Global Restructuring Review

The Art of the Ad Hoc

Editors
Howard Morris, Sonya Van de Graaff and James M Peck

Second Edition

Global Restructuring Review

The Art of the Ad Hoc

Second Edition

Editors:

Howard Morris, Sonya Van de Graaff and James M Peck

Reproduced with permission from Law Business Research Ltd
This article was first published in November 2020
For further information please contact kieran.hansen@lbresearch.com

Published in the United Kingdom
by Global Restructuring Review
Law Business Research Ltd
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

www.globalrestructuringreview.com

To subscribe please contact subscriptions@globalrestructuringreview.com

ISBN: 978-1-83862-276-3

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following law firms for their assistance throughout the preparation of this book:

APPLEBY

AVONHURST

BOIES SCHILLER FLEXNER (UK) LLP

BROWN RUDNICK LLP

KIRKLAND & ELLIS

LATHAM & WATKINS LLP

LOYENS & LOEFF N.V

MCDERMOTT WILL & EMERY

MILBANK LLP

MORRISON & FOERSTER LLP

SIMMONS & SIMMONS LLP

SULLIVAN & CROMWELL LLP

THOMAZ BASTOS, WAISBERG, KURZWEIL ADVOGADOS

WONGPARTNERSHIP LLP

Publisher's Note

Welcome to *The Art of the Ad Hoc* – part of the Global Restructuring Review technical library.

GRR, for anyone unfamiliar, is the online home for all professionals who specialise in high-stakes restructuring and insolvency, with a particular focus on cross-border aspects. We tell our readers everything they need to know about all that matters, wherever it takes place.

As well as guides such as this, GRR readers get access to our daily news, surveys and features; GRR Live events (covid-19 allowing); and innovative tools and know-how products.

The origin of this volume lies in an observation that there was a gap in the literature. No book yet systematically covered all aspects of the institution known as the ad hoc committee – even though, as Judge James M Peck notes in his tremendous introduction, they now 'rule' the restructuring world.

The Art of the Ad Hoc fills that gap and has all the answers. In plain English, it guides you through how to work successfully with these committees, illuminating an activity that is, at its core, 'an art'.

This is our second edition, fully updated and expanded to keep pace with changes in practice. We once again benefit from the collective wisdom and real-life experiences of 32 distinguished practitioners from 14 different firms. We are confident you will find it an essential desktop reference work.

I would like to convey my personal thanks to those authors and my LBR team for their sterling work. And to the editors, for their energy and vision.

If you have suggestions for this, or other GRR guides, please do not hesitate to get in touch at insight@globalrestructuringreview.com.

Contents

PART V
GLOBAL DEVELOPMENTS

PART VI
CASE STUDIES

Part V

Global Developments

15

Singapore

Smitha Menon, Clayton Chong and Muhammed Ismail Noordin[1]

Relevance of ad hoc committees in Singapore restructurings

With the disruption in the global economy arising from the covid-19 pandemic,[2] the risk of corporate debt defaults increases by the day.

Singapore's GDP contracted sharply in the first half of 2020, reflecting a combination of travel restrictions, supply-side disruptions, and the attendant decline in external and domestic demand.[3] As at 26 May 2020, the Ministry of Trade and Industry estimated that the Singapore economy would experience a full-year contraction in 2020, with GDP projected to decline by 7 to 4 per cent, and noted that there continued to be a significant degree of uncertainty over the length and severity of the covid-19 outbreak, as well as the trajectory of the economic recovery both globally and in Singapore.[4]

The confluence of multiple factors, including the fluctuation of oil prices and disruption of trade flows, has exposed the latent financial problems of fundamentally unviable firms. A recent example that has received much attention in Singapore is the unearthing of problematic trades that were entered into by Hin Leong Trading (Pte) Ltd, leading to the company

1 Smitha Menon is a partner, Clayton Chong is a senior associate and Muhammed Ismail Noordin is an associate at WongPartnership LLP.

2 'Impact Of The Covid-19 Pandemic On The Singapore Economy,' feature article at pp. 36–44 in the Economic Survey of Singapore First Quarter 2020, Ministry of Trade and Industry, May 2020, (available at: www.mti.gov.sg/-/media/MTI/Resources/Economic-Survey-of-Singapore/2020/Economic-Survey-of-Singapore--First-Quarter-2020/FullReport_1Q20.pdf).

3 *Macroeconomic Review*, Volume XIX, Monetary Authority of Singapore, 1 April 2020, ISSN 0219-8908, at page 21 (accessible at: www.mas.gov.sg/-/media/MAS/EPG/MR/2020/Apr/MRApr20.pdf).

4 Press release titled 'MTI Downgrades 2020 GDP Growth Forecast to "-7.0 to -4.0 Per Cent"', Ministry of Trade and Industry Singapore, press release, 26 May 2020 (available at: www.singstat.gov.sg/-/media/files/news/gdp1q2020.pdf).

being placed under interim judicial management against a debt burden of approximately S$5 billion.[5]

With the rise in non-performing loans[6] and uncertainties in business, companies looking to emerge from the current economic climate with a strong balance sheet will proactively pursue restructuring. Large companies are no less vulnerable to this economic downswing. As such, the industry is gearing up for an increase in larger scale restructurings.

The common feature across larger scale restructurings is that there are numerous creditors, spread across different exposure bands with differing rights and security packages.

In the first edition of this text, and in the INSOL Principles, commentators noted the need for coordination among the increasingly fractured creditor constituencies in larger scale distressed situations.[7]

This chapter examines some unique aspects of such ad hoc committees in Singapore.

At the outset, in the previous edition of this text, there was a distinction drawn between steering committees or coordination committees (i.e., committees formed by the company with such appointment being confirmed by lenders in a standard form of documents, such as those put out by the Loan Market Association)[8] and ad hoc committees (i.e., self-formed groups of creditors that coordinate among themselves and the debtor on the implementation of the workout)[9].

In Singapore, there is no bright-line distinction between the terms used to describe the various forms of creditor committees. The degree of formality involved in the establishment and operation of a creditor committee, and the extent to which the company plays a role in the establishment of such a committee, varies from one restructuring to another. In this chapter, we use the term 'ad hoc committee' generally to refer to different forms of creditor committees that are established in the course of a restructuring.

In Singapore, where a small group of lenders has a considerable portion of the debt, lenders may self-organise into an ad hoc committee. By contrast, where creditors are a more fragmented group such as holders of securities, the company may assist to form an ad hoc committee where the committee can be kept apprised on a more regular basis than the broader stakeholder group from which its members are drawn, and allow for the committee to act as a channel for the broader stakeholder community it represents to voice their views to the company as the restructuring progresses. Such an ad hoc committee may also be able to provide recommendations to the wider stakeholder community they are drawn from, from their perspective as members of that stakeholder community. This may allow for the last mile of reaching the stakeholder community to be bridged.

---

5 'Debt-ridden oil trader Hin Leong wants to hand control to PwC; Sembcorp unit cancels gasoil deal', *The Straits Times*, 23 April 2020 (available at: www.straitstimes.com/business/companies-markets/debt-ridden-oil-trader-hin-leong-to-hand-control-to-pwc).

6 The rate of non-performing bank loans saw a mild increase from 2.01 per cent in the fourth quarter of 2019 to 2.2 per cent in the first quarter of 2020, with the rise largely attributable to an increase in non-performing loans among general commercial banking loans: see Monthly Statistical Bulletin (Money and Banking), Monetary Authority of Singapore (available at: www.mas.gov.sg/statistics/monthly-statistical-bulletin/money-and-banking).

7 Asimacopoulos and Zeng, 'The role and purpose of an ad hoc committee from the debtor's perspective' in *The Art of the Ad Hoc* (Morris, Peck and Van de Graff eds, 2017) at p. 10.

8 id.

9 id.

For example, in the recent restructuring of a Singapore-based water treatment services and related engineering, procurement and construction company, Hyflux Ltd, the debt of approximately S$3 billion was spread across bank lenders and parties that purchased various securities. This meant that the number of creditors was too large for constant one-to-one communication between the company and its creditors. With the assistance from the company and the Securities Investors Association (Singapore), the senior unsecured bondholders and the subordinated securities holders formed ad hoc committees to establish channels for effective communication with the company and the other creditor groups.[10]

This chapter examines the ad hoc committee model in Singapore, outlines some of the difficulties faced in past distressed situations, and sets out workable solutions to address these difficulties.

Formation of an ad hoc committee: benefiting both the company and creditors

Where there is a large number of creditors involved in a restructuring, coordination between the creditors and the debtor is often difficult.

In respect of bonds held through a trust structure, the trustee is typically obliged to act only upon receiving pre-funding or indemnification for their fees. In practice, a collective action problem arises as individual bondholders are not incentivised to pre-fund or indemnify the trustee when their exposures are small, relative to the overall debt. The High Court in *Re Swiber Holdings Ltd* [2018] 5 SLR 1358 noted that these practical difficulties lent to the unsatisfactory situation where bondholders who are not organised or cannot organise themselves may not have their voices heard in the insolvency process.

In the Singapore context, a practice has developed where the company takes the lead in commencing the process to form an ad hoc committee for the relevant stakeholder constituency. This is especially important where a considerable portion of debt was raised through the capital markets. In such situations, where numerous bondholders with relatively small debt value (compared with the total debt of the company) are likely to be involved, establishment of an ad hoc committee to represent the bondholders is a keystone to a successful bond restructuring.

The formation of appropriate ad hoc committees helps to facilitate coordination between creditors and the debtor as well as creditor groups inter se and enables the formulation of a restructuring plan with better prospects of success.

Many successful bond restructurings, such as the restructuring of Miclyn Express Offshore, involved ad hoc committees of bondholders that were instrumental to the process.

Initiating the formation of a committee

There are no prescribed rules for the formation of an ad hoc committee, but debtors can follow certain recommended best practices set out below.

10 This is sometimes done with the assistance of investor advocate groups: see e.g., 'SIAS sets up informal steering committees for Hyflux noteholders', *The Business Times*, 29 August 2018 (available at: www.businesstimes.com.sg/companies-markets/sias-sets-up-informal-steering-committees-for-hyflux-noteholders).

A helpful first step is for the debtor to seek the support of investor advocate groups, such as the Securities Investors Association (Singapore). When a company anticipates that it will default on securities it has issued, it should promptly commence a process for the formation of an ad hoc committee.

The ad hoc committee will comprise a group of bondholders who will act as representatives to advocate for the interests of the bondholder community. These representatives are usually volunteers and often include people with experience or a background in relevant fields such as finance, accounting or law.

The process for the formation of an ad hoc committee should be open and transparent, with the aim of establishing an ad hoc committee that is representative of a cross-section of the bondholder community.

Companies should seek to avoid over-representation by any particular section of the stakeholder constituency, such as institutional investors, as this may hamper the ability of the committee to accurately represent the views of the stakeholder constituency. In this regard, debtors should have regard to the following overarching principles.

First, prospective members should have adequate expertise to participate in the committee constructively. In this regard, committee members are often volunteers, and in Singapore there has been a tendency for the volunteers to be retired members of the banking and finance industry. For bond restructurings, the committee has also tended to include large, often institutional, investors who purchased the bonds.

Second, the committee should aim to have a mix of representatives across the stakeholder constituency. Especially where the stakeholder constituency in question comprises securities holders, which could mean that persons across the range of holders of the security should be sought to be included in the committee. There is at present no practice of requiring a representative from each sector of the stakeholder constituency (e.g., small investors, medium-sized investors and institutional investors). If not addressed, this may mean the composition of the ad hoc committee becoming non-representative of the group they are supposed to speak for. This limits the committee's ability to solicit views from the appropriate sectors within the stakeholder constituency for feedback.

Third, the committee should seek to minimise inclusion of parties who may have extraneous interests that will plainly diverge from the interests of the stakeholder constituency of which the committee's views are expected to be representative. This problem may not always be easily avoided, particularly where there is an overlap in the holders of two separate securities or instruments issued by the company. To address these concerns, there are two main options that the company may consider:

- form the committee with a view to taking into account the interests of holders of both types of securities or instruments. This would usually only be possible where both instruments provide holders with similar rights against the company; or
- require that any member of the committee clearly states the interests in other instruments they hold that may affect their views. This would usually be done in any meeting of the committee, but may need to be emphasised where the company is aware of the likelihood of such extraneous interests arising.

The recommended formation process is as follows:

- a town hall session should be convened by the company for the relevant stakeholder constituency;
- prior to the town hall, the relevant stakeholder constituency should be given ample notice and an agenda for the meeting. In the agenda, the relevant stakeholder constituency should be notified of the company's intention to form an ad hoc committee, the intended objective of the committee and the opportunity to volunteer to become members of the committee;
- the company may request the credentials of the volunteers, such as their relevant experience and background;
- at the town hall, the credentials of the volunteers may be presented for the relevant stakeholder constituency to consider;
- attendees of the town hall should be given ample time to raise questions to the volunteers, and to consider whether to accept the appointment of the volunteers to the ad hoc committee; and
- attendees of the town hall may vote on a show of hands, or by poll (if a show of hands is inconclusive), to accept the appointment of each volunteer on the ad hoc committee.

Such a process would allow for the ad hoc committee to be seen by the relevant stakeholder constituency as having a legitimate 'mandate', rather than a sectarian group that is negotiating with the company solely for its benefit. This also helps ensure that the committee's views accurately reflect those of the relevant stakeholder constituency when negotiating and later making informal recommendations on proposals presented by the company.

Objectives of an ad hoc committee to be clear from the outset

It is also important to clearly articulate the objectives of the ad hoc committee from the outset.

If expectations of the company, the committee and the stakeholder constituency that the committee is to represent are not adequately set, there is a risk that the committee will not aid in the restructuring and possibly hinder an effective restructuring.

To alleviate this, the intended objectives of the committee should be made clear at the outset (i.e., when the committee is being formed). They may be further refined following the formation of the committee, but should generally include the following objectives:

- review information provided by the issuer to understand the financial position of the company;
- discuss and provide input on the company's restructuring plans and go-forward strategy to resolve the defaults on the company's debts (especially those of the stakeholder constituency that the committee represents);
- represent interests of the stakeholder constituency that the committee represents (e.g., bondholders) in discussions and negotiations on the company's restructuring proposals as well as in court proceedings where the restructuring is court supervised; and
- provide recommendations to the stakeholder constituency, which the committee represents on the company's restructuring proposals.

Where the securities are being traded and will continue to do so throughout the restructuring, there should be clarity whether the members of the ad hoc committee are to refrain from

trading while they have access to information on the restructuring that is not yet available in the market because of their role on the ad hoc committee.

With these objectives made clear, the parties who wish to become part of the committee would be informed of the role they will be playing, and the creditors who the committee will represent will also be aware of what the committee can do for them and more importantly what it cannot do for them.

In some situations, the ad hoc committee may not be fully aware of the functions that the company may expect it to play. Setting expectations is important here and can sometimes lead to a restructuring proposal's success. For example, in the restructuring of Ezion Holdings Limited, a provider of liftboats, service rigs and offshore logistics vehicles, the ad hoc committee of bondholders was aware of its intended role of having to provide recommendations to the wider bondholder community from which its members were drawn.[11] Arguably, the support of the committee substantially contributed to the acceptance of the restructuring proposal (of excess of S$550 million of debt) by the bondholders.

Potential of fiduciary duties to be made clear and excluded as appropriate

The use of an ad hoc committee to 'represent' a stakeholder constituency is not aimed at imposing fiduciary duties on the committee. However, as noted in an earlier edition of this text, such use of a committee means there remains a risk that fiduciary duties are imposed on the committee, as a matter of law, both in the US and in England.[12]

In Singapore, the apex court, the Court of Appeal, has clarified that:[13]

- fiduciary duties are voluntarily undertaken in the sense that they arose as a consequence of the fiduciary's conduct, and were not imposed by law independently of the fiduciary's intentions;
- a person does not need to be subjectively willing to undertake the obligations of a fiduciary, but the undertaking of such obligations would arise where the party had voluntarily positioned himself or herself where the law could objectively impute an intention on his or her part (based on his or her conduct) to undertake those obligations; and
- the precise content of these duties are to be deduced from the surrounding circumstances, including, and especially, any relationship between the parties.

Accordingly, to avoid unwittingly taking on fiduciary duties to the stakeholder constituency as a whole, it would be prudent that the committee ensures that it makes clear that its recommendations to the stakeholder constituency are being made on an informal and non-reliance basis with all liability fully excluded.[14]

---

11 See statement issued by the committee of holders of bonds issued by Ezion Holdings Limited on 3 November 2017 in support of the restructuring proposal (accessible at https://sias.org.sg/latest-updates/ezion-bondholders-independent-steering-committee-isc-statement/).

12 Howard, 'Managing the relationships between members' in *The Art of the Ad Hoc* (Morris, Peck and Van de Graff eds, 2017) at pp. 43–46.

13 *Tan Yok Koon v. Tan Choo Suan* [2017] 1 SLR 654 at [192]–[194] and [205]–[206].

14 Howard, 'Managing the relationships between members' in *The Art of the Ad Hoc* (Morris, Peck and Van de Graff eds, 2017) at p. 46.

Taking such measures would provide comfort to the committee, while allowing them to play an active and constructive role in reaching a restructuring proposal acceptable to the company and the stakeholder constituency as a whole.

Running ad hoc committees to be effective players in a restructuring

Following the formation of the ad hoc committee, it is important to ensure that the ad hoc committee is well placed to play its role in the restructuring.

This will involve reaching agreement on two key issues: how the ad hoc committee members will reach agreement for carrying on the business of the ad hoc committee, and how the ad hoc committee deals with the company in furtherance of its role.

On the first issue, the company and the ad hoc committee may consider entering into a formal company appointment letter.[15]

In Singapore, however, the company and the committee are often not able to agree on a formally documented appointment letter. Instead, there has been a tendency for the ad hoc committee to reach an agreement on an informal basis with the company. On the second issue, the process of running the ad hoc committee needs to be clearly laid out by the committee members and the process put in place should be made known to the stakeholder constituency. Formulating these processes may sometimes involve the company where the ad hoc committee needs assistance to be set up (such as in a bond restructuring).

Broadly, the ad hoc committee should, in the early stages after its establishment, agree on a protocol for carrying out the business of the ad hoc committee, which should cover the following issues:

- frequency of meetings;
- form and requirements for notice of meetings, including circulating resolutions or agenda for meetings;
- quorum for meetings;
- how resolutions are to be passed at meetings (including voting thresholds);
- keeping minutes and documenting discussions; and
- communications with third parties, including advisers and the stakeholder constituency the ad hoc committee represents.

Provision of information by the company to the ad hoc committee

Without an ad hoc committee, bondholders do not have a channel to receive non-public information on the ongoing steps that a company may be taking to deal with its debts or seek new investments. The company may not be able to share meaningful information, given the developing nature of restructuring discussions with the company's other lenders (usually institutional lenders such as banks) and potential investors (many of whom would also be in the exploratory phase or unable to commit until there is more clarity on the restructuring). It may also not be appropriate to disclose information to the general market as potential negotiations with investors, bid processes for asset sales or other fund raising efforts are uncertain, at times speculative and evolving in nature.

15 Sum and Cox, 'Contracting with an ad hoc committee' in *The Art of the Ad Hoc* (Morris, Peck and Van de Graff eds, 2017) at pp. 81–83.

A key area that the ad hoc committee will need to reach agreement with the company on soon after its formation is with respect to information sharing.

To facilitate information flow from the company to the ad hoc committee, given the regulatory landscape in Singapore, it is often required that each member of the ad hoc committee enter into a non-disclosure agreement with the company, which will require the member of the ad hoc committee not to trade on any information that they come into possession of as a member of the ad hoc committee.

Where the ad hoc committee members may prefer not to directly enter into such non-disclosure agreements, a practice has developed in Singapore where the ad hoc committee appoints advisers who can enter into the non-disclosure agreements and process the information received, and generate output or recommendations without divulging the underlying information received.

This middle ground is sometimes also supplemented with some limited information that the company undertakes to make public and provide to the court.

This has been done in situations where the company enters into a court-supervised restructuring process and applies for a moratorium in aid of such a process under Section 64 of the Insolvency, Restructuring and Dissolution Act 2018 (No. 48 of 2018) (IRDA). If the application for such a moratorium is granted, the court is required under Section 64(6) of the IRDA to order the company to provide 'sufficient information relating to the company's financial affairs to enable the company's creditors to assess the feasibility of the intended or proposed compromise or arrangement'. This means that the court, when granting the moratorium or subsequently, will specify the information that the company is to provide publicly as well as a prescribed time frame for the provision of such information.

As such, when such an application for a moratorium is made, the company will often, on consultation with the ad hoc committee or at least some of the potential members of the ad hoc committee, propose provision of information that will usually comprise the following:[16]

- a report on the valuation of each of the company's significant assets;
- where the company acquires or disposes of any property or grants security over any property, information relating to that transaction within 14 days of such a transaction;
- periodic financial reports for the company and its subsidiaries; and
- forecasts of profitability and cash flow from operations of the company and its subsidiaries.

The company and the ad hoc committee should, shortly after the formation of the ad hoc committee, reach an agreement on the engagement that the company will give the ad hoc committee throughout the restructuring process.

Sharing of information, including the quality of the information shared, and access to the company are often intertwined with one another. This is especially important when the information provided by the company usually requires meetings to be explained. The value of the ad hoc committee's feedback on evolving proposals by the company is also largely based on the quality and timeliness of information it is provided.

16 This list is specified in Section 64(6) of the IRDA as a non-exhaustive and non-prescriptive list of information that the court may require the company to provide when granting a moratorium under Section 64(1) of the IRDA.

Apart from sharing information on a regular basis, the debtor and ad hoc committee should also establish channels for continued engagement, always subject to the appropriate confidentiality or trading restrictions. For example, where clarification on information is required, the ad hoc committee should be able to request such clarifications or further information, which the company will consider and respond to appropriately. The debtor should also consider providing a point of contact for the ad hoc committee so that the ad hoc committee has a direct line to raise queries to the company.

With the information sometimes being commercially sensitive and the limited resources that are usually available during a restructuring, the company may require that any further information requests only be made at specified time frames. It may also be prudent to consider agreeing to have an insolvency practitioner appointed as a mediator to whom parties will look to for resolution of any disputes as to the necessity or relevance of information that the ad hoc committee seeks.[17]

Access to the company, and negotiations between the ad hoc committee and the company

In some large-scale restructurings, it may be necessary to have regular meetings between the company and the ad hoc committees set up for the different stakeholder constituencies to allow for a single forum for engagement with all stakeholders. This is premised on each of the ad hoc committees and any other attendees being able to enter into the appropriate agreements with the company so they can be provided with the same level of information to participate at a meeting together.

If such regular meetings are appropriate, it is prudent that prior to such meetings between the company and the ad hoc committees, agreement is reached on:

- frequency and timing of meetings;
- usual agenda items for meetings (which may be modified as appropriate based on the stage of the restructuring);
- how such meetings are to be minuted and discussions at such meetings are to be documented; and
- parties that are entitled to attend such meetings (e.g., requirement for certain members of management of the company to attend to respond to queries on operations).

Reaching an agreement on how often the meetings are to take place as well as the quality of information to be presented at such meetings would allow for the tone and expectations on all sides to be set for the meetings.

These meetings, where various ad hoc committees are present, can also be used for multi-party negotiations on a restructuring plan, or other courses of action that the company may wish to take. For example, if the company is seeking 'rescue financing'[18] (a variation of debtor-in-possession financing available in US under Chapter 11), the company may wish to explain the proposal from potential rescue financiers to the ad hoc committees so that any

17 The Singapore High Court has referenced the value of insolvency mediators in developing restructuring plans: see *Re IM Skaugen SE* [2019] 3 SLR 979 at [93]–[94].

18 See Sections 67 and 101 of the IRDA, for rescue financing that can be implemented through a scheme of arrangement and judicial management respectively.

party keen to provide financing on matching or better terms may consider putting in a bid. Availability of a forum to do so is also beneficial to the company as the Singapore High Court has made clear that there must have been 'evidence of reasonable attempts at trying to obtain [rescue financing without the grant of super priority]'.[19]

On the whole, it would be mutually beneficial for the company and the ad hoc committees for regular engagement where all parties involved in the restructuring can air their views and concerns, and potentially receive immediate clarifications or responses. As the 'buy-in' for the restructuring proposal for any class includes an assessment of what the other classes are being offered, and approval from all classes are required, it is important for the creditors in one class to know the rationale guiding the views of the other creditor classes.

Advisers and funding for an ad hoc committee

As in other jurisdictions, it is typical for ad hoc committees in Singapore to expect to be properly advised and hence engage advisers of their own. As mentioned above, the ad hoc committee may sometimes consider that these advisers play an 'information intermediary' role to distil the material non-public information provided by the company and convey high-level positions and explanations to the ad hoc committee so the committee members do not themselves have to enter into non-disclosure agreements with the company.

The advisers of the ad hoc committee usually do not have their fees indemnified by the ad hoc committee or the stakeholder constituency that the ad hoc committee represents. There may be exceptions where the ad hoc committee comprises bank lenders who may rely on their existing contractual rights to seek indemnification from the company for engagement of advisers to preserve or enforce their interests. Even where such indemnification rights exist, the company will likely not agree to pay the advisers directly since the claims that the creditors have against the company may still be subject to the broader restructuring.

The typical arrangement in Singapore instead involves the ad hoc committee requesting that the company, as a matter of goodwill, enters into a fee arrangement with the ad hoc committee's advisers. However, given the financially parlous situation of the company, the company is usually only able to offer a middle ground of agreeing to settle the reasonably incurred fees of the ad hoc committee's advisers only upon the completion of a successful restructuring.

Such an arrangement, while practical, may create possible misalignments of interest between the members of the ad hoc committee and the ad hoc committee's advisers. For example, the ad hoc committee's advisers may be incentivised by the prospect of settlement of fees to work towards a successful restructuring regardless of the recovery offered to the stakeholder constituency that the ad hoc committee represents. Concurrently, the ad hoc committee may be motivated to instruct their advisers to take all steps to extract value for the stakeholder constituency they represent (which might be time-consuming, costly and detrimental to the wider restructuring) since none of their advisers' fees are being borne by them.

To avoid such concerns, the company should consider working with the ad hoc committee to develop a protocol for the settlement of advisers' fees. The protocol can set out the following items:

19 *Re Attilan Group Ltd* [2017] SGHC 283 at [61].

- milestones at which payments will be made to advisers of the ad hoc committee;
- a 'sunset date' for the partial payment of advisers' fees;
- the bondholders may provide their own funding to the advisers of the ad hoc committee; and
- arrangements can be proposed such that the bondholders agree among themselves that those who agree to fund the advisers will be entitled to be compensated or rewarded by receiving some degree of preferential treatment or priority in the ultimate restructuring proposal.

Decision-making within an ad hoc committee

The ad hoc committee can only be as effective as its ability to reach a decision on issues that are before it.

In previous restructurings in Singapore, even with the information processed by their advisers and provided to the ad hoc committee, some ad hoc committees have been unable to provide meaningful input on proposals from the company due to the lack a decision-making framework within the ad hoc committee.

Without a decision-making framework, ad hoc committees end up taking all actions by unanimous vote. The practical consequence is that the ad hoc committee is often unable to provide meaningful responses to the company on any proposals presented to them, save for consolidating the views of members of the stakeholder constituency. While providing a sense of the 'feeling on the ground' is helpful in the course of the restructuring, ad hoc committees have the potential to play a bigger role.

In addition, without an agreement on the decision-making threshold within the ad hoc committee, the committee is often unable to provide a clear recommendation to the stakeholder constituency whether to support the company's restructuring proposal. This can defeat the purpose of the ad hoc committee and make it an expensive endeavour that serves little purpose for the stakeholder constituency it represents.

Consequently, it is crucial that shortly after formation, as suggested above, the members of the ad hoc committee reach agreement on how their meetings are to be conducted, including how decisions are to be made.

If there is adequate representation of the various groups of creditors within the stakeholder constituency as discussed above, it may be possible simply to agree on each member of the ad hoc committee having a single vote, and for resolutions to be passed by a simple majority in number and by three-quarters majority where an important decision such as whether to recommend a proposal from the company to the stakeholder constituency is to be made.

This ability to make decisions would also allow the ad hoc committee to take positions on issues that may arise in the restructuring that the court may need to assess that can affect the stakeholder constituency they represent. For example, an ad hoc committee (in the recent restructuring of Miclyn Express Offshore) was able to take a position on the issue of a senior creditor being classified in a class of its own (i.e., a single-member class), allowing the court to hear full arguments for and against the classification to assess the issue and arrive at a conclusion.[20] Having an ad hoc committee mount arguments to advance its constituency's

20 See orders of court made in HC/SUM 1993/2020 to HC/SUM 1995/2020 in HC/OS 107/2020 to HC/OS 109/2020, where the court upheld the company's position that a single member class is allowed where an

own interests is beneficial to the company as it allows the court to have the benefit of full arguments from an opposing party rather than receiving submissions only from the company.

Engagement with the stakeholder constituency

Another advantage that the ad hoc committee may bring is the ability for the company to keep the stakeholder constituency represented by the ad hoc committee apprised of the restructuring through the ad hoc committee.

To ensure that the stakeholder constituency represented by the ad hoc committee is continually kept apprised of the restructuring, the company and the ad hoc committee should agree to a protocol for engaging the wider stakeholder constituency. This can also help ensure that the ad hoc committee is held accountable to the stakeholder constituency. This protocol should account for various factors such as the complexity of the matter, the number of parties within the stakeholder constituency the ad hoc committee represents and the level of sophistication of the stakeholder constituency the ad hoc committee represents.

The protocol for stakeholder constituency engagement should cover areas such as:

- organising focus group or small-group meetings where members of the stakeholder constituency can attend meetings with the ad hoc committee and its advisers. These meetings can be used to provide the stakeholder constituency with an overview of the ongoing discussions that the ad hoc committee has been having with the company. The ad hoc committee can also use such meetings to collate views from the stakeholder constituency to take into account in its negotiations with the company;
- regular updates on discussions with the company that the ad hoc committee can prepare in the form of an email to the stakeholders who have signed up for such updates; and
- updates that the company and the ad hoc committee may issue jointly to the stakeholder constituency via a release on the relevant stock exchange announcement platform (e.g., SGXNet), the company's website or in the form of a press release. In the course of the *Hyflux Ltd* restructuring, the company worked with the ad hoc committee for junior securities holders on FAQs to be posted on the company website explaining developments in the restructuring, voting instructions as well as the nuances of the proposals that had been made.

Conclusion

Ultimately, there are many benefits of having a well-informed and well-advised ad hoc committee, both to the stakeholder constituency that the ad hoc committee represents and the company.

To reap those benefits, however, the company will need to ensure that an appropriately constituted ad hoc committee is formed early in the restructuring process, and the committee is provided with adequate support to fulfil the functions it is has the potential to carry out.

application of the dissimilarity principle required that creditor to be classed separately. For details on dissimilarity principle, see *UDL Argos Engineering & Heavy Industries Co Ltd v. Li Oi Lin* [2001] 3 HKLRD 634 at [27], cited with approval in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) v. TT International Ltd* [2012] 2 SLR 213 at [130].

Appendix 1

About the Authors

Smitha Menon
WongPartnership LLP

Smitha Menon is a partner in the firm's international arbitration, restructuring and insolvency and special situations advisory practices. Her main areas of practice are corporate disputes and restructuring.

Smitha's international and local appointments include being the chair of the International Chamber of Commerce (ICC) Singapore Arbitration Group and on the ICC Commission for Arbitration and ADR. Smitha is also the Singapore alternate court member on the ICC International Court of Arbitration. She is a fellow of the Insolvency Practitioners Association of Singapore, on the board of the Singapore network of the International Women's Insolvency and Restructuring Confederation, and on the Insolvency Practice Committee of the Law Society. A former council member of the Singapore Law Society and the Professional Affairs Committee of the Singapore Academy of Law, she serves on the Law Society's Inquiry Panel and is regularly appointed on disciplinary matters, including representing the Law Society before the Court of Three Judges. She has been appointed arbitrator on Indian law-governed arbitrations conducted under the SIAC Rules and ICC Rules.

Smitha's expertise has been recognised in legal publications such as *Chambers Asia-Pacific*, *IFLR1000*, *The Legal 500* and *The Global Restructuring Review*'s list of the world's leading restructuring lawyers.

Clayton Chong
WongPartnership LLP

Clayton Chong is a senior associate in WongPartnership LLP's restructuring and insolvency practice.

Clayton has advised debtors and creditors in multiple restructuring and insolvency matters, including court-supervised restructurings and consensual workouts involving cross-border elements, and transaction values in billions of dollars. He has also advised on

insolvency-related transactions such as distressed business and asset purchases, and acted for insolvency officeholders such as liquidators and judicial managers.

Muhammed Ismail Noordin
WongPartnership LLP

Muhammed Ismail Noordin is an associate in WongPartnership LLP's restructuring and insolvency practice.

Ismail has been involved in multiple restructuring matters, including advising debtors and creditors on restructurings and related transactions, such as distressed business and asset purchases where debt and transaction values approach or were in the billions of dollars, as well as contentious restructurings. He has also been involved in providing advice to insolvency officers such as liquidators and judicial managers, and financial institutions on resolution processes for business contingency planning.

WongPartnership LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore 018982
Tel: +65 6416 8000
smitha.menon@wongpartnership.com
clayton.chong@wongpartnership.com
muhammedismail.konoordin@wongpartnership.com
www.wongpartnership.com

With changes in credit markets, traditional steering committees, now seen as too slow and unwieldy, have fallen from favour in restructurings. Enter the ad hoc committee. They take less time to set up, are more flexible and can achieve better results. To quote our introduction, 'ad hoc committees now rule the restructuring world'.

Understanding the rules that govern such committees and their inner workings is therefore essential. *The Art of the Ad Hoc* has all the answers. In plain English, it provides a comprehensive guide on how to work successfully with these committees, an activity that Judge James M Peck says in the introduction is rightly described as 'an art'.

The Art of the Ad Hoc draws on the collective wisdom and real-life experiences of 32 distinguished practitioners from 14 different firms to cover every angle and perspective – particularly those of committee members and debtors. It is an essential desktop reference work.

Visit globalrestructuringreview.com
Follow @GRRalerts on Twitter
Find us on LinkedIn

an LBR business

ISBN 978-1-83862-276-3