RECONCILING SINGAPORE'S AMBITIONS AS A DEBT RESTRUCTURING HUB AND AS A GLOBAL FINANCIAL CENTRE

Singapore positions itself as a debt restructuring hub and as a global financial centre. While these two ambitions may appear to be at odds with each other, a closer look at the regulatory regimes and restructuring and insolvency regimes applicable to the financial sector and other critical services reveals that regulation and intervention are introduced along a spectrum, depending on the financial entity and contract in question. These regimes have been carefully calibrated to ensure that market participants continue to have the certainty they require, in order to do business in Singapore.

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I. Introduction

1 More experienced practitioners may recall the failure of MF Global, which was one of the ten largest insolvencies in the history of the US at that time.[1] Locally, the transfer or close-out of almost all MF Global customer positions was completed within a week, without using any default fund resources and without having to pause any trading and clearing activities.[2] Creditors of MF Global Singapore were also the

1 Shira Ovide, "MF Global: Likely Among the 10 Biggest Bankruptcies Ever" *Wall Street Journal* (31 October 2011) <https://www.wsj.com/articles/BL-DLB-35316> (accessed 11 October 2023).

2 "The Clearing House as Central Clearing Counterparty to Derivatives Transactions" *SGX Group* (21 July 2012) <https://www.sgxgroup.com/zh-hans/sgxgroup/media-centre/20120721-clearing-house-central-clearing-counterparty-derivatives-
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first set of creditors of MF Global entities worldwide to receive interim payments in respect of their entitlements to customer segregated funds.[3]

2 A pro-business environment, excellent infrastructure[4] and open financial markets – these are key factors contributing to Singapore's status as a leading international financial centre. For 15 consecutive years, Singapore has retained its position as having the world's best business environment.[5] According to the World Bank's *Ease of Doing Business* rankings, Singapore ranks as the top country in the East Asia & Pacific region.[6] At the same time, Singapore continues to establish itself as an international centre for debt restructuring.[7]

3 At first instance, these two objectives – to maintain our status as a leading international financial centre[8] and to establish ourselves as a debt restructuring hub – may sound at odds with each other. However, as the then Senior Minister of State for Law Mr Edwin Tong SC highlighted in the Second Reading of the Insolvency, Restructuring and Dissolution Bill, these two objectives are in no way mutually exclusive:[9]

> … In fact, in many ways, they are complementary. We want businesses to be set up here, thrive, function, and operate. But when they fall into difficult times, given the impact it has on various stakeholders, in terms of the creditors, employees and other counter-parties, we want to provide them the best possible tools and the best regime possible in this forum to restructure and get back on its feet. Being an international centre for debt restructuring in fact augments our attractiveness as *a global financial centre*. It enhances our capabilities to provide a comprehensive end-to-end suite of options for businesses and transactions. [emphasis added]

4 In this article, the authors consider how exactly the insolvency regime in Singapore is designed to give parties in the financial sector

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transactions> (accessed 11 October 2023): this was an extract of the keynote address delivered by Ms Yeo Lian Sim, Chief Regulatory Officer of the Singapore Exchange, at the Profit & Loss Forex Network Asia 2012.

3 MF Global, "News Release" (11 October 2012) <https://docplayer.net/16545814-Creditors-of-mf-global-singapore-to-get-first-interim-dividend-soon.html> (accessed 11 October 2023).

4 See the Monetary Authority of Singapore's website: <https://www.mas.gov.sg/development/why-singapore> (accessed 2 January 2024).

5 See the Economist Intelligence Unit's Business Environment Rankings: <https://www.eiu.com/n/eius-business-environment-rankings/> (accessed 11 October 2023).

6 "Ease of Doing Business" *The World Bank* <https://archive.doingbusiness.org/en/rankings?region=east-asia-and-pacific> (accessed 11 October 2023).

7 See also the *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (Ministry of Law, 20 April 2016).

8 See also ss 4(1)(*b*) and 4(1)(*d*) of the Monetary Authority of Singapore Act 1970 (2020 Rev Ed).

9 Singapore Parl Debates; Vol 94; [1 October 2018].

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the "best possible tools" and the "best regime possible" to restructure, and how in the overall analysis it is in fact consistent with and in some ways "augments our attractiveness as a global financial centre". In particular, the authors outline the restructuring and insolvency regimes in Singapore in the context of the financial sector, in order to better understand how Singapore seeks to reconcile the goal of developing Singapore as an international financial centre with her ambitions to be an international debt restructuring hub. This article is also written with the hope of providing a starting point of reference for practitioners faced with restructuring and insolvency matters involving financial institutions.

5 A few things should be noted at the outset. First, there is no one perfect regime – regimes in various jurisdictions can constantly be reviewed and refined to suit their purposes, in accordance with the culture and the needs of the economy that they are designed for.

6 Second, when we think about restructuring and insolvency in Singapore, we think mainly about the Insolvency, Restructuring & Dissolution Act 2018 (the "IRDA", as it has come to be familiarly known). In understanding how our restructuring and insolvency regime interacts with the development of the financial sector, it is worth taking a step back and noting that there are various other regulatory and resolution regimes that operate outside of and alongside the IRDA, in order to ensure that financial institutions and arrangements are dealt with more efficiently, effectively, and in an orderly manner, in the event of an insolvency.

7 It should also be added that parts of this article will necessarily discuss regulation of certain types of financial institutions in Singapore, especially in relation to the resolution and insolvency of financial institutions. However, regulation of financial institutions is an extremely broad area involving a multitude of policy and other considerations, and the discussion in this article is not intended to be exhaustive. Reference should be had to other texts for a further understanding of financial regulation in Singapore.

8 This article begins with a discussion on how the financial health of financial institutions is subject to constant regulatory oversight and how, unlike regular companies, such financial institutions may be required to develop their own resolution plan way in advance of any insolvency. This article then turns to consider the extensive powers that the Monetary Authority of Singapore (the "MAS") has in respect of financial institutions facing insolvency, and how such powers are nevertheless calibrated in order to bring certainty and assurance for the financial markets. This article then looks into the statutory frameworks applicable to specific types of financial institutions (*eg*, banks, clearing houses and insurers), and considers how an insolvency of such institutions would differ from

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the insolvency of a general company under the IRDA. Finally, this article looks at the IRDA itself and considers how it has been designed to bring certainty and assurance for the financial markets.

II. A brief introduction to the regulatory regime for financial institutions

9 First, unlike other corporate entities, financial institutions are supervised and regulated by the MAS. It bears noting that the MAS falls under the direct purview of the Prime Minister's Office,[10] which highlights the central role that the MAS plays in the financial stability of Singapore. One of the functions of the MAS is "to conduct integrated supervision of the financial services sector and financial stability surveillance".[11]

10 One of the MAS's stated principal objectives is to "promote financial stability and foster a sound and reputable financial centre" in Singapore.[12] In seeking to do so, the MAS is clear that it does not aim to establish a "zero failure" regime. Instead, the aim is to "reduce the risk and impact of a failure, through rigorous financial supervision coupled with robust recovery and resolution planning".[13] Needless to say, financial stability and the soundness of the regime is critical to Singapore's status as an international financial centre.

11 As part of this risk-based supervisory approach, the MAS regularly monitors and supervises financial institutions in Singapore. The intensity of supervision depends on the financial institution's risk profile and systemic impact, and ranges from: (a) Business-as-usual (BAU) Supervision; to (b) Heightened Monitoring; to (c) Pre-emptive Action; to (d) Crisis Management.[14] Along the way, the MAS may institute corrective actions, though at the Crisis Management stage, *eg*, when the financial institution is assessed to be no longer viable, the MAS will consider taking resolution actions.

12 The MAS may identify certain systemically important financial institutions and subject them to recovery and resolution planning

10 Constitution of the Republic of Singapore (Ministerial Responsibility) Notification 2020 (S 723/2020).

11 Monetary Authority of Singapore Act 1970 (2020 Rev Ed) s 4(2)(*b*).

12 *MAS' Approach to Resolution of Financial Institutions in Singapore* (Monetary Authority of Singapore, August 2017).

13 *MAS' Approach to Resolution of Financial Institutions in Singapore* (Monetary Authority of Singapore, August 2017) at para 1.2.

14 *MAS' Approach to Resolution of Financial Institutions in Singapore* (Monetary Authority of Singapore, August 2017) at para 2.1.

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obligations.[15] As part of these obligations, these financial institutions are required to appoint an executive officer to lead and oversee the recovery planning process[16] and to provide information to the MAS to facilitate resolution planning.[17] A recovery plan sets out actions that the financial institution will take to stabilise and restore its financial strength and viability when it comes under severe stress.[18] The resolution plan is developed by the MAS and sets out the strategy for timely and orderly resolution of a financial institution when it faces material financial distress or failure. The aim of the resolution plan is to ensure the feasibility of the resolution of the financial institution without severe disruptions, while protecting systemically important functions.[19]

13 Immediately, two observations can be made. First, for a regular company, generally any oversight and supervision as to the company's financial health is left to private stakeholders, *eg*, directors and officers of the company, shareholders and creditors (*eg*, by way of information and financial covenants). In contrast, financial institutions have their financial health constantly monitored by a public regulatory authority (with the level of scrutiny constantly re-assessed). Without a doubt there are public costs involved in doing so, but this is necessary given the potential impact and consequences on society at large should a systemically important financial institution fall into ill health.

14 Second, unlike these systemically important financial institutions, other private corporations are not required to prepare a set of processes that they intend to put into action, if they ever enter stress or failure. The cost of imposing such a requirement on each and every private corporation will be immense, given the number of business entities in Singapore.[20] Such an additional requirement would also make setting up

15 Monetary Authority of Singapore Act 1970 (2020 Rev Ed) Pt 4A, Div 2. The MAS's powers to subject certain financial institutions to recovery and resolution planning obligations will be moved from the Monetary Authority of Singapore Act 1970 to the Financial Services and Markets Act 2022 when the latter Act is fully in force.

16 *MAS' Approach to Resolution of Financial Institutions in Singapore* (Monetary Authority of Singapore, August 2017) at para 5.3. See also "MAS Notice 654" (30 January 2019) at para 5.1(a).

17 See s 44 of the Monetary Authority of Singapore Act 1970 and *MAS' Approach to Resolution of Financial Institutions in Singapore* (Monetary Authority of Singapore, August 2017) at para 5.9. See also "MAS Notice 654" (30 January 2019) at para 4.2.

18 *MAS' Approach to Resolution of Financial Institutions in Singapore* (Monetary Authority of Singapore, August 2017) at para 5.5.

19 *MAS' Approach to Resolution of Financial Institutions in Singapore* (Monetary Authority of Singapore, August 2017) at paras 5.8–5.9.

20 As of November 2023, there were 587,047 business entities (including companies, limited liability partnerships and variable capital companies) registered with the Accounting and Corporate Regulatory Authority: see <https://www.acra.gov.sg/

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a company in Singapore a less attractive proposition. Instead, these other corporate entities tend to put together a plan when they actually run into financial issues – for breathing space during this period, they can rely on the scheme moratorium under s 64 of the IRDA.

15 That banking corporations, licensed finance companies, licensed insurers, approved financial institutions and merchant banks are each excluded from the scheme moratorium regime under the IRDA, *ie*, they are not entitled to apply for a scheme moratorium under s 64 of the IRDA, is aligned with the regulatory oversight and recovery and resolution planning regime. That is, it is not envisioned that such financial institutions should be asking for breathing space to put together a plan, with their creditors, only when they run into trouble. However, it should be noted that the MAS does have a right to apply to court for a moratorium in respect of that financial institution if it considers it to be in the interests of "affected persons" of that financial institution: see paras 20–22 below.

16 Does the additional regulatory oversight and imposition of recovery planning requirements increase the cost of doing business? Probably so, but these are reasonable and can be expected for any financial institution, especially if their reach is so wide that they become systemically important globally or domestically in any single jurisdiction. Further, such regulatory oversight and requirements for recovery and resolution planning are not unique to Singapore – the major international financial centres that are members of the Financial Stability Board[21] (the "FSB") are expected to have recovery and resolution planning regimes that meet the Key Attributes of Effective Resolution Regimes for Financial Institutions and have done so to varying degrees.

III. The Monetary Authority of Singapore's resolution powers

17 The Monetary Authority of Singapore Act 1970 (the "MAS Act") was amended in 2013 to confer resolution powers on the MAS to deal with, amongst others, banks, insurers and other financial institutions in

training-and-resources/facts-and-figures/business-registry-statistics> (accessed 2 January 2024).

21 The members of the FSB are Argentina, Australia, Brazil, Canada, China, France, Germany, Hong Kong SAR, India, Indonesia, Italy, Japan, Korea, Mexico, the Netherlands, Russia, Saudi Arabia, Singapore, South Africa, Spain, Switzerland, Türkiye, the UK and the US.

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the event of their insolvency.[22] Such resolution powers are broad, and are meant to supplement the powers of control conferred on the MAS under other statutes relating to each type of financial institution (*eg*, the Banking Act 1970 (the "Banking Act") and Insurance Act 1966 (the "Insurance Act"), which are discussed in further detail below). These powers are only described briefly here.

A. Power to issue directions

18 The MAS may issue directions or make regulations concerning any person that has ceased to be a specified financial institution as it considers necessary: (a) in order to discharge, or to facilitate the discharge of, any binding obligation of the person or class of persons, as the case may be; or (b) where it is in the public interest to do so.[23] A "specified financial institution" means a pertinent financial institution[24] or an excluded financial institution.[25]

B. Power to prohibit carrying on significant business

19 The MAS may make an order prohibiting a specified financial institution from carrying on its significant business or from doing or performing any act or function connected with its significant business, if it considers it to be in the interests of the affected persons of that specified financial institution.[26]

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22 The MAS's resolution powers will be moved from the Monetary Authority of Singapore Act 1970 to the Financial Services and Markets Act 2022 when the latter Act is fully in force.

23 Monetary Authority of Singapore Act 1970 (2020 Rev Ed) s 51.

24 A "pertinent financial institution" is defined as "any person who is approved, authorised, designated, recognised, registered, licensed or otherwise regulated by the [MAS] under [the MAS Act] or any of the written laws set out in the Schedule, and is prescribed by regulations made under section 126 as a pertinent financial institution": see s 49 of the Monetary Authority of Singapore Act 1970.

25 An "excluded financial institution" is defined as "any person who is approved, authorised, designated, recognised, registered, licensed or otherwise regulated by the [MAS] under [the MAS Act] or any of the written laws set out in the Schedule, and is prescribed by regulations made under section 126 as an excluded financial institution".

26 Monetary Authority of Singapore Act 1970 (2020 Rev Ed) s 53(1). Guidance on who are the "affected persons" in the case of each type of financial institution can be found in the Monetary Authority of Singapore (Resolution of Financial Institutions) Regulations 2018 (S 714/2018) – *eg*, the depositors of a bank, the participants of a payment system and the policy owners of insurance policies issued by an insurer.

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C. Power to apply for moratoriums

20 The MAS may apply to the General Division of the High Court for a number of moratoriums in respect of the specified financial institution, if it considers it to be in the interests of the affected persons of that specified financial institution.[27] Such moratoriums appear similar to that available under the scheme moratorium and judicial management regimes, save that the court may grant an order that "no steps may be taken by any person, other than a person specified in the order, to sell, transfer, assign or otherwise dispose of any property of the specified financial institution". This is likely to prohibit the disposal of any property by the specified financial institution itself (unless it is specified in the order).

21 Such an order is not available under s 64 of the IRDA. In fact, a creditor who is concerned with the company disposing of its assets will have to take out a separate application under s 66 of the IRDA for an order restraining the company from disposing of its property (other than in good faith and in the ordinary course of business).[28] It can be observed that while the scheme moratoriums under s 64 of the IRDA are meant to protect the debtor company from steps taken by its creditors, under the MAS Act the protection accorded by the moratorium appears to be more nuanced and in this respect, the toolkit for recovery and resolution is more targeted and far-reaching. The intention appears to be also to prevent the debtor (here, the specified financial institution) from taking certain steps such as disposing of its assets, which may be prejudicial to its stakeholders.

22 In fact, the protection here is potentially stricter than that available under s 66 of the IRDA. Section 53(3) of the MAS Act goes further to provide that any sale, transfer, assignment or other disposition of property that contravenes the order made under s 53(2)(*f*) of the MAS Act is void (as opposed to voidable).[29]

D. Power to apply for winding up

23 The MAS may apply to wind up a company that is carrying on the significant business of a specified financial institution.[30] It can do so based on the grounds listed in s 125(1) of the IRDA (which applies to corporations generally), but also on further grounds stated under s 54(1) of the MAS Act, which are that: (a) the MAS has exercised any power

27 Monetary Authority of Singapore Act 1970 (2020 Rev Ed) s 53(2).
28 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 66.
29 Monetary Authority of Singapore Act 1970 (2020 Rev Ed) s 53(3).
30 Monetary Authority of Singapore Act 1970 (2020 Rev Ed) s 54(1).

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under the relevant provisions in relation to the company; or (b) the company has contravened any provision of the MAS Act or any of the written laws set out in the Schedule to the MAS Act.

E. Power to order a compulsory transfer of business

24 The MAS may determine that the whole or part of a business of a pertinent financial institution shall be transferred to a transferee, if certain grounds are met. For example, in the case of a bank, if the MAS is satisfied that the transfer is appropriate, having regard to amongst other things, the interests of the depositors given priority and the order of priority of each class of depositors under s 62 of the Banking Act, and the stability of the financial system in Singapore.

25 However, such statutory powers are carefully calibrated such that they apply only within the jurisdiction, and do not appear to be overreaching. That is, where the transferor is a pertinent financial institution incorporated or established outside of Singapore, the MAS's determination must only be in respect of the business which is reflected in the books of the transferor in Singapore in relation to the transferor's operations in Singapore.[31]

26 Commercially, concerns have been raised as to whether such powers are too broad and would interfere with commercial arrangements. For example, while these statutory powers do not make any reference to set-off or netting arrangements, this issue was raised in consultations conducted by the MAS before the resolution powers were introduced. In the *Response to Feedback Received – Consultation on Amendments to the Monetary Authority of Singapore Act* issued by the MAS on 5 February 2013, it was stated that:[32]

> Some respondents have expressed concern that the proposed resolution powers may affect the enforceability of bilateral netting arrangements. They were of the view that the proposed resolution powers are broad and appeared to defeat existing contractual rights under such arrangements. In particular, the concerns centred around the compulsory transfer of business provisions (which in the respondents' view, could potentially allow MAS to transfer part but not all of the transactions entered into under an ISDA Master Agreement, which may result in preventing those transactions from being closed-out and netted under the ISDA Master Agreement) and the provision allowing MAS to issue directions to persons who have ceased being a financial institution ('FI'), which

31 Monetary Authority of Singapore Act 1970 (2020 Rev Ed) s 57(2).

32 *Response to Feedback Received – Consultation on Amendments to the Monetary Authority of Singapore Act* (Monetary Authority of Singapore, 5 February 2013) at para 2.1.

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> had to be complied with 'notwithstanding any other duty imposed by any rule of law, written law or contract' (new section 30AAM). They expressed the view that if the proposed amendments were passed in their present form, there could be appropriate qualifications made to bilateral netting opinions in respect of Singapore and affect Singapore's status as a good 'netting' jurisdiction.

27 The MAS recognised these legitimate commercial concerns in its response:[33]

> MAS agrees that the legal framework governing contractual netting should be clear and transparent during resolution of regulated entities, and not hamper implementation of resolution measures. In light of the comments, the MAS(A) Bill will be amended to expressly reflect that the exercise of resolution powers is not intended to defeat bilateral netting arrangements. MAS will also provide in the MAS(A) Bill, a general power to prescribe safeguards to the exercise of the resolution powers. This would enable the Minister to *expressly provide in subsidiary legislation that bilateral netting arrangements, as well as other similar arrangements warranting carve-out, will not be affected by the exercise of resolution powers under the MAS Act*. [emphasis added]

28 The potential impact of such extensive resolution powers on financial arrangements were also actively raised in Parliament. During the Second Reading of the Monetary Authority of Singapore (Amendment) Bill on 15 March 2013,[34] Nominated Member of Parliament Ms Tan Su Shan (based on her experience as a banker) raised the risk that the amendments to the MAS Act would cause other financial institutions outside of Singapore to re-assess their exposure to Singapore's financial institutions:

> First, enforceability of bilateral netting arrangements. I appreciate and thank the Deputy Prime Minister for bringing this up in a speech earlier and, as I had earlier mentioned about net and gross exposures, it is useful to point out – as he had rightly pointed out – that most industry players here use the ISDA Master Agreement to enforce bilateral netting arrangements.
>
> Many industry players are also concerned that the proposed resolution powers may affect the enforceability of such arrangements, as the proposed powers are broad and it appears that they may, in some instances, defeat existing contractual rights. If this leads, for example, to 'cherry picking' of which transactions to close out, then this could lead to counterparty losses. Section 30A(AM) may also give the MAS powers to override the institution's existing contractual obligations. If this is the case, FIs around the world will have to re-assess their exposure to Singapore FIs. And this would affect our status as a good 'netting' jurisdiction and increase the cost of doing business here.

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33 *Response to Feedback Received – Consultation on Amendments to the Monetary Authority of Singapore Act* (Monetary Authority of Singapore, 5 February 2013) at para 2.5.

34 Singapore Parl Debates; Vol 90; [15 March 2013].

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> We welcome subsidiary legislation to ensure bilateral netting arrangements will be carved out and ask that this be extended to cover the Banking Act and Insurance Act, too.

29 In response, the then-Deputy Prime Minister and Minister for Finance Mr Tharman Shanmugaratnam clarified:[35]

> I can assure Members that the carve-outs through subsidiary legislation that we will make, as provided for in the Bill, will include specific provisions for bilateral netting arrangements. I can also confirm that the *carve-outs for bilateral netting arrangements will apply across all financial institutions, including banks and insurance companies*.
>
> The approach we are taking is essentially similar to that being taken in the United Kingdom where they have adopted a Special Resolution Regime, and the carve-outs that the European Union has now directed its members to put in place when designing their resolution frameworks. It is a system where you put in place the basic provisions and the powers that a regulator needs, but you have carve-outs to ensure that contractual obligations and, specifically, bilateral netting arrangements, are not defeated.

30 Indeed, several safeguards for specific financial arrangements have been introduced in the Monetary Authority of Singapore (Resolution of Financial Institutions) Regulations 2018 (the "MAS Resolution Regulations"). These are described briefly here:

(a) Regulation 11 of the MAS Resolution Regulations provides that a transfer of a part of a transferor's business under s 57 of the MAS Act must not provide for the transfer of some, and not all of the protected rights and liabilities between a particular person ("P") and the transferor. Such rights and liabilities are protected if they arise from one or more financial contracts between the two parties, and they are rights and liabilities which either P or the transferor is entitled to set-off or net under a set-off arrangement, netting arrangement or title transfer arrangement.[36] In theory, this means that rights and liabilities under all derivatives transactions documented under a single ISDA Master Agreement must be transferred together as a whole to a transferee. This would prevent cherry-picking and avoid a disruption of close-out netting under the ISDA Master Agreement.

(b) Regulation 14 of the MAS Resolution Regulations protects secured liabilities in a transfer, by providing generally

35 Singapore Parl Debates; Vol 90; [15 March 2013].

36 Monetary Authority of Singapore (Resolution of Financial Institutions) Regulations 2018 (S 714/2018) reg 11.

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that where a liability is secured, the security must be transferred together with the liability.

(c) Regulation 12 of the MAS Resolution Regulations provides that a transfer of a part of a transferor's business must not provide for the transfer of some, and not all, of the rights and liabilities of the transferor that arise from a clearing and settlement arrangement of a market infrastructure, if the failure to transfer any such right or liability will result in a disruption of the arrangement. It includes a non-exhaustive list of what may constitute a "disruption of the clearing and settlement arrangement of a market infrastructure", such as a disruption of the discharge of payment and delivery obligations in respect of transactions cleared and settled through the market infrastructure.[37]

(d) Regulation 15 of the MAS Resolution Regulations protects covered bond arrangements, by providing that a transfer of a part of a transferor's business must not result in the transfer of some but not all of the rights and liabilities of all the covered bonds that are issued under the covered bond programme.[38]

31 Taking a step back, it becomes clear that the approach has been to introduce the wide-ranging powers for resolution that are deemed necessary for the regulator in the event of an insolvency of the financial institution, and then carve-back areas that need to be protected in order to assure the financial markets that their contractual arrangements with Singapore's financial institutions will not be unduly affected by such powers. In that way, the resolution regime is calibrated to on one hand, provide the regulator with sufficient powers, and on the other, to protect and respect financial arrangements entered into between commercial parties.

IV. Banks

32 Aside from the broad-ranging powers that the MAS has in respect of specified financial institutions as discussed above, the Banking Act also confers upon the MAS other powers that can be exercised where a bank approaches insolvency or is insolvent.

37 Monetary Authority of Singapore (Resolution of Financial Institutions) Regulations 2018 (S 714/2018) reg 12(2)(*a*).

38 Monetary Authority of Singapore (Resolution of Financial Institutions) Regulations 2018 (S 714/2018) reg 15(2).

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33 At the outset, any bank that is or is likely to become insolvent or unable to meet its obligations, or has suspended or is about to suspend payments, is obliged to immediately inform the MAS.[39] This obligation is taken further in s 48AA of the Banking Act, which obliges a bank to immediately inform the MAS if it becomes aware of any development that has occurred or is likely to occur which it has reasonable grounds to believe has or is likely to materially and adversely affect amongst other things its financial soundness or reputation, or its ability to conduct business.[40] The obligation here is placed on the bank, *ie*, to voluntarily inform the MAS of any such matters. A failure to do so would constitute a criminal offence.[41]

34 Where the bank informs the MAS that, amongst other things, it is likely to become insolvent, the MAS may exercise a range of powers in respect of the bank.[42] This includes appointing a statutory adviser[43] or a statutory manager[44] to the bank. As observed earlier such powers are carefully calibrated such that they do not appear to be overreaching. Section 49(3) provides that in the case of a bank incorporated outside Singapore, any appointment of a statutory adviser or statutory manager or any assumption of control by the MAS of the bank's business is only in relation to: (a) the business or affairs of the bank carried on, or managed in or from, Singapore; or (b) the property of the bank located in Singapore, or reflected in the books of the bank in Singapore in relation to its operations in Singapore.[45]

35 The statute is silent on whether the purview of the statutory adviser or statutory manager appointed to a bank incorporated in Singapore would extend to its business overseas. The better view should be that the purview would extend to the Singapore-incorporated bank's branches' operations overseas, subject to the financial regulations and provisions for recognition and assistance in those other jurisdictions.

36 A bank cannot voluntarily enter judicial management.[46] A judicial management order must not be made in relation to a bank either.[47] Whilst the court nevertheless has the right to make a judicial management order if it considers that the public interest so requires, one queries whether

39 Banking Act 1970 (2020 Rev Ed) s 48.
40 Banking Act 1970 (2020 Rev Ed) s 48AA(1).
41 Banking Act 1970 (2020 Rev Ed) ss 48(2) and 48AA(4).
42 Banking Act 1970 (2020 Rev Ed) s 49(1).
43 Banking Act 1970 (2020 Rev Ed) s 49(2)(*b*).
44 Banking Act 1970 (2020 Rev Ed) s 49(2)(*c*).
45 Banking Act 1970 (2020 Rev Ed) s 49(3).
46 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 94(13).
47 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 91(8)(*b*).

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circumstances will ever develop such that this is required, given that the MAS is likely to have taken action by the time this is put in issue before the court.

37 A bank can be wound up. However, in a winding up of a bank, there are different rules that govern priorities and set-off, which distinguish a bank from a regular company in winding up. For example, under s 61(2) read with s 62(1) of the Banking Act, certain specified liabilities have priority over all unsecured liabilities of the bank, other than the preferential debts specified in s 203(1) of the IRDA. These liabilities include premium contributions due and payable by the bank under the Deposit Insurance and Policy Owners' Protection Schemes Act 2011,[48] liabilities incurred by the bank in respect of insured deposits up to certain limits, and other deposit liabilities owed to non-bank customers.[49]

38 Further, in a winding up of a bank in Singapore, a liquidator must first set-off a depositor's liabilities to the bank against any deposit of the depositor placed with the bank that is accepted in Singapore dollars or on terms under which the deposit may be repaid by the bank in Singapore dollars.[50] This provision applies "despite any written law or rule of law relating to the winding up of companies". While the general rules of set-off should be available where there are cross-claims between the bank and the depositor, this statutory provision simply makes it clear that the depositor's liabilities *must* be set off against any deposits, so that the depositor does not run the risk of continuing to owe the bank (in liquidation) a large sum of money (*eg*, under a home loan) while facing the possibility of receiving only a few cents to the dollar on his or her deposits.

39 These provisions highlighted above reflect the focus on the protection of depositors in a bank's insolvency. Such provisions are necessary in order to maintain confidence of the public in the security of their bank deposits. These work together with other protections such as those relating to covered bond arrangements, which have developed into important sources of funding for banks in Singapore.

48 The Deposit Insurance Scheme was established to protect the core savings of small depositors in Singapore, should a full bank or finance company fail. More information is available on the Singapore Deposit Insurance Corporation Limited's website: <https://www.sdic.org.sg/public/di_overview> (accessed 30 December 2023).

49 Banking Act 1970 (2020 Rev Ed) s 62(1).

50 Banking Act 1970 (2020 Rev Ed) s 62A.

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V. Clearing houses and participants

40 Another related, and similarly specially protected, realm in which the general law of insolvency applies in a modified manner pertains to clearing processes. These are also central to orderly trading markets in Singapore.

41 A clearing house facilitates the exchange of payments, and securities and derivatives transactions between participants. For these purposes, a "participant" refers to a person who "under the business rules of an approved clearing house or a recognised clearing house, may participate in one or more of the services provided by" the clearing house.[51] These can include banks or other financial institutions or individual investors, who may in turn act for themselves or for separate principals.

42 The MAS licenses clearing houses as "approved clearing houses" ("ACHs") or "recognised clearing houses" ("RCHs"). Clearing houses that are of systemic importance to the Singapore financial markets are regulated as ACHs, whereas other clearing houses are regulated as RCHs.[52] In assessing applications to be licensed as clearing houses, the MAS considers factors such as risk management capabilities, track record, management expertise, ability to meet prescribed minimum financial requirements, strength of internal controls and systems, business plans and corporate governance.[53]

43 The clearing houses that most readers will be familiar with are Singapore Exchange Derivatives Clearing Limited ("SGX-DC") and The Central Depository (Pte) Limited ("CDP"), both of which are ACHs. Very generally, CDP provides clearing and settlement for Singapore equities and debt securities, while SGX-DC provides clearing and settlement for derivatives.

44 When a market participant becomes insolvent, tensions between the general laws of insolvency and market integrity may arise in several areas, especially in the area of netting arrangements. For example, in *British Eagle International Air Lines Ltd v Compagnie National Air France*,[54] the House of Lords was split 3–2 on the issue of whether the

51 Securities and Futures Act 2001 (2020 Rev Ed) s 2(1).

52 Securities and Futures (Clearing Facilities) Regulations 2013 (S 464/2013) reg 8.

53 "Approved Clearing House (ACH) or Recognised Clearing House (RCH) Licence" *Monetary Authority of Singapore* <https://www.mas.gov.sg/regulation/capital-markets/apply-for-licensing-or-registration-of-capital-market-entities/copy-of-approved-clearing-house-ach-or-recognised-clearing-house-rch-licence> (accessed 29 September 2023).

54 [1975] 1 WLR 758.

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multilateral netting arrangement enacted through the International Air Transport Association (IATA) as the central clearing party should be upheld, when British Eagle (a participant) went into liquidation. The majority held that the netting arrangement there contravened the *pari passu* principle.[55] Such uncertainty arising from the general law cannot be tolerated where a market participant is insolvent. For reference, an average of S$1.07bn in value of securities is traded on the SGX daily.[56] In such cases, it makes sense once again to lean in favour of greater regulation in respect of clearing houses.

45 The Securities and Futures Act 2001 ("SFA") provides protections to contracts and proceedings in the event of the insolvency of market participants. Ever since the SFA was introduced in 2001, as a consolidation of, among others, the previous Securities Industry Act[57] and the Futures Trading Act,[58] it has had in place exceptions to the laws of insolvency for clearing and settlement activities, in order to "minimise any systemic risk to our clearing and settlement system".[59] In particular, the then-Deputy Prime Minister BG Lee Hsien Loong noted during the Second Reading of the Securities and Futures Bill:[60]

> By giving primacy to the default rules of the clearing house over the rules of insolvency, the [Securities and Futures Bill] will ensure that the insolvency of a member will not disrupt the clearing and settlement of trades already executed. Such giving of priority to systemic stability is consistent with the practice in other financial centres.

46 This is manifested in special protections that are accorded under Pt 3, Div 4 of the SFA to certain transactions cleared or settled by any ACH or RCH. In particular, these include market contracts, market collateral, market charges and default proceedings. For reference:

(a) "**Market contract**" means:[61]

> … (a) a contract subject to the business rules of an approved clearing house or a recognised clearing house, that is entered into between the approved clearing house or recognised clearing house and a participant pursuant to a novation (however described), whether

55 Though in more modern times the issue in *British Eagle International Air Lines Ltd v Compagnie Nationale Air France* is taken to have been more about the anti-deprivation principle: see, *eg*, *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383.

56 For the fourth quarter of the financial year 2023: see *Market Statistics Report* (SGX Group, September 2023).

57 Cap 289.

58 Cap 116.

59 Singapore Parl Debates; Vol 73; [5 October 2001].

60 Singapore Parl Debates; Vol 73; [5 October 2001].

61 Securities and Futures Act 2001 (2020 Rev Ed) s 48(1).

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> before or after default proceedings have commenced, which is in accordance with those business rules and for the purposes of the clearing or settlement of transactions using the clearing facility of the approved clearing house or recognised clearing house, or (b) a transaction which is being cleared or settled using the clearing facility of an approved clearing house or a recognised clearing house, and in accordance with the business rules of the approved clearing house or recognised clearing house, whether or not a novation referred to in paragraph (a) is to take place.

(b) "**Market collateral**" means:[62]

> … any property held by or deposited with an approved clearing house or a recognised clearing house, for the purpose of securing any liability arising directly in connection with the ensuring of the performance of market contracts by the approved clearing house or recognised clearing house.

(c) "**Market charge**" means "a security interest, whether fixed or floating, granted in favour of an approved clearing house, or a recognised clearing house, over market collateral".[63]

(d) "**Default proceedings**" means "any proceedings or other action taken by an approved clearing house or a recognised clearing house under its default rules", and "**default rules**" refers to:[64]

> … the business rules of the approved clearing house or recognised clearing house which provide for the taking of proceedings or other action if a participant has failed, or appears to be unable or to be likely to become unable, to meet the participant's obligations for any unsettled or open market contract to which the participant is a party.

47 Section 81C(1) provides that certain contracts or transactions (*eg*, market contracts, a disposition of property in accordance with the business rules of an ACH or a RCH relating to the application of property provided as market collateral) are not invalid to the extent at law by reason only of inconsistency with any written law or rule of law relating to the distribution of the assets of a person on insolvency. That is, these proceedings will take precedence over the general law of insolvency.

48 Further, s 81C(2) of the SFA provides that a relevant office holder, or a court applying the law relating to insolvency in Singapore, must not exercise such power to prevent or interfere with: (a) the settlement of a market contract in accordance with the business rules of an approved

62 Securities and Futures Act 2001 (2020 Rev Ed) s 48(1).
63 Securities and Futures Act 2001 (2020 Rev Ed) s 48(1).
64 Securities and Futures Act 2001 (2020 Rev Ed) s 48(1).

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clearing house or a recognised clearing house, or any proceedings or other action taken under those business rules; or (b) any default proceedings. It is worth highlighting that even the court's hands are tied here – Parliament intended that the settlement of a market contract should be protected in the face of an insolvency of participants.[65]

49 Section 81G of the SFA provides that general insolvency laws relating to disclaimer of onerous property[66] or rescission of contracts[67] in insolvency proceedings (*eg*, court winding up, creditors' voluntary winding up, bankruptcy) do not apply to certain contracts or proceedings. These include market contracts, market charges and default proceedings.

50 Section 81H of the SFA provides that the general insolvency laws relating to adjustments of prior transactions[68] in insolvency proceedings do not apply to certain contracts or proceedings. That is, clawback claims for transactions at undervalue, unfair preferences, extortionate credit transactions and transactions defrauding creditors, do not apply to contracts or proceedings such as market contracts, market charges and default proceedings.

51 This finds some balance in s 81I, which provides the insolvency office holder of a participant of the clearing house with the right to recover a specified gain obtained from an overvalued or undervalued transaction with a counterparty. This is in the limited circumstances where the transaction occurred within six months prior to the occurrence of bankruptcy or insolvency proceedings in relation to the first participant, and at the time of the transaction the counterparty knew or ought reasonably to have known that the bankruptcy or insolvency proceedings were likely to occur in relation to the first participant.[69]

52 Separately, s 81J provides that where property has been provided as market collateral, that property may be applied in accordance with the business rules or default rules of the ACH or RCH in so far as it is necessary, *despite* any prior equitable interest or right, or any right or remedy arising from a breach of fiduciary duty (unless the clearing house had actual notice of such interest, right or breach of duty at the time the property was provided as market collateral). As such, it can be observed

65 Securities and Futures Act 2001 (2020 Rev Ed) s 81C(2).
66 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ss 230, 231, 373 and 374.
67 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ss 130(1), 170(1) and 328.
68 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ss 224, 225, 228, 361, 362, 366 and 438.
69 Securities and Futures Act 2001 (2020 Rev Ed) s 81I(3) read with s 81I(4).

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that these statutory provisions go as far as to affect property rights of parties, in favour of market integrity, albeit with certain safeguards that generally involves the *bona fides* of the clearing house.

53 These protective provisions are further buttressed by s 81L(1), which provides that a court is:

> … not to recognise or give effect to (a) an order of court exercising jurisdiction under the law of insolvency in any place outside Singapore, or (b) an act of a person appointed in any place outside Singapore to perform a function under the law of insolvency in that place, insofar as the making of the order by a court in Singapore, or the doing of the act by a relevant office holder, would be prohibited under [the SFA].

The effect is that these rules cannot be circumvented by commencing foreign insolvency proceedings and seeking recognition and assistance of such proceedings in Singapore. It should be noted again that these provisions (including s 81L in particular) have been in the SFA since 2001, long before cross-border recognition applications were common in Singapore. In any case, the Model Law (which was enacted much later) does not apply to ACHs.[70]

54 It appears that participants of a clearing house are not *per se* prohibited from applying for scheme moratoriums or judicial management.[71] That is, participants may, of their own accord, apply for a moratorium under s 64(1) of the IRDA. At first sight, this has the potential to plunge the financial markets into disarray, given the number of contracts a participant could be party to. However, this article notes that contracts between a recognised clearing house and its members, containing or incorporating by reference the business rules of the recognised clearing house, are excluded from the operation of s 440 of the IRDA (discussed later in this article).[72] Again this shows that the approach has been thought through – in this instance the decision was made to allow such entities to obtain such protections under the IRDA, with a caveat that the relevant contracts that a participant is party to should not be affected.

70 Insolvency, Restructuring and Dissolution (Prescribed Companies and Entities) Order 2020 (S 620/2020) para 5(1)(*o*), read with Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) Third Schedule, Art 1(2).

71 Unless they are separately regulated, *eg*, banks and insurers.

72 Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020 (S 616/2020) reg 3(*e*). See also reg 3(*k*).

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VI. Insurers

55 Insurance companies in Singapore are also subject to regulation by the MAS. On an ongoing basis, the MAS has a statutory right to inspect the books, accounts and records of licensed insurers, branches or subsidiaries outside Singapore of licensed insurers established or incorporated in Singapore and insurance intermediaries.[73]

56 Where a licensed insurer or insurance intermediary approaches insolvency, the MAS may exercise certain broad-ranging powers under s 102 of the Insurance Act. Such broad-ranging powers include issuing directions to require the licensed insurer or insurance intermediary to recruit management personnel as may be necessary to enable it to conduct its business in accordance with sound insurance principles, or stopping the renewal or issuance of further policies.[74]

57 In respect of a licensed insurer, the MAS may also assume control of and manage its business, and appoint a statutory manager to run the business on such terms and conditions as the MAS may specify.[75] In managing the relevant business of a licensed insurer, the MAS or statutory manager is statutorily obliged to take into consideration the interests of the *policy owners* of the licensed insurer.[76] That is, while the focus in the insolvency of a general corporate entity is the creditors of that entity, it is specifically clarified here that the interests of the policy owners (as opposed to the general creditors) must be considered.

58 Further, even though a licensed insurer is not entitled to apply for a scheme moratorium under s 64 of the IRDA,[77] the MAS has the statutory right to apply for a moratorium under s 107 of the Insurance Act. While most of the protections look similar, in respect of a licensed insurer the court may also grant an order that "no steps may be taken by any person, other than a person specified in the order, to sell, transfer, assign or otherwise dispose of any property of the licensed insurer".[78] This is likely to bind the licensed insurer itself, unless it is the person specified in the order as being able to take such steps. Such an order is not part of the suite of moratoriums available under s 64 of the IRDA. In fact, a creditor concerned about the company disposing of its assets will have

73 Insurance Act 1966 (2020 Rev Ed) s 98(1).
74 Insurance Act 1966 (2020 Rev Ed) s 102(2).
75 Insurance Act 1966 (2020 Rev Ed) s 102(2)(*b*).
76 Insurance Act 1966 (2020 Rev Ed) s 103(3)(*a*).
77 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 63(3) read with Insolvency, Restructuring and Dissolution (Prescribed Companies and Entities) Order 2020 (S 620/2020) para 3(*e*).
78 Insurance Act 1966 (2020 Rev Ed) s 107(1)(*e*).

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to take out a separate application under s 66 of the IRDA for an order restraining the company from disposing of its property (other than in good faith and in the ordinary course of business).[79] It can be observed that while the scheme moratoriums under s 64 of the IRDA are meant to protect the debtor corporation from steps taken by its creditors, under the Insurance Act the protection accorded by the moratorium appears to be more nuanced and targeted. The intention appears to be also to prevent the debtor (here, the licensed insurer) from taking certain steps such as disposing of its assets, which may be prejudicial to stakeholders such as policy owners.

59 On a related note, there does not appear to be any statutory provision preventing a licensed insurer from proposing a scheme of arrangement with its creditors under s 210 of the Companies Act 1967. However, it should be noted that if a voluntary transfer of the whole business or part of it is contemplated, such a transfer can only be effected by a scheme under s 117(1) of the Insurance Act. Such a scheme will require the approval of the MAS.

60 Like a bank, a licensed insurer cannot voluntarily enter judicial management.[80] A judicial management order must not be made in relation to a licensed insurer either.[81] Whilst the court nevertheless has the right to make a judicial management order if it considers that the public interest so requires, again one queries whether circumstances will ever develop such that this is required, given that the MAS is likely to have taken action by the time this is put in issue before the court.

61 Where the licensed insurer enters winding up, there are also a number of matters in the winding up that diverge from liquidations for regular companies as well. Some examples include:

(a) The liquidator of the licensed insurer must be approved by the MAS in writing.[82]

(b) The MAS must be a party to the winding up proceedings, and the liquidator is obliged to provide information as the MAS may from time to time require about the affairs of the insurer.[83]

(c) Sections 218(2) to 218(8) of the IRDA, which relate to debts provable in winding up, are specifically disapplied

79 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 66.
80 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 94(13).
81 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 91(8)(*c*).
82 Insurance Act 1966 (2020 Rev Ed) s 120(1) read with Monetary Authority of Singapore Act 1970 (2020 Rev Ed) s 54(4).
83 Insurance Act 1966 (2020 Rev Ed) s 120(6).

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to the valuation of liabilities in respect of policies. Instead, such liabilities are to be determined in accordance with either prescribed rules or on a basis approved by the court.[84]

(d) In winding up the affairs of a licensed insurer, the liquidator must endeavour, as far as reasonably practicable, to sell or transfer the whole or part of the insurance business to any other insurer licensed to carry on the relevant class or classes of business, or to carry on the insurance business until it is so transferred.[85]

(e) Certain liabilities specific to insurers have priority over all unsecured liabilities of the insurer, other than the preferential debts under s 203(1) of the IRDA.[86] These include any levy due and payable under the Deposit Insurance and Policy Owners' Protection Schemes Act 2011, liabilities protected under that Act and liabilities incurred in respect of direct policies which are not protected under that Act.

62 On the whole, it can be observed that where insurers are concerned, special concerns apply relating to the protection of policy holders and better ensuring that they are not disenfranchised as a result of the insurer's failure. Undoubtedly, this goes toward facilitating the adoption of insurance (both personal and commercial) in Singapore.

VII. Payment systems and participants

63 Similarly, statutory protection from the general laws of insolvency is accorded to the realm of payment systems, which again are central to the effective functioning of Singapore's financial system.[87] Generally, payment systems facilitate the circulation of money, and as such "form a critical part of market and economic infrastructure".[88] Retail payment systems in Singapore include Fast and Secure Transfers (FAST), the Inter-bank GIRO system (IBG System), and NETS Electronic Fund Transfers at Point of Sale (EFTPOS). The MAS also operates the MAS Electronic

84 Insurance Act 1966 (2020 Rev Ed) s 120(10).
85 Insurance Act 1966 (2020 Rev Ed) s 120(2).
86 Insurance Act 1966 (2020 Rev Ed) s 123(2).
87 *Payment Systems Oversight Act: Consultation Paper* (Monetary Authority of Singapore, April 2003) at p ii.
88 *Payment Systems Oversight Act: Consultation Paper* (Monetary Authority of Singapore, April 2003) at p 4.

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Payment System (MEPS+), which is a wholesale payment system for processing high value or urgent payments.[89]

64 In 2002, the MAS and the Attorney-General's Chambers issued a joint consultation paper on legal protection for financial payment systems[90] (the "MAS-AGC Consultation Paper"). In this paper it was emphasised that a payment system can only work effectively if "its legal environment ensures the finality and irrevocability of all settlements and payments made through the system". In particular, the paper identified three main legal issues arising from: (a) finality of settlement and payments; (b) enforceability of netting arrangements in payment systems; and (c) enforceability of close-out netting. The Payment and Settlement Systems (Finality and Netting) Act 2002 (the "PSSFNA") was eventually enacted to, amongst other things, provide certainty in respect of such issues. Again, the MAS-AGC Consultation Paper reveals that such law reform was motivated by the drive to cement Singapore's position as a major financial centre:[91]

> To enhance Singapore's position as a major financial centre, the international competitiveness of her financial institutions is paramount. Legal certainty as to the status of the transactions effected through payment systems and netting arrangements would most certainly boost Singapore's international standing as a financial hub.

65 This article will discuss them in brief and highlight generally the effect of the PSSFNA.[92]

A. Finality of settlement and payments

66 Central to the workings of a payment system is the "transfer order". This refers to the instruction by a participant, which may be carried out in or through one or more designated systems, to place at the disposal of a recipient an amount of money by means of a book-entry on the accounts of a settlement institution for a designated system, or that, when settled, results in the assumption or discharge of a payment

89 "Payment Systems" *Monetary Authority of Singapore* <https://www.mas.gov.sg/regulation/payments/payment-systems> (accessed 31 December 2023).

90 *Legal Protection for Financial Payment Systems* (The Monetary Authority of Singapore & The Attorney-General's Chambers, 15 August 2002).

91 *Legal Protection for Financial Payment Systems* (The Monetary Authority of Singapore & The Attorney-General's Chambers, 15 August 2002) at para 8.5

92 Note that amendments were introduced to the Payment and Settlement Systems (Finality and Netting) Act 2002 in 2018 to, amongst other things, enhance the protection of payment transactions by extending the period during which transactions enjoy finality and hence, protect a wider range of transactions from insolvency law in a liquidation event: see Singapore Parl Debates; Vol 94; [8 January 2018].

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obligation as defined by the governing rules of a designated system.[93] It can also refer to an instruction by a participant to transfer book-entry securities.[94]

67 In respect of a transfer order, the risk is that where the participant in a payment system enters insolvency proceedings, certain clawback actions may apply or relevant transactions may not complete. For instance, this may be so where the participant is required to make funding payments to the payment system operator, to ensure that there are sufficient funds in that participant's accounts for the purposes of settlement. Risks may be introduced by the availability of clawback claims in the participant's insolvency, such as claims for transactions at an undervalue, unfair preferences and extortionate credit transactions. Further, uncertainty may also be introduced if a liquidator is allowed to cherry-pick contracts and disclaim certain contracts that are unfavourable to the company. Finally, the zero-hour rule (*ie*, when an event is specified to have occurred on a certain date, that event is deemed to have occurred immediately after midnight of that day) may void transactions, *eg*, when a company commences winding up, all transactions on that day may be rendered void as they would be taken to have been effected after the winding up of the company.

68 Part 2 of the PSSFNA was introduced to respond to such concerns. In particular:

> (a) Section 6 of the PSSFNA provides that the general law of insolvency has effect in relation to transfer orders effected through a designated system, and actions taken under the rules of a designated system with respect to the orders "subject to the provisions of this Part". In particular, Pt 2 is concerned with the bankruptcy, judicial management and winding up proceedings of a participant.
>
> (b) Section 7 makes it clear that where the rules of a designated system provide that the transfer of funds into and out of a participant's account, the netting or settlement of any payment obligation, or the settlement and transfer of book-entry securities, is final and irrevocable, such transfer, netting or settlement "must not" be reversed, repaid or set aside, and "no order is to be made by any court for the rectification or stay of the transfer, netting or settlement". The language is clear, and limits the jurisdiction of the court to make any such order that

93 Payment and Settlement Systems (Finality and Netting) Act 2002 (2020 Rev Ed) s 2.
94 Payment and Settlement Systems (Finality and Netting) Act 2002 (2020 Rev Ed) s 2.

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may affect the finality of the transactions contemplated under the rules.

(c) Section 8 of the PSSFNA contains provisions that the proceedings of a designated payment system are to take precedence over the law of insolvency. That is, a transfer order, any disposition of property pursuant to such an order, or any action taken under the rules of a designated system are not to be regarded as invalid on the ground of inconsistency with the law for distribution of the assets of a person on bankruptcy or winding up, or on the appointment of a receiver, receiver and manager or an equivalent officer over any of the assets of a person. Further, s 8(2) of the PSSFNA circumscribes the powers of a relevant office-holder (*ie*, the Official Assignee, a liquidator, receiver, judicial manager, or bankruptcy trustee) and the powers of a court under the law of insolvency, providing that they must not be exercised so as to interfere with the netting or settlement of a transfer order in accordance with the rules of a designated payment system.

(d) Section 9 provides that specific provisions under the IRDA relating to disclaimers and restrictions on dispositions of property do not apply to transfer orders.

(e) Section 10 provides that "no order may be made by a court" under specific provisions under the IRDA relating to clawback claims in corporate insolvency and bankruptcy, in relation to a transfer order or any disposition of property pursuant to such a transfer order.

69 Further, the extent of recognition and assistance that can be rendered in a foreign insolvency proceeding is limited. Under s 14 of the PSSFNA, a court is not to recognise or give effect to an order of court exercising jurisdiction under a foreign insolvency law, or an act of a person appointed in a place outside Singapore to perform a function under the law of insolvency there, in so far as the making of the order or such act would be prohibited under the PSSFNA for a court in Singapore or a relevant office holder. For example, given that a Singapore relevant office-holder would not be able to exercise its powers so as to interfere with the netting or settlement of a transfer order under the PSSFNA, the Singapore court is not to recognise or give effect to a foreign order that involves a foreign insolvency professional interfering with the netting or settlement of a transfer order relating to a payment system in Singapore. As such, modifications to the general law of insolvency under the PSSFNA ensure the stability of designated payment and financial systems, which is consistent with Singapore's status as a global financial centre.

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VIII. Payment entities

70 The MAS has emergency powers in respect of certain payment entities, such as a payment service provider licensed under the Payment Services Act 2019 (the "PSA"), an operator of a designated payment system, or a settlement institution of a designated payment system.

71 Where such a payment entity informs the MAS that it is or is likely to become insolvent or unable to meet its obligations, or has suspended or is about to suspend payments, the MAS may exercise a number of powers.[95] For example, it may require the payment entity to take certain actions, appoint a statutory adviser to advise the payment entity on the proper management of the business, or appoint a statutory manager or assume control of and manage its business. Where the MAS or statutory manager assumes control of the business, it takes custody or control of that business.[96] In doing so, the MAS or statutory manager has all the duties, powers and functions of the board of directors of the payment entity.[97] The chief executive officer's and any director's appointment is treated as revoked, unless the MAS gives its written approval for the individual to remain in appointment.[98]

72 The statutory provisions make it clear that the MAS's decision is intended to be paramount – where there is any conflict between the directions given by the MAS or the statutory manager on one hand, and directions given by a chief executive officer, director or office-holder on the other, the former prevails over the latter. Further, even shareholders of the company are not allowed to exercise their rights attached to any share in the payment entity in a manner that would defeat or interfere with the MAS's or statutory manager's duty, power or function.[99] Here, the statutory provisions are drafted to clarify that such powers are to take precedence over private rights.

73 If there is an *emergency* in relation to a designated payment system, the MAS may exercise a further set of powers.[100] This includes the power to direct an operator or settlement institution of a designated payment system to take certain actions to restore the safe and efficient operation of the designated payment system, to apply to court for the winding up of the operator or settlement institution, and to require an operator of a designated payment system to cease operations. An

95 Payment Services Act 2019 (Act 2 of 2019) s 78.
96 Payment Services Act 2019 (Act 2 of 2019) s 80(1).
97 Payment Services Act 2019 (Act 2 of 2019) s 80(3)
98 Payment Services Act 2019 (Act 2 of 2019) s 80(5)(*a*).
99 Payment Services Act 2019 (Act 2 of 2019) s 80(9)(*a*).
100 Payment Services Act 2019 (Act 2 of 2019) s 79.

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"emergency" occurs when: (a) a situation prevents a designated payment system from carrying out its functions; (b) the operations of a designated payment system are carried on in a manner likely to be detrimental to the interests of its participants; or (c) there is an undesirable situation or practice that, in the MAS's opinion, constitutes an emergency.

74 As is the case for clearing houses, it seems that operators or settlement institutions of designated payment systems may, on their own accord apply for a moratorium under s 64(1) of the IRDA. Again, while this may at first sight have the potential to cause disorder in the markets, this is to some extent managed by the rules protecting finality of settlement and payments – the designated payment systems under the PSA are also designated under the PSSFNA. Further, contracts containing or incorporating by reference the designated system operating rules of a designated system (under the PSSFNA) that are entered into, amongst others, between the operator and a participant of a designated system, are excluded from s 440 of the IRDA.[101] Again, this shows that the decision was made to allow such entities to obtain such protections under the IRDA, with a caveat that the relevant contracts under a designated system should not be affected.

IX. Financial advisers

75 A "financial adviser" is defined under the Financial Advisers Act 2001 as "a person who carries on a business of providing any financial advisory service".[102]

76 In comparison, the insolvency of licensed financial advisers appears to be less regulated than that of other financial institutions discussed above. The insolvency of licensed financial advisers are less likely to have systemic implications for the financial system in Singapore or an impact on the retail public, as financial advisers are less likely to handle customers' monies or be a counterparty to financial transactions.

77 The Financial Advisers Act 2001 envisions that a licensed financial adviser may be wound up under the IRDA,[103] though certain other provisions under s 76 of the Financial Advisers Act 2001 apply. For example:

101 Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020 (S 616/2020) reg 3.
102 Financial Advisers Act 2001 (2020 Rev Ed) s 2(1).
103 Financial Advisers Act 2001 (2020 Rev Ed) s 76(1).

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(a) In addition to the list of persons who may apply for the winding up of a company under s 124 of the IRDA, s 76(1) of the Financial Advisers Act 2001 provides that the MAS may apply for the winding up, or for the continuance of a winding up, of a licensed financial adviser.

(b) In addition to the grounds for winding up a company,[104] that the licensed financial adviser has contravened a provision of the Financial Advisers Act 2001 is a ground on which the MAS may apply to wind up the licensed financial adviser.[105] However, note that this ground appears to be available only where the MAS is the applicant for the winding up of the licensed financial adviser. It does not appear to be a ground that other applicants, such as creditors, can rely on.

(c) The MAS shall be a party of the winding up proceedings of a licensed financial adviser,[106] and the liquidator appointed must give the MAS such information as it may from time to time require about the affairs of the licensed financial adviser.[107]

78 Licensed financial advisers are not expressly prevented from applying for scheme moratoriums or from proposing a scheme of arrangement with their creditors, or from entering judicial management. However, such matters are grounds for the MAS to refuse to grant an application for the grant of a financial adviser's licence.[108] As the systemic financial impact of insolvency of a financial adviser is minimal, unsurprisingly the licensing regime takes a light touch approach (*ie*, it does not really affect the general law of insolvency, which undergirds Singapore's ambition as an international debt restructuring centre).

X. Variable capital companies

79 A variable capital company ("VCC") is a corporate structure for investment funds. It can issue and redeem shares without having to seek shareholders' approval. This enables investors to exit their investments in the investment fund when they wish to. Unlike companies under the Companies Act 1967, a VCC can pay dividends using its capital.[109]

104 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 125(1).
105 Financial Advisers Act 2001 (2020 Rev Ed) s 76(2).
106 Financial Advisers Act 2001 (2020 Rev Ed) s 76(3).
107 Financial Advisers Act 2001 (2020 Rev Ed) ss 76(3)–76(4).
108 Financial Advisers Act 2001 (2020 Rev Ed) s 8.
109 "Explanatory Brief on the Variable Capital Companies Bill on 10 September 2018" *Monetary Authority of Singapore* (10 September 2018) <https://www.mas.gov.sg/

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A VCC can be constituted as a single fund, or it can be an umbrella VCC with several sub-funds.

80 VCCs are relatively new in Singapore. They were introduced in 2020, by the Variable Capital Companies Act 2018 (the "VCC Act"), with an aim to encourage new funds to set up in Singapore, and to facilitate the re-domiciliation of foreign funds to Singapore, thereby expanding the country's fund servicing ecosystem.[110]

81 A VCC may be wound up under s 130 of the VCC Act, while a sub-fund may be wound up under s 33 of the VCC Act. The relevant insolvency legislation is *incorporated by reference* into the VCC Act, so the winding up provisions for a VCC are to be found in the VCC Act itself. At the time of writing, these provisions still incorporate by reference Pt 10 and s 389 of the Companies Act 1967 as in force prior to the IRDA taking effect, with certain modifications. However, the MAS has stated its intention to align the insolvency and winding up regime for VCCs with that under the IRDA.[111] Further, the Variable Capital Companies (Miscellaneous Amendments) Act 2019 ("VCC (MA) Act") was passed in Parliament on 3 September 2019 with provisions incorporating the relevant provisions under the IRDA, however the relevant sections of the VCC (MA) Act are not yet in force.

82 In the meantime, VCCs and their sub-funds continue to be subject to the pre-IRDA winding up regimes (voluntary and involuntary) that were applicable to Singapore-incorporated companies. Logically, this should also include subsidiary legislation such as the Companies (Winding Up) Rules and, in so far as reference is made in the relevant Companies Act provisions thereto, the Bankruptcy Act[112] and its accompanying subsidiary legislation.

83 Judicial management and schemes of arrangements do not appear to be intended to apply to VCCs:

(a) First, there are no provisions under the VCC Act that expressly incorporate the judicial management and scheme regimes.

news/speeches/2018/explanatory-brief-on-the-variable-capital-companies-bill> (accessed 11 October 2023).

110 Indranee Rajah SC, *The VCC: A Game-Changer for Singapore's Funds Industry* (Monetary Authority of Singapore, 2 October 2018).

111 *Response to Feedback Received: Consultation Paper on the Proposed Framework for Variable Capital Companies Part 3* (Monetary Authority of Singapore, January 2020).

112 Cap 20, now repealed.

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(b) Second, in the Second Reading Speech of the Variable Capital Companies (Miscellaneous Amendments) Bill, the Second Minister for Finance & Education Ms Indranee Rajah made reference only to receivership and winding up of VCCs in explaining the insolvency provisions in the VCC Act, with no reference to judicial management or schemes of arrangement:

> The first aspect relates to the insolvency provisions in the VCC Act. The current provisions in the VCC Act relating to the receivership and winding up of VCCs and their sub-funds are adapted from the Companies Act. In October 2018, the Insolvency, Restructuring and Dissolution Act, or 'IRDA' was passed by Parliament. The IRDA consolidates all personal and corporate insolvency, and debt restructuring laws under one statute. When the IRDA comes into force, the insolvency provisions in the Companies Act will be repealed. As such, the VCC Act must be amended so that the insolvency framework for VCCs and their sub-funds will make reference to the relevant provisions in the IRDA instead of the Companies Act.

(c) Third, the VCC (MA) Act will amend the VCC Act such that s 5(2) of the VCC Act will read: "[the VCC Act] (except for Part 7) applies the provisions of the Companies Act *and Part 6, Part 8 and Part 9 of the IRDA (as it applies to winding up)* subject to the modifications set out by [the VCC Act]" [emphasis added]. This specifically excludes Pt 7 of the IRDA, which applies to judicial management, and makes no reference to Pt 5 of the IRDA, which applies to schemes of arrangement. It also limits Pt 9 of the IRDA (which contains provisions relating to judicial management and winding up) to winding up *only*.

(d) In a consultation paper released by the MAS on 23 March 2017 titled "Consultation Paper on the Proposed Framework for Singapore Variable Capital Companies", the MAS stated that "consistent with global industry practice, we propose not to adopt the mechanisms for arrangements, reconstructions and amalgamations under the [Companies Act] for [VCCs]. These mechanisms will be generally governed by the provisions set out in the constitution".

(e) In the response to the consultation paper which was published on 10 September 2018, the MAS stated that it would proceed with this proposal, and that "while MAS recognises that the approach for restructuring procedures to be governed by each VCC's constitution *will not bind third parties (*eg *creditors)*, the approach accords flexibility in allowing VCCs and sub-funds to restructure under the terms of each VCC's constitution".

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84 On the whole, it can be observed that only the winding up regime (for now, under the old provisions in the Companies Act 1967) applies to VCCs. It should only be a matter of time before the transition to the IRDA provisions is complete. However, even after such a transition, judicial management and schemes of arrangement would still not apply to VCCs. The practical effect of such exclusion of would be to exclude much of the reforms within the scheme of arrangement and judicial management regimes in the last decade, which helped develop Singapore as a debt restructuring centre. For VCCs, it is important to offer greater certainty to contractual arrangements, property rights and security, so as to encourage fund-raising. In this respect, the balance favours fund-raising over the ability to effect debt restructuring under general insolvency law.

XI. Other critical service providers

85 Financial markets aside, the authors pause to note that there are also special insolvency regimes for other critical services, that are essential to both our personal and commercial lives. For example, where an airport licensee is unable to pay its debts, the Civil Aviation Authority of Singapore ("CAAS") may apply to the Minister for a special administration order, under s 72 of the Civil Aviation Authority of Singapore Act 2009 (the "CAAS Act"). When a special administration order is in force, the affairs, business, and property of the airport licensee must be managed by a person appointed by the Minister, for the achievement of the purposes of the special administration order, and in a manner that protects the respective interests of the members, creditors and customers of the company.[113] It is interesting to note that where such a regulated company is unable to pay its debts, unlike for other general companies the focus does not shift from the interests of the members to the creditors.[114] The statute makes it clear that the approach is wholistic, *ie*, the interests of members, creditors and customers are all to be protected.

86 There are corresponding provisions restricting certain private actions and proceedings. For example, no airport licensee may be voluntarily wound up without the CAAS's consent, and 14 days' notice to the CAAS must be given before any step can be taken to enforce security over the company's property or to make any application under s 210 of the Companies Act or s 71 of the IRDA (both relating to proposing

113 Civil Aviation Authority of Singapore Act 2009 (2020 Rev Ed) s 73.
114 *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089.

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compromises or arrangements with creditors). No judicial manager can be appointed under the IRDA to an airport licensee.[115]

87 It should be noted that an airport licensee licensed under s 36 of CAAS Act is a prescribed company for the purposes of s 63(3) of the IRDA. Generally this means that Pt 5 of the IRDA, which contains provisions relating to scheme moratoriums, super-priority, cramdowns and pre-packs do not apply to such companies. If so, even if 14 days' notice is given to the CAAS pursuant to s 75 of the CAAS Act before an application is made under s 71 of the IRDA, s 71 (which is in Pt 5 of the IRDA) should not apply at all.

88 Similar provisions for special administration orders can be found in other statutes relating to critical services, including the Telecommunications Act 1999 (relating to telecommunication licensees), Electricity Act 2001 (relating to electricity licensees), Police Force Act 2004 (relating to auxiliary police forces), Public Utilities Act 2001 (relating to designated entities that supply water or collect, treat, recover or dispose of used water), District Cooling Act 2001 (relating to licensed entities providing district cooling services),[116] Singapore Tourism Board Act 1963 (relating to cruise terminal licensees),[117] Maritime and Port Authority of Singapore Act 1996 (relating to public licensee authorised to provide any port service or facility relating to container terminal services or facilities), Gas Act 2001 (relating to gas licensees) and the Environmental Public Health Act 1987 (relating to public waste collector licensees).

XII. The Insolvency, Restructuring and Dissolution Act 2018 and financial entities and arrangements

89 This article now turns its focus to the IRDA, to highlight a few other areas in which accommodations have been made to facilitate other commercial and financial arrangements.

115 Civil Aviation Authority of Singapore Act 2009 (2020 Rev Ed) s 75(1)(*b*).

116 Interestingly, inability to pay debts is not an express ground for a special administration order under the District Cooling Act 2001 (2020 Rev Ed).

117 Correspondingly, a cruise terminal licensee is statutorily obliged to ensure that its central management and control is ordinarily exercised in Singapore: see s 29V of the Singapore Tourism Board Act 1963 (2020 Rev Ed). This was introduced so that the Singapore Tourism Board, the regulatory authority with oversight over cruise terminal licensees, can take enforcement action swiftly if any contraventions ever arise: see Singapore Parl Debates; Vol 95; [12 September 2022]. It can be observed, though, that neither s 29ZF of the Singapore Tourism Board Act 1963 nor s 63(3) of the Insolvency, Restructuring and Dissolution Act 2018 appear to prevent a cruise terminal licensee from applying for a scheme moratorium under s 64 of the Insolvency, Restructuring and Dissolution Act 2018.

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A. Prohibition against ipso facto *clauses: carve-outs for financial arrangements and special purpose vehicles*

90 When a corporate debtor applies for judicial management or scheme proceedings, s 440 of the IRDA applies to limit the exercise of certain contractual rights by reason only that such proceedings have been commenced or that the company is insolvent. Generally, while these proceedings are in force, no person may terminate or amend or claim an accelerated payment or forfeiture of the term under any agreement with the company, or terminate or modify any right or obligation under any agreement with the company.[118]

91 At first sight, such a provision appears to be an infraction into the private rights of commercial parties and runs the risk of deterring commercial contracting with Singapore entities. However, s 440(5) expressly provides that this prohibition against *ipso facto* clauses does not apply to any "eligible financial contract". Such eligible financial contracts are prescribed at reg 3 the Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020, and include derivatives contracts, margin lending agreements, securities contracts, master netting agreements, covered bonds or contracts or agreements connected with a covered bond or the issuing of a covered bond and agreements to clear or settle transactions relating to derivative contracts.

92 These carve-outs are important and significant – they signal to financial market participants that their contracts are going to be intact and immediately enforceable notwithstanding that their counterparty has commenced restructuring or insolvency proceedings in Singapore. Behind that is a more general message – that this jurisdiction is committed to protecting its financial markets and the arrangements entered into in these markets. The general protections available for debtors under the IRDA are not meant to interfere with, nor deter, such financial transactions.

93 These carve-outs for financial arrangements are further buttressed by specific entity-type carve-outs contained in the Insolvency, Restructuring and Dissolution (Prescribed Companies under Section 440) Order 2020, which provides that the prohibition against *ipso facto* clauses under s 440(1) do not apply to covered bond special purpose vehicles and securitisation special purpose vehicles. These are very specific exclusions

118 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 440(1).

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to the general rule, undoubtedly introduced in order to protect the covered bonds and securitisation markets in Singapore.[119]

B. Moratoriums: carve-outs for specified financial entities and arrangements

94 Similarly, a range of financial entities are carved out from the scheme-related regime under Pt 5 of the IRDA, which includes moratoriums and cram-downs. These entities include banking corporations, licensed finance companies, licensed insurers, covered bond special purpose vehicles and securitisation special purpose vehicles.[120]

95 Likewise, financial institutions such as banking corporations and licensed insurers, as well as covered bond special purpose vehicles and securitisation special purpose vehicles are carved out of the judicial management regimes. The moratorium protection available thereunder would not ordinarily be available to such entities.

96 Carve-outs from scheme moratoriums and judicial management are also available in respect of certain arrangements, under the Insolvency, Restructuring and Dissolution (Prescribed Arrangements and Proceedings) Regulations 2020. Here, the regulations stipulate that the scheme moratoriums and judicial management moratoriums do not affect security interest arrangements that secure obligations under securities contracts, derivatives contracts, master netting agreements, securities lending or repurchase agreements, or margin lending agreements.[121]

97 Again, it is evident that these carve-outs are designed to send a clear message to financial market participants – that the debt restructuring regimes have been carefully thought through and are not meant to affect these specific financial arrangements that are core to Singapore's economic activity, and that it continues to be safe to conduct business in Singapore.

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119 By end-2022, three Singapore banks had issued close to US$22bn in covered bonds: see Lim Cheng Khai, "Opportunities and Partnership for a Strong and Resilient Covered Bond Market", speech at The Asian Covered Bond Roadshow (8 March 2023).

120 Insolvency, Restructuring and Dissolution (Prescribed Companies and Entities) Order 2020 (S 620/2020) para 3.

121 Insolvency, Restructuring and Dissolution (Prescribed Arrangements and Proceedings) Regulations 2020 (S 615/2020) reg 3.

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XIII. Conclusion

98 Taking a bird's eye view of the restructuring and insolvency landscape as it relates to specific parts of the financial markets and other critical services in Singapore, the authors observe that different levels of intervention are available depending on the type of entity or service that is involved. The regulator may have a heavier hand in the insolvency of a bank or insurer, given that the insolvency of such an entity would undoubtedly have a wider impact on Singapore's financial system. In contrast, the insolvency of a sole financial adviser or a VCC is less likely to have the same impact, and as such seems to warrant less regulation or intervention.

99 A balance is being struck between certainty for financial market participants and their contractual arrangements on one hand, and the need for protection of the market on the other. It is against this backdrop that the lines have been drawn in the restructuring and insolvency regimes that apply to each of these entities and arrangements that have been examined in this article.

100 The authors recognise that as the financial markets evolve and as new financial arrangements and expectations appear in the market, these lines will have to be re-drawn. As mentioned at the beginning of this article, there is no one perfect regime. It can only be concluded that constant reflection on the state of the financial markets and how the various restructuring and insolvency regimes are to work in tandem with them is necessary in order for Singapore's financial landscape to remain relevant and competitive internationally.

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