WONG PARTNERSHIP

LAW WATCH

SEPTEMBER 2022

In Brief

DEALS

EMPLOYMENT

RESTRUCTURING & INSOLVENCY

CONTRACT

WONG PARTNERSHIP

DEALS

WONGPARTNERSHIP LLP ACTED IN…
The Listing of NIO Inc. on the Main Board of the Singapore Exchange ("SGX")

NIO Inc., a pioneer and leading company in the premium smart electric vehicle ("**EV**") market, listed, by way of introduction, its Class A ordinary shares on the Main Board of the Singapore Exchange Securities Trading Limited on 20 May 2022.

With an estimated market capitalisation at the time of listing of more than S$35 billion, the listing of NIO Inc. on SGX attracted significant media attention. NIO Inc. is the first vehicle company to be listed on three global stock exchanges and the first Chinese company to be listed on the New York Stock Exchange, Hong Kong Exchange and SGX.

Founded in 2014, NIO Inc. focuses on building smart electric vehicles, providing premium services and creating innovative solutions, such as its industry-leading battery swapping technologies as well as its proprietary autonomous driving technologies.

Partners involved in the transaction were Gail Ong and James Choo from the Equity Capital Markets Practice and Chong Hong Chiang from the China Practice.

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Other recent matters that WongPartnership was involved in were:

DESCRIPTION	PRACTICE AREAS
Advising in an investment treaty claim by Byrich Holdings against the Laos Government over the expropriation of a cement production enterprise serving China's Belt and Road initiative. Byrich Holdings submitted its notice of intent under the PRC-Laos bilateral investment treaty, and is seeking at least US$58 million in sunk costs as well as loss of profits in view of the Laos Government's revocation of a 40-year licence to produce cement for distribution in Laos held by Byrich Holdings.	Corporate Commercial Disputes International Arbitration
Acting in the disposal of 800 Super Holdings Pte. Ltd. by 8S Capital Holdings Pte. Ltd., which is jointly owned by KKR Credit Funds and the founders of 800 Super Holdings Pte. Ltd., to Keppel Asia Infrastructure Fund and Keppel Infrastructure Holdings for S$380 million.	Corporate/Mergers and Acquisitions Intellectual Property, Technology & Data Corporate Real Estate
Acting in the proposed acquisition of nine serviced residences, rental housing and student accommodation properties by Ascott Residence Trust from its sponsor, The Ascott Limited. The acquisition will increase Ascott Residence Trust's distribution by S$9.2 million and its distribution per stapled security by 3.0 per cent, on a pro forma FY2021 basis.	Corporate/Mergers and Acquisitions Equity Capital Markets
Acting in the US$20 million investment by Intel Capital, the strategic investment arm of chipmaker Intel Corporation, in an extension to digital health startup, Biofourmis' Series D financing. This additional funding brings the amount raised in the Series D round of Biofourmis led by General Atlantic to US$320 million.	Corporate/Mergers and Acquisitions WPGrow: Start-up / Venture Capital
Acting for the liquidators of Three Arrows Capital in Singapore, the bankrupt billion-dollar cryptocurrency hedge fund, which attracted attention globally in 2022 as its collapse severely impacted the cryptocurrency market.	Special Situations Advisory Restructuring & Insolvency
Advised on incorporation, intellectual property, data protection and compliance matters in relation to the setting up of a bicycle sharing business operation in Singapore by HelloRide, a Chinese bicycle-sharing operator. This marks the first time since China-based players exited the market. HelloRide has been awarded a Type 2 sandbox licence to operate a fleet of up to 1,000 shared bicycles. Type 2 licence	China Intellectual Property Technology & Data

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DESCRIPTION	PRACTICE AREAS
is valid for up to a year, after which operators will need to apply for Type 1 full licence that allows them to operate a larger fleet.	
Advising in the project by Sembcorp Utilities Pte Ltd ("Sembcorp") to build 200MW/200MWh of energy storage systems at Singapore's industrial hub on Jurong Island, including drafting and negotiating the Energy Storage Services Agreement with the Energy Market Authority of Singapore ("EMA"), Engineering, Procurement and Construction (EPC) contracts and agreements for supply of equipment and provision of services with various contractors and suppliers. EMA issued an expression of interest in May for the project to build, own and operate 200MW/200MWh of energy storage systems, and the project was awarded to Sembcorp.	Energy, Projects and Construction
Acting in the issuance of Keppel DC REIT's €75 million fixed-rate notes due 2028 at 2.61 per cent per annum involving DBS Bank Ltd as sole dealer.	Debt Capital Markets

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EMPLOYMENT

Singapore High Court Rules That Commissioner of Labour May Take Into Account Settlement Payments When Assessing Compensation Payable By Employer

Authored by Partners Jenny Tsin and Vivien Yui with contribution from Senior Associate Samuel Yap

It has always been quite clear that the Work Injury Compensation Act ("**WICA**") regime limits an employee's right to compensation if the employee has commenced court proceedings or recovered damages through such court proceedings. What is less clear is whether the WICA regime prevents an employee from recovering compensation if he has received compensation by way of private settlement with his employer.

The General Division of the High Court ("**High Court**") has held that the Commissioner for Labour ("**Commissioner**") is entitled (but not obliged) to take into account settlement payments paid directly to an employee (or the employee's dependants) when assessing the amount of compensation payable for the employee's death under the Work Injury Compensation Act (Cap 354, 2009 Rev Ed) ("**WICA 2009**"). This would permit the Commissioner to deduct such settlement payments from any compensation assessed to be payable where he deems it fair and reasonable to do so on the particular facts of the case before him: *M.T.M. Ship Management Pte Ltd v Devaswarupa and others* [2022] SGHC 178.

Our Comments

While this decision was based on an analysis of the WICA 2009, the Court also discussed the position under the present Work Injury Compensation Act 2019 ("**WICA 2019**").

In this regard, the High Court noted the difference in the language between the WICA 2009 and WICA 2019. The crucial difference is that the WICA 2019 does not contain any specific provision allowing the Commissioner to take into account prior settlement payments.

However, after considering the purpose of the WICA, the High Court suggested that it may not have been Parliament's intention to remove the Commissioner's power to consider such settlement payments when determining the compensation payable, as this would appear to detract from the overarching legislative intent behind the WICA regime. The High Court further commented that section 51(2) of the WICA 2019, which empowers the Commissioner to "make any order to give effect to [a settlement agreement]", may be an avenue through which settlement payments can be taken into account. This however is not an elegant solution; to fall under section 51(2), the settlement must be in respect of a claim for compensation under the WICA 2019. Section 51 of the WICA 2019 does not appear to apply to settlements made before any claim for compensation under the WICA 2019 is made or contemplated. Ultimately, the High Court also recognised that any gaps in the law may have to be filled by legislative amendments or determined in an appropriate case in the future where arguments on the WICA 2019 are properly argued and considered.

In the interim, should an incident occur where payments may have to be made to an employee, employers should consider how and when such payments ought to be made.

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This update takes a look at the High Court's decision.

Background

The applicant, M.T.M. Ship Management Pte Ltd ("**MTM**") was the manager of a seagoing vessel ("**Vessel**"), and the employer of the deceased, Mr Gainady Ajay Bhavani Prasad ("**Mr Gainady**"). The first and second respondents were Mr Gainady's wife and mother respectively. They were also Mr Gainady's beneficiaries in equal proportions. The third and fourth respondents were Mr Gainady's children.

On 13 August 2020, Mr Gainady was injured while working on board the Vessel and he died the next day. Pursuant to Mr Gainady's employment contract, which incorporated a Memorandum of Collective Agreement between the applicant and the Singapore Organisation of Seamen, the first and second respondents were each paid the equivalent sum of US$72,000 in Indian Rupees ("**Settlement Sum**").

On 28 September 2020, and after receiving the Settlement Sum, the first and second respondents executed a document titled "Deed of Receipt, Release, Discharge & Indemnity Agreement" ("**Deed**") confirming, *inter alia*, that MTM was "fully and absolutely released and forever discharged from any further payment of any and all compensation … whether arising now or in the future or whether in Contract, or in Tort, or any other Law". The first and second respondents also each signed a receipt acknowledging the payment of the Settlement Sum as "full and final payment, settlement and discharge" of any and all claims for compensation.

Despite this, the respondents lodged, on 26 November 2020, a claim with the Commissioner under the WICA 2009 for compensation for Mr Gainady's death. On 23 December 2020, the Commissioner issued a notice of assessment of compensation to MTM and the respondents ("**Notice of Assessment**"), stating that the respondents had a valid claim for compensation, and that any objections had to be raised within 14 days from the date the Notice of Assessment was served.

On 4 March 2021 at around 3.18 pm, Assistant Commissioner Jason Loh Chee Boon ("**Assistant Commissioner Loh**") issued a Certificate of Order requiring MTM to pay the respondents compensation of S$190,703.96, based on Mr Gainady's average monthly earnings of S$1,782.28 ("**Certificate of Order**").

On 4 March 2021 at 4.24 pm, MTM for the first time informed the Commissioner that it had paid the Settlement Sum to the first and second respondents and asserted that, as the Settlement Sum exceeded the compensation it had been ordered to pay under the WICA 2009, it was not liable to pay any further sums to the respondents, and that the Certificate of Order should be withdrawn.

Assistant Commissioner Loh declined to withdraw the Certificate of Order, noting, among other things, that:

- The applicable legislation was the now-repealed WICA 2009, and not the WICA 2019.
- Nothing in the WICA 2009 expressly allowed him to withdraw the Certificate of Order. Nor did the Certificate of Order contain any clerical or arithmetical mistake that allowed him to add to,

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or alter, it. Accordingly, once the Certificate of Order had been issued, he was *functus officio* and could not revise or set aside his orders.

- MTM had failed to raise the Settlement Sum as a ground of objection to the Notice of Assessment within the 14-day period provided under section 25(2) of the WICA 2009 to do so. Assistant Commissioner Loh took the view that he was therefore "legally required" to disregard MTM's belated objection.

MTM subsequently appealed against the Commissioner's decision as set out in the Certificate of Order. It sought, seeking *inter alia*: (a) an order for the Deed to be recorded as a settlement agreement and as an order under section 51 of the WICA 2019; (b) alternatively, a declaration that it was discharged from its obligation to make payment under the Certificate of Order; or (c) alternatively, for the Certificate of Order to be set aside.

The High Court's Decision

The High Court allowed the appeal by MTM, reversed and set aside the Assistant Commissioner's decision as encapsulated in the Certificate of Order, and ordered that no further compensation was payable to the respondents under the WICA 2009.

The High Court agreed with Assistant Commissioner Loh that the WICA 2009 applied to the accident which resulted in Mr Gainady's personal injury and death, and that Assistant Commissioner Loh was *functus officio* once the Certificate of Order was issued and did not retain any residual powers to set aside or rescind the Certificate of Order. It was also satisfied that the Assistant Commissioner did not err in refusing to consider MTM's belated objection, as the Commissioner did not possess any discretion to extend the period for raising objections, or to consider the late objection.

That said, MTM's appeal to the High Court was by way of a rehearing and the High Court deemed it fair, reasonable and in the interests of justice to consider the novel and important question of whether the Commissioner has the power under the WICA regime to take into account settlement payments when assessing the amount of compensation payable.

Following a detailed analysis of the statutory language and legislative history of section 9(1A)(b) of the WICA 2009, the High Court took the view that the Commissioner was empowered by that subsection to take into account settlement payments made by an employer to an employee when assessing the amount of compensation payable, if the Commissioner considers it fair and reasonable to do so.

The High Court reasoned as follows:

(a) Nothing in the WICA 2009 requires the Commissioner to take into account settlement payments made by an employer to an employee when assessing the amount of compensation payable by the employer.

(b) However, section 9(1A)(b) of the WICA 2009 provides that the Commissioner *may* take into account any amount paid otherwise than in accordance with subsection (1) in assessing the compensation payable under the WICA 2009 if he considers it fair and reasonable to do so.

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(c) A private settlement constitutes a payment "made otherwise than by deposit with the Commissioner". Further, the wording of section 9(1A)(b) indicates that the Commissioner has a wide discretion in this respect, since he may take into consideration "any amount", so long as he thinks it "fair and reasonable" to do so.

(d) Accordingly, on the plain meaning of section 9(1A)(b) alone, the Commissioner is entitled (but not obliged) to take into account settlement payments paid directly to an employee when assessing the sum of compensation payable under the WICA 2009.

(e) The legislative intent behind the enactment of the Workmen's Compensation Act 1975 (of which sections 9(1) and 9(1)(b) were *in pari materia* with sections 9(1) and 9(1A)(b) of the WICA 2009) was to, *inter alia*, give the Commissioner more autonomy and oversight over the assessment of compensation. A broader and more expansive interpretation of section 9(1A)(b) of the WICA 2009 better accorded with the legislative history of the provision and should be preferred.

(f) The legislative intent of the WICA 2009 could not have been to allow an employee who has already received a settlement payment from his employer to also obtain compensation in respect of the same injury *as of right* and without exception. This would effectively allow the employee to avoid the principle of deductibility which would have applied to a claim for common law damages, and consequently provide a more generous measure of compensation to the employee.

(g) As such, it would better accord with the overall legislative intent behind the WICA 2009 for section 9(1A)(b) to be interpreted such that the Commissioner does have the power to take into account settlement payments when assessing the amount of compensation payable for an employee's death. This would permit the Commissioner to deduct settlement payments from any compensation assessed to be payable where he deems it fair and reasonable to do so on the particular facts. In essence, the Commissioner would be able to exercise this discretionary power, where appropriate, in a manner similar to the operation of the principle of deductibility at common law.

The High Court therefore held that the effect of the payment of the Settlement Sum to the first and second respondents was to reduce the amount of compensation payable under the Certificate of Order to nil. This was a fair and reasonable outcome, given that the Settlement Sum exceeded the compensation that the Commissioner had assessed to be payable by MTM.

Interestingly, the High Court also proffered some guidance on the question of whether the Commissioner has the power under the WICA 2019 to take into account settlement payments when assessing the sum of compensation payable.

It first noted that there is no provision in the WICA 2019 that is *in pari materia* with section 9(1A)(b) of the WICA 2009, or any provision that expressly allows the Commissioner to take into account settlement payments when determining the sum of compensation payable. Nor is there any mention in the relevant parliamentary debates as to why section 9(1A)(b) of the WICA 2009 is absent from the WICA 2019.

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However, the High Court was of the view that the absence (in the WICA 2019) of a provision identical or similar to section 9(1A)(b) of the WICA 2009 does not necessarily mean that Parliament intended to remove the Commissioner's power to consider settlement payments when determining the compensation payable. This would appear to detract from the overarching legislative intent behind the WICA regime and, as such, is unlikely to be a legislative change that Parliament would make without express mention of its intent to do so.

The High Court considered that it "may well be the case" that the Commissioner's power to take into account settlement payments has been subsumed under other provisions in the WICA 2019, such as section 51(2) of the WICA 2019, which empowers the Commissioner to "make any order to give effect to [a settlement agreement]". It noted that it remains a question open for future determination whether the phrase "make any order to give effect to the settlement" contained in section 51(2)(a) of the WICA 2019, or the Commissioner's power in section 54(1)(c) of the WICA 2019 to make an order as he "thinks just", can be read to encompass a power to take into account settlement payments when determining the compensation payable.

The High Court nevertheless acknowledged that there were potential difficulties with relying on sections 51(2)(a) and 54(1)(c) of the WICA 2019, and expressed the hope (assuming that it was not Parliament's intention to exclude the Commissioner's power to take into account settlement payments from the WICA 2019 regime) that relevant provisions in the WICA 2019 do continue to encompass this power, or if not, that Parliament would consider making appropriate legislative amendments.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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RESTRUCTURING & INSOLVENCY

Singapore High Court Gives Guidance On Applications Under Section 64 of Insolvency, Restructuring and Dissolution Act 2018

The General Division of the High Court ("**High Court**") has, in the context of a cryptocurrency exchange platform operator seeking protection from potential creditor lawsuits under sections 64 and 65 of the Insolvency, Restructuring and Dissolution Act 2018 ("**IRDA**"), given important guidance on creditor engagement and the court's jurisdiction over foreign applicants: *Re Zipmex Co Ltd and other matters* [2022] SGHC 196 ("***Zipmex***").

Our Comments

The Singapore Parliament has been taking steps to enhance Singapore as a "*nodal jurisdiction*" of choice for cross-border businesses whose operations may involve legal agreements, obligations, and liabilities spanning multiple jurisdictions. These steps include the recent amendments to the Singapore International Commercial Court Rules which come into effect on 1 October 2022, and are expected to enhance Singapore's attractiveness as a restructuring and insolvency centre for debtors with cross-border operations.

These changes are expected to further solidify Singapore's position as a jurisdiction of choice for debtors with cross-border operations, and growth is likely to be expected, particularly in emerging areas such as cryptocurrency. Following the recent "crypto winter", Singapore has seen a series of insolvency and restructuring filings here, with the Zipmex group of companies ("**Zipmex Group**") being one of them.

In tandem with the steps taken to enhance the legislative regime for cross-border restructurings and insolvencies, the High Court clarified in this decision how the concept of a "centre of main interests" of a foreign company ("**COMI**") continues to be relevant even in the context of a restructuring, and how, in the context of a cryptocurrency platform, the types of factors that would be relevant to the court's assessment of COMI. While the High Court left open the issue of how the *lex situs* for cryptocurrency assets may be determined (and for the avoidance of doubt, did not assume that there is a *lex situs* to begin with), the decision helpfully identified other factors that may point to Singapore being the "nerve centre" of the group's operations.

The High Court also recognised that, for Singapore to maintain its credibility as a centre for cross-border restructurings and insolvencies, it is equally essential for the process to engender trust from creditors all over the world, who may not be legally represented and who may not have equal access to the process. Practitioners and debtors who intend to make use of the restructuring and insolvency mechanisms in Singapore would benefit also from the High Court's guidance on communicating with large numbers of unrepresented creditors.

This update takes a look at the High Court's decision.

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Background

The Zipmex Group operated a cryptocurrency exchange platform on which various cryptocurrencies are traded. It comprised:

(a) Zipmex Asia Pte Ltd, the group holding company incorporated in Singapore ("**Zipmex Asia**");

(b) Zipmex Pte Ltd, a Singapore subsidiary;

(c) Zipmex Company Limited, a Thai company ("**Zipmex Thailand**");

(d) Zipmex Australia Pty Ltd, an Australian company ("**Zipmex Australia**"); and

(e) PT Zipmex Exchange Indonesia, an Indonesian company ("**Zipmex Indonesia**").

It was understood that Singapore was the hub of the business, and that the various country entities had been established to comply with local market regulations.

When the companies in the Zipmex Group ran into financial difficulties in conjunction with the recent rout in the cryptocurrency sector, they applied under sections 64 and 65 of the IRDA for a five-month protection from potential creditor lawsuits.

Sections 64 and 65 of the IRDA govern moratoria of proceedings against a company and its subsidiaries and holding companies. Briefly put:

(a) The moratorium regime under section 64 of the IRDA ("**Section 64**") gives a company in difficulty breathing space to assemble a rescue plan, thus avoiding a scramble by the company's creditors to liquidate the company.

(b) Under section 64(4) of the IRDA, the trade-off for the moratorium or suspension of proceedings against the company is showing that there is support from creditors, and an undertaking or promise by the company to put forward a rescue plan or proposal. Guidance on the approach to be taken was given in *Re IM Skaugen SE and other matters* [2019] 3 SLR 979, a case which considered the precursor to Section 64, i.e., section 211B of the Companies Act:

    (i) Where a company intends to propose a compromise or arrangement, evidence of creditor support for the moratorium must be shown, requiring on a broad assessment that there is reasonable prospect of the intended compromise or arrangement working and being acceptable to the general run of creditors.

    (ii) The court does not take a vote at this time but makes a broad assessment, bearing in mind the quality of creditor support, particularly from significant or crucial creditors.

    (iii) In Section 64 proceedings, the court cannot determine the merits of claims or order the applicant to pay them off.

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(c) Section 65 of the IRDA extends the protection of the moratoria by an applicant under Section 64 to its subsidiaries, holding companies or ultimate holding companies, where such related companies play a necessary and integral role in the proposed compromise or arrangement being considered in the application under Section 64. The idea is to protect integral parts of the group to ensure the success of the restructuring effort.

The High Court's Decision

The High Court granted extensions of the moratoria, but not for the full five months sought by the applicants. It instead granted an (approximately) three-month extension for each of the applicants until 2 December 2022 so that the court could monitor progress and engagement, with further extensions being granted if matters were in order.

In finding that the applicants met the requirements under sections 64 and 65 of the IRDA, the High Court noted that there was "sufficient indication" that the applicants' proposed scheme would work and that the scheme would be acceptable to the general run of creditors.

Significantly, the High Court had, with a view to providing guidance and clarification to practitioners, foreign account holders and future applicants dealing with large numbers of unrepresented creditors or cryptocurrency assets:

(a) Expounded on the court's jurisdiction over the applicants which were foreign companies (i.e., Zipmex Thailand, Zipmex Australia and Zipmex Indonesia); and

(b) Highlighted the importance of engagement with creditors and how such engagement would be scrutinised by the courts when a Section 64 application is made.

Court's jurisdiction over foreign companies: establishing a substantial connection to Singapore

Section 246(1)(d) of the IRDA provides that an unregistered company (i.e., a foreign company) may be wound up only if it has a "*substantial connection with Singapore*".

By section 246(3) of the IRDA, such a substantial connection may be established by a number of factors, including Singapore being the COMI.

While the concept of COMI had been considered in Singapore mainly in the context of recognition of foreign proceedings (where the term is used in the UNCITRAL Model Law), the High Court took the view that there was no reason to differentiate between the use of the term in different contexts, such as recognition of proceedings under the UNCITRAL Model Law, winding-up under the IRDA, and the protection of restructuring *via* moratoria under sections 64 and 65 of the IRDA. In reaching this determination, the High Court observed that:

(a) Parliament has not indicated any intention to so differentiate the use of the term "COMI" outside the context of the UNCITRAL Model Law; and

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(b) There is in any case no reason in principle to do so, as the High Court found that COMI is a useful concept in identifying the jurisdiction with the closest and most tangible or impactful connection to a company.

Applying the court's observations about the determination of COMI in *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] 4 SLR 1343 (which considered the term in the context of recognition of foreign proceedings), the High Court found that the COMI of Zipmex Thailand, Zipmex Australia and Zipmex Indonesia was Singapore and that this conferred substantial connection, allowing the court to exercise its jurisdiction under sections 64 and 65 of the IRDA.

Among other things, the High Court found, on a holistic assessment, that the following factors pointed to Singapore being the COMI for the foreign entities:

(a) Singapore being the location of the ultimate use of all the cryptocurrency assets in a wallet connected online (i.e., a "hot wallet") held by Zipmex Asia. The "hot wallet" aggregated all the customers' cryptocurrency assets deposited into their respective "Z wallets" under a certain ZipUp+ service, at a group level. This arrangement essentially permitted the Zipmex Group to utilise the cryptocurrencies and deploy them to third parties, such as cryptocurrency exchanges or cryptocurrency asset management companies. In the High Court's view, the consolidation of cryptocurrency assets in the "hot wallet" hosted by Zipmex Asia in Singapore from all the entities lay at the bottom of the business model and operations of the Zipmex Group. While not all the creditors may have actually been aware of this, the fact that such consolidation occurred pointed to a Singapore "centre of gravity". The fact that some creditors did not know of the Singapore connection would not have affected the analysis.

(b) The use of the ZipUp+ service, which allowed customers deposit cryptocurrency assets held in their respective "hosted wallets" (which stored purchased cryptocurrencies) into "Z wallets" in return for certain benefits.

(c) The locus of the Zipmex Group's management in Singapore, a fact which would be more readily apparent to creditors and other observers.

Engagement with creditors

The High Court set out the following guidance for the benefit of potential applicants dealing not only with cryptocurrency assets but also with large numbers of unrepresented creditors:

(a) Ensure proper communication and engagement, e.g., through townhalls: At a minimum, facilities should be provided for dissemination of information, electronically or otherwise. Applicants should not avoid this simply on account of "large numbers", given that the applicants would have had the benefit of a large customer base, and "cannot seek to hide behind numbers when things come to grief". Translations of documents should be provided wherever feasible. Explanations of how Section 64 works, possible investments and the likely timelines should also be given. The website of the Singapore Courts provided a simplified overview of Section 64 for the benefit of creditors in the present application by way of an information note, which is available here.

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(b) Establish creditor committees: Serious thought should be given to the establishment of creditor committees. A framework for selection and representation should be explored. It is key to give voice to the creditors.

(c) Appoint independent legal and financial advisors: Where feasible, independent legal and financial advisors should be appointed and their remuneration provided for. These advisors should be focused on the needs of unrepresented creditors in navigating the process in obtaining a moratorium under Section 64 which, together with any scheme application under section 210 of the Companies Act, may take a while to come to a landing. At the very least, the appointment of an independent financial advisor (as here) would be helpful

The High Court stressed that applicants' engagement with creditors was critical and that this would be scrutinised by the court when applications for extension are made. While the matters set out above are not strictly a checklist -- what may be needed will vary from case to case – potential applicants should seriously consider each of those matters, and be prepared to answer to the court why a particular form of engagement is not being used.

The High Court also noted that there could well be other helpful mechanisms to provide timely communications to creditors, assist them in understanding developments and have some voice in the process, and encouraged potential applicants to consider what is being done in this regard in other jurisdictions. It also added that the court would, at its end, consider what could be done to facilitate access to hearings, e.g., through the use of the Zoom webinar system and the uploading of the recordings of proceedings on YouTube.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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CONTRACT

Singapore High Court Affirms That Breaches of Contract Are Actionable Without Proof of Loss

In an appeal from the District Court, the General Division of the High Court ("**High Court**") affirmed that a claimant who proves a breach but fails to prove loss or damage in a breach of contract claim would be awarded nominal damages instead of having the claim dismissed. There may, however, be adverse costs consequences for the claimant, depending on whether the trial was bifurcated: *Youprint Productions Pte Ltd v Mak Sook Ling* [2022] SGHC 212.

This update takes a look at the High Court's decision.

Background

The appellant employer ("**Employer**"), commenced suit against the respondent former employee ("**Employee**") in the District Court for breach of an employment contract entered into between them.

The District Judge found that the Employee did breach the employment contract, but that the Employer had failed to prove loss (indeed, the Employer appeared to have dropped its claim for substantial compensatory damages by the time of its reply closing submissions, and was instead seeking an account of profits which was not previously pleaded). On that basis, the District Judge dismissed the Employer's claim, relying on the English High Court's decision in *LighthouseCarrwood Ltd v Luckett* [2007] EWHC 2866 (QB) ("***LighthouseCarrwood***").

The Employer appealed.

The High Court's Decision

The High Court allowed the Employer's appeal, holding that the District Judge's decision to dismiss the claim on the basis that loss had not been proved was wrong as a matter of law. The High Court based its decision on the trite principles that:

(a) An innocent party is always entitled to claim damages at common law *as of right* for loss resulting from a breach of contract (see *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 at [40] and *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd and another and other appeals* [2021] 1 SLR 631 at [60]); and

(b) Recovery of substantial damages requires proof of such loss, short of which, nominal damages would be awarded (see *Biofuel Industries Pte Ltd v V8 Environmental Pte Ltd and another appeal* [2018] 2 SLR 199 at [40]-[44]).

At [7] of the judgment, the High Court stated that, insofar as *LighthouseCarrwood* decided that a claim for breach of contract fails if loss cannot be proved, it was wrong and should not be followed in Singapore.

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That said, a claimant's failure to prove loss (and consequent recovery of nominal damages only) may have costs consequences. At [11] of the judgment, the High Court held that:

(a) Where the trial is not bifurcated and the claimant succeeds in proving breach of contract but recovers only nominal damages because it fails to prove loss, the claimant generally ought to be awarded costs. The quantum of costs awarded could, however, factor in the claimant's failure to prove loss; and

(b) Where however the trial is bifurcated and the claimant fails to prove loss at the assessment stage, the claimant would generally either recover no costs or be ordered to pay the costs of the assessment, given that the only issue at the assessment hearing is the quantum of loss and a claimant who merely receives nominal damages has effectively lost.

In the circumstances, the High Court set aside the District Judge's order dismissing the Employer's claim and awarded the Employer nominal damages fixed at $1,500. As the Employer confirmed it was not seeking costs of the trial below, no order was made in that regard.

The High Court also made no order as to costs of the appeal, given that the Employee had made an offer to settle before the hearing of the appeal which terms were more favourable to the Employer than the High Court's award of $1,500 in nominal damages.

Concluding Observations

It is not immediately clear whether the observations on costs allocation at [11] of the judgment (which place emphasis on whether or not the trial was bifurcated) took into account the fact that a claimant's failure to prove substantial loss at trial may in practice have resulted in similar time and resource wastages whether or not the trial had been bifurcated.

In any case, as costs are ultimately in the discretion of the court, the significance of bifurcation would likely have to be assessed against all of the circumstances, and thus differ in each case. Counsel should however bear in mind the observations at [11] of the judgment when making strategic calls concerning bifurcation.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or the following Partner:

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LEGAL HIGHLIGHTS

AUGUST 2022	
25 August 2022	**Strengthening AML/CFT Practices for External Asset Managers** The MAS has published an information paper titled "Strengthening AML / CFT Practices for External Asset Managers", which sets out the MAS' supervisory expectations of effective anti-money laundering and countering the financing of terrorism ("**AML/CFT**") frameworks and controls for external asset managers ("**EAMs**"). The guidance is based on key findings from a series of thematic inspections and engagements conducted by the MAS. The MAS expects EAMs to review their AML/CFT frameworks and controls against these expectations and to implement remediation or enhancement measures should there be any gaps in their frameworks and controls. All fund management companies are also expected to incorporate the learning points from the information paper into their AML / CFT frameworks and controls. **Related information:** Strengthening AML / CFT Practices for External Asset Managers **Contact our Partners:** Elaine Chan | Rosabel Ng | Chan Jia Hui | Tian Sion Yoong
JULY 2022	
15 July 2022	**Proposed Exemptions for Approved Exchange and Recognised Market Operators That Provide Certain Clearing and Settlement Services** The MAS has released a consultation paper on its proposal to introduce an exemption for approved exchanges ("**AEs**") and recognised market operators ("**RMOs**") which would allow them to provide certain post-trade services without also being subject to regulation as approved or recognised clearing houses. The MAS has observed the introduction of new business models where AEs and RMOs also provide such post-trade services, which may fall within the scope of the current regime that regulates the provision of clearing and settlement services – such post-trade services include verifying a trade by confirming the terms of the trade and calculating the obligations of counterparties under a trade. However, the MAS has indicated that it is not its intent to impose additional regulatory obligations on such AEs and RMOs where trades are not routed to a clearing facility for clearance or settlement by the facility on a centralised basis. **Related information:** Consultation Paper on Proposed Exemptions for Approved Exchange and Recognised Market Operators that provide certain Clearing and Settlement services **Contact our Partners:** Elaine Chan | Chan Jia Hui | Tian Sion Yoong

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OTHER UPDATES

DATE	TITLE
26 September 2022	Competition Law Update – Merger Control Related Developments in the Region
22 September 2022	Special Update: VIMA 2.0 – An Updated and Expanded Suite of Documents for Start-up / Venture Capital Investments
16 September 2022	SGX RegCo and CGAC Statements on KPMG Review Report Regarding Corporate Governance Practices
8 September 2022	Law Watch: Employment Law Edition September 2022
10 August 2022	Managing Internal and External Insolvency: A Checklist For In-House Counsel
20 July 2022	Data Protection Quarterly Updates (April – June 2022)
19 July 2022	PRC Administrative Rules for Cross-Border Data Transfer Security Assessment
18 July 2022	Singapore High Court Clarifies that Hong Kong Non-Money Judgments Are Not Registrable in Singapore Under the Reciprocal Enforcement of Judgments Act 1959

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RECENT AUTHORSHIPS

DATE	AUTHORSHIPS	CONTRIBUTORS / PARTNERS
23 September 2022	Mondaq Comparative Guide to ESG 2022 - Singapore Chapter	Tiong Teck Wee | Quak Fi Ling
23 September 2022	Lexology Getting The Deal Through - Banking Regulation 2022 (Singapore)	Elaine Chan | Chan Jia Hui
9 September 2022	INSOLVENCY: NOW & BEYOND - A Thought Leadership Document On Insolvency Regime	Clayton Chong
5 September 2022	The Legal 500: White Collar Crime Country Comparative Guide 2022 (Singapore)	Melanie Ho | Tang Shangwei
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30 June 2022	The Investment Treaty Arbitration Review (Seventh Edition) - Objection of Manifest Lack of Legal Merit of Claims: ICSID Arbitration Rule 41(5)	Alvin Yeo, Senior Counsel | Koh Swee Yen, Senior Counsel | Monica WY Chong

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