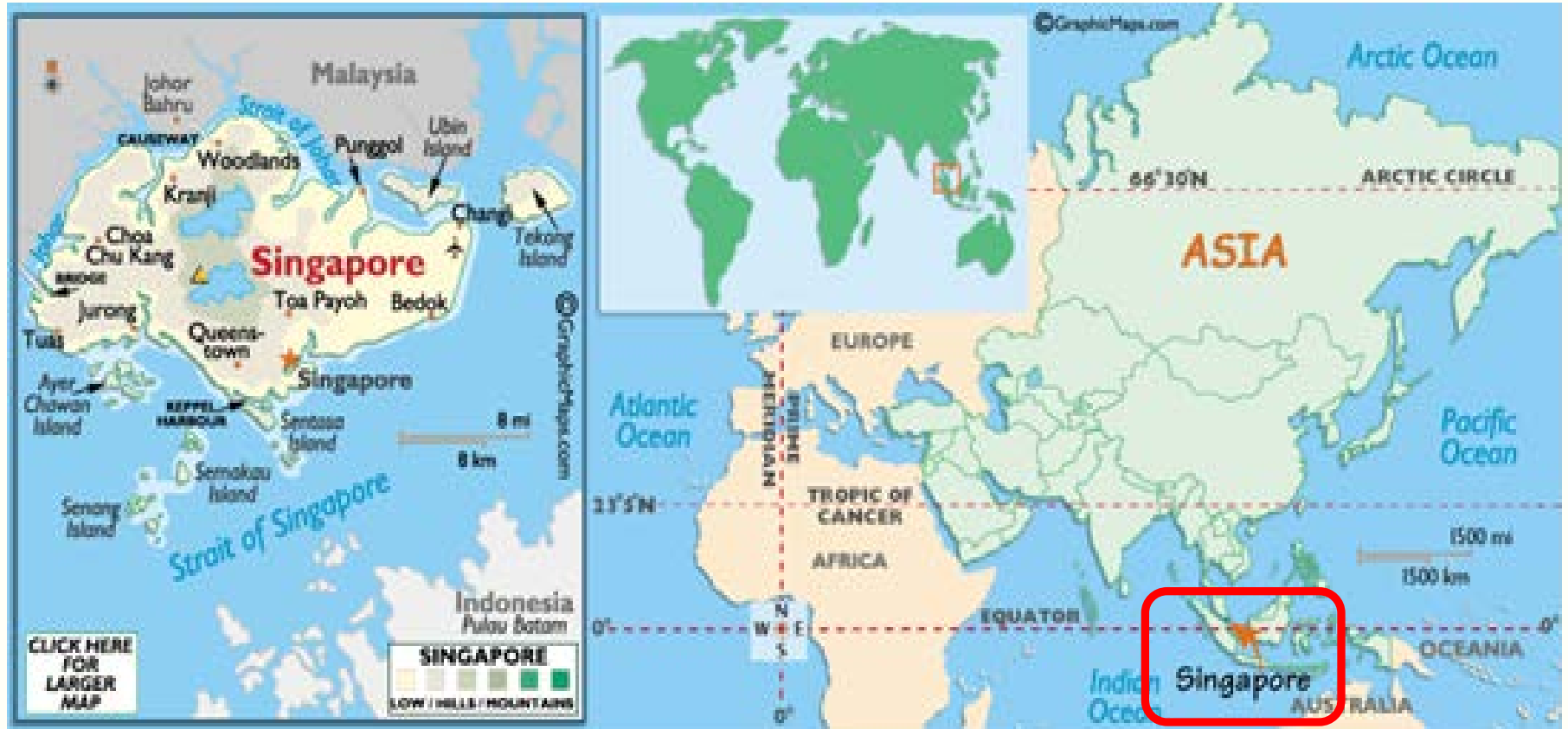




# **CROSS BORDER INSOLVENCY: THE SINGAPORE APPROACH**

**JUSTICE VINODH COOMARASWAMY  
SUPREME COURT OF SINGAPORE**

# SINGAPORE





# SINGAPORE



# ACCESS

- A liquidator of a foreign company will be recognised as the representative of the company for the purposes of getting in and realising the company's worldwide assets and there will generally be no basis for a Singapore court to decline to recognise the liquidator's claim to assets belonging to the company under general principles of property law.

*Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd*  
[2014] 2 SLR 815 at [87]

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# ACCESS

- A foreign liquidator of a foreign company wound up in its place of incorporation or origin has the powers of a Singapore liquidator until a Singapore liquidator is appointed.

S377(2)(b) of the Companies Act

- But the foreign liquidator does not have *all* the powers of a Singapore liquidator. The powers are restricted to the power to recover assets of the foreign company in Singapore.

*Official Receiver of Hong Kong v Kao Wei Tseng and Ors* [1990] 1 SLR(R) 315

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## ACCESS

- A foreign liquidator has standing to apply to the Singapore court even when a Singapore liquidator has been appointed.
- Singapore law recognises the interest of the foreign liquidator in the fund to be received from the Singapore liquidation.

*Tobru Motobayashi v Official Receiver and another [2000] 3 SLR(R) 435 (“Tobru Motobayashi “)*

# ACCESS

- The Singapore courts have recognised a bankruptcy trustee appointed in Japan over a BVI company (and vested Singapore assets in him) on the basis that:
  - Japan was the COMI; and
  - an undertaking that Singapore creditors would be paid out of the Singapore assets under Singapore law before the Singapore estate was remitted to Japan.

*Re Opti-Medix Ltd (in liquidation)* 2016] 4 SLR 312

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# RECOGNITION OF ORDERS

- An order of a foreign court in its insolvency jurisdiction will be recognised and enforced in Singapore on the usual principles applicable to the recognition of foreign judgments.

*Rubin and another v Eurofinance SA and others* [2012] UKSC 46  
 (“*Rubin*”).



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# RECOGNITION OF ORDERS

- An English court has a common law power to assist a foreign insolvency proceeding so far as it properly can.
- An English court does not have jurisdiction over parties simply by virtue of its power (or desire) to assist a foreign insolvency proceeding.
- An English court does not have a common law power to assist a foreign insolvency proceeding by doing within England whatever it can do in support of a domestic insolvency.

*Singularis Holdings Limited v PWC* [2014] UKPC 36



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# RECOGNITION OF ORDERS

- Where a foreign insolvency proceeding is not mirrored by an insolvency proceeding in Singapore, the Singapore court is not obliged to uphold any foreign stay.
- But it is open to the Singapore court to assist the foreign insolvency proceeding by exercising its inherent jurisdiction to stay Singapore proceedings.

*Beluga* at [85] and [98]

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# RECOGNITION OF ORDERS

- *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd)* [2016] SGHC 195 (“*Hanjin*”)
  - Factors to be considered in granting recognition:
    - 1) Sufficiency of connection of the company to the forum in which the rehabilitation is taking place.
    - 2) What the rehabilitation process entails, including its impact on domestic creditors and whether it is fair and equitable in the circumstances.
    - 3) Whether there are any strong countervailing reasons against recognition of the foreign rehabilitation proceedings.

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# RELIEF

- Vesting of assets and records in the foreign liquidator
  - Once the foreign liquidator is recognised, the Singapore court is prepared to vest the assets and records in the foreign company in Singapore in the foreign liquidator as of the date of the foreign order.
  - See *Opti-Medix* (supra)

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# RELIEF

- Restraint and stay orders
  - Granted in *Hanjin* (supra)
  - Imperative for orderly rehabilitation and restructuring of the company running a global business across jurisdictions.
  - Need to ensure that the company's assets could be marshalled or collected for the rehabilitation and restructuring.
  - In effect, it is an anti-suit injunction with no undertaking as to damages and with worldwide effect.

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## RELIEF

- *Pacific Andes Resources Development Ltd and other matters* [2016] SGHC 210 (“*Pacific Andes*”)
  - The applicants applied for a moratorium under s210(10), the Scheme of Arrangement provisions in Singapore.
  - Held: A Singapore court has no jurisdiction under s210(10) or as a matter of inherent jurisdiction to restrain proceedings outside Singapore.

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## JUDICIAL INSOLVENCY NETWORK

- The Judicial Insolvency Network (“JIN”) is an initiative of our Chief Justice implemented by Aedit Abdullah JC and Kannan Ramesh JC.
- The aim of the JIN is to encourage communication and cooperation amongst courts by bringing together best practices in cross-border restructuring and insolvency, which is critical in today’s increasingly global economy.
- The inaugural conference of the JIN was held in Singapore on 10 and 11 October 2016.

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# JUDICIAL INSOLVENCY NETWORK

- The judges that attended the conference included judges from
  - Australia (Federal Court of Australia and New South Wales)
  - British Virgin Islands
  - Canada (Ontario)
  - Cayman Islands
  - England & Wales
  - Hong Kong SAR (as observer)
  - United States (Southern District of New York and Delaware)
  - Singapore
- Judges from Bermuda, Japan and South Korea have been kept informed of the proceedings at the conference at their request.



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## JUDICIAL INSOLVENCY NETWORK

- The conference concluded with the preparation of draft Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (“the JIN Guidelines”).
- The JIN Guidelines are the product of the collective effort of the participating judges at the conference.
- The JIN Guidelines are the first set of guidelines developed solely by insolvency judges in key commercial jurisdictions as a best practices guide to assist stakeholders in a cross-border insolvency to develop protocols for court-to-court communication and cooperation.

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# JUDICIAL INSOLVENCY NETWORK

- The JIN Guidelines address key aspects of communication and cooperation among courts, insolvency representatives and other parties involved in cross-border insolvency proceedings.
- Provisions for joint hearings were included in an appendix.
- The use of the JIN Guidelines will facilitate the preservation of enterprise value of financially distressed cross-border businesses by encouraging comity and ameliorating the risk of inconsistent orders or judgments thereby minimizing legal costs.

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# JUDICIAL INSOLVENCY NETWORK

- The implementation of the JIN Guidelines is a matter that is entirely within the discretion of the jurisdictions that the participating judges represent.
- There is optimism that the JIN Guidelines will be implemented by several jurisdictions by the 2nd quarter of 2017.
- The JIN will be looking to expand at a sustained pace. It is envisaged that JIN conferences will take place every two years in various jurisdictions where the JIN Guidelines will be discussed and refined, and new initiatives discussed.

# RESTRUCTURING HUB INITIATIVE

- Singapore is an ideal hub for restructuring work.
- Singapore is a convenient and natural location which provides proximity and connectivity to major Asian economies.
- Legal processes, such as scheme of arrangements or judicial management are well established and offer a flexible approach to restructuring.

# RESTRUCTURING HUB INITIATIVE

- Singapore conducted an overview of its insolvency regime which resulted in the Insolvency Law Review Committee (“ILRC”) report in October 2013.
- ILRC recommended:
  - Adoption of the Model Law
  - Extension of judicial management to foreign companies which will give these companies an option to come to and use the Singapore process to restructure its debt.
  - Adoption of features of US Bankruptcy Code: super-priority for rescue financing and cram down provisions

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# RESTRUCTURING HUB INITIATIVE

- The Committee to Strengthen Singapore as an International Centre for Debt Restructuring (20 April 2016)
  - To enhance the legal framework for restructuring
    - Creating bespoke rules and procedures for restructuring
    - Having a bench of specialised judges.
    - Increasing use of dispute resolution processes to resolve insolvency issues.
  - To create a restructuring friendly ecosystem
    - Increase availability of rescue financing
    - Strengthen the quality of insolvency professionals in Singapore

**THANK YOU**

