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Global Restructuring & Insolvency Guide

Singapore

Overview and Introduction

Given the notable preference of creditors and stakeholders in companies for restructuring as opposed to liquidation, this chapter focuses on the corporate rescue mechanisms available under the Singapore Companies Act to rehabilitate an insolvent company and achieve a better realisation of assets than possible in a liquidation.

The Singapore court has a flexible approach towards these mechanisms, which provides substantial scope for the company and its creditors to work themselves out of insolvency with minimal judicial interference.

Applicable Legislation

The principal legislation governing the insolvency and bankruptcy regimes in Singapore consists of the Companies Act,[1] the Companies (Winding-Up) Rules,[2] the Companies Regulations,[3] the Bankruptcy Act[4] and the Bankruptcy Rules.[5]

Personal Bankruptcy

The law and procedure on bankruptcy in Singapore are comprehensively laid out in Part VI of the Bankruptcy Act.

Bankruptcy proceedings may be commenced against an individual debtor or a firm. The individual debtor must satisfy one of the following conditions before he may be subject to bankruptcy proceedings in Singapore:

- Is domiciled in Singapore;
- Has property in Singapore; or
- Within a period of one year immediately preceding the date of the bankruptcy application, has been ordinarily resident, or has had a place of residence, in Singapore, or has carried out business in Singapore.

Similarly, a firm, which is defined as an unincorporated body of individuals carrying on business in partnership with a view to profit, must satisfy one of the following conditions:

- At least one of the partners in the firm is domiciled in Singapore, has property in Singapore, or within a period of one year immediately preceding the date of the bankruptcy application, has been ordinarily resident or has had a place of residence in Singapore; or
- The firm has, within a period of one year immediately preceding the date of the bankruptcy application, carried out business in Singapore.

The making of a bankruptcy order vests in the Official Assignee all property belonging to the individual debtor, which property becomes divisible among all his creditors. In the meantime, creditors have no further remedy against the bankrupt in respect of the debt owing, and no action or proceedings shall

1 Companies Act (Chapter 50).
2 Companies (Winding-Up) Rules (Chapter 50, Rule 1).
3 Companies Regulation (Chapter 50, Regulation 1).
4 Bankruptcy Act (Chapter 20).
5 Bankruptcy Act (Chapter 20, Rule 1).

proceed or be commenced against the bankrupt. For the purposes of preservation of the bankrupt's property for the fair distribution amongst his creditors, all dispositions of property by the bankrupt from the day the bankruptcy application is made until the day the bankruptcy order is made are void, except to the extent that the disposition has been made with the consent of, or been subsequently ratified by, the court. A bankruptcy order made against a firm shall operate as if it were a bankruptcy order made against each of the persons who, at the time of the order, is a partner of the firm.

Singapore bankruptcy laws provide recourse against antecedent transactions carried out under circumstances in which there was an undervalue transaction or unfair preference. The Official Assignee may seek the court's assistance in unravelling transactions that should not have taken place for a period of time prior to the individual being adjudged bankrupt. These remedies are identical to those in insolvency proceedings (see "Corporate Insolvency" below).

Debt-Repayment Scheme

The Debt Repayment Scheme ("**DRS**") is a voluntary scheme administered by the Official Assignee under the Bankruptcy Act. The purpose of the DRS is to help debtors who have debts of less than SGD 100,000 avoid bankruptcy by devising a debt repayment plan to pay their debts over a fixed period of time.

Upon receiving a bankruptcy application, the court may adjourn the application if the debtor's total liabilities are less than SGD 100,000, for an assessment of the debtor's eligibility and suitability for a DRS. The DRS will come into effect (on such date as may be specified by the Official Assignee) if the Official Assignee, after consultation with the creditors, approves a debt repayment plan proposed by the debtor. For the period of the DRS, no creditor is allowed to commence or proceed with any action against the debtor for any outstanding debt without the court's permission. The moratorium on proceedings is without prejudice to the right of any secured creditor to realise or otherwise deal with his security.

Corporate Insolvency

Liquidation

The law and procedure on insolvent winding-up in Singapore is comprehensively laid out in Part X of the Companies Act.

A Singapore company can be wound up either voluntarily or by the court. A voluntary winding-up may be either a member's voluntary winding-up or a creditor's voluntary winding-up. A key difference between voluntary winding-up and winding-up by the court is the method by which the winding-up is initiated. A members' resolution is required in a voluntary winding-up but not in a winding-up by the court. An application to the court for winding-up can be brought by a creditor of the company, and the court may order the winding-up of a company on the ground of insolvency, if (amongst other things):

- The company is unable to pay its debts;
- An inspector appointed under the Companies Act has reported that he is of the opinion that the company cannot pay its debts and should be wound up; or
- The court is of the opinion that it is just and equitable that the company be wound up.

The making of a winding-up order brings into operation a statutory scheme for dealing with the assets of the insolvent company. A liquidator is appointed to administer the winding-up proceedings, to realise the assets in liquidation and to distribute the assets equitably amongst the company's creditors. In line with the preservation of the company's assets for the fair distribution amongst creditors, all dispositions of property of the company after the commencement of winding-up are void unless the court otherwise orders. In addition, a moratorium on proceedings is put in place to prevent legal action, enforcement or execution without the court's leave.[6]

A company being wound up usually has insufficient assets to pay all its creditors in full, so the priority of recovery of the company's creditors from the liquidation assets becomes crucial.

Creditors may be broadly divided into two classes: secured creditors and quasi-secured creditors who have proprietary rights against assets in the company's possession, and unsecured creditors. The interests of secured creditors and quasi-secured creditors are recognised in winding-up proceedings, and these creditors are generally entitled to enforce their interests against the assets of the company, independently of the winding-up proceedings and ahead of unsecured creditors. Preferential debts (e.g. the costs and expenses of winding-up, wages and salaries of employees, and tax) are also paid out of the liquidation assets in priority of all other unsecured debts.

After the debts of the secured creditor(s) and the preferential debts of the winding-up are satisfied, the balance of the liquidation assets (if any) will be divided amongst the unsecured creditors of the company on a *pari passu* basis.

A liquidator also has certain powers available to recover the value of the company's assets in certain circumstances, including (i) undervalue transactions and (ii) transactions with an unfair preference. These come in the form of seeking the court's assistance in unravelling transactions that should not have taken place for a period of time prior to the commencement of winding-up.

Undervalue Transactions

On an application of the liquidator, the court may order a clawback or restore undervalue transactions that an insolvent company had entered into. The Bankruptcy Act defines three categories of undervalue transactions: a gift or a gratuitous transaction, a transaction entered into in exchange for marriage with the other party and a transaction in which the consideration received is significantly less than the value of the consideration provided by the insolvent company.

The period of time in which an undervalue transaction may be challenged is five years prior to the date of the winding-up application.

Unfair Preferences

In the same vein as undervalue transactions, the liquidator may apply to the court for an order to restore the position of the company to what it would have been had a party not been given an unfair preference by the company. An unfair preference occurs where a creditor, surety or guarantor is put in a better position than he would have been by an act of the company, and the act was influenced by a desire to put the creditor, surety or guarantor in a better position.

The relevant period of time here is six months prior to the commencement of the winding-up. However, if the unfair preference is given to an associate, the relevant period of time is two years. An associate is defined by statute and covers a wide category of people including spouses, family members, relatives, partners, directors, employees and trustees.

Corporate Rescue Mechanisms

Scheme of Arrangement

A scheme of arrangement provides a statutory regime to allow the company to vary or modify its obligations in relation to its debts and liabilities owed to its creditors or a class of creditors. The statutory scheme expressly provides for the restraint of proceedings, upon the application of the company, its members or creditors, against the company while a scheme is being proposed.

[6] Sections 260, 262(3), 299(1) and 299(2) of the Companies Act (Chapter 50) apply to a winding-up by the court and a creditors' voluntary winding-up. It is unclear whether the moratorium applies in respect of a members' voluntary winding-up.

Section 210 of the Companies Act

Section 210 of the Companies Act provides a statutory mechanism for a scheme of arrangement that is binding on the company, its members and its creditors once sanctioned by the court. There are three stages by which a scheme of arrangement under section 210 becomes binding.

- First, an application must be submitted to court for an order that one or more meetings of members and/or creditors be summoned.

- Second, the scheme proposal(s) must be put before these meeting(s) and approved by a majority in number representing three-fourths in value of the claims of each class of creditors or members.

- If (and only if) the proposal(s) are so approved at the meeting(s), the court may then, at its discretion, sanction the scheme.

Clarity, Certainty and Finality

The overarching principles that the statutory regime for schemes of arrangement is premised upon are clarity, certainty and finality. The mechanism in section 210 of the Companies Act was designed to ensure that members and creditors are fully informed of, and have ample opportunity to raise objections on, the scheme before the court makes its final decision on whether to sanction the scheme. For example, every notice summoning a meeting must be accompanied by a statement explaining the effect of the compromise or arrangement and stating any material interest of the directors. After a scheme is sanctioned, the courts would necessarily be slow in hearing further objections or making any amendments to the scheme.

Flexibility of the Scheme

The Companies Act deliberately provides little guidance as to the requirement of the scheme document and no guidance on the terms to be proposed by the scheme. Accordingly, there is no limitation on how the scheme is to be structured, save that it is required to be approved by creditors and/or members, and sanctioned by the court. This allows flexibility in structuring a restructuring proposal that achieves the objectives of the scheme.

Singapore Courts' Approach

In line with the above principles, the Singapore courts have consistently adopted a limited supervisory role in relation to the fairness and the reasonableness of the scheme and have been reluctant to substitute their own commercial judgment for that of the members and/or creditors. This cautious approach is in line with the view that at the core of the scheme was a commercial arrangement, the terms of which had been agreed to between the company and a majority of the creditors.

The Singapore courts have demonstrated a willingness to give effect to the terms of a scheme so long as the statutory requirements have been satisfied. In the case of *Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd*,[7] CEL Tractors proposed a scheme of arrangement with its creditors, one of which was Daewoo. Daewoo held a guarantee given by one of the directors of CEL Tractors in respect of Daewoo's loan to the company. The scheme provided that CEL Tractors would make certain scheduled payments and grant share options to the creditors, in return for which the creditors would release both CEL Tractors and their respective guarantors from liability under the loan. Daewoo objected to the scheme at the sanction stage on the basis that a scheme of arrangement bound only the company and the creditors and therefore could not discharge or affect the liability of a third-party guarantor of the company's debts.

In its judgment, the Singapore Court of Appeal noted that the cases cited by Daewoo did not contain any express term requiring the creditors to extinguish or discharge the liability of a third party. It held that there was no reason in principle why a scheme of arrangement could not incorporate an express term to the effect that the creditors would release the guarantors from their obligations under a

[7] [2001] 4 SLR 35.

guarantee, and found the express term in the scheme releasing the liability of the third-party guarantor to be valid and effective.

In the case of *Re Reliance National Asia Re Pte Ltd*,[8] an issue arose as to whether the court had the jurisdiction to grant an extension period for a creditor to file its proof of claim beyond the deadline stipulated in the court-sanctioned scheme. The court considered whether the scheme operated as a statutory contract or an order of court, and preferred the former approach. The court took the view that it had no jurisdiction to alter the substance of the scheme and impose upon creditors an arrangement to which they had not agreed, and consequently dismissed the application for an extension.

On appeal,[9] the Court of Appeal considered that the approach of the court below was unduly restrictive and might lead to unjust consequences. The Court of Appeal opined that section 210(3) of the Companies Act stipulates that a scheme becomes binding only if it is approved by an order of the court, and therefore suggests that the efficacy of a scheme stems from the court order approving it. The Court of Appeal also pointed out that section 210(4) of the Companies Act, which states that the court "may grant its approval to a compromise or [an] arrangement subject to such alterations or conditions as it thinks just", reinforces the view that the Singapore courts were allowed a more participatory role in respect of schemes of arrangement.

The Court of Appeal felt that an extension was a matter of procedure and did not relate to the substance or materiality of the commercial decision of the scheme. It was also of the view that no prejudice would be caused to the respondent or the other scheme creditors if the extension was granted, and that severe prejudice would be caused to the appellant if no extension was granted. In the circumstances, the Court of Appeal allowed the appeal and granted the extension period.

The Singapore courts have also recently shown a willingness to grant an interim moratorium to the applicant company under section 210(10) of the Companies Act, which moratorium would provide the applicant company the much needed breathing space to engage in detailed negotiations with its creditors on the proposed terms of the scheme. This again demonstrates flexibility on the part of the Singapore courts to enable the objects of the restructuring to be achieved.

Where a scheme of arrangement has been proposed for the purposes of or in connection with a scheme for the reconstruction of any company or the amalgamation of any two or more companies, where the undertaking or property of any company concerned in the scheme is to be transferred to another company, section 212 of the Companies Act gives the court the power to provide, either in the order approving the scheme or by a subsequent order, directions to facilitate the reconstruction or amalgamation.

A further advantage that the flexibility of a scheme has is that it permits bigger creditors to be repaid proportionately less than smaller creditors. Dictating that the assets be distributed in a *pari passu* manner akin to liquidation would not only decrease the flexibility available to the planner of schemes but may also dampen what the scheme of arrangement could achieve and sound the death knell of the company prematurely.

Implementing the Scheme

The case of *The Royal Bank of Scotland NV v TT International Ltd*[10] provides useful guidance on how schemes of arrangement should be implemented in the Singapore context. In that case, the Court of Appeal laid down the following principles:

- A proposed scheme manager must act transparently and objectively and should not be in a position of conflict of interest. He must strike the right balance and manage the competing interests of successfully securing the approval of his proposed scheme and uncompromisingly respecting the procedural rights of all involved in the scheme process.

8 [2007] SGHC 206.

9 *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] 3 SLR(R) 121.

10 [2012] 2 SLR 213.

- A scheme creditor is entitled to examine the proofs of claim submitted by other scheme creditors in respect of a proposed scheme if he produces *prima facie* evidence of impropriety in the admission or rejection of such proofs of claim.

- A scheme creditor should be notified of the proposed scheme manager's decisions to admit or reject his own and other creditors' proofs of claim before the votes are cast at the creditors' meeting.

- A scheme creditor may appeal the proposed scheme manager's decisions to admit or reject his own and other creditors' proofs of claim for the purposes of voting. However, such appeals to court should be taken only after the votes have been counted and it can be seen whether the vote in question would affect the result, preferably concurrently during the sanction stage.

- Scheme creditors should be classified differently for voting purposes when their rights are so dissimilar that they cannot sensibly consult together with a view to their common interest. In other words, if a creditor's position will improve or decline to such a different extent *vis-à-vis* other creditors simply because of the terms of the scheme assessed against the most likely scenario in the absence of scheme approval, then it should be classified differently. However, the courts will take a broad, practical and objective approach in analysing creditor relationships and ensure that the application of this principle does not lead to an impractical mushrooming of classes that could potentially result in the creation of unjustified minority vetoes.

- Related party creditors and contingent creditors should generally have their votes discounted. Wholly owned subsidiaries should have their votes discounted to zero and should effectively be classified separately from the general class of unsecured creditors.

As a final point, the Singapore Court of Appeal has also held that a scheme manager should ensure, prior to the sanction of the scheme, that the financially distressed company promptly discloses to the scheme creditors and the court all benefits accruing to the proposed scheme manager.[11]

Judicial Management

Judicial management is another form of corporate rescue that a company in financial difficulty can rely on to stave off action by its creditors and buy time to work out a way to rescue the business, to make an arrangement with its creditors or to carry out a controlled realisation of its remaining assets to obtain the best value under the circumstances.

Application

The judicial management procedure is contained in Part VIIIA of the Companies Act. Before an application for judicial management can be filed, the company or its creditor(s) must be of the opinion that the company is or will be unable to pay its debts, and that there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding-up.

The court will grant the judicial management order only if it is satisfied that the company is or will be unable to pay its debts, and that the judicial management would be likely to achieve one or more of the following purposes:

- The survival of the company as a going concern;

- The approval of a scheme of arrangement under section 210; or

- A more advantageous realisation of the company's assets than in a winding-up.

To facilitate the rehabilitation of the company, once an application for a judicial management order is made, and until the order is made or the application is dismissed, there is a moratorium on the

[11] *The Royal Bank of Scotland NV v TT International* [2012] 4 SLR 1182, 1195.

winding-up of the company, on enforcement against the company and on the start or continuation of any legal process against the company or its property.

Powers of the Judicial Manager

The judicial manager has the power to set aside certain transactions entered into by the company prior to the judicial management on the grounds of being a transaction at an undervalue, being an unfair preference or being an extortionate credit transaction. These powers granted to the judicial manager allow him to avoid transactions that have the result of depleting the company's property to the prejudice of the company and its creditors.

The grant of such powers to judicial managers is unique to Singapore; similar powers are not accorded to judicial managers in other jurisdictions. These powers are similar to the powers of a liquidator as described in the section above.

The judicial manager can also rely on wide-ranging provisions, such as section 227X(b) of the Companies Act,[12] in his efforts to resuscitate the company, to seek an extension of the judicial management order from the court for the purpose of the better realisation of the assets of the company. In the case of *Neo Corp Pte Ltd (in liquidation) v Neocorp Innovations Pte Ltd*,[13] the Singapore Court of Appeal showed its willingness to support the judicial management regime. One of the issues in that case was whether legal proceedings commenced by a judicial manager challenging a company transaction on grounds of unfair preference or undervalue under section 227T of the Companies Act could be continued by a liquidator. While the court held in the negative, it also intimated that the judicial manager was not without recourse in his bid to realise the best value of the assets and should have relied on section 227X(b) to extend the judicial management order.

Conclusion

Singapore's statutory regime provides adequate measures for a company in financial difficulty to avoid the end-game of liquidation, to ward off creditors and to ultimately survive the insolvent period. The Singapore courts' approach has been supportive of these corporate rescue regimes and has allowed companies and their creditors wide discretion in this regard. This is counter-balanced by a requirement for fairness and transparency in the manner in which the rescue regimes are carried out. The provisions for these regimes (and for liquidation) also permit a clawback of company property disposed against the interests of the company or its creditors.

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[12] Section 227X(b) of the Companies Act (Chapter 50) states: "At any time when a judicial management order is in force in relation to a company under judicial management – (b) sections 337, 340, 341 and 342 shall apply as if the company under judicial management were a company being wound up and the judicial manager were the liquidator, but this shall be without prejudice to the power of the Court to order that any other section in Part X shall apply to a company under judicial management as if it applied in a winding-up by the Court and any reference to the liquidator shall be taken as a reference to the judicial manager and any reference to a contributory as a reference to a member of the company".

[13] [2006] 2 SLR 717.