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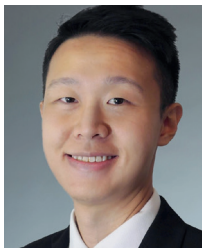

Singapore: The Singapore International Commercial Court and its role in establishing Singapore as a nodal jurisdiction

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Singapore has made no secret of its ambitions to be an international debt restructuring hub. In the latest of a series of legislative reforms, the Supreme Court of Judicature Act 1969 has been amended to clarify that the Singapore International Commercial Court ("SICC") has jurisdiction to hear cross-border restructuring and insolvency matters. The SICC is uniquely positioned to deal with foreign law issues that arise in cross-border matters and has the capability and a robust framework for adeptly resolving such issues. In this article, we discuss how it reinforces Singapore's ability to serve as a nodal jurisdiction for the coordination of international restructurings and insolvencies.

In recent years, significant legislative changes have been made to refine the tools available for companies restructuring in Singapore. These include the introduction of enhanced moratorium protections,[1] super-priority for rescue financing,[2] pre-pack schemes of arrangements,[3] and restrictions on the operation of *ipso facto* clauses.[4]

The latest in the developments toward reaching this goal is the amendment to the Supreme Court of Judicature Act 1969 clarifying that the Singapore International Commercial Court ("SICC") has jurisdiction to hear cross-border restructuring and insolvency matters.[5]

As we will discuss in this article, this is an important step as the SICC is uniquely positioned to deal with foreign law issues that arise in cross-border matters. The SICC has the capability and a robust framework for adeptly resolving such issues, which reinforces Singapore's ability to serve as a nodal jurisdiction[6] for the coordination of international restructurings and insolvencies. It also helps foster restructuring and insolvency solutions that are harmonised with foreign laws, and in turn, improves the prospects of such solutions receiving recognition and acceptance by the courts and stakeholders of other jurisdictions.

The SICC

The SICC is a division of the High Court of Singapore,[7] and was conceptualised as a forum dedicated to handling only international commercial disputes.[8] Its initiation was a confluence of two key ideas:[9]

(i) the realisation that the exponential growth in economic activity in Asia would give rise to a concomitant rise in commercial disputes; and

(ii) the continuing effort to position Singapore as a centre for the resolution of commercial disputes.

With these ideas in mind, the SICC was formed with 11 International Judges in 2015.[10] Alongside their appointment, changes were also made to allow foreign lawyers to appear before the SICC and argue matters on particular questions of foreign law in specific cases.[11]

This has grown to 18 International Judges, with Judge Christopher Scott Sontchi being one of the most recent appointments announced in 2021.[12] Judge Sontchi is a preeminent insolvency judge, formerly of the US Bankruptcy Court, District of Delaware, who holds appointments with the International Insolvency Institute, Judicial Insolvency Network, National Conference of Bankruptcy Judges, American Bankruptcy Institute and INSOL International. Judge Sontchi's term will commence on July 4, 2022.[13]

With multiple eminent foreign judges, and Judge Sontchi's appointment to the SICC as well as the SICC's ability to have foreign lawyers make submissions on foreign law (instead of

needing to prove it as a fact as would be done in a typical High Court hearing), Singapore has created a platform for its restructuring and insolvency frameworks to be utilisable for debtors with interests in multiple jurisdictions.

The importance of giving due regard to foreign law

It is commonplace for a company to have its headquarters in one jurisdiction, operate across multiple jurisdictions and consequently have its assets spread out across multiple jurisdictions, and raise capital in another jurisdiction.

As suggested by the Honourable Justice Kannan Ramesh, whenever such a company needs to restructure its debts or liquidate, there ought to be autonomy to find the "nodal jurisdiction" which has the right ecosystem for developing good restructuring solutions.

With the SICC, Singapore is well placed to become a nodal jurisdiction for such debtors who need to undergo cross-border restructurings or insolvencies.

In particular, in cross-border restructuring and insolvency matters, situations will invariably arise where the law of the proceedings (the *lex fori concursus*) is at odds with the parties' chosen contract law[14] or the insolvency law of other jurisdictions which the debtor has connections with.[15] For a jurisdiction to be an effective nodal jurisdiction, it is crucial that it be equipped to give proper consideration and due regard to foreign laws, rather than applying a parochial attitude in applying its own laws to the exclusion of others.

The regard for foreign laws finds its greatest expression in the concept of "synthetic proceedings" – proceedings of a domestic court applying the foreign law of another jurisdiction in order to create an effect which would have been achieved had insolvency proceedings been commenced in that foreign jurisdiction.[16]

The Honourable Justice Kannan Ramesh has astutely observed that synthetic proceedings can be used to facilitate an efficient, effective and cohesive restructuring process by centralising the resolution of key issues within a single proceeding, and also greatly reduces the prospect of inconsistent outcomes.[17]

This can have very real benefits for creditors, as was seen in the Collins & Aikman Group restructuring, where the use of synthetic proceedings enabled realisation of US$45m more from the liquidation of the companies' assets than was initially estimated.[18] In essence, the administrators in the Collins & Aikman Group restructuring had assured foreign trade creditors that their claims would be dealt with in accordance with the relevant foreign insolvency law of their debts.

This obviated the need for actual secondary proceedings (which were threatened by some trade creditors to obtain favourable treatment[19]) while safeguarding any favourable rights they might be able to assert in the relevant foreign jurisdiction.

By endorsing this assurance through the use of synthetic proceedings in England, the English Court enabled realisation of what amounted to one-third of the total pool of assets that was eventually available for distribution.[20]

Since the time these observations were made, synthetic proceedings have been codified in Article 28 of the UNCITRAL Model Law on Enterprise Group Insolvency ("MLG"), which provides a legislative framework to deal with this aspect of enterprise group insolvencies, the coordination of court hearings and communication between insolvency professionals across different jurisdictions.

Article 28 of the MLG seeks to minimise the commencement of foreign or non-main proceedings within the nomenclature of the MLG, and facilitate the centralised treatment of claims in an enterprise group insolvency by allowing for a claim by a foreign creditor to be accorded treatment as it would have in the foreign jurisdiction using the existing main insolvency proceedings (without needing to commence separate foreign insolvency proceedings in another jurisdiction).[21]

There is a myriad of issues where the domestic and foreign laws do not perfectly align, necessitating a choice of law determination[22] and the application of foreign law in addition to (or in lieu of) domestic law where appropriate. Such issues include the priority conferred to employees[23] or trade creditors,[24] the applicability of set-off,[25] the avoidance of preferences,[26] the validity of third-party releases,[27] and the preservation or termination of contracts and licences.[28]

The failure to properly confront and resolve such issues could lead to the proceedings being denied recognition by the relevant foreign jurisdictions in which the debtor may have its interests. The originating state of the insolvency proceedings must be cognisant and be attuned to potential differences in law *vis-à-vis* states in which recognition might be sought.

In an illuminating analysis of Chapter 15 of the US Bankruptcy Code (the US adaptation of the Model Law on Cross-Border Insolvency),[29] the Honourable Judge Allan Gropper observes that Chapter 15 does not mandate total deference to the *lex fori concursus* and argues for an explicit determination as to which law should apply (for example, the *lex fori concursus*, *lex situs*, or the parties' chosen governing law) when granting recognition and assistance to foreign insolvency proceedings.

Judge Gropper advocates for a choice of law determination when assessing whether, for example, there is "sufficient protection" before property is turned over to a foreign representative of a debtor under § 1521(b) of the US Bankruptcy Code. A clear example where the *lex fori concursus* would not be given effect to is if the *in rem* rights of secured creditors over collateral in the recognising state would be prejudiced or defeated if the assets were turned over to the foreign representative of the originating state.[30]

This shows that an originating state of insolvency proceedings ought to pre-emptively consider such issues before rendering any decision that may adversely affect the interests of creditors.

Institutions assisting in giving effect to foreign law

With the flattening of the globe and corporate groups increasingly having operations across jurisdictions, such issues will likely become more pronounced in future insolvency and restructuring proceedings. There may be situations where there are differing applicable laws to each entity within a corporate group where each have insolvency regimes or specific rules in their respective insolvency laws that need to be given effect to while administering the entire group's estate efficiently and fairly for creditors (from the view of each of the relevant jurisdictions).

Against this backdrop, there is likely to be a rise in such issues, and it could well be ripe for the adoption of Justice Kannan Ramesh's suggestion of synthetic main proceedings, where issues in a main proceeding can be resolved in a secondary proceeding.[31]

Jurisdictions with institutions like the SICC would be well placed to operate as jurisdictions where synthetic proceedings, including synthetic main proceedings, can be effected. The SICC, with its deep bench of renowned International Judges, is well positioned to deal with a myriad of foreign law issues across different jurisdictions and legal traditions. It is not merely that these International Judges have an extensive understanding and knowledge of the law of their home jurisdictions, but also that they have the insight into the conditions, circumstances, and context of the law which informs the interpretation of the law in the penumbra of cases.[32]

Further, the International Judges can be assisted by foreign counsel on these issues without needing to go through the process of proving the foreign law as a fact (as would be the case in other proceedings before the High Court, which would typically entail using foreign lawyers as expert witnesses as opposed to being counsel that can directly address the Court on legal issues). This could enable deeper examination of issues of foreign law by the SICC than would

otherwise be capable in a traditional system where foreign law will need to be proven as a fact.

Such ability to take a deep dive into the foreign law with assistance from foreign counsel and with judges that are well-versed in the foreign law as well as its context would be especially important for matters relating to insolvency, which often have policy considerations to be considered when being decided by a court.[33]

Finding nodal jurisdictions in restructuring

The use of institutions such as the SICC to leverage on the expertise of International Judges would further improve the likelihood of orders made through synthetic proceedings being given effect to in the relevant foreign jurisdictions. This would build on the already strong position that Singapore holds as a hub for restructuring.[34]

It would also further strengthen the ability to effect cross-border restructurings using a selected nodal jurisdiction, as recently seen in the restructurings of Prosafe SE (which received recognition of its Singapore moratorium and scheme in Brazil)[35] and PT Pan Brothers Tbk (which received recognition of its Singapore moratorium in Indonesia[36] and the recognition of its Singapore scheme in the US[37]).

With the orthogonal considerations that can be at play in assessing where to restructure (i.e. locating the nodal jurisdiction), institutions like the SICC can assist to provide comfort for both creditors and debtors by allowing for insolvency regimes to seamlessly integrate with one another, in a cross-pollination of ideas that still allows for independent development of local laws while giving effect to foreign laws in cross-border restructurings.

Notes:

1 Insolvency, Restructuring and Dissolution Act 2018 (No. 40 of 2018), Section 64.

2 Insolvency, Restructuring and Dissolution Act 2018 (No. 40 of 2018), Section 67.

3 Insolvency, Restructuring and Dissolution Act 2018 (No. 40 of 2018), Section 71.

4 Insolvency, Restructuring and Dissolution Act 2018 (No. 40 of 2018), Section 440; Chong Yi-Hao Clayton, "Section 440 of the Insolvency, Restructuring and Dissolution Act 2018: Restrictions on Ipso Facto Clauses" [2019] SAL Prac 27.

5 The SICC previously had jurisdiction to hear and try matters that the General Division of the High Court may hear and try in its original civil jurisdiction. The amendment to the SICC's jurisdiction was passed through Courts (Civil and Criminal Justice) Reform Act 2021 (No. 25 of 2021), Section 56 in August 2021 and now expressly provides that the SICC can hear matters relating to corporate insolvency, restructuring or dissolution under the Insolvency, Restructuring and Dissolution Act 2018.

6 To borrow the term coined by the Honourable Justice Kannan Ramesh in Kannan Ramesh J, " Party Autonomy and the Search for Nodal Jurisdictions in Cross-Border Insolvency", speech at the Texas International Law Journal Symposium (6 February 2021).

7 Supreme Court of Judicature Act 1969, Section 18A.

8 Sundaresh Menon CJ, "International Commercial Courts: Towards a Transnational System of Dispute Resolution", Opening Lecture for the DIFC Courts Lecture Series 2015 (19 January 2015).

9 Mohan R Pillay & Toh Chen Han, *The SICC Handbook* (Sweet & Maxwell, 2016), foreword at p. v.

10 Amanda Lee, "11 sworn in as commercial court's first international judges", *Today* (6 January 2015). ←https://www.todayonline.com/singapore/11-sworn-commercial-courts-first-international-judges→ (accessed 23 March 2022).

11 Mohan R Pillay & Toh Chen Han, *The SICC Handbook* (Sweet & Maxwell, 2016), at [1.44].

12 Prime Minister's Office, "Appointments, extension of appointments and

reappointments of Supreme Court judges and international judges to the Singapore International Commercial Court", media release (15 November 2021) ←https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-release-appointments-extension-of-appointments-and-reappointments-of-supreme-court-judges-and-international-judges-to-the-singapore-international-commercial-court→.

13 Prime Minister's Office, "Appointments, extension of appointments and reappointments of Supreme Court judges and international judges to the Singapore International Commercial Court", media release (15 November 2021) ←https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-release-appointments-extension-of-appointments-and-reappointments-of-supreme-court-judges-and-international-judges-to-the-singapore-international-commercial-court→.

14 Kannan Ramesh JC (as he then was), "The Gibbs Principle – A Tether on the Feet of Good Forum Shopping" (2017) 29 SAcLJ 42.

15 Westbrook, Jay L., "Comity and Choice of Law in Global Insolvencies" (July 7, 2019). Texas International Law Journal, 54, 2019, University of Texas Public Law and Legal Theory Research Paper Series Number 700.

16 Sim Kwan Kiat, "Jurisdictional Basis of Synthetic Proceedings in Cross-border Insolvency" [2019] SAL Prac 10.

17 Kannan Ramesh J, "Synthesising Synthetics: Lessons learnt from *Collins & Aikman*", keynote address at the 2nd Annual GRR Live New York (26 September 2018).

18 *Re Collins & Aikman Europe SA and other companies* [2006] EWHC 1343 at [8].

19 *Supra* n 17 at [5].

20 *Supra* n 17 at [8].

21 Guide to Enactment of the UNCITRAL Model Law on Enterprise Group Insolvency paras. 198, 200 to 207.

22 Allan L. Gropper, "The Curious Disappearance of Choice of Law as an Issue in Chapter 15 Cases" 9 Brook. J. Corp. Fin. & Com. L. (2014).

23 *Re Alitalia Linee Aeree Italiane* SpA [2011] 1 WLR 2049

24 See, e.g., *Re Collins & Aikman Europe SA* [2006] BCC 861.

25 E.g. *HIH Casualty and General Insurance Ltd, Re* [2008] 1 WLR 852; See, e.g., *In re Sivec SRL* 476 B.R. 310 (Bankr. E.D. Okla. 2012).

26 *Maxwell Commc'n Corp. plc v. Societe Generale plc* (*In re* Maxwell Commc'n Corp. plc), 93 F.3d 1036 (2d Cir. 1996).

27 *In re Vitro* S.A.B. de C.V., 701 F.3d 1031

28 *Jaffé v. Samsung Elec. Co., Ltd.*, 737 F.3d 14 (4th Cir. 2013); *SMP Ltd. v. SunEdison, Inc.* (*In re SunEdison, Inc.*), 577 B.R. 120, 123 (Bankr. S.D.N.Y. 2017),

29 *Supra* n 22.

30 *Ibid.* at p. 174-175.

31 *Supra* n 17 at paras. 16-18. See also, *supra* n 6 and [22].

32 Andrew Phang JA, Goh Yihan & Jerrold Soh Tsin Howe, "The development of Singapore Law: A bicentennial retrospective" (2020) 32 SAcLJ 804.

33 E.g. *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, where the Court of Appeal held that the insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard (in the context of whether a claim was arbitrable): see [45]–[46].

34 Aurelio Guerra-Martinez, "Building a restructuring hub: Lessons from Singapore", 10-2021 Research Collection Singapore Management University School of Law. Available at: ←https://ink.library.smu.edu.sg/sol_research/3465→.

35 Ana Carolina Monterio, "Brazil's first

recognition of a foreign proceeding under the Model Law on Cross-Border Insolvency", 18 August 2021, Singapore Global Restructuring Initiative blog accessible at: ←https://ccla.smu.edu.sg/sgri/blog/2021/08/18/brazils-first-recognition-foreign-proceeding-under-model-law-cross-border→. Debtwire, COURT: Prosafe obtains recognition of Singapore scheme of arrangement in Brazil, leading the way in the country (29 December 2021).

36 Catherine Shen, "Landmark Indonesian Recognition of Singapore Moratorium", 16 August 2021, Singapore Academy of Law blog, accessible at: ←https://www.sal.org.sg/blog/2021-Emmanuel-Chua→.

37 *In re PT Pan Brothers Tbk*, Chapter 15, Case No. 22-10136-mg, Order Granting (I) Recognition of Foreign Nonmain Proceeding, (II) Recognition of Foreign Representative, (III) Recognition of Sanction Order and Related Scheme, and (IV) Related Relief and Additional Assistance under Chapter 15 of the Bankruptcy Code (United States Bankruptcy Court Southern District Of New York).

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