SINGAPORE COURTS – CONVERSATIONS WITH THE COMMUNITY

Opening Address

"Healing Businesses in a New World: Problems, Opportunities and Solutions"

27 March 2024

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Supreme Court of Singapore

Distinguished guests
Ladies and gentlemen

I. Introduction

1 A very good afternoon, and thank you for joining us today. It is my privilege to address you for the fourth session in the "Conversations with the Community" series organised by the Singapore Courts. The theme for the conversation this afternoon is about troubled businesses in an uncertain world. The theme poses the fundamental question: what is the objective of an insolvency and restructuring ("R&I") regime?

2 The answer varies depending on the circumstances and it is simplistic to analyse the question on a purely creditor/shareholder axis. As Chief Justice Sundaresh Menon observed in his keynote address at the 18th Annual Conference of the International Insolvency Institute in 2018, insolvency law and practice is, at its core, about the endeavour to recycle capital to maximise the prospects of business recovery, and when this is not possible, to maximise the realisation of value.[1] Inherent in this endeavour lies the need to reconcile a myriad of

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[*] I am deeply grateful to my law clerk, Samuel Chan, for his assistance in the research for and preparation of this address and to my colleague, Assistant Registrar Jacqueline Lee, for her efforts in coordinating the organisation of this session.

[1] Chief Justice Sundaresh Menon, "The Future of Cross-Border Insolvency: Some Thoughts on a Framework Fit for a Flattening World" (Keynote address at the 18th Annual Conference of the International Insolvency Institute 2018) (accessed at

conflicting interests, which includes the rights of the debtor and the creditors, and the needs of society in general.[2] The precise objectives of an effective R&I regime will therefore depend on what each society believes is the appropriate balance between these interests, based on the prevailing domestic and global commercial landscape, and societal considerations.

3 This is not a hypothetical inquiry leading to an abstract answer. It should be properly situated in the real world where businesses operate. And the world today is very different. New developments have unsettled or at least called into question many of the post-World War II economic and political norms. These developments have brought new challenges for businesses such as increased geopolitical risks, the threat of sanctions and a regulatory environment that is in a state of flux. Overarching this terrain is the growing focus on the existential question of climate change, which in turn raises environmental, social and governance ("ESG") issues. The challenge posed by ESG issues has been exacerbated by the reluctance of sovereigns to take a cohesive approach to observing obligations under the 2016 Paris Agreement.

4 The evolving and fluid business climate underscores the importance of a robust R&I regime that is fit for purpose – one that is able to support businesses in distress in this climate. Why is this important? A robust regime incentivises entrepreneurs to take measured risks, and encourages creditors to extend credit knowing that their interests are protected within reason. This is vital to foster a culture of entrepreneurship and sensible risk-taking, which is the bedrock of modern capitalist economies.

5 What then is the DNA of a robust R&I regime? There are no easy answers, but experience is the best teacher. The lessons of others will help us navigate the future. R&I regimes cannot remain static. They must evolve to stay relevant. The fact that the US Bankruptcy Code has been amended 70 or more times since its introduction more than 40 years ago bears testament to this.[3] In a complex world with multifarious challenges, R&I regimes

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https://www.iiiglobal.org/file.cfm/63/docs/keynote%20address%20delivered%20by%20chief%20justice%20sundaresh%20menon.pdf) ("Menon CJ's Speech") at para 3.

[2] Report of the Review Committee of Insolvency Law and Practice (Chairman: Sir Kenneth Cork, GBE) (Cmnd. 8558) ("Cork Report") at paras 196 and 212.

[3] US Government Publishing Office, 11 U.S.C. (accessed at https://www.govinfo.gov/content/pkg/USCODE-2011-title11/html/USCODE-2011-title11.htm).

must be nimble, flexible and bold, and embrace innovation. I hope that the conversation this afternoon will help build consensus on the shape that our R&I regime should take.

II. Challenges of the New World

6 Before we deconstruct the R&I regime that best suits us, let us begin by understanding the operating environment. Let me sketch the terrain. The architecture of global trade has changed significantly. Two main developments have brought about this change.

An increasingly fragmented and polarised world

7 The first is an increasingly fragmented and polarised world. Globalisation has suffered as a result. The primary cause is great power rivalry which has strained the post-World War II rules-based order. The order was seen as a triumph of peace over war. The clarion call of "never again" from nations emerging from the ruins of the war was the *raison d'etre* for global institutions such as the United Nations, the International Court of Justice and the International Criminal Court. The World Trade Organisation ("WTO"), which was formed to shape the world's trading order, was a subsequent manifestation of the same philosophy.

8 But cracks have emerged in the rules-based order. The proliferation of various conflicts around the world evidences this. For one, the war between Russia and Ukraine that begun in 2022 is a breach of Article 2(4) of the United Nations Charter.[4] The conflict shattered illusions of global stability and political self-restraint, and triggered immediate disruptions in the energy markets. Oil and gas were not the only commodities that were hit. Other commodities such as wheat, a major source of food for many nations, were similarly affected.[5] As a result, inflation became a real issue with interest rates being the preferred tool to combat it, pushing up costs of borrowings. Almost overnight, businesses had to grapple with severances of established

[4] This states that "[a]ll members shall refrain … from the threat or use of force against the territorial integrity or political independence of any state". See Statement delivered by Ambassador Burhan Gafoor, Permanent Representative of Singapore to the United Nations, at the 11th Emergency Special Session of the United Nations General Assembly (22 February 2023) (New York) (accessed at https://www.mfa.gov.sg/Overseas-Mission/New-York/Mission-Updates/Plenary/2023/02/20230222) at para 6.

[5] Ashrafee T. Hossain, Abdullah-Al Masum & Samir Saadi, "The impact of geopolitical risks on foreign exchange markets: Evidence from the Russia–Ukraine war" (2024) Finance Research Letters Volume 59) (ISSN 1544-6123) (accessed at https://doi.org/10.1016/j.frl.2023.104750).

supply chains, inflationary pressures, higher borrowing costs and greater volatility in the global markets.

9 There are also other flashpoints. The war in Gaza has reignited concerns over instability in the Middle East. This has ramifications beyond the heart-wrenching humanitarian crisis in Gaza. The war has pushed up the costs of shipping and insurance in view of the perils of navigating the Red Sea and the Gulf of Aden, forcing some commercial shipping to take the longer and costlier route around the Cape of Good Hope. This has implications for trade flow between Asia, and Europe and the Americas, and has increased the costs of financing and insurance substantially.[6]

10 The unfortunate consequence of this unstable geopolitical backdrop is "decoupling". Decoupling is the process by which two or more interconnected economies seek to reduce their mutual dependence on each other. This can mean reducing trade, severing supply chains, and limiting technological cooperation. Ultimately, the objective of decoupling is "derisking". If a country perceives risks arising from its economic dependence on another, decoupling becomes a way to reduce those risks. Such perceived risks may stem not only from geopolitical instability, but also from national security concerns or the need to protect local interests.

11 It is obvious that "decoupling" is antithetical to globalisation and cross-border trade, and indeed economic growth. It may require businesses to find new suppliers, possibly at higher costs and lower reliability, which in turn impacts profitability, and causes delay and disruption.

12 More importantly, access to once-lucrative markets may become heavily restricted or even closed off. These restrictions frequently take the form of regulations and sanctions. For example, the sweeping sanctions which have been imposed by a host of countries on Russia, which include asset freezes on Russian entities, export controls, and restrictions on Russian imports, have created barriers to trade and greater fragmentation in the global economy.

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[6] Bogdan Munteanu, "Immediate Geopolitical and Economic Considerations on the Israel-Hamas Conflict in the First Two Weeks since 7 October 2023" (2024) Vol XXIII(2) "Ovidius" University Annals (Economic Sciences Series) 128 at 130–131.

13 The upshot is this: businesses, which were once used to operating in a largely open-border free trade environment, are now forced to navigate a geopolitical minefield which has immeasurably increased the risk of conducting business. As an EU official poignantly observed at the recent 13th Ministerial Conference of the WTO, "trade will be more and more characterised by power relations rather than the rule of law".[7]

14 It is readily apparent that such a global trading matrix makes business forecasting akin to crystal ball gazing. Investment decisions become difficult to make as assumptions may not hold, even in the short term. Any conflagration or regulatory intervention may change the cost structure and the pricing formula. The resultant impact on profit, cashflow and the balance sheet could lead to casualties. Hence, the importance of a R&I regime fit for purpose.

The heightened focus on environmental concerns

15 The second development is the increasing focus on climate change. The Paris Agreement represents a shared global commitment to combating climate change. It is a clear statement that threats to the environment will be treated as a global public policy issue. This commitment has since been translated into national legislation by the signatories to the Paris Agreement. But implementation is best described as patchy. Some countries have accelerated their transition to net-zero, imposing stringent regulations on industry. Others have been slower to act, offering cost advantages to businesses as a result, but also attracting at the same time a greater risk of "carbon leakage". Collectively, pledges under the Paris Agreement to combat climate change have been criticised as being largely inadequate, with projections reflecting a global increase in emissions even beyond 2030.[8]

16 For businesses operating in this uneven landscape, navigating ESG requirements (both within and across jurisdictions) may be a daunting task. Businesses which rely on outmoded, polluting technologies will undoubtedly struggle to survive in the face of new regulations. These regulations could include rules such as Singapore's carbon tax on greenhouse gas

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[7] Reuters, "Rocky start set WTO talks up for minimal results" (CNA) (2 March 2024) (accessed at https://www.channelnewsasia.com/business/rocky-start-set-wto-talks-minimal-results-4165131).

[8] United Nations Framework Convention on Climate Change, "Climate Plans Remain Insufficient: More Ambitious Action Needed Now" (26 October 2022) (accessed at https://unfccc.int/news/climate-plans-remain-insufficient-more-ambitious-action-needed-now).

emissions applicable to all sectors of the economy.[9] Adapting production methods, investing in green technologies, and ensuring compliance with a patchwork of such regulations may significantly increase costs. Those unable to cope may well end up in distress. In other words, the consequences of the increased focus on ESG requirements could well be the reason why businesses are pushed to restructure.[10]

17 The green movement has also resulted in businesses facing pressure from investor and consumer communities to improve their ESG performance. Consumers are becoming more conscious of the environmental and social impact of their purchases and are choosing to support, at times vociferously, businesses that are committed to sound ESG practices. Lenders and investors are also increasingly looking to transact with sustainable businesses. The rise of green financing – the Singapore-Asia Taxonomy and the US$5 billion COP28 Fast-P platform – is evidence of this. The pressure from stakeholders is making businesses take ESG seriously, in terms of transparent reporting, adhering to the relevant regulations and adapting parts of their businesses. The pressure is seen in the rise in "greenwashing" disputes, which involve claims pertaining to inaccurate statements being made by businesses about the environmental credentials of their products or operations. In Germany, for example, local courts have found misleading statements that various products (such as candles,[11] frozen croquettes[12] and grave lights[13]) were "climate-neutral". These statements left consumers with the incorrect impression that the production and use of such products would not involve carbon emission.

III. Assisting businesses through these challenges

18 This is therefore the landscape. Being an open economy, Singapore is plugged into this ecosystem. The terrain is daunting, and riddled with potential pitfalls and potholes. But there

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[9] Audrey Tan & Toh Wen Li, "Singapore Budget 2018: Carbon tax of $5 per tonne of greenhouse gas emissions to be levied" (19 February 2018) The Straits Times.

[10] Cleary Gottlieb, "Navigating the shifting ESG Risks in Insolvency and Restructuring" (accessed at https://content.clearygottlieb.com/corporate/global-restructuring-insights/navigating-the-shifting-esg-risks-in-insolvency-and-restructuring/index.html).

[11] Regional Court of Düsseldorf's decision on climate neutral claims regarding candles (accessed at https://climatecasechart.com/non-us-case/regional-court-of-dusseldorfs-decision-on-climate-neutral-claims-regarding-candles/).

[12] Regional Court of Frankfurt am Main's decision on company's climate neutral claims regarding frozen croquettes (accessed at https://climatecasechart.com/non-us-case/regional-court-of-frankfurt-am-mains-decision-on-companys-climate-neutral-claims-regarding-frozen-croquettes/).

[13] Higher Regional Court of Koblenz's decision on company's climate neutral claims regarding grave lights (accessed at https://climatecasechart.com/non-us-case/higher-regional-court-of-koblenzs-decision-on-companys-climate-neutral-claims-regarding-grave-lights/).

are opportunities as well. With the right calculations, our businesses will do well. However, miscalculations may mean severe headwinds. How can we support our businesses if that were to happen? To answer this question, we must be clear what we want to achieve with our R&I regime.

19 I offer my thesis. As alluded to earlier, an effective R&I regime ought to encourage a culture of entrepreneurship and innovation balanced by sensible risk taking. Businesses form the lifeblood of commerce. They fuel economic growth and raise living standards. By generating revenue and profits, they create jobs and contribute to the local, national and the global economy through their spending and the multiplier effect.[14]

20 There is therefore much to be gained, at least from a socio-economic standpoint, from incentivising a culture of entrepreneurship and innovation throughout the lifecycle of a business. At the beginning of a business's life, the focus is on obtaining start-up capital and conducting initial market research.[15] The private sector as well as the public sector may be the source of such assistance. For example, the public sector here is already providing such support through the Startup SG Programmes which has various support initiatives for mentorship and capital grants. These initiatives make it easier for entrepreneurs to start businesses.

21 However, it is the other side of the coin, when entrepreneurs are in distress, that the R&I regime becomes fundamental. We must recognise that the risks of business failure (indeed business failure itself) are inherent aspects of the entrepreneurial journey.[16] At the same time, the position of the creditors must not be forgotten. Creditors assume risk by extending credit and may be left facing a non-performing liability if businesses fail.[17] An effective R&I regime must therefore strike the right balance between the debtor and the creditor. It must provide entrepreneurs with the space and the tools to restructure their businesses, if viable, and to efficiently wind-up if not. At the same time, the regime must ensure adequate protection for the interests of creditors.

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[14] See Menon CJ's Speech at para 56.

[15] Industry mentorship is also important to many start-ups – see Francis Kan, "The advice that counts: Why mentoring matters for founders" (CNA) (accessed at https://www.channelnewsasia.com/brandstudio/entrepreneurs-and-industry-leaders-reveal-value-mentorship-powering-their-success-3983706).

[16] Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (20 April 2016) ("DR Report") at para 1.1.

[17] Vanessa Finch, *Corporate Insolvency Law* (Cambridge University Press, 2nd Ed, 2009) ("Finch") at p 9.

IV. Developing a suitable R&I regime

22 In constructing a suitable regime, lessons may be drawn from two main models. It is helpful to understand the benefits and drawbacks of each model in order to appreciate which features of each are best suited to our needs.

Creditor-driven R&I regimes

23 The first model is best described as the creditor-driven model. Regimes adhering to this model prioritise the rights of creditors. These models trace their roots to ancient formulations of insolvency law (such as in Roman law) as primarily collective debt-collection mechanisms favouring creditors.[18] The focus is on ensuring creditors are able to recover as much and as quickly as possible, and debtors are duly "punished" if they fail to discharge their debt obligations. Thus, the objective is primarily the liquidation of assets to satisfy creditors' claims based on a hierarchy of priorities. The rescue of companies may not be a substantive objective of the regime.[19] Accordingly, a more conservative approach is taken towards granting a discharge of debt.

24 Such regimes tend to be trustee-led because of the traditional notion that where a business fails, it is necessary to solicit assistance from the outside in the form of a qualified insolvency professional.[20] The trustee acts independently of the debtor and the creditors and ensures that creditors' interests are considered fairly and collectively. The entire process is managed by the trustee who makes the relevant decisions on how the business's assets should be dealt with or otherwise distributed amongst its creditors.

25 The primary benefit of a creditor-driven model is that claims are satisfied with relative speed in a cost-effective manner. If a restructuring is intended, creditors are generally accorded greater control over the process. In theory, this incentivises the provision of funds to businesses as creditors may be assured of their rights in the event of a default of debt obligations.

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[18] James Sprayregen, "International Insolvency: From Punitive Regimes toward Rescue Culture" (2020) 36(1) Emory Bankruptcy Developments Journal 7 ("Sprayregen") at 7–8.

[19] Janis Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (University of Toronto Press, 2003) at pp 255–256.

[20] Roy Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011) at para 2-07.

26 There are, however, drawbacks. I cite two to illustrate.

27 First, the dominance of creditors' rights may result in an institutional predisposition to winding up as opposed to rehabilitation. This may result in the loss of potential value if the business is viable as a going concern.

28 Second, a trustee-led approach may be justifiable in a winding up, where the primary aim is the distribution of assets among the creditors. However, the rationale for extending the approach to a restructuring is not readily apparent. This is because it cuts out or at least marginalises equity from the restructuring, even though the entrepreneur knows and understands the business. Questions may be asked as to the suitability of an external party, like a trustee, in furthering the aims of the business when he or she may not be familiar with the business climate and the special relationships which the business is situated and operates in. This might be pertinent in Asian economies, where cultural elements and the political setting may influence how business is conducted. This is not to say that an external party will always be inappropriate. But there may be limitations.

29 It is perhaps for these reasons that very few countries presently only offer a strict creditor-driven model.

Debtor-in-possession R&I regimes

30 The second is a debtor-in-possession model. Such models are characterised by a more liberal approach to rehabilitation or preserving the value of distressed businesses as a going concern.[21] Chapter 11 of the US Bankruptcy Code is typically regarded as a forerunner of such debtor-focused models. I will therefore refer to the Chapter 11 framework to illustrate the strengths and drawbacks of a debtor-in-possession model.

31 The US system is characterised by several key features.

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21 Finch at p 278.

32 First, being a debtor-in-possession model, management remains in control, subject to trustees being appointed in certain circumstances.[22] Such control serves as an incentive for the debtor to reorganise.[23] Some commentators have argued that keeping the debtor in possession and giving the debtor the right to propose the plan offers the assurance that the effort in building the business will not be jeopardised by an outside trustee.[24] While this argument captures the essence of the point, the position may not be as binary as it suggests.

33 Second, a worldwide automatic moratorium prevents enforcement actions by creditors.[25] This overcomes the problem of the "anti-commons", which is where blocking actions by individual creditors frustrate the wishes of the majority.[26] While a secured creditor may seek to lift the stay, the moratorium will be upheld if the debtor has provided the creditor with "adequate protection" for its secured interests.

34 Third, subject to safeguards, dissenting creditors may be crammed down when the court approves the reorganisation plan.[27]

35 Fourth, debtor-in-possession financing may be raised. Such financing is accorded priority over unsecured pre-petition debt and administrative expenses, and may also be accompanied by a lien on unencumbered assets or by sharing an existing lien on assets for pre-petition debt.[28]

36 Fifth, prepackaged plans ("prepacks") are a possibility. This opens the door to a pre-negotiated reorganisation between the debtor and its creditors with quick entry and exit from the restructuring process. This saves legal and accounting fees, and minimises the duration of

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[22] It is however possible for the court to appoint a trustee in certain circumstances to replace existing management: see, *eg*, US Bankruptcy Code, 11 U.S.C. §1104(c)(2).

[23] Sprayregen at 8.

[24] John Kong Shan Ho and Raymond Siu Yeung Chan, "Is Debtor-in-Possession Viable in Hong Kong?" (2010) 39(2) Common Law World Review 204 at 206–207.

[25] See US Bankruptcy Code, 11 U.S.C. §362.

[26] Gerard McCormack & Wan Wai Yee, "Transplanting Chapter 11 of the US Bankruptcy Code into Singapore's Restructuring and Insolvency Laws: Opportunities and Challenges" (2019) 19(1) Journal of Corporate Law Studies 69 at 82–83.

[27] See US Bankruptcy Code, 11 U.S.C. §1129(b).

[28] See Sris Chatterjee, Upinder Dhillon & Gabriel Ramirez, "Debtor-in-possession financing" (2004) 28(12) Journal of Banking & Finance 3097.

the R&I proceedings, especially where the debtor has a small number or limited class of creditors.[29]

37 A model that prioritises restructuring, such as the US debtor-in-possession regime, has the benefit of keeping the business operational. This protects the value of intangible assets such as customer relationships, intellectual property and workforce expertise, and increases job retention. In general, such a model is value-retentive if not value-accretive, as it gives the business an opportunity to salvage itself from its financial mire rather than be dismantled and sold in a liquidation exercise. Creditors and shareholders may well be able to ride the upside from a successful rehabilitation.

38 On the other hand, criticisms of the debtor-in-possession model include the delays that may arise. For example, extensions of time are frequent in the US regime, and it is usual for creditors to be held at bay for one or more years.

39 More importantly, debtor-in-possession regimes may raise concerns that present management (which was arguably responsible for the business's descent into distress) is allowed to remain in control. This means that the debtor may potentially present misleading pictures of the business's health and abuse the flexibility accorded to the debtor for illegitimate purposes.[30]

Lessons for Singapore?

40 So what are the lessons for Singapore? How does our R&I regime stack up amidst all of this? Our regime has traditionally involved elements characteristic of a creditor-driven model.[31] The general focus was on a trustee-led R&I process and strong oversight by the courts. The judicial management regime is an example of this. It is fair to say that until the reforms in 2017,[32] Singapore did not have an identifiable debtor-in-possession restructuring model. Before 2017, through the ingenuity of the market, the scheme of arrangement in s 210 of the Companies Act 1967 (2020 Rev Ed) was adopted and adapted as a proxy for a debtor-in-

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29 Grace Luppino & Robert Smith, *Bankruptcy Law and Practice* (Pearson Publishing, 2016) at p 95.

30 Finch at p 286.

31 See Wee Meng Seng, "The Singapore Story of Injecting US Chapter 11 into the Commonwealth Scheme" (2018) 15 European Company and Financial Law Review 553 ("Wee Meng Seng") at 559.

32 These reforms were implemented by way of the Companies (Amendment) Act 2017.

possession model. While it achieved success as a restructuring tool, it had operated on the "barest minimum" of statutory provisions, as noted by a leading academic.[33] This should not be a surprise as the regime was not originally designed as a pure restructuring tool.

41 Thus, the question that faced the Committee which considered the 2017 reforms was whether a bespoke debtor-in-possession regime should be created or the existing scheme of arrangement be adapted and improved to address its shortcomings and serve as an effective restructuring platform. The second option was taken for two reasons. First, the market's familiarity with the scheme of arrangement as a restructuring tool. There was really no need to reinvent the wheel. Second, and more importantly, the inherent flexibility of the scheme of arrangement as a restructuring platform was regarded as important in customising solutions. Consequently, a potent platform was created by grafting onto the scheme of arrangement certain features of the US Chapter 11 regime, with appropriate modifications in some instances. This was not a perfect platform, but it was a really good start.

42 These features included an automatic 30-day moratorium,[34] which might be extended by the court on terms, depending on the level of creditor support and the fulfilment of notification[35] and disclosure requirements.[36] The requirement of relevant creditor support for moratorium relief was significant as it sought to balance the competing interests at play. The moratorium could be extended by the court to entities related to the debtor that were relevant to the restructuring plan (such as other companies in the same group) – a recognition that businesses today frequently operated as corporate groups.[37] Although Chapter 11's extra-territorial moratorium was not adopted, the court was given the power to grant injunctive relief against the pursuit of foreign proceedings by creditors, subject to such terms as the court may impose.[38] This is almost like an anti-suit injunction. The reforms also adopted the prepack mechanism[39] as well as rescue financing with "superpriority" and "superpriority" lien features.[40] The cram-down system was introduced as well, though significantly without providing for the wipeout of equity.

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33 Wee Meng Seng at 561–562.
34 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"), ss 64(8) and 64(14).
35 IRDA, s 64(3).
36 IRDA, ss 64(4) and 64(6).
37 IRDA, s 65; *Re IM Skaugen SE and other matters* [2019] 3 SLR 979 ("*Re IM Skaugen*") at [63].
38 IRDA, s 64(5).
39 IRDA, s 70.
40 IRDA, s 67.

43 These reforms have moved our regime along the spectrum toward a sound debtor-in-possession regime aimed at encouraging the rehabilitation of viable businesses. Entrepreneurs now have a solid platform to restructure their business and preserve their equity. But this does *not* mean that the interests of creditors have been compromised. The court remains the steward of the entire restructuring process, ensuring that the right balance is struck between the interests of the various stakeholders in each case. Pertinently, the court-ordered moratorium is granted subject to terms, such as ring-fencing of cash and appointing an external party to exercise oversight over the debtor.[41] Such a party could be akin to a Monitor (which is what is used in Canada) or a Chief Restructuring Officer. This means that the court retains the power to control the debtor's behaviour by customising a framework that is appropriate for the given case. The debtor may be left in possession, but the debtor is not unpoliced. We have therefore adopted a **court-led pro-restructuring approach** which seeks to foster rehabilitation while ensuring the interests of creditors are well-protected. I must emphasise that this is neither a pro-debtor nor a pro-creditor regime. It is a pro-restructuring regime. We must be careful not to conflate a debtor-in-possession regime with a pro-debtor regime. To conflate is to confuse.

44 The key question, then, is this: is the present regime robust enough or do we need to make changes to deal with the challenges facing the world today?

45 On the one hand, it is easy to suggest that our current regime is robust. It is recent and therefore may be regarded as current. On the other, the challenges today are new and novel, and indeed, unprecedented in scale and complexity. While the 2017 reforms are a nod in the direction of an entrepreneurial culture and recognises that the entrepreneur should not be cut out of the restructuring conversation, we must ask ourselves at regular intervals and whenever the occasion demands what more we can do to improve.

46 To this end, I raise for consideration some suggestions.

47 The first relates to the concept of fault. The two models which I have described have distinct views on fault. For creditor-driven regimes, insolvency and restructuring is regarded as a sign of failure. This stigma is also associated with wrongdoing on the part of management,

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41 *Re IM Skaugen* at [93].

whether justified or otherwise. In debtor-focused regimes, however, business failure is seen as a misfortune rather than the result of wrongdoing, unless the facts suggest otherwise.[42] The choice we make will convey what we believe is the right attitude towards business risk and failure.

48 In my view, there is a need to move away from the perception that business failures are necessarily tied to wrongdoing or poor management. The taking of risks is fundamentally an incident of doing business. These risks may materialise for a host of reasons, many of which may be beyond the entrepreneur's control. An effective R&I regime should thus distance itself from any stigma associated with business failure, while at the same being prepared to act resolutely if wrongdoing is shown.

49 Second, rescue financing is critical in a restructuring. Traditional lenders such as financial institutions are, however, generally reluctant to extend funding as they may be limited by regulation and capital adequacy ratios. Alternative sources of funding in the shape of private equity, venture capital funds and distressed debt funds are therefore important if not critical.

50 These funds are often the primary source of funding for distressed companies.[43] They invest in the debtor's capital structure or purchase assets from companies in distress. They should be welcomed, albeit with the appropriate safeguards.

51 For such sources of funding to work, a strong debt trading market is needed. This will allow financial institutions to sell their debt efficiently to these funds. A healthy debt trading market will also enable the efficient trading of debt between funds by creating the supply and demand dynamics which will enhance transparency on pricing and risk, and allow for accessible entry and exit.[44] Taking the US as an example, the defaulted and distressed debt market between 2004 and 2013 has been estimated at between US$500 billion and close to US$1 trillion each year.[45] With a healthy debt trading market, funds and financial institutions

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[42] Gabriel Moss, "Chapter 11: An English Lawyer's Critique" (1998) 11 Insolvency Intelligence 17 at 18.

[43] Global Restructuring Review, "Investment Fund Activity in US Debt Restructurings" (accessed at https://globalrestructuringreview.com/review/restructuring-review-of-the-americas/2024/article/investment-fund-activity-in-us-debt-restructurings).

[44] Edward Altman, "The Role of Distressed Debt Markets, Hedge Funds and Recent Trends in Bankruptcy on the Outcomes of Chapter 11 Reorganizations" (2014) 22 American Bankruptcy Institute Law Review 75 ("Altman") at 84.

[45] Altman at 82.

are able to observe the market's assessment of the implied values of the debtor's assets and its future levels of recovery and reorganisation values.[46] However, for a debt trading market to work, traditional lenders must be prepared to trade their debt. I recognise that this may be a shift in some instances for historical and cultural reasons, but I believe that it is a change that financial institutions must make.

52 Third, a greater emphasis on out-of-court workouts and turnarounds as rehabilitative options is warranted. The Asian Business Law Institute and the International Insolvency Institute have done some fine work on out-of-court workout tools with the 2023 publication, the "*Guide on Conducting an Out-of-Court Workout in Asia*". The Guide is available online and best of all for free. Businesses and professionals will do well to reference the Guide. As for turnaround, this is typically a pre-insolvency informal action taken by a business that has gone through a period of poor performance. The objective is to identify the problem and implement a problem-solving strategy with the assistance of professionals. On the other hand, a restructuring is commonly, not always, a formal process where the focus is on the capital structure of the company. It happens further down the slope of a business's financial health. Some may regard turnaround as seamlessly fusing into a restructuring but the point I make remains regardless. Turnaround is an attempt to identify the problem early or at least earlier and nip it in the bud. Acting early by seeking help and accepting professional advice may often prove to be a much better and less disruptive option than entering into a formal process. Taking the medicine early is not just a matter of economic prudence. It is also critical to director's duties as the important judgment of the Court of Appeal in *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)*[47] which was released this morning explains.

53 Fourth, with the Paris Agreement and ESG issues increasingly raising public policy considerations, attention must be given to navigating the intersection between climate change and restructuring. Must a restructuring plan be "ESG-compliant" before it is sanctioned by the court, even if the plan has the required level of support? Should the court direct an ESG audit before granting the plan its *imprimatur*? Should rescue financing be green? Would a plan with significant ESG issues raise public policy considerations under Article 6 of the UNCITRAL

[46] Altman at 79.
[47] [2024] SGCA 10.

Model Law on Cross-Border Insolvency (the "Model Law")? These are perhaps open questions at present, but that may not be so in the future.

54 Fifth, jurisdictional arbitrage is one of the main thorns in global restructuring. This must be addressed, and one way of doing so is to encourage a confluence of philosophy. Communication and cooperation between courts is an important aspect of this as recognised by the Model Law. The Judicial Insolvency Network (the "JIN") is a critical milestone in this regard. I am glad that the Supreme Court took the initiative in 2017 to bring together judges from leading jurisdictions to form the network with the mission of finding solutions to the management of cross-border issues. The JIN Guidelines – the JIN's first publication – has been adopted by 18 jurisdictions – the Bahamas in December 2023 being the most recent – and is now cited and used in many restructurings globally, the most recent of which was in the Netherlands involving concurrent proceedings in the US. The JIN remains very active. A recent project is on the often overlooked and infrequently deployed alternative dispute resolution mechanisms, such as mediation and arbitration, in cross-border insolvencies. The JIN is a fine example of thought leadership from the Bench. But more such initiatives are needed.

55 Finally, even with the right R&I tools and financing options, a holistic ecosystem is necessary to achieve good restructuring solutions. Such an ecosystem has certain attributes - a robust legal system and rule of law framework, a strong judiciary, a vibrant financial market, a pool of excellent legal and allied professionals, and a cost-competitive infrastructure.[48] Jurisdictions with such an ecosystem are described as nodal jurisdictions (or lead centres). I would argue that selecting the right nodal jurisdiction is part of the evaluative exercise of identifying the right restructuring solution. I have described this in other speeches as good forum selection, and advocated for a philosophy that embraces this.[49]

56 Singapore is a nodal jurisdiction as it has many if not all of the attributes I have described. In particular, the Singapore International Commercial Court (the "SICC") is a strong forum for the restructuring of cross-border debt obligations. Three aspects are pertinent. First, the strength of the Bench for R&I matters. The appointment of two eminent jurists from the US to the SICC Bench as International Judges, namely Justices James Michael Peck and

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[48] Kannan Ramesh JAD, "Party Autonomy and the Search for Nodal Jurisdictions" (Speech on 6 February 2021) ("Ramesh JAD's Speech") at para 12.

[49] Ramesh JAD's Speech at paras 3 and 7.

Christopher Sontchi underscores this. They bring with them a wealth of experience in the management of some of the most complex insolvencies, including Lehman Brothers. Second, the possibility of foreign counsel appearing in the SICC in restructurings with a significant foreign element, subject to leave of court. This is an important step, and it recognises that cross-border insolvencies today raise difficult choice of law issues. Third, Singapore's existing alternative dispute resolution frameworks, such as mediation and arbitration, provide the SICC with more options to resolve issues arising in R&I proceedings.[50]

V. Conclusion

57 In conclusion, I hope that this afternoon's conversation will shine the light on the considerations relevant to the building blocks of a well-rounded R&I regime that is fit for our purpose. Balancing protection and potential, risk and reward, is at the heart of this ongoing challenge. We must decide – based on the prevailing global challenges, existing commercial realities and societal needs – where in the spectrum between a creditor-driven and debtor-focused model Singapore should be.

58 I have argued that a debtor-in-possession regime based on the scheme of arrangement is the most suitable for our purposes, provided the safeguards are robust and the court's supervision is scrupulous. The flexibility of the scheme of arrangement and the moratorium allows the court and the parties to customise the appropriate solutions to respond to a business failure in a fluid global climate. The endgame is to achieve economic growth by encouraging and supporting entrepreneurship and innovation. To all entrepreneurs, you will do well to remember the words of Anais Nin – "Life shrinks or expands in proportion to one's courage."

59 I look forward to hearing the perspectives which will be raised during the panel discussion and the Q&A session to follow.

60 It has been an absolute pleasure. Thank you very much.

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[50] DR Report at paras 3.66–3.67.