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

[2023] SGHC 337

Originating Application 697 of 2023

In the matter of Part 11 of the Insolvency, Restructuring and Dissolution Act 2018

And

In the matter of Section 252 of the Insolvency, Restructuring and Dissolution Act 2018

And

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

Between

(1) Charles Thresh
(2) Michael Morrison

… *Applicants*

And

(1) British Steamship Protection And Indemnity Association Limited
(2) British Steamship Management Ltd

… *Non-parties*

Version No 1: 30 Nov 2023 (10:29 hrs)

JUDGMENT

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

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Re Thresh, Charles and another (British Steamship Protection and Indemnity Association Ltd and another, non-parties)

[2023] SGHC 337

General Division of the High Court — Originating Application No 697 of 2023
Hri Kumar Nair J
23 October, 24 November 2023

30 November 2023 Judgment reserved.

Hri Kumar Nair J:

Introduction

1 This is an application under Art 17 of the UNCITRAL Model Law on Cross-Border Insolvency ("the Model Law") as adopted in Singapore ("the SG Model Law") to recognise the proceedings before the Supreme Court of Bermuda (Commercial Court) in Companies (Winding Up) 2022 No 281 filed in respect of British Steamship Protection and Indemnity Association (Bermuda) Limited ("the Company") under the provisions of the Bermuda Companies Act 1981 ("the Proceeding"), and the Winding Up Order by the Supreme Court of Bermuda dated 28 October 2022 issued in the Proceeding ("the Winding-Up Order").

2 I allow the application for the reasons below.

Background and the parties

3 The Company was an insurer licensed in Bermuda. The Winding-Up Order was made pursuant to a petition filed by the Bermuda Monetary Authority ("BMA") on 12 September 2022 ("the Petition") to wind up the Company.[1] The Applicants are the joint provisional liquidators appointed by the Supreme Court of Bermuda under the Winding-Up Order.[2]

4 The Non-Parties are the sole shareholder, British Steamship Protection And Indemnity Association Limited ("BSP"), and the manager, British Steamship Management Ltd ("BSM"), of the Company.[3] They are effectively owned and/or controlled by one Mr Li Yu ("Li"), a director of the Company.[4] Li is a Singapore citizen and resides in Singapore.[5] The Non-Parties oppose the recognition of the Proceeding and the Winding-Up Order on several grounds. I deal with each in turn below.

5 A few days before the first hearing of the application, the Court of Appeal issued its decision in *Ascentra Holdings, Inc (in official liquidation) and others v SPGK Pte Ltd* [2023] SGCA 32 ("*Ascentra Holdings*"), which dealt with the interpretation and application of provisions of the SG Model Law relevant to this application, and which is binding on me. On my direction, parties filed written submissions on *Ascentra Holdings* as it applies to this case. In addition, the Applicants filed the affidavit of Nicholas Patrick Howard ("the Howard Affidavit") to explain and clarify various issues on the applicable laws

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1 1st Affidavit of Michael Morrison (13 Jul 2023) ("MM-1") at paras 3 and 11.

2 MM-1 at para 3(b).

3 1st Affidavit of Li Yu (15 Sep 2023) ("LY-1") at paras 1–2.

4 LY-1 at para 3.

5 LY-1 at p 2.

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of Bermuda,[6] and the parties filed further submissions with respect to the Howard Affidavit.

My decision

Foreign proceeding

6 The court cannot exercise its power under Art 17 of the SG Model Law to recognise any proceeding unless it is a "foreign proceeding" within the meaning of Art 2(*h*) of the SG Model Law.

7 Article 2(*h*) defines a "foreign proceeding" as "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation".

8 In *Ascentra Holdings*, it was held (at [29]) that Art 2(*h*) prescribes at least five different and cumulative requirements for a proceeding to qualify as a "foreign proceeding":

(a) that proceeding must be collective in nature;

(b) that proceeding must be a judicial or administrative proceeding in a foreign State;

(c) that proceeding must be conducted under a law relating to insolvency or adjustment of debt;

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6 1st Affidavit of Nicholas Patrick Howard (4 Nov 2023) ("NH-1").

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(d) the property and affairs of the debtor company must be subject to control or supervision by a foreign court in that proceeding; and

(e) that proceeding must be for the purpose of reorganisation or liquidation.

9 The Non-Parties take issue with the first and third limbs.[7]

10 Article 16(1) of the SG Model Law states that if a decision or certificate mentioned in Art 15(2) indicates that the proceeding in respect of which an application for recognition is made is a foreign proceeding within the meaning of Art 2(*h*), the court is entitled to so presume.

11 Here, the certificate issued by the Supreme Court of Bermuda dated 12 January 2023 ("the Certificate") provides that:[8]

> The [Winding-Up Order] would be considered a foreign proceeding within the meaning of Article 2(h) of [the Model Law].

12 However, the Certificate only gives rise to a presumption which can be rebutted. It is for this court to determine whether Art 2(*h*) is satisfied.

A law relating to insolvency or adjustment of debt

13 One key issue in this case is whether the Proceeding was conducted under a law relating to insolvency or adjustment of debt.

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7 Non-Parties Written Submissions ("NPWS") at para 6.

8 MM-1 at p 56.

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14 It is evident that the Company was *not* wound up because it was insolvent. This is made abundantly clear in the Petition as well as the Applicants' first affidavit ("the Morrison Affidavit") filed in these proceedings.

15 The Petition states:[9]

> 17. The grounds for [the] Petition involve numerous serious non-compliances with mandatory regulatory requirements that have gone unresolved for years. The [BMA] has attempted to work with the Company to resolve these non-compliances. The [BMA] has also imposed fines as a less drastic enforcement mechanism short of a winding up to obtain compliance from the Company. Neither stick nor carrot nor patience have obtained any level of compliance from the Company.

16 The grounds of the Petition were summarised in the Morrison Affidavit:[10]

> (a) First, the Company had failed to appoint an approved auditor with effect from 21 November 2019, when Arthur Morris & Company Limited filed its resignation as the Company's auditor with immediate effect. This was in contravention of section 16 of the Bermuda Insurance Act, which requires every insurer to appoint an auditor approved by the [BMA] to audit its statutory financial statements.
>
> (b) Second, the Company had failed to file its statutory financial returns ("SFRs") for the years ended 20 February 2019, 2020, and 2021. This was in contravention of section 18 of the Bermuda Insurance Act, which requires every insurer to file SFRs.
>
> (c) Third, the Company had failed to maintain adequate accounting and record keeping systems and meet its reporting requirements, including the requirement to submit SFRs for the years ended 20 February 2019, 2020 and 2021. This was in contravention of section 46 of the Insurance Code of Conduct 2015, which requires an insurer to establish sound accounting and financial reporting procedures and practices.

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9 MM-1 at p 23.

10 MM-1 at para 12.

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> (d) Fourth, the Company had failed to appoint a principal representative with effect from 1 November 2021, when Davies Captive Management Limited's resignation as the Company's principal representative took effect. This was in contravention of section 8 of the Bermuda Insurance Act, which requires every insurer to appoint a principal representative resident in Bermuda.
>
> (e) Fifth, the Company had failed to maintain a registered office following the resignation of Conyers Corporate Services (Bermuda) Limited as the Company's corporate secretary with effect from 21 February 2020. This was in contravention of section 62 of the Companies Act 1981 (the "Bermuda Companies Act"), which requires every company to have a registered office in Bermuda.
>
> (f) Sixth, following the resignation of the Company's corporate secretary and principal representative, the Company was in contravention of section 130 of the Bermuda Companies Act, which required the Company to have at least one director, a corporate secretary or a resident representative that is ordinary resident in Bermuda.

17 The BMA concluded the Petition and prayed for the winding-up of the Company as follows:[11]

> 40. The non-compliance of the Company are as follows:
>
> (i) Section 8 of the Insurance Act 1978: a failure to appoint a principal representative with effect from 1 November 2021;
>
> (ii) Section 16 of the Insurance Act 1978: A failure to appoint an approved auditor with effect from 21 November 2019;
>
> (iii) Section 18A of the Insurance Act 1978: Failure to file SFRs for the years ended 20 February 2019, 2020 and 2021;
>
> (iv) Section 62 of the Companies Act: Failure to file notice of registered office;
>
> (v) Section 130 of the Companies Act: Failure to appoint a resident director or corporate secretary or resident representative.

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[11] MM-1 at pp 28–29.

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> 41. The [BMA] is satisfied that the Company should be wound up pursuant to the Insurance Act:
>
> (i) Section 35(1)(b) – the Company has failed to satisfy an obligation to which it is or was subject by virtue of the Insurance Act; and/or
>
> (ii) Section 35(1)(c) – the Company has failed to satisfy the obligation as to the preparation of accounts and failure to file statutory financial statements; and/or
>
> (iii) Section 35(3) – it is just and equitable that the Company be wound up as it is expedient in the public interest given the Company's failure to act prudently, to rectify non-compliances in a timely fashion, to communicate forthrightly and openly with [the BMA] regarding non-compliances and the reasons therefore and to identify non-compliances as and when they arise.

18 In the affidavit of Susan Davis-Crockwell ("the Davis Affidavit") filed in support of the Petition, it was stated:[12]

> 19. The cumulative effect of the various non-compliances, detailed below and in [the Petition], is that the Company has exited Bermuda in favour of Singapore. At present, the [BMA] has no direct access to the Company as the Company has no office and no directors or officers in the jurisdiction. This poses obvious regulatory and enforcement concerns. For these reasons, the [BMA] has now determined that the Company must be wound up to ensure long running non-compliances are brought to an end and any detrimental effects on the ultimate policyholders or on Bermuda's regulatory reputation may be managed and repaired. A winding up will ensure that a fulsome and professional evaluation of the Company's financial affairs may be conducted by individuals to whom [the BMA] will have direct access, as necessary.

19 It is therefore clear that the BMA did not petition for the winding-up of the Company on the grounds that it was insolvent or in any form of financial distress. The grounds and provisions it relied on do not relate to insolvency but to the Company's failure to comply with various statutory requirements governing insurance companies under Bermudan law.

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12 MM-1 at pp 34–35.

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20 This, however, does not determine the issue.

21 Having carefully considered the language of Art 2(*h*), both itself and in the context of other provisions of the SG Model Law, as well as the policy and impetus behind the SG Model Law and authorities interpreting Art 2(*h*) and similar provisions here and elsewhere, the Court of Appeal in *Ascentra Holdings* concluded that a company does not need to be insolvent or in severe financial distress before the proceedings in respect of it may be recognised under the SG Model Law. Specifically, the Court of Appeal held (at [98]–[99]):

> 98 We are therefore satisfied that there is *no requirement under the SG Model Law for a company to be insolvent or in severe financial distress* before a proceeding concerning that company may be recognised as a foreign proceeding under the SG Model Law. For this reason, we agree with the appellants that the approach taken in *Re Betcorp* towards the interpretation of the words "law relating to insolvency or adjustment of debt" (*ie*, the Broad Approach) should be adopted in Singapore. Interpreting Art 2(*h*) of the SG Model Law in that manner better coheres with its ordinary meaning and reflects Parliament's intention to include proceedings concerning solvent companies within the scope of the SG Model Law. We are also satisfied that such an interpretation does not undermine, and is indeed consistent with, the overall purpose of the UNCITRAL Model Law.
>
> 99 To reiterate, under the Broad Approach, the requirement that a proceeding be conducted "under a law relating to insolvency or adjustment of debt" within the meaning of Art 2(*h*) will be satisfied *as long as the law or the relevant part of the law under which the relevant proceeding is conducted includes provisions dealing with the insolvency of a company or the adjustment of its debts*. It will generally be *irrelevant* that the company concerned in the relevant proceeding is not insolvent or in severe financial distress.
>
> [emphasis added]

22 In the circumstances, the issue is whether the Bermuda Insurance Act 1978 ("IA 1978"), pursuant to which the Proceeding was brought, is a law which falls within what was referred to in *Ascentra Holdings* as "the Broad

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Approach", *ie*, where the law or the relevant part of the law under which the Proceeding is conducted includes provisions dealing with the insolvency of a company or the adjustment of its debts. As seen above, the Petition was founded on various sub-sections of s 35 of the IA 1978. Significantly, s 35(1)(a) of the IA 1978 expressly provides for a petition for winding-up on the grounds of insolvency:[13]

> **Winding up on petition of Authority**
>
> 35 (1) The Authority may present a petition for the winding up, in accordance with the Companies Act 1981, of an insurer, being a company which may be wound up under that Act, on the ground—
>
> (a) that the insurer is unable to pay its debts within the meaning of sections 161 and 162 of the Companies Act 1981;
>
> …

23 In the circumstances, and applying the "Broad Approach" , the IA 1978 is "*a law relating to insolvency or adjustment of debt*". This element of Art 2(*h*) is therefore satisfied.

24 For completeness, I deal with the Applicants' argument that Art 2(*h*) is satisfied because the Company is in fact insolvent or in financial distress.[14] I do not accept that submission:

(a) Art 2(*h*) deals with the *law* relating to the proceedings under which the Company was wound up. As confirmed in *Ascentra Holdings* at [99], the Company's actual financial position is generally irrelevant; and

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13 Applicants' Bundle of Authorities ("ABOA") at Tab 4.

14 Applicants' Written Submissions ("AWS") at para 29(a).

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(b) in any event, there is no evidence that the Company is insolvent or in financial distress:

(i) the fact that the Company fell below the threshold for solvency required under the IA 1978 and its regulations does not mean it is insolvent, but only that it has failed to meet or maintain its licensing requirements as an insurer;

(ii) there is no evidence that the Company has any outstanding debts (actual or contingent). None is mentioned in the Petition or the Davis Affidavit. Indeed, according to the Davis Affidavit, the Company has paid all the regulatory fines imposed on it in Bermuda;[15] and

(iii) no debt is mentioned in the Morrison Affidavit or the second affidavit filed on behalf of the Applicants ("the Thresh Affidavit"). In fact, the Thresh Affidavit refers to a balance sheet of the Company as at 28 October 2022, which states that it had net assets of US$118,000.[16] The balance sheet was not exhibited and the Non-Parties say it was furnished on a "without prejudice" basis.[17] As the correspondence was not produced, I make no finding as to whether the Applicants ought to have referred to the same. Nonetheless, at its highest, it does not support the Applicants' argument.

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15 MM-1 at p 39.

16 Affidavit of Charles Thresh (2 Oct 2023) ("CT-1") at para 14.

17 NPWS at para 34.

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Proceeding must be collective in nature

25 In *Ascentra Holdings*, the Court of Appeal summarised (at [104]) the relevant principles concerning the requirement of a proceeding being collective as follows:

> (a) … it must concern *all* creditors of the debtor generally, in contrast to, for instance, one that is instigated at the request, and for the benefit, of a single secured creditor (*Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (Look Chan Ho gen ed) (Globe Law and Business Publishing, 4th Ed, 2017) at p 178).
>
> (b) In evaluating whether a proceeding is collective, a key consideration is whether substantially all of the assets and liabilities of the debtor are dealt with in the proceeding, subject to local priorities and statutory exceptions, and to local exclusions relating to the rights of secured creditors (2013 Guide, part two at para 70).
>
> [emphasis in original]

26 The term "collective" includes proceedings involving an insolvency representative being able to control the realisation of assets for the purpose of *pro rata* distribution among all creditors, as opposed to a proceeding designed to assist a particular creditor to obtain payment or a process designed for some purpose other than to address the insolvency of the debtor – *United Securities Sdn Bhd (in receivership and liquidation) and another v United Overseas Bank Ltd* [2021] 2 SLR 950 at [56], citing Richard Fisher & Adam Al-Attar, "The UNCITRAL Model Law" in *Cross-Border Insolvency* (Richard Sheldon gen ed) (Bloomsbury Professional, 4th Ed, 2015).

27 The Non-Parties argue that the criterion is not satisfied because the Petition was unilaterally initiated by the BMA; the Applicants have not shown that the creditors had notice of the Proceeding and were able to participate in it; the Winding-Up Order was obtained without affording the Company or its creditors the opportunity to be heard; and the Applicants have not reached out

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to creditors to provide them with a right to submit claims for determination and to receive an equitable distribution, or have not consulted the creditors before initiating this application.[18]

28 None of these objections has merit. While the Petition was initiated by the BMA, there is no evidence that it was to benefit only it. The BMA would presumably have an interest in ensuring that licensed insurers which failed to adhere to its statutory and regulatory requirements should cease their business and be wound up – that would be part of their statutory duties and mandate to protect the public interest. Indeed, the Davis Affidavit makes clear that the Company was wound up to ensure that its breaches of the relevant laws in Bermuda were put to an end and, *inter alia*, detrimental effects on the Company's policyholders may be managed and repaired.[19] The winding-up would also enable the Applicants as professional liquidators to evaluate the Company's financial affairs (see [18] above).

29 More importantly, the Howard Affidavit confirms that:

(a) s 35 of the IA 1978 does not provide a different or distinct winding-up process, and that a winding-up petition presented by the BMA is done in accordance with the procedure under the Bermuda Companies Act 1981 ("CA 1981") for compulsory liquidations;[20]

(b) regardless of the reasons for which a company is wound up (whether under the CA 1981 or the IA 1978), the liquidators will follow the same essential process leading to collection and distribution of the

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18 NPWS at para 14.

19 MM-1 at p 44.

20 NH-1 at p 21.

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company's assets first amongst its creditors *pari passu* and then amongst contributories. As a result, these statutes together provide a complete regime for the compulsory liquidation of insurance companies;[21]

(c) where a winding-up order is made, the appointment of the provisional liquidators will be made on a "full powers" basis, meaning they have the same powers and authority as permanent liquidators to manage the company and creditors' claims.[22] These full powers are described in s 175 of the CA 1981, and include the ability to make calls on debts, compromise debts and make distributions to creditors, and the power "to do all such other things as may be necessary for winding up the affairs of the company and distributing its assets" – s 175(2)(h) of the CA 1981;[23] and

(d) the Applicants were appointed on a "full powers" basis. The powers are set out in the Winding-Up Order, which gives the Applicants a wide range of powers in relation to the Company's property and affairs for the benefit of all creditors: it authorises the Applicants to take steps in the best interests of the Company's creditors, including the recovery of the Company's assets, to bring or defend any action in the name of and on behalf of the Company and to enter a scheme of arrangement with the creditors.[24]

30 The Howard Affidavit also states that the Companies (Winding-Up) Rules 1982 is one of the legislative instruments governing the liquidation of

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21 NH-1 at para 22.

22 NH-1 at para 24.

23 NH-1 at para 30.

24 NH-1 at para 32 and Tab 3.

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companies.[25] Rule 79 of the Companies (Winding-Up) Rules 1982 states that "[i]n a winding-up by the Court the Official Receiver or provisional liquidator, before the appointment of a liquidator, shall have all the powers of a liquidator with respect to the examination, admission, and rejection of proofs".[26]

31 Significantly, it is not the Non-Parties' case that the Winding-Up Order is intended to benefit only the BMA or any specific creditor or class of creditors.

32 The above makes it clear that the Proceeding is "collective" in nature.

33 The Non-Parties' complaint of the lack of notice to, or participation by, the creditors thus far is irrelevant as far as this element of Art 2(*h*) is concerned.

34 I deal in more detail with the question of notice below at [45]–[46]. For completeness, there is no evidence that any creditor opposed the Petition or was prevented from doing so. Nor is there any evidence that any creditor had taken, or is taking, steps to challenge or set aside the Winding-Up Order. The allegation that the Applicants have thus far not reached out to the creditors is a non-starter as they are entitled to first take steps to better understand the affairs of the Company, which the terms of the Winding-Up Order and this application facilitate. As noted in the Howard Affidavit, in order to call meetings of creditors and contributories, the Applicants must ascertain the identity and location of the company's creditors and contributories, which information is typically found in the statement of affairs that the company's former management is obligated to provide or within the company's books and records,

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25 NH-1 at para 8.

26 Applicants' 2nd Supplementary Bundle of Authorities at Tab 1.

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or both.[27] Indeed, the Applicants say that they are unable to reach out to the creditors as Li has failed or refused to disclose information relating to the Company's affairs.[28]

35 The Non-Parties relied on the case of *In re Global Cord Blood Corporation* 2022 WL 17478530 (SD NY, 2022) ("*Global Cord*") for the proposition that in order for a proceeding to be "collective", all creditors must receive notice of the same.[29] *Global Cord* does not support that broad submission. The court there was highlighting that the foreign proceedings sought to be recognised were not for the benefit of the creditors but the corporation itself. It was in that context that the court highlighted that the corporation's creditors had not received formal notice of, or been granted standing to participate in, the foreign proceeding; nor did the foreign proceeding involve any effort to identify or classify creditors or determine how and whether to satisfy their claims. That was why the court concluded that it was not a "collective" action: *Global Cord* at *8. That is plainly not the case here.

36 For completeness, I deal with the Non-Parties' argument that I should disregard the Howard Affidavit as its deponent, Nicholas Patrick Howard had represented BMA in the Proceeding and was therefore not independent.[30] The court has discretion under s 47(4) of the Evidence Act 1893 (2020 Rev Ed) to vary the weight accorded to expert evidence because of an expert's lack of independence: see *Innovative Corp Pte Ltd v Ow Chun Ming and another* [2023] 3 SLR 1488 at [93], [97] and [98]. While it may have been preferable

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27 NH-1 at para 33.

28 AWS at para 24.

29 Non-Parties' Further Written Submissions ("NPFWS") at para 7.

30 Non-Parties' 2nd Further Written Submissions ("NPFWS-2") at para 5.

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for the Applicants to have found an independent lawyer to give evidence on Bermudan law, there was ultimately no reason to reject the Howard Affidavit. Its evidence was not contradicted – the Non-Parties were given leave to file a response affidavit but did not do so. In any case, the evidence in the Howard Affidavit was not inconsistent with a plain reading of the relevant statutes and regulations of Bermuda, and not remarkable. I therefore accept the evidence contained therein.

Public policy

37 Article 17 of the SG Model Law provides that this court *must* recognise the Proceeding and the Winding-Up Order if its requirements are satisfied. However, that is qualified by Art 6 of the SG Model Law, which provides that the court may refuse recognition if such recognition would be contrary to the public policy of Singapore. The SG Model Law does not define "public policy".

38 In *Re Zetta Jet Pte Ltd and others* [2018] 4 SLR 801 ("*Re Zetta Jet*"), the High Court observed (at [21]–[23]) that under the Model Law, the court can only deny recognition on this ground if recognition is "manifestly contrary" to public policy, but the SG Model Law omits the word "manifestly". The court surmised that that the omission was deliberate, and this meant that the standard of exclusion on public policy grounds in Singapore is lower than in other jurisdictions: *Re Zetta Jet* at [23].

39 Commentaries on other international documents provide some guidance as to the meaning of the phrase "manifestly contrary" to public policy. This requires "additional, extended scrutiny", and means that an alleged violation of public policy must not be "an arguable violation" but must be one which is definitely recognisable as such": see Ronald A Brand & Paul Herrup, *The 2005*

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Hague Convention on Choice of Court Agreements: Commentary and Documents (Cambridge University Press, 2008) at pp 91–93. The phrase is intended to set a high threshold and refers to the basic norms or principles of the relevant State, not mere technical violations of a mandatory rule: see Trevor Hartley & Masato Dogauchi, *Explanatory Report on the Convention of 30 June 2005 on Choice of Court Agreements* (Hague Conference on Private International Law, 2013) at para 153.

40 I note that the phrase "manifestly contrary" to public policy has been retained in ss 12(1)(*c*) and 14(*c*) of the Choice of Court Agreements Act 2016 (2020 Rev Ed) ("CCAA"), which provide respectively that an exclusive choice of court agreement may not be given effect, and the court must refuse to recognise or enforce a foreign judgment, if doing so would be manifestly contrary to the public policy of Singapore. The CCAA gives effect to the Hague Convention on Choice of Court Agreements 2005 ("the Hague Convention"): see the Explanatory Statement to the Choice of Court Agreements Bill (Bill No 14/2016) ("the CCAB Explanatory Statement"). However, neither the CCAB Explanatory Statement nor the report of the Law Reform Committee (see Law Reform Committee, *Report of the Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005* (March 2013) (Author: Yeo Tiong Min)) comment on the choice to retain the phrase "manifestly contrary" from the Hague Convention in ss 12(1)(*c*) and 14(*c*) of the CCAA.

41 In so far as the phrase "manifestly contrary" has been retained in the CCAA and not the SG Model Law, it does suggest that in the context of the recognition of foreign proceedings under the SG Model Law, the standard of exclusion on public policy grounds in Singapore is lower. I also note the observations in the *UNCITRAL Model Law on Cross-Border Insolvency with*

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Guide to Enactment and Interpretation, UN Sales No E.05.V.10 (2013) ("the 2013 Guide") at para 104 that:

> The purpose of the expression "manifestly", used also in many other international legal texts as a qualifier of the expression "public policy", is to emphasize that public policy exceptions should be *interpreted restrictively* and that article 6 is only intended to be invoked under *exceptional circumstances concerning matters of fundamental importance* for the enacting State. [emphasis added]

Therefore, the omission of the word "manifestly" in Art 6 of the SG Model Law suggests that our Parliament intended that the public policy ground may be invoked for reasons less stringent than those concerning matters of fundamental importance for Singapore.

42 I do not propose to lay down an exhaustive definition of the phrase "contrary to public policy" in Art 6 of the SG Model Law – that would not be possible. Nonetheless, it is trite that preventing or limiting a person's rights on public policy grounds is an exceptional measure, and the burden is on the party invoking to identify the precise public policy engaged and how it has been (or will be) violated. As held in *UKM v Attorney-General* [2019] 3 SLR 874 ("*UKM*"), the alleged public policy relied on by a party must be shown to be attributable to a constitutionally authoritative source (such as legislation, statements made by Cabinet ministers, and judicial decisions) which clearly expresses the policy: *UKM* at [136], [138] and [144]. The Non-Parties do not come close to meeting this high threshold.

43 The Non-Parties argue a breach of public policy on two grounds:

(a) there was a breach of the rules of natural justice; namely the right to a fair hearing in the conduct of the Proceeding as service of the Petition was not properly effected, such that the Company and its

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directors received no actual notice of the Proceeding until after the Winding-Up Order was made;[31] and

(b) the Applicants have failed to protect the relevant interests, in that they have commenced this application with no due regard to the interests of the creditors and whether it was what the creditors wanted.[32]

44 I note that the Non-Parties did not clearly state what public policy was breached, how it was attributable to a constitutionally authoritative source, or the weight to be given to the alleged public policy as opposed to any countervailing concern in favour of recognition (see *UKM* at [136]). In any case, the facts did not demonstrate a breach of any public policy as alleged.

45 On the Non-Parties' first ground, they point out that the BMA had served the Petition and the Davis Affidavit at the offices of the Company's Personal Representative ("PR") on 4 October 2022 although it was aware that the PR had resigned as of 1 November 2021.[33] However, no evidence of Bermudan law was adduced to state that this was impermissible or that the service requirements under Bermudan law were not met. Further, these facts appear to have been made known to the Supreme Court of Bermuda as the BMA had filed an affidavit of service, and also referred to the date of the PR's resignation in its Petition and the supporting affidavit.[34] I further note that no application has been filed to set aside the Winding-Up Order on this or any other ground. In his

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31 NPWS at paras 48–55.

32 NPWS at paras 56–59.

33 NPWS at para 52.

34 LY-1 at pp 89–90; MM-1 at pp 26,41.

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affidavit ("the Li Affidavit"), Li states that he had considered challenging the Winding-Up Order, but chose not to proceed.[35]

46 The Non-Parties relied on the decision of *Paulus Tannos v Heince Tombak Simanjuntak and others and another appeal* [2020] 2 SLR 1061 ("*Paulus*"), but that does not assist them. Those proceedings involved the recognition of bankruptcy orders made in Indonesia against the individual appellants: *Paulus* at [1]. It was accepted that the appellants were required to be served notice of the proceedings, and the issue turned on whether that requirement was met: *Paulus* at [19] and [42]. The appellants filed affidavits asserting that they had not been served and the respondents offered no relevant evidence to the contrary: *Paulus* at [64]–[66]. In this case, the Non-Parties have not asserted what the Bermudan law for service of the Petition is or that it has been breached. The fact that the Non-Parties or the directors of the Company may not have been served is not relevant, unless it is shown that they are required to be served. No such evidence was adduced.

47 On the Non-Parties' second ground, their main complaint is that the Applicants had acted dishonestly by alleging that (a) a Singapore company owned or controlled by Li, EF Marine Pte Ltd ("EF Marine") had received premiums for and on behalf of the Company; and (b) they have received very little co-operation from Li.[36] The Non-Parties also accuse the Applicants of incurring exorbitant costs – they and their legal advisers had apparently incurred about S$150,000 as at 1 February 2023.[37]

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35 LY-1 at para 55.

36 NPWS at paras 65–66.

37 NPWS at para 71.

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48 Nothing in the material before me rises to the level of being contrary to any public policy. Further, I note that:

(a) without a proper accounting of all that the Applicants have done, which is not before me, I am in no position to assess whether the Applicants have incurred "exorbitant" costs as the Non-Parties claim. More importantly, the Applicants are court-appointed provisional liquidators and are subject to the supervision of the Supreme Court of Bermuda. Any allegation that they have incurred unnecessary costs or have otherwise misconducted themselves, should properly be brought before the Supreme Court of Bermuda. In this regard, I note that the Winding-Up Order confers on the Applicants all the powers set out in s 175 of the CA 1981, and that s 175(3) provides that:[38]

> (3) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

No application has been made to the Supreme Court of Bermuda by the Non-Parties or any creditor or contributory with respect to the exercise of the Applicants of their powers under the Winding-Up Order;

(b) it is undisputed that EF Marine has received premiums on policies issued by the Company.[39] It is Li's position that EF Marine did so as agent for the Company's re-insurer, Swiss Re International SE Singapore Branch ("Swiss Re").[40] It is unclear to me, and Li has not explained, why he needed to interpose himself (through EF Marine)

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38 ABOA at p 15.

39 AWS at para 44; LY-1 at para 35.

40 LY-1 at para 35.

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between the Company and Swiss Re and how the Company benefitted, and what benefits EF Marine obtained, from this arrangement. No agreement or document between EF Marine and Swiss Re was exhibited in the Li Affidavit;

(c) the Thresh Affidavit sets out the chronology of the correspondence between the Applicants and Li since October 2022, and details the categories of information on the Company's affairs which Li has to date failed to furnish.[41] I note that it is not the Non-Parties' case that the said information has been furnished – Li's position (which the Applicants deny) is that he is being co-operative, but the information requested is in China and he is wary of contravening China's regulations on the transfer of information out of China.[42] Li did obtain Chinese legal advice on these regulations and informed the Applicants' solicitors accordingly;[43] nevertheless, none of this shows that the Applicants acted dishonestly in arguing that they received little co-operation from Li, such that a breach of public policy should be found.[44] In any event, there would be relevant information and documents in Singapore (*eg*, with EF Marine) the disclosure of which would not be subject to Chinese regulations; and

(d) the allegation that the Applicants are acting against the interests of the Company's creditors appears weak in the face of the Certificate issued by the Supreme Court of Bermuda to support this application.[45]

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41 CT-1 at para 7.

42 NPWS at para 67.

43 LY-1 at pp 73–84.

44 LY-1 at paras 39–43.

45 MM-1 at pp 56–58.

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49 I therefore dismiss the Non-Parties' submission that the recognition of the Proceeding and the Winding-Up Order would be contrary to public policy.[46]

COMI

50 The Non-Parties argue that Bermuda is not the Company's centre of main interests ("COMI") and that the Company did not have an establishment in Bermuda.[47] Thus, they contend that the Proceedings are therefore neither a "foreign main proceeding" nor a "foreign non-main proceeding" as defined under Art 2 of the SG Model Law.[48]

51 Under Art 16(3) of the SG Model Law, in the absence of proof to the contrary, I am entitled to presume that the Company's registered office is its COMI.

52 The Applicants rely on the following factors in support of the argument that Bermuda is the Company's COMI:[49]

(a) the Company is a Bermuda-incorporated company which is regulated by the BMA, and its last known address was in Bermuda;

(b) the Company's statutory books and records, including its minute books and share register, are in Bermuda; and

(c) the Applicants, who are based in Bermuda, have been dealing with the Company's affairs (including reviewing outstanding claims),

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46 NPWS at para 6.

47 NPWS at para 79.

48 NPWS at paras 73, 79.

49 AWS at para 55.

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liaising with the Company's underwriting agent and reinsurer, and providing updates to the BMA and the Supreme Court of Bermuda.

53 I do not consider the third factor relevant – where the Applicants are based or are carrying out their work does not matter; what is relevant is the centre of gravity of the Company's commercial activity when it was carrying on business: *Re Tantleff, Alan* [2023] 3 SLR 250 at [45].

54 I note that the Company had no registered office at the time this application was filed.[50] Moreover, when the Petition was filed, the Company had no PR, auditor or corporate secretary in Bermuda as they had all resigned some time before.[51] It is also not disputed that the Company did not have an office or employees in Bermuda.[52] Neither is there evidence that it had assets in Bermuda, its only bank account there having closed some time ago.[53]

55 According to the Li Affidavit:

(a) the Company's business operations were conducted from offices in China, Ukraine and Russia;[54]

(b) the creditors of the Company, namely EF Marine, BSM and the brokers, were not located in Bermuda. EF Marine was in Singapore,

50 LY-1 at para 62(e).

51 LY-1 at paras 21, 24; NPWS at para 77.

52 LY-1 at para 62(d).

53 LY-1 at para 28.

54 LY-1 at para 62(e).

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BSM was in the Marshall Islands, and the brokers were located across the world;[55]

(c) the Company's customers were vessel owners located across the world, the majority of whom were from China. They were not from Bermuda;[56]

(d) the employees of the Company were employed in offices based in China, Ukraine and Russia. There were no employees in Bermuda;[57] and

(e) the Company's reinsurer was Swiss Re, which operated from Singapore, along with EF Marine as its general managing agent.[58]

56 The Non-Parties therefore argue that the Company's COMI was not in Bermuda, nor did it have an establishment in Bermuda.[59]

57 In response, the Applicants point out that it has been unable to ascertain the facts in relation to the Company's affairs and creditors because of Li's failure to co-operate – see [34] above.

58 I note that the Non-Parties, save for objecting to Bermuda, have not taken the position on affidavit that there is another jurisdiction which is the Company's COMI based on objectively ascertainable and permanent factors. Counsel for the Non-Parties submitted that the Li Affidavit suggested that the

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55 LY-1 at para 62(b).

56 LY-1 at para 62(c).

57 LY-1 at para 62(d).

58 LY-1 at para 63(f).

59 NPWS at para 78.

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COMI was in China, although he candidly admitted that this was not said explicitly. I did not read the Li Affidavit to suggest that. It made broad statements that the Company's operations were run from offices in China, Ukraine and Russia, and that the brokers and the majority of the shipowners who were the Company's customers were from China.[60] It is unclear to me, without more, how the mere location of the Company's creditors and customers was relevant to determining its COMI. Even if true, it was not relevant to the question of where the Company's business was conducted.

59 In any case, Li did not furnish any objective evidence to support his assertion that the Company conducted its business from China, Ukraine and Russia, or that most of its customers are from China. Significantly, Li also has not said where the assets of the Company are located, although he must know this.

60 It is also unclear who the Company's creditors are and where they reside. The fact that the Company's reinsurer (and the re-insurer's agent) is in Singapore is not material.

61 In the absence of other credible evidence, I find that the most important factor is that the Company had run an insurance business which was licensed in Bermuda and regulated by the BMA.[61] Some of its obligations under the law of Bermuda have been set out in the Petition and the Morrison Affidavit, including filing statutory returns, maintaining adequate accounting and record keeping systems, and having a PR.[62] The centre of gravity of its commercial activity was

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60 LY-1 at para 62(b).

61 LY-1 at para 9; MM-1 at p 34.

62 MM-1 at para 12, pp 23–28.

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therefore Bermuda. Further, the Company's statutory books and records, including its minute books and share register, are in Bermuda, and its last known business address was in Bermuda.[63]

62 In the circumstances, I find that Bermuda is the Company's COMI, and the Proceeding must therefore be recognised under Art 17(2) of the SG Model Law as a "foreign main proceeding".

Whether the Singapore courts have jurisdiction to recognise the Winding-Up Order

63 In their further written submissions, the Non-Parties argued that Art 4 of the SG Model Law was not satisfied and the Singapore courts therefore did not have jurisdiction to recognise the Proceeding and the Winding-Up Order.[64] Art 4 of the SG Model Law states:

> **Article 4. Competent Court**
>
> 1. The functions mentioned in this Law relating to recognition of foreign proceedings and cooperation with foreign courts are to be performed by the General Division of the High Court in Singapore.
>
> 2. Subject to paragraph 1 of this Article, the Court has jurisdiction in relation to the functions mentioned in that paragraph if —
>
> (a) the debtor —
>
> (i) is or has been carrying on business within the meaning of section 366 of the Companies Act 1967 in Singapore; or
>
> (ii) has property situated in Singapore; or
>
> (b) the Court considers for any other reason that it is the appropriate forum to consider the question or provide the assistance requested.

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63 MM-1 at para 16.

64 NPFWS at paras 9–13.

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64 The Applicants candidly admit that they do not have sufficient information to establish either limb of Art 4(2)(*a*) of the SG Model Law.[65] They therefore must satisfy Art 4(2)(*b*). The issue is the meaning and ambit of Art 4(2)(*b*).

65 Article 4(2) is absent in the Model Law. However, there does not appear to be any public statement on the reasons for its inclusion in the SG Model Law – the Explanatory Statement in the Companies (Amendment) Bill 2017 (Bill No 13/2017) ("the CAB Explanatory Statement") (which enacted the SG Model Law) is silent in this regard.

66 Nevertheless, the CAB Explanatory Statement does state that the SG Model Law contains the articles of the original Model Law, with modifications to adapt them for application in Singapore, and is also adapted with modifications from Schedule 1 to the Cross-Border Insolvency Regulations 2006 (SI 2006, No 1030) (UK) ("the UK Regulations"). The UK Regulations include an Art 4(2) which is almost identical to that of the SG Model Law. Hence, it appears that Art 4(2) of the SG Model Law was imported directly from the UK Regulations. Article 4(2) of the UK Regulations reads as follows:

> 2. Subject to paragraph 1 of this article, the court in either part of Great Britain shall have jurisdiction in relation to the functions referred to in that paragraph if—
>
> (a) the debtor has—
>
> (i) a place of business; or
>
> (ii) in the case of an individual, a place of residence; or
>
> (iii) assets,
>
> situated in that part of Great Britain; or

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65 AWS at para 45.

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> (b) the court in that part of Great Britain considers for any other reason that it is the appropriate forum to consider the question or provide the assistance requested.

67 The Explanatory Memorandum to the UK Regulations is unfortunately also silent on the reasons for the inclusion of Art 4(2)(*b*). The case of *American Energy Group Ltd v Hycarbex Asia Ltd* [2014] EWHC 1091 (Ch) ("*American Energy*") sheds some light on this issue – the court there noted that Art 4(2) was not meant to impose a jurisdictional requirement for the courts to perform the functions relating to recognition of foreign proceedings. Rather, the provision was *only meant to allocate jurisdiction* as between the courts of England and Wales and the courts of Scotland: *American Energy* at [13].

68 That appears consistent with how Art 4(2) of the UK Regulations is worded. However, in the recent decision of the English High Court in *Lau Yu v Patrick Cowley & Anor* [2020] EWHC 2429 (Ch) ("*Lau*"), the court observed that Art 4(2) may impose a jurisdictional requirement which must be satisfied together with the requirements under Art 17(1): *Lau* at [8] and [10]. I note however, that the court there did not engage in an analysis of Art 4(2) and *American Energy* was not cited or referred to.

69 It is therefore doubtful whether Art 4(2) of the SG Model Law was intended to impose a jurisdictional requirement. Indeed, Art 4 has the same header as its Model Law equivalent, *ie*, "*Competent Court*", which suggests it was only intended to designate the national court to perform the function of recognition. Nonetheless, each country is entitled to adapt and modify the Model Law to suit its own circumstances and requirements (see the 2013 Guide at para 20), and Art 4(2) of the SG Model Law must therefore be interpreted with reference to its ordinary meaning and context: see *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [38]. On its plain

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language, Arts 4(2)(*a*) and 4(2)(*b*) of the SG Model Law appear as disjunctive jurisdictional requirements for the Singapore court to recognise foreign proceedings.

70 Article 4(2)(*a*) is self-explanatory – it requires a tangible connection between the debtor and Singapore in terms of business activity or assets. In this regard, there is no specified minimum threshold, suggesting that a *de minimis* connection may be sufficient.

71 That low threshold to establish jurisdiction is also evident in the language used in Art 4(2)(*b*) – that the court "considers for *any* other reason that it is the *appropriate* forum to consider the question or provide the assistance requested" [emphasis added]. However, while this discretion is broad, it obviously cannot be unfettered. It is trite that statutory interpretation in Singapore follows the purposive approach – *ie*, an interpretation that would promote the purpose or object underlying the written law is to be preferred: see s 9A of the Interpretation Act 1965 (2020 Rev Ed) and *Tan Cheng Bock* at [35]. Thus, Art 4(2)(*b*) must be interpreted in a manner which enables the court to find jurisdiction where the recognition of the foreign proceedings will advance the purpose of the SG Model Law.

72 The Preamble to the SG Model Law provides that the purpose of the SG Model Law is to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of, *inter alia*:

(a) co-operation between the courts and other competent authorities of Singapore and foreign States involved in cases of cross-border insolvency;

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(b) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor; and

(c) protection and maximisation of the value of the debtor's property.

73 This is reinforced by the observations of the court in *Ascentra Holdings* at [64] that the Model Law is designed to provide a harmonised approach to the treatment of cross-border insolvency proceedings in national legal systems; to facilitate co-operation between courts and office holders involved in the same insolvency across different jurisdictions; to provide for the recognition of proceedings and the consequences of such recognition; and to afford direct access by foreign representatives of such companies to the courts of the enacting state. These concerns arise not only in the context of an insolvent company, but also for a company undergoing solvent liquidation: *Ascentra Holdings* at [65].

74 I find that Singapore is the appropriate forum to provide the assistance requested in this case and that Art 4(2)(*b*) is therefore satisfied. The application is intended, *inter alia*, to facilitate the Applicants requesting and receiving from third parties, including but not limited to the former directors of the Company, documents and information concerning the Company's affairs, and to take legal proceedings in Singapore to enable the Applicants to locate, protect, secure and take into their possession and control all assets and property within Singapore to which the Company is or appears to be entitled.[66] These ends accord with the SG Model Law's objectives of promoting the fair and efficient administration of cross-border liquidations that protects the interests of all creditors and other

[66] HC/OA 697/2023 at para 4.

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interested persons, as well as the protection and maximisation of the debtor's property.

75 Li is a Singapore citizen residing in Singapore.[67] He is the principal owner and director of the Company.[68] It cannot be seriously disputed that he has knowledge of, and access to, information and documents relating to the Company's affairs. Further, premiums payable to the Company on policies it issued were paid to EF Marine, which is based in Singapore and owned and controlled by Li.[69] Li claims that EF Marine was receiving the premiums as the agent of Swiss Re, which is also based in Singapore.[70] The Applicants should be allowed to investigate this claim and how the payments were dealt with. It is therefore reasonable to expect that the relevant persons, documents and information are available in Singapore. I have also outlined at [48(c)] above the evidence of the Applicant's unsuccessful efforts to obtain documents and information on the Company's affairs from Li. Clearly, it would be appropriate for this court to assist the Applicants to properly discharge their role as joint provisional liquidators and exercise their powers conferred under the Petition.

76 In his oral arguments, counsel for the Non-Parties argued that there is nothing to stop the Applicants from initiating fresh proceedings to obtain information and documents from Li or EF Marine, if they can establish their relevance to the Winding-Up Order. This submission appears to contradict the Non-Parties' earlier concern that the Applicants were incurring unnecessary

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67 LY-1 at p 2.

68 LY-1 at para 1.

69 LY-1 at para 35, p 2.

70 LY-1 at para 32.

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costs.[71] Recognising the Proceeding and the Winding-Up Order would enable the Applicants to discharge their duties in a more timely and cost-efficient manner. If Li is genuinely co-operative and concerned about costs as he claims to be, he should have nothing to be concerned about.

The standing of the provisional liquidators

77 Finally, the Non-Parties argued in further submissions that the Applicants lacked standing to bring the application because their appointment as permanent liquidators had not been confirmed to date by the creditors and contributories of the Company, in breach of the timeline set by the Supreme Court of Bermuda.[72] They pointed out that under Bermudan law, provisional liquidators are typically confirmed as permanent liquidators in the first meeting of the debtor's creditors and contributories.[73] Clause 5 of the Winding-Up Order by the Supreme Court of Bermuda dated 28 October 2022 stipulated that the period for convening this first meeting "is hereby extended for three (3) months from the date of this Order".[74] However, the Non-Parties noted that the Applicants had not adduced any evidence either that the Supreme Court of Bermuda had extended this timeline or appointed them as permanent liquidators notwithstanding that the first meeting of creditors had yet to be held.[75]

78 This argument was only raised by the Non-Parties in further submissions and not in their affidavits. I note that counsel for the Applicants represented from the Bar that the deadline for convening the first meeting of creditors had

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71 LY-1 at paras 49, 57, 59.

72 NPFWS-2 at para 7.

73 NPFWS-2 at para 8.

74 NPFWS-2 at para 9; MM-1 at p 53.

75 NPFWS-2 at para 9.

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been extended by the Supreme Court of Bermuda to 30 April 2024. In any case, there was no suggestion that the Applicants' powers under the Winding-Up Order were affected by the fact that they had not been confirmed as permanent liquidators. They were therefore still "foreign representatives" within the meaning of Art 2(*i*) of the SG Model Law.

Conclusion

79 In the circumstances, all requirements for the recognition of the foreign proceedings are met. I therefore allow the application.

80 Given that a substantial part of the Non-Parties' objections was made before the Court of Appeal's decision in *Ascentra Holdings*, and that the first hearing was adjourned to allow the Applicants to file the Howard Affidavit, it is only fair that I make no order for costs against the Non-Parties and for the Applicants' costs be paid out of the assets of the Company as an expense of the liquidation.

Hri Kumar Nair
Judge of the High Court

Siraj Omar SC, Allister Brendan Tan Yu Kuan, Joelle Tan and Tan Shih Rong Robbie (Drew & Napier LLC) for the applicants;
Mohamed Ibrahim s/o Mohamed Yakub, Low Shi Hou and Yasmin Binte Abdullah (Achievers LLC) for the non-parties.

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