The Securitisation Law Review

Third Edition

Editor
Michael Urschel

The Law Reviews

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THE SECURITISATION LAW REVIEW

THIRD EDITION

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This article was first published in October 2021
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Published in the United Kingdom
by Law Business Research Ltd, London
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK
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Enquiries concerning editorial content should be directed
to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-83862-826-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following for their assistance throughout the preparation of this book:

ADVOKATFIRMAET BAHR AS

ALLEN & OVERY LLP

ANDERSON MŌRI & TOMOTSUNE

BAKER MCKENZIE LLP

GOODMANS LLP

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PREFACE

Securitisation, broadly defined as the conversion of assets into marketable financial securities, has been used as a method of raising capital since as early as the 1970s in the United States. The use of securitisation as a form of borrowing has increased globally since then, and bodies of law have been established in many jurisdictions to allow borrowers to access capital in this manner, while protecting potential investors. Regulatory considerations include tax structuring, bankruptcy considerations and economic-driven regulation focused specifically on securitisation.

Securitisation regulatory frameworks have developed at different rates globally and largely depend on a variety of factors, including the economic state of a given jurisdiction, the broader legal frameworks already in existence (including tax and bankruptcy law), particular asset classes available to securitise and habits of local consumers. Although certain assets, such as mortgage loans, are frequently securitised across many jurisdictions, other asset classes can vary. For example, in the United States and many developed countries, in addition to mortgage loan securitisation, securitisation of automobile loans and consumer debt is extremely common and significant expansion into other operating assets such as leases and royalties is occurring. In certain other countries, more purpose-driven and asset-class specific monetisation transactions are relevant. Economic events, such as the 2008 recession in the United States, have had a great impact on the regulatory framework, not only in the United States, but also in jurisdictions such as Japan that were affected by the recession and the effects of the covid-19 pandemic and have led to certain government responses in bolstering the securitisation market. Nevertheless, 2020 and 2021 are showing to be robust years for the securitisation markets, with increased deal volume and substantial innovation in the asset class across the globe.

In this third edition of *The Securitisation Law Review*, we aim to provide securitisation attorneys, borrowers, lenders and other market participants with insight into a sample of structural frameworks and regulatory issues surrounding the industry in a broad array of jurisdictions – including a new jurisdiction, Switzerland, to this edition. This volume is not intended to be a comprehensive overview of securitisation regulation and structures in every jurisdiction, but rather to provide a frame of reference for, and a comparison of, the various structural features available and the regulatory considerations necessary in securitising assets globally. As the asset securitisation industry continues to develop and expand to new and more esoteric asset classes, such a comparison will undoubtedly be useful to those innovating in global securitisation markets.

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I would like to thank the contributors for the chapters that follow. I hope that this volume will produce grounds for continued discussion in the global securitisation industry.

Michael Urschel
King & Spalding LLP
New York
October 2021

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Chapter 9

SINGAPORE

Ting Chi Yen and Joseph Tay[1]

I OVERVIEW

In the past six years, Singapore has made great leaps and bounds in its bid to be recognised as a leading international financial centre, undergirded by a robust and reliable dispute resolution infrastructure coupled with responsive and ever-evolving business-friendly legislation.

At a domestic level, the Singapore courts' summary judgment process allows simple straightforward claims such as the enforcement of debt and guarantees to be expedited, keeping the costs of lending in Singapore low. To complement its position as a financial, legal and business hub, Singapore has aimed to strengthen its effectiveness as an international debt restructuring centre. As part of these efforts, Singapore has overhauled and consolidated its insolvency and debt restructuring regime to keep pace with regional and global developments. On 30 July 2020, the Insolvency, Restructuring and Dissolution Act 2018 (IRDA) came into force as an omnibus statute for all personal and corporate insolvency and restructuring proceedings, and it was hoped that its enactment would serve to strengthen Singapore's laws on securitisation by imbuing greater clarity to the balance between the protection of creditors and the broader interests in rehabilitating a company in financial distress.

This was immediately stress-tested by the covid-19 pandemic, which has since led to an interplay between the IRDA and the COVID-19 (Temporary Measures) Act 2020 (No. 14 of 2020) (Temporary Measures Act). Policymakers have sought to use the Temporary Measures Act as a type of 'funnel' to regulate and pace the implementation of the new regime under the IRDA, at a pace that financially-distressed individuals and businesses can adapt to, and keep up with, amid pandemic-related pressures.

II REGULATION

As a common law jurisdiction, Singapore law in the area of credit and security is largely based on English law. Concepts of common law have generally been followed and applied by the Singapore courts unless otherwise modified by local statute. Accordingly, Singapore law adopts and recognises the traditional common law forms of security interests such as mortgages, equitable charges, pledges and liens (as modified by local statute).

The regulatory regime in Singapore in respect of securitisation will largely depend on the nature of the asset being secured. Singapore does not have a central regulatory body that maintains a register of all security interests in Singapore – instead, individual statutory bodies will have oversight over particular asset classes and accordingly, any encumbrance

1 Ting Chi Yen is a partner and Joseph Tay is a senior associate at Oon & Bazul LLP.

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or disposition of title in or to those assets will be registered with the appropriate statutory bodies. These statutory bodies may also prescribe forms in which the security documents must take, as well as any filing or lodgement requirements with which they must comply to perfect or otherwise give effect to the security created. Generally, any filings, lodgements or registrations in respect of securities with the relevant statutory body will incur fairly nominal registration charges. The creation or enforcement of certain securities will also attract taxes such as stamp duties, and in some cases, withholding tax.

The most common examples are charges over certain asset classes created by companies that are to be registered with the Accounting and Corporate Regulatory Authority of Singapore (ACRA), and mortgages over real property that are registrable with the Singapore Land Authority (SLA). Security over these asset classes will be dealt with in greater detail below. Security interests created over specific assets such as vessels and intellectual property rights will be dealt with by the relevant statutory body in Singapore – mortgages over vessels are required to be registered with the Maritime and Port Authority of Singapore, and security over intellectual property rights may be registered with the Intellectual Property Office of Singapore.

i Security over real property

Singapore adopted the Torrens system of land registration in 1960 with the enactment of the Land Titles Act (Chapter 157, 2004 Revised Edition) and by 31 December 2002, the process of converting all land previously registered under the Registration of Deeds Act (Chapter 269, 1989 Revised Edition) to the Torrens system was completed. The central feature of the Torrens system is the principle that the registered proprietor has indefeasible title. In essence, the registered proprietor's title to land will be paramount and cannot be defeated by a prior unregistered interest (save for certain statutorily prescribed categories). The Torrens system allows any person dealing with a registered proprietor of land to save him or herself the expense of investigating the registered proprietor's title to satisfy himself or herself that the registered proprietor has good title the land. A person dealing with a registered proprietor may therefore simply check the land register – he or she will be bound by interests stated in the register but will not be affected by any interests not reflected therein.

In Singapore, all dealings with title to registered land under the Land Titles Act (Chapter 157, 2004 Revised Edition) are dealt with by the Land Registry under the auspices of the SLA. Under the Land Titles Act, the folios in respect of properties issued by the Registrar of the Land Registry are to be deemed conclusive evidence of the proprietor of that property, including where his or her estate or interest is subject to any encumbrances such as mortgages.

Notwithstanding that traditional mortgages involve the transfer of ownership of land by the mortgagor to the mortgagee subject to the mortgagee's right of redemption, mortgages created over land registered under the Land Titles Act (Chapter 157, 2004 Revised Edition) differs in that there is no transfer of ownership in the property from the mortgagor to the mortgagee at the time of the creation of the mortgage. Instead, the mortgage is registered with the Singapore Land Authority, which maintains the registry of property transactions in Singapore, including the creation of any encumbrances on property in Singapore.

Unless a mortgage over real property has been registered with the SLA, it will not be effective in vesting any legal interest in the mortgagee. Upon registration, the mortgage will be reflected in any subsequent title searches conducted on the property and will be conclusive proof of the encumbrance of the property created in favour of the mortgagee.

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ii Registrable charges

The creation of charges over certain asset classes granted by corporate entities may be required to be registered with ACRA, under the Companies Act (Chapter 50, 2006 Revised Edition) of Singapore. The following charges are registrable:

a a charge to secure any issue of debentures;
b a charge on uncalled share capital of a company;
c a charge on shares of a subsidiary of a company that are owned by the company;
d a charge created or evidenced by an instrument that, if executed by an individual, would require registration as a bill of sale;
e a charge on land where situate or any interest therein but not including any charge for any rent or other periodical sum issuing out of land;
f a charge on book debts of a company;
g a floating charge on the undertaking or property of a company;
h a charge on calls made but not paid;
i a charge on a ship or aircraft or any share in a ship or aircraft; and
j a charge on goodwill, on a patent or a trademark or on a copyright or on a registered design or a licence to use any of the foregoing.

Charges created over the foregoing are to be registered with ACRA within 30 days of their creation if they are created within Singapore, or 37 days if created outside of Singapore. While a failure to register the charge does not render the charge unenforceable as between the chargor and the chargee, the charge will be unenforceable as against the liquidator and other secured creditors of the company. In essence, where a company has created a registrable charge in favour of a lender and fails to register it, the lender will be unable to enforce its rights under the charge upon the company's insolvency or against any other creditor asserting a registered security or other recognisable interest over the same assets. The assets in question will instead form part of the company's general pool of assets to be administered and distributed by the liquidator, and the lender will be considered an unsecured creditor.

iii Issues of taxation and fees involved in the creation of security

While there are no significant tax benefits or savings in creating one form of security over another, certain types of securities will attract stamp duties that, though minimal, may nevertheless be a salient consideration for parties in a securitisation transaction. Stamp duty will be chargeable on any mortgage of real property or a mortgage of shares at the rate of 0.4 per cent of the loan amount granted on the mortgage subject to a maximum duty of S$500.

Where foreign lenders extend loans to Singaporeans or hold Singapore-based security, the issue of withholding tax arises as a relevant consideration. Withholding tax at the rate of 15 per cent will be chargeable on the gross payment of any interest, commission or fees in connection with any loan or indebtedness and deducted at the source. Any Singaporean making payment of interest, commission or fee in relation to a loan or indebtedness to a foreign entity will be required to withhold 15 per cent of that gross payment before making payment to the foreign entity.

Administrative fees or lodgement charges will also be imposed where any necessary registration or filings are made with statutory bodies. Each statutory body will prescribe the relevant administrative fees to be paid for the necessary lodgement or filings made in respect of securities. For example, a lodgement fee of S$60 will be payable to ACRA when a charge is registered.

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III SECURITY AND GUARANTEES

The forms of security recognised under Singapore law may be broadly classified into the following categories:

a guarantees, including standby letters of credit and performance guarantees;
b charges over assets, both fixed and floating charges;
c assignment of receivables; and
d security over real assets such as mortgages and pledges.

The features of each category of security, relevant perfection requirements and the enforceability of the securities in the face of insolvency proceedings are explored in greater depth below.

i Guarantees

Personal and corporate guarantees, standby letters of credit and performance guarantees or bonds are all fairly typical forms of security in personam used commercially in Singapore. Generally speaking, there are no registration or other perfection requirements in respect of personal security, save that the guarantee be in writing and signed by the person giving the guarantee.[2]

The key feature of a guarantee is that the guarantor assumes only a secondary or collateral liability to that of the borrower, who will be primarily liable for repayment of the loan. In a true guarantee, the liability of the guarantor will depend on the validity and enforceability of the primary contract. Consequently, the liability of the guarantor will arise only when the borrower defaults. Notwithstanding this, guarantees in Singapore are often drafted as a guarantee and indemnity, thereby creating a separate and independent obligation on the part of the guarantor. The effect of this practice creates a primary obligation on the part of the guarantor that is not contingent on first looking towards the borrower under, or the validity of, the underlying contract.

Standby Letters of Credit (SBLC) are also often used in trade finance transactions. Under an SBLC, the issuing bank will undertake to pay the beneficiary upon the default of performance of obligations owed to the beneficiary of the SBLC. The prospective defaulter is usually the applicant of the SBLC. An SBLC may be contrasted with a guarantee, as it imposes a primary obligation on the issuing bank to make payment upon the beneficiary having fulfilled the terms of the credit. This is usually by way of the beneficiary producing a written demand for payment and a declaration of the performance default of the applicant. The issuing bank will be required to pay without further investigation in the absence of fraud. To maintain international comity between banks and lenders, SBLCs are usually issued subject to customary terms contained in the UCP 600 or the ISP98, which prescribe standard sets of rules and terms applicable to documentary credits or SBLCs.

Performance bonds are also common instruments used by banks. Performance bonds typically state that the bank will pay the bearer of the bond unconditionally upon demand, without any regard as to liability under the underlying contract. In essence, when the bearer of the bond calls on the performance bond, the obligation on the bank to make payment will arise without any requirement for the bank to conduct independent investigations as to whether a breach has occurred under the underlying contract.

2 Section 6(b), Civil Law Act (Chapter 43, 1999 Revised Edition).

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ii Charges

Charges do not involve the transfer of either ownership or possession of the charged property to the lender, and may be either fixed or floating. Fixed charges are granted over one or more specific assets, and assets subject to a fixed charge cannot be freely dealt with or sold by the chargor. In contrast, a floating charge may be taken over a class of assets generally and 'hovers' over the assets, allowing the chargor to deal with it in the ordinary course of its business. Floating charges are appropriate where security is needed to be taken over the inventory of a business, as the chargor will still be able to sell or add to its inventory in the course of its business.

The specific assets secured by a floating charge will only be determined at the point in time that the floating charge crystallises. Parties may contractually agree on the events that trigger the crystallisation of a floating charge, such as events of default, insolvency or any attempt to dispose of or encumber the charged assets in a manner inconsistent with the terms of the security. Notwithstanding any contractual provisions for events of crystallisation, a floating charge automatically crystallises if a receiver is appointed over the chargor's assets or if the chargor goes into liquidation or ceases to carry on business.[3] Upon crystallisation, the floating charge will attach to the assets in the class that it hovers over, and will be a fixed charge.

As stated above, all floating charges and certain fixed charges will be registrable with ACRA within 30 days of their creation (if created within Singapore) or 37 days (if created outside of Singapore). A failure to register a registrable charge within the required time period will, in the event of the chargor's insolvency, render the charge void as against the liquidator and other creditors of the company. Priority as between two charges over the same assets will be determined by the date of creation of the charges, and not by the time of registration.

iii Assignment of receivables

Another common security taken by lenders is assignment of trade debts. The assignment of trade debts and receivables may be by way of an absolute legal assignment or an assignment by way of security.

If an assignment is to be an absolute legal assignment, it must comply with the form and procedure prescribed by section 4(8) of the Civil Law Act (Chapter 43, 1999 Revised Edition), namely that the assignment must be in writing and must not purport to be by way of charge only, and that notice of the assignment must be given to the third party debtor. Notice of the assignment to the third-party debtor is required to perfect the assignment. Where an absolute assignment fails to comply in full with the requirements of Section 4(8) of the Civil Law Act (Chapter 43, 1999 Revised Edition), the assignment will be an equitable assignment.

Although Singapore law recognises both legal and equitable assignments, the differences between them lie in the rights and remedies afforded to the lender as against the third-party debtors. These differences may be traced to the requirement for notice to be given to the third-party debtor. Absent a Notice of Assignment, any payments made by the third-party debtor to the assignor will be a good satisfaction of its debt and the third-party debtor will be treated as having discharged its underlying obligations. This is because a third-party debtor,

3 *Re Panama, New Zealand and Australian Royal Mail Co* (1870) 5 Ch App 318 (Court of Appeal in Chancery, England).

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without knowledge of the assignment, will continue to discharge its obligations in accordance with the underlying contract by making payment to the assignor and cannot be liable to the assignee for the payment of debts already paid.

iv Security over real assets

Mortgages

While traditional mortgages involve the transfer of ownership of land by the mortgagor to the mortgagee subject to the mortgagee's right of redemption, mortgages of land registered under the Land Titles Act (Chapter 157, 2004 Revised Edition) must comply with the formalities in the Land Titles Act (Chapter 157, 2004 Revised Edition). Land titles mortgages differ from traditional mortgages in that there is no transfer of ownership in the property from the mortgagor to the mortgagee at the time of the creation of the mortgage.

Owing to Singapore's adherence to the Torrens system, priority of land titles mortgages will not be determined by the order in which they are created – rather they will be determined by the order in which they were registered with the Land Titles Registry. This is an important differentiation since rights as to title in registered land derives from the act of registration.

Priority between legal mortgages (other than mortgages in respect of which priority is determined by registration in accordance with any applicable statute, for example, Land Titles mortgages and Singapore ship mortgages) will be determined by the order in which they are created, although mortgagees are free to regulate their respective rights and interests as between themselves. A legal mortgage will also prevail over all other mortgagees whose mortgages he or she had no notice at the time his or her mortgage was created.

Pledges

As pledges involve the bailment of the secured assets, the key feature of a pledge is that the pledgee has actual or constructive possession of the goods. Actual delivery may take place by physically depositing the goods with the pledgee, while constructive delivery may be by way of deposit of title deeds (without which the pledgor is unable to deal with the goods) or by way of deposit of keys to the warehouse in which the goods are stored.

The pledgee should not relinquish his or her possession (whether actual or constructive) of the goods to the pledgor – doing so may bring the pledge to an end. The redelivery of the pledged goods to the pledgor may cause the pledgee to lose his rights to the pledged goods unless it is for a limited purpose and parties clearly intend for the pledgee to regain possession when that purpose has been met.[4]

v Enforcement of security in the event of insolvency

On 30 July 2020, the Insolvency, Restructuring and Dissolution Act 2018 (IRDA came into effect. The IRDA consolidates Singapore's insolvency regime into an omnibus act that applies to both corporate entities and individuals. Prior to the enactment of the IRDA, Singapore's insolvency regime was contained in disparate pieces of legislation such as the now-repealed Bankruptcy Act (Chapter 20 of Singapore) and Part X of the Companies Act (Chapter 50 of Singapore). These pieces of legislation have since been repealed in tandem with the enactment of the IRDA.

4 *Law of Credit and Security*, Loo Wee Ling at [10.57].

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Division 3 of Part 9 of the IRDA, which applies to companies in judicial management and in liquidation, provides for the unravelling of certain transactions entered into within a certain period of the commencement of judicial management or winding-up proceedings. Division 3 of Part 9 also prescribes a 'hardening period' for floating charges wherein a floating charge created within a certain period of the commencement of a company's judicial management or winding-up may be invalid to a certain extent.

The applicable period during which transactions or floating charges entered into may be unravelled or rendered void will be determined by whether the chargee or counterparty (as the case may be) was associated with the company. The definition of 'association' is set out in Section 217 and includes situations where an individual (or an individual and his or her associates) are able to control both corporations, the two corporations will be associated; or where an individual's associates are employed by a corporation, that individual and the corporation will be treated as associated.

Floating charge void upon winding-up

Section 229 of the IRDA provides that floating charges created within a certain period of the commencement or after commencement of judicial management or winding-up proceedings will be void to a certain extent. Floating charges created within two years (if the chargee and the company are associated) or one year (if the chargee and the company are not associated) of the commencement of judicial management or winding-up proceedings will be void to the extent of the consideration for the charge and any interest thereon.

However, a floating charge in favour of a non-associate created within one year of the commencement of judicial management or winding-up proceedings will not be void if the company was not insolvent at the time, or was not made insolvent as a consequence of granting the charge.

Unwinding of transactions at an undervalue

Under Section 224 of the IRDA, where a company enters into a transaction for a consideration of whose value is significantly less than the value of the consideration provided by the counterparty three years prior to commencement of judicial management or winding-up proceedings, the court is empowered to make such orders as it thinks fit for restoring the position to what it would have been if the company had not entered into that transaction.

The company must have been insolvent at the time the transaction was entered into or have become insolvent as a consequence of that transaction. A presumption of insolvency of the company will apply where the transaction was entered into with an associate.

Notwithstanding that the transaction was entered into at an undervalue or that the company was insolvent at that time or made insolvent as a consequence of that transaction, the court cannot make an order in respect of the undervalue transaction if the company entered into the transaction in good faith and for the purpose of carrying on its business and if at the time the company entered into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

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Unwinding of unfair preference transactions

Section 225 of the IRDA allows the court to unwind transactions occurring before the commencement of judicial management or winding-up that unfairly favour one creditor at the expense of other creditors even if the transaction does not diminish the company's assets. This provision aims to police debtor misconduct and passivity and ensures that all creditors are treated fairly.

In the case of an unfair preference that is not a transaction at an undervalue and where the preferred creditor is a director of the company or associated with the director, or is an associate of the company, the court has the power to examine and unwind such transactions made within the two-year period preceding the commencement of judicial management or winding-up of the company. In all other cases of unfair preference, the court may only examine and unwind such transactions if they were made within one year prior to the commencement of judicial management or winding-up.

The unfair preference transaction must be carried out at a time when the company was insolvent or becomes insolvent as a result of the transaction. A presumption of insolvency will apply where a transaction at an undervalue was entered into with a person connected with the company (otherwise than by reason only of being the company's employee).

A company gives an unfair preference to a person if that person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities, or if the company does anything that has the effect of putting that person into a position, which, in the event of the company's winding-up, will be better than the position the person would have been had that thing not been done. The following are examples of transactions that may be construed as intending to improve the position of a particular creditor:

a payment or part payment of an old debt;
b providing security for past indebtedness; or
c transferring assets to an unsecured creditor in full or partial repayment of debt.

The court will only exercise its power to unwind such transactions if the company was influenced by a desire to produce, in relation to the creditor, the effect of putting the creditor in a better position than he or she would have been if the transaction had not been entered into. A presumption of influence will apply where the unfair preference was given to a person who, at the time the unfair preference was given, was connected with the company (otherwise than by reason only of being the company's employee).

Improper trading

Section 239 of the IRDA establishes liability for wrongful trading, which occurs when a company incurs debts (or other liabilities) that it has no reasonable prospect of meeting in full.

The wrongful trading regime established under this section is notable for its creditor-friendly nature. Under the previous regime established by the Companies Act, an officer of the company in question would have to be convicted of criminal liability before a claim for wrongful trading could be brought against that officer to establish civil or personal liability. In the new IRDA regime, civil liability can be imposed without a finding of criminal liability. This removes the prior hurdle of establishing criminal liability, and thus lowers the standard of proof that claimants need to satisfy to establish a wrongful trading claim.

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Notably, a declaration for wrongful trading can be made against 'any person who was a party to the company trading in that manner'; this would appear to expand the pool of possible persons beyond the directors and officers of the company.

The implementation of Section 239 of the IRDA was temporarily held in abeyance by Section 23(2) of the Temporary Measures Act, which provided relief from the wrongful trading provisions from 20 April 2020 to 19 October 2020, as a means of keeping afloat businesses by enabling them to take larger risks during the uncertain covid-19 pandemic period to ease financial pressures, and to avoid a 'chilling effect' on an already dampened economy. The Prescribed Period for this temporary relief has, however, since expired, and it is expected that there will be further clarity on the scope and strength of Section 239 of the IRDA as it is subsequently tested in the Singapore courts.

IV PRIORITY OF PAYMENTS AND WATERFALLS

A Singapore court is likely to give effect to a contractual provision in an agreement (whether or not governed by Singapore law) distributing payments to parties in a certain order specified in the contract so long as such clauses are valid, binding and enforceable under the governing law of the agreement, but subject to any statutory priorities that may arise in the event of the insolvency of the debtor under the provisions of the Companies Act (Chapter 50, 2006 Revised Edition).

Lenders are also free to contractually determine the distribution of payments as between themselves. This may take the form of a subordination agreement in which lenders determine the order in which they may collect repayment from the debtor, or an intercreditor *pari passu* agreement such that all lenders share equally in repayment in the respective proportions of the debts due to them. Lenders in syndicated loan transactions will often enter into agreement with the facility agent to set out the distribution of payments to each lender in default and non-default scenarios.

Certain common law rights are also available to bankers, such as the banker's lien and banker's right of set-off.

A banker's common law right of lien over securities deposited by a customer with the banker in the ordinary course of business arises whenever the customer is indebted to the banker. The banker's right of lien will not extend to the credit balance in the customer's account as this credit balance is essentially a debt owed by the bank to its customer. It is illogical for the bank to take a lien over its own indebtedness. This is instead addressed through the banker's right of set-off. In select circumstances, a banker's right of lien can arise even though the customer's account is in credit. For example, if a banker allows its customer to draw against uncleared cheques deposited by the customer with the bank, the banker will have a right over the cheques as the banker has already given credit to the customer for the value of the cheques.

The banker's equitable right of set-off arises where there are mutual credits and debits between a bank and its customer. If a customer has more than one account with the bank, the bank will be entitled to treat all the accounts as one single account unless otherwise expressly or impliedly agreed between the parties. The bank may therefore combine two or more accounts kept by the customer with it in exercising its right of set-off.

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V ISOLATION OF ASSETS AND BANKRUPTCY REMOTENESS

From the borrower's perspective, relying on the concept of separate legal identity and segregating its asset-holding companies is one of the main ways a group can achieve bankruptcy remoteness. This is facilitated in Singapore by the convenience and expediency of incorporating a company. Lenders, through a mix of cross-collateralisation, cross-default clauses and non-restructuring or reorganisation undertakings, and obtaining parent–child guarantees across group companies, seek to extend the lenders' remedies and recourse to group structures.

The bankruptcy regime is particularly relevant in factoring or discounting transactions. Financers engaging in invoice discounting or factoring arrangements are exposed to the risk of having their purchase of accounts receivables from the borrower recharacterised as a secured loan transaction. If so recharacterised, the sale of receivables will be treated as an assignment by way of security, which would have been registrable as a charge within the timelines set out in Section 131 of the Companies Act (Chapter 50, 2006 Revised Edition). In the event of the seller's insolvency, the charge over the account receivables would be void for want of registration.

Distinguishing a true sale from a secured loan in account receivables financing

In deciding whether a transaction may be properly characterised as a true sale or a secured loan transaction, the courts will look at the substance as opposed to the form of the transaction, taking into account the following factors in distinguishing a true sale from a secured loan.

Equity of redemption

The essence of a loan lies in the obligation to repay, which may be express or implied.[5] The corollary is that the borrower has an equity of redemption, that is, the right to the ownership of the charged assets free of the charge on the discharge of his obligation to repay the lender. In contrast, a seller of book debts should not have an equity of redemption.[6]

Rights on realisation of book debts

In the case of a loan on security, the lender, on realising the charged assets, has to account to the borrower for any excess over the amount of the borrower's obligations to the lender. The corollary is that if the charged assets do not realise the amount of the obligations, the borrower is still liable for the shortfall. In contrast, in the case of a true sale of book debts, the buyer becomes the owner of the book debts, and any profit or loss on realisation attaches to him. A sale and purchase of book debts without recourse is therefore clearly distinguishable from a loan on security.

A sale and purchase of book debts with recourse would generally not be characterised as a loan on security, provided that the protection that the buyer is seeking is the obligation of the seller to repurchase the book debts or to guarantee payment of the book debts, as opposed to the obligation to repay the money paid to the seller by the buyer to the extent that it is not recovered by the collection of debts.[7]

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5 *Nissho Iwai International (Singapore) Pte Ltd v. Kohinoor Impex Pte Ltd and another* [1995] SGHC 127 at [10]–[13].

6 *In re George Inglefield, Limited* [1933] Ch. 1.

7 *Salinger on Factoring*, 4th Ed at 7–22.

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Discount or interest

In the case of a true sale of book debts, the profit to the buyer should be a discount on the book debts, being the difference between the amount paid for the book debts and the realisation of the same, as opposed to interest payable on the amount paid by the buyer to the seller.

If the transaction is rightfully characterised as a true sale, there will be no need for any registration or lodgement to be made with any government or regulatory authority in Singapore.

VI OUTLOOK

As countries continue to develop and deploy vaccine and management strategies to contain the economic impact of the covid-19 pandemic, the Monetary Authority of Singapore has been optimistic in noting signs that point towards a strengthening of global demand. To ameliorate the damage wrought by the pandemic on domestic trade in 2020, the Singapore government rolled out a total of four Budgets totalling S$93 billion to stabilise economic activity when many businesses came to a standstill. As economic activity picks up in 2021, the government has declined to draw down any further on its reserves, though support measures are still being provided, albeit on a smaller scale, as small and medium-size enterprises have been assured of additional support measures in the region of S$1.2 billion. In tandem with the spending measures, the Singapore government continues to utilise the Covid-19 (Temporary Measures) Act 2020 as a means of providing temporary relief from contractual obligations and temporary relief for financially distressed firms and individuals.

Singapore will also likely see an increase in restructuring and insolvency proceedings, with all such proceedings coming under the new Insolvency, Restructuring and Dissolution Act 2018. The IRDA will be stress tested as companies and individuals alike continue to recover from the effects of the covid-19 pandemic.

i Covid-19 (Temporary Measures) Act 2020

The Singapore government enacted a slew of measures to address the unusual pressures on businesses and contractual parties resulting from the covid-19 pandemic. Among them was the Covid-19 (Temporary Measures) Act 2020, which granted temporary relief between 20 April 2020 to 19 October 2020 (the Prescribed Period) to contracting parties from certain contractual obligations by imposing a moratorium on any court or arbitration proceedings or enforcement of security in respect of that contracting party's failure to fulfil its contractual obligations.

The Prescribed Period for this relief has since been extended for certain modes of relief and terminated for others. Relief was extended for select 'scheduled contracts' such as construction or supply contracts, and performance bonds granted thereto, until 30 September 2021, if the party claiming relief could demonstrate that their inability to perform their end of the contractual bargain was the result of an attempt to comply with covid-19-related laws, or had been occasioned by the covid-19 pandemic itself. The higher debt thresholds implemented by the Act for the commencement of bankruptcy and winding-up proceedings during the 'hot' period of the pandemic, in contrast, was no longer available under the Temporary Measures Act.

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ii Insolvency, Restructuring and Dissolution Act (IRDA)

The IRDA introduces some exciting new developments to the restructuring and insolvency landscape in Singapore. Some key developments include a new summary dissolution regime, which could see itself being heavily used as Singapore grapples with the fallout of the covid-19 pandemic. The IRDA also introduces a new restriction on *ipso facto* clauses, and a new regime for the regulation of insolvency practitioners.

The summary dissolution regime is set out in Sections 209 and 210 that allow for an Official Receiver or any other liquidator to apply for the early dissolution of a company if there is reasonable cause to believe that the realizable assets of the company are insufficient to cover the expenses of the winding-up, and the affairs of the company do not require further investigation.

The Official Receiver or liquidator may give 30 days' notice that the company will be struck off by the Registrar of Companies and the company dissolved. Such notice is to be given to the following:

- *a* all creditors who have filed proofs of debt;
- *b* creditors who have made themselves known to the liquidator but who have not yet filed proofs of debt;
- *c* every person mentioned in the statement of affairs as a creditor who has not filed a proof of debt;
- *d* any receiver or manager of the company; and
- *e* all the contributories of the company.

Notwithstanding the notice issued by the Official Receiver or liquidator, the company may not be dissolved at the expiry of the notice if:

- *a* an application is made and an order granted in respect of the appointment of a replacement liquidator for the purposes of continuing the liquidation; or
- *b* an order is made that the dissolution of the company be deferred or the winding-up of the company proceed as though no notice had been given by the Official Receiver or liquidator on the grounds that:
  - the realisable assets of the company are sufficient to cover the expenses of the winding-up;
  - the affairs of the company require further investigation; or
  - the early dissolution of the company is inappropriate for any other reason.

The IRDA also introduces restrictions on *ipso facto* clauses, the use of which was previously unrestricted in Singapore. Section 440 of IRDA restricts the ability of contractual counterparties to terminate, amend or claim accelerated payments under any agreement, or to terminate or modify any existing right or obligation under that agreement by reason only that proceedings have been commenced against the company or that the company is insolvent. The company cannot contract out of this provision, and it aims to support a company's rehabilitative efforts by recognising that the acceleration of payment timelines and the resultant withdrawal of resources from the company, for the sole reason that proceedings have commenced, can be needlessly financially debilitating.

Counterparties may, in turn, apply to court for an order that the restriction in Section 440 of IRDA does not apply or only applies to a limited extent declared by the court on the basis that the operation of Section 440 would likely cause it significant financial hardship – the burden of proving the existence and sufficiency of 'significant financial hardship'

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would then rest on the counterparty in question. Practitioners can look forward to seeing the development of case law in respect of how the courts will assess 'significant financial hardship' as this term is not defined under the IRDA, and has not been contested before the courts at present.

The restriction on *ipso facto* clauses will not apply to all contracts. Commercial ship charters, contracts likely to affect the national or economic interest of Singapore as well as financial contracts prescribed under the Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020 are excluded from the restriction.

The restriction on *ipso facto* clauses will also not apply to all forms of insolvency proceedings – winding-up and receivership proceedings are not protected by Section 440 because its application is presently restricted to restructuring proceedings, such as judicial management and schemes of arrangement. Parties who perceive commercial benefit in the inclusion of *ipso facto* clauses can continue to do so for proceedings that are not specified in Section 440(6) of the IRDA.

Another new feature in Singapore's insolvency regime is the regulation of insolvency practitioners. The IRDA establishes regulatory regime for insolvency practitioners who act as officeholders in insolvency and restructuring proceedings. The IRDA sets out requirements, conditions and minimum qualifications for the grant and renewal of licences for insolvency practitioners as well as a disciplinary framework for officeholders who fail to meet the required standards of professional conduct. Individuals who wish to take up insolvency officeholder appointments in winding-up, judicial management, receivership, bankruptcy and voluntary arrangement cases commenced on or after 30 July 2020 will be required to hold a valid licence. A transitional period of six months from 30 July 2020 to 30 January 2021 has been provided for, to allow insolvency practitioners to perform debt restructuring or insolvency work while applying for a licence.

Section 64(1) of the IRDA gives the court the power to protect companies in an insolvency context by restraining proceedings against a company that has proposed, or is intending to propose, a compromise or an arrangement with its creditors. Making an application for the imposition of the moratorium gives rise to an automatic moratorium period that can last up to a maximum of 30 days. During this period, no step may be taken to enforce any security over any property of the company except with the leave of the court and subject to such terms as the court imposes; this would apply to restrain both secured and unsecured creditors alike. The scope of the moratorium can extend extra-territorially to acts that take place outside Singapore, and to subsidiaries or holding companies if they should make the necessary application under Section 65 of the IRDA.

While companies that avail themselves of the IRDA's statutory moratorium would receive the considerable protection outlined above and more, it is noteworthy that such companies would still need to demonstrate that their proposed compromise or arrangement is 'feasible'. This question was considered by the Singapore High Court in a recent unreported decision, where the court determined that the proposed compromise or arrangement was unfeasible, and dismissed the application for a moratorium. This drove home the point that any applicant seeking the moratorium's shelter would first have to show evidence of sufficient creditor support, and provide sufficient particulars to suggest that a feasible and meritorious compromise or arrangement was (or would shortly be) on the table.

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Appendix 1

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Ting Chi Yen regularly acts in a wide range of cross-border matters involving working capital, trade finance, structured finance, acquisitions, project, syndicated and asset financing. He also advises banks and financial institutions with compliance, AML/KYC and other regulatory requirements.

Chi Yen's clients comprise multinational lenders, including local and foreign banks, financial institutions, and leasing companies in jurisdictions such as Singapore, Hong Kong, Malaysia, India, South Korea and Japan. He also has particular expertise in working with borrowers from commodities houses, traders and shipping lines. He is able to advise on complex insolvency and corporate restructuring scenarios and the realisation of securities and enforcement of non-performing accounts, and he provides lenders with practical and economical solutions.

In addition, Chi Yen has a breadth of experience in all aspects of non-contentious shipping work and frequently acts for shipping lines and banks in the financing, sale and purchase of vessels, registration and mortgages in local and international ship registries, including leasing arrangements, charter parties, carriage and freight. His practice includes real estate and conveyancing and covers the acquisition, disposition and securitisation of residential, industrial and retail or commercial properties.

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A senior associate in Oon & Bazul LLP's banking and finance practice, Joseph Tay has handled transactions spanning a diverse range of industries. He has experience advising on various cross-border financing transactions, including real estate finance, asset finance as well as trade and commodities finance. In particular, Joseph has acted for various clients in ship financing transactions, and is experienced with leading completion exercises across multiple jurisdictions.

Aside from transactional banking and finance work, Joseph regularly advises both local and international clients on regulatory and compliance matters in Singapore, and his advisory work extends to structuring payment features for payment platforms seeking to provide instalment payment plans, as well as the true sale of trade receivables. His clients include a number of international financial institutions with a presence in Singapore, including several East Asian banks.

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Beyond banking and finance, Joseph has experience advising clients in an array of industry sectors, including retail, employment law, and the sale and purchase of ships.

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ISBN 978-1-83862-826-0

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