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Singapore as International Debt Restructuring Center: Aspiration and Challenges

Wee Meng Seng (lawwms@nus.edu.sg)
Hans Tjio (lawtjioh@nus.edu.sg)

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Wee Meng Seng and Hans Tjio

Abstract

According to some economists, the deglobalization of the world has commenced. While that is true of trade and of ideas, it may not reflect the experience of existing companies undergoing restructuring which have in a sense been locked into a previous matrix where its assets and stakeholders were widely dispersed throughout the globe. This has created anomalies in the handling of worldwide insolvency cases which comes up against both protectionism, including judicial competition for such cases leading to less universalism in some situations, as well as the realignment of interests between the various corporate constituencies due to Covid-19, which may have further strengthened the hands of shareholders at the expense of other stakeholders as companies are kept afloat. In Singapore the government decided to develop Singapore into an international center for debt restructuring as part of its strategy to export its services and for this purpose embarked on an ambitious project to reform both its domestic and cross-border insolvency laws. The hybrid scheme was created by injecting some US bankruptcy law elements into the 'English' scheme of arrangement. The UNCITRAL Model Law on Cross-border Insolvency, in the form of the Third Sch of the Insolvency, Restructuring and Dissolution Act 2018 (IRDA 2018), was also adopted. Providing a forum for distressed companies in the region to restructure their debts without having to travel to London or New York is a positive development for Singapore and the region. The hybrid scheme is a path-breaking innovation so challenges to its design and operation are unavoidable. But its structure is flexible enough to allow for judicial creativity to fill gaps and to prevent its abuse. The courts face less challenges in interpreting the Third Sch, and has achieved some success in fostering cooperation and communication in cross-border insolvency matters between courts, but the domination of family companies, fragmentation of credit and weak legal institutions in the region may be more difficult challenges to Singapore's aspiration to serve as the regional restructuring hub.

Key words: forum shopping; international debt restructuring center; scheme of arrangement; hybrid scheme; UNCITRAL Model Law on Cross-Border Insolvency; Insolvency, Restructuring and Dissolution Act 2018; Chapter 11

INTRODUCTION

The first Prime Minister of Singapore, Lee Kuan Yew, was very much influenced by Arnold J Toynbee's *A Study of History*[1] and believed that those civilizations that survived and succeeded were those who were constantly challenged. The responses of "creative minorities" to those challenges kept them engaged and never self-satisfied and so it was thought necessary to sometimes create more challenges even if it was quite unsettling for the rest of the citizenry. The alternative was stagnation, decline and the eventual disintegration of the civilization state. Another more modern tech-savvy way of putting it is that "only the paranoid survive".[2]

We try to examine the myriad challenges posed in international debt and corporate restructuring in this light, and Singapore's responses to those challenges. Given the dynamic nature of state competition, we also try to predict what future challenges and responses lie in that regard. Some understanding of the international political economy is unavoidable in this context.

GLOBALIZATION AND DEGLOBALIZATION

Modern thinking is that globalization and technological change really took off in the 1990s and became an irreversible trend. This led to greater interconnectedness between individuals, businesses and states around the world. Complex supply chains have been created as a result. While MNCs have been around since the 1950s and 60s, it is the financialization of the world, including emerging economies, that have increased systemic risks that has resulted in at least one financial followed by an associated economic crisis every decade. As multinational companies and banks grow larger with more stakeholders, this has thrown up highly complex business insolvencies, with the assets and liabilities mismatched not only in temporal terms (the possible cause of the insolvency in the first place), but also in terms of their geographical locations, with the assets, liabilities and residual owners crossing jurisdictional boundaries. For a while, countries seemed to accept wider notions of "modified universalism", a phrase coined by Professor Westbrook, [3] such that there would be sufficient universalism in bankruptcy whilst keeping domestic concerns in the balance. The underlying philosophy is one of international comity, and ideally one set of insolvency proceedings in the seat of bankruptcy that recognizes the claims of ancillary jurisdictions, and whose judgment is given effect to elsewhere. We have seen this crystallize within the European Community, where the EC Regulation on Insolvency Proceedings gives a member state main jurisdiction over a winding up where the company has its center of main interests (COMI)[4]. It also found

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[1] 12 Volumes (Oxford University Press, 1934-1961). See Michael D. Barr, *Lee Kuan Yew, The Beliefs Behind the Man* (Richmond: Curzon, 2000).

[2] Andrew S. Grove, *Only the Paranoid Survive: How to Exploit the Crisis Points That Challenge Every Company* (New York: Currency Doubleday, 1999). The third Prime Minister of Singapore, Lee Hsien Loong, "once remarked that it could be the city state's national motto": Stefania Palma, "Singapore Inc gains new figurehead as Temasek appoints next chief" *Financial Times, London*, February 16, 2021.

[3] Jay Lawrence Westbrook, "Theory and pragmatism in global insolvencies: Choice of law and choice of forum." *Am. Bankr. LJ* 65 (1991) 457.

[4] COUNCIL REGULATION NO 1346/2000 ON INSOLVENCY PROCEEDINGS [2000] OJ L160/1 (which is applicable to EU countries except for Denmark). The recast INSOLVENCY REGULATION 2015/848, which fully applies to insolvency proceedings from June 26 2017, provides a codification of the center 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.

its way into the UNCITRAL Model Law on Cross-Border Insolvency, and through the Model Law, Chapter 15 of the US Bankruptcy Code and now Singapore's Insolvency, Restructuring and Dissolution Act 2018.[5]

This comfortable narrative of inter-dependency and cooperation has been challenged. Harold James argued that the first wave of globalization really started at the end of the 19th Century or early 20th Century, and yet its further progression was tragically halted during the Inter-War Years.[6] So there is nothing inevitable about globalization and the path it takes. Even more worryingly, the leading international economist, Paul Krugman, has somewhat recanted on his belief in the good of international trade and globalization, recognizing that too many communities have been left behind by this.[7] There is now clearly a trend towards deglobalization and perhaps worse, the rolling back of liberal democracy in many countries.[8] Our concern is less with politics but what this means for the regime of international insolvency. With protectionism on the rise, the counter-philosophy of territorialism in bankruptcy follows even if businesses have been locked into a matrix where its constituents are strewn all across the globe, but with their headquarters in a chosen state which gives them administrative and treaty advantages but where they do not carry on their business. Perhaps the country that evidences this change in mindset most clearly is the UK.

On the other hand, the underlying principle under the UK Insolvency Act 1986 s 426 (which is applicable to a 'relevant country or territory'), appeared to be that of modified universalism, where there are some safeguards for domestic creditors. In *HIH Casualty & General Insurance Ltd, Re*[9], the Court of Appeal agreed with the judge below that English creditors would have been disadvantaged if the proceeds of HIH, a large insolvent Australian insurer, were remitted to Australia for distribution in accordance with Australian law. There were statutory provisions applicable to insolvent insurance companies in Australia that would have prejudiced English unsecured creditors, and there was no issue of a countervailing advantage that could justify an interference with the statutory scheme of distribution imposed under the Insolvency Act 1986. The House of Lords, with the leading judgment given by Lord Hoffmann, however, allowed the appeal.[10] The Law Lords unanimously agreed that Insolvency Act 1986 s 426 was part of English insolvency law and it envisaged the possibility of a foreign law applying which differed from English law in its approach towards preferential creditors, unless perhaps some kind of 'manifest injustice to a creditor' was caused.[11] In cases outside of s.426, it was not clear if a court has an inherent jurisdiction to ignore the statutory scheme of distribution required by English insolvency law in its decision whether to remit assets to the place of principal winding up. Conversely, regulation 2 of the Cross-Border Insolvency Regulations 2006, which provides that the UNCITRAL Model Law on Cross-

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[5] ACT No 40 of 2018, which came into effect on July 30, 2020.
[6] Harold James, *The End of Globalization Lessons from the Great Depression* (Harvard University Press, 2001).
[7] Paul Krugman, "What Economists (Including Me) Got Wrong About Globalization" *The Bloomberg*, October 10, 2019.
[8] Roger Eatwell and Matthew Goodwin, *National populism: The revolt against liberal democracy* (Penguin UK, 2018).
[9] *HIH Casualty & General Insurance Ltd v. McMahon* [2006] EWCA Civ 732; [2007] 1 All E.R. 177.
[10] *McGrath v. Riddell* [2008] UKHL 21; [2008] 1 W.L.R. 852.
[11] *Id.* at [62], Lord Scott.

Border Insolvency shall have the force of law in Great Britain, appears only to ask whether 'the interests of creditors in Great Britain are adequately protected.'[12]

However, in deciding whether to recognize a default summary judgment made of the US Bankruptcy Court for the Southern District of New York involving avoidance proceedings against a person who was not resident there, a majority in the Supreme Court in *Rubin v Eurofinance SA*[13] sent a strong signal against the universalist views of Lord Hoffmann in *HIH Casualty & General Insurance Ltd, Re*[14], in the process overruling his Lordship's judgment in *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc*[15]. There, Lord Hoffmann suggested that there might be a *sui generis* rule with a wider scope for recognizing foreign judgments in relation to bankruptcy, that was neither in rem nor in personam, and this was taken up by the Court of Appeal in *Rubin v Eurofinance SA*.[16] However, in following the usual common law rules relating to the enforcement of foreign *in personam* judgments captured in rule 43 of *Dicey, Morris & Collins on the Conflict of Laws* (i.e. so that there was no special rule for foreign insolvency judgments), the Supreme Court allowed the appeal and took the view that the UNCITRAL Model Law did not provide for the reciprocal enforcements of judgments. It dealt with procedural matters and not the enforcement of foreign judgments against third parties.[17] The Court also thought that the Insolvency Act 1986 s. 426 might not fully cover the enforcement of judgments in the insolvency context.[18] But perhaps the most telling statement in respect of a common law fallback was of Lord Collins where he said that:

> the introduction of judge-made law extending the recognition and enforcement of foreign judgments would be only to the detriment of United Kingdom businesses without any corresponding benefit.[19]

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[12] CROSS-BORDER INSOLVENCY REGULATIONS 2006 (SI 2006/1030) reg.2, which came into force on April 4 2006. The Court of Appeal in *HIH Casualty & General Insurance Ltd, Re* [2006] EWCA Civ 732; [2007] 1 All E.R. 177 at [54] declined to comment on the extent to which this test differed from the one under the UK Insolvency Act 1986 s.426. The House of Lords in *McGrath v. Riddell*, *Id.*, did not discuss the UNCITRAL Model Law On Cross-Border Insolvency.

[13] [2012] UKSC 46; [2013] 1 A.C. 236, reversing [2010] EWCA Civ 895; [2011] Ch. 133.

[14] [2008] UKHL 21; [2008] 1 W.L.R. 852; compare Lord Collins in *Rubin v. Eurofinance SA* [2012] UKSC 46; [2013] 1 A.C. 236 at [16].

[15] [2006] UKPC 26; [2007] 1 A.C. 508 (assisting a Chapter 11 plan in the Isle of Man without asking if the New York court had properly assumed jurisdiction); compare Lord Collins in Rubin v. Eurofinance SA, *Id*. at [132] stating that Cambridge Gas was wrongly decided.

[16] Rubin v. Eurofinance SA [2010] EWCA Civ 895; [2011] Ch. 133 at [61].

[17] *Dicey, Morris & Collins on the Conflict of Laws*, eds. Lord Collins of Mapesbury and Jonathan Harris, (Sweet & Maxwell, 15th ed., 2018).

[18] For a discussion of the relationship between REGULATION 1346/2000 ON INSOLVENCY PROCEEDINGS [2000] OJ L160/1 and the BRUSSELS REGULATIONS (Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1, see David Milman "EC Regulation on insolvency proceedings 1346/2000: a review of the current law and practice", *Co . L.N*. 2012, 326, 1–5. See also MG Probud Gdynia sp. z o.o. (C-444/07) EU:C:2010:24; [2010] B.C.C. 453.

[19] Rubin v. Eurofinance SA [2012] UKSC 46; [2013] 1 A.C. 236 at [130]. Kah-Wai Tan, "All that glisters is not gold? Deconstructing Rubin v Eurofinance SA and its impact on the recognition and enforcement of foreign insolvency judgments at common law", *Journal of Private International Law*, 16:3 (2020) 465 has pointed out that this 'thin' view of modified universalism will require the need for multiple judgments. He also discusses the draft UNCITRAL MODEL LAW ON RECOGNITION AND ENFORCEMENT OF INSOLVENCY-RELATED JUDGMENTS.

While the specific issues in these 2 cases which reversed the respective holdings in the Court of Appeal are not the same, the general retreat from an expansive view of modified universalism was confirmed in 2014 by the Privy Council on appeal from Bermuda in *Singularis Holdings Ltd v Pricewaterhouse Coopers*[20] in relation to the common law power to recognize and grant assistance to foreign insolvency proceedings. This more territorialist position may not have taken into account the needs of those small jurisdictions still using the Privy Council as its final appellate court or the fact that the common law can be different across jurisdictions.[21] We will see that although small, Singapore has been described as a "market-dominant small jurisdiction" with its own distinct advantages in law and finance.[22] Singapore ended its links to the Privy Council in 1993 and has far greater autochthony in charting the direction of its own laws. For example, the Singapore High Court in *Re Opti-Medix*[23] adopted a common law COMI approach for recognizing foreign insolvency proceedings, whilst refusing to follow the UK Supreme Court decision in *Rubin v Eurofinance*. This more universalist approach will be further explored in the next part, where it is suggested that it may have an inverse correlation with how creditor rights are protected in a particular jurisdiction.

CREDITOR SHAREHOLDER CONFLICT

Another complication for any international restructuring regime is the possible rejigging of the creditor and shareholder balance that may have partly resulted from financial theory suggesting that a company's debt-equity mix is irrelevant.[24] While that in itself is neutral, it may have resulted in the relaxation of capital maintenance rules all around the world. Companies have been using more debt and less outside equity particularly with existing tax structures and low interest rates (seen perhaps most clearly in the falling market capitalizations in the US even with record high stock prices). It has recently been argued that businesses may no longer require equity financing from the public and can rely on debt and private equity,[25] with the numbers of listed firms in the US peaking in 1997 and almost halving by 2017. At the same time, the nature of that debt has moved away from direct bank lending to more dispersed forms of bond financing or securitized lending. Concentration of share ownership, however, is today also a phenomenon even in the US.[26] Even if creditor rights have not been varied in this conflict, which is not just over finance but control rights,[27] Covid-19 has increased the imperative (rightly so) to

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[20] In a way, this may be a reversion to an earlier position represented by cases such as Felixstowe Dock & Railway Co v. United States Lines Inc [1989] Q.B. 360, criticised by Westbrook, *supra* note 3, at 481 *et seq.*

[21] Adrian Briggs, "Private International Law and the Privy Council" in *The World of Maritime and Commercial Law: Essays in Honour of Francis Rose*, eds. C Mitchell and S Watterson) (Hart Publishing, 2020) at 123.

[22] Christopher M. Bruner, *Re-imagining offshore finance: market-dominant small jurisdictions in a globalizing financial world* (Oxford University Press, 2016).

[23] For COMI under the MODEL LAW found in section 354B read with the Tenth Schedule of the SINGAPORE COMPANIES ACT (Cap 50, 2006 Rev Ed), see Re Zetta Jet Pte Ltd [2019] SGHC 53; [2019] 4 S.L.R. 1343, at [74]-[77].

[24] Franco Modigliani & Merton H. Miller, "The Cost of Capital, Corporation Finance and the Theory of Investment" *American Economic Review* 48(3) (1958) 261–297. But see now Robin Wigglesworth, "The debt bubble legacy of economists Modigliani and Miller", *Financial Times, London*, October 19, 2020.

[25] Kathleen M. Kahle and René M. Stulz, "Is the US public corporation in trouble?" *Journal of Economic Perspectives* 31 (2017) 67.

[26] John C. Coffee, "The Future of Disclosure: ESG, Common Ownership, and Systematic Risk." *European Corporate Governance Institute-Law Working Paper* (2020), accessed 1 February 2021, https://ssrn.com/abstract=3678197 (institutional investors rather than controlling shareholder).

[27] Philippe Aghion and Patrick Bolton, "An Incomplete Contracts Approach to Financing Contracting" *Review of Economic Studies* 59 (1992) 473.

preserve existing businesses. In many countries, wrongful trading rules which are intended to stop a company incurring further debts when there is no reasonable possibility of repaying them, have been suspended.[28] As the leading UK corporate law academic Paul Davies has said, "continued trading in the vicinity of insolvency might be absolutely the right thing"[29]. As such, we believe that there is some profit to be gained in understanding the political economy of creditor and shareholder rights.

A good place to start would be with La Porta *et al's* seminal paper on 'Law and Finance' in 1998.[30] This charted the legal regimes across jurisdiction in terms of how they protected creditor and shareholder rights. We believe that this can be then correlated with how universalist a country is towards cross-border insolvencies. Countries that protect domestic creditors more, such as those that remain pro-banking, like the UK, would have a tendency to be less friendly to foreign proceedings or liquidators. On the other hand, we believe there is an inverse correlation between creditor rights and universalism in US and Singapore. US states have for a long time had very weak or even no direct rules on capital maintenance, perhaps because some, like Justice Story in *Wood v Dummer*[31] saw capital stock as an asset on the 'upper left hand side of the balance sheet, close to the modern businessman's concept of current assets'. Given that, the main concern was to prevent the return of assets in bankruptcy, as opposed to extant creditor protection, and so rules on capital maintenance were not seen to be as important as insolvency rules.[32] Manning also thought that "share reacquisition creates another major perforation in the protective wall supposedly built for the creditor by the legal capital statutes."[33] Share buybacks have become widespread around the world, although the financial jury is still out on whether there is too much, too little, or just the right amount of it.[34] For insolvency restructuring, there was the Chandler Act in 1938 and then in 1978, Chapter 11 was introduced into bankruptcy legislation. La Porta *et al*, scored the US 1 in terms of creditor rights as opposed to 4 for the UK (with both having 5 for shareholder rights[35]). Singapore, on the other hand, was scored the same way as the UK in the 1998 article[36]. Things have, however, evolved as described below with changes to the judicial management

[28] See the suspension of wrongful trading in various jurisdictions due to Covid-19 discussed by Kristin van Zwieten and Amir Licht, "The COVID-19 Pandemic and Business Law: A Series of Posts from the Oxford Business Law Blog" (April 11, 2020), *Oxford Legal Studies Research Paper* No. 15/2020, accessed November 20, 2020, https://ssrn.com/abstract=3573419.

[29] Paul Davies, *Introduction to Company Law* (Clarendon, 3rd ed., 2020) 236.

[30] Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert W. Vishny, "Law and Finance" *Journal of Political Economy* 106 (1998) 1113, 1130-1136.

[31] 30 Fed Cas 435 (no 17944) (CC DMe1824), Bayless Manning, *A Concise Textbook on Legal Capital* (Foundation Press, 2nd ed., 1981) 28.

[32] Capital maintenance rules "accelerate the point at which failing corporations must file for insolvency": William T Allen and Reiner Kraakman, *Commentaries and Cases on the Law of Business Organization* (Aspen, 5th ed., 2016) 4.2.3.

[33] Manning, *supra* note 31 at 79.

[34] Compare William Lazonick, Mustafa Erdem Sakinc and Matt Hopkins, "Why stock buybacks are dangerous for the economy" *Harvard Business Review* January (2020) 7 and Jesse M. Fried and Charles CY Wang, "Are buybacks really shortchanging investment" *Harvard Business Review* 96, no. 2 (2018) 88.

[35] Strictly "antidirector rights" which were revisited by Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer. "The law and economics of self-dealing" *Journal of Financial Economics* 88, no. 3 (2008) 430, where the US was rescored as a 3 whilst the UK remained 5: see further Holgar Spamann, "The "Antidirector Rights Index" Revisited" *The Review of Financial Studies*, 23, no. 2 (2010), 467, 475.

[36] Singapore's "antidirector rights" score of 4 was revised to a 5: Spamann, *Id.* This is likely to be scored as 4 today given the removal of the "One Share-One Vote" rule in 2016.

regime and schemes of arrangement, particularly from 2017. If we were to score creditor rights in Singapore today using La Porta's matrices, we believe it will also be 1 (like in the US), with changes to the coding for the categories "No Automatic Stay on Assets", "Restrictions for Going into Reorganization" and "Management Does Not Stay in Reorganization". As we will see later, however, secured creditors continue to be well protected.

Singapore regulators still understand the need to preserve asset partitioning and the benefits that that provides (as do the courts which continue to apply capital maintenance rules strictly[37]). There is a need to maintain the balance between debtors and creditors and the Second Minister for Law Edwin Tong has said that this is to be revisited once Covid-19 ends.[38] Even before Covid-19, some push back against creditor rights was understandable given the part banks played in the Global Financial Crisis of 2007-8. Many western banks can also in theory no longer become insolvent given bail-in rules that convert debt to equity automatically when they default. In the East, even prior to that, the 1997-8 Asian Financial Crisis showed the dangers of over-reliance on bank lending for Asian borrowers and banks. Immediately after the AFC, in Singapore, the Corporate Finance Committee[39] suggested a need to develop the bond markets. While in the US, what may have been swapped is equity for debt, in Singapore, it may be that it is bank lending that has been replaced by other forms of debt.

What has been seen in the past 10 years or so since the GFC is the exponential growth of the bond market in Singapore. As discussed elsewhere,[40] much of this involves large denomination bonds that has been sold to high net worth individuals, thereby bypassing prospectus requirements. The collective action problems on the part of bondholders, without trustees bound by strict statutory duties,[41] has provided a scenario where creditor rights may have been reduced in fact, even if not in law. The other characteristic of Singapore restructuring is that it invariably uses a formal restructuring framework as contractual workouts work best when only institutional investors are involved (and even that may not be enough going forward in the US if unanimity is required for bondholder votes[42]).

The numbers, which admittedly only give a very rough picture of the bond market, suggest that issuer quality could be a concern and that the Singapore bond market may have perhaps grown too quickly from some perspectives. The regulators themselves saw a wall of debt falling due with $38 billion projected by 2020[43]. But problems in the bond market started before then, with the decline in commodity prices badly impacting the resource and shipping sectors worldwide, and economic recovery has not been able to remove default fears in these sectors. There has been a significant number of defaults on wholesale bonds listed on the Singapore Exchange, which includes those of many foreign

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[37] *The Enterprise Fund III Ltd v. OUE Lippo Healthcare Ltd* (formerly known as International Healthway Corp Ltd [2019] SGCA 48. See also Hans Tjio, "Rethinking Share Repurchases" *Capital Markets Law Journal* 16 (2021) (forthcoming).

[38] KC Vijayan, "Restructuring regime neither pro-creditor nor pro-debtor", *Straits Times, Singapore*, November 9, 2020.

[39] MINISTRY OF FINANCE CORPORATE FINANCE COMMITTEE, THE SECURITIES MARKET FINAL RECOMMENDATIONS para 5.2.5 (October 21, 1998).

[40] Hans Tjio, "Restructuring the Bond Market in Singapore" *Capital Markets Law Journal* 14 (2019) 16.

[41] Marissa Lee, "Bond Holders of Troubled Firms Turn on Trustee", *Straits Times, Singapore*, October 8, 2016.

[42] See CNH Diversified Opportunities Master Account v. Cleveland Unlimited*,* No. 42, 2020 WL 6163305 (NY. Oct. 22, 2020).

[43] Editorial, "Singapore's looming debt wall fuels concern after Ezra stumbles", *Business Times, Singapore*, March 20, 2017.

entities. By the start of 2017, 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[44]. While the wholesale bond market has continued to see steady defaults, in 2018, Singapore saw the very first retail bond default, that of a large listed water treatment company. Hyflux, with more than 30,000 debt and preference shareholders, has been attempting to restructure its capital structures using the newer scheme of arrangement regime. It has been a difficult learning process, with the company being put into judicial management in November 2020 when it had been sought in 2018 by some of its largest creditors. Management was, however, allowed to remain in possession as it tried to find buyers for its assets and businesses.[45]

We believe that the regime that Singapore has adopted, a 'hybrid', is intended to deal with both its own domestic defaults, now exacerbated by Covid-19, as well as to help foreign restructurings, possibly from neighboring civilian jurisdictions like Indonesia that have not adopted the Model Law or may not have fully developed their own restructuring regimes.[46] Whether one likes it or not, it also takes a common law system to fully understand finance. Finance still, as a starting point, prefers laws with greater party autonomy (or the perception of such), and the common law provides that. There is talk that Shenzhen or Macau will try to adopt the common law given Hong Kong's issues. That, however, still seems a long way away from becoming a reality. But even HK has been struggling to provide a specialized service in cross-border insolvencies for its listed companies incorporated overseas[47]. It is the kind of difficult challenge envisaged by Toynbee that tests and taxes the state, legal profession[48] and regulators.[49] The Singapore response has been calibrated to preserve businesses, co-operate with foreign jurisdictions, and to constantly reexamine the balance between creditors and shareholders, both domestic and foreign. It aspires to provide a specialized service to help in cross-border insolvencies that is perhaps more sensitive to the needs of a region characterized by family businesses and state-owned enterprises. At the same time, the Singapore International Commercial Court, which was formed in 2015 with the powers of a High Court to hear transnational cases, has on its panel many notable foreign judges. Foreign lawyers can also obtain rights of audience before the SICC. There is now also focus on mediation

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[44] Tjio, *supra* note 40, Part II.

[45] Grace Leong, "Time for Hyflux's company-led restructuring to end?" *Business Times, Singapore*, October 21, 2020.

[46] German companies, for example, have utilised English scheme of arrangement proceedings as the German restructuring process was seen as unhelpful in areas such as binding a dissentient minority as unanimous consent might be required.

[47] As seen in a recent Hong Kong decision in *Re China Huiyan Juice Group Ltd* [2020] HKCFI 2940. See also Emily Lee, "Problems of Judicial Recognition and Enforcement in Cross-Border Insolvency Matters Between Hong Kong and Mainland China" *American Journal of Comparative Law* 63 (2015) 439.

[48] See Hans Tjio, ""Merrill and Smith's intermediate rights lying between contract and property: are Singapore trusts and secured transactions drifting away from English towards American law?" *Singapore Journal of Legal Studies* (2019) 235 (suggesting that adopting Chapter 11 may require an understanding of US secured transactions and trust laws as well).

[49] See Angela Tan, "SGX RegCo to align listing rules with Singapore's push for restructuring hub" *Business Times, Singapore*, December 17, 2020.

and arbitration in the context of insolvency restructuring, which may be the best way of keeping businesses, and projects, alive in uncertain economic and political times.[50]

BACKGROUND TO SINGAPORE'S INSOLVENCY REGIME

Of the former English colonies in Asia, Singapore's corporate insolvency law is one of the closest to the English. The provisions on liquidation and scheme of arrangement (henceforth 'scheme') in both jurisdictions are largely similar and Singapore's judicial management[51] (henceforth 'JM') was modelled on the administration in UK's Insolvency Act 1985. It will be convenient to refer to the scheme of arrangement derived from the original English prototype as the Commonwealth scheme of arrangement, since different versions of it are found in many former English colonies. There are also other similarities between England and Singapore. Their commercial laws are largely similar and both are important financial centers and arbitration centers.

The Singapore government appointed a committee, the Insolvency Law Review Committee ('ILRC') in November 2010 to undertake a comprehensive review of personal bankruptcy law and corporate insolvency law and to recommend reforms. The ILRC reported in Oct 2013. While the government accepted most of its recommendations, it was not satisfied with the recommendations of the ILRC on reforms to Singapore's restructuring laws, especially the recommendation to bring in only limited elements of US bankruptcy law. It proceeded to appoint the Committee to Strengthen Singapore as an International Centre for Debt Restructuring in May 2015. The name of this Committee, which will be referred to as SICDR, made clear the government's intention to attract restructuring work to Singapore and the mission of SICDR was to find ways to achieve that. The SICDR reported in 20 Apr 2016.

The government moved very rapidly to enact the Companies (Amendment) Act 2017 (henceforth 'Amendment Act 2017') which came into force on 23 May 2017. The Amendment Act has two parts which are most relevant for the purposes of this paper. The first part enacted the recommendations of the ILRC and SICDR to inject certain US elements into the Commonwealth scheme of arrangement ('Commonwealth scheme' or 'scheme') to create what will be referred to as the hybrid scheme in this paper. The second part enacted the recommendations of the ILRC on cross-border insolvency, ie, abolish the ring-fencing of assets in the liquidation of foreign companies and enact the UNCITRAL Model Law on Cross-border Insolvency ('Model Law'). These reforms have since been consolidated with later reforms to other areas of Singapore's bankruptcy and corporate insolvency law into the Insolvency, Restructuring and Dissolution Act 2018 ('IRDA').

About four years have passed since the 2017 reforms. It is too early to conclude the extent of success of the reforms *on the ground*. At the same time, it is possible to proffer some tentative views of the most salient features of the reforms, reflect on possible weaknesses and solutions to consolidate the fruits of the reforms. The Amendment Act 2017 and IRDA are by far the most ambitious reforms to Singapore's corporate insolvency law since independence. Adapting the Model Law as adopted by Singapore, which is now contained in the Third Schedule to the IRDA 2018 ('Third Sch'), to the realities on the ground,

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[50] Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Ministry of Law, *Report of the Committee* (April 20, 2016) and Sundaresh Menon, Chief Justice, Supreme Court of Singapore, "The future of cross-border insolvency: some thoughts on a framework fit for a flattening world", keynote address at the 18th Annual Conference of the International Insolvency Institute 2018 (September 25, 2018).

[51] Companies Act (Cap 50, 2006 Rev Ed) ss 227A to 227X.

integrating the hybrid scheme into an English-inspired insolvency system, and maintaining the priority that creditors enjoy over shareholders are some of the challenges. There is no reason why Singapore will not overcome those challenges. But certain things are unfortunately beyond Singapore's control. The dominance of family companies, weak legal institutions and the geopolitics in the region belong to a different realm and they may conspire to undermine Singapore's aspiration to be the regional hub for restructuring.

FIVE FORMAL CORPORATE INSOLVENCY PROCEDURES

The colonial laws were preserved both when Singapore first ceased to be a colony of the UK in 1962 and then became an independent country in 1965. Indeed, there was continued reception of English commercial law[52] until 1993.[53] This sets the framework and key to understanding Singapore's insolvency law, subject to two important caveats: (a) Singapore's insolvency law began to diverge slowly from English law from 1986, and the divergence increased from 2002 onwards; (b) selected elements of US and Canadian laws were injected into Singapore's insolvency law from 2017 onwards.

Singapore has five formal insolvency procedures: insolvent liquidation, JM, receivership, Commonwealth scheme and hybrid scheme. The salient features of each of the procedures are as follows.

Insolvent liquidation

An insolvent liquidation (or winding up) may be commenced voluntarily by the members of the company passing a winding up resolution, or by the court on an application by, inter alia, a creditor of the company on the ground that the company is unable to pay its debts. A liquidator will be appointed to realize the company's assets and distribute the realizations of the proceeds to the creditors of the company.

Liquidation triggers a moratorium against enforcement action and proceedings against the company.[54] This is necessary to protect and preserve the assets of the company and ensures pari passu treatment of all the creditors of the company. However, the moratorium does not affect the right of secured creditors to enforce their security through, for eg, appointing a receiver.[55] The reason is that the security confers proprietary rights in the secured creditor so that to the extent of those rights the property of the company 'belongs' to the secured creditor. In enforcing its security the secured creditor is not proceeding against the property of the company but rather its own property. This entirely proprietary reasoning which elevates the priority enjoyed by secured creditors to giving them control rights which prevails over a collective proceeding is one feature of the privileged position enjoyed by secured creditors under Singapore and English law. The pro-secured creditor or pro-creditor culture of Singapore/English law is a theme we will return to repeatedly in this paper.

Judicial Management

[52] Pursuant to Civil Law Act (Cap 43), s 5.
[53] When the Civil Law Act (Cap 43), s 5 was repealed by the Application of English Law Act 1993, s 6(1).
[54] IRDA, s 130(2) and s 133(1) (compulsory winding up); s 170 (creditors' voluntary winding up).
[55] *Re David Lloyd & Co* (1877) 6 Ch D 339. For a brilliant analysis of this area of law, see Rizwaan Jameel Mokal, 'What Liquidation Does for Secured Creditors, and What it Does for You' *Modern Law Review* 71 (2008) 699.

The defining feature of the JM, which was adopted from UK's administration, is the moratorium.[56] This moratorium is broader than the moratorium in winding up as it prohibits enforcement by secured creditors. But it is not as broad as the stay in the United States' Bankruptcy Code[57] as it does not prohibit the exercise of self-help remedies such as set-off or contract termination. The purpose of the moratorium is to give the company a breathing space to consider its options. The judicial manager, an insolvency practitioner given broad powers to manage the company in substitution of the company's management, will formulate a proposal on the company's exit from the JM for the company's creditors to vote.[58] The objectives of JM, and hence its exit options, are as follows: (a) the survival of the company or the whole or part of its undertaking as a going concern, (b) the implementation of a scheme of arrangement, and (c) a more advantageous realization of the company's assets than in a liquidation.[59]

There is thus no direct comparison between the JM and the US Chapter 11. JM cannot be used to restructure the company's balance sheet non-consensually. To overcome dissent, it will be necessary to twin the JM with a scheme, which was what happened in the UK of twinning administration with scheme.[60] But unlike the position in the UK where the scheme has no moratorium, it is possible for a company proposing a scheme to obtain a stay against creditors' enforcement action by applying to court for a stay order,[61] and since the Amendment Act 2017 to obtain an even wider moratorium.[62] There is therefore no need for a company to enter into JM first in order to obtain the benefit of a moratorium so as to do a scheme with its creditors to restructure the company's debts.

JM, like administration, was unpopular in Singapore,[63] though the pre-packaged administration has become popular in UK in recent years. The ILRC noted that while the JM has achieved some success in realizing the assets of the company more advantageously than winding up, its record as a rehabilitative regime has been disappointing.[64] This is perhaps unsurprising. As will be explained shortly, administration was conceived by the Cork Committee as a junior supplement to receivership. The Cork Committee thought, too optimistically, that viable business may be saved in a receivership compared to piecemeal fire sale in a liquidation. Receivership is never a rescue procedure like Chapter 11.

Receivership

Receivership at its heart is a debt enforcement mechanism for creditors with a security over the company's property. Under English law, because of the invention of the floating charge, it is possible for a lender to take a security over all the property, present and future, of the company. The usual practice is to take one or more fixed charges over the fixed assets of the company, and a floating charge over the remainder of the assets, ie a global security package. In this case, the security document will also confer wide powers of management and disposal on the lender, and crucially confer on the lender the right to appoint a receiver and manager out of court to exercise those powers for the purpose of paying the debts owed to the lender which are secured by the security package. The receiver and manager will be

[56] IRDA, s 96(4).
[57] s 62.
[58] IRDA, s 108.
[59] IRDA, s 89(1).
[60] Eg, *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch); [2010] 1 BCLC 338.
[61] Companies Act (Cap 50, 2006 Rev Ed) s 210(10).
[62] Companies (Amendment) Act 211B, now IRDA, s 64(1), (8).
[63] ILRC Report, 82.
[64] ILRC Report, 82.

referred to simply as the receiver in this paper henceforth, but it is crucial to remember this is only a convenient expression, as such a receiver is very different from a receiver *simpliciter*, ie a receiver appointed over one or more properties who does not enjoy similar powers of management of those properties.[65] For the same reason, receivership in this paper means a receivership where such a receiver has been appointed.

The wide powers enjoyed by the receiver enables the receiver to continue the business of the company pending its sale through a hive-down. If the receiver does choose to do so, the profitable parts of the business will be transferred to a new subsidiary set up for this purpose. The receiver will then cause the shares in the subsidiary to be sold to a buyer, and the proceeds of the sale would be paid to the creditors of the company in accordance with the ranking of their claims against the company. A hive-down will usually deliver a better outcome to the creditors compared to a piecemeal fire sale of the assets of the company taking place immediately or very soon after the appointment of the receiver, and at the same time, viable businesses will be saved and jobs may be preserved.

Receivership's ability to save viable businesses and preserve jobs hinges on the receiver's decision to continue the business of the company pending sale instead of selling the company's assets piecemeal immediately or shortly after the receiver's appointment to pay the debts owed to the secured creditor which appointed the receiver. Unfortunately, the receiver owes no duty to continue the business of the company.[66] The Privy Council set its face against imposing any general duty of care on the receiver to take into account the collective interests of the creditors of the company.[67] This stymied the development of the receivership[68] and in the UK this probably contributed to the administrative receivership's virtual abolition and substitution by an enlarged administration regime in 2002.[69] But receivership survived in Singapore, with the ILRC putting up a stout defense of it and arguing that the 2002 UK reforms were not suitable for Singapore.[70]

Scheme of arrangement

The scheme is not an insolvency procedure. It is a statutory framework for a company, its shareholders or a class of shareholders, and/or creditors or a class of creditors to negotiate between themselves to achieve any legitimate corporate purpose, for eg, take-over, restructure of balance sheet, moratorium, etc. Hence unlike the insolvency procedures discussed above, the scheme has no insolvency requirement and there is no displacement of management. Further, as there is no moratorium in the English scheme or only a weak stay in the Singapore scheme,[71] the scheme may be seen *broadly* as a *weak* debtor-in-possession (DIP) procedure when it is used by a company to restructure its debts with its creditors, in contradistinction to the Chapter 11, the most established DIP procedure. The other

[65] *Re Manchester & Milford Railway Co* (1880) 14 Ch D 645, 653.
[66] *Medforth v Blake* [1999] 2 BCLC 221; *Silven Properties Ltd v Royal Bank of Scotland Plc* [2003] EWCA Civ 1409; [2004] 1 WLR 997.
[67] *Downsview Nominees v First City Corp Ltd* [1993] AC 295.
[68] The English Court of Appeal in *Medforth v Blake* [1999] 2 BCLC 221 sought to claw back the position a little by holding that while a receiver is under no duty of care in deciding whether to continue a business, the duty of diligence attaches if the receiver does decide to continue the business.
[69] Enterprise Act 2002, ss 248, 249.
[70] ILRC Report, pp 56-58.
[71] Companies Act (Cap 50, 2006 Rev Ed), s 210(10).

procedures discussed above may be described as different models of practitioner-in-possession (PIP) procedure.

The prototype English scheme does not contain any moratorium. For a company proposing a scheme to be protected from creditor enforcement action, it will need to enter into a standstill agreement with creditors, or where a scheme is already on foot, it may apply to court for the court to exercise its case management powers to stay execution and proceedings against the company in order to allow a scheme to be proposed.[72] The Singapore scheme, on the other hand, gives the court power in s 210(10) to grant a stay of proceedings on application by the company.[73] The s 210(10) stay is weaker than the JM moratorium in two aspects: it does not apply to the enforcement of security and it is not triggered automatically.

The ILRC rationalized the differences between the JM moratorium and the s 210(10) stay on the basis that the scheme, unlike the JM which results in the displacement of management in favor of an insolvency practitioner, is a DIP procedure. Creditors in a JM are given the assurance that the company is managed by an independent third party administrator and thus are not prejudiced by the moratorium on their enforcement rights. To have the same moratorium in a scheme would be 'unfair to creditors and could potentially lead to abuse as the company would remain under the control of its management and would not be subject to any restrictions or control on the disposal and application of its assets.'[74] This reasoning of the ILRC is of course entirely consistent with the traditional approach in English insolvency law of displacing the management of a company in an insolvency proceeding in favor of a professionally qualified independent insolvency practitioner. A weak DIP model like the scheme is thus consistent within a system of insolvency law predicated on PIP models.

Following an influential English decision,[75] which was approved by the Singapore Court of Appeal,[76] it has become the practice to say that the scheme consists of three stages, with each stage serving a distinct purpose. First, there must be an application to the court for an order that a meeting or meetings of creditors, and where necessary, shareholders, be summoned.[77] This first hearing is usually called the convening hearing. Second, the scheme proposals are put to the meeting or meetings held in accordance with the order that has been made. The majority required for approval in *each* meeting is a simple majority in number representing three-fourths in value of those present and voting in person or by proxy, though it should be noted that for the Singapore scheme the court has power to waive the majority in number requirement.[78] The requisite majority in each meeting thus binds the minority, but unlike Chapter 11 there is no cross-class cram down in the scheme. Third, if approved at the meeting or meetings, there must be a second application to the court to obtain the court's sanction to the compromise or arrangement.[79] This is usually referred to as the sanction hearing.

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[72] *Sea Assets Ltd v PT Garuda Indonesia* [2001] EWCA Civ 1696; *Bluecrest Mercantile BV v Vietnam Shipbuilding Industry Group* [2013] EWHC 1146 (Comm).
[73] Companies Act, s 210(10).
[74] ILRC Report, p 141.
[75] *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241; [2001] 2 BCLC 480, [11], [12].
[76] *The Royal Bank of Scotland NV v TT International Ltd* [2012] SGCA 9; [2012] 2 SLR 213, [55].
[77] Companies Act (Cap 50, 2006 Rev Ed) s 210(1).
[78] Companies Act (Cap 50, 2006 Rev Ed) s 210(3AA), s 210(3AB).
[79] Companies Act (Cap 50, 2006 Rev Ed) s 210(3AB)(c).

We submit that the notion that the scheme has three stages is not complete and liable to mislead. First, much work has to be done by the company before the convening hearing. The company must decide prior to the application on (a) which creditors to scheme with,[80] (b) whether or not to summon more than one meeting of creditors; and (c) who should be summoned to which meeting. Indeed, those decisions and the terms of the scheme are the most important decisions in the entire scheme procedure. In the UK the company also has to send what is called the Practice Statement Letter (PSL)[81] to the relevant creditors in good time before the convening hearing so that the creditors have the requisite information and sufficient time to decide whether to attend the hearing and whether to seek legal advice.[82] The Practice Statement fleshes out the bare skeletal structure of the statutory provisions on scheme by laying down the procedural rules, in effect serving the function of subsidiary legislation. Failure to object to the company's proposed classification of creditors at the convening hearing does not preclude a creditor from raising the objection at the sanction hearing.[83] Classification goes to the court's jurisdiction, so in any event the court at the sanction hearing is required to revisit the classification issue. But the court will expect a creditor to show good reason why it did not raise the issue at an earlier stage. In Singapore there is no equivalent to England's Practice Statement. Though the court will still expect the company to provide the creditors with the relevant information before the convening hearing, the practice is less structured, and the standard seems to be lower.[84]

Further, the company is required to prepare the statutory explanatory statement with information on the purpose of the scheme, the terms of the scheme and its commercial impact, and all such information as is reasonably necessary to enable the creditors to make an informed decision as to whether or not the scheme is in their interests.[85] In England it is mandatory under the Practice Statement to include a draft explanatory statement with the application to court for the convening hearing.[86] The English court will consider the adequacy of the explanatory statement at the convening hearing. It may refuse to make a meetings order if it considers that the explanatory statement is not in an appropriate form. However, it will not approve the explanatory statement at the convening hearing, and it will remain open to any creditor to raise issues as to its adequacy at the sanction hearing.[87] In Singapore there is no equivalent to England's Practice Statement, but it would seem roughly the same approach is taken on the ground.

Both the PSL and the explanatory statement go to the heart of protecting creditors' interests and the legitimacy of the scheme procedure. Without timely and adequate information, it is impossible for the

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[80] The scheme, unlike Chapter 11, is not a plenary procedure affecting all the creditors and shareholders of the company. The company can choose which creditors it wants to scheme with. See eg, *Re Bluebrook Ltd* [2009] EWHC 2114 (Ch); [2010] 1 BCLC 338, [24]-[25].

[81] Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006), 26 Jun 2020 < https://www.judiciary.uk/publications/practice-statement-companies-schemes-of-arrangement-under-part-26-and-part-26a-of-the-companies-act-2006/> accessed 24 Jan 2021.

[82] Id, paras 7, 8. See eg, *Re Indah Kiat International Finance Co BV* [2016] EWHC 246 (Ch); [2016] BCC 418.

[83] id, para 10.

[84] Compare *Re Indah Kiat International Finance Co BV* [2016] EWHC 246 (Ch); [2016] BCC 418 with *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* [2019] SGCA 29; [2019] 2 SLR 77.

[85] Companies Act (Cap 50, 2006 Rev Ed) s 211.

[86] Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006), 26 Jun 2020 < https://www.judiciary.uk/publications/practice-statement-companies-schemes-of-arrangement-under-part-26-and-part-26a-of-the-companies-act-2006/> accessed 24 Jan 2021, para 14.

[87] id, para 15.

creditors to assess how their rights would be impacted by the scheme, and they would be none the wiser on what objections to raise at the convening hearing and the sanctions hearing. The importance of this cannot be overstated, particularly in the hybrid scheme which has become a much stronger DIP prototype.

Secondly, after obtaining the requisite orders to convene the meetings, the company is required, pursuant to the court orders, to send the explanatory statement and the notice of the meetings and how to vote on the meetings to the creditors before the holding of the meetings.

Therefore, it is more accurate to conceive the scheme as consisting of five stages, ie, the preparatory stage, the convening hearing, the sending of explanatory statement and giving notice of the meetings, the meetings, and the sanction hearing.

The scheme 'began to see widespread use in Singapore in the 1990s'[88] and has since 'become the favoured corporate rescue regime.'[89] The ILRC identified a number of drawbacks arising from how the scheme has operated in Singapore and proposed reforms to address them. The philosophy set out by the ILRC as guiding its deliberations, and the subsequent partial rejection of that philosophy by the SICDR, will be discussed in the section on the evolution of Singapore's insolvency law later. We turn here to discuss the hybrid scheme.

Hybrid scheme

The hybrid scheme differs from the scheme in the additional statutory provisions undergirding it, which are found in the IRDA. Note that however the operative provisions of both the scheme and hybrid scheme are found in the Companies Act.[90] It remains perfectly possible for a company to enter into a scheme with its creditors, as discussed above, based on those provisions only. But where a company requires a broad moratorium, cross-class cram down or rescue financing, etc, it will have to rely on the additional provisions in the IRDA. Each of those features will be examined briefly below.

Scheme moratorium

A company may obtain an automatic moratorium as wide as the JM moratorium by filing with the court certain documents.[91] This may be at the same time as the application for the convening hearing, or if the benefit of the moratorium is required earlier, when it intends to propose a scheme with its creditors. The only substantive requirement in the filing is evidence of support from the company's creditors for the proposed scheme and an explanation of how such support would be important for the success of the proposed scheme.[92] This statutory requirement is, with respect, not easy to understand or apply. The court has held that the test for evidence of creditor support is whether on a broad assessment, there was a reasonable prospect of the proposed or intended scheme working and being acceptable to the general run of creditors, and that the court should refrain from undertaking a vote count.[93] This interpretation avoids the difficulty and pitfalls of securing creditor support at a very early stage when

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[88] ILRC Report, p 135.
[89] ILRC Report, p 135.
[90] Companies Act (Cap 50, 2006 Rev Ed), s 210.
[91] IRDA, s 64(1), (8).
[92] IRDA, s 64(4).
[93] *Re IM Skaugen SE* [2018] SGHC 259; [2019] 3 SLR 979.

things may be very unstable and evolving rapidly by effectively transferring the decision to the court. But unfortunately it begs the question of whether the court is in a position to decide whether the scheme may work and is acceptable to the general run of creditors.

The automatic moratorium lasts thirty days or such earlier time when the court hears and decides the application.[94] If the application is successful, the automatic moratorium will be replaced with a court-ordered moratorium which scope may extend as far as the automatic moratorium,[95] and it may be extended on application multiple times without any statutory limit on the totality of its duration.[96]

The moratorium makes the hybrid scheme a much stronger DIP procedure than the scheme. This raises the question of its suitability within a system predicated on PIP models. We submit that the protection *currently* offered by IRDA's statutory provisions to creditors appears relatively weak and insufficient, but there is scope for judicial development of measures to protect the creditors. While the moratorium is in force, there is no statutory provision to prevent the potential detriment this may cause to the creditors through independent external scrutiny of the company's conduct of its business or dealing with its assets, nor is the company subject to any restriction in those matters, though the court may impose terms in a court-ordered moratorium.[97] A creditor is required to apply to court to restrain the company from disposing of its property other than in good faith and in the ordinary course of the company's business.[98] This provision, which was recommended by the ILRC,[99] is the direct opposite to that applying in Chapter 11, where the DIP can use, sell, or lease property of the estate only in the ordinary course of business and a motion and hearing is required for anything beyond that.[100]

There are various measures to protect creditors in Chapter 11 against potential abuse by the DIP of the wide moratorium. They include, in addition to the restriction on the DIP's ability to dispose of assets mentioned above, the ability of unsecured creditors to form an official committee which is entitled to appoint lawyers and other advisers funded by the estate[101] and to submit a competing plan after the expiry of the exclusivity period,[102] and the monitoring of the progress of cases by the US Trustee. There is no functional equivalent to those measures in the hybrid scheme. However, the structure of the hybrid scheme is flexible enough for the courts to develop principles to protect the creditors against abuse. For eg, when granting or extending a moratorium, the court may impose terms on the company[103] to keep it on a tight leash. Further, we submit there is enough room for high-level judicial creativity to develop further measures, for eg, to appoint an insolvency practitioner to serve functions similar to that of an examiner in Chapter 11 or the monitor in UK's Part 26A scheme of arrangement. This will increase the costs of the hybrid scheme, but such costs may be unavoidable and well-spent in deserving cases. In future, with the accumulation of practical experience, the judicial developments may even be codified.

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[94] IRDA, s 64(8), (14).
[95] IRDA, s 64(1).
[96] IRDA, s 64(7).
[97] IRDA, s 64(1), (5).
[98] IRDA, s 66(1)(a).
[99] ILRC Report,
[100] Bankruptcy Code, s 363(b), (c).
[101] Bankruptcy Code, ss 330, 1102, 1103.
[102] Bankruptcy Code, s 1121(c).
[103] IRDA, s 64(5), (7).

But while the hybrid scheme *may* be abused by the company at the expense of unsecured creditors, secured creditors may prevent a company from gaining access to it. There is nothing in IRDA to prevent a creditor with a global security package from appointing a global receiver before the company applies for a moratorium. If such a receiver is appointed, the directors would lose their powers of management.[104] Contrary to the assertion of the government that a company in receivership may still enter into a scheme with its creditors,[105] it is established law the company cannot do that. The question here is whether the company may pre-empt a receivership by obtaining the automatic scheme moratorium beforehand. The scales are tilted in favor of the secured creditor, but pre-emption may still happen.

There is no explicit requirement in IRDA to notify secured creditors before a company applies for the moratorium. This may lead secured creditors, worried that the company may be on the brink of applying for a scheme moratorium, to appoint a receiver precipitately. Secured creditors may also take steps to protect themselves in the security documents by extracting covenants from the company. Moreover, it will be difficult for a company to act against the interest of its secured creditor, as its support for the intended scheme and any rescue financing the company may need, will usually be critical to the scheme's success. Nevertheless, it cannot be discounted that a company may apply for a moratorium and so prevent a receiver from being appointed. If so, this may lead to an unseemly race between the company and the secured creditor.

The above shows that the hybrid scheme does not undermine the pro-secured creditor nature of Singapore's insolvency law, even while it has tilted the balance in favor of the company at the expense of unsecured creditors. The tension between the hybrid scheme and the receivership illustrates Singapore's dilemma. In pushing for the hybrid scheme to be like Chapter 11, there probably needs to be some trade-offs between that objective and the pro-secured creditor nature of Singapore's insolvency law, but the IRDA has not taken a position on this matter. We will return to this issue when we explain the evolution of Singapore's insolvency law.

Cross-class cram down

The cross-class cram down[106] was proposed by the ILRC.[107] It tracks the Chapter 11 cram down closely, but only in relation to the cram down of dissenting *creditors*. There is no provision to cram down a dissenting class of *shareholders*. Further, the IRDA amended the earlier, initial provision on cram down of a dissenting class of *unsecured* creditors in the Amendment Act of 2017.[108] Whereas the absolute priority rule applied in the relevant provision in the Amendment Act of 2017, it was removed in the equivalent provision in IRDA.[109] This was the only substantive difference between the two versions of

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[104] *Gomba Holdings UK Ltd v Homan* [1986] 1 WLR 1301.
[105] Ministry of Law, 'Ministry's Response to Feedback from Public Consultation on The Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring (The "Draft Bill")' (27 Feb 2017) para 3.1.3 and 3.1.4.
[106] IRDA, s 70.
[107] ILRC Report, 154-156,
[108] Companies (Amendment) Act 2017, s 22 (inserting s 211H(4)(b)(ii)(B) into the Companies Act (Cap 50, 2006 Rev Ed).
[109] IRDA, s 70(4)(b)(ii)(B).

hybrid schemes. For ease of exposition, the hybrid scheme under the Amendment Act of 2017 will be called the *original hybrid scheme*, while the reformed one in IRDA will be called the *new hybrid scheme*.

The new provision in IRDA provided that, where a class of unsecured creditors has dissented, the terms of the compromise or arrangement must provide for the creditors in the class to receive property of a value equal to the amount of their claims, or

> must not provide for any creditor with a claim that is subordinate to the claim of a creditor in the dissenting class, or any member, to receive or retain any property *of the company* on account of the subordinate claim or the members' interest.[110]

The italicized words were added in IRDA to the original provision in the Amendment Act of 2017. The original provision followed the absolute priority rule, ie, if a plan does not pay a particular class in full, no class junior to it may retain or receive anything on account of its old claim or interest, unless the senior class consents. The addition of the italicized words was intended to abolish the absolute priority rule's protection of dissenting unsecured creditors via-a-vis members, ie, to allow for the possibility of the members retaining their shares in the company even when the dissenting unsecured creditors have not been paid in full.

The reason given for abolishing the absolute priority rule's protection of dissenting unsecured creditors vis-à-vis members was that the original provision was difficult to apply in practice. Unlike Chapter 11, it will be recalled, the hybrid scheme does not contain a cram down mechanism against dissenting shareholders. The old law thus relied on the members' voluntarily agreeing to their shares being divested which, it was claimed, may be difficult to achieve in practice. Consequently, the Ministry of Law decided to remove the absolute priority rule's operation in this regard, by adding the italicized words in the quote above.[111]

It should be pointed out that there has been no reported case and apparently no known case of cram down of dissenting creditors since the hybrid scheme was introduced. An important reason was that Singapore followed the robust approach to classification of creditors enunciated by the English Court of Appeal in *Re Hawk Insurance Co Ltd*,[112] which was designed to prevent minority holdup of deserving schemes.[113] On the other hand, there has been reported cases of controlling families of companies agreeing voluntarily to very substantial divestments of their stakes in those companies' schemes with creditors.[114] There is thus not much evidence to support the stated fear that without the change in law the hybrid scheme will not work.

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[110] IRDA, s 70(4)(b)(ii)(B) (emphasis supplied).
[111] Paul Apathy, Emmanuel Duncan Chua and Rowena White, 'Singapore's New "Omnibus" Insolvency, Restructuring and Dissolution Bill', The Singapore Law Gazette (Jan 2019) https://lawgazette.com.sg/feature/singapores-new-omnibus-insolvency-restructuring-and-dissolution-bill/ (accessed 22 Jan 2021).
[112] [2001] EWCA Civ 241; [2001] 2 BCLC 480, [23]-[52].
[113] Gabriel Moss, 'Hawk Triumphant: A Vindication of the Modern Approach to Classes in Section 425 Schemes' *Insolvency Intelligence* 15 (2002) 41.
[114] Eg, Hwee Hwee Tan 'In a perfect storm, will Nam Cheong scheme creditors take a leap of faith?' *Business Times, Singapore,* January 19, 2018, reports that in the Marco Polo Marine Ltd scheme, the Lee family's equity in the company was diluted from 62 per cent to 6 per cent to pave way for the company's restructuring and in the Nam Cheong scheme, the Tiong family will retain a 28 per cent equity stake after the scheme and the rights issue.

But if we look beyond Singapore to the region, there is a plausible explanation why the change in law was thought to be needed. So far most companies entering into schemes and hybrid schemes in Singapore were Singapore incorporated companies with substantial operations in Singapore. There have been less examples of regional companies with little presence in Singapore entering into schemes or hybrid schemes in Singapore. The shareholdings of many large regional companies are very concentrated and are usually held by one or more controlling families. There have been cases of those companies engaging in protracted litigation with their creditors, especially foreign bondholders, as the controlling families were not willing to give up control of their companies,[115] and resorting to unfair measures[116] or even perjury[117] to restructure the company's debts through schemes so that they will remain in control of the revived companies. In this environment, the original hybrid scheme had little attraction for regional companies. By allowing for dissenting unsecured creditors to be crammed down without requiring the existing shareholders to be divested of their shares, the new hybrid scheme may be more attractive to those companies.

The concern with the new hybrid scheme is that it runs the risk of it being used to squeeze out unsecured creditors by 'senior creditors and shareholders acting in concert to force through a reorganisation'.[118] If that happens, it will invert the ranking between the creditors and shareholders. The risk is mitigated by some features of the hybrid scheme. First, a pre-requisite to cram down is that a majority in number representing three-fourths in value of all creditors present and voting must have voted for the hybrid scheme. This is a unique feature of the hybrid scheme not found in Chapter 11.[119] Secondly, there is also a modified version of the best interest rule in Chapter 11, viz, that no creditor in the dissenting class receives an amount that is lower than what the creditor is estimated by the court to receive in the most likely scenario if the scheme does not take effect.[120] Thirdly, the court may refuse to sanction a scheme even where it has obtained the requisite majorities at the meetings. This should apply similarly to hybrid schemes. In particular, the permissive word 'may' is used to describe the court's exercise of power to cram down and sanction a hybrid scheme.[121] It is possible that the court will do so in egregious cases. Nevertheless, the risk remains and adds to the above observation that the hybrid scheme has tilted the balance in favor of the company at the expense of unsecured creditors.

Rescue financing

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[115] Eg, *Deutsche Bank AG v Asia Pulp & Paper Co Ltd* [2003] SGCA 19; [2003] 2 SLR 320.

[116] Eg, *Re Indah Kiat International Finance Co BV* [2016] EWHC 246 (Ch); [2016] BCC 418; *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* [2019] SGCA 29; [2019] 2 SLR 77.

[117] In *Fidelity Advisor VIII v APP China Group Ltd* [2007] Bda LR 35, para 167 the Supreme Court of Bermuda held that perjured evidence was given by the president commissioner of a company in an Indonesian Group in a scheme of arrangement the company entered into with its creditors three years earlier.

[118] Paul Apathy, Emmanuel Duncan Chua and Rowena White, 'Singapore's New "Omnibus" Insolvency, Restructuring and Dissolution Bill', The Singapore Law Gazette (Jan 2019) https://lawgazette.com.sg/feature/singapores-new-omnibus-insolvency-restructuring-and-dissolution-bill/ (accessed January 24 2021).

[119] IRDA, s 70(3).

[120] IRDA, s 70(3)(c) and s 70(4)(a).

[121] IRDA, s 70(2).

This was proposed by the ILRC[122] and the SICDR extended the proposal to include super-priority lien.[123] The legislation[124] followed US legislation closely, but modification was required as IRDA does not provide for expenses of a scheme, and indeed the avoidance provisions do not apply to schemes as well. In this regard, the hybrid scheme is not a full-fledged insolvency procedure like liquidation or JM. The provision to achieve the modification had drafting problems[125] and may have contributed to difficulties in practice.[126] But the more fundamental issue for the purposes of this paper is that of the interaction of super-priority lien with Singapore's law on credit and security.

The proposal to introduce rescue financing into the UK was dropped after it met with strong opposition at the consultation stage.[127] There was much concern that rescue financing would reduce the value of security[128] and in any event, the provision of finance in the UK and security rights were not conducive to the approach adopted in procedures like the chapter 11. For example, AlixPartners UK LLP, a subsidiary of a leading US turnaround firm, argued in its feedback that 'the customary UK use of floating charges which cover all or significantly all of the assets of the company inhibit the seeking of rescue finance for a troubled business. In practice, companies who are in a position to require a moratorium have few if any unpledged assets, and the value of the pledged security is frequently approached or even exceeded by borrowings against those assets.'[129]

It is unlikely that the SICDR would have recommended extending rescue financing to include super-priority lien if it thought those fears articulated in the UK consultation would materialize for the hybrid scheme. Rather, looking to US experience, it pointed out that existing lenders are in strong position to extend rescue financing to companies in Chapter 11, and '[i]n DIP Financing arrangements which involve super-priority liens, it is common for the lender to be an existing secured creditor'.[130] The SICDR reasoned that as super-priority liens are a vital part to the DIP Financing industry in the US, 'having similar provisions for super-priority liens would encourage established players in the US DIP Financing industry to provide rescue financing in Singapore'.[131] That objective was regarded as being so important that, despite acknowledging that some Distressed Debt Funds (which the SICDR used to mean hedge funds and investment banks that buy distressed debts at deep discounts) are unduly litigious and the

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[122] ILRC Report, 107-113 (JM), 153 (scheme).

[123] SICDR Report, paras 4.5-4.6.

[124] IRDA, s 67.

[125] Meng Seng Wee, 'The Singapore Story of Injecting US Chapter 11 into the Commonwealth Scheme' *European Company and Financial Law Review* 15 (2018) 553, 577-578.

[126] See eg the confusion of the legal advisers in *Re Attilan Group Ltd* [2017] SGHC 283; [2018] 3 SLR 898.

[127] Department for Business, Energy & Industrial Strategy, *Insolvency and Corporate Governance*, August 26 2018, [5.186] https://www.gov.uk/government/consultations/insolvency-and-corporate-governance accessed January 24 2021.

[128] See eg, Insolvency Service, *Summary of Responses: A Review of the Corporate Insolvency Framework* (September 2016) 456, 470 (in running order of the document) (response of PWC to the consultation exercise). <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/578524/Summary_of_responses_26-10-16_Redacted.pdf> accessed 22 Jan 2021.

[129] Insolvency Service, *Summary of Responses: A Review of the Corporate Insolvency Framework* (September 2016) 33 (in running order of the document) at 43 (response of AlixPartners to the consultation exercise). <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/578524/Summary_of_responses_26-10-16_Redacted.pdf> accessed 22 Jan 2021.

[130] SICDR Report, para 4.5(b).

[131] SICDR Report, para 4.5(c).

interests of Distressed Debt Funds are not necessarily aligned with other creditors,[132] the SICDR concluded that, on balance, the benefits arising from the participation of Distressed Debt Funds in rescue financing outweigh the potential downsides. The SICDR thus advocated that 'steps should be taken to attract Distressed Debt Funds to establish a base and operate out of Singapore.'[133]

The logic behind the SICDR's approach is clear. As Singapore and the regional market are new to rescue financing, the most effective way for the market to develop as quickly as possible is to leverage on the knowledge, expertise and experience of the US market in rescue financing. The SICDR stated that Singapore 'already has a range of incentives which apply to rescue financing activity in Singapore and to Distressed Debt Funds'[134] and on that basis urged that '[T]argeted promotional activity can be undertaken to create awareness of the relevant incentives amongst entities that are exploring rescue financing activity in the region.'[135] Even so, the SICDR wanted to improve Singapore's attraction further, which it believed would be achieved by making super-priority lien available.[136] Against that policy objective, the possible impact of extending rescue financing to super-priority lien on pre-existing secured creditors became of secondary importance, and in any event the SICDR thought that court approval for super-priority lien would be a sufficient safeguard to protect the interests of those creditors.[137]

Hybrid scheme in local and foreign restructurings

The impact of the perceived current weaknesses of the hybrid scheme on its use may well differ between local and foreign restructurings. While the alleged weaknesses are potential problems with regards to companies carrying on business in Singapore seeking restructuring, as shown in the protracted case of Hyflux[138] before the court put the company into JM, ironically they may not be so for foreign companies wanting to do a scheme in Singapore. Indeed, the company and powerful creditors able to protect themselves may even welcome that. What is uncertain is whether if the scheme of the foreign company is sanctioned, the dissenting creditors may object to its recognition in a third jurisdiction, for eg, in the US. As the ground of objection under the public policy exception of Art 6 of the Model Law is narrow, a Ch 15 application may be successful. If so, the hybrid scheme will attract regional work, but may be unsatisfactory domestically and may distort Singapore's insolvency law or even economy, somewhat similar to the early days of Chapter 11 when it was abused in some cases. This is of course only a possibility, as if signs of that were to appear in future, the Singapore government will no doubt take action to reform the law.

THE EVOLUTION OF THE FRAMEWORK

The key to understanding the deep structure underpinning Singapore's insolvency law is to trace the introduction of the JM into Singapore and the reforms proposed by the ILRC and the SICDR.

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[132] SICDR Report, paras 4.10, 4.11
[133] SICDR Report, para 4.12.
[134] SICDR Report, para 4.13
[135] SICDR Report, para 4.14.
[136] SICDR Report, para 4.5(c).
[137] SICDR Report, para 4.6.
[138] *Supra* note 45.

As mentioned above, the JM was largely based on the UK's administration. It is thus necessary to explain the background of the administration briefly to understand how it was conceived. The administration came about because of the recommendations of the Cork Committee, which was appointed by the UK government in the 1970s to conduct a comprehensive review of UK's bankruptcy and corporate insolvency laws. The Cork Committee spelt out the objectives of a good insolvency law, which inter alia includes,

> (j) to provide means for the preservation of viable commercial enterprises capable of making a useful contribution to the economic life of the country;[139]

The choice of the word 'enterprises', which means businesses, in the above quote was deliberate. In another part of the Cork Report, this point was made clear in stark and uncompromising language:

> In the case of an insolvent company, society has no interest in the preservation or rehabilitation of the company as such, though it may have a legitimate concern in the preservation of the commercial enterprise.[140]

The proposition that the law should be concerned with rescuing businesses rather companies reflected the *extant* English attitude towards insolvency law of preferring the rights of creditors, especially secured creditors, over that of shareholders. English law is thus usually said to be pro-creditor, in contrast to US law which is said to be pro-debtor. While such generalization of insolvency systems in the world should be treated with some caution, the classification is nevertheless useful in providing a broad overview.

The recommendation behind administration showed clearly the influence of the pro-creditor culture of English law. The Cork Committee thought that receivership enabled the preservation of the profitable parts of the enterprise through the technique of hive-down, and this 'has been of advantage to the employees, the commercial community, and the general public.'[141] Where there is no floating charge, the Cork Committee thought that neither the choice of an informal moratorium or a formal scheme of arrangement is 'wholly satisfactory.'[142] 'The latter is expensive and time consuming; the former is informal, is not binding on those creditors who do not assent, and can lead to problems in practice.' Further, where neither course is practical, an insolvent company has no option but to cease trading and enter into a winding up. The Cork Committee concluded:[143]

> We are satisfied that in a significant number of cases, companies have been forced into liquidation, and potentially viable businesses capable of being rescued have been closed down, for want of a floating charge under which a receiver and manager could have been appointed.

As perhaps an example of the tail wagging the dog, the Cork Committee thus proposed that provisions be introduced to allow the court, on an application by the company or a creditor, to appoint a person (to be called the administrator) with the powers normally conferred upon a receiver in order to, inter alia, rescue the company through reorganization or trading, or realize the assets of the company in the most

[139] Cork Report, para 198.
[140] Cork Report, para 193.
[141] Cork Report, para 495.
[142] Cork Report, para 496.
[143] Cork Report, para 496.

profitable manner.[144] If there is a floating charge and the holder of the floating charge has either appointed a receiver or given an undertaking forthwith to appoint one, the court should not normally make such an order.[145] In other words, whilst administration is a collective procedure for the benefit of all the creditors of the company, it is nevertheless subordinate to receivership, which is a debt enforcement mechanism for the benefit of the secured creditor which appoints the receiver. The aforesaid proposals largely found their way, first into the Insolvency Act 1985 and then the Insolvency Act 1986.[146] This is a vivid and powerful illustration of the pro-secured creditor culture of English law.

Mention should also be made briefly of the administrative receivership which was created at the same time. This is just the good old receivership to which was added some collective features, for eg, creditors' committee and meeting of creditors. The administrative receivership may thus be seen as a kind of enhanced receivership.

While Singapore adopted the administration as the JM in 1986, she did not adopt the administrative receivership or the company voluntary arrangement (CVA). The CVA is somewhat similar to the scheme of arrangement, but it cannot be used to cram down dissenting secured creditors and an insolvency practitioner will be appointed supervisor. In the larger scheme of things, those differences are minor. Singapore's insolvency law was largely similar to English insolvency law and both were clearly pro-secured creditor.

English insolvency law was reformed substantially by the Enterprise Act 2002 which virtually abolished administrative receivership in favor of administration.[147] A new and more expansive administration was inserted into the Insolvency Act 1986, in Sch B1 of the Act. Creditors which previously were entitled to appoint receivers were given the right to appoint administrators out of court instead. Hierarchy was for the first time imposed on the different objectives of administration,[148] which made clear the preference of maximizing recoveries for the benefit of all creditors over the rescue of the company as a going concern. This was a repudiation of the Cork Committee's opinion that receivership may be relied on for business rescue, but it reaffirmed the Cork Committee's opinion that society has no interest in the preservation of the company as such, and that the interests of the creditors clearly prevail over that of the shareholders.[149] The virtual demise of the administrative receivership in favor of administration 'tip

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[144] Cork Report, para 497, 498.
[145] Cork Report, para 504.
[146] Administration is now found in the Insolvency Act 1986, Sch B1.
[147] For a detailed analysis, see John Armour and Rizwaan Jameel Mokal, 'Reforming the Governance of Corporate Rescue: The Enterprise Act 2002' *Lloyd's Maritime and Commercial Law Quarterly* [2005] 28.
[148] Insolvency Act 1986, Sch B1, para 3(1) sets out the objectives that an administrator may seek to achieve. Objective (a) is to rescue the company as a going concern. Objective (b) is to achieve a better result for the company's creditors as a whole than would be likely if the company were wound up. Objective (c) is to realise property in order to make a distribution to the secured or preferential creditors. Next, para 3(3) prescribes very closely how the administrator is to choose between the three objectives. The administrator must perform his functions to achieve objective (a), unless he thinks either that it is not reasonably practicable to achieve that objective, or that objective (b) would achieve a better result for the company's creditors as a whole. Next, it is only when he thinks that it is not reasonably practicable to achieve either objective (a) and (b) that he may achieve objective (c), and in this he must not unnecessarily harm the interests of the company's creditors as a whole.
[149] See for eg Ian Fletcher 'UK Corporate Rescue: Recent Developments' *European Business Organization Law Review* 5 (2004) 119, 137. Fletcher suggested that the approach here perpetuated the traditional disposition of

the balance firmly in favor of collective insolvency proceedings.'[150] Unlike the administrative receiver or receiver who acts in the interests of the secured creditor which appoints him or her and owes very limited duties to the other creditors of the company, the administrator acts in the interests of all the creditors. Further, after the 2002 reforms, even when an administration is conducted for the purpose of realizing the charged properties in order to make a distribution to the secured or preferential creditors, the administrator must not unnecessarily harm the interests of the company's creditors as a whole. As the commentators have pointed out, the hierarchy of objectives virtually stands the priorities attaching to receivership on its head.[151]

Singapore did not follow the 2002 English reforms of the administration. When the ILRC recommended reforms to the JM, the furthest it went to strengthen the position of general creditors vis-à-vis secured creditors entitled to appoint receivers was to propose that courts be given a power to override the objection of those secured creditors on a balancing exercise.[152] This was largely adopted in the Amendment Act of 2017.[153] The ILRC examined the 2002 English reforms and decided against following those reforms. In proposing that the receivership be retained, subject to some reforms to improve its workings,[154] the ILRC Report affirmed that Singapore should continue with its pro-secured creditor culture, even as England has adjusted its position to become less pro-secured creditor.

At the same time, the ILRC observed that the scheme of arrangement has become the preferred mechanism to rescue companies in Singapore.[155] 'The accumulation of professional ground experience, judicial guidance and support have transformed the scheme of arrangement procedure into a corporate insolvency regime with distinctly Singapore characteristics.'[156] In considering ways to improve the scheme, the ILRC was guided by the principle that the scheme

> can usefully incorporate many features of a debtor-in-possession reorganisation regime, but still be built upon a model and based on concepts and principles which are familiar to the commercial and financial sector in Singapore as well as those familiar with legal systems based on English law.[157]

This principle was best reflected in its proposal on the scope of the scheme moratorium, viz, the scope of the stay should be broadened but it should not be triggered automatically upon the filing of an application to court for the convening hearing.[158] As a corollary, safeguards for creditors' interests were proposed.[159]

English insolvency law to elevate the interests of creditors above the other possible benefits of a corporate rescue, including the preservation of shareholder value and continuation of employment that might be achieved.

[150] White Paper 'Insolvency – A Second Chance', 2001 (Cm 5234) p 10.

[151] Ian Fletcher 'UK Corporate Rescue: Recent Developments' *supra* note 149; John Armour and Rizwaan Jameel Mokal, 'Reforming the Governance of Corporate Rescue: The Enterprise Act 2002' *supra* note 147.

[152] ILRC Report, pp 89-92.

[153] Companies (Amendment) Act 2017, s 25(d). The new law is now contained in IRDA, s 91(6).

[154] ILRC Report, p 61-62.

[155] ILRC Report, p 135.

[156] ILRC Report, p 135.

[157] ILRC Report, p 139.

[158] ILRC Report, p 142.

[159] ILRC Report, p 147-148.

Interestingly, the ILRC then moved beyond the guiding principle to consider additional reforms that could be adapted from features found in the US Bankruptcy Code.[160] It noted the difficult balancing exercise involved. It pointed out that most of those features were 'underpinned by a very different policy rationale demanding active judicial involvement/oversight' and so may not be capable of introduction into Singapore.[161] So on balance it concluded that Singapore should not introduce a Chapter 11 style DIP model. Nevertheless, it felt that limited adaption of certain features may enhance the JM and scheme.[162] In particular, it thought that the scheme with its elements of a DIP model and with refinements and enhancements will adequately and effectively address Singapore's needs for the foreseeable future. On that basis it proposed that provisions allowing for super-priority for rescue finance, but not super-priority lien, be introduced. The ILRC also proposed, by a majority, that the Chapter 11 cross-class cram down be adapted into the scheme.

The pecking order as conceived by the ILRC is that receivership prevails over JM or hybrid scheme, but the court is given power to 'undo' that order. Unfortunately, the ILRC did not articulate how that power should be exercised. This order was altered when the SICDR recommended (along with the super-priority lien) that the moratorium be made automatic on its application. The result, as explained above, is to lead to tension between receivership and the hybrid scheme, and the strengthening of the company's position at the expense of the unsecured creditors, albeit the courts may develop measures to protect the unsecured creditors. At the heart of this tension lies many questions, starting with the question whether receivership should be abolished or reformed, and in the latter scenario, the manner of the reform, etc. The accumulation of jurisprudence on and experience of the hybrid scheme will help point the direction. Injecting elements of Chapter 11 into a largely English-type insolvency system is path-breaking innovation and consequently immensely challenging. It is to be expected that refinements will be needed, and indeed will be made, to the original prototype. In any event, as economies and financing structures evolve and change, refinements and sometimes even reforms to insolvency law will always be needed to ensure that the law is fit for purpose.

CONCLUSIONS ON THE HYBRID SCHEME AND SINGAPORE'S CORPORATE INSOLVENCY LAW

The scheme is far less prescriptive than Ch 11 and its uses are potentially limitless. It has many weaknesses as a rescue mechanism, but not the lack of flexibility. But Ch 11 is more flexible than schemes in a crucial way – it allows for a s 363 sale of the whole of the company's business or part thereof, whereas the scheme does not offer that possibility, as an asset sale is not a compromise or an arrangement. Sure, the scheme may be used to obtain a moratorium and with this protection a sale may be done, but the sale would not conducted under the scheme provisions.

Consequently, in the US, whether it is a sale or a reorganization it will take place within Ch 11, a single gateway. In the UK pre-pack administration is used to effect sales. We are not certain whether a company may by filing the relevant documents obtain a stand-alone moratorium so as to negotiate a sale, since the putative monitor needs to be of the view that the moratorium will likely result in the rescue of the company as a going concern,[163] which is not satisfied if the company's intention is to conduct a sale. But if the company is subject to an outstanding winding-up petition, the court may grant

[160] ILRC Report, p 105-125 (JM); 153-156 (scheme).
[161] ILRC Report, p 105.
[162] ILRC Report, p 105.
[163] Corporate Governance and Restructuring Act 2020, s A6(1)(e).

a moratorium if it is satisfied that the moratorium would achieve a better result for the company's creditors as a whole than would be likely if the company were wound up.[164] In Singapore a sale will be through receivership or JM. This raises the question of whether UK law or Singapore law is efficient in allocating the decision of sale or restructuring across different insolvency proceedings, a big topic which we will have to leave to another occasion to discuss.

DELIBERATIONS LEADING TO THE ENACTMENT OF THE MODEL LAW

When the ILRC recommended that the Model Law be enacted, one reason it gave was that Singapore should aspire to be a regional hub for the restructuring of foreign companies and adopting the Model Law would be 'a firm step in this direction'.[165] This was probably the least important reason in the ILRC's deliberations. It was very brief and it came last, after the ILRC had expended much more effort elaborating on three other reasons before it. The ILRC noted the suggestion that 'enacting the Model Law does more to assist foreign insolvencies than it does to assist local ones'[166] and the lack of reciprocity in the Model Law.[167] Even though it agreed with the former to some extent and was concerned by the latter, it thought there were more compelling reasons that outweighed both.

The ILRC thought that first, enacting the Model Law would improve the clarity and certainty of Singapore's cross-border insolvency law which 'may possibly help lower the risks and costs of international financing, reduce the overall cost of insolvency litigation, and reduce the overall costs of obtaining recoveries or dividends from the cross-border insolvency process.'[168] Secondly, it thought that if the Model Law were adopted, it was more likely that future cross-border insolvencies in Singapore might be more likely to attract support and cooperation from other countries.[169] The two reasons influenced the ILRC's considerations on the issue of reciprocity as well. It acknowledged that the advantages that the Model Law bestowed on outward-bound requests for recognition and assistance would only materialize if other countries also enacted the Model Law.[170] However, that did not deter it from suggesting that there should be no reciprocity requirement, since Singapore should follow the international trend of not imposing a reciprocity requirement, and should seek to 'play a leadership role in the international insolvency community and set an example for other countries for cooperation.'[171]

In the end, the reciprocity requirement was a non-issue. The government accepted the recommendation to adopt the Model Law without a reciprocity requirement readily and there was no opposition to the government's decision in the public consultation exercise on the ILRC Report, which took place well before the appointment of the SICDR. This may be inferred from the fact that there was no mention of the reciprocity requirement in the summary of feedback on the ILRC Report and the

[164] ibid, s A4(5).
[165] ILRC Report, p 235.
[166] ILRC Report, p 234 (citing the US National Bankruptcy Review Commission Report 1997 (Chapter 2, Transnational Insolvency) at p 361.
[167] ILRC Report, p 234.
[168] ILRC Report, p 234.
[169] ILRC Report, p 234.
[170] ILRC Report, p 236.
[171] ILRC Report, p 237.

Ministry's response,[172] where the Ministry's approach was not to 'reflect the recommendations for which no feedback was received and where the Ministry of Law was in agreement.'[173]

There was therefore a high degree of consensus that Singapore should adopt the Model Law, both from the desire to lead by example in the region and from enlightened self-interest. When subsequently the SICDR examined cross-border insolvency law, as it was bound to do so from the angle of the mission it was entrusted, it focused on the specific issue of outward-bound requests for recognition, enforcement and assistance. This was anchored on its assessment that there was increasing need for restructuring services in the region and Singapore was ideally placed to meet the demand for such services,[174] since Singapore 'is already a major financial, legal and business hub.'[175]

Working on the premise that the Model Law would be enacted, the SICDR pointed out that while Singapore schemes have been recognized under Model Law provisions enacted in foreign jurisdictions,[176] relying on the Model Law to help enforce Singapore schemes globally and thus to achieve its aspiration of being a regional restructuring hub has its limitations. The main problem here was that many jurisdictions in the region had not adopted the Model Law[177] or anything equivalent that recognized foreign insolvencies or restructurings such that a restructuring that was approved by the Singapore courts might not be recognized and enforced in those jurisdictions.[178] Consequently, in addition to supporting the ILRC's recommendation that Singapore should adopt the Model Law, the SICDR proposed additional innovative measures to help develop Singapore into an international center for debt restructuring. It recommended that Singapore should support international efforts to increase the adoption of the Model Law, that the Singapore government should explore entering into bilateral or multilateral agreements with countries for the recognition and enforcement of restructuring proceedings, and that Singapore courts should continue with its efforts to explore avenues for improved communication and co-operation among foreign courts.[179]

IMPLEMENTATION OF THE RECOMMENDATIONS ON CROSS-BORDER INSOLVENCY

The government and judiciary have achieved mixed results in their efforts to implement the recommendations of the ILRC and the SICDR. The Model Law was enacted, together with the hybrid scheme, in the Amendment Act of 2017, and is now to be found in the Third Sch of IRDA. We will assess the case law on the Third Sch shortly. As there was political will and general consensus to enact the Model Law, this was achieved smoothly. But implementation of most of the other recommendations

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[172] Ministry of Law, 'Annex A: Summary of feedback on the ILRC report and MinLaw's response', 7 Oct 2013 https://www.mlaw.gov.sg/files/news/public-consultations/2013/10/MinLaw%20Response%20to%20Feedback%20on%20ILRC%20Report.pdf accessed 24 Jan 2021.

[173] Ministry of Law, 'Response to feedback received from Public Consultation of the report of the Insolvency Law Review Committee', 7 Oct 2013 https://www.mlaw.gov.sg/news/public-consultations/response-to-feedback-from-public-consultation-on-ilrc-report0/ accessed 24 Jan 2021, para 2.

[174] SICDR Report, paras 2.1 to 2.11.

[175] SICDR Report, Introduction, p 6, para 3.

[176] SICDR Report, para 3.27, referring to the scheme of arrangement in *Re Blue Ocean Resources Pte Ltd* which was recognized under Chapter 15 of the US Bankruptcy Code.

[177] Within ASEAN, Philippines and Myanmar adopted the Model Law in 2010 and 2020 respectively.

[178] SICDR Report, para 3.28.

[179] SICDR Report, paras 3.28- 3.30.

require cooperation or even consent from other countries, and Singapore faced considerable difficulties here. Singapore has not entered into bilateral or multilateral agreements with countries, whether in the region or beyond, for the recognition and enforcement of restructuring proceedings. Focusing only on ASEAN, this is not surprising. Singapore has provisions for reciprocal enforcement of judgments from other jurisdictions, but these are limited to specified courts in the Commonwealth[180] and the former UK colony of Hong Kong SAR.[181] If there has been no reciprocal arrangement on enforcement of commercial judgments, not being judgments in insolvency proceedings, between Singapore courts and the courts of other ASEAN countries, it is hard to see how the parties would enter into such arrangements for insolvency-related judgments, since the latter usually raise more complex legal issues and are politically much more sensitive than the former.

Some success was however achieved by the judiciary through less formal and flexible arrangements to facilitate cooperation in insolvency matters. The judiciary initiated and played the leading role to establish the Judicial Insolvency Network ('JIN'), a network of leading insolvency *judges* from around the world which aims to encourage communication and cooperation amongst national courts and the exchange of experience and ideas between insolvency judges.[182] The JIN has developed guidelines (JIN Guidelines) for court-to-court communication and cooperation, which will guide the preparation of protocols used in cross-border insolvency cases.[183] The Supreme Court of Singapore adopted the JIN Guidelines on 1 February 2017.[184] Further, on 19 June 2020, it adopted the Modalities of Court-to-Court Communications ('Modalities'), which prescribe the mechanics for initiating, receiving and engaging in such communication.[185] While such measures unfortunately do not generally attract much academic attention,[186] their importance in supplying the sorely needed details to operationalize the broad principles on cooperation and communication in the Model Law on the ground cannot be underestimated. One immediate benefit would be to help reduce costs and improve efficiency in cross-border insolvency cases.

In addition to contributing to multi-lateral arrangements, the judiciary has also been exploring bilateral initiatives. The Supreme Court has signed memoranda of understanding with the US Bankruptcy Court for the Southern District of New York,[187] and the US Bankruptcy Court for the District of Delaware[188] on

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[180] Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, Rev Ed 1985) and the subsidiary legislation.
[181] Reciprocal Enforcement of Foreign Judgments Act (Cap
[182] Judicial Insolvency Network http://jin-global.org/ accessed 24 Jan 2021.
[183] JIN Guidelines http://jin-global.org/jin-guidelines.html accessed 24 Jan 2021. For an excellent analysis of the JIN Guidelines, see Rebecca Lee and Eric C Ip, 'Judicial Diplomacy in the Asia-Pacific: Theory and evidence from the Singapore-Initiated Transnational Judicial Insolvency Network' *Journal of Corporate Law Studies* 20 (2020) 389-420.
[184] Registrar's Circular No 1 of 2017, 1 Feb 2017 (RC 1/2017 - Issuance of Guidelines for Communication and Coorporation Between Courts in Cross-Border Insolvency Matters) https://www.supremecourt.gov.sg/rules/legislation-and-directions/registrar's-circulars accessed 24 Jan 2021.
[185] Registrar's Circulars No 7 of 2020, 19 Jun 2020 (RC 07/2020 – Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters and Modalities of Court-to-Court Communication) https://www.supremecourt.gov.sg/rules/legislation-and-directions/registrar's-circulars accessed 24 Jan 2021.
[186] A notable exception is the analysis in Rebecca Lee and Eric C Ip, 'Judicial Diplomacy in the Asia-Pacific: Theory and evidence from the Singapore-Initiated Transnational Judicial Insolvency Network' *supra* note 183.
[187] Supreme Court Media Release: Towards Greater Excellence in Cross-Border Insolvency, 28 Sep 2018 https://www.supremecourt.gov.sg/news/media-releases/towards-greater-excellence-in-cross-border-insolvency accessed 24 Jan 2021.
[188] Id.

24 Sep 2018, and with the Seoul Bankruptcy Court in May 2018.[189] These memoranda aim to improve the efficiency and effectiveness of transnational insolvency proceedings by encouraging cooperation between the signing courts. They further the separate adoption of the JIN Guidelines by the three courts through demonstrating the high level of mutual trust and commitment to deeper cooperation between the courts. Next, cross-border insolvency was one of the topics discussed in the Third Singapore-China Legal and Judicial Roundtable.[190] The Singapore-China Legal and Judicial Roundtable is a key platform for the exchange of ideas between the two countries which serves, inter alia, to promote legal and judicial cooperation between both countries.

The judiciary has also been active in capacity building and the promotion of harmonization of laws and law reforms for the region. The Singapore Academy of Law, which is a statutory body led by the judiciary, established the Asian Business Law Institute – an institute based in Singapore that initiates, conducts and facilitates research with a view to providing practical guidance in the field of Asian legal development and promoting the convergence of Asian business laws.[191] It embarked on an ambitious project with the International Insolvency Institute to publish a set of Asian Principles of Business Restructuring which seeks to eliminate the inefficiencies arising from the patchwork of laws with different approaches and philosophies.[192] The project consists of two phases. The first phase was a mapping exercise of the business reorganization regimes in ASEAN, Australia, China, Hong Kong, India, Japan and South Korea. This phase has already been completed and a compendium of jurisdiction reports for each of the sixteen jurisdictions, *Corporate Restructuring and Insolvency in Asia 2020*,[193] has been published. In the second phase, which is ongoing, the jurisdiction reports will be examined to determine the areas of similarity and make recommendations for ways in which the regimes in each jurisdiction could work more effectively with one another.

The results of the developments over the last few years showed the challenges facing the judiciary in its efforts to promote cooperation in cross-border insolvency and develop Singapore into an international center for debt restructuring. The greatest success was in the multi-lateral arrangement of JIN, but unfortunately regional countries were almost totally absent from it. Other than judges from the Supreme Court of Singapore, none of the judges of ASEAN countries' courts are members of JIN, and even within Asia, only the judges from Seoul Bankruptcy Court, High Court of Hong Kong SAR, Tokyo District Court and Supreme Court of Japan participated, but as observers, not members. Bilateral efforts, as in the Singapore-China Legal and Judicial Roundtable, has not borne fruit yet. The judiciary thus has to find alternatives. It was astute to turn to improving understanding and cooperation in insolvency within ASEAN and Asia through the Asian Principles of Business Restructuring project. It is an indirect strategy where the outcome is uncertain and it may take a long time to bear fruit, if at all. But it will at least help to improve mutual understanding in regional countries of their respective insolvency laws, and with the benefit of soft persuasion rather than a treaty or agreement which may wrongly be

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[189] Id.

[190] Supreme Court Media Release: 3rd Singapore-China Legal and Judicial Roundtable, 28 August 2019 https://www.supremecourt.gov.sg/news/media-releases/year/2019/ accessed 24 Jan 2021.

[191] https://abli.asia/Introduction accessed 28 Jan 2021.

[192] https://abli.asia/Projects/Asian-Principles-of-Business-Restructuring accessed 28 Jan 2021.

[193] Asian Business Law Institute (ABLI) and International Insolvency Institute, 2020. This is part of ABLI's *Legal Convergence Series (/Publications)*.

associated with 'hard sell', this may lead decision-makers in the region to choose voluntarily to use the restructuring services that Singapore offers.

CASE LAW ON THIRD SCH

The Third Sch faces different challenges from the hybrid scheme. It did not involve creating a new insolvency procedure or the need to harmonize two very different streams of jurisprudence. The emergent case law on the Third Sch shows the substantial influence of Chapter 15 and provides some early indications of how the judiciary will develop it, as part of Singapore's cross-border insolvency law. They show that the courts will take into account international case law on the Model Law, in particular case law from US, UK and Australia, the EU Insolvency Regulation where the relevant provision is similar to that in the Third Sch under consideration, and that the judiciary is not averse to adopting from different jurisdictions on different points of law. Collectively they show a commitment to modified universalism, pragmatism and innovation.

Both *Re Zetta Jet Pte Ltd (No 2)*[194] (*Zetta*) and *Re Rooftop Group International Pte Ltd* [195] (*Rooftop*) were concerned with determining the COMI of the relevant companies. In *Zetta*, after comparing the different approaches of US law and EU law to the nature of the presumption on COMI, the court preferred to follow US law. The court held that the presumption on COMI is not a legal presumption which must be rebutted on a balance of probabilities; rather it is only a starting point subject to displacement. This is in contrast to EU law which gives more weight to the presumption. Next, the court considered what should be the rule on the relevant time for determining COMI. After an extensive consideration of the case law from Australia, UK and the US on this issue, the court decided to follow the US approach which is that the relevant date is the date of the application for recognition. Two of the reasons given were: postponing the date from the date when the foreign proceedings commenced or were opened to the date of application for recognition would allow the applicant (debtor company) to shift its COMI to create a jurisdictional nexus with that forum, and while evasion of criminal or similar laws would not be allowed, the debtor should be allowed to forum shop for commercial reasons. This is similar to the English approach which draws a distinction between good and bad forum shopping. But while the court followed US law on the aforesaid two issues, it said that the 'nerve center' test preferred by some US courts on determining the location of COMI is too narrow. On the approach to be taken to determine COMI, the factors to take into account and the weight to be given to the factors, the court referred to the 2013 Guide on the principal factors to determine the location of COMI, viz, the location where the central administration of the debtor takes place which is readily ascertainable by creditors,[196] which seems similar to the 'head office functions' test argued by some to be the test adopted in EU law and UK law,[197] and the 2013 Guide on additional COMI factors.[198] What appears from this extensive discussion of the law is that the COMI enquiry under Singapore law is an intense enquiry of all the relevant facts on the ground. This is probably truer to the spirit of universalism but in making the enquiry so open-ended it may increase the uncertainty of COMI determination. Finally, it should be noted that the court emphasized that the focus of the COMI determination is on determining the center of gravity of the

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194 [2019] SGHC 53; [2019] 4 SLR 1343.
195 [2019] SGHC 280; [2020] 4 SLR 680.
196 2013 Guide, para 145.
197 Gabriel Moss, '"Head Office Functions" Test Triumphs in ECJ : Interedil' (2011) 24 Insolvency Intelligence 126.
198 2013 Guide, para 147.

objectively ascertainable factors. It is material, in determining which factors to take into consideration in a COMI determination, to consider how likely it is that a creditor would weigh a particular factor in mind when deciding whether to afford credit to the debtor company. This emphasis on objectively ascertainable facts follows EU law[199] and UK law[200] which emphasize the need for objective criteria that would allow for ascertainment of the COMI by third parties, especially creditors and potential creditors.

ABOLISHING RING-FENCING OF ASSETS TO PAY DEBTS INCURRED IN SINGAPORE

There were three other important reforms to cross-border insolvency in addition to the enactment of the Model Law. Previously, Singapore assets of a registered foreign company were ring-fenced to pay debts incurred in Singapore before they may be remitted to the foreign liquidator.[201] The ILRC considered that this was inconsistent with the spirit of the Model Law, which in any event offered adequate protection of the interests of local creditors,[202] and so recommended that it be abolished, subject to exceptions for regulated industries where the interests of local creditors had to be protected.[203]

SCHEME JURISDICTION FOR FOREIGN COMPANIES

Secondly, the SICDR recommended that 'further guidance should be provided on the factors which the courts will take into account to determine if they have jurisdiction over foreign corporate debtors.'[204] The scheme jurisdiction is not limited to companies incorporated in Singapore.[205] It extends to include a company incorporated outside Singapore, ie a foreign company,[206] but the court will decline to assume jurisdiction unless there is some connection between the company and Singapore. It seems that the SICDR recommendation was made to overcome a local decision[207] which has been thought to set the bar too high for assuming jurisdiction. The court in that decision followed English law and held that a company must establish that it has a clear connection or nexus to Singapore before the courts would be willing to assume jurisdiction for its restructuring. The court then held that, a Korean shipping company which has no connection whatsoever with Singapore except that its vessels would dock in Singaporean ports from time to time was not sufficiently connected to Singapore to promulgate a scheme in Singapore. In so far as the principle the court espoused is concerned, it is not clear that the bar was set too high and indeed English courts have assumed jurisdiction to sanction many schemes where the companies' nexus to the UK was relatively modest, for example, on the basis that the debenture was governed by English law.[208] In any event, the factors on which the courts may rely on to support a

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[199] *Interedil Srl (In Liquidation) v Fallimento Interedil Srl*, Case C-396/09 [2011] ECR 1-9915; [2012] BCC 851.
[200] *Re Stanford International Bank* [2010] EWCA Civ 137; [2011] Ch 33.
[201] Under the repealed Companies Act (Cap 50, 2006 Rev Ed) s 377(3)(c).
[202] To clarify, the criterion for receiving payment out of ring-fenced assets was not based on the nationality of the creditor, but the location where the debt was incurred. There is of course overlap between the two, and it is probably usually the case that for local creditors the debts would be incurred in Singapore and thus satisfy the criterion.
[203] ILRC Report, p 242-243.
[204] SICDR Report, para 3.5.
[205] Companies Act (Cap 50, 2006 Rev Ed), s 210(11); IRDA, s 63(3).
[206] Companies Act (Cap 50, 2006 Rev Ed), s 4(1) (definition of corporation and foreign company); IRDA, s 2(1).
[207] *Re TPC Korea Co Ltd* [2010] SGHC 11; [2010] 2 SLR 617.
[208] *Re Vietnam Shipbuilding Industry Group* [2013] EWHC 2476; [2014] 1 BCLC 400; *Re Apcoa Parking (UK) Ltd* [2014] EWHC 997 (Ch); [2014] 2 BCLC 285; *Re DTEK Finance BV* [2015] EWHC 1164 (Ch).

determination of substantial connection to Singapore as proposed by the SICDR, which considered UK and US law,[209] and which became law[210] were entirely reasonable and not different from English law, except for one recommended factor. The SICDR noted the commentary that US barriers to entry are low and proposed that the opening of a bank account in Singapore and transferring funds into it be a factor as well,[211] but this proposal was not adopted in the legislation. The factors recommended and adopted include: Singapore is the center of main interests (COMI) of the company, the company is a foreign company registered under the Companies Act, Singapore law is the law governing a loan or other transaction or disputes arising from the loan or transaction, or the company has submitted to the jurisdiction of Singapore courts for the resolution of disputes relating to a loan or other transaction.

In deciding whether a substantial connection has been established, the courts face a delicate balancing task. Too liberal an approach may lead to ill-feelings and undermine the likelihood that orders of the courts will be recognized and enforced in foreign jurisdictions. Such concerns may even be greater in regional countries sensitive to any purported 'loss of face' or 'infringement of sovereignty', which is not helped by the fact that Singapore is the smallest country by size in ASEAN. On the other hand, too strict an approach will mean that foreign companies will not be able to promulgate a scheme in Singapore, and this will defeat Singapore's aspiration to be an international center for debt restructuring.

The issue arose in *Re PT MNC Investama TBK* (hereinafter *Investama*).[212] The Indonesia company wanted to propose a scheme in Singapore and for this purpose applied to court for the hybrid scheme moratorium. In this judgement the court dealt only with the question of the legal standing of the company to apply for the moratorium, which is exactly the same question as the scope of the scheme jurisdiction. On the facts the company did not satisfy any of the factors listed in the statute as constituting substantial connection. But based on the fact that the company's New York law-governed notes were listed on the Singapore Exchange, the court held that was sufficient because having the 'securities traded on a Singapore exchange is akin to substantial business activity that is not merely transient'[213] and being 'subject to Singapore regulation or laws in the listing of its securities is also a strong indicator of a company's substantial connection to Singapore.'[214] On that basis, the court did not examine other factors raised by the company, viz, that its debt service account was situated in Singapore, that the notes were arranged by Singapore-based banks, and that the account charge over the debt service account is governed by Singapore law. Nevertheless, the court went on to refer to *In re Berau Capital Resources Pte Ltd* (hereinafter *Berau*),[215] where it was held that as the company had retained New York lawyers, it could apply for relief under Chapter 15. The court thought it was an 'interesting question'[216] whether in the same circumstance a Singapore court would similarly hold that to constitute substantial connection.

Investama may have extended the law on assuming jurisdiction. First, the bonds listed by the company were wholesale bonds sold to high-net worth individuals in Singapore, 'thereby bypassing prospectus

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[209] SICDR Report, para 3.6
[210] IRDA, s 246(3).
[211] SICDR Report, para 3.6(b).
[212] [2020] SGHC 149.
[213] ibid para 13.
[214] Ibid, para 13.
[215] 540 BR 80 (Bankr SDNY 2015).
[216] *Re PT MNC Investama TBK* [2020] SGHC 149, para 18.

requirements in the Securities and Futures Act as being offers to accredited investors.'[217] The listing process is very quick, and 'levels of disclosure, both initially and on a continuing basis, are much lower than for equity listings and retail bonds.'[218] It is thus not clear whether listing a wholesale bond may be regarded as being akin to the other listed factors. Secondly, *Berau* was concerned with an application under Chapter 15, not an attempt to petition for Chapter 11.[219] Nevertheless, formal barriers of entry to bankruptcy proceedings in US are low; a small amount of cash in a US bank account has been held to qualify a foreign entity as debtor under s 109 of the Bankruptcy Code.[220] As pointed out by Walters, the approach of English law (and Singapore law) to jurisdiction is different from US law.[221]

Thus, while the formal procedures vary across the different insolvency regimes, the UK applies a screen at the outset to determine whether cases should be commenced whereas the US allows cases to start and then, if the appropriate motion is filed, determines whether they should continue.

As the SICDR's suggestion to include opening a bank account and transferring money into it did not appear in the list of factors constituting substantial connection, it was a signal that the government was not ready to adopt the US approach. The court's contemplation that a retainer *may* constitute substantial connection, if it becomes law, will move Singapore's law decisively in the direction of US law. Practical realities may however in the end restrict this move. One issue that UK courts will address at the sanction hearing for cross-border schemes is the effectiveness of the schemes in jurisdictions where the company has assets against which disaffected creditors may seek to enforce their pre-scheme claims.[222] The reason is that the UK courts will not act in vain. Singapore courts have yet to address the issue. In practice, creditors that are subject to the *in personam* jurisdiction of Singapore courts will not seek to enforce their pre-scheme claims as that would amount to contempt of court. But with the fragmentation of credit there would be creditors with no presence in Singapore and so are not subject to the court's jurisdiction. How the courts decide the related questions of the scheme's international jurisdiction and international effectiveness will be litmus tests on the law's future path of development.

EXTRA-TERRITORIAL REACH OF MORATORIUM

The third change to the cross-border insolvency law was that the court may order the scheme moratorium to 'apply to any act of any person in Singapore or within the jurisdiction of the Court, whether the act takes place in Singapore or elsewhere.'[223] This has already happened, eg, in the scheme promulgated by Hoe Leong Corporation Ltd.[224] This is part of the overall assessment of Singapore's

[217] Hans Tjio, 'Restructuring the Bond Market in Singapore' 14 Capital Markets Law Journal (2019) 16, 19.
[218] id.
[219] The distinction between the two was explained in Daniel M Glosband and Jay Lawrence Westbrook, 'Chapter 15 Recognition in the United States: Is a Debtor Presence Required' (2015) 24 Int'l Insolvency Rev 28.
[220] See for eg, *Re Theresa McTague* (1996) 198 BR 428 ($194 in bank account); *Re Iglesias* (1998) BR 721 ($522 in bank account).
[221] Adrian Walters, 'United States' Bankruptcy Jurisdiction over Foreign Entities: Exorbitant or Congruent?' 17 (2017) Journal of Corporate Law Studies 367, 385.
[222] See eg, *Re Noble Group Ltd (No 2)* [2018] EWHC 3092 (Ch); [2019] 2 BCLC 548; *Re Global Garden Products Italy SpA* [2016] EWHC 1884 (Ch); [2017] BCC 637.
[223] IRDA, s 64(5)(b).
[224] There was no written judgment, but this appeared in the company's announcement published on the Singapore Exchange which contained the relevant provisions of the court order granting the moratorium. See https://links.sgx.com/1.0.0/corporate-

jurisdictional posture in out-bound and in-bound cases. Singapore is becoming more like the US[225] as has been the case with areas ancillary to bankruptcy.[226] This may help to achieve Singapore's objective of attracting regional restructuring work. Much will depend on how effective the 'extra-territorial' court orders will be, and how regional countries will react to those orders.

CONCLUSION

Forum shopping is a reality today. As the famous English judge, Lord Denning, once said, "(a)s a moth is drawn to the light, so is a litigant drawn to the United States"[227]. He also said, separately, that "but if the forum is England, it is a good place to shop in: both for the quality of the goods and the speed of service"[228]. Singapore is not in a position to be so bold, as it recognizes that even as a "market-dominant small jurisdiction"[229], any judgment it renders will have to be recognized or enforced elsewhere. As such, the service it provides has to be one that best preserves going concern values for the overseas company, and also aligns with societal values in the foreign jurisdiction. To continue to build its brand, Singapore "will need to become even more active in its participation in multilateral frameworks" given its "orientation towards international recognition and approbation".[230] The adoption of the Model Law and introduction of the hybrid scheme attests to that. But it will need continued adaptive responses on the part of the state, judiciary and legal profession to meet the challenges of being an international debt restructuring center.

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announcements/TJ4TE7L7G4CGXAUA/389ae62507ef24bd413ea8a1ee32f11dd89ef0ecb1b13bcae3f0c32b1552c213 accessed 28 Jan 2021. See also Noel McCoy, 'Will Singapore Become an International Centre of Debt Restructuring? A Comparative Analysis of Singapore's Bold Insolvency Reforms' INSOL International Special Report, Nov 2018, [4.3]

[225] For an excellent discussion of the differences between English and US courts on assuming jurisdiction, see Adrian Walters, 'United States' Bankruptcy Jurisdiction over Foreign Entities: Exorbitant or Congruent?' *supra* note 221.

[226] See Hans Tjio, ""Merrill and Smith's intermediate rights lying between contract and property: are Singapore trusts and secured transactions drifting away from English towards American law?" *supra* note 48.

[227] Smith Kline & French Lab. Ltd. v. Bloch [1983] 1 WLR 730, 733.

[228] The Atlantic Star [1973] Q.B. 364, 381G, 382C.

[229] Bruner, *supra* note **Error! Bookmark not defined.**

[230] Buck Song Koh, *Brand Singapore* (Marshall Cavendish, 3rd ed, 2021), 242-5.