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A COMPARATIVE LOOK AT THE *IPSO FACTO* REGIME

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On 30 July 2020, the *ipso facto* regime formally came into effect in Singapore. Briefly, the rule against *ipso facto* clauses prevents contractual counterparties from asserting their contractual rights merely because the company is insolvent. This article analyses the provision in context, in order to determine the scope of its effect on contractual counterparties to insolvent companies, and how it is likely to be applied and developed in Singapore. Further, a comparative analysis of the current exceptions to the *ipso facto* regime is conducted to explore how similar exceptions might be introduced in Singapore in the future.

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I. Introduction

1 The new Insolvency, Restructuring and Dissolution Act 2018[2] (the "IRDA") which came into effect on 30 July 2020 has been lauded as a strong step forward in establishing Singapore as a forum of choice for foreign debtors to restructure and an

1 The authors acknowledge the contribution of Zephan Chua Wei En and Angela Phoon Yan Ling to this article. The authors would also like to thank Toh Ding Jun, who was an intern with the firm, for his helpful research and assistance.
2 Act 40 of 2018.

international legal, financial and business centre.[3] The IRDA aims to consolidate Singapore's corporate and personal insolvency and restructuring laws into a single omnibus Act. It also updates the existing legislation and introduces several new provisions into Singapore's corporate restructuring and insolvency regime.[4]

2 The introduction of the IRDA is certainly a timely and welcomed piece of legislation, especially in the light of the ongoing pandemic. Last year, Singapore enacted the COVID-19 (Temporary Measures) Act 2020[5] (the "CTMA") to provide temporary relief to businesses and individuals unable to perform their contractual obligations because of COVID-19. Part 3 of the CTMA, which pertained to measures relating to bankruptcy and insolvency, expired on 19 October 2020, and the last extended relief period under Part 2 of the CTMA expired on 31 March 2021.[6] There are fears that the removal of the protections afforded by the CTMA may lead to a "legal epidemic",[7] as contracting parties seek to enforce contractual obligations hitherto suspended by the CTMA. Against this backdrop, the provisions of the IRDA are likely to play a critical role in helping companies seeking to restructure in Singapore mitigate the effects of the imminent "legal epidemic".

3 For the purposes of this article, the authors focus specifically on s 440 of the IRDA, which restricts the operation of certain *ipso facto* clauses while a company undergoes restructuring proceedings. It has been noted elsewhere that this section is "probably the single most controversial aspect of the reforms".[8] In particular, the authors examine the issues arising from the

3 *Parliamentary Debates, Official Report* (1 October 2018), vol 94 (Edwin Tong Chun Fai, Senior Minister of State for Law).
4 Paul Apathy, Emmanuel Chua & Rowena White, "Singapore's New 'Omnibus' Insolvency, Restructuring and Dissolution Bill" *Singapore Law Gazette* (January 2019).
5 Act 14 of 2020.
6 Ministry of Law, "Extension of Relief Periods under the COVID-19 (Temporary Measures) Act for Specified Categories of Contracts" (12 October 2020).
7 V K Rajah & Goh Yihan, "The Covid-19 Pandemic and the Imminent Legal Epidemic" *The Straits Times* (7 May 2020).
8 Paul Apathy, Emmanuel Chua & Rowena White, "Singapore's New 'Omnibus' Insolvency, Restructuring and Dissolution Bill" *Singapore Law Gazette* (January 2019).

introduction of s 440 to Singapore's insolvency and restructuring regime, and how it is likely to be applied and developed in Singapore. Finally, a comparative approach is taken to consider the exemptions to the *ipso facto* regime in other jurisdictions, and how similar exceptions might be introduced in Singapore.

II. Background

4 The Latin phrase "*ipso facto*" is translated to mean "by the fact itself". When applied to the restructuring and insolvency context, an *ipso facto* clause is typically one that allows a contracting party to: (a) terminate, amend, accelerate payment or forfeit the term under any agreement; or (b) terminate or modify any right or obligation under any agreement, *solely* based on the other contracting party's insolvency or commencement of an insolvency-related proceeding. Such insolvency-related proceedings would generally include, *inter alia*, judicial managements, administration procedures, schemes of arrangement, and applications for a moratorium.

5 Prior to the IRDA, there were no restrictions on the operation of *ipso facto* clauses upon the insolvency of a Singapore company, and parties could rely on such clauses to terminate a contract. In fact, commercial agreements often contain such *ipso facto* clauses as a form of contractual protection for the parties. It is often deemed imprudent and unwise not to terminate or amend the terms of contractual relations when the counterparty is undergoing restructuring proceedings.

6 However, such *ipso facto* clauses pose great difficulties for companies attempting to restructure their debts. In particular, the termination of key contracts can severely hamper the company's operations, plunge the company into further distress and undermine any restructuring efforts. As Law Minister K Shanmugam noted in the second reading of the Insolvency, Restructuring and Dissolution Bill in Parliament, this was a major issue in the Hyflux restructuring. There, upon Hyflux's application for a moratorium, its creditors exercised their rights under *ipso facto* clauses to demand for accelerated repayments,

thereby restricting the cash flow of the already struggling company, and worsening its dire financial straits.[9]

7 Seen in this light, the *ipso facto* regime was introduced in response to the potential roadblock that existed in a company's bid to restructure and revive its business.[10] The intention behind the restrictions on *ipso facto* clauses was to smoothen restructuring attempts by ensuring that distressed companies would be able to continue with their business operations whilst undertaking restructuring efforts at the same time.

III. Section 440

8 Singapore's *ipso facto* regime is contained in s 440 of the IRDA, the different subsections of which are set out in full and briefly explained below.

9 The wording of s 440 adopts the language of s 34 of the Canadian Companies' Creditors Arrangement Act[11] ("CCAA"). Notwithstanding this, the Singapore Parliament has made it clear that the introduction of the *ipso facto* regime is intended to align Singapore's position to that of other key jurisdictions such as the US, Canada and Australia. It is therefore valuable to examine the equivalent legislation and case law from these jurisdictions, to illuminate the scope and intended application of the *ipso facto* regime in Singapore.

A. Section 440(1)

> **440.**—(1) No person may, at any time after the commencement, and before the conclusion, of any proceedings by a company —
>
> > (*a*) terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement (including a security agreement) with the company; or

9 *Parliamentary Debates, Official Report* (1 October 2018), vol 94 (K Shanmugam, Minister for Home Affairs and Law).

10 *Parliamentary Debates, Official Report* (1 October 2018), vol 94 (Edwin Tong Chun Fai, Senior Minister of State for Law).

11 RSC 1985, c. C-36. See also *Parliamentary Debates, Official Report* (1 October 2018), vol 94 (Edwin Tong Chun Fai, Senior Minister of State for Law).

> (*b*) terminate or modify any right or obligation under any agreement (including a security agreement) with the company,
>
> by reason only that the proceedings are commenced or that the company is insolvent.

10 Section 440(1) aims to preserve the *status quo* of the distressed company's contracts while it undergoes restructuring, by preventing the termination, acceleration of a payment, or forfeiture of the term of a contract. This restriction is suspensory in nature and does not seek to terminate or extinguish the counterparty's contractual rights.[12]

11 Further, the restrictive wording of the provision means that counterparties can still terminate the contract on grounds other than insolvency. In other words, parties can still employ self-help remedies to get out of their contractual obligations. This is an important feature, given that the *ipso facto* regime has been criticised for making unwarranted inroads into the fundamental principle of freedom to contract.[13]

B. Section 440(2)

> **440.**—(2) Nothing in this section is to be construed as —
>
> (*a*) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of the proceedings; or
>
> (*b*) requiring the further advance of money or credit.

12 The *ipso facto* regime under the IRDA affects the interests of counterparties only to the extent necessary to protect the distressed company. Section 440(2) states, in particular, that

12 *Parliamentary Debates, Official Report* (1 October 2018), vol 94 (Edwin Tong Chun Fai, Senior Minister of State for Law).

13 The Singapore Ministry of Law had convened the Insolvency Law Review Committee in December 2010 to review Singapore's bankruptcy and corporate insolvency regimes. See Insolvency Law Review Committee, *Report of the Insolvency Law Review Committee: Final Report* (2013) (Chairman: Lee Eng Beng SC).

the rights of counterparties to require payments for payables accrued after the commencement of the specified proceedings are not affected, and that counterparties are in no way obliged to advance further credit to the distressed company.

C. Section 440(3)

> **440.**—(3) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

13 Section 440(3) prevents parties from contracting out of the *ipso facto* regime. Notably, if the contract stipulates that the counterparty is excused from its contractual obligation when the company is *approaching* insolvency, as opposed to being insolvent, it is likely that the clause will be caught by the provision for being, in substance, contrary to the *ipso facto* regime.

D. Section 440(4)

> **440.**—(4) On an application by a party to an agreement, the Court may declare that this section does not apply, or applies only to the extent declared by the Court, if the applicant satisfies the Court that the operation of this section would likely cause the applicant significant financial hardship.

14 Section 440(4) allows a counterparty to apply to court for relief on the grounds of significant financial hardship.

15 Section 440 does not provide further details about what would constitute "significant financial hardship". Accordingly, in interpreting the meaning of "significant financial hardship", the court will likely seek guidance from the jurisprudence of foreign jurisdictions. This will be discussed in greater detail below.

E. Section 440(5)

> **440.**—(5) Subsection (1) does not apply in respect of any legal right under –
>
> (*a*) any eligible financial contract as may be prescribed;
>
> (*b*) any contract that is a licence, permit or approval issued by the Government or a statutory body;

> (*c*) any contract that is likely to affect the national interest, or economic interest, of Singapore, as may be prescribed;
>
> (*d*) any commercial charter of a ship;
>
> …

16 Section 440(5) carves out certain specified classes of contracts, such as financial contracts, ship charters and government contracts from the *ipso facto* regime.

17 The term "eligible financial contracts" in s 440(5)(*a*) is defined in the Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020.[14] This will be discussed in greater detail below.

F. Section 440(6)

> **440.**—(6) In this section —
>
> "company" means any corporation liable to be wound up under this Act, but excludes such company or class of companies as the Minister may by order in the Gazette prescribe;
>
> …
>
> "national interest" includes national defence, national security, public security and the maintenance of any essential service;
>
> "proceedings" means any proceedings arising from —
>
> (*a*) any application under section 210(1) of the Companies Act for the approval of the Court in relation to any compromise or arrangement between a company and its creditors or any class of those creditors;
>
> (*b*) any application under section 71 for the approval of the Court in relation to any compromise or arrangement;
>
> (*c*) any application for an order under section 64 or 65;

14 S 616/2020.

(*d*) any application for a judicial management order under section 91; or

(*e*) the lodgment of a written notice of the appointment of an interim judicial manager under section 94(5)(*a*).

18 Section 440(6) sets out the proceedings to which the restrictions on *ipso facto* clauses under s 440 apply. These include proceedings arising from applications for a court-ordered scheme meeting and applications for judicial management. It should be noted that the restrictions do not apply if the distressed company undergoes other insolvency proceedings which are not concerned with the rehabilitation of the distressed company, such as winding up and receivership.

IV. Safeguards for counterparty

19 While the *ipso facto* regime offers respite to distressed companies, it is also liable to bring about a slew of unintended negative consequences. In the 2013 report of the Insolvency Law Review Committee[15] (the "ILRC"), the ILRC came to the conclusion that the potential unintended consequences would outweigh the benefits of an *ipso facto* regime and recommended that restrictions on *ipso facto* clauses not be adopted.[16] Briefly, the arguments against the introduction of an *ipso facto* regime included:

(a) unfairness to the contractual counterparty;

(b) the risk of small suppliers and customers becoming insolvent, *ie*, "domino insolvencies", as these parties are now exposed to greater unpredictability and risks; and

(c) lack of contractual freedom.

15 The Singapore Ministry of Law had convened the Insolvency Law Review Committee in December 2010 to review Singapore's bankruptcy and corporate insolvency regimes. See Insolvency Law Review Committee, *Report of the Insolvency Law Review Committee: Final Report* (2013) (Chairman: Lee Eng Beng SC).

16 Insolvency Law Review Committee, *Report of the Insolvency Law Review Committee: Final Report* (2013) at para 90 (Chairman: Lee Eng Beng SC).

20 Despite this, the restriction on *ipso facto* clauses was eventually introduced in the IRDA as part of the ongoing reforms to Singapore's insolvency and restructuring laws.

21 As such, this article will address the relevant issues that may arise from s 440 in relation to the counterparty and the distressed company's group, and the safeguards that exist under the IRDA.

A. Counterparty can terminate on grounds other than insolvency

22 The inability to terminate a contract upon the distressed company's insolvency may give rise to situations wherein the counterparty is forced to carry out its contractual obligations with no prospects of receiving payment. This inequity is compounded in contracts that contain exclusivity provisions which restrict the counterparty from sourcing alternative supplies or require the counterparty to continue making periodic payments to the distressed company.[17]

23 As aforementioned, the above concerns are somewhat mitigated by s 440(1), which allows parties to enforce *ipso facto* clauses so long as they are triggered by grounds other than the company's insolvency or commencement of restructuring proceedings. For example, facility agreements involving financial institutions as lenders often provide for a right to declare an event of default and accelerate upon the breach of certain financial covenants. As such, it is likely that such lenders will be able to rely on the breach of such financial covenants to exercise their rights, independent of the borrower's insolvency.

B. Financial hardship

24 To safeguard the interests of counterparties, s 440(4) allows a counterparty to seek relief from the courts if the restrictions under s 440 would cause them "significant financial

17 Insolvency Law Review Committee, *Report of the Insolvency Law Review Committee: Final Report* (2013) at para 88 (Chairman: Lee Eng Beng SC).

hardship". Since this provision is new, one would have to look to other jurisdictions for guidance on what would constitute "significant financial hardship".

25 In *Toronto-Dominion Bank v Ty (Canada) Inc*[18] ("*Toronto-Dominion Bank*"), the court in Canada applied s 65.1(6) of the Canadian Bankruptcy and Insolvency Act[19] ("BIA") (which is *in pari materia* to s 34(6) of the CCAA and s 440(4) of the IRDA) and held that (a) the interests of relevant stakeholders should be considered and (b) the test should be an objective one. These two factors are analysed in turn below.[20]

26 It should be noted that the court in *Toronto-Dominion Bank* had considered the lifting of *both* the stay on *ipso facto* clauses under s 65.1 and the stay on proceedings against the distressed company under s 69.1.[21] The court's decision should therefore be read in that light, as it might not have intended for its decision to apply with equal force to *just* the stay on *ipso facto* clauses.

C. Financial hardship – Interests of third parties

27 The court in *Toronto-Dominion Bank* held that "the interests of all affected parties" should be considered in determining "significant financial hardship".[22]

28 It is unclear if this position should be adopted in Singapore. On a plain reading of both the Singapore and the Canadian provisions, relief from the *ipso facto* regime is to be granted if the restrictions would cause the counterparty "significant financial hardship"; no reference is made to the interests of third parties.

29 This should be contrasted with the position in Australia, where the provisions relieving counterparties from the *ipso facto* regime differ from those in Singapore and Canada – they

18 2003 CanLII 43355.
19 RSC, 1985, c. B-3.
20 *Toronto-Dominion Bank v Ty (Canada) Inc* 2003 CanLII 43355 at [22(a)]–[22(k)].
21 *Toronto-Dominion Bank v Ty (Canada) Inc* 2003 CanLII 43355 at [22(a)]–[22(k)].
22 *Toronto-Dominion Bank v Ty (Canada) Inc* 2003 CanLII 43355 at [22(i)] and [22(k)].

do not refer to "significant financial hardship". Instead, the court may grant an applicant relief from the *ipso facto* regime if it is "appropriate in the interests of justice".[23] This gives the Australian court a wider discretion in determining if an applicant should be granted relief. Beyond the financial considerations of the counterparty, the Australian court would arguably be allowed to consider the interests of the other creditors of the distressed company and of third parties whose rights might be affected.

30 Based on the statutory wording of s 440(4), it is likely that the Singapore Parliament had intended only for the interests of that one counterparty to be considered in its application for relief.

D. Financial hardship – Objective test?

31 The Canadian court in *Toronto-Dominion Bank* also adopted an objective test in applying s 65.1, holding that "[t]he prejudice in section … 65.1(6) is objective prejudice, not subjective prejudice; it refers to the degree of prejudice suffered by the creditor in relation to the indebtedness and the security held by the creditor and not to the extent that such prejudice may affect the creditor as a person, organization or entity. To succeed under section … 65.1(6), the creditor must be able to show quantitatively the prejudice that it will suffer if the stay is not removed".[24]

32 It remains to be seen whether Singapore will adopt such an approach in assessing "significant financial hardship". For one, in the second reading of the Insolvency, Restructuring and Dissolution Bill, it was stated that s 440(4) was a safeguard to bring in "a degree of flexibility, depending on the impact that it may have in a particular situation or on a particular creditor. And this can be determined by the Court on the basis of facts and context in that case and on a case-by-case basis".[25]

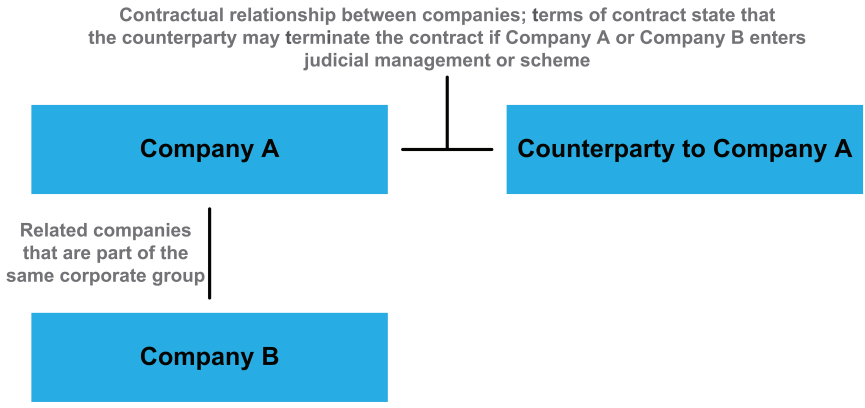
23 Corporations Act 2001 (Cth) s 415D, 415E, 434J, 434K, 451E and 451F.
24 *Toronto-Dominion Bank v Ty (Canada) Inc* 2003 CanLII 43355 at [22(a)].
25 *Parliamentary Debates, Official Report* (1 October 2018), vol 94 (Edwin Tong Chun Fai, Senior Minister of State for Health and Law).

33 Further, the test for "significant financial hardship" has been interpreted to be a subjective one in the context of a different Canadian statutory provision – the disclaimer of agreements under s 32(4) (which is in the same Part of the CCAA as s 34). In *Target Canada Co (Re)*, the court held that the loss faced by the counterparty had to go beyond simple economic or financial loss before it would be considered "significant financial hardship".[26] In *Timminco Ltd (Re)*,[27] the court opined that a subjective "examination of the individual characteristics and circumstances of [the] counterparty" should be undertaken to decide whether the said counterparty would suffer significant financial hardship.

E. Ipso facto *clauses involving the insolvency event of a related company*

34 The restrictions on the enforcement of *ipso facto* clauses under s 440 apply only to parties that are in a contractual relationship with the distressed company.

35 However, in reality, many companies are part of corporate groups and it is common for *ipso facto* clauses to contain cross-default clauses which allow termination on the basis of an insolvency event of a related company.



26 *Target Canada Co* [2015] OJ No 1205 at [26].
27 2012] OJ No 4008 at [60].

36 On a plain reading of s 440(1) of the IRDA, the *ipso facto* regime only applies between contractual counterparties. For example, with reference to the diagram above, where the contract between Company A and its contractual counterparty contains an *ipso facto* clause allowing the counterparty to terminate the contract in the event Company A or any of its related entities enters into judicial management proceedings, the operation of this clause would be restricted by s 440 in the event of Company A entering into judicial management proceedings. However, where Company A's subsidiary, Company B, enters into judicial management proceedings, the counterparty would be entitled to terminate the contract against Company A.

37 In other words, the intended efficacy of s 440 in the context of a corporate group restructuring is affected as the commencement of restructuring proceedings by one group entity would trigger off cross-defaults throughout the corporate group.

38 It is unclear if Parliament had intended for parties to be able to circumvent the *ipso facto* regime simply by providing that the *ipso facto* clause should operate in the event of a related party's insolvency. One may attempt to argue that cross-default and termination clauses impermissibly attempt to contract out of the *ipso facto* regime and therefore fall foul of s 440(3), though the authors are of the view that such an attempt is unlikely to succeed.

39 In any event, in the interests of certainty, if it is intended for the *ipso facto* regime to also apply in the event of a related party's insolvency, it is recommended that legislative amendments be made to s 440 to expressly provide for this.

V. Exempted contracts under the Insolvency, Restructuring and Dissolution Act 2018

A. "Eligible financial contracts" under section 440(5)

40 As provided for under s 440(5) of the IRDA, the restriction on *ipso facto* clauses does not apply to all types of contracts. The exceptions are set out in the Insolvency, Restructuring

and Dissolution (Prescribed Contracts under Section 440) Regulations 2020, which exclude, *inter alia*, derivatives agreements,[28] agreements to borrow or lend securities or commodities,[29] repurchase,[30] or buy-sell back agreements with respect to securities or commodities,[31] and margin loans.[32] Presumably, exposing these categories of contracts to the *ipso facto* regime will result in a "disproportionately adverse impact" on and "uncertainty" in the market.[33] Indeed, as Parliament has expressly stated, the underlying rationale behind the exemption of "eligible financial contracts" is to "ameliorate any potential negative impact on the industries that rely on such contracts for various commercial reasons".[34]

41 Significantly, it must be noted that the definition of "eligible financial contracts" in Singapore closely mirrors the Canadian position as defined in r 2 of the Canadian Eligible Financial Contract General Rules (Bankruptcy and Insolvency Act).[35] This strongly suggests that Parliament has recognised and imported the best practices of the Canadian regime and is adopting a wait-and-see approach regarding other kinds of exempted contracts.

28 Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020 (S 616/2020) r 3(*f*).
29 Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020 (S 616/2020) r 3(*g*).
30 Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020 (S 616/2020) r 3(*g*).
31 Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020 (S 616/2020) r 3(*f*).
32 Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020 (S 616/2020) r 3(*f*).
33 *Parliamentary Debates, Official Report* (1 October 2018), vol 94 (Edwin Tong Chun Fai, Senior Minister of State for Health and Law).
34 *Parliamentary Debates, Official Report* (1 October 2018), vol 94 (Edwin Tong Chun Fai, Senior Minister of State for Health and Law).
35 SOR/2007-256. For example, rr 2(a), 2(d) and 2(i) of the Canadian provisions correspond materially with regs 3(*f*), 3(j), 3(m) and 3(n) in the Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020 (S 616/2020).

B. Wide exclusions to the ipso facto *regime under Australia's Corporations Act*

42 In that regard, some guidance can be gleaned from Australia's experience with the restrictions on *ipso facto* clauses, and the corresponding exemptions. The relevant provisions in the Corporations Act 2001 (Cth) (the "Corporations Act") provided for a stay on *ipso facto* clauses in the event of certain corporate restructuring and insolvency procedures.[36] Notably, while these provisions were initially hailed as a huge step towards improving Australia's corporate rescue laws, some later criticised the changes for creating uncertainty and being "profoundly disappointing".[37]

43 The Australian *ipso facto* regime is statutorily enshrined in ss 415D, 434J and 451E of the Corporations Act. In general, a right cannot be enforced against a company on grounds of the company's financial position.

44 The introduction of the stay on *ipso facto* clauses had been accompanied by exclusions set out in ss 415D(6) to 415D(7), 434J(5) to 434J(6), and 451E(5) to 451E(6). These were supplemented with a further 60 exclusions and carve-outs in the Corporations Regulations 2001 (Cth) in 2018.[38] In practice, this means that a sizable number of commercial arrangements will be excluded from the protection offered by Australia's *ipso facto* regime.[39]

45 As such, the Australian regime goes a lot further than the position in Singapore and Canada. For example, any contracting, agreement or arrangement *relating* to Australia's national security, border protection or defence capability will not be subject to the *ipso facto* regime.[40] Likewise, in the context of public

36 The relevant provisions in the Corporations Act 2001 (Cth) are ss 451E (in relation to voluntary administration), 434J (in relation to receivership) and 415D (in relation to creditors' schemes).

37 Jason Harris & Christopher Symes "Be Careful What You Wish For! Evaluating the *Ipso Facto* Reforms" (2019) 34 *Australian Journal of Corporate Law* 84 at 85.

38 Corporations Regulations 2001 (Cth) reg 5.3A.50.

39 Jason Harris & Christopher Symes "Be Careful What You Wish For! Evaluating the Ipso Facto Reforms" (2019) 34 *Australian Journal of Corporate Law* 84 at 89.

40 Corporations Regulations 2001 (Cth) reg 5.3A.50.

health, *any* agreement for the supply of goods and services to a public hospital or a public health service will be excluded from the *ipso facto* regime.[41] This includes contracts which may not have a direct implication on the quality or quantity of healthcare. In other words, a contract between a public hospital and a food supplier is excluded in Australia's *ipso facto* regime. This means, for example, that a public hospital can avoid a contract the moment the food supplier is insolvent.

46 While the Singapore Parliament has the ability to prescribe the exclusion of contracts that is likely to affect the national or economic interest of Singapore,[42] the authors submit that it is difficult to see Singapore adopting such a broad exclusion like Australia. This is because the operative principle underlying the *ipso facto* regime is one where the suspension of the *ipso facto* clause will lead to a "disproportionately adverse impact" on and "uncertainty" in the market.[43] *Prima facie*, this entails a market analysis which, in the end result, will lead to greater specificity in the categories of contracts that are excluded from the *ipso facto* regime.

VI. Conclusion

47 At the second reading of the Insolvency, Restructuring and Dissolution Bill in Parliament, Edwin Tong, the then Senior Minister of State for Health and Law, made the following observations:[44]

> Taken as a whole, these reforms benefit local businesses experiencing financial difficulties by providing them with more robust tools to rehabilitate – to get back onto its feet; position Singapore as a forum of choice for foreign debtors to restructure, creating new and greater opportunities for our professional services such as the legal, accounting and financial services;

41 Corporations Regulations 2001 (Cth) reg 5.3A.50.
42 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 440(5)(*c*).
43 *Parliamentary Debates, Official Report* (1 October 2018), vol 94 (Edwin Tong Chun Fai, Senior Minister of State for Health and Law).
44 *Parliamentary Debates, Official Report* (1 October 2018), vol 94 (Edwin Tong Chun Fai, Senior Minister of State for Health and Law).

> create value for our economy, by supporting Singapore's position as an international legal, financial and business centre through a strong restructuring regime.

48 The above observations have gained added salience given the significant financial and economic impact of COVID-19. Given that Parts 2 and 3 of Singapore's CTMA have expired, the provisions of the IRDA will likely play a critical role in the anticipated wave of corporate insolvencies in the coming months. Seen in this light, s 440 of the IRDA is a welcome addition to the already abundant toolkit for companies seeking to restructure their debts in Singapore.

49 In interpreting this provision, the Singapore courts will have to grapple with the varying interests of stakeholders, set against the backdrop of the COVID-19 aftermath. The ability of the Singapore courts to do so in a commercially equitable and fair manner will go a long way towards setting Singapore on its path to becoming the forum of choice for international debt restructuring.