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A Comparative Review of Legislative Restrictions on the Enforcement of *Ipso Facto* Clauses

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Acknowledgment

INSOL International is pleased to publish this new technical paper, "A Comparative Review of Legislative Restrictions on the Enforcement of *Ipso Facto* Clauses", authored by Sim Kwan Kiat (Head of Restructuring & Insolvency, Rajah & Tann Singapore LLP), Ho Zi Wei and Naomi Lim (with research assistance from Craig Chua), all from the Restructuring & Insolvency team at Rajah & Tann Singapore LLP.

Ipso facto clauses are common as a matter of commercial practice, permitting a party to terminate, modify or accelerate obligations under a contract if certain events happen to the debtor, including most typically an insolvency event. These clauses may limit the ability of an entity to restructure its affairs in the event of financial distress, and accordingly are antithetical to attempts to encourage a stronger corporate and business rescue culture as a priority of insolvency law reform. For that reason, in recent years many jurisdictions have introduced restrictions on the enforcement of *ipso facto* clauses contingent on an insolvency event, subject to carefully crafted exceptions that also ensure adequate protection for creditors.

This paper provides a comprehensive overview of the *ipso facto* legislation that applies in the United States, Canada, the United Kingdom, Singapore, Australia, India and the Netherlands, as well as under the European Union (EU) Restructuring Directive. It identifies the central features of the legislation, including the core enforcement restrictions, the exemptions to the restrictions and the public policy concerns behind the drafting of the legislative provisions. In doing so, the paper seeks to identify key trends and issues that will be a focus for courts and in practice as the *ipso facto* provisions are applied and interpreted in future years.

INSOL International expresses its sincere thanks to the authors for the research and practical insights that have gone into this paper, which will be of considerable use to our global membership.

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A Comparative Review of Legislative Restrictions on the Enforcement of *Ipso Facto* Clauses

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1. Introduction

Ipso facto clauses allow a party to a contract to terminate or modify the contract, or to accelerate certain obligations, upon a specified event, usually the occurrence of prescribed events of default. Common events of default include the insolvency of the counterparty and the commencement of restructuring or liquidation proceedings. *Ipso facto* clauses generally do not require anything beyond the occurrence of the prescribed event to trigger their operation. Such clauses are therefore useful as they allow the protected party to rely on the prescribed event (such as insolvency) alone, instead of having to show an actual breach of contract.

While *ipso facto* clauses provide certainty to creditors and suppliers, they do not sit well with the objective of debt restructuring and the preservation of companies as a going concern. Indeed, the unilateral termination of contracts pursuant to *ipso facto* clauses can jeopardise a company's restructuring efforts, especially when the relevant contracts are vital to the company's survival.

This paper reviews the legislation in eight different jurisdictions: the United States, Canada, the United Kingdom, Singapore, Australia, India, the Netherlands, and for Member States under the European Union (EU) Restructuring Directive.

The paper examines the background to the legislative provisions in those jurisdictions, the scope of the restrictions and the applicable exceptions thereto. It also discusses certain common themes and features of *ipso facto* legislation notwithstanding differences that are seen across jurisdictions.

2. United States

The United States is one of the earliest jurisdictions across the world to prohibit the enforcement of *ipso facto* clauses. Prior to the adoption of the United States Bankruptcy Code, Federal law permitted the enforcement of *ipso facto* clauses triggered by the filing of a bankruptcy application. The prohibition was introduced with the enactment of the Bankruptcy Code in 1978, and restricted party autonomy in favour of the protection of bankrupt estates.

The principal rationale behind the prohibition on the exercise of *ipso facto* clauses is that allowing the debtor to retain advantageous contracts enhances the likelihood of successful reorganisation and preserves the assets available to creditors should the bankruptcy estate ultimately enter liquidation.[1]

[1] See *CCT Communications, Inc. v. Zone Telecom, Inc.*, Case No. SC 19574, Nov. 21, 2017; *In re Cochise College Park, Inc.*, 703 F.2d 1339, 1355 (9th Cir. 1983); *Days Inn of America, Inc. v.161 HotelGroup, Inc.*, supra, 125. See also *Summit Investment & Development Corp. v. Leroux*, 69 F.3d 608, 610 (1st Cir. 1995), 610 ("automatic termination of a debtor's contractual rights frequently hampers rehabilitation efforts by

The prohibitions on *ipso facto* clauses are now encapsulated in sections 365(e), 363(l), 541(c)(1)(B), and 545(1) of the Bankruptcy Code. Together, these sections prescribe that, upon the commencement of a case under Title 11, *ipso facto* clauses which are stated in a contract to have one or more of the following effects are no longer valid:

(a) terminating or modifying any executory contract or unexpired lease (as at the date of commencement of the case);[2]

(b) obstructing the sale, use or lease of the bankruptcy estate's property by the estate trustee;[3]

(c) transferring an interest of the debtor out of the bankruptcy estate;[4] or

(d) fixing a statutory lien on the debtor's property.[5]

According to the Bankruptcy Code, the *ipso facto* clauses are invalidated to the extent they are predicated on:[6]

(a) the debtor's insolvency or financial condition;

(b) the commencement of any case under Title 11 (or, for section 545(1), the commencement of any insolvency proceeding even outside of Title 11); or

(c) the appointment of or taking possession by a trustee or custodian.

Section 365(e) is the most relevant in practice. In relation to that provision, an executory contract is a contract in which "performance is due to some extent on both sides," and failure to complete performance would constitute a material breach.[7] The relevant "case" under section 365(e) is the case of the debtor who is the party to the relevant executory contract in dispute, and the "commencement of the case" refers to the "petition date of the debtor whose rights have been modified or whose property has been affected".[8]

Section 365(e)(1) operates automatically upon the commencement of the Title 11 case. There is no further requirement for the Chapter 11 trustee to first affirm or reject any contract before the protection under section 365(e) can operate to restrict termination of a contract.[9]

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depriving the Chapter 11 estate of valuable property interests at the very time the debtor and the estate need them most" [internal quotation marks omitted]).

2 US Bankruptcy Code, s 365(e).

3 *Idem*, s 363(l).

4 *Idem*, s 541(c)(1)(B).

5 *Idem*, s 545(1).

6 *Idem*, ss 363(l), 365(e)(1), 541(c)(1)(B) and 545(1).

7 See *In re Sentle Trucking Corp.*, 839 F.2d 533, 536 (Bankr. N.D. Ohio 1988); *In re Kemeta, LLC*, 470 B.R. 304, 322-25 (Bankr. D. Del. 2012).

8 *Lehman Brothers Special Financing Inc v Bank of America National Association* 553 BR 476 (Bankr. S.D.N.Y. 2016).

9 *CCT Communications, Inc. v. Zone Telecom, Inc.*, Case No. SC 19574, Nov. 21, 2017, where the Supreme Court of Connecticut held: "If the Bankruptcy Code's protections from *ipso facto* clauses do not kick in until a contract has been formally assumed, then, as was the case here, a non-debtor party can circumvent those protections by simply terminating the contract immediately upon the filing of the petition, before the

2.1 Exceptions and commentary

The exceptions to the prohibition on *ipso facto* clauses in executory contracts and unexpired leases are set out in section 365(e)(2) of the Bankruptcy Code. They include:

(a) non-assignable contracts – where applicable law excuses a party from accepting performance from or rendering performance to the trustee or assignee of the contract or lease, and that party does not consent to the assumption or assignment;[10] and

(b) loan contracts or any contract which extends a form of debt financing or financial accommodation to the debtor, or which issues a security of the debtor.[11]

Examples of non-assignable contracts in case law include contracts for personal services,[12] partnership agreements predicated on personal trust and confidence,[13] trademark licenses where the identity of the licensee is of crucial importance to the licensor,[14] and non-exclusive patent licenses.[15]

The rationale behind these exceptions is that, in certain contractual arrangements, the special identities of the parties and their unique relationships provide the main impetus for entering into the contract. Accordingly, the *ipso facto* exceptions allow parties to avoid a situation where they are forced into new relationships simply as a result of the bankruptcy of one of their chosen co-investors.[16]

For example, in *In re Trump Entertainment Resorts Inc*, the Court recognised that, in the context of trademarks, "Federal trademark law generally bans assignment of trademark licenses absent the licensor's consent because, in order to ensure that all products bearing its trademark are of uniform quality, the identity of the licensee is crucially important to the licensor".[17]

debtor has had an opportunity to decide whether assumption or rejection will best serve the interests of reorganisation and of the debtor's creditors … If a non-debtor party were free to invoke an *ipso facto* clause at any time until the debtor assumed its executory contracts, then there would essentially be a three-week window at the commencement of every Chapter 11 proceeding during which 11 U.S.C. § 365 (e) would not apply, rendering the statutory protections largely toothless. We doubt that Congress so intended."

[10] US Bankruptcy Code, s 365(e)(2)(A).

[11] *Idem*, s 365(e)(2)(B).

[12] *In re Tonry*, 724 F.2d 467, 469 (5th Cir. 1984) – where contingent fee agreements entered into by the debtor were executory. The Court held that these were personal service contracts which were non-assumable under s 365(c) of the Bankruptcy Code, and so not part of the debtor's estate. Note that s 365(c)'s language largely mirrors the exception to s 365(e)(1) in s 365(e)(2)(A).

[13] *In re Harms*, 10 B.R. 817, 821 (Bankr. D. Colo. 1981).

[14] *In re Trump Entm't Resorts, Inc.*, 526 B.R. 116, 124 (Bankr. D. Del. 2015).

[15] *In re Catapult Entertainment, Inc.*, 165 F.3d 747, 750, 752 (9th Cir. 1999).

[16] See *Milford Power Co., LLC v. PDC Milford Power, LLC,* 866 A.2d 738 (Del. Ch. 2004), where the Court recognised that the Delaware LLC Act establishes that "unique relationships…exist among members of LLCs" that protect "solvent members from being forced into relationships they did notchoose that result from the bankruptcy of one of their chosen co-investors."

[17] See above, n 14, 124.

3. Canada

Canada's *ipso facto* regime spans across two separate sets of legislation – the Bankruptcy and Insolvency Act 1985 (BIA) and the Companies' Creditors Arrangement Act 1995 (CCAA). The relevant provisions are sections 65.1, 66.34 and 84.2 of the BIA, and section 34 of the CCAA. The BIA is available to both natural persons and legal persons such as companies with a total debt less than CAD $5 million. The CCAA is only applicable to corporations with at least CAD $5 million in debt.

Generally, the BIA and CCAA stipulate that no person may amend or terminate any agreement or claim, accelerated payment or forfeiture of a term under any agreement by reason of an act of bankruptcy or insolvency. These acts include:

(a) the filing of a notice of intention or proposal;[18]

(b) bankruptcy for individuals;[19]

(c) the debtor qualifying as insolvent under the BIA or the CCAA;[20] and

(d) a proceeding commenced under the CCAA.[21]

3.1 Exceptions and commentary

Each of the *ipso facto* sections states that any contractual clause which, in substance, purports to give a contracting party rights that are contrary to the *ipso facto* prohibitions as a whole is of no force or effect.[22]

The court has the power to disapply the prohibitions upon an application by the parties or a public utility, in circumstances where the operation of the prohibitions will cause "significant financial hardship".[23] This standard has been explored in a number of key cases.

In *Toronto Dominion Bank v TY (Canada) Inc*,[24] the applicant had entered into distributorship and licensing agreements with the counterparty. The counterparty was in financial difficulties and filed a notice of intention to file a proposal pursuant to the BIA. The applicant sought a stay of proceedings and for permission to terminate the agreements on the basis the applicant would suffer significant financial hardship if it was not permitted to terminate and then sell its new inventory directly in the market.

[18] BIA, ss 65.1(1) and 66.34(1). Only s 65.1 can be triggered by the filing of a notice of intention.
[19] *Idem,* s 84.2(1).
[20] A debtor under Canadian law is also considered insolvent if it fails the cash flow tests by being unable to meet current obligations as they generally become due or has not been able to do so in the past, or by failing the balance sheet test such that its assets are insufficient to satisfy its liabilities. See the definition of "insolvent person" in BIA, s 2.
[21] Although the CCAA does not define when a company is considered insolvent, Justice Farley held in *Re Stelco Inc* (2004), 48 CBR (4th) 299 at [19], 129 ACWS (3d) 1065 (Ont Sup Ct J) that a longer time horizon must be used since CCAA proceedings tend to take at least a year.
[22] BIA, ss 84.2(5), 65.1(5) and 66.34(5); CCAA, s 34(5).
[23] BIA, ss 84.2(6), 65.1(6) and 66.34(6); CCAA, s 34(6).
[24] 42 CBR (4th) 142, 2003 CanLII 43355.

Declining to grant the stay, the Ontario Superior Court held that the applicant "must be able to show quantitatively the prejudice that it will suffer if the stay is not removed". Based on the facts, the Court found that the applicant had not demonstrated quantitatively any material prejudice it would suffer if it was not allowed to terminate the agreements, other than a delay in pursuing its strategy of direct selling to Canadian customers.

The decision in *Toronto Dominion Bank* suggests that an applicant is unlikely to succeed in demonstrating significant financial hardship by mere allegations of prejudice. Rather, the applicant must provide quantitative analysis to demonstrate the extent of the resultant prejudice. Further, the Court held that the prejudice must be objective, not subjective. That said, other recent case law on a separate provision of the CCAA (section 32, which allows for the disclaimer of onerous contracts) that uses the same phrase of "significant financial hardship" indicates that a subjective approach is appropriate.[25]

Importantly, even if an applicant is able to demonstrate that it would suffer prejudice because of its inability to enforce the relevant *ipso facto* clause, the court is entitled to "consider a balancing of the interests of all affected parties"[26] and "take into account the effect of the lifting of the stay on the administration of the estate and the prejudice to other stakeholders".[27] The applicant's financial hardship is not the sole inquiry.

4. United Kingdom

The *ipso facto* regime in the United Kingdom can be characterised as a stay on the enforcement of contractual rights that arise due to pre-insolvency events of default, which lasts for the period the company is undergoing an insolvency process. The stay can only be lifted with the consent of the debtor, judicial permission or if a relevant prescribed exemption is satisfied.

Under sections 233, 233A[28] and 233B[29] of the Insolvency Act 1986, *ipso facto* clauses cease to have effect upon the debtor company entering certain insolvency proceedings. The scope of the restriction is wide. Specifically, *ipso facto* clauses under which a contract would terminate or "any other thing would take place"[30] because the company becomes subject to the relevant insolvency procedure cannot be enforced. The rights of suppliers to "do any other thing" are similarly restricted. One exception, however, is if the clause is premised on the non-payment of goods provided after the company enters the relevant insolvency event.[31]

The relevant insolvency events that trigger the operation of sections 233A and 233B, as well as the scope of the protection available under those sections, differ based on the type of contract involved.

[25] *Re Timminco Ltd* [2012] OJ No 4008, 2012 ONSC 4471, 93 CBR (5th) 326, 2012 CarswellOnt 10568, [60].
[26] *Toronto Dominion Bank v TY (Canada) Inc* 42 CBR (4th) 142, 2003 CanLII 43355, [22(i)].
[27] *Idem*, [22(c)].
[28] Introduced by the Insolvency (Protection of Essential Supplies) Order 2015.
[29] Introduced by the Corporate Insolvency and Governance Act 2020.
[30] Insolvency Act 1986, s 233B(3)(a).
[31] See the example given in the Corporate Insolvency and Governance Bill 2020 Factsheet, "Prohibition of Termination Clauses", 5 June 2020, retrieved at <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-bill-2020-factsheets/prohibition-of-termination-clauses>.

First, section 233A provides that *ipso facto* clauses contained in contracts for the supply of essential utilities (defined in section 233(3) as gas, electricity, water and communications services) cease to have effect upon the debtor entering administration, or a voluntary arrangement under Part 1 of the Insolvency Act.

Second, as introduced by the Corporate Insolvency and Governance Act 2020 (CIGA), which came into effect on 26 June 2020, section 233B of the Insolvency Act extends the scope of the restrictions on *ipso facto* clauses to all contracts for the supply of goods and services, upon the occurrence of the following to the debtor company (referred to below as "insolvency procedures"):

(a) a moratorium under Part A1 coming into force for the company;[32]

(b) the company entering administration;

(c) the appointment of an administrative receiver (otherwise than in succession to another administrative receiver);

(d) the taking effect of a voluntary arrangement approved under Part 1;

(e) liquidation of the company;

(f) appointment of a provisional liquidator of the company (otherwise than in succession to another provisional liquidator); or

(g) the making of a court order under section 901C(1) of the Companies Act 2006 summoning creditors to attend a meeting relating to a compromise or arrangement.

Specific to termination rights, section 233B(4) of the Insolvency Act provides that even if the right to terminate the contract is triggered by "event[s] occurring before the start of the insolvency period",[33] suppliers of non-essential goods cannot exercise those termination rights for the period of the insolvency procedure if they were not exercised prior to the commencement of the insolvency procedure. Section 233A, however, has no equivalent restriction.

By expanding the *ipso facto* restrictions to a wider scope of contracts and insolvency procedures, section 233B is intended to:

> "help companies trade through a restructuring or insolvency procedure, maximising the opportunities for rescue of the company or the sale of its business as a going concern. [The provision] complement[s] the policy for a new moratorium and restructuring plan procedure, which are aimed at enhancing the rescue opportunities for financially distressed companies."[34]

[32] A moratorium under Part A1 of the Insolvency Act 1986 may be applied for when a winding up petition has not yet been presented against the company, but the company's directors take the view that the company is, or is likely to become, unable to pay its debts, and that a moratorium for the company would result in the rescue of the company as a going concern. See Insolvency Act 1986, Part A1, s A6.
[33] Insolvency Act 1986, s 233B(4). See s 233B(8) for the definition of "the insolvency period".
[34] Explanatory Notes, 8.

While beneficial to debtors, section 233B effectively imposes an obligation on counterparties to continue the supply of goods and services even when the debtor may ultimately be unable to pay. This is mitigated for suppliers of essential utilities – under section 233A(5) read with section 233A(3), utility suppliers can demand that the officeholder (the administrator or supervisor of the voluntary arrangement, as the case may be) provides a personal guarantee for payments in respect of supplies provided after the company enters administration or after the voluntary arrangement takes effect. If the officeholder refuses to provide the guarantee within 14 days of the demand, the supplier may terminate the supply of essential utilities.

Suppliers of non-essential goods and services cannot insist on a personal guarantee from the officeholder of section 233B insolvency procedures. However, suppliers may make available further supplies, conditional upon payment for those supplies.[35] This would make it possible for suppliers to refuse to provide further supplies on the basis of the debtor company's failure to pay for the supplies after the company becomes subject to an insolvency procedure.

It is noteworthy that the CIGA was a product of an accelerated legislative process motivated by the COVID-19 pandemic. After consultations for the improvement of the United Kingdom's corporate governance and insolvency laws in May 2016 and March 2018, the Corporate Insolvency and Governance Bill [HC 2019-21] was introduced in the House of Commons on 20 May 2020. It was then fast-tracked through Parliament – receiving its second hearing on 3 June 2020 and its Royal Assent just three weeks later on 25 June 2020 before coming into force on 26 June 2020.[36] To ensure that any gap in the CIGA could be addressed expediently, the CIGA provided for the Secretary of State to have wide-ranging powers to amend or modify the effect of the CIGA through regulations made by statutory instrument instead of further legislation, up until 29 April 2022.[37]

As part of the Government's COVID-19 response, the CIGA included an exemption for small suppliers[38] which expired on 30 June 2021. Those suppliers will now need to rely on the general exceptions to the *ipso facto* restrictions.

4.1 Exceptions and commentary

There are three main exceptions to the *ipso facto* restrictions in the United Kingdom:

(a) judicial permission to terminate the contract pursuant to a court application if the applicant can satisfy the court that the continuation of the contact would cause hardship;

(b) consent of the debtor company to termination of the contract (where the company has entered a moratorium, voluntary arrangement or restructuring plan) or consent of

[35] Insolvency Act 1986, s 233B(7).
[36] Commons Library Research Briefing, "Corporate Insolvency and Governance Act 2020", 6 April 2022.
[37] Corporate Insolvency and Governance Act 2020, ss 20, 24, 26.
[38] A business was deemed a small supplier if it met at least two of the following tests: (a) the supplier's turnover is not more than £10.2 million (or an average of £850,000 each calendar month if the supplier is in its first financial year); (b) the supplier's balance sheet total is not more than £5.1 million; and (c) the number of the supplier's employees is not more than 50.

its office holder[39] (in any other relevant procedure); and

(c) exempted contracts as specified in Schedule 4ZZA of the Insolvency Act.

Schedule 4ZZA provides a list of persons and contracts which are exempted from the *ipso facto* prohibitions. The list includes the following:

(a) persons involved in financial services;[40]

(b) contracts involving financial services;[41] and

(c) other exclusions, such as financial markets and insolvency, setting off and netting and aircraft equipment regulations under the International Interests in Aircraft Equipment (Cape Town Convention) Regulations 2015.

Judicial guidance on the meaning of "hardship" under the judicial permission exception in section 233B(5)(c) is keenly anticipated. One example given in the United Kingdom Government's Guidance[42] is where the supply of goods would threaten the solvency of the supplier itself. The House of Common's briefing document on the CIGA stated two considerations for the court's assessment of hardship under section 233(5)(c):

(a) whether the supplier would be more likely than not to enter into an insolvency procedure as a result of being compelled to continue supply; and

(b) whether exempting the supplier from the obligation to supply would be reasonable in the circumstances, having regard to the effect of non-supply on the debtor company and the prospects of rescue.

The document further highlights that the threshold for "hardship" is high, and a supplier can only seek an exemption if continued supply threatens its own insolvency.

The overarching intention behind the *ipso facto* provisions is to maintain the supply of goods and services to companies in restructuring and insolvency procedures by limiting the circumstances in which the supplier can terminate or alter the contract. This is intended to help companies trade through a restructuring or insolvency process, thereby maximising the opportunities for the rescue of the company or the sale of its business as a going concern.[43]

[39] The title of "office-holder" is given to the qualified insolvency practitioner who acts as the administrative receiver, liquidator or provisional liquidator of a company undergoing an insolvency procedure, as the case may be. See Insolvency Act 1986, s 230.

[40] Such as insurers, banks, electronic money institutions, investment banks and investment firms, payment institutions, operators of payment systems, infrastructure providers, recognised investment exchanges, securitisation companies and overseas activities.

[41] Financial contracts (loans, guarantees or commitments, securities contracts, commodities contracts, futures or forwards contracts and swap agreements), securities financing transactions, derivatives, spot contracts, capital market investments and contracts forming part of a public-private partnership.

[42] Corporate Insolvency and Governance Bill 2020 Factsheet, "Prohibition of Termination Clauses" (5 June 2020), retrieved at <https://www.gov.uk/government/publications/corporate-insolvency-and-governance-bill-2020-factsheets/prohibition-of-termination-clauses>.

[43] Explanatory Note to the Corporate Insolvency and Governance Act 2020, retrieved at: <https://www.legislation.gov.uk/ukpga/2020/12/notes/division/3/index.htm>.

However, the legislative intent behind the United Kingdom provisions goes beyond corporate rescue and rehabilitation. The United Kingdom has expanded the protection against *ipso facto* clauses even to debtors that enter into liquidation proceedings. This may be contrasted with the approach taken in other countries, such as Singapore, where only debtors participating in a restructuring proceeding can avail themselves of the protection against the enforcement of *ipso facto* clauses.

Although there has not been much judicial guidance as yet on the scope of the *ipso facto* restrictions, the United Kingdom courts have considered interesting issues which arise where the event of default is not the debtor company's own insolvency, but instead that of its parent or related companies. The decision in *P&O Princess Cruises*[44] suggests that the insolvency procedures of a debtor's related companies do not trigger the protection under section 233B of the Insolvency Act for the debtor itself.

In *P&O Princess Cruises,* the CMV Group was forced to suspend operations as a result of the COVID-19 pandemic and needed a place to dock two of its cruise ships – the Columbus and the Vasco da Gama. The ships were demise chartered to single purpose companies within the CMV Group, known as Lyric and Mythic respectively. The Port of Tilbury agreed to charge a low tariff for the docking of the vessels on account of the longstanding commercial relationship between the Port and the CMV Group. When other companies in the CMV Group entered into administration, the Port terminated the discounted tariff rate and provided notice that the usual published tariffs would apply.

The Admiralty Court Judge's order was a Queen of the South order, where the Port undertook that it would not exercise its statutory right to detain and sell the vessels if its fees were treated as an expense of the sale, and accordingly given priority over other creditors. The question arose as to which tariff rate should be used for the calculation of fees. If the older discounted rate was applied, the fee would only be £78,000. If, however, the usual published tariff rate applied, the fee would be approximately £2.5 million.

With regard to section 233B, it was argued by the cautioners that an interpretation which recognised the purpose of section 233B should apply and the Port should be prohibited from changing the tariff rate from the discounted contractual rate, notwithstanding that neither Lyric nor Mythic were themselves in administration.

The Court rejected this argument, and held that because the Port's services were directly provided to Lyric and Mythic, and because these two companies were not in a relevant insolvency procedure themselves, section 233B could not apply. Notably, the Court seemed to take the view that if Lyric and Mythic were in administration, then the variation of the rate pursuant to regulation 5.6 (which enabled the Port to vary the rates it charged) would be caught by s 233B since it applies not just to the "termination" of contracts but also the doing of "any other thing" arising from the debtor's insolvency, which would include a variation in rates.

The implication of this decision is clear – the statutory protection afforded by section 233B only applies if a party to the contract enters into an insolvency procedure itself. The insolvency or restructuring of related parties is irrelevant. It arguably follows from the

[44] *P&O Princess Cruises International Ltd v Demise Charterers of the Vessel 'Columbus'; P&O Princess Cruises International Ltd v Owners and/or Demise Charterers of the Vessel 'Vasco da Gama'* [2021] EWHC 113 (Admlty).

reasoning in *P&O Princess Cruises* that *ipso facto* clauses premised on the insolvency or restructuring of related parties can continue to operate notwithstanding sections 233A and 233B.

5. Singapore

Singapore introduced restrictions on *ipso facto* clauses in July 2020, as part of the Insolvency, Restructuring and Dissolution Act 2018 (IRDA). Section 440 of the IRDA states:

(1) No person may, at any time after the commencement, and before the conclusion, of any proceedings by a company:

(a) terminate or amend, or claim an accelerated payment or forfeiture of the term under, any agreement (including a security agreement) with the company; or

(b) terminate or modify any right or obligation under any agreement (including a security agreement) with the company,

by reason only that the proceedings are commenced or that the company is insolvent.

(2) Nothing in this section is to be construed as:

(a) prohibiting a person from requiring payments to be made in cash for goods, services, use of leased property or other valuable consideration provided after the commencement of the proceedings; or

(b) requiring the further advance of money or credit.

(3) Any provision in an agreement that has the effect of providing for, or permitting, anything that, in substance, is contrary to this section is of no force or effect.

(4) On an application by a party to an agreement, the Court may declare that this section does not apply, or applies only to the extent declared by the Court, if the applicant satisfies the Court that the operation of this section would likely cause the applicant significant financial hardship.

"Proceedings" are defined to mean the debtor company's application for, *inter alia*, a judicial management order, a moratorium for restructuring procedures, or a scheme of arrangement.

Section 440(2) confers some protection on the debtor's counterparties, who are not prevented from demanding cash payment for goods, services or leases provided, and are not required to provide further financing to the debtor. Further, the exercise of *ipso facto* clauses based on other events, such as payment defaults and breaches of financial covenants, are not prohibited under section 440.

Under the transitional provisions, section 440 does not apply to any contract entered into before 30 July 2020.

5.1 Exceptions and commentary

Section 440(5) of the IRDA sets out the types of contracts exempted from the *ipso facto* restrictions:

(a) any eligible financial contract as may be prescribed;[45]

(b) any contract that is a licence, permit or approval issued by the Government or a statutory body;

(c) any contract that is likely to affect the national interest, or economic interest, of Singapore, as may be prescribed;

(d) any commercial charter of a ship;

(e) any agreement within the meaning of the Convention as defined in section 2(1) of the International Interests in Aircraft Equipment Act; or

(f) any agreement that is the subject of a treaty to which Singapore is party, as may be prescribed.

As stated by the then Senior Minister of State for Law in the Parliamentary Debates on the IRDA, these exemptions recognise that restricting the application of *ipso facto* clauses in certain categories of transactions or contracts would have a disproportionately adverse impact on certain markets.[46]

The most significant category would be that of "eligible financial contracts". The Prescribed Contracts Regulations contain a list of prescribed financial contracts. The intention is to minimise any potential negative impact on the industries that rely on such contracts, where *ipso facto* clauses may be well established and regarded as industry norms.

The list of eligible financial contracts in the Prescribed Contracts Regulations was arrived at after a public consultation by the Singapore Ministry of Law (MinLaw). There were certain categories of exemptions proposed during the public consultation that were rejected by MinLaw. These categories, and the reasons given by MinLaw for their rejection, are set out below:[47]

(a) Any contract or agreement that is directly connected with a commodity. This proposed category was rejected for being too broad and unjustifiable. Further, a narrower category of "commodities lending or repurchase contract" is already excluded;

[45] Under the Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020.
[46] Parliamentary Debates, Official Report (1 October 2018), vol 94 (Mr Edwin Tong Chun Fai, Senior Minister of State for Health and Law).
[47] Ministry of Law, Ministry's Response to Feedback Received from Public Consultation on the Exclusions under Sections 440(5)(5) of the Insolvency, Restructuring and Dissolution Act 2018 (23 July 2020).

(b) Loan contracts. This proposed category was also rejected for being too broad and unjustifiable. Further there are numerous safeguards in place for financial institutions as it is;

(c) Outsourcing contracts. This proposed category was rejected for being too broad and unjustifiable. The types of contracts falling within the scope of this category are generally not financial contracts by nature, which may be prescribed as exempted;

(d) Cash pooling. This is a manner of structuring financing for a group of companies and does not appear to be a type / category of financial contract *per se*; and

(e) An entity-level exclusion for banks and insurers. It was submitted in feedback that the resolution regime is the more appropriate form of restructuring for banks and insurers as it is specifically tailored to take into account the considerations concerning the insolvency of those institutions. However, MinLaw stated that section 440 neither prejudices nor adversely constrains the possibility of a bank or insurer being placed into the resolution regime. Also, in the event the bank or insurer is not placed into the resolution regime, that particular bank or insurer may attempt to restructure by way of a scheme of arrangement.

Beyond the prescribed exceptions, parties to an agreement may apply to the Singapore High Court for a declaration that section 440 does not apply, or applies only to the extent declared by the Court, if the applicant satisfies the Court that the application of the section would likely cause the applicant significant financial hardship.

What then constitutes "significant financial hardship"? There is no local case law as yet on the meaning of this phrase, though Canadian case law provides some guidance. The Singapore provisions and their Canadian counterparts are *in parimateria*. As such, if the matter ever comes before the Singapore courts, they are likely to refer to the holding and reasoning in *Toronto Dominion Bank* – that the applicant must be able to show quantitatively the prejudice it will suffer if the stay is not removed.

As to whether the Singapore courts are inclined to follow an objective or subjective approach, during the Second Reading of the Insolvency, Restructuring and Dissolution Bill, it was stated in Parliament that section 440(4) of the IRDA was intended to introduce a degree of flexibility, and that its application would depend on the impact which the restriction would have on the particular creditor or in the particular situation.[48] It follows that the Singapore courts should not be constrained by a formulation based on either a subjective or objective approach, but should rather undertake a holistic assessment of the facts in determining whether the applicant has demonstrated "significant financial hardship". Nonetheless, in line with the objective of section 440, one expects the bar to be high.

The court in *Toronto Dominion Bank* stated that it should "consider a balancing of the interests of all affected parties" in determining an application for relief from the *ipso facto* restrictions. Although section 440(4) does not expressly refer to the interests of other parties, the court should not be precluded from considering such other interests. Section 440(4) states that the court *may* declare that the provision does not apply if the

[48] Parliamentary Debates, Official Report (1 October 2018), vol 94 (Mr Edwin Tong SC, then Senior Minister of State for Health and Law).

applicant can demonstrate it is likely to suffer significant financial hardship. This suggests that the court's decision on a section 440 application is ultimately a matter of discretion, and the court is not prevented from considering the interests of other parties and the circumstances of the case.

Section 440 of the IRDA contains language similar to the legislation in the United States and, as noted above, Canada (in particular, section 34(1) of the Canadian CCAA and section 365(e)(1) of the United States Bankruptcy Code). Case law relating to the equivalent provisions in the Canadian CCAA and the United States Bankruptcy Code may therefore be relevant in interpreting sections 440(1)(a) and 440(1)(b) of the IRDA.

While the wording of section 440(1) is generally fairly straightforward, one area of uncertainty is the meaning of amending an agreement or modifying any right or obligation.

United States case law provides some guidance on the meaning of "modification" of rights and obligations. In *Lehman Brothers Special Financing Inc v Bank of America National Association*,[49] the United States Bankruptcy Court for the Southern District of New York considered whether certain "flip clauses" were *ipso facto* clauses which were unenforceable in bankruptcy. The parties, including Lehman Brothers Special Financing (LBSF) and the Lehman Brothers noteholders (Noteholders), had entered into swap agreements under which they would be paid from the proceeds of the liquidation of certain collateral. The parties would be paid in accordance with the priority of payments or waterfall provisions in the agreements. The flip clauses served to change the priority of the parties in the payment waterfall.

The court in this case identified two distinct waterfall provisions in the agreements:

(a) type 1 transactions – LBSF initially had priority in payment over the Noteholders. However, upon LBSF's default under the swaps, the flip clause was activated such that the Noteholders then held payment priority over LBSF. The Court found that these were unenforceable *ipso facto* clauses as they served to modify LBSF's rights, divesting LBSF of its existing payment priority; and

(b) type 2 transactions – in these transactions, neither LBSF nor the Noteholders held payment priority at the outset. The order of priority would only be established after a termination event occurred. Pursuant to this "toggle", the Noteholders would have priority if the early termination was the result of LBSF's default under the swaps. The Court found that this did not constitute a modification of LBSF's rights, as LBSF did not initially have an existing right to payment priority, and only held a contingent right to priority depending on the circumstances. As such, these were restricted under the *ipso facto* provisions.

The Court's determination in this case suggests that the "modification" of a right under the *ipso facto* regime involves the variation of an existing right upon an event of insolvency or restructuring. The existing right should be defined and must have actually crystallised before the occurrence of the triggering event, as opposed to the contingent

[49] 553 BR 476 (Bankr. S.D.N.Y. 2016).

right in the type 2 transactions described above (which only crystallised after the event of insolvency).

Further, it may be observed that "modification" does not require the *ipso facto* clause to expressly provide that the party's rights are altered in a certain manner upon the occurrence of a triggering event. A contract which sets out the relative position of the parties at the outset (when the parties are solvent) and prescribes a different position upon a party's insolvency proceedings may be regarded as an *ipso facto* clause which is subject to restriction if that party finds itself in a less advantageous position following the triggering event.

6. Australia

Effective from 1 July 2018, the Treasury Laws Amendment (2017 Enterprise Incentives No 2) Act 2017 (amending the Corporations Act 2001) introduced a stay on the enforcement of contractual rights triggered by insolvency or restructuring events. On 1 January 2021, the Corporations Amendment (Corporate Insolvency Reforms) Act 2020 came into effect and extended the scope of the stay to reflect the new restructuring regime in Part 5.3B of the Corporations Act 2001.

Following these amendments, the Australian regime on *ipso facto* clauses is now neatly encapsulated within sections 415D, 434J, 451E and 454N of the Corporations Act 2001, with exceptions and details of the regime set out in the Corporations Regulations 2001. Together, these sections impose a stay on the enforcement of contractual rights that are triggered by the relevant restructuring events applicable in Australia, namely:

(a) a creditors' schemes of arrangement (section 415D of the Corporations Act 2001);

(b) receivership (section 434J);

(c) voluntary administration (section 451E); and

(d) restructuring of small businesses (section 454N).[50]

The provisions are phrased broadly and capture not only those *ipso facto* clauses which are triggered by the debtor company *becoming subject to* (or to an application for) each restructuring proceeding, but also where the company *possibly becomes subject to* each proceeding, and where the clause is predicated on the *financial position of the debtor while under* each proceeding. That a clause may be "self-executing"[51] does not exempt it from the restriction on enforcement.[52] A final catch-all to each section provides that contractual rights predicated on "a reason that, in substance, is contrary to this subsection" are similarly unenforceable.[53]

[50] Despite similarities with voluntary arrangements in that the company proposes a compromise arrangements with creditors, a "restructuring" under Australian law is a process specially created for small businesses, and is implemented with control over the company remaining with the directors, not the restructuring practitioner: see Corporations Act 2001, s 452A, read with s 453K.

[51] Defined as clauses that start to apply automatically (i) for one or more reasons; and (ii) without any party making a decision that the clause should start to apply: *idem*,ee ss 415FA(3), 434LA(3), 451GA(3), 454R(3).

[52] *Idem*, ss 415FA(2), 434LA(2), 451GA(2), 454R(2).

[53] *Idem*, ss 415D(1)(f), 434J(1)(d), 451E(1)(d), 454N(1)(d).

Subject to the exceptions set out below, the stay applies to all contracts, agreements or arrangements entered into on or after 1July 2018,[54] unless the contract was entered into or renewed only as a result of a novation, assignment or variation of a contract which took place prior to 1 July 2018, or if the contract was entered into after the relevant insolvency or restructuring proceeding takes place.[55]

6.1 Exceptions and commentary

Counterparties to contracts under which rights are stayed may apply to the court for the stay to be lifted. The court is empowered to lift the stay when it is satisfied that it is in the interests of justice to do so,[56] or, in the case of a scheme, if the relevant scheme which triggered the stay was not initiated by the company for the purpose of avoiding being wound up.[57]

Some contracts and rights are expressly excluded from the operation of the stay. These exceptions can be found in regulation 5.3A.50(2) of the Corporations Regulations 2001[58] and the Corporations (Stay on Enforcing Certain Rights) Declaration 2018 (No 2)[59] respectively.

The types of contracts, agreements and arrangements excluded from the *ipso facto* provisions broadly include:[60]

(a) licenses, permits and approvals issued by Commonwealth, State or Territory authorities;

(b) contracts relating to Australia's national security, border protection or defence capability;

(c) contracts for the supply of goods or services to, or on behalf of, or by a public hospital or a public health service;

(d) contracts for the supply of essential or critical goods or services to Commonwealth, State or Territory authorities or the public;

(e) derivatives and securities financing transactions;

(f) contracts for the underwriting of an issue or sale of securities, financial products, bonds, promissory notes or syndicated loans;

(g) contracts under which securities may be offered under a rights issue;

(h) contracts for the sale of all or part of a business;

[54] *Idem*, ss 415D(5)(a), 415D(5)(b), 434J(5)(a), 434J(5)(b), 451E(5)(a), 451E(5)(b), 454N(5)(a), 454N(5)(b).
[55] Corporations Regulations 2001, reg 5.3A.50(2)(zn).
[56] Corporations Act, ss 434K, 451F, 415E, 454P.
[57] *Idem*, s 415E(1)(a).
[58] Read together with regs 5.1.50, 5.2.50 and 5.3B.12, and effective from 1 July 2018.
[59] Effective from 1 January 2021.
[60] Corporations Regulations 2001, reg 5.3A.50, ss 2(a) to 2(f).

(i) contracts for the issue of fungible instruments, the first of which was issued before 1 July 2018;

(j) contracts connected with the issuance of bonds;

(k) contracts providing for the management of financial investments;

(l) contracts involving a special purpose vehicle, and that provide for a securitisation, public private partnership or project finance arrangement under which a financial accommodation is to be repaid or otherwise discharged primarily from the project's cash flow, and all or substantially all of the project's assets, rights and interests are to be held as security for the financial accommodation;

(m) contracts altering the priority of security interests in a particular property;

(n) flawed asset arrangements;

(o) factoring arrangements;

(p) arrangements relating to financial markets and clearing and settlement facilities; [61]

(q) RTGS systems, netting arrangements and contracts connected with such market netting arrangements;[62]

(r) contracts entered into on or after 1July 2018 but before 1 July 2023 for the provision of work, goods, and services for building works, the total payments of which amount to at least AUD $ 1 billion; and

(s) contracts for reinsurance or retrocession.

Exempted rights include:[63]

(a) a right to appoint a controller of property – when the right is over the whole or substantially the whole of the property of the debtor and the creditor has a security interest over the same;[64]

(b) a right to change the basis, or rate, on which any amount under a financing arrangement (or guarantees, indemnities or securities relating to such an arrangement) is calculated;

(c) a right to payment by way of indemnity in relation to any liability or loss arising from the preservation or enforcement of rights or any changes and expenses incurred in doing the same;

(d) a termination right under a standstill or forbearance arrangement;

[61] *Idem*, reg 5.3A.50, ss 2(v) to 2(x).
[62] *Idem*, reg 5.3A.50, ss 2(zd) to 2(zm).
[63] Corporations (Stay on Enforcing Certain Rights) Declaration 2018, s 5(4).
[64] *Idem*, s 6.

(e) a right to change the priority, or order, in which amounts are to be paid under contracts;

(f) a right of set-off;

(g) a right for combination of accounts;

(h) a right to net balances;

(i) a right to transfer or novate rights and obligations;

(j) a right for property that is subject to a circulating security interest to become subject to a non-circulating security interest;

(k) a right for a floating charge over property to operate as a fixed charge;

(l) a right for property consisting of accounts or chattel paper to be transferred to a secured party by way of security;

(m) a right that restricts the grantor of a security interest in property from dealing with the property;

(n) a right to perform obligations, to engage another person to perform obligations, to enforce rights or to engage another person to enforce rights, of the specific person under a contract, agreement or arrangement; and

(o) a right to enforce certain possessory security interest.

Apart from the prescribed exceptions, the Minister retains the power to declare new exceptions to the regime.[65]

The *ipso facto* regime in Australia was motivated not solely by a need to assist business recovery and restructuring but had been formulated as part of the National Innovation and Science Agenda, which was aimed at promoting a culture of entrepreneurship and innovation, reducing the stigma of failure and helping drive business growth, local jobs and global success.[66]

The Australian *ipso facto* regime has certain noteworthy features. Creditors' interests are protected by a prohibition on debtor companies enforcing their rights for new advances of money or credit under contracts when the creditor or counterparty's rights have been rendered unenforceable under the *ipso facto* stay.[67]

[65] Corporations Act 2001, ss 415D(7), 434J(6), 451E(6), 454N(6).
[66] See the Explanatory Statement to the Corporations (Stay on Enforcing Certain Rights) Declaration 2018, issued by authority of the Minister for Revenue and Financial Services, Minister for Women and the Minister Assisting the Prime Minister for the Public Service, retrieved at: <https://cdn.treasury.gov.au/uploads/sites/1/2018/04/04_T280567_Explanatory_Statement_Corporations_Amendment_Declaration_2018-1.pdf>.
[67] Corporations Act 2001, ss 434J(8), 451E(8), 415D(9), 454N(8).

Another feature is the express legislative provision on the duration of the prohibition on *ipso facto* clauses. In short, section 415D(2) of the Corporations Act 2001 prescribes a duration referred to as a "stay period". For instance, if a "disclosing entity" – generally a public listed company – proposes a scheme of arrangement, the stay period is usually three months (unless extended by the court) from the time it announces its intention to make a court application for convening a creditors' meeting for the scheme. For non-disclosing entities, the *ipso facto* prohibition lasts until the scheme application is withdrawn or dismissed, or if the scheme is approved, for the duration of the approved scheme.

In addition, section 415(D)(4) states that an *ipso facto* clause is "unenforceable against [the company] indefinitely" after the end of the stay period to the extent that a reason for seeking enforcement is, *inter alia*, the company's financial position before the end of the stay period, or the company having made a scheme application before the end of such period.

At first blush, this may seem susceptible to abuse. For example, if a company simply announces an intention to make a scheme application, and that triggers the stay on the enforcement of *ipso facto* clauses, the question is whether the indefinite stay should still apply if the company subsequently does not make good on its promise to make such an application. Presumably, because section 415(D)(4) only disallows reliance on the scheme application or the company's financial position as *a* reason for enforcing an *ipso facto* clause, a counterparty is not prevented from relying on other reasons for doing so, such as a breach of a covenant.

7. India

Indian law does not prohibit the enforcement of *ipso facto* clauses in all contracts. Instead, only specified contracts are subject to a restriction on the enforcement of *ipso facto* rights.

Under the Indian Bankruptcy Code 2016 (IBC), upon the Adjudicating Authority's[68] acceptance of an application to enter into a "corporate insolvency resolution process" (CIRP), a moratorium takes effect over proceedings against the corporate debtor and only ceases upon the Adjudicating Authority's approval of the resolution plan, or upon the corporate debtor entering liquidation.[69] During that moratorium period, certain protected contracts deemed necessary for the company to continue as a going concern[70] cannot be terminated, suspended or interrupted on grounds of insolvency. This is subject to the condition that there is no default in payment of current dues arising from such contracts or licenses during the moratorium period.

The contracts which fall within the scope of the prohibition on *ipso facto* clauses are those specified under sections 14(2) and 14(2A) read with the explanation to section 14(1) of the IBC. There are three categories – licenses and permits, essential supplies and critical supplies.

[68] The National Company Law Tribunal (NCLT) and the National Company Law Appellate Tribunal (NCLAT).
[69] IBC, ss 13(1)(a), 14(4), 31(3)(a).
[70] February 2020 Report of the Insolvency Law Committee (Ministry of Corporate Affairs), 8.15.

First, under the explanation to s 14(1) IBC, licenses, permits and other rights given by Government authorities to companies are specified as contracts to which the *ipso facto* prohibition applies.

Second, under section 14(2), contracts for "essential supplies" as specified under subsidiary legislation are protected. Regulation 32 of the CIRP Regulations[71] specifies essential supplies as electricity, water, telecommunication services and information technology services, but limits the definition only "to the extent these are not a direct input to the output produced or supplied by the corporate debtor."[72] For example, water supplied to a corporate debtor will be essential supplies for drinking and sanitation purposes, but not for the generation of hydroelectricity.[73]

Third, under section 14(2A), contracts for "critical supplies" are protected. This latest amendment to section 14 of the IBC took effect from 28 December 2019. The identification of "critical supplies" is left to the resolution professional in charge of the corporate insolvency resolution process. Guidelines for the identification of critical supplies were provided in the February 2020 Report of the Insolvency Law Committee and include:[74]

(a) whether the supplies have a significant and direct relationship with keeping the corporate debtor as a going concern; and

(b) whether the supplies may be replaced easily or efficiently.

A knowing or wilfully authorised or permitted breach of section 14 by a creditor is a criminal offence.[75]

To militate against the potential unfairness to creditors who cannot now terminate their contracts with a potentially insolvent debtor, costs for essential goods or services, as well as costs incurred by the resolution professional in running the business of the corporate debtor as a going concern (which presumably includes the continuation of critical contracts under section 14(2A)), will have to be paid in priority to other costs as part of a resolution plan or, if the corporate debtor goes into liquidation, during distribution of the assets.[76]

Section 14 of the IBC is only applicable to debtor companies with a minimum defaulted debt amount of one crore rupees.[77] Interestingly, the recent decision of the Supreme Court of India in *Gujarat Urja Vikas Nigam Limited v Amit Gupta and others*[78] dealt with an *ipso facto* clause, which not only purported to grant termination rights but to shorten the

[71] Insolvency and Bankruptcy Board Of India (Insolvency Resolution Process For Corporate Persons) Regulations, 2016, version accurate as of 24 April 2022.
[72] *Idem*, reg 32.
[73] *Ibid*.
[74] February 2020 Report of the Insolvency Law Committee (Ministry of Corporate Affairs), 8.17.
[75] IBC, s 74(2).
[76] *Idem*, s 5(13)(c), read with reg 31 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
[77] IBC, s 4(1).
[78] C.A. No. 9241/2019.

statutory timeline for completion of the insolvency resolution process. The Supreme Court held that such a clause was unenforceable for being inconsistent with the IBC.[79]

The Supreme Court also reviewed the regimes relating to *ipso facto* clauses in different jurisdictions and observed that the resolution of issues on the validity of *ipso facto* clauses would require the balancing of a myriad of complex questions. As such, it was best left to the legislature to decide on the scope and ambit of any restriction on the exercise of *ipso facto* clauses.

We next consider how certain civil law jurisdictions have addressed *ipso facto* clauses in the insolvency context. By no means exhaustive, we look at the recent introduction of *ipso facto* legislation under Dutch law, and the EU Restructuring Directive.

8. The Netherlands

The Court Approved Restructuring Plan Act (*Wet Homologatie Onderhands Akkoord* or WHOA) came into effect in the Netherlands in January 2021. Also known as the "Dutch scheme", the WHOA amends the Dutch Insolvency Act and provides a framework for a Dutch debtor company to propose and implement a debt restructuring plan with its creditors (under article 370(1)) and to appoint a restructuring expert (under article 371). Among the features which support a debt restructuring, the new articles 373(3) and 373(4) of the Dutch Insolvency Act[80] provide that:

> "The preparation and presentation of a plan as referred to in article 370(1) and the appointment of a restructuring expert as referred to in article 371, as well as events and actions directly related thereto or with the implementation of the plan and which are reasonably necessary for that purpose, are no ground for amendment of obligations or obligations towards the debtor, for suspension of the performance of an obligation towards the debtor and for dissolution of an agreement concluded with the debtor.
>
> If a cooling-off period has been declared in accordance with article 376, during that period a default by the debtor that occurred before the cooling-off period shall not be a ground for the modification of obligations or obligations towards the debtor, for suspension of the performance of a obligation towards the debtor and for the dissolution of an agreement concluded with the debtor, insofar as security has been provided for the fulfilment of the new obligations that arise during the cooling-off period."

In essence, these articles restrict the enforcement of *ipso facto* clauses based on the commencement of a restructuring process pursuant to a Dutch scheme. Notably, the restriction extends to reliance on "events and actions" related to the scheme. This phrase is not defined and presumably includes negotiations relating to and implementation of the terms of the scheme.

Further, once a "cooling-off period" (or moratorium) has been declared pursuant to a Dutch scheme, counterparties will not be able to rely on the debtor's defaults which

[79] *Idem*, [25].
[80] Official Gazette of the Kingdom of the Netherlands, Official Gazette 2020, 414.

occurred before the start of the cooling-off period, provided that the debtor provides security for the fulfilment of new obligations arising during the cooling-off period. This is significant, as it appears that such defaults are not confined to the commencement of an insolvency procedure and may include payment defaults and breaches of covenants.

The *ipso facto* restrictions under WHOA are relatively new, and we await pronouncements and guidance on the scope of the restrictions and possible exceptions to the restrictions.

9. The EU Restructuring Directive[81]

With the objective of ensuring that EU Member States have in place effective debt restructuring regimes, the EU Restructuring Directive requires every Member State to revise their laws to provide measures to facilitate debt restructuring, including a moratorium, a cross-class cramdown option in creditors' voting for a restructuring plan, and restrictions on the enforcement of *ipso facto* clauses.

Article 7(5) of the EU Restructuring Directive provides that Member States shall ensure that creditors are not allowed to withhold performance or terminate, accelerate or, in any other way, modify executory contracts to the detriment of the debtor by virtue of a contractual clause providing for such measures, solely by reason of:

(a) a request for the opening of preventive restructuring proceedings;

(b) a request for a stay of individual enforcement actions;

(c) the opening of preventive restructuring proceedings; or

(d) the granting of a stay of individual enforcement actions as such.

Article 7(4) goes further, by requiring Member States to:

> "provide for rules preventing creditors to which the stay applies from withholding performance or terminating, accelerating or, in any other way, modifying essential executory contracts to the detriment of the debtor, for debts that came into existence prior to the stay, solely by virtue of the fact that they were not paid by the debtor. 'Essential executory contracts' shall be understood to mean executory contracts which are necessary for the continuation of the day-to-day operations of the business, including contracts concerning supplies, the suspension of which would lead to the debtor's activities coming to a standstill.
>
> The first sub-paragraph shall not preclude Member States from affording such creditors appropriate safeguards with a view to preventing unfair prejudice being caused to such creditors as a result of that subparagraph. Member States may provide that this paragraph also applies to non-essential executory contracts."

[81] See, generally, J Sarra, J Payne and S Madaus, "The Promise and Perils of Regulating *Ipso Facto* Clauses" (2022) 31 *International Insolvency Review* 45-80.

The EU Restructuring Directive primarily focuses on protecting the debtor from the effect of *ipso facto* clauses on "essential executory contracts". The illustrations given in the Directive refer to contracts for the supply of utilities such as gas, electricity and water and telecommunications and payment services. Nonetheless, the Directive provides flexibility by allowing Member States to extend the restrictions to "non-essential executory contracts". In addition, it is open for Member States to provide safeguards to prevent "unfair prejudice" to counterparties and creditors caused by *ipso facto* restrictions. The term "unfair prejudice" is not defined, but it does seem to be a potentially broader inquiry than the "significant financial hardship" test under the Canadian and Singapore *ipso facto* restrictions.

10. Common themes in *ipso facto* legislation

While the *ipso facto* regimes differ across jurisdictions, there are certain common themes and features. These themes and features include: (a) the types of contracts subject to the restrictions; (b) the types of contracts excluded or exempted from the restrictions; and (c) an affected counterparty's recourse to seek exemption or relief from the restrictions (and what the counterparty has to demonstrate). The final form of the *ipso facto* regime is ultimately shaped by an assessment of different, sometimes conflicting, interests and policy objectives.

These matters are considered in further detail below.

10.1 Essential contracts

Certain jurisdictions (such as the United Kingdom and India) confine their *ipso facto* regimes to "essential contracts". This is consistent with the primary objective of preventing the termination of essential services required for the debtor's business and operations solely because of the operation of an *ipso facto* clause.

Each jurisdiction decides its own scope and definition of essential contracts. At the most basic level, they refer to essential utilities such as power, water and telecommunications. It is possible to move beyond utilities, and to undertake an inquiry on what would be regarded as "essential" depending on the nature of the debtor's business. For instance, the supply of waste products may be essential to a debtor in the business of recycling. In India, the insolvency professional determines what are "critical supplies" for the debtor's business. In other jurisdictions, such as Singapore, the types of contracts affected by the *ipso facto* restrictions are simply not confined by any definition of "essential contracts".

To give some protection to the interests of suppliers to the debtor, the *ipso facto* regime may require the debtor to pay for the services provided during the moratorium period. This is an important safeguard for suppliers.

10.2 Excluded contracts

Another recurring feature is the exclusion of certain types of contracts from the *ipso facto* restrictions. A common denominator appears to be "eligible financial contracts" (or other similar formulation), where *ipso facto* clauses may be well established and regarded as industry norms. Common examples include ISDA contracts and contracts subject to business rules of exchanges. Commercial charters for ships are excluded in certain

jurisdictions (such as Singapore and Australia). However, beyond that, we see considerable variation in the classes of excluded contracts – compare, for instance, the Australian regime and the Singapore regime, where each jurisdiction weighs the potential impact of *ipso facto* restrictions against the efficacy of the restrictions and draws its own boundaries of excluded contracts.

10.3 Safeguards against prejudice to creditors or suppliers

Recognising that *ipso facto* restrictions fundamentally interfere with pre-existing contractual rights, most jurisdictions with *ipso facto* restrictions provide some form of protection for an affected counterparty. This protection occurs at different levels. At one level, an affected party may seek relief based on "financial hardship" (Singapore and Canada) or "unfair prejudice" (EU Restructuring Directive). At a more operational level, the United States regime requires the debtor or its trustee to provide adequate assurance for future performance before the counterparty performs its own obligations.[82] In Australia, a reciprocal prohibition on the debtor's enforcement of rights for new advances of money or credit under contracts is imposed once the creditor's own rights are restricted. In India and the United States, the costs incurred by the insolvency professional (including those incurred in continuing essential and critical supply contracts) are treated as expenses of the insolvency procedure and paid in priority to other claims.[83] These measures help ameliorate creditors' risks of supplying goods and services to an otherwise insolvent debtor.

10.4 Impact on drafting of legal documents

Not surprisingly, the introduction of *ipso facto* restrictions has prompted a review of contractual documents as a matter of commercial practice. Foremost in the minds of drafters of contracts would be how to safeguard contractual rights to the extent possible without infringing the statutory *ipso facto* restrictions. Drafters of contracts should note that *ipso facto* legislation can be widely framed. For instance, Australian legislation prohibits any clause which "in substance, is contrary" to the *ipso facto* legislation. The United Kingdom equivalent restricts clauses under which "any other thing would take place" because the debtor commenced an insolvency procedure.

To the extent that the *ipso facto* legislation prohibits the acceleration of payment by a borrower, some lending contracts may be amended to allow (if they do not already) a creditor to claim against a secondary obligor such as a guarantor for the total debt, without the need to accelerate the payment of the debt by the borrower.

In practice, there is now likely to be enhanced focus on events of default or terms which are not insolvency related. Most *ipso facto* legislation does not prevent the exercise of contractual rights triggered by events such as payment defaults and breaches of representations and warranties or covenants.

[82] See 11 U.S.C. § 365(b)(1)(C).
[83] See IBC, s 5(13)(c), read with reg 31 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016; US Bankruptcy Code

11. Conclusion

The world economy is likely to continue to be stressed in the near future, given the confluence of challenges on different fronts, including the ongoing impact of COVID-19, supply chain weaknesses, the war in the Ukraine and rising inflation. It is clear from the adoption of *ipso facto* restrictions across many jurisdictions that we no longer live in the same world where restrictions on *ipso facto* rights are thought of as "unquestionably one of the most draconian and controversial of all stays, because of [their] massive impact on transactions".[84]

Notwithstanding such restrictions, *ipso facto* clauses will likely remain relevant and useful, given that none of the jurisdictions discussed in this paper invalidate *ipso facto* clauses *in toto,* but only for the duration of an insolvency or restructuring procedure. For ease of reference, a summary table comparing the *ipso facto* restrictions in the jurisdictions discussed in this paper is set out in the Annexure.

[84] Philip Wood, *Principles of International Insolvency* (2nd ed, 2007, Sweet & Maxwell, London) at 430- 453. See further Suchak, "Corporate Rescue Proceedings and the Enforcement of *Ipso Facto* Termination Clauses: A Comparison of the English and US Approaches" (2011) 8(2) *International Corporate Rescue*.

Summary of *Ipso Facto* Restrictions				
Jurisdiction	**Contracts subject to *ipso facto* restrictions**	**Excluded contracts**	**Insolvency events that trigger the restrictions**	**When the court grants relief or disapplies restrictions**
USA	▪ Executory contracts and unexpired leases ▪ Contracts obstructing the sale, use or lease of the bankruptcy estate's property by the estate trustee ▪ Contracts which transfer an interest of the debtor out of the bankruptcy estate ▪ Contracts which fix a statutory lien on the debtor's property	▪ Loan contracts ▪ Non-assignable contracts - e.g. personal contracts and contracts for partnerships which are based on special relationship of trust ▪ Financial market contracts - e.g. lose-outs in commodity broker and stockbroker liquidations, sale and repurchase agreements in relation to securities and certain financial derivatives and swaps and master netting agreements	▪ Insolvency of the debtor ▪ Change in financial condition of the debtor ▪ Commencement of any case under Title 11 ▪ For s 545(1), the commencement of any insolvency proceeding even outside of Title 11 ▪ Appointment of or taking possession by a trustee or custodian	Not expressly provided
UK	▪ Contracts for supply of utilities ▪ Contracts for supply of goods and services	▪ By parties' consent ▪ Persons providing financial services ▪ Contracts including financial contracts, securities financing transactions, derivatives, spot	▪ For essential utilities contracts – in the event of administration or a voluntary arrangement ▪ For contracts for other goods and services – when the debtor is under a	Yes, if the continuation of the contract would cause the supplier hardship

Summary of *Ipso Facto* Restrictions				
Jurisdiction	**Contracts subject to *ipso facto* restrictions**	**Excluded contracts**	**Insolvency events that trigger the restrictions**	**When the court grants relief or disapplies restrictions**
		contracts, capital markets investments, contracts forming part of a public-private partnership, contracts regulated by financial markets and insolvency, setting off and netting arrangements and contracts for aircraft equipment	moratorium, administration, a voluntary arrangement, liquidation, provisional liquidation, receivership or there has been a court order for a meeting of creditors	
Singapore	All contracts	▪ Eligible financial contracts specified in subsidiary legislation ▪ Licenses, permits and approvals issued by the Government or a statutory body ▪ Contracts affecting the national or economic interests of Singapore as prescribed in subsidiary legislation	▪ Schemes of arrangement ▪ Application for moratorium for a scheme of arrangement ▪ Application for a judicial management order ▪ Written notice of the appointment of an interim judicial manager	If the court is satisfied the restriction will cause the applicant significant financial hardship

Summary of *Ipso Facto* Restrictions				
Jurisdiction	**Contracts subject to *ipso facto* restrictions**	**Excluded contracts**	**Insolvency events that trigger the restrictions**	**When the court grants relief or disapplies restrictions**
		▪ Commercial charters of ships ▪ Agreements within the meaning of section 2(1) of the International Interests in Aircraft Equipment Act ▪ Any agreement that is the subject of a treaty to which Singapore is a party		
Australia	All contracts	Broadly: ▪ Arrangements relating to laws, international obligations and public services ▪ Arrangements relating to securities and financial products ▪ Complex arrangements between sophisticated	▪ Appointment of a managing controller over the whole of a company's property ▪ Administration ▪ Schemes of arrangement ▪ Restructuring[1] ▪ A right triggered by company's financial position if it is subject to one of the	If the court is satisfied that it is appropriate in the interests of justice

[1] Restructuring is a process for companies with liabilities (excluding employee entitlements) of less than AUD $1 million, under Part 5.3B of the Corporations Act. The restructuring process was introduced by the Corporations Amendment (Corporate Insolvency Reforms) Act 2020 (Cth) with effect from 1 January 2021.

Summary of *Ipso Facto* Restrictions				
Jurisdiction	**Contracts subject to *ipso facto* restrictions**	**Excluded contracts**	**Insolvency events that trigger the restrictions**	**When the court grants relief or disapplies restrictions**
		parties ▪ Arrangements relating to financial markets and clearing and settlement facilities ▪ RTS systems and netting arrangements	above insolvency regimes ▪ Applies to "self-executing" provisions triggered by such events.	
India	▪ Government licences and permits ▪ Contracts for the supply of utilities ▪ Contracts for critical contracts as identified by resolution professional	Financial transactions, agreements or arrangements as may be notified by the Central Government	Acceptance of an application to enter into a corporate insolvency resolution process	Not expressly provided

Summary of *Ipso Facto* Restrictions				
Jurisdiction	**Contracts subject to *ipso facto* restrictions**	**Excluded contracts**	**Insolvency events that trigger the restrictions**	**When the court grants relief or disapplies restrictions**
Canada	All contracts	▪ Eligible financial contracts under s 2 of the Eligible Financial Contract General Rules (Bankruptcy and Insolvency Act) ▪ Generally – derivatives agreements, agreements to borrow or lend securities or commodities, agreements to act as depository for securities, commodities repurchase agreements and margin loans in respect of securities / futures account maintained by a financial intermediary	For individuals: ▪ Bankruptcy ▪ Insolvency ▪ Notice of intention or proposal ▪ Consumer proposal in respect of a consumer debtor For companies: ▪ Insolvency	If the court is satisfied the restriction will cause the applicant significant financial hardship
Netherlands	All contracts	Not expressly provided	Preparation and presentation of a restructuring plan and the appointment of a restructuring expert, as well as events and actions directly related thereto or with the implementation of the plan and which are	Not expressly provided

Summary of *Ipso Facto* Restrictions				
Jurisdiction	**Contracts subject to *ipso facto* restrictions**	**Excluded contracts**	**Insolvency events that trigger the restrictions**	**When the court grants relief or disapplies restrictions**
			reasonably necessary for that purpose	
EU Restructuring Directive	Essential executory contracts (open for member states to extend restrictions to non-essential executory contracts)	Up to Member State	▪ A request for the opening of preventive restructuring proceedings ▪ A request for a stay of individual enforcement actions ▪ The opening of preventive restructuring proceedings ▪ The granting of a stay of individual enforcement actions as such	Up to Member State

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