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# **Cross-Border Rehabilitation: An Impediment to Ship Arrest in Singapore?**

*Jesse Zhihe Ji\**

Conflicts between admiralty law and cross-border rehabilitations have long caused legal difficulties with ship arrests in various jurisdictions. In Singapore, which is recognised as both a liberal ship arrest jurisdiction and a promising debt-restructuring hub, such issues are causing concern in the context of the current volatility of global shipping. Singapore case law in this regard reflects a shift in position from an admiralty-paramount to a pro-universalist view. While this trend is understandable, given Singapore's intention to implement the UNCITRAL Model Law on Cross-Border Insolvency, it requires a consideration of how the Model Law can be reconciled with enforcement of maritime liens and other statutory liens in admiralty. Furthermore, it should be borne in mind that the Model Law does not purport to remove or alter existing protections of secured creditors in Singapore domestic law. It therefore appears inapt to interpret broadly the court's inherent powers as a device permitting a blanket order overriding the provisions of the High Court (Admiralty Jurisdiction) Act in order to assist a foreign rehabilitation proceeding by staying all ship arrests. Striking a delicate balance between ship arrest and cross-border rehabilitation will benefit and strengthen Singapore in the long term as a regional twin-hub of maritime trade and debt restructuring.

Keywords: Cross-border insolvency, foreign rehabilitation proceedings, ship arrest, maritime law, modified universalism, inherent powers, UNCITRAL Model Law on Cross-Border Insolvency, High Court (Admiralty Jurisdiction) Act, Order 92 Rule 4 of the Rules of Court.

# 1 Introduction

In his prominent work on maritime liens, DR Thomas made an oft-quoted remark that:<sup>1</sup>

The law of [insolvency] seems to have developed with little regard to the Admiralty proceeding *in rem*. Certainly, it is difficult to fit the Admiralty proceeding into the legislative language of the relevant statutes which regulate [insolvency proceedings]. Yet the need for the latter to accommodate the action *in rem* and the potential conflict between the two processes is plain.

The interplay between the two regimes — admiralty and cross-border insolvency — has created unique practical and legal challenges, and recently came into sharp focus with the decision of *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd)*<sup>2</sup> amid the Hanjin debacle worldwide. Some novel perspectives embedded in this decision give fresh impetus to a discussion and review of Singapore's standing as a liberal ship arrest jurisdiction and a promising debt restructuring hub.

This paper first looks at the contrasting judicial views expressed in *Re Taisoo Suk* and a previous Singapore case, *Re TPC Korea*,<sup>3</sup> on the status of the High Court (Admiralty Jurisdiction) Act<sup>4</sup> ('HCAJA') governing ship arrest in the context of cross-border rehabilitation. The discussion that follows considers ship arrest for the purpose of enforcing maritime liens, as well as arrest on the basis of statutory liens. Both Commonwealth and local case law will be reviewed, rather than merely engaging in a binary debate in the current pre-Model Law era in Singapore.

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<sup>1</sup> DR Thomas, *Maritime Liens* (Stevens & Sons 1980) para 99.

<sup>2</sup> [2016] SGHC 195, [2016] 5 SLR 787.

<sup>3</sup> [2010] SGHC 11, [2010] 2 SLR 617.

<sup>4</sup> Cap 123, 2001 Rev Ed.

The focus will then shift to Order 92, Rule 4 of the Rules of Court ('O 92 r 4'),<sup>5</sup> which was successfully relied upon for the first time in *Re Taisoo Suk* by the foreign representative to persuade the court to grant a stay order restraining ship arrest. This innovative gateway, which is a plausible avenue for companies under foreign rehabilitation, is analysed with reference to: (a) the traditional standing of the Singapore courts; (b) the proper construction of the Rules of Court; (c) the common law perspective; and (d) the upcoming adoption of the UNCITRAL Model Law on Cross-Border Insolvency 1997 ('Model Law')<sup>6</sup> by Singapore.

Finally, this paper concludes in calling for judicial comity between admiralty law and cross-border insolvency, both priorities in Singapore, in the post-financial crisis era. The development of one should not be at the expense of the other.

## **2 HCAJA: a self-contained regime governing ship arrest in the context of cross-border rehabilitation?**

The emergence of the Admiralty Court as a distinct jurisdiction has been traced back to the period between 1340 and 1357.<sup>7</sup> The modern jurisdiction in Singapore is derived directly from the UK Administration of Justice Act 1956<sup>8</sup> and in Singapore, admiralty jurisdiction is conferred on the High Court by the HCAJA.

In *Re TPC Korea*, the Singapore High Court observed that, in the context of cross-border insolvency, the HCAJA should be regarded as a self-contained regime governing ship arrest.<sup>9</sup>

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<sup>5</sup> Cap 332, R 5, 2014 Rev Ed.

<sup>6</sup> For the official English text see UNGA Res 52/158 (15 December 1997) UN Doc A/RES/52/158 Annex. See also *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* <<http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>> accessed 8 March 2017.

<sup>7</sup> Nigel Meeson and John Kimbell, *Admiralty Jurisdiction and Practice* (4th edn, Informa 2013) para 1.1.

<sup>8</sup> 4 & 5 Eliz II, c 46.

<sup>9</sup> *Re TPC Korea* (n 3) [19].

Admiralty proceedings against the vessels were held not to be necessarily affected in that rehabilitation case.

The Singapore Maritime Legal Association (SMLA) has subsequently expressed the view that:<sup>10</sup>

*Re TPC Korea* represents an area of difficulty in the administration of cross-border maritime insolvencies. The practical effect of *Re TPC Korea* allows ship arrests to take place in Singapore resulting in the depletion of the foreign company's assets. This would be problematic for the utility of the main foreign administration proceedings.

This admiralty-paramount position has recently been revisited and questioned by Abdullah JC in *Re Taisoo Suk*. In that case, the judge was of the view that the HCAJA did not prohibit him from issuing orders which would have the effect of restraining the arrest of ships and staying other admiralty proceedings.<sup>11</sup>

The judicial approaches adopted in *Re TPC* and *Re Taisoo Suk* with regard to the HCAJA appear to be irreconcilable. Behind this controversy over whether the HCAJA is a self-contained regime governing ship arrest lies the broader legal difficulty, which is how to accommodate both admiralty proceedings in rem for maritime claims and in personam claims in cross-border rehabilitation proceedings.

As to the exercise of admiralty jurisdiction over maritime claims, the HCAJA allows for actions in rem to be brought: (a) against the ship which is encumbered with a maritime lien that comes within section 4(3); and (b) against the ship in question which falls under section

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<sup>10</sup> SMLA's reply to the Comité Maritime International's International Working Group on Cross-Border Insolvency Questionnaire (2012) para 29: <<http://www.comitemaritime.org/Uploads/Work%20In%20Progress/Cross-Border%20Insolvency/Singapore%20MLA%20Reply%20To%20Questionnaire.pdf>> accessed 8 March 2017.

<sup>11</sup> *Re Taisoo Suk* (n 2) [24].

3(1)(d)-(q).<sup>12</sup> Put differently, under Singapore law actions in rem for maritime claims can be categorised as maritime liens and other statutory liens.<sup>13</sup> The essential difference is that a maritime lien arises and attaches to the ship from the time of the underlying cause of action,<sup>14</sup> whilst a statutory lien only crystallises upon the issue of the in rem claim form.<sup>15</sup>

With regard to a maritime lien proceeding in rem, *Re Taisoo Suk* shed very little light on this issue in the context of cross-border rehabilitation proceedings. No further observation was made by the judge, as the order was made on the basis of an ex parte application and there was no argument on the merits in the case.

The Australian experience is instructive in this respect. In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*,<sup>16</sup> a maritime lien was treated by the Full Court of the Federal Court of Australia as a secured claim, and hence the time when the lien arose was not dependent upon when an action in rem was commenced. Subsequently, Buchanan J in *Yu v STX Pan Ocean Company Ltd*<sup>17</sup> helpfully restated the principle of English law that, in the case of a maritime lien, proceedings in rem vindicate an existing security right.

Recently, in *Yakushiji v Daiichi Chuo Kisen Kaisha*,<sup>18</sup> Allsop CJ held that a maritime lien claim is not necessarily affected by any moratorium arising from the recognition of cross-border insolvency because of the exception for secured claims already existing in insolvency proceedings.

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<sup>12</sup> Proprietary claims against the vessel listed in section 3(1)(a)-(c) of the HCAJA fall outside of the scope of this paper, as these do not normally give rise to parallel claims between creditors in the context of cross-border maritime insolvencies.

<sup>13</sup> In *The Vinalines Pioneer* [2015] SGHC 278, [2016] 1 SLR 448 [13], Belinda Ang Saw Ean J observed that “Put simply, if a maritime lien exists, a statutory lien and jurisdiction in rem is available. However, the converse is not necessarily true. If a statutory lien and jurisdiction in rem are made out, it is not the case that a maritime lien can be inferred.”

<sup>14</sup> *The Two Ellens* (1872) LR 4 PC 161.

<sup>15</sup> *The Monica S* [1986] P 741, [1967] 2 Lloyd’s Rep 113.

<sup>16</sup> [2006] 157 FCR 45 [112]-[114].

<sup>17</sup> [2013] FCA 680, 223 FCR 189, 31 ACLC 13-032 [40].

<sup>18</sup> [2015] FCA 1170 [17]-[22].

In addition, the Federal Court noted the significant public interest in upholding the ability to enforce the security of a maritime lien, and found no basis for it to be affected by the recognition of foreign insolvency proceedings.<sup>19</sup> The rationale for this conclusion was that:<sup>20</sup>

... those whose claims fall into the categories of maritime lien have provided fundamental services to the ship or have victims of a maritime wrong which must be compensated. The fact that ships were highly mobile and could flee the jurisdiction of the court, coupled with the additional fact that their owners could continue to incur liability to the detriment of existing creditors, may have resulted in special protection being given to those who fell within the various categories mentioned. That special protection took the form of the artifice of the maritime lien, which survived transfers of ownership, and was given effect to by the action *in rem*.

From an Australian perspective, the purpose of a maritime lien proceeding *in rem* is to enforce a pre-existing security claim that is supposed to be insulated from the insolvency regime applicable to unsecured creditors. Any impediment to such an action *in rem* would possibly allow new liability to be incurred during the vessel's operation on sea and be detrimental to all creditors, especially in the context of cross-border insolvency.

In Singapore, the status of a maritime lien holder is laid down and determined by the HCAJA at domestic law and under the *lex fori*.<sup>21</sup> Once a maritime lien attaches to the vessel, the holder is regarded as a secured claimant in admiralty proceedings and ranks ahead of any other unsecured party, irrespective of whether or not insolvency proceedings are involved. It is correct to say, as Abdullah JC remarked in *Re Taisoo Suk*, that the inability of individual creditors to obtain security was a necessary consequence of the universal collection and

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<sup>19</sup> Yu (n 17) [40].

<sup>20</sup> Sarah Derrington and James Turner, *The Law and Practice of Admiralty Matters* (2nd edn, OUP 2016) para 2.21. See also *The Zafiro* [1960] P 1.

<sup>21</sup> In *Bankers Trust International Ltd v Todd Shipyards Corp (The Halcyon Isle)* [1981] AC 221 (PC), a decision of the Privy Council on appeal from Singapore, the majority held that the asserted maritime lien is to be adjudged according to the law of the forum. The majority approach in *The Halcyon Isle* was recently confirmed by the Full Court of the Federal Court of Australia in *The Ship 'Sam Hawk' v Reiter Petroleum Inc (The Sam Hawk)* [2016] FCAFC 26.

marshalling of assets.<sup>22</sup> What is undeniable is that the obtaining of security by a general unsecured creditor is to be distinguished from the exercise of security by a maritime lien holder arresting the ship to which the security has previously attached. The decision in *Re Taisoo Suk* appears to have overlooked the uniqueness of the maritime lien as a preferred maritime claim in rem, as well as the public interests behind such maritime liens.

Although Singapore has announced that it will adopt the Model Law in the near future,<sup>23</sup> the application in *Re Taisoo Suk* was still based on the common law. The common law principle of recognition and assistance of cross-border insolvency was delineated by the Privy Council in *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc*.<sup>24</sup> In that case Lord Hoffmann stated that:<sup>25</sup>

[T]he insolvency proceedings are not to determine or establish the existence of rights. ... The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.

The recognition of, and the providing of assistance to, foreign insolvency proceedings are devised to deal with possible parallel proceedings and conflicts over different jurisdictions in the arena of insolvency law. It is not appropriate to intervene in the established HCAJA framework with the purpose of ousting the secured priority enjoyed by maritime lien holders, or to change the conflicts rules established by *The Halcyon Isle*.<sup>26</sup>

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<sup>22</sup> *Re Taisoo Suk* (n 2) [31].

<sup>23</sup> In October 2016, the Singapore Ministry of Law announced that it would enact the Model Law via the proposed Companies (Amendment) Bill 2017. See *Public Consultation on Proposed Amendments to the Companies Act to Strengthen Singapore as an International Centre for Debt Restructuring* <<https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/public-consultation-on-proposed-amendments-to-the-companies-act-.html>> accessed 8 March 2017.

<sup>24</sup> [2006] UKPC 26, [2007] 1 AC 508 [14]-[22].

<sup>25</sup> [2007] 1 AC 508 [14] and [22].

<sup>26</sup> *The Halcyon Isle* (n 21).

The Singapore Court of Appeal in *Beluga Chartering*<sup>27</sup> adopted Lord Scott's observation in *Re HIH Insurance*<sup>28</sup> that the court providing recognition and assistance of foreign insolvency does not have the power to deprive creditors proving their statutory rights in a local liquidation. Section 262(3) of the Singapore Companies Act,<sup>29</sup> which applies to a compulsory winding up, states that, after the commencement of the winding up, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court imposes.<sup>30</sup> This section is equivalent to section 471B of the Australian Corporations Act 2001 (Cth). However, no counterpart of section 471C of the Australian Corporations Act, which provides that '[n]othing in section 471A or 471B affects a secured creditor's right to realise or otherwise deal with the security interest', is found in section 262(3) of the Singapore Companies Act. In *Yu Buchanan J* observed that, because a maritime lien holder is a secured creditor, an action in rem to enforce a maritime lien would fall within, and be protected by, section 471C of the Australian Corporations Act, and that there was therefore no need to apply to the court for leave under section 471B to enforce the maritime lien.<sup>31</sup>

This Australian approach, which allows for the enforcement of maritime liens as secured creditor's rights without having to apply to the court for leave, does not seem to be available in Singapore under the current wording of section 262(3) of the Singapore Companies Act. The logical inference to draw from this is that default insulation from compulsory foreign winding-up proceedings is likely to be unavailable to a maritime lien holder that intends to exercise its secured rights in Singapore. In such circumstances, the maritime lien holder will have to rely on the exception in section 262(3) of the Companies Act and apply for leave of the court to exercise its statutory right of ship arrest granted by section 4(3) of the HCAJA.

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<sup>27</sup> *Beluga Chartering GmbH (in liquidation) v Beluga Projects (Singapore) Pte Ltd (in liquidation) (Beluga Chartering)* [2014] SGCA 14, [2014] 2 SLR 815.

<sup>28</sup> [2008] 1 WLR 852 [59].

<sup>29</sup> Cap 50, Rev Ed 2006.

<sup>30</sup> An analogous provision for voluntary winding up can be found in section 299(2) of the Singapore Companies Act.

<sup>31</sup> *Yu* (n 17) [41].

For arrangement and reconstruction proceedings, the counterpart of section 262(2) can be found in section 210(10) of the Singapore Companies Act. Abdullah JC in *Re Taisoo Suk* saw no difficulty in extending similar considerations in the context of winding-up proceedings to other forms of insolvency proceedings, including restructuring and rehabilitation.<sup>32</sup> The same conclusion can be reached in this context; namely, that leave to arrest a ship to enforce a maritime lien will have to be granted by the court that provides recognition and assistance of foreign rehabilitation.

With regard to other statutory liens in rem, arrest is merely a form of provisional security, which is designed to ensure that, if a judgment in rem is obtained, the arrested property is available to satisfy the judgment.<sup>33</sup> In Singapore, admiralty jurisdiction is invoked when the vessel is either arrested or served with the writ in rem, whichever occurs first.<sup>34</sup> The question as to when ship arrest for a statutory lien in rem trumps cross-border rehabilitation may ultimately be left to the party that acts first. This is settled law and well-established practice for local liquidations in Singapore.

In *Lim Bok Lai*,<sup>35</sup> the Singapore Court of Appeal followed the English case of *Re Aro*<sup>36</sup> to the effect that the court's leave would normally be granted to a claimant to proceed with its statutory lien in rem claim, provided that the in rem action against the vessel was underway prior to the commencement of a compulsory winding up. The plaintiffs in *Lim Bok Lai* were granted leave under section 262(3) of the Companies Act to continue admiralty proceedings in rem on the ground that the writ for unpaid bunkers had been issued prior to the commencement of winding-up proceedings. Likewise, the Singapore Court of Appeal in *The Hull 308*<sup>37</sup> held that the plaintiff had failed to obtain a statutory lien as no writ in rem had been effectively issued before the presentation of the winding-up petition. Recently, in *The Oriental Baltic*,<sup>38</sup> the Singapore High Court further clarified that the principle in *Lim Bok Lai*

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<sup>32</sup> *Re Taisoo Suk* (n 2) [16].

<sup>33</sup> Verónica Ruiz Abou-Nigm, *The Arrest of Ships in Private International Law* (OUP 2011) para 4.19.

<sup>34</sup> *The Fierbinti* [1994] 3 SLR(R) 574.

<sup>35</sup> [1987] SGHC 35, [1987] SLR(R) 466.

<sup>36</sup> [1980] Ch 196.

<sup>37</sup> [1991] SGCA 34, [1991] 2 SLR(R) 643.

<sup>38</sup> [2011] 1 SLR 487.

and *The Hull 308* was applicable to a voluntary winding-up under the Singapore Companies Act.<sup>39</sup> The reasoning in *Re Taisoo Suk* sits well with this inclusive approach and would embrace other insolvency proceedings, including rehabilitation.

In the context of foreign rehabilitation, a side issue that is still uncertain under Singapore law is whether the commencement of proceedings on a statutory lien in rem has to take place prior to the commencement of foreign insolvency proceedings or recognition given by the Singapore court. The New Zealand High Court in *Kim and Yu v STX Pan Ocean Co Ltd* held that foreign orders did not have extraterritorial reach.<sup>40</sup> In line with this, the Australian Federal Court in *Kim v Daebo International Shipping Co Ltd* suggested that the date of commencement of the foreign proceeding was not relevant in such cases.<sup>41</sup> Similarly, the Singapore Court of Appeal in *Beluga Chartering* held that it was not automatically bound by a foreign insolvency order, ‘premised on the fundamentally territorial nature of jurisdiction.’<sup>42</sup> The court, nonetheless, appeared to grapple with this issue to some extent in its later tentative observations:<sup>43</sup>

Whether and how the Singapore court will render assistance to foreign winding up proceedings will depend on the particular circumstances before it. ... We would observe however that the commencement of legal proceedings against a defendant foreign company or an attempt to levy execution against its asset *is not precluded by the mere fact that insolvency proceedings have been commenced against the company in another jurisdiction.*

The question of whether, and to what extent, either commencement or recognition of foreign insolvency proceedings will constitute an obstacle to the success of a statutory lien proceeding will require further consideration when it is fully put before the Singapore courts in the future.

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<sup>39</sup> Section 290.

<sup>40</sup> [2014] NZHC 845 [40].

<sup>41</sup> [2015] FCA 684, (2015) 232 FCR 275 [14].

<sup>42</sup> *Beluga Chartering* (n 27) [90].

<sup>43</sup> *Ibid* [99]. Emphasis added. It should be noted that the court did not refer to the effect of *recognition* of foreign insolvency proceedings.

Overall, it might be an admiralty-paramount view to suggest, as the court did in *Re TPC Korea*, that the HCAJA is a self-contained regime to ‘resolve [any] disputes where the relevant interests or assets involved were vessels’.<sup>44</sup> On the other hand, the stay order in *Re Taisoo Suk*, which has the effect of frustrating all types of actions in rem and ship arrests, reflects the view that universalism in cross-border insolvency should take precedence over all admiralty matters. The cases of *Re TPC Korea* and *Re Taisoo Suk* therefore cannot provide a full analysis of the Singapore position regarding ship arrest at the intersection of admiralty law and cross-border insolvency.

Taking account of Commonwealth experience and local case law, it may be observed that, insofar as a maritime lien proceeding in rem arises, the HCAJA may remain a self-contained regime to be considered by the Singapore courts when considering whether to grant leave for ship arrest amid cross-border rehabilitation. For other statutory lien in rem proceedings, the situation is different. The availability of ship arrest depends on issuing in rem proceedings expeditiously before the commencement of foreign insolvency proceedings, or alternatively recognition rendered to foreign insolvency proceedings by the local courts.

### **3 O 92 r 4: an innovative master key to successful judicial assistance of cross-border rehabilitation in Singapore?**

In the context of cross-border insolvency, without effective assistance rendered by the local court, recognition per se cannot achieve anything. The legal principle regarding judicial assistance in Singapore to foreign insolvency proceedings has been framed and developed by the local courts.

In *Re China Underwriters Life and General Insurance Co Ltd* the Singapore High Court decided that it had no inherent jurisdiction to exercise powers pursuant to statutory

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<sup>44</sup> *Re TPC Korea* (n 3) [19].

provisions where they were otherwise not applicable.<sup>45</sup> This was subsequently upheld by the Court of Appeal in *Official Receiver of Hong Kong v Kao Wei Tseng*,<sup>46</sup> confirming that judicial assistance could not be provided without a statutory basis. This suggests that, under the Companies Act, there is almost no room for a residual statutory discretion to assist foreign insolvency proceedings.<sup>47</sup>

In these circumstances, it is imperative to find an avenue for assistance at common law. In this regard, Lord Hoffman in *Cambridge Gas* held that:<sup>48</sup>

At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which forms no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency.

In *the Matter of China Sun Bio-Chem Technology Group Co Ltd*,<sup>49</sup> an applicant successfully relied on the above principle and persuaded the Singapore High Court to accept that an unregistered foreign company that does not carry on business in Singapore should be in the same position as a registered foreign company in Singapore under the Companies Act. The Court of Appeal in *Begula Chartering* later offered the provisional observation that:<sup>50</sup>

Whether and how the Singapore court will render assistance to foreign winding up proceedings through the regulation of its own proceedings will depend on the particular circumstances before it. Nonetheless, it remains open to the courts to assist the foreign liquidation proceedings by exercising their inherent discretion to stay proceedings.

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<sup>45</sup> [1998] 1 SLR(R) 40 [38].

<sup>46</sup> [1990] 1 SLR(R) 315 [17]-[22].

<sup>47</sup> Chan Sek Keong, 'Cross-border Insolvency Issues Affecting Singapore' (2011) 23 SAclJ 413 para 21.

<sup>48</sup> *Cambridge Gas* (n 24) [22].

<sup>49</sup> Unreported, Originating Summons No 762 of 2010. See Rodney Keong and Melvin See, 'Foreign Liquidators of Unregistered Foreign Companies' <<http://www.lexology.com/library/detail.aspx?g=e3ea6bbd-df0a-4e9d-be8a-974e5a341830>> accessed 24 Dec 2016.

<sup>50</sup> *Beluga Chartering* (n 27) [98], [99].

Building on these dicta, Abdullah JC in *Re Taisoo Suk* was persuaded to invoke O 92 r 4, on the inherent powers of the court, to assist in foreign rehabilitation.<sup>51</sup>

Following *Re China Insurance* and *Re Taisoo Suk*, the ability of Singapore courts to assist foreign insolvency proceedings at statutory law seems to have been reinvigorated. On a narrow view, the relevant statutory law was confined to Companies Act.<sup>52</sup> With the imminent enactment of the Companies (Amendment) Bill 2017 in alignment with the Model Law, it is worth examining whether O 92 r 4 can be relied on as a front-line resource to advocate universalism in cross-border insolvency proceedings in Singapore.

O 92 r 4 states as follows: ‘For the avoidance of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Courts to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.’

Tellingly, this provision in a miscellaneous part of the Rules of Court contains a presumption of statutory limitation and accordingly confers ultimate power on the court dealing with substantial injustice and procedural abuse in extraordinary cases. Abdullah JC in *Re Taisoo Suk* therefore emphasised that O 92 r 4 should not be invoked or granted lightly as the first resort in dubious claims. He was, however, of the view that the imperative for orderly rehabilitation and restructuring of a company running a global business provided sufficiently strong grounds for the exercise of the inherent powers of the court to grant the restraint and stay orders.<sup>53</sup> This conclusion merits further examination.

First, the court sidestepped making any general pronouncement on the meaning of ‘injustice’ or ‘abuse’ in O 92 r 4. On a literal construction, it is difficult to simply equate injustice and abuse of court proceedings with a judicial policy of applying universalist principles in managing cross-border insolvency. O 92 r 4 is concerned with limiting the

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<sup>51</sup> *Re Taisoo Suk* (n 2) [15], [32].

<sup>52</sup> Chan Sek Keong (n 47) para 24.

<sup>53</sup> *Re Taisoo Suk* (n 2) [32].

courts' authority to extraordinary cases. It is submitted that it is a step too far to entertain insolvency as a justification for the court to exercise its inherent powers, as cross-border insolvency is a regular occurrence in international commerce.

Second, O 1 r 2(2) of the Rules of Court expressly limits its scope as being inapplicable to proceedings relating to the winding-up of companies. If there is an express legislative exclusion of the court's inherent powers, it follows that there cannot be any inherent powers for the court to exercise.<sup>54</sup> Rehabilitation, as illustrated, is considered analogous to winding up before the Singapore courts, and thus deserves equal treatment in this regard.

Third, ship arrest per se has procedural legitimacy that cannot be caught by O 92 r 4. Certain observations of Lord Simon in the case of *The Atlantic Star* still carry weight today:<sup>55</sup>

Forum-shopping is, indeed, inescapably involved with the concept of maritime lien and the action in rem. Every port is automatically an admiralty emporium. This may be very inconvenient to some defendants, but the system has unquestionably proved itself on the whole as an instrument of justice.

It appears inapt to utilise O 92 r 4 as a statutory device to assist a foreign rehabilitation proceeding by staying ship arrests. 'Inherent power' under O 92 r 4 is not intended to be an endorsement for the 'inherent discretion' considered by the judges in *Beluga Chartering*. More precise analysis as to the basis of any common law right to assist a foreign rehabilitation proceeding is still required.

*Beluga Chartering* is a landmark case in Singapore affirming that the traditional common law doctrine of ancillary liquidation has always been a part of Singapore law and stands alongside the statutory regime.<sup>56</sup> An incidental remark to the effect that local assistance

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<sup>54</sup> Goh Yihan, 'The Inherent Jurisdiction and Inherent Powers of the Singapore Courts: Rethinking the Limits of Their Exercise' (2011) SJLS 178.

<sup>55</sup> *The Atlantic Star (Owners) v Bona Spes (Owners) (The Atlantic Star)* [1974] AC 436,473.

<sup>56</sup> *Beluga Chartering* (n 27) [58], [60].

may be available in foreign insolvency proceedings has not clarified the extent to which assistance is achievable in practice under the aspirational approach of modified universalism.

Modified universalism is modified because it permits a local court to make its own evaluation before deferring to a foreign main proceeding. Guidance may be found in the leading decision of the Privy Council in *Singularis Holding Limited v PricewaterhouseCoopers*.<sup>57</sup> The principle of modified universalism is now accepted with limits. In respect of the power exercised by the assisting court, Lord Sumption, speaking for the majority, pointed out an order providing assistance must be consistent with the substantive law of the assisting court. In Singapore, *Re Aero Inventory (UK) Limited (in administration)*<sup>58</sup> also demonstrates this principle. Although the court ordered that the English administrators would have the same powers as under English law, this was qualified by providing that they should not cause or suffer anything to be done that would be a breach of any applicable local insolvency law.<sup>59</sup> Rendering assistance to foreign insolvency proceedings derives from the recognition of foreign rights and the comity of nations. It is a matter of private international law under which the preferential status of a foreign insolvency representative is not presumed.

Recently, in *Pacific Andes Resources Development Ltd*,<sup>60</sup> the Singapore High Court was required to decide, amongst other things, whether a restructuring plan was merely a formal vehicle to game the system of statutory moratoriums. The court took into account the cogent and reasonable explanation for the paucity of details that the local restructuring plan was heavily contingent on the foreign proceedings. It indicated that the maturity level of the rehabilitation scheme remained a relevant matter of local insolvency law for the court's consideration.<sup>61</sup>

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<sup>57</sup> [2014] UKPC 36 [25].

<sup>58</sup> Originating Summons No 127 of 2011 (unreported).

<sup>59</sup> Andrew Chan Chee Yin, Jonathan Chan Tuan San, Jo Tay Yu Xi and Alexander Lawrence Yeo Han Tiong, 'Cross-border Insolvency and its Impact on Arbitration' (2014) 26 SAclJ 999 [69].

<sup>60</sup> [2016] SGHC 210.

<sup>61</sup> See also *Re Conchubar Aromatics Ltd and other matters* [2015] SGHC 322.

In *Re Taisoo Suk*, Abdullah JC held that a restraint order under a local scheme of arrangement or judicial management may not be available in these circumstances, as no plan with sufficient particularity had been proposed to satisfy the conditions required by section 210(10) of the Companies Act. He nevertheless found there was nothing to pose an obstacle to grant assistance. The judge took the pro-universalist view that insisting on equivalence between different jurisdictions would not serve the needs of universality. A more liberal foreign approach might, in fact, be a spur to changes in the domestic regime.<sup>62</sup> A similar example of this undogmatic and flexible approach can be found in the case of *Re Opti-Medix Ltd (in Liquidation)*,<sup>63</sup> decided by the same judge recently.

The English Supreme Court in *Rubin v Eurofinance SA*<sup>64</sup> was more careful to draw the boundaries of judicial innovation. Lord Collins distinguished a radical departure from substantially settled law from an incremental development of existing principles.<sup>65</sup> If such a radical departure were to be made, it should be achieved by legislation rather than by the courts. The lesson from this may be that changes which the common law might make under its own steam are not to be tailored or nuanced so as to do damage to those who held legitimate expectations, and that legislation may provide the best available answer.<sup>66</sup>

In the new Companies (Amendment) Bill 2017, stay and suspension for the purpose of recognition of a foreign main insolvency proceeding are prescribed to be 'subject to the same powers of the Court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Singapore in such a case.'<sup>67</sup> Thus, in the Singapore legislator's view, modified universalism, the heart of the Model Law, has its own boundaries. The golden thread that limits recognition and assistance of foreign insolvency proceedings is drawn consistently by the local law of the assisting court. Neither the Model Law nor the existing common law rule suggests the rendering of transnational assistance to a foreign

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<sup>62</sup> *Re Taisoo Suk* (n 2) [27].

<sup>63</sup> [2016] SGHC 108, [2016] 4 SLR 312.

<sup>64</sup> [2012] UKSC 46, [2013] 1 AC 236.

<sup>65</sup> *Ibid* [128].

<sup>66</sup> Adrian Briggs, 'Rubin and New Cap: Foreign Judgments and Insolvency' <[http://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1000&context=jday\\_lect](http://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1000&context=jday_lect)> accessed 24 Dec 2016.

<sup>67</sup> See Article 20.2(b).

insolvency representative when such a judicial remedy is unavailable in an equivalent domestic insolvency.

In this sense, *Re Taisoo Suk* may have gone too far in restraining ship arrest in the infant stage of cross-border rehabilitation when no scheme of reconstruction had been proposed to the court to satisfy section 210(10) of the Companies Act. It should therefore not be taken as authority for the proposition that modified universalism may 'crowd out' local law in Singapore.

#### **4 Conclusion**

The inherent uniqueness and complexity of ship arrests for actions in rem have long given rise to greater legal difficulty when a foreign shipping company, which normally operates a global business, becomes the subject of cross-border insolvency proceedings. In the case of Singapore, the HCAJA may remain as a self-contained regime governing maritime liens and endorses the need for the court's leave for ship arrest in the context of cross-border rehabilitation. Ship arrest for statutory liens may be ousted when the action in rem is commenced too late; the foreign insolvent company's application for a restraint order would have the effect of displacing the admiralty jurisdiction laid down by the HCAJA.

In decades past, the general principles of Singapore Law have leant towards the view that judicial assistance to foreign insolvency companies is very limited. At common law and in the Singapore Companies (Amendment) Bill 2017, the scope of such assistance is subject to local law. It is questionable whether O 92 r 4 of the Rules of Court should be utilised as a skeleton key to open the gate of local judicial assistance to a foreign insolvency proceeding. A blanket stay of all ship arrests can hardly be warranted in cross-border rehabilitation when the substantial plan, as required by local law, has not yet been proposed to the court.

Volatility, and even the potential meltdown of global shipping is never far away. How ship arrests for maritime claims should be properly treated, and how priority of maritime claims should be procedurally ensured, serve to underpin the further operation of the global shipping industry. Singapore has taken a decisive step forward with the enactment of the Model Law. In the post-financial crisis era, it merits particular attention that rehabilitation is supposed to be more commonly adopted to overhaul the individual company and save the whole sector. In this sense, *Re Taisoo Suk* is the beginning of the end, rather than the end of the beginning. Neither the general common law nor the Model Law changes admiralty law, but highlights the importance of the policy considerations underpinning it. Striking a delicate balance between ship arrest and cross-border rehabilitation will benefit and strengthen Singapore in the long term as a regional twin-hub of maritime trade and debt restructuring.