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CREDITOR SCHEMES OF ARRANGEMENT AND DISSENTING CREDITOR PROTECTION

In 2014 and 2017, changes were made to the statutory provisions which govern the use of schemes of arrangement in debt restructurings in Singapore. This article looks at three of those changes, which relate to the headcount test, cram-downs and pre-packs. These changes were intended to promote debt restructurings, but have also diluted some of the protections that were previously available to dissenting creditors. This reflects a shift in balance towards favouring the policy objectives of promoting restructurings and away from the protection of dissenting creditors' rights, but various safeguards continue to ensure that the balance remains fair.

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I. Introduction

1 A scheme of arrangement is a statutory mechanism for implementing a transaction between a company and its members or creditors, particularly where a minority of those members or creditors do not consent to the transaction. Schemes can be used in many types of corporate transactions, but are particularly useful for implementing debt restructuring transactions in relation to financially distressed companies where one or more creditors do not consent. This article focuses on such schemes.

2 As a debt restructuring scheme essentially imposes the views of majority creditors on the dissenting minority, the traditional scheme process has certain protections built into it to protect dissenting creditors from being unfairly prejudiced. These protections strike a balance between the policy objectives of promoting restructurings, on the one hand, and protecting dissenting creditors' rights from being unfairly varied, on the other.

3 In Singapore, schemes are provided for in ss 210–212 of the Companies Act.[1] In 2014 and 2017, various legislative amendments were made to the statutory provisions concerning schemes, many with a view to promoting restructurings.[2]

4 This article looks at three of those changes in particular: (a) a change in the requirement that a majority in number of creditors must vote in favour of the scheme (commonly called "the headcount test"); (b) the introduction of a provision allowing for a scheme to be sanctioned by the court even where the voting thresholds have not been met in a particular class of creditors (commonly called a "cram-down"); and (c) the introduction of a provision allowing for a scheme to be implemented without having to hold a creditors' meeting (commonly called a "pre-pack"). It is argued that these changes have diluted some of the protections that were previously available to dissenting creditors under the traditional scheme process. The balance has therefore shifted in favour of the policy objectives of promoting restructurings, although there are still safeguards present to ensure the balance continues to be fair to dissenting creditors.

5 This article begins by describing the traditional scheme process in a simplified way, without the complexities created by the recent changes. It then gives a brief overview of the policy objectives underlying the promotion of restructurings and describes four countervailing protection mechanisms that safeguard dissenting creditors' rights from being unfairly interfered with. The three changes are then discussed in turn. The impact on the balance between policy objectives and protecting dissenting creditors' rights is then considered, before concluding.

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1 Cap 50, 2006 Rev Ed. See generally Tracey Evans Chan, "Schemes of Arrangement as a Corporate Rescue Mechanism: The Singapore Experience" (2009) 18 *International Insolvency Review* 37.

2 For useful commentary on these changes generally, see Wee Meng Seng, "Whither the Scheme of Arrangement in Singapore: More Chapter 11, Less Scheme?" (24 February 2017) <https://ssrn.com/abstract=2922956> (accessed 15 March 2018), Paul Apáthy & Emmanuel Chua, "Singapore's New 'Supercharged' Scheme of Arrangement" (2017) 5 *Butterworths Journal of International Banking and Finance Law* 282, Alvin Chia, Manoj Pillay Sandrasegara & Smitha Menon, "Super Priority in Rescue Financing: Lifeline or Lasso?" (2017) 5 *Butterworths Journal of International Banking and Finance Law* 286 and Sim Kwan Kiat & Chan Min Hui, "The New Insolvency Landscape in Singapore" (2018) 15 *International Corporate Rescue* 4.

II. Simplified view of traditional scheme process

6 Before considering the recent changes, it would be useful to set out a simplified overview of the traditional scheme process, without the added complexities now created by the changes. This Section is an attempt to do that, so that the discussion of the changes that appears later on can be properly contextualised. What follows is highly simplified,[3] emphasising only the key steps and certain details that are relevant for contextualising the discussion that appears later on.

7 The first main stage in the scheme process involves the debtor company applying to court for an order that a creditors' meeting be summoned.[4] One of the key considerations for the court at this stage is whether the creditors have been properly separated into classes.[5] The principle used for classification is that those creditors whose rights are so dissimilar to each other's that they cannot sensibly consult together with a view to their common interest must vote in different classes.[6] At this stage, the court does not consider the merits or fairness of the scheme.[7]

8 If the court is satisfied and orders a meeting to be summoned, the second main stage consists of holding the meeting and the voting at the meeting. There are two main voting thresholds at this stage if the scheme is to pass. First, a majority in number of the creditors in each class must vote in favour of the scheme ("the headcount test").[8] Second, the majority in number must also represent at least three-fourths in value of the creditors in that class (commonly called, "the value test").[9] It bears emphasising that these voting thresholds must be met in each class, and not merely on an overall basis. Also, these thresholds only need to be met among those creditors who are "present and voting either in person or by proxy at the meeting".[10]

9 If the voting thresholds are met, the third main stage requires the applicant to return to court for the scheme to be approved by order of the court.[11] Here, the court must be satisfied of three things.[12] First,

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3 For a fuller description of the scheme process, see *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213 at [55]–[70].
4 Companies Act (Cap 50, 2006 Rev Ed) s 210(1).
5 *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213 at [62].
6 *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213 at [131].
7 *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213 at [63].
8 Companies Act (Cap 50, 2006 Rev Ed) s 210(3AB)(*a*).
9 Companies Act (Cap 50, 2006 Rev Ed) s 210(3AB)(*b*).
10 Companies Act (Cap 50, 2006 Rev Ed) s 210(3AB).
11 Companies Act (Cap 50, 2006 Rev Ed) s 210(3AB)(*c*).
12 *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213 at [70].

the court must be satisfied that the statutory provisions have been complied with. Second, the court must be satisfied that "those who attended the meeting were fairly representative of the class of creditors … and that the statutory majority did not coerce the minority to promote interests adverse to those of the class whom the statutory majority purported to represent".[13] Third, the court must be satisfied that "the scheme is one which a man of business or an intelligent and honest man, being a member of the class concerned and acting in respect of his interest, would reasonably approve".[14]

10 If the scheme passes through all of the three main stages above, the final court order issued by the court is lodged with the Registrar of Companies, whereupon the scheme becomes binding on all creditors, including any dissenting creditors who may have voted against the scheme.[15]

III. Policy objectives and dissenting creditor protection

11 There are several policy objectives underpinning the desire to promote debt restructurings.[16] Perhaps most current among these policy objectives is the aim of promoting Singapore as a centre for international debt restructuring. This was the key objective underpinning the *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring*[17] ("ICDR report") issued in 2016, which prompted two of the three legislative changes discussed in this article. The aim was to attract businesses in the region to use Singapore as a base for their debt restructuring transactions.[18] This would in turn benefit local business sectors such as the legal and financial professional services sectors.[19] Other policy objectives referred

13 *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213 at [70(b)].
14 *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213 at [70(c)].
15 Companies Act (Cap 50, 2006 Rev Ed) ss 210(3AA) and 210(5).
16 For a fuller discussion of the policy objectives of promoting restructurings, see Gerard McCormack, "Corporate Rescue Law in Singapore and the Appropriateness of Chapter 11 of the US Bankruptcy Code as a Model" (2008) 20 SAcLJ 396 at 396–406.
17 Ministry of Law, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at para 1.6 <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Final%20DR%20Report.pdf> (accessed 15 March 2018).
18 Ministry of Law, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at para 2.4 <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Final%20DR%20Report.pdf> (accessed 15 March 2018).
19 Ministry of Law, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at para 1.9

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to in the ICDR report include preserving viable businesses,[20] allowing creditors to obtain better recoveries than in a liquidation[21] and protecting employees of distressed businesses from losing their jobs.[22]

12 While these policy objectives may be laudable, it should not be forgotten on the other hand that in many restructurings implemented using schemes, dissenting creditors will have their rights as creditors varied without their consent. There is therefore a tension between the pursuit of the policy objectives and the sanctity of dissenting creditors' rights, and this necessitates that there be protection mechanisms to ensure that dissenting creditors' rights are not unfairly prejudiced in the name of the policy objectives. A number of such protection mechanisms form part of the traditional scheme process as outlined above. Four of these will be relevant to the discussion here.

13 First, there is the requirement that creditors be put into classes and that the voting thresholds be met in every class before the court can sanction the scheme. This means that a group of creditors with different rights or whose rights are affected differently by the proposed scheme will ordinarily be put into a separate class for the purposes of voting. If the voting thresholds are not met in this separate class of creditors, the scheme cannot be sanctioned by the court, as the voting thresholds will not have been met in every class. A class of dissenting creditors will therefore be able to prevent a scheme from being implemented, instead of having their votes drowned out by having to vote together with other creditors who may have better rights against the company or who may be getting better terms under the scheme.

<https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Final%20DR%20Report.pdf> (accessed 15 March 2018).

20 Ministry of Law, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at para 1.2 <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Final%20DR%20Report.pdf> (accessed 15 March 2018).

21 Ministry of Law, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at para 1.2 <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Final%20DR%20Report.pdf> (accessed 15 March 2018).

22 Ministry of Law, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at para 3.37 <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Final%20DR%20Report.pdf> (accessed 15 March 2018). Many of these policy objectives were also recognised in *BNP Paribas v Jurong Shipyard Pte Ltd* [2009] 2 SLR(R) 949 at [19], where the court noted, "[where] a petition to wind up a temporarily insolvent but commercially viable company is filed, many other economic and social interests may be affected, such as those of its employees, the non-petitioning creditors, as well as the company's suppliers, customers and shareholders".

14 Second, there is the headcount test. Requiring at least a majority in number of creditors in each class to vote in favour of a scheme means that a group of dissenting creditors who are numerous but whose claims are comparatively small in value will not have their votes drowned out just because the value of their claims is comparatively small. For example, a single creditor with a claim whose value exceeds 75% of the total value of creditor claims may satisfy the value test on its own, but will still only be able to push through a scheme if a majority in number of creditors, including other creditors who may have smaller claims, also vote in favour of the scheme.

15 Third, there is the creditors' meeting itself. While "paper meetings" are now common in many other areas of company law, creditors' meetings to consider schemes are still held in the traditional, physical way. This means that dissenting creditors have an opportunity to air their views at the meeting, in the hope of persuading other creditors to also vote against the scheme and thereby prevent a scheme from being implemented. This "voice" at the meeting is valuable to dissenting creditors.

16 Lastly, there is the final court hearing for the sanctioning of the scheme. Even if the voting thresholds have been met, before the court can sanction the scheme, it will need to be satisfied that those who attended the meeting were fairly representative of the class of creditors, and that the majority did not coerce the minority to promote interests adverse to those of the class whom the majority purported to represent. For example, where the majority creditors are companies that are related to the debtor company, they may have voted with the intention of promoting their interests as related companies. As this interest may not be shared by other creditors in the same class which are not related companies, the court may refuse to sanction the scheme.[23] The court also needs to be satisfied that the scheme is one which a man of business or an intelligent and honest man, being a member of the class concerned and acting in respect of his interest, would reasonably approve. This ensures at least a baseline level of "objective fairness"[24] and reasonableness[25] in the scheme, without which dissenting creditors should not have their rights as creditors interfered with without their consent.

17 These four protection mechanisms strike a balance between the policy objectives of promoting restructurings on the one hand, and the

23 See, *eg*, *Re Landmark Corp Ltd* [1968] 1 NSWR 759 and *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213 at [160].
24 *The Royal Bank of Scotland NV v TT International Ltd* [2012] 2 SLR 213 at [70].
25 *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd* [2017] 2 SLR 898 at [79].

sanctity of dissenting creditors' rights on the other hand. However, three recent legislative changes may have shifted this balance in favour of promoting restructurings. These three changes relate to the headcount test, the need for the voting thresholds to be met in every class of creditors and the need for a creditors' meeting. Each of these changes will be considered in turn.

IV. Change in the headcount test

18 In 2014, a Companies (Amendment) Act[26] was passed which modified the language of the headcount test requirement in the Companies Act. While the previous provision provided that a "majority in number" of creditors was required for the voting threshold to be met, the amended version of the provision, now in s 210(3AB), qualifies this by adding the words "unless the Court orders otherwise" before the phrase "a majority in number". This change came into force on 3 January 2016.

19 The change was prompted by a recommendation of the *Report of the Steering Committee for Review of the Companies Act*[27] ("SC report"), issued in 2011. In suggesting this change, the committee was concerned mainly with the problem of share-splitting in member schemes.[28] Member schemes are schemes of arrangement proposed between a company and its members, as opposed to between a company and its creditors. The share-splitting problem arises where certain members who are opposed to a scheme but who constitute less than a majority in number transfer portions of their shareholding to others who are also willing to vote against the scheme. The headcount of the members voting against the scheme therefore increases, and if this headcount crosses the majority mark, the scheme can no longer be sanctioned because the headcount test would not be met. To deal with this problem, the committee recommended following certain Australian amendments, which also introduced the phrase "unless the Court orders otherwise" into a statutory provision concerning member schemes (but not creditor schemes).[29] Notably, the committee did not recommend the total abolition of the headcount test, noting that the UK had also considered and rejected such a move, since the headcount test was "an

26 Companies (Amendment) Act 2014 (Act 36 of 2014).

27 Ministry of Finance, *Report of the Steering Committee for Review of the Companies Act* (Consultation Paper, June 2011).

28 Ministry of Finance, *Report of the Steering Committee for Review of the Companies Act* (Consultation Paper, June 2011) at paras 146–152.

29 Ministry of Finance, *Report of the Steering Committee for Review of the Companies Act* (Consultation Paper, June 2011) at paras 148–149.

important safeguard for minority shareholders".[30] The Ministry of Finance ("MOF") agreed with the committee's recommendation to introduce the amendment proposed in the SC report, noting that "the purpose of the amendment is to prevent the defeat of a member's scheme of arrangement by opposing parties engaged in share-splitting".[31] The Explanatory Statement to the relevant Bill[32] expresses the same sentiments, stating that the purpose of the change is "to confer a discretion on the Court … to prevent the defeat of a member's scheme of arrangement by opposing parties who engaged in share splitting".[33]

20 The concern that prompted this change seems to relate exclusively to member schemes. However, there is nothing in the text of the statute that either limits the effect of the amendment solely to member schemes or prevents the amendment from also applying to creditor schemes. If the intention was to limit the effect of the amendment to member schemes, this could easily have been clarified in the text of the statute, but this has not been done. The amendment should therefore be taken to apply equally in the context of creditor schemes,[34] even though its application to creditor schemes does not seem to have been discussed in the SC report, the response of MOF or the Bill.

21 The effect of the change is that now, even in a situation where the headcount test is not met, the court still has jurisdiction to sanction a scheme, if the court decides to dispense with the headcount test by "ordering otherwise". This was not possible previously, as the headcount test operated as a strict requirement that had to be met before the court could have jurisdiction to sanction a scheme. The change therefore dilutes the ability of small but numerous creditors to veto a scheme by the mere fact of their headcount. The value test, however, remains intact and must still be met before the court can sanction a scheme.

22 It is worth pointing out that the "direction" in which the phrase "unless the court orders otherwise" affects the phrase "majority in

30 Ministry of Finance, *Report of the Steering Committee for Review of the Companies Act* (Consultation Paper, June 2011) at paras 150–151.
31 *Ministry of Finance's Responses to the Report of the Steering Committee for Review of the Companies Act* (3 October 2012) at para 135 <https://www.mof.gov.sg/portals/0/Public%20Consultation/AnnexA_SC_RCA.pdf> (accessed 15 March 2018).
32 Companies (Amendment) Bill (Bill 25 of 2014).
33 Companies (Amendment) Bill (Bill 25 of 2014) cl 135, Explanatory Statement.
34 This interpretation is also shared in Jennifer Payne, "Intermediation and Bondholder Schemes of Arrangement" (14 March 2018) at p 12 <https://ssrn.com/abstract=3140596> (accessed 21 May 2018) and Wee Meng Seng, "Whither the Scheme of Arrangement in Singapore: More Chapter 11, Less Scheme?" (24 February 2017) at p 3 <https://ssrn.com/abstract=2922956> (accessed 15 March 2018).

number" is not expressly stated. Therefore, while the amendment can be read as allowing the court to sanction a scheme even where the majority-in-number requirement is not met, it can also be read as allowing the court to require more than a majority in number to vote in favour before it sanctions a scheme. In other words, even if a majority in number has voted in favour, the court could still refuse to sanction a scheme by requiring an even larger number to vote in favour, by exercising its power under the "orders otherwise" clause. However, this latter interpretation is unlikely to make much sense in practice. If the court were to feel a need to refuse to sanction a scheme even where the majority-in-number requirement is met, the court would likely be able to do so based on the more usual considerations at the sanction hearing, for example, that dissenting creditors have been unfairly coerced or that the scheme is not one that an honest man would reasonably approve. One example of this is the decision in *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd*[35] ("*SK Engineering*"), where the court decided that a scheme should not have been sanctioned even where the headcount test was met.[36]

23 The statute is silent on when the court should exercise its power to dispense with the headcount test. In creditor schemes, this power could be useful in cases where creditors have split their debts to block a scheme, much like the problem of share-splitting in member schemes. As the court in *SK Engineering* observed, "the general concern with vote-splitting in respect of shareholders' schemes of arrangement would not be any different in relation to creditors' schemes of arrangement".[37] As with the case of share-splitting, creditors in certain situations can also assign portions of their debts to others who then vote against the scheme, thereby increasing the number of creditors voting against the scheme and thwarting the scheme based on the headcount test. With the legislative change, the court can now sanction such a scheme even though the headcount test is not met. However, it is not every case of debt-splitting that would warrant dispensing with the headcount test. The ability to split and assign debts is generally part and parcel of the bundle of rights that creditors have and creditors should not be prejudiced for exercising these rights in the ordinary course. As the court in *SK Engineering* cautioned, "there is nothing inherently sinister in the trading of claims or the assignment of debts, and … it is not easy

35 *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd* [2017] 2 SLR 898.
36 *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd* [2017] 2 SLR 898 at [83].
37 *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd* [2017] 2 SLR 898 at [78].

to define the point at which an assignment of debt ceases to be a lawful and routine commercial transaction".[38]

24 A second possible situation where the headcount test may be usefully dispensed with is best illustrated with a criticism of the headcount test. Jennifer Payne has expressed the criticism as follows:[39]

> [The] headcount test places significant veto power in the hands of small shareholders, out of proportion to their financial involvement in the company. It can result in a group of persons, who together have contributed only a small proportion of the company's equity or debt capital, having the capacity to block a scheme that is supported by shareholders or creditors that have contributed a much larger portion of the capital.

25 Taken to its extreme, this runs directly counter to the very objective of the headcount test, which is to protect the votes of smaller creditors from being drowned out by those of larger but less numerous creditors. The court therefore should not be too quick to dispense with the headcount test merely because the value of the dissenting creditors' claims is small, as this could lead to the headcount test being dispensed with in almost every case where it would be necessary to consider if the test should be dispensed with. Instead, it might be argued that the court should take a more robust approach and dispense with the headcount test only where the value of dissenting creditors' claims is so small that it would be very much out of proportion for those creditors to be able to thwart a scheme, or where the dissent of those creditors is motivated by extraneous interests.

26 One other criticism levelled against the headcount test is that it fails to deal adequately with situations involving intermediated securities,[40] such as where beneficial owners hold shares through an intermediary, or, in the case of creditor schemes, where beneficial owners of bonds hold their interests in the bonds through a global noteholder or trustee. In these situations, if the beneficial owners are not recognised as creditors for the purposes of voting on the scheme, then only the intermediary can vote, and the intermediary's vote is treated as just one vote for the purposes of the headcount test, regardless of how many beneficial owners there may be. It has been suggested that

38 *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd* [2017] 2 SLR 898 at [78].

39 Jennifer Payne, *Schemes of Arrangement: Theory Structure and Operation* (Cambridge University Press, 2014) at p 64.

40 Jennifer Payne, *Schemes of Arrangement: Theory Structure and Operation* (Cambridge University Press, 2014) at pp 66–67 and 184–187; Jennifer Payne, "Intermediation and Bondholder Schemes of Arrangement" (14 March 2018) <https://ssrn.com/abstract=3140596> (accessed 21 May 2018).

dispensing with the headcount test would deal with this problem.[41] The SC report also hints at this, at least in the context of member schemes. The text of its recommendation states that the purpose of the legislative change was not only to deal with share-splitting, but also to give the court "latitude to decide who the members are in a particular case".[42] This suggests that the change was also intended to allow the court to decide that beneficial owners who hold their shares through an intermediary are to be treated as members, so that the beneficial owners (as opposed to the intermediary) become part of the headcount. However, somewhat curiously, this suggestion appears only in the text of the recommendation itself, and does not manifest itself in any part of the discussion leading up to the recommendation. At least in the context of creditor schemes, it should be noted that even without the legislative change, courts elsewhere in the Commonwealth have found ways to decide that beneficial owners of bonds are considered creditors for the purposes of voting on a scheme.[43] Although there is no reported decision on this yet in Singapore, the Singapore court has also allowed beneficial owners of bonds to vote on schemes, as demonstrated in the scheme involving Blue Ocean Resources Pte Ltd.[44] It is suggested, therefore, that the problem of beneficial ownership of debts be dealt with using the existing case law as far as possible, instead of by dispensing with the headcount test under the new amendment, as the main issue in these cases is who should be considered a "creditor" for the purposes of voting, and not what level of headcount is required for the scheme to pass fairly.

V. Provision for cram-downs

27 The second legislative change discussed here relates to the need for the voting thresholds to be met in every class of creditors. Under a new s 211H introduced by the Companies (Amendment) Act 2017,[45] the court can now sanction a creditor scheme even where the voting

41 Jennifer Payne, *Schemes of Arrangement: Theory Structure and Operation* (Cambridge University Press, 2014) at pp 67 and 187.

42 Ministry of Finance, *Report of the Steering Committee for Review of the Companies Act* (Consultation Paper, June 2011) Recommendation 3.40.

43 See, *eg*, *Re Castle Holdco 4 Ltd* [2009] EWHC 3919 (Ch), *Re Boart Longyear Ltd* [2017] NSWSC 567 and *Re Titan Petrochemicals Group Ltd* [2014] SC (Bda) 74 Com and Jennifer Payne, "Intermediation and Bondholder Schemes of Arrangement" (14 March 2018) <https://ssrn.com/abstract=3140596> (accessed 21 May 2018).

44 OS 55/2013. A copy of the court order for the creditors' meeting to be summoned can be found at http://www.lynchpinbm.com/assets/files/Blue-Ocean/Order_of_Court_(15_Feb_13).pdf (accessed 25 July 2018).

45 Act No 15 of 2017.

thresholds have not been met in one or more classes of creditors (commonly called a "cram-down").

28 The origin of this cram-down provision lies in the *Report of the Insolvency Law Review Committee: Final Report*[46] ("ILRC report") issued in 2013, which set out three reasons for introducing the provision. First, there was a concern that without such a provision, a minority of creditors could "hold out for better returns by threatening to veto a scheme merely because they form a separate class".[47] This seemed to be the main reason for recommending the cram-down provision. The second reason was that "a minority of creditors in a dissenting class should not be able to veto a scheme merely because they are in a separate class", which is similar to the first reason but slightly different in emphasis: the first reason focuses on obtaining better terms while the second focuses on blocking the scheme. The third reason was that introducing cram-downs "may help to avoid excessive emphasis on the classification exercise". It is the second of these three reasons that was highlighted in the parliamentary debates leading up to the change.[48]

29 There are four conditions that must be met before the cram-down provision becomes applicable.[49] First, there must be a scheme that has been voted on at a creditors' meeting.[50] Second, the creditors meant to be bound by that scheme must have been placed into two or more classes for the purposes of voting.[51] Third, the voting thresholds must have been met in respect of at least one class of creditors.[52] Since the text of this requirement refers to the generic voting thresholds provision applicable to schemes generally,[53] which includes the phrase "unless the court orders otherwise", it would appear that this requirement can be met even if the headcount test has been dispensed with in relation to any class of creditors. Lastly, either or both of the

46 2013.
47 *Report of the Insolvency Law Review Committee: Final Report* (2013) at para 52; and para 49(2).
48 *Parliamentary Debates, Official Report* (10 March 2017) vol 94 (Indranee Rajah SC, Senior Minister of State for Law and Finance). The second reason was also the one put forward in a note from Senior Minister Indranee Rajah SC concerning the legislative changes: see Indranee Rajah SC, "Enhancing Singapore as an International Debt Restructuring Centre for Asia and Beyond" (20 June 2017) at p 3 <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Note%20on%20Debt%20Restructuring.pdf> (accessed 15 March 2018), but it is not entirely clear what weight such non-parliamentary material should have in statutory interpretation.
49 Companies Act (Cap 50, 2006 Rev Ed) s 211H(1).
50 Companies Act (Cap 50, 2006 Rev Ed) s 211H(1)(*a*).
51 Companies Act (Cap 50, 2006 Rev Ed) s 211H(1)(*b*).
52 Companies Act (Cap 50, 2006 Rev Ed) s 211H(1)(*c*).
53 Companies Act (Cap 50, 2006 Rev Ed) s 210(3AB).

headcount or value test must not have been met in respect of at least one class of creditors (the dissenting class that is to be crammed down).[54]

30 If the foregoing conditions are met, the provision applies. However, there are safeguards in the form of three further conditions that must be met before the court can sanction the scheme despite the vote in the dissenting class.[55] First, a majority in number of all the creditors must have voted in favour of the scheme.[56] Essentially, this means that a version of the headcount test needs to be met on an overall basis, without having regard to the different classes of creditors. This version of the headcount test cannot be dispensed with.[57] Second, the majority in number must represent three-fourths in value of the creditors (regardless of class), meaning that a version of the value test also needs to be met on an overall basis.[58] Third, the court needs to be satisfied that the scheme "does not discriminate unfairly" between classes of creditors, and is "fair and equitable" to each dissenting class.[59]

31 It almost goes without saying that the most controversial of these three conditions is the last one. The statute provides some guidance on when a scheme is "not fair and equitable" to a dissenting class.[60] It states that a scheme is not fair and equitable if the amount that any creditor in the dissenting class receives under the scheme is lower than what the creditor would have received in the most likely scenario if the scheme did not become binding.[61] This applies regardless of whether the dissenting class is made up of secured or unsecured creditors. There are also additional conditions, depending on whether the dissenting class is made up of secured or unsecured creditors. In relation to secured creditors, the scheme is not fair and equitable unless at least one of three alternative conditions is met. The first is that the scheme must provide for each creditor in the dissenting class to receive deferred cash payments totalling the amount of the creditor's claim that is secured by the security, and preserve that security and the extent of that claim.[62] The second is that if the scheme provides for any dissenting creditor's security to be realised by the company free of encumbrances, it must

54 Companies Act (Cap 50, 2006 Rev Ed) s 211H(1)(*d*).
55 Companies Act (Cap 50, 2006 Rev Ed) s 211H(3).
56 Companies Act (Cap 50, 2006 Rev Ed) s 211H(3)(*a*).
57 In the public consultation on the draft Bill, one respondent had suggested doing away with the headcount test in this context, but the suggestion was not accepted – see Ministry of Law, *Ministry's Response to Feedback from Public Consultation on the Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring* (27 February 2017) at para 8.1.
58 Companies Act (Cap 50, 2006 Rev Ed) s 211H(3)(*b*).
59 Companies Act (Cap 50, 2006 Rev Ed) s 211H(3)(*c*).
60 Companies Act (Cap 50, 2006 Rev Ed) s 211H(4).
61 Companies Act (Cap 50, 2006 Rev Ed) s 211H(4)(*a*).
62 Companies Act (Cap 50, 2006 Rev Ed) s 211H(4)(*b*)(i)(A).

also provide that the creditor has a charge over the proceeds of the realisation to satisfy the creditor's claim that is secured by that security.[63] The third is that the scheme must provide that each creditor in the dissenting class is entitled to realise the indubitable equivalent of the security held by the creditor in order to satisfy the creditor's claim that is secured by that security.[64] In relation to unsecured creditors, the scheme is "not fair and equitable" unless either of two alternative conditions is met. The first is that the scheme must provide for each creditor in the dissenting class to receive property of a value equal to the amount of the creditor's claim.[65] The second is that the scheme must not provide for any creditor with a claim that is subordinate to the claim of a creditor in the dissenting class, or any member, to receive or retain any property on account of the subordinate claim or the member's interest.[66] This last condition is an aspect of the "absolute priority rule" which forms part of the Chapter 11 procedure in the US[67] and requires that shareholders give up their shares before a dissenting unsecured class of creditors can be crammed down.[68]

32 While the foregoing statutory guidance has been provided, the guidance only specifies when a scheme is *not* fair and equitable. The statute therefore sets out only a baseline standard and it remains possible for the court to decide that a scheme is not fair and equitable even where the statutory baseline standard of fairness and equity has been exceeded. This is expressly acknowledged in the Explanatory Statement to the Bill.[69] Further, in both the ILRC report[70] and in the response by the Ministry of Law[71] ("MinLaw") to feedback received on the ILRC report, it was emphasised that the court should "require a high threshold of proof that the dissenting class is not going to be prejudiced by the cram-down". It is also worth noting that while the statute provides guidance on when a scheme is not "fair and equitable", it is silent on when a

63 Companies Act (Cap 50, 2006 Rev Ed) s 211H(4)(*b*)(i)(B).
64 Companies Act (Cap 50, 2006 Rev Ed) s 211H(4)(*b*)(i)(C).
65 Companies Act (Cap 50, 2006 Rev Ed) s 211H(4)(*b*)(ii)(A).
66 Companies Act (Cap 50, 2006 Rev Ed) s 211H(4)(*b*)(ii)(B).
67 Bankruptcy Code 11 USC §§1129 and 1129(b)(2)(B)(ii) (2018).
68 Note, however, that the Singapore cram-down provision does not provide for any mechanism to compel shareholders to give up their shares, as confirmed in Ministry of Law, *Ministry's Response to Feedback from Public Consultation on the Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring* (27 February 2017) at para 8.4. However, see *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 (PC) at [26].
69 Companies (Amendment) Bill (Bill 13 of 2017) cl 22, Explanatory Statement and s 211H(4).
70 *Report of the Insolvency Law Review Committee: Final Report* (2013) at para 53.
71 Ministry of Law, *Response to feedback received from Public Consultation of the Report of the Insolvency Law Review Committee* (2014) Annex A at p 24.

scheme "does not discriminate unfairly". Much has therefore been left in the courts' hands to decide. In this respect, while the parliamentary debates[72] and the Explanatory Statement in the Bill[73] candidly acknowledge the debt of the cram-down provision to the analogous provisions in Chapter 11 of the US Bankruptcy Code, MinLaw's response to feedback on the draft Bill clarifies that it is open to the Singapore courts to depart from the US jurisprudence. MinLaw's response states, "[while] jurisprudence from other jurisdictions may be relied by our Courts for guidance, our Courts will be free to develop jurisprudence on the use of cram-down provisions that would be suitable in the local context".[74]

33 If all of the statutory requirements in the cram-down provision are met, the court can sanction a scheme despite the voting thresholds not having been met in the dissenting class, and the scheme will become binding on all creditors, including those in the dissenting class.[75]

34 It is worth pausing to consider the interaction between the cram-down provision and the generic voting thresholds provision in s 210(3AB), which allows the court to dispense with the headcount test, since both provisions deal in a way with situations where the voting thresholds have not been met. Where there is a scheme with only one class of creditors, the cram-down provision cannot be applied, because the cram-down provision only applies where there is a scheme with at least two classes of creditors.[76] Where there is a scheme where the value test has not been met in any class, this problem cannot be dealt with under s 210(3AB), as s 210(3AB) only allows the headcount test to be dispensed with. The problem will therefore have to be dealt with under the cram-down provision (provided the other requirements of the cram-down provision are met, such as the requirement that there be at least two classes of creditors). Where there is a scheme with at least two classes of creditors and the headcount test is not met in any class, either s 210(3AB) or the cram-down provision could apply. It may be argued that the cram-down provision and not s 210(3AB) should govern in this scenario, given that the cram-down provision is the more specific one

72 *Parliamentary Debates, Official Report* (10 March 2017) vol 94 (Indranee Rajah SC, Senior Minister of State for Law and Finance).

73 Companies (Amendment) Bill (Bill 13 of 2017).

74 Ministry of Law, *Ministry's Response to Feedback from Public Consultation on the Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring* (27 February 2017) at para 8.2.2. A similar approach to the US jurisprudence was reflected in *Re Attilan Group Ltd* [2018] 3 SLR 898 at [51], where the High Court was considering the new super-priority provisions in the Companies Act which were also inspired by the US Chapter 11 provisions.

75 Companies Act (Cap 50, 2006 Rev Ed) s 211H(2).

76 Companies Act (Cap 50, 2006 Rev Ed) s 211H(1)(*b*).

and sets up various safeguards, as compared to s 210(3AB), which may be easier to satisfy. However, it is perhaps more likely that the appropriate provision to apply will vary according to the factual context and the purpose of the two provisions. For example, in a case of deliberate debt-splitting carried out to block a scheme, it would seem unfair to require the debtor company to satisfy the more onerous requirements of the cram-down provision and it is arguable that s 210(3AB) should govern instead.

35 One situation in which a cram-down may prove useful is where there is a class of "out-of-the-money" creditors. These are junior creditors of a company where the value of the company is insufficient to repay the claims of senior creditors. It is arguably unfair to other creditors for these out-of-the-money creditors to be able to veto a scheme in circumstances where they would receive something under the scheme but nothing in a liquidation, for example. The ability to cram-down such a class of creditors and have a scheme sanctioned despite their dissent could therefore be beneficial. A similar ability had already been created by English courts, but has only been used in situations where the scheme was not proposed to the dissenting creditors and did not purport to affect the dissenting creditors' rights directly.[77] The cram-down provision therefore extends the scope of that ability to schemes that expressly and directly affect dissenting creditors' rights. While it has been cautioned that using the provision could bring about thorny court disputes over issues of valuation,[78] the usefulness of the provision could perhaps prove to be more in the mere fact of its existence than its actual use: the existence of the possibility of a cram-down could encourage creditors who would otherwise have voted against to vote in favour, instead of holding out for better terms, given the possibility that they may be crammed down.

36 The overall effect of the cram-down provision is that now, not all classes of creditors need to vote in favour of a scheme before it can be sanctioned. The veto right that a dissenting class of creditors had previously has therefore now been diluted.

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77 See, *eg*, *Re Bluebrook Ltd* [2010] 1 BCLC 338 (Ch). For other limitations of this approach, see Jennifer Payne, "Debt Restructuring in English Law: Lessons from the United States and the Need for Reform" (2014) 130 LQR 282 at 303. This approach is also not without its critics – see, *eg*, Chi-Ling Seah, "The Re Tea Corporation Principle and Junior Creditors' Rights to Participate in a Scheme of Arrangement – A View from Singapore" (2011) 20 *International Insolvency Review* 161.

78 Wee Meng Seng, "Whither the Scheme of Arrangement in Singapore: More Chapter 11, Less Scheme?" (24 February 2017) at p 22 <https://ssrn.com/abstract=2922956> (accessed 15 March 2018).

VI. Removing need for creditors' meeting – Pre-packs

37 The third change discussed here was brought about by another provision introduced by the Companies (Amendment) Act 2017.[79] This new s 211I allows for a scheme to be sanctioned even if a creditors' meeting has not been ordered or held at all.[80]

38 The introduction of this provision was prompted by a recommendation in the ICDR report, where a desire was expressed for facilitating "pre-packaged restructurings" or "pre-packs".[81] This concept is explained in the ICDR report as follows:[82]

> A pre-packaged restructuring ('Pre-Pack') involves a restructuring plan that is pre-negotiated between the debtor and its *major creditors* and agreed upon before formal court restructuring proceedings commence. The pre-agreed plan (or Pre-Pack) is then presented to the court for approval at the commencement of court proceedings. Rules governing Pre-Packs serve to facilitate the approval of the restructuring plan fairly, quickly and efficiently. [emphasis added]

39 The reference to "major creditors" here should not be overlooked. This reference was carried over into the parliamentary debates, where it was stated that the purpose of this provision was to facilitate restructurings with "key creditors", and it was observed that "[other] creditors will not be affected as the pre-pack is sufficient to save the company".[83] It is easy to overlook this aspect of the purpose of the provision when the text of the provision does not refer expressly to "key" or "major" creditors.

40 The pre-pack provision allows the court to sanction a scheme "even though no meeting of the creditors or class of creditors has been ordered under section 210(1) or held".[84] This makes it clear that it is not

79 Act 15 of 2017.
80 Companies Act (Cap 50, 2006 Rev Ed) s 211I.
81 Ministry of Law, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at paras 3.32–3.41 <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Final%20DR%20Report.pdf> (accessed 15 March 2018).
82 Ministry of Law, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at para 3.32 <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Final%20DR%20Report.pdf> (accessed 15 March 2018).
83 *Parliamentary Debates, Official Report* (10 March 2017) vol 94 (Indranee Rajah SC, Senior Minister of State for Law and Finance). The theme was also carried in a note from Senior Minister Indranee Rajah SC which used the term "major creditors": see Indranee Rajah SC, "Jupiter, Juno and Singapore as an International Centre for Debt Restructuring" (26 July 2016) at p 3.
84 Companies Act (Cap 50, 2006 Rev Ed) s 211I(1).

only the meeting that can be dispensed with, but also the initial application to court for an order that the meeting be summoned. This is despite the title of the provision, which refers only to the ability to sanction a scheme "without meeting of creditors" but makes no mention of the initial court application.[85]

41 The court procedure for a pre-pack therefore begins with an application to court for the scheme to be sanctioned despite the lack of a meeting. The requirements that have to be met before the court can grant the order include giving information to creditors regarding the company and the scheme and giving notice to creditors of the court application.[86] Additionally, the court also needs to be satisfied that had a meeting of creditors been summoned, the voting thresholds (namely the headcount and value tests) would have been met in each class.[87]

42 As to this last requirement, the statute does not specify what sort of evidence is required to show that the voting thresholds would have been met. Would the applicant have to show actual expressions of creditors' voting intentions, or would it suffice to show evidence predicting how creditors are likely to vote? The ICDR report suggests the former interpretation, as it mentions votes being "solicited" before the filing of the application and the counting of those "solicited" votes.[88] Given also that the provision is targeted at schemes involving "key creditors" only, it should not be onerous for the former interpretation to be followed in practice if the provision is used for its intended purpose. It has also been suggested that the existence of voting or lock-up agreements may help to show that the voting thresholds would have been met.[89]

43 It has also been suggested that the pre-pack provision may not be as advantageous to the debtor company as it is made out to be because the vote of every creditor needs to be counted regardless of

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85 This interpretation is also consistent with other statutes like s 2(1) of the International Interests in Aircraft Equipment Act (Cap 144B, 2012 Rev Ed), which defines "commencement of insolvency proceedings" as, among other things, either the date of the initial application for an order for a scheme meeting or the date of an application under the pre-pack provision.

86 Companies Act (Cap 50, 2006 Rev Ed) ss 211I(3)(*a*)–211I(3)(*c*).

87 Companies Act (Cap 50, 2006 Rev Ed) s 211I(3)(*d*).

88 Ministry of Law, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at para 3.41 <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Final%20DR%20Report.pdf> (accessed 15 March 2018).

89 Paul Apáthy & Emmanuel Chua, "Singapore's New 'Supercharged' Scheme of Arrangement" (2017) 5 *Butterworths Journal of International Banking and Finance Law* 282 at 284.

whether they would have attended the creditors' meeting.[90] This is in contrast to the situation under the traditional scheme process, where it is necessary to count only the votes of creditors who attend the meeting by person or proxy. This is stated to be a potential problem especially for schemes involving trade creditors,[91] who may be numerous and from whom the company may not be able to get a majority vote especially if it is necessary under the pre-pack provision to count the votes of all creditors and not just the votes of those who would have attended a meeting. However, given that the provision is meant to deal with schemes involving "key creditors" only, it is probably not intended to be used in a situation like this which involves large numbers of creditors. This sentiment is perhaps also reflected in MinLaw's response to feedback received on the draft Bill, which suggests that the provision is intended to be used only "where it is clear that the statutory requirements are fulfilled" and not in situations where fulfilment of the requirements is complicated by there being a "large class of creditors".[92]

44 One interesting question is whether the headcount test can be dispensed with in a scheme brought under the pre-pack provision. A technical reading of the pre-pack provision would allow for the headcount test to be dispensed with, since the provision merely refers to the generic headcount provision applicable to schemes generally,[93] which includes the phrase "unless the Court orders otherwise". However, MinLaw's response to feedback received on the draft Bill recorded that one respondent had suggested removing the headcount test for pre-pack schemes, but that MinLaw did not take on this suggestion.[94] This suggests that the ability to dispense with the headcount test was not intended. Therefore, even if a technical reading of the pre-pack provision allows the headcount test to be dispensed with, the court should be circumspect in allowing this to occur.

45 The position is clearer in relation to cram-downs, which cannot be twinned with a pre-pack. The cram-down provision applies only where a meeting has been held, and so cannot be applied in the context

90 Wee Meng Seng, "Whither the Scheme of Arrangement in Singapore: More Chapter 11, Less Scheme?" (24 February 2017) at p 28 <https://ssrn.com/abstract=2922956> (accessed 15 March 2018).

91 Wee Meng Seng, "Whither the Scheme of Arrangement in Singapore: More Chapter 11, Less Scheme?" (24 February 2017) at p 28 <https://ssrn.com/abstract=2922956> (accessed 15 March 2018).

92 Ministry of Law, *Ministry's Response to Feedback from Public Consultation on the Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring* (27 February 2017) at para 9.1.

93 Companies Act (Cap 50, 2006 Rev Ed) s 210(3AB).

94 Ministry of Law, *Ministry's Response to Feedback from Public Consultation on the Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring* (27 February 2017) at para 9.1.

of a pre-pack where the very objective is not to hold a meeting. MinLaw's response to feedback on the draft Bill also states this clearly.[95]

46 The usefulness of the pre-pack provision is that it could allow for schemes to be pushed through more quickly, especially when they relate only to major creditors. However, the trade-off is that because there is no meeting, dissenting creditors have less of an opportunity to persuade other creditors to vote against the scheme. The "voice" they would have had at the meeting has been taken away.

VII. Taking stock – Shift in balance

47 We have seen therefore that the ability to dispense with the headcount test has diluted the ability of small but numerous creditors to veto a scheme, that the cram-down provision has diluted the ability of a dissenting class of creditors to veto a scheme, and that the pre-pack provision has diluted the "voice" that dissenting creditors may otherwise have had at a creditors' meeting. These innovations have therefore eroded three of the four mechanisms described earlier for protecting dissenting creditors.

48 These innovations can be seen as marking a shift in the balance towards the policy objectives of promoting restructurings and away from the protection of dissenting creditors' rights. However, it should not be forgotten that there are nevertheless safeguards, either in the form of statutorily prescribed requirements that need to be met or in the form of the court having to exercise discretion in deciding whether it is appropriate to apply the innovations in any particular case. Also, the fourth mechanism for protecting dissenting creditors still remains intact: the court must ultimately still decide whether to sanction the scheme, and in doing so will consider the fairness and reasonableness of the scheme, at least at a baseline level. Therefore, while the balance may have shifted, the various safeguards should continue to ensure that dissenting creditors are treated fairly.

49 One consequence of the shift in balance is that there is now a greater role for courts to play in scheme cases, to ensure that dissenting creditors are not unfairly prejudiced even with the new innovations. This is perhaps in line with another recommendation in the ICDR report, which was that judges should take a "'judge-led' approach to proactive case management when hearing restructuring proceedings,

95 Ministry of Law, *Ministry's Response to Feedback from Public Consultation on the Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring* (27 February 2017) at para 9.3.

especially in the case of schemes of arrangement proceedings".[96] It has been suggested that this is at odds with the Singapore courts' previous practice of leaving commercial judgments to commercial parties,[97] but the converse is not necessarily the inevitable outcome of the new judge-led approach, especially if judges focus mainly on processes and fairness as opposed to the commercial attractiveness of particular outcomes.

VIII. Conclusion

50 Only time will tell whether the new changes to Singapore's scheme procedure will result in more restructurings of improved quality, or if the balance has shifted too far away from protecting dissenting creditors' rights and if the hoped-for gains in terms of the policy objectives will turn out to have been merely hypothetical.

51 In the meantime, however, we might take a step back and appreciate the collaborative process by which these changes have come about. The reader will have noticed the numerous committee reports, public consultation exercises and feedback papers that have led to the current changes. Stakeholders from across the debt restructuring community – including lawyers, insolvency practitioners, professional associations, financial institutions, academics, judges and the Government – have all participated and taken an active interest in this project. This is perhaps reflective of the general ethos of the restructuring community in Singapore, which has always been focused on collaborating to make the restructuring ecosystem the best that it can be. This ethos is to be lauded and should stand the community in good stead in the interesting times ahead.

96 Ministry of Law, *Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring* (20 April 2016) at para 3.51 <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Final%20DR%20Report.pdf> (accessed 15 March 2018).

97 Wee Meng Seng, "Whither the Scheme of Arrangement in Singapore: More Chapter 11, Less Scheme?" (24 February 2017) at p 23 <https://ssrn.com/abstract=2922956> (accessed 15 March 2018).