AMERICAN BANKRUPTCY INSTITUTE

Cross-Border Insolvency Program

View from the Bench

R. Adam Swick, Moderator
Akerman LLP | Austin, Texas

Hon. Lisa G. Beckerman
U.S. Bankruptcy Court (S.D.N.Y.) | New York

Chief Justice Geoffrey B. Morawetz
Ontario Superior Court of Justice | Toronto

Hon. Christopher S. Sontchi
Singapore International Commercial Court | Singapore

2023

641 B.R. 768
United States Bankruptcy Court, S.D. New York.

IN RE: **MODERN LAND** (CHINA) CO., LTD., Debtor in a Foreign Proceeding.

Case No. 22-10707 (MG)
|
Signed July 22, 2022

Synopsis
Background: Authorized foreign representative of debtor, a Cayman-incorporated holding company for a large group of businesses involved in real estate investment and development that largely were incorporated in the Cayman Islands or the British Virgin Islands (BVI) but conducted most or all of their business in the People's Republic of China (PRC), filed motion for recognition, as a foreign main proceeding, of Cayman Islands proceeding involving consensual scheme of arrangement between debtor and certain holders of notes that were issued by debtor and governed by New York law. No objections were filed.

Holdings: The Bankruptcy Court, Martin Glenn, Chief Judge, held that:

[1] the fact that debtor's Cayman Islands proceeding did not involve court-appointed joint provisional liquidators did not preclude a determination that debtor's center of main interests (COMI) was in the Cayman Islands;

[2] recognition of the Cayman Islands proceeding as a foreign nonmain proceeding was not warranted; but

[3] recognition as a foreign main proceeding was warranted.

Motion granted.

Procedural Posture(s): Motion for Recognition as Foreign Main or Nonmain Proceedings.

West Headnotes (23)

[1]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	Based on the UNCITRAL Model Law on Cross-Border Insolvency, Chapter 15 of the Bankruptcy Code adopts the center of main interests (COMI) concept, permitting recognition of a foreign proceeding in a debtor's center of main interests, that is, a "foreign main proceeding," or, alternatively, recognition of a "foreign nonmain proceeding" in a place where the debtor maintains an "establishment." 11 U.S.C.A. §§ 1502(2), 1502(4), 1517(a)(1), 1517(b)(2).

[2]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	Pursuant to Chapter 15 of the Bankruptcy Code, provided that a foreign court properly exercises jurisdiction over a foreign debtor in an insolvency proceeding, and the foreign court's procedures comport with broadly accepted due process principles, a decision of the foreign court approving a scheme or plan that modifies or discharges New York law-governed debt is enforceable. U.S. Const. Amend. 15; 11 U.S.C.A. § 1501 et seq.

[3]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	Chapter 15 of the Bankruptcy Code limits a United States bankruptcy court's authority to enjoin conduct outside the territorial jurisdiction of the United States, but it does not make a discharge of New York law-governed debt any less controlling. 11 U.S.C.A. § 1501 et seq.

[4]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	To obtain recognition under Chapter 15, a foreign proceeding must be either a foreign main or foreign nonmain proceeding. 11 U.S.C.A. § 1517(a)(1).

[5]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	Chapter 15 debtor's center of main interests (COMI) is determined as of the filing date of the Chapter 15 petition, without regard to the debtor's historic operational activity. 11 U.S.C.A. § 1502(4).

[6]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	Although, in absence of evidence to contrary, Chapter 15 debtor's registered office is presumed to be center of debtor's main interests (COMI), this presumption can be overcome. 11 U.S.C.A. §§ 1502(4), 1516(c).

[7]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	In determining whether the presumption that a Chapter 15 debtor's center of main interests (COMI) is in the country where its registered office is located has been overcome, among the factors that courts consider are the location of debtor's headquarters, the location of those who actually manage debtor, the location of debtor's primary assets, the location of the majority of debtor's creditors or of a majority of the creditors who would be affected by the case, and/or the jurisdiction whose law would apply to most disputes; courts also may consider whether the location in question is where debtor conducts its regular business, so that the place is ascertainable by third parties. 11 U.S.C.A. §§ 1502(4), 1516(c).

[8]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	In determining whether the presumption that a Chapter 15 debtor's center of main interests (COMI) is in the country where its registered office is located has been overcome, courts are readily able to determine whether debtor's COMI is in fact regular and ascertainable, and not easily subject to tactical removal, by examining factors in the public domain. 11 U.S.C.A. §§ 1502(4), 1516(c).

[9]	**Bankruptcy**Cases Ancillary to Foreign Proceedings

	If debtor's center of main interests (COMI) has "shifted" prior to filing its Chapter 15 petition, courts may engage in holistic analysis to ensure that debtor has not manipulated center in bad faith; courts ask whether there is evidence pointing to any insider exploitation, untoward manipulation, and overt thwarting of third-party expectations that would support denying recognition. 11 U.S.C.A. §§ 1502(4), 1516(c).

[10]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	In the Chapter 15 case of debtor, a Cayman-incorporated holding company for a large group of businesses involved in real estate investment and development that largely were incorporated in the Cayman Islands or the British Virgin Islands (BVI) but conducted most or all of their business in the People's Republic of China (PRC), the fact that the Cayman Islands proceeding for which debtor sought recognition, which concerned a consensual scheme of arrangement between debtor and certain holders of notes issued by debtor, did not involve court-appointed joint provisional liquidators did not preclude a determination that debtor's center of main interests (COMI) was in the Cayman Islands. 11 U.S.C.A. §§ 1502(4), 1516(c).

[11]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	With respect to a foreign proceeding, recognition and enforcement can be granted as discretionary relief under Chapter 15 of the Bankruptcy Code even in a nonmain proceeding. 11 U.S.C.A. §§ 1507, 1517(b)(2), 1521.

[12]	**Bankruptcy**Cases Ancillary to Foreign Proceedings

	Whether foreign debtor has an "establishment" in a country, as required for recognition of a foreign proceeding as a "foreign nonmain proceeding" under the Bankruptcy Code, is determined at the time of filing the Chapter 15 petition. 11 U.S.C.A. §§ 1502(2), 1517(b)(2). 1 Case that cites this headnote

[13]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	Several factors contribute to identifying an "establishment" in a country, as required for recognition of a foreign proceeding as a "foreign nonmain proceeding" under the Bankruptcy Code: the economic impact of debtor's operations on the market, the maintenance of a minimum level of organization for a period of time, and the objective appearance to creditors whether debtor has a local presence, as evidenced by engagement of local counsel and commitment of capital to local banks. 11 U.S.C.A. §§ 1502(2), 1517(b)(2). 1 Case that cites this headnote

[14]	**Bankruptcy**Cases Ancillary to Foreign Proceedings

	Recognition was not warranted, as a foreign nonmain proceeding, of Cayman Islands proceeding involving consensual scheme of arrangement between Chapter 15 debtor, a Cayman Islands holding company for businesses involved in real estate investment and development that largely were incorporated in the Cayman Islands or the British Virgin Islands (BVI) but conducted most or all of their business in the People's Republic of China (PRC), and creditors that held notes issued by debtor and governed by New York law; recognition would have been inconsistent with goals of foreign nonmain proceedings, as notes in question were not assets in the Cayman Islands, neither the Cayman restructuring itself nor debtor's bookkeeping activities there constituted nontransitory economic activity, and debtor's business activities had negligible effect on the local marketplace. 11 U.S.C.A. §§ 1502(2), 1517(b)(2).

[15]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	Provisions of the UNCITRAL Model Law on Cross-Border Insolvency, upon which Chapter 15 of the Bankruptcy Code is based, governing foreign nonmain proceedings support the administration of a restructuring proceeding by a single foreign court. 11 U.S.C.A. § 1501 et seq.

[16]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	The foreign insolvency proceeding of a foreign debtor cannot itself constitute "nontransitory economic activity" within meaning of the Bankruptcy Code's definition of "establishment," as required to support recognition of proceeding as a foreign nonmain proceeding. 11 U.S.C.A. §§ 1502(2), 1517(b)(2). 1 Case that cites this headnote

[17]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	Recognition was warranted, as a foreign main proceeding, of Cayman Islands proceeding involving consensual scheme of arrangement between Chapter 15 debtor, a Cayman-incorporated holding company whose subsidiaries largely were incorporated in the Cayman Islands or the British Virgin Islands (BVI) and were involved in real estate investment and development around the world, and creditors that held notes issued by debtor and governed by New York law; there were no objections to recognition, recognition was consistent with goals of Chapter 15, including cooperation with foreign courts, maximizing value of debtors' assets, and facilitating protection for debtors, as well as with creditors' expectations, debtor had ongoing Cayman restructuring efforts which constituted its primary business activity at time of filing, Cayman choice-of-law principles supported recognition, and debtor did not engage in center of main interests (COMI)-shifting behavior or bad faith. 11 U.S.C.A. §§ 1501(a)(1)-(5), 1502(4), 1516(c).

[18]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	Chapter 15 of the Bankruptcy Code contemplates cooperation between American and foreign bankruptcy courts. 11 U.S.C.A. § 1501 et seq.

[19]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	When determining debtor's center of main interests (COMI), for purposes of determining whether foreign proceeding is foreign main proceeding, creditor expectations can be evaluated through examination of the public documents and information available to guide creditor understanding of the nature and risks of their investments. 11 U.S.C.A. §§ 1502(4), 1517(a)(1).

[20]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	Factors considered in determining a foreign debtor's center of main interests (COMI) are not meant to be applied "mechanically" but, rather, are to be viewed in light of Chapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor's value. 11 U.S.C.A. §§ 1502(4), 1516(c).

[21]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	When court considers the factors for determining a debtor's center of main interests (COMI), for purposes of determining whether foreign proceeding is foreign main proceeding, the protection of creditors' interests is paramount. 11 U.S.C.A. §§ 1502(4), 1516(c).

[22]	**Bankruptcy**Cases Ancillary to Foreign Proceedings
	Exempted-company status of debtor, a Cayman-incorporated holding company for large group of businesses involved in real estate investment and development that largely were incorporated in the Cayman Islands or the British Virgin Islands (BVI) but conducted most or all of their business in the People's Republic of China (PRC), did not jeopardize its ability to have its center of main interests (COMI) in the Cayman Islands, even though, as an exempted company with limited liability, debtor's operations in the Cayman Islands were subject to certain limitations. 11 U.S.C.A. §§ 1502(4), 1516(c).

[23]	**Bankruptcy**Cases Ancillary to Foreign Proceedings

	When conducting analysis of foreign debtor's center of main interests (COMI), courts may consider jurisdiction whose law would apply to most disputes; this choice-of-law factor favors a COMI in the jurisdiction whose law applies. 11 U.S.C.A. § 1502(4).

Attorneys and Law Firms

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MEMORANDUM OPINION GRANTING MOTION FOR RECOGNITION AND RELATED RELIEF

MARTIN GLENN, CHIEF UNITED STATES BANKRUPTCY JUDGE

[1]This case raises the important questions of whether and when, under Chapter 15 of the Bankruptcy Code, a bankruptcy court may recognize and enforce a scheme of arrangement sanctioned by a court in the Cayman Islands, the debtor's place of incorporation, that modifies or discharges New York law governed debt. The Debtor here is a holding company for a large group of businesses, most of which are incorporated in the Cayman Islands or the British Virgin Islands ("BVI"), but that conduct most or all of their business in the People's Republic of China ("PRC"). Based on the UNCITRAL Model Law on Cross-Border Insolvency, Chapter 15 adopts the center of main interest ("COMI") concept, permitting recognition of a foreign proceeding in a debtor's center of main interest (a "foreign main proceeding") or, alternatively, recognition of a "foreign nonmain proceeding" in a place where the debtor maintains an "establishment." While the statute establishes a presumption that a debtor's COMI is its place of incorporation, the presumption can be overcome where other factors support finding the COMI to be elsewhere. Should this Debtor's Cayman sanctioned Scheme be recognized and enforced by this Court? On the facts of this case, the Court concludes the answer is yes. For the reasons explained below, this Court **GRANTS** the Motion recognizing the Cayman Proceeding as a foreign main proceeding and recognizing and enforcing the Scheme.

*773 I. BACKGROUND

A. The Motion for Recognition and Enforcement

Pending before the Court is the *Motion for (I) Recognition of a Foreign Main Proceeding, (II) Recognition of a Foreign Representative, and (III) Related Relief under Chapter 15 of the Bankruptcy Code* (the "Motion," ECF Doc. # 4), filed by Mr. Zhang Peng, in his capacity as the authorized foreign representative (the "Foreign Representative") of **Modern Land** (China)

Co., Limited (the "Debtor"). A proposed recognition order is attached to the Motion as Exhibit A. ("Proposed Recognition Order," ECF Doc. # 4-1.) The Debtor is the subject of a foreign proceeding (the "Cayman Proceeding") concerning a scheme of arrangement (the "Scheme" or "Cayman Scheme") between the Debtor and certain holders of the existing notes (the "Scheme Creditors"), under section 86 of the Cayman Islands Companies Act 2022 (the "Companies Act") and currently pending before the Grand Court of the Cayman Islands (the "Cayman Court").

The following declarations were filed in support of the Motion: (i) a declaration of the Foreign Representative ("Peng Declaration," ECF Doc. # 5); (ii) a declaration of the Debtor's Cayman Islands counsel, Caroline Moran ("Ms. Moran") (ECF Doc. # 6); and (iii) the Foreign Representative's statements required by section 1515(c) of the Bankruptcy Code and Rule 1007(a)(4) of the Federal Rules of Bankruptcy Procedure (ECF Doc. # 3). The Foreign Representative also filed supplemental briefing addressing the *In the Matter of Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 1686 ("Rare Earth Briefing," ECF Doc. # 12) and *In the Matter of an application for recognition and assistance by the provisional liquidator of Global Brands Group Holding Limited (in liquidation)*, HCMP 644/2022, [2022] HKCFI 1789 ("Global Brands Briefing," ECF Doc. # 19.)

The objection deadline was set for June 29, 2022, at 4:00 p.m. (*See* ECF Doc. # 9). There were no objections filed in response to the Motion. The hearing to sanction the Scheme by the Cayman Court was scheduled for July 5, 2022, at 11:00 a.m. (Motion ¶ 34.)

On July 5, 2022, the Debtor filed a supplemental declaration of Ms. Moran addressing the hearing to sanction the Scheme. ("Supplemental Moran Declaration," ECF Doc. # 20.) Annexed to the Supplemental Moran Declaration as Exhibit A is a report of the scheme meeting held on June 30, 2022 (ECF Doc. # 20-1) and as Exhibit B a copy of the order sanctioning the Scheme issued by the Cayman Court ("Sanction Order," ECF Doc. # 20-2).

A hearing on the Motion was held on July 7, 2022. At the hearing, the Court directed the Foreign Representative's counsel to file further supplemental briefing by July 12, 2022. On July 12, 2022, the Foreign Representative filed (i) a supplemental brief ("Supplemental Brief," ECF Doc. # 23), (ii) a second declaration by the Foreign Representative ("Supplemental Peng Declaration," ECF Doc. # 24), and (iii) a third declaration by Ms. Moran ("Third Moran Declaration," ECF Doc. # 25).

B. The Debtor's Business Operations and Preexisting Capital Structure

On June 28, 2006, the Debtor was incorporated in the Cayman Islands under the Companies Act as an exempted company with limited liability. (Motion ¶ 6.) The Debtor is the ultimate holding company of a group of companies comprising the Debtor and its subsidiaries, including the following: Great Trade Technology Ltd., a holding company incorporated with limited ***774** liability in the BVI; the **Modern Land** HK Companies; and Jiu Yun Development Co., Ltd., a holding company incorporated with limited liability in Hong Kong (collectively with Great Trade Technology Ltd., the **Modern Land** HK Companies, and together with the Debtor, the "Company"), that carries out real estate investment and development in the PRC and the United States. (*Id.* ¶ 7.) The Company is a property developer focused on eco-friendly residences in the PRC with four product lines: MOMA; Modern Eminence MOMA; Modern Horizon MOMA; and Modern City MOMA. (*Id.* ¶¶ 8, 10.)

As of June 30, 2021, the Company had a contracted sales gross floor area of 2.08 million square meters and aggregate unsold gross floor area of 16.77 million square meters in the PRC. (*Id.* ¶ 11.) During the first half of 2021, the Company purchased a total of 20 new projects with an aggregate gross floor area of 3.56 million square feet. (*Id.*)

The Debtor's shares have been listed on the Stock Exchange of Hong Kong Limited since July 12, 2013. (*Id.* ¶ 9.) As of December 31, 2021, the authorized share capital of the Debtor was $80 million divided into eight billion ordinary shares of a par value of $0.01 each, of which 2.79 billion of the ordinary shares were issued and fully paid.[1] (*Id.*) As of June 30, 2021, the Company's total indebtedness was $4.32 billion, including: (i) short-term borrowings of $972.33 million; (ii) long-term borrowings of $1.92 billion; and (iii) bonds payable of $1.42 billion. (*Id.* ¶ 12.) Additionally, as of June 30, 2021, the Company's contingent liabilities amounted to $2.57 billion. (*Id.*)

As part of the Company's $1.42 billion of bonds payable, the total principal amount outstanding under the existing notes ("Existing Notes") is $1.34 billion. (*Id.* ¶ 13.) The Existing Notes are the subject of the Scheme with each series of notes issued by the Debtor having different maturity dates and different interest rates. (*Id.* ¶¶ 13–14.) The remaining indebtedness is not being restructured and will be unaffected by the Scheme and this Chapter 15 case. (*Id.* ¶ 14.) As of June 30, 2021, the Debtor's current assets amounted to $12.49 billion on a consolidated basis[2] and these assets were located in the PRC and the United States. (*Id.* ¶ 15.) Some of the assets were pledged to secure certain banking and other facilities granted to the

Company and mortgage loans granted to buyers of sold properties. (*Id.*)

C. The Cayman Proceeding

Market concerns over the operations of Chinese property developers were intensified due to reduced lending for real estate development, the impact of COVID-19 on macroeconomic conditions, and certain negative credit events. (*Id.* ¶ 18.) These conditions led the Company to experience liquidity pressures due to limited access to external capital to refinance debt and reduced cash generated from sales. (*Id.*) The Company failed to meet two repayments arranged for October 2021 and February 2021 which constituted events of default. (*Id.*) These amounts remain unpaid. (*Id.*)

On October 26, 2021, the Debtor appointed Sidley Austin LLP as its legal advisor. (*Id.* ¶ 20.) On November 5, 2021, the Debtor appointed Houlihan Lokey ***775** (China) Limited as its financial advisor. (*Id.*) The Company commenced discussions with the ad hoc group of holders of the Existing Notes, who are advised by Kirkland & Ellis LLP. (*Id.* ¶ 19.)

On February 25, 2022, after negotiations with the ad hoc group, the Debtor entered into a restructuring support agreement (the "RSA") with the Scheme Creditors. (*Id.* ¶ 21; *see also* Peng Decl., Ex. A.) As of May 31, 2022, certain Scheme Creditors holding $1,083,272,000 of the Existing Notes—representing 80.75% of the aggregate outstanding principal amount of all Existing Notes—had agreed to the RSA. (Motion ¶ 24.)

On April 14, 2022, the Debtor filed a petition (the "Scheme Petition," ECF Doc. # 6-1) with the Cayman Court commencing the Cayman Proceeding, seeking an order that (i) directed the Company to convene a meeting on the Scheme for a single class of creditors only (the "Scheme Meeting"), (ii) requested a convening hearing (the "Convening Hearing"), and (iii) sought the appointment of the Foreign Representative. (*Id.* ¶ 32.) Following the Convening Hearing on May 31, 2022, the Cayman Court entered the order (the "Convening Order") scheduling the Scheme Meeting for June 29, 2022, scheduling the Sanction Hearing for July 5, 2022, and appointing the Foreign Representative. (*Id.* ¶ 34; Peng Decl., Ex. B.)

The Convening Order states that Scheme Creditors will be notified properly of the Scheme Meeting and will have the opportunity to raise questions and objections to the Scheme at the Scheme Meeting and/or at the Sanction Hearing. (Motion ¶ 37; Peng Decl., Ex. B.) At the Scheme Meeting, a vote will be held to determine whether the Scheme Creditors that are present and voting in person or by proxy will approve the Scheme. (Motion ¶ 38.) If a majority of creditors representing at least seventy-five percent in value of the Scheme Creditors present and voting at the Scheme Meeting votes in favor of the scheme, the Scheme is approved.[3] (*Id.*)

D. Description of the Scheme and Issuance of New Notes

The Scheme's effect will be to release the Scheme Creditors' claims related to the Existing Notes documents. (*Id.* ¶ 26.) In return, each Scheme Creditor will receive a pro rata share of the following consideration (the "Scheme Consideration"): cash consideration of $22.916 million; and the new notes ("New Notes"), in an aggregate principal amount equal to the sum of (i) 98.3% of the outstanding principal amount of the Existing Notes held by the Scheme Creditors; and (ii) accrued and unpaid interest up to but excluding the day the restructuring becomes effective (the "Restructuring Effective Date"). (*Id.*) This will enable the Company to restructure its existing indebtedness under the Existing Notes. (*Id.* ¶ 28.) The Debtor will also be issuing the New Notes on the Restructuring Effective Date. (*Id.*)

On the Restructuring Effective Date, following the distribution of the Scheme Consideration and the issuance of the New Notes, all outstanding Existing Notes will be canceled and all guarantees in connection with the Existing Notes will be released. (*Id.* ¶ 29.) Additionally, the Scheme provides for releases by Scheme Creditors of any claim related to the restructuring against the Debtor and its affiliates. (*Id.* ¶ 30.) If the Scheme is approved by the requisite majorities of creditors and sanctioned ***776** by the Cayman Court with a sealed copy of the Sanction Order filed with the Cayman Islands Registrar of Companies, the Scheme will then bind all Scheme Creditors regardless of how, or if, they voted. (*Id.* ¶ 31.)

E. Rare Earth Briefing

On June 6, 2022, the High Court of the Hong Kong Special Administrative Region Court of First Instance (the "Hong Kong Court") ruled in *In the Matter of Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 1686 (the "*Rare Earth* Opinion"). In dicta, the *Rare Earth* Opinion speculated that "recognition under *Chapter 15* is limited in territorial effect and I think it is reasonable to assume that the reason for this is that the procedure does not discharge the debt." *Rare Earth* Opinion ¶ 36. The *Rare Earth* Opinion relies heavily upon this Court's decision in *In re Agrokor d.d.*, 591 B.R. 163, 169 (Bankr. S.D.N.Y. 2018). Specifically, the Hong Kong Court points to this Court's explanation that "Section 1520(a)(1) provides that the automatic stay will apply to all the debtor's property *that is located within the territorial jurisdiction of the United States*." *Rare Earth* Opinion ¶ 35 (citing *In re Agrokor*, 591 B.R. at 187). From this statement, the Hong Kong Court concludes that "[r]ecognition does not appear as a matter of United States' law to discharge the debt." *Id.* ¶ 36.

On June 17, 2022, the Debtor filed the Rare Earth Briefing noting that the Hong Kong Court's statements principally rely on the application of United States law. (Rare Earth Briefing ¶ 8.) The Debtor notes that a federal court's Chapter 15 order that recognizes a discharge of New York law governed debt granted in a foreign proceeding is a complete and valid discharge of that debt as a matter of United States law. (*Id.* ¶ 9.) The Debtor asserts that because the Proposed Recognition Order recognizes a discharge to the extent granted in the foreign Cayman Proceeding, it serves as a complete and valid discharge of the Existing Notes, which are governed by New York law, as a matter of New York state law. (*Id.*)

This is a critically important issue. The Scheme in this case, and in many other scheme or restructuring plan cases, modifies or discharges existing debt and related guarantees governed by New York law, and provides for the issuance of new debt and guarantees governed by New York law. An indenture trustee will only take the actions authorized by the scheme or plan if enforceable orders have been entered by the foreign court and a Chapter 15 court.

[2] [3]With great respect for the Hong Kong court in *Rare Earth*, that court misinterprets this Court's earlier decision in *Agrokor*, as well as many other decisions in the United States which have recognized and enforced foreign court sanctioned schemes or restructuring plans that have modified or discharged New York law governed debt. Provided that the foreign court properly exercises jurisdiction over the foreign debtor in an insolvency proceeding, and the foreign court's procedures comport with broadly accepted due process principles, a decision of the foreign court approving a scheme or plan that modifies or discharges New York law governed debt is enforceable. Under U.S. law, that is an unremarkable proposition that has been firmly established in the U.S. at least since the Supreme Court decision in *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527, 3 S.Ct. 363, 27 L.Ed. 1020 (1883), which granted international comity and enforced a Canadian scheme that discharged New York law governed debt and provided for the issuance of new debt governed by New York law. As Chief Justice Waite said in *Gebhard*, "the true spirit of international ***777** comity requires that schemes of this character, legalized at home, should be recognized in other countries." *Id.* at 548, 3 S.Ct. 363. Chapter 15 limits a U.S. bankruptcy court's authority to enjoin conduct outside the territorial jurisdiction of the United States, but it does not make a discharge of New York law governed debt any less controlling.

To be clear, in recognizing and enforcing the Scheme in this case, the Court concludes that the discharge of the Existing Notes and issuance of the replacement notes is binding and effective.[4]

F. The Global Brands Briefing

1. <u>The Debtor Does Not Intend or Expect to Seek Recognition of the Scheme or any Chapter 15 Order of this Court in Hong Kong</u>

The Court entered an order on June 27, 2022 (ECF Doc. # 18) requiring the Foreign Representative to file a supplemental brief addressing another recent Hong Kong court judgment, *In the Matter of an application for recognition and assistance by the provisional liquidator of Global Brands Group Holding Limited (in liquidation)*, HCMP 644/2022, [2022] HKCFI 1789 ("*Global Brands*"). The court in *Global Brands* stated that, in the future, recognition and enforcement by the Hong Kong court of schemes sanctioned in the Cayman Islands and BVI depended upon common law principles developed by Hong Kong courts that would ordinarily apply a center of main interests test rather than the place of incorporation as had been done in the past. Because the Debtor and its affiliates conduct their business in the PRC, and the Debtor's common stock trades on the Stock Exchange of Hong Kong Limited, this Court wanted to know whether the Debtor intends to seek recognition and enforcement in Hong Kong of the Cayman Scheme and of any order of this Court recognizing and enforcing the Cayman Scheme. In short, the Foreign Representative's answer is that the Debtor does not intend or expect to seek recognition and enforcement of the Scheme or this Court's order recognizing and enforcing the Scheme in Hong Kong.

Given that the Existing Notes are issued by a Cayman Islands entity and are governed by New York law, the Foreign Representative submits that the implementation and effectuation of a Cayman Islands scheme of arrangement and recognition and enforcement of the scheme under Chapter 15 of the Bankruptcy Code are all that is required to effectuate the Restructuring. (Global Brands Briefing ¶ 5.) Further, the Foreign Representative notes that the solely affected creditors, the holders of the Existing Notes, also agree with this position. (*Id.* ¶ 6.) The RSA and the Scheme documents, which were negotiated at arm's-length with sophisticated creditors represented by able counsel, do not require recognition of the Scheme in Hong Kong. (*Id*.)

2. The Scheme Can Become Effective Without Recognition in Hong Kong

According to the Foreign Representative, nothing in the RSA or in any of the Scheme documents necessitates or requires recognition and/or enforcement of the Scheme by the Hong Kong Court for the Scheme to be effective. (*Id.* ¶ 8.) Under ***778** the terms of the Scheme, once the Cayman Court sanctions the Scheme and the Sanction Order has been delivered to the Cayman Companies Registrar, the Scheme will become effective. (*Id.*) The Foreign Representative notes that the restructuring will ultimately become effective upon entry of the Sanction Order by the Cayman Court and the Proposed Recognition Order by this Court. (*Id*.) Further, the Foreign Representative argues that this Court does not need to consider whether the Scheme would be recognized and enforced in Hong Kong in making its determination whether to recognize and enforce the Scheme pursuant to section 1521 of the Bankruptcy Code. (*Id.* ¶ 9.) This argument relies on the *Agrokor* case, where this Court enforced the modification of both English law and New York law-governed debts pursuant to a Croatian insolvency proceeding, even though jurisdictions following the *Gibbs* Rule may not have treated the modification of English law-governed debts as effective. (*Id*. ¶ 10.)

3. Global Brands is Distinguishable

The Foreign Representative believes it is unlikely that a court in Hong Kong will be asked to consider whether the Scheme is effective in Hong Kong. (*Id.* ¶ 15.) The Foreign Representative does not intend to seek relief in Hong Kong or to obtain any assets located in Hong Kong, and they argue the risk of a dissenting Scheme Creditor seeking enforcement of the Existing Notes in Hong Kong is de minimis. (*Id*.) It is, of course, for the Debtor to decide whether to seek recognition and enforcement in Hong Kong, and for Hong Kong Court to decide whether to recognize and enforce the Scheme if the issue is presented by the Debtor or any other party that has standing to raise the issue in Hong Kong.

G. The Outcome of the Cayman Proceeding

Ms. Moran notes that the Scheme Creditors overwhelmingly approved the Scheme in the required majorities. (Supp. Moran Decl. ¶ 4.) Ms. Moran states that there were 372 creditors who voted (and one creditor that abstained), with over 99% (370) of those voting to support the Scheme. (*Id.*) Further, the supporting creditors represented 94.78% ($1,271,425,000) of the total principal amount outstanding under the Existing Notes. (*Id.*) Only two creditors voted against the Scheme representing less than 1.23% ($16,319,000) of the total principal amount outstanding under the Existing Notes. (*Id.*)

On July 5, 2022, the Cayman Court presided over the Sanction Hearing and found that the Scheme satisfied the requisite elements to be sanctioned. (*Id.* ¶ 7.) Ms. Moran notes that no creditor raised any objection during the Sanction Hearing. (*Id.*) The Cayman Court entered the Sanction Order which sanctions and approves consummation of the Scheme and authorizes and effectuates the Scheme Restructuring. (*Id.* ¶ 8.)

H. Supplemental Briefs

A hearing on the Motion was held on July 6, 2022. ("Transcript," ECF Doc. # 21.) The Court expressed its concerns regarding the Debtor's COMI and, with respect to possible recognition as a foreign nonmain proceeding, whether the Debtor established that it was engaged in "non-transitory activity." (Transcript at 45:6–24.) Counsel to the Foreign Representative filed the Supplemental Brief on July 12, 2022.

The Debtor asserts that it's COMI is in the Cayman Islands because it is, and publicly identifies as, a Cayman-incorporated company. (Supp. Brief ¶ 1.) The ***779** Foreign Representative states that the Debtor's historical corporate counsel is a Cayman Islands law firm, Conyers Dill & Pearman, which provided general corporate advice on the issuance of the Existing Notes. (*Id.* ¶ 2.) The offering memoranda for the Existing Notes make clear that the Debtor is a Cayman entity. (*Id.* ¶ 3.) The Debtor notes that when it first defaulted under the Existing Notes, BFAM Asian Opportunities Master Fund, LP ("BFAM,") issued a "statutory demand" (the "Statutory Demand") against the Debtor, threatening a winding up petition that would be filed under the laws of the Cayman Islands. (*Id.* ¶ 4.) The Statutory Demand prompted the restructuring negotiations and the RSA. (*Id.* ¶ 5.)

1. Insolvency Procedures in the Cayman Islands

The Debtor notes that liquidation of a Cayman Islands incorporated company is required to be implemented pursuant to Cayman law through insolvency practitioners appointed by the Cayman Court. (*Id.* ¶ 5 (citing Third Moran Decl. ¶¶ 16–18).) The Cayman courts generally do not recognize a non-Cayman Islands liquidation as being capable of liquidating and dissolving a Cayman Islands company. (*Id.* (citing Third Moran Decl. ¶¶ 18–23).)

The Foreign Representative notes that most of the Restructuring-related activities took place in the Cayman Islands. (Supp. Peng Decl ¶ 6.) Maples and Calder (Cayman) LLP ("Maples"), the Debtor's Cayman counsel since November 2021, advised the Debtor with respect to practical elements of the Restructuring during negotiations of the RSA. (Third Moran Decl. ¶ 25.) The RSA put Scheme Creditors on notice that the proceeding to sanction the Scheme would occur in the Cayman Islands. (Supp. Brief ¶ 8.) The Debtor completed each of the steps needed to sanction the Scheme by the Cayman Court. (Supp. Peng Decl. ¶ 10.) These steps included holding the Scheme Meeting in the Cayman Islands that was chaired by an individual who resides in the Cayman Islands and was engaged directly by the Debtor for the purposes of the Scheme Meeting. (Third Moran Decl. ¶ 25.) The chairman of the Scheme Meeting held proxies for the majority of the Scheme Creditors and attended and voted at the meeting in the Cayman Islands on their behalf. (*Id.*)

2. Debtor's Arguments in Favor of Foreign Main

The Debtor relies on the Scheme Creditor's expectations that the Debtor's COMI is the Cayman Islands. (Supp. Brief ¶ 11.) The Debtor notes that creditor expectations were formed via the publicly available descriptions of the Debtor in (i) the offering memoranda of the Existing Notes that stated that "an insolvency proceeding relating to us, even if brought in the United States, would likely involve Cayman Islands insolvency law" and (ii) the Debtor's press releases, pointing to the Debtor as a company "incorporated in the Cayman Islands." (*Id.*) The Debtor notes that creditor expectations were reinforced by certain actions including: (i) BFAM's negotiations related to the Restructuring by issuing the Statutory Demand and threatening a Cayman Islands winding up petition and (ii) the RSA contemplating an insolvency proceeding in the Cayman Islands. (*Id.*)

The Debtor notes that no Scheme Creditor—including the two Scheme Creditors that voted against the Scheme—objected to the Debtor's COMI being in the Cayman Islands. (*Id.* ¶ 12.) The Debtor argues that the consensus of those affected by the Scheme points in favor of a Cayman COMI. (*Id.*)

The Debtor notes that Cayman Islands law requires that liquidation proceedings of Cayman Islands-incorporated companies take place in the Cayman Islands under the supervision of a Cayman Islands-appointed ***780** liquidator. (*Id.* ¶ 13.) This requirement was made clear in the documents related to the issuance of the Existing Notes.[5] (*Id.*)

The Debtor maintains its registered office in the Cayman Islands to which all communications may be addressed, and where matters such as the administration of annual filings and the payment of annual fees with the Cayman Registrar are dealt with. (*Id.* ¶ 14.) The Debtor is also required to maintain statutory registers of members (*i.e.*, shareholders), mortgages and charges, and directors in the Cayman Islands. (*Id.*)

The Debtor is also tied to the Cayman Islands by way of its asset holdings and the location of certain creditors. (*Id.* ¶ 15.) Nearly half of the Debtor's wholly owned direct subsidiaries are Cayman entities. (*Id.*) Additionally, the Debtor identified at least 35 entities—representing a minimum of over half a billion dollars of the outstanding principal of the Existing Notes—that are domiciled in the Cayman Islands. (*Id.*) But it is undisputed that despite its domicile in the Cayman Islands, the Debtor

and its affiliates are managed and conduct their business in the PRC.

Finally, the Debtor's restructuring activities have been centralized in the Cayman Islands and undertaken by Cayman Islands actors. (*Id.* ¶ 16.) These activities include: (i) Maples advising the Debtor on all aspects of the Restructuring, including the terms of the RSA, the Practice Statement Letter, the Explanatory Statement, and all Cayman Court documents; (ii) preparing for and appearing at hearings in front of the Cayman Court in the Cayman Islands; (iii) the convening of the Scheme Meeting by the Cayman Court; and (iv) the Scheme Meeting, which was chaired by an individual who resides in the Cayman Islands, was engaged directly by the Debtor for the purposes of the Scheme Meeting, and who held proxies for the majority of the Scheme Creditors and attended and voted at the Scheme Meeting in the Cayman Islands on their behalf. (*Id.*) The Debtor notes that its board of directors did not host meetings that were physically located in the Cayman Islands during the restructuring due to international travel restrictions and changes in business practices ***781** resulting from the COVID-19 pandemic. (*Id.*)

The Debtor also argues that it was not necessary for its Cayman counsel or its Scheme Chairperson to wrest control of the Debtor from its previously existing management or take possession of its property like a joint provisional liquidator ("JPL"). (*Id.*) The Debtor asserts that such activities are not required or appropriate in a consensual scheme of arrangement. (*Id.*) A scheme of arrangement, by its nature, is driven by negotiation and compromises between a company and its creditors. (*Id.*) The Debtor argues that holding scheme chairpersons to the same standard as a JPL would create a perverse incentive for companies to enter into liquidations rather than a value maximizing, consensual resolution with their creditors via a scheme of arrangement.[6] (*Id.*) The Debtor argues that this would dictate that the restructuring activities in liquidations, but not schemes, would merit recognition under Chapter 15. (*Id.*)

3. Foreign Nonmain Arguments

The Debtor asserts that it has substantial connections to the Caymans including issuing debt and holding assets in the Caymans, retaining counsel and employing professionals in the Caymans, and holding itself as an entity that could only be liquidated effectively in the Caymans. (*Id.* ¶ 19.) The Debtor argues that this is sufficient to find that the Debtor has non-transitory business connections with the Caymans. (*Id.*) The Debtor notes that its maintenance of a registered office in the Cayman Islands, compliance with the corporate formalities required to maintain its status as a Cayman entity, and representations to creditors that it is a Cayman-incorporated entity also support finding non-transitory connections with the Caymans. (*Id.*)

The Debtor also argues that the alternative to recognition of the Cayman Proceeding is to potentially deny the Debtor the ability to implement a consensual restructuring and force the Debtor into a Cayman liquidation. (*Id.* ¶ 20.) The Debtor argues that it would leave all parties in a worse position. (*Id.*)

II. LEGAL STANDARD

A. Foreign Main Proceeding

[4] [5]To obtain recognition, the foreign proceeding must be either a foreign main or foreign nonmain proceeding. 11 U.S.C. § 1517(a)(1). Under section 1502(4) of the Bankruptcy Code, the term "foreign main proceeding" means "a foreign proceeding pending in the country where the debtor has the center of its main interests." 11 U.S.C. § 1502(4); *see, e.g., In re Ocean Rig UDW Inc.*, 570 B.R. 687, 702 (Bankr. S.DN.Y. 2017) (recognizing foreign main proceeding); *In re Suntech Power Holdings Co.*, 520 B.R. 399, 416–17 (Bankr. S.D.N.Y. 2014) (recognizing foreign main proceeding); *see also Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 138 (2d Cir. 2013) (hereinafter "*Fairfield Sentry*") (affirming recognition of foreign main proceeding). A Chapter 15 debtor's COMI is determined as of the filing date of the Chapter 15 petition, without regard to the debtor's historic operational activity. *See Fairfield Sentry*, 714 F.3d at 137 ("[A] debtor's COMI should be determined based on its activities at or around the time the chapter ***782** 15 petition is filed, as the statutory text suggests.").

[6]The Bankruptcy Code establishes that "[i]n the absence of evidence to the contrary, the debtor's registered office ... is presumed to be the center of the debtor's main interests." 11 U.S.C. § 1516(c). However, this presumption can be overcome.

See, e.g. ABC Learning, 445 B.R. 318, 328 (Bankr. D. Del. 2010); *aff'd*, 728 F.3d 301 (3d Cir. 2013) (stating that "the COMI presumption may be overcome particularly in the case of a 'letterbox' company not carrying out any business" in the country where its registered office is located); *In re Basis-Yield Alpha Fund (Master)*, 381 B.R. 37, 51–54 (Bankr. S.D.N.Y. 2008) (concluding that the absence of objections to COMI were not binding; the court must make an independent determination of COMI).

[7]Courts consider several additional factors to determine whether the COMI presumption has been overcome, including: "the location of the debtor's headquarters; the location of those who actually manage the debtor ... the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes." *In re SphinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006). In *SphinX*, this court explained that these factors should not be applied "mechanically"; rather, "they should be viewed in light of Chapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor's value." *Id.*; *see also Fairfield Sentry*, 714 F.3d at 137 (explaining that "consideration of these specific factors is neither required nor dispositive" and warning against mechanical application). The *SphinX* court also noted that "because their money is ultimately at stake, one generally should defer ... to the creditors' acquiescence in or support of a proposed COMI." 351 B.R. at 117.

[8]The Second Circuit and other courts often examine whether a Chapter 15 debtor's COMI would have been ascertainable to interested third parties, finding "the relevant principle is that the COMI lies where the debtor conducts its regular business, so that the place is ascertainable by third parties. Among other factors that may be considered are the location of headquarters, decision-makers, assets, creditors, and the law applicable to most disputes." *Fairfield Sentry*, 714 F.3d at 130. As the Second Circuit explained, by examining factors "in the public domain," courts are readily able to determine whether a debtor's COMI is in fact "regular and ascertainable [and] not easily subject to tactical removal." *Id.* at 136–37; *see also In re British Am. Ins. Co.*, 425 B.R. 884, 912 (Bankr. S.D. Fla. 2010) ("The location of a debtor's COMI should be readily ascertainable by third parties."); *In re Betcorp Ltd.*, 400 B.R. 266, 289 (Bankr. D. Nev. 2009) (looking to ascertainability of COMI by creditors).

[9]If a debtor's COMI has "shifted" prior to filing its Chapter 15 petition, courts may engage in a more holistic analysis to ensure that the debtor has not manipulated COMI in bad faith. *See Fairfield Sentry*, 714 F.3d at 138 (concluding that "a court may look at the period between the commencement of the foreign proceeding and the filing of the Chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith .... The factors that a court may consider in the analysis are not limited and may include the debtor's liquidation activities"). Courts ask whether there is evidence pointing to any "insider exploitation, untoward manipulation, [and] overt thwarting of third-party expectations" that would support denying recognition. *Id.*; *see also* ***783** *Ocean Rig*, 570 B.R. at 687 (granting recognition of foreign main proceeding where debtors shifted COMI from jurisdiction that only provided a liquidation option to jurisdiction that permitted reorganization, taking steps to shift COMI beginning one year before the foreign filing and where notice was given to creditors throughout the process of shifting COMI). The court in *Suntech* noted how "[A] debtor's COMI is determined as of the time of the filing of the Chapter 15 petition," but, "[t]o offset a debtor's ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition." 520 B.R. at 416. Various factors could be relevant, such as "the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes." *Id.*

In *Suntech,* the debtor's presumptive COMI was the Cayman Islands, where it was incorporated, however, the Cayman Islands was not its actual COMI when the Foreign Proceeding was commenced. *Id.* Notably, the *Suntech* debtor did not conduct any activities in the Cayman Islands, and maintained its principal executive offices in Wuxi, China from where it managed the Suntech Group. *Id.* So, the issue was whether the debtor's COMI should be measured at the time of the commencement of the Chapter 15 case or when the Foreign Proceeding was commenced. *Id.* But in *Suntech*, the Cayman Court appointed JPLs and authorized them to exercise a host of additional powers (including acts on behalf of the debtor, possession of its property and collect all debts, dealing with all questions relating to or affecting the assets or the restructuring etc.) *Id.* at 417–18. The JPLs assumed control of the debtor's affairs, met with employees and creditors, opened a bank account in the Cayman Islands funded with transfers from one of the debtor's other accounts, and filed claims. *Id.* The *Suntech* court found the debtor's COMI on the date of the commencement of the chapter 15 case was the Cayman Islands and the JPLs did not manipulate the debtor's COMI in bad faith. *Id.* Therefore, the court overruled a creditor's objection to finding the debtor's COMI to be in the Cayman Islands.

[10]The *Suntech* court's analysis and conclusion that COMI was in the Cayman Islands was consistent with the Second Circuit's analysis in *Fairfield Sentry*. In both cases, court-appointed fiduciaries assumed substantial control over the debtors'

liquidation (in the case of *Fairfield Sentry*) and scheme proceeding (in the case of *Suntech*). So, the question is whether the absence of court-supervised fiduciaries, such as JPLs, requires a different result in finding COMI in the Cayman Islands in this case given that no JPLs were appointed. While this would be an easier case if JPLs had been appointed, the Court concludes that the Cayman court's supervision of the Debtor's Scheme Proceeding, in light of the other factors present here, is enough for the Court to conclude that the Debtor's COMI for the proceeding involving the single class of Existing Note holders was in the Cayman Islands.[7]

***784 B. Foreign Nonmain Proceeding**

[11]The Foreign Representative's counsel argues, in the alternative, that the Scheme Proceeding satisfies the requirements to be a foreign nonmain proceeding. Recognition and enforcement can be granted as discretionary relief under sections 1507 and 1521 of the Bankruptcy Code even in a nonmain proceeding. The Court concludes that the Scheme Proceeding was not a foreign nonmain proceeding.

Courts recognize a foreign proceeding as a "foreign nonmain proceeding" if "the debtor has an establishment within the meaning of section 1502 in the foreign country where the proceeding is pending." 11 U.S.C. § 1517(b)(2). Section 1502(2) defines "[e]stablishment" as "any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. § 1502(2); *see also In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 70 (Bankr. S.D.N.Y. 2011), *aff'd* 474 B.R. 88 (S.D.N.Y. 2012) ("*Millennium Glob. I*"). Additionally, courts have required proof of more than a "mail-drop presence" to satisfy the establishment requirement. *In re Serviços de Petróleo Constellation S.A.*, 600 B.R. 237, 277 (Bankr. S.D.N.Y. 2019) ("*Constellation I*") (citation omitted). Due to the "paucity of U.S. authority" on this question, the court in *Millennium Glob. I* cited a "persuasive" English law holding that the presence of an asset and minimal management or organization can create a debtor establishment. 458 B.R. at 84–85 (citing *Shierson v. Vlieland-Boddy*, [2005] EWCA Civ. 974, [2005] W.L.R. 3966 (2005)).

[12] [13]Whether the debtor has an "establishment" in a country is determined at the time of filing the Chapter 15 petition. *See Beveridge v. Vidunas (In re O'Reilly)*, 598 B.R. 784, 803 (Bankr. W.D. Pa. 2019). Several factors "contribute to identifying an establishment: the economic impact of the debtor's operations on the market, the maintenance of a 'minimum level of organization' for a period of time, and the objective appearance to creditors whether the debtor has a local presence." *Millennium Glob. I*, 458 B.R. at 85. *See In re Creative Fin., Ltd.*, 543 B.R. 498, 520 (Bankr. S.D.N.Y. 2016) (citing *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 131 (Bankr. S.D.N.Y. 2007)) (finding that an "establishment" requires a "showing of a local effect on the marketplace, more than mere incorporation and record-keeping and more than just the maintenance of property.") This is evidenced by engagement of "local counsel and commitment of capital to local banks." *Millennium Glob. I*, 458 B.R. at 86–67. *See also Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1028 (5th Cir. 2010) (If a foreign "bankruptcy proceeding and associated debts [themselves] ... demonstrate an establishment ... [t]here would be no reason to define establishment as engaging in a nontransitory economic activity. The petition for recognition would simply require evidence of the existence of the foreign proceeding."); *Rozhkov v. Pirogova (In re Pirogova)*, 612 B.R. 475, 484 (S.D.N.Y. 2020) (finding that a foreign insolvency proceeding on its own cannot suffice to count as nontransitory economic activity in support of recognition as a foreign nonmain proceeding.)

III. DISCUSSION

For the reasons outlined below, the Court **GRANTS** the Motion for recognition of the Cayman Proceeding as a foreign main proceeding. The Court does not explicitly address the following aspects of the ***785** Motion because they are uncontroversial and satisfied by the uncontested facts: (i) whether the Debtor meets the eligibility requirements under section 109(a) of the Bankruptcy Code; (ii) whether the Cayman Proceeding is a foreign proceeding as defined in section 101(23) of the Bankruptcy Code; (iii) whether the Cayman Proceeding has been commenced by a duly authorized foreign representative; (iv) whether the Scheme Petition meets the requirements of section 1515 of the Bankruptcy Code; (v) whether the Debtor is entitled to additional relief under section 1521 of the Bankruptcy Code; (vi) whether the Scheme is procedurally fair; (vii) whether the interests of creditors and other interested parties are sufficiently protected; (viii) whether the Foreign Representative is entitled to additional relief under section 1507 of the Bankruptcy Code; and (ix) whether recognition of the foreign proceeding is contrary to the public policy of the United States.

A. Recognition is Not Warranted as a Foreign Nonmain Proceeding.

[14]The Court finds that recognition of the Cayman Proceeding as a foreign nonmain proceeding is not warranted because recognition would be inconsistent with the goals of foreign nonmain proceedings. Further, neither the bankruptcy proceeding itself nor the Debtor's bookkeeping activities constitute nontransitory economic activity, and the Debtor does not otherwise affect the local marketplace in the Cayman Islands.

1. Recognition as a Nonmain Proceeding Would Be Inconsistent with the Goals of UNCITRAL Model Law

[15]The Court declines to recognize the Cayman Proceeding as a foreign nonmain proceeding because such a recognition would not comport with the stated goals of foreign nonmain proceedings. The UNCITRAL Model Law on Cross-Border Insolvency explains that in a foreign nonmain proceeding, "the court must be satisfied that the action relates to assets that, under the law of this State, should be administered in the foreign non-main proceeding." UNITED NATIONS, UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, 12 (2014) (the "GUIDE"). The GUIDE further explains that "[u]nlike 'foreign main proceeding,' there is no presumption with respect to the determination of establishment ... [t]he commencement of insolvency proceedings, the existence of debts, and the presence alone of goods in isolation, of bank accounts, or of property would not in principle satisfy the definition of establishment." *Id.* at 47. These provisions support the administration of a restructuring proceeding by a single foreign court.

In the present case, the Cayman Scheme pertains to the Existing Notes held by the Scheme Creditors. (Motion ¶ 13.) The language of the UNCITRAL Model Law on Cross-Border Insolvency therefore requires, for the purposes of recognition of the Cayman Proceeding as a foreign nonmain proceeding, that the Existing Notes be assets in the Cayman Islands. However, this Court is not persuaded that the Existing Notes are assets within the meaning of Article 23, subsection 2 of the Model Law. As the GUIDE explains, "the existence of debts ... would not in principle satisfy the definition of establishment." GUIDE at 47.

2. There is Insufficient Evidence to Support a Finding of Nontransitory Economic Activity in the Caymans

[16]The Cayman restructuring cannot itself constitute nontransitory economic activity to support recognition as a foreign nonmain proceeding. In *Lavie v. Ran*, 406 B.R. 277, 286–87 (S.D. Tex. 2009), the bankruptcy court explained that if "the ***786** proceeding and associated debts alone could suffice to demonstrate an establishment, it would essentially rule out the possibility that any proceeding would fall into the ... category of proceedings that are neither foreign main nor foreign nonmain. But, this third category was clearly envisioned by the drafters." Further, in *In re Pirogova*, 612 B.R. at 484, the court cited *Ran* and agreed that if "a foreign trustee could merely point to a foreign bankruptcy itself, which is subject to a recognition petition, as evidence of an establishment, the statutory requirements for recognition would be pointless." The court in *Pirogova* denied recognition of a foreign nonmain proceeding despite the Debtor's ownership of an apartment in Russia, her Russian utility bills, her vehicles in Russia, and her Russian yacht club membership, as well as the debtor's ongoing bankruptcy proceeding in Russia. *Id.* at 480.

In the present case, the Debtor's connections to the Cayman economy are far more tenuous than those discussed in *Pirogova*. The Debtor maintains a registered office in the Cayman Islands to which all communications may be addressed or served, and where the administration of annual filings and the payment of annual fees are registered. (Supp. Brief ¶ 1.) The Debtor also initiated the restructuring proceeding in its country of incorporation, the Cayman Islands. (*Id.*) However, the Debtor has been unable to point to any additional connections to the Cayman Islands that might constitute nontransitory economic activity, and therefore falls well short of the standards set in *Ran* and *Pirogova*.

3. The Debtor's Business Activities Have No Local Effect on the Marketplace

The court explained the standard for nontransitory economic activity in *In re Creative Fin., Ltd.*, 543 B.R. at 520–21. There, the court explained that recognition required "a showing of a *local effect on the marketplace*, more than mere incorporation

and record-keeping and more than just the maintenance of property." *Id.* at 520 (emphasis added). In that case, the debtor, a foreign exchange trading business, was organized under the laws of the BVI, and admittedly engaged in bad-faith actions to pursue a restructuring proceeding there. *Id.* at 513. Nevertheless, the tenuous nature of the connection between the debtor's business activities and the BVI marketplace supported the court's denial of recognition as a foreign nonmain proceeding. *Id.* at 521.

In the present case, despite the absence of apparent bad faith, the Debtor similarly has a negligible effect on the local marketplace. The Debtor is a Cayman-incorporated investor and developer in real-estate that carries out its business in the PRC and maintains its books and records in the Cayman Islands. (*Id.* ¶¶ 6–7, 64.) However, the Debtor has not provided the Court evidence of "more than mere incorporation and record-keeping and more than just the maintenance of property." *In re Creative Fin., Ltd.*, 543 B.R. at 520. The failure to engage the local economy excludes the Debtor from a foreign nonmain classification.

B. Recognition Is Warranted as a Foreign Main Proceeding

[17]The Court recognizes the Debtor's COMI in the Cayman Islands. Section 1516(c) provides that "[i]n the absence of evidence to the contrary, the debtor's registered office ... is presumed to be the center of the debtor's main interest." 11 U.S.C. § 1516(c). Given the evidence in this case, the Court considers the totality of the circumstances before it, including the goals of Chapter 15, the Scheme Creditors' expectations and intentions, the judicial role in the Cayman Scheme, the function ***787** of the Cayman Scheme Chairperson, the insolvency activities in the Caymans, Cayman choice of law principles and the Debtor's good-faith petition for recognition of the Cayman Proceeding. Each of these factors function together to support a finding of COMI in the Cayman Islands.

1. Recognition as a Foreign Main Proceeding is Consistent with the Goals of Chapter 15

Recognition of the Cayman proceeding as a foreign main proceeding would comport with the goals of Chapter 15. In *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. at 126, *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008), the court explained that:

> Unique to the Bankruptcy Code, Chapter 15 contains a statement of purpose: "[t]he purpose of this chapter is to incorporate the Model Law on Cross–Border Insolvency so as to provide effective mechanisms for dealing with cases of cross-border insolvency," with the express objectives of cooperation between United States courts, trustees, examiners, debtors and debtors in possession and the courts and other competent authorities of foreign countries; greater legal certainty for trade and investment; fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor; the protection and maximization of the debtor's assets; and the facilitation of the rescue of financially troubled businesses. 11 U.S.C. § 1501(a)(1)–(5); *In re SPhinX, Ltd.*, 351 B.R. 103, 112 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007).

[18]Chapter 15 contemplates cooperation between American and foreign bankruptcy courts, as well as facilitating protection for the Debtor in this case before the Court.

The Second Circuit has recognized that "[t]he absence of a statutory definition for a term that is not self-defining signifies that the text is open-ended, and invites development by courts, depending on facts presented, without prescription or limitation." *Fairfield Sentry*, 714 F.3d at 138.

Here, the Debtor argues that denial of recognition of the Debtor's COMI in the Cayman Islands may leave the Debtor "with the alternative of converting a highly consensual Scheme into a Cayman liquidation in an effort to obtain such chapter 15 recognition at a later date." (Supp. Brief ¶ 23.) The Debtor also contends that this "would not maximize the value of the Debtor's assets, as it would divert additional funds towards an entirely new insolvency process in an effort to potentially achieve the relief requested" in the Motion. (*Id.*) Such an outcome would clearly diverge from Chapter 15's stated goal of maximizing the value of the debtor's assets, as well as facilitating the rescue of a financially troubled business. Further, recognition of the Cayman Proceeding would promote cooperation between the American and Cayman courts, by helping facilitate the Cayman Proceeding and maximizing the chances of a successful reorganization.

2. Recognition of this Proceeding is Consistent with Creditors' Expectations

[19]The Scheme Creditors' expectations that their loan agreements would be governed by Cayman law supports recognition of COMI in the Cayman Islands. (Supp. Brief ¶ 11.) When determining a Debtor's COMI, "creditor expectations can be evaluated through examination of the public documents and information available to guide creditor understanding of the nature and risks of their investments." ***788** *In re Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. 169, 228 (Bankr. S.D.N.Y. 2017); *see also Constellation I*, 600 B.R. at 274 (listing cases in which offering memoranda and indentures were evaluated for purposes of determining creditors' expectations). Here, this expectation was reasonable considering the publicly available descriptions of the Debtor as a Cayman company in (i) the offering memoranda of the Existing Notes that stated that "an insolvency proceeding relating to us, even if brought in the United States, would likely involve Cayman Islands insolvency law" and (ii) the Debtor's press releases, pointing to the Debtor as a company "incorporated in the Cayman Islands." (Supp. Brief ¶ 11.)

The Debtor's actions reinforced these expectations, particularly the fact that (i) BFAM initiated negotiations related to the Restructuring by issuing the Statutory Demand and threatening a Cayman Islands winding up petition and (ii) the RSA contemplated an insolvency proceeding in the Cayman Islands. (*Id.*) It is incontrovertible that the Scheme Creditors understood that the Debtor is a Cayman Islands company and expected that its debts would be restructured pursuant to the law of the Cayman Islands if a restructuring became necessary. (*Id.*) *See In re Ascot Fund Ltd.*, 603 B.R. 271, 283 (Bankr. S.D.N.Y. 2019) (finding COMI in the Caymans, in part, because "[f]rom the Ascot Fund investors' point of view, and as a matter of fact and law, they invested in a Cayman fund and their rights were to be determined under Cayman law.")

[20] [21]In *In re SPhinX, Ltd.*, 351 B.R. at 117, the Court explained that "[v]arious factors, singly or combined, could be relevant" to a COMI determination. The factors are not meant to be applied "mechanically," but rather, "viewed in light of chapter 15's emphasis on protecting the reasonable interests of parties in interest pursuant to fair procedures and the maximization of the debtor's value." *Id.* The *SPhinX* court reasoned that "because their money is ultimately at stake, one generally should defer, therefore, to the creditors' acquiescence in or support of a proposed COMI." *Id.* In *SPhinx*, ultimately, the Court found that COMI was outside of the Caymans, but the concept remains, when a Court considers COMI factors, the protection of the creditors' interests is paramount. *Id.*

The decision in *In re Serviços de Petróleo Constellation S.A.* ("*Constellation II*") also underscores how "Courts in the Second Circuit also look to the expectations of creditors with regard to the location of a debtor's COMI." 613 B.R. 497 (Bankr. S.D.N.Y. 2019) (finding COMI in Luxembourg, in part, because the creditors' expectations of the location of the insolvency proceeding); *see In re Chiang*, 437 B.R. 397 (Bankr. C.D. Cal. 2010) (noting how "the location of the COMI is an objective determination based on the viewpoint of third parties (usually creditors)"); *see also In re Codere Finance 2(UK) Ltd.*, Case No. 20-12151 (MG), (Bankr. S.D.N.Y. Oct. 9, 2020) ("*Codere* Transcript," ECF Doc. # 13 at 21:17–23:6) (concluding that COMI in the UK was supported by lack of objections, overwhelming support of the scheme, no evidence of exploitation or untoward manipulation or thwarting of third-party expectations, and interests of creditors and other interested parties sufficiently protected).

In *In re Oi Brasil Holdings*, 578 B.R. at 226–229, the court considered whether, having initially recognized Brazil as the Debtor's COMI, subsequent events caused the COMI to shift to the Netherlands. To evaluate whether the COMI had shifted, the court considered creditor expectations, concluding "that purchasers of the notes understood that they were investing in Brazilian-based businesses, and [the debtor's] place of incorporation, or for that ***789** matter its very existence, was immaterial to their decision to purchase their notes." *Id.* at 229. It was notable in this case that "the [noteholders] had no legitimate expectation that the Austrian courts would play any role in the determination or payment." *Id.* at 226; *see also In re Olinda Star Ltd.*, 614 B.R. 28, 44 (Bankr. S.D.N.Y. 2020) (holding third party and creditors' expectations weigh in favor of finding COMI); *Constellation II*, 613 B.R. at 508 (noting "[c]ourts in the Second Circuit also look to the expectations of creditors with regard to the location of a Debtor's COMI.")

In the present case, the Scheme Creditors made loans to **Modern Land**, a Cayman-incorporated holding company that carries out the business of real estate development in the PRC. (Motion ¶¶ 6–7.) Given the statutory presumption included in section 1516(c) of the Bankruptcy Code, the creditors could reasonably have concluded that the Debtor's registered office in the Cayman Islands was its COMI, subjecting it to the Cayman Companies Act, and in turn subjecting the creditors' agreements with the Debtor to Cayman law. Further, "nearly half of the Debtor's wholly owned subsidiaries are Cayman entities." (Supp. Brief ¶ 7.) Given the proclivity of Courts in the Second Circuit to consider creditor expectations when making a COMI determination, therefore, this factor supports a finding of the Cayman Islands being the Debtor's COMI.

The creditor expectations in this case are further evidenced by the overwhelming creditor support. Not one Scheme Creditor

objected to the Debtor's COMI being located in the Cayman Islands, including the two dissenting Scheme Creditors that voted against the Scheme. (Supp. Brief ¶ 12.) Over 99% in number of the Scheme Creditors present and voting at the Scheme Meeting, representing approximately 95% in value of the outstanding principal of the Existing Notes, voted in favor of the Scheme. (*Id*., Supp. Moran Decl. ¶ 4.) In this case, definitive creditor expectations and overwhelming creditor support solidify a finding of COMI in the Cayman Islands.

3. The Judicial Role in the Cayman Scheme is Prevalent in this Case

Another factor supporting COMI being in the Cayman Islands is the ongoing restructuring proceeding itself. In *In re Suntech Power Holdings Co.*, 520 B.R. at 418, a Cayman-incorporated holding company primarily conducting business in China filed for Chapter 15, seeking recognition. Over creditors' objections, this Court found COMI in the Cayman at the time of the filing, while acknowledging that COMI had been in China prior to the filing. *Id.* The *Suntech* court discussed at length the role of the JPLs, who conducted much of the Debtor's business from the Cayman Islands following the petition. *Id.*

In the present case, unlike in *Suntech*, there are no objections to recognition as a foreign main proceeding. The Scheme Creditors in this case overwhelmingly approved the Scheme. (Motion ¶ 65.) **Modern Land** is not subject to the control of JPLs, but there were no issues about the propriety if any actions by management, and the Debtor and its professionals successfully negotiated an RSA with very broad creditor support. (Third Moran Decl. ¶ 7.) There was no need for the appointment of JPLs. (Supp. Brief ¶ 16.)

Furthermore, the Debtor in this case identifies itself as a Cayman-incorporated company in press releases and in official memoranda. (*Id.* ¶ 1.) The Debtor maintains its registered office in the Cayman Islands, and maintains a statutory register of members (i.e. shareholders), mortgages, charges, and directors in the Cayman Islands. (*Id.*) The Debtor's historical corporate counsel, who additionally advised the Debtor on the issuance of the Existing ***790** Notes, is a law firm located in the Cayman Islands. (*Id.* ¶ 2.) The offering memoranda for the Existing Notes indicated in several places that, if needed, the Debtor would initiate an insolvency proceeding in the Cayman Islands. (*Id.* ¶ 3.) Lastly, the first demand upon the Debtor following its initial default under the Existing Notes threatened a winding up petition pursuant to the laws of the Cayman Islands. (*Id.* ¶ 4.)

The RSA expressly requires a Cayman Islands scheme of arrangement, and approximately 80.75% of the aggregate principal outstanding amount of all Existing Notes acceded to the RSA. (*Id.* ¶ 5.) No Scheme Creditors objected to the Debtor's COMI being located in the Cayman Islands, and 99% in number of the Scheme Creditors present and voting at the Scheme Meeting representing approximately 95% in value of the outstanding principal of the Existing Notes, voted in favor of the Scheme. (*Id.* ¶ 12.)

Cayman law further provides that only the Cayman Court can conduct an effective liquidation of a Cayman Islands-incorporated company. (Third Moran Decl. ¶ 16.) The Debtors assert that, pursuant to Cayman law, a suit against a member of the Debtor's board of directors would require the application of Cayman law, even if such director did not live in the Cayman Islands. (*Id.* ¶ 24.) Next, nearly half of the Debtor's direct wholly owned subsidiaries are Cayman entities. (Supp. Brief ¶ 7.) The Debtor further identified at least 35 entities—representing a minimum of over half a billion dollars of the outstanding principal of the Existing Notes—that are domiciled in the Cayman Islands. (*Id.*)

The Debtor asserts, importantly, that as of the time of the filing of the Chapter 15 petition, the restructuring efforts were the Debtor's "primary business activity ... to ensure the Debtor's survival." (*Id.* ¶ 8.) The "vast majority of Restructuring-related activities took place in the Caymans," and the Debtor's Cayman counsel advised the Debtor as a matter of Cayman Islands law. (*Id.*) For example, the Scheme Meeting took place in the Cayman Islands, the Scheme Meeting was presided over by a Cayman Islands resident, and the chairman of the meeting held proxies for the majority of the Scheme Creditors and attended and voted at the meeting in the Cayman Islands on their behalf. (*Id.*) The Debtor's Cayman counsel also appeared at both hearings before the Cayman Court to obtain permission to convene the Scheme Meeting and to sanction the Scheme. (Third Moran Decl. ¶ 25.) The Scheme received the support of Scheme Creditors representing approximately 95% of the value of the Existing Notes. (Supp. Brief ¶ 9.) Given the strong support for the Scheme, the fact that the restructuring was the primary business activity of the Debtor at the time of the filing of the Chapter 15, the ongoing activities pertaining to the restructuring itself support recognition of the Cayman Islands as the Debtor's COMI in the present case.

[22]Further, the fact that the Debtor is an exempted company does not jeopardize its ability to have a COMI in the Cayman Islands. The Debtor was incorporated in the Cayman Islands under the Companies Act as an exempted company with limited liability. (Motion ¶ 6.) While the Debtor's exempted company status places certain limitations upon its operations in the Cayman Islands, this Court has held that exempted companies can have a Cayman COMI. In *Ocean Rig.*, 570 B.R. at 705, this Court held that "[i]t also does not matter that [the debtor] is classified as 'exempted' under the Cayman Companies Law,

even though 'exempted' company status appears to limit that company's activities in the Cayman Islands ... [w]hile exempted companies are prohibited from ***791** *trading* in the Cayman Islands, except in furtherance of their business outside the Cayman Islands, they may still be *managed* from there." The *Ocean Rig* Court subsequently concluded that the Cayman Islands was indeed the debtor's COMI, and recognized the foreign main proceeding. *Id.* at 707. Therefore, in the present case, the Debtor's status as an exempted company does not jeopardize its COMI in the Cayman Islands.

4. Choice of Law Principles Support a Finding of COMI in the Cayman Islands

[23]When conducting a COMI analysis, Courts in this Circuit additionally consider the jurisdiction whose law would apply to most disputes. *Olinda Star*, 614 B.R. at 43. "[T]his factor weighs in favor of a COMI in" the jurisdiction whose law applies. *Id.* at 44; *see also Constellation I*, 600 B.R. at 280 (stating that "because Parent/Constellation is a Luxembourg incorporated entity, that depends upon Luxembourg law for its existence and its corporate operations, the Court found that Luxembourg law should be considered the law that applies to *most* of Parent/Constellation's disputes"). In the present case, the Foreign Representative explained that the Debtor, as a Cayman-incorporated company, "depends on Cayman Islands law for its existence and is subject to Cayman Islands laws and regulations." (Supp. Brief ¶ 13.) The Foreign Representative further explained that the requirements of Cayman law were "made clear in the documents related to the issuance of the Existing Notes." (*Id.*) While the Existing Notes as governed by New York law, the Cayman Islands is the jurisdiction whose law would apply to most disputes over corporate actions that may arise in the Cayman Proceeding, this factor supports finding a COMI in the Cayman Islands. And, to the extent that any New York law issues arose concerning the Existing Notes, the Second Circuit explained in *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 424 (2d Cir. 2005), that "[w]e have repeatedly held that U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding."

The Scheme Creditors here include only holders of Existing Notes. The Debtor's capital structure includes substantial debt governed by Hon Kong law. The Court has no reason to address the COMI of any insolvency or scheme proceeding involving creditors with claims other than holders of the Existing Notes. Creditor expectations in such a case could point to COMI somewhere other than the Cayman Islands.

5. The Debtors Seek Recognition in Good Faith

Many of the cases in which courts have denied recognition of a foreign main proceeding in a debtor's country of incorporation involved instances of bad faith, which are not present in the Debtor's petition for recognition. For example, in *Creative Finance*, the court found that the debtor's principal "and his associates—and hence the Debtors—were guilty of bad faith in numerous respects." 543 B.R. at 513. Among other transgressions, the debtors in *Creative Finance* sought to manipulate a liquidator, ignored important inquiries, and sought to deny a disfavored creditor the opportunity to benefit from the proceeding. *Id.* In contrast, in *In re Fairfield Sentry Ltd.*, 440 B.R. 60, 64-65 (Bankr. S.D.N.Y. 2010), the Court held that "[t]here being no showing of bad faith on the part of the BVI Liquidators, and given that the [d]ebtors are incorporated in and maintain their registered offices in the BVI, the Court finds it more compelling that the [d]ebtor's COMI lies in the BVI." *See also Codere* Transcript at 20:1–21:25 (reasoning that "the lack of objections ***792** and the overwhelming support for the scheme of arrangement in this case suggests that there has not been insider exploitation, untoward manipulation, overt thwarting of third-party expectations.... Those sorts of things could evidence bad faith COMI manipulation.").

SPhinX was even more explicit in its consideration of the Debtor's bad faith as the basis for rejecting recognition. There, the Bankruptcy Court explained that "a primary basis for the Petition, and the investors' tacit consent to the Cayman Islands proceedings as foreign main proceedings, is improper ... this litigation strategy [seeking to frustrate a settlement agreement by exploiting the automatic stay] appears to be the only reason for their request for recognition." *In re SPhinX*, 351 B.R. at 121. The *SPhinX* Court therefore rejected a finding of COMI supporting recognition of a foreign main proceeding, and instead proceeded to consider the existence of a foreign nonmain proceeding not subject to the debtor's bad faith. *Id.*

In *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, the court denied recognition of a Cayman scheme proceeding seeking to restructure an open-end investment firm as either a foreign main or nonmain proceeding. 374 B.R. at 126. The *Bear Stearns* court emphasized the Debtor's operational history, considering the location of its employees, managers, books and records, and liquid assets. *Id.* at 130. The court therefore denied recognition of COMI in the Cayman Islands because the United States, not the Cayman Islands, was "the place where the Funds conduct the administration of their interests on a regular basis." *Id.* However, *Fairfield Sentry* subsequently clarified that:

> A court may look at the period between the commencement of the foreign proceeding and the filing of the chapter 15 petition to ensure that a debtor has not manipulated its COMI in bad faith, but there is no support for [the] contention that a debtor's entire operational history should be considered. The factors that a court may consider in this analysis are not limited and may include the debtor's liquidation activities.

714 F.3d at 138.

The *Fairfield Sentry* court also emphasized that "[t]here was no finding of bad-faith COMI manipulation." *Id.* at 139. In the present case, like in *Fairfield Sentry*, the Debtor is a holding company with subsidiaries that conduct business around the world. (Motion ¶ 7.) The Debtor is similarly engaged in a restructuring proceeding pursuant to the laws of its country of incorporation. (*Id.* ¶ 21.) The *Fairfield Sentry* court explained that "[it] matters that the inquiry under Section 1517 is whether a foreign proceeding '*is pending* in the country where the debtor *has* the center of its main interests.' 11 U.S.C. § 1517(b)(1) (emphasis added)." 714 F.3d at 134. The same is true in this case too.

In *In re Ran*, 390 B.R. 257 (Bankr. S.D. Tex. 2008), the bankruptcy court denied recognition of an Israeli bankruptcy proceeding as either a foreign main or nonmain proceeding. On remand from the district court, the bankruptcy court "decline[d] to make findings on whether or not Lavie [a trustee overseeing the bankruptcy] acted in bad faith." *Id.* at 298. However, the court explained that "[b]y citing favorably to *In re SPhinX*, ... in its order of remand, the district court suggests that a foreign representative's bad faith motive in seeking recognition of a foreign proceeding may appropriately be considered in determining the location of a debtor's center of main interests." *Id.* at 297. Indeed, despite the court's distaste for making findings based upon the debtor's apparent bad faith, the court nevertheless devoted an entire section of its ***793** analysis to the foreign representative's motive. *Id.* at 295. So, while the presence of bad faith did not play an explicit role in the court's decision in *Ran*, the questionable motivations of the foreign representative clearly informed the court's analysis.

In the present case, the Debtor has not engaged in COMI-shifting behavior, nor has it sought to deceive the Court or the Scheme Creditors in its pursuit of a Cayman restructuring. Instead, as discussed above, the Debtor seeks recognition of a proceeding under Cayman law, a fact which the Scheme Creditors likely factored into their decision to conduct business with the Debtor in the first place.[8] Given the absence of COMI-shifting and the Debtor's good-faith petition for recognition under chapter 15, this factor supports recognition of COMI in the Cayman Islands.

IV. CONCLUSION

For the reasons explained above, the Court **FINDS** that the Cayman Islands is the Debtor's COMI. All other requirements for recognition have been satisfied.

Therefore, the Court recognizes the Cayman Proceeding as a foreign main proceeding. Additionally, the Court, in the exercise of discretion, recognizes and enforces the Cayman Scheme.

A separate order will be entered granting the requested relief.

All Citations

641 B.R. 768

Footnotes

1	All dollar amounts are calculated in USD.

2	As of June 30, 2021, the Company's current assets consist of the following: a) inventory of $145.79 million; b) properties under development for sale of $6.92 billion; c) properties held for sale of $895 million; d) trade and other receivables of $1.78 billion; e) amount due from related parties of $129.27 million; f) restricted cash of $570.69 million; and g) bank balances and cash of $2.06 billion. (Motion ¶ 15.)
3	As detailed in Section I.G., below, the Scheme Creditors voted overwhelmingly to approve the Scheme—99% in number and 94.8% in amount. No objections to the Scheme were raised either in connection with the Cayman sanction hearing or this Court's recognition hearing.
4	What *Agrokor* discussed at length (and will not be repeated here) is that English and some commonwealth courts continue to apply the *Gibbs* Rule, based on an 1890 decision of the Court of Appeal in *Antony Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399, which refuses to recognize a discharge or modification of English law governed debt approved by a court outside of England. *See Agrokor*, 591 B.R. at 192-96.
5	The Debtor's argument is misleading. Neither the Debtor nor any of its creditors filed a winding up petition that would have resulted in the appointment by the Cayman court of one or more provisional liquidators, who are independent fiduciaries. *See* Cayman Companies Act §§ 94, 104. Rather, here, the Debtor filed the Scheme Petition under section 86 of the Cayman Companies Act, which does not by itself result in the appointment of JPLs. The benefit of a winding up order is that it enables the court in appropriate cases to issue a moratorium similar to our automatic stay preventing creditors from taking action to recover on their claims while the parties try to reach agreement on a scheme. The Cayman court in this case issued the Convening Order appointing the Debtor's president as the Foreign Representative and scheduling the Scheme Meeting. No JPLs were appointed, meaning that there was no independent fiduciary overseeing the process. The Debtor and its professionals had already negotiated the RSA and were proceeding rapidly to a consensual scheme of arrangement without the necessity of a winding up petition, JPLs and a moratorium. In many Cayman cases where the debtor hopes to negotiate a scheme of arrangement, a winding up order and appointment of JPLs precedes the negotiation of the scheme. Such matters are often referred to as a "light touch" restructuring. *See In the Matter of Midway Resources Int'l*, Grand Court of the Cayman Islands, Cause Number: FSD 51 of 2021 (NSD) (Nicholas Segal J.) (30 March 2021), at [68] ("I am satisfied that this is an appropriate case in which the PLs should be appointed on a soft touch basis (although I would reiterate my plea to substitute 'light-touch' for 'soft touch', since the latter expression has always seemed to me to bring with it associations of someone being duped and defrauded!").
6	Ms. Moran notes that a company would seek the appointment of JPLs and avail of the stay afforded by section 97(1) of the Companies Act to facilitate a restructuring if: (a) there were issues with the propriety of actions taken by management, with a view to suspending the powers of the directors and/or (b) the scheme of arrangement was contentious including where there is a risk that minority creditor(s) might seek to frustrate the restructuring through the presentation of a winding up petition. (Third Moran Decl. ¶ 7.)

7	It would be ironic if a scheme proceeding, following the appointment of JPLs in a contentious case where JPLs were needed to facilitate agreement between the debtor and its creditors, was recognized as a foreign main proceeding, but in a case such as this one where the Debtor and its professionals successfully negotiated the RSA with overwhelming creditor support without the need to file a winding up petition and the appointment of JPLs before obtaining sanction of the Scheme could not be recognized as a foreign main proceeding.
8	*See Suntech*, 520 B.R. at 418: Nor does the evidence support a finding that the Debtor's creditors would have expected it to restructure its businesses in China. The Debtor's largest creditor group was the Noteholders. The Indenture was governed by New York law and the parties to the Indenture submitted to the non-exclusive jurisdiction of the New York state and federal courts. In addition, when the representatives ... who held approximately 50% of the debt, met with the Debtor's representatives, they urged the Cayman Islands as the most logical restructuring venue. The Debtor was incorporated in the Cayman Islands and the Cayman Islands employed a predictable, flexible and cost effective method for dealing with restructuring.

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HCMP 2227/2021 & HCCW 81/2021
(HEARD TOGETHER)
[2022] HKCFI 1686

HCMP 2227/2021

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
MISCELLANEOUS PROCEEDINGS NO 2227 OF 2021

IN THE MATTER of Rare Earth Magnesium Technology Group Holdings Limited 稀鎂科技集團控有限公司 (Provisional Liquidators Appointed) (For Restructuring Purposes Only)

and

IN THE MATTER of Sections 670, 671, 673, and 674 of the Companies Ordinance (Cap 622)

AND

HCCW 81/2021

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
COMPANIES WINDING-UP PROCEEDINGS NO 81 OF 2021

IN THE MATTER of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Chapter 32)

and

IN THE MATTER of Rare Earth Magnesium Technology Group Holdings Limited 稀鎂科技集團控有限公司 (Provisional Liquidators Appointed) (For Restructuring Purposes Only)

(HEARD TOGETHER)

Before: Hon Harris J in Court

Date of Hearing: 27 May 2022

Date of Decision: 27 May 2022

Date of Reasons for Decision: 6 June 2022

REASONS FOR DECISION

Introduction

1. I have before me:

(1) the Company's Petition seeking the Court's:

(a) sanction under *section 673* of the *Companies Ordinance* (Cap. 622) ("**Ordinance**") of a scheme of arrangement between the Company and its Scheme Creditors; and

(b) approval of certain amendments to the Scheme providing for improved recovery for the Scheme Creditors.

(2) The Petition issued by AI Global Investment SPC on 22 February 2021 to wind up the Company ("**Winding-Up Petition**"), which the Company asks me to dismiss and order that the costs are paid by the Petitioner. I deal with this in [44].

2. On 12 January 2022 I made an order for the Company to convene a meeting of its creditors to consider a proposed scheme of arrangement restructuring its debt ("**Convening Order**"). After an adjournment, the Scheme Meeting was duly convened on 1 March 2022. At the Scheme Meeting the resolution was carried by a majority in number of the Scheme Creditors present and voting, in person or by proxy, holding 79.06% of the Claims voted. Specifically, 9 out of the 10 Scheme Creditors voted for the Scheme.

3. The Scheme seeks to restructure the Company's indebtedness in order to return the Company to a solvent going concern. A successful restructuring would give the Scheme Creditors a much higher recovery (estimated to be 100% of the principal under the Scheme's Term Extension Option). Absent restructuring, the Company would be liquidated and the Scheme Creditors' estimated recovery would be approximately 8.5% to 23.1%.

4. The background to the Company and the need for the Scheme are in brief as follows. The Company is a Bermuda-incorporated entity and its shares have been listed on the Main Board of The Stock Exchange of Hong Kong Limited ("**SEHK**") since 28 January 1993. The Company is an investment holding company. The Company's subsidiaries are principally located in Hong Kong, Mainland China, and the British Virgin Islands. The Company is also part of a wider group ("**Group**") ultimately held by Century Sunshine Group Holdings Limited ("**Century Sunshine**") which is an exempted company incorporated in the Cayman Islands and listed in Hong Kong (Stock Code: 509).

5. The Group's key businesses consist of the development and production of green fertilisers, including ecological fertilisers, functional

fertilisers and general fertilisers; a with the primary production bases in the Jiangsu Province and Jiangxi Province; and the production of magnesium in the Jilin Province and Xinjiang Uyghur Autonomous Region.

6. The Company is the key operator of the magnesium alloy production business segment of the Group and indirectly owns the relevant production bases in the Mainland. Despite enjoying strong growth and profitability in the past, the Group's financial position deteriorated in 2020 due to COVID-19. The Company is at least cashflow insolvent. The Company's management accounts as of 31 December 2021 stated that the Company had net assets of HK$1,138,523,000 and net current liabilities of HK$613,477,000.

7. The Company's principal indebtedness arises from unsecured interest-bearing bonds issued by the Company, which are governed by Hong Kong law. As of 31 December 2021, the Company's total indebtedness was approximately HK$852,533,000 owed to 10 Scheme Creditors. The Company is likely to go into liquidation unless its current indebtedness can be restructured. On 22 February 2021, a creditor (AI Global Investment SPC) presented a winding-up petition against the Company in Hong Kong ("**Petition**"). The Petition hearing has been adjourned to 27 May 2022 so that the Court may consider both the Scheme's progress and the Petition together.

8. Before the Petition was issued, the Company sought the appointment of soft-touch provisional liquidators ("**PLs**") in Bermuda:

(1) On 3 July 2020, the Company filed a winding-up petition in Bermuda against itself.

(2) On 16 July 2020, the Bermuda court appointed the PLs to assist in and facilitate the Company's debt restructuring.

9. On 25 August 2020, I recognised the PLs in Hong Kong: *Re Rare Earth Magnesium Technology Group Holdings Ltd*[1].

10. To avoid liquidation and to return the Company to a solvent going concern, the Company (with the PLs' assistance) has been pursuing a debt restructuring leading to the Scheme. The Scheme seeks to discharge the Company's unsecured indebtedness, which would also entail releasing the Scheme Creditors' right to enforce guarantees granted by Century Sunshine (Clauses 1 and 2 of the Scheme). In return, the Scheme Creditors will be given a choice to choose either the Term Extension Option, the Convertible Bonds Swap Option, or a combination of both (Clause 7 of the Scheme).

11. Under the Term Extension Option, the Scheme Creditors' Claim repayment deadline will be extended for five years, during which the Scheme Creditors will be entitled to receive the Term Extension Interest, Interim Payments, and the Final Payment; and where applicable the Early Repayment and Term Extension Potential Extra Payment (Clauses 7.2 to 7.10 of the Scheme).

12. Under the Convertible Bonds Swap Option, the Scheme Creditors' Claim will be converted into Convertible Bonds which will mature in five years. The Convertible Bonds do not carry any interest and may be converted into the Conversion Shares during the conversion period. Unless previously redeemed or converted, the Company shall redeem the

[1] [2020] HKCFI 2260; [2020] HKCLC 1295.

Convertible Bonds on the maturity date at the redemption amount which shall be equal to 100% of the outstanding principal amount (Clause 7.14 of the Scheme).

13. To give additional comfort to the Scheme Creditors who choose the Term Extension Option, the following are offered to those Scheme Creditors:

(1) Century Sunshine is pursuing its own debt restructuring via the Century Sunshine Proposed Scheme. If there are surplus assets resulting from the Century Sunshine Proposed Scheme, the surplus assets are intended to be transferred to the Scheme Company for distribution to the Option A Creditors (Clause 7.11 of the Scheme).

(2) Century Sunshine will provide a corporate guarantee to the Scheme Company to guarantee the punctual payment of the Interim Payment(s) (if payable) and the Final Payment (Clause 7.12 of the Scheme).

(3) The Company's various subsidiaries will provide security interests and corporate guarantees to the Scheme Company to secure the Final Payment (Clause 7.13 of the Scheme).

14. In addition, the Scheme Creditors who have executed the Consenting Agreement will be given a consent fee in cash amounting to 3% of the principal amount of the debt owed by the Company to the Scheme Creditors (Clause 9 of the Scheme).

15. The Scheme Creditors' recovery under the Term Extension Option is estimated to be 100% of the principal, whereas in a liquidation the Scheme Creditors' recovery is estimated to be approximately 8.5% to 23.1%.

16. The Company does not need any parallel scheme of arrangement in any jurisdiction.

Relevant Principles

17. In considering whether to sanction a scheme, the Court applies some well-established principles which I recently restated in *Re China Singyes Solar Technologies Holdings Ltd*[2]. The Court considers in particular the following:

(1) whether the scheme is for a permissible purpose;

(2) whether creditors who were called on to vote as a single class had sufficiently similar legal rights such that they could consult together with a view to their common interest at a single meeting;

(3) whether the meeting was duly convened in accordance with the Court's directions;

(4) whether creditors have been given sufficient information about the scheme to enable them to make an informed decision on whether or not to support it;

(5) whether the necessary statutory majorities have been obtained;

(6) whether the Court is satisfied in the exercise of its discretion that an intelligent and honest man acting in accordance with his interests as a member of the class within which he voted might reasonably approve the scheme; and

(7) in an international case, whether there is sufficient connection between the scheme and Hong Kong, and whether the scheme is effective in other relevant jurisdictions.

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[2] [2020] HKCFI 467; [2020] HKCLC 379 at [7].

18. As in *Singyes*, the Scheme is a genuine debt restructuring of a distressed company. It is also a permissible purpose to compromise via the Scheme guarantees granted by Century Sunshine (see *Re Century Sun International Ltd*[3]).

19. In considering whether creditors are properly classified, the test is whether creditors who are called on to vote as a single class have sufficiently similar legal rights that they could consult together with a view to their common interest at a single meeting. The relevant principles may be summarised as follows:

(1) The overarching question is whether the pre and post-scheme rights of those proposed to be included in a single class are so dissimilar as to make it impossible for them to consult with a view to their common interest. If that is the case, separate meetings must be summoned.

(2) The second principle is that it is the rights of creditors, not their separate commercial or other interests, which determine whether they form a single class or separate classes. Conflicting interests will normally only ever arise at the sanction stage as a question for consideration.

(3) The third principle is that the court should take a broad approach to the composition of classes, so as to avoid giving unjustified veto rights to a minority group of creditors, with the result that the test for classes becomes an instrument of oppression by a minority.

(4) The fourth principle is that the court has to consider, on the one hand, the rights of the creditors in the absence of the scheme and, on the other hand, any new rights to which the creditors become entitled under the scheme. If, having carried

[3] [2021] HKCFI 2928; [2021] HKCLC 1477 at [15]–[17].

out that exercise, there is a material difference between the rights of the different groups of creditors, they may, but not necessarily will, constitute different classes. Whether they do so depends on a judgment as to whether such a difference makes it impossible for the different groups to consult together with a view to their common interest.

(5) In applying the above test, the starting point is to identify the appropriate comparator: that is, what would be the alternative if the scheme does not proceed.

See *Re China Oil Gangran Energy Group Holdings Ltd*[4].

20. The Scheme Creditors correctly voted as a single class for these reasons:

(1) The appropriate comparator here is an insolvent liquidation because, absent the Scheme, an insolvent liquidation of the Company would be an unavoidable outcome.

(2) The Scheme Claims are the Company's general unsecured debts.

(3) All Scheme Creditors are given the same options for distribution under the Scheme.

21. The Convening Order has been complied with. This is explained by Mr Chi in his 2nd affirmation which confirms the circulation of the notice of the Scheme Meeting, Explanatory Statement and Scheme. The advertisement of the Scheme Meeting was duly placed in The Standard and Sing Tao Daily on 18 January 2022.

[4] [2021] HKCFI 1592; [2021] HKCLC 911 at [15]–[16].

22. During the Scheme Meeting held on 15 February 2022, the Chairman adjourned the Scheme Meeting to 1 March 2022 in view of the impending amendments to the Scheme resulting from negotiations with a major Scheme Creditor. This was permissible. The Chairperson could validly adjourn the Scheme Meeting to allow the Scheme Creditors sufficient opportunity to consider proposed amendments to the Scheme (see *Re Peninsula and Oriental Steam Navigation Company*[5]; *aff'd The Peninsular and Oriental Steam Navigation Company v Eller and Co*[6]; *Re CIL Holdings Ltd*[7]).

23. On 23 February 2022, the Company circulated the revised Scheme to all Scheme Creditors. The adjourned Scheme Meeting on 1 March 2022 duly voted in favour of the Scheme. The requirements under *section 674(1)(b)* of the *Ordinance* that the Scheme be approved by a majority in number representing at least 75% in value of the Scheme Creditors present and voting in person or by proxy have been satisfied.

24. To satisfy the requirements of *section 671(3)* of the *Ordinance*, an explanatory statement must be sufficiently informative:

> "A company is under a duty to include in the explanatory statement all the information necessary to enable the creditors to form a reasonable judgement on whether the scheme is in their best interests or not, and hence how to vote. The extent of the information required to be provided will, of course, depend on the facts of the particular case. Necessarily, the duty extends to the company providing up to date information, or an adequate explanation of why it has not done so, that will allow a creditor to contrast what is to be anticipated if the scheme is approved, and the outcome if it is not. A company is required to provide specific financial information to support its predicted outcomes, and I would normally expect it to have its views independently

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5 [2006] EWHC 389 (Ch) at [34], [49], [54]–[55] (Warren J).
6 [2006] EWCA Civ 432.
7 (Unrep., HCMP 2799/2002, 2 April 2003) at [8]–[12] and [18] (Kwan J).

> verified by an insolvency practitioner or other suitable professionals."[8]

The Explanatory Statement satisfies these requirements.

25. The Court is slow to differ from the majority views, as it normally acts on the principle that businessmen are much better judges of what is to their commercial advantage than the court could be: *Re Allied Properties (HK) Ltd*[9]. The primary object of the Scheme is that, upon the Scheme becoming effective, the Scheme Creditors' Claims will be discharged and in return they will be entitled to be given a cash distribution, convertible bonds or a combination of both under the terms of the Scheme. The Scheme consideration provides the Scheme Creditors with a much better return than in an insolvent liquidation of the Company. Therefore, in respect of the Scheme Creditors, the Scheme is one that an intelligent and honest person acting in accordance with his interests as a member of the class within which he voted might reasonably approve.

Transnational Cases

26. The business group of which the Company is an intermediate subsidiary carries on business in Jiangsu, Jiangxi and Jilin Provinces and the Xinjiang Uyghur Autonomous Region. The ultimate holding company is incorporated in the Cayman Islands and listed on the SEHK. The Company is incorporated in Bermuda. The debt to be compromised by the Scheme is very largely governed by Hong Kong law.

27. In transnational cases, the Court considers whether a scheme is effective in other foreign jurisdictions of practical importance because it

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[8] *Re Century Sun International Ltd, supra*, footnote 3 at [23].
[9] [2020] HKCA 973; [2020] HKCLC 1549 at [37].

would not be a proper exercise of the discretion to sanction a scheme if it serves no purpose. In practice whether or not a jurisdiction is of practical importance to the efficacy of a scheme sanctioned in Hong Kong will commonly be determined by the following considerations:

(1) Is a material amount of debt to be compromised by a scheme governed by the law of a jurisdiction other than Hong Kong?

(2) Even if there is some doubt as to whether or not a scheme will compromise a proportion of the debt, is there any reason to think that the creditors will take action in a jurisdiction which will not recognise a scheme as compromising the debt?

(3) The amount of the debt involved. If, for example, the amount of debt that is not governed by Hong Kong law is less than the cost of introducing a parallel scheme it makes more sense to exclude that debt from the scheme and settle it separately if it is ever pursued: *China Oil*[10].

28. Although there is no parallel scheme or recognition application in any jurisdiction, the Scheme is expected to be internationally effective, in particular in Bermuda and Cayman Islands, because all the Claims are governed by Hong Kong law. As Miles J recently observed in, *Re PGS ASA*[11], in an English law context:

> "There is no requirement for a scheme to be effective in every jurisdiction worldwide, provided that it is likely to be effective in the key jurisdictions in which the company operates or has assets. Where the governing law of the debt affected by the scheme is English law, it is inherently likely that the scheme will be recognised abroad."

[10] *Supra*, footnote 4 at [21]–[23].
[11] [2021] EWHC 222 (Ch) at [29] (Miles J).

29. The expectation that the discharge of Hong Kong law-governed debt effected by a Hong Kong scheme of arrangement will be recognised abroad is justified because the discharge occurs as a matter of substantive Hong Kong law. This is certainly to be expected of a jurisdiction, which applies, what is commonly known as, the Rule in *Gibbs*. The Rule in *Gibbs*[12] provides that a debt is treated as discharged if compromised in accordance with the law of the jurisdiction, which governed the instrument giving rise to the debt. As far as I am aware, at the time of this decision *Gibbs* is followed in Bermuda, Cayman Islands and the other offshore jurisdictions. If a creditor submits to the jurisdiction of a foreign insolvency process he is taken to have accepted that his contractual rights will be governed by the law of the foreign insolvency process[13]. Consequently, a scheme sanctioned by the court of an offshore jurisdiction compromising debt governed by Hong Kong law will be treated in Hong Kong as binding on a creditor, who submitted to the foreign jurisdiction. It will not bind a creditor, who did not participate in the scheme proceedings or any associated insolvency process in the foreign jurisdiction.

30. Although not material in the present case, it is common for Mainland business groups listed in Hong Kong to raise US$ denominated debt and for the relevant agreements to be governed by United States law. A technique was established in about 2016 to compromise such debt by introducing a scheme in Hong Kong that would be recognised in the United States[14]. This would not be inconsistent with the Rule in *Gibbs*. As I explain in *Winsway*[15]:

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12 *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399.
13 *China Oil supra* [24] referring to *China Singyes supra* [18(2)].
14 See in particular *Re Winsway Enterprises Holdings Ltd* [2017] 1 HKLRD 1; [2016] HKEC 2495.
15 *Ibid* [36].

> "The second issue is answered by the Privy Council's decision in *New Zealand Loan and Mercantile Agency Co v Morrison*[16]. The Privy Council held, applying *Gibbs*, that a scheme of arrangement sanctioned in England under the *Joint Stock Companies Arrangement Act 1870* did not prevent a claim being brought in Victoria in respect of a debt governed by the law of Victoria. It did, however, bind all creditors '*wherever the creditors may be found, whether in the United Kingdom or in the Colonies or in foreign countries; and within the jurisdiction of the English Courts, all, wherever domicile, will be bound by the result.*'[17] The Scheme will, therefore, prevent action being taken within the jurisdiction of the Hong Kong courts regardless of the governing law of the debt. This is one of the principal reasons for introducing a scheme such as the present one. It will prevent action being taken in Hong Kong by a dissident creditor, which interferes with the Company's listed status."

31. A creditor could not take enforcement action within the United States as a consequence of recognition of the scheme under *Chapter 15* and granting by the relevant Bankruptcy Court of ancillary relief which prohibited enforcement in the United States. As the offshore jurisdictions apply the Rule in *Gibbs*, such a scheme might not be effective to compromise the debt of a creditor, who has not submitted to the jurisdiction of the Hong Kong court. Whether or not it is necessary to introduce a parallel scheme in the offshore jurisdiction will depend on the factors that I consider in [23]–[29] of *China Oil*[18].

32. A scheme sanctioned in an offshore jurisdiction and recognised under *Chapter 15* in the United States will not be treated by a Hong Kong court as compromising US$ debt. The Rule in *Gibbs* requires the substantive alteration of contractual rights to be sanctioned by some substantive provision of the relevant law[19]. In the insolvency context in the United States this is I understand is achieved under *Chapter 11* of

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16 [1898] AC 349.
17 Lord Davey pp357–8.
18 *Supra.*
19 *In re OJSC International Bank of Azerbaijan Bakhshiyeva v Sberbank of Russia* [2018] Bus LR 1270, 1308, [158(2)] (Hildyard J).

United States Bankruptcy Code. This is explained by Glenn J (who dealt with the *Chapter 15* application in *Winsway*[20]) in his judgment in *In re Agrokor d.d*[21]. In pages 184 to 185 Glenn J explains the position as follows:

> "The Supreme Court concluded in *Tennessee Student Assistance Corp. v. Hood*, 541 U.S. 440, 447, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004), that the discharge of debt in a U.S. bankruptcy proceeding is proper because it is an *in rem* proceeding. A single court should resolve all claims to property of the debtor, which necessarily requires that the court resolve all creditor claims that have been, or could have been, asserted, provided that the creditors have received the notice required by due process. Thus, in an *in rem* proceeding, personal jurisdiction over all creditors is not required; the court determines the creditors' rights to receive distributions from all property of the debtor that is part of the estate. A creditor cannot ignore or avoid a Chapter 11 case and later sue to recover on its prepetition claim. Upon confirmation of a Chapter 11 plan, section 1141 (d)(1)(A) discharges the debtor from any debt that arose before the date of confirmation, whether or not the creditors filed a proof of claim or accepted the plan…"

33. As a matter of United States law a confirmed *Chapter 11* plan operates to discharge the existing debt of a debtor and replace it with a right to receive a distribution in accordance with the confirmed plan. This is also the effect of a sanctioned scheme. Glenn J goes on at the end of the paragraph I have quoted to refer to the same principles applying to recognition of a foreign insolvency process with the same consequences, however, it is clear from reading the judgment as a whole that recognition under *Chapter 15* does not operate as a discharge and that Glenn J acknowledges this.

34. On page 185 Glenn J introduces an objection to recognition based on the fact that some of the debt compromised by the arrangement

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[20] *Supra*.
[21] 591 B.R. 163 (Bankr. S.D.N.Y. 2018).

Glenn J was asked to recognise was governed by English law and the arrangement arose under Croatia's *Act of the Extraordinary Administration Proceedings in Companies of Systemic Importance of the Republic of Croatia*.

> "From the record before this Court—particularly since no objections have been filed—the Court concludes that the Croatian Proceeding was procedurally fair, provided proper notice to all creditors and, through the Settlement Agreement, determined the rights of all creditors to property that was subject to the jurisdiction of the Croatian Court. Is there any reason, then, not to recognize and enforce the Settlement Agreement within the territorial jurisdiction of the United States? This Court believes there is not. Nonetheless, the issue (of whether recognition of the entire Settlement: Agreement is appropriate within the territorial U.S.) arises because of the English courts' enforcement of the *Gibbs* rule, discussed below, which could lead an English court to conclude that certain aspects of the Settlement Agreement cannot be enforced in England against creditors holding English law governed debt. Such a refusal of the English court to enforce parts of the Settlement Agreement would most certainly cause the Settlement Agreement to fall considering the amount of prepetition debt governed by English law.[22] That would be unfortunate, indeed."

35. The material distinction between *Chapter 11* and *Chapter 15* proceedings is explained on page 187:

> "Section 1520 details the mandatory relief that is automatically granted upon recognition of a foreign main proceeding under Chapter 15. 11 U.S.C. § 1520. Section 1520(a)(1) provides that the automatic stay will apply to all the debtor's property *that is located within the territorial jurisdiction of the United States*. The statute refers specifically to the property of the debtor, as opposed to the property of the estate, since there is no estate in a Chapter 15 case. *See, e.g., Atlas Shipping*, 404 B.R. at 739. Despite this difference, the automatic effect of recognition of a foreign main proceeding under section 1520(a) is an imposition of an automatic stay on any action regarding the debtor's property located **in the United States. *Id.***" (emphasis added)

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[22] As Chief Justice Waite said in *Gebhard*, 109 U.S. at 539, 3 S.Ct. 363, "[u]nless all parties in interest, wherever they reside, can be bound" by the arrangement which is sought to have legalized, the scheme may fail. All home creditors can be bound. What is needed is to bind those who are abroad. Under these circumstances the true spirit of international comity requires that schemes of this character, legalized at home, should be recognized in other countries."

36. It is clear from this passage that recognition under *Chapter 15* operates procedurally to prevent action by a creditor against a debtor's property in the United States. Recognition does not appear as a matter of United States' law to discharge the debt. Consistent with this at page 196 Glenn J states that it is appropriate to extend comity within the territorial jurisdiction of the United States. Unlike a discharge under *Chapter 11* which purports to have worldwide effect, recognition under *Chapter 15* is limited in territorial effect and I think it is reasonable to assume that the reason for this is that the procedure does not discharge the debt.

37. There is a distinction between a court treating a compromise as having the substantive legal effect of altering the legal rights of the parties to an agreement (the issue with which *Gibbs* is concerned) and a court within its jurisdiction recognising, pursuant to a process such as *Chapter 15*, the purported legal consequence of a foreign insolvency procedure. This is a distinction to which advisers need to be alert when dealing with transnational restructuring. A scheme in an offshore jurisdiction purporting to compromise debt governed by United States law will not be effective in Hong Kong. Recognition of the scheme under *Chapter 15* does not constitute a compromise of debt governed by United States law, which satisfies the Rule in *Gibbs*. The result is that if a company has a creditor, which did not submit to the jurisdiction of the offshore court the creditor will be able to present a petition in Hong Kong to wind up the Company and if, for example, the creditor is a bond holder whose debt is not disputed, obtain a winding up order unless the debt is settled. I note that there appears to be a surprisingly large number of Mainland business groups listed in Hong Kong, whose US$ denominated debt has recently been subject to schemes only in offshore jurisdictions and

recognition under *Chapter 15*[23]. It may be that all the creditors of these companies, which hold debt of any material value have agreed to the terms of the compromise, but if that is not the case such companies, and any that might adopt a similar model in future, will be at risk of a petition being presented against them in Hong Kong and being wound up here. An offshore scheme and *Chapter 15* recognition will not protect them.

Modification of the Scheme

38. The Company seeks to modify the Scheme terms slightly in order to accommodate SEHK's comments on the structure of the Term Extension Share Placement. The amendments are in summary as follows:

(1) Subject to complying with the public float requirement, the Company will issue in one lot all shares under the Term Extension Share Placement, instead of five instalments as originally proposed.

(2) The Term Extension Interest payable to the Scheme Creditors will no longer be subject to any cap; the original proposal was a 5% cap.

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[23] By way of example: Hilong Holding Limited (Stock Code 1623), GCL New Energy Holdings (Stock Code: 451), MIE Holdings Corporation (Stock Code: 1555), Golden Wheel Tiandi Holdings Company Limited (Stock Code: 1232), Modern Land (China) Co., Limited (Stock Code: 1107) and E-House (China) Enterprise Holdings Limited (Stock Code: 2048). In *Winsway* the scheme was recognised because the Hong Kong proceedings to introduce a scheme were found by Glenn J to constitute "*foreign non-main proceedings*" as defined in the **UNCITRAL Model Law** as incorporated in *Chapter 15*, on the basis that the Company was listed on the SEHK: *supra* [37]. My understanding is that it was thought by *Winsway's* legal advisers that the Company's COMI might be in the Mainland and, therefore, the proceedings in Hong Kong would not constitute "*foreign main proceedings*" and the *Chapter 15* application was framed accordingly. For obvious reasons it is unlikely that any of the Mainland companies to which I have referred have their COMI in an offshore jurisdiction or an establishment as defined in paragraph (f) of Article 2. Article 16 paragraph 3 provides that "*In the absence of proof to the contrary, the debtor's registered office ..... is presumed to be the centre of the debtor's main interests*". I would have thought that it would be apparent from evidence filed in support of an application for recognition under *Chapter 15* explaining a scheme and its background that most, if not all, of these companies do not have their COMI in the place of incorporation. As I explain in [20] of my decision in *Li Yiqing v Lamtex Holdings Limited* [2021] HKCFI 622; [2021] HKCLC 329, referring to *Creative Finance Ltd* Case No. 14–10358 (REG) 13 January 2016, my understanding is that offshore jurisdictions are not normally eligible for recognition under *Chapter 11*.

(3) The Company will have no liability for the Scheme Costs. All Scheme Costs will be settled solely from the Term Extension Share Placement Proceeds.

39. The Company seeks the Court's permission to modify the Scheme terms to meet SEHK's requirements. In this connection, the Company relies on Clause 119 of the Scheme:

> "The Scheme Administrators may jointly consent for and on behalf of all concerned to any modification of or addition to the Scheme or to any condition the Court may see fit to approve or impose at any hearing of the Court to sanction or give directions in respect of the Scheme, whether in accordance with Section 670 of the Companies Ordinance or otherwise… If the Court approves a modification or addition to the Scheme without the need to convene a meeting of the Scheme Creditors to vote on the modification, such modification or addition shall be binding on the Company and the Scheme Creditors provided that no further obligations or liabilities should be imposed on the Company and that the Company should not be adversely affected by reason of such modification or addition."

40. I permit the post-Scheme Meeting modifications. The proposed modifications seek only to improve the Scheme Creditors' recovery and thus by definition would not prejudice any Scheme Creditors. Had the proposed modifications been before the Scheme Meeting, they would not have made any difference to the outcome of the Scheme Meeting. There is no question of the Court, by approving these modifications, "foisting" on the Scheme Creditors anything other than what they voted on at the Scheme Meeting. In these circumstance, allowing the proposed modifications would be entirely consistent with authority: *Re China Saite Group Co Ltd*[24].

[24] [2022] HKCFI 1128 at [8].

Determination

41. The Scheme is a legitimate debt restructuring scheme which has complied with all the statutory requirements and has received the requisite Scheme Creditors' support after exercising their independent business judgment and will achieve its intended purpose. I will, therefore, make an order sanctioning the Scheme in the form of the draft order submitted to Court, which is in conventional terms.

Listing of Schemes, recognition applications and applications to appoint Provisional Liquidators

42. Mr Look Chan Ho for the Company told me at the hearing that there appears some confusion among practitioners about the procedural and jurisdiction aspects of the current scheme practice. It will be helpful if I clarify this. As I thought had been brought to practitioners' attention, although Linda Chan J has taken over the role of Companies Judge, because of the amount of cases in the Companies List I will continue to deal with particular types of applications if my diary permits and in the first instance solicitors should approach my clerk for dates. If I am not able to deal with them I will liaise with Linda Chan J. The following matters should be referred to my Clerk in the first instance for dates and listing:

(1) Schemes of arrangement and capital reductions;

(2) applications to appoint provisional liquidators; and

(3) applications for recognition and assistance of foreign provisional liquidators and liquidators.

43. I would also remind practitioners of my guidance in *Re Enice Holding Co Ltd*[25]:

[25] [2018] HKCFI 1736; [2018] HKCLC 305 at [49].

> "I would emphasise that the Companies Court expects solicitors to proceed as follows when acting for parties introducing schemes or capital reductions. As soon as they are instructed to proceed with a scheme or capital reduction they should approach the Companies Judge's clerk to obtain dates, which it is reasonable to expect the company to meet. Counsel should be instructed who are available on the allocated dates and the Company should work towards those dates. The Companies Court should not be expected to fit in with the convenience of companies and solicitors should make this clear to those instructing them."

The Winding Up Petition

44. The Company seeks an order dismissing the Winding-Up Petition. The Petitioner, who appeared today through Justin Ho did not object, but the Petitioner seeks its costs. Costs are controversial. As Recorder William Wong SC heard that substantive hearing of the Winding-Up Petition and will determine the costs of that hearing it seems to me that he should also deal with the other costs of the Petition, which I anticipate are small.

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

Mr Look Chan Ho, instructed by Gall, for the company (in both actions)

Mr Justin Ho, instructed by DLA Piper Hong Kong, for AI Global Investment SPS (the creditor in HCMP 2227/2021 & the petitioner in HCCW 81/2021)

Attendance of the Official Receiver was excused (in HCCW 81/2021)

CITATION: YRC Freight Canada Company (Re), 2023 ONSC 4492
COURT FILE NO.: CV-23-00704038-00CL
DATE: 2023-08-08

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C 36, AS AMENDED

AND IN THE MATTER OF YRC FREIGHT CANADA COMPANY, YRC LOGISTICS INC., USF HOLLAND INTERNATIONAL SALES CORPORATION AND 1105481 ONTARIO INC.

APPLICATION OF YELLOW CORPORATION UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

Applicant

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *Caroline Descours, Andrew Harmes and Brennan Caldwell,* for the Applicant

Jane Dietrich and Natalie Levine, for Alvarez & Marsal Canada (Proposed IO)

Ben Muller, for Apollo Capital Management LP (DIP Lender)

HEARD: August 8, 2023

ENDORSEMENT

[1] This Application was brought under Part IV of the *Companies' Creditors Arrangement Act* (the "CCAA") and section 106 of the *Courts of Justice Act* (the "CJA") by Yellow Corporation (the "Yellow Parent") as the proposed foreign representative of YRC Freight Canada Company ("YRC Freight Canada"), YRC Logistics Inc. ("YRC Logistics"), USF Holland International Sales Corporation ("USF") and 1105481 Ontario Inc. ("1105481, and collectively with YRC Freight Canada, YRC Logistics and USF, the "Canadian Debtors") for an interim stay of proceedings in connection with the chapter 11 proceedings (the "Chapter 11 Cases") commenced by the Yellow Parent and certain of its affiliates (collectively, the "Debtors"), including the Canadian Debtors, in the United States Bankruptcy Court for the District of Delaware (the "U.S. Bankruptcy Court").

[2] Capitalized terms not otherwise defined have the meanings set out in the Affidavit of Matthew A. Doheny, Chief Restructuring Officer of Yellow Parent, sworn August 7, 2023 (the "Doheny Affidavit").

[3] Yellow Parent contends that it has faced a severe liquidity crisis in recent months resulting in large part due to the inability to implement the Company's strategic initiative, referred to as "One Yellow", that was intended to modernize Yellow's business and upgrade the efficiency of its operations. Yellow Parent states that the inability to implement the One Yellow initiative significantly impaired the Company's liquidity and efforts to refinance its $1.2 billion in debt maturing in 2024 or 2026.

[4] In an effort to preserve value and effect an orderly wind-down of the business, the Debtors commenced the Chapter 11 Cases on August 6, 2023 by filing voluntary petitions for relief (the "Petitions") under chapter 11 of title 11 of the United States Code (the "U.S. Bankruptcy Code") in the U.S. Bankruptcy Court. The Debtors are scheduled to appear before the U.S. Bankruptcy Court on August 9, 2023 for a hearing (the "First Day Hearing") to seek various first day orders pursuant to the U.S. Bankruptcy Code (the "First Day Orders"), including, among other things, an order appointing the Yellow Parent as the foreign representative of the Chapter 11 Cases (in such capacity, the "Foreign Representative").

[5] At this time, the Yellow Parent, as the proposed Foreign Representative of the Chapter 11 Cases, is requesting an order from this Court granting a stay of proceedings (the "Interim Stay") in respect of the Canadian Debtors and the Yellow Parent in Canada (the "Interim Stay Order"). If the U.S. Bankruptcy Court grants the requested First Day Orders, the Yellow Parent anticipates returning before this Court to seek two additional orders:

(a) an order (the "Initial Recognition Order"), among other things, (i) declaring the Yellow Parent as the Foreign Representative in respect of the Chapter 11 Cases and (ii) recognizing the Chapter 11 Cases as a "foreign main proceeding" in respect of the Canadian Debtors; and

(b) an order (the "Supplemental Order"), among other things, (i) recognizing certain First Day Orders, (ii) appointing Alvarez & Marsal Canada Inc. ("A&M") as the information officer in respect of these proceedings (in such capacity, the "Information Officer"), (iii) granting an administration charge over the assets and property of the Canadian Debtors in Canada in favour of Canadian counsel to the Canadian Debtors, the Information Officer and counsel to the Information Officer, (iv) granting a directors' charge over the assets and property of the Canadian Debtors in Canada in favour of the directors and officers of the Canadian Debtors to secure the Canadian Debtors' indemnification obligations, and (v) granting a charge over the assets and property of the Canadian Debtors in Canada to secure the interim financing that has been negotiated by the Debtors (the "DIP Financing").

[6] The Canadian Debtors are YRC Freight Canada, YRC Logistics, USF and 1105481.

(a) YRC Freight Canada: YRC Freight Canada is the primary operating company in Canada. It was incorporated under the laws of Nova Scotia with its registered office in Halifax, Nova Scotia. It specialized in shipments

into, across and out of Canada, offering Canadian shippers a selection of direct connections within Canada and throughout North America. YRC Freight Canada owns three transportation service centres (two in Ontario and one Quebec), and leases 13 additional transportation service centres across British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and Quebec, six of which are in Ontario. YRC Freight Canada was completely integrated within the larger YRC Freight brand to provide seamless cross-border service. YRC Freight Canada is the only Canadian Debtor that generates revenue. Its revenue was $89.8 million during the 12 months ended December 31, 2022, which represented approximately 2% of Yellow's consolidated revenue for such period.

(b) YRC Logistics: YRC Logistics is a corporation incorporated under the laws of Ontario with its registered office in Ottawa, Ontario. YRC Logistics is a wholly-owned direct subsidiary of YRC Logistics Services, Inc., an Illinois company, which is also a Debtor, and is largely inactive.

(c) USF: USF is a corporation incorporated under the laws of Nova Scotia with its registered office in Halifax, Nova Scotia. USF is a wholly-owned direct subsidiary of USF Holland LLC, a Delaware company, which is also a Debtor. USF is a dormant company with no operations, employees or assets.

(d) 1105481: 1105481 is a corporation incorporated under the laws of Ontario with its registered office in Ottawa, Ontario. 1105481 is a wholly-owned direct subsidiary of the Yellow Parent. As of the Petition Date, 1105481 has no assets or operations.

[7] As of approximately July 27, 2023, the Canadian Debtors had approximately 584 employees, all of whom were employed by YRC Freight Canada. Of these employees, approximately 563 were full-time employees and approximately 21 were part-time employees. Approximately 428 employees were hourly employees, and approximately 156 were salaried employees. Approximately 421 of YRC Freight Canada's employees are represented by the Union.

[8] The issue to be considered on this application is whether this Court should grant the Interim Stay Order providing for the Interim Stay in Canada.

[9] This Court has previously granted interim orders providing for a temporary stay of proceedings in Canada following the initiation of Chapter 11 (See: *Lightsquared LP, Re*, 2012 ONSC 2994 at para 3; *Paladin Labs Canadian Holding Inc.,* 2022 ONSC 4748 at para 20 [*Paladin Interim Stay Endorsement*]).

[10] In *Paladin Labs Inc.*, I observed that granting the interim stay and other relief as proposed in the interim order was "in accordance with the principles of cooperation and comity" and within the Court's jurisdiction.

[11] In my view, the granting of the requested Interim Stay is within the Court's jurisdiction, consistent with this Court's practice in recent Part IV recognition proceedings, and important for the preservation of the value of the Canadian Business as part of Yellow's wind-down efforts.

[12] In addition to the stay of proceedings in respect of the Canadian Debtors, the proposed Interim Stay Order provides for a stay of proceedings in Canada in favour of the Yellow Parent, the ultimate parent of the Yellow enterprise, and its directors.

[13] The proposed stay in favour of the Yellow Parent is intended to give effect in Canada to the U.S. Bankruptcy Code automatic stay of proceedings and to enable the Company to focus on effecting an orderly wind-down.

[14] This Court has the jurisdiction to grant a stay with respect to non-applicant debtor companies. In the context of a recognition proceeding, the Court's jurisdiction arises from its authority under subsection 49(1) of the CCAA and pursuant to section 106 of the CJA. A stay of proceedings is also consistent with the principles of comity and cooperation embodied in section 52 of the CCAA. (See: *Tamerlane Ventures Inc, Re*, 2013 ONSC 5461 at para 21; *Pacific Exploration & Production Corp, Re*, 2016 ONSC 5429 at para 26; *Paladin Interim Stay Endorsement* at paras 24-25).

[15] Yellow Parent submits that the balance of convenience favours granting the stay of proceedings in favour of the Yellow Parent, as such protection is critical to preserve overall stability and allow the Company to maximize value for stakeholders and implement an orderly wind-down. For the purpose of the relief sought today, I accept this submission.

[16] I am satisfied that it is both appropriate and necessary to grant the Interim Stay Order providing for the Interim Stay in Canada.

[17] In the event that the U.S. Bankruptcy Court grants the requested First Day Orders, arrangements can be made for Yellow Parent to schedule a recognition motion returnable on Monday, August 14, 2023 at 9:00 a.m. before me.

Chief Justice Geoffrey B. Morawetz

Date: August 8, 2023

CITATION: Diebold Nixdorf, Incorporated, 2023 ONSC 4230
COURT FILE NO.: CV-23-00702777-00CL
DATE: 2023-07-18

SUPERIOR COURT OF JUSTICE - ONTARIO
(COMMERCIAL LIST)

RE: **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF DIEBOLD NIXDORF, INCORPORATED; DIEBOLD NIXDORF TECHNOLOGY FINANCE, LLC; DIEBOLD GLOBAL FINANCE CORPORATION; DIEBOLD SST HOLDING COMPANY, LLC; DIEBOLD HOLDING COMPANY, LLC; DIEBOLD SELF-SERVICE SYSTEMS; GRIFFIN TECHNOLOGY INCORPORATED; IMPEXA, LLC; DIEBOLD NIXDORF CANADA, LIMITED and DIEBOLD CANADA HOLDING COMPANY INC.

APPLICATION OF FOREIGN REPRESENTATIVE CARLIN ADRIANOPOLI UNDER SECTION 46 OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36,* AS AMENDED

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: Chief Justice Geoffrey B. Morawetz

COUNSEL: *D.J. Miller, Rebecca L. Kennedy and Puya Fesharaki,* for the Foreign Representative

Jennifer Stam, Arnold Cohen and Noah Schein, Canadian Counsel to the Ad Hoc Group and DIP Lenders

John F. Higgins and Megan Young-John, Texas Counsel to the Ad Hoc Group and DIP Lenders

Daniel T. Moss, Nicholas J. Morin, Heather Lennox and T. Daniel Reynolds, U.S. Counsel for the Chapter 11 Debtors and Debtors in Possession

Dylan A. Consla and Amber Leary, U.S. Counsel to the Ad Hoc Group and DIP Lenders

Seth Lieberman and Andrew S. Richmond, U.S. Counsel for Computershare Trust Company, National Association, as successor trustee under the 2024 Stub Unsecured Notes Indenture and Second Lien Notes Indenture

HEARD: July 18, 2023

ENDORSEMENT

[1] This Application was brought by Carlin Adrianopoli, Senior Managing Director of FTI Consulting, Inc. (the "Applicant"), in his capacity as foreign representative (the "Foreign Representative") of Diebold Nixdorf, Incorporated ("Diebold"), Diebold Nixdorf Technology Finance, LLC, Diebold Global Finance Corporation, Diebold SST Holding Company, LLC, Diebold Holding Company, LLC, Diebold Self-Service Systems, Griffin Technology Incorporated, Impexa LLC, Diebold Nixdorf Canada, Limited ("DNC") and Diebold Canada Holding Company Inc. ("DCH") (collectively, the "Chapter 11 Debtors") for certain Orders pursuant to sections 46 through 49 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA"), *inter alia*:

(a) declaring that: (i) the Applicant is a "foreign representative" of the Chapter 11 Debtors pursuant to section 45 of the CCAA; (ii) the Chapter 11 Cases, as defined below, are "foreign main proceedings" pursuant to sections 47 through 48 of the CCAA; and

(b) recognizing and enforcing in Canada certain orders of the U.S. Court made in the Chapter 11 Cases, including but not limited to: (i) an Order (the "DIP Order") granting a super-priority debtor-in-possession charge over the Property of the Chapter 11 Debtors located in Canada (the "DIP Charge"), to give full effect to the DIP Order; and (ii) an Order (the "Plan Confirmation Order") recognizing the Chapter 11 Debtors' prepackaged plan of reorganization (as amended from time to time, the "U.S. Plan").

[2] Capitalized terms used herein and not otherwise defined have the meaning given to them in the Affidavit of Carlin Adrianopoli sworn July 16, 2023 (the "Adrianopoli Affidavit").

[3] The Application was not opposed.

BACKGROUND

[4] The Chapter 11 Debtors, together with their non-debtor affiliates (collectively, the "DN Group") operate a global financial and technical company focused on providing point-of-sale and other services to the retail and banking sectors.

[5] Diebold is the ultimate parent company of the DN Group and is based in the State of Ohio in the United States ("U.S."). Diebold's subsidiaries span North and South America, Europe, Asia and the Middle East. The operations and business segments of the DN Group however are highly

integrated, and all of the various subsidiaries rely on executives located in the U.S. for key decision-making.

[6] The DN Group operates in Canada through the Canadian subsidiaries, DCH and DNC, who are each directly or indirectly owned by Diebold. DCH and DNC service customers in Canada and have their own local business functions within Canada (such as accounting and human resources). However, both subsidiaries report directly to U.S.-based supervisors who manage the operations on a North American basis.

[7] The Canadian operations form an integrated part of the DN Group's overall business, but do not account for a significant portion of the DN Group's total revenue or assets. For fiscal year ended December 31, 2022, the combined total revenue of DCH and DNC represented less than 3% of the DN Group's total revenue for the year ending December 31, 2022, and the combined total assets of DCH and DNC represented less than 8% of the DN Group's total assets based on book values.

[8] DCH and DNC rely on their U.S. and international affiliates in many other respects, including for the supply of the products provided to customers in Canada, which are provided subject to standard transfer pricing and intercompany accounts.

[9] The DN Group has a capital structure that is more fully set out in the Adrianopoli Affidavit. As of the Petition Date (as defined below), the DN Group had over $2.7 billion in outstanding funded debt obligations, of which 96% is nominally secured. DCH and DCN are borrowers and/or guarantors under all such senior debt obligations.

[10] The DN Group has suffered from liquidity challenges for several years. The challenges have persisted notwithstanding numerous cost-cutting measures, and the refinancing of certain indebtedness of the DN Group's indebtedness.

[11] In May 2023, the DN Group entered into a restructuring support agreement (the "Restructuring Support Agreement") that provides for a de-leveraging of the DN Group's capital structure and the influx of more than $500 million in additional liquidity (the transactions contemplated are collectively defined as the "Prepackaged Transaction"). The Prepackaged Transaction is to be implemented, in part, pursuant to the U.S. Plan, of which they are seeking confirmation in the United States Bankruptcy Court for the Southern District of Texas (the "U.S. Court").

[12] The Prepackaged Transaction contemplates maintaining the *status quo* in respect of: (a) day-to-day operations; and (b) the DN Group's relationships with employees, vendors and customers, for the benefit of all such stakeholder groups. Pre-filing and post-filing unsecured claims (other than unsecured funded debt claims) will continue to be paid in the ordinary course under the Prepackaged Transaction.

[13] On June 1, 2023 (the "Petition Date"), each of the Chapter 11 Debtors filed a voluntary petition for relief (the "Chapter 11 Cases") under chapter 11 of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code").

[14] Also on the Petition Date, the Chapter 11 Debtors sought and were granted the following orders by the U.S. Court (the "First Day Orders"):

(a) an Order directing joint administration of the Chapter 11 Cases;

(b) an Order scheduling a combined disclosure statement approval and plan confirmation hearing, and approving certain other scheduling and procedural matters;

(c) an Order authorizing Carlin Adrianopoli to act as Foreign Representative of the Chapter 11 Debtors;

(d) an Order confirming the protections of sections 362, 365 and 525 of the Bankruptcy Code;

(e) an Order establishing notice and objection procedures for transfer of equity securities and granting related relief;

(f) an Order authorizing the Chapter 11 Debtors to continue their insurance, workers' compensation, surety bond programs and granting related relief;

(g) an Order approving the redaction in public filings of certain personally identifiable information for individual creditors and interest holders;

(h) an Order authorizing the employment and retention of Kroll Restructuring Administration LLC as claims, noticing, and solicitation agent;

(i) an Order authorizing the Chapter 11 Debtors to pay prepetition employee wages and related amounts;

(j) an Order authorizing the Chapter 11 Debtors to pay prepetition trade payables and related amounts;

(k) an Order establishing adequate assurance procedures with respect to utility providers and granting related relief;

(l) an Order approving the continued use of the Chapter 11 Debtors' cash management system; and

(m) an interim DIP Order authorizing a US$1.250 billion post-petition senior secured debtor-in-possession financing facility (the "DIP Facility") and granting the DIP Charge over all of the Chapter 11 Debtors' property securing same, in priority to all other secured obligations.

[15] On July 12, 2023 and July 13, 2023, the U.S. Court granted, respectively (i) a final DIP Order; and (ii) a Plan Confirmation Order (collectively with the First Day Orders, the "Foreign Orders").

[16] Pursuant to the interim DIP Order, the lenders thereunder advanced on June 5, 2023 the US$1.250 billion DIP Facility, which included: (a) approximately $733,000,000 of new money term loans used to refinance outstanding existing prepetition obligations; and (b) $516,000,000 of new money term loans used to bring certain outstanding trade debt current and to fund operations and restructuring expenses.

[17] Each of the Chapter 11 Debtors jointly and severally guaranteed the obligations under the DIP Facility.

[18] All of the Chapter 11 Debtors' pre-petition secured lenders who have liens that will be subordinate to the liens granted to secure the DIP Facility either: (a) explicitly consented to the DIP Facility pursuant to the terms of the Restructuring Support Agreement; (b) are deemed to have consented to the priming of their liens and to the Chapter 11 Debtors' use of cash collateral under the applicable prepetition debt documents intercreditor agreement; and/or (c) if required under the CCAA, have received notice of the priming lien granted to the DIP Lenders.

[19] The DIP Charge is not expected to impact creditors of DCH and DNC (other than those lenders of funded debt) because the Prepackaged Transaction provides that all general unsecured claims (other than funded debt unsecured claims) are unimpaired. Further, all secured creditors located in any Province or Territory of Canada have consented to the DIP Order and DIP Charge through the execution of the Restructuring Support Agreement and/or entry into the applicable prepetition debt documents, other than in respect of registrations relating to motor vehicles or similar specific assets, that will remain unaffected by the DIP Charge.

[20] The Chapter 11 Debtors, through their noticing and claims agent, held a vote in respect of the U.S. Plan. Both classes accepted the U.S. Plan in each instance.

[21] On July 13, 2023, the U.S. Court granted an Order confirming the U.S. Plan.

ISSUES

[22] The issues before the Court are:

(a) whether this Court ought to recognize the Chapter 11 Cases as foreign main proceedings, and the Foreign Representative as the foreign representative in this proceeding;

(b) whether the Orders granted by the U.S. Court should be recognized;

(c) whether the DIP Order and the Plan Confirmation Order should be recognized and given effect with respect to the Canadian Collateral; and

(d) whether the requirement for the Foreign Representative to post a notice in a newspaper of the foreign recognition order should be dispensed with in the circumstances.

Recognition of a Foreign Proceeding

[23] On application by a foreign representative, section 47(1) of the CCAA provides that two requirements must be met before a court shall recognize a foreign proceeding:

(a) the application for the recognition of a foreign proceeding relates to a foreign proceeding; and

(b) the applicant is a foreign representative in respect of that foreign proceeding.

[24] The Chapter 11 Cases were commenced under Chapter 11 of the Bankruptcy Code, and Canadian courts have consistently found such proceedings to be "foreign proceedings" for the purposes of the CCAA (Section 45(1) of the CCAA). (See: *Lightsquared LP (Re)*, 2012 ONSC 2994 [*Lightsquared*] at para 18; *Massachusetts Elephant & Castle Group, Inc. (Re)*, 2011 ONSC 4201 [*Elephant & Castle*] at para 13; *LTL Management LLC*, 2023 ONSC 2648 at para 27)..

[25] The Foreign Representative Order made by the U.S. Court has already authorized the Applicant to act as Foreign Representative on behalf of the Chapter 11 Debtors in any judicial or other proceeding in any foreign country.

[26] I am satisfied that the Chapter 11 Cases are "foreign proceedings" to which the present application relates.

[27] The next point to be addressed is whether this foreign proceeding is a foreign main proceeding or a foreign non-main proceeding. A "foreign main proceeding" is a "foreign proceeding in a jurisdiction where the debtor company has the centre of its main interests" (its "COMI"). In the absence of proof to the contrary, section 45(2) of the CCAA establishes the presumption that a debtor company's registered office is deemed to be its COMI.

[28] This presumption may be rebutted if there are factors which, viewed objectively by third parties, would support the conclusion that the centre of main interest is other than the location of the debtor company's registered office. There are three primary factors which will be considered in assessing whether the location in which the foreign proceedings have been commenced is the debtor company's COMI:

(a) whether the location in which the foreign proceedings has been filed is readily ascertainable by creditors;

(b) whether the location in which the foreign proceedings have been filed is one in which the debtor's principal assets or operations are found; and

(c) whether the location in which the foreign proceedings has been filed is where the management of the debtor takes place.

(See: *Elephant & Castle, supra* note 27 at paras 30-31.)

[29] These primary factors may be interpreted with reference to the following:

(a) the location where corporate decisions are made;

(b) the location of employee administrations, including human resource functions;

(c) the location of the company's marketing and communication functions;

(d) whether the enterprise is managed on a consolidated basis;

(e) the extent of integration of an enterprise's international operations;

(f) the centre of an enterprise's corporate, banking, strategic and management functions;

(g) the existence of shared management within entities in an organization;

(h) the location where cash management and accounting functions are overseen;

(i) the location where pricing decisions and new business development initiatives are created; and

(j) the location of an enterprise's treasury management functions, including management of accounts receivable and accounts payable.

(See: *Elephant & Castle, supra* note 27 at paras 26-31; *Voyager, supra* note 19 at para 21; *Hollander, supra* note 21 at para 32.)

[30] The focus remains, at all times, on identifying a principal place of business that is consistent with the objectively ascertainable expectations of the stakeholders who dealt with the enterprise before the foreign proceedings commenced.

[31] In this present matter, while DNC's registered office is in Ottawa and DCH's registered office is in Calgary. Counsel to the Applicant submits there are several material factors which objectively indicate that their COMI is in the U.S., rather than in Canada.

[32] The Chapter 11 Debtors both operate and are managed on a consolidated basis out of the U.S. Diebold is the ultimate parent of both DCH and DNC, and the North American corporate headquarters of the Chapter 11 Debtors are in Hudson, Ohio. All major strategic decisions for the Americas are made by the senior executive team located at the Ohio corporate headquarters, and both Canadian entities each have no more than one director or officer who is Canadian. This sole

director or officer is in place to comply with minimum statutory requirements, and the remaining directors and officers are all individuals who both work and reside in the U.S.

[33] In addition, the Chapter 11 Debtors' consolidated management is similarly apparent at the functional level. The Chapter 11 Debtors' marketing and communication functions for the Americas business, are both carried out in the U.S. While DCH and DNC have some of their own local business functions, including accounting and human resources, each of those functions nevertheless directly report to U.S.-based supervisors.

[34] DCH and DNC are not only integrated with the Chapter 11 Debtors in respect of their management but are also integrated financially. Each entity is either a co-borrower or guarantor of the DN Group's obligations under the terms of their prepetition credit facilities and notes, all of which are governed by U.S. law. Further, all the Chapter 11 Debtors' financial reporting, for the purpose of reporting to their lenders, is performed on a consolidated basis from the Ohio corporate headquarters.

[35] Further, the depth of financial integration is further reflected in the globally integrated Cash Management System employed by the Chapter 11 Debtors and their non-debtor affiliates. The DN Group makes and receives thousands of payments per week through the Cash Management System, with over $2 billion in cash flowing through the system annually.

[36] Having considered the factual matrix, I am satisfied that, notwithstanding that DNC's registered office is in Ottawa and DCH's registered office is in Calgary, the COMI for both entities is in the U.S. Consequently, this foreign proceeding is a "foreign main proceeding" for the purposes of s. 47 – 48 of the CCAA.

Recognition of the U.S. Court's Order

[37] The Foreign Representative requests that the Court recognize and give effect to the Foreign Orders. The relief is described in detail in the Adrianopoli Affidavit, and specifically includes authorizing the Foreign Representative in his capacity as Foreign Representative to seek recognition of the Chapter 11 Cases in Canada. The relief granted in the Foreign Orders further includes, *inter alia*:

(a) authorization to pay prepetition employee obligations;

(b) authorization to pay prepetition trade and other unimpaired claims, along with associated expenses;

(c) authorization to continue using the Cash Management System, including performing intercompany transactions and using existing bank accounts; and

(d) confirmation of the U.S. Plan and the termination of the U.S. Proceedings upon implementation of the U.S. Plan.

[38] Circumstances where Canadian courts express a reluctance to recognize the orders of a foreign court in foreign main proceedings generally arise only where such orders do not align with the substance of Canadian insolvency law or the provisions of the CCAA, or are contrary to public policy (See; *Ibid,* para 21; *Elephant & Castle, supra* note 27 at para 39.).

[39] This Court has previously granted the specific relief sought under the Foreign Orders, permitting the debtors to pay their pre-filing obligations to suppliers in circumstances where operations could be disrupted and vendor relationships adversely impacted if such amounts were not paid (See: *Eddie Bauer of Canada Inc., Re*, 2009 CarswellOnt 3657, [2009] O.J. No. 2647 (S.C.J. [Commercial List]) at para 22). In this case, the evidence establishes that the Chapter 11 Debtor's require this relief.

[40] This Court has also granted recognition of a Plan Confirmation Order when a U.S. Court has concluded that the prepackaged plan complies with applicable U.S. bankruptcy principles which mirror and underlie the principles of the CCAA. Further, the U.S. Plan is consistent with the purpose of the CCAA. (See: *Xerium Technologies Inc.,* 2010 CarswellOnt 7712 (S.C.J. [Commercial List] [*Xerium*] at para. 28).

[41] In the present matter, I am satisfied that none of the Foreign Orders is inconsistent with the CCAA and its underlying principles, nor are they contrary to public policy.

Recognition of the DIP Order and DIP Charge

[42] The Foreign Orders include a DIP Order which authorizes the Chapter 11 Debtors to enter into the DIP Facility described in the Adrianopoli Affidavit. The DIP Facility permits the Chapter 11 Debtors to use a portion of the DIP Facility to repay certain existing indebtedness.

[43] Although Section 11.2(1) of the CCAA precludes a Canadian court from making an order which secures an obligation that exists before the order is made, the situation is viewed differently by Canadian courts in the context of a foreign recognition proceeding. Section 49 of the CCAA permits a Canadian court, once it has recognized a foreign proceeding, to make any order that it considers appropriate if it is satisfied that the order is necessary for the protection of the debtor's property or the interests of its creditor or creditors.

[44] Section 49 of the CCAA has been held to authorize Canadian courts to recognize DIP orders referencing provisions made in foreign main proceedings, including DIP orders that have the effect of facilitating the payment of pre-filing obligations, as well as permit charges over assets located in Canada to give effect to such foreign orders (See: *Hartford Computer Hardware Inc., Re*, 2012 ONSC 964 at paras 10-12).

[45] In determining whether to recognize a DIP order made by a foreign court in foreign main proceedings, the court will consider:

(a) whether the order is necessary to protect the debtor's property or is in the interests of its creditors; and

(b) whether there would be any material prejudice to any Canadian interests in recognizing the roll-up provisions of the DIP order (See: *Xinergy, supra* note 40 at paras 20-21).

[46] The Applicant submits that, in the present circumstances, recognizing the DIP Order is necessary to protect the debtor's property, and is in the interests of the Chapter 11 Debtors' creditors. The DIP Facility will provide liquidity to fund the DN Group's operating, working capital and capital expenditure requirements through the restructuring process. I accept this submission.

[47] In recognizing a foreign DIP Order, the Court has considered whether doing so would alter the *status quo* and make any creditor group worse off (See: *Payless Holdings Inc. LLC, Re*, 2017 ONSC 2321 at para 43). In the circumstances, I am satisfied that recognizing the DIP Order would not materially prejudice the interests of any Canadian stakeholders. The Prepackaged Transaction expressly provides that all General Unsecured Claims will be unimpaired, and this applies to the creditors of the Canadian entities DCH and DNC.

[48] In these circumstances, I am satisfied that the interests of comity favour recognizing the DIP Order and granting the DIP Charge over the collateral of the Chapter 11 Debtors located in Canada.

Information Offer

[49] Due to the nature of the Chapter 11 Cases and the substantial support for the Prepackaged Transaction by creditors prior to commencing these proceedings, the Chapter 11 Debtors do not expect the Chapter 11 Cases to remain open for a prolonged duration. Moreover, the Canadian General Unsecured Creditors (other than unsecured funded debt creditors) will continue to be paid in the ordinary course and be unimpaired under the Prepackaged Transaction. In my view, the involvement and expense of an information officer is not warranted in the current circumstances.

Notice Request

[50] Section 53(b) of the CCAA is a mandatory provision that requires publication of a notice of an order reorganizing a foreign proceeding containing the prescribed information. I see no basis on which to override this provision and I decline to grant such relief.

DISPOSITION

[51] For the foregoing reasons, this Application is granted The Foreign Orders, as defined in [15] above, are recognized and given full force and effect.

Chief Justice G.B. Morawetz

Date: July18, 2023

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 165 OF 2022 (NSJ)

IN THE MATTER OF SECTION 86 OF THE COMPANIES ACT (2022 REVISION)

AND

IN THE MATTER OF E-HOUSE (CHINA) ENTERPRISE HOLDINGS LIMITED

Before:	**The Hon. Mr Justice Segal**
Appearances:	**Mr Nick Herrod, Mr Ryan Hallett and Ms Allegra Crawford of Maples and Calder (Cayman) LLP for the Company**
Convening hearing:	**15 September 2022**
Sanction hearing:	**9 November 2022**
Draft judgment distributed:	**10 November 2022**
Judgment Delivered:	**17 November 2022**

HEADNOTE

Creditors' scheme of arrangement pursuant to section 86 of the Companies Act (2022 Revision) – decision at convening hearing and sanction hearing – voting by creditors who are affected by sanctions on Russia – scheme discharging New York law governed debt – availability and effect of relief under chapter 15 of the US Bankruptcy Code and under New York private international law – effect of the scheme under Hong Kong and BVI law

JUDGMENT

Introduction

1. In July 2022 E-House (China) Enterprise Holdings Limited (the ***Company***) applied for an order (the ***Convening Order***) giving it permission to convene a single meeting (the ***Scheme Meeting)*** of certain of its creditors (all of whom are holders of notes issued by the Company) who were to be parties to a scheme of arrangement under section 86 of the Companies Act (2022 Revision) (the ***Companies Act***) for the purpose of considering and if thought fit approving the scheme.

2. On 28 July 2022, the Company filed a petition seeking the sanction of the proposed scheme and a summons (the ***Convening Order Summons***) pursuant to which it applied for the Convening Order. On 7 September 2022 the Company filed a further summons seeking permission to amend the petition in the manner set out in the amended petition attached to the further summons (the ***Amended Petition***).

3. The Convening Order Summons was heard on 15 September 2022. I was satisfied that it was appropriate to permit the Company to convene a meeting of the creditors to be parties to the scheme, although, as I explain below, I declined to permit the Company to exclude from voting certain creditors affected by sanctions against The Russian Federation (***Russia***). The Convening Order was made on 20 September 2022. The meeting was to be held on 12 October 2022. I explain below the issues that arose at the convening hearing and my reasons for making the Convening Order.

4. On 4 October 2022 the Company filed a summons (the ***Scheme Meeting Summons***) seeking an urgent order that the date of the meeting be changed to 2 November 2022. The Company, in its evidence in support of the Scheme Meeting Summons, explained that scheme documents had been sent to creditors but the Company had recently found that creditors were taking longer than expected to submit their voting instructions. As a result, the Company considered that creditors should be given more time to submit voting instructions so that as many creditors as

possible had the opportunity to vote and participate in the meeting. The Company also sought an order that the record date for the meeting be amended and that certain other consequential orders be made (including a direction that it give notice to creditors of the change to the date of the meeting and the other orders made). The Company also filed a Re-Amended Petition (the ***Re-Amended Petition***) which included various minor updating amendments to the Amended Petition. The Company requested that I deal with the Scheme Meeting Summons on the papers without the need for a further hearing. In view of the urgency and subject matter of the Scheme Meeting Summons, I was prepared to do so. On 5 October 2022, I ordered (the ***Further Convening Order***) that the Company had permission to amend and reschedule the date of the meeting to 2 November 2022 and made the necessary consequential orders. I also gave the Company permission to amend the scheme document in the form appended to the Fourth Affirmation of Zhou Liang (***Mr Zhou***).

5. On 6 October 2022 the Company sent to scheme creditors and published the notice of the date of the reschedule meeting and an update letter explaining the reasons for the change to the date of the meeting, explaining the further proposed amendments to the scheme and providing an update on progress in the restructuring and certain further information which I directed be provided to scheme creditors.

6. The meeting of scheme creditors was held in the Cayman Islands on 2 November 2022 at the offices of the Company's Cayman Islands attorneys (Maples and Calder). Creditors were able to attend in person or via a Zoom link. Over 93% in value of the notes subject to the scheme attended in person or by proxy and creditors representing 99.96% by value and 99.87% by number voted in favour of the scheme. The scheme therefore achieved the support of a very substantial proportion of affected scheme creditors.

7. On 9 November 2022, the Company's application for an order sanctioning the scheme was heard. At the end of the hearing I confirmed that I would grant the order sought and that I would subsequently set out in writing, in addition to my reasons for making the Convening Order, my reasons for making the order sanctioning the scheme. This judgment now sets out those reasons.

The evidence

8. The main evidence filed in support of the Convening Order Summons was as follows. The First Affirmation (***Zhou 1***) of Mr Zhou (who is the Company's CFO), the Second Affirmation of Mr Zhou (***Zhou 2***), the Third Affirmation of Mr Zhou (***Zhou 3***), the First Affidavit of Yeung King Shan Fanny (***Ms Yeung***) (who is an associate director of D.F. King Limited, the Company's information agent (the ***Information Agent***)), the Second Affidavit of Ms Yeung, the Affidavit of Edward Lam (***Mr Lam***) (who is a partner in Skadden, Arps, Slate, Meagher & Flom, the Company's onshore legal advisers) and the Affidavit of Allan Gropper (***Judge Gropper***) (who is a well-known and highly respected retired Bankruptcy Judge for the Southern District of New York). Zhou 1 exhibited a copy of the form of explanatory statement (the ***Explanatory Statement***) that the Company proposed to send to the creditors who were to be parties to the proposed scheme. The formal terms of the proposed scheme were set out at Appendix 4 of the Explanatory Statement (the ***Scheme***).

9. The following further evidence was filed in support of the Company's application for an order sanctioning the scheme. The Fifth Affirmation of Mr Zhou (***Zhou 5***); the Third Affidavit if Ms Yeung; the First Affidavit of Mr Alexander Lawson (the chairperson at the meeting of scheme creditors); the First Affirmation of Zhang Xing (***Zhang 1***) (Mr Zhang is an officer of China International Capital Corporation Hong Kong Securities Limited (***CICC***), the Company's financial adviser) and the Third Affidavit of Ms Rachel Catherine Baxendale of Maples and Calder. Shortly before the sanction hearing, the Company also filed the Sixth Affirmation of Mr Zhou (***Zhou 6***).

The Company, its financial position, and the notes which are to be subject to the scheme

10. The Company is a holding company. Its shares and notes have been listed on the Hong Kong Stock Exchange (***HKSE***). Its principal assets are the shares that it holds in its subsidiaries, in

particular Fangyou Information Technology Holdings Limited (***Fangyou***), a company incorporated in the BVI (through which it indirectly owns a number of operating entities including Hong Kong Fangyou Software Technology Company Limited (***Hong Kong Fangyou***) a company incorporated in Hong Kong), and TM Home Limited (of which the Company owns 70.23%, and which is incorporated in the Cayman Islands and ultimately controls a number of other operating entities). The Company is in the business of real estate agency services, real estate data and consulting services and real estate brokerage network services in the People's Republic of China (***PRC***), through its indirect operating subsidiaries there (I refer to the Company, its subsidiaries and its indirect subsidiaries as the ***Group***).

11. There are two note issues which are to be subject to the scheme (together the ***Old Notes***). The notes are all governed by New York law:

(a). senior notes with an aggregate principal amount of US$298,200,000, a coupon of 7.625% per annum and a maturity date of 18 April 2022 (the ***2022 Notes***).

(b). senior notes with an aggregate principal amount of US$300,000,000, a coupon of 7.60% per annum and a maturity date of 10 December 2023 (the ***2023 Notes***).

12. The 2022 Notes were listed on the HKSE but were delisted following maturity. The 2023 Notes remain listed on the HKSE but trading was suspended on 19 April 2022. I refer to the holders of the 2022 Notes and the 2023 Notes together as the ***Noteholders***.

13. The Old Notes are held in global form through the Hongkong and Shanghai Banking Corporation Limited (***HSBC***) acting through its nominee HSBC Nominees (Hong Kong) Limited as common depositary (the ***Depositary***) for the clearing systems (who are identified below). HSBC is the trustee of the Old Notes (the ***Old Notes Trustee***).

14. The Old Notes are guaranteed by certain direct and indirect subsidiaries of the Company (the ***Subsidiary Guarantors***), namely Fangyou , CRIC Holdings Limited (***CRIC***) (incorporated in the British Virgin Islands), Hong Kong Fangyou and CRIC Holdings (HK) Limited (***CRIC Hong Kong***) (incorporated in Hong Kong).

15. The Company has liabilities in addition to those arising under the Old Notes. These include sums owing under a convertible note (the ***Convertible Note***) issued on 4 November 2020 to Alibaba.com Hong Kong Limited (***Alibaba***) in the principal amount of HK$1,031,900,000 (US$135,000,000). In addition, there are liabilities owed to other members of the Group of RMB 1,423,300,000 (US$223,347,000) and other payables of RMB 12,200,000 (US$1,914,000).

16. The Company's financial position deteriorated in the second half of 2021 and the first half of 2022 as a result of various factors described in Zhou 1, including the downturn in the PRC property market. The Company was unable to repay the principal due on 18 April 2022 in respect of certain of the Old Notes. This default caused a cross-default under the Convertible Note but Alibaba agreed to waive this default subject to certain conditions which included a term that if the Company's proposed restructuring had not become effective by 31 October 2022 (which was later extended to 15 December 2022), then the waiver would be automatically and immediately revoked and Alibaba would become entitled to enforce the Convertible Note. Despite this waiver, sums remain due and owing under both the 2022 Notes and the 2023 Notes which the Company cannot pay. The Company's position is that it was therefore cashflow insolvent at the time of the filing of the petition and remains so and that absent the approval of the scheme by Noteholders and the sanction of the scheme by the Court, it was likely to go into insolvent liquidation.

17. According to Mr Zhou, the Company's financial position as at 31 March 2022 can be summarised as follows:

(a). it had assets with a net book value of approximately RMB 8,967,000,000 (approximately US$1,407,118,000). It had total liabilities of approximately RMB 5,981,189,000 (approximately US$938,579,000).

(b). the value of its assets (valued at book value) exceeded its liabilities. However, a majority of the Company's assets were not readily realisable and were unlikely to be recoverable in full or, in some instances, at all.

(c). the Company held cash and cash equivalents of approximately RMB13,380,000 (approximately US$2,100,000).

(d). the Company was, as noted above, unable to repay the principal sum of US$298,200,000 due on the maturity of the 2022 Notes on 18 April 2022. The failure to pay the amounts due under the 2022 Notes constituted an event of default under the relevant indenture, and as already noted, a cross-default (but without giving rise to an automatic acceleration) under the terms of the Convertible Note, which in turn constituted a cross-default under the 2023 Notes. The default under the Convertible Note has been, as I have also already noted, waived by Alibaba in exchange for the Company entering into various undertakings and agreements. However, the amounts due under the 2022 Notes and the 2023 Notes remain payable and outstanding.

18. As at the date of the Explanatory Statement, the Company's most recent audited accounts were those for the period ending 31 December 2020, as the audited accounts for 31 December 2021 were still in preparation (see the Explanatory Statement at [2.14(b)]). A copy of the unaudited consolidated financial statements of the Group for the year ended 31 December 2021 and the interim unaudited consolidated financial statements of the Group as at 30 June 2021 were attached in Appendix 8 to the Explanatory Statement and Mr Zhou provided further financial information in Zhou 1 based on and extracted from the Group's unaudited management accounts as at 31 December 2021. Mr Zhou stated that there had been some significant movements in relation to certain assets and liabilities during the period from 1 January 2022 to 31 March 2022 and confirmed that these had been taken into account in the information provided and statements made regarding the Company's financial position in Zhou 1 and that the updated information had been provided to Kroll (HK) Limited (***Kroll***) for the purpose of its liquidation analysis (which was attached as appendix 3 to the Explanatory Statement).

19. The Explanatory Statement (at [2.14(a)]) also noted that the figures for 31 March 2022 provided in it were based on the Group's unaudited management accounts as at 31 December 2021 with the necessary amendments to reflect the updated information provided to Kroll. Mr

Zhou further confirmed in Zhou 1 that there had been no significant changes to the Company's financial position since these updated figures. He also explained why the Company had been unable to finalise its 2021 and interim 2022 financial statements in time for inclusion in the Explanatory Statement. This, he said, had been primarily due to the fact that the progress in preparing the financial statements of the Group had been negatively affected by the strict COVID-19 prevention and control measures in the PRC, as well as staff turnover within the Group and a change in the Company's auditor. The Company had made announcements in July 2022 and August 2022 on the HKSE regarding the delays in finalising its financial statements and the reasons for the delays.

The restructuring negotiations and communications with Noteholders regarding the scheme process in advance of the hearing of the Convening Order Summons

20. The Company has been in discussions for some time regarding how to deal with its financial problems and the terms of a restructuring of the Old Notes.

21. In March 2022, the Company appointed a financial adviser (CICC) to evaluate the capital structure and liquidity position of the Company and its subsidiaries, and to explore options for the restructuring of the Old Notes.

22. On 31 March 2022, the Company announced on the HKSE website the commencement of an offer to exchange the outstanding principal amount of the Old Notes and a solicitation of consents from the Noteholders (the ***Exchange Offer***) which exchange was subject to certain conditions being met, including acceptance of the Exchange Offer by holders of at least 90 per cent of the outstanding principal amount of the Old Notes (the ***Minimum Acceptance Amount***).

23. Given the conditions attached to the Exchange Offer, concurrent with announcement of the Exchange Offer, the Company also invited the Noteholders (through an announcement on the HKSE website) to accede to a restructuring support agreement (the ***RSA***) by 4.00 p.m. London time on 11 April 2022 (the ***Exchange Expiration Deadline***). The Company's announcement also stated that the restructuring may be implemented through a scheme of arrangement if the Exchange Offer was not successfully completed, and provided a copy of the RSA, which

appended a term sheet setting out the terms of the proposed restructuring (the ***RSA Term Sheet***).

24. On 11 April 2022, the Exchange Expiration Deadline was extended to 4.00pm London time on 13 April 2022 and the Company announced this on the HKSE's website.

25. On 14 April 2022, the Company announced on that website that it had terminated the Exchange Offer due to the Minimum Acceptance Amount condition not having been satisfied and that it was preparing to implement the restructuring by way of a scheme of arrangement and that therefore it was extending the deadline for accession to the RSA, in accordance with the terms of the RSA, to 4.00 pm London time on 22 April 2022 (the ***Instruction Fee Deadline***).

26. On 5 August 2022, the Company sent a letter to Noteholders (as creditors who would be subject to the scheme). This letter is referred to as the ***PSL*** (an abbreviation of practice statement letter). The purpose of the PSL was (as contemplated by [3.1] of the Practice Direction No 2 of 2010 (the ***Practice Direction***)) to give notice to Noteholders of the terms of the proposed Scheme and of the restructuring, of the relevant background, that the Company intended to apply to the Court for an order permitting it to convene a meeting of Noteholders and to give notice of the issues that the Court would need to consider at the hearing of the Convening Order Summons. The PSL stated that the hearing of the Convening Order Summons had been listed for 5 September. It also explained that the commencement of the Scheme proceedings had been delayed for various reasons including (as discussed in more detail below) difficulties resulting from the effect of sanctions on Russia and the need for negotiations with Alibaba. The PSL noted that the terms of the scheme provided that the date on which the scheme became effective (the ***Restructuring Effective Date***) must occur by a certain date (the ***Longstop Date***) which had initially been 13 October 2022 but which the Company wished to amend to 31 October 2022. The PSL was notified to Noteholders via various different methods. These were posting the PSL on the website established by the Company to upload relevant information and documents relating to the scheme; circulating the PSL electronically through the clearing systems (Euroclear Bank S.A./N.V. and Clearstream Banking, S.A.) and sending the PSL via email

directly to each Noteholder who had registered with the Information Agent or had otherwise notified the Company or the Information Agent of its email address.

27. As noted above, the petition and the Convening Order Summons were then filed on 28 July 2022. The hearing of that summons was originally listed for 5 September 2022. However it subsequently became necessary to delay the hearing until 15 September 2022. Noteholders were notified of this change by letter dated 2 September 2022 (the ***2 September 2022 Letter***) which was distributed using the same methods of communication that had been used for giving notice of and circulating the PSL.

28. The Company had planned to circulate on 2 September 2022 or shortly thereafter an update to Noteholders to inform them of the changes that had been made since the PSL to the terms and structure of, and the process for voting on, the scheme. The 2 September 2022 Letter stated that "*Further details on the Scheme will follow early next week*." But unfortunately, because of further delays in finalising aspects of the restructuring, in particular delays in obtaining confirmation from the Old Notes Trustee that it would be prepared to act as a trustee of the new notes to be issued under the scheme (the ***New Notes***) and that it would assume other roles in connection with the New Notes, the update was further delayed. On 12 September 2022, three days before the hearing of the Convening Order Summons, the Company eventually sent out the update (the ***Additional PSL***) once again using the same methods of communication as had been used for the PSL. The Additional PSL explained the revisions to the scheme and the restructuring that had been made since the PSL and attached copies of the amendments to the scheme documents required to give effect to those changes.

The terms of the RSA and the high level of Noteholder support for the Scheme

29. A detailed overview of the RSA is set out at [5.10] of the Explanatory Statement. Its terms can be summarised as follows. Under the RSA, any Noteholder who accedes to the RSA by the Instruction Fee Deadline, votes in favour of the Scheme at the Scheme meeting and does not exercise its rights to terminate the RSA or breach any provision of it in any material respect, will be a ***Consenting Creditor***, and will receive a cash fee on the Restructuring Effective Date

in an amount equal to 1% of the aggregate principal amount of that Consenting Creditor's Old Notes as at the Instruction Fee Deadline (the ***Instruction Fee***). Mr Zhou confirmed in Zhou 1 (at [49]) that as at the date of his affirmation (9 September 2022) approximately 89.07% by value of Noteholders had signed or acceded to the RSA and therefore had undertaken to vote in favour of the Scheme at the Scheme meeting.

The terms of the Scheme

30. The terms of the Scheme were summarised in Zhou 1 at [61] to [87] and in further detail in section 7 of the Explanatory Statement and, as I have noted, set out in Appendix 4 to the Explanatory Statement. The Scheme will only affect the rights of the Company, the Subsidiary Guarantors and the "*Scheme Creditors*."

31. Scheme Creditors are defined as "*without double counting, the Noteholders, the Old Notes Trustee and the Depositary*." As regards voting, however, the Old Notes Trustee and the Depositary have agreed not to vote at the scheme meeting. The Noteholders are defined as "*those Persons with an economic or beneficial interest as principal in the Old Notes held in global form or global restricted form through the Clearing Systems at the Record Date, each of whom has a right upon the satisfaction of certain conditions, to be issued with definitive registered notes in accordance with the terms of the Old Notes*." A Released Claim is defined as "*any Scheme Claim, Ancillary Claim, or any past, present and/or future Claim arising out of, relating to or in respect of: (a) the Old Notes Documents; (b) the preparation, negotiation, sanction and implementation of [the] Scheme and/or the RSA; and/or (c) the execution of the Restructuring Documents and the carrying out of the steps and transactions contemplated in [the] Scheme …"* An Ancillary Claim is a claim against a Released Person. The following are defined as a Released person: the Company; the Subsidiary Guarantors, the Group, their Affiliates, Personnel and Advisers; the Old Notes Trustee and its connected parties and advisers; the New Notes Trustee and its connected parties and advisers; the Holding Period Trustee (whose role I discuss below); the Scheme Supervisor (who is Mr Lawson, who is appointed by the Board to act in such capacity); the Information Agent and the Cayman Islands Information Agent (which is Alvarez & Marsal Cayman Islands Limited).

32. Under the Scheme, on the Restructuring Effective Date:

(a). Scheme Creditors will release in full the Released Claims, in exchange for the New Notes and the Cash Consideration (which means 6% of the outstanding principal amount of the Old Notes held by the relevant Noteholder together with interest on the Old Notes accrued up to but excluding 18 April 2022).

(b). the Old Notes will be released, cancelled, fully compromised and forever discharged, and the respective rights and obligations of the Scheme Creditors, the Company, the Subsidiary Guarantors and the Old Notes Trustee towards one another under the Old Notes Documents will terminate and be of no further effect.

(c). Noteholders who are Consenting Creditors will be paid the Instruction Fee.

(d). the New Notes will be issued to Scheme Creditors in tranches which mature on the first anniversary and then in six-month increments from the date of the issue of the New Notes. The interest rate on the New Notes will be 8% per annum. The first principal payment of 10% of the aggregate principal amount of the New Notes will be due one year after the Restructuring Effective Date. The New Notes will mature on the third anniversary of the date that they are issued.

(e). the liability of the Subsidiary Guarantors will be released.

The Kroll liquidation analysis

33. An estimated outcome for Scheme Creditors of a liquidation of the Company was prepared by Kroll. They prepared a written liquidation analysis (dated 29 July 2022) which was discussed in Zhou 1 at [93] to [97] and set out, as I have said, at appendix 3 to the Explanatory Statement. In summary, the return to Scheme Creditors in an insolvent liquidation was estimated by Kroll to be in a range from 25.8% (low case) to 36.1% (high case). The liquidation analysis assumed

that all entities in the Group are put into liquidation. It assessed the likely realisable value of each of the companies in the Group on what is described as a segmented based approach. Kroll explained what this means in [3.2] of their analysis:

> *"E-House has over 300 major subsidiary entities within the Group. Given the significant number of subsidiaries and the complexity of the Group's corporate structure, we have sought to conduct our analysis on a consolidated basis for each Segment level. Based on the information provided by Management, we have aggregated the assets and liabilities of each Segment. For this Liquidation Analysis, we have assumed that upon the liquidation of each Segment, the proceeds from the aggregated realisation of assets for any specific Segment will be used to repay the aggregated debts recognised in the same Segment."*

34. The six segments identified by Kroll were as follows: the Company; 125 subsidiary entities that are principally engaged in real estate agency and consultancy; 17 subsidiary entities that are principally engaged in the provision of real estate related education services; 7 subsidiary entities that are engaged in offshore financing and marketing activities; 54 subsidiary entities that are principally engaged in digital marketing and brokerage; and 104 entities controlled by Leju Holdings Limited, a NYSE-listed entity that is principally engaged in the provision of online-to-offline real estate services. The liquidation analysis assumed that each company in the Group will cease operations upon liquidation and as a result that its assets will be sold at discounted prices rather than at prices that might be achieved if they were sold on a going concern basis.

The impact of Russian sanctions

35. The UK Government, the US Government and the European Union have imposed sanctions on Russia including sanctions in response to Russia's invasion of Ukraine. The UK's sanctions have been extended to and apply in the Cayman Islands. The Company was required to consider the effects, and to modify the terms of the scheme to deal with issues arising because, of these sanctions. The Company had to consider whether any Noteholders were subject to these sanctions regimes (in particular the asset freezes imposed thereby) in order to decide whether sanctions prohibited the discharge of the Old Notes, the issue of the New Notes and the payment of fees to Noteholders. Furthermore, as the Company discovered, it was also necessary

to consider whether any Russian banks or custodians through whom Noteholders hold their Old Notes (which banks and custodians are participants in and hold accounts with the clearing systems) were subject to sanctions and the impact of sanctions on the operation of the clearing systems. Sanctions may have an impact on the means by which the clearing systems communicate with and distribute documents to their participants and account holders. This could extend to the process by which the Explanatory Statement and related documents are to be distributed to Noteholders, the blocking by the clearing systems of transfers of and dealings in the Old Notes and the process for obtaining voting instructions from Noteholders.

36. Where notes are held through a clearing system the identity of the beneficial holders of the notes will generally not be known to the issuer of the notes and may be impossible to ascertain otherwise than with the assistance of the clearing system. The issuer relies on the clearing systems to facilitate communications with (both to and from) noteholders. The issuer sends a notice or other communication to the clearing system who transmits it to its account holders, who in turn submit it to those who hold accounts with them. The clearing system will also transmit voting instructions back from the ultimate beneficial owner to the issuer. The issuer also depends on the clearing system to ensure the integrity of the voting process by blocking trading in and transfers of the notes during the period in which noteholders are voting. The issuer also depends on account holders in the clearing system to provide confirmation and verification that a person claiming to be a scheme creditor is a holder of notes and the amount of notes they hold. The position role of the clearing systems and their involvement in communications with Noteholders and the voting process is explained in Ms Yeung's First Affidavit.

37. The sanctions regimes I have identified are relevant to the Company's scheme for the following reasons:

(a). the Cayman Islands sanctions regime is engaged because the Company is a Cayman Islands exempted company. As a British Overseas Territory the UK's sanction regulations (The Russia (Sanctions) (EU Exit) Regulations 2019) are applied to and

in the Cayman Islands by The Russia (Sanctions) (Overseas Territories) Order 2020 (as amended).

(b). the United States sanctions regime is potentially engaged because the Old Notes are governed by New York law and denominated in US$.

(c). the European Union sanctions regime is engaged because the clearing systems through which the Old Notes are held are subject to certain sanctions imposed by the European Union. This includes, since March 2022, the blocking and suspension of settlement services provided by the clearing systems in respect of accounts held by certain Russian banks and financial intermediaries, including the National Settlement Depository (***NSD***) which is the central securities depository for the Russian Federation.

38. Consequently, the Company considered and took advice on the impact on the scheme process and the nature and scope of these sanction regimes. Mr Zhou dealt with this in his evidence. He summarised the position in Zhou 2 as follows (see also Zhou 1 at [86]):

> *"6. Various financial sanctions have been imposed in response to Russia's invasion of Ukraine. As a result of such sanctions, the Clearing Systems (through which the Old Notes are settled) have blocked all transfers with accounts held by certain Russian banks and financial intermediaries. These restrictions have affected approximately 6.65% of the Noteholders (by value) who acceded to the RSA.*
>
> *7. The Company has been advised that the Scheme does not constitute a breach of the applicable financial sanctions regimes of the United States, the United Kingdom, the Cayman Islands and the European Union.*
>
> *8. Nevertheless, it is a matter for all stakeholders in the Scheme …to take their own commercial position on sanctions."*

39. A summary of the steps taken and advice received by the Company was set out by Mr Lam in his Affidavit. He noted that the Company had made various inquiries, with the assistance of the Information Agent, to ascertain whether any Noteholders were subject to or affected by the sanctions regimes. The Company deduced, based on information provided by the clearing

systems and obtained from the process for obtaining Noteholders' agreement to accede to the RSA, that approximately 6.65% of those Noteholders who acceded to the RSA hold their Old Notes through the NSD. The clearing systems have blocked transfers from the accounts of NSD's held by them. Mr Lam explained (at [22]) that:

> *"I have been informed by D.F. King, the information agent engaged by the Company, that Euroclear and Clearstream, through which the 2022 Notes and the 2023 Notes are settled, have blocked all transfers with accounts held by certain Russian banks and financial intermediaries, including Russia's National Settlement Depositary (the **"NSD")** from March 2022 (prior to the time the RSA was entered into in April 2022). I have also been informed by D. F. King that approximately 6.65 per cent of the holders of the 2022 Notes and the 2023 Notes who acceded to the RSA did not submit instructions through Euroclear or Clearstream. The Company was provided with a lock-up report containing the identity those holders that had acceded to the RSA, including those who did not submit instructions through Euroclear or Clearstream (the **"Lock-up Report").** So far as the Company can determine, the Lock-up Report contains the identity of all the holders of the 2022 Notes and 2023 Notes that did not submit instructions through Euroclear or Clearstream (the **"Blocked Noteholders")**. The Company has informed us that it believes, after due inquiry with D.F. King, that all of its Blocked Noteholders hold their 2022 Notes and/or 2023 Notes through the account of the NSD. As a result of the transfer block imposed by Euroclear and Clearstream, the Company believes there has been no change to the list of Blocked Noteholders since the time the RSA was entered into."*

40. Accordingly, some Noteholders are unable to receive documents or give instructions via the clearing systems (I refer to all such Noteholders as the ***Blocked Noteholders***). It appears that the Blocked Noteholders are Noteholders who hold their Old Notes through accounts with NSD or with other custodians who themselves have accounts with NSD. Some of the Blocked Noteholders have, despite these difficulties, been contacted by the Company and acceded to and agreed to be by bound the RSA. I refer to these Noteholders as the ***RSA Blocked Noteholders***. There may be other Blocked Noteholders but the Company currently does not know whether any exist or if they do exist who they are.

41. 89.07% by value of all Noteholders have acceded to the RSA and, as I have said, the RSA Blocked Noteholders constitute approximately 6.65% of all such acceding Noteholders. The alternative method for contacting the RSA Blocked Noteholders was discussed in Zhou 1 at [53]. The PSL and other documents and notices were posted on the scheme website so that any

Blocked Noteholder could access them and were sent by email to each Blocked Noteholder whose email address was known to the Company or the Information Agent (see Zhou 1 at [102]).

42. Therefore, so far as the Company was able to ascertain, all the RSA Blocked Noteholders held their Old Notes through NSD and none of the Noteholders were themselves subject to the asset freezes or other provisions of the sanctions regimes. The Company had also, as Mr Lam confirmed, verified that none of the RSA Blocked Noteholders were listed or treated as designated or blocked persons under the regulations governing the relevant sanctions.

43. As a further precaution to ensure that no Noteholder who is prevented by sanctions from voting on, from having the Old Notes discharged by or from receiving the scheme consideration under the scheme, from doing so, the Company will require Scheme Creditors to execute a distribution confirmation deed. This contains various sanctions related confirmations to be made by and on behalf of each Scheme Creditor to confirm that they are not subject to sanctions. If any Scheme Creditor fails to give the required affirmative confirmations then Company will check that Scheme Creditor's details against the lists of designated sanctioned persons in the Cayman Islands, the United Kingdom, the European Union and the United States to ensure that the Scheme Creditor is not on a sanctioned person.

44. In these circumstances, the Company is satisfied that, based on and following what it considers to be reasonable inquiries, the promotion and implementation of the scheme will not give rise to a breach of any applicable sanctions regime.

The Company's approach before the hearing of the Convening Order Summons to voting by Blocked Noteholders

45. Thus the clearing systems' decision to suspend settlement services and communications through accounts held by NSD has had an impact on the process for obtaining the approval of and implementing the scheme. As a result, the Company has been unable to give notices to or obtain voting instructions from the Blocked Noteholders via the clearing systems in the usual way (or make payments or transfer the scheme consideration to Blocked Noteholders). In

addition, the Company's bank has advised that it cannot make direct payments to the Blocked Noteholders (see Zhou 1 at [58]) and the Information Agent has indicated (in light of comments made by the clearing systems) that it is unable to collect information and voting instructions from the Blocked Noteholders outside the clearing systems.

46. The difficulties associated with sanctions were not addressed prior to the RSA being signed because the Company was not aware of them at the time. The need to investigate and resolve these difficulties and to prepare amendments to the scheme documents caused delays in finalising the terms and structure of the scheme and were mainly responsible for the need to delay the hearing of the Convening Order Summons. The amendments that the Company decided were needed to address the problems caused by sanctions were summarised in the Additional PSL as follows (underlining added):

> *"5. Since the [PSL], the Scheme Company has been working through the mechanics of the Restructuring and, following discussions with Euroclear and Clearstream, it has been agreed that the new notes to be issued pursuant to the Restructuring (the **"New Notes")** can take a global form and will be on the same terms as the Term Sheet to the RSA, subject to the amendments shown in Appendix B to this PSL. The trustee of the New Notes will be an independent and professional provider of note trustee services that will be confirmed by the Scheme Company as soon as possible. The Scheme and Restructuring are also subject to the amendments set out below.*
>
> *6. First, the Scheme Consideration due to those persons or entities who hold the Old Notes through accounts held by certain Russian banks and financial intermediaries, including the [NSD], whose settlement services have been suspended and blocked by Euroclear and Clearstream, (the **"Blocked Scheme Creditors")** will need to be first held by a trustee in accordance with the terms of the Holding Period Trust Deed (the **"Holding Period Trustee")** on trust for the Blocked Scheme Creditors until the maturity date of the New Notes or the lifting of the applicable sanctions, whichever is earlier. If applicable sanctions are still in place upon the expiry of the Holding Period Trust, the Scheme Company will undertake in the Scheme to create a successor trust (the **"Successor Trust")** for Blocked Scheme Creditors' Scheme Consideration to be held until the earlier of (i) the expiry of the perpetuity period of the Successor Trust or (ii) the lifting of applicable sanctions, with the Blocked Scheme Creditors being given a reasonable period thereafter to recover their entitlement to the Scheme Consideration in accordance with the terms of the Successor Trust. The same will apply to the Instruction Fee, which is to be paid to those Blocked Scheme Creditors who*

> *are also Consenting Creditors. The Holding Period Trustee will be Ultrex Holdings (HK) Limited, a Hong Kong incorporated subsidiary of the Scheme Company.*
>
> *7. Further and on account of the same sanctions regulations of the European Union, the Information Agent is not able to collect information, including voting instructions, from the Blocked Scheme Creditors. As a result, the Blocked Scheme Creditors will not be permitted to attend or vote at the Scheme Meeting. However, Blocked Scheme Creditors who are also Consenting Creditors will still be eligible to receive the Instruction Fee, on the terms set out in paragraph 6 above.*
>
> *8. Finally, as anticipated in the [PSL], the Scheme Company proposes an amendment to the RSA to extend the Longstop Date until 31 October 2022. The Scheme Company now also proposes a further amendment to the RSA to provide the Scheme Company with the right (at its sole discretion) to extend the Longstop Date to 30 November 2022 (together with the initial extension until 31 October 2022, the **"Longstop Date Extension")** should additional time be required to complete the Restructuring. Consenting Creditors who vote in favour of the Scheme will be treated as having voted in favour of the Longstop Date Extension."*

47. As this extract makes clear, the Company decided, in order to deal with the impact of sanctions, that the New Notes could be issued in global form; that the New Notes could not be issued to Blocked Noteholders but would need to be held on their behalf by a trustee and Blocked Noteholders could not and would not be allowed to vote at the scheme meeting.

48. The arrangements for voting at the scheme meeting were set out in the Explanatory Statement and the documents attached to it, including the solicitation package. These explained what steps needed to be taken by a Scheme Creditor in order to be entitled to attend and vote at the scheme meeting. In the case of intermediated securities such as the Old Notes held through clearing systems, as I have noted, the clearing systems play a critical role since they pass on documents to their account holders (who then forward the documents to sub-custodians and thereby to Noteholders), block dealings in the Old Notes while voting is taking place and transmit back voting instructions executed by such account holders on behalf of Noteholders.

49. The Company prepared a form of document to be used by account holders for the purpose of recording and evidencing the Old Notes held and the voting instructions given by Noteholders.

This is the Account Holder Letter which must be signed by an Account Holder, who is defined in the Scheme as a person who has an account with the clearing systems and is recorded in the books of the clearing systems as holding in that account a book-entry interest in the Old Notes. The Account Holder in the Account Holder Letter identifies and provides the name of the person who is the to be treated as the Scheme Creditor in respect of a specified amount of the Old Notes and on whose behalf the Account Holder is acting. This ensures that the ultimate beneficial owner of the relevant Old Notes can attend and vote at the Scheme Meeting in accordance with the "Looking through the Register" approach set out in the Practice Direction (see [4]). The Account Holder in the Account Holder Letter gives various confirmations (representations) and voting instructions on behalf of the Scheme Creditor and provision is made in the Account Holder Letter for the appointment of a proxy by the Scheme Creditor. Appendix 2 to the Account Holder Letter attaches a distribution confirmation deed (to which I made reference above) which all Scheme Creditors must execute in order to be entitled to receive and before receiving their share of the New Notes. Annex B to the distribution confirmation deed sets out various securities law and sanctions confirmations and undertakings to be given by the relevant Scheme Creditor. The sanctions confirmations, in summary, confirm that the Scheme Creditor and its affiliates and associates are not subject to sanctions or acting for Russia and will not use the proceeds of the New Notes to fund or facilitate the business of any sanctioned person or of Russia.

50. The Explanatory Statement and the solicitation package confirmed and expanded on what was said in the Additional PSL regarding the position of the Blocked Noteholders. Blocked Noteholders (including the RSA Blocked Noteholders) would be excluded from voting. The Company considered that this was necessary because the Blocked Noteholders could not receive documents or give voting instructions via the clearing systems and because the Information Agent was also unable to send documents to or receive voting instructions from them. However, to ensure that the RSA Blocked Noteholders (who had acceded to the RSA and thereby agreed to submit an Account Holder Letter and vote in favour of the Scheme at the scheme meeting, and who were only entitled to the Instruction Fee if they did so) would be financially no worse off by being unable to vote, the Company agreed to waive the RSA Blocked Noteholders' obligation to submit an Account Holder Letter and agreed that the RSA

Blocked Noteholders should nonetheless still be paid their Instruction Fee if the Scheme was approved and sanctioned. This would be paid to the Holding Period Trustee.

Third Parties

51. The Scheme also provides that by no later than the date of the sanction hearing, various non-parties to the Scheme will give undertakings to the Company and the Court to be bound by the terms of the Scheme. These include the Subsidiary Guarantors, the subsidiaries who will guarantee the New Notes, the Old Notes Trustee, the Depositary, the Old Notes Paying and Transfer Agent, the New Notes Trustee,, the New Notes Paying and Transfer Agent, the Holding Period Trustee, the person appointed to act as the supervisor of the Scheme and the Information Agent.

The issues arising on the convening hearing

52. It is now well settled that the function of the Court at a scheme convening hearing is not to consider the merits or fairness of the proposed scheme. These issues arise for consideration at the sanction hearing if the scheme is approved by the requisite majority of creditors. At the convening hearing the Court is concerned with a narrower range of issues when determining whether to give directions for the convening of the scheme meeting and if so what those directions should be. The issues for consideration are referred to in the Practice Direction (at [3]). They are now frequently summarised as covering three main areas, namely first, any issues which may arise as to the constitution of the meeting or meetings of creditors; secondly, any issues as to the existence of the Court's jurisdiction to sanction the scheme and thirdly, any other issue (not going to the merits or fairness of the scheme) which might lead the Court to refuse to sanction it (which will usually include a review of the extent to which the scheme will be effective abroad in other relevant jurisdictions).

53. In addition, the Court will consider whether adequate notice has been given to creditors of the purpose and effect of the proposed scheme and of the convening hearing. The Practice Direction (at [3.1]), as noted above, states that:

> *"....practitioners should consider giving notice to persons affected by the scheme in cases where class or other issues referred to in paragraph 3.3 below arise and where it is practical to do so. Such notice should include a statement of the intention to promote the scheme and of its purpose, and also of the proposed composition of classes and of the intention to raise any issue as referred to in paragraph 3.3 below."*

54. Paragraph 3.3 of the Practice Direction states that:

> *"At the first hearing, the Court will also consider any other issue which is relevant to the jurisdiction of the Court to sanction the scheme, and any other issue which, although not strictly going to jurisdiction, is such that it would unquestionably lead the Court to refuse to sanction the scheme."*

55. In this case, there is no issue as to jurisdiction. The Company is a Cayman Islands incorporated company and is therefore liable to be wound up under the Companies Act. Accordingly, pursuant to section 86(5) of the Companies Act the Court clearly has jurisdiction to convene a scheme meeting (and sanction a scheme) in respect of the Company (I discuss below the relevance of the connections to the jurisdiction for the purpose of the Court's exercise of its discretion to sanction the Scheme). The Scheme is also clearly an arrangement within the meaning of section 86 of the Companies Act.

56. Issues do however arise in relation to the following matters: the notice of the convening hearing; class composition; the extent to which there are doubts as to the international effectiveness of the Scheme; the adequacy of the disclosure in the Explanatory Statement and the directions to be given for the convening and conduct of the Scheme meeting. I deal with each of these issues in turn.

Notice of the convening hearing and amendments to the Scheme

57. As I have noted above, Scheme Creditors were first given notice of the proposed scheme on 5 August 2022 in the PSL. The PSL said that the convening hearing was listed on 5 September 2022. They were notified on 2 September 2022 that the date of the convening hearing had been put back to 15 September 2022. They were then notified shortly before the convening hearing,

on 12 September 2022, that certain amendments to the Scheme were to be made with respect to the treatment of the Blocked Noteholders and that the Company would seek to be granted the power to extend the Longstop Date to 30 November 2022.

58. The question of the timing and adequacy of notice to Scheme Creditors has been considered by a number of authorities. As Mr Justice Zacaroli noted in *Re Lecta Paper UK Limited* [2019] EWHC 3615 (Ch) (***Lecta***) at [10] "*The essential question, as posed by Norris J in Re NN2 Newco Ltd [2019] EWHC 1917 (Ch), at [22]-[23] is whether in all the circumstances of the case (including the complexity of the scheme, the degree of prior consultation with creditors and the urgency of the scheme) creditors have been given sufficient notice of the basic terms of the scheme and an effective opportunity to raise any concerns*." As Mr Justice Meade said in *Re Nostrum Oil & Gas Plc* [2022] EWHC 1646 (Ch) (***Nostrum***) at [25] "*the appropriate period of notice is a fact-sensitive matter*."

59. In this case, leaving to one side the position of the Blocked Noteholders, I am satisfied that adequate notice has been given. The basic terms of the Scheme were notified on and have not materially changed since 5 August 2022. The PSL in early August gave notice that the convening hearing would be in early September and the subsequent notice dated 2 September gave just under two weeks' notice of the revised hearing date (of 15 September). Furthermore, a substantial proportion of the Noteholders have been involved in the restructuring negotiations and have become parties to the RSA. The precise dates on which Noteholders acceded to the RSA have not been disclosed but it is clear that they did so some time in advance of the PSL. In the PSL the Company confirmed (at [39]) that Noteholders holding approximately 90% of the Old Notes had already by 5 August 2022 entered into or acceded to the RSA.

60. But what about the position of the Blocked Noteholders? Some of the Blocked Noteholders acceded to the RSA. They will have been fully informed of the terms of the Scheme. But there may be others who have not come forward. They cannot receive notices through the clearing systems and so must rely on making their own searches of the Company's website and the HKSE website. This may result in some delays in their picking up and finding out about developments. However, the PSL was uploaded to the Company's and the HKSE's website in

early August 2022 and therefore it is reasonable to expect that even these other Blocked Noteholders will have been aware of the restructuring proposals, the terms of the Scheme and the timetable for implementing it, including there being a convening hearing in early September. I had a concern that they will only have found out that the Company was proposing that they would not have the right to vote at the Scheme meeting a matter of days before the convening hearing. It is possible that some of the Blocked Noteholders may have wished to object to the Company's proposal and to have made representations at the convening hearing but were unable to do so in view of the very short notice given of the amendments. However, in this case I do not consider that there is a need to find or justification finding that the Company failed to give adequate notice to the Blocked Noteholders of important amendments to the Scheme so that the convening hearing should be adjourned. First, as I shall explain shortly, I directed at, and the Company has agreed following the convening hearing that Blocked Noteholders be permitted to vote at the Scheme meeting and that arrangements be made that will give them an opportunity to do so outside the clearing systems. Therefore, the main cause of concern that the Blocked Noteholders would have had has been dealt with. Secondly, and most importantly, the Blocked Noteholders will have an opportunity to raise any concerns and objections to sanction of the Scheme at the sanction hearing. In view of the very short notice they were given of the amendments to the Scheme affecting them, they will be given greater leeway than creditors would usually have to raise at the sanction hearing issues that could and should have been brought forward at the convening hearing. Thirdly, the Company is clearly under serious time pressure in view of the Alibaba deadline and an adjournment of the convening hearing would potentially have serious and damaging consequences for the restructuring and the interests of Noteholders.

Class composition

61. The Court's approach to considering the question of class composition was neatly summed up recently by Meade J in *Nostrum* as follows:

> *"The basic principle is that a class must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest (see Sovereign Life Assurance v Dodd [1892] 2 QB at [573] and many cases since, including e.g. Re Telewest Communications Plc [2004] BCC*

> *342). In answering the question of whether a separate class is required, the Court must consider the rights that creditors would have if the proposed scheme were not implemented. In carrying out that exercise, the Court is concerned with rights, not interests. Even where there are differences in rights, the differences must be sufficient to make consultation impossible. It is important that the Court should not be too picky, to guard against the risk that that will enable a small group to hold out unfairly against a majority."*

62. In this jurisdiction the test to be applied is also summarised in the Practice Direction (at [3.2]).

63. When dividing creditors or members into classes, two considerations are relevant: the rights that the creditors or members would have if the scheme were not implemented, and the rights that the creditors or members have if the scheme is implemented. As Chadwick LJ said in *Re Hawk Insurance Co Ltd* [2002] BCC 300 at [30]:

> *"In each case the answer to that question will depend upon analysis (i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by way of compromise or arrangement, to those whose rights are to be released or varied."*

64. The Company submitted that in the present case, the Scheme Creditors should vote in a single class:

(a). the Court needed to consider the rights of Scheme Creditors under the Scheme and under the alternative to the Scheme. The Company submitted that the Scheme Creditors have the same rights and are treated equally under the Scheme and would have the same rights under the alternative to the Scheme.

(b). the Scheme Creditors will, subject to the two differences discussed below, be given identical legal rights under the Scheme. Once the restructuring is implemented, each Scheme Creditor will be entitled to receive the same package of Scheme consideration pro rata to their existing claims. There is no relevant difference of treatment and therefore no difference in the rights acquired by Scheme Creditors under the Scheme.

(c). the Company also submitted that the evidence indicated that the alternative to the Scheme (the comparator) was an insolvent liquidation. If the Scheme is not approved the Company is very likely to enter into insolvent liquidation. In that situation, all Scheme Creditors would have the same legal rights against the Company. They would have unsecured claims ranking *pari passu*, and would receive (based on the Kroll liquidation analysis) the same estimated pro rata return of approximately 25.8% to 36.1%. The Company submitted that the Kroll liquidation analysis had been properly prepared and set out a realistic and reasonable estimate of the recoveries that Scheme Creditors would make if the Company and other members of the Group were forced in liquidation upon the failure of the Scheme.

65. The Company accepted that there were some differences of treatment between Scheme Creditors but that these differences were said to be immaterial and did not fracture the class:

(a). some, but not all, Scheme Creditors have signed the RSA and will receive the Instruction Fee although all Noteholders were offered the opportunity to accede to the RSA and receive the Instruction Fee.

(b). the Blocked Noteholders will not be able to receive the Scheme consideration on the Restructuring Effective Date, but instead the Scheme consideration to which the Blocked Noteholders would otherwise be entitled will be held on trust by the Holding Period Trustee, and subsequently the trustee of the Successor Trust until the applicable sanctions are lifted or for the duration of the two trusts. Furthermore, the Company's position at the convening hearing was that the Blocked Noteholders would not be entitled to attend or vote at the Scheme meeting.

66. As regards the fees, the Company argued that the fact that creditors had entered into a lock-up agreement did not give rise to a class issue. Rather, it was relevant to the exercise of the discretion of the Court when deciding whether to sanction a scheme (citing *Telewest Communications* [2004] BCC 342 at [53]). The Company argued that it was well-established that fees paid in connection with lock-up agreements of a type similar to the RSA (commonly

referred to as consent fees) did not fracture a class merely because some members of the class will not receive the fee (*In Re DX Holdings Ltd and other Companies* [2010] EWHC 1513 (Ch) at [7]). Two factors were important: first, whether or not the consent fee was offered to all scheme creditors and secondly, whether the consent fee was likely to exert any material influence on creditors' voting decisions (*Re Magyar Telecom* [2014] BCC 448 at [12]; *Re PrimaCom Holdings GmbH (No.1)* [2013] BCC 201 at [55]-[57] and *Re Privatbank* [2015] EWHC 3186 (Ch) at [30]). In this case, as already noted, the Instruction Fee had been offered to all Noteholders who acceded to the RSA by the Instruction Fee Deadline and all Noteholders were given the opportunity and sufficient time to accede to the RSA after the announcement of the RSA on 31 March 2022; the Instruction Fee was small, being only 1% of the outstanding principal amount of the Old Notes held by Noteholders who are Consenting Creditors; under the Scheme, the Noteholders were expected to receive 100% of the sums due under the Old Notes (albeit at a later date) but in a liquidation, the return was expected to be between 25.8% (low) and 36.1% (high) so that in these circumstances it was highly unlikely that a Noteholder who would otherwise have intended or planned to vote against the Scheme would have been persuaded and incentivised to vote in favour in order to obtain the Instruction Fee and a small additional 1% return.

67. As regards the treatment of the Blocked Noteholders:

(a). the Company noted that the Blocked Noteholders were receiving the same benefits under the Scheme as other Scheme Creditors (including, where they had acceded to the RSA, the Instruction Fee) but at a later date. The Company submitted that the delay in the Blocked Noteholders having access to their Scheme consideration was not unusual where parties to a scheme were subject to regulatory or other requirements that made it unlawful for them to receive the scheme consideration immediately. The Company relied on the following recent statement of the applicable principle by Mr Justice Marcus Smith in *Re Haya Holco 2 plc* [2022] EWHC 1079 (Ch) (***Haya***) at [72(3)]:

> "*Scheme Creditors will be required to make certain customary confirmations with respect to US securities legislation in order to certify their ability to*

> *receive their allocation of New SSNs and New Shares. If a Scheme Creditor is unable to make such customary confirmations, it may nominate a person to receive its allocation of New SSNs and New Shares on its behalf. If a Scheme Creditor fails to nominate such a person, then the New SSNs and New Shares for that Scheme Creditor will be transferred into a "holding trust" for up to 12 months. If the New SSNs and New Shares still have not been claimed at the end of that period, then they will be sold and the net proceeds will be distributed to the relevant creditor. This structure does not, in my judgment, fracture the class. It is a customary feature of schemes that involve the issuance of new debt or equity securities. The Scheme Creditors have the same rights in relation to the New SSNs and New Shares under the Scheme. An inability to give the customary confirmations required to be given to receive an allocation of New SSNs and New Shares goes merely to the enjoyment of those rights, creating a potential fairness, not class, issue: see Re Lecta Paper UK Ltd [2019] EWHC 3615 (Ch) at [19] per Zacaroli J; Re Obrascon Huarte Lain SA [2021] EWHC 859 (Ch) at [28] per Adam Johnson J; Re Swissport Fuelling Ltd [2020] EWHC 3064 (Ch) at [82]-[83] per Trower J.*"

(b). as regards the prohibition on the Blocked Noteholders from attending or voting at the Scheme Meeting, the Company noted that the issue had arisen in *Nostrum*, another sanctions case, but had not affected Meade J's decision that it was appropriate to convene a scheme meeting of a single class of scheme creditors. Meade J had noted at [42] of his judgment, the Company said, that the scheme creditors affected by sanctions had signed a lock-up agreement prior to their being sanctioned, and this strongly indicated that they did not object to the scheme. The Company submitted that the restrictions on the Blocked Noteholders' right to attend and vote at the Scheme meeting, if relevant at all, related only to the fairness of the Scheme, which was not a question to be decided at the convening hearing. If the Blocked Noteholders had any objections to the Scheme, related to the effect of sanctions or the mechanisms put in place to deal with them, then they would be able to raise these objections at the sanction hearing.

68. I accept that the entitlement of Consenting Creditors to be paid the Instruction Fee does not require that they be put in a separate class. But in my view the proper approach to be followed by the Court was that set out by Marcus Smith J in *Haya*. He said this (at [72(4)] (underlining added):

*"Consent payment. A consent fee is payable to Scheme Creditors who acceded to the Lock-Up Agreement by 5pm on 31 March 2022 (the **Consent Payment**). The Consent Payment is a sum equal to 0.5% of the principal amount of the New SSNs to be received by the relevant Scheme Creditor under the Scheme. The Consent Payment will be payable in cash upon the implementation of the Scheme. Consent fees of this type are common, and at this level do not – given the value at risk - fracture the proposed class. Of course, this is a matter that is fact dependent, and the fees incurred in bringing forward a scheme, and the basis on which they are to be paid, are always going to be matters the court ought to bear in mind. More specifically:*

(a) Some of the authorities suggest that, where a consent fee is made available to all creditors in advance of the scheme meeting, it cannot fracture the class. If each creditor had a right to obtain the fee, then there is no difference in rights that is capable of fracturing the class: see Re HEMA UK I Ltd [2020] EWHC 2219 (Ch) and Re Swissport Fuelling Ltd [2020] EWHC 3064 (Ch) at [72] per Trower J, among many other cases. I am a little doubtful as to the weight of this point, since the critical question is how the class will vote at the meeting, and the factors that might impair that vote.

(b) Some of the authorities suggest that even if a consent fee was made available to all, it is necessary to consider whether the quantum of the consent fee is material. On this view, if a consent fee would be unlikely to exert a material influence on the relevant creditors' voting decisions (having regard to the amount that creditors would receive in the comparator to the scheme and the value of the rights conferred by the scheme), then the fee does not fracture the class: see Re Primacom Holding GmbH [2013] BCC 201 at [57] per Hildyard J, among other cases.

It is this, second, factor that is persuasive – at least in the present case, although I would be troubled if the potential for a consent fee were not available to all members of the class. To that extent, selectivity may be a negative factor, requiring of explanation. In the present case, all of the financial creditors were given an opportunity to sign the Lock-Up Agreement and receive the Consent Payment (if they acceded by 5pm on 31 March 2022). More importantly, the Consent Payment (which represents only 0.5% of the New SSNs to be received by the relevant Scheme Creditor) would not, in my judgment, exert a material influence on the Scheme Creditors' voting decisions. The difference between the "Scheme outcome" and the "comparator outcome" is far greater than 0.5% and it would be fanciful to suppose that anyone would vote for the Scheme in order to receive the Consent Payment."

69. The Court is required, when addressing the question of whether the class of Scheme Creditors has been fractured, to have regard to the rights given to Scheme Creditors pursuant to or in connection with the Scheme and consider whether there are material differences in those rights that prevent the Scheme Creditors from being able to consult together with a view to their common interest. It seems to me that rights have to be assessed at the date of the Scheme Meeting and include rights granted under documents that are entered into in connection with and for the purpose of obtaining creditor support for the Scheme. Accordingly, Consenting Creditors are to be treated as having different rights from other Scheme Creditors. But where all Scheme Creditors have been given an equal opportunity to obtain the consent fee (by acceding to a lockup agreement such as the RSA) and all Scheme Creditors are otherwise treated equally, the difference in rights is self-induced, in the sense that it arises from a choice made by those Scheme Creditors who have decided not to accede to the lockup agreement. Furthermore, the difference in rights is not of a kind that can reasonably be expected materially to affect Scheme Creditors' decision making at the Scheme Meeting, if the amount of the consent fee is so small that no reasonable and properly informed Scheme Creditor would be likely to change his/her vote (to vote in favour of the scheme) because of the entitlement to be paid the consent fee or be likely to regard that entitlement as having a substantial effect on his voting decision.

70. In the present case, all Scheme Creditors were invited to become parties to the RSA. This included the Blocked Noteholders, a significant number of whom acceded to the RSA. The Instruction Fee is an amount equal to 1% of the aggregate principal amount of that Consenting Creditor's Old Notes as at the Instruction Fee Deadline. The fee is not calculated by reference to the scheme consideration, as was the case in *Haya*, but that is not unusual or determinative. The amount of the Instruction Fee is not *de minimis* or trivial but it is not of such an amount that Scheme Creditors who are entitled to it can reasonably be expected to have a materially different view of the benefits of the Scheme over the alternative (an insolvent liquidation). There is no evidence to indicate, nor is the amount of the Instruction Fee inherently and of itself so large as to indicate, that a reasonable and properly informed Scheme Creditor would be likely to change his/her vote because of the entitlement to be paid the Instruction Fee or be likely to regard that entitlement as having a substantial effect on his voting decision. The Instruction Fee is being paid as an incentive for an early commitment to support the Scheme,

and represents reasonable compensation for a commitment to support the Scheme in advance of the Scheme meeting.

71. It is also worth noting that the payment of a consent fee may also be relevant to a different issue at the sanction stage. If fees are paid to secure the support of Scheme Creditors and have the effect of manipulating the vote at the Scheme Meeting, such fees can affect and undermine the integrity of the vote and be a ground for refusing to sanction the scheme. But no issue on this ground arises in this case.

72. I accept the Company's submissions with respect to the effect of the arrangements made in relation to the Blocked Noteholders' Scheme consideration. As pointed out by Marcus Smith J in *Haya* there is a fundamental distinction between a scheme conferring different rights on different groups of creditors and a scheme conferring the same rights on all creditors but with some creditors being unable to enjoy those rights (immediately) by virtue of some personal characteristic that they possess. The latter situation should not fracture the class, as it involves a difference in interests rather than rights.

Preventing Blocked Noteholders from attending or voting at the Scheme meeting

73. However, I do not accept that it would be permissible to deprive the Blocked Noteholders of the right to attend and vote at the Scheme meeting. While it might be said that by establishing arrangements and obtaining directions for the conduct of the Scheme meeting that prevented Blocked Noteholders (who were nonetheless Scheme Creditors whose rights were discharged and varied by the Scheme) from attending and voting, the Blocked Noteholders were being granted different rights from other Scheme Creditors under or in connection with the Scheme (so that they should be in a different class), it seems to me that this issue does not go to class composition. It goes to an even more fundamental point, namely the rights given by the Companies Act to parties to a scheme and to the fairness of the Scheme (leaving aside the

impact of the Bill of Rights). It therefore raises an issue which might lead the Court to refuse to sanction the Scheme at the sanction stage.

74. Blocked Noteholders are unable to receive documents and give voting instructions via the clearing systems. There is no evidence that attendance of any Blocked Noteholder or voting by a Blocked Noteholder at the Scheme meeting would be unlawful and a breach of relevant sanctions. If that were the case, the position would be different. It is just that the usual method of communicating with and obtaining instructions from the ultimate and unidentified holders of the Old Notes is not available because of the effect of sanctions and the action taken by the clearing systems in response to such sanctions.

75. Parties to a scheme of arrangement whose rights are to be varied or discharged thereby are entitled to attend and vote at the Scheme meeting. In my view, that is what is envisaged and required by the relevant provisions of the Companies Act.

76. Section 86 of the Companies Act states that:

> *"(1) Where a compromise or arrangement is proposed between a company and its creditors or any class of them … the Court may … order a meeting of the creditors or class of creditors …. to be summoned in such manner as the Court directs.*
>
> *(2) If a majority in number representing seventy-five per cent in value of the creditors or class of creditors as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors or the class of creditors as the case may be, and also on the company or, where a company is in the course of being wound up, on the liquidator and contributories of the company.*

77. The Court is to summon a meeting of all those creditors who are made parties to the scheme and such creditors are entitled to vote. The Blocked Noteholders are to be made parties to the Scheme. They must be summoned to the Scheme meeting and allowed to vote.

78. As I pointed out to the Company at the convening hearing, parties to a scheme must be given the right to vote on it and if there are practical problems which make it difficult for them or limit their ability to exercise that right and vote then the company must do (and must show that it has done) everything which it can reasonably be expected to do to give the scheme creditors concerned the opportunity to exercise the right to vote. In this case, it seemed to me that Blocked Noteholders could be given the opportunity to vote. They had already been notified of the Scheme and arrangements for the Scheme Meeting and could access the Scheme documents via the Company's scheme website and it seemed to me that it must also be possible for the Company to make arrangements, as had been done with the RSA, for Blocked Noteholders to submit voting instructions and evidence of their status as Noteholders outside the clearing systems to suitable persons identified and appointed by the Company for the purpose. After the convening hearing, and following consultations with its advisers and the clearing systems, the Company confirmed that indeed this was possible and the Scheme documents and the arrangements for attendance and voting at the Scheme meeting were amended to allow Blocked Noteholders to attend and vote at the meeting.

79. The Company relied on the judgment of Meade J in *Nostrum* and it is worth noting precisely what the learned judge had said on this topic in his judgment (underlining added):

> *"13. There are certain regulatory approvals that the Company must obtain in order to implement the Restructuring, which arise due to certain of the Scheme Creditors being direct or indirect targets of sanctions in the UK, EU or US. Such Scheme Creditors ("the Sanctions Disqualified Persons") are currently prohibited from dealing with the Existing Notes. Approximately 7.1% by value of the Notes are held by Sanctions Disqualified Persons.*
>
> *14. The Restructuring may require licences to be granted by the sanctions authorities in the UK, the Netherlands and the US. I understand from Mr Allison QC, who appeared for the Company, that there is a possibility that the relevant authorities will indicate that no such licence is required (although this is less likely with the US). There is uncertainty as to when such licences (or confirmation that licences are not required) will be provided, which is why the moratorium is necessary to provide the Company with breathing room to implement the Restructuring.*
>
> ....

> *42. Sanctions Disqualified Persons will not, because of their status as such, be able to vote on the Scheme. I note however that the (current) Sanctions Disqualified Persons signed up to the Lock-Up Agreement prior to their being sanctioned and this strongly indicates that they did not object to the Scheme and would be unlikely to do so now.*
>
> *43. In any event, in my opinion the issue of sanctions relates, if anything, to the fairness of the Scheme, which is not a question I need to decide at this stage. I therefore agree with Mr Allison that the fact that there are Sanctions Disqualified Persons, and the mechanisms put in place to deal with sanctions, do not fracture the class. For completeness, I record that I slightly misunderstood the voting position in relation to Sanctions Disqualified Persons at the hearing because I was at cross-purposes with Mr Allison. The paragraphs above have been corrected following a helpful communication from the Company's Counsel after seeing my judgment. I am confident that my misunderstanding did not affect the result and I would have announced the same decision at the hearing anyway."*

80. It therefore appears that in *Nostrum* the Sanctions Disqualified Persons were prohibited by sanctions from dealing with their notes. That appears to have meant that it would have been unlawful for them to vote at the scheme meeting. That is not the position in this case. In addition, it appears that all the Sanctions Disqualified Persons had agreed to support and be bound by the scheme, so that their assent did not need to be established or confirmed by a vote at the scheme meeting. I do not need in this case to decide whether the Court would be willing to sanction a scheme where creditors who are made parties to the scheme cannot vote. I would say however that I am not currently satisfied that this is an issue which only goes to fairness.

International effectiveness of the Scheme

81. At the convening hearing, the Court also needs to consider, at that stage on a preliminary basis, whether there is no point in convening a meeting of creditors because even if scheme creditors were to vote in favour and the Court were to sanction the scheme it would ultimately be ineffective since the scheme would not bind creditors and would be of no effect in other jurisdictions in which the company concerned had valuable assets or could be subject to insolvency proceedings (and there was a real risk that dissenting creditors might take action there). The Court will not act in vain and will not sanction a scheme which will not be substantially effective and achieve its core purpose.

82. In this case the Old Notes are governed by New York law. While as a matter of Cayman law, the Scheme will be effective to discharge the Old Notes and Noteholders will be bound by the Scheme if sanctioned, the question arises as to whether the Scheme will be effective as a matter of New York law and whether Noteholders will be bound so that they cannot bring proceedings to enforce the Old Notes or to wind up the Company in another jurisdiction in which the Company has valuable assets or could be wound up (and whether there is a real risk that dissenting creditors would take such action). As I have noted, the Company is a holding company and its principal assets are the shares it holds in its subsidiaries, in particular Fangyou (a BVI incorporated company) and TM Home Limited (a Cayman incorporated company).

83. In order to ensure that the Scheme is binding and given effect as a matter of New York law, the Company intends to apply, if the Scheme is sanctioned, for relief under chapter 15 of the US Bankruptcy Code. As regards the prospects of obtaining and the effect of chapter 15 relief the Company relied on Judge Gropper's evidence. Judge Gropper, as I have noted, is a hugely experienced and highly respected former US Bankruptcy Judge for the Southern District of New York. He summarised his evidence at [9] and [10] of his Affidavit as follows:

> *"9. I have been asked to state whether in my opinion (i) a United States Bankruptcy Court with appropriate jurisdiction, including the United States Bankruptcy Court for the Southern District of New York, would recognize the Cayman Islands' judicial process of obtaining approval of the Scheme (the "**Proceeding**") as a foreign main proceeding under chapter 15; (ii) relief could be obtained to ensure that the Scheme would be enforced in the United States, given the Indentures are governed by New York law, and in accordance with such principles, a creditor would or could be prevented from bringing legal proceedings in the United States against the Company in contravention of the terms of the Scheme; (iii) the grant of appropriate relief in the chapter 15 proceeding would have the effect of substantively discharging the Notes affected by the Scheme for the purposes of U.S federal and state law; and (iv) the third-party waivers and releases and exculpation provisions set out in substantially the same form as the draft Scheme would be enforceable in the United States. I have also been asked to address whether the Cayman Islands would be recognized as the center of main interests ("**COMI**") of the Company such that the Proceeding would be*

recognized as a "foreign main" proceeding under chapter 15 of the Bankruptcy Code.

10. Based on the facts provided in the documents identified below and the analysis set forth herein, and subject to the qualifications stated, it is my opinion that (i) the Cayman Proceeding would be recognized as a "foreign main proceeding" under chapter 15 of the Bankruptcy Code; (ii) the Scheme will be effective in the United States in practice to bind Scheme Creditors in relation to the variation of their rights; (iii) relief in the chapter 15 proceeding would have the effect of substantively discharging the Notes and related guarantees for the purposes of U.S. Federal and State law; and (iv) the third-party waivers, releases and exculpation provisions set out in substantially the same form as the draft Scheme will be enforceable in the United States. I can also confirm that principles of international comity remain important considerations for courts in the United States when considering applications to give effect in the United States to foreign proceedings."

84. Judge Gropper's Affidavit sets out a fully reasoned analysis with reference to relevant authorities to support his conclusions. He dealt in depth with the test under the chapter 15 jurisprudence for determining COMI and said this at [24]:

"Based on the statute as construed by the cases discussed above, it is my opinion that the Proceeding in the Cayman Islands would be recognized by a U.S. bankruptcy court as a foreign main proceeding. As stated above, section 1516(c) of chapter 15 provides that the place of registration is presumed to be the debtor's COMI, and in the instant case we must start with the presumption that the Cayman Islands is the COMI. This presumption may be rebutted, but here there would be insufficient grounds to do so. The Cayman Islands is undoubtedly the "center of the Company's interests", taking into account the words of the statute as written. Indeed, the Company's future as an entity depends on its efforts to restructure debt that is in default. These efforts are all centered in the Cayman Islands - in the petition to this Court to convene a Scheme Meeting, in that the Scheme Meeting will take place in the Cayman Islands, and in this Court sanctioning the Scheme. I am informed that noteholders who wish to contact the Company in relation to the restructuring and/or the Scheme will be informed through a practice statement letter that they may do so by contacting A&M, a service provider located in the Cayman Islands by: (i) writing to a Cayman Islands address; (ii) sending an email to a Cayman Islands email address; or (iii) by telephoning A&M on a Cayman Islands telephone number. In any event, by the date of the filing of the chapter 15 petition, which is the critical date for chapter 15 purposes, the Company's very existence will depend on activities centered in the Cayman Islands."

85. Judge Gropper relied in particular on the decision of the Second Circuit Court of Appeals in *Morning Mist Holdings Ltd v Kris* 714 F.3d 127 (2d Cir. 2013) (***Morning Mist***) and noted that his conclusions were strongly supported by the recent decision of Judge Glenn, the Chief Judge of the Bankruptcy Court for the Southern District of New York, in *In re Modern Land (China) Co., Ltd* 2022 WL 2794014 (Bankr. S.D.N.Y, July 22, 2022) ("***Modern Land***"). He said this about that decision:

> *"My conclusions as set forth above are strongly supported by the Modern Land decision of Judge Glenn discussed above. In a case involving a company with many relevant similarities to the Company here, the Court held that recognition as a foreign main proceeding would be consistent with the goals of chapter 15, with creditors' expectations and with choice of law principles, among other things. The Court also stressed that the judicial role in that proceeding, like the instant proceeding, was prevalent and that it would not imply the requirement that provisional liquidators or their equivalent would be required in order to meet the standards for recognition. 2022 WL 27940 at *13-14.*

86. In Judge Gropper's opinion, the third party releases in the Scheme would not preclude the US Bankruptcy Court from granting relief under chapter 15 and that the relief which would be granted would include both recognition and enforcement of the discharge effected by the Scheme. The US Bankruptcy Court would "*give full force and effect*" to the provisions of the Scheme.

87. Judge Gropper also referred to the judgment of Mr Justice Harris in Hong Kong in *In re Rare Earth Magnesium Technology Group Holdings Limited* [2022] HKCFI 16896 (***Rare Earth***). *Rare Earth* was a case involving a Hong Kong scheme in respect of a company incorporated in Bermuda which sought to discharge debt governed by Hong Kong law. But the learned judge made some comments regarding the approach of the Hong Kong courts to the effect and recognition in Hong Kong of chapter 15 relief granted by US Bankruptcy Courts in respect of schemes sanctioned in "*offshore jurisdictions*" which discharged New York law debt. Mr Justice Harris said as follows:

> *"31. A creditor could not take enforcement action within the United States as a consequence of recognition of the scheme under Chapter 15 and granting by the relevant Bankruptcy Court of ancillary relief which prohibited*

enforcement in the United States. As the offshore jurisdictions apply the Rule in Gibbs, such a scheme might not be effective to compromise the debt of a creditor, who has not submitted to the jurisdiction of the Hong Kong court. Whether or not it is necessary to introduce a parallel scheme in the offshore jurisdiction will depend on the factors that I consider in [23]–[29] of China Oil.

32. *A scheme sanctioned in an offshore jurisdiction and recognised under Chapter 15 in the United States will not be treated by a Hong Kong court as compromising US$ debt. The Rule in Gibbs requires the substantive alteration of contractual rights to be sanctioned by some substantive provision of the relevant law. In the insolvency context in the United States this is I understand is achieved under Chapter 11 of United States Bankruptcy Code. This is explained by Glenn J (who dealt with the Chapter 15 application in Winsway) in his judgment in In re Agrokor d.d. In pages 184 to 185 Glenn J explains the position as follows:*

> *"The Supreme Court concluded in Tennessee Student Assistance Corp. v. Hood, 541 U.S. 440, 447, 124 S.Ct. 1905, 158 L.Ed.2d 764 (2004), that the discharge of debt in a U.S. bankruptcy proceeding is proper because it is an in rem proceeding. A single court should resolve all claims to property of the debtor, which necessarily requires that the court resolve all creditor claims that have been, or could have been, asserted, provided that the creditors have received the notice required by due process. Thus, in an in rem proceeding, personal jurisdiction over all creditors is not required; the court determines the creditors' rights to receive distributions from all property of the debtor that is part of the estate. A creditor cannot ignore or avoid a Chapter 11 case and later sue to recover on its prepetition claim. Upon confirmation of a Chapter 11 plan, section 1141 (d)(1)(A) discharges the debtor from any debt that arose before the date of confirmation, whether or not the creditors filed a proof of claim or accepted the plan…"*

33. *As a matter of United States law a confirmed Chapter 11 plan operates to discharge the existing debt of a debtor and replace it with a right to receive a distribution in accordance with the confirmed plan. This is also the effect of a sanctioned scheme. Glenn J goes on at the end of the paragraph I have quoted to refer to the same principles applying to recognition of a foreign insolvency process with the same consequences, however, it is clear from reading the judgment as a whole that recognition under Chapter 15 does not operate as a discharge and that Glenn J acknowledges this.*

34. *On page 185 Glenn J introduces an objection to recognition based on the fact that some of the debt compromised by the arrangement Glenn J was asked to*

recognise was governed by English law and the arrangement arose under Croatia's Act of the Extraordinary Administration Proceedings in Companies of Systemic Importance of the Republic of Croatia.

"From the record before this Court—particularly since no objections have been filed—the Court concludes that the Croatian Proceeding was procedurally fair, provided proper notice to all creditors and, through the Settlement Agreement, determined the rights of all creditors to property that was subject to the jurisdiction of the Croatian Court. Is there any reason, then, not to recognize and enforce the Settlement Agreement within the territorial jurisdiction of the United States? This Court believes there is not. Nonetheless, the issue (of whether recognition of the entire Settlement: Agreement is appropriate within the territorial U.S.) arises because of the English courts' enforcement of the Gibbs rule, discussed below, which could lead an English court to conclude that certain aspects of the Settlement Agreement cannot be enforced in England against creditors holding English law governed debt. Such a refusal of the English court to enforce parts of the Settlement Agreement would most certainly cause the Settlement Agreement to fall considering the amount of prepetition debt governed by English law. That would be unfortunate, indeed."

35. *The material distinction between Chapter 11 and Chapter 15 proceedings is explained on page 187:*

"Section 1520 details the mandatory relief that is automatically granted upon recognition of a foreign main proceeding under Chapter 15. 11 U.S.C. § 1520. Section 1520(a)(1) provides that the automatic stay will apply to all the debtor's property that is located within the territorial jurisdiction of the United States. The statute refers specifically to the property of the debtor, as opposed to the property of the estate, since there is no estate in a Chapter 15 case. See, e.g., Atlas Shipping, 404 B.R. at 739. Despite this difference, the automatic effect of recognition of a foreign main proceeding under section 1520(a) is an imposition of an automatic stay on any action regarding the debtor's property located in the United States. Id." (emphasis added)

36. *It is clear from this passage that recognition under Chapter 15 operates procedurally to prevent action by a creditor against a debtor's property in the United States. Recognition does not appear as a matter of United States' law to discharge the debt. Consistent with this at page 196 Glenn J states that it is appropriate to extend comity within the territorial jurisdiction of the United States. Unlike a discharge under Chapter 11 which purports to have*

> *worldwide effect, recognition under Chapter 15 is limited in territorial effect and I think it is reasonable to assume that the reason for this is that the procedure does not discharge the debt.*
>
> *37. There is a distinction between a court treating a compromise as having the substantive legal effect of altering the legal rights of the parties to an agreement (the issue with which Gibbs is concerned) and a court within its jurisdiction recognising, pursuant to a process such as Chapter 15, the purported legal consequence of a foreign insolvency procedure. This is a distinction to which advisers need to be alert when dealing with transnational restructuring. A scheme in an offshore jurisdiction purporting to compromise debt governed by United States law will not be effective in Hong Kong. Recognition of the scheme under Chapter 15 does not constitute a compromise of debt governed by United States law, which satisfies the Rule in Gibbs. The result is that if a company has a creditor, which did not submit to the jurisdiction of the offshore court the creditor will be able to present a petition in Hong Kong to wind up the Company and if, for example, the creditor is a bond holder whose debt is not disputed, obtain a winding up order unless the debt is settled. I note that there appears to be a surprisingly large number of Mainland business groups listed in Hong Kong, whose US$ denominated debt has recently been subject to schemes only in offshore jurisdictions and recognition under Chapter 15. It may be that all the creditors of these companies, which hold debt of any material value have agreed to the terms of the compromise, but if that is not the case such companies, and any that might adopt a similar model in future, will be at risk of a petition being presented against them in Hong Kong and being wound up here. An offshore scheme and Chapter 15 recognition will not protect them.*

88. Judge Gropper noted that Judge Glenn in *Modern Land* had considered that Mr Justice Harris' summary of applicable US law had not been correct. Judge Gropper made the following comments in his Affidavit (at [19]) (underlining added):

> *"In regard to these issues, mention should be made of the recent decision of a Hong Kong Court in a case captioned In the Matter of Rare Earth Magnesium Technology Group Holdings Limited, [2022] HKCFI 1686. There, the Court, taking it upon itself to construe United States law and quoting from the decision in the Agrokor case cited above, stated in dictum that it did not believe that an order under chapter 15 recognizing and enforcing a foreign proceeding discharges the underlying debt. With respect, I believe the Court's discussion of chapter 15 and its effect erred, and Judge Glenn, the author of the decision in Agrokor, stated his disagreement with the Hong Kong decision in his recent decision in Modern Land. Judge Glenn said that the Hong Kong Court had misinterpreted his Agrokor decision and, in the plainest terms, said:*

> *"To be clear in recognizing and enforcing the Scheme in this case, the Court concludes that the discharge of the Existing Notes and issuance of the replacement notes [in Modern land's Cayman scheme] is "binding and effective." 2022 WL 2794014 at *5 (footnote omitted)."*
>
> *Therefore, as stated above, it is my opinion that an order of a court in a foreign insolvency proceeding under chapter 15 that meets the requirements of chapter 15 will be enforced in the United States and the relief granted will have the effect of discharging the debt and releasing guarantee claims against the Old Notes Subsidiary Guarantors for U.S. purposes, regardless of whether the debt is governed by U.S. law. If a court in Hong Kong or elsewhere refuses, for whatever reason, to give similar effect to a foreign scheme or liquidation, it will do so for its own reasons, not because of any issue arising under chapter 15 or other provision of U.S. law."*

89. The Company also relied on an opinion on Hong Kong law provided by Mr Ian De Witt, a partner in Tanner De Witt and a solicitor qualified in Hong Kong. His opinion dated 19 August 2022 was exhibited to Zhou 1. Mr De Witt opined (as I understood it) that if the Old Notes were treated as discharged in accordance with New York law, they would be treated as discharged as a matter of Hong Kong law. He relied on Judge Gropper's evidence for the proposition that the relief to be granted on the Company's application under chapter 15 would discharge the debts under the Old Notes and the obligations of the Subsidiary Guarantors and that therefore that such discharge would also be given effect under the law of Hong Kong as a result of the well-known rule in *Anthony Gibbs and Sons v La Societe Industrielle et Commercial des Metaux* (1890) 25 QBD 399 (***Gibbs***). As regards *Rare Earth*, Mr De Witt noted that Mr Justice Harris' "*analysis [did] not accord with the opinion given by [Judge] Gropper*" and that:

> *"In any event, the potential impact of Harris J's decision in respect of the effect of a Chapter 15 recognition is minimal as his statements are obiter and non-binding. This is because:*
>
> *(a). The debts compromised by the scheme of arrangement in [Rare Earth] did not concern any United States governed law debts….. It is unclear [how the effect of chapter 15 relief in a case involving the discharge of New York law debts by a foreign scheme] arose in the written decision.*
>
> *(b). It is not apparent from the written decision that his Lordship considered any expert opinion on New York law.*

> *(c). The sanction of the scheme of arrangement in [Rare Earth] was unopposed, thus any expert opinion adduced by the scheme company would not have been challenged."*

90. At the convening hearing I asked where the restructuring negotiations had taken place and Mr Herrod confirmed that they had largely taken place in the PRC including Hong Kong. I then asked whether this was a fact that Judge Gropper had considered and whether this might be relevant to his assessment of the location of the Company's COMI. Mr Herrod said that this was a matter that the Company would raise with Judge Gropper in advance of the sanction hearing.

91. Further, the Company also relied on the advice it had received from Maples' BVI attorneys as to applicable BVI law. In an email dated 5 August 2022, Mr Matthew Freeman, a partner of Maples in the BVI, noted that two of the Subsidiary Guarantors were incorporated in the BVI and that their guarantees were governed by New York law. He confirmed that in his opinion if sums due under the Old Notes and liability under the guarantees were discharged in accordance with New York law, then such discharge would be given effect in the BVI.

92. In view of these opinions and advice, I was satisfied that there were good grounds for concluding (and that it was reasonably likely) that the discharge effected by the Scheme would be given effect and be binding on Scheme Creditors under and as matter of New York law. It appeared that the Company would be seeking, following and in the event of the sanction of the Scheme, an order from the Bankruptcy Court for the Southern District of New York under chapter 15 (or pursuant to New York private international law applying comity) to the effect that the Released Claims would be treated as discharged under and as a matter of New York law and that there were good grounds for concluding (and that it was reasonably likely), based on Judge Gropper's evidence and recent authority (*Modern Land*), that the New York court would grant such relief.

93. It also appeared that there were good grounds for concluding (and that it was reasonably likely) that, applying the chapter 15 jurisprudence to the facts of the present case, the Company's COMI is to be treated in the Cayman Islands at the date of the filing of its chapter 15 petition.

94. I was also satisfied that in these circumstances, and applying *Gibbs*, the discharge under and resulting from the Scheme should be given effect and recognised as a matter of Hong Kong and BVI law. However, I recognise and respect the fact that Mr Justice Harris has taken a different view of the effect of relief under chapter 15 and do not disregard the importance of the *dicta* in his judgment in *Rare Earth*. It seemed to me that Mr De Witt had rather too heavily discounted the significance of those *dicta*. Nonetheless, in view of the clear decision of Judge Glenn in *Modern Land* and the strong opinion of Judge Gropper in his evidence in this case, I concluded that there were good grounds for concluding that a properly drafted order (which confirmed that the relevant debt was treated as discharged by the Scheme) did mean that under and as a matter of the law of New York the Released Claims would for all purposes be regarded as discharged and extinguished by the Scheme so that for the purpose of the rule in *Gibbs* the Released Claims would treated as having been discharged and extinguished in accordance with, as a matter of and under their proper law. I also concluded that Mr Justice Harris may wish (of course recognising that this is a matter entirely for him and the Hong Kong court) at least to review and revisit his analysis of the effect of relief under chapter 15 (with the benefit of Judge Glenn's opinion and in light of the terms of the orders made by the US court) and that, while the issue was likely to come before and require further consideration by the Hong Kong courts, the evidence before me was that the discharge of the Old Notes and the liabilities of the Subsidiary Guarantors under the Scheme would be effective in and under New York law and therefore should be given effect in Hong Kong law (once again recognising that it is for the Hong Kong court to determine questions of Hong Kong law and not for this court to do so). I can see that it might be the case that the Hong Kong court would wish to form its own view and be entitled to make its own decision as to the location of the Company's COMI when deciding whether itself to give common law assistance to Cayman appointed provisional liquidators or liquidators but it was not argued nor does it seem to me to be right to say that when the *Gibbs* rule is being applied the Hong Kong court can or should go behind and mount a collateral attack on the New York court's finding with respect to COMI and its order granting chapter 15 relief.

95. The position is the same as a matter of BVI law, which is clearly of considerable practical significance in this case since the Company has assets (shares in a major subsidiary) and two of the Subsidiary Guarantors are incorporated there.

Adequacy of the Explanatory Statement

96. I was generally satisfied that the Explanatory Statement provided adequate disclosure to Scheme Creditors. However, there were three issues which arose.

97. First, I noted that the Explanatory Statement did not provide Scheme Creditors with any details of the costs of the restructuring and Scheme process. It seemed to me that Scheme Creditors should have this information and I directed that it be provided.

98. Second, there was an issue whether the financial information contained or referred to in the Explanatory Statement was sufficiently up to date or could be considered to be stale, and whether audited financial statements should have been included. I have explained above the financial information which the Company included and referred to and the Company's explanation as to why it had not been possible or practicable to include audited financial statements or more recent financial information. I was satisfied that in the circumstances the financial information was sufficiently up to date to allow Scheme Creditors to make a properly informed decision as to how to vote on the Scheme and that the Company's explanations as to why audited financial statements were not available was reasonable.

99. Thirdly, there was an issue as to whether Kroll's liquidation analysis had been properly prepared and was sufficiently reliable. As I have noted, Kroll's liquidation analysis was not based on a company by company analysis of the likely outcome of a liquidation of each company. Instead Kroll adopted what they described as a segmented based approach under which Kroll put the Group's over three hundred companies into six sub-groups (segments) and aggregated the assets and liabilities of each sub-group (segment) for the purpose of estimating their estimate of the return to creditors of each company in the sub-group in the event of a liquidation of all the companies concerned. Kroll assumed that it was sufficient to give Scheme Creditors an analysis that based estimated returns for creditors of each company in a sub-group

on the *pro rata* amount that all creditors of all companies in the sub-group would receive if the proceeds from realisation of all assets of all such companies were aggregated and distributed among all such creditors to discharge the aggregate of all liabilities of all such companies. It appears that membership of the sub-groups was based on the companies concerned being part of the same business sector. I did have some concerns about this methodology which did not appear to be based on the impact of intercompany indebtedness between particular companies (a company in one segment might owe or be owed large sums by a company in another segment so that value would flow from or to such companies otherwise than through the segment) but concluded that it was not wholly unreasonable to assess the impact of the liquidation of a company by reference to and with the effect of a liquidation of other companies operating in the same business sector and that Kroll's approach was reasonable having regard to the number of companies concerned and the need to establish a workable and cost-effective methodology for the liquidation analysis.

Directions for the convening and conduct of the Scheme meeting

100. I was satisfied that the arrangements for convening and conducting the Scheme meeting were satisfactory. The Scheme meeting was to take place in the Cayman Islands at a time and in a manner that would allow Scheme Creditors from across the world, in particular from Asia, the UK and the US east coast to participate. Scheme Creditors were able to attend and vote at the Scheme Meeting by video conference using dial-in details which could be obtained on request from the Information Agent. Scheme Creditors who attended via video conference would be able to see and hear and be seen and heard by other Scheme Creditors attending the Scheme meeting so as so ensure that there would be an adequate "*coming together*" of Scheme Creditors and an ability for them to consult among themselves (see Trower J's judgment in *Re Castle Trust Direct PLC* [2021] BCC 1 at [42]). At the convening hearing I indicated that it would be necessary for the chairperson at the Scheme meeting to confirm in his report to the Court on the outcome of the Scheme meeting for the purpose of the sanction hearing that the technology had worked properly and that Scheme Creditors were in fact able to see and hear each other and consult in this way.

101. As I have noted, following the convening hearing the Convening Order was amended to allow the Blocked Noteholders to attend and vote at the Scheme meeting. A form of voting form (the ***Blocked Scheme Creditor Voting Form***) was prepared for use by the Blocked Noteholders and the Convening Order provided that votes cast by Blocked Noteholders using the Blocked Scheme Creditor Voting Form were to be counted by the chairperson at the Scheme meeting.

The outcome of the Scheme meeting

102. The Scheme meeting was duly held on 2 November 2022 in accordance with the terms of the Convening Order and the Scheme Creditors in attendance at the Scheme Meeting overwhelmingly approved the Scheme. Of those Scheme Creditors present and voting at the Scheme Meeting, 99.96% by value and 99.87% by number voted in favour of the Scheme. In particular, of those Blocked Noteholders present and voting at the Scheme meeting, all Blocked Noteholders voted in favour of the Scheme and none voted against. All of the Blocked Noteholders who voted in favour of the Scheme were Consenting Creditors.

Further amendment to the Scheme

103. Shortly before the sanction hearing, the Company filed Zhou 6. In that affirmation, Mr Zhou explained that Deutsche Bank AG, Hong Kong, who has been engaged to act as the New Depository, had recently informed the Company that it would not sign the deed of undertaking on the basis that it had no direct contact with the Company. Its role and relationship was only with the clearing systems. Mr Zhou said that Deutsche Bank AG had no obligations under the Scheme and so did not need to be party to the deed of undertaking. Nonetheless, it had been necessary to amend the form of deed of undertaking to remove Deutsche Bank AG as a party and to make minor amendments to the Scheme to reflect the fact that Deutsche Bank AG would not be a party. The Company indicated that it would be seeking the sanction of the Scheme with this amendment and submitted, and I accept, that it had the power to make this minor change pursuant to clause 17 of the Scheme.

Longstop Date

104. At the sanction hearing, the Company confirmed that it would be exercising the power under clause 10.1(a) of the Scheme of extending the Longstop Date to 14 December 2022 and would, if the Scheme was sanctioned, give notice to this effect to Scheme Creditors in the Scheme Effective Notice.

The issues arising at the sanction hearing

105. In my judgment in *Re Freeman FinTech Corporation Ltd* (unreported, 4 February 2021) (***Freeman FinTech***) I set out and summarised the law regarding the function of, and the approach to be adopted by, the Court at the sanction hearing (see [16] – [17]). I also set out the approach to be taken where there were issues as to the international effectiveness of the scheme (see [31]). I also note that the approach to be adopted and issues to be considered by the Court at the sanction hearing were well summarised even more recently by Mellor J when sanctioning the scheme in *Re Nostrum* [2022] EWHC 2249 (Ch) at [15] – [18].

106. The issues to be considered can be summarised as follows:

(a). first, that the Company has complied with the terms of the Convening Order and the Further Convening Order in convening the Scheme meeting and that the requisite statutory majorities under section 86(2) of the Companies Act were achieved at the Scheme meeting (***Issue One***).

(b). secondly, that the class of Scheme Creditors was fairly and adequately represented by those who attended the Scheme meeting and that the statutory majorities were acting bona fide and not coercing the minority in order to promote interests adverse to those of the class whom they purported to represent (***Issue Two***).

(c). thirdly, that the Scheme is a scheme of arrangement that is fair, in the sense that an intelligent and honest person, being a member of the class concerned and acting in

respect of his/her interest, might reasonably approve of it and that, as a matter of its residual discretion, the Court should sanction the Scheme (***Issue Three***).

(d). fourthly, that there is no other blot or defect in the Scheme which would warrant the Court refusing to sanction the Scheme (***Issue Four***).

(e). fifthly, in the case of a scheme with an international element, that the Court will not be acting in vain if it sanctions the Scheme. This requires consideration of whether the scheme will be recognised and given effect in other relevant jurisdictions. This was, as I have noted above, addressed in a preliminary way without the benefit of the results of the Scheme Meeting, at the convening hearing but needs to be reviewed again at the sanction stage (***Issue Five***).

Issue One

107. As regards Issue 1, I am satisfied that the additional evidence filed by the Company in advance of the sanction hearing demonstrates that the Scheme meeting was convened and conducted in accordance with the Convening Order and the Further Convening Order (and was quorate). I note in particular the evidence in Zhang 1 regarding the effectiveness of the video conference facilities. All Scheme Creditors who could not, or did not, wish to attend at the Scheme meeting venue including the Blocked Noteholders who were invited to vote by lodging duly completed Blocked Scheme Creditor Voting Forms and to attend the Scheme meeting, provided that they were able to have their identity/authority, status as Noteholder, and the size of their note holding verified by the Company prior to the Scheme Meeting. CICC provided and hosted the video conference facilities for the Scheme meeting using Zoom. One Scheme Creditor attended the Scheme meeting by video conference and no Blocked Noteholders indicated they would like to attend or attended the Scheme meeting. The person who joined via video conference could see and hear the proceedings at the Scheme Meeting venue, they could see each other and be seen by those at the Scheme Meeting venue and had the opportunity to ask questions or express opinions by using the chat function.

Issue Two

108. The Court is bound to assess whether the vote at the Scheme meeting was representative of the class of Scheme Creditors. In *Re BTR plc* [2000] 1 BCLC 740 at 747 Chadwick LJ stated that:

> *"The way in which Parliament's intention is to be given effect – as it seems to me and as it has seemed to judges over the century or so since Bowen LJ considered the matter in 1892 – is that the court is not bound by the decision of the meeting. A favourable resolution at the meeting represents a threshold which must be surmounted before the sanction of the court can be sought. But if the court is satisfied that the meeting is unrepresentative, or that those voting in favour at the meeting have done so with a special interest to promote which differs from the interest of the ordinary independent and objective shareholder, then the vote in favour of the resolution is not to be given effect by the sanction of the court. That, as it seems to me, is the check or balance which Parliament has envisaged."*

109. Similarly, in *Re The Scottish Lion Insurance Co Ltd* [2010] SCLR 107 at [37] Lord Glennie stated that:

> *"[T]he grounds upon which an opposing creditor may seek to oppose the scheme are clearly wider than perversity, dishonesty and irrationality. The opposing creditor is entitled to seek to prove that the voting was unfair, unrepresentative or affected by special interests."*

110. I accept the Company's submission that in this case there is no reason to believe, and no evidence, that the views of those Scheme Creditors who voted at the Scheme meeting do not fairly represent the views of the Scheme Creditors as a whole. Neither is there any reason to believe or evidence that they were not acting *bona fide* or that they were being coerced.

Issue Three

111. The Court must also be satisfied that the proposed Scheme is fair such that as a matter of discretion it is appropriate to sanction the Scheme. Putting the same point another way, the

Court must be satisfied that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve the scheme.

112. In *Re SPhinX Group of Companies*, [2014] (2) CILR 152 at [3] Chief Justice Smellie summarised the role of the Court at the sanction hearing as follows:

> *"At the third stage of the process, it is apparent that the role of the court is a limited one. Although it is often referred to as the stage at which the court will consider issues relating to the "fairness" of the proposed scheme, the task of the court at the sanction stage is not to pass its own subjective judgment on the merits of a scheme. The court takes the view that in commercial matters, members or creditors are much better judges of their own interests than the court."*

113. In applying this test, the Court is required to consider the relevant comparator to the Scheme. In the present case, the evidence shows that the Scheme is likely to produce or at least facilitate a considerably better recovery for Scheme Creditors than a liquidation.

114. It seems to me that the Scheme is obviously one that an intelligent and honest person, a member of the class concerned and acting in respect of his own interest, might reasonably approve. The commercial purpose of the Scheme was clearly explained in the Explanatory Statement and it appears that the Scheme offers material benefits to Scheme Creditors. Furthermore, Scheme Creditors have, both as regards the terms of and the procedure of voting on the Scheme, as a result of the directions given to permit Blocked Noteholders to attend and vote at the Scheme meeting, been treated fairly and I see nothing unfair in the Company agreeing to pay the Instruction Fee only to Consenting Creditors.

115. I also accept the Company's submission that the arrangements relating to the Holding Period Trust and, potentially, the Successor Trust for Blocked Noteholders are necessary, reasonable and fair in the circumstances. As the Company pointed out, the structure it adopted mirrors and responds to the block currently imposed by the clearing systems. The position of the Blocked Noteholders under the Scheme is no different from their position as holders of the Old Notes in that they are unable to receive consideration until that block is lifted. Furthermore, the Company has not arbitrarily imposed this structure on the Blocked Noteholders but explored,

under considerable time pressure, a number of alternatives. The Company will be able to review the status of sanctions and the position of Blocked Noteholders after three years at the end of the Holding Period Trust and before setting up and if required transferring the Blocked Noteholders' Scheme consideration to the Successor Trust. I also note that none of the Blocked Noteholders have objected to these arrangements.

Issue Four

116. The Court must also be satisfied that there is no blot on or defect in the Scheme that would warrant refusal to sanction the Scheme. I accept the Company's submission that no question of a blot or other defect arises in this case.

Issue Five

117. In *Freeman FinTech* I explained at [31] the Court's approach when considering the international effectiveness issue:

> "31. *In my view, the following points summarise the approach which the Court should adopt in the present and similar cases:*
>
> *(a). the Court needs to take into account all relevant circumstances when deciding whether to exercise its discretion to sanction the scheme.*
>
> *(b). the Court needs to be provided with evidence as to the circumstances and in particular the realistic risks arising from and associated with the creditor not being bound by the scheme or the sanction order. This was why in this case I required further evidence to be provided as to whether the Company had considered whether the Macau Creditor could obtain a judgment in a jurisdiction in which the Cayman Scheme was not recognised and enforce that judgment or otherwise obtain execution in a jurisdiction in which the Company had assets and which would also not recognise the Cayman Scheme. I indicated that there should be evidence as to the nature and extent*

of the risks associated with having a creditor, who is owed a not insubstantial sum, left outside and not bound by the Cayman Scheme. In this connection, I note the following comments of Snowden J in Van Gansewinkel Groep BV [2015] EWHC 2151 (Ch) at [71], after referring to Sompo Japan (underlining added):

"In cases such as the present, the issue is normally whether the scheme will be recognised as having compromised creditor rights so as to prevent dissenting creditors from seeking to attach assets of the scheme companies in other countries on the basis of an assertion of their old rights. The English court does not need certainty as to the position under foreign law—but it ought to have some credible evidence to the effect that it will not be acting in vain."

(c). *the Court needs to consider whether on the evidence it is appropriate to sanction the scheme despite and having regard to the risks of enforcement action by creditors who are not bound and are likely to be able to take action in other jurisdictions. This assessment will be made in light of the location of the company's assets and the impact of any enforcement action (including any winding up proceedings in other jurisdictions) on the implementation of the scheme and company in the future (in so far as that may impact the recovery and rights of creditors and others under the scheme). The Court will consider, as Lloyd J put it in his judgment at first instance in Garuda (2001 and WL 1171948, which was upheld by the Court of Appeal) the "risk of disturbance." In appropriate cases, the fact that significant claims may not be bound by the scheme may not prevent the Court sanctioning the scheme where there are clear and real benefits that will be derived from the scheme and which are unlikely to be disturbed by hostile action following sanction. In Sompo Japan, a case involving an insurance business transfer scheme where what mattered most was the effectiveness of the transfer, the evidence established that only something over 27% of the policies in number and by reference to reserves were governed by English law. Nonetheless, since it was reasonable to suppose that the transfer would be effective in any relevant jurisdictions as regards those policies, the scheme would achieve a substantial purpose, irrespective of the fact that it also extended to a larger class of business not governed by English law. If the scheme is likely to be effective to a substantial extent and provide parties with the benefits they anticipated to a substantial or material extent, the Court will be likely to sanction the scheme despite some creditors not being bound and the risk of enforcement action by them. But the Court will wish carefully to consider the risks in each case. It will be relevant that the creditor or creditors in question had indicated support for the scheme and an intention not to take action, as was the case in China*

> *Lumena, or that there was evidence of foreign law that the courts in other relevant jurisdictions were unlikely to act inconsistently with the scheme, as in Garuda.*
>
> *(d). it also seems to me that the Court needs to consider the issue of fairness in this context. If those who are bound by the scheme have accepted a haircut or other variation or discharge of their rights and claims, it may be unfair to sanction the scheme and hold them to the terms of the scheme if there is a serious risk that other creditors will be able to enforce their pre-scheme claims in full or to a substantial extent (or subsequently negotiate a payment or recovery above that received by Scheme Creditors under the scheme). It may be relevant in this context to have regard to the extent to which creditors were made aware of the risks in the explanatory statement before voting, as in Garuda."*

118. I have already discussed at some length the approach I took to this issue at the convening hearing. But something further briefly needs to be said on the point since the Company filed further evidence from Judge Gropper after the convening hearing, the outcome of the Scheme meeting is now known and the issue falls to be reconsidered and assessed in the context of the exercise of the Court's discretion to sanction the Scheme.

119. On 28 September 2022 Judge Gropper wrote a letter to the Company, which was adduced into evidence by being exhibited to Zhou 5. In that letter Judge Gropper confirmed that he had been told that the restructuring negotiations leading to the proposed Scheme had taken place in the PRC including Hong Kong and that his opinions and conclusions set out in his Affidavit were unaffected. He noted, *inter alia*, that in *Morning Mist* the critical factor confirming that BVI was the COMI of the company was the fact that the scheme was considered and sanctioned there. Judge Gropper also noted the criticisms of the decision by Professor Jay Westbrook, a well–respected academic and bankruptcy law specialist from the University of Texas, but confirmed his view that *Modern Land* was correctly decided and that in his view Professor Westbrook's views were unpersuasive.

120. Accordingly, Judge Gropper has strongly reiterated his opinion and the analysis of the applicable law that I applied for the purpose of the convening hearing remains unaffected. Furthermore, the very substantial vote in favour of the Scheme by Noteholders and the

complete absence of any opposition to the Scheme means that, applying the test I set out in *Freeman FinTech*, it must be right to conclude that the risk of a successful challenge to the effectiveness is very low. There is a risk that the very small percentage of Noteholders who did not vote in favour of the Scheme could, even assuming that the New York Bankruptcy Judge grants the relief sought under chapter 15, seek to take action in Hong Kong but it is far from clear that they would be entitled to do so as a matter of law or that any action would prevent the Scheme being implemented. In any event, there is no evidence that any such Noteholders are considering or would wish to do so.

121. There is of course the risk that New York Bankruptcy Judge will decline to grant the relief sought by the Company. It is a condition to the effectiveness of the Scheme that such relief is granted. I was told at the sanction hearing that the Company's chapter 15 petition is due to be heard by The Honorable John P. Mastando III on Monday (14 November). It will, obviously, be a matter for Judge Mastando. The Company pointed out at the sanction hearing that this condition is one that it is permitted to waive and that should the relief it seeks not be granted it will need to consider its position and whether to waive the condition. This would be a possibility in this case in view of the very high level of support that the Scheme has obtained. Of course, in this event, the Company has the ability under the Scheme to apply for directions from this Court (see clause 19 of the Scheme). As I noted in *Re China Agrotech* [2019 2 CILR 356] at [35] the Court has the power to sanction a scheme subject to the satisfaction of conditions to implementation which are unsatisfied at the hearing date (following the reasoning of Henderson, J. in *Lombard Medical* [2014] EWHC 2457 (Ch)) and will do so where those conditions can reasonably be expected to be satisfied within a reasonably short time. I was satisfied in the present case that it was reasonably likely that the chapter 15 petition would be granted and in any event that since it was due to be heard very shortly after the sanction hearing any difficulties would emerge and could be dealt with promptly; that the conditions that needed to be satisfied in order to allow the Restructuring Effective Date to occur were administrative or otherwise likely to occur and that the amended Longstop Date was in the near future and reasonable in the circumstances.

122. I have also considered, in the context of the exercise of my discretion to sanction the Scheme, whether there are any grounds for concluding that the use of a Cayman scheme in the present case represents an abuse of process or improper forum shopping, having regard in particular to the fact that the debt subject to the Scheme is governed by New York law and the Company's strong connections with Hong Kong and the PRC. I note that no Scheme Creditor has raised any objection to a Scheme being promoted in this jurisdiction; in fact the position is the reverse. Virtually all the Noteholders have supported and voted in favour of the Scheme. In those circumstances, and generally in the circumstances of this case, it seems to me that the application for a scheme in this jurisdiction was proper and justifiable. I must say that I sometimes have a concern that when courts seek to be overly prescriptive as to when and whether it is legitimate for foreign courts to exercise jurisdiction in respect of cross-border restructuring or insolvency proceedings they do so without regard to whether creditors have objections. It seems to me that we need to adopt a flexible approach that gives companies the opportunity properly to make use of procedures in jurisdictions with which they have a sufficient and appropriate connection, where that is done in the interests of and with the support of creditors and adopt a case by case and fact sensitive basis that involves the rejection of attempts by companies to use foreign proceedings which harm or are objected to by creditors but not to intervene where they do not.

The Hon. Mr Justice Segal
Judge of the Grand Court, Cayman Islands
17 November 2022

United Nations Commission on International Trade Law (UNCITRAL)
Working Group V (Insolvency)
Secretariat Vienna International Centre
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Anthony J. Casey
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14 September 2023

To the Secretariat of UNCITRAL Working Group V

1. Introduction

The UNCITRAL Model Law on Cross-Border Insolvency ("MLCBI") turned 26 years in 2023. During this period, it has been adopted in more than 60 jurisdictions around the world and it has significantly contributed to successful management of insolvency proceedings with a cross-border element. Therefore, the MLCBI is an achievement that the international insolvency community needs to celebrate.

The MLCBI is built on the idea of "modified universalism". Therefore, it envisions the commencement of a main procedure in a *single* jurisdiction even if non-main proceedings can also be opened and the laws of other jurisdictions can still be relevant for certain aspects of the procedure. Once the procedures are opened, the MLCBI establishes a set of rules to facilitate cooperation and assistance for the successful management of the procedures.

In our view, the adoption of modified universalism as a regulatory model to deal with cross-border insolvency is a sensible one. Indeed, against those favoring the adoption of a more fragmented (or "territorialist") approach, we believe that the existence of a centralized procedure is a superior option.[1] We also believe that the type of cooperation and assistance facilitated by the MLCBI significantly improves the efficiency and effectiveness of insolvency proceedings in cases where the debtor has assets, creditors and operations in various jurisdictions. Therefore, any future reforms and developments in the area of cross-border insolvency promoted by UNCITRAL should keep moving in that direction.

2. Harmful economic effects generated by the concept of COMI

Despite our positive views about the content and impact of the MLCBI, we believe that the MLCBI errs in the policy option chosen to determine the initiation of the foreign

[1] This policy option has been generally supported in the literature. See, for example, Lucian A Bebchuk and Andrew T Guzman, 'An Economic Analysis of Transnational Bankruptcies' (1999) 42 *Journal of Law and Economics* 775; Jay L Westbrook, 'Global Insolvency Proceedings for a Global Market: The Universalist System and the Choice of a Central Court' (2018) 96 *Texas Law Review* 1473. Expressing their skepticism about universalist models, however, see Lynn M LoPucki, 'Cooperation in International Bankruptcy: A Post-Universalist Approach' (1999) 84(3) *Cornell Law Review* 696; Frederic Tung, 'Is International Bankruptcy Possible?' (2001) 23 *Michigan Journal of International Law* 31.

main proceeding. Under the MLCBI, a procedure qualifies as a foreign *main* procedure if it takes place in the jurisdiction where the debtor has its centre of main interests ("COMI"), which is generally the place of the debtor's registered office unless it is shown that the central administration of the debtor is in a different location which is ascertainable by creditors.[2] In our view, this policy option presents various flaws that can undermine the ability of insolvency law to facilitate the maximization of the returns to creditors, the effective reorganization of viable but financially distressed businesses, and the promotion of entrepreneurship, access to finance and economic growth.[3]

First, the MLCBI encourages debtors to initiate insolvency proceedings in the place where they have their COMI. Otherwise, even if a jurisdiction eventually allows foreign debtors to initiate insolvency proceedings, as it is indeed permitted in various countries,[4] the debtor faces the risk that the procedure or some aspects triggered by the procedure - such as a moratorium or a discharge or modification of the terms of a debt - might not be recognized overseas.[5] As a result, this aspect may encourage debtors to initiate insolvency proceedings in the place of their COMI, even if their local jurisdictions have an inefficient insolvency system or other jurisdictions simply provide a more attractive legal, market or institutional environment to deal with financial distress. Therefore, the initiation of an insolvency proceeding in a less efficient insolvency forum not only may hamper the maximization of the returns to creditors and the effective reorganization of viable but financially distressed businesses but it can

[2] See art 16(3) of the Model Law on Cross-Border Insolvency. See also UNCITRAL, 'Model Law on Cross-Border Insolvency: Guide to Enactment and Interpretation' (2013) <https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> accessed 24 January 2023, 70–71. For a summary of the case law interpreting the concept of COMI, see UNCITRAL, *Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency*, pp. 39-42. <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/20-06293_uncitral_mlcbi_digest_e.pdf>.

[3] For a pioneering work criticizing the concept of COMI, see Robert K Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 *Michigan Journal of International Law* 1. Emphasizing the harmful economic effects generated by the existence of the concept of COMI, see Aurelio Gurrea-Martinez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (Cambridge University Press, Forthcoming, 2024), Chapter 8.

[4] These jurisdictions include the United States, the United Kingdom and Singapore, provided that the debtor shows some forms of "connection" with the country. In the United States, this connection is generally shown if the debtor has property in the United States. See Section 109(a) of the US Bankruptcy Code. To that end, the concept of property has been interpreted very broadly. See *In re Global Ocean Carriers Ltd* 251 B.R. (Bankr. D. Del. 2000). In the United Kingdom, foreign companies can initiate insolvency proceedings if they show a "sufficient connection" that can be found if, for example, the debtor has assets or creditors in the country or debt contracts subject to English law. See *Van Gansewinkel Groep B.V*. [2015] EWHC 2151. In Singapore, foreign companies can initiate insolvency proceedings if they show a "substantial connection" that may include situations in which the debtor: (i) has its centre of main interest in Singapore; (ii) is carrying on business in Singapore or has a place of business in Singapore; (iii) has substantial assets in Singapore; (iv) has chosen Singapore law as the law governing a loan or other transactions; or (iv) has submitted to the jurisdiction of the Singapore Courts in the resolution of one or more disputes relating to a loan or other transactions. See Section 63(3), 246(1)(d) and 246(3) of the Insolvency, Restructuring and Dissolution Act 2018. Other factors, such as the listing of securities in Singapore, can also show the substantial connection. See *In Re PT MNC Investama TBK* [2020] SGHC 149.

[5] This aspect, along with other weaknesses of the concept of COMI, is highlighted in Aurelio Gurrea-Martinez, INSOLVENCY LAW IN EMERGING ECONOMIES (Cambridge University Press, Forthcoming, 2024), Chapter 8.

also lead to an *ex ante* increase in the cost of credit that will reduce firms' access to finance and the promotion of economic growth. Furthermore, given that countries with inefficient insolvency frameworks often include emerging economies, the preservation of the concept of COMI will be particularly harmful in countries where the adoption of active policies to reduce poverty and foster growth are more urgently needed.[6]

Second, the concept of COMI is far from clear, especially in a world that has become increasingly global, internationally connected and technology driven. Indeed, many companies nowadays have assets, creditors, subsidiaries, offices, employees and clients in many jurisdictions. In this context, determining the debtor's COMI is not an easy task. Additionally, due to the nature of certain businesses, such as cryptoexchanges and decentralized finance applications, the concept of COMI becomes even less clear.[7] In such a world, a market participant can never be entirely sure about the place of debtor's COMI. As a response, lenders will rationally price their loans assuming the worse scenario – that is, the place with the most inefficient insolvency forum where the debtor could potentially initiate an insolvency proceeding– leading to an undesirable increase in the cost of credit. Additionally, many market participants might also be discouraged from doing business with a company if they do not know where a potential insolvency proceeding will be initiated. Thus, the current concept of COMI may discourage transactions that could potentially create jobs, wealth and growth. As a result, the uncertainty created by the concept of COMI can also be detrimental for society from an *ex ante* perspective, that is, before a situation of insolvency arises. Put differently, the current concept of COMI hampers economic growth even if a company never becomes insolvent.

Third, due to the controversies surrounding the concept of COMI, different stakeholders may have different views about the place of the debtor' COMI. Under the current system, these controversies will need to be handled in court, and very often with the involvement of different courts. As a result, the current concept of COMI will inevitably result in litigation costs that will destroy value at the expense of debtors, creditors and society as a whole.

Finally, the concept of COMI can lead to opportunistic behaviour by debtors. Indeed, given that the concept of COMI can be moved without obtaining prior consent from the creditors, debtors can opportunistically change their COMI once they have obtained credit. Therefore, this risk of opportunistic behavior can be priced by lenders in the form of higher interest rates, requiring more collateral, or not extending credit at all. Thus, the concept of COMI ultimately reduces firms' access to finance and the promotion of economic growth.

3. Alternative approaches to determine the insolvency forum

As a result of the factors mentioned in Section 2, we respectfully urge UNCITRAL to reconsider the concept of COMI. In our view, the concept of COMI should be abolished

[6] *Ibid.*

[7] Recent cases such as the collapse of FTX shows the difficulties associated with determining the debtor's COMI in the context of cryptoexchanges.

and replaced by the approach suggested in Section 3.1. Alternatively, UNCITRAL should consider the adoption of the second-best solution suggested in Section 3.2.

3.1. Preferred approach: the *ex ante* choice of the insolvency forum in the company's constitution[8]

As one of us suggested in the 1990s, an alternative approach to determine the place where an insolvency proceeding will be initiated (should the need arise) may consist of allowing debtors to choose the insolvency forum in the company's constitution.[9] This approach presents several advantages. First, it provides more predictability about the place where an insolvency proceeding will take place. Indeed, as the debtor's insolvency forum would be mentioned in the company's constitution, every market participant would have the ability to know where a future insolvency proceeding will be initiated. Second, this solution would also reduce litigation costs once a debtor initiates an insolvency proceeding. Finally, the choice of insolvency forum in the company's constitution would allow debtors and creditors to have access to more attractive insolvency frameworks. Therefore, this approach would encourage lenders to extend credit at a lower cost, facilitating firms' access to finance and the promotion of economic growth. By allowing debtors to choose more efficient insolvency systems, this solution would also contribute to the maximization of the returns to creditors and the effective reorganization of viable but financially distressed businesses.

It can be argued that this solution can lead to opportunistic behaviour by debtors. For example, a potential concern is that debtors may want to opportunistically choose a forum that can be attractive to them but detrimental to the creditors. It can also be argued that this system may allow debtors to opportunistically change the insolvency forum once they have obtained credit. Thus, by choosing a more debtor-friendly and less creditor-friendly regime, they can benefit themselves at the expense of the creditors. Finally, another potential criticism of the proposed approach is that it may hamper the change of insolvency forum even if debtors and creditors realize that a jurisdiction not initially chosen by the debtor can serve as a more attractive insolvency forum. However, these arguments are not persuasive if, as we urge UNCITRAL, our proposed approach is adopted with the safeguards and conditions suggested below.

First, it is important to start our analysis by highlighting that debtors should not have incentives to choose an insolvency forum that is not attractive for *sophisticated* lenders. Otherwise, they will be exposed to an increase in the cost of debt or, in certain scenarios, they may even restrict themselves from having access to credit. Therefore, the real risk of opportunistic behavior when initially choosing the insolvency forum only exists in the context of *vulnerable* creditors such as tort claimants and employees, that do not have the ability, information or bargaining power to adjust the conditions of their claims.

[8] For the purpose of this note, the terms "company's constitution", "corporate charter" or "articles of association" are used interchangeably. The terms "bankruptcy procedure" and "insolvency proceedings" are also used as synonyms.

[9] See Robert K Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 *Michigan Journal of International Law* 1.

Second, the risk of having debtors choosing an insolvency forum that can be detrimental for vulnerable creditors, however, is a concern that can be addressed through several mechanisms. For example, if countries seriously want to protect these creditors, a defined group of vulnerable creditors such as tort claimants and employees can be given a preferential treatment in the ranking of claims,[10] and the lack of respect of this priority may serve as a cause for denying recognition, even on the basis of "public policy", of any insolvency proceeding initiated by the debtor in a foreign jurisdiction.[11] Alternatively, countries can just impose that those vulnerable creditors should not be worse off, in terms of expected returns, compared to what they would receive if the procedure would have been initiated in the debtor's local jurisdiction.[12]

Third, as mentioned above, another risk associated with our proposal –if adopted without any safeguards– is that, given that the company's constitution can be changed by the shareholders and not by the creditors, the debtor may opportunistically change the insolvency forum once it has obtained credit. To address this problem, UNCITRAL may adopt different solutions. For instance, it can require debtors to provide notice to all the pre-existing creditors, except for those vulnerable creditors identified by the insolvency legislation.[13] Then, if no creditor objects within a reasonable period of time (e.g., 3-4 weeks), the change of the insolvency forum approved by the company would be deemed to be blessed by the creditors.[14] By adopting this approach, none of the company's pre-existing creditors would be required to accept an insolvency forum that was not accepted at the moment of extending credit. Therefore, this approach can be considered the most protective one.[15]

A more flexible approach may consist of requiring approval of a majority or super-majority of the creditors.[16] While this approach may avoid some holdout problems eventually existing in the previous approach, it can create certain costs. On the one hand, obtaining consent from the majority or super-majority of creditors can be costly, especially in the context of companies with dispersed debt structures. On the other hand, since certain creditors might be required to accept an insolvency forum that was

[10] Employees generally have this preferential treatment in most jurisdictions. Tort claimants, however, only enjoy a preferential treatment in the ranking of claims in some jurisdictions (e.g., Spain).
[11] See Aurelio Gurrea-Martinez, REINVENTING INSOLVENCY LAW IN EMERGING ECONOMIES (Cambridge University Press, Forthcoming, 2024), Chapter 8.
[12] *Ibid.*
[13] Given that vulnerable creditors would always get priority, their involvement in the change of forum would not be needed.
[14] Robert K Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 *Michigan Journal of International Law* 1.
[15] We believe that requiring the debtor to provide notice to the creditors and allowing the change of insolvency forum if no creditor objects would be equally protective than requiring individual consent from all the pre-existing creditors, as some authors have suggested. See Robert K Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 *Michigan Journal of International Law* 1; Aurelio Gurrea-Martinez, 'Insolvency Law in Emerging Markets' (2020) Ibero-American Institute for Law and Finance, Working Paper 3/2020 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3606395>. However, our proposed approach would provide more flexibility if the debtor wants to change the insolvency forum in order to choose a more value-enhancing insolvency regime.
[16] Suggesting this approach, see Randall Thomas and Robert K. Rasmussen, 'Timing Matters: Promoting Forum Shopping by Insolvent Corporations' (2000) 94 *Northwestern University Law Review* 1357.

not foreseen at the moment of extending credit, it can encourage lenders to assume the worst scenario when drafting their debt contracts. Therefore, this approach can lead to an increase in the cost of credit.

A third approach eventually adopted by UNCITRAL may consist of subjecting the change of the insolvency forum to any conditions eventually imposed in the company's constitution.[17] Sophisticated lenders will price their loans taking into account the approach adopted by the debtor. Therefore, debtors seeking to obtain credit at a lower cost will have incentives to choose a system that can be attractive to creditors. And vulnerable creditors will be fully protected given that they would always get priority.

3.2. The second-best approach: *ex post* choice of insolvency forum

If UNCITRAL decides to keep the concept of COMI, debtors should be allowed to initiate an insolvency proceeding in any jurisdiction that permits the initiation of insolvency proceedings by foreign companies.[18] Additionally, and more importantly, the MLCBI should establish that the place where the insolvency proceeding is initiated will be considered functionally equivalent to the debtor's COMI for the purpose of the MLCBI. Put differently, initiating an insolvency proceeding in the place of debtor's COMI or in any other forum chosen by the debtor would trigger similar effects under the MLCBI. To grant these functionally equivalent effects, however, the debtor needs to show that the place of filing is beneficial for the creditors as a whole. In the absence of clear evidence showing the beneficial effects of choosing a different insolvency forum, the debtor would still be allowed to initiate an insolvency proceeding if it is permitted by the laws of that jurisdiction (as it happens nowadays) but it would be subject to the legal risks currently associated with initiating an insolvency proceeding in a place that it is not the debtor's COMI.

This second-best solution improves the current regulatory framework for cross-border insolvency in several ways. First, it allows debtors and creditors to benefit from the choice of a more efficient insolvency forum.[19] And while this practice is already observed in the market,[20] the adoption of the proposed solution in the MLCBI would provide more certainty. Second, if the debtor shows that the place of filing can be

[17] Anthony J. Casey and Joshua C. Macey, 'Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars' (2021) 37 *Emory Bankruptcy Developments Law Journal* 436.

[18] This solution is generally admitted nowadays. However, it entails some of the risks and practical challenges mentioned in Section 2.

[19] The choice of a value-enhancing insolvency forum has been largely supported in the literature. See, for example, Randall Thomas and Robert K. Rasmussen, 'Timing Matters: Promoting Forum Shopping by Insolvent Corporations' (2000) 94 *Northwestern University Law Review* 1357; Horst Eidenmüller, 'Free Choice in International Company Insolvency Law in Europe' (2005) 6(3) *European Business Organization Law Review* 423; Wolf-Georg Ringe, 'Forum Shopping Under the EU Insolvency Regulation' (2008) 9(4) *European Business Organization Law Review* 579; Kannan Ramesh, 'Party Autonomy and the Search for Nodal Jurisdictions in Cross-Border Insolvency' (Texas, 6 February 2021) <https://static1.squarespace.com/static/571cb81f86db43188990d82a/t/602cebf8688a4a6f750ac18b/1613556730419/Justice+Kannan+Ramesh_Party+Autonomy+and+the+Search+for+Nodal+Jurisdictions+TILJ.pdf>; Anthony J. Casey and Joshua C. Macey, 'Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars' (2021) 37 *Emory Bankruptcy Developments Law Journal* 436.

[20] This practice is particularly popular among companies from countries that do not have efficient insolvency frameworks as it typically occurs in emerging economies. Recent examples include Avianca, LATAM and Philippines Airlines. Even though these companies are primarily based in Colombia, Chile and the Philippines, respectively, they filed for bankruptcy in the United States.

beneficial for the creditors as a whole, this solution may avoid many of the legal risks associated with choosing an insolvency forum that is not the debtor's COMI.

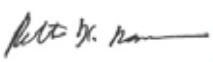
Yet, it should be noted that this solution is inferior to the preferred approach suggested in Section 3.1. On the one hand, this solution can lead to litigation costs if, for example, there are some disagreements about the ability of the place of filing to benefit the creditors as a whole. On the other hand, even if the new place chosen by the debtor has functionally equivalent effects to the debtor's COMI provided that it can be beneficial for the creditors, nothing would prevent the debtor from initiating the procedure in the place of the debtor's COMI *even if* this solution is not the most desirable one for the creditors. Thus, from an *ex ante* perspective, this scenario will be priced by sophisticated lenders, leading to an undesirable increase in the cost of credit. Hence, while this second-best solution can still improve the current regulatory framework for cross-border insolvency, it would provide a less desirable solution than the preferred approach suggested in Section 3.1.

4. Conclusion

The MLCBI has played a major role in the improvement and efficient management of cross-border insolvency cases. In our view, the principle of modified universalism and the cooperation and assistance promoted by the MLCBI have contributed to the success of this instrument enacted by UNCITRAL. Therefore, any future reforms and developments in the space of cross-border insolvency should keep embracing these principles. Nonetheless, we believe that the MLCBI presents a major flaw: the adoption of the concept of COMI as the policy option to determine the place where a main foreign proceeding should take place. We believe that embracing the concept of COMI can undermine the ability of insolvency law to promote the maximization of the returns to creditors, the effective reorganization of viable but financially distressed businesses and the promotion of entrepreneurship, access to finance and economic growth. Therefore, we respectfully urge UNCITRAL to reconsider the concept of COMI and adopt one of the approaches suggested in this article. To support our views, Annex 1 includes a list of prominent scholars and leading practitioners that endorse our proposal.

We will be honored and delighted to discuss the details and possible implementation of this proposal and provide any assistance eventually needed by the Secretariat of UNCITRAL Working Group V.





Anthony J. Casey Aurelio Gurrea-Martínez Robert K. Rasmussen

ANNEX 1: Signatories

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Vanderbilt Law School

[2023] UKPC 33
Privy Council Appeal No 0055 of 2020

JUDGMENT

FamilyMart China Holding Co Ltd (Respondent) *v* Ting Chuan (Cayman Islands) Holding Corporation (Appellant)

On appeal from the Court of Appeal of the Cayman Islands

before

Lord Reed
Lord Hodge
Lord Lloyd-Jones
Lord Briggs
Lord Kitchin

JUDGMENT GIVEN ON
20 September 2023

Heard on 15 and 16 November 2022

Appellant
Charles Kimmins KC
Mac Imrie KC
Paul Smith
Ryan Hallett
Mark Tushingham

(Instructed by Charles Russell Speechlys LLP (London), Maples and Calder (Cayman) LLP and Sidley Austin (Hong Kong))

Respondent
Tom Lowe KC
Hilary Stonefrost
Gemma Lardner
Corey Byrne
(Instructed by Sharpe Pritchard LLP and Ogier (Cayman) LLP)

LORD HODGE:

1. This appeal raises the question whether an agreement to settle disputes arising out of a shareholders' agreement by arbitration may prevent a party to that agreement from pursuing a petition to wind up the company whose management is the focus of those disputes. The other side of the coin is whether an application to the Grand Court to wind up that company on the just and equitable ground makes all matters which are the subject matter of those court proceedings non-arbitrable, thereby rendering inoperative the agreement to resolve such disputes by arbitration.

2. Ting Chuan (Cayman Islands) Holding Corporation ("Ting Chuan") and FamilyMart China Holding Co Ltd ("FMCH") are the shareholders of China CVS (Cayman Islands) Holding Corp ("the Company") which is the company that is subject to the winding up proceedings. Ting Chuan owns 59.65% and FMCH 40.35% of the issued shares in the Company.

3. The relationship between Ting Chuan and FMCH so far as is relevant is governed by a shareholders' agreement dated 11 May 2011 ("the SHA"), pursuant to which four of the Company's seven directors are nominated by Ting Chuan (referred to as "the majority directors") and three are nominated by FMCH (referred to as "the minority directors"). FMCH alleges that there was an understanding between it and Ting Chuan as to how the Company would operate its business.

4. The Company through nine subsidiaries operates a very substantial convenience store business in the People's Republic of China ("PRC") under the brand name "FamilyMart". As at 31 December 2021 the business had an annual turnover in excess of US $1.32 billion. The Company was licensed to operate through its subsidiaries the FamilyMart brand in the PRC in return for a royalty of 1 per cent on all revenues. The Company is solvent and operates as a going concern. As explained below, nobody intends to wind up the business, but establishing the grounds for winding up the Company on the just and equitable ground is a necessary step in the company law of the Cayman Islands in order to obtain a court order for the buy-out of the shareholding in the Company of the majority shareholder (here, Ting Chuan).

1. Factual background

5. FMCH is a Japanese company whose owners are two enterprises, Taiwan FamilyMart Co Ltd and FamilyMart Co Ltd (referred to as "the FM parties"), one of which has had considerable success in the convenience store business in Japan and elsewhere in Asia for over 40 years under the brand name "FamilyMart". The owner of Ting Chuan is Ting Hsin (Cayman Islands) Holding Corporation ("Ting Hsin") which was until 2006 the majority shareholder of the Company. Ting Chuan and Ting Hsin are

part of a group of companies founded by the Wei family which includes entities related to or associated with Ting Chuan or Ting Hsin (referred to as "the Ting Hsin Group").

6. Members of the Ting Hsin Group have experience in the food industry but lacked expertise in the convenience store business. To make up for that lack of expertise they required the assistance of staff provided by the FM parties to act as departmental heads with a view to transferring those responsibilities to Ting Hsin's own staff at a later date. FMCH believes that the Ting Hsin Group is owned and controlled by the majority directors who are members of the Wei family, and their family members.

7. FMCH presented a petition to wind up the Company to the Grand Court on 12 October 2018. In that petition FMCH alleges that the Company was incorporated as a joint venture vehicle to develop and conduct a convenience store business in the PRC. The Ting Hsin Group sought by the joint venture to combine the FamilyMart brand and the expertise of the FM parties with the infrastructure which the Ting Hsin Group had established in the PRC. Relations between Ting Chuan and FMCH became strained because FMCH believed and believes that since about 2012 the majority directors of the Company have diverted profits of the Company to members of the Ting Hsin Group which are suppliers of the Company, being food factories and the suppliers of logistics and information processing services to the Company, and have prevented the minority directors from gaining access to information relating to the Company's business, including the identity of those related party suppliers. FMCH asserts that, by so acting, Ting Chuan acted in breach of an understanding that the contracting of such services would be transparent and disclosed by the Ting Hsin Group to the FM parties and would be on a footing that the terms were fair and reasonable.

8. In its petition FMCH alleges that Ting Chuan and/or Ting Hsin have caused, permitted and/or procured the majority directors to act in breach of their duties to the Company. FMCH alleges (i) that it has lost trust and confidence in the conduct and management of the Company's affairs as a result of that lack of probity and (ii) that its relationship with Ting Chuan has irretrievably broken down. FMCH avers that it is just and equitable that the Company be wound up. In the alternative, and this is the real aim of its application, FMCH seeks an order from the Grand Court that Ting Chuan be required to sell its majority stake in the Company to FMCH at a value to be determined by the Court, if not agreed.

9. Ting Chuan, relying on the arbitration agreement in the SHA, applied to strike out the winding up petition or, alternatively, for an order dismissing or staying the petition under section 4 of the Foreign Arbitral Awards Enforcement Act (1997 Revision) ("FAAEA") or under the inherent jurisdiction of the court until the disputes which underlay the petition had been arbitrated. By the Citation of Acts of Parliament Act 2020 legislation which previously was referred to as a "Law" is now referred to as an "Act". The Board adopts that nomenclature in this judgment.

10. The Grand Court (Kawaley J) in an order dated 25 February 2019 granted Ting Chuan's application to stay the winding up proceedings for arbitration under section 4 of the FAAEA. By order dated 14 July 2020, Kawaley J, in an exercise of his powers under the Companies Winding up Rules O.3 r 12(1)(a), (b) and (d), allowed the Company to defend the proceedings if so advised, and ordered that the petition be treated as an inter partes proceeding and that the advertisement of the petition be dispensed with.

11. As discussed more fully below, the Court of Appeal by order dated 27 July 2020 set aside Kawaley J's order of 25 February 2019 and refused to grant a stay of the winding up petition. Ting Chuan has obtained the permission of the Board to appeal against that decision.

2. The arbitration agreement

12. Section 20.3(a) of the SHA provides that it is governed by the laws of the Cayman Islands. The SHA contains the arbitration agreement (section 20.3(b)) which, so far as relevant, provides:

> "Any and all disputes in connection with or arising out of this Agreement shall, insofar as is possible, first be settled amicably by the Parties hereto. … If the Parties cannot come to an amicable settlement within twenty (20) days of the onset of any dispute, *any and all disputes in connection with or arising out of this Agreement [shall be] submitted for arbitration* in accordance with and finally settled under the Rules of Arbitration of the International Chamber of commerce [sic] in effect at the time of the arbitration, except as may be modified herein or by mutual agreement of the Parties. The arbitration shall be confidential and conducted in the Chinese language. The Parties agree that the arbitration shall take place in Beijing, PRC. The award of the arbitration tribunal shall be final and binding upon the disputing Parties, and the prevailing Party may apply to a court of competent jurisdiction for enforcement of such award. …" (Emphasis added)

13. FMCH initially argued that the dispute between it and Ting Chuan did not fall within the scope of the arbitration agreement, but it abandoned that contention in the course of the hearing before the Court of Appeal. It is now a matter of agreement that the dispute falls within the scope of the arbitration agreement. The central dispute between the parties is now whether FMCH's petition in the Grand Court for the winding

up of the Company has made the matters raised in that petition not susceptible to arbitration.

3. The relevant statutory provisions

14. The Companies Act (2022 Revision) provides in section 90 that a company may be wound up compulsorily by order of the Court. Section 92 provides that a company may be wound up by the Court on various grounds including if "(e) *the Court is of opinion* that it is just and equitable that the company should be wound up" (Emphasis added).

15. Section 95, which sets out the powers of the court, provides in subsection (2):

> "The Court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not to present a petition against the company."

Subsection (3) provides for several remedies, including the remedy which FMCH is seeking by its presentation of the winding up petition. It provides so far as relevant:

> "If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court shall have jurisdiction to make the following orders, as an alternative to a winding-up order, namely – …
>
> (d) an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's capital accordingly."

This provision was introduced into the Companies Act by the Companies (Amendment) Act 2007. As is well known, the Cayman Islands has not provided in its company law for a self-standing petition (separate from a winding up petition) by a member of a company for a remedy where the affairs of the company are being or have been conducted in a manner that is unfairly prejudicial to the interests of members. Such a remedy was introduced into United Kingdom company law by section 75 of the Companies Act 1980 and is now contained in sections 994-996 of the Companies Act 2006.

16. The Cayman Islands has separate legislation governing foreign arbitrations and domestic arbitrations. The FAAEA addresses foreign arbitrations and gives effect to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("the New York Convention"). Section 4 of the FAAEA, which gives effect to article II of the New York Convention, provides:

> "If any party to an arbitration agreement … commences any legal proceedings in any court against any other party to the agreement … in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is … inoperative …, shall make an order staying the proceedings."

Domestic arbitration agreements in the Cayman Islands are governed by the Arbitration Act 2012, which is based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (as amended in 2006) and the English Arbitration Act 1996.

4. The judgments of the courts below

17. Kawaley J in his judgment of 25 February 2019 observed (para 17) that the petition had been drafted in a "somewhat obtuse way" to sidestep the argument that the complaints arose in relation to the SHA and were caught by the very broad arbitration agreement. He held (para 61) that it was "clear beyond sensible argument" that the allegations in the petition related to the subject matter of the SHA. He rejected FMCH's submission that the underlying disputes were not arbitrable because only the court can grant a winding up order, holding that there was a fundamental difference between the resolution of the underlying disputes and the grant by the court of statutory relief (para 66). He attached no significance to the fact that neither the Company nor the majority directors were parties to the SHA because the genuine dispute was between the minority shareholder and the majority shareholder (para 67). He granted a mandatory stay of the winding up petition under section 4 of the FAAEA.

18. The Court of Appeal (Rix, Martin and Moses JJA), in a judgment dated 23 April 2020, overturned Kawaley J's decision, holding that the court had exclusive jurisdiction to determine whether a company should be wound up on the just and equitable ground and that, as a result, the underlying disputes were not susceptible to arbitration, notwithstanding that they fell within the scope of the arbitration agreement contained in the SHA. In so deciding, the Court of Appeal discussed as a key authority the judgments of Patten, Longmore and Rix LJJ in the Court of Appeal of England and Wales in

Fulham Football Club (1987) Ltd v Richards [2011] EWCA Civ 855; [2012] Ch 333 ("*Fulham*"), in which the court granted a stay of an unfair prejudice petition under section 994 of the Companies Act 2006 to enable the parties to resolve their underlying dispute by arbitration. The Cayman Islands Court of Appeal, in the leading judgment by Moses JA, also considered other cases, including the judgment of Harris J in the Hong Kong High Court in *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759 ("*Quiksilver*"), in which the judge stayed a petition seeking a winding up on the just and equitable ground to enable the substantive dispute between the parties, which was within the scope of an arbitration agreement, to be determined by arbitration; and a judgment of the Federal Court of Australia in *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164 ("*WDR Delaware*"), which followed the *Quiksilver* judgment by granting a stay for arbitration of a petition on the grounds of oppressive or unfairly prejudicial behaviour in which a winding up order was only one of several available remedies. The rationale of those cases was that an essentially private dispute between shareholders, in which discrete issues could be identified, should be resolved, in accordance with the parties' agreement, by arbitration.

19. Moses JA distinguished those cases, holding that under section 92 of the Companies Act the court's consideration of whether it is just and equitable that a company should be wound up is a threshold question and not a question of relief. Section 92 was the sole gateway to obtaining alternative relief under section 95(3): *Tianrui (International) Holding Co Ltd v China Shanshui Cement Group Ltd* [2019] CILR 481 ("*Tianrui*"). *Tianrui* did not involve a conflict between an arbitration agreement and a petition to wind up a company but its reasoning was central to the Court of Appeal's reasoning. *Fulham* was to be distinguished on the basis that in that case there was no need to prove conduct that would justify winding up the company. By contrast in the context of an application to wind up a company on the just and equitable ground, Moses JA summarised the question in these terms (para 98):

> "In cases where there is an arbitration agreement the scope of which embraces disputes of fact which are also raised in the petition, the question of a stay to arbitration turns on whether it is possible to submit such disputes to arbitration without trespassing upon the exclusive jurisdiction of the court to make a winding up order."

He stated that in *Fulham* and the cases which had followed it, the courts had identified discrete, substantive issues which did not invoke the exclusive jurisdiction of the court. But where a petitioner was invoking a statutory right to bring the petition and the underlying issues were central and inextricably connected to the question whether the company should be wound up on the just and equitable ground, it was difficult to identify discrete issues outside the exclusive jurisdiction of the court.

20. Moses JA held that in determining the threshold question the court did not have to determine only questions of primary fact but had to evaluate all the circumstances of the case. The court had to decide whether the conduct of the majority directors and the breakdown of the relationship between the shareholders justified the winding up of the Company. If matters were hived off to arbitration, there would be a risk of inconsistent decisions where there was first a decision by an arbitrator and then a further decision by the court which took into account the arbitrator's award where some of the parties to the petition would not be bound by the arbitrator's award. This outcome could be avoided only if the parties had agreed not to present a winding up petition. No such agreement was expressly stated in the SHA and none could be implied. As a result, section 95(2) of the Companies Act did not apply.

21. Moses JA held that because neither the majority directors nor the Company were parties to the SHA and thereby to the arbitration agreement, it was not permissible to apply the mandatory provisions of section 4 of the FAAEA to the petition in its entirety and because the allegations against Ting Chuan could not be separated from the threshold issue, section 4 could not operate pro tanto. The arbitration agreement was therefore inoperative. Finally, there was no basis for the court to grant a discretionary stay in the exercise of its powers of case management.

5. The parties' positions in this appeal

22. Ting Chuan submits that the Court of Appeal erred in refusing to grant a stay of the winding up petition to allow disputes under the SHA to be determined by arbitration. Ting Chuan asserts that (i) it and FMCH are parties to an arbitration agreement, (ii) FMCH has commenced legal proceedings against it, (iii) those legal proceedings are in respect of matters agreed to be referred to arbitration, and (iv) therefore it is entitled to a mandatory stay unless the Board is satisfied that the relevant matters are non-arbitrable.

23. Ting Chuan identifies the matters which it argues are arbitrable and entitle it to a mandatory stay under the FAAEA. It argues that the petition for winding up contains five matters, the first four of which should be determined by arbitration. The five matters are:

> (1) Whether FMCH has lost trust and confidence in Ting Chuan and in the conduct and management of the Company's affairs. Ting Chuan particularises this matter into three sub-headings: (i) whether the majority directors owe various duties to the Company, (ii) whether the majority directors have breached those duties or engaged in misconduct, and (iii) whether Ting Chuan caused, permitted or procured the majority directors to act in breach of their duties or to engage in the alleged misconduct.

(2) Whether the fundamental relationship between FMCH and Ting Chuan has irretrievably broken down. In particular: (i) whether an understanding was reached between the shareholders by 2003 and, if so, what were the terms of that understanding, (ii) was the understanding superseded at any point in time after 2003, for example by reason of the conclusion of the SHA, and (iii) whether Ting Chuan acted contrary to that understanding after 2012.

(3) Whether it is just and equitable that the Company should be wound up.

(4) Whether FMCH should be granted the alternative relief, which it prefers, under section 95(3)(d) of the Companies Act, namely an order requiring Ting Chuan to sell its shares in the Company to FMCH, and, if so, what is the value of those shares.

(5) Whether, if such alternative relief is not appropriate, an order winding up the Company should be made and whether the persons identified by FMCH should be appointed as joint official liquidators.

In the alternative, Ting Chuan argues that the first two matters listed above are arbitrable, that there should be a mandatory stay of the winding up petition pro tanto under the FAAEA, and that the Board should grant a discretionary stay of matters (3) to (5) above.

24. FMCH invites the Board to uphold the judgment of the Court of Appeal. It characterises the principal question raised in the appeal as being whether and, if so, in what respect and to what extent a petition to wind up a Cayman Islands registered company on the just and equitable ground is arbitrable. It argues that the legislation does not allow a private arbitral tribunal to make the critical threshold decision that it is just and equitable that a company should be wound up. It advances two principal reasons for that view. First, it submits that the proceedings are inherently unsuited to arbitration, and, secondly, it argues that the legislature has recognised that there is a public interest in the judicial determination of winding up petitions in open court, which excludes the use of private arbitration to any extent in the process. It points out that a court in deciding whether it is just and equitable that a company be wound up has regard to all the facts as they exist at the date of the hearing and exercises its discretion at that date. The proceedings must be conducted expeditiously because section 99 of the Companies Act may render void dispositions of property and other transactions made after the presentation of the petition. By contrast, the reference to arbitration of matters encompassed by the winding up application might require multiple and successive arbitrations which would not bind all of the parties to the winding up petition. This cannot have been what a rational businessperson would have contemplated. The winding up petition has been stayed since 2018 while the parties, on Ting Chuan's

insistence, engaged in a very expensive arbitration before the ICC International Court of Arbitration which lasted three and a half years dealing with claims which Ting Chuan advanced, unsuccessfully, against FMCH.

6. The structure of The Board's analysis

25. In addressing those submissions, the Board first considers by way of background the uncontested view that, as a general rule, the law of the Cayman Islands, like English law and the laws of many other jurisdictions, respects the right of parties to agree to have their disputes determined by a private arbitral tribunal. Secondly, the Board addresses the interpretation of section 4 of the FAAEA, and in particular the meaning of (i) "legal proceedings", (ii) "matters", and (iii) "the arbitration agreement is … inoperative". The Board, thirdly, considers whether the petition for winding up on the just and equitable ground is an unum quid, excluding any possibility of arbitration, or whether there should be a partial stay under the FAAEA so that matters within the scope of the arbitration agreement can and should be hived off for arbitration. Fourthly, the Board considers the application for a discretionary stay of the winding up petition; and, finally, the Board briefly addresses a submission relating to section 95(2) of the Companies Act.

7. Background: the approach to arbitration agreements

26. It is common ground in this case that the disputes between Ting Chuan and FMCH, which are articulated in the winding up petition, fall within the scope of the arbitration agreement. No question therefore arises as to the interpretation of the arbitration agreement itself. Case law in England and Wales, and the Cayman Islands, which adopts a liberal interpretation of an arbitration agreement, is not directly in issue. Nonetheless, such case law on interpretation is indicative of the respect which the courts of many jurisdictions give to the autonomy of parties to choose how they wish their disputes to be resolved. In *Enka Insaat ve Sanayi AS v OOO "Insurance Co Chubb"* [2020] UKSC 38; [2020] 1 WLR 4117, ("*Enka Insaat*") Lord Hamblen and Lord Leggatt, giving the leading judgment of the court, stated (para 107):

> "In *Fiona Trust & Holding Corpn v Privalov* [[2007] UKHL 40;] [2007] Bus LR 1719, the House of Lords affirmed the principle that 'the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal' (see para 13, per Lord Hoffmann).

> Contrary to a submission made on behalf of Chubb Russia, this is not a parochial approach but one which, as the House of Lords noted in the *Fiona Trust* case, has been recognised by (amongst other foreign courts) the German Federal Supreme Court (Bundesgerichtshof), the Federal Court of Australia and the United States Supreme Court and, as stated by Lord Hope at para 31, 'is now firmly embedded as part of the law of international commerce'. In his monumental work on *International Commercial Arbitration,* 2nd ed (2014), p 1403 Gary Born summarises the position as follows:
>
> 'In a substantial majority of all jurisdictions, national law provides that international arbitration agreements should be interpreted in light of a "pro-arbitration" presumption. Derived from the policies of leading international arbitration conventions and national arbitration legislation, and from the parties' likely objectives, this type of presumption provides that a valid arbitration clause should generally be interpreted expansively and, in cases of doubt, extended to encompass disputed claims. That is particularly true where an arbitration clause encompasses some of the parties' disputes and the question is whether it also applies to related disputes, so that all such controversies can be resolved in a single proceeding (rather than in multiple proceedings in different forums).'"

The Court of Appeal of the Cayman Islands has adopted a similarly expansive approach to the interpretation of arbitration agreements in order to give effect to the reasonable commercial expectations of the parties: *McAlpine Ltd v Butterfield Bank (Cayman) Ltd* (Appeal No 30 of 2019) (unreported) 21 November 2019 at paras 30-31.

27. The legislature of the Cayman Islands in enacting statutory rules for its domestic arbitration in the Arbitration Act 2012 stated the principles on which the Act was founded and by which its provisions should be construed: section 3(3). Those principles are:

> "(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial arbitral tribunal without undue delay or undue expense;
>
> (b) *the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest*; and

> (c) in matters governed by this Law the court should not intervene except as provided in this Law." (Emphasis added)

Those principles are articulated in substantially the same terms in section 1 of the Arbitration Act 1996 in England and Wales and in section 1 of the Arbitration (Scotland) Act 2010. The respect which they show to the autonomy of the parties is not a new phenomenon. In England and Wales, the courts until the later nineteenth century often took the view that a contract to oust the jurisdiction of the courts was against public policy and would not enforce such a contract. This approach was altered by legislation in the Common Law Procedure Act 1854, section 11 and in section 4 of the Arbitration Act 1889. Such a judicial approach to arbitration agreements did not exist in Scotland as the House of Lords explained in *A Sanderson & Son v Armour & Co Ltd* 1922 SC (HL) 117, in which Lord Dunedin expressed the matter pithily (p126): "[i]f the parties have contracted to arbitrate, to arbitration they must go." More recently, similar statements have been made about English law: in *Nori Holding Ltd v PJSC Bank Otkritie Financial Corp* [2018] EWHC 1343 (Comm); [2019] Bus LR 146, at para 66, Males J stated: "[w]here parties agree to arbitrate, it is the policy of the law that they should be held to their bargain." See also Mustill & Boyd, *Commercial Arbitration,* 2nd ed, Companion Vol (2001) p 75.

28. Ting Chuan prays in aid section 26 of the Arbitration Act 2012 which provides:

> "(1) Any dispute that parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law of the Islands, such a dispute is not capable of determination by arbitration.
>
> (2) The fact that any other law confers jurisdiction in respect of any matter on the court but does not refer to the determination of that matter by arbitration, does not mean that a dispute about that matter is incapable of determination by arbitration."

In the Board's view FMCH is correct in its submission that the 2012 Act, which is concerned only with arbitrations where the seat of the arbitration is in the Islands (section 3(1)), is not of itself a valid tool for interpreting the FAAEA, which was enacted at an earlier date and is concerned only with arbitrations with a foreign seat. Nonetheless, the section is consistent with a position in relation to international arbitration which has extensive support internationally. See for example, in England and Wales, *Wealands v CLC Contractors Ltd* [2000] 1 All ER (Comm) 30 ("*Wealands*"), Mance LJ paras 17, 18 and 21; *Bridgehouse (Bradford No 2) Ltd v BAE Systems plc*

[2020] EWCA Civ 759; [2020] Bus LR 2025, Newey LJ paras 56-57; and *Fulham*, Patten LJ paras 27-33; in Singapore, *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57; [2016] 1 SLR 373 ("*Tomolugen*"), Sundaresh Menon CJ paras 75-76; in Australia, *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896 ("*Tridon*"), Austin J paras 192-194, *WDR Delaware* Foster J para 147; in Hong Kong *Quiksilver*, Harris J para 14. The Board observes a similar approach in the jurisprudence of the Supreme Court of the United States: see, for example, *Green Tree Financial Corp-Alabama v Randolph* (2000) 531 US 79, Rehnquist CJ at p 90. It is important in cases which arise out of domestic legislative provisions implementing the New York Convention to have regard to jurisprudence in other contracting states to promote legal certainty in the jurisprudence relating to international arbitration.

29. The Board therefore accepts Ting Chuan's submission that effect should be given to the arbitration agreement unless the agreement is contrary to the public policy of the Islands or there is a rule of law or statutory provision which renders the matters within the scope of the arbitration agreement incapable of resolution by arbitration.

8. The interpretation of section 4 of the FAAEA

30. Section 4 of the FAAEA (para 16 above) implements article II(3) of the New York Convention which provides:

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

31. Many countries which are contracting states to the New York Convention have implemented provisions like section 4 of the FAAEA in accordance with their obligations under the New York Convention. In *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP* [2022] UKPC 21 ("*Gol Linhas*") the Board, in a judgment delivered by Lord Hamblen and Lord Leggatt, addressed the correct approach to the interpretation of the FAAEA. In para 21 of its judgment the Board referred to the judgment of the UK Supreme Court in *Enka Insaat* at para 126 in which it observed that more than 160 states had signed the New York Convention and stated:

> "The essential aim of the Convention was to establish a single uniform set of international legal standards for the recognition and enforcement of arbitration agreements and awards. Its

> success is reflected in the fact that … the New York Convention has been implemented through national legislation in virtually all contracting states." (Citations omitted)

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

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

It is appropriate therefore to consider the jurisprudence of several countries as guides to the interpretation of section 4 of the FAAEA in so far as they have statutory provisions which are worded in a similar way to the Cayman Islands provision.

32. The Board has set out the relevant text of section 4 of the FAAEA in paragraph 16 above. Several questions of interpretation arise. They are (i) the meaning of "legal proceedings" commenced by a party to an arbitration agreement, (ii) the meaning of any "matter" which the parties have agreed to refer to arbitration, (iii) whether a stay of legal proceedings can be a partial stay, and (iv) the meaning of "inoperative" in the phrase "the court, unless satisfied that the arbitration agreement is ... inoperative… shall make an order staying the proceedings".

(a) The meaning of "legal proceedings"

33. It was not contentious and the Board sees no reason to question that "legal proceedings" in section 4 of the FAAEA can include a petition to wind up a company of which the parties to an arbitration agreement are members. In *Fulham* (para 33) the Court of Appeal of England and Wales treated as legal proceedings under section 9(1) of the Arbitration Act 1996 a petition under section 994 of the Companies Act 2006 alleging that a company's affairs had been conducted in a manner which was unfair to the petitioner as one of its members. In *Quiksilver*, Harris J in the Court of First Instance in Hong Kong dealt with a petition for the winding up of a solvent company on the just and equitable ground. The relevant provision of the Arbitration Ordinance (differing from those of the Cayman Islands and England and Wales) spoke of "a court before which an action is brought" having the power to refer the parties to the petition to an arbitration. He observed that winding up proceedings were not an action and distinguished the case of *Fulham* on that ground; but, as the parties did not dispute that the court had a discretionary power to stay the petition, the difference in wording between the Hong Kong provisions and the English provisions did not have a material impact on the matter which he had to decide (paras 20-21).

(b) The meaning and ascertainment of "matter"

34. There is now considerable jurisprudence in several countries which casts light on the meaning of a "matter" in domestic legislation implementing the New York Convention.

35. In *Fulham* Patten LJ, giving the leading judgment of the Court of Appeal of England and Wales, treated as "matters" falling within the arbitration clause of the rules of the Football Association Premier League Ltd ("the FAPL") the allegation that there had been unfair prejudice to Fulham Football Club (1987) Ltd ("the Club") in the conduct of the affairs of the FAPL and the remedies, which the Club sought, of an order restraining the chairman of the FAPL from participating in future player transfer negotiations and an order that he cease to be chairman of the FAPL. In para 33 Patten LJ observed that it was common ground that an arbitrator could make the orders which the Club sought. In substance, the subject matter of the Club's petition under section 994 of the Companies Act 2006 was treated as a matter to be referred to arbitration and the section 994 petition was stayed. The principal question which was in dispute in that case was whether the matters were arbitrable; a similar question arises in this appeal which the Board addresses below.

36. In *Lombard North Central plc v GATX Corporation* [2012] EWHC 1067 (Comm); [2013] Bus LR 68 ("*Lombard North Central*") Andrew Smith J in the High Court of England and Wales addressed an application under section 9 of the Arbitration Act 1996 for a stay of legal proceedings for arbitration. The arbitration agreement was contained in an agreement for the financing of train vehicles which provided for the establishment of a joint venture by the claimants and another company. The arbitration

agreement covered disputes which arose relating to the joint venture. The claimants sought declaratory relief in the High Court concerning the meaning of a clause in the agreement which provided for the establishment of the joint venture. The defendants applied for a stay of those proceedings. The case involved a dispute as to the scope of the arbitration agreement, a subject with which the Board is not concerned in this appeal, and the meaning of section 9 of the 1996 Act. In his judgment Andrew Smith J focussed on the words "in respect of" a matter rather than the word "matter" in section 9. What he said is nonetheless important with regard to the meaning of "matter" as his statements on the subject in paras 13-17 of his judgment have been relied on in the English cases which the Board discusses below.

37. In his discussion in those paragraphs Andrew Smith J, first, recognised that section 9 empowers the court to grant a stay of part of legal proceedings, where those proceedings were in respect of a referred matter and other matters. He held that the express words of section 9(1) permitted such a stay as they referred to a stay of the proceedings "so far as they concern that matter". Secondly, he stated that the court determines whether the proceedings relate to a referred matter by having regard to the nature of the claim or claims rather than relying only on the formulations in the claim form and any pleadings. In so doing, the court should consider what questions will foreseeably arise for determination in the proceedings, and whether they include, or would foreseeably include, referred matters. Such foreseeable questions would, in the Board's view, include matters raised in defences yet to be pleaded. Thirdly, he held that a party to an arbitration agreement is entitled to a stay unless he could have no real or proper purpose for seeking the stay. Fourthly, the risk of proceedings both before the courts and an arbitral tribunal is inherent in an arbitration agreement which refers only certain disputes to arbitration. Referring to the speech of Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334, at 353, he stated that that is the price of respecting the parties' agreement and the risk that they are to be taken to have chosen to take. Fifthly, he stated that a defendant would not necessarily be entitled to stay the legal proceedings where the referred matter was peripheral to the proceedings as a whole. The proceedings could be partly stayed to allow the referred matter to be determined by arbitration while the proceedings could otherwise proceed.

38. In *Quiksilver* the Court of First Instance in Hong Kong addressed an application to stay or dismiss petitions by a shareholder to wind up two solvent joint venture companies on the just and equitable ground. The shareholders of the companies had entered into a detailed joint venture agreement which contained an arbitration clause and a buy-sell procedure as a means of resolving disputes by enabling one party to buy out the shares of the other. After difficulties had arisen in the buy-sell procedure, Quiksilver Greater China Ltd presented the winding up petitions. The other shareholder, Glorious Sun Overseas Co Ltd, invoked the arbitration agreement and sought a stay of the winding up petitions pending the outcome of the arbitration. Before the judge, the principal disputes between the parties were whether the winding up petitions amounted to class actions and whether a shareholder had an inalienable right of access to the court to seek the winding up of a company rather than any question of statutory interpretation

as to what would amount to a "matter" to be sent to arbitration. Because, as mentioned above, the Hong Kong legislation referred to an "action" rather than "legal proceedings" the Hong Kong equivalent to section 4 of the FAAEA was not in play and the judge was addressing a discretionary stay rather than a mandatory stay under the Hong Kong legislation. Harris J recognised, and it was common ground between the parties, that an arbitrator could not make a winding up order which affected third parties but he held that the precise relief sought in the winding up petitions was not critical. He stated (para 22) that the correct approach is "to identify the substance of the dispute between the parties and ask whether or not that dispute is covered by the arbitration agreement." Harris J analysed the substantive dispute between the parties to be the basis on which the joint venture was to end, being either a buy-out by Glorious Sun or a winding up at the instance of Quiksilver. That commercial dispute was arbitrable and, if Quiksilver were to prevail in the arbitration, the stay of the winding up petitions could be lifted and the court would not need to re-hear the substantive arguments, which would have been determined in the arbitration.

39. In *Tomolugen* the Court of Appeal of Singapore addressed an application under section 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA") by Lionsgate Holdings Pte Ltd ("Lionsgate") for a mandatory stay for arbitration of court proceedings raised by a minority shareholder, Silica Investors Ltd ("Silica"), under section 216 of the Companies Act (Cap 50, 2006 Rev Ed) for relief for oppressive or unfairly prejudicial conduct. The defendants in the court proceedings were the company, the shareholders of the company, including Lionsgate, and the directors and former directors of the company and related companies. Lionsgate, which was the wholly owned subsidiary of Tomolugen Holdings Ltd, the majority shareholder in the company, had sold shares in the company to Silica in a share sale agreement which contained an arbitration clause. Lionsgate argued that part of the dispute in the court action fell within the arbitration clause of the share sale agreement and to that extent the legal proceedings should be the subject of a mandatory stay. It, and the other defendants, sought a discretionary case management stay of the remainder of the legal proceedings, pending the outcome of the arbitration. Much of the judgment of the Court of Appeal, delivered by Sundaresh Menon CJ, concerned the question of arbitrability, which the Board considers below in this appeal. But the judgment also contained an important discussion of the concept of a "matter".

40. The Court of Appeal (paras 15-19) analysed the allegations made in the section 216 application under four broad categories (1) the share issuance allegation, (2) the management participation allegation, (3) the guarantees allegation, and (4) the asset exploitation allegation.

41. It will assist the understanding of the judgment if the Board quotes the relevant provision (section 6) of the IAA which provides:

> "(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, at any time after appearance and before delivering any pleading or taking any other step in the proceedings, apply to that court to *stay the proceedings so far as the proceedings relate to that matter.*
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings *so far as the proceedings relate to the matter*, unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed." (Emphasis added)

42. Between paras 108 and 122 of the court's judgment Sundaresh Menon CJ addressed the question whether a "matter" should be interpreted broadly by identifying the essential dispute or the main issue, as Silica urged, or more granularly, as Lionsgate submitted. He stated (para 108) that establishing whether the dispute pertained to a matter that is subject to the arbitration agreement involves two stages:

> "(a) the court must first determine what the matter or matters are in the court proceedings; and
>
> (b) it must then ascertain whether the matter(s) fall within the scope of the arbitration clause on its true construction."

At the first stage, the court proceedings which are sought to be stayed may involve more than a single matter. In addressing the differing submissions of the parties, Sundaresh Menon CJ stated (para 113) that the starting point of the analysis was the language of section 6 of the IAA. Section 6 of the IAA mandates a stay only "so far as" the court proceedings relate to the matter or matters which are the subject of the arbitration agreement. This, he stated, militates against taking "an excessively broad view of what constitutes a 'matter' or treating it as a synonym for the court proceedings as a whole". He continued (para 113):

> "In our judgment, when the court considers whether any 'matter' is covered by an arbitration clause, it should undertake a practical and common-sense enquiry in relation to

> any reasonably substantial issue that is not merely peripherally or tangentially connected to the dispute in the court proceedings. The court should not characterise the matter(s) in either an overly broad or an unduly narrow and pedantic manner. In *most* cases, the matter would encompass the claims made in the proceedings. But, that is not an absolute or inflexible rule." (Emphasis in the original)

43. In support of this view Sundaresh Menon CJ then addressed jurisprudence from Australia (*Tridon*), the British Virgin Islands (*Ennio Zanotti v Interlog Finance Corp* Claim No BVIHCV 2009/0394 (8 February 2010)) and England (*Lombard North Central*) before concluding at para 122:

> "We therefore consider that a 'matter', for the purposes of s 6 of the IAA, should not be construed in either an overly broad or an unduly narrow way. On the specific facts of this case, each of the four categories of allegations made in the Suit raises substantial issues that are neither peripheral nor tangential to Silica Investors' claim for relief under s 216 of the Companies Act. We accordingly find that each category is a separate 'matter' for the purposes of Lionsgate's stay application under s 6 of the IAA."

44. Thereafter, the court analysed the arbitration clause to determine which of the categories of allegation (para 40 above) fell within the scope of the arbitration agreement. It was not in dispute that the third and fourth categories did not, and the court therefore focused on the first two categories. In each category the court examined the substance of the controversy and concluded that the share issuance allegation was not within the scope of the arbitration agreement but that the management participation allegation was.

45. In *WDR Delaware* Foster J in the Federal Court of Australia addressed an application for a stay under section 7(2) of the International Arbitration Act 1974 and article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration which has the force of law in Australia. Hydrox Ltd was a joint venture company. The legal proceedings in question were for (i) a declaration that the affairs of Hydrox Ltd had been conducted in a manner oppressive to, unfairly prejudicial to or unfairly discriminatory against WDR, and (ii) an order for the winding up of Hydrox Ltd. It was common ground that the disputes between the shareholders were within the scope of the arbitration clause in the joint venture agreement. The principal dispute before Foster J was whether some or all of the claims in the court proceedings were arbitrable and, if so, whether the whole or only part of the court proceedings should be stayed.

46. The relevant statutory provisions were as follows. Section 7(2) of the International Arbitration Act 1974 provided:

> "Subject to this Part, where:
>
> (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
>
> (b) the proceedings involve the *determination of a matter that*, in pursuance of the agreement, *is capable of settlement by arbitration*;
>
> on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings *or so much of the proceedings as involves the determination of that matter*, as the case may be, and refer the parties to arbitration in respect of that matter." (Emphasis added)

Article 8(1) of the Model Law provides:

> "A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."

47. Foster J set out his analysis of how the court identifies the matters which are the subject of the legal proceedings between paras 102 and 123 of his judgment. In summary, he reasoned: (i) that the nature and extent of the matters are ordinarily to be ascertained from the pleadings and from the underlying subject matter upon which the pleadings, including any defence, are based; the task is to ascertain the substantive questions in dispute, (ii) multiple matters may exist within the one court proceeding; (iii) a matter is something more than a mere issue or question that might fall for decision in the court proceedings or in the arbitral proceedings, (iv) a matter may or may not comprise the whole subject matter of any given proceeding, and (v) the court must first identify the matter or matters to be determined in the court proceeding before asking whether those matters fall within the scope of the arbitration agreement, and, if so, whether they are arbitrable.

48. In support of his third proposition, that a matter is something more than a mere issue or question which might fall for determination in proceedings, Foster J cited the judgment of the High Court of Australia in *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 ("*Tanning")*. That case was concerned principally with section 7(2) and (4) of the Arbitration (Foreign Awards and Agreements) Act 1974 (renamed in 1989 the International Arbitration Act 1974, as considered in *WDR Delaware*) and the question whether a liquidator was a person "claiming through" the company in liquidation, which was a party to an arbitration agreement, and therefore entitled to a stay of legal proceedings for arbitration. The High Court held that the liquidator, who had rejected a creditor's proof of debt for goods allegedly sold under a licence agreement which contained an arbitration clause, was a person claiming through the company under section 7(4) and was entitled to a stay under section 7(2). Deane and Gaudron JJ in a joint dissenting judgment discussed the meaning of the word "matter" in section 7(2) at pp 351-352. They observed that "matter" was not defined in the 1974 Act but that, in any context, it was "a word of wide import" and stated:

> "In the context of s. 7(2), the expression 'matter … capable of settlement by arbitration' may, but does not necessarily, mean the whole matter in controversy in the court proceedings. So too, it may, but does not necessarily encompass all the claims within the scope of the controversy in the court proceedings. Even so, the expression 'matter … capable of settlement by arbitration' indicates something more than a mere issue which might fall for decision in the court proceedings or might fall for decision in arbitral proceedings if they were instituted. … It requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy."

Deane and Gaudron JJ went on (p 353) to reject the argument that section 7(2) did not apply to proof of debt proceedings, stating that the operation of the section is not confined to proceedings in which the parties seek the same relief as might be sought in arbitration proceedings.

49. In *Sodzawiczny v Ruhan* [2018] EWHC 1908 (Comm); [2018] Bus LR 2419 ("*Sodzawiczny*") Popplewell J in the High Court of England and Wales addressed an application for a stay of legal proceedings under section 9 of the Arbitration Act 1996 which refers to proceedings having been brought "in respect of a matter which … is to be referred to arbitration." The basis on which the defendants sought a stay of proceedings was that their defence to legal proceedings against them fell within the scope of the parties' arbitration agreement. The claimant opposed the stay, arguing that section 9 was not engaged if the claim itself did not fall within the arbitration agreement.

50. Popplewell J recorded that it was common ground that section 9 of the 1996 Act allowed a stay for arbitration of one or more matters within the legal proceedings while leaving other matters to be pursued in court. It was also common ground that there were two stages in the court's inquiry under section 9: first the court must determine what the matter or matters are in respect of which the court proceedings have been brought; and, secondly, the court must then determine in respect of each such matter whether it falls within the scope of the arbitration agreement (paras 35-36).

51. The material difference between the parties was as to the meaning of "matter". The claimant's counsel submitted that "matter" in section 9 was to be equated with a claim or cause of action and the fact that a defence is raised which falls within an arbitration agreement does not engage section 9. The defendants' counsel argued that "matter" meant an issue and that the court had to search for issues which were the subject matter of the arbitration agreement. Popplewell J referred to various authorities, including *Lombard North Central* and *Tomolugen*. He observed that the thing which parties referred to arbitration was a dispute or difference, words which were in this context synonymous. A dispute could be constituted in general terms, or it might be well defined before legal proceedings were commenced. A cause of action might involve several issues and sub-issues, some of which might be arbitrable and some not, and a commercial action often might involve several causes of action. Defences to a claim might involve a completely different set of facts and legal principles from those involved in the claim itself.

52. Popplewell J rejected the claimant's argument that section 9 was not concerned with a defence but only with a claim. He set out in para 43 what he considered to be the principled approach to what constitutes a "matter". He stated:

> "The court should treat as a 'matter' in respect of which the proceedings are brought any issue which is capable of constituting a dispute or difference which may fall within the scope of an arbitration agreement."

53. He continued his analysis in that paragraph by stating, secondly, that where the issues had not been fully identified in the legal proceedings by the time the court addressed the application for a stay, the court should seek to identify the issues which it was reasonably foreseeable might arise. He stated, thirdly, that the court should stay the proceedings to the extent of any issue which falls within the scope of an arbitration agreement. The search, he said, "is not for the main issue or issues, or what are the most substantial issues, but for any and all issues which may be the subject matter of an arbitration agreement". This applied to any dispute with which the court proceedings were, or would foreseeably be, concerned. Fourthly, section 9 was concerned with substance and not form, and the court should look at the nature and substance of the claim and the issues to which it gave rise and not simply the formulation in the

pleadings. The same approach should be adopted to identified or foreseeable defences. In para 44 of his judgment Popplewell J recognised that this approach could lead to a fragmentation of proceedings but opined that this was the result of the sanctity of the parties' arbitration contract and the requirement in section 9 that the court uphold the parties' bargain. The risk of fragmentation could be reduced either by an expansive construction of the arbitration agreement or by the court's use of its case management powers to stay proceedings in so far as they fall outside the scope of the arbitration agreement.

54. In *Republic of Mozambique (acting through its Attorney General) v Credit Suisse International* [2021] EWCA Civ 329; [2022] 1 All ER Comm 235 ("*Mozambique*") the Court of Appeal of England and Wales addressed the meaning of "matter" in section 9 of the 1996 Act. Carr LJ, in a judgment with which Singh and Henderson LJJ agreed, stated:

> "63. A 'matter' is not the same as a cause of action; it includes any issue capable of constituting a dispute under the relevant arbitration agreement. And a mandatory stay under s. 9(4) can be applied pro tanto (as reflected in the words 'so far as they concern that matter' in s. 9(1)).
>
> 64. There are two stages of inquiry for a court (although there may be overlapping considerations): first, to identify the 'matters' in respect of which the proceedings are brought; secondly, to assess whether those matters are 'matters' which the parties have agreed are 'to be referred to arbitration'. That is to be resolved by reference to the scope of the relevant arbitration agreement properly construed in context...."

55. Carr LJ then stated that the relevant principles were summarised in the judgment of Popplewell J in paras 43 and 44 of his judgment in *Sodzawiczny* and quoted in full those paragraphs, which the Board has summarised in paras 52 and 53 above. She stated (para 66) that the position identified by Popplewell J was consistent with and followed the earlier decision of the Singapore Court of Appeal in *Tomolugen* which the Board has discussed in paras 39-44 above. Carr LJ summarised the position under the title "Discussion and analysis" at paras 70-72 of her judgment stating:

> "70. It is trite law that an arbitration agreement is a contractual agreement to which statute dictates that mandatory effect must be given in so far as it applies: *Sodzawiczny* at para 44. The application of s. 9 can give rise to particular

> difficulties both as a matter of analysis and procedure, but the sanctity of the parties' agreement takes priority.
>
> 71. Thus, whether or not there is futility in practical terms of any stay is immaterial. Equally, the fact that there may be (on the facts of this case particularly acute) unwelcome case management complications if all or parts of claims are stayed is irrelevant. These are complexities which flow from s. 9 and ones which will often arise in multi-party, multi-issue litigation such as this.
>
> 72. I also accept that there is a two-stage test (although the considerations that arise may overlap and it may be convenient to consider the questions together): first to identify the matter and secondly to decide if that matter is one that the parties have agreed can only be arbitrated. Further, the court looks to substance and not form, adopting a practical and common-sense approach. It should guard against placing undue weight on what may be nuanced emphases or artificial characterisations adopted for tactical or other purposes. This is of course not to say that the parties' pleaded position is to be ignored, but rather to emphasise that the search is for the reality of the dispute."

56. The Supreme Court of the United Kingdom has reviewed the decision of the Court of Appeal in *Mozambique* in a judgment handed down on the same day as this judgment is promulgated. The approach of that court to the question of what is a "matter" and how the court ascertains what is a "matter" is consistent with the approach which the Board adopts on this appeal in the following paragraphs.

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

58. The court in considering such an application adopts a two-stage process. First, the court must determine what the matters are which the parties have raised or foreseeably will raise in the court proceedings, and, secondly, the court must determine

in relation to each such matter whether it falls within the scope of the arbitration agreement. (See *Tomolugen*, para 42 above; *WDR Delaware*, para 47 above and *Sodzawiczny*, para 50 above).

59. The court must ascertain the substance of the dispute or disputes between the parties. This involves looking at the claimant's pleadings but not being overly respectful to the formulations in those pleadings which may be aimed at avoiding a reference to arbitration. It involves also a consideration of the defences, if any, which may be skeletal as the defendant seeks a reference to arbitration, and the court should also take into account all reasonably foreseeable defences to the claim or part of the claim. (See *Lombard North Central*, para 37 above; *Quiksilver*, para 38 above, *Tomolugen*, para 42 above, *WDR Delaware*, para 47 above; and *Sodzawiczny*, para 53 above).

60. Secondly, while article II(3) of the New York Convention, which requires that the court refer a matter to arbitration, is silent as to the stay of the court proceedings, legislation implementing this provision of the New York Convention has generally made express provision for a stay pro tanto. Examples include section 9 of the Arbitration Act 1996 in England and Wales, section 10 of the Arbitration (Scotland) Act 2010 in Scotland, section 7 of the International Arbitration Act 1974 in Australia, and section 6 of the IAA in Singapore. In the Cayman Islands section 4 of the FAAEA speaks of "staying the proceedings" and makes no reference to the possibility of a stay pro tanto. Nonetheless, the context is a domestic statute implementing an international convention, in which broad and generally accepted principles should be adopted in interpreting such a statute: see *Gol Linhas* which the Board discussed in para 31 above. In *Bennion, Bailey and Norbury on Statutory Interpretation* (8th ed. 2020) the authors state at section 9.3: "Unless the contrary intention appears, the legislature is presumed to intend an enactment to be read in light of the principle that the greater includes the less." This principle is derived from Roman law ("non debet cui plus licet, quod minus est non licere": Corpus Juris Civilis, Digest 17.21 (Ulpian)). In the Board's view in this context the greater includes the lesser. Counsel did not argue otherwise in this appeal. Accordingly, the Board considers that section 4 of the FAAEA allows a pro tanto stay of legal proceedings.

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

62. A focus on the substantial nature and relevance of a referred matter to the legal proceedings is consistent with international jurisprudence, including *Lombard North Central*, *Quiksilver*, and *Tomolugen*. It is also consistent with the Australian jurisprudence in *Tanning* and *WDR Delaware*. In those cases, the judicial formulation was influenced by the statutory wording of section 7(2) of the International Arbitration Act 1974 which refers to a matter "capable of settlement by arbitration". But there is no material difference between that formulation and the other judicial formulae as a stay of legal proceedings should be granted only in respect of a dispute which falls within an arbitration agreement and is capable of settlement by arbitration.

63. The judgment of Popplewell J in *Sodzawiczny* is in part consistent with this approach but the passages in his summary of the law in para 43 of his judgment which suggest that a "matter" is any issue which is capable of constituting a dispute or difference within the scope of an arbitration agreement cannot be accepted without qualification in the light of the wider case law discussed above. Popplewell J referred to *Lombard North Central* and *Tomolugen* as the background to his analysis. Those judgments contain further qualifications which are not expressly articulated in his summary, although he may have taken them as read. In para 43 he spoke of a "matter" as "any issue which is capable of constituting a dispute or difference" within the scope of the arbitration agreement and as covering "all issues which may be the subject of the arbitration agreement". These formulae expressly draw on the judgment of Andrew Smith J in *Lombard North Central.* But no mention is made of Andrew Smith J's concern about the abusive application for a stay which the Board discusses in para 64 below nor of his recognition that peripheral matters may not merit a stay of the legal proceedings. The emphasis in *Tomolugen* on the evaluation of the matter as being of reasonable substance and not peripheral to the legal proceedings is not reflected in the relevant paragraph of the *Sodzawiczny* judgment.

64. No judicial formula encapsulating the meaning of "matter" should be treated as if it were a statutory text. A court facing an application for a stay under section 4 of the FAAEA should approach the question in a practical and common-sense way. The court must respect the agreement of the parties to arbitrate their disputes. An agreement to arbitrate a dispute is an agreement not to resolve that dispute in court proceedings. Thus, any substantial matter in the legal proceedings, which is relevant to the claim or foreseeable defence, and which is within the scope of the arbitration agreement, will give rise to a mandatory stay of the legal proceedings pro tanto on the application of one of the parties. There is considerable authority to support the view that the procedural complexity caused by a reference to arbitration does not of itself render a matter non-arbitrable: see, for example, *Wealands*, Mance LJ para 26, *Fulham*, Patten LJ para 25, *Tomolugen*, Sundaresh Menon CJ para 105. That does not mean that procedural complexity is irrelevant in all circumstances because the court, when addressing an application to stay legal proceedings to enable the determination of a dispute by arbitration, should be careful to prevent an abuse of process. The Board agrees with Andrew Smith J in *Lombard North Central* (para 37 above) that the court could refuse an otherwise mandatory stay if the applicant has no real or proper purpose for seeking

the stay. That could include not only an application for a stay in relation to issues that were peripheral to the legal proceedings but also an application that amounted to an abuse of process. In this regard the Board respectfully disagrees with the statement of the Court of Appeal in England and Wales in para 71 of the judgment in *Mozambique* (para 55 above) that the practical futility of a stay will in all circumstances be irrelevant. There may be circumstances in which a party seeks a stay for an improper purpose and it would be contrary to justice if the court could not act to prevent an abuse of process. For example, if matters (1) and (2) were referred to arbitration and an arbitral tribunal were to determine those matters in FMCH's favour and FMCH acted promptly to remove a stay on the legal proceedings before the Grand Court, the court would be entitled to look with some care at any application for a stay for a further arbitration.

65. Fourthly, the exercise involving a judicial evaluation of the substance and relevance of the "matter" entails a matter of judgment and the application of common sense. It is not a mechanistic exercise. It is not sufficient merely to identify that an issue is capable of constituting a dispute or difference within the scope of an arbitration agreement without carrying out an evaluation of whether the issue is reasonably substantial and whether it is relevant to the outcome of the legal proceedings of which a party seeks a stay. In so far as the summary of the law in para 43 of *Sodzawiczny* suggests otherwise, it is in error.

66. The approach to the word "matter" in section 4 of the FAAEA set out in paras 59-65 above may involve the fragmentation of the parties' disputes with some matters being determined by an arbitral panel and other matters being resolved by the court. Such fragmentation may on occasion be inconvenient to one or more of the parties to the court proceedings. Rational businesspeople may as a general rule prefer that their disputes are determined in the same forum: see Lord Hoffmann in *Fiona Trust & Holding Corpn v Privalov* [2007] UKHL 40; [2007] Bus LR 1719 ("*Fiona Trust*"), paras 5-8. An arbitration agreement may be interpreted generously to achieve that end if the court can ascertain that as the parties' commercial purpose and the wording of the agreement can bear that meaning. But, where, on a proper interpretation of the arbitration agreement, the parties have contracted to refer to arbitration disputes which do not extend to all the matters raised in the legal proceedings, giving effect to the parties' contract will involve fragmentation of the disputes. The disadvantages caused by such fragmentation can be mitigated by effective case management by both the court and the arbitral panel.

67. In the light of the case law discussed above, the Board considers that the obiter comments of Carswell LCJ in the Northern Ireland Court of Appeal in *In re Wine Inns Ltd* [2000] NIJB 343, 358-359, should not be followed. He stated that the just and equitable winding up petition or the application for relief against the conduct of the management of a company in an unfairly prejudicial manner in that case, which related to allegations of the breakdown of trust and confidence in a quasi-partnership, each

raised an indivisible issue and not a series of discrete disputes or matters. That is not consistent with the case law which the Board has discussed above.

68. As discussed below, the meaning of "matter" is relevant to the question of whether an arbitration agreement is operative. The Board now turns to that question.

(c) The meaning of "the arbitration agreement is … inoperative"

69. As set out in para 30 above, article II(3) of the New York Convention, which is enacted in domestic law by section 4 of the FAAEA, provides exceptions to the obligation of a court of a contracting state to refer a matter to arbitration if the arbitration agreement is "null and void, inoperative or incapable of being performed." Section 4 uses the same words in defining the exceptions. In this case, the questions whether the subject matter of the dispute between the parties is indivisible or whether the remedies sought are arbitrable would not, in the Board's view, fall within the exception that the agreement was null and void or the exception that that agreement was incapable of being performed. The Board is concerned with the exception that the agreement is inoperative. The essence of the dispute between the parties on this appeal turns on this question. It is whether the arbitration agreement is inoperative or, in other words, the matters at issue between the parties are incapable of being settled by arbitration or the remedies sought are unavailable to an arbitral tribunal.

70. On the authorities there are two broad circumstances in which an arbitration agreement may be inoperative. The first is where certain types of dispute are excluded by statute or public policy from determination by an arbitral tribunal. The second is where the award of certain remedies is beyond the jurisdiction which the parties can confer through their agreement on an arbitral tribunal. The Board refers to the first type as "subject matter non-arbitrability" and to the second as "remedial non-arbitrability".

71. Subject matter non-arbitrability can arise where the state intervenes by statute to preserve a right of access to the courts. Examples of such in English law in the field of employment and discrimination can be found in section 203 of the Employment Rights Act 1996 and section 144(1) of the Equality Act 2010, which, subject to specified exceptions, prevent parties by agreement from contracting out of an employee's right to have access to an employment tribunal, or in the latter Act the courts. Subject matter non-arbitrability may also arise as a result of public policy considerations. In the Singaporean case of *Larsen Oil and Gas Pte Ltd v Petropod Ltd* [2011] 3 SLR 414, ("*Larsen*") V K Rajah JA, delivering the judgment of the Singapore Court of Appeal, at para 44 recognised two grounds for excluding from arbitration a dispute which fell within the scope of an arbitration agreement. The first was where the legislature had precluded the use of arbitration to determine the particular type of dispute and the second was where "there is an inherent conflict between arbitration and the public

policy considerations involved in that particular type of dispute". *Larsen* was concerned with claims by the liquidator of an insolvent company for the avoidance of unfair preferences and payments made with an intention to defraud a creditor which arose only on the onset of insolvency and could be pursued by the liquidator of the insolvent company for the benefit of the company's creditors. The court refused the application by Larsen, the recipient of the alleged preference, to stay the legal proceedings for arbitration of the dispute on grounds of public policy, namely that it would affect the substantive rights of the company's creditors and undermine the policy aims of the insolvency regime.

72. The underlying concept of subject-matter non-arbitrability is that there are certain matters which in the public interest should be reserved to the courts or other public tribunals for determination. But there is no agreement internationally as to the kinds of subject matter or dispute which fall within subject matter non-arbitrability. In the 2001 Companion Volume to their book on Commercial Arbitration Lord Mustill and Stewart Boyd stated (p 71):

> "Since different states have their own traditions and precepts, differing radically from state to state, on matters of politics, economics, morality and the like, it is not surprising that equally radical divergences can be found when each state identifies the matters which are regarded as too important to be left to private dispute resolution."

73. A similar statement can be found in Born, *International Commercial Arbitration*, 3rd ed (2021) Vol I, p 1029, para 6.01 in which the author states:

> "Although the better view is that the [New York] Convention imposes international limits on Contracting States' applications of the nonarbitrability doctrine… the types of claims that are nonarbitrable differ from nation to nation. Among other things, typical examples of nonarbitrable subjects in different jurisdictions include selected categories of disputes involving criminal matters; domestic relations and succession; bankruptcy; trade sanctions; certain competition claims; consumer claims; labor or employment grievances; and certain intellectual property matters. Over the past several decades, the scope of the non-arbitrability doctrine has materially diminished in most developed jurisdictions.
>
> As these examples suggest, the types of disputes which are nonarbitrable nonetheless almost always arise from a common

> set of considerations. The nonarbitrability doctrine rests on the notion that some matters so pervasively involve either 'public' rights and concerns, or interests of third parties, that agreements to resolve such disputes by 'private' arbitration should not be given effect." (Footnotes omitted)

74. It would be wrong, however, to overstate the differences of approach in the commercial sphere between jurisdictions which share the same common law heritage. In the Board's view, the jurisprudence of the courts of other common law jurisdictions in this sphere can provide the generally accepted principles for the commercial law of the Cayman Islands. It is also relevant to bear in mind, when considering these commentaries, the relatively granular meaning of "matter" in the FAAEA, which the Board discussed in paras 61-63 above, when addressing the question whether a matter is excluded from arbitral determination by subject matter non-arbitrability.

75. The second circumstance in which an arbitration agreement may be inoperative, ie where there is remedial non-arbitrability, is concerned with the circumstance in which the parties have the power to refer matters to arbitration but cannot confer on the arbitral tribunal the power to give certain remedies. In the common law world there appears to be a general consensus that an arbitration agreement cannot confer on an arbitral tribunal the power to make an order to wind up a registered company on the application of a creditor where the company is insolvent and there is strong authority in support of such an exclusion when the application is by a contributory where the company is solvent. This is because the power to wind up a company lies within the exclusive jurisdiction of the courts, which alone have the discretion as to whether to make such an order. See in English law, *Fulham* at paras 76 and 83, in Hong Kong, *Quiksilver* para 14, in Singapore, *Tomolugen* para 83 (in relation to a creditor's application), in Australia, *WDR Delaware* para 26. In *Quiksilver* and *WDR Delaware* the inability of an arbitral tribunal to make a winding up order was common ground; it is also common ground between the parties on this appeal.

76. There is a general consensus that an arbitral tribunal has the power to grant inter partes remedies, such as ordering a share buy-out in proceedings for relief for unfairly prejudicial conduct in the management of a company under section 994 of the Companies Act 2006 in the United Kingdom and similar legislation in other jurisdictions. See *Fulham*, Patten LJ at paras 77-78, Longmore LJ at paras 96 and 99; *Tomolugen*, Sundaresh Menon CJ at paras 88-89 and 103; *WDR Delaware*, Foster J at para 147 quoting para 194 of *Tridon.* Although the court is given the power by statute to make such orders, an arbitral tribunal may also grant such a remedy because third parties, who are not involved in the dispute, do not have a legal interest in the dispute and there is no public element in a dispute of that nature.

77. Similarly, in an application to wind up a company on the just and equitable ground there may be matters in dispute between the parties, such as allegations of breaches of a shareholders' agreement, which can be referred to an arbitral tribunal for a determination, which is binding on the parties, notwithstanding that only a court can make a winding up order: *Fulham*, Patten LJ at para 76; *Quiksilver*, Harris J at paras 14, 21-22; *Tomolugen*, Sundaresh Menon CJ at paras 96-103; *WDR Delaware*, Foster J at paras 161-164. The researches by the appellants' counsel demonstrate that a similar approach can be found in case law in Quebec, Canada (*Capital JPEG Inc v Corporation Zone B4 Ltd* [2019] QCCS 2986) in relation to mediation, Cyprus *(In re Kissonerga Development Co Ltd* (Application no 7/20) (unreported) 9 July 2020 which was an interim decision, Jersey (*Consolidated Resources Armenia v Global Gold Consolidated Resources Ltd* [2015] JCA 061 ("*Consolidated Resources*"), and Zambia (*Vedanta Resources Holdings Ltd v ZCCM Investment Holdings plc* [2020] ZMCA 104). See also in Hong Kong *China Europe International Business School v Chengwei Evergreen Capital LP* [2021] HKCFI 3513 ("*China Europe*"). Counsel did not address these cases in any detail, but they are consistent with the main cases which the Board has discussed above and support a conclusion that there is substantial agreement among common law jurisdictions as to the correct approach.

78. In *WDR Delaware* Foster J summarised his conclusion on this matter at para 164:

> "With the exception of that part of the present proceeding which involves the Court forming an opinion as to whether the plaintiffs are entitled to a winding up order, the questions of fact and law which mark out the substantive controversy between the parties in this proceeding are all matters which are capable of resolution by arbitration. Any award or awards which determine those matters will be taken into account when the Court comes to consider whether a winding up order should be made. If, at the end of the arbitral process, the award or awards do not address satisfactorily or comprehensively all of the grounds relied upon by the plaintiffs in support of their claims for relief made in the present proceeding, then it will be open to them to supplement or explain the terms of the relevant award or awards by evidence. The process by which that would be done is the everyday process of applying the law of evidence."

The Board agrees as a general rule with this approach to discrete matters which involve inter partes disputes in the context of a winding up application. Matters, such as whether one party has breached its obligations under a shareholders' agreement or whether equitable rights arising out of the relationship between the parties have been flouted, are arbitrable in the context of an application to wind up a company on the just and

equitable ground and the arbitration agreement is not inoperative because the arbitral tribunal cannot make a winding up order.

9. The application of the FAAEA to the facts of this case

79. The first matter which the Board must address is the interpretation of the Companies Act. As stated in para 14 above, section 92 of that Act sets out the grounds on which the court may wind up a company including the ground which is relevant in this appeal, ie that the court is of the opinion that it is just and equitable that the company should be wound up. Section 95 of that Act sets out the powers of the court, which include the power to make a winding up order or on a contributory's petition on the just and equitable ground, an alternative order providing, among other things, for the purchase of the shares of any members of the company by other members of the company.

80. The Board agrees with Moses JA that the court's consideration under section 92 of the Act whether it is just and equitable that the company should be wound up is a threshold question which is to be answered before a petitioner can get access to any of the remedies available under section 95. That is clear from a straightforward reading of the wording of the Act. The Board also accepts, as Moses JA held, that the court has exclusive jurisdiction to make a winding up order. A winding up order is an order in rem which only a court can make. It is beyond the jurisdiction of an arbitral tribunal as parties cannot confer such a power on an arbitral tribunal by private agreement. An arbitral agreement that purported to confer such a power would be inoperative to that extent.

81. Further, in deciding whether to make a winding up order on the just and equitable ground, the court conducts a wide-ranging enquiry into and evaluation of the facts. The court takes the decision whether it is just and equitable to wind up a company with regard to all the relevant circumstances at the date of the hearing: *Lau v Chu* [2020] UKPC 24; [2020] 1 WLR 4656 ("*Lau v Chu*"), para 43 per Lord Briggs, giving the judgment of the Board. A decision by an arbitral tribunal on whether it was just and equitable to wind up the company by reference to the circumstances which existed on an earlier date could not determine the issue which the court has to consider. Such a decision would be an ineffective legal judgment. The Board therefore respectfully disagrees with the obiter suggestion by Patten LJ in *Fulham* at para 83 (and its endorsement by Sundaresh Menon CJ in *Tomolugen* at para 100) that an arbitrator could make a ruling on whether it would be appropriate for a complainant to initiate winding up proceedings or be limited to some lesser remedy. A ruling by an arbitral tribunal that it was of the view that it was just and equitable that a company be wound up would be ineffective; it could not bind the parties in a hearing before the court and, given the interests of third parties in a possible winding up of the company, it could not bind the court. In deciding on the appropriate remedy under section 95 the court takes into

account the interests of third parties, including the company's directors and employees, and businesses which have dealings with the company, who will be affected if a winding up order is made. See, by way of analogy, *Fulham* para 46; *In re Neath Rugby Ltd* [2009] EWCA Civ 291, [2010] BCC 597, para 84; and *In re Asia Television Ltd* [2015] 1 HKLRD 607, paras 55-58.

82. The parties were therefore correct in their agreement that an arbitral tribunal does not have the power to decide the fifth matter listed in para 23 above, ie whether a winding up order should be made and whether the persons identified by FMCH should be appointed joint liquidators of the Company. Further, for the reasons set out above, the Board agrees with Mr Thomas Lowe, counsel for FMCH, that an arbitral tribunal does not have power to make a ruling on matters (3) and (4), ie whether it is just and equitable that the company should be wound up or whether the remedy of a share buy-out should be granted under section 95 of the Companies Act.

83. That leaves the first and second matters set out in para 23 above. The first is whether FMCH has lost trust and confidence in Ting Chuan and in the conduct and management of the Company's affairs. FMCH allege that Ting Chuan caused, permitted or procured the majority directors, whom it appointed, to act in breach of their duties to the Company and to engage in misconduct in the management of the Company's affairs. The second is whether the fundamental relationship between FMCH and Ting Chuan has irretrievably broken down as a result of Ting Chuan's having acted contrary to the understanding between the parties as to how the business of the Company would be operated. Those two matters raise questions of mixed fact and law.

84. Moses JA further reasoned that, as the majority directors and the Company were not parties to the SHA and to the arbitration agreement which it contained, and as the allegations made against Ting Chuan could not be separated from the threshold issue of whether the court was of the opinion that it was just and equitable that the Company be wound up, the arbitration agreement was inoperative. His conclusion has been summarised in a first instance decision of the High Court of England and Wales in these terms:

> "Where … a necessary precursor to any form of relief is a decision by the court that it would be just and equitable to wind up the company, then bifurcation will not be possible."

See *Riverrock Securities Ltd v International Bank of St Petersburg* [2020] EWHC 2483 (Comm); [2021] 2 All ER (Comm) 1121, para 68 per Foxton J. See also *NDK Ltd v HUO Holding Ltd* [2022] EWHC 1682 (Comm); [2022] Bus LR 761, para 64 in which Foxton J recorded the proposition from *Riverrock* as common ground between the

parties. The issue before the Board in relation to matters (1) and (2) is whether that statement is correct.

85. Mr Lowe advanced several submissions as to why the Court of Appeal had decided this case correctly. On the question of statutory interpretation, he argued that the Companies Act made it clear that no private arbitral tribunal could make the critical decision whether it is just and equitable to wind up the Company. The Board agrees for the reasons discussed above but that argument goes only to matters (3) and (4).

86. Mr Lowe can derive no support from the judgment of the Court of Appeal of England and Wales in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2014] EWCA Civ 1575; [2015] Ch 589 ("*Salford Estates*"). That case concerned a winding up petition on the ground that the company was unable to pay its debts under section 122(1)(f) of the Insolvency Act 1986. The petitioner cited several debts in its petition as evidence of the company's inability to pay its debts, only some of which arose out of the transaction to which the arbitration agreement applied. Sir Terence Etherton C opined that in those circumstances there was no basis for a mandatory stay of the winding up proceedings under section 9 of the Arbitration Act 1996 (para 34). He then expressed the view (para 35) that it seemed "highly improbable" that Parliament intended section 9 of the 1996 Act to confer on a debtor the right to a non-discretionary order "striking at the heart of the jurisdiction and discretionary power of the court to wind up companies in the public interest where companies are not able to pay their debts". In the Board's view, whether or not this view is correct, it has no bearing on a petition in which a member of a company seeks a winding up order on the just and equitable ground.

87. Mr Lowe also advanced an argument that the Cayman Islands was unique among Commonwealth countries in not introducing either a remedy for oppression, such as the former section 210 of the Companies Act 1948 in the United Kingdom, or a remedy for unfairly prejudicial conduct in the management of the company, such as that which has been available in the United Kingdom since 1980 and is now contained in sections 994-996 of the Companies Act 2006, which was separate from an application to wind up the company. He inferred from the legislature's decision not to introduce such remedies as separate proceedings from a winding up petition that the legislature had evinced an intention that disputes between shareholders concerning the conduct of the management of Cayman Islands companies were to be conducted in open court in the public interest. He pointed out that the Cayman Islands is a very significant jurisdiction for the incorporation of companies which operate in other jurisdictions or internationally and that there was a public interest in maintaining the confidence of incorporators in the competence of the Cayman Islands courts in resolving shareholder disputes. He submitted that, while the Cayman Islands had ambitions to host international arbitrations, it was not a significant centre for such proceedings in contrast to its role as one of the largest offshore incorporation centres. The problems with this argument are, first, that neither party produced or suggested that there were any pre-legislative materials which explained why the Cayman Islands legislature had not

introduced free-standing remedies for oppression and unfair prejudice. The submission therefore is simply speculation. Secondly, in any event, on the basis that matters (3)-(5) are to be determined exclusively by the courts, there will be court proceedings in public in which the critical decisions are made and the factual basis on which those decisions are made will be manifest. The Board is not persuaded that there is a public interest in making the Cayman Islands an outlier in relation to the treatment of international arbitration.

88. FMCH further submitted that winding up was intended to be a quick and efficient process. The presentation of a winding up petition offered protections to the petitioner as section 99 of the Companies Act serves to maintain the status quo by nullifying retrospectively on the making of a winding up order any disposition of the company's property or transfer of shares or alteration in the status of its members after the commencement of the winding up, unless the court orders otherwise. The Court of Appeal of the Cayman Islands clarified the purpose of this provision in *Tianrui (International) Holding Co Ltd v China Shanshui Cement Group Ltd* [2020] CILR 417. A prolonged process involving an arbitration in relation to matters (1) and (2) followed by a court process to determine matters (3)-(5) would not achieve the speedy resolution of the disputes and would leave hanging over the Company the possibility of the retrospective nullification of transactions under section 99. Mr Lowe pointed out that the parties had already been involved in a lengthy arbitration at the instance of Ting Chuan which had been very expensive and had taken over three and a half years to complete.

89. This is an argument relating to public policy. Mr Lowe further submitted that the complexity and delay involved in a bifurcation of the proceedings between an arbitral tribunal and the court would frustrate the expectations of reasonable businesspeople. In the Board's view the reference to such expectations is a relevant consideration principally in the interpretation of an arbitration agreement, viz Lord Hoffmann in *Fiona Trust*, rather than a distinct ground of public policy. In any event, there is no necessity that an arbitration of matters (1) and (2) would involve undue delay if the arbitral tribunal exercises robust case management in fulfilment of their task in reaching a speedy resolution of an arbitrated dispute. The Board is not persuaded that the determination of matters (1) and (2) by an arbitral tribunal is excluded on grounds of public policy because of the risk of some delay. In invoking the jurisdiction of the Court on the just and equitable ground FMCH is seeking a statutory remedy of an equitable nature: *In re Westbourne Galleries Ltd; Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 379 per Lord Wilberforce; *Lau v Chu*, para 64 per Lord Briggs. The clean hands doctrine applies. Further, in the Board's view, in the exercise of this equitable jurisdiction the court must have regard to a party's contractual obligations, which may include an agreement to refer to arbitration disputes which fall within the scope of the relevant arbitration agreement.

90. There is no substance in the submission that a sword of Damocles is hanging over the Company through the operation of the avoidance provisions of section 99 of the Companies Act. As Mr Charles Kimmins KC pointed out on behalf of Ting Chuan, Kawaley J issued a consent order on 16 November 2018 which prevents payments made for the purpose of paying debts and expenses of the Company in the ordinary course of its business after the date of presentation of the winding up petition from being avoided under section 99 of the Companies Act.

91. The Board is not persuaded that an agreement to refer to arbitration disputes arising out of the SHA amounts to a contractual prohibition on initiating a petition to wind up a company. The Board discusses this matter below when it considers section 95(2) of the Companies Act. The submission that an arbitration would deny a party the protections of section 99 of the Companies Act is misconceived both because the arbitration agreement does not prevent the presentation of a winding up petition and because the parties have chosen to limit the application of section 99 in this case.

92. A further submission by FMCH in support of the argument that the just and equitable jurisdiction was indivisible was that the court alone could decide the facts in conducting the broad enquiry which was required when deciding whether it was just and equitable that a company should be wound up. Mr Lowe went so far as to suggest that the court needed to hear and test all the evidence. When questioned by the court he conceded, correctly, that there was nothing to stop the parties presenting the court with a statement of agreed facts. In the Board's view, such a statement could include, in principle, that FMCH had lost trust and confidence in Ting Chuan and that the fundamental relationship between those parties had broken down. A party could admit such facts, if it wished. As the court in exercising its jurisdiction under section 92 of the Companies Act would be bound by such an agreed statement or admission as between the parties, there is no reason in principle why the court should not be bound in a question between Ting Chuan and FMCH by the determination of an arbitral tribunal, which would set out its reasoning and its findings of fact.

93. The Board recalls that Kawaley J in his order of 14 July 2020 ordered that the petition be treated as an inter partes proceeding between those parties. See para 10 above. A finding by the arbitral tribunal on matters (1) and (2) would be binding on the parties under article 35(6) of the ICC Rules of Arbitration which provides:

> "Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

There is therefore no danger of duplication of effort or inconsistent findings in relation to matters (1) and (2).

94. Finally, FMCH submits that section 4 of the FAAEA requires a stay only in respect of a matter which is capable of settlement by arbitration. It submits that a matter must be a determination of a right or liability and not merely a declaration. It prays in aid a statement by Deane and Gaudron JJ in their joint judgment in the High Court of Australia in *Tanning* at 351 in which they interpreted the meaning of "matter" in the Australian legislation, which includes the words "capable of settlement by arbitration" in this way:

> "It requires that there be some subject matter, some right or liability in controversy which, if not co-extensive with the subject matter in controversy in the court proceedings, is at least susceptible of settlement as a discrete controversy."

FMCH referred also to a more recent joint judgment of Kiefel CJ and Gageler, Nettle and Gordon JJ in the High Court of Australia in *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514, para 68 in which, paraphrasing the judgment of Deane and Gaudron JJ in *Tanning*, they stated that it was sufficient that the defence puts in issue "among other things, some right or liability which is susceptible of settlement under the arbitration agreement as a discrete controversy". But the Board notes that the meaning of the judgment in *Tanning* was not a matter of controversy in that appeal.

95. The Board does not accept this submission, which is that an arbitrable matter must be a dispute which leads to the determination by an arbitral tribunal of a right or a liability, if by that FMCH means that the arbitral panel must have the jurisdiction to make an award such as an order for payment to enforce the right or require a party to fulfil its obligation. The Board does not interpret the judgment of Deane and Gaudron JJ as excluding the possibility of the determination of a dispute or controversy by means of a declaration, where the dispute is a matter of substance. See paras 59-62 above.

96. Matters (1) and (2) are controversies relating to legal or equitable rights which are of substance. They are matters which lie at the heart of the legal proceedings in the Cayman Islands for an order under section 95 of the Companies Act. A declaration, for example, that Ting Chuan had breached FMCH's equitable rights and that their relationship had irretrievably broken down would be highly relevant to FMCH's application for a just and equitable winding up of the Company or in the alternative a share buy-out. They are also matters which the parties accept fall within the scope of the arbitration agreement.

97. For the reasons set out above, the Board concludes that matters (1) and (2) which it has set out in para 23 above are "matters" in terms of section 4 of the FAAEA for which a stay pro tanto of the winding up proceedings is mandated.

10. The application for a case management stay of the winding up proceedings

98. Ting Chuan seeks a discretionary stay of the winding up proceedings so far as they are formally directed against parties other than itself. Kawaley J in para 75 of his judgment opined that section 95(1)(d) of the Companies Act, which provides that the court may make "any other order that it thinks fit" gave him the power to do so. The Court of Appeal between paras 138 and 141 of Moses JA's judgment discussed the court's power to grant a discretionary case management stay but considered that there was no room to exercise such discretion as the petition to wind up the Company on the just and equitable ground involves an indivisible factual evaluation.

99. As the winding up process is intended to be conducted with expedition, the court will, as a general rule, rarely wish to grant a stay of such proceedings. But a stay for arbitration is a special case. Where the shareholders of a company are engaged in an inter partes dispute which is within the scope of a binding arbitration agreement and an essential precursor to the determination of a winding up petition on the just and equitable ground, there are strong grounds for granting such a stay. In *Salford Estates* the Court of Appeal of England and Wales held that the court's discretionary power under section 122(1) of the Insolvency Act 1986 ("A company *may* be wound up by the court if …") had to be exercised consistently with the parties' agreement as to the proper forum for resolving their disputes and in accordance with the legislative policy of the Arbitration Act 1996. The case concerned a disputed debt alleged to arise under a lease and the lessor presented a petition seeking the winding up of the tenant. Sir Terence Etherton MR, giving the judgment of the court, stated (para 39) that section 122(1) of the Insolvency Act 1986 conferred on the court a discretionary power to wind up a company. He said that it was "entirely appropriate" that the court should, "save in wholly exceptional circumstances", grant a discretionary stay as that was consistent with the pro-arbitration policy of the 1996 Act.

100. The statutory provisions under which the Cayman Islands courts are operating in this case are contained in the FAAEA. The FAAEA does not contain provisions stating the well-known principles that parties are free to agree how their disputes are resolved subject only to such safeguards as are necessary in the public interest, and restricting the intervention of the court, such as are found in section 1 of the 1996 Act, on which the Court of Appeal of England and Wales relied in *Salford Estates*, and in section 3(3) of the Arbitration Act 2012 in the Cayman Islands, which relates to domestic arbitrations. Nonetheless, such principles are wholly consistent with the wide international consensus in favour of a pro-arbitration policy in relation to international arbitrations governed by the New York Convention, which provides in article II(1):

> "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

101. Thus, in *Tomolugen* the Court of Appeal in Singapore in an unfair prejudice petition granted a mandatory stay under section 6 of the IAA of one of the matters which fell within the scope of the arbitration agreement and granted a discretionary case management stay of the other matters which did not: see Sundaresh Menon CJ at paras 187-190. In *WDR Delaware*, a case involving a winding up petition arising out of allegations of oppressive conduct, Foster J granted a stay of the whole of the winding up petition although only certain matters were arbitrable. Similarly, in *Consolidated Resources* the Court of Appeal in Jersey granted a mandatory stay of the matters within the scope of the arbitration agreement and, using the court's inherent jurisdiction, a discretionary stay of the remaining claims in the proceedings for unfair prejudice and winding up (para 159). In *China Europe*, Linda Chan J in the Court of First Instance in Hong Kong granted a discretionary stay for arbitration of a winding up petition on the just and equitable ground, where the disputes between the shareholders which grounded the petition fell within the scope of an arbitration agreement. It will be recalled that in Hong Kong section 20 of the Arbitration Ordinance, which provided for a mandatory stay, referred to an "action" and did not extend to a winding up petition; *Quiksilver* para 20.

102. The Board is inclined to think, in agreement with Kawaley J and Sir Terence Etherton MR, that in the Cayman Islands as in England and Wales there is a statutory basis for the grant of a stay of a winding up petition. The Board therefore does not need to determine whether and to what extent a discretion exists under the court's case management powers apart from statute. In *In re Nanfong International Investments Ltd* [2018] CILR 321 ("*Nanfong*") the Cayman Islands Court of Appeal adopted a restrictive approach to the grant of a discretionary stay, applying the principles set out by Lord Bingham of Cornhill CJ in *Reichhold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173 ("*Reichhold*"). Moses JA adopted the same approach in this case, holding at para 138 that a stay will be granted only in rare and compelling circumstances. The Board observes that in *Reichhold* and *Nanfong* the basis on which a stay was sought did not involve an assertion that all or some of the matters in the legal proceedings fell within the scope of a binding arbitration agreement. While it is not necessary for the Board to decide this matter, it questions the proposition that a discretionary case management stay of winding up proceedings on the just and equitable ground where a substantial part of the dispute between the parties or some of the parties to the petition falls within the scope of a binding arbitration agreement should be granted only in rare and compelling circumstances. Such a conclusion appears to be inconsistent with the support which the courts give to arbitration and the trend of case law internationally.

103. The determination of matters (1) and (2) will be an essential precursor to the court's formation of its opinion whether it is just and equitable to wind up the Company, which in turn is the threshold for giving a remedy under section 95 of the Companies Act (ie matters (3)-(5)). The Board is satisfied that it is appropriate to grant such a stay.

11. Section 95(2) of the Companies Act

104. It will be recalled that section 95(2) states that the court shall dismiss or adjourn a hearing of a winding up petition if the petitioner is contractually bound not to present a petition against the company. In this case there is no contract binding FMCH not to present a winding up petition. The arbitration agreement in the SHA requires certain matters to be determined by arbitration but is silent as to the presentation of a winding up petition against the Company. The Board is satisfied that the contractual obligation on the parties to determine those matters by arbitration entails an obligation not to have those matters determined by a court. That obligation is enforced by the court's grant of a stay of the winding up petition pro tanto. It does not amount to a contractual prohibition against the initiation of winding up proceedings. Section 95(2) is therefore not relevant to the dispute between the parties and the Board will say no more about it.

12. Conclusion

105. Matters (1) and (2) are substantive disputes between FMCH and Ting Chuan which provide the factual basis for the winding up petition on the just and equitable ground. Those matters fall within the scope of the parties' arbitration agreement and must be determined by an arbitral tribunal unless the parties waive their right to arbitration. There must therefore be a mandatory stay of the winding up petition in relation to matters (1) and (2) under section 4 of the FAAEA and a discretionary stay in relation to matters (3)-(5). In relation to the Company, which is the other party to the winding up petition, the Board is satisfied that there should be a stay of the winding up petition. The determination of matters (1) and (2) is the precursor to the determination of the petition which Kawaley J in his order dated 14 July 2020 has ordered be treated as an inter partes proceeding between FMCH and Ting Chuan.

106. The Board will humbly advise His Majesty that this appeal should be allowed.

CITATION: BBB Canada Inc., 2023 ONSC 2308
COURT FILE NO.: CV-23-694493-00CL
DATE: 2023-04-14

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEEMNT OF BBB CANADA LTD.

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Shawn Irving, Emily Paplawski and Blair McRadu*, for the Applicant Bed Bath & Beyond Ltd.

Jeffrey Levine and Wael Rostom, for Sixth Street Specialty Lending, Inc. (FILO Agent)

Linda Galessiere, for Landlords of BBB Canada, namely, RioCan; Ivanhoe, SmartCentre; Centrecorp and Royop

Max Freedman, U.S. Counsel to the Applicant

Kevin Zych, Michael Shakra and Joshua Foster, for the Monitor, Alvarez & Marsal Canada Inc.

Roger M. Jaipargas, for 1431582 Alberta Inc.

Evan Cobb, for JPMorgan Chase (ABL Lenders)

Nate Fennema, Mike Shakra, Sean Zweig and Joshua Foster, for the Monitor, Alvarez & Marsal Canada Inc.

John C. Wolf, for Sun Life Assurance Company, Heritage Greene Development Corporation, Skyline Retail Real Estate Holdings Inc., and Queensway 427 Centre Inc.

Monique Sassi, for the Hilco Merchant Retail Solutions, ULC, Gordon Brothers Canada ULC, Tiger Asset Solutions Canada, ULC, and B. Riley Retail Solutions ULC

Craig Firth, for Preston West Properties Ltd.

Steven Weisz, for Canadian Tire Corporation

Kyle Plunkett, for DKB Capital

Heather Meredith, for Langley City Square Properties Ltd., Sunstone Opportunity (2007) Realty Trust and Fiera Real Estate Core Fund GP Inc. on behalf of Fiera Real Estate Core Fund LP

Dina Peat, for 1651051 Alberta Ltd., 1826997 Ontario Inc., Yonge Bayview Holdings Inc., Airport Highway 7 Developments Limited, Woodhill Equities Inc. and Winston Argentia Developments Limited

HEARD AND DETERMINED: April 11, 2023

ENDORSEMENT

[1] On February 10, 2023, BBB Canada Ltd. (the "Applicant"), along with Bed Bath & Beyond Canada L.P. ("BBB LP", and together with the Applicant, "BBB Canada"), was granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985 c. C-36 (the "CCAA") pursuant to an Initial Order (the "Initial Order"). Alvarez & Marsal Canada Inc. was appointed to act as the Monitor (the "Monitor"). On February 21, 2023, the court granted an Amended and Restated Initial Order (the "ARIO") and a Sale Approval Order.

[2] BBB Canada has retained Retail Ventures CND Inc. ("RVC") as its exclusive listing agent for the purpose of facilitating the sale of leases and other property rights for some or all of BBB Canada's retail stores across Canada (the "Leases").

[3] BBB Canada brings this motion for an order approving the Omnibus Assignment and Assumption of Leases, FF&E and Trade Fixtures Agreement, dated March 28, 2023 (the "DKB Capital Agreement") between BBB LP, Bed Bath & Beyond Inc. ("BBBI") and 11607987 Canada Inc., dba DKB Capital ("DKB Capital"). Under the terms of the Amended and Restated Order ("ARIO"), court approval is required for the DKB Capital Agreement.

[4] The Applicant accordingly seeks the following orders:

(a) an order approving the DKB Capital Agreement;

(b) an order assigning certain Leases to DKB Capital pursuant to section 11.3 of the CCAA on an unopposed basis;

(c) an order vesting BBB LP's right, title and interest in and to certain Leases and other purchased assets in DKB Capital free and clear of all Encumbrances other than permitted encumbrances identified in, or pursuant to, the DKB Capital Agreement; and

(d) an order directing that the unredacted copy of the DKB Capital Agreement be treated as confidential and sealed, and not form part of the public record, until the earlier of: (1) the closing of the DKB Capital Agreement, (2) disclaimer of the Leases subject to the DKB Capital Agreement, or (3) any further order of the Court.

[5] The Applicant submits that the DKB Capital Agreement is the culmination of a marketing process and should be approved on the basis that the criteria set out in section 36(3) of the CCAA are clearly satisfied.

[6] The Applicant further submits that the consideration paid by DKB Capital for the applicable Leases is fair and reasonable in the circumstances. It represents the highest, non-overlapping executable offer received within the marketing process.

[7] The Monitor supports the position of the Applicants and no party opposed the requested relief.

[8] The facts regarding this motion are fully set out in the affidavit of Wade Haddad.

[9] The following issues are raised on this motion:

(a) should the court approve the DKB Capital Agreement and grant the proposed Assignment, Approval and Vesting Order;

(b) should the court assign certain Leases to DKB Capital pursuant to section 11.3 of the CCAA on an unopposed basis; and

(c) should the court grant an order directing that the unredacted DKB Capital Agreement be treated as confidential and sealed, and not form part of the public record, until the earlier of: (1) the closing of the DKB Capital Agreement, (2) disclaimer of the Leases subject to the DKB Capital Agreement, or (3) any further order of this court.

[10] Section 36 of the CCAA sets out the legal test for obtaining court approval that applies where a debtor company seeks to sell assets outside the ordinary course of business during a CCAA proceeding.

[11] The Applicant submits that, taking into account the criteria listed in Section 36(3) of the CCAA, the court should approve the DKB Capital Agreement and grant the proposed Assignment, Approval and Vesting Order.

[12] I am satisfied that the record establishes that the process followed by the listing agent was comprehensive and garnered significant interest from third parties.

[13] Further, the Monitor has been involved in the marketing process and supports the requested relief. The Monitor's views in this respect are entitled to deference.

[14] BBB Canada, RVC, and the Monitor are each of the view that the consideration to be received by BBB Canada under the DKB Capital Agreement is fair and reasonable.

[15] The Applicant submits that BBB Canada and the listing agent undertook a comprehensive sales and marketing process for the sale of the Leases. I am satisfied that the evidence establishes there is ample evidence that the market has been thoroughly tested in order to obtain the best price.

[16] I am also satisfied that the DKB Capital Agreement is beneficial to the creditors and other stakeholders of the Applicant.

[17] The DKB Capital Agreement provides that certain of the Leases will be assigned in accordance with section 11.3 of the CCAA on an unopposed basis.

[18] Section 11.3 of the CCAA gives this Court jurisdiction and the discretion to make an order assigning the rights and obligations of the debtor company.

[19] The Applicants submit that the requested assignments are critical to closing the transactions contemplated in the DKB Capital Agreement and are essential to the ability of the Applicant to realize upon the value of these transactions for the benefit of all stakeholders. In addition, there can be no suggestion that counterparties are being treated unfairly, as each of the requested assignments are proceeding on an unopposed basis.

[20] I accept these submissions and I am satisfied that the assignment of certain Leases should be approved.

[21] It is noted, however, that the parties have expressly agreed that in respect of any leases not subject to this Order assigning leases pursuant to s. 11.3 of the CCAA, the issue of whether the test under s. 11.3 of the CCAA has been met in respect of any future motion under s. 11.3 of the CCAA is to be treated as de novo in respect of any further motion to compel assignment of any other leases. The issuance of this Order assigning leases shall not be directly or indirectly argued as the basis for granting such relief in the future.

[22] Finally, the Applicant requests that the unredacted copy of the DKB Capital Agreement be temporarily treated as confidential and sealed, and not form part of the public record, until the earlier of: (1) the closing of the DKB Capital Agreement, (2) disclaimer of the Leases subject to the DKB Capital Agreement, or (3) any further order of this Honourable Court.

[23] The test for a sealing order was established by the Supreme Court in *Sierra Club*, and subsequently recast in *Sherman Estate*. The test requires the court to consider whether:

(a) court openness poses a serious risk to an important public interest;

(b) the order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measure will not prevent this risk; and

(c) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[24] The request for the proposed sealing order is supported by the Monitor.

[25] Having considered the *Sherman Estate* test, I am satisfied that it is appropriate to grant the sealing order. The proposed order is limited both in scope and time and is appropriate in the circumstances.

[26] The motion is granted and the order has been signed.

Chief Justice G.B. Morawetz

Date: April 14, 2023

CITATION: Nordstrom Canada Retail, Inc., 2023 ONSC 1422
COURT FILE NO.: CV-23-00695619-00CL
DATE: 2023-03-03

SUPERIOR COURT OF JUSTICE – ONTARIO2023-03-01

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORDSTROM CANADA RETAIL INC., NORDSTROM CANADA HOLDINGS INC., LLC AND NORDSTROM CANADA HOLDINGS II, LLC

BEFORE: Chief Justice G.B. Morawetz

COUNSEL: *Jeremy Dacks, Tracy Sandler, Martino Calvaruso and Marleigh Dick*, for the Applicants

Susan Ursel, Karen Ensslen, for the Proposed Employee Representative Counsel

Brendan O'Neill and Brad Wiffen, for the Proposed Monitor

George Benchetrit, for the Directors and Officers of the Nordstrom Canada Entities

Aubrey Kauffman, for Nordstrom, Inc. (U.S.)

HEARD and DETERMINED: March 2, 2023

REASONS: March 3, 2023

ENDORSEMENT

Background

[1] At the conclusion of the hearing on March 2, 2023, I granted the requested relief, with reasons to follows. These are the reasons.

[2] Nordstrom Canada Retail, Inc. ("Nordstrom Canada"), together with the other applicants listed above (collectively, the "Applicants"), seek relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA"). The Applicants seek a stay of proceedings (the "Stay") for the initial ten-day period (the "Initial Stay Period") under section 11.02(2) of the CCAA, together with related relief necessary to preserve the Applicants' business and stakeholder value during the Initial Stay Period. The Applicants also seek to extend the stay of proceedings to Nordstrom Canada Leasing LP ("Canada Leasing LP") and, for limited purposes, to Nordstrom,

Inc. ("Nordstrom US"). The Applicants and Canada Leasing LP are referred to collectively below as the "Nordstrom Canada Entities."

[3] Nordstrom Canada is a retailer which acts as the Canadian operating subsidiary of Nordstrom US. Nordstrom Canada entered the Canadian marketplace in September 2014 and currently operates 13 retail stores in Ontario, Alberta and British Columbia. Nordstrom Canada has experienced losses each year. Nordstrom Canada has only been able to sustain operations due to the financial support of Nordstrom US, which has provided Nordstrom Canada with approximately USD$775 million in net funding through various means since inception. Nordstrom US also provides various other ongoing strategic support, and administrative services.

[4] Given Nordstrom Canada's financial performance and after considering available options, Nordstrom US has determined that it is in the best interest of its stakeholders to discontinue further financial and operational support for Nordstrom Canada in order to focus on its core business in the US. Nordstrom US has terminated its support and IP licensing arrangements with the Nordstrom Canadian Entities and replaced them with a Wind-Down Agreement (described further below).

[5] The Applicants contend that without support from Nordstrom US, the Nordstrom Canada Entities are insolvent and require the flexibility of the CCAA in order to effect an orderly, responsible and controlled wind-down of operations.

[6] The Applicants further contend that the requested relief is urgent, as the Nordstrom Canada Entities cannot operate without Nordstrom US's support, and continued support during the wind-down process is conditional on obtaining protection under the CCAA.

[7] The requested relief includes the approval of the Employee Trust, the appointment of Employee Representative Counsel, Court-ordered Administration and D&O charges in an amount required for the Initial Stay Period, as well as a Co-tenancy Stay of proceedings (the "Co-tenancy Stay") and a stay in favour of Nordstrom US.

[8] At the Comeback Hearing, the Applicants anticipate seeking certain additional relief, including the approval of an Employee Retention Plan. Additionally, the Applicants, in consultation with Alvarez & Marsal Canada Inc. (the "Proposed Monitor"), also plan to solicit bids from a number of professional third-party liquidators and to seek court approval in the near term to engage the successful liquidator bidder and to conduct an orderly realization process.

[9] The facts have been set out in an affidavit of Misti Heckel, President of Nordstrom Canada Retail, Inc., and President and Treasurer of Nordstrom Canada Holdings, LLC and Nordstrom Canada Holdings II LLC. In addition, the Proposed Monitor has filed a pre-filing report.

[10] The Proposed Monitor supports the position of the Applicants.

The Nordstrom Canada Entities

[11] Nordstrom Canada is incorporated pursuant to the laws of British Columbia. It is a wholly-owned subsidiary of Nordstrom International Limited ("NIL"). NIL is a wholly-owned subsidiary of Nordstrom US, a publicly traded company on the New York Stock Exchange. Nordstrom Canada serves as the Canadian retail sales operating entity.

[12] As of January 28, 2023, Nordstrom Canada employed approximately 1925 full-time and 575 part-time employees. Of these, 2,047 are full-line store and 310 are Rack store employees.

[13] Nordstrom Canada Holdings, LLC ("NCH") is a US single member limited liability company wholly-owned by NIL. NCH, as general partner, owns 99.9% of Canada Leasing LP, the Canadian leasing entity. Nordstrom Canada Holdings II, LLC ("NCHII") is a US holding company that owns 0.1% of Canada Leasing LP, as its limited partner.

[14] Canada Leasing LP is an Alberta limited partnership responsible for the Canadian real estate activities, such as leasing retail space from the Landlords, and subleasing the retail space to Nordstrom Canada.

Business of the Applicants

[15] Nordstrom Canada currently operates six Nordstrom-branded full-line stores and seven off-price Nordstrom Rack stores in Ontario, Alberta and British Columbia. These retail operations are conducted in facilities which are leased to Canada Leasing LP, as lessee, by third-party landlords (the "Landlords") pursuant to leases (the "Leases") and sublet by Canada Leasing LP to Nordstrom Canada pursuant to subleases (the "Subleases").

[16] Ms. Heckel contends that Nordstrom Canada Entities' business is dependent on Nordstrom US for administrative and business support services, including legal, finance, accounting, bill processing, payroll, human resources, merchandising, strategy, and information technology project support (the "Shared Services"). Nordstrom US formerly provided these Shared Services under an inter-affiliate licence and services agreement, effective as of February 3, 2019, between Nordstrom US and Nordstrom Canada (the "Licence and Services Agreement").

[17] On March 1, 2023, Nordstrom US notified Nordstrom Canada that it would be terminating the Licence and Services Agreement in accordance with its terms, as well as the other agreements referenced above to which it is a party. Subsequently, the Nordstrom Canada Entities agreed to have the termination become effective immediately. Nordstrom US and the Nordstrom Canada Entities have entered into a new administrative services agreement effective March 1, 2023 (the "Wind-Down Agreement") for Nordstrom US to continue providing Shared Services, as well as a license to use the essential IP, for the sole purpose of an orderly wind down under the CCAA.

Financial Position of the Nordstrom Canada Entities

[18] As of January 28, 2023, the Nordstrom Canada Entities had combined total assets with a book value of approximately $500,784,000 and total liabilities of approximately $561,024,000.

[19] Since 2014, Nordstrom Canada has experienced yearly losses across the majority of its 13 Canadian locations. For the year ended January 28, 2023, Nordstrom Canada generated revenue of $515,046,000. As a result of its high occupancy and other operating costs, its EBITDA for the year ending January 28, 2023, was negative $34,563,000, prior to taking into account intercompany payments.

[20] Most of the Nordstrom Canada Entities' losses have been absorbed by Nordstrom US through intercompany payments. However, Nordstrom US has resolved to discontinue this support, without which Nordstrom Canada cannot continue operating.

[21] The Nordstrom Canada Entities do not owe any secured indebtedness. Prior to the commencement of this proceeding, by virtue of amendments agreed upon by parties to a revolving Credit Agreement among Nordstrom US (as Borrower), Wells Fargo Bank, National Association, and certain other lenders, Nordstrom Canada was released from its guarantee obligations in relation to this indebtedness. The corresponding security interest granted by Nordstrom Canada was also released. Nordstrom Canada does not have any commitments under and has not granted any security in relation to the remaining debt agreements of Nordstrom US.

[22] Ms. Heckel states that since 2014, Nordstrom US has provided the Nordstrom Canada Entities with approximately USD $950 million. Taking into account the distributions of USD $175.6 million made by Nordstrom Canada to Nordstrom US, Nordstrom US has provided net funding to Nordstrom Canada of USD $775 million.

[23] Nordstrom US, with the support of its advisors, has decided in its business judgment that it is in the best interests of Nordstrom US to discontinue its support of the Canadian operations. The Applicants contend that due to its operational and financial dependence on Nordstrom US, Nordstrom Canada cannot continue operations without the full support of Nordstrom US, including a licence to use Nordstrom US's IP.

[24] The Nordstrom Canada Entities believe that these CCAA proceedings are the only practical means of ensuring a fair and orderly wind-down. Additionally, Nordstrom US has indicated that it is only willing to continue providing the Shared Services and to permit use of the IP if the wind-down is supervised by this Court under the CCAA.

Requested Relief

[25] Having reviewed the record and hearing submissions, I am satisfied that the Applicants are all affiliated debtor companies with total claims against them in excess of $5 million. I am also satisfied that Nordstrom Canada and the other Applicants are each a "company" for the purposes of s. 2 of the CCAA because they do business in or have assets in Canada.

[26] I accept that without the ongoing support of Nordstrom US, the realizable value of the Nordstrom Canada Entities' assets will be insufficient to satisfy all of their obligations to their creditors. I am satisfied that the Applicants in these proceedings are either currently insolvent under the definition of "insolvent person" in the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.

B-3 ("BIA") or the expanded concept of insolvency adopted by this Court in *Stelco Inc., Re*, 2004 CanLII 24933 (Ont. Sup. Ct.).

[27] I am also satisfied that this Court has jurisdiction over the proceedings. The chief place of business of the Nordstrom Canada Entities is Ontario: 8 of the 13 Nordstrom Canada retail stores are located in Ontario, while approximately 1,450 out of Nordstrom Canada's 2,500 full and part-time employees work in Ontario. Further, during fiscal year 2022, store sales in Ontario totalled $220 million, compared to $148 million in British Columbia and $77 million in Alberta .

[28] There are a number of examples of CCAA proceedings that have been commenced for the purpose of winding down a business. Recent examples include *Target Canada Co. (Re)*, 2015 ONSC 303*, Bed Bath & Beyond Canada Limited (Re),* 2023 ONSC 1014, and *Bed Bath & Beyond Canada Limited (Re)*, 2023 ONSC 1230.

[29] Section 11.02(1) of the CCAA permits the Court to grant an initial stay of up to 10 days on an application for an initial order, provided such a stay is appropriate and the applicants have acted with due diligence and in good faith. Under section 11.001, other relief granted pursuant to this Court's powers under section 11 of the CCAA at the same time as an order under s. 11.02(1) must be limited "to relief that is reasonably necessary for the continued operation of the debtor company in the ordinary course of business during that period." In my view, the relief requested in this first-day application meets these criteria.

[30] Where the operations of partnerships are integral and closely related to the operations of the applicants, it is well-established that the CCAA Court has the jurisdiction to extend the protection of the stay of proceedings to those partnerships in order to ensure that the purposes of the CCAA can be achieved. (See: *Target Canada Co. (Re)*, 2015 ONSC 303 at paras. 42 and 43; *4519922 Canada Inc. (Re)*, 2015 ONSC 124 at para. 37; *Just Energy Corp. (Re)*, 2021 ONSC 1793 at para. 116; *Bed Bath & Beyond Canada Limited (Re),* 2023 ONSC 1014, at para. 28).

[31] The Applicants submit that it is appropriate to extend the Stay to Canada Leasing LP. As the lessor of Nordstrom Canada's retail premises, its business and operations are fully intertwined with those of the Nordstrom Canadian Entities, and any proceedings commenced against Canada Leasing LP would necessarily involve key personnel of the Applicants, who collectively hold a 100% interest in Canada Leasing LP. As counterparty to the store Leases, Canada Leasing LP is also insolvent and needs the breathing space provided by the stay to prevent the exercise of Landlord remedies during the pendency of the proposed liquidation sale.

[32] I accept this submission. In my view, the proposed extension of the Stay is appropriate in the circumstances.

[33] Many retail leases provide that other tenants within the same shopping centre have certain rights against the Landlords upon an anchor tenant's (such as Nordstrom Canada's) insolvency or cessation of operations. In order to alleviate potential prejudice, the Applicants request that the Court extend the Stay to all rights of third-party tenants against the Landlords, owners, operators or managers of the commercial properties where the Nordstrom Canada's stores, offices or

warehouses are located that arise as a result of the Applicants' insolvency, or as a result of any steps taken by the Applicants pursuant to the proposed Initial Order.

[34] The Court's authority to grant the Co-tenancy Stay flows from the broad jurisdiction under sections 11 and 11.02(1) of the CCAA to make an initial order on "any terms that may impose." The Applicants submit that a Co-tenancy Stay is justified on the basis that, if tenants were permitted to exercise these "co-tenancy" rights during the Initial Stay Period (and beyond), the claims of the landlords against the debtor company would greatly increase, with a potentially detrimental impact on the restructuring efforts of the debtor company and that such claims would result in a multiplicity of proceedings which would be detrimental to an efficient and orderly wind-down.

[35] I have been persuaded that the Co-tenancy Stay should be granted in the circumstances.

[36] The Applicants also request that the Stay be extended (subject to certain exceptions related to the Cash Management System) to Nordstrom US in relation to claims that are derivative of the primary liability of or related to the Nordstrom Canada Entities (the "Parent Stay"). The Applicants submit that, among others, the Parent Stay would affect contractual counterparties with contracts or purchase orders involving Nordstrom Canada merchandise and concession operations entered into or issued by Nordstrom US on behalf of, or jointly with, Nordstrom Canada. The Parent Stay would also affect claims that arise out of or in connection with any indemnity, guarantee or surety relating the Leases. The proposed Initial Order further provides that any Landlord claim pursuant to an indemnity or guarantee in relation to either Canada Leasing LP or the Applicants shall not be released or affected in any way in any Plan filed by the Applicants under the CCAA, or any proposal under the BIA.

[37] The Parent Stay is being requested as a temporary measure designed to preserve the *status quo* and create breathing space during the Initial Stay Period, in particular to engage in good faith discussions with the Landlords. It is intended to prevent a multitude of proceedings being commenced in several different jurisdictions against Nordstrom US during this initial period with possibly inconsistent outcomes.

[38] The Court recently granted similar relief during the initial stay period in *Bed Bath & Beyond Canada Limited (Re),* 2023 ONSC 1014. I note that it is the Applicants' intention to request a continuation of the Parent Stay for a reasonable period beyond the Initial Stay Period at the Comeback Hearing.

[39] I note that the Applicants submit that section 11.04 of the CCAA does not prohibit this relief. Firstly, the Indemnities are not "guarantees." Secondly, even if the Indemnities could be characterized as "guarantees", the opening words of section. 11.04 do not oust the Court's jurisdiction under section 11 to grant a third party stay in favour of a guarantor in appropriate circumstances.

[40] The Applicant submits that the Court has jurisdiction under section 11 to grant a third party stay and references *Target Canada* at para. 50, *McEwan Enterprises Inc.*, 2021 ONSC 6453 at para. 45, *Laurentian University of Sudbury* 2021 ONSC 659 at paras. 30–33 and *Lydian*

International Limited, 2019 ONSC 7473 at para. 39. The Applicant submits that section 11.04 of the CCAA does not prevent the Court from granting such a remedy in its discretion on the basis that the section is inapplicable, as the indemnities at issue here are not guarantees. In its factum, the Applicant also references that the Alberta Court of Queen's Bench in *Northern Transportation Company Limited (Re)*, 2016 ABQB 522 at para. 69 took a contrary view. The contrary view was also expressed in *Cannapiece Group Inc. v. Carmela Marzili*, 2022 ONSC 6379.

[41] This issue is not free of doubt and affected landlords have not been served and did not appear at this hearing.

[42] There are outstanding issues as between the Applicant and the landlords that have to be addressed in the near future. In an effort to encourage discussions as between the Applicants and the various landlords, I am prepared to grant the Parent Stay for the initial 10-day period prior to the comeback hearing.

[43] Ms. Heckel states that it is expected that the vast majority of Nordstrom Canada's employees will be provided with working notice of termination on, or shortly after, the commencement of these CCAA proceedings.

[44] Nordstrom Canada is seeking this Court's approval of the Employee Trust, which is to be funded by Nordstrom US. The Employee Trust is intended to provide Nordstrom Canada employees with a measure of financial security during the wind-down process.

[45] The Applicants submit that the Court in *Target Canada* exercised its CCAA jurisdiction to sanction the establishment of an employee trust established by the debtor company's parent for similar purposes.

[46] The Applicants submit that the Employee Trust is intended to ensure that these employees receive the full amount of termination and severance pay owing to them pursuant to employment standards legislation in a timely manner. Nordstrom US has a right of subrogation against Nordstrom Canada in respect of amounts paid pursuant to the Employee Trust.

[47] I am satisfied that the creation of an Employee Trust is fair and appropriate in the circumstances. The Employee Trust is approved.

[48] The Applicants seek the appointment of Ursel Phillips Fellows Hopkinson LLP as Employee Representative Counsel, to represent Nordstrom Canada's store-level employees and all non-KERP eligible non-store employees. Among other things, Employee Representative Counsel will assist with questions regarding Eligible Employee Claims and other issues with respect to the Employee Trust.

[49] I am satisfied that the appointment of Employee Representative Counsel is appropriate in these circumstances. Employees who do not wish to be represented by Ursel Phillips will have the right to opt out.

[50] The Applicants also seek authorization, with the consent of the Monitor, to make payments of pre-filing amounts owing to certain suppliers, including: (i) logistics or supply chain providers; (ii) providers of information, internet, telecommunications and other technology; and (iii) providers of payment, credit, debit and gift card processing related services. The Applicants believe that categories of suppliers are fundamental to continuing operations and the proposed liquidation sale and any disruptions of their services could jeopardize the orderly wind down, given the expedited timelines for the proposed Realization Process.

[51] For third-party suppliers or service providers other than those listed above, the Initial Order proposes permitting payments in respect of pre-filing amounts up to a maximum aggregate amount of $1,000,000 with the consent of the Monitor, if, in the opinion of the Nordstrom Canada Entities, the supplier is critical to the orderly wind down of Nordstrom Canada's business.

[52] The Applicants submit that the Court has exercised its jurisdiction on multiple occasions to grant similar relief (See: *Target Canada* at paras. 62-65; *Just Energy*, at para. 99; *Original Traders Energy Ltd. and 2496750 Ontario Inc. (Re)*, 2023 ONSC 753, at paras. 72-74; *Boreal Capital Partners Ltd et al. (Re),* 2021 ONSC 7802, at paras. 20-22). The Court in *Index Energy Mills Road Corporation (Re),* 2017 ONSC 4944 at para. 31 outlined the factors that courts have considered in determining whether to grant such authorization, including (a) whether the goods and services are integral to the business of the applicants; (b) the applicants' dependency on the uninterrupted supply of the goods or services; (c) the fact that no payments will be made without the consent of the Monitor (which is a requirement under the proposed Initial Order); and (d) the effect on the debtors' operations and ability to restructure if it could not make such payments.

[53] In my view, a consideration of these factors leads to the conclusion that this requested relief should be granted.

[54] Pursuant to section 11.52 of the CCAA, the Applicants are requesting an Administration Charge in favour of the Proposed Monitor, along with its counsel, counsel to the Nordstrom Canada Entities, counsel to the directors and officers of the Nordstrom Canada Entities, and Employee Representative Counsel, as security for their respective fees and disbursements up to a maximum of $750,000 (the "Administration Charge"), which amount covers the time period until the comeback hearing. The Applicants anticipate requesting an increase to $1.5 million at the Comeback Hearing. The Administration Charge was sized in consultation with the Proposed Monitor and is proposed to have first priority over all other charges and security interests.

[55] In my view, the requested Charge satisfies the well-accepted factors originally established by Pepall J. (as she then was) in *Canwest Publishing Inc./Publications Canwest Inc. (Re)*, 2010 ONSC 222, at para. 39. Among other factors, the requested amount is fair and reasonable, and appropriate to the size and complexity of the businesses being restructured. In addition, the initial amount requested is tailored only to the needs within the Initial Stay Period. This relief is granted.

[56] In accordance with section 11.51 of the CCAA, the Applicants also seek a directors and officers charge (the "Directors' Charge") in the amount of $10.75 million until the Comeback Hearing. The Applicants anticipate requesting an increase to $13.25 million at the Comeback

Hearing. The Applicants submit that the quantum of the Director's Charge was arrived at in consultation with the Proposed Monitor and is proposed to be secured by the property of the Nordstrom Canada Entities and to rank behind the Administration Charge. The Directors' Charge would act as security for the Nordstrom Canada Entities' indemnification obligations for director and officer liabilities that may be incurred after the commencement of the CCAA proceeding. This charge would only be relied upon to the extent liabilities are not covered by existing insurance.

[57] In light of the potential liabilities, the continued service and involvement of the director and officers in this proceeding is conditional upon the granting of an Order which includes the Directors' Charge. I am satisfied that the Directors' Charge is necessary in the circumstances.

Disposition

[58] In summary, the Applicants' request for the relief set out in the proposed Order is granted and Alvarez & Marsal Canada Inc. is appointed as Monitor. The Comeback Hearing is scheduled for March 10, 2023.

Chief Justice G.B. Morawetz

Date: March 3, 2023

Faculty

Hon. Lisa G. Beckerman is a U.S. Bankruptcy Judge for the Southern District of New York in New York, sworn in on Feb. 26, 2021. From May 1999 until she was appointed to the bench, she was a partner in the financial restructuring group at Akin Gump Strauss Hauer & Feld LLP. From September 1989 until May 1999, she was an associate and then a partner in the bankruptcy group at Stroock & Stroock & Lavan LLP. Prior to her appointment, Judge Beckerman served as a co-chair of the Executive Committee of UJA-Federation of New York's Bankruptcy and Reorganization Group, as co-chair and as a member of the Advisory Board of ABI's New York City Bankruptcy Conference, and as a member of ABI's Board of Directors of from 2013-19. She is a Fellow and a member of the board of directors of the American College of Bankruptcy, as well as a member of the National Conference of Bankruptcy Judges (NCBJ) and the 2021 NCBJ Education Committee. She also is a member of the Dean's Advisory Board for Boston University School of Law. Judge Beckerman received her A.B. from University of Chicago in 1984, her M.B.A. from the University of Texas in 1986 and her J.D. from Boston University in 1989.

Chief Justice Geoffrey B. Morawetz is Chief Justice of the Superior Court of Justice in Toronto. He was appointed in 2005 and served as Team Leader of the Commercial List in Toronto from 2010-13, when he was appointed Regional Senior Justice. He was named Chief Justice in 2019. Chief Justice Morawetz first practiced with Borden and Elliot (now Borden Ladner Gervais), then joined Goodmans LLP in 1999, where he practiced primarily in the area of corporate restructuring with an emphasis on cross-border and international transactions. He is a past director and Honourary Fellow of the Insolvency Institute of Canada, a Fellow of the American College of Bankruptcy, and a member of the International Insolvency Institute. Chief Justice Morawetz is a co-author of Bankruptcy and Insolvency Law of Canada, and is an editor of the Canadian Bankruptcy Reports. Prior to his appointment to the court, Chief Justice Morawetz was consistently recognized as a top-tier practitioner of restructuring and insolvency law in several leading publications, including *Chambers Global* and *Euromoney Legal Expert*, and was recently named as one of the "Top 25 Most Influential" in the justice system and legal profession in Canada. Since 2008, he has participated as an advisor to the Canadian delegation at sessions of the UNCITRAL Working Group on Insolvency. Chief Justice Morawetz is also team leader of the Commercial List of the Toronto Region of the Ontario Superior Court of Justice. He received his Bachelor of Laws from the University of Western Ontario in 1978 and was admitted to the Ontario Bar in 1980.

Hon. Christopher S. Sontchi is a retired U.S. Bankruptcy Judge for the District of Delaware in Wilmington, initially appointed in 2006, and a professional neutral with Delaware ADR in Hockessin, Del. He also served a term as the court's Chief Judge. Judge Sontchi was recently appointed as an International Judge of the Singapore International Commercial Court. He is a frequent speaker in the U.S. and abroad on issues relating to corporate reorganizations, and he has been a Lecturer in Law at The University of Chicago Law School. In addition, he has taught corporate bankruptcy to international judges through the auspices of the World Bank and INSOL International. Judge Sontchi is a member of the International Insolvency Institute, Judicial Insolvency Network, National Conference of Bankruptcy Judges, ABI and INSOL International. He was recently appointed to the International Advisory Council of the Singapore Global Restructuring Initiative and the Founders' Committee of

The University of Chicago Law School's Center on Law and Finance. Judge Sontchi has testified before Congress on the safe harbors for financial contracts, and has published articles on creditors' committees, valuation, asset sales and safe harbors. Prior to his appointment, he was in private practice, representing a wide variety of nationally based enterprises with diverse interests in most of the larger chapter 11 reorganization proceedings filed in Delaware. Judge Sontchi served on the ABI Commission to Study the Reform of Chapter 11's Financial Contracts, Derivatives and Safe Harbors Committee and testified on safe harbors for financial contracts before the Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the House Committee on the Judiciary. Following law school, Judge Sontchi clerked for Hon. Joseph T. Walsh in the Delaware Supreme Court. He received his B.A. Phi Beta Kappa with distinction in political science from the University of North Carolina at Chapel Hill and his J.D. from the University of Chicago Law School.

R. Adam Swick is special counsel in the Bankruptcy and Reorganization department of Akerman LLP in Austin, Texas. He has more than 15 years of experience and focuses his practice on bankruptcy and complex commercial litigation matters. Mr. Swick has represented a diverse group of litigation clients ranging from bankruptcy committees and trustees to class-action plaintiffs and local business owners, in addition to debtors, creditors and committees in liquidations and restructurings. He has also filed a multitude of chapter 15 bankruptcy cases, many of which have resulted in critical opinions that helped shape the current legal landscape. Mr. Swick is a sought-after speaker on a wide range of international insolvency topics. He also serves as Communications Manager for ABI's International Committee and is an ABI "40 Under 40" honoree. Mr. Swick is admitted to practice in Texas, New York, the U.S. District Courts for the Western, Northern, Eastern and Southern Districts of Texas, the U.S. District Court for the Northern District of Illinois, and the U.S. District Courts for the Northern and Southern Districts of New York. He received his B.A. with honors from the University of Texas at Austin in 2002 and his J.D. *summa cum laude* from Southern Methodist University Dedman School of Law in 2006, where he was class salutorian.