IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2025] SGCA 13

Court of Appeal / Civil Appeal No 59 of 2024

Between

(1) Sapura Fabrication Sdn Bhd
(2) Mohd Anuar bin Taib
(3) Chew Seng Heng
(4) Norzaimah binti Maarof

… *Appellants*

And

GAS

… *Respondent*

In the matter of Originating Application No 241 of 2024

In the matter of Part 11 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed)

And

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

And

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

And

In the matter of Sapura Fabrication Sdn Bhd

Between

(1) Sapura Fabrication Sdn Bhd
(2) Mohd Anuar bin Taib
(3) Chew Seng Heng
(4) Norzaimah binti Maarof

… *Applicants*

And

GAS

… *Non-Party*

Court of Appeal / Civil Appeal No 60 of 2024

Between

(1) Sapura Offshore Sdn Bhd
(2) Mohd Anuar bin Taib
(3) Chew Seng Heng
(4) Norzaimah binti Maarof

… *Appellants*

And

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JUDGMENT

[Insolvency Law — Cross-border insolvency — Recognition of foreign insolvency proceedings — Automatic moratorium arising on recognition as foreign main proceedings — Whether carve-out should be granted for arbitration to proceed — Article 20 UNCITRAL Model Law on Cross-Border Insolvency]
[Arbitration — Agreement — International — Enforcement of arbitration agreements]
[Conflict of laws — Choice of law — Insolvency — Recognition and enforcement of foreign insolvency proceedings — Submission to foreign insolvency proceedings]

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Sapura Fabrication Sdn Bhd and others
v
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[2025] SGCA 13

Court of Appeal — Civil Appeals Nos 59 and 60 of 2024
Sundaresh Menon CJ, Steven Chong JCA and Kannan Ramesh JAD
22 January 2025

21 March 2025 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

1 The right of a party to pursue a claim which is subject to a valid arbitration agreement is typically in direct conflict with the nature of insolvency proceedings. This is not surprising since arbitration and insolvency proceedings are driven by two competing public policy considerations. The enforcement of arbitration agreements upholds party autonomy and freedom to contract, while insolvency proceedings advance the collective interests of the general body of creditors.

2 The question which arises not infrequently is how the court should navigate this inherent tension. In this regard, the courts have developed tests to guide the exercise of their discretion as to when an arbitration agreement may be enforced against a party which is undergoing insolvency proceedings.

3 The principal issue in these two appeals concerns the exercise of the discretion by the Judge of the General Division of the High Court (the "Judge") in granting a carve-out of arbitration claims after he recognised the reorganisation proceedings of Sapura Fabrication Sdn Bhd and Sapura Offshore Sdn Bhd (the "Sapura Entities") in Malaysia as foreign main proceedings, pursuant to the UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997) (the "Model Law") as implemented under s 252(1) and the Third Schedule to the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "SG Model Law"). The Judge's full reasons were set out in *Re Sapura Fabrication Sdn Bhd and another matter (GAS, non-party)* [2024] SGHC 241 (the "Judgment").

4 In addition to the exercise of his discretion, the Judge also opined that he would have allowed the carve-out premised on his understanding of the court's mandatory obligation to enforce the arbitration agreements. A key pillar of the Judge's reasoning relied on this court's decision in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 ("*AnAn*"). The Judge also noted that the recent Privy Council decision of *Sian Participation Corp (in liquidation) v Halimeda International Ltd* [2024] UKPC 16 ("*Sian Participation*") had taken a position that is contrary to our decision in *AnAn.*

5 In these appeals, the appellants submit that the carve-out should be refused and, in aid of its submissions, invite this court to revisit the General Division of the High Court's (the "General Division") decision in *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd and another* [2023] 3 SLR 1604 ("*Wang Aifeng*"). However, at the close of the hearing before us, we were informed by the respondent's counsel that the parties had reached an agreement to settle. The appellants withdrew their appeals approximately two weeks later.

Nevertheless, this court retains the discretion whether or not to issue its judgment: see *Bumi Armada Offshore Holdings Ltd and another v Tozzi Srl (formerly known as Tozzi Industries SpA)* [2019] 1 SLR 10 at [62]. Given the issues involved, we find it appropriate to express our views on the merits of the appeals as they pertain to legal points of general interest and significance which are in the public interest to ventilate, namely, the standard for carve-outs as well as the interplay between arbitration agreements and insolvency proceedings: see *QBE Insurance (Singapore) Pte Ltd and another v Relax Beach Co Ltd* [2023] 2 SLR 655 at [43].

6 After due consideration of the parties' submissions, we would have dismissed the appeals but for their withdrawal. Among other things, we can see no compelling reason to revise the test laid down in *Wang Aifeng.* Furthermore, as we do not agree with the Judge's view of the court's mandatory obligation to enforce the arbitration agreement, we do not think it is necessary to revisit *AnAn* in the light of the Privy Council's decision in *Sian Participation*.

Background Facts

The Sapura Entities

7 The first appellants in both appeals, *ie*, the Sapura Entities, are private limited companies incorporated in Malaysia, and are the direct subsidiaries of Sapura Energy Berhad, a publicly listed Malaysian company. Sapura Energy Berhad and the Sapura Entities are part of the corporate group known as the Sapura Group.

8 The second to fourth appellants in both appeals are the persons authorised to act as the representatives of the Sapura Entities and have been

recognised by the General Division as foreign representatives within the meaning of Art 2(*i*) of the SG Model Law.

The first and second reorganisation proceedings

9 The Sapura Group has been engaging in a series of restructuring proceedings in Malaysia since 2022. On 7 March 2022, the Sapura Group applied in Originating Summons No. WA-24NCC-148-03/2022 (the "First Reorganisation Proceeding") to seek orders from the High Court of Malaya at Kuala Lumpur (the "Kuala Lumpur High Court") for the convening of meetings of its creditors and to restrain all proceedings against the Sapura Group and/or its assets unless leave of the Malaysian court was obtained. The Kuala Lumpur High Court granted an order in terms of the application on 10 March 2022.

10 It appears that, under Malaysian law, a restraining order will be granted first for a duration of three months and can then be extended once by a further nine months. This means a restraining order may only remain in force for a total period of 12 months. Consequently, the restraining order obtained in the First Reorganisation Proceeding was originally meant to expire on 10 June 2022 but was extended to 10 March 2023.

11 In the First Reorganisation Proceeding, the proposed schemes were only intended to compromise outstanding liabilities as at a cut-off date of 31 January 2022. On that basis, the scheme creditors were invited to file proofs of debt by 30 June 2022. On or around 30 June 2022, the respondent filed separate proofs of debt against each of the Sapura Entities for claims and liabilities owed by them that, in the respondent's view, had fully crystallised as at 31 January 2022. These claims arose under two contracts that the respondent had entered into with the Sapura Entities (the "Contracts"). Under the Contracts, the Sapura Entities

undertook to provide the respondent construction-related services in exchange for a total payment of around US$169m.

12 On 25 January 2023, the Sapura Group obtained an order from the General Division recognising the First Reorganisation Proceeding as a foreign main proceeding under the SG Model Law and granting relief. The recognition order was discharged on 10 March 2023 with the lapsing of the restraining order.

13 On 3 March 2023, the Sapura Group made an application to the Kuala Lumpur High Court for essentially a similar set of convening and restraining orders in (the "Second Reorganisation Proceeding"). This was granted by the Kuala Lumpur High Court on 8 March 2023. The General Division thereafter granted a similar recognition order and relief on 20 November 2023.

14 When the Second Reorganisation Proceeding commenced, no fresh proof of debt exercise was required. Instead, the scheme chairman was entitled to rely on the outcome of the proof of debt exercise conducted in the First Reorganisation Proceeding. Additionally, at the onset of the Second Reorganisation Proceeding, the schemes still limited the cut-off date for claims by creditors to 31 January 2022.

The arbitration proceedings between the respondent and the Sapura Entities

15 On 29 September 2023, the respondent commenced separate arbitration proceedings against the Sapura Entities. Similar to the claims for which the respondent had filed its proofs of debt, the dispute giving rise to both arbitrations (the "Arbitration Claims") arose from the Contracts. The Contracts were governed by English law and contained arbitration agreements providing

for Singapore-seated arbitrations administered by the Singapore International Arbitration Centre (the "SIAC").

16 The Contracts gave the respondent the right to terminate or reduce the scope of the Contracts in the event of certain defined circumstances. These included if the Sapura Entities:

(a) became subject to an "Insolvency Event", as defined in the Contracts;

(b) wilfully delayed performance of the Contracts;

(c) abandoned or repudiated the Contracts; or

(d) committed breaches of the Contracts that were material and incapable of remedy.

17 According to the respondent, it formally served notices on the Sapura Entities on 13 March 2023 to partially terminate the contract with Sapura Fabrication for cause and reduce the scope of the contract with Sapura Offshore. The respondent's grounds for doing so were as follows:

(a) that the Sapura Entities' demobilisation of two vessels to be utilised for the performance of the Contracts amounted to contractual breach, wilful delay and/or abandonment of the Contracts;

(b) that the restraining orders granted by the Kuala Lumpur High Court in the Second Reorganisation Proceeding on 8 March 2023 constituted an Insolvency Event as defined in the Contracts; and

(c) that there were numerous additional breaches of the Contracts committed by the Sapura Entities.

18 Accordingly, the respondent filed Notices of Arbitration against each of the Sapura Entities on 29 September 2023. In the arbitration, the respondent seeks declaratory and monetary relief, which include:

(a) declarations that the respondent's partial termination and reduction of scope of the Contracts were valid, and that the Sapura Entities have committed various breaches of the Contracts;

(b) compensation for all damage suffered by the respondent as a result of the termination events and breaches of contract; and

(c) a full indemnity of the respondent's costs and expenses in pursuing its claims through arbitration, and interest on the award.

19 The respondent also asserts that the Arbitration Claims had only crystallised on 13 March 2023, when the respondent served the notices on the Sapura Entities, which was *after* the schemes' stipulated cut-off date of 31 January 2022 (see [11] and [14] above). Therefore, the respondent takes the position that, as of the date the respondent filed its Notices of Arbitration, the Arbitration Claims did not fall within the scope of the schemes.

20 On 16 October 2023, the Sapura Entities filed their separate Responses to Notice of Arbitration and denied the respondent's claims in their entirety. First, they argued that the demobilisation of the vessels did not amount to a breach and/or abandonment of the Contracts; that any delay was not caused by the demobilisation; and that, in any case, such delay was not wilful. Second, that the orders issued by the Kuala Lumpur High Court did not constitute an "Insolvency Event", and in any event, that the respondent was not entitled to exercise its rights of termination or reduction of contractual scope due to waiver

by election and/or estoppel. Third, the Sapura Entities pleaded a general denial in respect of the additional breaches under the Contracts.

21 On the same day that they filed their Responses to Notice of Arbitration, the Sapura Entities each nominated the same co-arbitrator. On 8 November 2023, the parties agreed to a protocol to appoint a presiding arbitrator for the arbitrations and, on 9 November 2023, they notified their respective nominees and the SIAC of the same. On 20 November 2023, the SIAC consolidated both arbitrations into a single arbitration proceeding with consent of the parties.

The third reorganisation proceeding and notices inviting the filing of new proofs of debt

22 On 6 November 2023, the Sapura Entities issued notices to certain creditors (including the respondent) inviting them to file new proofs of debt in the Second Reorganisation Proceeding. The notices indicated that the Sapura Entities intended to compromise claims for, *inter alia,* "contingent and unliquidated breach of contract and tort claims" without stipulating any applicable cut-off date. However, the respondent did not, in response, file any proofs of debt in relation to the Arbitration Claims.

23 The Second Reorganisation Proceeding was due to lapse on 10 March 2024. Thus, on 20 February 2024, the Sapura Group applied for yet another set of convening and restraining orders and relief (the "Third Reorganisation Proceeding"), which were granted by the Kuala Lumpur High Court on 7 March 2024. The Sapura Entities then applied in HC/OA 241/2024 and HC/OA 242/2024 respectively ("OA 241" and "OA 242") to seek the General Division's recognition of the Third Reorganisation Proceeding. The applications were essentially uncontested and the recognition orders were granted on 8 May 2024. On 2 April 2024, the respondent filed its reply affidavit

in OAs 241 and 242, seeking a carve-out to proceed with the arbitration proceedings against the Sapura Entities under Art 20(6) of the SG Model Law.

24 On 9 April 2024, the Sapura Entities issued fresh notices to their creditors (including the respondent) inviting them to file new proofs of debt in the Third Reorganisation Proceeding. According to the respondent, this notice stated, for the first time, that the schemes would cover "Designated Contingent Creditors Scheme Claims" which "may have been incurred prior or after the Cut-Off Date". On 10 May 2024, the appellants confirmed, by way of supplementary affidavit, that the draft scheme paper filed in the Third Reorganisation Proceeding provided that certain designated contingent creditors with claims after the cut-off date of 31 January 2022 were to be included in the proposed scheme.

Decision below

25 The Judge exercised his discretion to grant a carve-out in favour of the respondent based on an application of the test in *Wang Aifeng* (the "Discretionary Ground"). To recapitulate, the test in *Wang Aifeng* involves the consideration of the following factors (the "*Wang Aifeng* factors") to guide the court's exercise of discretion (at [32]):

(a) the timing of the application for a carve-out;

(b) the nature of the claim;

(c) the existing remedies;

(d) the merits of the claim;

(e) the existence of prejudice to the creditors or to the orderly administration of the restructuring proceedings; and

(f) other miscellaneous factors such as the potential of an avalanche of litigation being unleashed by the grant of permission, the proportionality of the cost of the proceeding to the scheme company's resources, and the views of the majority creditors.

26 Alternatively, the Judge observed in *dicta* that because the arbitration agreements in the Contracts remained valid, and the dispute between the parties fell within their scope, a carve-out would, in any case, have to be ordered in view of the Singapore court's mandatory obligation to enforce the arbitration agreements on the respondent's request for the dispute to be resolved by arbitration (the "Mandatory Ground").

The Discretionary Ground

27 The Judge held that the complex nature of the Arbitration Claims made it less suitable to be resolved through the proof of debt regime as compared to arbitration (Judgment at [41]–[46]). Furthermore, while the appellants had emphasised the robustness of the scheme's proof of debt framework and highlighted the adjudicator's power to, *inter alia,* call for written submissions and oral hearings, there was no requirement or guarantee that these additional steps would be taken by the adjudicator. That the adjudicator could or might adopt a more robust process was insufficient assurance (Judgment at [48]).

28 Next, the Judge noted that there was no undue prejudice that would be occasioned from the grant of the carve-out. There was no evidence that granting a carve-out would risk a deluge of similar proceedings by other creditors, or that the arbitration would unduly strain the ongoing restructuring efforts, bearing in mind that the sum claimed by the respondent in the arbitration (US$169m) was dwarfed by the total debt that the Sapura Entities sought to restructure (approximately RM12bn) (Judgment at [55]).

29 Additionally, to ensure that the respondent did not gain any undue advantage over the other scheme creditors *via* enforcement of the award, the Judge imposed a condition that there should be no enforcement of the award anywhere, whether of the claims proper or of costs, without leave of the General Division, pursuant to Art 20(6) of the SG Model Law (Judgment at [56]).

30 Lastly, the Judge rejected the respondent's submission that the Arbitration Claims fell outside the scope of the Sapura Entities' proposed schemes of arrangement, and that the Sapura Entities had acted in bad faith in amending the scope of their schemes of arrangement to stifle the respondent's attempt at pursuing arbitration. As for the scope of the schemes, the Sapura Entities' evidence of the draft scheme paper presented to the Kuala Lumpur High Court in the Third Reorganisation Proceeding made clear that the respondent's contingent claims being raised in the arbitration were included under the schemes (see [24] above). As for the allegation of bad faith, an update to the scope of the schemes, that had been going on since 2022, consisting of three reorganisation proceedings, was to be expected to reflect commercial reality and the Sapura Entities' financial needs (Judgment at [57]–[61]).

The Mandatory Ground

31 The starting point for the Judge's reasoning in respect of the Mandatory Ground was Art II(3) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Concluded at New York on 10th June 1958 ("New York Convention"), which is specifically implemented via s 6 of the International Arbitration Act 1994 (2020 Rev Ed) ("IAA"). Article II(3) and s 6 embody the policy of mandatory enforcement of international arbitration agreements, and that policy was applied by this court in *AnAn* at [56] in holding that an insolvency court would stay or dismiss a winding-up petition based on a

disputed debt if it was satisfied on a *prima facie* basis that there was a valid arbitration agreement between the parties and the dispute fell within the scope of the arbitration agreement (Judgment at [64]).

32 Next, the Judge found that the respondent had submitted to the Malaysian court's jurisdiction in respect of the Third Reorganisation Proceeding. The Judge took into account the decision of the Kuala Lumpur High Court in *Sapura Energy Bhd & Ors v Martin Bencher (Malaysian) Sdn Bhd* [2024] 3 CLJ 159 ("*Martin Bencher*"), which held at [47] that, in the specific context of the Sapura Entities' restructuring, a proof of debt filed in the First Reorganisation Proceeding constituted a submission to the court's jurisdiction in relation to the subsequent Reorganisation Proceedings (Judgment at [78]–[79]).

33 When the decision in *Martin Bencher* was considered together with the fact that the Malaysian court's orders in the Second and Third Reorganisation Proceedings did not make any reference to the filing of fresh proofs of debt, it led to the conclusion that the respondent's submission to the Malaysian court's jurisdiction did not lapse with the termination of the First Reorganisation Proceeding. The Second and Third Reorganisation Proceedings were in substance extensions of time to complete the proof of debt exercise commenced during the First Reorganisation Proceeding as opposed to completely distinct proceedings (Judgment at [80]).

34 The Judge also held that it was immaterial that the claims in the respondent's proofs of debt were different from the Arbitration Claims, and cited the case of *Stichting Shell Pensioenfonds v Krys and another* [2015] AC 616 ("*Stichting Shell*") (Judgment at [84]). In *Stichting Shell,* the defendant creditor had lodged a proof of debt in liquidation proceedings in the British

Virgin Islands ("BVI"). The proof of debt related to a debt arising from the creditor's right to redeem shares in the insolvent company (at [3] and [11]). Separately, the creditor obtained from the Dutch courts an attachment order over the insolvent company's assets, and subsequently brought proceedings in the Dutch courts for alleged misrepresentations and breaches of warranties (at [7] and [9]). In upholding an anti-suit injunction obtained by the liquidators to restrain the creditor from prosecuting the ongoing proceedings in the Netherlands, the Privy Council held that the creditor had submitted to the jurisdiction of the BVI court by lodging a proof of debt (at [31]–[32]). Just as lodging a proof of debt in the BVI amounted to submission to the BVI courts' jurisdiction in respect of the creditor's separate claim in the Dutch proceedings, the respondent's lodging of a proof of debt could amount to submission to the Malaysian court's jurisdiction in respect of the separate Arbitration Claims. The Judge further considered that this conclusion was consistent with the principle of inchoate submission as articulated in *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545 ("*Giant Light*") at [48] (Judgment at [81]).

35 Despite the finding of submission, the Judge held that the arbitration agreement was not thereby rendered ineffective or unenforceable. The Judge relied on the proposition set out at [31] of *Stichting Shell* that a creditor's submission of a proof for one claim does not *per se* preclude the creditor from taking proceedings outside the liquidation on another claim, so long as the proceedings were not meant to allow the creditor priority access to the debtor's assets. In a similar vein, the respondent's submission to the Reorganisation Proceedings did not preclude it from seeking to have its dispute with the Sapura Entities determined by arbitration. Accordingly, as the arbitration agreements in the Contracts were still valid, the Judge held that he would have granted the

carve-out in accordance with the Singapore court's mandatory obligation to enforce the arbitration agreements (Judgment at [86]–[88]).

The submissions on appeal

36 The parties' cases on appeal centre around the Judge's findings that (a) the carve-out ought to be granted as a matter of the court's discretion under the Discretionary Ground; and (b) the carve-out should in any case be granted under the Mandatory Ground.

The parties' cases on the Discretionary Ground

37 The appellants argue that the Judge erred in not applying the "exceptional circumstances" standard in the exercise of his discretion. They cite the Kuala Lumpur High Court decision in *Re Top Builders Capital Bhd & Ors* [2021] 10 MLJ 327 ("*Top Builders*") for the proposition that, in the context of a restructuring proceeding where the debtor company had obtained a restraining order (*ie*, a moratorium), a creditor would be granted permission to continue or commence court or arbitration proceedings only in "exceptional circumstances" (*Top Builders* at [44] and [99]). The underlying rationale for this standard is that a scheme proceeding is time-sensitive and seeks to revive the financially distressed company as a going concern. Therefore, the public interest of benefitting the many ought to outweigh the interests of the individual creditor (*Top Builders* at [62]).

38 Furthermore, regardless of whether the "exceptional circumstances" standard is adopted, the appellants submit that the Judge erred in his application of the factors set out in *Wang Aifeng* at [32] (the "*Wang Aifeng* factors"). They argue that the Judge failed to take into account the robustness of the schemes' proof of debt processes, and further point to the fact that the scheme adjudication

processes in the Reorganisation Proceedings are modelled after those approved in the English cases of *Re Lehman Brothers International (Europe) (in administration)* [2018] EWHC 1980 (Ch) ("*Re Lehman Brothers*") and *Re Noble Group Ltd and another (No 2)* [2019] 2 BCLC 548 ("*Re Noble Group (No 2)*"). Therefore, the dispute submitted to arbitration is capable of being resolved under the scheme adjudication process despite the considerable factual disagreements involved.

39 The appellants also take issue with the Judge's consideration that parties presumably chose English law as the governing law of the Contracts because they wanted an English law tribunal to determine their dispute. They argue that the Judge's reasoning is speculative as non-English courts and tribunals frequently adjudicate disputes governed by English law and that, in any case, the parties to an insolvency or restructuring process ought not to be permitted to insist on the full satisfaction of all their pre-insolvency entitlements once that process is under way.

40 The appellants also submit that the grant of a carve-out would be prejudicial to the Sapura Entities. They note that the respondent's request for a carve-out comes at a relatively late stage – approximately two years after the First Reorganisation Proceeding commenced on 7 March 2022. Allowing the arbitration to proceed will cause the Sapura Entities to incur substantial time and costs on the arbitration. The appellants reiterate the argument that granting the respondent the carve-out would lead to other creditors seeking similar carve-outs, which could cause the Sapura Entities to be subject to a deluge of claims by other creditors, adversely impacting the restructuring process.

41 Finally, the appellants invoke the wider doctrine of comity and modified universalism. They cite *Re PT Garuda Indonesia (Persero) Tbk and another*

matter [2024] 3 SLR 254 ("*Garuda*") at [66] as standing for the proposition that modified universalism requires insolvency proceedings to be unitary and universal, through national courts striving to administer the estate of the insolvent company "in co-operation with the court of the jurisdiction of the principal liquidation of the debtor". The Judge failed to accord due deference to this principle of comity by not attaching sufficient weight to the Malaysian court's prior decision in *Sapura Energy Bhd & Ors v Tecnimonthqc Sdn Bhd* [2023] MLJU 124 ("*Tecnimonthqc*"), where another scheme creditor was denied leave to commence arbitration proceedings against other entities in the Sapura Group (*Tecnimonthqc* at [36]). In effect, the Judge's decision gave the respondent a procedural advantage over the other scheme creditor who applied for a carve-out in Malaysia rather than Singapore, defeating the principle of modified universalism under the SG Model Law.

42 In response, the respondent disagrees that the "exceptional circumstances" test ought to apply because it is inherently vague. Further, there is no need for a different standard to be applied to carve-outs in restructuring proceedings as compared to liquidation proceedings since the proof of debt adjudication processes in both proceedings are of a summary nature, and the concern that a complex claim engaging substantial disputes of fact ought to instead be resolved by an action applies with equal force in both situations.

43 As for the Judge's application of the *Wang Aifeng* factors, the respondent largely agrees with the Judge's findings. On the appellants' invocation of comity, the respondent points out that comity, cooperation and modified universalism are broad principles and do not by themselves form standalone principles or substantive rules in insolvency law. In the context of modifying the stay under Art 20(6) of the SG Model Law, a recognising court is allowed to determine such relief as it regards appropriate following

recognition for itself. It was thus up to the General Division and the Judge to determine whether to allow the arbitration to proceed.

The parties' cases on the Mandatory Ground

44 The appellants argue that the Mandatory Ground is wrong in law as the Judge incorrectly considered himself bound by *AnAn*. *AnAn* was a case dealing with pre-insolvency rights and the anterior question whether a debtor should be placed in the insolvency process. The holding in *AnAn* therefore does not apply to the present case where the Sapura Entities are indisputably in a collective statutory proceeding. In such a scenario, the policy concerns underpinning the insolvency regime ought to apply with stronger force, and ought not to be trumped automatically by the policy concerns underpinning the international arbitration regime.

45 The appellants also refer to the Canadian position that, while an moratorium is in place, all arbitration agreements are *ipso facto* rendered "inoperative" or "incapable of being performed". This position was taken by the Ontario Superior Court of Justice in *The Attorney General of Canada v Reliance Insurance Co* (2007) 87 OR (3d) 42 ("*Reliance Insurance*") at [31]–[32]. The appellants argue that this position ought to be adopted in Singapore.

46 Unsurprisingly, the respondent adopts the Judge's views on the Mandatory Ground. It, however, seeks to characterise the Mandatory Ground as the court accounting for the policy of mandatory enforcement of international arbitration agreements in its exercise of discretion to grant the carve-out. It also highlights that *Reliance Insurance* is no longer the most recent word on the Canadian position on the effect of moratoria on arbitration agreements, as the position has since been qualified by the Supreme Court of Canada in *Peace River Hydro Partners v Petrowest Corp* [2022] SCJ No 41 ("*Peace River*")

at [8]. In any case, the respondent disagrees with the positions taken in *Reliance Insurance* and *Peace River*, on the basis that it would detract from the policy of enforcing international arbitration agreements as a matter of right and not discretion, said to be embodied in Art II of the New York Convention and the IAA more generally, and it maintains that the arbitration agreements in the Contracts remain operative and capable of being performed.

Issues to be determined

47 The issues arising for determination in this appeal are as follows:

(a) whether the Judge erred in the exercise of his discretion in granting a carve-out for the arbitration proceedings; and

(b) whether the court is under a mandatory obligation to grant a carve-out to enforce the arbitration agreements in the Contracts.

Preliminary Issue

48 Before examining the main issues on appeal, there is a preliminary point to dispose of. The respondent seeks to challenge the Judge's finding that the respondent had submitted to the Malaysian court's jurisdiction in respect of the Third Reorganisation Proceeding. However, this argument was not seriously pursued by the respondent's counsel, Ms Eunice Chan, during the oral hearing.

49 In our view, this argument does not assist the respondent. The respondent's foremost difficulty lies in its failure to file any cross-appeal against the Judge's finding of submission. To overcome this, the respondent submits that it is procedurally entitled to challenge the Judge's finding, even without filing a cross-appeal, based on O 19 r 31(2)(*d*) of the Rules of Court 2021 (the "ROC 2021") which provides as follows:

> **Appellant's Case, respondent's Case and appellant's Reply (O. 19, r. 31)**
>
> **31.**—(1) …
>
> (2) The respondent's Case must contain the following:
>
> …
>
> (*d*) if the respondent intends to submit that —
>
> (i) the lower Court's decision should be varied should the appeal be wholly or partially allowed where the respondent has not appealed against the decision of the lower Court; or
>
> (ii) the lower Court's decision should be affirmed on grounds other than those relied upon by that Court,
>
> those submissions and the reasons for the respondent's submissions;
>
> …
>
> (3) Where the respondent fails to comply with the requirements in paragraph (2)(d), the respondent is not allowed to make the submissions mentioned in paragraph (2)(d) unless the Court otherwise orders.

50 Order 19 r 31(2)(*d*) is of no assistance to the respondent. The statutory predecessor to O 19 r 31(2)(*d)* of the ROC 2021 is O 57 r 9A(5) of the Rules of Court (2014 Rev Ed). In *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455, this court made clear that O 57 r 9A(5) was not intended to "circumvent the need to file a cross-appeal in a situation in which the respondent was challenging a holding by the court that had gone against him". Rather, it was only meant to allow a respondent to support the court's decision in his favour by varying or affirming it on a ground which the court had not relied on below (at [23]). These principles continue to be applicable to the ambit of O 19 r 31(2)(*d*), and the respondent's challenge against the Judge's finding of submission is squarely the type of challenge that the rule is *not* intended to allow in the absence of a cross-appeal being filed.

51 The respondent's failure to file a cross-appeal suffices for us to dispose of its challenge against the Judge's finding of submission. Nevertheless, even if the respondent were procedurally entitled to argue the point, we agree with the Judge that the respondent's submission to the Malaysian Court's jurisdiction in the First Reorganisation Proceeding persists to the Third Reorganisation Proceeding. In our view, the Judge correctly prioritised substance over form when he held that the Second and Third Reorganisation Proceedings were, in substance, extensions of time to complete the proof of debt exercise given the fact that no fresh proof of debt exercise *at large* was required in respect of the subsequent Reorganisation Proceedings (at [80] of the Judgment).

52 The respondent's chief contention is that the Judge misapplied the case of *Stichting Shell.* This is because the Judge failed to consider that, unlike the BVI liquidation proceedings in *Stichting Shell* where *all* possible liabilities within reason were provable*,* a scheme of arrangement is a contractual workout where the debtor decides which claims and creditors it wishes to compromise with. Accordingly, the present case is distinguishable from *Stichting Shell* because the Arbitration Claims were not capable of being proved in the First Reorganisation Proceeding (by virtue of the cut-off date), and thus the respondent did not and could not have consented to submit to the Malaysian court's jurisdiction in respect of the Arbitration Claims.

53 We do not accept the respondent's submission. To begin with, we do not see why the respondent needs to have *consented* to submission in respect of the Arbitration Claims. As the appellants point out, the case of *Rubin and another v Eurofinance SA and others (Picard and others intervening)* [2013] 1 AC 236 ("*Rubin*") illustrates that a party's "consent" to submit in respect of a subsequent claim is not necessary. In *Rubin,* a company was placed into liquidation in Australia, and an English syndicate of reinsurers filed a proof of debt and proxy

form and participated in creditors' meetings (at [158]). The liquidators then sought to pursue avoidance claims against the syndicate in Australia, but the syndicate objected to the Australian court's jurisdiction and did not take any steps in those proceedings. The UK Supreme Court opined at [167] that it would have regarded the syndicate as having submitted to the Australian court's jurisdiction given the steps that it had taken in the liquidation process. We observe that the finding of submission was justified even though the defendant syndicate did not consent to the avoidance claims being brought against it.

54 Furthermore, we agree with the Judge that the finding of submission is consistent with the principle of inchoate submission. As stated in *Giant Light,* a party's submission to an earlier set of claims may be imputed to further claims where (a) the subsequent claim concerns the same subject matter or (b) where the subsequent claim is related to the original claim. The court making the assessment ought to evaluate the fairness between the claimant and defendant and disregard technical impediments created by procedural rules under both foreign and forum law (*Giant Light* at [49]).

55 Given that the Second and Third Reorganisation Proceedings were, in effect, extensions of time necessitated by the requirement under Malaysian law that a restraining order could only be in force for a maximum of 12 months (see [10] above), we deem it fair to impute the respondent's submission in the first set of proceedings to the subsequent proceedings. We also accept that it is reasonable that a restructuring commenced in 2022 would need to update the scope of the schemes over time to reflect commercial reality and the Sapura Entities' financial needs (see Judgment at [61]). Accordingly, it is fair for the respondent's submission with respect to the first set of proceedings to be imputed to the expanded scope of the subsequent schemes.

56 Finally, this finding is ultimately of no consequence to the appeals because irrespective of the submission to the Malaysian court's jurisdiction, the respondent would still be required to satisfy the court that a carve-out should be granted for the arbitration proceedings. Moreover, the respondent's standing to apply for a carve-out to continue arbitration proceedings is not affected by the finding of submission.

The Discretionary Ground

The Applicable Test

57 Before we examine the Judge's application of the *Wang Aifeng* factors, we first address the appellants' submission that this court should apply the "exceptional circumstances" test in deciding whether to grant carve-outs from moratoriums in restructuring proceedings. The Kuala Lumpur High Court in *Top Builders* had defined "exceptional circumstances" to mean that "the circumstance or combination of circumstances must be of sufficient weight to overcome the strong imperative to have the claims dealt with under the machinery of the scheme of arrangement" (at [99]). This definition was adopted from the English High Court Chancery Division's decision in *Ronelp Marine Ltd and other companies v STX Offshore & Shipbuilding Co Ltd* [2016] EWHC 2228 (Ch) ("*Ronelp*"), which applied the test in an application for a carve-out from the moratorium arising from the recognition of rehabilitation proceedings in the Republic of Korea (at [31]). The court in *Top Builders* further explained that the test necessitates the balancing of the harm and loss to the applicant if leave is not granted with the harm and loss to the general body of creditors under the scheme if leave is granted (at [102]).

58 The appellants' submission necessitates an analysis of the differing nature of liquidation and restructuring proceedings, which we now turn to.

Generally speaking, we acknowledge that the underlying considerations in a liquidation proceeding are different from those in restructuring or reorganisation proceedings. These differences, in turn, can inform the purpose of the moratorium or stay that may be in force. This distinction was extensively explored in the *UNCITRAL Legislative Guide on Insolvency Law*, UN Publication Sales No E.05.V.10 (adopted on 25 June 2004) (at pp 83–84):

> *(i) Liquidation*
>
> 27. As a general principle, the emphasis in liquidation is on realizing the assets, in whole or in part, so that creditors' claims can be satisfied from the proceeds of the estate as quickly as possible. Maximizing value is an overriding objective. The imposition of a stay can ensure a fair and orderly administration of the liquidation proceedings, providing the insolvency representative with adequate time to avoid making forced sales that fail to maximize the value of the assets being liquidated and also an opportunity to see if the business can be sold as a going concern, where the collective value of assets may be greater than if the assets were to be sold piecemeal. A stay also allows the insolvency representative to take stock of the debtor's situation, including actions already pending, and provides time for all actions to be fully considered, increasing the possibility of achieving a result that is not prejudicial to the interests of the debtor and creditors. The balance that is difficult to achieve in liquidation proceedings is between the competing interests of secured creditors, who will often hold a security interest in some of the most important assets of the business and wish to enforce that security interest, and unsecured creditors, who may benefit from retention of that asset to facilitate sale of the business as a going concern.
>
> *(ii) Reorganization*
>
> 28. *In reorganization proceedings, the application of a stay facilitates the continued operation of the business and allows the debtor a breathing space to organize its affairs, time for preparation and approval of a reorganization plan and for other steps such as shedding unprofitable activities and onerous contracts, where appropriate.* As in liquidation, it also provides an opportunity to consider actions pending against the debtor. Given the goals of reorganization, the impact of the stay is greater and therefore more crucial than in liquidation and can provide an important incentive to encourage debtors to initiate reorganization proceedings. At the same time, the commencement of proceedings and the imposition of the stay

> give notice to all those who do business with the debtor that the future of the business is uncertain. This can cause a crisis of confidence and uncertainty as to how the insolvency proceedings will affect suppliers, customers and employees of the debtor's business.
>
> [emphasis added]

59 As stated in the above passage, the focus of the moratorium in the restructuring context is on giving the debtor company "breathing space" to organise its affairs and put forward a restructuring proposal. This stands in contrast to the purpose of the moratorium in liquidation proceedings, which ensures a fair and orderly process in order to maximise the value that may be realised from the assets of the estate.

60 The idea that the restructuring moratorium is focused on giving a debtor company "breathing space" is shared across insolvency regimes in various jurisdictions. In Singapore, where a company is proposing or intends to propose a scheme of arrangement, the purpose of the moratorium is to "give[] the company breathing room to put forward the restructuring proposal" (Singapore Parl Debates; Vol 94, Sitting No 43; [10 March 2017] (Indranee Rajah, Senior Minister of State for Finance)). Subsequently, in *The "Ocean Winner" and other matters* [2021] 4 SLR 526, Ang Cheng Hock J highlighted the applicability of the rationale of "breathing space" to the moratoriums arising in schemes of arrangement and judicial management under the local statutory regime (at [49]–[55]). Similarly, the automatic stay arising under §362 of the United States Code 11 USC (US) (1978) is considered to give the debtor-in-possession a "breathing spell" to focus its assets and properties on an effective reorganisation: see, *eg, Truebro, Inc v Plumberex Specialty Prods, Inc (In re Plumberex Specialty Prods, Inc)* 311 BR 551 at 555–556. The English and Australian courts have also affirmed, in the context of administration and voluntary administration proceedings respectively, that the moratoria arising

under those cases give the administrators time and space to formulate and present proposals: see, *eg, Re Atlantic Computer Systems plc* [1992] Ch 505 at 528; *Re Pan Ocean Co Ltd* [2015] EWHC 1500 (Ch) at [50]–[51]; *Rialto Sports Pty Ltd (admin apptd) v Cancer Care Associates Pty Ltd (No 2) and other appeals* [2023] NSWCA 246 ("*Rialto Sports*") at [17]; and *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 285 ALR 207 ("*Larkden*") at [37]–[38].

61 How, then, can the court give effect to this rationale of "breathing space" when deciding a carve-out application? One possible option is to impose a blanket high bar for carve-outs from moratoria in ongoing restructuring proceedings to be granted. This may, in essence, be similar to the "exceptional circumstances" test as advocated by the appellants.

62 However, we do not agree with the appellants that adopting the "exceptional circumstances" test would be the right course of action. With respect, the test set out in *Top Builders* is vague and does not assist the court in determining when and how a creditor may satisfy the threshold of "exceptional circumstances". The wording of the test simply connotes, without more, a broad balancing exercise between two sets of interests, albeit one weighted against a particular outcome.

63 Indeed, we note that a similar issue was faced by the Australian courts in deciding the standard for granting leave to commence proceedings against a company in administration. In *Foxcroft v The Ink Group Pty Ltd* (1994) 15 ACSR 203 ("*Foxcroft*"), Young J opined (at 205) that applications for leave to commence proceedings against a company in administration ought to "rarely be granted" given the short time frame that the administrator had to assess his position and that a company in administration, unlike a company in liquidation, was seeking to maximise the chance of it staying in business (at 204–205).

64 However, the position in *Foxcroft* was not endorsed in subsequent Australian authority. The decision was criticised by Hammerschlag J in *Larkden,* who opined that an approach commencing with an assumption that leave would rarely be granted amounted to an unwarranted confinement of the court's discretion (at [36]). Hammerschlag J instead endorsed an approach that preserved the court's flexibility to consider each application "on its own circumstances" (at [40]), and further observed that "[a] stay is the starting point. There must be circumstances which warrant its displacement" (at [39]).

65 More recently, the New South Wales Court of Appeal in *Rialto Sports* opined (at [21]) that there was little practical difference between the approaches in *Foxcroft* and *Larkden.* The court further endorsed the suggestion by Doyle J in *Pybar Mining Services Pty Ltd v Challenger Gold Operations Pty Ltd* [2018] SASC 156 ("*Pybar*") at [15] that the two approaches could be reconciled on the following basis (*Rialto Sports* at [22]):

> Second, the apparent divergence in the authorities can be reconciled, as Doyle J suggested in *Pybar* at [15]:
>
> > … Indeed, these two approaches might be reconciled on the basis that they are merely expressed at differing levels of generality or abstraction. It is true that at the most general or abstract level the discretion is unfettered and so must be approached without any preconception as to the caution or rarity with which it will be exercised. However, once the Court moves to the task of exercising the discretion, the considerations underpinning the rationale for the existence of s 440D will generally carry significant weight, and thus require the identification of other considerations of at least equivalent weight before it will be appropriate to grant leave to proceed. While it is perhaps unnecessary to describe this as taking a cautious approach, and as resulting only rarely in leave being appropriate, they are in my mind accurate enough descriptions of the practical application and outcome of the exercise of the discretion under s 440D [of Australia's Corporations Act 2001 (Cth)].

66 In our view, the analysis in *Pybar* and *Rialto Sports* on how the court's discretion should be exercised has much to commend it. In the court's evaluation of the circumstances of the case, more weight may be given to considerations that directly touch on the rationale for moratoria in restructuring proceedings, *ie,* to give a debtor breathing room to put forward a proposal. This allows the court to give effect to the purpose of the moratorium while preserving the court's flexibility to assess carve-out applications on a case-by-case basis.

67 Accordingly, we affirm that in determining whether to grant a carve-out from a moratorium arising from restructuring proceedings, the starting position remains that the restructuring proceedings are a unitary process for the resolution of the rights involved. However, the law recognises the court's discretion to allow particular claims to be carved out. The court's discretion remains guided by the *Wang Aifeng* factors, which are specific, non-exhaustive markers to guide the court in balancing the various considerations and interests involved. In the balancing process, more weight may be given to considerations touching on the need to give the debtor breathing room to put forward a proposal, such as the existence of prejudice that the carve-out would pose to the general body of creditors (to the extent this is relevant) or to the orderly administration of the restructuring proceedings. Lastly, we do not see any compelling reason to adopt the "exceptional circumstances" test.

68 With the above principles in mind, we turn to the Judge's application of the *Wang Aifeng* factors in the present case.

The Nature of the Claim

69 In our view, the complexity of the case and of the dispute is the overriding consideration in this application. It directly engages the question

whether the claim is of a type that ought to proceed by arbitration rather than the adjudication process.

70 It is clear to us that the Arbitration Claims are vigorously disputed. They involve claims for damages for breaches of construction contracts, with the respondent claiming a cumulative sum of at least US$185m in damages. The respondent has also highlighted numerous factual disputes that may require evidence from factual and expert witnesses. For instance, in May 2023, the Sapura Entities had sent letters to the respondent to refute the claims that they had wilfully delayed performance and/or abandoned the Contracts. They raised several rebuttals, including that:

(a) it was infeasible to retain one of the vessels on standby in light of weather conditions and other incidents causing delay to the progress schedule;

(b) the other vessel had to be demobilised because of a collision, prolonged weather conditions and pre-existing contractual commitments in respect of that vessel; and

(c) the Sapura Entities had progressively provided the respondent a functional plan to mitigate delays by providing plans to enter into contracts for the provision of vessels subcontracted from third parties.

71 Furthermore, as the Judge rightly observed, the complexity of the claim is only exacerbated by the possibility of the Sapura Entities asserting the right of set-off. The Sapura Entities had alluded to their intention to assert rights of set-off in a letter sent to the scheme chairman vigorously disputing the proofs of debt filed by the respondent with respect to other claims (Judgment at [44] and [46]). While we note that the Sapura Entities have not raised the defence of

set-off in the arbitration proceedings, the set-off simply goes to show the extent to which the Arbitration Claims may be contested.

72 From the foregoing, we observe that the adjudication of the Arbitration Claims would almost certainly require a factually complex exercise of assessing the respondent's entitlement to terminate the Contracts, the consequences of those actions and the relevant remedies. With respect, such a dispute would be impracticable for an adjudicator to meaningfully adjudicate. We note that similar considerations of factual complexity were taken into account in *Cosco Bulk Carrier Co Ltd v Armada Shipping SA and another* [2011] 2 All ER (Comm) 481 ("*Cosco Bulk Carrier*"), where the English High Court Chancery Division (Companies Court) granted the applicant leave to continue arbitration proceedings against the respondent, which had voluntarily filed for liquidation in Switzerland. In that case, among the issues in dispute was whether an equitable charge created by an owner's lien on sub-hire would be invalidated by the prohibition on assignment in the sub-charter, which the court noted would involve fact-intensive examinations into the knowledge or otherwise of the sub-charterer (at [30] and [51]).

73 That said, we have a reservation on the Judge's observations as regards the relevance of the choice of English law as the governing law of the Contracts as a source of potential legal complexity (Judgment at [45]). As pointed out by the English High Court Chancery Division in *Ronelp,* the fact that English law is involved cannot be in itself sufficient as the parties' choice of law is a contractual right that may be subject to interference in insolvency proceedings (at [35]).

74 Indeed, in cases where the governing law of the claims was a relevant consideration militating in favour of allowing leave to commence proceedings,

it appears that there were specifically identified complex legal issues that rendered the proof of debt process less suitable for the adjudication of the claim.

(a) In *Ronelp,* five Liberian companies sought leave to continue proceedings in the English Commercial Court in respect of guarantees provided by the respondent, which had commenced rehabilitation proceedings in the Korean court (at [2]–[3] and [8]). In granting leave, the court placed emphasis on its finding that the dispute involved a complex issue of contractual illegality, the application of which was unclear in the light of the divided views of the UK Supreme Court in *Patel v Mirza* [2016] UKSC 42 ("*Patel v Mirza*"). The court in *Ronelp* recognised that the application of the illegality principle as stated in *Patel v Mirza* to the facts of the case was complex (at [36]) and "uncertain to an exceptional degree" (at [37]).

(b) In *Cosco Bulk Carrier,* a major source of the *legal* complexity was a dispute on the juridical nature and effect of an owner's lien over sub-hire, which the court observed to be "at least at the academic level and at all levels above (perhaps) first instance, a well-known and long-unresolved problem" and was "plainly ripe for consideration at least by the Court of Appeal" (at [26] and [51]). Thus, while the Judge cited *Cosco Bulk Carrier* for the proposition that the mere choice of English law may support the grant of leave to continue arbitration proceedings (Judgment at [45]), we are of the view that choice of any foreign law *per se* may not be material. There needs to be something more such as in establishing that the choice of law is material to resolve complex legal issues embedded in the dispute before it is to be accorded additional weight in the exercise of the court's discretion to grant a carve-out.

75 Accordingly, the choice of English law in the present case was in our view a neutral factor. The respondent did not raise any particular issue of English law that is complex or uncertain; its arguments instead chiefly centred around explaining the factual complexity of the Arbitration Claims and the need for factual and expert evidence.

The Existing Remedies

76 The factor of existing remedies involves a comparative exercise which examines whether the nature of the claim is such that it can be dealt with adequately within the relevant insolvency regime: see *Wang Aifeng* at [37]. In this case, that regime would be the scheme adjudication process. The appellants argue that the scheme adjudication process is adequate and robust, and point to the various powers of the adjudicator to, *inter alia,* call for further evidence, further written submissions, appoint an expert advisor, hold hearings and extend timelines.

77 In our view, the adequacy and robustness of an adjudication process should not be examined in a theoretical vacuum. Instead, where appropriate, it should be tested against the *actual* experience as to how the adjudication process has panned out. In this regard, the key difficulty with the appellants' argument is that the actual implementation of the adjudication process does not show it is adequate or sufficiently robust for the resolution of the Arbitration Claims.

78 The decision of *Loyal Ltd v Standard Tobacco Company, Ltd (In Liquidation)* [1935] NZLR 83 ("*Standard Tobacco*") illustrates the principle that, in the appropriate circumstances, the court may draw an inference from the actual implementation of the adjudication process that the creditor's claim is one that ought to proceed by an action instead of the insolvency process. There, Fair J had granted the applicant leave to commence proceedings because the

liquidator had been unduly dilatory in adjudicating the claim (see McPherson & Keay, *The Law of Company Liquidation* (Sweet & Maxwell, 5th Ed, 2021) at para 7-079). This was because the liquidator had not yet admitted or rejected the applicant's proof of debt filed more than six months ago. In view of the liquidator's duty to act within a reasonable time, Fair J held that his conduct militated in favour of granting leave (at 84):

> … The liquidator, by postponing his decision in respect of a proof of debt, should not be allowed to give himself an indefinite time within which to decide the question. Just as the creditor must appeal promptly, so the liquidator ought to act within a reasonable time. I do not say that he has acted unreasonably here; but in view of all the facts which have been put before me on affidavit, and by the statements of counsel, it is apparent that there is a serious question in dispute between the applicant and the liquidator, and that attempts have been made to settle their differences, over a period of some six months, so far without success. The questions in issue do not appear to be of such a nature that they could be settled as easily in the course of a winding-up as in an action. It seems that an action will facilitate their decision.

79 In the present case, as stated above (at [11]), the respondent's proofs of debt were filed on or around 30 June 2022. As of 20 February 2024, when the Sapura Group applied for the Third Reorganisation Proceeding (see [23] above), the respondent's unadjudicated proofs were, together with the claims of another creditor, separately explained as "alleged contingent claims which entail assessment of voluminous documents and consideration of issues of foreign law". At that point in time, the adjudicator had already adjudicated 17 disputed proofs of debt, the juxtaposition of which further highlights the difficulty experienced by the appellants in the adjudication of the respondent's proofs. Seven months later, as of the date of the Judgment (*ie,* 18 September 2024), the respondent's proofs of debt were *still* not adjudicated. As the Judge rightly noted, this was more than two years since the respondent's proofs of debt were submitted (Judgment at [43]). While it is unnecessary for us to draw the

inference that the adjudicator had been unduly dilatory in adjudicating the respondent's proof of debts, the length of delay strongly indicates to us that the scheme adjudication process is not adequate to deal with the Arbitration Claims, which arise out of the same Contracts and are similarly (if not more) complex and disputed compared to the respondent's proofs of debt.

80 We further disagree with the appellants' argument that the scheme adjudication process ought to be viewed as sufficiently fair and robust because it was modelled after the processes approved by the English courts in *Re Lehman Brothers* and *Re Noble Group (No 2).* First, as the respondent rightly points out, those cases are distinguishable because they concerned the sanction of a scheme and not a carve-out application. Pertinently, the courts in those cases were concerned with whether the schemes were generally fair and reasonable, and not whether individual complex claims such as the Arbitration Claims could be appropriately dealt with *via* the scheme adjudication process.

81 This point is amply evidenced by an examination of *Re Noble Group (No 2).* In his previous decision to convene the relevant scheme meetings, Snowden J had noted that there were six contingent and unliquidated claims in contract or tort which had been intimated or made against the debtor company. Together with the contingent claims arising out of certain guarantees and indemnities undertaken by the debtor company, these potential scheme claims were considered by him as the "Other Scheme Claims" (*Re Noble Group Ltd (No 1)* [2019] 2 BCLC 505 ("*Re Noble Group (No 1)*") at [6] and [29]–[38]). Subsequently, upon the convening of the relevant scheme meeting, there were only two scheme creditors with "Other Scheme Claims" who asserted claims against the debtor company, and these creditors both voted in favour of the scheme (*Re Noble Group (No 2)* at [44]–[45]). No scheme creditor had indicated that they considered themselves not to be bound by the scheme, apart from one

creditor with a relatively small contingent claim (for which the debtor company intended to pay a suitable sum into court to secure that claim) (*Re Noble Group (No 2)* at [105]). For completeness, we note that the adjudication process in the Noble Group restructuring took place *after* the scheme was sanctioned, unlike in the present case (*Re Noble Group (No 1*) at [8]).

82 Therefore, Snowden J's recognition of the fairness and appropriateness of the adjudication process (*Re Noble Group (No 2)* at [75]) has to be viewed in the context that all scheme creditors with "Other Scheme Claims" who chose to participate in the scheme had voted in favour of said scheme. There is nothing in Snowden J's decision to indicate that he was concerned with the prospect of a carve-out application, or that there was a disputed, complex contingent and unliquidated claim that he deemed suitable to be resolved *via* adjudication. The discussion in *Re Noble Group (No 2)* is therefore of limited assistance to the present issue of the carve-out.

83 Turning to the decision of *Re Lehman Brothers,* that case is even further removed from the present case because the adjudication process in that scheme was not concerned with contingent and unliquidated claims at all. In *Re Lehman Brothers,* all admitted provable claims concerning unsubordinated debts had been paid in full (at [10]–[11] and [20]), and the adjudication process proposed in the scheme was solely focused on determining the rate of interest that those creditors were entitled to (at [37]). This, in turn, hinged on whether the creditors were entitled to the statutory minimum of 8% per annum or some higher rate as contractually provided for under the relevant financial master agreements (at [34]). The determinations to be made in that adjudication process were therefore similar in nature, such that it was more expedient and cost-effective for the claims to be adjudicated on the same basis to ensure consistency and certainty in outcome.

Timing of the application and prejudice to the parties

84 The factor of prejudice examines whether the grant of a carve-out would cause undue prejudice to the general body of creditors: *Wang Aifeng* at [43]. This is typically intertwined with the timing of the application for a carve-out, which may influence the extent of the prejudice that would be occasioned. As alluded to above (at [67]), the factor of prejudice may be given more weight if the grant of the carve-out would cause the debtor company to have insufficient "breathing space" to put forward a restructuring proposal. For instance, in an otherwise efficiently run scheme proceeding, a court may decide not to grant a carve-out if it would delay the scheme process by affecting the debtor company's ability to propose a scheme to its creditors.

85 The inquiry into whether the pursuit of the respondent's claims in arbitration would adversely impact the scheme has to be considered against the facts. Here, the respondent's Arbitration Claims are for more than US$185m in damages, or approximately RM825m. The Sapura Entities are seeking to restructure liabilities of around RM12bn. At best, the Arbitration Claims represent about 6–7% of the total debt.

86 Given the small fraction of the claims relative to the overall debt, the respondent's vote on the scheme, either way, would likely be inconsequential to the viability of the scheme. In other words, regardless of whether the court grants a carve-out or not, that decision will have a negligible impact on the scheme. In this sense, the grant of a carve-out does not affect the Sapura Entities' breathing space to propose an arrangement.

87 The appellants submit that the carve-out would affect the Sapura Entities' ability to expeditiously conclude the Reorganisation Proceeding since the Third Reorganisation Proceeding would have ended on 7 March 2025, and

there was no guarantee that the Malaysian court would allow for a further reorganisation proceeding. They also raise the spectre of the carve-out unleashing a deluge of carve-out claims by other claimants. In our view, these submissions are highly speculative with no evidence to support them. The Judge was entitled, on the evidence before him, to attach no weight to the possibility of other carve-out applications (for a similar analysis, see *New Cap Reinsurance Corp Ltd v HIH Casualty & General Insurance Ltd* [2002] 2 BCLC 228 at [49]). In any event, this has been borne out by the events subsequent to the Judge's decision. The appellants have not informed this court of any further applications for carve-out since.

88 In view of the above analysis, the only impact of granting the carve-out would be the time and costs that the Sapura Entities would incur in defending the arbitration. It would undoubtedly be more expensive compared to adjudication by way of proof of debt, and therefore might be a strain on the resources of the Sapura Entities. However, this is where the balancing exercise becomes crucial. The Sapura Entities, as debtors, cannot have it both ways. While it is their right to dispute the respondent's claims, it cannot expect the respondent to wait indefinitely for the claim to be adjudicated. It should not be overlooked that equally a creditor has the right to pursue its claim without undue delay (*Standard Tobacco* at 84; see also *Somerfield Stores Ltd v Spring (Sutton Coldfield) Ltd* [2010] 2 BCLC 452 at [13] for a similar holding in respect of a non-creditor tenant's application for a new tenancy against a landlord company in administration). In the present case, the proofs of debt submitted by the respondent concerning the same Contracts have yet to be adjudged for more than two years (Judgment at [43]).

89 There will come a point in time when it would be apparent to the court that the proof of debt regime is not suitable for the resolution of the disputed

claim. For the reasons explained earlier, that time has come and passed. The consideration of breathing space does not hold much weight on the facts. While it cannot be denied that the Sapura Entities would suffer some form of "prejudice" by way of the increased costs for the arbitration, this is the inevitable consequence of their decision to dispute and then delay in adjudicating the respondent's proofs of debt.

90 In any event, the Judge had ensured that there would be no undue prejudice to the other scheme creditors by imposing a condition that there should be no enforcement of the award anywhere, whether of the claims proper or of costs, without leave of the General Division (see [29] above). In response, counsel for the appellants, Mr Keith Han, raised the argument that the respondent could circumvent this condition by seeking enforcement of the award in a jurisdiction that does not adopt the Model Law. With respect, the submission is speculative and misplaced. Unless shown otherwise, the court acts on the basis that parties would comply with our orders. This echoes our position in *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills and others and another matter* [2024] 2 SLR 516, which affirmed that the court deciding whether to grant an anti-suit injunction ought not to contemplate that the order would be disobeyed (at [107] and [111]). If the resolution of carve-out applications were to be premised on the understanding that there is no guarantee that a party would never misbehave, it seems to us that carve-outs would never be granted. In any event, this argument reflects a misunderstanding of the effect and nature of the carve-out. The starting point to note is that the carve-out is solely to permit the respondent to pursue the claim in arbitration *in lieu of* the proof of debt adjudication process. Having submitted to the Malaysian court's jurisdiction as we have found to be the case, the respondent is bound by the outcome of the reorganisation proceedings. If there a plan that is approved by the creditors and sanctioned by the Malaysian court, the respondent's claim

would be compromised in accordance with its terms. Thus, there is strictly no question of enforcement of the arbitral award. The award is solely for the purpose of establishing the respondent's right to participate in the scheme. To this extent, the Judge's condition was merely precautionary in nature.

The relevance of comity

91 It is settled law that even outside the cross-border insolvency context, the consideration of comity can find expression in doctrines such as transnational issue estoppel (see, *eg*, *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [67]–[68], [101] and [121]), which applies to foreign judgments capable of being recognised where there is identity of parties and issues: *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* [2021] 1 SLR 1102 at [31]–[33] and [40]. In cross-border insolvency cases, the principle of comity has been applied to recognition applications, *viz* that a court should eschew an inquiry into the substantive merits of foreign law and findings made by the foreign court in the foreign proceedings when assessing a recognition application: see *Garuda* at [71].

92 However, we do not agree with the appellants that the principle of comity goes as far as to require the Singapore court to decide the present case on a similar basis as the Malaysian court did in *Tecnimonthqc*. With all due respect to the Malaysian court, the carve-out application in *Tecnimonthqc* concerned a *different dispute* between *different parties* where the Malaysian court applied a *different test.* In such a context, there is nothing in the SG Model Law to indicate that the Singapore court, as the recognising court, ought to follow the approach taken by the Malaysian court in calibrating relief under Art 20(6). The *UNCITRAL Model Law on Cross-Border Insolvency with Guide to*

Enactment and Interpretation UN Publication Sales No E.14.V.2 (adopted on 18 July 2013) is similarly silent on the considerations that a recognising court should take into account when deciding whether to modify or terminate the stay arising under Art 20, and only reiterates that any such modification or termination ought to be "subject to the provisions of law of the enacting State relating to insolvency" (at para 184). The appellants also did not identify any authority where a court had applied the principle of comity in a similar manner as that advocated by them. This indicates to us that the Judge was entitled, based on the facts before him and the test under Singapore law, to attach due weight to the Malaysian court's decision without regarding himself as bound by the analysis in *Tecnimonthqc*.

Conclusion on the discretionary ground

93 For the above reasons, we hold that the Judge did not err in granting the carve-out application. In this regard, we reiterate that the Judge's decision was an exercise of his discretion. As this court stated in *ARW v Comptroller of Income Tax and another and another appeal* [2019] 1 SLR 499, appellate intervention against the exercise of discretion by the court below is only warranted where (a) the Judge had misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; (b) the Judge, in exercising his discretion, had taken into account matters which he ought not to have done or failed to take into account matters which he ought to have done; or (c) where his decision was plainly wrong (at [83]). As is clear from the foregoing discussion, none of these yardsticks have been met in the present case.

The Mandatory Ground

Whether the decision in AnAn has any application when restructuring proceedings are already ongoing

94 To recapitulate, the Judge observed in *obiter* that because the arbitration agreements in the Contracts remained valid, and the dispute between the parties fell within their scope, a carve-out had to be ordered in view of the Singapore court's mandatory obligation to enforce the arbitration agreement. The Judge extended the logic from our decision in *AnAn,* in which we decided that when a court is faced with either a disputed debt or a cross-claim that is subject to a putative arbitration agreement, the *prima facie* standard should apply, such that the winding-up proceedings will be stayed or dismissed as long as (a) there is a valid arbitration agreement between the parties; and (b) the dispute falls within the scope of the arbitration agreement, provided that the dispute is not being raised by the debtor in abuse of the court's process (at [56]).

95 With respect, we do not agree with the Judge. *AnAn* does not stand for the proposition that the policy of enforcing arbitration agreements should trump the insolvency regime under all circumstances. In our view, the Judge overlooked the point that in *AnAn*, the policy concerns of the insolvency regime were not strictly engaged. This is because, at the time that a winding-up petition based on a disputed debt is brought, the company is not yet determined to be a debtor (see *AnAn* at [71]), a point that we reiterated in *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [35]–[36]. It is only when the debt is established to be due and owing and the debtor company found to be insolvent as a result thereof that the policy interest of the insolvency regime in protecting the general body of creditors becomes relevant (see *AnAn* at [71]).

96 In comparison, the policy concerns of the insolvency regime are strictly engaged in the present context. The Sapura Group's rationale for commencing restructuring proceedings was that it would otherwise likely default on its financial obligations and become unable to pay its debts as and when they fall due (see Judgment at [6]). It has also been observed that a scheme of arrangement is in many instances sought because the debtor corporation is insolvent, and the statutory features of a scheme of arrangement (albeit under Singapore law) make it quite unarguable that schemes do not involve debt restructuring in an insolvency setting: see Kannan Ramesh, *The Gibbs Principle: a tether on the feet of good forum shopping* (2017) 29 SAcLJ 42 ("*The Gibbs Principle*") at paras 28–30. It would therefore not be tenable to argue that the schemes in the present case do not engage the policy concerns of the insolvency regime because schemes are only to be viewed as pre-insolvency settlements within which contractual rights are adjusted: see *The Gibbs Principle* at para 27.

97 Additionally, our decision in *AnAn* was also informed by the concern that an alleged creditor, who was also a party to an arbitration agreement, could potentially abuse the court's winding-up jurisdiction by using the winding-up process to bypass the arbitration agreement (*AnAn* at [61]–[65], [88] and [107]). Such a risk of abuse is clearly not present when a creditor asserts his rights under an arbitration agreement in a carve-out application, which explains why the Mandatory Ground is not necessary in the present context.

98 We further observe that the implementation of the Mandatory Ground, as envisioned by the Judge, would significantly reduce the effectiveness of an moratorium. As discussed earlier, a moratorium in the restructuring context is meant to give a company breathing room to put forward a proposal. This purpose would be severely compromised if it could be easily circumvented by

the invocation of a *prima facie* valid arbitration agreement automatically overruling the policy considerations of the insolvency proceeding.

99 Therefore, with respect, we do not think that the Judge's view as regards the court's mandatory obligation to grant a carve-out in order to enforce the arbitration agreements should be followed. As such, we also do not think it necessary at this juncture to revisit our decision in *AnAn.*

Whether an moratorium renders an arbitration agreement inoperative or incapable of being performed

100 We turn to address the appellants' argument that this court should follow the Canadian position as set out in *Reliance Insurance.* First, we disagree that a moratorium *per se* ought to render all arbitration agreements *ipso facto* inoperative or incapable of being performed. As this court observed in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414, allowing a creditor to arbitrate a prior private *inter se* dispute against the insolvent company does not necessarily undermine the underlying policy aims of the insolvency regime (at [51]). Insofar as V K Rajah JA opined that, in such circumstances, there would "usually be no good reason not to observe the terms of the arbitration agreement", we view that statement as being reflective of the court's discretion to order a carve-out after balancing all the relevant interests involved.

101 Second, the court in *Reliance Insurance* also made it clear that, despite the arbitration agreement being inoperative, the court still retained the discretion to consider whether to lift the stay and grant leave for the arbitrations to proceed (at [32]–[33]), and such leave was denied on account of the particular facts at play there which militated against such an outcome (at [34]–[35]). Therefore, in

the context of a creditor's carve-out application, the practical benefit of following *Reliance Insurance* is limited since the court would still have to examine the facts in the exercise of its discretion.

102 Third, as the respondent points out, *Reliance Insurance* has been qualified by the Supreme Court of Canada in *Peace River*. The court in *Peace River* had clarified that while a moratorium would in most circumstances cause an arbitration agreement to cease to have effect for the future, this would not always be the case (at [140]–[141]). An arbitration agreement would only be found to be "inoperative" where enforcing it would compromise the orderly and efficient resolution of insolvency proceedings. The court then set out a list of factors relevant to determining whether a particular arbitration agreement would be inoperative (at [155]). The factors include:

(a) the effect of arbitration on the integrity of the insolvency proceedings;

(b) the relative prejudice to the parties from the referral of the dispute to arbitration;

(c) the urgency of resolving the dispute;

(d) the applicability of a stay of proceedings under bankruptcy or insolvency law; and

(e) any other factor considered material in the circumstances.

103 Even so, we do not think it necessary to follow the discretionary, multifactorial approach in *Peace River.* In deciding a carve-out application, the *Wang Aifeng* test already allows for a discretionary analysis which adequately balances all relevant interests. Indeed, this may be apparent from the significant overlap between the *Wang Aifeng* factors and the factors listed in *Peace River*.

It would therefore appear to be superfluous to mandate an additional test of inoperability or superimpose the *Peace River* factors over and above the *Wang Aifeng* factors just because the party applying for a carve-out is seeking to enforce an arbitration agreement as compared to a court action.

104 For completeness, we should mention that the factual matrix of *Peace River* is the converse of the present context of a carve-out application. That case strictly concerned a receiver arguing that the arbitration agreements between the company and its contractual counterparties were inoperative so that the receiver could bring court proceedings on behalf of the company against those contractual counterparties and to avoid a stay of proceedings in favour of arbitration. Here, it is the respondent as the counterparty of the Contracts who is seeking a carve-out in order to commence arbitration proceedings against the appellants. As to whether the *Peace River* approach ought to be adopted where the *debtor company* is seeking to avoid an arbitration agreement in order to commence court proceedings against a counterparty, we will leave that open for future consideration when the issue is squarely before this court.

Conclusion

105 For the reasons above, we would have dismissed the appeals, save for the appellants' withdrawal of the appeals. As agreed by the parties, we make no order as to costs.

Postscript

106 From 13 December 2024 to 17 January 2025, the SIAC held a public consultation on the draft SIAC Insolvency Arbitration Protocol (the "Protocol"). The Protocol modifies the SIAC Rules for use by parties resolving their disputes by arbitration in the insolvency context, with the purpose of adapting the

arbitration process to the nature of insolvency proceedings and ensuring time-efficiency. For example, the Protocol envisions the truncation of several existing timelines under the existing SIAC Rules.

107 Should the Protocol come into effect, it may facilitate the court's task in deciding whether to grant a carve-out. As an example, the adoption of the Protocol may attenuate the concern that the arbitration would cause undue delay, expense and distraction to the insolvency proceeding. That said, we express no further opinion on the matter and leave it for future consideration.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Kannan Ramesh
Judge of the Appellate Division

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