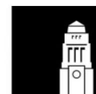

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McCormack, G orcid.org/0000-0002-1574-1296 and Wan, WY (2019) Transplanting Chapter 11 of the US Bankruptcy Code into Singapore's restructuring and insolvency laws: opportunities and challenges. Journal of Corporate Law Studies, 19 (1). pp. 69-104. ISSN 1473-5970

https://doi.org/10.1080/14735970.2018.1491680

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TRANSPLANTING CHAPTER 11 OF THE US BANKRUPTCY CODE INTO SINGAPORE'S RESTRUCTURING AND INSOLVENCY LAWS: OPPORTUNITIES AND CHALLENGES

GERARD MCCORMACK*, WAI YEE WAN**

**Address correspondence to Wai Yee Wan, School of Law, Singapore Management University; email: wywan@smu.edu.sg.

Gerard McCormack
Professor of Law
School of Law
University of Leeds
Email: G.McCormack@leeds.ac.uk
Address: School of Law
The Liberty Building
University of Leeds
Leeds, LS2 9JT
Telephone: +44 0113 343 7160

Wai Yee Wan
Associate Professor of Law and Lee Kong Chian Fellow
Singapore Management University
Email: wywan@smu.edu.sg
Address: 55 Armenian Street, Singapore 179943
Telephone: +64 68280654

Acknowledgement
* Professor, School of Law, University of Leeds, Leeds, UK, Jones Day Visiting Professor of Commercial Law, Singapore Management University, Singapore. This article is a modified (and expanded) version from the lecture that was delivered at the Singapore Management University Jones Day Professorship of Commercial Law Lecture on 30 August 2017. This author would like to thank Jones Day for the generous funding of the Jones Day Visiting Professorship and Singapore Management University for its hospitality during his visit.
** Associate Professor, Lee Kong Chian Fellow, School of Law, Singapore Management University. This author was a member of the Insolvency Law Reform Committee that issued the Final Report 2013. This article represents her personal views and not the views of the committee. This author gratefully acknowledges the funding from the Lee Foundation through the Lee Kong Chian Fund for Excellence.

TRANSPLANTING CHAPTER 11 OF THE US BANKRUPTCY CODE INTO SINGAPORE'S RESTRUCTURING AND INSOLVENCY LAWS: OPPORTUNITIES AND CHALLENGES

Abstract

In 2017, Singapore introduced wide-ranging reforms to its insolvency and restructuring laws with a view to enhancing its attractiveness as an international centre for debt restructuring. Central to these reforms is the transplantation (with modification) of certain provisions from Chapter 11 of the US Bankruptcy Code including the automatic moratorium, cross-creditor cram-down, rescue financing and pre-packs. Drawing upon the US experience and similar reform proposals in the EU (including the UK), we critically evaluate the impact of the new Singapore law. We argue that there remain challenges in ensuring that the transplantation works well and highlight the possible unintended consequences of such transplantation.

I. INTRODUCTION

A good restructuring and insolvency legal regime is vital to the broader economy in promoting the restructuring of viable businesses and efficient closure and transfer of assets of failed businesses. With the rise of demand for corporate restructuring services worldwide, there are strong incentives among countries, particularly those with international financial centres, continually to review and modernise their restructuring and insolvency laws.[1] The importance of an effective legal and regulatory framework for a debt restructuring regime is underscored by a recent survey by Debtwire which has identified the greatest impediment towards a successful restructuring effort as being unfavourable bankruptcy laws.[2]

To this end, the European Commission[3] has recently reviewed the restructuring and insolvency framework and proposed significant changes, though none of these proposed reforms have been enacted into law yet. The United Kingdom (UK) Insolvency Service has also conducted a similar exercise in relation to the UK specifically though again there have been no legislative changes.[4] The central theme of all the proposed reforms relate to the adaptation (and adoption) of various provisions of Chapter 11 of the United States (US) Bankruptcy Code 1978 (Bankruptcy Code), which are widely regarded as pro-debtor,[5] pro-restructuring[6] and highly flexible. Chapter 11 has been held out as a success and as a model for the reform of restructuring laws worldwide.[7] 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

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1 On the role of law generally and institutions in promoting economic development see generally D North, Institutions, Institutional Change, and Economic Performance: The Political Economy of Institutions and Decisions (Cambridge University Press 1990); C Goodhart, 'Economics and the Law: Too Much One-Way Traffic?' (1997) 60 MLR 1; R Posner, 'Creating a Legal Framework for Economic Development' (1998) 13 World Bank Research Observer 1; K Dam, The Law-Growth Nexus: The Rule of Law in Economic Development (Brookings Institution Press 2013).

2 DebtWire, 'Asia-Pacific Distressed Debt & Special Situations Update' (PwC, November 2016) <https://www.pwc.com/sg/en/publications/distressed-debt-special-situation-mkt-2016.html>.

3 European Commission, Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU COM (2016) 0723 final.

4 The Insolvency Service, A Review of the Corporate Insolvency Framework: A Consultation on Options for Reform (May 2016).

5 See T Eisenberg and S Sundgren, 'Is Chapter 11 Too Favorable to Debtors? Evidence from Abroad', (1997) 82 Cornell L Rev 1532; cf G McCormack, 'Control and Cooperative Rescue – An Anglo-American Evaluation' (2007) 56 ICLQ 515 (describing the characterisation as somewhat simplistic); G McCormack, 'Corporate Rescue Law in Singapore and the Appropriateness of Chapter 11 of the US Bankruptcy Code' (2008) 20 SAcLJ 396.

6 See S Paterson, 'Rethinking Corporate Bankruptcy Theory in the Twenty-First Century' (2016) 36 OJLS 297.

7 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: AFME, Frontier Economics and Weil, Gotshal and Manges LLP, Potential economic gains from reforming insolvency law in Europe (AFME, February 2016), 12 <https://www.afme.eu/globalassets/downloads/publications/afme-insolvency-reform-report-2016-english.pdf>; see generally M Brouwer, 'Reorganization in US and European Bankruptcy Law' (2006) 22 European Journal of Law and Economics 5.

throughout the world'.[8] 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 creditors with going-concern value rather than the possibility of a more meagre satisfaction of outstanding debts through liquidation'.[9] To this end, Chapter 11 contains certain fundamental characteristics such as a 'strong' automatic stay of creditor actions to the debtor company, a debtor in possession regime where the management remains in control of the debtor company and continues to lead its restructuring efforts, the availability of super-priority financing and a cross-creditor cram-down process.

In line with international developments, Singapore has recently reviewed and adopted wide-ranging reforms to its insolvency restructuring regime in 2017. These 2017 reforms draw on the recommendations made by Singapore's Insolvency Law Review Committee (ILRC) in its report in 2013 (2013 Report),[10] but more directly on the subsequent report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (Restructuring Committee) in 2016 (2016 Report).[11] The 2017 reforms, implemented via Companies (Amendment) Act 2017, comprise the engrafting of certain Chapter 11 features into the local scheme of arrangement procedure, which is an important debt restructuring tool, and the adoption of the UNCITRAL Model Law on Cross Border Insolvency.[12] A further set of reforms is expected to take place in 2018, to take into account the remaining recommendations of the ILRC. This article focuses on the 2017 reforms and, in particular, the inclusion of Chapter 11 provisions in Singapore law. In this article, we refer to the amendments effected pursuant to the Companies (Amendment) Act of 2017[13] as the '2017 reforms'.

In this article, we seek to answer the following questions: whether the transplant of Chapter 11 provisions (with modifications) is likely to work well in Singapore and what are some of the challenges that may be encountered in connection with this transplant.[14] It is something of a truism that reform must be sensitive to local conditions and should take account of different implementing

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[8] See E Warren and JL Westbrook, 'The Success of Chapter 11: A Challenge to the Critics' (2009) 107 Michigan Law Review 603, 604.

[9] Canadian Pacific Forest Products Ltd v JD Irving Ltd (1995) 66 F 3d 1436, 1442.

[10] Insolvency Law Review Committee, Report of the Insolvency Law Review Committee: Final Report (Ministry of Law, 2013) <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Revised%20Report%20of%20the%20Insolvency%20Law%20Review%20Committee.pdf> (2013 Report).

[11] Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Report of the Committee (Ministry of Law, 2016) <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Report%20of%20the%20Committee.pdf> (2016 Report).

[12] See UNCITRAL, 'UNCITRAL Model Law on Cross-Border Insolvency (1997)' <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html>; for a somewhat sceptical and partly Singaporean perspective on the Model Law of Cross Border Insolvency, see C Mohan 'Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?' (2012) 21 International Insolvency Review 199.

[13] The Companies (Amendment) Act 2017 introduces, among others, the new sections 211A to 211J of the Companies Act (Cap 50, 2006 rev edn) (Companies Act (Singapore)), which contain the Chapter 11 provisions (with modifications).

[14] There is a rich literature on legal transplants and their effectiveness or otherwise. The classic work here is A Watson, Legal Transplants: An Approach to Comparative Law (Scottish Academic Press 1974) and for a retrospective assessment see J W Cairns, 'Watson, Walton, and the History of Legal Transplants' (2013) 41 Georgia Journal of International and Comparative Law 637. See generally on the 'political' dimensions of transplants O Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 MLR 1; L Bebchuk and M Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance' (1999) 52 Stanford Law Review 127.

environments. Legal concepts tend to behave differently in different countries and the importation of a new concept may have unintended consequences for the rest of the body of law.[15] 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.[16] In this article, we argue that Singapore's adaptation of Chapter 11 provisions may lead to a shift in leverage to shareholders and/or management at the expense of junior creditors; further, more emphasis will be placed on valuation fights in the context of cram-down and on whether the duties of directors and scheme managers have been properly discharged. We also suggest that the success of the 2017 reforms will at least partly depend on recognition of the Singapore schemes overseas.

Our study on the Singapore experience will be relevant to other common law jurisdictions that are considering transplanting Chapter 11 provisions into their restructuring and insolvency framework. While this is a study on the Singapore experience, we have also made comparison with the UK's restructuring and insolvency laws and experiences for the following reasons. First, like the UK, Singapore's insolvency regime has traditionally been 'creditor friendly' or, more particularly, 'secured creditor friendly'. Second, the UK also uses the scheme of arrangement as a debt restructuring tool and while the scheme is highly flexible, it has its limitations as this regard. Third, the UK is considering legislative changes to its insolvency framework and the reservations expressed in the course of this legislative deliberation are likely to be relevant also in the Singapore context.

The rest of the article is structured as follows. Part II discusses the limitations of the existing mechanisms of debt restructuring framework prior to 23 May 2017 (being the date on which the 2017 reforms came into force), and how the gaps are intended to be filled by incorporating certain Chapter 11 provisions. Part III discusses how the Chapter 11 provisions have been incorporated into Singapore's insolvency laws, with the focus on moratoria, super priority rescue financing, cross creditor class cram-downs and pre-packaged procedures. Part IV discusses the key challenges and possible unintended consequences. Part V concludes.

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[15] See D Berkowitz, K Pistor and JF Richard, 'The Transplant Effect' (2003) 51 American Journal of Comparative Law 163 and see also J Armour, S Deakin, P Lele, and M Siems, 'How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection' (2009) 57 American Journal of Comparative Law 79; G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergences' (1998) 61 MLR 11.

[16] See generally on the role of existing legal norms in shaping subsequent legal developments H Spamann, 'Contemporary Legal Transplants – Legal Families and the Diffusion of (Corporate) Law' (2010) 2009 Brigham Young University Law Review 1813; see also W Twining, 'Social Science and Diffusion of Law' (2005) 32 Journal of Law and Society 203; W Twining 'Diffusion of Law: A Global Perspective' (2005) 49 Journal of Legal Pluralism 1; D Cabrelli and M Siems, 'Convergence, Legal Origins and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis' (2015) 63 American Journal of Comparative Law 109.

II. LIMITATIONS OF EXISTING MECHANISMS OF THE DEBT RESTRUCTURING FRAMEWORK IN THE UK AND SINGAPORE AND THE RELEVANCE OF CHAPTER 11

A. Limitations of the Existing Debt Restructuring Framework: the Scheme of Arrangement

In the UK, there are three possible statutory mechanisms available for corporate restructuring: a company voluntary arrangement (CVA), a scheme of arrangement and an administration.[17] Singapore has the scheme of arrangement (which is modelled upon the UK scheme of arrangement) and judicial management. Judicial management is the functional equivalent of the original UK administration order procedure as introduced in 1986 and before it was substantially revised by the Enterprise Act 2002 which allowed an administrator to be appointed either by the debtor company or a general secured creditor out–of-court. Singapore does not have the equivalent of a CVA or the UK administration procedure introduced by the Enterprise Act 2002.

In the UK, only the CVA and the scheme of arrangement involve 'debtor in possession'.[18] There is no management displacement in favour of an external insolvency practitioner. 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 usage of CVA has been low for various reasons, including the fact that it does not bind secured or preferential creditors.[19] On the other hand, the UK scheme was once described as a blunderbuss and somewhat cumbersome[20] but it is now used as a powerful debt restructuring tool altering in various ways the financial obligations of companies.[21] Its use in this regard have been commented upon by Snowden J in Re Van Gansewinkel Groep BV[22] as follows:

> 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

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[17] See discussion in J Payne, 'Debt restructuring in English law: lessons from the United States and the need for reform' (2014) LQR 282.

[18] It should be noted that CVAs and schemes of arrangement may be coupled with administration in which case they are no longer debtor-in-possession. Likewise, in Singapore, the scheme may be coupled with judicial management. See generally on debtor-in-possession versus creditor-in-possession see D Hahn, 'Concentrated Ownership and Control of Corporate Reorganizations' (2004) 4 JCLS 117; S Franken, 'Creditor - and Debtor-Oriented Corporate Bankruptcy Regimes Revisited' (2004) 5 EBOR 645.

[19] J Payne, 'Debt restructuring in English law: lessons from the United States and the need for reform' (n 17), 289.

[20] Sir Kenneth Cork, Insolvency Law and Practice: Report of the Review Committee (Cmnd 8558, 1982) para 419 and see also The Insolvency Service, Report of the Joint DTI/Treasury Review of Company Rescue and Business Reconstructions Mechanisms (May 2000) para 43.

[21] See generally C Pilkington, Schemes of Arrangement in Corporate Restructuring (2nd edn, Sweet & Maxwell 2017); G O'Dea, J Long and A Smyth, Schemes of Arrangement Law and Practice (Oxford University Press 2012); J Payne, Schemes of Arrangement; Theory, Structure and Operation (Cambridge University Press 2014). See also LC Ho, 'Making and enforcing international schemes of arrangement' (2011) 26 JIBLR 434; J Payne, 'Cross-Border Schemes of Arrangement and Forum Shopping' (2013) 14 EBOR 563.

[22] [2015] EWHC 2151, [5].

> 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.

Likewise, the Singapore scheme of arrangement features prominently as a restructuring tool, and a recent study has shown that it has generally been successful.[23]

The scheme of arrangement provisions are found in the Companies legislation in the UK[24] and Singapore respectively[25] but the law has also 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. 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 per cent in value and a majority in number of creditors within each class.[26] 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.[27] While the court is not a rubber stamp, it need not be satisfied that the scheme proposed is the only fair one.[28] Thus, the court must be satisfied that not only the statutory provisions have been observed, the relevant class must have been 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'. This fact makes the composition 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.[29] In addition, the relevant test to work out the constitution of classes is whether creditors have different legal

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[23] 2013 Report (n 10) 135.

[24] Companies Act 2006 (UK), Part 26.

[25] Companies Act (Singapore), section 210.

[26] In Singapore (but not in the UK), the court in sanctioning the scheme may prescribe a different majority than a majority in number for the headcount test, though it must still represent 75 per cent in value: Companies Act (Singapore), section 210(4). See Ministry of Finance, Report of the Steering Committee for the Review of the Companies Act: Consultation Paper (June 2011) [3-35] – [3-38].

[27] See Anglo-Continental Supply Co Ltd [1922] 2 Ch 723, 736.

[28] 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, [75].

[29] Re Telewest Communications plc [2004] BCC 342 (approved by the English Court of Appeal in Re Telewest Communications plc [2005] BCC 29). In the Singapore context, see Royal Bank of Scotland NV v TT International (No 1) [2012] 2 SLR 213.

rights rather than separate interests that may stem from these legal rights.[30] It has also been held that small differences in rights does not prevent creditors being placed in the same class.[31] 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.[32] 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.[33]

On alternatives to cross class creditor cram-down, 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 plc[34] and the Re IMO Carwash[35]. 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 realisation 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 authorisation, the courts have given their blessing to 'prepackaged' administrations which involve the sale of all or part of the company's business normally to a pre-arranged purchaser once the administrator has been appointed.[36]

Under the 'business transfer' scheme, the assets or business of the company is normally transferred to a new company owned by the creditors; the new company assumes 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 by administrators who are appointed once the scheme has been sanctioned. There is no need however, 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.

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30 In re Hellenic & General Trust Ltd [1976] 1WLR 123; UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin [2001] 3 HKLRD 634. In the Singapore context, see Royal Bank of Scotland NV v TT International (No 1) [2012] 2 SLR 213.

31 Sovereign Life Assurance Co v Dodd [1892] 2 QB 573 (a scheme class confined to those "persons whose rights are not so dissimilar to make it impossible for them to consult together with a view to their common interest").

32 See Chadwick LJ in Re Hawk Insurance Co Ltd [2001] 2 BCLC 480, [33], suggesting that the relevant tests should not be applied in such a way that they become an instrument of oppression by a minority.

33 See Re Global Garden Products Italy SpA [2016] EWHC 1884.

34 See Re My Travel Group plc [2004] EWHC 2741 (Ch) and Re Tea Corp Ltd [1904] 1 Ch 12. For a general discussion, see CL 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.

35 This case is also referred to as Re Bluebrook [2009] EWHC 2114 (Ch).

36 See generally P Walton 'Pre-Packaged Administrations – Trick or Treat' (2006) Insolvency Intelligence 113; see also V Finch 'Pre-packaged administrations: bargains in the shadow of insolvency or shadowy bargains?' [2006] JBL 568.

Business transfer schemes may be complex and they also give rise to questions of fairness and procedural propriety.[37] The courts consider the question of valuation at the sanction stage and 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? [38]

Quite apart from the difficulties involving pre-packs, there are however, a number of limitations with schemes of arrangement in the UK and Singapore. The first limitation relates to the lack of a wide-ranging wide moratorium to allow the company the time to restructure its operations. In the UK, there is no 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.[39] In contrast, while Singapore has had a statutory provision[40] for a moratorium/stay on proceedings against the debtor company, this stay was somewhat limited in that it did not cover enforcement actions by secured creditors nor the forfeiture of leases.[41]

Second, the UK (and Singapore) scheme remains more a dedicated debt restructuring procedure rather than a full-blown corporate/business rescue procedure. The scheme of arrangement 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.[42] Many contracts contain so-called 'ipso facto' clauses allowing, 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 'cherry-pick' among outstanding contracts rejecting financially disadvantageous ones.

Third, there is no ability to cram-down a dissenting class of creditors in a scheme of arrangement. This results in an excessive emphasis on the classification of creditors, with the result that creditors placed in a different class tend to bargain for excessive rights. The extensive case law surrounding the classification of creditors underscores the point.[43] Fourth, there is a lack of a formal structure for grant of priority and/or super-priority for rescue financing. New financing may be critical to the rehabilitation of the company and the unavailability of such priority will limit the

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[37] See generally M Crystal QC and R Mokal, 'The Valuation of Distressed Companies: A Conceptual Framework Parts 1 and 11' (2006) 3 International Corporate Rescue 63 and 123; N Segal, 'Schemes of Arrangement and Junior Creditors – Does the US Approach to Valuations Provide the Answer?' (2007) 20 Insolvency Intelligence 49.

[38] 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' (n 17). In the UK, the Insolvency Service, A Review of the Corporate Insolvency Framework: A Consultation on Options for Reform (n 4) states at [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.'

[39] See BlueCrest Mercantile BV v Vietnam Shipbuilding Industry Group [2013] EWHC 1146.

[40] Companies Act (Singapore), section 210(10).

[41] 2013 Report (n 10) 136: '[T]he 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.'

[42] For a detailed cross-country comparison of this issue see D Faber et al., Treatment of Contracts in Insolvency (Oxford University Press 2013); for the classic definition in the US, see V Countryman, 'Executory Contracts in Bankruptcy' (1972) 57 Minnesota Law Review 439; (1973) 58 Minnesota Law Review 479.

[43] See discussion in nn 29-33 (and accompanying text).

options that are available to the company or its professionals in the restructuring. Simply put, without such priority, new lenders are at risk of being grouped together with other unsecured claimants should the restructuring fail and the company goes into liquidation.

In view of the limitations of the scheme of arrangement procedure, the UK Insolvency Service has now suggested reforms including the introduction of a statutory moratorium as well as a dedicated new cram-down procedure.[44] On cram-down, the proposals are somewhat lacking in detail but what is essentially proposed is a statutory, 12-month time-limited multi-class restructuring 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 cram-down, to consider the most likely alternative scenario to a restructuring rather than confining itself to liquidation value per se.[45] On rescue financing, the UK Insolvency Service had put forward certain options that were previously raised in an earlier 2009 consultation,[46] such as the giving of super-priority status to rescue finance costs in administration, and to override negative pledge clauses in security arrangements. However, as discussed below, the majority of respondents disagreed with these proposals.[47]

In Singapore, the ILRC, comprising insolvency practitioners, academics and representatives from industry, and tasked to review Singapore's bankruptcy and corporate insolvency regimes, released its final report in 2013. The ILRC recommended a number of changes to the schemes of arrangement and the judicial management process. These key recommendations are summarised as follows. First, it was proposed to broaden the availability of the moratorium so as to make it available when the company has an intention to propose a scheme (and not merely when the scheme has been proposed).[48] However, it did not recommend Chapter 11's worldwide automatic stay of proceedings on the grounds of possible abuse.[49]

Second, measures were recommended to fill in certain gaps in the schemes of arrangement procedure, including rules on the proof of debts, the role of the scheme manager who is appointed to adjudicate on the scheme claims, and powers to allow a re-vote. Somewhat controversially, the majority also recommended a cram-down of classes of dissenting creditors but only in circumstances where there was a high degree of proof that dissenting classes were not prejudiced by the cram-down. The ILRC also recommended, to a limited measure, super-priority for rescue financing but this would not include the overriding or 'trumping' of existing security interests.[50]

The Singapore Government accepted most of the ILRC recommendations but in May 2015, before the recommendations were enacted, the Government appointed the Restructuring

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[44] See the Insolvency Service, A Review of the Corporate Insolvency Framework: A Consultation on Options for Reform (n 4). 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).

[45] The Insolvency Service, A Summary of Responses: A Review of the Corporate Insolvency Framework (September 2016).

[46] The Insolvency Service, Encouraging Company Rescue: A Consultation (June 2009).

[47] See the Insolvency Service, A Summary of Responses: A Review of the Corporate Insolvency Framework (n 45). See n 107 - 110 (and accompanying text).

[48] 2013 Report (n 10) 142.

[49] ibid 123 – 125.

[50] ibid 153.

Committee to consider reforms that would specifically enhance Singapore's effectiveness as a centre for international debt restructuring. The Restructuring Committee made many wide-ranging recommendations, and in particular, the transplant of certain Chapter 11 features. The Government accepted the recommendations and Parliament passed the Companies (Amendment) Act of 2017 to give effect to the changes.

B. Relevance of Chapter 11

The US Chapter 11 is seen as pro-restructuring for a number of reasons. First, 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. 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 US contacts are non-existent that they can safely proceed with actions against the debtor.[51]

Second, 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. 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.[52] 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.[53] 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 assets, within a particular period.[54] The statutory framework also allows the DIP lender to override

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[51] See generally G McCormack, 'US exceptionalism and UK localism? Cross-border insolvency law in comparative perspective' (2016) 36 Legal Studies 136, 149.

[52] Section 1104(c)(2) seems to require the appointment of an examiner where the company's unsecured, non-trade and non-insider debt exceeds US$5m ie in every medium to large case but see: American Bankruptcy Institute (ABI), Commission to Study the Reform of Chapter 11: Final Report and Recommendations (2012 – 2014) at 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.'

[53] For criticisms of Chapter 11 see eg DA Skeel, 'Rethinking the line between Corporate Law and Corporate Bankruptcy' (1994) 72 Texas Law Review 471, 535: 'Like an antitakeover device, bankruptcy can impair the market's ability to discipline managers because it may substitute reorganization procedures for market mechanisms that would otherwise lead to the ouster of managers outside of bankruptcy.' But this criticism has largely fallen away with new forms of market governance in US bankruptcy cases – see DG Baird and RK Rasmussen, 'The End of Bankruptcy' (2002) 55 Stanford Law Review 751; DG Baird and RK Rasmussen, 'Private Debt and the Missing Lever of Corporate Governance' (2006) 154 University of Pennsylvania Law Review 1209 but see B Adler, V Capkun and L Weiss, 'Value Destruction in the New Era of Chapter 11' (2013) 29 Journal of Law, Economics, and Organization 461.

[54] See generally K Ayotte and E Morrison, 'Creditor Control and Conflict in Chapter 11' (2009) 1 Journal of Legal Analysis 511 who find 'pervasive creditor control' (at 552).

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.[55]

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.[56] But 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. [57] 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'.[58] 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.[59]

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 impacted on the effectiveness of the current law.[60] In 2014, it produced a comprehensive report[61] 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, we will consider the proposed changes in terms of binding dissenting creditors to a restructuring plan – so-called 'cross class creditor

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[55] See K Li and W Wang, 'Debtor-in-possession financing, loan-to-loan, and loan-to-own' (2016) 39 Journal of Corporate Finance 212: 'Debtor-in-possession (DIP) financing has been the standard loan contract offered to firms in bankruptcy for their short-term liquidity needs since the early 1990s. Approximately 60 per cent of large public US firms that filed for Chapter 11 since then obtained such post-petition financing, primarily from pre-petition bank lenders.'

[56] See generally DA Skeel Jr, *Debt's Dominion:* A History of Bankruptcy Law in America (Princeton University Press 2001).

[57] See generally D Baird and R Rasmussen, 'The End of Bankruptcy' (2002) 55 Stanford Law Review 751; 'Private Debt and the Missing Lever of Corporate Governance' (2006) 154 University of Pennsylvania Law Review 120; DA Skeel, 'Creditors' Ball: The "New" New Corporate Governance in Chapter 11' (2003) 152 University of Pennsylvania Law Review 917.

[58] See K Ayotte and DA Skeel, 'Bankruptcy or Bailouts' (2010) 35 Journal of Corporation Law 469, 477: '[R]oughly 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'. But for another perspective on the available data see LM Lopucki and JW Doherty, 'Bankruptcy Survival' (2015) 62 UCLA Law Review 970.

[59] See LM Lopucki and JD, 'Bankruptcy Survival', ibid 979.

[60] See E Altman, 'The Role of Distressed Debt Markets, Hedge Funds and Recent Trends in Bankruptcy on the Outcomes of Chapter 11 Reorganizations' (2014) 22 American Bankruptcy Institute Law Review 75.

[61] American Bankruptcy Institute, Commission to Study the Reform of Chapter 11: Final Report and Recommendations (n 52).

cram-down' though it seems unlikely that these proposed reforms will be enacted in the near future.[62]

III. INTRODUCTION OF CHAPTER 11 FEATURES INTO SINGAPORE'S INSOLVENCY FRAMEWORK

The 2017 reforms introduce Chapter 11 features into both the schemes of arrangement and the judicial management procedures. Under the reforms, judicial management becomes easier to access. A judicial 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.[63] The secured creditor veto on the making of a judicial management order which hitherto generally existed in Singapore has also been weakened.[64] 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.[65]

While it is now possible to make a judicial management in respect of a company registered overseas,[66] 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.[67] 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[68] 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.[69] The UK courts have sanctioned schemes where the relevant foreign

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[62] For detailed criticism of the ABI's report, see Loan Syndications and Trading Association (LSTA), The *Trouble with Unneeded Bankruptcy Reform: The LSTA's Response to the ABI Commission Report* (October 2015) 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'.

[63] Companies Act (Singapore), section 227B(1).

[64] Companies Act (Singapore), section 227B(5).

[65] Companies Act (Singapore), section 227B(5).

[66] Companies Act (Singapore), section 227AA.

[67] The judicial management has not been regarded as a success: see 2013 Report (n 10) 82 – 88.

[68] In Re Real Estate Development Co [1991] 1 BCLC 210, 217, 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. 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.

[69] See Re Seat Pagine Gialle SpA [2012] EWHC 3686; Primacom Holdings GmbH v Credit Agricole [2011] EWHC 3746; Re Rodenstock GmbH [2011] EWHC 1104 and see generally LC Ho, 'Making and enforcing

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.[70]

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 cram-down though not in the case of 'prepacks'.

A. The Moratorium

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.[71] The stay addresses the 'anti-commons' problem of blocking actions by individual creditors who are seeking to frustrate the wishes of the majority.[72] As outlined above, 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.[73] The new Singapore law 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.

In the 2013 Report, the ILRC considered the possibility that a stay should be triggered automatically upon the filing of a scheme application but declined to make a positive recommendation in this regard.[74] The 2016 Report took a somewhat different view however, and suggested a certain 'streamlining of procedure'.[75] This latter view is now reflected in the new legislation which in line with the Restructuring Committee's recommendations, also contains certain safeguards against abuse.[76] These include the requirement that certain evidence must be filed with the court to support the stay application including evidence of support from creditors

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international schemes of arrangement' (2011) 26 JIBLR 434; J Payne, 'Cross-Border Schemes of Arrangement and Forum Shopping' (n 21).

70 Re TPC Korea Co Ltd [2010] 2 SLR 617; Companies Act (Singapore), section 211A(3) read with s 351.

71 See HR 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'.

72 For a discussion of 'anti-commons' problems, see D Baird and R Rasmussen, 'Anti-bankruptcy' (2010) 119 Yale LJ 648 and, more generally, MA Heller, 'The tragedy of the anticommons: property in the transition from Marx to markets' (1998) 111 Harv L Rev 622.

73 On the worldwide effect of the US automatic stay see: In re Nortel Networks Inc (2011) 669 F 3d 128.

74 2013 Report (n 10) 141.

75 ibid 10.

76 Companies Act (Singapore), section 211B.

whose support is important for the success of the proposed scheme.[77] There is also a prohibition against repeat stay applications attracting the automatic moratorium within 12 months.[78] 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 company must undertake to the court to make the latter application as soon as practicable.[79]

The court may extend the automatic 30-day interim stay but, in this case, more stringent information requirements are likely to be required to be satisfied by the applicant for an extension.[80] The stay may also be given worldwide in personam effect provided that the Singapore court has jurisdiction over affected creditors or their assets.[81] 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.[82] There are suggestions that the Singapore courts would adopt a similar approach in the absence of statutory guidance but the 2016 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.

The 2017 reforms allow the stay to be extended to entities related to the debtor.[83] Various conditions have to be met to the satisfaction of the court including the fact that 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.[84] 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.'[85]

It should be noted however, that 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 section 105(a) of the Bankruptcy Code which allows US courts to 'issue any order, process, or judgment that is necessary or appropriate' to implement the provisions of the Code as a sufficient base for extending the protections of the automatic stay to non-debtors. It seems that in the US,

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77 Companies Act (Singapore), section 211B(4).
78 Companies Act (Singapore), section 211B(9).
79 Companies Act (Singapore), section 211B(4)(b).
80 Companies Act (Singapore), section 211B(8) read with s 211B(7). See also 2016 Report (n 11) 11.
81 Companies Act (Singapore), section 211B(5).
82 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.
83 Companies Act (Singapore), section 211C.
84 Companies Act (Singapore), section 211C(2).
85 2016 Report (n 11) 21.

the courts apply a fact-specific analysis to determine whether the stay applies to non-debtor entities as well as the debtor itself. Nevertheless, it is only 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[86] 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,[87] 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 respect of modification or discharge of the stay. Lengthy restructuring proceedings and, in particular those involving a stay on the enforcement of security interests, 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 those holding property rights who are adversely affected by the stay.[88] Chapter 11 provides examples of 'adequate protection' though there is no definition of the concept as such.[89] It is only the value of the security interest however, that is entitled to adequate protection[90] 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.[91] The more detailed US provisions may be used to shape judicial discretion in Singapore when courts are 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.[92]

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[86] (1986) 788 F 2d 994, 999.

[87] (2003) 321 F 3d 282, 287.

[88] Bankruptcy Code (US), s 361.

[89] 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.

[90] See 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 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.

[91] Companies Act (Singapore), section 211D.

[92] See Recommendation 50 of the UNCITRAL Legislative Guide on Insolvency.

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; or (ii) changing the composition of the debtor-company's shareholders.[93]

B. A New Finance Regime in Singapore Including Super-priority

As outlined above, the 2016 Report suggested that provisions for super-priority new finance should be introduced in Singapore.[94] 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'.[95]

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,[96] and also those of 'underinvestment', i.e. lack of incentives to finance value-generating projects.[97] 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 the fact that '[t]he market for DIP financing has developed significantly in the past decade, in particular with alternative investors, such as hedge funds and private equity (PE) funds, emerging as new breeds of financiers … DIP loans provided by activist institutional investors often have trigger clauses allowing lenders to replace senior debt with newly issued equity upon case resolution, becoming an important route for the "loan-to-own" strategy'.[98]

Following on from the recommendations in the 2016 Report, the 2017 reforms contains a new financing regime for companies in the course of restructuring proceedings including the possibility of super-priority new finance overriding existing security interests. These reforms[99] follow closely those in section 364 of the US Bankruptcy Code. 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

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93 Companies Act (Singapore), section 211D.

94 2016 Report (n 11) 37 – 39.

95 ibid 38.

96 See European Commission, 'Commission Staff Working Document, Impact Assessment: Accompanying the document, Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/13 EU' SWD (2016) 357 Final, 158, which refers to 'debt overhang' as a situation where a firm's high debt levels act as a disincentive to new investment.

97 See generally G McCormack, 'Super-priority New Financing and Corporate Rescue' (2007) Journal of Business Law 701; G Triantis, 'A Theory of the Regulation of Debtor-in-Possession Financing' (1993) 46 Vanderbilt Law Review 901; S Dahiya, K John, M Puri and G Ramirez, 'Debtor-in-Possession Financing and Bankruptcy Resolution: Empirical Evidence' (2003) 69 Journal of Financial Economics 259.

98 K Li and W Wang, 'Debtor-in-possession financing, loan-to-loan and loan-to-own' (n 55); see also AFME, Frontier Economics and Weil, Gotshal and Manges LLP, Potential economic gains from reforming insolvency law in Europe, n 7, at 18.

99 Companies Act (Singapore), section 211E.

financing, even on a super-priority basis, provided such financing is deemed necessary to enable the debtor to continue as a going concern or the financing is necessary to achieve a more advantageous realisation of its assets of a company that obtains the financing, than on a winding up.[100] The law provides some detail as to what constitutes adequate protection – cash payments, additional or replacement security or something that is the 'indubitable equivalent'.[101] This is Chapter 11 language that does not appear to have a precedent in the pre-existing Singapore 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 security (collateral) to support both the existing and new loans.[102]More generally, it has been suggested that 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'.[103] The 2017 reforms largely observes these guidelines.[104] In a recent High Court decision in Re Attilan,[105] the court was cautious to grant super-priority status, holding that the conditions set out in the legislation must be strictly complied with. In particular, there must be evidence that the debtor company has undertaken reasonable steps to secure financing without such super-priority and had been unsuccessful.

Nevertheless, super-priority new finance remains controversial not least because of its potential to 'trump' existing priority rules. As outlined above, similar proposals for super-priority new finance in a restructuring context have so far been resisted in the UK and EU.[106]

In the UK, differences in business culture and economic environment have been cited in this connection.[107] There are concerns about bringing about a situation that would essentially

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[100] Companies Act (Singapore), section 211E(1).

[101] Companies Act (Singapore), section 211E(6).

[102] For a full discussion, see American Bankruptcy Institute, Commission to Study the Reform of Chapter 11: Final Report and Recommendations (n 52), 73-79, including on how abuses associated with super-priority new financing might be checked.

[103] 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' (2017) Oxford Legal Studies Research Paper 41/2017, 34 – 35 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2976446>.

[104] Observance is seen as follows: (1) notice to each creditor is required (Companies Act (Singapore), section 211E(2)), (2) the threshold that the debtor must demonstrate that it would not have been able to obtain the rescue financing from any person unless the debt is secured (s 211E(1)(c)(ii)); (3) balance of benefit and prejudice to existing creditors (section 211E(1)(d)); and (4) the court orders that can be made to ensure that there is adequate protection to existing creditors (section 211E(6)).

[105] [2017] SGHC 283.

[106] The call for such a regime was made in a study by AFME/Frontier Economics that advocated EU legislative action: see AFME, Frontier Economics and Weil, Gotshal and Manges LLP, Potential economic gains from reforming insolvency law in Europe (n 7) 18.

[107] See the parliamentary debates on the Enterprise Bill; in particular House of Lords debates for 29th July 2002 and the discussion in Stephen Davies, Insolvency and the Enterprise Act 2002 (Jordans 2003) 20 – 26, particularly at 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

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[108] and most recently in the 2016 Insolvency Service consultation reviewing the Corporate Insolvency Framework.[109] The market reaction remained hostile and cautioned against introducing a US style new financing regime.[110] 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.[111] 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.

C. Cross Class Creditor cram-down

The 2017 reforms have also followed the US in terms of cross class creditor cram-down with some differences; most notably the differences lie in the fact that cram-down is more difficult to accomplish in a Singapore context because of the requirement that 75 per cent in value of creditors should approve a scheme rather than merely one impaired class of creditors. Cross class creditor cram-down 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 per cent 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.[112]

The 'fair and equitable' and 'unfair discrimination' requirements are concepts based upon the cram-down provisions in section of 1129 of the 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 a dissenting creditor must receive at least as much under a scheme as it would receive were

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administrations 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.'

[108] The Insolvency Service, Encouraging Company Rescue (n 46).

[109] See the Insolvency Service, A Review of the Corporate Insolvency Framework: A Consultation on Options for Reform (n 4).

[110] See the Insolvency Service, A Summary of Responses: A Review of the Corporate Insolvency Framework (n 45), [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.'

[111] See World Bank, 'Doing Business 2018: Reforming to Create Jobs' (The World Bank, 31 October 2017) < http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB2018-Full-Report.pdf>, at 114: '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 super-priority 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.'

[112] Companies Act (Singapore), section 211H(3).

the scheme not approved.[113] 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.[114]

The main justification for the introduction of cross-class creditor cram-down in Singapore comes in the 2013 Report.[115] According to the ILRC, 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 ILRC pointed out, the objections may come from creditors seeking to improve their bargaining position and to get a greater stake in the restructured business. A cross-class creditor cram-down 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 ILRC 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.'[116] The ILRC therefore recommended 'a high threshold of proof' allowing the court to check against unreasonable valuations and abuse of the cram-down provisions.[117] 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. The Singapore law has taken on board the suggestion that a valuation expert may be appointed to assist the court.[118] The 2017 reforms however, tweaked the ILRC's recommendation (and Chapter 11) by making the relevant comparator what the court estimates the creditors would have received if the scheme did not come to pass rather than if the company were liquidated.[119] There was a suggestion that the 75 per cent in value requirement was unnecessary and overly restrictive but the Ministry referred back to the consideration of the relevant arguments by the ILRC.[120]

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

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[113] Companies Act (Singapore), section 211H(4)(a).

[114] For a suggestion that the US 'absolute priority' principle is less absolute than it might superficially appear see MJ Roe and F Tung, 'Breaking bankruptcy priority: How rent-seeking upends the creditors' bargain' (2013) 99 Virginia Law Review 1235 and see also S Lubben, 'The Overstated Absolute Priority Rule' (2016) 21 Fordham Journal of Financial and Corporate Law 581.

[115] See the discussion at 2013 Report (n 10) 154 – 157.

[116] ibid 155.

[117] ibid 156.

[118] Companies Act (Singapore), section 211H(5).

[119] Companies Act (Singapore), section 211H(4). In the Chapter 11 cram-down, each creditor of the impaired must accept the plan or would have received a sum that is not lower than what he would have received in a liquidation.

[120] See Ministry of Law, 'Ministry's Response to Feedback from Public Consultation on the Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring' (Ministry of Law, 27 February 2017) <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20Goverment%20Response%20to%20Public%20Consult%20Feedback%20for%20Companies%20Act%20Amendments.pdf>, at 18 – 19.

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 effects 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.[121]

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:[122]

> 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'.

In order to address these difficulties, 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.[123] 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 proposals include putting in detailed rules that 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, reflecting the fact that within three 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.

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[121] See generally S Paterson, 'Rethinking Corporate Bankruptcy Theory in the Twenty-First Century' (2016) 37 OJLS 697; and S Paterson, 'Bargaining in Financial Restructuring: Market Norms, Legal Rights and Regulatory Standards' (2014) 14 JCLS 333.

[122] See the Insolvency Service, A Summary of Responses: A Review of the Corporate Insolvency Framework (n 45) 539 for a response by S Paterson.

[123] See American Bankruptcy Institute, Commission to Study the Reform of Chapter 11: Final Report and Recommendations (n 52) 207–11.

Could these Chapter 11 reform proposals to the 'absolute priority' principle address the difficulties relating to valuation and if so, are there merits in adopting these proposals in Singapore? In US, due congressional stalemate, there seems little prospect of such changes being enacted and implemented in the immediate future.[124] Further, 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.[125]

D. Prepackaged Schemes of Arrangement

Following on from the 2016 Report, the 2017 reforms contains a mechanism for 'prepackaged schemes of arrangement'.[126] 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 procedure that may lead to a going-concern sale of all, or part, of an ailing company's assets.[127] 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.[128] 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

[124] For a discussion see generally D Bernstein and J Millstein, 'ABI Commission Report: Redemption Option Value Explained' (2015) 34 American Bankruptcy Institute Journal 10.

[125] See generally S Paterson, 'Rethinking Corporate Bankruptcy Theory in the Twenty-First Century' (2016) 37 OJLS 697, in particular 718 – 720; 'Bargaining in Financial Restructuring: Market Norms, Legal Rights and Regulatory Standards' (2014) 14 JCLS 333.

[126] Companies Act (Singapore), section 211I.

[127] 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.

[128] See generally The Insolvency Service, Graham Review into Pre-pack Administration: Report to The Rt Hon Vince Cable MP (16 June 2014).

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.[129]

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 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.[130] Be that as it may, there have been market developments in the US which combine ‘prepacks’ with ‘going concern sales’. Under section 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.[131] Perhaps, the most notable example where this occurred is in relation to the General Motors (GM) car company.[132]

GM, a huge auto manufacturer and distributor, 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 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

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[129] See section 129 of Small Business, Enterprise and Employment Act 2015 (UK) (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.

[130] L LoPucki and S Kalin, ‘The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a “Race to the Bottom”’ (2001) 54 Vanderbilt Law Review 231. But for different perspectives see R Rasmussen and R Thomas, ‘Timing Matters: Promoting Forum-shopping by Insolvent Corporations’ (2000) 94 Northwestern University Law Review 135 arguing that the Bankruptcy Code (US) would be more efficient if the law facilitated more forum shopping for bankruptcy venues; D Skeel, ‘What’s So Bad about Delaware?’ (2001) 54 Vanderbilt Law Review 309; H Miller, ‘Chapter 11 Reorganization Cases and the Delaware Myth’ (2002) 55 Vanderbilt Law Review 1987; T Zywicki, ‘Is Forum-Shopping Corrupting America’s Bankruptcy Courts?’ (2006) 94 Georgetown Law Journal 1141.

[131] On the ‘business justification’ test for Bankruptcy Code (US), s 363 sales, see In re Lionel Corp (1983) 722 F2d 1063.

[132] 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: US Congressional Oversight Panel, The Use of TARP Funds in the Support and Reorganization of the Domestic Automotive Industry (9 September 2009). 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.

ranking. The Bankruptcy Court however, rejected this argument stating that section 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.[133] 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.[134]

Despite the concerns about bypassing standard Chapter 11 protections, the US prepack clearly offers more procedural safeguards than its UK counterpart in that it has to come before the court for approval. Not surprisingly the 2016 Report suggested a Pre-Pack regime that was essentially similar to the US regime.[135] The 2017 reforms allow the court to approve a scheme if it is satisfied that had a meeting of creditors or classes of creditors been held, the necessary consents would have been obtained.[136] The 2017 reforms also require that in a prepack there should be adequate advance disclosure to creditors and sets out a clear standard for this disclosure.[137] Nevertheless, the experience in other jurisdictions suggests the need for caution in exercising these new powers to approve prepacks.

IV. REFLECTIONS ON THE CHALLENGES OF TRANSPLANTING US CHAPTER 11 TO SINGAPORE

UK academics and English bank lenders have cautioned against the transplantation of the Chapter 11 model into the UK and, in particular, the moratorium and debtor in possession model which allows the grant of priority and super-priority in rescue financing.[138] Similar concerns were raised by the ILRC in the context of Singapore,[139] whose regime has, largely been pro-creditor and in particular, pro-secured creditor.[140] It remains an empirical issue whether the cost of credit for companies will be driven up by the new 2017 reforms. The success of the reforms also hinges on whether the judges hearing the cases will develop the requisite expertise to manage these cases effectively.[141] In this section, we offer some reflections on the transplant of Chapter 11 in terms of regulatory philosophies.

A. Relationship Between Restructuring and Corporate Governance

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133 In re General Motors Corp (2009) 407 BR 463.

134 For different perspectives see D Baird, 'Lessons From The Automobile Reorganizations' (2012) 4 Journal of Legal Analysis 271; S Lubben, 'No Big Deal: The GM and Chrysler Cases in Context' (2009) 82 American Bankruptcy Law Journal 531; M Roe and D Skeel, 'Assessing the Chrysler Bankruptcy' (2010) 108 Michigan Law Review 727.

135 2016 Report (n 11) 27.

136 Companies Act (Singapore), section 211I.

137 Companies Act (Singapore), section 211I(3).

138 Eg J Payne, Lessons from the United States (n 17); The Insolvency Service, A Summary of Responses: A Review of the Corporate Insolvency Framework (n 45) 67 – response by British Bankers Association.

139 2013 Report, 156.

140 Prior to the 2017 reforms, the secured creditor had a strong ability to veto a judicial management order. See n. 64 and accompanying text above.

141 The 2016 Report calls for the restructuring proceedings to be heard by a bench of specialist judges. See 2016 Report (n 11) 15 – 16.

1. Shareholder veto

It has been argued above that a Chapter 11 regime, the possibility of a contested valuation hearing may shift some of the power of negotiation to subordinated creditors, who otherwise in a pro-creditor regime, have very little say when they are 'out of the money'.[142] One of the major criticisms of the Chapter 11 proceedings in the US is that despite the absolute priority rule, subordinated creditors and shareholders are given disproportionate voice in the restructuring process as a result of these junior interests taking advantage of the uncertainty of the valuation.[143] However, scholars have pointed out that the problem may be more apparent than real for the larger restructurings in practice. The study by LoPucki and Whitford[144] of large publicly held companies involved in Chapter 11 proceedings between 1979 to 1988 demonstrates that in practice, shareholders do receive payoffs though the payoffs are not as significant as anticipated. Other scholars have argued that the more recent practices in relation to DIP financing effectively mean that DIP financers have a lot more leverage over restructurings,[145] thereby neutralising the threat that debtor companies may hold the creditors hostage as part of the process. Professor Baird has commented: 'By the early 2000s, equity commonly received nothing in the vast majority of cases.'[146]

In Singapore, by way of contrast to Chapter 11 which contains specific provisions on shareholder cram-down,[147] the 2017 reforms do not subject shareholders to a cram-down.[148] The Ministry of Law considered this issue but took the view that shareholder approval is not uncommon in the debt-equity share swaps and wished to preserve the existing position. [149] Thus, depending on the place of incorporation of the debtor and/or any applicable listing rules if the debtor is listed, shareholder approval may still be required. In particular, if the debtor is incorporated and/or listed in Singapore, in certain kinds of restructuring, particularly those involving debt-equity swap or major sales of the assets in pre-packs,[150] shareholder approval will be required. It appears paradoxical that junior creditors are subject to cram-down but shareholders may have an effective right of veto over the restructuring. In response to the suggestion of hold-ups, the Ministry of Law took the view that there is very little risk of this under the 2017 reforms because of the absolute priority rule found in section 211H(4)(ii), which requires the unsecured creditors to be paid in full

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142 See n 122 (and accompanying text).

143 ibid. See also DG Baird & D Bernstein, 'Absolute Priority, Valuation Uncertainty, and the Reorganization Bargain' (2006) Yale LJ 1930.

144 LM LoPucki and WC Whitford, 'Corporate Governance in the Bankruptcy Reorganisation of Large, Publicly Held Companies' (1993) 141 University of Pennsylvania Law Review 669.

145 D Skeel, 'Creditors' Ball: The New Corporate Governance in Chapter 11' (2003) 152 U Pa L Rev 917, 952.

146 D Baird, 'Chapter 11's Expanding Universe' (2015) 87 Temple Law Review 975 at 979 and see also K Ayotte and E Morrison, 'Creditor Control and Conflict in Chapter 11' (2009) 1 Journal of Legal Analysis 511 (finding pervasive creditor control in large privately and publicly held businesses that filed Chapter 11 in 2001).

147 Bankruptcy Code (US), sections 1126(d) and 1129(2)(C).

148 Companies Act (Singapore), section 211H (2) refers to cram-down on classes of creditors only.

149 Ministry of Law, Response to Feedback from Public Consultation (n 120) 19 – 20.

150 Eg Companies Act (Singapore), section 160 (sale of substantially all of the assets of the company) requires shareholder approvals. Further, for Singapore Exchange-listed companies (whether incorporated in Singapore elsewhere), under the listing rules, a substantial disposal of the assets of the company requires shareholder approvals (chapter 10). Depending on the number of shares that may be issued in connection with the debt-equity swap, the recipient of the shares may require a 'white-wash' waiver, that is the approval of the independent shareholders, under the Singapore Code on Takeovers and Mergers to avoid having to make a mandatory offer for the remaining shares.

before the subordinated creditors or shareholders receive any 'property on account of the subordinated claim or the [shareholder's] interest'.[151]

However, in our view, the absolute priority rule, as framed in section 211H, will not completely eliminate the risk of hold-ups by shareholders with a view to extracting payoffs that are given to them in a different capacity and, in particular, as part of the management team. For example, if the restructuring plan provides for the cram-down of junior creditors and requires the issuance of equity (and thus requires shareholders to approve under company law), shareholders have nothing to lose by refusing to vote in favour unless the management receives some payoff, even if junior creditors were to receive either nothing or a small amount considerably less than their full claims. The absolute priority rule, as framed in section 211H, will arguably not apply to prevent the cram-down of the junior creditors even if there is payoff to the existing management team (as the payments are to the management, rather than shareholders); thus, the risk of prejudice to the junior creditors is high if the management team is either made up of large shareholders or controlled by such shareholders. On the other hand, the court has an overriding discretion not to approve the scheme on the ground that it is not fair and equitable,[152] and it remains to be seen if they would veto the scheme on such ground.

Thus, the outcome of not disenfranchising shareholders under the 2017 reforms is similar to the position that has existed for the scheme of arrangement procedure, even without the introduction of the Chapter 11 features. Under the scheme of arrangement simpliciter (that is, sans Chapter 11 features) in Singapore, a 'business transfer scheme' described in Section II.A above which involves the transfer of all or substantially all of the assets and senior debt to the 'newco' owned by the senior lenders, leaving behind the junior debt in the 'oldco', will continue to require shareholders' approval for the sale of the assets and senior debt.[153] Thus, in Singapore, shareholders can effectively veto the sale even if they are 'out of the money'. In this respect, it is important to note that for a 'business transfer scheme', Singapore differs from the UK position in that UK allows for the use of such scheme of arrangement twinned with a pre-packaged administration;[154] shareholders' approval thus is not required and shareholders can be effectively crammed down.[155] In Singapore, the sale of substantially of company's assets and senior debt will require the approval of the shareholders under company law and listing rules (if applicable). Pre-pack judicial management is not available in Singapore.[156]

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[151] See n 149 above. See also Minister of State for Law's speech in Parliament: "Shareholders' cram down exists in Chapter 11, but Chapter 11 is an insolvency process that re-organises both debt and equity of a company. By contrast, the new provisions support creditor schemes, which only bind the company's creditors. The current cram down provisions ensure that the scheme distributes a company's property to its creditors in a fair and equitable manner and are not concerned with adjustments to shareholder interests [emphasis the authors']." Singapore Parliamentary Debates, vol 94, session 1, 10 March 2017.

[152] Companies Act (Singapore), section 211H(3).

[153] See n 150 above.

[154] Eg see Re IMO Carwash and My Travel, nn 34-35 above.

[155] J Bannister & E Mathison, 'New Tricks for an Old Dog: the Recent Use of Schemes of Arrangement for Restructurings in the UK' (2009) Business Restructuring and Insolvency Quarterly 26; see P Hertz et al, "Compromising Shareholder Claims both Generally and in Listed Companies" in The Law and Practice of Restructuring in the UK and US (ed by C Mallon and S Y Waisman, 2011), ch 11 at [11.3.7.1.3] and [11.3.8.13].

[156] See Wee Meng Seng, "Whither the Scheme of Arrangement in Singapore: More Chapter 11, Less Scheme", available at https://www.law.ox.ac.uk/sites/files/oxlaw/wee_the_scheme_of_arrangement_in_singapore.pdf (accessed 22 May 2018), at p 3. While Singapore has the judicial management process, it is based on the UK's administration process prior to the reforms introduced under the Enterprises Act 2002 (and thus, is not the functional equivalent of the UK's administration order under the Enterprises Act 2002). See discussion in Section II.A above. Thus, even if a

Thus, the 2017 reforms may have inadvertently created a situation where the shareholders are able to exert leverage over junior creditors in the case of larger-scale insolvencies involving listed companies in Singapore and indeed in much of Asia. The reforms are designed to enhance the attractiveness of Singapore as a restructuring hub for international companies including, in particular, Asian companies, but, unlike the US and UK, Asian stock markets are dominated by companies with concentrated shareholdings, whether in the hands of the state or families.[157] In larger scale restructurings typically involving listed companies, the concern that a debtor/management-friendly regime can lead to abuse is very real.[158] The management and the controlling shareholders (whether it is the state or families) have incentives to put forward an agenda that favours their continued control of the company.[159] In a pro-creditor regime, these persons have much less leverage since the creditors are the ones determining the success of the re-organisation.

2. Duties of directors and insolvency practitioners in a cram-down scheme of arrangement

A matter not addressed in the 2017 reforms, and left to case law, is the issue of the duties that are owed by directors and restructuring specialists (normally IPs) who are hired to oversee the cram-down scheme of arrangement. It is trite law that directors owe fiduciary duties to the company and when the company is insolvent, there is a duty to act in the interests of the creditors.[160] In Singapore, in TT International (No. 1), the Singapore Court of Appeal has further held that a proposed scheme manager, in a conventional scheme of arrangement under section 210, who is hired to formulate and implement the scheme of arrangement, owes a duty to 'strike the right balance [emphasis the court's] and manage the competing interests of successfully securing the approval of his proposed scheme and uncompromisingly respecting the procedural rights of all involved in the scheme process'.[161] Such a duty exists despite the fact that the proposed scheme manager is inherently in a position of conflict since his remuneration depends on the success of his efforts in resuscitating the company.[162]

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company is in judicial management, the sale of substantially of company's assets will require shareholders' approval.

[157] For Singapore, see C Chen, WY Wan and W Zhang, 'Board Independence as a Panacea to Tunneling? An Empirical Study of Related Party Transactions in Hong Kong and Singapore' (2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2991423> (based on a sample of 103 Singapore-listed companies, the data shows approximately 66 per cent of the Singapore companies have beneficial owners over 30 per cent and 87 per cent). For the rest of Asia, see RW Carney and TB Child, 'Changes to the Ownership and Control of East Asian Corporations between 1996 and 2008 : The Primacy of Politics' (2013) 107 Journal of Financial Economics 494.

[158] In the Asia Pulp and Paper restructuring, some of the creditors had opposed the management-led restructuring because they believed that controlling shareholders had caused the company to be in distressed in the first place. See Deutsche Bank v Asia Paper & Pulp [2003] 2 SLR 320.

[159] D Hahn, 'Concentrated Ownership and Control of Corporate Reorganisations' (n 18).

[160] Eg West Mercia Safetywear v Dodd (1988) 4 BCC 30; Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd [2010] 4 SLR 1089.

[161] Royal Bank of Scotland v TT International (No. 1) [2012] 2 SLR 213.

[162] See WY Wan, 'Recent developments in schemes of arrangement in Singapore: classification of creditors and scheme manager's conflicts of interest' [2013] JBL 552.

Difficult questions may arise as to how the directors and the proposed scheme managers should properly view their respective roles when the proposed restructuring involves a company which is either insolvent or close to insolvency and it is proposed that certain classes of junior creditors should receive greater write-down (and even cram-down) of their debts than other classes. While the courts will generally not review the decisions of directors with hindsight under the business judgment doctrine,[163] the protection is lost if the allegation is one of conflict of interest, such as where the management team is allocated equity or other participatory interest in the post-scheme company. Further, it is by no means clear that the proposed scheme managers have similar protections as the business judgment doctrine that applies to directors.

Some guidance may be drawn from the UK decisions on schemes of arrangement involving de facto 'squeeze-outs'. In Re IMO Carwash, which involved a business transfer scheme, it was argued by certain creditors that the directors were not acting in the interests of all creditors when they approved the proposed scheme of arrangement which would have resulted in the senior creditors owning most of the 'newco' and the objecting creditors left in the 'oldco' which was a shell company (and facing a de facto cram-down). There were seven directors on the board that approved the proposed scheme; five of them would receive significant bonuses in 'newco' if certain targets were met and the remaining two were independent directors. Mann J rejected the argument, holding that the objecting creditors were negotiating on their own behalf and in any case, they no longer had any economic interest.[164] Mann J placed weight on the fact that the independent directors had approved the scheme. Going forward, when the directors determine that certain classes have no economic interests and/or should be crammed-down, it is likely that valuation issues will play a prominent role in deciding whether the directors have acted properly in the discharge of their duties to the company and/or whether the scheme managers have paid proper regard to the interest of the creditors. The views of independent directors will be important, particularly if the directors face a conflict of interest.

B. Attracting International Business - the Recognition of Singapore Schemes Around the World

The second issue that arises is whether the transplant of Chapter 11 will work in attracting international restructuring and insolvency players to Singapore. New York and London are major international debt restructuring centres[165] but it should be remembered that most international bond offerings are governed by either New York or English law and it remains to be seen whether Singapore can compete on this global scale given the fact Singapore law does not appear to be used widely as a basis for international bond issues. We make the following observations.

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.[166] There is a long-established principle of the common law that the discharge of a debt under foreign insolvency

[163] Eg Re Continental Assurance Company of London plc [2007] 2 BCLC 287.

[164] Re Bluebrook [2009] EWHC 2114 para 63.

[165] See generally G McCormack 'Bankruptcy Forum Shopping: The UK and US as venues of choice for foreign companies' (2014) 63 International and Comparative Law Quarterly 815; LC Ho, 'Making and enforcing international schemes of arrangement' (2011) 26 JIBLR 434; J Payne, 'Cross-Border Schemes of Arrangement and Forum Shopping' (n 21).

[166] See Justice K Ramesh, 'The Gibbs Principle: The Tether on the Feet of Good Forum Shopping' (2017) 29 SAcLJ 42.

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[167] 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[168] and there is also a statement by Lord Hoffmann in Wight v Eckhardt Marine GmbH[169] 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,[170] 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 not 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 it was held in Re Pacific Andes Resources Development[171] 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 Regulation[172] there may also be difficulties in obtaining recognition in other European countries of a Singapore scheme that purports to modify foreign law obligations.[173] Under generally accepted principles of private international law, the modification or termination of a contract is governed by the proper law of the contract.[174] This principle is reflected in the Rome I Regulation which provides in Article 12(1) 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'.[175]

Secondly, 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

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167 Gibbs v La Société Industrielle et Commerciale des Métaux (1890) 25 QBD 399 CA.

168 Joint Administrators of Heritable Bank Plc v Winding up Board of Landsbanki Islands HF [2013] UKSC 13; [2013] 1 WLR 725 at [44].

169 Wight v Eckhardt Marine GmbH [2003] UKPC 37; [2004] 1 AC 147 at [11].

170 Global Distressed Alpha Fund 1 Ltd Partnership v PT Bakrie [2011] EWHC 256 (Comm); [2011] 1 WLR 2038.

171 Re Pacific Andes Resources Development [2016] SGHC 210.

172 Council Regulation (EC) 593/2008 of 17 June 2008. This regulation is directly applicable law in all EU Member States. It does not need national implementing legislation.

173 The chances of recognition of a Singapore scheme overseas may be increased if the governing law of a debt contract is changed from a foreign law to Singapore law pursuant to a provision in the contract itself – for example of where the governing law was changed to English law: see Re Apcoa Parking Holdings Gmbh [2014] EWHC 3849 (Ch).

174 AV Dicey, L Collins, JHC Morris and A Briggs (ed), Dicey, Morris and Collins on the Conflict of Laws (15th edn, Sweet & Maxwell 2012), [32] – [156].

175 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' and see also recital 7 of the preamble to the Regulation. 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 Re Rodenstock [2012] BCC 459, [76] – [77]; see also R Sheldon, Cross Border Insolvency (Bloomsbury 2015) 507.

UNCITRAL Model Law on Cross Border Insolvency[176] 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.[177]

Finally, 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.[178] 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.[179] 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.[180] Singapore itself has experienced a similar phenomenon in the Asia Pulp & Paper case where the Singapore courts declined to make a judicial management order in respect of the Singapore registered holding company of an Indonesian conglomerate.[181] The operating companies were outside Singapore, principally in Indonesia, and declined to cooperate with the Singapore proceedings thereby rendering such proceedings largely futile.

V. CONCLUSION

The 2017 reforms have the express objective of enhancing Singapore as an attractive destination to conduct corporate restructuring. It builds on the established strengths of the Singapore legal system and its role as a leading centre for international arbitration and mediation.[182] A number of observations appear to be appropriate. First, our article suggests that while transplant of the US

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[176] UNCITRAL Model Law on Cross Border Insolvency (n 12).

[177] Articles 20 and 21 of the Model Law and for an analysis of how the Model Law has been adopted in the UK and US see G McCormack 'US exceptionalism and UK localism? Cross Border insolvency law in comparative perspective' (2016) 36 Legal Studies 136 and for an evaluation of its adoption in Australia, see G McCormack and A Hargovan 'Australia and the International Insolvency Paradigm' (2015) 37 Sydney Law Review 389.

[178] Eg R Tomasic and Z Zhang, 'From Global Convergence in China's Enterprise Bankruptcy Law 2006 to Divergent Implementation: Corporate Reorganisation in China' (2012) 12 JCLS 295.

[179] Re Yukos Oil 312 BR 396 (Bankr SD Texas 2005) (dismissing the Chapter 11 application, holding, among other things, that '[t]he sheer size of Yukos, and correspondingly, its impact on the entirety of the Russian economy, weighs heavily in favor of allowing resolution in a forum in which participation of the Russian government is assured'; American Bankruptcy Institute, 'A Tale of Two Proceedings Turnabout Is Fair Play in the Yukos U.S. Bankruptcy Cases' (ABI Journal, Jul/Aug 2006) <https://www.abi.org/abi-journal/a-tale-of-two-proceedings-turnabout-is-fair-play-in-the-yukos-us-bankruptcy-cases>.

[180] In re Northshore Mainland Services, Inc., et al., Debtors, 537 B.R. 192, 208 (Bankr Del 15 September 2015).

[181] Deutsche Bank v Asia Paper & Pulp [2003] 2 SLR 320.

[182] See Ministry of Law, Opening Address by Mr Ng How Yue, Permanent Secretary for Law, at the Second National Insolvency Conference 2015 (14 September 2015).

Chapter 11 provisions into the Singapore's scheme of arrangement procedure ('law in the books') has taken place within a very short period of time (being less than one year from the publication of the 2016 Report to enactment of the reforms, the challenges will lie in how these provisions will be implemented in practice ('law in action'). The scheme of arrangement has proven to be a very flexible tool, though not without its flaws, and the addition of innovative features from Chapter 11 has been carefully considered with reference to Singapore conditions. For example, the moratorium provisions have been carefully crafted to cover related corporations and to avoid the problems of delay that are sometimes associated with Chapter 11. Many of the reservations however, that are raised in the UK relating to rescue financing could potentially continue to apply in the Singapore context. Moreover, the new cram-down provisions could see many disputes in respect of valuation including evaluating whether the directors and scheme managers have properly discharged their duties. Chapter 11 is itself very complex and when its provisions are juxtaposed into the existing scheme of arrangement procedure which has been shaped by judicial authority in Singapore (as in the UK), there remains much that is hazy and uncertain. This is not to say that the merits of such reforms are thereby diminished: indeed, the very complexity of restructuring transactions highlights the importance of far-sighted initiatives and the advantages of such initiatives will be fully seen only in the course of time as they are refined and developed.

Second, while the 2017 reforms seek to take the desirable features of Chapter 11 and avoid its disadvantageous elements, ultimately, there is fundamental shift in power from the existing creditors to the debtor company. In Singapore (and many other Asian countries) where the majority of the companies (including publicly listed companies) have concentrated shareholdings,[183] and managers are often not independent of the controllers, the question is whether the managers and/or controlling shareholders in a debtor in possession model will abuse their leverage and act in ways that are contrary to the creditors' interests. In particular, the absence of an express shareholder cram-down in the 2017 reforms may unwittingly give shareholders and/or management leverage at the expense of the junior creditors even when shareholders are clearly 'out of the money' on any valuation of the company's worth.

Finally, it remains to be seen whether the Singapore schemes will be recognised overseas. This is especially the case where a scheme is approved in relation to a foreign company or purports to modify debt obligations that are governed by a non-Singapore law. Political factors are complex and may militate against the recognition of Singapore proceedings when the interests of a foreign state or government linked entity are involved, irrespective of how well fashioned Singapore's restructuring and insolvency laws may be.

[183] See n 157 and accompanying text.