Singapore as an international debt restructuring centre – opportunities and challenges

Singapore has been a great economic success story. It is one of the original Asian Tiger economies moving from Third World status to First World status under the premiership of its founding father Lee Kuan Yew. It has long been seen as a bastion of free trade and free enterprise. Nevertheless, Singapore’s economy faces new challenges in a world of Trump and Brexit and the apparent pushback from the practice of global free trade. But there should be new opportunities also as the world pivots to the East with the rise of China and India as well other Asian economies.

Singapore’s UK colonial heritage has given its population proficiency in the English language – the global language of business – and a common law legal system which has scored consistently well on international score cards measuring the efficiency of legal regimes such as the World Bank Doing Business survey. Its unique population mix with an ethnically Chinese majority but with significant Malay and Indian minorities also facilitates the role of Singapore as the location for international commerce and international legal interactions.

Its role as an international and more specifically Asian arbitration centre for the settlement of commercial disputes is already well established. More recently, Singapore has promoted itself as a leading hub for debt restructuring and corporate restructuring and insolvency more generally. To a certain extent, London has acted as a debt restructuring and bankruptcy capital for Europe and Singapore has similar aspirations to serve as such a centre for Asia and potentially more generally. To this end, Singapore as well as adopting the Model Law on Cross Border insolvency, has embarked on an ambitious package of reforms to make Singapore law more ‘restructuring friendly’. In the main, these reforms have taken the existing scheme of arrangement procedure in Singapore, closely modelled on schemes of arrangement under the UK Companies Act, and engrafted innovative new features drawn from Chapter 11 of the US Bankruptcy Code.

Singapore is an exciting new field for insolvency and restructuring law innovations and the hope is that major ‘players’ will come to make use of the exciting new infrastructure. This paper crucially evaluates the Singapore reforms putting them in their international and national

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context. The Kevin Costner movie vehicle "Field of Dreams" reflects the belief that if you build a field then important players will come. Nevertheless, it may be unwise to assume if certain reforms then certain consequences will automatically follow. It is something of a truism that legal changes must be sensitive to local conditions and should take account of different implementing environments. It is the case that legal concepts behave differently in different countries and the importation of a new concept may have unintended consequences for the rest of the body of law. While one should not preclude the possibility of borrowing from other countries, a good fit of foreign with domestic law would be enhanced by meaningful adaptation of imported laws to local conditions. This paper will address whether the transplanted has been given the necessary space to bed down into the Singapore body fabric.

The Singapore reforms in their international context

In recent years, significant changes to restructuring and insolvency laws have been proposed for the US, EU and UK though none of these proposed reforms have been enacted into law yet. It is generally accepted that modern laws should promote the restructuring of viable businesses as well as the efficient closure and transfer of assets of failed businesses. Chapter 11 of the US Bankruptcy Code has been held out as a success in this regard and as a model for the reform of restructuring laws on a worldwide basis. Some Chapter 11 proponents suggest that its provisions merit a prominent place in "the pantheon of extraordinary laws that have shaped the American economy and society and then echoed throughout the world". According to one leading case, Chapter 11 has as its objective "to provide a debtor with the legal protection necessary to give it the opportunity to reorganize, and thereby to provide

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6 In a leading study by inter alia, the Association of Financial Markets in Europe (AFME) and Frontier Economics it has been described as an important comparison point for further insolvency law reform in Europe - Potential economic gains from reforming insolvency law in Europe (February, 2016) at p 11 and see generally M Brouwer, ‘Reorganization in US and European Bankruptcy Law’ (2006) 22 European Journal of Law and Economics 5.

creditors with going-concern value rather than the possibility of a more meagre satisfaction of outstanding debts through liquidation.\(^8\)

Chapter 11 is seen as pro-restructuring for a number of reasons. It is easy to access by the debtor who generally has to file a petition with the court disclosing certain financial and other information. A court order is not however needed to activate the process and there are no other onerous conditions to be fulfilled. Moreover, the filing of a Chapter 11 petition brings about a worldwide moratorium on proceedings against the debtor or the debtor’s assets. This is referred to as the automatic stay. The global economic reach of the US means that even creditors outside the US can ill-afford to ignore this stay. It is only where there US contacts are non-existent that they can safely proceed with actions against the debtor.\(^9\)

Chapter 11 also reflects a ‘debtor in possession’ norm by which is meant that prima facie, the existing management team remain in control of the company’s business rather than being displaced in favour of an external manager or administrator. They are referred to as the ‘debtor-in-possession’. In certain, though limited circumstances, the court may appoint a bankruptcy trustee to displace existing management and an outside examiner may also be appointed by the court to investigate and report on certain matters.\(^10\) It is the case however, that the composition of the management team may change significantly during the Chapter 11 period due generally to the altered financial circumstances or perhaps more specifically as a result of pressure from creditors.\(^11\) Creditors may exert powerful influence during the Chapter 11 process including through provisions in debtor-in-possession finance agreements – ‘DIP’ financing. Chapter 11 contains an extensive set of provisions on DIP finance but there is scope for the statutory regime to be supplemented by contractual agreements giving new finance providers power to influence the debtor’s behaviour. New finance may be contractually conditioned on the debtor taking certain actions, such as auctioning off specific

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8 *Canadian Pacific Forest Products Ltd v JD Irving Ltd* (1995) 66 F. 3d 1436 at 1442.
10 Section 1104(c)(2) seems to require the appointment of an examiner where the company’s unsecured, non-trade and non-insider debt exceeds $5m i.e. in every medium to large case but see however, the American Bankruptcy Institute (ABI) Chapter 11 Commission report – *www.commission.abi.org/full-report/— at p 33: ‘Whether the appointment of an examiner is truly mandatory in any given case has met with resistance by some courts and created a split in the law.’
assets, within a particular period. The statutory framework also allows the DIP lender to override existing security interests in certain circumstances though these circumstances are the exception rather than the rule and the DIP lender may in fact be an existing secured lender wearing a different hat.

Chapter 11 in more or less its current incarnation forms part of the US Bankruptcy Code since 1978 though there were earlier version which achieved similar results in somewhat different ways. But as suggested above with the discussion of contractual bargaining, Chapter 11 has not stood still since 1978. There have been significant developments in the financial marketplace and this has led to changes in Chapter 11 practice with a stronger emphasis on ‘going concern’ sales of the company’s assets rather than reorganisations in the traditional sense. In other words, the Chapter 11 process may lead to either the whole or partial sale of the assets of a business on the basis of a going concern rather than relevant stakeholders coming together under the protective umbrellas provided by Chapter 11 and agreeing on a restructuring plan. The relevant statistics can be interpreted in different ways but one estimate suggests that “roughly two-thirds of all large bankruptcy outcomes involve a sale of the firm, rather than a traditional negotiated reorganization in which debt is converted to equity through the reorganization plan.” Some of the difficulties in interpreting the relevant statistics comes from the fact that a company may be the subject of major changes in the course of its time in the Chapter 11 process. It may be split into different businesses, shrink in size, change its name, change the management team, change the nature of its business or be sold to different owners.

One of the most important actors in the US bankruptcy and restructuring landscape – the American Bankruptcy Institute – has spoken of the need for reform of Chapter 11 given the significant changes since its first enactment. It has instanced in this connection the expanded use of secured credit, growth in distressed-debt markets as well as other factors that have

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impacted on the effectiveness of the current law. In 2014 it produced a comprehensive report that set out a long list of proposed changes to Chapter 11 though these are mainly in the detail rather than affecting the fundamental essence of Chapter 11. Later on, this article will consider the proposed changes in terms of binding dissenting creditors to a restructuring plan – so-called ‘cross class creditor cramdown’ though it seems unlikely that these proposed reforms will be enacted in the near future.

Restructuring and insolvency law reform seems to be higher up the legislative agenda in the EU. In November 2016 the European Commission introduced a proposal for a restructuring directive. This proposal is a development of earlier Commission initiatives including the 2014 Recommendation on a new approach to business failure and insolvency. The proposal has three main features. Firstly, it suggests the introduction of a “preventive” restructuring framework in EU Member States containing certain minimum elements to facilitate the restructuring of ailing businesses. Secondly, it has provisions on second chance/fresh start for “entrepreneurs” and thirdly, there are more general aspects that are intended to enhance the efficiency of restructuring, insolvency and second chance procedures.

The Commission's overall objective is to reduce barriers to the free flow of capital and the freedom of companies to move operations across national frontiers – barriers that may at least arise partly from differences in the different laws and procedures of the various EU Member States on restructuring and insolvency. This is intended to lead to stronger economic growth and increased employment opportunities.

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19 For detailed criticism of the report by the Loan Syndications and Trading Association (LSTA) see “The Trouble with Unneeded Bankruptcy Reform: The LSTA’s Response to the ABI Commission Report” (October 2015) at p. 9: “If adopted, these reforms risk disrupting the operation of a bankruptcy system that has served the nation very well—aiding in the economic recovery from the Great Recession—and that has become the envy of the world. They also threaten to increase the cost of credit to both performing and distressed businesses, which will in turn hurt the very businesses that the proposals are designed to help.”
20 COM (2016) 723 final 2016/0359 (COD) and see also European Commission Staff working document accompanying the proposal – SWD (2016) 357 final.
21 C (2014) 1500 final and see also the Commission Communication A New European Approach to Business Failure and Insolvency COM (2012) 742.
22 The free flow of capital is one of the foundation stones on which the European Union is built - see now Article 26(2) of the Treaty on the Functioning of the European Union (TFEU) referring to the creation of an internal market comprising an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.
23 On the broader dimensions of insolvency law see generally F Mucciarelli, ‘Not Just Efficiency: Insolvency Law in the EU and its Political Dimension’ (2013) 14 EBOR 175; J Armour, ‘The Law and
According to the Commission:

“Boosting jobs and growth in Europe requires a stronger rescue culture which helps viable businesses to restructure and continue operating while channelling enterprises with no chance of survival towards swift liquidation, and gives honest entrepreneurs in distress a second chance. This proposal is an important step towards such a change of culture.”

The European Commission has also referenced the relatively poor performance of European economies on the World Bank Doing Business survey. It highlights the fact that the Doing Business (DB) project ranks countries according, inter alia, to the efficiency of their insolvency frameworks on a scale of 0-16 and points out that the “EU average is 11.6, which is 5% below the OECD average for high income countries.”

Questions have been raised about the World Bank methodology. These concerns focus on the underlying normative assumption that particular features of insolvency law are better or more desirable than others and what these particular features might be. They also focus on the accuracy on the empirical enquiries carried out by the World Bank before publishing their findings. Notwithstanding such concerns, the European Commission also relied on World Bank statistics on recovery rates in insolvency proceedings in articulating the need for a new Europe-wide insolvency instrument. It said: "World Bank indicators suggest that recovery

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28 COM (2016) 723 final 2016/0359 (COD) at p. 3.
rates vary between 30% and 90% in the EU. Recovery rates are higher in economies where restructuring is the most common insolvency proceeding: in such economies creditors can expect to recover 83% of their claims, against an average of 57% in liquidation procedures. The length of insolvency proceedings ranges from a few months to four years, with 14 Member States having procedures which last for two or more years."

The reliance by the European Commission on World Bank statistics was largely instrumental however. The desire by the Commission was not per se to improve the position of European economies in the World Bank Doing Business rankings but rather to bolster its arguments that some action was required at the European level to reform restructuring law with a view to boosting jobs and growth. More restructurings and less insolvencies would bring about greater economic stability reducing dislocation in communities and fostering growth.

In formulating the content of the proposal the Commission made use of some of the ideas contained in the US Chapter 11. It also acknowledged that the UK scheme of arrangement had been widely used in recent years by European incorporated companies as a debt restructuring tool. Singapore law has long contained a scheme of arrangement procedure modelled on the UK equivalent. The new Singapore reforms largely take the existing scheme procedure with its English antecedents and push it in a largely US Chapter 11 direction. The UK procedure therefore warrants some discussion including proposed reforms of UK restructuring law though it is not clear whether these reforms will come to pass in the foreseeable future.

The UK scheme of arrangement and proposed reforms

In recent years, schemes of arrangement have increasingly been used as debt restructuring too altering in various ways the financial obligations of companies. These obligations have been commented upon by Snowden J in *Re Van Gansewinkel Groep BV* commented as follows at paragraphs 4-5:

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29 S Madaus, ‘The EU recommendation on business rescue - only another statement or a cause for legislative action across Europe?’ [2014] Insolvency Intelligence 81 at 84 suggesting that the ‘Commission obviously had this tool in mind when they designed the Recommendation’.


31 [2015] EWHC 2151 at paras 4-5.
“The use of schemes of arrangement in this way has been prompted by an understandable desire to save the companies in question from formal insolvency proceedings which would be destructive of value for creditors and lead to substantial loss of jobs. The inherent flexibility of a scheme of arrangement has proved particularly valuable in such cases where the existing financing agreements do not contain provisions permitting voluntary modification of their terms by an achievable majority of creditors, or in cases of pan-European groups of companies where co-ordination of rescue procedures or formal insolvency proceedings across more than one country would prove impossible or very difficult to achieve without substantial difficulty, delay and expense.”

Part 26 of the UK Companies Act 2006 contains the UK law on schemes of arrangement but the law has been developed substantially by judicial interpretation. Essentially, the scheme procedure involves an arrangement between a company and its creditors and/or members with some element of “give and take” on both sides. Essentially, the sanctioning of a scheme is a three-stage procedure with firstly, an application to the court to convene relevant meetings of creditors or members of a company. Secondly, the relevant class meetings are held and the scheme is required to be approved by 75% in value and a majority in number of creditors within each class. The third stage involves the scheme coming before the court for approval. The court must be satisfied that the scheme proposed is a reasonable one such that a reasonable member of the class concerned and acting in respect of its own interests could have voted for it. While the court is not a rubber stamp, it need not be satisfied that the scheme proposed is the only fair one. Essentially, the court must be satisfied statutory provisions have been observe, in other word, there is no ‘blot’ on the scheme; that the relevant class was fairly represented by those who attended the meeting and that the statutory majority were acting bona fide and not coercing the minority in order to promote interests adverse to those of the class they purport to represent. The court addresses whether an intelligent and honest person, a member of the class concerned and acting in respect of its own interest, might reasonably approve the scheme.

While dissenting creditors within a class may be ‘crammed down’, there is no scope for dissenting classes of creditors in their entirety to be crammed down’. The UK scheme of arrangement differs in this respect from the US Chapter 11. This fact makes the composition

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32 See Anglo-Continental Supply Co Ltd [1922] 2 Ch. 723 at 736.
33 It has been pointed out that the test is not whether the opposing creditors have reasonable objections to the scheme since a creditor might be acting equally reasonably in voting either for or against the scheme. In these circumstances, the English courts consider that creditor democracy should prevail - see Re British Aviation Insurance Co Ltd [2005] EWHC 1621 at para 75.
of creditor classes very important in the context of a scheme of arrangement. It also leads to more complicated strategies with a view to ‘squeezing out’ dissenting creditors. To a certain extent, the courts have aided scheme proponents through their interpretations of the class composition rules. It has been held that questions on class composition should be determined at the convening hearing stage rather than later at the hearing to sanction the scheme. In addition, the relevant test to work out the constitution of classes is whether creditors have different legal rights rather than separate interests that may stem from these legal rights. It has also been held that small differences in rights does not prevent creditors being placed in the same class. The courts take a ‘broad brush’ approach to avoid the situation where a minority group of creditors have an effective veto on whether the scheme should be approved.34 It is also the case that ‘lock-up’ agreements – small financial inducements given to creditors who vote in favour of the scheme proposals before a particular date – do not necessarily require that the creditors who are bound by the lockup agreement should be put in a separate class.35

On alternatives to cross class creditor cramdown, it has been held that it is only necessary to get the consent of those with economic interest in proposed restructuring. Schemes might therefore be used to ‘squeeze out’ creditors who are ‘out of the money’ as in Re MyTravel plc36 and the Re IMO Carwash37 case. In broad essence, company assets are transferred to a ‘newco’ together with some liabilities of creditors who are ‘in the money’ but ‘out of the money’ creditors are left stranded with claims against the ‘oldco’ which no longer has any assets. Such schemes usually implemented as part of ‘pre-packaged’ administration and are generally referred to as ‘prepack’ or ‘business transfer’ schemes. Administration is the UK procedure designed for ailing companies involving the appointment of an external administrator (insolvency practitioner or IP) and the displacement of the board of directors and the existing management team in favour of the IP. The administrator is mandated to address the rescue of all or part of the company’s business, achieving a more advantageous realization of the company’s assets than could be achieved in a liquidation and making distributions to secured and preferential creditors. Despite the absence of any explicit statutory authorization, the courts have given their blessing to ‘prepackaged’ administrations which involve the sale of all

34 See Chadwick LJ in Re Hawk Insurance Co Ltd, [2001] 2 B.C.L.C. 480 at para 33 suggesting that the relevant tests should not be applied in such a way that they become an instrument of oppression by a minority.
36 See Re My Travel Group plc [2004] EWHC 2741 (Ch) and see also Re Tea Corp Ltd [1904] 1 Ch 12. For a general discussion see Chi-Ling Seah, ‘The Re Tea Corporation Principle and Junior Creditors’ Rights to Participate in a Scheme of Arrangement: A View from Singapore’ (2011) 20 International Insolvency Review 161.
37 This case is also referred to as Re Bluebrook [2009] EWHC 2114 (Ch).
or part of the company’s business normally to a pre-arranged purchaser once the administrator has been appointed.38

Under the ‘business transfer’ scheme, the assets or business of the company is normally transferred to a new creditor owned company with the latter assuming an agreed amount of the company’s existing liabilities equalling to or exceeding the value of the business or assets being transferred. The transfer is carried out the administrators who are appointed once the scheme has been sanctioned – hence the expression ‘prepack’. There is no need to obtain the approval of junior creditors who no longer have any economic interest in the business, given the current value of the business. These junior ‘out of the money’ creditors are left behind in the old scheme company with their rights unaltered but now essentially valueless since the ‘oldco’ has been stripped of assets.

Business transfer schemes may be complex but they also give rise to questions of fairness and procedural propriety.39 The courts consider the question of valuation at the sanction stage but there may be difficult questions about where the debt structure the value “breaks”; how one assesses value and what is the relevant comparator for assessing fairness and value – whether it is liquidation value, going concern value, or something else?40

The UK Insolvency Service has now suggested reforms including the introduction of statutory moratorium as well as a dedicated new cramdown procedure.41 Currently, the UK lacks a specific statutory moratorium on proceedings or enforcement proceedings against a company when scheme proposals are being considered though a limited moratorium has been developed judicially.42 On cramdown, the proposals are somewhat lacking in detail but what is essentially proposed is a statutory, 12 month time-limited multi-class restructuring

38 See generally P Walton “Pre-Packaged Administrations – Trick or Treat” [2006] Insolvency Intelligence 113 and see also V Finch “Pre-packaged administrations: bargains in the shadow of insolvency or shadowy bargains?” [2006] Journal of Business Law 568.
40 For a general discussion of the issues see J. Payne, “Debt Restructuring in English Law: Lessons From the United States and the Need for Reform” (2014) 130 L.Q.R. 282. In the UK, A Review of the Corporate Insolvency Framework states [9.9]: “The cram-down of a rescue plan onto ‘out of the money’ creditors is currently possible in the UK only through a costly mix of using a ‘scheme of arrangement and an administration. The Government believes that developing a more sophisticated restructuring process with the ability to ‘cram-down’ may facilitate more restructurings, and the subsequent survival of the corporate entity as a going concern.”
41 See the Insolvency Service consultation, A Review of the Corporate Insolvency Framework: A consultation on options for reform (May 2016). This consultation seeks views on whether the UK regime ‘needs updating in the light of international principles … recent large corporate failures and an increasing European focus on providing businesses with the tools to facilitate company rescue. It seeks to establish whether legislative change would improve the UK corporate insolvency regime and provide a better environment to achieve the successful rescue of a viable business’ (see p 4).
procedure to aid corporate rescue. The cram-down mechanism would allow a restructuring plan to be imposed on an impaired class provided that other classes have accepted the plan and that the impaired class would receive at least as much under the plan as they would do in a liquidation of the company. The proposals have since been revised to oblige the court in deciding whether or not to approve cramdown, to consider the most likely alternative scenario to a restructuring rather than confining itself to liquidation value per se.43

Singap俄国 – the old and the new

The Singapore Companies (Amendment) Act 2017 brings forward an ambitious package of reforms that builds on old and existing procedures and takes them off in new directions largely along the lines of Chapter 11 of the US Bankruptcy Code. The reforms draw on the 2013 Report of Singapore’s Insolvency Law Review Committee44 but more directly on the 2016 Report of the Committee to promote Singapore as an International Debt Restructuring Centre.45 One of the explicit aims of the new legislation is to boost the status of Singapore as a regional and international hub for debt restructuring bringing international business to Singapore and increased employment opportunities for finance and legal professionals as well as bankers. In this respect, the Singapore reforms are to be contrasted with those mooted in the US and Europe where the aim is more to boost the domestic economies though the reforms in Singapore may also have a beneficial effect for local business. As far as the UK is concerned, the projected reforms may be more twin track – aiding the domestic economy but also preserving and enhancing the attractiveness of the UK as the European destination of choice for financially distressed companies needing to be restructured. While London may have become the debt restructuring capital of Europe, it cannot be seen to be resting on its laurels, not least in a post-Brexit world.

The new Singapore legislation makes major changes to both the schemes of arrangement and judicial management (JM) procedures. The JM procedure fairly closely parallels the original UK administration order procedure as introduced in 1986 and before it was substantially revised by the Enterprise Act allowing an administrator to be appointed either by the debtor company or a general secured creditor out–of-court. This facility does not exist in Singapore but under the reforms judicial management becomes easier to access. A judicial

43 UK Insolvency Service, A Summary of Responses: A Review of the Corporate Insolvency Framework (September 2016)
45 This report is available at https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Report%20of%20the%20Committee.pdf
management order may be made by the court where it considers it merely likely that the company will be unable to pay its debts as distinct from a probability of this occurring. The secured creditor veto on the making of a judicial management order which hitherto generally existed in Singapore has also been weakened. The court is now required to apply a balancing of harms test though the general secured creditor bears the burden of establishing that it would be caused disproportionately greater prejudice by the making of a judicial management order than unsecured creditors would be caused by its refusal.

While it is now possible to make a judicial management in respect of a company registered overseas, it is clear that the scheme procedure is seen as the main vehicle for Singapore to flex its strength in the international debt restructuring arena. On the basic issue of jurisdiction and discretion, there is clarification of the circumstances in which the courts may approve schemes. In some respects, the scheme jurisdiction may be seen as potentially “exorbitant” since that it may interfere with the disposition by foreign sovereign powers of matters within their own territories. There is also the practical concern of ensuring that the court only made orders where some useful purpose would be served. In the UK, “sufficient connection” test has been used as the overriding criterion for determining whether the court should exercise its discretion to make a winding-up order in respect of a foreign company and the same “sufficient connection” test has been used in relation to exercising the jurisdiction to sanction a scheme of arrangement in relation to a foreign registered company. The UK courts have sanctioned schemes where the relevant foreign company has a “sufficient connection” with the UK, even though its centre of main interest (Comi) is not in the UK. It may be enough that all or some of the scheme creditors are domiciled in the UK; where the scheme purports to modify obligations governed by UK law or where there is a UK choice of forum clause. It seems that the Singapore courts will exercise their scheme jurisdiction in relation to foreign companies on a largely similar basis and this has now been put on a statutory footing.

The Singapore scheme of arrangement procedure developed as flexible debt restructuring tool possibly even before its widespread use in this respect in the UK and a number of helpful

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46 In Re Real Estate Development Co [1991] 1 BCLC 210 Knox J referred to a sufficient connection that would justify the court in setting in motion its winding-up procedures over a body that was prima facie beyond the limits of territoriality. The test can be criticised for being somewhat circular but it does enable a wide range of factors to be brought into the reckoning including benefit to the petitioner whether through the presence of corporate assets in the UK or otherwise – [1991] 1 BCLC 210 at 217. Knox J also talked about a reasonable possibility of benefit accruing to the applicants for a winding-up and a person or persons interested in the distribution of the assets being persons over whom the court can exercise jurisdiction.

judicial decisions facilitated its use. Moreover, and unlike in the UK, the Singapore scheme included a statutory moratorium/stay on proceedings against the debtor company though this stay was somewhat limited in that it did not cover enforcement actions by secured creditors nor the forfeiture of leases. The new legislative dispensation strengthens the stay to cover these matters and moreover, there is now an automatic 30 day initial stay/moratorium on proceedings etc. against the debtor and the stay can be extended to cover entities related to the debtor.

The new dispensation also makes provision for the possibility of ‘prepacks’- ‘prepackaged’ schemes; for super-priority new finance and also for cross-class creditor cramdown though not in the case of ‘prepacks’. It adopts the UNCITRAL Model Law and abolishes the so-called ‘ring fencing’ rule whereby if a company registered in Singapore as a foreign company was the subject of a Singapore secondary liquidation, then assets collected in the course of the Singapore proceedings should be set aside for the payment of debts incurred in Singapore, before being remitted to the foreign liquidator in the foreign insolvency proceedings.

**The Singapore moratorium**

Like in the UK, the Singapore scheme of arrangement developed as a mainstream and popular debt restructuring procedure from the 1990s. The UK scheme was once described as a blunderbuss and somewhat cumbersome but it is now a high precision weapon to deal with ‘debt overhang’.

The Singapore scheme for some time has features additional to those in the UK scheme and these have been strengthened considerably in the new legislation. It remains the case however, that the Singapore scheme remains more a dedicated debt restructuring procedure rather than a fully blown corporate/business rescue procedure. It lacks certain aspects of the US Chapter 11 such as an executory contracts regime – a facility to deal with contracts not yet performed by the debtor. Many contracts contain so-called ‘ipso facto’ clauses allowing,

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48 For a discussion see Report of the Insolvency Law Review Committee (2013) Chapter 7 and the statement at pp 135-6 “The Committee is of the view that the scheme of arrangement regime has generally worked well in practice. However, there are a number of drawbacks that have been identified. The Committee noted that some of these drawbacks have been identified and ameliorated in part by judicial rulings …”

49 Ibid at p 136 “the protection afforded by the statutory moratorium provided at section 210(10) of the Companies Act is relatively weak compared with the moratoriums found in the liquidation or judicial management regimes.”


51 For a detailed cross-country comparison of this issue see D. Faber, N. Vermunt, J. Kilborn and K. van der Linde, *Treatment of Contracts in Insolvency* (Oxford, Oxford University Press, 2013) and for
for instance, suppliers to terminate or modify a long-term supply arrangement if the counterparty enters formal insolvency or restructuring proceedings or more generally experiences financial difficulties. Subject to certain protections for contractual counterparties, a Chapter 11 debtor may 'cherrypick' among outstanding contracts rejecting financially disadvantageous ones. The newly revised Singapore scheme does not contain executory contract provisions along US lines but it does embody other Chapter 11 features.

Like Chapter 11, the Singapore scheme remains a 'debtor-in-possession' procedure. There is no management displacement in favour of an external IP. The company management can prepare a restructuring plan and submit it to creditors though obviously in practice there is likely to be a high degree of interaction and consultation with creditors in formulating the detailed terms of the plan and making sure that it is likely to meet with creditor approval.

The stay/moratorium on creditor enforcement action is a key feature of Chapter 11 enabling the debtor to preserve assets that may be essential for the carrying on of its business and giving it the breathing space to prepare restructuring proposals. The stay addresses the "anti-commons" problem of blocking actions by individual creditors who are seeking to frustrate the wishes of the majority. In the US the filing of a Chapter 11 petition brings about a worldwide automatic stay on proceedings against debtor or its assets and because of the global economic reach and power of the US this stay cannot be ignored unless an affected party has no US connections. The new Singapore adopts some of these features from Chapter 11 and enhances enormously the existing Singapore stay. There is now an automatic 30 day interim stay on the filing of a moratorium application and the stay is expanded to cover both the enforcement of security and the forfeiture of leases. The interim stay may be extended on application to the court.

In 2013, Singapore’s Insolvency Law Reform Committee (ILRC) considered the possibility that a stay should be triggered automatically upon the filing of a scheme application but declined


53 See H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977): The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.


55 On the worldwide effect of the US automatic stay see In re Nortel Networks Inc (2011) 669 F. 3d 128.
to make a positive recommendation in this regard. It suggested that an automatic stay might lead to abuse.\textsuperscript{56} The 2016 Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring took a somewhat different view however, and suggested a certain ‘streamlining of procedure’.\textsuperscript{57} This latter view is now reflected in the new legislation which in line with the Committee’s recommendations, also contains certain safeguards against abuse. These include the requirement that certain evidence must be filed with the court to support the stay application including evidence of support from creditors whose support is important for the success of the proposed scheme. There is also a prohibition against repeat stay applications attracting the automatic moratorium within 12 months. The stay application may be made in advance of the application to the court for an order convening meetings of creditors to approve the proposed scheme but in this scenario, the court must undertake to the court to make the other application as soon as practicable.

The court may extend the automatic 30 day interim stay but, in this case, more stringent information requirements need to be satisfied by the applicant for an extension. The stay may also be given worldwide in personam effect provided that the Singapore court has jurisdiction over affected creditors or their assets. Under the case law as developed in the English courts, creditors may be restrained by injunction from pursuing foreign proceedings where the conduct of such creditors is oppressive, vexatious or otherwise unfair or improper.\textsuperscript{58} There are suggestions that the Singapore courts would adopt a similar approach in the absence of statutory guidance but the 2016 Debt restructuring committee report suggested that an express statutory statement would have a greater visibility internationally. The Committee said at para 3.14

“Express provisions for this injunctive relief should therefore allow the Singapore courts to make an order to stay creditors, who are based in Singapore or having sufficient nexus to Singapore such as to invoke the jurisdiction of the Singapore courts, from taking action globally (i.e. similar in nature to the in personam effect of an anti-suit injunction). This injunctive relief is useful as it leverages on Singapore’s status as an international financial hub and can bind creditors registered in and/or operating from Singapore from taking actions that might frustrate a restructuring.”

\textsuperscript{56} See p 141 of the Committee’s report.
\textsuperscript{57} P 19 (para 3.9).
\textsuperscript{58} The leading case is now the decision of the Privy Council in Stichting Shell Pensioenfonds v Krys [2014] UKPC 41 and see generally the case for a more extensive stay under UK law H Anderson, “The Extra-Territoriality of the Statutory Stay in an English Administration” (2004) 23 International Insolvency Review 40.
The new Singapore law also goes somewhat beyond English law by allowing the stay to be extended to entities related to the debtor. Various conditions have to be met to the satisfaction of the court including the fact that the related company plays a "necessary and integral role" in the debtor's scheme and the creditors of the related company will not be unfairly prejudiced by an extension order. In making the case for this legislative innovation, the 2016 report pointed to the fact that many businesses organise themselves across a corporate group structure and that "a restructuring can potentially be frustrated if creditors are able to take action against related corporate entities that are a necessary and integral part of the restructuring plan."\(^{59}\)

It should be noted that there is no express statutory authority for such an extension in the US Chapter 11 though there is judicial authority. Reliance has been placed on s. 105(a) of the Bankruptcy code which allows US bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate" to implement the provisions of the Bankruptcy Code as sufficient for extending the protections of the automatic stay to non-debtors. It seems that in the US, the courts apply a fact-specific analysis to determine whether the stay applies to non-debtor entities as well as the debtor itself. It is only however, in "unusual circumstances" where the interests of a debtor and non-debtor are very closely related that the stay can reach the non-debtor party. It was held in the leading case of *AH Robins Co v Piccinin*\(^{60}\) that "unusual circumstances" exist when the non-debtor party establishes that "there is such identity between the debtor and the non-debtor that the debtor may be said to be the real party defendant and that a judgment against the non-debtor will in effect be a judgment or findings against the debtor." In another leading case - *Queenie Ltd v Nygard International*\(^{61}\) - it was held that the automatic stay can apply to non-debtors if a claim against the non-debtor will have "an immediate adverse economic consequence for the debtor's estate."

In terms of detailed drafting the new Singapore provisions also depart from Chapter 11 in terms of modification or discharge of the stay. Lengthy restructuring proceedings and, in particular those involving a stay on the enforcement of security interest, effectively transfer wealth to managers and shareholders at the expense of creditors. Creditors are prevented from realising their security but company managers may keep their jobs and shareholders may also benefit from the company being kept afloat during the restructuring period. In Chapter 11, a secured creditor, together with other affected parties, can apply to have the so-called automatic stay lifted and there is also specific requirement of ‘adequate protection’ for

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59 P 21 (para 3.15).
60 (1986) 788 F 2d 994 at 999.
61 (2003) 321 F 3d 282 at 287
those holding property rights who are adversely affected by the stay.\textsuperscript{62} Chapter 11 provides examples of ‘adequate protection’ though there is no definition of the concept as such.\textsuperscript{63} It is only the value of the security interest however, that is entitled to adequate protection\textsuperscript{64} and an under-secured creditor may be in a position of footing the bill for an unsuccessful restructuring attempt. The stay prevents it from enforcing the security interest but it is not entitled to interest during what may be a lengthy period while the debtor is in Chapter 11. The over-secured creditor is in a much stronger position however, since it is condition of the court approving the restructuring plan that it should be paid interest out of the ‘excess’ security.

In Singapore the new statutory provisions are broad and flexible. The stay order may be made subject to conditions and a creditor may also seek a court order discharging the stay or modifying its scope. The more detailed US provisions may be used to shape judicial discretion in Singapore when exercising the new powers. Guidance might also be drawn from the UNCITRAL Legislative Guide on Insolvency which suggests that while the stay lasts, a secured creditor is entitled to protection of the value of the asset in which it has a security interest with appropriate measures of protection including cash payments by the debtor’s estate, provision of additional security interests, or such other means as the court determines.\textsuperscript{65}

It should also be noted that in Singapore there are specific provisions against debtor misconduct during the stay period. A creditor may also apply for an order preventing the debtor from: (i) disposing of assets other than in good faith and in the ordinary course of business; (ii) engaging in conduct that materially prejudices creditors or significantly diminishes the debtor’s assets; or (iii) changing the composition of the debtor-company’s shareholders.

A new finance regime in Singapore including the possibility of super-priority

Following on from the recommendations in the 2016 Debt restructuring committee report, the new Singapore law contains a new financing regime for companies in the course of restructuring proceedings including the possibility of super-priority new finance overriding

\textsuperscript{62} Section 361 US Bankruptcy Code.

\textsuperscript{63}The examples given are cash payments, additional or replacement security interests on other property and, unusually expressed, something that will give the creditor the ‘indubitable equivalent’ of its security interest.

\textsuperscript{64} See \textit{Re Alyucan} (1981) 12 BR 803 where the court rejected the view that the preservation of a certain collateral-to-debt ratio was part of the creditor’s property interest that warranted protection. See also \textit{United Savings Association of Texas v Timbers of Inwood Forest Associates Ltd} (1988) 484 US 365 where the Supreme Court held that the adequate protection provision did not entitle an under-secured creditor to compensation for the delay caused by the stay in enforcing the security.

\textsuperscript{65} See Recommendation 50 of the UNCITRAL Legislative Guide on Insolvency.
existing security interests. The 2013 ILRC report recommending against making provision for such finance on the basis that it interfered unduly with an existing secured lender’s rights and might unsettle the market. The 2016 report departed from this approach and suggested that provisions for super priority new finance should be introduced in Singapore. It argued that such finance formed a vital plank to the DIP financing industry in the US, and the existence of similar provisions should encourage established players in the US DIP financing industry to make available rescue financing in Singapore. It also said that “rescue financing often amounts to a small portion of the total debt and any prejudice caused to existing secured lenders must be balanced against the possibility that the rescue financing may improve restructuring prospects substantially.”

More generally, the importance of a super-priority new finance facility has often been stressed in the context of resolving both ‘debt overhang’ problems, i.e. existing assets being fully secured, and also those of ‘underinvestment’, i.e. lack of incentives to finance value-generating projects. In the US, this form of financing is seen as attractive to bank lenders because it may come with substantial upfront fees, higher margins and a strong portfolio of covenants that may restrict the debtor’s activities. Reference has also been made to ‘increased activity from bespoke lenders such as hedge funds, private equity funds, institutional lenders and CLO funds, drawn by the higher yields available or possible loan to own strategies.’

The provisions in the new Singapore law follow closely those in s 364 of the US Bankruptcy Code. Now under certain conditions, including the unavailability of credit on less favourable terms and adequate protection of the interests of existing secured creditors, the Singapore court may authorise the debtor to raise new financing, even on a super-priority basis, provided such financing is deemed necessary to enable the debtor to continue as a going concern. The law provides some detail as to what constitutes adequate protection – cash payments, additional or replacement security or something that is the ‘indubitable equivalent’. This is Chapter 11 language that does not appear to have a precedent in the existing Singapore law.

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66 See pp 111-112.
68 P 38.
69 SWD (2016) 357 final at p 158 refers to “debt overhang” as a situation where a firm’s high debt levels act as a disincentive to new investment.
71 Potential economic gains from reforming insolvency law in Europe (February, 2016) at p. 18. The report was prepared by AFME, Frontier Economics and Weil, Gotshal and Manges LLP.
statute book. It seems that in the US, the 'adequate protection' criterion is strictly interpreted and that the courts will only authorise super-priority new finance if it finds there is sufficient value in the property subject to the interests (collateral) to support both the existing and new loans.\footnote{For a full discussion see American Bankruptcy Institute, \textit{Commission to Study the Reform of Chapter 11 2012–2014, Final Report and Recommendations} (2014), pp 73-79, available at www.commission.abi.org/full-report including on how abuses associated with super-priority new financing might be checked.}

More generally, it has been suggested certain guidelines that should be adhered to in a new financing regime such as “(i) effective notice to pre-filing creditors and the ability of those creditors to object; (ii) thresholds for the debtor to qualify for such financing, for example a requirement that the debtor demonstrate that it cannot adequately finance itself without the priority being granted; (iii) a menu of relevant criteria to balance benefit and prejudice, such as considering whether any creditors will be materially prejudiced and whether the financing enhances the prospects of a viable business in the future; and (iv) a role for the court in resolving disputes, ensuring fairness to stakeholders, and serving as an accountability check …”\footnote{See J Payne and J Sarra, “Tripping the Light Fantastic: A Comparative Analysis of the European Commission’s Proposals for New and Interim Financing of Insolvent Businesses” \textit{Oxford Legal Studies Research Paper No. 41/2017} abstract and pp 34-35.} The Singapore legislation observes these guidelines. Nevertheless, super-priority new finance remains controversial not least because of its potential to ‘trump’ existing priority rules. It should be noted similar proposals for super-priority new finance in a restructuring context have so far been resisted in the UK and EU.\footnote{The call for such a regime was made in a study by Association of Financial Markets in Europe (AFME)/Frontier Economics that advocated EU legislative action - \textit{Potential economic gains from reforming insolvency law in Europe} (February, 2016) at p 18.}

In the UK, differences in business culture and economic environment have been cited in this connection.\footnote{See the parliamentary debates on the Enterprise Bill; in particular House of Lords debates for 29\textsuperscript{th} July 2002 and the discussion in Stephen Davies ed \textit{Insolvency and the Enterprise Act 2002} (Bristol, Jordans, 2003) at pp 20-26 where there is this comment at p 20: “Anecdotally, it has been said that, during the preparation of the proposals and the Bill, more time was spent by the Insolvency Service and those whom they consulted considering the vexed question of how administration would be funded than any other single topic. The assumption is that the topic proved too difficult because neither the White Paper nor the Bill made any provision for funding administrations.”} There are concerns about bringing about a situation that would essentially guarantee a return to lenders providing funds on a super-priority basis without regard to the commercial viability of the restructuring proposals. The view was that decisions about lending to a distressed business was a commercial one that was best left to the market place and to business judgment. Potential lenders could consider the viability of the restructuring
proposals, any unencumbered free assets that might serve as collateral; lower-ranking security and the possibility of obtaining security releases from existing lenders.

The possibility of reform was considered in conjunction with the Enterprise Act reforms in 2002, again in 2009 and most recently in the 2016 Insolvency Service consultation reviewing the Corporate Insolvency Framework. The market reaction remained hostile and cautioned against introducing a US style new financing regime. Moreover, it may be noted that under the World Bank Doing Business “Resolving Insolvency” indicators, the highest marks are given to countries that have a new financing framework but only where there is no provision for super-priority over existing secured debt. In general, the “Resolving Insolvency” indicators follow the standards laid down in the US Chapter 11 but in this respect there is a notable departure.

**Cross class creditor cramdown**

Singapore has also followed the US in terms of cross class creditor cramdown. The new Singapore is along the lines of s 1129 US Bankruptcy code but there are some differences most notably in the fact that cramdown is more difficult to accomplish in a Singapore context because of the requirement that 75% in value of creditors should approve a scheme rather than merely one impaired class of creditors. Cross class cramdown is now possible in a Singapore scheme once three basic conditions have been satisfied – the existing class consent requirements are satisfied in respect of at least one class; creditors representing a majority in number and at least 75% in value of total claims against the debtor for which votes are actually cast vote in favour and thirdly, the court is satisfied that the scheme is "fair and equitable" to dissenting creditors and does not “discriminate unfairly” between two or more classes of creditors.

The “fair and equitable” and “unfair discrimination” requirements are concepts based upon the cram-down provisions in s 1129 US Bankruptcy Code and the US precedents can be drawn upon in working out their detailed meaning. Moreover, more detailed guidance is given in the Singapore statute itself. The ‘fair and equitable’ criterion specifically imports requirement that

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76 Encouraging Company Rescue – a consultation’ (2009)
77 See the Insolvency Service consultation, A Review of the Corporate Insolvency Framework: A consultation on options for reform (May 2016).
78 See UK Insolvency Service A Review of the Corporate Insolvency Framework: summary of responses (September, 2016) at para 5.52 “[Some] respondents were concerned that any changes made to the order of priority would have a negative impact on the lending environment by increasing the cost of borrowing.”
79 See the 2017 DB Report at p 159: “Whether post-commencement finance receives priority over ordinary unsecured creditors during distribution of assets. A score of 1 is assigned if yes; 0.5 if post-commencement finance is granted superpriority over all creditors, secured and unsecured; 0 if no priority is granted to post-commencement finance or if the law contains no provisions on this subject.”
a dissenting creditor must receive at least as much under a scheme as it would receive were
the scheme not approved. Moreover, a dissenting secured creditor must receive the value of
its security and a dissenting unsecured creditor should be paid in full before shareholders
receive anything. This is the so–called "absolute priority" rule. 80

The main justification for the introduction of cross-class creditor cramdown in Singapore
comes in the 2013 Report of the Insolvency Law Review Committee. 81 According to the
Committee, if dissenting creditors get the same or more under a restructuring plan as they
would in a liquidation and are not the subject of discrimination, then any complaint that the
scheme is being unreasonably imposed upon them sounds hollow. As the committee pointed
out, the objections may come from creditors seeking to improve their bargaining position and
to a greater stake in the restructured business. A cross-class creditor mechanism would also
reduce the amount of time spent in disputes about creditor classification since it ceases being
the most decisive issue to resolve. At the same time, a minority in the Committee were against
the introduction of cram-down provisions since they rely “on comparative valuations between
rescue and liquidation, which are often speculative or in some cases nuanced to make rescue
sound more attractive.” 82 The Committee therefore recommended “a high threshold of proof”
allowing the court to check against unreasonable valuations and abuse of the cram-down
provisions. 83 It also suggested that the court should have the option of appointing an assessor
or expert to provide assistance in valuation matters.

Valuation disputes are undoubtedly difficult and in some cases almost requiring an economic
crystal ball to predict future conditions and the Singapore law has taken on board the
suggestion that a valuation expert may be appointed to assist the court. The new law tweaks
however, the Committee’s recommendation (and Chapter 11) by making the relevant
comparator the creditors’ position if the scheme did not come to pass rather than if the
company were liquidated. The Ministry of Law was also lobbied to reduce the high threshold
before cramdown is allowed. It was argued that the 75% in value requirement was
unnecessary and overly restrictive but the Ministry referred back to the consideration of the
relevant arguments by the Insolvency Law Review Committee. 84

80 For a suggestion that the US ‘absolute priority’ principle is less absolute than it might superficially
appear see Mark J Roe and Frederick Tung, “Breaking bankruptcy priority: How rent-seeking upends
the creditors’ bargain” (2013) 99 Virginia Law Review 1235 and see also and also S. Lubben, “The
81 See the discussion at pp 154-157.
82 P 155.
83 P 156.
84 See 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’) at pp 18-19 available at
https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-
Recent reform proposals advanced by both the European Commission and the Insolvency Service in the UK also contain provisions for cross-class cram-down that are dependent on “value” determinations being made by relevant courts or administrative authorities. Working out value, whether on a liquidation or restructured enterprise basis, is no easy task and the appointment of property qualified valuation experts will not necessarily solve all the matters since each party may come to the court armed with their own “independent” expert. It may also be the case that the restructuring takes place in a period of depressed asset values either in the particular sector where the company operates, or in the economy more generally. It is easier to put a value on a company if there are competing bids from rival bidders or some sort of formal auction or bidding process but the depressed economic conditions may deter or rule out rival bids. Valuation experts, however eminent or distinguished their qualifications, are not able to forecast future economic with perfect precision.

The possibility of a contested valuation hearing gives however, junior creditors a certain amount of leverage. They can obstruct the restructuring for a certain period of time until the necessary hearing is held and the outcome of the hearing is also contingent. The valuation hearing incentivises all the relevant parties to try to reach a negotiated settlement since all parties have good reason to be fearful of both the litigation risk and also the expense that comes with valuation conflicts being adjudicated upon in a courtroom setting.\(^\text{85}\)

Valuation fights it seems are common in a US Chapter 11 context with contesting parties equipped with their own valuation expert prepared to advance a plausible view on the value of both the existing and restructured enterprise using certain standard valuation methodologies such as comparable transaction, discounted cash flow (DCF) and leveraged buyout pricing. The disadvantages in the US approach have been highlighted as follows:\(^\text{86}\) “First, out-of-the money creditors may fear the valuation fight less than senior creditors (having less to lose) and thus capture returns which they ought properly not to be entitled to. Secondly, negotiations can become very protracted, costing significant amounts and delaying rehabilitation of the company. Finally, the approach is very subjective so that the result is somewhat unpredictable, and the judge hearing the valuation dispute may … ‘feel gamed’.”


\(^{86}\) See UK Insolvency Service, A Summary of Responses: A Review of the Corporate Insolvency Framework (September 2016) at p. 539 – response by S. Paterson.
The 2014 report from the American Bankruptcy Institute on Chapter 11 reform suggested giving “out of the money” stakeholders “redemption option value” through making changes to the “absolute priority” principle.\(^{87}\) It stated “valuation may occur during a trough in the debtor’s business cycle or the economy as a whole, and relying on a valuation at such a time my result in a reallocation of the reorganized firm’s future value in favour of senior stakeholders and away from junior stakeholders in a manner that is subjectively unfair and inconsistent with the Bankruptcy Code’s principle of providing a breathing spell from business adversity.”

The Chapter 11 reform proposals however would increase the complexity of the restructuring process and given US congressional stalemate there seems little prospect of such changes being enacted and implemented in the immediate future.\(^{88}\) The detailed rules would entail giving a class of creditors that received nothing under a restructuring plan but was next in line to receive such a distribution a “redemption option value” that accords with the value of an option to purchase the entire company and to pay in full or “redeem” all the outstanding senior debt. The valuation of the option is done using a market based model and options pricing methodology. It reflects the fact that within 3 years the value of a restructured company might be such that senior creditors can be paid in full and along with incremental value for the immediately junior class of stakeholders.

There are considerable complexities associated with options pricing methodology and given that the Singapore reforms have yet to tried and tested, it seems sensible to shy away from such complexities especially given the fact that the US has not yet embraced them.\(^{89}\)

**Prepackaged schemes of arrangement**

Following on from the 2016 report of the Committee on Debt Restructuring, the new Singapore law contains a mechanism for ‘prepackaged schemes of arrangement’. The provisions tend to follow those in the US under Chapter 11 rather than the prepackaged administration that is common in the UK. The Chapter 11 process is essentially a procedure whereby the broad parameters of a restructuring plan are worked out between relevant stakeholders in advance of the chapter 11 filing and then the company enters Chapter 11 with a view to overcoming holdouts among minority creditors. The fact that the main contours of the plan have been


worked out in advance of the filing reduces the leverage of minority groups and also reduces the amount of time spent in Chapter 11. The fact that the plan has nevertheless to be approved by a court provides some measure of protection for minority creditors.

The UK pre-packaged administration, on the other hand, has less procedural protection in that the procedure may not necessarily come before any court for approval. Essentially, it is an expedited procedures that may lead to a going-concern sale of all, or part, of an ailing company’s assets.\textsuperscript{90} Before the administration process is activated, the company works out an agreement with its secured lenders under which certain corporate assets will be transferred to a new business vehicle with the existing security interests remaining in place and the secured lenders continuing their financial support for the business. A likely buyer for the assets is identified and this may be newly constituted entity that is connected to the existing management team. An insolvency practitioner (IP) may help the company to put together the various deals and the IP may then be appointed as administrator to the company under the out-of-court process. The IP then implements the sale of assets and the other arrangements consequent on the sale.

There have been complaints however, that ‘prepackaged administrations’ may involve sweetheart deals for existing management at the expense of unsecured creditors.\textsuperscript{91} Secured creditors are protected because their security remains in place but unsecured creditors are left with claims against an ‘oldco’ that has been shorn of assets. It is important to ensure that the price paid for the assets is a fair one and that the assets have been properly marketed especially if the prospective buyer has links to the existing management. There have been statements of insolvency practice formulated by the relevant regulatory bodies to try to maintain fairness and integrity in the process and the UK government has taken a reserve power to legislate by statutory instrument in the event of serious shortcomings.\textsuperscript{92}

Prepacks combine some of the advantages of informal out of court workouts with those of formal insolvency procedures. They build on the insight that there is likely to be a substantial saving of cost and convenience if a debtor can minimise the period of time that it spends in formal procedures. The longer and more drawn out the procedure, the greater the costs and

\textsuperscript{90} For an extended discussion including comparative analysis see P Walton and M Wellard “A Comparative Analysis of Anglo-Australian Pre-Packs: Can the Means be Made to Justify the Ends?” (2012) 21 International Insolvency Review 143.
\textsuperscript{91} See generally Graham Review into Pre-pack Administration Report to The Rt Hon Vince Cable MP (June 2014).
\textsuperscript{92} See s 129 Small Business, Enterprise and Employment Act 2015 (inserting a new provision in Schedule B1 para 60 Insolvency Act 1986) which allows regulations to be made that prohibit or impose requirements or conditions in relation to the disposal, hiring out or sale of property of a company by an administrator to a connected person of the company. No such regulations have been made yet.
expenses that are likely to be incurred. It is also the case that a debtor may suffer a loss of goodwill and valuable customers once formal procedures are commenced.

Prepacks even in the US however, lack some of the procedural protections associated with more traditional Chapter 11 procedures. There have been suggestions that prepacks are more a quick fix rather than a cure for underlying ills in the business model. Also some US empirical studies argue that companies with pre-packaged Chapter 11s are more likely ‘forum shop’ - file for relief in an advantageous location rather than the centre of the company’s operations, and also that such companies may make a ‘Chapter 22’ filing within a few years i.e. once again seek protection from its creditors.\(^93\) Be that as it may, there have been market developments in the US which combine ‘prepacks’ with ‘going concern sales’. Under s 363 of the US Bankruptcy Code, the courts can authorise going concern sales of the assets or operations of a company in Chapter 11 but they have required a substantial business justification for the sale.\(^94\) Perhaps, the most notable example where this occurred is in relation to the General Motors (GM) car company.\(^95\)

GM – a huge auto manufacturer and distributors – was effectively reorganised through a sale of potentially the profitable part of the company’s businesses to a newly created shell company with the shell company paying a certain amount for the assets of the ‘old’ General Motors and also agreeing to assume certain workforce-related liabilities. The detailed structure and funding arrangement in respect of the shell company had been negotiated in advance of the Chapter 11 filing and the US government acted as the main finance provider. Certain creditors objected to the process arguing that the so-called ‘business sale’ constituted in reality both a restructuring and also upset the normal priorities scheme since the new car company – new GM – had assumed certain liabilities of the old GM but refused to assume other liabilities that were higher up the priority ranking. The Bankruptcy Court however, rejected this argument.


\(^{94}\) On the ‘business justification’ test for s 363 sales - see In re Lionel Corp (1983) 722 F2d 1063.

\(^{95}\) The restructuring of another major US auto manufacturer – Chrysler - was a prelude to that in General Motors and on the Chrysler and General Motors restructurings see the US Congressional Oversight Panel report on the same (September 2009) ‘The Use of TARP Funds in the Support and Reorganization of the Domestic Automotive Industry’ available at: http://cop.senate.gov/documents/cop-090909-report.pdf This report contains a perceptive analysis of US restructuring and bankruptcy law and attached papers that are both supportive and critical of the GM/Chrysler de facto rescues.
stating that s 363 authorised the sale of corporate assets outside the normal course of business in the event of there being a business justification for the sale.\textsuperscript{96} In this case, an expeditious sale was considered to be justified because business and customers would melt away if there were continued uncertainty about the fate of GM cars.\textsuperscript{97}

Despite the concerns about bypassing standard Chapter 11 protections in the US, the US prepack clearly offers more procedural safeguards than its UK counterpart in that it still has to come before the court for approval. Not surprisingly the 2016 Debt Restructuring Committee report suggested a Pre-Pack regime that was essentially similar to the US regime.\textsuperscript{98} The new Singapore law allows the court to approve a scheme if it is satisfied that had a meeting of creditors of classes of creditors been held, the necessary consents would have been obtained. The new law also requires that in a prepack there should be adequate advance disclosure to creditors and sets out a clear standard for this disclosure. Nevertheless, the experience in other jurisdictions suggests the need for caution in exercising these new powers to approve prepacks.

**Conclusion**

The Kevin Costner movie vehicle ‘Field of Dreams’ is ultimately an uplifting one – a true ‘feel good’ movie. Despite what seemed initially to be a hopefully unrealistic idea – the baseball field was built and the stars did come to play. The idea of building up Singapore as a major centre for international debt restructuring is far from being an unrealistic one. On the contrary, it builds on the established strengths of the Singapore legal system and its role as a leading centre for international commercial arbitration and mediation. Singapore also has an established tool for debt restructuring – the scheme of arrangement procedure – that has been fashioned, refined and improved over the years. The scheme of arrangement has English antecedents and the new Singapore law takes this tool and aims to enhance its dynamism in the legal infrastructure by the addition of innovative new features inspired by Chapter 11 of the US Bankruptcy Code. Chapter 11 has been tried and tested over the years through judicial interpretations and has been shaped by changes in market practice but it is often seen as the model to which restructuring laws throughout should aspire. Some of its main features – principally the enhanced moratorium, super priority new finance, cross-class creditor cramdown and opportunities for prepackaged procedures – have been adopted in the new

\textsuperscript{96} In re General Motors Corp (2009) 407 BR 463.


\textsuperscript{98} P 27.
Singapore law but have all been modified in greater or lesser measure to take account of specifically Singaporean conditions. These modifications appear appropriate and certainly have been carefully thought through.

Nevertheless, it is worth sounding a few cautionary notes ranging on a spectrum from the largely legal to the purely political.

Firstly, there is what is known as the ‘Gibbs’ point i.e. if a Singapore scheme purports to modify debt obligations that are governed by a foreign law, whether that purported modification will be recognised by the courts or authorities in the relevant foreign jurisdiction.

There is a common law long-established principle of the common law that the discharge of a debt under foreign insolvency law will not be given effect in the UK where the contract creating the debt is governed by English law. It was said in the Gibbs case held that the foreign law was not relevant because it was “not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound”.

In recent years, the Gibbs principle has been approved at the highest UK judicial levels by Lord Hope in Joint Administrators of Heritable Bank Plc v Winding Up Board of Landsbanki Islands HF and there is also a statement by Lord Hoffmann in Wight v Eckhardt Marine GmbH that the question whether an obligation has been extinguished is governed by its proper law. Moreover, in Global Distressed Alpha Fund 1 Ltd Partnership v PT Bakrie, it was held that the movement towards “universalism” in insolvency proceedings did not allow a lower court to disregard the established doctrine and therefore the discharge of a debt under Indonesian restructuring and insolvency law would be given effect in the UK where the contract creating the debt was subject to English law.

As part of the move towards universalism, the Singapore courts have been less than impressed by Gibbs and in was held in Re Pacific Andes Resources Development that upon recognising foreign insolvency proceedings, it may give effect to a compromise or discharge of debts governed by Singapore law that was purportedly effected by a foreign insolvency or restructuring law. Nevertheless, Gibbs remains the law in the UK and given the Rome 1

99 Gibbs v La Société Industrielle et Commerciale des Métaux (1890) 25 Q.B.D. 399 CA.
100 Joint Administrators of Heritable Bank Plc v Winding up Board of Landsbanki Islands HF [2013] UKSC 13; [2013] 1 W.L.R. 725 at [44].
Regulation\textsuperscript{104} there may difficulties in obtaining recognition of a Singapore that purports to modify foreign law obligations in other European countries. Under generally accepted principles of private international law, the modification or termination of a contract is governed by the proper law of the contract. The same principle is also contained in the Rome I Regulation which applies in all states that are members of the European Union. Article 12(1) provides that the law applicable to a contract shall govern in particular: (a) interpretation; (b) performance; (c) the consequences of a total or partial breach of obligations and “(d) the various ways of extinguishing obligations, and prescription and limitation of actions”\textsuperscript{105}

The difficulties in getting recognition of a Singapore scheme overseas may be compounded in cases where Singapore is not the centre of main interests (Comi) of the debtor. The UNCITRAL Model Law on Cross Border Insolvency which Singapore has now adopted and which has been adopted by other major trading nations including the US facilitates the recognition of cross-border insolvency proceedings and specifically in the cases of both Singapore and the US, proceedings for the rearrangement of debt. The greatest recognition and relief however, comes in cases where relevant proceedings have been opened in States where the debtor has its Comi. In other situations, the relief that may be granted by the courts of the recognising State is purely discretionary.

In many insolvency and restructuring situations, there are strong political interests at stake and these may militate against the recognition of foreign proceedings in respect of a debtor that is a local or national champion. Commentators for instance, have spoken of the influence of provincial governments in China and the factor of local protectionism. Under the US law, Chapter 11 restructuring proceedings may be opened in respect of a foreign debtor but such proceedings ultimately floundered in the well known Yukos and Baha Mar cases because of hostility from foreign governmental entities. The Yukos case concerned a leading Russian oil company whose controlling shareholder had incurred the wrath of the Russian President and which was coming under financial pressure because of large and unexpected tax demands. The more recent Baha Mar case concerned a showpiece resort in the Bahamas where the major investor was a Chinese state owned enterprise that was opposed to the idea of becoming subject to the long arm of US jurisdiction. Singapore itself has experienced a similar phenomenon in the Asia Pulp and Paper case where the Singapore courts declined to make a judicial management order in respect of the Singapore registered holding company of an

\textsuperscript{104} Regulation 593/2008.

\textsuperscript{105} On the other hand, Article 1(2)(f) excludes from the scope of Rome I “questions governed by the law of companies … internal organisation or winding-up of companies”. This exclusion is not very clear, but it has been suggested that the effect of a scheme of arrangement is one of the questions governed by the law of companies, and therefore it falls outside Rome I - see R. Sheldon (ed), Cross Border Insolvency, 4th edn (London: Bloomsbury, 2015) at p 507.
Indonesian conglomerate. The operating companies were outside Singapore, principally in Indonesia, and declined to cooperate with the Singapore proceedings thereby rendering them largely futile.