Whither the Scheme of Arrangement in Singapore: More Chapter 11, Less Scheme?

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1. Introduction

Of the former English colonies in Asia, Singapore’s corporate insolvency law is one of the closest to the English. The provisions on liquidation and scheme of arrangement (henceforth ‘scheme’) in both jurisdictions are largely similar and Singapore’s judicial management1 (henceforth ‘JM’) was modelled on the administration in the Insolvency Act 1985. Further, there are also important similarities between Singapore and England in the legal and financial environments within which their respective insolvency laws operate. Their commercial laws are largely similar and both are important financial centres and arbitration centres. But there are also important differences between the two jurisdictions. Singapore has no equivalent to the English company voluntary arrangement (CVA) and unlike England a debenture holder with a global security package continues to be entitled to appoint a receiver and manager.

The similarities and differences go a long way towards explaining the use of the scheme as a debt restructuring tool in the two jurisdictions over the last twenty years. While the scheme has been used mainly by large or very large companies in England to restructure financial debts,2 in Singapore it has been used widely by large and medium sized companies to restructure not only financial debts but also trading debts, becoming the most popular corporate rescue tool. Singapore courts played a leading role in that development, and developed a body of law which has transformed the scheme into a hybrid regime where the existing management remains in office, but with insolvency practitioners assuming key functions and the court exercising supervisory powers and providing assistance. Until very recently, this direction was set to continue. The Singapore Government has accepted broadly the recommendations from the Insolvency Law Review Committee (ILRC), which rejected adopting a US Chapter 11 style restructuring but proposed several reforms to scheme. Although some of them were quite radical, they could still be seen as developing the scheme organically.

Since then, developments in the latter part of 2016 have rendered the future direction of scheme in Singapore very uncertain. The same may yet happen in England. Both the Singapore and English governments have at about the same time proposed adopting significant elements of Chapter 11 which would modify their rescue laws, including the law on scheme, directly or indirectly. The Insolvency

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1 ss 227A to 227X.
Service published a document, *A Review of the Corporate Insolvency Framework*, on 25 May 2016, which for convenience will be referred to as the English Review in this paper. In Singapore, the Committee to Strengthen Singapore as an International Debt Restructuring Centre (henceforth ‘Restructuring Committee’) published its report on 20 April 2016. But whilst implementation of the English Review has been put on hold because of Brexit, Singapore has moved ahead rapidly and is poised to enact the reforms by the first or second quarter of 2017.

The striking feature in both the English Review and Singapore reforms is that whilst the governments in both jurisdictions declared that the restructuring laws in their respective jurisdictions were performing well, they believed that the laws would be improved by incorporating significant elements of Chapter 11. Due to the significant differences between Chapter 11 and English-inspired insolvency laws, and differences across a range of other matters such as the taking of securities, judicial attitudes in insolvency cases, etc, that interest to move towards Chapter 11 deserves close scrutiny. It may mark the beginning of some kind of convergence towards Chapter 11 in Singapore and England if most of the proposals in the English Review are implemented.

This paper has two purposes. It explains the reasons for the scheme’s transformation from a cumbersome procedure to an efficient and effective debt restructuring tool in Singapore and Singapore’s contributions to the law on schemes. The second purpose is to evaluate the proposals to reform the schemes in two rounds of consultations and the reforms in the draft Companies (Amendment) Bill 2016 (henceforth ‘Amendment Bill’). It will be argued that the measures in the draft Companies (Amendment) Bill 2017 would most likely usher in a period of uncertainty or even instability. But it is not possible to predict how the Chapter 11 elements would take root in Singapore.

The paper is organised as follows. The second section provides an outline of the history of the scheme in Singapore from her independence in 1965. The third section explains the distinctive features of Singapore’s law and practice on using scheme as a debt restructuring tool. The fourth to sixth sections evaluate the reform proposals in the two rounds of consultation exercises and the amendments in the Amendment Bill. The seventh section concludes.

Unless otherwise stated, all references of statutory provisions are to Singapore’s Companies Act (Cap 50, Rev Ed), and all references to the Companies (Amendment) Bill 2017 are to the draft version of the bill published on 21 October 2016 for public consultation.

2. The development of schemes in Singapore

(a) The legislation

The scheme provisions in Singapore are contained in sections 210 to 212 of the Companies Act. Section 210 is the operative section giving the court power to summon meetings and sanction schemes, while s 211 stipulates the information that the company is required to provide to the creditors or members. Section 212 gives the court power to grant ancillary order where the scheme is for the reconstruction or amalgamation of companies. They are largely similar to the English provisions, but the following differences should be noted. First, under s 210(10) the court may ‘restrain further proceedings in any action or proceeding against the company except by leave of the Court and subject to such terms as the
Court imposes. Singapore adopted this limited stay from Victoria’s Companies Act 1961. The Victorian stay provision traced its root to the New South Wales’ Joint Stock Companies Arrangement Act 1891, s 3. This provision was enacted in New South Wales to deal with a banking crisis and it has a chequered history. Although it could conceivably have helped to develop a debtor in possession procedure in New South Wales, that did not happen. But in Singapore the stay has been important in helping companies gain a breathing space to propose a scheme and contributed to the scheme’s popularity.

The second difference is that under s 210(4), the court in sanctioning a scheme may grant its approval ‘subject to such alterations or conditions as it thinks just’, which has no equivalent in the English provisions. The third and fourth differences came about because of a recent amending legislation. It provided that the court may prescribe a different majority than a majority in number for the headcount test, although it must still represent three-fourths in value. The amendment was meant to give effect to the recommendations of a committee appointed to review the company law that s 210 should be amended to enable holders of units of shares in a company to be parties to a scheme, and to give the court a discretion to prevent a members’ scheme from being defeated by share splitting. However, although the intention was to amend only the law on members’ schemes, the amended provisions apply equally to creditor scheme as well. Whilst there are strong arguments to reform or abolish the headcount test in creditor scheme, there should be debate and consultation before a decision is taken. The amending legislation also provided that where a company is in the course of being wound up, a sanctioned scheme would be binding on the liquidator and contributories of the company. Although there seems to have been no reported case in Singapore of a company in liquidation entering into a creditor scheme, it is not that uncommon in other jurisdictions, especially for insurance companies. It is very hard to see any reason for restricting creditor schemes to companies not yet in liquidation. As such, it seems that drafting error cannot be ruled out.

(b) Judicial guidance

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3 See Hansard XXX.
4 Companies (Amendment) Act 2014, s 135 and s 136.
5 Companies (Amendment) Act 2014, s 135, which became s 210(3AB)(a), (b).
7 On the use of share splitting or debt assignment to support or defeat a scheme, see Jennifer Payne, Schemes of Arrangement: Theory, Structure & Operation (CUP, 2014) 64-66.
8 ibid.
9 This is not an argument against the reform of the headcount test.
10 Companies (Amendment) Act 2014, s 135, which became s 210(3AA)(a).
11 See for eg, Re Hawk Insurance Co Ltd [2001] EWCA Civ 241, [2001] 2 BCLC 480 (in provisional liquidation); Re Sovereign Marine & General Insurance Co Ltd [2006] EWHC 1335 (Ch); [2007] 1 BCLC 228 (in provisional liquidation); Re Kempe v Ambassador Insurance Co [1998] 1 WLR 271. As pointed out in Jennifer Payne, Schemes of Arrangement: Theory, Structure & Operation (CUP, 2014) 281 it is relatively common for schemes to be used alongside liquidation, and often the purpose of adding a scheme to liquidation is to depart from the rules that would otherwise apply in liquidation.
Schemes became popular in Singapore from around the mid-1990s. There were a few reasons for its success. The JM was very unpopular and there was no pre-pack JM. There was also nothing similar to the CVA. On the other hand, the scheme offered companies the opportunity to restructure their debts under the protection of a court granted stay. The courts have arguably stretched the limited stay in some cases to give debtor companies a chance to propose a scheme. In the early stages, the courts have been very supportive by allowing meetings to be summoned even though the scheme proposal was very sketchy. The scheme also offered companies great leeway to negotiate commercially acceptable solutions on debt restructuring; for eg, the pari passu rule was held not to apply in scheme. Directors were also attracted to use schemes. Not only was there no automatic displacement of existing management, the scheme may be used to waive guarantees that the directors have given to the scheme creditors to secure the company’s debts.

The success of scheme shows that, in the absence of suitable procedures, in particular pre-packaged JM, insolvency practitioners and insolvency lawyers, under the guidance and support of the courts, have been innovative in responding to market pressure to develop a procedure which was previously viewed as cumbersome and costly into a highly effective and efficient debt restructuring tool. At the same time the courts have sought to protect the creditors, both between the creditors as a group and the company, and also intra-creditors. The courts have strengthened the role of the scheme manager, which is the person administering the scheme after it has been sanctioned, given themselves more scope to intervene even after sanction has been given, and required the provision of sufficient information to creditors.

The scheme’s success shows the inherent flexibility of Singapore’s corporate insolvency law, the development of the rescue culture in Singapore and the pressure of market forces. Although the formal features of Singapore’s corporate insolvency law may be said to be creditor friendly (a more accurate description is secured creditor friendly), rescue of viable businesses are possible and have become

\[12\] For a full account of JM’s experience in Singapore, see ILRC, Final Report, 82-88.
\[13\] The wording in s 210(10) suggests strongly that the court may only stay proceedings in an action which has already been commenced against the company, and that was so held in Re Reid Murray Acceptance Ltd [1964] VR 82. It is also arguable that a company may only apply for a stay at the same time as or after it has applied to court for an order to convene the creditors’ meeting to vote on the scheme (ie, application for the first hearing). But Singapore courts have granted a stay of all proceedings against the company in an ex parte hearing, and before the company has applied for the first hearing. For the former see, for eg, Re Econ Corp Ltd [2003] SGHC 288, [2004] 1 SLR 273, [9] where Lai Siu Chiu J said that such an order was made when Kan J ordered the creditors’ meeting to be held. For the latter and a general discussion of s 210(10), see Re Conchubar Aromatics Ltd [2015] SGHC 322. See generally Tracey Evans Chan, ‘Schemes of Arrangement as a Corporate Rescue Mechanism: The Singapore Experience’ (2009) 18 International Insolvency Review 37, 42-43.

\[14\] From conversation with Mr Lee Eng Beng, SC.
\[16\] Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd [2001] 4 SLR 35.
\[17\] Unlike England which has virtually abolished the administrative receivership, a debenture holder with a global security package is entitled under Singapore law to appoint a receiver and manager, and may veto an application to court for a JM order: s 227B(5). On the ILRC’s recommendation this veto power would be restricted under the Amendment Bill. See text to fn XXX.
more prevalent. Like England, Singapore has succeeded in striking a fair balance between ‘creditor friendly’ and ‘debtor friendly’ approaches to restructuring and insolvency.

(c) Review and reforms

The ILRC was appointed in November 2010 to review Singapore’s existing bankruptcy and corporate insolvency regimes generally and to advise on measures to modernise and unify the regimes in a single piece of legislation. In reviewing the JM and the scheme, the ILRC considered but in the end rejected adopting the US Chapter 11 as US laws and conditions were very different. As stated earlier, it recommended that the JM and the scheme may be improved through organic development, by drawing on established doctrines and addressing deficiencies that have surfaced in practice.

While the Government was drafting a new Insolvency Act to implement the ILRC’s recommendations which it has largely accepted in May 2014, it appointed the Restructuring Committee in May 2015 to recommend initiatives and/or legal reforms that should be undertaken to enhance Singapore’s effectiveness as a centre for international debt restructuring.\(^{18}\) The Government was of the view that Singapore was well placed to serve the region’s increasing need for the restructuring of cross-border debts.\(^{19}\) The Restructuring Committee adopted a very different approach to that of the ILRC. It used Chapter 11 as the blueprint to recommend reforms to scheme and to a lesser extent, JM. Although the reasons for the importation of Chapter 11 are somewhat different from that in England, whereby a main driver was to improve England’s position in the World Bank’s annual Doing Business Report,\(^{20}\) both governments were driven by the determination to grow the debt restructuring industry and the need to keep up with external developments, rather than addressing the weaknesses of their respective debt restructuring regimes.

3. A hybrid proceeding

(a) Bare statutory framework

A striking feature of the law on scheme is that it contains the barest minimum of statutory provisions and no subsidiary legislation. First, the provisions give very little guidance on the extent that a company is required to disclose to the creditors regarding the company and the proposed scheme.\(^{21}\) A critical feature of the scheme process is its reliance on creditor evaluation and majority consent within each class as a means of resolving the complex web of conflicting interests and assessments of the company’s value at stake. It is clearly insufficient for the statute to stipulate only that the company is required to explain the effect of the scheme and to state any material interests of the directors and the trustee for the debenture holders that differ from the others voting on the scheme.\(^{22}\)


\(^{19}\) Report of the Restructuring Committee, Chapter 2.

\(^{20}\) English Review, [2.3].


\(^{22}\) s 211(1), (2).
Secondly, the provisions make no mention of the financial advisers, accountants or insolvency practitioners who would usually have to be engaged by the company to advise on the debt restructuring and administer the scheme after it has obtained court sanction. This is a governance issue, which is less of a problem where the company is large and the creditors are large financial institutions or hedge funds. Although the existing management may remain in office, the company’s governance would have been subject to the contracts between the company and the creditors, and in any event the creditors are also able to look after their own interests. But where the company is small or relatively small and the creditors are numerous and consist of small traders, those factors whereby the creditors’ interests are protected are absent. The risks that the existing management will act in ways detrimental to the creditors’ interests are further exacerbated by the stay on proceedings against the company in s 210(10).

Thirdly, there is no rule on how the proof of debts for the purposes of voting on the scheme should be conducted, even though the question of whether the requisite majorities in favour of the scheme have been obtained rests on it.

In pointing out the above, this writer is not suggesting that they necessarily represent gaps in the legislation. If the creditor scheme is used predominantly as providing statutory support to enable a majority of creditors to bind a minority to a debt restructuring plan, as in England, it would or may make sense not to legislate on those things. But when the scheme begins to be used by smaller companies and takes on more colour as an insolvency proceeding, as has happened in Singapore, the inadequacies of the legislation become apparent. The different uses of the scheme in England and Singapore accounted for the different focus of their respective case law on scheme. English law has tended to focus on very technical aspects of the scheme provisions, such as the meaning of key terms, the classification of creditors and valuation, and cross-border issues, reflecting London’s role as an international debt restructuring centre, while governance issues have rarely been raised. In contrast, governance issues in scheme have featured prominently in Singapore case law.

From Singapore’s perspective, therefore, the above aspects of the scheme legislation represented gaps in the legislation. Moreover, they reinforce each other in practice thereby magnifying the impact of the gaps. Take the case of voting on the scheme, which is the most important element on whether it becomes binding on the company and the creditors. The outcome of voting depends on which proof of debts were admitted or rejected. In practice, the company will engage an insolvency practitioner to adjudicate on the proofs. It will be convenient to refer to this person as the adjudicator, since this is the term used in the Amendment Bill.

The gaps in the legislation mean that there is very little protection of the creditors’ interests in the voting process. The adjudicator, being appointed by the company, would tend to look after the company’s interest. The lack of rules on the proof of debts gives the adjudicator room to manipulate in the company’s interests, by for example being lenient with suspicious proofs submitted by internal creditors but strict or even harsh with proofs of external creditors. This is compounded by the

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23 This was how the court conceived the scheme in *Re Norfolk Island and Byron Bay Whaling Co Ltd* (1969) 90 WN (Pt 1) (NSW) 351, 354.

24 Proposed s 211F(5).
legislation’s failure to provide the creditors with any recourse to bring a personal action against the adjudicator for misconduct. This state of affairs is not conducive to maintaining the creditor’s trust in the integrity of the voting process, and at a time when trust in the proceeding is crucial to the success of the scheme. The trust deficit, in turn, may cause the creditors to question the adjudicator on his decisions more aggressively, and to request to see the proofs of debt submitted by internal creditors. But as the legislation provides so little guidance on what the company is required to disclose to the creditors, it is an open question whether the adjudicator has to accede to any such request. The uncertainty on the level of disclosure may lead to a general lack of transparency, and a downward spiral in the relationships between the company and its creditors.

(b) Measures to enhance governance

Singapore courts have developed principles and rules to deal with the aforesaid gaps in the legislation. Some of these have since led to further developments as enacted in the Amendment Bill. For example, substantial guidance was given in the first two cases concerning TT International on the conduct of proof of debts and the duties of the adjudicator and scheme manager. The ILRC developed the rules on proof of debts further and its recommendations have been enacted in the Amendment Bill. Although the ILRC did not recommend legislating on the duties of the adjudicator and scheme manager, the judicial developments have nevertheless found their way into the Amendment Bill which acknowledged the two positions. It defined the adjudicator as the person who is nominated by the company to be appointed as the chairman of the creditors’ meeting, and who is responsible for adjudicating on the proofs of debt submitted by the creditors, and the scheme manager as the person appointed by the company to administer the scheme.

The judicial developments have helped to develop Singapore’s scheme as a hybrid insolvency proceeding in three ways: enhancing disclosure and transparency, taking nascent steps to create a new office, and strengthening court’s powers of supervision and assistance.

Disclosure and transparency

In Wah Yuen Electrical Engineering v Singapore Cables Manufacturers, the Court of Appeal held that, aside from statutory authority, it is an independent principle of law that the creditors should be put in possession of such information as is necessary to make a meaningful choice. In TT International (No 2), this basic principle on disclosure was expanded slightly so that

scheme creditors are rightfully entitled to expect to receive accurate information which would allow them to make a holistic assessment as to whether the proposed scheme manager and/or

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26 See text to fn XXX.
27 Proposed s 211F(5).
28 Proposed s 211J(5).
30 ibid, [24].
the proposed terms of the scheme are appropriate for the Company both in the short and long run.\(^{32}\)

But while it is not difficult to understand the basic principle on disclosure, it is another thing applying it where the facts are hotly disputed. It can be seen from the cases where the creditors complained of insufficient disclosure that creditors evaluating a proposed scheme are usually concerned with two common issues.\(^{33}\) The first is the evaluation of the company’s business or business with a view to assessing whether the proposed scheme is in their interests.\(^{34}\) The second is the phenomenon of woodwork creditors and related party debts. The origin and quantum of the debts might be unsubstantiated or suspect.\(^{35}\) The difficulty facing the court when the creditors and the company disagree on whether the company has provided the creditors with sufficient information on those two issues is that there is usually no clear yardstick which the court may use to reach a decision. For example, in the Wah Yuen case, the opposing creditor argued that the internal creditors should not be allowed to vote as it was impossible to verify the extent of their claims or even whether they were creditors on the available information. The Court of Appeal agreed that the concerns were justified, but decided not to rule on it, on the ground that there was if it were a condition precedent that a company had to satisfy each creditor of the genesis and extent of all of its debts before the scheme could be put to the vote, the entire process would be cumbersome and administratively inconvenient.\(^{36}\) The reason given was somewhat puzzling since the issue was not about satisfying all creditors of their doubts but whether there was sufficient merit in the opposing creditors’ challenge which the company has failed to address and thus the votes of the internal creditors should either not be counted in the computation of the majority, or be discounted by the court in the exercise of its discretion. Nevertheless, it shows the difficulty a court may face when asked to decide whether sufficient disclosure has been made.

The courts have responded to the difficulty in two ways. First, it developed bright line rules where the tests may be applied readily. The best example is probably the rule that where a scheme involves an insolvent company, enough information must be given to the creditors for them to assess whether the returns under the proposed scheme would be greater than what they could expect in an insolvent liquidation,\(^{37}\) or perhaps the rescue procedure the company would enter into if the scheme was not approved.\(^{38}\) The Court of Appeal in Wah Yuen articulated the rule and used it to uphold the trial judge’s refusal to sanction the scheme. Another example is the rule that a contingent liability ‘which would

\(^{32}\) ibid, [21] (emphasis original).


\(^{36}\) ibid, [18].


meaningfully affect the amount that scheme creditors bound by the Scheme could ultimately recover. This is derived from the broader rule that

“material information” which had to be disclosed connoted information relating to the commercial viability of the implementation of the scheme as a whole, in order to allow creditors to make a holistic assessment as to whether the proposed scheme manager and/or the proposed terms of the scheme were appropriate for the Company.

But while bright line rules deliver certainty and predictability, they lack flexibility and may lead to harsh or unfair outcomes. In *Wah Yuen*, the Court of Appeal held that the company’s failure to provide audited accounts meant that the creditors could not assess whether the returns in the proposed scheme would be more than the returns in an insolvent liquidation. To require that audited accounts must always be given, regardless of the situation, is however too rigid.

Regardless of broad principle or specific rules, their major drawback is that creditors have to expend time and costs to invoke them. They do not on their own deliver consistent and realistic protection to the creditors. It has been explained above that the issues arising from the gaps in the legislation are intimately connected. The crux of the issues is the corporate governance of the company while it is negotiating a scheme and after the scheme has been sanctioned, its implementation. The company’s existing management continues to manage the company, unless displaced at the insistence of powerful creditors. But the management may be the reason for the company’s current dire state, or contributed substantially to it. Creditors who are suspicious of the management’s competence or even good faith may rather prefer letting an insolvency practitioner manage the company. Practitioner-in-possession, in any event, is the mainstay of Singapore’s corporate insolvency law. Further, the stay in s 210(10) prefers the interests of the shareholders and the management over the creditors as the creditors’ enforcement rights are suspended while the company is enabled to continue trading where it otherwise may not have been able to do so.

The courts have very recently seized the opportunity to lay the groundwork for a more effective governance structure to protect the interests of the creditors. This is done primarily by imposing duties on the professionals appointed to assist the company, and by regulating the fees they charge.

*Nascent steps to creating a new office*

Since the scheme legislation does not even acknowledge the existence of the professional advisers, these appointments are entirely contractual and vary from case to case. The court may conceivably impose requirements when it hears the company’s application for an order to summon the creditors’ meeting, but it is not known whether that has been done and the extent thereof. It seems the usual practice is to appoint an insolvency practitioner to adjudicate on the proofs of debt, chair the creditors’ meeting and implement the scheme after it has been sanctioned, and appoint the person’s firm or

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40 ibid.
company as the independent financial advisor to formulate the scheme and negotiate with the creditors.\textsuperscript{42} This paper will not coin a separate term for the independent financial advisor performing those functions, but refer simply to that as the adjudicator formulating the scheme.

In \textit{TT International (No 1)},\textsuperscript{43} the creditors disputed several of the adjudicator’s decisions on proofs of debt. In addition to laying down rules governing proofs of debt, the Court of Appeal also took the opportunity to examine the functions of the professional advisers. The Court held that the duties evolved during the different stages of the scheme. The adjudicator in formulating the scheme owes a duty of good faith to the company and the body of creditors as a whole and must not mislead creditors or suppress material information from them. They must act fairly and in an independent manner in discharging their duties, and must never favour the interests of their appointers over that of the other legitimate claimants to the company’s assets.\textsuperscript{44} Next, the duties are amplified when the adjudicator adjudicates on the proofs of debt. Holding that those functions are similar to that of the liquidator and judicial manager, the Court held that an adjudicator in this quasi-judicial role owes duties to be objective, independent, fair and impartial.\textsuperscript{45} Further, again drawing on the office of liquidator as a comparator, the Court held that, after the scheme has been sanctioned, ‘the proposed scheme manager’s duties to administer the approved scheme take on a fiduciary nature upon his appointment as the scheme manager’.\textsuperscript{46} Finally, the Court also held that a ‘proposed scheme manager is in a position of conflict of interest when he without good reason aligns his interests with those of the company’.\textsuperscript{47} Although a proposed scheme manager is ‘inherently in a position of conflict’,\textsuperscript{48} since his remuneration depends, inter alia, on successfully resuscitating the company, he must ‘nevertheless, seek to strike the right balance 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’.\textsuperscript{49}

The above propositions may be seen as an innovative attempt to create a new office of adjudicator/scheme manager. Where the creditors are too dispersed and unable to protect themselves, the duties imposed on the adjudicator/scheme manager would serve to strengthen corporate governance in scheme and protect the interests of the creditors. That some such office is required can be seen from the strong support for greater creditor protection in the feedback to the English Review on the standalone moratorium proposal.\textsuperscript{50}

But while there is market pressure for the creation of the office, the doctrinal foundation of three of the propositions the Court of Appeal laid down in \textit{TT International (No 1)} are uncertain. The Court did not explain the source of the duty of good faith the adjudicator owes to the creditors in formulating the scheme, or why the office of the scheme manager is, presumably vis-à-vis the creditors, a fiduciary one.

\textsuperscript{42} That was what took place in the scheme of TT International. See the discussion in text to fn XXX.
\textsuperscript{44} ibid, [74].
\textsuperscript{45} ibid, [75].
\textsuperscript{46} ibid, [76].
\textsuperscript{47} ibid, [52].
\textsuperscript{48} ibid, [77].
\textsuperscript{49} ibid.
\textsuperscript{50} See text to fn XXX.
It is hard to support the propositions by recourse to existing doctrines. The difficulties in turn cast doubt on the propositions regarding conflict of interest, since there would be no conflict of duty and interest if the better view is that the adjudicator/scheme manager does not owe the duty of good faith or fiduciary duties as held by the Court. But the duty imposed on the adjudicator when adjudicating proofs of debt stands on firmer ground. Since the function is undoubtedly quasi-judicial, it would follow from general principles that the adjudicator owes a duty to be objective and impartial to the creditors who have submitted their proofs of debt.

The courts have also sought to exercise control over the adjudicator/scheme manager by regulating the fees charged. It seems a common practice for the fees to be computed not only on time costs but also to include a value added fee (VAF) which is dependent, inter alia, on the amount of debts owed to the creditors that are waived, extinguished or converted into equity.\(^51\) In *The Royal Bank of Scotland NV v TT International Ltd (No 2)*,\(^52\) the quantum of the VAF was estimated to be in the region of some $15m to $30m.\(^53\) It only came to light two years after the sanction of the scheme, because the scheme manager was an excluded creditor and thus not part of the scheme, and the company refused to respond to the creditors’ request for information on the fees of the scheme manager. The Court of Appeal held that the VAF was a contingent liability of the company, and in view of its potentially enormous impact on the company’s financial position, was material information which should have been disclosed to the creditors so that they could assess the proposed scheme holistically when exercising their votes. The company and the scheme manager have breached their respective duties of disclosure when they failed to disclose its existence. The Court held that it would have set aside the scheme and ordered a fresh vote, but because the scheme has been implemented for more than two years, it was not practical to set it aside without causing more harm to the company and the creditors.\(^54\) Hence it ordered that the scheme manager, the company and the monitoring committee of the creditors should endeavor to reach an agreement as to what ought to be the proper fees due to the scheme manager, and that if the parties fail to agree, the fees would be assessed by a High Court judge.\(^55\)

The decision in *TT International (No 2)* raises difficult questions on the jurisdiction and power of a court to make orders affecting the scheme after it has been sanctioned, which we would consider shortly. As scheme managers are usually insolvency practitioners, it is easy when the topic of their fees come up to compare it with the fees charged by liquidators and judicial managers. But unlike a liquidator or judicial manager where statute or the inherent jurisdiction of the court provides the basis to regulate the fees charged, it is extremely hard to find any basis to regulate the scheme manager’s fee. The Court of Appeal navigated around the problem by effectively mandating that the scheme manager’s fee should


\(^52\) [2012] SGCA 9, [2012] 2 SLR 213. The VAF was payable not to the scheme manager, but rather the company owned by the scheme manager, but as the Court of Appeal considered this point to be irrelevant to its decision (at [27]), this paper will gloss over the difference.

\(^53\) ibid, [6].

\(^54\) ibid, [33].

\(^55\) [ibid], [34]-[35].
be disclosed to the creditors and the court prior to the sanction of the scheme, even where the scheme manager is not a party to the scheme.\textsuperscript{56}

\textit{Court’s jurisdiction and power to set aside or amend scheme}

In \textit{The Oriental Insurance Co Ltd v Reliance National Asia Pte Ltd},\textsuperscript{57} the Singapore Court of Appeal allowed an application by Oriental Insurance Co Ltd (‘Oriental Insurance’) for an extension of time to file a proof of debt under a sanctioned scheme. The court refused to follow the strict approach of the Privy Council in \textit{Kempe v Ambassador Insurance Co},\textsuperscript{58} which reflected the English position that it was statute, not a court order, which gave binding force to a scheme. Consequently, the court’s inherent jurisdiction to amend a scheme was very limited. While a court could correct an obvious mistake, it could not alter the substance of the scheme and impose an arrangement on the creditors to which they had not agreed. The Privy Council in \textit{Kempe} held that the time limits in the scheme to file a proof of debt were one of substance.\textsuperscript{59} To allow deadlines to be extended would be a material alteration, detracting from the certainty and expedition which were the chief objects of the scheme.

The approach in \textit{Kempe} was held to be unnecessarily strict and mechanical in \textit{Oriental}, which was concerned that it may lead to unjust results. The Court of Appeal examined Australian cases and preferred their reasoning that a scheme operated as an order of court instead of a statutory contract.\textsuperscript{60} It characterised an extension of time as a procedural matter and examine how its discretion should be exercised.\textsuperscript{61} On the facts, not only would there be no prejudice to the company or the other scheme creditors if the application was allowed, but the company would be prejudiced if the application was not granted.

The different judicial attitudes in \textit{Kempe} and \textit{Oriental Insurance} show that Singapore courts prefer a more flexible jurisdiction to amend a scheme where the matter is procedural and where justice requires, even though that may impinge on the certainty and finality of schemes. But in \textit{TT International (No 2)}, the Court of Appeal assumed a much greater jurisdiction to amend a scheme when it held that it would have set aside the scheme on account of the non-disclosure of the scheme manager’s VAF but for the concern that doing so would cause more harm to the company and the creditors. In \textit{TT International (No 3)},\textsuperscript{62} another differently constituted Court of Appeal refused an application to set aside the decision in \textit{TT International (No 2)}. It held that the earlier Court of Appeal could have rescinded its sanction of the scheme on the basis of the non-disclosure of the VAF.\textsuperscript{63} The reason is that ‘should new facts emerge which cast doubt on the validity of the scheme’s sanction, the court has the authority to determine whether those new facts should have any effect on the scheme.’\textsuperscript{64} But the Court acknowledged that

\textsuperscript{56} As recognised in \textit{Kao Chai-Chau Linda v Fong Wai Lyn Carolyn} [2015] SGHC 260, [2016] 1 SLR 21, [A.35].

\textsuperscript{57} [2008] SGCA 18, [2008] 3 SLR 121.

\textsuperscript{58} [1998] 1 WLR 271.

\textsuperscript{59} ibid, 276.

\textsuperscript{60} \textit{The Oriental Insurance Co Ltd v Reliance National Asia Pte Ltd} [2008] SGCA 18, [2008] 3 SLR 121, [61]-[69].

\textsuperscript{61} ibid, [65].


\textsuperscript{63} ibid, [113].

\textsuperscript{64} ibid, [112].
there was force in counsel’s argument that the effect of the order of the earlier Court of Appeal that the parties should reach an agreement on the fee failing which it would be taxed amounted to a rewriting of the substance of the scheme by the court, and that the correct order to make was to rescind the scheme and left it to the scheme creditors to vote on a new scheme.65

*TT International (No 2)* and *TT International (No 3)* have the potential to impact on the finality of scheme significantly. It is established law, which was accepted in *Oriental Insurance*, that once a scheme has become effective and is binding on the parties to it, it cannot afterwards be altered, except where it is pursuant to amendment provisions within the scheme itself,66 or where the court exercises its inherent jurisdiction in limited circumstances, for example, if consent to the scheme was obtained by fraud or where there are obvious mistakes in the documents setting out the scheme.67 Although the Court of Appeal in *TT International (No 3)* sought to soften the impact by suggesting that the proper order to make was limited to rescinding the scheme, this is still a major inroad into the finality of scheme.

4. **First round of proposed reforms from the ILRC**

ILRC recommended several measures to improve the workings of schemes, as part of the efforts to improve rescue laws. It noted that schemes were used not only by insolvent companies for debt restructuring but also by companies that were not in financial distress for corporate transactions.68 Thus, it recommended that the scheme sections should remain in the Companies Act, but where the company, its creditors or members applied for a moratorium, additional provisions in the proposed Insolvency Act, which would house individual bankruptcy and corporate insolvency in one Act for the first time, would apply.69 Note however that this is not a complete statement, as cramdown and other recommendations would also apply to a creditor scheme. No mention was made of s 210(10), but it would be strange to leave this in the Companies Act. Various issues arise from amending the scheme provisions to cater specifically for scheme as a debt restructuring tool which we will examine briefly under we look at the Amendment Bill later.

(a) Moratorium

Unlike England where schemes are used mainly by large companies to restructure financial debts, schemes are used in Singapore by large and smaller companies to restructure both financial and trading debts.70 There is greater need for a moratorium while the company negotiates on the terms of the

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65 ibid, [194], [195].
66 *Re Cape plc* [2006] EWHC 1316 (Ch), [2007] 2 BCLC 546, [72]-[73] (later sanctioned, [2006] EWHC 1446 (Ch)).
67 *Fletcher v Royal Automobile Club Ltd* [2000] 1 BCLC 331 (fraud); *Kempe v Ambassador Insurance Co* [1998] 1 WLR 271, 276.
68 ILRC, Final Report, 139-140.
69 ibid, 140.
scheme. Drawing on the experience gained from the operation of s 210(10), the ILRC recommended that the stay should be broadened but this would be balanced by safeguards for creditors.\textsuperscript{71}

The ILRC recommended that there should be a broader moratorium, not narrower than the moratorium in the JM, which the court would have discretion to alter in each case according to the circumstances. Further, unlike the existing law where an application for a stay may only be made where a scheme ‘has been proposed between the company and its creditors or any class of such creditors’,\textsuperscript{72} an application for a moratorium may be made when the company has an intention to propose a scheme.\textsuperscript{73} In arriving at those recommendations, the ILRC considered but ultimately rejected the option of an automatic stay arising on filing and appointing a supervisory trustee, similar to the position under Chapter 11, to protect the interests of the creditors. It distinguished between the moratorium in JM and the moratorium in schemes. There is no displacement of management in schemes, unlike JM. Allowing a moratorium to arise automatically will be unfair to creditors and potentially lead to abuse. Indeed, the ILRC also recommended increasing creditor protection during the interim period between an application for a JM order and the making of the order when an initial moratorium is in place.\textsuperscript{74}

To protect creditors from possible abuse of moratorium, the ILRC recommended two safeguards:\textsuperscript{75} time should stop to run with regards the application of avoidance provisions once any application for a scheme has been filed in court, and a creditor may apply to court to restrict any disposition of property by the company and/or any activity that is not carried out in the usual course of business.

(b) Measures to fill the gaps in the statutory framework

The ILRC recommended several measures to fill the gaps in the statutory framework on schemes. First, it developed the rules laid down in \textit{TT International (No 1)} on the proof of debts and recommended that legislation should be enacted on the filing, adjudication and inspection of proofs of debts, which would help to streamline the processes and promote transparency and fairness. Secondly, it recommended that a statutory right should be given to the company, its creditors and scheme manager to apply to court for directions on procedural and implementation issues, but not substantive or commercial terms of the scheme. Thirdly, it recommended that the court should be given a power to order a re-vote.

The first and third recommendations have been enacted in the Amendment Bill and they will become ss 211F and 211G of the Companies Act respectively. But with regards to the second recommendation, the scope of s 211J is much more limited than that recommended. It applies only to an application to court to review acts or omissions committed after the scheme has been sanctioned.

The above recommendations were organic developments of the scheme. But the recommendation on cram down was different. It was based on Chapter 11 and controversial. The ILRC decided against

\textsuperscript{71} ILRC Final Report, 140-143.
\textsuperscript{72} s 210(10).
\textsuperscript{73} ILRC Final Report, 142.
\textsuperscript{74} ILRC, Final Report, 103-105.
\textsuperscript{75} ibid.
introducing a Chapter 11 style debtor-in-possession model in Singapore, but recommended adopting some of its features.

(c) Power of court to cram down a dissenting class

In view of modern reservations about the correctness of *Re Tea Corporation*, which held that the company may cram down a class which has voted against the scheme, the practice in England has been to twin a scheme with an administration in order to overcome objections from a class of creditors that are out of the money. Although schemes have been proposed and sanctioned in JM, cramming down a class of out of money creditors did not seem to be a reason for using that combination of procedures. The status of the *Re Tea Corp* principle in Singapore is not clear. But the issue of overcoming objections from out of money creditors was not listed as one of the problems or drawbacks of schemes.

The main reasons given by the ILRC, when it recommended by a majority to legislate for a power to cram down a class of dissenting creditors, were that this would reduce the excessive emphasis on classification, and that it was needed to deal with creditors who were placed in a different class and were unreasonably using this to bargain for more rights. The majority was aware that this would raise issues of valuation, and thought that if necessary, the court should be allowed to appoint a court assessor or expert to assist in the matter. The Minority was concerned that, unlike the US which has very developed methodologies for valuation, and is a large and developed economy which allows for better comparative analysis, Singapore’s smaller economy may not allow for the same comparative analysis to be made.

The reasons given by the majority are not convincing. It fails to take into account the developments since the restatement of the test on classification in *Re Hawk Insurance Co Ltd*, which has de-emphasised the use of class to protect the interests of creditors with nominally different rights. But if creditors are still placed in a different class under the *Hawk* test, it could hardly be said that the absence of the power to cram down would allow ‘a minority of creditors to hold out for better returns by threatening to veto a scheme merely because they form a separate class.’ English law and Singapore law have developed different methodologies from Chapter 11 to achieve fairness to different group of creditors. We will return to this matter again when considering the provisions in the Amendment Bill which have implemented this recommendation.

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76 [1904] 1 Ch 12.
79 ILRC, Final Report, 154-156.
82 ILRC, Final Report, 156.
(d) Super-priority for rescue finance

The next feature of Chapter 11 that the ILRC recommended adopting was the grant of priority and super-priority for rescue finance, but not super-priority lien. Priority and super-priority for rescue finance means that the rescue loan would rank as what the Americans have termed an administrative expense claim and the top-ranked claim of the administrative expense claims, respectively. The doctrine of administrative expense claims is the functional equivalent of the doctrines of liquidation expenses and JM expenses. Super-priority lien means a security granted to the provider of rescue finance that ranks equally or above an existing security on the assets of the company.

The ILRC noted that financing is often essential to the rehabilitation of a company, and ‘may in many cases be even more essential than other trade debts or other post-commencement contracts that the insolvent company may enter into’.\(^8\) At the same time, it also noted that this may lead to costly disputes, that courts may face difficulty deciding whether the proposed rescue funding would be likely to aid the body of creditors rather than prejudice them, that trade or other creditors may become more wary of dealing with the company, and that Singapore does not have the volume of cases to warrant the establishment of debtor-in-possession financing departments within banks and financial institutions. Balancing the conflicting considerations, the ILRC decided that allowing super-priority for rescue funding in schemes and JM would enhance the rescue options available to the company. However, it decided against allowing super-priority liens. It is surprising that in recommending rejection the ILRC did not express any concern that the availability of super-priority liens would impact adversely on the value of security, and may cause banks to reduce lending and raise the cost of loans.

Although not entirely satisfactory, the ILRC’s recommendations may still be seen as an incremental development by ranking new credit above other debts or claims incurred in JM or while the company is negotiating a scheme. But the step is bigger in scheme as there is no doctrine of scheme expenses to begin with. Unlike English law, there is no statutory ranking of the various items constituting the costs and expenses of liquidation or JM. But the Restructuring Committee disagreed and recommended the introduction of super-priority lien, which has been enacted in the Amendment Bill and which we will examine shortly.

5. Second round of proposed reforms by the Restructuring Committee

The Restructuring Committee was set up to consider ways to strengthen Singapore as an international debt restructuring centre. The influence of Chapter 11 on the deliberations of the Restructuring Committee was substantial. Unfortunately, as will be seen shortly, there was little consideration of how Chapter 11 would interact with the existing restructuring procedures, the broader commercial law, lending practices, and judicial approaches to insolvency and commercial disputes.

With regards to schemes, the Restructuring Committee recommended an automatic moratorium, super-priority liens and pre-packaged schemes. These are very significant reforms, but they are not all. The Restructuring Committee also recommended a slew of other measures. Some relate to cross-border

\(^8\) ILRC, Final Report, 109.
insolvencies, such as adopting the UNCITRAL Model Law on Cross-border Insolvency and empowering Singapore courts to grant in personam worldwide injunctive relief. Other notable measures sought to enhance case management, dedicate a bench of Specialist Judges to hear and determine restructuring cases, appoint international restructuring experts to augment the pool of local Specialist Judges, and exhorting the Specialist Judges to take a judge-led approach to managing restructuring cases.

6. Amendment Bill 2017

As mentioned earlier, the Singapore Government is in the process of drafting an Insolvency Act to bring together corporate insolvency and individual bankruptcy in one statute for the first time. As that is a massive project requiring some time to complete, and the Government would like the ‘legislative amendments which are key to enhancing Singapore’s corporate rescue and restructuring framework’ to be implemented quickly, it decided to go ahead with the latter while the former was still pending. A draft bill, the Companies (Amendment) Bill 2017 was published on 21 October 2016 for public consultation. It is an amendment to the current Companies Act, as Singapore currently has no dedicated legislation for corporate insolvencies.

(a) Add-on sections for creditor scheme – an insolvency proceeding?

Schemes may be used for many purposes besides debt restructuring. There is no insolvency requirement and this has been regarded as one of the attractions of using a scheme to restructure the debts of an insolvent company. There is no clear distinction between members’ schemes and creditor schemes in the legislative sections. The English Review adopted a ‘single gateway’, ‘standalone moratorium’ and ‘restructuring plan’ approach to reform England’s debt restructuring laws. On the manner of implementing the restructuring plan, there was considerable support in the feedback to keep it as a standalone tool, separate from scheme and CVA. The issue of how reforms to debt restructuring laws, in particular, schemes, should be carried out is not an academic question. It has implications on stigma, cross-border recognition, existing structures and processes, etc.

Singapore’s approach is different from that in England. As explained above, the ILRC recommended that the reforms to scheme to enhance its effectiveness as a debt restructuring tool should be brought in as an add-on to the traditional scheme sections, and should be contained in the proposed Insolvency Act. Thus, s 211A(1) of the Amendment Bill stipulates that the new sections apply where the scheme between the company and its creditors or any class of them ‘will, if it takes effect, compromise the rights of the creditors or class of creditors, as the case may be.’ But some of the difficult issues faced by English law reformers apply to Singapore as well, but unfortunately the rushed consultation and implementation have not allowed the issues to be aired sufficiently.

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85 See eg, feedback from Insolvency Lawyers’ Association Technical Committee, Sarah Paterson, Allen & Overy, R3, Chancery judges, PWC.
The Amendment Bill has three parts. The first part is concerned with improving the attractiveness of schemes as a debt restructuring device. The second part relates to judicial management. The third part is concerned with various reforms to facilitate the resolution of cross-border insolvencies. This paper is concerned only with the reforms to scheme.

(b) Moratorium

The Bill provided that a company may, instead of applying for a stay of proceedings under s 210(10), apply to court for a broad moratorium under the proposed s 211B. The company may apply for this at the same time as it applies to court for the first hearing or for the approval of a pre-packaged scheme, or when it intends to make such an application as soon as practicable, and no order has been made or resolution passed for the winding up of the company. Unlike the English proposal on moratorium, a pending winding up application does not disqualify the company from applying for moratorium.

Once an application for a moratorium is made, an initial moratorium which is as broad as what the court may grant after hearing the application comes into being for a period of 30 days. During this period, the company cannot be wound up and no receiver or manager may be appointed. Further, except with leave of the court, no proceedings other than scheme proceedings or execution or other legal process may be commenced or continued against the company, no step may be taken to enforce security or to repossess goods under any hire-purchase or title retention agreement, and no right of re-entry or forfeiture under any lease may be enforced.

To apply for a moratorium, the company is required to file with the court certain documents (details below), to give public notice of the application, and to notify every creditor sought to be bound by the proposed scheme and who is known to the company and any person who has appointed or is or may be entitled to appoint a global receiver and manager (following English usage for ease of reference, holder of qualifying floating charge, ‘HQFC’) of the application. Although a HQFC will thus be notified of a moratorium application, it cannot prevent the moratorium from arising. But if it has appointed a receiver and manager, it does not seem that the moratorium can take effect. There is no provision requiring the receiver and manager, or indeed any receiver, to vacate office.

Under the proposed s 211B(3), the company is required to file evidence of support for the proposed scheme from creditors, a list of the 20 largest unsecured creditors who are not related to the company, and where the application is not part of the application for the first hearing, a brief description of the proposed scheme with sufficient particulars to enable the court to assess that the proposed scheme is feasible and merits due consideration by the creditors. On what would constitute evidence of support from the creditors, the draft contained two requirements: support from creditors representing not less than one-third in value of the creditors sought to be bound by the proposed scheme, or creditors whose

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86 English Review, [7.20].
87 Proposed s 211B(8).
88 Proposed s 211B(8)(a), (b).
89 Proposed s 211B(8)(c), (d), (e), (f).
90 Proposed s 211B(4).
91 Proposed s 211B(3).
support would be important for the success of the proposed scheme. The Government sought input specifically on whether the two requirements are feasible, and if both are feasible, whether the company should comply with both or only one of the requirements.

The second requirement lacks certainty and so should be rejected. But the first requirement is also not free of difficulty. First, it does not distinguish between the different types of creditors. Where secured creditors are fully secured, their consent to the moratorium may not offer sufficient protection for the unsecured creditors. Secondly, as there will be no supervisor or monitor of any sort, there is no independent third party to verify the companies’ claims that the conditions for the moratorium have been fulfilled, or to ensure that the moratorium is not abused in the 30 day period. The right given to creditors to apply to court to challenge the moratorium,\(^\text{92}\) or to restrain the company’s acts,\(^\text{93}\) does not offer any realistic protection. Thirdly, in any event it may be hard for the company to obtain that level of support from the creditors early in the negotiations.

Moving beyond the technical details, the initial moratorium raises important policy questions. As mentioned earlier, the ILRC was concerned that allowing a moratorium to arise automatically in a scheme, which is effectively a debtor-in-possession procedure, would pose too much risk to the creditors of the company. But the Restructuring Committee was motivated by different considerations when it recommended that the initial moratorium should arise automatically. It was attracted by the Chapter 11 moratorium which arises automatically when a Chapter 11 petition is filed and has extra-territorial worldwide effect. It pointed out that because of that and the global economic reach of the US, foreign creditors can ill-afford to ignore US bankruptcy proceedings, except where their assets or connections in the US are completely non-existent.\(^\text{94}\) To safeguard against abuse of the moratorium, the Committee recommended that certain conditions should be satisfied which were largely followed in the Amendment Bill.

The Restructuring Committee, with respect, should have given greater weight to the concerns expressed by the ILRC on the need to protect creditors’ interest in a moratorium. Similar concerns were expressed in the feedback\(^\text{95}\) to the English Review which proposed allowing a standalone moratorium to arise automatically for a period of three months, which may be extended by the court, when the company has met the eligibility requirements and satisfied two conditions by filing certain requisite documents with the court.\(^\text{96}\) The two conditions were that the directors believed that the company would be able to pay its debts during the moratorium and had a reasonable prospect of restructuring its debts.\(^\text{97}\) The company would also have to appoint a supervisor who is required to report to court if the conditions ceased to be satisfied, and whose consent to a transaction which is out of the ordinary course of the

\(^{92}\) Proposed s 211B(9).
\(^{93}\) Proposed s 211D.
\(^{94}\) Report of the Restructuring Committee, [3.7].
\(^{95}\) See for eg, feedback of Allen & Overy, R3, Chancery judges, ICAEW, CMS Cameron McKenna LLP, Federation of Small Businesses, City of London Law Society, KPMG, PWC.
\(^{96}\) English Review, [7.7], [7.16]-[7.17].
\(^{97}\) English Review, [7.22]-[7.23].
company’s business is required.\textsuperscript{98} There is strong support in the feedback calling for stronger creditor protection, principally by reducing the period of the initial moratorium to 21 or 28 days, and increased monitoring from the supervisor.

The automatic initial moratorium is unlikely to inspire confidence and may bring about unintended consequences. First, a secured creditor that lacks confidence in the company's management may decide to act by appointing a receiver, and if a HQFC appoints a global receiver and manager, there will be no scheme unless the company manages to obtain a JM order and the judicial manager decides to promote a scheme. Under current law the court cannot make a JM order if it is opposed by a HQFC, but pursuant to the ILRC’s recommendation, it seems that the Amendment Bill would allow the court to make a JM order unless the court is satisfied the making of the order would cause prejudice to the HQFC that is disproportionately greater than the prejudice that would be caused to the unsecured creditors if the JM order is not made.\textsuperscript{99} In this regard Singapore is more pro-secured creditor than England. Secondly, unsecured creditors may also react by withholding or cutting credit at the first sign of trouble.

It is envisaged that the court will hear the application for moratorium before the expiry of the 30 day period. If it approves the application, the Bill allows the court to choose from a menu of options. This is a sensible arrangement. But there is very little protection of creditors’ rights under the court-ordered moratorium, which may last from a few months to more than a year. The length of the moratorium and subsequent extension is entirely up to the court’s discretion. It is not clear why no time limit is imposed. When making the moratorium order, the court is bound to order the company to submit financial information of the company as may be adequate to enable the creditors to assess the feasibility of the proposed scheme. It is very doubtful that this will offer any real protection. The purpose of giving the information is not to enable the creditors to monitor the moratorium, and in any event is wholly inadequate. As in the case of the initial moratorium, a supervisor is the barest minimum to protect the creditors’ legitimate interests.

In addition to the above problems, the section is also badly drafted. The heading to s 211B reads ‘Power of Court to restrain proceedings, etc. against company’. This is very misleading when one of its subsection, sub-section (4), confers an automatic moratorium. The sub-section should be a new section with a heading that describes its effect accurately.

A subsidiary of a company which has been granted a moratorium by the court may, even though it is not proposing to enter into a scheme, apply for a similar moratorium provided certain conditions are satisfied.\textsuperscript{100} The Restructuring Committee thought that this was needed as many businesses are organised in corporate groups and ‘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

\textsuperscript{98} English Review, [7.43].
\textsuperscript{99} The reason for the doubt is that the Amendment Bill does not abolish s 227B(5)(a) which provides that the court shall dismiss an application for a JM order if it is satisfied that a receiver and manager has been or will be appointed by a HQFC. This must be an omission as the intention.
\textsuperscript{100} Proposed s 211C.
plan. The Amendment Bill limited the scope of the extension of moratorium to subsidiaries of the company proposing a scheme. Nevertheless, it is not clear why a subsidiary which requires protection from its creditors should not be required to propose a scheme itself. Large corporate groups have entered into linked schemes involving many companies without any particular difficulty. Although a condition for extending the moratorium is that the court has to be satisfied that the creditors of the subsidiary would not be unfairly prejudiced by the moratorium, this is hardly satisfactory protection of the severe curtailment of the creditors’ enforcement rights. This is yet another example of the sharp move to a pro debtor rescue law, but it seems with insufficient consideration of its impact on the legitimate interests of creditors.

(c) Cram down of dissenting class

This was recommended by the ILRC, as explained above, but with few details. Under the proposed s 211H(2), the court may cram down a dissenting class of creditors if the three conditions set out in s 211H(3) are satisfied. They are (i) a majority in number of the creditors sought to be bound by the scheme who were present and voting either in person or by proxy at the meeting ordered by the court under s 210(1); (ii) the majority represents three-fourths in value of the creditors; and (iii) the court is satisfied that the scheme does not discriminate unfairly between two or more classes of creditors, and is fair and equitable in respect of each dissenting class. The meaning of ‘fair and equitable’ will be discussed later.

The manner in which the two conditions are drafted is awkward. The intention is clearly that a sufficient majority of all the creditors whose debts that the company would like to restructure approves the restructuring, ignoring the fact that they have been put into different classes to vote on the restructuring. But the provisions refer to the creditor voting at ‘the relevant meeting’, which is the meeting of that class of creditors. This is not only a drafting error, but it also reveals that the drafters of the scheme sections did not have Chapter 11 style cram down in mind. A scheme is not a collective procedure, and the meeting envisaged in s 210(1) is a single meeting of all the creditors or a class of creditors. This also explains Chadwick LJ’s restatement of the test in Re Hawk Insurance Co Ltd, ie, whether the scheme is a single arrangement or a number of linked arrangements. Another issue is that the cramdown applies to creditor claims only. It is not clear why the power to cramdown a dissenting class of shareholders (or equity interests) is not included.

The meaning of ‘fair and equitable’ is explained in the proposed s 211H(4). It brings in modified versions of what the Americans termed the ‘best interests of creditors test’ and the ‘absolute priority rule’. How the courts would interpret and apply the ‘fair and equitable’ standard lies at the heart of how the cramdown power in s 211H would be exercised. As Parliament’s intention of engrafting elements of Chapter 11 onto scheme is to attract restructuring work to Singapore, there would be pressure to follow US case law closely so that the familiarity will improve efficiency and reduce costs. But the differences between scheme and Chapter 11 may mean that is not possible.

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101 Report of the Restructuring Committee, [3.15].
102 Proposed s 211C(2)(d).
The power to cram down is intimately linked to the classification of creditors and sanction of schemes. Because of the power to cramdown, the dynamics of classification of creditor claims and equity interests in Chapter 11 are very different from and much more complicated than in scheme. The most obvious is that unlike the scheme where the incentive for the company is to put all the creditors whose debts would be compromised in one single class or as few classes as possible, under Chapter 11 the incentive moves in different directions depending on the facts of the case. For example, in a typical SARE case, which is the acronym for single asset real estate case, there will be a under-secured mortgage claim with a very large unsecured portion which will outvote other unsecured claims if they are grouped together. By classifying the claims separately, the debtor can count on the unsecured trade creditors to vote in favour of the plan. The support of this slightly impaired class of claims will enable the court to cram down the mortgage lender’s objection. Although SARE cases do not represent the majority of Chapter 11 cases, they serve to illustrate the complex interaction between classification and cramdown in Chapter 11.

While it is not possible to tell whether something similar to the manoeuvrings in SARE cases may also happen to the Singapore scheme, it is almost certain that the absolute priority rule would reduce the flexibility that the scheme enjoys and renders it much more complex. The scheme of Garuda airline forced finance creditors to take a haircut, but excluded some trade creditors, including the engine manufacturers whose continued support was essential for the continued operation of Garuda. Nevertheless, the English Court of Appeal affirmed the trial judge’s decision sanctioning the scheme that different groups of unsecured creditors may be dealt with differently if that is commercially rational. Singapore courts have held that the pari passu rule does not apply in schemes. The hard edges of the absolute priority rule would not permit that flexibility. Next, disputes over valuation, which lies at the heart of the absolute priority rule, will make the process very complicated and costly. Warren has stated bluntly that ‘[i]n practice, no problem in bankruptcy is more vexing than the problem of valuation.’ The ILRC suggested that if necessary, the court should be free to appoint a court assessor or expert to assist in the valuation. But under s 211H(5), the court is given power only to appoint ‘any person of suitable knowledge, qualification or experience to assist the Court to estimate the amount that a creditor is expected to receive in the event that the company is wound up.’ It is not clear why the assistance is limited to providing a liquidation analysis. The draftsman may have been influenced by the report of the ILRC, which in its discussion on valuation in cram down referred only to comparative valuations between liquidation and rescue. This understanding of Chapter 11 is however erroneous. The comparison in Chapter 11 valuation is not between liquidation and rescue, which even in England has been heavily criticised. It is more complicated than the more nuanced counter-factual

104 Re Perusahaan Perseroan (Persero) PT Persusahaaan Penerbangaan Garuda Indonesia [2001] All ER (D) 53 (Oct).
105 SEA Assets Ltd v Perusahaan Perseroan (Persero) PT Persusahaaan Penerbangaan Garuda Indonesia [2001] EWCA Civ 1696, [23], [31].
108 ILRC, Final Report, 156.
109 ILRC, Final Report, 155-156.
approach which has been applied in English courts.\textsuperscript{110} The valuation process is something that sophisticated Chapter 11 participants avidly desire to avoid. By compromise and settlement, secured creditors can avoid the risks inherent in a valuation of the collateral and a court-imposed interest or discount rate while unsecured creditors and shareholders can avoid the risk presented to them by a valuation of the ‘new’ company.\textsuperscript{111} The approach used in Chapter 11 has thus been referred to as the ‘bargaining and litigation’ approach. If the courts decided to adopt this approach, s 211H(5) would be inapplicable.

The Restructuring Committee has called for Singapore courts to be much more involved in managing restructuring cases, citing with approval the ‘proactive approach to case management’\textsuperscript{112} of US bankruptcy courts, in particular the US Bankruptcy Court for the Southern District of New York. This development is probably inevitable as Singapore’s scheme become more like Chapter 11, but as pointed out by the Chancery bench in their response to the English Review, greater court involvement would lead to greater expense and delay, and involving judges to make commercial decisions ‘may not be consistent with the accepted role of the English judge in resolving legal disputes’.\textsuperscript{113} This comment applies to Singapore as well. A judge-led approach is also at odds with the established practice of leaving ‘commercial judgments on how best to rescue companies or their businesses to insolvency practitioners who are qualified and experienced enough to make them’,\textsuperscript{114} and the Restructuring Committee’s own recommendation that the moratorium should arise automatically on filing without the need for a court hearing.

(d) Super-priority rescue financing

\textit{Implementing ILRC’s recommendations}

Unlike liquidation and JM which are insolvency procedures with their respective doctrines of liquidation expenses and JM expenses, there is no equivalent for scheme as it is not an insolvency procedure. Hence, to implement the ILRC’s recommendations, the Amendment Bill has to create a functional equivalent to give rescue financing priority. This is achieved by providing that the court may order that, in the event of the winding up of the company, ‘any debt arising from any credit obtained or to be obtained by the company\textsuperscript{115} to enable the business of the company to continue as a going concern (for ease of reference, ‘rescue finance’) ‘is to be treated as if it were a cost or an expense of the winding up’.\textsuperscript{116} For ease of reference, this kind of priority would be referred to as ‘deemed liquidation expense priority’.

\textsuperscript{112} Report of the Restructuring Committee, [3.50].
\textsuperscript{113} Feedback of the Chancery judges to the English Review, [2d].
\textsuperscript{114} Feedback of the Chancery judges to the English Reivew, [2d]. Similar comments have been made in the feedback to the English Review. See for eg, CMS Cameron McKenna LLP,
\textsuperscript{115} Proposed s 211E(1)(a).
\textsuperscript{116} ibid.
This technique of deeming rescue finance as a liquidation expense would ensure that if the scheme fails, any rescue finance which has not been repaid in full would enjoy priority over all other debts incurred by the company while the scheme was being negotiated or implemented. Further, although the rescue finance is a pre-liquidation debt which would ordinarily rank after the liquidation expenses, preferential debts and floating charge debts, by deeming it a liquidation expense it becomes entitled to the same ranking as the actual costs and expenses that would be incurred in the winding up.\(^{117}\) But it is not clear if the liquidator may choose or be compelled to pay this while the liquidation is ongoing, instead of at the completion of the liquidation when there may not even be enough assets to pay all the liquidation expenses.

The ILRC has also recommended that rescue finance may enjoy super-priority if the court thinks that would be appropriate.\(^{118}\) The Amendment Bill does not give the court a broad-based discretion on this issue, but imposes a hard rule that super-priority may be given if the company is unable to obtain the rescue finance from any person unless super-priority is given.\(^{119}\) This ‘otherwise no rescue finance’ test is borrowed from Chapter 11, and as will be seen shortly, applies also to the grant of security and super-priority lien. The deemed liquidation expense technique would provide the basis to grant super-priority. All that needs to be done is to stipulate that, if the ‘otherwise no rescue finance’ test is satisfied, the rescue finance is to be paid ahead of all other costs and expenses of liquidation. But the Amendment Bill did something rather different. It did not use the deemed liquidation expense technique. Instead, it provided that if the ‘otherwise no rescue finance’ test is satisfied, the rescue finance is to enjoy ‘priority over all the preferential debts specified in section 328(1) in the event of a winding up of the company.’\(^{120}\) For ease of reference, this will be referred to as ‘liquidation super-priority’. Probably in a case of belt and braces, the Amendment Bill further devoted an additional sub-section on the ranking of liquidation super-priority,\(^{121}\) which with all respect is unnecessary. But there are bigger problems with the wording of liquidation super-priority.

The term preferential debts is understood in most jurisdictions derived from English law to mean certain debts incurred by the company before it goes into liquidation that are not subject to the pari passu rule and given priority, and is clearly distinguished from liquidation expenses. Unfortunately the situation in Singapore is not so clear. The term ‘preferential debt’ is not defined in the Companies Act, and there are provisions in the Act that treat liquidation expenses as a category of preferential debts.\(^{122}\) That treatment is a recipe for confusion, and it is unfortunate that the Amendment Bill has adopted that treatment. There is no doubt that Parliament’s intention is that super-priority for rescue finance means not only priority over preferential debts, but also over all the other liquidation expenses. The deemed liquidation expense technique is the obvious way to implement that intention.

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\(^{117}\) s 328(1)(a).

\(^{118}\) ILRC, Final Report, 112.

\(^{119}\) Proposed s 211E(1)(b).

\(^{120}\) Proposed s 211E(1)(b)(ii).

\(^{121}\) Proposed s 211E(3).

\(^{122}\) See for eg, s 328(5).
In addition to the above measures, rescue finance would also enjoy priority if it is a secured debt. If the company still has any unencumbered asset, a provider of rescue finance may certainly bargain with the company to take security in it. A subordinate security may also be taken in an encumbered asset, but as invariably there would be a negative pledge clause prohibiting the company from creating a security in the asset, the consent of the security holder to the creation of the subordinate security would have to be obtained. The aforesaid kind of priority will be referred to as ‘security priority’ in this paper.

Under current Singapore law, the company is not required to obtain the consent of the court to borrow on secured terms. The Amendment Bill gives the court power to grant security priority, but in view of the facilitative language used, it would seem that a company continues to enjoy the ability at common law to give a security without court consent. But the court power is useful if an existing secured creditor refuses to countenance a subordinate security. It would also provide some protection to the creditors, since it would be the company’s management that would be making the decision to give security, unlike in JM where the decision would be taken by the judicial manager. The condition for granting security priority is similar to that for granting liquidation super-priority, ie, satisfying the ‘otherwise no rescue finance’ test.123

Implementing Restructuring Committee’s recommendations

The court may also grant a security that is equal to or ranks above an existing security (ie, super-priority lien) if the ‘otherwise no rescue finance’ test124 and a further condition, that ‘there is adequate protection of the interest of the holder of the existing security interest in the property’125 on which the super-priority lien is proposed to be granted, are satisfied. The term ‘adequate protection’ is not defined, but s 211E(5) offers three non-exclusive methods of providing adequate protection. The first is a cash payment or periodic cash payment to the extent that the grant of the super-priority lien decreases the value of the secured creditor’s interest in the secured property. The second is based on the same idea, but instead of cash the company provides an additional or replacement lien. The third is such other relief, other than entitling the existing security holder to compensation, that will result in the realisation by the holder of the indubitable equivalent of the holder’s existing security interest in the property.

Doctrinally and theoretically, the twin tests of super-priority lien, that the rescue finance cannot be obtained without the super-priority lien and that the existing secured creditor is adequately protected, are in tension. ‘Consider how these twin tests are in tension. If a debtor cannot get money from anyone without interfering with the priority rights of a secured creditor, there may be good reason to believe that the debtor cannot adequately protect the creditor. The debtor’s inability to borrow money from anyone else, using the same package it offers the secured creditor as adequate protection, provides at

123 Proposed s 211E(1)(c)(ii).
124 Proposed s 211E(1)(d)(ii).
125 Proposed s 211E(1)(d)(iii).
least some evidence that the debtor’s prospects are not as bright as the debtor might suggest to the court.\textsuperscript{126}

The above shows that it is important to differentiate the different types of priority when discussing DIP financing. Super-priority lien trumps the \textit{property} rights of a secured creditor, while security priority trumps the \textit{contractual} right of a secured creditor with a negative pledge clause but not its property rights. The deemed liquidation expense priority and liquidation super-priority enjoy priority over debts secured by a floating charge. But since liquidation expenses and JM expenses enjoy the same priority, this is a ‘natural’ consequence of effectively making creditor schemes insolvency proceedings. Therefore, while the other three kinds of priority for rescue funding may impact on existing practices with regards to lending and the extension of credit, they are far less disruptive compared to super-priority lien.

\textit{Issues arising from super-priority lien and its availability}

The Restructuring Committee did not adduce any evidence that the lack of super-priority lien has caused the rescue of viable companies or businesses in Singapore or the region to fail, or that lenders have been unwilling to lend to viable companies or businesses. The reasons given for disagreeing with the ILRC’s decision not to recommend super-priority lien were arguably based more on hope than facts on the ground, and the desire to attract ‘established players in the US DIP Financing industry’,\textsuperscript{127} including US distressed debt funds, to use Singapore as a base to provide DIP financing in Singapore and the region.

The Restructuring Committee acknowledged that the interests of existing secured creditors should be safeguarded, and recommended that court approval is required to create a super-priority lien,\textsuperscript{128} but just like the ILRC, there was no discussion of how its availability may affect the value of security and thus the availability and costs of bank loans to companies in Singapore. The omission of both committees to discuss this matter is in stark contrast to the attention devoted to it in the English Review\textsuperscript{129} and the feedback.

It is because of the potential of super-priority lien to reduce the value of security that much concern and opposition have been expressed in the feedback to the English Review on rescue finance. Two major reasons have been given. The first is that the provision of finance in the UK and security rights are not conducive to the approach adopted in procedures like the Chapter 11. As pointed out in the feedback of AlixPartners UK LLP, a subsidiary of a leading US turnaround firm,

\begin{quote}
the customary UK use of floating charges which cover all or significantly all of the assets of the company inhibit the seeking of rescue finance for a troubled business. In practice, companies who are in a position to require a moratorium have few if any unpledged assets, and the value
\end{quote}

\textsuperscript{127} Report of the Restructuring Committee, [4.5].
\textsuperscript{128} ibid, [4.6].
\textsuperscript{129} English Review, [10.11]-[10.14].
of the pledged security is frequently approached or even exceeded by borrowings against those assets.\textsuperscript{130}

This ultimately raises the issue of the efficiency, fairness and accountability of the floating charge as a security, which is a topic for another occasion. But it may be noted in passing, quoting again from AlixPartners, that

\begin{quote}
[although a negative pledge clause may inhibit further lending in some cases, in practice most lenders who hold a floating charge lend to a greater degree than would otherwise be the case. There is a real risk that should lenders believe that the assets backing their lending may be primed by rescue finance providers, they may factor this into their calculations when making financial available to companies. Consequently there may be a knock on reduction in lending facilities, which may do more harm to troubled businesses.]
\end{quote}

Secondly, 'The risks of legislating for super-priority rescue funding could be very serious. Any significant change in lending behaviour generally which might be triggered by such a change, whether as to the availability, or the cost, of lending could have a material effect on the economy.'\textsuperscript{131}

Since the law on security and quasi-security and lending practices in Singapore are very similar to England, the above reasons for concern would apply to Singapore similarly. It is unfortunate that the Singapore government did not consult more widely before deciding to bring in super-priority lien. England’s experience on this is instructive. Before the English Review, the English government has consulted on whether to give rescue financing super-priority in 2001\textsuperscript{132} and 2009.\textsuperscript{133} The former was part of the exercise which led to the Enterprise Act 2002, and the government concluded that ‘the matter was one of too great complexity which required a wider consultation, particularly if it were intended that the UK courts would have a role in approving the grant of super-priority funding on a case by case basis’.\textsuperscript{134} The Restructuring Committee has recommended appointing foreign judges renowned for managing insolvency and restructuring cases to the Singapore International Commercial Court (SICC).\textsuperscript{135} American bankruptcy judges would be the most natural candidates for that purpose. But the concern is that the jurisprudence developed in the SICC, which may not pay enough attention to Singapore’s existing law and practices, would nevertheless be highly relevant to the domestic courts. The challenges facing the Singapore courts are complex and onerous.

(e) Pre-packaged scheme

The Restructuring Committee’s discussion of this topic, perhaps more than any other, showed that it was using the Chapter 11 as its blueprint. It explained a pre-packaged restructuring, which it called a

\begin{thebibliography}{99}
\bibitem{130} Feedback of AlixPartners UK LLP to the English Review, XXX.
\bibitem{131} Response of PWC to the English Review.
\bibitem{132} Insolvency Service, \textit{A Review of Company Rescue and Business Reconstruction Mechanisms: Report by the Review Group} (May 2000) [122]-[139].
\bibitem{133} 'Encouraging Company Rescue – a consultation’ (2009)
\bibitem{134} Chris Mallon, \textit{Financing in Insolvency Proceedings} (INSOL International).
\bibitem{135} Report of the Restructuring Committee, [3.46]-[3.47], recommendation 3.5.
\end{thebibliography}
Pre-Pack, as involving a plan that was pre-negotiated and agreed between the debtor and its major creditors before formal court proceedings commence, whereupon the Pre-Pack ‘is then presented to the court for approval’. This notion of pre-pack is the Chapter 11 pre-pack. It is very different from the English pre-packaged administration which does not require court approval, unless it is twinned with a scheme of arrangement.

The Restructuring Committee gave two reasons for favouring the US approach to Pre-Pack over the English approach. The first was that the US approach offered greater flexibility in designing a restructuring plan, unlike the English which required the sale of the debtor’s business, which may not be possible in some restructurings. The second was that it valued the requirement for court approval in the US approach, which it thought would ‘ensure that the minority dissenting creditors are treated fairly and serves as a good safeguard against potential abuse’. It thus recommended that ‘a Pre-Pack regime that is essentially similar to the US regime can be effected in Singapore by amending the existing schemes of arrangement regime to enable the court to approve a scheme even where not all the procedural requirements currently found in the scheme sections have been satisfied.

The difficulty with the Restructuring Committee’s reasoning is that it was, with respect, comparing apples with oranges. The typical English pre-pack uses the device of administration to conclude a sale of the company’s business. The company’s debts are not restructured. If a debt restructuring is desired but it could not be achieved consensually, the company would have to twin an administration with a scheme, in which case court approval is required. Due to the structural differences between English and US laws, it is not possible to conduct a simple, direct comparison between an English pre-pack and a US pre-pack without falling into error.

The Amendment Bill empowered a court, on a company’s application, to approve a scheme even though no court order that one or more creditors’ meeting be held has been made and no such meeting has been held, provided that the company has given the requisite information to each creditor sought to be bound by the scheme (‘relevant creditor’); notified each relevant creditor of the application and given publicity of the application; and the court is satisfied that had the meeting of the relevant creditors been summoned, the requisite majorities approving the meeting would have been satisfied. Cram down of a dissenting class is thus not available to a pre-pack scheme.

The information to be given to each relevant creditor in a pre-pack scheme is obviously of critical importance. The Amendment Bill stipulated that in addition to the information which is required to be given in the explanatory statement accompanying the notice summoning the meeting in a scheme,

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136 ibid, [3.32].
137 ibid, [3.40].
138 ibid, [3.40(b)].
139 ibid, [3.41].
140 Proposed s 211(2)(a).
141 Proposed s 211(2)(b), (c).
142 Proposed s 211(2)(d).
143 Proposed s 211(3)(a).
144 Proposed s 211(3)(a).

the company must give information concerning itself, for eg, its business, financial condition and prospects, how the scheme will affect the rights of the creditor, and whatever information as is necessary for the creditor to make an informed decision in relation to the scheme.\textsuperscript{145}

As the legislation is silent on what will constitute satisfactory evidence that the requisite majorities would have been obtained had the meeting been held, the courts would have to develop the principles. But it would be erroneous to think that is the only matter that a court needs to take into account. It is established law that the court may refuse to sanction a scheme even where the requisite majorities have approved it. The absence of a meeting means that the court will be deprived of information such as the scale of the opposition to the scheme and the discussions at the meeting, which may be relevant to the court’s exercise of discretion. The interests of the dissenting minority may thus be prejudiced. Moreover, the hoped for efficiency and cost saving that a pre-pack scheme would bring may not materialise all the time. The requisite majorities in a scheme are counted based on the creditors present and voting either in person or by proxy at the meeting, but in a pre-pack that would have to be counted against all the creditors sought to be bound by the scheme since there is no meeting. This is less of a problem if the scheme is concerned to restructure financial debts of large companies, but as schemes are used in Singapore to restructure trading debts as well, getting that level of majority may be difficult in practice.

7. Conclusion

The shortcomings of creditor schemes as they currently exist in England, Singapore and other jurisdictions are well discussed and reform proposals have been suggested.\textsuperscript{146} The IRLC recommended that the scheme should remain a model ‘based on concepts and principles which are familiar to the commercial and financial sector in Singapore as well as those familiar with legal systems based on English law.’\textsuperscript{147} Although the ILRC did not adhere to this policy strictly, as when it recommended that the power of cram down be adopted, the enactment of its recommendations would not cause the scheme to lose its character of a hybrid proceeding and become an off-shoot of Chapter 11. The Restructuring Committee, on the other hand, used Chapter 11 as its blueprint and adopted several elements from it, but with little discussion of how those elements would fit into the existing very different framework.

There seems to be a rush in both England and Singapore to adopt as much of Chapter 11 as possible to make their restructuring laws more debtor-friendly. But it is important not to lose sight that Chapter 11 has its own difficulties,\textsuperscript{148} and more importantly that Chapter 11 may not be appropriate for England or

\textsuperscript{145} Proposed s 211I(3)(b).
\textsuperscript{147} IRLC, Final Report, 139.
Singapore. Ironically, at least in England, a significant segment of the entities for which that movement was supposed to benefit did not agree that was the direction the law should be moving. In its feedback to the English Review, the Federation of Small Businesses, which is the largest organisation representing small and medium sized businesses in the UK, stated that the proposals would not enhance the existing framework in the ways that it needed to be improved, and that a balance need to be struck between facilitating the winding up of businesses that are no longer viable with the potential benefits that might accrue from trying to rescue viable businesses.\textsuperscript{149} Similar comments that not all insolvent companies deserved to be rescued were made by others with extensive experience of restructuring work.\textsuperscript{150} From the similarity of the insolvency legal systems in both jurisdictions, the deliberations of the ILRC, and the lack of clamouring from trade or industrial associations, business or professional representative organisations or professional firms to reform the law to be more debtor-friendly, it would seem that those comments to the English Review are apposite to Singapore as well.

It is not possible to predict how the Chapter 11 elements would take root in Singapore. Legal transplants are complex businesses, and in this case the complexity is made worse because Chapter 11 is extremely complicated and Singapore is engrafting some modified elements of Chapter 11 onto a very established framework. England has some experience of Chapter 11, more than Singapore, but even so Peter Bloxham in his feedback to the English Review commented that the proposals were based on a ‘superficial understanding of US practice.’\textsuperscript{151} Singapore judges have their work cut out for them to ensure that the Chapter 11 elements work seamlessly with the existing framework.