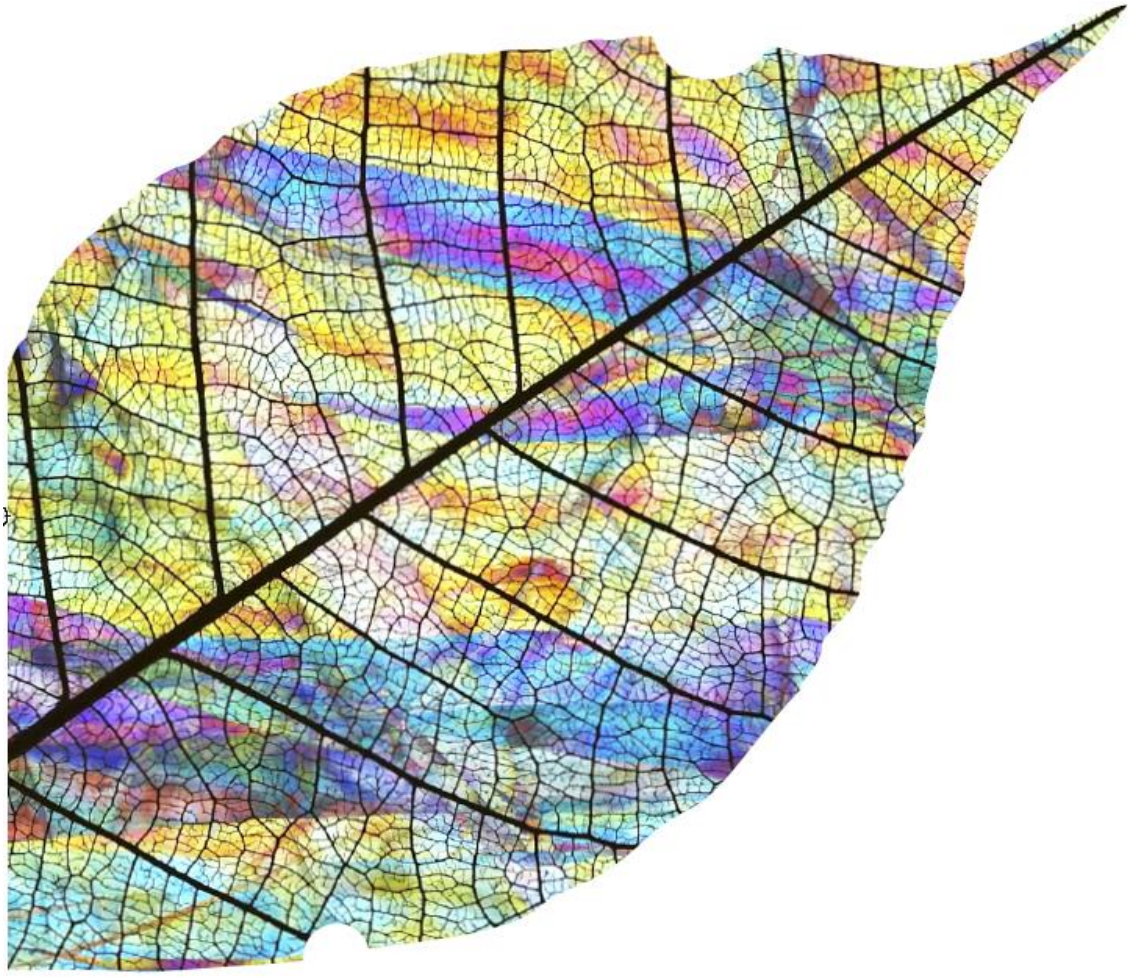
World Universities Comparative Law Project
Legal rating of Singapore
carried out by the National University of Singapore

A production of the Allen & Overy Global Law Intelligence Unit



April, 2018

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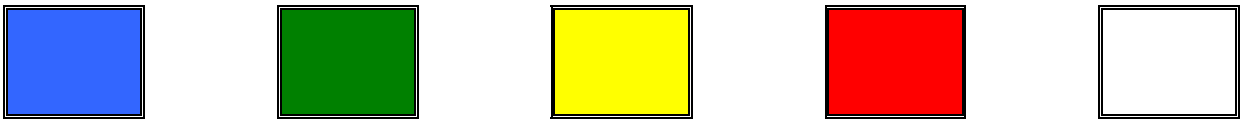


Produced by the Allen & Overy Global Law Intelligence Unit

World Universities Comparative Law Project

The World Universities Comparative Law Project is a set of legal ratings of selected jurisdictions in the world carried out by students at leading universities in the relevant jurisdictions. This legal rating of Singapore was carried out by students at the National University of Singapore.

The students of that Faculty of Law at the National University of Singapore who carried out the survey were:

Allen Sng Kiat Peng

Chen Shilun

Kenneth Ong Kang Ying

The members of the Practitioner Expert Panel with whom the students could discuss the questions in the survey were:

Associate Professor Dora Neo

Dr. Dan W. Puchniak

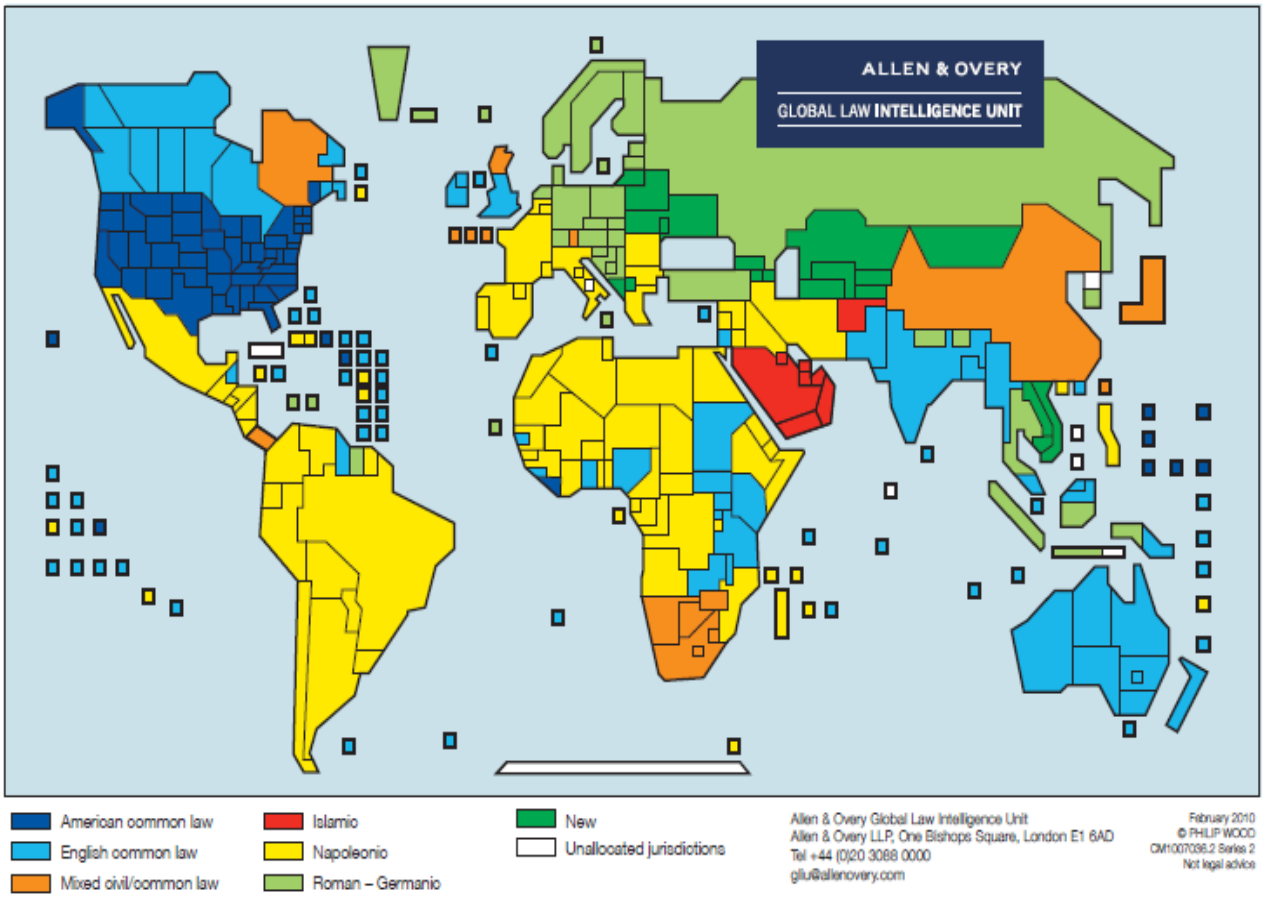
Professor Hans Tjio

Mr. Philip Wood QC (Hon)

The Allen & Overy Global Law Intelligence Unit produced this survey and is most grateful to the above for the work they did in bringing the survey to fruition.

All of those involved congratulate the students who carried out the work.

Families of law



Foreword by Associate Professor Dora Neo

The National University of Singapore's Law Faculty was invited to participate in this World Universities Comparative Law Project when Philip Wood, Special Global Counsel of Allen & Overy LLP, visited NUS to give the inaugural Distinguished Speaker Lecture at the official launch of the faculty's Centre for Banking & Finance Law in September 2014. The extent to which his lecture was oversubscribed shows the popularity and influence of his books on international financial law in Singapore, as in other countries.

Such global connections are a feature of the law and practice of international finance, even more so today. International financial and commercial lawyers and finance professionals are increasingly more mobile, whether by choice or necessity. Being called upon to help resolve legal issues in foreign jurisdictions is becoming a norm. Having a feel for the terrain of international practice beyond national borders will help legal practitioners to adapt to new scenarios and find creative solutions in their practice, just as much at home as in other territories.

A profound interest in regional and global awareness is central to the mission of NUS' Centre for Banking and Finance Law. The Centre's events and research projects over the past 5 years have sought to explore and develop exactly the kind of knowledge and expertise for international practice that this project promotes.
Finding fresh global relevance is also what the Singapore judiciary has been actively doing, taking established English common law principles and developing them further from their earlier foundations for Singapore law, which were laid as part of the Republic's colonial history. Today, in statutory law, Singapore looks to the UK, but also to other countries for inspiration. The establishment of the Singapore International Commercial Court in 2015 as a division of the High Court to decide international commercial disputes, including those governed by foreign law and even with only a tenuous connection with Singapore, is another aspect of the further globalisation of Singapore's legal industry.

Being business-friendly has always been a national characteristic of Singapore, from its early days as a free port to a future-oriented global hub today for many sectors of enterprise including banking and finance. This global outlook and psyche is shared by the NUS Law Faculty, Asia's global law school.

The three authors of this report have performed a valuable service. I am sure that the perspectives their work provide will help business advisers in the international arena understand Singapore law better, and develop their own international practice further.

Dora Neo
Associate Professor
Founding Director, Centre for Banking & Finance Law
Faculty of Law, National University of Singapore

Description of the legal rating method

Introduction

This paper assesses aspects of the law in Singapore with a view to rating the law in the relevant areas. The survey is concerned primarily with wholesale financial and corporate law and transactions, not with retail law.

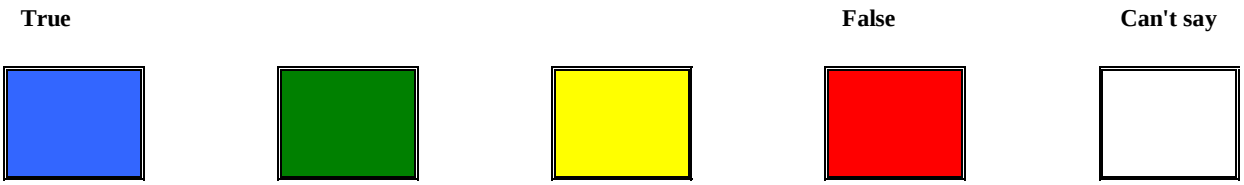
Legal risk has increased globally because of the enormous growth of law; because of its intensity; because many businesses are global but the law is national; because nearly all countries are now part of the world economy; and because the law is considered to play a very significant role in the fortunes of our societies. Liabilities can be very large and reputational losses severe.

The survey was carried out by students at the National University of Singapore. The survey was designed by the Allen & Overy Global Law Intelligence Unit.

The students were requested to express their views freely and in their own way. The views expressed are their views, not necessarily those of the National University of Singapore, the members of the Practitioner Expert Panel or the Global Law Intelligence Unit, the members of Allen & Overy.

Methodology

The survey uses colour-coding as follows:



Blue generally means that the law does not intervene and the parties are free, ie the law is liberal and open.

Red generally means that there is intense legal intervention, usually in the form of a prohibition.

Green and **yellow** are in-between.

The purpose of this colour-coding is to synthesise and distil information in a dramatic way, rather than a legal treatise. The colours correspond to a rating of 1, 2, 3 or 4, or A, B, C or D.

The cross in the relevant box signifies the view of the students carrying out this assessment of the position of Singapore. This is followed by a brief comment, e.g. pointing out qualifications or expanding the point. These comments were written by the students.

The colour-coding does not usually express a view about what is good or bad. Whether the law should intervene in a particular arena is a matter of opinion. The scale is from low legal intervention to intense legal intervention or control. This is not a policy or value judgment as to whether or not the law should or should not intervene. Jurisdictions often disagree on whether the law should intervene and how much. So one of the main purposes of this survey is to endeavour to identify some of the points of difference so as to promote fruitful debate.

Black letter law and how it is applied

This survey measures two aspects of law. The first is black letter law, ie what the law says or the written law or law in the books.

The second measure is how the law is applied in practice, regardless of what it says. Thus, the law of Congo Kinshasa and Belgium has similar roots but its application is different.

Although there is a continuum, these two measures have to be kept separate. Otherwise we may end up with just a blur or noise or some bland platitude, eg that the law depends upon GDP per capita.

In fact, only the last two questions deal with legal infrastructure and how the law is applied. All of the others deal with the written law, without regard to enforcement or application.

Key indicators

The survey uses key indicators to carry out the assessment. It is not feasible to measure all the laws or even a tiny fraction of them. The law of most jurisdictions is vast and fills whole libraries.

The key indicators are intended to be symptomatic or symbolic of the general approach of the jurisdiction. To qualify as useful, the indicator must usually be (1) important in economic terms, (2) representative or symbolic and (3) measurable. In addition, the indicators seek to measure topics where jurisdictions are in conflict. There is less need for measuring topics where everybody agrees.

An important question is whether this method is useful or not, and, if it is, whether the indicators are relevant.

Legal families of the world

Most of the 320 jurisdictions in the world, spread just under 200 sovereign states, can be grouped into legal families. The three most important of these are: (1) the common law group, originally championed by England; (2) the Napoleonic group, originally championed by France; and (3) the Roman-Germanic group, originally championed by Germany, with major contributions from other countries.

The balance of jurisdictions is made up of mixed, Islamic, new and unallocated jurisdictions.

Many aspects of private law are determined primarily by the family group, but this is not true of regulatory or economic law.

Excluded topics

This survey does not cover:

- transactions involving individuals
- personal law, such as family law or succession
- competition or antitrust law
- intellectual property
- auditing
- general taxation
- macroeconomic conditions, such as inflation, government debt, credit rating or savings rates
- human development, such as education, public health or life expectancy
- infrastructure, such as roads, ports, water supply, electricity supply
- personal security, such as crime rates, civil disorder or terrorism.

Banking and finance

Introduction

Banks and bondholders (typically also banks, but also insurance companies, pension funds and mutual funds) provide credit or capital. Their main risk is the insolvency of the debtor and therefore the key indicators intended to measure whether the law supports those habitual creditors or debtors, such as large corporations

as borrowers, when it matters, ie on bankruptcy. This is when commercial law is at its most ruthless in deciding who survives and who drowns.

This debtor or creditor decision is implemented mainly through the bankruptcy ladder of priorities. A feature of common law systems is the presence of super-priority creditors who are paid before anyone else - creditors with a set-off or a security interest and beneficiaries under a trust. For example, if a bank has universal security over all the assets of a company, the bank is paid before all other creditors, including employees and trade creditors. This regime therefore protects significant creditors who such as banks.

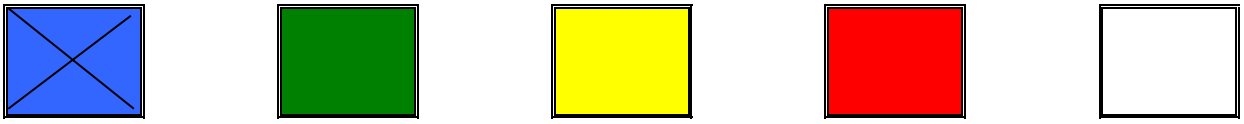
Jurisdictions based on the English common law model give super-priority to all three claimants. Traditional Napoleonic jurisdictions typically do not allow insolvency set-off, have narrower security interests and do not recognise the trust. Their bankruptcy ladder favours greater equality of creditors. Most traditional Roman-Germanic jurisdictions are in-between. They allow insolvency set-off and have quite wide security but most do not recognise the trust. There are wide exceptions to these generalisations.

Insolvency set-off

Generally If set-off of mutual debts is allowed on insolvency, the creditor is paid. If it is not allowed, then effectively the creditor is not paid. Very large amounts are involved in markets for foreign exchange, securities, derivatives, commodities and the like, so that the question of whether exposures should be gross or net is a matter of policy as to who the law should protect.

Q1 In Singapore, creditors can set off mutual debts on the insolvency of a debtor if they are incurred before notice of the insolvency.

True **False** **Can't say**



Comment:

In Singapore, creditors can set off mutual debts on the insolvency of a debtor if they are incurred before notice of the insolvency. Under s 88 of the Bankruptcy Act read with s 327(2) of the Companies Act, insolvency set-off operates when the insolvent company and the creditor has mutual debts, provided that the creditor's claim against the company can also be proved. In *Good Property Land Development v Societe General* [1996] 1 SLR(R) 884, it is held that mutual set off is "mandatory if there have been mutual dealings. Account is taken from the date of the commencement of the winding up, i.e. the date on which the winding up application was made."

Security interests

Generally Security interests give priority to the creditor with security - typically banks - who are the main providers of credit in most countries.

In traditional common law jurisdictions, a company can create universal security over all its present and future assets to secure all present and future debt owed to a bank. Once registered, the security is valid against all creditors, except that the floating collateral ranks after preferred creditors - typically wages and taxes. The security can be granted to a trustee for creditors. On a default there are no mandatory grace periods and the creditor can enforce out-of-court by appointing a receiver (a type of possessory manager) or by private sale. But in some common law jurisdictions there are freezes on enforcement in the event of a judicial rescue of the debtor. Also, in some of these jurisdictions there are stamp duties.

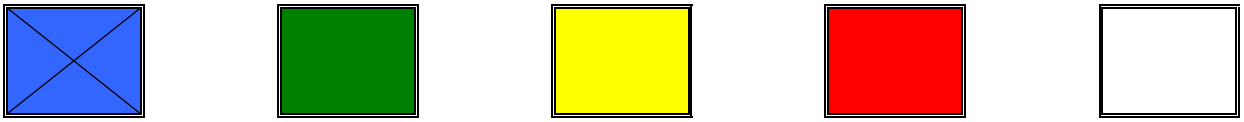
On the other hand, in many traditional Napoleonic jurisdictions, universal security is not possible, neither is security for all future debt. There is no trustee to hold the security. On enforcement, there are grace periods and no receiver. Sale is through the court and a public auction. Preferential creditors rank ahead. Some countries have a freeze on enforcement under a judicial rescue statute.

The main policy issue is therefore whether security should be encouraged or whether the law should intervene to impose greater equality.

The main tests are (1) scope of eligible assets, (2) debt secured, (3) trustee, (4) priority over preferred creditors, (5) private enforcement and receiver, (6) no rescue freezes and (7) low costs.

Q2 In Singapore, the law offers a security interest which is highly protective of the secured creditor.

True **False** **Can't say**



Comment:

Security interests are important for commerce. Being able to take security allows the creditor to look to the debtor's assets to satisfy the debt in the event of default. This added protection in favour of the creditor helps to lower the costs of borrowing, as the risk of a failure to recoup the loan is now minimised. The ability to give security, and lower borrowing costs means that credit is now available to a wider group of individuals. In Singapore, the law on security interests is highly complex, and it is hard to say if such interests are highly protective of the secured creditor. The focus of this comment would be on security interests granted by a Company, which is the most common method used in practice.

(1) Scope of eligible assets, attachment and perfection

Generally, there does not seem to be any bar to the type of assets which may be taken as security. These assets can be broadly divided into real (land, buildings) and personal property, personal property being subdivided into tangibles (chattels) and intangibles (choses in action). So long as the formalities to its creation are validly executed, the security will attach. However, such formalities differs for the various types of security. The asset may be legal or equitable in nature. For example:

- A pledge can be given over documents of title such as a bill of lading by taking possession over such documents.[1]
- Equitable mortgage of scriptless shares can be achieved by assignment under S81SS(2)(a) of the Securities and Futures Act, but only in favour of account holders. General law security interests can still apply via S21 of the Securities and Futures Act (CDP) Regs 2015, but requires the lender to create a sub-account with a depository agent. For general shares, equitable mortgages can be taken as well.[2]

[1] *Palcrim Investments v Tan Mui Keow Claire,* [2005] 1 SLR(R) 141 (High Court of Singapore) at [18])
[2] *Pacrim Investments v Tan Mui Keow Claire,* [2008] 2 SLR(R) 898 (Court of Appeal Singapore)

- A statutory mortgage (whereby ownership is not taken as security)[3] of real property is available under the Land Titles Act. Such mortgage must be in the approved form.[4]
- A charge or equitable mortgage can be taken over future assets as well.[5]

Whether the security is valid against other creditors depends on the perfection requirements. As such perfection requirements may affect the priority of the security interests between secured creditors. Depending on the type of asset, there may be different perfection requirements. For example:

- Certain charges given by a Company must be registered, and the failure to do so would render the security void against the liquidator and any creditor of the company. [6] Charges are defined as including a mortgage and any agreement to give or execute a charge or mortgage.[7] These include[8]:
    - A charge on the book debts of the company;
    - All floating charges over any asset of the company;
    - Any instrument, if executed by an individual, would require registration as a bill of sale.
- Nevertheless, registration is not evidence of its creation or validity, nor does it confer priority.[9] As such issues as to priority is governed by the common law. Generally, the default rule is that the first security interest would prevail, but this rule is riddled with exceptions. Some examples of such exceptions include:
    - The rule in *Dearle v Hall* which provides that the priority between two assignees of choses I action (assignment by way of security) is determined by the order of giving notice of the assignment to the debtor under the chose in action.
    - A bona fide purchaser for value of the legal interest without notice of the prior existing equitable security interest takes priority over the equitable interest.
    - An earlier floating chargee may lose priority to a latter fixed chargee. However, if the earlier floating charge includes a negative pledge clause, and the subsequent chargee has notice of such clause, the subsequent fixed chargee will rank after the earlier floating charge.[10]
    - A security interest may lose priority over quasi-security interests such as goods subject to retention of title clauses.[11]

In such situations, the practical approach taken by practitioners is to obtain a subordination agreement between creditors, so as to establish priority privately between them.

[3] S68(3), Land Titles Act (Cap 157), 2004 Rev Ed Sing.
[4] S68(1), Land Titles Ac.
[5] *Holroyd v Marshall*, (1862) 10 HLC 191.(House of Lords). In this regard, it is impossible to take a present legal mortgage, and only equitable security interests are possible for future assets.
[6] S131(1), Companies Act (Cap 50), 2006 Rev Ed Sing.
[7] S4, Companies Act.
[8] See generally S131(3), Companies Act.
[9] *The Asiatic Enterprises (Pte) Ltd v United Overseas Bank Ltd*, [1999] 3 SLR(R) 976 (Court of Appeal Singapore) at [32].
[10] *Kay HIan & Co v Jon Phua Ooi Yong*, [1988] 2 SLR(R) 439 (High Court of Singapore) at [33].
[11] *Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd* [1976] 1 WLR 676, (Court of Appeal of England and Wales).

(2) Debt Secured

In Singapore, it has been recognised that a security interest can be given for present, past and future debts (all moneys security).12 As such, such a security interest will take priority over unsecured creditors. However, if there is a latter security interest attached to the same asset, any further loan given by the first security interest holder with notice of the latter interest will be subject to the latter security interest.[13]

(3) Security Trustee

The security trustee is one of the most powerful innovations in common law jurisdictions, and forms the backbone of any syndicated loan. Security trusts allows the trustee to hold an asset on trust for security over a (often changing) class of creditors. This reduces the need for security to be retaken by each creditor who sells off his loan to a subsequent creditor, thereby avoiding priority concerns and insolvency hardening periods. Singapore law allows for such arrangements.[14]

(4) Priority over Preferred Creditors

Generally, fixed chargees have priority over preferred creditors[15] under Singapore Law. However, floating chargees rank after such preferred creditors.[16] In the case of a rescue financing, the Courts may grant super priority security interest for debt arising from any rescue financing, which takes priority over any existing security interest.[17]

(5) Private Enforcement and Receivers

A receiver and manager can be appointed by a debenture holder under a power contained in the debenture, and the circumstances in which such power can be invoked depends on the terms of the debenture. It has been noted that it is standard practice for debentures to confer power on the debenture holder to appoint a receiver and manager in an event of default, and it is rare for the holder to want an appointment by the Court. Generally, an application to court is only needed where the debenture holder's right to make appointment is challenged.[18] This allows for private enforcement of the security, as management of the company's undertaking is now in the hands of the receiver and manager.[19]

(6) Rescue Freezes

Singapore has, in her bid to become a restructuring hub, introduced amendments to the Company Act in 2017. These amendments are based on the Chapter 11 of the US Bankruptcy Code. As such, where the company proposes or intends to propose a compromise between itself and its creditors, on application to the Court the Court may order rescue freeze measures such as[20]:

- An order restraining the appointment of a receiver or manager over any property or undertaking of the company;
- An order restraining the passing of a resolution for winding up of the company;
- An order restraining the taking of any step to enforce any security over any property of the company.

[12] *Re Tarorone Investments Pte Ltd* [2001] 3 SLR(R) 61 (Court of Appeal Singapore) at [19].
[13] *Hopkinson v Rolt* (1861) 9 HL Cas 514 (House of Lords).
[14] See *DB Trustees (Hong Kong) Ltd v Consult Asia Pte Ltd* [2009] SGHC 62 (High Court of Singapore) for an example of a security trustee.
[15] See generally S328 of the Companies Act. Such preferred creditors include costs and expenses of winding up, wages or salary of any employee of the company.
[16] See S226(1), S328(1), S328(4) and S328(5), Companies Act.
[17] S211E(1)(d), Companies Act.
[18] Woon's Corporation Law Chapter M Part VIII, [51].
[19] *Moss Steamship Co Ltd v Winney* [1912] AC 254 (House of Lords).
[20] See generally S211B, Companies Act.

(7) Costs

It is not possible to tell whether the costs are low for such private enforcement. Such costs are highly variable, and are likely to comprise of professional fees.

Universal trusts

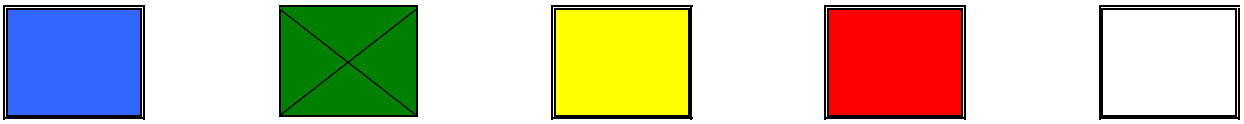
Under a trust, one person, called the trustee, holds title to the assets of another person, called the beneficiary, on terms that, if the trustee becomes insolvent, the assets go to the beneficiary and are not used to pay the trustee's private creditors. The assets are immune and therefore taken away from the debtor-trustee's bankrupt estate.

The main examples of trusts are custodianship of securities, pension funds, securities settlement systems and trustees of security for bondholders and syndicate banks. The amounts involved are enormous.

All jurisdictions have an effective trust of goods (called bailment or deposit). The common law group has a universal trust for all other assets (land and intangible property). Most members of the civil code group do not have a universal trust, subject to wide exceptions, especially for custodianship of securities. A few countries in this group have a universal trust by statute, e.g. France and China.

Q3 Singapore has a universal trust for all assets.

True **False** **Can't say**



Comment:

Types of assets which could be impressed with a trust in Singapore

Generally, *any type of property can be impressed with a trust in Singapore, if it is currently owned by the person settling the trust*.[21] These can be broadly divided into real (land, buildings) and personal property, personal property being subdivided into tangibles (chattels) and intangibles (choses in action).[22] The property could be absolute or equitable in nature.[23]

Future property[24] *is treated differently under Singapore law, but it should not be of concern for commercial arrangements.* Under Singapore Law, it is impossible to declare a present trust over such property. This is because equity considers future property to be an uncertain subject matter, and such trusts would be void at

[21] The comment here does not consider rules which may prevent a property from being impressed with a trust for reasons apart from the property's nature. One example would be laws in Singapore prohibiting foreign ownership of land. The property is capable of being impressed with a trust, but whether it is possible would depend on the identity of the beneficiary.

[22] In this regard, the High Court decision of *Sheares Betty Hang Kiu v Chow Kwok Chi* [2006] 2 SLR(R) 285 is illustrative of this. This decision concerned a settlor wishing to distribute her property to her children. This was done by way of trust, and the assets impressed with the trust included: land (a Property known as 35 Ridout Road, Singapore 248431); shares listed and private companies; cash in banks (choses in action); and jewelry, furniture, objets d'art and motor vehicles (chattels), Sheares Betty at [4].

[23] See *Chng Bee Kheng and another (executrixes and trustees of the estate of Fock Poh Kum, deceased) v Chng Eng Chye*, [2013] 2 SLR 715 (High Court of Singapore) at [49].

[24] Defined as property which the settlor does not currently own, but may come to own in the future.

the point of declaration.[25] However, the certainty of subject matter rule does not bar *contracts with the settlor to impress a trust over future property*. As such, if such an agreement is entered into for the settlor to do so, and the settlor receives valuable consideration in return, equity will regard the settlor's conscience as bound. Equity would make an order for the specific performance of the agreement, and deem the beneficiaries as having an immediate equitable interest in the property, at the time which the settlor obtains ownership of the property.[26]

Other indicators

Other bankruptcy indicators not measured here include freezes on the termination of contracts, fraudulent preferences, the priority of rescue new money, the presence and intensity of corporate rescue proceedings and recognition of foreign insolvencies. Director liability for deepening the insolvency is dealt with below.

Other financial law topics not covered in this survey include the regulatory regime, especially capital, liquidity, authorisation of financial business, conduct of business, control of prospectuses, control of market abuse and frauds, such as insider dealing, and the insolvency regime for banks. Financial regulation is a very large field.

Corporations

Introduction

Financial law involves competition between debtors and creditors so that jurisdictions can be positioned on a straight line. Corporate law however involves three main competitors: (1) shareholders, (2) creditors and (3) managers - a triangle. If the key indicators show that a jurisdiction strongly favours one or other of the parties at the points of the triangle, whether creditors, shareholders or management, then one can begin to build up a picture of the choices which the jurisdiction habitually makes in resolving the conflicting interests of the parties.

For example, a very tough prohibition on financial assistance (which is protective of creditors against shareholders) tends also to support an attitude to other principles of the maintenance of capital or to support the proposition that mergers by fusion are difficult (because they can prejudice creditors). This would be true of the English regime in 1948. Similarly, a view which easily imposes personal liability on directors for deepening an insolvency might also show a legal approach which is not supportive of the veil of incorporation in other areas, eg shareholder liability and substantive consolidation on insolvency.

The two extreme corporate law models are the Delaware model and the traditional English model, exemplified by the English Companies Act 1948 (now superseded). Napoleonic and Roman-Germanic models are in-between to varying degrees.

The Delaware regime is highly protective of management in the key areas. The traditional English regime favours creditors on most of the key contests and, where creditor interests are not involved, it tends to favour shareholders as opposed to managers.

Director liability for deepening an insolvency

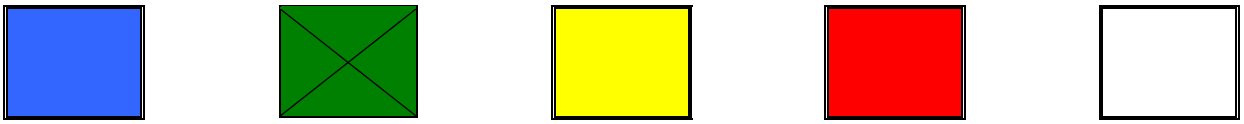
Generally If the law imposes personal liability on directors for deepening an insolvency, eg carrying on business and incurring debts where there is no reasonable prospect of paying them, then the regime is hostile to the interests of management. The legal risks of management are increased.

[25] See *Chng Bee Kheng and another (executrixes and trustees of the estate of Fock Poh Kum, deceased) v Chng Eng Chye*, [2013] 2 SLR 715 (High Court of Singapore) at [49].
[26] See the oft cited decision of *Edward Tailby v The Official Receiver* (1888) 13 App Cas 523 at 546.

There are basically four regimes internationally: (1) directors are hardly ever liable for deepening the insolvency, eg Delaware and most US jurisdictions, plus some traditional English jurisdictions which only punish fraudulent trading; (2) directors are liable for serious negligence (England, Singapore, Australia, Ireland); (3) directors are liable for mere business misjudgements deepening the insolvency (France); and (4) directors are liable if they fail to file for an insolvency proceeding after the company becomes insolvent (France, Germany and others).

Q4 In Singapore the law rarely imposes personal liability on directors for deepening the insolvency and there is no rule that the directors must file for insolvency when the company is insolvent.

True **False** **Can't say**



Comment:

Introduction to directors' duties when a company is insolvent

The observations by VK Rajah JC (as he then was) succinctly reflects Singapore's approach towards directors' liabilities: *the courts are slow to interfere with bona fide commercial decisions taken by directors*. Underlying this attitude is the acceptance that every business decision (such as the decision not to file for insolvency) comes with commercial benefits and risks. Eventuated risks *ipso facto* cannot justify imposing legal liability on businessmen, for their very function is to take such risks. It is only where ordinary norms of commercial morality are not observed[27], that civil and criminal liability follows.[28]

Subject to the aforementioned approach, in the context of a company's insolvency, directors would be held personally liable for deepening the insolvency only if:

1. they were acting in breach of their fiduciary duties owed to the company (in particular, the duty to act *bona fide* in the company's interest); or
2. they were negligent.

As such, it is fair to say that in Singapore, the law rarely imposes personal liability on directors, and there is no strict rule that directors must file for insolvency when the company is insolvent.

Personal liability for breaches of fiduciary duties

Broadly speaking, directors owe 3 overlapping fiduciary duties to their company: to act *bona fide* in the interests of the company, to avoid putting himself in a position of conflict vis-à-vis the company, and to use their powers for proper purposes. A director in breach of these duties may be held personally liable to the company for the losses which follow. *In the context of a company facing insolvency, the directors' decision is most likely challenged for not being bona fide in the interests of the company.*

[27] *Vita Health Laboratories Pte Ltd and others v Pang Seng Meng*, [2004] 4 SLR(R) 162 (High Court Singapore) at [17]-[18]. These comments were reiterated in the Court of Appeal decision *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd)*, [2014] 3 SLR 329 at [37], [39].

[28] Civil liability could be imposed under common law and the Companies Act (S157, breach of director's fiduciary duties). Depending on the nature of the act, criminal liability may be imposed under the Companies Act (S157, breach of director's fiduciary duties; S340, fraudulent trading), and under the Penal Code (S405, criminal breach of trust).

Locally, the Singapore Court of Appeal has held that when a company is insolvent or close to being insolvent, the interests of the company is identified to be the creditors' interests. This is because the company's business is now effectively run with creditors' money. *In these circumstances, directors are required to ensure that "the company's assets are not dissipated or exploited for their own benefit to the prejudice of creditors' interests*." [29] Where a director caused the company to give a creditor undue preference, he would (barring exceptional circumstances) have misapplied the company's assets to the prejudice of the company's interests. Such a director would be required to restore the company to the position it would otherwise have been.[30]

Personal liability for breaches of directors' duty of care

It is trite law that directors owe a duty under common law to their company to act with reasonable care. This civil duty could be founded in the tort of negligence,[31] implied in contract,[32] or imposed by statute.[33] The standard of care in civil and criminal law is identical, and is assessed objectively: whether the director has exercised the same degree of care and diligence as a reasonable director found in his position. The standard is not lowered to accommodate any inadequacies in the director's knowledge or experience, and is raised if he held himself out to possess or in fact possess some special knowledge or experience.[34] In the context of non-executive directors, the local courts are likely to follow the trend in the common law jurisdictions, and hold them to a lower standard than that expected of executive directors.[35]

In addition, a director may also be personally liable for negligent trading under s340(2) Companies Act, but this would require a criminal conviction under s339(3) of the Companies Act, where the director was knowingly a party to the contracting of a debt but had no reasonable ground of expectation of the company being able to pay the debt. However, given that personal liability under S340(2) can only be imposed after a criminal conviction, it is rarely invoked in practice. In most cases, it would be easier to establish liability for negligence under general law as discussed above.

Fraudulent trading

Under s340 of the Companies Act, a director may be liable for fraudulent trading. For the director to be liable, it must be shown that (1) the business of the company has been carried on, with the intent to defraud creditors, or for any fraudulent purpose; and (2) the director was knowingly a party to the carrying on of the business with that intent or purpose[36]. To establish fraud, the Courts have required a finding of the director's dishonest intention. This is to be inferred from the circumstances[37], and factors such as whether the creditor was deceived and whether there was an intention that the creditors would not be paid would be relevant.

[29] *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd*, [2010] 4 SLR 1089 (Court of Appeal Singapore), Per VK Rajah JA at [48] – [52].
[30] See Living the Link Pte Ltd (in creditors' voluntary liquidation) and others v Tan Lay Tin Tina and others [2016] 3 SLR 621 (High Court Singapore) at [90], for an example of a director being made to compensate the company, due to his procuring of an undue preference.
[31] *Daniels v AWA Ltd* (1992) 16 ACSR 607 (Court of Appeal, NSW).
[32] *Agrosin Pte Ltd v Martynov Igor* [2009] SGHC 148 at [7].
[33] In the oft-cited decision of *Lim Weng Kee v PP*, [2002] 2 SLR(R) 848, the High Court has held that "reasonable diligence" under S157 of the Companies Act is the equivalent of "negligence" at common law. However, there are academic views as to why such an interpretation is incorrect, and that reasonable diligence is conceptually different from negligence. See Woon's Corporation Law, Chapter H, [2201]; "Directors' duty of care and liability for lapses in corporate disclosure obligations", (2016) 28 SAcLJ 598.
[34] Lim Weng Kee v PP, [2002] 2 SLR(R) 848 at [28] (High Court Singapore).
[35] For example, in the recent High Court decision of *Prima Bulkship Pte Ltd v Lim Say Wan* [2017] 3 SLR 839 at [49].
[36] *Rahj Kamal bin. Abdullah v Public Prosecutor* [1997] 3 SLR(R) 227 at [35] – [36] (High Court Singapore).
[37] *Rahj Kamal bin. Abdullah v Public Prosecutor* [1997] 3 SLR(R) 227 at [32] (High Court Singapore).

Financial assistance to buy own shares

Generally Many jurisdictions prohibit a company from giving financial assistance to buy its own shares. The typical example would be where a bidder finances the acquisition of a target company by a loan and after the takeover arranges for the target to guarantee the loan and charge its assets to secure the guarantee. The commercial effect is similar to the repayment of the share capital of the target before its creditors are paid. Shareholders should be subordinated to creditors.

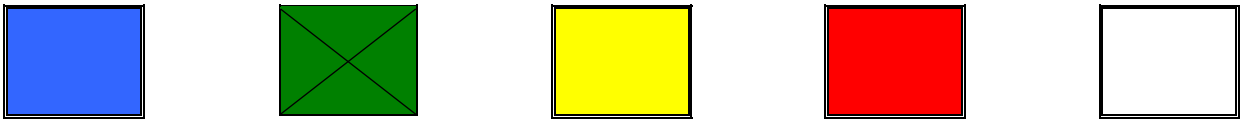
The prohibition therefore favours creditors against shareholders of the target.

The Delaware regime does not prohibit financial assistance. The traditional English regime has a wide prohibition (not England any more). Most Roman-Germanic regimes are against it, with Napoleonic regimes hesitant. The EU has a prohibition against financial assistance by public companies. Some countries allow financial assistance by private companies if solvency is established.

A contravening transaction is usually a criminal offence and void.

Q5 Singapore permits a company to grant financial assistance for the purchase of its own shares.

True **False** **Can't say**



Comment:

Introduction to the PFA

Singapore has a thin version of a prohibition against financial assistance. S76 of the Companies Act[38] broadly prohibits a company from having financial dealings in its shares. S76(1A) prohibits all companies from acquiring or lending money on the security of its own shares. ***Complementing this is S76(1), which contains Singapore's Prohibition against Financial Assistance ("PFA").***

If a company engages in financial assistance, there are significant criminal and civil consequences on several fronts:

1. Every officer in default would be guilty of a criminal offence and may face a fine not exceeding $20,000, and/or imprisonment of up to 3 years.[39]
2. In addition, the officer in default may also be ordered to compensate the company for any loss suffered, due to the giving of financial assistance.[40]
3. The company has an option to avoid the infringing transaction.[41]
4. The Court has a broad remedial discretion to make orders which it thinks is just and equitable, against any person who was involved in the infringement.[42]

[38] Companies Act (Cap 50), 2006 Rev Ed Sing.
[39] S76(5), Companies Act.
[40] S76(6), Companies Act.
[41] S76A(2), Companies Act.
[42] See generally 76A(4), (5), (6), Companies Act.

As with most jurisdictions, the difficulty in scoping the PFA lies in balancing the need to protect creditors and shareholders from the improper dissipation of a company's capital, against the need for commercial certainty and not catching beneficial or innocuous transactions. In the recent 2014 amendments[43], the PFA's application has been narrowed: by reducing the type of companies which the prohibition would apply to, expressly excluding certain transactions from the prohibition, as well as providing additional whitewash methods to authorise financial assistance transactions.

The end result is that Singapore's PFA looks much like a chunk of cheese now – it is riddled with holes.

Scope and application of the PFA

Currently, the PFA applies only to a public company and its subsidiaries.[44] PFA generally prohibits these companies from giving financial assistance to any person, for the purpose of helping that person acquire shares in its company, its holding company, or its ultimate holding company. *In short, the PFA does not apply to the large number of private limited liability companies which are not subsidiaries of a public company.*[45]

Excluded transactions from the PFA

The long list of transactions which are excluded from the PFA can be found in S76(8) and S76(9) of the Companies Act. Some of these are:

1. Distributions by way of dividends;
2. Distributions in the course of a company's winding up;
3. Allotment of bonus shares;
4. Discharge of a company's liability incurred in good faith, under a transaction which was entered into on ordinary commercial terms.

In the 2014 amendments, the Steering Committee noted that for the ex ante rule to work well, there needs to be clarity on when the PFA is breached and to ensure that the PFA does not catch necessary or acceptable transactions. In this regard, it was recommended that the PFA be reviewed against the list of excepted financial assistance transactions in the UK and updated. ***It is likely that such an approach would also be taken for future amendments, and the list of excluded transactions is likely to grow.***

Whitewash Methods

The Companies Act provides for four whitewash methods[46], which will take a company's financial assistance out of the PFA's application. The key considerations in choosing the appropriate method are as follows:

1. S76(9A) has a limit on the amount of financial assistance which can be given.
2. Some methods require a solvency statement which is to be made by all directors. The statement may not be forthcoming if the board of directors do not agree on the company's financial state, or if some directors are unwilling to open themselves to potential criminal liability for misstatements.
3. The solvency test may not be appropriate in some instances to safeguard shareholders and creditors.
4. There is some uncertainty in the application of the material prejudice test, which was recently introduced in the 2014 amendments.

[43] In particular the 2014 Company Law amendments.
[44] S76(1), Companies Act.
[45] 2014 Company Law amendments, wef 1st July 2015.
[46] S76(9A), (9B), (9BA), (10), Companies Act.

5. Methods requiring approval from both the board of directors and shareholders, or sanction from the courts may be lengthy.

The table below is a summarised comparison of the methods:

–	S76(9A)	S76(9B)	S76(9BA)	S76(9A)
Limit on amount of financial assistance	10% of company's aggregate capital	–	–	–
Requirement of Solvency Statement (all directors)	Yes	Yes	No	No
Approvals	Board Resolution	Board and Shareholder Resolution	Board Resolution	Board Resolution Shareholder Special Resolution[47]
Court Sanction Required	No	No	No	Yes
Applicable legal test by directors	Best interest of Company, Terms are fair and reasonable.	Best interest of Company, Terms are fair and reasonable.	Assistance does not materially prejudice the interests of the company, its shareholders and creditors.	None. However, there are several Court procedures to comply with.

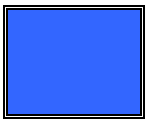
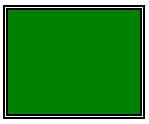
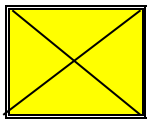
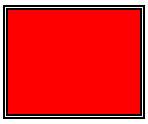
Public takeover regime

Generally A public takeover regime which is free and open tends to favour managers who can guard against takeovers by poison pills and the like and who have relative freedom to acquire other companies. An example is the Delaware regime. A restrictive regime on the lines of the British system tends to favour shareholders.

The chief features of a restrictive regime are: (1) the bidder must make a mandatory bid in cash when a threshold of shares in the target is reached, eg 30%; (2) the bidder must pay the same price to all shareholders (sharing the control premium); (3) no partial bids (getting control on the cheap); (4) proof of certain funds to implement the offer; (5) compulsory acquisition of dissenting minorities (squeeze-out); (6) fixed timetable; (7) no ability of the managers to frustrate a bid by poison pills without shareholder approval; and (8) control of the content of circulars, especially forecasts.

[47] Requires a supra-majority

Q6 Apart from exchange controls and restrictions on foreign direct investments, the public takeover regime in Singapore is open and has few restrictions.

True		False	Can't say
				

Comment:

The public takeover regime in Singapore shares many characteristics as that of the UK, favouring the welfare of the shareholders. However, Singapore's public takeover regime is not a carbon copy of the UK's. For example, partial bids are allowed in Singapore. This regime favours the interests of shareholders above all.

The main methods for the acquisition of control of a publicly listed company are, namely, takeovers and schemes of arrangement. These methods of takeover are mainly regulated by the Securities and Futures Act (Cap 289, 2006 Rev Ed Sing) (the "SFA"), the Singapore Code on Take-overs and Mergers (the "Code"), and the Companies Act (Cap 50, 2006 Rev Ed Sing) (the "Companies Act"). For more effective administration of the takeover process, the Code was issued by the Monetary Authority of Singapore (MAS). The Code is administered and enforced by the Securities Industry Council (the "Council"). The Takeover Code, which is the "primary source of regulation of the conduct of parties to a public takeover, was inspired by the setting up of the Panel on Takeovers and Mergers in the UK. Under General Principle 2 of the Code, boards of an offeror and an offeree company and their respective advisers and associates have a primary duty to act in the best interests of their respective shareholders.

(1) The bidder must make a mandatory bid in cash when a threshold of shares in the target is reached, eg 30%;

Under Rule 14 of the Code, a mandatory offer is triggered when an offerer:

a) acquires, whether by a series of transactions over a period of time or not, shares which (taken together with shares held or acquired by persons acting in concert with him) carry 30% or more of the voting rights of a company; or

b) holds, together with persons acting in concert with him, not less than 30% but not more than 50% of the voting rights and the offerer, or any person acting in concert with him, acquires in any period of 6 months additional shares carrying more than 1% of the voting rights.

The chain principle also applies in Singapore under Rule 14 of the Code.

Under Rule 17 of the Code, a cash offer for each class of shares must be in cash where the offerer has bought for cash, during the offer period and within 6 months prior to its commencement, share of any class under offer in the offeree company carrying 10% or more of the voting rights of that class.

(2) the bidder must pay the same price to all shareholders (sharing the control premium);

Under General Principle 3 of the Code, an offeror must treat all shareholders of the same class in an offeree company equally.

Under Rule 10 of the Code, the offeror may not make any arrangements with selected shareholders if "there are favourable conditions attached which are not being extended to all shareholders. Rule 14.3 of the Code states that when a mandatory offer is being triggered, offers made under this Rule, in respect of each class of equity share capital involved, must not be less than the highest price paid by the offeror during the offer

period and within 6 months prior to its commencement. Under Rule 18 of the Code, where a company has more than one class of equity share capital, a comparable offer must be made for each class. Under Rule 21 of the Code, the offeror acquiring securities in the offeree company at above the offer price is required to increase its offer to not less than the highest price paid for any securities so acquired.

(3) partial bids are sometimes allowed;

Under Rule 16 of the Code, the Council's consent is required for any partial offer. The Council will normally consent to a partial offer which could not result in the offeror holding shares carrying 30% or more of the voting rights of the offeree company. Offers between 30% and 50% of the voting rights will not be consented by the Council, but offers for more than 50% of the voting rights may be given consent by the Council provided some conditions are being met.

(4) requires proof of certain funds to implement the offer;

Under Rule 23.8 of the Code, where the offer is for cash or includes an element of cash, the offer document must include an unconditional confirmation by an appropriate third party (e.g. the offeror's banker or financial adviser) that resources are available to the offeror sufficient to satisfy full acceptance of the offer.

(5) compulsory acquisition of dissenting minorities (squeeze-out) is provided;

Under s 215 of the Companies Act, where the offeror has, within 4 months of making of the offer, obtained approval from shareholders in the offeree's company who hold at least 90% of the shares, the offeror may by notice require that dissenting shareholders sell their shares to it on the terms of the offer.

(6) fixed timetable;

Rule 22 of the Code provides a fixed offer timetable which applies to both schemes of arrangement or trust schemes, as well as amalgamations.

(7) no ability of the managers to frustrate a bid by poison pills without shareholder approval; and

General Principle 7 of the Code states that the board of an offeree company must not, without the approval of its shareholders in general meeting, take any action of the affairs of the offeree company that could effectively result in any bona fide offer being frustrated or the shareholders being denied an opportunity to decide on its merits. Rule 5 of the Code sets out a non-exhaustive list of actions that the board of the offeree may not undertake without shareholder approval.

(8) control of the content of circulars, especially forecasts.

General Principle 11 of the Code requires that any document or advertisement addressed to shareholders containing information, opinions or recommendations from the board of an offeror or offeree company or its advisers, should, as with a prospectus, meet the highest standards of care and accuracy. Profit forecasts require special care. Rule 25 of the Code states that directors have the sole responsibility for compiling a profit forecast, and that they must do so with due care and consideration. This is to ensure that all communications to shareholders in an offer are provided with the highest standards of accuracy, and in a fair manner.

Other indicators

Other important indicators are corporate governance (difficult to measure), free ability to merge companies by fusion, the one-share-one-vote rule, and, to a lesser extent, minority protections. Other indicators relate to quick and cheap incorporation, the *ultra vires* rule, maintenance of capital, no par value shares, shareholder liability, substantive consolidation on insolvency and disclosure. These are not measured here.

Commercial contracts

Introduction

Contract is at the heart of commercial life, and is everywhere. In fact, the main tenets of contract law across the main families of jurisdictions are consistent - it is in the fields of insolvency and property law where the main differences emerge. It is true that there are contract differences, for example, between writing requirements, open offers, the time of acceptance and specific performance, but often these differences are of lesser significance in practice in the business field.

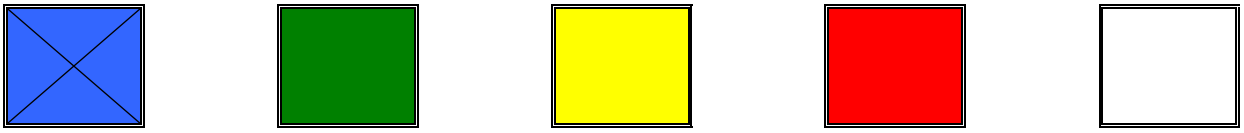
The key indicators the survey chooses all tend to symbolise whether the approach of the jurisdiction to contract is hard or soft. If the approach is hard, then the jurisdiction tends to support predictability in business contracts so that certainty and freedom of contract are valued more than mitigating the risk of occasionally abusive behaviour and unfair results, especially for weaker parties. A soft jurisdiction tends to give greater primacy to notions of good faith and the like.

Exclusion of contract formation

Generally Commercial parties often wish to be able to negotiate heads of terms commercially without being bound by a contract. In some jurisdictions, the courts are ready to infer that the parties are bound if the terms are sufficiently clear, even if they have said expressly that they do not intend to be bound.

Q7 In Singapore, parties are not bound to heads of terms if they expressly state that the terms are "subject to contract" or some such clear phrase.

True **False** **Can't say**



Comment:

"Subject to contract" clauses

Under Singapore Contract Law, the Court takes an objective approach in ascertaining whether there has been a validly formed contract.[48] Following this approach, the Court will consider both the "subject to contract" clause, as well as the circumstances of the case in order to find whether there is a binding contract between the parties. ***Generally, the Courts will give effect to the prima facie meaning of "subject to contract" clauses****, ie*, that there was no binding and enforceable contract embodied by the document.[49] As such, even if the essential terms of a contract have been agreed upon, and there is no need for further negotiation regarding those terms, the Courts will respect the parties' decision (through the inclusion of an express "subject to contract" clause) to defer legal relations until the execution of a formal contract.[50] Where such clear and

[48] See for example Bakery Mart Pte Ltd (in receivership) v Sincere Watch Ltd [2003] 3 SLR(R) 462 at [22], where the Court of Appeal held that "Where negotiations are protracted the court is entitled to look at all the circumstances and apply an objective test to determine whether the parties had reached an agreement as far as the essential terms are concerned, or whether the parties intended to reserve their rights pending a formal agreement".
[49] *Norwest Holdings Pte Ltd v Newport Mining Ltd*, [2011] 4 SLR 617, (Court of Appeal Singapore) at [20].
[50] *Norwest Holdings Pte Ltd v Newport Mining Ltd*, [2011] 4 SLR 617, (Court of Appeal Singapore) at [29].

express "subject to contract" clauses are used, this prima facie meaning of "subject to contract" will only be displaced in "very strong and exceptional context".[51]

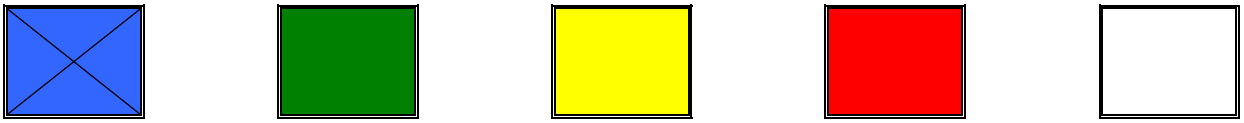
However, where the clause is unclear, the Court is more likely to find that the clause is not a "subject to contract clause".[52] The Courts will consider the commercial context, such as the urgency to enter into an oral contract first and for documentation to follow subsequently, in interpreting such clauses.[53]

Termination clauses

Generally Many contracts, especially loan contracts, leases of goods and long-term sales contracts, contain events of default on the occurrence of which one party can terminate the contract. Jurisdictions which uphold freedom of contract and the literal interpretation of contract give effect to these clauses and do not rewrite the contract according to the court's notions of what is fair. Other jurisdictions prefer good faith. We ignore consumer contracts - where there may be consumer protections.

Q8 In Singapore, a termination clause in a loan or sale of goods contract between sophisticated companies (not individuals) providing for the termination of the contract immediately on certain events is usually upheld, even if the event concerned is relatively trivial.

True **False** **Can't say**



Comment:

Express Termination Clauses

A distinction between express termination clauses, and common law termination rights needs to be distinguished briefly, as there can be confusion when one conflates the two. Express termination clauses are clauses where parties confer upon each other a contractual right of termination, usually upon the happening of a specified event which may or may not be a default in the contractual performance of either party.[54] On the other hand, the common law also provides for termination rights where one party breaches a condition of a contract, or breaches an innominate term of the contract and the breach deprives the innocent party

[51] *Norwest Holdings Pte Ltd v Newport Mining Ltd*, [2011] 4 SLR 617, (Court of Appeal Singapore) at [31]. In this case, Newport submitted a firm letter of offer, offering to purchase the Shares at S$10.25m, with the letter stating that "we hereby offer to purchase the shares… subject to the terms and conditions in the Sale and Purchase Agreement to be negotiated". In the Acceptance letter, the Liquidator of Norwest Holdings stated that "[a] formal Sale and Purchase Agreement is to be negotiated and executed between [Newport] and [Norwest]". It was held that such phrases were "subject to contract" clauses, and as such no binding contract was made between the parties.

[52] See *OCBC Capital Investment Asia Ltd v Wong Hua Choon*, [2012] 4 SLR 1206 (Court of Appeal Singapore), where the Court found that there was an oral agreement between the parties, notwithstanding the fact that the Term Sheet (which was agreed by the disputing parties) contained a term "Documentation: A Supplemental Agreement to be executed to effect the necessary changes".

[53] See *OCBC Capital Investment Asia Ltd v Wong Hua Choon*, [2012] 4 SLR 1206 (Court of Appeal Singapore) at [45].

[54] See *RDC Concrete v Sato Kogyo (S) Pte Ltd*, [2007] 4 SLR(R) 413 (Court of Appeal Singapore) at [91], where such situations are termed as falling under the category of "Situation 1".

substantially the whole benefit which he should obtain under the contract.[55] A breach of a warranty does not confer the innocent party any right to terminate the contract.[56] While express termination clauses may overlap with the common law termination rights, they are distinct from each other, and the remedies following the exercise of the rights may differ.[57]

Generally in Singapore, the Courts are likely to uphold such termination clauses (in contracts between sophisticated companies), even if the event concerned is relatively trivial. While there does not seem to be any direct authority on point, this position is likely to be taken for the following reasons. Assuming that there is no express provision to the effect that parties must act in good faith in terminating the contract, Singapore law is unlikely to imply such a term to act in good faith into the contract:

- This term is unlikely to be implied in fact, given that such a term will only be implied if (a) parties did not contemplate the issue at all and left a gap, (b) that it is necessary to imply the term in order to give the contract efficacy, and (3) the term implied must be one which the parties would have responded "Oh, of course!" had the proposed term been put to them at the time of the contract.[58] The cumulative requirements mean that implied terms in fact would be rare. ***The judicial attitude is conservative, and the Court will not rewrite the contract for the parties based on its own sense of what is fair and just.***[59]

- It is unlikely that the term would be implied at law as well. For such a term to be implied in law, the "general reasons of justice and fairness as well as of public policy" must justify such an implication. Given that an implied term in law would apply to all contracts of a particular type, the Courts will naturally be hesitant in implying such a broad and ambiguous term for parties to act in good faith.[60]

However, in situations where parties have conferred on each other a broad discretion to terminate the contract at their convenience ("termination for convenience" clauses)[61], there remains the possibility that there are limits to the discretion to terminate the contract which may be implied into the contract. For example, in a construction contract which purports to allow the Employer a contractual power to terminate the contract for convenience, it has been suggested that the Employer cannot use this clause to take advantage of lower prices offered by another contractor.[62] If this is correct, the same principle may apply to loan contracts, leases of goods and long-term sales contracts.

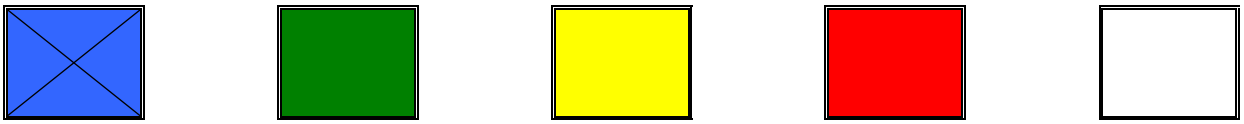
[55] See *RDC Concrete v Sato Kogyo (S) Pte Ltd*, [2007] 4 SLR(R) 413 (Court of Appeal Singapore) at [92], where such situations are termed as falling under the category of "Situation 3(a)" for condition-warranties and "Situation 3(b)" for innominate terms.
[56] See *RDC Concrete v Sato Kogyo (S) Pte Ltd*, [2007] 4 SLR(R) 413 (Court of Appeal Singapore) at [98].
[57] See *Sports Connection Pte Ltd v Deuter Sports GmbH*, [2009] 3 SLR(R) 883 (Court of Appeal Singapore) at [55], where the Court observed that "whilst Situation 1 entails (in substance) the same legal effect as a condition (pursuant to the condition-warranty approach), this is only with regard to the termination of the contract. However, this does not necessarily mean that, from a remedial perspective, the innocent party is also entitled to the full measure of damages if there has, in fact, been no breach which would have entitled it to terminate the contract at common law".
[58] See *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*, [2013] 4 SLR 193 (Court of Appeal Singapore) at [101].
[59] See *Sembcorp Marine Ltd v PPL Holdings Pte Ltd*, [2013] 4 SLR 193 (Court of Appeal Singapore) at [88].
[60] See *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd*, [2006] 3 SLR(R) 769 (Court of Appeal Singapore) at [90]-[92]. See also *Ng Giap Hon v Westcombe Securities Pte Ltd*, [2009] 3 SLR(R) 518 (Court of Appeal Singapore) at [44]-[60], where the Court of Appeal rejected implying a duty to act in good faith as an implied term in law. However, the Court also suggested that extremely egregious bad behavior could be prohibited by way of an implied term in law (*Ng Giap Hon* at [97]).
[61] These are not conditioned upon an event of default.
[62] See *TT International Ltd v Ho Lee Construction Pte Ltd*, [2017] SGHC 62 at [40], where the High Court left open the possibility for such an implied limit.

Exclusion clauses

Generally Contracting parties often seek to exclude their liability for defective performance of the contract. So the issue is whether these exclusion clauses are generally upheld if they are clear and whether freedom of contract is allowed in this area.

Q9 In Singapore, exclusions of liability in most commercial contracts between sophisticated companies, such as a sale of goods contract, are generally upheld if they are clear.

True **False** **Can't say**



Comment:

Exclusions of liability

Exclusion of liability is an important tool in risk allocation between the parties. Given that the assumption is that the exclusion of liability clause is clear, this comment will not consider the operation of the contra proferentum rule.[63] ***Most exclusion clauses would be upheld, but statute has provided limitations on the parties' freedom to exclude liability in certain situations. Local statutes, such as the Unfair Contract Terms Act[64] and the Sale of Goods Act[65] interferes with the operation of such exclusion of liability clauses, even if the exclusion clause within the commercial contract is clear.*** This comment will highlight on some key liability which cannot be excluded. This comment further assumes that none of the sophisticated companies are dealing as a consumer.[66]

Liability which cannot be excluded

Seller's implied undertakings as to title

Under the Unfair Contract Terms Act, S6(1)(a) provides that ***liability for breach of obligations arising from S12 of the Sale of Goods Act cannot be excluded or restricted by reference to any contract term***. S12 of the Sale of Goods Act provides generally for implied terms about title in a contract for the sale of goods. For example:

> In a contract of sale, there is an implied condition that the seller has the right to sell the goods. In an agreement to sell in the future, there is an implied condition that the seller will have such a right to sell when the property is to pass.[67] For both of these contracts:
>
> a. There is an implied warranty that the goods are free and is not under any encumbrance not disclosed or known to the buyer before the contract is known to be made.[68]

[63] The *contra proferentum rule* provides that where there is an ambiguity in a clause, the Courts will prefer an interpretation against the person who put them forward.
[64] (Cap 396, 1994 Rev Ed Sing)
[65] (Cap 393, 1999 Rev Ed Sing).
[66] Under the Unfair Contract Terms Act, as against a person dealing as a consumer, liability for breach of obligations under the Sales of Goods Act or the Hire Purchase Act cannot generally be excluded (See S6(2) of the Sale of Goods Act). If the person does not deal as a consumer, the exclusion of liability is allowed only if it is reasonable.
[67] S12(1), Sale of Goods Act.
[68] S12(2)(a), Sales of Goods Act.

b. There is also an implied warranty that the buyer will enjoy quiet possession of the goods except so far as it may be disturbed by any person entitled to the benefit of the encumbrance so disclosed or known.[69]

Liability for death or personal injury resulting from negligence

S2(1) of the Unfair Contract Terms Act provides that a person cannot exclude or restrict liability for death or personal injury resulting from negligence.

Liability which may be excluded if reasonable

Standard Form Contracts

Under the Unfair Contract Terms Act, if one of the contracting parties ("Party A") deal on the other's ("Party B") written standard terms of business, any attempt to exclude or restrict liability by Party B against Party A will not be effective,[70] unless the exclusion or restriction of liability term satisfies the requirement of reasonableness.[71] Party B cannot provide in the contract the right to render a substantially different performance from that which was reasonably expected, or the right to render no performance at all,[72] unless such a contract term is reasonable.[73]

Seller's implied undertakings as to conformity of goods with description or sample, or as to their quality or fitness for a particular purpose.

S6(3) of the Unfair Contract Terms Act provides that ***liability under S13, 14 and 15 of the Sales of Goods Act cannot be excluded or restricted unless the term satisfies the requirement of reasonableness***. S13, 14, and 15 of the Sales of Goods act generally provide for implied terms regarding sale of goods by description or sample, as well as implied terms about quality and fitness. Some of these implied terms include:

1. If there is a contract for sale of goods by description, there is an implied condition that the goods will correspond with the description.[74]
2. Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of satisfactory quality.[75]
3. Where the buyer makes known to the seller the purpose for which the goods are bought, there is an implied condition that the goods supplied by the seller under the contract would be fit for the buyer's purpose, unless the circumstances show that the buyer does not rely, or that it is unreasonable for the buyer to rely on the skill or judgement of the seller.[76]
4. Where there is a sale of goods by sample, there is an implied condition that the bulk will correspond with the sample in quality. There is also an implied condition that the goods will be free from any defect making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample.

[69] S12(2)(b), Sale of Goods Act.
[70] S3(1), 3(2)(a), Unfair Contract Terms Act.
[71] S3(1), Unfair Contract Terms Act.
[72] S3(2)(b) Unfair Contract Terms Act.
[73] S3(1), Unfair Contract Terms Act.
[74] S13(1), Sale of Goods Act.
[75] S14(2), Sale of Goods Act.
[76] S14(3), Sale of Goods Act.

Other indicators

Other contract indicators not assessed here include writing formalities, open offers, mistake, frustration, damages, penalties, specific performance and whether notice of assignment of the contract to the debtor is mandatory if the assignment is to be valid on the insolvency of the assignor.

Litigation

Introduction

The first three key indicators of governing law, jurisdiction and arbitration tend to show whether the jurisdiction does or does not place a high value on international comity and freedom of contract as opposed to national primacy.

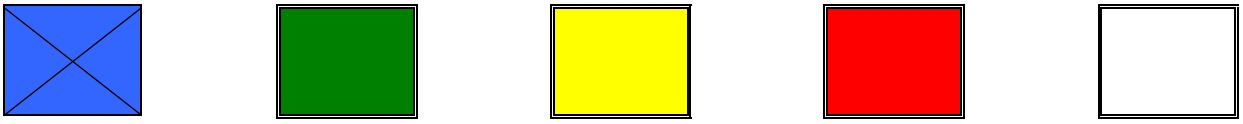
The indicator on class actions tends to show whether or not the jurisdiction's litigation system is orientated towards plaintiffs, especially mass plaintiffs in product liability cases. This indicator may also show the attitude of the jurisdiction to the protection of individual parties as against business parties, both in terms of the incidence of costs and enforcement.

Governing law clauses

Generally Most countries apply a foreign governing law of a contract even if there is no connection between the contract and the jurisdiction. If the courts do not uphold the governing law, the effect is that the contract obligations may be different.

Q10 The Singapore courts will apply an express choice of a foreign law in a loan or sale of goods contract between sophisticated companies, even though the contract has no connection with the foreign jurisdiction, but subject to Singaporean public policy and mandatory statutes.

True **False** **Can't say**



Comment:

Generally, where parties have an express choice-of-law clause in the contract, Singapore Courts would give effect to the selected law. The rationale is to uphold the freedom to contract, giving effect to parties' express intentions[77]. The Courts would only depart from the parties' choice of law if the choice of that law was made in bad faith, or if the application of the foreign law was contrary to public policy[78]. It is immaterial if the contract has no connection with the foreign jurisdiction[79].

[77] *Peh Teck Quee v Bayerische Landesbank Girozentrale* [2000] 1 SLR 148; [1999] SGCA 79 (Singapore Court of Appeal) at [17].
[78] *Peh Teck Quee v Bayerische Landesbank Girozentrale* [2000] 1 SLR 148; [1999] SGCA 79 (Singapore Court of Appeal) at [12].
[79] *Peh Teck Quee v Bayerische Landesbank Girozentrale* [2000] 1 SLR 148; [1999] SGCA 79 (Singapore Court of Appeal) at [18].

If parties did not make an express selection on the law to govern the contract, the Courts may infer a choice from the contract and the surrounding circumstances at the time of the making of the contract. This is an objective inquiry, based on the intention of parties at the time of contract formation[80].

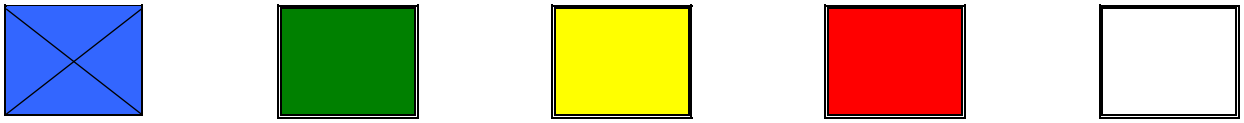
Only where the Courts could not find an express or implied selection of law, then the proper law is the law of the country or system of law with the closest and most real connection with the transaction and the parties[81].

Foreign jurisdiction clauses

Generally Many contracts confer jurisdiction, sometimes exclusive, on the courts of a foreign jurisdiction, usually accompanied by a choice of foreign governing law.

Q11 The Singapore courts will generally uphold a clear submission in a loan or sale of goods contract between sophisticated companies to the exclusive jurisdiction of the courts of a foreign country, even if there is no connection between that country and the contract.

True **False** **Can't say**



Comment:

Singapore is a signatory to The Hague Choice of Court Convention, 30 June 2005. Parties under the Convention shall recognize a choice of court agreement and thus courts not chosen in the agreement will stay all proceedings. Further, Section 5 of the Singapore Choice of Court Agreements Act 2016 (No. 14 of 2016) ("SCCAA") provides that with regards to an exclusive choice of court agreement:

1. The agreement is to be treated as independent of the other terms of the contract; and
2. The validity of the agreement cannot be challenged solely on the ground that the contract is not valid.

Under Section 12 of the SCCAA, Singapore Courts must give effect to an exclusive choice of court agreement where the chosen court is not in Singapore. The Court shall stay or dismiss the proceeding to which the agreement applies, unless the Court determines that:

1. The agreement is null and void under the law of the State of the chosen court;
2. A party to the agreement lacked the capacity, under the law of Singapore, to enter into or conclude the agreement;
3. Giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of Singapore;
4. For exceptional reasons beyond the control of the parties to the agreement, the agreement cannot reasonably be performed; or

[80] *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR 491; [2008] SGCA 1 (Singapore Court of Appeal) at [49].
[81] *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR 491; [2008] SGCA 1 (Singapore Court of Appeal) at [50].

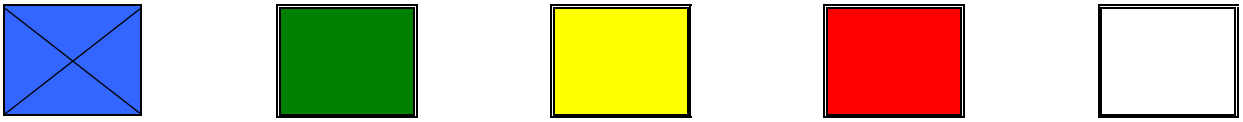
5. The chosen court has decided not to hear the case or proceeding.

Arbitration recognition

Generally Contracting parties, especially in trading and construction contracts, but less so in loan contracts, wish to submit disputes to arbitration, sometimes in a foreign country. The resulting award is often enforceable locally under the New York Arbitration Convention of 1958, to which most countries have adhered.

Q12 In Singapore, the courts allow sophisticated contracting parties to submit contract disputes to a foreign arbitral tribunal to the exclusion of the Singapore courts.

True **False** **Can't say**



Comment:

Under Section 15A of the Singapore International Arbitration Act ("IAA"), Singapore Courts shall give effect to arbitration rules or procedure agreed to by the parties. Accordingly, parties can submit their arbitrations to a foreign arbitral institution or *ad hoc* tribunal unless it is inconsistent with a provision of the UNCITRAL Model Law or the IAA. Singapore Courts adopt a supportive role in the arbitral process, and gives effect to party autonomy as the cornerstone underlying judicial non-intervention in arbitration.[82]

Given that Singapore has adopted the Model Law, Singapore Courts cannot intervene in arbitral matters except where allowed under the Model Law or the IAA.[83] Further, the Model Law stipulates that Singapore Courts shall refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.[84]

For example, Singapore Courts may intervene by giving orders for interim matters, including:[85]

1. Security for costs;
2. Discovery of documents and interrogatories;
3. Giving of evidence by affidavit;
4. The preservation, interim custody or sale of any property which is or forms part of the subject-matter of the dispute
5. Securing the amount in dispute; and
6. An interim injunction or any other interim measure

[82] *Tjong Very Sumito v Antig Investments Pte Ltd* [2009] 4 SLR(R) 732; [2009] SGCA 41 (Singapore Court of Appeal) at [28].
[83] Article 5 Model Law.
[84] Article 8(1) Model Law.
[85] Section 12A of the International Arbitration Act.

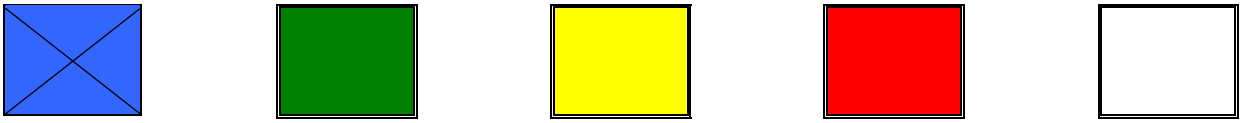
Singapore Courts may only intervene in the above matters if the arbitral tribunal has no power or is unable for the time being to act effectively.[86]

Class actions

Generally In some countries, such as the United States, a plaintiff can be authorised by the court to sue on behalf of all claimants who are similarly situated. Claimants have to opt out or they are bound.

Q13 In Singapore, class actions where the class is bound if they do not opt out are generally not allowed.

True **False** **Can't say**



Comment:

Under Singapore law, "representative group litigation" is allowed.[87] The key elements of a representative action are that the represented group must consist of "numerous persons" who have the "same interest" in the proceedings.[88] Singapore Courts have the power to decide if representative proceedings are appropriate and order the litigants to proceed in the ordinary manner.[89]

A judgment or order of the court in the course, or at the conclusion, of the representative proceedings binds the represented persons even though they are not mentioned on the record. Notwithstanding the binding nature of the judgment on represented persons, they have the right to dispute their liability.[90] A judgment may not be enforced against a represented person unless the court gives its leave for this purpose.[91]

Regardless, members of the class of represented persons must be objectively capable of clear definition, and must have the same interest in the relief granted by the court.[92]

Other indicators

Other indicators not covered by this survey include contingent costs, loser pays the costs of the winner, prejudgment freezes or arrests, appeals, scope of disclosure (discovery of documents), efficacy of waivers of sovereign immunity and the enforceability of foreign judgments.

Real property

Ownership of land

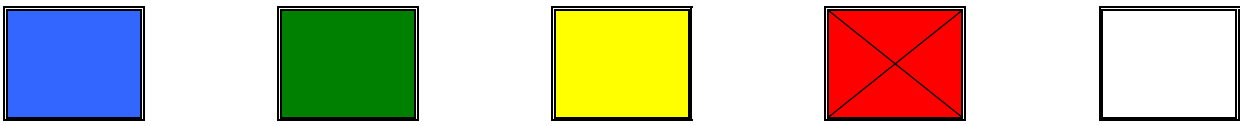
Generally In most countries, nationals can own land absolutely and are not restricted simply to leases for a limited term or simple rights of occupancy. However, in some jurisdictions, absolute ownership of land is not available to nationals or local corporations. If this is so, then the jurisdiction would be coloured green if

[86] Section 12A(6) of the International Arbitration Act.
[87] Order 15, Rule 12(1) of the Rules of Court.
[88] Order 15, Rule 12(1) of the Rules of Court.
[89] Order 15, Rule 12(1) of the Rules of Court.
[90] Order 15, Rule 12(5) of the Rules of Court.
[91] Order 15, Rules 12(3) – 12(6) of the Rules of Court.
[92] *Koh Chong Chiah v Treasure Resort Pte Ltd* [2013] 4 SLR 1204; [2013] SGCA 52 (Singapore Court of Appeal) at [78].

citizens can lease land for a very long term without material restrictions, such as 999 years, and can also mortgage or sell the land or give it away or bequeath it under their wills without official consent because the ownership is a close proximate of absolute ownership. If on the other hand citizens are entitled only to a lease of, say, 70 years or less, or to similar rights of occupancy, and if there are limitations on dealing with the land without official consent, such as mortgaging, selling or bequeathing it, then the jurisdiction would be red.

Q14 In Singapore, nationals and local corporations are entitled to own land absolutely.

True **False** **Can't say**



Comment:

In Singapore, absolute ownership of land is rare and almost impossible. Most businesses or citizens only have short leases in the land. This is because of Singapore's natural geographical limitations: Singapore is a tiny island nation of only 719 square kilometres of land area, with a population density of 7,796 per square kilometre. As one of the nations with the highest population density, land is a scarce and heavily controlled resource in Singapore.

In Singapore, the land is predominantly owned by the State, or by statutory boards.[93] In 1969, the amount of State land was 49.2%, and in 1975 it was approximately 65%. By 2006, the amount of State land was 58%, and this figure does not include land sold to statutory boards.[94] This feature of ownership is largely due to the State's powers of compulsory acquisition of land, under the Land Acquisition Act (Cap 152, 1985 Rev Ed Sing). Land is owned or managed primarily by the following statutory boards: the Jurong Town Corporation (land for industrial purposes), the Urban Redevelopment Authority (land for commercial purposes), and the Housing and Development Board (land for public housing purposes).

Given the majority of the land being absolutely owned by the State, the prevalent method of land holding is the leasehold. Most leases are relatively short in practice. There are two reasons for this.

- First, Rule 10 of the State Lands Rules provides that "the title ordinarily to be issued [by the State exercising its powers of alienation under the State Lands Act] shall be a lease for a term not exceeding ninety-nine years". Where longer leases are granted (such as 999 years), these are usually granted to the statutory bodies such as the Urban Redevelopment Authority, which in turn sub-let the land to private developers.[95]
- Second, in line with the scarce nature of land, the State and statutory bodies have a policy of not granting long leases in general. The short lease would allow the State and statutory bodies to ensure that land is allocated to the most productive and optimal use. For example, the standard term lease for industrial premises is for 30 years, and may be coupled with an option to renew for a further

[93] Statutory boards are quasi-governmental bodies with separate legal personality from the State.
[94] Ricquier (2017). *Land Law*, 5th Ed. Singapore: LexisNexis. Para [2.2.7].
[95] Ricquier (2017). *Land Law*, 5th Ed. Singapore: LexisNexis. Para [2.4.1].

period of 30 years.[96] This can also be seen from the criteria used in assessing whether a lease should be renewed by some of the statutory bodies.[97]

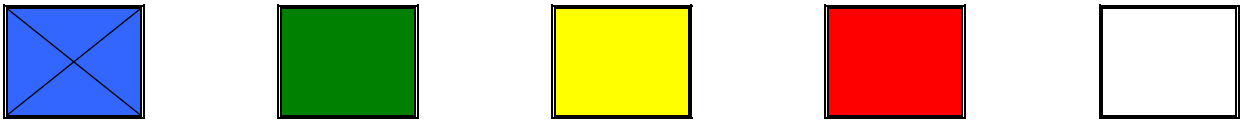
Security of land title and land registers

Generally Many jurisdictions improve the security of title to land by a registration system which, although not necessarily state-guaranteed, has high reliability. An example is the Torrens system developed in Australia and used in many other countries, eg Canada and England.

Most countries in the civil code groups do not have a title register but instead require documents concerning land to be notarised and filed at the registry so that they can be searched. The United States does not generally have title registers for land although there may be mortgage registers. They rely on title registration companies which provide title insurance.

Q15 Most land in Singapore is registered in a land register which records most major interests in land, eg ownership, mortgages and longer-term leases.

True **False** **Can't say**



Comment:

Though theoretically in Singapore, land could be both registered and unregistered, virtually all land is now registered under the land register under the Land Titles Act and Land Titles (Strata) Act. Singapore adopts the Torrens System, and legal ownership or interests in land is acquired by way of registering the transfer with the Registrar of Titles.[98] As Singapore adopts the model of immediate indefeasibility, where the person who has a registered interest would obtain an indefeasible title upon registration, notwithstanding that the source of the new registered title might be defective.[99] The priority of interests is determined by the order of registration.[100]

The indefeasibility of title is only subject to a few exceptions. Notably, the title is subject to the overriding interests provided under S46(1)(i) to (vii). These include:

- The rights of any person in occupation of the land under a tenancy not exceeding 7 years;
- Any subsisting exceptions, exceptions, covenants and conditions, contained or implied in the State title.

The indefeasibility of title is also subject to exceptions. The registered title may be defeated, if it had been obtained by fraud.[101] The registered title cannot be used to defeat a beneficiary's interest under a express

[96] Ricquier (2017). *Land Law*, 5th Ed. Singapore: LexisNexis. Para [2.4.2].
[97] See for example the Jurong Town Corporation lease renewal application form at http://www.jtc.gov.sg/documents/leasemanagement/appnform_leaserenewal_landSF.pdf. Applicants are required to submit a business plan which includes revenue projection, a breakdown of the activities to be carried on-site, and efforts to intensify land use.
[98] See S45(1), Land Titles Act (Cap 157), 2004 Rev Ed Sing. The Land Titles Act provides for certain instruments which must be registered under the Act for it to be effectual to pass any estate or interest in land. However, this does not prevent any unregistered instrument from operating as a contract (S45(2)).
[99] *United Overseas Bank v Bebe bte Mohammad* [2006] 4 SLR(R) 884 (Court of Appeal Singapore) at [93].
[100] S48(1), Land Titles Act.
[101] S46(2)(a), Land Titles Act.

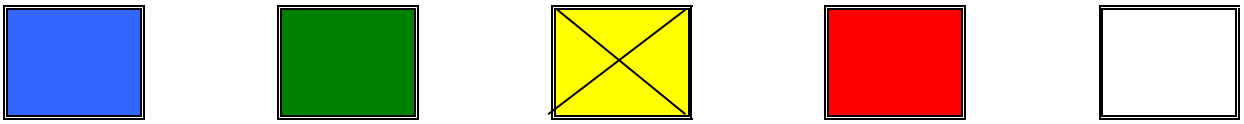
trust, as against a registered proprietor-trustee.[102] While the Court of Appeal indicated that only express trusts are exceptions to indefeasibility of title, later case law seems to indicate that other forms of trust may fall under the "trust exception", such as resulting trust.[103] It is unclear whether other trusts arising from operation of law such as constructive trusts can form an exception to the indefeasibility of title, and this is still an area unresolved in Singapore law.

Land development restrictions

Generally Many countries restrict development and the change of use of land and require permits to be obtained for any development or change of use.

Q16 In Singapore, apart from environmental controls (dealt with later), the control of commercial development and the change of use of land is very light and, where required, permits are quick and cheap to obtain.

True **False** **Can't say**



Comment:

There are land development restrictions in Singapore. An individual or entity intending to carry out development projects that increase the value of the land, or to change the use of a property is required to seek approval or permission from the Urban Redevelopment Authority of Singapore. Depending on the type of development application, whether it concerns an alteration within a conserved building within a historic conservation area or a simple change of use of premise application, different charges apply. Application for all types of development application can be done online, with the fee schedule accessible for all.

Development Charge

Pursuant to s 35 of the Planning Act, a development charge is a tax levied in respect of every development of land authorised by any planning or conservation permission. on either the owner of the land to which the planning or conservation permission is granted, or the person who applied for the relevant planning or conservation permission. Development charge will be levied when planning permission is granted to carry out development projects that increase the value of the land, and this includes rezoning the land to a higher value use, or increasing the plot ratio of the land.

Change of Use of Premise

Whenever a planning permission is required for the change of use of a property, a development charge of S$535 would be levied on either the owner of the property or the person who applied for the planning permission. This is a non-refundable fee even if the planning permission is not granted. In Singapore, the type of use of a premise is divided into 18 "Use Classes". A "Use Class" is a broad group of building uses with similar mode of operations or impact to the surrounding. Not all change of use of premise would require approval from the Urban Redevelopment Authority. For example, change of use approval is not required

[102] S46(2)(c). See *United Overseas Bank v Bebe bte Mohammad* [2006] 4 LSR(R) 884 at [77].
[103] *Loo Chay Sit v Estate of Loo Chay Loo* [2010] 1 SLR 286 (Court of Appeal Singapore),

when the proposed use is within the same Use Class. Conversely, change of use approval will be required when the proposed use changes from one Use Class to another Use Class.

Other indicators

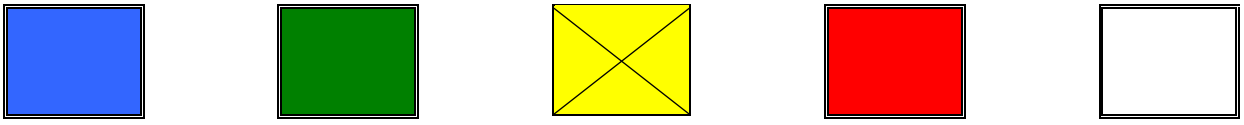
Other indicators not surveyed include transfer costs, stamp duties and lessee protections.

Employment law

Generally The indicator here is whether it is easy or hard to hire and fire employees. The measures include high minimum wages, maximum hours, minimum holidays, maternity rights, equal pay for equal work (non-discrimination) and severance costs.

Q17 In Singapore, there are few controls on hiring and firing employees or on the terms of employment.

True **False** **Can't say**



Comment:

Under Singapore law, there are various control mechanisms with regards to the hiring of employees.

General Obligations

Generally, employers are required to do the following when hiring employees:[104]

1. Follow a system of meritocracy while selecting and recruiting candidates for employment. Skills, experience and ability to perform the job should take precedence over age, race, gender, religion, family status or disability;
2. Selection criteria should be related to job requirements and must be made known to all job applicants and reviewed regularly to ensure relevancy;
3. Job advertisements should avoid listing attributes such as age, gender, marital status, race, religion and language, unless it is duly justifiable;
4. Job application forms should only ask for information relevant to assessing an applicant's suitability for a job;
5. If personal data is required, it is important to state that it is for administrative purposes only; and
6. Job interviews and tests should be confined to questions that are relevant to the job requirements.

Formalizing Employment Contract

Contract terms must abide by the minimum requires under Singapore law and include Key Employment Term [105] such as the appointment position, duration of employment contract, date of employment commencement, remuneration, hours of work, employee benefits, code of conduct and termination.

[104] Singapore Tripartite Guidelines On Fair Employment Practices.
[105] Section 95A of the Singapore Employment Act.

Employers are also required to issue these in writing to all employees not later than 14 days after employment begins.[106]

Age Restrictions

The legal age to work in Singapore is 17 years and above. However, children and young persons aged 13 to 16 years can be employed for restricted duties. A child who is 13 or above can engage in light work in a non-industrial setting, and may work in an industrial setting in which only members of the same family are employed.[107]

There are also various control mechanisms under Singapore law with regards to the firing of employees.

General Obligations

Generally, companies intending to implement retrenchments are required to do the following:

1. Notify the Ministry of Manpower or the Tripartite Alliance for Fair and Progressive Employment Practices of any such retrenchments;[108]
2. Consult with the union if the company is unionized;[109]
3. To make decisions based on the employee's ability to contribute to the company's business needs and not based on any form of discrimination;[110]
4. To treat all affected employees with dignity and respect;[111] and
5. To pay all salaries, including unused annual leave and notice pay on or prior to their last day of work.[112]

Notice and Unfair Dismissals

Companies must give employees the requisite notice set out under Singapore law.[113] Further, specific rules also apply to female employees. It is an offence for an employer to give a female employee notice of dismissal while she is on maternity leave, if she is eligible to take such leave and has given sufficient notice of the same.[114]

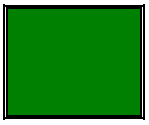
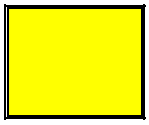
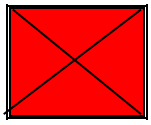
Non-Discrimination Obligations

In relation to discrimination, Singapore has issued guidelines which discourage employers from discriminating employees based on their family responsibilities and their marital and pregnancy status. Specifically, an employer shall not dismiss on the ground of age any employee who is below the prescribed retirement age (currently 62 years of age).[115] Further, an employer shall not, in engaging persons for employment, discriminate against a person by reason of that person being or proposing to be a union member.[116]

[106] Section 95A of the Singapore Employment Act.
[107] Section 68 of the Singapore Employment Act.
[108] Singapore Tripartite Guidelines on Mandatory Retrenchment Notifications.
[109] Rule 7 of the Singapore Tripartite Advisory On Managing Excess Manpower And Responsible Retrenchment.
[110] Rule 5 of the Singapore Tripartite Advisory On Managing Excess Manpower And Responsible Retrenchment.
[111] Rule 4 of the Singapore Tripartite Advisory On Managing Excess Manpower And Responsible Retrenchment.
[112] Rule 16 of the Singapore Tripartite Advisory On Managing Excess Manpower And Responsible Retrenchment.
[113] Section 10(3) of the Singapore Employment Act.
[114] Section 81 of the Singapore Employment Act.
[115] Section 4(2) of the Singapore Retirement and Re-employment Act.
[116] Section 80 of the Singapore Industrial Relations Act.

Environmental restrictions

Q18 In Singapore, the rules governing the environment and liability for clean-up are very light and relaxed.

True			False	Can't say
				

Comment:

One renowned academic in Singapore wrote that "a clean and green environment was part of Prime Minister Lee Kuan Yew's strategy in wooing investors in the early years." Even now, a clean and green Singapore continues to be one of the key tenets of Singapore's economic strategy in attracting foreign investment. As such, Singapore has "made full use of the law to control unsociable behaviour". Littering is an offence that carries a fine of S$2000 in the case of a first conviction, and up to S$10000 in the case of a third or subsequent conviction. Some offences, such as illegal dumping, or discharging a toxic substance into inland waters, carry mandatory jail terms for a second or subsequent offence. These laws have been "judiciously applied" in the Singapore courts, with the then Chief Justice Yung Pung How holding that "it is imperative that courts regard offences of pollution with the utmost gravity".

In Singapore, laws regarding public health and pollution are administered and enforced by the Ministry of Environment and Water Resource and its two statutory boards, the National Environmental Agency and the Public Utilities Board. In relation to pollution control, Singapore adopts four integrated strategies of Prevention; Monitoring; Enforcement; and Public education.

Under Prevention, the government undertakes "careful land-use planning". Even while courting foreign investors, there are "close consultations" between ministries "to ensure that environmental considerations are incorporated at the land use planning, development control and planning stages, so as to minimise the impact of pollution on the surrounding land use." Furthermore, before a proposed development can be built, the developer is required to submit the building plans to the National Environmental Agency, which "examines all building plans to ensure they comply with sewerage, drainage, environmental health and pollution control requirements. Another round of inspections are required upon completion of the factory building.

Under Monitoring and Enforcement, stringent laws are put in place to penalise individuals or companies which do not comply with regulations concerning air pollution control, water pollution control, the management of hazardous substances and toxic waste management. The breach of provisions under the EPMA, such as the failure to maintain fuel burning equipment and air pollution control equipment in an efficient condition, or the discharge of toxic substance or hazardous substance into any inland water which causes pollution could lead to a fine or imprisonment upon the first conviction, or both a fine and mandatory imprisonment on a second or subsequent conviction.

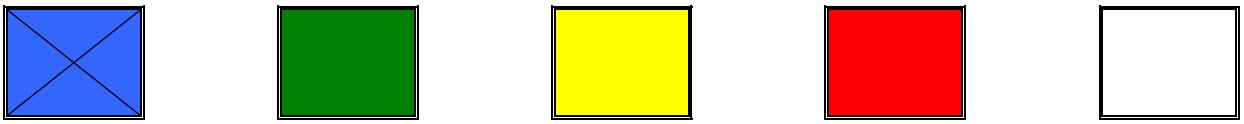
Openness to foreign business

Generally These indicators measure the degree to which the country is open to foreign businesses. The indicators are quite generic and therefore subjective.

Foreign direct investment

Q19 In Singapore, foreigners may freely own and control local companies outside protected industries, such as media, banks and defence.

True **False** **Can't say**



Comment:

Control of local companies

In Singapore, the Companies Act requires at least one director who is "ordinarily resident in Singapore".

Foreign ownership of local companies

In Singapore, there are no general limits on foreign ownership of local companies except in the sectors of media, banks, and defence. Examples below are non-exhaustive.

Media

S 44 of the Broadcasting Act restricts foreign ownership of broadcasting companies in Singapore to less than 49% of the shares in the company or its holding company. Under s 11(3) of the Newspaper and Printing Presses Act , no person (whether local or foreign) shall be able to hold shares of more than 5% of the total votes attached to all voting shares in a newspaper company without first obtaining the approval of the Minister.

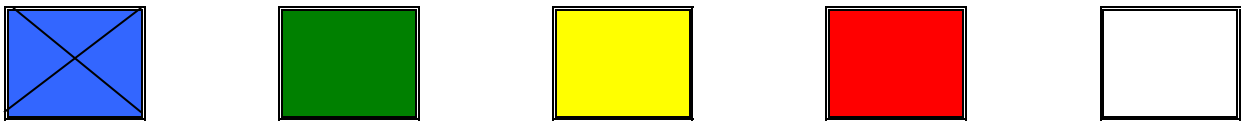
Banks

Under s 15A of the Banking Act, no person or entity (local or foreign) shall hold shares equal to or more than 5% of the total votes attached to all voting shares in a designated financial institution, without first obtaining the approval of the Minister.

Exchange controls

Q20 In Singapore, there are no exchange controls. Businesses may therefore have foreign bank deposit accounts in foreign currency, borrow in foreign currency and repatriate profits to foreign shareholders in foreign currency.

True **False** **Can't say**

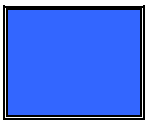
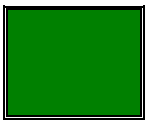
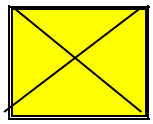
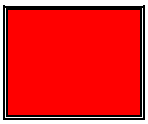


Comment:

There are no foreign exchange or currency controls in Singapore.

Alien ownership of land

Q21 In Singapore, foreign-controlled companies have the same rights as nationals or residents to own or lease land without a permit.

True		False		Can't say
				

Comment:

Apart from restricted properties, foreign-controlled companies have the same rights as nationals or residents to own or lease land without a permit. Restricted properties include:

- Vacant residential land;
- Terrace house;
- Semi-detached house;
- Bungalow/detached house;
- Strata landed house which is not within an approved condominium development under the Planning Act (e.g. townhouse or cluster house);
- Shophouse (for non-commercial use);
- Association premises;
- Place of worship; and
- Worker's dormitory/service apartment/boarding house (not registered under the provisions of the Hotels Act).

For certain restricted properties such as restricted residential property, foreign-controlled companies are allowed to purchase them subject to approval via an online application to the Singapore Land Authority. The online application requires a non-refundable application fee of S$1,220 per property. The foreign-controlled companies' ability to purchase a restricted property is subject to the condition that the property is used for the occupation of the company's senior personnel as a dwelling house and not for rental or any other purpose (such as investment).

Generally, there are no restrictions in foreigners buying commercial or industrial property. The *Residential Property Act* (Cap. 274, 2009 Rev. Ed. Sing.) (the "RPA") regulates foreign ownership of property, land, and housing. The Land Dealings (Approval) Unit, under the Singapore Land Authority, administers the provisions of the RPA. The RPA defines a 'foreign person' as any person who is not a Singapore citizen; Singapore company; Singapore limited liability partnership; or Singapore society [insert provision]. Under s 2 of the RPA, a "foreign company" within the meaning of the RPA is any company (whether holding company or otherwise) other than a Singapore company.Apart from the abovementioned types of properties, foreign-controlled companies are able to purchase the following types of property without a permit:

- Condominium unit;
- Flat unit;
- Strata landed house in an approved condominium development;

- A leasehold estate in a landed residential property for a term not exceeding 7 years, including any further term which may be granted by way of an option for renewal;
- Shophouse (for commercial use);
- Industrial and commercial properties;
- Hotel (registered under the provisions of the Hotels Act); and
- Executive condominium unit, HDB flat and HDB shophouse.

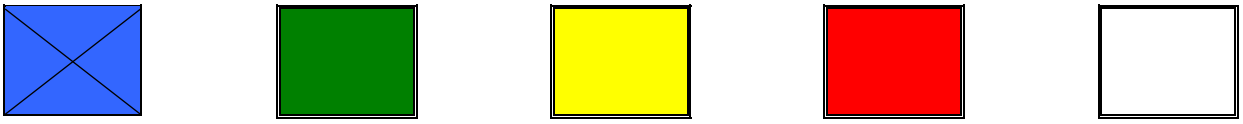
Once the property is being purchased, it would be registered under the land register under the Land Titles Act and Land Titles (Strata) Act. Singapore adopts the Torrens System, and legal ownership or interests in land is acquired by way of registering the transfer with the Registrar of Titles. This would provide the property with immediate indefeasibility, regardless of whether the owner of the property is a local or foreign entity.

Application of the law

Generally These indicators deal with the application of the law, as opposed to what the law actually says. They are bound to be generic and subjective, a matter of impression.

Q22 In Singapore, the higher courts usually treat big businesses as fairly as they treat individuals and do not favour local interests over foreigners.

True **False** **Can't say**



Comment:

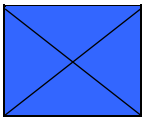
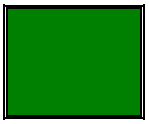
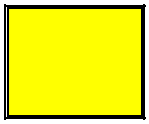
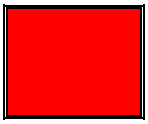
Generally, under the Singapore Constitution, all persons are equal before the law and entitled to the equal protection of the law.[117] This assures the right to equal treatment for both locals and foreigners in similar circumstances.[118] It prohibits laws which require that some individuals within a single class should be treated by way of punishment more harshly than others.[119]

Singapore Courts premise themselves on core values of equality before the law, fairness, impartiality, independence of decision-making, integrity and timeliness.[120] These values guarantee due process and equal protection of the law to all those who have business before the court. They are aimed to maintain a high level of public trust, which will enhance voluntary compliance with court orders, strengthen respect for the rule of law, and increase support for the provision of resources to meet court needs.

[117] Article 12(1) of the Singapore Constitution.
[118] *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489; [1998] SGCA 37 (Singapore Court of Appeal) at [54].
[119] *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489; [1998] SGCA 37 (Singapore Court of Appeal) at [54].
[120] See The International Framework for Court Excellence, which Singapore Courts subscribe to.

Costs and delays of commercial litigation

Q23 The costs and delays of commercial litigation in the higher courts in Singapore are not considered materially greater than in other comparable countries.

True			False	Can't say
				

Comment:

One important core value upheld by Singapore Courts is the principle of timeliness – to achieve an optimal equilibrium between just outcomes and the prevention of judicial delays.[121] Today, Singapore Courts remain efficient in clearing its cases.[122] For the past few years, Singapore Courts have consistently met all its set targets of achieving at least 90% compliance for the waiting periods in various court processes.[123] Criminal trials are heard within 6 weeks from the final Pre-Trial Conference or Criminal Case Disclosure Conference, while civil trials are heard within 8 weeks from the date of setting down. Criminal appeals to the Court of Appeal are heard within 8 weeks of receiving the last confirmation of the records of proceedings. Civil appeals to the Court of Appeal before 2 Judges and 3 or more Judges are heard within 15 and 19 weeks respectively from the date of notification to collect the records of proceedings.[124]

A comprehensive range of strategies was employed to tackle the accumulation of cases:

1. Jurisdictional Reforms (e.g. enlarging the District Courts' jurisdictions);
2. Procedural Reforms (e.g. updating the Rules of Court);
3. Robust and Effective Case Management (e.g. Pre-Trial Conferences); and
4. Other Measures (e.g. attracting quality Judges).

Jurisdictional Reforms

The caseload in Singapore was re-distributed such that the High Court focused on the more complex cases. The other cases were transferred to the High Court Registrars and the Subordinate Courts of Singapore. The civil, criminal and matrimonial jurisdictions of the Magistrates and District Courts were enlarged to enable them to hear more cases. There was also a diversion of certain classes of cases to specialised adjudicatory bodies outside the court system, for example, the Financial Industry Disputes Resolution Centre.

Procedural Reforms

From 1990 to February 2012, the Singapore Rules of Court were amended a total of 55 times. The Rules of Court were amended to mandate the filing of opening statements with a bundle of documents and authorities before the trial to identify the issues in dispute, using affidavits of evidence-in-chief for witnesses to reduce the time spent on examining witnesses in court, and introducing hearing fees and costs orders for delays

[121] See The International Framework for Court Excellence, which Singapore Courts subscribe to.
[122] Supreme Court of Singapore's Annual Report 2014/ 2015, "Justice Within Reach: Strengthening Our Global and Local Presence" at p.47.
[123] Supreme Court of Singapore's Annual Report 2014/ 2015, "Justice Within Reach: Strengthening Our Global and Local Presence" at p.48.
[124] Supreme Court of Singapore's Annual Report 2014/ 2015, "Justice Within Reach: Strengthening Our Global and Local Presence" at p.47-48.

caused by a lawyer. Cases were automatically discontinued if no steps were taken in the proceedings in the past 12 months.

Case Management

Pre-Trial Conferences are now held to allow the court to narrow the issues in dispute, assess whether parties are ready for trial and to allocate trial dates. This minimises the number of cracked trials –trials which are listed for hearing and for which judicial time has been set aside, but which are not proceeded with – and enables the court to better assess the trial's duration.

Other Measures

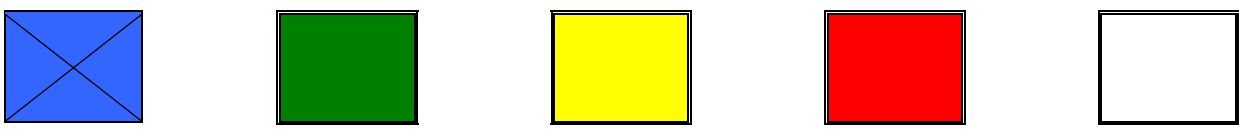
Electronic filing of court documents has undergone periodic upgrading ever since it was introduced in 2000, and the Digital Transcription System means that there is digital audio recording of all hearings in the Supreme Court, so that Judges no longer have to take copious notes of the proceedings. The Courts have also been highly supportive of efforts to take cases out of the court system by encouraging parties to go for mediation.

Overall ranking

This overall ranking is achieved by a survey of all the rankings as shown in this table:

	Question	Rating
1.	Insolvency set-off	
2.	Security interest	
3.	Universal trusts	
4.	Director liability for deepening insolvency	
5.	Financial assistance to buy own shares	
6.	Public takeover regime	
7.	Exclusion of contract formation	
8.	Termination clauses	
9.	Exclusion clauses	
10.	Governing law clauses	
11.	Foreign jurisdiction clauses	
12.	Arbitration recognition	
13.	Class action	
14.	Ownership of land	
15.	Security of land title and land registers	
16.	Land development restrictions	
17.	Employment law	
18.	Environmental restrictions	
19.	Foreign direct investment	
20.	Exchange controls	
21.	Alien ownership of land	
22.	Court treatment of foreign big business	
23.	Costs and delays of commercial litigation	

True **False** **Can't say**



Profiles

The survey was carried out by the following students:

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Allen is a fourth year LLB student in the National University of Singapore. He has an interest in corporate work and cross-border transactions, as well as legislative drafting. He aspires to join NUS Law as an academic in the future. Allen may be reached on LinkedIn at: https://www.linkedin.com/in/allensng.

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Allen & Overy Global Law Intelligence Unit

The Allen & Overy Global Law Intelligence Unit is part of the international firm of Allen & Overy and produces papers, surveys and other works on cross-border and international law within the field of its practice. Allen & Overy is one of the largest legal practices in the world with approximately 5,000 people, including some 512 partners, working in 40 offices worldwide. For further information, please contact Philip Wood, philip.wood@allenovery.com or Melissa Hunt, melissa.hunt@allenovery.com.

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Philip Wood is one of the world's leading comparative lawyers and practitioners. He has written about 18 books on financial law. He was formerly a partner and head of the banking department of Allen & Overy. For many years he has been developing innovative and pioneering methodologies for assessing legal jurisdictions and has produced a book of maps of world financial law. His university textbook on the Law and Practice of International Finance has been translated into Chinese and a Japanese version is forthcoming.

Melissa Hunt is project director of the Intelligence Unit and is responsible for the management of the project. She carries out other work for the Intelligence Unit, including the preparation of tables covering rule of law and legal infrastructure risks in the jurisdictions of the world.

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