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Singapore as a forum of choice for insolvency proceedings: the story so far

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Acknowledgement

INSOL International is very pleased to present a technical paper titled 'Singapore as a forum of choice for insolvency proceedings: the story so far' by Mei Yen Tan, Partner, Oon & Bazul LLP.

Since 2013, Singapore has taken clear steps to promote itself as a hub for cross-border insolvency and as a forum of choice for insolvency proceedings. This paper sets out these efforts and explores the reform of Singapore's legislative regime in relation to corporate insolvencies as it seeks to strengthen its viability as a forum of choice for insolvency proceedings. Concurrently with shifting its policy to attain that objective, it has adopted a positive attitude to legitimate forum shopping. The paper reviews recent caselaw and provides a useful update and guidance for insolvency and restructuring practitioners who may consider shifting a debtor's COMI to Singapore and thereafter seek recognition of the Singapore insolvency proceedings as foreign main proceedings in other jurisdictions. It sets out the respective stances (or likely stance) of the courts in Australia, Hong Kong, the United Kingdom and the United States on the recognition of the Singaporean restructuring regime.

INSOL International sincerely thanks Mei Yen Tan for this detailed examination of recent legislative developments and case law in this area and for providing our members with this excellent technical paper.

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Singapore as a forum of choice for insolvency proceedings: the story so far

By Mei Yen Tan, Partner, Oon & Bazul LLP*

1. Introduction

Singapore has taken clear steps to promote itself as a hub for cross-border insolvency. Since 2013, there has been a concerted effort to develop Singapore as a forum of choice for insolvency proceedings. This paper briefly sets out these efforts. Specifically, it explores the reform of Singapore's legislative regime in relation to corporate insolvency before providing a short overview of Singapore's promotion of legitimate forum shopping. Finally, it reviews the respective stances (or likely stance) of the courts in Australia, Hong Kong, the United Kingdom (UK) and the United States (US) on the recognition of the Singaporean restructuring regime.

2. The development of Singapore as a forum of choice for insolvency proceedings

Singapore has developed and reformed its legislation in recent times as it seeks to strengthen its viability as a forum of choice for insolvency proceedings. Concurrently with shifting its policy to attain that objective, it has adopted a positive attitude to legitimate forum shopping.

2.1 Legislative reform

The legislative reform comprised of two primary steps – the creation of the Insolvency Law Review Committee (the ILRC) and the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (the Committee), and the implementation of their recommendations.

2.1.1 The establishment of the ILRC and the Committee

In 2013, the ILRC made several recommendations to update Singapore's personal and corporate insolvency and debt restructuring laws. Personal and corporate insolvency regimes were at that time separated into two distinct statutes and the ILRC's primary recommendation was the enactment of a new omnibus legislation to consolidate the two.

In July 2015, the first of the ILRC's recommended changes was made when the Bankruptcy Act was amended to create a more rehabilitative discharge framework for bankrupts and to encourage institutional creditors to exercise financial prudence when granting credit.

The economic downturn in that same year resulted in an increasing number of insolvencies and restructurings in the Asia Pacific region. The Ministry of Law saw a need for a "lead centre" to be established. Given that Singapore was already a major financial, legal and business hub providing businesses in the region with a convenient base combining efficiency, expertise and a clear and certain legal framework, the Ministry saw Singapore as being a prime location from which a multi-jurisdictional restructuring could be co-ordinated.[1]

The Committee, which comprised of members of the Ministry of Law, the Judiciary, and industry professionals, was set up and tasked with recommending initiatives and / or legal

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* The views expressed in this paper are the views of the author and not of INSOL International, London.

[1] Committee to Strengthen Singapore as an International Centre for Debt Restructuring, "Report of the Committee" (20 April 2016) at page 3. <https://www.mlaw.gov.sg/files/news/public-consultations/2016/04/Final%20DR%20Report.pdf>

reforms to enhance Singapore's effectiveness as a centre for international debt restructuring.

The Committee's report was published on 20 April 2016.[2] The Committee made 17 recommendations grouped into 3 broad categories:

a) enhancing the legal framework for restructurings;
b) creating a restructuring friendly ecosystem by increasing the availability of rescue financing and strengthening the quality of Singapore-based insolvency professionals; and
c) addressing the perception gap by raising international awareness of the benefits of restructuring debt in Singapore.

2.1.2 The implementation of the recommendations

The Singapore Parliament then adopted a three-phased approach in order to implement the recommendations of the ILRC and the Committee.[3]

2.1.2.1 First phase

In July 2015, amendments were made to the Bankruptcy Act to create a more rehabilitative discharge framework for bankrupts, and to encourage institutional creditors to exercise financial prudence when granting credit.

2.1.2.2 Second phase

On 23 May 2017, amendments to the Companies Act (the 2017 Amendments) came into operation and enhanced Singapore's corporate rescue and restructuring processes, positioning Singapore as a forum of choice for debt restructuring.

Some of the major changes in the second phase included:[4]

(a) The adoption of the UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997) (the Model Law) to facilitate the recognition process for foreign insolvency and rehabilitation representatives and proceedings for cross-border insolvency.

(b) The introduction of super-priority status for rescue financing in schemes of arrangement and judicial management.

(c) The availability of an automatic stay upon the filing of a stay application pending the formal hearing of the stay application for schemes of arrangement and the extension of stays to companies related to an entity undergoing a scheme of arrangement even when the related companies are not themselves undergoing schemes.

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[2] *Supra* note 1, Report of the Committee (20 April 2016) at page 1. https://www.mlaw.gov.sg/files/news/public-consultations/2016/04/Final%20DR%20Report.pdf

[3] Tan Meiyen and Thenuga Vijakumar, 'Insolvency, Restructuring and Dissolution Bill Passed' (26 October 2018). https://static.dynamicdelta.com/blogs/37/files/406705fb-83cd-4faf-be7f-00ce03a000f7/ILO261018%20-%20Insolvency,%20Restructuring%20and%20Dissolution%20Bill%20passed.pdf

[4] Tan Meiyen, Thenuga Vijakumar and Dennis Oh, 'Restructuring and insolvency cases following recent amendments to Companies Act' (1 February 2019). https://static.dynamicdelta.com/blogs/37/files/6fe9f856-2162-4d25-a798-e823add874c7/ILO010219%20-20Restructuring%20and%20insolvency%20cases%20following%20recent%20amendments%20to%20Companies%20Act.pdf

(d) The Court's ability to order worldwide *in personam* stays against a wide range of acts including the enforcement of security against the company in restructuring when a stay application is filed for a scheme of arrangement.

(e) The introduction of the ability to cram down dissenting classes of creditors in schemes of arrangement.

(f) The availability of pre-packaged, expedited schemes of arrangement that can be implemented with prior negotiations with major creditors without the need to call for a meeting of creditors.

(g) The extension of the judicial management regime to make it available to foreign companies with sufficient connection to Singapore.

(h) An added requirement for a secured creditor who opposes an application to show that the making of the judicial management order will cause disproportionately greater prejudice to the said creditor than the prejudice caused to the unsecured creditors if the judicial management order is not made.

(i) The lowering of the threshold that a company needs to meet in order to enter into judicial management; from "will be" unable to pay its debts to "likely to become" unable to pay its debts.

(j) The abolition of the ring-fencing rule, save for specific exceptions, that required liquidators of foreign companies to pay local creditors first before releasing the funds for foreign insolvency proceedings.

2.1.2.3 Third phase

The third phase is the introduction of the Insolvency, Restructuring and Dissolution Act (the IRDA). The IRDA will consolidate the personal and corporate insolvency and restructuring laws which are presently governed by the Bankruptcy Act and the Companies Act respectively. The Bankruptcy Act will be repealed and the provisions relating to corporate insolvency and restructuring in the Companies Act removed.

Some of the notable changes include:

(a) The establishment of a regulatory regime over practitioners acting as officeholders in restructuring and insolvency proceedings which will be administered by the Ministry of Law's Insolvency and Public Trustee's Office.

(b) The ability of a company to place itself under judicial management by obtaining a resolution of the majority in number and value of the company's creditors present, and voting at a meeting convened for this purpose, without the need to apply to court for a judicial management order.

(c) Increasing the availability of third-party funding to judicial managers and liquidators, by allowing these professionals to assign the proceeds of actions relating to transactions at an undervalue, unfair preferences, extortionate credit transactions, fraudulent trading, wrongful trading and delinquent officers.

(d) The empowerment of the court to terminate a winding up instead of staying it indefinitely.

(e) The introduction of a restriction on clauses which permit the termination or modification of the contract upon the occurrence of a specified trigger event, such as the insolvency of the company, an application to propose a scheme of arrangement or the commencement of judicial management which are commonly known as *ipso facto* clauses.

The IRDA was passed by Parliament on 1 October 2018 and was assented to by the President on 31 October 2018. It was gazetted on 7 November 2018 and whilst no date has yet been set, it is expected to come into force in 2020.

2.2 Singapore's acceptance of legitimate forum shopping

Concurrently with the above legislative reforms, Singapore also moved towards accepting legitimate forum shopping as, *inter alia*, a means of promoting itself as a forum of choice for insolvency proceedings.

Legitimate, or "healthy", forum shopping refers to a situation in which a debtor seeks to resort to the law of a particular jurisdiction, not to evade its debts, but to achieve the best possible outcome for creditors.[5] This is to be contrasted with illegitimate forum shopping where a jurisdiction is selected to allow a debtor to escape from its liabilities or reduce the assets recoverable by its creditors.

2.2.1 Beluga Chartering GmbH (in liquidation)

Perhaps one of the earliest indicators of Singapore's willingness to be a forum of choice was the Singapore Court of Appeal's observation in *Beluga Chartering GmbH (in liquidation) v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (Deugro (Singapore) Pte Ltd, non-party)* (*Beluga Chartering*).[6] The Court of Appeal observed in this case that the Singapore court would, in particular circumstances, be willing to render assistance to foreign winding up proceedings through the regulation of its own proceedings. This would be in recognition of the desirability and practicality of a universal collection and distribution of assets. Additionally, this would acknowledge that a creditor should not be able to gain an unfair priority by an attachment or execution on assets located within the jurisdiction of the court subsequent to a winding up order made elsewhere.[7]

The movement towards universalism in the case of *Beluga Chartering* was later complemented by the 2017 Amendments to the Companies Act, which made substantial amendments to the ring-fencing provision. Under the new section 377(3)(c) of the Companies Act, a liquidator of a foreign company would no longer be required to pay the debts and satisfy the liabilities of local creditors first – provided that the foreign company was not carrying on business as a "relevant company" under section 377(14) of the Companies Act – before releasing the funds for the foreign insolvency proceedings. The only exceptions to whom ring-fencing continued to apply were certain financial entities such as banks and insurance companies. The abolition of ring-fencing has brought Singapore in line with other jurisdictions.

2.2.2 Taisoo Suk

Subsequently, in *Re Taisoo Suk (Taisoo Suk),*[8] the Honourable Justice Aedit Abdullah cited the 2014 case of *Beluga Chartering* as authority for the proposition that it was within the inherent powers of the court to recognise foreign winding up proceedings and render

[5] *Re Codere Finance (Uk) Limited* [2015] EWHC 3778 (Ch) at [18].
[6] [2014] 2 SLR 815.
[7] *Ibid,* [99].
[8] [2016] 5 SLR 787.

assistance to them by regulating its own proceedings. Abdullah JC (as he then was) took the view that although *Beluga Chartering* dealt with liquidation proceedings, this observation should also apply to other forms of foreign insolvency proceedings such as restructuring and rehabilitation as it would not be to the creditors' benefit to have a "*free-for-all, catch-as-catch-can situation*" with disparate proceedings.[9]

On 10 March 2017, the Honourable Justice Kannan Ramesh published an article titled "*The Gibbs Principle: A Tether on the Feet of Good Forum Shopping*".[10] At paragraph 49, he demonstrated his support for "good forum shopping":

> *"Where a particular forum is selected for insolvency or restructuring because, in the view of the debtor or the creditors, that jurisdiction possesses an insolvency ecosystem – comprising both regulatory and soft infrastructure – that will best promote the economic survival of the debtor or achieve the best possible outcome for creditors, the courts should not stand in the way of such an arrangement even though it is evident that that particular forum is chosen solely for those purposes and none other. This is the type of forum shopping that we should all get behind. It is carried out for a bona fide purpose and is therefore properly characterized as "good forum shopping". The touchstone is really whether the forum shopping was undertaken to take advantage of the juridical and other advantages that a jurisdiction possesses for a bona fide purpose."*

Justice Ramesh supported his argument by citing the case of *Re Codere Finance (UK) Ltd* (*Codere*).[11]

2.2.3 Codere Finance (UK) Ltd

In *Codere,* the Spanish parent company of a corporate group in financial difficulty acquired Codere Finance (UK) Ltd to assume joint obligation for debts owed, in order to take advantage of the favourable scheme jurisdiction available in England & Wales under the Companies Act 2006. The use of restructuring mechanisms available in jurisdictions other than England and Wales was unattractive as they involved some form of insolvency proceeding which could have put certain licenses at risk that the group depended upon.

At the first Court hearing (held for the purpose of seeking the Court's permission to convene the meeting of creditors to vote on the scheme) Mr Justice Nugee remarked that this appeared:

> "…*at first blush to be quite an extreme form of forum shopping, in which the restructuring is brought in the UK purely by incorporating a company to take on very large liabilities*".[12]

At the second Court hearing to sanction the scheme, Mr Justice Newey was influenced by the fact that the creditors had voted overwhelmingly in favour of the proposed scheme, taking it as a signal that the creditors considered such an arrangement to be in their best interests. He concluded by saying:

> *"…In a sense, of course, … what is sought to be achieved in the present case, is forum shopping. Debtors are seeking to give the English court jurisdiction so that they can take advantage of the scheme jurisdiction available here and which is not widely*

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9 *Ibid,* [16].
10 '*The Gibbs Principle: A Tether on the Feet of Good Forum Shopping'*, Singapore Academy of Law Journal, Vol. 29, No. 1, Mar 2017: 42-74.
11 [2015] EWHC 3778 (Ch).
12 *Re Codere Finance (UK) Ltd* [2015] EWHC 3206 (Ch) at [8].

> *available, if available at all, elsewhere. Plainly forum shopping can be undesirable. That can potentially be so, for example, where a debtor seeks to move his COMI with a view to taking advantage of a more favourable bankruptcy regime and so escaping his debts. In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping."*[13]

Justice Ramesh cited the extreme case of forum shopping in *Codere* as an example of good forum shopping, together with *Sea Assets Ltd v Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia* (*Garuda*)[14] and *Re AI Scheme Ltd* (*AI Scheme*).[15]

This view was also shared by the Honourable Chief Justice Sundaresh Menon who, in his keynote address at the 18th Annual Conference of the International Insolvency Institute 2018, articulated factors which determine when forum shopping is 'good', including creditor support for the change, the motivation for the selection being the desire to use a favourable form of proceeding, or for reasons of judicial efficiency or even cultural familiarity, especially where this is all undertaken in the creditors' interest. He agreed with Mr Justice Newey in *Codere* that the issue is whether such a selection would result in the "*best possible outcome for creditors*", and that the case for appropriate forum selection is compelling.

Chief Justice Menon opined that first, Singapore should rethink and even jettison established shibboleths that impede forum selection and second, that forum selection is not just permissible but is also the "*necessary and responsible thing to do*". He accordingly proposed that a director's fiduciary duty to consider the interests of creditors should be extended to identifying the forum that will allow for the best restructuring outcome.

The cases below provide further insight into legitimate forum shopping and Singapore as a forum of choice for insolvency proceedings.

2.2.4 Pacific Andes Resources Development Ltd

In *Re Pacific Andes Resources Development Ltd and other matters* (*Pacific Andes*),[16] Justice Ramesh reformulated the principle in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (*Gibbs*)[17] to prevent the *Gibbs* principle from becoming an impediment to good forum shopping.[18] The principle in *Gibbs* is that the discharge of a debt is not effective unless it is in accordance with the law governing the debt. The Court in *Pacific Andes* reformulated the *Gibbs* principle and stated that if the court has subject matter jurisdiction and there exist assets in or with a sufficient nexus to Singapore that warrants the exercise of jurisdiction, debts which are not governed by Singapore law may be legitimately compromised by Singapore insolvency proceedings.[19] *Pacific Andes* is a prime example of the support for legitimate insolvency forum shopping and the promotion of Singapore as a forum of choice for insolvency proceedings.

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13 [2015] EWHC 3778 (Ch) at [18].
14 [2001] EWCA Civ 1996.
15 [2015] EWHC 1233 (Ch).
16 [2018] 5 SLR 123.
17 *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399.
18 *Re Pacific Andes Resources Development Ltd and other matters* [2018] 5 SLR 125 at [51].
19 *Ibid,* [52].

2.2.5 *China Sports International Limited*

On 28 June 2018, the Singapore High Court granted China Sports International Limited, a company incorporated in Bermuda, an order to place itself under judicial management in Singapore.[20] The company had applied under Section 227AA of the Companies Act, which was introduced in the 2017 Amendments to extend the judicial management regime to foreign companies with a substantial connection to Singapore. The Court found that there was sufficient nexus between China Sports International Limited and Singapore to exercise that jurisdiction because it:

(a) was listed on the Mainboard of the Singapore Exchange;
(b) was subject to the requirements under the Companies Act, including those of financial reporting, accounting standards, and audit;
(c) had auditors in Singapore; and
(d) held its annual general meetings in Singapore.[21]

2.2.6 *Zetta Jet Entities*

In March 2019, the Court recognised the US bankruptcy proceedings of Zetta Jet Singapore Pte Ltd (Zetta Jet Singapore) and Zetta Jet USA, Inc (Zetta Jet USA) (collectively, the Zetta Entities) as a foreign main proceeding under Article 2(f) of the Model Law.[22] The Model Law, as enacted domestically under the Tenth Schedule of the Companies Act (the Singapore Model Law), was introduced as part of the 2017 Amendments.

In *Re: Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* Justice Abdullah recognised that a debtor's centre of main interests (COMI) may shift in coming to a determination on the relevant date for the assessment of COMI. In that case, Justice Abdullah held that COMI should be ascertained as at the date on which the application for recognition is filed.[23] One key reason for the Court's decision is that postponing the centre of main interests determination until the application for recognition is made accepts that, in contemporary practice, various entirely legitimate measures can be taken to shift a debtor's centre of main interests to another jurisdiction (for example, to create a jurisdictional nexus for the opening of insolvency proceedings). Such measures may not all be in place by the time of the foreign insolvency application.

Justice Abdullah stated that it was not objectionable to grant companies the discretion to select the jurisdiction that will offer the best prospect of achieving an effective restructuring solution.[24] While there may be only one main insolvency proceeding, a debtor's centre of main interests can change. A neutral stance should be taken in respect of any purported changes to the centre of main interests in order to recognise the applicant's autonomy, subject to any public policy concerns.

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[20] China Sports International Limited (Under Judicial Management), "Judicial managers appointed", (27 June 2018). https://links.sgx.com/FileOpen/SGX%20Announcement%20-%20JM%20Order_270618.ashx?App=Announcement&FileID=512064>

[21] Shook Lin & Bok LLP, "China Sportswear Manufacturer is the First Foreign Company to be Placed Under Judicial Management in Singapore", (October 2018). <https://shooklin.com/images/publications/2018/October/China-sportswear-manufacturer-is-the-first-foreign-company-to-be-placed-under-judicial-management-in-Singapore.pdf>

[22] *Re: Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] SGHC 53.

[23] *Ibid,* [23].

[24] *Ibid,* [57].

2.2.7 Re Rooftop Group

In December 2019, the Singapore High Court recognised the US bankruptcy proceedings of Rooftop Group International Pte Ltd, a Singapore-incorporated company, with its business situated largely in the United States.

In *Re Rooftop Group International Pte Ltd and another (Triumphant Gold Ltd and another, non-parties)* (*Rooftop Group*),[25] Justice Abdullah affirmed the position in *Re Zetta Jet* with respect to determining a company's COMI. The first applicant claimed that the company's COMI was in the US, citing reasons such as that most of the company's sales were concentrated in the US, and most of its intellectual property rights were also registered there. The non-parties, who were the first applicant's creditors, claimed that the company's COMI was in Singapore, given that most of the first applicant's creditors' meetings were held in Singapore and most of the loan agreements with the first applicant were also entered into under either Singapore or Hong Kong law.

Under Article 16(3) of the Model Law, the first applicant's place of incorporation is presumed to be its COMI. The Court in this case found that the various factors advanced by the first applicant were insufficient to displace the presumption of the company's COMI being in Singapore.[26]

The Court found that as a consequence of Rooftop Group's COMI being in Singapore, the US proceedings were not foreign main proceedings. Nonetheless, the Court ruled that recognition and assistance could be granted to the US proceedings as foreign non-main proceedings within the scope of assistance under Article 21 of the Model Law.

With regard to the issue of recognition of Rooftop Group's foreign representative, Justice Abdullah expressed certain concerns about the foreign representative, in particular, about the foreign representative not discharging his duties in an even-handed manner[27]. Reasons for the concerns included the foreign representative's status as a bankrupt in the US, along with his actions in prompting the first applicant's pursuit of frivolous proceedings against the non-parties. Despite this, Justice Abdullah was of the view that the appropriateness of the appointment of the foreign representative was a matter that should be determined in the foreign proceeding itself under Article 2(i) of the Model Law[28], rather than by the recognising court. The foreign representative was, therefore, granted recognition.

3. The recognition of Singapore's restructuring regime by foreign courts

The culmination of Singapore's efforts to promote itself as a restructuring hub and its acceptance of legitimate forum shopping bode well but one of the true measures of the success of Singapore's insolvency reforms is the recognition of Singapore insolvency proceedings and moratoria by the courts in foreign jurisdictions.

If Singapore is to be a lead jurisdiction for the restructuring of a debtor company, such recognition is critical. This is particularly so if the debtor company has assets in or connections to foreign jurisdictions.

Four foreign jurisdictions, namely the UK, the US, Australia and Hong Kong are examined briefly below. Aside from looking at whether there are any known cases in which Singapore insolvency proceedings and moratoria have been recognised in each jurisdiction, each section will also consider whether the courts in each jurisdiction have displayed any

[25] [2019] SGHC 280.
[26] *Ibid,* [22].
[27] *Ibid,* [51].
[28] *Ibid,* [49].

reservation towards debtor companies that change their COMI prior to commencing insolvency proceedings. The court's attitude to this latter point should be an important consideration to debtor companies.

3.1 United Kingdom

There is at least one known case of the UK courts recognising a Singapore scheme of arrangement.

The UK has enacted the Model Law under the Cross-Border Insolvency Regulations 2006. In April 2019, the UK High Court in *H & CS Holdings Pte Ltd v Glencore International AG*[29] recognised a Singapore scheme of arrangement under section 211B of the Singapore Companies Act as a foreign main proceeding in accordance with the Model Law and granted the applicant company, H & CS Holdings, moratorium relief.[30] This appears to be the first reported decision in which the UK courts recognised a Singaporean scheme of arrangement.[31]

In this case, the applicant company had been granted a moratorium by the High Court of Singapore under Section 211B to enable it to undergo a restructuring of its debts. The underlying purpose of seeking recognition of the Singapore moratorium order was to seek an automatic stay of 2 arbitration proceedings involving the applicant company in the UK with Glencore International AG. The moratorium granted in Singapore had no extra-territorial effect, so the applicant had to seek recognition of the Singapore moratorium in the UK to halt the aforementioned arbitration proceedings.

Under the UK Cross-Border Insolvency Regulations 2006, a "foreign proceeding" means:

> "*a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation*."

The same definition is found in the UNCITRAL Model Law as adopted in Singapore (Tenth Schedule of the Companies Act).

The grant of the recognition application in this case was a ground-breaking decision and demonstrates the effectiveness of a Singapore interim scheme moratorium in a foreign jurisdiction.

The UK court has also displayed its willingness to accept legitimate forum shopping in the case of *Re Noble Group Ltd*.[32] Noble Group Ltd, a Bermudan company, with the support of a large proportion of its creditors shifted its COMI from Hong Kong to the UK for the specific purpose of availing itself of an English scheme of arrangement under the Companies Act 2006. The shift occurred between 14 March 2018 and 7 April 2018. The application for an order sanctioning a scheme of arrangement between Noble Group Ltd and its scheme creditors was filed in or around 9 October 2018.

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29 [2019] EWHC 1459 (Ch).
30 *Ibid,* [12].
31 Rajah & Tann, "High Court in UK recognises Singapore's new moratorium law for debt restructuring in landmark decision", (1 April 2019). <https://www.rajahtann.com/news/news/high-court-in-uk-recognises-singapore-s-new-moratorium-law-for- debt-restructuring-in-landmark-decision>
32 [2018] EWHC 3092 (Ch).

Where a scheme company is incorporated abroad, the UK court will not exercise its jurisdiction to sanction the scheme unless it has a "sufficient connection" to England and Wales.[33] Mr Justice Snowden noted that some of the same factors, relevant to establishing a shift in COMI to England for the purposes of recognition in other relevant jurisdictions, were also likely to be relevant to demonstrate a "sufficient connection" to that jurisdiction. While he acknowledged that the UK court will strike down shifts in COMI conducted for illegitimate reasons, it was also acceptable for companies to shift their COMI for a "self-serving purpose", given that a company is at liberty to pick where it wishes to conduct its activities. Justice Snowden also opined that the court will particularly allow for shifts in COMI where companies have already received the approval of their creditors and are motivated to obtain the best outcome for them.[34] He noted factors associated with the shift in COMI to England (including the move of the company's operations and centre for restructuring negotiations to London), that the majority of the debts which are compromised under the scheme are governed by English Law and the strong support for the scheme in finding that there was a sufficient connection with England to justify exercise of the scheme jurisdiction.

The above cases set a positive note for the recognition of insolvency proceedings in the UK. This in turn provides greater certainty for companies which have commenced insolvency proceedings in Singapore and wish to seek recognition of the same in the UK. However, given that the *Gibbs* principle (as referred to in paragraph 2.2.4 above) remains operative in the UK,[35] there may still be a need for the Singapore proceedings to be coupled with a relevant UK proceeding in order for an applicant to achieve a discharge of a debt governed by English law.

3.2 United States

Chapter 15 of the United States Bankruptcy Code (the Code) was enacted to incorporate the Model Law and thereby provide "an effective mechanism for handling cases of cross-border insolvency."

Chapter 15 of the Code allows the foreign representative of an eligible debtor to seek recognition of the debtor's non-U.S. "foreign proceeding." A "foreign proceeding" is defined in section 101(23) of the Code as

> *"…a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation."*

There are currently no US reported decisions on the recognition of Singapore insolvency orders as foreign proceedings to the best of the author's knowledge. However, given its history of recognition of foreign insolvency orders, including those from Ireland,[36] Croatia,[37]

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33 *Re Drax Holdings Ltd* [2004] 1 WLR 1049 (Ch) at [29].
34 *Re Noble Group Ltd* [2018] EWHC 3092 (Ch) at [95] – [96].
35 *OJSC Bank of Azerbaijan case (Bakhshiyeva v Sberbank of Russia* [2018] EWCA Civ 2802.
36 Declan Bush, "Way clear for Ballantyne Re to finish restructuring after New York recognition" (14 June 2019). <https://globalrestructuringreview.com/article/1194067/way-clear-for-ballantyne-re-to-finish-restructuring-after-new-york-recognition>
37 Benjamin Clarke, "Agrokor granted Chapter 15 protection in New York" (24 September 2019). <https://globalrestructuringreview.com/article/1174707/agrokor-granted-chapter-15-protection-in-new-york>

and Curaçao,[38] it is highly likely that a Singapore insolvency proceeding would be recognised in the US.

The US courts have also taken a positive approach to shifts in COMI. In one example, *Re Ocean Rig UDW Inc* (*Ocean Rig*),[39] the debtor shifted its COMI from the Republic of Marshall Islands where it was registered, to the Cayman Islands, less than a year before the insolvency proceedings were commenced in the Cayman Islands. This shift was made for the primary reason that the jurisdiction that the company was in, Republic of the Marshall Islands, did not have a statute or any procedures permitting reorganisation.[40] The US Bankruptcy Court recognised that the debtor's COMI had been legitimately moved to the Cayman Islands in order to undertake a reorganisation and granted the petition for recognition of the Cayman Proceedings as foreign main proceedings.

Judge Glenn noted in *Ocean Rig* that:

> "*Increasingly, foreign jurisdictions – including the United Kingdom, Hong Kong, Singapore, and the Cayman Islands – provide statutory authority for schemes of arrangement as a way of permitting companies in financial distress to restructure their financial debt, as these Foreign Debtors are attempting to do here. While the U.S. Bankruptcy Code does not currently include provisions authorizing schemes of arrangement, U.S. bankruptcy courts, including this Court, have found that a foreign scheme of arrangement proceeding (including in the Cayman Islands) may satisfy section 101(23)'s definition of a collective judicial proceeding providing for the adjustment of debt that qualifies for recognition.*"[41]

Although there is no tested "Singapore case" *per se*, it is clear from the wealth of jurisprudence in the US on recognition of foreign insolvency proceedings and an openness to legitimate forum shopping that a debtor company can enjoy a fairly high level of certainty that a Singapore insolvency proceeding and moratoria will be granted recognition in the US.

3.3 Australia

There is at least one known case on the recognition of Singapore insolvency proceedings in Australia. In *Chong, In The Matter of CNA Group Ltd v CNA Group Ltd*,[42] the plaintiffs sought recognition of themselves in Australia as the joint and several Interim Judicial Managers, and subsequently the Judicial Managers of CNA Group Ltd, a Singapore company, under the Australian Cross-Border Insolvency Act which enacted the Model Law in Australia. The Australian court recognised the Singapore judicial management as a foreign main proceeding within the meaning of Article 2(a) for the purposes of Article 17(1) of the Model Law and recognised the Judicial Managers as the foreign representatives of CNA Group Ltd.

In that case, there was no question as to where the company's COMI was located as its registered office was situated in Singapore and the Judicial Managers relied on the presumption under Article 16(3) of the Model Law that the company's place of incorporation is presumed to be its COMI.

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38 Dominic Lawson, "Curaçao Chapter 15 recognition may provide hard Brexit precedent" (8 January 2019). <https://globalrestructuringreview.com/article/1178854/curacao-chapter-15-recognition-may-provide-hard-brexit-precedent>

39 570 B.R. 687 (2017).

40 *Ibid,* 703.

41 *Ibid,* 695.

42 [2015] FCA 1148.

This may be different in a case where a company shifts its COMI to Singapore only a short time before applying for insolvency proceedings in Singapore. In *Moore, as Debtor-in-Possession of Australian Equity Investors v Australian Equity Investors*,[43] the Federal Court of Australia stated that the:

> "*Court should be slow to accept that an established centre of main interests has been changed by activities that may turn out to be temporary or transitory*".[44]

A very recent shift in COMI may therefore lead an Australian court to delve deeper into the reasons for such shift even if the said applicant could rely on the presumption in Article 16(3) of the Model Law. There is a possibility that the Australian court may wish to first satisfy itself, as a threshold issue, that the shift was neither temporary nor transitory.

3.4 Hong Kong

Currently, there is no statutory provision empowering a Hong Kong court to render assistance to a foreign court in an insolvency matter, as Hong Kong has not adopted the Model Law in its domestic legislation.

In recent years, however, the Hong Kong Court has made a series of decisions, using common law principles, to recognise and assist foreign insolvency officeholders. The Hong Kong Court has developed a standard practice for applications of this type so that orders can be granted very quickly and usually without the need for a hearing. The Hong Kong Court has also set out a standard form order to guide applicants.[45]

The vast majority of recognition orders have been made where the applicant was a liquidator or provisional liquidator from a common law jurisdiction (including BVI, Cayman and Bermuda). More recently, the Hong Kong court has recognised for the first time a Japanese winding up proceeding[46] and a Chinese liquidation.[47]

From these decisions the following criteria have emerged which must be satisfied for the Court to provide recognition and assistance:

a) the foreign insolvency proceedings are collective proceedings; and

b) were opened in the company's country of incorporation.

Whilst, as stated above, there have been a series of decisions recognising liquidators or provisional liquidators, there is no known Hong Kong case in which a Singapore restructuring proceeding or liquidation has been granted recognition in Hong Kong. The *obiter* statements made by the Hong Kong court, however, in *Re CW Advanced Technologies Limited* (*CW Advanced Technologies*)[48] provide some guidance. On 22 June 2018, four companies in the CW Group made an application to the Singapore court under section 211B of the Singapore Companies Act for a six-month moratorium in order to facilitate a restructuring (Singapore Moratorium). Subsequently, the debtor company's largest creditor filed an unopposed application to appoint provisional liquidators over the Hong Kong incorporated private company.

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43 [2012] FCA 1002.
44 *Ibid,* [20].
45 *Re Joint and Several Liquidators of Pacific Andes Enterprises (BVI) Ltd* HCMP 3560/2016.
46 *Re Kaoru Takamatsu* – [2019] HKCFI 802 (date of judgment 25 March 2019).
47 *Re CEFC Shanghai International Group Limited,* (13 January 2020).
48 [2018] HKCFI 1705.

The Honourable Justice Harris expressed reservation as to whether a moratorium granted by a Singapore court in domestic restructuring was firstly, eligible for recognition in Hong Kong, and secondly, even if it were, whether the Hong Kong Court should grant assistance by appointing provisional liquidators.

Justice Harris noted that it is unclear if the Singapore Moratorium is a collective insolvency proceeding for common law recognition purposes. As the Singapore Moratorium was granted to facilitate a scheme of arrangement, the characterisation of the moratorium for recognition purposes may well depend on whether a scheme of arrangement should be treated as a collective insolvency proceeding, which is a question subject to seemingly conflicting comparative authorities.[49]

Justice Harris stated that even if a Singapore moratorium is recognised via the inclusion of the moratorium within the scope of a collective insolvency proceeding, there is no Hong Kong authority on whether the Court may recognise a foreign collective insolvency proceeding where the foreign jurisdiction is not the country of incorporation.

There is also no known case in Hong Kong in which the Hong Kong Courts have had to consider an application of a company that has shifted its COMI to a different country, commenced insolvency proceedings in that country and then sought recognition in Hong Kong.

4. Concluding remarks

Singapore has made clear and consistent progress in establishing itself as an international hub for debt restructuring. While the new omnibus legislation represents an important step in the right direction, there still exist certain issues that require clarification.

A critical example is the absence of clear provisions for the treatment of shareholders in a creditor 'cram-down' scenario - shareholder 'cram-downs' are presently not recognised under the Singaporean regime. Under the present regime, Section 211H(4)(b)(ii)(B) of the Companies Act provides that for an arrangement to be "fair and equitable" to a dissenting class of unsecured creditors which is to be "crammed down", such arrangement

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

The effect of this Section is that shareholders have to be divested of their shares before creditor 'cram-downs' can be effected. But a flaw in this provision is the absence of a mechanism to force shareholders to divest themselves of their shares, suggesting that it is up to shareholders to voluntarily divest themselves of their shares.[50]

While the corresponding provision in the new omnibus legislation, Section 70(4)(b)(ii)(B), specifies that the property referred to in Section 211H(4)(b)(ii)(B) of the Companies Act is

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[49] *Ibid,* [32]. One may contrast this decision against the decision of the UK High Court in *H & CS Holdings Pte Ltd v Glencore International AG* referred to at paragraph 3.1 above where the UK High Court accepted a scheme of arrangement as a collective insolvency proceeding.

[50] Paul Apathy, Emmanuel Chua and Rowena White, 'Singapore Unveils New 'Omnibus' Insolvency, Restructuring and Dissolution Bill' (24 October 2018). <https://www.herbertsmithfreehills.com/latest-thinking/singapore-unveils-new-omnibus-insolvency-restructuring-and-dissolution-bill>

property "of the company", [51] there is still no room for shareholder "cram-downs". Hence, shareholders, under some circumstances, may be able to exercise more rights than junior creditors, such as in debt-equity swaps, where shareholder approval is necessary, giving them an effective veto over restructurings.[52] In other words, there are circumstances under which junior creditors will have to settle their claims for low compensation (especially where the other choice is a liquidation where they stand to receive nothing), while shareholders retain part or all of their shareholding. As a result, shareholders will be able to benefit from some or all of the value created by the restructuring at the cost of junior creditors.[53] This is regrettable given that shareholders are likely to be 'out of the money' under such a scenario.

Further, while Singapore is applauded for taking a clear stance on the acceptance of legitimate forum shopping which adds to its desirability as the location to commence insolvency proceedings, it is still in the early stages of entrenching itself as the choice location. One main issue Singapore faces is the lack of certainty that its insolvency processes will be recognised in foreign jurisdictions. Time will tell.

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51 Kenneth Lim Tao Chung and Wong Pei Ting, "The Restructuring Review – Edition 12: Singapore" (September 2019). <https://thelawreviews.co.uk/edition/the-restructuring-review-edition-12/1197457/singapore>

52 Paul Apathy and Emmanuel Chua, "Singapore's new "supercharged" scheme of arrangement" (May 2017) at 284. <https://www.herbertsmithfreehills.com/file/22016/download?token=j4gPhvXv>

53 *Supra* note 50, Paul Apathy, Emmanuel Chua and Rowena White, 'Singapore Unveils New 'Omnibus' Insolvency, Restructuring and Dissolution Bill'.

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