1)(b) is satisfied once the creditor is applying on the basis of a debt that is not disputed on genuine and substantial grounds."

86. Academic commentary has, if anything, been even more mixed. Broadly supportive of the *Salford Estates* outcome are Shaun Matos, "Arbitration agreements and the winding-up process: reconciling competing values" (2023) 72 ICLQ, 309-332 and Gill & Gass, "One step forwards – two steps sideways" [2021] LMCLQ 6. Following and developing Deputy Judge Wong's critique in *Dayang* is Claudia Quek, "The insolvency versus arbitration conflict: determined, resolved and finally settled?" (2021) 137 LQR 34. Equally critical of *Salford Estates*, but for different reasons, are Leung & Cheung, "To stay or not to stay - asking the right questions: Re Guy Kwok-Hung Lam" [2022] 8 JBL, 653-667.

87. The academic commentators are generally aligned in thinking that the same principles ought to apply when either an arbitration clause or an exclusive jurisdiction clause are relied upon to stop a creditor's petition. More than one of them introduce the suggestion that to apply *Salford Estates* is liable to hinder rather than promote a pro-arbitration policy, since prospective creditors might resist the inclusion of an arbitration clause in their contracts if this has the effect of reducing, or making slower and more expensive, their remedies in the event of an insolvency of the debtor.

(5) The way forward

88. The Board considers that *Salford Estates*, and the cases which have followed it, were wrong to introduce a discretionary stay of creditors' petitions (or, in the BVI, liquidation applications) where an insubstantial dispute about the creditor's debt is raised between parties to an arbitration agreement. Our reasoning is as follows. The starting point is the perception, rightly arrived at in almost all the relevant cases including *Salford Estates*, that a creditor's winding up petition (or similar liquidation application) does not trigger the mandatory stay provided for by article 8 of the Model Law, or by the various statutory provisions for a mandatory stay which implement it, such as section 9 of the 1996 Act or section 18 of the Arbitration Act. This is because a winding up petition (or similar liquidation application) is simply not a claim of the type caught by those provisions. This is not just a matter of language. It is because such a petition or application does not seek to, and does not, resolve or determine anything about the petitioner's claim to be owed money by the company. Nor is the existence or amount of the debt a matter or issue for resolution in those proceedings.

89. The contractual obligation embodied in the typical arbitration agreement is to refer disputes to arbitration for resolution. The negative obligation is not to have them resolved by any court process. Thus the presentation of a winding up petition (or similar liquidation application) does not offend the negative obligation at all. It is simply not something which the creditor has agreed not to do.

90. Nor are the policies underlying the arbitration legislation which implement the Model Law in any way offended or infringed by a party to an arbitration agreement seeking the liquidation of a debtor party which fails to pay the debt. There is a policy of insolvency legislation that the liquidation route should not be pursued, or even threatened, against a company which genuinely disputes the debt on substantial grounds. Where there is such a dispute, the policy is that the creditor should first establish his claim, by having that dispute resolved in its favour, either by a judgment in court or, if there is an applicable arbitration agreement, by an arbitral award.

91. The clearest legislative signal about the boundary of the policy that a party to an arbitration agreement should arbitrate is the extent of the mandatory stay provision which implements article 8 of the Model Law. That identifies the extent of the negative obligation: not to seek resolution of a dispute in court. A winding up petition or similar application lies outside both that boundary and therefore the extent of the underlying policy.

92. None of the general objectives of arbitration legislation (efficiency, party autonomy, pacta sunt servanda and non-interference by the courts) are offended by allowing a winding up to be ordered where the creditor's unpaid debt is not genuinely disputed on substantial grounds. To require the creditor to go through an arbitration where there is no genuine or substantial dispute as the prelude to seeking a liquidation just adds delay, trouble and expense for no good purpose. Party autonomy and pacta sunt servanda are not offended because seeking a liquidation is not something which the creditor has promised not to do. And by ordering a liquidation the court is not resolving anything about the debt, nor interfering with the resolution of any dispute about it.

93. Above all there is nothing anti-arbitration in this conclusion. In most agreements where one party is likely to be the creditor, (such as any typical loan agreement), it is that party which will generally have the whip-hand in choosing or vetoing the detailed terms of the agreement. Such a party is much more likely to agree to include an arbitration clause if it does not impede a liquidation where there is no genuine or substantial dispute about the debt. And where there is such a dispute, then arbitration will prevail as the means of resolution.

94. The reasoning in *Salford Estates* calls for review against those considerations. The Board has already observed that the Court of Appeal arrived correctly at first base: namely by concluding that a creditor's winding up petition is not subject to a mandatory stay under section 9. But the Chancellor then just assumed, without further analysis, that the policy inherent in the 1996 Act went further into the prohibition of court proceedings than did section 9 itself. He simply said:

> "It is entirely appropriate that the court should, save in wholly exceptional circumstances which I presently find difficult to envisage, exercise its discretion consistently with the legislative policy embodied in the 1996 Act."

With great respect the Board considers that assumption to have been wrong, at least in relation to winding up (or liquidation) proceedings on the insolvency ground, for the reasons already given. The legislative policy embodied in the 1996 Act, and in all similar legislation founded upon the Model Law, is that claims or matters within the scope of an arbitration agreement should be resolved in arbitration and not resolved in court. But nothing about a debt covered by an arbitration agreement is resolved in winding up or liquidation proceedings in court. The legislative policy therefore stops short of such proceedings.

95. *FamilyMart* confirms rather than undermines that analysis. Although there is a superficial family likeness between a creditor's winding up petition and a contributory's petition for winding up on the just and equitable ground, the two types of proceedings are in substance quite different. A contributory's petition has to show circumstances, usually inequitable conduct by other shareholders, which make it just and equitable to wind up the company, and that conduct has to be pleaded in detail and, if disputed, proved bell, book and candle at a trial. Any dispute about it has to be resolved in the winding up proceedings. Even though the proceedings are not, viewed as a whole, a claim which can be arbitrated, those disputes are likely to raise distinct matters which can be resolved by a declaratory arbitral award, while the winding up proceedings are stayed, whether under an applicable provision for a mandatory stay (not applicable here) or (possibly) as a matter of case management discretion.

96. Nothing in the remainder of the reasoning in *Salford Estates* remedies what the Board considers to be an impermissible and unexplained leap in the reasoning of the Court of Appeal as to the extent of the legislative policy behind the 1996 Act. The first point made by the Chancellor was the apparent anomaly between the clear legislative policy to outlaw summary judgment of claims covered by an arbitration clause and the similar summary process undertaken by the Companies Court in assessing whether the petitioner's debt is genuinely disputed on substantial grounds. It is true that both have a common element of summary process - ie one which looks to see whether there is an issue which needs to be tried. But there the similarity ends. Summary judgment is, as its name implies, a means of resolving a claim by final resolution in a judgment. But the light touch used by the Companies Court resolves nothing either way, and does not lead to a judgment or anything similar.

97. The remaining reasoning advanced by the Court of Appeal concerns the temptation to bypass an applicable arbitration agreement, or the use of an improper threat to present a petition as a means of applying pressure on a company to pay the debt, or to have to establish a genuine and substantial dispute to the debt in an inappropriate forum. In the Board's view neither of these concerns does anything to bridge the gap in the reasoning about the supposed extent of the legislative policy. They are concerns well-known in the Companies Court, in relation to bypassing the need for litigation about disputed debts in ordinary claims in court, and applying improper pressure otherwise than by threatening an ordinary claim to recover the debt. They are treated by the Companies Court (or similar insolvency court) as types of abuse of process, and orders for indemnity costs are commonly visited upon the perpetrators. There is nothing peculiarly "anti-arbitration" about such conduct.

98. It has already been noted that there is nothing in the decisions around the common law world which have followed *Salford Estates* which adds significantly to the reasoning given by the Chancellor. The Board broadly shares the concerns expressed by Deputy Judge Wong SC in the *Dayang* case and in the academic articles which have developed those concerns.

99. Accordingly, the Board concludes that, as a matter of BVI law, the correct test for the court to apply to the exercise of its discretion to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement or an exclusive jurisdiction clause and is said to be disputed is whether the debt is disputed on genuine and substantial grounds. This conclusion applies to a generally worded arbitration agreement or exclusive jurisdiction clause. Different considerations would arise if the agreement or clause was framed in terms which applied to such a liquidation application.

5. Issue (2): was the relevant test met or should the matter be remitted to determine whether this was the case?

100. In the light of our conclusion that *Salford Estates* was wrongly decided and that the traditional test for a disputed debt of whether it is genuinely disputed on substantial grounds should be applied, it follows that Wallbank J and the Court of Appeal applied the correct test, as set out in *Jinpeng*. No challenge is made to Wallbank J's decision that the appellant failed to show that the Debt was disputed on genuine and substantial grounds and so no question of remission arises.

6. Issue (3): did Wallbank J conclude that the court should refuse to consider the impact of the arbitration agreement because it had been raised too late and, if he did so find, was he wrong to do so?

(1) The procedural chronology

101. On 2 October 2020, the appellant was served with the liquidation application. This was originally listed for a hearing on 30 November 2020. On Wednesday, 25 November 2020, the appellant's lawyers indicated in correspondence that the liquidation application should not be permitted to proceed due to the Arbitration Agreement. On 27 November

2020, the appellant filed a Notice of Opposition (the "NOO"). The NOO did not refer to the Arbitration Agreement.

102. At a hearing on Monday, 30 November 2020, Wallbank J adjourned the application and gave directions for further evidence to be filed by the appellant by 18 December 2020 and by the respondent by 26 January 2021, with no further evidence to be filed by either party without permission. The adjourned hearing was listed for 4 February 2021. On 30 January 2021, the appellant issued a strike out application including supporting evidence which exhibited the claim form and particulars of claim in the BVI Proceedings. One of the grounds relied on in support of the strike out application was the existence of the Arbitration Agreement. On 3 February 2021, the appellant served further evidence in the liquidation application, without permission.

103. The hearing on 4 February 2021 was adjourned with agreed directions (without prejudice to any argument that the respondent might make in respect of the strike out application being late). The liquidation application was re-listed for 20 April 2021. On 5 February 2021, the appellant issued an application for permission to rely on the additional evidence (which had been filed on 1 February and 3 February 2021).

104. On 19 March 2021, the appellant filed an amended NOO, which included the argument that "...aspects of each of the disputes described above in any event fall within the scope of one or more arbitration clauses and ought properly to be resolved in the context of an arbitration.". On 23 March 2021, the appellant filed a re-amended NOO including the same point. No permission had been given for the appellant to amend or re-amend its original NOO.

(2) The judgment of Wallbank J

105. In his oral judgment of 19 May 2021 Wallbank J rejected the appellant's reliance on the Arbitration Agreement in the following terms:

> "Sian's reliance on the arbitration agreement in the loan agreement is a hopeless objection. Why? Well, it was raised late. Sian was aware of the point sufficiently early, but chose not to use it. They then changed their mind and sought to introduce it via a

> strike out application. Secondly, Sian failed to commence an arbitration. They invoked the arbitration agreement, but they have not sought to bring one. Instead they have started claims on matters that would require arbitration on their case, or might require arbitration on their case, but they haven't done so in arbitration. And thirdly, Sian's reference to the Arbitration Agreement is entirely academic; Fourthly, it is not the law that the existence of an Arbitration Agreement means that a creditor cannot invoke a collective remedy of liquidation; Fifthly, there is no mandatory stay of liquidation proceedings in favor of arbitration. We get that from *Jinpeng Group Limited v. Peak Hotels and Resorts Limited* at paragraph 45."

(3) The judgment of the Court of Appeal

106. The Court of Appeal considered that Wallbank J had refused to allow the appellant to rely on the Arbitration Agreement because the point had been raised late and that no error had been shown as to the exercise of his discretion so to rule. Although no reference to these matters had been made by Wallbank J, the Court of Appeal relied on section 18 of the Arbitration Act (which requires a party to "an action" to request a referral to arbitration when submitting the first statement on the substance of a dispute) and rule 164 of the BVI Insolvency Rules (which requires a notice of objection to be filed no later than seven days before the date of the hearing) as justifying the decision which it understood Wallbank J to have made.

(4) What did Wallbank J decide?

107. The Board is not satisfied that Wallbank J did dismiss the Arbitration Agreement on the prior and independent ground that it had been raised too late. First, this is only one of five rolled up reasons given by Wallbank J for dismissing the appellant's reliance on the Arbitration Agreement. Secondly, Wallbank J goes on to consider the effect of the Arbitration Agreement and concludes that it should not affect the exercise of the court's discretion in the light of the *Jinpeng* decision. Thirdly, lateness is a factor of potential relevance in relation to the exercise of the court's discretion as to the effect to be given to an arbitration agreement in a liquidation application. Fourthly, had Wallbank J intended to rely on lateness as an independent ground of decision he would surely have had to identify the

extent of the lateness and to address whether there was any good reason for it and the degree of prejudice suffered, if any. He did not do so. Fifthly, the importance of doing so is highlighted by the Court of Appeal's retrospective justification of the decision apparently made. The Court of Appeal placed considerable reliance on section 18 of the Arbitration Act but it is common ground between the parties that this does not apply to a winding up petition or liquidation application as neither is "an action", as was held in *Jinpeng*. As to the reliance on rule 164, this ignores the fact that a NOO was filed long before the hearing date and that the relevant issue was one of amendment of the NOO.

108. For all these reasons, the Board concludes that Wallbank J did not decide that the court should refuse to consider the impact of the arbitration agreement because it had been raised too late and that the Court of Appeal erred in concluding otherwise.

7. Issue (4): does the appeal fall within section 3(1)(a) of the 1967 Order? In particular, does "the appeal [involve] directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards"?

109. Issues arising under section 3(1) have commonly been referred to as raising the question of whether "the value threshold" has been met.

110. It is well established that "the provisions governing appeals as of right are normally to be strictly construed". This is because the "absence of an appeal as of right is not the end of the road" as the appellant can seek and obtain leave from either the local court or the Privy Council – see *Jacpot Ltd v Gambling Regulatory Authority* [2018] UKPC 16, para 7 per Lord Sumption.

111. It is also well established that the value threshold must be approached from the perspective of the appellant - see *Lakhamshi v Furniture Workshop* [1954] AC 80, p 88.

112. Authoritative guidance as to how the value threshold falls to be applied is provided by the advice of the Board given by Lord Wilberforce in *Fletcher v Income Tax Commissioner* [1972] AC 414. That case concerned a provision in the Constitution of Jamaica in materially similar terms to section 3(1)(a) of the 1967 Order. The issue was whether the relevant value was the amount on which the appellant had been held liable in income tax (£145) or the

amount of the receipts for which his liability for income tax was being assessed (£1,720). The Board held that it was the former. As Lord Wilberforce explained at p 419G-H:

> "Whether an appeal is competent under a provision such as this (which has existed and exists in the same form in many other jurisdictions) must be decided upon the basis of the judgment against which it is sought to appeal, and depends upon whether that judgment affected the interest of the party prejudiced by it to an extent not less than the specified amount. This was clearly laid down by this Board in *Macfarlane* v. *Leclaire* (1862) 15 Moo. P.C.C. 181, which has repeatedly been followed and applied."

113. The appellant contends that the petition (and now the appeal) involves "directly or indirectly" the respondent's "right" against the appellant (i) to be paid the Debt and/or (ii) to invoke the collective winding-up process on the basis of the Debt.

114. The question is whether the judgment upholding the judge's order to appoint liquidators affects the appellant's interests to the extent of at least £300. The Board considers that it does not.

115. Wallbank J relied upon the unpaid Debt, and the absence of any genuine and substantial dispute, as evidence that the appellant was insolvent. He did not need to, and did not, purport to make any determination of either the duty to pay or the right to be paid. The respondent will still need to prove for the Debt in the liquidation. As explained in para 33 above, the process of seeking and obtaining an order for the appointment of a liquidator (or a winding up in the UK) does not require or involve any pursuit or adjudication of the applicant's claim to be a creditor, either as to liability or quantum.

116. As Lord Hoffmann stated in *Wight v Eckhardt Marine GmbH* [2003] UKPC 37; [2004] 1 AC 147:

> "26. ...It is first necessary to remember that a winding up order is not the equivalent of a judgment against the company which converts the creditor's claim into something juridically different, like a judgment debt. Winding up is, as Brightman LJ said in *In re*

> *Lines Bros Ltd* [1983] Ch 1, 20, 'a process of collective enforcement of debts'. The creditor who petitions for a winding up is 'not engaged in proceedings to establish the company's liability or the quantum of the liability (although liability and quantum may be put in issue) but to enforce the liability'.
>
> 27. The winding up leaves the debts of the creditors untouched...."

If the winding up or appointment of a liquidator leaves the debt of the appellant untouched then it does not affect the appellant's financial interest to the extent of £300 or at all.

117. A similar point was made in the recent decision of the Cayman Islands Court of Appeal in *In re Virginia Solution SPC Ltd* (unreported) 10 November 2023 ("*Virginia Solution*"). That case involved an appeal by a shareholder against the discharge of a winding up order that had been made on the grounds that it had been just and equitable to do so. The applicant relied on its claim to share in the company's surplus assets as a valuable right that the appeal would involve. The court held (per Martin JA, with whom Goldring P and Moses JA agreed) that it would not do so, explaining as follows:

> "9. ... To establish that it is entitled to leave as of right, Valley must bring its claims concerning surplus assets in the liquidation and costs under this limb. In my judgment, it cannot do so in either case. The focus of the limb is on claims or questions which are directly or indirectly 'involved' in the putative appeal. This implies matters which are in dispute, and which will be directly or indirectly resolved by the outcome of the appeal....
>
> 10. So far as concerns the right to share in the surplus assets of the Company, the right derives from Valley's shareholding in the Company – which is not in dispute, and which Valley will retain if the company is not wound up. It follows that Valley's entitlement to share in the assets of the Company is not directly or indirectly the subject of a claim or question: *the underlying right represented by its shareholding will remain whatever the outcome of the putative appeal.*" (Emphasis added).

Similarly, in the present case the appellant's underlying debt will remain whatever the outcome of an appeal.

118. The BVI Court of Appeal's judgment of 24 April 2023 refusing permission to appeal in this case is to the same effect. As stated in the judgment of Farara JA (with which the other Justices agreed):

> "27 ...it does not follow that once the winding-up was ordered because of an unpaid debt of US$226 million that the value threshold test is met. Further the fact that the intended appeal relates to large sums in general terms is not relevant. It was not in dispute between the parties, either in the court below or in the appeal or before this Court at the hearing of the application for leave to appeal, that the debt of US$226 million was in fact due and owing. The issue which confronted the learned judge was whether this debt was disputed on genuine and substantial grounds. The judge found it was not....
>
> 28. This Court found that the judge in the court below did not make any determination concerning Sian's interest in any property. The intended appeal therefore cannot 'involve directly or indirectly a claim to or question respecting property ... of the value of £300'".

119. The *Virginia Solution* case provides a further reason why the making of a winding up order or appointment of a liquidator order does not engage the value threshold. In that case the appellant was the party seeking a winding up order. In the present case the appellant is the party against whom the order is sought. From either perspective the "right" engaged is not one on which a value can be placed. As Martin JA said at para 7:

> "... The matter in dispute on the putative appeal to the JCPC ... will be whether or not a winding up order should have been made. Valley's interest in that matter does not, in my view, have a value capable of being identified in monetary terms. Even if it had been successful in establishing that all the elements necessary to give the court jurisdiction to make a winding up order on the just and

> equitable ground were present, Valley would have had no right to such an order – it being always in general terms a matter for the court's discretion whether or not to make such an order…
> …Valley's right is to have its application to the court properly determined; and, as in *Jacpot*, that right is no different in kind from the right which any person with a relevant interest has to see the law applied. The right cannot be valued, and so cannot be said to be greater in value than the statutory threshold."

The making of a winding up order or appointment of a liquidator on a creditor's petition is also a matter for the court's discretion.

120. Further, if the appellant's case were accepted it would mean that there would be an appeal as of right in virtually every creditor's petition for winding up or appointment of a liquidator since the evidence will almost invariably involve debts of at least £300. Moreover, such appeals would be second appeals against a judge's exercise of discretion. This would not reflect a strict construction of the value threshold provisions.

121. For all these reasons the Board agrees with and upholds the conclusion of the Court of Appeal that the appeal does not fall within section 3(1)(a) of the 1967 Order and does not give rise to an appeal as of right.

8. Conclusion

122. The Board concludes:

(1) As a matter of BVI law, the correct test for the court to apply to the exercise of its discretion whether to make an order for the liquidation of a company where the debt on which the application is based is subject to an arbitration agreement or an exclusive jurisdiction clause and is said to be disputed is whether the debt is disputed on genuine and substantial grounds.

(2) The relevant test was correctly applied by Wallbank J and the Court of Appeal and no question of remission arises.

(3) Wallbank J did not conclude as an independent ground of decision that the court should refuse to consider the impact of the arbitration agreement because it had been raised too late.

(4) The appeal does not fall within section 3(1)(a) of the 1967 Order as it does not "[involve] directly or indirectly a claim to or question respecting property or a right of the value of £300 sterling or upwards".

123. It follows that the Board will humbly advise His Majesty that the appeal be dismissed.

124. There remains the question whether the Board should make a *Willers v Joyce* direction, namely that *Salford Estates* should no longer be followed in England and Wales, and that this decision of the Board, so far as it holds that *Salford Estates* was wrongly decided, now represents the law of England and Wales. In *Willers v Joyce (No 2)* [2016] UKSC 44; [2018] AC 843 a unanimous nine justice panel of the Supreme Court decided that, in an appropriate case, this is something which the Board has jurisdiction to do, so as to resolve what had previously been an unsatisfactory question for the English courts as to whether it was a foregone conclusion that the view of the Board would, in due course, eventually prevail over an otherwise binding English decision.

125. The Board considers that such a direction should be given. Our conclusion that *Salford Estates* was wrongly decided was not merely a conclusion about the law of the BVI. It was a conclusion about English law, even though informed in its reasoning by the study of overseas decisions and academic writings, as decisions about English law often are. The Board is aware that it is the current practice of the Companies Court in England and Wales to follow *Salford Estates* in exercising a supposed discretion to stay or dismiss a creditors' winding up petition on the ground that the petitioner's debt is covered by an arbitration clause, without being shown to be genuinely disputed on substantial grounds. The Board's view is that this should cease and it so directs.

126. This direction will also resolve the parallel issue whether an exclusive jurisdiction clause should have the same effect. In the Board's view the underlying policy in relation to arbitration clauses and exclusive jurisdiction clauses is the same. The presence of an exclusive jurisdiction clause applicable to the debt relied upon by the petitioner should not lead to the stay or dismissal of the petition unless the debt is genuinely disputed on substantial grounds.

127. This direction applies where there is a generally worded arbitration agreement or exclusive jurisdiction clause. Different considerations would arise if the agreement or clause was framed in terms which applied to a creditor's winding up petition.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	)	**FOR PUBLICATION**
	)	
InterCement Brasil S.A., *et al.*,	)	Case No. 24-12291 (MG)
	)	Chapter 15
Debtors in a Foreign Proceeding.	)	(Jointly Administered)

MEMORANDUM OPINION AND ORDER RECOGNIZING FOREIGN MAIN PROCEEDINGS

APPEARANCES:

WHITE & CASE LLP
Attorneys for Antonio Reinaldo Rabelo Filho,
as Petitioner and Foreign Representative
1221 Avenue of the Americas
New York, New York 10020-1095
By: John K. Cunningham, Esq.
Thomas E. MacWright, Esq.
Ricardo M. Pasianotto, Esq.
Ashley R. Chase, Esq.

Southeast Financial Center
200 South Biscayne Blvd., Suite 4900
Miami, Florida 33131
By: Richard S. Kebrdle, Esq.
Amanda Parra Criste, Esq.

111 South Wacker Drive, Suite 5100
Chicago, Illinois 60606
By: Jason N. Zakia, Esq.

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Counsel to the Ad Hoc Group
One Liberty Plaza
New York, New York 10006
By: Richard J. Cooper, Esq.
David H. Botter, Esq.
Luke A. Barefoot, Esq.
Thomas S. Kessler, Esq.
David Z. Schwartz, Esq.
Thomas Q. Lynch, Esq.

MARTIN GLENN
CHIEF UNITED STATES BANKRUPTCY JUDGE

Antonio Reinaldo Rabelo Filho (the "Petitioner" or "Foreign Representative"), in his capacity as the duly authorized foreign representative of InterCement Brasil S.A. ("ICB"), InterCement Participações S.A ("ICP"), InterCement Financial Operations B.V. ("IC Financial" or "ICBV"), and InterCement Trading e Inversiones S.A. ("ITI" and, together with ICB, ICP, and IC Financial, the "Debtors" or "Chapter 15 Debtors"), seeks in the above-captioned cases (the "Chapter 15 Cases") recognition of a Brazilian *recuperação judicial* ("RJ") proceeding (the "Brazilian RJ Proceeding") commenced on December 3, 2024 as a foreign main or nonmain proceeding pursuant to section 1517 of the Bankruptcy Code. *See Chapter 15 Petition for Recognition of Foreign Proceeding* (the "Petition", ECF Doc. # 1) and *Petitioner's Declaration and Verified Petition for Recognition of the Brazilian Proceeding and Motion for Order Granting Related Relief Pursuant to 11 U.S.C. §§ 105(a), 1515, 1517, 1520, and 1521* ("Motion," ECF Doc. # 2). The Petitioner seeks entry of an order (the "Proposed Order," ECF Doc. # 2-1) that:

a) grants the Petition in the Chapter 15 Cases and recognizes the Brazilian RJ Proceeding as the "foreign main proceeding" for each of the Chapter 15 Debtors pursuant to section 1517 of the Bankruptcy Code, or in the alternative, recognizes the Brazilian RJ Proceeding as a "foreign nonmain proceeding" and grants appropriate relief;

b) finds that the Petitioner is the duly appointed "foreign representative" of each of the Chapter 15 Debtors within the meaning of section 101(24) of the Bankruptcy Code and is authorized to act on behalf of each Chapter 15 Debtor; and

c) grants such other and further relief as the Court deems just and proper.

(Motion ¶ 42.)

The Motion is supported by the Declarations of Ana Elisa Laquimia (ECF Doc. # 4) and Guillermo Ruiz Medrano (the "Medrano Declaration," ECF Doc. # 46) pursuant to 28 U.S.C. § 1746.

On January 15, 2025, the Petitioner filed a *Brief on COMI Determination as of the December 9, 2024 Filing Date for Chapter 15 Debtors IC Financial and ITI* ("COMI Brief," ECF Doc. # 30), arguing that recent developments, including the Debtors' pre-Petition restructuring activities, support a determination that the center of main interests of two Chapter 15 Debtors, as of the filing of the Chapter 15 Cases, is Brazil. The COMI Brief is supported by the declaration of Dr. Matthias Haentjens pursuant to 28 U.S.C. § 1746 (ECF Doc. # 32).

On January 31, 2025, an *ad hoc* group of holders (the "Ad Hoc Group") of New York law-governed notes (the "NY Notes"), filed an *(i) Objection to the Petitioner's Verified Petition and (ii) Opposition to the Petitioner's Brief of COMI Determination as of the December 9, 2024 Filing Date for Chapter 15 Debtors IC Financial and ITI* (the "Objection," ECF Doc. # 39). The Objection is supported by the declaration of Thomas Q. Lynch (ECF Doc. # 40). The Objection argues that the COMI of ICBV is the Netherlands, and the COMI of ITI is Spain, notwithstanding the Debtors' pre-Petition restructuring activities in Brazil.[1]

On February 7, 2025, the Foreign Representative filed the *Petitioner's Omnibus Reply on COMI Determination as of the December 9, 2024 Filing Date for Chapter 15 Debtors IC Financial and ITI* (the "Reply," ECF Doc. # 45).

Despite that two of the foreign debtors maintain their registered offices in Spain and the Netherlands, respectively, rather than in Brazil, for the reasons explained below, the Court

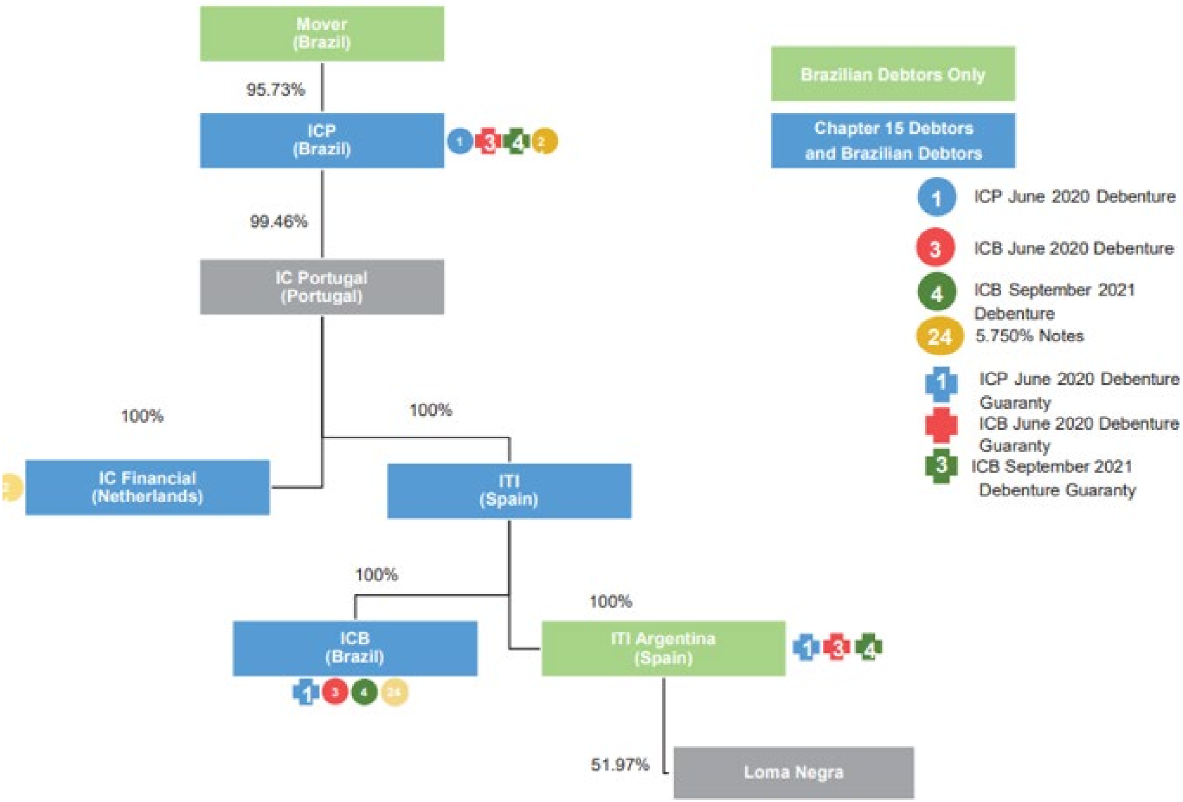
[1] UMB Bank, N.A., Trustee for the NY Notes, filed a *Joinder to Ad Hoc Group's (i) Objection to the Petitioner's Verified Petition and (ii) Opposition to the Petitioner's Brief of COMI Determination as of the December 9, 2024 Filing Date for Chapter 15 Debtors IC Financial and ITI* (the "UMB Joinder," ECF Doc. # 41).

concludes that all of the foreign debtors, as of the date of the filing of the Brazilian RJ Proceeding, have their COMI in Brazil. Therefore, the Court **GRANTS** the relief sought in the Motion, **RECOGNIZES** the Brazilian RJ Proceeding as a Foreign Main Proceeding, and **OVERRULES** the Ad Hoc Group's Objection.

I. BACKGROUND

A. History and Corporate Structure of the Debtors

The InterCement Group (the "InterCement Group" or "InterCement") is a large cement producer in Brazil. (*In re InterCement Brasil S.A.*, Case No. 24-11226 (MG) (Bankr. S.D.N.Y. September 20, 2024) (the "Prior Chapter 15 Cases"), *Declaration of Antonio Reinaldo Rabelo Filho, as Petitioner and Foreign Representative for the Chapter 15 Debtors* (the "Rabelo Declaration," ECF Doc. # 78) ¶¶ 38–39.) It is comprised of a Brazilian holding company ("Mover") and a collection of subsidiaries within and outside of Brazil. A simplified organizational chart documenting the various entities comprising the InterCement Group is set forth below:



(Motion ¶ 9.)

Each of the subsidiaries plays a specific role within the group.

1. The Brazilian Entities

Mover, the ultimate parent holding company, engages in capitalization and financing activities for the corporate group, and is responsible for business management, including providing the group with "strategic direction on key business matters"; it is incorporated and headquartered in Brazil. (*Id.*)

InterCement Participações S.A, the holding company responsible for "concentrating all of Mover's investments in the cement sector," is also incorporated in Brazil, with its registered office in São Paulo. (*Id.*) All of ICP's directors, officers, and employees are located in Brazil.

(Rabelo Declaration ¶ 38, JX-284[2].) ICP functions as the "head" of the InterCement Group, and its board of directors and executive officers make "the main strategic, financial, and operational decisions" for the company as a whole out if its headquarters in Brazil; for example, ICP decides whether the InterCement Group should "market and sell assets, incur or restructure indebtedness, grant collateral, initiate or defend against material lawsuits and commence insolvency proceedings." (Rabelo Declaration ¶ 4.) The Debtors contend that ICP "controls each of the other members of the InterCement Group," citing ICP's ability to "directly or indirectly . . . appoint or remove the directors of each of its direct and indirect subsidiaries, including the other Chapter 15 Debtors." (*Id.* ¶ 38.)

InterCement Brasil S.A. is the InterCement Group's primary operating company and Brazil's third-largest cement company. (*Id.* ¶ 5.) ICB is "engaged in all stages of cement production and sales" in Brazil. (*Id.*) The company is incorporated in Brazil and has its registered office in São Paulo. (*Id.*) It has 1,745 employees, 99% of whom are located in Brazil. (JX-284.)

2. <u>The Netherlands Entity</u>

InterCement Financial Operations B.V. is a Netherlands-incorporated special purpose financing vehicle created to provide the InterCement Group with "access to the international capital markets to support the InterCement Group's funding needs." (Rabelo Declaration ¶ 6.) ICBV's registered office is in Amsterdam. (*Id.*) It is owned by InterCement Portugal ("IC Portugal"), which is in turn owned by ICP. (*Id.*) As the issuer of the NY Notes, ICBV has two

[2] Documents marked with the prefix "JX" were entered as exhibits in the evidentiary hearing held on November 20 and 21, 2024 in the case captioned *In re InterCement Brasil S.A.*, Case No. 24-11226 (MG); page numbers of exhibits are designated by the Bates stamps utilized by the parties if available. *See infra* I(B), Prior Chapter 15 Cases.

limited functions: managing relationships with the holders of the NY Notes, and paying on the NY Notes. (*Id.* ¶ 41.)

ICBV's primary assets are intercompany claims against ITI and ICP (incorporated in Spain and Brazil, respectively), and its only other asset is $2 million in cash. (*Id.* ¶ 52.) ICBV's intercompany loans are denominated in USD or Euros, and its largest asset, its intercompany claim against ITI, is denominated in Euros and worth over a billion dollars. (*Deposition Designations of Matthijs Paul Adrian Stoop* ("Stoop Dep."), Prior Chapter 15 Cases, ECF Doc. # 81, at 65:4-10, 66:6-17; *Transcript Regarding Hearing Held on 11/20/24* ("Trial Tr. Day 1"), Prior Chapter 15 Cases, ECF Doc. # 93, at 140:4-6 ("Q: So then necessarily, 90 percent of IC Financial's intercompany receivables are located in Spain, right? A: Right.").) As for ICBV's cash, it is kept in six bank accounts, including one Dutch account. Three of the accounts are denominated in Euros, two in USD, and one in Brazilian *reais*. (Stoop Dep. 32:22–33:7.) As of July 2024, the majority of ICBV's cash was located in an account in the Bahamas and denominated in USD. (JX-149; Trial Tr. Day 1 at 141:9–19.). ICBV's Brazilian bank accounts have been inactive since 2022 and show a balance of zero *reais* as of October 2024. (JX-272, -277, -182 at IC_FR_00003838; Trial Tr. Day 1 at 143:6-144:21.)

As for ICBV's liabilities, all holders of the USD-denominated NY Notes, ICBV's largest debt at $750 million, are located outside of both Brazil and the Netherlands (Rabelo Declaration ¶ 53), and its second-largest debt, worth $436.27 million, stems from intercompany loans owed to ICP (*id.* ¶ 54). Apart from the intercompany claims, ICBV has no creditors in Brazil. (JX-232.)

ICBV's key operations involving the NY Notes are governed by two documents: the Offering Memorandum (the "OM," JX-1), a 2014 document which advertised the sale of the NY

Notes, and the indenture agreement governing the NY Notes (the "Indenture," JX-209, Prior Chapter 15 Cases, ECF Doc. # 2-5). The Offering Memorandum, which displays ICBV's country of incorporation on the first page, describes the InterCement Group on the first page of its Executive Summary as among the largest "international cement producers . . . with operations in South America . . . Europe . . . and Africa," and as a "market leader[] in Argentina, Portugal, Mozambique and Cape Verde, the second largest cement producer in Brazil, and a regional leader in South Africa." (JX-1 at IC_FR_00002669, IC_FR_00002680.) At the same time, the Offering Memorandum makes clear that, at the time, InterCement's largest operations and its controlling shareholder were located or based in Brazil. (*Id.* at IC_FR_00002709 ("Brazilian operations . . . account for the most significant portion of our overall revenues and expenses"), IC_FR_00002728 (describing InterCement as a "Brazilian company with a significant portion of our operations in Brazil").)[3] The OM provides:

> The issuer's [ICBV's] principal business activity is to act as a financing vehicle for our activities and operations. The issuer has no substantial assets (other than in connection with transactions entered into with [Mover] and its affiliates) and its only sources of cash flow are from its financing activities and capital contributions made by us[4] and our other subsidiaries. Accordingly, the ability of the issuer to pay principal, interest and other amounts due on the notes and other indebtedness will depend upon our financial condition and results of operations.

(JX-1 at IC_FR_00002712.)

The OM warns creditors that, in the event of a bankruptcy, the guarantors of the NY notes—ICP and ICB, both Brazilian entities—"may become subject to bankruptcy proceedings in Brazil," which may be "less favorable to creditors" than proceedings in other jurisdictions.

[3] Since the OM was written, the InterCement Group has sold 48% of its Argentinian interests and all of its other businesses outside Brazil (Rabelo Declaration ¶¶ 66-67; Motion ¶ 67), and announced these divestments publicly (*see, e.g.*, JX-86 (announcing divestment of operations in Egypt), JX-119 (announcing sale of business in rest of Africa).

[4] The OM provides that references to terms like "we," "our company," "ours", and "us" refer to ICP and its subsidiaries, rather than ICBV. JX-1 at IC_FR_00002670.

.

(*Id.* at IC_FR_00002714.) However, any insolvency involving the ICBV would likely be affected by, if not governed by, Dutch law: "Any insolvency proceedings with respect to the issuer in the EEA [European Economic Area] (excluding Denmark) would most likely be based on and governed by the insolvency laws of the Netherlands. In addition, there can be no assurance as to how the insolvency laws of the Netherlands would be applied in the event that the issuer is subject to one or more insolvency proceedings outside the Netherlands." (*Id.*)

The Indenture Agreement directs investors to send related correspondence to a Brazilian address, and provides that ICBV can be substituted as issuer with either ICP or ICB without the consent of the noteholders. (Rabelo Declaration ¶¶ 61–62; Indenture at 62, 90.) ICBV files taxes solely in the Netherlands. (Stoop Dep. 59:2–13.) ICBV's annual reports (with financial results denominated in euros) are filed with the Dutch Chamber of Commerce and are publicly available. (Stoop Dep. 28:14–25, 32:10–18.) ICBV's original books and records are kept by its vendor Vistra in the Netherlands, with copies separately maintained in Brazil, pursuant to Dutch law. (Rabelo Declaration ¶ 51; Stoop Dep. 25:7–11.)

ICBV has six directors, three of whom are Dutch and reside in the Netherlands and three of whom are Brazilian and reside in Brazil. (Rabelo Declaration ¶ 46.) Any action taken by ICBV's board requires the approval of at least one Dutch director and at least one Brazilian director. (*Id.*; Stoop Dep. 23:13–25:6.) This means that, without approval from at least one Dutch (or Brazilian) director, the board cannot act. (Trial Tr. Day 1 122:8–20.) Because ICBV's Dutch directors are not employees of the InterCement Group, the Dutch directors rely on the Brazilian directors (and other InterCement employees) to provide them with information regarding the corporate group's operations at large. (Rabelo Declaration ¶ 47.)[5] ICBV's board

[5] *See also* Stoop Dep. 23:13-24:5 ("[T]he Brazilian board members are obviously well integrated into the overall InterCement Group, so they bring that knowledge to" ICBV.)

may take into account advice from the Brazilian component of the InterCement Group when determining what course of action to take, but ultimately acts independently and maintains independent judgment in executing its fiduciary duties.[6] In fact, the Foreign Representative was unable to think of a time when the shareholders of ITI and ICBV refused to ratify any action of the companies' respective boards. (Trial Tr. Day 1 127:14–19.) Vistra Employment Services, B.V., a Dutch corporation, has a permanent seat on ICBV. (*See* Stoop Dep. 11:7–23.) Over the three years prior to the Petition Date, formal board meetings have been held virtually, with the Dutch directors calling in from the Netherlands and the Brazilian directors from Brazil, but all in-person meetings typically took place in the Netherlands, whether formal or informal. (Rabelo Declaration ¶ 48; Stoop Dep. 29:2–31:16; Trial Tr. Day 1 122:3–7.)

ICBV's operations are, in significant part, run out of Brazil: ICP's agents hold calls and meetings with the holders of the NY Notes, prepare investor presentations, audit quarterly financial statements (prepared on a consolidated basis for ICP and all its subsidiaries), make market announcements, and run quarterly public investor calls out of Brazil. (Rabelo Declaration ¶¶ 42, 59.) ICP's board of directors and officers makes "material strategic decisions for all entities" within the InterCement Group from the company's Brazilian headquarters, and, according to the Foreign Representative, this encompasses the decision as to "when and how to pay the scheduled interest payments on the NY Notes" and whether to transfer money from other entities to allow ICBV to make such payments.[7] (*Id.* ¶ 43.) However, while ICP determines

[6] Stoop Dep. 55:5–11, 57:6–16 ("Q: "[Y]ou're not aware of any instances in which Mover provided direction on a resolution to the IC Financial board of directors?" . . . A: . . . [T]hey can propose something which for the consideration of the board. Ultimately, the board needs to make its own assessment and decision."); Trial Tr. Day 1 123:7–10 ("Q: [Y]ou are not aware of an instance in which IC Financial shareholder has instructed IC Financial's board to take an action, are you? A: No.").

[7] The Foreign Representative provided an example of the exercise of such power: "For instance, if IC Financial's Dutch directors wanted to make a scheduled interest payment on the NY Notes, the effectuation of such interest payment would in fact be dependent on decisions made in Brazil to transfer funds to pay IC Financial." (Rabelo Declaration ¶ 43.)

how to extract the necessary funds from the InterCement Group's operations and provide those funds to ICBV for the purpose of paying on the NY Notes, it is ultimately the ICBV board which decides whether and when to make payments on the Notes.[8]

ICBV has no employees but engages with a number of Dutch contractors in order to run its business. (JX-284; Rabelo Declaration ¶ 44.) ICBV does not have an office of its own, but rents shared office space from Vistra, which provides a number of additional services, including recordkeeping, mail services, tax return preparation, and payment of daily expenses. (Rabelo Declaration ¶ 40; Trial Tr. Day 1 115:3–116:4.). Vistra also provides draft annual reports for ICBV, which are prepared by individuals in the Netherlands working in "close connection and interaction with the financial team in Brazil." (Stoop Dep. 27:18–28:2.) ICBV pays Vistra for the services it provides. (Trial Tr. Day 1 121:4–14.) Vistra does not any provide services for the InterCement Group in Brazil. (*Id.* 121:18–20.) PricewaterhouseCoopers Nederland prepares the first draft of ICBV's tax returns and Vistra prepares the first drafts of its accounts, but ICP's employees in Brazil review and sign off on these documents before they are finalized. (Rabelo Declaration ¶ 44.) However, ahead of the November 2024 evidentiary hearing, one of ICBV's Dutch board members testified, unchallenged, that it is the responsibility of ICBV's 50% Dutch board of directors to ultimately approve the annual report. (Stoop Dep. 28:3–7.) ICBV's annual financial reports are audited by Ernst & Young Nederland, but ICBV does not have its own audit committee; rather, it shares an Audit Committee with the rest of the InterCement Group. (Rabelo Declaration ¶ 44; JX-182 at IC_FR_00003824.)

---

[8] Trial Tr. Day 1 133:21–134:4. ("Q: [T]he ultimate decision to make payments on the notes is made by the IC Financial Board, right? A: When the proceeds arrive in IC Financial's account, yes, the board is entitled to pay it, to press the button. But, of course, all the decision about the region of the money we [] provided and how it will be generated and how it's to be paid is derived from IC participants in Brasil.").

The NY Notes ICBV manages are governed by New York law, and ICBV, as a Netherlands-incorporated entity, is subject to Dutch law. (JX-1 at IC_FR_00002837, IC_FR_00002861.) However, as the operations generating cash flow in the InterCement Group, which generate funds used to pay the NY Notes, take place in Brazil, certain disputes likely to affect ICBV would largely be governed by Brazilian law. (Rabelo Declaration ¶ 55; *see also* JX-1 at IC_FR_00002694-IC_FR_00002698, IC_FR_00002703- IC_FR_00002714 (citing risk factors, most of which refer to Brazil.)) However, with the exception of intercompany agreements, ICBV is not a party to any third-party agreement governed by Brazilian law. (Trial Tr. Day 1 137:21–138:5).

3. The Spanish Sub-Holding Company

InterCement Trading e Inversiones S.A. is a Spanish sub-holding company wholly owned by IC Portugal. (Rabelo Declaration ¶ 7.) ITI is the controlling shareholder of ICB and of ITI Argentina ("ITI ARG") (in turn a sub-holding company which is the controlling shareholder of the Argentine operating company Loma Negra). (*Id.*) ITI and ITI ARG both support InterCement's international financing efforts, including by guaranteeing debentures (the "Debentures") issued by ICB and ICP in the Brazilian capital markets. (*Id.*) ITI also issues inter-company loans denominated in euros, US dollars, and Brazilian *reais*, most of which are held by Brazilian entities ICP and ICB. (JX-250.) ITI represented to a Spanish court that its corporate purpose consists, in part, of:

> [T]he acquisition, holding and enjoyment, general administration, sale and encumbrance of Spanish securities, fixed or variable income, through the corresponding organization of personal and material resources . . . as well as the provision of technical management, auditing, consulting and technical assistance services, as well as technical know-how and implementation of initiatives in the cement sector and its derivative products or raw materials destined for construction companies within and outside the [InterCement G]roup.

(JX-215 at 2.)[9]

ITI is incorporated in Spain, and its registered office is in Bilbao, where it rents a one-room office. (Rabelo Declaration ¶ 68.) Its bylaws are in Spanish and are governed by Spanish law. (JX-165.) ITI has a single employee who is located in Spain, one Spanish director residing in Spain, and two Brazilian directors residing in Brazil (both of whom are ICP employees); it has no officers. (Rabelo Declaration ¶ 69, JX-284.) In recent years, many of ITI's board decisions have been made by written consent, which the two Brazilian directors executed from Brazil and the Spanish director executed from Spain. (Rabelo Declaration ¶ 69.) Most board meetings took place in Spain, as required by Spanish law, with the remainder taking place over videoconference with each director participating from his domicile. (*Id.*) The Foreign Representative testified that while ITI's board of directors "consider[s], take[s] into account, [and has] as part of the total mix of information" the "guidance, information, and recommendation[s] from the Brazilian employees [and] Brazilian directors" of the InterCement Group when making decisions, the ITI board does not take instruction from ICP or any other entity's agents, and makes all final decisions regarding actions carried out by ITI. (Trial Tr. Day 1 100:12–101:1, 113:2–4.)

ITI's sole employee "organizes the administrative affairs for ITI in Spain, such as paying the rent and utilities . . . preparing draft meeting minutes and preparing drafts of ITI's accounts, subject to approval by the . . . teams in Brazil," and she "takes direction from ICP's chief financial officer . . . in Brazil." (Rabelo Declaration ¶ 69.)) As with ICBV, employees of ICP provide legal, finance, treasury, tax, accounting, compliance, and investor relations services to ITI. (*Id.* ¶ 70.)

---

9 The Foreign Representative states that ITI no longer sells Spanish securities, and Rabelo testified that ITI has not sold Spanish securities since 2012. (Foreign Representative Closing Demonstrative at 8, Rabelo Declaration at 25 n.14.) However, in a 2024 filing in Spanish court, ITI asserted that it sold such securities more recently. (JX-215 at 2.)

ITI's books and records are kept in Spain, with copies separately maintained in Brazil; all entries in the books and records are first approved by an ICP employee. (*Id.*) ITI contracts with a number of Spanish counterparties as needed to support the company's operations, and has retained various Spanish professionals, including legal and tax advisors, auditors, and consultants to provide services in Spain. (Trial Tr. Day 1 97:10–13; 104:25–105:6.)

ITI's assets consist of its equity interests in ICB, 100% of the shares of ITI ARG, and cash in various bank accounts. (Rabelo Declaration ¶ 71.) Most of ITI's cash is held in bank accounts in Spain. (*Id.*; JX-252, -253.) ITI has a mix of Brazilian and non-Brazilian creditors; the holders of the Debentures (the "Debenture Holders"), which ITI guarantees but is not directly a party to, are mostly based in Brazil. (Rabelo Declaration ¶ 72.) ITI has no other Brazilian creditors; its other creditors are entities within the InterCement Group to which it has made intercompany loans. (JX-232, JX-250.)

While the Debentures are governed by Brazilian law, ITI's intercompany loans are governed by Spanish, Dutch and Brazilian law, and ITI itself is subject to certain Spanish laws as a Spain-incorporated company. (Rabelo Declaration ¶¶ 75–76.) Other than the holders of the Debentures, all of ITI's creditors are located outside of Brazil. (JX-232.)

B. Prior Chapter 15 Cases

On July 15, 2024 (the "Prior Petition Date"), the Chapter 15 Debtors filed a petition (the "Prior Petition") seeking recognition under chapter 15 of the Bankruptcy Code, initiating the Prior Chapter 15 Cases (*In re InterCement Brasil S.A.*, Case No. 24-11226 (MG) (Bankr. S.D.N.Y. July 18, 2024)). Immediately prior to the filing of the Prior Chapter 15 Cases, a portion of the InterCement Group[10] (the "Brazilian Applicants") had commenced a court-

[10] The Brazilian Applicants are ICP, ICB, IC Financial, ITI, ITI Argentina, and Mover. (Motion at 2 n.5.)

supervised mediation proceeding in in São Paulo (the "Brazilian Mediation") with a number of creditors. (Motion ¶ 1). The 1st Bankruptcy and Restructuring Court of São Paulo (the "Brazilian Bankruptcy Court") granted a 60-day injunction barring creditors from pursuing the Brazilian Applicants' assets. (*Id.*) Three days later, on July 18, 2024, this Court granted a provisional stay barring potential creditor actions against the Chapter 15 Debtors. (*Id.*)

The Brazilian Applicants were able to reach an agreement in principle with the Debenture Holders (who comprised a majority of their largest creditor constituency) regarding the terms of a restructuring plan (the "EJ Plan"). (*Id.* ¶ 2.) On September 16, 2024, a subset of the Brazilian Applicants (the "EJ Debtors"[11]) filed a petition with the Brazilian Bankruptcy Court to convert the Brazilian Mediation into a consensual *recuperação extrajudicial* proceeding (the "Brazilian EJ Proceeding"). (*Id.*) The Brazilian Bankruptcy Court promptly entered an order accepting the Brazilian EJ Proceeding, and granted an additional 120-day stay to provide the EJ Debtors with time to seek support for the EJ Plan. (*Id.*) This Court also granted a further provisional stay on creditor actions against the Chapter 15 Debtors in the United States pending its consideration of the relief requested in the Prior Petition. (*Id.*)

In the Prior Petition, the Foreign Representative sought recognition of the Brazilian EJ Proceeding as a foreign main or nonmain proceeding. [12] The Ad Hoc Group objected to the Prior Petition. A two-day evidentiary hearing was held on November 20 and 21, 2024 to consider

[11] The EJ Debtors are ICP, ICB, IC Financial, ITI, ITI Argentina. The EJ Debtors include all of the Brazilian Applicants except Mover, which consented to the EJ Plan but was not an EJ Debtor as it was not an obligor with respect to any of the claims affected by the EJ Plan. (Motion at 3 n.8.)

[12] It is not contested that ICBV, ITI, ICP, and ICB have sufficient connections to the United States to warrant this Court's exercise of jurisdiction over them. As discussed *infra*, ICBV, ICP, and ICB have contract rights under an indenture governed by New York choice-of-law and choice-of-forum provisions. (Rabelo Declaration ¶ 35, 47.) ITI has assets in the United States consisting of $200 million of the NY Notes held on deposit with an institution in New York. (*Id.* ¶ 36.) These four debtors also have $5,000 each in cash in a trust account located in New York. (*Id.* ¶ 37.) The companies not seeking Chapter 15 protection have no connection to the United States.

factual issues related to each Chapter 15 Debtor's COMI and establishments as of the Prior Petition Date. (*Id.* ¶ 5.) The Court did not rule on the requested relief.

C. Commencement of Proceedings in the Netherlands and Spain

1. The Netherlands

On July 9, 2024, a few days before the filing of the Prior Petition, an NY Noteholder filed a petition in the Amsterdam Court (Private Law Department) (the "Dutch Court") seeking the appointment of a restructuring expert with the authority to submit a restructuring plan for ICBV pursuant to a provision of the *Wet homologatie onderhands akkoord* ("WHOA"). (Prior Chapter 15 Cases, *Declaration of Robert van Galen in Support of the Ad Hoc Group's Objection to Verified Petition and Verified Supplement* (the "Van Galen Declaration," ECF Doc. # 79), ¶ 10.) In response, ICBV filed a Commencement Statement on July 17, 2024 (JX-282 at Exhibit 21), requesting that the Dutch Court declare a four-month cooling-off period under a different provision of the WHOA and appoint an observer pursuant to the WHOA rather than a restructuring expert. (Motion ¶ 30.) In its Commencement Statement, ICBV identified the Netherlands as ICBV's "centre of main interests" on the basis of its "corporate seat" being located in the Netherlands. (Objection ¶ 8; Trial Tr. Day 1 24:11–20).

By filing the Commencement Statement, ICBV initiated a voluntary public restructuring procedure (the "Dutch Proceeding"). In voluntary proceedings in the Netherlands, Dutch courts remain largely uninvolved with the restructuring, and debtors in public proceedings can secure a pan-European stay on creditor actions if the proceeding is recognized pursuant to the European Insolvency Regulation ("EIR") (Trial Tr. 20:11–19.) However, public proceedings only fall within the scope of the EIR if the debtor's COMI is located within the European Union, according to the EIR's definition of COMI. (Van Galen Declaration ¶ 23; *see also* Trial Tr. Day 1 21:2–7.)

On July 31, 2024, the Dutch Court entered an order (the "Dutch Order") accepting ICBV's voluntary WHOA filing and rejecting the NY Noteholder's request for the appointment of an expert. (Motion ¶ 30.) Instead, as requested by ICBV, the Dutch Court appointed an observer (the "Dutch Observer") pursuant to Section 380 of WHOA to, *inter alia*, oversee the formation of a restructuring plan for ICBV (*Id.*; JX-282 at Exhibit 19). In the Dutch Order, the Dutch Court found that ICBV's COMI is "situated in the Netherlands." (JX282 at Exhibit 5, Section 5.2.)

On November 1, 2024, a member of the Ad Hoc Group filed a petition in the Dutch Court to end the cooling-off period imposed by the Dutch Court, along with a petition for bankruptcy on behalf of ICBV. (Rabelo Declaration ¶ 27.) On December 5, 2024, the Dutch Court denied the request to terminate the cooling-off period and permitted the Dutch Proceeding to continue. (Exhibit F to Motion.) In doing so, the Dutch Court reiterated its earlier finding that ICBV's COMI is the Netherlands, a finding consistent with ICBV's own repeated representations in the Dutch Proceeding. (*Id.* at 8.)

The cooling-off period in the Dutch Proceeding expired on March 1, 2025. (ECF Doc. # 56 at ¶ 7.) The Dutch Court held a hearing on March 14, 2025 to consider the continued necessity of the appointment of the Dutch Observer, and subsequently revoked the appointment of the Dutch Observer on March 21, 2025. (*See* ECF Doc. # 61 at ¶ 1.)

2. <u>Spain</u>

On July 16, 2024, ITI and ITI ARG filed a notice before the Commercial Court No. 2 of Bilbao, Spain (the "Spanish Court") communicating the initiation of creditor negotiations and seeking an initial pre-insolvency protection period of three months (the "Spanish Proceeding"). (Rabelo Declaration ¶¶ 28-29.) The Spanish Court accepted the notice and imposed the requested stay on July 24, 2024. (*Id.* ¶ 29.) The Spanish Court extended the stay for an additional three months on October 15, 2024. (Motion ¶ 30.)

Subsequently, ITI and ITI ARG filed a motion seeking recognition of the Brazilian RJ Proceeding; a separate commercial court in Bilbao granted the motion on January 17, 2025 (the "Spanish Recognition Order"). (*See* ECF Doc. # 56 at ¶ 9.) Members of the Ad Hoc Group have filed a notice of appeal of the Spanish Recognition Order, which remains pending at this time. (*Id.*)

D. Liquidation Efforts

In Brazil, the success of the Brazilian EJ Proceeding hinged on the proposed sale of all of the EJ Debtors' business. (Motion ¶ 2.) Accordingly, a number of restructuring processes occurred before and during the pendency of the Brazilian EJ Proceeding, beginning with the Brazilian Mediation, and thereafter including the filing of the EJ Plan and a marketing and sales process whereby the InterCement Group provided confidential information to creditors and the leading bidder, Companhia Siderúrgica Nacional ("CSN"). (*Id.*).

Ultimately, after months of negotiations, the EJ Debtors concluded that they would be unable to execute a sale agreement or obtain the requisite creditor support for the EJ Plan prior to the expiration of the deadline required by the Brazilian Bankruptcy Law. (Motion ¶ 3.) Accordingly, on December 3, 2024, the Chapter 15 Debtors and certain of their affiliates (collectively, the "RJ Debtors"[13]) commenced the Brazilian RJ Proceeding and obtained a further stay from the Brazilian Bankruptcy Court barring creditor actions. (*Id.*) Because the Brazilian

[13] The other RJ Debtors are ITI Argentina, Sucea Participações S.A. ("Sucea"), Sincro Participações S.A. ("Sincro"), and Mover. (*Id.* at 1 n.1.)

RJ Proceeding added new debtors, it is considered under Brazilian law a distinct insolvency proceeding from the Brazilian EJ Proceeding, rather than a continuation or conversion thereof. (*Id.*)

E. Chapter 15 Petition and Debtors

On December 9, 2024 (the "New Petition Date"), the Petitioner commenced the Chapter 15 Cases, seeking recognition of the Brazilian RJ Proceeding as a foreign main proceeding (or, in the alternative, a foreign nonmain proceeding) for each of the Chapter 15 Debtors. (Motion ¶ 4). The identities of the Chapter 15 Debtors are identical to the debtors in the Prior Chapter 15 Cases. (*Id.*)

II. LEGAL STANDARD

A. Section 1517(a): Foreign Proceeding Recognition

Section 1517(a) of the Bankruptcy Code establishes three requirements for the recognition of a foreign proceeding under chapter 15. In order to recognize the foreign proceeding, a court must conclude that:

> (1) The foreign proceeding constitutes a foreign proceeding (either main or nonmain) as are defined under section 1502;
>
> (2) The foreign representative applying for recognition is a person or body; and
>
> (3) the petition meets the requirements of section 1515.

11 U.S.C. § 1517(a).

Recognition of the foreign proceeding is statutorily mandated if the three requirements of section 1517(a) are met and no exception is applicable. *See In re Millard*, 501 B.R. 644, 651 (Bankr. S.D.N.Y. 2013).

1. <u>1517(a)(1): Foreign Main Proceeding Recognition</u>

Section 1517(a) distinguishes between "foreign main" and "foreign nonmain" proceedings. Section 1517(b) establishes conditions for recognition of each. In relevant part, section 1517(b)(1) states that a foreign proceeding shall be recognized "as a foreign main proceeding if it is pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1517(b)(1). Section 1502(4) uses the same language to define "foreign main proceeding."

a. "Foreign Proceeding"

Section 101(23) defines a "foreign proceeding" as:

> [A] collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

11 U.S.C. § 101(23).

Based on this definition, courts have held that a "foreign proceeding" requires:

> (i) [the existence of] a proceeding;
>
> (ii) that is either judicial or administrative;
>
> (iii) that is collective in nature;
>
> (iv) that is in a foreign country;
>
> (v) that is authorized or conducted under a law related to insolvency or the adjustment of debts;
>
> (vi) in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and
>
> (vii) which proceeding is for the purpose of reorganization or liquidation.

See Armada (Singapore) Pte Ltd. v. Shah (*In re Ashapura Minechem Ltd.*), 480 B.R. 129, 136 (S.D.N.Y. 2012) (*citing In re Betcorp Ltd.*, 400 B.R. 266, 277 (Bankr. D. Nev. 2009)); *see also*

In re Overnight & Control Com'n of Avánzit, S.A., 385 B.R. 525, 532–36 (Bankr. S.D.N.Y 2008) (discussing factors).

b. "Center of Main Interests"

The term "center of [debtor's] main interests" ("COMI") is not defined by the Bankruptcy Code. However, section 1516(c) provides that, in the absence of an objection or evidence to the contrary, a debtor's registered office or habitual residence "is presumed to be the center of the debtor's main interests." 11 U.S.C. § 1516(c); *see also In re Olinda Star I*, 614 B.R. 28, 41 (Bankr. S.D.N.Y. 2020); *In re Ocean Rig UDW Inc.*, 570 B.R. 687, 705 (Bankr. S.D.N.Y. 2017); *In re ABC Learning Centres Ltd*., 445 B.R. 318, 333 (Bankr. D. Del. 2010), *aff'd*, 728 F.3d 301 (3d Cir. 2013). The relevant time period to determine the location of the debtor's COMI is the date on which the chapter 15 petition is filed. *See Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013) (hereinafter "*Fairfield Sentry*").

In assessing whether the registered office presumption has been overcome, courts in this District have applied a list of non-exclusive factors for determining the COMI. Those factors include: (i) the location of the debtor's headquarters; (ii) the location of those who actually manage the debtor; (iii) the location of the debtor's primary assets; (iv) the location of the majority of the debtor's creditors or a majority of the creditors who would be affected by the case; and (v) the jurisdiction whose law would apply to most disputes. *Fairfield Sentry*, 714 F.3d at 137 (*citing In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006)). While these factors serve as a "helpful guide" in determining a debtor's COMI, the factors are not exclusive, and none of the factors is required nor dispositive. *Fairfield Sentry*, 714 F.3d at 137 (explaining that "consideration of these specific factors is neither required nor dispositive" and warning against mechanical application).

Additionally, in determining a debtor's COMI, the Second Circuit and this Court have examined the expectations of creditors and other interested parties, as a company's COMI must be "ascertainable to third parties." *See Fairfield Sentry*, 714 F.3d at 136–38; *In re Millennium Global Emerging Credit Master Fund Ltd.*, 474 B.R. 88, 93 (S.D.N.Y. 2012). As the Second Circuit has explained, by examining factors "in the public domain," courts are readily able a debtor's COMI is in fact "regular and ascertainable [and] not easily subject to tactical removal." *See Fairfield Sentry*, 714 F.3d at 136–37. "Creditor expectations can be evaluated through examination of the public documents and information available to guide creditor understanding of the nature and risks of their investments." *In re Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. 169, 228 (Bankr. S.D.N.Y. 2017). In practice, the evaluation of creditor expectations has focused on reviewing disclosures in offering memoranda and indentures. *See id.* at 228–32 (reviewing offering memorandum to establish noteholder expectations as part of a COMI analysis); *In re OAS S.A.*, 533 B.R. 83,102–03 (Bankr. S.D.N.Y. 2015) (same); *Millennium Glob.*, 474 B.R. at 93–94 (same); *In re Suntech Power Holdings Co., Ltd.*, 520 B.R. 399, 418 (Bankr. S.D.N.Y. 2014) (considering terms of indenture agreement to establish creditor expectations regarding likely location of a restructuring as part of a COMI analysis).

As noted, the Second Circuit has also clarified that the determination of a debtor's COMI should be based on the facts available at the time the Chapter 15 petition is filed. *Fairfield Sentry*, 714 F.3d at 138. The Court explained that "the factors that a court may consider in this analysis are not limited and may include the debtor's liquidation activities." *Id.* at 137–38. *See also In re Modern Land (China) Co., Ltd.*, 641 B.R. 768, 783 (Bankr. S.D.N.Y. 2022) (finding that a Cayman court's supervision of a debtor's Cayman scheme of arrangement proceeding established the Cayman Islands as the debtor's COMI—although the debtor was a holding company of entities involved with real estate investing in China and the United States—when other factors putting creditors on notice were considered). Pre-filing restructuring efforts may shift a debtor's COMI, especially where a debtor is an entity with limited operations such that restructuring activity constitutes the debtor's "primary business activity" prior to the filing of a petition for recognition. *Modern Land*, 641 B.R. at 789–90.

Relevant pre-filing restructuring efforts may include the negotiation or execution of a restructuring framework or support agreement, holding of meetings with creditors, or other operational or liquidation activities or administrative functions. *Oi Brasil*, 578 B.R. at 222 (citing *In re Creative Fin.*, 543 B.R. 498, 517 (Bankr. S.D.N.Y. 2016)); *see, e.g.*, *Modern Land*, 641 B.R. at 778–81, 789–90. However, courts may also undertake a "holistic analysis" to consider whether a debtor has manipulated COMI in bad faith prior to the filing of a chapter 15 petition in the debtor's preferred locale. *Ocean Rig*, 570 B.R. at 706–07. Indicators of bad-faith "COMI-shifting" may include "insider exploitation, untoward manipulation, [and] overt thwarting of third party expectations." *Fairfield Sentry*, 440 B.R at 66.

2. <u>1502(5): Foreign Non-Main Proceeding</u>

A foreign nonmain proceeding is defined as a "foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment." 11 U.S.C. § 1502(5). An "establishment" is "any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. § 1502(2). The location should:

> constitute a 'seat for local business activity' for the debtor. The terms 'operations' and 'economic activity' require a showing of a local effect on the marketplace, more than mere incorporation and record-keeping and more than just the maintenance of property.

Creative Fin., 543 B.R. at 520.

Recognition as a foreign nonmain proceeding requires "a showing of a local effect on the marketplace, more than mere incorporation and record-keeping and more than just the maintenance of property." *Id.*

3. 1517(a)(2): Foreign Representative Recognition

The term "foreign representative" is defined in section 101(24) of the Bankruptcy Code as follows:

> [A] person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding.

11 U.S.C. § 101(24).

4. 1517(a)(3): Section 1515 and Rule 1007 Requirements

Section 1515 separately imposes the following procedural requirements:

> (a) A foreign representative applies to the court for recognition of a foreign proceeding in which the foreign representative has been appointed by filing a petition for recognition.
>
> (b) A petition for recognition shall be accompanied by—
>
> > (1) a certified copy of the decision commencing such foreign proceeding and appointing the foreign representative;
> >
> > (2) a certificate from the foreign court affirming the existence of such foreign proceeding and of the appointment of the foreign representative; or
> >
> > (3) in the absence of evidence referred to in paragraphs (1) and (2), any other evidence acceptable to the court of the existence of such foreign proceeding and of the appointment of the foreign representative.
>
> (c) A petition for recognition shall also be accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative.
>
> (d) The documents referred to in paragraphs (1) and (2) of subsection (b) shall be translated into English. The court may require a translation into English of additional documents.

11 U.S.C. § 1515.

Additionally, Bankruptcy Rule 1007 imposes additional procedural requirements, including the filing of a corporate disclosure statement. FED. R. BANKR. P. 1007.

B. Additional Relief

1. Automatic Relief Under Section 1520

Section 1520(a) of the Bankruptcy Code sets forth a series of statutory protections that automatically result from the recognition of a foreign main proceeding, including the application of the protection afforded by the automatic stay under section 362(a) of the Bankruptcy Code to the debtor and its property located within the territorial jurisdiction of the United States. *See* 11 U.S.C. § 1520(a).

2. Discretionary Relief Under Section 1521

Section 1521(a) outlines the discretionary relief a court may order upon recognition. *See* 11 U.S.C. § 1521(a). "The discretion that is granted is 'exceedingly broad,' since a court may grant 'any appropriate relief' that would further the purposes of chapter 15 and protect the Debtor's assets and the interests of creditors," provided that the interests of creditors and other interested entities are sufficiently protected. *In re Atlas Shipping A/S*, 404 B.R. 726, 740 (Bankr. S.D.N.Y. 2009) (citing 11 U.S.C. §§ 1521(a), 1522(a)). In *Atlas Shipping*, this Court described "sufficient protection" as embodying three basic principles: "the just treatment of all holders of claims against the bankruptcy estate, the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceeding, and the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by U.S. law." *Atlas Shipping*, 404 B.R. at 740.

3. Relief Under Section 105

Additionally, section 105(a) of the Bankruptcy Code provides that the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

III. ANALYSIS

A. The Brazilian RJ Proceeding Should be Recognized as a Foreign Main Proceeding

1. The Brazilian RJ Proceeding is a "Foreign Main Proceeding" under Sections 1517(a) and 1517(b)

a. The Brazilian RJ Proceeding Proceeding is a "Foreign Proceeding"

The Brazilian RJ Proceeding qualifies as a "foreign proceeding." Courts in this Circuit have long agreed that the Brazilian RJ process satisfies these standards. *See In re Servicos de Petroleo Constellation S.A*., 600 B.R. 237, 270 (Bankr. S.D.N.Y. 2019) (collecting cases). As such, the Court will not further examine each specific requirement of section 101(23).

b. Each Chapter 15 Debtor's COMI is Brazil as of the New Petition Date

i. Uncontested Entities: ICP & ICB

ICP is the parent company of the other Chapter 15 Debtors. No party contests that ICP's COMI is Brazil. (Rabelo Declaration ¶ 38.) ICP's registered office in São Paulo, Brazil. *Id.* Therefore, absent "evidence to the contrary," the Bankruptcy Code presumes its COMI is Brazil. 11 U.S.C. § 1516(c); *see also In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 130 (Bankr. S.D.N.Y. 2007). Here, no evidence contradicts this presumption: ICP's directors, officers, and employees are all based in Brazil, and its books and records are maintained in Brazil. (Rabelo Declaration ¶ 38.) Accordingly, ICP's COMI is Brazil.

Similarly, ICB, a Brazilian operating company and cement production and sales corporation, has near-exclusive ties to Brazil, and no party disputes that its COMI is Brazil. (Rabelo Declaration ¶ 39.) ICB's registered office is also located in São Paulo, and no evidence undercuts the resultant statutory presumption that its COMI is Brazil: 99% of ICB's 1,745 employees are based in Brazil, where it represents the country's third-largest cement company. (*Id.*) As such, ICB's COMI is Brazil.

ii. <u>ICBV</u>

ICBV's COMI as of the New Petition Date is contested: the Foreign Representative maintains that ICBV's COMI is Brazil, while the Ad Hoc Group asserts that it is the Netherlands. ICBV's registered office is in Amsterdam, (Motion ¶ 40), entitling it to a rebuttable statutory presumption that its COMI is the Netherlands. 11 U.S.C. § 1516(c).

There are several other *Fairfield Sentry* factors that would ordinarily undercut a straightforward determination that ICBV's COMI is Brazil. First, ICBV's Board meetings are typically held in the Netherlands, the entity contracts with almost exclusively Dutch contractors and offers no services in Brazil, and the Board requires consent from at least one of its Dutch constituent directors to make ultimate corporate decisions regarding the payment of the NY Notes. ICBV's assets are dispersed, with its largest (an intercompany receivable) held by a Spanish entity, while the majority of its cash is denominated in USD and held in a Bahamanian bank, and its Brazilian bank accounts are empty. The same pattern applies for ICBV's creditors, the majority of whom are neither based in Brazil nor in the Netherlands. Similarly, the law applicable to ICBV's disputes is mixed: New York law governs the NY Notes, which constitute the majority of ICBV's debt, and its intercompany loans are governed by a mix of New York and

Brazilian law. However, as a Dutch-incorporated company, ICBV is bound to certain Dutch laws. *See supra* I(A)(2).

The analysis of ICBV's creditor and other third-party expectations is more salient—and more complex. Governing law in this District provides that where, as here, a debtor is a special purpose financing vehicle (SPV) with no operations other than managing relationships with creditors and paying off obligations on behalf of a larger corporate parent, the debtor's COMI should be determined by the location of the corporate "nerve center." *Oi Brasil*, 578 B.R. at 222–30. And the developments immediately before the commencement of the Brazilian RJ Process—namely, the Brazilian Mediation and Brazilian EJ Proceeding—bolster the Foreign Representative's position that ICBV's COMI, as of the New Petition Date, is Brazil.

The facts in *Oi Brasil* were remarkably similar to the circumstances presently before the Court. There, the debtor was an SPV to a large conglomerate in Brazil. The SPV was incorporated in the Netherlands and maintained its registered office in Amsterdam. *Oi Brasil*, 578 B.R.at 177. Like ICBV, the SPV in *Oi Brasil* had no operations or business independent of its Brazil-based corporate parent, had "never held money for any entity" other than a member of the conglomerate, and performed only two functions, primarily "borrowing, or issuing or assuming notes." *Id*. at 177–78. The SPV was the issuer of two series of notes governed by New York law, the governing indentures of which disclosed that the SPV had "no operations other than the issuing and making payments on the Notes and other indebtedness ranking equally with the Notes, and using the proceeds therefrom as permitted by the documents governing these issuances," and explained that the ability of the SPV to "pay principal, interest and other amounts due on the Notes and other indebtedness" would "depend upon the financial condition and results of operations" of the Brazilian parent. *Id*. Similarly, ICBV's OM provides:

> The issuer's principal business activity to act as a financing vehicle for [ICP's] activities and operations. The issuer has no substantial assets . . . and its only sources of cash flow are from its financing activities and capital contributions made by [ICP] and [its] other subsidiaries. Accordingly, the ability of the issuer to pay principal, interest, and other amounts due on the notes and other indebtedness will depend upon [ICP's] financial condition and results of operations.

(JX-1 at IC_FR_00002712; *see also id.* at IC_FR_00002670 (clarifying that references to "we," "our company," "ours", and "us" in the OM refer to ICP and its subsidiaries, not ICBV).) The notes indentures at issue in *Oi Brasil* also "explicitly warn[ed] of the possibility of a Brazilian bankruptcy" in terms nearly identical to ICBV's OM: "[i]f we are unable to pay our indebtedness, including our obligations under the notes, then we may ***become subject to bankruptcy proceedings in Brazil***. Brazilian bankruptcy laws ***are significantly different from, and may be less favorable to creditors than***, those of the United States." *Oi Brasil*, 578 B.R. at 180 (emphases added). Given these striking similarities, it would be reasonable to find that ICBV's COMI, is, and has always been, Brazil.

However, the Court need not answer this question; rather, it must only identify ICBV's COMI as of the New Petition Date. *Fairfield Sentry*, 714 F.3d at 137. In addressing that more narrow question, the Court finds that applicable restructuring activities occurring as part of the Brazilian Mediation and Brazilian EJ Proceeding establish conclusively that, as of December 9, 2024, ICBV's COMI was Brazil. In the months leading up to the filing of the Chapter 15 Petition, ICBV's "primary business activity" was clearly limited to repayment of the NY Notes. *Modern Land*, 641 B.R. at 789–90. As a practical matter, this effort was channeled through—and its success depended on—the success of the Brazilian Mediation and Brazilian EJ Proceeding and related creditor negotiations in Brazil. *See OAS*, 533 B.R. at 101 (finding that an Austrian-incorporated SPV had "no other business except to pay [notes governed by New York law] off," and observing that this was "the very business [the SPV] and the other Brazilian Debtors were engaged in through the Brazilian [b]ankruptcy [p]roceedings").

Specifically, ICBV participated in the Brazilian Mediation as a debtor, attending approximately six mediation sessions with the Ad Hoc Group's advisors and four sessions with the Indenture Trustee. (Rabelo Declaration ¶ 32; Motion ¶ 31; COMI Brief ¶ 38.) ICBV also commenced the Brazilian EJ Proceeding, and signed the EJ Plan, which was filed with the Brazilian Bankruptcy Court. (COMI Brief ¶ 39.) ICBV actively participated in litigation before the Brazilian Bankruptcy Court and filed pleadings addressing matters substantively affecting its interests in the Brazilian EJ Proceeding. (Laquimia Declaration ¶¶ 9, 12, 13.) ICBV's Brazilian directors also executed non-disclosure agreements in connection with the provision of information regarding the InterCement Group to the Ad Hoc Group and its advisors. (Rabelo Declaration ¶¶ 32–34; COMI Brief ¶ 15.) ICBV's Brazilian advisors and directors met with the Ad Hoc Group's counsel to discuss matters directly impacting the scope of potential recoveries on the NY Notes—the sole focus of ICBV's business operations at that time. (Rabelo Declaration ¶¶ 32–34; COMI Brief ¶ 15.) Finally, the Brazilian Mediation, Brazilian EJ Proceeding, and ultimate commencement of the Brazilian RJ Proceeding were all publicly and widely disclosed by press releases by ICP from Brazil. (COMI Brief ¶ 43.) Accordingly, when considered as a whole, the Brazilian Mediation and Brazilian EJ Proceeding provide strong indicia that ICBV's creditors were on notice of the proceedings in Brazil.[14]

[14] The Foreign Representative emphasizes that the Ad Hoc Group had no connection to the Netherlands: no Ad Hoc Group member ever interacted with anyone in the Netherlands. (*See* Prior Chapter 15 Cases, ECF Doc. # 72, Joint Stipulated Facts.) Similarly, the Foreign Representative points out that the Ad Hoc Group stipulated to the fact that its members "anticipated that any main plenary proceeding in which [the NY Notes] would be restructured would be in the Federative Republic of Brazil," (*id.* ¶ 6), and points to email evidence showing that the Ad Hoc Group's members subjectively anticipated a bankruptcy process in Brazil to affect their holdings (*see, e.g.*, JX-15, -55, -102, -116) and understood the importance of InterCement's operations in Brazil to their investment (*see, e.g.*, JX-17, -61, JX-102). Note, however, that even were this not the case, the subjective beliefs of a debtor's creditors

By contrast, no restructuring activities with the capacity to materially impact ICBV's ability to conduct its business operations occurred in the Netherlands during this timeframe. While the Ad Hoc Group focuses on the progress of the Dutch Proceeding during this timeframe, the existence of parallel developments in that proceeding fails to negate the fact that, as a matter of United States law, ICBV's COMI as of the New Petition Date was Brazil. The Dutch Observer's activity in the Dutch Proceeding, while continuous and consistent, "do[es] little to change the economic realities associated with [ICBV's] status as a special purpose financing vehicle and the related expectations of its creditors," and separately has minimal impact on the COMI determination because "there are significant legal and pragmatic limitations on the [Observer's] authority with respect to ICBV." *Oi Brasil*, 578 B.R. at 225. As to the first point, ICBV's unique "economic reality," which stems from its structure as an SPV, cannot be ignored and has special implications for its COMI analysis. *Id.* Given that ICBV's primary business activity has, at all relevant times, been limited to the repayment of the NY notes, its economic reality was tied inextricably to Brazil as of the New Petition Date because, up until that point, the Brazilian EJ Proceeding had "provide[d] the only realistic chance to repay [ICBV's] debts." *Id.* at 226. Indeed, even the Dutch Observer acknowledged in his monthly reports that ICBV's financial prospects were wholly dependent on the success of the Brazilian EJ Proceeding. (*See* the "October Report," ECF Doc. # 30-1, at §§ 1.2.3, 2.3.3, 2.3.4; the "November Report," ECF Doc. # 30-2, at § 1.2.3).[15] Therefore, notwithstanding the involvement of the Dutch Observer in

concerning the debtor's COMI does not matter—it is the perspective of the *hypothetical* (i.e., objective) third party/creditor which the Court must consider.

[15] In an apparent acknowledgement of ICBV's involvement in the Brazilian EJ Proceeding, the Observer also explained in the November Report that he was kept "sufficiently informed by ICBV (and its advisers and those of the Group) . . . about the course of events in the EJ Procedure." (November Report at § 5.3.).

the Dutch Proceeding, in totality, all relevant circumstances underscore that, as of the New Petition Date, ICBV's COMI is Brazil.

The Ad Hoc Group also relies on ICBV's representations in the Dutch Proceeding that, ICBV's COMI, pursuant to the EIR, has at various points in time been the Netherlands—a representation which it reiterated in November 2024, a few weeks before the New Petition Date. (Objection ¶ 16.) On December 5, 2024, the Dutch Court referenced this representation in extending the cooling-off period in the Dutch Proceeding, commenting that ICBV had provided "no reason" for the Dutch Court to "reconsider its earlier finding" that ICBV's COMI was the Netherlands. (*Id.*) The Ad Hoc Group further emphasizes ICBV's continued reiteration of this position in the Dutch Proceeding in January 2025, even after the Foreign Representative filed the COMI Brief. (*Id.* ¶ 17.) The Ad Hoc Group asserts that the Petitioner should be estopped from proffering an apparently contradictory position in these Chapter 15 Cases: namely, that contemporaneous developments have shifted ICBV's COMI from the Netherlands to Brazil. (*Id.*)

The Ad Hoc Group's position is incorrect. Corporate entities are not precluded from having different COMIs in European and Chapter 15 proceedings, because a "COMI finding under the [EIR] in the Dutch proceedings is not the same as a COMI finding under Chapter 15 of the Bankruptcy Code." *Oi Brasil*, 578 B.R. at 206. The Second Circuit made clear in *Fairfield Sentry* that the EIR "does not operate as an analog to Chapter 15." *Fairfield Sentry*, 714 F.3d at 136. Critically, the EIR is a "poor analog" for Chapter 15 "in regards to the timeframe considered in a COMI analysis . . . [t]he [EIR] looks to the date of the filing of the foreign insolvency proceedings, whereas in the U.S. the inquiry centers on the date of the Chapter 15 recognition petition." *Oi Brasil*, 578 B.R. at 207 (citing *Fairfield Sentry*, 714 F.3d at 136 n.9

(internal citations omitted)). This distinction alone legitimizes what initially appear to be contradictory COMI positions by ICBV before the Dutch Court and this Court. On the one hand, the EIR's tethering of the COMI analysis to the filing of the foreign insolvency proceedings substantiates ICBV's continued representations to the Dutch Court that no intervening developments would justify a departure from its initial position on ICBV's COMI at the commencement of the Dutch Proceeding. On the other hand, because it is the *Chapter 15 petition date* that controls the analysis under the Bankruptcy Code, the Foreign Representative cannot be estopped from contending that ICBV's COMI in these cases is Brazil. And for the foregoing reasons, the centralization of the Brazilian Mediation and Brazilian EJ Proceeding within Brazil justifies this Court's finding that ICBV's COMI, for purposes of these Chapter 15 Cases, is Brazil.

iii. <u>ITI</u>

Like ICBV, ITI's COMI is contested: the Foreign Representative maintains that ITI's COMI is Brazil, while the Ad Hoc Group asserts that its COMI is Spain. ITI's registered office is in Bilbao, Spain, (Motion ¶ 94), entitling it to a rebuttable statutory presumption that its COMI is Spain. 11 U.S.C. § 1516(c).

However, as with ICBV, ITI's COMI analysis as relevant to these Chapter 15 Cases is heavily dependent on the nature of its operations as of time of the New Petition Date. ITI's primary assets are its equity interests in ICB, which undisputedly has its COMI in Brazil. (Rabelo Declaration ¶ 39; Motion ¶ 97.) As guarantor to the Debentures issued by ICB and ICP, ITI's primary business activities at the time of the commencement of the Brazilian RJ Proceeding, and these Chapter 15 Cases, were the restructuring of its obligations under the Debentures—activities which predominantly occurred in Brazil.

Like ICBV, ITI participated in the Brazilian Mediation and was a debtor in the Brazilian EJ Proceeding, and its key creditors, including the Debenture Holders, participated in these processes as well. (Motion ¶ 31; COMI Brief ¶ 47.) The Debenture Holders and their advisors engaged substantively in the Brazilian EJ Proceeding, and the majority of the Debenture Holders ultimately signed onto the EJ Plan. (COMI Brief ¶ 47.) The Debenture Holders appeared at a creditors' meeting in Brazil and were appointed to a committee to oversee the sales process and negotiations under the EJ Plan. (*Id.*) Like ICBV, ITI's creditors were all made aware of the Brazilian Mediation, Brazilian EJ Proceeding, and ultimate commencement of the Brazilian RJ Proceeding through widely-disseminated press releases issued by ICP from Brazil. (*Id.*) Notably, ITI itself does not contest that its COMI is Brazil, and it previewed as much to the Spanish Court prior to the New Petition Date; a commercial court in Bilbao has since granted ITI's request for recognition of the Brazilian RJ Proceeding.[16] (ECF Doc. # 56 at ¶ 9.)

Accordingly, when considered as a whole, the factual circumstances leading up to the New Petition Date provide strong indicia that ITI's creditors were on notice of the proceedings in Brazil, and, more broadly, that ITI's COMI is Brazil.

---

[16] The Ad Hoc Group speculates that any "events in Spain" subsequent to the New Petition Date were "plainly engineered to boost Petitioner's recognition efforts." (Objection ¶ 17; *see also id.* at 9 n.51). While the Ad Hoc Group does not directly accuse the Foreign Representative of bad faith conduct or forum-shopping, it is worth briefly addressing this point directly, as courts have authority to "look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition" in order to "offset [the] debtor's ability to manipulate its COMI." *Fairfield Sentry,* 714 F.3d at 133. In short, here, neither party's description of the Brazilian Mediation and the Brazilian EJ Proceeding rings of bad faith or COMI manipulation. Courts have declined to find bad faith even where parties have sought to shift COMI from a debtor's principal place of business to a "letterbox" jurisdiction where the debtor plainly does not conduct meaningful business. *See Suntech Power*, 520 B.R. at 419 (liquidators who shifted COMI from China to Cayman Islands did not act in bad faith). Here, the opposite is true: the Foreign Representative's position is that COMI has shifted from a "letterbox" jurisdiction to the undisputed principal place of business of the debtor's corporate family. Under these circumstances, there is no factual basis reasonably supporting a presumption of bad faith.

B. The Petitioner is a "Foreign Representative"

The Petitioner was duly appointed by the Chapter 15 Debtors via corporate resolution to act as the foreign representative of the Brazilian RJ Proceeding and commence the Chapter 15 Cases in accordance with 101(24) of the Bankruptcy Code. (Motion ¶ 112.) The appointment of the Petitioner comports with applicable requirements. *See, e.g.*, *In re Mina Tucano Ltda.*, No. 22-11198 (LGB) (Bankr. S.D.N.Y. Oct. 12, 2022) (ECF Doc. # 26) (approving verified petition where the foreign representative was authorized by chapter 15 debtors' corporate resolution).

C. The Petition Otherwise Meets Section 1515's and Rule 1007(a)(4)'s Procedural Requirements

The Foreign Representative satisfies section 1517(a)(3) of the Bankruptcy Code, which states that the petition shall meet the requirements of section 1515, which in turn provides applicable requirements in subsections 1515(b) and (c). Those subsections require that a recognition petition include a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative, as well as a statement identifying all foreign proceedings with respect to the Chapter 15 debtors known to the foreign representative. 11 U.S.C. §§ 1515(b)–(c), 1517(a)(3).

The Petitioner has satisfied those requirements. The Foreign Representative properly commenced these Chapter 15 Cases in accordance with sections 1504 and 1509(a), which require the filing of a petition for recognition along with all the documents and information required under section 1515. (Motion ¶ 114.) In accordance with section 1515(b), the Foreign Representative filed original and certified translated copies of the petition in and the order by the Brazilian Bankruptcy Court accepting the Brazilian RJ Proceeding, as well as the corporate resolutions authorizing the Petitioner to act on behalf of each Chapter 15 Debtor as a foreign representative. (*Id.* ¶ 115.) As required by section 1515(c) of the Bankruptcy Code, the Foreign

Representative also submitted a declaration identifying all known foreign proceedings on behalf of the Chapter 15 Debtors. (*Id.* ¶ 116.) Finally, the Foreign Representative has satisfied the requirement of Bankruptcy Rule 1007(a)(4) to file a corporate ownership statement including all information required by Rule 7007.1, as well as a list including the names and addresses of all person or bodies authorized to administer the foreign proceedings of the Chapter 15 Debtors and all parties to litigation pending in the United States to which the Chapter 15 Debtors are parties. (*Id.* ¶ 117; *see* FED. R. BANKR. P. 1007.)

Accordingly, all elements of Section 1517 and Rule 1007(a)(4) have satisfied, and the Court should recognize the Brazilian RJ Proceeding as a foreign main proceeding.

D. The Court Need Not Consider Recognition as a Foreign Nonmain Proceeding

Because the Court has concluded that the COMI of each Chapter 15 Debtor is Brazil and therefore that the Brazilian RJ Proceeding constitutes a foreign main proceeding, the Court need not assess whether to grant recognition of the Brazilian RJ Proceeding as a foreign nonmain proceeding pursuant to section 1517(b)(2) of the Code.

E. The Debtors Should Receive Additional Relief

1. <u>Automatic Relief Under Section 1520</u>

Upon the recognition of a foreign main proceeding, a debtor is automatically entitled to the protection of the automatic stay under section 362(a) with respect to the debtor and its property within the jurisdiction of the United States. 11 U.S.C. § 1520(a). As the Foreign Representative has shown that the Brazilian RJ Proceeding should be recognized as the foreign main proceeding in these Chapter 15 Cases, the Chapter 15 Debtors are entitled to the automatic relief under section 1520.

2. Discretionary Relief Under Section 1521

Upon recognition of a foreign proceeding, section 1521(a) authorizes the Court to grant "any appropriate relief" at the request of the foreign representative "where necessary to effectuate the purpose of [chapter 15] and to protect the assets of the debtor or the interests of the creditors." 11 U.S.C. § 1521(a). Pursuant to section 1521(a)(6), the Foreign Representative requests that any protective relief that is the subject of the Provisional Relief Motion (ECF Doc. # 5) be extended pursuant to section 1521(a)(6) of the Bankruptcy Code. (Motion ¶ 133.) Courts granting discretionary relief pursuant to section 1521 must ensure that the interests of "the creditors and other interested entities, including the debtor, [must be] sufficiently protected." 11 U.S.C. § 1522(a). The Bankruptcy Code does not define "sufficient protection." A determination of sufficient protection "requires a balancing of the respective parties' interests." *In re AJW Offshore, Ltd.*, 488 B.R. 551, 559 (Bankr. E.D.N.Y. 2013) (citing *SNP Boat Serv. S.A. v. Hotel Le St. James*, 483 B.R. 776, 784 (S.D. Fla. 2012)).

Here, the extension of provisional relief will provide adequate protection to the Chapter 15 Debtors and their creditors by centralizing the orderly administration of the debtors' assets in the United States. Additionally, the balance of the parties' interests weighs in favor of extending provisional relief, as the Chapter 15 Debtors represent that permitting creditor actions "could threaten their ability as a going concern" and the parties have previously agreed to extend provisional relief to mirror the relief extended by the Brazilian Bankruptcy Court. (Motion ¶ 137; *see* ECF Doc. # 58.).

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the relief sought in the Foreign Representative's Motion, **RECOGNIZES** the Brazilian RJ Proceeding as a Foreign Main Proceeding, and **OVERRULES** the Ad Hoc Group's Objection.

IT IS SO ORDERED.

Dated: March 31, 2025
New York, New York

Martin Glenn
MARTIN GLENN
Chief United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 15
Crédito Real, S.A.B. de C.V., SOFOM, E.N.R.,[1]	Case No. 25-10208 (TMH)
Debtor in a foreign proceeding.	

OPINION

In its June 27, 2024 decision in Harrington v. Purdue Pharma, L.P.,[2] the Supreme Court held that a chapter 11 plan of reorganization cannot provide for a nonconsensual third-party release of claims against a non-debtor.[3] Following that decision, the international insolvency community has debated whether, under chapter 15, a bankruptcy court nonetheless may enter an order enforcing a *foreign plan* containing such releases.[4] That is the question presented here. At the recognition hearing held in this chapter 15 case on March 11, 2025, in an oral bench

[1] The last four identifying digits of the tax number and the jurisdiction in which the Chapter 15 Debtor pays taxes is Mexico – 6815. The Chapter 15 Debtor's corporate headquarters is located at Avenida Insurgentes Sur No. 730, 20th Floor, Colonia del Valle Norte, Alcaldía Benito Juárez, 03103, Mexico City, Mexico.
[2] 603 U.S. 204 (2024).
[3] Id. at 226–27 ("Confining ourselves to the question presented, we hold only that the bankruptcy code does not authorize a release and injunction that, as part of a plan of reorganization under Chapter 11, effectively seeks to discharge claims against a nondebtor without the consent of affected claimants.").
[4] See, e.g., Joshua Kieran-Glennon, Restructuring Update: Third-Party Releases after Purdue Pharma – Solutions in Irish Law, McCann FitzGerald (Nov. 7, 2024), available at https://perma.cc/HR72-YR79; Michelle McGreal, Douglas Deutsch, & Robert Johnson, Purdue Pharma Bankruptcy Ruling Sidesteps Chapter 15 Implications, Bloomberg (July 10, 2024), available at https://perma.cc/5U5G-CXBF.

ruling, this Court held that such an order is permissible after Purdue and granted enforcement of a Mexican plan containing such releases.

Section 1501 of title 11 of the United States Code (the "Bankruptcy Code") describes the "purpose and scope of application" of chapter 15.[5] When it enacted chapter 15, Congress sought to facilitate cooperation between the courts of the United States and the courts of foreign countries in cross-border insolvency cases and to empower a court exercising bankruptcy jurisdiction to render assistance to the foreign court.[6]

In this case, Robert Wagstaff, the foreign representative (the "Foreign Representative") of Crédito Real, S.A.B. de C.V., SOFOM, E.N.R. (the "Chapter 15 Debtor"), petitioned for entry of an order recognizing the Chapter 15 Debtor's Mexican bankruptcy case (the "Mexican Prepack Proceeding") as a foreign main proceeding.[7] That request was unopposed.

The Foreign Representative also asked this Court to render assistance to the Mexican court by recognizing and enforcing the plan that the Mexican court

[5] 11 U.S.C. § 1501.
[6] Id.; see also In re ABC Learning Ctrs. Ltd., 728 F.3d 301, 304–05 (3d Cir. 2013) (examining Congress's purpose in enacting chapter 15 and explaining the objectives of the legislation); In re Irish Bank Resol. Corp., No. 13-12159 (CSS), 2014 WL 9953792, at *9–10 (Bankr. D. Del. Apr. 30, 2014), aff'd, 538 B.R. 692 (D. Del. 2015).
[7] Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant to 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521 (the "Verified Petition") [D.I. 2].

approved. The parties refer to that plan as the Concurso Plan[8] and the order approving it as the Concurso Order.[9]

The United States International Development Finance Corporation (the "DFC") opposed this relief, arguing that the nonconsensual third-party releases contained in the Concurso Plan are not authorized under chapter 15 and would be "manifestly contrary to the public policy of the United States."[10] This Court overruled that objection and entered its Order Granting (I) Recognition of Foreign Main Proceeding, (II) Full Force and Effect to Concurso Plan and Certain Related Relief (the "Recognition Order").[11] On March 25, 2024, the DFC filed its notice of appeal.[12] This is the Court's written opinion in support of the Recognition Order.[13]

---

[8] Foreign Rep. Ex 7.
[9] Foreign Rep. Ex. 8.
[10] 11 U.S.C. § 1506.
[11] D.I. 51.
[12] D.I. 58.
[13] See Del. Bankr. L.R. 8003-2 ("Any bankruptcy Judge whose order is the subject of an appeal may file a written opinion that supports the order being appealed or that supplements any earlier written opinion or recorded oral bench ruling or opinion within 7 days after the filing date of the notice of appeal.").

I. Background[14]

The Chapter 15 Debtor was one of Mexico's largest non-bank financial lending institutions.[15] Its customers were located predominantly in Mexico, elsewhere in Latin America, and in the United States.[16] It is a Mexican company, and it held or holds direct or indirect equity interests in entities located in Mexico, the United States, Honduras, Panama, Turks and Caicos, Costa Rica, Nicaragua, Guatemala, and El Salvador.[17]

In 2021, amid a liquidity crisis, the Chapter 15 Debtor began discussions with its key creditors on a restructuring.[18] These negotiations failed, and in June 2022, an ad hoc group of unsecured creditors (the "Ad Hoc Group") filed an

[14] This background section is based on the (i) Verified Petition;, (ii) the Declaration of Juan Pablo Estrada Michel Pursuant to 28 U.S.C. § 1746 in Support of the Petitioner's Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant to 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521 (the "Estrada Dec.") [D.I. 3] (Foreign Rep. Ex. 2); and (iii) the Supplemental Declaration of Juan Pablo Estrada Michel Pursuant to 28 U.S.C. § 1746 in Support of the Petitioner's Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant to 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521 (the "Estrada Supp. Dec.") [D.I. 41] (Foreign Rep. Ex. 11). The Verified Petition, Estrada Dec., and Estrada Supp. Dec. were admitted without objection. Messrs. Wagstaff and Estrada were not cross-examined.
[15] Verified Petition ¶ 1.
[16] Id.
[17] Id. ¶ 4.
[18] Id. ¶ 11.

involuntary chapter 11 petition against the Chapter 15 Debtor (the "Involuntary Chapter 11 Case").[19]

On June 28, 2022, one of the Chapter 15 Debtor's shareholders commenced a liquidation proceeding in the 52nd Civil State Court of Mexico City, Mexico (the "Mexican Liquidation Proceeding").[20] The court appointed Fernando Alonso-de-Florida Rivero as judicial liquidator (the "Mexican Liquidator").[21]

Then, on July 14, 2022, the Foreign Representative filed a petition under chapter 15 in this Court (the "Prior Chapter 15 Case"), along with a petition for recognition of the Mexican Liquidation Proceeding as a foreign main proceeding.[22]

Following these events, the Chapter 15 Debtor, the Mexican Liquidator, the Foreign Representative, and the Ad Hoc Group adjourned pending disputed matters in the Involuntary Chapter 11 Case and the Prior Chapter 15 Case to pursue settlement discussions.[23] These negotiations succeeded, and the Chapter 15 Debtor, the Mexican Liquidator, and the Ad Hoc Group entered into a restructuring support agreement (the "RSA") to implement a global restructuring of the Chapter 15 Debtor's assets and liabilities.[24] It was under the terms of the RSA that the Mexican

[19] Id. ¶ 12; In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R., Case No. 22-10696 (TMH) (formerly Case No. 22-10842 (DSJ) in the United States Bankruptcy Court for the Southern District of New York).
[20] Id. ¶ 13.
[21] Estrada Dec. ¶ 48.
[22] Verified Petition ¶ 14; In re Crédito Real, S.A.B. de C.V., SOFOM, E.N.R., Case No. 22-10630 (TMH).
[23] Verified Petition ¶ 15.
[24] Id. ¶ 20; Foreign Rep. Ex. 9.

Liquidator commenced the Mexican Prepack Proceeding.[25] The parties agreed that that Foreign Representative would seek recognition here of the Mexican Prepack Proceeding as a foreign main proceeding and an order giving full force and effect to the Concurso Plan.[26]

On October 6, 2023, the Chapter 15 Debtor commenced the Mexican Prepack Proceeding at the direction of the Mexican Liquidator by filing a voluntary petition with the Mexican court.[27] On November 13, 2023, the Mexican Court issued a judgment officially commencing the conciliation stage of the Mexican Prepack Proceeding (the "Concurso Judgment").[28]

The Concurso Judgment imposed protective measures designed to preserve the Chapter 15 Debtor's estate, including a stay on all enforcement and collection actions against the Chapter 15 Debtor's assets and a prohibition on paying obligations due before the date of the commencement of the Mexican Prepack Proceeding.[29] Miguel Escamilla Villa was appointed as the Conciliator[30] of the Mexican Prepack Proceeding.[31] The Concurso Judgment was served on creditors and other parties through publication in a nationwide newspaper and in the Official Journal of the Federation; additionally, a summary of the judgement was registered

---

[25] Verified Petition ¶ 20.
[26] Id.
[27] Id. ¶ 21; Foreign Rep. Ex. 4.
[28] Foreign. Rep. Ex. 5.
[29] Estrada Dec. ¶ 55.
[30] Under Mexican bankruptcy law, the court appoints the Conciliator to work with the debtor and its recognized creditors on an agreement about the debtor's restructuring. See id. ¶ 29 for a description of the role of the Conciliator.
[31] Id. ¶ 56.

in the Public Registry of Commerce to ensure that all interested parties, including foreign creditors, were adequately informed.[32]

On March 20, 2024, the Mexican Court issued a judgment of recognition that confirmed the ranking and classification of all the creditors' claims (the "Recognition Judgment").[33]

On May 21, 2024, the Concurso Plan was presented to the creditors recognized under the Recognition Judgment, and on July 1, 2024, with the consent of the majority of the recognized creditors, the Conciliator formally submitted the plan to the Mexican Court.[34] On August 15, 2024, the Mexican Court issued the Concurso Order overruling all objections to the Concurso Plan and finding that the Concurso Plan satisfied all of the requirements of the Mexican Bankruptcy Law and did not violate Mexican public policy.[35] The Concurso Plan received support representing 56.55% of the aggregate outstanding unsecured claims.[36]

The Concurso Plan is consistent with the terms of the RSA and provides for the repayment of creditors who are located in the United States.[37] It establishes the creation of a special purpose vehicle through a Mexican trust, to which almost all of

---

[32] Id. ¶ 57.
[33] Id. ¶ 58; Foreign Rep. Ex. 6.
[34] Estrada Dec. ¶ 60.
[35] Id. ¶ 61; see also Ley de Concursos Mercantiles [LCM] (Bankruptcy Law) art. 64, Diario Oficial de la Federación [DOF] 12-5-2000, últimas reformas DOF 14-1-2014 (Mex.) (establishing the requirements for a plan to obtain approval under Mexican Bankruptcy Law).
[36] Estrada Dec. ¶ 62.
[37] Id. ¶ 63.

the Chapter 15 Debtor's remaining assets will be transferred.[38] Upon the monetization, sale, or assignment of such assets, the corresponding proceeds will be distributed according to the priority scheme set forth in the Mexican Bankruptcy Law, *pari passu* and *pro rata* among unsecured creditors.[39] Upon the distribution, the unsecured claims will be cancelled or extinguished in accordance with the Concurso Plan.[40]

Clause 16 of the Concurso Plan contains exculpatory provisions that shield certain parties who played roles in the negotiation and implementation of the Chapter 15 Debtor's restructuring process, including the Ad Hoc Group, the Mexican Liquidator, the Chapter 15 Debtor's former directors and officers, the Indenture Trustee, and certain related parties (the "Release").[41] These parties are exculpated for any actions or inactions taken during the restructuring process prior to the creditors' formal acceptance of the plan, subject to the Concurso Plan's carve-outs and exceptions.[42] Specifically, the Concurso Plan provides:

> In any event, [the Chapter 15 Debtor] and the Recognized Creditors agree not to bring any action, complaint, suit or claim, as the case may be, against the Participating Recognized Creditors nor [the Chapter 15 Debtor], respectively, as well as their shareholders, its former general manager Felipe Guelfi Regules, liquidator, directors, officers, secretaries, depositaries and officers, and The Bank of New Mellon, as trustee for [the Chapter 15 Debtor]'s foreign-denominated bonds denominated in U.S. dollars, legal tender in the United States of America, and euros, legal tender in the European Union as the case may be, for any act or omission incurred by them during the Bankruptcy

[38] Id.
[39] Id.
[40] Id.
[41] Id. ¶ 66; Concurso Plan, Clause 16.
[42] Concurso Plan, Clause 16.

> Proceeding and at any time prior to the execution of this Agreement, except for actions, complaints, claims or demands, as the case may be, for acts or omissions of [the Chapter 15 Debtor] that have caused damage or impairment to the Bankruptcy Estate and that they have failed to declare or disclose to the Participating Recognized Creditors during the negotiations of this Settlement Agreement and up to the date of its execution.[43]

As written, the Release is customary in Mexican settlement agreements and is permitted under Mexican Bankruptcy Law.[44] Under the Concurso Order, the Mexican Court determined that the Concurso Plan and the Release are consistent with Mexican Bankruptcy Law and not in violation of the public or individual interest of any specific creditor.[45] The Concurso Order has not been subject to a stay in Mexico, so it remains in effect and is enforceable under Mexican law.[46]

The DFC was an active participant in the Mexican Prepack Proceeding.[47] It filed a proof of claim and objected to the approval of the Concurso Plan on grounds that were unrelated to the Release.[48] On November 21, 2024, the DFC appealed the Concurso Order, challenging, among other things, the Release.[49] On December 10, 2024, the Ad Hoc Group, the Chapter 15 Debtor, and the Conciliator each filed a reply to the DFC's appeal.[50] In their respective briefs, the Chapter 15 Debtor and Ad Hoc Group argued that the Release does not violate Mexican Bankruptcy Law,

---

[43] Concurso Plan Clause 16.
[44] See Estrada Supp. Dec. ¶ 17.
[45] Id. ¶ 25.
[46] Id.
[47] Id. ¶ 22.
[48] Id. ¶¶ 23–24.
[49] Id. ¶ 26.
[50] Id. ¶ 27.

and they defended the propriety of the Release.[51] The DFC appeal remains pending.[52]

On February 7, 2025, the Foreign Representative filed the Verified Petition, commencing this chapter 15 case and seeking entry of an order recognizing the Mexican Prepack Proceeding and enforcing the Concurso Plan and Concurso Order. The DFC objected.[53]

On March 11, 2025, this Court conducted an evidentiary hearing to consider the Verified Petition and concluded that it possessed the power to grant (i) recognition to the Mexican Prepack Proceeding as a foreign main proceeding, and (ii) comity and full force and effect to the Concurso Plan. The Court accordingly entered the Recognition Order.[54]

II. The DFC Objection

In the DFC Objection, the DFC argued that the Concurso Plan cannot be recognized in its current form because the Release is not authorized under Bankruptcy Code sections 1507 and 1521.

It contends that Bankruptcy Code section 1521(a) does not include third-party releases as relief available to a foreign debtor. Specifically, the DFC argues

---

[51] Id.
[52] Id. ⁋ 23.
[53] See Objection of United States International Development Finance Corporation to Verified Petition for Recognition of Foreign Main Proceeding and Motion for Order Granting Full Force and Effect to the Concurso Plan and Related Relief Pursuant To 11 U.S.C. §§ 105, 1507(a), 1509(b), 1515, 1517, 1520 and 1521 (the "DFC Objection") [D.I. 30].
[54] Following entry of the Recognition Order, this Court entered orders dismissing the Involuntary Chapter 11 Case and the Prior Chapter 15 Case.

that the term “any appropriate relief” used in that section refers to relief available under the Bankruptcy Code. The DFC contends that non-consensual third-party releases are not available. Relatedly, it contends that Bankruptcy Code section 1507, which provides that a U.S. court may grant “additional assistance” to a foreign representative, also does not provide for such relief.

The DFC posits that the Foreign Representative wrongly relies on the catchall provisions of Bankruptcy Code section 1521(a)(7) and 1507 to justify enforcement of the Concurso Plan. In so doing, it points to Purdue. However, the DFC does not argue that Purdue’s refusal to approve a non-consensual third-party release in that chapter 11 case means that such a release cannot be available in chapter 15. Instead, the DFC argues that Purdue offers a framework for thinking about statutory interpretation that means this Court lacks authority to order enforcement of the Release.

The DFC contends that this Court should read the catchall provisions of Bankruptcy Code sections 1521(a)(7) and 1507 in the same way the Purdue Court read Bankruptcy Code section 1123(b)(6), and therefore conclude that catchall provisions like these are limiting provisions that provide no authority for enforcement of the Release.

The DFC also argues that the Release is “manifestly contrary to the public policy of the United States” as provided in Bankruptcy Code section 1506.

III. Discussion

This is a core proceeding under 28 U.S.C. § 157(b)(2)(P) because it involves "matters under chapter 15 of title 11." The DFC did not contest that recognition of the Mexican Prepack Proceeding under Bankruptcy Code section 1517 was appropriate, and this Court entered an order granting recognition of the Mexican Prepack Proceeding as a foreign main proceeding. As a consequence of that recognition, this Court "shall grant comity or cooperation to the [F]oreign [R]epresentative."[55]

Chapter 15 begins with a policy statement. Section 1501, which is titled "Purpose and scope of application," provides:

> (a) The purpose of this chapter is to incorporate the Model Law on Cross-Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of—
>
> (1) cooperation between—
>
> (A) courts of the United States, United States trustees, trustees, examiners, debtors, and debtors in possession; and
>
> (B) the courts and other competent authorities of foreign countries involved in cross-border insolvency cases;
>
> (2) greater legal certainty for trade and investment;
>
> (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor;
>
> (4) protection and maximization of the value of the debtor's assets; and

[55] 11 U.S.C. § 1509(b)(3) (directing a court to grant comity if it has granted recognition under section 1517 and subject to any limitations consistent with the policy of chapter 15).

> (5) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.[56]

No other chapter of the Bankruptcy Code sets forth a similar statement about its purpose. The inclusion of this policy statement in section 1501 highlights that the Court should be guided by the main policy goals of chapter 15—cooperation and comity with foreign courts and deference to those courts within the confines established by chapter 15.

The importance of comity is reinforced in section 1507(b), which instructs that the provision of "additional relief" be "consistent with the principles of comity . . . ."[57] It is then further emphasized in section 1509(b)(3), which provides that when a U.S. court grants recognition of a foreign proceeding under Bankruptcy Code

---

[56] 11 U.S.C. § 1501(a). The language of this section closely tracks the Preamble of the UNCITRAL Model Law of Cross-Border Insolvency, which provides that:

> The purpose of this Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:
>
> > (a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
> >
> > (b) Greater legal certainty for trade and investment;
> >
> > (c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
> >
> > (d) Protection and maximization of the value of the debtor's assets; and
> >
> > (e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

[57] 11 U.S.C. § 1507(b).

section 1517, it "shall grant comity or cooperation to the foreign representative."[58] Therefore, in deciding the issues presented here, this Court is mindful of the context in which it operates and considers the centrality of cooperation and comity in reaching its decision.

Upon recognition of a foreign main proceeding, the Court has broad discretion to order enforcement of orders entered in a foreign main proceeding, consistent with the guiding principles of comity.[59] These principles of comity are particularly compelling in the bankruptcy context, where "American courts have long recognized the need to extend comity to foreign bankruptcy proceedings, because the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding; if all creditors could not be bound, a plan of reorganization would fail."[60] Therefore, when considering whether to

---

[58] 11 U.S.C. § 1509(b)(3).

[59] See In re Energy Coal S.P.A., 582 B.R. 619, 626–27 (Bankr. D. Del. 2018) (quoting In re Daebo Int'l Shipping Co., 543 B.R. 47, 52–53 (Bankr. S.D.N.Y. 2015)) (explaining that the Bankruptcy Code gives courts "broad discretion" and instructs them to be "guided by principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief"); In re Grant Forest Prods., Inc., 440 B.R. 616, 621 (Bankr. D. Del. 2010) (stating that this broad power is designed to promote cooperation between U.S. courts and foreign courts in cross-border insolvency cases); In re Elpida Memory, Inc., No. 12-10947 CSS, 2012 WL 6090194, at *7–8 (Bankr. D. Del. Nov. 20, 2012) (reiterating the broad discretion certain sections of chapter 15 accord, consistent with principles of comity). See generally Hilton v. Guyot, 159 U.S. 113, 164 (1895) (defining comity as the "recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protections of its laws").

[60] In re Energy Coal S.P.A., 582 B.R. at 627 (quoting In re Atlas Shipping A/S, 404 B.R. 726, 733 (Bankr. S.D.N.Y. 2009)) (internal quotation marks and alterations omitted). See generally In re ABC Learning Ctrs. Ltd., 728 F.3d at 304–07

enforce an order entered in a foreign main proceeding, U.S. bankruptcy courts should aim to maximize assistance to the foreign court conducting the foreign main proceeding.[61]

Two provisions through which a U.S. bankruptcy court may enforce orders entered in a foreign main proceeding are Bankruptcy Code sections 1521(a) and 1507. The Foreign Representative asked that this Court enforce the Concurso Plan under those sections. Section 1521(a) empowers bankruptcy courts to grant appropriate relief, whereas section 1507 empowers bankruptcy courts to provide additional assistance.

However, Bankruptcy Code section 1521(a)'s and 1507's broad grants of discretion are limited in multiple ways. A main limitation on the court's discretion under these sections is Bankruptcy Code section 1506. That section provides that the court may "refus[e] to take an action governed by [chapter 15] if the action would be manifestly contrary to the public policy of the United States."[62] Refusing to take an action under Bankruptcy Code section 1506 is an extraordinary act. That section should be "narrowly interpreted, as the word 'manifestly' in international

(discussing the origins of chapter 15 and emphasizing the role of comity in bankruptcy proceedings).

[61] See In re ABC Learning Ctrs. Ltd., 728 F.3d at 306 (explaining that chapter 15 directs U.S. courts to act "in aid of the main proceedings, in preference to a system of full bankruptcies . . . in each state where assets are found" (quoting H.R. Rep. No. 109–31(1), at 109 (2005) reprinted in 2005 U.S.C.C.A.N. 88, 171)).

[62] 11 U.S.C. § 1506.

usage restricts the public policy exception to the most fundamental policies of the United States."[63] As a consequence, that authority rarely is exercised.[64]

Under Bankruptcy Code section 1506, the Court's discretion to enforce orders of a foreign court is circumscribed by fundamental policies of fairness. Since before the enactment of chapter 15, for a U.S. bankruptcy court to enforce an order of a foreign court in an insolvency proceeding, courts have required that the foreign proceeding afford litigants the same fundamental protections that they would have received in a U.S. court.[65] Relief that is granted in a foreign proceeding does not

---

[63] In re Ephedra Prods. Liab. Litig., 349 B.R. 336 (S.D.N.Y. 2006) (citing H.R. Rep. No. 109–31(I) at 109, reprinted in 2005 U.S.C.C.A.N. 88, 172).

[64] See In re PT Bakrie Telecom Tbk, 628 B.R. 859, 890–91 (Bankr. S.D.N.Y. 2021) (reading the public policy exception narrowly because the word "manifestly" restricts it to the "most fundamental" U.S. policies and finding that, prior to Purdue, non-consensual third-party releases were not manifestly contrary to U.S. public policy); In re Sino-Forest Corp., 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013) (emphasizing that courts should construe this section narrowly and finding that, prior to Purdue, non-consensual third-party releases were not manifestly contrary to U.S. public policy); In re Metcalfe & Mansfield Alternative Invs., 421 B.R. 685, 697 (Bankr. S.D.N.Y. 2010) (construing the section narrowly and finding that, prior to Purdue, U.S. bankruptcy courts could enforce non-consensual third-party releases because they were not manifestly contrary to U.S. public policy). Compare In re Rede Energia S.A., 515 B.R. 69, 98 (Bankr. S.D.N.Y. 2014) (stating that section 1506 should be construed narrowly and used sparingly and finding that to enact the Brazilian plan would not be manifestly contrary to the public policies of the United States because "Brazilian bankruptcy law meets our fundamental standards of fairness and accords with the course of civilized jurisprudence"), with In re Toft, 453 B.R. 186, 198 (Bankr. S.D.N.Y. 2011) (finding that while a difference in U.S. law from the foreign law does not necessarily preclude enforcement under chapter 15, the plan component at issue was affirmatively banned under U.S. law, enforcement would subject the enforcer to criminal liability, and enforcement would directly compromise privacy rights established in a comprehensive statutory scheme and based on constitutional rights).

[65] Courts are divided on the statutory source of this limitation, but they agree that it is a central tenet of whether to afford foreign orders comity in insolvency proceedings, and it has remained so throughout multiple iterations of the

have to be identical to relief that might be available in a U.S. proceeding.[66] Instead, the cases teach that we should look to the fairness of the foreign proceeding.[67]

Bankruptcy Code and the U.S. bankruptcy system itself. See Vertiv, Inc. v. Wayne Burt PTE, Ltd., 92 F.4th 169, 180 (3d Cir. 2024) (holding that a court should examine the foreign proceeding's fairness pursuant to principles of comity); In re Irish Bank Resol. Corp., 2014 WL 9953792 at *18 (explaining that a court must examine the procedural fairness of the foreign proceedings pursuant to the public policy exception of section 1506); In re PT Bakrie Telecom Tbk, 628 B.R. at 884 (clarifying that the considerations of fairness a court must examine in its determination of whether to enforce an order of a foreign court overlap with the considerations of Bankruptcy Code sections 1521 and 1507, all combining to "assure the just treatment and protection against prejudice of claim holders in the United States through adequate procedural protections"); In re Rede Energia S.A., 515 B.R. at 90 (holding that Bankruptcy Code section 1507 establishes the fairness considerations that courts must examine in determining whether to grant comity to a foreign court's order); In re Sino-Forest Corp., 501 B.R. at 662–63 (emphasizing the importance of ensuring fairness in the foreign proceeding when determining whether to grant a foreign order comity under chapter 15); In re Atlas Shipping A/S, 404 B.R. at 733 (explaining that before Congress enacted chapter 15, Bankruptcy Code section 304 required bankruptcy courts, when considering whether to enforce foreign orders, to determine that such enforcement would not prejudice the rights of U.S. citizens); Phila. Gear Corp. v. Phila. Gear de Mex., S.A., 44 F.3d 187, 193–94 (3d Cir. 1994) (directing the District Court, in determining whether to grant comity to a Mexican proceeding, to make findings on certain considerations of fairness, including whether the Mexican court was a duly authorized tribunal, whether the plan provided for equal treatment of creditors, whether recognition would be inimical to the U.S. policy of equality, and whether the U.S. creditor would be prejudiced); Canada S. Ry. Co. v. Gebhard, 109 U.S. 527, 536 (1883) (considering whether to afford comity to a Canadian insolvency plan and determining that the Canadian proceedings did not deprive creditors of their property without due process of law).

[66] In re Metcalfe, 421 B.R. at 697 (explaining that enforcement of relief in a foreign plan does not require identical relief to be available in the United States); In re Toft, 453 B.R. at 198 (emphasizing that the mere fact that U.S. law differs from the law of the foreign main proceeding does not preclude enforcement as "manifestly contrary" to U.S. public policy).

[67] See In re Elpida Memory, Inc., 2012 WL 6090194, at *7–8 (explaining that comity is limited to instances where U.S. parties are provided the same fundamental protections that litigants in the United States would receive and finding that Bankruptcy Code section 1520(a) requires U.S. Bankruptcy Courts to apply the standard for a sale of assets under Bankruptcy Code section 363 to comport with

Therefore, as a matter of comity, if the forum of the foreign proceeding offers "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting," the judgment should be enforced.[68]

---

this limitation); In re Agrokor d.d., 591 B.R. 163, 184 (Bankr. S.D.N.Y. 2018) (construing section 1506 to allow deference to the foreign court so long as the foreign proceedings are procedurally fair and not manifestly contrary to U.S. public policy); In re Atlas Shipping A/S, 404 B.R. at 733 ("Federal courts generally extend comity whenever the foreign court had proper jurisdiction and enforcement does not prejudice the rights of United States citizens or violate domestic public policy.").

[68] Hilton v. Guyot, 159 U.S. 113, 202–03 (1895); accord In re Metcalfe, 421 B.R. at 698; see also In re Elpida Memory, Inc., 2012 WL 6090194, at *7 (requiring, for enforcement of the foreign plan, that the foreign proceeding afford the litigants the same fundamental protections that they would receive in the United States); In re PT Bakrie Telecom Tbk, 628 B.R. at 878–79 (looking to Hilton and other cases for factors of fairness in determining whether to grant comity). In examining the procedural fairness of a foreign main proceeding, courts have also looked at:

> (1) whether creditors of the same class are treated equally in the distribution of assets; (2) whether the liquidators are considered fiduciaries and are held accountable to the court; (3) whether creditors have the right to submit claims which, if denied, can be submitted to a bankruptcy court for adjudication; (4) whether the liquidators are required to give notice to the debtors' potential claimants; (5) whether there are provisions for creditors' meetings; (6) whether a foreign country's insolvency laws favor its own citizens; (7) whether all assets are marshalled before one body for centralized distribution; and (8) whether there are provisions for an automatic stay and for the lifting of such stays to facilitate the centralization of claims.

Vertiv, Inc. v. Wayne Burt PTE, Ltd., 92 F.4th at 181 (internal alterations omitted); accord In re PT Bakrie Telecom Tbk, 628 B.R. at 879 (quoting Allstate Life Ins. v. Linter Grp., 994 F.2d 996, 999 (2d Cir. 1993)); In re Sino-Forest Corp., 501 B.R. at

A. Statutory Interpretation of Bankruptcy Code Sections 1521(a) and 1507

The DFC argues that the Supreme Court's analysis of Bankruptcy Code section 1123(b) in Purdue changes the way courts should interpret sections 1521(a) and 1507. It does not.

This section begins by recounting the DFC's argument in further detail. Next, it examines the plain meaning of the language in Bankruptcy Code sections 1521(a) and 1507. Then, it analyzes congressional intent through canons of statutory construction to confirm the plain meaning interpretation. As it proceeds through the plain language analysis and then the canons of construction analysis, it also compares the conclusions derived from sections 1521(a) and 1507 to section 1123(b)(6) and the conclusions the Supreme Court derived from that section. Because the power to enforce the Concurso Plan and the Concurso Order may only derive from Bankruptcy Code sections 1521(a)(7) or 1507(a) (the "Chapter 15 Catchalls"), the focus of this analysis is on those subsections.

The DFC specifically argues that the Chapter 15 Catchalls are analogous to the catchall provision of Bankruptcy Code section 1123(b)(6), so the Court should interpret them all the same way.[69] Section 1123(b) enumerates certain relief that a chapter 11 plan may provide. Subsection (6)—or, as the Supreme Court refers to it in Purdue, the "catchall"—provides that a chapter 11 plan may "include any other

662–63 (quoting Finanz AG Zurich v. Banco Economico S.A., 192 F.3d 240, 249 (2d Cir. 1999)).

[69] DFC Objection at 4.

appropriate provision not inconsistent with the applicable provisions of this title."[70] The Purdue Court held that subsection (6) does not allow a chapter 11 plan to include nonconsensual third-party releases when interpreted in light of its surrounding context pursuant to the statutory canon of *ejusdem generis*.[71] It explained that the other provisions in section 1123(b) authorized relief that concerns the debtor, its rights and responsibilities, and its relationship with its creditors.[72] Because none of the other provisions in section 1123(b) consider a third-party's relationship with a creditor, the Supreme Court explained, subsection (6) must be interpreted in that context and should not extend to govern a third-party's relationship with a creditor by granting nonconsensual third-party releases.[73]

The DFC urges this Court to apply a similar analysis to sections 1521(a)(7) and 1507(a). It asserts that because those subsections are catchalls, like section 1123(b)(6), and because neither section 1521(a) nor 1507 discusses third-party relationships, then the Chapter 15 Catchalls should not extend to allow nonconsensual third-party releases. Neither the plain language nor canons of statutory interpretation support the DFC's arguments.

In determining how to interpret sections 1521(a) and 1507, "[o]ur interpretation . . . starts 'where all such inquiries must begin: with the language of

[70] 11 U.S.C. 1123(b)(6).
[71] Purdue, 603 U.S. at 217–18.
[72] Id. at 218.
[73] Id.

the statute itself.'"[74] If the text of the statute is unambiguous, we construe it according to its plain meaning.[75] If it is ambiguous, then we turn to legislative history and the canons of construction to determine congressional intent in enacting the statute.[76] However, "[i]n any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation[.]"[77]

Section 1521, subsection (a) provides:

> 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—
>
> (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights,

---

[74] Ransom v. FIA Card Services, N.A., 562 U.S. 61, 69 (2011) (quoting United States v. Ron Pair Enters., 489 U.S. 235, 241 (1989)); see also In re Phila. Newspapers, LLC, 599 F.3d 298, 304 (3d Cir. 2010), as amended (May 7, 2010) ("It is the cardinal canon of statutory interpretation that a court must begin with the statutory language.").

[75] See Jensen v. Pressler & Pressler, 791 F.3d 413, 418 (3d Cir. 2015) ("Our interpretive task begins and ends with the text of the statute unless the text is ambiguous or does not reveal congressional intent with sufficient precision to resolve our inquiry." (internal quotations omitted)); Conn. Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."); In re Smale, 390 B.R. 111, 113 (Bankr. D. Del. 2008) ("[T]he starting point is to examine the plain meaning of the text of the statute. . . . '[W]hen a statute's language is plain, the sole function of the courts, at least where the disposition by the text is not absurd, is to enforce it according to its terms.'" (quoting Hartford Underwriters Ins. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000))).

[76] See In re WW Warehouse, Inc., 313 B.R. 588, 591 (Bankr. D. Del. 2004) ("If, after a studied examination of the statutory context, the natural reading of a provision remains elusive, the statute is ambiguous and the Court must seek guidance beyond the statutory text." (internal quotations omitted)); In re Smale, 390 B.R. at 114 ("[A]pplying the plain meaning of the statute is the default entrance—not the mandatory exit.").

[77] Conn. Nat'l Bank v. Germain, 503 U.S. at 253.

obligations or liabilities to the extent they have not been stayed under section 1520(a);

(2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);

(3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);

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

(5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;

(6) extending relief granted under section 1519(a); and

(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).[78]

Meanwhile, section 1507 provides:

(a) Subject to the specific limitations stated elsewhere in this chapter the court, if recognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.

(b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—

(1) just treatment of all holders of claims against or interests in the debtor's property;

[78] 11 U.S.C. § 1521(a).

> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
>
> (3) prevention of preferential or fraudulent dispositions of property of the debtor;
>
> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
>
> (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.[79]

The plain language of the two sections demonstrates that the DFC's interpretation is incorrect for multiple reasons. Beginning with section 1521, subsection (a) enumerates some relief that a bankruptcy court may grant at the request of a foreign representative. However, the section begins by explaining the court may grant "any" appropriate relief. Even though that statement is followed by a list of some relief a court may grant, the word "including" indicates that the enumerated relief is not a complete and exclusive list. Congress expressly addresses the term "including" at Bankruptcy Code section 102(3), providing that the word "'includes' and 'including' are not limiting."[80] This definition codifies the rule of statutory construction that the terms "includes" and "including" are illustrative, and not exclusive or limiting.[81]

---

[79] 11 U.S.C. § 1507.
[80] 11 U.S.C. § 102(3).
[81] See, e.g., Am. Sur. Co. v. Marotta, 287 U.S. 513, 517 (1933) (overruling lower court that found the word "includes" in section 1(9) of the Bankruptcy Act of 1898 to be one of limitation); Friedman v. P+P, LLC (In re Friedman), 466 B.R. 471, 482, n.20 (B.A.P. 9th Cir. 2012) (explaining and providing sources to support the proposition that "including" is not a word of limitation).

It is true that when comparing this "any . . . including" language to that in section 1123(b), they are, at first blush, similar. Section 1521(a) allows a bankruptcy court to "grant any appropriate relief, including . . . any additional relief" while section 1123(b) allows a plan to "include any other appropriate provision." But the critical difference lies in the language that qualifies "any . . . including" in each section.

Section 1521(a) qualifies that language by explaining that any additional relief a court grants should be of the kind that is available to a trustee,[82] and then lists relief that a court should not grant. It is well-settled that enforcement of a third-party release contained in a foreign plan is appropriate under that section.[83]

Meanwhile, section 1123(b) simply states that a court may include any "other" chapter 11 plan provision that is not "inconsistent with the applicable provisions of this title." In Purdue, the Supreme Court explained that the word "other" directs courts to look to the other provisions in section 1123(b) to determine what further relief a court could grant.[84] By looking at section 1123(b)(1)–(5), the Supreme Court thus concludes that subsection (6) should only grant similar relief, as in relief that concerns the debtor and its rights, responsibilities, and

[82] The term "trustee" is defined in chapter 15 as "includ[ing] a trustee [and] a debtor in possession in a case under any chapter of this title . . . ." 11 U.S.C. § 1502(6).
[83] See, e.g., In re Arctic Glacier Int'l, Inc., 901 F.3d 162 (3d Cir. 2018) (enforcing third party releases in a Canadian plan of arrangement); In re Avanti Commc'ns Grp. PLC, 582 B.R. at 618 (finding that it had the power to enforce third-party releases under either section 1521(a)(7) or section 1507(a)).
[84] Purdue, 603 U.S. at 218.

relationships.[85] However, section 1521(a) does not direct courts to look to the "other" provisions when providing relief under its catchall.[86] Instead, section 1521(a) allows courts to grant "any additional relief that may be available to a trustee."[87] Accordingly, section 1521(a) does not direct courts to limit its relief to the kind afforded in other provisions, but rather, to relief available to a trustee. Because the relief in question would be available to a trustee, it is permissible under section 1521(a)(7).

Second, section 1521(a)(7) qualifies its "any . . . including" language by listing specific relief that a court is not permitted to grant under that section.[88] That list of prohibited relief does not include nonconsensual third-party releases.[89] By establishing explicit boundaries, Congress allowed relief that does not exceed those boundaries.

On the other hand, in section 1123(b), rather than provide specific prohibited relief, Congress directs courts to look to the whole of the Bankruptcy Code to determine if the requested provision is consistent with it. In Purdue, the Supreme Court framed this section as one that "set[s] out a detailed list of powers, followed by a catchall."[90] It explained, "Congress could have said in [section 1123(b)](6) that 'everything not expressly prohibited is permitted[]'" but instead limited it to "any

[85] Id. at 218–19.
[86] 11 U.S.C. § 1521(a)(7).
[87] Id.
[88] 11 U.S.C. § 1521(a)(7) ("except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)").
[89] Id.
[90] Purdue, 603 U.S. at 218.

other appropriate provision not inconsistent with the applicable provisions of this title."[91] In comparison, in section 1521(a)(7), Congress did expressly enumerate what it wanted to prohibit; in a chapter 15 case, a court cannot grant relief under sections 522, 544, 545, 547, 548, 550, and 724(a). By specifically enumerating relief that the court cannot grant under section 1521, Congress more concretely defined the outer bounds of what the court can grant, thus also more concretely defining what is included in what the court can grant, bearing in mind the guiding principles of comity and cooperation.

Briefly turning to a canon of statutory construction before moving onto examining the plain language of section 1507, the canon of *expressio unius* confirms this reading of the express prohibitions established in section 1521(a)(7). "*Expressio unius est exclusio alterius*" stands for the proposition that the expression of one thing means the exclusion of another.[92] By establishing a list of relief that courts should not grant under section 1521(a)(7), the section implies that other forms of relief not expressly prohibited are permitted. Therefore, enforcing foreign orders providing for nonconsensual third-party releases is within the scope of authority that section 1521(a) provides.

Section 1507 similarly affords courts a broad grant of authority to provide relief while setting out express limitations. Section 1507 establishes that a court may provide "additional assistance to a foreign representative" if the court has

---

[91] Id.; 11 U.S.C. § 1123(b)(6).
[92] In re Thompson, 217 B.R. 375, 378 n.5 (B.A.P. 2d Cir. 1998).

recognized the proceeding. Notwithstanding that the term "additional assistance" is a broad term at the outset, it also suggests that even if a court cannot grant relief under section 1521(a)(7), it may grant relief under section 1507. Thus, section 1507 implies an even more expansive grant of power than already found in section 1521(a).

However, section 1507 does have limitations. First, it states that any assistance should be "[s]ubject to the specific limitations stated elsewhere in this chapter[.]"[93] Therefore, in determining whether relief may be granted as part of section 1507's "additional assistance," a court should look to the remainder of chapter 15 to guide its decision. Nevertheless, this instruction differs from section 1123(b)(6)'s instruction to look at subsections (1)–(5) to contextualize appropriate relief because chapter 15 covers a broader array of topics than section 1123(b)(1)–(5), which is limited to matters concerning and connected to the debtor. Section 1507's instruction also differs from section 1123(b)(6)'s other instruction that any other provisions not be inconsistent with applicable provisions of "this title" (as in, the Bankruptcy Code). Chapter 15 has a much different purpose and context—mainly to promote comity and international cooperation—thus entailing different limitations when compared to the Bankruptcy Code at large.[94] Accordingly, relief that is appropriate subject to limitations in chapter 15 must be different than relief that is not inconsistent with the applicable provisions of the Bankruptcy Code.

---

[93] 11 U.S.C. § 1507(a).
[94] See 11 U.S.C. § 1501 (establishing the scope and purpose of chapter 15).

Second, section 1507(b) establishes a list of considerations for courts when determining whether to provide such additional assistance. Those factors, like much of chapter 15, focus on whether relief would be "consistent with principles of comity[.]"[95] They direct a court to confirm that any additional assistance would reasonably assure just treatment of creditors, protection of U.S. claim holders against prejudice, prevention of preferential or fraudulent transfers, equitable distribution of assets in accordance with the Bankruptcy Code, and the provision of an opportunity for a fresh start for the debtor.[96]

By adding this list of considerations, Congress again established boundaries for courts in granting relief under chapter 15 and directed courts on how to determine if it is appropriate to grant relief. And again, these express prohibitions provide a more explicit and fuller picture of the broad relief a court may grant, as compared to that in section 1123(b)(6), and they direct a court to focus on principles of comity when considering granting the relief. Because comity is central to chapter 15, the relief granted in the foreign court does not have to be available in U.S. courts under chapter 11.[97] In other words, U.S. courts do not have to reject relief solely because it would be unavailable in the United States. However, there must be metrics to assess whether the proposed relief is appropriate. Section 1507(b) solves that problem by providing these considerations while prioritizing comity to foreign courts.

---

[95] 11 U.S.C. § 1507(b).
[96] Id.
[97] In re Metcalfe, 421 B.R. at 697.

As with section 1521, section 1507 thus differs from section 1123(b) because section 1123(b) does not expressly establish specific boundaries; instead, it directs courts to look to the rest of the Bankruptcy Code to determine whether a provision is appropriate. Because Congress expressed specific prohibitions, courts do not need to read further into its words like they do for section 1123(b).[98] The plain language of section 1507 (and section 1521) already enumerates the boundaries unambiguously.

Here, the Mexican Prepack Proceeding provided all the protections set out in section 1507(b).[99] Therefore, section 1507 allows this Court to enforce the relief entered in the Mexican Prepack Proceeding.

Accordingly, the plain language of both section 1521(a)(7) and section 1507(a) permit a U.S. court to enforce a foreign order for nonconsensual third-party releases. Nevertheless, even if the Chapter 15 Catchalls are ambiguous, the legislative history and canons of statutory construction confirm this interpretation and corresponding Congressional intent.[100]

---

[98] See Kaufman v. Allstate N.J. Ins., 561 F.3d 144, 155 (3d Cir. 2009) ("In interpreting a statute, the Court looks first to the statute's plain meaning and, if the statutory language is clear and unambiguous, the inquiry comes to an end." (citing Conn. Nat'l Bank v. Germain, 503 U.S. at 253–54)).

[99] For a fuller discussion of the fairness of the Mexican proceeding, see infra section B on section 1506's public policy considerations.

[100] Even where the plain language of a statute is ambiguous, courts will often examine the congressional intent to confirm their interpretation, especially for chapter 15 cases. See In re Elpida Memory, Inc., 2012 WL 6090194, at *5 ("[I]n interpreting Chapter 15, 'the court shall consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions.'" (quoting 11 U.S.C. § 1508)); In re Premier Int'l Holdings, Inc., 423 B.R. 58, 63–64 (Bankr. D. Del. 2010)

Congress enacted chapter 15 in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act to "provide effective mechanisms for dealing with cases of cross-border insolvency."[101] The legislative history of chapter 15 shows that a major purpose in its enactment was to promote comity for the orders of foreign courts. In fact, as discussed above, section 1501 explicitly establishes one of its purposes as promoting cooperation between U.S. courts and foreign courts.[102] Further, section 1508 directs courts "[i]n interpreting this chapter, [to] consider its international origin, and the need to promote an application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions."[103] Thus, granting bankruptcy courts the authority to enforce nonconsensual third-party releases originating in foreign courts would promote chapter 15's goals of comity and providing assistance to foreign courts during foreign insolvency proceedings.[104]

Moreover, in examining multinational laws, as chapter 15 directs, nonconsensual third-party releases are widely accepted by foreign courts. Courts have previously looked to multinational laws in interpreting chapter 15 and determining whether certain relief would comport with international insolvency

---

("Moreover, regardless of whether the text is plain or ambiguous, it is appropriate to identify, if possible, a congressional purpose consistent with the Court's interpretation.").

[101] In re ABC Learning Ctrs. Ltd., 728 F.3d at 304.

[102] 11 U.S.C. § 1501.

[103] 11 U.S.C. § 1508.

[104] See In re ABC Learning Ctrs. Ltd., 728 F.3d at 306 (finding that chapter 15 directs courts to act in aid of main proceeding and to maximize assistance).

norms and the UNCITRAL Model Law on Cross-Border Insolvency, on which chapter 15 is based.[105] Other countries recognize nonconsensual third-party releases in insolvency proceedings.[106] Most relevant here, Mexican law provides for such releases.[107] That Mexican law provides for such releases further encourages the authority of this Court to enforce such releases in comity with the Mexican court.

Additionally, the DFC is correct that the sections should be read in their context pursuant to the canon of *ejusdem generis*. The Supreme Court has repeatedly stated that "a 'fundamental canon of statutory construction'[is] that 'the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'"[108] However, the DFC neglects the major differences between the contexts of chapters 11 and 15. Namely, chapter 15 exists to provide assistance to foreign courts by granting comity to their orders.[109] Doing so promotes the purpose of an insolvency proceeding, which is to provide for equitable and

---

[105] See In re Servicos de Petroleo Constellation S.A., 600 B.R. 237, 273–74 (Bankr. S.D.N.Y. 2019) ("[I]t is therefore appropriate for U.S. bankruptcy courts to consider interpretations from other international jurisdictions that have adopted the Model Law." (citing In re Fairfield Sentry Ltd., 714 F.3d 127, 136 (2d Cir. 2013)).
[106] See In re Avanti Commc'ns Grp. PLC, 582 B.R. at 618 (finding such schemes common under United Kingdom law); In re Metcalfe, 421 B.R. at 699 (explaining that a Canadian court had the power to enter such relief).
[107] See supra note 35, 44–46 and accompanying text (explaining that the Mexican court here found the releases to be valid under Mexican law); Ad Hoc Group of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.), 701 F.3d 1031, 1039–40 (5th Cir. 2017) (explaining that a Mexican court approved the releases at issue and that relief available in a foreign court need not be identical to or available under U.S. law).
[108] United States v. Miller, 604 U.S. _, slip op. at 13 (2025) (quoting Davis v. Mich. Dept. of Treasury, 489 U. S. 803, 809 (1989)).
[109] See In re ABC Learning Ctrs. Ltd., 728 F.3d at 306 (explaining courts should "maximize assistance").

orderly distribution of a debtor's assets in a manner that is enforceable across borders.[110]

Of course, a court's ability to enforce a foreign court's order has limitations, but Congress specified such limitations in the Bankruptcy Code. It specified relief that a court cannot grant under section 1521(a)(7).[111] It provided protections to consider before granting relief under section 1507.[112] It established that if such relief is manifestly contrary to public policy or violates a U.S. citizen's fundamental rights or procedural fairness, then it is not available.[113] All these limitations provide boundaries for relief under chapter 15 and ensure that it can have far-reaching consequences, so long as it is within these boundaries.[114] Accordingly, enforcing nonconsensual third-party releases granted in a foreign insolvency proceeding under that country's laws and in a fair proceeding is within this Court's authority under the Bankruptcy Code.

B. The Third-Party Releases Are Not Manifestly Contrary to the Public Policy of the United States

The DFC also contends that the Concurso Plan should not be enforced under the public policy exception of Bankruptcy Code section 1506. As explained above "[t]he public policy exception has been narrowly construed, because the 'word

---

[110] See In re Energy Coal S.P.A., 582 B.R. at 627 (quoting In re Atlas Shipping A/S, 404 B.R. at 733) (explaining how comity to foreign court orders in the bankruptcy context is particularly important to promote the goals of bankruptcy).
[111] See 11 U.S.C. § 1521(a)(7) ("except for relief available under sections 522, 544, 545, 547, 548, 550, and 724(a)").
[112] See 11 U.S.C. § 1507(b).
[113] See 11 U.S.C. § 1506.
[114] See In re Atlas Shipping A/S, 404 B.R. at 741 (acknowledging the boundaries for discretionary relief that Congress set in chapter 15).

'manifestly' in international usage restricts the public policy exception to the most fundamental policies of the United States.""[115] Therefore, courts should use this exception to deny enforcing foreign relief sparingly.[116]

"The public policy exception applies 'where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections' or where recognition 'would impinge severely a U.S. constitutional or statutory right.'"[117] The DFC did not object to the fairness of the proceedings, nor did it identify a constitutional or statutory right on which the Concurso Plan impinges. Nonetheless, the facts demonstrate that the Mexican proceeding comported with U.S. standards of procedural fairness, and the Concurso Plan does not violate any constitutional or statutory rights.

In the Mexican Prepack Proceeding, the DFC did not object to the Release and only raised the issue on appeal. There was an opportunity for objection, consistent with our own procedures, but the DFC did not avail itself of that opportunity. Article 164 of the Mexican Bankruptcy Law provides for an opportunity to object to a *concurso* plan, after which the Mexican court is to verify that the *concurso* plan complies with all the requirements for a valid plan and is not contrary to public policy; only then can a *concurso* plan be approved.[118] The DFC,

---

[115] In re ABC Learning Ctrs. Ltd., 728 F.3d at 308 (quoting H.R. Rep. No. 109–31(1), at 109 reprinted in 2005 U.S.C.C.A.N. 88, 172).
[116] In re ENNIA Caribe Holding N.N., 594 B.R. 631, 640 (S.D.N.Y. 2018) (citing In re Toft, 453 B.R. at 193).
[117] In re ABC Learning Ctrs. Ltd., 728 F.3d at 310 (quoting In re Qimonda AG Bankr. Litig., 433 B.R. 547, 570 (E.D. Va. 2010)).
[118] Estrada Supp. Dec. ¶ 25.

having failed to object in the Mexican Prepack Proceeding, cannot contend that there was a procedural unfairness, and in fact, does not contend that the Mexican's courts procedures were unfair.

Even though the DFC does not argue the Mexican proceedings were unfair or identify any facts that would support a finding of unfairness, this Court finds that the Mexican proceedings offered "a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it is sitting."[119]

U.S. courts frequently have recognized Mexican *concurso* plans as being the product of a fair process.[120] In so holding, those courts have found that the contested Mexican *concurso* plans embodied arms'-length agreements and conformed to the general distribution priorities established in the Bankruptcy Code.[121] Mexican law

---

[119] Hilton v. Guyot, 159 U.S. at 202–03. Some courts have held that even where a claimant does not object to the fairness of the foreign proceeding, the bankruptcy court should nevertheless make a finding that the foreign proceeding was fair. See In re PT Bakrie Telecom Tbk, 628 B.R. at 884 (finding that, to enforce a foreign plan, a bankruptcy court must make a finding that the foreign proceeding abided by fundamental standards of procedural fairness).

[120] See, e.g., In re Cozumel Caribe, S.A. de C.V., 482 B.R. 96, 114–17 (Bankr. S.D.N.Y. 2012) (finding a Mexican insolvency proceeding fair); In re Metrofinanciera, S.A.P.I. de C.V., Sociedad Financiera de Objeto Multiple, E.N.R., No. 10-20666, 2010 WL 10075953, *3–4 (Bankr. S.D. Tex. Sept. 24, 2010) (same); JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V., 412 F.3d 418, 428 (2d Cir. 2005) (same).

[121] See, e.g., In re Metrofinanciera, 2010 WL 10075953, at *3.

also provides for due process to consider objections to a plan.[122] After creditors have been given the opportunity to object, Mexican law provides that the court may verify the plan if it complies with all the requirements for a valid plan and is not contrary to public policy.[123]

The present decision does not diverge from those prior decisions confirming the fairness of Mexican proceedings. The uncontroverted evidence before the Court is that the Concurso Plan's Release is customary and permitted under Mexican law; the Release is the product of arms'-length negotiations among the Chapter 15 Debtor, the Recognized Creditors, and the Shareholders; and the Concurso Plan was approved by a majority of the Recognized Creditors.[124]

It also is undisputed that the DFC played an active role in the Mexican Prepack Proceeding.[125] The DFC filed a proof of claim asserting that it was a privileged creditor.[126] The Mexican Court instead allowed the DFC's claim as an unsecured creditor and granted the DFC status as a Recognized Creditor.[127] The DFC has appealed that ruling, and the appeal remains pending.[128] The DFC did not

---

[122] See, e.g., id.

[123] Ley de Concursos Mercantiles [LCM] (Bankruptcy Law) art. 64, Diario Oficial de la Federación [DOF] 12-5-2000, últimas reformas DOF 14-1-2014 (Mex.); see also Estrada Supp. Dec. ¶ 25 (confirming the availability under Mexican law).

[124] Estrada Supp. Dec. ¶¶ 15–21.

[125] Id. ¶ 22.

[126] Id. ¶ 23.

[127] Id.

[128] Id. It bears noting that should the Mexican appellate court determine that the Release is impermissible, the Release would become ineffective here. This Court is not granting the Release. Instead, it is simply enforcing the Concurso Plan. If the Release provision of the Concurso Plan is later altered as a result of the DFC's

object to the Release but did object to the Concurso Plan on other grounds.[129] The Mexican Court overruled the DFC's plan objection and entered the Concurso Order approving the Concurso Plan. In so doing, the Mexican Court found that the Concurso Plan complied with Mexican law and "neither the public interest nor the individual interest of any specific creditor is violated, since the terms agreed to will apply to all creditors equally . . . ."[130] The extent of the DFC's participation and the Mexican court's finding that the Concurso Plan would not violate the public interest or the interests of any creditors both emphasize the DFC's opportunity (of which it did not avail itself) to object to the Release before the approval of the Concurso Plan. The Mexican court provided the DFC with a full and fair opportunity to be heard, which is a central tenet of U.S. procedural fairness.[131]

Therefore, in consideration of the fairness of this proceeding, the procedural safeguards typical under Mexican law, and the fact that the DFC has not identified an example of lack of fairness, this Court finds that the Mexican proceeding was procedurally fair.

Likewise, the DFC has identified no constitutional or statutory right upon which the Concurso Plan impinges. Its only argument is that nonconsensual third-party releases are manifestly contrary to U.S. public policy because the Purdue

appeal, the Release would only be enforceable in the United States—if at all—to the extent provided by the Concurso Plan.

[129] Id. ¶ 24.

[130] Concurso Order at 60.

[131] Cf. Vertiv, Inc., 92 F.4th at 181 ("[A] United States court is well within its discretion to deny the extension of comity to foreign proceedings that deny 'notice and opportunity to be heard' to a party opposing comity.").

decision prohibits them in most chapter 11 plans.[132] However, far from being "manifestly contrary to the public policy of the United States," nonconsensual third-party releases are expressly permitted under Bankruptcy Code section 524(g) in the context of asbestos cases. Furthermore, in Purdue, the Supreme Court noted that while it held that nonconsensual third-party releases are not permitted under chapter 11 (except in the asbestos context under Bankruptcy Code section 524(g)), Congress could have authorized them.[133] Indeed, the Supreme Court framed this issue in terms of the policy choices that Congress is authorized to make. To be manifestly contrary to U.S. public policy, the contested relief must impinge on some constitutional or statutory right; if a nonconsensual third-party release impinged on some constitutional right, the Supreme Court would not have said that Congress could provide for it. Accordingly, Congress has authorized nonconsensual third-party releases before, and the Supreme Court has explicitly said that it could do so again in the context of chapter 11 if it so desired. Lack of specific availability in U.S. courts does not equate to manifest contrariness to U.S. public policy, especially where, as here, the contested relief is available in other contexts and could be made available more broadly by a simple act of Congress.[134]

---

[132] But see In re Metcalf, 421 B.R. at 697 (explaining that even if relief in a foreign order is not typically available in a U.S. proceeding, it may be available in a chapter 15 proceeding pursuant to principles of comity).

[133] See Purdue, 603 B.R. at 222 (noting that "the [Bankruptcy Code] *does* authorize courts to enjoin claims against third parties without their consent, but does so in only *one* context" (emphasis in original)).

[134] See In re Metcalf, 421 B.R. at 697 (so holding); In re Rede Energia S.A., 515 B.R. at 91 (holding the same and emphasizing that the "public policy exception is clearly drafted in narrow terms and the few reported cases that have analyzed section

The In re Vitro S.A.B. de C.V. court makes a similar point. While the Fifth Circuit denied enforcement of a Mexican plan's third-party release provisions, it noted that "although our court has firmly pronounced its opposition to [nonconsensual third-party] releases, relief is not thereby precluded under § 1507, which was intended to provide relief not otherwise available under the Bankruptcy Code or United States law."[135] Thus, it found that it could not deny the relief simply on the basis that third-party releases were not available in its jurisdiction.[136] Instead, the In re Vitro court only declined to enforce the plan in that case because of the role in the approval process of the votes of insiders holding intercompany claims.[137]

Simply put, if permitting third-party releases is a policy decision that Congress can and has made, it cannot also be true that enforcing such releases where principles of cooperation and comity so require in chapter 15 would be "manifestly contrary to the public policy of the United States." The simple fact that a U.S. court could not grant such releases in a typical chapter 11 plan does not

---

1506 at length recognize that it is to be applied sparingly" (internal quotations and alterations omitted)); In re ABC Learning Ctrs., 728 F.3d at 311 (finding that although Australian insolvency law used a different prioritization scheme from U.S. bankruptcy law, recognizing and enforcing the Australian proceeding would not be manifestly contrary to U.S. public policy, and in fact, refusing to recognize and enforce it would allow claimants to circumvent the Australian courts and undermine U.S. public policies of ordered proceedings and equal treatment).

[135] In re Vitro, 701 F.3d at 1062.

[136] Id.

[137] Id. at 1067. Because the court decided that case on other grounds, it did not rule on whether third-party releases would be manifestly contrary to public policy under section 1506. Id. at 1069–70

make them manifestly contrary to U.S. public policy so as to require this Court to prohibit enforcement of the Release in this chapter 15 case. The DFC's public policy exception argument fails.

CONCLUSION

Accordingly, chapter 15 authorizes this Court to enforce nonconsensual third-party releases ordered by foreign courts. The plain language of Bankruptcy Code sections 1521(a) and 1507 give this Court a broad grant of discretion to aid foreign courts in accordance with principles of comity. Nothing in the plain language of these statutes or the legislative history or canons of construction indicates that Congress intended to diverge from this policy of comity to prohibit enforcing releases entered by foreign courts. The Mexican Prepack Proceeding was fair, and the Concurso Plan and the Concurso Order are not manifestly contrary to U.S. public policy. Therefore, this Court enforces the Concurso Plan and the Concurso Order in their entirety.

Thomas M. Horan

Dated: April 1, 2025
Wilmington, Delaware

Thomas M. Horan
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: Odebrecht Engenharia e Construção S.A. - Em Recuperação Judicial, *et al.*, Debtors in a Foreign Proceeding.	Case No. 25-10482 (MG) Chapter 15

MEMORANDUM OPINION GRANTING MOTION FOR RECOGNITION OF FOREIGN MAIN PROCEEDINGS AND OVERRULING UST OBJECTIONS

A P P E A R A N C E S:

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Attorneys for the Foreign Representative of Odebrecht Engenharia e Construção S.A. - Em Recuperação Judicial and affiliated debtors
One Liberty Plaza
New York, New York 10006
By: Luke A. Barefoot, Esq.
Thomas S. Kessler, Esq.

WILLIAM K. HARRINGTON
UNITED STATES TRUSTEE, REGION 2
Alexander Hamilton Custom House
One Bowling Green, Room 534
New York, NY 10004
By: Greg M. Zipes, Esq.

MARTIN GLENN
CHIEF UNITED STATES BANKRUPTCY JUDGE

This Court has already entered an order ("Order," ECF Doc. 21) granting all the relief requested by the foreign representative (Adriana Henry Meirelles, or "Foreign Representative") of the above-captioned foreign debtors ("Debtors"): recognizing the Debtors' Brazilian *recuperação judicial* ("RJ") proceeding as the Debtors' foreign main proceeding, recognizing the full force and effect of the subsequent RJ plan ("RJ Plan"), giving full force and effect to the related Brazilian court confirmation order, and providing further relief which this Court deemed just and proper. No party objected to the recognition of the Brazilian RJ proceeding as the foreign main proceeding, nor to the recognition and enforcement of the RJ Plan in the United States. The only objection was filed by the United States Trustee ("UST"), which objected to language in the Debtors' proposed order[1] which provided additional relief. ("Objection," ECF Doc. # 16.) The Foreign Representative filed a reply ("Reply," ECF Doc. # 18).

The Court entered the Debtors' final proposed order without further modifications. The Court now writes separately to address two of the UST's objections, both of which were overruled at the hearing, to provide further clarification, as the UST has made similar objections in multiple Chapter 15 cases.

I. BACKGROUND

A. Company Structure and History

The Debtors, along with certain other related entities and affiliates (the "OEC Group"), are part of the business division of Novonor S.A. – Em Recuperação Judicial ("Novonor") and its related entities and affiliates (the "Novonor Group"), one of the largest private business groups in Brazil today, with businesses in engineering, construction and in the development and operation of infrastructure. (ECF Doc. # 2 at 3.) The OEC Group is one of the largest construction companies in the world and employs over 17,000 people. (*Id.* at 10.) The OEC Group's operational and economic activities are primarily concentrated in Brazil. (*Id.* at 12.) The Foreign Representative's motion seeking recognition and enforcement of the RJ Plan provides additional details on each of the Debtors and on the OEC Group as a whole. (*See generally id.*)

The Debtors or their affiliates have filed two previous Chapter 15 proceedings. On August 26, 2019, Novonor (formerly known as Odebrecht S.A.) and certain affiliates (the

---

[1] The proposed order was edited twice, but the language to which the UST objected remained the same throughout. This opinion therefore relies on the language in the order ultimately entered, *see* ECF Doc. # 21.

"Novonor Debtors") filed a petition ("Novonor Petition") seeking recognition of the jointly administered judicial reorganization proceeding pending at the time before a Brazilian court. (*Id.* at 3 n.3.) On September 18, 2019, this Court entered an order granting the relief sought in the Novonor Petition and recognizing the Brazilian RJ proceeding as a foreign main proceeding for all the Novonor Debtors. (*Id.*) A bit over a year later, on November 24, 2020, a subset of three of the Debtors sought recognition of an extrajudicial reorganization (*recuperação extrajudicial*, or "EJ") and enforcement of an agreed plan of reorganization ("EJ Plan") which had been approved by the First Bankruptcy and Judicial Recovery Court of the District of the Capital of the State of São Paulo. (*Id.* at 3–4.) The aim of the Brazilian EJ Proceeding was to optimize the OEC Group's capital structure and provide additional runway for the OEC Group to reach an environment favorable to the resumption of its growth. (*Id.*) The EJ Plan only involved the obligations of a subset of the current set of Debtors and resulted in the replacement of certain New York law-governed notes with new notes, enabling a restructuring of a financial liability exceeding $3.1 billion. (*Id.* at 4–5.)

Due to the pressures of the pandemic, a financial crisis in Brazil, a reduction in infrastructure investments, and lower demand for infrastructure projects in countries where the OEC Group operates, a broader restructuring became necessary. (*Id.* at 5.) In June 2024, the Debtors filed the Brazilian RJ Proceeding to implement a comprehensive restructuring of the OEC Group's liabilities to ensure the preservation and continuation of its business through an agreed plan of reorganization (the RJ Plan). In broad strokes, the RJ Plan involves (i) a restructuring of the OEC Group's existing capital structure both to satisfy the OEC Group's existing debt and strengthen its cash flow; (ii) the creation of a new business unit, with a healthy capital structure and high technical capacity; and (iii) an injection of liquidity to finance future projects through a minimum $120 million debtor-in-possession financing facility, subject to certain conditions precedent being met. (*Id.* at 6.) After two rounds of voting, the ultimate result was a resounding vote in favor of the RJ Plan by the creditor classes and claimants present to vote, and after resolving certain objections and finding that the requisite amount of creditor support and all other legal requirements were met, the Brazilian court issued an order confirming the RJ Plan (the "Brazilian Confirmation Order") on March 7, 2025. (*Id.* at 26–28.)

On March 14, 2025, the Foreign Representative filed in this Court a motion for recognition and enforcement, along with a proposed order and a copy of the RJ Plan. (ECF Doc. # 2.) The proposed order was modified before becoming the ultimate Order, but the relevant provisions, excerpted below, did not change. The United States Trustee objected to portions of the proposed order, as discussed below.

B. Terms of RJ Plan

The only term of the RJ Plan that matters for the following discussion can be found at clause 11.5 of the RJ Plan:

> 11.5. Settlement. The fulfillment of the payment obligations in accordance with the terms and conditions established in this Plan will entail, automatically and regardless of any additional, broad, general and unrestricted formality, the discharge of all Bankruptcy Credits against the Companies under Reorganization and their officers, directors, agents, employees and representatives.

(Objection at 5 (citing RJ Plan).) All parties agreed during the recognition hearing that this provision does not constitute a nonconsensual third-party release.

C. UST Objection

The UST objected to portions of the proposed order granting recognition (but *not* to the recognition of the Brazilian RJ proceeding or to the enforcement of the RJ Plan as written). The

Court overruled the UST's objections. However, two of the UST's objections merit further discussion, as they have recurred throughout multiple Chapter 15 cases.

First, the UST argued that the following limitation on liability is inappropriate because it is a "veiled exculpation clause," it goes beyond the relief granted by the Brazilian court, and there is no statutory basis for granting the limitation:

> The Directed Parties[2] and their respective officers, directors, employees, representatives, advisors, attorneys, professionals and managers, in each case, solely in their respective capacities as a Directed Party, shall be entitled to a full limitation of liability from and shall have no liability for any and all claims, obligations, suits, judgments, damages, rights, causes of action, liabilities from, or in connection with, any action or inaction taken in furtherance of and/or in accordance with this Order, these Chapter 15 Cases, the Brazilian RJ Proceeding, the Brazilian Confirmation Order and the RJ Plan, except for any liability arising from any action or inaction constituting gross negligence, fraud, willful misconduct or professional malpractice as determined by this Court.

(Order ¶ 7; Objection at 11.) Assuming *arguendo* that the limitation on liability is appropriate, the UST also objected on the grounds that the limitation "lacks the hallmarks of an acceptable exculpation provision in a chapter 11 proceeding": there is no temporal limitation, and the clause creates "prospective immunity by exculpation." (Objection at 13–14.) Furthermore, the UST argued, the exculpation applies to too many parties—it applies to anyone in connection with "any action or inaction taken in furtherance of and/or in accordance with this Order, this Chapter 15 Case, the Brazilian RJ Proceeding, the Brazilian Confirmation Order and the RJ Plan," so the exact parties to whom the exculpation applies are not known, and it also covers non-estate fiduciaries. (*Id* at 15.) (The UST also objected to the absence of a carveout for bad faith, breach of fiduciary duty, and legal malpractice, all of which are required by the New York Rules of

---

[2] The "Directed Parties" are: (i) The Bank of New York Mellon, as the indenture trustee (the "Indenture Trustee") under the indentures related to the 2024 Notes, the 2026 Notes, the 2027 Notes, the 2029 Notes, the 2033 Notes, the 2046 Notes, and the Perpetual Notes (collectively, the "NY Notes"); (ii) the Depository Trust Company ("DTC"), Euroclear Bank S.A./N.V., and/or Clearstream Banking, Société Anonyme, as clearing systems, as applicable; (iii) Epiq Corporate Restructuring LLC; and (iv) the custodians of the NY Notes. (Order ¶ 5 n.3.)

Professional Conduct; the Order was amended to include a carveout for malpractice claims.) Second, the UST argued that the proposed order created impermissible nonconsensual third-party releases. As compared to the release of the debtors contemplated by the RJ Plan (cited above, Section 11.5 of the RJ Plan), the order provides as follows:

> Except as provided in paragraph 12 of this Order, all persons and entities are permanently enjoined and restrained from (i) commencing or taking any action or asserting any claim, within the territorial jurisdiction of the United States, that is inconsistent with, in contravention with, or would interfere with or impede the administration, implementation and/or consummation of the RJ Plan, the Brazilian Confirmation Order or the terms of this Order; and (ii) taking any action against the Debtors or their property located in the territorial jurisdiction of the United States to recover or offset any debt or claims that are extinguished, novated, cancelled, discharged or released under the RJ Plan and the Brazilian Confirmation Order. No action may be taken within the territorial jurisdiction of the United States to confirm or enforce any award or judgment that would otherwise be in violation of this Order without first obtaining leave of this Court.

(Order ¶ 11.) The UST took the position that (1) this language creates "an expansive third-party release" because it "enjoins *all persons and entities* from *taking any action*." (Objection at 16–17.) The UST argued that section 1521(a) of the Code does not provide courts with a statutory basis for issuing orders which contain third-party releases: applying the canon of *ejusdem generis* as the Supreme Court did in *Harrington v. Purdue Pharma*, 603 U.S. 204 (2024) (henceforth "*Purdue*"), the UST claimed that third-party releases are "not similar in nature to the relief provided in section 1521(a)" because third-party releases are not designed to protect a debtor (unlike the provisions of section 1521(a)), so cannot fit under that subsection of the Code. (Objection at 17–18.) The UST also argued that the release supposedly created by the above section of the Order does not fall within the category of "appropriate relief" under section 1521(a) of the Code because "third-party releases may not be imposed without consent through a bankruptcy plan under United States law," citing *Purdue*. (*Id.* at 18.)

D. Foreign Representative's Reply

The Foreign Representative's reply can be summarized as follows. First, the language of the order limiting liability is customary and similar to language this Court approved in other chapter 15 cases. (Reply at 4–5.) Second, the provision in Section 11.5 of the RJ Plan is proper under both Brazilian and U.S. law, as it does not create a third-party release. (*Id.* at 5–6.) The Foreign Representative then argued that the UST misread the language of the proposed confirmation order, as it does not create a wide-reaching release but rather bars only those "actions that contravene relief set forth in the RJ Plan and Brazilian Confirmation Order" —i.e., the order sought only "enforcement of the relief granted in the Brazilian RJ Proceeding within the territorial jurisdiction of the United States and nothing more." (*Id.* at 6.) Even if Section 11.5 of the RJ Plan did create nonconsensual third-party releases, however, the Foreign Representative maintained that enforcement of such a provision is acceptable because *Purdue* does not apply in Chapter 15 cases. (*Id.* at 7–9.)

II. LEGAL STANDARD

A. Relief in a Chapter 15 Proceeding

In 2005, Congress adopted Chapter 15 of the Bankruptcy Code based on the Model Law on Cross-Border Insolvency proposed by the United Nations Commission on International Trade Law in 1997. Chapter 15 replaced section 304 of the Bankruptcy Code, which originally provided the statutory framework for cases filed in the United States that are ancillary to insolvency proceedings filed in foreign countries. Section 304 provided a bankruptcy court with broad discretion in fashioning an appropriate remedy in a particular case. While Chapter 15 replaced section 304, many of the principles underlying section 304 remain in effect under chapter 15, including the principles of comity and cooperation with foreign courts in deciding whether to grant the foreign representative additional post-recognition relief. *In re SPhinX, Ltd.*, 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006) ("[C]hapter 15 maintains—and in some respects enhances—the 'maximum flexibility,' that section 304 provided bankruptcy courts . . . in light of principles of international comity and respect for the laws and judgments of other nations." (internal citation omitted)).

Section 1520 outlines the mandatory relief automatically granted upon recognition of a foreign main proceeding under Chapter 15. The relief available under this provision is not at issue in this case. Rather, it is the relief available to the foreign representative at the Court's discretion under sections 1521 and 1507 of the Code which are relevant.

"Section 1521(a) outlines the discretionary relief a court may order upon recognition of a foreign proceeding, whether main or non-main . . . . The discretion that is granted is 'exceedingly broad' since a court may grant 'any appropriate relief' that would further the purposes of chapter 15 and protect the debtor's assets and the interests of creditors." *In re Atlas Shipping A/S*, 404 B.R. 726, 739 (Bankr. S.D.N.Y. 2009) (internal citation omitted). Section 1521(a) reads as follows:

> (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—
>
> > (1) staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities to the extent they have not been stayed under section 1520(a);
> >
> > (2) staying execution against the debtor's assets to the extent it has not been stayed under section 1520(a);
> >
> > (3) suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under section 1520(a);
> >
> > (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;

> (5) entrusting the administration or realization of all or part of the debtor's assets within the territorial jurisdiction of the United States to the foreign representative or another person, including an examiner, authorized by the court;
> (6) extending relief granted under section 1519(a); and
> (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).

11 U.S.C. § 1521(a). To determine what relief could fall under the catch-all at the beginning of the subsection ("additional relief"), courts look to relief available under the now-deleted section 304 of the Code. Courts give varying weight to section 304 precedent. *See In re Vitro S.A.B. de CV*, 701 F.3d 1031, 1057 (5th Cir. 2012) (holding that relief available under section 1521(a) is "co-extensive" with that available under section 304); *compare In re Cozumel Caribe, S.A. de C.V.*, 482 B.R. 96, 114 (Bankr. S.D.N.Y. 2012) (viewing section 304 caselaw as providing "useful precedents"). Relief under section 1521 will be granted only if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected. 11 U.S.C. § 1522(a).

Section 1507 provides additional discretionary grounds for the Court to grant relief to the foreign representative. Section 1507 reads:

> (a) Subject to the specific limitations stated elsewhere in this chapter the court, if re cognition is granted, may provide additional assistance to a foreign representative under this title or under other laws of the United States.
> (b) In determining whether to provide additional assistance under this title or under other laws of the United States, the court shall consider whether such additional assistance, consistent with the principles of comity, will reasonably assure—
>> (1) just treatment of all holders of claims against or interests in the debtor's property;
>> (2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;
>> (3) prevention of preferential or fraudulent dispositions of property of the debtor;
>> (4) distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by this title; and
>> (5) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. § 1507.

Section 1506 provides that a bankruptcy court may decline to grant relief requested in a chapter 15 case if the action would be "manifestly contrary to the public policy of the United States." 11 U.S.C. §§ 1506. This public policy exception is narrowly construed. *See In re Ocean Rig UDW Inc.*, 570 B.R. 687, 707 (Bankr. S.D.N.Y. 2017); *see also In re Toft*, 453 B.R. 186, 195 (Bankr. S.D.N.Y. 2011) ("[T]hose courts that have considered the public policy exception codified in [section] 1506 have uniformly read it narrowly and applied it sparingly.").

B. Exculpations in Chapter 11s

"Exculpation provisions are designed to 'insulate court-supervised fiduciaries and some other parties from claims that are based on actions that relate to the restructuring.'" *In re Genesis Glob. HoldCo, LLC*, 660 B.R. 439, 527 (Bankr. S.D.N.Y. 2024) (quoting *In re Aegean Marine Petroleum Network Inc*., 599 B.R. 717, 720 (Bankr. S.D.N.Y. 2019)). "It is well settled that an exculpation clause approved at confirmation may exculpate estate fiduciaries like a committee, its members, and estate professionals for their actions in the bankruptcy case except where those actions amount to willful misconduct or gross negligence." *In re LATAM Airlines Grp. S.A*., No. 20-11254 (JLG), 2022 WL 2206829, at *50 (Bankr. S.D.N.Y. June 18, 2022) (citations omitted). Such provisions in chapter 11 plans are "not uncommon" and are generally permissible "so long as they are properly limited and not overly broad." *Id*. at *49 (quoting *In re Nat'l Heritage Found., Inc.*, 478 B.R. 216, 233 (Bankr. E.D. Va. 2012)).

Generally, it has been recognized that:

> [A] proper exculpation provision is a protection not only of court-supervised fiduciaries, but also of court-supervised and court-approved transactions. If this Court has approved a transaction as being in the best interests of the estate and has authorized the transaction to proceed, then the parties to those transactions should not be subject to claims that effectively seek to undermine or second-guess this

> Court's determinations. In the absence of gross negligence or intentional wrongdoing, parties should not be liable for doing things that the Court authorized them to do and that the Court decided were reasonable things to do.

Aegean Marine Petroleum Network, 599 B.R. at 721.

In the Chapter 11 context, "in general, exculpated parties who are not estate fiduciaries are entitled to benefit from a broad exculpation provision where they have been actively involved in all aspects of the Chapter 11 Cases and have made significant contributions to the success of the cases." *In re Wythe Berry Fee Owner LLC*, No. 22-11340 (MG), 2024 WL 2767121, at *13 (Bankr. S.D.N.Y. May 29, 2024) (cleaned up). This Court in *Wythe Berry* exculpated a creditor group, among others, because its participation "was instrumental to the Debtor formulating a plan on an expedited basis, and their support was essential to the successful negotiation of the Plan" and related agreements. *Id.* (cleaned up). And while the exculpation reached beyond the set of estate fiduciaries, it still was limited just to "court-supervised and court-approved transactions." *Aegean Marine Petroleum Network*, 599 B.R. at 721. *See also In re Residential Cap. LLC*, Case No. 12-12020 (MG), 2013 WL 12161584, at *13 (Bankr. S.D.N.Y. Dec. 11, 2013) (order confirming plan contained exculpations for parties "instrumental to the successful prosecution of the Chapter 11 Cases or their resolution pursuant to the Plan, and/or provided a substantial contribution to the Debtors"); *KG Winddown, LLC, et al.*, Case No. 20-11723 (MG) (Bankr. S.D.N.Y. 2020) (ECF Doc. # 494) (permitting exculpation of purchaser as non-estate fiduciary); *Genco Shipping & Trading Ltd.*, Case No. 14-11108 (SHL) (Bankr. S.D.N.Y. July 2, 2014) (ECF Doc. # 322) (approving exculpation provision in plan providing exculpation for non-estate fiduciaries). "In determining whether to approve exculpation provisions, courts also consider whether the beneficiaries of the exculpation participated in good faith in negotiating the plan and bringing it to fruition, and whether the provision is integral to the plan . . . . Courts in this and other districts have approved exculpation provisions . . . for estate fiduciaries and non-estate fiduciaries." *In re: Klaynberg*, No. 22-10165 (MG), 2023 WL 5426748, at *17–18 (Bankr. S.D.N.Y. Aug. 22, 2023). Finally, courts in the Second Circuit allow exculpation provisions so long as they apply to post-petition conduct and explicitly exclude gross negligence and willful misconduct. *Id.* ("Courts in the Second Circuit have held that [exculpation provisions] . . . are appropriate when confined to postpetition activity and explicitly exclude gross negligence and willful misconduct."). *But see In re PTL Holdings LLC*, No. 11-12676 BLS, 2011 WL 5509031, at *12 (Bankr. D. Del. Nov. 10, 2011) (sustaining UST's objection to exculpation of non-estate fiduciaries and limiting exculpation clause to just estate fiduciaries).

Additionally, courts in this district have exculpated behavior that occurred after the effective date of a plan of reorganization when that behavior was "authorized by bankruptcy courts to carry out the bankruptcy process." *See In re Ditech Holding Corp.*, No. 19-10412 (JLG), 2021 WL 3716398, at *9 (Bankr. S.D.N.Y. Aug. 20, 2021) ("It is settled that exculpatory provisions are proper to protect those authorized by bankruptcy courts to carry out the bankruptcy process, even after the effective date of a plan . . . . The Exculpation Provision expressly covers acts falling under the 'administration of the Plan'—which by definition occurs post-Effective Date . . . . [T]he Exculpation Provision in Section 10.7 of the Plan applies to shield the conduct of these Individual Defendants [in implementing the plan] from collateral attack in a separate lawsuit."); *In re Aegean Marine Petroleum Network Inc*., 599 B.R. at 720 ("I think that a proper exculpation provision is a protection not only of court-supervised fiduciaries, but also of court supervised and court-approved transactions . . . . In the absence of gross negligence or intentional wrongdoing, parties should not be liable for doing things that the Court authorized them to do and that the Court decided were reasonable things to do."); *In re Granite Broad. Corp*., 369 B.R. 120, 139 (Bankr. S.D.N.Y. 2007) (approving exculpation clause "for actions in connection, related to, or arising out of the Reorganization Cases," noting that the language "generally follows the text that has become standard in this district and is sufficiently narrow to be unexceptional" and that "the Plan provides exculpation only for acts or omissions in connection with the Plan and the bankruptcy cases. It requires, in effect, that any claims in connection with the bankruptcy case be raised in the case and not be saved for future litigation."); *In re Flushing Hosp. & Med. Ctr.*, 395 B.R. 229, 235 (Bankr. E.D.N.Y. 2008) ("It is apparent that the exculpation provisions quoted above are not limited to pre-effective date claims. By their terms, these provisions apply to 'any act or omission in connection with, or arising out of . . . the administration of the Plan.' Adopting [the objector's] interpretation would render the 'administration of the Plan' clause meaningless, because conduct during the administration of the Plan necessarily occurs after the effective date of the Plan.").

Exculpations have been granted by courts in this district in Chapter 15 cases, including protection of non-fiduciaries. *See, e.g.*, *In re Olinda Star Ltd.*, 614 B.R. 28, 48 (Bankr. S.D.N.Y. 2020) (exculpating, among others, the indenture trustees and record holders of certain debtor-issued notes, as well as an information agent, because "such relief is necessary and appropriate to prevent interference with the consummation of" the foreign scheme of arrangement and "because without such exculpations the ability of [the foreign debtors' liquidators] and their advisors to take action to effectuate the restructuring would be limited"); *In re Oi S.A.*, 587 B.R. 253, 269 n.3 (Bankr. S.D.N.Y. 2018) (noting that the court found that the exculpation requested by the foreign representative was "appropriate under the circumstances").

C. ***Purdue* in Chapter 15s**

Courts in this district have long enforced foreign restructuring plans in Chapter 15 cases which include nonconsensual third-party releases, most doing so pursuant to sections 1507 and

1521 of the Code. *See, e.g.*, *In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017) (recognizing and enforcing scheme of arrangement that released affiliate guarantees); *In re Towergate Fin. plc*, Case No. 15–10509–SMB (Bankr. S.D.N.Y. Mar. 27, 2015) (ECF Doc. # 16); *In re New World Res. N.V.*, Case No. 14-12226-SMB (Bankr. S.D.N.Y. Sept. 9, 2014) (ECF Doc. # 20); *In re Sino–Forest Corp.*, 501 B.R. 655, 665 (Bankr. S.D.N.Y. 2013) (enforcing foreign order containing third-party releases); *In re Magyar Telecom B.V.*, Case No. 13-13508-SHL, 2013 WL 10399944 (Bankr. S.D.N.Y. Dec. 11, 2013) (ECF Doc. # 26); *In re Metcalfe & Mansfield Alt. Inv.,* 421 B.R. 685, 696 (Bankr. S.D.N.Y. 2010) (concluding that "principles of enforcement of foreign judgments and comity in chapter 15 cases strongly counsel approval of enforcement in the United States of the third-party non-debtor release and injunction provisions included in the Canadian Orders, even if those provisions could not be entered in a plenary chapter 11 case.").

The Supreme Court held in *Purdue* that "the Bankruptcy Code does not authorize a bankruptcy court to approve, as part of a plan of reorganization under Chapter 11, a release and injunction that extinguishes claims against non-debtor third parties without the consent of affected claimants." 603 U.S. 204, 204 (2024). To date, only one written decision has been issued on the question whether *Purdue* applies in chapter 15 proceedings: *In re: Credito Real, S.A.B. de C.V., SOFOM, E.N.R.*, No. 25-10208 (TMH), 2025 WL 977967, at *1 (Bankr. D. Del. Apr. 1, 2025). The *Credito Real* case is discussed below.

III. DISCUSSION

For this Court to provide the relief requested by the Foreign Representative, it must be available to the Foreign Representative under either sections 1507 or 1521 of the Code. The authority to issue the exculpation and the third-party release contained in the Order must, therefore, stem from one of these two sections of the Code.

One of the UST's objections is consistent across both provisions: that the provision provides relief beyond the scope provided by the Brazilian Confirmation Order and the RJ Plan. This objection is addressed first, followed by provision-specific objections.

A. Provision of Relief Outside Scope of Foreign Court Orders and Plan

Both the text of Chapter 15 and caselaw building upon it indicate that U.S. courts operating pursuant to Chapter 15 are *not* limited in the discretionary relief they grant by that relief afforded by the foreign court or the plan of reorganization. There are limitations to courts' discretionary powers under Chapter 15, but they are not obligated to grant only that relief which is similar or parallel to that granted abroad or specified in the plan at issue.

The text of Chapter 15 of the Code indicates that U.S. courts, despite being ancillaries to foreign proceedings when operating under Chapter 15, *see In re Foreign Econ. Indus. Bank Ltd., "Vneshprombank" Ltd.*, 607 B.R. 160, 168 (Bankr. S.D.N.Y. 2019), are not hamstrung by the operations of foreign courts and law when determining what relief to grant to the foreign representative. Section 1521(a) enables courts to grant "any appropriate relief" so long as that relief is "necessary to effectuate the purpose of [Chapter 15] and to protect the assets of the debtor or the interests of the creditors" (followed by a non-exclusive list of examples of the type of relief the court may grant). Section 1507 permits a court to grant "additional assistance" subject to "specific limitations stated elsewhere in" Chapter 15, so long as the "additional assistance" is available "under this title or under other laws of the United States." Under the "expansive grant of power" in section 1507, "even if a court cannot grant relief under section 1521(a)(7), it may grant relief under section 1507." *Credito Real*, 2025 WL 977967, at *11. The drafters of Chapter 15 referenced principles of comity as limiting factors, rather than foreign rulings or even the availability of relief under foreign law. *See* 11 U.S.C. § 1507(b) (requiring court to consider "the principles of comity" when deciding whether to grant relief); *In re Comair Ltd.*, No. 21-10298(JLG), 2021 WL 5312988, at *9 (Bankr. S.D.N.Y. Nov. 14, 2021) ("Post-recognition relief under section 1521 'is largely discretionary and turns on subjective factors that embody the principles of comity.'") (internal citation omitted).

The relief provided in the Recognition Order puts an enforcement mechanism in the U.S. order that prevents disgruntled creditors who are bound by the RJ Plan from suing in the U.S.to recover on claims that are barred by the RJ Plan. Granting this relief to the Foreign Representative is in furtherance of comity, as it enables the full enforcement of the RJ Plan by closing the door to potential workarounds to the Plan.

B. Exculpation

The provision in the Order which provides for an exculpation reads as follows:

> The Directed Parties and their respective officers, directors, employees, representatives, advisors, attorneys, professionals and managers, in each case, solely in their respective capacities as a Directed Party, shall be entitled to a full limitation of liability from and shall have no liability for any and all claims, obligations, suits, judgments, damages, rights, causes of action, liabilities from, or in connection with, any action or inaction taken in furtherance of and/or in accordance with this Order, these Chapter 15 Cases, the Brazilian RJ Proceeding, the Brazilian Confirmation Order and the RJ Plan, except for any liability arising from any action or inaction constituting gross negligence, fraud, willful misconduct or professional malpractice as determined by this Court.

(Order ¶ 7.)

The UST objected to the provision of this relief, as discussed above. It relies on a Fifth Circuit case, *Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1044 (5th Cir. 2012), to structure its analysis of section 1521 and 1507. The Fifth Circuit in *Vitro* adopted a three-step framework to determine whether relief requested by a foreign representative is available: "a court . . . should first consider the specific relief enumerated under § 1521(a) and (b). If the relief is not explicitly provided for there, a court should then consider whether the requested relief falls more generally under § 1521's grant of any appropriate relief. We understand 'appropriate relief' to be relief previously available under Chapter 15's predecessor, § 304. Only if a court determines that the requested relief was not formerly available under § 304 should a court consider whether relief would be appropriate as 'additional assistance' under § 1507." *Id.* at 1054. Following this rubric, the UST argued that none of the seven enumerated bases for relief under section 1521 apply: the first five concern the debtor and do not explicitly authorize exculpations, the sixth concerns extension of relief upon the filing of a petition, and the seventh concerns the relief available to a trustee which the UST claimed is irrelevant to the limitation of liability in the Order. (Objection at 12.) The UST also found no support for the exculpation in section 1507. Without providing much support for its argument, it claimed that the foreign representative "can only get the relief that is set forth in the RJ Plan or is otherwise sanctioned by the Bankruptcy Code—neither of which circumstance exists here." (Objection at 17.) The first part of this argument—that this Court cannot grant such an exculpation because the exact relief is not in the RJ Plan—is addressed and rejected above. The second part of the argument—that such exculpation is not "sanctioned by the Bankruptcy Code"—is addressed below.

First, courts in this district are not bound by the analytical approach taken in *Vitro*. *See, e.g.*, *In re PT Bakrie Telecom Tbk*, 628 B.R. 859, 877 (Bankr. S.D.N.Y. 2021) (noting that, as between sections 1521 and 1507, "often courts have found it unnecessary to determine the primacy of these two provisions if the outcome would be the same under either section," and collecting cases); *In re Atlas Shipping*, 404 B.R. at 741 (granting relief under section 1521 and concluding that it was unnecessary to determine whether "additional assistance" was available under section 1507).

Courts can provide exculpations in Chapter 15 proceedings to the same extent they can in Chapter 11 cases pursuant to sections 1507 and 1521, so long as the exculpation is not contrary to U.S. public policy in violation of section 1506.

In the Chapter 11 context, at least in this district, non-estate fiduciaries are entitled to exculpation when they have been actively involved in the bankruptcy proceeding and made significant contributions to its success, and when the exculpation applies to court-supervised and -approved transactions. *In re Wythe Berry Fee Owner LLC*, 2024 WL 2767121, at *13; *In re: Klaynberg*, No. 22-10165 (MG), 2023 WL 5426748, at *17 (Bankr. S.D.N.Y. Aug. 22, 2023) (noting that courts also look to whether parties have acted in good faith and look to whether the exculpation provision is critical to plan implementation). Gross negligence and willful misconduct must be excluded from the scope of the exculpation provision. *In re Wythe Berry Fee Owner LLC*, 2024 WL 2767121, at *13. The logical analogue in the Chapter 15 context is exculpation of parties who have been actively involved in the foreign restructuring, and who are exculpated for behavior relating to court-supervised and -approved transactions, whether those transactions are supervised here or abroad. (Where a foreign plan is enforced in the U.S. pursuant to a Chapter 15 recognition proceeding, the U.S. court may also be the one supervising and approving.) Here, the exculpated parties (the Directed Parties) are the indenture trustee of certain notes cancelled pursuant to the RJ Plan, the custodians of those notes, and the clearing system involved with the effectuation of the RJ Plan. (Order ¶ 7.) These parties are clearly essential to the implementation of the RJ Plan, which is being supervised by a Brazilian court. There is no indication in the record before the Court that the Directed Parties have acted in anything but good faith. Moreover, the Foreign Representative has submitted that the cancellation of these notes is "one of the central parts of the RJ Plan" and that without the cooperation of the Directed Parties, they cannot be cancelled; no party has contested this claim. (Reply at 9.) The exculpation provision in the Order is, therefore, integral to the recognition and enforcement of the RJ Plan. The Court finds that the exculpation provision in the Order complies with the requirements courts place on exculpation provisions in Chapter 11 cases. *See also In re Olinda Star*, 614 B.R. at 48 (granting exculpation when "necessary and appropriate to prevent interference with the consummation of the foreign restructuring scheme").

C. Putative Nonconsensual Third-Party Release

The provision in the Order which the UST claims creates impermissible third-party releases reads as follows:

> Except as provided in paragraph 12 of this Order, all persons and entities are permanently enjoined and restrained from (i) commencing or taking any action or asserting any claim, within the territorial jurisdiction of the United States, that is inconsistent with, in contravention with, or would interfere with or impede the administration, implementation and/or consummation of the RJ Plan, the Brazilian Confirmation Order or the terms of this Order; and (ii) taking any action against the Debtors or their property located in the territorial jurisdiction of the United States to recover or offset any debt or claims that are extinguished, novated, cancelled, discharged or released under the RJ Plan and the Brazilian Confirmation Order. No action may be taken within the territorial jurisdiction of the United States to confirm or enforce any award or judgment that would otherwise be in violation of this Order without first obtaining leave of this Court.

(Order ¶ 11.)

It is not clear that this language creates a third-party release: unlike most third-party releases, the third parties are on the plaintiff's side of the "v." ("all persons and entities," language which conceivably covers more than just the debtors' creditors and claimholders), as the defendant's side consists only of "the Debtors [and] their property."[3] Assuming *arguendo* that paragraph 11 of the Order does create nonconsensual third-party releases, the Court finds that it has the power to issue such an order in a Chapter 15 case, pursuant to at least section 1521, in support of a foreign proceeding.

Since subsections 1521(a)(1)–(7) do not expressly authorize non-debtor third-party releases, a court should decide whether the requested relief can be considered "appropriate relief" under section 1521(a). To do so, the Court must first examine the plain language of section 1521. *Grajales v. Comm'r of Internal Revenue*, 47 F.4th 58, 62 (2d Cir. 2022) ("Statutory interpretation always begins with the plain language of the statute.") (internal citation and quotation marks omitted). It will then look at caselaw from Chapter 15's predecessor, section 304, which, as noted above, is instructive in interpreting the scope of section 1521(a).

1. Text of Chapter 15

Judge Horan's recent opinion in *Credito Real* provides a lucid explanation why courts can enforce nonconsensual third-party releases found in foreign plans of reorganization. Here, all parties agreed during the recognition hearing that there is no third-party release in the RJ Plan, or even in the Brazilian court order confirming the RJ Plan. Rather, there is a provision in *this* Court's order recognizing the Brazilian proceeding as the foreign main proceeding and enforcing the RJ Plan which might be construed as a nonconsensual third-party release. However, there is no meaningful difference between *enforcing, via order, a foreign plan* with a

---

[3] If this provision is not, in fact, a third-party release, it should be considered an injunction in support of the RJ Plan, given that, as the Foreign Representative convincingly explained, this section of the Order is carefully limited to bar only those actions that contravene relief provided in the RJ Plan and the Brazilian Confirmation Order. (Reply at 6.) All this provision does, per the Foreign Representative, is enforce the relief granted in the Brazilian RJ Proceeding within the territorial jurisdiction of the United States. (*Id.*) Under this reading, the provision would be enforced as a foreign plan-supporting injunction, a type of relief available under section 1521 of the Code. *See, e.g.*, *In re Rede Energia S.A.*, 515 B.R. 69, 93 (Bankr. S.D.N.Y. 2014); *In re Olinda Star*, 614 B.R. at 47–48.

third-party release provision, and *issuing an order enforcing a foreign plan*, which order contains a third-party release which itself is not in the foreign plan. The practical effect is the same—a U.S. court issues an order, which takes effect in the United States, which releases claims over which the U.S. court has jurisdiction.

In *Credito Real*, Judge Horan addressed a common objection to the grant of third-party releases under sections 1521 and 1507, one which the UST made here: that courts must apply *Purdue*'s *ejusdem generis* approach to interpreting section 1123(b) of the Code to sections 1521 and 1507, and in so doing, find that courts have no authority to grant third-party releases under those sections. Judge Horan walked through the differences in language between section 1123(b) and, in turn, 1521 and 1507, to find that courts wield significantly more power under the latter two sections. Regarding section 1521, he notes first that it allows a court to grant "any" appropriate relief, and then provides a non-exhaustive list of examples. 2025 WL 977967 at *9. Section 1521(a)(7) qualifies the "any . . . including" language in the section "by explaining that any additional relief a court grants should be of the kind that is available to a trustee." *Id.* at *10. (Per Judge Horan, it is "well-settled that enforcement of a third-party release contained in a foreign plan is appropriate under that section." *Id.* (*citing In re Arctic Glacier Int'l, Inc.*, 901 F.3d 162 (3d Cir. 2018) (enforcing third party releases in a Canadian plan of arrangement); *In re Avanti Commc'ns Grp. PLC*, 582 B.R. at 618 (finding that it had the power to enforce third-party releases under either section 1521(a)(7) or section 1507(a))).) Section 1521 thus differs from section 1123(b), which "simply states that a court may include any 'other' chapter 11 plan provision that is not "inconsistent with the applicable provisions of this title.'" *Id.* The Supreme Court in *Purdue* read "other" as directing courts to look to the other provisions of 1123(b) to determine what further relief a court could grant. But "section 1521(a) does not direct courts to look to the 'other' provisions"—listed in subsections (a)(1)–(7)—"when providing relief under its catchall," instead allowing "courts to grant 'any additional relief that may be available to a trustee.'" *Id.* The limitation in section 1521(a), therefore, is not whether the relief is similar to those listed in 1521(a)(1)–(7), but whether the relief is available to the trustee. Moreover, section 1521(a)(7) qualifies its "any . . . including" language by listing specific relief a court is *barred* from granting under that section—and that list of prohibited relief does not include nonconsensual third-party releases. "By establishing explicit boundaries, Congress allowed relief that does not exceed those boundaries . . . . By specifically enumerating relief that the court cannot grant under section 1521, Congress more concretely defined the outer bounds of what the court can grant, thus also more concretely defining what is included in what the court can grant, bearing in mind the guiding principles of comity and cooperation." *Id.*; *see also id.* at *11 (citing the canon of *expressio unius* to support the conclusion). Judge Horan conducts a similar analysis of section 1507 to again find that, unlike section 1123(b), it establishes a broad set of powers and precisely defines the court's limitations under that section, "provid[ing] a more explicit and fuller picture of the broad relief a court may grant, as compared to that in section 1123(b)(6)." *Id.* at *11. In sum, both sections 1521 and 1507 differ from 1123(b) "because section 1123(b) does not expressly establish specific boundaries; instead, it directs courts to look to the rest of the Bankruptcy Code to determine whether a provision is appropriate. Because Congress expressed specific prohibitions [in 1521 and 1507], courts do not need to read further into its words like they do for section 1123(b). The plain language of section 1507 (and section 1521) already enumerates the boundaries unambiguously." *Id.* at *12.

Section 1522(a) permits the Court to grant relief pursuant to section 1521 only if the interests of creditors, the debtor, and other interested entities are "sufficiently protected."

"Sufficient protection" embodies "three basic principles: 'the just treatment of all holders of claims against the bankruptcy estate, the protection of U.S. claimants against prejudice and inconvenience in the processing of claims in the [foreign] proceeding, and the distribution of proceeds of the [foreign] estate substantially in accordance with the order prescribed by U.S. law.'" *Atlas Shipping*, 404 B.R. at 740. The Court finds that, in the present case, the issuance of a third-party release which enables the distribution of the foreign debtor's estate in the manner set forth in the RJ Plan enables the just treatment of all claimants, substantially in accordance with U.S. law.

Section 1506 provides another boundary: a bankruptcy court may decline to grant relief requested in a Chapter 15 case if the action would be "manifestly contrary to the public policy of the United States." 11 U.S.C. §§ 1506. This public policy exception is narrowly construed. *See In re Ocean Rig UDW Inc.*, 570 B.R. at 707. *Purdue* did not hold that nonconsensual third-party releases are contrary to the public policy of the U.S. In fact, the majority expressly stated that "[b]oth sides of this policy debate may have their points." *Purdue*, 603 U.S. at 226. The Supreme Court's holding was narrow: Chapter 11 of Title 11 does not provide bankruptcy courts, in Chapter 11 cases, with the authority to authorize such releases. It cannot be read to hold that nonconsensual third-party releases are "manifestly contrary to" U.S. public policy such that they would be barred by section 1506. *See also Credito Real*, 2025 WL 977967, at *15–16 (similar).

Following the logic of *Credito Real* and *Purdue*, the Court finds that the text of section 1521 permits the grant of a nonconsensual third-party release in support of a foreign debtor's plan of reorganization. Pre-Code caselaw, as well as opinions interpreting section 304, also support this finding.

Longstanding precedent holds that bankruptcy courts can strip U.S. parties of rights they have under the laws of the United States. As far back as 1883, the Supreme Court sanctioned the enforcement of a Canadian scheme of arrangement under which certain bonds would be issued to replace prior ones. U.S. bondholders argued that the scheme of arrangement, to which they had not consented, was imposed in such a way that violated the U.S. Constitution's bar on certain contractual impairments and hence the scheme should not be recognized by U.S. courts; the Supreme Court rejected this argument:

> [E]very person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him.

Canada Southern Ry. Co. v. Gebhard, 109 U.S. 527, 537–38 (1883). And building on *Gebhard*, the Second Circuit in *Cunard* dismissed a U.S. lawsuit solely on the grant of comity to a foreign proceeding. *Cunard S.S. Co. Ltd v. Salen Reefer Servs. AB*, 49 B.R. 614, 618 (S.D.N.Y. 1985), *aff'd sub nom. Cunard S.S. Co. v. Salen Reefers Servs. AB*, 773 F.2d 452, 452 (2d Cir. 1985). The sole concern of the Second Circuit was that the foreign court governing the foreign proceeding was a court of competent jurisdiction, and that enforcement of the foreign proceeding would not violate public policy in the U.S.; the fact that U.S. law would have led to a different outcome, and even the fact that a right granted by U.S. law was being stripped by enforcement, did not matter. *Id.* at 617–19.

A battery of similar cases makes it clear that a party can lose rights in an ancillary proceeding which it otherwise would have had in a plenary case under the Bankruptcy Code.

See, e.g., *In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333, 337 (S.D.N.Y. 2006) (recognizing Canadian order as an exercise of comity even though it overrode a defendant's constitutional right to a civil jury trial); *In re Bd. of Directors of Multicanal S.A.*, 307 B.R. 384, 389–91 (Bankr. S.D.N.Y. 2004) (holding that foreign law can "override" U.S. law (specifically, the Trust Indenture Act) via the enforcement of a foreign plan pursuant to section 304 which deprived a creditor of rights that he would have had under the TIA); *see also Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 999–1000 (2d Cir.1993) (dismissing bondholders' federal securities fraud action in granting comity to Australian insolvency proceeding, as it would have been "inefficient and inequitable to permit the individual claims to go forward. Indeed, since these individuals were sued solely because of their affiliation with the [foreign debtors], to allow these claims to go forward in the United States . . . would defeat the purpose of granting comity in the first place."); *Lindner Fund, Inc. v. Polly Peck Int'l PLC*, 143 B.R. 807, 807–11 (S.D.N.Y.1992) (dismissing federal securities fraud action in favor of foreign reorganization based on comity and noting that "American courts have traditionally extended comity to foreign bankruptcy proceedings by dismissing actions filed by creditors in United States courts"); *Smith v. Dominion Bridge Corp.*, No. 96-7580, 1999 WL 111465, at *1–5 (E.D. Pa. Mar. 2, 1999) (staying action against foreign debtor in U.S. courts out of comity considerations, and noting that courts have, under certain circumstances, extended the stay to cover non-debtor co-defendants).

As the Second Circuit has previously stated, "deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and . . . do not contravene the laws or public policy of the United States." *United JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005). So long as these guidelines are respected, a long string of caselaw indicates that bankruptcy courts may, acting as ancillaries to foreign proceedings, extinguish claims that would be available in plenary actions in the U.S. in the name of comity.

2. Pre-*Purdue* Caselaw

Given the above analysis, it is not surprising that pre-*Purdue* chapter 15 courts which faced the question whether limitations on a bankruptcy court's powers in plenary cases carried over into the chapter 15 context came to the same conclusion that courts operating under section 304 did: ancillary cases are fundamentally different, and limitations that exist in plenary cases do not always carry over. In *In re Metcalfe & Mansfield Alternative Invs*., the court had to determine whether a third-party release which might not be available in a plenary case under chapter 11 should be granted in a chapter 15. 421 B.R. at 694. The potential limiting factor there was not the appropriateness of the release under *Metromedia* (moot post-*Purdue*), but a more fundamental one—the *jurisdictional* limitation on chapter 11 courts in *Manville*. The *Metcalfe* court determined that the scope of its authority to release non-debtors in plenary proceedings did not matter because such jurisdictional limitations did not carry over into the chapter 15 context: "whatever the precise limits of a bankruptcy court's jurisdiction to approve a third-party non-debtor release and injunction in a plenary chapter 11 case, the important point for present purposes is that the jurisdictional limits derive from the scope of bankruptcy court 'related to' jurisdiction under 28 U.S.C. § 1334, and the prudential limits courts have applied in chapter 11 cases under the Bankruptcy Code. This Court is not being asked to approve such provisions in a plenary case; rather, the Court is being asked to order enforcement of provisions approved by the Canadian courts. The correct inquiry, therefore, is whether the foreign orders should be enforced in the United States in this chapter 15 case." *Id.* at 695–96. The *Metcalfe* court then moved onto what it considered to be the sole limiting factor: whether *principles of* *comity* counseled in favor of the grant. *Id.* *Metcalfe* was a section 1507 case, but its holding carries over into section 1521: there is no reason why a jurisdictional limitation *on bankruptcy courts acting in plenary cases* should hamper courts' ability to act as ancillaries to foreign proceedings. Its logic still holds after *Purdue*: *Purdue* only held that *chapter 11* of the Code does not give courts the power to grant such releases, and did not say anything about limitations on the power of courts to act as ancillaries to foreign proceedings under chapter 15.

To summarize, (1) the plain text of Chapter 15, (2) caselaw under its predecessor (section 304), and (3) pre-*Purdue* caselaw in this district all support a finding that courts can, pursuant to section 1521 of the Code, issue orders pursuant to their discretionary powers under section 1521 which contain nonconsensual third-party releases, whether or not those releases originate from a foreign court. Having found that this power exists under section 1521, this Court need not conduct a full analysis of section 1507 to determine whether it, too, so permits. *See In re Sino-Forest Corp.*, 501 B.R. at 666 (recognizing and enforcing foreign court order approving non-debtor release); *In re Avanti Commc'ns Grp. PLC*, 582 B.R. at 618 (same); *Metcalfe & Mansfield*, 412 B.R. at 696 (same).

IV. CONCLUSION

For the foregoing reasons, this Court finds that it had the authority under the Code to issue the Order as written. The United States Trustee's objections were **OVERRULED**.

Dated: April 21, 2025
New York, New York

Martin Glenn
MARTIN GLENN
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: ODEBRECHT ENGENHARIA e CONSTRUÇÃO S.A. - Em Recuperação Judicial, *et al*., Debtors in a Foreign Proceeding	Case No. 25-10482 (MG) Chapter 15

ORDER TO SHOW CAUSE

On or before 5:00pm, March 24, the Foreign Representative shall file a status report concerning this case specifically addressing what remaining steps are required before these cases can be closed.

IT IS SO ORDERED.

Dated: March 10, 2026
New York, New York

Martin Glenn
MARTIN GLENN
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 15
Altice France S.A., *et al.,*[1]	Case No. 25-11349 (MEW)
Debtors in a Foreign Proceeding.	(Jointly Administered)

ORDER RECOGNIZING FOREIGN PROCEEDING

Upon the *Verified Petition under Chapter 15 for Recognition of a Foreign Proceeding* (the "Verified Petition" and, together with the *Chapter 15 Petition for Recognition of a Foreign Proceeding (Official Form 401)* filed contemporaneously therewith for each Debtor, the "Petitions")[2] of Laurent Halimi, in his capacity as the duly-authorized foreign representative (the "Foreign Representative") of each of the Debtors, in support of entry of an order pursuant to sections 105(a), 1507, 1509(b), 1517, 1519, 1520(a), and 1521 of title 11 of the United States Code, 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code") (a) finding that (i) the Debtors are each eligible to be a "debtor" under chapter 15 of the Bankruptcy Code, (ii) the Foreign Representative satisfies the requirements of a "foreign representative" within the meaning of section 101(24) of the Bankruptcy Code, and (iii) the Petitions for each Debtor were properly filed and meets the

[1] The Debtors in these chapter 15 cases are the following entities (the Debtors' French SIREN number (with the location of the trade and company register where they are respectively registered) or the last four digits of their respective United States state registration number, as applicable, follow in parenthesis) Altice France S.A. (794 661 470 RCS Paris); Altice B2B France SAS (499 662 757 RCS Paris); Complétel SAS (418 299 699 RCS Paris); SFR Fibre SAS (400 461 950 RCS Meaux); SFR Presse Distribution SAS (808 636 054 RCS Paris); SFR Presse SAS (810 902 635 RCS Paris); Société Française du Radiotéléphone – SFR SA (343 059 564 RCS Paris); Ypso France SAS (484 348 131 RCS Meaux); and Numericable U.S. LLC (807 859 376 RCS Meaux; 5379 (U.S.)). The Debtors' address is 16, rue du Général Alain de Boissieu, 75015 Paris, France except for SFR Fibre SAS, Ypso France SAS and Numericable U.S. LLC, the address of those entities being 10, rue Albert Einstein, 77420 Champs-sur-Marne, France.

[2] Capitalized terms used herein but not otherwise defined shall have the meanings given to such terms in the Verified Petition.

requirements of section 1515 of the Bankruptcy Code, (b) granting recognition of the Accelerated Safeguard Proceedings as foreign main proceedings under sections 1517 and 1520 of the Bankruptcy Code, (c) granting all relief automatically available pursuant to section 1520 of the Bankruptcy Code, including section 549 of the Bankruptcy Code and the automatic stay under section 362 of the Bankruptcy Code, which, in each case, shall apply to the debtholders and, solely to the extent acting at the direction of any debtholder, agents and trustees under the Revolving Credit Facilities, Term Loans, and AF Senior Secured Notes with respect to the Debtors and the Debtors' property that is now or in the future located within the territorial jurisdiction of the United States, (d) in the alternative, solely as to the Accelerated Safeguard Proceeding for any Debtor that the Court finds is not a "foreign main proceeding," a finding and recognition that such Accelerated Safeguard Proceeding is a "foreign nonmain proceeding" as contemplated by section 1517(b)(2) of the Bankruptcy Code entitled to the benefits of the "automatic stay" pursuant to section 1521 of the Bankruptcy Code to apply to the Affected Creditors; (e) entrusting the administration or realization of all or part of the Debtors' assets located in the United States to the Foreign Representative to protect and preserve the value of such assets pursuant to section 1521(a)(5) of the Bankruptcy Code; (f) suspending the right of any Affected Creditor to transfer, encumber, or otherwise dispose of any assets of the Debtors pursuant to section 1520(a)(3) of the Bankruptcy Code; and (g) such other and further relief as is appropriate under the circumstances; and upon the hearing (the "Hearing") on the Petitions and this Court's review and consideration of the Petitions, the Halimi Declaration, and the Gumpelson Declaration;

IT IS HEREBY FOUND AND DETERMINED THAT:[3]

A. This Court has jurisdiction to consider the Petitions and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334, section 1501 of the Bankruptcy Code, and the *Amended Standing Order of Reference to Bankruptcy Judges of the District Court for the Southern District of New York*, dated January 31, 2012, Reference M-431 (Preska, C.J.).

B. The consideration of the Petitions and the relief requested therein is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P).

C. Venue is proper before this Court pursuant to 28 U.S.C. § 1410(1).

D. Good, sufficient, appropriate, and timely notice of the filing of the Petitions and the Hearing has been given by the Foreign Representative, pursuant to Bankruptcy Rules 1011(b) and 2002(q). In light of the nature of the relief requested and prior orders of this Court, no other or further notice is required.

E. No objections or responses were filed that have not been overruled, withdrawn, or otherwise resolved.

F. Each Debtor is "eligible" to be a debtor in these chapter 15 cases pursuant to sections 109 and 1501 of the Bankruptcy Code.

G. Each Accelerated Safeguard Proceeding is a "foreign proceeding" as such term is defined in section 101(23) of the Bankruptcy Code.

H. The Accelerated Safeguard Proceedings are pending in France, which is where each Debtor has its "center of main interests" as referred to in section 1517(b)(1) of the Bankruptcy

[3] The findings and conclusions set forth herein and on the record of the Hearing to consider the Petitions constitute this Court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, made applicable herein by Rules 7052 and 9014 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). To the extent any of the findings of fact herein constitute conclusions of law, they are adopted as such. To the extent any of the conclusions of law herein constitute findings of fact, they are adopted as such.

Code. As such, each Accelerated Safeguard Proceeding is a "foreign main proceeding" pursuant to section 1502(4) of the Bankruptcy Code and is entitled to recognition as a foreign main proceeding pursuant to section 1517(b)(1) of the Bankruptcy Code.

I. The Foreign Representative is a "person" as such term is defined in section 101(41) of the Bankruptcy Code and has been duly appointed, made responsible for administering the restructuring of each Debtor, and designated as the "foreign representative" of each Debtor as such term is defined in section 101(24) of the Bankruptcy Code.

J. These chapter 15 cases were properly commenced pursuant to sections 1504 and 1509, and the Petitions satisfy the requirements of section 1515 of the Bankruptcy Code and Bankruptcy Rule 1007(a)(4).

K. Absent the relief granted herein, the restructuring contemplated by the Accelerated Safeguard Proceedings may be frustrated by the actions of individual financial creditors, a result inconsistent with the purposes of chapter 15 of the Bankruptcy Code.

L. The relief granted herein is necessary and appropriate, in the interests of the public and international comity, consistent with the public policy of the United States, and warranted pursuant to sections 105, 362, 1504, 1507, 1509, 1515, 1517, 1520 and 1521 of the Bankruptcy Code.

BASED ON THE FOREGOING FINDINGS OF FACT AND AFTER DUE DELIBERATION AND SUFFICIENT CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED THAT:

1. The Petitions and the relief requested therein are granted as set forth herein, and any objections or responses thereto that have not been withdrawn or resolved are overruled with prejudice.

2. Each Accelerated Safeguard Proceeding is recognized as a "foreign main proceeding" pursuant to sections 1517(a) and 1517(b)(1) of the Bankruptcy Code.

3. The Foreign Representative is recognized as the "foreign representative" of each Debtor as defined in section 101(24) of the Bankruptcy Code in respect of the Accelerated Safeguard Proceedings.

4. All relief and protections afforded to foreign main proceedings under section 1520 of the Bankruptcy Code are hereby granted to the Accelerated Safeguard Proceedings, each Debtor and each Debtor's assets that are now or in the future located within the territorial jurisdiction of the United States, as applicable, including the application of section 549 of the Bankruptcy Code and the automatic stay under section 362 of the Bankruptcy Code (subject to the exceptions to section 362 set forth in the Bankruptcy Code), in each case, to each party listed below (collectively, the "Affected Creditors"):

a. the direct or beneficial holders, assignees, or transferees of the term loans under the term loan credit agreement, dated May 8, 2014, among Altice France S.A., Ypso France SAS, and Numericable U.S. LLC, as co-borrowers, the guarantors party thereto from time to time, the lenders party thereto from time to time, J.P. Morgan SE, as Initial Euro Administrative Agent, JPMorgan Chase Bank, N.A., as Initial Dollar Administrative Agent, and Deutsche Bank AG, London Branch, as Security Agent (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time in accordance with the terms therein, the "Term Loan Credit Agreement"), and the agents thereunder (solely to the extent acting at the direction of the term lenders);

b. the direct or beneficial holders, assignees, or transferees of the notes issued under each of the indentures entered into among, *inter alios*, Altice France S.A., as issuer, the guarantors party thereto from time to time, Deutsche Bank Trust Company Americas, as the Indenture Trustee, and Deutsche Bank AG, London Branch as the Security Agent (the "Senior Secured Note Indentures"), and the Indenture Trustee and agents thereunder (solely to the extent acting at the direction of the noteholders);

c. the direct or beneficial holders, assignees, or transferees of the revolving credit loans issued under the each of the revolving credit facilities, dated May 8, 2014, among Altice France S.A., Complétel SAS, Ypso France SAS, and SFR Fibre SAS, as co-borrowers, the guarantors party thereto from time to time, the lenders party thereto from time to time, and Deutsche Bank AG, London Branch, as Facility Agent and Security Agent (as amended, restated, amended and restated, supplemented, or otherwise modified from time to time in accordance with the terms therein, the "Revolving Credit Facilities"), and the agents thereunder (solely to the extent acting at the direction of the revolving lenders); and

d. any other successor, representative, agent, trustee, or party acting on behalf of (or asserting the claims of) the foregoing parties (including under parallel debt claims).

5. Nothing herein shall: (x) prevent any entity from filing any claims against any Debtor in the Accelerated Safeguard Proceedings; (y) prevent any party to the framework agreements from enforcing its terms; or (z) prevent any entity from seeking relief from the French Court in the Accelerated Safeguard Proceedings or this Court in these chapter 15 cases, as applicable. For the avoidance of doubt, the stay provided by this Order shall not be applicable to any act that is permitted, and that is not stayed, by orders entered by the French Court in the Accelerated Safeguard Proceedings.

6. The Foreign Representative is entrusted with the administration of the Debtors' assets located in the United States and is established as the exclusive authority to administer the Debtors' assets and affairs in the United States.

7. The Foreign Representative is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.

8. No action taken by the Foreign Representative in preparing, disseminating, applying for, implementing or otherwise acting in furtherance of the Accelerated Safeguard Proceedings, the documents contemplated thereunder, this Order, these chapter 15 cases, any further order for additional relief in these chapter 15 cases, or any adversary proceedings in connection therewith, will be deemed to constitute a waiver of the immunity afforded the Foreign Representative in its capacity as such under section 1510 of the Bankruptcy Code.

9. The Foreign Representative, the Debtors, and each of their respective agents are authorized to serve or provide any notices required under the Bankruptcy Rules or local rules of this Court.

10. Notwithstanding any provision in the Bankruptcy Rules to the contrary, this Order shall be immediately effective and enforceable upon its entry.

11. This Court shall retain jurisdiction with respect to the implementation, enforcement, amendment, or modification of this Order.

Dated: July 25, 2025

s/Michael E. Wiles
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 15
Altice France S.A., *et al.*,[1]	Case No. 25-11349 (MEW)
Debtors in a Foreign Proceeding.	(Jointly Administered)

ORDER (I) ENFORCING THE ORDERS OF THE FRENCH COURT APPROVING THE ACCELERATED SAFEGUARD PLANS AND (II) GRANTING RELATED RELIEF

Upon consideration of the *Motion of the Foreign Representative for an Order (I) Enforcing the Orders of the French Court Approving the Accelerated Safeguard Plans and (II) Granting Related Relief* (the "Motion")[2] of Laurent Halimi, in his capacity as the duly-authorized foreign representative (the "Foreign Representative") of each of the Debtors, each of which commenced *sauvegarde accélérée* proceedings under French law (the "Accelerated Safeguard Proceedings") before the *Tribunal des Activités Économiques de Paris* (Commercial Court of Paris, France) (the "French Court"), for entry of an order pursuant to sections 105(a), 1145, 1507, 1521, 1522 and 1525 of title 11 of the Bankruptcy Code:

a. giving full force and effect in the United States to the orders of the French Court dated August 4, 2025 (the "Plan Approval Orders"), approving the Accelerated Safeguard Plans for each Debtor;

---

[1] The Debtors in these chapter 15 cases are the following entities (the Debtors' French SIREN number (with the location of the trade and company register where they are respectively registered) or the last four digits of their respective United States state registration number, as applicable, follow in parenthesis) Altice France S.A. (794 661 470 RCS Paris); Altice B2B France SAS (499 662 757 RCS Paris); Completel SAS (418 299 699 RCS Paris); SFR Fibre SAS (400 461 950 RCS Meaux); SFR Presse Distribution SAS (808 636 054 RCS Paris); SFR Presse SAS (810 902 635 RCS Paris); Société Française du Radiotéléphone – SFR SA (343 059 564 RCS Paris); Ypso France SAS (484 348 131 RCS Meaux); and Numericable U.S. LLC (807 859 376 RCS Meaux; 5379 (U.S.)). The Debtors' address is 16, rue du Général Alain de Boissieu, 75015 Paris, France except for SFR Fibre SAS, Ypso France SAS and Numericable U.S. LLC, the address of those entities being 10, rue Albert Einstein, 77420 Champs-sur-Marne, France.

[2] Capitalized terms used but not defined herein have the meanings given to them in the Motion.

b. permanently enjoining all parties listed in subsections (i)-(iv) below (collectively, the "Affected Creditors") affected or bound by the Accelerated Safeguard Plans from commencing or taking any action inconsistent with the Accelerated Safeguard Plans or the Plan Approval Orders within the territorial jurisdiction of the United States with respect to claims or interests treated under the Accelerated Safeguard Plans:

   i. the direct or beneficial holders, assignees, or transferees of the term loans (the "Term Loans") under the term loan credit agreement, dated May 8, 2014, among Altice France S.A., Ypso France SAS, and Numericable U.S. LLC as co-borrowers, the guarantors party thereto from time to time, the lenders party thereto from time to time, J.P. Morgan SE as initial Euro administrative agent, JPMorgan Chase Bank, N.A. as initial U.S. dollar administrative agent, and Deutsche Bank AG, London Branch as security agent (as amended, the "Term Loan Credit Agreement");

   ii. the direct or beneficial holders, assignees, or transferees of the notes (the "AF Senior Secured Notes") issued under each of the indentures entered into among Altice France S.A. as issuer, the guarantors party thereto from time to time, Deutsche Bank Trust Company Americas as the indenture trustee, and Deutsche Bank AG, London Branch as the security agent (as amended, the "Senior Secured Note Indentures");

   iii. the direct or beneficial holders, assignees, or transferees of the revolving credit loans issued under each of the revolving credit facilities, dated May 8, 2014, among Altice France S.A., Completel SAS, Ypso France SAS, and SFR Fibre SAS as co-borrowers, the guarantors party thereto from time to time, the lenders party thereto from time to time, and Deutsche Bank AG, London Branch as facility agent and security agent (as amended, the "Revolving Credit Facilities"); and

   iv. any other successor, representative, agent, trustee, or party acting on behalf of (or asserting the claims of) the foregoing parties (including under parallel debt claims);

c. declaring that the issuance of new securities, which consists of the New Notes and the New LuxCo Shares, which will be issued to U.S. holders, among others, by the Debtors or their affiliates under the Accelerated Safeguard Plans are exempt from registration pursuant to section 1145 of the Bankruptcy Code as incorporated by section 1521 of the Bankruptcy Code;

d. directing Deutsche Bank Trust Company Americas, Deutsche Bank AG, London Branch, JPMorgan Chase Bank, N.A., and J.P. Morgan SE, each in their respective capacities as indenture trustee, registrar, security agent, paying agent, transfer agent, administrative agent, common depository and any other capacities in connection with the Term Loan Credit Agreement, Senior Secured Note Indentures, Revolving Credit Facilities, and related instruments and documentation, as applicable, and each of the agents and trustees under the New Securities and New Term Loans (collectively with any successors and assigns, the "Directed Parties") to take all actions that may be necessary or appropriate to give effect to and implement the Plan Approval Orders and Accelerated Safeguard Plans and consummate the transactions contemplated thereby;

e. authorizing the Foreign Representative to seek entry of a final decree (the "Proposed Final Decree") to close the chapter 15 cases of the Debtors upon notice of presentment and deeming this Motion to be the final report required to be filed by the Foreign Representative pursuant to Rule 5009(c) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rule 5009 of the Local Bankruptcy Rules for the Southern District of New York (the "Local Rules");

f. waiving the 14-day stay of effectiveness of the order; and

g. granting such other and further relief as the Court deems just and proper.

and due and sufficient notice of the Motion, the Accelerated Safeguard Plans, and the Plan Approval Orders having been provided; and the Court having held a hearing (the "Hearing") to consider the relief requested in the Motion; and no objections to the Motion having been filed that have not been withdrawn, resolved, or overruled; and upon consideration of the Declarations admitted into evidence at the Hearing, including but not limited to the Supplemental Declaration of Laurent Halimi that was filed, at the Court's request, at ECF No. 31 (the record of the Hearing having been left open for that purpose); and the Court having found and determined that the relief granted herein is consistent with the purposes of chapter 15 of the Bankruptcy Code and is in the best interests of the Debtors; and after due deliberation and sufficient cause appearing therefor; and for the reasons stated on the record at the Hearing;

IT IS HEREBY FOUND AND DETERMINED THAT:[3]

A. This Court has jurisdiction to consider the Motion and the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference to Bankruptcy Judges of the District Court for the Southern District of New York*, dated January 31, 2012, Reference M-431 (Preska, C.J.).

B. The consideration of the Motion and the relief requested therein is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(P).

C. Venue is proper before this Court pursuant to 28 U.S.C. § 1410(1).

D. Good, sufficient, appropriate, and timely notice of the Motion and the Hearing thereon has been given by the Foreign Representative, pursuant to Bankruptcy Rules 1011(b) and 2002(q) and Local Rule 9006-1. In light of the nature of the relief requested and the prior orders of this Court, no other or further notice is required.

E. Pursuant to an order of this Court dated July 25, 2025, the Foreign Representative was duly recognized as the "foreign representative" of the Debtors within the meaning of section 101(24) of the Bankruptcy Code, and each of the Accelerated Safeguard Proceedings were recognized as a "foreign main proceeding" within the meaning of sections 1502(4) and 1517(b)(1) of the Bankruptcy Code [Dkt. No. 23].

F. The relief granted herein is necessary and appropriate, in the interests of the public and international comity, consistent with the laws and public policy of the United States, and warranted pursuant to sections 105, 1145, 1507, 1521, 1522 and 1525 of the Bankruptcy Code.

[3] The findings and conclusions set forth herein constitute this Court's findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, made applicable to this proceeding pursuant to Bankruptcy Rule 9014. To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such. To the extent any of the following conclusions of law constitute findings of fact, they are adopted as such.

G. The relief granted herein is necessary to effectuate the purposes and objectives of chapter 15 of the Bankruptcy Code and to protect the interests of the Debtors, their creditors, and all other parties in interest.

H. Absent the relief granted herein, the Accelerated Safeguard Proceedings and the Debtors' efforts to consummate the restructuring may be thwarted by the actions of Affected Creditors, which would be at odds with the purpose of chapter 15 of the Bankruptcy Code as set forth, *inter alia*, in section 1501(a) of the Bankruptcy Code. Such results could threaten, frustrate, delay, and ultimately jeopardize the implementation of the Debtors' restructuring. Absent the injunction set forth in this Order, the Debtors and their assets may be subject to the prosecution of judicial, quasi-judicial, arbitration, administrative, or regulatory actions or proceedings in connection with claims held by the Affected Creditors against the Debtors and their assets, thereby interfering with and causing irreparable harm to the Debtors, their global financial restructuring process, their creditors, and other parties in interest.

I. The injunction contained herein as applied solely to the Affected Creditors (a) is within the Court's jurisdiction to grant, (b) is both an integral element of and essential to the success and objectives of the Accelerated Safeguard Proceedings and the Accelerated Safeguard Plans, and (c) confers material benefits on, and is in the best interests of, the Debtors, their creditors, and all other parties in interest.

J. The Foreign Representative and the Debtors, as applicable, are entitled to the additional assistance and discretionary relief set forth in this Order pursuant to sections 1507 and 1521 of the Bankruptcy Code.

K. The relief granted herein will, in accordance with section 1507(b) of the Bankruptcy Code, reasonably assure: (a) the just treatment of all holders of claims against or interests in the

Debtors' property; (b) the protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in the Accelerated Safeguard Proceedings; (c) the prevention of preferential or fraudulent dispositions of property of the Debtors favoring one Affected Creditor to the detriment of another; and (d) the distribution of proceeds of the Debtors' property substantially in accordance with the order prescribed in the Bankruptcy Code.

L. Each of the New Securities will be offered or sold by a Debtor or an affiliate of a Debtor under a plan in accordance with section 1145 of the Bankruptcy Code, in satisfaction of claims against or interests in the Debtors.

M. The Debtors provided sufficient disclosures regarding the New Securities, which constituted "adequate information" (as such term is defined in section 1125 of the Bankruptcy Code), justifying exemption from securities laws under section 1145 of the Bankruptcy Code.

N. All creditors and other parties in interest, including the Debtors, are sufficiently protected in the grant of the relief ordered hereby in compliance with 11 U.S.C. § 1522(a).

O. The U.S. Securities and Exchange Commission did not receive timely service of the Motion and has not submitted any response or taken a position with respect to the relief granted herein, including, without limitation, the applicability of Section 1145 of the Bankruptcy Code or any other exemption from registration under the Securities Act of 1933, as amended.

BASED ON THE FOREGOING FINDINGS OF FACT AND AFTER DUE DELIBERATION AND SUFFICIENT CAUSE APPEARING THEREFOR, IT IS HEREBY ORDERED THAT:

1. The Motion and the relief requested therein is GRANTED as set forth herein, and any objections or responses thereto that have not been withdrawn or resolved are overruled with prejudice.

2. The Plan Approval Orders and the Accelerated Safeguard Plans are hereby granted comity and given full force and effect in the United States to the same extent that they are given effect in France, and shall be binding and enforceable to that same extent, pursuant to sections 105(a), 1145, 1507, 1521, 1522 and 1525 of the Bankruptcy Code, on all Affected Creditors whose claims or interests are affected by the Accelerated Safeguard Plans and the Plan Approval Orders. Nothing in this paragraph shall impair the obligations issued or required to be paid pursuant to the Accelerated Safeguard Plans or any of the Plan Approval Orders, or enjoin any party from bringing an action to enforce the terms of the Accelerated Safeguard Plans or the Plan Approval Orders.

3. To the extent that the Plan Approval Orders and the Accelerated Safeguard Plans are enforceable in France, all Affected Creditors are hereby permanently enjoined from taking actions within the territorial jurisdiction of the United States that are inconsistent with the terms of the Accelerated Safeguard Plans, the Plan Approval Orders, or this Order or that would interfere with the implementation of the Accelerated Safeguard Plans, the Plan Approval Orders, or this Order. Nothing in this paragraph shall prevent any person or entity from (a) seeking enforcement of any rights or obligations under the Accelerated Safeguard Plans, the Plan Approval Orders, the documents governing the New Securities and the New Term Loans, or this Order, (b) taking any actions or entering into transactions permitted by the Accelerated Safeguard Plans, the Plan Approval Orders, or this Order, or (c) seeking relief from the French Court in the Accelerated Safeguard Proceedings or this Court in these chapter 15 cases, as applicable, consistent with applicable law.

4. For the avoidance of doubt, nothing in this Order is intended to enjoin or to prevent the prosecution of appeals that may be pending in France. If the Plan Approval Orders and the Accelerated Safeguard Plans require any modification as the result of any such appeals, the Foreign

Representative shall so notify this Court and shall seek such further relief (including reopening this chapter 15 case) as may be appropriate to reflect such modification.

5. Pursuant to sections 1507, 1521(a)(7), and 1145 of the Bankruptcy Code, (i) the offer and sale (or deemed offer and sale) of the New Securities pursuant to the Accelerated Safeguard Plans and the resale of any New Securities by the holders thereof are exempt from any applicable registration requirements under section 5 of the Securities Act of 1933, as amended, and analogous state and local law pursuant to section 1145 of the Bankruptcy Code, except to the extent that any such holder is deemed to be an "underwriter" as defined in section 1145(b) of the Bankruptcy Code.

6. The Directed Parties are authorized and directed to take any and all actions that may be necessary or appropriate to give effect to and implement the Plan Approval Orders and Accelerated Safeguard Plans and consummate the transactions contemplated thereby, subject to the rights and protections of the documents under which they have or shall be appointed to act including, without limitation, issuing the New Securities and New Term Loans, effectuating the cancellation and discharge of the applicable definitive documents of the Term Loan Credit Agreement, Senior Secured Note Indentures, Revolving Credit Facilities, and related instruments and documentation, and effectuating the release of the collateral securing the Term Loan Credit Agreement, Senior Secured Note Indentures, and Revolving Credit Facilities, and executing applicable agreements.

7. On the transaction closing date, the Term Loan Credit Agreement, Senior Secured Note Indentures, and Revolving Credit Facilities and all instruments and documents (including guarantees) related thereto will be deemed automatically cancelled, terminated and of no further force or effect including as a matter of federal and New York state law, without any further act or

action pursuant to any applicable agreement, law, regulation, order, or rule; *provided*, *however*, that (a) any rights, benefits or other provisions of the Term Loan Credit Agreement, Senior Secured Note Indentures, and Revolving Credit Facilities and the instruments and documents related thereto in favor of the Directed Parties shall continue in effect (the "Directed Parties' Rights") and (b) the Term Loan Credit Agreement, Senior Secured Note Indentures, and Revolving Credit Facilities shall remain in effect to the extent required to permit distributions to be made pursuant thereto consistent with the Accelerated Safeguard Plans and the Plan Approval Orders.

8. Without limitation of the relief granted in the foregoing or subsequent paragraphs, the Directed Parties are authorized and directed to take the following actions (as applicable) to give effect to and implement the Plan Approval Orders and the Accelerated Safeguard Plans and consummate the transaction contemplated thereby: (a) cancelling the Senior Secured Note Indentures and cancelling any related guarantees or security granted in respect of or in connection with the Term Loan Credit Agreement, Senior Secured Note Indentures, and Revolving Credit Facilities; (b) terminating and cancelling all obligations under and related to the Term Loan Credit Agreement, Senior Secured Note Indentures, and Revolving Credit Facilities (including on the records of The Depository Trust Company, Euroclear Bank SA/NV and Clearstream Banking, *société anonyme*, and the Directed Parties are hereby authorized and directed to execute documentation relating to such cancellation); (c) enforcing any obligation owed to any of them under the Accelerated Safeguard Plans and the Plan Approval Orders; (d) appearing in these chapter 15 cases or any proceeding in which they are or may become a party; (e) consummating any step and executing any document necessary and appropriate to implement the transactions contemplated by the Accelerated Safeguard Plans and the Plan Approval Orders, including acknowledging the cancellation and discharge of the Term Loan Credit Agreement, Senior Secured

Note Indentures, and Revolving Credit Facilities and any instruments and documents related thereto; and (f) issuing the New Securities and New Term Loans and granting and perfecting the security interests and liens securing the New Notes and New Term Loans. For the avoidance of doubt, nothing in the Plan Approval Orders, the Accelerated Safeguard Plans, these chapter 15 cases or this Order or actions taken pursuant to or in connection with any of the foregoing shall affect, impair, diminish or discharge the Directed Parties' Rights, including any rights to be paid reasonable and documented fees and expenses (including, without limitation, legal fees and expenses) and any indemnification rights of the Directed Parties in connection with the Term Loan Credit Agreement, Senior Secured Note Indentures, Revolving Credit Facilities, and related instruments and documentation.

9. The Debtors shall pay in cash all contractually required reasonable and documented fees, costs and expenses (including, without limitation, legal fees and expenses) of the Directed Parties, including, without limitation, those incurred or that may be incurred in connection with the Plan Approval Orders, the Accelerated Safeguard Plans, these chapter 15 cases or this Order and in connection with the transactions contemplated by any of the foregoing, on or before the transaction closing date or, if incurred thereafter, as and when would be or would have been required under the definitive documentation of the Term Loan Credit Agreement, Senior Secured Note Indentures, and Revolving Credit Facilities, or the New Securities or New Term Loans, as applicable.

10. The Foreign Representative and the Debtors are authorized and empowered to, and may in their discretion and without further delay, execute and deliver documents to effectuate the Accelerated Safeguard Plans and take any action and perform any act necessary to implement and effectuate the terms of this Order or the Plan Approval Orders. The Debtors and the Foreign

Representative are authorized and empowered to exercise all consent and approval rights provided for in the Accelerated Safeguard Plans in the manner set forth in the Accelerated Safeguard Plans.

11. No action taken by the Foreign Representative, the Debtors or their respective agents, representatives, advisors, or counsel, in preparing, disseminating, applying for, implementing, or otherwise acting in furtherance of or in connection with the Accelerated Safeguard Proceedings, these chapter 15 cases or any further proceeding commenced in these chapter 15 cases shall be deemed to constitute a waiver of the immunity afforded such persons pursuant to 11 U.S.C. §§ 306 or 1510.

12. No party shall incur any liability for following the terms of this Order (whether by acting or refraining from acting), except in the case of the party's own gross negligence or willful misconduct.

13. Nothing herein shall enjoin a police or regulatory act of a governmental unit, including a criminal action or proceeding.

14. The Motion satisfies the requirements of Bankruptcy Rule 5009(c), and the Foreign Representative's obligation to submit a final report in connection with the closure of these chapter 15 cases has been fulfilled.

15. Upon this Order becoming a final, non-appealable order, the Foreign Representative is authorized to seek entry of a final decree by notice of presentment, and the Motion and supporting Declarations shall be deemed to be the final report required to be filed by the Foreign Representative pursuant to Rule 5009(c) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and Rule 5009 of the Local Bankruptcy Rules for the Southern District of New York (the "Local Rules").

16. Notwithstanding any provision in the Bankruptcy Code or the Bankruptcy Rules to the contrary, (a) this Order shall be effective immediately and enforceable upon its entry, (b) the Foreign Representative is not subject to any stay in the implementation, enforcement, or realization of the relief granted in this Order, and (c) this Order shall constitute a final order within the meaning of 28 U.S.C. § 158(a).

17. This Court shall retain jurisdiction with respect to all matters relating to the implementation, enforcement, amendment, or modification of this Order.

Dated: New York, New York
September 30, 2025

s/Michael E. Wiles
THE HONORABLE MICHAEL E. WILES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

---x

In re:	**FOR PUBLICATION**
Giftcraft Ltd. *et al.*,	Chapter 15
Debtors in a Foreign Proceeding.	Case No. 25-11030 (MG)

---x

MEMORANDUM OPINION GRANTING MOTION AUTHORIZING SALE, INCLUDING ASSETS IN THE U.S., AND ASSUMPTION OF EXECUTORY CONTRACTS

A P P E A R A N C E S:

CHIPMAN BROWN CICERO & COLE, LLP
Counsel to the Foreign Representative
501 5th Avenue, 15th Floor
New York, New York 10017
By: Daniel G. Egan, Esq.

MARTIN GLENN
CHIEF UNITED STATES BANKRUPTCY JUDGE

Pending before the Court is the uncontested *Motion of Foreign Representative for Entry of an Order Pursuant to Sections 105(A), 363, 365, 1507, 1520, and 1521 of the Bankruptcy Code and Bankruptcy Rules 2002, 6004, 6006, And 9014 (I) Recognizing and Enforcing the Approval and Vesting Order, (II) Authorizing the Sale of Certain of the Debtors' Assets Free and Clear of All Liens, Claims, Interests, and Encumbrances, (III) Authorizing the Assignment of Certain Executory Contracts, and (IV) Granting Related Relief* (the "Motion," ECF Doc. # 43) submitted by KPMG Inc. ("KPMG"), in its capacity as the court-appointed receiver (in such capacity, the "Receiver") of the above captioned debtors (the "Debtors"), and in its capacity as the authorized foreign representative (the "Foreign Representative") of the Debtors, which are the subjects of a receivership proceeding (the "Giftcraft Receivership") pursuant to section

243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "BIA"), and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "CJA"), pending before the Ontario Superior Court of Justice (Commercial List) (the "Canadian Court"). This Chapter 15 case has previously recognized the Canadian proceeding as a foreign main proceeding. The Sale has been approved by the Canadian court. The Sale Motion includes assets located in the United States. Second Circuit precedent makes clear that sales of assets located in the United States require the Chapter 15 court to determine whether the sale of U.S. assets satisfies section 363(b) of the Bankruptcy Code. *See In re Fairfield Sentry Ltd.*, 768 F.3d 239, 244 (2d Cir. 2014). As discussed below, the Motion includes the necessary showing permitting the sale of U.S. assets.

The objection deadline was July 29, 2025, and no objections were received. The Foreign Representative seeks entry of an order (the "Proposed Order"), annexed to the Motion as Exhibit A (i) recognizing, enforcing, and giving effect in the United States to the Canadian Court's Approval and Vesting Order (the "Approval and Vesting Order"), annexed as Exhibit 1 to the Proposed Order; (ii) authorizing and approving the sale of substantially all of the assets of Debtors Giftcraft Canada, Giftcraft US, and Yosox (collectively, the "Selling Debtors") free and clear of all liens, claims, interests, and encumbrances pursuant to the Asset Purchase Agreement, dated as of July 7, 2025 (together with all schedules, exhibits, and amendments thereto, the "APA"), by and between the Receiver and Giftcraft 2025 Inc., as purchaser (the "Purchaser"), a copy of which is annexed to the Motion as Exhibit B; (iii) authorizing and approving the assumption and assignment of the Assumed Contracts (as defined in the APA); and (iv) granting related relief.

For the reasons explained below, the Court **GRANTS** the Motion

I. <u>BACKGROUND</u>

A. Giftcraft Receivership

On May 9, 2025, following defaults by the Debtors under their secured credit facilities, Royal Bank of Canada ("RBC"), the Debtors' secured lender, filed a Notice of Application with the Canadian Court under the BIA and CJA seeking to have a receiver appointed. (Motion ¶ 5.) On May 14, 2025, the Canadian Court entered an order (the "Appointment Order") appointing KPMG as the Receiver, without security, over all the present and future assets, undertakings, and properties of each of the Debtors acquired for, or used in relation to, a business carried on by each Debtor, including all proceeds thereof (the "Property"). (*Id.*)

The Appointment Order also provides the Receiver with broad authority over the Debtor's assets including the ability to:

- take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;
- manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtors;
- receive and collect all monies and accounts now owed or hereafter owing to the Debtors and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by the Debtors;
- execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to the Appointment Order;
- market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;
- sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business, (i) without the approval of the Canadian Court in respect of any transaction not exceeding $250,000 provided that the aggregate consideration for all such transactions does not exceed $1,000,000 and (ii) with the approval of the Canadian

Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause; and

- apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property.

(*Id.* ¶ 6.)

B. The Chapter 15 Cases

On May 20, 2025, (the "Petition Date"), the Foreign Representative filed, among other things, (a) voluntary petitions in this Court for relief under chapter 15 of the Bankruptcy Code for each of the Debtors, (b) a *Verified Petition for (I) Recognition of Foreign Main Proceedings, (II) Recognition of Foreign Representative, and (III) Related Relief Under Chapter 15 of the Bankruptcy Code* [ECF Doc. # 3], and (c) a *Motion for Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code* [ECF Doc. # 6]. (*Id.* ¶ 7.)

On May 30, 2025, the Court entered the *Order Granting Provisional Relief Pursuant to Section 1519 of the Bankruptcy Code* [ECF Doc. # 28] (the "Provisional Recognition Order"), giving provisional recognition to the Giftcraft Receivership and granting full force and effect to the Appointment Order on a provisional basis. (*Id.* ¶ 8.)

On June 16, 2025, the Court entered the *Order Granting Verified Petition of Foreign Representative for (I) Recognition of Canadian Proceeding as Foreign Main Proceeding, (II) Recognition of Foreign Representative; and (III) Related Relief Under Chapter 15 of the Bankruptcy Code* [ECF Doc. # 37] (the "Recognition Order") recognizing the Giftcraft Receivership as a foreign main proceeding on a final basis and granting various related relief. (*Id.* ¶ 9.)

C. Marketing Process

Upon the Canadian Court's entry of the Appointment Order, the Receiver immediately began working to fulfill its responsibilities under the Appointment Order with the aim to pursue a sale process with respect to the Debtors' assets in an effort to maximize value for the benefit of all stakeholders. (*Id.* ¶ 10.)

In furtherance thereof, the Receiver contacted a total of eighteen (18) potentially interest parties (the "Interested Parties"), consisting primarily of strategic buyers, in connection with a sale or other strategic restructuring transaction involving the Debtors' business and assets. (*Id.* ¶ 11.) The Interested Parties contacted by the Receiver include parties that had previously expressed an interest in some or all of the Debtors' assets through formal or informal marketing efforts conducted by the Debtors prior to entry of the Appointment Order. (*Id.*)

The Receiver held introductory calls with many of these parties, and ten (10) of the Interested Parties executed non-disclosure agreements ("NDAs") with the Receiver and were provided access to a virtual data room maintained by the Receiver containing financial, operational, and other diligence information concerning the Debtors and their assets to assist the Interested Parties in evaluating a potential transaction. (*Id.* ¶ 12.) The Receiver also held follow-up diligence calls with many of the Interested Parties that executed NDAs and, to the extent requested, organized site visits to the Debtors' headquarters in Brampton, Ontario to allow such Interested Parties to view the Debtors' operations and meet with management. (*Id.*)

On or about May 30, 2025, the Receiver received letters of intent from two Interested Parties regarding a potential transaction involving some or all of the Debtors' business and assets. (*Id.* ¶ 13.) The Receiver continued to engage in negotiations with these Interested Parties and, following such negotiations, determined that the proposal submitted by CTG Brands Inc.

("CTG") was the highest or otherwise best offer for the Purchased Assets (as defined in the APA) and that it was in the best interest of all stakeholders to move forward and finalize documentation with respect to such proposal. (*Id.*) A summary of the terms of the APA is contained in the Motion at paragraph fourteen (14). Accordingly, on July 7, 2025, the Receiver entered into the APA with the Purchaser, an entity formed by CTG, providing for the sale of substantially all of the Selling Debtors' assets on the terms and conditions set forth therein.[1] (*Id.*)

II. LEGAL STANDARD

A. Recognition of the Canadian Court's Vesting Order

Section 1520 outlines the mandatory relief automatically granted upon recognition of a foreign main proceeding under chapter 15. Once section 1520(a) applies, sections 363, 549 and 552 also apply to any transfer of a debtor's interest in property within the United States. 11 U.S.C. § 1520(a)(2); *In re Atlas Shipping A/S*, 404 B.R. 726, 739 (Bankr. S.D.N.Y. 2009). Section 1520 also allows a foreign representative to operate a debtor's business by exercising the rights and powers of a trustee under sections 363 and 552; and it applies section 552 to property of the debtor that is within the territorial jurisdiction of the United States. (*Id.*; 11 U.S.C. § 1520(a).) When considering if section 363 review is required in an ancillary U.S. bankruptcy proceeding "when there is a 'foreign main proceeding,' section 1520(a)(2) instructs the bankruptcy court to apply section 363 to a 'transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate.'" *In re Fairfield Sentry Ltd.*, 768 F.3d at 244 (quoting 11 U.S.C. § 1520(a)(2)).

[1] The APA does not provide for a sale of any of Ripskirt's assets and the Receiver is continuing to market those assets for sale.

B. Asset Sale Pursuant to Section 363 of the Bankruptcy Code

1. General Order M-383: Amended Guidelines for the Conduct of Asset Sales

The United States Bankruptcy Court for the Southern District of New York has established amended guidelines (the "Guidelines") for the conduct of asset sales under 11 U.S.C. § 363(b). The Guidelines establish the necessary components of a debtor's application to conduct asset sales, including a Sale Motion, Sale Order, Sale Procedures, and a Sale Procedures Order, along with additional detailed information described within each of the sections. A debtor applying for this Court's approval of asset sales must comply with General Order M-383.

2. Sale of a Debtor's Assets under Section 363(b)

"[T]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). In approving a transaction conducted pursuant to section 363(b)(1), courts consider whether the debtor exercised sound business judgment. *See In re Chateaugay Corp.*, 973 F.2d 141, 144-45 (2d Cir. 1992) (approving sale of assets based on a finding that sound business judgment supported sale because delay in the sale of assets may diminish their value); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1072 (2d Cir. 1983) (holding that the sale of assets out of the ordinary course of business must be supported by "some articulated business justification, other than appeasement of major creditors" and that "a judge determining a § 363(b) application [must] expressly find from the evidence presented before him at the hearing a good business reason to grant such an application"). Once the Trustee articulates a sound business justification, there "is a presumption that in making a business decision the [decision maker] acted on an informed basis, in good faith and in the honest belief that the action was in the best interests of the company." *Official Comm. of Subordinated Bondholders v. Integrated Res., Inc.,* 147 B.R. 650, 656 (Bankr. S.D.N.Y. 1992).

A determination that there are sufficient business reasons to justify a particular sale depends on the facts and circumstances of each particular case. *In re Lionel Corp.,* 722 F.2d at 1072. However, courts should consider factors such as: (1) the proportionate value of the asset to the estate as a whole, (2) the amount of time elapsed since the filing, (3) the likelihood of proposing and confirming a plan in the near future, (4) the effect of the proposed sale on any reorganization, (5) the sale price to be obtained with reference to any appraisals of the property, (6) alternative uses of the property, and (7) whether the asset is increasing or decreasing in value. (*Id.* at 1071.)

3. <u>Sale of Assets Free and Clear of Liens under 363(f)</u>

Bankruptcy Code section 363(f) states that a sale free and clear of liens may be approved only if at least one of the following conditions are met: (1) applicable non-bankruptcy law permits sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is in *bona fide* dispute; or (6) such entity could be compelled to accept a monetary satisfaction of such interest. According to *In re Dundee Equity Corp.*, 1992 WL 53743, at *3 (Bankr. S.D.N.Y. Mar. 6, 1992), the sale of interest may proceed "if any of the five conditions of section 363(f) have been met."

4. <u>Protections to Good Faith Purchasers under 363(m)</u>

Bankruptcy Code section 363(m) states that "The reversal or modification of an appeal or an authorization under subsection (b)…of this section of a sale…of property does not affect the validity of a sale…under such authorization to an entity that purchased…such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale…were stayed pending appeal." The Second Circuit has held that "[g]ood faith of a purchaser is shown by the integrity of his conduct during the course of the sale proceedings…A purchaser's good faith is lost by 'fraud, collusion between the purchaser and other bidders or the trustee, or any attempt to take grossly unfair advantage of other bidders.'" *Licensing by Paola v. Sinatra (In re Gucci),* 126 F.3d 380, 390 (2d Cir. 1997) (citations omitted).

5. Waiver of Bankruptcy Rules 6004(h) & 6006(d)

Bankruptcy Rule 6004(h) provides that "an order authorizing the use, sale, or lease of property . . . is stayed until the expiration of 14 days after entry of the order, unless the Court orders otherwise." FED. R. BANKR. P. 6004(h). Similarly, Bankruptcy Rule 6006(d) provides that "[a]n order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) is stayed until the expiration of 14 days after the entry of the order, unless the court orders otherwise." FED. R. BANKR. P. 6006(d). The rules are intended to provide time for an objecting party to appeal a sale order or the assignment of an executory contract before such order can be implemented. *See* Advisory Committee Notes to FED. R. BANKR. P. 6004(h); Advisory Committee Note to FED. R. BANKR. P. 6006(d).

Collier suggests that because the purpose of the rules is to "protect the rights of an objecting party," a court should eliminate the 14-day stay period and allow the sale or the assignment, as applicable, to close immediately in all cases where there has been no objection to the procedure. 10 COLLIER ON BANKRUPTCY § 6004.10 (16th 2019) (discussing Bankruptcy Rule 6004(h)); *id.* § 6006.04 (discussing Bankruptcy Rule 6006(d)).

Under the Guidelines, if a debtor seeks relief from the 14-day stay imposed by Bankruptcy Rule 6004(h), the sale motion must disclose the business or other basis for such request." (Guidelines § I.4.D.16.) Additionally, if the Debtor seeks findings limiting the purchaser's successor liability, the sale motion must disclose the proposed notice of such relief. (*Id.* § I.4.D.12.)

C. Assumption and Assignment of Executory Contracts

Section 365(a) of the Bankruptcy Code provides that a debtor-in-possession, "subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a). "The purpose behind allowing the assumption or rejection of executory contracts is to permit the trustee or debtor-in-possession to use valuable property of the estate and to 'renounce title to and abandon burdensome property.'" *Orion Pictures Corp. v. Showtime Networks (In re Orion Pictures Corp.)*, 4 F.3d 1095**,** 1098 (2d Cir. 1993) (citation omitted); *In re Republic Airways Holdings*, 547 B.R. 578, 582 (Bankr. S.D.N.Y. 2016); *see also In re Ames Dep't Stores, Inc.*, 306 B.R. 43, 51-52 (Bankr. S.D.N.Y. 2004).

The assumption or rejection of an executory contract or unexpired lease is subject to review under the business judgement standard. If the debtor has exercised "reasonable" business judgment, courts typically approve the proposed assumption or rejection. *See, e.g.*, *Mission Prod. Holdings* v. *Tempnology, LLC*, 139 S. Ct. 1652, 1658 (2019) (noting that a bankruptcy court will generally approve a debtors' choice to assume or reject an executory contract under the deferential business judgment rule) (citation omitted); *NLRB* v. *Bildisco and Bildisco*, 465 U.S. 513, 523 (1984); *In re Gucci*, 193 B.R. 411, 415 (S.D.N.Y. 1996) ("A bankruptcy court reviewing a trustee's decision to assume or reject an executory contract should….apply its best 'business judgement' to determine if it would be beneficial or burdensome to the estate to assume [it].") (citations omitted); *In re Child World, Inc.*, 142 B.R. 87, 89 (Bankr. S.D.N.Y.

1992) ("A debtor may assume or reject an unexpired lease in accordance with 11 U.S.C. § 365(a) in the exercise of its best business judgement.").

The "business judgment" standard is not a strict standard; it requires only a showing that either assumption or rejection of the executory contract will benefit the debtor's estate. *See In re Orion Pictures Corp.*, 4 F.3d at 1098–99; *In re Balco Equities, Inc.*, 323 B.R. 85, 99 (Bankr. S.D.N.Y. 2005) ("In determining whether the debtor has employed reasonable business discretion, the court for the most part must only determine that the rejection will likely benefit the estate.") (quoting *In re G Survivor Corp.*, 171 B.R. 755, 758 (Bankr. S.D.N.Y. 1994), *aff'd*, 187 B.R. 111 (S.D.N.Y. 1995)); *see also In re Genco Shipping & Trading Ltd.*, 509 B.R. 455, 463 (Bank. S.D.N.Y. 2014) ("A court will generally not second guess a debtor's business judgement regarding whether the assumption or rejection of a contract will benefit the debtor's estate."). Debtors are afforded significant discretion when requesting to assume or reject an executory contract. *See, e.g.*, *Androse Assocs. of Allaire, LLC* v. *Great Atl. & Pac. Tea Co. (In re Great Atl. & Pac. Tea Co.)*, 472 B.R. 666, 673 (S.D.N.Y. 2012) (concluding that courts may approve a debtor's lease assumption decision "[a]s long as assumption of a lease appears to enhance a debtor's estate" and the debtor's decision is not "clearly erroneous, too speculative, or contrary to the provisions of the Bankruptcy Code.") (citation omitted).

1. <u>Section 365 of the Bankruptcy Code</u>

A debtor-in-possession may generally assume and assign any executory contract or unexpired lease of the debtor, subject to court approval, if it (a) cures, or provides adequate assurance that it (or its assignee) will promptly cure, any applicable defaults and (b) provides adequate assurance of future performance under such contract or lease, including by its assignee. 11 U.S.C. § 365.

Bankruptcy Code section 365(b)(1) provides, in pertinent part, that:

> (b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee—
>
> > (A) cures, or provides adequate assurance that the trustee will promptly cure, such default . . .
> >
> > (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
> >
> > (C) provides adequate assurance of future performance under such contract or lease.

11 U.S.C. § 365(b)(1).

In addition, section 365(f) of the Bankruptcy Code provides that "[t]he trustee [or debtor-in-possession] may assign an executory contract or unexpired lease of the debtor only if . . . adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease." Courts in this district have held that "[a]dequate assurance of future performance are not words of art, but are to be given practical, pragmatic construction." *In re U.L. Radio Corp.*, 19 B.R. 537, 542 (Bankr. S.D.N.Y. 1982). "What constitutes 'adequate assurance' is to be determined by factual conditions." (*Id.* (citations omitted).) The chief concern is "the assignee's ability to satisfy [its proposed] financial obligations." (*Id.*) Adequate assurance does not, however, require "'an absolute guarantee of performance'; rather, 'it must simply appear that the [payments] will be paid and other . . . obligations met. . . . The emphasis is on protection.'" *In re Great Atl. & Pac. Tea Co.*, 472 B.R. at 674–75 (citing *In re M. Fine Lumber Co.*, 383 B.R. 565, 573 (Bankr. E.D.N.Y. 2008)). Courts have found that adequate assurance of future performance is provided when the assignee had the financial resources and willingness to give the business a strong likelihood of success. *In re Bygaph, Inc.*, 56 B.R. 596, 605–06 (Bankr. S.D.N.Y. 1986); s*ee also In re Bronx-Westchester Mack Corp.*, 20 B.R. 139, 143 (Bankr. S.D.N.Y. 1982) (determining that the assignee's financial status and assumption of the debtor's ongoing obligations constituted adequate assurance of future performance).

III. DISCUSSION

For the reasons discussed below, the Court **GRANTS** the Motion and **APPROVES** the recognition and enforcement of the Canadian Court's vesting order, **APPROVES** the sale of assets located in the United States pursuant to section 363 of the Bankruptcy Code, and **APPROVES** the assumption and assignment of the identified executory contracts.

A. This Court Should Recognize and Enforce the Canadian Court's Vesting Order

This Court has recognized the Canadian proceeding as the foreign main proceeding. (*See* Recognition Order.) Section 1520(a)(2) provides that "§ 363 applies to a transfer of an interest of the debtor in property . . . to the extent that the section[] would apply to property of an estate, following the recognition of a foreign proceeding as a foreign main proceeding." 11 U.S.C. § 1520(a). The Approval and Vesting Order issued by the Canadian Court enables the Foreign Representative to market the Debtors' property for sale, and with Canadian Court approval, sell, convey, transfer, or assign the Debtors' property outside the ordinary course of business. (Motion ¶ 19; *see* Motion Ex. A; *see also* Motion Ex. B.) The Approval and Vesting Order is consistent with the exercise of a Foreign Representative's authority under sections 1520(a) and 363 of the Bankruptcy Code and this Court should recognize the order.

B. The Court Approves the Asset Sale Pursuant to § 363 of the Bankruptcy Code

1. <u>Compliance with the Guidelines</u>

As required by the Guidelines, the Motion includes a copy of the Proposed Order, and the proposed purchase agreement. (*See* Guidelines at I.A.) Additionally, the Debtors' Motion complies with the notice provisions of the Guidelines. (Guidelines § I.4.D.16.) The Foreign Representative states it will provide notice to (a) the Debtors; (b) all persons or bodies authorized to administer the Debtors' foreign proceedings; (c) counsel to the Debtors' secured lender; (d) all known creditors and contract counterparties of the Debtors in the United States; (e) the Office of the United States Trustee for the Southern District of New York; (f) any other creditors and parties in interest, as set forth on the Consolidated Verified List Pursuant to FED. R. BANKR. P. 1007(a)(4), 1008, and 2002(q) attached to the Petitions; and (g) all other parties that request notice in these chapter 15 cases as of the date of such service. This list of parties to be provided notice is consistent with the Guidelines. (Guidelines § II.B.)

Accordingly, the Motion complies with the Guidelines.

2. Articulation of a Business Judgment

As required, the Foreign Representative has articulated a sound business purpose for the Auction Sale. *See In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 175 (Bankr. S.D.N.Y. 1989). The Foreign Representative has a sound business judgment to consummate the sale pursuant to the APA. Debtors represent that the sale furthers the Foreign Representative's mandate and "presents the best opportunity for the Foreign Representative to maximize the value of the Purchased Assets. (Motion ¶ 20.) The Debtor further represents that the purchase price is reasonable and that it is the highest offer received to date. (*Id.* ¶ 21.) The APA was the product of good faith, arm's length negotiations between the Foreign Representative and the Purchaser. (*Id.* ¶ 22.) There have been no allegations of collusion or bad faith regarding the proposed sale pursuant to the APA. (*Id.*) Lastly, the Debtor represents that adequate and reasonable notice is being provided to all parties of interest. (*Id.* ¶ 23.) The Court should not double guess the Foreign Representative's judgment without specific justification, "as business judgment of the estate representative is entitled to great deference" and the Court should find that the Foreign

Representative's business judgment is sufficient. *See In re Borders Grp., Inc.*, 453 B.R. 477, 483 (Bankr. S.D.N.Y. 2011).

3. Sale of Assets Free and Clear of Liens under 363(f)

The Foreign Representative has satisfied the requirements of section 363(f) and should be permitted to sell the property free and clear of all liens and interests. One of the grounds for selling a property free and clear is that lien holder consents. 11 U.S.C. § 363(f)(2). The Debtors represent that their secured creditor, Royal Bank of Canada, has approved the Foreign Representative's proposed process for the sale pursuant to the APA. (Motion ¶ 27.)

The Foreign Representative is also permitted to sell the property free and clear of all interests, including non-lien interests. 11 U.S.C. § 1520(a)(2); 11 U.S.C. § 363. Section 363(f) is satisfied here because all parties in interest will have notice and an opportunity to object. A failure to object generally constitutes consent to sale for the purposes of Section 363(f). *See, e.g.*, *FutureSource LLC v. Reuters Ltd.*, 312 F.3d 281 (7th Cir. 2002) (failure to object may constitute consent, if there was adequate notice); *Citicorp Homeowners Servs., Inc. v. Elliot* (*In re Elliot*), 94 B.R. 343 (E.D. Pa. 1988) (finding implied consent under similar circumstances).

4. Good Faith Protections Under §§ 363(m) & (n)

Again, the Debtors represent that APA was the product of good faith, arm's length negotiations between it and the Purchaser. (Motion ¶ 21.) The Foreign Representative conducted a robust marketing process, and the APA reflects the highest bid received through the process. (*Id.* ¶¶ 10-13, 21.) Eighteen (18) parties were contacted in connection with this marketing process, with ten (10) parties executing NDAs and two (2) bids were ultimately received. (*Id.* ¶¶ 11-13.) The Purchaser is not an insider of any of the Debtors, and no common identity of incorporators, directors, or controlling stockholders exists between the Purchaser and the Debtors. (*Id.* ¶ 14.) Therefore, the Foreign Representative has adequately demonstrated that the Court should grant the Motion with the protects available under sections 363(m) and 363(n) of the Bankruptcy Code.

5. Waiver of Bankruptcy Rules 6004(h) & 6006(d)

The Foreign Representative requests relief from Bankruptcy Rule 6004(h). (Motion ¶¶ 36-38.) A Debtor seeking relief from Rule 6004(h) "must disclose the business or other basis for such request." (Guidelines § I.4.D.16.) Rule 6004(h) and the Advisory Committee Notes are silent as to when a court should "order otherwise" and eliminate or reduce the 14-day stay period, commentators have suggested that the 14-day stay period should be eliminated to allow a sale or other transaction to close immediately "where there has been no objection to the procedure." Collier on Bankruptcy, ¶ 6004.11 (Richard Levin & Henry J. Sommer eds., 16th ed.). No objections to the Motion have been filed. The Foreign Representative argues that to the extent an objection is filed and overruled and the objecting party notifies the Court of its intent to appeal, the stay may be reduced to the amount of time actually necessary to file such appeal. (Motion ¶ 37.) The Foreign Representative claims that time is of the essence, and requests waiver of the 14-day stay period to permit the sale to close with immediate effect. (*Id.* ¶ 38.)

The Court finds that the Foreign Representative has made a sufficient showing to waive Rules 6004(h) and 6006(d). The Foreign Representative has demonstrated good cause and a sound business purpose for the immediate consummation of the Transaction as contemplated by the APA and waiver of Rules 6004(h) and 6006(d) is warranted.

C. The Court Approves the Assumption and Assignment of Executory Contracts

The Debtors have a sound business judgment for assuming and assigning the contracts to the Purchaser. A schedule of the contracts to be assumed and assigned are annexed to the APA as Schedule D. The APA provides that the Purchaser must make reasonable commercial efforts to obtain all necessary third-party consents to the assumption and assignment of the contracts to be assumed (the "Assumed Contracts"). (*Id.* ¶ 34.) The APA further provides that nothing "shall be construed as an agreement to assign any Assumed Contract that is not assignable in whole or in part without the consent, approval or waiver of the party or parties thereto other than the [Receiver], unless the consent, approval or waiver required to assign such Assumed Contract has been given." (*Id.*; APA § 4.10.) Absent the consent of the relevant counterparty, applicable contract will not be an Assumed Contract and will not be assigned to the Purchaser at closing. (*Id.* ¶ 34.)

1. <u>Business Judgment</u>

The assumption and assignment of the Assumed Contracts is a sound exercise of the Foreign Representative's business judgment. By assuming and assigning the Assumed Contracts to the Purchaser, the Debtor will avoid any damages claims that would arise from the rejection of the Assumed Contracts and will be relieved of the burden of performance under such agreements. (*Id.*) Accordingly, the Debtor submits that assumption of the Assumed Contracts and assignment to the Purchaser is an appropriate exercise of the Debtor's business judgment and should be approved. (*Id.*)

Courts in this district have routinely granted relief similar to the relief requested herein. *See, e.g.*, *In re SVB Financial Group*, No. 23-10367 (MG) (Aug 16, 2023), ECF Doc. # 501 (authorizing assumption and assignment of certain executory contracts); *In re Purdue Pharma L.P.*, No. 19-23649 (SHL) (May 30, 2023), ECF Doc. # 5644 (same); *In re Celsius Network, LLC*, No. 22-10964 (MG) (Dec. 13, 2022), ECF Doc. # 1686 (same); *In re GBG USA Inc.*, No. 21-11369 (MEW) (Dec. 22, 2021), ECF Doc. # 432 (same); *In re Evergreen Gardens Mezz LLC*, No. 21-10335 (MG) (Nov. 29, 2021), ECF Doc. # 266 (same); *In re LSC Communications, Inc.*, No. 20-10950 (SHL) (Oct. 7, 2020), ECF Doc. # 877 (same).

For these reasons the assumption and assignment of the Assumed Contracts is a sound exercise of the Foreign Representative's business judgment.

2. Section 365 Requirements

A debtor-in-possession may generally assume and assign any executory contract or unexpired lease of the debtor, subject to court approval, if it (a) cures, or provides adequate assurance that it (or its assignee) will promptly cure, any applicable defaults and (b) provides adequate assurance of future performance under such contract or lease, including by its assignee. 11 U.S.C. § 365.

Any Assumed Contracts, to the extent there are any cure costs, will be paid in full. (Motion ¶ 35.) The APA provides that the Purchaser and the Debtors will each pay 50% of all amounts necessary to cure any monetary default under any Assumed Contract. (*Id.* ¶ 34.) The Foreign Representative represents that the Purchaser is in the process of contracting counterparties to obtain consent for the assignment of the Assumed Contracts and regarding the payment of cure costs. (*Id.*)

In addition, the parties have adequate assurance of the Purchaser's future performance under the contracts. Although the Motion does not contain a fulsome discussion of adequate assurance, the Court finds proof of adequate assurance through the affected counterparties' consent to have their contract assumed and assigned. Again, the APA requires the counterparty's consent for a contract to be assumed and assigned. (*Id.*; APA § 4.10.) Therefore, this Court finds that the parties are adequately protected through their consent to have their contract assumed and assigned.

Therefore, the Court **GRANTS** the request to assume and assign contracts to the Purchaser.

IV. CONCLUSION

For the reasons discussed above, the Court **GRANTS** the Motion, **APPROVES** the recognition and enforcement of the Canadian Court's Approval and Vesting Order, **APPROVES** the asset sale pursuant to section 363 of the Bankruptcy Code, and **APPROVES** the assumption and assignment of the identified executory contracts.

A separate Order will be entered.

Dated: August 13, 2025
New York, New York

Martin Glenn
MARTIN GLENN
Chief United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:	§	**Chapter 15**
FOSSIL (UK) GLOBAL SERVICES LTD,[1]	§	**Case No. 25-90525 (CML)**
Debtor in a Foreign Proceeding.	§	

ORDER GRANTING PETITION FOR (I) RECOGNITION OF FOREIGN MAIN PROCEEDING, (II) RECOGNITION OF FOREIGN REPRESENTATIVE, AND (III) RELATED RELIEF UNDER CHAPTER 15 OF THE BANKRUPTCY CODE

Upon consideration of the *Verified Petition for (I) Recognition of Foreign Main Proceeding, (II) Recognition of Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code* (the "**Verified Petition**," and together with the form petition filed concurrently therewith, the "**Petition**"),[2] filed by the Foreign Representative as the "foreign representative" of the above-captioned debtor (the "**Foreign Debtor**"); and upon the hearing on the Verified Petition and this Bankruptcy Court's review and consideration of the Petition, the Greben Declaration, and the Sage Declaration;

---

1 The last four digits of the Foreign Debtor's foreign identification number are: 7372. The location of the Foreign Debtor's service address for purposes of this chapter 15 case is: Ashton House, 497 Silbury Boulevard, Milton Keynes, United Kingdom, MK9 2LD. Additional information may be obtained on the website of the Foreign Debtor's information agent at http://dm.epiq11.com/fossiluk.

2 Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Verified Petition.

IT IS FOUND THAT:[3]

A. This Bankruptcy Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334.

B. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b).

C. Venue is proper before this Bankruptcy Court pursuant to 28 U.S.C. § 1410.

D. This Bankruptcy Court may enter a final order consistent with Article III of the United States Constitution.

E. Due, sufficient, timely and proper notice of the Petition and the hearing on the Verified Petition have been provided in accordance with the *Order (I) Scheduling Recognition Hearing, (II) Specifying Form and Manner of Service of Notice, and (III) Granting Related Relief* (Docket No. 18), and no other or further notice need be provided.

F. No objections or other responses to the Verified Petition were filed that have not been overruled, withdrawn, or otherwise resolved.

G. The Foreign Debtor has property in the United States, and therefore, the Foreign Debtor is eligible to be a debtor in a chapter 15 case pursuant to sections 109 and 1501 of the Bankruptcy Code.

H. This Chapter 15 Case was properly commenced pursuant to sections 1504, 1509, and 1515 of the Bankruptcy Code.

---

[3] The findings and conclusions set forth herein and in the record of the hearing on the Petition constitute this Bankruptcy Court's findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure, as made applicable herein by Rules 7052 and 9014 of the Bankruptcy Rules. To the extent any of the findings of fact herein constitute conclusions of law, they are adopted as such. To the extent any of the conclusions of law herein constitute findings of fact, they are adopted as such.

I. The UK Proceeding is a "foreign proceeding" pursuant to section 101(23) of the Bankruptcy Code.

J. The Foreign Representative is a "person" pursuant to section 101(41) of the Bankruptcy Code and is the duly appointed "foreign representative" of the Foreign Debtor as such term is defined in section 101(24) of the Bankruptcy Code. The Foreign Representative has satisfied the requirements of section 1515 of the Bankruptcy Code and Bankruptcy Rule 1007(a)(4).

K. The UK Proceeding is entitled to recognition by this Bankruptcy Court pursuant to section 1517 of the Bankruptcy Code. The UK Proceeding is pending in England, where the Foreign Debtor has its "center of its main interests" as referred to in section 1517(b)(1) of the Bankruptcy Code. Accordingly, the UK Proceeding is a "foreign main proceeding" pursuant to section 1502(4) of the Bankruptcy Code, and is entitled to recognition as a foreign main proceeding pursuant to section 1517(b)(1) of the Bankruptcy Code.

L. The Foreign Representative is entitled to relief available pursuant to sections 1507, 1520, and 1521 of the Bankruptcy Code including, without limitation, application of the automatic stay pursuant to section 362 of the Bankruptcy Code as well as additional assistance and discretionary relief, to the extent set forth in this Order.

M. The standards for injunctive relief have been satisfied pursuant to section 1521(e) of the Bankruptcy Code.

N. The Restructuring Plan is not contrary to the public policy of the United States.

O. The cancellation of all obligations, including guarantees with respect to the Unsecured Notes as contemplated under the Restructuring Plan, is an essential element of the Restructuring Plan and is in the best interests of the Foreign Debtor and the Plan Creditors.

P. The relief granted hereby is necessary to effectuate the purposes and objectives of chapter 15 and to protect the Foreign Debtor and its interests.

THEREFORE, IT IS ORDERED THAT:

1. The UK Proceeding is recognized as a foreign main proceeding pursuant to section 1517 of the Bankruptcy Code, and all the effects of recognition as set forth in section 1520 of the Bankruptcy Code shall apply.

2. Upon entry of this Order, the UK Proceeding, including the Sanction Order and all prior orders of the English Court entered in the UK Proceeding, shall be and hereby are granted comity and given full force and effect in the United States and, pursuant to section 1520 of the Bankruptcy Code, among other things:

a. the protections of sections 361 and 362 of the Bankruptcy Code apply to the Foreign Debtor;

b. all persons and entities are enjoined from seizing, attaching, and enforcing or executing liens or judgments against the Foreign Debtor's property in the United States or from transferring, encumbering, or otherwise disposing of or interfering with the Foreign Debtor's assets or agreements in the United States without the express consent of the Foreign Representative; and

c. all persons and entities are enjoined from commencing or continuing, including the issuance or employment of process of, any judicial, administrative or any other action or proceeding involving or against the Foreign Debtor or its assets or proceeds thereof, or to recover a claim or enforce any judicial, quasi-judicial, regulatory, administrative, or other judgment, assessment, order, lien, or arbitration award against the Foreign Debtor or its assets or proceeds thereof.

3. The Restructuring Plan is recognized, enforced, and given full force and effect within the territorial jurisdiction of the United States in accordance with its terms. Such recognition shall extend to, without limitation, the waiver, release, and discharge of any and all rights or claims against the Released Parties in accordance with the terms set forth in the Restructuring Plan, which incorporates the Cancellation Order and the Deed of Release, and to the

maximum extent enforceable under English law. Holders of such claims released thereby, including the Plan Creditors, shall be precluded from asserting such claims within the territorial jurisdiction of the United States.

4. The Foreign Representative is the duly appointed foreign representative of the UK Proceeding with respect to the Foreign Debtor, within the meaning of section 101(24) of the Bankruptcy Code, and is authorized to act on behalf of the Foreign Debtor in the Chapter 15 Case.

5. The Foreign Representative and the Foreign Debtor shall be entitled to the full protections and rights enumerated under section 1521(a)(4) and (5) of the Bankruptcy Code and, accordingly, the Foreign Representative:

a. is entrusted with the administration or realization of all or part of the Foreign Debtor's assets located in the United States; and

b. has the right and power to examine witnesses, take evidence, or deliver information concerning the Foreign Debtor's assets, affairs, rights, obligations, or liabilities.

6. The Foreign Representative is hereby established as the representative of the Foreign Debtor with full authority to administer the Foreign Debtor's assets and affairs in the United States.

7. The Foreign Representative, the Foreign Debtor, and their respective agents are authorized to serve or provide any notices required under the Bankruptcy Rules or Local Rules of this Bankruptcy Court.

8. Pursuant to sections 1521(a) and 1521(e) of the Bankruptcy Code, and except as otherwise permitted or contemplated by the Restructuring Plan or this Order, all persons and entities (as such terms are defined in section 101 of the Bankruptcy Code), other than the Foreign Debtor and their representatives and agents, are hereby permanently enjoined and

restrained from taking any action in the United States inconsistent with the UK Proceeding and orders entered therein (including the Sanction Order), and the Restructuring Plan (including the Cancellation Order and Deed of Release), or interfering with or impeding the administration, enforcement, and implementation of the Restructuring Plan.

9. No action taken by the Foreign Representative, the Foreign Debtor, or their respective successors, agents, representatives, advisors, or counsel in preparing, disseminating, applying for, implementing, or otherwise acting in furtherance of or in connection with the UK Proceeding, this Order, this Chapter 15 Case, or any adversary proceeding herein, or contested matters in connection therewith, will be deemed to constitute a waiver of any immunity afforded the Foreign Representative, including, without limitation, pursuant to section 1510 of the Bankruptcy Code.

10. The Foreign Representative is authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.

11. The Foreign Representative shall have access to additional relief available under sections 1507 and 1521 of the Bankruptcy Code, including as necessary or appropriate to give effect to and implement the Sanction Order and the Restructuring Plan, including the Cancellation Order and Deed of Release, and to consummate the transactions contemplated thereunder.

12. No action taken by the Foreign Representative, the Foreign Debtor, or their respective successors, agents, representatives, advisors, or counsel in preparing, disseminating, applying for, implementing, or otherwise acting in furtherance of or in connection with the UK Proceeding, this Order, the Chapter 15 Case, or any further proceeding commenced hereunder, shall be deemed to constitute a waiver of the rights or benefits afforded to such persons under

sections 306 and 1510 of the Bankruptcy Code.

13. The Foreign Debtor, FGI, The Bank of New York Mellon Trust Company, N.A., in its capacity as indenture trustee for the Unsecured Notes (the "**Notes Trustee**"), the custodians of the Unsecured Notes, Epiq Corporate Restructuring, LLC, and The Depository Trust Company ("**DTC**" and, together with their respective officers, directors, employees, representatives, agents, advisors, attorneys, professionals, managers, successors, and assigns, collectively, the "**Authorized Parties**") are authorized to take any and all lawful actions necessary or appropriate to give effect to and implement the Restructuring Plan (including the Cancellation Order and Deed of Release), the Sanction Order, and the transactions contemplated thereunder, including, without limitation, the cancellation of the Unsecured Notes, in each case subject to the terms and conditions of the documents under which they have been appointed to act.

14. In connection with implementing the Sanction Order and the Restructuring Plan (including the Cancellation Order and Deed of Release), the Foreign Debtor is authorized to cause FGI to deliver to the Notes Trustee and/or DTC, as applicable, any and all documentation required to effect the cancellation of the Unsecured Notes in DTC and the removal of all remaining positions on account of the Unsecured Notes from DTC's books and records, including, without limitation, the settlement spreadsheet to be provided to DTC by the Information Agent, this Order, the Cancellation Order (if requested by DTC), and such other documentation (in each case in a form reasonably acceptable to the Notes Trustee) as may be required by DTC to cancel the Unsecured Notes.

15. Subject to (i) the Notes Trustee's receipt of the Cancellation Order from FGI, (ii) DTC's receipt of the settlement spreadsheet to be provided to DTC by the Information Agent, this Order, the Cancellation Order (if requested by DTC), (and any other required

documentation) from FGI; and (iii) confirmation from the Foreign Debtor that Restructuring Step 1 of the Transaction Implementation Deed has occurred, the Notes Trustee is authorized to consummate any and all lawful actions and execute any documents reasonably necessary or appropriate to effectuate and/or acknowledge the cancellation of the Unsecured Notes in accordance with the terms of the Unsecured Notes, the Unsecured Notes Indenture and the Restructuring Plan.

16. The Authorized Parties are authorized and directed to cooperate with the other Authorized Parties to facilitate the cancellation of the Unsecured Notes pursuant to the Restructuring Plan, Cancellation Order, and Sanction Order.

17. Prior to or as soon as reasonably practicable following the cancellation of the Unsecured Notes, and pursuant to the terms of the Unsecured Notes Indenture, the Foreign Debtor shall pay (or shall cause FGI to pay) the reasonable and documented fees, costs, and expenses of the Notes Trustee (including, without limitation, its attorneys' fees, costs and expenses) incurred or to be incurred in connection with the UK Proceeding, this Chapter 15 Case, and the implementation of the transactions provided for in the Restructuring Plan and/or Sanction Order (including, without limitation, the cancellation of the Unsecured Notes); *provided* that the Notes Trustee and its attorneys shall not be required to provide itemized time detail and may instead submit summary invoices reflecting their respective fees, costs, and expenses.

18. Nothing in this Order shall impair or otherwise affect any contractual indemnification rights of the Notes Trustee under the terms of the Unsecured Notes Indenture or any related documents.

19. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

20. This Bankruptcy Court shall retain jurisdiction with respect to the enforcement, amendment, or modification of this Order, any requests for additional relief or any adversary proceeding brought in and through this Chapter 15 Case and any request by an entity for relief from the provisions of this Order, for cause shown, that is properly commenced and within the jurisdiction of this Bankruptcy Court.

21. This Order applies to all parties in interest in this Chapter 15 Case and all of their agents, employees, and representatives, and all those who act in concert with them who receive notice of this Order.

IT IS SO ORDERED.

Signed: November 12, 2025

Christopher Lopez
United States Bankruptcy Judge

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2026] SGCA 24

Court of Appeal / Civil Appeal No 36 of 2025

Between

Singapore Commodities Group Co., Pte. Ltd.

… *Appellant*

And

Founder Group (Hong Kong) Limited (in liquidation)

… *Respondent*

In the matter of Companies Winding Up No 120 of 2022

In the matter of Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018)

And

In the matter of Singapore Commodities Group Co., Pte. Ltd.

Between

Founder Group (Hong Kong) Limited (in liquidation)

… *Claimant*

And

Singapore Commodities Group
Co., Pte. Ltd.

… *Defendant*

GROUNDS OF DECISION

[Arbitration — Agreement]
[Insolvency Law — Winding up — Disputed debt]
[Insolvency Law — Winding up — Standing]

TABLE OF CONTENTS

Singapore Commodities Group Co, Pte Ltd
v
Founder Group (Hong Kong) Ltd (in liquidation)

[2026] SGCA 24

Court of Appeal — Civil Appeal No 36 of 2025
Steven Chong JCA, Ang Cheng Hock JCA and Kannan Ramesh JAD
13 February 2026

8 May 2026

Ang Cheng Hock JCA (delivering the grounds of decision of the court):

1 This was the second appeal to come before us involving these parties. The respondent applied for the appellant to be wound up on the basis of an unpaid debt arising from a sale and purchase contract for copper cathodes. The appellant, however, disputed the debt on the basis that the contract was a sham and that the respondent had not delivered any copper cathodes to it. The parties proceeded to arbitrate the dispute over the debt which resulted, perhaps unexpectedly, in a stalemate as the tribunal found that the debt had been neither disproven by the appellant nor proven by the respondent. This unusual result spawned two new areas of disputes that were the subject of a previous appeal and the one before us here.

2 The first appeal we heard last year concerned whether the respondent was entitled to payment out of a sum of money that had been paid by the appellant into court pending the resolution of the dispute in the arbitration and

the disposal of the winding-up application. We answered this in the negative as the respondent had not established the existence of the debt in the arbitration. We thus set aside the payment out order that had been made by a Judge of the General Division of the High Court ("Judge"), reinstated the respondent's winding-up application which had been withdrawn following the payment out order, and remitted the winding-up application to the Judge: see *Singapore Commodities Group Co, Pte Ltd v Founder Group (Hong Kong) Ltd* [2025] SGCA 35 ("*SG Commodities (No 1)*").

3 In *SG Commodities (No 1)*, we highlighted that the Judge would have to consider, in light of the result of the earlier arbitration, whether the winding-up application could be maintained based on the principles laid down in the decisions of this court in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 ("*AnAn*") and *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd Ltd* [2023] 2 SLR 554 ("*Founder Group (CA)*"). What these decisions broadly establish is that parties to an arbitration agreement cannot bypass their agreement to resolve disputes over the existence or otherwise of a debt through arbitration by presenting a winding-up application based on that alleged debt. Thus, while a court hearing a winding-up application will generally engage in a light-touch review of the merits of a dispute over the existence of the debt to the extent of inquiring if there is a triable issue over the debt, an arbitration agreement that governs any disputes over the debt would generally preclude *any* form of merits review of the dispute. Accordingly, if the debtor raises a dispute over the debt that is subject to arbitration, the general rule is that the winding-up application will be dismissed as the applicant will be precluded by the arbitration agreement from establishing the debt in the winding-up proceedings and hence its standing as a creditor to

apply for the winding-up of the debtor, although a stay of the application may exceptionally be ordered.

4 This appeal arose from the Judge's decision on remittal in which he ordered the appellant to be wound up. The Judge arrived at this conclusion despite finding, given the outcome of the earlier arbitration, that there remained a dispute over the existence of the debt that was subject to a valid arbitration agreement between the parties. While this would ordinarily have led to the dismissal of the winding-up application based on the general rule as described above, the Judge held that this case fell within the scope of a limited exception, recognised by this court in *AnAn*, that allowed the court to decide the dispute over the existence of the debt in the usual way if it was satisfied that the dispute had been raised by the debtor in abuse of process. The Judge found that the appellant's conduct constituted an abuse of process as it had resiled from certain past admissions of the debt. The appellant's main contention in this appeal was that the Judge had erred in finding that it had acted in abuse of process.

5 After hearing the parties, we allowed the appeal. As we briefly explained at the hearing, we were satisfied that the Judge had erred in his finding that the appellant had acted in abuse of process. The result was that the general rule in *AnAn* and *Founder Group (CA)* applied and the respondent was unable to establish its standing as a creditor to bring a winding-up application against the appellant, given the absence of a finding by the arbitral tribunal that the debt was indeed due to the respondent. We thus set aside the winding-up order made by the Judge and dismissed the winding-up application. We also made certain consequential orders on costs and ordered that the money paid into court by the appellant be returned to it.

6 We now provide our full grounds of decision, in which we take the opportunity to clarify: (a) the general approach to disputed debts in winding-up applications; (b) the ambit of the abuse of process exception in *AnAn*; and (c) the circumstances in which a defendant to a winding-up application will be found to have disputed the debt in abuse of the process of the court by resiling from a previous admission of the debt.

Background to the appeal

7 The appellant, Singapore Commodities Group Co, Pte Ltd, and the respondent, Founder Group (Hong Kong) Ltd, were previously part of a group of companies that were owned and controlled by Peking University Founder Group Company Ltd ("PUFG"). However, after reorganisation proceedings were commenced against PUFG in the Beijing First Intermediate People's Court, the appellant fell under the ownership and control of a consortium of strategic investors, while the respondent remained under the ultimate ownership of PUFG.

8 The dispute between the parties concerned an alleged debt due from the appellant to the respondent under a contract entered into in December 2015 for the sale of copper cathodes from the respondent to the appellant ("Purchase Contract"). The Purchase Contract contained a multi-tiered dispute resolution clause which provided that the parties were to attempt to resolve all disputes in connection with the Purchase Contract or the performance of the Purchase Contract through friendly discussion, failing which the controversy or claim should be submitted to arbitration under the auspices of the China International Economic and Trade Arbitration Commission ("CIETAC"). The clause further provided that the governing law of the Purchase Contract was that of the People's Republic of China ("PRC").

9 The respondent was wound up on 19 July 2021 by a Hong Kong court and placed under the control of liquidators. According to the respondent, its liquidators discovered upon review of the respondent's books that there was an outstanding debt of US$14,117,585.50 owing to the respondent from the appellant ("Alleged Debt"). The Alleged Debt was said to be originally evidenced in three audit confirmation letters from the appellant's auditors to the respondent ("Audit Confirmation Letters"). Although the Audit Confirmation Letters were dated from 2018 to 2022, it appeared that the first Audit Confirmation Letter was erroneously dated as 2018, given that it concerned the appellant's financial period ended 31 December 2018 and must logically have been issued in 2019. This discrepancy is, however, immaterial for the purposes of the present appeal.

10 On 18 February 2022, the respondent proceeded to issue a statutory demand to the appellant for the amount of the Alleged Debt pursuant to s 125(2)(*a*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA") to be paid within 21 days. The respondent later agreed to grant the appellant an extension of time until 21 March 2022 to respond to the statutory demand.

11 Instead of paying the Alleged Debt, the appellant commenced a CIETAC arbitration against the respondent ("Arbitration") on 12 April 2022. In the Arbitration, the appellant sought a negative declaration that it did not owe the Alleged Debt to the respondent. The appellant argued that the Alleged Debt did not exist as:

(a) the Purchase Contract was "null and void" under Art 146 of the Civil Code of the PRC because the Purchase Contract was solely for accounting and bookkeeping purposes since the parties did not have an intention to buy or sell copper cathodes at the time the Purchase Contract was signed; and

(b) the respondent had never delivered any copper cathodes to the appellant under the Purchase Contract.

12 The respondent objected to the jurisdiction of the arbitral tribunal ("Tribunal") on the basis that, on the appellant's own case that the Purchase Contract was null and void, the arbitration clause contained within the Purchase Contract had to be invalid. Critically, however, the respondent did not mount a counterclaim for the Alleged Debt in the Arbitration, although it did lead some evidence to prove the existence of the Purchase Contract and the Alleged Debt.

13 Despite the commencement of the Arbitration by the appellant, the respondent filed a winding-up application against the appellant on 27 May 2022 in HC/CWU 120/2022 ("CWU 120"). The respondent relied on two grounds to seek a winding up of the appellant in CWU 120: (a) first, that the appellant was unable to pay its debts within the meaning of s 125(1)(*e*) of the IRDA ("Insolvency Ground"); and (b) second, that it was just and equitable for the appellant to be wound up within the meaning of s 125(1)(*i*) of the IRDA ("Just and Equitable Ground").

14 What transpired next has been detailed in *SG Commodities (No 1)*. In brief, the material facts are as follows.

15 The appellant contested CWU 120. It relied on, among other things, the existence of a dispute over the Alleged Debt that fell within the scope of the CIETAC arbitration clause. The respondent took the position that the appellant

had admitted the Alleged Debt in terms of both liability and quantum by way of the Audit Confirmation Letters and the appellant's books which recorded the Alleged Debt from Financial Years ("FY") 2016 to 2021. The respondent thus argued that the appellant was acting in abuse of process in trying to get a stay or dismissal of CWU 120 based on the CIETAC arbitration clause.

16 The appellant subsequently applied to pay a sum equivalent to the Alleged Debt ("Sum") into court, pending the determination of CWU 120 and the ongoing Arbitration. The respondent agreed to the payment in of the Sum and for CWU 120 to be stayed pending the outcome of the Arbitration. It is noteworthy that, at this juncture, the respondent did not press the point that the appellant was acting in abuse of process and that the court should proceed with CWU 120 and order that the appellant be wound up.

17 The Judge then granted the appellant leave to provide "security for [the respondent's] claim" by payment of the Sum into court pending the determination of CWU 120 and the Arbitration ("Payment In Order"). As a consequence, CWU 120 was stayed until further order. The terms of the Payment In Order were as follows:

> … **IT IS ORDERED THAT:**
>
> 1. Pursuant to Section 130(1) of the [IRDA], the [appellant] be and is hereby granted leave to provide security for the [respondent's] claim of US$14,117,585.50, by way of payment of an equivalent sum of monies into Court [(*ie*, the Sum)], pending the determination of [CWU 120] and the ongoing arbitration proceedings at the [CIETAC] [(*ie*, the Arbitration)] arising from or related to such claim.
>
> …

18 Sometime later, the Tribunal issued its award following the Arbitration ("Award"). The Tribunal rejected the respondent's jurisdictional objections,

holding that the Purchase Contract was a valid contract that could be used as the basis for the Tribunal's determination of the rights and obligations of both parties, and that the respondent in fact believed this to be the case. In any event, the doctrine of separability applied pursuant to Art 19 of the Arbitration Law of the PRC, enabling the appellant to invoke the arbitration agreement regardless of the validity of the Purchase Contract.

19 Turning to the substantive merits of the case, the Tribunal declined to grant the negative declaration sought by the appellant. The Tribunal found that the appellant had failed to provide sufficient evidence to prove that the Purchase Contract had been entered into for accounting and bookkeeping purposes without a genuine intention to perform the Purchase Contract. However, the Tribunal also expressed reservations as to whether the respondent had fulfilled its delivery obligations under the Purchase Contract based on the evidence that had been put before it. In particular, the Tribunal noted that the respondent had not submitted any relevant evidence of its delivery of copper cathodes to the appellant under the Purchase Contract, such as the bill of lading and waybill related to the delivery of the goods. The respondent had also not provided any evidence of the terms of delivery including the delivery location, the country of origin of the goods and the quality of goods. Moreover, although the respondent had relied on the Audit Confirmation Letters as establishing that it was "highly probable that there [was] a real creditor-debt[or] relationship" between the parties, the Tribunal was unpersuaded as it found that the Audit Confirmation Letters "[could not] be used as direct evidence to determine the relationship between [*sic*] creditor's rights and debts" and were insufficient to prove the positive existence of the Alleged Debt. This was because, under PRC law, an audit confirmation letter was based solely on the corporate accounting records and could include confirmation data that was not reflective of the actual state of

affairs. It therefore could not be equated to an account confirmation letter issued by the company itself. Accordingly, despite rejecting the appellant's claim for a declaration that the Alleged Debt did not exist, the Tribunal expressly caveated its decision by stating that it had not made any finding or ruling as to whether the Alleged Debt did or did not exist. In this regard, the Tribunal noted that the respondent had not mounted a counterclaim in the Arbitration for the Alleged Debt. Presumably, the Tribunal adverted to this omission as the reason it refrained from definitively deciding if the Alleged Debt did or did not exist.

20 After the issuance of the Award, the respondent applied to court for the stay of CWU 120 to be lifted. The Judge lifted the stay by consent of the parties.

21 The respondent then applied for the Sum to be paid out to it or, alternatively, for an order that the appellant be wound up in CWU 120 if the Sum was not paid out to it. The appellant contested this application and asked that CWU 120 be dismissed, and the Sum be returned given that the Arbitration had not established the existence of the Alleged Debt. What is notable is that, for the purposes of its payment out application, the respondent took the position that the appellant was ostensibly cash flow solvent based on its latest financial statements. This was in response to the Judge's concern that ordering payment of the Sum to the respondent would be prejudicial to the appellant's unsecured creditors, if the appellant was indeed insolvent. However, at the same time, the respondent maintained that the appellant was unable to pay its debts and should be wound up on the Insolvency Ground if payment out of the Sum was not ordered.

22 Eventually, the Judge ordered that the Sum be paid out to the respondent and granted it leave to discontinue CWU 120. In so doing, the Judge noted,

among other things, that both parties agreed that the appellant was solvent and able to pay its debts as they fell due, and that the interests of its other creditors would not *prima facie* be engaged if the Sum was paid out to the respondent: see *Founder Group (Hong Kong) Ltd v Singapore Commodities Group Co, Pte Ltd* [2024] SGHC 280 ("*SG Commodities (No 1) (HC)*") at [158]–[159].

23 The appellant appealed against the order for payment out and this led to the parties' first appearance before us in CA/CA 47/2024. We issued our judgment for that appeal in *SG Commodities (No 1)*. We allowed the appeal, holding that the Payment In Order could only be read to mean that the respondent would be *prima facie* entitled to payment out of the Sum to it if it had established in the Arbitration that it was legally owed the Alleged Debt. Since the respondent had failed to establish that it was a creditor of the appellant in the Arbitration, the condition for payment out was not fulfilled, and there was thus *prima facie* no basis for the Sum to be paid out to the respondent: *SG Commodities (No 1)* at [73]–[74]. We also found that the appellant had not abandoned its primary position before the Judge that the Sum should not be paid out to the respondent: *SG Commodities (No 1)* at [79]–[88].

24 As mentioned above, we set aside the payment out order and reinstated CWU 120, given our decision that the respondent was not entitled to have the Sum paid out to it. CWU 120 was remitted to the Judge for his decision. We indicated that the Judge should do so in accordance with the principles in *AnAn* and *Founder Group (CA)*. Thus, if the Judge were to conclude that the arbitration agreement in the Purchase Contract was valid and the dispute over the Alleged Debt fell within the scope of the arbitration agreement, CWU 120 should be dismissed unless the appellant had abused the process of the court. In this regard, we also observed that the Award had not resolved the dispute over

the existence of the Alleged Debt and that the Tribunal had rejected the respondent's challenge to the validity of the arbitration agreement: see *SG Commodities (No 1)* at [92]–[93].

Decision below

25 In the remitted CWU 120 proceedings, the parties disagreed on two main points, namely, whether the respondent had the requisite standing to pursue CWU 120 and, if so, whether there were sufficient grounds for the appellant to be wound up.

26 Both parties accepted that the requirements in *AnAn* applied to the question of the respondent's standing to pursue CWU 120 and that there was a *prima facie* dispute concerning the Alleged Debt that was referable to arbitration. Although this would usually mean that the respondent had no standing as a creditor of the appellant to pursue CWU 120, the respondent submitted that the appellant had acted in abuse of process by disputing the Alleged Debt in the face of its earlier admissions of the Alleged Debt in the Audit Confirmation Letters, its audited financial statements from FY2016 to FY2021 and a confirmation of balance request purportedly signed by the appellant and affixed with the appellant's seal ("Confirmation Request"). Accordingly, the respondent invited the court to "exercise its discretion and decide for itself whether the [respondent was] a creditor of the company within the meaning of s 124(1) of the IRDA". In this regard, the respondent submitted that it had standing either as an actual creditor or contingent creditor of the appellant.

27 The appellant disagreed that it had acted abusively by disputing the Alleged Debt. The appellant emphasised that the Tribunal had deliberately

stopped short of finding that the Alleged Debt existed (see [19] above). Moreover, the appellant had also demonstrated that it was disputing the Alleged Debt in good faith by, among other things, voluntarily applying to pay the Sum into court and taking active steps to pursue a determination of the Alleged Debt in the Arbitration. As there was a dispute over the Alleged Debt that fell within the scope of the arbitration agreement and the appellant had not raised the dispute in abuse of process, the respondent did not have standing to pursue CWU 120 and it should therefore be dismissed.

28 As for the grounds for winding up, the respondent argued that the appellant should be wound up on either the Insolvency Ground or Just and Equitable Ground. On the former, the appellant was presumed insolvent due to its failure to satisfy the respondent's statutory demand within the three-week period under s 125(2)(*a*) of the IRDA; and, in any event, the appellant was cash flow insolvent due to material uncertainties and discrepancies regarding the company's ability to pay its debts as and when they fell due, its trading operations and cash flow projections, and the veracity of its financial and accounting records. The respondent also argued that it was just and equitable for the appellant to be wound up due to a clear lack of probity in the conduct of the appellant's present management. The appellant disagreed that the Insolvency Ground or Just and Equitable Ground had been made out.

29 The Judge held that the respondent had standing as a creditor. Applying the approach set out in *AnAn*, the Judge found that there was a valid arbitration agreement between the parties and assumed that the dispute over the Alleged Debt fell within the scope of the parties' arbitration agreement. However, the Judge accepted the respondent's submission that the appellant was acting in abuse of process by resiling from its prior admissions of the Alleged Debt in the

Audit Confirmation Letters. Although it is not entirely clear, the Judge appeared to have considered that there was no *bona fide* and substantial dispute over the Alleged Debt as he went on to consider if there were grounds for winding up the appellant. In this regard, the Judge held that the Insolvency Ground was established in light of the appellant's failure to satisfy the statutory demand issued by the respondent for the Alleged Debt and its cash flow insolvency based on the evidence before the court. However, the Judge rejected the respondent's case on the Just and Equitable Ground.

30 The appellant applied to the Judge for a stay of execution of the winding-up order pending its intended appeal. The Judge granted a partial stay that allowed the winding-up order to take effect subject to several qualifications on the powers of the appellant's liquidators with a view to generally preserving the appellant's rights and liabilities. The appellant subsequently filed its notice of appeal against the winding-up order, and an application to this court for a complete stay of execution of the winding-up order pending the appeal. We granted this application, but on the condition that the appeal be expedited.

The parties' cases

31 On appeal, the appellant's primary submission was that the Judge erred in finding that the respondent had standing to maintain CWU 120. The dispute over the Alleged Debt fell within the scope of the arbitration agreement between the parties and had in fact been referred to arbitration, but the Arbitration had not conclusively resolved the dispute as to whether the debt existed. Applying the principles in *AnAn* and *Founder Group (CA)*, this meant that the respondent had no standing as a creditor to present a winding-up application against the appellant based on the Alleged Debt. The Judge should have dismissed CWU 120 on this basis.

32 To the extent that the Judge relied on the abuse of process exception in *AnAn* to decide the dispute over the Alleged Debt, the appellant submitted that the Judge was wrong to find that it had acted in abuse of process by resiling from its earlier admissions of the Alleged Debt in the Audit Confirmation Letters. Given that the Tribunal had already determined that the Audit Confirmation Letters did not amount to confirmations of debt under PRC law, it was not open to the Judge to revisit the issue and find, on the contrary, that the Audit Confirmation Letters did amount to admissions of the Alleged Debt from which the appellant had improperly resiled. In the circumstances, there was no basis to find that the appellant had acted in abuse of process, and the Judge should have dismissed CWU 120.

33 In any event, the appellant argued that the Insolvency Ground was not made out. The presumption of insolvency arising from the appellant's failure to satisfy the statutory demand would have been rebutted by the payment of the Sum into court by the appellant. In any event, it was also clear on the face of the appellant's financial statements that it was solvent and able to pay its debts as they fell due. The appellant also made several further arguments that the respondent was precluded from relying on the Insolvency Ground because it had: (a) agreed that CWU 120 should be stayed for the dispute to be referred to arbitration and thereby waived its right to rely on the deemed insolvency of the appellant based on the statutory demand; and (b) later taken the position that the appellant was solvent in support of its application for payment out of the Sum.

34 The respondent accepted that the Arbitration did not conclusively determine the existence of the Alleged Debt and that there remained a *prima facie* dispute over the Alleged Debt that fell within the scope of a valid arbitration agreement. However, this did not preclude a finding that the

respondent had the requisite standing to pursue CWU 120 because, adopting the reasoning of the Privy Council in *Sian Participation Corpn v Halimeda International Ltd* [2025] AC 1321 ("*Sian Participation*"), the question of an applicant's standing to bring a winding-up application was a distinct inquiry from a determination of the existence of the debt. As we explain at [70]–[72] below, this was inconsistent with the reasoning of this court in *AnAn* and *Founder Group (CA)*. But, at the hearing before us, counsel for the respondent, Ms Hoang Linh Trang ("Ms Hoang"), confirmed that she was not asking this court to revisit the correctness of its decisions in *AnAn* and *Founder Group (CA)*. We elaborate on the implications of this below.

35 In any event, the respondent submitted that the Judge was correct to find that the appellant had abused the process of the court in resiling from the admissions of the Alleged Debt in the Audit Confirmation Letters. Despite the Tribunal's observation that the Audit Confirmation Letters did not constitute confirmations of the Alleged Debt, the Judge was entitled to find that the Audit Confirmation Letters were admissions of the debt because the status of the Audit Confirmation Letters fell to be determined under Singapore law as part of the question of whether the appellant had acted in abuse of process based on the legal framework in *AnAn* and *Founder Group (CA)*. This was a distinct inquiry from the Tribunal's comments on the effect of the Audit Confirmation Letters as a matter of PRC law. In this regard, it was well-established under Singapore law that audit confirmations and the unqualified recognition of a debt in a company's books constituted out-of-court admissions of that debt. Apart from the Audit Confirmation Letters, the appellant had also admitted the Alleged Debt in its audited financial statements for FY2016 to FY2021 and the Confirmation Request. It was therefore incumbent on the appellant to provide

a clear and convincing explanation for its change in position to now disputing the Alleged Debt.

36 In this regard, the respondent submitted that the appellant had failed to provide a cogent explanation. The appellant was not entitled to maintain that the Audit Confirmation Letters, its financial statements and the Confirmation Request had reflected the Alleged Debt only for accounting or bookkeeping purposes as this had been rejected by the Tribunal in the Award. In any event, even if the appellant could take the point, it was nonetheless not an acceptable explanation for disputing the Alleged Debt given the "importance of [ensuring] proper corporate governance and bookkeeping" and the need to uphold accounting standards in Singapore.

37 In the event that it did not have standing as an actual creditor due to the dispute over the Alleged Debt, the respondent argued in the alternative that it had standing as a contingent creditor of the appellant given that the Tribunal had found that the Purchase Contract was valid and binding under PRC law and the parties' remaining dispute only related to whether the contingency that crystallised the Alleged Debt under the Purchase Contract had occurred.

38 As for the grounds for winding-up, the respondent reiterated its submissions below on the Insolvency Ground and the Just and Equitable Ground (see [28] above).

Issue to be determined

39 In our view, the outcome of this appeal turned in the first instance on the issue of whether the respondent had standing as a creditor of the appellant to apply for the appellant to be wound up based on the principles established in

AnAn and *Founder Group (CA)*. This was an anterior issue of dispositive significance because, if the respondent was unable to establish that it had standing to apply for an order that the appellant be wound up, the court would decline to wind up the appellant in the absence of another creditor with standing to invoke its winding-up jurisdiction. A finding that the respondent did not have standing would be a sufficient ground for the appeal to be allowed and the winding-up application to be dismissed.

40 It was only if this anterior issue of standing was answered affirmatively that the question of whether a ground for winding up the appellant – namely, the Insolvency Ground or the Just and Equitable Ground relied on by the respondent – had been made out would arise. Ultimately, as we decided that the respondent did not have standing as a creditor of the appellant, it was not necessary for us to determine if either the Insolvency Ground or the Just and Equitable Ground had been established on the facts. We observe, however, that, in so far as the respondent had relied on the statutory demand issued in respect of the Alleged Debt, the dispute over the Alleged Debt not only meant that the respondent did not have standing but also meant that the respondent could not rely on the statutory demand to establish the Insolvency Ground. Nevertheless, we confine our reasons below to the issue of the respondent's standing to apply as a creditor for the winding up of the appellant.

Applicable legal framework

41 We begin with an overview of the principles governing the treatment of disputed debts in winding-up applications.

The legal framework in winding-up applications generally

42 When a claimant ("*C*") brings a winding-up application against a defendant ("*D*"), three conditions must be met for the court to make a winding-up order on the application:

(a) First, *C* must have standing as a person with a statutory right to apply for the winding up of *D* under s 124(1) of the IRDA.

(b) Second, *C* must establish one or more of the grounds for winding up under s 125(1) of the IRDA.

(c) Third, there must be no reason for the court to exercise its discretion to decline to make a winding-up order notwithstanding that a ground for winding up has been established.

43 The first and second conditions above can be seen as going towards the court's jurisdiction to wind up a company. Thus, if *C* does not have standing to apply for the winding up of *D* as *C* does not fall within the class of persons listed in s 124(1) of the IRDA, or *C* fails to establish any of the statutory grounds for winding up under s 125(1) of the IRDA, the winding-up application would be dismissed on the basis that the court simply lacks jurisdiction to wind up the company.

44 The third condition, on the other hand, is a residual discretion which comes into play once the court's winding-up jurisdiction has been enlivened by establishing the first and second conditions. This follows from how s 125(1) of the IRDA is framed in permissive terms – "[t]he Court *may* order the winding up of a company" [emphasis added] – although the general rule is that a creditor who establishes the first and second conditions is *prima facie* entitled to a

winding-up order *ex debito justitiae*: *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 at [61]; *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 ("*BNP Paribas*") at [15]; *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] 2 SLR 478 at [84].

45 It is worth emphasising that the first (standing) and second (operative ground for winding up) conditions are disjunctive. Thus, *C*'s failure to meet one condition cannot be compensated for by however strong a case it may have on the other: *Mann v Goldstein* [1968] 1 WLR 1091 ("*Mann v Goldstein*") at 1094–1095. We clarify this as Ms Hoang suggested before us that, even if the dispute over the Alleged Debt should be resolved in arbitration, the court should nonetheless order the winding up of the appellant as it was insolvent and there had been a loss of confidence in the appellant's management due to "serious allegations of misconduct", such that an "independent investigator" should be appointed while the parties arbitrated the dispute over the Alleged Debt. However, as we explained to Ms Hoang, this argument was circular as considerations of insolvency or impropriety in the appellant's affairs went towards establishing grounds for winding up the appellant and would only become relevant after the respondent had crossed the hurdle of having standing to apply for the winding up of the appellant: *Founder Group (Hong Kong) Ltd v Singapore JHC Co Pte Ltd* [2023] SGHC 159 ("*Founder Group (HC)*") at [102]–[103]; *Founder Group (CA)* at [24].

The treatment of disputed debts in winding-up applications

46 The issue of the respondent's standing was thus the main sticking point in this appeal. In this regard, it is well-established that if *D* disputes the debt on which *C*'s winding-up application is based, this may result in the application being dismissed on the basis of *C*'s lack of standing. This is because *D*'s

assertion that it does not owe the debt claimed by *C* is an assertion that *C* is not a "creditor" of *D* under s 124(1)(*c*) of the IRDA and therefore has no standing to present a winding-up application against *D*: *Tallington Lakes Ltd v Ancasta International Boat Sales Ltd* [2012] EWCA Civ 1712 ("*Tallington*") at [5]; Derek French, *Applications to Wind Up Companies* (Oxford University Press, 4th Ed, 2021) ("*Applications to Wind Up Companies*") at para 7.344. In turn, *C*'s lack of standing will mean that the court has no jurisdiction to make a winding-up order against *D*, as the power to wind up a company is conferred by statute and "the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by the statute to make it": *Deloitte & Touche AG v Johnson* [1999] 1 WLR 1605 at 1611B.

47 The case law has established two approaches that govern how the court responds to the situation where *D* raises a dispute to the debt claimed by *C* in a winding-up application brought by *C* against *D*. The two approaches are differentiated: (a) first, by the circumstances in which they apply; and (b) secondly, by what they represent in terms of the court's power and willingness to resolve the dispute over the debt. We elaborate on the two approaches and the differences between them.

Where the dispute is not subject to a valid arbitration agreement

48 The general approach that applies when the dispute raised by *D* is not subject to any valid arbitration agreement is that the court will consider if *D* is disputing the debt claimed by *C* on *bona fide* and substantial grounds. The mere assertion of a dispute by *D* will therefore not suffice; instead, *C*'s standing as a creditor of *D* will only be called into question if *D* establishes something that "satisfies the Court that there is something which ought to be tried, either before the Court itself, or in an action, or by some other proceeding": *In re Great*

Britain Mutual Life Assurance Society (1880) 16 Ch D 246 at 253. In practice, what this means is that the court will consider if *D*'s defence to *C*'s claim for the debt raises a *triable issue* that would have resulted in the court giving *D* leave to defend if *C* had brought an application for summary judgment for the debt: *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [23].

49 If the court finds that *D* has failed to raise a triable issue on the debt, *C*'s standing to apply for the winding up of *D* will not be affected. The court will then proceed to determine the winding-up application by considering if *C* has established a ground for winding up and if there is any reason to exercise its discretion not to make a winding-up order if a ground for winding up exists.

50 If, on the other hand, the court finds that *D* has raised a triable issue on the debt, the starting point is that *C* will have no standing to apply as a creditor to wind up *D*, unless the court decides the dispute in the winding-up proceedings and does so in *C*'s favour. In this regard, the general rule is that the court will *not* decide such a dispute in a winding-up application. This means that, in most cases, the winding-up application will be dismissed on the ground that *C* has no standing to apply as a creditor of *D*: *Mann v Goldstein* at 1098H–1099B; *Stonegate Securities Ltd v Gregory* [1980] Ch 576 ("*Stonegate Securities*") at 579F–580C. But one should not lose sight of the fact that this is a rule of *practice* that is underpinned by pragmatic and policy-based justifications, which we discuss at [56] below, as opposed to a jurisdictional bar against deciding a dispute in a winding-up application: *Founder Group (HC)* at [31].

51 At the same time, it is important that the extent of the court's discretion where *D* disputes the debt on *bona fide* and substantial grounds is not taken too

far. In this regard, it is necessary not to conflate two distinct issues that arise once *D* successfully establishes a triable issue on the debt. The first is that, as a matter of law, the existence of a *bona fide* and substantial dispute on the debt will be sufficient to deny *C* of standing as a creditor of *D*, and in turn, the court's jurisdiction to make a winding-up order against *D*. The second is that, as a matter of practice, the court will decline to decide a *bona fide* and substantial dispute raised by *D* in the winding-up proceedings: *Applications to Wind Up Companies* at para 7.352. The consequence of this rule of practice is that the court will dismiss or, in rare cases, stay, the winding-up application on the basis of *C*'s lack of standing.

52 We emphasise this distinction because it appears to have been suggested on occasion that the court has jurisdiction to make a winding-up order against *D* even if the debt is disputed on *bona fide* and substantial grounds. For example, in *RCMA Asia Pte Ltd v Sun Electric Power Pte Ltd* [2020] SGHC 205 ("*Sun Electric (HC)*"), the High Court said that "the dismissal of winding-up petitions involving disputed debts was a rule of *practice*, rather than a rule of *law*" [emphasis in original] (at [82]), and held that "the court has the discretion to order a winding-up notwithstanding that there is a substantial and *bona fide* dispute in respect of the debt", albeit "this discretion should only be exercised in exceptional circumstances" (at [86]). The High Court referred, in this connection, to this court's decision in *BNP Paribas* for the proposition that "the court's power to order a winding-up is a discretionary one" (at [87]).

53 To the extent that the High Court in *Sun Electric (HC)* suggested that the court has the power to wind up *D* where *D* disputes the debt claimed by *C* on *bona fide* and substantial grounds *without resolving the dispute on the debt*, we think this overstates the scope of the court's discretion and elides the two

issues set out at [51] above. As we have explained, the effect of a *bona fide* and substantial dispute as to the debt claimed by *C* is to deprive *C* of standing to apply for *D* to be wound up as *C* will not be a "creditor" of *D* under s 124(1)(*c*) of the IRDA. The result of this is that the court simply has no power to make a winding-up order against *D* as one of the two conditions for enlivening its winding-up jurisdiction is absent. It is therefore incorrect to say that the court has a discretion to make a winding-up order against *D* where there remains a *bona fide* and substantial dispute in respect of the debt because no such discretion exists; in such circumstances, the court does not make a winding-up order because it *cannot* do so and not because it has *elected* not to do so. We reiterate that, in such circumstances, the court's winding-up jurisdiction is simply not engaged.

54 What the court has discretion over is the issue of whether it will invoke its general civil jurisdiction to resolve a dispute over the debt in the winding-up application rather than dismissing (or exceptionally, staying) the application. Thus, while the default position is that the court will have no jurisdiction to wind up *D* where *D* disputes the debt on *bona fide* and substantial grounds, the court has a discretion to decide the dispute in the exercise of its general civil jurisdiction and can, in so doing, cure the deficiency in its winding-up jurisdiction in the event that it decides the dispute in *C*'s favour such that *C*'s standing as creditor is established. But it is one thing to say that the court has a discretion to decide a dispute in the exercise of its general civil jurisdiction and thereafter make a winding-up order against *D*, and quite another to say that the court has a discretion to make a winding-up order against *D without deciding the dispute*. The former is not inconsistent with the rule that the court cannot exercise a power that is granted by statute – here, the power to wind up a company – outside the terms prescribed by the statute (see [46] above), but the

latter is. If the court decides to exercise its general civil jurisdiction and goes on to decide the dispute on the debt in the winding-up proceedings, and finds that the debt exists, *ex hypothesi* there will no longer be a *bona fide* and substantial dispute and accordingly no impediment as to *C*'s standing and the court's jurisdiction to wind up *D*, subject to there being an operative ground for winding up under s 125(1) of the IRDA.

55 Nothing in this court's decision in *BNP Paribas* supports the existence of a discretion to wind up *D* where the debt claimed by *C* is disputed on *bona fide* and substantial grounds without the court going on to exercise its general civil jurisdiction to decide the dispute. In *BNP Paribas*, the discretionary element of the court's power to wind up *D* that this court was concerned with was the *residual* discretion that arises after the court's jurisdiction to wind up *D* has been enlivened by: (a) *C* establishing its standing to petition; and (b) *C* establishing a ground for winding up *D* (see [44] above). This is a very limited discretion, which is quite different from whether the court will exercise its general civil jurisdiction in a winding-up application to decide whether the debt is owed, and which only arises *after* the court has chosen to exercise its civil jurisdiction to decide a dispute over the debt (and does so in *C*'s favour).

56 However, it is also well-established, as mentioned above, that the court will generally decline to exercise its general civil jurisdiction to decide a dispute on the debt in the winding-up proceedings. This practice is underpinned by two main reasons. First, practically speaking, the procedure in winding-up proceedings is generally ill-suited for determining disputes of fact that may require pleadings, production of documents and cross-examination of witnesses: *Coilcolor Ltd v Camtrex Ltd* [2016] BPIR 1129 at [32]. That said, this is not an insurmountable hurdle as the court may adopt such procedures as

it thinks necessary to resolve the dispute over the debt if it decides to do so: *Pacific Recreation* at [20]–[22]. The second reason is thus the more pertinent one, and it is that, as a matter of policy, the court is keen to guard against the risk of the threat or pendency of winding-up proceedings being abused as a means of exerting improper pressure against a company that genuinely disputes the debt: *Tallington* at [5]; *Parmalat Capital Finance Ltd v Food Holdings Ltd* [2009] 1 BCLC 274 at [9]. This was neatly explained by Chadwick J in *Re a company (No 006685 of 1996)* [1997] 1 BCLC 639 as follows (at 642b–d):

> … The true rule, which has existed for many years, is that this court will not allow a winding-up petition to be used for the purpose of deciding a substantial dispute raised on bona fide grounds. It will not do so, as a matter of practice, because the effect of presenting a winding-up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate) which is quite different in nature from the effect of an ordinary writ action. The pressure arises from the fact that once the existence of the petition is known amongst those having dealings with the company, they are likely to withdraw credit or refuse to continue to trade with the company on the ground that, if the company is wound up on the petition, their dealings with it will be subject to the provisions in s 127 of the Insolvency Act 1986. In those circumstances, it may well be commercially necessary for the company to pay a debt which is disputed on substantial grounds rather than to run the risk that the whole of the company's business will be destroyed.

The same concern about the coercive use of winding-up proceedings also underpins the general rule that, instead of staying the winding-up proceedings pending the resolution of the dispute over the debt in another forum, the court will dismiss the winding-up application outright: *In re JN 2 Ltd* [1978] 1 WLR 183 at 187H.

57 To summarise, the general approach is characterised by two features:

(a) first, a limited inquiry into the merits of the dispute to determine if the debt is disputed on *bona fide* and substantial grounds (*ie*, the triable issue standard); and

(b) second, upon the identification of a *bona* fide and substantial dispute over the debt, the existence of a discretion to exercise the court's general civil jurisdiction to decide the dispute in the winding-up proceedings, even if this would be very rarely exercised in practice.

Where the dispute is subject to a valid arbitration agreement

58 Neither of the two features which we have just referred to are applicable where the dispute raised by *D* is subject to a valid arbitration agreement between *C* and *D*. The short reason is that the agreement between the parties to resolve disputes over the debt in arbitration significantly curtails the court's discretion to inquire into the merits of the dispute and, in turn, *C*'s standing to apply for a winding-up order. The arbitration agreement circumscribes the discretion of the court to exercise its general civil jurisdiction to decide the dispute in the winding-up proceedings, as to do so would be contrary to their agreement as to their choice of forum to resolve their differences. The upshot of this is that the general approach, which essentially entails a triable issue standard of review (as applied in a summary judgment application), is not appropriate where the parties have agreed to resolve their disputes through the process of arbitration, and not through court proceedings.

59 This was first recognised in the decision of the English Court of Appeal in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589 ("*Salford Estates*"). There, Sir Terence Etherton C (as he then was) held (at [40]) that the intention as manifested in the arbitration legislation – in England and Wales, the

Arbitration Act 1996 (c 23) (UK) – was to "exclude the court's jurisdiction to give summary judgment" and thus:

> … It would be anomalous, in the circumstances, for the Companies' Court to conduct a summary judgment type analysis of liability for an unadmitted debt, on which a winding up petition is grounded, when the creditor has agreed to refer any dispute relating to the debt to arbitration. …

As his Lordship noted, any other approach would encourage parties to present a winding-up petition as a means to circumvent the arbitration agreement (at [40]):

> … Exercise of the discretion otherwise than consistently with the policy underlying the [arbitration legislation] would inevitably encourage parties to an arbitration agreement – as a standard tactic – to bypass the arbitration agreement and the [arbitration legislation] by presenting a winding up petition. The way would be left open to one party, through the draconian threat of liquidation, to apply pressure on the alleged debtor to pay up immediately or face the burden, often at short notice on an application to restrain presentation or advertisement of a winding up petition, of satisfying the Companies Court that the debt is bona fide disputed on substantial grounds. That would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the [arbitration legislation].

60 In *AnAn*, we broadly agreed with the decision in *Salford Estates* and held that an arbitration agreement will displace the general approach taken by the court in relation to disputed debts in winding-up applications if the dispute is subject to the arbitration agreement. We further held that, in assessing if there is a valid arbitration agreement between *C* and *D* and whether the dispute raised by *D* falls within the scope of the arbitration agreement, the court should adopt a *prima facie* standard of review (at [56] and [92]). This aligned with the approach taken in applications for a stay of court proceedings in favour of arbitration under s 6 of the Arbitration Act 2001 (2020 Rev Ed) and s 6 of the

International Arbitration Act 1994 (2020 Rev Ed) (at [61]). As we explained, such alignment promoted coherence in the law and, echoing the concern expressed by Etherton C in *Salford Estates*, prevented the outflanking of an arbitration agreement by the simple device of reframing a claim for a debt in the form of a winding-up application (at [63]):

> In our judgment, there is no principled basis to apply differing standards to what is essentially the *same* disputed debt. Under the present dichotomy of standards, the applicable standard of review would depend solely on the creditor's arbitrary or tactical choice – if the creditor pursues an ordinary claim for debt, the *prima facie* standard would apply; if the creditor applies, on the basis of the *same* disputed debt, for the debtor to be wound up, the higher triable issue standard would apply. This would in turn encourage the abuse of the winding-up jurisdiction of the court, which is not the appropriate forum to adjudicate on disputed claims that are subject to arbitration … [emphasis in original]

61 In short, if the parties have agreed to resolve disputes over the debt in arbitration, it would be inappropriate for the court to review the merits of the dispute because this would be inconsistent with the parties' agreed mode of dispute resolution. Given the *kompetenz-kompetenz* principle (*ie*, that the arbitral tribunal has jurisdiction to determine its own jurisdiction), the court should not consider the questions of whether there exists a valid arbitration agreement between *C* and *D* and whether the dispute falls within the scope of such an agreement at a degree of scrutiny above the *prima facie* threshold: *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [29] and [67]; *Founder Group (CA)* at [28(c)]. It follows *a fortiori* that, if the court will not generally examine the merits, it cannot exercise the discretion it has to decide a dispute as part of its general civil jurisdiction in the winding-up proceedings; that discretion is, as a general rule, displaced by the parties' agreement to arbitrate. Given that the court will not decide the merits of the dispute over the debt where there is an arbitration agreement, *C* will in turn be

unable to establish its standing as a creditor of *D*, and as a result, the court will not have jurisdiction to wind up *D*.

62 But, at the same time, we also recognised in *AnAn* the need for a safety valve to "check against abuses of [the *prima facie*] standard of review" as it may be all too convenient for *D* to obtain a dismissal of the winding-up application by asserting a dispute that appears *prima facie* to be subject to a valid arbitration agreement between *C* and *D*: *AnAn* at [93]. A safety valve was necessary because dismissing (or exceptionally staying) the winding up proceedings was ultimately an exercise of discretion by the court, and not a case of the court ordering an automatic or mandatory stay or dismissal upon it being shown that there was a *prima facie* dispute that is subject to arbitration: *AnAn* at [94]. Instead, it was necessary to strike an appropriate balance between enforcing the parties' agreement to arbitrate and preventing an abuse of process of the court on the other: *AnAn* at [96]. Thus, we held that the *prima facie* standard of review should be subject to an "overarching restriction" that the court will not stay or dismiss the winding-up application where to do so would amount to an abuse of the process of the court: *AnAn* at [97]. While the threshold of abusive conduct was "very high" and the categories of conduct that could meet this threshold were not closed, we noted that one example where an abuse of process may be found is when *D* raises a dispute to the debt in the face of an earlier admission of it as regards both liability and quantum: *AnAn* at [99]. As the abuse of process exception, and this specific type of abuse in the form of *D* resiling from a previous admission of the debt, formed the crux of the respondent's case in this appeal, we will elaborate on this in our analysis below.

63 Following our decision in *AnAn*, it has been settled that, rather than applying the general approach of assessing if the debt is disputed by *D* on *bona*

fide and substantial grounds and potentially going on to decide that dispute, the court will ordinarily dismiss or, in exceptional cases, stay, a winding-up application brought by *C* if:

(a) there is *prima facie* a valid arbitration agreement between *C* and *D*;

(b) *D* has raised a dispute in relation to the debt claimed by *C* which *prima facie* falls within the scope of the arbitration agreement; and

(c) *D* has not raised the dispute in relation to the debt in circumstances constituting an abuse of the process of the court.

64 Subsequently, in *Founder Group (CA)*, we clarified how the principles in *AnAn* tied into the question of *C*'s standing as a creditor of *D* to apply for *D* to be wound up. As we have explained earlier, under the general approach, a *bona fide* and substantial dispute (or the existence of a triable issue as to the debt) would deprive *C* of standing to apply as a "creditor" of *D* under s 124(1)(*c*) of the IRDA, the result of which is that the court will have no basis to exercise its winding-up jurisdiction to make such an order against *D*: *Founder Group (CA)* at [32]–[33]. The same applies, with appropriate modification for the lower *prima facie* standard of review, where *D* raises a dispute over the debt that is subject to an arbitration agreement. To put it simply, where *D* raises a dispute that is *prima facie* within the scope of an arbitration agreement, the effect of this is that *C* will have no standing to apply as a creditor to have *D* wound up until the dispute has been resolved in arbitration; unless *C* has standing, the court will have no basis to exercise its winding-up jurisdiction to make such an order against *D*, and the winding-up application will be ordinarily dismissed. This is, however, subject to the abuse of process safeguard established in *AnAn* which,

if engaged on the facts, would exceptionally allow the court to apply the general approach to winding-up applications notwithstanding the arbitration agreement: *Founder Group (CA)* at [36], [37] and [63].

65 This suffices as a restatement of the current position under our law. But, at this juncture, we pause to observe that, while *AnAn* and *Founder Group (CA)* remain authoritative in this jurisdiction on the effect of an arbitration agreement on the treatment of disputed debts in winding-up applications, the courts of other jurisdictions have taken a different view of the matter. More specifically, unlike *AnAn* and *Founder Group (CA)* which establish that an arbitration agreement will displace the general approach of identifying if the dispute raises a triable issue (and the court potentially going on to decide that dispute as part of its general civil jurisdiction), the apex courts of the British Virgin Islands (the Judicial Committee of the Privy Council) and Malaysia (the Federal Court of Malaysia) have held that the general approach should apply regardless of whether there is an arbitration agreement between the parties.

66 In *Sian Participation*, the Privy Council held that the correct approach in a winding-up application involving a disputed debt was to consider if the debt was disputed on genuine and substantial grounds, and this was unaffected by whether the debt on which the application had been brought was subject to an arbitration agreement or an exclusive jurisdiction agreement (at [99]). In this regard, the Board repudiated the reasoning in *Salford Estates* (which this court had broadly adopted in *AnAn*) that the court's approach to disputed debts in winding-up applications should be aligned with that in stay applications, as having been based on an illegitimate extension of the policy underlying the arbitration legislation (at [94]). While the appeal came before the Board from the Eastern Caribbean Court of Appeal and not as an appeal to the UK Supreme

Court, the Board issued a direction that *Salford Estates* should no longer be followed by the courts of England and Wales (at [124]–[125]). *Sian Participation* thus represents the current position under English law as well.

67 At the heart of the Board's decision and its rejection of *Salford Estates* was its view that, where *C* brings a winding-up application against *D*, a dispute over the debt claimed by *C* arising in that setting does not fall within the scope of an arbitration agreement between *C* and *D* as the court in a winding-up application "does not seek to, and does not, resolve or determine anything about the petitioner's claim to be owed money by the company". Thus, the presentation of a winding-up application by *C* on a debt that is disputed by *D* does not breach the negative obligation imposed by an arbitration agreement not to have disputes over the debt resolved in any forum other than arbitration: *Sian Participation* at [88]–[89]. The Board considered that the proposition that a winding-up application does not involve the adjudication of *C*'s claim to be a creditor either as to liability or quantum was supported by how: (a) a winding-up order does not create a *res judicata* as between *C* and *D* over the debt; and (b) the liquidator of *D* is free to reject *C*'s proof of debt even if the debt claimed by *C* was the debt upon which a winding-up order had been made against *D*: *Sian Participation* at [33].

68 In its recent decision of *V Medical Services M Sdn Bhd v Swissray Asia Healthcare Co Ltd* [2025] 2 MLJ 744 ("*Swissray*"), the Federal Court of Malaysia also had occasion to consider the position and to decide if Malaysian law should adopt the approach in *AnAn* or the approach in *Sian Participation*. The court ultimately decided in favour of the latter and held that a court hearing a winding-up application should consider if the debt was "genuinely disputed on substantial grounds" even if there was an arbitration agreement between the

parties (at [162]). Notably, instead of focusing on how the winding-up application did not decide a dispute over the debt like the Board did in *Sian Participation*, the Malaysian court preferred to emphasise two other points:

(a) First, the importance of drawing a clean separation between the spheres of operation of the arbitration and insolvency regimes in light of their different underlying policies, which meant that there should no alignment of the approach to disputed debts in winding-up applications with the approach in stay applications (at [138]–[140], [147]–[150] and [162(a)]).

(b) Second, the collectivist nature and purpose of winding-up proceedings as involving the determination of whether *D* was insolvent in the interests of *D*'s creditors, which distinguished a dispute over the debt in a winding-up application from a simple bilateral dispute between *C* and *D* over the debt (at [146], [162(d)]–[162(f)] and [162(h)]).

69 As prefaced at [34] above, the issue of whether the current approach in *AnAn* and *Founder Group (CA)* should be reconsidered in light of these developments in other jurisdictions did not arise in this appeal as Ms Hoang confirmed before us that the respondent was not seeking to challenge the correctness of the prevailing Singapore position and was arguing its case based on the existing state of the law. We had put this question directly to Ms Hoang as it appeared to us that the respondent had drawn some inspiration from *Sian Participation* based on some aspects of its case below and in this appeal. We say this because, in the respondent's written submissions and during Ms Hoang's arguments at the hearing, *Sian Participation* was relied on for the proposition that a winding-up application did not involve an adjudication of any dispute raised by *D* over the debt on which *C* claimed standing to apply for *D*'s

winding up, as a means of getting around certain findings or statements that the Tribunal had made in the Award as to whether the Alleged Debt was owed to the respondent. It was not satisfactory that, despite confirming early on in her submissions that the respondent was not inviting this court to revisit *AnAn* and *Founder Group (CA)*, Ms Hoang went on to rely on the aforesaid proposition in *Sian Participation* without appreciating that it was inconsistent with the existing law as laid down in *AnAn* and *Founder Group (CA)*.

70 In light of this, we take the opportunity to state that, until a party mounts a successful challenge against *AnAn* and *Founder Group (CA)* before this court, the position under Singapore law continues to be as set out in those cases. We also take the opportunity to make clear that, although *Sian Participation* and *Swissray* may not necessarily be inconsistent in all respects with *AnAn* and *Founder Group (CA)*, care must be taken when referring to the former pair of decisions as certain lines of reasoning or propositions articulated therein are fundamentally inconsistent with the current approach of our courts. We provide two examples of this.

71 First, the view taken in *Sian Participation* that a dispute over a debt in a winding-up application is not caught by an arbitration agreement between the parties is inconsistent with this court's decision in *AnAn*. The Board's approach appears to be based on interpreting the obligation imposed by an arbitration agreement as an obligation of a more limited scope that prevents the parties from obtaining a *final* adjudication on the merits of their dispute in a forum other than arbitration. On this view, it would not be inconsistent with the parties' agreement to arbitrate for the court to assess if the debt is disputed on *bona fide* and substantial grounds. However, the approach in *AnAn* adopts the opposing perspective and considers that the court should not engage in *any* form of merits

review as that is a matter which the parties have reserved to the arbitral tribunal (at [1]). This underlies the rejection of the triable issue standard where there is an arbitration agreement between the parties in *AnAn* (see [58]–[61] above).

72 Second, in contrast to our decision in *Founder Group (CA)*, the decisions in *Sian Participation* and *Swissray* do not appear to have considered the anterior question of whether a dispute over the debt will affect *C*'s standing to apply for the winding-up of *D* as a creditor of *D*. As explained above, under the general approach, the effect of a *bona fide* and substantial dispute as to the debt is to deprive *C* of standing to invoke the winding-up jurisdiction of the court. The court has a discretion, however, to exercise its general civil jurisdiction to decide the dispute, and if it chooses to do so, the deficiency in *C*'s standing would be cured if the dispute is decided in its favour. In the context of arbitration agreements, the position is modified to accommodate the lower *prima facie* threshold of review, but the point remains that a *prima facie* dispute over the debt falling within the scope of an arbitration agreement will deprive *C* of standing. As the arbitration agreement would also generally prevent the court from exercising any discretion pursuant to its general civil jurisdiction to decide the dispute in the winding-up application, *C* will be required to establish its standing by obtaining a resolution of the dispute in arbitration as the parties' agreed forum. Although the Board in *Sian Participation* and the Malaysian Federal Court in *Swissray* held that the general approach should apply even where there exists an arbitration agreement, neither appears to have considered the effect of a dispute as to *C*'s standing to invoke the court's winding-up jurisdiction to make a winding-up order against *D*.

73 We highlight these differences only to make the point that *Sian Participation* and *Swissray* do not appear wholly reconcilable with *AnAn* and

Founder Group (CA). Given Ms Hoang's confirmation that the respondent was content to argue this appeal on the basis of the present state of the law in Singapore, as stated in *AnAn* and *Founder Group (CA)*, that was the approach upon which our analysis of the merits of this appeal was based. However, this also meant that, in so far as certain of the respondent's arguments drew on aspects of *Sian Participation* that were inconsistent with *AnAn* and *Founder Group (CA)*, those arguments necessarily had to be rejected, as we point out below.

The respondent failed to establish its standing as a creditor of the appellant

74 Based on the legal framework as set out above, the question of the respondent's standing as a creditor to apply to wind up the appellant fell to be determined by an application of the approach in *AnAn* and *Founder Group (CA)*. Accordingly, CWU 120 ought to be dismissed or stayed based on the respondent's lack of standing if the following three conditions were present:

(a) first, there was *prima facie* a valid arbitration agreement between the parties;

(b) second, the appellant had raised a dispute in relation to the Alleged Debt which *prima facie* fell within the scope of the arbitration agreement; and

(c) third, the appellant's dispute as to the Alleged Debt was not an abuse of process.

75 The first two conditions were not in issue in this appeal. It was common ground before us that there was a valid arbitration agreement between the parties and that the dispute over the Alleged Debt fell within the scope of the arbitration

agreement. This was also consistent with the Judge's decision below. It thus followed that, unless the appellant had acted in abuse of process in disputing the Alleged Debt (as the Judge found), in which case the general approach would be applied to assess if there was a triable issue as to the existence of the Alleged Debt, CWU 120 should be dismissed on the basis that the respondent did not have standing to apply for the appellant's winding up as a creditor of the appellant. No issue of a stay of CWU 120 arose as the respondent did not suggest, either before us or before the Judge that, even if the court should find that the appellant had not acted in abuse of process, a stay of CWU 120 should be ordered instead of dismissing it outright (see [78] below).

76 As mentioned, this was an unusual case because the parties had already proceeded to arbitration over the Alleged Debt and obtained the Award. However, the Arbitration did not conclusively resolve the dispute over the Alleged Debt. As explained above, while the appellant failed to obtain a declaration as to the non-existence of the Alleged Debt in the Arbitration, the Tribunal also made it clear in the Award that it was not deciding that the respondent was owed the Alleged Debt. To reiterate, this was because the Tribunal had concerns about whether the respondent had performed the Purchase Contract, as the respondent was unable to produce even basic trade documents to substantiate its claim that it had delivered the copper cathodes to the appellant under the Purchase Contract (see [19] above). As we pointed out in *SG Commodities (No 1)* (at [92]), this meant that the Award did not establish the existence of the Alleged Debt and provided no basis for the respondent to assert that it was a creditor of the appellant. The respondent accepted this.

77 Given that the Arbitration failed to resolve the dispute over the Alleged Debt, as we pointed out to Ms Hoang, there seemed to be nothing to stop the

respondent from commencing a fresh arbitration to obtain an award affirming the existence of the Alleged Debt and its standing as a creditor of the appellant. Indeed, both parties confirmed before us that it was common ground that there was nothing under PRC law in terms of a doctrine akin to *res judicata* or the rule in *Henderson v Henderson* (1843) 3 Hare 100 ("*Henderson*") that might preclude the respondent from commencing a fresh arbitration to establish the Alleged Debt.

78 Despite this, the respondent informed the Judge below that it did not intend to commence a fresh arbitration and was thus not seeking a stay of CWU 120 for that purpose. Similarly, before us, Ms Hoang stated that while the respondent was reserving its right to commence a new arbitration, it intended to press on with its arguments that the Judge below was right in granting a winding-up order against the appellant in CWU 120. Based on the approach in *AnAn* and *Founder Group (CA)*, the only way the respondent could possibly achieve this was by establishing that the appellant had acted in abuse of process in disputing the Alleged Debt, such that the court should apply the general approach and determine the issue of the respondent's standing for itself. In this regard, the respondent argued that the appellant's conduct constituted an abuse of process as its dispute of the Alleged Debt was an attempt to resile from prior admissions of the Alleged Debt in the Audit Confirmation Letters and its audited financial statements from FY2016 to FY2021. Thus, the only real issue was whether the appellant had acted in abuse of process.

The scope of the abuse of process inquiry

79 As mentioned at [61] above, the application of the *prima facie* standard means that a winding-up application will be dismissed or stayed as long as there *exists* a dispute over the debt that is referrable to arbitration, regardless of

whether the defences put forth by the defendant company are valid or credible. As the court does not engage in any form of merits review, there is the risk that a defendant will conjure up a dispute over what is in truth an undisputed debt for the sole purpose of staving off a winding-up application. The court in *AnAn* was alive to this and therefore introduced the abuse of process exception as a safeguard to curb against such abuses of the *prima facie* standard of review: *AnAn* at [93].

80 However, the abuse of process safeguard must be applied in a manner that is consistent with the underlying premise of the approach in *AnAn*. It would be incongruous for the court to reject any inquiry into the merits of the parties' dispute based on the application of the *prima facie* standard of review (and the rejection of the triable issue standard), only to engage in a back-door review of the merits under the guise of considering if there has been an abuse of process. Thus, we emphasised that "the abuse of process control mechanism cannot be used as a gateway for parties to introduce arguments on the merits"; in particular, the fact that the defendant's defence may be plainly unmeritorious would not be grounds for a finding of abuse of process: *AnAn* at [99]–[100].

Abuse of process by resiling from an admission of the debt

81 Although abuse of process can manifest in a number of forms and the categories of abusive conduct are not closed, a paradigm example of abuse is where a defendant resiles from an earlier admission of the debt: *BWG v BWF* [2020] 1 SLR 1296 ("*BWG*") at [55]. Where this occurs, there is the possibility that the defendant has contrived a dispute that did not previously exist for the sole purpose of playing for time. This is because the law treats a "dispute" referable to arbitration and an "admission" by the defendant as two sides of the same coin, in that a "dispute" would exist for the purposes of triggering an

arbitration agreement so long as the defendant *does not admit* the claim: *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 ("*Tjong Very Sumito*") at [56]. Thus, if the defendant has at any point in time before the winding-up application against it made an admission of the claim, it will mean that there was no dispute between the parties until the time of the winding-up application. A subsequent change of tune when the defendant is faced with a winding-up application gives rise to the suspicion that it is acting cynically in disputing the debt. Thus, in *AnAn* we held that absent a "clear and convincing" reason for the defendant's change of position, the court would generally find that there has been an abuse of process (at [94]).

82 However, an applicant creditor may attempt to engage in an improper back-door review of the merits of the defence under the abuse of process inquiry. In our view, that was exactly what the respondent did in the present case.

83 First, there was the anterior question of whether the admissions that the respondent claimed the appellant had resiled from were even proper admissions to begin with. The respondent had relied on the Audit Confirmation Letters as admissions of the Alleged Debt by the appellant. But, as we explain below, a significant difficulty with this was that it ran contrary to findings the Tribunal had made in the Award about the legal effect of the Audit Confirmation Letters under PRC law. The respondent nonetheless attempted to persuade this court that we could *reconsider* the effect of the Audit Confirmation Letters as a matter of Singapore law and find that the appellant had previously admitted the Alleged Debt such that it had to provide a clear and convincing explanation for its change of position, failing which the appellant should be found to be acting abusively.

84 Second, it appeared to us that the respondent had interpreted the reference to a "clear and convincing" reason as an invitation to delve into the merits of the appellant's explanation for disputing the Alleged Debt, despite the court having expressly cautioned against such a backdoor merits review through the abuse of process safeguard. We say this because the respondent repeatedly stated in its written submissions for this appeal that the appellant had failed to give a "cogent explanation" or "cogent reason" for its "manifestly inconsistent positions" of denying the Alleged Debt in the face of admissions of it in the Audit Confirmation Letters, its financial statements and the Confirmation Request. By this, what the respondent was saying was not that the appellant had failed to give an explanation for disputing the Alleged Debt, but that the appellant had failed to give a *satisfactory* explanation. This was clear in the respondent's submission that the appellant's claim – that the appellant did not owe the Alleged Debt as the Purchase Contract had been entered into and the Audit Confirmation Letters had been issued for the purposes of "accounts processing" – should be rejected as it would otherwise "greatly undercut the importance of proper corporate governance and bookkeeping" and "make a mockery of the accounting standards and the independent audit confirmation process in Singapore" (see [36] above). With respect, we did not think that arguments such as these fell within the proper scope of inquiry under the abuse of process exception in *AnAn* as it was not targeted at the existence of an explanation for the appellant's position, but the merits of the explanation that the appellant had given. As mentioned, the abuse of process exception was never intended to be an avenue for the court to hear arguments on the merits of the parties' dispute.

85 In light of these issues, before turning to the specific facts of the case, we first clarify the approach to be taken where the defendant (or putative debtor)

is alleged to have abused the process of the court in disputing a debt on which the winding-up application is brought despite having made a prior admission of the debt. To state our conclusion upfront, we think that the analysis should be approached in two stages:

(a) First, there must have been a clear and unequivocal admission by the defendant as to liability and quantum for the claimed debt.

(b) Second, the defendant must have resiled from the admission without a clear and convincing reason for its change in position.

It is only where both elements are present, and having regard to the totality of the circumstances, that the appellant may be found to have acted in abuse of process.

(1) First Stage: Whether there is a clear and unequivocal admission of liability and quantum

86 Although the abuse of process crystallises upon the defendant's change in position, a defendant can only be found to have changed its position in an abusive manner if, in the first place, there had been an admission for it to resile from. An admission as to both liability and quantum of the debt is therefore a prerequisite to a finding of abuse. It is necessary for the admission to cover both liability *and* quantum because if there is an admission of only the former, there will remain a dispute referable to arbitration on the latter (unless, of course, there is an undisputed portion of the debt that is above the threshold for seeking a winding-up order on the basis of a statutory demand (of $15,000) under s 125(2)(*a*) of the IRDA), and the defendant cannot be said to have abused the process of the court in maintaining a dispute to an aspect of the claimant's claim that it had never admitted: *Tjong Very Sumito* at [63]–[64].

87 Furthermore, the conduct or statement of the defendant that the claimant relies on as an admission must be "clear and unequivocal": *Tjong Very Sumito* at [59]. This standard of "clear and unequivocal" gives effect to the principle of party autonomy and ensures that the court does not get drawn into an evaluation of the merits of the parties' dispute that is a matter properly for the arbitral tribunal. A dispute over whether the defendant has indeed admitted the claim is itself a dispute that an arbitral tribunal has jurisdiction over and, therefore, it is important for the court to tread carefully: *Tjong Very Sumito* at [62]. As explained above, the abuse of process safeguard is not intended to be a backdoor for parties to make arguments on the merits which are within the proper province of the tribunal. The standard of a "clear and unequivocal" admission thus ensures that the *AnAn* framework is internally consistent and that at no point in the analysis does the court engage in a form of merits review (see [80] above).

88 In this regard, it is fair to say that cases in which a clear and unequivocal admission may be found will be the exception rather than the norm: *Marchand Navigation Co v Olam Global Agri Pte Ltd* [2024] 3 SLR 1695 at [32]. In *Tjong Very Sumito*, we cautioned that the court "ought to be ordinarily inclined to find that there has been a denial of a claim in all but the clearest cases" and "should not be astute in searching for admissions of a claim" [emphasis in original omitted] (at [61]). Thus, "once [an] admission is challenged by the defendant with any semblance of credibility, the court will ordinarily be inclined to decide that a 'dispute' has arisen" and refer the parties to arbitration (at [63]). Accordingly, the court may find that there was *no* admission of the debt where there were previous inconclusive discussions between the parties or prevarication by the defendant. A defendant's silence, without more, will also

generally be insufficient to amount to a clear and unequivocal admission (at [61]).

89 The practical application of this stringent rule can be illustrated by reference to several examples. The decision of the Hong Kong Court of First Instance in *Getwick Engineers Ltd v Pilecon Engineering Ltd* [2002] HKCU 1020 ("*Getwick*") was regarded as a useful example of when a court may find that there was a clear and unequivocal admission of a claim: *Tjong Very Sumito* at [59]. In that case, the plaintiff brought a claim against the defendant for outstanding amounts for work done that were purportedly due under a sub-contract. The claimed sum was said to be evidenced by interim payment certificates issued by the defendant to the plaintiff, as well as three post-dated cheques issued by the defendant (albeit for an amount less than the total claim sum) which were accompanied by a statement that the exact amount of further payment would be agreed after the completion of the final account to the sub-contract. The defendant applied for a stay of the court proceedings in favour of arbitration under s 6 of the Arbitration Ordinance (Cap 341) (Hong Kong).

90 Geoffrey Ma J (as he then was) held that the interim payment certificates did not amount to a clear and unambiguous admissions of liability, as they did not involve a final acceptance by the defendant that either the work carried out had been up to standard or that the amount stated in the payment certificates were unequivocally and undisputedly due (*Getwick* at [26(3)]). However, Ma J accepted that the cheques were clear and unequivocal admissions of liability and quantum for the sums that each cheque had been made out for as cheques were to be treated as equivalent to cash for the amounts stated thereon. Thus, while only two of the cheques had cleared, Ma J granted summary judgment for

the sum stated in the remaining cheque that had been dishonoured (*Getwick* at [26(4)]).

91 The differing treatment given to the interim payment certificates and the dishonoured cheque in *Getwick* usefully demonstrates the high threshold as to what would amount to a "clear and unequivocal" admission. The dishonoured cheque satisfied this threshold as, by issuing the cheque – which, as a bill of exchange, was the legal equivalent to cash – in favour of the claimant, the defendant had basically attempted to pay the claimant the sum stated in the cheque. The defendant would only have done so if it accepted that the claimant was owed a debt of that sum.

92 Similar reasoning can be found in the decision of Hri Kumar Nair J (as he then was) in *Gulf International Holding Pte Ltd v Delta Offshore Energy Pte Ltd* [2023] 5 SLR 1455 ("*Gulf International*"). In that case, the defendant applied to stay a judicial management application against it on the basis that it disputed the debt owed to the claimant who had applied to place it under judicial management. The claimant argued that the dispute in relation to the debt had been raised in abuse of process as the defendant had earlier admitted the debt by making multiple requests for extensions of time to pay the debt. Nair J held that the defendant had indeed admitted the debt as it had, in each of its requests for extensions of time, "clearly and unequivocally acknowledged that the various tranches [of the loan from the claimant] were due to be repaid by a specified date and was asking for more time to repay the same" (at [32]). In our view, the determinative point was that, like the issuance of the dishonoured cheque in *Getwick*, the defendant's conduct in asking for extensions of time to pay necessarily presupposed that it accepted that the debt was due and payable.

93 In contrast, no clear and unequivocal admission was found on the facts of *Mercantile & Maritime Investments Pte Ltd v Iceberg Energy Pte Ltd* [2024] 3 SLR 628 ("*Mercantile*"). The claimant there had applied for the defendant to be wound up based on an unsatisfied statutory demand issued for an outstanding sum due under a loan facility agreement. The defendant resisted the winding up on the basis that the facility was not repayable at the date when the statutory demand was issued and that this dispute should be referred to arbitration under an arbitration clause in the loan facility agreement. In response, the claimant argued that the defendant had expressed a willingness to make repayment under the loan facility in two previous e-mails and had thus disputed the debt in abuse of process. The court held, after examining the two e-mails which the claimant relied on, that the defendant had only acknowledged that it had borrowed the relevant sums under the loan facility agreement and, at most, indicated its willingness to settle the dispute. It was of some significance that the defendant had also vehemently disputed its liability in a prior letter to the claimant. As a willingness to settle was not inconsistent with non-admission of liability, the court considered that there was at least a *prima facie* dispute as to whether the defendant's expressions of willingness to settle the outstanding sums under the loan facility constituted admissions of the debt and this, as well as the main dispute over whether the loan facility was repayable at the time when the statutory demand was issued, should both be referred to arbitration (at [75]–[76]). In our view, the relevant e-mails in *Mercantile* fell short of a "clear and unequivocal" admission as, while the defendant had acknowledged that it had borrowed the relevant sums from the claimant, it had not admitted that the sums claimed by the claimant were *payable* and had qualified its position by indicating its intention to settle the parties' dispute. This factor distinguished it from *Getwick*, where the defendant had actually attempted repayment which

failed, and *Gulf International*, where the defendant had made an unqualified request for an extension of time to repay the debt due.

94 The consequence of there being no clear and unequivocal admission by the defendant, or where there is a dispute or uncertainty over whether there was an admission of the debt, is that the defendant cannot be said to have fabricated a dispute for the purpose of staving off the winding-up proceedings. In such circumstances, and assuming that the first two requirements in *AnAn* are satisfied, a dismissal (or, in exceptional circumstances, a stay) of the winding-up application should be granted in favour of arbitration.

(2) Second stage: Whether there is a clear and convincing reason for resiling from the admission

95 If, however, the high threshold of a "clear and unequivocal" admission as to both liability and quantum of the debt is met, the next question is whether the defendant has resiled from the admission in a manner that may be said to amount to an abuse of the court's process. This will generally be the case where the defendant is unable to provide a "clear and convincing reason for the change of position": *AnAn* at [94]; *BWG* at [55].

96 As mentioned above, the respondent had relied on the "clear and convincing reason" requirement to invite this court to evaluate the cogency of the appellant's explanation for disputing the debt. The respondent was effectively arguing that the appellant had no *arguable or persuasive* defence. In our view, this was problematic as it encroached into an assessment of the merits of the appellant's defence under the abuse of process inquiry.

97 It should be clear from our discussion above that the court will not and should not evaluate the merits of the defence when considering whether there has been an abuse of process (see [79]–[80] above). The point is simply that, as this court expressed in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 ("*Vinmar*") in the context of stay applications sought pursuant to an exclusive jurisdiction clause, the parties have contractually agreed for *all* disputes within the scope of their agreement, *regardless of their merits*, to be referred to resolution at the agreed forum (at [114]). The court therefore should not adjudicate on the dispute simply because it is of the view that the defence is unpersuasive or because it considers the dispute to be an "open-and-shut" case. To do so would not only be contrary to the principle of party autonomy, but would also engender significant commercial uncertainty, since dispute resolution in arbitration will then be subjected to an uncertain determination of the merits by the court: see *AnAn* at [83]–[86], affirming *Vinmar* at [116].

98 We had therefore emphasised in *AnAn* that the court "must be wary that it does not engage in examining the merits of the parties' dispute" when determining whether a defendant is guilty of an abuse of process: *AnAn* at [99]–[100]. Thus, the fact that a defence was "so obviously lacking in merit" was not a proper basis to conclude that the defendant had acted abusively: *AnAn* at [99]. We had reiterated the centrality of this point in *BWG* (at [1] and [57]).

99 It follows from the above that the abuse of process inquiry does not involve *any* merits assessment, and the respondent has misconstrued the content of the "clear and convincing reason" requirement. The pith of the requirement can be easily discerned when one considers the purpose of the abuse inquiry, namely, to safeguard against abuses of the *prima facie* standard of review. Such

abuse is occasioned when a defendant "seeks a stay *for no reason other than its alleged inability to pay*" [emphasis added]: see *AnAn* at [94], referring to *Vinmar* at [131]. Consequently, for a defendant's conduct of resiling from a previous admission to be found excusable under the test in *AnAn*, a defendant simply needs to provide an explanation for its change of position that would satisfy the court that it is not disputing the debt for the sole purpose of staving off winding up. This, in our view, is the nub of the "clear and convincing reason" requirement.

The appellant did not act in abuse of process

100 Applying the framework we have set out above, we were of the view that respondent had not shown that the appellant had acted in abuse of process in disputing the Alleged Debt by resiling from prior admissions of the Alleged Debt (see [29] above). In the first place, neither the Audit Confirmation Letters, the appellant's financial records nor the Confirmation Request constituted clear and unequivocal admissions of the Alleged Debt. In any event, even if these documents constituted admissions of the Alleged Debt, we were of the view that the appellant had given a satisfactory explanation for disputing the Alleged Debt. Having regard to the totality of the appellant's conduct in CWU 120, we did not think that the appellant's conduct crossed the high threshold of abuse of process.

The appellant did not make any clear and unequivocal admission of the Alleged Debt

101 The Audit Confirmation Letters provided the primary basis for the Judge's finding of abusive conduct and formed the central focus of the parties' arguments before us. The starting point is that the effect of the Audit

Confirmation Letters was disputed between the parties. Although the respondent relied on the Audit Confirmation Letters as admissions of the Alleged Debt, the appellant did not accept this. In the course of the arguments before the Judge, the appellant's counsel, Mr William Ong ("Mr Ong"), had emphasised that: (a) the issue of whether the Audit Confirmation Letters were admissions, or the extent to which they established the Alleged Debt, was a matter governed by PRC law; and (b) the Tribunal had found in the Award that the Audit Confirmation Letters did not establish the Alleged Debt.

102 In our view, Mr Ong was correct in emphasising these two points as they made it untenable for the Audit Confirmation Letters to constitute clear and unequivocal admissions of the Alleged Debt. In arguing that the appellant had abusively resiled from the admissions of the debt in the Audit Confirmation Letters, the respondent was effectively mounting a collateral attack on the Tribunal's finding in the Award that, as a matter of PRC law, an audit confirmation letter "[could not] be used as direct evidence to determine the relationship between [*sic*] creditor's rights and debts" (see [19] above). Indeed, although the appellant did not put the argument strictly in terms that the Tribunal's finding on the Audit Confirmation Letters in the Award had given rise to an issue estoppel that prevented the respondent from relying on them as admissions of the Alleged Debt, we would likely have been prepared to find that such an estoppel had arisen. At the very least, seeing as the respondent itself had sought to rely on the Award to argue that the appellant could no longer dispute the Alleged Debt, it seemed to us that the respondent could not disassociate itself from the aspects of the Award that were adverse to it, such as the Tribunal's findings on the status of the Audit Confirmation Letters and, as we examine in greater detail below, whether the respondent had established its performance of the Alleged Contract (see [113]–[122] below).

103 Before us, Ms Hoang argued that the respondent and the Judge were entitled to go behind the Tribunal's findings on the effect of the Audit Confirmation Letters because the question before the court in CWU 120 was different from that which the Tribunal had considered. Specifically, while the Tribunal had considered if the Audit Confirmation Letters were evidence of the Alleged Debt under PRC law, the issue before the court in CWU 120 was whether the Audit Confirmation Letters constituted admissions of the Alleged Debt under Singapore law. This was because the latter issue was part of the overarching inquiry into whether a respondent to a winding-up application had acted in abuse of process, which fell to be determined as a matter of Singapore law. It was thus argued that there was strictly no inconsistency between the Judge's finding that the Audit Confirmation Letters constituted admissions of the Alleged Debt and the Tribunal's doubts in the Award. In this connection, Ms Hoang referred us to local case law, including this court's decision in *Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd* [2009] 4 SLR(R) 458 ("*Fustar*"), as authority for the proposition that audit confirmations were strong *prima facie* evidence of a debt.

104 We rejected the respondent's argument that the issue of whether the Audit Confirmation Letters amounted to admissions of the Alleged Debt was a matter to be decided under Singapore law. As explained above, an admission is correlative to a dispute in that, if there is an admission, there would be no dispute to refer to arbitration. The question of whether the defendant has admitted a claim falls to be determined by the law governing the parties' dispute – in this case, PRC law, as the law governing the Purchase Contract. It will not make sense for the court to hold that there is no dispute over a debt between the parties based on certain statements about the debt, which amount to admissions under the *lex fori*, but not the law governing the contract giving rise to the debt. This

is because an admission of a debt is in substance conclusive evidence of the debt. Whether a given piece of evidence is probative, as well as the extent to which it is probative, of the existence of a debt are matters that are to be determined by the law governing the existence of the debt. The decision in *Fustar*, which concerns the status of an audit confirmation as a matter of *Singapore* law, was thus of no assistance because the status of the Audit Confirmation Letters in this case was a matter of PRC law.

105 In our view, Ms Hoang's argument that the effect of the Audit Confirmation Letters should be decided under Singapore law because it was part of the overarching abuse of process inquiry erroneously conflated the two stages of the analysis that we have explained at [85]–[99] above. The abuse of process arises when a defendant changes its position and disputes a debt after making an earlier admission of the debt in the absence of a clear and convincing reason for the *volte-face*. This is the second stage of the analysis, which is properly a question to be determined under Singapore law. But the assessment of whether there is a clear and unequivocal admission of the debt is an *anterior* question that forms the first stage of the analysis and is a matter to be determined under the law governing the existence of the debt, *ie*, the law governing the contract from which the debt arose.

106 It also appeared to us that the respondent may have fallen into error for a separate reason. The respondent's argument rested on the supposition that the question that had arisen before the Tribunal in the Arbitration was not the same as the question that had arisen before the court in CWU 120 in that the latter was an issue of the respondent's standing to pursue a winding-up application against the appellant while the former was a question of the existence of the Alleged Debt. Since the questions were not the same, it might have been thought

that there was no difficulty in them being governed by different laws. This argument was an example of what we have noted at [69] above was a tendency of the respondent to attempt to build in elements of the Privy Council's reasoning in *Sian Participation* into the legal framework established in *AnAn* and *Founder Group (CA)* without due regard as to the consistency between the two different approaches. Indeed, when we pointed this out to Ms Hoang, she fairly accepted that she was relying on *Sian Participation* for this proposition, but that it was "a sensible decision" on this point. This was untenable. As explained at [67] above, the proposition that a dispute over the debt that the parties have agreed to resolve in arbitration is distinct from a dispute over the debt in the setting of a winding-up application was the basis for the Privy Council's view there that the latter is not subject to an arbitration agreement, and thus the existence of the arbitration agreement does not warrant a different approach than the usual approach of assessing if the debt is disputed on *bona fide* and substantial grounds. This is fundamentally inconsistent with *AnAn* and *Founder Group (CA)* which do not treat as different what is essentially the same dispute based on whether the question is asked in a winding-up application or in another setting. It is for this reason that this court held in *AnAn* and *Founder Group (CA)* that the triable issue standard should not be applied where the dispute over the debt falls within the scope of an arbitration agreement. Having confirmed that the respondent was not inviting this court to overrule *AnAn* and *Founder Group (CA)*, it was quite untenable for the respondent to seek to introduce the approach in *Sian Participation* through the backdoor by raising it in the abuse of process inquiry.

107 In any case, we point out that, even if the approach in *Sian Participation* were to be applied, we had difficulty understanding how that would mean that the issue of the effect of the Audit Confirmation Letters would fall to be decided

under Singapore law instead of PRC law. Even if the relevant question was whether there was a *bona fide* and substantial dispute over the Alleged Debt given the Audit Confirmation Letters, the court would consider if the Audit Confirmation Letters were admissions of the Alleged Debt under PRC law as that was the law governing the Purchase Contract from which the Alleged Debt was said to have arisen. The position is no different than if the respondent had applied for summary judgment on the Alleged Debt: the court would consider if all of the evidence, including the Audit Confirmation Letters, had established the Alleged Debt based on PRC law. The respondent's reliance on *Sian Participation* thus did not take it anywhere.

108 In our judgment, the Tribunal's finding in the Award that the Audit Confirmation Letters did not evidence the Alleged Debt under PRC law was fatal to the respondent's case that the Audit Confirmation Letters were admissions that the appellant had resiled from. As explained above, the need for a clear and unequivocal admission of the debt ensures that the court does not get drawn into deciding a dispute between the parties on whether an admission has been made as that is a matter that is properly reserved for an arbitral tribunal where the parties have agreed to resolve their dispute through arbitration. Where, as in this case, an arbitral tribunal has already weighed in on the effect of an alleged admission, *a fortiori*, it is simply not open to either party, as well as the court, to come to a different conclusion on the issue.

109 Apart from the Audit Confirmation Letters, the respondent also suggested that the appellant had admitted the Alleged Debt by virtue of its financial statements which recorded a sum of "trade payables due to related companies", which presumably included the Alleged Debt owed to the respondent, and the Confirmation Request. The Judge did not find that these

documents amounted to admissions of the Alleged Debt, and the respondent also did not seriously pursue these points on appeal.

110 In any event, we were of the view that these documents could not be said to amount to clear and unequivocal admissions of the Alleged Debt in the present circumstances. Similar to the Audit Confirmation Letters, the parties were sharply divided on whether these documents amounted to admissions of the Alleged Debt. The appellant had consistently objected to the reliance on its financial statements since the inception of CWU 120 in 2022, arguing that the trade payables were only recorded as being due to "related companies" generally and that there was no indication that the stated amounts (or any part thereof) were due specifically to the respondent. The appellant also previously disputed the relevance of the Confirmation Request on the basis of several irregularities.

111 Furthermore, as with the Audit Confirmation Letters, the question of whether the financial statements and the Confirmation Request amounted to admissions of the Alleged Debt was a matter governed by PRC law (see [105] above). However, these documents had not been placed before the Tribunal during the Arbitration, and no evidence was put before the Judge or this court as to their effect under PRC law. We therefore had no proper basis to determine whether these documents constituted admissions of debt. As we have explained above, where uncertainty exists over whether there has been an admission of the debt, the court will ordinarily find that there is a dispute referable to arbitration, and will be slow to conclude that the defendant has fabricated a dispute for the purpose of staving off the winding-up proceedings in an abuse of process (see [88] and [94] above).

112 For the reasons above, we disagreed with the respondent's submission that the appellant had made a clear and unequivocal admission of the Alleged Debt. This meant that the respondent's case on abuse of process failed *in limine* as the appellant logically could not be said to have acted in abuse of process in resiling from an admission that it had never made to begin with. The appeal was allowed on this basis alone. However, for completeness, we go on to explain our view that, even if the Audit Confirmation Letters, the financial statements or the Confirmation Request had constituted admissions of the Alleged Debt, the appellant had provided a satisfactory reason for changing its position and disputing the Alleged Debt.

The appellant had a clear and convincing reason for resiling from any admission of the Alleged Debt

113 In the Arbitration, the appellant had sought a declaration that the Alleged Debt did not exist. The appellant made two closely related arguments in support of this: (a) first, the Purchase Contract was "null and void" under Chinese law as it had been entered into for accounting and bookkeeping purposes and the parties did not have a genuine intention to buy or sell copper cathodes; and (b) second, and flowing from the first argument, the respondent had not delivered any copper cathodes to the appellant under the Purchase Contract (see [11] above). In our view, given the equivocal outcome of the Arbitration, the issue of whether the appellant had a clear and convincing reason for resiling from any admission of the Alleged Debt depended on whether it was entitled to maintain either of these objections in CWU 120 despite failing to obtain the declaration that it had sought. As explained above, the focus is on whether the defendant has an explanation for its change in position such that the court is satisfied that it is not disputing the debt for the sole purpose of staving off winding up. Thus, if the Award had failed to determine either of the objections that the appellant

had made in the Arbitration, that would mean that the appellant could legitimately continue to dispute the Alleged Debt notwithstanding the earlier Arbitration, and it was not open to the court to examine the merits of the appellant's objection to the Alleged Debt.

114 The respondent submitted that the appellant was estopped by the Award from maintaining its first objection that the Purchase Contract had been entered into for bookkeeping purposes and that the parties had not had any genuine intention to buy and sell copper cathodes. Even if that was correct, the appellant would still have a good explanation for disputing the Alleged Debt as long as its second objection as to the respondent's non-delivery of copper cathodes under the Purchase Contract was an issue that had not been determined in the Arbitration. In our view, there was no inconsistency between any finding by the Tribunal that the Purchase Contract was valid and the appellant continuing to maintain its objection that the Alleged Debt was not owed because the respondent had not performed the Purchase Contract. Even if the Tribunal did not agree with the appellant that the parties had no genuine intention to perform the Purchase Contract and therefore upheld its validity, the fact remained that, if the respondent had not performed the Purchase Contract, the Alleged Debt would not be due and payable by the appellant. The crux of the appellant's case was therefore the respondent's non-performance of the Purchase Contract; the reason for the respondent's non-performance – whether it was a common understanding between the parties that the Purchase Contract would not be performed or something else – was strictly irrelevant.

115 In this regard, we found it significant that it was common ground between the parties that the respondent could commence a fresh arbitration to establish that it had performed the Purchase Contract and thereby establish the

Alleged Debt (see [77] above). In its written submissions in the appeal, the respondent had submitted that there had been "no finding [in the Award] as to whether the Purchase Contract had been performed" and that there was nothing by way of estoppel or preclusion preventing the respondent from arguing that it performed the Purchase Contract:

> … since the *ratio decidendi* of the Award contains no finding as to whether the Purchase Contract had been performed, [the respondent] was/is not estopped or precluded from the Award from maintaining, both in CWU 120 and in a future arbitration, that (i) the [Purchase] Contract had indeed been performed; and (ii) the [Alleged] Debt does exist. Indeed, under PRC law, the Award does not preclude [the respondent] from commencing a fresh arbitration against [the appellant] in respect of the [Alleged Debt]. This legal position was also submitted by [the appellant].

Before us, Ms Hoang took the same position when it was put to her that the issue of non-performance had been "left open" by the Tribunal in the Award. Indeed, Ms Hoang went further and accepted that the question of whether the respondent had performed the contract was "something that should be decided by [a] tribunal" as a matter of "PRC law".

116 In our judgment, the respondent's position in this regard made it untenable for it to also argue that the appellant was acting in abuse of process in disputing the Alleged Debt. It was illogical for the respondent to accept, on the one hand, that the dispute over whether it had performed the Purchase Contract remained live, and also argue, on the other hand, that the appellant was acting in abuse of process in disputing the Alleged Debt on that very basis such that the court should wind up the appellant. If the appellant remained entitled to assert in a subsequent arbitration that the respondent had not performed the Purchase Contract, it could hardly be said that the appellant was disputing the Alleged Debt for no reason other than to play for time. Given this, we were

satisfied that the appellant had a clear and convincing reason for resiling from any earlier purported admission it might have made to the Alleged Debt, and it could not be said that the appellant was acting in abuse of process in disputing the Alleged Debt.

117 In any event, even if the respondent had not taken this position, we were nonetheless satisfied, based on a review of the Award, that there was no issue estoppel on the question of whether the respondent had performed the Purchase Contract that would disable the appellant from maintaining this objection.

118 The existence and the scope of any issue estoppel from a prior decision is strictly a matter governed by Singapore law as the *lex fori* because it is an issue of procedure. However, where the prior decision from which a *res judicata* is said to arise is a decision of a foreign court, a Singapore court would only treat it as having final and conclusive effect on a certain issue if the court of origin would regard it as such as well: *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 ("*Merck*") at [41]–[43]. In *Merck*, this court referred with approval to the statement of Lord Reid in *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 that the court should give a foreign judgment no more and no less a preclusive effect than the foreign court would itself accord to it (at 919):

> … [W]e should have to be satisfied that the issues in question cannot be relitigated in the foreign country. In other words, it would have to be proved in this case that the courts of the German Federal Republic would not allow the re-opening in any new case between the same parties of the issues decided by the [Federal] Supreme Court in 1960, which are now said to found an estoppel here. There would seem to be no authority of any kind on this matter, but it seems to me to verge on absurdity that we should regard as conclusive something in a German judgment which the German courts themselves would not regard as conclusive. It is quite true that estoppel is a matter

> for the lex fori but the lex fori ought to be developed in a manner consistent with good sense.

In our view, there is no reason why the same principle should not apply where the prior decision is not that of a foreign court but an award of an arbitral tribunal. Indeed, it has been held by this court that the principles of *res judicata*, including in the extended form under the *Henderson* doctrine, are applicable to prevent the re-litigation of points that have been or could have been dealt with in an earlier arbitration: *AKN v ALC* [2016] 1 SLR 966 at [57]–[59].

119 Accordingly, the question of whether the Award contained a final and conclusive determination on the respondent's performance or non-performance of the Purchase Contract fell to be considered from the perspective of PRC law: *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545 at [66]. In this regard, there were two main sources before the court from which the court could determine the effect of the Award: (a) the Award itself; and (b) the legal opinions of the parties' respective experts on the legal effect of the Award. In our judgment, both spoke in one voice that the Tribunal had not come down on one side or the other as to whether the respondent had or had not performed the Purchase Contract.

120 In the Award, the Tribunal recorded that the respondent had not been able to adduce any evidence to substantiate its claim that it had delivered the copper cathodes to the appellant under the Purchase Contract such as documents of delivery like the bill of lading or waybill. Because of this, the Tribunal stated that it "ha[d] reason to question the [r]espondent's claim that it ha[d] fulfilled its delivery obligations". In so stating, the Tribunal clearly did not accept that the respondent had performed the Purchase Contract such that the Alleged Debt was owed. The Tribunal went on to highlight another gap in the respondent's

case, in that the respondent had "not provide[d] evidence to explain what delivery conditions it claim[ed] that the actual handover delivery of the contract goods was performed under"; this, too, the Tribunal said, meant that it "ha[d] reason to challenge the [r]espondent's claim that it ha[d] fulfilled its obligation to deliver goods". Then, in its concluding remarks summarising its decision, the Tribunal stated that its rejection of the appellant's case "[did] not mean that [it] supported or made any of ruling on the [r]espondent's claim that it ha[d] contractual claims against the [appellant]", pointing out that the respondent had not filed a counterclaim for the Alleged Debt in the Arbitration.

121 Given what was said in the Award, it was unsurprising that the parties' PRC solicitors both accepted in their respective expert opinions that the Tribunal did not conclusively determine whether the respondent had performed the Purchase Contract. These opinions were put before the Judge for the purposes of the respondent's application for payment out of the Sum, which formed the subject of the first appeal in *SG Commodities (No 1)*:

(a) The respondent's PRC solicitors, Fangda Partners ("Fangda"), had opined that the Award could be interpreted as having found that it was "more likely than not that the [Alleged] Debt exist[ed] and [the appellant] [was] liable for the same". We rejected this interpretation in *SG Commodities (No 1)* (at [70]). However, more material for present purposes was that it was accepted by Fangda, albeit phrased in double negative terms, that "[t]he Tribunal did not conclude that there was no delivery of the goods by [the respondent]". Fangda also could not point to any part of the Award where the Tribunal definitively found that the respondent had delivered the goods. In other words, the respondent accepted that the Tribunal had not resolved the issue of whether the respondent had either performed or not performed the Purchase Contract.

(b) The appellant's PRC solicitors, Zhong Lun Law Firm ("Zhong Lun"), opined that the Tribunal had hedged its position on whether the Alleged Debt existed based on its expressions of doubt as to whether the respondent had fulfilled its delivery obligations under the Purchase Contract. Zhong Lun also expressed the view that, because the Tribunal had dismissed the appellant's claim based on the burden of proof, there was nothing preventing the respondent from commencing a fresh arbitration for the Alleged Debt.

122 In these premises, it was clear that there remained an extant dispute following the Arbitration as to whether the respondent had performed the Purchase Contract. There was thus no basis for the respondent to contend that the appellant was abusing the process of the court by disputing the Alleged Debt. As explained above, the court does not consider the merits of the explanation given by the defendant. So long as there *is* an explanation that satisfies the court that the defendant is not contesting the winding-up application simply because it is unable to pay the debt, no abuse of process will be found. Thus, whether the evidence actually supported the appellant's claim that the respondent had not performed the Purchase Contract was a matter to be determined in arbitration, and not by the court in CWU 120. We therefore disagreed with the respondent's submission that the appellant had acted in abuse of process by disputing the Alleged Debt.

The appellant's conduct as a whole did not constitute an abuse of process

123 Finally, taking a holistic view of the appellant's conduct before and during CWU 120, we were satisfied that the appellant had not acted in abuse of process. Although the Judge considered that the appellant's conduct evinced bad faith on its part, we disagreed with this characterisation. It bears emphasis that the threshold for a finding of an abuse of process is a high one: *AnAn* at [99]. Having regard to the following three factors, we did not think that this high threshold had been met.

124 First, after the respondent had issued the statutory demand for the Alleged Debt, the appellant commenced the Arbitration and did so more than a month before the respondent brought CWU 120. The fact that the appellant took the initiative to commence the Arbitration before CWU 120 was even filed demonstrated a genuine desire on its part to dispute the Alleged Debt.

125 Second, the appellant's proactiveness in applying to pay the Sum into court also suggested that it was acting in good faith in disputing the Alleged Debt. As we highlighted to Ms Hoang during the hearing, we found it difficult to see how the respondent could complain that the appellant was acting in bad faith in disputing the Alleged Debt given that the payment in of the Sum showed that the appellant was good for the money and was willing to pay the Alleged Debt if it was found to be due and owing in the Arbitration. Ms Hoang argued that the payment in of the Sum was found by the Judge to have not created any security interest in favour of the appellant in *SG Commodities (No 1) (HC)*, which question we left open in *SG Commodities (No 1)*. However, this point was neither here nor there. The fact remains that, by paying the Sum into court, the appellant accepted that a consequence of doing so was that the Sum might not be returned to it. Put another way, the appellant relinquished control over

how the Sum would be dealt with in so far as the Sum became subject to the terms of the Payment In Order. Objectively speaking, we could not see why the appellant would have subjected itself to this potential detriment – bearing in mind that the payment in of the Sum had been on the appellant's own initiative (see [16] above) – if it was simply looking to play for time.

126 Moreover, we did not accept the respondent's argument that no weight should be given to the payment in of the Sum as the respondent had not derived any benefit from it since the payment out of the Sum ordered by the Judge was later reversed by this court in *SG Commodities (No 1)*. In our view, the fact that the Sum was ultimately not paid out to the respondent could not be attributed to the appellant's conduct. As we observed in *SG Commodities (No 1)*, it was clear from the terms of the Payment In Order that the parties had contemplated that the Arbitration would resolve the issue of the Alleged Debt one way or the other. If the respondent had obtained an Award that confirmed that the Alleged Debt was due and owing, the respondent would likely have had no difficulty in persuading the court to order that the Sum be paid out to it (at [68]). However, for reasons best known to the respondent, which it had described only as "tactical reasons" before the Judge, the respondent chose not to mount any counterclaim in the Arbitration (at [69]).

127 In our view, it was the respondent's omission to bring a counterclaim, rather than any conduct of the appellant, that was the cause of the unusual position which the parties found themselves in. Put simply, if the respondent had mounted a counterclaim (which would entail the burden to prove the existence of the Alleged Debt), the Tribunal would have been constrained to decide if the Alleged Debt was or was not owed to the respondent. Indeed, the Tribunal itself acknowledged this in the Award, as it referred to the lack of a

counterclaim by the respondent when it stated that it was not deciding if the respondent had a claim against the appellant for the Alleged Debt. In the circumstances, we did not think that it lay in the respondent's mouth to complain that the Sum had not been paid out to it or generally that the Tribunal had failed to resolve the parties' dispute over the Alleged Debt. The stalemate following the Arbitration was a consequence of its own making.

128 Third, following on from the last point, we did not see anything in the circumstances of the case that suggested that the appellant was acting in bad faith in resisting CWU 120. A significant feature of this case was that, while the setting of a winding-up application meant that the interests of the appellant's other creditors (and stakeholders) were strictly also in play, it appeared that the respondent was the only creditor of the appellant that had a complaint over an unpaid debt or concerns that the appellant was unable to pay its debts. We say this because no other creditor had come forward in support of CWU 120 despite it having been filed more than three years ago. CWU 120 was thus in substance a bilateral dispute between the appellant and the respondent over the Alleged Debt. There was no extant concern before the court of there being other creditors or claimants lining up to assert that the appellant was unable to pay its debts. In any event, if there were such other creditors, they would be at liberty to take such steps as they saw fit to safeguard their interests, including bringing separate winding-up applications against the appellant if they considered themselves entitled to do so.

Conclusion

129 For the foregoing reasons, we disagreed with the Judge that the appellant had acted in abuse of process by disputing the Alleged Debt. First, we did not agree with the Judge that the Audit Confirmation Letters constituted a clear and

unequivocal admission of the Alleged Debt by the appellant. Second, in any event, we were satisfied that the appellant had given a clear and convincing explanation for disputing the Alleged Debt as it was incontrovertible that the respondent had *not* established its performance of the Purchase Contract and, along with this, that the Alleged Debt was due and payable. Third, having regard to the appellant's conduct as a whole and the totality of the circumstances, we did not think that the appellant's conduct rose to the high threshold of an abuse of process.

130 The consequence of our decision that the appellant did not act in abuse of process was that the respondent was unable to establish its standing as a creditor of the appellant to apply for the appellant to be wound up in CWU 120.

The respondent was not a contingent creditor of the appellant

131 For completeness, the respondent argued in the alternative that it had standing to petition for the appellant to be wound up as a contingent creditor of the appellant. According to the respondent, it was a contingent creditor as the "parties' remaining dispute now only relates to whether the contingency that crystalised the Debt under … the Purchase Contract had occurred".

132 A contingent creditor is a "creditor in respect of a debt which will only become due in an event which may or may not occur": *Stonegate Securities* at 579E–F. The essence of this definition is that the defendant is subject to an existing obligation which, upon a contingency at some point in the future, may crystallise into an obligation to pay the claimant a sum of money. A "contingency" is, by definition, a *future* event that has not yet occurred (and may never occur).

133 In our judgment, it was clear that the respondent did not fit the definition of a "contingent creditor". In the first place, it was not quite clear to us how the respondent was characterising itself as a contingent creditor. As we saw it, the respondent's argument could be put in two different ways that were distinguished based on the source of the alleged contingent debt. On a proper analysis, neither argument could establish the respondent as a contingent creditor of the appellant.

134 The first way would be to treat the Alleged Debt, which arose from the Purchase Contract, as a contingent debt. The relevant "contingency" here would be the respondent's performance of the Purchase Contract by delivery of copper cathodes to the appellant as that was the condition triggering the appellant's obligation to pay the Alleged Debt. But, in our view, this was inconsistent with the definition of a contingent creditor because, as of the time when the Judge heard and decided CWU 120, the respondent's performance (or non-performance) of the Purchase Contract was a matter of *past* fact, save that its existence was disputed and thus subject to a future determination by an arbitral tribunal. The Alleged Debt would only have been a contingent debt if, at the time of the court's determination of CWU 120, the time for the respondent to perform the Purchase Contract had not yet come to pass such that there was an element of uncertainty as to whether the Alleged Debt would later arise. In this case, the fact that the issue of the respondent's performance of the Purchase Contract was disputed and therefore had to be determined by an arbitral tribunal at a future time did not change the issue of performance from a past fact into a future fact. All that an arbitral tribunal would do when deciding the dispute would be to *confirm* what had transpired. That confirmation, however, did not change the reality that the Purchase Contract had either been performed or not been performed and the Alleged Debt had either arisen or not arisen.

135 The respondent referred to our decision in *Founder Group (CA)* at [43(a)] where we had cited the following observations of Kitto J in the decision of the High Court of Australia in *Community Development Pty Ltd v Engwirda Construction Co* (1969) 120 CLR 455 ("*Community Development*") (at 459):

> … there must be an existing obligation and that out of that obligation a liability on the part of the company to pay a sum of money will arise in a future event, whether it be an event that must happen or only an event that may happen. A building contract creates, as soon as it is entered into, an obligation upon the building owner to pay the contract price, either as a whole upon a future event or, more usually, by progress and final payments each of which is to be made on a future event. The event or events may not happen, but if and when one of them does happen the building owner, by force of the contractual obligation, must pay the builder a sum of money. It is, I think, nothing to the point that the event may be complex, as where the payment is agreed to be made when the whole or some part of the work has been done to the satisfaction of an architect as expressed in a certificate or to the satisfaction of an arbitrator as expressed in an award: the building owner is bound from the time the contract is made to pay money to the builder upon a contingency; and that in my opinion makes the builder a contingent creditor of the owner.

In this passage, the point that Kitto J was making was that, upon the entry into a contract, the claimant (the builder) would be a contingent creditor of the defendant (the building owner) as upon the occurrence of a future event (*ie*, the contingency), the defendant will be obliged to pay the claimant a sum of money. We do not disagree with this as a matter of principle. But, in our view, this analysis must be subject to the caveat that the contingency has not occurred by the time of the winding-up application. It is therefore not the case that the claimant would be a contingent creditor in perpetuity. Instead, as explained above, if the contingency is an event that, by the time of the winding-up application, must necessarily have either occurred or not occurred, it will by that time no longer be a contingency by the natural definition of that word. The fact that there is a dispute as to whether the contingency has occurred or not does not change this; the debt is no longer a contingent debt but simply a disputed debt.

136 For this reason, we disagree with the analysis of the General Division of the High Court in *Re Logistics Construction Pte Ltd* [2024] SGHC 58. In that case, the issue was whether a party, Buildforms, had standing as a contingent creditor of the applicant company to object to the applicant's nominated judicial manager. At the time of the application, there was a pending claim in the Singapore courts where Buildforms had sought payment for certain construction works it had carried out for the applicant. Despite this, the court held that Buildforms was a contingent creditor of the applicant. Its reasoning, in brief, was that because the applicant's defence to Buildforms' claim did not extend to disavowing the existence of the contracts under which Buildforms had brought its claim, but was instead based on a right of set-off in respect of a cross-claim for breach of contract by Buildforms, the contracts "created an obligation upon the applicant to pay Buildforms contingent on a future event, which [was] Buildforms' completion of the specified works" (at [40]). *Community Development* and *Founder Group (CA)* were cited as authority for this analysis. With respect, we do not think this is correct. By the time of the relevant application in which the issue of Buildforms' standing arose, the contingency under the contracts – Buildforms' performance of certain works – had either already occurred or not occurred. The performance of the works was therefore no longer contingent in the sense that it was uncertain whether or not it would take place at some future point in time. If the time for a contingency to occur has passed, the debt which is said to arise upon the fulfilment of the contingency has either come into existence or it has not, although the occurrence of the contingency may be the subject of dispute. Hence, in such circumstances, there

is no longer anything contingent in the existence of the debt, even if its existence or otherwise is subject to determination by a court or arbitral tribunal.

137 The second way in which the respondent could claim to be a contingent creditor of the appellant was based on the debt arising from a future arbitral award confirming that the Alleged Debt had indeed arisen and ordering payment by appellant to the respondent. It should be emphasised that, on this analysis, the relevant debt on which the respondent would claim standing as a creditor of the appellant would not be the Alleged Debt, which arose from the Purchase Contract, but the obligation to pay a sum equivalent to the Alleged Debt imposed by an arbitral award in the respondent's favour. The Alleged Debt, strictly speaking, would by then have ceased to exist as the underlying cause of action for the Alleged Debt would have merged into the arbitral award: *Darsan Jitendra Jhaveri v Lakshmi Anil Salgaocar* [2025] 3 SLR 716 at [48]–[56].

138 However, even on this analysis, the respondent would not be a contingent creditor of the appellant. A claimant would only be a contingent creditor if the defendant was under an *existing* obligation that would crystallise into an obligation to pay the claimant money on the occurrence of a future event. A debt arising from a judgment or arbitral award would not be a contingent debt as until the time when the judgment or award is made, the defendant would be under no obligation to the claimant: *Applications to Wind Up Companies* at para 7.360.

139 In the final analysis, the general difficulty with the respondent's attempt at characterising itself as a contingent creditor was that a disputed debt does not, by reason of the dispute, become a contingent debt. If the respondent's argument were correct, every case involving a disputed debt in a winding-up application

could be re-characterised as a case involving a contingent debt by framing the future determination of the dispute in the applicant's favour as the relevant "contingency". This would abrogate the rule that an applicant whose debt is disputed on *bona fide* and substantial grounds has no standing as a creditor, since any applicant whose debt is disputed could simply sidestep the rule by re-characterising itself as a contingent creditor. We think the absurdity in such an approach speaks for itself.

Conclusion

140 For the above reasons, we found that the respondent had not established its standing as a creditor or contingent creditor of the appellant. This meant that the respondent had no right to present a winding-up application against the appellant. Accordingly, we allowed the appeal, set aside the winding-up order made by the Judge, and dismissed CWU 120. There was no need for us to consider the evidence of the appellant's solvency.

Costs and consequential orders

141 Given our decision to allow the appeal, we ordered that the respondent pay the appellant the costs of the appeal. We also set aside the costs order made by the Judge in CWU 120 for the appellant to pay the respondent's costs and substituted it with an order that the respondent pay the appellant costs.

The respondent was ordered to pay costs on an indemnity basis

142 It is well-established that an order that a party pay costs on an indemnity basis should only be made in exceptional circumstances and must be specifically justified: *BIT Baltic Investment & Trading Pte Ltd v Wee See Boon* [2023] 1

SLR 1648 at [83]. In our judgment, this was an appropriate case for such an order to be made.

143 In *Airtrust (Hong Kong) Ltd v PH Hydraulics & Engineering Pte Ltd* [2016] 5 SLR 103, the High Court set out the following non-exhaustive categories of conduct that could attract an order of indemnity costs (at [49]):

> (a) where the action is brought in bad faith, as a means of oppression or for other improper purposes;
>
> (b) where the action is speculative, hypothetical or clearly without basis;
>
> (c) where a party's conduct during the proceedings is dishonest, abusive or improper; and
>
> (d) where the action amounts to wasteful or duplicative litigation or is otherwise an abuse of process.

The common thread running through these four categories and the general touchstone of an award of indemnity costs is that the party has engaged in unreasonable conduct: *Lim Oon Kuin v Ocean Tankers (Pte) Ltd* [2022] 1 SLR 434 at [36].

144 In our view, the present case fit within all four of the categories above. The respondent's conduct in both CWU 120 and the appeal rose to the high threshold of unreasonableness.

145 First, we considered that the respondent's position in CWU 120 and in this appeal was so devoid of merit that its pursuit of CWU 120 could fairly be termed as "clearly without basis". The law in *AnAn* and *Founder Group (CA)* is

clear: the effect of an arbitration agreement is that the court will, in most cases, find that the applicant in a winding-up application has no standing to apply as a creditor once the debt is disputed by the respondent to the application. In our view, it should have been clear to the respondent that CWU 120 was bound to fail given the circumstances of this case where the parties had already gone through the earlier Arbitration and the resulting Award did not establish the existence of the Alleged Debt. It was obvious, with respect, that the parties remained in the same positions that they were in before the Arbitration in that there was a dispute over the Alleged Debt that was subject to an arbitration agreement. Indeed, even if there remained some ambiguity in the position following the Arbitration itself, any lingering doubts should have been dispelled by our decision in *SG Commodities (No 1)*. Our decision to reverse the payment out of the Sum to the respondent in *SG Commodities (No 1)* turned on the fact that the Award had contained no determination that the respondent was owed the Alleged Debt by the appellant. In the circumstances, as we highlighted to Ms Hoang during the hearing, we found it troubling that the respondent did not do the plain and obvious thing of commencing a fresh arbitration to obtain a conclusive determination that the Alleged Debt was owed to it. Instead, the appellant chose to press on with CWU 120 based on what was, with respect, a contrived argument of abuse of process that was in substance a collateral attack on the Tribunal's decision in the Award, which had expressly stated that there were doubts as to whether the respondent had performed the Purchase Contract (and, therefore, whether the Alleged Debt was owed to it).

146 Second, the overwhelming impression that we derived from the respondent's conduct was that it had chosen to press on with CWU 120 instead of commencing a fresh arbitration to establish the Alleged Debt as it was concerned that it would not succeed in the arbitration, especially in light of the

deficiencies in its evidential case which the Tribunal had flagged in the Award. This concern seemed to us to be the gist of what was referred to before the Judge as the "tactical reasons" for the respondent's omission to mount a counterclaim for the Alleged Debt in the Arbitration and what Ms Hoang described before us as "commercial reasons" for proceeding with CWU 120 despite the Award having expressly stated that the respondent had not established the Alleged Debt. Indeed, despite understandably hedging her position, Ms Hoang candidly accepted that this was "not an unreasonable assessment" of the thinking behind the respondent's decision to proceed with CWU 120.

147 In our view, the respondent's attempt to press on with CWU 120 despite knowing full well from the Award that it had not established the Alleged Debt was a paradigm example of "speculative" conduct. This was reflected in its misguided attempt at relying on elements of the decision in *Sian Participation* which were incompatible with this court's decisions in *AnAn* and *Founder Group (CA)* to justify its decision to pursue CWU 120 instead of establishing the Alleged Debt by commencing a fresh arbitration. It might have been different if the respondent had attempted to mount a direct challenge to the existing law in *AnAn* and *Founder Group (CA)*, and to invite this court to adopt the approach in *Sian Participation* over the approach established in those decisions. But the respondent made no such attempt and was content to argue its case based on the existing law. As mentioned above, it was clear from the outset that there was no reasonable prospect of the respondent succeeding in CWU 120 based on the approach in *AnAn* and *Founder Group (CA)*.

148 Third, we were satisfied that the respondent's conduct in CWU 120 amounted to an abuse of the court's winding-up jurisdiction. As explained at [56] above, a key driver behind the general rule that the court will not exercise

its general civil jurisdiction to decide a dispute over a debt in a winding-up application is the risk that the winding-up application may be abused as an instrument of coercion to pressure a defendant into paying a debt that is genuinely disputed. We considered the present case to be a paradigm example of this. Although we would not go as far as to say that CWU 120 was an abuse of process from the outset, the respondent's continued prosecution of it after the Arbitration was clearly abusive and smacked of bad faith.

149 The starting point is the respondent's application to court for the Sum to be paid out to it despite the Award having stated expressly that the Tribunal had refrained from making any finding that the Alleged Debt existed. We found this significant as it revealed that the respondent was indifferent to whether it had established its right to the Alleged Debt. Rather, its true intention was simply to get its hands on the Sum. To this end, the respondent held CWU 120 over the appellant's head as a Sword of Damocles, when it argued that the appellant should be wound up if the court decided not to order that the Sum be paid out to it: *SG Commodities (No 1)* at [33]. True to this, the respondent's counsel indicated, at the start of the first hearing of the payment out application, that the respondent would apply to withdraw CWU 120 if the appellant consented to the Sum being paid out to the respondent: *SG Commodities (No 1)* at [36].

150 The respondent's motivations were also clear from its adoption of inconsistent positions as to the appellant's solvency. As we have noted at [21] above, despite claiming that the appellant was solvent to justify payment out of the Sum to it, the respondent also maintained in the same breath that the appellant was insolvent such that it should be wound up on the Insolvency Ground in CWU 120 if the Sum was not ordered to be paid out to the respondent. These were logically inconsistent positions since the respondent

could not be solvent and insolvent at the same time. In our view, the fact that the respondent blew hot and cold in this way indicated a lack of genuine belief in its pursuit of CWU 120. It also supported the inference that what the respondent was really interested in was the Sum and pressing on with CWU 120 was a tactical ploy to pressure the appellant not to contest the payment out of the Sum.

151 Even if there remained any doubt, the inference of the respondent's bad faith became inescapable after our decision in *SG Commodities (No 1)*. There, we had made clear that the Award had made no finding as to whether the Alleged Debt existed and that it provided no basis for the respondent to claim payment out of the Sum: *SG Commodities (No 1)* at [69]–[70]. It is also worth pointing out that, in a later part of our judgment explaining our decision to remit CWU 120 to the Judge, we again stated that "the Award did not lead to a resolution of the dispute over the existence of the Alleged Debt", and that the parties should bear this in mind when considering how CWU 120 should be treated based on the principles in *AnAn* and *Founder Group (CA)*: *SG Commodities (No 1)* at [92].

152 As we have already said, it ought to have been obvious to the respondent that it did not have standing to maintain CWU 120 given that the Arbitration had failed to resolve the dispute between the parties over the Alleged Debt. The respondent, however, chose to press on with CWU 120, instead of commencing a fresh arbitration to establish the Alleged Debt and potentially seeking a stay of CWU 120 pending the Arbitration. Leaving aside the fact that this was a completely misconceived position to take, the inexorable inference from the respondent's failure to do the obvious thing and its persistence in prosecuting CWU 120 was that it was using CWU 120 as a means of vexation and

oppression of the appellant to pressure it to pay the Alleged Debt even though the dispute over it had not been resolved in the Arbitration.

153 For the reasons above, we ordered the respondent to pay the appellant costs on an indemnity basis for both CWU 120 and this appeal. We fixed the costs of CWU 120 in the sum of $78,000 (all-in) and the costs of the appeal in the sum of $84,000 (all-in). The latter figure included the costs of the appellant's applications to the Judge and later to this court for a stay of the winding-up order pending the disposal of the appeal. We also ordered that the costs of the liquidation of the appellant to-date were to be borne by the respondent.

The return of the Sum to the appellant

154 Finally, in light of the dismissal of CWU 120 and the conclusion of the Arbitration, the purpose of the Payment In Order was spent given that its terms provided that the Sum was paid into court pending the Arbitration or the determination of CWU 120 (see [17] above). We therefore ordered that the Sum (of US$14,117,585.50) together with all interest accrued thereon, which had been held by the respondent's solicitors, to be returned to the appellant.

Steven Chong Justice of the Court of Appeal	Ang Cheng Hock Justice of the Court of Appeal

Kannan Ramesh
Judge of the Appellate Division

Ong Boon Hwee William, Koh Zhen-Xi Benjamin and Kenneth Wang Ye (Allen & Gledhill LLP) for the appellant;
Hoang Linh Trang and Chu Shao Wei Jeremy (Shook Lin & Bok LLP) for the respondent.