Schemes of Arrangement as a Corporate Rescue Mechanism: The Singapore Experience

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This paper reviews the use of schemes of arrangement in Singapore as a corporate rescue mechanism, and argues that a number of features have contributed to its emergence as a de facto debtor-in-possession regime. It also offers some suggestions on how this organic process can be further enhanced without unduly prejudicing the interests of stakeholders.

I. Introduction

This paper is prompted by the ongoing saga of corporate insolvency reform in Singapore. The first major shake up in the legal landscape was prompted by the Pan-Electric crisis in the mid-1980s, when the collapse of a major listed conglomerate led to systemic failure of major stock-broking firms and the temporary closure of the then Stock Exchange of Singapore. Judicial management (‘JM’), substantially modelled on the UK’s then recently introduced Administration procedure, made its debut in 1987 with the promise of offering companies in financial difficulty a temporary respite to consider and implement solutions to their financial woes. After weathering the Asian financial crisis of 1998, a review of the corporate and regulatory framework was undertaken by the Company Legislation and Regulatory Framework Committee (‘CLRFC’) in December of 1999, with corporate insolvency as a specific item on a comprehensive agenda. As yet, nothing concrete has come out of the Committee’s recommendations published in October of 2002 in respect of the corporate insolvency law, the foremost of which was the enactment of an omnibus insolvency legislation. This is likely to be modelled on the UK’s Insolvency Act 1986, though the extent to which reforms introduced by the Enterprise Act 2002 are to be incorporated is not known.

Apart from the CLRFC’s principal recommendation to consolidate corporate insolvency provisions (presently disparately located in different Acts and subsidiary legislation), the final report alludes to a need to review the “existing suite of rescue options” in view of the “success” of JM and s.210 Schemes of Arrangement moratoria as corporate rescue procedures. In particular, the committee recommended further evaluation of the debtor-in-possession concept reflected in U.S. Chapter 11 proceedings (‘Chapter 11’) and the adoption of the U.K. Company Voluntary Arrangement (‘CVA’) regime. Since then, the Chapter 11 option has been examined carefully by the relevant government departments and the relevant professions in a

1 Assistant Professor, Faculty of Law, National University of Singapore. An earlier draft of this paper was presented at the Corporate Law Teachers Association Annual Conference, Sydney, Australia, 3-5 February 2008. My thanks to an anonymous referee. All errors remain mine alone.
2 See T.C. Choong & V.K. Rajah, Judicial Management in Singapore (Singapore: Butterworths, 1990), c.1 at 11-12.
5 Supra note 4 at para. 2.9.
6 Ibid. at para. 3.1-3.2.
number of consultations with US experts and conferences on corporate reorganisations. This paper therefore seeks first, to review the organic use of the Schemes of Arrangement (‘SOA’) framework in the past decade as a means to effect corporate ‘rescue’ reorganisations, and second, argues that reform seeking to improve the efficiency and efficacy of the corporate rescue framework in Singapore should approach the issues from an organic and functional perspective, rather than a ‘shop for foreign models’ approach.

II. Private negotiated vs. market based solutions

Corporate reorganisations or restructurings are an important aspect of any jurisdiction’s corporate rescue or rehabilitation framework. The CLRFC’s recommended consideration or adoption of Chapter 11 and CVA type processes implicitly recognise this. In such processes, the objective is to achieve an internal negotiated ‘sale’ of the business to its existing stakeholders in accordance with their existing claims against the company. A successful reorganisation resolves the company’s financial difficulties and allows it to emerge rehabilitated with a more manageable capital structure, having implemented some sort of settlement with all or most pre-existing creditors and shareholders. Law and economics commentators often advocate reliance on market auctions to avoid inherently difficult and uncertain valuation disputes that bog down such negotiations in reorganisations. The latter also allow management and equity interests to delay the process in order extract value from creditors. Nevertheless, reorganisation processes still offer important alternative options where the market is unable to offer a better exit value, where firm specific value can only be effectively captured by preserving existing commercial and employment relationships, or where existing sophisticated investors of the firm are less willing to accept market imperfections in a sale and prefer to recapitalise and preserve the going concern value through a reorganisation.

III. Existing reorganisation frameworks

Singapore has two related processes that offer companies in financial difficulty the opportunity to restructure their obligations in order to preserve the going concern value of the business, and avoid liquidation or a depressed sale of the going concern in the market. Both are ultimately rooted in the bargaining framework offered by

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8 See e.g., L. Belchuk & H. Chang, “Bargaining and the Division of Value in Corporate Reorganization” 8 J.L. Econ. & Org. 253 at 255-256.
s.210 of the *Companies Act,* which gives a company the power to make compromises with its creditors and shareholders under a SOA. Section 210 is inspired by both s. 206 of the UK *Companies Act 1948* and s. 181 of the Victorian *Companies Act of 1961.* Conceptually, the bargaining framework allows the company to bind different classes of creditors and shareholders to a scheme, provided a statutory majority in each class votes in favour of the scheme. This majoritarian ‘cram-down’ mechanism allows the company to deal with hold-out problems and is substantially similar to the bargaining frameworks envisaged in the Chapter 11 plan approval process and the Canadian *Companies Creditors Arrangement Act* (‘CCAA’).

The SOA process can be initiated by management, creditors or members of a company in a summary application. There is no insolvency threshold to such an application, and schemes may be flexibly used in many other contexts apart from corporate rescue reorganisations. Alternatively, a company may first be placed in JM with the stated purpose, *inter alia,* of implementing a SOA under s.210. The key differences are that JM necessarily involves the displacement of management by the judicial manager, an officer of the court, and entry into the regime is premised on judicial satisfaction of (a) a likely inability to pay debts as they fall due (factual insolvency) and (b) a reasonable prospect of achieving the listed statutory objectives.

Section 210 is by itself a bare-bones framework with a relatively modest moratorium found in subsection (10) to support it. The moratorium only comes into force upon a court order. Managerial success at reorganisation is very much dependent on their acumen or skill (and the help of professional “turnaround” advice) in devising and persuading creditors and shareholders of the commercial sense of the scheme proposed. In contrast, JM has a clearly more extensive moratorium that extends to enforcement of secured and quasi-security interests. The judicial manager also has some ability to deal with charged assets for the purposes of raising fresh finance and the potentially coercive power to propose a scheme under s.210 where a simple majority of a single class of creditors would appear to suffice. Notwithstanding these advantages in JM, based on anecdotal evidence, schemes have emerged as a

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12 Cap. 50, 2006 Rev Ed. Sing. [CA].
13 The requirement is a majority in number representing three-fourths in value of creditors of each class present and voting at the meeting: CA, s.210(3).
16 See generally, CA, Part VIII.A.
17 CA, s. 227B(1)(b)(ii)
18 CA, s.227B(1).
19 A. Chan, *Law and Practice of Corporate Insolvency* (Singapore: Lexis-Nexis, 2005), c.2 at [253].
20 CA, ss. 227C and D.
21 CA, ss. 227H and 227I
22 CA, s.227X(a). See, however, *Hitachi Plant Engineering & Construction Co. Ltd. v. Eltraco International Pte Ltd, infra* note 70 at para. 46-48, which argues that creditor classification will still be necessary in a scheme proposed by a judicial manager.
viable option in effecting successful insolvent corporate reorganisations in Singapore.  

IV. The SOA process’s organic role as a debtor-in-possession regime

It is argued that the SOA framework has to some extent emerged as a viable debtor-in-possession regime for the purposes of insolvency related corporate reorganisations. In such a regime, management of the company controls the method and progress of reorganisation negotiations and the eventual proposal of a scheme. Several features of the existing corporate rescue framework and the emerging SOA jurisprudence of the courts have engendered such a development.

A. The disincentives created by the judicial management route

The main reason for this seems to be the relative unattractiveness of the JM process to a company’s management who is minded to do something about an impending crisis. Displacement by the judicial manager obviously operates as a great disincentive to petition for such an order, and it is to be expected that management and controlling shareholders would seek out all other possible means, informal and formal, to work out the company’s problems. JM is likely seen as a last resort, by which time it may be too late for any realistic chance of rehabilitation via reorganisation.

Furthermore, upon entry into JM, management are envisaged to only play second fiddle, while shareholders have no voting rights in the process and have very little voice in decision-making processes. Indeed the regime presupposes that shareholder interests have been wiped out, given the insolvency threshold. Consistent with these observations, in a number of high profile reorganisation cases, a JM order has instead been sought by disgruntled creditors (albeit unsecured ones) who seek a way out of informal or SOA negotiations that they are unhappy with for one reason or another, and to wrest control of the workout process from the hands of incumbent management and place them in the hands of a more trusted or independent judicial manager. JM is also disfavoured by management of listed companies, as the Singapore Exchange requires the suspension of trading in the company’s securities once it enters JM. This is another disincentive for management who often hold securities in the company that may be pledged as security.

From an outcomes perspective, JM has only rarely achieved a successful rehabilitation via a corporate reorganisation. A study done pursuant to the work of the CLRFC on JM’s track record between 1996 and 2000 indicated that a majority of JM

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24 See generally, CA, ss. 227N and 227R.
26 Lee Eng Beng, supra note 23.
cases resulted in asset sales or liquidation. This is not necessarily of any concern if we assume that market processes efficiently capture the true value of the firm, whether on a going concern or piecemeal basis. The insolvency working group of the CLRFC consequently assessed JM as a qualified success given its stated statutory and policy role. A downside to this is that entry into JM is an obvious public dampener to (if not guillotine of) the company’s commercial good will, as the business and financial community generally perceive JM as a prelude to a liquidation. This makes negotiations within JM on the footing of a reorganisation even more difficult.

B. Interim moratorium read liberally?

In contrast, SOAs allow management to initiate and take charge of the reorganisation process, and the lack of an insolvency threshold not only encourages earlier intervention, but perhaps also mitigates the commercial perception or stigma of the process in dealing with financial distress. The process has been crucially supported by the interim moratorium available under s.210(10). Unlike JM, the moratorium is not automatic and must be applied for in order to restrain “further proceedings in any action or proceeding against the company”. The court hearing the application will generally be concerned about the bona fides of the applicant proposing the SOA and the interests of creditors generally, although some Malaysian decisions on the equivalent s.176 of the Malaysian Companies Act require the applicant to present sufficient particulars concerning the “general principles” of the proposed scheme before ordering a stay.29 The period and scope of the moratorium otherwise appear to be within the discretion of the court.

Unlike s.425 of the UK Companies Act 1985, the provision for a judicial power to stay proceedings has empowered management to deal with hold-out creditors that require the assistance of civil enforcement proceedings, JM or winding up applications in enforcing their debts. This is despite the fact that a close reading of the sub-section suggests that it was only envisaged to work on a case-by-case basis in respect of pending proceedings against the company. The Australian case of Re Reid Murray,30 interpreting a similar provision under s.181(9) of the Companies Act 1961 supports this interpretation. However, without expressly examining the scope of such a moratorium, there is evidence that Singapore courts have been prepared to make blanket stay orders of all present and future proceedings against the company whilst the SOA is being put together for consideration by the various classes of creditors.31 This must have been crucial in allowing management to focus on negotiations with creditors and shareholders, without being bogged down resisting enforcement, repossession or winding up proceedings as and when they emerge. This practice is supported by a more recent unreported Australian decision in Glencore Nickel Pty Ltd, which adopted a purposive interpretation approach in granting a stay order

27 See CLRFC Working Group 4, Interim Report on the Corporate Insolvency Regime in Singapore (August 2001), Annex B – Review of Judicial Management Cases (1996 – 2000) (on file with author). Out of 58 reviewed cases where JM orders were made, 33 (56.8%) were classified as qualified successes or failures that ended up in liquidation, while an unspecified number of successful cases (29) also ended up in winding up as the objective achieved was a more advantageous realisation of assets.
31 See e.g., Re Econ Corp Ltd [2004] 1 SLR 273 at para. 9; see also, Chan, Law and Practice of Corporate Insolvency, supra note 19, c.3 at [752].
restraining any action or other civil proceeding against the debtor company.\textsuperscript{32} The court effectively read “further” to extend to “other” proceedings against the company, whether pending or not, in order to facilitate an orderly and efficient consideration of the proposed schemes.

It is uncertain whether the moratorium extends to non-judicial enforcement action. There is earlier Australian authority in \textit{Re Chevron (Sydney) Ltd} that would seem to include the extra-judicial appointment of receivers as a ‘proceeding’ under the section.\textsuperscript{33} Canadian judicial interpretation of the phrase under the \textit{Companies Creditors’ Arrangement Act}\textsuperscript{34} holds that it extends to secured creditor enforcement action\textsuperscript{35} and non-judicial remedies such as set-off,\textsuperscript{36} on the ground that there is “a discretionary power to restrain judicial or extra-judicial conduct against the debtor company the effect of which is, or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiating period.”\textsuperscript{37} However, the s.210 SOA framework is embedded in the \textit{Companies Act}, where “proceeding” under s.227D(4)(c) of the Part VIII JM regime connotes a process initiated, whether in court or by way of arbitration or a step in such process, and therefore excludes extra-legal actions such as contractual set-off.\textsuperscript{38} Notwithstanding the CA’s recognition that the SOA process can operate as a corporate rescue mechanism,\textsuperscript{39} it is likely that consideration for internal consistency would lead the court to similarly confine “further proceedings” under s.210(10), thereby limiting its utility in the SOA process.

\textbf{C. De facto cram down mechanisms}

Historically, SOAs were unpopular partly because of the inherent uncertainty in determining how classes of creditors and shareholders were to be formed.\textsuperscript{40} Any material errors in creditor classification would later unravel the entire process as courts would refuse to sanction the scheme if they felt that the composition of classes unfairly diluted the divergent interests of affected creditors (and perhaps even shareholders), without any clear mechanism to settle these uncertainties before actually putting the scheme to its respective class votes.\textsuperscript{41} Nevertheless, courts in Singapore, while adopting the general longstanding principles of classification

\begin{itemize}
\item \textsuperscript{32} [2003] WASC 18 at paras. 64-68.
\item \textsuperscript{33} 7 May 1962 (unreported), discussed in \textit{Re Reid Murray}, supra note 30. See also \textit{Re Panglobal}, supra note 30, although the decision involved an interim stay ordered on an \textit{ex parte} application without any reasoning based on the wording of s.210(10), and is therefore of limited persuasive authority.
\item \textsuperscript{34} \textit{Supra} note 15, s.11. The \textit{CCAA} is inspired by the U.K. \textit{Companies Act 1929}, c.23: see J. Sarra, \textit{Rescue! The Companies’ Creditors’ Arrangement Act} (Toronto: Thomson-Carswell, 2007), c. 1 at 15. The latter Act is the antecedent to the UK \textit{Companies Act 1948}, c.38, on which the Singapore \textit{Companies Act} is based.
\item \textit{Ibid.} at para. 17.
\item \textit{See e.g., Electro Magnetic (S) Ltd v. DBS Ltd.} [1994] 1 SLR 734 (CA) at 741, following \textit{Bristol Airport v Powdrill} [1990] Ch 744 (C.A.).
\item \textit{Hitachi Plant Engineering & Construction Co. Ltd. v. Eltraco International Pte Ltd.}, infra note 70.
\item \textit{V. Finch, Corporate Insolvency Law – Perspectives and Principles} (Cambridge: CUP, 2002), c.10 at 326-327.
\end{itemize}
according to similarities or dissimilarities of original interests and entitlements, have also recognised that they wield significant discretion in delineating voting classes. They do so with an honest acknowledgement that schemes which promote the collective interests of creditors should not be unnecessarily hindered by technical differences between affected rights. For example, the Court of Appeal in *Wah Yuen Electrical Engineering Pte Ltd v. Singapore Cables Manufacturers Pte Ltd* held: “Just as the court must be careful not to empower the majority to oppress the minority by allowing the company to put everyone in the same class, it must be careful not to enable a small minority to thwart the wishes of the majority by fragmenting the creditors into small classes.” On the facts, the court held that it would be unrealistic and impractical to sub-divide the creditors into separate classes based on minor differences in claim percentages they stood to recover. Consequently, courts can effect a limited “cram-down” by limiting the number of creditor classes in order to prevent hold-outs by minority creditors.

Commentators on the Canadian *CCAA*, whose class voting mechanism for implementing a plan (or scheme) also have their origin in s. 2 of the U.K. *Joint Stock Companies Arrangement Act 1870*, observe that that judicial scrutiny and sanction eschewed make valuation determinations of the reorganised entity, preferring to leave this question to the voting classes based on an assessment of the information provided by management proposing the SOA (facilitated by a majoritarian voting rule). This approach is justified on the inherent uncertainties and complexities involved in making a valuation judgment, and the unsuitability of relying on a judge to make such a finding. Contrast this with the position under U.S. Chapter 11, where the court is empowered to bind dissenting classes of creditors or shareholders to a plan if it is deemed “fair and equitable” under §1129(b)(2).

However, the English Court of Appeal decision in *Re Tea Corporation Ltd* presents an important exception under the SOA framework where courts have been prepared to exclude a whole class of ‘bottom-rung’ claimants on the basis that a valuation of the company on the evidence meant that they no longer had any economic interest in the reorganising company. *Tea Corporation Limited* (‘Tea Co.’), which had earlier voted at general meeting to going into voluntary winding up, subsequently proposed a SOA. The purpose of the SOA was to transfer the company’s assets and liabilities to a new company, in return for the issuance of new debt and equity to the existing creditors and shareholders of Tea Co. If successfully implemented, this would reorganise the capital structure of the underlying business. The judge at first instance

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42 See e.g., *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin*, supra note Error! Bookmark not defined.
43 *Supra* note Error! Bookmark not defined. at para. 21. This is also the approach taken in Canada by courts interpreting similar provisions in the *Companies Creditors Arrangement Act*: see J. Sarra, *Creditor Rights and the Public Interest: Restructuring Insolvent Corporations* (Toronto: UT Press, 2003) c. 4 at 1332-133.
47 Title 11, U.S.C.
48 [1904] 1 Ch. 12 (C.A.)
sanctioned the scheme notwithstanding that the meeting of the ordinary shareholders failed to obtain the requisite statutory majority.

Romer and Stirling L.JJ. analysed the legitimacy of this court sanction from the perspective of the economic substance, as opposed to the form, of the scheme. The trial judge determined that the ordinary shareholders had no financial interest in the company (based on a valuation of its assets). Therefore in substance, the scheme constituted an arrangement between the company, its secured and unsecured creditors, and the preference shareholders. The approval of ordinary shareholders was unnecessary and the scheme’s allocation of shares in the new company to them was interpreted as a concession made with the consent of the preference shareholders (as residual claimants). Vaughan Williams L.J. adopted Buckley J’s analysis. The court should not consider the votes of those classes who really have no financial interest in the assets of the company, otherwise that would empower them to insist on deviations from absolute priority in what was otherwise a sensible scheme approved by claimants in the money.

There are two possible interpretations of the power exercised by the court in Re Tea Corporation. The first, simpler account is that the ordinary shareholders were not really a party to or affected by the scheme, but rather gratuitous beneficiaries under the scheme. The failure to obtain the statutory majority of ordinary shareholders was therefore not a jurisdictional impediment to the sanction of the SOA. If indeed it was just a question of the true scope or effect of the SOA, then this was an uncontroversial exercise of the court’s express power under s.24 of the U.K. Companies Act 1900. This approach would, however, also imply that a determination of the ordinary shareholders’ lack of financial or economic interest in the company’s assets was irrelevant and unnecessary if the scheme did not purport to alter or extinguish any of their existing rights against Tea Co. The truth of the matter is that the scheme did in fact extinguish their interests in Tea Co. Buckley J’s order at first instance, which was upheld on appeal, sanctioned the scheme as binding on all the voting class meetings called by the company. This order formally bound the ordinary shareholders to all the terms of the scheme, including the transfer by the liquidator of all the assets and liabilities of Tea Co. to the new company, the consequential stay on the winding up proceedings and dissolution of Tea Co. thereafter. Leaving behind Tea Co. as an empty shell, the SOA effectively extinguished any rights or interest the ordinary shareholders had and arguably also prevented them from subsequently challenging the transfer agreement. In this vein, Romer L.J. also accepted that the ordinary shareholders’ were surrendering any claims they had to Tea Co.’s assets.

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49 Ibid. at 25 per Stirling LJ; at 24 per Romer LJ.
50 Ibid. at 23-24.
51 There are a number of examples of schemes approved or sanctioned even though there are objecting claimants on the ground that the scheme either does not bind or affect them: see e.g. Re MyTravel Group Plc. [2004] EWCA Civ 1734; Olympia & York Developments Ltd. v. Royal Trust Co. (1993) 12 O.R. (3d) 500 (O.C.J.).
52 As was the case in respect of the modified scheme in Re MyTravel Group Plc., ibid. at paras 22-24, per Chadwick LJ.
53 Supra note 48 at 18.
54 See cl. 10 of the scheme, ibid. at 16-17.
55 Supra note 49.
It is therefore submitted that upon taking a position on the valuation of the assets of Tea Co., the court exercised a de facto cram-down power on the dissenting class of ordinary shareholders who were “under the water”, thus binding them to the terms of the scheme on the basis that their claim to a share in the company’s assets was in substance extinguished.\textsuperscript{56} This is a significant and useful power that reduces the bargaining space in SOA negotiations, thereby facilitating the implementation of workable schemes in the collective interest.\textsuperscript{57} Although detractors have rightly argued that a judicially implemented valuation determination is costly and unreliable, it can be usefully wielded by scheme initiators in appropriate situations against holdout claimants who seek unjustifiable deviations from absolute priority,\textsuperscript{58} or simply irrational claimants who would otherwise stymie a fair and reasonable SOA outcome.\textsuperscript{59} Nor does such a cram down power detract from genuine negotiations between the company and claimants over inherent valuation uncertainties, which can be adequately dealt with through options mechanisms and would avoid costly valuation hearings in most instances.\textsuperscript{60} Admittedly, there is no reported instance of this de facto cram down power being invoked in Singapore, but the existence of the power further demonstrates the attractiveness of the SOA process, and may well have been used in some unreported SOAs in the initial stage of scheme drafting.

Recognition of a de facto cram-down power leads to a critical consequential issue – how should a judge determine the value of the company’s business or assets in answering the economic interest question? This was answered, albeit in obiter dicta, by Mann J. in Re MyTravel Group Plc. as requiring the court to determine what the dissenting claimants would have received if they had enforced their claims against the company.\textsuperscript{61} If the only realistic means of doing so was via a winding up, then the proper method would be to value the company’s assets on a liquidation basis. Crystal and Mokal rightly take issue with this. If the SOA in substance proposes a restructuring to preserve the going concern value of the company’s business, then valuation on a hypothetical break-up basis in a liquidation is inappropriate. In every instance, the question should be what the value of the business is, as inferred from what the company or its claimants propose to do with it under the SOA.\textsuperscript{62} Some schemes propose a more advantageous means of realising the assets of the company than achievable in a winding up.\textsuperscript{63} In such cases, a valuation on a break up basis may be justified. However, if a salvage of the going concern value of the business is the

\textsuperscript{56} See also Re Oceanic Steamship Co. [1939] Ch. 41 at 47; Cf. Nick Segal, “Schemes of Arrangement and Junior Creditors – Does the US Approach to Valuations Provide the Answer” (2007) 20(4) Insolv. Int. 49 at 51, who takes the view that under English law, a scheme cannot be sanctioned over the objection of a dissenting class which is, or should be treated as, a party to the scheme.


\textsuperscript{58} See Re Tea Corporation, supra note 50.


\textsuperscript{60} Baird & Bernstein, supra note 10 at 1952-1965.

\textsuperscript{61} [2005] 1 W.L.R. 2365 at paras. 57-60. It is unclear from the report of Re Tea Corporation, supra note 48, what valuation methodology was used by Buckley J. in coming to a conclusion that the ordinary shareholders were wiped out.

\textsuperscript{62} Crystal & Mokal, supra note 10 at 14-16.

\textsuperscript{63} See e.g., Re Oceanic Steamship Navigation Co., supra note 56.
object, then the methods of valuation should reflect this chosen course in determining the relative financial or economic interests that claimants have in the company.\textsuperscript{64}

D. The SOA’s ability to deal with third party obligations

Another significant development adding to the attractiveness of SOAs is the decision in \textit{Daewoo Singapore Pte Ltd v. CEL Tractors Pte Ltd}.\textsuperscript{65} The Court of Appeal held that a scheme of arrangement under s. 210 may incorporate an \textit{express} term to the effect that the scheme creditors would release directors from their personal obligations under the respective guarantees granted to the company’s creditors. In doing so, it distinguished some Australian authorities such as \textit{Hill v. Anderson Meat Industries}\textsuperscript{66} on the ground that in those cases, there was no express term to the same effect. It is therefore permissible under Singapore law to incorporate in a scheme an involvement or participation by an outsider. In terms of the efficacy of the clause releasing directors from their guarantee obligations, the court held:

> Although the scheme or compromise binds only the company and the creditors, \textit{there is no reason in principle why the company cannot in principle enforce the terms of the scheme as against the creditors}. Should the creditors take legal proceedings to enforce their guarantees, CEL Tractors [the scheme company] are entitled to seek equitable reliefs in the form of an injunction and specific performance against the creditors concerned, because if the creditors seek to enforce the guarantees, the guarantors will inevitably seek to have a recourse against CEL Tractors for an indemnity, effectively negating the provisions of cl 4.3 of the scheme.\textsuperscript{67}

Quite apart from the commentary that questions the efficacy of the guarantee release under an express term of a SOA,\textsuperscript{68} the significance of the \textit{Daewoo} case is plain. The taking of personal director guarantees is a common commercial lending practice that seeks a bonding device for corporate agents who might otherwise have an incentive to over invest.\textsuperscript{69} Guarantees serve the purpose of internalising the cost of corporate decision-making and activity that would otherwise be shielded by limited liability. Allowing a reorganisation to deal holistically with the entire web of legal and contractual relationships surrounding the company in financial difficulty provides further incentive for management bound by these guarantees to work with creditors earlier on in seeking solutions, in the knowledge that there will be means to deal with their own personal liabilities to creditors holistically, rather than incentivising even more risky decisions in the hope of avoiding the stigma associated with corporate liquidation and personal bankruptcy. Finally, as the Court of Appeal noted, these guarantee release provisions are still subject to the procedural protections in the SOA process – class acceptance and judicial scrutiny as to the fairness and reasonableness of the releases. Facilitating a broader scope of debt workout does not automatically imply an expropriation of creditors’ contractual guarantee entitlements. However,

\textsuperscript{64} Crystal & Mokal suggest the adoption of tried and tested methods used by the US Bankruptcy Courts in hearing Chapter 11 cases: \textit{supra} note 10, Part IV.

\textsuperscript{65} [2001] 4 SLR 35

\textsuperscript{66} [1971] 1 NSWLR 868

\textsuperscript{67} \textit{Supra} note 65 at 33 [emphasis added]

\textsuperscript{68} Lee Eng Beng, “Insolvency Law” (2001) SAL Annual Review of Cases 239 at 251-255.

\textsuperscript{69} See D. Hahn, “Velvet Bankruptcy” (2006) 7 Theoretical Inquiries in Law 523 at 530-533.
allowing SOAs to work this way is still only one important step towards a more coherent rescue regime. Such negotiations can only work if creditors also refrain from enforcing the guarantees directly against the directors. Presently worded, the interim moratorium under s.210(10) is not wide enough to capture such collateral enforcement action.

V. Creditor protection in the SOA process

An important consideration in evaluating the efficacy of SOAs as a corporate rescue mechanism is the protection that it affords creditors against strategic behaviour on the part of management and controlling shareholders, to the extent that the bargaining costs of devising and negotiating a scheme may be used to extract value from creditors in favour of equity. Two important developments in this respect are highlighted.

A. Importing insolvency norms for creditor protection

The first is the Court of Appeal’s decision in Hitachi Plant Engineering & Construction Co. Ltd. v. Eltraco International Pte Ltd.70 At issue here was the propriety of the use of a direct payment clause under a standard term construction contract by the owner of the project in favour of a nominated subcontractor. This was alleged by the scheme administrators of the insolvent main contractor to be in contravention, by analogy, of the common law pari passu principle typically applied in the context of winding up proceedings. The court reviewed the existing precedents and determined that as a matter of principle:

… a scheme of arrangement is a corporate rescue mechanism. As with other corporate rescue mechanisms, such as judicial management, it seeks to rehabilitate the company and achieve a better realisation of assets than possible on liquidation … Such a rescue mechanism may need, in order to be effective, to discriminate amongst creditors for example by repaying bigger creditors proportionately less than small creditors are repaid. Dictating that the assets should be distributed in a pari passu manner would not only decrease the flexibility now available to planners of schemes but it may also put a dampener on what the scheme of arrangement could achieve and spell the death knell of the company prematurely.71

Here we have explicit judicial recognition of the new status of SOAs in the corporate rescue framework, supported by a relaxing of an important principle in insolvency law which, on a traditional reading, requires the pro-rata distribution of the company’s assets to its creditors in accordance with pre-insolvency entitlements.72 Nonetheless, the court qualified its pronouncement by adding that “[i]nstances where a scheme of arrangement proposes to depart from the provisions of the insolvency regime will be rare”.73 Creditor protection lies not so much in the rigid invocation of the pari passu principle, but “[w]here the objection is that the scheme does not provide for pari passu distribution, the court will be able to decide whether in the particular circumstances, this objection is an insuperable barrier to implementation of

71 Ibid. at para. 81 (emphasis added)
is added).
73 Supra note 70 at para. 84.
the scheme.”74 This recognition of a need for some compromise in order to facilitate collective interests in the rehabilitation of the company is to be welcomed, although one looks forward to the enunciation of the specifics justifying such departures in sanctioning a SOA as ‘fair and reasonable’. Perhaps one clear situation is where preferring or prioritising a certain creditor accrues an additional collective benefit on the rest of the creditors in facilitating the implementation of the scheme that will result in a better overall return as compared to a liquidation.75 This may in the future pave the way for judicial recognition and sanction of fresh super-priority financing to support the reorganisation effort. A more general, but equally important, result is that *Eltraco* effectively sanctions the contextual importation of relevant insolvency principles into the SOA process via the broad judicial discretion in sanctioning them, thereby affording more principled protection to creditors affected by the scheme.

An interesting aside is in the result of the court’s deliberations on application to the facts. Although *pari passu* was held not strictly applicable in SOAs, the Court of Appeal held that the direct payment to the subcontractor was in fact caught by a rather vaguely worded provision in the particular scheme encompassing the company’s “accounts receivable”, and the Scheme administrators had rightly, after all, sought to injunct the direct payment to the subcontractor. A related observation on this result is that *pari passu* in fact encompasses two distinct aspects – the importance of collective management of the company’s assets in an insolvency regime, and the more familiar requirement of *pro rata* distribution of those assets in accordance with absolute priority. One wonders if the flexible approach to *pari passu* application extends to the law’s suspicion of *ipso facto* clauses that deprive the insolvent estate of assets before a collective decision can be made as to their optimal use. In this light, the court could have more directly dealt with the direct payment clause on the basis of an attempted circumvention of the collective management principle, rather than burying this underlying concern in the contractual interpretation of the scheme’s provisions.76 At the very least, the *Eltraco* decision leaves this open while setting future inquiries on the right compass – that such decisions are to be made bearing in mind the contextual use of SOAs as corporate rescue mechanisms, arguably entailing a principle of collective management.

On the other hand, another direct payment to a similarly situated sub-contractor who threatened to withhold warranty certification for waterproofing works was not contested by the scheme administrators, who were chastised by the court for this conduct.77 This highlights a somewhat incoherent approach to the court’s understanding of *pari passu* and its application in SOAs. The uncontested direct payments to the other sub-contractor could be justified on the basis of the promotion of the collective interest in obtaining the waterproofing warranties, presumably thereby enhancing the value of the assets of the company. The project owners had

74 Ibid.
75 But this perhaps does not say much more than what liquidation practice already acknowledges. Although *pari passu* is rhetorically fundamental, many exceptions are admitted. E.g. in validating dispositions of the insolvent company’s property under s.250 of the *CA*, the court is entitled to do so even if it results in preferential treatment when such treatment makes such a course desirable “in the interests of the unsecured creditors as a body”: *Re Gray’s Inn Construction Co. Ltd.* [1980] 1 W.L.R. 711 (C.A.) at 718.
76 For a discussion of these aspects of *pari passu* and their application outside of liquidation, see T.E. Chan, “The *Pari Passu* Principle in Judicial Management” [2006] *Sing J.L.S.* 213.
77 *Supra* note 70 at paras. 52-54.
refused to pay retention sums until the warranty was provided, and thus the payment for its provision could be seen as necessity or expense of realising the company’s assets.\footnote{78 See Eltraco International Pte Ltd v. Sennet Electrical Engineering Pte Ltd & Ors. [2003] SGHC 40 at para. 37 (the trial judge’s decision).} However, in chastising the ‘inconsistent conduct’ of the scheme administrators for flouting equal treatment of unsecured creditors, the court did not pause to consider the possible underlying commercial reason for this concession by the scheme administrators justified on a ‘collective interest’ basis.

**B. Extensive disclosure requirements**

A critical feature of the SOA process is its reliance on creditor evaluation and majority consent within each class as a means of resolving the complex web of conflicting interests and assessments of the company’s value at stake. In sanctioning the scheme, the courts also work around the rule of thumb that the creditors are a better judge of their own commercial interests, and they should not be too ready to second guess creditor choices.\footnote{79 In Re English, Scottish, and Australian Charted Bank [1893] 3 Ch. 385 at 409, cited with approval in Wah Yuen, supra note \textit{Error! Bookmark not defined.} at para. 33.} Accordingly, procedural protections are a critical aspect of the process. Two common issues that concern creditors evaluating a SOA proposal are, first, the valuation of the company’s assets or business with a view to determining whether the SOA is indeed in their interests and, second, the phenomenon of woodwork creditors and related party debts. Section 211(1)(a) of the \textit{Companies Act} requires the company to issue a statement, when summoning the creditors meeting, explaining the effect of the SOA and “in particular stating any material interests of the directors, the effect thereon of the compromise or arrangement in so far as it is different from the effect on the like interests of other persons.” Apart from these general requirements, there is no statutory elaboration of the specifics of disclosure. The courts have therefore had to step in to supplement this lacuna with principles of disclosure.

The first and foremost is the creditors should be put in possession of such information as was necessary to make a meaningful choice.\footnote{80 \textit{Wah Yuen}, supra note \textit{Error! Bookmark not defined.} at para. 24.} This disclosure should be done to enable creditors to assess whether “the returns under the proposed scheme were in fact greater than what they could expect in a liquidation.”\footnote{81 \textit{Ibid.}} The extent of the disclosure has been put in various terms, from “full information”,\footnote{82 \textit{Re Halley’s Department Store Pte Ltd} [1996] 2 S.L.R. 70 at para. 13.} to “all the information reasonably necessary”.\footnote{83 \textit{Re National Bank Ltd} [1966] 1 WLR 819 at 829.} Practitioners have expressed concern that requiring “full” disclosure is unrealistic and might very well spell doom for most companies seeking to implement a SOA given the time and expense needed to comply with such a high standard.\footnote{84 M. Hwang & M Reza, “Singapore Cases on Schemes of Arrangement and Compromise – Eight Themes” (Paper presented at the Inaugural IPAS Conference, 2 November 2006) at 2-4.} Although the Singapore courts have not clearly spelt out the level of disclosure required, it is submitted that this uncertainty reflects the inherent tension between serving the collective interest in facilitating a more advantageous reorganisation of the business or realisation of the assets and ensuring that creditor interests are not prejudiced by a manipulation of information. The \textit{Wah Yuen} case illustrates how exacting the disclosure standards can be:

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\footnotesize{\begin{itemize}
\item See \textit{Eltraco International Pte Ltd v. Sennet Electrical Engineering Pte Ltd & Ors.} [2003] SGHC 40 at para. 37 (the trial judge’s decision).
\item In \textit{Re English, Scottish, and Australian Charted Bank} [1893] 3 Ch. 385 at 409, cited with approval in \textit{Wah Yuen}, supra note \textit{Error! Bookmark not defined.} at para. 33.
\item \textit{Wah Yuen}, supra note \textit{Error! Bookmark not defined.} at para. 24.
\item \textit{Ibid.}
\item \textit{Re Halley’s Department Store Pte Ltd} [1996] 2 S.L.R. 70 at para. 13.
\item \textit{Re National Bank Ltd} [1966] 1 WLR 819 at 829.
\end{itemize}}
On the face of it, the proposed scheme was certainly an attractive one because it offered the creditors an estimated realisable value of 15% as opposed to 0.4% in a liquidation scenario. The creditors were assured of payment because the funds came from an external investor as opposed to the struggling company itself. The related parties even went so far as to give the other creditors priority by subordinating their claims to theirs. Unfortunately, the creditors were not in a position to ascertain whether the scheme was in fact as attractive as it appeared because of Wah Yuen’s lack of transparency.85

This lack of transparency stemmed from the fact that the valuation estimates provided by the KPMG accountants were based on unaudited accounts.86 However, it is submitted that an insistence on audited accounts in every case may be too onerous, and should not be taken as a strict requirement. Indeed, the real concern of the C.A. in that case seems to be the lack of information about related party debts which, if unsubstantiated or fabricated, were likely to skew the liquidation dividend estimates. Where there is some other means of offering a reliable estimation of the value of the company, say via the appointment of an independent investigative accountant,87 insistence on audited accounts might be too onerous on companies genuinely seeking to work out their problems. In light of these considerations, perhaps the best formulation of the test is found in Re Pheon Pty Ltd, cited with approval in Wah Yuen: the company has “a duty to make full and fair disclosure of all material facts known to them or reasonably accessible to them which is relevant for the creditors to know.”88 Even where disclosure has been deficient in some respect, the court may overlook this deficiency in determining compliance if the information in question would not have caused any consenting claimant to have changed her view.89 Furthermore, Re Heron International NV amplifies this by specifying the object of disclosure:

An explanation of the effects of the schemes requires an explanation of how the schemes will affect a bond holder or creditor commercially. He needs to be given such up to date information as can reasonably be provided on what he can expect if the group were to go into liquidation and as to what he can expect under the schemes.90

85 Wah Yuen, supra note Error! Bookmark not defined. at para. 42.
86 Audited accounts presumably refers to accounts audited in compliance with the requirements under ss.201 and 207 of the Companies Act (Cap 50, 2006 Rev. Ed.), i.e. they comply with the Singapore Accounting Standards and give a true and fair view of the company’s state of affairs/profit or loss as at the end of the statutory period to which the accounts relate.
87 For an indication of commercial banking practice in such situations, see Association of Banks in Singapore, “Principles and Guidelines for Restructuring of Corporate Debt – The Singapore Approach” (undated) at para. 2.6, online: ABS <http://www.abs.org.sg/pdf_files/spore_approach.pdf>. In Re Heron International NV [1994] 1 BCLC 667 at 673, Nicholls V.C. observed that there may be cases where the only practical way for creditors to be properly informed is by the board of directors commissioning a report from an expert who is given access to far more information than can be distributed generally to all the creditors. Indeed, s.210(8) of the CA empowers the meeting of members of the company to compel, by resolution, the directors to instruct accountants and/or solicitors to report on the proposals and make these available to shareholders and creditors before the meetings voting on the proposal.
88 (1986) 11 ACLR 142 at 155 [emphasis added].
89 Supra note 87 at 673.
90 Ibid. at 672.
Thus, it may not be sufficient for disclosure to merely indicate the expected alternative dividend in liquidation, but also the basis of the expected valuation of the going concern sought to be preserved by the SOA, where applicable. This would allow the creditors voting not only to determine their comparative returns between the alternative processes available, but also the fairness of distributions under the SOA in accordance with absolute priority and the justifications for any deviations observed.

This leads us to the second related problem of the ascertainment of valid claims against the company, which goes towards not only the accurate valuation of the alternative outcomes of the company in reorganization and liquidation, but also the allocation of voting rights at the creditors meeting. A common phenomenon when schemes are proposed is the emergence of ‘woodwork’ creditors, the origin and quantum of whose claims are unsubstantiated or suspicious. The SOA process lacks any proof of debt mechanism by which these could be objectively reviewed and quantified. The *Wah Yuen* case addressed this problem indirectly by treating the votes of such related parties with reserve in examining whether their votes fairly reflected the views of the creditors concerned, on the basis that the company failed to divulge evidence as to origin and nature of the related party debts.\(^\text{91}\) Consequently, the disclosure obligations under the SOA process are fairly extensive and potentially onerous depending on the time at which the scheme is proposed. To the extent that the specific information is material in order to permit creditors and other affected by the scheme to exercise meaningful choice, this is a necessary cost of the process.

In summary, the SOA process functions to some degree in Singapore as a *de facto* debtor-in-possession regime, and appears to be a more viable alternative to the JM process in corporate rescue reorganisations as it encourages management to seek external assistance at an earlier stage in financial distress. This result was facilitated by a combination of structural and judicial factors. A significant factor has been the jurisprudence and practice of the Singapore courts, which facilitated the workability and integrity of SOAs via generally principled augmentation of the skeletal framework and careful scrutiny of SOA applications to ensure a balance between collective and individual creditor interests. Nevertheless, it must be acknowledged that the viability and stability of the current process implicitly depends on the cooperation of secured creditors, who can easily undo the entire process by insisting on unilateral private enforcement of their security,\(^\text{92}\) given that the moratorium under s.210(10) likely stops short of constraining such enforcement action. In addition, SOAs are also likely to be utilised where the company’s debt structure is more widely dispersed; concentrated debt structures in a bank dominated financial system like Singapore\(^\text{93}\) are more likely to be restructured in a reorganisation by informal, private

\(^\text{91}\) The court cited *Re Pheon Pty Ltd*, *supra* note 88 at 156 in support.

\(^\text{92}\) That is, enforcement that does not require judicial assistance via legal proceedings, e.g. the contractual appointment of a private receiver and manager, exercise of a withholding lien or exercise of contractual rights of set-off (*de facto* security).

\(^\text{93}\) See Monetary Authority of Singapore, *Annual Report 2007/2008* (Singapore: MAS, 2008) at 105 and 114, online: <http://www.mas.gov.sg/about_us/annual_reports/annual20072008/index.html> In the year 2007, commercial banks (excluding merchant banks and finance companies) provided S$198.35 billion worth of loans to businesses (excluding professional and private individuals) while S$30.02 billion was raised in the domestic debt market. GDP during the same period was S$243.17 billion.
consensual workouts\textsuperscript{94} where the transaction costs of renegotiation are not too high\textsuperscript{95} or via a contractual, security based system like receivership.

V. Looking ahead – wholesale imports or functional development?

A review and reform process focussed on a modular assessment of rescue mechanisms may result in an unduly rigid conception of possible avenues of improvement. For example, the CLRFC report appears to reflect a binary conception of appropriate governance frameworks for the reorganisation process, either based exclusively on management-in-control or an external independent manager.\textsuperscript{96} There may be other alternatives available that better suit the circumstances of corporate failure in Singapore. An alternative approach would seek first to understand how and to what extent the current system has developed and succeeded organically, and then identify key mechanisms that need improvement in order for the system to better achieve its objectives. Among these is the need to encourage companies in financial difficulty to address problems earlier, channel them into appropriate processes depending on whether they are worth rehabilitating or liquidating, with appropriate gate-keeping along the way.\textsuperscript{97} Of course, inspiration for such improvements often comes from a functional analysis of foreign models and their practical workings. In this vein, at least two important general issues emerge from the foregoing review of the SOA process, which offer direction on how the existing process can be improved.

A. Corporate reorganisation governance

A ‘trustee’ type regime like JM that displaces management in favour of an external professional invariably creates a disincentive to resort to insolvency processes early.\textsuperscript{98} Furthermore, where reorganisation is called for, management is often the best placed, in terms of working relationships and information, to keep the operational aspects of the business going while a scheme is formulated. The appointment of an external trustee with a view to the same objective incurs great learning costs that would further deplete assets, and reduces the probability of a successful workout.\textsuperscript{99} The more realistic outcome in many of such cases is a sale of some part of the going concern or assets.\textsuperscript{100} This is not necessarily an indictment of trustee based systems, particularly in the case of small and medium sized enterprises with a single institutional debtor.\textsuperscript{101} In such a situation, the monitoring and timely intervention by a concentrated debtor with the appropriate incentives to do so could result in private or formal rescue processes

\textsuperscript{94} The Association of Banks in Singapore has promulgated its own informal guidelines for a workout: The Singapore Approach, supra note 87.
\textsuperscript{96} Supra note 4 at para. 2.9.
\textsuperscript{97} Treblilcock & Katz, supra note 15 at 7-16.
\textsuperscript{98} V. Finch, “Control and co-ordination in corporate rescue” (2005) 25 Legal Studies 374 at 391-392.
\textsuperscript{100} See supra note 27. See also the recent study done on Administrations in the U.K.: S. Frisby, “Report on Insolvency Outcomes” (26 June 2006), online: \textlangle}http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/corpdocs/Insolvency Outcomes.pdf\textrangle, where only 3% of all cases result in a rescue of the company, 53% were asset sales and 40% involved a sale of the whole or part of the going concern.
\textsuperscript{101} See generally S. Franken, supra note 14 at 659-665.

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that would maximise the value of the underlying business. The high incidence of asset sales may merely reflect the reality that the value of most such smaller businesses is best realised via market sales rather than a reorganisation.

On the other hand, the legitimate concern of policy makers is whether management of larger companies with more diffuse debt structures can be trusted to act impartially and objectively for the interests of all stakeholders during the process of restructuring. This is likely to be of greater concern in jurisdictions like Singapore, where a larger proportion of large and medium-sized publicly traded corporations are closely held by family or state interests rather than widely held. In the case of closely-held companies, management is likely to be unduly beholden to the interests of controlling shareholders, with a view to entrenching their positions by means of a protective moratorium and therefore furthering personal interests, to the detriment of more diffuse creditors without adequate monitoring incentives (and greater collective action problems) to muster the information needed to wrest control from existing shareholder-beholden management. Perhaps this has been the main underlying concern of many Commonwealth regimes in considering a move to a more debtor-in-possession oriented regime, and appears at first to be an irresolvable conflict of corporate rescue policy.

This tension highlights the need for substitute checks on management in the SOA process once the discipline of debt is muted by the invocation of an interim moratorium. Hahn’s proposal for an integrated model of governance in corporate reorganisations offers a promising way out of this seeming impasse. He suggests a control model that incorporates both management and an appointed external trustee tasked with protecting the interests of creditors. There are various ways of structuring this shared control. Hahn prefers an integrated approach where the appointed trustee sits on the board of directors and wields veto powers over board matters, but presumably cannot independently dictate the progress and form of the reorganisation. Nevertheless the appointed trustee, representing the interests of creditors, plays an active part in the process and has to be duly informed of the business matters of the corporation. She also offers greater integrity in the decision-making concerning the prospects of a viable reorganisation. There are however, inherent costs in this model, arising from the likely conflicts on the board resulting from the divergent interests and the information asymmetry between management and the newly appointed trustee.

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103 See e.g., R.L. Porta et al., “Corporate Ownership Around the World” (1999) LIV Journal of Finance 471 at 492-6 (Note that both classes studied consisted of corporations with a stock market capitalisation of at least US$500 million); S. Claessens et al., “The separation of ownership and control in East Asian Corporations” (2000) 58 Journal of Financial Economics 81 at 106, Table 8 (10 and 20% of the 20 largest and 50 median publicly traded firms were widely held respectively, while 32.5 and 46% were family-owned and 42.5 and 35% were state-owned at the end of the 1996 fiscal year.)

104 Hahn, supra note 99 at 132-133; Franken, supra note 14 at 665-666.

105 Ibid. at 147-149.

106 E. Adams, “Governance in Chapter 11 Reorganizations: Reducing Costs, Improving Results” (1993) 73 Boston University Law Review 581 at 621, proposes a bifurcated board structure under which the appointed bankruptcy trustee and the pre-petition management share in the decision-making of the corporation.

107 Ibid. at 152-153.
In addition, some concern may be raised about the independence of the trustee, who is likely to be drawn from a limited pool of insolvency practitioners. Commercial considerations in a small jurisdiction like Singapore might render these professionals to be more inclined to favour certain repeat players like banks and other financial institutions in their decision-making. Nevertheless, this is a problem that already exists in JM and would have to be dealt with through a better explication of the legal and professional duties of such an appointed trustee. Perhaps the more crucial aspect of this model is the critical role an independent, external trustee has in generating information on the company. There are practical limits to what can be achieved in a single, static document such as the explanatory statement. Such a trustee or supervisor could, with access to the company’s property, records and meetings, provide continuing independent observation and oversight of the reorganising company during a SOA process, and therefore more reliable critical information to creditors or creditors’ committees.

The attractiveness of this proposal to reconfigure the governance structure of a company in a restructuring process is borne out somewhat by the SOA experience in Singapore, where independent insolvency or accounting professionals have been appointed to supervise the operations of the company during the formulation and proposal of a SOA, and/or the implementation of the SOA, with a duty to report directly and regularly to the creditors or a creditors’ committee. These instances of private ordering suggest that the financial community and institutional lenders in particular are familiar with such supervisory measures, and have found them acceptable in protecting their interests in an informal corporate reorganisation setting. This provides some assurance that an altered SOA governance framework will not be received with the same scepticism as JM has. Interestingly, Malaysia has moved ahead in this respect via their amendments to s. 176 of the Malaysian Companies Act 1965. Section 176(10A) now empowers the court to grant a stay where, inter alia, the company approves the appointment of a person nominated by a majority of the creditors in the stay application to act as a director, who has “a right of access at all reasonable times to the accounting and other records” and “is entitled to require from any officer of the company such information and explanation as he may require for the purposes of his duty.”

Whether governance of the SOA process should mandate a full-fledged integrative model as proposed by Hahn very much depends on the potential for managerial conflicts of interest presented by the particular company and the type of scheme intended. Such integrated control systems are unlikely to come cheap. Insolvency professionals or accountants are likely to charge a premium for the added responsibilities and potentially significant liabilities presented by appointment to the board of directors. Where the scheme proposed by the company is relatively simple,

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108 Finch, supra note 98 at 381.
110 See J. Sarra, Rescue!, supra note 34, c.8 at 258.
111 Supra note 27 at 13. See also, ABS, The Singapore Approach, supra note ... at para. 2.6, which envisages the appointment of a special accountant/independent financial advisor to review and comment in the debtor company’s financial controls and systems, projections, financial information and the plan of action.
112 Lee Eng Beng, supra note 23.
113 2000 Reprint, which is the equivalent of s.210 of the CA.
114 Malaysian Companies Act 1965, s. 176(10B).
management is not ostensibly beholden to controlling shareholders, and have been open and forthright with information, a less intrusive supervisory set-up may be all that is warranted. In contrast, where the operations of the company are complex, potential for shareholder bias evident, the means of rehabilitation unclear and the information disclosed sketchy, a more empowered trustee or supervisor is warranted. A more nuanced approach is therefore desirable and this might be implemented either by creditor application based on a statutory ‘menu’ of supervisory arrangements or independently by the court hearing an ex parte stay application. Such a menu may start off with providing access rights in order to monitor the company’s business and finances, and extend to specific control rights over cash flows or property transfers. An existing example of such a model is the office of the monitor under the Canadian CCAA.115 A court ordering a stay under the Act116 must also appoint a person to “monitor the business and financial affairs of the company”, which as an adjunct can include such other functions in relation to the company as the court may order.117 Furthermore, in recent times, chief restructuring officers (CROs) have also been appointed who are turnaround experts who take over control of the company in place of the board of directors and the chief executive officer.118 A CRO is vested with responsibility to steer the insolvent firm through the negotiation of the plan under the CCAA and the restructuring process.

B. An enhanced moratorium

As the interim moratorium currently stands, a distinction appears to be drawn between judicial and private (contractual) means of enforcement of secured and unsecured debt, and further between pending and future judicial proceedings against the company. Neither of these distinctions makes sense if the object is to grant the company a breathing space to propose and negotiate a reorganisation with its creditors and shareholders. Creditors so exempted may unilaterally short circuit any such negotiation process unless their demands are met. It would therefore be prudent to extend s.210(10) to cover all enforcement action, secured and unsecured alike, set-off, contractual ipso facto clauses and other self-help measures. Furthermore, in the light of the value of allowing reorganisation negotiations to encompass third party directorial guarantees, the court should have a discretion to extend the moratorium to proceedings against relevant officers of the company where this would facilitate a successful negotiated solution to the company’s difficulties.119

A likely sticking point in effecting this will be the existing privilege given to a qualifying floating charge holder who has a veto power over JM120 and therefore priority of enforcement via a receivership. The criticisms of exempting receivership from the collective principle have been well documented,121 although there have also been arguments in support of the process where dominant creditors holding a floating charge have heightened incentives to monitor debtor companies and take prompt

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115 Supra note 15, s.11.7.
116 CCAA, ibid., s.11(3).
117 CCAA, ibid., ss.11.7(3)(a)-(d); See also Sarra, supra note 110, c.8.
118 Sarra, supra note 110, c. 5 at 160-161.
120 CA, s.227B(5).
121 See e.g., R. Mokal, “The Harm Done by Administrative Receivership” (June 2004), online: <http://ssrn.com/abstract=568702>; Hahn, supra note 99 at 142-144.
action. However, this latter analysis assumes that a floating chargee is at least at risk of being undersecured and is not able to extract further collateral or guarantees from the company. Even then, receivership law in Singapore does not require the receiver or appointer to act in the collective interest of all creditors in examining the merits of a reorganisation so long as they act in good faith.

The concerns of secured creditors are nonetheless legitimate if the SOA process clothes the company and its management with a more extensive moratorium which may be used to deplete or extract value from their security in an attempt to advance management and shareholder interests. Three measures can, however, be put in place to address these concerns. The first has been outlined above – an improved governance framework as outlined above that keeps creditors informed of the progress of the SOA negotiations and offers a check on managerial abuse and fraudulent transactions. Secondly, strict judicial supervision and timelines to prevent abuse and delay are important facets of minimising strategic game-playing on the part of management and controlling shareholders. This supervision would be enhanced by offering clear exit routes if a company proposing a scheme fails to meet court prescribed timelines or secure sufficient creditor support for a reorganisation. For example, a court supervising a failed SOA could be empowered to transfer the company in winding up or JM, depending on the information available to it that indicates the next best alternative. In addition, creditors with the means and incentives to monitor the company should be independently empowered to move for such a switch of process if they can persuade the court that this is the more optimal route given the company’s circumstances. In this vein, the holder of a floating charge who is a dominant creditor, or a group of lenders in a bank-dominated financial system who are as or more completely appraised of the situation should not have significant difficulty in opposing the initial grant of a SOA moratorium or applying for a transfer into a winding up, JM or receivership on the basis that a private sale, auction or piecemeal liquidation through these alternative processes is likely the more appropriate process. This also strongly suggests that moratorium itself should remain discretionary in nature, and not automatic as it is under JM. The courts could then continue to play an important threshold gate-keeping function to ensure that only bona fide attempts to restructure should receive the protection of the s.210(10) moratorium, and in doing so allow interested claimants to provide relevant information and input in such decisions.

Finally, ‘adequate protection’ should be provided for individual secured creditors during the course of the moratorium to cater for the inherent effects of delay in enforcement on particular security interests. For example, Israel has added a moratorium to its SOA equivalent, and s.350(f) of the Companies Law 1999 allows the court to permit a mortgagor or floating charge to enforce their security on the ground that “no proper protection of the rights of the creditor in the asset has been

123 See e.g. Roberto Building Material Pte Ltd v. OCBC Ltd [2003] 2 SLR 353 (C.A.).
125 Israel Companies Law 5759-1999, s. 350, online: <http://www.justice.gov.il/MOJHeb/HeskeminVeKishreiHutz/KishreiChutz/HukimEnglish/>. 
secured.” This concept of adequate protection has in fact also been developed by the Singapore courts to protect secured creditors under the JM moratorium.\textsuperscript{126}

VII. Conclusion

The CLRFC recommendations rightly call for an examination of the data of our JM and SOA processes in the light of their success as rescue procedures. In respect of the SOA framework, this \textit{prima facie} evaluation appears to be supported by anecdotal evidence of practitioners and an examination of the reported cases. Further empirical studies are necessary to better understand how the current system actually works and the background factors that contribute to the array of observed insolvency outcomes. On the other hand, the report’s observation that “[o]portunity should be taken … to revisit the merits of a management-in-control US Chapter 11 process \textit{in lieu} of judicial management” assumes that the corporate rescue framework in Singapore is currently devoid of any such concept.\textsuperscript{127} The foregoing discussion demonstrates that this has not been the case, and offers some suggestions on how this organic SOA process can be further refined and enhanced to facilitate corporate reorganisations when they are called for, without unduly prejudicing the interests of stakeholders. Such a system would likely be more suited to local conditions than an imported model of corporate reorganisation.

\textsuperscript{126} See \textit{Electro Magnetic (S) Ltd v. DBS Ltd} [1994] 1 SLR 734 (C.A.).

\textsuperscript{127} CLRFC Report, supra note 4 at para. 2.9.