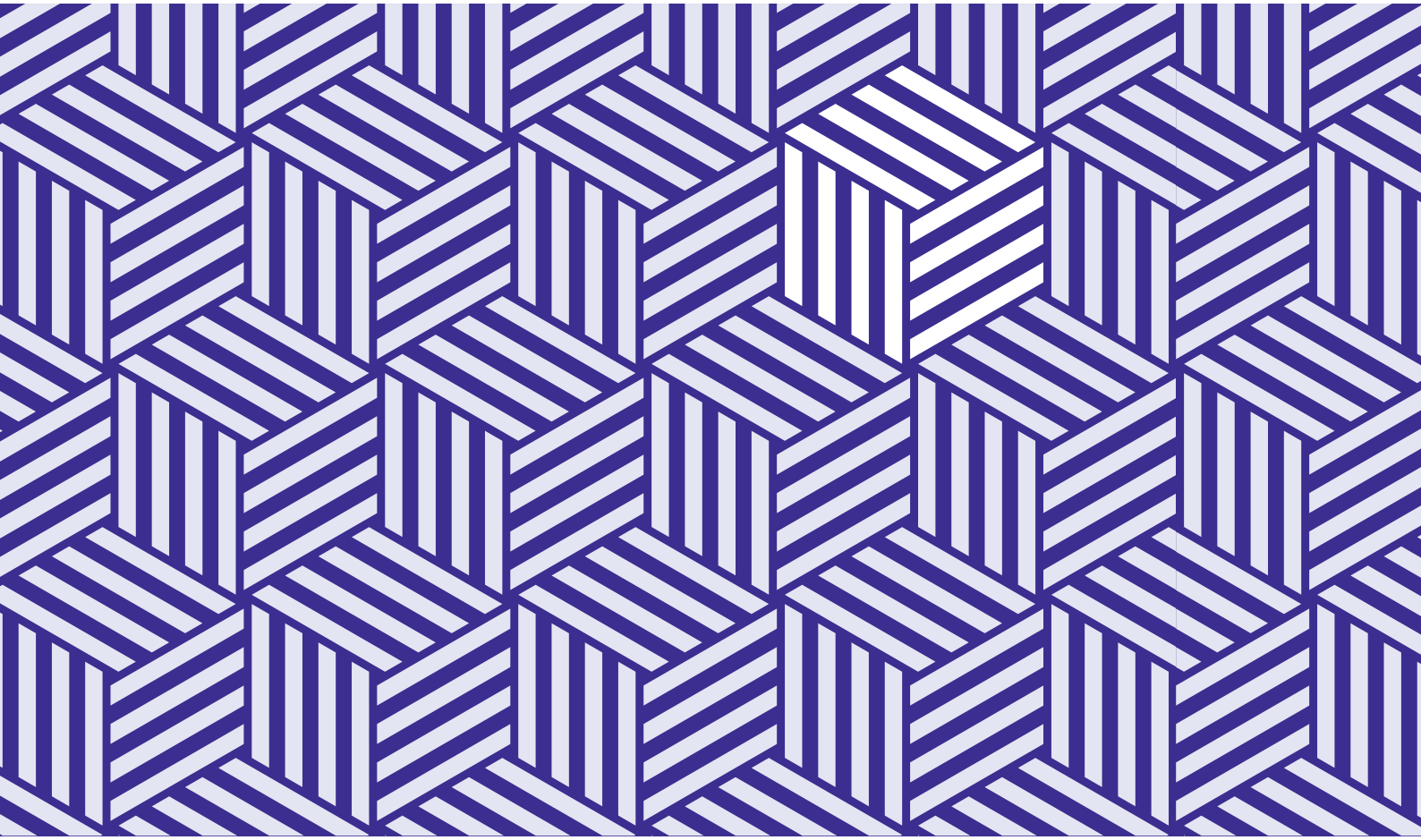
Singapore Academy of Law
Law Reform Committee

Report on the Building and Construction Industry Security of Payment Act and Corporate Insolvency and Restructuring

April 2020



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Report on the Building and Construction Industry Security of Payment Act and Corporate Insolvency and Restructuring

April 2020

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About the Law Reform Committee

The Law Reform Committee ("LRC") of the Singapore Academy of Law makes recommendations to the authorities on the need for legislation in any particular area or subject of the law. In addition, the Committee reviews any legislation before Parliament and makes recommendations for amendments to legislation (if any) and for carrying out law reform.

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CHAPTER I

INTRODUCTION

1.1 The SOPA-Insolvency Law Reform Sub-Committee (the "**Committee**") was convened with the intention of (a) exploring insolvency issues which may arise in relation to statutory adjudication under the Building and Construction Industry Security of Payment Act (Cap 30B, 2006 Rev Ed) ("**SOPA**") and (b) recommending subsequent steps to tackle those potential issues where appropriate, so as to grant greater certainty to stakeholders in the adjudication process.

1.2 To this end, the Committee reviewed the adjudication process at various stages and considered the potential insolvency issues that could arise at each stage. It thereafter proposed and evaluated suggestions from members of the Committee. The final recommendations of the Committee are set out herein.

A. BACKGROUND TO THE BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT ACT

1.3 The SOPA was introduced with the intention of easing cash-flow support for contractors and sub-contractors amidst a slowdown in the construction industry. Under the SOPA, a fast and low-cost adjudication system to resolve payment disputes was introduced and gave unpaid suppliers and contractors in the construction industry a range of statutory remedies to secure payment for their work. For example, the SOPA granted unpaid contractors the statutory right to suspend work if payment had been withheld by employers. This right did not exist under common law.

1.4 Statutory adjudication is a dispute resolution process which is designed to deliver what has sometimes been described as "rough and ready justice". The process typically begins with the rejection by an employer or main contractor, of a contractor or sub-contractor's payment claim in part or in full. The Claimant may then file an adjudication application with the authorised nominating body, which is currently designated as the Singapore Mediation Centre ("**SMC**"), to formally kickstart the statutory adjudication process. A Respondent will have tight timelines to file an adjudication response before the matter is placed before an adjudicator, who will issue his adjudication determination within short timelines as well. Since the short timelines do not permit a comprehensive examination of evidential material and legal issues in most cases, the decision of the adjudication, i.e. the adjudication determination ("**AD**"), only has temporary finality. This means that it is binding only until the dispute is finally determined in the courts or through arbitration.

1.5 If the Claimant is partially or entirely successful, he can enforce the AD as a judgment and claim the adjudicated amount ("**AA**") against the Respondent. If the Respondent fails to pay, the Claimant will have a number of statutory remedies available to him (such as the right to suspend work or to withhold the supply of goods and services) in addition to the typical remedies available to a judgment creditor.

1.6 In such a situation, the Respondent will be placed in a difficult situation where payment would often have to be made first, pending final resolution of the dispute in litigation or arbitration – a process which could take months or years. Statutory adjudication therefore has the effect of shifting the cash-flow risk from the employer to the contractor.

1.7 However, as noted by Mr Cedric Foo Chee Keng (then Minister of State for National Development) during the second reading of the Building and Construction Industry Security of Payment Bill,[1] one important caveat is that:

> *Payment disputes involving insolvency are not covered under the Bill. If any one of the parties involved is insolvent, the provisions allowing direct payment and lien on unfixed materials will not be applicable.* ***This is to avoid upsetting creditor priorities under existing insolvency laws****.*
>
> (Emphasis added)

1.8 It is therefore important to highlight here that the SOPA regime was never intended to address the situation where either the Claimant or the Respondent is subject to formal insolvency or restructuring proceedings and the typical principles applicable to any insolvency or restructuring are not amended by the provisions of the SOPA.

1.9 More than a decade has passed since the introduction of the SOPA. In September 2015, the Singapore Academy of Law's Law Reform Committee published a report setting out "*Proposals for Amending the Building and Construction Industry Security of Payment Act*" with the intention of refining the administration of the statutory regime.[2] Crucially, this report recorded a significant increase in adjudication applications from 1 case in 2005 to 416 cases in 2014. It also noted that the majority of adjudications were commenced by sub-contractors, which was in line with expectations. Bearing in mind the increasing significance of adjudication to the

1 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at cols 1118 – 1119.

2 Law Reform Committee, Singapore Academy of Law, *Proposals for Amending the Building and Construction Industry Security of Payment Act*, September 2015 (Chair: Philip Chan) <*https://www.sal.org.sg/sites/default/files/PDF%20Files/Law%20Reform/2015-09%20-%20Building%20and%20Construction%20Industry%20Security%20of%20Payment%20Act.pdf*> (Accessed 8 April 2020; archived at <*https://web.archive.org/web/20200408104414/https://www.sal.org.sg/sites/default/files/PDF%20Files/Law%20Reform/2015-09%20-%20Building%20and%20Construction%20Industry%20Security%20of%20Payment%20Act.pdf*>)

construction industry, a review of the potential insolvency issues relating to statutory adjudication would be timely given their possible impact on an increasing number of construction companies.

1.10 This report was prepared based on the SOPA in force prior to 15 December 2019 but has also considered the recent Building and Construction Industry Security of Payment (Amendment) Act ("**SOPA (Amendment) Act**") introduced in Parliament on 10 September 2018 and effective 15 December 2019. The SOPA (Amendment) Act implements a number of key reforms to the SOPA regime, including but not limited to:

(a) Imposing a 30-month limitation period for the service of a payment claim;

(b) Increasing the amount of time for a Respondent to provide a payment response from 7 to 14 days after the service of a payment claim, unless otherwise agreed in contract;

(c) Allowing new arguments to be raised by a Respondent and considered by an adjudicator in response to an adjudication application notwithstanding their non-inclusion in a payment response under certain limited circumstances;

(d) Allowing a Claimant to seek an adjudication review ("**AR**"), i.e. a review of the AD by another adjudicator or a panel of three adjudicators, where the claimed amount exceeds the AA by a prescribed amount; and

(e) Crucially, allowing a Respondent to pay an AA to an authorised nominating body instead of the Claimant pending the outcome of an AR.

1.11 The proposed amendments to the statutory adjudication regime set out in this report are intended to build upon the improvements introduced by the SOPA (Amendment) Act, so as to ensure that no one party is inadvertently disadvantaged as a result of an insolvency or restructuring event.

B. INTRODUCTION TO FORMAL INSOLVENCY/RESTRUCTURING PROCEEDINGS

1.12 Notwithstanding the recent developments to the SOPA, the restructuring and insolvency regime in Singapore has also been undergoing significant change.

1.13 In 2017 major changes to the Singapore Companies Act ("**CA**") were introduced via the Companies Amendment Act 2017 to promote a more positive restructuring environment and to encourage the growth of a rescue culture in Singapore. These included the statutory power for court approval of super-priority rescue financing, whether through the scheme of arrangement ("**SOA**") process or the judicial management process.

1.14 The latest amendments to the CA reinforce the fact that, in Singapore, when a company runs into financial difficulties, liquidation is not inevitable. Restructuring options through the SOA process or the judicial management process are available to debtors and creditors alike to try and rescue a deserving company. Consequently, the Committee, in considering insolvency issues which arose in statutory adjudication, thought it necessary to give due regard to the SOA and judicial management regimes and make recommendations with the appreciation of the nuances between each of them.

1.15 The latest proposed changes to the CA set out in the Insolvency, Restructuring and Dissolution Act (Act 40 of 2018)("**IRDA**"), introduced on 10 September 2018, read a second time on 2 October 2018 and assented to by the President on 31 October 2018, further reflect Singapore's ongoing attempts to position itself as a hub for restructuring in the region. Apart from consolidating the different insolvency and restructuring regimes under one omnibus act, key changes proposed in the IRDA include but are not limited to:

(a) Limiting the enforceability of clauses automatically terminating a contract upon the occurrence of certain insolvency-related triggering events, i.e. *ipso facto* clauses;[3]

(b) Allowing debts incurred by the judicial manager ("**JM**") on behalf of the company, and his or her remuneration and expenses to be claimed in priority to the other creditors out of the property of the company that is in the custody or under the control of the JM, without requiring the JM to incur personal liability;[4] and

(c) Expressly granting the Court jurisdiction to grant higher priority to a creditor over other creditors in consideration of the creditor providing funding in the winding up of a company.[5]

1.16 It is useful at this juncture to summarise briefly the key insolvency and restructuring regimes which may affect statutory adjudication – winding-up/liquidation, SOAs and judicial management.

1.17 Very broadly speaking, the liquidation of a company is a terminal process whereby the operations and business of a company are brought to an end. The Official Receiver ("**OR**") or a liquidator, who is an officer of the court, is appointed to execute the entire process, which includes investigating the state of affairs of the company, calling for and adjudicating proofs of debt, realising assets of the company where possible and pursuing claims against parties for the benefit of the creditors of the company where appropriate. The objective of the liquidation is to maximise

3 Section 440 IRDA.
4 Section 102 IRDA.
5 Section 204 IRDA.

a return for the creditors of the company from whatever assets remain or can be recovered, and there is no intention of reviving the company.

1.18 On the other hand, where the fundamental business of a company is viable but the company has run into temporary financial difficulties, a SOA may be considered. This is a process where a company is given time and breathing space, via a statutory moratorium, to negotiate with its creditors and shareholders and to look for potential investors to try and rescue the company, albeit through some form of collective compromise between the creditors. The objective of the SOA process is to adjust members' or creditors' rights *inter se*, so as to compromise creditors' claims against an insolvent company or to reorganise the share capital of the company or, in the case of a group, reconstruction or merger.[6] It is also to overcome the impossibility or impracticability of obtaining the individual consent of every member of the class intended to be bound by the SOA, and for preventing, in appropriate circumstances, a minority of class members from frustrating an otherwise beneficial SOA.[7] All this is to be done without any halt in the trading operations of the company, as "*the whole pith and marrow of the arrangement is to allow the company to continue trading in order to repay a part of the total debts owed*".[8]

1.19 As for judicial management, the process is focused on the potential revival of the operations of a company through the appointment of an insolvency professional, acting as an officer of the court and acting in the interests of all parties concerned. Judicial management may also allow for a better realisation of the company's assets than in a liquidation scenario by allowing the assets of the company to be sold on a going-concern basis. Upon the filing of a judicial management application, a statutory moratorium is imposed. An interim JM may be appointed prior to the hearing of the application to perform a holding operation so as to minimise the economic costs that would be incurred if trading was halted. If the application is successful, a JM is appointed with "*far-reaching statutory powers designed to assist him in*" achieving one of the statutory objectives:

> (a) The survival of the company, or the whole or part of its undertaking as a going concern;
>
> (b) The approval under section 210 or 211I CA of a SOA between the company and its creditors and/or members; or

6 *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213 at [54] citing *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell Asia, Rev 3rd Ed 2009) at [16.2].

7 *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR(R) 121 at [38] citing with approval Street J's summary in *Re Norfolk Island and Byron Bay Whaling Co Ltd* (1969) 90 WN (Pt 1) (NSW) 351 of the purpose of SOAs.

8 TC Choong & VK Rajah, *Judicial Management in Singapore* (Butterworths, Singapore, 1990) ("***JM in Singapore***") at 22.

(c) A more advantageous realisation of the assets of the company than in liquidation.[9]

C. DEVELOPMENT OF RESCUE CULTURE IN SINGAPORE

1.20 It is also important at this juncture that the Committee highlights the resurgent "rescue culture" in Singapore. This is a significant factor that had to be considered in this report because of its fundamental implications on the nature of the recommendations made herein.

1.21 While the term "rescue culture" is relatively new to Singaporean jurisprudence, it is a well-established concept which was fundamental to the drafting of the 1986 Insolvency Act (UK). In *Powdrill v Watson* [1995] 2 AC 394, Lord Browne-Wilkinson described the "*rescue culture*" as one which sought to "*preserve viable businesses*" and which was "*fundamental to much*" of the 1986 Insolvency Act (UK). Thus, amongst many other reforms, the machinery of the court-appointed administrator, which is similar to Singapore's JM, was introduced with powers to preserve the profitable parts of a business with a view to either "*procuring its recovery or to its disposal as a going concern*".[10]

1.22 In the United States, the US Chapter 11 process represented the world's most liberal debtor relief programme for many years, with the clear objective of offering businesses a second lease of life whether through debtor-in-possession ("**DIP**") financing or the appointment of a bankruptcy fiduciary, for example. These processes have seen several of the world's biggest turnarounds, including that of General Motors Corporation and Chrysler LLC.

1.23 Building on mechanisms tried and tested numerous times in other jurisdictions, the recent amendments to the CA brought to local shores unprecedented flexibility and better empower businesses in financial distress in their attempts to restructure and recover. Key features of the 2017 amendments to the CA in relation to restructuring and insolvency include:

(a) Enhanced moratoriums against creditor action by courts, including an automatic 30-day moratorium that takes effect from the filing of an application to Court to propose a creditor scheme;

(b) Lower thresholds for the granting of judicial management orders and for the commencement of judicial management;

(c) The extension of the judicial management regime to foreign companies;

9 See *JM in Singapore* at 25 and Section 227(1)(b) CA.
10 *Powdrill v Watson* [1995] 2 AC 394 at 441F-G.

(d) The adoption of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency, to facilitate the recognition of cross-border insolvency processes in Singapore; and

(e) Provisions to align the local insolvency regime with the Chapter 11 Bankruptcy laws of the United States, including super-priority debtor-in-possession ("**DIP**") financing.

1.24 The foregoing examples demonstrate a concerted effort in Singapore to introduce unprecedented flexibility in its restructuring and insolvency laws to promote a "rescue culture". Companies are therefore given more options to find a solution that works best for their circumstances and can take swift action to prevent the dissipation of value in their assets. Crucially, such options are also made available to foreign companies, clearly demonstrating Singapore's intentions to promote itself as a restructuring hub in the region.

D. TERMS OF REFERENCE OF THE SUB-COMMITTEE

1.25 Given the parallel developments in statutory adjudication and restructuring in Singapore, the Law Reform Committee constituted this Committee to specifically explore and review the state of law at the intersection of statutory adjudication and insolvency/restructuring and to recommend reform where appropriate.

1.26 Following an initial meeting convened in late 2017, the Committee formulated the terms of reference which would guide further discussions and the scope of this report. In particular, four key potential issues were identified for analysis, namely:

(a) Unfair prejudice to a Respondent where a Claimant commences or continues statutory adjudication when the Claimant is already subject to formal insolvency proceedings or undergoing restructuring;

(b) Whether a Claimant should be allowed to commence statutory adjudication against a Respondent who is already subject to formal insolvency proceedings or undergoing restructuring;

(c) Whether a Claimant who has already commenced statutory adjudication against a Respondent should be allowed to continue the proceedings against a Respondent who is now subject to formal insolvency proceedings or undergoing restructuring; and

(d) Whether a Respondent's principal ("**Principal**") should be permitted to exercise its rights of direct payment to a successful Claimant pursuant to section 24 of the SOPA and enjoy an indemnity against any risk of double payment.

1.27 In addition to the foregoing, the Committee also considered a further issue relating to the validity of *ipso facto* clauses, as such clauses could

have a significant impact on the construction industry by destroying the sources of income of contractors in temporary financial distress. It should be noted that the potential impact of *ipso facto* clauses will be reined in by the incoming changes under the IRDA.[11] Hence, the Committee provided its comments on the incoming changes.

1.28 The Committee was required to consider each issue in relation to:

(a) Liquidation;

(b) SOAs; and

(c) Judicial managements.

1.29 Thereafter, the Committee was tasked with considering what further steps to mitigate the impact of those potential issues that they identified under each process were appropriate. In certain cases, the issues and recommendations were unique to one particular insolvency process/restructuring. In others, there were common issues which negated the need to identify a process-specific solution.

1.30 Once a draft of this report had been prepared, the Committee submitted the draft for review and consultation with the following stakeholders:

(a) Building and Construction Authority ("**BCA**");

(b) Insolvency Practitioners Association of Singapore Ltd ("**IPAS**");

(c) Ministry for National Development ("**MND**");

(d) Real Estate Developers Association of Singapore ("**REDAS**");

(e) Singapore Contractors Association Limited ("**SCAL**");

(f) Singapore Institute of Architects ("**SIA**"); and

(g) Singapore Institute of Surveyors and Valuers ("**SISV**").

1.31 Following the collection of feedback, the Committee considered all comments and feedback received and undertook further consideration of its recommendations. These final recommendations are set out in this report.

1.32 It is important for the Committee to clarify that its analysis was focused only on issues which arise after the commencement of formal insolvency or restructuring proceedings. While the Committee recognised that a construction company could slip into cash-flow or balance sheet insolvency or undergo an informal restructuring without initiating formal proceedings in Court, the Committee considered that such situations should be best left under the supervision of the stakeholders who are

11 Section 440 IRDA.

directly involved. This provides stakeholders with maximum flexibility to find the best commercial solution.

1.33 On the other hand, upon the application for the commencement of a formal insolvency process/restructuring, the rights and obligations of various stakeholders would be subject to the applicable statutory regime and the supervision of the Court. It is this imposition on the rights and obligations that may inadvertently lead to a shift in the leverage of each stakeholder and it is this scenario which the Committee decided to focus on.

1.34 In this regard, when reference is made in this report to formal insolvency proceedings/restructuring, it is specifically referring to the following legal processes which have been sanctioned by the Singapore courts:

(a) Formal insolvency proceedings:

(1) Creditors' voluntary winding-up;[12] or

(2) Court-ordered winding-up;

(all or each of which fall under the "**liquidation**" or "**winding-up**" of the company)

(b) Restructuring:

(1) SOA; or

(2) Judicial management.

1.35 Thus, even though a Claimant or Respondent may be factually insolvent under either the cash-flow or balance sheet test applied in the Singapore Courts, the scope of this Committee's mandate does not extend to such situations until a formal application is filed into court. Likewise, a Claimant or Respondent may seek to restructure its existing debt through informal or bilateral arrangements or negotiations outside the supervision of the Singapore Courts. This Committee's mandate also does not extend to such situations.

1.36 Finally, in considering the insolvency issues that would arise in a statutory adjudication, the Committee remained cognisant of the intricacies of each insolvency/restructuring process. Each particular chapter therefore deals with the SOA, judicial management and liquidation regimes separately unless it was considered that the considerations under each process were similar.

12 The Committee has excluded the members' voluntary winding up process from this Report as there are no insolvency or restructuring considerations under a members' voluntary winding up, given that the company would need to be solvent before it can invoke this process.

E. STRUCTURE OF REPORT

1.37 This report sets out the Committee's analysis of the issues and its recommendations on how to resolve the issues set out at paragraph 1.26 above. Each chapter is dedicated to one issue.

1.38 Within each chapter, and unless the particular chapter requires otherwise, the Committee's review of each formal insolvency process/restructuring is further sectioned into:

(a) Introduction to the issue and the existing framework/status quo;

(b) Issues arising or encountered;

(c) Exiting caselaw and academic commentary;

(d) The Committee's analysis; and

(e) The Committee's recommendation.

1.39 The recommendations of the Committee are summarised in the next chapter for ease of reference.

CHAPTER II

SUMMARY OF RECOMMENDATIONS

2.1 In respect of the commencement and continuation of statutory adjudication when a Claimant is subject to formal insolvency proceedings or undergoing restructuring, the Committee recommends that reforms to the SOPA should be made to permit AAs to be paid to a stakeholder pending final determination of the payment dispute between the Claimant and the Respondent. This is to ensure that Respondents will be able to recover either the whole or part of the AA in the event that, after final determination of the payment dispute, it is determined that the Claimant was not entitled to payment. Alternatively, Claimants in liquidation may be prevented from commencing statutory adjudication altogether. However, given the substantial curtailment of the Claimant's statutory remedies under the SOPA and in the light of recent developments overseas, the Committee recommends that further dedicated review be conducted on this issue and the results of that separate review be published in a dedicated report.

2.2 In respect of a Claimant's entitlement to commence statutory adjudication when the Respondent is subject to formal insolvency proceedings or undergoing restructuring, having reviewed the competing interests and the existing legal framework, the Committee recommends that the *status quo* be maintained. Thus, upon the commencement of formal insolvency or restructuring proceedings, a Claimant will not be entitled to commence statutory adjudication against the Respondent.

2.3 Similarly, with regard to a Claimant's entitlement to continue statutory adjudication when the Respondent becomes subject to formal insolvency proceedings or undergoes restructuring, the Committee does not find sufficient justification to depart from the status quo.

2.4 With regard to permitting a Principal to make direct payments to a Claimant on behalf of a Respondent when the Respondent is insolvent, the Committee recommends that, in the case of a Respondent in liquidation, such direct payments continue to be prohibited and that Principals should not be protected from double jeopardy if such payments are made. However, the Committee recommends that a dedicated review be conducted on whether direct payments may be permitted when a Respondent is undergoing restructuring, i.e. via judicial management or a SOA.

2.5 Finally, with regard to the enforcement of *ipso facto* clauses, the Committee welcomes the proposed provisions limiting the enforcement of such clauses which will be introduced in the IRDA and recommends their adoption in full.

CHAPTER III

COMMENCEMENT AND CONTINUATION OF STATUTORY ADJUDICATION WHEN A CLAIMANT IS SUBJECT TO FORMAL INSOLVENCY PROCEEDINGS OR UNDERGOING RESTRUCTURING

3.1 Under the current SOPA and CA, there is nothing to expressly preclude or prevent a company undergoing formal insolvency proceedings/restructuring from commencing or continuing statutory adjudication proceedings under the SOPA over a payment dispute.

3.2 The Committee is aware that the English Courts and Australian Courts have rendered decisions on the question of whether a claimant subject to formal insolvency proceedings can commence and continue statutory adjudication. Australian jurisprudence, in particular, has spurred incoming amendments to the current adjudication regime in New South Wales ("**NSW**") via the Building and Construction Industry Security of Payment Amendment Bill 2018 ("**NSW Amendment Bill**") which specifically provides that a claimant in liquidation cannot serve a payment claim under the NSW Building and Construction Industry Security of Payment Act 1999 ("**NSW SOPA**").

3.3 These developments overseas lay the groundwork for deeper consideration of the issue which fall outside the scope of this report. However, for the purposes of this report, given that the matter has yet to be determined by the Singapore Courts and given the necessity for specific legislative amendment to the NSW SOPA to disentitle claimants in liquidation from utilising the process, the Committee decided to proceed on the basis that, at least in Singapore, a Claimant which has been subject to formal insolvency proceedings/restructuring can comment or continue statutory adjudication proceedings. Indeed, it is hoped that the recommendations of the Committee in this report may also provide a satisfactory solution to balancing the competing interests engaged in such a scenario.

3.4 Proceeding on that basis, if such a Claimant succeeds on its claims in adjudication, the Respondent generally has 7 days after service of the AD to make payment of the AA to the Claimant (unless the adjudicator provides for some other date in his AD).[13]

3.5 In the event the Respondent fails to pay the AA, the SOPA provides the Claimant with various forms of recourse, including applying to court to enforce the AD as a judgment debt.[14]

13 Section 22(1) SOPA.

14 The recourses where a Respondent fails to make payment of the adjudicated amount are found at Sections 23 to 27 SOPA.

3.6 Against this, the SOPA also provides a Respondent, who is dissatisfied with an AD, avenues to challenge the decision. These are:

(a) Lodging an AR under the SOPA. Provided the threshold amount prescribed under the SOPA is satisfied, a Respondent dissatisfied with the outcome of the AD can apply to review the AD in the first instance. However, it is compulsory for the Respondent to first pay the AA into a trust account before lodging the review. [15] Similar to an AD, the decision in the AR has temporary finality, and can be set aside or be referred for final resolution (as will be elaborated below).

(b) Applying to Court to set aside the AD (or the AR determination, as the case may be). In order to commence any such setting aside proceedings, the Respondent must however pay the AA into court pending the final determination of those proceedings. [16]

(c) Commencing proceedings in court or arbitration (as the case may be) to have the payment dispute finally resolved, since the AD (or the AR determination, as the case may be) only has temporary finality.

(collectively, the "**Recovery Proceedings**")

3.7 However, the end result of the Recovery Proceedings remains a temporarily final adjudication which is enforceable as a judgment pending final determination. Given the need for a Respondent to pay out the AA before it obtains final determination of an AD or AR, the Committee believes that there are genuine concerns over a Respondent's prospects of recovering the monies paid out in a situation involving a Claimant undergoing formal insolvency proceedings or restructuring pending such final determination:

(a) Where a Respondent has paid out the AA to the Claimant but has obtained a final determination in the Respondent's favour, there may be statutory restrictions on the Respondent's ability to commence proceedings to recover the AA from the Claimant. This will be elaborated on in the following sections below; and

(b) Even if the Respondent is able to circumvent these statutory restrictions, there is a question over the Respondent's prospects and ability to recover the monies in full. This will likewise be elaborated on in the following sections.

3.8 The above stems from the fundamental principles underlying the SOPA.

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15 The trust account will be administered by the SMC. However, it should be noted that the new provisions permitting payment to the SMC are only triggered if the Respondent intends to commence an AR, and not seek final determination of the dispute.

16 Section 27(5) SOPA.

3.9 Statutory adjudication is intended to facilitate cash flow in the building and construction industry through, *inter alia*, providing a fast and low-cost adjudication system to resolve payment disputes. The "*intervening, provisional process of adjudication which, although provisional in nature, is final and binding on the parties to the adjudication until their differences are ultimately and conclusively determined or resolved*".[17]

3.10 However, the very feature of providing a fast and low-cost adjudication process under the SOPA may result in outcomes that do not reflect (in part or in full) the true merits of the respective parties' cases.

3.11 First, there are strict rules and timelines governing the statutory adjudication process which carry potentially harsh consequences for the Respondent:

(a) Under the current SOPA, save in very limited circumstances, a Respondent is precluded from including in its adjudication response, and the adjudicator is precluded from considering, any reason for withholding any amount claimed by a Claimant unless the reason was included in the relevant payment response.[18] Although it has been over ten years since the enactment of the SOPA, the number of cases involving a Respondent who has failed to issue a payment response remains significant. One can appreciate the draconian effect of this – a Respondent who may otherwise have a credible objection to payment, is prevented in statutory adjudication from raising its defence to a claim for payment as a result of a technicality under the SOPA; and

(b) A Respondent has only 7 days after service of the adjudication application to lodge an adjudication response. In practice, a Respondent's ability to prepare a complete, well-supported and substantiated adjudication response within the short timeline is invariably dependent on the claims presented by the Claimant in the adjudication application. The Committee has received feedback of numerous instances where the number of claims presented by a Claimant in the adjudication application are numerous (and supported by voluminous documents) and involve complex legal arguments.

3.12 In view of the above, a Respondent may be unfairly prejudiced by the statutory adjudication process through either the operation of a technical rule under the SOPA or the time pressures and restrictions imposed by the

17 *W Y Steel Construction Pte Ltd v Osko Pte Ltd* [2013] 3 SLR 380 (Court of Appeal) ("***W Y Steel***") at [18] – [19].

18 More specifically, an objection not raised in a payment response will only be considered by an adjudicator if the circumstances of that objection only arose after the Respondent provided the relevant payment response or if it could not have reasonably known of the circumstances when providing the relevant payment response.

SOPA. Indeed, they convey on the Claimant a tactical advantage in allowing the Claimant to assert significant pressure on the Respondent which may be entirely unjustified in the circumstances.

3.13 Second, the nature of the statutory adjudication process presents limited opportunities to test the parties' respective cases and the evidence. For example, the parties are not availed of the usual procedural/evidential instruments which are otherwise part of common law civil procedure, such as discovery, further and better particulars, and cross examination of witnesses.

3.14 Third, the adjudicator has a relatively short time to render his AD. Under the SOPA, he must do so:

> (a) Within 7 days after the commencement of the adjudication or such longer period as may have been requested by the adjudicator and agreed to by the Claimant and the Respondent, if:[19]
>
> > (1) the Respondent fails to submit a payment response and adjudication response; or
> >
> > (2) the Respondent fails to pay the response amount which has been accepted by the Claimant;
>
> (b) In any other case, within 14 days after the commencement of the adjudication or such longer period as may have been requested by the adjudicator and agreed to by the Claimant and the Respondent.[20]

3.15 The time pressure and limitations within which an adjudicator is required to render his AD invariably means the adjudicator applies a standard of persuasion, and not a standard of proof, to assess the cases presented by the Claimant and the Respondent. This is consistent with the "rough and ready" form of justice intended under the SOPA where the parties retain the right to have the subject of adjudication referred for final resolution in the forum of choice.

3.16 Therefore, the nature of the summary process in adjudication can result in an unfair outcome to a Respondent.

3.17 The Recovery Proceedings are available under the SOPA regime to avoid serious prejudice to the Respondent. Yet, the Committee notes that recourse to proceedings in court or arbitration (as the case may be) to have the payment dispute finally resolved requires, as a condition precedent, a Respondent to make payment of the AA to the Claimant. In the context of the latest amendments to the SOPA, where the Respondent intends to commence an AR and the AA must first be paid to the SMC, there is nothing prohibiting the SMC from subsequently releasing the AA (or any

19 Section 17(1)(a) SOPA, provided the adjudication relates to a construction contract.
20 Section 17(1)(b) SOPA.

part thereof) to the Claimant, prior to final determination of the payment dispute, if the Respondent is unsuccessful (or only partially successful) in the AR. Similarly, for an application to court to set aside an AD, save in the exceptional circumstances where it is necessary to secure the "ends of justice", the AA paid into court will generally be released to the Claimant if the Respondent is unsuccessful in the application. The Respondent is in effect being asked to "pay first, and argue later".

3.18 Once payment of the AA is made to the Claimant, it will be very difficult for the Respondent to recover the AA if, despite final determination pursuant to litigation or arbitration, the Claimant is still insolvent or undergoing restructuring. What is pertinent to note is that no liquidator, JM or scheme manager ("**SM**") is bound by law to keep the money out of the general pool of assets for distribution to the Claimant's Creditors.

3.19 The Court of Appeal ("**SGCA**") in *W Y Steel* has commented that in cases where a successful Claimant may be insolvent, then it is likely that a stay of enforcement of the AD may be granted. This is an attractive solution that protects the interests of the Respondent. However, in circumstances where the solvency of the Respondent is also in doubt, then the Claimant undergoing formal insolvency proceedings/restructuring risks losing the ability to recover any payment at all if, in the time it takes to obtain the final determination of its claims, the Respondent becomes insolvent. This would deprive the creditors of the Claimant from potentially significant recoveries.

3.20 The Committee also considered whether Claimants which are subjected to formal insolvency or restructuring proceedings should be prevented from commencing statutory adjudication altogether, as is now the case in NSW for liquidation proceedings. Given that this issue is complex and requires dedicated in-depth review and consideration which falls outside the scope of this report, the Committee has only proceeded on a preliminary analysis. In short, for the purposes of this report, the Committee has proceeded on the basis that although there are noteworthy concerns in allowing a Claimant in liquidation to remain entitled to commence or continue statutory adjudication proceedings, a blanket preclusion from commencing or continuing statutory adjudication proceedings would impose a severe and draconian limitation on the rights of Claimants as they stand. Likewise, if an automatic stay is imposed on the continuation of the proceedings, which has been the approach applied in England.[21]

3.21 Further, the Committee considers that there are compelling reasons to allow such Claimants to remain entitled to commence statutory adjudication, in particular:

21 *Bresco Electrical Services Limited (in liquidation) v Michael J Lonsdale (Electrical) Limited and another appeal* [2019] EWCA Civ 27 ("***Bresco***").

(a) Statutory adjudication provides a low-cost, expedited process for Claimants to support their cash-flow. This is particularly pertinent in cases where there are realistic prospects of restructuring the Claimant, or where the financial difficulties of the Claimant are only temporary; and

(b) Statutory adjudication also provides office holders such as liquidators, JMs and SMs an alternative means to assess the viability and merits of the Claimant's claims against third parties. For example, even in a liquidation scenario, a liquidator may commence statutory adjudication to obtain a preliminary determination by a construction industry expert so as to assess whether the costs of pursuing the claims in full in litigation or arbitration are justified.

3.22 Furthermore, insofar as the continuation of adjudication proceedings is concerned, the Committee similarly finds good reasons to permit the proceedings to continue until an AD is issued, in particular:

(a) This ensures that the costs already incurred in the adjudication process are not wasted and the adjudicator himself or herself is permitted to see the process through and recover his fees;

(b) There is no prejudice to the Respondent if the enforcement of the AD does not preclude the eventual recovery of such amounts due to it following the final determination of the Claimant's claims; and

(c) As mentioned above, obtaining a determined outcome is still helpful to assist the liquidators, JMs and SMs in assessing the viability and merits of the Claimant's claims.

3.23 The Committee therefore proceeded to consider whether, given the **temporary** finality of ADs, the payment provisions under the SOPA could be amended to balance the interests of Claimants in obtaining quick and effective adjudication of their claims and the interests of the Respondent in ensuring that monies paid out as AAs are eventually recoverable should final determination of the payment dispute resolve in its favour.

3.24 Against the above backdrop, the rest of this chapter will discuss various forms of formal insolvency and restructuring proceedings which a Claimant may be undergoing, and will seek to recommend potential solutions to address the possible imbalance of risks and potential prejudice to the Respondent arising from the interfacing of the insolvency regime with the SOPA regime.

3.25 For ease of reference, the imbalance of risks and potential prejudice to the Respondent shall hereinafter be referred to as "**Unfair Prejudice**" in this chapter. It is also important to clarify that the respective periods under consideration in relation to each of these proceedings are defined as follows:

(a) SOA

The period between (i) the making of a proposal for a SOA and (ii) the creditors' vote on the SOA and approval or dismissal of the SOA by the Court (if the vote was successful) ("**SOA Period**").

(b) Judicial Management

(1) The period between (i) the making of an application for a judicial management order and (ii) the making of a judicial management order or dismissal of the application by the Court ("**JMT Application Period**"); and

(2) The period after the judicial management order is made, i.e. when the Claimant is under judicial management ("**JMT Period**").

(c) Liquidation

(1) The period between (i) the making of a non-voluntary winding up application and (ii) the making of a winding up order or dismissal of the application by the Court ("**CWU Application Period**"); and

(2) The period after a winding up order is made, i.e. when the Claimant has been wound up ("**WU Period**").

A. SCHEMES OF ARRANGEMENT

3.26 With regard to SOAs the issue for the committee to decide is whether a Claimant who is already subjected to a SOA application, but where the SOA has yet to be approved, should still be permitted to commence or continue statutory adjudication against a Respondent. The period following the Court hearing to sanction or dismiss the scheme does not need to be considered in this report as, in the former case, the Claimant's claims would likely be governed by the terms of the SOA, and in the latter case, the pre-application status quo would be restored.

1) Existing Framework/Status Quo

3.27 Under existing laws, a company's ability and entitlement to commence or continue statutory adjudication proceedings under the SOPA is not affected by any proposal for a SOA, vote on the SOA, or approval of the SOA by the Court.[22] The company is essentially permitted to continue as a going concern.

22 Section 210(3AA) CA.

3.28 However, a Respondent's ability to bring a claim against the Claimant for final determination of any dispute can be stayed or hindered in two circumstances:

(a) A SOA application brought under section 210(10) CA; and

(b) A SOA application brought under section 211B CA.[23]

3.29 In the first case, where any such SOA has been proposed between the Claimant and its creditors or any class of such creditors, the Court may, on the application of the Claimant or of any member, creditor or holder of units of shares of the company, restrain further proceedings in any action or proceeding (including statutory adjudication) against the company except by leave of the Court and subject to such terms as the Court imposes.

3.30 In the second case, where the Claimant proposes, or intends to propose, any such SOA between the Claimant and its creditors or any class of those creditors, the Court may, on the application of the Claimant, make an order restraining the commencement or continuation of any proceedings against the Claimant,[24] except with the leave of the Court and subject to such terms as the Court imposes, and such order is in force for such period as the Court thinks fit: Section 211B(1)(c) CA. During the "*automatic moratorium*"[25] period for such an application, no proceedings[26] may be commenced or continued against the Claimant, except with the leave of the Court and subject to such terms as the Court imposes.

3.31 From experience, the typical period of restraint granted by the Court would be between 3 and 6 months, and may be extended from time to time until the end of the SOA Period.

3.32 It bears mention that even if the Respondent is not included as a creditor in the SOA, it may still be bound by the terms of the moratorium. This is because the objective of the moratorium is to allow the Claimant time and breathing space to negotiate the terms of the SOA without having to allocate resources and direct attention to defending claims from unhappy creditors.

3.33 Thus, once a SOA application is filed in court, the Respondent is placed at risk of suffering the Unfair Prejudice.

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23 The possible distinctions between a SOA application made pursuant to section 210 CA and one made pursuant to section 211B CA has been explored in further detail in Mohan Gopalan, *The Moratorium Under Sections 210(10) and 211B of the Companies Act* [2019] SAL Prac 2.

24 Other than proceedings under Sections 210, 211B, 211D, 211G, 211H or 212 CA.

25 The "*automatic moratorium period*" starts on the date on which the application is made and ends on the earlier of (i) a date that is 30 days after the date on which the application is made or (ii) the date on which the application is decided by the court: Section 211B(13) CA.

26 Other than proceedings under Sections 210, 211B, 211D, 211G, 211H or 212 CA.

2) Issues Arising/Encountered in Practice

3.34 If a Claimant succeeds in its statutory adjudication during the SOA Period and obtains an AD requiring payment of monies by the Respondent, the Respondent will potentially suffer the Unfair Prejudice of having to pay the AA without being able to commence proceedings to finally determine the dispute. This is because there will likely be restrictions on the Respondent's ability to commence proceedings in court or in arbitration (as the case may be) arising from the moratoriums imposed pursuant to section 210 and 211B CA.

3.35 While the payment of the AA by the Respondent during the SOA Period does not inevitably mean that the Respondent can never claim the amount back following final determination by a court or tribunal, the Respondent's right to seek final determination of the Claimant's claims may be compromised or extinguished under the terms of the SOA, thereby precluding any attempt to finally determine the Claimant's claims. This is especially so where the Respondent is a minority creditor of the Claimant. The possibility that a SOA may be crammed down on the Respondent further raises the risk of the Unfair Prejudice.

3) Existing Case Law/Academic Commentary

3.36 In the first place, it should be noted that the latest amendments to the SOPA pursuant to the SOPA (Amendment) Act seek to ameliorate the potential circumstances under which a Respondent may suffer the Unfair Prejudice by permitting the Respondent to make payment of the AA to the SMC instead of the Claimant when it is seeking an AR under the new section 18 SOPA. This is a welcome improvement to the statutory adjudication regime. However, there remain limitations on the effectiveness of these incoming amendments in an insolvency or restructuring scenario:

(a) First, the right to pay the AA to the SMC instead of the Claimant arises only if the Respondent is seeking to review the AD. It does not appear to apply to a situation where the Respondent seeks to obtain a final determination of the Claimant's claim;

(b) Second, the imposition of a moratorium or stay on proceedings means that the Respondent can only invoke this entitlement under section 18 SOPA after obtaining leave to commence proceedings against the Claimant. In this regard, given that the time available for the Respondent to commence an AR is 7 days after being served with an AD, the Respondent would have to obtain leave and commence an AR within 7 days. This is not an insurmountable hurdle, but creates significant practical challenges for the Respondent nonetheless.

3.37 At this juncture, the Committee considers it pertinent to highlight the observations of the SGCA in *W Y Steel*.[27] In that case, the appellant, W Y Steel Construction Pte Ltd ("**W Y**") awarded a subcontract to the respondent, Osko Pte Ltd ("**Osko**"). Osko commenced statutory adjudication proceedings against W Y for payment of an amount of SGD 1,767,069.80.

3.38 The adjudicator awarded the full amount to Osko. Thereafter, W Y applied to court to set aside the AD and paid the fully adjudicated sum into court pursuant to section 27(5) SOPA. In the High Court, the application was dismissed and W Y then appealed to the SGCA. As an alternative to its main prayer to set aside the AD, W Y also sought a stay of the AD pending final determination of the dispute between the parties in a separate suit. In support of its stay application, W Y contended that there was evidence that Osko was in dire financial straits, such that if W Y was finally successful, there was a real risk it would not be able to recover the AA.

3.39 The SGCA dismissed W Y's appeal and application for a stay, finding on the facts that W Y had not justified that a stay should be granted in the circumstances. It is, however, helpful to consider the observations of the SGCA.

3.40 At [59], the SGCA recognised that "*the purpose of the [SOPA] is to ensure (inter alia) that even though adjudication determinations are interim in nature, successful claimants are paid … where a claimant succeeds in his adjudication application, he is entitled to receive the adjudication amount quickly and cannot be denied payment without very good reason*." However, the Court also recognised that:

> *Notwithstanding these provisions, it is clear that the court retains the power to stay the enforcement of an adjudication determination. In our judgment, this follows* ***from the provisional nature of an adjudication determination. Such a determination is not a final determination of the parties' rights****. Rather, it establishes a position with finality* ***for the present****, and this position continues* ***until the rights of the parties are eventually and finally determined or resolved****. It follows from this* ***that the court retains the discretion to order a stay of enforcement of an adjudication determination where it is necessary to do so in order to secure the ends of justice.***
>
> (Emphasis added)

3.41 The SGCA then went on to consider a number of foreign cases which had considered whether a stay of enforcement of an AD was appropriate in certain circumstances – *Brodyn Pty Limited t/as Time Cost and Quality v Davenport* [2004] NSWCA 394 ("***Brodyn***"), *Grosvenor Constructions (NSW) Pty Limited (in administration) v Musico* [2004] NSWSC 344 ("***Grosvenor***"), *Bouygues UK Ltd v Dahl-Jensen UK Ltd* [2001] CLC 927, *Rainford House*

27 Above, n 17.

Limited v Cadogan Limited [2001] BLR 416 and *Wimbledon Construction Company 2000 Limited v Derek Vago* [2005] BLR 374. Notably, whether a stay was granted in each of those cases depended heavily on the relevant court's interpretation of the facts. However, after considering all these cases, this did not prevent the SGCA from observing generally that:

> *In our judgment, a stay of enforcement of an adjudication determination* ***may ordinarily be justified*** *where there is* ***clear and objective evidence of the successful claimant's actual present insolvency****, or where the court is satisfied on a balance of probabilities that* ***if the stay were not granted, the money paid to the claimant would not ultimately be recovered*** *if the dispute between the parties were finally resolved in the respondent's favour by a court or tribunal or some other dispute resolution body.*
>
> (Emphasis added)

3.42 It is clear therefore from case law that the temporary finality of an AD was not intended to deprive a Respondent from recovering payment should final determination be in the Respondent's favour.

3.43 It is worth noting, however, that the SGCA in *W Y Steel* had also observed that it was appropriate, in determining whether to grant a stay of enforcement of an AD, for a court to consider whether "*the claimant's financial distress was, to a significant degree, caused by the respondent's failure to pay the adjudicated amount and, also, whether the claimant was already in a similar state of financial strength or weakness (as the case may be) at the time the parties entered into their contract*".[28] Thus, the Court would not "*readily*" grant a stay since the very purpose of the SOPA was to "*avoid and guard against pushing building and construction companies over the financial precipice*".[29]

3.44 While the concerns expressed by the SGCA above are undoubtedly valid, it is arguable that even if the question of whether the Respondent's failure to pay the AA had triggered the Claimant's insolvency is in issue, whether it was right for the Respondent to withhold payment of the AA to the Claimant is ultimately a question which still needs to be finally determined. Further, one cannot also discount the insolvency risk of the Respondent. If a stay of enforcement of an AD is granted, the insolvency risk is shifted to the Claimant since the monies which may ultimately be finally determined to be due to the Claimant remain part of the Respondent's assets, and if, prior to final determination of the dispute, the Respondent goes insolvent, then the Claimant would lose all ability for any meaningful recovery of its claim.

3.45 Therefore, there remains a need for an intermediate position whereby the Respondent does not retain use of the monies it is supposed to pay out as the AA, and the Claimant does not obtain payment of the AA

28 *W Y Steel* at [70].
29 *W Y Steel* at [71].

because of the risk that the Respondent would not recover the monies upon final determination of the dispute.

4) Analysis of the Issue

3.46 With regard to the Unfair Prejudice, the Committee clarifies at the outset that it is not concerned with Respondents who have a sufficiently large undisputed counterclaim against the Claimant, notwithstanding the AD, to effectively veto any SOA proposed by the Claimant. If this was the case, the Respondent would be in a position to protect its own interests.

3.47 However, a Respondent without such leverage would be at risk of having to pay an AA without ever having the means to recover that amount back. The "temporary finality" of an AD would effectively have final effect through the interplay of the SOPA regime and the SOA process.

3.48 Further, while the intention of the SOPA regime was to allow funds to come into the Claimant's hands precisely based on a temporarily final determination, this was never intended to have final effect.

3.49 To address this Unfair Prejudice, the Committee therefore proposes the following potential solution for consideration:

(a) During the SOA Period, any AA payable to a successful Claimant in statutory adjudication should be paid to an appropriate stakeholder (e.g. the Court, SMC or Singapore Academy of Law), and not be released to the Claimant during the SOA Period except in accordance with sub-paragraph b below. The AA is therefore not available for distribution under the terms of any SOA in the meantime.

(b) The Respondent should be entitled to seek final determination of its claims in accordance with the claims adjudication mechanism availed by section 211F CA – first by filing a proof of debt with the SM; thereafter, any dispute relating to a rejection of the proof of debt may be adjudicated by an independent assessor under section 211F(9) CA; and if the Respondent disagrees with the independent assessor's decision, it may then file a notice of disagreement for consideration by the Court under section 211F(10) CA. Subsequently, the AA paid by the Respondent may only be released upon the application by a party claiming an interest or entitlement to the AA, on the basis that the Claimant's entitlement to the AA has been finally determined.

(c) In other words, if the Respondent seeks to finally determine the Claimant's claim pursuant to section 211F CA, the AA will continue to be held with the stakeholder and the AA will not be available for distribution to the other creditors of the Claimant pursuant to the terms of the scheme. Thereafter:

(1) If the Respondent succeeds in the requisite proceedings, the AA (or such amount as the respondent successfully challenges) will be returned to the Respondent.

(2) If the Respondent does not succeed in the requisite proceedings, the AA will be paid out according to the decision of the SM, the independent assessor or the Court (as the case may be).

(d) Alternatively, if for any reason the procedure under section 211F CA is not appropriate for final determination of the Claimant's claim, then the Respondent should seek leave to commence arbitration or litigation proceedings against the Claimant. If the Respondent is successful in obtaining leave, then if the Respondent does not commence proceedings to obtain final determination within 14 days, the Claimant can then apply for the AA to be released into the pool of the Claimant's assets and subsequently distributed to the Claimant's creditors pursuant to the terms of the SOA, if the SOA is successfully voted on by the creditors and approved by the Court.

3.50 The aforesaid recommendation attempts to balance the right of the Claimant to obtain fast payment of AAs on the basis of temporary finality on the one hand, and the right of the Respondent to have the claim finally determined on the other. However, should the Respondent choose not to avail itself of this opportunity, it should not be in a position to complain if its ability to recover any portion of the AA is extinguished or compromised.

5) Recommendation

3.51 The Committee considers that reforms are necessary to balance the commercial interests of Claimants and Respondents in the SOA process. The SOPA regime was never intended to deprive a Respondent of having the Claimant's claim properly and finally determined. This is especially where the Claimant is already in financial difficulties. Hence, insofar as the SOA process and the SOPA regime gives the Claimant this advantage, reform in the manner as set out above is necessary.

B. JUDICIAL MANAGEMENT

3.52 When a Claimant undergoes judicial management, the JM may decide to pursue statutory adjudication against the Respondent in order to obtain urgent working capital to keep the business of the Claimant afloat. Statutory adjudication is particularly attractive because it has the potential to allow the Claimant to obtain working capital cheaply and quickly.

1) Existing Framework/Status Quo

3.53 A Claimant's ability and entitlement to commence statutory adjudication proceedings under the SOPA does not appear to be affected by any application for the Claimant to be placed under judicial management, or any judicial management order made thereon.[30] Indeed, when a Claimant is placed under judicial management, it may continue operations to try and generate value.

3.54 Consequently, if the Claimant is successful and obtains an AD, the AA would have to be paid over by the Respondent. Technically, the Claimant, although in financial distress, is not in a terminal stage of its life. Hence, monies paid over could technically be paid back if the Respondent commences litigation or arbitration proceedings.

3.55 However, given the imposition of a moratorium under section 227C and 227D CA, the following three conditions must be satisfied:

(a) The Claimant must exit judicial management;

(b) The terms of any SOA proposed by the JM and approved by the creditors of the Claimant must not have finally determined the Claimant's claims; and

(c) The Claimant must not slip into liquidation.

3.56 If the Claimant is still under judicial management:

(a) During the JMT Application Period, no other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the Claimant or its property except with leave of the Court and subject to such terms as the Court may impose;[31]

(b) During the JMT Period, no other proceedings may be commenced or continued against the Claimant, except with the consent of the JM, or with the leave of the Court and subject to such terms as the Court imposes[32].

3.57 If the terms of a SOA proposed by the JM and approved by the Claimant's creditors finally determines the Claimant's claims, the Respondent will be unable to thereafter commence litigation or arbitration to challenge that final determination and recover the AA paid over.

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30 The Committee is aware that the issue of whether a company in liquidation can commence statutory adjudication is currently before the Singapore High Court in HC/OS 457/2019. However, even if a company in liquidation is not entitled to commence statutory adjudication, different considerations may apply to a company under or seeking to be placed under judicial management. This seems apparent given the differing objectives of liquidation and judicial management.

31 Section 227C(c) CA.

32 Section 227D(4)(c) CA.

3.58 If the Claimant slips into liquidation, the rights and entitlements of the Respondent will be governed by the liquidation regime. In such a situation, the Respondent will remain unable to pursue litigation or arbitration against the Claimant, save with leave of court.

2) Issues Arising/Encountered in Practice

3.59 From experience, as with sections 258, 262(3) and 299 CA applicable to liquidation proceedings, the Court will exercise its discretion under sections 227C(c) and 227D(4)(c) CA very judiciously and will grant leave only in very limited and exceptional circumstances. Whilst there may be uncertainty whether the restraint under the CA applies to an AR, the prejudice that the Respondent may suffer is no different in practice regardless of whether the Respondent is successful in the AR or not.

3.60 Further, as discussed earlier in this report, if the Respondent is a minority creditor of the Claimant, it may not have the necessary leverage to veto any SOA that finally determines the Claimant's claims.

3.61 Furthermore, the Committee has also received feedback that many judicial managements slip directly into liquidation, thereby forestalling any opportunity for the Respondent to act to obtain final determination of the Claimant's claims.

3.62 Thus, if a Respondent pays an AA to a successful Claimant in judicial management, the AA may be dissipated following the commencement of the JMT Application Period. Further:

(a) If a SOA is subsequently proposed by the JM and approved by the Claimant's creditors and this SOA finally determines the Claimant's claims, the Respondent will be bound by the SOA resulting in the Unfair Prejudice; or

(b) If a winding up order is made subsequently, unless leave is obtained by the Respondent to pursue litigation or arbitration, the moratorium on proceedings against the Claimant will prevent the Respondent from obtaining final determination of the Claimant's claims in arbitration. Indeed, even if the Respondent's claims may be admitted in full, the admitted debt will still rank equally with the other unsecured claims brought by the Claimant's creditors and any recovery by the Respondent will be subject to *pari passu* distribution. This also results in the Unfair Prejudice.

3) Existing Case Law/Academic Commentary

3.63 The Committee considers the observations of the SGCA in *W Y Steel* equally applicable to the judicial management scenario. Indeed, the Committee notes that in *Grosvenor*, a stay of enforcement of an AD was granted against a successful Claimant who had been placed in administration. Hence, it seems very likely that if a Claimant obtains an AD

after the commencement of the JMT Application Period, a stay of enforcement of the AD will be granted so as to prevent injustice to the Respondent.

4) Analysis of the Issue

3.64 As with the SOA process, the Committee believes that the Unfair Prejudice arises from the risk of the temporarily final AD effectively having final effect when the Claimant undergoes insolvency proceedings/restructuring. It is clear to the Committee that Parliament's intention was never to prejudice the interests of the Respondent in the event of the Claimant's financial distress.

3.65 To address the Unfair Prejudice in arising when the Claimant applies for or is placed under judicial management, we recommend the following potential solution for consideration:

(a) During the JMT Application Period and JMT Period, upon the imposition of a moratorium on proceedings against the Claimant, any AA which would otherwise have to be paid by the Respondent to the successful Claimant shall instead be paid to an appropriate stakeholder (e.g. the Court, SMC or Singapore Academy of Law) and shall not be released to the Claimant until an order of court is obtained for the release of the AA. This would achieve the following ends:

(1) There is no risk of dissipation of the AA by the Claimant; and

(2) The AA will be ring-fenced in the event a judicial management order is made and the Claimant subsequently gets wound up, since the AA would not form part of the Claimant's assets to be distributed *pari passu* amongst its creditors.

(b) If the judicial management order is not granted then the moratorium proceedings against the Claimant will be lifted and the Claimant can then apply to court for the AA will be released to the Claimant. The Respondent can then commence proceedings against the Claimant in court or arbitration to finally determine the dispute with the Claimant.[33]

33 Under the latest SOPA amendments, the AA will remain with the stakeholder if the Respondent commences AR proceedings. However, it is very unlikely that the Respondent would still be able to commence AR proceedings given the 7-day deadline to file an AR application pursuant to section 18(2) SOPA. This is because the hearing for the JM application will usually be heard after 7 days from the filing of the application itself, by which time would have expired. Nevertheless, the Respondent's right to finally determine the Claimant's claim in arbitration or litigation is not prejudiced.

(c) If the judicial management order is granted, the AA will continue to be held with the stakeholder, subject to the occurrence of any of the following events:

(1) The Claimant's claim is finally determined in the JMT Period through the adjudication process under section 211F CA, which would be applicable if the JM decides to propose a SOA;

(2) The Claimant's claim is finally determined in the JMT Period through arbitration or litigation proceedings commenced by the Respondent after obtaining the leave of court; or

(3) The Respondent obtains leave of court to commence proceedings against the Claimant, but the Respondent does not thereafter proceed to commence an action to finally determine the Claimant's claim.

(d) If the Claimant slips from judicial management into liquidation, then different considerations would arise and the next section of this report will cover this particular scenario.

3.66 The above proposal places the AA in neutral territory, securing the amount for the Claimant pending final determination of its claim, but at the same time restricting the dissipation of the AA such that the Respondent is not irretrievably prejudiced. In such a situation, both the Claimant and the Respondent have an interest in seeking final determination of the dispute lest the AA remains held in stasis during the judicial management of the Claimant.

3.67 The Committee also recognises that, to some extent, the proposal also appears to defeat a key objective of the SOPA, which is to secure cash flow for Claimants. However, it should be emphasised that, where AR proceedings have not commenced, the entitlement of the Respondent to pay the AA to a stakeholder only arises **after** a judicial management application is filed. Hence, once the JMT Application Period commences, the insolvency of the Claimant must be conceded, and in such an instance, the Committee considers that the policy interest in securing cash flow for the Claimant weakens, though it is not completely eliminated. The Committee's proposal is therefore to find some middle ground between the competing interests of the Claimant and the Respondent.

5) Recommendation

3.68 The Committee considers that reforms are necessary to balance the commercial interests of Claimants and Respondents in the judicial management process. The SOPA regime was never intended to deprive a Respondent of having the Claimant's claim properly and finally determined and obtaining recovery of the monies it had paid over to the extent that it is determined that the Claimant was never entitled to the amounts in the first

place. This is especially so where the Claimant is already in financial difficulties and has to concede that it is insolvent in order to obtain the protections and reliefs granted under the judicial management regime. Hence, insofar as the judicial management process and the SOPA regime gives the Claimant this advantage, reform in the manner proposed above is necessary.

C. WINDING UP

3.69 The situation where the Claimant is intended to be wound up presents a slightly different challenge for a potential Respondent. There is no longer any prospect of revival or rescue for the Claimant. The Respondent would therefore be very cautious of paying any monies over to the Claimant since the intended liquidation of the Claimant would present significant difficulties for any recovery of the amounts. At the same time, the interest of the Claimant in seeking immediate cash flow is weakened by virtue of the fact that it needs to eventually wind down its business and cease operating as a going concern. Section 272(1) CA does permit the liquidator to carry on the business of the company, but this is only insofar as it is necessary for the benefit of the liquidation of the company, and leave of court or approval by the committee of inspection is required if the business is to be carried on past four weeks after the date of the winding up order.

1) Existing Framework/Status Quo

3.70 A Claimant's ability and entitlement to commence statutory adjudication proceedings under the SOPA does not appear to be affected by any application for a winding up order against the Claimant, or the making of a winding up order. As mentioned, the definition of a "*claimant*" under the SOPA does not draw a distinction between a solvent claimant and an insolvent claimant.[34]

3.71 As mentioned, the Committee is aware that English and Australian cases[35] have doubted whether a Claimant remains entitled to commence

34 See paragraph 3.1 and following, above.

35 In the English Court of Appeal case in *Bresco*, the Committee notes that the Court found that the adjudicator had jurisdiction to hear the adjudication application. This implies that a claimant is not disentitled from commencing statutory adjudication simply by virtue of its liquidation. However, the Court granted a stay of proceedings and stay of enforcement on any ADs because it was of the opinion that there was no utility in the adjudication proceedings. In the NSW case of *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liquidation)* [2019] NSWCA 11 ("***Seymour Whyte***"), the NSW Court of Appeal declined to follow the Victorian Court of Appeal's decision in *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 47 that a claimant in liquidation was disentitled from commencing statutory adjudication. What is interesting about *Seymour Whyte* was that the NSW Court of Appeal held that the claimant in question

(*cont'd on the next page*)

statutory adjudication if it enters liquidation and there are incoming legislative changes to the NSW SOPA clarifying this. Further, the Committee is also aware that there is presently a pending case before the Singapore High Court on this issue.[36] However, pending clarity on the issue in our local jurisprudence, and solely for the purposes of this report, the Committee has assumed that Claimants remain entitled to commence statutory adjudication proceedings even if they enter liquidation.

3.72 Therefore, if the Claimant succeeds in the statutory adjudication during the CWU Application Period and WU Period, there are restrictions on the Respondent's ability to commence proceedings in court or in arbitration (as the case may be) to challenge the AD and recover the AA that has been paid to the Claimant.

(a) First, during the CWU Application Period, the Claimant or any creditor or contributory may, where any action or proceeding against the Claimant is pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit[37];

(b) Second, during the WU Period or when a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the Claimant except by leave of the Court and in accordance with such terms as the Court imposes[38].

3.73 The exception to this is if the Claimant was subject to a members' voluntary liquidation. In such a situation, there will be no stay of proceedings against the Claimant. The entitlement of the Respondent to seek final determination in this situation is therefore not hampered and the Committee will not deal with this particular situation.

2) Issues Arising/Encountered in Practice

3.74 The starting premise for the Unfair Prejudice is the inability of the Respondent to commence or continue proceedings against the Claimant to finally determine the Claimant's claim and obtain any recovery of the AA. From experience, the Court will exercise its discretion very judiciously and will grant leave to commence or continue proceedings against the Claimant only in very limited and exceptional circumstances. It is highly unlikely that an AR or proceedings in court or in arbitration (as the case may be) will be allowed to proceed against the Claimant if the Claimant is protected by a

was entitled to commence statutory adjudication proceedings and pursue its claim to judgment, notwithstanding its winding-up and despite the fact that the NSW Amendment Bill had been passed and assented to prior to judgment.

36 HC/OS 457/2019.

37 Section 258 CA.

38 Section 262(3) and 299 (2) CA.

moratorium or stay of proceedings during the CWU Application Period or the WU Period.

(a) Unfair Prejudice – risk of dissipation of the AA during the CWU Application Period

3.75 If the Claimant is successful in obtaining an AD during the CWU Application Period and also successfully obtains a stay of proceedings under section 258 CA, then if the AA is paid over by the Respondent, there is a risk that the AA may be dissipated by the Claimant to cover the expenses of liquidation.

3.76 If the winding up application is subsequently dismissed and the Respondent then commences proceedings in court or in arbitration (as the case may be), any favourable outcome for the Respondent may be rendered nugatory due to the prior dissipation of the AA during the CWU Application Period. The Respondent will then suffer the Unfair Prejudice. A successful Respondent in an AR will face a similar predicament since payment of the AA to the Claimant is required before the review process can be initiated.

(b) Unfair Prejudice – pari passu distribution of the AA during the WU Period

3.77 Assuming the AA is not dissipated by the Claimant, and a winding up order is made subsequently, the AA will form part of the Claimant's assets. The Respondent's main form of recourse to try and recover the AA, assuming that leave is not granted by the Court for the Respondent to pursue litigation or arbitration proceedings, is to file a proof of debt in respect of the AA which, if admitted, will be subject to *pari passu* distribution, in which case the Respondent will stand to recover only a fraction of the debt (if at all). Once again, the Respondent suffers the Unfair Prejudice.

3.78 Likewise, if the AA is paid to the Claimant during the WU Period instead of the CWU Application Period i.e. the Unfair Prejudice would result from a *pari passu* distribution of any admitted debt due to the Respondent.

3.79 Further, even if the Respondent is successful in commencing AR against the Claimant before any stay comes into effect, if the AA remains within the possession of the Claimant at the commencing of the winding up, a successful Respondent in an AR will still face a similar predicament to that mentioned above.

3) Existing Case Law/Academic Commentary

3.80 The Committee considers that the observations of the courts in the cases of *Bresco* and *W Y Steel* are applicable to the present scenario. In particular, the Committee considers it appropriate for measures to be put in place to prevent a Respondent from being unable to recover the AA in

the event that final determination of the payment dispute is wholly or partially in its favour.

3.81 Presently, *Bresco* and *W Y Steel* suggest that the Respondent may successfully obtain a stay of statutory adjudication proceedings or a stay of enforcement of the AD by a Claimant in liquidation as a means of protecting itself against the Unfair Prejudice. As the English Court of Appeal observed in *Bresco*:[39]

> *… the adjudication process on the one hand, and the insolvency regime on the other, are incompatible. It would only be in exceptional circumstances that a company in insolvent liquidation (and facing a cross-claim) could refer a claim to adjudication, succeed in that adjudication, obtain summary judgment and avoid a stay of execution. Thus, in the ordinary sense, even though the adjudicator may technically have the necessary jurisdiction, it is not a jurisdiction which can lead to a meaningful result …* ***the solution to the incompatibility issue is the one that was adopted in the present case: the grant of an injunction to restrain the further continuation of the adjudication.***
>
> [Emphasis added]

3.82 In *W Y Steel*, the SGCA opined that:[40]

> *In our judgment,* ***a stay of enforcement of an adjudication determination may ordinarily be justified where there is clear and objective evidence of the successful claimant's actual present insolvency,*** *or where the court is satisfied on a balance of probabilities that if the stay were not granted, the money paid to the claimant would not ultimately be recovered if the dispute between the parties were finally resolved in the respondent's favour by a court or tribunal or some other dispute resolution body.*
>
> [Emphasis added]

3.83 Consequently, it appears that under the present state of law, even if a Claimant retains its entitlement to commence statutory adjudication proceedings notwithstanding its liquidation, the Court will be prepared to either stay the statutory adjudication proceedings or stay the enforcement of an AD, if not granting the stay would more likely than not prevent the Respondent from being able to recover the AA in full upon final determination of the Claimant's claim.

4) Analysis of the Issue

3.84 Notwithstanding the welcome intervention of the courts in the event a Claimant in liquidation seeks to enforce an AD against a Respondent, considerations on the side of the Claimant suggest that there is room to propose another option to address the Unfair Prejudice.

39 *Bresco* at [54] – [55].
40 *W Y Steel* at [70].

3.85 In this regard, while a stay of proceedings or enforcement of an AD protects a Respondent from the Unfair Prejudice, it exposes the Claimant to the possibility of losing any meaningful recovery of its claim if the Respondent itself is in a financially parlous situation. This risk is more prevalent in situations where the Claimant is a sub-contractor and the Respondent is a main contractor which is itself facing cash flow issues.

3.86 In other words, assuming that the Claimant in liquidation has successfully obtained an AD and the enforcement of the AD is stayed, if, prior to the final determination of the Claimant's claim, the Respondent itself becomes insolvent, then the Claimant's claim may be rendered practically worthless. The Claimant's creditors are prejudiced as a result.

3.87 To address the issues set out above, the Committee recommends the following potential solutions for consideration.

Unfair Prejudice – risk of dissipation of the AA during the CWU Application Period

3.88 During the CWU Application Period and WU Period, any AA payable to a successful Claimant should be paid to an appropriate stakeholder (e.g. the Court, SMC or Singapore Academy of Law). This will achieve the following ends:

(a) there is no risk of dissipation of the AA by the Claimant (during the CWU Application Period);

(b) the AA will be ring-fenced in the event a winding up order is made since these monies will not form part of the Claimant's assets to be distributed *pari passu* amongst its creditors; and

(c) The Claimant's creditors are themselves protected from the Respondent's insolvency prior to final determination of the AD.

3.89 If the winding up application is dismissed, the Claimant can then apply to court for the AA to be released to it[41]. The Respondent may then proceed to commence proceedings in court or in arbitration (as the case may be) against the Claimant if it so wishes. Where the Respondent is subsequently successful in having the AD overturned in a final determination, the Respondent will be able to recover the monies it paid out under the original AD.

41 Under the latest amendments to the SOPA, the AA would have been retained by the stakeholder if the Respondent commenced AR proceedings.

Unfair Prejudice – pari passu distribution of the AA during the WU Period

3.90 If a winding up order is made subsequently:

(a) The AA will continue to be held with the stakeholder.

(b) The Respondent will then be permitted to file its proof of debt for determination by the liquidator. Thereafter, if the Respondent is dissatisfied with the liquidator's determination, the Respondent may then appeal the liquidator's decision in court to have its claim against the Claimant finally determined.

(c) The AA will only be paid out after the Respondent's claim has been finally determined, in accordance with the liquidator's decision or the directions of the Court, as the case may be. The party claiming an interest in the AA will then apply to court for payment out of the AA in accordance with the terms of the final determination.

(d) Alternatively, the Respondent may obtain leave to commence litigation or arbitration proceedings to finally determine the Claimant's claim. If it is successful, it can then commence proceedings accordingly. However, if it has not done so within 14 days of obtaining leave, the Claimant can then apply to court to release the AA on account of the Respondent's delay.

3.91 As mentioned in respect of the other scenarios, the Committee is firmly of the view that the SOPA regime was never intended to give the Claimant a financial advantage in the event of its insolvency. To this end, insofar as the SOPA regime allows the Claimant to effectively render a temporarily final AD final in effect, this should not be allowed.

3.92 Furthermore, the Committee highlights that on the commencement of a winding up, a mandatory insolvency set-off applies which would allow the Respondent to set off the Claimant's claims against any mutual cross-claims, counterclaims or set-offs it can bring against the Claimant. It is therefore important to ensure that the recoverability of the AA is not compromised. Otherwise, the insolvency set-off would effectively be nugatory.

3.93 On the other hand, by requiring the AA to be paid to a stakeholder instead of staying the enforcement of the AD entirely, the Claimant effectively becomes a secured creditor in the event of the Respondent's insolvency. However, this would have been the position if the Claimant was allowed to enforce the AD in the first place and the funds remain protected from dissipation by either party pending final determination. In this manner, the interests of the creditors of both the Claimant and the Respondent may be protected.

5) Recommendation

3.94 The Committee considers that the reforms proposed above are necessary to ensure that the interests of Respondents are not unfairly

compromised in the liquidation process. The SOPA regime was never intended to deprive a Respondent of having the Claimant's claim properly and finally determined. This is especially where the Claimant is already in financial difficulties.

3.95 To this end, the Committee has annexed to this report a draft bill setting out its proposed amendments to the SOPA to implement its recommendations. The structure of the proposed amendments mirrors the recommendations made in this chapter and the amendments are intended to keep the AA with the stakeholder until final determination or until one party is allowed to commence proceedings to obtain final determination of the Claimant's claims.

3.96 Further, bearing in mind the recent English case of *Bresco* and the incoming amendments to the NSW SOPA disentitling a claimant in liquidation from commencing statutory adjudication proceedings, the Committee also believes that further review needs to be undertaken to assess whether Singapore should follow NSW in making similar amendments to our SOPA.

CHAPTER IV

ENTITLEMENT TO COMMENCE STATUTORY ADJUDICATION WHEN A RESPONDENT IS SUBJECT TO FORMAL INSOLVENCY PROCEEDINGS OR UNDERGOING RESTRUCTURING

4.1 Having addressed the potential prejudice that allowing a Claimant undergoing insolvency proceedings/restructuring to commence or continue statutory adjudication proceedings might bring to a Respondent, it is also pertinent for the Committee to address the converse situation – whether a Claimant should be entitled to commence statutory adjudication against a Respondent subjected to formal insolvency proceedings or restructuring. The scope of this chapter does not cover members' voluntary/solvent liquidations.

4.2 In discussions between the Committee, it emerged that, notwithstanding the imposition of a moratorium or stay of proceedings against the Respondent, there were potential practical advantages in allowing the statutory adjudication process to quickly determine the Claimant's claim against the Respondent. A determined claim, even if only imbued with temporary finality, would still assist a liquidator, SM or JM to gauge the interest a particular creditor had against an insolvent Respondent. This would result in time and cost savings for the office holder.

4.3 Further, it is worth highlighting that even a successful Claimant would not be placed in a higher priority than any other unsecured creditor simply by virtue of his obtaining an AD. His situation would be similar to that of a judgment creditor in that event, and the SOPA is not intended to put the Claimant in a better position than other creditors in the same class.

4.4 Moreover, it was considered that certain construction claims were highly technical in nature and the assistance of an experienced construction professional would result in a fairer determination of the Claimant's claims.

4.5 The issue before the Committee in this regard therefore related to practical considerations and whether the potential practical advantages of the statutory adjudication process justified allowing a clear carve-out from the general moratorium preventing all creditors of an insolvent Respondent from commencing legal proceedings against the Respondent.

A. SCHEMES OF ARRANGEMENT

4.6 In respect of SOAs, the issue before the Committee is whether a default carve out should be introduced to allow all construction-related

claims to be determined by statutory adjudication as opposed to adjudication by the SM.

1) Existing Framework/Status Quo

4.7 Presently, there are no specific carve-outs for the commencement of statutory adjudication against a company on which there is a moratorium, in relation to a SOA. The existing framework allows:

(a) The Court to grant a discretionary stay of the proceedings which have been commenced against a Respondent, under section 210(10) CA, subject to various requirements in this provision.

(b) An automatic stay of proceedings (from being commenced or continued) against a Respondent, as part of the maximum 30-day moratorium period, under section 211B(8) CA, subject to various requirements in section 211B.

(c) A discretionary stay of proceedings (from being commenced or continued) against a Respondent, under section 211B(1) CA, subject to various requirements in section 211B.

4.8 The Claimant will then have to file a proof of debt to establish its interest as a creditor against a Respondent at two junctures:

(a) First, in order to vote at the meeting of the creditors; and

(b) Second, if the SOA is passed, in order to receive a distribution under the SOA.

4.9 At either stage, the SM will have to assess the Claimant's claims and determine them for the purposes of voting. A specific procedure has been set out in section 211F CA for the filing, inspection, and adjudication of proofs of debt, allowing adjudication by an independent assessor and, ultimately, by the Court.

2) Issues Arising/Encountered in Practice

4.10 It should be noted that the entire process set out above can span several months, as SMs usually have to determine numerous varied claims against the Respondent.

4.11 The timespan is further aggravated by the technical nature of certain claims thereby requiring additional time and effort from an insolvency practitioner – who may not necessarily be familiar with construction-related claims – to dispense a form of "rough and ready justice".

3) Existing Case Law/Academic Commentary

4.12 There is no existing case law where the Singapore Courts had to consider whether statutory adjudications should be allowed to be

commenced against a Respondent that has been granted a moratorium to negotiate a SOA.

4.13 Neither is there academic commentary proposing a carve-out from the moratorium for construction-related claims going to statutory adjudication.

4.14 One possible reason for this is that the industry may have accepted and proceeded on the assumption that all claims against the Respondent, including adjudication proceedings, were stayed once the Respondent was placed under insolvency proceedings/restructuring.

4) Analysis of the Issue

4.15 Having considered the issues arising in respect of allowing statutory adjudications to commence against Respondents notwithstanding the imposition of a moratorium, the Committee's recommendation is that statutory adjudication should not be allowed to be commenced against a Respondent who is subject to a SOA application.

4.16 The main reason why there are essentially no exceptions/carve outs to the moratorium (whether in relation to the commencement of statutory adjudication or otherwise) is because of the need for the moratorium to allow for the orderly management of myriad creditor and shareholder interests, so as to provide the company breathing space to effectively negotiate a SOA. This is generally in line with the legislative approach towards encouraging the use of SOAs as a tool for restructuring, as indicated by the introduction of a more expansive moratorium in the latest amendments to the Companies Act in 2017.

4.17 The Committee considers that allowing a carve-out for the statutory adjudication may compromise the company's ability to negotiate a SOA with creditors (in the limited number of situations where a moratorium is allowed for a SOA to be worked out), especially when one considers that the SOPA regime has no limit on the quantum that may be claimed. The prospect of having to allocate resources to defend against SOPA claims may result in a higher probability of liquidation – which would be contrary to the objectives of both the SOPA and SOA regimes.

4.18 Considering a situation where a potential Respondent is trying to work out a SOA, and where the continued performance of a construction contract (in which a payment dispute arises) is so important and crucial to the Respondent's survival for the optimal realisation of the Respondent's assets for the creditors, the Committee considers that the existing SOA process already permits:

> (a) An SM and/or the Respondent keeping the contract 'alive' (assuming this is in the best interests of the Company and/or its creditors); and/or

(b) The potential Claimant applying to court to lift the moratorium in respect of SOPA proceedings.

4.19 The Committee therefore considers that there is sufficient flexibility to address the practical concerns faced by Claimants and/or SMs whilst at the same time protecting the Respondent's attempts to restructure.

4.20 In this regard, the Committee considers it important to highlight that the SOPA regime does not specifically prioritise the survival of cash-flow sensitive subcontractors **at all costs**. One of the important objectives of statutory adjudication is in preventing construction projects from being hampered by payment disputes – the SOPA regime provides a cost-efficient and expedient means of solving cash-flow issues so that work can continue. There is no clear intention by Parliament or the drafters of the SOPA to extend the scope of the SOPA regime to protect a Claimant's interests in the event of a potential Respondent's insolvency.

4.21 In light of this, in the event of the insolvency of a potential Respondent, the 'domino effect' that the Respondent's insolvency may have on other parties (both up and down the 'chain') in a construction project would be a commercial reality that was not intended to allow, and would not be solved by allowing, a general carve-out from the moratorium binding all other creditors of the potential Respondent for Claimants to commence statutory adjudication.

4.22 This approach is generally in line with other jurisdictions which implement a similar security of payments regime. In particular, the UK[42] and Australia[43].

4.23 The Committee also considers that while there are possible advantages to allowing construction-related claims to be determined via statutory adjudication, upon closer review, the need to materialise those potential advantages is not so pressing as to justify reform presently.

4.24 One possible advantage is that allowing construction claims to be determined under statutory adjudication may be more advantageous to creditors as a whole, albeit with only a limited carve-out from the moratorium to permit construction-related claims to be determined by statutory adjudication but not to allow enforcement of an AD in priority to the other creditors as a whole. This is because allowing an adjudication of the Claimant's claims by an independent construction professional may provide neutral ground for parties to resolve their dispute amicably

42 In relation to voluntary arrangements under Section 1A, read with Schedule 1A, of the UK Insolvency Act 1986.

43 See Section 411(16) of Australia's Corporations Act 2001, which allows the Court to impose a moratorium in the context of a SOA, on the application of a member or creditor of the Company. No specific carve-out is provided for security of payment claims.

without incurring additional costs through the section 211F CA adjudication process.

4.25 The Committee also notes that the risk of re-opening a claim determined under statutory adjudication in this process is perhaps more apparent than real, since the claim would in almost every case be compromised pursuant to the terms of the SOA.

4.26 However, the Committee notes that SMs frequently deal with a myriad of claims, some of which may require specialist technical expertise or knowledge and yet creditors bringing such claims are not treated differently (save insofar as the SOA expressly allows for it).

4.27 Further, it may be argued that, save for the most technical of construction cases, the adjudication process undertaken by a SM may not materially differ from statutory adjudication in that the determination is done on a summary basis without a trial of facts. For those few cases where specialist technical knowledge and expertise is required, special provision may be made for the proper adjudication of those claims through the section 211F CA procedure with the help of an independent assessor, or the terms of the SOA may provide a specific carve-out for those particular claims. Thus, the flexibility in the scheme process allows for such claims to be determined differently, albeit with the necessary consent from the other creditors.

4.28 Finally, given that there is a cost to statutory adjudication without the benefit of priority payment, there is little reason for the Claimant itself to incur this cost. Instead, it would probably be more advantageous for the Claimant to allow the cost of adjudication to be borne out of the assets of the potential Respondent through the adjudication process under section 211F CA.

5) Recommendation

4.29 Considering the above, the Committee's recommendation is that statutory adjudication should not be allowed to commence against a Respondent that has been granted a moratorium to negotiate a SOA or the automatic interim moratorium.

B. JUDICIAL MANAGEMENT

4.30 Turning now to the judicial management regime, the issue before the Committee is whether a Claimant should be permitted to commence statutory adjudication against a potential Respondent who is the subject of a judicial management application or who has been placed under judicial management or interim judicial management.

1) Existing Framework/Status Quo

4.31 Section 227C CA imposes a statutory moratorium against the commencement of all proceedings or other legal process against the potential Respondent upon the filing of the application.[44] Section 227D CA extends this statutory moratorium to the period under which the potential Respondent would be under judicial management.[45]

4.32 Presently, there are no specific carve-outs permitting the commencement of statutory adjudication against a Respondent who is subject to a judicial management application or which is undergoing a judicial management.

4.33 During the judicial management of a debtor, the JM is permitted to contract on behalf of the debtor, enter into new contracts or adopt an existing contract to which the debtor is already a party. Insofar as the JM enters into or adopts such contracts, the JM will incur personal liability under the said contracts save where expressly disclaimed.[46] Counterparties, on the other hand, will have claims arising under those contracts ranked in priority to those of other unsecured creditors since their claims will be considered a cost and expense of the judicial management. However, in the case of adopted contracts, the claims of the counterparties will be limited to claims arising during the judicial management of the debtor, or conversely, the claims for which the JM is liable for. Claims accruing before the JM application will not be accorded such priority.

4.34 Additionally, should the JM require the creditors of the debtor to vote on a proposal during the judicial management of a debtor, a notice for the creditors to prove their debts will be issued. The process to consider and approve a proposal is similar to the process for the approval of a SOA.

4.35 If a proposal is approved, the JM's role becomes very similar to that of a SM for a SOA.

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44 See also, section 95 IRDA.

45 See also, section 96 IRDA.

46 See also, section 102 IRDA, *cf* section 227I CA. Given that the JM is presently allowed to disclaim personal liability, and usually does so, the imposition of personal liability has been rendered academic. Therefore, section 227I(2) CA, in respect of the JM's personal liability, has not been re-enacted in section 102 IRDA: *Singapore Parliamentary Debates, Official Report* (1 October 2018) vol 94 <*https://sprs.parl.gov.sg/search/fullreport?sittingdate=1-10-2018*> (accessed 8 April 2020) (Mr Edwin Tong Chun Fai, Senior Minister of State for Law (for the Minister for Law)).

4.36 On the other hand, if:

(a) the JM cannot obtain an approval for a proposal;

(b) the JM considers that it is unable to achieve any one of the other statutory objectives of its appointment; or

(c) the judicial management period expires,

the JM may be discharged from office and the debtor may slip directly into liquidation, and the Claimant remains unable to commence statutory adjudication.

4.37 Conversely, if the JM is successful in rehabilitating the debtor, he/she may be discharged as well and the debtor may be taken out of judicial management. This would restore the rights of a Claimant in commencing statutory adjudication against the potential Respondent. However, until such time, the moratorium prevents the Claimant from doing so. This time period can span several months or even years, frustrating the cash flow of the Claimant for substantial periods of time.

2) Issues Arising/Encountered in Practice

4.38 Broadly speaking, the purpose of judicial management is to rehabilitate the company or to achieve optimal realisation of assets for the benefit of the debtor's creditors as a whole. The judicial management moratorium under section 227C[47] and 227D[48] CA serves that purpose by allowing the JM to consolidate financial affairs of a company in financial difficulties and make a proposal in furtherance of such purpose. Further, the JM is not allowed to discharge any debts of the company incurred prior to the judicial management in preference to any creditors.

4.39 This demonstrates that the judicial management regime seeks to preserve the statutory priorities in liquidation since failure of the judicial management will likely result in the liquidation of the potential Respondent.

4.40 If the creditors need to vote on a proposal, their proofs of debt will need to be adjudicated. In this regard, should construction-related claims prove to be highly technical, the JMs may only be able to deal with the claims generally. There may be some justification for allowing such claims to be put through statutory adjudication, if only for the purposes of having an experienced construction professional determine the Claimant's interest as a creditor (and not for any actual distribution).

4.41 However, it should also be noted that JMs are permitted to incur operational expenses and pay the parties who had supplied the goods and rendered the services insofar as these were provided during the judicial

47 See also, Section 95 IRDA.
48 See also, Section 96 IRDA.

management in order to keep the business of the debtor running. Hence, if, for example, there was a construction contract that the JM adopted in the belief that the continued performance of the contract would assist in the rehabilitation of the debtor, a Claimant would have a valid claim against the debtor, and the JM would be liable, for such goods supplied and/or services rendered in the judicial management. It might then be suggested that a Claimant should be permitted to commence statutory adjudication against the JM and enforce the AD either against the JM personally (if there has been no disclaimer of liability)[49] or against the assets of the Respondent debtor in any event.

3) Existing Case Law/Academic Commentary

4.42 Presently, there is no existing case law where the Singapore Courts had to consider specifically whether the commencement of SOPA adjudications should be permitted against a company under judicial management. This may be because *ipso facto* clauses would typically permit termination of the contract by the innocent party and such contracts are so terminated,[50] or the JM decides not to adopt the contract at all. In which case, the industry appears to have rightly accepted that the moratorium would prevent statutory adjudication from being commenced against the debtor.

4.43 On the other hand, the Committee is unaware of any statutory adjudication being commenced against a JM for work done during a judicial management. This could be possibly due to JMs paying for the work done in a timely manner, or because of the perception that the moratorium would prevent statutory adjudication from being commenced against the JMs as well.

4) Analysis of the Issue

4.44 In respect of claims arising prior to the commencement of a judicial management, statutory adjudication should not be allowed to commence against a Respondent to which a JM has been appointed. The moratorium in a judicial management serves the purposes of taking pressure off the debtor Respondent to allow it to negotiate a compromise with its creditors. The Committee does not find sufficient justification to recommend a departure from the status quo.

4.45 Different considerations arise in respect of claims incurred by the JM during the judicial management itself. These claims can arise by virtue of the JM adopting existing contracts to which the debtor is already a party, or by the JM entering into new contracts with the potential Claimant.

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49 See also, section 102 IRDA, *cf* section 227I CA.

50 On this note, see also, Chapter VII below. The IRDA restricts the enforcement of *ipso facto* clauses in certain circumstances.

4.46 Indeed, in a situation where the continued performance of a construction contract (in which a payment dispute could arise) is so important and crucial to the potential Respondent's survival or the optimal realisation of the Respondent's assets for the creditors, this would likely result in the JM and/or the Respondent trying their best to keep the contract 'alive' (assuming this is in the best interests of the Respondent and/or its creditors). In such a situation, a JM would have to "adopt" the contract and, in so doing, incur liabilities under the said contract insofar as work was done by the contractor Claimant during the JM.

4.47 Under section 227I(1)(b) CA, the JM would become personally liable on the construction contract save where expressly disclaimed pursuant to section 227(2) CA.[51]

4.48 However, once the contract is adopted, the putative Claimant would have a priority claim against the assets of the potential Respondent in respect of performance rendered during the judicial management period. In such situations, it would arguably make sense to allow such claims, if disputed by the JM, to be submitted to statutory adjudication. This would allow the claims to be quickly determined (usually within the judicial management period) by an experienced construction professional and at minimum cost.

4.49 At the same time, the other creditors cannot claim to be unfairly prejudiced by the commencement of statutory adjudication and the subsequent enforcement of the AD since the statutory adjudication does not affect the priorities of the creditors. Instead, the Claimant is given priority status by virtue of the adoption of the construction contract by the JM.

4.50 If the Claimant intends to commence statutory adjudication against the debtor Respondent in respect of work done during the judicial management, the statutory moratorium would prevent the Claimant from doing so. The Committee considers that leave of court could very easily be obtained by the Claimant given that the statutory adjudication is merely the means by which its claims are adjudicated,[52] without granting it any higher priority than it already enjoys in respect of those particular claims.

4.51 However, the Committee also considers that since there is very little justification for preventing a Claimant from commencing statutory adjudication against a Respondent in respect of the aforesaid scope of work, it would be helpful for a clear and specific carve-out to allow for the commencement of such claims in the judicial management of a company. This would remove the additional step of applying for leave to commence

51 See also, Section 102 IRDA, *cf* Section 227I CA.

52 On the guidelines applicable in deciding if leave should be granted to commence proceedings, albeit in the context of a company in liquidation, see *Korea Asset Management Corp v Daewoo Singapore Pte Ltd* [2004] 1 SLR 671 at [42]-[50].

proceedings and further the statutory objectives of protecting the cash flow of Claimants. The Committee also considers that this added incentive for Claimants to continue their construction contracts with Respondents (instead of terminating the contract upon the filing of a judicial management application or the appointment of a JM) strengthens the rescue culture as it preserves viable contracts and generates income for both Claimants and the Respondent.[53] This is especially where the Respondent is a main contractor.

4.52 Insofar as the JM is liable by virtue of his/her adoption of the contract, in particular if personal liability has not been disclaimed,[54] then the Claimant should also be able to commence statutory adjudication against the JM directly for payment under the adopted construction contract. In this regard, the specific wording of the moratorium suggests that its scope does not extend to claims made against the JM directly. The Committee therefore does not recommend any amendment to address this issue.

4.53 Finally, it should be noted that while the JMs can also enter into new construction contracts with contractors, this is a highly improbable event since contractors will not willingly contract with a company in financial distress. The Committee therefore does not consider this particular scenario relevant to the issues under consideration.

5) Recommendation

4.54 In consideration of the foregoing it is the Committee's view that in respect of claims falling outside the judicial management period or arising from contracts not adopted by the JM, it is unable to find sufficient justification to allow such claims to be carved out from the moratorium.

4.55 On the other hand, it may be helpful for a specific carve-out from the statutory moratorium to allow statutory adjudication to be commenced against Respondents for work done by Claimants during the judicial management of the Respondent. However, this is perhaps not so pressing a concern considering that the existing mechanisms permitting a Claimant to apply for leave to commence proceedings already provide some flexibility to deal with such claims as and when they arise.

C. WINDING UP

4.56 The liquidation of a company is a terminal process where the assets of a company are vested in the hands of a liquidator and disbursed

53 On this note, see also, Chapter VII below. The ability of the Claimant to terminate their construction contracts with Respondents may be curtailed with the passage of the IRDA.

54 See also, section 102 IRDA *cf* section 227I CA.

according to the statutory priorities and in accordance with the rule of *pari passu*. The issue before the Committee is whether statutory adjudication should be permitted notwithstanding the commencement of this terminal process.

1) Existing Framework/Status Quo

4.57 Presently, there are no specific carve-outs for the commencement of statutory adjudication against a Respondent which has been wound up.

4.58 Instead, once an application to wind-up the Respondent is filed into Court, a moratorium comes into effect, preventing any creditors from commencing any proceedings against the Respondent, including statutory adjudication.

4.59 The exception to this is a member's voluntary liquidation. In the case of a member's voluntary liquidation, there is no moratorium on proceedings against the debtor Respondent. Given this, statutory adjudications may be commenced against a Respondent undergoing voluntary liquidation and such situations fall outside the purview of this report.

4.60 Once the liquidator assesses that there are sufficient assets of the Respondent to make a distribution to the Respondent's creditors, creditors such as the Claimant will then be invited to submit proofs of debt to establish their interests.

4.61 The liquidator is required to adjudicate the proofs submitted where there are disputes on the amount claimed by a creditor. In so doing, the liquidator is further required to account for any claims that the debtor may have against the creditor and set the mutual credits, debts and dealings off. If, at the end of this exercise, a proof is partially or wholly rejected, the creditor Claimant would then be able to appeal the decision by filing an application to the Court for a final determination of its claims.

4.62 Distributions, if any, are then made based on the creditor Claimant's interest in the assets of the Respondent.

2) Issues Arising/Encountered in Practice

4.63 Where a company has been wound up, the assets in the company would be consolidated and distributed amongst the creditors in an established priority of payment. This priority serves to provide an orderly and equitable means of distributing the company's assets and seeks to balance the interests of the creditors as a collective group.

4.64 Consequently, the Committee considers that there is an element of incompatibility between the insolvency regime and the SOPA regime because statutory adjudication is focused on the interest of a sole creditor

Claimant seeking an expedient resolution to its claim so as to mitigate cash-flow problems prevalent in the construction industry. Insofar as the Claimant is relying on statutory adjudication to obtain a more favourable position in the distribution of the Respondent's assets, the Committee is unable to discern any clear policy interest in allowing construction claims special treatment.

4.65 That said, the Committee received feedback from liquidators that there were instances when they had to adjudicate highly technical construction-related claims. In which case, they appreciated a potential practical benefit in allowing statutory adjudication to be commenced, not to place the creditor Claimant in a better position vis-à-vis the other creditors, but to determine the Claimant's interest. A further point, already mentioned, is that the obtainment of an AD is, legally speaking, in and of itself insufficient to confer on the Claimant any priority of payment as a creditor of the Respondent.

3) Existing Case Law/Academic Commentary

4.66 The existing cases in Singapore have been unanimous in ensuring that the SOPA regime and statutory adjudication cannot be used as a means to give a creditor Claimant an advantage in the winding up of the Respondent. The Committee refers to two Singapore cases which provide some guidance on the issue.

4.67 First, in the context of bankruptcy, the Honourable Judicial Commissioner Edmund Leow in the case of *Lim Poh Yeoh (alias Lim Aster) v TS Ong Construction Pte Ltd* [2016] 5 SLR 272 ("***Lim Poh Yeoh***") observed that Parliament's intent was that, to the extent that there is a normative conflict between the two, the legislative policy of facilitating cash flow in the construction industry should yield to the wider purpose of the insolvency process. At [71], the Court further commented that the policy objective of the SOPA regime, being the facilitation of cash flow in the construction industry, while vital, was never intended to be undertaken at all costs. In an insolvency, the focus of the regime serves to provide the maximum recovery for the general body of creditors. Permitting a single creditor to utilise SOPA to enforce his own debt would not be aligned to the main purpose of the SOPA regime.

4.68 In the subsequent High Court decision of *Strategic Construction Pte Ltd v JH Projects Pte Ltd* [2017] SGHC 238 ("***Strategic Construction***"), the Honourable Justice Tan Siong Thye made reference to the parliamentary debate for the second reading of the Building and Construction Industry Security of Payment Bill and observed, at [57], that:

> *Parliament had already considered that a claim under SOPA might potentially conflict with a claim under the insolvency regime. It had expressly intended that the latter would prevail in such situations because the insolvency regime had far-reaching consequences, including that of preferring certain creditors over others due to their security over the Respondent's assets. Allowing SOPA*

> *claimants to intrude into this regime would unnecessarily tilt the balance in favour of the construction industry over other creditors. This was an intrusion that Parliament was unwilling to endorse.*

4.69 In this regard, during the second reading, Mr Cedric Foo Chee Keng (then Minister of State for National Development) had stated:[55]

> *Payment disputes involving insolvency are not covered under the Bill. If any one of the parties involved is insolvent, the provisions allowing direct payment and lien on unfixed materials will not be applicable.* ***This is to avoid upsetting creditor priorities under existing insolvency laws****.*
>
> (Emphasis added)

4.70 It is important to highlight that, in the same session, the question of insolvency was raised by Dr Amy Khor Lean Suan, who asked:[56]

> … ***since the proposed Act would not over-ride the current law on insolvency****, how then is the issue of the main contractor becoming insolvent resolved without jeopardising the legitimate interest of the subcontractors?*
>
> (Emphasis added)

4.71 Mr Cedric Foo then explained:[57]

> … ***But in the area of insolvency, there is a higher justice that must be served. There is an established priority of payments that have to be made to different parties who have suffered as a result of a party going insolvent. So this priority should not be upset just because of the payment woes in the construction industry.*** *So we have therefore left insolvent cases alone so as not to disrupt a process which is working well.*
>
> (Emphasis added)

4.72 The importance of ensuring the statutory priority regime in insolvency is a view shared by other jurisdictions as well. For instance, in the UK House of Commons Debate on the Local Democracy, Economic Development and Construction Bill (13 October 2009) at Column 173, the Minister for Regional Economic Development and Coordination, Dame Rosie Winterton, also explained that:

> *… all the proposals rest against the same core principle. That principle is simple and clear:* ***the insolvency regime applies to all businesses, regardless of the sector in which they operate. Without that consistency across business, it is hard to see how the insolvency regime can operate in an equitable way****…We feel it would be* ***wrong for legislation to distinguish between business sectors where there is an insolvency.***
>
> (Emphasis added)

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55 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at cols 1118 – 1119

56 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1124.

57 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1133.

4.73 The Committee considers it clear from the foregoing excerpt that the intention of the SOPA was never to displace the existing *pari passu* regime of distribution applicable under common law. Hence, insofar as the commencement of statutory adjudication is done with the intention and objective of allowing a Claimant a higher priority than it would have obtained in the liquidation of the insolvent Respondent, this should not be permitted.

4.74 On the other hand, the Committee also notes that there has not been any local judicial or academic commentary on permitting the limited commencement of statutory adjudication to assist the liquidators in the adjudication of complex and highly technical construction claims. This can be explained by the fact that statutory adjudication is a creature of statute and nowhere in the CA is the liquidator expressly permitted to lift the moratorium or stay of proceedings against the debtor company to allow the commencement of statutory adjudication by the Claimant. This power remains within the authority of the Courts.[58]

4) Analysis of the Issue

4.75 The Committee considers it settled and beyond challenge that statutory adjudication should not be allowed to commence against a Respondent who is subject to a winding up application. There should be no preference for creditors in a particular industry.

4.76 The interest of ensuring that the sub-contractor's work on the construction project continues is less significant where the Respondent main contractor is insolvent as compared to when the Respondent is subject to a SOA and/or judicial management, where there may be some prospect of rescue for the Respondent.

4.77 The SOPA regime does not prioritise the survival of cash-flow sensitive sub-contractors at all costs. One of the important objectives of the SOPA regime is in preventing construction projects from being hampered by payment disputes – the SOPA regime provides a cost-efficient and expedient means of solving cash-flow issues so that work can continue. In light of this, in the event of the insolvency of a potential Respondent, the domino effect the insolvency may have on other parties (both up and down the 'chain') in a construction project would be a commercial reality that would not be solved by allowing a carve-out for the commencement of statutory adjudication.

58 Section 262(3) and 299(2) CA.

4.78 This approach would generally be in line with other jurisdictions which implement a similar security of payments regime, in particular the UK,[59] and Australia.[60]

4.79 From a practical practitioner's perspective, where the company is deeply insolvent and unable and/or unlikely to make any distributions (in a winding-up), the cost consideration is straightforward, in that there would usually be no benefit in the Respondent being subject to a slew of claims brought by one specific class of creditors. If statutory adjudication is allowed to commence and the liquidators are compelled to participate, unnecessary resources would be expended to ascertain a creditor's claim. These resources, if available, would be from the company's assets and may be preferring the creditor's interest over the others.

4.80 Even if one considers the limited application of statutory adjudication for the purposes of assisting a liquidator in the determination of complex and highly technical construction claims, the Committee, on balance, considers that the existing processes already sufficiently protect the interests of a Claimant. In particular, where a proof of debt filed based on a construction claim is adjudicated and the Claimant wishes to appeal the liquidator's determination, the Claimant will have full access either to the trial processes or, where leave is granted, to the arbitration process, to finally determine its claim.

4.81 These processes are clearly more suited for the final determination of the Claimant's interests, as opposed to the summary and "rough and ready" process in statutory adjudication. In particular, considering that the Respondent is already subjected to a terminal process, the Committee finds that the need to obtain a "rough and ready" determination of the Claimant's claims (albeit on a temporarily final basis) falls away. The Claimant stands with the other creditors of the Respondent, subject to the same adjudicative procedures in liquidation and the same timelines.

4.82 Alternatively, if on the off-chance that the liquidator feels compelled by the technical nature of a particular claim to seek the assistance of an experienced construction expert, the Committee believes that the powers of the Court are wide enough to allow for such extraordinary proceedings to proceed upon the application of the liquidator for directions.

5) Recommendation

4.83 Considering the above, the Committee recommends that a Respondent who is subject to liquidation proceedings remain protected

59 See Section 130(2) of UK's Insolvency Act 1986. No specific carve-out is provided for security of payment claims.

60 See Section 471B of Australia's Corporations Act 2001. No specific carve-out is provided for security of payment claims.

from statutory adjudications. A Claimant should not be entitled to commence statutory adjudication proceedings against a putative Respondent. There should be no preference for creditors in a particular industry and the resources of the Respondent, being already limited, should not be expended in defending claims which only result in temporarily final outcomes.

CHAPTER V

STAY OF STATUTORY ADJUDICATION AGAINST AN INSOLVENT RESPONDENT

5.1 The next chapter deals with a slightly different issue of whether a Claimant who has already commenced statutory adjudication prior to the Respondent being placed under formal insolvency proceedings or restructuring should be permitted to continue the proceedings and obtain an AD against the Respondent.

5.2 In certain cases, a judicial management application or SOA application is deliberately used as a tactic to stall the statutory adjudication proceedings, and a Claimant's cash-flow would be adversely affected for months on end.

5.3 Further, statutory adjudication may provide a quick and efficient way to determine complex and highly technical construction-related claims by the liquidators, JMs and SMs. The continuation of statutory adjudication on limited terms could allow the Claimant to prove his interest against the Respondent based on an AD, or a judgment based on the AD, whilst at the same time preventing the Claimant from obtaining a higher priority than he would ordinarily be entitled to. As mentioned above, there may be potential practical advantages to this, since a determined claim, albeit on a temporarily final basis, is more easily adjudicated by a liquidator, JM or SM than an undetermined claim.

5.4 Furthermore, the Respondent may have already incurred costs to defend against the adjudication proceedings, and stalling the process when all that is left is the rendering of an AD may result in wasted costs.

5.5 The issue before the Committee is therefore whether a Claimant should be permitted in certain circumstances to continue statutory adjudication notwithstanding the insolvency and restructuring proceedings.

A. SCHEMES OF ARRANGEMENT

5.6 SOAs are flexible tools with which companies may restructure their debt or capital structures. The Court's ability to impose a moratorium is aimed at providing the debtor with sufficient breathing room and time to engage with the relevant creditors and members in the hopes of negotiating terms acceptable to all parties.

1) Existing Framework/Status Quo

5.7 If a SOA application is brought by the Respondent under section 211B CA, a 30-day automatic moratorium against continuing proceedings against a Respondent arises to allow the Respondent immediate temporary relief from any action or proceeding currently in progress.

5.8 This moratorium may be further extended by the Court under section 211B(1) CA after hearing the SOA application.

5.9 Alternatively, a SOA application may be brought under section 210 CA, but no automatic moratorium arises. A moratorium will only arise if applied for and granted by the Court.

5.10 Once a moratorium is imposed, existing proceedings may be permitted to continue against a Respondent, but only with leave of court. Hence, generally speaking, where any adjudication of any claim against the Respondent is required, such functions are either performed by the Court hearing the SOA application, the chairman of the meeting of members/creditors, or by the SM.

5.11 In this regard, it is important to note that, in a SOA, a Claimant's interest against the Respondent is significant in three key stages of the SOA process:

(a) At the outset, in determining whether a Claimant has standing as creditor to bring (under section 210 CA but not section 211B CA) or oppose an application to the Court to commence the SOA process;

(b) In determining whether a Claimant is considered a creditor of the Respondent and, if so, his voting power at the creditors' meeting; and

(c) In determining how much distribution, if any, should be paid to the Claimant under the SOA.

5.12 At each stage, any uncertainty regarding the Claimant's standing as a creditor results in additional time and expense required to resolve that uncertainty.

5.13 In the first case, the Court hearing the SOA application would have to determine the standing of the Claimant, and also determine whether the application has been brought in bad faith, where necessary.

5.14 In the other two cases, the chairman or the SM would have to determine the Claimant's interest based on the proof of debt filed by the Claimant.

2) Issues Arising/Encountered in Practice

5.15 The Committee has received feedback from the industry that the SOA process is sometimes at risk of abuse, such as where applications are filed under section 211B CA by a Respondent in order to obtain a 30-day automatic moratorium.[61] This would effectively forestall the continuation of proceedings against the debtor company, including any statutory adjudication.

5.16 Additionally, where an ongoing statutory adjudication involves a particularly complex or highly technical construction claim, the imposition of an automatic/discretionary moratorium would require the Claimant to restart the process of having its claim determined all over again with the Court, chairman or SM, who may appreciate the determination of a construction professional to assist his/her own adjudication. Practically speaking, where the statutory adjudication proceedings are at an advanced stage, significant costs may also become wasted as a result of the stay of proceedings.

5.17 A further concern is that if the Respondent is ultimately unsuccessful in obtaining a moratorium (in the first instance) or an extension of the automatic moratorium under section 211B CA, then it is unclear whether the statutory timelines under the SOPA may be extended so as to accommodate the reinstatement of proceedings. Otherwise, the Claimant would have to start all over again, and incur the additional costs of doing so while wasting the costs already incurred in the earlier adjudication.

5.18 Each case raises the issue of whether the statutory adjudication process should be allowed to continue, notwithstanding the moratorium but subject to a stay on enforcement, so that a Claimant would be able to establish its standing as a creditor, or otherwise. This would, in the first case, provide some basis for the Court to determine whether the SOA application has been filed in bad faith, or, in the second case, provide some basis for the chairman or SM to accept or reject a complex or highly technical construction claim. In the third case, obtaining an AD at the outset could also assist in the eventual ascertainment of the amount of distribution the Claimant is entitled to under the SOA, if any.

3) Existing Case Law/Academic Commentary

5.19 The case law is clear that the moratorium imposed under section 210 and 211B CA applies to statutory adjudication and there are no carve-outs without the leave of court.

61 The impact of a section 210 CA application would not be as acute since there is no automatic moratorium and parties would have the opportunity to make their case to the Court before any moratorium is imposed.

5.20 The Committee refers in particular to *Electro Magnetic (S) Ltd (under judicial management) v Development Bank of Singapore Ltd* [1994] SGCA 33 ("***Electro Magnetic***"), where, at [16], the SGCA cited with approval the following decision by Sir Nicholas Browne-Wilkinson V-C (as he then was) in *Bristol Airport Plc v Powdrill* [1990] Ch 744 (at 765):

> *The natural meaning of the words 'no other proceedings … may be commenced or continued' is that the proceedings in question are either legal proceedings or quasi-legal proceedings such as arbitration…*
>
> *Further, the reference to the 'commencement' and 'continuation' of proceedings indicates that what Parliament had in mind was legal proceedings. The use of the word 'proceedings' in the plural together with the words 'commence' and 'continue' are far more appropriate to legal proceedings (which are normally so described) than to the doing of some act of a more general nature.*

5.21 There can be little doubt that a SOPA adjudication is a legal or quasi-legal proceeding.

5.22 That said, the Committee also highlights that there is some measure of flexibility in the terms of the scheme itself – indeed, where due process is followed, and the requisite approvals from the different classes of creditors/members are obtained, the terms of a scheme may even allow for certain claims to be determined under the pre-existing adjudication process. The wide scope of the moratorium can also be scaled back on such terms as the Court deems fit.

4) Analysis of the Issue

5.23 On a general level, the Committee does not find sufficient justification for statutory adjudication, as a legal or quasi-legal proceeding, to be treated differently from other types of proceedings, like litigation and arbitration.

5.24 With respect to the first issue of a Respondent applying to commence the SOA process in bad faith in order to stall a statutory adjudication, the Committee finds that the possibility of abuse of the stay of proceedings protection under sections 210(10) and 211B CA applies not only to construction claimants but also to claimants from all other sectors. To allow claimants in statutory adjudications to proceed while staying all other proceedings by other non-statutory adjudication claimants would have the effect of favouring one class of creditors over the other, even if an AD does not ultimately confer a legal preference on claimants. The potential advantages such a carve-out may provide to claimants in statutory adjudication is perhaps most evident in the event of a failure of a SOA and the lifting of the moratorium, as a Claimant who has obtained a favourable AD will have a valuable time advantage in relation to enforcement over other claimants whose claims were stayed.

5.25 The Committee sees no justification for conferring upon construction claimants such an advantage. Indeed, such a preference would run counter to the legislative intent of the SOPA **not** to provide a SOPA adjudication Claimant with any advantage over the other creditors of an insolvent Respondent.

5.26 This is clear from the second reading of the Building and Construction Industry Security of Payment Bill:[62]

> *Payment disputes involving insolvency are not covered under the Bill. If any one of the parties involved is insolvent, the provisions allowing direct payment and lien on unfixed materials will not be applicable. This is to avoid upsetting creditor priorities under existing insolvency laws. For example, if a respondent is unable to pay the adjudicated amount because he is insolvent or under judicial management, the principal, in this case, cannot pay the claimant directly either.*
>
> *… But in the area of insolvency, there is a higher justice that must be served. There is an established priority of payments that have to be made to different parties who have suffered as a result of a party going insolvent. So this priority should not be upset just because of the payment woes in the construction industry. So we have therefore left insolvent cases alone so as not to disrupt a process which is working well.*

5.27 The Committee also highlights again the case of *Strategic Construction* where the Honourable Justice Tan Siong Thye referred to the aforesaid paragraphs and also concluded that Parliament did not intend to provide SOPA Claimants with an advantage over other creditors.

5.28 The extent to which a SOPA AD will assist in the proof of debt adjudication process is also unclear because the statutory adjudication process may not allow all disputes between a SOPA Claimant and an insolvent Respondent to be fully ventilated. For example, an insolvent Respondent is precluded from relying on reasons for withholding payment in a statutory adjudication pursuant to section 15(3) of the SOPA if such reasons are not contained in a valid payment response served by the insolvent Respondent. In some cases, an insolvent Respondent may not even be able to rely on any reasons for withholding payment where it did not serve a payment response. As a further example, there is local authority to the effect that an adjudicator in a statutory adjudication cannot determine a claim for damages in relation to the termination of a construction contract.[63]

5.29 A further point is that pursuant to the decision of the SGCA in *Civil Tech Pte Ltd v Hua Rong Engineering Pte Ltd* [2018] SGCA 12, cross-contract set-offs cannot be raised in a statutory adjudication. Statutory adjudication

62 *Singapore Parliamentary Report* (2004, November 16), Vol. 78, cols 1118-1119 – and 1133.

63 See for example *Asplenium Land Pte Ltd v CKR Contract Services Pte Ltd* [2016] SGHC 85.

would therefore prevent a Respondent from raising counterclaims, set-offs and cross-claims arising from a separate contract with the Claimant, and is a more limited process than those permitted under section 211F CA or under the general SOA provisions.

5.30 At present, there is no local authority providing any guidance on the specific issue of whether an adjudication should be allowed to be continued against an insolvent Respondent that is subject to a section 210(10) or 211B(1) or 211B(8) stay of proceedings.

5.31 However, in the New South Wales Supreme Court case of *Modcol v National Buildplan Group* [2013] NSWSC 380 ("***Modcol***"), the New South Wales Supreme Court examined the issue of whether a Claimant should be allowed to pursue a claim pursuant to the NSW SOPA against a Respondent who was under administration (which is the equivalent of judicial management in Singapore).

5.32 In that case, Buildplan did not issue a payment schedule in response to Modcol's payment claim within the statutory timelines. Under section 14(4) of the NSW SOPA, Buildplan became liable to pay Modcol the full amount of the payment claim. The NSW SOPA provided Modcol with two alternative courses of action, to either recover the unpaid amount as a debt from Buildplan in Court or to commence adjudication proceedings against Buildplan. Modcol chose the former and applied for leave to commence proceedings in Court against Buildplan, as there was a stay of proceedings against Buildplan because it was under administration.

5.33 McDougall J declined to grant leave for Modcol to commence proceedings against Buildplan, ruling that to do so would subvert the primary objective of the administration, which is to give Buildplan a chance of continuing in business. Further, McDougall J held that in granting leave to Modcol to commence proceedings against Buildplan, Modcol would be given a significant advantage over Buildplan's other creditors, especially since one of the consequences of allowing Modcol to proceed would be to enable it to demand sums, which were otherwise payable by the principal to Buildplan, to be paid to Modcol instead. This would essentially have enabled Modcol to obtain payment ahead of Buildplan's other creditors and deprive Buildplan of much-needed cash flow.

5.34 While this decision deals with the issue as to whether NSW SOPA proceedings should be allowed to commence after an insolvent respondent entered administration, we submit that the reasoning is equally applicable to the issue of whether such proceedings should be allowed to continue where an insolvent respondent enters into formal insolvency proceedings only after such proceedings have already been commenced.

5.35 This decision is also consistent with Parliament's intention that SOPA is not intended to confer on a SOPA Claimant any advantage over other creditors of an insolvent Respondent.

5.36 This being said, statutory adjudication has been tried and tested for construction disputes for more than 13 years. While it will be unfair to allow a statutory adjudication to proceed in spite of a general stay of proceedings, it is open for certain elements of the statutory adjudication process to be incorporated to improve the process for the adjudication of proofs of debt relating to construction disputes (or any other highly technical claim requiring specialist knowledge to determine, for that matter).

5.37 To this end, the Committee notes that the inherent flexibility of SOAs may permit the inclusion of terms providing for the referral of construction claims to statutory adjudication for determination. As such, the SM is not entirely hapless to deal with such claims.

5.38 This flexibility is not available to the chairman of a SOA meeting. However, one possibility is to permit a chairman of a SOA meeting to appoint a neutral specialist to determine particular claims. This flexibility would be open to all kinds of highly technical claims which the chairman considers require highly specialised knowledge beyond his expertise and experience to determine. Such a general flexibility will, however, require further review that is beyond the scope of this report.

5) Recommendation

5.39 Consequently, the Committee does not recommend any amendment to the existing provisions setting out the SOA process to allow the continuation of statutory adjudications against debtor Respondents. However, further review to allow chairmen of SOA meetings and SMs more flexibility to permit the commencement/continuation of statutory adjudications of highly technical and complex construction disputes by specialist adjudicators is encouraged.

B. JUDICIAL MANAGEMENT

5.40 In judicial management, the JM, as an officer of the Court, is granted extensive powers to manage the affairs of the debtor in financial distress with the intention of achieving one or more of the statutory objectives, including the rehabilitation of the debtor. During the judicial management period, proceedings against the debtor are stayed in order to allow the JM time and breathing space.

1) Existing Framework/Status Quo

5.41 To provide a company in financial distress breathing space from creditors, the CA provides for an automatic stay of proceedings (from being commenced or continued) against an insolvent Respondent upon an

application for a judicial management order, until the application is allowed or dismissed.[64]

5.42 What this means is that during this period, no statutory adjudication proceedings against an insolvent Respondent may be continued except with leave of court.

5.43 In the event that the judicial management order is granted by the Court, the stay of proceedings will continue[65] while the judicial management order is in force, except with the consent of the JM, or with leave of the Court, and subject to such terms as the Court imposes.

5.44 During a judicial management, in light of the mandatory moratorium, the adjudication of claims is typically not a primary concern of the JM. However, the adjudication of claims comes into play when the JM intends to propose a SOA. In which case, creditors would be called to submit proofs of debt for adjudication by the JM. In such situations, a Claimant who had commenced a judicial management would have to disregard the statutory adjudication and file its claim anew in its proof of debt, with the adjudication to be performed by the JM instead of the statutory adjudicator.

5.45 This results in wasted costs for the Claimant, and even for the Respondent if the statutory adjudication proceedings have reached an advanced stage. Further, if the judicial management order is not granted, or the Respondent exits judicial management without having finally determined the Claimant's claim, the Claimant would have to recommence statutory adjudication proceedings once again, incurring another set of costs.

2) Issues Arising/Encountered in Practice

5.46 At the outset it is important to distinguish between claims based on work performed during the judicial management period and claims based on work performed prior to the judicial management period. The former arguably constitute expenses incurred by the JM in the judicial management and therefore enjoys preferential ranking vis-à-vis other claims, including the Claimant's own claims for work done prior to the judicial management.

5.47 Given that this chapter deals with the situation of a Respondent going into judicial management after a statutory adjudication has already been commenced, it is not possible for the claims in the statutory adjudication to be preferential claims. In which case, consistent with the Committee's view on maintaining *pari passu* and Parliament's express

64 Section 227C(c) CA
65 Section 227D(4)(c) CA.

intention for the SOPA not to prefer construction claims over other claims, the Committee does not have strong reasons to depart from applying the moratorium on all claims against the Respondent.

5.48 Therefore, the Committee's position is clearly that statutory adjudications should not enjoy any special carve-out from the general moratorium that would allow their continuation against a Respondent who is subjected to judicial management proceedings.

5.49 That said, when it comes to the adjudication of proofs of debt, one problem that has materialised in practice is the difficulty some JMs have in adjudicating proofs of debt lodged by creditors in the judicial management where there are complex and/or high value construction claims and/or counterclaims. Disagreements with such adjudications may be escalated to the Court who may be asked to review the JM's adjudication.

3) Existing Case Law/Academic Commentary

5.50 On the authority of the SGCA decision in *Electro Magnetic*, a stay of "*any proceedings*" granted either under sections 227C(c) or 227D(4)(c) CA is broad enough to cover statutory adjudication.

5.51 What this means is that during the period between the judicial management application and the grant or dismissal of the application, no statutory adjudication proceedings against an insolvent Respondent may be continued except with leave of court.

5.52 Similarly, while the judicial management order is in force, no statutory adjudication proceedings against an insolvent Respondent may be continued except with leave of court or consent of the JM.

4) Analysis of the Issue

5.53 As mentioned above, when it comes to the continuation of statutory adjudication proceedings against a Respondent who is subjected to judicial management proceedings, the Committee does not see any justification for permitting a blanket carve-out to allow construction claims to be determined under statutory adjudication when all other claims against the Respondent fall to be adjudicated by the JM.

5.54 The Committee's view is that such a preference would run against the legislative intent of the SOPA not to confer on a Claimant any advantage over other creditors of an insolvent Respondent.

5.55 In fact, in a judicial management scenario, the level playing field intended by Parliament may be unfairly tilted in favour of the Claimant to the detriment of the JMs and other creditors. It is important to bear in mind that the main characteristics of statutory adjudication are its fast-track process and short timelines. For example, a Respondent only has 7 days to

lodge its adjudication response. The Committee considers that it is neither realistic nor fair to expect a JM who is already placed under significant time and resource constraints to be immediately in a position to properly defend statutory adjudication proceedings which have already been commenced within the short timelines.

5.56 Admittedly, the pressure on the JM is less acute where the Respondent has already submitted its case to the adjudicator and the parties are simply awaiting an AD. In which case, the JM may benefit from having an experienced construction professional's determination of the Claimant's claim. This is especially where the claim is highly technical and complex.

5.57 Nevertheless, on the whole, while allowing a statutory adjudication to proceed may assist in the proof of debt adjudication process in a judicial management, this would have the effect of providing SOPA Claimants with a potential advantage over other creditors, especially where there is a chance that the Respondent may exit judicial management. This is against Parliament's intention to maintain a level playing field between SOPA Claimants and other creditors of insolvent Respondents.

5.58 Further, as in the case of the SOA, the extent to which a SOPA AD will assist in the proof of debt adjudication process is not entirely clear because the statutory adjudication process may not allow all disputes between a SOPA Claimant and an insolvent Respondent to be fully ventilated in the SOPA adjudication. Allowing a temporary final AD to stand as the final determination of a JM's adjudication may therefore unfairly accord summarily determined ADs the binding effect they were not intended to have.

5.59 We also reiterate that cross-contract set-offs cannot be raised in a statutory adjudication. Statutory adjudication would therefore prevent a Respondent from raising counterclaims, set-offs and cross-claims arising from a separate contract with the Claimant and is a more limited process than those permitted under the JM provisions.

5) Recommendation

5.60 Consequently, the Committee does not recommend any amendment to the existing provisions setting out the judicial management process to allow the continuation of statutory adjudications against debtor Respondents.

C. WINDING UP

5.61 This next section addresses the issue of whether statutory adjudication should be allowed to continue against a Respondent that has been subjected to winding up proceedings.

1) Existing Framework/Status Quo

5.62 Section 255(2) CA provides that a Respondent's liquidation shall be deemed to have commenced at the time of the making of the application for winding up. At any time after the filing of a compulsory winding up application and before a winding up order has been made, the Respondent or any creditor or contributory may apply to the Court to stay or restrain further proceedings against the Respondent in any pending actions or proceedings (including statutory adjudication) pursuant to section 258 CA, and the Court may stay or restrain the proceedings on such terms as it thinks fit.

5.63 Where a winding up order is made or a provisional liquidator has been appointed, section 262(3) CA provides that no action or proceeding shall be proceeded with or commenced against the Respondent except with the leave of the Court and in accordance with such terms as the Court may impose.

5.64 If, on the other hand, the Respondent is liquidated pursuant to a creditors' voluntary liquidation, section 299(2) CA provides that after the commencement of the winding up, no action or proceeding shall be proceeded with or commenced against the company except with the leave of the Court and subject to such terms as the Court imposes. The commencement of the winding up in a creditors' voluntary liquidation is deemed to be the time of the passing of the company resolution resolving to wind up the Respondent.

5.65 The exception to this is if the Respondent was subjected to a members' voluntarily liquidation, in which case the Respondent would not have the right to apply to the Court for a stay of proceedings against it. Therefore, statutory adjudication proceedings may continue in this scenario and it is not within the scope of this report to deal with this situation.

5.66 Once the Respondent enters liquidation, its assets are vested in the liquidator for distribution in accordance with the applicable statutory priorities laid out under section 328(1) CA. If there are sufficient assets to make a distribution to creditors, proofs of debt are filed and the liquidator would have to adjudicate on these proofs to determine each creditor's interest. Should a creditor be dissatisfied with the liquidator's determination, it may apply to the Court for the determination to be reviewed.

2) Issues Arising/Encountered in Practice

5.67 Presently, where adjudication proceedings are stayed against a Respondent, the Claimant's only recourse is to file a proof of debt with the liquidator after the Respondent is in liquidation or to seek leave of court to continue with the proceedings pursuant to section 262(3) or 299(2) CA.

Consistent with the Committee's findings thus far, there is little reason or justification to permit construction claims different or preferential treatment from the other claims of the Respondent's other creditors.

5.68 However, the Committee has received feedback that a practical difficulty faced by liquidators is deciding whether a particular proof of debt should be admitted or rejected. This difficulty is exacerbated where Claimants submit proofs of debt arising out of complex construction contracts with highly technical issues. The liquidator not only has to decide whether the Respondent is liable for the amount claimed by the Claimant but also the quantum due if any. Moreover, the liquidator's lack of expertise in dealing with such complex construction claims may result in the need to engage a third-party expert to assess the claim. This increases the costs and expenses of liquidation and extends the time taken by the liquidator in deciding whether the proof of debt should be admitted or rejected.

5.69 While these are important considerations arising in practice, the issue then is whether such considerations necessarily justify a special carve-out for construction claims in winding up proceedings.

3) Existing Case Law/Academic Commentary

5.70 There is a dearth of authority in Singapore on the issue of whether statutory adjudication should be allowed to continue against a Respondent that is subject to winding up proceedings after the commencement of statutory adjudication. This is likely due to the unique circumstances considered under this scenario (where the Respondent, after the commencement of adjudication proceedings but prior to the issuance of the AD, has winding up proceedings commenced against it) and the narrow timeframe involved as the AD would typically be issued within 7 to 14 days after the commencement of the statutory adjudication unless otherwise extended with the agreement of the parties.

5.71 There is similarly a dearth of authorities in Australia (in relation to the NSW SOPA and Building and Construction Industry Security of Payment Act 2002 in Victoria ("**VIC SOPA**")) and the United Kingdom (in relation to the Housing Grants, Construction and Regeneration Act 1996), as well as academic commentary on this issue. The cases instead relate to circumstances where the Respondent is already in liquidation when statutory adjudication proceedings are commenced (i.e. the scenario covered at Chapter IV of this report).

4) Analysis of the Issue

A) Where the winding up application has been made but before the winding up order is granted

5.72 Presently, where a winding up application has been made but no winding up order is granted, no moratorium is imposed on actions or proceedings against the Respondent company. However, in the case of a compulsory winding up, the Respondent or any creditor or contributory may apply to stay or restrain further proceedings pursuant to section 258 CA.

5.73 The status quo should be preserved in relation to statutory adjudication against a Respondent in this scenario. The Committee takes the view that this rightly places the burden on the Respondent or any creditor or contributory to establish why the ongoing statutory adjudication proceedings against the Respondent ought to be stayed, and if this burden is satisfied, then the statutory adjudication proceedings would be justifiably stayed under section 258 CA.

5.74 To impose an automatic stay which only applies to statutory adjudications would prejudice Claimant contractors and/or sub-contractors. If Claimants are deprived of the statutorily provided fast and low-cost adjudication system to resolve their disputes, they would likely commence court actions or arbitrations against the Respondent instead, which would further burden the struggling Respondent with legal fees and expenses.

B) After the winding up order is granted

5.75 Presently, pursuant to section 262(3)(a) CA, after a winding up order has been granted, leave of court would be required for any proceedings to be continued. Similarly, pursuant to section 299 CA, after the commencement of the creditors' voluntary liquidation, leave of court would be required for any proceedings to be continued.

5.76 The Committee notes that there are arguments in favour of an exception being made in relation to statutory adjudication to allow statutory adjudication proceedings to continue to assist the determination process and not to allow the Claimant to obtain a higher priority than it would otherwise be entitled to. These arguments will be discussed below.

i. Adjudicator's expertise in dealing with the Claimant's claims and Respondent's counterclaims/cross-claims (if any)

5.77 First, as mentioned earlier in this report, it has been noted by the Committee that statutory adjudication may confer practical advantages to the task of adjudicating claims borne by liquidators, JMs and SMs. SOPA adjudicators are trained and accredited by the Construction Adjudication Accreditation Committee of the SMC. Pursuant to regulation 11(1) of the

Building and Construction Industry Security of Payment Regulations (Cap 30B, Rg 9, 2006 Rev Ed), the adjudicators should possess "*such degree or diploma in architecture, building studies, engineering, environmental studies, law, planning, real estate or urban design, or such other qualification, as may be recognised by the authorised nominating body [i.e. SMC]*" and "*working experience of at least 10 years in, or relating to, the building and construction industry in Singapore*". Adjudicators are also required to successfully complete the pre-qualification assessment and training course conducted by SMC.

5.78 It is thus clear that SOPA adjudicators would have the necessary expertise to assess the Claimant's claims. Liquidators, on the other hand, may not have such expertise to assess the complex claims arising out of construction contracts and may have to engage third-party consultants to assess the Claimant's proof of debt. This would lead to increased costs and expenses of liquidation.

5.79 Further, an adjudicator is obliged to "*consider the material properly before him and make an independent and impartial determination*" (see *W Y Steel* at [53]). This includes the Claimant's payment claim, and any payment response served by the Respondent. If the payment response includes a counterclaim/cross-claim by the Respondent, this would also be dealt with in the AD although no sums may be awarded to the Respondent under SOPA proceedings (see *Quanta Industries Pte Ltd v Strategic Construction Pte Ltd* [2015] 2 SLR 70 (SGHC) at [10]-[11]). The AD would thus give the liquidator a preliminary view as to whether to bring proceedings to pursue the cross-claim or counterclaim against the Claimant at a later stage.

5.80 By allowing the SOPA proceedings to continue, the resulting AD issued may form the basis of the Claimant's proof of debt in liquidation or serve as guidance to the liquidators in determining whether to admit a Claimant's proof of debt if this is based on the original payment claim sum.

ii. Quick assessment of the Claimant's claims and Respondent's counterclaims/cross-claims (if any)

5.81 Second, pursuant to section 17(1) SOPA, the adjudicator is required to determine the adjudication application within 7 or 14 days after commencement of the adjudication, or within such longer period as requested by the adjudicator and agreed to by the Claimant and Respondent, as the case may be.

5.82 In a compulsory winding-up, subject to any extensions of time granted, if a winding up order is granted, this time period would overlap with the 14-day period for the directors and secretary of the company to submit a statement as to the affairs of the company as at the date of the winding up order to the liquidator (as per section 270(3) CA). The statement of affairs contains details of the company's assets and liabilities, and enables liquidators to investigate into the affairs of the company.

5.83 No delays would be caused to the liquidation process since the statement of affairs would be based on the Claimant's payment claim sum. The AD may subsequently form the basis of the Claimant's proof of debt at the appropriate time, or it may serve as guidance to the liquidator in determining whether to admit the Claimant's proof of debt if this is based on the original payment claim sum.

iii. Low cost method of assessing issues of liability and quantum in a construction dispute

5.84 Third, with respect to costs, the adjudicator's fees are likely to be cheaper than that of a third-party consultant engaged by the liquidator.

5.85 Presently, for claims up to S$24,000, the adjudicator's fees would be S$300 per hour, up to a maximum of S$2,400. For claims above $24,000, the adjudicator's fees cannot exceed 10% of the claimed amount.[66]

5.86 Given the complex nature of construction disputes, having an expert adjudicator assess the Claimant's claims would likely be cheaper than requiring the liquidator to engage a third-party consultant to do so.

5.87 Further, there is no additional cost to the Respondent for the statutory adjudication to continue as the Claimant pays the Adjudication Application fee and provides a deposit for the adjudicator's fees when filing the Adjudication Application. The Respondent is also not required to engage lawyers to attend the adjudication conference (if any). Any costs that are awarded to the Claimant as part of the AD may form part of the Claimant's claim in its proof of debt.

iv. Allowing the SOPA proceedings to continue does not subvert the rules of the insolvency regime

5.88 Fourth, the SOPA provisions relating to direct payment of the AA by the Principal as well as liens on unfixed materials, namely sections 24 and 25 SOPA, do not apply if any of the parties involved is insolvent.[67]

5.89 Pursuant to section 259 CA, any disposition of the property of the company made after the winding up application is filed is void, unless the Court orders otherwise. Thus, the Respondent would not be in a position to pay out any monies due under the AD unless the Court makes an order validating such disposition pursuant to section 259 CA. If the Claimant does not seek such an order from the Court, it would have to file a proof of debt

66 See the SMC's Fee Schedule (5th Edition, 1 April 2017) <*https://www.mediation.com.sg/wp-content/uploads/2019/12/Fee-Schedule-1-April-2017.pdf*> (accessed 5 March 2020; archived at <*https://web.archive.org/web/20200408095912/https://www.mediation.com.sg/wp-content/uploads/2019/12/Fee-Schedule-1-April-2017.pdf*>).

67 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at cols 1118 –1119 and 1133.

based on the AD after the Respondent is placed in liquidation instead. This means that the priority of payments of the Respondent's creditors would not be disturbed and there is no preference of construction claims as against claims by other creditors.

5.90 Although a successful Claimant is fully entitled to seek leave to enforce the AD as a judgment pursuant to section 27 SOPA, such enforcement proceedings may be stayed pursuant to section 258 CA, and will be subject to an automatic stay pursuant to section 262(3) and 299 CA where a winding up order is granted.

v. Overarching considerations under the insolvency regime ultimately prevail

5.91 Nevertheless, after careful consideration of the merits of the points listed above, the Committee remains firmly of the view that these justifications do not overcome the above-mentioned policy considerations underlying the insolvency regime and Parliament's intention that the established priority of payments in the insolvency regime should not be disturbed notwithstanding the payment issues in the construction industry.

5.92 The practical benefits of allowing SOPA adjudication proceedings to continue against a Respondent subject to a winding up order do not sufficiently justify preferential treatment being afforded to SOPA adjudication proceedings as opposed to other types of legal or quasi-legal proceedings, such as arbitration.

5.93 Firstly, Parliament did not intend for a special carve-out to be made for statutory adjudication proceedings in the insolvency regime. This is evident from the fact that the SOPA provisions relating to direct payment of AA by the principal as well as liens on unfixed materials, namely sections 24 and 25 of the SOPA, do not apply where any of the parties involved are insolvent.[68] This ensures that statutory adjudication does not upset the established priority of payments that have to be made to the insolvent company's various creditors.

5.94 Secondly, the Committee also recognises that the policy considerations underlying the SOPA regime do not outweigh the policy considerations underlying the insolvency regime and the rationale for moratoriums in winding up (such as the statutory moratorium which applies automatically after a winding up order has been granted under section 262(3) CA).

5.95 The underlying philosophy of the Singapore corporate insolvency regime is to maximise recovery while simultaneously ensuring speedy and

68 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at cols 1118 -1119 and 1133.

fair distribution of assets of the insolvent companies.[69] Similarly, the Singapore Court of Appeal in *Chan Siew Lee Jannie v Australia and New Zealand Banking Group Ltd* [2016] 3 SLR 239 provided the following policy consideration in the context of the bankruptcy regime at [18], which the Singapore High Court in *Lim Poh Yeoh* (at [71]) found equally applicable to the insolvency regime:

> *[B]ankruptcy proceedings are not intended as a means for a single creditor to enforce his debt but is instead a method for the collective realisation of the assets of the debtor in order to maximise recovery for the general body of creditors.*

5.96 The rationale for a moratorium in winding up proceedings, as explained by VK Rajah JC (as he was then) in *Korea Asset Management Corp v Daewoo Singapore Pte Ltd* [2004] 1 SLR(R) 671 (SGHC) at [36], is to:

> … ***prevent the company from being further burdened by expenses incurred in defending unnecessary litigation***. *The main focus of a company and its liquidators once winding up has commenced should be to* ***prevent the fragmentation of its assets and to ensure that the interests of its creditors are protected to the fullest extent***. *In other words, returns to legitimate creditors should be maximised; the* ***process of collecting assets and returning them to legitimate creditors should be attended to with all practicable speed. Unnecessary costs should not be incurred;*** *liquidators should act in the collective interests of all legitimate stakeholders and not with a view to enhancing their own self-interests or fees.*
>
> (Emphasis added)

5.97 As noted by Edmond Leow JC in *Lim Poh Yeoh*, while the policy objective of facilitating cash flow in the construction industry under the SOPA regime is vital, it does not displace the usual rules of the insolvency regime. Similarly, in *Strategic Construction*, Justice Tan Siong Thye held that where a claim under SOPA conflicts with a claim under the insolvency regime, the latter would prevail in such a conflict because the insolvency regime has far-reaching consequences.

5.98 Moreover, Parliament clearly intended that the policy considerations underlying the SOPA regime are subject to the policy objectives of the insolvency regime, and the Committee reiterates the views expressly laid out by the Minister of State for National Development in the second reading of the Building and Construction Industry Security of Payment Bill[70], which reads as follows:

> *But* ***in the area of insolvency, there is a higher justice that must be served. There is an established priority of payments that have to be made to different parties who have suffered as a result of a party going insolvent***. *So* ***this priority should not be upset just because of the***

69 *Halsbury's Law of Singapore* vol 13 (Butterworths Asia, 2016) at [150.001].

70 *Singapore Parliamentary Debates, Official Report* (16 November 2004) vol 78 at col 1133 (Mr Cedric Foo Chee Keng, Minister of State for National Development).

> ***payment woes in the construction industry****. So we have therefore left insolvent cases alone so as not to disrupt a process which is working well.*
>
> (Emphasis added)

5.99 Thus, it is clear that the policy considerations underlying the insolvency regime do prevail over the policy considerations underlying the SOPA, and hence it will be difficult to justify preferential treatment for SOPA adjudication proceedings in the insolvency regime.

5.100 A final point may be made that if there is a particular case by which it is absolutely imperative that statutory adjudication proceedings be permitted to continue, then the proper recourse is for the Claimant to seek leave of court to continue such proceedings. The existence of such an option militates against a blanket carve-out for all construction creditors of a Respondent.

5.101 In light of this, the Committee recommends that no special carve-out ought to be made for statutory adjudication proceedings in the current insolvency regime.

5) Recommendation

5.102 It is thus the Committee's recommendation that:

(a) First, where a winding up application has been made but before the winding up order has been granted or a provisional liquidator has been appointed, the status quo should be preserved in that statutory adjudication proceedings should be allowed to continue against the Respondent unless an application is made to stay the adjudication pursuant to section 258 CA.

(b) Second, where a winding up order has been granted or a provisional liquidator has been appointed, statutory adjudication should not be allowed to continue against the Respondent pursuant to section 262(3) CA, because it would lead to the preference of construction claims over all claims made by other creditors. Thus, the Committee does not recommend any amendments to be made to the existing provisions relating to the winding up process to allow the continuation of SOPA adjudication proceedings against debtor Respondents.

CHAPTER VI

DIRECT PAYMENT BY PRINCIPAL AND PROTECTION AGAINST DOUBLE JEOPARDY

6.1 Within the construction industry, it is a common scenario where, in the event that the Respondent main contractor is facing financial difficulties, the Principal may choose to step in to make a direct payment to the Claimant sub-contractor to avoid any stoppages/suspension of the works going towards the completion of the project.

6.2 Considered in the context of the SOPA, if a Claimant sub-contractor has obtained an AD for a certain sum in its favour and the Respondent main contractor is unable to pay the same, section 24 SOPA expressly provides a statutory procedure by which the Principal is able to make a direct payment for the amounts that are determined to be due and owing to the Claimant sub-contractor (bypassing the Respondent main contractor).

6.3 However, this has certain implications when considered against the current statutory framework for insolvency in Singapore. In the situation where a Respondent main contractor is placed into liquidation or undergoes restructuring, the most pertinent concern is that such a direct payment from the Principal to the Claimant sub-contractor contravenes the fundamental anti-deprivation principle that the assets of an insolvent company are to be distributed *pari passu* among creditors within the same class.

6.4 In other words, the question is whether or not the express provision for direct payment under the SOPA ought to be allowed to override the general principle in insolvency that assets of an insolvent to be distributed on a *pari passu* basis among its creditors.

6.5 Given that the *pari passu* principle applies similarly, albeit to differing extents, across each mode of insolvency, including SOA, judicial management and liquidation, the question of whether the Principal of a Respondent main contractor should be allowed to exercise its right to make direct payments to the Claimant sub-contractor under section 24 SOPA is equally relevant in each circumstance and will be addressed together.

1) Existing Framework/Status Quo

6.6 The specific wording used in section 24 SOPA expressly provides:

> ***24.*** *– (1) Where a respondent fails to pay the whole or any part of the adjudicated amount to a claimant in accordance with section 22, the principal of the respondent may make payment of the amount outstanding, or any part thereof, in accordance with the procedure set out in subsection (2).*

> *(2) The procedure by which the principal may make payment to the claimant shall be as follows:*
>
> > *(a) the principal shall serve a notice of payment on the claimant stating that direct payment shall be made, and serve a copy thereof on the respondent and the owner (if the principal is not the owner);*
> >
> > *(b) the respondent shall, if he has paid the adjudicated amount to the claimant, show proof of such payment to the principal and the owner (if the principal is not the owner) within 2 days after receipt of the notice referred to in paragraph (a); and*
> >
> > *(c) if the respondent fails to show proof of payment in accordance with paragraph (b), the principal shall be entitled to pay the outstanding amount of the adjudicated amount, or any part thereof, to the claimant.*
>
> …
>
> *(4) Any payment by the principal under this section –*
>
> > *(a) may be treated by the principal as payment to the respondent in reduction (by the amount of the payment) of any amount that the principal owes, or may in future owe, to the respondent in connection with the construction work, or the goods or services, concerned; or*
> >
> > *(b) may be recovered by the principal as a debt due from the respondent.*
>
> …

6.7 However, in considering the application of the above, the Committee reiterates that section 24 SOPA was not drafted with the intention to be applied to payment disputes where the Respondent is facing insolvency. In this regard, the Minister, in moving the second reading of the Bill in Parliament, was of the view that the SOPA ought to preserve the application of insolvency laws: [71]

> *Payment disputes involving insolvency are not covered under the Bill. If any one of the parties involved is insolvent, the provisions allowing direct payment and lien on unfixed materials will not be applicable. This is to avoid upsetting creditor priorities under existing insolvency laws. For example, if a respondent is unable to pay the adjudicated amount because he is insolvent or under judicial management, the principal, in this case, cannot pay the claimant directly either*

6.8 Given the above, it then becomes clear that section 24 SOPA was contemplated to be subsidiary to the existing insolvency regime under the CA and only applies if the Respondent is not insolvent. This is consistent with the proviso under section 36(4) SOPA, which provides that "*[n]othing in this Act shall … limit or otherwise affect the operation of any other law in relation to any right, title, interest, privilege, obligation or liability of a person arising under or by virtue of a contract or an agreement*".

71 *Singapore Parliamentary Debates, Official Report* (16 Nov 2004) vol 78 at cols 1118–1119.

2) Issues Arising/Encountered in Practice

6.9 The main issue with the existing framework for direct payments is that there is a strong commercial advantage for the Principal to make such payment. The public, or at least a certain section of the public, may even derive some benefit from this. This is particularly where the construction projects pertain to public infrastructure projects.

6.10 In making a direct payment, the Principal obtains the distinct benefit of preventing the Claimant sub-contractors from suspending their works, which would be detrimental to the completion of construction projects. Furthermore, where the Respondent main contractor is facing financial difficulties but may navigate its way out of its financial difficulties, such as where (i) a SOA involving the Respondent main contractor is sanctioned and approved, or (ii) the Respondent main contractor is placed in judicial management, it would generally be beneficial to the Respondent and its creditors if the Principal does not terminate the contract for the works solely due to cash-flow issues.[72]

6.11 This would suggest that the Principal, Respondent main contractor and Claimant sub-contractor, may all be in favour of such direct payments, notwithstanding the fact that there may be ongoing insolvency proceedings against the Respondent main contractor. In fact, feedback the Committee received from IPAS advocated allowing direct payments by a Principal when a Respondent was subject to SOA or judicial management proceedings.[73]

6.12 In its feedback, IPAS considered that the SOPA does not expressly prohibit direct payments in the event of the Respondent's insolvency. Additionally, IPAS noted that existing caselaw did not preclude the making of direct payments outside of liquidation and that the Singapore Courts have held that the *pari passu* principle does not apply when a company is in SOA or judicial management proceedings.

6.13 From a commercial standpoint, IPAS noted that direct payments bring about the following benefits:

(a) Direct payments help ensure the continuity of the Respondent's operations, minimising damages arising from potential delays or stoppages of work and continue generating revenue from its projects. This continuity benefits the general body of creditors; and

(b) Principals also continue enjoying the commercial benefits in payment (albeit to the sub-contractors). In this regard, IPAS noted that even if the restrictions on *ipso facto* clauses under section 440

72 In this regard, the incoming restrictions on the effect of *ipso facto* clauses under section 440 IRDA may alleviate some of the concerns.

73 IPAS's feedback regarding this issue is set out in full in Annex B.

IRDA were effective to prevent termination by the Principal, this would not prevent sub-contractors and potential Claimants from terminating their contracts with the Respondent, thereby stalling the entire project to the detriment of all stakeholders.

6.14 IPAS's points are compelling at first glance and merit serious consideration. However, the Committee also considered the following countervailing factors against allowing a Principal to exercise its right to make direct payments to the Claimant sub-contractor under section 24 SOPA, regardless of whether the Respondent was undergoing insolvency proceedings or restructuring:

(a) Statutory adjudication proceedings are intended to provide an interim form of "rough and ready" justice, to facilitate the construction process and the completion of projects, and do not represent a final or precise determination of the sums owed between Parties. As such, it may be inherently undesirable for such "*interim relief*" to "*intrude upon the administration of the company at a time when all other entitlements are put in suspension pending decisions as to the fate of the company and as to the getting in of and the distribution of its assets*";[74] and

(b) If the amounts owing to the Respondent sub-contractor are substantial, direct payments by the Principal (with indemnification against the risk of double payment) may limit the possibilities/options that a SM can explore in proposing a SOA.

6.15 Furthermore, there are a number of practical issues that need to be addressed, even if the Principal is hypothetically permitted to make direct payments to Claimant sub-contractors notwithstanding the insolvency of the Respondent main contractor. These include the following main considerations:

(a) At which point in time should the Principal no longer be allowed to exercise this right – when the winding up application/order is made? When the SOA is proposed or when the SOA is sanctioned? When the application for judicial management or the judicial management order is made?

(b) Should the mechanisms that exist in other jurisdictions be adopted?

(1) NSW SOPA and VIC SOPA envision a process of the Claimant obtaining a judgment debt for the adjudicated sum, followed by a notice of claim to the Principal.

74 *Belmadar Constructions Pty Ltd v Environmental Solutions International Ltd* [2005] VSC 24 at [18].

(2) However, the difficulty of this is that priority depends on how fast the sub-contractors are in filing their notices of claims – a seemingly arbitrary result.

The Position in Australia

6.16 Each state in Australia has its own version of the SOPA, albeit with slightly different provisions.

6.17 In particular, it is noteworthy that Queensland, South Australia, the Australian Capital Territory and Tasmania **do not** have any provisions allowing the Claimant to bring direct claims against the Principal ("**leapfrogging**") in their versions of the SOPA.

6.18 However, NSW and Victoria do have equivalent provisions which expressly provide that, instead of allowing the Principal to elect to pay the Claimant sub-contractor directly, the Principal has an obligation to pay the adjudicated sum to the Claimant sub-contractor once the Claimant sub-contractor requires him to do so. The following shall discuss the positions in NSW and Victoria, as they are the most similar to that in Singapore:

(a) Under the law in NSW, in the event that the Claimant sub-contractor wishes to bring a claim against the Principal in respect of moneys owed to it by the Respondent main contractor, there are two options that it may take:

(1) First, the Claimant sub-contractor may decide to recover the unpaid portion as a judgment debt against the Respondent main contractor. Once the judgment debt has been given, in accordance with the Contractors Debts Act 1997 ("**CDA**"), the Claimant sub-contractor will have to obtain a debt certificate from the Court and notify the Principal of its claim, in order to claim from the Principal the sums owed to it by the Respondent main contractor (section 6 CDA).

(2) Alternatively, the Claimant sub-contractor may file an adjudication application. Once this is done, the Claimant sub-contractor can require the Principal to withhold sums which are or which may become payable to the Respondent main contractor (section 26A NSW SOPA) and can claim those sums in the event that the main contractor defaults.

(b) On the other hand, the VIC SOPA only offers the former route. In other words, the VIC SOPA only allows the Claimant sub-contractor to claim against the Principal by obtaining a judgment debt from the Court, but does not allow for the Claimant sub-contractor to order the Principal to withhold payment. Unlike the NSW SOPA, the entire mechanism is provided for under the same act.

The Position in Hong Kong/UK

6.19 At present, the equivalent of the SOPA has yet to be implemented in Hong Kong, although there are ongoing discussions and consultation papers to consider joining Australia and Singapore in this regard. Nevertheless, the consultation papers have shown that there was no consideration of any equivalent provision (in relation to section 24 SOPA) to facilitate direct payments from the Principal to the Claimant sub-contractor, whether in the case of insolvency or otherwise.

6.20 As for the UK, while the Housing, Grants and Construction Act 1996 expressly provides for a scheme which is similar to the one under the SOPA, there is similarly no equivalent provision to facilitate direct payments from the Principal to the Claimant sub-contractor.

3) Existing Case Law/Academic Commentary

6.21 Typically, the Principal may seek to rely on some express provision in the main contract (between the Principal and the Respondent main contractor) to exercise its right to make a direct payment to the Claimant sub-contractor in order to induce the sub-contractor to continue working on the project. However, these provisions are often only available in respect of payments to nominated, and not domestic, sub-contractors. In addition, such recourse is fraught with the risk that the Principal's payment to the Claimant sub-contractor does not operate as a discharge of its own corresponding payment to the Respondent main contractor. This raises the risk of double liability or double payment on the part of the Principal.

The Position in Singapore

6.22 The Committee highlights that the risk of double payment, albeit on the basis of a contractual direct payment clause, has been discussed in the Singapore in the case of *Joo Yee Construction Pte Ltd v Diethelm Industries Pte Ltd* [1990] SLR 278 ("***Joo Yee***").

6.23 In this case, Joo Yee was the main contractor and the government was the employer. The main contract contained a clause 20(e) which provided that should the main contractor be in default of payment to a sub-contractor, the government may make direct payment of the same, upon the certification of the superintending officer, and deduct that amount from any sums due to the main contractor. When the main contractor subsequently became insolvent, at issue was whether any direct payments made under clause 20(e) were in contravention of the section 329 CA. The Honourable Justice Thean (as he then was) held that the direct payment provision in clause 20(e) was inconsistent with the principle that the property of an insolvent company should be applied in settlement of its liabilities *pari passu*.

6.24 The position remains the same even if the insolvent party has not formally entered into liquidation, as long as it is clear to all parties

concerned that the winding up of the debtor company was an inevitable or possible result.[75]

6.25 In fact, it is well-established that upon the making of a winding up order, a statutory trust is imposed on the assets of the company for the purpose of discharging the company's liabilities by *pari passu* distribution among the unsecured creditors.[76]

6.26 IPAS's feedback noted that the case of *Joo Yee* should be limited to prohibiting direct payments at the point at which the Respondent was wound up. It did not apply when the Respondent was insolvent but not yet in winding up. However, the position in Singapore remains that the commencing of winding up is deemed to be at the filing of the winding up application, in which case, it would be extremely risky for Principals to make direct payments once proceedings had commenced.

6.27 IPAS also noted that the cases of *Hitachi Plant Engineering & Construction Co Ltd and another v Eltraco International Pte Ltd and another appeal* [2003] 4 SLR(R) 384 and *Re Wan Soon Construction Pte Ltd* [2005] 3 SLR(R) 375 confirmed that the *pari passu* principle was inapplicable in the context of SOA or judicial management proceedings.

6.28 The points raised by IPAS are valid, but the need to address the issues highlighted earlier in this chapter remains.

The Position in Australia

6.29 In Australia, the point has been addressed multiple times by the Victorian and NSW courts, all in favour of preventing direct payment in the event of a main contractor's insolvency save for one exceptional case.

6.30 *Re Summit Design & Construction* [1999] NSWSC 1136 ("***Re Summit***"):

(a) The line of cases begins with *Re Summit*, an NSW case. Under NSW law, section 5 CDA provides that an unpaid sub-contractor has the statutory right to obtain payment from the Principal in the event that the main contractor defaults on payment, out of money that is payable or becomes payable from the Principal to the main contractor.

(b) In this case, a winding up order was filed against the main contractor. The sub-contractor subsequently sought leave under section 471B Corporations Law of Australia to commence proceedings against the main contractor in order to obtain a debt certificate, which it then intended to exercise against the Principal.

75 *DBS Bank Ltd v Tam Chee Chong (judicial managers of Jurong Hi-Tech Industries Pte Ltd)* [2011] 4 SLR 948.

76 *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733.

(c) The Court refused to exercise its discretion under section 471B Corporations Law of Australia in this case. In doing so, the Court (at [14]) emphasised the importance of public policy "*to ensure that once a step has been taken which causes the company to be in external administration, individual creditors are no longer able to recover their debts from the company separately but must abide by a system of rateable distribution out of the assets of the company in accordance with the principles of the Law*". The judge also found that the sub-contractor had no proprietary claim over the sums held by the Principal.

(d) The judge in *Re Summit* also considered the following points:

(1) First, if leave were granted, whether the main contractor's sub-contractors would be able to access funds in the hands of the Principal would be contingent on how fast they acted to serve a notice of claim and debt certificate on the Principal, to the exclusion of slower sub-contractors. The judge could not see the justice of that result.

(2) Second, as a matter of construction, section 5 Corporations Law of Australia states that a later enactment of the Parliament of NSW is not to be interpreted as amending or repealing or otherwise altering the effect of the Corporations Law of Australia, unless expressly provided for. As such, the statutory rights granted by the CDA cannot be regarded as eclipsing the rights of the unsecured creditors granted by the Corporations Law of Australia.

6.31 *Belmadar Constructions Pty Limited v Environmental Solutions International Limited (Receivers and Managers Appointed) (Subject to a Deed of Company Arrangement)* [2005] VSC 24 ("***Belmadar***"):

(a) The case of *Re Summit* was considered in the Victorian case of *Belmadar*. At that point in time, the VIC SOPA had already been implemented.

(b) As with the facts of *Re Summit*, the main contractor was insolvent and the sub-contractor sought leave from the Court to commence proceedings against the main contractor to obtain a judgment debt for an adjudicated sum under the VIC SOPA, so that it could bring a claim against the Principal. However, one day before it commenced the proceedings, the main contractor fell into administration. The sub-contractor then sought leave from the Court to proceed, pursuant to section 440D(i)(b) Corporations Act.

(c) In denying the sub-contractor such leave, the Court, at [17], chose to follow the reasoning in *Re Summit* in holding that "*[i]t is important that once the processes for an orderly management and winding up of the affairs of a company in financial distress are set in train that the statutory rights of and limitations upon the rights of all concerned, including unsecured creditors under the Corporations Act*

2001, be respected and given effect to. Nothing appears from the facts of this case to dictate a different approach."

(d) The judge in *Belmadar* also considered that "*[o]ne further consideration bears upon this question of principle. The procedure for adjudicating the claim of a subcontractor under the Act is, as I have observed, an interim one. It does not finally determine the entitlement of the subcontractor. The procedures for recovery against the principal have the same characteristic. In an insolvency situation it would be very undesirable that such interim relief which is available to a particular class of creditor should intrude upon the administration of the company at a time when all other entitlements are placed in suspension pending decisions as to the fate of the company and as to the getting in of and the distribution of its assets*" (at [18]).

(e) The judge also considered how the Corporations Act constituted Commonwealth legislation and would thus prevail over an inconsistent State Act by virtue of section 109 of the Commonwealth Constitution, but declined to go further as it was not necessary to determine this issue.

(f) Under the VIC SOPA, after the judgment debt against the main contractor has been obtained, the sub-contractor has to file a notice against the Principal in order to bring any claim against the Principal. The case of *Belmadar* therefore left open the question of what would happen if the main contractor becomes insolvent before the notice has been filed, but after the judgment debt has been obtained. Following the reasoning of the judge, however, it is likely that the filing of the notice has to precede the insolvency.

6.32 *Sam the Paving Man Pty Limited v Berem Constructions Pty Limited (in liquidation)* [2010] NSWSC 868 ("***Sam the Paving Man***")

(a) In this case, the administrators of the insolvent main contractor were appointed before the sub-contractor sought to obtain a judgment debt, in accordance with the then-enacted NSW SOPA. However, the sub-contractor unexpectedly managed to obtain the judgment debt. The distinguishing facts of this case were that the main contractor's liquidators consented to the sub-contractor pursuing a claim against the Principal, provided that, if the sub-contractor was successful, the sub-contractor would pay the liquidator $50,000. The Principal, as the second defendant, opposed the sub-contractor's application for leave to proceed against the first defendant main contractor, pursuant to section 500(2) Corporations Act.

(b) The judge granted the sub-contractor leave, holding that because the liquidators had consented to the proceedings and would obtain a benefit out of it, this was "*a commercial judgment which must have involved the weighing of the costs of an action against [the Principal] Memocorp, the risk of having to meet an adverse costs order, and the likely success of such an action*" (at [25]). As such, the judge

did not see any reason to doubt the liquidators' commercial judgment that it was in the interests of the main contractor to allow the sub-contractor's claim to proceed at its own cost and risk. Furthermore, the Court took the position that there was no hardship brought to the Principal, Memocorp, should they have to pay the plaintiff sub-contractor, instead of the main contractor first defendant.

(c) The judge contemplated the reasoning in the case of *Re Summit*. Addressing the point in *Re Summit* that allowing the sub-contractor to claim directly against the principal where the main contractor was insolvent would introduce a race to serve notice of their claim, the judge held that such a risk was absent in the present case. This was because the liquidators were the ones who consented to the claim being sought, thus, it was not necessary for the sub-contractor to serve the application or give notice of the application to all the main contractor's creditors as the liquidators acted in the interests of the creditors as a whole. The judge therefore granted the sub-contractor leave to proceed against the main contractor.

6.33 *Modcol*:

(a) In this case, the main contractor's administrators were appointed two days before the sub-contractor filed summons against the main contractor for judgment debt. The sub-contractor sought leave under section 440D Corporations Act to commence proceedings against the main contractor.

(b) The judge in *Modcol* upheld the reasoning in *Re Summit* and *Belmadar* and concluded that where a judgement debt is obtained against an insolvent main contractor and sought to be claimed against the Principal, this would not be "*consistent with the general scheme of the Corporations Act 2001 providing for the administration of companies under Pt 5.3A. It is certainly not consistent with the provisions of the Corporations Act 2001 relating to the liquidation of companies. Those provisions cannot be put to one side, because one possible outcome of the administration process is, as s 439C recognises, that the company may be put into liquidation*" (at [26]).

(c) In addition, the judge found no special facts that justified departing from the ruling in *Belmadar*. He held (at [41]-[42]) that the "*effect of intercepting what might be a substantial amount owed by Health Insurance to Buildplan would in [his] view be subversive to the primary object of Pt 5.3A*" because "*if the chances of the company's continuing in business are to be maximised, it will need as much cash as it can get its hands on for the purpose of funding both the administration, any deed of company arrangement and the subsequent continuation of the business*" and "*If, however, there is no arrangement and the company does not continue in business, the likely result is winding up. Clearly, a payment which would have the effect of giving a*

significant advantage to one unsecured creditor over others would not be consistent with the scheme of the Act for winding up on insolvency".

(d) Moreover, the judge also took the position that it was in the early days of administration, and there were as yet no clear facts that justified the granting of the leave or otherwise. As such, the proceedings by the sub-contractor against the main contractor were stayed until further order.

4) Analysis of the Issue

6.34 As mentioned above, the question of whether section 24 SOPA is sufficient to override the general principle in insolvency that the assets of an insolvent company are to be distributed on a *pari passu* basis among its creditors, is central to the consideration of whether reform is required for section 24 SOPA.

6.35 In this context, it would be necessary to balance the policy of the SOPA regime against the competing considerations for the enforcement of insolvency laws in Singapore. At this juncture, it is worth revisiting the Minister's argument, in moving the second reading of the Bill in Parliament already cited earlier (see paragraphs 4.69–4.71).

6.36 While no cases examining the application of section 24 SOPA have yet gone before the Courts in Singapore, in both Singapore and Australia, such provisions were enacted with the intention that they were to be, in all circumstances, subsidiary to the overriding insolvency legislation.

6.37 With specific regard to insolvency proceedings, the commencement of winding-up proceedings requires the application of mandatory set-off between the mutual credits, debts and dealings between the Claimant and the Respondent. Allowing the Principal to make direct payment to the Claimant would complicate the accounting between the Claimant and the Respondent since it would be unfair to continue to recognise the Claimant's claim against the Respondent once direct payment had been made. Yet direct payment does not break the mutuality between the Claimant and the Respondent for that particular claim. Neither does it discharge the Principal's debt to the Respondent for the same amount.

6.38 However, the Committee considers that the arguments in favour of allowing direct payments in the context of SOA and judicial management proceedings are interesting and merit serious consideration. An in-depth review of the competing tensions and the interests of various stakeholders in such a scenario will need to be considered.

5) Recommendation

6.39 In light of the foregoing, while there is no compelling reason to allow the Principal to override the *pari passu* distribution principle when making direct payments to a Claimant sub-Contractor pursuant to section 24 SOPA

in the case of winding-up proceedings, the Committee recommends that a further study be conducted on permitting direct payments by Principals to Claimants (and other sub-contractors) in the case of a Respondent being subject to SOA or judicial management proceedings.

CHAPTER VII

VALIDITY OF IPSO FACTO CLAUSES

7.1 *Ipso facto* clauses are clauses that entitle a contracting party to terminate the agreement and/or exercise certain remedies when its counterparty in the contract enters into judicial management, a SOA or any other insolvency-related proceeding. Under Singapore law, a contracting party is generally not precluded from relying on *ipso facto* clauses.

7.2 In the report delivered by the Insolvency Law Review Committee (the "**ILRC**") on 4 October 2013 (the "**ILRC Report**")[77], the ILRC considered and recommended against the introduction of restrictions on the enforcement of *ipso facto* clauses. Half a decade has passed since the ILRC Report was delivered and huge strides were made to enhance Singapore's legal framework for debt restructuring. Response to the 2017 amendments to the CA that adopted the recommendations in the ILRC Report has been largely positive. There has also been progress in other jurisdictions such as Australia, where legislative amendments were introduced to restrict the enforcement of *ipso facto* clauses in 2017, and which came into effect on 1 July 2018.

7.3 In keeping with the momentum of the reforms and to further enhance Singapore's legal framework for debt restructuring, the recent introduction of the IRDA pushed the boundaries of Singapore's restructuring landscape by proposing restrictions on the enforcement of *ipso facto* clauses.[78] The Committee welcomes the proposed restrictions on the enforcement of *ipso facto* clauses, with its accompanying provisions for exemptions and judicial oversight.

A. SCHEMES OF ARRANGEMENT

7.4 The purpose of the SOA regime is to allow companies in financial distress to restructure its debts so as to remain as a going concern. The SOA regime has become the favoured corporate rescue regime in Singapore, and the success rate of the SOA regime in rehabilitating companies has been high.[79]

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77 ILRC, *Report of the Insolvency Law Reform Committee – Final Report* (3 October 2013) <*https://www.mlaw.gov.sg/files/news/public-consultations/2013/10/RevisedReportoftheInsolvencyLawReviewCommittee.pdf*> (accessed 8 April 2020; archived at <*https://web.archive.org/web/20200408094634/https://www.mlaw.gov.sg/files/news/public-consultations/2013/10/RevisedReportoftheInsolvencyLawReviewCommittee.pdf*>).

78 Section 440 IRDA.

79 77.1%, as per the study conducted by the Insolvency and Public Trustee's Office in December 2009 to consider a review of the scheme of arrangement provisions in the

(*cont'd on the next page*)

7.5 In order to enhance the effectiveness of the SOA regime, Singapore recently drew inspiration from the US Chapter 11 regime and introduced provisions for, *inter alia*, enhanced moratoriums, rescue financing and cram-down, in order to grant the Court additional powers and flexibility to support SOAs in 2017. However, a noticeable feature unique to the US Chapter 11 regime that was missing from the 2017 reforms is the restriction on the enforcement of *ipso facto* clauses. In this regard, the position of Singapore remains similar to other Commonwealth countries such as the UK and Hong Kong, where the contractual counterparty of a company undergoing a SOA may be contractually entitled to terminate the agreement and/or exercise certain remedies upon the occurrence of an insolvency event.

1) Existing Framework/Status Quo

7.6 Until the IRDA comes into effect, the position in Singapore remains that *ipso facto* clauses remain *prima facie* enforceable. Thus, depending on how the particular contractual clause in question is drafted, a SOA application would be sufficient to entitle the Claimant to terminate its contract with the Respondent.

2) Issues Arising/Encountered in Practice

7.7 As the ILRC has studied the practical issues and arguments for and against the stay, it is apposite to begin the analysis by setting out the findings of the ILRC in 2013, before examining the considerations of the ILRC in recommending against introducing restrictions on the enforcement of *ipso facto* clauses, and evaluating whether the considerations remain valid and how can they be adequately addressed.

7.8 The ILRC noted that the arguments in favour of restricting the enforcement of *ipso facto* clauses include:[80]

> *(1)* *… [I]t is extremely difficult for a company under … a scheme to trade its way out of trouble when creditors have the ability to terminate their contracts with the company. The* ***crippling effect of the cancellation of key contracts once a company enters formally … scheme proceedings may put an end to company operations and any possibility of restructuring****, thereby resulting in the general body of creditors obtaining less than they would if the company had been rehabilitated. Accordingly, if the enforcement of* ipso facto *clauses were restricted,* ***key contracts of the company may be kept alive, and all creditors including banks and bondholders, who are usually the main creditors, may stand to benefit****.*

Companies Act, with a review of the statistical study of schemes of arrangement cases from 2002 to July 2009 (see ILRC Report at 135).

80 See ILRC Report at 119.

> *(2) Unless* ipso facto *clauses are regulated, creditors providing essential supplies or holding key contracts may have too much bargaining power, allowing them to demand additional payment or guarantees from the administrators in exchange for continued performance. This may prejudice other creditors who do not have similar bargaining power.*
>
> *(3) The risk of cancellation of key contracts may deter companies from seeking formal reconstruction efforts … Restricting [the enforcement of]* ipso facto *clauses may allow companies in distress to have the confidence to seek help earlier.*
>
> *(4) The preservation of contracts reduces the risk of breaks in a chain of contracts; for example, manufacturing and distribution chain contracts.*
>
> (Emphasis added)

7.9 On the other hand, the ILRC acknowledged various countervailing arguments in favour of giving effect to *ipso facto* clauses, which include:[81]

> *(1) Without the ability to terminate on insolvency*[82]*, counterparties already staring at the bleak prospect of writing-off outstanding invoices or loans would be compelled to perform their contractual obligations even where there may be no hope of being paid. This situation is worsened where the contract contains exclusivity provisions preventing the counterparty from sourcing alternative supplies or compelling it to continue making periodic payments.*
>
> *(2) For smaller suppliers and customers, the solvent party may itself be threatened by the unpredictability and potentially greater exposure. This could give rise to the risk of domino insolvencies, especially in chain contracts.*
>
> *(3) Even if the counterparty is precluded from relying on the event of insolvency to terminate the contract, it is unlikely in most cases that the insolvent company will be able to perform, and so the interference with* ipso facto *clauses in contracts is not justified in the majority of situations.*
>
> *(4) Despite statutory inroads, English law and, by extension, Singapore law has always respected party autonomy to choose when to contract with each other, and on what contractual terms. Among other things:*
>
> > *(a) There is an enormous variety of contracts which may be affected by restrictions on* ipso facto *clauses, each with their own unique balance of risks upon insolvency. Contracting parties still know best what risks they can and cannot contractually accept, compared to a one-size-fits-*

81 ILRC Report at 120-122.

82 Or indeed, the Committee notes, *contemplated* insolvency proceedings.

all legislative provision. It is probably impossible to arrive at a fair balance of risks using such legislation.

(b) It should be left to the individual creditor to determine, in light of its own and the individual company's circumstances, whether to terminate the contract. If the creditor is of the view that the company can be turned around, they may not exercise their rights under the ipso facto clause. In this manner, market forces, and not the legislature or courts or insolvency professionals, determines whether companies should be rescued, which may lead to a more 'rational' outcome in the economic sense.

(5) The netting of a series of executory contracts between the parties can dramatically reduce exposure and hence capital and systemic risks, especially in markets for foreign exchange, securities, commodities and the like. However, where there is a series of open executory contracts between parties, denying the solvent counterparties' right to terminate the contract on account of the ipso facto *clause will result in these counterparties being unable to close out and nett the amounts owed under these open contracts. Prohibiting ipso facto clauses will therefore allow the insolvency professional to abandon or terminate the loss-making contracts, while maintaining the profitable contracts for the insolvent company, i.e. cherry-picking. The ability of the insolvent company to cherry-pick contracts would disrupt the rules on set-off and netting by making it difficult to isolate which contracts should be eligible for set-off or netting.*

(6) Leading commentators have argued that the variety of carve-outs and special protections which need to [be] provided for in order to implement restrictions on the enforcement of ipso facto clauses may "greatly complicate commercial law and create a regime of first- and second-class citizens with a fuzzy boundary between the two…". This complexity can give rise to an increase in litigation. An increase in litigation may also result from the fact that, in the absence of clear grounds of termination under ipso facto clauses, parties may be forced to rely on less easily established grounds (e.g. anticipatory breach or defective performance).

(7) Certain industries may hike prices in order to provide for the above risks and unpredictability, leading to an increase in business costs.

7.10 In coming to its eventual recommendation against introducing restrictions on the enforcement of *ipso facto* clauses, the ILRC listed three key arguments: [83]

> (a) "*[T]he freezing or stay on self-help termination is unquestionably one of the most draconian and controversial of all stays, because of its massive impact on transactions*".
>
> (b) "*[O]nly a minority of countries appear to impose restrictions on the enforcement of ipso facto clauses. The primary jurisdictions that do so are US, Canada and France. Some of the jurisdictions that do not impose express limits on general ipso facto clauses are the UK, Japan, China, Australia,*[84] *Germany and Hong Kong."*
>
> (c) *"[I]f such a framework were introduced, it would be essential to introduce provisions allowing counterparties to apply to court to object to the stay on [the enforcement of] the* ipso facto *clause and the enforcement of the remaining contractual terms on the basis that they are unduly prejudiced. This is because there may be instances where the risk to counterparties in dealing with the insolvent company is unacceptably high. Alternatively, the court may be asked to determine cases that are too urgent to wait for the expiration of the specified period for the insolvency professional to adopt or reject the contract."* However, the ILRC noted *"the strong concerns that such determinations would require a decision on the commercial benefits or risks of the adoption of certain contracts,"* and that "*it would be inappropriate to impose such a burden on the courts.*"

3) Analysis of the Issue

7.11 Since the publishing of the ILRC's views half a decade ago, much has changed in the local paradigm with respect to *ipso facto* clauses, and the IRDA has proposed a regime that attempts to strike an appropriate balance between the competing interests that came to the fore on this issue.

7.12 On this note, the Committee considers it helpful to set out how the US, Australian, and Canadian jurisdictions have legislated in order to limit the destructive impact of *ipso facto* clauses.

Canada

7.13 As the language of the proposed section 440 IRDA takes reference from section 34 of the Canadian Companies' Creditors Arrangement Act

83 ILRC Report, at 122.
84 As mentioned above, Australia has since introduced provisions in 2017 to restrict the enforcement of ipso facto clauses

("**CCAA**"),[85] the Committee will begin with an overview of the Canadian regime.[86]

7.14 Section 34 CCAA, as it presently stands, was introduced with the statutory reforms made over 10 years ago. It provides that upon the commencement of insolvency proceedings, or when the company is insolvent, the contractual counterparties may not terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement with the debtor company.[87] However, the contractual counterparty's position is protected in two ways. The contractual counterparty will not be forced to provide free services or materials to the debtor company as the debtor company is still required to comply with the terms of the agreement, and the contractual counterparty is not required to provide credit but may demand immediate payment.[88]

7.15 Owing to the impact on financial markets and systems, as acknowledged by the ILRC, certain financial contracts are designated as "*eligible financial contracts*" and are excluded from the operation of certain aspects of the CCAA. These include that:

(a) Eligible financial contracts may be terminated or accelerated as a result of a party filing a bankruptcy proposal or commencing proceedings under the CCAA;[89]

(b) Counterparties to eligible financial contracts are not subject to the general prohibition against netting and setting-off obligations in bankruptcy and insolvency proceedings;[90] and

(c) Counterparties may deal with or otherwise realise financial collateral held in respect of an eligible financial contract, notwithstanding a general stay of proceedings under the CCAA.[91]

7.16 Section 34(6) CCAA also allows contractual counterparties to apply to the Court to exclude the application of the restriction if the applicant is able to satisfy the Court that the operation of this section would likely cause the applicant significant financial hardship.[92] As there are few cases interpreting this exception to the restriction on the enforcement of *ipso facto* clauses,[93] it is useful to look at the cases interpreting section 65.1(6) of

85 Companies' Creditors Arrangement Act, RSC 1985, c C-36 ("CCAA").
86 See Singapore Parliamentary Debates, Official Report (1 October 2018) vol 94 <*https://sprs.parl.gov.sg/search/fullreport?sittingdate=1-10-2018*> (accessed 8 April 2020) (Mr Edwin Tong, Senior Minister of State for Law)
87 Section 34(1) CCAA; section 440(1) IRDA.
88 Section 34(4) CCAA; section 440(2) IRDA.
89 Section 34(7) CCAA.
90 Section 34(8)(a) CCAA.
91 Section 34(8)(b) CCAA.
92 Section 440(4) IRDA.
93 Adrienne Ho, *The Treatment of* Ipso Facto *Clauses in Canada* (2015) 61(1) McGill LJ 139 to 189 at 183.

the Canadian Bankruptcy and Insolvency Act ("**BIA**"),[94] which applies to individuals and companies with less than $5 million in debt. It appears from these cases that the Canadian courts have applied a high threshold and will consider the interests of all the debtor's stakeholders.[95]

United States

7.17 In the US, a stay on the enforcement of *ipso facto* clauses applies in relation to rights that are triggered solely because of a provision in such contract or lease that is conditioned on—

> (a) the insolvency or financial condition of the debtor at any time before the closing of the case;
>
> (b) the commencement of a case under the relevant title of the US Bankruptcy Code; or
>
> (c) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.[96]

7.18 In addition, *ipso facto* clauses are generally stayed except in an executory contract or unexpired lease of the debtor.[97]

Australia

7.19 The position in Australia is similar to the Canadian position in that the stay applies in relation to express rights that are triggered either because a body applies for or is subject to a compromise or arrangement under section 411 Corporations Act, or owing to its financial position,[98] and does not however prevent a right from being enforced where the corporation has failed to meet its payment or other obligations under the agreement.

7.20 Although the enforcement of *ipso facto* clauses is also generally stayed, the Australian provisions setting out exceptions to the stay are more flexible. Besides excluding agreements made after the commencement of the restructuring and where the scheme manager has given his consent in writing, the Minister may declare certain rights or kinds of contracts to be excluded.[99]

7.21 In addition, the Australian Parliament has gone further than the US in enacting statutory provisions to strike a balance between the competing interests:

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94 RSC 1985, c B-3.
95 Adrienne Ho, *The Treatment of* Ipso Facto *Clauses in Canada* (2015) 61(1) McGill LJ 139 to 189 at 183 – 185.
96 11 U.S.C. § 365(e)(1).
97 11 U.S.C. § 365(e)(2).
98 Section 415D(1) Corporations Act 2001.
99 Section 415D(6) and (7) Corporations Act 2001.

(a) There is a prescribed term to the stay, which begins upon the application for a SOA under section 411 Corporations Act or when the company announces its intention to make an application for a scheme, and ends a) if the company fails to make the application within 3 months of the announcement (subject to the Court's order to extend this time period), b) if the application is withdrawn, c) if the Court dismisses the application, d) at the end of any compromise or arrangement approved as a result of the application under section 411 Corporations Act, or e) when the affairs of the body have been fully wound up following a resolution or order for the body to be wound up.[100]

(b) In order to prevent the perverse outcome of a clause in an agreement that is stayed while a body is subject to a compromise or arrangement from being used against the company once the SOA has ended, the *ipso facto* clause is unenforceable even after the stay ends, to the extent that the reason for seeking to enforce the right relates to:

(1) the body's financial position before or during the stay period;

(2) the body being subject to an announcement of, application for or approval of a compromise or arrangement; or

(3) a reason prescribed in the regulations.[101]

(c) In order to avoid any abuse of process, the stay will only apply where the application for a SOA under section 411 Corporations Act states that it is being made for the purpose of the body avoiding being wound up in insolvency.[102] On the other hand, the stay is worded broadly as an anti-avoidance mechanism to ensure that parties are unable to draft or prepare the contracts to circumvent the stay of *ipso facto* clauses.

(d) Where a contractual counterparty's rights are stayed against the company, the company's rights against the contractual counterparty for the provision of new advances of money or credit are also not enforceable.[103]

(e) The contractual counterparty may apply to the Court to intervene and lift the stay if the SOA is not for the purpose of the company avoiding being wound up in insolvency, or if it is appropriate in the interests of justice.[104]

100 Section 415D(2) and (3) Corporations Act 2001.
101 The Explanatory Memorandum to the Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Bill 2017 at [2.82]; Section 415D(4) Corporations Act.
102 Schedule 1, Part 2, item 7, subsection 415D(5).
103 Section 415D(9) Corporations Act 2001.
104 Section 415F Corporations Act 2001.

(f) As a transitional arrangement, the restrictions on *ipso facto* clauses only apply to contracts which are entered into after 1 July 2018.[105]

4) Recommendation

7.22 It is clear from the example provided by the Senior Minister of State for Law, Mr Edwin Tong, at the Second Reading of the IRDA that section 440 IRDA applies to the construction industry:[106]

> *So, let me illustrate. In a case of a developer and a main contractor entering into a contract for the construction of a building, where the contract contains ipso facto clauses that may be triggered either on the commencement of restructuring proceedings, or the failure to meet construction milestones, which is not untypical in such a contract.*
>
> *If the main contractor is in financial distress and files an application to Court to place the company into judicial management, the developer will be restricted by clause 440 from relying on the ipso facto clause, because it is triggered by the filing of the application for a judicial management order, which is one of the specified restructuring proceedings in clause 440(6).*
>
> *If, however, in addition to the filing of the restructuring proceedings, the main contractor also fails to meet construction milestones and timelines which are built into the contract, the developer may use the ipso facto clause to terminate the contract or for a variety of other reliefs as specified in the contract. So, it is only by reason of the restructuring efforts set out in clause 440 alone that these ipso facto clauses are restricted.*

7.23 The Committee believes that the introduction of the restrictions on the enforcement of *ipso facto* clauses is a good complement to the existing SOPA regime. The issues highlighted by the ILRC above are especially pertinent in the construction industry where the various parties such as the banks, employer, main contractor and sub-contractors are interwoven by back-to-back contracts. The failure of any link in the chain could have a cascading effect on the financial viability of the other parties.

7.24 Where the debtor company is the employer, the restriction on the enforcement of *ipso facto* clauses stabilises the debtor company's financial affairs, and reduces the risks of non-payment, as the financial institutions are precluded from terminating the financing arrangements. Nevertheless, should the employer fail to make payment for work done, the contractor may choose to bring a claim under the SOPA regime, and has the right to terminate the contract due to the non-payment.

105 Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017.

106 *Singapore Parliamentary Debates, Official Report* (1 October 2018) vol 94 <*https://sprs.parl.gov.sg/search/fullreport?sittingdate=1-10-2018*> (accessed 5 March 2020) (Mr Edwin Tong, Senior Minister of State for Law).

7.25 For example, when Hyflux Ltd filed for a moratorium to support its restructuring process, its creditors and contractual counterparties exercised their contractual rights to accelerate repayment. This exacerbated the weakening of the financial position of the company and restricted Hyflux's cashflow.[107] In addition, the triggering of *ipso facto* clauses may force Hyflux to sell its majority stake in the TuasOne WTE Project to its co-investor at a discount below fair market value, thereby reducing the assets available to its creditors.[108]

7.26 On the other hand, if the debtor company is the contractor, the restriction on the enforcement of *ipso facto* clauses prevents the employer and sub-contractor from terminating the contracts. This gives the debtor company the chance to perform its contractual obligations, and if the employer fails to make payment for work done, the SOPA regime provides a fast and low-cost adjudication to resolve payment disputes so as to keep the debtor company alive.

B. JUDICIAL MANAGEMENT

7.27 Section 440 IRDA will equally apply in the judicial management regime.[109] As the purpose of the judicial management regime is to rehabilitate the debtor, preserve all or part of its business as a going concern, or effect a more advantageous realisation of the company's assets than a winding up,[110] the Committee similarly welcomes the introduction of the restriction on enforcement of *ipso facto* clauses.

C. WINDING UP

7.28 Unlike SOAs and judicial management, the debtor is already in a terminal stage when it is wound up pursuant to a voluntary winding up process or a court order. As such, the preservation of existing contracts is not a priority and section 440 IRDA will not apply.

7.29 Having said that, it is only appropriate that the restriction on enforcement of *ipso facto* clauses should be lifted if there is a transition from a prior restructuring regime (i.e. SOA or judicial management) to liquidation. In other words, if the debtor fails to implement the scheme or

107 *Singapore Parliamentary Debates, Official Report* (1 October 2018) vol 94 <*https://sprs.parl.gov.sg/search/fullreport?sittingdate=1-10-2018*> (accessed 5 March 2020) (Mr Edwin Tong, Senior Minister of State for Law).

108 See the 8th affidavit of Lum Ooi Lin filed in HC/SUM 2122/2019 of HC/OS 633/2018 on 30 April 2019 at [122-130] <*https://www.hyflux.com/wp-content/uploads/2019/08/20190430-8th-Affidavit-of-Lum-Ooi-Lin.pdf*> (accessed 8 April 2020; archived at <*https://web.*archive.org/web/20200408102656/https://www.hyflux.com/wp-content/uploads/2019/08/*20190430-8th-Affidavit-of-Lum-Ooi-Lin.pdf*>).

109 Section 440(6) IRDA.

110 Section 227A CA.

the judicial management order lapses without a feasible restructuring plan, the contractual counterparties should be allowed to rely on the debtor's financial position before and/or during the period of the stay to enforce the rights under the contract.

CHAPTER VIII

CONCLUSIONS

8.1 In conclusion, the Committee has analysed the different issues arising where construction claims brought under statutory adjudication and insolvency meet. The Committee has considered that, by and large, the interests at play in the insolvency and/or restructuring of a party continue to hold very significant weight and the significance of these interests have underpinned the Committee's recommendations and limited proposals for reform.

8.2 Ultimately, the Committee finds that the legislative intent behind the introduction of statutory adjudication in the SOPA regime cannot be departed from – that is, that Claimants would have in their repertoire of legal options for non-payment, the option of commencing statutory adjudication against a Respondent. However, the entitlement of Claimants to exercise this option was not unfettered. In this regard, the Committee considers that there are legitimate reasons to ensure that the temporary finality accorded to ADs does not inadvertently become finally determinative on parties without due process.

8.3 Hence it is hoped that although the Committee has recommended limited reforms following its review of the issues, those reforms will be considered seriously as a means to balance the interests between all stakeholders in the construction industry.

8.4 Additionally, the Committee recommends a further review into the issue of whether a Claimant in liquidation remains entitled to commence statutory adjudication proceedings and whether principals should be entitled to make direct payments when a Respondent is undergoing SOA or judicial management proceedings. The Committee recognises that there are many nuanced and contrasting considerations at play in relation to this issue and a detailed review of those considerations should be undertaken.

ANNEX A

BUILDING AND CONSTRUCTION INDUSTRY SECURITY OF PAYMENT (AMENDMENT) BILL

== DRAFT FOR REVIEW ==

A BILL

i n t i t u l e d

An Act to amend the Building and Construction Industry Security of Payment Act (Chapter 30B of the 2006 Revised Edition).

Be it enacted by the President with the advice and consent of the Parliament of Singapore, as follows:

Short title and commencement

1. This Act is the Building and Construction Industry Security of Payment (Amendment) Act [•] and comes into operation on a date that the Minister appoints by notification in the *Gazette*.

New Section 34A

2. The principal Act is amended by inserting, immediately after section 34, the following section:

> ***"No Payment to Claimant under Certain Circumstances***
>
> ***34A.*** *–(1) Notwithstanding section 22 the respondent shall be entitled to pay the adjudicated amount to the authorised nominating body within 7 days after the adjudicator's determination or the adjudication review determination is served on the respondent, if at any time prior to the determination of an adjudication application or an adjudication review application, as the case may be, a moratorium or stay of proceedings or further proceedings in any action or proceeding against the claimant has been imposed pursuant to sections 210(10), 211B, 211C, 227A, 258, 262(3) or 299 of the Companies Act.*[111]

111 Once the IRDA comes into effect, the relevant provisions will be section 210(10) CA, sections 64, 65, 90, 129 and 170 IRDA.

(2) The Court may, on the application of any party claiming an interest or entitlement to the adjudicated amount, direct payment of the adjudicated amount made pursuant to subsection (1) above to any party if:

(a) The respondent has not commenced an action to finally determine the claimant's entitlement to the adjudicated amount within 14 days of the occurrence of one of the following events:

i. The moratorium or stay of proceedings or further proceedings entitling the respondent to pay the adjudicated amount to the authorised nominating body under subsection (1) above is lifted or terminated as against any proceedings between the claimant and the respondent, or otherwise expires; or

ii. Leave of Court is granted by the respondent to commence proceedings against the claimant;

(b) The claimant's entitlement to the adjudicated amount is finally determined;

(c) The payment dispute between the claimant and the respondent is finally settled; or

(d) The Court is satisfied that it is in the interests of justice for the adjudicated amount to be paid out by the authorised nominating body to any party claiming an interest in or entitlement to the adjudicated amount."

ANNEX B

FEEDBACK FROM THE INSOLVENCY PRACTITIONERS' ASSOCIATION OF SINGAPORE

1. We agree with the SOPA-Insolvency Law Reform Subcommittee's ("**Committee**") recommendations set out in Chapter II of the draft report dated July 2019, save for the recommendation at paragraph 41 relating to direct payments in insolvency.

2. The Committee's recommendation at paragraph 41 is that:

> "*With regard to permitting a Principal to make direct payments to a Claimant on behalf of a Respondent when the Respondent is insolvent, the Committee recommends that such direct payments continue to be prohibited and that Principals should not be protected from double jeopardy if such payments are made.*"

3. Our view is that a Principal should be expressly allowed to make direct payments (in reliance of the mechanism under Section 24 of the SOPA) to a Claimant on behalf of a Respondent, if the Respondent is undergoing judicial management or scheme of arrangement proceedings (even if the Respondent is insolvent), but not if the Respondent is in winding up. Allowing direct payments when a Respondent is in judicial management and scheme of arrangement proceedings will boost a Respondent's prospects of a successful rehabilitation. From a broader view, this benefits the construction industry it will help to mitigate the systemic risk of domino insolvencies.

Position under Singapore law

4. As a preliminary point, we disagree with the Committee's analysis that the law (as it stands now) prohibits a Principal from making direct payments when a Respondent is insolvent. Direct payments are prohibited after a Respondent is put into winding up, and not merely upon the insolvency of the Respondent.

5. The case of *Joo Yee Construction Pte Ltd v Diethelm Industries Pte Ltd* [1990] SLR 278 ("*Joo Yee*"), discussed at paragraph 344 and 345 of the draft report, did not suggest that direct payments were prohibited once a company entered insolvency. It is only upon the winding up of the insolvent company that direct payments were prohibited, as such payments contravene the *pari passu* principle (see [18]):

> 399. ***Upon liquidation of an insolvent company (whether voluntary or compulsory)**, subject to the rights of preferential creditors and also secured creditors, if any, its property must be applied in settlement of its liabilities pari passu, and any contract made by the company which provides for a distribution of any of its property for the benefit of one or more of its unsecured creditors which runs counter to or seeks to vary this rule, ie any "contracting out", is contrary to public policy, and the law as regards distribution of the insolvent's property under the insolvency legislation must prevail. Accordingly, the liquidator of an insolvent company is entitled to disregard – indeed it is obligatory on him to disregard – such a contract.*
>
> 400. …

> 401. *Now, these sums are owed by the plaintiff to the three defendants respectively: they are liabilities of the plaintiff. Therefore, if the Government elects to make payment of these sums to the three defendants under the first limb of cl 20(e) and in consequence deducts these amounts from moneys due or payable to the plaintiff, it is in effect distributing to the three unsecured creditors of the plaintiff sums of money which would otherwise be paid to the plaintiff and form part of the general assets of the plaintiff available for distribution among all its creditors pari passu. On this analysis, clearly the operation of such a contractual provision* ***in the liquidation of the plaintiff*** *would infringe the insolvency law providing for distribution of the insolvent's property pari passu among its creditors; the operation of that clause would amount to a "contracting out" of the provisions of such insolvency law. …*

6. When a company is insolvent, but not yet in winding up, the interests of the creditors are safeguarded by, *inter alia*, the statutory rules governing unfair preference and undervalue transactions (see section 329 of the Companies Act (Cap. 50) read with sections 98 and 99 of the Bankruptcy Act (Cap. 20)).

7. Furthermore, the Singapore courts have expressly held that the *pari passu* principle does not apply when a company is in judicial management or scheme of arrangement proceedings.

8. In *Hitachi Plant Engineering & Construction Co Ltd and another v Eltraco International Pte Ltd and another appeal* [2003] 4 SLR(R) 384, the Court of Appeal held that the *pari passu* principle did not apply in a scheme of arrangement (at [86]):

> ***It seems to us that whether the pari passu principle should apply outside liquidation really depends on whether the creditors to be affected by a proposed scheme of arrangement require the additional protection of this principle. Our view is that they do not.*** *The statutory regime already sufficiently safeguards the interests of such creditors. Under s 210(3) of the Companies Act for a scheme of arrangement simpliciter and s 210(3) read with s 227X(a) of the Companies Act for a scheme of arrangement in a judicial management, the scheme will not become binding unless the court approves it. This means that every creditor is entitled to challenge the scheme before the courts and to point out why it should not be sanctioned. Such objections can be based on the failure of the scheme to embody the pari passu principle or be made for other reasons. Where the objection is that the scheme does not provide for pari passu distribution, the court will be able to decide whether in the particular circumstances, this objection is an insuperable barrier to implementation of the scheme. The statutory regime therefore enables each case to be considered on its own particular facts and this is a far better approach than the rigid application of the pari passu rule would be.*

9. In a similar vein, in *Re Wan Soon Construction Pte Ltd* [2005] 3 SLR(R) 375, the High Court held (at [24] to [25]) that the *pari passu* principle did not apply in the context of judicial management:

> 24 *It is clear that the pari passu principle applies with regard to unsecured creditors in the context of a winding up.*
>
> …
>
> 25 *However,* ***I was not persuaded that the principle ought to apply in the context of judicial management as well****. Indeed, what authority there appeared to be seemed to point in the opposite direction: see, in particular,*

> *the Singapore Court of Appeal decision of Hitachi Plant Engineering & Construction Co Ltd v Eltraco International Pte Ltd [2003] 4 SLR(R) 384 ("Hitachi Plant Engineering") (reference may also be made to In re Atlantic Computer Systems Plc at 527–528).*

10. The reason for drawing a distinction between winding up, on the one hand, and judicial management and schemes of arrangement, on the other, is that the latter are corporate rescue mechanisms. Such rescue mechanisms may need to discriminate amongst creditors in order to be effective, as explained by the Court of Appeal in *Hitachi Engineering* (at [81]):

> 81 *Further, one has to remember that a scheme of arrangement is a corporate rescue mechanism. As with other corporate rescue mechanisms, such as judicial management, it seeks to rehabilitate the company and achieve a better realisation of assets than possible on liquidation: see, generally, Walter Woon, Company Law (2nd Ed, 1997) at p 627 and Chapter 17. Such a rescue mechanism may need, in order to be effective, to discriminate amongst creditors for example by repaying bigger creditors proportionately less than small creditors are repaid. Dictating that the assets should be distributed in a pari passu manner would not only decrease the flexibility now available to planners of schemes but it may also put a dampener on what the scheme of arrangement could achieve and sound the death knell of the company prematurely.*

11. More fundamentally, there is nothing in the SOPA which prohibits direct payments pursuant to section 24 once the Respondent is insolvent. To interpret section 24 as having an implied requirement that the Respondent is solvent would severely jeopardise the interests of a Principal seeking to rely on that provision. The Principal will often not have precise knowledge of the Respondent's financial situation and whether the Respondent is in fact insolvent or not. If the Principal makes direct payments to a Claimant and subsequently discovers that the Respondent was insolvent at the time, the Principal would be in a highly disadvantageous position since it cannot rely on section 24(4) of the SOPA to either reduce its debt against the Respondent or recover the direct payment from the Respondent.

12. In any event, regardless of the current state of the law, our recommendation as discussed below is that the Principal <u>should</u> be expressly allowed to make direct payments (in reliance of the mechanism under Section 24 of the SOPA) to a Claimant on behalf of a Respondent if the Respondent is undergoing judicial management or scheme of arrangement proceedings.

Direct payments should be permitted when a Respondent is in judicial management or scheme of arrangement proceedings

13. There are strong policy reasons in favour of allowing direct payments when a Respondent is undergoing judicial management or scheme of arrangement proceedings.

14. The Principal, Respondent and Claimant all stand to benefit in a direct payment arrangement. The Claimant sub-contractor receives payment for its work, the Respondent alleviates its cash flow problems, and the Principal avoids sub-contractors terminating their contracts or suspending works. When a Respondent is in financial difficulties and unable to pay its sub-contractors in a timely manner, direct payments are particularly crucial as they help ensure the continuity of the Respondent's operations. The general body of creditors also benefit since the

Respondent can minimise damages arising from potential delays or stoppages of work, and continue generating revenue from its projects.

15. From a commercial perspective, there is a much stronger incentive for a Principal to make a direct payment to a sub-contractor, as opposed to paying the insolvent Respondent. By making a direct payment, the Principal can ensure that the payments are channelled specifically to sub-contractors working on its projects, thereby ensuring the progress of its project. If Principals are prohibited from making direct payments, they may not see any commercial benefit in continuing to pay the Respondent if there is no certainty that the Respondent will use these funds to continue the Principal's project.

16. If direct payments are prohibited when a Respondent is in judicial management or scheme proceedings, there is a heightened risk that the Respondent's sub-contractors will stop work on the Respondent's projects. This is detrimental to all parties involved, especially the Respondent's creditors, since the Respondent would lose the revenue that it could have generated from the project and would incur liquidated damages from any delays or stoppages. Contrary to what is suggested in footnote 70 of the draft report, the restrictions on *ipso facto* clauses under section 440 of the IRDA are unlikely to alleviate these problems for a Respondent, as a sub-contractor is free to terminate a contract if the Respondent fails to pay the sub-contractor under their contract.

Safeguards for creditors

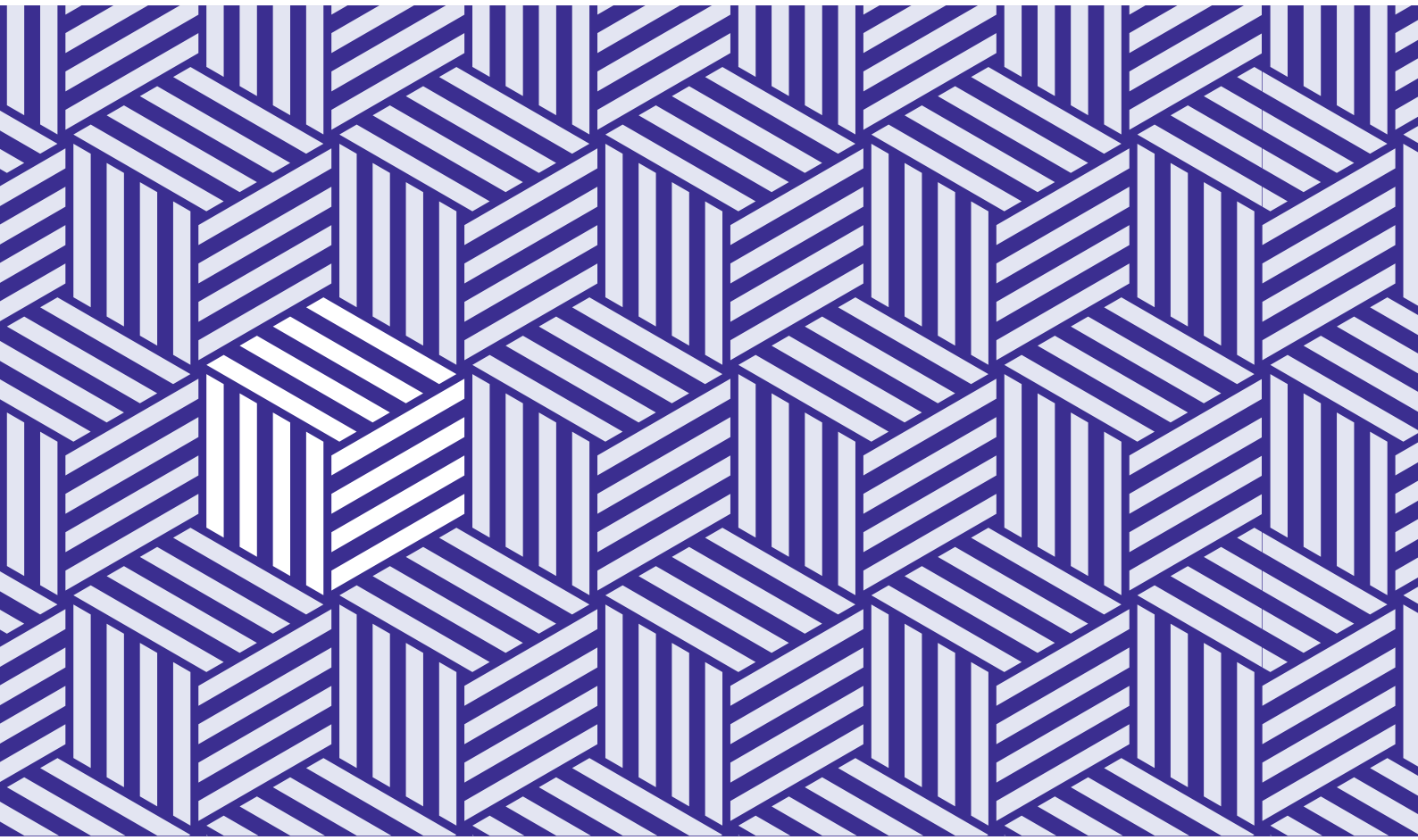
17. If there is a concern that allowing direct payments when a Respondent is in judicial management or scheme proceedings might prejudice the interests of the general body of the creditors, the Committee should consider adding safeguards to the direct payment regime under section 24 of the SOPA rather than imposing an absolute prohibition.

18. There are existing safeguards under the judicial management and scheme of arrangement regimes which should be noted. Judicial management and scheme proceedings are court-supervised processes in which the judicial manager and debtor-in-possession respectively are under the scrutiny of the courts. If the direct payment regime is being abused to the detriment of creditors (for example, if the Respondent and Principal collude to make payments to Claimants which are related to the Respondent or the Respondent's controllers), it is open to creditors to apply to the court to discharge the judicial management or scheme moratorium orders (as the case may be).

19. One safeguard the Committee may consider introducing is a requirement that the Respondent file periodic reports with the Court listing the direct payments made by any Principal to a Claimant in the course of the judicial management or scheme moratorium. Creditors can then make their own assessment as to whether their interests are being adversely affected by the direct payments.

Conclusion

20. Please feel free to let us know if you have any questions or if you wish to discuss the matters above.



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