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Financing the Belt and Road Initiative: Can Singapore help in securitising it?

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Introduction

Singapore may not be directly involved in the infrastructure development associated with China's ambitious Belt and Road Initiative (BRI), but it will be argued that it can be a small partner of China in terms of financing projects linked to what is in effect China's attempt at a Marshall Plan (the aim is obviously not war reconstruction but to make up for shortfalls in aggregate demand since the Global Financial Crisis). It has been estimated, for example that Asia ex-China will need up to almost US$900 billion in infrastructure spending a year from 2018-2027, which is 50% above historical rates.[1] Much of this is expected to be funded by debt directly or indirectly either by China or institutions linked to China. Yet China's foreign reserves are only in the region of U$3 trillion. So there is a funding gap that will have to be provided by governments or private sectors in other parts of Asia and the world.

However, while Singapore is not in a position to lend large amounts of money to help build the BRI, it can assist in the Asian Infrastructure Investment Bank (AIIB) given its experience with international financial institutions such as the Asian Development Bank (which has estimated that Asia will require US$26 trillion for infrastructure investment by 2030)[2]. Singapore was also one of the first members of the AIIB, whose role right now seems to be to provide some of the finance for the BRI. It has been estimated, for example, that the AIIB has extended around $8 billion for 40 projects in 16 countries.[3] But the AIIB only has authorised capital of $100 billion. If China has in fact committed approximately $1 trillion in foreign projects in the BRI[4], it would suggest that much of that has been provided by other sources within China, namely state-owned Chinese banks (since the official Silk Route Fund itself only has US$40 billion, and both this and the AIIB invest jointly with the International Bank for Reconstruction and Development). Indeed, it is stated that BRI investment has as its first level of financing the China Development Bank and Export-Import Bank of China[5]. The second is the Silk Road Fund which focuses on equity investment and the

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[1] Nicolas Fizli, "World Pensions Council: Pension Investment in Infrastructure Debt: A New Source of Capital" *World Bank Blog* (February 2017).

[2] Asian Development Bank, *Meeting Asia's Infrastructure Needs* (Asian Development Bank, 2017), vii. [https://www.adb.org/sites/default/files/publication/227496/special-report-infrastructure.pdf]

[3] "AIIB can be a key benchmark for BRI" *Global Times*, July 7 2019. AIIB loans are based on the criteria of financial sustainability, environmentally friendliness and social acceptance locally.

[4] US$837.4 billion worth of foreign BRI projects had been launched by May 2018: City of London, *Building an Investment and Financing System for the Belt and Road Initiative*, September 2018, 5.

[5] Which are both also shareholders of the Silk Route Fund. There is a lot of overlap between the financiers.

third Chinese commercial banks like the Industrial and Commercial Bank of China (ICBC) which are amongst the largest in the world by market capitalisation and seemingly well-placed to lend.[6]

But the 1997-8 Asian Financial Crisis really showed the dangers of over-reliance on bank lending for Asian borrowers and banks. From the corporate borrowers' viewpoint, borrowing in foreign currency (largely US dollars) due to lower interest costs arising from the differential between US and domestic interest rates seemed logical (and was profitable when used to inflate local real property prices) until domestic currencies collapsed, and a downward spiral grew from those companies then buying dollars to repay their debts.[7] From the domestic bank lenders' point of view, the mismatch in timing between its assets and liabilities, which is very much a characteristic of bank runs, [8] resulted in the collapse of a number of those financial institutions. Many of those that still survive today had enormous debt overhang, which is why it took so long for developing Asian countries to recover from the 1997-8 crisis.[9] While it is too simplistic to say that countries like Hong Kong and Singapore did not suffer the same problems, they recovered faster than Indonesia, Thailand and South Korea. In part, this was because they had stronger securities markets and corporate governance,[10] which might have slowed down the flight of capital, both domestic and foreign, that accompanied the currency meltdowns.[11] But we will see that it was also because they kick-started their securitisation markets more quickly than other Asian countries and so cleaned up the balance sheets of their banks and property companies.

While concerted efforts were made to rely more on the capital markets after the Asian financial crisis of 1997-1998,[12] the equilibrium position in Asia appears to be that some countries have continued to strengthen their domestic banks as these remain their main avenues of financing,

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[6] City of London, *Building an Investment and Financing System for the Belt and Road Initiative*, September 2018, 11. The 4th level is made up of the World Bank and ADB and the 5th import-export credit insurance companies. See also Shen Wei, *Shadow Banking in China: Risk, Regulation and Policy* (Edward Elgar, 2016), 38.

[7] Commentators lamented the absence of intra-Asian interest in instruments denominated in Asian currencies: P Bowring, *Time Magazine*, July 25, 2001. One of the BRI goals is to create more financing and financial instruments in RMB and local currencies: City of London, *Building an Investment and Financing System for the Belt and Road Initiative*, September 2018, 8.

[8] See T Frankel, *Securitisation: Structured Financing, Financial Assets Pools, and Asset-Backed Securities* (Fatham, 1991) at §3.3.4.

[9] K Bradsher, "Asia's Long Road to Recovery" *New York Times* June 28, 2007.

[10] See OECD, *White Paper on Corporate Governance in Asia* (2003) at footnote 28.

[11] "In 1996 capital was flowing into emerging Asia at the rate of about $100 billion a year; by the second half of 1997 it was flowing out at about the same rate": P Krugman, "Saving Asia" *Fortune*, September 7, 1998, and "the IMF and US Treasury blamed the crisis on a lack of transparency in financial markets" J Stiglitz, "10 Years After the Asian Crisis, We're Not Out of the Woods Yet" *Project Syndicate* July 2007.

[12] I Shim 'Development of Asia-Pacific corporate bond and securitisation markets' in "Weathering financial crises: bond markets in Asia and the Pacific" (2012) BIS Papers No. 63, p 5. Available at <http://www.bis.org/publ/bppdf/bispap63.pdf>; M Kawai, R Newfarmer and SL Schmukler 'Financial Crises: Nine Lesson From East Asia' (2003) p 11. Available at: <http://siteresources.worldbank.org/DEC/Resources/Kawai-Newfarmer-Schmukler-EEJ-9May2003.pdf>.

which will largely be of domestic manufacturing and trade. Others are better placed to rely on their securities or capital markets, with funds raised for reasons that have less to do with the home real economy, either because they are raised by foreign companies or for reasons of financial innovation and risk management by the banks. Asia has become stronger with greater financial and regulatory diversity.

There is consequently the argument that there also needs to be diversification in funding sources for the BRI. However, there is little evidence at the moment that foreign debt linked to the BRI are being securitised into "wealth management products", as was the case with China's own domestic project financing. But it does mean that there may be systemic risks created by the BRI that remain within the banking system. Even if, as an article by Jiwei Qian and Jie Gao[13] suggests, the corporate governance of companies involved in the BRI are better than that of other Chinese companies, they point out that state-owned enterprises account for 50% of total infrastructure in the BRI and 70% of its project values.

There is growing evidence that Chinese banks are now struggling to manage their foreign loans (whether BRI related or not) as bad debts mount on overseas ventures of Chinese companies.[14] They are building up their expertise in places like Hong Kong for bank-managed restructuring activities. It will be suggested below that Singapore may also be able to help and perhaps more so with equity financing and bond restructuring that also helps reduce systemic risks in the financial system. There is a need to plan for the future as the BRI is intended to be completed only in 2049 as this is to coincide with the 100th anniversary of the People's Republic of China.

Securitisation in China

Securitisation was first facilitated by corporate and securities laws through the recognition of true sale arrangements (by accepting the primacy of form over substance) which allowed the shifting of assets off balance sheets. There have been attempts at asset securitisation in Asia, which improves the capital ratios of an entity, but this has sometimes consisted of setting up government agencies to buy up poor quality receivables (see Indonesia, Thailand and Malaysia), rather than the present day model found in developed financial markets (at least until the sub-prime mortgage crisis[15]) of transferring good quality receivables to a special purpose vehicle which offers its own securities to the public. Such a special purpose vehicle obtains funding more efficiently than the originator/assignor as it has a better credit rating. The difficulty for asset securitisation in Asia was the lack of market infrastructure, including rating agencies and credit insurance,[16] needed to

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[13] "Leadership Transformation in China's SOEs under BRI" (…..)

[14] Don Weinland, "Chinese banks build up asset recovery teams as bad debts mount" *Financial Times*, October 17 2019.

[15] Earlier on, it was thought that securitisation might have seen its best days in the US, "Wall Street's broken spirits" *Business Week* September 2, 2002.

[16] But that may not have been a bad thing given the role that rating agencies played in the sub-prime mortgage crises due to conflicts of interest in its rating of securities and the fees it obtained: see eg R Lowenstein, "Triple-A Failure" *The New York Times*, April 27, 2008. He explains how a derivative could obtain a higher rating than those of the underlying bonds that were themselves backed by sub-prime mortgages. Even before the sub-prime mortgage crisis,

support such activity. HK and Singapore were clearly ahead in this game and took regulatory measures to facilitate the growth of REITs, in particular, from around 2002 (through changes in their trust, tax and securities laws), and a number of highly indebted property companies managed to clean up their balance sheets in the process. Investors, though, should have been more concerned with the relatively weaker trust governance structures[17] which contributed to CDOs and CDSs being in effect sold to them later during the Global Financial Crisis. And securitisation in general has recently come under renewed scrutiny from the Financial Stability Board,[18] as part of its review of the shadow banking system. US banks have moved away from risker forms of securitisation involving CDOs and CDSs.[19] However, Europe is clearly pushing the securitisation agenda as this could allow European banks to lend again for SME growth and job creation.

China though has had a good deal of experience with securitisation since the Trusts Law[20] was passed in 2001 and have many of their own rating agencies and different bond markets but the focus has been on their own domestic "wealth management products" based on local projects that has been estimated at $4 trillion.[21] The securitisation may have been indirect or "informal"[22] in the sense that funds were obtained by bank-related asset managers from investors which then bid for the largest real estate developers. These "wealth management products" were created because banks could not lend directly to these Chinese related projects and had to act more as a conduit between the investors (largely high net worth individuals rather than institutional investors) and these projects. That it is in the process of reforming their corporate and securities laws quite significantly suggests that not all has been well in this area.

On the surface, domestic securitisation in the broad sense may explain why Chinese banks have both been able to keep BRI debt on its books as well as the reluctance of the authorities to allow foreign debt to be securitised given that there is less control over them. Banks may well be sufficiently capitalised by international standards as they did not lend directly to domestic projects

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by 2005, it was clear that default rates on CDOs were 8 times higher than on Baa rated corporate bonds, and yet CDOs were treated by the rating agencies no differently from bonds.

[17] MAS recognised this problem: Consultation Paper P006-2005, "Review of the Regulatory Regime Governing REITs" (June 2005).

[18] FSB Press Release, "The Financial Stability Board's work on Shadow Banking: Progress and the next steps" September 1, 2011.

[19] WW Bratton and AJ Levitin, "A Tale of Two Markets: Regulation and Innovation in Post-Crisis Mortgage and Structured Finance Markets" (August 21, 2019). U of Penn, Inst for Law & Econ Research Paper No. 19-33 (2019). Available at SSRN: <https://ssrn.com/abstract=3441366>

[20] Trust Law of the People's Republic of China, adopted at the 21st Meeting of the Standing Committee of the Ninth National People's Congress on April 28, 2001 and promulgated by Order No. 50 of the President of the People's Republic of China on April 28, 2001.

[21] Marilyn Romero, "Winning the War to Rein in China's Wealth Management Products" *China Law and Practice* July 18 2019.

[22] Shen Wei, *Shadow Banking in China: Risk, Regulation and Policy* (Edward Elgar, 2016), 120.

with the rise of the shadow banking system funding those projects.[23] This may explain their aggressive foreign lending that has now just been reined in. But another reason why they may not have securitised their foreign debt is due to the problems that China has had with this shadow banking sector due to the implicit guarantees that were given with respect to the "wealth management products" in China.[24] Banks that managed these projects and others distributing "wealth management products" may have mis-sold some of them in China to persons who though perhaps wealthy were not in fact sophisticated. This has led to calls for more formal fiduciary duties to be imposed on financial advisers and asset managers there on top of the ad hoc compensation that has already been paid out to investors.

It is true that in the BRI, Chinese banks may lend mainly on a secured basis in exchange for collateral which then becomes foreign assets or property owned by them if there are defaults. But assets can become a liability after a while practically speaking (politically as well) and certainly so legally for financial institutions that are subject to capital adequacy ratios. Securitisation is then necessary to shift these assets off the balance sheet as their value starts to get impaired. Chinese banks have now begun to force their defaulting Chinese corporate borrowers to become net sellers of foreign assets for the first time.[25] There is something to be said for worrying about these problems upfront and so that even if securitisation may have been abused in the US through sub-prime lending which led to the Global Financial Crisis, good securitisation does reduce systemic risks and borrowing costs in the system.[26] The discipline of a credit rating and scrutiny by public markets could help assess the viability of certain projects although there may be other strategic reasons for them. Further, issuers can reach out to global investors looking for steady returns from infrastructural projects. So the goal is not to get their own Chinese investors involved but foreign ones which may then lead to greater buy in into the BRI.[27] There is, of course, already some of that, eg, in December 2017, the China Development Bank issued a US$350 million BRI special bond in Hong Kong through a private placement. It has also been argued more recently that Hong Kong can play a part in securitisation linked to the BRI.[28] Singapore may be able to help further reduce systemic risks in that regard with its public equity and bond markets.

Singapore's possible financing role

[23] Most of the wealth management products were created by smaller banks: Shen Wei, *ibid* at 126-7.

[24] Alun John, "China's 28tr yuan of wealth management products under mounting stress in second half, analysts say" *SCMP*, July 12 2017. Shen Wei, *ibid* at 129-130.

[25] *Supra* n 14.

[26] Steven Schwarcz, "Enron and the use and abuse of special purpose entities in corporate structures" (2002) 70 University of Cincinnati Law Review 1309.

[27] Gu Qingyang, "BRI: Need to woo global private investors" *Business Times* October 23 2019.

[28] David Ho, "Securitization to push BRI" *China Daily*, October 22 2018 and presentation of Anthony Neoh: <https://www.aail.org/ufiles/ckeditor/files/2019_CSF_Dr_Anthony_NEOH_eng.pdf>

Singapore's role as a middleman is to try to be in the middle, and to be a legal translator of sorts. Ideally it should help bridge the gap between US-China and India-China as it did when it was the inter-monsoon stop for trading ships. Singapore is still fortunate enough to be in a position to do so where Law is concerned unlike, say, the Sciences, Engineering and Medicine, due to the enormous differences that still exist between civil law and common law countries. This is especially so when it comes to law and finance. It is a dangerous game and perhaps best left to financial centres which understand the nuances involved more.[29] We will see that Singapore has also experienced having its investors not fully understand modern financial products and whose investors are now sophisticated enough after having experienced previous losses (unlike in China, there is no moral hazard in that respect). Hong Kong's problems also suggest that Singapore will have a part to play in coming up with financial structures that perhaps only the common law can create due to its innate flexibility. As has been recently said with respect to cryptoassets:[30]

> The great advantage of the English common law system is its inherent flexibility. Rather than depending on the often cumbersome, time-consuming and inflexible process of legislative intervention, judges are able to apply and adapt by analogy existing principles to new situations as they arise. In commerce, the law is there to support and fulfil reasonable expectations. It is "endlessly creative … a living law, built on what has gone before, but open to constant renewal". Time and again over the years the common law has accommodated technological and business innovations, including many which, although now commonplace, were at the time no less novel and disruptive than those with which we are now concerned. In no circumstances therefore are there simply no legal rules which apply.

Whether we like it or not, it takes a common law system to fully understand finance and, while there is talk that Shenzhen or Macau will try to adopt the common law given Hong Kong's issues that still seems a long way away from fruition. Benjamin said that with respect to the need for certainty of subject matter in trust law (discussed in the next part) that earlier precedents were eroded as "case law approached the financial markets".[31] It is about making new law without appearing to do so. We will see later that much depends on the commercial law judges in *eg*, dealing with derivatives.[32] Singapore is similarly well positioned in that respect as will be seen below.

It can also be argued that many Asian countries, except for HK, Singapore and Taiwan, have and should delink themselves from the "global trend of *financialization*: the reengineering of manufacturing firms as highly leveraged investment vehicles and, soon, the packaging of

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[29] Luh Luh Lan and Hans Tjio, "Regulatory Framework: The Winning/Losing Architecture" in *A Tale of Two Crises: A Multidisciplinary Analyses* (NUS Global Asia Institute, 2010).

[30] UK Jurisdictional Taskforce *Legal statement on cryptoassets and smart contracts*, November 2019 para 3.

[31] Joanna Benjamin, *Financial Law* (Oxford: Oxford University Press, 2007) at 21.12.

[32] Jo Braithwaite, "Standard Form Contracts as Transnational Law: Evidence from the Derivatives Markets" (2012) 75 MLR 779.

mortgages into risky asset backed securities for offloading into global markets".[33] It has also been observed that actual economic growth before the Global Financial Crisis (GFC) was in fact relatively stable and less risky, and it was really just the financial markets that had seen so much volatility, largely because of its complexity.[34] But real growth has been destabilised by the financial markets in the past 10 years so much so that we are increasingly again hearing Churchill's lament that "finance be less proud and industry more content".[35] China is at a crossroads, toying with the idea of further financial sector liberalisation, but like some others, worrying that the underlying economy may fail to benefit from or, worse, may be damaged by this.[36]

China is undoubtedly aware of the hubris linked with Japan whose fortunes seemed to change when they became more heavily involved in finance, with the 1985 Plaza Accords always a reference point when they allowed or were forced to allow the Yen to appreciate by too much against the US dollar. China also has to accept that the US is in the unique position of having the world's reserve currency that can be exported in return for goods and services.[37] It will take a long process requiring the full internationalisation of the Renminbi and long and sustained Chinese deficits before that can become a reserve currency. The financialization of the world is really the end point as economies moved from making to taking, with US at the forefront of this phenomenon.[38]

With the BRI, China must try to avoid the "rentier capitalism" that we have seen in some parts of the Western world.[39] Sornarajah has argued that with its investment treaties, China has a chance to spread its pluralist ideals to the developing world when compared to the previous US-led neoliberal international investment regime.[40] So a positive aspect of the BRI is that it is adding to aggregate demand which has been missing in the world since the GFC, whereas in the West, quantitative easing in its various incarnations have only led to excess cash being hoarded by the wealthy and by corporates, leading in turn to higher asset prices but not jobs. Share buybacks are just a symptom of that underlying problem. Since 2009 more than US$8 trillion have been used to

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[33] Nicholas Shaxson, *Treasure Islands,Uncovering the Damage of Offshore Banking and Tax Havens* (St Martin's Griffin, 2012) at 84.

[34] R Bookstaber, *A Demon of Our Own Design: Markets, Hedge Funds and the Perils of Financial Innovation* (Wiley, 2007) at 4-5 and 225-6.

[35] Minute from Winston Churchill to Sir Otto Niemeyer, 22 February 1925, CHAR 18/12/A96-99.

[36] N Chomsky, *Profit over People, Neoliberalism and Global Order* (Seven Stories, 1999) at 27-8.

[37] See Milton Friedman and Rose Friedman, *Free to Choose* (Harcourt, 1979).

[38] Mariana Mazzucato, *The Value of Everything, Making and Taking in the Global Economy* (Allen Lane, 2018).

[39] Martin Wolf, "Why rigged capitalism is damaging liberal democracy" *Financial Times* September 18 2019.

[40] M Sornarajah, "Investment Treaties and Dispute Settlement in the Belt and Road Area" (….) where he says that there "is no evidence yet that the Western induced fears of China's domination is a more evident fact than any existing Western dominance of the developing countries".

repurchase stock in US listed companies.[41] Much of this is fuelled by borrowing, and at a time when stock values are high but real earnings are faltering. There is thus less research & development[42] and job creation. Singapore and China's corporate capital maintenance rules in that sense perform a better much "capital lock in"[43] function than in the US.

We also have to accept that although China may have the biggest banks by market capitalisation in the world, see *eg* the Industrial and Commercial Bank of China, the most influential investment banks in the world are largely Anglo-American (see those involved in Aramco's IPO - JP Morgan, Morgan Stanley, Bank of America, Merrill Lynch, Goldman Sachs, Credit Suisse, Citi, HSBC, and Saudi Arabia's National Commercial Bank and Samba). Even the European banks have suffered when they moved away from traditional commercial banking to investment banking and with their experiences in expanding into the US. This was particularly the case with UBS and Deutsche Bank.[44] This article will focus on why China might therefore want to delegate to Singapore some of its obligations in financing the BRI given its experience and infrastructure, whilst acknowledging that China has reached a level of financial sophistication in such a short period never previously witnessed in humankind.[45]

Experience with property and infrastructural trusts

More specifically, Singapore can play a part to facilitate equity project financing for the BRI (which is the focus of the Silk Route Fund). Its lawyers and regulators and more recently courts have had extensive experience in equity securitization via infrastructural trusts (with REITs since 2002 and the Business Trusts Act (BTA) since 2004 for infrastructural trusts). There were teething problems in Singapore as there were struggles in adapting the trust form to business, particularly as trusts are not regulated as an entity or financial instrument. But this was an example of issuers working closely with regulators to come up with optimal regulation, as opposed to what we see in the crowdfunding and crypto world of issuers trying to *avoid* regulation. We have argued elsewhere that REIT issuers in particular are now benefitting from this whereas ICOs, for example, have suffered even if Singapore has become the 3rd largest ICO venue in the world.[46] There are now 38 Singapore-REITs (S-REITs) listed on the Singapore Exchange comprising more than 12%

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[41] Robin Wigglesworth, "US investor cash return bonanza breaks records" *Financial Times* March 6 2019.

[42] William Lazonick, Mustafa Erdem Sakinç and Matt Hopkins, "Why Stock Buybacks Are Dangerous for the Economy" Harvard Business Review 7 January 2020 state that "in 2018, only 43% of companies in the S&P 500 Index recorded any R&D expenses, with just 38 companies accounting for 75% of the R&D spending of all 500 companies".

[43] Lynn Stout, "On the Nature of Corporations" (2005) University of Illinois Law Review 253.

[44] M Lewis, *The Big Short, Inside the Doomsday Machine* (WW Norton, 2011).

[45] "China plans 'aircraft carrier-sized' investment banks' Bloomberg, 25 December 2019.

[46] H Tjio and Y Hu, "Collective Investment: Land, Crypto and Coin Schemes - Regulatory "Property"" (forthcoming in [2002] EBOR).

of its market capitalisation that are regulated as collective investment schemes (CIS). Some of these consist of substantially all foreign assets.

The definition of a CIS, which is similar to the definitions in Schedule 1 of Hong Kong's Securities and Futures Ordinance and the UK's Financial Services and Markets Act 2000, has concurrent requirements that require delegation to a manager *or* pooling of monetary contributions and profits (thus effectively excluding timeshares and club memberships), and the sharing of what appears to be profits in *pecuniary* form ('the profits or income from which payments are to be made to them are pooled' and 'profits, income, or other payments or returns') rather than "profits, rent or interest" as was the case in the definition of "interests" under the now repealed s 107 of the Singapore Companies Act. The long list of exclusions also relate to schemes that generate such financial returns. It does appear from the beginning that the Singapore authorities wanted to really only regulate redeemable open-end unit trusts as CISs.[47]

Closed-end trusts or companies were kept out of the definition of collective investment schemes altogether. While the latter is regulated when it offers shares to the public, the former was outside the regulatory reach of the Securities and Futures Act (SFA) entirely, and could be offered to the public completely unregulated (and not just to accredited investors had it been an unauthorized CIS). This created some difficulties, particularly with the introduction of REITs into the capital markets. In Singapore, these are structured as trusts (mainly for tax reasons as trusts have tax transparency), and due to the illiquid nature of the underlying assets, the units that are issued or sold to investors are in effect not redeemable (the trust deeds generally state that they cannot be redeemed while the REIT is listed on an exchange). Given the exclusion of closed-end funds from the definition of a collective investment scheme, they should have fallen outside the regulatory regime, and would not have required MAS's approval as a collective investment scheme before they could be sold to the public. However, most issuers of REITs, and the investment bankers associated with them, in fact desired the regulatory safeguards as that increased investor confidence in the units being sold or marketed to the public. This is something true in perhaps more developed financial jurisdictions where institutional investors can only invest in regulated products (even where they are only lightly regulated).[48] So with REITs, they were registered as CISs even though redemption was suspended and so could not legally have been considered open-end funds. Crucially, this was largely due to the efforts of the REITs (or more accurately, the persons who set them up).

What happened was that the definition of "closed-end fund" that was excluded from the CIS definition was seen in practice to further exclude these REITs, and this was then progressively

[47] MAS and ACRA are closely studying the adoption of an open-ended investment company ('OEIC') regime after having introduced the Singapore Variable Capital Company ("SVCC") for investment funds in November 2018. The Variable Capital Companies Act came into force on 14 January 2020 and will be useful for venture capital and private equity funds.

[48] See eg Crypto Fund AG which obtained authorization as an asset manager from Finma under the Swiss Collective Investment Schemes Act in October 2018. 40% of listed G3 bonds in the Asia Pacific are also listed on the Singapore Exchange so that institutional investors can purchase them even if not first offered into Singapore: see further H Tjio, "Restructuring the bond market in Singapore" (2019) 14 Capital Markets Law Journal 16.

amended since the mid-2000s so that the CIS exclusion for closed-end funds highlighted above does not really exist anymore except for very few investment funds. This actually brings us to the position in HK where the Securities and Futures Commission has made clear that it does not matter whether a CIS is open or closed-ended.[49] It does show how pragmatic the regulators in Singapore are, even at the risk of being accused of being slightly unprincipled in going back on a previous position.

The creeping nature of regulation shows the careful approach of Singapore regulators towards market development. There is a fear of overregulation until they see clear opportunistic behavior. This has been the case with land-banking schemes and ICOs. However, with REITs the story is inverted in that while they were not subject to regulation at the start, originators desired it and MAS was then willing to provide it immediately to help grow a nascent industry. There is thus also a strategy of regulating early in order to create regulatory "property" in the sense of legitimating a deliberate practice through signaling.[50] We will see below in the context of business trusts that this also indirectly helped overcome the fact that REITs and business trusts in Singapore are probably non-charitable purpose trusts that traditional English law would have seen as invalid. Courts have slowly recognized the REIT and business trust as a separate legal entity able to commit its own assets to creditors as is the case with US business trusts, and this was partly due to regulation and the application of those regulations in, for example, the restructuring context where parallels are drawn with corporate schemes of arrangement.[51] The Singapore stock exchange has become synonymous with REITs and infrastructural funds. It is the largest REIT market in Asia ex-Japan. Aside from forming more than 10% of the total market capitalisation of stocks listed on SGX, REITs comprise a quarter of the top 20 stocks by turnover on a day-to-day basis.[52] The counter-example is of holiday timeshares which still remain in a shadowy state outside the definition of collective investment scheme altogether as MAS sees it. We have argued elsewhere that the fate of ICOs is in the balance and in the hands of issuers who can choose to work with regulators to create a stable regulatory structure or perhaps share the fate of land banking and timeshares.[53]

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[49] Securities and Futures Commission of Hong Kong, [●], (2016).

[50] This may not be property in the fullest sense. For newer, intermediate "property" like cryptocurrency, Rainer Kulms, "Blockchains: Private Law Matters" (forthcoming in [2002] SJLS) has highlighted the differences in the Anglo-American liberal/contractarian approach with the civilian need for some legislative or regulatory backing. The adaptability of the common law is seen as a strength: UK Jurisdictional Taskforce, *Legal statement on cryptoassets and smart contracts* (November 2019) at para 3.

[51] See Hans Tjio, "Merrill and Smith's intermediate rights lying between contract and property: Are Singapore trusts and secured transactions drifting away from English law towards American Law?" [2019] Sing JLS 235 and the text accompanying n 67 therein discussing *Re Croesus Retail Asset Management Pte Ltd* [2017] 5 SLR 811**.**

[52] SGX Market Updates, *10 Largest SGX Listed REITs See 30% Surge in Average Daily Turnover in 2019 YTD vs 2018*, May 27 2019.

[53] Hans Tjio and Ying Hu, "Collective Investment: Land, Crypto and Coin Schemes - Regulatory "Property"" (forthcoming in [2002] EBOR).

Once the S-REIT market came into being from 2002, the regulators turned their attention to other forms of business trusts for shipping and foreign real estate asset securitisation. It enacted the BTA in 2004[54], which was modelled on Australia's Managed Investment Scheme regime to create a business entity intended for public infrastructural trusts. Where units in a business trust are offered to the investing public, they have to comply with the share and debenture prospectus requirements in Pt XIII of the SFA (which are different from the ones applicable to CIS REITs).[55] These business trusts also have to be registered under the separate BTA. At the start of 2019, there were 20 registered business trusts (of which 15 were listed), but concerns continued to be raised about their governance and sustainability, particularly as to the independence of their directors given that they are usually still nominated by the sponsor.[56] But the more immediate concern seems to be with the restructuring and acquisition of such entities given their troubled underlying assets. These problems have been in the Singapore financial markets since the decline of commodity prices which then cascaded onto shipping revenues and which will be discussed in greater detail in the next part on bond financing.

In October 2016, Rickmers Maritime Trust, a business trust listed on SGX, tried to obtain unitholder approval for 1.32 billion new units in the trust in partial redemption of $60m of the principal amount of notes, with the remaining $40m to be payable in November 2023 rather than May 2017. This was part of a precondition required by their bank lenders to reschedule their loans to 2021. Rickmers' bondholders were unhappy as other companies in difficulties which had listed their bonds on the SGX wholesale bond market had pledged full redemption of their notes in exchange for payment extensions. They refused to provide the required majority and Rickmers was wound up in April 2017. One problem was that it was not fully clear what the restructuring rules were, as the BTA only provided for winding up but not restructuring. The Securities Industry Council Practice Statement on Trust Schemes in Respect of Mergers and Privatisations[57] highlighted the need to utilise the general court powers over the administration of trusts under O 80 of the Rules of Court and this would be applicable to any winding-up or scheme in relation to real

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[54] Cap 31A, 2005 Rev Ed; see also Monetary Authority of Singapore, *Regulation of Business Trusts* (Consultation Paper No 15 – 2003, December 2003).

[55] The Securities and Futures (Amendment) Act 2017 (Act 4 of 2017) (not yet in force) has assimilated this division with the securities offering regime in Div 1 of Pt XIII of the Securities and Futures Act (Cap 289, 2006 Rev Ed) and not the one governing collective investment schemes in Div 2. The duration of a business trust prospectus is also six months, which is similar to that for securities offerings. Note, though, that the one unit one vote requirement in s 58 of the Business Trusts Act (Cap 31A, 2005 Rev Ed) has not been removed even though the one-share-one-vote requirement for public companies in s 64 of the Companies Act (Cap 50, 2006 Rev Ed) was deleted by the Companies (Amendment) Act 2014 (Act 36 of 2014), which came into effect in January 2016.

[56] Mak Yuen Teen, "Governance Risks in Business Trust Model" *Business Times* (July 16 2013); see further Monetary Authority of Singapore, "List of Registered Business Trusts", available at http://www.mas.gov.sg/Regulations-and-Financial-Stability/Regulations-Guidance-and-Licensing/Business-Trusts/List-of-Registered-Business-Trusts.aspx (accessed 15 November 2019).

[57] October 3 2008.

estate investment trusts and business trusts. It was thought that a court was likely to be guided by s 210 of the Companies Act but this was not tested up to that point in time.[58]

The parallels drawn from s 210 with corporate schemes was then confirmed in *Re Croesus Retail Asset Management Pte Ltd*.[59] Croesus is the asset manager of Croesus Retail Trust (CRT), which is an SGX-listed business trust that invested mainly in retail real estate in the Asia-Pacific region. In June 2017, Blackstone, a large private equity group, announced an offer to acquire all the units in CRT and to privatise it via a trust scheme in compliance with the Takeovers Code[60] using a special purpose vehicle, Cyrus Bidco Pte Ltd. The *ex parte* matter came before Aedit Abdullah J under O 80 r 2 of the Rules of Court after the Securities Industry Council indicated that the trust scheme was exempt from various provisions of the Takeovers Code subject to unitholder and court approvals being obtained that were similar to that required of shareholders in a corporate scheme.[61] This required, amongst other things, the approval, by a majority in number representing three-fourths in value of CRT's unitholders, of the scheme and various amendments to the trust deed (to implement the scheme). The judge said that it was "apparent that the proposed orders largely paralleled that in an application for a scheme or arrangement under section 210".[62] Abdullah J ordered that the scheme meeting be called within three months of the date of the order and that a further hearing be held for the scheme to be approved and effected. His Honour, however, also provided interesting comments for trust lawyers to consider when he noted that:[63]

> Croesus differs from an orthodox and traditional trust since the unit holders are expressly stated not to have any equitable proprietary interest in the trust property but only a right to compel due performance by the trustee …

But analogising the trust with the corporation and separate entity[64] and also seeing units in REITs and business trusts as being closer to a share in a corporation rather than creating beneficial interests in the underlying business makes it easier for Singapore trusts to be understood in civilian jurisdictions where they do not recognise a splitting of legal and beneficial interests. More recently,

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[58] The jurisdiction under s 210(1) of the Securities and Futures Act (Cap 289, 2006 Rev Ed) is over an "unregistered company" under s 350 of the Companies Act (Cap 50, 1994 Rev Ed), which includes any *partnership* or *association* of more than five people. While this could include overseas associations, it does not include international organisations: see *Re International Tin Council* [1987] 2 WLR 1229.

[59] [2017] 5 SLR 811.

[60] Monetary Authority of Singapore, *The Singapore Code on Take-Overs and Mergers* (March 25 2016).

[61] The Securities Industry Council also required that an independent financial adviser be appointed to advise the unitholders.

[62] *Re Croesus Retail Asset Management Pte Ltd* [2017] 5 SLR 811 at [6].

[63] *Re Croesus Retail Asset Management Pte Ltd* [2017] 5 SLR 811 at [11].

[64] Recently effectively rejected by the UKPC in *Re Investor Trust (Guernsey) Ltd* [2018] UKPC 7.

Phang JA stated in *Ernest Ferdinand Perez De La Sala v Compania De Navegacion Palomar, SA*[65] that:

> It is for this reason that beneficial "ownership" has been described as "a right against a right", *ie*, a right to constrain or control the way another person exercises *his* right to deal with a thing, rather than a right against the thing itself: see Ben McFarlane and Robert Stevens, "The Nature of Equitable Property" (2010) 4 Journal of Equity 1.

Even in a fixed interest trust, the beneficiary would usually not have a right to present enjoyment of the trust property, which may be deferred by the terms of the trust.[66] However, its beneficial and equitable ownership interest is manifested in its right to protect the trust fund. In other words, a beneficial owner may have an "equitable" interest that is not necessarily a "proprietary" interest and in that sense may reflect how civilian jurisdictions would characterise a trust from an obligation-constrained view. Civil law finds it difficult to see that two or more persons may have rights in the same piece of property. Singapore trust law, by moving away from traditional English law towards American law, could in fact be more acceptable or recognisable to many civilian jurisdictions, including China. This is certainly the case where investors such as the Silk Route Fund are seeking to make equity investments in a way which may not necessarily make them owners of the underlying project or property for regulatory reasons.

Abdullah J, however, also noted some differences between a corporate scheme and the trust scheme before him:[67]

> In an O 80 r 2 application, the main focus is on the interest of the beneficiaries and the terms of the trust … uppermost in the court's consideration would be adequate protection in the circumstances for unit holders as putative beneficiaries in an investment vehicle …

It is important to continue to see the differences between the trust and corporation. Whereas the latter has had difficulties with risk taking in order to boost short-term shareholder value[68], the business trust has lower risk reward ratios due to the duty of impartiality which imposes on trustees the need to balance the interest of income and capital beneficiaries or unit-holders.[69] It has also been argued that business trusts are much better placed to capture modern goals of sustainability

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[65] [2018] SGCA 16 at [145].

[66] See in the context of discretionary trusts, Jessica Palmer & Charles Rickett, "The Revolution and Legacy of the Discretionary Trust" (2017) 11 *Journal of Equity* 157.

[67] *Re Croesus Retail Asset Management Pte Ltd* [2017] 5 SLR 811 at [13]–[16].

[68] One of the most egregious examples being the Boeing saga with the 737 Max: Jonathan Ford, "Boeing and the siren call of share buybacks" *Financial Times* August 4 2019.

[69] S Schwarcz, "Commercial Trusts as Business Organisations: Unravelling the Mystery" (2003) 58 Business Lawyer 559.

and corporate purpose.[70] There has recently been a global revival is seeing the business as a separate entity driven by a purpose as opposed to just the interests of its shareholders or even stakeholders.[71] The business trust could capture many of the ideals Sornarajah has expressed for the BRI.

There has consequently been sufficient experience with the listing, restructuring and takeovers of securitised foreign entities and overseas payment streams in Singapore now even where they do not take the corporate form (and it may in fact be better that they do not). There have also been instances where greater regulation has been imposed in some sectors and less in others, which again shows the pragmatism of the regulators. Where listing rules for equity securities are concerned, the SGX in August 2012 reverted to the need for profit and revenue track record, as opposed to an alternative criteria looking only at market capitalisation, for a listing.[72] At the same time, however, it retained more liberal listing rules for life science companies which still contain a pure market capitalisation criterion, amongst others.[73] This shows that some form of industrial policy can work even in the financial markets. In September 2013, SGX also created a pure market capitalisation criterion for mineral, oil and gas companies as well when it wanted to promote their listings although we have seen that the sector is now the main reason why there is so much bond restructuring work in Singapore (as it is much easier for an entity that has its equity securities listed to also then list its debt securities, discussed in the next part). It is submitted that this can also be done for the securitisation of BRI initiatives.

Deeper bond markets, defaults and derivatives

Singapore also has had much deeper bond markets for the past 10 years and the SGX most recently launched its first catastrophe bond on 25 November 2019. It has also had a great deal of experience of dealing with large defaults in the past 3 years, some of which we have seen have pushed the courts to recognise the separate legal entity status for the business trust and draw parallels with companies for schemes of arrangement and takeovers of the units in these business trusts.

First, the size of the bond market. New corporate debt issuance in Singapore in 2015, 2016, 2017 and 2018 were valued at S$174, $186, $259 and $236 billion respectively. Total outstanding debt reached S$315 billion in 2015 and $424 billion in 2018, which shows the short term nature of much of the debt issued in Singapore – more than 90% of total debt volume in 2015 was made up of reissuances.[74] In 2018, however, there was $96 billion of long-term debt issued, a record high fueled by Asian issuers which sought to raise international capital to finance regional and global

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[70] Lee-ford Tritt and Ryan Scott Teschner, "Re-Imagining the Business Trust as a Sustainable Business Form" (2019) 97 Washington University Law Review (….)

[71] See the World Economic Forum's new statement on what it means for business to serve the world in the 21st Century, "A Company's Purpose in the Fourth Industrial Revolution", WEF 50th Annual Meeting January 2020.

[72] SGX Listing Manual rule 210(2).

[73] SGX Listing Manual rule 210(8). This is something to this effect for REITs under rule 210(2)(c).

[74] MAS, *Singapore Corporate Debt Market Development 2017*, 11.

growth which must have included some BRI projects. 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).

A lot of debt is in foreign currencies, with US$ debt making up 67% of all issuances in 2015 and 64.1% in 2018. In contrast this was for the Singapore dollar (15.4% in 2015 and 10.9% in 2018) and for the RMB (3.2% in 2015 and 0.8% in 2018). There has been a steady decline in RMB issuances (in 2014 it was 4.2%, 2016 it was 2.3% and 2017 0.5%) and it may be the case that the market can absorb far more RMB debt.

Except for these listing rules permitting bonds to be issued under the newer retail bond 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. It is not altogether that different in the US where it was said in a Bloomberg piece that while equity trading has changed substantially in the past 25 years, bonds are still sold over the phone between traders.[75] The usual consequence of this is that trading volumes are much lower than in the equity markets, and dominated by institutional investors.[76]

A lot of wholesale debt in these recent issuers were, however, previously sold to high-net worth individuals in Singapore although the trend seems to be that financial institutions (particularly funds) are again more dominant due to the bond defaults that may have impacted individual investors more previously. In 2018 private banking clients bought up 23.4% of SGD debt issuances as opposed to 29% by financial institutions and 31.9% by funds with the respective figures in 2017 being (30.7% versus 34.2% versus 20.9%), 2016 being (21.6% versus 40.2% versus 22.8%), 2015 being (26.8% versus 33.3% versus 16.5%) and 2014 being (43.5% versus 21.6% versus 13.7%).[77] Selling to such investors bypasses the 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 one business day for wholesale bond applications compared to 10 business days for retail bonds.[78] 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.[79]

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[75] Edward Robinson, "Reinventing the corporate bond" *Bloomberg* February 2 2015.

[76] John Armour *et al*, *Principles of Financial Regulation* (Oxford, 2016), 156-7.

[77] For non-SGD debt issuances, the numbers were for (2018) 6.3% private bank clients, 57.5% FIs, 28.7% Funds; (2017) 4.7% private bank clients, 59.8% FIs, 31.8 Funds; (2016) 4.4% private bank clients, 57.8% FIs , 31.5% Funds; (2015) 7% private bank clients, 59.4% FIs, 29% Funds and for (2014) 8% private bank clients, 53.8%, 28.5% Funds. There was greater demand for such debt to be rated.

[78] MAS *Singapore Corporate Debt Market Development 2016*, 14.

[79] See further, OICV-IOSCO, Consultation Report, *Regulatory Reporting and Public Transparency in the Secondary Corporate Bond Markets*, CR06/2017.

The decline in commodity prices has, however, badly impacted the resource and shipping sectors worldwide. This has resulted in a significant number of defaults on wholesale bonds listed on the Singapore Exchange, which includes those of many foreign entities. 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%.

We have seen the difficulties involved in restructuring the bonds issued by business trusts in the previous part. But this is not the first time that individual investors have been involved in financial markets intended more for institutional investors. As we had seen earlier, the 2008 financial crisis, triggered by the collapse of the US housing bubble and loose lending practices, damaged US and European financial institutions. In Singapore, the risks of the US housing market collapse and consequent mortgage and financial institution default were, however, largely moved off the books of financial conglomerates and sold to the public as debentures, under a debenture issuance programme introduced through a then new provision, s 240A of the SFA, in 2005. The most egregious example was in the case of Lehman Minibonds. It was best described in a Singapore *Business Times* Editorial:[80]

> For banks, the Lehman Minibonds fiasco holds many instructive lessons. Here, investors were led to believe they were buying a bond-like instrument that paid a regular, relatively riskless coupon when, in reality, they were providing Lehman with insurance for its exposure to the inflated US housing market. This insurance was via risky and complicated credit default swaps, instruments that are wholly unsuited to novice retail investors. Yet, the product was passed off as being retail investor-friendly. Worse, the true, substantive nature of the instruments was concealed under hundreds of pages of technical disclosures in order to maximise sales.

While this is what derivatives do, in many other countries these were structured for sale only to sophisticated investors. The only other countries in which such instruments were sold to the retail public (in tranches of S$5,000 in Singapore) were Hong Kong, Taiwan and Germany, all countries where large sums of investor money were still kept in bank deposits and that was encouraged to only move out of them due to almost zero interest rates prevailing at that time. In contrast, the UK is only now experiencing their own "Minibond" problems linked to their own housing market.[81] It has also been argued that there needs to be derivatives created for the BRI project in order to facilitate diversification and hedging.[82]

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[80] "Disclosure: quality counts, not just quantity" *Business Times* (February 26 2010).

[81] Ben Chapman, "Mini-bond marketing to ordinary savers to be banned after string of scandals" *The Independent*, November 26 2019.

[82] City of London, *Building an Investment and Financing System for the Belt and Road Ini*tiative, September 2018, 30.

That the Singapore investor is, and is supposed to be, sophisticated has been confirmed by many cases brought by investors against banks in Singapore for trading losses caused by derivatives such as accumulators which the Court of Appeal acknowledged to mean "I kill you later"[83]. In a recent case of *Koh Kim Teck v Credit Suisse AG Singapore Branch*[84], a plaintiff tried to sue his bank for losses incurred by him investing in knock-out discount accumulators and dual currency investments that he purchased from the bank for what he claimed were breaches of the tortious duty of care owed to him personally both for the losses as well as in its treatment of the collateral shortfall and closing out of the account at the height of the Global Financial Crisis. Here, the plaintiff was clearly a sophisticated investor, having been a stockbroker for many years (reaching the position of general managing of a large stockbroking firm in Malaysia before retiring). Aedit Abdullah J said, however, in the last paragraph of his judgment that:

> Mr Koh, the Plaintiff, was not owed any duty or obligation by the Bank in respect of the investments he made, or in respect of the close out of his account. It is always important to bear in mind that the relationship between a client and a bank is governed by the contractual documents that are signed. Contrary to the advertisements that are often put out, this is not a pastel-coloured relationship that is almost familial: a bank looks out for itself and has many lawyers. While exceptions to such relationships may exist, they are likely to be rare, exclusive and expensive for the client.[85]

Singapore investors are fully accustomed to *caveat emptor* language[86], which has been utilized by the politicians as well. While the use of *caveat emptor* in Singapore's financial markets has been criticised[87], it has also been pointed out that the then UK's Financial Services Authority focused too much on consumer protection during the GFC and not enough on financial stability.[88] It is also interesting that the new CEO of UK Financial Conduct Authority said in July 2016 that it was time to put the phrase *caveat emptor* back on the agenda to counter what may be seen to be too much consumer protection.[89] Singapore investors in that sense have been weaned, unlike those in China and even the UK. Many, both local and foreign, also see the SGX as one for yields rather than capital gains and that is its strength as a REIT, business trust and now bond market. That makes Singapore eminently suitable for the first of the 6 areas of opportunity identified by PwC as linked

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[83] *First Asia Capital Investments Ltd v Société Générale Bank & Trust* [2017] SGHC 78 at [1] per Chong JA.

[84] [2019] SGHC 82, following *Deustche Bank AG v Chang Tse Wen* [2013] 4 SLR 886. See Kelry Loi & Kelvin Low, "Non-reliance clauses and the Unfair Contract Terms Act: Welcome Clarity from Singapore" [2014] JBL 155.

[85] *Ibid* at [114]. The plaintiff's appeal in Civil Appeal No 176 of 2018 was dismissed by the Court of Appeal on October 23 2019 with no written grounds of decision rendered.

[86] *Ibid* at [66].

[87] Ignatius Low, 'What's wrong with the *caveat emptor* system?' *Business Times*, October 27 2003.

[88] John Armour *et al*, *supra* n 76 at 11.

[89] A Bailey, Financial Conduct Authority 2016 annual public meeting, July 19 2016.

to the BRI, namely, as investors, suppliers, partners in building the project, experts in project management, facility operators and asset sellers.

New formal restructuring powers

Singapore can realistically only be involved in the financial aspects of the BRI and in project management. But the other end of financing as well as project management is the need for restructuring (which would include further financing) when things go wrong. 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 was then followed by the introduction of North American type restrictions against *ipso facto* provisions, voluntary judicial management provisions and a new regime for licensing insolvency practitioners into the new Insolvency, Restructuring and Dissolution Bill 2018 that will come into effect sometime in 2020.

The new formal restructuring framework is needed as contractual workouts work best when only institutional investors are involved – the problem in Singapore, as we have seen, is that high net worth individuals became large purchasers of listed bonds in previous years that are now being restructured. We have witnessed collective action problems that have not been solved by non-statutorily required bond trustees in Singapore.[90] 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.[91] 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.[92] We have seen, however, that the Singapore investor has also had sufficient experience with CDOs and CDSs.

Just as importantly, the reach of Singapore courts has been widened 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 s 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;

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[90] Marissa Lee, "Bond Holders of Troubled Firms Turn on Trustee" *The Straits Times* (October 8 2016).

[91] Anita Gabriel, "SIAS, Rajah & Tann Seek MAS Action on Insurance for Singapore Bonds" *Business Times* (September 13 2017).

[92] Edward Robinson, "Reinventing the corporate bond" *Bloomberg* February 2 2015.

(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 matter, *ie*, in the determination of what is the "centre of main interest" (COMI) of a company.[93] It remains to be seen, however, how cautious Singapore courts will be in using these factors, such as the choice of Singapore law in the bond or even the security documentation[94], to administer a scheme, particularly where the COMI is elsewhere. Judicial cooperation has always been important to Singapore, and it is also mindful not to exceed its jurisdictional reach as a small jurisdiction.[95] The newly amended scheme of arrangement procedure was recognised in the UK in *H & CS Holdings Pte Ltd v Glencore International AG*[96] as the "foreign main proceeding" of the debtor in question.

The advantages of a formal restructuring regime such as a scheme of arrangement even outside of insolvency as opposed to private bond workouts is that litigators 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",[97] 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

[93] See *Re Zetta Jet Pte Ltd* [2019] 4 SLR 1343; [2019] SGHC 53 at [74]-[77]. The recast Insolvency Regulation 2015/848, which fully applies to insolvency proceedings from June 26 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.

[94] 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.

[95] See Wee Meng Seng, "Belt-Road Initiative and Cross-Border Insolvency" (…..)

[96] [2019] EWHC 1459 (Ch).

[97] Chi-Leng 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 405.

based on some form of egregious behaviour,[98] 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 have not been successful in obtaining bondholder consent.

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 rather than the formal schemes discussed here 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[99] 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"[100] being "a *uniquely* recalcitrant debtor"[101] 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. Such reasoning adds uncertainty to the market but it does show how precedent is less important in the US compared to, say, the UK.

The scheme of arrangement offers a better alternative much of the time in Singapore, not least because of court sanction but also because the introduction of Chapter 11 characteristics may have lessened 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;

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[98] RC Nolan, (2013) 129 LQR 161 at 165, thought that if the approach is objective at all, that is just evidence of bad faith or irrationality.

[99] *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.

[100] 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).

[101] *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).

- 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.

But the courts had also been at work in creating Chapter 11 like protections even before these statutory changes. Understanding that there are other corporate constituents even in vicinity of possible insolvency helps to explain *dicta* in the Singapore Court of Appeal decision in *BNP Paribas v Jurong Shipyard Pte Ltd*[102] where the previous Chief Justice Chan Sek Keong thought that a court had the discretion not to grant a winding-up application against a company even where the company has refused to pay out on an undisputed debt, which appears to be a somewhat anti-creditor approach. While the area has been the subject of some discussion amongst insolvency academics in Singapore,[103] it does show the context specificity of a decision that from a policy perspective could be seen as being sensitive to other competing interests, such as those of employees at a time of economic crisis. Chan C.J. has also, extra-judicially, discussed the recent Court of Appeal decision in *The Royal Bank of Scotland NV v. TT International Ltd*[104] where he suggested that the scheme of arrangement provisions in the Singapore *Companies Act* had been interpreted in a fashion which allowed a Chapter 11-type re-organisation, which is generally seen as a pro-debtor device.[105] He also thought that Singapore courts were "solution-oriented rather than doctrine-oriented".[106]

All this shows a pragmatism that is inherent as we have seen in the common law which yet is sheltered from criticism that it is unprincipled. Because rights are being varied or even expropriated in a restructuring, courts have to undertake a delicate balancing exercise and be very mindful of the commercial considerations involved. The Ministry of Law stated when the new scheme provisions were enacted that:[107]

> Singapore is the first common law system in the world to introduce this unique hybrid regime which combines the flexibility of the English regime with the powerful arsenal of US Chapter 11 provisions. Think of it as analogous to a merger of English rugby with

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[102] [2009] 2 SLR(R) 949, *cf Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 (CA) at para 61; *Angel Group Limited v. British Gas Trading Limited* [2012] EWHC 2702 (Ch).

[103] Suet Lin Joyce Lee, "The Court's Jurisdiction to Restrain a Creditor From Presenting a Winding Up Petition Where a Cross-Claim Exists" (2010) 69 Cambridge L.J. 113; Wee Meng Seng, "Taking Stock of the Insolvency Tests in Section 254 of the *Companies Act*" [2011] Sing. J.L.S. 486.

[104] [2012] 2 S.L.R. 213. See now *The Royal Bank of Scotland NV v TT International (No 2)* [2012] 4 S.L.R. 1182 (CA).

[105] The Honourable the Chief Justice Chan Sek Keong, Opening Address, (Singapore Academy of Law Conference 2011, Supreme Court Auditorium 24 February 2011), published in *Trends and Perspectives*, supra note **Error! Bookmark not defined.** at ix [SAL Opening Address]. See further Raymond Chan and John Ho, "Debtor-in-Possession: Not Appropriate for Hong Kong and Singapore" (2011) 32 The Company Lawyer 304.

[106] SAL Opening Address, *ibid*.

[107] Note by Senior Minister of State for Law and Finance, Indranee Rajah SC, on Debt Restructuring, Legal Industry Newsletters, 20 June 2017.

American football – the rules and features are all familiar but there is now a completely new game in town, open to international stakeholders.

A very recent decision applying the new scheme provisions in Singapore shows this. *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd*[108] provides instructive guidelines on a number of issues arising under the provisions of the Companies Act relating to schemes of arrangement, including the extent of disclosure of the applicant-company, the validity of third party releases, and the proper classification of creditors. Empire was a Singapore incorporated investment holding company that was part of Berau, a large Indonesian global group in the coal mining business. The group had been in financial difficulties since 2014. In April 2017, Empire sought leave to convene a creditors' meeting to consider and vote on a proposed scheme of arrangement, which was the fourth in Singapore for the Berau group. The scheme sought to restructure two sets of notes issued by two other companies in the Berau Group respectively on behalf of the Berau Group. In essence, the scheme provided for the full and final release of all liabilities under the 2015 and the 2017 Notes. In consideration, PT Berau Coal (Berau Coal), the main operating entity of the Berau Group, would issue new notes on a dollar-for-dollar basis on certain terms. The Berau Group urged the creditors to vote in favour of the scheme as they purportedly stood to recover less in the event of a liquidation than under the scheme. Pathfinder Strategic Credit LP and BC Investment LLC, who together owned around 12.5% of the outstanding notes, opposed the leave application.

The court found that, provisionally, holders of the 2015 and the 2017 Notes could properly be classed together for the purposes of considering and voting on the Proposed Scheme, as the differences between their relative positions under the Proposed Scheme and in an insolvent liquidation did not appear material. This is consistent with cases in Singapore focusing on the quality of disclosure, rather that class separation, although most of those cases concerned disclosure at the later stage where the court is asked to approve the scheme.[109]

The Court of Appeal discussed the disclosure requirements at the application for convening of meetings stage in great detail and thought that this was lower than at the later stage to approve the scheme. However, there remained a minimal standard of disclosure that a company had to satisfy before leave would be granted under s 210(1) of the Companies Act.[110] At the leave stage, the

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[108] [2019] SGCA 29.

[109] *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* [2019] SGCA 29 at [90]-[91]. See *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629. This case shows that the quality of disclosure has become critical in assessing schemes. Another example of the Singapore courts declining to approve a scheme on the grounds that the scheme lacked transparency and that there was a lack of information provided to members and creditors is *Re Econ Corp Ltd* [2004] 1 SLR(R) 273. See also *Re Horizon Knowledge Solutions Pte Ltd* [2004] SGHC 270, *Re Ng Huet Foundations Pte Ltd* [2005] SGHC 112, and *Re TT International Ltd* [2010] SGHC 177. The Court of Appeal in the latter case [2012] SGCA 9 at [73], however, reiterated the need for strict compliance with s 210 of the Companies Act (Cap 50, 2006 Rev Ed) and the need to respect and safeguard the integrity of voting outcomes in the context of debt restructuring.

[110] *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* [2019] SGCA 29 at [48] and [50].

company bore a duty of unreserved disclosure to assist the court in determining whether and how the creditors' meeting was to be conducted. This had to be taken to require at least such disclosure as would enable the court to determine the issues that it had to properly consider at this stage, such as the classification of creditors, the realistic prospects of success of the proposal, and any allegation of abuse of process. It followed the decision of Snowden J in *Indah Kiat International Finance Company BV*[111] by stating that by the leave stage, the company had to provide such financial disclosure in such manner and to such extent as would be reasonably necessary for the court to be satisfied that fair conduct of the creditors' meeting would be possible. This would be quite different an inquiry from whether the scheme was doomed to fail or whether there was an inference of abuse of process. Rather, the focus is on the question of fairness in the conduct of the creditors' meeting, and what was important was the sufficiency of the financial disclosure as that underpinned the integrity of the scheme regime and provided a safeguard to this exercise in creditor democracy. On the facts, Empire Capital had failed to provide the scheme creditors with the minimal level of financial disclosure reasonably necessary to satisfy the court that fair conduct of the creditors' meeting was possible. The Court of Appeal held this even though it was aware that scheme procedures could be abused by minorities holding out.[112] This could thwart genuine attempts at restructuring in times of financial crisis, especially by smaller companies with fewer resources. It reaffirms the balancing exercise that a court has to undertake as the disclosure obligations and procedures may themselves be oppressive.[113]

Legal expertise for BRI financing

There are a number of excellent articles in this publication looking at Singapore's role in settling disputes linked to the BRI. Here the focus is on the legal infrastructure for project financing and securitisation. It has to be acknowledged that London is clearly the world's leading international financial centre and already heavily involved in the BRI. The same point has been made about Hong Kong's involvement. Both cities are, however, facing some difficulties and while the Monetary Authority of Singapore has warned bankers not to take advantage of the situation in Hong Kong,[114] it can play a role as suggested above for securitisation and project finance given its experiences in REITs, business trusts, bond financing and restructuring.

While there may have been a time when domestic legal expertise was deficient in these areas, the Singapore Government through the Ministry of Law has been very forward looking in developing legal practice. Initially it promoted joint ventures between local firms and international law firms.

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[111] [2016] EWHC 246 (Ch). This was left open earlier in *Re Attilan Group Ltd* [2017] SGHC 283, [2018] 3 SLR 898 where it was also held that there was no need for separate classes of creditors.

[112] *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* [2019] SGCA 29 at [57].

[113] Debenture holders have standing under section 216 of the Companies Act (Cap 50, 2006 Rev Ed) to argue that they have been oppressed but there are no reported cases on this area: Chi-Ling, Seah, "Bondholder Rights and the Section 216 Oppression Remedy" (2011) Sing JLS 432. Here, the concern is only with disclosure and the composition of classes.

[114] "Local bankers advised not to exploit turmoil in HK: Sources" *Straits Times*, July 13 2019.

It then started given out Qualifying Foreign Law Practice (QFLP) licences from 2009 to enable international firms to practice most areas of Singapore law except litigation without a domestic partner although others many still continue to be in joint ventures with local firms. Since then 10 QFLP licences have been handed out although a review of some of the foreign firms (which have stipulated revenue targets that may not have been met) was delayed till 2020. Having international firms here is vital as project finance and securitisation are really handled by the largest firms in the world due to the need for their global connectivity. Of these 9 remaining QFLP firms[115] (Herbert Smith opted not to renew but is in any case known for its litigation) are English magic circle firms like Linklaters that are heavily involved in project finance and mentioned in a report jointly produced by the People's Bank of China and the City of London Corporation in September 2018 for its involvement in the BRI.[116] While there are overlaps, the combined listing of the UK Legal 500 Structured Products and Securitisation Tier 1 rankings[117] and the US News and World Report's Securitisation and Project Finance Tier 1 rankings contains 7 of these remaining 9 firms.[118] The Government has also announced that it intends to embark on a standardisation of project finance documents in 2020.[119]

But Singapore law itself is taking on a path that we have seen may be more easily understood by civilian countries, including China. We have seen this in the context of trust law. Even in contract law, doctrines of good faith[120] are slowly seeping into longer term contracts as Singapore lawyers have begun to understand civilian systems better and courts have cited "our cultural value of promoting consensus" as one reason for recognizing "negotiate in good faith" clauses as "it is fairly common practice for Asian businesses to include similar clauses in their commercial contracts."[121] English law has traditionally been too transactional even if it is often the choice of law (alongside domestic law) governing most project finance contracts linked to the BRI. But

[115] The 9 firms with QLFP licences are: Allen & Overy, Clifford Chance, Latham & Watkins, Norton Rose Fulbright, White & Case, Gibson Dunn & Crutcher, Jones Day, Linklaters and Sidley Austin.

[116] City of London, *Building an Investment and Financing System for the Belt and Road Initiative*, September 2018 at 23.

[117] UK Legal 500 Structured Products and Securitisation Tier 1 rankings list only 3 firms: Clifford Chance, Linklaters and Allen & Overy.

[118] US News and World Survey Securitisation Tier 1 includes Norton Rose and Sidley Austin while the same survey has a Project Finance Tier 1 which includes Norton Rose, Clifford Chance, Latham & Watkins and White & Case.

[119] Grace Ho, "Singapore to standardise project finance documents" *Straits Times* October 2 2019.

[120] *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust) v. Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at para. 68 (rent review).

[121] *Ibid* at [40], citing Philip J McConnaughay, "Rethinking the Role of Law and Contracts in East-West Commercial Relationships" (2000–2001) 41 Va J Int'l L 427 at 448–449.

English courts have also started expressly recognising "relational contracts".[122] While it will take time, civilian influences on Singapore law may well see it as a distinctive choice of law that better accommodates some of the ideals seen above which Sornarajah has suggested are needed for good foreign investment in developing countries. The kinds of settlements and negotiations he describes which have occurred with BRI projects in Sri Lanka and Malaysia would best be accomplished by a law that recognises the need to preserve contractual relationships and harmony for the long run.[123] Even if there is otherwise no clear underlying preference between liberal market economies driven more by external equity markets and coordinated market economies focusing on longer term relational contracting,[124] this factor alone may will determine the choice of law for some countries in the BRI.

The most recent push by Singapore is in the area of mediation which best reflects the middle position of trying to settle disputes (or even prevent them from arising) as opposed to all or nothing solutions linked to adversarial litigation. Private litigation does not work well in all societies,[125] particularly in Asia. In this respect the Singapore Convention on Mediation (which is the (UN) Convention on International Settlement Agreements Resulting from Mediation), has been a huge success from day one, with 46 countries signing up, including China, the US, India and South Korea.

Conclusion

If more private sector financing is needed for the BRI, this could involve perhaps having established ways of project finance that we have seen with the large infrastructural projects of the past as well as modern methods of asset securitisation. Lawyers and financiers would be needed and the West has traditionally held a comparative advantage in them whereas China's advantage is in building and making things. Singapore is perhaps now well placed to offer its services in a way that brings the East and West together and that would hopefully provide a balanced approach that distributes benefits to all involved in the BRI. Its experiences are far from perfect but it has learned painful lessons to position itself as a financial centre supporting the real economy that can now hopefully begin to rival New York, London and Hong Kong.

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[122] *Bates v Post Office Ltd (No 3)* [2019] EWHC 606 (QB); *UTB LLC v Sheffield United Ltd & Ors* [2019] EWHC 2322 (Ch).

[123] Sornarajah, *supra* n 40 at ……

[124] Peter A Hall and David Soskice, "An Introduction to the Varieties of Capitalism" in Hall and Soskice eds., *Varieties of Capitalism* (Oxford 2001) Ch 1.

[125] *Cf* Bernard Black and Reineer Kraakman, "A Self Enforcing Model of Corporate Law" (1996) 109 *Harv L Rev* 911.