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SECTION 440 OF THE INSOLVENCY, RESTRUCTURING AND DISSOLUTION ACT 2018: RESTRICTIONS ON *IPSO FACTO* CLAUSES

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Commercial contracts often contain *ipso facto* clauses – clauses that allow one party to terminate the contract or exercise certain rights if specified events occur, usually if the counterparty becomes insolvent or enters insolvency proceedings. The Insolvency, Restructuring and Dissolution Act 2018 introduced restrictions on the operation of certain *ipso facto* clauses while a company is undergoing restructuring proceedings. This article discusses the implications of the new *ipso facto* regime, potential areas of uncertainty, and issues which practitioners should consider when advising on and drafting commercial agreements, in the light of the new regime.

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I. Introduction

1 Commercial contracts often contain *ipso facto*[1] clauses – clauses that allow one party to terminate the contract or exercise certain rights if specified events occur, usually if the counterparty becomes insolvent or enters insolvency proceedings.

2 The Insolvency, Restructuring and Dissolution Act 2018[2] ("Act"), which was passed in October 2018, introduced restrictions on the operation of certain *ipso facto* clauses while a

1 *Ipso facto* is a Latin phrase meaning "by the fact itself".
2 Act 40 of 2018.

company is undergoing restructuring proceedings. Among other things, a party cannot terminate a contract with a company by reason only that the company is insolvent or undergoing judicial management or scheme proceedings.[3] The restrictions are intended to facilitate corporate restructuring by protecting a company's valuable commercial contracts while restructuring efforts are underway.[4]

3 This article discusses the implications of the new *ipso facto* regime, potential areas of uncertainty, and issues which practitioners should consider when advising on and drafting commercial agreements in the light of the new regime.

II. Background

4 *Ipso facto* clauses pose acute difficulties for companies attempting to restructure their debts. A company's restructuring efforts may be undermined if key suppliers or service providers terminate their contracts for the sole reason that the company is insolvent, even where the company remains capable of performing its obligations. Termination of key contracts disrupts the company's operations, diminishes the value of the business, and lessens the prospects of a successful restructuring.

5 On the other hand, *ipso facto* clauses provide a degree of protection to an innocent counterparty. With the ability to terminate on insolvency, a counterparty can bring the contract to an end, rather than risk incurring greater financial exposure when it is uncertain that the company can fulfil its contractual obligations.

6 In 2013, the Insolvency Law Review Committee ("ILRC"), tasked by the Ministry of Law to review the existing bankruptcy and corporate insolvency regimes, considered the various

3 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ss 440(1) and 440(6).

4 *Parliamentary Debates, Official Report* (1 October 2018), vol 94 (Edwin Tong Chun Fai, Senior Minister of State for Law).

arguments for and against regulating *ipso facto* clauses and decided, on balance, not to recommend introducing restrictions on *ipso facto* clauses.[5] In 2017, various amendments were made to the Companies Act to enhance Singapore's debt restructuring and corporate rescue framework,[6] including improving the moratorium protections for a company seeking to propose a scheme of arrangement,[7] but these amendments did not include any restrictions on *ipso facto* clauses.

7 Following the 2017 amendments, some commentators suggested that the lack of a regime governing the treatment of executory contracts and *ipso facto* clauses was a shortcoming in Singapore's statutory framework for schemes of arrangement, making it "more a dedicated debt restructuring procedure rather than a fully blown corporate/business rescue procedure".[8]

8 Eventually, in October 2018, in the Second Reading of the Insolvency, Restructuring and Dissolution Bill ("Bill"), the Senior Minister of State for Law, Edwin Tong Chun Fai, noted that further industry feedback received in the five years following the ILRC's 2013 report indicated that *ipso facto* restrictions would, on balance, be beneficial to a company's rehabilitation efforts. The restructuring of Hyflux was used to illustrate the negative consequences of *ipso facto* contractual provisions. Hyflux's filing for moratorium protection, without more, constituted an event of default allowing Hyflux's creditors to accelerate repayment terms and exercise set-off rights, which restricted Hyflux's cash flow and exacerbated the company's financial position. The intention behind introducing the *ipso facto* regime was to ensure that a company in a similar situation in the

5 Insolvency Law Review Committee, *Report of the Insolvency Law Review Committee: Final Report* (2013) at pp 117–123 (Chairman: Lee Eng Beng SC).

6 Companies (Amendment) Act 2017 (Act 15 of 2017) s 22.

7 Companies Act (Cap 50, 2006 Rev Ed) s 211B.

8 Wan Wai Yee & Gerald McCormack, "Transplanting chapter 11 of the US bankruptcy code into Singapore's restructuring and insolvency laws: Opportunities and challenges" (2019) 19(1) *Journal of Corporate Law Studies* 69 at 77.

future can continue with its business operations while restructuring its debts.[9]

9 The *ipso facto* reform aligns Singapore's restructuring framework with jurisdictions such as the US and Canada, which have had similar regimes for several decades. The move also mirrors recent developments in Australia and the UK, with Australia introducing *ipso facto* restrictions in July 2018 as part of its insolvency law reforms,[10] and the UK announcing in August 2018 its intention to prohibit *ipso facto* clauses in contracts for the supply of goods and services.[11]

10 Singapore's *ipso facto* regime is contained in s 440 of the Act. The provision is largely modelled on s 34 of the Canadian Companies' Creditors Arrangement Act[12] ("CCAA"), which in turn is based on an older statutory provision, s 65.1 of the Canadian Bankruptcy and Insolvency Act[13] ("BIA").

III. Scope of the *ipso facto* restrictions

11 The introduction of the *ipso facto* regime is probably a positive development in Singapore's restructuring laws. However, applying the provisions may prove challenging in practice. The *ipso facto* restrictions apply to all types of contracts except for certain specified categories, such as "eligible financial contracts" to be prescribed by subsidiary legislation,[14] and

9 *Parliamentary Debates, Official Report* (1 October 2018), vol 94 (Edwin Tong Chun Fai, Senior Minister of State for Law).

10 Corporations Act 2001 (No 50 of 2001) ss 415D(1), 434J(1) and 451E(1).

11 United Kingdom, Department for Business, Energy & Industrial Strategy, *Insolvency and Corporate Governance: Government response* (26 August 2018) at para 5.97.

12 RSC, 1985, c. C-36.

13 RSC, 1985, c. B-3. See Adrienne Ho, "The Treatment of *Ipso Facto* Clauses in Canada" (2015) 61(1) McGill LJ 139 at 183–185.

14 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 440(5)(a); *Parliamentary Debates, Official Report* (1 October 2018), vol 94 (Edwin Tong Chun Fai, Senior Minister of State for Law).

any contract that is a licence issued by the Government or a statutory body.[15]

12 Furthermore, s 440(3) provides that "[a]ny provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect", thereby nullifying attempts to "contract out" of the *ipso facto* regime.[16]

13 Given the relative brevity of s 440 of the Act and the wide variety of possible contractual arrangements, there may be instances where it will not be clear how the provisions should apply.

14 In this section, we consider the conditions under which the *ipso facto* regime applies and the scope of contractual rights which are restrained by the *ipso facto* restrictions.

A. Conditions under which the ipso facto *regime applies*

15 The *ipso facto* restrictions only apply while a company is undergoing specified "proceedings", which is a term defined in s 440(6) of the Act. The relevant proceedings include applications to place a company into judicial management and applications for moratorium orders to protect a company intending to propose a scheme of arrangement.[17]

16 The restrictions do not apply if the company undergoes other insolvency processes such as winding up or receivership. There is thus still a purpose in retaining *ipso facto* clauses as a contingency for these scenarios.

17 The *ipso facto* restrictions only restrain the exercise of certain rights, such as termination, by reason only that the

15 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 440(5).

16 See *Canadian Petcetera Ltd Partnership v 2876 R Holdings Ltd* 70 CBR (5th) 180, 2010 BCCA 469 at [24] and E Patrick Shea, "Dealing with Suppliers in a Reorganization" (2008) 37 *Canadian Bankruptcy Reports* (5th) 161.

17 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 440(6).

company is insolvent or that restructuring proceedings are commenced.[18] A party is not precluded from terminating a contract on other grounds, for example, if the company fails to perform its obligations under the contract.[19]

18 *Ipso facto* clauses in contracts often do not merely use insolvency, in the technical sense of balance sheet or cash-flow insolvency,[20] as a trigger for termination. A counterparty does not usually know the financial state of a company, and so other trigger events are used as proxies for a company's insolvency, such as the suspension or threat of suspension of payment of its indebtedness, negotiations with creditors with a view to restructuring its indebtedness, the occurrence of cross-defaults under banking facilities, or execution being levied against the assets of the company. Where proxies are used for the company's insolvency, there is a likelihood that such provisions would be construed as in substance contrary to s 440 and thereby rendered ineffective by s 440(3).

19 Another issue is whether the *ipso facto* regime prevents a party from terminating on the basis of an anticipatory breach. Being able to terminate for an anticipatory breach may be a helpful remedy in situations where the counterparty cannot afford to wait until the company actually fails to perform its obligations under the contract. This may be pertinent in long-term contracts, such as construction or shipbuilding contracts where the project milestones may be spaced across several months or years.

18 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 440(1).

19 *Parliamentary Debates, Official Report* (1 October 2018), vol 94 (Edwin Tong Chun Fai, Senior Minister of State for Law). See also *Avison Young Real Estate Alberta Inc v Bosa Properties (Eau Claire) Inc* 24 CBR (6th) 143, 2015 ABQB 208 at [40].

20 See *Living the Link Pte Ltd v Tan Lay Tin Tina* [2016] 3 SLR 621 at [26]–[34].

20 The *ipso facto* regime likely does not prevent a party from terminating a contract on the basis of an anticipatory breach.[21] In *The STX Mumbai*, the Court of Appeal rationalised that an anticipatory breach can be equated with an *actual* breach of contract – where a party to a contract has evinced a clear intention that it will not perform its contractual obligations, the party is, in substance, committing an actual breach of the contract notwithstanding that the contractually stipulated time for performance has yet to arrive.[22] Since termination for an actual breach of contract is not precluded by the *ipso facto* restrictions, it follows that termination for an anticipatory breach should also not be precluded.

21 Whether an anticipatory breach has occurred will fall to be determined on the facts of each case.[23] A counterparty cannot assume that the insolvency of the company automatically amounts to an anticipatory breach of contract.[24] For example, it is not uncommon for a company's lenders to agree to a standstill on repayments, thereby allowing the company to have sufficient cash flow for its operations. Furthermore, a company undergoing judicial management or scheme proceedings can also obtain rescue financing to ensure the survival of the company.[25]

22 In practice, a party may not have sufficient information to accurately assess if there are grounds for alleging an anticipatory breach. If the company applies for a scheme moratorium under s 64 of the Act, the company may be ordered to disclose cash flow and profitability forecasts,[26] which can help shed light on the company's ability to continue running its

21 See *The STX Mumbai* [2015] 5 SLR 1 at [42]–[89] and Goh Yihan & Yip Man, "Rationalising Anticipatory Breach in Executed Contracts" (2016) 75 Cambridge Law Journal 18–21.

22 *The STX Mumbai* [2015] 5 SLR 1 at [51].

23 *The STX Mumbai* [2015] 5 SLR 1 at [79].

24 *The STX Mumbai* [2015] 5 SLR 1 at [79]–[89].

25 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ss 67 and 101.

26 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 64(6)(*d*).

operations. However, such information may not be readily available in other restructuring proceedings. In more sophisticated commercial agreements, parties may want to bargain for the right to receive periodic updates on the operations and finances of the company to allow them to assess the ongoing viability of the business. Other bases for termination which are not related to insolvency may also be considered, such as if the company is unable to secure ancillary goods or services necessary to perform its obligations under the contract.

B. Contractual rights which are restrained by section 440(1)

23 The specific contractual rights restrained are set out in s 440(1). Where s 440(1) applies, no person may:

> (*a*) terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement ... with the company; or
>
> (*b*) terminate or modify any right or obligation under any agreement ... with the company.

24 The language in limb (*a*) tracks the wording in s 34 of the Canadian CCAA and s 65.1 of the Canadian BIA,[27] while limb (*b*) appears to adopt the language of s 365(e)(1) of the US Bankruptcy Code.[28] The drafters may have chosen to adopt the provisions from both Canadian and US statutes to ensure that the restrictions are comprehensive, and to allow case law from both jurisdictions to help guide the application of s 440. It is also arguable that the phrase "modify *any right or obligation* under any agreement" [emphasis added] in limb (*b*) is intended to be wider than the phrase "amend ... any agreement" in limb (*a*).

25 The general scheme of s 440(1) is that it serves to protect the *status quo* of the company's contracts while it undergoes restructuring by preventing the termination, acceleration of a

27 Companies' Creditors Arrangement Act (RSC, 1985, c. C-36); Bankruptcy and Insolvency Act (RSC, 1985, c. B-3) s 65.1.

28 Bankruptcy Code 11 USC § 365(e)(1).

payment, or forfeiture of the term of a contract.[29] The most significant uncertainty surrounds the meaning of the terms "amend … any agreement" in s 440(1)(*a*) and "modify any right or obligation under any agreement" in s 440(1)(*b*).

26 Take for example, a contractual term which provides that a supplier shall supply *X* number of widgets if the company is solvent, and *Y* number of widgets if the company is insolvent. There is no amendment or modification of the contract in the strict sense – the contract merely provides for a different set of rights and obligations in each scenario. However, the end result of the operation of such a provision is that the company's rights pre-insolvency and post-insolvency are altered. If such contractual terms are not restricted, the purpose of the *ipso facto* regime may be undermined. A supplier can effectively reduce its supply or increase the price of its goods solely on the basis that the company is insolvent, and this would adversely affect the company's business and operations.

27 Canadian cases do not appear to have specifically considered the meaning of "amending" an agreement in the context of the Canadian *ipso facto* provisions. However, in the US, the phrase "modify any right or obligation" has not been interpreted in the manner described above.[30] Rather, if an express contractual term purports to modify an existing pre-insolvency or pre-filing right of the company, such a modification is prohibited by the US *ipso facto* statutory provisions.

28 The case of *Lehman Brothers Special Financing Inc v Bank of America National Association*[31] ("*Lehman Brothers*"), a decision of the US Bankruptcy Court for the Southern District of New York, helps to illustrate the meaning of "modifying" a right or obligation. This decision, together with earlier cases involving

29 *Re Heritage Flooring Ltd* 3 CBR (5th) 60, 2004 NBBR 168 at [48]; *Capital Steel Inc v Chandos Construction Ltd* 2019 ABCA 32 at [38].

30 See para 26 above.

31 553 BR 476 (Bankr SDNY, 2016).

the bankruptcy of Lehman Brothers,[32] considered the enforceability of provisions in swap agreements that modified the priority between Lehman Brothers entities on the one hand, and holders of notes issued by Lehman Brothers on the other, with regard to the distribution of proceeds from the liquidation of certain collateral.[33]

29 The court in *Lehman Brothers* classified the swap agreements in question into two broad categories:

> (a) In "Type 1 Transactions", the plaintiff Lehman Brothers Special Financing Inc ("LBSF") initially held a right to receive payments ahead of the noteholders under the swap agreements. Upon a default by LBSF under the swaps, the priority would "flip" such that the noteholders would then hold a payment priority right over LBSF. The court found this to be an *ipso facto* modification of LBSF's rights because LBSF was divested of an existing right which it had held.[34]
>
> (b) In "Type 2 Transactions", the priority between LBSF and the noteholders was not fixed at the outset of the transaction. The priority between the parties would remain unknown until the occurrence of the specified events. Instead, the provisions created a "toggle"

32 *Lehman Brothers Special Financing Inc v BNY Corporate Trustee Services Ltd* 422 BR 407 (Bankr SDNY, 2010); *Lehman Brothers Special Financing Inc v Ballyrock ABS CDO 2007-1 Ltd* 452 BR 31 (Bankr SDNY, 2011).

33 *Lehman Brothers Special Financing Inc v Bank of America National Association* 553 BR 476 (Bankr SDNY, 2016) ("*Lehman Brothers*") at 482–484; It should be noted that, in the Second Reading of the Insolvency, Restructuring and Dissolution Bill, it was indicated that swap agreements will likely be exempted from the operation of s 440 as an "eligible financial contract": see *Parliamentary Debates, Official Report* (1 October 2018), vol 94 (Edwin Tong Chun Fai, Senior Minister of State for Law). The holdings in *Lehman Brothers* relating to the enforceability of swap agreements will not be relevant in Singapore. Nevertheless, the case is cited here to illustrate what constitutes a "modification" of a right or obligation under s 440 of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018).

34 *Lehman Brothers Special Financing Inc v Bank of America National Association* 553 BR 476 (Bankr SDNY, 2016) at 492–495.

> between two potential scenarios, such that the noteholders would have priority if the early termination of the swap was the result of LBSF's default, and LBSF would have priority if it was not. The court found the Type 2 Transactions did not entail a modification of LBSF's rights, because under the agreements, LBSF did not have an existing right to payment priority that could have been modified. Instead, LBSF only had a contingent right to either one of the two priority positions depending on the circumstances.[35]

30 In essence, *Lehman Brothers* suggests that there is a "modification" under the *ipso facto* regime if an existing right or obligation under a contract is altered by reason of insolvency or commencement of restructuring proceedings, even if this alteration occurs pursuant to an express contractual term. Drawing back to the example above,[36] if the company has an existing right to receive the supply of *X* number of widgets if it is solvent, but is only entitled to receive *Y* number of widgets if it becomes insolvent, this may amount to a modification of a right or obligation which is prohibited by s 440(1)(*b*) of the Act.

31 Reading s 440 instead to only prohibit an amendment or modification of the *terms* of the contract renders the phrases "amend … any agreement" and "modify any right or obligation under any agreement" largely otiose, since the terms of a contract cannot be varied without the company's agreement.[37] It is unlikely that s 440 was only intended to prohibit the exercise of clauses that allow one party to unilaterally vary the contract,[38] given that such provisions are uncommon in practice.

32 Practitioners should, therefore, be mindful that contractual terms which purport to modify the parties' rights

35 *Lehman Brothers Special Financing Inc v Bank of America National Association* 553 BR 476 (Bankr SDNY, 2016) at 492–495.

36 See para 26 above.

37 *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2012] 2 SLR 311 at [66].

38 See *B2C2 Ltd v Quoine Pte Ltd* [2019] 4 SLR 17 at [163], where it was held that unilateral variation clauses are not unlawful *per se*.

and obligations upon insolvency or commencement of restructuring proceedings may be caught by the *ipso facto* restrictions in s 440(1). This may also have implications for other contractual arrangements which are triggered upon the counterparty's insolvency, such as call and put options or buyout rights in shareholders' agreements.

IV. Carve-outs under section 440(2)

33 Although the effect of s 440(1) is that a counterparty is obliged to continue performing its contracts with the company, s 440(2) provides carve-outs which help protect the interests of the company's counterparties.[39] These provisions help ameliorate some of the risks involved with continuing to trade with a company which is insolvent or undergoing restructuring.

34 Section 440(2) provides:

> (2) Nothing in this section is to be construed as —
>
> (*a*) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of the proceedings; or
>
> (*b*) requiring the further advance of money or credit.

35 On a literal reading, s 440(2) does not create a substantive right for a counterparty to demand that the company make payments in cash for goods, services, use of leased property or other valuable consideration, or a right to stop making further advances of money or credit to the company. In other words, s 440(2) may be interpreted as being silent on these issues, and permits a counterparty to exercise such rights only if the terms of the contract expressly provide for them.[40]

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39 See Ellen L Hayes, "Executory Contracts in Debt Restructuring" (1994–1995) 24 Can Bus LJ 44; *Re Cosgrove-Moore Bindery Services Ltd* 17 CBR (4th) 205, 48 OR (3d) 540 at [10].

40 Ellen L Hayes, "Executory Contracts in Debt Restructuring" (1994–1995) 24 Can Bus LJ 44.

36 However, Canadian courts have taken a different view of the equivalent Canadian provisions. It appears well established in Canada that the statutory provisions grant a supplier the right to demand immediate cash payments for the supply of goods and to resist being compelled to supply goods on credit, regardless of the terms of the contract.[41] A landlord can also demand rent on a day-to-day basis from its tenant.[42]

37 Canadian courts have gone one step further by relying on the Canadian equivalent of s 440(2)(*a*) to make orders directing the company to make payments to suppliers and landlords for the supply of goods, services and leased property, on the basis that it would be inconsistent with the purpose of the provision to require suppliers and landlords to commence lengthy and expensive litigation in order to collect amounts which they are entitled to.[43]

38 It remains to be seen whether the Singapore courts will adopt the Canadian approach in applying s 440(2). In particular, it is uncertain if the Singapore courts will read s 440(2)(*a*) as conferring upon the court the power to order payments to be made by the company. Until there is judicial guidance on these issues, it would be prudent for parties to ensure that their contracts entitle them to insist on immediate cash payments and to withhold the advance of further credit if the company becomes insolvent or commences restructuring proceedings.

41 See *HSBC Bank Canada v Tri-Tec Industries Ltd* 22 CBR (5th) 120, 2006 CarswellOnt 3174; *Re 728835 Ontario Ltd* 1998 CarswellOnt 2025, [1998] OJ No 1980; *Re Cosgrove-Moore Bindery Services Ltd* 17 CBR (4th) 205, 48 OR (3d) 540; Adrienne Ho, "The Treatment of *Ipso Facto* Clauses in Canada" (2015) 61(1) McGill LJ 139 at 183–184; and E Patrick Shea, "Dealing with Suppliers in a Reorganization" (2008) 37 *Canadian Bankruptcy Reports* (5th) 161.

42 *Crystalline Investments Ltd v Domgroup Ltd* (2002) 58 OR (3d) 549.

43 *Re Cosgrove-Moore Bindery Services Ltd* 17 CBR (4th) 205, 48 OR (3d) 540 at [11].

V. Exemption for significant financial hardship

39 Section 440(4) allows a party to apply for an exemption from the application of the *ipso facto* regime. An applicant is required to satisfy the court that the operation of s 440 would likely cause "significant financial hardship".

40 There are few Canadian cases dealing with what qualifies as "significant financial hardship".[44] It has been suggested that there is a high threshold to qualify for an exemption from the *ipso facto* restrictions.[45]

41 In *Toronto-Dominion Bank v Ty (Canada) Inc*[46] ("*Toronto-Dominion Bank*"), the court held that the applicant must demonstrate "quantitatively the prejudice that it will suffer if the stay is not removed".[47] In that case, the applicant sought to terminate its distributorship arrangements and trademark licence agreement with the insolvent company, so that it could then penetrate the Canadian market and sell its products directly to Canadian customers.[48] The court denied the application on the basis that the applicant did not demonstrate quantitatively any material prejudice it may suffer.[49] The court also denied the application on the basis that any prejudice to the applicant would be outweighed by the interests of the general body of creditors.[50] This suggests that even if the applicant is able to cross the threshold of showing significant financial hardship, the court

44 E Patrick Shea, "Dealing with Suppliers in a Reorganization" (2008) 37 *Canadian Bankruptcy Reports* (5th) 161.

45 Adrienne Ho, "The Treatment of *Ipso Facto* Clauses in Canada" (2015) 61(1) McGill LJ 139 at 184.

46 42 CBR (4th) 142, 2003 CanLII 43355.

47 *Toronto-Dominion Bank v Ty (Canada) Inc* 42 CBR (4th) 142, 2003 CanLII 43355 at [22(a)].

48 *Toronto-Dominion Bank v Ty (Canada) Inc* 42 CBR (4th) 142, 2003 CanLII 43355 at [13].

49 *Toronto-Dominion Bank v Ty (Canada) Inc* 42 CBR (4th) 142, 2003 CanLII 43355 at [22(b)].

50 *Toronto-Dominion Bank v Ty (Canada) Inc* 42 CBR (4th) 142, 2003 CanLII 43355 at [22(c)]–[22(k)].

can consider the interests of other stakeholders in the exercise of its discretion under the section.

42 Furthermore, the court held that the prejudice to be considered is "objective prejudice, not subjective prejudice", meaning that the court looks at the degree of prejudice suffered in relation to the indebtedness of the creditor and "not to the extent that such prejudice may affect the creditor as a person, organization or entity". It is unclear if this position should be followed in Singapore as "financial hardship" connotes looking at the particular financial situation of the applicant.[51]

43 In reality, whether a party will suffer significant financial hardship will depend on whether the company is able to fulfil its contractual obligations. As discussed above, in order to assess whether the company is able to perform its obligations, it is sensible for parties to contract for informational rights relating to the company's operations and finances. Assuming a party is able to demonstrate that the company is unable to perform its obligations, there may not even be a need for an application under s 440(4) because termination may then be justified on the basis of an anticipatory breach.

VI. Conclusion

44 The *ipso facto* restrictions in s 440 may have wide-ranging implications for a variety of contracts. Nevertheless, there are safeguards in place to balance the interests of the

51 See, *eg*, *RGA Holdings International Inc v Loh Choon Phing Robin* [2017] 2 SLR 997 at [48] in the context of whether an interim injunction should be refused on the grounds of undue hardship; E Bruce Leonard, "Debt Restructuring Under the Bankruptcy and Insolvency Act June 1, 1995 — Stays of Proceedings under the Bankruptcy and Insolvency Act" IIC-ART 1995-14, where it is suggested that it may be difficult for a large organisation to show that it will suffer significant hardship. See also United Kingdom, Department for Business, Energy & Industrial Strategy, *Insolvency and Corporate Governance: Government response* (26 August 2018) at para 5.109, in the context of the UK *ipso facto* proposals, where it is suggested that the financial hardship exemption in the proposed UK legislation is intended to be invoked only if the supplier's own solvency is threatened.

insolvent company and its counterparties. Practitioners should be mindful of the potential implications of the *ipso facto* regime and consider new ways of addressing counterparty insolvency risk, apart from relying purely on *ipso facto* clauses.