IN THE SINGAPORE INTERNATIONAL COMMERCIAL COURT
OF THE REPUBLIC OF SINGAPORE

[2024] SGHC(I) 17

Originating Application No 6 of 2024 and Summons No 19 of 2024

In the matter of Section 71 of the Insolvency, Restructuring and Dissolution Act 2018

And

In the matter of No Va Land Investment Group Corporation

No Va Land Investment Group Corporation

… *Applicant*

GROUNDS OF DECISION

[Companies — Schemes of arrangement — Jurisdiction over foreign companies — Sections 63 and 246 of the Insolvency, Restructuring and Dissolution Act 2018]
[Companies — Schemes of arrangement — Disclosure — Section 71 Insolvency, Restructuring and Dissolution Act 2018]

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[2024] SGHC(I) 17

Singapore International Commercial Court — Originating Application No 6 of 2024 and Summons No 19 of 2024
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James Michael Peck IJ:

Introduction

1 These Grounds of Decision relate to a sanction order entered on 26 April 2024 in connection with a pre-pack scheme of arrangement for a significant business enterprise incorporated and based in Vietnam. The application to sanction the scheme for No Va Land Investment Group Corporation (the "Applicant") was brought pursuant to SIC/OA 6/2024 (the "Application"). Although the Application proceeded on an uncontested basis, this was the first ever cross-border pre-pack scheme filed in the Singapore International Commercial Court (the "Court" or the "SICC"), and the Court's description of its experience with the Application constitutes useful precedent for the management and prosecution of similar restructurings that may arise in the future. These grounds include an analysis of disclosure obligations in relation to pre-packs that the Court hopes will be considered useful in future pre-pack restructurings.

Facts

Background facts

2 The Applicant is a Vietnamese real estate investment holding company with 93 corporate affiliates (collectively, the "Group") incorporated in and doing business within Vietnam.[1] The Group is one of Vietnam's largest mid-market residential real estate developers.

3 Beginning in 2022, Vietnam's real estate sector entered a cycle of distress impacting market participants including the Applicant, and this challenging business environment negatively impacted the Applicant's performance and profitability,[2] leading, as conditions worsened, to liquidity constraints and an eventual payment default on 16 July 2023 with respect to scheduled debt service obligations under the Applicant's outstanding US$300m convertible bonds (the "Bonds").[3] The Bonds originally were issued on 16 July 2021 with a five-year maturity date and a 5.25% interest rate under terms of an indenture governed by New York law.[4] The Bonds were listed on the main board of the Singapore Exchange Securities Trading Limited (the "SGX-ST").[5]

4 The real estate crisis in Vietnam was an external economic circumstance not directly related to the Applicant itself, and it became evident that the Bonds that were then in default needed to be restructured for the mutual benefit of all parties. The payment default served as the catalyst for restructuring discussions between the Applicant and certain initial bondholder representatives (the "Initial

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1 1st affidavit of Ng Teck Yow dated 11 April 2024 ("NTY") at paras 12 and 14.

2 NTY at paras 35–37.

3 NTY at para 40.

4 NTY at para 28.

5 NTY at para 34.

Supporting Holders").[6] The discussions among the parties resulted in an agreement in principle to defer and capitalise unpaid interest, extend the maturity date applicable to repayment of the Bonds, and modify certain key economic attributes of the Bonds and rights of the bondholders. It appears that the parties recognised early in the process that a consensual solution to the structural problem of a still disrupted and unpredictable real estate market in Vietnam was in the best interest of everyone involved.

5 In pursuit of an agreement on terms and the means of implementation of a restructuring, the Applicant negotiated with the Initial Supporting Holders with the aim of laying the groundwork for a consensual restructuring of the Bonds to be effectuated either through a fully consensual out-of-court agreement or a scheme of arrangement to be put forward and become effective under Singapore law.[7] These negotiations produced an agreement on a so-called "transaction support letter" dated 14 December 2023 that includes many of the same restructuring terms now embodied in the pre-packaged scheme of arrangement (the "Scheme") as proposed by the Applicant and as supported by all bondholders who voted on the Scheme (together with the Initial Supporting Holders, the "Supporting Holders").[8]

The sanction hearing

6 The Application was filed with the Court on 11 April 2024, and was presented to the Court for approval at a virtual hearing on the merits of the requested relief that took place on 26 April 2024 (the "Sanction Hearing"). The Sanction Hearing included persuasive showings of the Applicant's rigorous and

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6 NTY at para 41.

7 NTY at para 50.

8 NTY at para 51.

substantial efforts to comply with procedures of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "IRDA") that allow qualifying schemes to be approved without having to first convene a meeting of creditors to vote on the proposed scheme, so long as the stated requirements of s 71 concerning the fairness of the process, the adequacy of information furnished to creditors and compliance with other procedural safeguards, are met. Professionals acting on behalf of the Applicant, as described in greater detail below, satisfied the statutory standards prescribed by s 71 of the IRDA and appeared to meet or exceed these standards. In short, disclosure here, as shown in supporting affidavits and related argument of counsel, was extremely clear, detailed, and well-coordinated.

7 At the uncontested Sanction Hearing, the Court heard and considered the arguments presented and granted all prayers for the relief sought by the Applicant. At the conclusion of the Sanction Hearing, the Court expressed appreciation to the parties for a well-executed and administered restructuring process that fully complied with the provisions of s 71 of the IRDA. The total elapsed time from case commencement to sanction of the Scheme was just 15 days.

8 The Sanction Hearing was orderly and comprehensively covered all relevant legal issues presented by the Application. The success of this expedited judicial process was due in large measure to the planning and diligence of the professionals and their careful attention to detail. The Applicant and the Supporting Holders anticipated the needs of the restructuring, were well prepared and succeeded in building a strong consensus within the bondholder constituency long before coming to Court.

9 The eventual acceptance of the Scheme by all voting stakeholders created what appeared to be deal momentum of its own. In recognition of the presence of such overwhelming support for the Scheme and with awareness of the limited time available to obtain an order approving the Scheme, the Court concluded that it was appropriate to move the process along as quickly as reasonably possible.

10 The date of the Sanction Hearing was initially set for 30 April 2024, but, at the Applicant's request, was moved to the earlier date of 26 April 2024, to add a buffer of a few additional days before the outside date for implementing the Scheme mandated by the Scheme documentation. Thus, the judicial phase of the Scheme approval process was extremely truncated, and essentially all the hard work to restructure the Bonds was accomplished out-of-court by the parties themselves, either in anticipation of or following the Sanction Hearing.

11 Every participating bondholder accepted the Scheme (25 bondholders voted in favour constituting 95.11% of the outstanding Bonds), and not a single bondholder objected.[9] That near perfect percentage indicated that a most effective job had been done in managing the flow of information and soliciting support for the proposed restructuring in comparison with the undesirable alternative of a failed process.

12 The overwhelming endorsement of the Scheme by so many affected stakeholders was also indicative of diligent and effective communication and execution. Descriptive materials and copies of implementing documentation were transmitted to creditors utilising communication channels approved by the Court. Bondholders were given relevant information in sufficient detail to

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9 NTY at paras 94(c)–(d).

enable them to understand and properly evaluate the benefits of the Scheme in comparison with foreseeable detriments to be suffered in a potential liquidation. The result of this robust notice and disclosure was a hearing in which the Court could see a relationship between the procedures used to inform the bondholders and the resulting acceptances. The functional suitability of the disclosure measures, in effect, had been verified by means of the very strong stakeholder support for the Scheme.

13 This case provides an opportunity for the Court to review the statutory underpinnings of the Court's jurisdiction, and to consider what can be gleaned from the procedures that were followed in this first-of-its-kind pre-pack for a regional enterprise. These grounds of decision address the legal issues considered by the Court in relation to the Scheme, review certain authorities applicable to pre-pack schemes in Singapore, and consider whether greater efficiencies and reduced burdens on parties and their professional advisors may be feasible as the practice in this area continues to develop, particularly in connection with the disclosure of essential financial information needed to make an informed decision on any scheme of arrangement.

14 In the sections that follow, the Court discusses (a) the application of Part 5 of the IRDA to foreign unregistered companies such as the Applicant, (b) the predicates for the Court's authority to exercise jurisdiction over such companies and (c) the satisfaction of the statutory requirements of s 71 of the IRDA. The Court takes this opportunity to provide guidance that may be helpful in relation to pre-packaged schemes for unregistered foreign companies that may be proposed in the future under the provisions of s 71 of the IRDA.

Issues to be determined

15 The issues to be determined in this decision were whether the Applicant, a foreign unregistered company, demonstrated that it qualified for relief under Part 5 of the IRDA and whether the Applicant was entitled to the grant of such relief in the SICC. A further issue was whether pre-filing disclosure of information performed properly in accordance with normal and customary practices in the restructuring community were in compliance with the disclosure requirements stated in s 71(3) of the IRDA.

The Applicant had substantial connections to Singapore and qualified for relief under Part 5 of the IRDA

16 As mentioned in the preceding section of this decision (see [3] above), the Bonds were listed on the SGX-ST, but there were additional relevant contacts with Singapore. Disputes relating to the indenture governing the Bonds were subject to resolution by means of arbitration seated in Singapore,[10] and the Scheme itself unequivocally contemplated voluntary submission to the jurisdiction of this Court by the Applicant and the Supporting Holders[11] to gain a judicial sanctioning of what the parties themselves already have done on their own to effectuate a restructuring of the Applicant's bond debt.

17 Given these three independent sources of connection, the Court found based on uncontroverted evidence and the authorities submitted that the Applicant, being a foreign unincorporated company, had satisfied the test for showing a substantial connection to Singapore, and that the Applicant was entitled to relief under the provisions of Part 5 of the IRDA. Establishing that such a substantial connection exists is the essential predicate that allows the

10 NTY at paras 33(e) and 101.

11 NTY at p 74.

Applicant or any other comparable foreign company to benefit from the law of Singapore and to gain access to this Court.

18 Once a foreign company shows that it is entitled on account of a substantial connection to pursue a winding up in Singapore, that company has met the standing requirements to seek to sanction a scheme in accordance with the streamlined procedures of s 71 of the IRDA (see [22] below). As this right to appear and be heard depends on the demonstrated circumstances of each situation and the ability of the company to show not just that connections are present, but that they are sufficiently substantial, the analysis necessarily is fact-specific. This implies the need for a case-by-case analysis of connections with varying degrees of perceived significance that may or may not reach the tipping point of satisfying that standard.

19 During the Sanction Hearing, the Court explored this subject and inquired of counsel for the Applicant regarding the grounds for concluding that a substantial connection existed. The three independent sources of connection mentioned above were all stressed (Singapore as the *situs* for bond trading, Singapore as the seat of arbitration for certain disputes under the indenture and consensual recourse to Singapore law and this Court in relation to the Scheme itself). These grounds, taken together, were sufficient.

20 The submission of disputes relating to loan or other transactions (see [22(f)]) constituted a substantial connection in the present case that was augmented by trading of the Bonds in Singapore and the arbitration provision that could lead to invoking the jurisdiction of the Singapore courts. These were helpful contextual factors, but it was also notable that the Applicant and the Supporting Holders deliberately chose to pursue an out-of-court process that contemplated the alternative of commencing proceedings in this Court for a pre-

pack scheme to be governed by Singapore law. Whether such a purposeful election of parties to a scheme of arrangement would be sufficient on its own to qualify as a sufficient substantial connection without the benefit of the additional connections that were present in this case was beyond the scope of these grounds of decision.

21 In analysing the entitlement of the Applicant to the relief that has been granted, the Court considered cases decided under the Companies Act 1967 (2020 Rev Ed) and the Companies Act (Cap 50, 2006 Rev Ed) (the "CA"). The High Court in *Re DSG Asia Holdings Pte Ltd* [2022] 3 SLR 1250 ("*DSG Asia*") made clear that case law regarding s 210 of the CA would apply to s 71 of the IRDA (except in those instances where the latter requires otherwise) because s 71 of the IRDA is derived from s 210 of the CA. Accordingly, authorities interpreting s 210 of the CA remain relevant in determining the requirements for sanction of a pre-pack scheme such as the one before the Court in this case.

22 As a threshold matter and as explained above, the Applicant fit the definition of a company entitled to winding up in Singapore due to its substantial connection with Singapore. This conclusion was based on the definition of "company" in s 63(3) of the IRDA (with certain exclusions not relevant here) which applies to "any corporation liable to be wound up under [the IRDA]". Thus, the capacity of a company to be wound up is a necessary link in deciding whether that company has standing to bring an application under s 71 of the IRDA. In this regard, s 246(1)(*d*) of the IRDA provides that a foreign unregistered company will qualify for winding up in Singapore so long as it can show a substantial connection with Singapore by reason of any one or more or the following factors:

(a) Singapore is the centre of main interests of the company;

(b) the company is carrying on business in Singapore or has a place of business in Singapore;

(c) the company is a foreign company that is registered under Division 2 of Part 11 of the CA;

(d) the company has substantial assets in Singapore;

(e) the company has chosen Singapore law as the law governing a loan or other transaction, or the law governing the resolution of one or more disputes arising out of or in connection with a loan or other transaction; and

(f) the company has submitted to the jurisdiction of the Court for the resolution of one or more disputes relating to a loan or other transaction.

23 In reviewing these factors, the High Court in *Re PT MNC Investama TBK* [2020] SGHC 149 ("*PT MNC*") held that a substantial connection can be gleaned from (a) the presence of business activities, control, and assets in Singapore (such activities would involve some permanence and exclude activities that are transient in nature); and (b) indications of submission and acceptance of Singapore jurisdiction or law (at [12]–[13]). As *PT MNC* focused on the language of the CA that is now contained in the IRDA, it remains persuasive in providing context for weighing whether a foreign unregistered company has connections with Singapore that are substantial enough to qualify that company for winding up proceedings.

24 The Court concurs with the observations made in that case regarding inferences to be fairly drawn from intentional choices made by companies and

related commercial actors to agree to become subject to Singapore law and to submit to its jurisdiction. The Applicant and its Supporting Holders plainly chose to sanction the Scheme in this Court and that, along with the other cited factors (see [16] above), demonstrated to the Court that the Applicant qualified as a foreign company that had standing to seek sanction of the Scheme.

25 As discussed more fully in the section below concerning the jurisdictional predicates for granting relief in this Court, the Court has jurisdiction to hear and determine issues in relation to the Scheme due to the factors described in *PT MNC*. These proceedings arise under the IRDA, are international and commercial in nature as defined in the Singapore International Commercial Court Rules 2021 ("SICC Rules"), and have a substantial connection to Singapore.

The Applicant fully satisfied the statutory requirements of s 71 of the IRDA

The approval requirements under s 71 of the IRDA

26 As explained in *DSG Asia*, the scheme jurisprudence from the CA era applies in cases originated under the IRDA and plainly states the well-understood requirements for obtaining court sanction of schemes proposed under the IRDA. A leading case on the subject is *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] 2 SLR 213 ("*TT International (No 1)*"). The Court of Appeal there held that in approving a scheme of arrangement pursuant to s 210 of the CA, a court must satisfy itself as to three issues. These are: first, that the statutory provisions have been complied with; second, that those who attended the meeting were fairly representative of the class of creditors, and that the statutory majority did not coerce the minority to promote interests adverse

to the class whom the majority purported to represent; and third, that the scheme is one which a man of business or an intelligent and honest man, being a member of the class concerned and acting in respect of his interest, would reasonably approve (*TT International (No 1)* at [70]).

27 The Applicant termed these three points the "Approval Requirements". *DSG Asia* is authority for applying these Approval Requirements to all schemes being put forward for sanction under the IRDA. They are applicable as well in seeking sanction of a pre-pack scheme, although in the pre-pack context, the following specific requirements under s 71 of the IRDA need to be met. These are:

(a) the company must provide each creditor meant to be bound by the compromise or arrangement with a statement containing the information as required under ss 71(3)(*a*) and 71(6) of the IRDA (the "Disclosure Requirement");

(b) the company must publish a notice of the application in the Government *Gazette* and in at least one English local daily newspaper, and send a copy of the notice published in the Government *Gazette* to ACRA (s 71(3)(*b*) IRDA);

(c) the company must send a notice and a copy of the application to each creditor meant to be bound by the compromise or arrangement (s 71(3)(*c*) IRDA); and

(d) the Court must be satisfied that if a meeting of the company's creditors or class of creditors had been summoned, the conditions in ss 210(3AB)(*a*) and 210(3AB)(*b*) of the CA would have been satisfied (*ie*, that a majority in number of, and such majority representing three-

fourths in value of, creditors or class of creditors present and voting either in person or by proxy at the meeting agrees to the compromise or arrangement) (s 71(3)(*d*) IRDA).

28 The High Court in *DSG Asia* stated that the standard to apply in approving a pre-pack scheme is one of "a clear case of agreement to the scheme" (at [31]). Particularly, there must be "a clear case that there has been proper disclosure, as well as fulfilment of the voting requirements, which in turn entails proper classification of creditors" (*DSG Asia* at [31]).

29 The present case complied with this standard. Agreement to the Scheme could not be any clearer and, for all practical purposes, had been unanimous. All Supporting Holders were properly classified together and received exceptionally detailed and constructive financial disclosure. The applicable standard for approving a pre-pack was satisfied in this instance without any doubt.

All jurisdictional predicates for sanction of the Scheme were satisfied

30 The substantial connections to Singapore specified in the preceding section at [16] above also constituted the requisite grounds for finding that this Court had jurisdiction to grant the requested relief. When dealing with a foreign unregistered company, the existence of a substantial connection is a requirement not just for standing to seek relief but also to establish a sufficient nexus for establishing substantive jurisdiction.

31 Section 18D(2)(*c*) of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) (the "SCJA") provides that the SICC has jurisdiction to hear any proceedings relating to corporate insolvency, restructuring or dissolution under

the IRDA that are international and commercial in nature and that satisfy such other conditions that may be prescribed by the Rules of Court.

32 The commercial character of the Scheme was indisputable based on the underlying subject matter – the restructuring of an outstanding financing transaction by agreement of the issuer of corporate obligations and the company's bondholders. This aspect of the test was entirely clear and essentially axiomatic. The subject matter of the case was corporate bonds, a classic and archetypical commercial matter.

33 The international prong was easily satisfied as well since the Applicant fit the definition of a foreign company, namely a company incorporated outside of Singapore (see s 4 of the CA). In cases involving a foreign company not arising under the UNCITRAL Model Law on Cross-Border Insolvency (under Part 11 of, and the Third Schedule to, the IRDA), two requirements must be fulfilled to satisfy the international prong for establishing jurisdiction: a substantial connection with Singapore as described in the above section of this decision, plus the fulfillment of certain requirements of the SICC Rules as of the commencement of the insolvency proceedings.

34 The Applicant satisfied every single one of the factors identified in O 23A r 2(2)(*b*)(ii) of the SICC Rules, namely, a place of business in a foreign country, property located in a foreign country, a liability that arose in a foreign country, contractual obligations to be performed in or owed to a person in a foreign country, obligations governed by laws of one or more foreign countries, at least one creditor having a place of business in a foreign country and control and direction of the subject administered from a foreign country. Vietnam was the foreign country in question except for the governing law of the bonds which

was New York State law in the US. Thus, there was an over-abundance of factors confirming that these proceedings were international in nature.

35 Kannan Ramesh JC (as he then was) in *Re Pacific Andes Resources Development Ltd and other matters* [2018] 5 SLR 125 considered and highlighted the distinction between subject matter jurisdiction and personal jurisdiction and stated as follows (at [19]):

> … In exercising subject matter jurisdiction over the scheme, creditors who are within the jurisdiction or participating in the scheme and whose debts are legitimately subject to the scheme would be subject to the *in personam* jurisdiction of the court. …

Here, for reasons shown, jurisdiction in relation to the subject matter of the Scheme is proper by virtue of substantial connections, but the Applicant and the Supporting Holders have also submitted to the Court's jurisdiction in connection with the Scheme and are subject to the *in personam* jurisdiction of this Court. It is notable that the Applicant and the Supporting Holders appeared in this Court intentionally for the purpose of obtaining an order to sanction the Scheme.

36 Therefore, the Court had the requisite jurisdiction to approve the Application. Proceedings with respect to the Scheme under the IRDA were both international and commercial in character, and the foreign company that was the subject of this case established that substantial connections to Singapore were present. The parties impacted by the Scheme also chose to appear in this Court. The jurisdictional predicates for obtaining relief from this Court were all satisfied.

The Disclosure Requirement of s 71(3) of the IRDA

37 The option to pursue the alternative of a pre-pack scheme was first proposed as an innovative restructuring tool by the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (the "Restructuring Committee"). As such, the pre-pack pathway to scheme formulation and approval is a relatively new development with limited case authority to guide interpretation of its provisions. As described by the Restructuring Committee in the *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 Apr 2016) at para 3.32, the pre-packaged restructuring is a "restructuring plan that is pre-negotiated between the debtor and its major creditors and agreed upon before formal court restructuring proceedings commence".

38 This description is reminiscent of analogous provisions of the United States Bankruptcy Code 11 USC (US) (1978) that allow for pre-filing solicitation of acceptances to a pre-packaged Chapter 11 plan when accompanied by disclosure of adequate information (see s 1125(g)). After the commencement of the case, the US Bankruptcy Court will determine whether that pre-petition disclosure of information was proper and complied with applicable law. This takes place during the expedited post-petition phase often leading to a prompt joint disclosure statement and confirmation hearing (provided, of course, that there are no snags to delay or disrupt the intended prompt schedule). The objectives in both the Singapore and US regimes are essentially the same – to expedite court proceedings by doing most of the "heavy lifting" before a formal judicial process, and in both regimes, the court has an obligation to confirm that disclosure performed in anticipation of subsequent judicial involvement was sufficient to enable a creditor to make an informed judgment about the proposed reorganisation.

39 The Scheme before the Court was prototypical of what could be accomplished rapidly in a pre-pack and pointed to the utility of following expedited restructuring procedures in a cross-border context. In view of the pre-filing activities that were crucial to the success of the pre-pack, the Court is providing additional comments in this section regarding compliance with relevant provisions of s 71 of the IRDA, particularly in relation to the important subject of disclosure.

40 The statute authorises the Court to make an order approving a compromise or arrangement on application made by the company without a meeting of creditors only if the company follows the requirements specified in s 71(3) of the IRDA. The Disclosure Requirement categorises the information to be provided as follows: (a) information concerning the company's property, assets, business activities, financial condition and prospects; (b) information on the manner in which the terms of the compromise or arrangement will, if it takes effect, affect the rights of the creditor; and (c) such other information as is necessary to enable the creditor to make an informed decision whether to agree to the compromise or arrangement.

41 The Disclosure Requirement does not say how much information should be furnished. The list includes broad descriptions of what needs to be disclosed but leaves room for interpretation and does not offer specific guidelines for the Court or the parties regarding the nature and content of the required disclosure. The centering premise, however, is the necessity to furnish information that will enable an informed decision regarding a proposed compromise of a creditor's rights with respect to outstanding obligations of a company.

42 As noted above at [28], s 71 only requires that the applicant show "a clear case that there has been proper disclosure, as well as fulfillment of the

voting requirements" (*DSG Asia* at [31]). Each creditor must be provided with all information "necessary to enable the creditor to make an informed decision whether to agree to the [proposed scheme]", and the creditors would need "information that enables them to assess whether the allocation of loss and the division of benefits is fair and in their commercial interests" (*DSG Asia* at [38]).

43 Because each negotiation to restructure indebtedness necessarily involves its own distinct set of underlying facts, personalities, and business environments, as well as varying levels of complexity and commercial risk, it is impractical to treat the Disclosure Requirement as a fixed checklist. In effect, what should be included and what constitutes proper disclosure will depend on the particulars of each case.

44 Given the timeline for a pre-pack, the determination that disclosure is sufficient and proper must occur after the disclosure has taken place, support for the compromise has been solicited and an application has been filed in the pursuit of a prompt scheme approval process. Determining the adequacy of pre-filing date actions to package and promote the scheme necessarily entails an after-the-fact look-back.

45 Due to this structure, the company and its stakeholders are left to decide on their own what information to disclose, how best to disclose it and whether enough disclosure is being provided. The professionals involved need to fulfill the document demands and commercial expectations of creditors eager to see customary diligence materials while also endeavoring to comply with the Disclosure Requirement. One relevant commercial question is how much professional time and related transactional expense should be invested before achieving a level of confidence that these pre-filing efforts are sufficient to

satisfy a statutory standard that can only be assessed retrospectively by the Court after the disclosure of information has occurred.

46 A pragmatic approach would be to look to commercial practices within the relevant restructuring market for an *ex ante* benchmark of the adequacy of disclosure. Because substantially all the restructuring activity in a pre-pack takes place before the filing date of the application, the Disclosure Requirement necessarily must be managed prospectively by professionals dedicated to building a consensus for a proposed compromise. That compromise of rights and remedies can only be understood and viewed as acceptable if adequate information is furnished to affected creditors. Information is disclosed during this pre-filing phase both because it is a practical necessity in pursuing commercial objectives and a statutory requirement related to the potential future filing of an application under the IRDA.

47 Such customary market behavior can function as a reference point for measuring the adequacy of disclosure in transactions contemplated by s 71(3) of the IRDA. That was what happened in relation to the Scheme. Information was disclosed to holders of the Bonds and their representatives that was sufficiently descriptive and commercially meaningful to have generated an impressive level of support for the Scheme.

48 Out-of-court disclosure methods used by market participants in comparable transactions serve as a kind of measuring stick for assessing the suitability and effectiveness of pre-filing disclosure. In substance, disclosure practices currently in use in the market aimed at achieving substantially consensual out-of-court restructurings or similar financial transactions, while not determinative, may be useful context in evaluating the disclosures prescribed in s 71(3) of IRDA.

49 Nonetheless, while functioning as relevant market indicators of commercially reasonable disclosure especially in situations with high rates of acceptance, the Court cannot solely look to the market and has a responsibility to independently find that disclosure practices followed in each case are proper and in compliance with the Disclosure Requirement. For example, it would be useful to know how the disclosure provided to creditors in a particular case compares with precedent transactions and whether there is any material variance from customary practices. A negative variance accompanied by opposition to the sufficiency of disclosure would need to be examined.

50 The Court is aware that support for a scheme develops over time within a process of iterative information sharing and negotiation eventually leading to term sheets and definitive documentation. This process takes place well in advance of any judicial involvement and over time extends outward beyond an initial group of negotiators to embrace all affected stakeholders. These members of a broader constituency of creditors are the ones who need an explanation of the transaction and access to the material information necessary to evaluate whether the compromise being proposed is in their best interest.

51 Sophisticated parties, acting prudently, cannot be expected to compromise their claims without being given sufficiently detailed and reliable financial information on the company and its prospects. Thus, it seems that the commercial motivations and bargaining behavior naturally present in private negotiations can be expected to provide reasonable assurances that creditors will be given the materials that are needed to make well-informed business decisions.

52 In effect, market incentives and expectations tend to encourage the furnishing of adequate information to creditors. That is how deals get done in

out-of-court negotiations. The slight difference in a pre-pack setting is that parties are exposed to some notional uncertainty as to whether enough has been done to satisfy the Disclosure Requirement in which the Court is placed in the position of retrospective arbiter of sufficient disclosure as contemplated by s 71(3) of the IRDA. This may have the effect of encouraging disclosure so robust that it could go over the top, but too much disclosure is not a risk factor, just an added expense. Ultimately, the question of how best to calibrate how much to disclose (not too little and not too much) during the pre-filing phase must be left to the discretion of the professional advisors who are most familiar with the transaction in question.

53 A critique of insufficient disclosure (during either the pre-filing period or after filing an application to approve a scheme) most likely would come from a disgruntled minority creditor aiming to hold up the process and achieve a better recovery. Or conceivably, a finding of a failure to satisfy the Disclosure Requirement could come from the Court on its own initiative in a situation of plainly improper or incomplete disclosure. That is what happened in the leading case of *Pathfinder* discussed in the immediately following paragraphs.

54 While not directly addressing the disclosure contemplated under the IRDA, the Court of Appeal in *Pathfinder Strategic Credit LP and another v Empire Capital Resources Pte Ltd and another appeal* [2019] 2 SLR 77 ("*Pathfinder*") considered questions concerning the sufficiency of information that must be provided to creditors to satisfy disclosure requirements for schemes of arrangement in Singapore, particularly where an applicant is at an early stage of the scheme process and seeks leave to convene a meeting of creditors. *Pathfinder* stresses the importance of informed creditor decision-making, and the points made there extend broadly to all schemes of arrangement in Singapore, including pre-packs such as the one before the Court in the present

case. The principles of disclosure set forth in *Pathfinder*, while focused on the convening of creditors' meetings, establish a bright line for required disclosure in pre-pack schemes.

55 *Pathfinder* makes clear that the scheme company bears a duty of disclosure and must "unreservedly disclose all material information" to assist the court (at [29(c)], citing *TT International (No 1)* at [62]). That required level of disclosure did not happen in *Pathfinder.* The Court of Appeal had initial concerns regarding the extent and adequacy of the financial disclosure provided by the scheme company, but those concerns were not resolved to the Court's satisfaction as the case progressed (mostly due to sparse disclosure materials that were not updated or audited and were otherwise incomplete and insufficient). The disclosure was found to be manifestly inadequate. That was a far cry from the situation before the Court in this case where disclosure given to the Applicant's creditors in relation to the Scheme was quite plainly comprehensive, extensive and detailed.

56 Adequate disclosure, as defined by relevant case law, is functional in nature and tied to furnishing creditors the information needed to evaluate the proposed transaction and properly exercise their right to vote. The scheme company has an obligation to show that it disclosed sufficient information to ensure that the creditors can "exercise their voting rights meaningfully" (*Pathfinder* at [47]). The test of sufficiency, thus, is creditor-centric and based on a concept of well-informed suffrage.

57 In evaluating fulfillment of disclosure requirements within a traditional scheme setting, the Court of Appeal in *Pathfinder* at [52] recognised that:

> … the overarching focus in this context is on the question of fairness in the conduct of the creditors' meeting, and the sufficiency of the financial disclosure is pivotal to that end

> because it underpins the integrity of the scheme regime and provides a real safeguard to this exercise in creditor democracy.
> …

58 Interestingly, *Pathfinder* involved disclosure that, despite active encouragement from the Court, still failed to meet this standard. In contrast, the experience with the Applicant enabled the Court to conclude with high confidence that the Disclosure Requirement was unquestionably satisfied. Overwhelming creditor support, while not decisive, was a factor to be taken into consideration in reaching this conclusion.

59 A landslide of affirmative creditor votes resulted from purposeful activity and must mean something. It implied that disclosure undertaken before filing the Application was undertaken to reach two compatible goals: attracting as much creditor support as possible and, at the same time, fulfilling the Disclosure Requirement in the contemplated pre-pack to be pursued after the votes were all in and counted. The motivation to achieve a high percentage of support out of court, thus, appears to be consistent with the motivation to disclose sufficient information to satisfy the Disclosure Requirement in court. These are overlapping goals.

60 One thing is for sure – the solicitation of support within the constituency of affected stakeholders in the present case demonstrated a very high level of creditor "buy in". That, in turn, made it easier for the Court to find that disclosure in this instance had been proper. The creditors had expressed their will in a most convincing manner and, unless they were misled (and there was no suggestion of anything like that), must have been fully satisfied that they were sufficiently well-informed.

61 As an aside, the Court does have some concern about what seems to be the vast amount of work and related costs associated with pre-filing disclosure

and solicitation of acceptances. More paper does not necessarily mean better disclosure. While the volume of data and the thickness of the stack of written materials regarding a proposed scheme may be one way to measure disclosure, what parties mostly want and really deserve is a clear, concise, and understandable description of the restructuring transaction, alternatives to that transaction and potential risks and rewards along with accessible, clearly formatted supporting financial data and an index to other related materials allowing for deeper diligence if thought necessary. Technology (websites and data rooms) can be another efficient means to fulfill the disclosure obligation.

62 The Court expects nothing less than disclosure in accordance with the statutory requirements for pre-packs. Creditor democracy in a pre-pack setting depends on such proper disclosure and ensuring that creditors are well-informed when voting on schemes of arrangement during the pre-filing phase of a pre-pack. Ordinarily, information provided during this phase should be enough to satisfy the Disclosure Requirement, unless some material misrepresentation, omission or departure from customary market practice can be shown that impacts the fairness and reliability of disclosures made to creditors. The Court will need to review the evidence submitted in relation to this standard, take into consideration the level of creditor support for or opposition to the scheme of arrangement, and then decide based on the merits of each case if the applicant has fulfilled the Disclosure Requirement.

63 While no creditor meeting took place in this pre-pack, the financial disclosure that did occur here was accomplished with evident care and attention to detail, and unquestionably creditors had the benefit of disclosure that met the standards as set forth in *Pathfinder*. Since the pre-pack approach dispenses with the need for a meeting of creditors, the distinctions between the disclosure

applicable to the leave stage and the sanction stage blur together and have become a single standard now governed by s 71(3) of the IRDA.

64 The *Pathfinder* guidance regarding disclosure (*ie*, disclosure of material information sufficient to enable well-informed voting) continues to apply with equal force in a pre-pack scheme of arrangement and should be read in conjunction with the Disclosure Requirement of s 71(3). Accordingly, the ability to show that creditors were well-informed is essential in satisfying this requirement of the IRDA.

Leave to plead and appear in SICC insolvency proceedings

65 As a postscript, the Court now addresses a technical issue that arose at the beginning of the Sanction Hearing dealing with the question of whether a solicitor named Mr Koh Wei Lun ("Mr Koh"), who is registered under s 36E of the Legal Profession Act 1966 (2020 Rev Ed) ("LPA"), ought to be permitted to plead and act on behalf of his clients. His clients were the Initial Supporting Holders, a key constituency with an obvious interest in the matters that were pending before the Court.

66 Mr Koh presented an application seeking permission to make submissions during the Sanction Hearing so that he would be able to address any issues that might be detrimental to the interests of his clients. That application brought on behalf of Mr Koh was designated SIC/SUM 19/2024 and made under r 14(1A)(*a*) of the Legal Profession (Regulated Individuals) Rules 2015 ("LP(RI)R"), which provides that a solicitor who is registered under s 36E of the LPA and has in force a practicing certificate ("s 36E solicitor") may *not*, in any "relevant proceedings" prescribed by the Legal Profession (Representation in Singapore International Commercial Court) Rules 2014 (the

"LP (Representation in SICC) Rules") plead any matter without the permission of the SICC.

67 As provided under r 3A(2) of the LP (Representation in SICC) Rules, "relevant proceedings" include any proceedings mentioned in s 18D(2)(*c*) of the SCJA (see [31] above). Thus, the Sanction Hearing fit the definition of a relevant proceeding, and Mr Koh could not plead any matter in relation to the Application without the Court's permission.

68 In deciding whether to grant permission under r 14(1A)(*a*), the SICC may take into account any relevant factor, including the following (see r 14(1B) of the LP(RI)R):

> (a) the nature of the factual and legal issues involved in the applicable proceedings;
>
> (b) the role of the solicitor mentioned in paragraph (1A) in the applicable proceedings;
>
> (c) the extent of the international elements involved in the applicable proceedings, including —
>
> (i) the amount of assets or properties in one or more foreign countries;
>
> (ii) the obligations and liabilities that are governed by the laws of one or more foreign countries; and
>
> (iii) the governing law of the underlying agreement.

69 In consideration of these factors and after a brief on the record discussion, the Court orally granted Mr Koh's application and entered an order to the same effect with respect to the application on 26 April 2024.

70 In exercising discretion to grant the application of Mr Koh, the Court gave consideration to Mr Koh's prominent role in representing a key constituency of Scheme stakeholders (r 14(1B)(*b*) of the LP(RI)R) and the

multiple international aspects of this cross-border case (r 14(1B)(*c*) of the LP(RI)R).

71 While there is no reported case law under r 14(1A)(*a*) of the LP(RI)R covering the grant of permission to a s 36E solicitor to plead a matter before the SICC, the decision to allow participation was an appropriate one in this instance and consistent with the factors referenced at [68] above.

72 Mr Koh was a foreign lawyer who had deep background in the negotiation and documentation of the Scheme and was fully familiar with the circumstances that produced the agreement embodied in the Scheme. As detailed in earlier sections of this decision, the Scheme plainly was international in nature, and it was proper in the circumstances presented to allow Mr Koh to participate and represent his clients in the Sanction Hearing.

73 Any similar application for permission to plead by a s 36E solicitor in the future will be addressed on its own merits in accordance with applicable rules and based on the facts presented.

Conclusion

74 These Grounds of Decision address the order entered on 26 April 2024 granting all relief requested by the Applicant in the first cross-border pre-pack scheme to have been commenced in the SICC. The proceedings were entirely consensual and, in that sense, unremarkable from a judicial point of view, but the case is noteworthy, nonetheless, due to the Applicant's pioneering cross-border use of recently adopted pre-pack procedures. These procedures worked well and have proven to be expedited, efficient and effective. This decision has been issued to provide background and assist other companies that may seek similar relief in the future.

James Michael Peck
International Judge

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