NUS Law Working Paper 2018/006
NUS - Centre for Banking & Finance Law Working Paper 18/01

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[March 2018]

This paper can be downloaded without charge at the National University of Singapore, Faculty of Law Working Paper Series index: http://law.nus.edu.sg/wps/

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Citations of this electronic publication should be made in the following manner: Author, "Title," NUS Law Working Paper Series, "Paper Number", Month & Year of publication, http://law.nus.edu.sg/wps. For instance, Chan, Bala, "A Legal History of Asia," NUS Law Working Paper 2014/001, January 2014, www.law.nus.edu.sg/wps/

RESTRUCTURING THE BOND MARKET IN SINGAPORE

Hans Tjio[*]

ABSTRACT:

The decline in commodity prices has badly impacted the resource and shipping sectors worldwide. There have been a significant number of defaults on bonds listed on the Singapore Exchange, which includes those of many foreign entities. The flip side of having a wall of corporate debt maturing in the next few years for the economy is that there is perhaps quite a bit of debt restructuring work on the horizon. Anticipating this, reforms to enable Singapore to become an international centre for debt restructuring were introduced in the Companies (Amendment) Act 2017, and these came into force in May 2017. This article discusses the likelihood of success of the reforms, which include widening restructuring jurisdiction and introducing some Chapter 11 characteristics, in light of the complexities of cross-border restructuring.

Keywords: Bonds, Bond defaults, Unrated bonds, Debt restructuring, Insolvency jurisdiction, Schemes of arrangement, Cross-border insolvency, Singapore law

[*] Professor, Faculty of Law, National University of Singapore. I would like to thank Norvin Chan, Khoo Yong Jie, Bu Fan and Jerrold Soh, who together have formed Lex Quanta, for the research support given to the Centre for Banking and Finance Law, NUS, on which I serve as Co-Director.

The Singapore Bond Market

Equity markets in Singapore have had a difficult time in terms of amounts raised in the primary markets. In 2015, even though the Singapore Exchange's (SGX) market capitalization remained near S$1 trillion for much of the year and trading volume that year on both its main and secondary board was around 350 billion shares valued at S$273 billion,[1] the IPO market that year only saw new issuers raising S$0.6 billion (which included sums raised off-exchange). One explanation for this was the absence of real estate investment trust (REIT) IPOs, due to measures taken to cool the property market in Singapore, as well as removal of some of the tax advantages such as the stamp duty remission for instruments of transfer of Singapore properties to SGX-listed S-REITs which had been given in 2005 and that was discontinued in 2015. What this shows perhaps is the importance of the property market in general in Singapore, but also in the context of the stock market, which has many listed entities linked to the property sector.[2] At the same time, however, the value of rights issues and private placements in 2015 stood at S$4.3 billion and S$2.4 billion respectively. Things improved markedly in 2016 with IPOs totalling S$2.4 billion and further secondary offerings of S$5.7 billion although this in itself further proves the point about the link between the equity and property markets as much of this were by REITs.

In contrast, new corporate debt issuance in Singapore in 2015 was valued at S$174 billion. Total outstanding debt reached S$315 billion, which shows the short term nature of much of the debt issued in Singapore - 90% of total debt volume in 2015 was made up of reissuances.[3] A lot of this was in foreign currencies, with US$ debt making up 67% of all issuances in 2015. But it is the Singapore dollar debt issuances (which made up 15.4% of the total) that are perhaps more properly compared with the primary equity market in Singapore. Singapore dollar-denominated (SGD) listed bonds, debentures and loan stocks, as well as unlisted (which includes those listed overseas), were in the following years valued, respectively, at: 1999 (S$6.1 billion; S$2.6 billion); 2002 (S$7.7 billion; S$10.3 billion); 2005 (S$5.1 billion; S$14.9 billion); 2009 (S$6.8 billion; S$8.5 billion); 2012 (S$26.7 billion; S$6.1 billion); 2015 (S$15 billion; S$11.7 billion) and 2016 (S$14.1 billion; S$7.5 billion).[4]

It is really this part of the capital market that is experiencing exponential growth, although this is now occurring at a time when interest rates are set to rise, with the expected corresponding fall in bond prices.[5] In May 2016, the Monetary Authority of Singapore (MAS) finalised regulations that facilitates the issue of retail bonds. The intention is to allow eligible corporate issuers[6] to issue bonds to retail

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1 See SGX *Monthly Market Statistics* December 2015, p 2.

2 M Tan, "IPO market likely to see more Reit, Catalist floats in 2016" *Business Times*, 31 December 2015.

3 For reasons given below, it is SGX-listed bonds that have been the subject of empirical analysis in this article.

4 MAS *Annual Report 2016/17 Statistical Annex G1* at 108.

5 On 14 June 2017, the US Federal Reserve increased interest rates by a quarter percent for the second time in the year, and signaled that another rate increase remained in the offing for 2017. See J Sommer, "Clouds forming over the bond market" *New York Times* 4 July 2017.

6 Issuers may offer seasoned bonds to retail investors only if they meet at least one criterion under each of the following three tests:
Test 1: Size
• Market cap of at least S$1 billion over the past 180 market days; or
• Net asset of at least S$500 million in the most recent audited financial year and annual average net asset of at least S$500 million over the three most recent audited financial years.
Test 2: Listing history
• Has equity securities listed on SGX or a recognised securities exchange for at least five years; or

investors at a lower cost and in minimum denominations of S$1000, subject to safeguards (this includes a seasoning framework in which the bonds are initially offered to institutional and accredited investors and to investors in large denominations of at least S$200,000 which after a 6-month period can be offered to retail investors). Also, MAS now allows an "exempt bond issuer" which satisfies stricter eligibility criteria than under the seasoning framework to offer bonds directly to retail investors at the start of an offer without a prospectus (although both a simplified disclosure document and product highlights sheet will be required, with only the latter required for seasoned bonds[7]). The SGX has also worked on a bond platform that allows retail investors more access by bringing smaller bond sizes onto the exchange.[8] At the start of 2017, there were 11 issuers that had raised funds using the new retail debt framework, with formalized trading of their bonds with board lot sizes of S$1000. Except for these listing rules permitting bonds to be issued under the newer framework, listed bonds and debentures usually carried a principal amount of at least S$250,000, and are seldom traded. The vast majority of these bonds have either no secondary market or they are very thinly traded off-exchange by dealers. To be fair, it is not altogether that different in the US where it was said in this Bloomberg piece that while equity trading has changed substantially in the past 25 years, bonds are still sold over the phone between traders.[9]

But there are signs that the wholesale bond market in Singapore is facing some difficulties, aside from the anticipated increase in interest rates. Towards the end of 2015, the Indonesian mobile phone distributor Trikomsel missed several interest payments. Then, from the middle of 2016, oil and gas related issuers, with both their equity and debt listed on the SGX, defaulted on their bond payments due to continued weakness in oil and commodity prices. These problems have since spread to the shipping industry. At the end of 2016, there had been defaults on payments on 27 SGX-listed bonds worth around S$12 billion, 7 of which were from Singapore issuers (in USD and SGD) and another 2 by foreign issuers in SGD. The total value of these 9 defaulted bonds amounted to slightly less than S$4 billion. All the 27 bonds were higher yield corporate bonds ranging from 5% to 10.75%.

It is the SGX wholesale bond market that provides us with a fuller picture of the extent to which bond restructuring will or could be governed by Singapore law whether by way of a formal scheme of arrangement, informal corporate workout or possible sovereign debt restructuring. Although it clearly does not fully overlap with the total value of corporate debt raised in Singapore, the figures on SGX-listed wholesale bonds far are more easily accessible and are the subject of empirical research here. In terms of the sums raised in 2015, there is also some correlation with the total debt issued in Singapore of S$174 billion as SGX listed a total of S$165 billion that year. However, in terms of the stock of wholesale bonds listed, that is far higher at more than S$1.5 trillion (as at end February 2017 there were 2417 debt securities listed by around 850 issuers from over 30 countries) as compared to total

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• Has listed or guaranteed the issuance of bonds listed on SGX for at least five years

Test 3: Track record

• Has a positive three-year average profit and a positive three-year average net operating cash flow; or

• Has a credit rating of at least BBB for either the issuer or the bonds being offered; or

• Has listed, or guaranteed the issuance of, bonds listed on SGX of at least S$500 million over the previous five years.

[7] Compare the Securities and Futures (Offers of Investments) (Exemption for Offers of Straight Debentures) Regulations 2016 and the Securities and Futures (Offers of Investments) (Exemption for Offers of Post-seasoning Debentures) Regulations 2016.

[8] Prior to this, a new Over-The-Counter platform, SGX Bond Pro, was set up in December 2015 to facilitate the trading of Asian corporate bonds.

[9] E Robinson, "Reinventing the corporate bond" *Bloomberg* 2 February 2015.

outstanding corporate debt of S$315 billion issued in Singapore. We have attempted to find out how much of that difference is made up of sovereign debt and the proportion that is simply debt created overseas and then later quoted here on the OTC market[10] in order to raise issuer profile or to satisfy other regulatory requirements (as more than 40% of listed G3 bonds in Asia Pacific are on the SGX wholesale market). In further tables below, we have also tabulated the amount and types of debt and the further possible relevant connections they have with Singapore aside from the SGX listing that may lead to some form of bond restructuring process here given Singapore's push to become an international centre for debt restructuring.

SGX Wholesale Bonds as at end February 2017

Total Sovereign/Quasi-Sovereign bonds of 88 unique issuers	**572**		**Total Non-Sovereign Bonds of 797 unique firms**	**1845**
NATIONAL GOVERNMENT	91		CORPORATION	1753
NATIONAL GOVERNMENT AGENCY	457		LIMITED PARTNERSHIP	19
LOCAL GOVERNMENT	4		CONDUIT FINANCING VEHICLE	46
PROVINCE OR COUNTY	1		INVESTMENT COMPANY	13
LOCAL GOVERNMENT AGENCY	16		SUPRANATIONAL AGENCY	6
LOCAL GOVERNMENT AUTHORITY	3		REIT	8
Total Value of Sovereign bonds	S$387.8 billion		Total Value of Non-Sovereign bonds	S$1119.4 billion
Sovereign bonds issued in SGD	S$32.9 billion		Non-Sovereign bonds issued in SGD	S$63.6 billion

A lot of the debt in these recent issuers were sold to high-net worth individuals in Singapore (in 2015 private banking clients bought up 26.8% of SGD debt issuances as opposed to 33.3% by financial institutions whereas in 2014 the figures were 43.5% and 21.6% respectively[11]), thereby bypassing prospectus requirements in the Securities and Futures Act as being offers to accredited investors. They were mainly listed on the SGX wholesale bond market which is lightly regulated. The listing process is a very quick one, as applications are processed within 1 business day for wholesale bond applications compared to 10 business days for retail bonds.[12] Listing is, however, usually required for bonds before they can, for various regulatory reasons, be purchased by financial institutions. But levels of disclosure, both initially and on a continuing basis, are much lower than for equity listings and retail bonds.[13]

[10] Around 400 bonds worth around S$400 billion are considered to be on the SGX OTC market (see *supra* n 7) as SGX itself listed more than 2400 wholesale bonds on their website as of January 2017 but its monthly statistics stated that it had only 2045 that were valued at slightly more than US$800 billion: SGX Monthly Market Statistics January 2017. Information on these OTC bonds are understandably less comprehensive.

[11] For non-SGD debt issuances, the numbers were for (2015) 7% private bank clients, 59.4% FIs and for (2014) 8% private bank clients, 53.8%. There was greater demand for such debt to be rated.

[12] MAS *Singapore Corporate Debt Market Development 2016* at 14.

[13] See further, OICV-IOSCO, Consultation Report, *Regulatory Reporting and Public Transparency in the Secondary*

The problems with the accredited investor corporate bond market may, however, have served as a signaling device to retail investors as the amounts involved were estimated in October 2016 to have clearly exceeded the sums involved with the Lehman Minibond crisis (where derivatives were sold as structured debentures to retail investors in Singapore). There has been no subsequent retail bond listed since the beginning of 2017. Influential financial journalists have called for a review of the safeguards in the new retail bond framework, such as the introduction of a credit rating.[14] But such rating has never been required in the wholesale bond market as investors, which were largely financial institutions, did not demand it even though the Asia Securities Industry and Financial Markets Association has stated in the context of lower investment grade bonds that "(i)ssuers are also encouraged to obtain internationally recognized credit ratings to improve transparency to investors"[15]. As we have seen more recently, however, SGD debt has increasingly been bought by private banking clients searching for yields due to the lower interest rate environment and the large pools of private sector cash, with deposits of non-bank customers of commercial banks in Singapore already amounting to more than S$600 billion[16]. But the perverse nature of some bond markets is that a formal credit rating may have made the rated bonds more expensive to issue (even though there are often likely to be shadow ratings held by larger lenders themselves). From the chart below, this appears to be particularly true of SGD bonds of Singapore and even foreign issuers.

SGX Bonds that were rated as of June 2017

Nature of SGX-listed Bond	Total	Investment grade	Non-investment grade
Sing Issuer, SGD Bonds	342	30	1
Sing Issuer, non-SGD Bonds	144	33	30
Foreign Issuer, SGD Bonds	28	4	2
Foreign Issuer, non-SGD Bonds	962	309	258

These were based on offer documents located on the Perfect Information database.

Unrated and Risky Corporate Debt

We have separately examined SGX listed bonds other than ones issued by foreign entities that are not SGD debt (given their weaker connections with Singapore). We find that there are 522 SGX-listed bonds that raised S$145 billion that are either of Singapore issuers or of foreign issuers issued in SGD. We have also attempted to find out how much may be susceptible to restructuring given the riskiness attached to them based on their coupon rates (as seen above, most of the bonds listed on the SGX are unrated and the vast majority of them are short to medium term senior or unsubordinated debt[17]). We

Corporate Bond Markets, CR06/2017.

[14] Goh EY, 'Review of SGX's bond framework needed' *Straits Times* 17 October 2016. MAS introduced a credit rating grant on 30 June 2017 to encourage SGD bond issuers to obtain credit ratings.

[15] ASIFMA, Best Practices Guide for Issuers of Non-Investment Grade Debt Securities in Asia, 1 November 2016 at 3.

[16] MAS *Annual Report 2016/7 Statistical Annex B1* at 98. This argument has been used to explain why during the Global Financial Crisis, it was only in Singapore, Hong Kong, Taiwan and Germany that derivatives based on the US housing market were sold to the retail public (in tranches of S$5000 in Singapore): H Tjio, "Challenges to Singapore from the global financial crisis: actual and suggested legal and regulatory responses" [2013] Sing JLS 168 at 172.

[17] Of the 2417 bonds listed on the SGX at the start of 2017, only 164 were listed as junior or subordinated debt. Of the 27

have chosen various yields to see how much debt listed on SGX may be considered lower investment grade although we recognize that this is an imprecise measure of how likely they may require some form of restructuring or amendment/waiver of covenants in their bond indentures. In addition, we have not used a moving system to track the yields against the prevailing rates in the year the bonds were issued. The chart on the implied yields of 10 year Singapore Government Securities, however, shows that except during the Global Financial Crisis (where it was just below 4%), those yields have stayed below 3%. So we have used 4%, 5% and 6% as rates to indicate how many of the 522 bonds identified might be considered lower investment grade (and these are 48.28%, 24.52% and 13.41% respectively[18]). The numbers, which admittedly only give a very rough picture of the junk bond market, suggest that issuer quality could be a concern and that the Singapore bond market may have perhaps grown too quickly in the past 10 years from the perspective of the retail investor. There could be a wall of debt falling due just over the horizon as seen from the graph below showing the number SGX-listed debt issues that have not been redeemed and their maturity dates. This may, however, have been part of a conscious effort to inject more entrepreneurial risk-taking into Singapore, although the focus of that was for the venture capital market and disruptive technology.[19] The flip side of this for the economy is that there is perhaps quite a bit of debt restructuring work on the horizon if we are right about the risks inherent in SGX listed debt that will fall due over the next few years.

522 out of 2417 bonds were issued either by Singapore issuers or in SGD

Breakdown of 522 bonds	**Unique firms/issuers**	**Value of debt**	**High yield high risk bonds (all individual bonds >= 5%)**
Issued by Singapore firms	195	S$131.1 billion	110
Issued by foreign firms but in SGD	35	S$12.0 billion	18
Issued by foreign sovereigns but in SGD	5	S$1.9 billion	0

5% is the cutoff based on high-yield bond ETFs in the US http://etfdb.com/etfdb-category/high-yield-bonds/#etfs__dividends&sort_name=assets_under_management&sort_order=desc&page=1. It should be lower in Singapore due to the lower interest rate environment although this is counterbalanced by the lower risk attached to ETFs. At 4%, of the 522 bonds, 252 or 48.28% would be seen as lower investment grade bonds. At 5%, of the 522 bonds, 128 or 24.52% would be seen as low investment grade bonds. At 6%, of the 522 bonds, 70 or 13.41% would be seen as low investment grade bonds

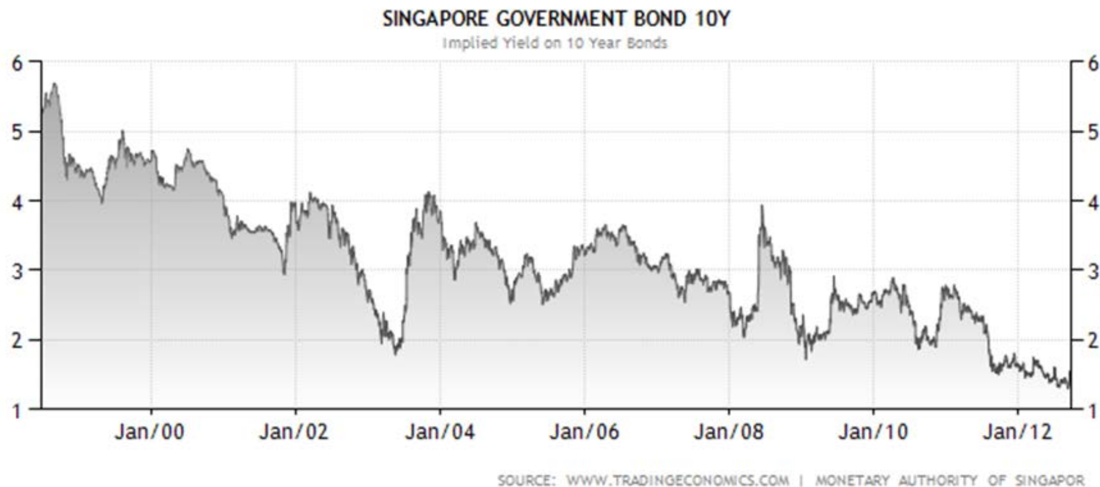
There does not appear to be much concern with sovereign or national debt (in the wider sense used in the tables above) listed on the SGX, particularly with those in SGD, and this is part of the picture consistently painted here. Only one of the 5 foreign sovereign issuers using SGD here offered its bond at a yield slightly more than 4% (Indonesia), which is the highest point reached by Singapore

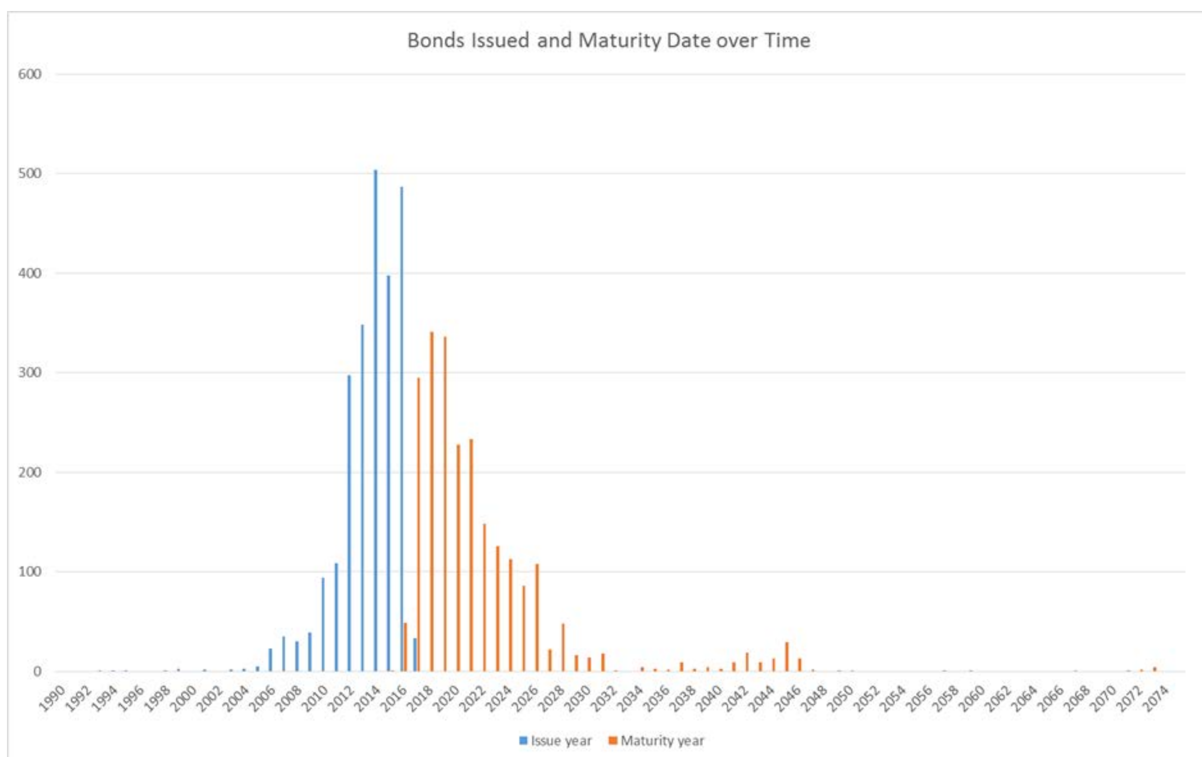
in default, 24 are senior or unsubordinated, and it is not applicable or unknown in the other 3. The coupon rates on these defaulted bonds range from 5% to 10.75%.

[18] From the Perfect Information database (accessed June 2017), 34 out of 518 of SGX bonds of Singapore issuers or those in SGD, with prospectuses or information memoranda on the database, were considered high yield or low investment grade with 69 considered investment grade. The rest were unrated or its ratings were unknown.

[19] See MAS Consultation Paper P004-2017, *Proposed Regulatory Regime for Managers of Venture Capital Funds* February 2017. See also Ronald J. Gilson, *Engineering a Venture Capital Market: Lessons from the American Experience* (2003) 55 Stanford Law Rev 1067, 1068. Compare L Lin, "Venture Capital Exits and the Structure of Stock Markets: Lessons from China" (2017) 12 no. 1, *Asian Journal of Comparative Law* 1-40

government bonds in the past 13 years, and the other four were comfortably below. None of the 27 SGX-listed bonds that were in default at the start of 2017 that were discussed above involved any form of sovereign or national bonds. The problems, if any, are consequently in the corporate bond market, particularly the resources and shipping sectors. Bond investors should expect to have to attend scheme meetings in Singapore to vote on haircuts, where we will see that their holdout rights are not strong.





Jurisdiction over Corporate Restructuring in Singapore: Schemes of Arrangement

The underlying hypothesis is that Singapore incorporated issuers will be subject to the domestic scheme of arrangement or judicial management should they or their debt require restructuring. There may, however, be conflicts of law or forum issues where their bonds are governed by a foreign law. This may explain why, even though their jurisdiction always extended to some foreign companies, Singapore courts still required a closer nexus than courts in the UK before they would oversee a corporate restructuring.

For various reasons, schemes of arrangement are more popular than judicial management as the form of corporate rescue in Singapore. Scheme jurisdiction[20] applies to any corporation which is liable to be wound up under the Act (and is likely applicable to REITs and business trusts in Singapore[21]). This would include companies incorporated in Singapore, but also foreign companies that can be wound up by virtue of section 350 (where confusingly, they are all referred to as "unregistered companies" in the sense that they were not incorporated under the Companies Act or its previous equivalent).[22] There must, however, be a sufficient connection with Singapore, and this was not seen to be the case with a Korean shipping company whose vessels would dock in Singaporean ports from time to time, but where it did not have any permanent assets.[23] The position was the same where the English common law is concerned in terms of when English courts had scheme jurisdiction.[24]

It was thought that while the foreign company did not have to establish a place of business in England, it had to have assets and creditors there in order for a court here to have jurisdiction to make the winding-up order. It has, however, more recently been held that it is not necessary for a foreign unregistered company which carries on a business there to have assets present in the jurisdiction. While that itself can found in winding-up jurisdiction, an alternative test is whether there is a sufficient connection between the company and England, and a reasonable possibility that, if a winding-up order is made, there is benefit to those applying for the winding-up order and the court is able to exercise jurisdiction over one or more persons interested in the distribution of assets.[25] This also appears to be the Singapore position although it was said recently in *Pacific Andes Resources Development Ltd*,[26] following more

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[20] Scheme or insolvency jurisdiction includes both personal and prescriptive jurisdiction as described in *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd* [2014] 3 SLR 381; [2014] SGCA 24 at [80]–[82]. See now *Cameron Lindsay v Duncan Diablo Fortune Inc* [2017] SGHC 172.

[21] Securities Industry Council Practice Statement on Trust Schemes in Respect of Mergers and Privatisations 3 October 2008 highlighted the need to utilize the general court powers over the administration of trusts under Rules of Court Order 80 and this would be applicable to any winding up or scheme in relation to REITs and business trusts, the first of which, Rickmers Maritime Trust, was wound up in August 2017. A court is likely to be guided by s 210 of the Companies Act for a trust scheme, as was the case in *In Re Croesus Retail Asset Management Pte Ltd* [2017] 5 SLR 811; [2017] SGHC 194. Further, the jurisdiction under s 210(1) is over an "unregistered company" under s 350 which includes any *partnership* or *association* of more than 5 people. While this could include overseas associations, it does not include international organisations: *Re International Tin Council* [1987] 2 WLR 1229.

[22] Division 5 of Pt X of the Companies Act (Cap 50, 2006 Rev Ed) does not provide for voluntary winding up which presumably should be at the place of incorporation (see s 351(1)(*b*)). For involuntary winding up, the test is not whether the foreign company has a place of business or is carrying on a business in Singapore covers an "unregistered company". Section 350 simply states that "'unregistered company' includes a foreign company and any partnership, association or company consisting of more than 5 members but does not include a company incorporated under this Act". The merger provisions following a scheme in section 212 were, however, only amended by the Companies (Amendment) Act 2014 to extend jurisdiction there to companies liable to be wound up under the Act when previously it only applied to companies incorporated in Singapore.

[23] *Re TPC Korea* [2010] 2 SLR 617.

[24] Collins J in *Re Draz Holdings Ltd* [2003] EWHC 2743. See further C Pilkingon, *Schemes of Arrangement in Debt Restructuring* (Sweet & Maxwell, 2013) at 4.5.3.

[25] *Re Real Estate Development Co* [1991] 1 BCLC 210 at 217. See also *Stocznia Gdenska SA v Latreefers Inc (No 2)* [2001] 2 BCLC 116 at 137 and now *Re HIH Casualty and General Insurance Ltd; McMahon v McGrath* [2006] EWCA Civ 732 at [37], in particular, on appeal, the speech of Lord Hoffmann in *McGrath v Riddell* [2008] UKHL 21 at [8]. See also *Singularis Holdings Ltd v Pricewaterhouse Coopers* [2014] UKPC 36 at [10].

[26] [2016] SGHC 210, following *Re Drax Holdings Ltd, supra* n 24.

recent English developments, that while the first requirement is necessary, the second and third are more applicable to winding up than schemes of arrangement. This is consistent with the fact that schemes are not seen as insolvency proceedings for the purposes of, *eg*, EC Insolvency Regulation on Insolvency Proceedings.[27]

Where English law may have gone further is where it only requires that the relevant creditor agreements are governed by English law and subject to the exclusive jurisdiction of English courts.[28] There, it may even be enough for the arrangement to be subject to the non-exclusive jurisdiction of the English courts or, separately, the choice of English law.[29] While this may be controversial, German companies, for example, have utilised English scheme of arrangement proceedings as the German restructuring process is seen as unhelpful in areas such as binding a dissentient minority as unanimous consent may be required. The UK courts may, in that sense, be seen as offering a service to the rest of Europe although how long that will continue given Brexit is unclear. There was no evidence that Singapore courts assumed scheme jurisdiction in such cases, where we have seen that courts still looked for a real, substantial connection. This was recently changed as amendments have been made by the Companies (Amendment) Act 2017 to, amongst other things, introduce a set of factors to be considered by the court in determining whether a foreign company has "substantial connection to Singapore" for the purposes of winding up, judicial management and schemes of arrangement. The new section 351(2A), which came into effect on 23 May 2017, provides that the court may rely on the presence of one or more of the following matters, whether:

(a) Singapore is the centre of main interests of the company;

(b) the company is carrying on business in Singapore or has a place of business in Singapore;

(c) the company is a foreign company that is registered as such in Singapore;

(d) the company has substantial assets in Singapore;

(e) the company has chosen Singapore law as the law governing a loan or other transaction, or the law governing the resolution of one or more disputes arising out of or in connection with a loan or other transaction;

(f) the company has submitted to the jurisdiction of the court for the resolution of one or more disputes relating to the loan or transaction.

The Explanatory Memorandum to the Bill explained that these matters were drawn from caselaw in Singapore and other common law jurisdictions although it is likely that EU regulations will be of assistance in dealing with the first, *ie*, in the determination of what is the "centre of main interest" of a company.[30] It remains to be seen, however, how cautious Singapore courts will be in using these factors,

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[27] Council Regulation on Insolvency Proceedings 1346/2000 came into force on 31 May 2002. This has been recast as Insolvency Regulation 2015/848, fully effective 26 June 2017.

[28] *Re Rodenstock GmbH* [2001] EWHC 1104. See also *Primacom Holdings GmbH v Credit Agricole* [2012] EWHC 164. These cases are discussed by J Payne, "Cross-border Schemes of Arrangement and Forum Shopping" (2013) 14 Eur Bus Org Law Rev 563 (examining also the effects of EU Insolvency and Judgment Regulations and finding that they do not impact much on scheme jurisdiction).

[29] *Re Vietnam Shipbuilding Industry Groups* [2013] EWHC 2476.

[30] The recast Insolvency Regulation 2015/848, which fully applies to insolvency proceedings from 26 June 2017, provides a codification of the centre of main interests, which will be presumed to be where the registered office is. Article 3(1) provides that this can be rebutted if the administration of its interests on a regular basis is in another Member State and this is ascertainable by third parties.

such as the choice of Singapore law in the bond or even the security documentation[31], to administer a scheme, particularly where the "centre of main interest" is elsewhere.

Likelihood of Corporate or Debt Restructuring in Singapore

What we try to determine below is the number of bonds or issuers clearly subject to scheme jurisdiction and those foreign companies that have a connection to Singapore (*eg* the bonds were issued in SGD and/or governed by Singapore law) that may subject them to scheme jurisdiction with the law reform changes. Even presently, however, we will see that there are non-scheme contractual workouts that Singapore courts may be able hear that may apply to bonds based on the use of Singapore as the proper law and choice of forum, and where the debtor is still solvent or at least not legally insolvent. In this context, the International Capital Markets Association has pointed out that "contracts of international bond offerings (other than those issued into the United States) will generally be governed by English law or another established common law such as Hong Kong law or Singapore law"[32]. We attempt to determine the incidence of this. Sovereign bonds may also fall into this category where they are denominated in SGD, although we find that the vast majority of SGX sovereign bonds are those of foreign entities denominated in non-SGD. The relevance of the use of SGD today is less apparent as the policy on the internationalisation of the Singapore dollar has been drastically relaxed. Previously, funds raised in SGD had to be used in relation to activities in Singapore or immediately swapped under certain conditions.[33] This policy against the internalization of the Singapore dollar had much to do with the fact that the MAS as de facto central bank does not set interest rates but focuses instead on exchange rates. Since 2002, however, only financial institutions have had some restrictions on the use of SGD funds that they raise. We believe, however, that it is still likely that, in practice, SGD funds that are raised by foreign entities will be used in relation to the carrying on business or having substantial assets in Singapore, which we shall see are now specified grounds for scheme jurisdiction. This is because there is only a small pool of SGD overseas which is used for actual transactions (even though the SGD is the 10th most traded currency on the foreign exchange markets). Bonds denominated in SGD are in that sense a proxy for jurisdictional grounds (a), (b) and (d) for schemes to be heard in Singapore. More importantly, perhaps, the use of SGD indicates that the place for payment of the bond or debt may be in Singapore, and that is a more traditional basis for insolvency jurisdiction as it shows the belief of the parties that that jurisdiction is a safe and sound place to carry on their business.

Although the relevance of this will be discussed more fully in the next part, we find that a large minority of Singapore issuers did not use Singapore law to govern their bond agreements and a large majority of foreign issuers issuing their bonds in SGD did not use Singapore law in that regard. Even with the wall of risky SGX debt, it is not clear how much additional corporate or debt restructuring will in fact be seen in Singapore given the complexity of cross-border corporate restructuring.[34] The picture changes

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[31] There are a small number of SGX-listed bonds that chose Singapore law to govern specific provisions of the loan, such as subordination or set-off.

[32] ICMA-NAFMII, "Practices and procedures in the Chinese and international primary debt capital markets" September 2015 at 7.

[33] See MAS Notice 757, Lending of Singapore Dollar to Non-Resident Financial Institutions (28 May 2004); SY Tan, "Currency Internationalisation of the Singapore Dollar and the Renminbi" SMU School of Economics (May 2013), available at http://www.technet.sg/writings/Currency%20Internationalisation.pdf.

[34] "Singapore's looming debt wall fuels concern after Ezra stumbles" *Business Times* 20 March 2017, estimating that S$38 billion worth of bonds of Singapore companies (excluding banks) will fall due by the end of 2020, and that the economic

slightly if the jurisdictional connection is determined by having Singapore as the place of payment (either into a bank or paying agent), but not in any clear or conclusive fashion.

SGX-listed Bonds using Singapore Law or Jurisdiction in the Agreement

Types of SGX-listed bonds	With Singapore as governing law or dispute forum	With Singapore as the place of payment
Singapore Issuers/SGD bonds	206/342 = 60.2%	193/342 = 56.4%
Singapore Issuers/non-SGD	45/144 = 31.3%	18/144 = 12.5%
Foreign Companies/SGD	8/28 = 28.6%	9/28 = 32.1%
Foreign Companies/non-SGD	20/962 = 2.1%	65/962 = 6.8%

These were based on offer documents located on the Perfect Information database.

Complexities of Cross-border Restructuring

If the choice of law or of jurisdiction in the debt agreement is relevant to where the restructuring occurs, which is the case with factors (e) and (f) in relation to schemes in Singapore, this could also lead to conflicts with more traditional bases for scheme jurisdiction where they differ. This is particularly so if the choice of law is also relevant for bond workouts outside the formal restructuring framework, especially if this choice can be made in relation to an ancillary agreement such as a security or charge document. If other countries adopt similar enlarged bases for restructuring jurisdiction, cooperation may end up being more difficult. The concept of unity or universality of bankruptcy, which presupposes the administration of a cross-border insolvency in one forum that is given effect to elsewhere,[35] would be even more unattainable. The first step in achieving this is to recognise that there is a main insolvency forum. But reorganisation or even going-concern liquidation would become more complex with more countries being able to assume jurisdiction over a corporate restructuring or over some part of it. In practice, what this means is that the process of administering a cross-border insolvency will be a highly involved one. Judges, liquidators and scheme administrators cannot escape having to co-operate with each other, with appropriate deference.[36] In this light, court-approved schemes have a better chance of success compared with, say, simply trying to obtain agreements between disparate creditors to a variation of their bondholder rights.

A good example of the complex interactions involved *Pacific Andes Resources Development Ltd*, a company incorporated in Bermuda that was part of a global industrial fishing group. We have seen that its defaulted bond is listed on the SGX and in SGD but governed by English law. The company, but not its subsidiaries, also carried out business activities in Singapore but this was largely as a holding company. Its main asset was its indirect holdings in a Cayman Islands' company that carried out

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recovery has not been able to remove default fears in the oil and gas, and shipping sectors. Ezra Holdings Ltd, a Singapore incorporated oil and gas sector related company, filed for Chapter 11 bankruptcy protection on 18 March 2017, stating that this was to obtain an automatic stay that was unavailable in Singapore at that time. Its SGX bonds were in SGD and governed by Singapore law and subject to the non-exclusive jurisdiction of the Singapore courts.

[35] JL Westbrook, "Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum" (1991) 65 American Bankruptcy Law Journal 457.

[36] H Tjio and Wee MS Cross-Border Insolvency and Transfers of Liquidation Estates from Ancillary Proceedings to the Principal Place of Bankruptcy" (2008) 20 SAcLJ 35.

substantial business in Peru. The company commenced a scheme of arrangement in Singapore in early 2016, which was then stopped after a Singapore court in the judgment referred to above declined to extend a global moratorium to restrain creditors of the company and its subsidiaries within its jurisdiction from commencing or continuing proceedings elsewhere, leading creditors to file winding-up petitions in Bermuda and the BVI (where some of its subsidiaries were incorporated). The judgment acknowledged that, although Singapore had jurisdiction over the matter, the Singapore scheme was contingent on the restructuring plan for the underlying Peruvian business.[37] Ramesh J, thought that while Singapore was the centre for main interest for the company itself, this was not the case for its subsidiaries, through which much of the business was carried out. At the same time that the Singapore scheme was dropped, the group filed for Chapter 11 protection in the US for 16 of its indirect subsidiaries. This appears to have become effectively the seat of bankruptcy (even though other subsidiaries are still being wound up in the BVI, for example) and the Southern District Court of New York has given the group until February 2018 to come up with a restructuring plan. But none of this would have worked without a great deal of court involvement and cooperation.

Importantly, however, Ramesh J in first finding that Singapore had scheme jurisdiction expressly refused to accept the *Gibbs* principle,[38] which is that a discharge of a debt is not effective unless it is in accordance with the law governing the debt. In *Pacific Andes*, this was English law for the SGX bond but there were smaller debts governed by Hong Kong law. This is right from a corporate restructuring perspective and consistent with the treatment of movable property but may lead to problems if, for example, there is also a concurrent attempt at bond restructuring elsewhere that may have started before the company neared insolvency. We have seen for example, English courts hearing cases concerning the variation of the terms of debt agreements of foreign entities that are governed by English law. These have been with respect to the obtaining of exit or variation consents to changes to bond indentures outside the scheme framework. However, this is incomplete as it does not cover trading debts (which Singapore schemes can) and others facets of corporate restructuring as the court is only dealing with the relationship between the issuer and the relevant bondholders. It also requires the terms of the bond issue to allow changes to the covenants with bondholder consent (collective action clauses). It also leads to a detailed examination of *pari passu* clauses as attempts can be made to pay out to consenting bondholders before dissenting ones under some forms of exchange offers (which do not directly alter the agreement). But it is that consent requirement that leads to further uncertainty as there may be an implied term that there is a limitation on the power on the majority to bind the majority in a way that is "discriminatory and unfair".[39]

The case that caused the most problems for bond restructuring in this regard was that of the English

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[37] In *Pacific Andes Resources Development Ltd* [2016] SGHC 210, Ramesh J was particularly mindful of this when he said:

> 73 The present case is illustrative of this reality. PARD, having listed and borrowed in Singapore (in the case of the SGD Bonds) and having operations here seeks to restructure its debts in Singapore. Its principal asset is its equity in the Peruvian Business through its indirect holding in CFGL. This makes PARD's restructuring plan here heavily contingent on the plan for the Peruvian Business and the restructuring of CFGL. It therefore seems to me incorrect to assert that PARD has not satisfied s 210(10) and *Conchubar* because it has not offered a fleshed out plan. This ignores the fact that PARD cannot restructure in isolation as it is effectively a holding company and its restructuring will depend on the value maximisation of its operating units. The creditors in extending credit to PARD must have reasonably anticipated this paradigm. They should not be so willing to argue without reference to this.

[38] *Gibbs v Societe Industrielle* (1890) 25 QBD 399. See further, K Ramesh, writing extra-judicially, "The *Gibbs* Principle* A Tether on the Feet of Good Forum Shopping" (2017) 29 SAcLJ 42; R Mokal, "Shopping and Scheming and the Rule in *Gibbs*". Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2922237.

[39] *Redwood Master Fund Ltd v TD Bank Europe Ltd* [2006] 1 BCLC 149 (syndicated loans).

High Court in *Assenagon Asset Management SA v Irish Bank Resolution Corporation Ltd*[40]. Assenagon did not consent to an exchange offer that would have changed their Eurobond subordinated debt (governed by English law) in the former Anglo-Irish Bank Corporation ("AIBC") to new notes at 20 cents to one Euro (which was the market price of the Eurobonds). Briggs J distinguished *Azevedo v Imcopa Importacao, Exportacao E Indústria De Oleos Ltd*[41] (a similar case, with English law governing notes issued by a Uruguayan company, at that time at first instance only) by saying that that involved a positive financial inducement to accept the consent payments that was available to all holders voting to accept deferral of the coupon payments (with those voting against or not voting excluded from the consent payments) as opposed to the negative inducement in the case before him (leading to some form of expropriation).

Subsequently, the Court of Appeal in *Azevedo*[42] upheld the first instance decision and found that there was no breach of the *pari passu* clauses there. But this decision may have been influenced by the corporate restructuring of the Brazilian holding company that guaranteed the notes in *Azevedo* where it may have been relevant that the claimant agreed to three out of the 4 noteholder resolutions there, all of which obtained the necessary majority approvals and which were confirmed by the Brazilian court. Consequently, the disadvantage of such bond workouts is that one eye has to be kept on the main corporate restructuring so that there is no legal arbitrage by any of the creditors. This also appears to be what happened in the Hong Kong decision of Reyes J in *Hong Kong Institute of Education v Aoki Group (No 2)*[43]. At the same time, however, acceptance of the *Gibbs* principle means that the main restructuring forum does not have full autonomy in dealing with debts governed by a foreign law.[44] This increases the likelihood of successful holdouts by vulture funds.

Such funds thrive on the uncertainty created by the application of some form of wrongful oppression of bondholders based either formally on section 216 of the Companies Act which in Singapore operates a broad test of "commercial unfairness",[45] or less so on an implied term that a majority would vote in the best interest of the class when it comes to a variation of the rights of a class of bondholders. The test seems to be based on some form of egregious behaviour,[46] and the lack of a clear dividing line between positive and negative inducements seen in the English cases may have contributed to the absence of reported cases disputing these workouts in Singapore. They are either not happening much at all, or

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40 [2012] EWHC 2090; [2013] 1 All ER 495, noted RC Nolan (2013) 129 LQR 161.

41 [2012] EWHC 1849.

42 [2013] EWCA Civ 364; [2014] 3 WLR 1124.

43 [2004] 2 HKC 397, discussed by Ramesh, *supra* n 38 at 46.

44 The problem is that *Gibbs* may be consistent with Jackson's theory that pre-bankruptcy entitlements should not be altered in an insolvency context, as that would give people the incentive to trigger off the insolvency processes to reorder their rights: TH Jackson, *The Logic and Limits of Bankruptcy Law* (Harvard University Press, 1986). The suggestion by R Mokal, *supra* n 38 at 4, that *Gibbs* be confined to companies that are not "factually distressed" is also difficult due to the difficulties of legally identifying what this is. Companies also move into and out of even technical insolvency. As to what this means today, see further Wee MS, "Understanding Commercial Insolvency and Its Justifications as a Test for Winding Up" [2015] LMCLQ 62.

45 C-L Seah, 'Bondholder Rights and the Section 216 Oppression Remedy' (2011) Sing JLS 432, finding no cases in Singapore on creditor oppression. For a view that shareholder oppression may have become too wide, see H Tjio, "An Empirical Look at the Consequences of Oppression Actions in Singapore" (2017) JCLS (forthcoming).

46 Nolan, *supra* n 40 at 165, thought that if the approach is objective at all, that is just evidence of bad faith or irrationality.

have not been successful in obtaining bondholder consent (even though the offering documents of the 8 SGX bonds of foreign companies issued in SGD governed by Singapore law identified above all had collective action clauses and this seems to be widely used), or minority creditors have not challenged them. The position is likely shared by the first two reasons due to the advantages discussed below of using the scheme of arrangement even outside of insolvency,[47] and the more dispersed numbers of creditors buying such bonds (private banking clients versus financial institutions). A further reason why informal bond workouts are seldom seen is because reputational considerations may mean that an issuer would seek a bond workout only when a company is near insolvency (due also to the absence of powerful wrongful trading provisions in Singapore). Any bond workout would thus always be in the shadow of a formal scheme of arrangement, which will also deal with trading debt.

Further uncertainty remains with the meaning of *pari passu* and this was seen with the restructuring of Argentinian bonds governed by New York Law. The sovereign bond market is analogous to the bond workouts discussed here rather than the formal schemes discussed below for the simple reason that any real restructuring is of the borrowing country itself (as was the case with Argentina which had been locked out of the bond markets since 2001 following its failed sovereign debt restructuring exercise (with the US court[48] largely taking a wide approach towards *pari passu* clauses and holding that the 7% of bond-holders who held-out had to be paid the face amount of the bonds in full alongside the 93% that had accepted large haircuts on their bonds, with the latter not otherwise being able to be paid at all). In April 2016, under a new government which wanted to re-access the bond markets, Argentina agreed to pay the hold-outs, some of whom had bought the distressed debt for far less than its face value, in full. But with Argentina doing so, the same US judge in January 2017 agreed with Argentina's motion to dismiss claims for damages for breach of the *pari passu* clauses by another group of holdouts, holding that it was the prior administration's "extraordinary conduct"[49] being "a *uniquely* recalcitrant debtor"[50] that led to his earlier finding that there was a breach of the clauses. It would appear that there is an aggravated *mens rea* requirement for a breach of *pari passu* clauses in the US.

While out of court bond workouts outside of Chapter 11 appear to have started to work in the US, and we have seen that they are actively used in the UK, the possible revival of some form of inter-creditor good faith and/or need to interpret older legislation in order to see that the restructuring is not affecting a bondholders right to receive payment[51] may require too much litigation to work itself out in the

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[47] In the case of Perisai Petroleum, a Malaysian company which defaulted on its SGX listed bond governed by Singapore law, the variation in the terms of the debt is taking place in the shadow of a scheme of arrangement which the company has said it will enter into: M Lee, "Perisai lays out new scheme to settle debts" *Straits Times* 8 March 2017.

[48] *NML Capital v Argentina* (2013) 727 F 3d 230 (2nd Cir). LC Buchheit and GM Gulati, "Restructuring Sovereign Debt After *NML v. Argentina*" (2017) 12 Capital Markets Law Journal 224. See further L Burn, "Pari passu clauses: English law after *NML v Argentina*" (2014) 9 Capital Markets Law Journal 2.

[49] See *NML Capital v Argentina ibid* at 247, referring to the Order, *NML Capital Ltd v Republic of Argentina* No 08-cv-6978 (SDNY Dec 7 2011).

[50] *NML Capital v Republic of Argentina* 727 F3d 230, 247 (2nd Cir) (emphasis added by the judge in *White Hawthorne LLC v The Republic of Argentina* No 16-cv-1042 (SDNY Dec 22 2016) where it was also held that monetary damages was not separately available for a breach of the *pari passu* clause).

[51] WW Bratton and AJ Levitin, "The New Bond Workouts" (February 23, 2017). U of Penn, Inst for Law & Econ Research Paper No. 17-9. Available at SSRN: https://ssrn.com/abstract=2909186 (arguing for removal of section 316(b) of the Trust Indenture Act 1939 due partly to declining household sector participation in the bond markets). In the context of shareholder voting, it is also not always clear when there is a variation of class rights. Courts in Singapore, as in England, may also be unwilling to see the mere indirect dilution of shares as a variation. In *Greenhalgh v Ardenes Cinemas Ltd*, it was held that there was no variation of class rights even if the ten shilling ordinary shares were seen to be of a separate

Singapore context. Contractual workouts work best when only institutional investors are involved – the problem in Singapore, as we have seen, is that high net worth individuals and retail investors have become large purchasers of bonds in recent years. We have witnessed collective action problems that have not been solved by non-statutorily required bond trustees in Singapore.[52] It is perhaps for this reason that the Singapore Investor Association of Singapore has submitted a proposal to the MAS for there to be a minimum tranche of 30% required for institutional investors in bond offerings.[53] Further, to solve the collective action problems, and the cost of getting bond trustees to act, they have proposed that issuers buy insurance to cover such costs, which is quite different from the credit default swaps suggested in order to make bonds more tradable on the secondary market.[54]

The most intractable problem, though, as we have alluded to, is that while a bond indenture may be governed by the proper law of the agreement, the issuer and any underlying security could be in a separate jurisdiction (as in the *Azevedo* case where comity may therefore have played a part in the court's decision). This will add to the myriad legal challenges that may already be posed by unhappy bondholders on the grounds discussed above in relation to the debt agreement and its variation or possible breach due to payments to some bondholders and not others. The scheme of arrangement offers a better alternative much of the time in Singapore, not least because Chapter 11 characteristics have been introduced to it which lessens the ability of creditors to hold out. Amongst the changes effected in May 2017 were:

- Worldwide moratoriums to be issued by Singapore courts;
- Super priority for rescue financing;
- Cram-down provisions against dissenting class of creditors;
- Pre-packs;
- Adoption of the UNCITRAL Model Law on Cross-Border Insolvency (1997);
- Abolition of the rule requiring liquidation of non-financial foreign companies to ring-fence Singapore assets and pay off debts incurred in Singapore first.

These changes further weaken the position of unsecured noteholders in relation to not just the debtor but also senior creditors.[55] It remains to be seen whether they will be sufficient to meet the aims of the

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class from the 1941 two shilling ordinary shares in respect of voting and other similar rights. Although the 1943 subdivision of the ten shilling ordinary shares into two shilling shares, each ranking as to one class with the 1941 two shilling shares, materially affected the rights of the 1941 two shilling ordinary shares, it did not vary them. There has been cogent and persuasive criticism of this decision but in *White v Bristol Aeroplane Co Ltd* [1953] Ch 65, rights of a preference shareholder were not seen to be varied by a bonus issue of preference and ordinary shares only to existing ordinary shareholders even though the former was diluted. The preference shareholder could have been protected by a clause in the constitution stating that a situation like this is deemed a variation of class right. In Singapore it was held that there is no variation of rights as such when preference shares are extinguished, merely a change in the way those rights are enjoyed: *Re Beaufort Sentosa Development Pte Lted* [2001] 2 SLR(R) 749, following *Re Saltdean Estate Co Ltd* [1968] 1 WLR 1844.

[52] M Lee, "Bond holders of trouble firms turn on trustee" The Straits Times 8 October 2016.

[53] A Gabriel, "SIAS, Rajah & Tann seek MAS action on insurance for Singapore bonds" Business Times 13 September 2017.

[54] See *supra* n 9.

[55] MS Wee, "Whither the Scheme of Arrangement in Singapore: More Chapter 11, Less Scheme?" (February

Committee to Strengthen Singapore as an International Debt Restructuring Centre.[56]

Hans Tjio

January 2018

24, 2017). Available at SSRN: https://ssrn.com/abstract=2922956, discussing the Companies (Amendment) Act 2017.

[56] See the Final Report of the Committee to Strengthen Singapore as an International Debt Restructuring Centre (April 2016). Available at: https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Final%20DR%20Report.pdf.