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Arbitration and insolvency disputes: A question of arbitrability

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Acknowledgement

Until recently it was commonly accepted that insolvency disputes fell outside the scope of arbitration. However, recent authorities suggest a more liberal approach to arbitration, albeit one where the boundary between those disputes that are or are not arbitrable, is somewhat blurred. A number of authorities suggest the line is determined by reference to whether a dispute involves “core” or “pure” insolvency issues, although the question may be asked what exactly the terms “core” or “pure” mean in this context? The purpose of this report is to consider these issues in order to distinguish those insolvency related disputes that are arbitrable from those that are not.

In doing so, this report considers issues such as the concept of “arbitrability” and the methodology employed in determining whether or not a dispute is arbitrable; public policy considerations relevant to the question of arbitrability; the identification of changes in perception of public policy considerations in New Zealand; the manner in which courts in various jurisdictions have determined whether particular insolvency disputes are capable of being determined by arbitration; a discussion of the different types of insolvency disputes in order to evaluate whether each should properly be characterised as arbitrable or not; a case study to assess whether the existence or otherwise of a debt can be resolved by arbitration; and, finally, a summary to draw together the principles that can be extracted from the authorities to which the authors refer.

INSOL International sincerely thanks the Hon Paul Heath QC and Dr Anna Kirk for this thought-provoking and interesting Special Report on arbitration and insolvency.

July 2020

Arbitration and insolvency disputes: A question of arbitrability[*]

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1. The issues

In the not so distant past, it was commonly accepted that insolvency disputes fell outside the scope of arbitration. Recent authority suggests a more liberal approach, albeit one where the boundary between those disputes that are or are not arbitrable is somewhat blurred. A number of authorities suggest the line is determined by reference to whether a dispute involves "core" or "pure" insolvency issues.[1] But, what exactly do the terms "core" or "pure" mean in this context? The purpose of this report is to consider these issues so as to distinguish those insolvency related disputes that are arbitrable from those that are not.

There is a tension between the public policy goals that drive the dispute resolution process of arbitration (on the one hand) and those that drive the resolution of contested insolvency proceedings (on the other), over which a national court will usually have a supervisory jurisdiction. The nature of the conflict was explained by the Court of Appeal of Singapore in *Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)*[2] (Larsen Oil). Delivering the judgment of the Court, Rajah JA said:

> "1. Arbitration and insolvency processes embody, to an extent, contrasting legal policies. On the one hand, arbitration embodies the principles of party autonomy and the decentralisation of private dispute resolution. On the other hand, the insolvency process is a collective statutory proceeding that involves the public centralisation of disputes so as to achieve economic

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[*] The views expressed in this Special Report are those of the authors and do not necessarily represent the views of INSOL International or any of its affiliates.

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[1] V Lazic, *Insolvency Proceedings and Commercial Arbitration* (Kluwer Law International, The Hague-London-Boston, 1998) at 263, para 3.2.2.2. In a recent article, Professor Stephan Madaus separated the concepts of "core" and "pure" insolvency disputes into those which an insolvency representative could settle and were arbitrable ("core") and those arising from insolvency legislation that could only be addressed by a court ("pure"): see S Madaus, "The (Underdeveloped) Use of Arbitration in International Insolvency Proceedings" *J Int Arbitr* (2020) 37(4) 449 at 458. In referring to a division between "core" and "non-core" bankruptcy functions, Madaus cited *Re US Lines Inc v American Steamship Owners Mutual Protection & Indemnity Association Inc* 197 F 3d 631, 640 (2nd Cir 1999).

[2] *Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21.

> efficiency and optimal returns for creditors. The appeal before us raised an interesting and novel point of law relating to the interfacing of these two policies where private proceedings could have wider public consequences. To what extent ought claims involving an insolvent company be permitted to be resolved through the arbitral process? . . .”

Because the question of arbitrability will be determined in the context of the law governing the arbitration itself, we use New Zealand law as our touchstone. In considering what insolvency-related disputes are capable of being determined by arbitration, we analyse the issues under the following headings:

(a) First, we consider the concept of “arbitrability”, both from an international and domestic perspective. In doing so, we discuss the methodology employed in many common law jurisdictions to determine whether or not a dispute is arbitrable.

(b) Second, we discuss public policy considerations relevant to the question of arbitrability.

(c) Third, we identify changes in perception of public policy considerations in New Zealand, having regard to legislation enacted over the last 30 years. These changes have both reduced the involvement of the courts in insolvency proceedings and encouraged the use of arbitration to resolve commercial disputes.

(d) Fourth, we consider the way in which courts in various jurisdictions have determined whether particular insolvency disputes are capable of being determined by arbitration.

(e) Fifth, we discuss different types of insolvency disputes to evaluate whether each should properly be characterised as arbitrable or not.

(f) Sixth, we undertake a case study, dealing with the question of arbitrability in the context of the proof of claim procedure used in liquidation proceedings in New Zealand (and many other common law countries), to assess whether the existence or otherwise of the debt can be resolved by arbitration.

(g) Seventh, we endeavour to draw together the principles to be extracted from the authorities to which we refer.

We have not specifically addressed the question of arbitration in the context of cross-border disputes, to which the UNCITRAL Model Law on Cross-Border Insolvency, in the various guises in which it has been enacted, applies. Nevertheless, our analysis is relevant to such disputes because the question of governing law will need to be determined in each case, and application of that law will inform whether a particular cross border dispute is arbitrable. For a recent and important contribution to this topic from an international perspective, we refer readers to Madaus’ article, “The (Underdeveloped) Use of Arbitration in International Insolvency Proceedings”.[3]

[3] S Madaus “The (Underdeveloped) Use of Arbitration in International Insolvency Proceedings”, *J Int Arbitr* (2020) 37(4) 449.

2. Glossary

We set out and define the generic terms we shall use in discussing the way in which arbitration may be used to meet the needs of various insolvency systems.

We use the term "insolvency process" to mean "a collective judicial or administrative proceeding relating to the bankruptcy, liquidation, receivership, judicial management, statutory management, or voluntary administration of a debtor, or the reorganisation of the debtor's affairs, under which the assets and affairs of the debtor are administered, or the assets of the debtor are or will be realised, for the benefit of secured or unsecured creditors".[4]

We use the term "insolvency representative" to identify a person appointed to administer any of the insolvency processes to which we have referred. That is a shorthand expression, intended to include a person appointed on an interim or final basis, who is authorised (among other things) to administer the reorganisation or liquidation of the debtor's assets or affairs.[5]

We use the term "liquidation" in the sense in which it is used in New Zealand.[6] Liquidation is a collective insolvency regime designed to realise the assets of a company that cannot pay its debts as they fall due and to distribute the proceeds of sale among its creditors, on a *pari passu* basis and in accordance with statutory priorities.[7] The most common ways in which a company may be put into liquidation in New Zealand are by special resolution of its shareholders, a resolution of its board of directors (on the occurrence of a particular event specified in the company's constitution), or by order of the High Court.[8] An order putting a company into liquidation is synonymous with the term "winding up order" in many other common law jurisdictions.

Some of the jurisdictions to which we refer draw a distinction between a proceeding in which liquidation is sought by a shareholder on the "just and equitable" ground and those in which liquidation may be sought as one of a suite of remedies available to a minority shareholder who alleges unfairly prejudicial or oppressive conduct on the part of the majority shareholder.[9] We refer to the former as "just and equitable" proceedings and to the latter as "minority oppression" proceedings.

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4 This definition is the same as that given to the term "New Zealand insolvency proceeding" in the Insolvency (Cross-border) Act 2006, Sch 1, art 2(i). It is adapted from the UNCITRAL Model Law on Cross-Border Insolvency (1997).

5 This definition is an adaptation of the meaning given to the term "foreign representative," in the Insolvency (Cross-border) Act 2006, Sch 1, art 2(h), which identifies the insolvency representatives by the name used in each of the statutes under which the particular regime is commenced.

6 Companies Act 1993, Part 16. To provide context we shall, on occasion, refer also to the voluntary administration regime which is used as a corporate rehabilitation process: see Companies Act 1993, Pt 15A.

7 *Idem*, Sch 7.

8 *Idem*, s 241(2)(a) to (c).

9 In particular, we refer to the Cayman Islands (*Familymart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation*, Court of Appeal of the Cayman Islands, CICA Civil Appeal Nos 7 and 8 of 2019, 23 April 2020) and Singapore (*Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57 (CA)).

3. Arbitrability

3.1 The concept

"Arbitrability" refers to whether a dispute is capable of resolution by arbitration. It has two component parts: (i) whether a particular type of dispute may be referred to arbitration; and (ii) whether a dispute falls within the scope of an arbitration agreement. Although the second is something that will need to be addressed in all cases where arbitrability (or jurisdiction) is in issue, it is the first with which we are primarily concerned.

Whether a particular type of dispute is considered arbitrable is a matter of policy for each State and, even among States with similar legal traditions, trends in arbitrability vary. The doctrine of arbitrability rests on the premise that parties should be free to choose to resolve disputes between them by arbitration if they so wish, while recognising that it may be inappropriate to resolve certain issues, including those involving public rights, collective rights, or the exercise of governmental authority, by private arbitration. Arbitrability will be determined by reference to the law governing the arbitration.

Application of the doctrine of arbitrability is complex. While arbitration has its origins in contractual (commercial) disputes, it is not limited to that sphere. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention)[10] affirms the rights of parties to arbitrate disputes "whether contractual or not".[11]

It has long been accepted that claims in tort and equity may be arbitrated. Nowadays, the pool of claims considered arbitrable in many States has further expanded to include, for example, disputes relating to competition law, intellectual property, corruption, fraud, corporate governance issues and trusts.[12] Traditionally, these topics were not considered to be arbitrable in many jurisdictions, as they were seen to incorporate public rights and / or third-party interests.

It is now evident that the "outer limits" of arbitrability are far less clear. One eminent text went so far as to suggest that it "would be wrong … to draw … any general rule that criminal, admiralty, family or company matters cannot be referred to arbitration".[13] This expansion of the availability of arbitration reflects the modern approach to arbitrability. Courts have moved away from broad exclusions towards a more nuanced approach where arbitrability is assessed by reference to the specific dispute at hand.[14]

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10 Set out as Sch 3 to the Arbitration Act 1996.

11 New York Convention, art I(3).

12 For example, in New Zealand certain disputes between trustees and beneficiaries are now capable of arbitration under the Trusts Act 2019, with appropriate court-based protections provided for beneficiaries who are not of full age or are otherwise incompetent to make their own decisions. See also the discussion under para 4 below.

13 M J Mustill and S C Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd ed, Butterworths, 1999) at 149–150, cited by the Court of Appeal of Singapore in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 (SGCA) at para 71.

14 For example, the US bankruptcy courts had previously considered all disputes before them non-arbitrable, but they now approach arbitrability by examining the dispute before them to determine whether "core" insolvency issues are at play (see N Blackaby *et al*, *Redfern and Hunter on International Arbitration* (6th ed, OUP) at 117); see also M Conaglen "The Enforceability of Arbitration Clauses in Trusts" 74(3) *Cambridge Law Journal* 450 at 452.

Few (if any) arbitration statutes provide a list of arbitrable or non-arbitrable disputes. Section 10 of the Arbitration Act 1996 (New Zealand) defines those disputes which may be resolved by arbitration as follows:

> "**10 Arbitrability of disputes**
>
> (1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration *unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration*.
>
> (2) The fact that an enactment confers jurisdiction in respect of any matter on the High Court or the District Court but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration." (Emphasis added)

The authors of the leading New Zealand text, *Williams & Kawharu on Arbitration*, characterise section 10 as "a public policy limitation on party autonomy."[15] While there are a few New Zealand statutes that expressly limit arbitration,[16] there are no provisions in any relevant insolvency law in force in New Zealand that expressly exclude any particular type of dispute from being arbitrated.

3.2 Approach to determining arbitrability in insolvency disputes

In *Tomolugen Holdings Ltd v Silica Investments Ltd (Tomolugen),*[17] (a minority oppression case) the Court of Appeal of Singapore considered two ways in which it could approach the question of whether any given dispute fell within the scope of an arbitration clause; namely, at a high level of abstraction or on a more granular basis. Delivering the judgment of the Court of Appeal, Menon, CJ said:[18]

> "111. … A cogent argument can be made that the parties could not have intended that a dispute over the management of a company with many shareholders, each of whom might potentially be affected, should fall within the ambit of an arbitration clause contained in a share sale agreement between just two shareholders. On the other hand, if a more granular approach is adopted, there is a compelling case that at least some of the four allegations made by Silica Investors in the Suit fall within the scope of the arbitration clause in the Share Sale Agreement. …"

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15 D A R Williams and A Kahwaru, *Williams & Kawharu on Arbitration* (2nd ed, LexisNexis, 2017) at para 7.2.1. Some caution is required if it is anticipated that enforcement will take place in another jurisdiction. Article V(1)(a) of the New York Convention enables a court in a country in which recognition and enforcement of an award is sought to refuse to grant those remedies where the arbitration "agreement is not valid under the law to which the parties have subjected it".

16 For example, Arbitration Act 1996, s 11 (consumer arbitration agreements) and Employment Relations Act 2000, s 155 (employment disputes, to the extent that the provisions of the Arbitration Act 1996 do not apply; s 155(2)(a)).

17 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 (SGCA).

18 *Idem*, at para 111.

The nature of the approach taken will have a bearing on the way in which a national court decides whether to grant a stay of court proceedings, pending arbitration. In each case, the starting point is the language of the particular arbitration statute in issue. Although Singapore has adopted the UNCITRAL Model Law on Commercial Arbitration (the Arbitration Model Law), section 6 of its International Arbitration Act addresses the question whether a stay of court proceedings should be granted by reference to a slightly different, more nuanced, test. Unlike article 8(1) of the Arbitration Model Law where a stay must be granted unless the court were to find that the "arbitration agreement is null and void, inoperative or incapable of being performed," section 6 of the International Arbitration Act allows the court to stay proceedings so far as they relate to a particular "matter" which is subject to the agreement, even though other "matters" may be excluded. This promotes a more granular approach to the question of whether a stay should be ordered.

Contrary to the first instance Judge's view in *Tomolugen,* the Court of Appeal considered that section 6(2) of the International Arbitration Act militated against taking an excessively broad view of what constitutes a "matter", or treating it as a synonym for the court proceedings as a whole. The Court focussed on the requirement of section 6(2) for the court to stay court proceedings "so far as [they] relate to [the] matter", as opposed to the language of article 8 of the Arbitration Model Law which speaks solely of "an action … brought in a matter which is the subject of an arbitration agreement". Menon, CJ stated:[19]

> 113. … In our judgment, when the court considers whether any "matter" is covered by an arbitration clause, it should undertake a practical and common-sense inquiry in relation to any reasonably substantial issue that is not merely peripherally or tangentially connected to the dispute in the court proceedings. The court should not characterise the matter(s) in either an overly broad or an unduly narrow and pedantic manner. In most cases, the matter would encompass the claims made in the proceedings. But, that is not an absolute or inflexible rule.

We suggest that, whatever may be the position with regard to any conflict that might exist between the provisions set out in article 8 of the Arbitration Model Law and section 6 of the (Singapore) International Arbitration Act, the methodology to be employed should be the same. The first step is to establish whether the matters in issue fall within the scope of the particular arbitration clause on which an applicant for a stay seeks to rely. That will, generally, be determined by reference to the underlying controversy between the parties; in other words, was it one that they "as rational business [people] were likely to have intended as arising out of the relationship into which they had entered and to be determined by the same tribunal"?[20] Once that has been decided, the next question will be whether, as a matter of domestic law governing the arbitration, any court proceeding should be stayed to enable the dispute to be resolved in the parties' forum of choice. That inquiry will include an assessment of whether

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19 *Idem*, at para 113. Three reasons were stated for taking this view: see paras 114 to 122.

20 *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2008] 1 Lloyd's Rep 254 (HL) at para 13, per Lord Hoffmann, cited with approval in both *Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21 (at para 13) and *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 (SGCA) (at para 124).

the arbitration agreement is "null and void, inoperative or incapable of being performed" on grounds of non-arbitrability.[21]

4. Public policy and arbitrability

For the purposes of section 10 of the Arbitration Act 1996 (New Zealand),[22] public policy is the touchstone of arbitrability. It is relevant to arbitration in two distinct ways: (i) public policy may render a dispute non-arbitrable, or (ii) it may act as a fetter on the enforceability of an award.

On applications to the High Court of New Zealand (the High Court) to set aside or to refuse enforcement of an award, the concept of "public policy" is interpreted narrowly. In *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd*,[23] the Court of Appeal of New Zealand (the Court of Appeal) held that the court's role was limited to considering whether a complaint against an award raised a "fundamental principle of law and justice", adding that an award would not be enforced if its recognition would damage the integrity of the domestic court system. This approach was applied by a Full Court of the High Court, in *Downer-Hill Joint Venture v Government of Fiji*.[24] As both *Amaltal* and *Downer-Hill* suggest, for the public policy exception to enforcement to apply, there must be some element of illegality, or enforcement of the award must involve clear injury to the public good or abuse of the integrity of the court's processes and powers.

While the dual concepts of "public policy" in respect of arbitrability (on the one hand) and enforcement of awards (on the other) are not perfectly aligned, they are each of relevance in determining whether any particular type of insolvency dispute can be resolved by arbitration. In our view, limitations on arbitrability as a result of public policy should be interpreted narrowly, just as they are at the enforcement stage. This is consistent with the general trend to broaden the scope of disputes considered arbitrable.[25]

A dispute does not become non-arbitrable simply because it has a public interest element or arises from statutory rights. Disputes in many areas of law have a considerable public interest element, but are nonetheless recognised as arbitrable. These include disputes involving competition law, intellectual property and allegations of bribery, corruption and fraud. Statutory rights are also capable of being the subject of arbitral claims, for example claims under the Fair Trading Act 1986 (New Zealand).[26] In any given case, an assessment must be made as to whether a specific public interest consideration arises that outweighs other public policy factors which favour arbitration.

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21 Those words are taken from art 8(1) of the Arbitration Model Law which has been adopted in New Zealand: Arbitration Act 1996, Sch 1, art 8.
22 See para 03.1 above.
23 *Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614 (CA).
24 *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554 (CA).
25 See para 3.1 above.
26 See *Danone Asia Pacific Holdings Limited et al v Fonterra Co-operative Group Limited* [2014] NZHC 1681, at paras 78 to 80.

5. Public policy: Arbitration and insolvency

5.1 Changes in perception

Over the last 30 years or so, there have been changes to both arbitration and company law in New Zealand which have had the effect of increasing the use of arbitration in commercial disputes and lessening the role of the court in both arbitration and insolvency proceedings. We consider that these changes have had an impact on the potential availability of arbitration as a means of resolving insolvency-related disputes.

Recognising that public policy considerations may be viewed differently in States in which courts play a greater role in supervising an insolvency process, we illustrate the relevance of particular public policy factors in the context of the New Zealand legislation. To do so, we use the New Zealand liquidation procedure as an example of a relevant insolvency process.

5.2 Arbitration

A significant change in attitude and approach to arbitration in New Zealand was signalled when the Arbitration Act 1996 (the Act) was passed. The new Act had been recommended by the Law Commission in a report issued in 1991.[27] The 1996 Act is based on the Arbitration Model Law, which had been promulgated in June 1985 by the United Nations Commission on International Trade Law.

In a statement of purposes, set out in section 5 of the Act, the use of arbitration as an agreed method of resolving commercial and other disputes was expressly encouraged, as was the need to promote consistency between international and domestic arbitral regimes operating in New Zealand.[28] The Act reflects a pro-arbitration policy. Since the statute was enacted, Parliament has expressly extended the ability to arbitrate disputes to those involving trusts, an area that had not previously been regarded, for public policy reasons, as arbitrable.[29] This is a reflection of the New Zealand Parliament's desire for the courts to take a less paternalistic approach to the resolution of disputes by arbitration.[30]

To emphasise Parliament's approval of a more expansive approach to the use of arbitration, the Act refines and clarifies the limits of judicial review of the arbitral process and arbitral awards in a manner consistent with the Arbitration Model Law.[31] The powers of the courts were reduced, with a concomitant increase in power conferred on an arbitral tribunal.

Four underlying principles can be distilled from the specific provisions of the Act (particularly, section 5) and Schedule 1, which incorporates the Arbitration Model Law provisions concerning: (i) party autonomy; (ii) equality of treatment; (iii) reduced involvement of the courts; and (iv) increased powers for the arbitral tribunal.[32] Underlying these principles are protections built into the Act, whereby

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27 *Arbitration* (NZLC R 20, 1991).
28 Arbitration Act 1996, s 5(a) and (b).
29 Trusts Act 2019, ss 142 to 148. See also M Conaglen, "The Enforceability of Arbitration Clauses in Trusts", 74(3) *Cambridge Law Journal* 450 at 450.
30 See D A R Williams and A Kawharu, *Williams & Kawharu on Arbitration*, (2nd ed, LexisNexis, 2017) at paras 7.2.5 and 7.2.6.
31 Arbitration Act 1996, s 5(c) and (d).
32 *Pathak v Tourism Transport Ltd* [2002] 3 NZLR 681 (HC), at [24].

arbitrators are bound by the principles of natural justice and impartiality.[33] Similarly, arbitrators must provide each party with a full opportunity to present its case.[34]

In summary, in 1996 Parliament provided greater powers for an arbitral tribunal to resolve disputes than had been the case under the earlier Arbitration Act 1908. It also reduced the ability of the High Court to intervene in the arbitration process. A recent illustration of the primacy given to arbitration over curial proceedings is found in *Zurich Australian Insurance Ltd v Cognition Education Ltd,*[35] in which the Supreme Court of New Zealand held that court proceedings in which summary judgment had been sought should be stayed to enable the underlying dispute to be resolved by arbitration;[36] in other words, as long as there is a genuine defence raised on a plausible narrative, the court proceeding will be stayed.[37] The New Zealand courts are yet to decide whether the same approach would be taken in cases where disputes are raised in response to a statutory demand where failure to pay may result in the issue of liquidation proceedings.

5.3 Insolvency

Around the same time that the New Zealand Parliament was giving enhanced powers to arbitral tribunals, the role of the High Court in relation to liquidation proceedings was diminishing. Enactment of the Companies Act 1993 (the 1993 Act) also followed a report issued by the Law Commission, in 1989, two years before its report on arbitration.[38] When the Companies Act 1955 (the 1955 Act) was replaced by the 1993 Act, a different approach to court supervision of liquidation proceedings was taken.

Under the 1955 Act, following earlier English models, three categories of liquidation existed: (i) a members' voluntary winding up; (ii) a creditors' voluntary winding up; and (iii) a winding up by the court.[39] The 1993 Act discarded those three regimes and replaced them with a single liquidation process that could be commenced by resolution of shareholders or directors, or by court appointment.[40] The Law Commission expressly intended to reduce the role of the High Court in liquidations (based on what it termed a "major criticism … that a liquidator must refer matters to the Court frequently") and to treat all types of liquidations in the same way.[41] Instead, the High Court was given broad powers of supervision over liquidators, for the purpose of safeguarding the interests of parties who might be adversely affected by the liquidation process.[42]

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33 An award can be set aside on public policy grounds if there were a failure to comply with the rules of natural justice: Arbitration Act 1996, Sch 1, arts 34(2)(b)(ii) and (6)(b).
34 *Idem*, Sch 1, art 18.
35 *Zurich Australian Insurance Ltd v Cognition Education Ltd* [2015] 1 NZLR 383 (SC).
36 *Idem*, at paras 36, 38 and 39, adopting what was said by Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 (HL) at 355–357.
37 See generally: *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] SGCA 33 (7 April 2020); *BW Umuroa Pte Ltd v Tamarind Resources Pte Ltd* [2020] SGHC 71 (6 March 2020); *Lasmos Ltd v Southwest Pacific Bauxite (HK) Ltd* [2018] HKCFI 426 (2 March 2018); and *But Ka Chon v Interactive Brokers LLC* [2019] HKCA 873 (2 August 2019).
38 *Company Law Reform and Restatement* (NZLC R 9, 1989).
39 Generally, see *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207 (HC) at para 22.
40 *Idem*, at para 33.
41 *Company Law Reform and Restatement* (NZLC R 9, 1989), at paras 642, 644 and 645.
42 Companies Act 1993, s 284(1). See also *Re Roslea Path Ltd (in liq)* [2013] 1 NZLR 207 (HC), at para 127 and *ANZ National Bank Ltd v Sheahan and Lock* [2013] 1 NZLR 674 (HC) at paras 136 to 139.

In describing the "principal duty of a liquidator", the 1993 Act requires the insolvency representative to protect, realise and distribute assets of the company in accordance with statutory priorities, "in a reasonable and efficient manner".[43] That composite expression emphasises both the autonomy given to a liquidator to decide how best to fulfil his or her principal duty and the desirability of avoiding complex litigation by the exercise of a significant degree of commercial judgment by a liquidator.

A good illustration of the liberalisation of liquidators' powers under the 1993 Act can be found in the different approaches taken to the ability of liquidators to initiate legal proceedings, or for others to bring or continue such proceedings against the company in liquidation:

(a) Section 226 of the 1955 Act provided that "no action or proceeding shall be proceeded with or commenced against the company" in liquidation without leave of the court and on such terms as may be imposed by it. Section 240(1)(a) of the same Act empowered a liquidator, with the sanction of either the court or a Committee of Inspection, "to bring or defend any action or other legal proceeding in the name and on behalf of the company".

(b) In contrast, section 248(1)(c)(i) of the 1993 Act allows a person to "commence or continue legal proceedings against the company or in relation to its property" as long as the liquidator agrees, or the court gives permission. Under clause (a) of Schedule 6, a liquidator is authorised, without any need for sanction, to "commence, continue, discontinue, and defend legal proceedings".

The importance of these changes lies in the stay of claims that comes into force after a company has been put into liquidation.[44] The effect of the change is to allow liquidators to agree to proceedings being brought or continued against the company without court involvement, or to issue or continue proceedings in the name of the company themselves. The change exemplifies the shift in policy to provide greater autonomy to liquidators in resolving claims, to enable distributions to be made as quickly as possible.[45]

The purpose and effect of the moratorium that exists once liquidation intervenes was explained by the Court of Appeal of England and Wales, in *Cook v Mortgage Debenture Ltd.*[46] David Richards LJ, with whom Lord Dyson MR and McCombe LJ agreed, said:[47]

> "[12] In the case of liquidation and bankruptcy, the purpose of these provisions is essentially twofold. First, given that the property of the company or individual stands under the statute to be realised and distributed, subject to any existing interests, among the creditors on a *pari passu* basis, the moratorium prevents any creditor from obtaining priority and thereby undermining the *pari passu* basis of distribution. Second, given that both a liquidation and bankruptcy contain provisions for the

43 Companies Act 1993, s 253.
44 *Idem*, s 248(1)(c)(i).
45 See discussion above.
46 *Cook v Mortgage Debenture Ltd* [2016] 3 All ER 957 (CA).
47 *Idem*, at para 12. See also, in a New Zealand context, *Maxim Group Ltd v Jones Publishing Ltd* HC Auckland CIV-2008-404-8179 17 December 200, Randerson J, at paras 38 to 46.

> adjudication of claims by persons claiming to be creditors, the moratorium protects those procedures and prevents unnecessary and potentially expensive litigation. In circumstances where the potential liability of the company or bankrupt is best determined in ordinary legal proceedings, as for example is often the case with a personal injuries claim, the court will give permission for proceedings to be commenced or continued, but usually on terms that no judgment against the company or individual can be enforced against the assets of the estate."

Sections 226 and 240(1)(a) of the 1955 Act each used the terms "action or proceeding" or "action or legal proceeding" disjunctively. Both section 248(1)(c)(i) and clause (a) of Schedule 6 to the 1993 Act,[48] use the expression "legal proceedings" only. The next question is whether arbitration falls within the ambit of the term "legal proceedings".

Although there is no express reference to arbitration in any of the four provisions to which we have referred, it seems clear that an arbitration falls within the concept of "legal proceedings". Historically, the term "action" has been used to refer to a proceeding in a court. The use of the terms "legal proceeding" and "action" disjunctively in the 1955 Act suggest that (at least) any form of binding and final determination will fall within the scope of the term "legal proceeding".[49] That view finds support in the judgment of the High Court of England and Wales, in *Hudson v Gambling Commission* (*Re Frankice (Golders Green) Ltd).*[50] Norris J held that the term "legal proceedings" included arbitration:[51]

> "It is unnecessary to go through each of the decisions to analyse the relevant reasoning and indeed time does not permit. But the following description will suffice. First, it is clear that legal process and legal proceedings are not confined to claims by creditors against the company; they include claims against the company by third parties, see: *Biosource Technologies v Axis Genetics* [2000] 1 BCLC 286. Second, it is plain that the legal process and legal proceedings are not confined to civil proceedings. Criminal proceedings are also caught by the moratorium, see: *Rhondda Waste* [2001] Ch 57, where a prosecution for breach of environmental regulations was permitted against the company, though the court plainly held that the criminal proceedings were caught by the moratorium. *Thirdly, it is plain that the relevant legal process or legal*

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48 Schedule 6 comprises a non-exhaustive list of powers that may be exercised by a liquidator. See Companies Act 1993, s 260(2).

49 In *Bresco Electrical Services Ltd (in liq) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, the Supreme Court of the United Kingdom confirmed that the principle applied equally to construction adjudications, which do not result in a final determination of a dispute: see, in particular, paras 41 (per Lord Briggs, for the Court).

50 *Hudson v Gambling Commission* (*Re Frankice (Golders Green) Ltd)* [2010] EWHC 1229 (Ch) at para 38. See also, *Philpott v Lycée Francais Charles de Gaulle School* [2015] EWHC 1065 (Ch), in which Judge Purle QC held that, despite the issue arising before him in the context of a proof of debt regime requiring the taking of an account, an arbitration clause in the pre-existing contract continued to be binding, though any arbitral proceedings that were commenced would be "vulnerable to an application for a stay". He added (at para 5) that: "It is clear that arbitration proceedings are legal proceedings or process for this purpose …."

51 *Hudson v Gambling Commission* (*Re Frankice (Golders Green) Ltd)* [2010] EWHC 1229 (Ch) at para 38.

> *proceedings are not confined to proceedings before a court of law. It covers proceedings before tribunals, before arbitrators and before statutory adjudicators*." (Emphasis added)

Any residual doubt about the availability of arbitration in a post-liquidation environment was removed by the Supreme Court of the United Kingdom in *Bresco Electrical Services Ltd (in liq) v Michael J Lonsdale (Electrical) Ltd*[52] (*Bresco*). Delivering the unanimous judgment of the Court, Lord Briggs said:[53]

> "33. Where there are real disputes between the company and third parties (who may be creditors or debtors) the insolvency code is inherently flexible as to the best means for their resolution. *A disputed pending claim (in court proceedings or in arbitration) against the company (as at the cut-off date) may be allowed to continue by the liquidator or by the court supervising the insolvency process, as the best means of resolving the dispute*: see *Cosco Bulk Carrier Co Ltd v Armada Shipping SA* [2011] EWHC 216 (Ch); [2011] 2 All ER (Comm) 481, para 58. *New proceedings may be authorised for the same purpose.* The liquidator may take the initiative by seeking the directions of the court in relation to particular disputes or to legal issues common to a number of disputed claims, and for that purpose join interested parties or representatives of interested classes. Within those proceedings the court has almost unlimited procedural flexibility, as the numerous matters referred to court by the administrators of the top Lehman company in London (Lehman Brothers International (Europe)) demonstrated. Furthermore there is no rule that, merely because there exists set-off between cross-claims, and the need to take an account, disputes about all the claims and cross-claims need to be adjudicated upon in a single proceeding. Again, the Lehman litigation contains numerous examples of the separate resolution, in successive proceedings, of different issues between the same parties within the Lehman group, concerning their mutual dealings." (Emphasis added)

5.4 Summary on public policy

Subject to the need to assess arbitrability in the context of any given insolvency dispute, the relevant New Zealand public policy trends identifiable from our analysis are:

(a) encouragement of arbitration, with limited judicial intervention in the arbitral process;

(b) a broadening of powers given to arbitrators to determine disputes in line with international best practice;

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[52] In *Bresco Electrical Services Ltd (in liq) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25.

[53] *Idem*, at para 33. Although Lord Briggs did not give any express reference to the resolution procedures used in Lehman Brothers International (Europe), an example is *Re Lehman Brothers International (Europe) (in administration)* [2018] EWHC 1980 (Ch), per Hildyard J, approving a scheme of arrangement containing an adjudication procedure to resolve claims.

(c) a broadening of arbitration to encompass areas traditionally thought to fall within the exclusive jurisdiction of the courts;

(d) a reduction of the role of the court in the liquidation process;

(e) liberalisation of the powers of liquidators to bring or continue claims in the name of the company, or to permit claims to be brought against it; and

(f) the ability, when questions of arbitrability arise, for an arbitrator to determine the extent of his or her own jurisdiction.[54]

While relevant public policy factors may differ, depending upon what governing law is applicable, we suggest that the trends to which we have referred are consistent with the view that insolvency-related disputes are arbitrable, except for those that are considered "core" or "pure".

6. What are "core" or "pure" insolvency disputes?

In this section, we survey authorities from a number of jurisdictions[55] in an endeavour to identify those types of insolvency-related disputes that should be excluded from resolution by arbitration. With the qualification that such issues will be considered under applicable law, to reflect what has been said in cases and texts, we will refer to these as "core" or "pure" insolvency disputes.

6.1 Public policy propositions

In *WDR Delaware Corporation v Hydrox Holdings Pty Ltd*[56] (Hydrox), Foster J, sitting in the Federal Court of Australia, endeavoured to capture a number of policy reasons for holding that a liquidation order was not arbitrable. By reference to counsel's submissions, Foster J set out the following propositions:[57]

(a) A liquidation order affects the legal status of a person, having serious consequences for the future of the company in question and those who have been charged with its management. (The status proposition.)

(b) A liquidation order affects a number of third parties. For example, it creates restrictions on the disposition of property, restricts the company's freedom to act in litigation and impacts on rights of the company's creditors to obtain payment of their due debts in full. (The third party rights proposition.)

(c) The creation and dissolution of an artificial legal entity "such as a company" is a matter uniquely the subject of governmental authority. (The legal entity proposition.)

(d) There is a public interest in ensuring that procedural steps by which a company is put into liquidation are governed by the court's processes and determined transparently, in the public domain. (The transparency proposition.)

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54 Arbitration Act 1996, Sch 1, art 16.
55 We have omitted the United States of America from this survey because of the prescriptive nature of the US Bankruptcy Code.
56 *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164.
57 *Idem*, at para 131.

These propositions form a sound policy basis for the exclusion of arbitration in relation to liquidation or winding up orders. It is uncontroversial for the reasons set out in *Hydrox* that liquidation orders fall within the exclusive jurisdiction of the courts. In our view, the status proposition is uncontroversial, and the legal entity proposition adds little, if anything, material to it.

From a policy perspective, the remaining two propositions, third party rights and transparency, are often cited to support the view that insolvency disputes more generally are not arbitrable.

The third party rights proposition has its roots in the collective nature of an insolvency process.[58] Collective proceedings will generally be less amenable to arbitration due to the inherent limitations of the consent-based nature of an arbitrator's jurisdiction. Some commentators have suggested that the non-arbitrability of insolvency disputes is not so much a public policy issue, but stems simply from the incompatibility of insolvency's collective nature with the contractual nature of arbitration.[59]

While it is true to say that a third party's interests may be adversely affected by an arbitral ruling, this is of itself not a bar to arbitration. For example, if a liquidator were to allow a related party claim as a debt provable in the liquidation, that would adversely affect the amount of any distribution payable to other creditors. This would affect the *interests* of other creditors, but not their underlying right to distribution *pari passu.* The same result would have occurred if a duly constituted arbitral tribunal had made an award in the same sum the day before liquidation intervened. A deeper analysis is required to determine whether the arbitration process might curtail a *right* granted to a third party under insolvency legislation and, if so, whether that is a sufficient factor, of itself, to oust the availability (in any given case) of arbitration to resolve an insolvency-related dispute.

Similarly, the interests of some creditors might be affected adversely if the liquidator were to make a claim that a payment had been made in circumstances allowing him or her to set aside an antecedent transaction. That would require repayment from the creditor against whom the claim is brought but enhancement of the pool of assets available to all creditors. While, as we suggest later, such a preference claim could not be arbitrated under a pre-existing arbitration agreement, there seems no reason in principle why an *ad hoc* agreement could not be entered into between the liquidator and the creditor against which the preference claim was made to resolve that issue. Rarely, if ever, would another party be joined in High Court proceedings to a preference claim of that type. A liquidator would have power to settle such a proceeding.[60] There is no intrinsic public interest attached to such a claim. In those

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58 *Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21, at para 1.

59 S Brekoulakis, "On Arbitrability: Persisting Misconceptions and New Areas of Concern" in L Mistelis, and S Brekoulakis, *Arbitrability: International and Comparative Perspectives* (The Hague, Kluwer Law International, 2009) at p 32. See also A L Gropper, "The Arbitration of Cross-Border Insolvencies", 86 *Am Bankruptcy Law J*, 201 at pp 228-229.

60 Companies Act 1993, Sch 6, Cls (e) and (f). Madaus postulates that arbitrability of insolvency disputes should turn on a "settlement capacity test", whereby if a dispute were capable of settlement by the parties, it is capable of arbitration: see S Madaus, "The (Underdeveloped) Use of Arbitration in International Insolvency Proceedings", *J Int Arbitr* (2020) 37(4) 449, at 453.

circumstances, why would "public policy … demand that an agreement to resolve the dispute by arbitration … not be given effect"?[61]

The transparency proposition raises questions of public interest. Allsop J, delivering the principal judgment of the Full Court of the Federal Court of Australia in *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*[62] said, in discussing the arbitrability of disputes involving such things as intellectual property, competition, and insolvency disputes, in the context of an admiralty issue:[63]

> "… the common element to the notion of non-arbitrability was that there was a sufficient element of legitimate public interest in these subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate."

As to transparency of the process, the debate is not limited to the question whether a dispute should be resolved in a public or private forum. Privacy and confidentiality are central but not immutable concepts of arbitration. Parties are able to waive both privacy and confidentiality, either generally or in relation to certain groups.[64] Transparency has been a focus of recent arbitral reform, with some organisations now seeking to publish arbitral awards.[65] Therefore, if the private nature of arbitration were the only concern, this objection could be overcome relatively easily by the liquidator insisting that any *ad hoc* arbitration take place in the public domain or, at least, by requiring the award to be available for inspection by any creditor.[66]

6.2 Claims arising post-insolvency

Two recent decisions, one in Singapore and the other in England and Wales, have discussed aspects of the third party rights and transparency propositions. They are *Larsen Oil*[67] (2011) and *Nori Holding Ltd v Public Joint-Stock Co "Bank Otkritie Financial Corporation"*[68] (*Nori Holding*) (2018). We contrast their approaches to the arbitrability of insolvency-related disputes.

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61 D A R Williams and A Kawharu, *Williams & Kawharu on Arbitration*, (2nd ed, LexisNexis, 2017), at para 7.2.1. Some caution is required if it is anticipated that enforcement will take place in another jurisdiction. Article V(1)(a) of the New York Convention enables a court in a country in which recognition and enforcement of an award is sought to refuse to grant those remedies where the arbitration "agreement is not valid under the law to which the parties have subjected it".

62 *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192.

63 At para 200, with whom, on this point, Finn and Finkelstein JJ appear to have agreed. See also, more generally, M Conaglen, "The Enforceability of Arbitration Clauses in Trusts", 74(3) *Cambridge Law Journal* 450, at 451 to 465.

64 See also Arbitration Act 1996 (NZ), ss 14 to 141, in relation to the arbitral tribunal's or a court's jurisdiction to make confidential information in an arbitration public.

65 The International Chamber of Commerce (ICC) now publishes arbitral awards by default (although parties can object to publication). Investment treaty awards are also usually publicly available – see, eg, https://icsid.worldbank.org and https://www.italaw.com. Reform of investment treaty arbitration, including greater transparency, is currently being considered by UNCITRAL Working Group III (Arbitration). In 2014, UNCITRAL released its "Rules on Transparency in Treaty-based Investor-State Arbitration".

66 In New Zealand, there is also an ability for any party to apply to the arbitral tribunal for an order allowing aspects of the proceeding and / or the award to be published publicly. Arbitration Act 1996, s 14D.

67 *Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21.

68 *Nori Holding Ltd v Public Joint-Stock Co "Bank Otkritie Financial Corporation"* [2018] EWHC 1343 (Comm).

Larsen Oil involved a company called Petroprod Ltd, which had been incorporated in the Cayman Islands but carried on business in Singapore. Petroprod was placed in official liquidation by order of the Grand Court of the Cayman Islands and later in compulsory liquidation by the High Court of Singapore. Proceedings were issued by the Singapore liquidators against Larsen Oil in an attempt to avoid payments made by Petroprod to Larsen Oil and four of its subsidiaries on the grounds that they amounted to unfair preferences, transactions at an undervalue, or made with an intent to defraud a creditor of the subsidiary companies. The unfair preferences and transactions at undervalue proceedings (the unfair transaction proceedings), while brought in the name of the company, were pursued under statutory provisions that granted liquidators the right to challenge such payments. In other words, they were proceedings that could not have been brought by the company before the insolvency process intervened. The separate claim that alleged that, before liquidation intervened, Petroprod had engaged in transactions designed to defraud certain parties (the constructive fraud claim) was brought under the (Singapore) Conveyancing and Law of Property Act. That was a claim that could have been brought by the company before a liquidation order was made.

Larsen Oil filed a summons in the High Court of Singapore in which it applied for a stay of proceedings brought by the liquidators of Petroprod on the grounds that the disputes could only be resolved through arbitration. The parties had entered into a contract that contained a clause requiring disputes between Petroprod and Larsen Oil to be determined by arbitration in Singapore. The stay was sought under section 6(2) of the International Arbitration Act (Singapore), pursuant to which courts must stay proceedings that should properly be determined by arbitration.

The question for the Court was whether Petroprod's claims fell within the scope of the pre-existing arbitration clause and, if so, whether a stay should be refused because the disputes were not arbitrable. The Court of Appeal of Singapore held that:

(a) because the unfair transaction claims were brought under powers that could be exercised only after the intervention of liquidation, they were not capable of being arbitrated under a pre-existing arbitration agreement between Petroprod and Larsen Oil;[69] and

(b) while the constructive fraud claim could have been brought in the name of the company before liquidation, it was "intimately intertwined with insolvency, since it is entirely contingent on the insolvent status of the debtor", meaning that the claim was not arbitrable.[70]

The Singaporean Court drew a distinction "between disputes involving an insolvent company that stem from its pre-insolvency rights and obligations and those that arose only upon the onset of insolvency due to the operation of an insolvency regime".[71] The Court took the view that the statutory purposes of an insolvency regime, "to recoup for the benefit of the company's creditors losses caused by the misfeasance and / or malfeasance of its former management", might be compromised if remedies designed to achieve that goal were not

[69] *Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21, at para 59.
[70] *Idem*, at paras 56 and 58.
[71] *Idem*, at para 45.

required to be addressed through court procedures.[72] For the Singaporean Court of Appeal, Rajah JA said:

> "46. We, therefore, are of the opinion that the insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard. The courts should treat disputes arising from the operation of the statutory provisions of the insolvency regime *per se* as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement."

In reaching that decision, the Court of Appeal made a number of relevant observations on the scope of arbitration in the context of insolvency disputes. We paraphrase what was said by the Court:

(a) Compelling parties to arbitrate inevitably deprives them of a fundamental right of access to the courts which can only be justified if they had previously consented to waiving their right to judicial remedies by substituting arbitration as their agreed method of dispute resolution. The Court was concerned that, if the arbitration clause were used, the company's pre-insolvency management may be able to dictate improperly the forum in which post-liquidation creditors' claims against them might be brought.[73]

(b) It is a well-established principle that a company cannot contract with some of its creditors for the non-application of certain insolvency rules, such as the "highly specialised form of dispute resolution in respect of claims brought against an insolvent party [by submitting] … a proof of debt to the liquidator." The Court said that "arguably" any agreement to arbitrate such a dispute would run foul of the principle that a creditor could not contract out of the proof of debt process.[74] However, implicitly emphasising its use of the term "arguably," the Court went on to articulate an opposing point of view; namely, that the proof of debt process is not undermined by arbitration as it is "merely a substituted means of enforcing debts against the company, and does not create new rights in the creditors or destroy old ones".[75]

(c) Pre-existing arbitration agreements should not be enforced by the court against a liquidator "where the agreement affects the substantive rights of other creditors" and "[undermines] the policy aims of the insolvency regime". The importance of explaining why a particular right might be affected adversely is emphasised by the Court's approval of an earlier decision, in which the High Court of Singapore had held that a pre-bankruptcy agreement between a debtor and its creditor on service of process for court proceedings did not amount to an arrangement that undermined public interest considerations.[76] Importantly, the point is consistent with the notion

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72 *Ibid*.
73 *Idem*, at para 46.
74 *Idem*, at para 49.
75 *Idem*, at para 51.
76 *Idem*, at para 50, citing *Re Rasmachayana Sulistyo (alias Chang Whe Ming), ex parte, The Hongkong and Shanghai Banking Corp Ltd and other appeals* [2005] 1 SLR(R) 483, at para 20.

that an arbitral award should not affect the substantive rights of anyone who did not have an opportunity to be heard.

Nori Holding was decided seven years after *Larsen Oil* and tends to take a more proactive approach to the availability of arbitration to resolve insolvency-related disputes. In that case, a successful application for an anti-suit injunction was brought by Nori Holding to restrain the pursuit of court proceedings in Russia, said to have been brought in breach of an arbitration agreement. Bank Otkritie, a Russian bank, had advanced moneys to companies related to Nori Holding under three loan agreements governed by Russian law and providing for the jurisdiction of the Moscow Arbitrazh Court. The loans were secured by pledge agreements that were governed by the law of Cyprus and which contained an arbitration clause requiring any dispute to be resolved under the rules of the London Court of International Arbitration (LCIA). Ultimately, Bank Otkritie was put into an insolvency process in Russia and the insolvency representative brought proceedings alleging that the transactions amounted to a fraud. Nori Holding referred that dispute to LCIA arbitration and sought a stay of the Russian proceedings, on the grounds that the arbitration agreement covered the type of insolvency-related claim that the insolvency representative had brought.

In determining the anti-suit injunction application, Males J considered whether *Larsen Oil* should be applied as a matter of English law. In doing so, he focussed primarily on the unfair transaction proceedings with which *Larsen Oil* had dealt. As previously indicated, the Court of Appeal of Singapore had held that such a claim, brought at the behest of a liquidator, could not fall within the scope of a pre-existing arbitration clause.[77] Males J also considered what had been said in *Larsen Oil* about policy reasons militating against giving effect to arbitration agreements between the insolvent company and contractual counterparties.[78]

Males J responded to the points made in *Larsen Oil* as follows:

(a) The arbitration clause in the pledge agreements was expressed "in wide and general terms", with no "express exclusion of disputes of any kind". There was no "good reason to imply a limitation to the effect that the clause does not extend to a claim in insolvency proceedings to avoid a transaction as being [one] at an undervalue". As a result, there was no justification to limit the scope of the arbitration clause to exclude, as a matter of construction, unfair transaction proceedings.[79]

(b) In assessing whether an insolvency claim under Russian law was arbitrable, it was necessary to focus on the substance of the dispute, rather than its form. The particular dispute before the Judge was factual in nature and turned on whether specific transactions constituted "a fraud … on the Bank to replace valuable secured loans with worthless bonds". As such a claim could be brought on a number of legal bases, it was the nature of the claim, rather than the process used to bring it, that should determine whether it was arbitrable.[80]

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77 *Idem*, at para 52.
78 See the discussion above.
79 *Nori Holding Ltd v Public Joint-Stock Co "Bank Otkritie Financial Corporation"* [2018] EWHC 1343 (Comm), at paras 60 and 61.
80 *Idem*, at paras 62 and 63.

(c) The particular proceeding brought by the insolvency representative of the Bank did not seek to change the status of the Bank. Nor was it one that "would affect the position of third parties in such a manner as to take the case beyond the consensually derived jurisdiction of the arbitrators".[81]

(d) There was no justification for excluding arbitration as an appropriate method of dispute resolution on the grounds that parties would be deprived of an "inalienable" right to go to court. The law no longer regards arbitration "as intrinsically better or worse than litigation". As Males J observed, it is just different, having both advantages and disadvantages." Parties should be held to their agreement to arbitrate.[82]

We endeavour to summarise the views expressed in *Larsen Oil* and *Nori Holding* in the context of the propositions set out in *Hydrox*.[83] We do so by treating the status and legal entity propositions as equivalents:

(a) As to the transparency proposition, different views were expressed about the "fundamental right of access to the courts":

(i) In *Larsen Oil*, the Singaporean Court's concern was to provide a disincentive for management of a company to insist on using their forum of choice on a claim brought by a liquidator (albeit in the name of the company) when the insolvency representative was not a party to the pre-existing arbitration agreement and the claim was based on rights that could not have been exercised by the company prior to liquidation. Under the Singaporean legislation, while the claim was one that could not have been brought in the name of the company before liquidation, it was pursued, after intervention of an insolvency process, in the name of the company, rather than the liquidator.

(ii) In *Nori Holding*, the Court was anxious to make the point that, provided there was otherwise a right to have a dispute with an insolvency representative determined by arbitration, the mere fact that it would not be held in a public forum, namely a court of law, was not sufficient to deny arbitrability. *Nori Holding* regards the question of arbitrability as turning on the scope of the arbitration clause and rejects the notion that arbitration should not be used because of transparency concerns. As the court observed, the law no longer regards arbitration "as intrinsically better or worse than litigation".

(b) In *Nori Holding*, the Court considered application of the arbitration agreement in the context of the underlying rights of the parties, rather than the procedure under which the claim was brought. Because a claim based on a transaction at an undervalue could have been brought before the insolvency process intervened, the pre-existing arbitration agreement was held to be enforceable. The reason why *Larsen Oil* took a contrary view was because the unfair preferences claim could not have been brought, in any form, prior to liquidation. The approaches taken in the two cases are compatible, if viewed in that context.

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81 *Idem*, at para 64.

82 *Idem*, at paras 65 and 66, with reference to Scrutton LJ's well known dictum in *Czarnikow v Roth Schmidt & Co* [1922] 2 KB 478 (CA) at 488, that the days had "long gone" when arbitration was regarded as an unacceptable "Alsatia … where the King's writ does not run".

83 *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164.

(c) *Larsen Oil* held that a company cannot contract with some of its creditors for the non-application of certain insolvency rules. An example given was the proof of debt regime, something we shall discuss in detail later.[84] While we do not necessarily agree with the sweeping nature of that proposition, there may be some types of disputes that relate to distributions to creditors to which the principle may apply; for example, the fundamental rule of *pari passu* distribution.[85]

6.3 Minority oppression and just and equitable proceedings

A number of the authorities deal with minority oppression proceedings. Section 174 of the 1993 Act is the relevant New Zealand provision. Materially, it takes the same form as similar provisions in other common law jurisdictions.

We take, as our starting point, a decision of the Court of Appeal of England and Wales, in *Fulham Football Club (1987) Ltd v Richards*[86] (*Fulham Football Club*). Although the proceeding had the potential to lead to an order putting a company into liquidation, it was held to be capable of arbitration, but with the caveat that an arbitral tribunal would not be able to make a liquidation order. This is an example of the application of the status / legal entity propositions. As with most minority oppression proceedings, alternative orders were sought that the applicant's shares be acquired at a fair value by the majority or (in effect, as a remedy of last resort) that the company be put into liquidation on just and equitable grounds.

In *Fulham Football Club* it was held that an arbitral tribunal exercising jurisdiction under a governing document was entitled to determine underlying facts or law, but had no power to make a liquidation order which would result in a change of status for the company. Delivering the principal judgment of the Court of Appeal, Patten, LJ said:[87]

> "83. … I … [prefer] the view that disputes of this kind which do not involve the making of any winding-up order are capable of being arbitrated. … I also take the view, as Austin J did in the *ACD Tridon* case, that the same probably goes for a similar dispute which is used to ground a petition … to wind up the company on just and equitable grounds. In those cases, the arbitration agreement would operate as an agreement not to present a winding-up petition unless and until the underlying dispute had been determined in the arbitration. The agreement could not arrogate to the

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84 We discuss arbitrability, in the context of the proof of debt regime, at para 8 below.

85 As a matter of New Zealand law, while a creditor may waive priority by subordinating its claim to others, it is not possible to contract out of the priority distribution regime created by statute. See *Attorney-General v McMillan & Lockwood Ltd* [1991] 1 NZLR 53 (CA) at paras 61 to 62 (Richardson and Bisson JJ, Williamson J dissenting). The current waterfall is set out in the Companies Act 1993, Sch 7.

86 *Fulham Football Club (1987) Ltd v Richards*, [2012] 1 All ER 414 (CA).

87 *Idem*, at para 83. In *Anzen Ltd v Hermes One Ltd* [2016] UKPC 1 (British Virgin Islands) at para 7, the Privy Council followed *Fulham Football Club* and stated that "it is … common ground that an arbitrator could determine disputes regarding underlying issues of fact or law relevant to the subsequent pursuit in Court of [winding up] orders". This approach is not dissimilar to that applied in admiralty law where *in personam* claims may be arbitrated but *in rem* claims that affect questions of status must be determined by a competent court exercising admiralty jurisdiction – see *Raukura Moana Fisheries Ltd v The Ship "Irina Zahrkikh"* [2001] 2 NZLR 801 (HC) at paras 65 and 95, per Young J.

> arbitrator the question of whether a winding-up order should be made. That would remain a matter for the court in any subsequent proceeding. But the arbitrator could, I think legitimately, decide whether the complaint of unfair prejudice was made out and whether it would be appropriate for winding-up proceedings to take place or whether the complainant should be limited to some lesser remedy. It would only be in circumstances where the arbitrator concluded that winding up proceedings would be justified that a shareholder would then be entitled to present a petition [on the just and equitable ground] …" (Footnotes omitted)

Longmore LJ agreed generally with the approach taken by Patten LJ. His Lordship took the view that there was no public interest that would prevent the question whether a company's affairs were or had been conducted in a manner unfairly prejudicial to the interests of its members from being subjected to arbitration.[88] Longmore LJ emphasised that the inability of an arbitrator to grant a particular order (in that case one putting a company into liquidation) was "just an incident of the agreement which the parties have made as to the method by which their disputes are to be resolved" and did not give rise to any public policy factor preventing resolution of the dispute by arbitration.[89] The third Judge, Rix LJ, took the view that there was no reason "why the autonomy of the parties … (subject to such safeguards as are necessary in the public interest) should not apply to the choice of arbitration" in relation to the particular dispute.[90]

A number of common law jurisdictions have adopted the approach articulated in *Fulham Football Club*. Examples can be found in Australia,[91] Canada,[92] Singapore[93] and Hong Kong.[94] In those jurisdictions, liquidation is seen as a remedy of last resort in minority oppression proceedings. However, the Cayman Islands has taken a different path, seemingly because of the lack of a specific statutory provision that enables a minority oppression proceeding to be brought. Such a claim can only be made through just and equitable proceedings, in which liquidation is sought as the primary remedy. The different approaches can best be illustrated by reference to the Singaporean case of *Tomolugen* and the Cayman case of *Familymart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation*[95] (*Familymart China*). We discuss each in some detail to explain both the analytical approach taken and the respective outcomes.

In *Tomolugen*, Silica Investors Ltd made an application alleging that the affairs of Auzminerals Resource Group Ltd had been conducted in an unfairly prejudicial or oppressive manner. Tomolugen was the majority shareholder of Auzminerals and the primary defendant in the litigation. The remaining

88 *Idem*, at paras 98 and 99.
89 *Idem*, at para 103.
90 *Idem*, at para 107.
91 *WDR Delamere Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164; *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896; and *Paul Brazis v Emelio Rosati* [2014] VSC 385.
92 *ABOP LLC v Qtrade Canada Inc* (2007) 284 DLR (4th) 171 (SC, BC).
93 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 (SGCA), at paras 84 to 88. In a different context, see also *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170, at paras 13 and 18.
94 *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759.
95 Court of Appeal of the Cayman Islands 23 April 2020, Rix, Martin and Moses JJA.

defendants were shareholders or current or former directors of Lionsgate Holdings Pte Ltd, another minority shareholder in Auzminerals and the second defendant. Lionsgate applied for a stay of the court proceedings on the grounds that the dispute fell within the scope of the arbitration clause in a share sale agreement between Lionsgate and Silica. The other defendants were not parties to that agreement. It was necessary for the court to determine whether a stay should be ordered and, if so, on what terms. The stays were sought both under the Singaporean arbitration statute and the case management jurisdiction of the High Court. The Court dismissed all stay applications. Lionsgate and three other defendants appealed. In addition to the question of arbitrability of the minority oppression proceedings, the Court of Appeal was also obliged to consider whether to allow an arbitration to proceed in which all defendants in the proceeding were not parties to the arbitration agreement.

In the Court of Appeal, Menon CJ, by reference to the Singaporean equivalent of section 10 of the Arbitration Act 1996 (New Zealand),[96] said that "the essential criterion of non-arbitrability is whether the subject matter of the dispute is of such a nature as to make it contrary to public policy for that dispute to be resolved by arbitration".[97]

The Singaporean Court of Appeal held that:[98]

(a) there would ordinarily be a presumption of arbitrability, as long as a dispute fell within the scope of an arbitration clause; and

(b) the presumption of arbitrability may be rebutted if it could be established that Parliament intended to preclude a particular type of dispute from being arbitrated (as evidenced by either the text or the legislative history of the statute in question) or it would be contrary to the public policy considerations involved in that type of dispute to permit it to be resolved by arbitration.

Silica had requested wide-ranging relief, including (as an alternative) an order that Auzminerals be placed in liquidation. Menon CJ drew a distinction between a minority oppression claim and one involving "the liquidation of an insolvent company or avoidance claims that arise upon insolvency because the former *generally* does not engage the public policy considerations involved in the latter two situations" (original emphasis).[99]
Menon CJ considered that Silica's claim that Auzminerals' affairs had been conducted in an oppressive manner was essentially about "protecting the commercial expectations of the parties" and did not involve any wider public interest.[100] It was, in essence, a claim designed to uphold the commercial agreement between the shareholders. The fact that Silica had requested liquidation as one potential remedy did not change the nature of the underlying claim. The Chief Justice pointed out that the parties intended that the arbitrator resolve the underlying commercial disagreement, as opposed to granting the particular relief that may be appropriate.[101] He said that this approach sought to

96 See discussion above.
97 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 (SGCA), at para 75.
98 *Idem*, at para 76.
99 *Idem*, at para 84. A similar view was expressed by Males J in *Nori Holding Ltd v Public Joint-Stock Co "Bank Otkritie Financial Corporation"* [2018] EWHC 1343 (Comm), at paras 62 and 63.
100 *Idem*, at para 88.
101 *Idem*, at para 102.

strike a balance between, on the one hand, upholding the agreement of the parties as to how their disputes are to be resolved and, on the other, recognising that there are jurisdictional limitations on the powers that are conferred on an arbitral tribunal. The Court was "satisfied that an arbitral tribunal's inability to grant certain reliefs which may be sought would not in itself render the subject matter of the dispute non-arbitrable".[102]

In *Tomolugen*, stays were ordered on terms that prevented the claims against non-parties to the arbitration agreement from continuing until such time as the arbitration had been concluded.[103] The claims that fell outside the scope of the arbitration agreement were stayed as part of the court's general case management discretion. A similar approach is taken in England and Wales and New Zealand, though a higher threshold is required to demonstrate the need for a stay of claims brought by non-parties to the arbitration agreement.[104] *Tomolugen* preferred a lower test.[105]

The New Zealand approach was explained, by the High Court, in *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group Ltd*[106] (*Danone*). In that case, Venning J concluded that "even where the parties to the proceeding are not both parties to the arbitration … the court retains jurisdiction to stay the proceedings" either under a specific provision in the High Court Rules or its inherent jurisdiction; "including for reasons of sensible case management".[107] In *Danone,* the proceedings were stayed on terms that (in effect) required the timely pursuit of the arbitration proceeding in Singapore.[108] In making that order, Venning J emphasised that the case management discretion should only be exercised in "rare and compelling circumstances," in which there "must be a real risk of unfairness or oppression to the defendant if the proceedings were allowed to continue".[109]

Familymart China illustrates the Cayman approach and highlights the way in which questions of arbitrability will turn on the terms of local legislation. *Familymart China* distinguished the approach taken in *Fulham Football Club* on the basis of Cayman law. Cayman law does not include a discrete minority oppression provision of the type considered in *Tomolugen* and *Fulham Football Club.* Instead*,* a shareholder seeking relief in such circumstances must bring a winding up petition on the just and equitable ground, for which the primary remedy is liquidation.

The distinction between the processes available to shareholders in the Cayman Islands and other jurisdictions was explained in an earlier judgment of the Cayman Court of Appeal, *Tianrui (International) Holding Co Ltd v China*

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102 *Idem*, at para 103.

103 The Court of Appeal of the Cayman Islands in *Familymart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation*, Court of Appeal of the Cayman Islands, CICA Civil Appeal Nos 7 and 8 of 2019, 23 April 2020, did not accept that approach was appropriate.

104 See discussion below.

105 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 (SGCA), at para 187.

106 *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group Ltd* [2014] NZHC 1681. Although an appeal to the Court of Appeal was brought, the Court did not offer any opinion on jurisdiction: *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group Ltd* [2014] NZCA 536.

107 *Danone Asia Pacific Holdings Pte Ltd v Fonterra Co-operative Group Ltd*, [2014] NZHC 1681 at para 54.

108 *Idem*, at para 99. That was done by reserving leave to apply to lift the stay if there was any delay in prosecuting the arbitral proceedings.

109 *Idem*, at para 55, applying what was said by Lord Bingham MR in *Reichhold Norway ASA v Goldman Sachs International* [2000] 2 All ER 679 (CA), at 186.

Shanshui Cement Group Ltd[110] (*Tianrui*). Martin JA, for the Court, noted that the only mechanism for complaining of unfairly prejudicial or oppressive conduct in the Cayman Islands was to bring a winding up petition based on the just and equitable ground. The *Tianrui* Court accepted that, if grounds were made out in other jurisdictions for a minority oppression claim to succeed, the orders that the court could make were similar to those which could be made in the Cayman Islands. In doing so, Martin JA adopted the view expressed by Chadwick P, in an earlier Cayman appellate decision, *Asia Pacific Ltd v ARC Capital LLC*.[111] The President in that case said that "the gateway to an order under [the Cayman provision] is that the Court is satisfied that [but for that order] it would be 'just and equitable' to wind up the company."[112]

Consequently, when a "buy-out" order is made in the Cayman Islands, the "threshold" issue that the court must determine is whether or not it would be just and equitable to wind up the company. The court does not "dismiss" the winding up petition. If it were to do so, it would have no jurisdiction to make an order requiring one shareholder to buy-out the other. Instead, having held that the grounds for a winding up order have been made out, the court imposes an order that is an appropriate "alternative" to liquidation.

Familymart China considered whether it was possible to isolate underlying factual issues that might be determined by arbitration. Delivering the judgment of the Court of Appeal, Moses JA put the point in this way:[113]

> "69. … The authorities on which the rival contentions focussed all start with the proposition that only the court can decide whether it is just and equitable to make a winding up order. The issue of arbitrability comes down to the question whether the underlying disputes are themselves susceptible to arbitration and should, in accordance with the [shareholders' agreement] be submitted to arbitration before the Court exercises its jurisdiction to decide whether it is just and equitable to make a winding up order, …"

The Court of Appeal held that the underlying factual issues all went to whether or not it was just and equitable to wind up the company. This was the first issue to be determined by the Court and, consequently, a dispute of this nature (including the underlying factual issues) was not arbitrable.
In giving his judgment, Moses JA discussed *Fulham Football Club,* as well as other authorities that had taken a similar approach;[114] for example, *Re Cybernaut Growth Fund LP,*[115] *SPhinX Group of Companies (in official*

[110] *Tianrui (International) Holding Co Ltd v China Shanshui Cement Group Ltd* (Court of Appeal of the Cayman Islands 5 April 2019, Martin, Newman and Moses JJA).
[111] *Asia Pacific Ltd v ARC Capital LLC* 2015 (1) CILR 299.
[112] *Idem*, at para 38.
[113] *Familymart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* (Court of Appeal of the Cayman Islands 23 April 2020), at para 69.
[114] In particular, *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589 (CA), at paras 34, 35 and 37, per Sir Terence Etherton C.
[115] *Re Cybernaut Growth Fund LP* 2014 (2) CILR 413 (Grand Court).

liquidation),[116] *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd (Quiksilver)*[117] and *Hydrox*.[118]

Quiksilver is a case in which arbitration was allowed even though no minority oppression proceeding was brought. It too concerned a just and equitable proceeding. Nevertheless, Harris J, in the Court of First Instance of Hong Kong, concluded that litigation could be stayed to allow arbitration to proceed because those interested in the petitions were limited to the two shareholders who were parties to the arbitration agreement. He considered that the underlying issues should be resolved by arbitration with the court considering whether or not to make a liquidation order based on the findings of fact made by the arbitrator.[119] This was the same approach that was subsequently taken in *Tomolugen*.

Having traversed those authorities in *Familymart China,* Moses JA concluded by saying that "the cases which have followed and developed *Fulham* [Football Club] have all depended upon the Court's ability to identify discrete, substantive issues which do not invoke the exclusive jurisdiction of the court."[120] The Court of Appeal distinguished that situation from the one pertaining in the Cayman Islands. It concluded that "where the underlying issues are central and inextricably connected to determination of the statutory question whether the company should be wound up on just and equitable grounds, the possibility of hiving off those issues becomes more difficult."[121]

6.4 Canada

Briefly, we touch on the position in Canada. We do so to highlight the flexible approach taken to the availability of arbitration to resolve insolvency-related disputes that might otherwise be addressed only through a court proceeding. By way of illustration, we refer to *Luscar Ltd v Smoky River Coal Ltd*[122] (*Smoky River*) in which the Court of Appeal of Alberta considered whether the first instance court was entitled to establish a procedure to resolve a dispute between the parties as part of its supervisory role under the Companies' Creditors Arrangement Act 1985 (CCAA), a Federal statute. The alternative was to stay the court proceeding, pending resolution of the dispute by an arbitrator appointed in British Columbia, in accordance with its Commercial Arbitration Act.

The position in Canada is complicated by the fact that the insolvency legislation is Federal in nature, while arbitration statutes are enacted by the Provinces. Federal legislation prevails over Provincial legislation where conflict exists.[123] On the particular facts of *Smoky River*, the Court of Appeal of Alberta took the view that it was more appropriate for the dispute to be resolved within the insolvency

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116 *Re Sphinx Group of Companies (in official liquidation)* (Court of Appeal of the Cayman Islands, CICA 6 of 2015, 2 February 2016), Mottley, Morrison and Field JJA.
117 *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759, at para 15 and 19 to 23.
118 *WDR Delamere Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164, at paras 161, 162 and 164.
119 *Quiksilver Greater China Ltd v Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759, at paras 19 and 22.
120 *Familymart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corporation* (Court of Appeal of the Cayman Islands 23 April 2020), at para 109.
121 *Ibid*.
122 *Luscar Ltd v Smoky River Coal Ltd* [1999] ABCA 179.
123 *Idem*, at para 75.

proceeding but did not exclude the possibility that, in different circumstances, it may be more appropriate for arbitration to be used.[124]

In *Smoky River,* the first instance judge had considered a number of matters in refusing to permit the arbitration. Among these were his view that the arbitration would compromise the CCAA process; that the effect of his order would not be to preclude or postpone the resolution of the dispute but to expedite it; that an expedited resolution of the dispute was critical to the CCAA proceedings given its possible impact on a plan of arrangement; and that it was desirable for Smoky's officers to focus on the re-organisation. The Court of Appeal agreed that these were all legitimate matters to consider.[125]

Delivering the judgment of the Court of Appeal, Hunt J observed that the judicial discretion was intended to "produce a result appropriate to the circumstances". She considered that the discretion should be exercised in a manner designed to give effect to the purpose of the CCAA and not to "seriously ... impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period."[126]

6.5 Summary

The cases above highlight certain trends in policy and approach by the courts to the arbitrability of insolvency-related disputes:

(a) It is uncontroversial that the granting of winding up or liquidation orders falls exclusively within the jurisdiction of the courts. There are strong policy reasons underpinning this position including the collective (or public) nature of liquidation and the change of status that takes place as a result of liquidation (for example, *Hydrox*);

(b) Claims that involve commercial issues between private parties are arbitrable in cases where liquidation is not the primary remedy. The policy rationale is that such disputes are essentially commercial in nature and do not engage the rights of third parties (for example, *Tomolugen* and *Fulham Football Club*);

(c) It is necessary to determine whether the claim in issue is one that the company could have brought before it entered an insolvency process or one that could only be initiated by an insolvency representative after that process had begun. A different approach to arbitrability may be taken, depending upon the outcome of that analysis (compare *Larsen Oil and Nori Holding).* While we tend to the view that claims that arise after the intervention of an insolvency process cannot be caught by a pre-existing arbitration agreement, we acknowledge that the authorities are not consistent on this point;

(d) The fact that an arbitral tribunal is not able to grant the full range of remedies available to a court (including liquidation), does not affect the arbitrability of the subject matter (for example, *Tomolugen* and *Fulham Football Club*);

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[124] *Idem*, at para 67.
[125] *Idem*, at paras 69 and 70.
[126] *Idem*, at para 68, citing *Quintette Coal* (1991) 7 CBR (3d) 165 (SC, BC), at 312.

(e) Issues that engage collective rights or affect the substantive rights of creditors will generally not be arbitrable (for example, *Larsen Oil*). However, not all disputes in a post-insolvency environment engage such rights;

(f) While some jurisdictions allow arbitration to be used to decide the underlying factual controversies in both minority oppression and just and equitable proceedings (for example, *Tomolugen* and *Quiksilver*), that approach does not command unanimous support (for example, *Familymart China*). We observe that, while *Familymart China's* departure from the approach taken in *Tomolugen* and *Quiksilver* can be justified on the Court's interpretation of the relevant Cayman legislation, there would seem no reason in principle why the underlying factual claims that precede a decision to put a company into liquidation on the just and equitable ground could not be resolved by arbitration, in the same way that they would if arising in a minority oppression proceeding; and

(g) An issue by issue or "granular" approach may mean that some issues are arbitrable while others are not. For case management reasons, a court may choose to stay all matters before the court until those that are arbitrable have been determined by an arbitral tribunal (for example, *Tomolugen*).

From the cases it can be seen that "core" or "pure" insolvency disputes are those that directly affect third party rights (that is, creditors' rights) or that change the status of or company. Other insolvency-related disputes remain essentially commercial disputes without engaging the rights of others outside of those directly involved in the dispute.

7. Categories of insolvency disputes

Having reviewed the various approaches to arbitration and insolvency disputes by courts in different jurisdictions, we set out below four different categories of proceedings (all of which require some form of qualification) that, *prima facie*, are amendable to resolution by arbitration. They are:

(a) claims that fall within an existing arbitration clause in respect of which an arbitration has been commenced before the intervention of an insolvency process;

(b) claims that fall within an existing arbitration clause and that arise before the commencement of the insolvency process, but in respect of which no arbitral proceeding had been commenced before insolvency intervened;

(c) claims that the insolvency representative may bring in the name of the company under an existing arbitration agreement, whether they arise before or after insolvency; and

(d) claims that an insolvency representative may bring in his or her own name pursuant to powers conferred as a direct result of the intervention of insolvency.

We develop each of those categories in turn, using the New Zealand liquidation process to explain our views:

(a) A party that commenced an arbitration against a company before the intervention of the insolvency regime will require consent from the High Court or the liquidator to continue that proceeding. The need for consent means that, generally, a liquidator will be able to resolve most money claims under the discrete proof of claim procedure. However, complex claims may still require resolution through contested proceedings.[127] Such claims may fall within an existing arbitration agreement and are generally commercial in nature. There is no good policy reason to prevent arbitration from being used for that purpose. That has been confirmed recently by the Supreme Court of the United Kingdom, in *Bresco*.[128]

(b) Arbitral proceedings that a party may wish to commence against a company in liquidation pursuant to an arbitration clause may not be commenced after the intervention of the insolvency regime without the consent of the High Court or the liquidator.[129] Provided that consent is given, there is no public policy reason why arbitration should not proceed. So long as the arbitration agreement attaches to a commercial claim that could have been made against the company before liquidation intervened, public rights cannot be implicated in such a way as to prevent the dispute from being arbitrated. For example, a claim could be brought to resolve a complex claim in the liquidation.[130]

(c) Claims that a liquidator may wish to bring in the name of the company that are of a character that fall within the pre-existing arbitration agreement can be brought by him or her, without leave of the court.[131] Enforcing an arbitration clause, if a liquidator believes it is in the company's best interest, poses no threat to public policy issues. Indeed, it does no more than to invoke the pre-existing mode of dispute resolution that has been agreed between the parties.

(d) A liquidator may initiate a claim in his or her own name, in respect of a right that accrues after liquidation has intervened. In our view, that type of claim can only be arbitrated under an *ad hoc* arbitration agreement, provided the claim is otherwise arbitrable.

In our view, the types of claims to which we have referred do not affect the rights of other creditors and therefore are not "core" or "pure" insolvency disputes. All that can be said is that a claim that may be of public interest is being shielded from the glare of publicity through the privacy and confidentiality attaching to the arbitral process. However, such concepts are not sacrosanct in arbitration. Save for the limited circumstances in which we suggest the transparency proposition may put a limited prohibition on the use of arbitration, there are other ways in which this particular concern can be addressed. For example, there are specific provisions in the Arbitration Act 1996 (New Zealand) that could be used to enable public disclosure in appropriate circumstances if required.[132] In an *ad hoc* arbitration, there is no reason why an insolvency representative of any type could not insist (for example) on an arbitration award being made available to all

[127] See *Cook v Mortgage Debenture* Ltd [2016] 3 All ER 957 (CA), at para 12, set out above.
[128] *Bresco Electrical Services Ltd (in liq) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, at para 33.
[129] Companies Act 1993, s 248(1)(c)(i). See also *Cook v Mortgage Debenture* Ltd [2016] 3 All ER 957 (CA).
[130] *Ibid*.
[131] Companies Act 1993, Sch 6, cl (a).
[132] Arbitration Act 1996, ss 14A to 14E.

creditors as a condition of agreeing to arbitrate the dispute. As noted previously, some arbitral institutions now default to publication of an award.

There is an issue with claims that the liquidator may choose to pursue in his or her own name or in the name of the company, for example directors' claims. In such cases, we consider that the answer will turn on whether the claim pursued by the liquidator is a new cause of action created as a result of the insolvency, or simply an extension of the pre-existing cause of action available to the company.[133]

Under present New Zealand law, section 301 of the 1993 Act, by which a liquidator can bring a claim against a director, is considered not to create a new cause of action, but to provide a mechanism though which existing claims at common law and equity can be determined.[134] Consequently, even if a liquidator brings the claim under this section in his or her own name, he or she is pursuing a claim that could have been initiated by the company before liquidation intervened. Therefore, there can be no public policy reason to reject arbitration as a chosen mode of dispute resolution under an *ad hoc* agreement.

Another area of difficulty involves unfair preference claims of the type with which *Larsen Oil* dealt. Under New Zealand law, these claims are brought in the name of the liquidator, rather than the company, and can be used to challenge transactions within a stipulated time that have the effect of preferring one creditor over others, the avoidance of security documents in certain circumstances, and recovery from someone who has acquired company property at an undervalue.[135]

There is no reason in principle why claims brought in the name of the liquidator cannot be the subject of an *ad hoc* arbitration agreement. In such cases, the liquidator is entering into an arrangement freely. Generally speaking, other creditors would not be joined to proceedings of that type, if brought in court. A separate issue arises if domestic legislation requires such a claim to be brought in the name of the company. In cases where the proceeding is brought by a liquidator, it is pursued by someone who was not party to an arbitration agreement but, if the claim were brought in the name of the company, the position is arguably different.[136]

8. Case study: The proof of debt regime for liquidations

We have chosen the proof of debt regime as a means of exploring whether arbitration of disputed claims should be regarded as "pure" or "core" and, therefore, not amenable to arbitration.[137]

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133 Compare *Arataki Properties Ltd v Craig* [1986] 2 NZLR 294 (CA) with *Re Maney and Sons De Luxe Service Station Ltd* [1969] NZLR 116 (CA).

134 *Benton v Priore* [2003] 1 NZLR 564 (HC) at paras 40 to 46.

135 Companies Act 1993, ss 291 to 298.

136 See the discussion on this point (and cases involving causes of action available before liquidation intervened) in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21, at paras 45 to 51 and compare with *Nori Holding Ltd v Public Joint-Stock Co "Bank Otkritie Financial Corporation"* [2018] EWHC 1343 (Comm), at paras 60 to 64.

137 In New Zealand, creditors are required to provide "proofs of claim" but we use the term "debt" as it is common to many other jurisdictions.

The question whether it is appropriate for a liquidator to arbitrate disputes arising out of proofs of debt is somewhat vexed. A claim by a putative creditor, if commenced before intervention of an insolvency process, might be caught by a pre-existing arbitration agreement. Yet, most statutes creating insolvency processes will mandate a specific procedure by which the insolvency representative decides whether the claim is justified. That regime typically provides rights for affected parties to seek review of an insolvency representative's decision in a court of competent jurisdiction. Using the New Zealand liquidation regime as an example, any creditor, shareholder or director of a company in liquidation may ask the High Court to confirm, reverse or modify a decision of the liquidator to admit or reject a proof of debt.[138]

The possibility of arbitrating proof of debt claims was discussed by Lazic in her book, *Insolvency Proceedings and Commercial Arbitration*.[139] She concluded that the question of arbitrability fell for determination in the context of the particular insolvency regime in issue. In surveying different claim regimes operating in the United States of America, the Netherlands and France, Lazic wrote:

> "… Pure bankruptcy issues, in particular those employing a special procedure provided by national insolvency laws, such as the verification, inventarization, collection and distribution of assets, are generally not to be decided by an arbitrator, but by the competent national courts having jurisdiction over bankruptcy. These are only examples. It is difficult to define the essence of pure bankruptcy issues.
>
> The extent of jurisdiction of bankruptcy courts may limit the domain of arbitration (arbitrability). This is of particular importance with respect to claims of ordinary, non-secured creditors against the debtor for payment from the estate, which have to be filed for verification or estimation in the bankruptcy proceedings. In the context of verification disputes – disputes when the claim is contested in bankruptcy proceedings – *vis attractiva concursus* has its strongest expression, and is then likely to limit arbitrability."

The proof of debt regime established under the 1993 Act (like that used in other jurisdictions) is designed to provide an efficient and effective mechanism for a liquidator to consider all competing claims and to determine the quantum of each, on the basis that the creditor must prove its claim.[140] Any challenge to a liquidator's decision to reject a proof of claim must be brought under the supervisory jurisdiction conferred by section 284(1)(b) of the 1993 Act to "confirm, reverse, or modify an act or decision of the liquidator". Leave is required for a putative creditor to challenge a decision to reject a proof of debt.

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138 Companies Act 1993, s 284(1)(b). The section also refers to any "other entitled person" but it is unnecessary, for the purposes of this paper, to explain who such persons are.

139 V Lazic, *Insolvency Proceedings and Commercial Arbitration* (Kluwer Law International, The Hague - London - Boston, 1998).

140 When what is now the Companies Act 1993 was proposed by the Law Commission, a major premise of the amendments made in relation to liquidations was based on the need for simplification of the law. As a result, it is unlikely that the courts would regard application of the more prescriptive rules contained in the Insolvency Act 2006 as overriding the more streamlined processes for which the Act and the Companies Act 1993 Liquidation Regulations 1994 provide: generally, see Company Law Reform and Restatement (NZLC R 9 1989) at para 642.

That is because of the Court's reluctance to interfere with the good faith exercise of a liquidator's discretionary powers and to avoid undermining his duty to carry out functions in an efficient manner.[141]

That approach is reinforced by section 256 of the 1993 Act which expressly forbids a liquidator from providing records of the liquidation (including proofs of debt and supporting documents) to a creditor or shareholder without permission of the High Court. *Harnish v Whittfield*[142] was a case in which a shareholder sought leave to access liquidation records in relation to a proof of claim lodged by a creditor, in circumstances where admission of the proof may have prevented a distribution to the shareholder. Associate Judge Smith said:[143]

> "[117] I think the main issue on prejudice to the liquidation must relate to the liquidator's right to control the manner in which creditors' claims are assessed, including controlling the flow of information to individual creditors to ensure that the claims are all properly examined, and that all creditors are treated fairly."

In common with similar regimes, section 304 of the 1993 Act requires an unsecured creditor to lodge a claim in the liquidation which contains full particulars of the claim and identifies any documents that evidence or substantiate it, and requires the liquidator (as soon as practicable) either to "admit or reject a claim in whole or in part" or to reconsider his decision later, if necessary.[144] The liquidator is entitled to require production of any document to which the claimant refers.[145] If the claim were rejected, in whole or in part, the liquidator "must forthwith give notice in writing of the rejection to the creditor".[146]

There are a number of reasons why a liquidator may reject a proof of debt. He may take the view that there is insufficient evidence to establish the claim. If a claim were rejected on that basis, the usual remedy would be for the claimant to seek leave to review the liquidator's decision in the High Court.[147] Alternatively, the liquidator may contend that there is a debt owing by the claimant to the company in liquidation which, when applied by way of set-off, extinguishes the creditor's claim. Resolution of this type of dispute is likely to be more complex, as section 310 of the 1993 Act requires, "an account [to] be taken of what is due from the one party to the other in respect of those credits, debts or dealings".[148] A third example is where a liquidator takes the view that a judgment has been improperly obtained by the claimant and is not prepared to admit the claim, notwithstanding the existence of a court judgment.[149]

A liquidator plays a quasi-judicial role in determining whether to admit or reject a proof of debt. In deciding whether the claim should be admitted, the liquidator's duty is to examine every proof and the grounds of debt and to determine whether the amount claimed is "justly and truly" owing by the company in

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141 *Re Northern Crest Investments Ltd (in liq)* HC Auckland CIV-2010-404-7741, 20 December 2011 at paras [7] and [8].
142 *Harnish v Whittfield* [2018] NZHC 2791 (Associate Judge Smith).
143 *Idem*, at para 117.
144 Companies Act 1993, s 304(1) and (3).
145 *Idem*, s 304(2).
146 *Idem*, s 304(4).
147 *Idem*, s 284(b).
148 *Idem*, s 310(1)(a).
149 Generally, see *Re Van Laun (ex parte Chatterton)* [1907] 2 KB 27 (CA).

liquidation.[150] Yet, if there were a challenge to his decision, the liquidator's role is as an advocate defending his decision before the court.

The broad nature of the liquidator's obligations was discussed by the Court of Appeal of England and Wales in *Re Van Laun (ex parte Chatterton)*.[151] The Court dealt with the ability of a liquidator (or a trustee in bankruptcy in that case) to "go behind" a judgment of a court to determine the amount "justly" due. Delivering the principal judgment, Sir Herbert Cozens-Hardy MR adopted what had been said by Bigham J at first instance:[152]

> "The trustee's right and duty when examining a proof for the purpose of admitting or rejecting it is to require some satisfactory evidence that the debt on which the proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or Account stated with him, can deprive the trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him. In the present case the trustee desires to satisfy himself that the claims for costs represent a real indebtedness. He can only do this by seeing and examining the bills. When he sees them it may be he will think them fair and reasonable, and, if so, he will probably admit the proof. But until Mr Chatterton furnishes him with the means of forming an opinion, I think the trustee cannot do otherwise than reject the proof."

In *Re Menastar Finance Ltd*,[153] Etherton J made some observations on the scope of a liquidator's ability to look behind a judgment of a court in order to examine the validity of a creditor's proof of debt. He said:

> "[48] It is equally well established that the court (and the liquidator or trustee in bankruptcy) will not, as a matter of course, look behind every judgment debt and consider afresh the validity of the debt. In *Re Flatau, ex p Scotch Whisky Distillers Ltd* (1888) 22 QBD 83 at 85, Lord Esher MR said:
>
> > 'It is not necessary now to repeat that, when an issue has been determined in any other court, if evidence is brought before the Court of Bankruptcy of circumstances tending to shew that there has been fraud, or collusion, or miscarriage of justice, the Court of Bankruptcy has power to go behind the judgment and to inquire into the validity of the debt. But that the Court of Bankruptcy is bound in every case as a matter of

[150] *Re Van Laun (ex parte Chatterton)* [1907] 2 KB 27 (CA), at para 29, per Sir Herbert Cozens-Hardy MR, with whom Vaughan Williams and Buckley LJJ agreed.

[151] *Ibid*. The first instance judgment is reported at [1907] 1 KB 155 (ChD). This approach has been adopted in many cases; more recent examples are *Re Minastar Finance Ltd (in liq)* [2003] 1 BCLC 338 (ChD) at paras 43 to 49. (Etherton J) and *Re Shruth Ltd* [2006] 1 BCLC 294 at paras 31–34 (Gloster J).

[152] [1907] 1 KB 155 (ChD) at pp 162–163.

[153] *Re Minastar Finance Ltd (in liq)* [2003] 1 BCLC 338 (ChD).

> course to go behind a judgment is a preposterous proposition.'
>
> [49] There has been some debate before me as to the circumstances, outside fraud and collusion, in which the court will (and a liquidator or trustee in bankruptcy should) go behind a judgment in order to examine the validity of the creditor's proof. In *Re Flatau,* as has been seen from the passage I have quoted, Lord Esher MR referred to circumstances in which there has been a 'miscarriage of justice'. In the earlier case of *Ex p Lennox, Re Lennox* (1885) 16 QBD 315 at 323 Lord Esher MR said that the court is bound to look into the alleged debt 'upon a sufficient case being shewn'. In *Re Van Laun, ex p Chatterton* [1907] 2 KB 23 at 31, Buckley LJ, drawing the two statements of Lord Esher MR together, said:
>
> 'If there be a judgment it is not necessary to shew fraud or collusion. It is sufficient, in the language of Lord Esher, to shew miscarriage of justice, that is to say, that for some good reason there ought not to have been a judgment.'"

The problem in classifying the nature of the proof of debt regime was well articulated in *Larsen Oil*.[154] The Court of Appeal of Singapore described the proof of debt regime as a "highly specialised form of dispute resolution in respect of claims brought against an insolvent party,"[155] noting that parties could not "contract out" of the application of insolvency rules. It saw an agreement to arbitrate as potentially infringing upon this principle. However, the Court also acknowledged a contrary argument; namely, that the proof of debt process cannot be undermined by the use of arbitration as it is "merely a substitute means of enforcing debts against the company, and does not create new rights in the creditors or destroy old ones".[156]

The former approach was adopted in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)*,[157] in which Sir Terence Etherton C held there was no basis for staying a petition brought on the grounds that the company was unable to pay its debts because "there can be no reference to arbitration of any of the debts because the making of a winding up order brings into effect the statutory scheme for proofs of debt which supersedes any arbitration agreement".[158] However, the second was applied recently by the Supreme Court of the United Kingdom, in *Bresco.*[159] In *Bresco,* Lord Briggs, by reference to claims arising in a scheme of arrangement, referred also to the possibility that directions of the court could be sought to enable particular disputes or legal issues common to a number of disputed claims to be referred for alternative dispute resolution; in context, we

[154] *Larsen Oil & Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] SGCA 21, at paras 49 and 51.
[155] *Idem*, at para 49.
[156] *Idem*, at para 51.
[157] *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589 (ChD).
[158] *Idem*, at para 34.
[159] *Bresco Electrical Services Ltd (in liq) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, at paras 33 and 34.

take that to include arbitration. By applying to the court, it was possible for interested parties or representatives of interested classes to be appointed, if necessary.

In summarising our views on public policy considerations, we acknowledged that issues involving "public" or "collective" rights might not be suitable for resolution by arbitration. By reference to *Tomolugen*, we agree that matters which "so pervasively involve 'public' rights and concerns, or interests of third parties, which are the subjects of uniquely governmental authority" are of a type that "agreements to resolve … by "private" arbitration should not be given effect".[160]

The unusual nature of the proof of debt regime has led us to the view that there are some aspects of the proof of debt process that are amenable to arbitration, but others that are not. Using liquidation to illustrate our views, we consider that a distinction should be drawn between cases in which a liquidator:

(a) relies on defences or cross-claims that would have been available to the company prior to the intervention of the insolvency process; and

(b) exercises powers conferred on him by legislation, common law or equity which would not have been available to the company prior to the intervention of an insolvency process. A simple rationale for excluding this type of case from arbitration is that it is inappropriate for arbitrators to be deciding whether a judgment of a court was lawfully made.

In our view, the first of those categories are arbitrable claims. However, those in the second category may properly be regarded as being "core" insolvency functions in nature and therefore not arbitrable. The distinction we have drawn finds support in a joint judgment given by Brennan and Dawson JJ (with whom Toohey J agreed on this point) in *Tanning Research Laboratories Inc v O'Brien*[161] (*Tanning*), a decision of the High Court of Australia.

In *Tanning,* a company in liquidation had, prior to liquidation, been party to an international arbitration agreement in respect of which an arbitrator had already given an award. The judgment is instructive because it supports the notion that a liquidator may use an arbitration agreement in force prior to liquidation to enable outstanding disputes to be resolved. Some discussion of the facts of the case is necessary.

Hawaiian Tropic Pty Ltd (Hawaiian Tropic) was a company that had been incorporated in New South Wales. Tanning Research Laboratories Inc (Tanning) was a corporation established in Florida. In 1975, the two companies entered into an agreement for the distribution of goods developed by Tanning. The agreement contained an arbitration clause to resolve any disputes that arose.

In 1981, Hawaiian Tropic was wound up by order of the Supreme Court of New South Wales. A liquidator was appointed. At some point after the liquidator was appointed, Tanning purported, unilaterally, to revoke the agreement. The liquidator issued instructions for proceedings to be commenced in a Circuit

[160] *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 (CA), at para 71. See also *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* [2016] FCA 1164, at para 131.

[161] *Tanning Research Laboratories Inc v O'Brien* (1990) 91 ALR 180 (HCA), at paras 184 to 185 (Brennan and Dawson JJ) and at para 195 (Toohey J). Although Deane and Gaudron JJ dissented, they did not take issue with this statement of principle.

Court in Florida seeking a declaratory judgment reinstating Hawaiian Tropic's rights under the licence and awarding damages in its favour. The Florida Court ordered the issue to be settled by arbitration, in accordance with the arbitration clause. An award was made on 8 January 1985, by the appointed arbitrators. On 6 May 1985, the award was given effect by the Circuit Court.

In consequence of the arbitration and order of the Florida Court, the liquidator gave notice rejecting Tanning's proof of claim. The liquidator pointed out that Tanning had elected not to pursue any cross-claim in the original arbitration proceeding. Tanning applied to reverse the liquidator's decision. The Supreme Court of New South Wales allowed Tanning to claim in an amount not pursued in the arbitration, but the Court of Appeal of New South Wales reversed that decision. Instead, it stayed Tanning's application to reverse the liquidator's decision and required determination of the amount in issue to be conducted by arbitration, under the arbitration agreement.

By a majority, the High Court of Australia upheld the Court of Appeal's decision. Giving the principal judgment, Brennan and Dawson JJ provided a lucid description of the differences that arise when a liquidator rejects a proof of debt based on a defence that could have been raised by the company prior to liquidation and those which are reliant on powers given independently to the liquidator. Their Honours said:[162]

> "A liquidator who defends his rejection of a proof of debt on the ground that, under the general law, the liability to which the proof relates is not enforceable against the company takes his stand on a ground which is available to the company. A liquidator who resists a claim made by a creditor against the assets available for distribution on the ground that there is no liability under the general law thus stands in the same position vis-à-vis the creditor as does the company. If the creditor and the company are bound by an international arbitration agreement applicable to the claim, there is no reason why the claim should not be determined as between the creditor and the liquidator in the same way as it would have been determined had no winding up been commenced. To exclude from the scope of an international arbitration agreement binding on a company matters between the other party to that agreement and the company's liquidator would give such agreements an uncertain operation and would jeopardise orderly arrangements: … *But it is otherwise if the liquidator supports his rejection of a proof of debt in reliance on a ground which allows him, and him alone, to go behind the judgment, account stated, covenant or estoppel on which the company's liability is founded*. The entitlement of a liquidator to go behind a judgment, account stated, covenant or estoppel is unaffected, either substantially or procedurally, by the existence of an international arbitration agreement binding on the company. To stay proceedings which involve only matters outside the scope of an international arbitration agreement would be to frustrate the provisions for winding up." (Emphasis added)

[162] *Tanning Research Laboratories Inc v O'Brien* (1990) 91 ALR 180 (HCA), at paras 186–187.

The distinction is reinforced by the way in which set-off claims may be addressed. There is high authority for the proposition that rights of set-off in an insolvency process can be determined through arbitration, in contrast to the proof of claim procedure. This issue was discussed by the House of Lords in *Stein v Blake*.[163] The relevant insolvency rule is that where there have been mutual dealings between the company in liquidation and a creditor proving or claiming to prove for a debt in the liquidation, an account must be taken of what is due from the company and the creditor to each other and the sums due from one must be set-off against those due from the other.[164] Only if there were a balance owed to the creditor can that debt be proved in the liquidation.[165]

In conceptual terms, the ability for a creditor to prove only for a net balance, or to pay a net balance to the liquidator, only arises after claims and cross claims have been determined. For the purpose of ascertaining the balance, the separate claims of the company and the purported creditor are treated as if they continue to exist, so that a proceeding may be issued to determine who is owed what sum of money. It is no more than a commercial dispute between the company and the creditor and therefore is capable of being resolved by arbitration.

Farley v Housing & Commercial Developments Ltd[166] implicitly acknowledged that arbitration was an acceptable means of determining the net balance. In that case, Neill J answered, in the affirmative, an arbitrator's special consultative case in which the question whether the respective claims ceased to have a separate existence as choses in action and were replaced by a balance of account.[167] The Judge's approach was approved by the Court of Appeal and House of Lords respectively, in *Re Kaupthing Singer & Friedlander Ltd (in administration)*[168] and *Stein v Blake*.[169]

The outcome of our analysis is that if a liquidator were not satisfied that a claimant has proved a debt, the putative creditor is entitled either to seek leave to review the liquidator's decision or to seek leave of the High Court to bring or continue a proceeding designed to determine the amount payable.[170] If the claim fell within the scope of an arbitration agreement, permission could be sought to bring or continue an arbitral proceeding.[171]

However, the position is different when a liquidator exercises a power to look behind a judgment debt and finds that there is good reason why it should not be applied. In such a case, the liquidator is acting for the benefit of the creditors as a whole and is empowered to disregard the estoppel that would otherwise arise

163 *Stein v Blake* [1996] 1 AC 243 (HL).
164 Companies Act 1993, s 310.
165 *Stein v Blake* [1996] 1 AC 243 (HL), was concerned with s 323 of the Insolvency Act 1986 (UK) in force in England and Wales at the relevant time. That section is materially similar to s 310(1) of the Companies Act 1993. See also, *Bresco Electrical Services Ltd (in liq) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, at paras 31 to 34.
166 *Farley v Housing & Commercial Developments Ltd* [1984] BCLC 442.
167 *Idem*, at 447.
168 *Re Kaupthing Singer & Friedlander Ltd (in administration)* [2010] EWCA Civ 518 (CA), at para 33, per Etherton LJ.
169 *Stein v Blake* [1996] 1 AC 243 (HL), at 255 per Lord Hoffmann, delivering the principal speech with whom Lord Keith of Kinkel, Lord Ackner, Lord Lloyd of Berwick and Lord Nicholls of Birkenhead, agreed.
170 For example, see *Cook v Mortgage Debenture Ltd* [2016] 3 All ER 957 (CA), at para 12 (and dealt with above).
171 See discussion above.

through the court judgment.[172] In undertaking that task, the liquidator is exercising the historical jurisdiction of a Court of Bankruptcy to go behind the judgment. As the liquidator, in effect, is acting as the court's delegate, it is appropriate that a court of competent jurisdiction rule on whether his or her decision is appropriate. On that view, resolution of a challenge to rejection of a proof of debt on that ground involves a core insolvency function, rather than the mere assessment of an amount payable which can be resolved, if necessary, by ordinary court proceedings or arbitration. As previously indicated, it is inappropriate for an arbitrator to rule on the validity of a court judgment.

9. Conclusions

Our survey of the authorities has revealed a similar pattern among the common law jurisdictions that we have considered. Arbitration of insolvency-related disputes is now widely accepted. The remaining differences in approach seem to stem from the nature of the starting point taken for the purpose of analysis. Using New Zealand law for the purpose of determining arbitrability, we express our conclusions below.

First, it is accepted that an arbitral tribunal (irrespective of the breadth of its remedial jurisdiction under the applicable law) cannot make an order putting a company into liquidation. Nor could it make any other form of order that purports to commence a collective insolvency regime. This bar is justified by both the status[173] and third party rights[174] propositions. The making of an order commencing a collective insolvency process is a core insolvency function that is reserved for the courts.

Second, disputes arising between a company in an insolvency process and others who claim to have provable claims, will (provided they come within the scope of a pre-existing arbitration clause between the parties) be amendable to resolution by arbitration where they cannot be determined summarily under a proof of debt regime. This approach is justified by the parties' consensual agreement, made before an insolvency process intervened, to determine disputes by arbitration. Such a dispute could also be subject to an *ad hoc* arbitration agreement post-insolvency. The underlying dispute being resolved is essentially commercial and does not engage third party rights or wider public interest elements. This method of dispute resolution can be employed in complex cases.

Third, a claim that could only be brought in the name of an insolvency representative, as a result of powers conferred after the insolvency process intervened, is unlikely to be amenable to arbitration under a pre-existing arbitration agreement because the insolvency representative is not a party to that agreement; this is a privity of contract issue. Two issues arise in cases in which the claim could be brought by the liquidator in the name of the company. First, it will be necessary to determine whether the particular dispute falls within the ambit of even a widely drawn arbitration clause; this inquiry involves the scope of the arbitration agreement. The second question is whether there is any person who would have a right to be heard but who is not a party to the arbitration agreement; this engages the third party rights proposition. In

[172] *Tanning Research Laboratories Inc v O'Brien* (1990) 91 ALR 180 (HCA), at 186 to 187, set out above.
[173] See discussion above.
[174] See discussion above.

addressing the question whether a pre-existing arbitration agreement would be enforceable, it is likely that a New Zealand court would need to consider whether the approach taken in *Larsen Oil* or *Nori Holding* ought to be preferred, or whether on the particular facts those two cases can be reconciled.

Fourth, we consider that claims that arise after insolvency intervenes may generally be the subject of an *ad hoc* arbitration, in which the insolvency representative must agree the terms on which the arbitration proceeds. However, exceptions to that general proposition may exist. For example, an *ad hoc* arbitration may not be appropriate in cases in which it is necessary for third parties to be heard (engaging the third party rights proposition) or those where the liquidator is exercising the historical jurisdiction of a Court of Bankruptcy in reviewing a proof of debt based on a judgment.

Fifth, in minority oppression cases, determination of the underlying questions of fact concerning the controversy between the parties are arbitrable. In such cases, an arbitral tribunal may award any appropriate remedy short of liquidation. If no minority oppression proceeding were brought but the shareholder relied solely on a just and equitable proceeding in which liquidation is the only remedy, it is likely that a New Zealand court would regard such a proceeding as non-arbitrable.[175]

Sixth, it is open for insolvency representatives to enter into *ad hoc* arbitration agreements to resolve disputes that do not directly engage third party rights; at least to the extent that they would have been similarly affected had an arbitral award been given the day before the insolvency process began. However, the insolvency representative will not be entitled to arbitrate disputes about the admissibility of proofs of debt in cases where he is relying on statutory, common law or equitable principles not available to the insolvent entity before insolvency intervened.[176]

We emphasise that public policy in individual States is likely to guide the circumstances in which the transparency proposition applies. A degree of consistency on this topic may emerge if insolvency representatives (in *ad hoc* arbitrations) were to insist on any award being published to creditors of the insolvent entity or other relevant stakeholders. The advantages of flexibility of process, choice of an agreed arbitrator with expertise in the subject matter of the dispute and speed of process would remain as factors that could weigh in favour of arbitration, even if an award were published more widely than the parties.

[175] For a discussion of New Zealand law in relation to the liquidation of a company on the just and equitable ground, see *Jenkins v Supscaf Ltd* [2006] 3 NZLR 264 (HC). It is possible that New Zealand may take the Cayman approach in cases where a just and equitable proceeding has been issued. That is because, contrary to the position in some other countries (compare *Tomolugen* at paras 83 and 84), there is a requirement to advertise a just and equitable proceeding, even if brought by a shareholder on grounds of deadlock or impropriety by others involved in the company: see, in particular, rr 31.3 (by reference to s 241(2)(c) of the 1993 Act, which applies to all applications to the Court to liquidate a company), 31.9, 31.18, 31.24(4) and 31.19 of the High Court Rules (NZ).

[176] See above for a comparison between the two statements.

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