



# **INSOL International**

**Will Singapore become an  
international centre of debt  
restructuring?  
A comparative analysis of  
Singapore's bold insolvency  
reforms**

**November 2018**

# Will Singapore become an international centre of debt restructuring? A comparative analysis of Singapore’s bold insolvency reforms

<b>Contents</b>	i
<b>Acknowledgement</b>	ii
<b>1. Introduction</b>	1
<b>2. Background</b>	2
<b>3. Overview of Singapore’s legislative reforms</b>	3
<b>4. “Super-charging” schemes of arrangement</b>	4
4.1 Tools modelled closely on provisions of Chapter 11	4
4.2 Moratorium for corporate groups	9
4.3 Application of the new provisions to date	9
<b>5. Facilitating multi-jurisdictional restructurings for foreign debtors</b>	10
5.1 Expanding jurisdiction for foreign debtors to take advantage of the scheme of arrangement provisions through a “substantial connection test”	10
5.2 Re-domiciliation rules to enable foreign companies to register within Singapore	11
<b>6. Recognition and facilitation of inbound cross-border restructurings and insolvencies</b>	12
6.1 Adoption of the UNCITRAL Model Law on Cross-Border Insolvency	12
6.2 Abolition of the “ring-fencing” rule	13
<b>7. Building a supporting “ecosystem” to embed the legislative reforms in practice</b>	13
<b>8. Recognition of Singapore restructurings in other jurisdictions</b>	14
8.1 Extra territorial <i>in personam</i> jurisdiction	15
8.2 United States	15
8.3 Model Law jurisdictions	15
8.4 United Kingdom	16
8.5 Hong Kong and offshore (common law) jurisdictions	16
8.6 ASEAN	17
8.7 People’s Republic of China (PRC)	18
<b>9. Will Singapore become an international centre of debt restructuring?</b>	18
<b>10. Conclusion</b>	21

INSOL International  
6-7 Queen Street, London, EC4N 1SP  
Tel: +44 (0) 20 7248 3333 Fax: +44 (0) 20 7248 3384

Copyright © No part of this document may be reproduced or transmitted in any form or by any means without the prior permission of INSOL International. The publishers and authors accept no responsibility for any loss occasioned to any person acting or refraining from acting as a result of any view expressed herein.

Copyright © INSOL INTERNATIONAL 2018. All Rights Reserved. Registered in England and Wales, No. 0307353. INSOL, INSOL INTERNATIONAL, INSOL Globe are trademarks of INSOL INTERNATIONAL.

## Acknowledgement

INSOL International is very pleased to publish a Special Report titled “Will Singapore become an international centre of debt restructuring? A comparative analysis of Singapore’s bold insolvency reforms” by Noel McCoy, Fellow, INSOL International and Norton Rose Fulbright, Australia.

For the past couple of years much has been written and said about Singapore’s ambitions of becoming an international centre of debt restructuring, aiming as it does to achieve the same status as London and New York in this regard. To this end, Singapore has made significant reforms to its insolvency and restructuring legislation in recent times. These reforms have significantly enhanced the power of restructuring tools available in Singapore, through what has been described as a unique hybrid regime combining the flexibility of the English regime with the powerful arsenal of US Chapter 11 provisions. The amendments have also introduced powerful mechanisms to enable foreign and multinational corporations and corporate groups to take advantage of these tools and undertake cross-border restructurings in Singapore.

To complement these legislative changes, Singapore is taking active steps to build an “ecosystem” which cultivates their spirit and intent in practice and simultaneously builds international awareness together with mechanisms for cross-border recognition and co-operation with Singapore’s enhanced restructuring regime.

This paper analyses Singapore’s legislative reforms comparative to England and Wales and the US. It also analyses the potential impact of these legislative changes, with particular emphasis on enforceability and recognition in the US, England and Wales and the Asia-Pacific region. It is in this context that the paper also offers some views on the likelihood of Singaporean success in becoming an international centre of debt restructuring.

It is worth mentioning that this excellent Special Report had its genesis as a short paper submitted as part of the INSOL International Global Insolvency Practice Course (GIPC), which Noel McCoy completed with the class of 2017/18. This Special Report is an expanded version of Noel’s short paper and was submitted for publication upon the recommendation of his examiners.

INSOL International sincerely thanks Noel McCoy, *Fellow INSOL International*, of Norton Rose Fulbright for this excellent Special Report, which we are sure members will find most interesting leading up to the Singapore annual regional conference in April 2019.

November 2018



# Will Singapore become an international centre of debt restructuring? A comparative analysis of Singapore's bold insolvency reforms\*

By  
Noel McCoy\*\* of Norton Rose Fulbright Australia, *Fellow, INSOL International*

## 1. Introduction

Singapore has set its sights on becoming an “International Centre for Debt Restructuring”, approaching the status of London and New York.<sup>1</sup>

Key to achieving that goal, in 2017 Singapore enacted the Companies (Amendment) Act 2017 (Singapore) (referred to hereafter as the “Amending Act”) which effected major legislative changes to restructuring provisions of the Singapore Companies Act (Cap 50) 2006 (referred to hereafter as the “Companies Act”).<sup>2</sup>

Those reforms have significantly enhanced the power of restructuring tools available in Singapore, through what has been described as a “unique hybrid regime which combines the flexibility of the English regime with the powerful arsenal of US Chapter 11 provisions.”<sup>3</sup> The amendments have also introduced powerful mechanisms to enable foreign and multinational corporations and corporate groups to take advantage of these tools and undertake cross-border restructurings in Singapore.

To complement those legislative changes, Singapore is taking active steps to build an “ecosystem” which cultivates their spirit and intent in practice and simultaneously builds international awareness together with mechanisms for cross-border recognition and co-operation with Singapore’s enhanced restructuring regime.

The first year of operation has seen significant take-up of the new mechanisms available. Significant restructurings that are making use of, or have made use of, the new provisions, include Nam Cheong Limited, EMAS Offshore Limited, Hoe Leong Corporation Ltd, Hyflux Limited and Pacific Radiance Limited.

This paper will analyse Singapore’s legislative reforms comparative to England and Wales and the US. It will also analyse the potential impact of these legislative changes, with particular focus on enforceability and recognition in the US, England and Wales and the Asia-Pacific region. In that context, the paper will also offer some views on the likelihood of Singaporean success in becoming an international centre of debt restructuring.

## 2. Background

Singapore’s constitution is based on the Westminster model of constitutional government with the sovereign power of the state distributed among the legislature, executive and judiciary.<sup>4</sup> It adopted and codified “most, if not all, of the laws, customs, conventions and practices of the British constitutional and parliamentary system.”<sup>5</sup>

\* This paper is an expanded version of a short paper submitted by the author on the INSOL International Global Insolvency Practice Course (class of 2017/18).

\*\* Noel McCoy is a partner at Norton Rose Fulbright, Australia. The views expressed herein are the author’s own views and not necessarily the views of INSOL International.

<sup>1</sup> Indranee Rajah S.C. “Enhancing Singapore as an International Debt Restructuring Centre For Asia and Beyond”, Office of the Senior Minister of State for Law and Finance, Singapore, 20 June 2017.

<sup>2</sup> The Amending Act has been followed by the passage of the Insolvency, Restructuring and Dissolution Act 2018 (which passed parliament on 1 October 2018 but at the time of publication of this Special Report, has not yet received Presidential assent). Among other matters discussed in this Special Report, the restructuring and insolvency provisions of the Companies Act (including those enacted by the Amending Act) will for the most part be repealed from the Companies Act and will instead be enacted in the Insolvency, Restructuring and Dissolution Act 2018 (which will be a stand-alone and consolidated enactment for personal and corporate restructuring and insolvency) with some modifications. This Special Report will refer to the provisions of the Companies Act but also cross-reference the provisions of the Insolvency, Restructuring and Dissolution Act 2018 in footnotes.

<sup>3</sup> *Supra*, note 1.

<sup>4</sup> *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGHC 163 at [11].

<sup>5</sup> *Jeyaretnam Joshua Benjamin v Attorney-General* [1987] SLR(R) 472, F A Chua J observed at [9].



It is no surprise, therefore, that “of the former English colonies in Asia, Singapore’s corporate insolvency law is one of the closest to the English.”<sup>6</sup> In particular, the provisions of the Companies Act relating to liquidations and schemes of arrangement have a high degree of similarity<sup>7</sup> and judicial management provisions are modelled on the administration provisions found in the Insolvency Act 1985 (UK).<sup>8</sup>

Nevertheless, prior to the Amending Act reforms, divergences had already grown between the English and Singapore regimes for a variety of reasons.

On the English side, participation in the European Common Market via the European Communities Act 1972 (UK) “opened the door to a great influx of European Community treaties, directives, regulation and decisions which have their own impact upon the content and methodology of the United Kingdom.”<sup>9</sup>

On the Singaporean side, long-standing provisions relating to schemes of arrangement differ to England. First, section 210(10) of the Companies Act took on an Antipodean flavour,<sup>10</sup> empowering the Court to impose a moratorium to stay “any action or proceeding against the company.” The provision has been interpreted liberally, allowing for a moratorium application to be made absent an application for convening a meeting of creditors for a scheme, so long as it could be shown that the application was bona fide.<sup>11</sup> Secondly, section 210(4) gives the Court a discretion to amend or impose conditions on any scheme of arrangement at the sanction hearing. Neither of these provisions – a moratorium or the ability to place conditions or amend a scheme – can be found in the Companies Act 2006 (UK) or its predecessor legislation in respect of schemes of arrangement.<sup>12</sup>

In fact, prior to the reforms enacted by the Amending Act, it was argued that the Singapore scheme of arrangement framework “emerged as a viable debtor-in possession regime for the purposes of insolvency related corporate reorganisations.”<sup>13</sup> This argument received support from the High Court of Singapore which held in *Pacific Andes Resources Development Ltd and other matters*<sup>14</sup> that “section 210 is a debtor-in-possession regime.”<sup>15</sup>

This characterisation has been attributed to the abovementioned differences in the English and Singaporean scheme of arrangement provisions as well as innovations of the Singapore Courts, for example, significant flexibility in the exercise of discretion in delineating separate classes of creditors “with an honest acknowledgement that schemes which promote the collective interests of creditors should not be unnecessarily hindered by technical differences between affected rights.”<sup>16</sup> Similarly, it has also been argued that:<sup>17</sup>

“...insolvency practitioners and insolvency lawyers, under the guidance and support of the courts, have been innovative in responding to market pressure to develop a procedure which was previously viewed as cumbersome and costly into a highly effective and efficient debt restructuring tool.”

<sup>6</sup> Meng Seng Wee “Whither the Scheme of Arrangement in Singapore: More Chapter 11, Less Scheme?”, *National University of Singapore (NUS) - Faculty of Law; National University of Singapore (NUS) - Centre for Law & Business*, 24 February 2017.

<sup>7</sup> *Ibid.*

<sup>8</sup> Paul Omar, “‘Super-Priority’ and the Singapore Scheme: The Attilan Case” (2018) 15(2) *International Corporate Rescue*, 100.

<sup>9</sup> Chief Justice Robert French AC, “Singapore – Where Common Law and Constitutions Meet”, (Anglo-Australasian Lawyers Society Breakfast Address, Sydney, 21 October 2013).

<sup>10</sup> Adopted from the Companies Act 1961 (Victoria, Australia), Meng Seng Wee, *supra* note 6.

<sup>11</sup> *Re Conchubar Aromatics Ltd and other matters* [2015] SGHC 322, in particular at [8] to [11].

<sup>12</sup> However, in *Bluecrest Mercantile NV v Vietnam Shipbuilding Industry Group* [2013] EWHC 1146 (Comm) the Court exercised powers under the Civil Procedure Rules to stay claims brought by dissentient creditors in circumstances where a scheme of arrangement was proposed.

<sup>13</sup> Tracey E Chan, “Schemes of Arrangement as a Corporate Rescue Mechanism: The Singapore Experience” 18(1) *International Insolvency Review* (2009), 41.

<sup>14</sup> [2016] SGHC 210.

<sup>15</sup> *Pacific Andes Resources Development Ltd and other matters* [2016] SGHC 210 at [61]; see also [24].

<sup>16</sup> *Ibid.*, [44].

<sup>17</sup> Meng Seng Wee, *supra* note 6.

In that context, in 2016, the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (referred to hereafter as “the Committee”) which was tasked with recommending initiatives and legal reforms that should be undertaken to enhance Singapore’s effectiveness as a centre for international debt restructuring,<sup>18</sup> observed that “Singapore is already a jurisdiction where significant regional work takes place.”<sup>19</sup>

Nevertheless, the Committee also reflected that its legislative framework for insolvency was “still largely focused on the liquidation process”<sup>20</sup> and inadequate for business rescue and rehabilitation.<sup>21</sup> Similarly, Omar, a leading cross-border insolvency academic, sums up Singapore’s pre-Amending Act regime this way:<sup>22</sup>

“The fate of restructuring initiatives on the island rested largely on the procedures available, which each had disadvantages, winding up rarely producing a sale as a going concern, with the scheme being complex to administer and only useful in the run up to insolvency for larger businesses. Even judicial management was rarely invoked and was not entirely favoured by creditors, who preferred receivership for the recovery opportunities it offered them. The cross-border framework was also weak and did not readily assist in coordination efforts between cases in Singapore and elsewhere.”

While addressing these apparent deficiencies in facilitating business rescue is its starting point, the Committee Report leaves little doubt that Singapore’s ambitions go well beyond and extend to building a significant industry by becoming an international competitor for major cross-border restructuring.

The Committee Report makes clear that Singapore intends to emulate New York and London which “have emerged as leading restructuring centres, where the bulk of co-ordination and restructuring work is conducted and thereafter implemented globally.”<sup>23</sup> It is intent on “attracting restructurings where the key stakeholders have little or no connection to their jurisdiction”<sup>24</sup> and make Singapore the “natural choice for business undergoing cross-border debt restructurings in the Asia Pacific region.”<sup>25</sup>

### 3. Overview of Singapore’s legislative reforms

The Amending Act was passed by the Singapore Parliament on 10 March 2017 and given Presidential assent on 29 March 2017.<sup>26</sup> The bulk of the provisions discussed in this paper relating to restructuring and insolvency commenced on 23 May 2017<sup>27</sup> and the new Part XA, re-domiciliation provisions commenced on 11 October 2017.<sup>28</sup>

The new legislative provisions of the Companies Act, soon to be incorporated in the Insolvency, Restructuring and Dissolution Act 2018 (referred to hereafter as the “IRD Act”), can be conceptually grouped under four (somewhat overlapping) categories:

1. “Super-charging”<sup>29</sup> schemes of arrangement with tools modelled on provisions of Chapter 11 of the US Bankruptcy Code:

<sup>18</sup> Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring, 20 April 2016 (referred to hereafter as “Committee Report”)

<sup>19</sup> *Ibid* [2.6]. See also [2.4] in which the Committee claims that within the Asia Pacific region “Singapore has co-ordinated significant regional restructuring cases.”

<sup>20</sup> *Ibid* [3.1].

<sup>21</sup> *Ibid*.

<sup>22</sup> Paul Omar, *supra* note 8.

<sup>23</sup> Committee Report, *supra* note 18 [3.1].

<sup>24</sup> *Ibid* [2.3]

<sup>25</sup> *Ibid* [2.5] to [2.10]. The five factors identified in the Committee’s report are discussed further in section 7 below.

<sup>26</sup> Singapore Government Gazette no. 17 of 2017 (31 March 2017).

<sup>27</sup> *Ibid*, ss 22 to 34, 40, 41, 43, 45, 49, 50, 53(3) and (6) and 54 of the Amending Act commenced on 23 May 2017.

<sup>28</sup> *Ibid*, s 42 of the Amending Act commenced on 11 October 2017.

<sup>29</sup> Paul Apáthy and Emmanuel Chua “Singapore’s new ‘super charged scheme of arrangement’”, (2017) *Butterworths Journal of International Banking and Financial Law* (May 2017) 282, 283.



- a) automatic 30-day moratorium where a company proposes or intends to propose a scheme of arrangement which moratorium restrains all manner of proceeding and enforcement, including secured creditor enforcement;
- b) power for the Court to order the moratorium to have *in personam* extraterritorial effect;
- c) rescue financing to be given “super priority” if necessary for the survival of a company as a going concern or to achieve a better than liquidation outcome;
- d) cross-class cram-downs with approval of 75% of all creditors across all classes and the Court otherwise being satisfied that the scheme of arrangement is fair and equitable in respect of each dissenting class; and
- e) “pre-pack” schemes of arrangement (sanctioning schemes of arrangement without having to apply for leave to call for a meeting of creditors).

Additionally, the moratorium available to a debtor seeking protection can also extend to subsidiaries or holding companies of the debtor seeking a moratorium if they are integral to the proposed restructuring.

2. Enhancing the effectiveness of the judicial management regime:

- a) extending the availability of judicial management to situations of pre-insolvency financial distress (when a company “is likely to become unable to pay its debts”);
- b) limiting the ability of secured creditors to object to the appointment of judicial management; and
- c) rescue financing to be given “super priority” in a like manner available in a schemes of arrangement context.

3. Facilitating multi-jurisdictional restructurings for foreign debtors:

- a) inclusion of a more detailed “substantial connection” test to expand and clarify the circumstances in which the Court might have jurisdiction over a foreign debtor; and
- b) re-domiciliation rules to enable foreign companies to register within Singapore;

4. Recognition and facilitation of inbound cross-border restructurings and insolvencies:

- a) adoption of the UNCITRAL Model Law on Cross Border Insolvency; and
- b) abolition of the “ring-fencing” rule.

The new substantive provisions resulting from the enactment of the IRD Act include restrictions on enforcement of certain contractual rights (*ipso facto* restrictions) while a Scheme of Arrangement or Judicial Management is afoot.<sup>30</sup>

#### 4. “Super-charging” schemes of arrangement

##### 4.1 Tools modelled closely on provisions of Chapter 11

The relevant provisions of the Amending Act introduce “a new set of provisions that apply to schemes which implement debt restructuring proposals. These provisions adapt parts of Chapter 11 of the United States Bankruptcy Code.”<sup>31</sup>

Below is a description of the new scheme of arrangement provisions as incorporated into the Companies Act by the enactment of the Amending Act. Those descriptions are set out side by side with the Chapter 11 provisions upon which they have been closely modelled, together with comments about their similarities and differences.

<sup>30</sup> Insolvency, Restructuring and Dissolution Act 2018, s 440.

<sup>31</sup> Singapore, *Parliamentary Reports*, 10 March 2017 Vol. 94, Companies Amendment Bill second reading speech.



New provision of the Companies Act	Chapter 11 “equivalent”
<p><b>Expanded and automatic moratorium for scheme of arrangement (section 211B)<sup>32</sup></b></p>	<p><b>Automatic stay (11 USC §362)</b></p>
<p>The Amending Act has supplemented the previously existing moratorium in section 210 with the addition of a new section 211B giving the Court power to grant a moratorium to a debtor that “makes, or undertakes to the Court to make as soon as practicable” an application to convene creditors meetings for a scheme of arrangement.</p> <p><b>Scope</b> The scope of the moratorium can be broad and can include, for any period as “the Court thinks fit”, orders restraining:</p> <ul style="list-style-type: none"> <li>(a) passing of a resolution for the winding up of the company;</li> <li>(b) appointment of a receiver or manager;</li> <li>(c) commencement or continuation of any proceedings;</li> <li>(d) levying of any execution, distress or other legal process against any property of the company;</li> <li>(e) enforcement of any security over any property of the company, or to repossess any goods held by the company under any chattels leasing agreement, hire-purchase agreement or retention of title agreement; or</li> <li>(f) enforcement of any right of re-entry or forfeiture under any lease.</li> </ul> <p><b>Stay relief</b> Stay relief is available to any creditor, receiver or manager or the company itself under section 211B(10).</p> <p><b>Automatic effect</b> Critically, while any such application is on foot, section 211B(8) provides that during the period from the date of making an application until the earlier of 30 days or the determination of the application, an automatic stay restraining any of the steps described in (a) to (f) above.</p> <p><b>Extra-territorial effect</b> Also, under section 211B(5) the Court is empowered to make any moratorium order in terms to “apply to any act of any person in Singapore or within the jurisdiction of the</p>	<p>The provisions of section 211B differ to the automatic stay under Chapter 11 in the following key respects:</p> <ul style="list-style-type: none"> <li>• the period of the Chapter 11 stay is until the court confirms a plan of reorganisation or otherwise lifts the stay upon request of a party seeking “stay relief”;</li> <li>• secured creditors are entitled to be “adequately protected” against declines in secured property values while a Chapter 11 case remains on foot. There is no corresponding provision in section 211B – however, it is easy to envisage that it might factor into the discretionary considerations under a section 211B(10) stay relief application;</li> <li>• the extraterritorial effect of the Chapter 11 stay is <i>in rem</i><sup>34</sup> as contrasted against the <i>in personam</i> approach of section 211B(5). Also, extraterritoriality is automatic under Chapter 11, whereas under section 211B(5) it is not.</li> </ul>

<sup>32</sup> Insolvency, Restructuring and Dissolution Act 2018, s 64.

<sup>34</sup> *In re Joseph Nakash*, 190 BR 763 (Bankr SDNY 1996) the Court held that because the stay applied to property of the debtor which, under s 541(a) is all property “wherever located”, Congress intended for the automatic stay to apply extraterritorially (at 768). The court held it has exclusive *in rem* jurisdiction worldwide (at 768).





<p>Court, whether the act takes place in Singapore or elsewhere”. The Committee took the view that <i>in personam</i> extraterritoriality was more in keeping the principles of international comity.<sup>33</sup></p>	
<p><b>Super priority for rescue financing (section 211E)<sup>35</sup></b></p>	<p><b>Obtaining credit (11 USC §364)</b></p>
<p>Rescue financing is defined in section 211E(9) as being finance which is either “necessary for the survival of a company [...] as a going concern” or “necessary to achieve a more advantageous realisation of the assets of a company [...] than on a winding up.”</p> <p>The Court is empowered under section 211E(1) to make, at its discretion, orders for “rescue financing” to be given priority according to the following four categories:</p> <ul style="list-style-type: none"> <li>(a) be treated as part of the costs and expenses in any subsequent winding up of the company;</li> <li>(b) have priority over preferential and unsecured debts in any subsequent winding up of the company;</li> <li>(c) be secured by a new security interest over unsecured property, or a subordinated security interest (where the property is already subject to security); or</li> <li>(d) be secured by a new security interest over already-secured property, of the same priority or a higher priority than the existing security interest.</li> </ul> <p>In each case, it will be necessary to show that the rescue finance would not have been obtained but for the granting of the relevant order of priority contemplated.</p> <p>In relation to (d), which empowers the Court to grant priority over secured creditors, it is also necessary for the existing security holders to have “adequate protection.”</p>	<p>The proximity in language of the rescue finance provisions in section 211E to section 364 of Chapter 11 was acknowledged in <i>Re Attilan Group Ltd</i>,<sup>36</sup> the first Singaporean decision on an application for rescue financing.</p> <p>The application in <i>Re Attilan</i> was in respect of categories (a) and (b) of section 211E of the Companies Act – that any such financing be treated as an expense in any winding up or priority over preferential and unsecured debts.</p> <p>Abdullah J acknowledged the key difference between section 364 of the US Bankruptcy Code and section 211E, namely that section 211E requires demonstration that the rescue finance would not have been obtained but for the granting of the relevant order of priority contemplated.<sup>37</sup></p> <p>Insofar as section 364 of the US Bankruptcy Code enables the Court to grant priority for rescue finance to be treated as administrative expenses in the debtor’s estate, “the provision does not lay down any express requirements that must be satisfied before the court’s power to grant such status can be invoked.”<sup>38</sup></p> <p>Ultimately, the application in <i>Re Attilan</i> failed “for non-satisfaction of the material condition of unavailability of financing without such super priority.”<sup>39</sup></p> <p>This appears due to a lack of evidence on the part of the applicant rather than any unwillingness or hesitancy of the Court to grant relief.</p> <p>Critically, Abdullah J held that the US authorities and in particular <i>In re Johnson</i></p>

<sup>33</sup> Committee Report, *supra* note 18 [3.14].

<sup>35</sup> Insolvency, Restructuring and Dissolution Act 2018, s 67.

<sup>36</sup> [2017] SGHC 283.

<sup>37</sup> *Re Attilan Group Ltd* [2017] SGHC 283, [60].

<sup>38</sup> *Ibid*, [59].

<sup>39</sup> *Ibid*, [67].



	<p><i>Rubber Company, Inc et al</i><sup>40</sup> is a “useful yardstick to guide the court’s discretion to grant the application for super priority.”<sup>41</sup> It appears therefore that US Jurisprudence will guide Singapore decisions.</p> <p>“While the application for priority failed in <i>Re Attilan</i>, there is enough information in the way the court dealt with it to ensure that the criteria that should underpin such applications are clearly understood and that, in appropriate cases in the future, applications for super-priority will be successful.”<sup>42</sup></p>
<p><b>Cross-class cram-downs (section 211H)<sup>43</sup></b></p>	<p><b>Confirmation of plan (11 U.S. Code § 1129)</b></p>
<p>The Court is empowered to approve a scheme of arrangement in spite of a class or classes of creditors or members dissenting to the scheme of arrangement.</p> <p>Where, in a proposed scheme, section 211H of the Companies Act empowers the Court to approve a scheme of arrangement if at least one class of creditors have voted in favour of the scheme provided that all creditors in aggregate across all classes a majority (comprising 50% in number and 75% in value) vote in favour of the scheme and the Court is satisfied that the scheme:</p> <ol style="list-style-type: none"> <li>a) does not unfairly discriminate between classes; and</li> <li>b) is fair and equitable to each dissenting class.</li> </ol> <p>The “fair and equitable” test (section 211H(4)), requires:</p> <ul style="list-style-type: none"> <li>• dissenting creditors to not receive less than they would in the most likely alternative to a scheme (typically a liquidation, but potentially also judicial management);</li> <li>• in the case of secured creditors, must protect the value of their security (“adequate protection”); and</li> <li>• in the case of dissenting unsecured creditors, the scheme must not allow for subordinated creditors or shareholders to achieve greater recoveries than them (“absolute priority rule”). The IDR Act has</li> </ul>	<p>The provisions of section 211H operate in a very similar fashion and use similar wording to section 1129 under Chapter 11 in all key respects. Specifically, section 1129 provides:</p> <ul style="list-style-type: none"> <li>• section 1129(a)(7) provides that each holder of a claim in any dissenting class must receive at least as much as it would in Chapter 7 (liquidation);</li> <li>• section 1129(b)(2) sets out the “fair and equitable test” which requires:             <ol style="list-style-type: none"> <li>(a) that the plan must not impinge upon or must otherwise protect the value of the secured creditor’s security rights (“adequate protection”) – section 1129(b)(2)(A);</li> <li>(b) “junior claims” (any claim that is subordinate to the claim of a creditor in the dissenting class) should not participate in any dividend or receive or retain any property unless more senior claims are paid in full (“absolute priority rule”) – section 1129(b)(2)(B).</li> </ol> </li> </ul> <p>A key substantive difference of section 1129 under Chapter 11 is that the requisite majority for each class is two-thirds rather than the 75% required under section 211H. Also, the modifications to section 211H effected by the IDR Act diluting the absolute priority rule will potentially lead to a significantly different approach to equity holders, giving them heightened importance</p>

<sup>40</sup> Case No 07-19391 (Bankr, ND Ohio, 2008).

<sup>41</sup> *Re Attilan Group Ltd* [2017] SGHC 283, [60].

<sup>42</sup> Paul Omar and Casey Watters, “The Evolution of Corporate Rescue in Singapore” (unpublished, 6 January 2018 rev 21 February 2018).

<sup>43</sup> Insolvency, Restructuring and Dissolution Act 2018, s 70.



<p>diluted the absolute priority rule, such that “the terms of distribution to the company’s creditors under the compromise or arrangement only extends to the property of the company, and not to other property owned by the members of the company, such as shares of the company.”<sup>44</sup></p>	<p>and increased power in a scheme restructuring. Whereas a Chapter 11 plan of reorganisation normally means that the equity holders are not permitted to retain their shares, under a Singapore scheme of arrangement, equity holders will be able to retain their shares.<sup>45</sup></p>
<p><b>“Pre-packaged” schemes (section 211I)<sup>46</sup></b></p>	<p><b>“Pre-packaged” bankruptcies (11 U.S. Code § 1125(g))</b></p>
<p>The new section 211I gives the Court power to sanction a proposed scheme without having to apply for leave to convene meetings of creditors.</p> <p>The Court may also sanction a proposed scheme without the holding of a meeting if it can be satisfied that had a meeting had been held it would have obtained the relevant approval.</p> <p>The Committee considered pre-packed restructurings in the United Kingdom and the United States<sup>47</sup> and having considered the pros and cons of both favoured the US approach because of, first, the supervisory role of the Court to allow it to act “as a gatekeeper to ensure minority dissenting creditors are treated fairly”<sup>48</sup> and, secondly, the US approach offers greater flexibility while the UK pre-pack approach “requires the sale of the debtor’s business which may not be possible in some restructurings.”<sup>49</sup></p>	<p>Chapter 11 provides that acceptances of a plan of reorganisation solicited and received prior to the filing of a bankruptcy petition may be used to confirm a plan in an ensuing bankruptcy. The plan of reorganization may then be filed at the same time the bankruptcy petition is filed. Section 1125(b) provides that support for a plan of reorganisation can be sought only after the Court has approved the summary and disclosure statement accompanying the plan.</p> <p>However, section 1125(g) provides that section 1125(b) does not apply if support for the plan “was solicited before the commencement of the case in a manner complying with applicable non-bankruptcy law.”</p>
<p><b>“Ipso facto” restrictions (section 440 of the IDR Act)<sup>50</sup></b></p>	<p><b>Executory contracts and unexpired leases (11 U.S. Code § 365(e)(1))</b></p>
<p>Section 440 of the IDR Act prohibits any person that is a counter party to a contract with a company subject to a scheme of arrangement (or other restructuring or insolvency proceeding referred to in the section) from terminating or amending any term or right under any agreement with the company, or claiming an accelerated payment or forfeiture against the company while the scheme of arrangement proceeding is on foot. Exempted from the</p>	<p>Section 365(e)(1) provides that an executory contract may not be terminated solely because of a condition in the contract “conditioned on the insolvency or financial condition of the debtor at any time before the closing of the case”. This provision exists in the context of section 365, enabling a debtor to assume an unexpired lease or executory contract (other than agreements to provide loans or other financial accommodations) if, at the time of</p>

<sup>44</sup> Insolvency, Restructuring and Dissolution Act 2018, s 70(4)(b)(ii)(B) and Explanatory Statement.

<sup>45</sup> The “new value” doctrine has seen some equity holders retain their shares in a Chapter 11 plan of reorganisation where they make a substantial and essential contribution in exchange for their continued ownership of the debtor – see *Bank of America National Trust and Savings Assn. v. 203 North LaSalle Street Partnership*, 526 U.S. 434 (1999).

<sup>46</sup> Insolvency, Restructuring and Dissolution Act 2018, s 71.

<sup>47</sup> Committee Report, *supra* note 18 [3.32] to [3.41].

<sup>48</sup> *Ibid.*, [3.40].

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ipsa facto* provisions were not included in the Companies Act.



<p>restriction on exercising <i>ipso facto</i> rights are eligible financial contracts as may be prescribed by regulation, a licence, permit or approval issued by the Government or a statutory body, any contract that is likely to affect the national interest, or economic interest, of Singapore, as may be prescribed by regulation, any commercial charter of a ship; certain aircraft equipment leases; or any agreement that is the subject of a treaty to which Singapore is party, as may be prescribed.</p>	<p>assumption, the debtor (a) cures past defaults (other than a default arising from any failure to perform non-monetary obligations) and (b) demonstrates its financial capability to perform the lease or contract in the future. No such corresponding obligation is imposed on a Singaporean debtor. The Singapore provision appears to more closely follow recent <i>ipso facto</i> legislative changes to Australia's insolvency regime than section 365.<sup>51</sup></p>
--	--

## 4.2 Moratorium for corporate groups

In addition to the above Chapter 11 inspired changes, the Amending Act has inserted section 211C of the Companies Act<sup>52</sup> to enable a Court to order a moratorium which imposes a stay against a subsidiary, holding company or ultimate holding company of a company (referred to hereafter as "Related Company") that is the subject of a moratorium under section 211B of the Companies Act.

As outlined above, in Chapter 11, a debtor is entitled to the protections of the automatic stay under section 362. However, that stay "only protects the debtor and does not extend injunctive coverage to non-debtor third parties, including equity shareholders and principals of a corporate debtor or an LLC."<sup>53</sup> While a Bankruptcy Court may use its power under section 105 of Chapter 11 to extend the stay to actions against a non-debtor, that power is limited to "special circumstances", and typically apply to lawsuits which threaten serious risk to a [bankruptcy] reorganization in the form of immediate adverse economic consequences for the debtor's bankruptcy estate."<sup>54</sup>

By contrast, following the Amending Act, the section 211C moratorium over a Related Company is available (on a discretionary basis) if the Court is satisfied that the following conditions have been met:<sup>55</sup>

- (a) the related company plays a necessary and integral role in the debtor's proposed scheme of arrangement;
- (b) the proposed scheme of arrangement would be frustrated if the moratorium is not granted to the related company; and
- (c) the Court is satisfied that the creditors of the related company will not be unfairly prejudiced.

The Related Company stays may include any of the kinds of stays available under section 211B (including restraints on enforcement by secured creditors).<sup>56</sup> "The most obvious use would be to obtain protection not only for a borrower, but also all of guarantors of debt subject to the scheme. However, there may well be more creative applications of a "group moratorium" order."<sup>57</sup>

## 4.3 Application of the new provisions to date

Market announcements made by Nam Cheong Ltd (incorporated in Bermuda), EMAS Offshore Limited (and its subsidiaries), Hoe Leong Corporation Ltd, Hyflux Limited, BLD Investments Pte Ltd (subsidiary of Indonesian company PT Bakrieland Development Tbk)<sup>58</sup> and Pacific Radiance Ltd

<sup>51</sup> See Treasury Laws Amendment (2017 Enterprises Incentives No. 2) Act 2017, Part 2.

<sup>52</sup> Insolvency, Restructuring and Dissolution Act 2018, s 65.

<sup>53</sup> *In re FPSDA I, LLC*, 2012 Bankr. LEXIS 5928, \*24 (Bankr. EDNY Dec. 26, 2012).

<sup>54</sup> *Gucci, Am., Inc. v. Duty Free Apparel, Ltd.*, 328 F. Supp. 2d 439 (SDNY 2004) at 442; *In re Northstar Contracting Corp.*, 125 B.R. 368, 370 (SDNY 1991).

<sup>55</sup> *Companies Act* (Singapore, Cap 50, 2006 rev ed), s 211C(2).

<sup>56</sup> *Ibid*, s 211C(1).

<sup>57</sup> Apáthy and Chua, *supra* note 29.

<sup>58</sup> <http://www.bldinvestmentsscheme.com/>.

in the course of their respective restructuring efforts have revealed a willingness of the High Court to deploy the new provisions of the Companies Act brought about under the Amending Act.

Moratoria granted under section 211B have been granted in all of those cases for periods ranging from four months up to nearly eight months from the date of the first application<sup>59</sup> to enable the respective debtors to propose a scheme of arrangement. Nam Cheong Ltd received a further moratorium extension of four months beyond the original six-month moratorium to successfully complete its scheme of arrangement process which was sanctioned on 3 August 2018.<sup>60</sup>

Hoe Leong Corporation Ltd's scheme of arrangement process utilised a number of the different available tools under Singapore's new "super-charged" schemes of arrangement leading to the successful sanctioning of its scheme of arrangement and resumption of trading on 6 August 2018:<sup>61</sup>

- it also obtained moratoria for its subsidiaries under section 211C;<sup>62</sup>
- all of the moratoria were expressed to be effective in Singapore and extraterritorially;<sup>63</sup>
- it used the pre-packaged scheme provisions under section 211I for a scheme with its financial creditors and controlling shareholder (but excluding trade creditors).<sup>64</sup>

## 5. Facilitating multi-jurisdictional restructurings for foreign debtors

### 5.1 Expanding jurisdiction for foreign debtors to take advantage of the scheme of arrangement provisions through a "substantial connection test"

Section 210 of the Companies Act permits a "company" to apply to the Court to convene scheme of arrangement creditors meetings. Section 210(11) defines a "company" for the purposes of that as meaning any corporation liable to be wound up.

The Amending Act has clarified the circumstances in which a foreign company can be wound up as an unregistered company where it has a "substantial connection with Singapore."<sup>65</sup>

A "substantial connection with Singapore" can be where:<sup>66</sup>

- (a) Singapore is the centre of main interests of the company;
- (b) the company is carrying on business in Singapore or has a place of business in Singapore;
- (c) the company is a registered foreign company;
- (d) the company has substantial assets in Singapore;
- (e) the rights of creditors are governed by Singapore law;
- (f) the company has submitted to the jurisdiction of the Singapore courts for the resolution of disputes.

These tests for "substantial connection" appear to be closely modelled on the factors for establishing jurisdiction to sanction an English scheme of arrangement.

Jurisdiction for English courts to sanction a scheme of arrangement of the creditors of a foreign company will exist if the foreign company has a "sufficient connection" with England.<sup>67</sup> What constitutes a "sufficient connection" requires examination of the case law, but has included the following:

<sup>59</sup> BLD Investments Pte Ltd (4 months); EMAS Offshore Ltd, Pacific Radiance Ltd, Hyflux Ltd and Nam Cheong Ltd (6 months); Hoe Leong Corporation Ltd (from 7 December 2017 to 31 July 2018).

<sup>60</sup> Nam Cheong Ltd, General Announcement, 3 August 2018.

<sup>61</sup> Hoe Leong Corporation Ltd, General Announcement, 3 August 2018.

<sup>62</sup> Hoe Leong Corporation Ltd, General Announcement, 7 December 2017.

<sup>63</sup> *Ibid.*

<sup>64</sup> Hoe Leong Corporation Ltd, General Announcement, 17 November 2017.

<sup>65</sup> Companies Act (Singapore, cap 50, 2006 rev ed) s 351(1)(d); Insolvency, Restructuring and Dissolution Act 2018, s 246(1)(d)

<sup>66</sup> *Ibid.*, s 351(2A); Insolvency, Restructuring and Dissolution Act 2018, s 246(3).

<sup>67</sup> *In re Drax Holdings Ltd* [2004] 1 W.L.R. 1049 [29]-[30].





- (a) England is the centre of main interests of the company (including where it was found that COMI had been shifted for the purpose of using the scheme of arrangement to carry out a restructuring);<sup>68</sup>
- (b) significant assets and operations within the jurisdiction (including, in one case, even though some debts were governed by foreign law);<sup>69</sup>
- (c) the presence of a sufficient number of creditors within the English jurisdiction;<sup>70</sup>
- (d) the finance documents are subject to the jurisdiction of the English courts with a jurisdiction clause in favour of the English courts<sup>71</sup> (including where finance documents included non-exclusive jurisdiction clause<sup>72</sup> and where the jurisdiction had been changed for the purpose of coming under the ambit of an English scheme of arrangement<sup>73</sup>); and
- (e) the rights of creditors are governed by English law.<sup>74</sup>

In view of these cases, it is easy to understand Snowden J's observation in *Van Gansewinkel Groep BV*:<sup>75</sup>

“In recent years schemes of arrangement have been increasingly used to restructure the financial obligations of overseas companies that do not have their COMI or an establishment or any significant assets in England.”<sup>76</sup>

It is equally easy to imagine how the similarities in the Singaporean “substantial connection” test and the English “sufficient connection” test have the potential to give rise to increased use of Singaporean schemes by foreign debtors.

## 5.2 Re-domiciliation rules to enable foreign companies to register within Singapore

The new Part XA of the Companies Act provides an alternative, or perhaps complementary, route for giving the Singapore Courts jurisdiction for restructuring and insolvency proceedings.

Section 359 of the Companies Act provides for transfer of registration by application to the Registrar (housed in the Accounting and Corporate Regulatory Authority).

The effect of registration is that the foreign company is deemed to be a Company for the purposes of the Companies Act and all the provisions of the Companies Act apply “and all provisions of this Act pertaining to companies apply” to it.<sup>77</sup>

This effect – deeming a foreign company to be a “Company” under the Companies Act – can be achieved at the time the Registrar accepts the application to register that Company's constitution. The foreign company then has 60 days to de-register in its place of incorporation, but if it fails to do so, the Registrar has a discretion to revoke the registration (it is not automatic) and there is a prescribed process before any such revocation order can be made, including giving 30 days' notice and the right of the foreign company to show cause.<sup>78</sup>

The minimum conditions to entitle a foreign company to register are prescribed by the Companies (Transfer of Registration) Regulations 2017 (Singapore).<sup>79</sup> However, solvency requirements do not apply if the Registrar is satisfied that the foreign company intends to make, upon registration, application for a scheme of arrangement or judicial management.<sup>80</sup>

<sup>68</sup> *Codere Finance (UK) Limited* [2015] EWHC 3778 (Ch); *Re Rodenstock* [2011] EWHC 1104 (Ch), [2011] All ER (D) 62 (May); *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch), [2013] All ER (D) 20 Dec.

<sup>69</sup> *Sea Assets v PT Garuda Indonesia* [2000] 4 All ER 371.

<sup>70</sup> *Re Hibu Group Limited and YH Limited* 2016 EWHC 1921 (Ch); *Re Rodenstock* [2011] EWHC 1104 (Ch), [2011] All ER (D) 62 (May).

<sup>71</sup> *Re La Seda de Barcelona* [2010] EWHC 1364 (Ch), [2011] 1 BCLC 555; *Re PrimaCom Holding GMBH* [2012] EWHC 164 (Ch); *Cortefiel SA and MEP 11 Sarl* [2012] EWHC 2998 (Ch).

<sup>72</sup> *Re Vietnam Shipbuilding Industry Group* [2013] All ER (D) 241 (Jun), [2013] EWHC 2476 (Ch).

<sup>73</sup> *Re Apcoa Parking Holdings GmbH* (Oct) [2014] EWHC 3849 (Ch); *DTEK Finance BV* [2015] EWHC 1164 (Ch).

<sup>74</sup> *Seat Pagine Gialle SpA* [2012] EWHC 3686 (Ch).

<sup>75</sup> [2015] EWHC 2151 (Ch)

<sup>76</sup> *Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch) at [4].

<sup>77</sup> Companies Act (Singapore, cap 50, 2006 rev ed) s 361.

<sup>78</sup> *Ibid*, ss 359(6) and 362.

<sup>79</sup> *Ibid*, s 364.

<sup>80</sup> Companies (Transfer of Registration) Regulations 2017 (Singapore), Reg 7.

The combined effect of these provisions is to enable a foreign company to avail itself of the Singapore Courts' jurisdiction for a restructuring by simply following specified procedural steps without having to identify any "substantial connection" of that foreign company with Singapore or without having to complete the process. Specifically, for the deeming to take effect, all a foreign company need do is register its constitution with the Registrar.

As such, this mechanism facilitates, with significant ease, a foreign debtor coming under the Singapore jurisdiction for the purpose of proposing a scheme of arrangement or utilising other Singaporean restructuring or insolvency proceedings.

## **6. Recognition and facilitation of inbound cross-border restructurings and insolvencies**

### **6.1 Adoption of the UNCITRAL Model Law on Cross-Border Insolvency**

Section 354B of the Companies Act adopts the UNCITRAL Model Law on Cross-Border Insolvency. The provisions as adopted appear in the Tenth Schedule of the Companies Act. Two notable differences between the drafting of the Model Law and its enactment in the form of the Tenth Schedule, are the definition of the "foreign proceeding" in Article 2 and the applicability of the public policy exception set out in Article 6.

#### **6.1.1 Definition of "foreign proceeding"**

Article 2 of the Model Law defines "foreign proceeding" as "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation" (emphasis added).

The Singaporean enactment of Article 2 of the Model Law amends the definition to also include any proceedings relating to the "adjustment of debt."<sup>81</sup> The definition used in the Singaporean enactment is identical to the definition used and applied in the United States under Chapter 15.<sup>82</sup>

This can be particularly important for recognition of a restructuring proceeding where the relevant legal restructuring tools used do not require insolvency as a pre-condition for jurisdiction or are not part of a law relating to insolvency. In that regard, much like Singapore schemes of arrangement, schemes of arrangement in the United Kingdom and a number of Commonwealth jurisdictions facilitate compromises with creditors but do not have a solvency (or insolvency) test as a pre-condition for invoking their use. Nevertheless, they have been routinely recognised and enforced under Chapter 15.<sup>83</sup>

#### **6.1.2 Public policy exception**

In the first decision under the provisions of the Model Law, *Zetta Jet Pte Ltd*,<sup>84</sup> the Court gave limited recognition to an interim trustee appointed to Zetta Jet Singapore and US under the Chapter 7 of the US Bankruptcy Code.

The Court noted that Article 6 of Singapore's legislated Model Law provisions differ from Article 6 of the UNCITRAL Model Law, which provides that recognition may be refused if it would be "manifestly contrary" to public policy, while Article 6 of Singapore's adopted Model Law provisions enable refusal of recognition if it would be "contrary" to public policy.<sup>85</sup> It was held that the omission of the word "manifestly" was a deliberate omission and meant that the threshold was lower.

<sup>81</sup> Companies Act (Singapore, cap 50, 2006 rev ed) Schedule 10, Article 2.

<sup>82</sup> 11 U.S.C. § 101(23).

<sup>83</sup> David Lawton and Shannon Wolf, "The Thing about Schemes in the Scheme of Things: Recognition of Schemes of Arrangement under Chapter 15 of the U.S. Bankruptcy Code", 3 *INSOL International Technical Series*. March 2018.

<sup>84</sup> [2018] SGHC 16.

<sup>85</sup> *Zetta Jet Pte Ltd* [2018] SGHC 16 [14] and [21].

The Court had previously issued an injunction in Singapore against Zetta Jet's Singaporean shareholders from taking steps to continue what was then a Chapter 11 case. The Court's injunction was ignored and the Chapter 11 case was subsequently converted to a Chapter 7 case. The Court considered that ignoring the Court's injunction "undermined the administration of Justice in Singapore" and by extension, so would recognition of the Chapter 7 case. The Court did not find that it was contrary to public policy but only granted limited recognition to the Chapter 7 trustee to take steps in Singapore to seek to overturn or appeal the earlier injunction orders.<sup>86</sup>

## 6.2 Abolition of the "ring-fencing" rule

Prior to the Amending Act, a liquidator appointed by the Court as local liquidator of a foreign company was required to realise any local assets and first meet local creditors' claims before repatriating the net proceeds of realisations to the foreign company's principal place of liquidation.

The ring fencing rule is now abolished with an express prohibition on paying any creditor.<sup>87</sup> However, any such liquidator must, before repatriating funds to the foreign liquidator, be satisfied that the interests of creditors in Singapore are adequately protected (and if they are not, seek directions as to how to deal with them).<sup>88</sup>

## 7. Building a supporting "ecosystem" to embed the legislative reforms in practice

To embed the legislative changes effected by the Amending Act, Singapore is taking active steps to build an "ecosystem" which cultivates their spirit and intent in practice and simultaneously builds international awareness of its efforts.

Central to these efforts has been:

- a) implementing the Committee's recommendation for the appointment of specialist insolvency judges:<sup>89</sup>
  - the Singapore International Commercial Court (hereinafter the "SICC") has appointed former UK Supreme Court President, Lord Neuberger, who has presided over leading cross border insolvency cases including *Rubin*<sup>90</sup> and *Singularis*<sup>91</sup> as well as other senior judges from the UK, Australia and Canada.<sup>92</sup> The SICC is a Division of the Singapore High Court,<sup>93</sup> being the Court conferred with jurisdiction by the Companies Act.<sup>94</sup> The SICC may hear and try any civil matter which the High Court may hear and is "is international and commercial in nature."<sup>95</sup> In that regard, the Committee expressly identified appointments of judges to the SICC as being a way to "augment the point of local Specialist Judges."<sup>96</sup> It seems likely that Lord Neuberger's appointment has been made with that recommendation in mind;
  - to the High Court of Singapore with the appointment of their Honours Justice Kannan Ramesh and Justice Aedit Abdullah as Judges of the High Court (previously they were both Judicial Commissioners) as judges of the High Court of Singapore.<sup>97</sup>
- b) the establishment and actively pursuing the growth of the Judicial Insolvency Network (**JIN**) which aims to encourage cross-court communication and cooperation in cross border

<sup>86</sup> *Ibid.*

<sup>87</sup> Companies Act (Singapore, cap 50, 2006 rev ed) s 4

<sup>88</sup> *Ibid.*, s 377(7).

<sup>89</sup> Committee Report, supra note 18 [3.42] to [3.51].

<sup>90</sup> *Rubin v Eurofinance SA* [2012] UKSC 46.

<sup>91</sup> *Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)* [2014] UKPC 3.

<sup>92</sup> Prime Minister's Office of Singapore, "Appointments / Reappointments to the Singapore International Commercial Court" (press release, 3 January 2018).

<sup>93</sup> Supreme Court of Judicature Act (Singapore, cap 322, 2007 rev ed) s 18A.

<sup>94</sup> Companies Act (Singapore, cap 50, 2006 rev ed) s 4.

<sup>95</sup> Supreme Court of Judicature Act (Singapore, cap 322, 2007 rev ed) s18D.

<sup>96</sup> Committee Report, supra note 18 [3.46].

<sup>97</sup> Prime Minister's Office of Singapore, "Appointments to the Supreme Court Bench" (press release, 16 February 2017); Prime Minister's Office of Singapore, "Appointment of Judges of the High Court" (press release, 16 August 2017).



insolvency proceedings.<sup>98</sup> As at the date of this paper, the JIN is comprised of judges from 13 jurisdictions (“observers” included) including England & Wales, prominent bankruptcy courts in the United States and key Asia-Pacific jurisdictions such as Australia, Hong Kong, Singapore, and most recently Japan and Korea;<sup>99</sup>

- c) following shortly upon the creation of the JIN, establishing Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters with insolvency courts in a number of jurisdictions;<sup>100</sup> and
- d) enacting a regime for the regulation of insolvency practitioners.

Both Ramesh J and Abdullah J have demonstrated, in their judgments, a disposition towards facilitating cross border restructurings and an expansive view of principles of comity in keeping with principles of modified universalism:

- (a) in *Re Opti-Medix Ltd (in liquidation)*,<sup>101</sup> (which preceded the Amending Act) Abdullah J gave recognition of a foreign liquidation taking place in the company’s COMI rather than place of incorporation. In doing so, he rejected the doubt expressed in *Rubin v Eurofinance* about introducing a new basis in the common law for recognition in relation to insolvency proceedings<sup>102</sup> and preferred Lord Hoffman’s approach in *Re HIH Casualty and General Insurance Ltd*.<sup>103</sup> His Honour endorsed universalism over territorialism as “the most conducive to the orderly conduct of business and resolution of business failures across jurisdictions.”<sup>104</sup>
- (b) in *Pacific Andes*,<sup>105</sup> Ramesh J endorsed “good forum shopping” and agreed with English cases that “have recognised that forum shopping in a bona fide attempt to restructure and so as to take advantage of a juridical advantage was permissible.”<sup>106</sup> Additionally, Ramesh J was a member of the Committee and, in his extra-judicial pronouncements, has taken what might be described as an activist approach in promoting the achievement of cross-border insolvency.<sup>107</sup>

## 8. Recognition of Singapore restructurings in other jurisdictions

Critical to Singapore’s success in achieving its ambitions, and an important area of challenge, will be the ability of Singaporean schemes of arrangement and other restructuring proceedings to be recognised and enforced in other jurisdictions.

In particular, the impetus to shift COMI or otherwise take advantage of mechanisms described above to bring a foreign restructuring into the jurisdiction of the Singapore Courts will largely depend on the ability of any such restructurings to be given effect in the jurisdiction from which such a shift has emanated. A key factor driving the widespread use of English restructuring and insolvency proceedings for European restructurings has been the ability to have them recognised across Europe. The extent to which Singapore is able to emulate this success across the globe

<sup>98</sup> Kannan Ramesh “The cross-border project – a ‘dual-track’ approach” (Speech delivered at the INSOL International Group of 36 Meeting, Singapore, 30 November 2015); *Cross-border Insolvency in Singapore: The Effectiveness of the Judicial Insolvency Network and the JIN Guidelines on the Administration of Cross-border Insolvency Matters*, INSOL International Technical Series Issue No. 40, May 2018.

<sup>99</sup> Australia (Federal Court of Australia and Supreme Court of New South Wales), Argentina (Buenos Aires, National Commercial Court), Bermuda (Supreme Court of Bermuda), Brazil (Sao Paulo State Court of Justice, First Bankruptcy Court of Sao Paulo), British Virgin Islands (Supreme Court of the Virgin Islands), Canada (Ontario Superior Court of Justice), Cayman Islands (Grand Court of the Cayman Islands), England & Wales, USA (Southern District of New York, Delaware and Florida), Hong Kong SAR (High Court of Hong Kong Special Administrative Region, as observer), Japan (Tokyo District Court, Director of Civil Affairs Bureau, General Secretariat of the Supreme Court of Japan, both as observers), Republic of Korea (Seoul Bankruptcy Court, as observer) and Singapore.

<sup>100</sup> For further analysis of the JIN and JIN Guidelines, see: *Cross-border Insolvency in Singapore: The Effectiveness of the Judicial Insolvency Network and the JIN Guidelines on the Administration of Cross-border Insolvency Matters*, May 2018, INSOL International Technical Series Issue No. 40.

<sup>101</sup> *Re Opti-Medix Ltd (in liquidation)* [2016] SGHC 108.

<sup>102</sup> *Ibid*, [19] to [22].

<sup>103</sup> [2008] 1 WLR 852.

<sup>104</sup> *Supra*, note 101, [17].

<sup>105</sup> *Supra*, note 15.

<sup>106</sup> *Ibid*, [51].

<sup>107</sup> See eg note 96 post and Kannan Ramesh, “The cross-border project – a ‘dual-track’ approach” (speech delivered at INSOL International Group of 36 Meeting in Singapore, 30 November 2015)

and the Asia Pacific region in particular will be perhaps the single most important determinant for the success of its project. Below is a survey of some salient considerations affecting potential recognition of Singapore restructurings and insolvencies in the US, Model Law jurisdictions, the UK and its overseas territories and in nations across the Asia Pacific.

### 8.1 Extra territorial *in personam* jurisdiction

The Committee Report noted that a key factor that will facilitate the effectiveness of Singaporean restructurings is commercial practicality: “numerous banks and other financial institutions from around the globe have a presence in Singapore and consequently subject to the jurisdiction of the Singapore courts.”<sup>108</sup> As noted above, the extraterritorial *in personam* reach of moratoriums will likely be effective as against institutional investors and others wishing to conduct business in Singapore and be in good standing in respect of Singaporean Courts and law.

### 8.2 United States

English, Australian, Cayman and South African schemes of arrangement have been recognised under Chapter 15 as “foreign proceedings.”<sup>109</sup> Further, “it is established Chapter 15 jurisprudence that foreign insolvency orders and judgments may be recognised and enforced locally, subject to limited exceptions such as public policy considerations.”<sup>110</sup> The US approach is to give relief under Chapter 15 which gives effect to and enforces in the United States, restructuring plans sanctioned in other jurisdictions, including schemes of arrangement.<sup>111</sup>

It would be reasonable to expect that schemes of arrangement that have taken on provisions of Chapter 11 as outlined above would make them even more amenable to recognition and enforcement in the United States.

### 8.3 Model Law jurisdictions

In the Asia Pacific region, Australia, Japan, New Zealand, Philippines, the Republic of Korea and Vanuatu have all adopted the Model Law.

India appears poised to adopt the Model Law. On 26 June 2018, it gave notice of its intent to introduce a chapter within the Insolvency and Bankruptcy Code 2016 to “provide a comprehensive legal framework” for cross-border insolvency.<sup>112</sup> The public notice paper explains the background and need for the Model Law, largely endorses the Model Law and includes draft Model Law provisions for enactment in India. The Insolvency Law Committee submitted its second report to the Ministry of Corporate Affairs on 16 October 2018, recommending the adoption of the Model Law with some modifications.<sup>113</sup> Myanmar is also at an advanced stage of consideration of a major modernisation and overhaul of its insolvency laws, including enacting the Model Law. On the current timetable, it is expected that its new laws will take effect in early 2019.<sup>114</sup>

It remains to be seen whether these and other jurisdictions which have adopted the Model Law will take a similar approach taken in the United States under Chapter 15 and treat creditor schemes of arrangement as “foreign proceedings” and, if so, whether relief might be available under automatic (Article 20) stays or by reason of discretionary relief (Article 21) giving recognition to and enforcing foreign schemes of arrangement.

<sup>108</sup> Committee Report, *supra* note 18, [2.7].

<sup>109</sup> See David Lawton and Shannon Wolf, *The Thing about Schemes in the Scheme of Things: Recognition of Schemes of Arrangement under Chapter 15 of the U.S. Bankruptcy Code*, March 2018, INSOL International, Technical Series Issue No. 3.

<sup>110</sup> Look Chan Ho, *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (Globe Law and Business, 4<sup>th</sup> ed, 2017) 249.

<sup>111</sup> See for example: *In re Salvati*, 2009 Bankr LEXIS 5722 (Bankr SDNY 7 May 2009); *In re Magyar Telecom BV*, 2013 Bankr LEXIS 5716 (Bankr SDNY 11 December 2013); see also Look Chan Ho, *supra* note 110, discussion at 249-251.

<sup>112</sup> Public Notice, Government of India, Ministry of Corporate Affairs, Insolvency Section File No. 30/27/2018, 20 June 2018: <[http://www.mca.gov.in/Ministry/pdf/PublicNoticeCrossBorder\\_20062018.pdf](http://www.mca.gov.in/Ministry/pdf/PublicNoticeCrossBorder_20062018.pdf)>.

<sup>113</sup> <http://www.prsindia.org/parliamenttrack/report-summaries/insolvency-law-committee-on-cross-border-insolvency-5486/>.

<sup>114</sup> INSOL International News Update, Issue No. 7, July 2018, “Myanmar Set to Adopt New Insolvency Laws Including a Corporate Rescue Procedure”, Bruno Arboit, KRYS Global Hong Kong.

While there are indications that Article 21 might be deployed in that way,<sup>115</sup> the approach in *Rubin v Eurofinance SA; New Cap Reinsurance Corp v Grant*<sup>116</sup> is that “the Model Law says nothing about the enforcement of foreign judgments against third parties.”<sup>117</sup>

#### 8.4 United Kingdom

The Model Law considerations discussed above are also relevant to the United Kingdom which has enacted the Model Law under the Cross-Border Insolvency Regulations 2006.<sup>118</sup>

Recognition in England of a Singapore restructuring of English law debt will be difficult in the face of the rule established in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux*<sup>119</sup> (referred to hereafter as the “Gibbs Rule”). Under the Gibbs Rule, contractual obligations can be discharged only in accordance with the proper law of the obligation. (The Gibbs Rule does not apply in certain circumstances, however, including where the relevant creditor has submitted to the jurisdiction of a foreign court.)

As such, a Court sanctioned restructuring of debt subject to English law, to be enforceable in England, need be effected by English courts (Singapore, by contrast, has effectively rejected the Gibbs Rule).<sup>120</sup> This will therefore be a potential issue not only in the United Kingdom but also in other English common law jurisdictions.

Judge Ramesh Kannan has noted recent criticisms of the Gibbs Rule by Lord Neuberger and appears to be keenly awaiting the outcome of *Bakhshiyeva v Sberbank of Russia*<sup>121</sup> in which it is anticipated that the Gibbs Rule likely to be considered by the English Court of Appeal later in 2018.<sup>122</sup>

In the context of section 426 of the UK Insolvency Act 1986, the English court has given assistance to the Irish High Court in respect of an Irish scheme of composition of debts such that it became binding on United Kingdom creditors.<sup>123</sup> However, Singapore is not a “relevant country” for the purposes of section 426 and as such that avenue will not be available for Singapore restructurings.

#### 8.5 Hong Kong and offshore (common law) jurisdictions

Harris J of the Hong Kong Special Administrative Region Court of First Instance, recently considered the eligibility of moratoriums available under section 211B of the Companies Act for recognition in Hong Kong in the case of *Re CW Advanced Technologies Ltd*.<sup>124</sup> In his reasons, his Honour indicated that the case “involves significant cross-border elements and engages the much discussed new Singapore restructuring regime.”<sup>125</sup>

The case related to an application in respect of a Hong Kong incorporated company, CW Advanced Technologies Limited, which was headquartered and had its principal place of business in Singapore and was conducting a restructuring in Singapore with other companies in its broader corporate group, including its parent company, incorporated in the Cayman Islands, managed from Singapore, listed on the Hong Kong Stock Exchange, and a registered non-Hong Kong company. All of the companies in the group obtained a six-month moratorium in Singapore in order to facilitate a restructuring.

<sup>115</sup> Look Chan Ho, *supra* note 110 at pages 247 to 251.

<sup>116</sup> *Rubin v Eurofinance* [2012] UKSC 46 at [142].

<sup>117</sup> Jennifer Payne, *Schemes of Arrangement: Theory, Structure and Operation* (Cambridge University Press, 1<sup>st</sup> ed, 2014).

<sup>118</sup> In the case of Great Britain and the Cross-Border Insolvency Regulations (Northern Ireland) 2007, in the case of Northern Ireland.

<sup>119</sup> *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399. Recently reaffirmed by the High Court of England and Wales in *Gunel Bakhshiyeva (in her capacity as the Foreign Representative of The OJSC International Bank of Azerbaijan) v Sberbank Of Russia & 6 Ors* [2018] EWHC 59 (Ch).

<sup>120</sup> *Pacific Andes Resources Development Ltd and other matters* [2016] SGHC 210 [46] to [52].

<sup>121</sup> *Bakhshiyeva v Sberbank of Russia & Ors* [2018] EWHC 59 (Ch).

<sup>122</sup> Kannan Ramesh, “Singapore Insolvency Conference 2018 – Keynote Address” (Speech delivered at the Singapore Insolvency Conference, Singapore, 23 July 2018).

<sup>123</sup> *Re Business City Express Ltd* [1997] 2 BCLC 510.

<sup>124</sup> *Big Island Construction (HK) Ltd v Wu Yi Development Co Ltd* [2018] HKCFI 1705 (19 July 2018).

<sup>125</sup> *Ibid* at [2].

Ultimately, his Honour did not have to decide on whether the Singapore moratoriums would be recognised as the application principally concerned the appointment of provisional liquidators in Hong Kong to facilitate the Singapore restructuring by preserving the company's assets and preventing a "potential open-ended winding-up petition."<sup>126</sup> Nevertheless, his Honour made important obiter comments on cross-border issues and in particular the eligibility of the moratorium for recognition.

The comments cast some doubt on whether a scheme of arrangement should be treated as a collective insolvency proceeding – "a question subject to seemingly conflicting comparative authorities"<sup>127</sup> – and therefore may be incapable of recognition in Hong Kong. Also, the comments identify that there is no Hong Kong authority as to recognition of a foreign insolvency proceeding taking place in a jurisdiction other than its place of incorporation.

While stating that "solving the cross-border challenges above is for another day",<sup>128</sup> his Honour suggested an alternative approach to achieving the same end: promoting Hong Kong schemes of arrangement which would presumably be recognised under the Model Law in Singapore (where, having abandoned the Gibbs Rule, there presumably would be no bar to the extent that Hong Kong schemes of arrangement seek to restructure Singapore law finance documents).

*Re CW Advanced Technologies Ltd* provides a useful framework for considering the potential issues and likely risks of seeking to obtain recognition of Singapore restructurings (particularly schemes of arrangement) in Hong Kong and other offshore jurisdictions which have not adopted the Model Law. As can be seen, there appear to be some risks attached but also potential alternative strategies available.

## 8.6 ASEAN

Singapore is a member state of the Association of Southeast Asian Nations (referred to hereafter as "ASEAN") together with Indonesia, Malaysia, the Philippines, Thailand, Brunei, Cambodia, Laos, Myanmar and Vietnam. The ASEAN Comprehensive Investment Agreement aims to establish "a free and open investment regime in ASEAN in order to achieve the end goal of economic integration."<sup>129</sup>

As early as 2013, Indonesia proposed a uniform regulation on cross-border insolvency for ASEAN nations, recognising that there would be an increasing number of insolvency issues following the anticipated establishment of the ASEAN Economic Community (referred to hereafter as "AEC") in 2015 and the consequent free flow of investment between nations.<sup>130</sup>

With Singapore's ASEAN Chairmanship role in 2018, cross border insolvency cooperation appears to be high on the agenda. At the 2018 UNCITRAL ABLI Emergence Conference, Singapore's Permanent Secretary for Law focused in his key note speech on restructuring and insolvency as one of three key areas to harness "international legal convergence efforts to give our businesses needed legal certainty", highlighting Singapore's recent adoption of the Model Law.<sup>131</sup> In similar vein, Mr Yue highlighted ABLI's Foreign Judgments Project as being "of particular interest."<sup>132</sup>

Given the progress toward economic integration in the AEC, there is an obvious need for a cross-border insolvency regime that can adequately deal with the cross-border assets of ASEAN insolvent debtors and that provides transnational businesses and investors with legal certainty in settling their disputes. Although there might not currently be adequate laws,<sup>133</sup> there are signs of

<sup>126</sup> *Ibid* at [17].

<sup>127</sup> *Ibid* at [32].

<sup>128</sup> *Ibid* at [33].

<sup>129</sup> ASEAN, "ASEAN Comprehensive Investment Agreement" (29 March 2012, Jakarta) section 1.

<sup>130</sup> Happy Rayna Stephany and Robert Sidauruk "Indonesia Recommends ASEAN Cross-Border Insolvency Law", 9 July 2013, <<http://en.hukumonline.com/pages/tt51f6574667287/indonesia-recommends-asean-cross-border-insolvency-law>>.

<sup>131</sup> Ng How Yue, "Keynote Address" (Speech at the UNCITRAL ABLI Emergence Conference, 25 July 2018).

<sup>132</sup> *Ibid*.

<sup>133</sup> Michael Sloan, "The lack of adequate insolvency frameworks for major corporate collapse in Asia", an Asian Development Bank Presentation for the Forum on Asian Insolvency Reform.



progress towards the development of cross-border insolvency law among ASEAN nations and a Singaporean desire to progress them.

## 8.7 People's Republic of China (PRC)

In *Kolmar Group v Jiangsu Textile Industry*,<sup>134</sup> the Nanjing Intermediate People's Court in Jiangsu Province, China became the first Chinese court to recognise a judgment of the High Court of Singapore on the basis of the principle of reciprocity,<sup>135</sup> directly relying on the fact that the Supreme Court of the Republic of Singapore had enforced a civil judgment by the Intermediate People's Court of Suzhou, Jiangsu Province in January 2014.<sup>136</sup> The principle of reciprocity requires that for a Chinese court to recognise and enforce a judgment of a foreign jurisdiction, that foreign jurisdiction must have previously recognised a judgment of a Chinese court.<sup>137</sup>

Historically, Chinese courts have been slow to recognise the existence of reciprocity, rejecting applications from Japan, Germany, the United Kingdom, Australia and the Republic of Korea for recognition of their judgments in Chinese courts. However, China have more recently expressed an openness to the establishment of reciprocity, with the Supreme People's Court of China indicating that Chinese courts may even provide judicial assistance to parties from different countries who were attempting to establish reciprocity.<sup>138</sup> Further efforts between the judiciaries of Singapore and China, led by their respective chief justices, have sought to advance mutual cooperation including by "further legal and judicial cooperation on mutual recognition and enforcement of monetary judgments."<sup>139</sup> These efforts culminated in the signing of a Memorandum of Guidance between the Supreme Courts of China and Singapore for the mutual recognition and enforcement of monetary judgments in Singapore and China.<sup>140</sup>

The *Kolmar* decision relates to recognition of a monetary judgment and it remains to be seen whether recognition of insolvency proceedings, or orders giving effect to schemes of arrangement and other formal Singapore restructurings, might occur in China under the principle of reciprocity.

## 9. Will Singapore become an international centre of debt restructuring?

There is good reason to believe that Singapore will accomplish its ambitious mission, particularly in the medium to long term.

As described in this paper, the legislative reforms to the Companies Act provide a gateway to access a Singapore scheme of arrangement using tests which are similar to those that have enabled foreign debtors to access English schemes of arrangement and contributed to their popularity in that jurisdiction.

It is easy to envisage, particularly in view of the Singaporean bench's favourable dispositions toward a universalist approach, including toward "good forum shopping", debtors regularly being allowed to come into the Singaporean jurisdiction for restructuring. The re-domiciliation provisions arguably provide an opportunity to completely "side-step" any remaining ambiguities in the "substantial connection" test.

This leads to the perhaps more significant point of why a foreign debtor would want to access the jurisdiction: the power of the Singapore scheme of arrangement to effect a restructuring appears, at least on paper, to be superior to what might be achieved under an English scheme of

<sup>134</sup> *Kolmar Group A.G. v Jiangsu Textile Industry (Group) Import & Export Co Ltd* (2016) Su01 Assisting Foreign Recognition No 3.

<sup>135</sup> *Civil Procedure Law of the People's Republic of China* (Adopted at the Fourth Session of the Seventh National People's Congress and promulgated by Order No. 44 of the President of the People's Republic of China on April 9, 1991).

<sup>136</sup> *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] SGHC 16.

<sup>137</sup> *Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts* (No. 9 [2015] of the Supreme People's Court).

<sup>138</sup> *Ibid.*

<sup>139</sup> Media Release – Supreme Court of Singapore, 21 August 2017, <<https://www.supremecourt.gov.sg/news/media-releases/inaugural-singapore-china-legal-and-judicial-roundtable>>.

<sup>140</sup> Memorandum of Guidance between the Supreme People's Court of the People's Republic of China and the Supreme Court of Singapore on Recognition and Enforcement of Money Judgments in Commercial Cases, 31 August 2018, <https://www.supremecourt.gov.sg/docs/default-source/default-document-library/spc-mog-english-version---signed.pdf>.





arrangement, emulating much of Chapter 11 (and in respect of related entities, going beyond what is possible under Chapter 11).

At the same time, by “cherry picking” some of the best Chapter 11 concepts but avoiding much of the complexity of the Chapter 11 framework and simultaneously maintaining an approach which is consistent with Singapore’s English based legal framework, Singapore is setting itself up to facilitate Chapter 11 type outcomes but at a lower cost.

Added to these newly legislated advantages, Singapore enjoys already existing competitive advantages:

- “its geographical location at the heart of Asia.”<sup>141</sup> This will be particularly significant with the recent up-tick in restructuring activity in India, as well as the continued economic rise of China and infrastructure projects arising out of the “One Belt One Road” initiative coordinated by China’s National Development and Reform Commission and the economic rise of South East Asian economies;
- it is already a “leading financial centre in the region...which facilitates commercial lending to businesses in the region and a major gateway for international businesses’ trade and investment into the region;”<sup>142</sup>
- it is a place with a high ease of doing business “with modern infrastructure and global connectivity;”<sup>143</sup>
- it will be able to build on its success in “establishing itself as an arbitration hub;”<sup>144</sup>
- the Singapore dollar relative to the U.S. Dollar (60-70 US cents over the last 5 years) or the Pound Sterling (45 to 60 pence over the last 5 years) make it a cost-competitive jurisdiction.

Singapore’s unique blend of cultures and language capabilities will serve it well for parties across Asia. While English was chosen as the working language given its importance as a communicative tool in world trade, bilingualism has been the cornerstone of its language policy since becoming an independent state, serving to strengthen an individual’s values and sense of cultural belonging through the use of the mother tongue of three main ethnic groups (Chinese, Malay and Indian communities).<sup>145</sup>

Factors such as political and economic stability, a strong rule of law and a skilled workforce may appear to be more closely connected to economic success. However, Singapore, being a multi-racial, multilingual and multi-cultural society, has long been able to capitalise on the strength in diversity and cross-cultural understanding through which it maintains its position as one of the leading global financial centres.<sup>146</sup>

As the Asian market continues to expand in size and importance, it appears that Singapore will likely be able to further leverage its status and competitive edge as a “multicultural cosmopolitan city that embodies Western modernity while retaining its Asian values” to realise business opportunities (including those envisaged by the recent legislative reforms) which are more often than not derived from mutual cultural understanding and trust between the parties concerned.<sup>147</sup>

The determination shared by the Singapore government and the judiciary for the success of the reforms is a factor not to be underestimated. As Chief Justice Menon apparently remarked to the then Chief Justice of the Australian High Court, Robert French AC: “Singapore is a place in which

<sup>141</sup> Committee Report, *supra* note 18 [2.5].

<sup>142</sup> *Ibid*, [2.7] to [2.8].

<sup>143</sup> *Ibid*, [2.5].

<sup>144</sup> Apáthy and Chua, *supra* note 29.

<sup>145</sup> National Library Board Singapore, *Bilingual policy*, 31 August 2016, [http://eresources.nlb.gov.sg/infopedia/articles/SIP\\_2016-09-01\\_093402.html](http://eresources.nlb.gov.sg/infopedia/articles/SIP_2016-09-01_093402.html).

<sup>146</sup> See eg Jiaying Hu, Matthias Vanhullebusch and Andrew Harding (ed.), *Finance, Rule of Law and Development in Asia* (Brill, 2016), 18-21; Australian Institute of Company Directors, “Cultural intelligence improves performance in diverse settings”, 8 July 2016, <http://aicd.companydirectors.com.au/advocacy/governance-leadership-centre/governance-driving-performance/cultural-intelligence-improves-performance-in-diverse-settings>.

<sup>147</sup> Su Lin Yeo and Augustine Pang, “Asian multiculturalism in communication: Impact of culture in the practice of public relations in Singapore” (2017) 43(1) *Public Relations Review* 112-122.



it is possible to have a good idea and to have it realised.”<sup>148</sup> Singapore has “demonstrated an ability to quickly legislate where required”<sup>149</sup> and any legislative lacunas or deficiencies are likely to meet a swift response in addressing them. The Singapore Minister for Home Affairs and Minister for Law recently expressed it in the following manner:<sup>150</sup>

“We have done a fair bit, but this is a dynamic environment. The only way to stay on top is to continue to be dynamic, to make changes, and adapt to the industry as it moves.”

As if almost to prove this point, the IDR Act was enacted on 1 October 2018, making changes and further development to the legislative regime an “ecosystem” identified elsewhere in this Special Report.

Additionally, the Committee Report reveals both holistic and lateral thinking around how Singapore might succeed in achieving its goal, including how to better foster a distressed debt funding market in Singapore<sup>151</sup> and incorporate ADR into restructuring proceedings.<sup>152</sup> Developments in these areas will be as much a predictor of success as will be some of the more obvious factors identified above.

Balanced against these factors which are likely to contribute to Singapore’s success, there are also clear challenges and hurdles to be surmounted.

The ability for Singapore restructurings to be recognised and enforced abroad will be a key challenge. It appears that Singapore will pursue “legal convergence” with members of the AEC and if it successfully secures an AEC cross border insolvency recognition regime, this will play a major role catapulting Singapore to major prominence as a restructuring hub in the Asia Pacific. Similarly, if states which have adopted the Model Law (or are about to, as India appears to be) follow the US approach in recognising schemes of arrangement as “foreign proceedings”, or are otherwise prepared to give them effect in their own jurisdictions, Singapore may become a jurisdiction of choice for more complex multinational restructurings. Whether either of these possibilities eventuate remains to be seen and should be closely watched. The Hong Kong case of *Re CW Advanced Technologies Ltd* discussed above hints at potential obstacles at obtaining recognition and enforcement under the common law.

The depth of capability and experience in London and New York across the judiciary, legal profession and restructuring professionals, particularly in dealing with large and complex cross border restructurings, tower over that which exists in Singapore. Closing this gap is something which the Committee acknowledged as critical.<sup>153</sup> The SICC is an important innovation as it draws upon top global judicial and legal experience and expertise. If the SICC is deployed for large and complex cross-border insolvencies, this could be a powerful way for Singapore to build credibility around its new restructuring system. Additionally, the Singapore Government has signalled its strong support for specific training and education initiatives.<sup>154</sup> The IDR Act includes a new regulatory regime for insolvency practitioners.<sup>155</sup>

Along similar lines, whereas Chapter 11 has been operating for over 40 years and has developed a depth and breadth of jurisprudence and practical experience, in contrast, Singapore is at “ground zero” and uncertainty exists as to whether Singapore will follow case law in the US, whether it will go its own way – or take a hybrid approach reflecting the hybrid nature of the legislative reforms. While *Re Attilan Group Ltd* (described above) suggests US Jurisprudence will guide Singapore decisions about priority for rescue finance, subtle but important drafting differences in the

<sup>148</sup> Robert French AC, “Singapore – Where Common Law and Constitutions Meet” (Speech at the Anglo-Australasian Lawyers Society Breakfast Address, 21 October 2013, Sydney)

<sup>149</sup> Apáthy and Chua, *supra* note 29.

<sup>150</sup> Kasiviswanathan Shanmugam, “Keynote Address by Mr K Shanmugam, Minister for Home Affairs and Minister for Law, at the Singapore Insolvency Conference 2017” (Speech delivered at the Singapore Insolvency Conference, Singapore, 24 August 2017), [49].

<sup>151</sup> Committee Report, *supra* note 18 [4.7] to [4.14].

<sup>152</sup> *Ibid*, [3.52] to [3.70].

<sup>153</sup> *Ibid*, [4.15] to [5.3] and Annex 1, recommendations 4.5, 4.6, 5.1 and 5.2.

<sup>154</sup> *Supra*, note 150 [34], [39] to [43].

<sup>155</sup> Insolvency, Restructuring and Dissolution Act 2018, Part 3, Division 3

Companies Act (and soon to be the IDR Act) and Chapter 11 legislative provisions might produce differing results in otherwise comparable situations. Uncertainty of outcome will tend to be a factor limiting use of the Singapore regime, particularly in these relative early days of its operation.

## 10. Conclusion

Overall, it is realistic to expect that far more restructurings emanating from the Asia Pacific region, such as those seen in English scheme of arrangement cases *Re Vietnam Shipbuilding Industry Group* and *Sea Assets v PT Garuda Indonesia*, will take place in Singapore, particularly over the medium to long term. The successful uptake of the new legislative provisions in a variety of significant restructurings indicates the potential for success.

English schemes' "inherent flexibility,"<sup>156</sup> predictability, the speed of access to, and the commercial attitude of, English judges<sup>157</sup> have contributed to the English scheme of arrangement becoming a very popular restructuring tool, particularly for European creditors and debtors.<sup>158</sup> It is unclear whether these features and other above identified advantages of the Singapore regime and "ecosystem" will see restructurings drawn away from England to Singapore, particularly in the short term. Similarly, it is unlikely that US-centred restructurings will be drawn to Singapore.

Other jurisdictions, however, may be "up for grabs." In particular, if the ASEAN nations are able to agree to a regime for cross border insolvency recognition, it is likely that Singapore's regime will "take off."

It is anticipated that the recent reforms will see a more visible effect on attracting restructurings of companies or groups based in Asia or those with substantial assets in Asia, given the existing capabilities of Singapore as an international financial centre and the distinct blend of cultures as discussed.

It is early days for Singapore's new mission, but "there is now a completely new game in town, open to international stakeholders"<sup>159</sup> and all signs are that Singapore will make serious inroads.

---

<sup>156</sup> *Van Gansewinkel Groep B.V.* [2015] EWHC 2151 (Ch) at [5].

<sup>157</sup> Katrina Buckley, David Campbell and Joel Ferguson, "The rise and rise of the English scheme of arrangement" (Allen & Overy Publication, 21 December 2015).

<sup>158</sup> *Ibid.*

<sup>159</sup> Rajah, *supra* note 1.





## **INSOL International GROUP THIRTY-SIX**

AlixPartners LLP  
Allen & Overy LLP  
Alvarez & Marsal  
Baker McKenzie  
BDO  
Brown Rudnick LLP  
BTG Global Advisory  
Clayton Utz  
Cleary Gottlieb Steen & Hamilton  
Clifford Chance LLP  
Conyers Dill & Pearman  
Davis Polk & Wardwell LLP  
De Brauw Blackstone Westbroek  
Deloitte LLP  
Dentons  
DLA Piper  
EY  
Ferrier Hodgson  
Freshfields Bruckhaus Deringer LLP  
FTI Consulting  
Goodmans LLP  
Grant Thornton  
Greenberg Traurig LLP  
Hogan Lovells  
Huron Consulting Group  
Jones Day  
King & Wood Mallesons  
Kirkland & Ellis LLP  
KPMG LLP  
Linklaters LLP  
Morgan Lewis & Bockius LLP  
Norton Rose Fulbright  
Pepper Hamilton LLP  
Pinheiro Neto Advogados  
PwC  
Rajah & Tann Asia  
RBS  
RSM  
Shearman & Sterling LLP  
Skadden, Arps, Slate, Meagher & Flom LLP  
South Square  
Weil, Gotshal & Manges LLP  
White & Case LLP



## **INSOL International**

**6 – 7 Queen Street, London EC4N 1SP**

**Tele: +44 (0)20 7248 3333**

**Fax: +44 (0)20 7248 3384**

**[www.insol.org](http://www.insol.org)**