IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 210

Originating Summons No 668 of 2016

In the matter of Section 210(10) of the Companies Act (Cap 50, 2006 Rev Ed)

PACIFIC ANDES RESOURCES DEVELOPMENT LIMITED

… *Applicant(s)*

Originating Summons No 812 of 2016

In the matter of Section 210(10) of the Companies Act (Cap 50, 2006 Rev Ed)

PARKMOND GROUP LIMITED

… *Applicant(s)*

Originating Summons No 813 of 2016

In the matter of Section 210(10) of the Companies Act (Cap 50, 2006 Rev Ed)

PACIFIC ANDES ENTERPRISES (BVI) LIMITED

… *Applicant(s)*

Originating Summons No 814 of 2016

In the matter of Section 210(10) of the Companies Act (Cap 50, 2006 Rev Ed)

PACIFIC ANDES FOOD (HONG KONG) COMPANY LIMITED

… *Applicant(s)*

ORAL JUDGMENT

[Companies] — [Foreign Companies]
[Companies] — [Schemes of Arrangement]
[Insolvency Law] — [Cross-border Insolvency]

TABLE OF CONTENTS

Pacific Andes Resources Development Ltd and other matters

[2016] SGHC 210

High Court —Originating Summons Nos 668 and 812–814 of 2016
Kannan Ramesh JC
1 July; 8 August, 15 August, 29 August; 13 and 26 September 2016

27 September 2016 Judgment reserved.

Kannan Ramesh JC:

Introduction

1 Pacific Andes Resources Development Ltd ("PARD"), Parkmond Group Limited ("PGL"), Pacific Andes Enterprises (BVI) Limited ("PAE") and Pacific Andes Food (Hong Kong) Limited ("PAF") (collectively "the Applicants") each filed applications under s 210(10) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") by way of Originating Summons Nos 668, 812, 813 and 814 of 2016 respectively (collectively "the Applications") for moratoria against proceedings brought or to be brought against them by their creditors in Singapore and elsewhere. The Applications were allowed, in the case of PARD on the terms set out in the Order of Court dated 1 July 2016 as varied by the Order of Court dated 8 August 2016 ("the PARD Orders"), and in the case of PGL, PAE and PAF (collectively, "the Subsidiaries") on the terms set out in the Orders of Court dated 15 August 2016 ("the Obligor

Orders"). The moratorium in each instance was granted until 5 September 2016.

2 The Applicants have each filed applications to extend the moratoria until 13 January 2017. In turn, certain of their creditors, all financial institutions, have filed applications to set aside the PARD Orders and the Obligor Orders save that no application has been made as regards PAF. A tabulation of the applications filed by the Applicants and the creditors is set out in Annex 1 hereto.

3 The applications came before me for hearing on 13 September 2016. After hearing arguments, I reserved judgment and extended the moratoria under the PARD Orders and the Obligor Orders on an interim basis until the conclusion of the hearing on 26 September 2016. On 26 September 2016, I gave brief grounds and my decision, and indicated that fuller grounds would be made available on 27 September 2016 at 5pm. I will proceed to deliver those grounds today. Full written grounds of decision shall be furnished if necessary.

The background

4 The Applicants are part of a cluster of companies which describes itself as the Pacific Andes Group ("the Group"). The companies in the Group are incorporated in various jurisdictions including the British Virgin Islands (the "BVI"), Bermuda, Peru, Hong Kong, the United Kingdom, Cyprus and Spain, just to name a few. Notably, none of the Applicants are incorporated in Singapore though it is pertinent that PARD is listed on the Singapore Exchange, and carries out business activity in Singapore. The Subsidiaries on

the other hand do not appear to have any business activity or assets, or at least assets of any significance, in Singapore. These are matters of importance for reasons which will become apparent later.

5 At the risk of over simplification, the economic activity of the Group might be spliced into three broad divisions of which only two appear to be of any commercial significance: the production of fishmeal and fish oil ("the Peruvian Business") and the supply of frozen fish and related products ("the Frozen Fish Business"). The Frozen Fish Business is controlled and managed by the Applicants with the Subsidiaries appearing to be the operating units. It is common ground that as between the two businesses, it is the Peruvian Business that is far more lucrative and valuable. It is the Group's most substantial asset, being described as its "crown jewel". Various values have been attributed to the Peruvian Business, ranging from US$1 to US$1.6 billion, and it seems quite evident that these values are not broadly speaking inaccurate. In contrast, the Frozen Fish Business, though not insignificant, pales in comparison in terms of turnover, profit (in the past at least) and most importantly, value. Given the financial malaise of the Group, the Frozen Fish Business has in fact ground to a halt, with efforts being made as part of the restructuring initiative to restart it. Nonetheless, it is evident to me that the principal discord between the Group and its creditors is over control of the Peruvian Business. Given its value, this should come as no surprise.

6 As the name would suggest, the economic activity of the Peruvian Business takes place in Peru through various operating entities there. These entities in turn are controlled by the China Fishery Group Limited ("CFGL"), a company incorporated in the Cayman Islands, through indirect equity

interest held through various other entities. PARD's most valuable asset is its indirect shareholding in CFGL, held through various entities of which Richtown Development Ltd ("Richtown"), a company incorporated in the BVI, is the immediate subsidiary. Richtown has been placed in provisional liquidation in the BVI on the application of a creditor, Sahara Investment Group Pte Ltd ("Sahara"). PARD, through its holding in Richtown, also has an indirect interest in the Subsidiaries. A simplified diagrammatic representation of the group structure of the Group with the Peruvian Business and the Frozen Fish Business delineated may be found in Annex 2 hereto.

7 The Subsidiaries owe liabilities to various creditors, in particular, the financial institutions which have filed applications to set aside the PARD Orders and the Obligor Orders. These liabilities have been guaranteed by PARD as the Subsidiaries' parent. It would appear that none of these debts, both primary and contingent, are subject to Singapore law. They are, it would seem, subject to Hong Kong law with the loans being structured in Hong Kong and disbursed by the branches of the financial institutions situated there. However, it is pertinent that PARD has also undertaken fund raising in Singapore, having issued some $200m in Singapore denominated bonds governed by English law ("the SGD Bonds"). These bonds are traded on the Singapore Exchange. PARD's total indebtedness, both contingent and primary, is approximately US$280 million. The bondholders therefore make up the single largest creditor polity of PARD.

8 It is clear that the Group in general, and the Peruvian Business and the Frozen Fish Business specifically, are in financial straits. Various reasons have been alleged and attributed by the debtor and the creditors as causative of that

situation. Needless to say, the reasons are quite polarised. For present purposes, these reasons are not germane.

9 In an effort to extricate itself from its financial woes, the Group initially engaged in discussions with principally its financial institution creditors. However, for reasons which are again not of relevance to the applications, the discussions broke down, resulting in increased polarisation of the debtor-creditor positions. Things appear to have come to a head in late June 2016 when in an attempt to secure breathing space and formulate a rescue plan, insolvency proceedings were commenced almost simultaneously in various jurisdictions. The Peruvian units under the control of CFGL commenced restructuring proceedings in Peru on 30 June 2016 ("the Peruvian Proceedings") simultaneously with CFGL filing Chapter 11 proceedings in the United States Bankruptcy Court, Southern District of New York ("the US Proceedings"). In addition, as noted earlier, Sahara applied for and obtained the appointment of a provisional liquidator on 30 June 2016 over Richtown.

10 Further, on 1 July 2016, the PARD filed Originating Summons 668 of 2016 seeking a moratorium as regards the Applicants. I heard that application on the same day on an urgent basis and granted it. When granting the application, I expressed reservations as to whether I had jurisdiction to make the order as regards PGL, PAE and PAF in the absence of an application by each of them. However, given the urgency of the situation, I granted the order on an interim basis until 12 August 2016 ("the 1 July 2016 Order") and directed PARD's counsel to address me on this issue if an application was made to extend the moratorium. Thereafter, PARD filed an application to extend the moratorium which came on for hearing before me on 8 August

2016. After hearing arguments, I varied the 1 July 2016 Order to exclude the Subsidiaries as I was the view that I did not have jurisdiction, in an application by PARD, to grant moratoria under s 210(10) to cover the Subsidiaries where they were not applicants in their own right. I extended the moratorium as regards PARD only until 5 September 2016 ("the 8 August 2016 Order"). However, I suspended the lifting of the moratoria as regards the Subsidiaries until 15 August 2016 to allow them time to file applications in their own stead, if they so desired. This they did on 12 August 2016 in Originating Summons Nos 812, 813 and 814 of 2016 respectively. Those applications came before me for hearing on an opposed *ex parte* basis on 15 August 2016. The principal arguments made in opposition were by Bank of America ("BoA"). After hearing arguments, I expressed reservations on whether the Subsidiaries had *locus standi* to make an application under s 210 of the Act. I therefore granted the moratoria in each instance on an interim basis until 5 September 2016 – the Obligor Orders – pending an *inter partes* hearing on whether the orders ought to be sustained. Malayan Banking Berhad ("Maybank") subsequently filed applications to set aside the Obligor Orders save as regards PAF, and the PARD Orders. The Applicants in turn filed applications to extend the moratoria until 13 January 2017.

11 Maybank's applications were supported by BoA, Cooperatieve Rabobank, UA, Hong Kong Branch ("Rabobank") and Standard Chartered Bank (Hong Kong) Limited ("SCB") as well a group of bondholders represented by Cavenagh Law LLP. Broadly speaking, these creditors collectively hold more than 25% of the debt of the Applicants on an individual basis.

12 On the other hand, two financial institutions namely, Taipei Fubon Commercial Bank Co Limited and China CITIC Bank International Limited were supportive of the Applicants' applications. United Overseas Bank Limited ("UOB") and DBS Bank Limited maintained neutrality. In addition, Sahara, and a group of bondholders which describes itself as the Informal Steering Committee were supportive of the Applicants' applications. Collectively, these creditors make up a substantial portion of the debts owed by the Applicants, though this proportion is insufficient to cross the statutory threshold for value for a successful scheme vote under s 210.

13 It appears that no restructuring plan has as yet been proposed in the Peruvian Proceedings and the US Proceedings. A broad outline of a restructuring plan has been placed before the Court in the Applications ("the Plan"). The Plan is, however, somewhat thin on details. This is perhaps unsurprising given that a successful restructuring of the Group generally and PARD in particular is very much contingent on the restructuring of the Peruvian Business. This in turn is dependent on the outcome of the US Proceedings and the Peruvian Proceedings to a large extent.

The Issues

14 A multitude of issues was canvassed before me. However, they may be conveniently condensed into three core issues:

(a) Does the Court have powers under s 210(10) of the Act or as a matter of inherent jurisdiction to restrain the commencement or continuation of proceedings elsewhere by creditors within and subject to the jurisdiction of the Court ("the Jurisdiction Issue").

(b) Do the Applicants have *locus standi* to make applications under s 210 of the Act? ("the *Locus Standi* Issue").

(c) Aside from *locus standi,* what are the pre-requisites for an order under s 210(10) of the Act ("the s 210(10) Issue").

The Jurisdiction Issue

15 This issue arose principally because the moratoria under the PARD Orders and the Obligors Orders were not limited to the commencement and continuation of proceedings *in Singapore only*. The orders provided that the moratoria were as regards "actions or proceedings in Singapore or *elsewhere*". The orders therefore sought to restrain proceedings from being brought not just in Singapore but elsewhere by creditors subject to the jurisdiction of the Court. This raised the question of whether the Court could restrain the commencement or continuation of proceedings elsewhere by creditors subject to its jurisdiction. The Applicants argued that the Court had the jurisdiction. They had two strings to their bow in support of their argument – the Court had jurisdiction under s 210(10) of the Act, and as a matter of inherent jurisdiction to make the order. I consider the points in turn.

Section 210(10) of the Act

16 The key question is whether s 210(10) can be construed as conferring extra-territorial jurisdiction? Having considered the arguments and authorities, the position seems fairly clear that it cannot be read in such a manner.

17 This seems to be a settled proposition here as noted by the reports of the Insolvency Law Review Committee (at para 92) and the Committee to

Strengthen Singapore as an International Centre for Debt Restructuring (at para 3.12). This is also the view in the academic literature. For example, in *Woon's Corporation Law* (LexisNexis, 2016), the following was said (at para 152.1):

> Generally, schemes of arrangement are territorial in nature and s 210(10) would therefore have no application to actions or proceedings in foreign courts akin to anti-suit injunctions restraining foreign proceedings from being started or proceeded with.

I endorse this view.

To construe otherwise would be to create dissonance between the moratorium provisions as regards liquidation and judicial management, which have been recognised by the Court of Appeal in *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 ("*Beluga Chartering*") (at [90]) as being territorial. A similar approach has also been taken in the United Kingdom as regards administration (see, *eg*, *Bloom and others v Harms Offshore AHT "Taurus" GmbH & Co KG and another* [2010] 2 WLR 349 (at [16]) ("*Bloom*"), which in turn, drew on cases such as *In re Oriental Inland Steam Co, ex parte Scinde Railway Co* (1874) LR 9 Ch App 557 (which was in the context of winding up). I see no principled basis for concluding that the approach under s 210(10) should be any different.

18 The Applicants made several arguments in counter. First, that there is nothing in the text of s 210(10) that constrains the Court to read its powers as being territorial. They argued that that the term "proceedings" as it appears in s 210(10) ought to be given its natural meaning and read without any territorial limitation to include proceedings outside jurisdiction. I do not find

this argument persuasive as it ignores the similarity of language between s 210(10) and similar statutory provisions for judicial management and liquidation in the Act. It also ignores the presumption that statutes are intended to operate territorially in the absence of language that suggests otherwise. It must be remembered that a scheme of arrangement is territorial in nature and therefore the protective relief that s 210(10) offers to facilitate a scheme ought to also be territorial. In the main, it is difficult to understand what policy imperative would require a departure in the approach taken for schemes of arrangements as compared to judicial management and liquidation.

19 Secondly, it was argued that the moratoria, while expressed as restraining proceedings elsewhere, would only apply to creditors within jurisdiction. It was pointed out that the PARD Orders and the Obligors Orders had specific carve outs to exclude creditors who were out of jurisdiction. The argument appeared to be that the moratoria would only enjoin the creditors who were within jurisdiction and participating in the Applications from commencing proceedings outside Singapore. In substance, the argument was that the Court was in substance exercising *in personam* jurisdiction and not any extra-territorial jurisdiction over these creditors. I have difficulty with this argument. The Court has subject matter jurisdiction by reason of s 210 so long as the applicant is a "company" within the definition provided in s 210(11). 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. The Court, having subject matter jurisdiction over the scheme and *in personam* jurisdiction over these creditors, is then able to exercise its powers to restrain such creditors only within the limits of s

210(10). And, for the reasons expressed earlier, s 210(10) does not have the reach that the Applicants contend for.

20 Further, the Applicants' suggested approach creates a dichotomy between creditors who chose to participate in the Applications and those who did not. The latter may actually do better simply by staying away. Ultimately, the question of whether a stay of proceedings *elsewhere* ought to be granted to facilitate a restructuring under a scheme of arrangement here is a matter for consideration by the Court where those proceedings are being brought. It will depend in such a situation on the domestic laws of that jurisdiction, and principles of comity and modified universalism. It may very well be that recognition of the proceedings here may have to be sought there or parallel proceedings opened there, in order to secure the required stay.

21 Third, the Applicant argued that such orders have been made by the High Court in various earlier matters. However, I note that those were instances where there did not appear to be any contest either at the stage where the order was obtained or subsequently. The specific issue of extra-territoriality of the powers under s 210(10) was not canvassed. I am therefore unable to attribute much precedential value to those cases.

Common law

22 The second string to the Applicants' bow is that the Court has inherent jurisdiction to restrain creditors over whom it has *in personam* jurisdiction from unsettling efforts to restructure under s 210 by commencing proceedings elsewhere. It was argued, drawing an analogy from authorities that recognised such jurisdiction as regards a creditor's oppressive, vexatious, or otherwise

unfair or improper conduct in the context of administration or liquidation, that a similar approach ought to be taken as regards schemes of arrangement. I am not persuaded.

23 The argument in my view ignores the jurisprudential basis upon which the Courts have recognised the jurisdiction in liquidation or administration. The jurisdiction is recognised, notwithstanding the existence of statutory provisions for moratorium within jurisdiction, to assist the discharge of statutory obligations of an officer, being a liquidator or an administrator, appointed by the Court, including the recovery and protection of the assets of the company. The Court is compelled to assist its officer in the discharge of his statutory obligations, and therefore exercises its inherent jurisdiction to restrain creditors: see *Bloom* at ([22] and [24]). The Court is in effect seeking to protect the integrity of its insolvency jurisdiction over the company and its assets with a view to ensuring that the statutory scheme is complied with: see *Societe Nationale Industrielle Aerospatiale (SNIA) v Lee Kui Jak* [1987] AC 871 (at 892H). In *Stichting Shell Pensioenfonds v Krys and another* [2015] AC 616 (at [24]) ("*Stichting*"), the Privy Council observed (at [24]):

> … Where a company is being wound up in the jurisdiction of its incorporation, other interests are engaged. The court acts not in interest of any particular creditor or member, but in that of the general body of creditors and members. Moreover, as the Board has recently observed in *Singularis Holdings Ltd v PriceWaterhouseCoopers* [2015] 2 WLR 971, para 23, there is a broader public interest in the ability of a court exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of its jurisdiction. *In protecting its insolvency jurisdiction, to adopt Lord Goff's phrase, the court is not standing on its dignity. It intervenes because the proper distribution of the company's assets depends on its ability to get in those assets so that comparable claims to them may be dealt with fairly in*

> *accordance with a common set of rules applying equally to all of them. …*
>
> [emphasis added]

24 This key element is missing in the scheme of arrangement which is essentially a debtor-in-possession regime. There is no officer of the Court appointed nor is there a statutory scheme governing the insolvency. Indeed, a scheme under s 210 of the Act is not predicated on insolvency unlike judicial management and most instances of liquidation.

25 I should also add that while there are statements in the authorities to the effect that such inherent jurisdiction ought to be exercised only when the conduct of the creditor is oppressive, vexatious, or otherwise unfair or improper, I am not persuaded that this is a necessary ingredient. If the *raison d'etre* of the jurisdiction is to assist its officer and preserve its insolvency jurisdiction in order to ensure that the statutory scheme is observed, I do not see why the conduct of the creditor needs to be so tainted before the jurisdiction is exercised. I find support for my view in the Privy Council's judgment in *Stichting* (see [18] and [23]), where it was stated as follows:

> 18 … In *Carron Iron Co Proprietors v Maclaren* (1855) 5 HL Cas 416, Lord Cranworth LC (at pp 437-439) identified three categories of case which, without necessarily being comprehensive or mutually exclusive, have served generations of judges as tools of analysis. … Third, there are cases which do not turn on the vexatious character of the foreign litigant's conduct, nor on the relative convenience of litigation in two alternative jurisdictions, in which foreign proceedings are restrained because they are "contrary to equity and good conscience". … the court has an equitable jurisdiction to restrain the acts of persons amenable to the court's jurisdiction which was calculated to violate the statutory scheme of distribution.
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> …

> 23 … The leading modern case on the jurisdiction to restrain foreign proceedings is *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871. … Lord Goff of Chieveley, delivering the advice of the Board, pointed out that *the insolvency cases proceeded on a different principle, which was based not on protecting litigants against vexation or oppression, but on the protection of the court's jurisdiction to do equity between claimants to an insolvent estate.* … It is clear from Lord Goff's formulation that he was making the same distinction as Lord Cranworth made in the Carron Iron case between cases such as the insolvency cases, in which there is an equitable jurisdiction to enforce the statutory scheme of distribution according to its terms, and cases in which the court intervenes on the ground of vexation or oppression.
>
> [emphasis added]

The Privy Council was of the view that there was an equitable jurisdiction to restrain interference by persons amenable to the jurisdiction of the Court who threatened to violate or interfere with the statutory scheme. I find this to be correct as a matter of principle and suggest that a similar position would apply in Singapore.

26 For completeness, Maybank argued that the Court should not find that it had inherent jurisdiction in the case of a scheme of arrangement because that would make s 210(10) irrelevant or otiose. I do not accept that in and of itself, the existence of a statutory provision imposing or enabling the grant of a moratorium is conclusive as to whether the Court ought to exercise inherent jurisdiction. That such jurisdiction has been recognised in the context of judicial management and liquidation, notwithstanding the existence of moratorium provisions that echo the language of s 210(10), undermines the argument (see, *eg*, *Bloom at* [21]–[22]). The issue instead is whether the Court ought to safeguard its jurisdiction by restraining a creditor over which it has jurisdiction from interfering with a statutory scheme administered by its

officer in the discharge of statutory obligations. Such a statutory scheme does not exist in the context of s 210.

27 In the final analysis, I am therefore unable to accept the view that the Court's inherent jurisdiction ought generally to be exercised to restrain proceedings elsewhere where the Court is faced with an application under s 210. To do so would be to interfere with the jurisdiction of another court and not recognise the principle of comity, assuming the creditor can legitimately bring such proceedings. There is, however, perhaps a caveat which I shall discuss briefly.

28 Maybank made the argument, without conceding the point, that such jurisdiction may perhaps exist where the Court has sanctioned the scheme. I agree with that submission. In such an instance, the Court is effectively giving effect to a scheme which has statutorily compromised an applicant's debts. However, I would venture to say that the point may go even further. Where the scheme is presented for sanction following a successful vote at a scheme meeting, an argument is certainly there for the exercise of equitable jurisdiction to restrain proceedings elsewhere so as to ensure observance with the scheme that has been presented for sanction. At that stage, a statutory compromise has been reached by the creditors, subject to court sanction, using statutory cram down powers. In such a scenario, I do not see why the Court should not protect the integrity of the vote so as not to undermine the application for sanction before it. However, I offer this only as a preliminary view as I have not heard full arguments on this issue.

Conclusion on the Jurisdiction Issue

29 I accordingly conclude that the Court has no jurisdiction under s 210(10) and under its inherent jurisdiction, certainly not at this stage, to restrain creditors subject to its jurisdiction from commencing or continuing proceedings elsewhere.

The *Locus Standi* Issue

30 The principal argument by Maybank and the creditors that support its applications is that Applicants have no *locus standi* to file applications under s 210.

31 Section 210 applies to a "company", the definition of which has been expanded under s 210(11) to "mean any corporation liable to be wound up under this Act". Section 351 stipulates that an "unregistered company" may be liable to be wound up under the Act and in turn, s 350 defines such a company as including a "foreign company". To complete the analysis, s 4 of the Act defines a "foreign company" as "a company or corporation incorporated outside Singapore". As the Applicants are incorporated in the Bermuda (PARD), the BVI (PGL and PAE) and Hong Kong (PAF), they would be foreign companies for the purpose of the Act. Notwithstanding this, the Court has jurisdiction under s 210.

Is sufficient nexus a matter of jurisdiction or discretion?

32 Maybank argued that notwithstanding the language of s 210(11) read with ss 350, 351 and 4, the Court has no jurisdiction under s 210 where there does not exist sufficient nexus between the company and Singapore. Reliance

was placed on the Singapore authorities of *Re Griffin Securities Corporation* [1999] 1 SLR(R) 219 ("*Re Griffin*"), *Re Projector SA* [2009] 2 SLR(R) 151 ("*Re Projector*") *and Re TPC Korea Co Ltd* [2010] 2 SLR 617 ("*Re TPC Korea*"). It was submitted that, insofar as the English position as set out in *Re Drax Holdings Ltd* [2004] 1 WLR 1049 ("*Re Drax*"), *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch) ("*Re Rodenstock*") and *Re Indah Kiat International Finance Company BV* [2016] EWHC 246 ("*Indah Kiat*") was that "sufficient nexus" did not go to jurisdiction but the exercise of discretion, I should decline to follow that position on the basis that it was at odds with the Singapore authorities. I should add that BoA took a very similar stance at the hearings on 15 August 2016 and 13 September 2016. On the other hand, the Applicants submitted that it was matter of discretion and not jurisdiction.

33 I am unable to agree with the submission of Maybank and BoA in this regard. A careful review of the Singapore authorities suggests to me that the Courts there were in substance approaching the issue as a matter of discretion and not of jurisdiction. In *Re Griffin* (at [17]), the Court spoke in terms of when the Courts would "exercise this discretion". *Re Projector*, which followed *Re Griffin*, cited this very paragraph with approval when it said (at [26]) that the Court had jurisdiction to wind up a foreign company where it had assets or there was sufficient nexus with Singapore. The Court, while using the term "jurisdiction", seemingly had "discretion" in mind. Similarly, in *Re TPC Korea,* the Court cited (at [12]) with approval both *Re Griffin* and *Re Projector*, when it articulated the circumstances where the Court would have "jurisdiction" under s 210. It seems evident that the concepts of jurisdiction and discretion were conflated simply because the dichotomy

between jurisdiction and discretion was not a point of focus. However, it seems equally evident that the Courts in fact had in mind discretion.

34 Accordingly, I do not believe that there is discord between the English and Singapore positions. In any event, if indeed there is a difference, I would prefer the English position for the reasons articulated in *Re Drax*. It was stated in *Re Drax* (at [24]–[26]) as follows:

> 24 In most cases the distinction will not matter. The English court will not wind up a foreign company where it has no legitimate interest to do so, for that would be to exercise an exorbitant jurisdiction contrary to international comity, and for that purpose it does not matter whether the preconditions are couched in terms of the existence of jurisdiction or the exercise of jurisdiction.
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> 25 But in the present case it may make a difference, because the question is one of the jurisdiction to approve a scheme of arrangement, and the second and third conditions may not be relevant because they were formulated in the context of winding up. If they go to the jurisdiction to order a winding up, the words "any company liable to be wound up" in section 425(6) may require those conditions to be fulfilled even in the case of schemes of arrangement. If they go to the discretion to wind up, then they do not have to be fulfilled in the case of a scheme of arrangement, although the first condition would plainly be relevant in any event.
>
> 26 The question therefore is whether (as was assumed in the present matter by the companies) the combined effect of section 425(6) of the 1985 Act and of section 221(1) of the Insolvency Act 1986, and the cases on the winding up of foreign companies, is that the three conditions must be satisfied before the court can exercise its powers under section 425. In my judgment the three conditions go to the discretion of the court, and not to the existence of its jurisdiction. If that it is right, then the conditions do not have to be satisfied for the purposes of section 425, because they do not go to the question whether a company is "liable" to be wound up under the Insolvency Act 1986. So also it is not necessary for the purposes of section 425 that the grounds for winding up in section 221(5) exist.

For completeness, I note that this is also the position in Hong Kong: see *Re LDK Solar Co Ltd (In Provisional Liquidation)* [2014] HKCU 2855 ("*LDK*") (at [35]).

35 However, Maybank and BoA submitted that there would be no difference in the outcome regardless of my conclusion on this issue. I agree. Ultimately, if the Applicants did not have assets within or sufficient nexus to jurisdiction, there would be no *locus standi* under s 210.

Is there sufficient nexus?

36 Mr Lee in response to a question from me candidly conceded that his strongest argument would not be that PARD did not have sufficient nexus to Singapore. This concession was rightly made. PARD, while incorporated in Bermuda, is listed and conducts economic activity here. Indeed, it does seem that it would not be inaccurate to conclude that PARD's COMI or Centre of Main Interest is in Singapore. I am therefore of the view that the Court has jurisdiction to hear an application by PARD under s 210.

37 The position, however, as regards the Subsidiaries is quite different. Despite posing the question several times, the Applicants were unable to point me to any assets within jurisdiction or any nexus that these entities might have with Singapore. Maybank submits and I agree that these entities do not have any tangible nexus to Singapore; they have failed to produce any evidence in this regard.

38 The Applicants rely on a variety of factors in support of the argument that there is in fact nexus.

39 First, the Applicants argue that the Subsidiaries are wholly owned by PARD, and integral to the Frozen Fish Business which has contributed significantly to PARD's revenue. With respect, none of these are relevant factors for the purpose of nexus. Nexus in this context is that which enables a court to wind up a foreign company. The fact that the Subsidiaries are wholly owned by PARD does not afford a basis. Neither does the fact that they are part of PARD's business offer any foothold. The Subsidiaries are independent legal entities and the fact that they intend to present a group restructuring with a composite, inter-dependent and inter-connected restructuring plan does not have the effect of or warrant the piercing or lifting of the corporate veil such that they may be regarded as one composite entity. This, I would venture to say, is settled law. While it would be possible to file for a scheme of arrangement that proposes a composite inter-dependent plan involving the Applicants, *all* the Applicants in such a situation must establish *locus standi* through the existence of assets within or sufficient nexus to jurisdiction. In addition, even if jurisdiction here is established, given that the Applicants are incorporated and carry on economic activity elsewhere, it may be necessary to present the restructuring plan for recognition and endorsement in other jurisdictions, in particular, the place of their incorporation.

40 Second, the argument is that PARD is a guarantor of the liabilities of the Subsidiaries, and therefore their largest contingent creditor. Other reasons were offered in support. For example, that PARD is listed in Singapore, has issued the SGD bonds on the Singapore Exchange, that PARD has an office in Singapore and has its annual general meetings in Singapore, that PARD has a bank account in Singapore, and that PARD has four subsidiaries incorporated in Singapore which own real properties as assets. While all of these factors

fortify my earlier conclusion that PARD has sufficient nexus to Singapore, they do not assist the Subsidiaries at all. They show no nexus between Singapore and the Subsidiaries.

41 Third, much store was placed on the argument that the Applicants have creditors within jurisdiction. In particular, emphasis was placed on the fact that the financial institutions which lent to the Subsidiaries through their Hong Kong branches had branches or were incorporated in Singapore and were therefore subject to the *in personam* jurisdiction of the Court. Reliance was placed on the English decision in *Re Magyar Telecom BV* [2015] 1 BCLC 418 (Ch) ("*Re Magyar*") and *Re Drax*. I do not believe that these authorities assist.

42 In *Re Magyar,* the remarks (at [22]) on the relevance of the presence of creditors within jurisdiction were made in the context of several other important considerations:

(a) Whether the debts were governed by English law and subject to jurisdictional clauses involving the English courts (at [15]);

(b) Whether there were assets within jurisdiction such that a scheme if sanctioned would have the effect of preventing execution against those assets (at [22]); and

(c) Whether the company had moved its COMI to England (as the company in the case had done before the application), such that any insolvency process would be undertaken under English law in England, providing a solid basis and background for a scheme under English law which altered contractual rights governed by a foreign law (at [23]).

43 On the facts of *Re Magyar*, the move of the COMI to England was clearly a factor that weighed heavily on the judge's mind. In *Re Drax*, the Court found that there were "many factors" which pointed to the exercise of the jurisdiction as being legitimate and appropriate (at [31]). The agreements were subject to English law and English jurisdiction clauses, the collateral taken for the debts were property and securities in England. Also, the financial institutions that were subject to the jurisdiction of the Court had undertaken the lending to the applicant in England. These factors were considered relevant. For completeness, a similar approach was taken in *Re Rodenstock*.

44 It seems evident therefore that the mere presence of creditors within jurisdiction *per se* is not necessarily a sufficient factor. If the debt owed to the creditor has a connection to the jurisdiction, then the presence of that creditor within jurisdiction may be regarded as a relevant factor in an overall assessment of sufficient nexus. This is significant in the context of banks that have undertaken lending through branches in various parts of the world. As Maybank correctly pointed out, these branches are quite often set up to comply with regulatory requirements in order for the relevant authority to exercise supervisory control over their business activities within jurisdiction. The regulator does not intend to control, through such branches, the business activities of the banks carried out in other jurisdiction unless of course that is of relevance to their activities within jurisdiction.

45 Accordingly, while it is correct to say that the banks are subject to the *in personam* jurisdiction of the Court by reason of being creditors within jurisdiction, it would be incorrect to assert that jurisdiction as regards their business activity elsewhere. That would be to conflate the Court's *in personam*

jurisdiction over the bank by reason of the presence of the branch within jurisdiction with the Court's subject matter jurisdiction over the conduct in question, *ie*, the lending that has taken place elsewhere by another branch of the bank. This was a point made by Hoffman J (as he then was) in *MacKinnon v Donaldson Lufkin and Jenrette Securities Corporation* [1986] 1 Ch 482 ("*MacKinnon*"), where he observed at (493) as follows:

> I think this argument confuses personal jurisdiction, i.e., who can be brought before the court, with subject matter jurisdiction, i.e., to what extent the court can claim to regulate the conduct of those persons. It does not follow from the fact that a person is within the jurisdiction and liable to be served with process that there is no territorial limit to the matter upon which the court may properly apply its own rules or the things which it can order such a person to do. …
>
> The content of the subpoena and order is to require the production by a non-party of documents outside the jurisdiction concerning business which it has transacted outside the jurisdiction. In principle and on authority it seems to me that the court should not, save in exceptional circumstances, impose such a requirement upon a foreigner, in particular, upon a foreign bank. The principle is that a state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction.
>
> … If every country where a bank happened to carry on business asserted a right to require that bank to produce documents relating to accounts kept in any other such country, banks would be in the unhappy position of being forced to submit to whichever sovereign was able to apply the greatest pressure.

This is a correct statement of principle in my view. To exercise jurisdiction in such a situation could be regarded as exorbitant. I am therefore not persuaded that the presence of the creditors within jurisdiction, particularly the branches of banks, *per se* provides sufficient nexus.

46 There is however, one caveat. It seems to me that the fact that the debt that is sought to be compromised is not subject to Singapore law or the jurisdiction of Singapore courts is not in and of itself a bar to the Court exercising jurisdiction if the applicant can otherwise show sufficient nexus to or assets within jurisdiction. This point assumed relevance as BoA, and notably not Maybank, argued that the Court should not assume jurisdiction over the Applications because the debts owed to the banks by the Applicants were subject to Hong Kong law. By reason of this, it was argued that any discharge of the debts would not be recognised in Hong Kong on the basis of the principle in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399 ("*Gibbs*") which was followed in Hong Kong in *Hong Kong Institute of Education v Aoki* [2004] 2 HKLRD 760 ("*Aoki*") and *LDK*. The principle in *Gibbs* is that a discharge of a debt is not effective unless it is in accordance with the law governing the debt. It was also pointed out that the bonds that PARD issued were subject to English law, presumably in support of the same point.

47 I am not convinced this is a compelling argument. It should be noted that the principle in *Gibbs* has received academic criticism – see *Dicey, Morris and Collins on The Conflict of Laws* (Sweet & Maxwell, 15th Ed, 2012) at para 31-097, Philip St J Smart's *Cross-Border Insolvency* (Butterworths, 2nd Ed, 1998) (at pp 259–60) and Professor Ian Fletcher in *Insolvency in Private International Law* (Oxford University Press, 2nd Ed, 2005) at para 2.127. Look Chan Ho, in *Cross-Border Insolvency: Principles and Practice* (Sweet & Maxwell, 2016), also offers a compelling critique of the principle in *Gibbs* from the perspectives of the common law, policy and Model Law. Among other points, Look Chan Ho questions if the common law refusal to recognise

foreign bankruptcy discharge still makes sense today for several reasons, including (see paras 4-096–4-107):

> First, the common law rule hinges on characterising bankruptcy discharge solely as a contractual matter which is thus logically within the scope of the governing law. … Upon closer inspection, the contractual characterisation of bankruptcy discharge is highly suspect. …
>
> The common law chose contract on the premise that the parties only intended the governing law of the contract to determine its discharge and did not assent to the use of any other system of law, including the bankruptcy law of the country in which the defendant was domiciled.
>
> The emphasis on party autonomy in general contractual matters is entirely understandable … But bankruptcy discharge is not quite a consensual matter.
>
> …
>
> Bankruptcy discharge is about the post-insolvency treatment of the claimants' pre-insolvency entitlements. This is because the recognition of bankruptcy discharge fundamentally concerns whether the contractual counter-party may seek to enforce his debt against the bankrupt's assets to the detriment of other creditors. The real contest is between the contractual counter-party and the bankrupt's other creditors who were not parties to the contract. …
>
> …
>
> Therefore, as bankruptcy law is not and cannot be a consensual matter, the fact that the parties to a contract did not choose the bankruptcy law of a country to discharge contractual obligations is neither here nor there.
>
> Second, … [t]reating bankruptcy discharge as an *in rem* matter would also be consistent with the orthodox English classification of bankruptcy proceeding as an *in rem* proceeding.
>
> Third, the common law rule that the discharge of an obligation is governed by its proper law seems to be premised on the contractual parties' expectation. But is the notion that people expect their contractual bargain to always trump bankruptcy law realistic? …

> … to say that "[o]rdinarily, looking to the proper law on questions of discharge would give effect to the expectations of the parties" is simply incorrect when the Insolvency Regulation is involved, and also unrealistic "in an age where the rules of private international law are evolving to accommodate the increasingly transnational nature of commerce" and to accommodate transnational insolvencies.
>
> …
>
> Fifth, it would be wrong to think that enforcing a foreign bankruptcy discharge is something radical. For instance, the US courts have always been willing to give effect to a foreign bankruptcy discharge even where it compromises rights granted under US statutes. …
>
> …
>
> Sixth, the failure to recognise foreign bankruptcy discharge is tantamount to refusing to recognise foreign insolvency proceedings. Recognition of international bankruptcy orders and judgments is particularly needed because the equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding and therefore deference to a foreign court of proper jurisdiction is appropriate so long as the foreign proceedings are procedurally fair and do not violate public policy …
>
> …
>
> It is therefore submitted that the English common law refusal to recognise foreign bankruptcy discharge is now utterly out of date. The right approach forward is to discard the traditional position and develop proper choice of law rules that could allow the English court to recognise and enforce a foreign bankruptcy discharge. …

Elsewhere, Look Chan Ho makes the point that insolvency policy necessarily overrides contracts because insolvency law is not about a "bilateral bargain" (at para 6-039) and that the principle in *Gibbs* is "philosophically incompatible and practically irreconcilable" with the British Model Law – the former is predicated on territorialism while the latter is steeped in modified universalism (at para 4-028).

48 Professor Fletcher offered a reformulation of the principle in *Gibbs* at para 2.129 which he argued is a better reflection of the needs of current global economic paradigm. He expressed the following view:

> In the case of a contractual obligation which happens to be governed by English law, a further rule should be developed whereby, if one of the parties to the contract is the subject of insolvency proceedings in a jurisdiction with which he has an established connection based on residence or ties of business, it should be recognised that the possibility of such proceedings must enter into the parties' reasonable expectations in entering their relationship, and as such may furnish a ground for the discharge to take effect under the applicable law.

There is much to commend to this view. I note that this passage was quoted with approval by the Court in *Global Distressed Alpha Fund I Limited Partnership v PT Bakrie Investindo* [2011] 1 WLR 2038 (at [14]) ("*Bakrie*"). It should also be noted that the Court in *Bakrie* would have followed Professor Fletcher's recommendation but for the fact that it felt bound by *Gibbs*, it being a decision of the Court of Appeal. For completeness, I should add that in *Bakrie*, the Court also took the view that creditors who participated in the foreign composition proceedings would be estopped from asserting subsequently that the composition does not bind on the basis of the principle in *Gibbs* (at [31]). A very similar point was made in *AWB Geneva SA v North America Steamships Ltd* [2007] EWHC 1167 (Comm). There is merit in this position as well.

49 While the Court in *Bakrie* might have felt itself bound by the weight of precedent, we, on the other hand, are not similarly constrained. Indeed, it would seem that the applicability of the *Gibbs* principle has not been considered by our courts. I am inclined to the view that the reformulation

offered by Professor Fletcher presents a principled basis to approach the discharge of a debt not under its governing law. I am fortified in my view by three further points:

(a) The approach in Australia which does not see the principle in *Gibbs* as an obstacle to asserting jurisdiction in Australia (see *Bulong Nickel Pty Ltd* [2002] WASC 226);

(b) In *Aoki*, where, while the principle in *Gibbs* was recognised, reservation was expressed by the Court; and

(c) The English courts have, notwithstanding the principle in *Gibbs*, recognised or will recognise the discharge of a foreign debt under English law in certain circumstances: see *Re Magyar, Sea Assets Limited v Perusahaan Perseroan (Persero) PT Perusahaan Penerbangan Garuda Indonesia* [2001] EWCA Civ 1696 ("*Garuda")* and *Indah Kiat*.

50 The principle in *Gibbs* may only create an issue of recognition in jurisdictions that recognise the principle. It should be noted that the principle does not present a problem in the United States which is a pertinent jurisdiction insofar as the US Proceedings are relevant to the restructuring of the debts of PARD. Ultimately, the failure to recognise is an issue for the debtor and perhaps not the creditor. In this regard, if the Applicants are comfortable restructuring debts governed by Hong Kong law and English law under a Singapore scheme, I see no reason why the Court should be slow to assume jurisdiction provided it had subject matter jurisdiction and there exists sufficient nexus to exercise that jurisdiction.

51 The reformulation of the principle in *Gibbs* is an important and timely step in the global insolvency landscape as it may otherwise prove to be an impediment to *"good forum shopping"*. The English courts in *Garuda, In the matter of Codere Finance (UK) Limited* [2015] EWHC 3778 ("*Re Codere*") and *Re Metinvest BV* [2016] EWHC 79 (Ch) have recognised that forum shopping in a *bona fide* attempt to restructure and so as to take advantage of a juridical advantage was permissible. In *Re Codere*, the Court said (at [17]–[18]) as follows:

> 17 … the authorities show that over recent years the English courts have become comfortable with exercising the scheme jurisdiction in relation to companies which have not had longstanding connections with this jurisdiction. Mr. Allison has reviewed the authorities in detail in his skeleton argument, referring me, for example, to cases dealing with companies which have shifted their centres of main interest; a relatively recent authority in which there was a change of governing law; and, by way of perhaps particular analogy to the present case, a line of authorities including the decision of Mr. Justice Norris this year in *Re A I Scheme Ltd*. reported at the convening stage at [2015] EWHC 1233 (Ch) and, at the sanction stage, at [2015] EWHC 2038 (Ch). In that case, a company had voluntarily assumed liabilities with a view to the scheme jurisdiction being exercised. Mr. Justice Norris did not consider that that fact prevented the English court from sanctioning the proposed scheme.
>
> 18 In a sense, of course, what was done in the A I Scheme case, and what is sought to be achieved in the present case, is forum shopping. Debtors are seeking to give the English court jurisdiction so that they can take advantage of the scheme jurisdiction available here and which is not widely available, if available at all, elsewhere. Plainly forum shopping can be undesirable. That can potentially be so, for example, where a debtor seeks to move his COMI with a view to taking advantage of a more favourable bankruptcy regime and so escaping his debts. In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is

> appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping.

52 This appears to be a sound proposition. I am therefore of the view that the principle in *Gibbs* does not create an obstacle to the exercise of jurisdiction. Accordingly, if the Court has subject matter jurisdiction and there exists assets in or sufficient nexus to jurisdiction that warrants the exercise of jurisdiction, debts which are not governed by Singapore law may be legitimately compromised by a scheme proposed under s 210. This would not be a situation akin to *MacKinnon* as there is subject matter jurisdiction and a legitimate basis for exercising it. I am cognisant that this could potentially cover loans extended or debts incurred offshore or elsewhere, and to the extent the lenders or creditors are within jurisdiction, the Court could exercise *in personam* jurisdiction to restrain them from commencing or continuing proceedings against the applicant debtor. However, such restraint would be limited to proceedings *within* jurisdiction for the reasons noted earlier in relation to the Jurisdiction Issue. Also, as noted earlier, it may very well be the case that given that the moratorium is territorial, there may be a need to seek recognition of the scheme sanctioned here or propose a parallel scheme in the relevant jurisdiction as was done in *Re Codere*. Alternatively, it may be, as suggested in *Indah Kiat* and *Re Codere*, that sanction of the scheme ought to be given subject to a non-waivable condition precedent that the scheme to be recognised in the relevant jurisdiction. Appropriate solutions can no doubt be found by creative practitioners.

Conclusion on the Locus Standi Issue

53 I therefore find that save for PARD, the Subsidiaries do not have *locus standi* to present applications under 210. As such, the Court ought not to grant them relief under s 210(10).

The s 210(10) Issue

54 Essentially two sub-issues arise for consideration. They are:

(a) Whether the Plan had sufficient particularity for the purpose of an application under s 210(10) ("the Particularity Issue"); and

(b) Whether the Court should decline to make an order under s 210(10) where a corpus of creditors constituting in value and/or number at least equal to the statutory threshold for a successful scheme vote has indicated that it will resist any scheme that is presented ("Threshold Issues").

I consider each issue in turn.

The Particularity Issue

55 I had observed earlier that the Plan was short on details. It should be noted that the Plan was only placed before the Court on my direction. I had also observed that the thinness of details is not surprising given that the restructuring of PARD and perhaps even the Subsidiaries is very much contingent on a successful restructuring in the Peruvian Proceedings and the US Proceedings. PARD as one of the holding companies of CFGL would benefit from the flow through of the restructuring efforts in those proceedings.

However, as no plan has been presented and approved in those proceedings as yet, a plan with great particularity has not surfaced in the Applications.

56 The Plan may be summarised as follows:

(a) Creditors to exchange their debt on a dollar-for-dollar basis into new debt instruments issued by PARD.

(b) The principal under the new debt instruments will be payable in full, *ie*, no haircut.

(c) The maturity of the new debt instruments is targeted to be five years, subject to negotiation.

(d) The new debt instruments will be guaranteed by each of PAF, PGL and PAE.

(e) The new debt instruments will be secured against the bank accounts of the PARD Group and against inter-company loans amongst the PARD Group.

(f) Most of the other terms and conditions of the new debt instruments will, in form and substance, be substantially similar to those governing creditors' existing claims.

(g) Creditors may also receive warrants that are convertible into PARD's shares.

(h) In terms of feasibility:

(i) The cashflow for the repayment of the new debt instruments is likely to come from one or more of the following sources, being: partial/entire sale of the Peruvian Business; declared dividends by CFGL; revenue from the revitalised Frozen Fish Business; and new equity capital.

(ii) There is the possibility of early repayment for creditors if suitable refinancing opportunities are identified, in which case PARD may exercise its call option under the new debt instruments to make early repayment.

(iii) Creditors will have some control over the feasibility of the scheme through their rights in relation to the operation of PARD Group's bank accounts and the approving of its yearly budget.

57 It was argued by many of the creditors led by BoA, Rabobank and SCB that the Plan was so shorn of detail that it was nothing more than an attempt to game the system in an effort to procure a moratorium under s 210(10). Heavy reliance was placed on the decision in *Re Conchubar Aromatics Ltd and other matters* [2015] SGHC 322 ("*Conchubar*"). It was also argued that the Plan was only filed to satisfy my direction that a plan be presented to the Court.

58 *Conchubar* has recognised, following the Malaysian decision of *Re Kuala Lumpur Industries Bhd* [1990] 2 MLJ 180, that an order under s 210(10) may be ordered notwithstanding that an application for a scheme meeting to be called under s 210(1) has not been made. I endorse that view.

59 Where an application is made under s 210(10) only, *Conchubar* suggests that two factors are of importance:

(a) Is the application made *bona fide* and not in an an attempt to game the system by procuring orders under s 210(10) without any real intention of putting forward a serious proposal; and

(b) Whether the proposal contained sufficient particularity for the Court to make a broad assessment that there is a reasonable prospect of the scheme working and being acceptable to the general run of creditors.

The creditors argued that the lack of particularity in the Plan indicated that the Applicants were attempting to game the system, and that they did not have any intention to present a serious restructuring plan. This they say demonstrated a lack of *bona fides*.

60 It is correct to say that the lack of particularity could indicate a lack of *bona fides*. Equally, seeking a long moratorium under s 210(10) without a conjoined application under s 210(1) could also suggest that. However, there is a limit to how far the argument can be taken. To accept the argument in the present context without qualification is to ignore the fact that the Applicants and the other entities of the Group have resorted to court-based restructuring regimes which involve close court scrutiny. It is axiomatic that Chapter 11 proceedings, such as the US Proceedings, entail close court and creditor supervision principally because it is a debtor-in-possession regime. I am informed that Peruvian restructuring laws are modelled on the structure in

Chapter 11, and will therefore assume that debtors operate under similar strictures.

61 A similar level of scrutiny can and does exist in relation to proceedings under s 210. It is important to note that there is nothing in the language of s 210(10) that restricts the court's power to grant the moratorium subject to such terms as it deems fit. This is a necessary adjunct of the power under s 210(10) as s 210 is a debtor-in-possession regime. The Court is able to ensure that the debtor is making a *bona fide* effort at restructuring by making such orders as it thinks appropriate to ensure close scrutiny of such effort. These could include – as a condition to the grant of a moratorium – directing an application under 210(1) to be filed by a certain date, requiring regular disclosure of information to the court and creditors, providing regular updates to the Court on the status of the restructuring plan and of satellite proceedings in other jurisdictions, and where relevant, the formation of creditor committees, and the appointment of a court representative (at the applicant's cost) to oversee and report to the Court and the creditors on the restructuring efforts. In addition, case management techniques such as cases docketed to judges and case managing the proceedings through regular and frequent case management conferences increase the depth of scrutiny. The debtor is kept on a fairly tight leash, particularly where there is a s 210(10) application without a s 210(1) application.

62 Section 210 is a malleable tool that allows the Court to exercise close control over the restructuring process thereby assuaging the concerns of creditors that the debtor, notwithstanding that it is insolvent, remains in possession and is managing the restructuring efforts. The Court in my view is

able to build in sufficient safeguards, through control mechanisms, into its orders. This as well as the case management techniques referred to earlier enables the Court to strike a balance between the competing interests of the debtor and its creditors.

63 The creditor's argument makes the sufficiency of particulars a cornerstone for the making of the order under s 210(10). They say that is what *Conchubar* says or requires. I think the argument misreads *Conchubar* and does not consider why particularisation was considered as important in the first place. The argument also ignores the reason why the Plan is short of details.

64 In my view, particularisation serves two important functions at the stage of a s210(10) application. First, the insufficiency of particulars could be an indicium of an absence of *bona* fides. However, that has to be seen against a milieu of other relevant considerations. The present case is clearly illustrative of that. The thinness of details in the Plan is principally down to it being contingent on the Peruvian Proceedings and the US Proceedings which concern the most valuable asset – the "crown jewel" – of the Group, namely the Peruvian Business. There therefore exists a cogent and reasonable explanation for the paucity of details, which the Court must take into account in the assessment of *bona fides*. *Conchubar* in fact makes the same point (at [11] and [16]) where is stated as follows:

> 11 … What was required, following *Re GAE Pty Ltd* [1962] VR 252 ("*Re GAE*"), was that the particulars of the scheme gave more than a general layout, so that the court would be able to determine if the scheme was feasible, *and that the intention to invoke the section was bona fide.*
>
> …

> 16 In the present case, there was nothing that would indicate that the proposal was not *bona fide*. The particularisation has been examined above. *Sufficient particularisation is relevant to the assessment of bona fides, as it shows that there is serious intent and thought.* There was nothing either that indicated that the proposal was so bad that it would likely be rejected outright.
>
> [emphasis added]

65 The second function that particularisation serves is to enable the Court, *not the creditors*, to make a broad assessment that there is a reasonable prospect that the scheme will work and be acceptable to the *general run* of creditors: see *Conchubar* (at [12]). As *Conchubar* correctly noted (at [12]), the task is not to undertake a close scrutiny of the merits of the proposal or its viability and likely acceptance by the creditors. Nor should the Court attempt to place itself in the shoes of different creditors with different exposures, commercial motivations and appetite for risk. That would be an impossible task for the Court. Accordingly, the Court, *as opposed to the creditors*, has to be satisfied on a broad assessment that there is a plan that has a reasonable prospect of working and being acceptable to the general run of creditors. Sufficiency of particulars is an aid in this regard. In undertaking this assessment, the Court should not carry out a vote count for the sound reason that the plan is still being discussed, negotiated and developed between the debtor and its creditors before it is ready to be placed at a scheme meeting for a vote. Creditor opposition is obviously relevant but in the face of significant creditor support for the plan, the Court should not engage in a vote count. Such support could be taken as an indicator that there is a reasonable prospect of the plan being acceptable to the general run of creditors: (see *Conchubar* at [12]).

66 In this regard, I note that in *Re Gae Pte Ltd* [1962] VR 252, the Court, when considering the *in pari materia* provision in Australia, expressed the following view (at 256):

> There must, however, be at least a scheme the general principles of which have been defined, and which, though it may need completion by the addition of details such as schedules of creditors and their debts, is nevertheless at a stage at which the Court would be justified in ordering a meeting of creditors. …

I am unable to accept this view insofar as it suggests that it the plan at the stage of a s 210(10) application must have reached a level of maturity that warrants the Court calling for a scheme meeting at a convening hearing under s 210(1). I do believe that such an approach is not only inconsistent with *Conchubar*, but is also not warranted by the language of s 210(10). Once it is accepted that an application under s 210(10) may be delinked from an application under s 210(1), in a situation where they are, it is not inconceivable and perhaps even likely that the plan that is placed before the Court in a s 210(10) application may differ from that which is placed before the Court in a convening hearing. It seems more than possible that the terms and details of the compromise may change by the time the convening hearing takes place. The plan in a s 210(10) application may very well be nascent as time may be required to discuss and negotiate a more detailed plan before it is presented at a convening hearing. As such, I do not see why the plan at the point of a 210(10) application must have the attributes suggested in *Re Gae*.

67 The argument was made that the words "any such" in s 210(10) indicates that the view is *Re Gae* is correct. While that is a possible reading, I would prefer to read the words as a reference to the *fact* that a plan has been proposed in a s 210(10) application that will be followed by a plan presented

to the Court at the convening hearing. It *does not* in my view mean that both plans are the same but for some difference in detail. The words "any such" is a reference to the fact that a plan that has been proposed in each instance as opposed to those plans being the same or similar. To construe otherwise would be to not recognise the fact that the plan will evolve between the applications under ss 210(10) and 210(1). In my view, what is required is that the debtor has proposed a plan in a *bona fide* application under s 210(10) with the intention of following through with a convening hearing thereafter under s 210(1) which may or may not involve a plan on exactly the same terms. The assessment that the Court makes as to the feasibility and acceptability of the plan to the general run of creditors at the stage of an application under s 210(10) is limited to that plan only. Any shortcoming in the particulars of the plan will have to be explained away by cogent, credible and reasonable reasons. I hasten to add that my remarks should not be in any way be read as an invitation to file an application under s 210(10) without a plan – s 210(10) does not allow for that. It should also not be read as a licence to file plans without adequate particulars. The Court will scrupulously scrutinise the reasons offered if that were to happen.

68 Ultimately, the key consideration appears to me to be the question of *bona fides* – is there a *bona fide* intention to invoke s 210(10)? In this regard, the further question is whether there is a sound reason why the Plan is short of particulars? I am persuaded, at least for now, that having examined the Plan *and the circumstances*, there is a *bona fide* attempt *in the circumstances* to propose a compromise or arrangement between the Applicants and their creditors. It seems clear that the shortness of details in the Plan is readily explained by the absence of an outcome in the Peruvian Proceedings and the

US Proceedings. I am also satisfied, on a broad assessment, that there is a reasonable prospect that the Plan is acceptable to the general run of creditors. In this regard, I have placed some reliance on the significant support from some creditors for the Applicants' applications. I am cognisant that support for these applications does not necessarily mean that there is also support for the Plan. However, as I have not heard otherwise, I conclude as I have done.

The Threshold Issue

69 The creditors who seek to set aside the PARD Orders and the Obligors Orders argue that as they collectively hold more than 25% of the debt owed by the Applicants, the scheme will never receive the approval of the requisite majority of creditors at a scheme meeting. As such, it would be futile to grant or extend a moratorium under s 210(10). The creditors' argument is premised on an extension of *Re Ng Huat Foundations Pte Ltd* [2006] SGHC 112 *("Re Ng Huat")* to a s 210(10) application. *Re Ng Huat* held that a court in a convening hearing should consider whether there is a realistic prospect of approval of the requisite majority of creditors under the Act, both in terms of value and numbers. If the prospect is not realistic, a scheme meeting ought not to be ordered. *Re Ng Huat* was cited with approval by the Court of Appeal in *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 and this court in *Re Punj Lloyd Pte Ltd and another matter* [2015] SGHC 321.

70 It would be apparent from my remarks on the Particularity Issue that I do not believe that it would be appropriate or indeed correct to apply *Re Ng Huat* to a s 210(10) application. It seems self-evident that if the plan that is before the Court for the purpose of a s 210(10) application is liable to or

capable of evolution and change because it is nascent and subject to discussion and negotiation, taking a straw poll of creditors at that stage would not be justified. *Conchubar* (at [12]) has warned against this, suggesting that a close scrutiny of the likely acceptance of the plan by creditors ought to be avoided when the Court makes the broad assessment. It is a matter of common logic that as the plan evolves, creditors are prone to change their position based on their commercial motivations. Indeed, I note that one creditor, UOB, has changed its position from unequivocal opposition to neutrality. Accordingly, to make an assessment of creditor support at the stage of a s 210(10) application is premature.

Conclusion on the s 210(10) Issue

71 I therefore find that the Plan satisfies s 210(10). In addition, I am of the view that the fact that more than 25% of the creditors will presumably oppose any scheme that the Applicants put on the table is no reason to set aside the PARD Orders and the Obligors Orders.

Some observations

72 In the final analysis, the approach that I have taken to the construction of s 210(10) is not only justified as a matter of principle but warranted in present day circumstances where cross-border restructurings are increasingly becoming common, given the proliferation of cross-border investments and trade. Where businesses entities are interconnected and cross-border in nature, it is only to be expected that restructuring of such business entities is undertaken on a composite, interconnected and inter-related basis. The formulation of such a composite plan is a long, involved and complicated

exercise simply by reason of the involvement of multiple jurisdictions with different restructuring regimes and the interweaving of multifarious business and creditor interests. The individual plans for the units that collectively make up the composite plan will therefore take time to formulate and finesse. The Courts must recognise and not turn a blind eye to this reality.

73 The present case is illustrative of this reality. PARD, having listed and borrowed in Singapore (in the case of the SGD Bonds) and having operations here seeks to restructure its debts in Singapore. Its principal asset is its equity in the Peruvian Business through its indirect holding in CFGL. This makes PARD's restructuring plan here heavily contingent on the plan for the Peruvian Business and the restructuring of CFGL. It therefore seems to me incorrect to assert that PARD has not satisfied s 210(10) and *Conchubar* because it has not offered a fleshed out plan. This ignores the fact that PARD cannot restructure in isolation as it is effectively a holding company and its restructuring will depend on the value maximisation of its operating units. The creditors in extending credit to PARD must have reasonably anticipated this paradigm. They should not be so willing to argue without reference to this.

74 I should point out that in the course of arguments, I raised the question that if the creditors' argument were accepted on the Particularity Issue, a company in a situation such as PARD's would face significant difficulty in restructuring under s 210. The response which I received, which implicitly acknowledged the point I made, offered the solution that PARD could apply for a provisional liquidator in Bermuda as it was incorporated there. I found this response to be not very satisfactory. First, it is axiomatic that the provisional liquidator will then take charge of the restructuring as it is settled

law that the appointment of a provisional liquidator effectively displaces management save for some residuary responsibilities (see *Re Union Accident Insurance Co Ltd* [1972] 1 WLR 640 and *Walter Woon on Company Law* (Sweet & Maxwell Asia, 3rd Ed, 2009) at para 17.98). This was acknowledged in the response. This seems to go against the grain of, and indeed is anathema to, a debtor-in-possession regime under s 210. Second, the suggestion in the response only has the potential to work where the company is incorporated elsewhere. If the company is incorporated here, it will have to resort to an application for judicial management to secure the benefit of a moratorium thereby displacing management once again. There would therefore be no scope for the application of a debtor-in-possession regime under s 210. It seemed to me that the solution to the problem did not lie in the response I had received but instead in the interpretation of the statutory language of s 210 that I have arrived at.

75 I make an additional point. This case is also illustrative of the need for communication and cooperation between courts and the insolvency administrators of the respective insolvency proceedings in the formulation of what is effectively a group restructuring plan. It seems axiomatic that such communication and cooperation will not only facilitate the formulation of the plan but also foster better understanding and resolution of issues involving and between the respective proceedings, and strengthen comity in the process. I had strongly encouraged the Applicants in the earlier hearings to come together with the insolvency representatives in the respective proceedings to formulate protocols for such communication and cooperation, subject to approval by the relevant courts. The Applicants unfortunately did not take my suggestion forward citing their battles with the creditors here and elsewhere as

a primary reason. I do not think that this is at all a satisfactory or persuasive reason. I reiterate my call for such a protocol to be formulated and implemented, at the very least with the US Proceedings. I hope that at least this time, my encouragement is pursued with vigour.

76 The importance of having a channel for communication and recognising comity became readily apparent to me when it was brought to my attention in the course of argument that one of the main reasons for wanting to restrict the moratorium to territorial limits was so that a provisional liquidator could be appointed at PARD's place of incorporation, Bermuda, on application by certain creditors. This was with a view to taking control of the US Proceedings and thereby the Peruvian Proceedings. The intention, it would seem, was to stop both proceedings in order to effect a sale of the Peruvian Business. This troubled me.

77 Apart from the small matter of the appointment of a provisional liquidator being antithetical to a debtor-in-possession restructuring of PARD in Singapore, it seemed apparent that the intentions of the creditors, or at least some of them, could very well render the restructuring effort here nugatory, given the importance of the Peruvian Business to PARD's efforts in this regard. This was difficult to accept given that the bondholders of the SGD bonds only had recourse to PARD, and had subscribed to the bonds on the basis of, *inter alia,* the value of PARD's interest in the Peruvian Business. It would seem that the creditors who were intent of proceeding in this manner might not be in the same boat. It may very well be that the composite restructuring plan approved by the creditors will eventually involve a managed sale of the Peruvian Business as an important integer of such a plan. However,

that is not the same as a sale by a provisional liquidator as an essential step in the process of liquidation. It is also not inconceivable that such a plan will not necessarily involve the sale of all or any part of the Peruvian Business. Therefore, the steps envisaged by the creditors did cast a potential pall on the proceedings under s 210 which this Court has exercised subject matter jurisdiction over, at least insofar as PARD. It would therefore seem that any application envisaged by the creditor ought to have the benefit of communication between this court and the relevant court in Bermuda, and perhaps even the Court having charge of the US Proceedings. I will take this opportunity to encourage the parties to enter into a protocol that permits communication between the Courts in Bermuda and Singapore on that issue.

78 In this regard, I draw reference to the judgment of the Supreme Court of Bermuda in *Re Contel Corporation Ltd* [2011] SC (Bda) 14 Com ("*Contel*") (at [11]). There, a Bermuda incorporated company applied for recognition of scheme sanctioned in Singapore. It should be noted that PARD is also Bermuda-incorporated. The company had brought no parallel scheme in Bermuda. Kawaley J (as he then was) in the Supreme Court of Bermuda recognised the order of Quentin Loh J in Singapore sanctioning a scheme. In a judgment which I shall describe as progressive, Kawaley J, who has since assumed the position of Chief Justice, applied the principle in *Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508 in granting recognition to Loh J's order. This case illustrates the importance of comity and the need to grant recognition where it is appropriate to do so in the particular circumstances of the case. This is entirely in step with the views expressed by the Court of Appeal in *Beluga Chartering* and this Court in *Re Opti-Medix Ltd (in*

liquidation) and another matter [2016] 4 SLR 312. There could therefore be value in allowing the restructuring efforts of PARD in Singapore to run their course insofar as they are allied to the outcome of the efforts in the US Proceedings and Peruvian Proceedings, subject to adequate supervision by the Court in all three proceedings. To this end therefore, I would invite parties to bring these grounds and the notes of arguments in these proceedings to the attention of the Honourable Court in Bermuda that may hear any application for the appointing of a provisional liquidator over PARD, and encourage parties to enter into a protocol for communication between the Courts in Bermuda and Singapore on that issue.

Conclusion

79 In conclusion, I set aside the Obligors Orders, save as regards PAF, and vary the PARD Orders by limiting the moratorium thereunder to proceedings in Singapore. As no application has been filed as regards PAF, I am unable to address the setting aside of the Obligors Orders insofar as they relate to PAF. However, in the light of my views, I declined to grant the application for extension of the moratorium as regards PAF. That moratorium expired on 26 September 2016.

80 In addition, I am minded to allow PARD's application to extend the moratorium under the PARD Orders, subject to the variation in [80] above, and would like to hear parties on the period and the terms upon which such extension ought to be granted, and on costs. I note that in the light of my conclusion that the PARD Orders do not operate extraterritorially, Maybank has informed me that it is not pursuing that part of its application in Summons 4008 of 2016 for orders that PARD and its directors undertake to all creditors

that PARD will be subject to Singapore law as regards unfair preference and transactions at undervalue. For the same reason, BoA has also indicated, subject to instructions, that it is likely to not pursue that part of its application in Summons 3857 of 2016 seeking leave to commence winding up proceedings against PARD, whether here, in Bermuda or elsewhere.

81 Finally, I would like to record my appreciation to counsel for all parties for their assistance to the Court on the challenging issues that have been canvassed in this case. Their assistance was articulate, thorough and invaluable, and was of immense use to me in coming to the conclusions that I have.

Kannan Ramesh
Judicial Commissioner

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Lee Eng Beng, *SC*, Mark Cheng, Matthew Teo and Zhao Jiawei (Rajah & Tann Singapore LLP) for Malayan Banking Berhad;
Suresh Nair and Nicole Foo (Advocatus Law LLP) for Informal Steering Committee;
Nish Shetty and Keith Han (Cavenagh Law LLP) for Steering Committee of Bondholders;
Kwek Fei Joseph, Bondholder, in person; and
Wang Chan Tak, Bondholder, in person.

Annex 1

Date	**Application**	**Filed by**	**Purpose**
1 July 2016	OS 668/2016	PARD	For moratoria under s 210(1) for PARD, PAE, PGL and PAF until 31 January 2017
4 August 2016	OS 668/2016 (SUM 3813)	PARD	To extend the 1 July 2016 Order till 12 February 2017
8 August 2016	OS 668/2016 (SUM 3857)	BOA	To, *inter alia*, limit the 1 July 2016 Order to PARD
12 August 2016	OS 812/2016	PGL	For moratorium under s 210(10) until 15 February 2017
12 August 2016	OS 813/2016	PAE	For moratorium under s 210(10) until 15 February 2017
12 August 2016	OS 814/2016	PAF	For moratorium under s 210(10) until 15 February 2017

17 August 2016	OS 668/2016 (SUM 4008)	Maybank	To set aside the PARD Orders and in the event that the PARD Orders are maintained or varied, for an undertaking that PARD will be subject to Singapore law of unfair preferences and undervalue transactions
19 August 2016	OS 813/2016 (SUM 4030)	Maybank	To set aside the 15 August 2016 Order (part of the Obligor Orders) and in the event that the order is maintained or varied, for an undertaking that PAE will be subject to Singapore law of unfair preferences and undervalue transactions
19 August 2016	OS 812/2016 (SUM 4031)	Maybank	To set aside the 15 August 2016 Order (part of the Obligor Orders) and in the event that the order is maintained or varied, for

			an undertaking that PGL will be subject to Singapore law of unfair preferences and undervalue transactions
6 September 2016	OS 668/2016 (SUM 4325)	PARD	To extend the PARD Orders (*ie*, the 1 July 2016 Order as varied by the 8 August 2016 Order) until 13 January 2017
6 September 2016	OS 812/2016 (SUM 4326)	PGL	To extend the 15 August 2016 Order (part of the Obligor Orders) until 13 January 2017
6 September 2016	OS 813/2016 (SUM 4327)	PAE	To extend the 15 August 2016 Order (part of the Obligor Orders) until 13 January 2017
6 September 2016	OS 814/2016 (SUM 4328)	PAF	To extend the 15 August 2016 Order (part of the Obligor Orders) until 13 January 2017

9 September 2016	OS 668/2016 (SUM 4439)	Steering Committee of Bondholders	For, *inter alia*, leave to file an affidavit in the proceedings

Annex 2