
REPORT OF THE INSOLVENCY LAW REVIEW COMMITTEE

FINAL REPORT

2013

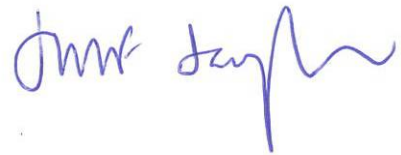
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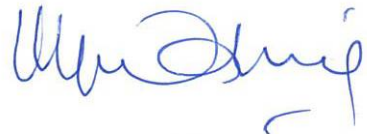
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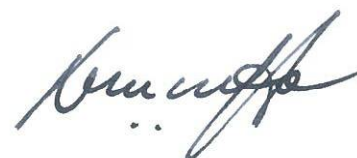
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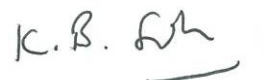
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Appendix 1: List of Recommendations

Appendix 2: Secretariat

CHAPTER 1: INTRODUCTION

1. In November 2010, the Ministry of Law decided that, as part of its ongoing review of the insolvency laws of Singapore, it would appoint a committee of insolvency practitioners, academics and stakeholders to form an Insolvency Law Review Committee (the “**Committee**”) to review the existing bankruptcy and corporate insolvency regimes, and to issue a report making recommendations on an Omnibus Insolvency Bill, with a view to:
 - (1) Unifying the bankruptcy and corporate insolvency regimes in a single piece of legislation;
 - (2) Modernizing the law of bankruptcy and corporate insolvency and adopting practices best suited to Singapore;
 - (3) Making the attendant processes user-friendly and accessible for individuals and corporations alike; and
 - (4) Where appropriate, taking into account the relevant recommendations made by the Companies Legislation and Regulation Framework Steering Committee.

(A) *THE COMMITTEE*

2. On 9 December 2010, Mr. K Shanmugam, the Minister for Law, appointed Mr. Lee Eng Beng, S.C., Managing Partner of Rajah & Tann LLP, as Chairman of the Committee.
3. The Committee has been vice-chaired by the:

- (1) Official Assignee and Public Trustee, Insolvency and Public Trustee's Office ("**IPTO**");¹ and
 - (2) Director-General of the Legal Group, Ministry of Law.²
4. In addition to the Chairman and the Vice-Chairpersons, the Committee comprised the following insolvency practitioners, academics, and representatives of various stakeholders in Singapore's insolvency practice:
- (1) Mr. Ng Wai King, Joint Managing Partner, WongPartnership LLP;
 - (2) Mr. Manoj Sandrasegara, Partner, WongPartnership LLP;
 - (3) Mr. Edwin Tong, Partner, Allen & Gledhill LLP;
 - (4) Mr. Ong Yew Huat, formerly of Ernst & Young LLP;
 - (5) Mr. Sushil Nair, Director, Drew & Napier LLC;
 - (6) Mr. Don Ho, Don Ho & Associates representing the Insolvency Practitioners Association of Singapore;
 - (7) Mr. Patrick Ang, Partner, Rajah & Tann LLP representing the Law Society of Singapore;
 - (8) Mr. Chee Yoh Chuang, Executive Director, Chio Lim Stone Forest LLP representing the Institute of Singapore Chartered Accountants;

¹ Ms. Mavis Chionh, as Official Assignee and Public Trustee, Insolvency and Public Trustee's Office acted as vice-chair till 30 September 2011; Ms. Sia Aik Kor, Official Assignee and Public Trustee, Insolvency and Public Trustee's Office, acted as vice-chair from 15 September 2011 onwards.

² Ms. Valerie Thean, as Director-General of the Legal Group, Ministry of Law acted as vice-chair till 1 October 2012; Ms. Thian Yee Sze, 1 Director-General of the Legal Group, Ministry of Law, acted as vice-chair thereafter, until 1 June 2013; Ms. Joan Janssen, 2 Director-General of the Legal Group, Ministry of Law, acted as vice-chair from 1 June 2013 onwards.

- (9) Ms. Loretta Yuen, Overseas-Chinese Banking Corporation, representing the Association of Banks of Singapore;
 - (10) Ms. Wan Wai Yee, Associate Professor, School of Law, Singapore Management University;
 - (11) Mr. Wee Meng Seng, Associate Professor, Faculty of Law, National University of Singapore;
 - (12) Mr. Tracey Evans Chan-Weng, Associate Professor, Faculty of Law, National University of Singapore;
 - (13) Mr. Soh Kee Bun, Senior State Counsel, Legislation and Law Reform Division, Attorney-General's Chambers.³
5. As a number of recommendations take reference to the approach in other jurisdictions, in the course of the Committee's work, the Committee also consulted with a group of international experts (comprising insolvency practitioners and academics from the UK and Australia)⁴ on the comparative approach taken on in those equivalent regimes.

³ Ms. Melinda Moosa, Deputy Senior State Counsel, Legislation and Law Reform Division, Attorney-General's Chambers, acted as Committee Member up till 31 December 2012; Mr. Soh Kee Bun, Senior State Counsel, acted as Committee Member thereafter.

⁴ These were, Mr David Kidd, formerly of Allen & Overy, Hong Kong (UK); Ms Jennifer Marshall, Partner, Allen & Overy (UK); Mr Adrian Cohen, Partner, Clifford Chance (UK); Professor Richard Fisher, General Counsel, The University of Sydney (Australia); and Mr Ron Harmer, Consultant, Blake Dawson Waldron (Australia).

(B) THE CURRENT FRAMEWORK AND THE NEED FOR REFORM

6. At the outset, the Committee considers it useful to briefly sketch out the existing legislative framework for insolvency in order to ascertain the key drivers for reform.
7. At present, the majority of statutory provisions addressing insolvency law in Singapore are found in the Companies Act (Cap. 50) (the “**Companies Act**”) and the Bankruptcy Act (Cap. 20) (the “**Bankruptcy Act**”).
8. The Companies Act sets out the framework for corporate insolvency. It makes provision for the liquidation, judicial management and receivership of companies, as well as schemes of arrangement entered into between companies and their creditors/shareholders. The personal insolvency regime is addressed through the Bankruptcy Act, which provides for the bankruptcy of individual debtors, the procedures for individual voluntary arrangements, and, more recently, debt repayment schemes. Certain aspects of Singapore’s bankruptcy laws, such as the provisions relating to the proof of debts and the avoidance of pre-bankruptcy transactions, are made applicable to companies in judicial management and liquidation by way of importation provisions in the Companies Act.⁵
9. Both the Companies Act and the Bankruptcy Act provisions are, in turn, supported by subsidiary legislation containing detailed rules governing the conduct of bankruptcies, liquidations, and judicial management.⁶
10. Further, depending on the specific context, a miscellany of provisions in other pieces of legislation also introduce modifications to the general corporate insolvency regime. Examples include the modification of winding up provisions as they apply to banks, insurance companies and co-operative

⁵ See sections 227T, 327(2), 329 of the Companies Act, and the Companies (Application of Bankruptcy Act Provisions) Regulations (Cap. 50, RG 3) (the “**CABAR**”).

⁶ See principally the Bankruptcy Rules (Cap. 20, R1) (the “**Bankruptcy Rules**”), the Companies (Winding Up) Rules (Cap. 50, R 1) (the “**Winding Up Rules**”) and the Companies Regulations (Cap. 50, RG 1) (the “**Companies Regulations**”).

societies,⁷ the provision for the priority of certain types of claims in a winding up,⁸ and the conferment of powers of a receiver when appointed under a mortgage.⁹

11. The insolvency framework described above has its roots in Singapore's colonial legal heritage. Singapore's personal insolvency regime originated from the Bankruptcy Ordinance 1888, which was introduced when Singapore was part of the British Straits Settlements. Our corporate insolvency regime originated with the application of the Indian Companies Act 1866 to the Straits Settlements.
12. Both regimes were based on legislation in force in the UK at the material time.¹⁰ Whilst both have undergone various revisions over the years, these have essentially been piecemeal in nature. The last significant amendment to the bankruptcy regime was made in the mid-1990s,¹¹ whereas the corporate insolvency regime remains a patchwork of UK and Australian legislation (from the 1940s and 1960s, respectively) adopted and adapted for use in a local context.¹²
13. As with any other legislation, there is a constant need to revise insolvency law to ensure that it remains modern and relevant. This has been driven not only by Singapore's growth as a regional financial and business hub, but also the proliferation of complex credit and financing transactions. The increased volatility of the global economy has also underscored the need to strengthen our corporate rescue mechanisms.

⁷ See sections 83 to 90 of the Banking Act (Cap. 19) (the "**Banking Act**"), sections 54, 54A, 55G of the Insurance Act (Cap. 142) (the "**Insurance Act**"), and section 42 of the Co-operative Societies Act (Cap. 62) respectively.

⁸ Several Acts give certain types of claims priority over unsecured claims in liquidation (see for example section 47 of the Employment Act (Cap. 91) (the "**Employment Act**") which gives priority to retrenchment benefits).

⁹ Provisions relating to the receiver appointed under a mortgage are also contained in section 29 of the Conveyancing and Law of Property Act (Cap. 61).

¹⁰ The Bankruptcy Ordinance 1888 was based on the English Bankruptcy Act 1883 (with certain amendments to reflect Singapore's status as a colony). The Indian Companies Act 1866 was based on the English Companies Act 1862.

¹¹ Amendments were made to incorporate provisions from the UK Insolvency Act 1986. Subsequent amendments were made in 2009 to introduce Part VA of the Bankruptcy Act, which introduced the debt repayment scheme.

¹² The Companies Act was passed in 1967 and incorporated provisions from the Australian Companies Act 1961 (Victoria) and the UK Companies Act 1948. Amendments were made to the Companies Act in the 1980s to introduce Part VIIIA, which introduced judicial management as an alternative corporate rescue mechanism.

14. Further, cross-border trade has become a common feature of the commercial landscape. Nowadays, it is not uncommon for companies to have assets, creditors, and debtors located across several jurisdictions, making it less surprising for a company to face insolvency proceedings outside its country of incorporation, or, indeed, to be faced with multiple sets of insolvency proceedings in different jurisdictions, each subject to different procedures and handled by different insolvency office-holders.
15. Singapore's insolvency regime has not yet been fully developed to deal with cross-border insolvencies. The Companies Act only provides for how a foreign company (either registered or unregistered in Singapore) may be wound up. The relationships between foreign and local insolvency proceedings and office-holders, as well as the degree of cooperation that is to be provided, continues to be governed largely by the common law. As Singapore seeks to attract greater foreign capital and investments, this aspect of cross-border insolvency must be given greater legislative clarity.
16. The personal and corporate insolvency regimes in other major Commonwealth jurisdictions, such as the UK and Australia, have also undergone significant review and reform in recent times:
 - (1) In the UK, the Cork Committee undertook a comprehensive review of English insolvency law, publishing its report in 1982 (the "**Cork Report**"). This led to the enactment of the UK Insolvency Act 1986 (the "**UK Insolvency Act**"), an omnibus bill which combined the personal and corporate insolvency regimes. Substantial refinements were again made to the UK's insolvency regime by way of the Enterprise Act 2002 (the "**UK Enterprise Act**") (which amended the UK Insolvency Act) and the Cross-Border Regulations 2006, which adopted the UNCITRAL Model Law on Cross-Border Insolvency into the UK regime.
 - (2) A similar review was conducted in Australia, which led to the publication by the General Insolvency Inquiry of the Australian Law Commission of its report in 1988. In 1993, the Corporate Law Reform

Act was passed, incorporating major revisions to the corporate insolvency regime, including the introduction of voluntary arrangement, and a re-write of the procedures for clawback provisions such as voidable preferences and insolvent trading. Since then, both the Australian Corporations Act and Bankruptcy Act, which govern corporate and personal insolvency respectively, have undergone further significant amendments.

17. It would not be an understatement to say that certain aspects of Singapore's insolvency regime, which was previously formulated on legislation in the UK and Australia, are outmoded and in need of a "face-lift".
18. The need, therefore, to undertake a holistic review of Singapore's insolvency regime to ensure that it remains robust, effective and fair in a modern commercial context cannot be more apropos.

(C) THE COMMITTEE'S APPROACH

19. The Committee first determined a list of key issues which would have to be addressed, and met a total of 13 times from 2010 to 2013 to discuss each of those issues. Prior to each meeting, the Committee's Secretariat prepared memorandums setting out the law on each of the areas for the Committee's consideration and discussion. The Secretariat's memoranda referred extensively to UK and Australian insolvency law for guidance and comparison.
20. The Committee also engaged in consultation with other stakeholders, such as the Monetary Authority of Singapore, the Supreme Court, the Accounting and Corporate Regulatory Authority ("**ACRA**") and the Association of Banks of Singapore.
21. There is no doubt that many technical, procedural and drafting issues will have to be addressed in the course of preparing the new legislation. What the

Committee's Report aims to do, however, is recommend the overall structure of the new regime, the key changes to be made, and provide a roadmap for the drafting of the detailed and specific statutory provisions. In this regard, consultation papers have been recently issued by, among others, Hong Kong and the UK proposing reforms to the insolvency laws¹³, some of which have already been dealt with by the Committee in this Report. Whilst many of the reforms proposed in these consultation papers deal with operation or technical reforms, and are therefore outside the scope of the Committee's Report, they may nevertheless be considered by the Government at an appropriate stage.

¹³ Hong Kong: *Consultation Document on Legislative Proposals for the Improvement of Corporate Insolvency Law*, April 2013, Financial Services and Treasury Bureau; UK: *Red Tape Challenge – Changes to insolvency law to reduce unnecessary regulation and simplify procedures*, 18 July 2013, Insolvency Service.

CHAPTER 2: A NEW INSOLVENCY ACT

1. The Committee has, in Chapter 1, given its brief reasons why it is timely to conduct a holistic review of Singapore's insolvency regime. In this chapter, the Committee sets out its reasons why, as part of this overhaul, Singapore's insolvency laws for both personal bankruptcy and corporate insolvency, should be consolidated and housed under a single piece of omnibus legislation. Recommendations are thereafter made as to the overall structure of the New Insolvency Act and certain issues which cut across the various insolvency regimes.

(A) REASONS FOR CONSOLIDATION

2. At the outset, the Committee notes that, in its report issued in October 2002, the Company Legislative and Regulatory Framework Committee ("**CLRFC**"), recommended the enactment of an omnibus Insolvency Act, modeled after the UK Insolvency Act and its subsidiary legislation, that will be applicable to both companies and individuals, in order to set out the common principles and procedures, as well as consolidate and update the core areas, of Singapore's insolvency regime.¹⁴ The Government accepted this recommendation.¹⁵
3. The Committee observes that, although more than a decade has passed since the CLRFC issued its recommendations, a number of major common law jurisdictions continue to house their corporate insolvency and personal bankruptcy regimes in separate pieces of legislation. For instance, the corporate insolvency and personal bankruptcy regimes for Australia are found in their Corporations Act 2001 ("**Australia Corporations Act**") and Bankruptcy Act 1966 ("**Australia Bankruptcy Act**") respectively.¹⁶
4. Nevertheless, the Committee is of the view that the CLRFC's recommendation should be implemented. There are several objectives to be

¹⁴ See Recommendation 4.1 of the CLRFC's Final Report (October 2002).

¹⁵ See Parliamentary Report dated 24 April 2003, Session No. 1, Volume No. 76, Sitting No. 13, Column No. 2133.

¹⁶ For further examples, see the Companies Act 1993 and the Insolvency Act 2003 of New Zealand, and the Companies Ordinance and the Bankruptcy Ordinance of Hong Kong.

achieved by enacting omnibus insolvency legislation and, as far as the Committee is aware, there are no disadvantages in doing so.

5. First, insolvency law has developed and is considered as a discrete area of commercial law that is underpinned by a set of concepts, principles and policies. For instance, much of the judicial management regime bears a closer relationship with the bankruptcy and liquidation regimes than general company law. This reflects the reality that, when individuals and companies are in financial distress, substantially different concerns, tensions, and stakeholder interests and objectives emerge, which have to be addressed outside general commercial and corporate law.
6. Second, having our insolvency statutory law untidily dispersed in fragmented and disparate pieces of legislation is not in keeping with Singapore's goal of establishing itself as a main commercial, financial and legal hub within the region. The consolidation of our various insolvency regimes into a single piece of legislation enhances clarity and access to our laws by members of the commercial sector. It also assists insolvency practitioners who currently have to navigate the mass of primary and subsidiary legislation in order to advise their clients and carry out their functions.
7. Third, consolidation will help to address the inconsistencies and uncertainties that invariably arise from having to cross-refer to concepts from various pieces of insolvency legislation; especially where there are differences between legislation relating to nomenclature, timeframes, analogous procedures and appointment holders. One such example would be the broad importation mechanism in section 227X(b) of the Companies Act that empowers the court to order that any other section in Part X of the Act (which relates to winding up) shall apply to a company under judicial management as if it applied in a winding up by the court. In practice, questions have often arisen as to how, and under what circumstances, section 227X(b) of the

Companies Act ought to operate. Another instance would be the CABAR, the difficulties of which have even been judicially noted.¹⁷

8. Fourth, consolidation will ensure that there is proper statutory provision to support the transition, relationship and coordination between the different insolvency regimes. For instance, the New Insolvency Act should provide for the smooth transition of legal proceedings from one insolvency regime (such as judicial management) into another (such as liquidation); hence addressing the anomalies in our current law whereby the importation of the avoidance provisions from the Bankruptcy Act into the judicial management regime have effectively prevented liquidators from maintaining an action for avoidance if the action was first commenced when the company was in judicial management.¹⁸
9. For these reasons, the Committee agrees with the recommendation of the CLRFC that both the personal bankruptcy and corporate insolvency regimes ought to be incorporated in a single omnibus legislation (similar to the approach taken in the UK Insolvency Act) that will, in turn, be supported by omnibus subsidiary legislation.

(B) THE APPROACH

10. As Singapore's current personal and corporate insolvency regimes are largely underpinned by UK statutory and common law, a natural starting point for the New Insolvency Act would be the UK Insolvency Act, as well as the wealth of case-law developed by the UK courts in applying its provisions. This also makes sense since English law is widely understood and applied in international business and finance transactions. Many areas of Singapore's law on companies, credit and security, banking, securities and commercial transactions are also informed by English law.

¹⁷ See the comments of the Singapore Court of Appeal in *Show Theatres Pte Ltd (in liquidation) v Shaw Theatres Pte Ltd and another* [2002] 2 SLR(R) 1143 at [30] and the Singapore High Court in *Amrae Benchuan Trading Pte Ltd (in liquidation) v Tan Te Teck Gregory* [2006] 4 SLR(R) 969 at [19] and [20].

¹⁸ See *Neo Corp Pte Ltd (in liquidation) v. Neocorp Innovations Pte Ltd* [2006] 2 SLR(R) 717.

11. Where appropriate, the Committee considered and took into account the approaches of other relevant jurisdictions, such as Australia, Hong Kong, New Zealand and Canada.
12. That being said, just as legislative developments and innovations in the insolvency laws of other countries are shaped by their economic and social conditions, the Committee is mindful that any reform of Singapore law must ultimately be informed by our local circumstances and considerations. The temptation to blindly adopt, either wholesale or in substantial part, the regimes developed in other jurisdictions must be firmly resisted. Ultimately, the Committee's recommendations are aimed at establishing an insolvency law regime that is progressive, effective, fair and efficient under local conditions and in the Singapore context.

(C) KEY AREAS OF THE NEW INSOLVENCY ACT

13. Subject to any feedback received in the course of public consultation on this Report and further detailed considerations at the drafting stage, the Committee considers that the New Insolvency Act would include the following areas:
 - (1) Interpretation and general matters, in particular, matters dealing with:
 - (a) definitions;
 - (b) the jurisdiction and powers of the courts;
 - (c) the role and powers of the Official Assignee and the Official Receiver;
 - (d) the role of insolvency practitioners and their qualifications; and
 - (e) officer liability.

- (2) Company insolvency and reorganisations including rules dealing with:
 - (a) receivership;
 - (b) supplemental provisions relating to schemes of arrangements;¹⁹
 - (c) judicial management; and
 - (d) winding up.
 - (3) Cross-border insolvency.
 - (4) Personal insolvency and bankruptcy.
 - (5) Provisions applicable to bankruptcy and all other regimes, such as proof of debt, avoidance provisions, transactions defrauding creditors and priority of debts.
 - (6) Subsidiary legislation.
 - (7) Other miscellaneous and general matters.
14. The New Insolvency Act should achieve a number of objectives. First, it should consolidate all the primary statutory provisions on personal bankruptcy and corporate insolvency in a single piece of legislation. Second, it should organise and house all the insolvency regimes on a common platform of fundamental concepts, principles and policies. Third, it should, as far as possible, standardise, rationalise and streamline the rules, procedures and nomenclature for the various insolvency regimes. Finally, it should eradicate the unsatisfactory features of the current piece-meal legislative framework

¹⁹ The Committee recommended that sections 210, 211 and 212 of the Companies Act be retained in the Companies Act. However, where the company or its creditors or members apply for a statutory moratorium against proceedings, there should be additional statutory support in the New Insolvency Act: See Chapter 7 on Schemes of Arrangement at para 14.

such as the uncertainty created by statutory importation of provisions from one regime into another.

(D) *SOME FRAMEWORK ISSUES*

15. The Committee considers that there are several basic points that should be highlighted at the outset in defining the architecture and scope of the New Insolvency Act.

Jurisdiction

16. Currently, the bankruptcy regime applies to all individuals who are physically present in Singapore. The corporate insolvency regime in the Companies Act applies only to Singapore-incorporated companies, foreign companies and corporations as defined in that Act. However, there are provisions in other pieces of legislation providing for certain aspects of the insolvency of entities and companies within particular industries, such as banks and insurance companies.²⁰
17. The Committee recommends that the New Insolvency Act adopts the same jurisdictional basis. It should address the insolvency of individuals, companies and corporations generally, and should not incorporate detailed provisions applicable to a particular industry or a particular type of business. These are best left in the specialised legislation relating to that industry or business. Of course, this can be only a general guide and it will be inevitable and desirable in certain situations for the New Insolvency Act to make provision qualifying, restricting or elaborating on the application of its provisions for certain types of insolvent parties where it would be more appropriate for it, as opposed to another piece of legislation, to do so.

²⁰ See, for example, section 47 of the Employment Act regarding gratuity payments under a collective agreement or award, sections 61 and 62 of the Banking Act relating to the priority of specified liabilities of banks in Singapore, and section 49FR of the Insurance Act relating to claims of policy owners and specified liabilities.

Consistency

18. The various parts of the New Insolvency Act will deal with different insolvency regimes and diverse issues that arise in corporate and personal insolvency. However, as a piece of omnibus legislation, it must have overall consistency in terms of policy, structure, objectives, concepts and principles, procedures, and even language. The New Insolvency Act, as far as possible, ought to ensure harmony and consistency in important aspects that are common to the different insolvency regimes, such as:
 - (1) The treatment of the rights of creditors, debtors and relevant stakeholders;
 - (2) The powers of the court;
 - (3) The qualifications, powers, duties and liabilities of insolvency practitioners;
 - (4) The control and supervision of insolvency practitioners' rights by the court and the creditors;
 - (5) Restrictions and moratoriums against proceedings and enforcement actions by creditors against insolvent parties;
 - (6) The invalidation or impugning of transactions and dispositions;
 - (7) The priorities of claims and debts;
 - (8) The lodgment, quantification and adjudication of proofs of debts;
 - (9) Terminology and nomenclature;
 - (10) Statutory procedures, timeframes and forms; and

(11) The imposition of civil and criminal liability.

Insolvency Practitioners

19. The New Insolvency Act should provide an overarching, effective and efficient regime to deal with the issues relating to insolvency office-holders such as receivers, judicial managers and liquidators. The current legislation does not deal with these issues globally or consistently, and the Committee recommends that the New Insolvency Act should do so. In particular, the qualifications, qualifying processes and licensing or approval of professionals to act as insolvency office-holders, the maintenance of proper standards amongst insolvency office-holders, and the supervision, regulation and discipline of insolvency office-holders should be clearly provided for by the New Insolvency Act. This topic is accorded separate treatment by the Committee at Chapter 10 of this Report.

Proofs of Debt

20. The drafting of the New Insolvency Act provides a good opportunity to rationalise and unify the legal position on proofs of debt. The subject of proofs of debt is often regarded as procedural in nature and minor in significance relative to the other branches of insolvency law. In fact, it is of central importance as it is the set of principles and rules that governs the nature and quantification of the claims that a party can assert against an individual or company that is undergoing an insolvency proceeding, and defines the rights of that party in the insolvency proceeding. A sophisticated insolvency regime should have a consistent and unified set of such principles and rules applicable to all forms of insolvency proceedings. The current law on proof of debts is fragmented, ill-organised, inconsistent and archaic; the Committee recommends that this be put right in the New Insolvency Act.

21. First, the test of provability of debts should be the same for all insolvency proceedings.²¹ Currently, in a bankruptcy²² and a liquidation of an insolvent company,²³ claims for “unliquidated damages arising otherwise than by reason of a contract, promise or breach of trust” are not provable; as such, claims for unliquidated damages arising from tort are not provable debts. In contrast, in the liquidation of a solvent company, “all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages” are provable debts.²⁴ As a result, one anomaly created by the above provisions is that claims for unliquidated damages arising from tort are not provable in bankruptcy and insolvent liquidation, but may be provable in solvent liquidation. There is no good justification for the distinction; further, difficulty and circularity arise where the solvency of a company depends on whether an unliquidated claim in tort is provable.²⁵
22. Second, there is no reason why a claim against an individual or company that is valid and enforceable under the general law should not be provable under the insolvency law. In the UK, it is immaterial “whether a debt or liability is present or future, whether it is certain or contingent, or whether its amount is fixed or liquidated, or is capable of being ascertained by fixed rules or as a matter of opinion”; indeed, the term “liability” is broadly defined to encompass “a liability to pay money or money's worth, including any liability under an enactment, any liability for breach of trust, any liability in contract, tort or bailment, and any liability arising out of an obligation to make restitution”.²⁶ The Committee recommends that the same approach be adopted in the New Insolvency Act.

²¹ One possible exception is that claims relating to latent tortious damage should not be provable in bankruptcy but should be provable in liquidation: see the amendment brought about by the UK Insolvency (Amendment) Rules 2006 and paragraph 40.3 of the Technical Manual published by the UK Insolvency Service. The rationale is that a claimant's legal remedy against an insolvent company will be extinguished upon the liquidation of that company, whereas in bankruptcy, a claimant will be able to take action against a debtor post-bankruptcy should material damage manifest itself at a later date.

²² See section 87(1) of the Bankruptcy Act.

²³ See section 87(1) of the Bankruptcy Act read with section 327(1) of the Companies Act.

²⁴ See section 327(1) of the Companies Act.

²⁵ *Re Berkeley Securities (Property) Limited* [1980] 1 WLR 1589; *In re Islington Metal & Plating Works Ltd* [1984] 1 WLR 14; *Re T&N Ltd* [2006] 1 WLR 1728 at p1762-1763

²⁶ See section 382 of the UK Insolvency Act and Rule 13.12 of the UK Insolvency Rules.

23. Third, the same procedural rules on proofs of debt should, *mutatis mutandis*, apply to all forms of insolvency proceedings. Currently, different sets of procedural rules apply to proofs of debt in bankruptcy, liquidation and judicial management.²⁷ Further, there are no statutory procedures for proving debts in schemes of arrangement. The New Insolvency Act should introduce a unified set of procedures for proof of debts.

24. Fourth, at present, contractual interest may be proved but it is subject to a maximum statutory rate²⁸ and creditors are further precluded from capitalising interest even where their contractual rights expressly permit capitalisation of interest.²⁹ Neither feature operates in the UK. These rules mean that substantial re-calculation of interest has often to be performed in order to prepare a proof of debt, and verification has to be performed by the adjudicating party.

25. On the other hand, the Committee is mindful that, in certain types of commercial transactions, there may be a practice or tendency for the governing contracts to allow creditors to charge interest at high contractual or default rates, capitalise interest into principal and/or charge compound interest. Abolishing the rule against capitalisation and the statutory cap on interest may allow certain creditors to claim extortionate rates of interest, at the expense of other creditors of the company. Although an application to court may be made to set aside extortionate credit transactions under section 103 of the Bankruptcy Act, there is little guidance on what would amount to an extortionate credit, which often discourages applications being made to court to challenge such transactions. In contrast, there is more certainty in retaining the present 'bright line' rule.

²⁷ See Part VII of the Bankruptcy Rules, Rules 78 to 90A of the Winding Up Rules and Part V of the Companies Regulations.

²⁸ See sections 87(3) and 94 of the Bankruptcy Act read with section 327(1) of the Companies Act.

²⁹ See *Re City Securities* [1995] 2 SLR(R) 746.

26. On balance, the Committee recommends that a compromise position be taken in the New Insolvency Act. Up until 3 years³⁰ prior to the commencement of liquidation, judicial management or bankruptcy, interest at a contractual rate should be provable and any contractual arrangement which allows accrued interest to be capitalised should be effective for the purposes of lodging a proof of debt. However, the rule against capitalisation and the statutory cap on interest should apply to the calculation of debts within 3 years from the commencement of liquidation or bankruptcy.
27. Lastly, the law on insolvency set-off³¹ may have to be clarified in light of the issues which have arisen relating to the date of set-off and the set-off of contingent debts and debts the value of which are unascertained as at the date of set-off.³² Provision should also be made to clarify that proofs of debt filed in a judicial management or schemes of arrangement should take into account any mutual debts or credits between the creditor and the company for the purposes of determining the creditor's right to vote.

Realisation of Security

28. In a bankruptcy, a secured creditor who fails to realise his security within 6 months from the date of the bankruptcy order, or such later date as may be determined by the Official Assignee, loses the right to claim interest on his debt.³³ It is not clear whether this rule applies in liquidation.³⁴
29. The policy behind this rule is clear. A secured creditor is entitled to use the proceeds of realisation of the security to discharge interest accruing on the secured debt after the making of a bankruptcy order³⁵ and, if the value of the

³⁰ This is consistent with the 3-year period prior to liquidation, judicial management or bankruptcy during which a transaction can be challenged as an extortionate credit transaction. In *Re City Securities* [1995] 2 SLR(R) 746, the Court also ordered that interest at the statutory rate be applied for a period of 3 years prior to liquidation.

³¹ See section 88 of the Bankruptcy Act and section 327(2) of the Companies Act.

³² See *Good Property Land Development Pte Ltd (in liquidation) v Societe-Generale* [1996] 2 SLR(R) 884; *Panorama Development Pte Ltd (in liquidation) v Fitzroya Investments Pte Ltd* [2003] 1 SLR(R) 93; *Re Lehman Brothers Finance Asia Pte Ltd (in creditors' voluntary liquidation)* [2013] 1 SLR 64.

³³ Section 76(4) of the Bankruptcy Act.

³⁴ As it is not clear whether section 76(4) of the Bankruptcy Act applies to liquidation by virtue of section 327(2) of the Companies Act.

³⁵ *Re Ho Kok Cheong, ex parte Banque Paribas* [2000] 2 SLR(R) 98.

security is sufficient to cover such interest, there may be little incentive on the part of the secured creditor to realise the security expeditiously. The delay in realising the security may then prejudice the interests of the unsecured creditors of the bankrupt estate in the residual value of the security. It may also prejudice the efficient administration of the bankruptcy estate.

30. The Committee not only recommends the retention of this rule, but that it should be made clear that the rule applies to liquidations. However, the 6-month period may not be appropriate in liquidations, since security arrangements granted by companies may cover assets of substantial value as well as various types of assets (as in the case of floating charges). The Committee considered whether one approach may be for the liquidator to decide in each case how much time should reasonably be given to the secured creditor to realise the security, failing which interest cannot be charged by the secured creditor (this decision would of course be subject to the supervision of the court like other decisions of a liquidator which affect a creditor's rights). However, on balance, the Committee is of the view that the better approach is to retain a default time limit, which may be extended by the Official Receiver or liquidator, or by application to court. The Committee further recommends that, at least in the context of liquidation, this time period should be extended to 1 year. Lastly, the Committee recommends that the above rule on realisation of security should be extended to judicial management, if leave is granted by the court or judicial manager for the enforcement of security.

Preferential Debts

31. Currently, there is statutory provision in the Companies Act for preferential debts only in relation to liquidation³⁶ and receivership.³⁷ The treatment of preferential debts in judicial management and schemes of arrangement is not statutorily provided for. The Committee recommends that the New Insolvency Act should, as far as possible, deal with the issue of statutory preferential

³⁶ See section 328 of the Companies Act.

³⁷ See section 226 of the Companies Act.

debts globally, that is, across all insolvency regimes.³⁸ In particular, it is important that statutory preferential debts are accorded their due priority in any distributions made in a judicial management.³⁹

32. On a separate note, the Committee would like to raise for consideration the issue of whether the preferential status of tax should be retained. Tax is currently a preferential debt under our liquidation regime largely because of historical reasons; it was provided for in the UK legislation from which the current provisions in the Bankruptcy Act and the Companies Act were derived. In the UK itself, the preferential status of tax has been abolished. The Cork Committee also criticised the Crown preference, stating that it visited hardship upon the general body of creditors whilst producing benefits insignificant in terms of total government receipts. Other reasons against retaining the Crown preference were that (a) there were greater gains to the government if the tax which would otherwise be paid in priority to the government was distributed to other creditors so that they, in turn, could continue their economic activities and pay their taxes; (b) the Crown is not alone in being an involuntary creditor; and (c) governments in other jurisdictions such as Australia, Canada and Ireland had agreed to abolish most State preferences.⁴⁰
33. In the Committee's view, there are good reasons for considering the abolition of the preferential status of tax claims. However, it is an issue which is intertwined with the policies and financial considerations of the Government and the Committee defers to the views of the Government.
34. Lastly, under section 328(2) of the Companies Act, the right to receive preferential payments of wages, salaries, retrenchment benefits or ex gratia payments is capped at an amount equivalent to 5 months' salary or S\$7,500, whichever is the lesser. However, there does not appear to be a separate cap on the amount of remuneration payable as a preferential debt to employees in

³⁸ This does not mean that the New Insolvency Act has to cover all classes of preferential debts; certain preferential debts are most appropriately dealt with in other legislation, for example, section 47 of the Employment Act, sections 61 and 62 of the Banking Act and section 49FR of the Insurance Act.

³⁹ See *Chew Eu Hock Construction Co Pte Ltd (under judicial management) v Central Provident Fund Board* [2003] 4 SLR(R) 137.

⁴⁰ See generally the Cork Report at paras 1409-1425.

respect of vacation leave under section 328(1)(f) of the Companies Act. The Committee recommends that remuneration in respect of vacation leave should also be subject to a cap of S\$7,500.

Applicability of the Rules of Court

35. Currently, Order 1 Rule 2 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) (the “**Rules of Court**”) provides that proceedings relating to the winding up of companies are not governed by the Rules of Court. Instead, such proceedings are governed by rules promulgated under s 410 of the Companies Act (mainly the Winding Up Rules). There are three exceptions to this general rule, namely, certain provisions in the Rules of Court relating to electronic filing and service (Order 63A), the payment of court fees (items 54 to 59 and 63 of Appendix B) and the conversion of a winding-up application on the “*just and equitable*” ground under section 254(i) of the Companies Act into a writ action (Order 88 Rule 2(5)).
36. On the basis of the above provisions, it has been held that the Rules of Court and the Winding Up Rules have mutually exclusive operation.⁴¹ The Rules of Court therefore cannot, without more, be imported into the winding up proceedings, even in instances where the current Winding Up Rules are silent.⁴²
37. This exclusion of the Rules of Court may in certain instances prove problematic, as the current Winding Up Rules are silent on a number of procedural aspects that are expressly provided for in the Rules of Court.⁴³ Further some uncertainty has been created as to whether and in what circumstances can “certain aspects” of the Rules of Court be imported where the Winding Up Rules are silent, despite the abovementioned mutually exclusive operation.⁴⁴

⁴¹ See *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] 1 SLR(R) 795 at [24].

⁴² See *Tohru Motobayashi v Official Receiver & Anor* [2000] 4 SLR 529.

⁴³ See *Tohru Motobayashi v Official Receiver & Anor* [2000] 4 SLR 529.

⁴⁴ See *Woodcliff Assets Ltd v Reflexology and Holistic Health Academy* [2009] SGHC 162, see also Annual Review of Singapore Cases, *Insolvency Law*, Chapter 16 (2009), at para 16.5 – 16.7.

38. In contrast to the position in winding up proceedings, the Rules of Court do apply to judicial management proceedings. Further, section 11 of the Bankruptcy Act provides that "[i]n any matter of practice or procedure for which no specific provision has been made in the Act or the Bankruptcy Rules, the practice or procedure of the Supreme Court shall be followed and adopted as nearly as may be". Accordingly, it has been held that the Rules of Court can apply to bankruptcy proceedings "in instances where lacunae in procedural issues exist, *ie*, where *no specific provision* has been made".⁴⁵
39. The Committee can discern no reason for the inconsistent application of the Rules of Court in judicial management, bankruptcy and liquidation proceedings. Indeed, the UK follows a broadly similar approach as our Bankruptcy Act by providing for the provisions of the UK Civil Procedure Rules to apply to insolvency proceedings, with any necessary modifications, except so far as is inconsistent with the UK Insolvency Rules 1986 ("**UK Insolvency Rules**").
40. The Committee therefore recommends that the New Insolvency Act extend the approach in our Bankruptcy Act to cover the procedures relating to corporate insolvency.

(E) SUMMARY OF RECOMMENDATIONS

41. In summary, the Committee recommends the following:
- 2.1 Singapore's insolvency laws for both personal bankruptcy and corporate insolvency, should be consolidated and housed under a single piece of omnibus legislation (i.e. the New Insolvency Act).

⁴⁵ See *Re Rasmachayana Sulisty (alias Chang Whe Ming), ex parte The Hongkong and Shanghai Banking Corp Ltd and other appeals* [2005] 1 SLR(R) 483 at [6].

- 2.2 The starting point for the New Insolvency Act should be the UK Insolvency Act. Where appropriate, the approaches of other relevant jurisdictions, such as Australia, Hong Kong, New Zealand and Canada should be taken into account.
- 2.3 The New Insolvency Act should address the insolvency of individuals, companies and corporations generally, and should not incorporate detailed provisions applicable to a particular industry or a particular type of business. The corporate insolvency regime in the New Insolvency Act should cover Singapore-incorporated companies, foreign companies and corporations as defined in the Companies Act.
- 2.4 Amendments should be made to rationalise and unify the legal position on proofs of debt; in particular:
- (a) The test of provability of debts should be the same for all insolvency proceedings.
 - (b) A claim against an individual or company that is valid and enforceable under the general law should equally be provable under insolvency law.
 - (c) The same procedural rules on proofs of debt should apply, *mutatis mutandis*, to all forms of insolvency proceedings.
 - (d) Up until 3 years prior to the commencement of liquidation, judicial management or bankruptcy, interest at a contractual rate should be provable and any contractual arrangement which allows accrued interest to be capitalised should be effective for the purposes of lodging a proof of debt. However, the rule against capitalisation and the statutory cap on interest should apply to the calculation of debts within 3 years from the commencement of liquidation or bankruptcy.

- (e) Insolvency set-off may have to be clarified in light of the issues which have arisen relating to the date of set-off and the set-off of contingent debts and debts the value of which are unascertained as at the date of set-off. Provision should also be made to clarify that proofs of debt filed in a judicial management or schemes of arrangement should take into account any mutual debits and credits between the creditor and the company for the purposes of determining the creditor's right to vote.

- 2.5 It should be clarified that the rule on realisation of security applies to both corporate and individual insolvency. At least in the context of liquidation, the default period under section 76(4) of the Bankruptcy Act which the secured creditor has to realise his security should be extended from 6 months to 1 year. The rule on realisation of security should also be extended to judicial management, if leave is granted by the court or judicial manager for the enforcement of security.
- 2.6 The New Insolvency Act should, as far as possible, deal with the issue of statutory preferential debts across all insolvency regimes. In particular, statutory preferential debts should be accorded their due priority in judicial management and schemes of arrangement. Furthermore, consideration should be given to the possibility of abolishing the preferential status of tax claims.
- 2.7 The amount of remuneration payable as a preferential debt to employees in respect of vacation leave under section 328(1)(f) of the Companies Act should be subject to a cap of S\$7,500.
- 2.8 The Rules of Court should apply to all insolvency regimes in instances where lacunae in procedural issues exist, i.e. where *no specific provision* has been made in the New Insolvency Rules.

CHAPTER 3: BANKRUPTCY

1. Singapore's bankruptcy laws are principally set out in the Bankruptcy Act. The current Bankruptcy Act was the result of a "fairly exhaustive review" undertaken in 1994 that resulted in a number of reforms intended to keep pace with social and economic developments in Singapore.⁴⁶ In this regard, the Bankruptcy Act seeks to achieve the following key objectives:
 - (1) Improve the administration of the affairs of bankrupts and protect creditors' interests without stifling entrepreneurship;
 - (2) Strike a balance between the interests of debtors, creditors and society;
 - (3) Ensure greater accountability of bankrupts in the administration of their estates; and
 - (4) Provide speedier discharge for bankrupts.⁴⁷
2. Since 1995, the Bankruptcy Act has been consistently reviewed and updated in order to keep pace with the social and economic developments in Singapore. In 1999, amendments were made to the Bankruptcy Act to fine-tune the bankruptcy framework, so as to encourage technopreneurial activity and enhance Singapore's entrepreneurial climate. In 2009, the Bankruptcy Act was further amended to provide for the Debt Repayment Scheme, an out-of-court mechanism meant to give a debtor a reasonable opportunity to pay off all or some of his debts through a repayment plan over a period of time without having to resort to the courts. The overall experience on the ground appears to be that the bankruptcy regime is operating and discharging its functions well.

⁴⁶ Parliamentary Report dated 25 August 1994, Volume 63, Columns 399 - 400.

⁴⁷ *Ibid.*

3. While the Committee is of the view that the Bankruptcy Act can largely be incorporated into the New Insolvency Act, the Committee would highlight a few key issues for consideration.

(A) *ALTERNATIVES TO BANKRUPTCY*

4. Alternatives to bankruptcy are necessary features of all bankruptcy regimes. Such alternatives typically involve negotiated schemes aimed at providing individual debtors a means of reaching some form of compromise with their creditors, thus avoiding the disabilities and associated stigma of being made a bankrupt and reducing the costs borne by the state in administering the bankruptcy regime. More importantly, such alternatives aim to promote responsible debt-settlement and individual debtor rehabilitation.
5. The Committee is of the view that having effective and practical pre-bankruptcy rehabilitation measures is of primary importance in Singapore, and reviewed the position in Singapore as well as in other common law jurisdictions.
6. Two forms of pre-bankruptcy rehabilitation measures exist under the Bankruptcy Act:
 - (1) Individual Voluntary Arrangements (“**IVA**”);⁴⁸ and
 - (2) Debt Repayment Schemes (“**DRS**”).⁴⁹
7. Until 2009, the IVA was the sole alternative bankruptcy procedure available to an insolvent debtor. The IVA is a court-based scheme that was introduced in 1995 and is based on a similar scheme found in Part VIII of the UK Insolvency Act. Under this scheme, an insolvent debtor may present a voluntary arrangement that seeks to implement a compromise or other arrangement with his creditors. The IVA becomes binding on all creditors subject to it, as

⁴⁸ See Part V of Bankruptcy Act.

⁴⁹ See Part VA of Bankruptcy Act.

long as it is approved by a majority in number of creditors holding at least 75% in value of the debts and subsequently sanctioned by the court. Whilst it has been noted that the IVA procedure may be cumbersome and costly for certain debtors, especially those with comparatively small debts, the Committee takes the view that the procedure may be useful for debtors who manage businesses or who have large debts and wish to put forward proposals that may not be straightforward.

8. The DRS, a scheme modeled after Chapter 13 of the US Bankruptcy Code, was introduced in 2009 as a non-court-based scheme to complement the IVA scheme. The DRS is targeted at debtors with a regular income and whose debts are not too large. It is designed to serve as a non-court-based alternative that will afford a debtor a reasonable opportunity to pay off some or all of his debts through a repayment plan spread over a period of time. The DRS mechanism is triggered only upon the filing of a bankruptcy application against an insolvent debtor. Under the DRS, an eligible insolvent debtor⁵⁰ will put up a debt repayment plan setting out the terms for the repayment of his debts, with the repayment period not exceeding 5 years. The debt repayment plan will be reviewed by the Official Assignee, who may modify the plan as he considers appropriate. The Official Assignee will then convene a meeting of creditors to review the proposed plan and may, at or after the meeting of creditors, approve the plan with or without modifications as he considers appropriate. Upon the commencement of the debt repayment plan, the bankruptcy application filed against the debtor is deemed withdrawn and a moratorium comes into effect to prevent any creditors from commencing or proceeding with any action against the debtor. At the completion of the repayment plan, the debtor would have paid all or some of his debts and would have avoided bankruptcy.
9. The Committee notes that different pre-bankruptcy rehabilitation regimes are in place in other common law jurisdictions, and considered whether Singapore should adopt any of these regimes or any particular features of these regimes.

⁵⁰ The eligibility criteria are set out in section 65(7) of the Bankruptcy Act.

10. Under Australia's bankruptcy regime, there are two major alternatives to bankruptcy – (a) a personal insolvency agreement⁵¹ and (b) a debt agreement.⁵² Both mechanisms afford a means for a debtor to come to an agreement with creditors without entering into bankruptcy. In a debt agreement, there are debt, asset or income limits which the debtor must qualify under; such limits are not found in a personal insolvency arrangement. Further, in proposing a personal insolvency agreement, a debtor is required to appoint a controlling trustee to take control of his property and to put forward the repayment proposal.
11. Under the New Zealand Insolvency Act 2006, there are three alternatives to bankruptcy.⁵³ They are the (a) debt repayment proposal by the debtor to the creditors; (b) summary installment order ("**SIO**"); and (c) no asset procedure ("**NAP**"). The debt repayment proposal procedure is, in all material respects, similar to the IVA procedure in the Bankruptcy Act.⁵⁴
12. The SIO⁵⁵ is a formal agreement between a debtor and his creditors whereby the debtor makes regular payments to pay back all, or an agreed part, of his debts over time. The SIO is an order granted by the Official Assignee. It may only be granted to debtors with total unsecured debts⁵⁶ of less than NZ\$40,000 and if the debtor is unable to pay those debts immediately. The usual term for a SIO is 3 years but where there are special circumstances, the SIO may be extended to 5 years.
13. In contrast, the NAP⁵⁷ is applicable to a debtor who has total secured and unsecured debts of between NZ\$1,000 and NZ\$40,000, and no realisable assets. Once a debtor is admitted to the NAP by the Official Assignee, a

⁵¹ See Part X of the Australia Bankruptcy Act.

⁵² See Part IX of the Australia Bankruptcy Act.

⁵³ See Part 5 of the New Zealand Insolvency Act 2006.

⁵⁴ See sections 325 to 339 of the New Zealand Insolvency Act 2006.

⁵⁵ See sections 340 to 360 of the New Zealand Insolvency Act 2006.

⁵⁶ These unsecured debts exclude student loans, fines, penalties and reparation orders.

⁵⁷ See sections 361 to 377B of the New Zealand Insolvency Act 2006.

moratorium⁵⁸ against any enforcement proceedings is imposed. The NAP usually lasts for up to 12 months, during which time the debtor is obliged to cooperate with the Official Assignee (by complying with requests for information) and is further restricted from incurring further credit of NZ\$1,000 or more without making the creditor aware that he is currently in a NAP. Upon a discharge from the NAP, all the debtor's debts that were the subject of the moratorium during the 12-month period are cancelled and the debtor is not liable to pay any part of the debts, including any penalties and interest that may have accrued.

14. In the UK, the UK Insolvency Act provides for two alternatives to bankruptcy – (a) Debt Relief Orders (“**DRO**”)⁵⁹ and (b) the UK equivalent of the IVA.⁶⁰ The IVA procedure is similar to that in Singapore, except that the IVA procedure in the UK is also available to undischarged bankrupts. Under the UK Insolvency Act, where a voluntary arrangement proposed by an undischarged bankrupt is approved at the creditors’ meeting, the court may, on application, annul the bankruptcy order made against the debtor.⁶¹
15. The DRO regime, on the other hand, is similar to the NAP in New Zealand. The DRO is applicable to debtors who have debts of less than £15,000, have less than £50 a month spare income and have less than £300 worth of assets. A DRO typically lasts for 12 months, during which no enforcement proceedings may be brought against the debtor. When the DRO is discharged, all debts listed in the order are written off and no payment is required.
16. In Hong Kong, the Bankruptcy Ordinance provides its own IVA procedure⁶² that is materially similar to the IVA procedures in UK and, consequently, Singapore.

⁵⁸ Debts such as child support and maintenance orders, court fines and reparation and debts incurred after the application for NAP are excluded from the NAP.

⁵⁹ See Part 7A of UK Insolvency Act.

⁶⁰ See Part VIII of the UK Insolvency Act.

⁶¹ See section 261 of the UK Insolvency Act.

⁶² See sections 20 to 20L of the Hong Kong Bankruptcy Ordinance.

17. Under the Canadian Bankruptcy and Insolvency Act 1985 (“**Canadian Bankruptcy and Insolvency Act**”), a debtor may apply for a consolidation order.⁶³ A consolidation order, which generally lasts for 3 years, sets out the amount and times when the debtor’s payments are due to be paid to the court. The court will then distribute these payments to the creditors. This procedure is only applicable to debts that do not exceed \$1,000 Canadian dollars each.⁶⁴ In addition, the Canadian Bankruptcy and Insolvency Act separately provides that a debtor may make a consumer proposal to his creditors. The consumer proposal is a repayment offer made by the debtor and must be approved by the creditors by ordinary resolution⁶⁵ and subsequently by the courts.⁶⁶ When the consumer proposal is fully performed, the debtor will be relieved of all the debts that were in the proposal.
18. Having regard to the pre-bankruptcy rehabilitation measures in the various jurisdictions, the Committee is of the view that the IVA and DRS regimes have worked fairly well in Singapore and that no major changes or adoption of other pre-bankruptcy rehabilitation measures are required. In particular, the Committee is of the view that:
- (1) A fair number of the alternative regimes to bankruptcy adopted by various other jurisdictions are, to a great extent, similar in structure and purpose to that of the IVA and the DRS.
 - (2) It is not necessary to follow the approach in the UK Insolvency Act of extending the IVA procedure to undischarged bankrupts. This is because under the Bankruptcy Act, a bankrupt is not precluded from proposing a scheme of arrangement to his creditors.⁶⁷ Currently, the Official Assignee may, pursuant to section 95A of the Bankruptcy Act, annul a bankruptcy where a composition or scheme of arrangement

⁶³ See Part X of the Canadian Bankruptcy and Insolvency Act.

⁶⁴ See section 218 of the Canadian Bankruptcy and Insolvency Act.

⁶⁵ See section 66.19 of the Canadian Bankruptcy and Insolvency Act.

⁶⁶ See section 66.22 of the Canadian Bankruptcy and Insolvency Act.

⁶⁷ See sections 95 to 96 of the Bankruptcy Act.

has been accepted by 75% of creditors in value and a majority in number.

- (3) Neither the NAP nor DRO regime should be adopted into our bankruptcy legislation as they place what in the local context can be regarded as undue emphasis on the interests of debtors. This may be seen from the fact that neither the NAP nor DRO requires any form of repayment to the creditors. Instead, the debts that are the subject of the NAP or DRO are automatically written off at the conclusion of the respective regimes. In contrast, the existing DRS regime strikes a fairer balance between the interests of debtors and creditors.

19. In light of the above, the Committee recommends that the IVA and DRS regimes should be incorporated into the New Insolvency Act, with no major amendments.

(B) *PROCEEDINGS IN BANKRUPTCY*

20. The current procedures for bankruptcy proceedings were introduced in 1995 so as to streamline and update earlier procedures that were regarded as cumbersome, complex and archaic. The objective of so doing was to achieve greater efficiency and lower costs.⁶⁸ The Committee is of the view that the current procedures have generally been shown to work well without any major difficulties.
21. Under the Bankruptcy Act, a bankruptcy application may be made by a debtor himself or by a creditor, with the latter being more commonly invoked. Currently, a bankruptcy application may only be filed if the debtor owes liquidated sums of not less than \$10,000, which is payable immediately and the debtor is unable to pay his debts.

⁶⁸ See Parliamentary Report dated 25 August 1994, Volume 63, Columns 399 - 400.

22. Whilst there are a number of statutory grounds under which a debtor will be presumed to be unable to pay his debts, the ground most commonly invoked by creditors is the debtor's failure to comply with a statutory demand issued under section 62 of the Bankruptcy Act. In this regard, the Committee observes that there exists an established body of case-law discussing the grounds on which statutory demands may be set aside.⁶⁹ There is thus little need for reform to this area of bankruptcy law.
23. The Committee also observes that the initiation of bankruptcy proceedings by creditors in Hong Kong⁷⁰ and the UK⁷¹ are in fact largely similar to those found under the Bankruptcy Act, whereas the procedure for bankruptcy applications in Australia,⁷² New Zealand⁷³ and Canada,⁷⁴ which rely on the concept of a debtor committing acts of bankruptcy and the two-tier system of court orders, is largely similar to the procedure in place in Singapore prior to the 1995 reforms to the Bankruptcy Act.
24. On a separate note, the Committee observes that, unlike the Bankruptcy Act, the bankruptcy legislation in Hong Kong⁷⁵ and the UK⁷⁶ provide additionally for the filing of expedited bankruptcy applications. Such expedited bankruptcy applications can be filed before the expiry of the time limited for a debtor to comply with a statutory demand, if there is a serious possibility that the debtor's property or the value of any of his property will be significantly diminished during that period. Presumably, one of the benefits of such a procedure would be to limit the debtor's ability to dispose of property/assets or abscond.⁷⁷
25. The Committee is of the view that it would be helpful to include such a provision in the New Insolvency Act so that the creditor may take swift action

⁶⁹ See *Wong Kwei Cheong v ABN-AMRO Bank NV* [2002] 3 SLR 594; *Tan Eng Joo v United Overseas Bank Ltd* [2010] 2 SLR 703.

⁷⁰ See sections 6 and 6A of the Hong Kong Bankruptcy Ordinance.

⁷¹ See sections 265 to 268 of the UK Insolvency Act.

⁷² See Part IV, Division 1 of Australia Bankruptcy Act.

⁷³ See Part 2 of New Zealand Insolvency Act 2006.

⁷⁴ See Part II of the Canadian Bankruptcy and Insolvency Act.

⁷⁵ See section 6C of the Hong Kong Bankruptcy Ordinance.

⁷⁶ See section 270 of the UK Insolvency Act.

⁷⁷ See for example para 1.41 of the Law Commission of Hong Kong Report on Bankruptcy.

against any fraudulent conveyance of property by the debtor together with the appointment of an interim receiver of the debtor's property under section 73 of the Bankruptcy Act. In this regard, section 73 of the Bankruptcy Act only permits the appointment of an interim receiver when a bankruptcy application has been filed. Such a provision would complement the avoidance provisions, which seek to ensure that debtors do not fraudulently dispose of their assets so as to keep the assets out of the reach of creditors.

26. In conclusion, the Committee is of the view that the provisions on proceedings in bankruptcy in the Bankruptcy Act can largely be adopted into the New Insolvency Act, with the inclusion of a procedure for an expedited bankruptcy application where there is a real risk that the debtor's assets would be diminished.

(C) *BANKRUPTCY ORDER AND ITS CONSEQUENCES*

27. Several consequences follow the making of a bankruptcy order, which marks the commencement of bankruptcy. These consequences include:

- (1) The vesting of property owned by the bankrupt in the Official Assignee;
- (2) The conferment of powers on the Official Assignee to claw back property that was divested by the bankrupt prior to the making of the bankruptcy order;
- (3) The distribution of the bankrupt's estate by the Official Assignee to the creditors; and
- (4) The disabilities and disqualifications that are imposed on a bankrupt.

These consequences seek primarily to strike a balance between the interests of the bankrupt, his family members, his creditors, other persons with whom the bankrupt would be dealing with, and society in general.

28. On this note, the Committee observes that the issues set out at paragraphs 27(2) and 27(3) above are not peculiar to the bankruptcy regime but apply equally to other corporate insolvency regimes such as liquidation and judicial management, and therefore warrant more detailed treatment in other chapters of this Report.⁷⁸ The Committee therefore confines its comments in this Chapter to the two other key consequences at paragraphs 27(1) and 27(4) above, as well as some other suggestions received in the course of deliberations.

Vesting of Property in the Official Assignee

29. Upon the making of a bankruptcy order, the bankrupt is divested of substantially the whole of his property and the property is vested in the Official Assignee without any further conveyance, assignment or transfer. The property also becomes divisible among his creditors.⁷⁹
30. The property that is divisible among the debtor's creditors comprises all such property as belongs to, or is vested in, the bankrupt at the commencement of his bankruptcy, or is acquired by or devolves on him after the bankruptcy order is made but before his discharge from bankruptcy.⁸⁰ However, property held by the bankrupt on trust for any person, tools of his trade, property that is necessary for satisfying the basic domestic needs of the bankrupt and his family as well as any property which is excluded under any other written law, are not available for distribution to the creditors.⁸¹ In this regard, the Committee notes that the Singapore courts have already laid down definitive pronouncements on the ambit of "property" referred to in section 78 of the Bankruptcy Act.⁸²

⁷⁸ See Chapter 8 on Avoidance Provisions, Chapter 2 on A New Insolvency Act for debts provable in bankruptcy, proofs of debts, set-off and priority of debts.

⁷⁹ See section 76 of the Bankruptcy Act.

⁸⁰ See section 78 of the Bankruptcy Act.

⁸¹ See section 78(2) of the Bankruptcy Act.

⁸² For example, in *Re Ng Lai Wat* [1996] 2 SLR(R) 261, the court clarified that the exclusion of a Housing Development Board ('HDB') flat from a bankruptcy estate, extends to the proceeds of sale of the HDB flat. In *Re Lim Lye Hiang*, ex parte *the Official Assignee* [2011] 1 SLR 707, the Court of Appeal clarified that an

31. The Committee further observes that the vesting of property in the Official Assignee is not peculiar to Singapore. Substantially similar positions have been adopted in the UK,⁸³ Hong Kong,⁸⁴ Australia,⁸⁵ New Zealand⁸⁶ and Canada.⁸⁷
32. On this note, the Committee observes that the UK and Hong Kong have a slightly different treatment towards property that is acquired after the commencement of bankruptcy but before discharge ("**after-acquired property**"). In these jurisdictions, after-acquired property does not automatically vest in the trustee in bankruptcy.⁸⁸ Instead, the trustee in bankruptcy is required to claim such property by way of a notice in writing. In Hong Kong, the bankrupt or any of the creditors may apply to the trustee in bankruptcy for the inclusion or exclusion from the estate of the bankrupt of a particular item.⁸⁹ Such an approach was adopted for the following reasons:⁹⁰
- (1) This would shift the emphasis from the trustee in bankruptcy being entitled to everything which a bankrupt accumulated after bankruptcy to one where the trustee could claim property selectively;
 - (2) It is difficult to enforce the legislative requirement that everything that is acquired by a bankrupt after a bankruptcy order automatically vests in the Official Assignee as it is hard to establish the extent of a bankrupt's assets several years after the commencement of bankruptcy; and
 - (3) Non-automatic vesting of property in the trustee would save the trustee in bankruptcy the trouble of having to disclaim onerous after-acquired property of the bankrupt.

undischarged bankrupt beneficiary's entitlement to CPF monies constituted "property" within the ambit of section 78(1) of the Bankruptcy Act and vested in the Official Assignee.

⁸³ See Part IX, Chapter II of the UK Insolvency Act.

⁸⁴ See sections 12 and 43 to 44 of the Hong Kong Bankruptcy Ordinance.

⁸⁵ See sections 58 and Part VI, Division 3, Subdivision A of the Australia Bankruptcy Act.

⁸⁶ See Part 3, Subpart 1 of the New Zealand Insolvency Act 2006.

⁸⁷ See Part IV of the Canadian Bankruptcy and Insolvency Act.

⁸⁸ See section 43A of the Hong Kong Bankruptcy Ordinance and section 307 of the UK Insolvency Act.

⁸⁹ See section 43D of the Hong Kong Bankruptcy Ordinance.

⁹⁰ See para 13.51 of the Hong Kong Law Commission Report on Bankruptcy.

33. On balance, the Committee is of the view that the non-automatic vesting of after-acquired property present in the UK and Hong Kong should not be adopted in Singapore as it runs counter to our existing framework, which requires bankrupts to be more accountable in the administration of their estates in bankruptcy. The Committee does not think that there are serious or widespread difficulties with automatic vesting of after-acquired property, and also did not receive representations from the Official Assignee's Office that the considerations identified in Hong Kong are similarly applicable in Singapore.

Duties, Disqualifications and Disabilities Imposed on a Bankrupt

34. Upon the making of a bankruptcy order, a wide range of disabilities, disqualifications and duties are also imposed on a bankrupt. These provisions are not only imposed through the Bankruptcy Act, but also by other written law. Essentially, these provisions do one of three things:
- (1) Disqualify a bankrupt from occupying certain positions;
 - (2) Disqualify or prohibit a bankrupt from doing certain acts; and
 - (3) Ensure that a bankrupt carries out his essential legal obligations.
35. An undischarged bankrupt who does not comply with the various provisions will be liable for prosecution.⁹¹
36. In this regard, the Committee observes that the courts have laid down several definitive judgments clarifying the scope of such disabilities, disqualifications and duties of a bankrupt.⁹² As the Committee is not aware of any major

⁹¹ See Part IX and Part X of the Bankruptcy Act.

⁹² See for example, the decision of the Court of Appeal in *Standard Chartered Bank v Loh Chong Yong Thomas* [2010] 2 SLR 569 where the Court of Appeal clarified, *amongst other things*, on the scope of the choses of action that would be vested in the Official Assignee as well as the point in time in which sanction by the Official Assignee must be obtained before an action can be commenced by an un-discharged bankrupt.

difficulties or issues concerning the duties, disabilities and disqualifications that are imposed on a bankrupt, it is of the view that these provisions can be substantially imported over to the New Insolvency Act.

Other Suggestions

37. Three other suggestions were raised for the Committee's attention during deliberations, to which the Committee agreed:
38. First, there should be a defence of lack of knowledge for bankruptcy offences. The Committee notes that various bankruptcy offences appear to be strict liability offences, in that criminal liability arises once the *actus reus* and certain stipulated circumstances are established,⁹³ unless the bankrupt can establish the defence of innocent intention under section 133 of the Bankruptcy Act. The defence of innocent intention applies only to certain bankruptcy offences under the Bankruptcy Act. The Committee is of the view that a provision should be introduced to excuse a bankrupt from criminal liability for failing to comply with his duties, disabilities or disqualifications where it can be shown that the bankrupt had neither actual nor constructive knowledge of his bankruptcy, or had no reason to believe that he had been made a bankrupt.
39. Secondly, the court's powers to order an examination of the bankrupt and other persons and the consequent delivery of property and payment of sums to the Official Assignee⁹⁴ should be extended to cover a situation where the bankrupt has been discharged, subject to the same limitations which presently exist for examinations and delivery prior to the bankrupt's discharge. This is to enable the Official Assignee to examine a discharged bankrupt to establish whether any other assets that ought to have vested were in fact delivered to the Official Assignee, with a view to either realising such assets or commencing action to reclaim them for the benefit of creditors.

⁹³ See e.g. *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183.

⁹⁴ Currently under sections 83 and 84 of the Bankruptcy Act.

40. Thirdly, some clarification may have to be made to section 131 of the Bankruptcy Act which provides that the Official Assignee's approval is required for a bankrupt to "maintain any action". The Committee notes that there has been some uncertainty as to the ambit of this provision and, in particular, the specific instances where the Official Assignee's sanction will be required. The Committee recommends that amendments be made to section 131 to clarify that:

- (1) The Official Assignee's sanction shall apply to the defence of any action by the bankrupt, including an action that is commenced or continued with leave of the court under section 76(1)(c) of the Bankruptcy Act;
- (2) The word "action" includes arbitration proceedings; and
- (3) Section 131 shall not apply to criminal and matrimonial proceedings, but that the bankrupt should be required to promptly notify the Official Assignee of all such proceedings within a specified period.

(D) ANNULMENT AND DISCHARGE FROM BANKRUPTCY

Discharge

41. Prior to the amendments in 1995, a bankrupt could only be discharged from a bankruptcy order if he settled his debts in full, or he proposed a scheme of arrangement or composition which was accepted by his creditors. This provided little incentive for a bankrupt to actively seek a discharge in disclosing his assets and cooperating with the Official Assignee.
42. Following the reforms made in 1995, the Bankruptcy Act provides that a bankrupt may be discharged from bankruptcy by an order of court⁹⁵ or by a certificate issued by the Official Assignee.⁹⁶

⁹⁵ See section 124 of the Bankruptcy Act.

43. An application for discharge by an order of court can be brought at any point in time. The court's powers to order a discharge from bankruptcy are wide – the court may refuse to discharge the bankrupt or may discharge him subject to such conditions as it thinks fit. In this regard, there is well-established case-law setting out the factors to be taken into consideration by the court in deciding whether an application for discharge should be granted. These are as follows:⁹⁷

- (1) The interests of the bankrupt and the creditors;
- (2) The public interest and commercial morality;
- (3) The bankrupt's conduct prior to and during his bankruptcy;
- (4) Whether the bankrupt has committed any offence under the Bankruptcy Act, or under sections 421 to 424 of the Penal Code (Cap. 224);
- (5) The cause of the bankrupt's insolvency and his culpability in incurring his debts;
- (6) The magnitude of the deficiency in the bankrupt's estate;
- (7) Any objections to the application;
- (8) The bankrupt's domestic, social and financial circumstances, including the bankrupt's employment status and whether the bankruptcy is affecting his chances of obtaining gainful employment; and
- (9) The contributions made by the bankrupt, for the benefit of the creditors.

⁹⁶ See section 125 of the Bankruptcy Act.

⁹⁷ See *Jeyaretnam Joshua Benjamin v Indra Krishnan* [2007] 3 SLR (R) 433 and *Hong Leong Bank Bhd v Soh Seow Poh* [2009] 4 SLR (R) 525.

44. The Official Assignee may also, subject to any objection by a creditor, discharge a bankrupt from bankruptcy by the issuance of a certificate of discharge. Bankrupts will only be considered for discharge under this regime if a period of 3 years has lapsed since the date of the commencement of the bankruptcy and if the debts which have been proved in bankruptcy do not exceed \$500,000. In considering whether or not to issue a certificate of discharge, the Official Assignee would consider the similar broad factors set out in the paragraph above.
45. The Committee observes that the discretionary discharge regime in Singapore contrasts with the automatic discharge regimes found in other jurisdictions such as Hong Kong,⁹⁸ Canada,⁹⁹ Australia,¹⁰⁰ New Zealand¹⁰¹ and UK.¹⁰²
46. The key traits of the automatic discharge regimes in the various jurisdictions set out above are as follows:
 - (1) The bankrupts are, subject to objections by creditors or the Official Receiver/Assignee, typically automatically discharged from bankruptcy upon the expiration of a certain number of years from the date of the bankruptcy orders.
 - (2) The onus is placed on the trustee of bankruptcy, the Official Receiver/Assignee (as the case may be), or the bankrupt's creditor to file an application in court objecting to the automatic discharge.
 - (3) The bankrupt may be required to make monthly or regular contributions to his estate in such amount and for such period, and for some cases,

⁹⁸ See sections 30A of the Hong Kong Bankruptcy Ordinance. In relation to a first-time bankrupt, he will be automatically discharged from bankruptcy after 4 years from the date of a bankruptcy order. For persons who had previously been adjudged bankrupt, the automatic discharge period will be 5 years from the date of the bankruptcy order.

⁹⁹ See section 168 of the Canada Bankruptcy and Insolvency Act

¹⁰⁰ See Part VII of the Australia Bankruptcy Act 1996

¹⁰¹ See Part 4 of the New Zealand Insolvency Act 2006

¹⁰² See section 279 of the UK Insolvency Act. It is further observed that the Cork Report did not in fact recommend the introduction of automatic discharge. The Cork Committee was of the view the onus should always be upon the bankrupt to apply for his discharge and to prove that the discharge is warranted. The Cork Committee justified this on the premises that bankruptcy is reserved for those who merit it as such, automatic discharge would not be appropriate (see Cork Report at para 610).

continue to make such contributions even after being discharged from bankruptcy, as the case may be.

- (4) Even after the bankrupt is discharged under the automatic discharge regime, the bankrupt may be required to render such assistance to the trustee in bankruptcy in the realisation of his bankruptcy estate.
- (5) In most of these jurisdictions, the bankrupt may also apply to court for early discharge in exceptional circumstances.¹⁰³

47. The Committee also observes that the reasons for introducing the automatic discharge regimes in these jurisdictions are as follows:

- (1) The previous discharge regimes were too cumbersome, resulting in a situation where bankrupts hardly applied for discharge, possibly through ignorance or from an unwillingness to put themselves through further expense and trouble. This resulted in a substantial increase in the number of bankrupts, which is administratively costly.¹⁰⁴
- (2) It was observed that a great number of bankrupts are the victims of misfortune and it seemed reasonable that such bankrupts should receive a discharge with minimum trouble and expense.¹⁰⁵
- (3) The substantial growth in the availability of personal credit has led to a substantial increase in the number of consumer bankrupts and the Government needing to keep in place machinery that can deal with such individual over-indebtedness.¹⁰⁶

¹⁰³ An application for early discharge may be filed by the bankrupt in Hong Kong, New Zealand and Canada.

¹⁰⁴ See The Law Reform Commission of Hong Kong Report on Bankruptcy at Chapter 17; Bankruptcy Law Update by the Canada Parliamentary Research Branch dated 18 May 1999.

¹⁰⁵ Australia Law Reform Commission Report 45 titled "General Insolvency Inquiry" at para 542; Chapter I of the Report of the Canadian Standing Senate Committee on Banking, Trade and Commerce titled "Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act" in Nov 2003.

¹⁰⁶ See White Paper issued by the UK Department of Trade and Industry entitled "Insolvency – A Second Chance", 2001 (Cm. 5234) at paras 1.45 to 1.47.

48. Members of the Committee have differing views on whether a regime of automatic discharge regime should be introduced in Singapore.

Views on automatic discharge

49. Some members of the Committee hold the view that, while a regime of automatic discharge from bankruptcy would help to periodically clear a number of bankruptcy cases from the system and hence help reduce the costs of bankruptcy administration, the need for mere administrative efficiency cannot trump the need to uphold the policy that individuals have to bear responsibility for their financial affairs. The disincentive against reckless incurring of credit or financial liability will be diluted too far in a regime of automatic discharge. It can be argued that the proper balance is struck in having a discharge from bankruptcy granted only after review by the Official Assignee or the court to ensure that it is warranted by the circumstances of the case.
50. Second, it was observed that the regime of automatic discharge may encourage the filing of bankruptcy by individual debtors in order to obtain a quick discharge of debts with little or no payment at all and debtors would not take their financial obligations seriously. This would consequently affect the costs of credit as creditors would feel that their interests are not protected adequately. In this regard, it was noted that Hong Kong experienced a phenomenal increase in bankruptcy (0.7% in 1994 to 86% by 2004)¹⁰⁷ after the regime of automatic discharge was introduced, despite a deep-rooted cultural stigma of bankruptcy. The number of bankruptcy applications in Australia also increased when automatic discharge was reduced from 3 years to 6 months.
51. Third, the savings in the costs of bankruptcy administration may be illusory. This is because the automatic discharge regime may provide less incentive for the bankrupts to co-operate with the Official Assignee in the administration

¹⁰⁷ It is noted that this spike coincided with the SARS outbreak. It is further highlighted that there exists no minimum threshold for self-petitions in Hong Kong.

of their estates and the discharge of their debts. Bankruptcy may be perceived as a mere rite of passage, carrying little or no connotation of moral opprobrium. The onus is then placed on the creditors or the Official Assignee to continuously monitor a bankrupt's affairs and object, if required, to a bankrupt's automatic discharge. This would actually increase the burden and costs of bankruptcy and its administration on the state, creditors and the taxpaying public. Members also opined that, in principle, the onus should be on the individual bankrupt to apply for discharge, to take steps to arrange his financial affairs and his proposals for meeting his debts; it is wrong in principle to place the onus on any other party to object to a discharge.¹⁰⁸

52. It was also noted that the current discharge regime, in particular, discharge by certificate issued by the Official Assignee, has worked well in practice.¹⁰⁹
53. Other members of the Committee, however, take the view that the current balance of interests between bankrupts and creditors may need to be reviewed. A policy of keeping bankrupts in bankruptcy with no definite exit points may result in bankrupts becoming desensitised and de-motivated to work towards their discharge. It was argued that the State also incurs excessive resources in administering these cases. The factors taken into account in determining whether the bankrupt should be discharged places emphasis on repayment of the debt, which tips the balance in the creditors' favour. This balance may have to be recalibrated, to allow Singapore to move further towards a more rehabilitative regime that encourages entrepreneurship.
54. In summary, there are valid reasons why automatic discharge may not be ideal. These, however, must be counter-balanced against the interests of the

¹⁰⁸ See *Singapore Parliamentary Debates* (1994), vol 63 at col 412, 25 August 1994, Second Reading Speech of the Bankruptcy Bill by Professor Jayakumar, the then-Minister for Law; see further Eighth Parliament of Singapore, *Report of the Select Committee on the Bankruptcy Bill (Bill No 16/94)*, presented to Parliament on 7 March 1995, at p vi.

¹⁰⁹ "The success of the novel experiment to expeditiously discharge bankrupts by certificate of the Official Assignee went beyond all expectations": Chandra Mohan, *Balancing Competing Interests in Bankruptcy: Discharge by Certificate of the Official Assignee in Singapore* (2008) 20 SAcLJ 464 at 485. The author notes that the regime allowed for (among other things) high rates of discharges from bankruptcy and major increases in the cooperation received from bankrupts and the dividends paid to creditors. The regime also won international awards.

bankrupt and the State. Certainly, an over-reliance on a discretionary regime of discharge, such as the discharge by certificate issued by the Official Assignee, may result in the clogging up of bankruptcy cases, and place a burden on the administrators of that system and the bankrupts themselves. To resolve this, some other system of discharge can be considered, but this other system will have to be carefully examined. The Committee does not make any recommendation to introduce automatic discharge but suggests that the present discharge regime can be reviewed and fine-tuned to see if a better balance can be achieved.

Annulment

55. Unlike the discharge of a bankruptcy order, an annulment of a bankruptcy order wipes out the bankruptcy altogether and puts the debtor in the position as if the bankruptcy order had never been made. All entries in the register or registers relating to the annulled bankruptcy order would also be deleted.
56. Under the Bankruptcy Act, bankruptcy orders may be annulled in the following circumstances:
 - (1) There are circumstances that show that the bankruptcy ought not to have been made;¹¹⁰ or
 - (2) The debts and expenses of the bankrupt have all been paid or secured to the satisfaction of the court or the Official Assignee;¹¹¹ or
 - (3) A composition or scheme of arrangement proposed by the debtor bankrupt is accepted by the creditors by a special resolution, i.e. 75% of creditors in value and a majority in number.¹¹²

¹¹⁰ See section 123(a) of the Bankruptcy Act.

¹¹¹ See sections 123(b) and 123A of the Bankruptcy Act.

¹¹² See section 95A of the Bankruptcy Act.

57. The Committee notes that the circumstances in which a bankruptcy order may be annulled in other common law jurisdictions (i.e. the UK,¹¹³ Australia,¹¹⁴ New Zealand,¹¹⁵ Hong Kong¹¹⁶ and Canada¹¹⁷) are largely the same as that provided for under the Bankruptcy Act.
58. On this note, the Committee observes that section 95A, which empowers the Official Assignee to annul a bankruptcy order when a composition or scheme of arrangement is approved by the creditors, created an exception to the general rule that a bankruptcy order will only be annulled when all the debtor's debts have been paid in full.
59. The Committee observes that earlier enactments of the Bankruptcy Act dating back to the Bankruptcy Ordinance of 1888¹¹⁸ gave the court separate powers to (a) approve an arrangement proposed between a debtor and his creditors and (b) grant an annulment of a bankruptcy order following the approval of the arrangement. The former turned on a consideration of whether the proposed arrangement was reasonable or if it was calculated to benefit the general body of creditors. The latter, presumably, turned on such considerations as the percentage recovery afforded to creditors, the circumstances that led to the making of the bankruptcy order and the conduct of the bankrupt prior to and during the period of bankruptcy.
60. In 1999 amendments were made to section 95 of the Bankruptcy Act to render a composition or scheme of arrangement that was supported by the requisite majority of creditors binding only upon the issuance by the Official Assignee of a certificate of annulment under a new section 95A of the Bankruptcy Act. Under the revised framework, which continues to apply today, the assessments of (a) whether the composition or scheme of arrangement ought to be supported; and (b) whether the bankruptcy should be annulled were collapsed into a single process.

¹¹³ See sections 263D and 282 of the UK Insolvency Act.

¹¹⁴ See sections 74 and 153A to 154 of the Australia Bankruptcy Act.

¹¹⁵ See sections 309 and 310 of the New Zealand Insolvency Act 2006.

¹¹⁶ See sections 20I and 33 of the Hong Kong Bankruptcy Ordinance.

¹¹⁷ See sections 61 and 181 of the Canadian Bankruptcy and Insolvency Act.

¹¹⁸ See section 95 of the Bankruptcy Act (Rev. Ed. 1996) and section 22 of the Bankruptcy Ordinance 1888, which can be traced back to section 187 of the UK Bankruptcy Act 1861.

61. The current approach under the UK Insolvency Act is somewhat different. The IVA procedure in Part VII of that Act subjects approval of a voluntary arrangement to the decision of a meeting of the debtor's creditors (although the decision may be subject to challenge in court). The chairman of the meeting is required to report the outcome of the meeting to the court. Where the debtor is an undischarged bankrupt, the court shall annul the bankruptcy order on an application made by the bankrupt or the Official Receiver.
62. In the Committee's view, the current approach under sections 95 and 95A of the Bankruptcy Act may be too restrictive as it ties the approval of a debtor's composition or scheme of arrangement to the Official Assignee's decision whether to annul the bankruptcy. Consequently, a composition or scheme of arrangement, even if it is (a) approved by the creditors and (b) reasonable and beneficial to the general body of creditors, may fail because the Official Assignee is of the view that the bankruptcy order should not be annulled. Such an outcome unjustifiably prejudices both the creditors and the bankrupt.
63. The approach under the UK Insolvency Act may be restrictive in a different way since annulment is effectively automatic once the creditors approve a voluntary arrangement. The court has no residual discretion to grant a discharge as an alternative to annulment where the bankrupt is undeserving of an annulment.
64. On balance, the Committee recommends that a clear distinction should be drawn in sections 95 and 95A of the Bankruptcy Act between the Official Assignee's power to approve a composition or scheme of arrangement, and the Official Assignee's discretion to grant an annulment of bankruptcy. It is further recommended that an annulment shall be granted in cases where all creditors have approved the composition or scheme of arrangement. Where the composition or scheme of arrangement is only supported by the requisite majority, but not all, of the bankrupt's creditors, the Official Assignee shall have the discretion to decide whether to issue a certificate of annulment or a certificate of discharge.

(E) SUMMARY OF RECOMMENDATIONS

65. In summary, the Committee recommends the following:

- (1) The IVA and DRS regimes should be incorporated into the New Insolvency Act, with no major amendments.
- (2) The provisions on proceedings in bankruptcy in the Bankruptcy Act can largely be adopted into the New Insolvency Act, with the inclusion of a procedure for an expedited bankruptcy application where there is a real risk that the debtor's assets would be diminished.
- (3) The non-automatic vesting of property that is acquired after the commencement of bankruptcy but before discharge present in the UK and Hong Kong should not be adopted in Singapore.
- (4) The provisions on the disabilities, disqualification and duties imposed on a bankrupt can be substantially imported over to the New Insolvency Act.
- (5) A provision should be introduced to excuse a bankrupt from criminal liability for failing to comply with his duties, disabilities or disqualifications where it can be shown that the bankrupt had neither actual nor constructive knowledge of his bankruptcy, or had no reason to believe that he had been made a bankrupt.
- (6) The court's powers to order an examination of the bankrupt and other persons, and the consequent delivery of property and payment of sums to the Official Assignee should be extended to cover a situation where the bankrupt has been discharged, subject to the same limitations which presently exist for examinations and delivery prior to the bankrupt's discharge.

- (7) Amendments be made to section 131 to clarify that (a) the Official Assignee's sanction shall apply to the defence of any action by the bankrupt, including an action that is commenced or continued with leave of the court under section 76(1)(c) of the Bankruptcy Act; (b) the word "action" includes arbitration proceedings; and (c) section 131 shall not apply to criminal and matrimonial proceedings but that the bankrupt should be required to promptly notify the Official Assignee of all such proceedings.
- (8) Sections 95 and 95A of the Bankruptcy Act should be amended to draw a clear distinction between the Official Assignee's power to approve a composition or scheme of arrangement, and the Official Assignee's discretion to grant an annulment of bankruptcy. Further, an annulment shall be granted in cases where all creditors have approved the composition or scheme of arrangement. Where the composition or scheme of arrangement is only supported by the requisite majority, but not all, of the bankrupt's creditors, the Official Assignee shall have the discretion to decide whether to issue the certificate of annulment or certificate of discharge.

CHAPTER 4: RECEIVERSHIP

1. Private receivership¹¹⁹ is commonly regarded as a corporate insolvency regime. However, it differs significantly from liquidation and judicial management in that it is not a collective process or a court-administered insolvency proceeding. At its most basic level, receivership is a mode of enforcement of security, and constitutes the appointment of a receiver over the security provided by a company. It originated as an equitable remedy for the enforcement of a charge over real property, but is now contractually provided for in lending and security documentation. Such documentation routinely provides for the circumstances in which the appointment of a receiver may be made, and the powers of the receiver.

2. In the corporate insolvency context, a receiver is normally appointed by a security holder for the predominant purpose of realising the security and applying the proceeds of sale towards the discharge of the debts owed to the debenture holder. Where the security is a floating charge that covers the undertaking of the company (or more commonly termed in commercial parlance as a “debenture”),¹²⁰ the receiver is also conferred powers of management over the undertaking of the company, and is known as a receiver and manager.¹²¹

3. The appointment of a receiver is contractual and can be effected with relative ease and speed. No application to the court is required. This provides an expedient and effective procedure for a debenture holder to realise his security and to displace the management of the company in favour of an insolvency practitioner of his choice. It therefore comes as no surprise that debenture holders, in particular, floating charge holders, value receivership as an important right.

¹¹⁹ As distinguished from court receivership which entails the appointment of a receiver by the court to preserve property or *status quo* pending the resolution of a dispute, court receivership may apply in many situations outside of corporate insolvencies.

¹²⁰ The term “debenture” in this Chapter shall include both fixed and floating security the terms of which allow the appointment of a receiver or receiver and manager.

¹²¹ The term “receiver” in this Chapter shall include both a receiver, and a receiver and manager.

4. Statutory law on receivership in Singapore is largely founded on a handful of provisions in the Companies Act.¹²² These provisions are substantively derived from the UK Companies Act 1948 and the Australia Companies Act 1961. These provisions are largely procedural in nature and are mainly designed to ensure that members and creditors of the company have sufficient information about the financial position of the company after the appointment of the receiver. They do not deal with the substantive rights, duties and liabilities of a receiver, the debenture holder, the company or its stakeholders; these remained governed by the common law and there is a substantial body of case-law¹²³ on the subject. The Singapore cases have essentially followed the law as pronounced in England (prior to the introduction of administrative receivership) and other Commonwealth jurisdictions.

5. It is settled law that the receiver is an agent of the company and can do acts and contract on behalf of the company. He can exercise his discretion in the management and disposal of the security; he can also cause the company to breach unsecured obligations without incurring any personal liability, as the security interest pursuant to which he was appointed has priority over such obligations. Parties with unsecured claims will have their usual legal recourse against the company, but will be unable to enforce any judgments obtained against the company against the assets subject to the security.

6. A receiver owes a general duty of good faith to the company and, possibly, other stakeholders in the company, that is, he must exercise his powers and conduct the receivership for the purpose of realising the security and discharging the secured debt, and not for any collateral purposes. The receiver does not owe a general duty of care to the company or the other stakeholders in the company, except for specific contexts such as the taking of reasonable steps to obtain a proper price for the security.

¹²² See Part VIII of the Companies Act.

¹²³ See the Singapore leading cases of *Roberto Building Material Pte Ltd and others v Oversea-Chinese Banking Corp and another* [2003] 3 SLR (R) 217 and *Beckett Pte Ltd v Deutsche Bank AG and another and another appeal* [2009] SGCA 18.

7. Accordingly, a receiver is under no general legal duty to consider and effect a corporate rescue, or even to preserve the company as a going concern if the security will be at risk. His primary task is to protect the interests of the security holder and to realise as much value from the security as he can for the benefit of the debenture holder. However, this is not an absolute rule. If the value of the security is more than sufficient to discharge the secured debt, or if a certain course of action may benefit the company's business or operations without significant risk to the security, the receiver may have to consider the interests of the company and its stakeholders as well.
8. The debenture holder has relatively few duties. In exercising his power to appoint a receiver, he is required only to act in good faith and owes no general duty of reasonable care to consider or have regard to the interests of the company or its stakeholders. The debenture holder is entitled to exercise the power to appoint a receiver so long as a valid demand for payment of the secured debt has been made and the company has failed to make payment after given such time as is necessary to implement the mechanics of payment. The debenture holder is not the principal of the receiver and is not vicariously liable for the acts of the receiver, unless the security holder intermeddles in the conduct of the receivership and constitutes the receiver as his agent.
9. The principal question considered by the Committee was whether receivership as a mode of enforcement of security, in particular, floating charges, should continue to be part of Singapore law. If so, the further question is whether the administrative receivership regime under the UK Insolvency Act (prior to changes made by the UK Enterprise Act) should be adopted in Singapore. On the other hand, if it is felt that receivership should not be retained in its existing form, the further issue is the extent to which it should be abolished in favour of judicial management. These issues are best considered against the dramatic changes made in the UK to the law of receivership.

(A) DEVELOPMENTS IN THE UK

10. In the UK, receivership was initially enhanced by the UK Insolvency Act. Receivership was placed on a statutory footing and became known as administrative receivership; a receiver correspondingly came to be known as an administrative receiver. Although some statutory obligations were placed on administrative receivers, the fundamental legal nature of receivership was not changed. Administrative receivership remained as a mode of enforcement of security for debenture holders.

11. The administrative receivership regime was introduced alongside the administration regime, upon which our judicial management regime is modelled. However, as is the current position in Singapore, debenture holders holding a floating charge over the whole or substantially the whole of a company's property could block the making of an order for the administration of the company.¹²⁴ This meant, of course, that debenture holders would frequently prevent a company from going into administration in preference to the appointment of an administrative receiver, who would enforce the security for their benefit.

12. Following a review by the UK Department of Trade and Industry in 2001,¹²⁵ the UK Parliament passed the UK Enterprise Act in 2002 and made drastic reforms to the administrative receivership and administration regimes. New provisions were introduced into the UK Insolvency Act to make it easier for a company to go into administration by dispensing with the need for a court order. This was done as research had shown that administrative receivership was more readily resorted to by secured creditors, as opposed to administration, due to the former's relative speed in asserting management control and the risk that delays in procuring court-appointed administration posed to the collection of assets.

¹²⁴ Unlike in Singapore, this opposition by debenture holders could not be overridden by the court, even on public interest grounds.

¹²⁵ See the White Paper issued by the UK Department of Trade and Industry entitled "Insolvency – A Second Chance", 2001 (Cm. 5234).

13. At the same time, provisions were introduced to prohibit the appointment of an administrative receiver by the holder of a “qualifying floating charge”,¹²⁶ except where those charges are created before 15 September 2003 or, if they were created thereafter, fall within one of the specified exceptions.¹²⁷ The holder of such a “qualifying floating charge” can only appoint an administrator out of court. In contrast to an administrative receiver, however, the administrator acts in the interests of all the creditors of the company and will have to attempt to effect a corporate rescue or, if this is not possible or feasible, to achieve better returns for all creditors than in a winding up of the company.

14. This partial abolition of administrative receivership by the UK Enterprise Act was a result of a deliberate move by the UK Government to “tip the balance firmly in favour of collective insolvency proceedings”¹²⁸ so as to improve the prospects of rehabilitating insolvent companies and obtain better returns for all creditors. These reforms were prompted by a number of concerns raised by the administrative receivership regime:
 - (1) Based on the large number of appointments of administrative receivers in the 1990s, there was an increasing sentiment that lenders tended to appoint administrative receivers prematurely, causing companies to fail unnecessarily. Such conduct was viewed as impeding the development of a “rescue culture”, raising concerns that administrative receivership, as a procedure, did not work to maximise the potential economic value of companies.

 - (2) Administrative receivership failed to provide an acceptable level of transparency and accountability to the range of stakeholders with an interest in the company’s affairs, particularly the unsecured creditors. This perceived lack of transparency, and the fact that administrative

¹²⁶ This refers to floating charge which purports, *inter alia*, to empower the holder of that floating charge to appoint an administrator or an administrative receiver.

¹²⁷ These specified exceptions are set out in sections 72A to 72GA of the UK Insolvency Act.

¹²⁸ White Paper issued by the UK Department of Trade and Industry entitled “Insolvency – A Second Chance”, 2001 (Cm. 5234) at p10

receivership gave secured creditors more power than in administration, resulted in unsecured investors reacting adversely towards administrative receivership.

- (3) Unsecured creditors could not challenge the costs of administrative receivership, notwithstanding that it was in their interest to minimise such costs. Such costs, on average, amounted to up to a quarter of the value of the value of an insolvent estate.¹²⁹

- 15. It is difficult to assess whether the changes introduced by the UK Enterprise Act have achieved the right compromise with regard to the legal rights and commercial interests of all stakeholders in a corporate insolvency and the ideals of corporate rescue.¹³⁰ It may also be that meaningful results can only be gathered and analysed over a longer period of time. Further, the abolition of receivership was not legislated in the UK as a stand-alone basis, but rather as a package of reforms in the UK Enterprise Act, which, significantly, included the removal of the Crown's status as a preferential tax creditor and the introduction of top-slicing for floating charges. It was a compromise reached between the UK government and other stakeholders which may well have taken into account issues or discussions that are not relevant for Singapore.
- 16. The Committee is of the view that there is currently no clear or compelling evidence or grounds that the position under the UK Enterprise Act ought to be adopted in Singapore. While the UK experience is helpful in understanding

¹²⁹ See further the study sponsored by the UK's Department of Trade and Industry/Treasury Working Group on Company Rescue and Business Reconstruction Mechanisms, "Cycle of Corporate Distress, Rescue and Dissolution: A Study of Small and Medium Size UK Companies", Julian Franks and Oren Sussman, April 2000; the UK Department of Trade and Industry Report "Review of Company Rescue and Business Reconstruction Mechanisms", November 2000.

¹³⁰ Though the following three reports provide an excellent insight into the experience after the UK Enterprise Act: (i) *Report on the Insolvency Outcomes, presented to the Insolvency Service by Dr. Sandra Frisby on 26 June 2006*

(<http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/corpdocs/InsolvencyOutcomes.pdf>);

(ii) *Interim Report to The Insolvency Service on Returns to Creditors from Pre- and Post- Enterprise Act Insolvency Procedure presented by Dr. Sandra Frisby on 24 July 2007* (<http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/returntocreditors.pdf>) and

(iii) Armour, John, Hsu, Audrey and Walters, Adrian, *The Costs and Benefits of Secured Creditor Control in Bankruptcy: Evidence from the UK (March 1, 2009)*, 1st Annual Conference on Empirical Legal Studies Paper; University of Cambridge Centre for Business Research Working Paper No. 332. Available at SSRN: <http://ssrn.com/abstract=912302>.

the competing considerations and how the balance may be struck, the issue for Singapore has to be considered afresh. The legal and commercial considerations in the local context have to be weighed.

(B) *THE POSITION IN SINGAPORE*

17. The main issue considered by the Committee is whether Singapore should follow the lead of the UK and abolish private receivership. This would mean that holders of floating charges will not be able to appoint private receivers to realise the security, and instead have to appoint judicial managers (perhaps in an out-of-court process, as in the UK) who would act in the interests of all creditors of the company in seeking to achieve the statutory purposes of judicial management. The key justification for such a position would be that a debenture holder, who is already entitled to extensive security rights under a floating charge and priority of payment over general unsecured creditors, should not be able to enforce the floating charge by the private appointment of a receiver, who would take over the company and single-mindedly realise the security for the benefit of the security holder to the exclusion of the unsecured creditors. Instead, the debenture holder should be required to participate in a collective insolvency proceeding for the benefit of all creditors, where the viability of a corporate rescue, or the preservation of the company for sale as a going concern, can be independently assessed and carried out if appropriate. The position of the debenture holder would be adequately protected as the security rights continue to be respected and the debenture holder has the right to apply to the court for relief against any unreasonable or unfairly prejudicial conduct of the judicial manager.
18. These are powerful arguments, but there several countervailing considerations.
19. First, the abolition of receivership will necessarily undermine the attractiveness and usefulness of floating charges. Floating charges are often granted by companies that need financing or deferment of financial

obligations but have no fixed assets over which to offer security. Creditors may be persuaded to take such security only if they are assured that they have a robust, efficient and expeditious mode of realising the security and will not be subject to a collective insolvency regime that will be conducted in the interests of all creditors. The abolition of receivership could therefore have an adverse impact on the cost of commercial borrowing and reduce the range of options for distressed companies to raise financing or secure continued support from its bank creditors.

20. Secondly, a floating charge is registrable and all parties dealing with a company that has granted a floating charge should be taken as having notice of it. These parties can decide how best to structure their dealings with the company, whether it is to obtain fixed security from the company, transact on a cash basis or otherwise.
21. Thirdly, it has been recommended elsewhere in this Report that the right of a debenture holder to object to the making of a judicial management order should be diluted, such that the court may override such objection not only where there are public interest considerations but also where the interests of the other creditors will be unfairly sacrificed or prejudiced.¹³¹ It has also been recommended that the court may allow concurrent appointments of receivers and judicial managers. Even more importantly, it has been recommended that, in the scheme of arrangement procedure (which the Committee feels is a much more effective and prevalent corporate rescue regime in Singapore), the company should be given the right to apply to the court for a moratorium against the enforcement of security, which would include the appointment of a receiver.¹³² To empower the court to prevent the appointment of a receiver in appropriate cases, after weighing competing rights and interests (which should of course include the *prima facie* right and interest of a debenture holder to appoint a receiver), may be a fairer and more nuanced way to deal with the issue.

¹³¹ See Chapter 6 on Judicial Management.

¹³² See Chapter 7 on Schemes of Arrangement.

22. Fourthly, there is no concrete evidence that the current position is wrong in principle, unfair to any stakeholder, economically inefficient or open to abuse. As pointed out above, empirical data from the UK does not show that the abolition of administrative receivership has engendered a strong rescue culture or increased the incidences of company rehabilitation. In Singapore, there has been no significant concerns over the status and operation of receivership, and there have been no serious or widespread misfeasance by receivers. Further, it appears that debenture holders (who are typically banks and financial institutions) are well aware of the consequences and costs of receivership, and invoke receivership only as a last resort where the company is beyond rehabilitation or management needs to be displaced. They generally prefer a consensual workout with the distressed company, often under the supervision of a monitoring accountant appointed by the company itself with their agreement.
23. After deliberating on the above issues, the Committee is of the view that the receivership regime should be retained in Singapore, with the refinements as recommended elsewhere in this Report in relation to the interface of receivership with judicial management and schemes of arrangement. The Committee feels that, in the context of the local conditions and the experience in Singapore, there is no pressing problem to be addressed with receivership that justifies its abolition. What may be required is simply some updating of the largely procedural statutory provisions on receivership.

(C) UPDATING THE STATUTORY FRAMEWORK

24. As mentioned above, the statutory framework for receivership is largely procedural in nature and provides, *inter alia*, as follows:
- (1) A summary of the company's affairs as at the date of the receiver's appointment¹³³ must be submitted by the directors of the company to the receiver within 14 days of the notice of appointment of the receiver.

¹³³ See sections 223(1) and 224 of the Companies Act.

The statement of affairs so prepared and filed is sent to the Registrar of Companies, together with any comments that the receiver may have on these statement of accounts.

- (2) The receiver is required to file a summary of the receipts and payments in the receivership at half-yearly intervals.¹³⁴
 - (3) A receiver may apply to the court for directions in relation to any matter arising in connection with the performance of his functions.¹³⁵
 - (4) The receiver is personally liable for certain debts incurred by him in the course of receivership, namely, in respect of services rendered, goods purchased and property hired, leased, used or occupied.¹³⁶
 - (5) If the company is not in the course of being wound up, debts which would constitute statutory preferential debts in winding up shall be paid out of any assets coming to the hands of the receiver in priority to the debt secured by the debenture.¹³⁷
25. The Committee observes that there is hardly any litigation on the statutory provisions on receivership¹³⁸ and understands that, in practice, there are no significant complaints regarding the statutory framework. As such, the Committee is of the view that no major updates are required. Nevertheless, the Committee is of the view that a number of provisions in the UK Insolvency Act can be introduced to make the statutory framework for receivership more robust.

¹³⁴ See section 225 of the Companies Act.

¹³⁵ See sections 218(3) and 218(4) of the Companies Act.

¹³⁶ See section 218(1) of the Companies Act.

¹³⁷ See section 226 of the Companies Act.

¹³⁸ It is noteworthy that there had only been three cases discussing and/or referring to the statutory provisions on receivership between 1994 and 2012. These cases are *Official Receiver (liquidator of Allied Cocoa Industries Pte Ltd) v Chi Man Kwong and others* [1994] 1 SLR(R) 277; *Re Sunshine Securities Pte Ltd; Sunshine Securities (Pte) Ltd and another v Official Receiver and Liquidator of Mosbert Acceptance Ltd* [1977 – 1978] SLR (R) 148; *Chin Yoke Choong Bobby and another v Hong Lam Marine Pte Ltd* [1999] 3 SLR(R) 907.

26. First, section 221 of the Companies Act requires a person, once appointed to act as receiver, to lodge a notice within seven days of appointment, failing which he will be subject to penal sanctions. With the exception of receivers who are appointed pursuant to an order of the court, there is some uncertainty as to the time in which the appointment takes effect. To resolve this uncertainty, the Committee proposes that it be clarified that the appointment of a person as a receiver shall be deemed to be made at the time of (a) the making of the order of court or (b) the receipt of the instrument of appointment, but that (b) shall be ineffective unless accepted by the appointee.¹³⁹
27. Secondly, there is at present no provision in the Companies Act that addresses the liability of a receiver who has been invalidly appointed (whether by virtue of the invalidity of the instrument or otherwise). So as to provide adequate protection to persons who accept the appointment as receiver, the Committee recommends that a provision be introduced to provide the court with a discretion to order that the receiver be indemnified by the appointee against any liability which arises solely by reason of the invalidity of the appointment.¹⁴⁰
28. Third, section 218 of the Companies Act only provides generally that a receiver (or other authorised person) entering into possession of any assets of a company for the purposes of enforcing any charge shall be liable for “debts incurred by him in the course of the receivership or possession for a restricted list of matters (namely, services rendered, goods purchased or property hired, leased, used or occupied). To take into account the varied factual circumstances with which a receiver may be faced, the Committee recommends amending section 218 to provide that the receiver shall be personally liable on all debts incurred by him on behalf of the company in the course of the receivership. However, it should also be expressly provided that the receiver is entitled to be indemnified out of the assets of the company for

¹³⁹ See section 33 of UK Insolvency Act.

¹⁴⁰ See section 34 of UK Insolvency Act.

his remuneration, expenses and statutory personal liability in priority to any charge or other security held by his appointer.¹⁴¹

29. Finally, in keeping pace with the use of technology by modern day businesses, section 222 of the Companies Act should be amended to extend the notification requirements of the appointment of a receiver to the company's website.¹⁴²
30. The Committee also takes this opportunity to invite views on any other matters relating to the statutory framework for the receivership regime.

(D) SUMMARY OF RECOMMENDATIONS

31. In summary, the Committee makes the following recommendations:
 - (1) The UK administrative receivership regime should not be adopted in Singapore.
 - (2) The statutory framework on receivership should be updated as follows:
 - (a) It should be clarified that the appointment of a person as a receiver shall be deemed to be made at the time of (i) the making of the order of court or (ii) the receipt of the instrument of appointment, but that (ii) shall be ineffective unless accepted by the appointee.
 - (b) It should be provided that where a person is invalidly appointed as a receiver, the appointing party may be ordered to indemnify the appointee against any liability which arises solely by reason of the invalidity of the appointment.

¹⁴¹ See section 37 of the UK Insolvency Act.

¹⁴² See section 39(1) of the UK Insolvency Act.

- (c) Section 218 of the Companies Act should be amended to extend the personal liability of a receiver to any contracts entered into by him and any contract of employment adopted by him in the performance of his function as a receiver and to expressly provide that the receiver is entitled to be indemnified out of the assets of the company. Correspondingly, it should be provided that where the receiver vacates his office, his remuneration, expenses and any indemnity to which he is entitled to out of the assets of the company, shall be charged on and paid out of any property of the company which was in his custody or under his control at that time in priority to any charge or other security held by his appointer.

- (d) Section 222 of the Companies Act should be amended to extend the notification requirements of the appointment of a receiver to the company's website.

CHAPTER 5: THE LIQUIDATION REGIME

1. Liquidation or winding up is not only a pillar of our corporate insolvency regime, but an essential part of corporate law generally. It is the process by which the affairs and assets of a company are put in order and the existence of the company then extinguished. It comprises several key components: the commencement of the liquidation, the appointment of a third-party administrator known as the liquidator, the administration of the company's affairs and assets by the liquidator, the ascertainment of the company's liabilities, the recovery and realisation of the company's assets, the distribution of the proceeds of realisation to the company's creditors and members, and the eventual dissolution of the company.

2. Although corporate liquidation law applies to both solvent and insolvent companies, it is in the case of the latter that it assumes the most significance. A fair, orderly and robust corporate insolvency regime is critical to deal with the many issues of law and the practical difficulties that may arise in the course of the liquidation of an insolvent company. Even in a situation where there is no actual liquidation of a company, it is equally important that the legal positions of parties *vis-a-vis* the company, in the event of an insolvent liquidation, are clear and predictable, as various financing, debt-restructuring and commercial transactions are commonly negotiated and structured against that backdrop.

3. The superstructure of Singapore's liquidation regime is set out in Part X of the Companies Act. This framework is supplemented by other legislation, such as the provisions of the Bankruptcy Act that relate to the Official Assignee's powers to set aside certain transactions before the commencement of bankruptcy.¹⁴³ Certain other ancillary provisions in other legislation, such as Civil Law Act (Cap. 43) and the Insurance Act,¹⁴⁴ further complement or augment the winding up process insofar as they apply to specific types of companies. For certain types of legal entities and organisations (for example

¹⁴³ For example, see sections 98, 99 and 103 of the Bankruptcy Act on the Official Assignee's powers to set aside the transactions at an undervalue, unfair preferences, and extortionate credit transactions.

¹⁴⁴ See section 4 of the Civil Law Act and section 49FO of the Insurance Act.

business trusts,¹⁴⁵ mutual benefit organisations,¹⁴⁶ trade unions,¹⁴⁷ cooperative societies,¹⁴⁸ societies,¹⁴⁹ and limited liability partnerships¹⁵⁰), the corporate insolvency regime under the Companies Act is excluded altogether in favour of a separate winding up process. As mentioned at Chapter 2 above, the Committee is of the view that the New Insolvency Act ought, for the time being, to apply to the insolvency regimes of natural persons and companies incorporated under the Companies Act. The question of whether the insolvency regimes for other legal entities and organisations ought to be brought under the ambit of the New Insolvency Act may be considered at a later time.

4. The present framework under the Companies Act is based on the winding up provisions in the UK Companies Act 1948 and the Australian Victorian Companies Act 1961. Similar provisions can be found in the companies legislation of Hong Kong and Malaysia. Many of the key provisions have been in force in these jurisdictions for a long time, particularly in the UK, and there is a very substantial body of case-law interpreting these provisions and explaining their underlying concepts. At its core, our laws and general principles on corporate liquidation are generally well-settled and are in line with the equivalent laws of other major jurisdictions. Our corporate liquidation regime is, for the most part, fairly sophisticated and stable. Feedback from regulators, academics and practitioners confirms that, in general, the statutory regime for corporate liquidation does not give rise to much legal or practical difficulty.

5. Nonetheless, in some respects, Singapore has not fully kept pace with the legislative developments in other jurisdictions. In the course of the drafting the New Insolvency Act, a review has to be carried out of the reforms made under the UK Insolvency Act as well as features in the corporate liquidation regimes of other jurisdictions which may be relevant to the local context, with a view to

¹⁴⁵ See Part VII of the Business Trust Act (Cap. 31A).

¹⁴⁶ See sections 32 to 34 of the Mutual Benefit Organisation Act (Cap. 191).

¹⁴⁷ See sections 19 to 20, Trade Unions Act (Cap. 333).

¹⁴⁸ See sections 79 to 83 of the Co-operative Societies Act (Cap. 62).

¹⁴⁹ See sections 6 to 7 of the Societies Act (Cap. 311).

¹⁵⁰ See the Fifth schedule to the Limited Liability Partnership Act (Cap. 163A).

incorporation or adaptation as part of our law. Not all of these will be appropriate for Singapore, and only those provisions that will enhance the effectiveness and proper functioning of the liquidation regime in Singapore ought to be considered.

6. The Committee's views on some the key changes that should be considered are set out below.

(A) SUMMARY LIQUIDATIONS

7. It is the reality that a sizeable number of companies that are wound up by the court have insufficient or no assets to fund the administration of the liquidation.¹⁵¹ In the case of a deeply insolvent company, insolvency practitioners are usually reluctant to be appointed as the liquidator of the company as there are insufficient or no assets to fund the administration of the liquidation, unless the party applying for the winding up order funds the liquidation (which would be rare as that party will usually be equally reluctant to provide funds for the winding up). Further, the current statutory regime provides that a party seeking a winding up order against a company is not required to nominate a private liquidator for appointment by the court. Where no private liquidator is nominated, the Official Receiver automatically becomes the liquidator of the company in the event that a winding up order is made.¹⁵² The Official Receiver then assumes the responsibility of conducting the administration of the liquidation; in many of these cases, the deposit paid by the applicant for the winding up is hardly sufficient to fund the liquidation properly.
8. Apart from invoking the winding up processes under the Companies Act, the Official Receiver may request the Registrar of Companies to invoke the statutory power to strike a defunct company off the register.¹⁵³ However, this power is subject to the Registrar's discretion, which is exercisable only where

¹⁵¹ As at 31 December 2012, the number of cases with estimated realisable assets of less than S\$1,000 administered by the Official Receiver stood at 320, constituting 42% of the 768 live cases administered that year.

¹⁵² See section 263 of the Companies Act.

¹⁵³ See section 344 of the Companies Act.

the Registrar has reasonable cause to believe that a company is not carrying on business or is not in operation.¹⁵⁴ Further, the power to strike off the register a company undergoing liquidation only applies where (a) there is no liquidator acting; (b) where the company has already been fully wound up but the liquidator has defaulted in lodging a return; or (c) the affairs of the company have been fully wound up and there are insufficient assets to pay the costs of obtaining an order of the court dissolving the company.¹⁵⁵ In other words, the Official Receiver would not be able to apply to the Registrar of Companies to strike off the company in situations where the affairs and assets of the company have not been fully administered, even though there are insufficient assets to fund the continuation of the liquidation.

9. The Committee is of the view that the public resources of the Official Receiver can be put to better use than to fund the administration of insolvent companies and therefore considered the viability of introducing a statutory scheme for summary liquidations akin to that found in the UK and Hong Kong. However, the introduction of such a statutory scheme should not unduly affect the rights of creditors in relation to the recovery and realisation of the assets of the liquidation. If a creditor is of the view that there should not be a summary liquidation, he should be entitled to object to a summary liquidation, but on condition that he is willing to fund the appointment of a private liquidator and the continuation of the liquidation. Further, a creditor providing such funding should receive the appropriate incentive and reward for doing so; this is the subject of a separate recommendation below on creditor funding.

10. Under the UK Insolvency Act,¹⁵⁶ the Official Receiver may apply to the Registrar of Companies to dissolve the company within 3 months where (a) the realisable value of an insolvent company's assets are insufficient to cover the liquidation expenses, and (b) the affairs of the company do not require further investigation. As a measure of protection to creditors and

¹⁵⁴ See section 344(1) of the Companies Act.

¹⁵⁵ See section 344(3) of the Companies Act.

¹⁵⁶ See sections 202 and 203 of the UK Insolvency Act.

contributories, the Official Receiver is required to give 28 days' notice before applying for early dissolution of the company. The Official Receiver's duties as liquidator in respect of the company, its creditors or contributories effectively cease upon the issuance of such notice.¹⁵⁷

11. The Hong Kong Companies Ordinance, on the other hand, adopts a different approach by permitting the Official Receiver to apply to the court for leave to dispense with some of the usual procedural requirements for winding up.¹⁵⁸ For example, the court may waive the need for the Official Receiver to obtain the consent of the company's creditors before proceeding to sell the assets of the company. However, such applications may only be made where the company has less than HK\$200,000 in assets.

12. The Committee is of the view that the system of summary liquidation in the UK is appropriate for Singapore and preferable to the position in Hong Kong. There should be no requirement for the Official Receiver to make another application to the court for leave to dispense with procedural requirements under the liquidation regime. The Official Receiver should be entitled to make an application to the Registrar of Companies to seek an early dissolution of the company if it appears that (a) the realisable assets of the company are insufficient to cover the expenses of the winding-up, and (b) the affairs of the company do not require any further investigation, and by giving reasonable notice to the creditors and contributories. The Official Receiver's duties as liquidator should cease as soon as notice is given to the creditor or contributories. A creditor or contributory who opposes such an action may apply for the appointment of a private liquidator or appeal to the court against the Official Receiver's decision.

13. The Committee is further of the view that the powers to invoke a summary liquidation should be extended to private liquidators. This is to address instances where a private liquidator determines, after his appointment and investigation into the affairs of the company, that summary liquidation would

¹⁵⁷ See section 202(4) of the UK Insolvency Act.

¹⁵⁸ See section 227F of the Hong Kong Companies Ordinance.

be the more appropriate course of action. As a safeguard against abuse of this procedure, private liquidators who intend to invoke the summary liquidation procedure shall, in addition to ensuring that all creditors and contributories have been notified, be required to obtain the Official Receiver's consent. An appeal may be made to the courts against the decision of the Official Receiver.

(B) THE OFFICIAL RECEIVER AS LIQUIDATOR OF LAST RESORT

14. The Companies Act provides that the Official Receiver is the default liquidator where there is no court-appointed liquidator, or where there is any vacancy in the position of liquidator of a company in a court-ordered winding up.¹⁵⁹ As observed at paragraph 7 above, even where a company has sufficient assets to fund the conduct of the liquidation by a private liquidator, the party seeking a winding up order is not obliged to nominate an insolvency practitioner as private liquidator. In such a situation, the Official Receiver has no option but to assume the office of liquidator and administer the liquidation.
15. In light of the limited resources of the Official Receiver, the Committee considered whether this position should be reviewed. In particular, the Committee considered the feasibility of adopting either the UK and Hong Kong approaches of permitting the Official Receiver to outsource liquidations to private liquidators, or the Australian approach of appointing a private liquidator in every case from a fixed list of insolvency practitioners.
16. Under the UK Insolvency Act, the Official Receiver may convene a meeting of creditors and contributories for the purposes of appointing a private liquidator,¹⁶⁰ failing which an application may be made to the Secretary of State for such an appointment to be made.¹⁶¹ However, the Committee notes that the guidelines published by the UK Insolvency Service adopt the position that the views of creditors must be sought and adhered to as much as

¹⁵⁹ See section 263 of the Companies Act.

¹⁶⁰ See section 136(4) of the UK Insolvency Act.

¹⁶¹ See section 137 of the UK Insolvency Act.

possible before an application is made to the Secretary of State, whose powers would not be exercised merely for the convenience of the Official Receiver.¹⁶² It is, perhaps, for this reason that the Secretary of State's powers are seldom invoked in practice.

17. In Hong Kong, the Official Receiver may outsource liquidations to two panels of private liquidators, depending on the value of the company's assets. For companies whose assets are equal to or more than HK\$200,000, a private liquidator is appointed from a roster and is remunerated based on a percentage of assets recovered in the liquidation.¹⁶³ Where a company's assets are less than HK\$200,000, a private liquidator is appointed based on a tender process, with the successful bidder receiving a subsidy from the Official Receiver.¹⁶⁴

18. In Australia, the position is entirely different. The Official Receiver's role is confined to the administration of bankruptcies. Corporate insolvencies are administered by private liquidators who are either (a) registered liquidators appointed by members or creditors in voluntary liquidations,¹⁶⁵ or (b) official liquidators appointed by the court.¹⁶⁶ In the latter case, the official liquidator cannot refuse an appointment on the basis that the company has no assets. The system for selection of an official liquidator varies from state to state and can take the form of a rotation system, a nomination system, or a combination of both.¹⁶⁷ The Committee understands that there is still sufficient incentive for insolvency practitioners to be appointed as official liquidators as they would be assured of a steady supply of cases, a fair proportion of which would have sufficient assets to fund a proper liquidation.

¹⁶² See the UK Insolvency Service's Technical Manual, Chapter 17 at para 17.47.

¹⁶³ See the Hong Kong Official Receiver's Office's 'Rules for Admission of Firms and Persons for Taking-up Appointment of Liquidators or Special Managers in Non-Summary Winding-up cases' (August 2012).

¹⁶⁴ See section 194(1A) of the Hong Kong Companies Ordinance.

¹⁶⁵ See section 448B of Australia Corporations Act.

¹⁶⁶ See section 472 of Australia Corporations Act; Australia Securities and Investments Commission Regulatory Guide 186.138.

¹⁶⁷ See Chapter 3 of the Commonwealth Treasury (Australia), 'Review of the Regulation of Corporate Insolvency Practitioners, Report of the Working Party', June 1997.

19. After much deliberation, the Committee is of the view that it will not be appropriate to adopt the outsourcing of liquidations systems of the UK, Hong Kong or Australia *in toto*, as there are features of their systems that may not be suitable or applicable in Singapore's context. The position in the UK appears somewhat cumbersome and to be of limited effect in reducing the burden of the Official Receiver. The system of outsourcing in Hong Kong for companies with assets of less than HK\$200,000 involves a subsidy from public funds, which the Committee views as inappropriate in the Singapore context. A formal outsourcing system as in Australia also does not appear feasible, as there is unlikely to be a sufficient critical mass of liquidations in Singapore which would make it financially viable for insolvency practitioners to be appointed as private liquidators regardless of whether a company has assets. This is confirmed by feedback received from insolvency practitioners.

20. Accordingly, the Committee is of the opinion that the Official Receiver should continue to remain the liquidator of last resort. The difficulties can be ameliorated in two ways. First, where the Official Receiver is appointed as the liquidator of companies that has little or no assets, the introduction of a procedure for summary liquidations (see above) will alleviate the burden of the Official Receiver. Second, a statutory provision may be enacted to empower the Official Receiver to outsource liquidations to private liquidators. The details of the outsourcing process will require further study of models employed by the various jurisdictions mentioned above.

(C) PRIORITY OF THE OFFICIAL RECEIVER'S FEES

21. Under section 328(1)(a) of the Companies Act, the fees of the liquidator enjoy priority over all other creditors but share that priority with two other categories of debts within the same "class", i.e. the taxed costs of the applicant for the winding up order and the costs of an audit carried out pursuant to section 317 of the Companies Act. These three sets of costs rank *pari passu* amongst each other.¹⁶⁸

¹⁶⁸ See section 328(3) of the Companies Act.

22. The Committee received feedback that, in many cases where the Official Receiver is appointed as liquidator, typically of a company with no or little assets, the Official Receiver receives almost no remuneration for the fees incurred in conducting the liquidation. The larger implication, of course, is that the cost of such liquidations is borne by public funds. The Committee therefore considered whether the Official Receiver's fees ought to enjoy priority over the other debts mentioned in section 328(1)(a).
23. In the UK, the Official Receiver's expenses and fees generally rank ahead of (a) the liquidator's expenses and remuneration and (b) the costs of the petitioning creditor.¹⁶⁹ Further, the Official Receiver is only entitled to charge (a) expenses properly chargeable and incurred and (b) fees prescribed in the insolvency legislation.¹⁷⁰ No guidance could be obtained from the Australian statutory provisions since, as observed above, the Official Receiver in Australia does not act as the liquidator in corporate liquidations.
24. The Committee is of the view that expenses and fees of the Official Receiver ought to enjoy priority over all creditors, *including the taxed costs of the petitioning creditor*, for the following reasons:
 - (1) Unlike the petitioning creditor, who is in a position to decide whether or not to proceed with a winding up application (and incur its associated costs), the Official Receiver, once appointed, is obliged to proceed to administer the liquidation of the company.
 - (2) Such an approach would be consistent with the Fees Act (Cap. 106), which provides that the officer of any public office required to do

¹⁶⁹ See Rule 4.218(3) of the UK Insolvency Rules.

¹⁷⁰ The Official Receiver's expenses generally relate to the cost of realisation and preservation of assets, which are "out-of-pocket" expenses due to third parties (e.g. storage fees for goods, auctioneer fees, etc). Fees of the Official Receiver generally relate to administration fees for the performance of the Official Receiver's duties, such as the duty to investigate and report on the affairs of the company in liquidation. For details, see the UK Insolvency Proceedings (Fees) Order 2004.

anything for which a fee or payment is required may decline to carry out the act until the fee is paid.¹⁷¹

25. The Committee also recommends that the above priority should also extend to the expenses and fees of private liquidators, in cases where the Official Receiver has outsourced liquidations to these private liquidators.

(D) *FUNDING BY CREDITORS OR CONTRIBUTORIES*

26. A company under liquidation may not have enough assets to fund the conduct of investigation and litigation for the recovery of assets that may have been improperly disposed of, or to pursue claims against the company's own officers or third parties. In such a situation, the liquidator may have to raise funds from creditors, contributories or litigation funding companies. However, as such parties may be assuming a significant amount of risk, it may not be enough for the funding to be provided simply on terms that the funding parties will be repaid in priority to the payment of any other debts or liabilities of the company (to which of course the liquidator is entitled, and indeed expected, to agree). Often, the funding party will seek a proportion of the fruits of recovery as consideration for funding the recovery exercise.
27. Currently, there are two ways in which such a funding arrangement can be put in place. The first is the sale of part of the fruits of recovery to a funding party, in exchange for upfront funding of the investigation and litigation. The liquidator's statutory power to sell the property and things in action of the company¹⁷² has been interpreted by English case-law to mean that the liquidator may sell a cause of action vested in the company, whether for upfront consideration or for a share of the recovery, without being subject to the rules of maintenance and champerty. The liquidator may also assign the fruits of the cause of action, provided that the liquidator does not also assign his discretionary power to prosecute the proceedings. However, the liquidator cannot assign statutory claims that are vested in the liquidator, such as claims

¹⁷¹ See section 4 of the Fees Act.

¹⁷² See section 272(2)(c) of the Companies Act.

for fraudulent trading and the avoidance of transactions at an undervalue or the giving of unfair preferences.¹⁷³

28. The Committee notes that this provides an effective legal platform on which a liquidator may raise funds for investigation and litigation, at least in relation to claims vested in the company. However, it appears that this mechanism is not often used in Singapore by liquidators, and the reason for this is not clear. As for claims vested in the liquidator, the provisions in the Companies Act that vest statutory causes of action with liquidators are worded similarly to those in the UK Insolvency Act. It is likely that the availability of third party funding for such statutory causes of action will, in the absence of express statutory provision, be constrained in the same manner as that in the UK.

29. The Committee agrees that actions that are created under the corporate insolvency legislation and statutorily vested in the office of the liquidator should not be assignable but should remain vested in the liquidator and pursued by the liquidator in the interests of the liquidation. Nonetheless, the Committee in principle has no objections to liquidators being permitted to assign the fruits of the statutory causes of action which vest in him to third party funders, provided appropriate safeguards are put in place to control the extent to which the third party funder can control the conduct of the proceedings. Such reforms should be considered in the wider context of third party funding and the general law of maintenance and champerty.

30. The second mode of raising funds for investigation and litigation is provided by section 328(10) of the Companies Act. This provides that where assets have been recovered under an indemnity for costs of litigation given by certain creditors, or have been protected or preserved by the payment of moneys or the giving of indemnity by creditors, or where expenses in relation to which a creditor has indemnified a liquidator have been recovered, the court may make such order as it thinks just with respect to the distribution of those assets and the amount of those expenses so recovered with a view to giving

¹⁷³ See the summary of the law in *Rawnsley & Anor v Weatherall Green & Smith North Ltd* [2009] EWHC 2482.

those creditors an advantage over others in consideration of the risks run by them in so doing. This provision, which is based on Australian legislation, is wide enough to extend to funding provided for the prosecution of statutory actions vested in the liquidator and to empower the court to order that the whole of the proceeds of recovery be paid to the funding creditors where appropriate.

31. The main drawback of this provision is that the court may make an order only after the relevant assets have been recovered, protected or preserved, or after the relevant expenses have been recovered. At the point of providing the funds or indemnity, the funding creditors have no assurance that the court will make an order giving them an advantage over other creditors in consideration of the risks run by them, and no certainty as to the terms of such an order. The Committee is of the view that the provision should be amended to allow creditors to apply to the court for an order in advance of providing the funding or indemnity.

(E) *STANDING OF A DIRECTOR TO APPLY FOR WINDING UP*

32. At present, a director of a company does not have legal standing to apply to wind up the company.¹⁷⁴ This creates difficulties in certain situations where it might be necessary for a director to file an application to wind up the company, for instance, where the shareholders and other directors of the company have abandoned the company, and the locally resident director becomes subject to liability for insolvent or fraudulent trading or failure to file annual returns.
33. However, allowing a single director to apply for winding up might lead to abuse, particularly where there are disputes amongst the directors and/or shareholders of a company, and an application for winding up is used as a pressure tactic or to secure a strategic advantage. As such, appropriate safeguards have to be put in place.

¹⁷⁴ See section 253(1) of the Companies Act.

34. The Committee is of the view that a single director ought to be given the right to commence winding up proceedings against the company, but only where the director is able to show that there is a *prima facie* case that the company ought to be wound up, and where leave of court is obtained to do so (in a manner similar to the derivative actions commenced in the name of the company pursuant to section 216A of the Companies Act.¹⁷⁵ The application for leave of the court will allow the court to satisfy itself that the winding up application is being made by the director for a legitimate reason, and not an improper purpose.

(F) POWERS OF MANAGEMENT AND PROVISIONAL LIQUIDATORS AT COMMENCEMENT OF VOLUNTARY LIQUIDATION

35. In voluntary liquidation, there may be a period of time in which the directors remain in control of the company, after deciding to place a company into liquidation, but prior to the appointment of a liquidator or provisional liquidator, and prior to the convening of the requisite meetings. The Cork Committee noted that during this twilight period, the company's assets and interests of creditors were most inadequately protected.¹⁷⁶ Additionally, there is a potential for abuse in instances where a provisional liquidator is appointed by the directors or a liquidator is appointed by the members, but these appointments have not yet been confirmed by a creditors' meeting. One example of such abuse is a practice which became known in the UK as "centrebinding",¹⁷⁷ in which controllers of a company would appoint a liquidator and effect swift liquidations under their own control, in which they themselves bought assets from the liquidator. Among other things, the company's controllers may deliberately delay holding a creditors' meeting to avoid their choice of liquidator being displaced, which is a technical breach of section 296(1) of the Companies Act, and also a criminal offence.

¹⁷⁵ See also section 459P(2) of Australia Corporations Act, which provides that an application for a court-ordered winding up by a director requires the leave of court. The primary justification in allowing a director to apply for winding-up is the concern about his liability for insolvent trading.

¹⁷⁶ See the Cork Report, para 666 *et seq.*

¹⁷⁷ *Re Centrebond Ltd* [1967] 1 WLR 377 ("**Centrebond**").

36. To address this abuse, the UK introduced sections 114 and 166 of the UK Insolvency Act. Section 114 provides that, prior to the appointment or nomination of a liquidator or provisional liquidator, the powers of directors may not be exercised without the sanction of the court, with certain exceptions including (a) the power to dispose of perishable goods, and (b) the power to do all things necessary to protect the company's assets. Section 166 places broadly similar restrictions on the powers of liquidators during the period prior to the meeting of the creditors, save that the liquidator has the additional power to take into his custody the property of the company.
37. It is not clear whether the position in *Centrebind* will be followed in Singapore.¹⁷⁸ Regardless of this, the Committee recommends that it would be prudent to introduce provisions similar to sections 114 and 166 of the UK Insolvency Act.

(G) USE BY LIQUIDATOR OF PROPERTY SUBJECT TO A FLOATING CHARGE

38. In the course of deliberations, the Committee noted that section 176A of the UK Insolvency Act permits a liquidator to use part of the company's property that is subject to a floating charge to pay the ordinary unsecured creditors (over and above the statutory preference accorded to preferential creditors). A similar provision was initially proposed by the Cork Committee¹⁷⁹ in its report but was not adopted by the UK Government at the time. It only found its way subsequently into the UK Insolvency Act in 2002.¹⁸⁰
39. The Committee is of the view that a provision similar to section 176A of the UK Insolvency Act should not be introduced in Singapore. The Committee is recommending elsewhere in this Report that the floating charge is a commercially useful form of security and should be retained in Singapore, and that accordingly receivership should also be retained as an enforcement regime for floating charge holders (save for limited inroads proposed in

¹⁷⁸ See e.g. the contrary Malaysian decision in *Re Sin Tek Hong Oil Mills Ltd* [1950] MLJ 232.

¹⁷⁹ See the Cork Report at para 1538.

¹⁸⁰ See Section 252 of the UK Enterprise Act.

relation the precedence of receivership over judicial management).¹⁸¹ In the circumstances, the Committee does not see any reason why the priority of the floating charge should be further eroded in favour of unsecured creditors.¹⁸²

(H) UNCLAIMED THIRD PARTY ASSETS

40. Presently, under sections 346 and 347 of the Companies Act, any property of the company after its dissolution vests in the Official Receiver, who “may sell or otherwise dispose of or deal with such property either solely or in concurrence with any other person in such manner for such consideration by public auction, public tender or private contract upon such terms and conditions as he thinks fit”. The proceeds from such sale are paid into the Companies Liquidation Account and, if unclaimed after 7 years, paid thereafter into the Consolidated Fund. A similar arrangement is provided in section 322 of the Companies Act in respect of any dividends that are unclaimed for 6 months or any moneys remaining in the company after a final distribution is made.
41. However, these provisions do not apply to assets that are legally owned by the company but held on trust for a third party, or a third party’s chattels which are in the possession of the company, for instance, as bailee or agent. There is no statutory direction on how such assets are to be dealt with if they are unclaimed after reasonable efforts have been expended by the liquidator to trace the owner of the assets. The dissolution of companies is sometimes delayed on account of these unclaimed assets.
42. The Committee is of the view that the New Insolvency Act should provide that the unclaimed assets held by a company for an untraceable third party should be vested in the Official Receiver and dealt with in the same manner as assets under sections 322, 346 and 347 of the Companies Act. If the assets are not moneys, the Official Receiver should be empowered to apply to the court for an order that the assets be converted into moneys. Steps will also

¹⁸¹ See Chapters 5 and 6 of this Report.

¹⁸² See section 328(5) of the Companies Act.

have to be statutorily prescribed for determining whether and when the third party owner should be regarded as untraceable.

(I) SUMMARY OF RECOMMENDATIONS

43. In summary, the Committee recommends the following:

- (1) A system of summary liquidation, akin to the position in the UK, should be introduced in Singapore whereby the Official Receiver should be empowered to make an application to the Registrar of Companies to seek an early dissolution of the company if it appears that (a) the realisable assets of the company are insufficient to cover the expenses of the winding-up, and (b) the affairs of the company do not require any further investigation, and by giving reasonable notice to the creditors and contributories. The Official Receiver's duties cease as soon as notice is given to the creditor or contributories. A creditor or contributory who opposes such an action may apply for the appointment of a private liquidator, or appeal to the court against the Official Receiver's decision. Similar powers to invoke the summary liquidation procedure should be extended to private liquidators subject to an additional condition that the consent of the Official Receiver is obtained. An appeal against the decision of the Official Receiver shall lie with the courts.
- (2) The Official Receiver should continue to remain as the liquidator of last resort. However, in addition to the introduction of a procedure for summary liquidations, the Official Receiver should be empowered to outsource liquidations to private liquidators.
- (3) Section 328(1)(a) of the Companies Act should be amended to confer priority on the Official Receiver's fees vis-à-vis the other debts identified in that section. This priority should also extend to the

expenses and fees of private liquidators, in cases where the Official Receiver has outsourced liquidations to these private liquidators.

- (4) Actions that are statutorily vested in the office of the liquidator should not be assignable, but remain vested in the liquidator and pursued by the liquidator in the interests of the liquidation. However, there are no objections to liquidators being permitted to assign the fruits of the statutory causes of action themselves to third party funders provided appropriate safeguards are put in place to control the extent to which a third party funder can control the conduct of the proceedings. This should be considered in the wider context of third party funding and the general law of maintenance and champerty.
- (5) Section 328(10) of the Companies Act should be amended to allow creditors to apply to the court for an order of court in advance of providing any funding or indemnity.
- (6) A single director should be given the right to commence winding up proceedings against the company where that director is able to show that there is a *prima facie* case that the company ought to be wound up, and where leave of court is obtained.
- (7) Provisions similar to sections 114 and 166 of the UK Insolvency Act should be introduced.
- (8) A provision similar to section 176A of the UK Insolvency Act permitting a liquidator to use part of the company's property that is subject to a floating charge to pay the ordinary unsecured creditors (over and above the statutory preference accorded to preferential creditors) should not be adopted.
- (9) The New Insolvency Act should provide that the unclaimed assets held by a company for an untraceable third party be vested in the Official Receiver and dealt with in the same manner as assets under sections

322, 346 and 347 of the Companies Act. If the assets are not moneys, the Official Receiver should be empowered to apply to court for an order that the assets be converted into moneys. Steps will also have to be statutorily prescribed for determining whether and when the third party owner should be regarded as untraceable.

CHAPTER 6: JUDICIAL MANAGEMENT

1. The judicial management regime¹⁸³ was introduced in 1987 following the Pan-Electric crisis, where Pan Electric Industries Limited, a public listed company, collapsed and led to the closure of the Singapore stock exchange for an unprecedented three days. The judicial management regime is modelled after the administration regime in the UK and offers an alternative to liquidation where one or more of three statutory purposes may be achieved: (a) the survival of the company or the whole or part of its undertaking as a going concern, (b) the implementation of a scheme of arrangement, and (c) a more advantageous realisation of the company's assets than in a liquidation.¹⁸⁴ Some of the provisions found under the existing judicial management regime are based on the provisions appearing in the UK Insolvency Bill 1985 that were ultimately not enacted in the UK.

2. Under the current regime, a judicial manager is appointed by the court to take possession of and administer the company's operations and assets in place of its management.¹⁸⁵ A moratorium against creditor action is put in place while the judicial management application is filed and pending hearing,¹⁸⁶ and while a judicial management order (which lasts for an initial period of 180 days) is in force.¹⁸⁷ During this period, creditors are statutorily restrained from commencing and continuing proceedings and enforcement actions against the company, as well as exercising security and quasi-security rights against assets belonging to or in the possession of the company, save with the leave of the court or the judicial manager. The judicial manager has to present a statement of proposals to the company's creditors within 60 days (or such other longer period as the court allows) of the judicial management order.¹⁸⁸ If the statement of proposals is approved by the creditors, the judicial manager

¹⁸³ See Part VIIIA of the Companies Act.

¹⁸⁴ See section 227B(1)(b) of the Companies Act.

¹⁸⁵ See section 227G(2) of the Companies Act.

¹⁸⁶ See section 227C of the Companies Act.

¹⁸⁷ See section 227B(8) of the Companies Act.

¹⁸⁸ See section 227M(1) of the Companies Act.

then implements the proposals;¹⁸⁹ if it is not, the judicial manager has to apply for the discharge of the judicial management order.

(A) THE JUDICIAL MANAGEMENT EXPERIENCE

3. The Committee observes that, since its introduction in 1987, the judicial management regime has not secured a very successful track record in relation to the rehabilitation of financially troubled companies. There are few reported or documented cases of companies that have gone into judicial management, restructured themselves under the control and management of a judicial manager, and emerged from judicial management as financially viable businesses. This can be contrasted with the companies that have successfully restructured themselves using schemes of arrangement.
4. Further, it appears that a majority of applications for judicial management filed in the courts have not been granted. In this regard, the Committee notes that:
 - (1) Between 1996 and 2000, over 100 applications for judicial management were filed.¹⁹⁰ Of the 89¹⁹¹ cases reviewed, 25 cases (or 28%) were successful,¹⁹² 29 cases (or about 32.5%) were unsuccessful¹⁹³ and 31 cases (34.8%) were dismissed or withdrawn.¹⁹⁴
 - (2) Between January 2001 and December 2010, a total of 124 judicial management cases were filed. Of the 105 cases¹⁹⁵ reviewed, only 27

¹⁸⁹ See section 227P(1) of the Companies Act.

¹⁹⁰ See Annex B to the CLRFC's Draft Report (August 2001).

¹⁹¹ The remaining cases were not reviewed because the judicial management regime was still ongoing or due to other circumstances.

¹⁹² This refers to companies under judicial management which were clear successes, i.e. all the debts of the company were paid and management was returned to the board of directors, and/or those which fulfilled the purposes of the judicial management order (generally, the survival of the company or the whole or part of its undertaking as a going concern and to carry out a more advantageous realisation of the company's assets than on a winding up). In this regard, where a company had filed for judicial management to facilitate the better realisation of its assets than in a winding up, any subsequent winding up of the company was not viewed as a failure.

¹⁹³ This refers to the companies under judicial management but were wound up for reasons such as where the judicial management order was brought about by deception or where the purposes of the judicial management order were incapable of achievement.

¹⁹⁴ This refers to the companies which had no chance at rehabilitation at all, thus resulting in a dismissal or withdrawal of the application for judicial management or in some instances, an application for its winding up.

¹⁹⁵ The remaining 19 judicial management cases were excluded from the review due to various reasons, such as the judicial management of the relevant companies was still being in progress at the time of review, or there is incomplete information.

cases (or 26%) were successful; 50 cases (or about 48%) were unsuccessful and the remaining 28 cases (or 26.7%) were dismissed or withdrawn.

5. The Committee compared the track record of the judicial management regime with that of the administration regime in the UK and observes that, prior to the passing of the UK Enterprise Act, the results of the administration regime in the UK were similarly disappointing. The number of administration orders made was low compared to the number of liquidations and administration orders, ranging between 100 and 700 in any one year.¹⁹⁶ The abnormally low incidence of usage suggested that the administration process was failing to attain their intended purposes. While there was some evidence of instances of successful rescues, there were also plentiful indications from the empirical data that administration was often employed merely as a convenient means to a delayed break up and liquidation of a business where immediate liquidation was either impractical or commercially inexpedient.¹⁹⁷ With the passing of the UK Enterprise Act, the number of companies resorting to administration has risen from 1601 in 2004 to 4820 in 2008.¹⁹⁸
6. The Committee notes, however, that judicial management has proved effective in some cases where the purpose is to achieve a more advantageous realisation of assets than in liquidation. The most common scenario is where the judicial management of public listed companies results in the sale of their listing status or provides a backdoor listing for investors who inject new businesses and subscribe for new shares in the companies in conjunction with a debt restructuring plan, thereby yielding more value to the creditors than if they had been placed in liquidation. In some cases, the shareholders who make up the public float of the company may in fact receive benefits from the investors even though the creditors are not paid in full, if their support of the restructuring is also required in order for the listing status of the original company to be carried over for the restructured company.

¹⁹⁶ Ian Fletcher, *The Law of Insolvency* (4th Edition, London Sweet & Maxwell 2009) at p1068.

¹⁹⁷ *The Law of Insolvency* at p515.

¹⁹⁸ *The Law of Insolvency* at p1068.

7. As a rehabilitative regime, nevertheless, the judicial management regime has not seen a high level of success and this probably can be attributed to the following reasons.
8. First, the judicial management regime is usually invoked far too late in the day when the finances, business and assets of the company have deteriorated to such an extent that the company is beyond any reasonable hope of rehabilitation. There may well be a disinclination by the management of a company to apply for judicial management as this necessarily entails the management relinquishing control of the company to the judicial manager if the application is successful. The management may also be concerned that, if it applies for judicial management, it may be seen as admitting that it has not managed the company properly and may invite investigations by the authorities. The disinclination to apply for judicial management may be heightened in relation to public listed companies where the management comprises substantial shareholders or their representatives, and judicial management will result in the suspension of trading in the companies' shares. As such, the management of the company will typically try to implement a scheme of arrangement in the first instance. Judicial management is frequently a measure of last resort.
9. Indeed, the displacement of the management may itself be a significant impediment to the effectiveness of the judicial management regime. The management of the company would have little incentive to stay on to assist the judicial manager, particularly where the judicial manager is nominated by a creditor. While judicial managers may be very competent professional accountants, it is inevitable that they initially lack the requisite experience and expertise in, and familiarity, with the company's business operations and assets. The judicial managers will require substantial time and resources to understand the company's assets, business and operations. In such circumstances, it is unlikely for the judicial managers to be able to rehabilitate the company, especially when judicial management is resorted to at a very late stage.

10. Second, a likely impediment to the judicial management regime being an effective rehabilitative regime is the fact that the statutory moratorium¹⁹⁹ does not apply to self-help remedies such as contractual termination clauses and contractual set-off. As such, a company in judicial management may therefore find the credit balances in its bank accounts being set off against liabilities owed to the bank,²⁰⁰ thereby depriving the company of much needed working capital. The statutory moratorium also does not prohibit the licensing, franchising or distribution agreements from being unilaterally terminated by the licensor, franchisor or agent, thereby extinguishing what may be the main revenue-generating asset of the company. Neither does it ensure that key management and employees will continue to work for the company. This may make it difficult for the judicial manager to maintain continuity in the company's business or operations.
11. Third, there is usually a substantial amount of negative publicity attendant upon the making of a judicial management order. The judicial management regime is now commonly seen as a precursor to liquidation. Such negative publicity adversely affects the reputation, business relationships and prospects of the company and its ability to rehabilitate.
12. Fourth, there is precedence of receivership over judicial management. A creditor who holds a floating charge over the whole or substantially the whole of the company's assets can veto the making of a judicial management order.²⁰¹ There is usually every incentive on the part of such a creditor to do so; the creditor will normally prefer the appointment of a receiver of its choice, who will realise the security for its benefit, as opposed to allowing a judicial manager to be appointed in the general interests of the entire body of creditors.

¹⁹⁹ See sections 227C and 227D(4) of the Companies Act.

²⁰⁰ See e.g. the case of *Coöperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International, Singapore Branch) v Jurong Technologies Industrial Corp Ltd (under judicial management)* [2011] 4 SLR 977 where the appellant bank had set off the credit balance in the respondent company's bank account against the amount due and owing by the respondent company to the appellant bank.

²⁰¹ See section 227B(5) of the Companies Act.

13. While section 227B(10)(a) of the Companies Act gives the court the ability to override the power of veto given to the holder of a floating charge and grant a judicial management order when “*public interest so requires*”, this ground is of uncertain scope and is rarely relied upon. In *Re Cosmotron Electronics (Singapore) Pte Ltd* [1989] 1 SLR(R) 121, the High Court held that “*public interest*” connotes an interest or object which, if achieved would transcend any or all of the purposes prescribed in section 227B of the Companies Act. In *Re Bintan Lagoon Resort Ltd* [2005] 4 SLR(R) 336, the High Court set a fairly stringent threshold, and held that the applicable considerations for any such application were the likely consequences of making an order for judicial management, and the severity and extent of such an order. The court further held that the mere fact that the company would fail if the judicial management order was not made was insufficient to override a security holder’s right of veto (even if the company was a publicly listed one, or a statutory body such as the Inland Revenue of Singapore). The order would therefore only be made where the collapse of the company would have a serious economic or social impact.²⁰² It therefore appears that the ground of “*public interest*” is a narrow one which is difficult to satisfy, and has never been held to be satisfied in any case to date. As such, the right of a floating charge holder to veto the making of a judicial management order is a strong one. In most cases where the company has given a floating charge over the whole or substantially the whole of its assets, there may be no purpose in filing an application for judicial management since the court is likely to be prevented by the opposition of the floating charge holder from making an order for judicial management, even if the circumstances warrant it.
14. Fifth, the judicial management regime is not available for foreign companies²⁰³ and, even for Singapore companies, is unable to afford means to properly deal with their substantial assets or subsidiaries in foreign jurisdictions. These weaknesses were highlighted in the application for judicial management proceedings against Asia Pulp & Paper Co Ltd (“**APP**”). APP was the

²⁰² See *Re Bintan Lagoon Resort Ltd* [2005] 4 SLR(R) 336 at [14].

²⁰³ See Chapter 11 (Cross-border Insolvency) where the Committee recommends that the judicial management regime ought to be extended to foreign companies.

Singapore-incorporated holding company of one of the world's largest producer of pulp and paper products (the "**APP Group**"). APP did not own any significant tangible assets or have any operations in Singapore but was an investment holding company with shareholdings in a large number of companies in several countries. The APP Group was insolvent with debts of US\$16.5 billion and appointed a number of financial and legal advisors to work on a consensual debt restructuring with its creditors. The application for a judicial management order filed by two of APP's bank creditors was dismissed by the High Court²⁰⁴ and the decision was affirmed on appeal to the Court of Appeal.²⁰⁵ The courts were of the view that the making of a judicial management order would not achieve any of the statutory purposes, but would cause the operating subsidiaries of APP to stop payments to APP and enter into separate restructuring arrangements with their own creditors. Further, a judicial manager, if appointed, would not be able to take control of APP's assets as they were mainly located overseas and it was not clear if the judicial manager's appointment and authority would be automatically recognised in the foreign jurisdictions. The case illustrates the difficulty that a judicial manager faces in controlling or even accessing assets sited outside Singapore and exercising shareholder control over the company's foreign subsidiaries, unless assistance and support is rendered by the management of the company. The reality is that the management of the company is in a far better position to exert such control in order to bring about a more effective rehabilitation of the company.

15. Lastly, there appears to be inadequate protection given to parties dealing with a company under judicial management. The legislation provides that a judicial manager is liable on contracts entered into or adopted by him in the carrying out of his functions but also provides that such personal liability may be excluded. As a matter of practice, all judicial managers routinely exclude such personal liability. Further, there is no clear provision that confers priority on debts incurred by the company in the course of judicial management or

²⁰⁴ See *Deutsche Bank AG & Another v Asia Pulp & Paper Company Ltd* [2002] SGHC 257.

²⁰⁵ See *Deutsche Bank AG and another v Asia Pulp & Paper Co Ltd* [2003] 2 SLR(R) 320.

prescribes how these debts are to be paid.²⁰⁶ In the circumstances, parties dealing with a company under judicial management will have no direct claim against the judicial manager but will have to look to the company and an unclear statutory regime for payment. Naturally, they will be cautious about credit risk and may only choose to deal on cash terms; however, cash is often the precise commodity that is in short supply.

(B) THE CASE FOR RETAINING JUDICIAL MANAGEMENT

16. Notwithstanding these weaknesses in the existing judicial management regime, the Committee is of the view that it does have an important role to play in our corporate insolvency regime.
17. As pointed out above, judicial management has, in appropriate cases, shown itself to be useful in the realisation or maximisation of the value of corporate assets that would be extinguished or devalued in the event of liquidation. Further, there will inevitably be other cases where an insolvent company, instead of being placed under liquidation, should be placed under the control and administration of independent court-appointed officers in the interests of the creditors. For example, where there has been serious fraud committed within a company or where the senior management of a company has absconded or has been charged or arrested, a court-appointed officer is necessary to introduce stability, confidence and propriety in the management of a company, before determining whether the company should be liquidated or rehabilitated. Another instance is where assets of the company have been wrongfully disposed of or applied, and it is necessary to utilise the avoidance provisions or invoke the powers of inquiry and investigation under the insolvency legislation to take steps to recover such assets. It would be unsatisfactory if our corporate liquidation regime does not provide an option other than liquidation in such cases, for the simple reason that the companies that find themselves in these situations may still yield better value for the stakeholders if they are not liquidated.

²⁰⁶ See section 227J(3) of the Companies Act.

18. It should be noted that inspectors appointed by the Minister under Part IX of the Companies Act to investigate into the affairs of the company cannot be expected to play the same role. In any case, to date, there are only two reported cases on the appointment of such an inspector.²⁰⁷ Inspectors are appointed by the Minister as part of a government inquiry and do not have powers to manage the company or its assets for the benefit of the creditors or other stakeholders of the company. In contrast, judicial managers can control the company and its operations and assets, sue to recover assets, utilise the avoidance provisions, examine officers of the company, and implement schemes of arrangement or other proposals for the benefit of the creditors of the company.

19. In the circumstances, the Committee recommends that the judicial management regime be retained but with legislative reforms in certain areas to address the deficiencies of the judicial management regime. The recommended legislative reforms are discussed in turn below. In making these recommendations, the Committee seeks to strengthen judicial management as a corporate rescue or reorganisation procedure, and discourage or restrict its use as a convenient precursor to liquidation.

(C) RECEIVERSHIP AND JUDICIAL MANAGEMENT

20. At present, section 227B(5)(b) of the Companies Act allows a person who has a floating charge over the whole or substantially the whole of the company's property the right to veto an application for judicial management. Such a right can only be overridden by the courts "if the public interest so requires".²⁰⁸ As discussed above,²⁰⁹ in practice, applications for judicial management are often stymied by floating charge holders so as to prevent any potential prejudice to their security rights, even in cases where rehabilitation may be possible for the company in question. The Committee considered if such a

²⁰⁷ See *Re Kie Hoe Shipping (1971) Pte Ltd* [1983-1984] SLR(R) 796 and *Baring Futures (Singapore) Pte Ltd (in liquidation) v Deloitte & Touche (a firm) & Anor* [1997] 3 SLR 312.

²⁰⁸ See section 227B(10) of the Companies Act.

²⁰⁹ See paras 12 - 13 above.

veto right should be removed or, in the alternative, if the circumstances where the courts may override the statutory right of veto should be expanded.

21. The first option of removing the veto right involves a consideration of the fundamental issue of how a proper balance is to be struck between the interests of a holder of a floating charge and those of unsecured creditors. Currently, the former has almost complete precedence over the latter; if a holder of a floating charge insists on appointing a receiver, no judicial management order may be made unless there are considerations of public interest (which, as has been discussed, can rarely be made out). If the veto right is removed, the balance will be struck at quite the opposite end of the spectrum; the holder of the floating charge will not be able to appoint a receiver as long as the unsecured creditors prefer a judicial management (which will be in the great majority of cases). This is in fact the current position in the UK. The UK Enterprise Act introduced a general prohibition against the appointment of an administrative receiver by the holder of a qualifying floating charge.²¹⁰ The effect is that a holder of such a floating charge no longer has a veto right against administration in the UK (although the holder of a floating charge has the right to appoint an administrator).²¹¹
22. The issue of whether Singapore should adopt the same approach is therefore closely tied to the issue of what the status of receivership should be in Singapore. If the veto right is removed, the receivership regime and the value of floating charges in Singapore are likely to be undermined. As stated in Chapter 4, the Committee is recommending that receivership should be retained in Singapore as an effective and useful enforcement regime for security holders and to uphold the value of floating charges as a form of security. As such, the Committee does not recommend the removal of the veto right.
23. The Committee is however of the view that there needs to be an adjustment of where the balance is struck and that the circumstances where the courts

²¹⁰ See Chapter 4, paras 10 – 16.

²¹¹ Para 14 of Schedule B1 of the UK Insolvency Act.

may override the right of veto of a holder of a floating charge should be expanded. At present, the courts may override the right of veto only “*if the public interest so requires*”; the Committee is of the opinion that this is too narrow and imposes too high a threshold. In particular, the court should be able to override the wishes of the holder of the floating charge where the balance of the respective legal and commercial interests of the stakeholders comes down clearly in favour of judicial management. At the same time, to ensure that there is no undue prejudice caused to the holder of the floating charge, the burden should be on the parties who desire a judicial management order to make out the circumstances warranting the overriding of the wishes of the holder of the floating charge.

24. After careful deliberations, the Committee recommends that the court should be given the overriding discretion to grant a judicial management order even where a secured creditor who may appoint a receiver over the whole or substantially the whole of the company’s assets objects to such an appointment. The court should exercise such discretion if the prejudice that will be caused to the unsecured creditors in the event that a judicial management order is not made is wholly disproportionate to the prejudice that will be caused to the secured creditors if a judicial management order is made.
25. A further recommendation is that the right to object to an application for judicial management should only accrue to a holder of a floating charge that is valid and enforceable in the liquidation of the company. Sections 131²¹² and 330²¹³ of the Companies Act relating to the validity of floating charges in liquidation do not apply (at least automatically) to the judicial management regime.²¹⁴ The Committee is of the view that there is no reason why a holder of a floating charge that would be void in the liquidation of a company should

²¹² Section 131 of the Companies Act provides that an unregistered charge is void as against a liquidator or any creditor.

²¹³ Section 330 of the Companies Act provides that a floating charge created within 6 months of the commencement of a winding up is void save to the extent that fresh cash is provided.

²¹⁴ The Committee noted that an application could be made pursuant to section 227X(b) of the Companies Act to apply section 330 of the Companies Act to the judicial management regime but not section 131 of the Companies Act.

be entitled to object to an application for judicial management and scuttle the rehabilitation efforts of the company.

26. Lastly, the Committee recommends that express provision be made to grant the holder of a floating charge who consents to the making of a judicial management order the right to appoint the judicial manager. Other creditors may object to the judicial manager nominated by the floating charge holder only on limited grounds (e.g. bias or bad faith). The Committee is of the view that such an express provision may provide some incentive for holders of a floating charge to consent to the judicial management of a company. Furthermore, the interests of the general creditors are not undermined since the judicial manager ultimately acts in the interest of all creditors.

(D) THE COMMENCEMENT OF JUDICIAL MANAGEMENT

27. Currently, a company may only enter into judicial management pursuant to an order of the court. In making such an order, the court must be satisfied that judicial management will achieve one or more of the purposes of judicial management; namely (a) the survival of the company or the whole or part of its business as a going concern, (b) the implementation of a scheme, or (c) a more advantageous realisation of the company's assets than in liquidation. The court, when issuing the judicial management order, must specify the precise purpose(s) of the order.²¹⁵
28. The Committee recommends reforms to three specific procedural aspects of commencing judicial management.
29. First, the Committee proposes that, as an alternative to seeking a judicial management order by the court, the company should be empowered to place itself into judicial management without a formal application to court. Instead, the company or its directors should be required to:

²¹⁵ Section 227B(2) of the Companies Act.

- (1) File certain requisite notices and other documents, including a statutory declaration stating that (a) the company is or is likely to become unable to pay its debts, (b) a meeting of the company's creditors have been summoned for a date within 1 month of the date of the declaration, and (c) the directors believe that one or more of the purposes of judicial management can be achieved.
 - (2) Give notice to any person who has appointed or is or may be entitled to appoint a receiver and manager of the whole (or substantially the whole) of a company's property, within the meaning of section 227B(4) of the Companies Act. As per the framework for court-ordered judicial management described in the preceding section on receivership, the Committee recommends that a person who has a floating charge over the whole or substantially the whole of the company's property should have the right to veto the above out-of-court procedure for judicial management.
 - (3) Appoint an interim judicial manager, who shall (among other things) adjudicate any proofs of debt filed by creditors ahead of the meeting of creditors.
 - (4) Hold the aforementioned creditors' meeting, at which time the directors shall disclose to the creditors the company's affairs and the circumstances leading up to the proposed judicial management. The creditors shall thereafter vote on whether to place the company into judicial management and, if so, the nominee to be appointed as the judicial manager.
30. The Committee further recommends that the appointed interim judicial manager and judicial manager should also provide declarations that they are not in a position of conflict of interest, and that in his or her view, one or more of the purposes of judicial management can be achieved. For avoidance of doubt, the out-of-court appointed judicial manager will enjoy the same powers as a court-appointed judicial manager. Dissenting creditors will also have the

same right of recourse to the court that they presently have against a court-appointed judicial manager (under e.g. section 227R of the Companies Act), by which the court may also order a discharge from judicial management.

31. The Committee recommends that, unlike the case of court-ordered judicial management under section 227B of the Companies Act, only the company can place itself into judicial management out-of-court. Thus, directors should not be conferred independent standing under the New Insolvency Act to invoke this out-of-court procedure and may only do so if they have been authorised by the company (e.g. pursuant to the articles of association). This is to ensure that the members have the final say on commencement of this out-of-court procedure.
32. The Committee is of the view that these proposed amendments will serve to reduce the expense, formality and (in some cases) the delay involved in obtaining a judicial management order from the court. For example, a contested judicial management application before the court could take a few months and significant legal fees to resolve, especially if multiple reply affidavits are filed by the company and its creditors. In contrast, the proposed out-of-court mechanism may only require a meeting of creditors to be held, after which a determination is made by the creditors by way of a vote on the day itself.
33. Additionally, the proposed reforms may also help to reduce the stigma of judicial management and increase the take up rate of judicial management since the controllers of distressed companies may no longer need to subject themselves to the formal judicial process. In this regard, the Committee notes that the UK administration regime was amended in 2002 to allow for companies to enter into administration without an application to the courts (although there is no corresponding requirement to hold a creditors' meeting). The new out-of-court appointment procedure is now used in the vast majority of administration cases in the UK.²¹⁶

²¹⁶ Sealy & Milman, *Annotated Guide to the Insolvency Legislation 2010* (Vol 1), 13th ed., (2010, Sweet & Maxwell, London), at p530. It should be noted that the decision to allow administration to be commenced outside

34. Lastly, the Committee is of the view that where possible, the decision on whether to enter into judicial management can be made by the stakeholders most affected by this decision, i.e. the company and the creditors, rather than requiring court involvement in all such cases. If they are agreed or substantially agreed that judicial management is the best option for the company, it is not necessary for an expense of a court application to be incurred.
35. Against the above, the Committee acknowledges that there are potential arguments against adopting the above proposed out-of-court mechanism. First, it could be argued that the cost and time savings are not demonstrably crucial to increasing the success rate for judicial management, particularly when management still has strong incentives to avoid judicial management for reasons of reputational costs and loss of control, and would thus delay entry into judicial management in any case. Second, easing procedural entry into judicial management this way could be said to increase the potential for abuse and corresponding costs imposed on the company's creditors to correct it via judicial intervention.
36. On balance, however, the Committee is of the view that the potential for savings of cost and time should not be discounted. The Committee further suggests that such abuse can be checked by (a) requiring the directors to file the requisite statutory declarations that the directors believe that one or more of the statutory purposes of judicial management can be achieved, and (b) providing for a meeting of creditors to decide whether to enter judicial management.
37. Second, the Committee recommends that the court should be empowered to place companies into judicial management where the company "*is or is likely to become unable to pay its debts*", and not merely where the company "*is or will be unable to pay its debts*". This amendment tracks the language of the

of the court process was a concession by the Government to banks in exchange for severely restricting the ability of holders of a floating charge to appoint private receivers.

UK Insolvency Act, which will enable financially distressed companies to resort to judicial management at an earlier time. This aims to address observations received from insolvency practitioners that the low success rate for judicial management may be attributed to the fact that it is oftentimes resorted to where the company is already hopelessly insolvent.

38. Third, the Committee recommends that the court, in granting a judicial management order, should no longer be required to state the specific purpose(s) for which achievement the judicial management order is granted. This, again, is consistent with the approach taken in the UK Insolvency Act and is premised on the philosophy that, provided that at least one of the purposes of judicial management can be achieved, the identification of specific objective(s) of judicial management for each company is a second-stage exercise best determined by the judicial manager after he has had time to acquaint himself with the state of affairs of the company. However, the court should still have the discretion to state the purposes of the judicial management order, if it so wishes. The Committee can envision cases in which it is very clear that only the third purpose of judicial management (i.e. achieving a better realisation than would have been achieved in liquidation) is achievable. In such instances, the court may see fit to restrict the purpose of that company's judicial management to only that third statutory purpose.

(E) *DEBTS INCURRED IN JUDICIAL MANAGEMENT*

39. At present, section 227I of the Companies Act provides that a judicial manager is personally liable in respect of contracts entered into or adopted by him in the course of the carrying out of his functions, unless such personal liability is expressly disclaimed. The Committee further observes that there are at present, no provisions in the Companies Act that satisfactorily address the issue of priority of debts incurred during judicial management. Section 227J(3) of the Companies Act merely provides that where at any time a person ceases to be a judicial manager of a company, "any sums payable in respect of any debts or liabilities incurred while he was a judicial manager

under contracts entered into by him in the carrying out of his functions” shall be charged on and paid out of the property of the company in his custody or under his control in priority to all other debts, except those subject to a fixed security. On its literal interpretation, this provision does not confer any right of priority on the persons entitled to the payment of the debts or discharge of the liabilities. It seems to confer rights on the judicial manager at the point in time when he ceases to be such and assumes that the judicial manager is liable for such debts and liabilities (which, of course, is unlikely to be the case given the practice of disclaiming personal liability).

40. The Committee is of the view that the primary objective of imposing personal liability on judicial managers is to ensure that parties dealing with a company in judicial management would be assured of priority in payment. However, as a matter of practice, judicial managers exercise their right to disclaim personal liability pursuant to section 227(2) of the Companies Act; in reality, judicial managers will only incur personal liability where the disclaimer was inadvertently left out.²¹⁷
41. The practice of disclaiming personal liability and the absence of provisions clearly addressing the issue of priority of debts incurred in the course of a judicial management are likely to lead to reluctance and discomfort on the part of third parties contracting with the company in judicial management, given that their rights of recourse are unclear if the company fails to honour its obligations. Many commercial parties will not extend credit to a company in judicial management and will contract with it only on cash terms.
42. The Committee is of the view that there is no real purpose in imposing personal liability on judicial managers in respect of contracts entered into or adopted by them, and then providing that they can disclaim such personal liability. This will only lead to the anomalous situation where judicial managers routinely exercise their right to disclaim their personal liability, and render academic the imposition of personal liability in the first place. At the same

²¹⁷ See e.g. *Kotjo Johanes Budisutrisno v Ng Wei Teck Michael and others* [2001] 2 SLR(R) 784.

time, the Committee is not in favour of the removal of the right to disclaim personal liability, such that personal liability is mandatorily assumed by a judicial manager. This may discourage judicial managers from entering into or adopting contracts which might be beneficial for the company. In fact, as a matter of principle, there is no reason why a judicial manager should assume personal liability. He is an independent officer appointed by the court to conduct the judicial management of the company; he has no personal interest at stake. If a liquidator of a company or indeed, the directors, who may well have a personal interest in the company, do not assume personal liability, there is no justification why judicial managers should be treated differently. The Committee therefore recommends that no personal liability should be imposed on judicial managers.

43. The Committee further recommends that clear provision should be made for the priority of debts incurred during the course of judicial management. Additionally, clear provision should be made for how (a) debts incurred by the judicial manager on behalf of the company and (b) the judicial manager's fees, rank *inter se*. As the former are incurred by the judicial manager on behalf of the company, these debts should rightfully have priority over the fees of the judicial manager. In other words, the judicial manager should not pay himself if there are insufficient assets to pay debts and liabilities he has incurred on behalf of the company in the course of judicial management in full.
44. This is in line with the position in the UK. Under the UK Insolvency Act, the administrator incurs no personal liability on new contracts into which he enters as agent for the company except where he agrees to assume such liability. Further, Rule 2.67 of the UK Insolvency Rules and paragraph 99 of Schedule B1 of the UK Insolvency Act provide that the sums payable in respect of a debt or liability arising under a contract made by the administrator ranks in priority to the administrator's remuneration and disbursements.
45. The Committee notes that a different approach has been adopted in relation to liquidations, in that the debts incurred by a liquidator on behalf of a

company in liquidation rank *pari passu* with the remuneration of liquidators.²¹⁸ However, the Committee considers that there is a greater need for debts incurred by a judicial manager to have priority over the judicial manager's remuneration, for the following reasons:

- (1) *Confidence of counterparties*: There is a greater need in judicial management for counterparties dealing with a judicial manager to have confidence that they will eventually receive full payment of amounts owed to them. In particular, counterparties may be wary of trading with a company in judicial management, because of the stigma of the company being in a formal insolvency procedure. According a special priority to such debts incurred by a judicial manager may give some degree of assurance to these counterparties that the judicial manager would not incur such debts without having solid grounds to expect to be able to repay the same. This additional confidence in dealing with a company in judicial management may go far in helping the judicial management achieve its statutory purposes.
- (2) *Judicial manager's discretion*: Judicial managers have significantly greater discretion than liquidators to incur new debts on behalf of the company. In particular, judicial managers can incur new debts for the purposes of carrying on the business of the company, whereas liquidators are generally constrained to only incurring such debts as are necessary for the beneficial winding up of the company.²¹⁹ In such circumstances, there is a greater need to protect counterparties to such transactions in the case of judicial management, as compared to liquidation.

46. For the reasons set out above, the Committee recommends that the debts incurred by a judicial manager on behalf of the company should have priority over the fees of the judicial manager.

²¹⁸ See section 328(1)(a) of the Companies Act read with section 328(3).

²¹⁹ See section 272(1)(a) of the Companies Act.

(F) TRANSITION FROM JUDICIAL MANAGEMENT TO LIQUIDATION

47. Section 253(1)(f) of the Companies Act provides that a judicial manager may apply to wind up the company. However, the liquidation and judicial management regimes are still regarded and structured as separate regimes and there is no provision that provides for a seamless transition should judicial management lead to liquidation.

48. Such deficiency in the existing legislative framework and the consequences that ensue were illustrated in *Neo Corp Pte Ltd (in liquidation) v Neocorp Innovations Pte Ltd* [2006] 2 SLR (R) 717 (“**Neocorp**”). In this case, the judicial managers of a company filed an application to set aside a floating charge granted by the company to a related company as an unfair preference and a transaction at an undervalue pursuant to section 227T(1) of the Companies Act. Before the application was heard, the judicial managers successfully applied for the company to be wound up and for themselves to be appointed as its liquidators. The Court of Appeal struck out the application to set aside the floating charge on the basis that the liquidators (that is, the former judicial managers) had no *locus standi* to continue with the application. The liquidators had to file a fresh application, as liquidators, to set aside the floating charge; on the facts, this was not possible as the floating charge had been granted by the company within 6 months of the application for judicial management, but not within 6 months of the winding up petition. As such, the application to set aside the floating charge failed as a result of a technical gap between the judicial management and liquidation regimes.

49. Under the corresponding provisions of the UK Insolvency Act which give an administrator and a liquidator the powers to avoid transactions at an undervalue or unfair preferences, the statutory time frame for the triggering of the avoidance provisions runs from the time when an application was made to place the company under administration, even where the company goes into

liquidation after administration.²²⁰ The problem in *Neo Corp* would therefore not arise in the UK.

50. The Committee is of the view that there should be statutory provision to ensure a seamless transition from judicial management to liquidation, including the following:

- (1) Upon an application for winding up made by the judicial manager, the length of the judicial management order should be extended to the time when a winding up order is made. Further, it should not be necessary to discharge the judicial managers if they are also appointed as the liquidators.
- (2) The statutory time frames for avoidance provisions and officer liability should be revised to have reference to the point in time when the company is placed under judicial management, even if there is a subsequent winding up.
- (3) Where proofs of debts have been filed and adjudicated upon in the judicial management, it should not be necessary for the proofs of debts to be re-filed in liquidation.²²¹ This would obviate the need for the liquidator to incur an additional set of costs.

(G) APPLICATION OF BANKRUPTCY AND LIQUIDATION PROVISIONS

51. Section 227T imports the bankruptcy provisions on transactions at an undervalue, unfair preferences and extortionate credit transactions into the judicial management regime. Section 227X(b) of the Companies Act, on the other hand, imports the liquidation provisions on officer liability and further empowers the court to make orders importing any of the provisions governing liquidation in Part X of the Companies Act. To date, the court's power under

²²⁰ See section 240 of the UK Insolvency Act.

²²¹ See Chapter 2, paras 20 - 27, where the Committee recommended that there should be a single set of rules regarding the debts to be proved in bankruptcy and corporate insolvency.

section 227X(b) has only been invoked once in a reported case to import section 334 of the Companies Act to the judicial management regime.²²² There is great uncertainty about how section 227X(b) should be applied as there is no statutory guidance given to the court in the exercise of its jurisdiction under this section. It is not clear why certain statutory provisions are imported without more and others (such as section 330 of the Companies Act, which should no doubt apply to judicial management) are imported only pursuant to a court order.

52. Further, section 227X(b) is under-inclusive as it assumes that Part X of the Companies Act contains all the supplemental provisions that will be needed in a judicial management. For example, section 131 of the Companies Act relating to the invalidity of unregistered charges in liquidation does not apply to judicial management and cannot be imported pursuant to section 227X(b) as it is not found in Part X of the Companies Act. It follows that section 227X(b) does not allow the court to declare that an unregistered charge is void against a judicial manager.
53. The Committee is of the view that the current mechanisms of legislative importation or importation by court order should be abolished. Not only do they look makeshift and untidy, they create uncertainty as well as problems in application. There are anomalies arising from the current approach which attempts to transplant bankruptcy and corporate insolvency rules into the judicial management regime. A thorough review of all such provisions that are potentially applicable should be conducted and the provisions that should apply in judicial management should be identified and amended such as to make their application in judicial management clear. The Committee is of the view that whichever provisions from bankruptcy and liquidation law that should apply in judicial management ought to be expressly stated to be so applicable.

²²² See *Re Wan Soon Construction Pte Ltd* [2005] 3 SLR (R) 375.

54. One issue that will no doubt have to be addressed in this exercise is whether the provisions on officer liability in liquidation should apply in judicial management. Provisions for officer liability are essentially provisions on ‘fraudulent trading’ or ‘wrongful trading’, which seek to impose personal liability on officers of the company when they have caused the company to incur debts and liabilities at a point of time when they know or ought to have known, that the company has no reasonable prospect of repayment of the debts, and avoid going into liquidation.²²³ In this regard, the Committee notes that, under the UK Insolvency Act, the avoidance provisions are applicable to both the liquidation and administration regimes.²²⁴ The provisions on officer liability are however, limited to winding up.²²⁵ These provisions primarily serve to address the “perverse incentive” of company officers who are tempted to take on high-risk business decisions at the expense of creditors, by incurring more debts or liabilities when the company officers know or ought to have known that the company is insolvent or will become insolvent. As a matter of principle, there is no reason why these provisions should not be applicable in judicial management. The Committee is further of the view that the company officers may well cause the company to incur debts and liabilities when they know or ought to have known that the company is already deeply insolvent, and place the company under judicial management to avoid or delay winding up. Therefore, on consideration, the Committee is of the view that the provisions on officer liability²²⁶ in liquidation should be extended to judicial management.

(H) SAFEGUARDS FOR CREDITORS

55. The Committee recommends that additional safeguards be put in place to protect creditors during the period between the filing of an application for judicial management and the making of the judicial management order when a judicial manager is appointed to take over the assets and affairs of the company.

²²³ See sections 339(3) and 340 of the Companies Act and sections 213 and 213 UK Insolvency Act.

²²⁴ See sections 238 to 246 of the UK Insolvency Act.

²²⁵ See sections 213 to 215 of the UK Insolvency Act.

²²⁶ The Committee’s further recommendations on officer liability can be found at Chapter 9.

56. Upon the filing of an application for judicial management, the company gets the benefit of the statutory moratorium²²⁷ but is not subject to any restrictions on the disposition of its assets and the incurring of additional debts and liabilities. Further, the avoidance provisions do not apply during this period of time as the statutory time frames run backwards from the date of the filing of the application for judicial management and not the date of the judicial management order.
57. While an interim judicial manager may be appointed if there are real concerns about dissipation of the company's assets and the incurring of more liabilities, the interim judicial manager may only be appointed by the applicant for judicial management.²²⁸ This compounds the problem and lends the judicial management regime to abuse when it is the company itself that files the application for judicial management. The company could apply to be under judicial management, seek adjournments of the hearing of its application and even ultimately withdraw the application. In such cases, the company would be protected from its creditors but be at liberty to deal with its assets and business.
58. In the circumstances, the Committee recommends that provisions be included to protect creditors during the period between the filing of the application for judicial management and the making of the judicial management order. They should include provisions addressing the following:
- (1) Any creditor of the company should be entitled to apply for the appointment of an interim judicial manager.
 - (2) Where an application for judicial management is filed by the company itself, the directors should be required to give personal undertakings to the court that, pending the hearing of the application, the company will apply its assets and incur liabilities only in the ordinary course of its business and will not dispose of its assets or make payment to any

²²⁷ See section 227C of the Companies Act.

²²⁸ See section 227B(10)(b) of the Companies Act.

creditor in respect of any debt or liability incurred prior to the date of the filing.

- (3) The court should be given the power, upon application by any creditor, to impose restrictions on the acts that may be carried out by the company pending the hearing of the application for judicial management.
- (4) If a judicial management order is ultimately made, the avoidance provisions should apply to transactions entered into during the period between the filing of the application for judicial management and the making of the judicial management order.

(I) ADDITIONAL REFORMS ADAPTED FROM THE US BANKRUPTCY CODE

- 59. The Committee also considered additional reforms that could be adapted from features found in the US Bankruptcy Code. Given that most of these features are underpinned by a very different policy rationale demanding active judicial involvement/oversight, the Committee feels that these may not be capable of introduction into our legal landscape. Nevertheless, limited adaptation of certain features that will enhance our judicial management and scheme of arrangement regimes are recommended. These, as well as the other processes that were considered, but ultimately deemed unsuitable for adaptation, are detailed below and, where appropriate, in Chapter 7 on Schemes of Arrangement.

Debtor-in-Possession Reorganisation

- 60. First, the Committee considered whether Singapore should have, in addition to judicial management, a debtor-in-possession corporate reorganisation regime, similar in concept to the rehabilitation of companies under the US

Bankruptcy Code, Title 11 (“**Chapter 11**”). Regimes similar to Chapter 11 are found in countries such as China,²²⁹ Germany²³⁰ and France.²³¹

61. Some of the common features of debtor-in-possession reorganisation regimes are as follows:

- (1) The management of the company is not displaced in favour of a court-appointed officer and the management itself can prepare a reorganisation plan and put the plan to the creditors. A court-appointed trustee may be appointed to monitor the rehabilitation process, but such trustee’s powers are not as intrusive as those of a judicial manager.
- (2) There is a moratorium to protect the company from its creditors and a mechanism for the approval of a reorganisation plan. These are key components of a single process.
- (3) There is usually a “cram-down” mechanism where a class of creditors, including secured creditors, can be forced to accept a reorganisation plan against their wishes if the court determines that there is at least one class of creditors who have accepted the plan and the court is of the view that the reorganisation plan is feasible.
- (4) Special debtor-in-possession financing is available, whereby the company can obtain financing for the purposes of continuing its operations or to further the reorganisation. The providers of these newly injected funds will typically enjoy “super-priority” ahead of other creditors.

62. The Committee notes that, in Singapore, the scheme of arrangement procedure has been widely used and, through practice and judicial guidance,

²²⁹ *The 2006 PRC Enterprise Bankruptcy Law: The Wait is Finally Over* (2008) 20 SAclJ 275.

²³⁰ See <http://www.nortonrose.com/knowledge/publications/62746/changes-to-the-german-insolvency-code-a-new-frontier-for-restructurings>.

²³¹ See <http://evanflaschen.net/France%20Insolvency%20Laws.pdf>.

has developed almost into a debtor-in-possession regime,²³² though still based on statutory provisions that are commonly found in regimes based on English law. The scheme of arrangement procedure has worked reasonably well, and the commercial community, the professional advisers and the courts have embraced it as a useful and practical debt-restructuring regime. The Committee has also recommended further enhancements to be made to the scheme of arrangement procedure.²³³ The Committee further notes that a Chapter 11 styled debtor-in-possession corporate reorganisation regime may be built upon policies, concepts and practical and commercial realities in the the US which may not be easily transplanted to Singapore or aligned with the rest of our insolvency laws.

63. On balance, the Committee is of the view that it would not be preferable to introduce a Chapter 11 style debtor-in-possession model in Singapore. Rather, the scheme of arrangement procedure has shown itself to be a useful reorganisation regime which, with refinements and enhancements and with its elements of a debtor-in-possession model, will adequately and effectively address our needs for the foreseeable future.

Super-Priority For Rescue Finance

64. When a company enters a formal insolvency process, the difficulties of obtaining new financing will usually increase dramatically. To aid the rehabilitation of companies, various jurisdictions have enacted legislation granting priority status to fresh finance granted while a company is undergoing insolvency proceedings.²³⁴
65. For example, the general features of the US Bankruptcy Code provisions on rescue finance are as follows:²³⁵

²³² Opening address by Chief Justice Chan Sek Keong at the Singapore Academy of Law Conference 2011.

²³³ See Chapter 7 on Schemes of Arrangement.

²³⁴ See Philip Wood, *Principles of International Insolvency*, 2nd ed., (2007, Sweet & Maxwell, London) at p720 - 722; see further the INSOL International Statement of Principles for a Global Approach to Multi-Creditor Workouts (October 2000), Principle 8.

²³⁵ See section 364(c) of the US Bankruptcy Code.

- (1) *Priority*: The US Bankruptcy Code confers priority status on new funds obtained after the commencement of insolvency proceedings, on the basis that it is an administrative expense claim. This priority status ranks equally with other post-commencement commitments and contracts retained by the estate (i.e. other administrative expense claims).
- (2) *Super-priority*: If the insolvent company is unable to obtain unsecured credit even with the conferment of priority status, the court may authorise the insolvent company to borrow money on the basis that such a loan would be repaid in priority to *all* other administrative expense claims (hence the description “**super-priority**”).
- (3) *Secured borrowing*: If the insolvent company is unable to obtain unsecured credit even on a super-priority basis, the court may *authorise* the company to borrow money against the provision of security²³⁶.
- (4) *Super-priority lien*: Where the assets of the company are already *subject* to security and a subsequent lender is unwilling to extend fresh financing against a junior lien subordinated to other pre-existing security interests, the court may authorise the company to borrow money secured by a superior or equal lien on previously encumbered property (hence the description “**super-priority lien**”). As this interferes with an existing secured lender’s rights, the court will require proof that (a) all other types of rescue financing detailed above are unavailable, and (b) the interest of the pre-existing lender must be adequately protected.

66. In contrast, Singapore’s legislative framework for rescue finance is as follows:

²³⁶ By comparison, in both Singapore and the UK, court approval is not required for fresh secured lending.

- (1) In the context of judicial management, while the statutory provisions are not entirely clear, it appears that new unsecured loans granted to a company under judicial management will enjoy priority status, ranking equally with other post-judicial management commitments and contracts adopted by the judicial manager. These new loans also appear to rank ahead of floating charges. Secured lending is always available provided there are unencumbered assets. However, there are no statutory provisions to facilitate super-priority loans or super-priority liens, although the latter could be achieved provided the existing secured creditor consents to subordinate his security interest to that of the new lender.
 - (2) For schemes of arrangement, there are, at present, no existing express provisions that provide for the priority status of unsecured loans made to a company undergoing scheme proceedings. However, the creditors of the company are free to agree to terms of a scheme that confer priority status on new lenders.
67. The Committee considered whether to introduce provisions allowing for super-priority or super-priority liens to be conferred by companies in rescue proceedings.
68. The argument in favour of adopting the US model of allowing super-priority for new financing (and also allowing super-priority liens for the same) is that it aids the rescue of the company. As noted above, financing is often essential to the rehabilitation of a company.²³⁷ It may in many cases be even more essential than other trade debts or other post-commencement contracts that the insolvent company may enter into, thus justifying granting it additional priority over other such administration expenses. For example, new financing is often the necessary tool that helps pay for the other administration expenses such as (a) the fees of professionals who assist in the reorganisation process, (b) capital expenditures and (c) other operational

²³⁷ See Finch, *Corporate Insolvency Law: perspectives and principles*, 2nd ed., (2009, Cambridge University Press, Cambridge) at p301.

costs needed to keep the company running. Granting super-priority status to such financing may also help to reduce borrowing costs and collateral obligations.

69. Against the above, the Committee notes various arguments against adopting the US model of granting super-priority status to new financing, including the following:

- (1) Rescue proceedings often fail to successfully rehabilitate the insolvent company. However, given their super-priority status, if the new financiers are fully secured, they may have little incentive to carry out costly screening or monitoring of the insolvent borrower and may allow over-investment in riskier (even negative NPV) projects. Consequently, other creditors may end up suffering even greater losses once the rescue proceedings fail.²³⁸ This harm may be particularly pronounced in schemes of arrangement, where the management of the company remains in control of the insolvent company and there are greater incentives for equity holders of insolvent companies to advocate shifting into riskier, negative NPV projects.
- (2) In times of corporate trouble, it may be difficult for the court to predict in advance that the proposed rescue funding is likely to aid the body of creditors rather than prejudice them.²³⁹ In urgent cases, it may also be difficult to make a commercially informed judgment in the time available.²⁴⁰
- (3) The expenses involved in a contested court application for approval for super-priority rescue financing may negate the value of that financing for many smaller companies.

²³⁸ See Dahiya, John, Puri and Ramirez, *Debtor-in-Possession Financing and Bankruptcy Resolution: Empirical Evidence*, August 2002 at p 9.

²³⁹ See Philip Wood, *Principles of International Insolvency*, 2nd ed., (2007, Sweet & Maxwell, London) at p719.

²⁴⁰ See Finch, *Corporate Insolvency Law: perspectives and principles*, 2nd ed., (2009, Cambridge University Press, Cambridge) at p305.

- (4) The claims of other trade or other creditors who continue to deal with the company will be subordinated to the super-priority claim by the new lenders. Accordingly, these other creditors may become more wary of entering into post-commencement dealings with the company.
 - (5) It has also been suggested that Singapore does not have the volume of cases to warrant the establishment of debtor-in-possession financing departments within banks and financial institutions. Lenders therefore may not offer such financing, even if our legislation were to provide for super-priority.
70. There are also the following arguments against the US model of granting super-priority liens for new financing:
- (1) In the US, the super-priority lien is difficult to obtain since it is onerous to prove that there is adequate protection for the pre-existing secured creditor, unless that creditor is hugely over-secured, and the assets of the company are usually insufficient to provide sufficient assurance.²⁴¹ There is therefore a query as to whether such provisions will be useful in many cases.
 - (2) It has also been noted that obtaining such super-priority liens will almost always involve a hotly contested, expensive and time-consuming court battle.²⁴²
 - (3) If the asset in question is hugely over-secured, granting a super-priority lien may in most cases be unnecessary. This is because (a) granting a second-ranking mortgage on the over-secured property should still be attractive to certain banks, and (b) even if not, a new mortgagee may simply pay off the existing security-holder (in addition to investing in the

²⁴¹ See Philip Wood, *Principles of International Insolvency*, 2nd ed., (2007, Sweet & Maxwell, London) at p721.

²⁴² See Kohn, Solow and Taber, *Pure Debtor-in-Possession Financing*, available at http://www.goldbergkohn.com/media/site_files/51_kohn_DebtorinPossession.pdf at p14.

insolvent company) in order to be a first-ranked mortgagee with respect to that asset.

71. Having taken into account the various arguments above, the Committee recommends that provisions allowing for super-priority be introduced. The Committee is of the view that super-priority provisions enhance the rescue options available to insolvency practitioners, and that the risk of abuse can be adequately dealt with by recourse to the courts, which are capable of determining the appropriateness of granting super-priority after hearing the affected parties. In response to some of the arguments against introducing super-priority, the Committee further notes the following:

- (1) It has been suggested that there is no empirical basis for the claim that super-priority financing leads to overinvestment.²⁴³ Further, such concerns are (at least in part) addressed by requiring the courts to approve the grant of super-priority, or at least allowing recourse to the courts to challenge the grant thereof.²⁴⁴ Lastly, in the case of judicial management, one further safeguard is that the judicial manager is required to exercise commercial judgment as an insolvency professional before granting a super-priority.
- (2) Upon the commencement of insolvency proceedings, it is usual for trade or other creditors who continue to deal with the insolvent company to do so on cash-terms (as opposed to credit terms). There is thus less of a concern that other post-commencement dealings may be deterred.

72. However, for reasons that are already canvassed at paragraph 70 above, the Committee does not recommend the introduction of provisions allowing for super-priority liens.

²⁴³ Dahiya, John, Puri and Ramirez, *Debtor-in-Possession Financing and Bankruptcy Resolution: Empirical Evidence*, August 2002 at p9.

²⁴⁴ See the criteria which could be applied by the court, considered in Department of Trade and Industry and HM Treasury, *A Review of Company Rescue and Business Reconstruction Mechanisms*, May 2000, at para 136.

73. Provisions for the introduction of super-priority in the context of judicial management can be implemented in the following manner:
- (1) Judicial managers (including interim judicial managers) should be allowed, upon notification to the creditors, to offer super-priority to new lenders.
 - (2) No court application will be required for the grant of super-priority in such an instance since the judicial manager is suitably placed to make such a commercial determination.
 - (3) Creditors may apply to the court to challenge the judicial manager's decision.
 - (4) Where a judicial manager has yet to be appointed (because the judicial management application has not been granted) or super-priority is urgently required and cannot wait for the requisite notice period to elapse, super-priority may be granted by the court.

Limitations on Set-Off in Rescue Proceedings

74. The Committee considered, but rejected, the possibility of introducing reforms to impose restrictions on parties' rights to exercise set-off in judicial management and schemes of arrangement.
75. At present, under Singapore law, the rights of set-off (in particular, the rules governing solvent set-off) are generally unaffected by the statutory moratoriums which apply to judicial management and schemes.²⁴⁵ As such, a company in judicial management or under a scheme may, for example, find the credit balances in its bank accounts being set-off against liabilities owed to the bank, thereby depriving the company of much needed working capital and endangering efforts to rescue the company.

²⁴⁵ See e.g. *Electro Magnetic (S) Ltd (under judicial management) v Development Bank of Singapore Ltd* [1994] 1 SLR 734.

76. The majority of jurisdictions generally allow insolvency set-off to apply in insolvency proceedings. In this regard, the UK, China, Australia, Germany, Austria, Netherlands, Switzerland and Canada do not prohibit set-off or insolvency set-off in insolvency proceedings.
77. The minority of jurisdictions which do impose stays on set-off include France, Portugal and Argentina, subject in each case to carve-outs for financial markets.
78. The US adopts a “soft-touch” approach, which has the following features:
 - (1) Set-off after the commencement of insolvency proceedings is permitted.
 - (2) However, court approval is required to exercise the right of set-off, since it is subject to an automatic stay. The US courts will ordinarily grant permission for the set-off if they are satisfied that the right of set-off exists under the applicable non-bankruptcy law, and, amongst other things, the debt owed to the company was not incurred by the creditor in the 90 days preceding the insolvency proceedings, while the debtor was insolvent, and for the purpose of obtaining a right of set-off.²⁴⁶
 - (3) The set-off may be refused and the property, such as a deposit account, used by the bankrupt estate if the trustee can provide “adequate protection” of the creditor’s interest in the property.²⁴⁷
 - (4) Extensive carve-outs are provided for financial markets.
79. The Committee considered various arguments in favour of prohibiting or limiting the right of set-off in insolvency proceedings, including the following:

²⁴⁶ See section 553(a)(3) of the US Bankruptcy Code.

²⁴⁷ See section 363 of the US Bankruptcy Code.

- (1) Set-off removes cash available to the debtor, and most rescue proceedings for an insolvent company would fail if the company had no access to cash.
 - (2) Set-off and netting reduces the assets available to other unsecured creditors. Further, the effect of a set-off is to effectively prefer one creditor over the general body of creditors, and consequently undermine the general rule requiring equal treatment of creditors.
 - (3) The right of set-off is effectively an unregistered, unpublished security interest in favour of the creditor exercising it.
80. On the other hand, the primary arguments against prohibiting or limiting the right of set-off include the following:
- (1) Set-off is designed to ameliorate the injustice that arises where the innocent party is required to pay over the full amount of any debt owed to the insolvent company, but is only permitted to receive dividend, if at all, representing a fraction of the debt owed to it by the insolvent company.
 - (2) Set-off is pervasive throughout all of commerce - there is a potential for set-off whenever there is a series of contracts between parties, or a single contract containing reciprocal obligations. The purpose of set-off is precisely to protect against all kinds of insolvency proceedings. In particular, set-off rights reduce financial exposure, and credit, capital adequacy and transaction costs.
81. Having considered the above, the Committee does not recommend the adoption of provisions limiting the right of set-off. In answer to some of the arguments in favour of such provisions, the Committee is of the view that, among other things:

- (1) It would be better for the insolvent company to obtain new money to support the rescue from the traditional and less discriminatory source of super-priority post-insolvency loans, rather than obtaining funds by imposing losses upon certain creditors who would have otherwise have exercised their right of set-off.
 - (2) Exceptions to the general principle of equality amongst creditors do exist in the insolvency regime. There exist categories of preferential creditors, security and quasi-security arrangements (e.g. retention of title clauses and flawed asset arrangements) that confer priority on particular creditors, and facilitate the flow of commerce. Balance between these competing interests is established through insolvency doctrines such as the anti-deprivation rule and avoidance provisions that already prevent the unfair reduction of the assets available to other unsecured creditors.²⁴⁸
 - (3) It is not practical to require creditors who have reciprocal claims to register or publish this fact. There are also many other cases where it is accepted that it is not realistic to publicise the fact that assets will be removed or depleted on insolvency; for example, repossessions of leased assets, cancellation of contracts, sales of assets subject to liens, etc.
82. The Committee also does not recommend the adoption of the US model of limiting the right of set-off. The primary argument in favour of the “soft touch” US model appears to be that set-off should not be exercised post-petition (a) pending an ordinary examination of the debtor’s and creditors’ rights, and (b) in cases where the creditors’ interests can be ‘adequately protected’, such as by the provision of security. However, it has been suggested that the above appears to be an unconvincing reason for complicating such an important remedy.²⁴⁹ Also, while the economic effect of set-off is generally preserved, this is at the cost of having to impose additional procedures. Further, the

²⁴⁸ See e.g. *Perpetual Trustee Co Ltd v BNY Ltd* [2011] 3 WLR 521.

²⁴⁹ See Philip Wood, *Principles of International Insolvency*, 2nd ed., (2007, Sweet & Maxwell, London) at p 416.

requirement to provide “adequate protection” to the creditor in exchange for withholding exercise of the right of set-off may still tie down the cash of the company. In this sense, any ‘benefits’ of such a minimal limitation of the right of set-off is likely to be drastically reduced.

83. Imposing limitations on set-off will also necessitate the introduction of complex, lengthy carve-out statutes which attempt to maintain set-off and netting in financial markets, but not elsewhere in the economy. The Committee is of the view that this merely creates a two-tier, discriminatory regime with ragged edges and an increase in legal complexity.

Restrictions on the Enforcement of Ipso Facto Clauses

84. The Committee also refrains from recommending the introduction of restrictions on the enforcement of *ipso facto* clauses, similar to that found in section 365(c) of the US Bankruptcy Code.
85. *Ipso facto* clauses are clauses that entitle an innocent contracting party to terminate the agreement and/or exercise certain remedies upon the commencement of judicial management, a scheme of arrangement or other insolvency-related proceeding. Under Singapore law, a contracting party is generally not precluded from relying on *ipso facto* clauses.²⁵⁰
86. In contrast, the US Bankruptcy Code provides that such clauses are unenforceable. General features of the US approach are as follows²⁵¹:
 - (1) *Ipso facto* clauses in executory contracts or unexpired leases are unenforceable, subject to the qualifications below. In this regard, the scope of the US provisions are wide enough to cover *ipso facto* clauses which allow termination or modification of contractual obligations due to

²⁵⁰ There are specific instances where such the enforcement of such *ipso facto* clauses is prohibited under a common law rule known as the anti-deprivation principle. This is, however, a narrower and less well-defined rule: see e.g. *Perpetual Trustee Co Ltd v BNY Ltd* [2011] 3 WLR 521.

²⁵¹ See section 365(c)(1) of the US Bankruptcy Code.

credit downgrades, breaches of financial ratios or other financial health requirements, etc.

- (2) Upon his appointment, the insolvency office-holder has a specified period, which the court may extend, to adopt or reject these executory contracts. If the contract is not adopted within the specified period, the contract is deemed rejected.
- (3) If an executory contract is adopted, any sums payable by the insolvent company are treated as an administration cost and paid in priority to the claims of unsecured creditors.
- (4) If the insolvent company is in default of its obligations under the executory contract, the insolvency office-holder may not adopt the contract unless the default is either cured or adequate assurance is provided that (a) the default will be cured, (b) compensation for loss caused will be paid, and (c) the company will continue performance of its obligations.
- (5) The stay on *ipso facto* clauses does not apply to certain contracts, including (a) contracts to make a loan or extend other debt financing or financial accommodations for the benefit of the debtor, or to issue a security to the debtor, (b) financial market contracts, such as certain close-outs in commodity broker and stockbroker liquidations, certain sale and repurchase agreements in relation to securities, certain financial derivative contracts and swaps and certain master netting agreements, and (c) personal contracts and leases which are based on the personal skill or character or on a special relationship of trust and confidence.
- (6) The counterparty is not prevented from terminating the contract due to other reasons, such as non-payment by the insolvent company of monies due under the contract.

87. The Committee notes the various arguments in favour of restricting the enforcement of *ipso facto* clauses, including the following:

- (1) Judicial management and schemes of arrangement are commonly used as mechanisms to rescue and rehabilitate companies in financial distress. However, it is extremely difficult for a company under judicial management or a scheme to trade its way out of trouble when creditors have the ability to terminate their contracts with the company. The crippling effect of the cancellation of key contracts once a company enters formally judicial management or scheme proceedings may put an end to company operations and any possibility of restructuring, thereby resulting in the general body of creditors obtaining less than they would if the company had been rehabilitated. Accordingly, if the enforcement of *ipso facto* clauses were restricted, key contracts of the company may be kept alive, and all creditors including banks and bondholders, who are usually the main creditors, may stand to benefit.
- (2) Unless *ipso facto* clauses are regulated, creditors providing essential supplies or holding key contracts may have too much bargaining power, allowing them to demand additional payment or guarantees from the administrators in exchange for continued performance. This may prejudice other creditors who do not have similar bargaining power.
- (3) The risk of cancellation of key contracts may deter companies from seeking formal reconstruction efforts. It has been suggested that one reason why judicial managements often fail is because management wait too long before attempting formal rescue proceedings. Restricting *ipso facto* clauses may allow companies in distress to have the confidence to seek help earlier.
- (4) The preservation of contracts reduces the risk of breaks in a chain of contracts; for example, manufacturing and distribution chain contracts.

88. Against the above are the countervailing arguments in favour of giving effect to *ipso facto* clauses, including the following:

- (1) Without the ability to terminate on insolvency, counterparties already staring at the bleak prospect of writing-off outstanding invoices or loans would be compelled to perform their contractual obligations even where there may be no hope of being paid. This situation is worsened where the contract contains exclusivity provisions preventing the counterparty from sourcing alternative supplies or compelling it to continue making periodic payments.
- (2) For smaller suppliers and customers, the solvent party may itself be threatened by the unpredictability and potentially greater exposure. This could give rise to the risk of domino insolvencies, especially in chain contracts.
- (3) Even if the counterparty is precluded from relying on the event of insolvency to terminate the contract, it is unlikely in most cases that the insolvent company will be able to perform, and so the interference with *ipso facto* clauses in contracts is not justified in the majority of situations.
- (4) Despite statutory inroads, English law and, by extension, Singapore law has always respected party autonomy to choose when to contract with each other, and on what contractual terms. Among other things:
 - (a) There is an enormous variety of contracts which may be affected by restrictions on *ipso facto* clauses, each with their own unique balance of risks upon insolvency. Contracting parties still know best what risks they can and cannot contractually accept, compared to a one-size fits all legislative provision.²⁵² It is

²⁵² See e.g. the UK Supreme Court's comments in relation to a relatively unique provision in *Perpetual Trustee Co Ltd v BNY Ltd* [2011] 3 WLR 521 at [178].

probably impossible to arrive at a fair balance of risks using such legislation.

- (b) It should be left to the individual creditor to determine, in light of its own and the individual company's circumstances, whether to terminate the contract. If the creditor is of the view that the company can be turned around, they may not exercise their rights under the *ipso facto* clause. In this manner, market forces, and not the legislature or courts or insolvency professionals, determines whether companies should be rescued, which may lead to a more 'rational' outcome in the economic sense.
- (5) The netting of a series of executory contracts between the parties can dramatically reduce exposure and hence capital and systemic risks, especially in markets for foreign exchange, securities, commodities and the like. However, where there is a series of open executory contracts between parties, denying the solvent counterparties' right to terminate the contract on account of the *ipso facto* clause will result in these counterparties being unable to close out and nett the amounts owed under these open contracts. Prohibiting *ipso facto* clauses will therefore allow the insolvency professional to abandon or terminate the loss-making contracts, while maintaining the profitable contracts for the insolvent company, i.e. cherry picking. The ability of the insolvent company to cherry-pick contracts would disrupt the rules on set-off and netting by making it difficult to isolate which contracts should be eligible for set-off or netting.
- (6) Leading commentators have argued that the variety of carve-outs and special protections which need to be provided for in order to implement restrictions on *ipso facto* clauses may "greatly complicate commercial law and create a regime of first- and second-class citizens with a fuzzy boundary between the two..."²⁵³ This complexity can give rise to an

²⁵³ See Philip Wood, *Principles of International Insolvency*, 2nd ed., (2007, Sweet & Maxwell, London) at p431.

increase in litigation. An increase in litigation may also result from the fact that, in the absence of clear grounds of termination under *ipso facto* clauses, parties may be forced to rely on less easily established grounds (e.g. anticipatory breach or defective performance).

- (7) Certain industries may hike prices in order to provide for the above risks and unpredictability, leading to an increase in business costs.
89. It has been noted that “[t]he freezing or stay on self-help termination is unquestionably one of the most draconian and controversial of all stays, because of its massive impact on transactions”.²⁵⁴ Further, the Committee notes that only a minority of countries appear to impose restrictions on the enforcement of *ipso facto* clauses. The primary jurisdictions that do so are US, Canada and France. Some of the jurisdictions that do not impose express limits on general *ipso facto* clauses are the UK, Japan, China, Australia, Germany and Hong Kong. Lastly, the Committee considered that, if such a framework were introduced, it would be essential to introduce provisions allowing counterparties to apply to court to object to the stay on the *ipso facto* clause and the enforcement of the remaining contractual terms on the basis that they are unduly prejudiced. This is because there may be instances where the risk to counterparties in dealing with the insolvent company is unacceptably high. Alternatively, the court may be asked to determine cases that are too urgent to wait for the expiration of the specified period for the insolvency professional to adopt or reject the contract. However, the Committee notes the strong concerns that such determinations would require a decision on the commercial benefits or risks of the adoption of certain contracts, and that it would be inappropriate to impose such a burden on the courts.
90. On balance, therefore, the Committee does not recommend introducing restrictions on the enforcement of *ipso facto* clauses.

²⁵⁴ See Philip Wood, *Principles of International Insolvency*, 2nd ed., (2007, Sweet & Maxwell, London) at p430-453; see further Suchak, *Corporate Rescue Proceedings and the Enforcement of Ipso Facto Termination Clauses: A Comparison of the English and US Approaches*, (2011) Intl Corp Rescue Vol 8 Issue 2.

Extra-Territorial Stays of Proceedings

91. When a company enters into the rescue process, the success of the rescue may often depend on the availability of a statutory moratorium in order to prevent individual creditors taking separate enforcement action in their own interests, thereby potentially strangling the reorganisation initiative at birth.

92. In Singapore, the relevant provisions which provide for a stay of proceedings and other action against the company in judicial management or schemes of arrangement do not appear to have extraterritorial scope. In other words, the prohibition against the commencement of legal process is generally understood not to apply to proceedings instituted in a foreign court. However, English courts have held, and the Singapore courts may well adopt the same position, that this does not preclude the court in an appropriate case from exercising its general jurisdiction to protect the assets of a company in certain formal insolvency processes, and to restrain acts interfering with those processes, by granting injunctive relief against the pursuit of foreign proceedings by a creditor, although the doctrine of comity would normally make it inappropriate to do so. The court has generally confined the exercise of this general jurisdiction to cases where the creditor has been guilty of oppressive, vexatious or otherwise unfair or improper conduct.²⁵⁵

93. The Committee considered whether to introduce provisions that expressly provide that Singapore courts may grant stays of proceedings with extraterritorial scope. Such provisions would be in line with how US bankruptcy courts have interpreted the US Bankruptcy Code, such that the creditors with a presence in the US are restrained from commencing proceedings in any jurisdiction. With the enactment of such a provision, the courts would no longer confine their jurisdiction solely to cases where there is oppressive, vexatious or otherwise unfair or improper conduct.

²⁵⁵ See Goode, *Principles of Corporate Insolvency Law*, 4th Ed., (London, Sweet & Maxwell, 2011) at p436-437.

94. The main arguments in favour of expressly providing for an extra-territorial stay of proceedings include the following:
- (1) Preventing or deterring creditors with a presence in Singapore from commencing proceedings or enforcing against the company overseas may help to preserve the estate of the company, which in turn will aid the rehabilitation of the company.
 - (2) Staying overseas proceedings or enforcement actions will help ensure fairness among creditors and avoid cases where certain creditors, by reason of enforcement actions taken overseas, recover their full debt whilst leaving other creditors to only recover a partial dividend.
95. The main arguments against expressly providing for an extra-territorial stay of proceedings include the following:
- (1) Provisions for an extra-territorial stay of proceedings will only restrain creditors who have a presence and/or assets in Singapore, which the Singapore courts can exercise some control over. Such provisions would likely be ineffective to prevent or deter creditors with no such presence in Singapore. Thus, even in cases involving companies undergoing Chapter 11 reorganisations in the US, there have been instances in which foreign creditors have seized overseas assets after the filing of a U.S. Chapter 11 case, thereby dismembering the estate and preventing a reorganisation.
 - (2) The better mechanism to restrain creditors from proceeding against the company overseas would be to apply for recognition and a stay of proceedings in the foreign State's courts, instead of introducing provisions for an extra-territorial stay. For example, under the UNCITRAL Model Law on Cross-Border Insolvency, if a debtor's assets are threatened by creditor collection efforts in a jurisdiction other than the country where a main bankruptcy or insolvency proceeding is pending, a representative of the debtor can seek injunctive relief from

the courts of the country in question by seeking recognition of the host nation's proceeding. Accordingly, stay provisions with extraterritorial reach are unnecessary in Model Law countries.

- (3) A broad extra-territorial extension of Singapore's insolvency laws may be viewed by foreign countries as a violation of their sovereignty, or the further application of protectionist policies aimed at protecting Singapore creditors as against foreign creditors.

- 96. In light of the matters above, the Committee is of the view that the express provision of extraterritorial scope is of limited utility and is undesirable given the need to recognise the comity amongst States. It should be sufficient to rely on our existing case-law, which restrains creditors where they have been guilty of oppressive, vexatious or otherwise unfair or improper conduct.

(J) *SOME IMPLEMENTATION ISSUES*

- 97. The Committee recommends that several procedural issues that have arisen or been identified in the course of judicial management proceedings be addressed.
- 98. First, pursuant to section 201 of the Companies Act, the company is required to prepare a duly audited profit and loss account and balance sheet to be laid before the shareholders at the general meeting, together with the directors' report. Section 197 then requires the company to file annual returns, based on those audited accounts, even if it is under judicial management. The Committee is of the view that as the company is already insolvent and is under the supervision of a court-appointed officer, there is little practical purpose in the filing of annual returns. It is also not in the interests of the creditors for the judicial manager to incur additional expenses in having to call a shareholders' meeting for the purposes considering the audited accounts of the company. As such, it should be clarified that a company under judicial management should not be required to call a shareholders' meeting to

consider the audited accounts, or to file annual returns during the duration of the judicial management order.

99. Second, section 227B(8) of the Companies Act currently provides that a judicial management order shall, unless it is otherwise discharged, remain in force for a period of 180 days from the date of making of the order. However, the court has the power to extend this period upon an application by the judicial manager.
100. By contrast, the UK Insolvency Act provides that an administrator's appointment should automatically end 1 year from the date on which it takes effect. This may be extended once by consent of the requisite creditors for a period of 6 months, or on application to court for any other specified period.²⁵⁶ An application for extension, however, may not be made retrospectively once the administrator's term of office has expired.²⁵⁷ In addition, the UK provisions set out special requirements for secured and unsecured creditor consent to be met, which differ depending on whether the administrator believes the company has insufficient property to enable distribution to be made to unsecured creditors. However, consent must in all cases be obtained from each secured creditor, and a requisite majority from unsecured creditors.²⁵⁸
101. As with paragraph 21 above, the Committee notes that these special requirements for secured creditors' consent reflect the UK's particular deference to the floating charge holders' rights under administration, in the context of the removal of floating charge holders' rights under the receivership regime. In contrast, the Committee notes that under its present recommendations, the secured creditor will still retain the right to apply for

²⁵⁶ UK Insolvency Act Schedule B1, para 76(1), 78(4).

²⁵⁷ UK Insolvency Act Schedule B1, para 78(4)(c). However, the court has the discretion to make an order if the application is made before expiry of the administrator's term of office and there is a real possibility that the application had been delayed because of delay by court staff: see Goode, *Principles of Corporate Insolvency Law* (4th Ed, 2011) at p392; *Re TT Industries* [2006] BCC 372.

²⁵⁸ UK Insolvency Act Schedule B1, paras 78(1) and (2). Generally, consent required means the consent of each secured creditor of the company, and if the company has unsecured debts, creditors whose debts amount to more than 50% of the company's unsecured debts (disregarding debts of creditors who do not reply to the request for consent). However, where the administrator has made a statement in the administration proposal that there is insufficient property to distribute to the unsecured creditors (apart from setting aside a prescribed amount under section 176A(2)(a)), then consent of each secured creditor of the company, and of preferential creditors whose debts amount to more than 50% of the company's preferential debts is required.

receivership in Singapore. Thus where the judicial manager's proposals have been validly approved by the requisite majority under section 227N of the Companies Act, the secured creditor may be taken as being rightly bound to that proposal.

102. Accordingly, the Committee recommends that the 180-day term of judicial management should be capable of being extended once for a period of up to 6 months, by a vote of a simple majority in number and value of creditors, without needing to apply to court for the same. An aggrieved creditor may apply to the court to either object to the extension of the judicial management order or to shorten the period of extension. This power given to creditors to extend the term of the judicial management should not exceed 6 months in order to avoid prolonged instances of judicial management. However, the court may extend a judicial management order for such period as it deems appropriate.
103. Third, the current powers of a judicial manager to make payments towards discharging unsecured pre-judicial management debts are severely constrained. In particular, section 227G(6) provides that such payments may only be made with the sanction of the court or pursuant to a compromise or arrangement sanctioned by the court.
104. In contrast, under the UK Insolvency Act, the administrator is empowered to make any payment which is necessary or incidental to the performance of his functions.²⁵⁹ Further, he may make a payment in any other circumstances if he thinks it likely to assist the achievement of the purpose of the administration.²⁶⁰ In this regard, the Committee notes that similar powers do exist under the Eleventh Schedule of the Companies Act, but that these powers can only be exercised in relation to *post-judicial* management debts, unless leave of court is granted.

²⁵⁹ UK Insolvency Act Schedule 1 para 13.

²⁶⁰ UK Insolvency Act Schedule B1 para 66.

105. The Committee is of the view that the position in the UK is commercially sensible and appropriately advances the interests of the creditors of the company. The Committee therefore recommends that judicial managers be given the power to make payments towards discharging pre-judicial management debts, when such payments are necessary or incidental to the performance of his functions, or when it will likely assist the achievement of the purposes of the judicial management. These powers should be exercisable without the need to seek the leave of court. Such a power would in many cases be particularly relevant in order to ensure the continued viability of the existing business of the company.
106. Fourth, section 227R of the Companies Act allows an application to court for the protection of interests of creditors and members, where the company's affairs, business and property are being or have been managed by the judicial manager in a manner which is or was unfairly prejudicial to the interests of its creditors or members. The Committee is of the view that this provision is, at present, too narrow. The Committee therefore recommends that creditors or members should also be able to apply to court for relief under this section on grounds of abuse, such as where the judicial management should not have been commenced to begin with (e.g. where the company was not likely to become or be insolvent when the judicial management had been commenced), or where there are no proper grounds for continuing the judicial management, (e.g. where the statutory purposes of judicial management can no longer be achieved), or where the judicial manager is not managing the company in accordance with the proposals which had been approved by the creditors under section 227N of the Companies Act.

(K) SUMMARY OF RECOMMENDATIONS

107. In summary, the Committee recommends the following:

- (1) The judicial management regime should be retained in the New Insolvency Act but with legislative reforms in certain areas to address the deficiencies of the existing judicial management regime.
- (2) The courts should be given the overriding discretion to grant a judicial management order even where secured creditors who may appoint a receiver over the whole or substantially the whole of the company's assets object to such an appointment. The court should exercise such discretion if the prejudice that will be caused to the unsecured creditors in the event that a judicial management order is not made is wholly disproportionate to the prejudice that will be caused to the secured creditors if a judicial management order is made.
- (3) The right to object to an application for judicial management should only accrue to a holder of a floating charge that is valid and enforceable in the liquidation of the company.
- (4) Express provision should be made to grant the holder of a floating charge who consents to the making of a judicial management order the right to appoint the judicial manager.
- (5) The company should be empowered to place itself into judicial management without a formal application to court, upon filing the requisite notices and other documents.
- (6) The court should be empowered to place companies into judicial management where the company "is or is likely to become unable to pay its debts".

- (7) The court, in granting a judicial management order, should no longer be required to state the specific purposes for whose achievement the judicial management order is granted. However, the court shall still have the discretion to state the purposes of the judicial management order, if it so wishes.
- (8) No personal liability should be imposed on judicial managers.
- (9) Clear provisions should be made for the priority of debts incurred during the course of judicial management and that the debts incurred by the judicial manager on behalf of the company should have priority over the fees of the judicial manager.
- (10) The following provisions should be included in the New Insolvency Act to ensure a seamless transition from judicial management to liquidation:
 - (a) Upon an application for winding up made by the judicial manager, the length of the judicial management order should be extended to the time when a winding up order is made;
 - (b) It should not be necessary to discharge the judicial managers if they are also appointed as the liquidators.
 - (c) The statutory time frames for avoidance provisions and officer liability should be revised to have reference to the point in time when the company is placed under judicial management, even if there is a subsequent winding up.
 - (d) Where proofs of debts have been filed and adjudicated upon in the judicial management, it should not be necessary for the proofs of debts to be re-filed in liquidation.

- (11) The current mechanisms of legislative importation or importation by court order should be abolished and the provisions from bankruptcy and liquidation law that should apply in judicial management should be expressly stated to be so applicable.
- (12) The provisions on officer liability in liquidation should be extended to judicial management.
- (13) The New Insolvency Act should include provisions to protect creditors during the period between the filing of the application for judicial management and the making of the judicial management order. They should include provisions addressing the following:
 - (a) Any creditor of the company should be entitled to apply for the appointment of an interim judicial manager.
 - (b) Where an application for judicial management is filed by the company itself, the directors should be required to give personal undertakings to the court that, pending the hearing of the application, the company will apply its assets and incur liabilities only in the ordinary course of its business and will not dispose of its assets or make payment to any creditor in respect of any debt or liability incurred prior to the date of the filing.
 - (c) The court should be given the power, upon application by any creditor, to impose restrictions on the acts that may be carried out by the company pending the hearing of the application for judicial management.
 - (d) If a judicial management order is ultimately made, the avoidance provisions should apply to transactions entered into during the period between the filing of the application for judicial management and the making of the judicial management order.

- (14) It would not be preferable to introduce a Chapter 11 style debtor-in-possession model in Singapore.
- (15) Provisions should be introduced into the judicial management regime allowing the grant of super-priority for rescue finance. Provisions allowing for super-priority liens should not be introduced.
- (16) Provisions prohibiting or restricting the right of set-off should not be introduced.
- (17) Provisions for a limited suspension on the enforcement of *ipso facto* clauses should not be introduced.
- (18) Provisions that expressly provide that our courts may grant stays of proceedings with extraterritorial scope should not be introduced.
- (19) A company under judicial management should not be required to call a shareholders' meeting to consider the audited accounts, or to file annual returns during the duration of the judicial management order.
- (20) The 180-day term of a judicial management should be capable of being extended by a period of 6 months, by a vote of a simple majority in number and value of creditors, without needing to apply to court for the same. An aggrieved creditor may apply to the court to object to the extension or shorten the period of extension. However, the court may extend a judicial management order for such period as it deems fit.
- (21) Judicial managers should be given the power to make payments towards discharging pre-judicial management debts, when such payments are necessary or incidental to the performance of his functions, or when it will likely assist the achievement of the purposes of the judicial management. These powers should be exercisable without the need to seek the leave of court.

- (22) Section 227R of the Companies Act should be broadened to permit applications to court for the protection of interests and creditors on grounds of abuse, such as where the judicial management should not have been commenced to begin with, or where there are no proper grounds for continuing the judicial management, or where the judicial manager is not managing the company in accordance with the proposals which had been approved by the creditors under section 227N of the Companies Act.

CHAPTER 7: SCHEMES OF ARRANGEMENT

1. The provisions on schemes of arrangement²⁶¹ were introduced in 1967 and have remained substantially the same over the years. The entire procedure is set out in two sections of the Companies Act, i.e. sections 210 and 211 of the Companies Act. These provisions were based on the English legislation formulated in the 19th Century, and have remained substantially in the same form.
2. Briefly, the three stages by which a scheme becomes binding can be stated as follow:
 - (1) An application is made by the company to the court for an order that one or more meetings of creditors (as well as meetings of members, if required) be summoned. Typically, the application will also ask for an order of court to restrain further proceedings in any action or proceeding against the company²⁶² pending the consideration and approval by the creditors and/or members of the scheme.
 - (2) A proposal in the form of a scheme of arrangement is presented by the company for the compromise of its debts and liabilities and is put before these meetings for approval. The scheme must be approved by 75% in value representing a majority in number of creditors and members present and voting. If the creditors and/or members have to be divided into classes, each class of creditors and/or members must meet the requisite majority, failing which the scheme will not be binding on them.
 - (3) If the scheme is approved at the meeting or meetings, there would be a further application to the court to obtain the court's sanction. Upon the court's sanction and upon lodging of the court order sanctioning the

²⁶¹ See Part VII of the Companies Act.

²⁶² See section 210(10) of the Companies Act.

scheme with the Registrar of Companies, the scheme becomes binding on all creditors and/or members.

3. Due to their flexibility and the ability for companies to take the lead in their own restructuring efforts, schemes of arrangement began to see widespread use in Singapore in the 1990s. By the early 2000s, schemes were being employed widely by companies to compromise their debt agreements with their creditors. Today, schemes of arrangement continue to be the preferred option for insolvent companies that are unable to achieve a private out-of-court debt restructuring with their creditors.
4. The accumulation of professional ground experience, judicial guidance and support²⁶³ have transformed the scheme of arrangement procedure into a corporate insolvency regime with distinctly Singapore characteristics. Today, the scheme of arrangement procedure appears to have become the favoured corporate rescue regime. The perception that the current scheme of arrangement regime is working relatively well is confirmed by statistics obtained in a study of the scheme of arrangement cases filed with the courts from the period between 2002 and July 2009.²⁶⁴ In the study, out of 48 companies which were sanctioned by the court in that period, a majority of the companies (77.1%) were remained live as at that date. The statistics are a good indication of the success rate of the scheme of arrangement regime in rehabilitating companies and ensuring their survival as going concerns.

(A) ISSUES IDENTIFIED FOR REFORM

5. The Committee is of the view that the scheme of arrangement regime has generally worked well in practice. However, there are a number of drawbacks that have been identified. The Committee noted that some of these

²⁶³ The Committee noted that on their part, the courts have been generous in their issue of judicial opinion in relation to schemes; more crucially, they have been robust in laying down principles and rules for the local context and adopting a commercial and practical approach to ensure the relevance and efficacy of schemes. They have rightly not allowed the scheme of arrangement procedure to be weighed down by technical objections or lengthy or tactical litigation, while keeping a firm eye on procedural fairness to creditors.

²⁶⁴ This was a study conducted by the Insolvency and Public Trustee's Office in December 2009 to consider a review of the scheme of arrangement provisions in the Companies Act, with a review of the statistical study of schemes of arrangement cases from 2002 to July 2009.

drawbacks have been identified and ameliorated in part by judicial rulings, in particular by the Court of Appeal decision in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] SGCA 9 (“**TT International**”).

6. First, the existing statutory provisions on schemes of arrangement only provide a bare and skeletal framework and do not provide for many of the substantive and procedural issues that arise in using a scheme of arrangement. In this regard, the statutory provisions for schemes of arrangement only contemplate a simple and straightforward proposal by the company to its creditors and/or members. The provisions do not address or accommodate many of the complexities which may arise in the context of a global commercial community and a modern debt restructuring exercise of a substantial business where credit and debt mechanisms for companies have become more sophisticated, creditors’ rights are increasingly differentiated and variegated, and business operations and financing arrangements may straddle more than one jurisdiction.

7. Second, the protection afforded by the statutory moratorium provided at section 210(10) of the Companies Act is relatively weak compared with the moratoriums found in the liquidation or judicial management regimes. The statutory moratorium under section 210(10) only restrains “*further proceedings in any action or proceeding against the company*” and does not appear to extend to enforcement of security or quasi-security interests²⁶⁵ (as is the case under the judicial management regime) or a blanket prohibition against actions taken by creditors (although this is unclear from the face of section 210(10) of the Companies Act). It also does not apply to landlords seeking to exercise their right of re-entry to registered leasehold property.

8. Third, the existing statutory framework does not provide sufficient safeguards for creditors, in particular, during the period of time when the company is finalising the scheme of arrangement under the protection of the statutory

²⁶⁵ Such quasi-security interests include repossession of goods under hire-purchase agreements, chattels leasing or retention of title agreements.

moratorium. There are no statutory restrictions or controls against continued trading by the company, disposition of assets and/or further incurring of debts and liabilities by the company. Further, the statutory timeframes for applications under the avoidance provisions, such as those relating to unfair preference and undervalue transactions, continue to run during the moratorium. This means that if the scheme of arrangement ultimately fails and the company is subsequently placed under judicial management or winding up, some of the applicable timelines under the avoidance provisions (for example, the timeframe of 6 months to challenge unfair preferences given to non-related parties) are likely to have expired and creditors may not have effective recourse to the avoidance provisions to set aside transactions that unfairly prejudice their rights of dividends from the assets of the company.

9. Fourth, there is limited court supervision over the entire process of formulation, presentation, approval and implementation of schemes, save at the point of hearing of the applications to convene a meeting, for court sanction of the approved scheme and for a statutory moratorium pursuant to section 210(10) of the Companies Act. Under the existing legislative framework, the creditors have no statutory right to apply to court for directions. The Committee observes, however, that the Singapore courts have been robust in asserting control over the scheme of arrangement procedure.²⁶⁶
10. Fifth, the existing legislative framework contains no provision on the appointment or conduct of professionals who are advising or assisting the company in the formulation of and/or implementation of a scheme of

²⁶⁶ In the three related decisions by Justice Kan in *Re Raffles Town Club Pte Ltd* [2005] SGHC 173, [2005] SGHC 178 and [2006] 1 SLR(R) 296, the High Court did not readily accede to the company's requests for extension of time to hold the creditors' meeting (and consequently, an extension of the statutory moratorium). In the first decision in *Re Raffles Town Club Pte Ltd* [2005] SGHC 173, Justice Kan directed that the creditors' meeting be held within a much shorter period than the company had requested for. In *Re Raffles Town Club Pte Ltd* [2006] 1 SLR(R) 296, Justice Kan rejected the company's request for a further extension of time to hold a creditors' meeting on the premise that there were no good reasons for extension of time. In the case of *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR 121, the Court of Appeal granted an extension of time for a creditor to file its proof of debt even after the scheme of arrangement had been sanctioned by the courts. In *TT International*, the Court of Appeal, after considering parties' arguments, ordered a re-vote, gave specific directions on the voting rights of certain creditors and the adjudication of disputed debts. The Court of Appeal also exercised its powers under section 210(4) of the Companies Act and altered some of the commercial terms of the scheme of arrangement.

arrangement. In *TT International*, the Court of Appeal laid down the following useful principles to be observed by a scheme manager:

- (1) Before a scheme of arrangement is sanctioned, the proposed scheme manager owes a good faith obligation to the company and the body of creditors as a whole.²⁶⁷
- (2) At the stage of adjudication of proofs of debts, the proposed scheme manager assumes a quasi-judicial role and is required to be objective, independent, fair and impartial.²⁶⁸
- (3) Once appointed as a scheme manager, the scheme manager owes fiduciary duties to the company and its creditors in administering the approved scheme.²⁶⁹
- (4) Although the proposed scheme manager is inherently in a position of conflict, given that he would be remunerated for the successful resuscitation of the company, the proposed scheme manager must nevertheless strike the right balance and manage the competing interests of successfully securing the approval of the proposed scheme and respecting the procedural rights of all involved in the scheme process.²⁷⁰

11. Sixth, the requirement that creditors ought to be classified into different classes²⁷¹ is problematic. While the starting principle is simple enough, i.e. that those creditors whose rights are so dissimilar to each other's that they cannot sensibly consult together with a view to their common interest must vote in different classes²⁷², the application of such a principle to complex transactions and situations where there are different levels of secured and

²⁶⁷ See *TT International* at [74].

²⁶⁸ See *TT International* at [75].

²⁶⁹ See *TT International* at [76].

²⁷⁰ See *TT International* at [77].

²⁷¹ Section 210(3) of the Companies requires a majority in number representing three-fourths in value of class of the creditors and/or members or class of creditors or members to agree to any proposed scheme of arrangement.

²⁷² See decision of *UDL Argos Engineering & Heavy Industries Co Ltd v Li Oi Lin* [2001] 3 HKLRD 634, referred to by the Court of Appeal in *TT International* at [130].

unsecured creditors, as well as intra-creditor relationships, is not without its difficulties and the attempt to define “legal right” in these context can be thorny.²⁷³ The Court of Appeal in *TT International* has clarified that any dispute as to the classification of creditors can be raised at the first application to court to convene a meeting of creditors, instead of being left to the hearing of the application for sanction of the scheme of arrangement.²⁷⁴ Nonetheless, the Committee is of the view, in the interest of certainty, it would be preferable to provide a statutory framework for objections on classification of creditors to be raised and adjudicated upon by the court.

12. Seventh, the adjudication and resolution of disputed debts present another difficult problem. However, the existing legislative framework contains no mechanism for proof and adjudication of debts and the resolution of disputed debts. While there is some judicial guidance on these issues from the Court of Appeal in *TT International*, the Committee is of the view that such issues are better dealt with in detail in legislation, as is the case with other insolvency regimes such as winding up and judicial management.

(B) PROPOSALS FOR REFORMS

13. The Committee is of the view that the scheme of arrangement procedure can and should be enhanced and should incorporate features addressing its existing weaknesses as far as possible. The scheme of arrangement procedure can usefully incorporate many features of a debtor-in-possession reorganisation regime, but still be built upon a model and based on concepts and principles which are familiar to the commercial and financial sector in Singapore as well as those familiar with legal systems based on English law.
14. The Committee is mindful that schemes of arrangement are not only used for insolvent companies seeking to make compromises with their debtors but are also used by companies that are not in financial distress for corporate

²⁷³ See e.g. *Re Telewest Communications plc* [2004] BCC 342; *Re Hawk Insurance Co Ltd* [2001] 2 BCLC 480; *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR 629.

²⁷⁴ See *TT International* at [61].

restructuring and mergers. As such, the Committee recommends that, as a starting point, sections 210, 211 and 212 of the Companies Act be retained in the Companies Act. Where the company or its creditors or members do not apply for a statutory moratorium, the Companies Act provisions shall continue to apply. However, where the company or its creditors or members apply for a statutory moratorium against proceedings, there should be additional statutory support in the New Insolvency Act (discussed below):

- (1) To ensure the integrity and fairness of the processes involved in the formulation, presentation, approval and implementation of the scheme of arrangement in the interests of the creditors and/or members;
 - (2) To define and provide for the relationship and transitions between the scheme of arrangement regime and other corporate insolvency regimes; and
 - (3) To provide more judicial supervision and powers for the court to intervene at appropriate junctures, to ensure that the respective interests of the company and the creditors and/or members are properly balanced and protected.
15. Additionally, creditors should have recourse to the court for an order that the additional statutory support in the New Insolvency Act will apply to a scheme of arrangement, even if no moratorium has been sought by the company (for example, where the company is proposing to compromise creditor rights through the scheme).

(C) SCOPE OF MORATORIUM

16. There are two key differences between the moratorium in judicial management and that in schemes of arrangement. First, as mentioned above at paragraph 7 above, the protection afforded by the moratorium in schemes of arrangement is comparatively weak as it does not apply to the enforcement

of security or quasi-security interests such as security over the company's property, or as a blanket prohibition against creditor action. Second, the moratorium in schemes of arrangement is not automatic; it must be specifically requested by the company seeking to enter into a scheme of arrangement at the hearing of the application by the court.²⁷⁵

17. The differences are largely a result of the fact that schemes of arrangement do not result in the displacement of management in favour of a court-appointed officer, and are akin to "debtor-in-possession" rehabilitations. They allow the management of the company (whose control of the company presumably led to the company's financial distress) to continue to control the company and take the lead in its rehabilitation efforts. This is in contrast with the judicial management regime, where creditors are granted the assurance that the management is displaced and that the company is managed by an independent third party administrator who is the judicial manager. It could therefore be rationalised that greater and automatic protection is afforded by the moratorium in judicial management, compared to that in a scheme of arrangement.
18. The Committee considered whether the moratorium in the scheme of arrangement procedure should be triggered automatically upon the filing of the application for the court to order to summon a meeting of creditors to consider and approve the scheme. However, the Committee has concluded in the negative. The Committee takes the view that such an extension would be unfair to creditors and could potentially lead to abuse as the company would remain under the control of its management and would not be subject to any restrictions or control on the disposal and application of its assets.
19. One option is to provide for the appointment of an independent supervisory trustee for the creditors, similar to the position under the Chapter 11 of the US Bankruptcy Code proceedings. However, the Committee is not in favour of this. It would reduce the autonomy and flexibility given to the company,

²⁷⁵ See section 210(10) of the Companies Act.

introduce more controls and restrictions which may adversely affect the company's business operations, increase costs for the company and perhaps the creditors, and dilute the practicality, expediency and effectiveness of the scheme of arrangement procedure. As such, some of the strongest advantages of the scheme of arrangement procedure will be curtailed. It may also result in lobbying by creditors for appointees of their choice, and opposing creditors may seek to put pressure on the company or the scheme of arrangement process through the trustee. Further, a trustee with narrow powers will not be effective, while a trustee with broad powers may well result in the scheme of arrangement procedure becoming too similar to judicial management procedure.

20. The Committee is further of the view that there is no pressing need for the moratorium in a scheme of arrangement to be triggered automatically upon the filing of an application for a meeting of creditors to consider a scheme. There is little difficulty for a company to seek and obtain an urgent hearing date from the courts and obtain an order for a moratorium, or at least an interim order, to stave off creditor action, where warranted.
21. On the other hand, the Committee is of the view that, if the scheme of arrangement procedure is to be strengthened as a corporate rescue regime, the scope of the statutory moratorium should be enlarged. The Committee considers that the scope of the statutory moratorium should be no narrower than that in a judicial management, and that the court should be given discretionary powers to alter the scope of the moratorium to be granted to the company. This would allow the court to tailor the scope of the moratorium in each case according to its circumstances. Further, in any instances of abuse, aggrieved creditors would be entitled to apply to the court for relief. Ultimately, this would provide flexibility and accountability in the interests of all parties.
22. Lastly, the statutory moratorium under section 210(10) of the Companies Act can currently only be invoked if a scheme "has been proposed between the company and its creditors or any class of such creditors". The Committee is of the view that this requirement that a scheme must have been "proposed"

before a moratorium can be granted may in some instances be counterproductive: in some cases, the moratorium is needed precisely because the company needs time to work out a scheme to propose to its creditors. The Committee therefore recommends that the court should have the power to grant a statutory moratorium where there is an intention to propose a scheme of arrangement, subject to such terms as the court sees fit to impose. For example, in cases where a scheme has not yet been proposed, the court may only be willing to grant a short moratorium (e.g. 14 days or a month), on the basis that the court will consider granting a longer moratorium once a scheme has been proposed.

(D) *FILING AND ADJUDICATION OF PROOFS OF DEBTS*

23. Under the current legislative scheme, there is no statutory procedure for the filing and adjudication of proofs of debt applicable to schemes of arrangement. The usual practice is for the filing and adjudication of proofs to be dealt with in the explanatory statement that accompanies the circulation of the scheme of arrangement to the creditors, or in the scheme of arrangement itself. However, this is unsatisfactory, for the simple reason that the filing and adjudication of proofs (for the purpose of voting) must take place before a scheme is voted upon and sanctioned by the court. At the time of filing and adjudication, the scheme would not have become effective, and nothing in the scheme (much less the explanatory statement) would bind the creditors. Further, there would be no standardisation or uniformity in the rules and procedures governing the filing and adjudication of proofs, as they would be defined on a case by case basis.
24. There is also no statutory provision or subsidiary rule governing the treatment of proofs that are rejected in full or partly by the company or the scheme manager. Neither is there statutory provision empowering creditors to examine the proofs of debt submitted by other creditors in respect of a proposed scheme and to consider if the scheme manager's decision to admit or reject the claims of certain creditors was proper. These are important

issues given that the quantum of the debt admitted or rejected may affect the outcome of the vote on the scheme of arrangement.

25. These issues were brought to the fore in *TT International*. In that case, there were significant disputes between different groups of creditors on the validity of the respective debts claimed and, in turn, their respective voting rights. This was fundamental; the adjudication of proofs of debts affected the voting outcome of the scheme of arrangement. The Court of Appeal held that a creditor is entitled to have access to the proofs of debt if he produces *prima facie* evidence of impropriety in the admission and rejection of proofs of debt by the scheme manager.
26. The Committee is of the view that such a right to information should be statutorily supported. It is an important right as the claims submitted by creditors and admitted or rejected by the company or the scheme manager would fundamentally affect voting rights and the issue of whether the scheme has been properly approved by the creditors. Although the decision in *TT International* has helpfully provided guidance, it is felt that statutory intervention is necessary to bring much needed clarity, certainty and fairness in this area. Similarly, there should be statutory support as to how disputed claims should be dealt with. In view of the need for expediency in the scheme of arrangement process, there should not be a full-blown appeal to the courts to resolve the dispute (as is the case in appeals against rejection of proofs in liquidation) unless the dispute is purely on an issue of law.
27. The Committee recommends that statutory provisions and/or subsidiary rules be introduced for schemes of arrangement involving the creditors of a company in relation to the filing and adjudication of proofs of debt, and creditors' right to information and to dispute the adjudication. In particular, it should be provided that:
 - (1) Each creditor is entitled to review the proofs submitted by other creditors and to be informed of the decisions of the company or the scheme manager in adjudicating on such proofs and the basis for the

decisions. Notice should be given to the company and the proving creditor before the proof is inspected, and the company and the proving creditor should have the right to object to the inspection. In this regard, the company or the proving creditor should state reasons for objecting to the inspection, including any confidentiality issues precluding disclosure. An independent assessor (who may be either a qualified insolvency practitioner or an advocate or solicitor) shall thereafter decide whether the company or the proving creditor has a legitimate basis for declining to disclose the proof. If the independent assessor decides against disclosure, he must review the proof himself and state whether, in his opinion, the proof has been properly admitted. The independent assessor may also direct that part of the proof be disclosed, and/or that sensitive portions shall be redacted.

- (2) Each creditor is entitled to challenge the rejection of his proof by the company or the scheme manager, or the admission by the company or the scheme manager of another creditor's proof in full or in part.
- (3) Any dispute relating to the admission or rejection of a proof (for the purposes of voting) shall be heard by the independent assessor.
- (4) The independent assessor may be appointed when the company makes the first application to court in relation to a scheme of arrangement, upon the nomination of the company or any creditor or member. Alternatively, the independent assessor may be subsequently appointed once a matter requiring an assessment arises. In such instances, the independent assessor shall be appointed by agreement of the parties, failing which the independent assessor shall be appointed by the court.
- (5) The decisions of the independent assessor may be challenged in court, but only at the sanction hearing,²⁷⁶ to ensure that there are no tactical

²⁷⁶ The courts have, in previous cases, commented on the test to be applied to adjudications of proofs of debt in the context of schemes of arrangement: see e.g. *TT International* at [106] – [108].

applications made with the objective of delaying the scheme of arrangement process.

- (6) Timelines should be imposed for the adjudication of proofs, challenges against the adjudication, the appointment of independent assessors and the independent assessors' assessment of any such dispute.

(E) INFORMATION TO BE PROVIDED TO CREDITORS

- 28. Under the existing legislative scheme, after the court issues directions for the calling of a meeting of creditors, notices summoning the meeting must be sent to the creditors. Section 211 of the Companies Act requires that such notices be accompanied by a statement that clearly explains the effect of the scheme and, in particular, discloses any material interests of the directors and the effect of the scheme thereon. It is also well-established by case-law that the company and the proposed scheme manager should give all the information reasonably necessary to enable the recipients to determine how to vote; the principle of transparency has been entrenched by a line of Singapore and commonwealth jurisdictions decisions.²⁷⁷ Further, with the decision in *TT International*, the chairman of the scheme creditors' meeting is now required to post a list of the creditors and the corresponding amounts of their admitted claims (for the purpose of voting) at the meeting prior to the meeting.²⁷⁸
- 29. The Committee considered whether these principles should be enshrined and reinforced by statutory provision, but has concluded that it is best to leave the issue to be governed by case-law. The fundamental principle of transparency has been clearly established by case-law, and further statutory directive is not necessary or desirable. The application of the principle to the facts of each scheme should be left to the court having supervisory jurisdiction; the judicial power to decline to grant sanction to a scheme or to grant sanction subject to

²⁷⁷ See *Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR (R) 629; *Re Econ Corp Ltd* [2004] 1 SLR (R) 273; *TT International* and the related decision of *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International and another appeal* [2012] SGCA 53; *Re Heron International NV and others* [1994] 1 BCLC 667; *Re Pheon Pty Ltd* (1986) 11 ACLR 142 at 155.

²⁷⁸ See *TT International* at [94] – [99].

conditions is wide and flexible enough, and probably more appropriate, than static statutory guidance to enforce the principle of transparency.

(F) SAFEGUARDS FOR CREDITORS

30. The Committee recommends that, if the scheme of arrangement procedure is to be strengthened as an effective corporate rescue regime, two additional safeguards are necessary to afford protection to creditors during the period between the filing of an application of a scheme of arrangement and convening a meeting of creditors.
31. First, it is proposed that the timeframe for the application of the avoidance provisions ought to be suspended once any application for a scheme of arrangement has been filed in court, until the scheme of arrangement has been sanctioned by the court or rejected by the creditors or the court. This is necessary given the proposal that an enhanced moratorium should be available to a company once it files an application for its creditors to meet to consider a scheme of arrangement. The suspension of the timeframe for the application of the avoidance provisions will protect creditors and prevent abuse of the scheme of arrangement process. If a company is protected from its creditors during the period that it is preparing and presenting a scheme of arrangement for the consideration of its creditors, it is only fair that the creditors' rights with regard to the application of the avoidance provisions are not prejudiced if the scheme ultimately fails and the company is placed under liquidation or judicial management. Further, a company should not have the improper incentive of using the scheme of arrangement procedure to cause delay and to enter any improper transactions outside the scope of the avoidance provisions.
32. Secondly, there should be a provision that allows any creditor to apply to court to restrict any disposition of property by the company and/or any activities that are not carried out in the usual course of business by the company, after the filing of the application for a meeting of creditors to consider a scheme of

arrangement. As mentioned above, the company remains in the control of its management throughout the scheme of arrangement process, while enjoying the protection of a moratorium against actions and proceedings by its creditors. Creditors should therefore be given the power to apply to the court to prevent any improper asset disposals or business activities pending the approval and sanction of the scheme of arrangement.

(G) STATUTORY RIGHT TO APPLY TO COURT FOR DIRECTIONS

33. There are many practical and legal issues that may arise in the entire course of the scheme process, in particular, novel or difficult issues on the preparation, presentation, approval and implementation of schemes of arrangement. Judicial guidance will often be very useful for the resolution of such issues. Thus, the Court of Appeal in *TT International* has recently held that any dispute as to the classification of creditors can be raised at the first application to court to convene a meeting of creditors, instead of being left to the hearing of the application for sanction of the scheme of arrangement.²⁷⁹ Further, it is preferable that issues are resolved as early as possible and before steps are taken by the company on the basis of a disputed position, as opposed to having them ruled upon at the sanction hearing, where issues decided against the company could well result in the court declining to sanction the scheme.
34. Under the current legislative scheme, there is no statutory right given to companies, creditors and scheme managers to apply for directions relating to proposed schemes as well as sanctioned schemes. The Committee is of the view that the introduction of a wide and statutory right to seek such directions will be an important enhancement to the scheme of arrangement procedure. The further question is whether, on such an application, the court should have the power to delete, amend or add to the terms of a sanctioned scheme. Upon consideration, the Committee is of the view that the powers vested in the court should be limited in this regard to procedural and implementation issues,

²⁷⁹ See *TT International* at [61].

and not to the commercial terms of the scheme. In this regard, the Committee notes the decision of *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR (R) 121 where the court held that the scheme of arrangement which is approved by *all* the creditors of a company "is wholly a *contractual* scheme"; the court order sanctioning such a scheme (*i.e.*, a scheme which is approved by all of the company's creditors) can be seen as a *consensual order*. The court decided that it would in the exceptional case grant an extension of time in respect of a court-approved scheme, which is simply a matter of *procedure*, and would refrain from going into matters of substance or materiality of the commercial dimension of the scheme.

35. The Committee therefore recommends that there should be a statutory right given to the company, its creditors and scheme managers to apply to court for directions on the following issues:
 - (1) Any issue arising in relation to the approval and sanction of a scheme or proposed scheme, including but not limited to the issue of the nature and extent of the information that must be disclosed to the creditors for the purpose of voting on the proposed scheme;
 - (2) The interpretation of any term of a scheme or proposed scheme;
 - (3) The effect of a breach or non-compliance of a term of a scheme or proposed scheme;
 - (4) The amendment of terms or the incorporation of new terms in a sanctioned scheme relating to a procedural matter and not a commercial term of the scheme, provided that such amendment or incorporation does not conflict with any existing term; and
 - (5) The appropriate classification of creditors for the purpose of voting on a proposed scheme.

(H) POWER TO ORDER A RE-VOTE

36. Where an application is made for the sanction of a scheme, the court may grant or decline the sanction, or grant the sanction subject to such alterations or conditions as it thinks fits. However, there is no express statutory power given to the court to order a re-vote. In *TT International*, however, the Court of Appeal upheld the objections of opposing creditors in relation to the treatment of certain proofs of debt but did not reject the proposed scheme; instead, the court issued directions on how the proofs of debt should be treated and ordered a re-vote to be conducted on the proposed scheme.
37. The Committee is of the view that such power of a re-vote should be clearly statutorily provided for. Where objections to the approval process or the terms of a scheme are raised and upheld at the sanction stage, it may not always be appropriate for the court to reject the scheme altogether. The power to order a re-vote, with or without certain directions as to the conduct of the re-vote, is a useful power in the court's armoury which may, in appropriate cases, be used to avoid the re-starting of the whole scheme process and reduce costs and delay for the company and its creditors. Further, the power to order a re-vote may be useful where the court is considering to sanction a scheme subject to alterations of its terms, but is interested to know the views of the creditors on the altered scheme before finally deciding on whether to grant the sanction and the alterations that should be made.

(I) COMPANY VOLUNTARY ARRANGEMENTS ("CVA")

38. The Committee deliberated on whether the UK's CVA²⁸⁰ regime ought to be adopted in Singapore, in addition to the scheme of arrangement procedure.

²⁸⁰ See Part I of the UK Insolvency Act.

39. In UK, a CVA is a private scheme or composition agreement entered into between the company and its creditors which does not require court sanction. It may be proposed whether the company is solvent or insolvent.
40. Some of the key features of the CVA are as follows:
- (1) Only the management of a company may propose a CVA. This would include the administrator, liquidator or the directors of the company. The proposals, together with a statement of the company's affairs, would be submitted to the intended nominee.²⁸¹ The nominee is required to submit a report as to whether, in his opinion, a meeting of the company and its creditors should be summoned to consider the proposal and if so, when and where.
 - (2) Only a small eligible²⁸² company can obtain an interim moratorium by filing the requisite documents into court. No court hearing is required. This moratorium is broad in its scope and ends on the day that the creditors and members meetings are held. The moratorium may also be extended but for no more than 2 months.
 - (3) The relationship amongst the parties to a CVA is essentially contractual in nature and its scope and effects, including whether there ought to be a stay of proceedings, are determined by its terms. As such, the court has no power to give directions to amend a concluded CVA.
 - (4) Unlike schemes, the company is not required to hold separate meetings for distinct classes of creditors. All the creditors of the company are treated in the same class.
 - (5) If the CVA is approved by the creditors, the CVA only binds creditors who were entitled to vote at the meeting, regardless of whether they

²⁸¹ The nominee is the person who will implement the CVA if the proposals are accepted by the creditors.

²⁸² Section 1A of the UK Insolvency Act provides that only small companies can obtain a moratorium in this manner, i.e. companies with not more than (a) GBP 5.6 million in turnover, (b) GBP 2.8 million in balance sheet total and (c) 50 employees.

had notice of the meeting. Creditors who were not entitled to vote will not be bound by the CVA, although it may have an effect on their ability to obtain any leave that may be necessary to enforce his claim.

- (6) Unlike a scheme of arrangement where the onus is on the proponents of the scheme to show why the court should sanction it, the onus is on the objecting creditors to show why the CVA is unfairly prejudicial.
41. The Committee is of the view that the CVA regime was necessitated in the UK by two factors: first, the reluctance of parties to utilise the scheme of arrangement procedure, and second, the need for a system to encourage the rehabilitation of specifically small and medium-sized companies. Another consideration could be that the CVA regime allows a proposal to become binding on creditors without the need for court involvement except where opposing creditors bring the matter to court.
42. The Committee notes that these factors are not highly relevant or convincing in the Singapore context. The lack of success of the scheme of arrangement procedure in the UK was due in part to the fact that the UK provisions do not provide for a statutory moratorium after the scheme has been proposed but before it has been sanctioned by the court.²⁸³ In contrast, Singapore's scheme of arrangement provisions do provide for such a statutory moratorium. The scheme of arrangement procedure in Singapore is working well and is commonly used by both large and small companies. It has become familiar to the commercial community and professional and financial advisers, and the many court rulings and established practices have helped to make the procedure effective, expedient and fair. There does not appear to be any need for an additional regime performing a similar function. Also, based on the procedure for CVAs as set out above, the costs attendant to CVAs appear to be similar to those incurred in preparing a scheme of arrangement. Further, there is nothing to suggest that court involvement for schemes of arrangement in Singapore is a disincentive towards the use of the procedure, or that there

²⁸³ Cork Report at para 406 – 408.

is a substantial increase in costs as a result of court involvement. On the contrary, it appears that court supervision is welcomed by creditors and provides a strong safeguard against the abuse of the scheme of arrangement procedure.

43. As such, the Committee is of the view that steps should be taken to strengthen and supplement the existing scheme of arrangement procedure, rather than introduce the CVA regime into Singapore.

(J) *ADDITIONAL REFORMS ADAPTED FROM THE US BANKRUPTCY CODE*

44. The Committee has already expressed its views on the adoption of some features found in the US Bankruptcy Code in Chapter 6 on Judicial Management.²⁸⁴ The specific recommendations relevant to schemes of arrangement (including schemes of arrangement proposed by a company in judicial management) are set out below.

Super-Priority for Rescue Financing

45. Following from the Committee's recommendation at paragraph 71 of Chapter 6, the introduction of super-priority in the context of schemes of arrangement can be implemented in the following manner:
 - (1) During the intervening period between the filing of the first application in respect of a scheme and the subsequent sanction of the scheme, any grant of super-priority must be approved by the court.
 - (2) No statutory provisions are necessary for the grant of super-priority after the scheme has been sanctioned since such arrangements should be provided as part of the scheme

²⁸⁴ See paras 59 to 96 of Chapter 6 on Judicial Management.

Cram-Down Provisions on Dissenting Creditor Classes

46. As mentioned above, under the current legislative regime for schemes of arrangement, a scheme is not binding on any class of creditors that votes against the scheme. This usually means that a scheme will fail when any one class of creditors votes against it, because many scheme documents require that all classes of creditors must accept the scheme.

47. To prevent schemes, or similar rehabilitation mechanisms, from being stymied by a dissident class of creditors, certain jurisdictions have 'cram-down' provisions that allow a rehabilitation plan to be passed over the objections of a dissenting class of creditors. For example, under the US Bankruptcy Code,²⁸⁵ it is provided that:
 - (1) The court can override a dissenting class of creditors and confirm a Chapter 11 reorganisation plan if certain standards of fairness are met, and provided that at least one impaired class accepts the plan.

 - (2) The court can exercise this power if, broadly, the dissenting class either receives more under the plan than they would have in liquidation, or would have received nothing under the plan.

 - (3) The plan also must not discriminate unfairly with respect to the dissenting class. In this regard, a plan can discriminate between classes but it must be fair. For example, trade suppliers may get less dividends but in cash, whereas bank creditors get more dividends but in notes which mature several years later. The plan must also be fair and equitable.

48. Jurisdictions that have cram-down provisions appear to include the US, China, Japan, Germany and Italy. Jurisdictions that do not have cram-down provisions generally include various Commonwealth States such as the UK,

²⁸⁵ See section 1129 of the US Bankruptcy Code.

Canada and Australia.²⁸⁶ However, the courts in the UK and Canada tend to sanction larger classes of creditors, and deal with any resulting prejudice by a separate test that requires schemes be fair and equitable. They also do not permit shareholders and junior creditors whose rights are valueless to vote, which has been described as a “cram-down in substance”.²⁸⁷

49. The Committee considered various arguments in favour of introducing cram-down provisions, including the following:
 - (1) A minority of creditors in a dissenting class should not be able to veto a scheme merely because they are in a separate class, provided that they are treated fairly under the proposed scheme. Otherwise, a single dissenting class may hold the entire scheme ransom to the prejudice of the vast majority of creditors who support the scheme.
 - (2) Where the dissenting creditors get at least as much under the rescue plan as they would in liquidation, and are not being otherwise discriminated against, they cannot complain that the scheme is unreasonably imposed on them. Often, much of the dissention arises from creditors who merely wish to improve their bargaining position in order to obtain a greater share of the dividends.
 - (3) At present, there are cases where parties have spent much time and costs over the classification of creditors. Providing for a cram-down mechanism may help to avoid excessive emphasis on the classification exercise.
50. The main reason against introducing cram-down provisions is that it relies on comparative valuations between rescue and liquidation, which are often speculative or in some cases nuanced to make rescue sound more attractive. Where valuations have been prepared on such a basis, almost all creditors could be deemed to obtain more under the rescue plan than under liquidation.

²⁸⁶ This is because there is no requirement in Australia for creditors to be separated into classes.

²⁸⁷ See Philip Wood, *Principles of International Insolvency*, 2nd ed., (2007, Sweet & Maxwell, London) at p687.

51. In answer to the above criticism of such provisions, the Committee notes that, among other things, the dissenting creditor is free to produce an alternative valuation, and to engage experts to challenge the scheme manager's valuations. Further, the court will decide the matter based on the competing evidence before it. There are therefore adequate checks against abuse of cram-down provisions and unreasonable comparative valuations.
52. On balance, the majority of the Committee was of the view that such cram-down provisions should be introduced into our insolvency legislation, subject to the requirement that the requisite majorities in number and value of creditors must have been obtained overall. The majority felt, in particular, that the absence of such provisions allows a minority of creditors to hold out for better returns by threatening to veto a scheme merely because they form a separate class. However, a minority of the Committee do not support the introduction of cram-down provisions, primarily because of the subjective nature of the comparative valuations between rescue and liquidation. The minority noted that the US has very developed methodologies for valuation, and its large and developed economy allows for better comparative analysis to be made because there are usually other companies in the US that are in the same field. The minority also noted that Singapore's smaller economy may not allow for the same comparative analysis to be made.
53. In light of the above differences in opinion, the Committee further recommends that the court should require a high threshold of proof that the dissenting class is not going to be prejudiced by the cram-down. This is to better protect the rights of all creditors, and also to allow the court to check against abuse of cram-down provisions and unreasonable comparative valuations. If necessary, the court should be free to appoint a court assessor or expert to assist in the matter.

(K) SUMMARY OF RECOMMENDATIONS

54. In summary, the Committee recommends the following:

- (1) Sections 210, 211 and 212 of the Companies Act should be retained in the Companies Act with additional statutory support provided for in the New Insolvency Act where the company seeks a statutory moratorium against its creditors. Creditors should, however, have recourse to the court for an order that the additional statutory support in the New Insolvency Act will to apply to a scheme of arrangement, even if no moratorium has been sought by the company.
- (2) The scope of the statutory moratorium for schemes of arrangement should be no narrower than the moratorium in judicial management, and the court should be given discretionary powers to alter the scope of the moratorium to be granted to the company.
- (3) The court should have the power to grant a statutory moratorium where there is an intention to propose a scheme of arrangement, subject to such terms as the court sees fit to impose.
- (4) Statutory provisions should be introduced in the New Insolvency Act in relation to scheme of arrangement involving the creditors of a company, in relation to the filing and adjudication of proofs of debts and creditors' right to information and to dispute the adjudication. In particular, it should be provided that:
 - (a) Each creditor is entitled to review the proofs submitted by other creditors and to be informed of the decisions of the company or the scheme manager in adjudicating on such proofs and the basis for the decisions. Notice should be given to the company and the proving creditor before the proof is inspected, and the company and the proving creditor should have the right to object to the inspection. In this regard, the company or the proving creditor

should state reasons for objecting to the inspection, including any confidentiality issues precluding disclosure. An independent assessor (who may be either a qualified insolvency practitioner or an advocate or solicitor) shall thereafter decide whether the company or the proving creditor has a legitimate basis for declining to disclose the proof. If the independent assessor decides against disclosure, he must review the proof himself and state whether, in his opinion, the proof has been properly admitted. The independent assessor may also direct that part of the proof be disclosed, and/or that sensitive portions shall be redacted.

- (b) Each creditor is entitled to challenge the rejection of his proof by the company or the scheme manager, or the admission by the company or the scheme manager of another creditor's proof in full or in part.
- (c) Any dispute relating to the admission or rejection of a proof (for the purposes of voting) shall be heard by the independent assessor.
- (d) The independent assessor may be appointed when the company makes the first application to court in relation to a scheme of arrangement, upon the nomination of the company or any creditor or member. Alternatively, the independent assessor may be subsequently appointed once a matter requiring an assessment arises. In such instances, the independent assessor shall be appointed by agreement of the parties, failing which the independent assessor shall be appointed by the court.
- (e) The decisions of the independent assessor may be challenged in court, but only at the sanction hearing, to ensure that there are no tactical applications made with the objective of delaying the scheme of arrangement process.

- (f) Timelines should be imposed for the adjudication of proofs, challenges against the adjudication, the appointment of independent assessors and the independent assessors' assessment of any such dispute.
- (5) The principle of transparency, as applied to the information that should be disclosed to creditors, should not be statutorily enshrined and should be left to be governed by case-law.
- (6) Two additional safeguards to afford protection to creditors during the period between the filing of an application for a scheme of arrangement and convening a meeting of creditors should be introduced in the New Insolvency Act:
 - (a) The timeframe for the application of the avoidance provisions ought to be suspended once any application for a scheme of arrangement has been filed in court until the scheme of arrangement had been sanctioned by the court or rejected by the creditors or the court.
 - (b) There should be a provision that allows any creditor to apply to court to restrict any disposition of property by the company and/or any activities that may be carried out by the company, after the filing of the application for a meeting of creditors to consider a scheme of arrangement.
- (7) There should be a statutory right given to the company, its creditors and scheme managers to apply to court for directions.
- (8) The judicial power to order a re-vote should be clearly statutorily provided for.

- (9) The CVA regime should not be introduced in Singapore. Instead, steps should be taken to strengthen and supplement the existing scheme of arrangement procedure.
- (10) Provisions should be introduced into the scheme of arrangement regime to allow for the grant of super-priority for rescue finance.
- (11) Cram-down provisions should be introduced to allow a scheme of arrangement to be passed over the objections of a dissenting class of creditors, subject to the requirement that the requisite majorities in number and value of creditors must have been obtained overall. However, the court should require a high threshold of proof that the dissenting class is not prejudiced by the cram-down.

CHAPTER 8: AVOIDANCE PROVISIONS

1. As a general rule, only the assets that encompass the estate of the bankrupt or the insolvent company at the time when a bankruptcy, judicial management or winding up order is made (or a winding up resolution is passed) are available for distribution in satisfaction of the claims of the creditors. However, in certain situations, a transaction entered into by an individual or company prior to the onset of bankruptcy, judicial management or liquidation may be impugned under avoidance provisions in insolvency legislation. This is so that the effect of any value improperly lost by the individual or company, or any advantage improperly conferred on a third party as a result of the transaction can be reversed or otherwise remedied. In summary, the avoidance provisions currently found in our insolvency legislation deal with the following types of transactions:

- (1) Transactions at an undervalue;
- (2) Unfair preferences;
- (3) Extortionate credit transactions;
- (4) Unregistered charges;
- (5) Floating charges granted without fresh consideration;
- (6) Disclaimer of onerous property;
- (7) Transactions entered into with intent to defraud creditors;
- (8) Dispositions of property after the filing of a bankruptcy or winding up application;
- (9) Excess or shortfall in value of property acquired from or sold to the company;

(10) General assignment of book debts; and

(11) Transfer or assignment by a company of all its property to trustees for the benefit of all its creditors.

2. Most of the avoidance provisions are based on English legislation and reflect basic and well-established notions of insolvency law. There is no doubt that, save for two instances (namely, (9) and (10) above), they should be retained as part of our insolvency regime. The main issue is whether they should be revised, updated and/or enhanced in order to remain effective so as to fulfill their statutory objective.

(A) *TRANSACTIONS AT AN UNDERVALUE, UNFAIR PREFERENCES AND EXTORTIONATE CREDIT TRANSACTIONS*

3. The avoidance provisions dealing with transactions at an undervalue, unfair preferences and extortionate credit transactions are found in sections 98, 99 and 103 of the Bankruptcy Act respectively, read together with sections 100, 101 and 102 of the Bankruptcy Act. These provisions are imported into the judicial management and liquidation regimes via sections 227T and 329 of the Companies Act respectively and, when applied in the context of these regimes, are subject to the CABAR.
4. The Committee notes that these provisions were introduced as part of the reforms to the Bankruptcy Act in 1995 and were substantially modelled after similar provisions in the UK Insolvency Act. These provisions have generally worked well in the context of bankruptcy. However, the Committee notes that difficulties have arisen when applying these provisions to the liquidation and judicial management regimes, mainly because of the unsatisfactory legislative

technique of importing the provisions through sections 329 and 227T of the Companies Act and CABAR.²⁸⁸

5. As such, the Committee recommends that sections 98, 99 and 103 should be carried over to the New Insolvency Act. However, the Committee further recommends that the position under the UK Insolvency Act be adopted, i.e., two separate sets of provisions, one applicable to bankruptcy and the other to liquidations and judicial management, ought to be provided. This will obviate the need for cross-referencing or legislative importation and will ensure clarity and certainty in application.

Relevant Time

6. One common concept running through these avoidance provisions is that of the “relevant time”. An event occurs at a relevant time if it falls within a specified period prior to the filing of bankruptcy, liquidation or judicial management proceedings. Only transactions that occur within the specified period are vulnerable to challenge pursuant to these avoidance provisions.
7. The Committee notes that under our current law, the meaning of “relevant time” depends on whether the transaction is being challenged as a transaction at an undervalue, the giving of an unfair preference or an extortionate credit transaction. There are also differences in the meaning of “relevant time” in our current provisions and the corresponding provisions in the UK Insolvency Act. This becomes apparent when presented in tabular form:

²⁸⁸ See the comments of the Singapore Court of Appeal in *Show Theatres Pte Ltd (in liquidation) v Shaw Theatres Pte Ltd and another* [2002] 2 SLR(R) 1143 at [30] and the Singapore High Court in *Amrae Benchuan Trading Pte Ltd (in liquidation) v Tan Te Teck Gregory* [2006] 4 SLR(R) 969 at [19] and [20].

Nature of Challenge	Singapore	The UK
Unfair Preference (which is not also a transaction at an undervalue)	<u>Bankruptcy</u> : 2 years (in the case of a transaction with an associate) or 6 months (in all other cases) before the presentation of the bankruptcy application. ²⁸⁹	<u>Bankruptcy</u> : 2 years (in the case of a transaction with an associate) or 6 months (in all other cases) before the presentation of the bankruptcy application. ²⁹⁰
	<u>Liquidation</u> : 2 years (in the case of a transaction with an associate) or 6 months (in all other cases) before the commencement of liquidation. ²⁹¹	<u>Liquidation</u> : 2 years (in the case of a transaction with an associate) or 6 months (in all other cases) before the commencement of liquidation. ²⁹²
	<u>Judicial Management</u> : 2 years (in the case of a transaction with an associate) or 6 months (in all other cases) before the presentation of the application for judicial management order. ²⁹³	<u>Administration</u> : 2 years (in the case of a transaction with an associate) or 6 months (in all other cases) before the presentation of the application for administration or the date the administrator is otherwise appointed; and at the time between the making of an administration application and the making

²⁸⁹ See section 100(1) of the Bankruptcy Act.

²⁹⁰ See section 341 of the UK Insolvency Act.

²⁹¹ See section 329 of the Companies Act, read with the CABAR.

²⁹² See section 240 of the UK Insolvency Act.

²⁹³ See section 227T of the Companies Act.

		of an administration order on that application. ²⁹⁴
Transaction at an undervalue	<u>Bankruptcy</u> : 5 years before the making of the bankruptcy application. ²⁹⁵	<u>Bankruptcy</u> : 5 years before the making of the bankruptcy application. ²⁹⁶
	<u>Liquidation</u> : 5 years before the commencement of liquidation. ²⁹⁷	<u>Liquidation</u> : 2 years (in the case of a transaction with an associate) or 6 months (in all other cases) before the commencement of liquidation. ²⁹⁸
	<u>Judicial Management</u> : 5 years before the making of the application for a judicial management order. ²⁹⁹	<u>Administration</u> : 2 years (in the case of a transaction with an associate) or 6 months (in all other cases) before the presentation of the application for administration or the date the administrator is otherwise appointed; and at the time between the making of an administration application and the making of an administration order on that application. ³⁰⁰

²⁹⁴ See section 240 of the UK Insolvency Act.

²⁹⁵ See section 100 of the Bankruptcy Act.

²⁹⁶ See section 341 of the UK Insolvency Act.

²⁹⁷ See section 329 of the Companies Act, read with CABAR.

²⁹⁸ See section 240 of the UK Insolvency Act.

²⁹⁹ See section 227T of the Companies Act.

³⁰⁰ See section 240 of the UK Insolvency Act.

Extortionate Credit Transaction	<u>Bankruptcy:</u> 3 years before the making of the bankruptcy application. ³⁰¹	<u>Bankruptcy:</u> 3 years before the making of the bankruptcy application. ³⁰²
	<u>Liquidation:</u> 3 years before the commencement of liquidation. ³⁰³	<u>Liquidation:</u> 3 years before the company went into liquidation. ³⁰⁴
	<u>Judicial Management:</u> 3 years before the making of the application for a judicial management order. ³⁰⁵	<u>Administration:</u> 3 years before the company entered administration. ³⁰⁶

8. The different periods specified for each of the three avoidance provisions seek to strike an appropriate balance between preserving the sanctity of transactions and protecting the interests of the creditors of a bankrupt or insolvent company. After careful consideration, the Committee makes the following recommendations in respect of the “relevant time” for each of the three avoidance provisions:

- (1) For unfair preferences that do not amount to transactions at an undervalue, the relevant time for transactions with a “non-associate” should be increased from 6 months to 1 year. A 6-month period is felt to be too short and does not strike the appropriate balance between the competing considerations. In particular, a 6-month period may be too short if an individual or company (or its controllers) acts covertly and/or deliberately takes steps to delay or restrain the presentation of the relevant application. The Cork Committee had resisted lengthening the period beyond 6 months because they felt that a challenge to the

³⁰¹ See sections 75 and 103 of the Bankruptcy Act.

³⁰² See section 343 of the UK Insolvency Act.

³⁰³ See section 329 of the Companies Act, read with CABAR.

³⁰⁴ See section 244 of the UK Insolvency Act.

³⁰⁵ See section 227T of the Companies Act.

³⁰⁶ See section 244 of the UK Insolvency Act.

validity of a transaction would turn substantially on the contemporaneous evidence of the parties' acts and the state of their respective affairs at the relevant time.³⁰⁷ Hence, the Cork Committee had concerns that allowing parties to bring proceedings after significant amounts of time would work injustice to the parties, possibly because the parties may not maintain such contemporaneous evidence for long periods of time. However, the Committee feels that these concerns are less relevant in the context of modern-day Singapore given the ease with which documentary and other contemporaneous evidence (such as emails) may be stored. However, the 2-year period to challenge unfair preferences conferred on a party who is an associate should be retained.

- (2) It is felt that the relevant time for transactions at an undervalue should refer to a longer period than the relevant time for unfair preferences. The effects of the former are somewhat more egregious, in that they result in an overall reduction in the value of the bankrupt or insolvent company's estate, whereas the latter results in a re-allocation of the assets amongst creditors. That said, the current 5-year period seems too long and may create unnecessary concerns and difficulties in practice for parties seeking to enter into legitimate commercial transactions. The nexus between a transaction and the prejudice to creditors, and therefore the objectionable nature of the transaction, also weakens with the passage of time. Indeed, the most reprehensible form of a transaction at an undervalue is one that is entered into by parties with full knowledge of the insolvency of one of them and with the intention to deprive that party's estate of value; this type of transaction tends to be entered into close to the time when the insolvent party is placed under bankruptcy or insolvency proceedings. In the circumstances, it is felt that a period of 3 years from the time of the relevant application would strike the proper balance.

³⁰⁷ See Cork Report at paras 1259 – 1263.

- (3) For the reasons given in (2) above, the relevant period for extortionate credit transactions should remain at 3 years.
9. The Committee also notes that an insolvent party may try to evade the reach of the avoidance provisions by proposing an individual voluntary arrangement or scheme of arrangement, in the hope that the relevant time period would have expired by the time the bankruptcy, judicial management or liquidation proceedings formally set in. Therefore, the Committee recommends that in the computation of the relevant time should not take into account any period of time commencing from the making of an application for an individual voluntary arrangement or a scheme of arrangement and the subsequent withdrawal or dismissal of that application.
10. A further issue is that, in judicial management, there is no statutory provision which avoids dispositions of property effected during the period between the filing of a judicial management application and the making of a judicial management order (as may be contrasted with the position in liquidation).³⁰⁸ This is not surprising, as the company will need to continue trading during this period. However, if the company is placed under judicial management, there is no reason why transactions entered into during this period should be exempt from the avoidance provisions dealing with transactions at an undervalue, undue preferences and extortionate credit transactions. The Committee therefore recommends that, in the case of judicial management, express provision should be made for the “relevant time” to also cover the period between the presentation of the application for judicial management and the granting of the judicial management order.³⁰⁹

Definition of “Associate”

11. An issue that is common to the avoidance provisions relating to transactions at an undervalue and unfair preferences is the term “associate” in section 101 of the Bankruptcy Act. The term is important for two reasons.

³⁰⁸ See section 259 of the Companies Act.

³⁰⁹ See section 240(1)(c) of the UK Insolvency Act.

12. First, in the case of unfair preferences, where a debtor confers such a preference onto an “associate”, the relevant time will be extended from within 6 months from the time of the making of the relevant bankruptcy, winding up or judicial management application to within 2 years.³¹⁰ Second, for transactions at an undervalue, the presumption that the debtor was insolvent at the time or became insolvent as a consequence of the transaction is automatically triggered if the impugned transaction was entered into with an “associate”.³¹¹
13. The term “associate” in the Bankruptcy Act is relatively clear and has been applied with little difficulty in the context of bankruptcy. However, the application of the term has met difficulties in the liquidation or judicial management of companies. For this, one must navigate the maze of statutory provisions comprising sections 227T and 329 of the Companies Act, section 101 of the Bankruptcy Act (which is imported by virtue of the two aforementioned provisions) and the CABAR. Indeed, the Singapore courts have commented on the unwieldy nature of this exercise, noting the clearer drafting approach adopted in the UK Insolvency Act.³¹²
14. Unlike the approach taken in our legislation, the UK Insolvency Act provides for separate avoidance provisions for individual bankruptcy and corporate insolvency.³¹³ The avoidance provisions on transactions at an undervalue and unfair preference provisions in the context of the liquidation and administration of companies employ a different concept of “connected persons”. This is defined to mean (a) a director or shadow director of the company or an “associate” of such director or shadow director, or (b) an “associate” of the company.³¹⁴ As to the meaning of the term “associate”, a

³¹⁰ See sections 100(1)(b) and (c) of the Bankruptcy Act.

³¹¹ See section 100(3) of the Bankruptcy Act.

³¹² See the comments of the Singapore Court of Appeal in *Show Theatres Pte Ltd (in liquidation) v Shaw Theatres Pte Ltd and another* [2002] 2 SLR(R) 1143 at [30] and the Singapore High Court in *Amrae Benchuan Trading Pte Ltd (in liquidation) v Tan Te Teck Gregory* [2006] 4 SLR(R) 969 at [19]-[20].

³¹³ See the UK Insolvency Act sections 238 to 246 for liquidations and administrations, and sections 339 to 344 for personal bankruptcy.

³¹⁴ See section 249 of the UK Insolvency Act.

single reference is then made to the definition found in the general interpretive section at Part XVIII of the UK Insolvency Act.

15. The drafting technique in the UK Insolvency Act is to be preferred as it provides for a unified definition of “associate” applicable to both personal bankruptcy and corporate insolvency regimes, with an additional concept of “connected persons” which is unique to the corporate insolvency regime. It is therefore recommended that a similar approach be adopted in the New Insolvency Act.

Test for Insolvency

16. Another issue common to transactions at an undervalue and unfair preferences is the test for determining insolvency.
17. Under section 100(2) of the Bankruptcy Act (applicable to companies via sections 227T and 329 of the Companies Act), in order for a transaction to be regarded as an undervalue transaction or an unfair preference, the bankrupt or company must either (a) have been insolvent during the relevant time, or (b) have become insolvent as a result of the transaction. Section 100(4) of the Bankruptcy Act further provides that a debtor shall be insolvent if (a) he is unable to pay his debts as they fall due (i.e. otherwise referred to as the “cash-flow test”) or (b) the value of his assets is less than the amount of his liabilities, taking into account his contingent and prospective liabilities (i.e. otherwise referred to as the “balance sheet test”).
18. The Committee considered whether it was appropriate to retain only the balance sheet test for the purposes of the avoidance provisions relating to transactions at an undervalue and unfair preferences. The issue was whether a transaction at an undervalue entered into, or an unfair preference given, by an individual or company that is balance sheet solvent should be rendered vulnerable. One could reasonably argue that, if the individual or company remained balance sheet solvent after the transaction or the preference, no

creditors have in fact been prejudiced and there would be no basis for impugning the transaction or the preference.

19. However, the Committee has decided not to make any recommendation in this regard. The Committee notes that the two tests in section 100(4) of the Bankruptcy Act are the same as those applied in the UK Insolvency Act and are well-established tests for insolvency.³¹⁵ Moreover, the court retains the ultimate discretion whether to grant any relief even if a transaction at an undervalue or the giving of an unfair preference is established; if no prejudice to the creditors has indeed been occasioned, the court may decline to intervene in the transaction or the preference.

20. In this regard, the Committee notes that the UK test of insolvency applicable to undervalue transactions and unfair preferences in corporate insolvencies is wider than section 100(4) of our Bankruptcy Act. Section 240(2) read with section 123(1) of the UK Insolvency Act recognises additional grounds for satisfying the test of insolvency. These include the failure to satisfy a written demand issued by a creditor within a specified period, or to satisfy, in whole or in part, execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company. The Committee however recommends that the test for insolvency should not be widened in Singapore to parallel the UK position. First, the Committee notes that the court can already take into account whether a statutory demand or judgment debt or execution has gone unsatisfied, which tempers the need for such provisions to be adopted. Second, the UK position appears to be somewhat inconsistent, as the wider test set out above only appears to apply to corporate insolvency, and not individual insolvency.³¹⁶ It is not apparent to the Committee that there is a solid basis for the divergent approaches adopted in the UK. Third, the presumption of insolvency when a company fails to satisfy a statutory demand makes more sense for winding up applications, because it is a useful tool to redress the imbalance in knowledge between the applicant creditor (who

³¹⁵ The exact meaning of the two tests continue to be fine-tuned by the courts: see e.g. *BNY Corporate Trustee Services Limited and others v Neuberger Berman Europe Ltd (on behalf of Sealink Funding Ltd) and others* [2013] UKSC 28.

³¹⁶ See section 341(3) of the UK Insolvency Act.

knows little of the financial status of the company) and the defendant company. This presumption may be less necessary in avoidance proceedings between the applicant liquidator and a defendant creditor/beneficiary of avoidable transactions.

Desire to Prefer

21. Section 99(4) of the Bankruptcy Act provides that a court will not unwind a particular transaction as an unfair preference unless it is proven that the person, in giving the preference, was influenced in deciding to give it by a “desire to prefer” the recipient (i.e. putting the recipient in a better position in the event of that person’s bankruptcy). This requirement is premised on a subjective assessment of the debtor’s intentions at the relevant time of the transaction, and is consistent with the approach currently found in the UK Insolvency Act.³¹⁷
22. This subjective approach contrasts with the objective approach taken in the Australia Corporations Act. The latter provides that a transaction may be challenged as a preference if, amongst other things, the transaction results in the creditor receiving from the debtor, in respect of an unsecured debt that the debtor owes to the creditor, more than the creditor would receive from the debtor in respect of the debt than if the transaction were set aside and the creditor were to prove for the debt in a winding up of the debtor.³¹⁸ This objective approach focuses on the overall effect of the transaction on the creditor in question, rather than the subjective intention of the debtor.
23. The Committee notes that the subjective approach has been the subject of a fair amount of judicial pronouncement such that the applicable principles are relatively well-settled.³¹⁹

³¹⁷ See sections 239(5) and 340(4) of the UK Insolvency Act.

³¹⁸ See section 588FA(1) of the Australia Corporations Act.

³¹⁹ See *Re Libra Industries Ltd* [1999] 3 SLR(R) 205 and *Amrae Benchuan Trading Pte Ltd v Tan Te Teck Gregory* [2006] 4 SLR(R) 969, following *Re MC Bacon* [1990] BCLC 324. See also *Liquidators of Progen Engineering v DBS* [2010] 4 SLR 1089, *DBS Bank Ltd v Tam Chee Chong and another (judicial managers of Jurong Hi-Tech Industries Pte Ltd (under judicial management))* [2011] 4 SLR 948 and *Coöperatieve Centrale*

- (1) The test is not whether there was a dominant intention to prefer, but whether the debtor's decision was influenced by a desire to prefer the creditor.
 - (2) The court will look at the desire (a subjective state of mind) of the debtor to determine whether it had positively wished to improve the creditor's position in the event of its own insolvent liquidation.
 - (3) The requisite desire may be proved by direct evidence or its existence may be inferred from the existing circumstances of the case.
 - (4) It is sufficient that the desire to prefer is one of the factors that influenced the decision to enter into the transaction; it need not be the sole or decisive factor.
 - (5) A transaction that is actuated only by proper commercial considerations will not constitute a voidable preference. A genuine belief in the existence of a proper commercial consideration may be sufficient even if, objectively, such a belief might not be sustainable.
24. The Committee notes various arguments advocating that the subjective approach ought to be jettisoned in favour of the objective approach.
25. First, it has been argued that the primary policy objective of the unfair preference provision is to ensure that “once a company becomes insolvent, no individual creditor should be allowed to steal a march on his competitors”³²⁰ and disrupt “the proper distribution of the bankrupt’s estate *pari passu* among the creditors”.³²¹ This suggests that the effect of the payment is of far greater relevance than the motive.

Raiffeisen-Boerenleenbank BA (trading as Rabobank International, Singapore Branch) v Jurong Technologies Industrial Corp Ltd (under judicial management) [2011] 4 SLR 977.

³²⁰ Goode, *Principles of Corporate Insolvency Law*, 4th Ed., (London, Sweet & Maxwell, 2011) at p571

³²¹ See Cork Report, at para1241.

26. Second, the defence of “genuine commercial pressure”,³²² which is a necessary feature of the subjective approach, is itself inimical to the concept of ensuring *pari passu* distribution. It is also inconsistent with the prevailing public interest in permitting viable commercial entities (even those that are temporarily insolvent) to trade themselves out of financial difficulties in that it encourages large creditors to actively pressure the debtor into making a preferential payment, which inevitably hastens the debtor towards bankruptcy or insolvency.
27. Third, it places too high a burden on the Official Assignee, liquidator or the judicial manager, being outsiders, to prove the subjective motivation of the bankrupt or the insolvent company. Indeed, the motives of a person in relation to a particular act are often facts that are solely within the knowledge of that person.³²³ It could therefore be argued that it is fairer not to require the Official Assignee, liquidator or judicial manager to prove the intentions of the debtor under the subjective approach. Instead, it should be sufficient for these office-holders to show that a preference had taken place under the objective approach and leave it to the recipient of the preference to show why the transaction should not be undone.³²⁴
28. The Committee has considered the above arguments, and nevertheless recommends that the subjective approach be retained. The Committee notes that all payments made to a creditor after a debtor goes insolvent would have the effect of preferring that creditor. One consequence of the objective approach is therefore that all payments made after insolvency are *prima facie* liable to be set aside. The Committee considers that such an approach is not suitable, both in principle and for practical reasons.
29. The Committee considers that there should be no *prima facie* rule that all payments to creditors should be set aside as a breach of the unfair preference

³²² *Re MC Bacon* [1990] BCLC 324.

³²³ It should be noted that this burden has been discharged in recent cases: see *DBS Bank Ltd v Tam Chee Chong and another* (judicial managers of *Jurong Hi-Tech Industries Pte Ltd* (under judicial management)) [2011] 4 SLR 948; and *Coöperatieve Centrale Raiffeisen-Boerenleenbank BA* (trading as *Rabobank International, Singapore Branch*) v *Jurong Technologies Industrial Corp Ltd* (under judicial management) [2011] 4 SLR 977.

³²⁴ See e.g. section 108 of the Evidence Act (Cap. 97).

rule. For example, it should be permissible for a financially distressed company to make reasonable and legitimate attempts to stave off formal insolvency proceedings by making payments to certain creditors, even if the effect is that these creditors enjoy an advantage over other creditors. There is also a strong public interest in permitting viable commercial entities (even those that are temporarily insolvent) to trade themselves out of financial difficulties. Adopting the objective approach may have the effect of discouraging the continuation of trade with a company perceived to be in financial difficulties, because all trades with a debtor run the risk of being set aside. This ‘cessation of payments’ will further endanger a financially-troubled debtor’s ability to trade through a period of crisis, and thus worsen the debtor’s financial difficulties, making it more likely that the debtor will enter into bankruptcy or liquidation. Currently, the core of the unfair preference rule strikes a proper balance: it prevents a deliberate attempt by debtors to prefer specific “friendly” creditors, such as their family or associates, in order to protect these “friendly” creditors from the debtors’ impending bankruptcy or liquidation, at the expense of the other creditors, while not affecting transactions entered into for proper commercial considerations or pursuant to a honest and reasonable exercise of commercial judgment. This seems to strike a better balance than the objective approach.

30. Further, the objective approach places the burden on the creditor who receives the payment to justify the transaction. This places an unduly heavy obligation on such a creditor, and affects the security and certainty of payments.
31. The Committee therefore recommends that the existing subjective approach found in section 99(4) of the Bankruptcy Act be retained, and incorporated into the New Insolvency Act.

(B) UNREGISTERED CHARGES

32. Though section 131(1) is not situated in the relevant Parts of the Companies Act relating to winding up, it is a provision which avoids certain types of security granted by a company in the event of its winding up. Pursuant to this provision, a charge created by a company over certain categories of property, shall be void against the liquidator of the company, if the charge is not registered within 30 days of its creation.³²⁵
33. The Committee is of the view that section 131(1) should be retained in the Companies Act and should not be moved to the New Insolvency Act.³²⁶ It is part of a series of statutory provisions relating to the overall registration regime for company charges, and these provisions are more appropriately housed in the Companies Act.
34. The Committee further notes that section 131(1), unlike the equivalent provision in section 874 of the UK Companies Act, renders an unregistered charge void only against the liquidator and not a judicial manager. The Committee agrees with this. An unregistered charge should not be void against the judicial manager, as the judicial management may successfully rehabilitate the company and the company may emerge from judicial management as a going concern. However, at the same time, an unregistered charge should be unenforceable during the period of judicial management, that is, the debt secured by the unregistered charge should be regarded as an unsecured debt during the judicial management and may be dealt with as such by the judicial manager. Upon the discharge of the judicial management, the unregistered charge ceases to be unenforceable (unless, of course, the company goes into liquidation upon the discharge of the judicial management, in which case it becomes void under section 131(1)).

³²⁵ Section 131(1) also provides that the unregistered charge is void against a creditor of the company; however, this provision has been construed to refer to creditors who have a proprietary interest in the asset: *Re Ehrmann Bros Ltd* [1906] 2 Ch 697. Nevertheless, it has been held that from the presentation of a winding up application, unsecured creditors have a beneficial interest in the property of the company so as to qualify as a 'creditor' for the purposes of section 131(1): see *Ng Wei Teck Michael v Oversea-Chinese Banking Corp* [1998] 1 SLR(R) 778.

³²⁶ See the reasons cited for retaining the equivalent provision in section 874 of the UK Companies Act in Goode, "Principles of Corporate Insolvency Law", 4th Edition, 2011 at p13-124.

(C) FLOATING CHARGES

35. Floating charges that are granted by companies to secure past indebtedness are vulnerable to challenge under section 330 of the Companies Act. Specifically, the section provides that a floating charge created within 6 months of the commencement of the winding up of a company that does not secure a cash advance made to the company at the time of or consequently to its creation is deemed invalid unless it is shown that the company remained solvent immediately after the creation of the charge.

36. Section 330 of the Companies Act differs from the corresponding provision in section 245 of the UK Insolvency Act in a few significant respects. First, section 330 applies in liquidation, but not in judicial management,³²⁷ unlike its UK counterpart which applies in both regimes. Second, whereas section 330 of the Companies Act preserves the validity of a floating charge to the extent that it secures the contemporaneous or subsequent payment of “cash” to the company, section 245 of the UK Insolvency Act adopts a more liberal approach by recognising the provision of other forms of value to the company, such as goods or services supplied, the discharge or reduction in debt, as well as applicable interest. Third, the requirement in the UK provision that the company is insolvent immediately after the creation of the floating charge only applies where the charge is granted to a person who is not “connected to the company”. In other words, where the floating charge is created in favour of a person “connected to the company”, it is irrelevant whether the company is insolvent immediately following the creation of the charge. Fourth, the relevant time period under the UK Insolvency Act is longer than the 6-month period stipulated in section 330 of the Companies Act. In fact, it is differentiated based on whether the chargee is a person “connected to the company”,³²⁸ namely, 12 months in the case of a floating charge granted to a person who is

³²⁷ Section 330 of the Companies Act can be made applicable to judicial management upon application to court under section 227X(b). However, importation is problematic because the holder of a floating charge, even if such charge is unregistered, may veto the making of a judicial management order.

³²⁸ See section 245(3) of the UK Insolvency Act.

not connected to the company and 2 years in the case of a floating charge granted to a connected person.

37. In the Committee's view, section 330 of the Companies Act should be amended to adopt the approach taken in section 245 of the UK Insolvency Act. As with section 131(1) of the Companies Act, there is no justification for constraining the application of section 330 to liquidation and not judicial management. The recognition of other forms of "value" given to the company is also sensible since the provision of goods and services, as well as the discharge or reduction of the company's debt, have the effect of swelling the value of the pool of assets belonging to the company and there is no reason why the provision of such value cannot be legitimately secured by a floating charge. Not requiring proof of the company's insolvency where the charge is granted to a person connected to the company is also justifiable since such an "insider" would be in a better position than an ordinary creditor of the company to assess the financial position of the company and take the necessary steps to safeguard his interests over that of other creditors. Finally, the relevant time period as provided in section 245 of the UK Insolvency Act should also be incorporated. Given that section 330 of the Companies Act operates on similar policy considerations that underpin the unfair preference provision in section 99 of the Bankruptcy Act, the relevant time period should be the same.

(D) *DISCLAIMER*

38. In both liquidation and bankruptcy, the insolvency office-holder is statutorily empowered to disclaim onerous property.³²⁹ The types of onerous property which may be disclaimed are as follows:

- (1) Any estate in land which is burdened by onerous covenants;

³²⁹ See section 332 of the Companies Act and section 110(1) of the Bankruptcy Act.

- (2) Shares in corporations;
 - (3) Unprofitable contracts; or
 - (4) Any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money.
39. However, the liquidation and bankruptcy regimes impose different controls on situations in which property may be disclaimed: in liquidation, the liquidator must apply to court or the committee of inspection for leave to disclaim any onerous property; whereas in bankruptcy, the Official Assignee may unilaterally disclaim onerous property at any time in writing (save for leases, which require leave of court, or the agreement of all persons interested in the property).
40. Singapore's disclaimer provisions are generally based on an old version of the UK's statutory provisions. Since the introduction of the UK Insolvency Act, the position in the UK has been modified, *inter alia*, in the following respects:
- (1) A liquidator may disclaim property unilaterally without having to apply to court for leave to do so, in the following manner:
 - (a) The liquidator disclaims the onerous property by giving notice of the disclaimer in the form prescribed by statute to the relevant persons who are interested in the property.³³⁰
 - (b) The notice of disclaimer must be served on the relevant persons interested in the property within seven days of the disclaimer. This notice must contain enough particulars of the property to make it identifiable. A copy of the notice must be forwarded to the

³³⁰ See section 178(2) and (4) of the UK Insolvency Act.

Registrar of Companies, (or the Chief Land Registrar, if registered land is disclaimed).³³¹

- (c) After a disclaimer has been carried out, a person claiming an interest in the disclaimed property, or who is under an outstanding liability in respect of the disclaimed property, may apply to court for the property to be vested in him or his trustee.³³² Alternatively, a person affected by the proposed disclaimer could apply to the court to review the liquidator's decision to disclaim the property.³³³

- (2) The categories of property which can be disclaimed have been more liberally defined.³³⁴ This is discussed further at paragraph 46 below.

- 41. Accordingly, the UK approach places the burden on any person interested in the property to apply to court to have it vested in them or to object to the disclaimer, as opposed to the Singapore approach where the burden of applying to court is placed on the liquidator.
- 42. The UK approach further allows property to be disclaimed where it is unsaleable or not readily saleable or requires the payment of money or the performance of any onerous act. This is as opposed to the Singapore approach where property (other than estates in land or shares) may only be disclaimed if it is unsaleable or not readily saleable by reason of requiring the payment of money or the performance of any onerous act.

Requirement for Leave of Court

- 43. The Committee is of the view that the requirement that liquidators apply to court for leave to disclaim property ought to be abrogated, and that a proper balance is best achieved by:

³³¹ See Rules 4.187 and 4.188 of the UK Insolvency Rules.

³³² See section 181 of the UK Insolvency Act.

³³³ See section 168(5) of the UK Insolvency Act.

³³⁴ See section 178(3) of the UK Insolvency Act.

- (1) Allowing insolvency office-holders to disclaim property without requiring the leave of court or the committee of inspection.
 - (2) Requiring advance notice of the proposed disclaimer to be given to the creditors, Official Receiver and any other relevant parties. In the event that the insolvency office-holder has cause to suspect that some third party may have an interest, but the third party is not immediately locatable, the insolvency office-holder should be required to advertise his proposal in a newspaper and/or the government gazette.
 - (3) Allowing any relevant parties affected by the proposed disclaimer to apply to court to object to the same.
44. Regarding the standard of review in an application to object to a proposed disclaimer, the Committee noted that under present UK law, an interested party may only be entitled to set aside a proposed disclaimer if the liquidator had not exercised his discretion *bona fide*, or had acted in such a way that no reasonable liquidator would act.³³⁵ In contrast, prior to the amendments to the UK Insolvency Act, leave of court to disclaim property would not be granted if the injury caused to the person affected by the disclaimer outweighed any advantage likely to be gained by the liquidator in administering the assets.
45. The Committee took the view that the latter standard of review applied by the court appropriately safeguards the interests of the interested parties. It seems somewhat unfair that a disclaimer may prejudice the rights of the interested parties as long as the liquidator acts *bona fide* or reasonably; there ought to be a balancing of the competing interests. The Committee recommends that the disclaimer provisions in the New Insolvency Act should provide that the court may, upon the application of any person affected by a proposed disclaimer, set aside the proposed disclaimer or make such order as the court thinks just where the injury caused to the person affected by the disclaimer

³³⁵ *Re Hans Place Ltd*, [1992] B.C.C. 737; Keay, *McPherson's Law of Company Liquidation*, 2nd ed. (2009, Sweet & Maxwell, London), at p574.

outweighs any advantage likely to be gained by the liquidator in administering the assets or in such other appropriate circumstances.

Categories of Property which can be Disclaimed

46. The Committee considered whether the categories of property which can be disclaimed ought to be more liberally defined. As noted above, the categories of property which can presently be disclaimed under section 332 of the Companies Act are (a) any estate in land which is burdened by onerous covenants; (b) shares in corporations; (c) unprofitable contracts; or (d) any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act or to the payment of any sum of money. The Committee noted that one impractical consequence of the present categories of property is that an insolvency office-holder would not be able to disclaim property (besides shares or estates in land) which are unsaleable, in instances where the unsaleability does not arise “by reason of [the property] binding the possessor thereof to any onerous act, or to the payment of any sum of money”.³³⁶
47. The UK Insolvency Act has both simplified and liberalised the above approach to the categories of property which may be disclaimed, allowing the following property to be disclaimed:
 - (a) Any unprofitable contract.
 - (b) Any other property of the company which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any onerous act.³³⁷
48. The Committee recommends that the New Insolvency Act should adopt the position under the UK Insolvency Act and replace the four categories of

³³⁶ See section 332(1)(d) of the Companies Act; *Re Potters Oil Ltd (in liquidation)*, [1985] BCLC. 203; Fletcher, *The Law of Insolvency*, 4th ed. (2009, Sweet & Maxwell, London) at para 24-004.

³³⁷ See section 178(3) of the UK Insolvency Act.

property under section 332 with the two broad categories listed above. This is because one primary objective of allowing the disclaimer of onerous property is to enable insolvency office-holders to complete the administration of liquidations and bankruptcies without being held up by continuing obligations under unprofitable contracts or the continued ownership and possession of assets which are of no value to the estate.³³⁸ Accordingly, the Committee is of the view that there is no reason to prevent the disclaimer of property which is unsaleable, even if it does not require the payment of money or the performance of any onerous act.

49. The Committee further notes that issues have arisen in other jurisdictions as to whether insolvency office-holders are able to disclaim property which is governed by separate environmental statutory provisions, such as waste management licenses.³³⁹ This issue is best addressed by provisions in the relevant environmental legislation. However, the Committee recommends that statutory provisions should be made to prescribe that the decision to disclaim shall not be made by the insolvency office-holder or the court if it will breach the environmental legislation or its stated purpose.

Disclaimer in Judicial Management

50. The Committee noted that in other jurisdictions such as the UK, administrators are not given the power to disclaim property.³⁴⁰ Notwithstanding the above, the Committee considered that such a power may assist judicial managers to achieve one or more of three statutory purposes of judicial management, viz., (a) the survival of the company or the whole or part of its undertaking as a going concern, (b) the implementation of a scheme of arrangement and (c) a more advantageous realisation of the company's assets than in a liquidation.³⁴¹ The Committee further notes that, where a company goes into

³³⁸ See *In re SSSL Realisations (2002) Ltd*, [2006] Ch 610.

³³⁹ See *Re Celtic Extraction Ltd* [2001] 1 Ch 475.

³⁴⁰ See *Astor Chemical Ltd v Synthetic Technology* [1990] BCC 97, followed by Scott J. in *Re P&C and R&T (Stockport) Ltd* [1991] BCLC 366 at 374c: "...an administration order does not constitute an authority for the administrators to break the company's contracts. There is no power of disclaimer such as is available to liquidators".

³⁴¹ See section 227B(1)(b) of the Companies Act.

liquidation after judicial management, it may in some instances be too late to wait for liquidation before allowing the disclaimer of onerous property.

51. In light of this, the Committee recommends that judicial managers should be given the power to disclaim onerous property.

(E) TRANSACTIONS TO DEFRAUD CREDITORS

52. An avoidance provision found outside of the Companies Act is section 73B of the Conveyancing and Law of Property Act (“**CLPA**”). The provision has its roots in the Statute of Elizabeth 1571 and was introduced into Singapore law by way of the Application of English Law Act, before its current enactment in the CLPA. Pursuant to this provision, any conveyance of property entered into with the intention to defraud creditors shall be voidable at the instance of any person who is prejudiced by that conveyance. A challenge to a conveyance under section 73B of the CLPA may be resisted where the property was disposed of for valuable consideration and in good faith, or, in the case of the recipient of the property, it was for good consideration and in good faith without any notice of the intention to defraud creditors. Significantly, the provision may be invoked, regardless of whether the transferor has been made a bankrupt or is subject to a winding up order.
53. Section 73B of the CLPA essentially mirrors the language of section 172 of the UK Law of Property Act 1925. The latter provision, however, has since been repealed by the UK Insolvency Act 1985 and replaced with the current section 423 of the UK Insolvency Act. In this regard, the Committee notes that section 423 of the UK Insolvency Act differs from section 73B of the CLPA in a number of major respects:
 - (1) The UK provision focuses on a narrower category of transactions (i.e. undervalue transactions) as opposed to the Singapore provision which applies to “every conveyance of property”.

- (2) The UK provision eschews the requirement of having to prove an “intention to defraud creditors” in favour of a subjective inquiry into the “purpose” of the transaction (i.e. either to put the asset beyond the reach of a person making or who may at some point make a claim against the debtor, or otherwise prejudice the interests of such a person in relation to the claim that he is making or may make).
 - (3) The UK provision provides prescriptive remedies subject to the overriding purpose of restoring the position to what it would have been had the transaction not taken place and protecting the interests of persons who are victims of the transaction.³⁴² In contrast, the Singapore provision simply provides that a successfully impugned transaction is voidable.
54. The Committee notes the recent observations of the Singapore courts that claims under section 73B of the CLPA are, by their very nature, closely intertwined with insolvency proceedings.³⁴³ In the circumstances, the Committee is of the view that the provision should be moved to the New Insolvency Act and amended to mirror the current language in section 423 of the UK Insolvency Act. This not only has the advantage of ensuring that all the relevant avoidance provisions are housed under the same primary legislation, but also lends greater conceptual clarity to the operation of this avoidance provision by, amongst other things, ensuring that its scope coincides with the underlying policy rationale (i.e. the preservation of the net asset value of the company for distribution amongst its creditors).

(F) VOID DISPOSITIONS

55. Section 77 of the Bankruptcy Act voids any disposition of property, including any payment (whether cash or otherwise) by the bankrupt to any person,

³⁴² See sections 423(2) and 425 of the UK Insolvency Act.

³⁴³ See *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414.

between the presentation of the bankruptcy application and the making of the bankruptcy order save to the extent that such disposition is made with the consent of, or been subsequently ratified by, the court. In considering whether or not to ratify a disposition, the court will “always do its best to ensure that the interests of the unsecured creditors will not be prejudiced”.³⁴⁴ So as to mitigate the harsh consequences that flow from this provision, exceptions are provided to cater to arms-length transactions where the disposition was entered into without any prior knowledge of the bankruptcy application.³⁴⁵

56. Similarly, section 259 of the Companies Act voids, amongst other things, any disposition of property belonging to a company (including things in action) made after the commencement of winding up by the court unless otherwise ordered by the court. Whilst this provision is comparatively less detailed than section 77 of the Bankruptcy Act, the applicable principles relating to the similarly worded provision in the UK Insolvency Act³⁴⁶ have been laid down by the English courts and are likely to be adopted by the Singapore courts:

- (1) That the court will only validate payments or dispositions by the company that are made while the petition for winding up is pending, if made honestly and for the benefit of the company and in the ordinary course of business.³⁴⁷
- (2) The fundamental principle guiding the exercise of the court’s discretion is that it will not validate any transaction which would result in a pre-liquidation creditor being paid in full at the expense of other creditors who will only receive dividends, unless to do so will benefit the unsecured creditors as a whole.³⁴⁸

³⁴⁴ See *Denney v John Hudson & Co Ltd* [1992] BCLC 901 at 904; cited with approval in *Cheo Sharon Andriesz v Official Assignee of the estate of Andriesz Paul Matthew, a bankrupt* [2012] 4 SLR 89; affirmed on appeal, [2013] 2 SLR 297.

³⁴⁵ See section 77(3) and (4) of the Bankruptcy Act.

³⁴⁶ See section 127 of the UK Insolvency Act.

³⁴⁷ See *Burton & Deakin Ltd, Re* [1977] 1 WLR 390.

³⁴⁸ See *Gray’s Inn Construction Co Ltd, Re* [1980] 1 WLR 711 (CA).

- (3) In circumstances where a creditor who received the company's property refuses to voluntarily surrender the property, thus causing the liquidator to resort to section 259 proceedings to avoid a disposition, the liquidator can deduct the costs of getting in that asset from any dividend which is subsequently payable to the creditor.³⁴⁹
 - (4) Only assets that are beneficially owned by the company at the time of the alleged disposition will constitute the "property of the company" for the purposes of this provision.³⁵⁰
 - (5) Where a company's bank account is in credit, payment in the form of cash or third party cheques drawn in favour of the company that are accepted by the bank, collected by it on the company's behalf and credited to the company's account do not amount to a "disposition of the company's property" for the purposes of the provision. Conversely, where the company's bank account is overdrawn at the date of presentation of the winding up petition, any payments into that account for the credit of the company, whether in the form of cash or cheques drawn in the company's favour, have the effect of reducing the size of the overdraft and therefore constitute dispositions to the bank.³⁵¹
 - (6) No disposition occurs as between the company and its bank when cheques drawn by the company in favour of third parties are honoured by the bank in debiting the account by the relevant amount. Only the third party payee of the cheque is liable to make good the disposition at the instance of the liquidator under section 259.³⁵²
57. The Committee notes that the provisions in section 77 of the Bankruptcy Act and section 259 of the Companies Act are largely similar to the equivalent provisions in the UK Insolvency Act³⁵³ and that no practical difficulties have

³⁴⁹ See *Davies Chemists Ltd, Re* [1992] BCC 697.

³⁵⁰ See *French's (Wine Bar) Ltd, Re* [1987] BCLC 499.

³⁵¹ See *Barn Crown Ltd, Re* [1994] BCC 381.

³⁵² See *Bank of Ireland v Hollicourt (Contracts) Ltd* [2000] BCC 1210.

³⁵³ See sections 127 and 284 of the UK Insolvency Act.

arisen in their application. There is also a substantial body of case-law on these provisions which give guidance to the court in the exercise of its discretion. These provisions are of established vintage, and have worked well in Singapore. In the circumstances, the Committee recommends that these provisions be retained in the New Insolvency Act.

(G) *EXCESS OR SHORTFALL IN VALUE OF PROPERTY ACQUIRED FROM OR SOLD TO THE COMPANY*

58. Section 331 of the Companies Act gives a liquidator the right to recover monies representing the excess or shortfall in value of property acquired from or sold to the company (as the case may be). This is an obscure provision modelled after section 295 of the now defunct Victorian Companies Act 1961.

59. The Committee noted that the equivalent Australian provision was repealed long ago and has never found its way, whether in its original or modified form, into subsequent Australian legislation. The Committee is not aware of any judgment of the Singapore courts where section 331 has been considered or, indeed, any Australian case-law which considers the corresponding Australian provision when it was in force in Victoria. Based on feedback, it appears to be a provision which is seldom considered or invoked in practice. Further, there is significant overlap between section 331 and the provision on transactions at an undervalue in section 98 of the Bankruptcy Act which, in the Committee's opinion, is the better drafted and conceptualised of the two provisions. Section 98 of the Bankruptcy Act has also been shown to be relevant in practice, and frequently discussed and applied in both Singapore and UK case-law. For these reasons, the Committee sees no practical benefit to retaining section 331 of the Companies Act and recommends that it be repealed from the Companies Act and omitted from the New Insolvency Act.

(H) GENERAL ASSIGNMENT OF BOOK DEBTS

60. Section 104 of the Bankruptcy Act provides that an assignment of book debts is void in the event of the assignor's bankruptcy, where the following conditions are satisfied:

- (1) The assignor, while engaged in business, makes a general assignment of his existing or future book debts.
- (2) The assignor is subsequently made a bankrupt.
- (3) The book debts were not paid before the presentation of the bankruptcy application against the assignor.
- (4) The assignment was not registered under the Bills of Sale Act.

61. This provision is based on section 344 of the UK Insolvency Act and was incorporated into the Bankruptcy Act in 1995. The English High Court in *Hill (a trustee in bankruptcy) v Alex Lawrie Factors Ltd* [2000] All ER (D) 882 explained the purpose of the English provision as follows:

“... the provision is in substance a re-enactment of section 43(1) of the Bankruptcy Act 1914. Prior to then a general assignment of book debts by way of security had been held effective against a trustee in bankruptcy, *Tailby v Official Receiver* (1888) 13 App. Cas. 523. The unsuccessful argument was that the subject-matter of the assignment was too vague. The House of Lords held that it was not; that the subject of the assignment was capable of identification when it was sought to enforce the security. **Whilst that is so in principle, it is obvious that in practice a complicated accounting exercise may be involved. And it will or may be difficult to see whether a proper price was given.** People who go bankrupt generally know they are in trouble before they do so. **There are plenty of sharks around willing to lend at extortionate rates or to factor at extortionate costs. A purely general assignment of book debts**

may make it impossible or difficult to see whether the transaction is in some way impugnable. So Parliament has provided that general assignments will not do against a subsequent trustee in bankruptcy.”

(emphasis added in bold)

62. The main purpose of section 104 (and its UK equivalent) therefore appears to be to allow general assignments of book debts to be set aside without any need to prove whether the said transaction falls within the scope of one of the other avoidance provisions, because of the practical difficulties in determining whether such a transaction may be impugned.

63. First, it is not apparent to the Committee why, as a matter of principle, a general assignment of books debts is objectionable in principle or policy. Indeed, factoring of present and future receivables is a well-established and proper form of financing for many businesses. Second, the Committee notes that, based on feedback, besides the above decision, both section 104 and its UK equivalent have, to date, been rarely invoked. Third, section 104 is both under-inclusive and over-inclusive. It is under-inclusive because it does not catch all transactions the unravelling of which would require “complicated accounting”; it is over-inclusive because it voids valid commercial transactions which may have been entered into *bona fide* and which do not otherwise offend against other avoidance provisions or the general policy of the insolvency legislation. Lastly, the Committee does not agree that a general assignment of book debts will always be impossible or difficult to evaluate to determine whether it falls within the scope of other avoidance provisions. There may, in some cases, be means to value such a general assignment of book debts in order to determine whether it is a transaction at an undervalue, or to determine whether it has been factored or involves interest at extortionate rates.

64. In light of the above, the Committee is of the view that section 104 of the Bankruptcy Act should not be incorporated into the New Insolvency Act. There

is no inherent objection against a general assignment of book debts, and all possible objections which have been identified are already covered by the other avoidance provisions.

(I) TRANSFER OR ASSIGNMENT BY A COMPANY OF ALL ITS PROPERTY TO TRUSTEES FOR THE BENEFIT OF ALL ITS CREDITORS

65. Section 329(3) of the Companies Act provides that any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void.
66. Based on feedback, as is the case with some of the provisions discussed above, the history and intended purpose of this provision appears to be rather obscure. Consequently, there is a paucity of information regarding the policy behind this provision. A commentator suggests that the provision “prohibits any corporate insolvency process akin to a deed of arrangement” but points out that companies “may of course submit to the statutory process of schemes of arrangement and judicial management”.³⁵⁴ The case of *London Joint City & Midland Bank v Herbert Dickinson Ltd* [1922] WN 13 elaborated that the object of the English equivalent (i.e. section 164 of the Companies Act 1862) was “to provide that there should not be a winding up except under the [Companies] Act”. The main point of section 329(3) appears to be that liquidation, as the collective procedure for realising a company’s assets and distributing the proceeds in accordance with the statutory scheme set out in the companies legislation, is exclusive of other procedures.³⁵⁵
67. The UK appears to have abolished this provision after the enactment of the UK Insolvency Act. In contrast, the Australians have preserved it in section 565(4) of the Australia Corporations Act. The Australian provision is expressly stated to be subject to the Australian provisions on voluntary administration.

³⁵⁴ See Woon’s Corporation Law at para 5855.

³⁵⁵ See Gronow, *McPhersons’ Law of Company Liquidation* (5th ed, 2006) at para 1.40.

68. The Committee recommends that section 329(3) be retained and imported into the New Insolvency Act. There is a need for a provision which prohibits clandestine or *de facto* liquidations, which circumvent the statutory framework set out in the Companies Act. For example, a liquidator, unlike a privately appointed trustee, is saddled with the responsibility not just to realise the assets and to distribute them in accordance with the priority under section 328 of the Companies Act (which can equally be provided in the terms of the trust), but also the duty to make inquiries into the management of the company and, where appropriate, take legal action to either recover the assets of the company (pursuant to the avoidance provisions) or seek compensation from errant management (pursuant to the fraudulent trading procedure). A transfer or assignment of all the property of the company to trustees for the benefit of creditors may address part of the liquidator's responsibilities, but also undermines the other aspects of liquidation by depriving the liquidator of possible means in which to finance investigations or legal actions.
69. However, the Committee recommends that the New Insolvency Act should specifically state that section 329(3) shall not affect anything done pursuant to a scheme of arrangement or judicial management.

(J) *LIMITATION PERIODS FOR LITIGATION INVOLVING AVOIDANCE PROVISIONS*

70. No limitation period is prescribed in either the Bankruptcy Act or the Companies Act for claims based on the avoidance provisions. This is also the case in the UK Insolvency Act. However, the position in Singapore and the UK may still be different due to the respective statutes of limitation.
71. Two specific provisions in the UK Limitation Act 1980 apply to litigation involving the avoidance provisions. They are sections 8 and 9, which deal with the time limits for actions on a specialty (i.e. a covenant under seal or an obligation imposed by statute) and actions for sums recoverable by statute respectively. It has been held by the English courts that these limitation

periods apply to claims for wrongful trading,³⁵⁶ undervalue transactions and unfair preferences,³⁵⁷ and transactions defrauding creditors,³⁵⁸ such that the applicable limitation period is determined by the substance of the relief being sought by the applicant.

72. Our Limitation Act does not have a corresponding provision dealing with specialty actions. Provision is made, however, under section 6(1)(d) for actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or sum by way of a penalty or forfeiture.³⁵⁹ Under such circumstances, it may be argued that actions involving the avoidance provisions are not time-barred to the extent that they do not, in substance, amount to an action for the recovery of any sum recoverable by virtue of any written law.
73. The Committee notes that instances of stale claims are brought in bankruptcy or insolvency litigation will be uncommon given that most office-holders will pursue such claims expeditiously and are subject to the supervision of the court in any event. That being said, there remains a need for finality to litigation in the context of bankruptcy and insolvency. However, as the issue of whether a limitation period for specialty actions ought to be introduced is a matter of policy that goes beyond the mandate of this Committee, no specific recommendations are made in this regard and the Committee suggests that the issue be considered in the event of a review of the Limitation Act.

(K) SUMMARY OF RECOMMENDATIONS

74. In summary, the Committee makes the following recommendations:

- (1) Sections 98, 99 and 103 of the Bankruptcy Act should be carried over to the New Insolvency Act. Two separate sets of provisions, one

³⁵⁶ See *Re Farmizer Products* [1997] 1 BCLC 589.

³⁵⁷ See *Re Priory Garage (Walthamstow) Limited* [2001] BPIR 144.

³⁵⁸ See *Hill v Spread Trustee Co Ltd and Another* [2007] 1 WLR 2404.

³⁵⁹ Section 6(1)(d) of the Limitation Act provides that such actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued.

applicable to bankruptcy and the other applicable to liquidations and judicial management ought to be provided.

- (2) For unfair preferences that do not amount to undervalue transactions, the relevant time for transactions with a “non-associate” should be increased from 6 months to 1 year.
- (3) The relevant time for transactions at an undervalue should be reduced from 5 years to 3 years.
- (4) The relevant period for extortionate credit transactions should remain at 3 years.
- (5) The computation of the relevant time should not take into account any period of time commencing from the making of an application for an individual voluntary arrangement or a scheme of arrangement and the subsequent withdrawal or dismissal of that application.
- (6) Express provision should be made for the “relevant time” to also cover the period between the presentation of the application for judicial management and the granting of the judicial management order.
- (7) The New Insolvency Act should provide for a unified definition of “associate” applicable to personal bankruptcy and corporate insolvency regimes, with an additional concept of “connected persons” which is unique to the corporate insolvency regime.
- (8) The test for insolvency for the purposes of the avoidance provisions relating to transactions at an undervalue and unfair preferences should not be widened to include the additional grounds set out in section 240(2) read with section 123(1) of the UK Insolvency Act.
- (9) The New Insolvency Act should retain the subjective test for unfair preference transactions, i.e. that a court will not unwind a particular

transaction as an unfair preference unless it is proven that the person, in giving the preference, was influenced in deciding to give it by a “desire to prefer” the recipient (i.e. putting the recipient in a better position in the event of that person’s bankruptcy).

- (10) Section 131(1) should continue to remain in the Companies Act. Reference to the effects of non-registration of such charges should be included into the New Insolvency Act.
- (11) Section 131(1) of the Companies Act should be amended such that an unregistered charge shall be void against a judicial manager but shall remain enforceable against the company in the event that the judicial management is successful and the company does not enter into liquidation.
- (12) Section 330 of the Companies Act should be amended to adopt the approach taken in section 245 of the UK Insolvency Act, in particular that:
 - (a) The provision should apply to both a company undergoing liquidation, and judicial management.
 - (b) The provision should recognise the provision of other forms of value to the company in addition to the contemporaneous or subsequent payment of fresh “cash” to the company; such as money paid, goods or services supplied, the discharge or reduction in debt, as well as applicable interest.
 - (c) The requirement that the company become insolvent immediately after the creation of the floating charge only applies where the charge is granted to a person who is not “connected to the company”.
 - (d) The relevant time during which the floating charge will be vulnerable to challenge should be extended from 6 months to (i) 2 years where the chargee is a person “connected to the company”, and (ii) 1 year in other cases.

- (13) The requirement that liquidators apply to court for leave to disclaim property should be abrogated by:
- (a) Allowing insolvency office-holders to disclaim property without requiring the leave of court or the committee of inspection.
 - (b) Requiring advance notice of the proposed disclaimer to be given to the creditors, Official Receiver and any other relevant parties. In the event that the insolvency office-holder has cause to suspect that some third party may have an interest, but the third party is not immediately locatable, the insolvency office-holder should be required to advertise his proposal in a newspaper and/or the government gazette.
 - (c) Allowing any relevant parties affected by the proposed disclaimer to apply to court to object to the same.
 - (d) Providing that the court may, upon the application of any person affected by a proposed disclaimer set aside the proposed disclaimer or make such order as the court thinks just, where the injury caused to the person affected by the disclaimer outweighs any advantage likely to be gained by the liquidator in administering the assets or in such other circumstances as the court thinks fit.
- (14) The categories of property which can be disclaimed ought to be liberalised to allow the following property to be disclaimed: (a) any unprofitable contract, (b) any other property of the company which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any onerous act.
- (15) The Committee recommends that the issue of whether insolvency office-holders are able to disclaim property governed by separate environmental statutory provisions is best addressed by provisions in

the relevant environmental legislation. However, statutory provisions should be made to prescribe that the decision to disclaim shall not be made by the insolvency office-holder or the court if it will breach the environmental legislation or its stated purpose.

- (16) Judicial managers should be given the power to disclaim onerous property.
- (17) Section 73B of the CLPA should be moved to the New Insolvency Act and amended to mirror the current language in section 423 of the UK Insolvency Act, in particular that;
 - (a) The new provision should focus on a narrower category of transactions (i.e. undervalue transactions) as opposed to the existing provision which applies to “every conveyance of property”.
 - (b) The new provision should eschew the requirement of having to prove an “intention to defraud creditors” in favour of a subjective inquiry into the “purpose” of the transaction (i.e. either to put the asset beyond the reach of a person making or who may at some point make a claim against the debtor, or otherwise prejudice the interests of such a person in relation to the claim that he is making or may make).
 - (c) The new provision should provide more prescriptive remedies
- (18) Section 77 of the Bankruptcy Act and section 259 of the Companies Act should be retained in the New Insolvency Act.
- (19) Section 331 of the Companies Act should be repealed from the Companies Act and omitted from the New Insolvency Act.
- (20) Section 104 of the Bankruptcy Act should not be incorporated into the New Insolvency Act.

- (21) Section 329(3) of the Companies Act should be retained and imported into the New Insolvency Act, and should specifically state that it shall not affect anything done pursuant to a scheme of arrangement or judicial management.

CHAPTER 9: OFFICER DELINQUENCY

(A) FRAUDULENT TRADING

1. Section 340(1) of the Companies Act applies where, in the course of winding up or any proceedings against a company, it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose. The court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper to do so, declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court directs. Such a person may also be guilty of the commission of an offence under section 340(5).

2. Section 340(1) is based on section 332(1) of the UK Companies Act 1948, the predecessor of section 213 of the UK Insolvency Act. There is a significant amount of English case-law on the subject. The Singapore courts have also had occasion to consider section 340(1) of the Companies Act in a number of criminal³⁶⁰ and civil³⁶¹ cases in Singapore. It is settled that, under section 340(1) of the Companies Act, applicants are required to prove actual subjective fraud and/or dishonesty, which attracts a stricter degree of proof than would usually be required in cases not involving fraud.³⁶²

3. The Committee is of the view that no substantive change needs to be made to the language and scope of the fraudulent trading provision. There is also no reason in principle or policy why the act of trading in a fraudulent manner should not continue to attract both criminal and civil liability. Fraudulent trading is a well-established, accepted and familiar part of our insolvency law

³⁶⁰ See *Rahj Kamal bin Abdullah v PP* [1997] 3 SLR(R) 227; *Tan Hung Yeoh v PP* [1999] 2 SLR(R) 262; *Phang Wah and others v PP* [2012] 1 SLR 646.

³⁶¹ See *Lim Teck Cheng v Wyno Marine Pte Ltd (in liquidation)* [1999] 3 SLR(R) 543; *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR(R) 263; *Liquidator of Leong Seng Hin Piling Pte Ltd v Chan Ah Lek and others* [2007] 2 SLR(R) 77; *Kon Yin Tong and another v Leow Boon Cher and others* [2011] SGHC 228.

³⁶² See *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR(R) 263 at [14]; *Kon Yin Tong and another v Leow Boon Cher and others* [2011] SGHC 228 at [42] and [43].

and the Committee therefore considers that the existing provision on fraudulent trading should be retained in the New Insolvency Act.

(B) *INSOLVENT TRADING*

4. Section 339(3) of the Companies Act provides that if, in the course of the winding up of a company or in any proceedings against a company, it appears that an officer of the company who was knowingly a party to the contracting of a debt had, at the time the debt was contracted, no reasonable or probable ground of expectation, after taking into consideration the other liabilities, if any, of the company at the time of the company being able to pay the debt, the officer shall be guilty of an offence. If found guilty, that person can also be made personally liable for the whole or part of the debt pursuant to section 340(2) of the Companies Act.
5. Insolvent trading can be contrasted with fraudulent trading in that it requires no dishonesty or fraud; the offence is constituted on the basis of an officer knowingly contracting a debt on behalf of the company when he had no reasonable or probable ground of expectation that the company would be able to pay the debt. In principle, the knowing contracting of debts in a reckless or unreasonable manner may be sufficient to establish the offence. This notion is not new and is established in insolvency law; in fact, this type of conduct also attracts civil sanctions under UK and Australian legislation.
6. The main drawback with sections 339(3) and 340(2) of the Companies Act is that they require a criminal conviction of the delinquent officer before civil liability to pay the whole or part of the debt incurred by the company can be triggered. This position is unsatisfactory as the insolvency office-holder and the creditors of the company are not in a position to ensure that a criminal prosecution is brought and a conviction secured against the delinquent officer. The time required for consecutive criminal and civil proceedings may also deter parties from pursuing civil liability against the delinquent officer. Further,

the fact that insolvent trading must be proved on the criminal standard of proof before civil liability can be triggered operates as another disincentive.

7. In fact, the Committee is not aware of any instance in Singapore where proceedings have been brought to impose civil liability for insolvent trading under section 340(2) of the Companies Act. The Committee further notes that there has been no reported case of a criminal prosecution being brought under section 339(3) of the Companies Act.
8. In the Committee's view, there is no justification for why a prior criminal conviction is necessary before civil liability is imposed on the delinquent officer.³⁶³ This is particularly so since civil liability can be imposed on an officer for fraudulent trading under section 340(1) of the Companies Act without the need for any criminal conviction. It should be sufficient for the imposition of civil liability if insolvent trading is established in civil proceedings on a balance of probabilities.
9. Separately, the Committee notes that the insolvent trading provisions are based on old Australian provisions that are no longer in force and have never been invoked or discussed in any reported Singapore case. In the view of the Committee, although the language of the provisions is clear, the provisions may not be detailed enough to provide a comprehensive legal regime to regulate insolvent trading. The Committee therefore also considered whether the scope and wording of sections 339(3) and 340(2) of the Companies Act should be changed or updated. The Committee explored three options in this regard.

Adopting the wrongful trading provision in the UK Insolvency Act

10. Under section 214 of the UK Insolvency Act, a person may be liable to contribute to a company's assets if the following conditions are satisfied:

³⁶³ These provisions were derived from Australian legislation from the state of Victoria in the 19th Century, and it is not clear from either the underlying provision or subsequent Australian case-law why a prior criminal conviction was a necessary prerequisite to civil liability.

- (1) The company has gone into insolvent liquidation.
 - (2) Before the commencement of winding up, that person knew or ought to have concluded that there was no reasonable prospect of the company avoiding going into insolvent liquidation.
 - (3) That person was at the time a director, or a *de facto* or shadow director, of the company.
11. A director may avoid civil liability by showing that he had taken every step with a view to minimising the potential loss to the company's creditors as he ought to have taken.
 12. The Committee is of the view that the UK provision should not be adopted. It has been noted that the section 214 of the UK Insolvency Act pointedly avoids giving any concrete meaning or positive guidance as to the concept of 'wrongful trading', and therefore is singularly imprecise in defining what types of conduct which will lead to liability. The UK Insolvency Act further gives no affirmative guidance as to what constitutes taking "every step" to which a director ought to take in order to avoid liability.³⁶⁴ It therefore leaves a major gap in the law that will have to be filled by decisions of the court in test cases.³⁶⁵
 13. Additionally, significant doubts have been expressed in the UK as to whether section 214 of the UK Insolvency Act has fulfilled its intended objective of achieving an efficient means by which officer delinquency can be successfully penalised. Indeed, both legal academics and the business community in the UK have criticised the provision as being a "paper tiger".³⁶⁶ This has also

³⁶⁴ Sealy & Milman, *Annotated Guide to the Insolvency Legislation 2010*, (Vol 1) 13th ed. (2010, Sweet & Maxwell, London) at p209; Keay & Murray, *Making Company Directors Liable: A Comparative Analysis of Wrongful Trading in the United Kingdom and Insolvent Trading in Australia*, (2005) 14 Intl. Insol. Rev. 27 at p53.

³⁶⁵ Sealy & Milman, *Annotated Guide to the Insolvency Legislation 2010*, (Vol 1) 13th ed. (2010, Sweet & Maxwell, London) at p208-209.

³⁶⁶ Keay & Murray, *Making Company Directors Liable: A Comparative Analysis of Wrongful Trading in the United Kingdom and Insolvent Trading in Australia*, (2005) 14 Intl. Insol. Rev. 27 at p53.

been borne out in practice given the disproportionately small number of actions invoking section 214 to date.³⁶⁷

14. Accordingly, the Committee does not recommend the adoption of the approach in section 214 of the UK Insolvency Act.

Adopting the Australian provisions on insolvent trading

15. The Committee considered the Australian insolvent trading provisions, i.e. sections 588G to 588Y of the Australia Corporations Act.
16. Under section 588G, a director is liable if he fails to prevent the company from incurring a debt in the following circumstances:
 - (1) The company was insolvent at the time when the debt was incurred or became insolvent as a result of the incurring of the debt.
 - (2) At the time that the debt was incurred there were reasonable grounds for suspecting insolvency.
 - (3) The director was aware at the time of the incurring of the debt that there were grounds for suspecting the insolvency of the company or a reasonable person in a like position would have been so aware.
 - (4) The respondent was at the time a director, or a *de facto* or shadow director, of the company.
17. Section 588H of the Australia Corporations Act provides for four defences to the above action, namely, that when the relevant debt was incurred:

³⁶⁷ Keay, *McPherson's Law of Company Liquidation*, 2nd Ed., (London, Sweet & Maxwell, 2009) at p743.

- (1) The director had reasonable grounds to expect (not merely suspect), and did so expect, that the company was solvent and would remain solvent even if the debt was incurred.
 - (2) The director had reasonable grounds to believe, and did so believe, that a subordinate was competent, reliable and responsible for providing adequate information about the company's solvency, and the director expected, on the basis of this information, that the company was solvent and would remain solvent.
 - (3) The director, because of illness or for some other good reason, did not take part in the management of the company at the time.
 - (4) The director took all reasonable steps to stop the company from incurring the debt.
18. The Committee is of the view that the Australian provisions on insolvent trading should not be adopted. The Australian provisions are considered to be some of the strictest provisions amongst the major jurisdictions, in the sense that they effectively prohibit trading once there are "*reasonable grounds for suspecting*" that a company is insolvent. The Committee is of the view that they are not appropriate for Singapore. A wide notional cessation of trading even prior to the commencement of insolvency proceedings may further endanger a financially-troubled company's ability to trade through a period of crisis, and thus worsen the company's financial difficulties. It does not strike the best balance between the interest in protecting creditors against the reckless or unreasonable incurring of debts by an insolvent company, and the interest in allowing the directors of a distressed company a fair opportunity to take reasonable steps to avoid the company's financial ruin. There should be more latitude afforded to a director to continue to trade in the reasonable expectation that, although the company is insolvent, it is most likely to be able to trade out of its present difficulties.³⁶⁸

³⁶⁸ Keay & Murray, *Making Company Directors Liable: A Comparative Analysis of Wrongful Trading in the United Kingdom and Insolvent Trading in Australia*, (2005) 14 Intl. Insol. Rev. 27 at p37.

19. The Committee further notes that the Australian position must be understood in a broader legislative context. For example, the Australian taxation regime imposes personal liability on company directors if the company's tax remains unpaid, and provides for the issuance of a notice by the Commissioner of Taxation which requires the directors to adopt one of four options within 14 days: (a) paying the tax owed, (b) compromising the tax owed, (c) placing the company into liquidation, or (d) opting for voluntary administration. It has therefore been noted that the Australian Commissioner of Taxation often serves as a *de facto* regulator of insolvency laws.³⁶⁹ The Australian approach (including its strict insolvency trading provisions) is not suitable in the Singapore context in that it tips the balance too much in favour of an early invocation of insolvency processes. The entry into formal insolvency procedures often has severe consequences on the company, and may in itself bring about the untimely end of the company. Further, the above legislative framework does not appear to provide sufficient avenues for informal work-outs outside of formal insolvency procedures.³⁷⁰

Paragraph 1806 of the Cork Report

20. The Committee considered the draft provision set out in paragraph 1806 of the Cork Report on "wrongful trading" and concluded that some of its key concepts were appropriate to be adopted for Singapore in place of the current provisions in sections 339(3) and 340(2) of the Companies Act. In particular, the framework of our insolvent trading regime can be amended to provide as follows:

- (1) A company is trading wrongfully if at a time when the company is insolvent or unable to pay its debts as they fall due it incurs further

³⁶⁹ See Keay & Murray, *Making Company Directors Liable: A Comparative Analysis of Wrongful Trading in the United Kingdom and Insolvent Trading in Australia*, (2005) 14 Intl. Insol. Rev. 27 at p40; see further p38-39.

³⁷⁰ See The Treasury, *Corporate Insolvency Law Reform Package* (19 January 2010), (http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/5OYV6/upload_binary/5oyv62.pdf;fileType=application%2Fpdf#search=%22media/pressrel/5OYV6%22); see also Kee & Young, *Duty for directors to avoid insolvent trading in Singapore: A proposition*, (2012) 20 Insolv. LJ 55 at 61.

debts or other liabilities to other persons without a reasonable prospect of meeting them in full.

- (2) Declarations may be made by the court in respect of wrongful trading by a company on the application of a liquidator or judicial manager, if the company is in the course of winding up or judicial management. In addition, the Committee is of the view that creditors and contributories should also be able to apply for relief under the insolvency trading provisions, but only if they have obtained the consent of the relevant insolvency office-holder, or the leave of the court. This is because, in insolvent liquidations or other analogous insolvency procedures, the sums recovered are properly the property of the company, to be applied for the benefit of all its creditors as opposed to a single creditor or contributory. The Committee is also concerned to avoid frivolous actions being brought against directors as a pressure tactic.
- (3) The court may declare that any person party to the carrying on of the business of the company shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct if it appears that such person knew, or as an officer of the company, ought, in all the circumstances, to have known, that the company's trading was wrongful.
- (4) If it appears to the court that such person has acted honestly and that having regard to all the circumstances of the case he ought fairly to be excused that the court may relieve him, either wholly or in part, from personal liability on such terms as it may think fit.
- (5) The court may give further directions as it thinks proper for the purpose of giving effect to that declaration, including a direction making the liability for any such person under the declaration a charge on any debt or obligation due from the company to him, or on any mortgage or charge or interest held by such person on any assets of the company. The court may also provide that sums recovered shall be paid to such

persons or classes of persons, for such purposes, in such amounts or proportions at such time or times and in such respective priorities *inter se* as its declaration shall specify.

- (6) The company and (if with the company's consent) any person party to or interested in becoming party to the carrying on of the business of the company, may apply to the court to determine whether all or any of the trading of the company at and after such application would be wrongful.
21. The Committee is of the view that such a framework strikes the best balance between promoting responsible entrepreneurship and preventing abuse of the corporate form by those who manage companies. It puts in place a fairer and more updated and comprehensive legal regime to regulate insolvent trading. For instance, the framework would apply to the "incurring of debts or other liabilities"³⁷¹ instead of only to the "contracting of a debt" as currently provided in section 339(3). It also introduces a useful defence for cases where the officer has acted honestly, and having regard to all the circumstances of the case ought to be fairly excused.³⁷² Implicit in this formulation is the recognition that there may exist such circumstances where the directors of a company genuinely incurred debts or other liabilities in the interests of the creditors and members.
22. Importantly, the proposed framework grants the court wide remedial powers and allows the court to fashion a remedy to suit the circumstances of each case, including directing that the proceeds of recovery are to be applied in a particular manner and for the benefit of certain parties. This is important given that insolvent trading may occur in a variety of factual matrices, and it is not always appropriate that the proceeds of recovery against the delinquent director be wholly paid to the company's general pool of assets. An example given by the Cork Report,³⁷³ with which the Committee respectfully agrees, is where one creditor has at his own expense and risk successfully brought the

³⁷¹ Cork Report at para 1806(1)(b).

³⁷² Cork Report at para 1806(3).

³⁷³ Cork Report at para 1797.

proceedings, it may be just that part or all of what is recovered should go first to him rather than merely swell the sum available to the general body of creditors.

23. It should further be noted that the proposed framework allows parties to obtain confirmatory or advance rulings from the court that a particular course of conduct or a series of transactions would not constitute wrongful trading. This procedure may be useful in appropriate cases in facilitating the carrying out of transactions contemplated or proposed by a financially distressed company or persuading parties to continue trading with such a company.
24. The Committee recommends that the key features of paragraph 1806 of the Cork Report as discussed above be adopted in the New Insolvency Act in place of sections 339(3) and 340(2) of the Companies Act. Additionally, in line with the current position, wrongful trading under this new regime should constitute a criminal offence. However, as discussed above, a criminal conviction should not be a pre-requisite to the making of an application to impose civil liability on the officer.

(C) *INVESTIGATIONS AND EXAMINATIONS*

25. The powers given to insolvency office-holders to conduct investigations and examinations form an important part of the scheme for detecting, investigating and prosecuting wrongdoing in the affairs and dealings of an insolvent company or bankrupt individual and ascertaining, locating and recovering the assets of the company or individual.
26. There are different tiers of investigation and examination powers which can be exercised by insolvency office-holders. Some of the main features of these powers are described briefly below:

- (1) A statement of affairs must be provided to the insolvency office-holder, generally containing particulars of the assets, creditors, debts and other liabilities of the company or bankrupt individual.³⁷⁴
- (2) There are powers to require the delivery to the insolvency office-holder of property, books, papers and records which appear to belong to the company or bankrupt individual, either on application to court or on demand.³⁷⁵
- (3) A duty is imposed on officers of the company or the bankrupt (among others) to provide information to or attend before the insolvency office-holder (commonly referred to as a “duty to co-operate”).³⁷⁶ No separate order of court is required before such persons are required to comply with their duty to co-operate with the insolvency office-holder.
- (4) An application to court can be made by the insolvency office-holder for the officers of the company or the bankrupt (among others) to be summoned before the court and examined on oath concerning the affairs of the company or bankrupt individual (commonly referred to as “private examinations”). The purpose of private examinations, which are typically conducted in chambers, is to obtain information as to the affairs of the company or bankrupt individual which were omitted from the statement of affairs or private interviews.
- (5) An application to court can also be made for officers of the insolvent company to be examined on oath in public (commonly referred to as “public examinations”). The Cork Committee noted that public examinations give publicity, for the information of creditors and the community at large, to the salient facts and unusual features connected with the company’s failure.³⁷⁷ It further noted that it is desirable for

³⁷⁴ See section 81 of the Bankruptcy Act and section 270 of the Companies Act.

³⁷⁵ See Rule 64 of the Winding Up Rules.

³⁷⁶ See section 82 of the Bankruptcy Act and Rule 41(2) of the Winding Up Rules.

³⁷⁷ Cork Report at para 656.

public examinations to be available to insolvency office-holders because:

“By exposing serious misconduct, it will help to promote higher standards of commercial and business morality and will also serve as a form of sanction against former officers of a failed company who have not adequately assisted the Official Receiver and the liquidator in the course of their respective investigations and administration of the company’s affairs.”

27. The provisions relating to investigative and examination powers of insolvency office-holders are currently not organised properly and are inserted at various points in the Companies Act and Bankruptcy Act, for instance, section 227V of the Companies Act (judicial management), section 127 of the Bankruptcy Act (bankruptcy) and section 270 of the Companies Act (liquidation). Furthermore, the variations in the language used in the various provisions conferring investigative powers to different insolvency office-holders also give rise to questions of consistency.
28. In contrast, the UK Insolvency Act neatly consolidates and organises the investigative powers of insolvency office-holders according to whether they relate to corporate insolvencies or bankruptcies. Section 235 of the UK Insolvency Act contains a consolidated provision that sets out the duty to co-operate with liquidators, provisional liquidators, administrators and administrative receivers. Bankruptcy is dealt with separately at section 291 of the UK Insolvency Act. Other powers of investigation and examination are also similarly consolidated. For example, section 133 of the UK Insolvency Act sets out the provisions relating to public examination in corporate insolvencies, and section 236 sets out the provisions relating to private examination in corporate insolvencies.
29. The Committee is of the view that the same approach should be adopted in the New Insolvency Act.

(D) SUMMARY OF RECOMMENDATIONS

30. In summary, the Committee recommends the following:

- (1) The existing provisions on fraudulent trading should be retained and enacted in the New Insolvency Act.
- (2) To amend the provisions for insolvent trading in sections 339(3) and 340(2) of the Companies Act by, amongst other things, incorporating features of the draft provision proposed at paragraph 1806 of the Cork Report. In addition, to:
 - (a) Remove the prior requirement for criminal liability as a condition for civil liability.
 - (b) Extend the scope of the insolvent trading provision (i.e. the “contracting of a debt”) to cover transactions involving the “incurring of debts or other liabilities”.
 - (c) Provide an express defence such that no liability shall arise where it appears to the court that the officer has acted honestly, and that having regard to all the circumstances of the case he ought to be fairly excused.
- (3) The New Insolvency Act should enact (a) consolidated provisions that set out the investigative and examination powers of liquidators, provisional liquidators, administrators and administrative receivers; and (b) provisions dealing with the investigative and examination powers of trustees in bankruptcy, including the Official Assignee.

CHAPTER 10: REGULATION OF INSOLVENCY PRACTITIONERS

1. The issues of the appropriate qualifications for, and the standards of competence, expertise, integrity and professionalism of, office-holders in insolvency proceedings are obviously important to the proper functioning of an insolvency regime. Not only is the office-holder the person in whom a whole array of statutory and legal duties and powers is vested, he or she is, in practice and in a very real sense, the central driving force and the nerve-centre in an insolvency proceeding. The due discharge of the responsibilities of the office requires the office-holder to at least possess a significant repertoire of technical knowledge and skills, as well as a certain level of experience in, and familiarity with, the conduct of insolvency proceedings generally. He or she must also possess not only qualities such as resourcefulness, financial and business acumen, but also a good sense of judgment and fairness when balancing the interests of creditors *inter se* or against other interests and statutory objectives.
2. There are four main ways in which the conduct of office-holders in insolvency proceedings is regulated.
3. First, there is the civil liability regime for office-holders, under which they may be held liable for the breach of a statutory or common law duty imposed on the relevant office or under the terms of their appointment. The case-law on the duties of care, skill, diligence and fidelity of office-holders is relatively well-developed, and it is neither necessary nor appropriate for the New Insolvency Act to legislate on the content of these general, multi-faceted and wide-ranging duties. As is the case under the present regime, the New Insolvency Act should provide only for statutory duties of office-holders, leaving it to the courts to decide in each case whether the breach of a particular statutory duty gives rise to civil liability and whether to infer additional common law duties from the statutory scheme. However, the New Insolvency Act should provide

statutory support for claims and complaints against office-holders to be pursued expeditiously and economically, where appropriate.³⁷⁸

4. Second, and perhaps corollary to the officer-holder's statutory duties, are the criminal sanctions that may be imposed on the office-holder for failure to comply with his or her statutory duties. One such example would be section 227K(3) of the Companies Act, which makes it an offence for a judicial manager to omit issuing the relevant notifications relating to the making of a judicial management order. Such offences currently exist for private trustees,³⁷⁹ liquidators,³⁸⁰ judicial managers³⁸¹ and receivers.³⁸² These should be maintained and, if necessary, enhanced in the New Insolvency Act.

5. Third, there is supervision and control by the court and/or by the Official Assignee or Official Receiver. Currently, the most comprehensive form of supervision and control by the court is found in the case of liquidators. There are statutory provisions empowering the court to control the exercise of the liquidator's powers, to give directions to the liquidator on any matter arising under the winding up, and to reverse, confirm or modify any act or decision of the liquidator.³⁸³ It is also provided that the court shall take cognizance of the conduct of the liquidator and shall inquire into any instance of a liquidator not faithfully performing his duties and take such action as it thinks fit.³⁸⁴ Further, the court may require any liquidator to answer any inquiry in relation to the winding up and may examine him on oath concerning the winding up and may direct an investigation to be made of the books and vouchers of the liquidator.³⁸⁵ A similar regime applies to trustees in bankruptcy.³⁸⁶ In the view of the Committee, such a system of supervision and control should be present in the New Insolvency Act, not only for liquidators, but all insolvency office-holders, *mutatis mutandis*. In addition, the Official Assignee's or Official

³⁷⁸ See e.g. sections 313(3) and 341(1) of the Companies Act.

³⁷⁹ See e.g. sections 35(2) and 37(2) of the Bankruptcy Act.

³⁸⁰ See e.g. sections 269(3), 274(3) and 276(5) of the Companies Act.

³⁸¹ See e.g. section 227K(3) of the Companies Act, and further, sections 227H(8) and 227N(6).

³⁸² See e.g. sections 221(3), 222(2), 223(4) and 225(5) of the Companies Act.

³⁸³ See e.g. sections 272(3), 273(2), 315 and 310 of the Companies Act.

³⁸⁴ See section 313(2) of the Companies Act.

³⁸⁵ See section 313(4) of the Companies Act.

³⁸⁶ See sections 39 and 40 of the Bankruptcy Act.

Receiver's duties and powers of supervision and control should be expanded to cover all insolvency office-holders *mutatis mutandis*, and not just liquidators appointed in court-ordered liquidations.

6. These three modes of regulation of the conduct of insolvency office-holders are instrumental but their application is restricted in the main to specific acts and transactions by an office-holder in a particular case. It is imperative that, in addition, there has to be a fourth component that provides the comprehensive and effective regulation of insolvency office-holders as a *profession*.
7. This professional regulatory regime has two aspects. The first is the "licensing" function, that is, the setting and enforcement of minimum qualifications and standards for the grant and renewal of licences to individuals to practise as insolvency office-holders. The second is the disciplinary function, that is, the inquiring into, and taking of disciplinary action, if appropriate, against errant insolvency office-holders.

(A) LICENSING OF INSOLVENCY OFFICE-HOLDERS

8. Currently, the licensing of public accountants and "approved liquidators" is performed by the Registrar of Public Accountants through the Accounting & Corporate Regulatory Authority ("**ACRA**"). Where such persons are appointed as trustees in bankruptcy, their conduct is supervised by the Official Assignee.³⁸⁷ In so far as they are appointed as liquidators, they come under the joint supervision of the Registrar of Companies (the "**Registrar**") and the Official Receiver.³⁸⁸
9. The Committee considered whether a new and separate body or organisation should be tasked with the discharge of these functions. The Committee is of

³⁸⁷ Section 39 (1), (2), (3), (4) and (5) of the Bankruptcy Act.

³⁸⁸ Sections 265 and 313 of the Companies Act. The supervisory powers of the Official Receiver extend only to liquidators in court-ordered liquidations. No express statutory provision is made, however, regarding the supervision of receivers, scheme managers and judicial managers.

the view that, given the likely modest volume of insolvency work,³⁸⁹ and the fact that a new system of professional regulation will encounter issues on the ground in its initial stages of implementation, it would be prudent not to introduce and establish a new and separate regulatory body or organisation at this stage. The existing regulatory framework should be utilised as far as possible.

10. As the New Insolvency Act will eventually come under the purview of the Ministry of Law and IPTO, the Committee recommends that the Official Receiver take over the Registrar of Public Accountants' function and role in the registration and renewal of approved liquidators' licenses, as well as the setting of licensing requirements. The Official Assignee/Official Receiver should also take over the registration, renewal and setting of licensing requirements of other insolvency office-holders.

(B) QUALIFICATIONS OF INSOLVENCY OFFICE-HOLDERS

11. Currently, different qualifying requirements apply across the bankruptcy and various insolvency regimes.
12. In bankruptcy proceedings, the court may appoint a person other than the Official Assignee to be the trustee of the bankrupt's estate. The trustee in bankruptcy must be (a) registered as a public accountant under the Accountants Act (Cap. 2), (b) an advocate and solicitor, or (c) such other person as the Minister may prescribe, and must not have been convicted of an offence involving fraud or dishonesty punishable on conviction by imprisonment for 3 months or more.³⁹⁰

³⁸⁹ For example in the year 2010, there were 193 applications made to the High Court for winding up, and 142 winding up orders were made. In the year 2011, there were 168 applications made to the High Court for winding up, and 113 winding up orders were made. There were 6 and 7 applications for judicial management in the years 2010 and 2011 respectively.

³⁹⁰ See section 34 of the Bankruptcy Act.

13. In a winding up by the court and a creditors' voluntary winding up, only individuals who are "approved liquidators" can act as liquidators.³⁹¹ A receiver must also be an approved liquidator.³⁹² The Minister grants the requisite approval, and the applicable criteria are found in the Practice Directions issued by the Registrar of Public Accountants.³⁹³ Generally, if an applicant is a public accountant registered under the Accountants Act, he needs to satisfy the Registrar of Public Accountants that he has the necessary experience (in audit or liquidation work) and capacity (as evidenced by the reports of two referees, one of whom must be an approved liquidator) to undertake the work of an approved liquidator satisfactorily. If the applicant is not a public accountant, then he must have passed the final examination in accountancy in a prescribed list of tertiary education institutions or professional examinations, have at least 3 years' relevant experience in insolvency work, and be of good reputation and character.

14. However, the liquidator in a members' voluntary winding up does not need to be an approved liquidator.³⁹⁴ Neither does a judicial manager; he need only be a public accountant who is not an auditor of the company, and even this requirement may be disapplied by the court or if he is nominated by the Minister.³⁹⁵ Further, no qualifications are required for a person to be appointed as a scheme manager in a scheme of arrangement.

15. It is clear that this piecemeal and disparate regime for the qualifications of insolvency office-holders is unsatisfactory. The same observation was made by the CLRFC, which proposed the establishment of a common set of qualifications for all insolvency office-holders.³⁹⁶ The Committee shares this view and recommends that there be a common qualification standard established for all insolvency office-holders, save for two instances, namely, scheme managers and liquidators in a members' voluntary winding up.

³⁹¹ See section 11(1)(a) of the Companies Act, see further section 11(2)(b), in a creditors' voluntary winding up, the requirement can be waived by the creditors.

³⁹² See section 217(1) of the Companies Act.

³⁹³ As at the date of this consultation paper, the applicable Practice Directions are ACRA Practice Directions No. 5 of 2005.

³⁹⁴ See section 11(2)(a) of the Companies Act.

³⁹⁵ See section 277B(3)(a) and (e) of the Companies Act.

³⁹⁶ Recommendation 4.3 of the CLRFC's Final Report (October 2002).

16. The Committee feels that it would be inappropriate to prescribe qualifications for scheme managers since the terms of a scheme of arrangement are completely dependent on the company proposing the scheme and the creditors who are subject to the scheme. The work that is to be carried out under a scheme of arrangement may differ greatly from case to case, and it is open to a solvent company to propose a scheme of arrangement. The role of a scheme manager, unlike most other insolvency office-holders, may also vary greatly from case to case. In fact, it is not even necessary for every scheme to have a scheme manager. Further, the appointment of a particular scheme manager, being one of the terms of the scheme, is always subject to the approval of the creditors and the sanction of the court.
17. The Committee is therefore of the view that the law should not impose any particular set of qualifications on scheme managers. The choice of a scheme manager with the appropriate qualifications and skills in any one case should thus be left to the company, the creditors and the court considering the scheme in that case. Of course, the court should, when asked to sanction the scheme of arrangement, have the discretion to appoint a scheme manager in place of the person nominated in the terms of the scheme, including a licensed insolvency office-holder.
18. On the issue of whether a liquidator in a members' voluntary winding up should meet the standard set of qualifications applicable to insolvency office-holders, the Committee was divided. Currently, a liquidator in a members' voluntary winding up need not be an approved liquidator.³⁹⁷ However, certain members of the Committee feel that there is no reason why such a liquidator should not be subject to the qualification regime as he would be carrying out liquidation work; the concerns with maintaining standards and ensuring confidence in the corporate insolvency regime would apply with the same force in this situation. On the other hand, it may be argued that, in a members' voluntary winding up, the company is solvent and the members of the

³⁹⁷ See section 11(2)(a) of the Companies Act.

company are in a position to decide for themselves whether, for reasons of cost or otherwise, the liquidation should be carried out by a qualified insolvency office-holder or by some other person (often a director or other officer of the company itself). Further, in a members' voluntary winding up, it is permissible and in fact frequently the case in practice that the assets of the company have been realised, its main liabilities discharged and its affairs wound up by the time the voluntary winding up process is formally initiated. The Committee suggests that further views be taken on the issue before a decision be made, in particular, from those in the business community who are likely to often utilise the members' voluntary winding up process.

Proposals from the Insolvency Practitioners Association of Singapore ("IPAS")

19. IPAS made a number of proposals with regard to the persons who can apply to be licensed as insolvency office-holders in Singapore:
 - (1) An applicant must be a member of the Institute of Singapore Chartered Accountants (formerly known as Institute of Chartered Public Accountants of Singapore) ("**ISCA**") or the Law Society of Singapore ("**Law Society**") for at least 3 years, and a member of IPAS, at the time of the making of the application.³⁹⁸
 - (2) An applicant must have spent at least three of the preceding 5 years doing professional work with and under the direct supervision of an insolvency office-holder, or have for at least 3 of the preceding 5 years worked on insolvency-related assignments.
 - (3) An applicant must have passed the Insolvency Practitioner Examinations (based on the modules prescribed by IPAS) in the year of application.

³⁹⁸ In the case of a foreigner, he or she must be an approved insolvency practitioner from another recognised professional insolvency body or government authority and a member of that recognised professional insolvency body for at least 3 years and, if he or she is not a member of IPAS, ISCA or the Law Society, a security bond must be provided.

20. IPAS also proposed that for applications for renewal of approval, the applicant must have completed a prescribed amount of Continuing Professional Education (“**CPE**”) hours. The requirement initially would be 10 hours per annum, and this will gradually be raised to 40 hours per annum, or a running CPE accumulation of 120 hours for the past 3 years.
21. The Committee understands the rationale for these proposals but is of the view that they should not be implemented at the outset but should be considered at a later juncture, after a “running-in” period for the new system has passed and any issues on the ground and during the transition have been addressed. At the start of the new system, the common qualification standard for insolvency office-holders should not be markedly different from that applicable to approved liquidators. Principally, the applicant should be a public accountant, an advocate and solicitor or such other person as the Minister may prescribe, with the requisite capability and experience. If the applicant is not a public accountant, it is proposed that requirements similar to what are currently required be retained; that is, he must have passed the final examination in accountancy in a prescribed list of tertiary education institutions or professional examinations, have at least 3 years’ relevant experience in insolvency work, and be of good reputation and character. With regard to foreign professionals, the Committee is of the view that the requirements should be similar to those applicable where the applicant is not a public accountant. Whether the applicant would need to be a member of IPAS, and would need to pass examinations or fulfill specific CPE requirements, may be considered at a later time. Furthermore, a foreign professional who is licensed as an insolvency office-holder may only be appointed to the office if he or she is jointly appointed with a Singapore licensed insolvency office-holder.

(C) *DISCIPLINARY FUNCTION*

22. In addition to the civil liability, criminal liability and judicial oversight regimes examined above, the disciplinary framework operates as an additional safeguard against malpractice by insolvency office-holders. Currently, however, there is no clear framework for aggrieved parties to make complaints and for the Official Assignee or Official Receiver to take appropriate disciplinary action against errant insolvency practitioners. What is presently provided is only that the Official Assignee or Official Receiver may lodge a complaint to the Registrar of Public Accountants against the approved liquidator or private trustee's neglect or misfeasance for disciplinary action to be taken, or, where necessary, apply to the court for removal of the approved liquidator or private trustee.³⁹⁹ The Official Receiver currently only makes an application to court in the most egregious cases of misconduct.
23. If it is accepted that the Official Assignee or Official Receiver (or, in a practical sense, IPTO) should assume the responsibility of licensing insolvency office-holders, the disciplinary function should similarly fall to be administered by IPTO. That said, the Committee anticipates that the number of persons licensed as insolvency office-holders is likely to be relatively modest (when compared to the numbers of practising public accountants and advocates and solicitors). In the circumstances, it is not easy to justify the effort, costs and resources that have to be expended in setting up a disciplinary regime specifically for insolvency office-holders. Further, the nature of the conduct and the inquiries with which such a disciplinary regime will primarily be concerned will be similar to that which the existing disciplinary regimes relating to accountants and lawyers regularly handle.
24. There is, therefore, much to be said about leveraging on the disciplinary processes of existing professional bodies such as the Public Accountants Oversight Committee, the ISCA and the Law Society. For instance, once a complaint of malpractice has been received, IPTO could refer the matter to

³⁹⁹ See sections 268 and 302 of the Companies Act. The Official Assignee is also empowered to apply to court for the removal of a trustee in bankruptcy following any inquiry or investigation made under section 39 of the Bankruptcy Act.

the relevant professional body for inquiry. Depending on the outcome of the disciplinary inquiry, a determination may thereafter be taken by IPTO as to whether the insolvency office-holder's license ought to be suspended or cancelled. As to the relevant professional standards to be applied, these may be left to the applicable professional standards administered by each professional body. Alternatively, a set of industry specific standards may be promulgated by IPTO to help guide the relevant professional bodies in their disciplinary functions.

25. Where an instance of malpractice may amount to a criminal offence, IPTO will pursue prosecution of that offence or refer the matter to the relevant enforcement authority. Depending on the outcome of that criminal matter (for example, if there is a conviction), IPTO may again further refer the matter to the relevant professional body for inquiry and/or take a decision on whether the insolvency office-holder's license ought to be suspended or cancelled.
26. This framework, however, is not without some shortcomings. It cannot be brought to bear against a scheme manager or a liquidator in a members' voluntary liquidation who does not happen to be a public accountant or an advocate and solicitor. It also does not apply to an insolvency officer-holder who is not a public accountant or an advocate and solicitor but who obtained his licence on the basis of passing the prescribed examinations, having at least 3 years' relevant experience in insolvency work and being of good reputation and character.
27. The Committee feels that regulation through civil or criminal liability and control by the court of insolvency office-holders who do not come under some form of professional disciplinary process is insufficient to enforce proper standards of professionalism. An ad hoc disciplinary process may need to be instituted for exceptional cases where an insolvency office-holder is not subject to the disciplinary oversight by a professional body. An alternative would be for the classes of persons who can undertake insolvency work to be confined to persons who are already subject to oversight by their respective professional bodies.

28. The options canvassed above should be studied carefully by the Government in consultation with industry stakeholders when designing the appropriate disciplinary framework for the insolvency profession.

(D) AUDITS

29. Currently, the regulatory framework does not empower the Official Receiver or any other regulator to conduct audits of an insolvency office-holder's cases. The Committee considered whether it was necessary to introduce such audits in Singapore.
30. In Australia, the Australian Securities and Investments Commission ("**ASIC**"), under its proactive insolvency practice review program, conducted 20 reviews involving detailed examination of 215 external administrations in 2010 and 2011. In a separate program, ASIC undertook 96 transaction reviews. These reviews examined transactions undertaken by registered liquidators based on matters notified to ASIC by the public, or from other sources, regarding registered liquidator conduct. In contrast, Hong Kong has eschewed the need for such processes since "the ability to remove or qualify the authorization [of insolvency practitioners] would make the authorizing body a useful forum for any complaints by the public or creditors, without imposing a significant supervisory burden in the absence of such complaints".⁴⁰⁰
31. The Committee does not see any immediate need to introduce an audit programme for insolvency office-holders, but nevertheless invites feedback on whether, in principle, the Official Receiver's functions ought to include an audit of insolvency office-holders' cases and, if so, the form it should take, the scope it should cover as well as the extent of the Official Receiver's powers in an audit.

⁴⁰⁰ Para 4.21 Hong Kong Review of the Official Receiver's Office Consultation Paper, June 2002. There have been no updates or plans for the audit of the insolvency profession as at the date of this Report.

(E) SUMMARY OF RECOMMENDATIONS

32. In summary, the Committee recommends the following:

- (1) The Official Receiver should take over the Registrar of Public Accountants' function and role in the registration and renewal of approved liquidators' licenses, as well as the setting of licensing requirements. The Official Assignee/Official Receiver should also take over the registration, renewal and setting of licensing requirements of other insolvency office-holders.
- (2) There should be a common qualification standard established for all insolvency office-holders, save for two instances; namely, scheme managers and, possibly, liquidators in a members' voluntary winding up.
- (3) Further views should be taken on the issue of whether liquidators in members' voluntary liquidations should be licensed insolvency office-holders before a decision be made; in particular, from those in the business community who utilise the members' voluntary winding up process.
- (4) As a start, the common qualification standard for insolvency office-holders should not be markedly different from that applicable to approved liquidators. Furthermore, a foreign professional who is licensed as an insolvency office-holder may only be appointed to the office if he or she is jointly appointed with a Singapore licensed insolvency office-holder.
- (5) That if IPTO should assume the responsibility of licensing insolvency office-holders, the disciplinary function should similarly fall to be administered by IPTO.
- (6) Given the small size of the insolvency industry, there is much to be said about leveraging on the disciplinary processes of existing professional

bodies. Where the insolvency office-holder does not come under the purview of an existing professional body, a simple regulatory system may have to be introduced to regulate less egregious forms of misconduct. Alternatively, the classes of persons who can undertake insolvency work could be confined to persons who are already subject to disciplinary oversight by their respective professional bodies. These options will have to be further studied by the Government in designing the appropriate disciplinary framework.

- (7) There is no immediate need to introduce an audit programme for insolvency office-holders.

CHAPTER 11: CROSS-BORDER INSOLVENCY

1. Globalisation has resulted in increased economic activities that transcend national borders. Key features of today's international business landscape include the conduct of business through branches, offices or independent subsidiaries set up in numerous countries, the entering into of transactions that generate assets in various geographical locations, and the incurring of debts (and therefore creditors) that are booked in different jurisdictions.

2. Business failure under such conditions will raise issues of cross-border insolvency such as: (a) the availability of local insolvency regimes to foreign companies, (b) whether local courts will have the jurisdiction to initiate winding up or other insolvency proceedings against the foreign company, (c) the extent to which locally situated assets will be available to satisfy foreign debts, and (d) the extent to which local courts will recognise foreign insolvency proceedings, the status of foreign insolvency office-holders and provide assistance in aid of such proceedings and persons.

(A) *CURRENT FRAMEWORK*

Personal Bankruptcy

3. Section 151 of the Bankruptcy Act permits the High Court to act in aid of and be auxiliary to the courts of Malaysia as well as the courts of any other designated country with jurisdiction in bankruptcy and insolvency matters, provided that these courts are required to act in aid of and be auxiliary to the courts in Singapore. However, no other country other than Malaysia has thus far been designated under this provision. Provision is also made in section 152 of the Bankruptcy Act for property situated in Singapore to be vested automatically in the Official Assignee of Malaysia where any person has been adjudged a bankrupt by a court in Malaysia, and that the Official Assignee of Malaysia has title to sue and be sued in any court in Singapore.

Liquidation

4. No express provision for the courts to provide auxiliary support to foreign insolvency proceedings is found in the Companies Act.⁴⁰¹ Instead skeletal provision is made for the winding up of unregistered companies and registered foreign companies at sections 351 and 377 of the Companies Act respectively.

5. An unregistered company incorporated outside of Singapore may be wound up by the Singapore courts notwithstanding that it is being wound up or has been dissolved or has otherwise ceased to exist as a company under the laws of the place in which it was incorporated.⁴⁰² The liquidator appointed over such an unregistered company may exercise any powers or do any act in the case of that company which might be exercised or done by it or him in the winding up of a Singapore incorporated company.⁴⁰³ Section 354 of the Companies Act further provides that the outstanding property of a defunct unregistered company whose place of incorporation or origin is a country designated by the Minister, shall vest in the liquidator at the date the company was dissolved. However, no country has yet been designated under this provision by the Minister.

6. Where a registered foreign company goes into liquidation or is dissolved in its place of incorporation, the foreign liquidator shall, until a liquidator for Singapore is duly appointed by the court, have the powers and functions of a liquidator for Singapore.⁴⁰⁴ Section 377(3)(c) of the Companies Act further provides that the liquidator of a registered foreign company shall, unless otherwise ordered by the court, recover and realise all the assets of the company and pay the net amount to the liquidator of the foreign company in its home jurisdiction “after paying any debts and satisfying any liabilities

⁴⁰¹ Contrast section 426 of the UK Insolvency Act. See also the Australia Corporations Act, which contains provisions that generally provide that Australian courts must act in aid of courts of prescribed foreign countries (see e.g. section 581).

⁴⁰² See section 351(3) of the Companies Act.

⁴⁰³ See section 350(2) of the Companies Act.

⁴⁰⁴ See section 377(2)(b) of the Companies Act.

incurred in Singapore by the [registered] foreign company". In essence, the assets of the company located in Singapore are ring-fenced for the benefit of creditors whose liabilities were incurred in Singapore.

7. Whilst it was previously thought that the ring-fencing proviso in section 377(3)(c) did not apply to unregistered foreign companies,⁴⁰⁵ the position is no longer clear in light of a recent decision of the High Court in *Beluga Chartering GMBH v Beluga Projects (Singapore) Pte Ltd (in liquidation)* [2013] SGHC 60.⁴⁰⁶
8. Apart from section 377(3) of the Companies Act, industry-specific legislation also expressly provides for ring-fencing. For instance, section 61 of the Banking Act specifies, among other things, that where a bank becomes insolvent, the assets of that bank in Singapore shall be available to meet all liabilities in Singapore of the bank specified in section 62(1) of the Banking Act and, further, that those liabilities shall have priority over all unsecured liabilities of the bank other than preferential debts specified in section 328(1) of the Companies Act.⁴⁰⁷ Similar provision is made in section 49FR of the Insurance Act as regards insolvent licensed insurers.⁴⁰⁸

Receivership

9. There are no statutory provisions relating to cross-border insolvency for the receivership regime. Cross-border cooperation may, however, be possible pursuant to common law principles.

⁴⁰⁵ See *RBG Resources plc v Credit Lyonnais* [2006] 1 SLR(R) 240.

⁴⁰⁶ At the time of this report, this decision was pending appeal to the Court of Appeal.

⁴⁰⁷ These comprise, in order of priority, any premium contributions under the Deposit Insurance and Policy Owners' Protection Schemes Act 2011; liabilities incurred in respect of insured deposits; deposit liabilities incurred with other non-bank customers; and deposit liabilities with non-bank customers when operating an Asian Currency Unit.

⁴⁰⁸ In the case of licensed insurance companies, such liabilities refer to any levy payable under the Deposit Insurance and Policy Owners' Protection Scheme 2011; protected liabilities; liabilities incurred in respect of direct policies not protected under the Deposit Insurance and Policy Owners' Protection Scheme 2011; and liabilities incurred in respect of reinsurance policies.

Judicial Management

10. As Part VIIIA of the Companies Act applies only to companies incorporated under the Companies Act or previous written law, the judicial management regime is not available to foreign companies.⁴⁰⁹ Further, the force of a judicial management order in respect of a Singapore company is strictly territorial unless foreign jurisdictions provide recognition and assistance, for example under the UNCITRAL Model Law on Cross-Border Insolvency (the “**Model Law**”). Indeed, a Singapore judicial manager may encounter real challenges in trying to carry out the purpose of the judicial management order where the assets are located in certain overseas foreign jurisdictions.⁴¹⁰

Schemes of Arrangement

11. Foreign companies are able to propose and implement schemes of arrangement under Part VII of the Companies Act.⁴¹¹ However, a Singapore scheme of arrangement implemented by a foreign company will not be granted extraterritorial effect in any other country save by applicable treaty or in accordance with the applicable law of that other country. Furthermore, a Singapore incorporated company which has obtained court sanction of its scheme of arrangement may nevertheless have its foreign assets or interests in assets subject to foreign winding up proceedings or legal attachment commenced under the applicable foreign law.⁴¹²
12. The Committee considers that the cross-border insolvency framework as described above is relatively bare in certain aspects, and does not cover a number of possible issues which could arise. In this regard, the Committee sets out below its recommendations for certain changes to the cross-border insolvency framework. In particular, the Committee is of the view that Singapore should adopt the Model Law (with certain modifications), which will

⁴⁰⁹ Section 227A of the Companies Act only envisages applications in respect of judicial management to be made in respect of “a company”, and section 2 of the Companies Act defines a “company” to mean “a company incorporated pursuant to [the Companies] Act or pursuant to any corresponding previous written law.

⁴¹⁰ See e.g. *Deutsche Bank AG v Asia Pulp & Paper Co Ltd* [2003] 2 SLR 320.

⁴¹¹ See section 210(11) of the Companies Act.

⁴¹² See *Re TPC Korea Co Ltd* [2010] 2 SLR 617 at [17].

have the effect of substantially enhancing the current regime on cross-border insolvency.

(B) *EXTENDING JUDICIAL MANAGEMENT TO FOREIGN COMPANIES*

13. As alluded to above, foreign companies that are experiencing financial difficulty have no recourse to the judicial management regime in order to effect a corporate restructuring or rescue.
14. There is, in principle, no justification for such differentiated treatment, in particular when both the scheme of arrangement and liquidation regimes may apply (with some modifications) to foreign companies as well. Foreign companies, like local companies, should be provided with adequate avenues in Singapore to avoid liquidation. Undoubtedly, there will arise instances where a foreign company with substantial business activities and assets in Singapore may need the protection and other features of judicial management within Singapore. The fact that the judicial manager may not be able to exert control or influence over operations or assets outside Singapore may be of secondary importance in such cases. In any event, there cannot be any fundamental objection to simply giving a foreign company the option to apply to place itself under judicial management in Singapore if it desires to do so.
15. In the circumstances, the Committee recommends that the judicial management regime be extended to cover all foreign companies.

(C) *ADOPTING THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY*

16. Unlike the legislative approach adopted by certain Commonwealth jurisdictions, the Companies Act contains few express provisions for the rendering of assistance between Singapore courts and the courts of other countries in relation to the insolvency of a foreign company.⁴¹³

⁴¹³ Contrast section 426 of the UK Insolvency Act. See also the Australia Corporations Act, which contains provisions that generally provide that Australian courts must act in aid of courts of prescribed foreign countries.

17. There is a suggestion that the absence of legislation providing for judicial cooperation in cross-border insolvency may be overcome by common law rules espousing the doctrine of “modified universalism” in cross-border insolvency, namely, that the courts should, so far as is consistent with justice and public policy, recognise and give active assistance to foreign insolvency procedures.⁴¹⁴ However, to the Committee’s knowledge, no local judgments have expressly applied the common law doctrine of modified universalism in Singapore to afford recognition and assistance to foreign insolvency proceedings via common law.⁴¹⁵ There has also been some suggestion that certain previous decisions of the Singapore courts preclude such recognition at common law.⁴¹⁶ Further, in the recent UK Supreme Court decision in *Rubin and another v Eurofinance SA and others (Picard and others intervening)* [2012] 3 WLR 1019, the court by a 4-1 majority overruled one of the main decisions which recognised the modified universalism approach by declining to create an exception to the existing common law rules on the recognition and enforcement of foreign judgments simply to further the objectives of universalism in cross-border insolvency. *Rubin* raises a question as to the future of the common law doctrine of “modified universalism”, and the extent of the court’s common law powers to recognise and assist foreign insolvency procedures in the absence of statutory provisions.
18. Given the uncertainty over the common law doctrine of “modified universalism”, and the relatively few express legislative provisions on cross-border insolvency, the Committee considered whether a firmer and more predictable platform for cross-border cooperation in insolvency matters could be injected into Singapore’s legislative framework by means of adoption of the Model Law.

⁴¹⁴ See the approach of the Privy Council in *Cambridge Gas Transportation Corporation v Official Committee of Navigator Holdings* [2007] 1 AC 508 and the judgments of Lord Hoffman and Lord Walker of the House of Lords in *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852.

⁴¹⁵ Although see e.g. the unreported cases of *Re Aero Inventory (UK) Limited (in Administration)* SIC No. 127/2001/X and *Re China Sun Bio-Chem Technology Group Company Ltd.*, OS762/2010/K; see also *Beluga Chartering GMBH v Beluga Projects (Singapore) Pte Ltd (in liquidation)* [2013] SGHC 60 at [24].

⁴¹⁶ See e.g. the Official Receiver’s submissions in *Re Aero Inventory (UK) Limited (in Administration)*, relying on *Re China Underwriters General and Life Insurance Co. Ltd.* [1988] 1 SLR(R) 40, affirmed on appeal in *Official Receiver of Hong Kong v Kao Wei Tseng & Ors* [1990] 1 SLR(R) 315; but see Chan Sek Keong, “Cross-border Insolvency Issues Affecting Singapore” (2011) 23 SAcLJ 413.

Features of the Model Law

19. The Model Law was promulgated by UNCITRAL in 1997 with the purpose of providing effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:
 - (1) Cooperation between the courts and other competent authorities of the State and foreign States involved in cases of cross-border insolvency;
 - (2) Greater legal certainty for trade and investment;
 - (3) Fair and efficient administration of cross-border insolvencies that protect the interests of all creditors and other interested persons, including the debtor;
 - (4) Protection and maximisation of the value of the debtor's assets; and
 - (5) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.⁴¹⁷

20. Significantly, the Model Law respects the differences among national procedural laws and does not attempt a substantive unification of insolvency law. It offers solutions that supplement a State's insolvency legislative framework by:⁴¹⁸
 - (1) Providing the person administering a foreign insolvency proceeding ("**foreign representative**") with access to the courts of the enacting State, thereby permitting the foreign representative to seek a temporary "breathing space", and allowing the courts in the enacting State to determine what coordination among the jurisdictions or other relief is warranted for optimal disposition of the insolvency;

⁴¹⁷ See the preamble to the Model Law.

⁴¹⁸ See the *Guide to Enactment of the UNCITRAL Model Law on Cross-border Insolvency* at para 3.

- (2) Determining when a foreign insolvency proceeding should be accorded "recognition" and what the consequences of recognition may be;
 - (3) Providing a transparent regime for the right of foreign creditors to commence, or participate in, an insolvency proceeding in the enacting State;
 - (4) Permitting courts in the enacting State to cooperate more effectively with foreign courts and foreign representatives involved in an insolvency matter;
 - (5) Authorising courts in the enacting State and persons administering insolvency proceedings in the enacting State to seek assistance abroad;
 - (6) Providing for court jurisdiction and establishing rules for coordination where an insolvency proceeding in the enacting State is taking place concurrently with an insolvency proceeding in a foreign State; and
 - (7) Establishing rules for coordination of relief granted in the enacting State in favour of two or more insolvency proceedings that may take place in foreign States regarding the same debtor.
21. Central to the operation of the Model Law is the recognition of foreign proceedings by the courts of enacting States. Provided that a foreign proceeding falls within the ambit of the definition, the Model Law requires the courts of enacting States to recognise the foreign proceeding upon provision of certain basic documentary evidence. Once recognition is granted, a number of effects will come into operation, depending on whether the foreign proceeding is a main proceeding (i.e. proceedings that take place in the State of the debtor's centre of main interest) or a non-main proceeding (i.e. proceedings that take place where the debtor carries out a non-transitory economic activity with human means and goods and services). For example,

in the case of the former, a moratorium similar to that granted to a like proceeding in the recognising State is triggered automatically, to preserve assets of the debtor and to prevent their removal across borders.⁴¹⁹ Where the proceeding is a non-main proceeding, no automatic moratorium arises, but the court that recognises such a proceeding may grant any appropriate relief “where necessary to protect the assets of the debtor or the interests of the creditors”.⁴²⁰

22. The Model Law also seeks to encourage recognising States to adopt a more universalist approach on the issues of how the assets of the debtor located in different parts of the world are to be realised, and how the proceeds are to be distributed. The courts of the recognising State may entrust the *realisation* of the debtors assets in its jurisdiction to the foreign representative of a foreign proceeding and/or entrust the distribution of the debtor’s local assets to the foreign representative.⁴²¹ To ensure that the grant of such relief shall not prejudice the interests of local creditors, safeguards are provided; such as the requirement that turnover relief will only be granted if the court of the recognising State is satisfied that the interest of local creditors will be adequately protected.⁴²²
23. Furthermore, the Model Law provides for means of cooperation and communication between courts and representatives and for the coordination of concurrent proceedings. For example, the court of a recognising State is required to cooperate to the maximum extent possible with foreign courts or foreign representatives; either directly or through the office holder of the local proceedings.⁴²³ Provision is made to enable the court to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives.⁴²⁴

⁴¹⁹ Art 20 of the Model Law.

⁴²⁰ Art 21(1) of the Model Law.

⁴²¹ Art 21(2) of the Model Law.

⁴²² Art 21(2) and Art 22 of the Model Law.

⁴²³ Art 25(1) of the Model Law.

⁴²⁴ Art 25(2) of the Model Law.

Adoption of the Model Law

24. The Committee considered whether Singapore should adopt the Model Law. In this regard, it has been suggested that enacting the Model Law does more to assist foreign insolvencies than it does to assist local ones.⁴²⁵ It has also been noted that, although several major commercial jurisdictions have adopted the Model Law, the total number of States which have adopted the same remains relatively low.⁴²⁶ A further concern relates to the lack of reciprocity. The Model Law obliges the enacting State to recognise and grant assistance to insolvency proceedings taking place in any foreign state, regardless of whether that foreign state has enacted the Model Law, or recognises and grants assistance to insolvency proceedings taking place in the enacting State.

25. Notwithstanding the above, the Committee considers that there are a number of reasons which favour the adoption of provisions of the Model Law (subject to certain additional considerations discussed further below). First, the Committee notes from the above account that the Model Law sets out a comprehensive framework for international cooperation which lends far greater clarity and certainty than the existing provisions in the Companies Act and the common law. This increased certainty and cooperation will in many cases lead to a greater predictability of process and outcome, which in many cases may possibly help lower the risks and costs of international financing, reduce the overall cost of insolvency litigation, and reduce the overall costs of obtaining recoveries or dividends from the cross-border insolvency process. It may also influence foreign investment in Singapore favourably.

26. Second, enactment of the Model Law will also support the development of a well-understood, uniform, internationally recognised framework for dealing

⁴²⁵ US National Bankruptcy Review Commission Report 1997 (Chapter 2, Transnational Insolvency) at p361

⁴²⁶ As at the date of this Report, only 19 States have adopted the Model Law; namely Australia, Canada, Columbia, Eritrea, Greece, Japan, Mauritius, Mexico, Montenegro, New Zealand, Poland, Republic of Korea, Romania, Serbia, Slovenia, South Africa, Uganda, UK and Ireland (and the British Virgin Islands as an overseas territory of the UK) and the United States of America.

with cross-border insolvencies. If the Model Law is adopted, future cross-border insolvencies in Singapore may be more likely to attract support and cooperation from other countries than if Singapore were to unilaterally adopt alternative cross-border insolvency mechanisms. Additionally, Singapore is not currently party to any multilateral convention on cross-border insolvency, and there is no such convention which could appropriately be adopted for this purpose. The Model Law remains the leading international initiative in this respect.

27. Third, because of the measured, calibrated approach of the Model Law, the adoption of its provisions does not require profound legislative changes to Singapore's insolvency framework. For example, the main forms of assistance envisioned under the Model Law are often similar to those which Singapore courts would have granted in the case of a domestic insolvency.⁴²⁷
28. Lastly, as noted above, Singapore should aspire to become a regional hub for restructuring and insolvency of foreign companies. The adoption of a clear and internationally recognised framework for cross-border insolvencies will be a firm step in this direction.
29. In 2002, the CLRFC stated in its report that it recommended awaiting further developments relating to the Model Law to ascertain how these would impact the insolvency legislation of the major common law jurisdictions.⁴²⁸ Since then, a number of common law jurisdictions have adopted the Model Law, including the US, New Zealand, UK, Australia and Canada. The Model Law has also received almost universal endorsement from leading practitioners and academics.
30. On balance, the Committee is of the view that there are substantial benefits to Singapore in enacting the Model Law. The Committee therefore recommends the adoption of provisions of the Model Law, subject to the matters set out below.

⁴²⁷ See e.g. Articles 19 to 21, and 23 of the Model Law.

⁴²⁸ Recommendation 1.3 of Chapter 4 of the CLRFC's Final Report (October 2002).

Whether to limit the application of the Model Law based on reciprocity

31. Wholesale adoption of the Model Law may raise concerns as it is not based on the principle of reciprocity between States, i.e. there is no condition or requirement that a foreign representative wishing to access facilities under the Model Law must have been appointed, or foreign proceedings commenced, under the laws of a State which has itself enacted the Model Law. In this regard, as noted above, many of the advantages that are reaped from the Model Law in terms of equality of treatment for local creditors, the ease of recovering assets from foreign jurisdictions and more efficient treatment of international insolvencies involving local businesses may come only if other countries also enact the Model Law or an equivalent thereof. It remains a fact that the Model Law has to date received limited adoption worldwide.

32. In the circumstances, the Committee considered whether to limit the application of the Model Law to foreign insolvency proceedings originating from States that have themselves already adopted the Model Law, such as by limiting the application of the Model Law to States which are gazetted by the Minister,⁴²⁹ or alternatively by a general reciprocity provision. Such an approach would ensure that the adoption of the Model Law does not oblige our courts to recognise and assist in insolvency proceedings in jurisdictions the legal and judicial systems of which may not be reliable and transparent, or may not meet up to universally accepted standards of procedural and substantive fairness. It would also enable policy makers to assess whether reciprocity ought to be extended to a particular State, depending on the manner in which that State has adopted or adapted the Model Law or other such provisions for cross-border cooperation. Further, the absence of a reciprocity or gazetting requirement may remove any incentive for foreign jurisdictions to reform their cross-border insolvency provisions to confer similar recognition and assistance to Singapore proceedings.

⁴²⁹ This may be similar to the gazetting requirement adopted by Singapore in its other cross-border recognition and enforcement legislation, such as the Reciprocal Enforcement of Foreign Judgments Act (Cap. 265) and Reciprocal Enforcement of Commonwealth Judgments Act (Cap. 264).

33. Against the above, the Committee noted that most other major jurisdictions which adopted the Model Law did not impose a reciprocity or gazetting requirement, for several reasons. One was a desire to play a leadership role in the international insolvency community and set an example for other countries for cooperation. Another reason was that the weight of international opinion went against imposing a reciprocity requirement. In particular, at the time of adopting the Model Law, some enacting States also noted that major countries which had mutual free-trade agreements with the enacting State had adopted the Model Law, and did not require reciprocity. It has further been pointed out that, in any case, the court has some discretion not to grant assistance to “non-friendly” countries.⁴³⁰ In this last regard, the Committee noted that the Model Law itself contains certain safeguards to ensure equality in treatment for local creditors when granting specific reliefs: see e.g. Articles 21 and 22, which provide that certain reliefs (including entrusting a foreign insolvency office-holder with the distribution of assets located within the jurisdiction) may only be granted where the local courts are “satisfied” that the interests of local creditors are adequately protected. Article 6 of the Model Law further allows the courts of the enacting State to refuse recognition or assistance on public policy grounds, such as in cases where there is a breach of natural justice or procedural fairness.⁴³¹
34. Finally, the Committee noted that having a reciprocity or gazetting requirement would not achieve fully the purpose of having a clear, predictable and comprehensive legal framework for managing all cross-border insolvencies. The Model Law’s benefits of (a) providing internationally recognised, clear and orderly cross-border insolvency procedures, (b) reducing procedural hurdles to recognition (e.g. streamlining communication between courts or office-holders), and (c) aiding universalism and the uniform treatment of creditors, will not be available in all cross-border cases. There

⁴³⁰ See the US National Bankruptcy Review Commission Report 1997 (Chapter 2, Transnational Insolvency) at p354; the UK’s *Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain: Summary of Responses and Government Reply* (March 2006) at para 40; Australia’s *Corporate Law Economic Reform Program Proposal for Reform: Paper No. 8, “Cross-Border Insolvency: Promoting international cooperation and coordination”* (2002) at p19-20; Canada’s *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies’ Creditors Arrangement Act; Report of the Standing Senate Committee on Banking, Trade and Commerce* (November 2003) at p144.

⁴³¹ *Re Eurofoods IFSC Ltd* [2004] IESC 47.

will have to be continuing reliance on the common law, with its uncertainties, controversies and irregular pace of evolution and modernisation.

35. The Committee concluded that, on balance, there should be no reciprocity requirement. However, the Committee makes this recommendation somewhat tentatively. The issue is really one of policy, namely, whether there should be control wielded by policy makers as to which foreign insolvency proceedings should be recognised and assisted under the Model Law, in addition to the power of the courts to decline or restrict such recognition and assistance on the ground of breach of natural justice or procedural fairness or prejudice to the interests of local creditors.⁴³² Having expressed its preference, the Committee would nevertheless defer to the views of the Government in this regard.
36. Another issue to consider is whether the Model Law should apply to both corporate and individual insolvencies, or only to corporate insolvencies. In this regard, the UNCITRAL Guide to Enactment to the Model Law suggests that enacting States may wish to exclude the application of the Model Law to individual bankruptcies where the bankrupts incurred their debts predominantly for personal or household purposes rather than for commercial or business purposes, or those insolvencies that relate to non-traders (subject to a monetary cap, such that the Model Law will continue to apply where the debts incurred exceed that cap).⁴³³ The Committee recommends that the Model Law only applies to corporate insolvencies for now, and to review at an appropriate juncture whether the Model Law ought to extend to individual insolvencies after the Model Law has been in operation for some time.
37. Quite apart from these specific recommendations, the adoption of the Model Law in any form will also require a detailed consideration of whether other specific provisions in the Model Law should be excluded or augmented to take into account local circumstances. For example, the UK has modified Article 20

⁴³² A brief survey of the 19 countries that have adopted the Model Law shows that there are at least 5 countries (Mexico, Mauritius, Romania, South Africa and the BVI) that have incorporated some requirement of reciprocity in the course of incorporating/enacting the Model Law into the local insolvency regime.

⁴³³ See the UNCITRAL Guide to Enactment to the Model Law at para 66. See further, for example, Australia's consideration of the same question at the Australian Corporate Law Economic Reform Program Paper No. 8, "*Cross-Border Insolvency: Promoting International Cooperation and Coordination*" at p31.

of the Model Law such that the court's power under Article 20 to grant relief of a stay or suspension of proceedings for the recognised foreign insolvency proceeding is limited to the same prohibitions, limitations, exceptions and conditions as would apply under UK law to a local insolvency proceeding.⁴³⁴ The UK approach may be a useful precedent for Singapore's adoption of the Model Law in this respect. As a final example, Article 25 of the Model Law provides that the court "shall" cooperate to the maximum extent possible with foreign courts or foreign representatives on certain specified matters. Singapore could again usefully consider the UK approach in this respect, which amended Article 25 to provide that the court "may" cooperate to the maximum extent possible with foreign courts or foreign representatives.

(D) *RING-FENCING OF LOCALLY SITUATED ASSETS*

38. The practical application of section 377(3)(c) of the Companies Act may result in the ring-fencing of locally situated assets in the Singapore winding up of a foreign company which has been registered to carry on business in Singapore. In such a winding up, the proceeds of realisation of the Singapore assets of the foreign company can be paid by the Singapore liquidator to the liquidator of the foreign company for the place where it was formed or incorporated, only after the Singapore liquidator has paid debts and satisfied liabilities incurred in Singapore by the foreign company. This provision has been the subject matter of some long-standing controversy.
39. In this regard, a number of arguments have been advanced for the repeal of section 377(3)(c) of the Companies Act:
 - (1) Singapore has aspirations to become a regional debt restructuring and corporate rehabilitation hub but ring-fencing will reduce Singapore's attractiveness in this regard. There are precedents for Singapore being used as an international restructuring hub by unregistered

⁴³⁴ See the UK Cross-Border Insolvency Regulations 2006.

companies,⁴³⁵ to which ring-fencing under section 377(3)(c) was formerly understood not to apply.⁴³⁶

- (2) Ring-fencing is contrary to internationally-accepted standards of a fair and equitable cross-border insolvency regime and will affect the credibility of Singapore's cross-border insolvency law. Based on feedback received by the Committee, ring-fencing is one concern which is often levelled at Singapore's insolvency regime in international insolvency circles.
- (3) Continued application of ring-fencing may also lead courts in other jurisdictions to be more reluctant to give assistance to Singapore-based insolvency proceedings.
- (4) The policy underlying section 377(3)(c) is not clear. A debt which is accorded priority under the section may well be incurred in Singapore by a foreign creditor having no substantial or meaningful connection with Singapore, and it is difficult to see why the mere fact that a debt is incurred in Singapore should attract priority under section 377(3)(c), regardless of the identity of the creditor and the purpose and nature of the debt. Further, section 377(3)(c) is not easy to reconcile with the fact that, in the winding up of a Singapore-incorporated company, all debts are accorded equal treatment regardless of where they have been incurred.
- (5) Ring-fencing may be a disincentive for foreign investment in Singapore since investors may be concerned that local creditors are given preference over foreign creditors. Thus it has been argued that ring-

⁴³⁵ See e.g. *Re Aero Inventory (UK) Limited (in Administration)* (unreported, 11 April 2011), where the UK administrators of a UK aerospace company brought almost S\$700m of airplane parts into Singapore as part of its insolvency restructuring plan, in order to use Singapore's strong business environment as a central hub for selling the parts in the region. In that case, a moratorium against winding up proceedings in Singapore was also granted by the Singapore courts, such that ring-fencing would not apply to the company.

⁴³⁶ See *RBG Resources plc v Credit Lyonnais* [2006] 1 SLR(R) 240; however see *Beluga Chartering GMBH v Beluga Projects (Singapore) Pte Ltd (in liquidation)* [2013] SGHC 60, which is (at the time of this report) on appeal to the Court of Appeal.

fencing operates as a form of “non-tariff barrier to entry” for foreign investors.⁴³⁷

40. On the other hand, there are persuasive counter-arguments:⁴³⁸

- (1) The argument that ring-fencing operates as a form of “non-tariff barrier to entry” overstates the case against ring-fencing as it does not appear to be a significant factor in the promotion of bilateral trade and investments. Otherwise, section 377(3)(c) would either have been modified or repealed long ago.
- (2) Ring-fencing does not prejudice foreign creditors in every instance. In fact, it can work to the benefit of a foreign creditor (whose debt is incurred in Singapore) in circumstances where the pool of local assets is sufficient to meet his claim, whereas adding them to the foreign pool may actually dilute the payout of his claim. To this extent, even if Singapore’s ring-fencing laws were considered by parties intending to invest in Singapore, ring-fencing might actually promote trade which leads to the incurring of debts in Singapore.
- (3) Ring-fencing may be justified in that local creditors may have also contributed to the accumulation of assets of the insolvent foreign company that are located in Singapore, whereas foreign creditors may not have so contributed to those assets.
- (4) Abolishing ring-fencing may simply produce more benefits for bigger and richer economies (which in many cases tend to be net-investors in other countries) as against smaller economies (which in many cases tend to be net-recipients of foreign investment).

⁴³⁷ As referred to in Chan Sek Keong, “*Cross-border Insolvency Issues Affecting Singapore*” (2011) 23 SAcLJ 418, but see then-Chief Justice Chan’s response to this argument at 419.

⁴³⁸ See, for example, Chan Sek Keong, “*Cross-border Insolvency Issues Affecting Singapore*” (2011) 23 SAcLJ 413, at Part V.

41. The Committee also noted that ring-fencing is not favoured by the Model Law. Article 13 embodies the principle that foreign creditors, when they apply to commence an insolvency proceeding in the enacting State or file claims in such proceeding, should not be treated worse than local creditors, and that generally speaking, the minimum ranking for claims of foreign creditors ought to be on the same ranking as general local unsecured claims.⁴³⁹
42. Moreover, Article 21(2) of the Model Law enables the local courts to entrust the distribution of all or part of the insolvent foreign company's assets located within the courts' jurisdiction to a foreign liquidator, provided that the courts are satisfied that the interests of local creditors are adequately protected. This effectively means that, under the Model Law, the ring-fencing principle does not, as general rule, apply to the winding up of a foreign company unless otherwise ordered by the local courts. It should however be noted that Article 22 of the Model Law permits the courts to, among other things, subject any remission of assets overseas to such conditions as appear appropriate, including the provision by the foreign insolvency appointee of security or caution for the proper performance of his functions. It may also, either upon request or of its own motion, modify or terminate such relief.
43. The Committee further noted that a number of major commercial jurisdictions, such as the US, UK, and Australia have adopted the Model Law and have not endorsed ring-fencing provided that the interests of local creditors are adequately protected.
44. On balance, having considered the arguments, the views of the international community and the earlier recommendation that the Model Law should be adopted in Singapore, the Committee is of the view that ring-fencing as a general rule for the winding up of foreign companies (whether registered to do business in Singapore) should be abolished. However, as envisaged by the Model Law, the court will have the discretion to prohibit, restrict, or subject to conditions, the remission of assets of a foreign company in winding up in Singapore to the principal foreign liquidation if it is not satisfied that the

⁴³⁹ See the UNCITRAL Guide to the Enactment of the Model Law on Cross-Border Insolvency at para 103-104.

interests of Singapore creditors will be adequately protected if they were to prove their claims in the foreign insolvency proceeding. Further, statutory preferential debts have to be paid before remission of assets to the foreign jurisdiction.

45. The Committee emphasises that the abolition of ring-fencing should not extend to regulated industries where the interests of local creditors have to be protected, particularly, the financial sector. In fact, Article 1 of the Model Law permits States to expressly exclude the operation of its provisions to various types of entities, such as banks and insurance companies. The reason for the exclusion is that the insolvency of such entities gives rise to the need to protect vital interests of a large number of individuals, or that the insolvency of such entities requires particularly prompt and circumspect action (for example, to avoid massive withdrawals of deposits).⁴⁴⁰ Jurisdictions such as Australia, Canada and the US have excluded the application of the Model Law to specifically excluded entities, and applied ring-fencing provisions to such excluded entities. As such, the Committee wishes to make clear that its recommendation that ring-fencing be abolished should not affect the promulgation or continued operation of any ring-fencing legislation which is applicable to any specific type of companies or industries, such as those currently found in the Banking Act.⁴⁴¹

(E) SUMMARY OF RECOMMENDATIONS

46. In summary, the Committee recommends the following:
 - (1) The judicial management regime should be extended to cover all foreign companies.
 - (2) Model Law should be adopted in Singapore, with the appropriate modifications and exclusions.

⁴⁴⁰ Paragraphs 61 to 65 of the UNCITRAL Guide to the Enactment of the Model Law on Cross-Border Insolvency.

⁴⁴¹ See e.g. sections 61 and 62(1) of the Banking Act; section 49FR of the Insurance Act.

- (3) The Government should consider whether the application of the Model Law should be subject to a reciprocity requirement, i.e. that Singapore would only afford recognition and assistance to foreign insolvency proceedings originating from States that have themselves already adopted the Model Law, or to specific States which have been gazetted by the Minister.
- (4) The Committee also recommends that the Model Law only applies to corporate insolvencies for now, and to review, at an appropriate juncture, whether the Model Law ought to extend to individual insolvencies after the Model Law has been in operation for some time.
- (5) Ring-fencing as a general rule for the winding up of foreign companies (whether registered to do business in Singapore) should be abolished. However, as envisaged by Article 21 and 22 of the Model Law, the court will have the discretion to prohibit, restrict, or subject to conditions, the remission of assets of a foreign company in winding up in Singapore to the principal foreign liquidation if it is not satisfied that the interests of Singapore creditors will be adequately protected if they were to prove their claims in the foreign insolvency proceeding.
- (6) The abolition of ring-fencing should not extend to regulated industries where the interests of local creditors have to be protected, particularly, the financial sector. The above recommendation therefore should not affect the promulgation or continued operation of any other ring-fencing legislation which is applicable to any specific type of companies or industries.

APPENDIX 1

LIST OF RECOMMENDATIONS

Chapter 2: A New Insolvency Act

Recommendation 2.1 Singapore's insolvency laws for both personal bankruptcy and corporate insolvency, should be consolidated and housed under a single piece of omnibus legislation (i.e. the New Insolvency Act).

Recommendation 2.2 The starting point for the New Insolvency Act should be the UK Insolvency Act. Where appropriate, the approaches of other relevant jurisdictions, such as Australia, Hong Kong, New Zealand and Canada should be taken into account.

Recommendation 2.3 The New Insolvency Act should address the insolvency of individuals, companies and corporations generally, and should not incorporate detailed provisions applicable to a particular industry or a particular type of business. The corporate insolvency regime in the New Insolvency Act should cover Singapore-incorporated companies, foreign companies and corporations as defined in the Companies Act.

Recommendation 2.4 Amendments should be made to rationalise and unify the legal position on proofs of debt; in particular:

- (a) The test of provability of debts should be the same for all insolvency proceedings.
- (b) A claim against an individual or company that is valid and enforceable under the general law should equally be provable under insolvency law.
- (c) The same procedural rules on proofs of debt should apply, *mutatis mutandis*, to all forms of insolvency proceedings.

- (d) Up until 3 years prior to the commencement of liquidation, judicial management or bankruptcy, interest at a contractual rate should be provable and any contractual arrangement which allows accrued interest to be capitalised should be effective for the purposes of lodging a proof of debt. However, the rule against capitalisation and the statutory cap on interest should apply to the calculation of debts within 3 years from the commencement of liquidation or bankruptcy.
- (e) Insolvency set-off may have to be clarified in light of the issues which have arisen relating to the date of set-off and the set-off of contingent debts and debts the value of which are unascertained as at the date of set-off. Provision should also be made to clarify that proofs of debt filed in a judicial management or schemes of arrangement should take into account any mutual debits and credits between the creditor and the company for the purposes of determining the creditor's right to vote.

Recommendation 2.5 It should be clarified that the rule on realisation of security applies to both corporate and individual insolvency. At least in the context of liquidation, the default period under section 76(4) of the Bankruptcy Act which the secured creditor has to realise his security should be extended from 6 months to 1 year. The rule on realisation of security should also be extended to judicial management, if leave is granted by the court or judicial manager for the enforcement of security.

Recommendation 2.6 The New Insolvency Act should, as far as possible, deal with the issue of statutory preferential debts across all insolvency regimes. In particular, statutory preferential debts should be accorded their due priority in judicial management and schemes of arrangement. Furthermore, consideration should be given to the possibility of abolishing the preferential status of tax claims.

Recommendation 2.7 The amount of remuneration payable as a preferential debt to employees in respect of vacation leave under section 328(1)(f) of the Companies Act should be subject to a cap of S\$7,500.

Recommendation 2.8 The Rules of Court should apply to all insolvency regimes in instances where lacunae in procedural issues exist, i.e. where *no specific provision* has been made in the New Insolvency Rules.

Chapter 3: Bankruptcy

Recommendation 3.1 The Individual Voluntary Arrangement and Debt Repayment Scheme regimes should be incorporated into the New Insolvency Act, with no major amendments.

Recommendation 3.2 The provisions on proceedings in bankruptcy in the Bankruptcy Act can largely be adopted into the New Insolvency Act, with the inclusion of a procedure for an expedited bankruptcy application where there is a real risk that the debtor's assets would be diminished.

Recommendation 3.3 The non-automatic vesting of property that is acquired after the commencement of bankruptcy but before discharge present in the UK and Hong Kong should not be adopted in Singapore.

Recommendation 3.4 The provisions on the disabilities, disqualification and duties imposed on a bankrupt can be substantially imported over to the New Insolvency Act.

Recommendation 3.5 A provision should be introduced to excuse a bankrupt from criminal liability for failing to comply with his duties, disabilities or disqualifications where it can be shown that the bankrupt had neither actual nor constructive knowledge of his bankruptcy, or had no reason to believe that he had been made a bankrupt.

Recommendation 3.6 The court's powers to order an examination of the bankrupt and other persons, and the consequent delivery of property and payment of sums to the Official Assignee should be extended to cover a situation where the bankrupt has been discharged, subject to the same limitations which presently exist for examinations and delivery prior to the bankrupt's discharge.

Recommendation 3.7 Amendments be made to section 131 to clarify that (a) the Official Assignee's sanction shall apply to the defence of any action by the bankrupt, including an action that is commenced or continued with leave of the court under section 76(1)(c) of the Bankruptcy Act; (b) the word "action" includes arbitration proceedings; and (c) section 131 shall not apply to criminal and matrimonial proceedings but that the bankrupt should be required to promptly notify the Official Assignee of all such proceedings.

Recommendation 3.8 Sections 95 and 95A of the Bankruptcy Act should be amended to draw a clear distinction between the Official Assignee's power to approve a composition or scheme of arrangement, and the Official Assignee's discretion to grant an annulment of bankruptcy. Further, an annulment shall be granted in cases where all creditors have approved the composition or scheme of arrangement. Where the composition or scheme of arrangement is only supported by the requisite majority, but not all, of the bankrupt's creditors, the Official Assignee shall have the discretion to decide whether to issue the certificate of annulment or certificate of discharge.

Chapter 4: Receivership

Recommendation 4.1. The UK administrative receivership regime should not be adopted in Singapore.

Recommendation 4.2. The statutory framework on receivership should be updated as follows:

- (a) It should be clarified that the appointment of a person as a receiver shall be deemed to be made at the time of (i) the making of the order of court or (ii) the receipt of the instrument of appointment, but that (ii) shall be ineffective unless accepted by the appointee.

- (b) It should be provided that where a person is invalidly appointed as a receiver, the appointing party may be ordered to indemnify the appointee against any liability which arises solely by reason of the invalidity of the appointment.
- (c) Section 218 of the Companies Act should be amended to extend the personal liability of a receiver to any contracts entered into by him and any contract of employment adopted by him in the performance of his function as a receiver and to expressly provide that the receiver is entitled to be indemnified out of the assets of the company. Correspondingly, it should be provided that where the receiver vacates his office, his remuneration, expenses and any indemnity to which he is entitled to out of the assets of the company, shall be charged on and paid out of any property of the company which was in his custody or under his control at that time in priority to any charge or other security held by his appointer.
- (d) Section 222 of the Companies Act should be amended to extend the notification requirements of the appointment of a receiver to the company's website.

Chapter 5: Liquidation

Recommendation 5.1 A system of summary liquidation, akin to the position in the UK, should be introduced in Singapore whereby the Official Receiver should be empowered to make an application to the Registrar of Companies to seek an early dissolution of the company if it appears that (a) the realisable assets of the company are insufficient to cover the expenses of the winding-up, and (b) the affairs of the company do not require any further investigation, and by giving reasonable notice to the creditors and contributories. The Official Receiver's duties cease as soon as notice is given to the creditor or contributories. A creditor or contributory who opposes such an action may apply for the appointment of a private liquidator, or appeal to the court against the Official Receiver's decision. Similar powers to invoke the summary liquidation procedure should be extended to private liquidators subject to an additional condition that the consent of the Official Receiver is obtained. An appeal against the decision of the Official Receiver shall lie with the courts.

Recommendation 5.2 The Official Receiver should continue to remain as the liquidator of last resort. However, in addition to the introduction of a procedure for summary liquidations, the Official Receiver should be empowered to outsource liquidations to private liquidators.

Recommendation 5.3 Section 328(1)(a) of the Companies Act should be amended to confer priority on the Official Receiver's fees vis-à-vis the other debts identified in that section. This priority should also extend to the expenses and fees of private liquidators, in cases where the Official Receiver has outsourced liquidations to these private liquidators.

Recommendation 5.4 Actions that are statutorily vested in the office of the liquidator should not be assignable, but remain vested in the liquidator and pursued by the liquidator in the interests of the liquidation. However, there are no objections to liquidators being permitted to assign the fruits of the statutory causes of action themselves to third party funders provided appropriate safeguards are put in place to control the extent to which a third party funder can control the conduct of the proceedings. This should be considered in the wider context of third party funding and the general law of maintenance and champerty.

Recommendation 5.5 Section 328(10) of the Companies Act should be amended to allow creditors to apply to the court for an order of court in advance of providing any funding or indemnity.

Recommendation 5.6 A single director should be given the right to commence winding up proceedings against the company where that director is able to show that there is a *prima facie* case that the company ought to be wound up, and where leave of court is obtained.

Recommendation 5.7 Provisions similar to sections 114 and 166 of the UK Insolvency Act should be introduced.

Recommendation 5.8 A provision similar to section 176A of the UK Insolvency Act permitting a liquidator to use part of the company's property that is subject to a

floating charge to pay the ordinary unsecured creditors (over and above the statutory preference accorded to preferential creditors) should not be adopted.

Recommendation 5.9 The New Insolvency Act should provide that the unclaimed assets held by a company for an untraceable third party be vested in the Official Receiver and dealt with in the same manner as assets under sections 322, 346 and 347 of the Companies Act. If the assets are not moneys, the Official Receiver should be empowered to apply to court for an order that the assets be converted into moneys. Steps will also have to be statutorily prescribed for determining whether and when the third party owner should be regarded as untraceable.

Chapter 6: Judicial Management

Recommendation 6.1 The judicial management regime should be retained in the New Insolvency Act but with legislative reforms in certain areas to address the deficiencies of the existing judicial management regime.

Recommendation 6.2 The courts should be given the overriding discretion to grant a judicial management order even where secured creditors who may appoint a receiver over the whole or substantially the whole of the company's assets object to such an appointment. The court should exercise such discretion if the prejudice that will be caused to the unsecured creditors in the event that a judicial management order is not made is wholly disproportionate to the prejudice that will be caused to the secured creditors if a judicial management order is made.

Recommendation 6.3 The right to object to an application for judicial management should only accrue to a holder of a floating charge that is valid and enforceable in the liquidation of the company.

Recommendation 6.4 Express provision should be made to grant the holder of a floating charge who consents to the making of a judicial management order the right to appoint the judicial manager.

Recommendation 6.5 The company should be empowered to place itself into judicial management without a formal application to court, upon filing the requisite notices and other documents.

Recommendation 6.6 The court should be empowered to place companies into judicial management where the company “is or is likely to become unable to pay its debts”.

Recommendation 6.7 The court, in granting a judicial management order, should no longer be required to state the specific purposes for whose achievement the judicial management order is granted. However, the court shall still have the discretion to state the purposes of the judicial management order, if it so wishes.

Recommendation 6.8 No personal liability should be imposed on judicial managers.

Recommendation 6.9 Clear provisions should be made for the priority of debts incurred during the course of judicial management and that the debts incurred by the judicial manager on behalf of the company should have priority over the fees of the judicial manager.

Recommendation 6.10 The following provisions should be included in the New Insolvency Act to ensure a seamless transition from judicial management to liquidation:

- (a) Upon an application for winding up made by the judicial manager, the length of the judicial management order should be extended to the time when a winding up order is made;
- (b) It should not be necessary to discharge the judicial managers if they are also appointed as the liquidators.

- (c) The statutory time frames for avoidance provisions and officer liability should be revised to have reference to the point in time when the company is placed under judicial management, even if there is a subsequent winding up.
- (d) Where proofs of debts have been filed and adjudicated upon in the judicial management, it should not be necessary for the proofs of debts to be re-filed in liquidation.

Recommendation 6.11 The current mechanisms of legislative importation or importation by court order should be abolished and the provisions from bankruptcy and liquidation law that should apply in judicial management should be expressly stated to be so applicable.

Recommendation 6.12 The provisions on officer liability in liquidation should be extended to judicial management.

Recommendation 6.13 The New Insolvency Act should include provisions to protect creditors during the period between the filing of the application for judicial management and the making of the judicial management order. They should include provisions addressing the following:

- (a) Any creditor of the company should be entitled to apply for the appointment of an interim judicial manager.
- (b) Where an application for judicial management is filed by the company itself, the directors should be required to give personal undertakings to the court that, pending the hearing of the application, the company will apply its assets and incur liabilities only in the ordinary course of its business and will not dispose of its assets or make payment to any creditor in respect of any debt or liability incurred prior to the date of the filing.
- (c) The court should be given the power, upon application by any creditor, to impose restrictions on the acts that may be carried out by the company pending the hearing of the application for judicial management.

- (d) If a judicial management order is ultimately made, the avoidance provisions should apply to transactions entered into during the period between the filing of the application for judicial management and the making of the judicial management order.

Recommendation 6.14 It would not be preferable to introduce a Chapter 11 style debtor-in-possession model in Singapore.

Recommendation 6.15 Provisions should be introduced into the judicial management regime allowing the grant of super-priority for rescue finance. Provisions allowing for super-priority liens should not be introduced.

Recommendation 6.16 Provisions prohibiting or restricting the right of set-off should not be introduced.

Recommendation 6.17 Provisions for a limited suspension on the enforcement of ipso facto clauses should not be introduced.

Recommendation 6.18 Provisions that expressly provide that our courts may grant stays of proceedings with extraterritorial scope should not be introduced.

Recommendation 6.19 A company under judicial management should not be required to call a shareholders' meeting to consider the audited accounts, or to file annual returns during the duration of the judicial management order.

Recommendation 6.20 The 180-day term of a judicial management should be capable of being extended by a period of 6 months, by a vote of a simple majority in number and value of creditors, without needing to apply to court for the same. An aggrieved creditor may apply to the court to object to the extension or shorten the period of extension. However, the court may extend a judicial management order for such period as it deems fit.

Recommendation 6.21 Judicial managers should be given the power to make payments towards discharging pre-judicial management debts, when such payments are necessary or incidental to the performance of his functions, or when it will likely assist the achievement of the purposes of the judicial management. These powers should be exercisable without the need to seek the leave of court.

Recommendation 6.22 Section 227R of the Companies Act should be broadened to permit applications to court for the protection of interests and creditors on grounds of abuse, such as where the judicial management should not have been commenced to begin with, or where there are no proper grounds for continuing the judicial management, or where the judicial manager is not managing the company in accordance with the proposals which had been approved by the creditors under section 227N of the Companies Act.

Chapter 7: Schemes of Arrangement

Recommendation 7.1 Sections 210, 211 and 212 of the Companies Act should be retained in the Companies Act with additional statutory support provided for in the New Insolvency Act where the company seeks a statutory moratorium against its creditors. Creditors should, however, have recourse to the court for an order that the additional statutory support in the New Insolvency Act will to apply to a scheme of arrangement, even if no moratorium has been sought by the company.

Recommendation 7.2 The scope of the statutory moratorium for schemes of arrangement should be no narrower than the moratorium in judicial management, and the court should be given discretionary powers to alter the scope of the moratorium to be granted to the company.

Recommendation 7.3 The court should have the power to grant a statutory moratorium where there is an intention to propose a scheme of arrangement, subject to such terms as the court sees fit to impose.

Recommendation 7.4 Statutory provisions should be introduced in the New Insolvency Act in relation to scheme of arrangement involving the creditors of a

company, in relation to the filing and adjudication of proofs of debts and creditors' right to information and to dispute the adjudication. In particular, it should be provided that:

- (a) Each creditor is entitled to review the proofs submitted by other creditors and to be informed of the decisions of the company or the scheme manager in adjudicating on such proofs and the basis for the decisions. Notice should be given to the company and the proving creditor before the proof is inspected, and the company and the proving creditor should have the right to object to the inspection. In this regard, the company or the proving creditor should state reasons for objecting to the inspection, including any confidentiality issues precluding disclosure. An independent assessor (who may be either a qualified insolvency practitioner or an advocate or solicitor) shall thereafter decide whether the company or the proving creditor has a legitimate basis for declining to disclose the proof. If the independent assessor decides against disclosure, he must review the proof himself and state whether, in his opinion, the proof has been properly admitted. The independent assessor may also direct that part of the proof be disclosed, and/or that sensitive portions shall be redacted.
- (b) Each creditor is entitled to challenge the rejection of his proof by the company or the scheme manager, or the admission by the company or the scheme manager of another creditor's proof in full or in part.
- (c) Any dispute relating to the admission or rejection of a proof (for the purposes of voting) shall be heard by the independent assessor.
- (d) The independent assessor may be appointed when the company makes the first application to court in relation to a scheme of arrangement, upon the nomination of the company or any creditor or member. Alternatively, the independent assessor may be subsequently appointed once a matter requiring an assessment arises. In such instances, the independent assessor shall be appointed by agreement of the parties, failing which the independent assessor shall be appointed by the court.

- (e) The decisions of the independent assessor may be challenged in court, but only at the sanction hearing, to ensure that there are no tactical applications made with the objective of delaying the scheme of arrangement process.
- (f) Timelines should be imposed for the adjudication of proofs, challenges against the adjudication, the appointment of independent assessors and the independent assessors' assessment of any such dispute.

Recommendation 7.5 The principle of transparency, as applied to the information that should be disclosed to creditors, should not be statutorily enshrined and should be left to be governed by case-law.

Recommendation 7.6 Two additional safeguards to afford protection to creditors during the period between the filing of an application for a scheme of arrangement and convening a meeting of creditors should be introduced in the New Insolvency Act:

- (a) The timeframe for the application of the avoidance provisions ought to be suspended once any application for a scheme of arrangement has been filed in court until the scheme of arrangement had been sanctioned by the court or rejected by the creditors or the court.
- (b) There should be a provision that allows any creditor to apply to court to restrict any disposition of property by the company and/or any activities that may be carried out by the company, after the filing of the application for a meeting of creditors to consider a scheme of arrangement.

Recommendation 7.7 There should be a statutory right given to the company, its creditors and scheme managers to apply to court for directions.

Recommendation 7.8 The judicial power to order a re-vote should be clearly statutorily provided for.

Recommendation 7.9 The Company Voluntary Arrangement regime should not be introduced in Singapore. Instead, steps should be taken to strengthen and supplement the existing scheme of arrangement procedure.

Recommendation 7.10 Provisions should be introduced into the scheme of arrangement regime to allow for the grant of super-priority for rescue finance.

Recommendation 7.11 Cram-down provisions should be introduced to allow a scheme of arrangement to be passed over the objections of a dissenting class of creditors, subject to the requirement that the requisite majorities in number and value of creditors must have been obtained overall. However, the court should require a high threshold of proof that the dissenting class is not prejudiced by the cram-down.

Chapter 8: Avoidance Provisions

Recommendation 8.1 Sections 98, 99 and 103 of the Bankruptcy Act should be carried over to the New Insolvency Act. Two separate sets of provisions, one applicable to bankruptcy and the other applicable to liquidations and judicial management ought to be provided.

Recommendation 8.2 For unfair preferences that do not amount to undervalue transactions, the relevant time for transactions with a “non-associate” should be increased from 6 months to 1 year.

Recommendation 8.3 The relevant time for transactions at an undervalue should be reduced from 5 years to 3 years.

Recommendation 8.4 The relevant period for extortionate credit transactions should remain at 3 years.

Recommendation 8.5 The computation of the relevant time should not take into account any period of time commencing from the making of an application for an individual voluntary arrangement or a scheme of arrangement and the subsequent withdrawal or dismissal of that application.

Recommendation 8.6 Express provision should be made for the “relevant time” to also cover the period between the presentation of the application for judicial management and the granting of the judicial management order.

Recommendation 8.7 The New Insolvency Act should provide for a unified definition of “associate” applicable to personal bankruptcy and corporate insolvency regimes, with an additional concept of “connected persons” which is unique to the corporate insolvency regime.

Recommendation 8.8 The test for insolvency for the purposes of the avoidance provisions relating to transactions at an undervalue and unfair preferences should not be widened to include the additional grounds set out in section 240(2) read with section 123(1) of the UK Insolvency Act.

Recommendation 8.9 The New Insolvency Act should retain the subjective test for unfair preference transactions, i.e. that a court will not unwind a particular transaction as an unfair preference unless it is proven that the person, in giving the preference, was influenced in deciding to give it by a “desire to prefer” the recipient (i.e. putting the recipient in a better position in the event of that person’s bankruptcy).

Recommendation 8.10 Section 131(1) should continue to remain in the Companies Act. Reference to the effects of non-registration of such charges should be included into the New Insolvency Act.

Recommendation 8.11 Section 131(1) of the Companies Act should be amended such that an unregistered charge shall be unenforceable against a judicial manager, but shall cease to be so upon the discharge of the judicial management.

Recommendation 8.12 Section 330 of the Companies Act should be amended to adopt the approach taken in section 245 of the UK Insolvency Act, in particular that:

- (a) The provision should apply to both a company undergoing liquidation, and judicial management.

- (b) The provision should recognise the provision of other forms of value to the company in addition to the contemporaneous or subsequent payment of fresh “cash” to the company; such as money paid, goods or services supplied, the discharge or reduction in debt, as well as applicable interest.
- (c) The requirement that the company become insolvent immediately after the creation of the floating charge only applies where the charge is granted to a person who is not “connected to the company”.
- (d) The relevant time during which the floating charge will be vulnerable to challenge should be extended from 6 months to (i) 2 years where the chargee is a person “connected to the company”, and (ii) 1 year in other cases.

Recommendation 8.13 The requirement that liquidators apply to court for leave to disclaim property should be abrogated by:

- (a) Allowing insolvency office-holders to disclaim property without requiring the leave of court or the committee of inspection.
- (b) Requiring advance notice of the proposed disclaimer to be given to the creditors, Official Receiver and any other relevant parties. In the event that the insolvency office-holder has cause to suspect that some third party may have an interest, but the third party is not immediately locatable, the insolvency office-holder should be required to advertise his proposal in a newspaper and/or the government gazette.
- (c) Allowing any relevant parties affected by the proposed disclaimer to apply to court to object to the same.
- (d) Providing that the court may, upon the application of any person affected by a proposed disclaimer set aside the proposed disclaimer or make such order as the court thinks just, where the injury caused to the person affected by the

disclaimer outweighs any advantage likely to be gained by the liquidator in administering the assets or in such other circumstances as the court thinks fit.

Recommendation 8.14 The categories of property which can be disclaimed ought to be liberalised to allow the following property to be disclaimed: (a) any unprofitable contract, (b) any other property of the company which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any onerous act.

Recommendation 8.15 The Committee recommends that the issue of whether insolvency office-holders are able to disclaim property governed by separate environmental statutory provisions is best addressed by provisions in the relevant environmental legislation. However, statutory provisions should be made to prescribe that the decision to disclaim shall not be made by the insolvency office-holder or the court if it will breach the environmental legislation or its stated purpose.

Recommendation 8.16 Judicial managers should be given the power to disclaim onerous property.

Recommendation 8.17 Section 73B of the Conveyancing and Law of Property Act should be moved to the New Insolvency Act and amended to mirror the current language in section 423 of the UK Insolvency Act, in particular that;

- (a) The new provision should focus on a narrower category of transactions (i.e. undervalue transactions) as opposed to the existing provision which applies to “every conveyance of property”.
- (b) The new provision should eschew the requirement of having to prove an “intention to defraud creditors” in favour of a subjective inquiry into the “purpose” of the transaction (i.e. either to put the asset beyond the reach of a person making or who may at some point make a claim against the debtor, or otherwise prejudice the interests of such a person in relation to the claim that he is making or may make).

(c) The new provision should provide more prescriptive remedies

Recommendation 8.18 Section 77 of the Bankruptcy Act and section 259 of the Companies Act should be retained in the New Insolvency Act.

Recommendation 8.19 Section 331 of the Companies Act should be repealed from the Companies Act and omitted from the New Insolvency Act.

Recommendation 8.20 Section 104 of the Bankruptcy Act should not be incorporated into the New Insolvency Act.

Recommendation 8.21 Section 329(3) of the Companies Act should be retained and imported into the New Insolvency Act, and should specifically state that it shall not affect anything done pursuant to a scheme of arrangement or judicial management.

Chapter 9: Officer Delinquency

Recommendation 9.1. The existing provisions on fraudulent trading should be retained and enacted in the New Insolvency Act.

Recommendation 9.2. To amend the provisions for insolvent trading in sections 339(3) and 340(2) of the Companies Act by, amongst other things, incorporating features of the draft provision proposed at paragraph 1806 of the Cork Report. In addition, to:

- (a) Remove the prior requirement for criminal liability as a condition for civil liability.
- (b) Extend the scope of the insolvent trading provision (i.e. the “contracting of a debt”) to cover transactions involving the “incurring of debts or other liabilities”.
- (c) Provide an express defence such that no liability shall arise where it appears to the court that the officer has acted honestly, and that having regard to all the circumstances of the case he ought to be fairly excused.

Recommendation 9.3. The New Insolvency Act should enact (a) consolidated provisions that set out the investigative and examination powers of liquidators, provisional liquidators, administrators and administrative receivers; and (b) provisions dealing with the investigative and examination powers of trustees in bankruptcy, including the Official Assignee.

Chapter 10: Regulation of Insolvency Practitioners

Recommendation 10.1. The Official Receiver should take over the Registrar of Public Accountants' function and role in the registration and renewal of approved liquidators' licenses, as well as the setting of licensing requirements. The Official Assignee/Official Receiver should also take over the registration, renewal and setting of licensing requirements of other insolvency office-holders.

Recommendation 10.2. There should be a common qualification standard established for all insolvency office-holders, save for two instances; namely, scheme managers and, possibly, liquidators in a members' voluntary winding up.

Recommendation 10.3. Further views should be taken on the issue of whether liquidators in members' voluntary liquidations should be licensed insolvency office-holders before a decision be made; in particular, from those in the business community who utilise the members' voluntary winding up process.

Recommendation 10.4. As a start, the common qualification standard for insolvency office-holders should not be markedly different from that applicable to approved liquidators. Furthermore, a foreign professional who is licensed as an insolvency office-holder may only be appointed to the office if he or she is jointly appointed with a Singapore licensed insolvency office-holder.

Recommendation 10.5. That if the Insolvency and Public Trustee's Office ("IPTO") should assume the responsibility of licensing insolvency office-holders, the disciplinary function should similarly fall to be administered by IPTO.

Recommendation 10.6. Given the small size of the insolvency industry, there is much to be said about leveraging on the disciplinary processes of existing professional bodies. Where the insolvency office-holder does not come under the purview of an existing professional body, a simple regulatory system may have to be introduced to regulate less egregious forms of misconduct. Alternatively, the classes of persons who can undertake insolvency work could be confined to persons who are already subject to disciplinary oversight by their respective professional bodies. These options will have to be further studied by the Government in designing the appropriate disciplinary framework.

Recommendation 10.7. There is no immediate need to introduce an audit programme for insolvency office-holders.

Chapter 11: Cross-Border Insolvency

Recommendation 11.1. The judicial management regime should be extended to cover all foreign companies.

Recommendation 11.2. The UNCITRAL Model Law on Cross-Border Insolvency (“**Model Law**”) should be adopted in Singapore, with the appropriate modifications and exclusions.

Recommendation 11.3. The Government should consider whether the application of the Model Law should be subject to a reciprocity requirement, i.e. that Singapore would only afford recognition and assistance to foreign insolvency proceedings originating from States that have themselves already adopted the Model Law, or to specific States which have been gazetted by the Minister.

Recommendation 11.4. The Committee also recommends that the Model Law only applies to corporate insolvencies for now, and to review, at an appropriate juncture, whether the Model Law ought to extend to individual insolvencies after the Model Law has been in operation for some time.

Recommendation 11.5. Ring-fencing as a general rule for the winding up of foreign companies (whether registered to do business in Singapore) should be abolished. However, as envisaged by Article 21 and 22 of the Model Law, the court will have the discretion to prohibit, restrict, or subject to conditions, the remission of assets of a foreign company in winding up in Singapore to the principal foreign liquidation if it is not satisfied that the interests of Singapore creditors will be adequately protected if they were to prove their claims in the foreign insolvency proceeding.

Recommendation 11.6. The abolition of ring-fencing should not extend to regulated industries where the interests of local creditors have to be protected, particularly, the financial sector. The above recommendation therefore should not affect the promulgation or continued operation of any other ring-fencing legislation which is applicable to any specific type of companies or industries

APPENDIX 2

Members of the Secretariat:

- (1) Ms. Jill Tan, Director of Community Legal Services Division, Ministry of Law.
- (2) Mr. Loke Shiu Meng, Ministry of Law.
- (3) Ms. Faith Boey, Ministry of Law.
- (4) Ms. Lim Shi Qi, Ministry of Law.
- (5) Mr. Christopher Eng, Insolvency and Public Trustee's Office.
- (6) Mr. Jordon Li, Insolvency and Public Trustee's Office.
- (7) Mr. Pruetthipunthu Tris Xavier, Insolvency and Public Trustee's Office.
- (8) Mr. Goh Zhuo Neng, Allen & Gledhill LLP (from April 2011 to December 2011).
- (9) Mr. Jonathan Lee, Rajah & Tann LLP (from October 2010 to June 2011).
- (10) Mr. Alexander Yeo, Allen & Gledhill LLP (from January 2013 to August 2013).
- (11) Mr. Louis Ng, Supreme Court.
- (12) Ms. Karen Ang, Legislation and Law Reform Division, Attorney-General's Chambers.
- (13) Mr. Melvin Shen, Legislation and Law Reform Division, Attorney-General's Chambers.