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Restructuring & Insolvency vs. Ship Arrest

How Is Singapore Balancing The Competing Interests

Of These 2 Regimes Now?

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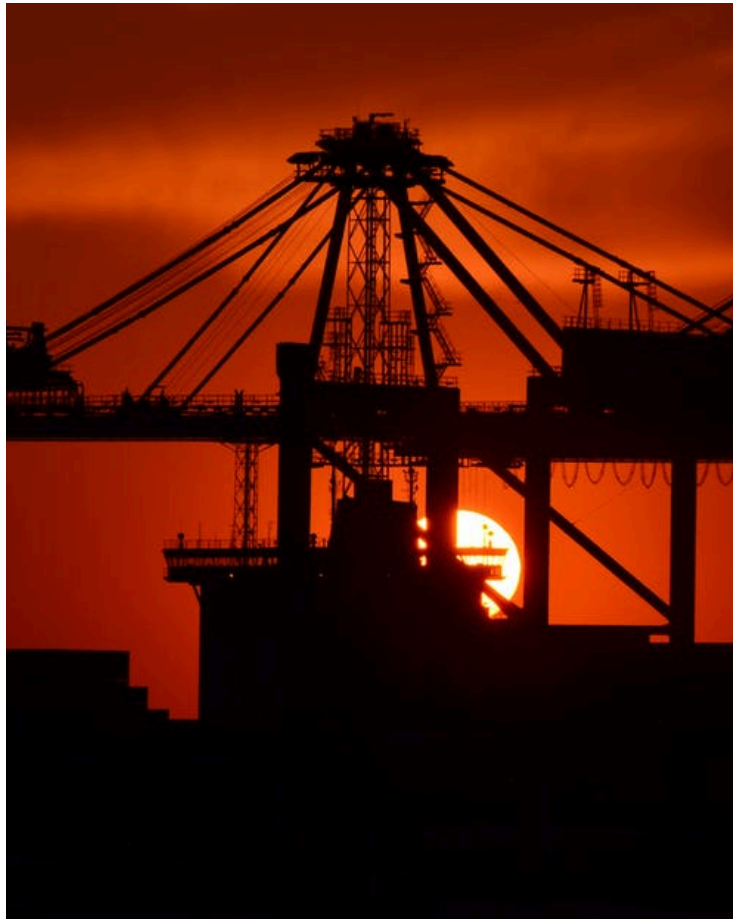
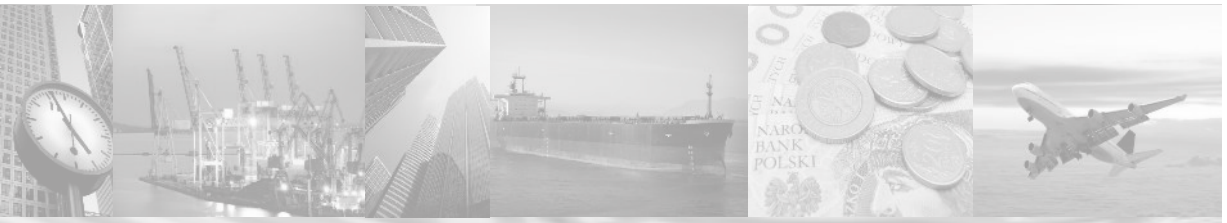
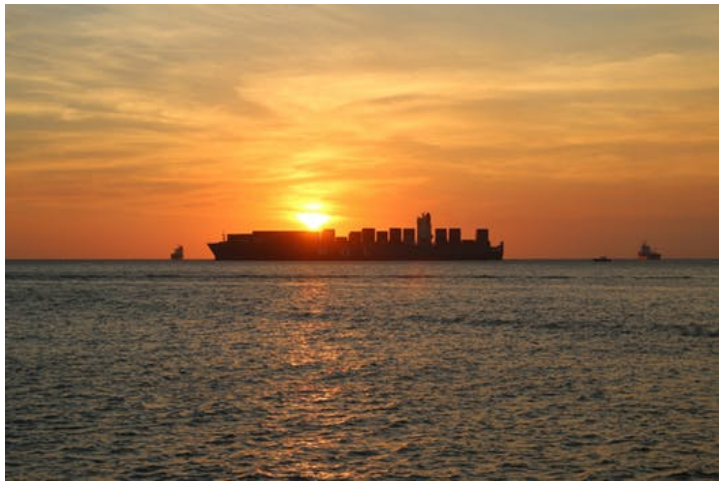




Status Of Admiralty Actions In Singapore

- Issuing an *in rem* Writ against vessel = secured creditor in the event of insolvency of ship-owning company

- Maritime claimant > Other unsecured creditors



Hanjin Shipping Co Ltd [2016] 5 SLR 787

- Korean company with two Singapore subsidiaries
- **29 August 2016**: One of their vessels, the "Hanjin Rome", was arrested in Singapore by a Singapore creditor
- **31 August 2016**: Hanjin filed an application for rehabilitation proceedings in Korea

Background

Hanjin Shipping Co Ltd [2016] 5 SLR 787

- **9 September 2016:** Hanjin brought an urgent ex-parte application in the Singapore Court seeking interim orders pending the presentation and approval of the rehabilitation plan, including:
  - Recognition of Hanjin's rehabilitation proceedings in Korea
  - A restraint of all pending, contingent or fresh proceedings against Hanjin and the Singapore subsidiaries or any enforcement or execution against any of their assets (including vessels beneficially owned or chartered by Hanjin or the Singapore subsidiaries)
  - A stay of all present proceedings against Hanjin and the Singapore subsidiaries

Holding

- The Singapore Court granted the interim orders sought by Hanjin, which includes the stay of all proceedings against Hanjin and its Singapore subsidiaries (including admiralty proceedings), subject to a "carve-out" for the "*Hanjin Rome*" that was arrested prior to the application.

- Held: In determining whether recognition of foreign rehabilitation proceedings should be granted, a court would need to consider:
  - The connection of the company to the forum in which the rehabilitation proceedings are taking place and to the place of rehabilitation;
  - What the rehabilitation process entails, including its impact on domestic creditors and whether it is fair and equitable in the circumstances; and
  - Whether there are any strong countervailing reasons against recognition of the foreign rehabilitation proceedings.

Strong countervailing reasons against recognition of the foreign rehabilitation proceedings?

(1) Potential interface with the admiralty jurisdiction:

- The Judge declined to follow an earlier Singapore High Court decision (*Re TPC Korea Co Ltd* [2010]) which held that the Singapore Admiralty Jurisdiction was a self-contained regime for the resolution of disputes where the relevant interests or assets involved were vessels.
- The admiralty regime was not to be insulated from the general powers of the court.
- There was nothing in the Statutes, rules and case law which prohibit the Court from issuing orders to restrain arrests of ships and admiralty proceedings.
- Assistance of the Korean rehabilitation proceedings should be granted even to the extent of preventing arrest of ships of the Hanjin fleet.

Strong countervailing reasons against recognition of the foreign rehabilitation proceedings?

(2) The possible adverse impact on Singapore creditors seeking to arrest Hanjin's vessels in Singapore:

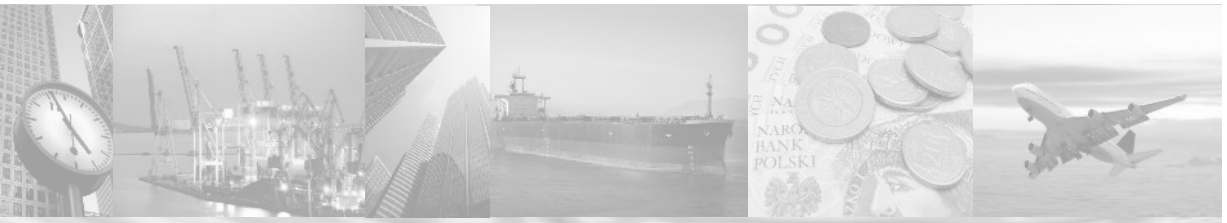
- The Judge was of the view that the inability of individual creditors to obtain security was a necessary consequence of universal collection and marshalling of assets, which was no different from the position of individual creditors constrained in relation to domestic restructuring and rehabilitation.

Questions left open by the Court

- The nature and character of the admiralty jurisdiction as against the inherent powers of the court to render assistance to foreign rehabilitation proceedings.

- What other reliefs (apart from restraint and stay orders) the Court could grant pursuant to its inherent powers – e.g. mandatory orders to assist foreign proceedings.

- The "carve-out" for the "*Hanjin Rome*" arose out of a concession by the applicant. To what extent would the Singapore Court be willing to grant exceptions as to specific assets?



All Leisure Holidays Limited

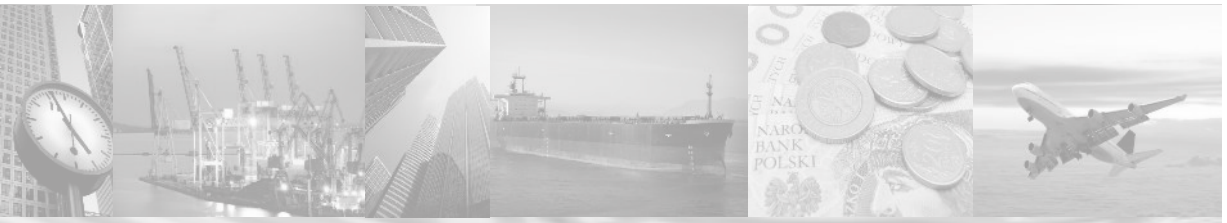
- In January 2017, All Leisure Holidays Limited (**"ALH**"), a UK company, applied to the Singapore High Court for recognition and assistance of foreign insolvency proceedings pending in the UK.

- Prior to the application, one of ALH's vessels – the "*Voyager*" – had already been arrested in Singapore by a creditor.

- In aid of the insolvency proceedings in the UK, the Singapore Court ordered that there be a stay of proceedings against ALH (including admiralty proceedings) and that creditors would require the consent of the Administrators or leave of the Singapore Court to arrest any of ALH's vessels (but "carve-out" exception for the existing arrest action against the "*Voyager*") .

EMAS Chiyoda

- In February 2017, member companies of the EMAS group filed applications for the recognition of the group's US Bankruptcy Code Chapter 11 proceedings in Singapore.
- The Singapore High Court recognised the Chapter 11 proceedings in allowing a limited stay and moratorium against proceedings in Singapore (including admiralty proceedings).



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TPC Korea [2010]

- Facts – the applicant applied for a restraint of all suits or proceedings against the applicant or any arrest, enforcement or execution against any assets of the Applicant (including any vessels owned by the Applicant) pending the approval / termination of its rehabilitation plan in Korea.

- Held – application dismissed:
  - The application was in respect of a company not incorporated or registered in Singapore, and which had no assets in Singapore other than the interests in certain vessels that might occasionally call into Singapore.
  - The application sought to displace the admiralty jurisdiction of the Court, which is a self-contained admiralty regime to address such proceedings should they arise.
  - Absence of clear statutory jurisdiction that conferred upon the Court the power to grant the application which had far-reaching implications.

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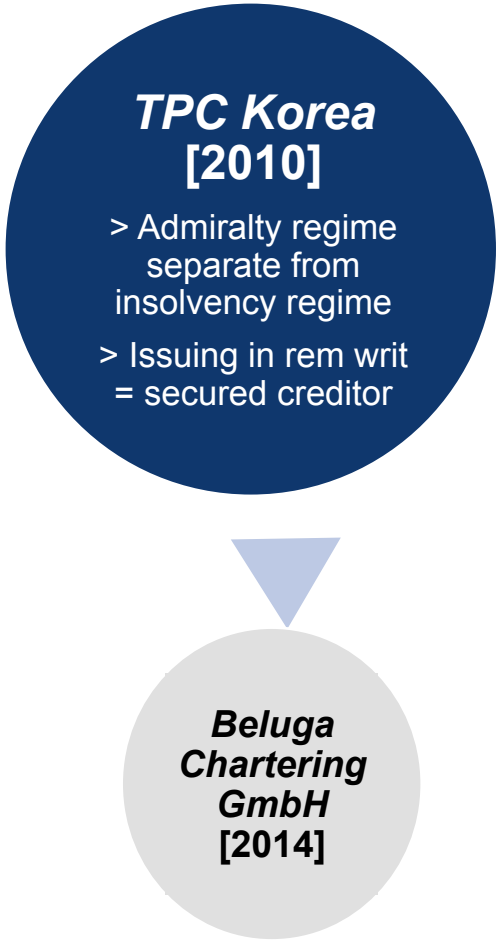

- *Beluga Chartt*he*ering GmbH (in liquidation)* [2014] SGCA 14, wherein Singapore Court of Appeal observed that:
  - The Singapore Court is not bound to recognise any foreign insolvency proceedings.
  - Whether or not the Singapore court would exercise its inherent jurisdiction to render assistance to foreign insolvency proceedings through regulation of its own proceedings would depend on the particular circumstances before it.

- Beluga shows the increasing willingness of the Singapore Court to render assistance to foreign insolvency proceedings.

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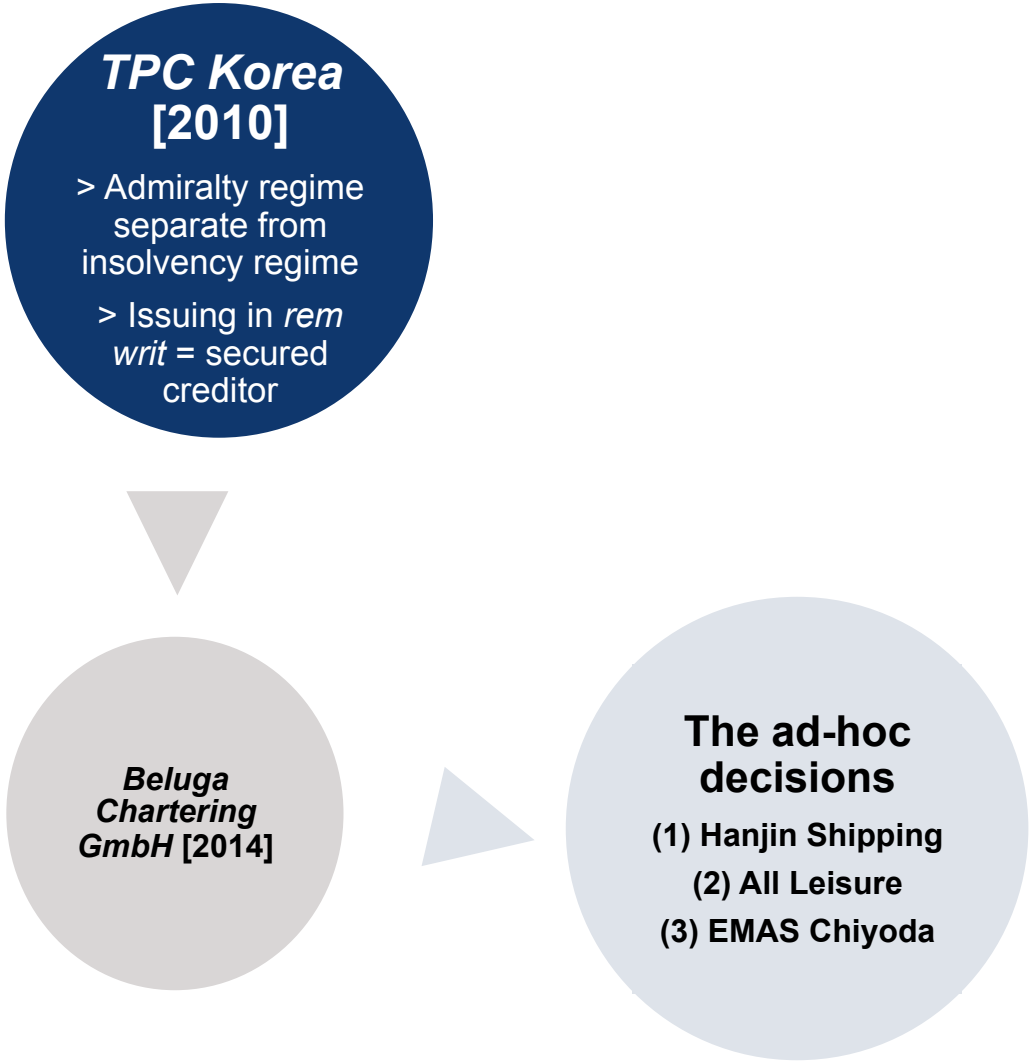

- The string of cases in 2016 and 2017 discussed earlier were "ad-hoc" decisions – At the time of those applications, Singapore had not yet adopted the UNCITRAL Model Law on Cross-Border Insolvency (20 May 1997). Accordingly, the basis of those applications had to lie in common law.
- These decisions clearly show a significant change in the judicial attitudes towards a greater recognition and assistance of foreign insolvency proceedings.
- Special "carve-out" provisions for vessels already arrested prior to those applications – the *in rem* claimants are still protected as secured creditors.

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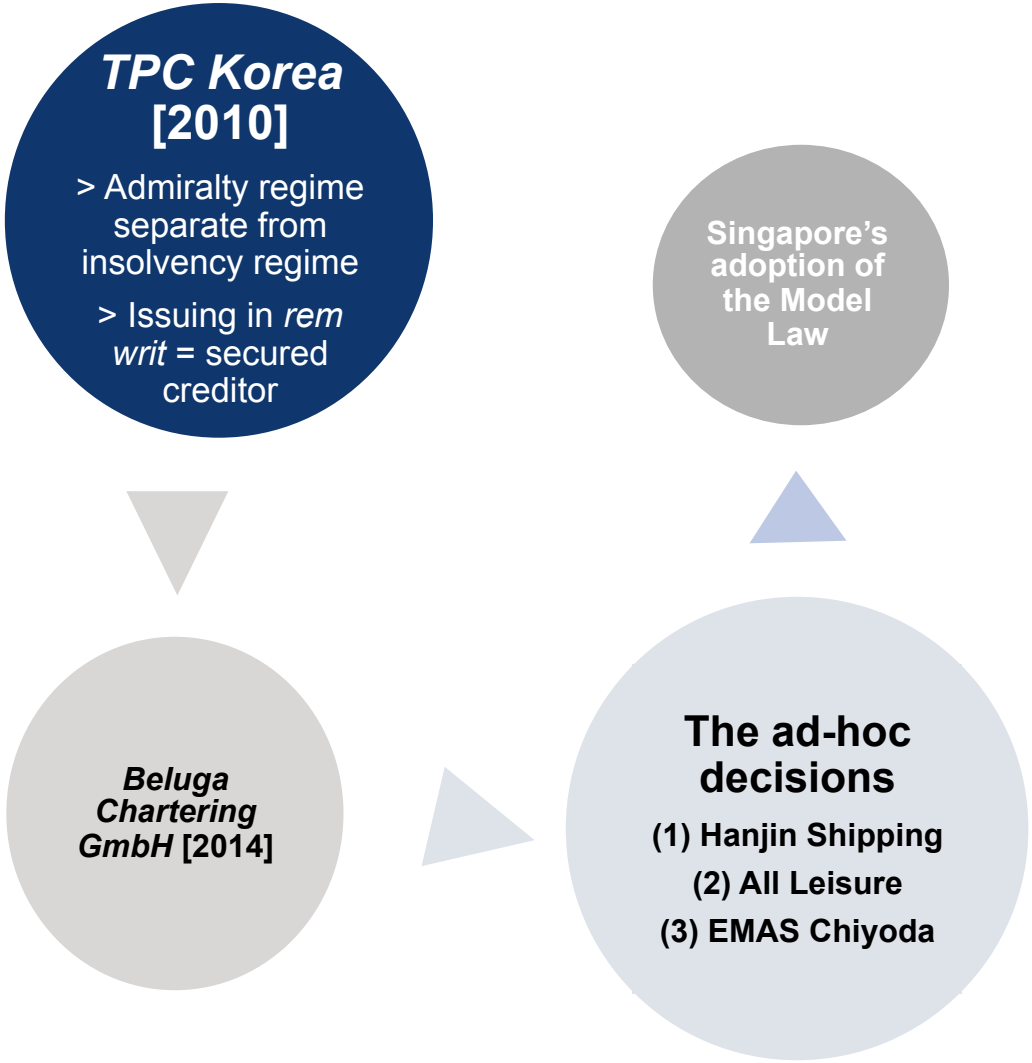
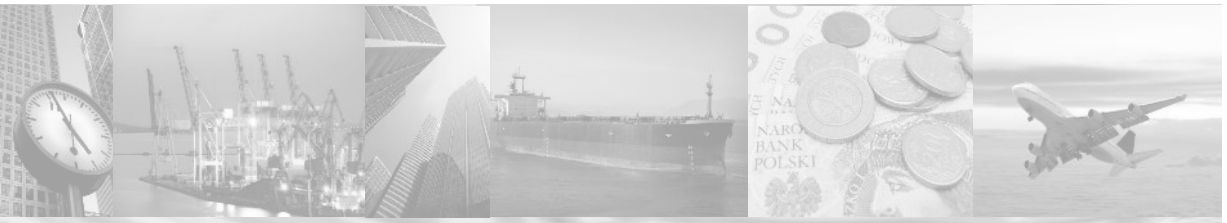


- Problem with an "ad-hoc" approach – results in uncertainty.
- A need for certainty and predictability in the recognition of foreign insolvency proceedings. The Singapore Insolvency Law Review Committee has recommended the adoption of the Model Law since 2013.
- The Model Law was implemented in Singapore on 23 May 2017 through the Companies (Amendment) Act 2017.



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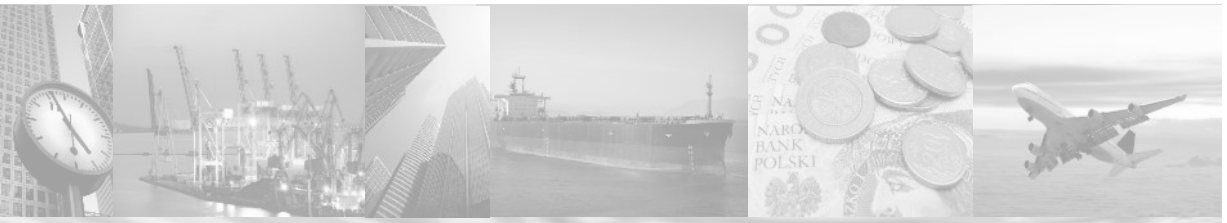
Singapore's adoption of the Model Law

PURPOSE OF THE MODEL LAW

- The Model Law's stated purpose is to assist states to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency proceedings.

- The Model Law aims to provide effective mechanisms for dealing with cases of cross-border insolvency so as to promote the objectives of:
  a) Cooperation between the courts and other competent authorities of this State and foreign States involved in cases of cross-border insolvency;
  b) Greater legal certainty for trade and investment;
  c) Fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor;
  d) Protection and maximization of the value of the debtor's assets; and
  e) Facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.



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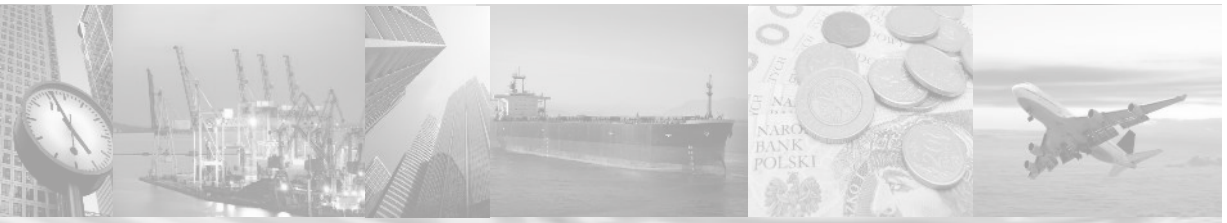
Singapore's adoption of the Model Law

REQUIREMENTS FOR MANDATORY RECOGNITION OF FOREIGN INSOLVENCY PROCEEDINGS

- Under the Model Law, the Singapore Court must grant recognition if certain requirements are met, unless it is contrary to the public policy of Singapore to do so.

- Article 17 – A proceeding must be recognised if:
  a) It is a foreign court proceeding under a law relating to insolvency or adjustment of debt in which the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation);
  b) The party applying for recognition is a foreign representative (i.e. a person or body, interim or permanent, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's property or affairs or to act as a representative);
  c) The application must be accompanied by certain documents / evidence as required by Article 15; and
  d) The application has been submitted to the Singapore Court.



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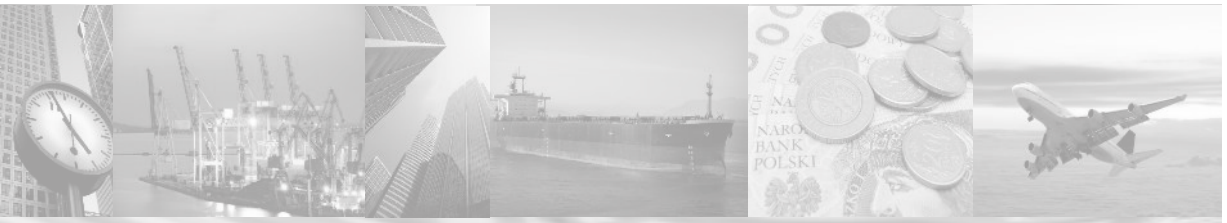
KEY PROVISIONS OF THE MODEL LAW

- Article 19 – Relief that may be granted upon an application for recognition of foreign proceedings includes:
  a) Staying execution against the debtor's property;
  b) Entrusting the administration or realization of all or part of the debtor's property located in Singapore to the foreign representative or another person designated by the Court; and
  c) Suspending the right to transfer, encumber or otherwise dispose of any property of the debtor.

- Articles 20 & 21 – Upon recognition of a foreign proceeding, relief that may be granted includes:
  a) Stay of commencement or continuation of individual actions / proceedings concerning the debtor's property, rights, obligations or liabilities;
  b) Stay of execution against the debtor's property; and
  c) Suspension of the debtor's right to transfer, encumber or dispose of any property.



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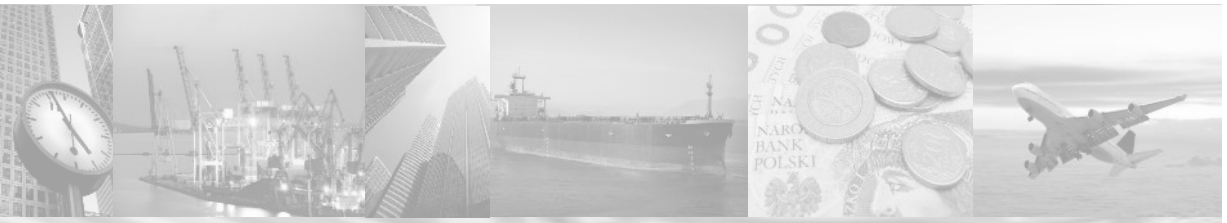
Singapore's adoption of the Model Law

EFFECT OF KEY PROVISIONS OF THE MODEL LAW

- Assists in the recognition and/or assistance to foreign insolvency proceedings.
- Provision according power to the Court to grant moratoriums against the commencement / continuation of proceedings or enforcement against assets is wide enough to cover *in rem* actions → **i.e. an *in rem* maritime claimant may not be a secured creditor.**
- Remedy of a worldwide stay of proceedings is also now available → **i.e. the Singapore Court has the power to prevent Singapore creditors from arresting vessels in foreign jurisdictions for security for their claims against a company that is in foreign insolvency proceedings.**



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***TPC Korea* [2010]**

> Admiralty regime separate from insolvency regime

> Issuing *in rem* writ = secured creditor

Beluga Chartering GmbH

[2014]

The ad-hoc decisions

[2016 – 2017]

> Admiralty regime not immune from Court's power to assist in foreign insolvency proceedings

> Issuing *in rem* writ = secured creditor

Adoption of the Model Law [2017]

> Position same as UK and US

> Court will assist in foreign insolvency proceedings

> An *in rem* claimant is not necessarily a secured creditor

THE END

Questions?