Committee to Strengthen Singapore as an International Centre for Debt Restructuring

Report of the Committee

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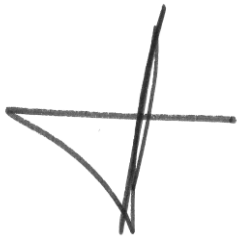

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Introduction

1. In the present economic climate, insolvencies and restructurings in the Asia Pacific region are increasing. Global corporate defaults have hit their highest levels since the global financial crisis in 2008 and regional law firms have reported a significant increase in insolvency and restructuring work in the past two years[1].

2. At the same time, insolvency and restructuring work has been impacted by globalisation, as many businesses today have assets overseas and international operations. This results in complex issues that cross jurisdictional boundaries and require a significant amount of expertise and co-ordination. For practical reasons, including efficiency, the bulk of the work relating to such insolvencies and restructurings are commonly co-ordinated from one 'lead' centre.

3. Within the Asia Pacific region, Singapore is a lead centre for international debt restructuring, mainly because it is already a major financial, legal and business hub. Singapore provides businesses in the region with a convenient base which combines efficiency, expertise and a clear and certain legal framework, from which to co-ordinate a multi-jurisdictional restructuring.

4. The Committee to Strengthen Singapore as an International Centre for Debt Restructuring ("Committee") was tasked with recommending initiatives and/or legal reforms that should be undertaken to enhance Singapore's effectiveness as a centre for international debt restructuring. The Committee has completed its work and presents this report.

Executive Summary of Recommendations

5. To strengthen Singapore as an international debt restructuring centre, the Committee has made 17 recommendations[2] which can be grouped into 3 broad categories:

   (a) enhancing the legal framework for restructurings;

   (b) creating a restructuring friendly ecosystem; and

   (c) addressing the perception gap.

[1] See *Singapore lawyers warn of 1998-like pain as debt defaults spread,* Straits Times 23 February 2016 (available at: http://www.straitstimes.com/business/economy/singapore-lawyers-warn-of-1998-like-pain-as-debt-defaults-spread)

[2] A full list of the Committee's recommendations can be found at Annex 1.

I. Enhancing the Legal Framework for Restructurings

Create bespoke rules and procedures for restructuring

6. To ensure that Singapore's legal framework for restructuring is quick, cost-efficient and delivers high certainty of outcomes, the Committee recommends that processes and procedures be developed for the judicial management and scheme of arrangement frameworks (see recommendation 3.1).

7. Such processes and procedures should include the following (see recommendation 3.2):

   (a) *List clear circumstances where court can take jurisdiction*: Provide a non-exhaustive list of factors that the court can take into account to determine whether a foreign debtor can come to the Singapore Courts for a restructuring (see recommendation 3.2.a);

   (b) *Enhance moratoriums for restructuring*: Automatic moratoriums can be given in support of restructurings and these moratoriums can have *in personam* worldwide effect and be extended to a debtor's related entities (see recommendation 3.2.b);

   (c) *Require disclosure of information*: A debtor should be required to provide adequate information during the restructuring process to allow stakeholders to make informed decisions about the restructuring plan (see recommendation 3.2.c);

   (d) *Consolidate proceedings before a single judge*: Insolvency and restructuring proceedings of a group of related entities should be consolidated and heard before the same judge, and this judge should be kept aware of non-insolvency proceedings so that he has greater visibility of what is happening across the group (see recommendation 3.2.d);

   (e) *Facilitate pre-packaged restructurings*: Allow the fast tracking of pre-negotiated restructuring plans between the debtors and major creditors (see recommendation 3.2.f); and

(f) *Enhance recognition and enforcement of Singapore restructurings*: Singapore should promote the adoption of the Model Law[3] globally and enter into bilateral or multilateral level agreements on recognition of insolvencies and restructurings and cross-border insolvency protocols (see recommendation 3.2.e).

An effective court for restructurings with a deep bench of specialist insolvency judges

8. Singapore must also ensure that its courts are an effective platform for hearing restructuring cases.

9. To enhance consistency and predictability of judgments in restructurings, these cases should be heard by insolvency specialist judges or international judges[4] (see recommendations 3.3, 3.4 and 3.5). These judges should take an active case management approach, to assist in steering stakeholders to successful outcomes (see recommendation 3.6).

Increase use of Alternative Dispute Resolution processes

10. Alternative Dispute Resolution ("ADR") can result in significant costs savings and judges hearing restructurings should encourage stakeholders to consider ADR (see recommendation 3.7). Local ADR institutions can capitalise on this by developing rules for insolvency and restructuring and strengthening their panels with insolvency specialists (see recommendations 3.8 and 3.9).

II. Creating a Restructuring Friendly Ecosystem

Increase availability of rescue financing

11. Rescue financing is not readily available in most countries and the availability of rescue financing in Singapore may be a determinative factor in choosing to conduct restructurings in Singapore. Increasing the availability of rescue financing in Singapore can be accomplished by:

(a) Introducing provisions for super-priority liens (priority over existing security) (see recommendations 4.1 and 4.2);

[3] The 1997 UNCITRAL Model Law on Cross Border Insolvency.
[4] International judges are non-Singapore judges appointed to the Singapore International Commercial Court.

(b) Attracting specialist investors who invest in distressed debts to Singapore (see recommendation 4.3); and

(c) Greater promotion of existing incentives can be undertaken (see recommendation 4.4).

Strengthen quality of insolvency professionals based in Singapore

12. While Singapore already has an existing pool of diverse restructuring professionals, steps should be taken to strengthen the skills of Singapore-based insolvency professionals. This may be effected through education, continuing professional development and multi-disciplinary training, to grow this pool and deepen expertise in handling complex cross-border restructuring work (see recommendations 4.5 and 4.6).

III. Addressing the Perception Gap

13. *Closing the perception gap:* The benefits of conducting a debt restructuring in Singapore needs to be communicated to the wider international restructuring community (see recommendation 5.1).

14. *Raise international awareness of Singapore's restructuring capabilities*: Singapore-based professionals, judges and academics can increase their involvement in international insolvency organisations, organise or speak at conferences, or conduct research on cutting edge issues in this field (see recommendation 5.2).

Creating an environment which facilitates restructurings

15. The Committee is of the view that these recommendations as a whole will help enhance Singapore's position as a leading regional and international centre for debt restructuring that meets the restructuring needs of the region.

Chapter 1: The Committee to Strengthen Singapore as an International Centre for Debt Restructuring

(A) Background

1.1 Business failure is a commercial reality and insolvency regimes have been developed to address such failures. A good insolvency regime facilitates efficient division and distribution of a debtor's assets while balancing the interests of the various stakeholders. A modern insolvency regime also offers a distressed debtor, its creditors and other stakeholders the option to restructure and rescue the business.

1.2 A restructuring generally involves a proposal which alters the creditors' interests and rights in a financially distressed business, often through renegotiation of the terms of debt. This could include a reduction of the debts owed. A restructuring, where successful, benefits the parties involved. Debtors are able to continue as a viable business, while creditors are able to obtain better recoveries than in liquidation.

1.3 As business structures and financial transactions become increasingly complex, there is a continuing need to maintain the relevance of Singapore's insolvency and restructuring regime.

1.4 To this end, the Ministry of Law formed an Insolvency Law Review Committee (the "**ILRC**") comprising insolvency practitioners, academics and stakeholders in December 2010 to review Singapore's bankruptcy and corporate insolvency regimes.

1.5 The ILRC delivered its report with recommendations for reform on 4 October 2013 (the "**ILRC Report**"), which the Government broadly accepted in its response issued on 6 May 2014. The ILRC Report included recommendations to enhance the corporate rescue mechanisms commonly used in Singapore for restructuring (i.e. judicial management and schemes of arrangements). The ILRC Report also suggested that Singapore adopt the UNCITRAL Model Law on Cross-Border Insolvency (the "**Model Law**"), as this would provide a clear and internationally recognised framework for resolving cross-border insolvencies[5]. These recommendations are expected to be enacted in the upcoming Omnibus Insolvency Bill. With the completion of the ILRC Report, the demand for restructuring services in the region was also recognised in view of the growth of restructuring work in the Asia Pacific region.

[5] See ILRC Report, Chapter 11, paragraph 28.

1.6 With a view to addressing this demand, on 8 May 2015, Mr K. Shanmugam, the Minister for Law, appointed a Committee to Strengthen Singapore as an International Centre for Debt Restructuring (the "**Committee**") co-chaired by Senior Minister of State, Ministry of Law and Ministry of Finance, Ms. Indranee Rajah and Judicial Commissioner Kannan Ramesh. The Committee was tasked with recommending initiatives or legal reforms that should be undertaken to enhance Singapore's effectiveness as a centre for international debt restructuring.

(B) Scope of the Committee's Work

1.7 The Committee's work spanned the period of May 2015 to March 2016. The Committee set out to consider how Singapore can further enhance its processes and support for consensual international debt restructurings[6] taking place in Singapore, particularly where foreign debtors and their creditors use Singapore as their lead jurisdiction in cross-border restructurings.

1.8 The Committee consulted industry stakeholders through focus group sessions, and also engaged other stakeholders, including the deans and other academics from the law and business schools of the local universities, retired US bankruptcy judges, the Singapore International Arbitration Centre and the Singapore International Mediation Centre[7].

1.9 The recommendations made in this report identify potential strategies to support Singapore's continuing development as a centre for international debt restructuring in the region. These recommendations are made in the wider context of other existing measures by the Government, institutions and the industry to promote the restructuring industry and related legal, professional and financial sectors.

(C) Composition of the Committee

1.10 The Committee comprised the following members:

(1) Ms. Indranee Rajah, Senior Minister of State, Ministry of Law and Ministry of Finance (Co-Chairperson);

(2) Mr. Kannan Ramesh, Judicial Commissioner, Supreme Court of Singapore (Co-Chairperson);

[6] The Committee regards "consensual international debt restructurings" as cases where the foreign debtor elects to carry out the restructuring in a foreign jurisdiction and a significant majority of its creditors are similarly supportive.

[7] See **Annex 2** for a list of stakeholders with whom the Committee consulted to prepare this Report.

(3) Mr. Han Kok Juan, Deputy Secretary, Ministry of Law[8];

(4) Ms. Joan Janssen, 2Director-General of the Legal Group, Ministry of Law;

(5) Mr. Kenneth Goh, Director, Community Legal Services Division, Ministry of Law;

(6) Mr. Cosimo Borrelli, Managing Partner, Borrelli Walsh;

(7) Mr. Lee Eng Beng S.C., Managing Partner, Rajah & Tann LLP;

(8) Mr. Sushil Nair, Director, Drew & Napier LLC;

(9) Mr. John Richards, Partner, Allen & Overy LLP;

(10) Mr. Manoj Sandrasegara, Partner, WongPartnership LLP;

(11) Mr. Tam Chee Chong, Regional Managing Partner, Deloitte & Touche LLP;

(12) Mr. Nicky Tan, Chief Executive Officer, nTan Corporate Advisory Pte Ltd;

(13) Mr. Tan Buck Chye, Executive Director – Group Special Asset Management, United Overseas Bank Limited;

(14) Mr. Edwin Tong S.C., Partner, Allen & Gledhill LLP;

(15) Mr. Duncan van der Feltz, Head, Group Special Asset Management, ASEAN, Standard Chartered Bank;

(16) Mr. Bernard Wee, Executive Director, Financial Markets Development Department, Monetary Authority of Singapore; and

(17) Mr. David Zemans, Partner, Milbank, Tweed, Hadley & McCloy LLP.

[8] Mr. Hong Yuen Poon, as Deputy Secretary, Ministry of Law, acted as Committee Member up till 31 October 2015; Mr. Han Kok Juan, Deputy Secretary, Ministry of Law, acted as Committee Member thereafter.

Chapter 2: Singapore as a Centre for International Debt Restructuring

(A) Restructuring in the Region

2.1 In the present economic climate, insolvencies and restructurings in the Asia Pacific region are increasing. Global corporate defaults have hit their highest levels since the global financial crisis in 2008 and regional law firms have reported a significant increase in insolvency and restructuring work in the past two years[9].

2.2 At the same time, insolvency and restructuring work has been impacted by globalisation, as many businesses today have assets overseas and international operations. This results in complex issues that cross jurisdictional boundaries which require significant coordination. For practical reasons, including efficiency, the bulk of the work relating to such insolvencies and restructurings are commonly co-ordinated from one 'lead' centre.

2.3 Certain locations such as New York and London have emerged as leading restructuring centres, where the bulk of co-ordination and restructuring work is conducted and thereafter implemented globally. New York and London are both examples of forums which have been successful in attracting restructurings where the key stakeholders have little or no connection to their jurisdiction.

2.4 Within the Asia Pacific region, Singapore has co-ordinated significant regional restructuring cases (or a significant proportion of the work involved) as it provides regional businesses with a convenient base which combines efficiency, expertise, and a clear and certain legal framework from which to conduct a restructuring.

(B) Singapore is Well-Positioned to Meet the Region's Debt Restructuring Needs

2.5 In addition to its general advantages such as its geographical location at the heart of Asia, modern infrastructure and global connectivity, Singapore has several specific strengths that make it the natural choice for businesses undergoing cross-border debt restructurings in the Asia Pacific region.

[9] See *Singapore lawyers warn of 1998-like pain as debt defaults spread,* Straits Times 23 February 2016 (available at: http://www.straitstimes.com/business/economy/singapore-lawyers-warn-of-1998-like-pain-as-debt-defaults-spread)

2.6 First, Singapore is already a jurisdiction where significant regional restructuring work takes place[10]. Singapore therefore has the advantage of being able to build on and scale up its existing role as a centre for regional restructuring work.

2.7 Second, as a leading financial centre in the region, numerous banks and other financial institutions[11] from around the globe have a presence in Singapore and are consequently subject to the jurisdiction of the Singapore courts. Many of the leading international financial institutions active in Asia have a presence in Singapore.

2.8 Third, Singapore's position as a financial centre facilitates commercial lending to businesses in the region. Such connections created at the point of debt origination favour Singapore as the ideal restructuring venue. Additionally, as Singapore is a major gateway for international businesses' trade and investments into the region, connections to Singapore also arise from the high volume of business transactions conducted through Singapore and from the incorporation of entities in Singapore for investment-holding and/or finance-raising purposes.

2.9 Fourth, Singapore has a strong base of professionals with relevant expertise in insolvency and restructuring. Many Singapore-based insolvency professionals belong to firms that have international links (such as global accounting and law firms), and therefore have access to a network of international experts to meet an increased demand for restructurings conducted in Singapore.

2.10 Fifth, Singapore has a legal system that is modern and comprehensive and its courts are highly regarded. Singapore has established the Singapore International Commercial Court ("**SICC**"), which also caters for disputes which are not governed by Singapore law. In a region where many financing arrangements are still governed by English and New York law, the SICC is uniquely placed to serve the needs of Asia-based disputants.

2.11 Finally, reforms based on recommendations in the ILRC Report are also expected to enhance the effectiveness of these procedures as tools for restructuring. There are two primary restructuring procedures in Singapore – judicial management and schemes of arrangement – both of which are currently found in the Companies Act (Chapter 50). These procedures are based on established equivalents in English law.

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[10] For example, consensual bond and loan restructurings for regional borrowers are often arranged out of Singapore and a number of major regional debt restructurings cases, mainly for Indonesian conglomerates, have been and are co-ordinated out of Singapore.

[11] As at 27 Feb 2016, these include 122 commercial banks, 35 merchant banks, 43 representative offices of banks, 274 registered fund management companies and 525 capital market services licence holders (Source: https://masnetsvc.mas.gov.sg/FID.html)

2.12 Notable reforms relating to judicial management recommended by the ILRC include:

(a) allowing a company to place itself in judicial management without a formal application to court[12]. This will reduce the expense, formality and delay involved in commencing judicial management, and may reduce the stigma of judicial management;

(b) enacting provisions to allow super-priority for rescue financing[13]; and

(c) extending the judicial management regime to foreign companies[14].

2.13 Notable reforms relating to schemes of arrangement recommended by the ILRC include:

(a) enhancing the stay that may be granted under section 210(10) of the Companies Act, which will give debtors who wish to propose a scheme significantly greater protection against creditor action[15];

(b) enacting provisions to allow super-priority for rescue financing for schemes of arrangement[16]; and

(c) enacting "cram-down" provisions similar to those found in the US Bankruptcy Code that will allow schemes of arrangement to be approved, notwithstanding that a class of creditors has not approved the scheme (subject to safeguards to ensure that the dissenting class of creditors are not prejudiced)[17].

2.14 The ILRC recommendations have been accepted by the Government and are expected to be implemented in the near future.

2.15 The recommendations of the Committee build on the ILRC recommendations and propose additional steps that can be taken to enhance Singapore as an international centre for debt restructuring.

[12] See ILRC Report Recommendation 6.5
[13] See ILRC Report Recommendation 6.15
[14] See ILRC Report Recommendation 11.1
[15] See ILRC Report Recommendation 7.1
[16] See ILRC Report Recommendation 7.10
[17] See ILRC Report Recommendation 7.11

Chapter 3: Enhancing Singapore's Legal Framework

(A) Processes and Procedures Specifically Tailored for Restructurings

Summary of Recommendations

- Processes and procedures specifically tailored to promote quick, cost-efficient and certain restructurings should be developed.
- Such processes and procedures should include the following specific aspects:
    - Provisions for the invocation of the Singapore court's jurisdiction over foreign corporate debtors;
    - Provisions concerning stays of creditor action which provide for: (i) the grant of automatic moratoriums in support of restructurings, and (ii) applications for injunctions which have *in personam* worldwide effect, and (iii) application for extension of moratoriums to related entities;
    - Provisions as to the disclosure of information required;
    - Provisions for the consolidation of related insolvency and restructuring proceedings before the same judge;
    - Provisions for increasing the recognition and enforcement of Singapore restructurings; and
    - Provisions for pre-packaged restructurings.

The Case for Restructuring-Specific Rules

3.1 Presently, Singapore's legislative framework for insolvency is still largely focused on the liquidation process[18]. However, liquidation applies only when all else has failed. In today's context, rehabilitation of an ailing business entity is an important

[18] Extensive provisions on liquidation are found in Part X of the Companies Act and the Companies (Winding up) Rules. By contrast, the legislative framework for restructurings is found in Parts VII and VIIIA of the Companies Act for schemes of arrangement and judicial management respectively. These provisions are less comprehensive. Additionally, there is no subsidiary legislation in relation to schemes of arrangement and the subsidiary legislation relevant to judicial management found in the Companies Regulations relates only to basic procedural issues such as the filing requirements for applications to court and the administrative steps to be taken when creditor meetings are convened.

alternative to liquidation and greater attention must be given to rules which enable such a rehabilitation to take place. To optimise the prospects for ailing business entities to achieve rehabilitation, the existing legislative framework for restructurings should be enhanced. In particular, while existing provisions for schemes of arrangement and judicial management have worked reasonably well in practice when applied to restructurings, there is room for improvement in equipping the courts with additional powers and procedural tools to deal with the multitude of increasingly complex issues specific to a restructuring.

3.2 The Committee therefore recommends the development of rules specifically tailored to govern the restructuring process and procedures which:

(a) permit restructurings to be achieved quickly and fairly;

(b) facilitate cost-effective restructuring processes; and

(c) encourage greater certainty in the legal outcomes that can result in a restructuring process.

3.3 The Committee notes that developing rules in the areas set out above are likely to involve legislative amendment, or the issuance of practice directions or circulars. The Committee is of the view that detailed recommendations on exactly where these rules may be promulgated would be unhelpful at this stage and that the Government may consider the most appropriate platform for each rule to be introduced, should it accept the Committee's recommendations.

Invocation of Jurisdiction over Foreign Debtors

3.4 The Committee notes that Singapore case-law requires a foreign debtor to show that it has a clear connection or nexus to Singapore before the courts would be willing to take jurisdiction for purposes of a restructuring[19].

3.5 In order to introduce greater clarity for foreign corporate debtors that want to restructure in Singapore, further guidance should be provided on the factors which the courts will take into account to determine if they have jurisdiction over foreign corporate debtors. This could be accomplished by promulgating rules which clearly set out a list of factors which may be taken into account. To preserve flexibility, the list should not be exhaustive. The Singapore court may still determine that its

[19] In *Re TPC Korea* [2010] 2 SLR 617, it was held that a Korean shipping company whose vessels would dock in Singaporean ports from time to time was not sufficiently connected to Singapore to rely on schemes of arrangement provisions in the Companies Act.

jurisdiction has been invoked even if a foreign corporate debtor does not satisfy any of the factors on the list.

3.6 In developing the list, the Committee considered established criteria from the UK and US[20] approaches. The Committee is of the view that the list of non-exhaustive factors that may be taken into account should include those where the foreign corporate debtor has:

(a) established or moved its head office to Singapore or has registered as a foreign company here;

(b) opened a bank account in Singapore and transferred funds into it;

(c) chosen Singapore law as the governing law for the resolution of disputes arising out of or in connection with the loan or other transaction; and/or

(d) submitted to the jurisdiction of the Singapore courts through its choice of the Singapore courts as the forum for dispute resolution in its loan documentation.

Moratoriums for Restructurings

3.7 A unique feature of Chapter 11 of the US Bankruptcy Code is the nature of the moratorium that restrains the commencement or continuation of any legal and enforcement action against the debtor (the "**Chapter 11 Stay**"). The Chapter 11 Stay is automatically granted to a debtor upon the filing of a petition under Chapter 11 and has extra-territorial worldwide effect[21]. It has been noted that the long arm of the US bankruptcy legislation, coupled with the global economic reach of the US, means that foreign creditors can "*ill-afford to ignore US bankruptcy proceedings*" save where "*their assets or connections in the US are completely non-existent*".[22] The US Chapter

[20] Particularly in the US, where section 109(a) of the US Bankruptcy Code requires that a debtor should have a residence, domicile, place of business or assets in the US, it has been held that foreign debtors whose connections with the US are "*marginal, at most, are eligible to file for restructuring under Chapter 11 of the US Bankruptcy Code upon showing a mere 'peppercorn' of property interests in the US*", see Gerard McCormack, *US exceptionalism and UK localism? Cross-border insolvency law in comparative perspective*, Legal Studies, Vol. 1 36 No. 1, 2016, pp 136 – 162, at p 147 – 148, citing *In re Globo Communicacoes E Participacoes SA* (2004) 317 BR 235. There have been cases, however, where foreign debtors' attempt to invoke the US bankruptcy jurisdiction by transferring funds to banks in the US less than a week prior to the filing of a petition under Chapter 11 were found to be lacking in good faith and dismissed. See, for example, *Re Yukos Oil Co* (2005) 321 BR 396

[21] See sections 362 and 541 of the US Bankruptcy Code. See also the US cases, such as *Hong Kong & Shanghai Banking Corp v Simon (In re Simon)* (1998) 153 F. 3d 991, which have interpreted the US Bankruptcy Code to have extra-territorial effect in respect of an estate property because section 541 expressly includes all of a debtor's property regardless of geographical location.

[22] Gerard McCormack, *US exceptionalism and UK localism? Cross-border insolvency law in comparative perspective*, Legal Studies, Vol. 1 36 No. 1, 2016, pp 136 – 162, at p 149

11 Stay is thus particularly helpful in preventing creditor action which might frustrate a restructuring.

(1) Automatically arising

3.8 In Singapore, an automatic moratorium against creditor action arises when a judicial management application is made[23]. However, in schemes of arrangement, there must be a specific application for a moratorium[24]. The Committee notes that the ILRC considered and declined to recommend that the moratorium in schemes of arrangement be triggered automatically upon the filing of an application for an order to call a meeting of creditors to consider and approve a scheme[25]. In declining, the ILRC noted that an automatic moratorium could lead to abuse. Obtaining a moratorium, or at least an interim order pending the hearing of an application for a moratorium under section 210(10) of the Companies Act, is relatively easy and quick.

3.9 In the Committee's view, the procedure for obtaining an interim moratorium should be streamlined by providing that the moratorium arises automatically upon the filing of an application for a moratorium under section 210(10) of the Companies Act.

3.10 To safeguard against abuse, the Committee recommends the following:

(a) when an application for moratorium is made to the court, notice of the application should be published in the same manner as is required for the publication of the notice of an application for judicial management order[26];

(b) basic information to be provided with the application should include:

(i) a brief description of the scheme which the applicant intends to propose;

(ii) evidence of support for the moratorium from creditors of sufficient importance to the restructuring of the debtor (such as secured creditors whose assets are integral to the operations of the debtor or constitute all or substantially all of the debtor's assets and/or significant unsecured creditors in terms of the value of their debt); and

(iii) a list of the 20 largest non-related unsecured creditors and the size of their claims;

[23] See section 227C of the Companies Act.
[24] See section 210(10) of the Companies Act.
[25] See ILRC Report, Chapter 7, paragraphs 18 to 20.
[26] See section 227B(4) of the Companies Act.

Absent any such information or where there is failure to give full and frank disclosure of material matters, creditors and other interested parties may apply to court to lift the automatic moratorium; and

(c) this automatic moratorium shall be limited to a period of only one month from the filing of the application. If a longer period of moratorium is required, the debtor may apply to court for an extension of the period. It is expected that more stringent requirements would need to be satisfied for an extension of the moratorium.

(2) In personam worldwide effect

3.11 The Committee notes that the ILRC also considered and declined to recommend provisions for moratoriums in judicial management or schemes of arrangement to have extraterritorial scope. Instead the ILRC was of the view that it would be sufficient to rely on existing English case-law which allows courts to grant injunctive relief against the pursuit of foreign proceedings by creditors in cases where the creditors have been guilty of oppressive, vexatious or otherwise unfair or improper conduct[27].

3.12 The Committee agrees that express provisions for extra-territorial moratoriums have limited effect, as they are unlikely to be recognised in foreign jurisdictions[28]. However, the Committee is of the view that there is merit in providing that the Singapore courts may grant injunctive relief against the pursuit of foreign proceedings by creditors who have been guilty of oppressive, vexatious or otherwise unfair or improper conduct in judicial management or schemes of arrangement proceedings. This is because the relief is based on English case-law and the Singapore courts may not necessarily adopt the same position absent specific provisions in this respect.

3.13 In addition, the Committee is of the view that the availability of injunctive reliefs against the pursuit of foreign proceedings by creditors need not be limited to circumstances where the creditor to be restrained has been guilty of oppressive, vexatious or otherwise unfair or improper conduct. This is because the success of a

[27] See ILRC Report, Chapter 6 paragraphs 91 to 96, and Goode, *Principles of Corporate Insolvency Law* (4th Ed.), at p436 to 437.

[28] Singapore courts have held that under common law recognition principles, courts are not bound to recognise stays of proceedings imposed by foreign legislature or a foreign court. See *Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party)* [2014] 2 SLR 815, at [90].

restructuring process very much depends on its effectiveness in staying creditor action, including actions commenced overseas.

3.14 The Committee recognises that there is a natural reluctance to provide for extra-territorial stay of proceedings arising predominantly from the principle of comity amongst States. The Committee suggests that an appropriate balance could be struck by enabling the Singapore courts to grant injunctive reliefs in judicial management and schemes of arrangement proceedings against creditor action so long as the creditors in question are subject to the *in personam* jurisdiction of the Singapore courts. Express provisions for this injunctive relief should therefore allow the Singapore courts to make an order to stay creditors, who are based in Singapore or having sufficient nexus to Singapore such as to invoke the jurisdiction of the Singapore courts, from taking action globally (i.e. similar in nature to the *in personam* effect of an anti-suit injunction). This injunctive relief is useful as it leverages on Singapore's status as an international financial hub and can bind creditors registered in and/or operating from Singapore from taking actions that might frustrate a restructuring.

(3) Extension to entities related to the debtor

3.15 Finally, in addition to considering whether moratoriums should be granted automatically and have extraterritorial effect, the Committee notes that moratoriums in judicial management and schemes of arrangement are only conferred on the debtor. However, given that many businesses organise themselves across a corporate group structure, a restructuring can potentially be frustrated if creditors are able to take action against related corporate entities that are a necessary and integral part of the restructuring plan.

3.16 In the circumstances, the Committee is of the view that moratoriums in judicial management and schemes of arrangement should have the flexibility of being extended to the related entities of a debtor. However, to safeguard against abuse and as the need to protect related entities from creditor action will vary from case to case, an extension of the moratorium to a debtor's related entities should be granted if it is shown that the related entity and/or entities is/are relevant to the restructuring and their inclusion in the moratorium would contribute to its success.

Disclosure of Information

3.17 In addition to the Chapter 11 Stay, another vital plank in the Chapter 11 process is the requirement for debtors to provide adequate information to the creditors. "Adequate information" in the Chapter 11 process is information of sufficient detail to allow a reasonable and typical investor to make an informed judgment about the

restructuring plan, though the exact kind and form of information is left to the discretion of the court[29].

3.18 Such requirements safeguard the interest of creditors as the Chapter 11 process operates on a debtor-in-possession norm, where the debtor's existing management is allowed to continue to run the affairs of the debtor while creditor action is stayed.

3.19 Under the Companies Act, while an applicant is required to include a statement which explains the effect of the scheme, any material interests of the directors and the effect of the scheme on their interests in so far as it is different from the effect on the like interests of other persons, the statement needs to be provided only at the stage when the notice summoning the meeting is sent[30]. Significant time may have lapsed between the filing for a moratorium and the summoning of a meeting of creditors.

3.20 The Committee is thus of the view that an applicant should be required to give disclosure of adequate information from the point of filing its application for a moratorium under section 210(10). However, recognising that disclosure of *all* relevant information at the point of filing is impractical, the level of disclosure required at the point of filing may be confined to disclosure of basic key information about the debtor and the restructuring[31]. If an extension of the moratorium is required, the applicant should provide all such information as may be required by the court to justify the extension. Generally, the degree of disclosure required should be proportionate to the length of time and the scope of related entities in respect of which the moratorium is sought to be extended.

3.21 Having regard to the requirements for disclosure of information in the Chapter 11 process, the Committee recommends that debtors seeking to use a scheme of arrangement to restructure their debts should provide basic disclosure at the point of filing and detailed disclosure by the time the first hearing is scheduled. Such requirements can be modified by the judge hearing the case, who is best placed to consider the complexity of the case and the benefit of additional information to creditors and other stakeholders. However, as a baseline, basic disclosure requirements should include the information referred to in paragraph 3.10(b). Over time, as and when arising, there should also be disclosure of the following:

(a) reports on the valuation of the debtor's significant assets;

[29] See section 1125 of the US Bankruptcy Code.
[30] See section 211 of the Companies Act.
[31] This basic disclosure has been outlined in paragraph 3.10(b) above.

(b) if the debtor acquires property, the debtor shall within 14 days update the court on the acquisition[32]; and

(c) periodic financial reports (based upon the most recent information reasonably available to the debtor) of the value, operations, and profitability of the debtor and each entity in which the debtor holds a substantial or controlling interest[33].

Case Management

3.22 In today's globalised economy, many companies are part of groups of companies (which include subsidiaries or related companies). The restructuring of such companies hence often requires an examination into the affairs of their subsidiaries or related companies. The Committee is thus of the view that effective synergies can be reaped in a restructuring of a debtor with related entities if the debtor notifies the court presiding over the debtor's restructuring proceeding of the existence of any proceedings concerning any of its related entities.

3.23 If proceedings are insolvency related[34], they should generally be assigned to the judge presiding over the main restructuring proceeding. This should apply even if the related entities involved are undergoing different types of insolvency proceedings (e.g. if they are undergoing winding up, rather than judicial management or scheme of arrangement). The judge hearing the main restructuring can then manage the restructuring process and deal with insolvency issues across various group members in a coordinated manner. This also removes the risk of inconsistent decisions in respect of different group members.

3.24 Other related proceedings which do not involve insolvency[35] need not be heard by the judge presiding over the main restructuring proceeding, as this may not necessarily be expedient or cost-efficient. However, in terms of case management, notice of non-insolvency proceedings should be given to the judge hearing the main restructuring. This will afford the judge presiding over the main restructuring proceeding greater visibility of what is happening across the group, as well as the impact that those non-insolvency proceedings could have on the restructuring. Depending on the facts and circumstances, the judge hearing the main restructuring can approach the other

[32] In the US, a similar requirement can be found in the Federal Rules of Bankruptcy Procedure at Rule 1007(h).
[33] In the US, a similar requirement can be found in the Federal Rules of Bankruptcy Procedure at Rule 2015.3(a).
[34] These would include proceedings relating to the restructuring, winding up, and receivership of the related entities.
[35] Which can cover a myriad of proceedings, e.g. derivative actions by shareholders of the debtor's subsidiary, breach of contract involving related companies etc.

related proceedings either by way of close coordination with the judges hearing them or, if necessary, arrange for the other related proceedings to be transferred to him.

3.25 Accordingly, the Committee is of the view that rules should be developed to:

(a) require applicants in a *restructuring* proceeding to notify the court of proceedings concerning any of its related entities;

(b) require the transfer and consolidation of related *insolvency* proceedings before the judge presiding over the main restructuring proceeding; and

(c) permit the transfer and consolidation of *other* related proceedings before the same judge where appropriate, but only at the motion of the court or on the application of the parties.

Recognition and Enforcement of Singapore Restructurings

3.26 For cross-border restructurings conducted in an international restructuring centre, an integral aspect of the restructuring is implementation of the scheme (or plan) overseas, given that significant aspects of the debtor's business are likely to have little or no connection with the restructuring centre. Accordingly, parties involved in restructurings in Singapore will be better served, and Singapore's role as an international restructuring centre will be enhanced, if Singapore restructurings are more easily recognised and enforced overseas.

3.27 The Committee notes that the Model Law is the leading international initiative on the recognition of foreign insolvency and restructuring proceedings. The provisions of the Model Law provide a clear framework for courts to recognise and assist a foreign restructuring and the Committee notes that the ILRC recommended that the Model Law be adopted in Singapore with the appropriate modifications and exclusions. The Committee also notes that Singapore schemes of arrangement have been recognised under Model Law provisions[36].

3.28 However, relying on the Model Law to help enforce a Singapore restructuring globally also has its limitations, as only about 41 jurisdictions have adopted the Model Law to date. In addition, many jurisdictions in this region have not adopted the Model Law and do not have an equivalent legal framework that recognises foreign insolvencies or restructurings, such that a restructuring that is approved by the Singapore courts may not be recognised and enforced in those jurisdictions. This difficulty is one that is not

[36] E.g. the scheme of arrangement in *Re: Blue Ocean Resources Pte Ltd*, OS No. 55 of 2013 was recognised under Chapter 15 of the US Bankruptcy Code.

unique to Singapore, and support should be given to international efforts to increase the adoption of the Model Law and similar frameworks[37].

3.29 In addition to promoting the adoption of the Model Law, the Committee recommends that the Singapore Government explore entering into bilateral or multilateral agreements with other countries for the recognition and enforcement of restructuring proceedings.

3.30 To facilitate quick, efficient and certain recognition and enforcement processes overseas, the Singapore courts could also explore avenues for improved communication and co-operation among foreign courts. The Committee notes that the Singapore courts are already making efforts in this area[38].

3.31 Finally, the Committee notes that there is a growing practice of administrators of insolvency and restructuring proceedings entering into protocols to facilitate co-operation and efficient interaction between insolvency and restructuring proceedings that take place in different countries[39]. These protocols can greatly assist large and complex cross-border restructurings and prevent disputes and claims between estates of insolvency or restructuring proceedings taking place in different jurisdictions. Insolvency professionals based in Singapore should consider adopting these protocols with counterparts in other jurisdictions in appropriate cases. Further support can be given to these protocols if they are sanctioned by the Singapore courts, as this will increase the certainty that the terms of the protocol can be enforced in Singapore.

Pre-Packaged Restructurings

3.32 A pre-packaged restructuring ("Pre-Pack") involves a restructuring plan that is pre-negotiated between the debtor and its major creditors and agreed upon before formal court restructuring proceedings commence. The pre-agreed plan (or Pre-Pack) is then presented to the court for approval at the commencement of court proceedings. Rules governing Pre-Packs serve to facilitate the approval of the restructuring plan fairly, quickly and efficiently.

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[37] These include potential frameworks being developed by UNCITRAL Working Group V on facilitating: (i) the recognition and enforcement of insolvency-related judgments (see A/69/17, para. 155), and (ii) the cross-border insolvency of multinational enterprise groups (A/65/17, para. 259).

[38] See the speech of Chief Justice Sundaresh Menon at Opening of the Legal Year 2016, 11 January 2016 at paragraphs 22 to 25. See also the opening address for the 2016 Global Pound Conference Series 17 – 18 March 2016 delivered by the Chief Justice at paragraph 32.

[39] A detailed history of the cross-border insolvency protocols and model clauses for these protocols can be found in the *UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation* (available at: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2009PracticeGuide.html).

3.33 Pre-Packs are increasingly common as they can generate significant time and cost savings, and have been particularly attractive to large corporate debtors which need to restructure their debts owed to financial institutions in large and complex restructurings[40], or when the restructuring plan needs to be approved quickly to preserve the business operations of the debtor.

3.34 The Pre-Pack mechanism has become a vital part of any modern restructuring framework. The Committee notes that there are two commonly used approaches to Pre-Packs, one from the US and another from the UK.

3.35 In the US, provisions under the Chapter 11 regime facilitate the quick approval of Pre-Pack restructuring plans that are pre-negotiated and where votes on the plan are solicited before the Chapter 11 proceeding is commenced. In such situations, the US bankruptcy courts have powers to count the votes solicited prior to the filing of the Chapter 11 application as if such votes were given after the Chapter 11 application was filed. Additionally, if the requisite majority of creditors have voted in favour of the plan, the court can dispense with the creditors' meeting to approve the restructuring plan[41]. The debtor, however, must give adequate disclosure of the details of the restructuring plan to the creditors and there cannot be an 'unreasonably short' time between disclosure of information and the soliciting of votes[42].

3.36 Without the need for a creditors' meeting, the restructuring plan can be approved and implemented shortly after the Chapter 11 proceeding is commenced. This will allow the company to stay in restructuring proceedings for only a minimal period. It is possible for a Pre-Pack Chapter 11 to be completed within 30 to 45 days, compared to a typical Chapter 11 proceeding which may take up to two years[43].

3.37 In the UK, a Pre-Pack is initiated by placing a company in administration after the restructuring plan is negotiated. Once administration begins, the administrator implements the restructuring plan by selling the business to a new entity which carries on its business operations. This results in a smooth transfer of the business which protects employees from losing their jobs and disassociates the business from the insolvency / restructuring proceeding. The debts of creditors involved in the Pre-Pack are often transferred to the new entity, while unsecured creditors will normally only

[40] For example in the US, between 2009 and 2013, nearly 20% of all Chapter 11 filings in large restructurings (over US$100 million liabilities) were Pre-Packs, see *Altman* at p91 and 104.
[41] See sections 341 and 1125 of the US Bankruptcy Code
[42] See section 1126 of the US Bankruptcy Code
[43] See primer slides to American Bankruptcy Institute's Central States Bankruptcy Workshop (Conducted 11- 14 June 2015); PLC, 'Restructuring and insolvency in the United States: overview', last updated 1 January 2015, available at: http://us.practicallaw.com/7-501-6870?source=relatedcontent#a167794.

receive a pro-rated distribution of the sale proceeds. An administrator effecting a Pre-Pack must comply with strict duties of disclosure to creditors following the sale in a Pre-Pack[44].

3.38 While Pre-Packs are a quick and cost efficient method for conducting a restructuring, they have attracted some criticisms. The speed in which the Pre-Pack process happens has led to concerns that creditors not directly involved in the negotiations may not understand the restructuring plan when they vote. Accordingly, both the US and UK approaches require adequate disclosure of information to all creditors in Pre-Packs. Additionally, concerns have been raised that the quick approval and implementation of a Pre-Pack may only be a temporary fix to a debtor's financial problems and valid objections from minority dissenting creditors may be stifled.

3.39 Notwithstanding these criticisms, the Committee takes the view that a process that facilitates approval of a pre-negotiated restructuring plan quickly and cost effectively is an integral feature in any modern restructuring jurisdiction, and a framework that permits Pre-Packs should be introduced in Singapore.

3.40 In introducing a Pre-Pack regime, the Committee is in favour of the US approach to Pre-Packs for the following reasons:

(a) the US Pre-Pack approach offers greater flexibility in designing a restructuring plan. In contrast, the UK Pre-Pack approach requires the sale of the debtor's business, which may not be possible in some restructurings; and

(b) the US Pre-Pack approach still requires a court to approve the Pre-Pack restructuring plan, as opposed to the UK Pre-Pack approach which is conducted primarily through out-of-court procedures. The requirement for court approval allows a judicial body to act as a gatekeeper to ensure that minority dissenting creditors are treated fairly and serves as a good safeguard against potential abuse.

3.41 The Committee is of the view 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:

(a) permit a debtor to solicit votes from its creditors before filing an application for a scheme of arrangement;

[44] See Statement of Insolvency Practice 16, which is currently being revised in accordance with recommendations from the Report on the Graham Review into Pre-Pack Administration.

(b) require that adequate disclosure be given to creditors in a pre-packaged restructuring and establish a clear standard for this disclosure;

(c) provide that votes solicited prior to the filing of an application for a scheme of arrangement may be counted as valid after the application is filed, provided that there has been adequate disclosure to the creditors; and

(d) allow the court to dispense with the calling of creditor meetings, if the court is satisfied that votes solicited before the filing of the scheme of arrangement application exceed the requisite majority to approve the scheme.

(B) An Effective Court for Restructurings

Summary of Recommendations

- Restructuring proceedings should be heard by a dedicated bench of judges.
- This dedicated bench of judges should have relevant practical experience in managing insolvency and restructuring cases and a good reputation in this field.
- International judges renowned for managing insolvency and restructuring cases can be appointed to the SICC. This would bring additional international judicial expertise to Singapore.
- These judges should take a judge-led approach to managing restructuring cases.

Specialist Judges

3.42 Time is of the essence in restructuring cases. Therefore, besides having specific rules to facilitate restructurings, a dedicated bench of judges should be appointed to manage and decide restructuring cases in an expeditious and efficient manner, with highly consistent and predictable judgments. To this end, it is important that this bench comprises judges who are experienced in managing restructuring and insolvency cases.

3.43 Various leading centres of commerce, such as the US, UK, Hong Kong and Australia, already have dedicated judges assigned to hear restructuring and insolvency cases. In the US in particular, specialised courts dedicated to manage and decide cases commenced under the Bankruptcy Code (which includes Chapter 11 on "Reorganisation") are a longstanding establishment. There is a bankruptcy court for

each judicial district in the country, with each bankruptcy court staffed with several specialist judges and having its own local rules.

3.44 There are several advantages to having a dedicated bench of judges who are experienced in restructuring work ("**Specialist Judges**") to be assigned to hear restructuring cases. The advantages include the following:

(a) specialist judges are likely to exercise discretion more consistently across different cases. This will in turn lead to greater certainty of processes and outcomes;

(b) these judges will be in a much better position to hear and determine restructuring cases in an expeditious manner;

(c) with their years of practical experience in managing restructuring cases, these judges are likely to be more effective in guiding stakeholders towards viable compromises, which should increase the likelihood of a successful restructuring; and

(d) the above advantages would strengthen stakeholders' confidence in the chosen restructuring jurisdiction.

3.45 The Committee is of the view that these advantages establish a strong case for Singapore to dedicate a bench of Specialist Judges to hear and determine restructuring cases. While there appears to be a discernible trend in recent years of restructuring and related insolvency cases being assigned to the same judges, this apparent practice is not manifested in any publication. Accordingly, a deliberate and publicised policy of assigning corporate restructuring and related insolvency cases to a group of Specialist Judges will be helpful in assisting parties choosing Singapore as the lead jurisdiction for a restructuring.

3.46 To augment the pool of local Specialist Judges, leading international restructuring experts may be appointed as International Judges pursuant to Article 95 of the Constitution of the Republic of Singapore to sit in the SICC.

3.47 Such International Judges with specialist restructuring expertise will be of particular importance to parties whose debts are not governed by Singapore law, since the SICC was established in part to attract and facilitate the hearing of disputes governed by foreign law.

A Judge-led Approach

3.48 Typically, corporate restructuring cases tend to be complex. This is because the stakeholders in a restructuring case often have conflicting commercial objectives. While this is most obviously understood when comparing the interests of a debtor with those of its creditors, it must not be overlooked that creditors themselves do not form a homogeneous class as each may have extracted varying degrees of security, if at all, from the debtor. Achieving the ideal result in a restructuring thus often requires the even-handed and careful management and balancing of the varying interests of a hodgepodge of stakeholders. This delicate task can be better carried out if the judge overseeing a restructuring takes a proactive role in managing the proceedings and guiding the stakeholders. For example, the judge can check an influential stakeholder group and prevent that group from unreasonably derailing the restructuring. The judge can also facilitate dialogue between stakeholders and assist them in overcoming their opposing goals to reach a compromise.

3.49 Corporate restructuring cases can be further complicated by cross-border elements which is an increasingly common phenomenon in today's business environment. Judges hearing these cases will often have to deal with not only the domestic legal issues that can arise from the interplay of insolvency law, commercial law and other applicable laws governing the business of the insolvent entity, but also the cross-border legal issues that arise.

3.50 Because of the experience that Specialist Judges would have in the field, they would be well placed to actively oversee a restructuring and, where possible, steer parties towards a successful restructuring. This proactive approach to case management has been taken by judges in the US bankruptcy courts, notably by the US bankruptcy court for the Southern District of New York ("**SDNY Bankruptcy Court**"). It is not uncommon for judges in the SDNY Bankruptcy Court to actively drive a Chapter 11 proceeding forward, such as incentivising stakeholders to formulate a restructuring plan quickly or to use more cost efficient alternative dispute resolution mechanisms such as mediation to resolve disputes.

3.51 The Committee is of the view that Specialist Judges should take a similar 'judge-led' approach to proactive case management when hearing restructuring proceedings, especially in the case of schemes of arrangement proceedings. The advantages of this approach include greater efficiency, greater consistency and greater certainty of processes and outcomes.

(C) Resolving Disputes in Insolvency and Restructuring through Alternative Dispute Resolution Methods

Summary of Recommendations

- Where there are issues and disputes that may be more appropriately and efficiently resolved via alternative methods of dispute resolution such as mediation or arbitration, the judge should be empowered to encourage parties in the proceedings to consider mediation, arbitration or other appropriate alternative dispute resolution processes. As certain issues arising in a restructuring may not be arbitrable, some guidance can be given on the issues that can be referred to arbitration.

- Local mediation and arbitral institutions, such as the Singapore International Arbitration Centre and Singapore International Mediation Centre, should develop and promulgate rules and protocols that cater specifically for insolvency related matters to attract potential users.

- Steps should be taken to strengthen panels of mediation bodies and arbitral bodies to include expert mediators and arbitrators with experience in cross-border restructuring.

3.52 Traditionally, alternative dispute resolution ("**ADR**") processes have not played a big role in restructuring or insolvency proceedings. However, as insolvencies and restructurings have become more complex and more costly, there is a growing trend of employing ADR processes, separately or in combination with the main court proceedings, as a tool to help save costs and time in the resolution of large and complex restructuring proceedings.

3.53 Using ADR in combination with main court proceedings has been particularly successful in the US bankruptcy courts, where procedural rules exist to permit judges in these courts to refer selected discrete issues in insolvency cases to ADR processes such as mediation, voluntary arbitration and early neutral evaluation[45].

[45] Sections 1104 and 1106 of the US Bankruptcy Code confer on the US bankruptcy courts the power to appoint mediators to address discrete disputes. Additionally, the US Bankruptcy Code provides that local courts may promulgate procedures by local rule, see for example, Rule 9019-1 of the Bankruptcy Court of the Southern District of New York which addresses use of mediation, voluntary arbitration and early neutral evaluation in bankruptcy proceedings before this court.

Mediation

3.54 The Committee observes that mediation can be used effectively in restructuring proceedings in the following situations, among others:

(a) to resolve individual creditor disputes with the debtor (in the context of a multi-creditor restructuring);

(b) managing multiple creditor disputes of the same nature ("**Similar Claims Mediation**"); and

(c) achieving consensus in the restructuring plan between the debtor and its creditors ("**Plan Mediation**").

3.55 In Similar Claims Mediation, a mediator is typically appointed to facilitate the resolution of multiple claims with a common nexus of law or fact. An example of this would be the US insolvency proceedings of Lehman Brothers Inc., where a structured mediation protocol led to the expedient resolution of the majority of derivatives related claims[46], resulting in cost and time saving.

3.56 In Plan Mediation, a mediator is appointed to help stakeholders achieve consensus in a restructuring plan or in cases where debtors are subject to dual insolvency proceedings in competing jurisdictions. An example of this occurred in the insolvency of MF Global Holdings Ltd, where mediation resolved potential disputes between insolvency proceedings in the US and the UK and led to substantial assets of the bankruptcy estate (which would have been used to pay fees and expenses that would have arisen from a court based litigation) being distributed to the creditors.

3.57 High profile cases such as the Lehman and MF Global cases demonstrate that there are substantial benefits if mediation is appropriately used in insolvency proceedings.

3.58 The Committee also notes the more widespread use of mediation in Chapter 11 proceedings in the US, especially in large complex cases. For example, between 2000 and 2011, mediation was used in the majority of Chapter 11 cases involving debtors with assets over $1 billion[47].

[46] These claims involved thousands of derivatives contract-related termination disputes and claims involving over 6,000 derivative contracts with 900,000 underlying transactions.

[47] see O' Donnell, '*Transnational Alternatives: Growing Role of Alternative Dispute Resolution in Transnational Insolvency Cases*', ("*O' Donnell*") at p7, available at: http://iiiglobal.org/component/jdownloads/viewdownload/337/5978.html

3.59 The Committee observes that the increased use of mediation in the US appears to be driven by the bankruptcy courts and bankruptcy judges, who play a leading role in encouraging parties to undergo mediation and other ADR processes.

Arbitration

3.60 While the use of arbitration in insolvency and restructuring proceedings has not been as popular as mediation, the Committee notes that there are several types of disputes that arise in restructuring proceedings that would be particularly amenable for resolution by arbitration.

3.61 Types of pre-insolvency disputes between the debtor and creditors where arbitration may be particularly helpful include:

(a) disputes involving cross-border issues, as arbitration would prevent issues from being re-litigated across various jurisdictions; and

(b) complex cases (e.g. disputes involving highly complex financial instruments) where there may be a need for specialist knowledge in the subject area and where it is likely that there will be inconsistent court decisions.

3.62 Arbitration can also be used to effectively resolve issues that arise post-insolvency, including:

(a) resolution of intercompany claims between affiliates across multiple jurisdictions within a large enterprise group;

(b) resolving issues across multiple concurrent insolvency proceedings. For example, where the business of a large multinational enterprise is sold as a going concern, proceeds of the sale have to be allocated across various insolvency proceedings. Arbitration can be used to resolve disputes as to how the distribution of the proceeds of the sale should be done[48]; and

(c) determining a debtor's centre of main interests, to avoid the situation where different jurisdictions claim that the primary administration of a restructuring proceeding should be based in the local forum.

3.63 The advantage that arbitration proceedings have over traditional court based insolvency proceedings is greater enforceability. An arbitral award benefits from the

[48] For example, this would be relevant in claims made between the Canadian, US and UK bankruptcy estates in the insolvency of the Nortel group of companies.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"), which allows enforcement of the arbitral award in over 150 countries. This allows an arbitral award to be enforced in far more countries than the Model Law (which has been adopted by about 41 countries to date) or the European Insolvency Regulation (which applies to 27 of the 28 EU member states). Using arbitration to resolve common issues in different jurisdictions and other transnational issues will prevent inconsistent court decisions across jurisdictions.

3.64 The Committee is cognisant that there are several challenges to using arbitration to resolve insolvency issues:

(a) The first challenge to using arbitration stems from general acknowledgment across jurisdictions that certain 'core' aspects of insolvency law are non-arbitrable[49]. Insolvency issues that are not considered to be a 'core' aspect of insolvency law or 'non-core' issues can be arbitrated. However, there is no consistent approach to the treatment of 'non-core' issues across jurisdictions and an issue that is arbitrable in one jurisdiction may not be arbitrable in another.[50] Courts may therefore reach inconsistent decisions on whether certain disputes referred to arbitration involved 'core' insolvency issues, meaning that the arbitration was commenced inappropriately. This in turn creates a lack of clarity and certainty on whether arbitration of an insolvency issue will be recognised as validly commenced in other countries.

(b) The second challenge is that arbitration is founded on an existence of an agreement to arbitrate between parties. An arbitration clause is normally included in contracts to create the agreement to arbitrate. However, as part of insolvency law, some insolvency officeholders have powers to disclaim / set-aside contracts, and this effectively destroys the agreement to arbitrate.

(c) Third, many insolvency proceedings often involve a stay of legal proceedings between stakeholders in the insolvency, and this includes arbitration. Therefore, it is possible that there will be inconsistent application of the stay of proceedings such that some arbitration proceedings are permitted to continue under one set of

[49] E.g. making of a collective insolvency order such as a winding up order against a company or appointment of an insolvency officeholder in a collective proceeding over the company.

[50] For example in the Singapore, UK and Australia, this issue is left to be decided by case-law. Other jurisdictions, such as the US, have a non-exhaustive list of 'non-core' insolvency issues that are arbitrable. Finally, jurisdictions such as Switzerland have broadly worded statutes that suggest most types of insolvency issues are arbitrable. See Kovacs, R., *A Transational Approach to the Arbitrability of Insolvency Proceedings in International Arbitration*, accessed at: http://www.iiiglobal.org/sites/default/files/transnationalapproachtothearbitrabilityofinsolvencyproceedingsinternationalarbitration.pdf

laws, while another set of arbitration proceedings under a different set of law are stayed.

3.65 Notwithstanding these challenges, the Committee is of the view that arbitration is an alternative tool / procedure which consenting parties can consider employing to provide an alternative means of resolving discrete disputes / issues or groups of disputes / issues within the context of a larger insolvency proceeding.

Increasing use of Mediation and Arbitration in Insolvency and Restructuring proceedings

3.66 Having established that mediation and arbitration can be useful options to resolve disputes arising in insolvency proceedings, the Committee is of the view that mediation, arbitration and other relevant ADR processes should be offered as options to resolve issues arising in insolvencies and restructurings. In this regard, there ought to be statutory provisions which will permit Singapore courts to refer issues arising in insolvency proceedings to ADR processes such as mediation or arbitration.

3.67 Drawing from the experience of the US bankruptcy courts, where judges often play a leading role in encouraging parties to undergo an ADR process, the Singapore court overseeing insolvency proceedings could do the same. This will also be consistent with the Committee's earlier recommendation that the Singapore courts should also adopt a judge-led approach in restructuring cases. In this regard, the Singapore courts are well positioned to take advantage of Singapore's well established ADR infrastructure.

3.68 Additionally, local institutions such as the Singapore International Arbitration Centre, the Singapore International Mediation Centre and the Singapore Mediation Centre can make themselves attractive to potential users by developing and promulgating rules and protocols that cater specifically for insolvency-related matters.

3.69 In addition to developing rules and protocols, the Committee also recommends that Singapore mediation and arbitral institutions look into strengthening their panels by actively seeking out mediators and arbitrators with specialist experience in cross-border insolvency or encouraging more insolvency practitioners to undergo the necessary training to mediate or arbitrate these matters. Having panels consisting of leaders in the insolvency field to mediate or arbitrate insolvency disputes would enhance the attractiveness of using ADR processes to resolve insolvency issues in Singapore.

3.70 With respect to arbitration, the Committee notes that, in light of the challenges to using arbitration in insolvency, it would be prudent to first focus on using arbitration

to resolve issues arising after insolvency proceedings are commenced.[51] Additionally, in order to better facilitate the referral of insolvency issues for resolution by arbitration:

(a) steps can be taken (and if necessary legislative amendments can be made) to provide clarity on insolvency matters or issues that can be referred to arbitration that is in line with existing case-law; and

(b) consent should be obtained from parties to the dispute prior to the referral to arbitration.

[51] See paragraph 3.62 above for examples of issues that arise post-insolvency.

Chapter 4: Creating a Restructuring Friendly Ecosystem

(A) Increasing Availability of Rescue Financing

Summary of Recommendations

- Allow super-priority liens in Singapore.
- The granting of a super-priority lien should be subject to approval from the court as such liens will affect substantial property rights. Additionally, there should be sufficient safeguards to ensure that existing secured creditors are not unfairly prejudiced by a super-priority lien.
- Distressed Debt Funds should be encouraged to establish a base in and operate out of Singapore.
- Singapore offers a range of incentives that apply to rescue financing activity and greater promotion of relevant incentives can be undertaken to increase awareness.

Super-priority liens

4.1 The ILRC Report recommended enacting provisions to allow super-priority for rescue financing[52]. 'Super-priority' is a concept from the US Bankruptcy Code which essentially allows new rescue financing to be repaid before all other administrative expense claims. It forms part of the legislative framework for rescue financing in the US, which is commonly known as debtor-in-possession financing ("**DIP Financing**").

4.2 Super-priority status provides an assurance that the rescue financing will be paid out of the unsecured assets of the borrower first, ahead of unsecured claims and other administrative expenses claims, should the restructuring fail. Obtaining super-priority is almost always sought as part of a DIP financing arrangement and forms a vital plank in the US rescue finance industry.

4.3 Another component of DIP Financing in the US is the provision for super-priority liens. There may be cases where assets of a debtor are already subject to security, and the rescue financier is unwilling to lend rescue financing on a security that is subordinated

[52] See ILRC Report Recommendations 6.15

to other pre-existing security interests. In such cases, the court can authorise a super-priority lien, which allows the debtor to borrow fresh funds which are secured by a superior or equal security to previously encumbered assets. As this interferes with an existing secured lender's rights, the court will require proof that no other rescue financing is available and the interests of pre-existing secured lenders are adequately protected (e.g. the value of the security significantly exceeds the debts owed to the secured lenders).

4.4 The ILRC noted that there were arguments against the granting of super-priority liens[53] and ultimately decided against recommending enacting provisions for super-priority liens.

4.5 The Committee acknowledges the ILRC's reasoning, but the feedback received from key stakeholders from the insolvency industry has highlighted the following reasons in favour of adopting such provisions:

(a) in instances where the majority of a debtor's assets are secured, merely granting super-priority for rescue financing will be inadequate to persuade the rescue financier to extend credit, as the secured lenders will still have priority over the rescue financier;

(b) providing super-priority liens may, in the same way, encourage existing secured creditors to provide rescue financing to the debtor. In DIP Financing arrangements which involve super-priority liens, it is common for the lender to be an existing secured creditor;

(c) super-priority liens form the other vital plank to the DIP Financing industry in the US, and having similar provisions for super-priority liens would encourage established players in the US DIP Financing industry to provide rescue financing in Singapore; and

(d) rescue financing often amounts to a small portion of the total debt and any prejudice caused to existing secured lenders must be balanced against the possibility that the rescue financing may improve restructuring prospects substantially.

4.6 Taking account of such broader industry views, the Committee is of the view that provisions for super-priority liens should be introduced in Singapore. However, to safeguard the interests of existing secured creditors, the granting of a super-priority

[53] See ILRC Report, Chapter 6 paragraph 70.

lien should be subject to court approval and the court should be satisfied that all other types of rescue financing are unavailable and that the interests of pre-existing secured lenders are adequately protected, before a super-priority lien is granted.

Distressed Debt Funds

4.7 Hedge funds and investment banks that buy distressed debts at deep discounts ("**Distressed Debt Funds**") are increasingly playing a big role in many US restructurings as a source of rescue financing. Current estimates suggest that, in the US, there are more than 200 such Distressed Debt Funds that invest over US$400 billion to US$450 billion in distressed debts[54].

4.8 Attracting Distressed Debt Funds to Singapore would increase the availability of rescue financing to debtors working on debt restructurings in Singapore and the region.

4.9 An alternative approach that Distressed Debt Funds might take in restructurings is through a private equity model, which would involve rescue financing in the form of an equity injection[55]. In such cases, it is likely that the debtor's existing management will be displaced. This can be beneficial as Distressed Debt Funds that operate on private equity models can provide management expertise to help restructure the distressed business.

4.10 Possible drawbacks to attracting Distressed Debt Funds have been highlighted. Certain Distressed Debt Funds are known to engage in tactics that result in prolonged and expensive litigation. Having more Distressed Debt Funds participate in Singapore-based restructurings may increase the likelihood of such litigation being used in a Singapore restructuring, driving up the cost of restructuring.

4.11 Additionally, the interests of Distressed Debt Funds are not necessarily aligned with other creditors, usually because the distressed investments were purchased at deep discounts. This misalignment with existing creditors, who provided credit at par value, may complicate and potentially frustrate a restructuring.

4.12 However, Distressed Debt Funds can constitute a significant source of rescue financing which is often critical to whether a restructuring can occur and to stave off liquidation. The Committee is therefore of the view that the benefits outweigh the potential

[54] See Edward I. Altman, *The Role of Distressed Debt Markets, Hedge Funds and Recent Trends in Bankruptcy on the Outcomes of Chapter 11 Reorganizations*, American Bankruptcy Institute Law Review, Vol. 22, at 75-123, ("*Altman*"), at p176

[55] See Altman at p87

downsides and steps should be taken to attract Distressed Debt Funds to establish a base and operate out of Singapore.

Incentives to Promote Rescue Financing Activity

4.13 The Committee notes that Singapore already has a range of incentives which apply to rescue financing activity in Singapore and to Distressed Debt Funds.

4.14 Targeted promotional activity can be undertaken to create awareness of the relevant incentives amongst entities that are exploring rescue financing activity in the region.

(B) Strengthening the Insolvency Profession in Singapore

Summary of Recommendations

- Steps should be taken to strengthen the Singapore insolvency profession, in particular to ensure that insolvency professionals here have the depth and breadth of expertise necessary to handle complex global restructurings.

- Multi-disciplinary teaching by the law, business and accountancy faculties of the local universities should be developed to build up the knowledge and expertise of the insolvency profession.

Building up Multi-Disciplinary Capabilities

4.15 As an international financial centre from which many of the world's leading financial institutions conduct cross-border lending, Singapore has a strong base of multinational talent involved in regional restructuring work. These range from legal professionals to accounting and other financial experts.

4.16 Professionals undertaking cross-border restructuring work need to understand complex (sometimes even novel) financing arrangements and corporate structures, as well as manage a wide spectrum of debtors and creditors with different commercial considerations as well as cultural backgrounds. In order to successfully complete a restructuring, these professionals will have to utilise a wide array of knowledge in various disciplines.

4.17 Professionals interested in cross-border restructuring work should be given opportunities to develop the knowledge and myriad skills cutting across the relevant disciplines. Cross-disciplinary knowledge will also facilitate more effective collaboration between the various professionals involved in a restructuring. The Committee therefore recommends that the accountancy, business and law schools at

Singapore's institutes of higher learning explore initiatives to nurture relevant cross-disciplinary skills.

4.18 A possible initiative could include developing professional courses or specialist post-graduate diplomas in restructuring, which may target professionals in the insolvency and restructuring industry who wish to increase their knowledge, or other professionals interested in picking up skills to capture opportunities in the insolvency and restructuring sector.

4.19 Aspects of these specialist restructuring courses may also be offered to undergraduates and full-time masters programme students, who may be interested in a future career in the insolvency and restructuring industry, to ensure there is renewal and a pipeline of talent within the industry.

Chapter 5: Addressing the Perception Gap

Summary of Recommendations

- Efforts should be made to communicate the benefits of conducting a debt restructuring in Singapore to the wider international restructuring community.

- Singapore-based professionals, judges and academics can undertake these efforts at international insolvency organisations, conferences and seminars or by providing thought leadership through research.

5.1 In a recent global study[56], Singapore was rated very highly as an effective jurisdiction for cross-border insolvency by practitioners who have had direct experience with the regime here. However, practitioners without such direct experience scored Singapore less highly. The study concluded that a significant perception gap on the strength of Singapore's insolvency regime exists. The Committee recommends that steps be taken to close this perception gap.

5.2 First, measures should be taken to better communicate the benefits of conducting a debt restructuring in Singapore to the wider international restructuring community. In particular, Singapore's strong restructuring framework (including the enhancements suggested by the ILRC and the Committee) and specialist professional services can be highlighted.

5.3 Second, Singapore-based professionals, judges and academics have an important role to play in bridging the perception gap through available platforms, such as leading international insolvency organisations (for example, INSOL International or the International Insolvency Institute), insolvency conferences and seminars. Additionally, these efforts can be complemented by providing thought leadership through research on cutting-edge issues in cross-border insolvency and restructuring.

[56] *From discord to harmony: the future of cross-border insolvency* by South Square and Grant Thornton accessed at: http://www.southsquare.com/files/SouthSquare_GT_Report_From_discord_to_harmony.pdf

Annex 1 – List of the Committee's Recommendations

I. Enhancing the Legal Framework for Restructurings

Processes and Procedures Specifically Tailored for Restructurings

Recommendation 3.1 Processes and procedures specifically tailored to promote quick, cost-efficient and certain restructurings should be developed.

Recommendation 3.2 Such processes and procedures should include the following specific aspects:

(a) Provisions for the invocation of the Singapore court's jurisdiction over foreign corporate debtors;

(b) Provisions concerning stays of creditor action which provide for: (i) the grant of automatic moratoriums in support of restructurings, and (ii) applications for injunctions which have *in personam* worldwide effect, and (iii) application for extension of moratoriums to related entities;

(c) Provisions as to the disclosure of information required;

(d) Provisions for the consolidation of related insolvency and restructuring proceedings before the same judge;

(e) Provisions for increasing the recognition and enforcement of Singapore restructurings; and

(f) Provisions for pre-packaged restructurings.

An Effective Court for Restructurings

Recommendation 3.3 Restructuring proceedings should be heard by a dedicated bench of judges.

Recommendation 3.4 This dedicated bench of judges should have relevant practical experience in managing insolvency and restructuring cases and a good reputation in this field.

Recommendation 3.5 International judges renowned for managing insolvency and restructuring cases can be appointed to the Singapore International Commercial Court. This would bring additional international judicial expertise to Singapore.

Recommendation 3.6 These judges should take a judge-led approach to managing restructuring cases.

Resolving Disputes in Insolvency and Restructuring through alternative dispute resolution methods

Recommendation 3.7 Where there are issues and disputes that may be more appropriately and efficiently resolved via alternative methods of dispute resolution such as mediation or arbitration, the judge should be empowered to encourage parties in the proceedings to consider mediation, arbitration or other appropriate alternative dispute resolution processes. As certain issues arising in a restructuring may not be arbitrable, some guidance can be given on the issues that can be referred to arbitration.

Recommendation 3.8 Local mediation and arbitral institutions, such as the Singapore International Arbitration Centre and Singapore International Mediation Centre, should develop and promulgate rules and protocols that cater specifically for insolvency related matters to attract potential users.

Recommendation 3.9 Steps should be taken to strengthen panels of mediation bodies and arbitral bodies to include expert mediators and arbitrators with experience in cross-border restructuring.

II. Creating a Restructuring Friendly Ecosystem

Increasing Availability of Rescue Financing

Recommendation 4.1 Allow super-priority liens in Singapore.

Recommendation 4.2 The granting of a super-priority lien should be subject to approval from the court as such liens will affect substantial property rights. Additionally, there should be sufficient safeguards to ensure that existing secured creditors are not unfairly prejudiced by a super-priority lien.

Recommendation 4.3 Distressed Debt Funds should be encouraged to establish a base in and operate out of Singapore.

Recommendation 4.4 Singapore offers a range of incentives that apply to rescue financing activity and greater promotion of relevant incentives can be undertaken to increase awareness.

Strengthening the insolvency profession in Singapore

Recommendation 4.5 Steps should be taken to strengthen the Singapore insolvency profession, in particular to ensure that insolvency professionals here have the depth and breadth of expertise necessary to handle complex global restructurings.

Recommendation 4.6 Multi-disciplinary teaching by the law, business and accountancy faculties of the local universities should be developed to build up the knowledge and expertise of the insolvency profession.

III. Addressing the Perception Gap

Recommendation 5.1 Efforts should be made to communicate the benefits of conducting a debt restructuring in Singapore to the wider international restructuring community.

Recommendation 5.2 Singapore-based professionals, judges and academics can undertake these efforts at international insolvency organisations, conferences and seminars or by providing thought leadership through research.

Annex 2 – List of Stakeholders engaged by the Committee

1. Mr Patrick Ang, Deputy Managing Partner, Rajah & Tann Singapore LLP
2. Mr Rahul Bhargava, Director, KKR Singapore Pte Ltd
3. Mr Gary Born, President of the Court of Arbitration, Singapore International Arbitration Centre (SIAC)
4. Mr Mark Chadwick, Senior Managing Director, FTI Consulting Pte Ltd
5. Mr Andrew Chan, Partner, Allen & Gledhill LLP
6. Mr David Chan, Partner, Shook Lin & Bok LLP
7. Mr Yoh Chuang Chee, Executive Director, Stone Forest Corporate Advisory Pte Ltd
8. Professor Qiang Cheng, Dean, School of Accountancy, SMU
9. Professor Simon Chesterman, Dean, Faculty of Law, NUS
10. Mr Sean Yu Chou, Joint Head, Restructuring & Insolvency Practice, Wong Partnership LLP
11. Mr Sui Tong Chua, Partner, Wong Partnership LLP
12. Mr Martin Chua, Group Head, Special Asset Management/Group Risk Management, OCBC Bank Ltd
13. Ms Eunice Chua, Deputy CEO, Singapore International Mediation Centre (SIMC)
14. Mr Carl Dunton, Partner, Ashurst LLP
15. Ms Angela Ee, Partner, Ernst & Young Solutions LLP
16. Mr Robert Foote, Partner, Walkers (Singapore) LLP
17. Professor Gerald George, Dean, School of Business, SMU
18. Mr Andrew Grimmett, Southeast Asia Restructuring Services Leader, Deloitte & Touche LLP
19. Mr Louis Han, Senior Regional Manager, Loan Management Unit Asia Pacific, HSBC
20. Ms Blossom Hing, Director, Corporate Restructuring & Workouts, Drew & Napier LLC
21. Mr B Jayaprakash, Country Legal Counsel, Citibank Singapore Ltd
22. Mr Ashok Kumar, Director, TSMP Law Corporation
23. Mr Julian Kwek, Co-Head, Corporate Restructuring & Workouts, Drew & Napier LLC
24. Mr Shaun Langhorne, Partner, Hogan Lovells International LLP
25. Mr Derek Lau, CEO, Heliconia Capital Management Pte Ltd
26. Mr Tiong Heng Lee, R&D and Government Incentives leader, Deloitte & Touche LLP
27. Ms Jean Leong, Director, Institutional Wholesale Credit, ANZ Banking Group Ltd
28. Ms Debby Lim, Partner, Shook Lin & Bok LLP
29. Ms Jane Lim, Head of RMA Workout Asia, Deutsche Bank AG
30. Ms Seok Hui Lim, CEO, SIAC; CEO, SIMC
31. Mr Keith Magnus, CEO, Evercore Asia (Singapore) Pte Ltd
32. Ms Neha Noronha, Manager, Trade Finance, ANZ Banking Group Ltd
33. The Honourable James Peck, Senior Of Counsel, Morrison & Foerster LLP
34. Mr Tim Reid, Partner, Ferrier Hodgson Pte Ltd
35. Mr Sandor Schick, Managing Director, Schick & Associates LLC

36. Mr Nish Shetty, Partner, Clifford Chance Pte Ltd
37. Mr Kwan Kiat Sim, Head, Restructuring & Insolvency Practice, Rajah & Tann Singapore LLP
38. Ms Jacqueline Tan, Senior VP, Institutional Banking Group, DBS Bank Ltd
39. Mr Henry Tan, Senior Vice President, DBS Bank Ltd
40. Mr Goh Siew Tan, Executive Director, Corporate and Investment Banking, JP Morgan Chase & Co
41. Mr Edward Tiong, Partner, Allen & Gledhill LLP
42. Mr Yosuke Uemura, Head of Risk Management Planning Group, Sumitomo Mitsui Banking Corporation
43. Mr Nicholas Weber, Managing Director, CarVal Investors Pte Ltd
44. Associate Professor Meng Seng Wee, Faculty of Law, NUS
45. Mr Lucien Wong, Chairman of the Board of Directors, SIAC
46. Mr Bob Yap, Partner, KPMG Advisory Services Pte Ltd
47. Associate Professor Victor Yeo, Head, Division of Business Law, NTU
48. Professor Tiong Min Yeo, Dean School of Law, SMU
49. Professor Bernard Yin Yeung, Dean, Business School, NUS.

Annex 3 - Members of the Secretariat

1. Mr. Quek Sze Hao, Ministry of Law
2. Ms. Faith Boey, Ministry of Law
3. Ms. Ramona Chia, Ministry of Law
4. Mr. Jordon Li, Ministry of Law (from 8 May 2015 to 31 December 2015)
5. Mr. Chris Tan, Supreme Court
6. Ms. Jacqueline Lee, Supreme Court