THE INSOLVENCY REVIEW

TENTH EDITION

Editor
Donald S Bernstein

THE LAWREVIEWS

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Stephanie Yeo, Clayton Chong and Eden Li[1]

I INSOLVENCY LAW, POLICY AND PROCEDURE

i Statutory framework and substantive law

Singapore's corporate insolvency law landscape may be broadly divided into winding-up and rehabilitative procedures, comprising the judicial management procedure and schemes of arrangement.

The primary legislation in this regard is the Insolvency, Restructuring and Dissolution Act 2018 (the IRDA). The IRDA is an omnibus statute that came into operation on 30 July 2020, and served to consolidate the statutory provisions governing corporate and personal insolvency, which were previously encapsulated in the Companies Act and Bankruptcy Act. In addition to the IRDA, there are industry-specific regimes that replace or supplement various aspects of the general insolvency provisions.[2]

ii Policy

There have been significant changes to Singapore's insolvency landscape over the past decade. Extensive reforms were made to Singapore's insolvency legislation pursuant to the recommendations of the Insolvency Law Review Committee (ILRC) in 2013 and the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (DRC) in 2016, whose mandates were respectively to modernise Singapore's insolvency laws and to enhance Singapore's effectiveness as a centre for debt restructuring.

The recommendations of the ILRC and DRC were broadly accepted and formed the basis of the wide-ranging amendments to the Companies Act enacted in 2017 (prior to the consolidation of the Companies Act's corporate insolvency provisions into the IRDA). Among other changes, new provisions included:

a granting super priority for lenders who provide rescue financing to distressed companies;
b allowing for the cramdown of dissenting creditors in schemes of arrangements;
c facilitating pre-packaged restructuring;
d enhancing moratorium protection; and
e adopting the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency (Model Law).

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2 See Section I.vi below.

With the IRDA (which introduced further changes) now in operation, Singapore's insolvency law landscape today includes:

a restrictions on the operation of *ipso facto* clauses providing for automatic termination or modification of contractual rights in the event of insolvency or similar events;

b an out-of-court appointment procedure for judicial management; and

c a licensing regime for insolvency practitioners.

Overall, these amendments largely build on Singapore's existing legislative framework rooted in the English regime, by incorporating elements inspired by Chapter 11 of the US Bankruptcy Code (Chapter 11). As a result, Singapore's legal framework is one that incorporates key features of both, presenting debtors and creditors with a spectrum of varied restructuring tools. This reflects the growing policy sentiment in Singapore that rehabilitation of distressed businesses is a valid and key alternative to liquidation.

iii Insolvency procedures

Winding up

Under Singapore law, winding up (also referred to as liquidation) may take place on either a compulsory or voluntary basis.[3]

Compulsory winding up by the court is initiated by the filing of an application to the General Division of the High Court. Locally-incorporated and foreign-incorporated companies with a substantial connection with Singapore may be compulsorily wound up.[4]

Voluntary winding up takes place out of court and involves only filings to the Accounting and Corporate Regulatory Authority (ACRA). In the case of a creditors' voluntary winding up, this is initiated by a members' resolution for winding up followed by a meeting of the company's creditors.[5] While a members' voluntary winding up is also initiated by a members' resolution for winding up,[6] the main difference is that a members' voluntary winding up can only be effected when the company is solvent.[7]

Once appointed, the liquidator has the power to run the company, wind up its business, realise its assets, adjudicate the creditors' claims and distribute proceeds according to those adjudicated proofs. The liquidator also has powers to make compromises or arrangements with creditors, and to recover property that has been improperly dissipated before winding up (e.g., pursuant to transactions entered into at an undervalue and unduly preferential transactions).[8] Overall, there is no fixed period for a winding up. After the above steps have been completed, the liquidator will apply to the court for release as liquidator and dissolution of the company.[9]

3 Section 119 of the IRDA.

4 Section 246(1)(d) of the IRDA. See below at Paragraph 56.

5 Section 166 of the IRDA.

6 Section 160(1) of the IRDA.

7 Section 163(1) of the IRDA.

8 Section 144 of the IRDA.

9 Section 147 of the IRDA.

Judicial management

Judicial management involves the appointment of a judicial manager who takes control of the company to achieve one or more of the following statutorily-specified objectives:[10]

a the survival of the company;

b the approval of a scheme of arrangement; and

c a more advantageous realisation of the company's assets than on a winding up.

Similar to a liquidator in compulsory winding up, the judicial manager also has powers to investigate and commence claims against the management, should any wrongdoing be discovered.

In Singapore, there appears to be a certain stigma attached to companies placed under judicial management because it is commonly seen as a precursor to liquidation.[11] Nonetheless, there are obviously legitimate benefits associated with judicial management. For instance, having a judicial manager step in to run the business will introduce confidence and stability if creditors do not trust existing management. Moreover, directors may prefer being replaced by a judicial manager in order to avoid facing the risk of civil or criminal liability, or both, for wrongful or insolvent trading.

Locally-incorporated companies and foreign-incorporated companies with a substantial connection with Singapore can generally avail themselves of the judicial management regime.[12] However, there are prescribed companies such as banks and insurance companies that are excluded from the judicial regime entirely and are subject to industry-specific regimes.[13]

A judicial management order typically lasts 180 days, unless otherwise ordered by the court.[14] It may also be prematurely discharged if:

a the creditors decline to approve the judicial manager's statement of proposals;[15]

b the court so orders by reason of the judicial manager's unfairly prejudicial actions,[16] or

c it appears that the purposes of the judicial management order cannot be achieved.[17]

The IRDA also introduced an out-of-court procedure for appointing a judicial manager. This means that a debtor company may, instead of applying to the court for a judicial management order, place itself into judicial management by a creditors' resolution without the need for a court order.[18] The company must consider that it is or is likely to become unable to pay its debts, and that there is a reasonable possibility of achieving one or more of the purposes of judicial management as mentioned above.[19] The consent of the majority of the creditors (in number and in value) is required.[20]

10 Section 89(1) of the IRDA.

11 Insolvency Law Review Committee, Report of the Insolvency Law Committee: Final Report 2013, at Chapter 6, para 11; Committee to Strengthen Singapore as an International Centre for Debt Restructuring, *Report of the Committee* (2016), at Paragraph 2.12.

12 Section 88 read with Sections 246(1)(d) and 246(3) of the IRDA.

13 Section 91(8) of the IRDA.

14 Section 111(1) of the IRDA.

15 Section 108(5) of the IRDA.

16 Section 115(a) and (b) of the IRDA.

17 Section 112(1) of the IRDA.

18 Section 94 of the IRDA.

19 Section 94(1) of the IRDA.

20 Section 94(11)(d) of the IRDA.

Schemes of arrangement

A scheme of arrangement refers to an arrangement between a company and its creditors, members or holders of units, or both, of the company's shares to adjust their respective rights and entitlements.[21] Schemes are available both to locally-incorporated companies and to foreign-incorporated companies with a substantial connection with Singapore.[22]

While companies do not need to be insolvent to deploy them, such schemes are in practice often used as a corporate rescue mechanism. Common features include reduction of debts (commonly known as 'haircuts'), deferral of payments and debt-to-equity conversions.

Schemes are binding on all of the company's creditors as long as:

a a majority in number representing three-fourths in value of the creditors (or each class of creditors) present and voting approves the scheme; and

b the court sanctions the scheme.[23]

Singapore's enhanced insolvency regime now supplies a range of Chapter 11-inspired tools to facilitate debt restructurings. These include:

a enhanced moratoriums on creditor actions (including enforcement of security interests) that come into effect from the time of application[24] and that may by court order be granted extraterritorial effect,[25] or be extended to protect the debtor's related entities;[26]

b allowing for pre-packaged schemes of arrangement, meaning that the court may sanction the scheme directly without the company first convening a creditors' meeting;[27]

c the court having the discretion to vary the majority in number threshold[28] for approving the scheme;

d cross-class cramdown on dissenting classes of creditors, which allows the court to sanction a scheme even if the approval threshold for one or more of creditor classes is not met;[29] and

e enhanced priority, including super priority, for debts arising from rescue financing.[30]

Certain types of debtors (e.g., prescribed financial institutions) are prevented from using some of these restructuring tools.[31]

21 Section 210 of the Companies Act and Section 71 of the IRDA.

22 Section 63(3) read with Sections 246(1)(d) and 246(3) of the IRDA.

23 Section 210 of the Companies Act 1967 (Companies Act).

24 Section 64 of the IRDA.

25 Section 64(5)(b) of the IRDA.

26 Section 65 of the IRDA.

27 Section 71 of the IRDA.

28 Section 210(3AB)(a) of the Companies Act.

29 Section 70 of the IRDA.

30 Section 67 of the IRDA.

31 Section 63(3) of the IRDA read with Paragraph 3 of the Insolvency, Restructuring and Dissolution (Prescribed Companies and Entities) Order 2020).

iv Starting proceedings

Winding up

In a compulsory winding up, the winding-up application may be filed to the General Division of the High Court by the company, its creditors, its contributories, the liquidator, the judicial manager or the Minister for Finance.[32]

In its supporting affidavit, the applicant must establish one or more of the statutory grounds for winding up.[33] Of these, the most commonly-invoked ground is that the company is unable to pay its debts. This can be established through actual proof that the company is cash flow insolvent; that is, its current liabilities exceed its current assets such that the company is not able to meet all debts as and when they fall due. While the previous position was that balance sheet insolvency (i.e., where a company's total (current and non-current) liabilities exceed its total assets) would also suffice as a basis for winding up,[34] the Singapore Court of Appeal has since clarified that the sole relevant test is the cash flow test.[35] Among other reasons, this is because a consideration of a company's current assets and liabilities (i.e., those assets realisable and those debts due within a 12-month time frame as per the standard accounting definition) provides a better indicator of a company's present ability to pay its debts.[36] The Court also provided a non-exhaustive list of factors relevant to the cash flow test, which include:

a the quantum of all debts that are due (or will be due in the reasonably near future), and whether payment is being demanded (or likely to be demanded) for them;

b whether the company has failed to pay any of its debts, their quantum and how long they have been due;

c the value of the company's current assets and assets realisable in the reasonably near future;

d the state of the company's business, in order to determine its expected net cash flow; and

e any other income or payment that the company may receive in the reasonably near future.[37]

That being said, in practice applicants often rely on the statutory presumption of insolvency.[38] This arises if a statutory demand for an amount of at least S$15,000 due and owing is served at the company's registered address, and is not paid, secured or compounded to the creditor's reasonable satisfaction within 21 days.[39]

For the period pending the determination of the winding-up application, the court may appoint a provisional liquidator if:

a there is a *prima facie* case for winding up; and

b if the court is satisfied in the circumstances of the case that a provisional liquidator should be appointed.

32 Section 124(1) of the IRDA.

33 Section 125(1) of the IRDA.

34 See, for example, *Kon Yin Tong and another v. Leow Boon Cher and others* [2011] SGHC 228.

35 *Sun Electric Power Pte Ltd v. RCMA Asia Pte Ltd* [2021] 2 SLR 478 at [56]–[65].

36 *Sun Electric Power Pte Ltd v. RCMA Asia Pte Ltd* [2021] 2 SLR 478 at [62].

37 *Sun Electric Power Pte Ltd v. RCMA Asia Pte Ltd* [2021] 2 SLR 478 at [69].

38 Section 125(1)(e) read with Section 125(2)(a) of the IRDA.

39 Section 125(2)(a) of the IRDA.

The primary function of the provisional liquidator is to preserve the status quo; his or her powers are prescribed by the court order for the appointment.[40]

To commence a creditors' voluntary winding up, the directors must first file a statutory declaration of the company's inability to carry on business by reason of its liabilities.[41] Upon the filing of the statutory declaration, the directors must immediately appoint a provisional liquidator.[42]

A meeting of the company will be summoned at which a resolution for the voluntary winding up of the company will be proposed to the shareholders.[43] Within one day of the meeting of the company, the company must convene a meeting of the company's creditors.[44] At this meeting, the creditors may nominate the liquidator; their choice prevails over the company's choice.[45] The creditors may also appoint a committee of inspection, which acts as a supervisory body over the winding up and whose approval is required for certain actions by the liquidator.[46]

For a member's voluntary winding up, which may only be effected if the company is solvent, the directors must first file a statutory declaration of solvency.[47] Within five weeks, the company must convene an extraordinary general meeting to pass a special resolution in favour of winding up voluntarily[48] and the appointment of a liquidator.[49]

Judicial management

A judicial management application may be initiated by the company, its directors or its creditors (including contingent or prospective creditors), by filing an application to the General Division of the High Court.[50] The applicant bears the burden of establishing two requirements to the court's satisfaction:

a that the company is or is likely to become unable to pay its debts; and

b that the making of the judicial management order would be likely to achieve one or more of the statutorily-specified objectives.[51]

Once the application is filed, an automatic moratorium arises to restrain the commencement or continuation of all proceedings against the company (including enforcement of security interests), except with the leave of court.[52] If the judicial management order is granted, a moratorium will continue to apply during the period in which the company is in judicial management.[53]

40 Section 138 of the IRDA.
41 Section 161(1) of the IRDA.
42 Section 161(1) of the IRDA.
43 Section 166(1) of the IRDA.
44 Section 166(1) of the IRDA.
45 Section 167 of the IRDA.
46 Section 169 of the IRDA.
47 Section 163 of the IRDA.
48 Section 163(3)(b) of the IRDA.
49 Section 164(1) of the IRDA.
50 Sections 90 and 91 of the IRDA.
51 Section 91(1) of the IRDA.
52 Section 95 of the IRDA.
53 Section 96(4) of the IRDA.

An interim judicial manager may be appointed for the period pending the determination of the judicial management application.[54] The functions, powers and duties of such interim judicial manager are prescribed by the court.

The IRDA allows a company to place itself in judicial management without the need for any court order by passing a creditors' resolution (requiring the consent of majority in number and in value of the creditors, subject to the veto right provided to a floating charge holder who is entitled to appoint a receiver and manager over substantially the whole of the company's property).[55]

Schemes of arrangement

A scheme may be commenced by the company, its creditors or shareholders.[56]

Before (or along with) the start of a scheme of arrangement, the company may file an application for a moratorium to restrain legal proceedings against the company. This provides the company with breathing space in order to formulate the restructuring proposal with its creditors and protects the company from creditor action when pursuing the implementation of the scheme of arrangement.[57]

In this regard, a moratorium may be sought under either Section 210(10) of the Companies Act or Section 64 of the IRDA. The moratorium under Section 64 of the IRDA provides relatively stronger protection to debtors.[58] Among other things, this enhanced moratorium regime provides for an automatic moratorium lasting up to 30 days from the date of application,[59] restrains creditors from enforcing their security interests and can be extended, on application, to restrain conduct occurring outside Singapore, as long as the specific party sought to be enjoined, with respect to a specific act, is within the Singapore court's jurisdiction.[60]

Corresponding to the greater degree of protection provided, debtors must satisfy relatively more requirements to obtain a Section 64 moratorium. In particular, if the debtor has already proposed the scheme at the time that the application is filed, the company must file evidence of creditor support for the moratorium and an explanation of how such support is important for the success of the proposed scheme. If no scheme has yet been proposed, then, in addition to these requirements, a brief description of the intended scheme containing sufficient particulars must also be provided to enable the court to assess whether it is feasible and merits consideration by the company's creditors when subsequently placed before them.[61]

The Section 64 moratorium can also be extended, on application, to related entities of the scheme company.[62]

54 Section 92 of the IRDA.

55 Section 94 of the IRDA.

56 Section 210(1) of the Companies Act.

57 Section 210(10) of the Companies Act and Section 64 of the IRDA.

58 See Insolvency Law Review Committee, Report of the Insolvency Law Review Committee: Final Report (2013) at Paragraphs 7 and 16.

59 Section 64(8) of the IRDA.

60 Section 64(5)(b) of the IRDA; *Re IM Skaugen SE* [2019] 3 SLR 979 at [39].

61 Sections 64(4)(a) and 64(4)(b) of the IRDA; *Re IM Skaugen SE* [2019] 3 SLR 979 at [48]–[54].

62 Section 65(1) of the IRDA. See also Committee to Strengthen Singapore as an International Centre for Debt Restructuring, *Report of the Committee* (2016) at Chapter 3, Paragraphs 3.15 to 3.15.

The general process of implementing a scheme is set out below:

a an application is filed seeking the court's leave to convene a creditors' meeting to vote on the scheme (leave stage);[63]

b notice of the creditors' meeting, the scheme document and an explanatory statement setting out the effects of the scheme, are issued to the creditors. In particular, such statement should disclose any material interests of the directors, and the effect thereon of the scheme insofar as it is different from the effect on the like interests of other persons;[64]

c if the requisite approval thresholds (i.e., majority in number and three-quarters in value of creditors present and voting at the meeting) are met for each class of creditors,[65] the court will consider sanctioning the scheme at a subsequent hearing (the sanction stage);[66] and

d if the court sanctions the scheme (subject to such alterations or conditions as it thinks just), the order of court is lodged with ACRA. The scheme takes effect on such date to be binding on the company and the creditors sought to be bound by the scheme (including dissenting creditors and creditors who had abstained).[67]

At the leave stage, the court's 'overarching focus' is the 'question of fairness in the conduct of the creditors meeting', particularly in relation to dissenting creditors, and 'the sufficiency of the financial disclosure is pivotal to that end'. As long as the court considers that the fairness of the creditors' meeting is 'patently compromised', it will not grant leave even if it the proposed scheme is thought likely to be approved by the requisite majorities.[68]

At the sanction stage, the court needs to be satisfied of three requirements before it sanctions the scheme:

a that the requisite statutory majority at a duly-convened meeting of the creditors has been reached;

b that the creditors who attended the meeting were fairly representative of the class of creditors and that the statutory majority did not coerce the minority; and

c that the scheme is one that a business person or someone who is simply intelligent and honest, being a member of the class concerned and acting in respect of his or her interest, would reasonably approve.[69]

While the implementation of a scheme generally follows the above-mentioned procedure, following the 2017 amendments, a proposed scheme may be sanctioned by the court even though no creditors' meeting has been ordered (i.e., the leave stage and the creditors' meeting

63 Section 210(1) of the Companies Act.

64 Section 211(1)(a) of the Companies Act.

65 For a discussion of common issues arising in connection with the composition of creditor classes, see Stephanie Yeo, 'Class Composition in Schemes of Arrangement' (2022) SAL Prac13, accessible at https://www.wongpartnership.com/insights/detail/sal-practitioner-class-composition-in-schemes-of-arrangement.

66 Section 210(3AB) of the Companies Act.

67 Section 210(5) of the Companies Act.

68 *Pathfinder Strategic Credit LP v. Empire Capital Resources Pte Ltd* [2019] 2 SLR 77 at [52].

69 *The Royal Bank of Scotland NV v. TT International Ltd* [2012] 2 SLR 213 at [70].

stage are skipped). This concept of the 'pre-pack' scheme is adapted from Chapter 11.[70] Key advantages of this restructuring tool include time and cost savings on the part of the scheme company.

A pre-pack will only be approved if the requisite approval threshold would have been satisfied had a creditors' meeting been held.[71] To this end, the court will also consider if the necessary information disclosures, including information concerning the company's property, assets, business activities, financial condition, prospects and such other information necessary to enable to the creditor to make an informed decision, were made.[72]

In general, any creditor opposition to the proposed scheme can be raised in the context of negotiations for the restructuring proposal, or if not resolved at that stage, at the various court hearings.

v Control of insolvency proceedings

Winding up

The powers conferred and duties imposed on the company's directors effectively cease when the winding-up order is made. The liquidator takes the company's property into his or her custody or under his or her control,[73] and may carry on the business of the company for the first four weeks so far as is necessary for its winding up. Thereafter, the liquidator can only carry on the company's business with authority of either the court or the committee of inspection.[74]

The liquidator is an officer of the court and the exercise of a liquidator's powers is subject to the control of the court.[75]

Additionally, where private liquidators are appointed, they are subject to the supervision of the Official Receiver. Should any complaint be made against a private liquidator, the Official Receiver shall inquire into the matter and take any such action as he or she may think expedient.[76]

Judicial management

Similarly, on appointment of a judicial manager, all powers conferred and duties imposed on the directors are exercised and performed by the judicial manager in their place,[77] who does all things as may be necessary for the management of the company's affairs, business and property, and such other things as the court may sanction.[78]

The judicial manager is required to send all creditors a statement of his or her proposals for achieving the stipulated purposes of the judicial management order within 90 days of

70 Committee to Strengthen Singapore as an International Centre for Debt Restructuring, *Report of the Committee* (2016) at Chapter 3, Paragraphs 3.35 and 3.36.

71 Section 71 of the IRDA.

72 Section 71 of the IRDA.

73 Section 140 of the IRDA.

74 Section 144(1)(a) of the IRDA.

75 Section 144(3) of the IRDA.

76 Section 137(2) of the IRDA.

77 Sections 99(1) and 99(2) of the IRDA. Save that directors continue to owe certain specific duties, which primarily enable the judicial manager to carry out his duties: Sections 105, 106, and 243 of the IRDA.

78 Sections 99(3) of the IRDA. See also the First Schedule of the IRDA for a judicial manager's specific powers.

his or her appointment.[79] If the proposal is approved by a majority in number and value of the company's creditors present and voting at a meeting of creditors,[80] the proposal must be implemented.[81]

The court retains ultimate oversight of the judicial management of a company, and the judicial manager may apply to the court for directions in relation to any matter arising in connection with the carrying out of his or her functions.[82] Correspondingly, creditors are also entitled to apply to court for relief if they consider that the judicial manager has managed the company's affairs, business or property in a manner that has been or would be 'unfairly prejudicial' to their interests.[83]

A two-stage test is applied to determine whether a judicial manager has acted in a manner that would be unfairly prejudicial to the interests of the applicant. First, it has to be shown that the action complained of had caused or would cause the applicant to suffer harm in his or her capacity as a member or creditor. Second, the action complained of has to be unfair. In this regard, unfairness may stem from:

a conspicuously unfair or differential treatment to the disadvantage of the applicant, which cannot be justified by reference to the objective of the judicial management or the interests of the members or creditors as a whole; or

b a lack of legal or commercial justification for a decision that caused harm to the members or creditors as a whole.

In the latter scenario, the court will not interfere with the judicial manager's decision unless it was perverse (i.e., unable to withstand logical analysis).[84]

Schemes of arrangement

Unlike the other insolvency procedures, the existing management remains in control during the scheme of arrangement process (although, in practice, it is common for an independent financial advisor with restructuring expertise to be appointed to assist the board and management).

However, the court is still able to supervise the process at certain key junctures (e.g., the grant of moratorium protection, the leave stage and the sanction stage) where court approval needs to be sought.[85]

Additionally, the court may also impose a requirement that a monitoring accountant or chief restructuring officer be appointed at the debtor's or creditor's costs and that this person be answerable to the court and must report to the creditors.[86]

79 Section 107(1) of the IRDA.

80 Section 108(3) of the IRDA.

81 Section 110 of the IRDA.

82 Section 99(5) of the IRDA. The judicial manager is an officer of the court whether or not he is appointed by the court (Section 89(4) of the IRDA).

83 Section 115 of the IRDA.

84 *Yihua Lifestyle Technology Co, Ltd and another v. HTL International Holdings Pte Ltd and others* [2021] 2 SLR 1141 at [17].

85 See Paragraphs 37 to 42 above.

86 *Re IM Skaugen SE* [2019] 3 SLR 979 at [93]. Note also that the court had suggested in *Re IM Skaugen SE* that an external party (e.g., a member of the panel of insolvency mediators maintained by the Singapore Mediation Centre) may be appointed to fill this role.

vi Special regimes

There are sector-specific insolvency regimes prescribed by legislation concerning certain systemically important institutions with a public interest element.[87]

For example, electricity licensees under the Electricity Act 2001 (the Electricity Act) are precluded from entering judicial management without the consent of the Energy Market Authority (EMA).[88] If an electricity licensee is nearing insolvency, the EMA may apply to the Ministry of Trade and Industry for a special administration order.[89]

The Monetary Authority of Singapore (MAS) also has a range of powers under the Monetary Authority of Singapore Act 1970 (the MAS Act) to resolve non-viable financial institutions. Among other things, the MAS can assume control of, and manage the business of, certain prescribed financial institutions,[90] effect a compulsory transfer of business[91] or effect a compulsory restructuring of share capital.[92] In the exercise of these powers, the MAS may have regard to, among other things, whether a failure of the financial institution would have a widespread adverse effect on Singapore's financial system or the economy, or both, and whether it is in the public interest to do so.[93]

vii Cross-border issues

Foreign-incorporated companies with a substantial connection with Singapore may undergo liquidation, judicial management and scheme of arrangement proceedings in Singapore. In determining the existence of a substantial connection, the court may have regard to the following matters:[94]

a whether Singapore is the company's centre of main interests (COMI);[95]
b whether the company is carrying on or has a place of business in Singapore;
c whether the company is registered in Singapore;
d whether the company has substantial assets in Singapore; and
e whether the company has chosen Singapore law to govern its loan, transaction or dispute resolution clause, or has submitted to the Singapore Court's jurisdiction.

The listing of a foreign company's securities on the Singapore Exchange has been held to be a sufficient factor for establishing a substantial connection with Singapore.[96]

87 Examples include legislation relating to insurance or insurance broking companies (Insurance Act 1966), securities exchanges or securities market (Securities and Futures Act 2001), electricity licensees (Electricity Act 2001) and railway licensees (Rapid Transit Systems Act 1995).
88 Electricity Act, s 29(7)(b).
89 Electricity Act, s 29(1).
90 MAS Act, s 33.
91 MAS Act, s 57.
92 MAS Act, s 69.
93 MAS Act, s 50.
94 Section 246(3) of the IRDA.
95 The concept of a debtor's centre of main interests in the context of the Model Law was discussed in *Re: Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] SGHC 53.
96 *Re PT MNC Investama TBK* [2020] SGHC 149 at [13].

To facilitate the conduct and coordination of cross-border insolvencies, Singapore has adopted the Model Law,[97] which allows a foreign insolvency office-holder to apply to the Singapore courts for recognition of his or her appointment, or the foreign insolvency proceedings,[98] and seek relief in aid of the foreign insolvency proceedings.[99]

To promote court-to-court cooperation in cross-border insolvency proceedings, the Singapore courts have played an active role in establishing the Judicial Insolvency Network, a network of insolvency judges from across the world. Singapore has since formally adopted the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters issued by the Judicial Insolvency Network[100] and the Modalities of Court-to-Court Communication,[101] which encompass matters such as exchange of communications between courts of different jurisdictions, sharing of information between courts, and conduct of joint hearings in cross-border insolvency and restructuring matters.[102]

II INSOLVENCY METRICS

As at 25 May 2022, the Ministry of Trade and Industry (MTI) forecasted 3.0 to 5.0 per cent growth in the Singapore economy in 2022. The MTI has observed that the external economic environment has deteriorated, due in part to the Russia-Ukraine conflict (which has disrupted the global supply of energy, food and other commodities and, in turn, exacerbated inflationary pressures), as well as stringent covid-19 containment measures in China (which has weighed on China's economy and contributed to global supply bottlenecks). Notwithstanding these economic headwinds, the MTI foresees growth in various sectors such as professional services, aviation, tourism, retail trade, and food and beverages, which are expected to benefit from the easing of border restrictions.[103]

The rate of non-performing bank loans saw a decrease from 2.33 per cent in the third quarter of 2021 to 2.06 per cent in the first quarter of 2022, with the decline largely attributable to a decrease in non-performing loans among general commercial banking loans (from 5.59 per cent to 4.54 per cent in the same period).

The table below shows the rates of non-performing loans in the loan books of commercial banks broken down by sector.

Period	2021 Q3	2021 Q4	2022 Q1
Overall	2.33	2.13	2.06
Agriculture, Mining, and Quarrying	2.52	2.98	2.9
Manufacturing	3.66	3.54	3.48
Building and Construction	0.99	1.07	1.03

97 Section 252 of the IRDA read with the Third Schedule of the IRDA; *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] SGHC 53.

98 Articles 15 to 17 of the Third Schedule of the IRDA.

99 Article 19 of the Third Schedule of the IRDA.

100 Supreme Court Registrar's Circular No. 1 of 2017.

101 Supreme Court Registrar's Circular No. 7 of 2020.

102 Supreme Court Registrar's Circular No. 1 of 2017, Schedule 1.

103 Ministry of Trade and Industry Singapore, Press release titled 'MTI Maintains 2022 GDP Growth Forecast at 3.0 to 5.0 Per Cent', accessible at https://www.mti.gov.sg/Newsroom/Press-Releases/2022/05/MTI-Maintains-2022-GDP-Growth-Forecast-at-3_0-to-5_0-Per-Cent.

Period	2021 Q3	2021 Q4	2022 Q1
General Commerce	5.59	5.29	4.54
Transport, Storage and Communication	9.37	6.74	6.9
Financial and Insurance Activities	1.07	1.2	1.18
Professional, Scientific, Technical, Administrative, Support Service Activities	5.34	5.28	5.12
Others	4.77	4.73	5.09

Figure: MAS statistics: Commercial Banks: Non-Performing Loans by Sector.[104]

III PLENARY INSOLVENCY PROCEEDINGS

One of the most significant restructurings to be completed in 2021 was the restructuring of Pacific International Lines' (PIL) US$3.3 billion debt via a Singapore scheme of arrangement (the Scheme) and out-of-court agreements with the vessel lessors who were based in Japan and China. The Scheme was implemented alongside a US$600 million investment by Heliconia Capital Management, which resulted in Heliconia obtaining a majority economic stake in PIL through debt and equity instruments.[105] The restructuring of PIL, which saw PIL repay all of its Scheme creditors in full and restore all haircuts taken by its creditors on its own initiative by the end of 2021, is arguably the most successful restructuring to have taken place in the recent history of Singapore.

Along with other major container liners globally, PIL had been facing increasing pressure from the steep downturn in shipping demand in recent years. The onset of the covid-19 pandemic exacerbated PIL's difficulties as lockdowns restricted trade flow and adversely impacted revenue streams.

While PIL could have followed the conventional route by waiting until its cash ran out before rushing to court for protection against creditor claims and attempting a restructuring, that would have likely resulted in it meeting the same fate as Hanjin Shipping where its filing for court protection caused an immediate supply chain implosion and ultimately resulted in its demise.

A pre-negotiated restructuring strategy was accordingly undertaken by PIL together with its advisors where key terms of the restructuring will be negotiated and the restructuring documentation is prepared before court proceedings are commenced, allowing the court proceedings to proceed on an expedited timetable.[106]

104 MAS, Monthly Statistical Bulletin (Money and Banking), accessible at https://www.mas.gov.sg/statistics/monthly-statistical-bulletin/money-and-banking.

105 See Lynette Tan, 'Pacific International Lines' debt restructuring plan receives court sanction', *The Business Times (Singapore)* (3 March 2021), accessible at https://www.businesstimes.com.sg/companies-markets/pacific-international-lines-debt-restructuring-plan-receives-court-sanction; and Ong Sing Yee, 'Pacific International Lines' debt restructuring plan effective on March 30', *The Business Times (Singapore)* (31 March 2021), accessible at https://www.businesstimes.com.sg/transport/pacific-international-lines-debt-restructuring-plan-effective-on-march-30.

106 For more details, please see Stephanie Yeo, 'The swift, silent restructuring of Pacific International Lines', *The Business Times (Singapore)* (15 June 2021), accessible at https://www.businesstimes.com.sg/opinion/the-swift-silent-restructuring-of-pacific-international-lines.

The primary objective of the strategy was to keep the restructuring swift and silent. Prior to the successful restructuring of PIL, it had never been undertaken in Singapore at such a scale and complexity.

Certain key steps were crucial to the pre-negotiated restructuring strategy. The first was a standstill on enforcement action and a principal and interest holiday from PIL's bank lenders without the filing of any court proceedings. As PIL needed to continue its operations to preserve its business, cash needed to be preserved and managed carefully. Accordingly, PIL sought an enforcement and repayment standstill from only PIL's bank lenders while repayments to trade suppliers and financial lessors in other jurisdictions continued.

Second, PIL initiated the establishment of the internal steering committee (ISC) which would hold enough aggregate debt to implement the restructuring through a cross-class cramdown under Singapore's new laws. This step not only reduced the ability of creditor groups outside of the ISC to take unreasonable holdout positions, but allowed negotiations to progress more quickly, resulting in a finalised restructuring proposal within a few months.

The third step was the innovative and pragmatic rescue financing structure for the US$112 million emergency cash facility extended to the company by Heliconia to fund the company's operations while the restructuring was underway. While rescue financing structures typically involve the grant of security or a priming lien to the rescue financier, PIL did not have any unencumbered assets or a single asset with a large enough equity cushion to secure the rescue financing and had to rely on the equity cushion of over 30 assets to raise the financing.

A priming lien over each asset would have involved heavy documentation and negotiation resulting in costly delays. As such, a financing structure was conceptualised where certain supportive lenders with security over assets with equity cushions executed undertakings to make payment of an agreed sum to Heliconia in the event the restructuring was not successful (based on their valuation of the equity cushion). The amount available under the facility would then be equal to the aggregate of these agreed sums. While the agreed sums would be payable upon enforcement of their security, it was agreed that these lenders would retain the discretion to determine the enforcement timing and process.

This structure not only simplified the documentation required, allowing the company quick access to the money that it needed urgently but also effectively granted Heliconia a priming lien while allowing the secured lenders to determine the amount of equity buffer they were each prepared to commit and to retain control over the enforcement strategy of the collateral, allowing them to manage the risk of any shortfalls arising from an enforcement.

Court proceedings were filed in November 2020 and concluded in less than four months with the restructuring plan being approved by an overwhelming majority.[107]

Crucially, this swift and silent restructuring enabled PIL to take advantage of the improved industry conditions and in a dramatic reversal of fortunes, repaid all of its Scheme

107 See HC/OS 1148/2020 (PIL's application for a moratorium under Section 64 of the IRDA), HC/OS 1149/2020 (PIL's application for leave to convene a scheme meeting under Section 210(1) of the Companies Act), and HC/OS 106/2021 (PIL's application for the sanction of the Scheme under Section 210(4) of the Companies Act).

creditors in full and restored all haircuts taken by its creditors on its own initiative within nine months from the implementation of the restructuring plan, well in advance of the expected repayment date (which would have been more than seven years later).[108]

As described by one of PIL's bank creditors:

> *Having worked through the Asian Financial Crisis in 1997 and the Global Financial Crisis in 2008, to witness what PIL is doing now whilst the world is still facing into the challenges of the COVID-19 pandemic is [a] unique privilege.*

IV ANCILLARY INSOLVENCY PROCEEDINGS

United Securities Sdn Bhd (in receivership and liquidation) and another v. United Overseas Bank Ltd [2021] 2 SLR 950 is the first reported decision of the Singapore Court of Appeal relating to the Model Law. The Model Law was enacted in 2017 as part of a comprehensive reform of Singapore's restructuring laws aimed at increasing Singapore's attractiveness as a hub for restructuring. The Court of Appeal took the opportunity in this decision to lay out the principles applicable to the Model Law in order to expand the local jurisprudence on cross-border restructuring and insolvency.

The case involved a Malaysian company being wound up by the Malaysian court. Prior to its winding up, the Malaysian company had granted a charge over its shares in its wholly owned subsidiary (Charge) to the respondent, which was a Singapore bank. The respondent bank filed proceedings in Singapore seeking, inter alia, a declaration that its rights under the Charge were valid and exercisable (Singapore Action). The liquidator of the Malaysian company applied for recognition of the Malaysian company's winding-up proceedings in the Singapore courts, and a stay of the Singapore Action.

On appeal, it was not disputed that the Malaysian winding-up proceedings constituted a 'foreign main proceeding' under the Model Law. The issue in dispute was whether the Singapore Action was automatically stayed under the Model Law following the recognition of the Malaysian winding-up proceedings or if it was not automatically stayed, whether a discretionary stay ought to be granted.

After a careful analysis of the Model Law and the preparatory materials of the Model Law, the Court of Appeal held that the automatic stay under the Model Law is the same in

108 See Michelle Zhu, 'Pacific International Lines creditors to receive US$1b repayment ahead of schedule', *The Business Times (Singapore)* (26 November 2021), accessible at https://www.businesstimes.com.sg/transport/pacific-international-lines-creditors-to-receive-us1b-repayment-ahead-of-schedule; Michelle Zhu, 'Pacific International Lines creditors to receive US$1.37 billion repayment ahead of schedule', *The Straits Times (Singapore)* (26 November 2021), accessible at https://www.straitstimes.com/business/companies-markets/pacific-international-lines-creditors-to-receive-137b-repayment-ahead-of; Jonathan Boonzaler, 'Pacific International lines to repay S$1bn in scheme debts ahead of schedule', TradeWinds (26 November 2021), accessible at https://www.tradewindsnews.com/containerships/pacific-international-lines-to-repay-1bn-in-scheme-debts-ahead-of-schedule/2-1-1106319; Tay Peck Gek, 'A year of adventure for PIL as it stages a dramatic turnaround in fortunes' (*The Straits Times*) (15 December 2021), accessible at https://www.businesstimes.com.sg/companies-markets/a-year-of-adventure-for-pil-as-it-stages-a-dramatic-turnaround-in-fortunes-0.

scope and effect as if the debtor had been wound up in Singapore. It is also subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under Singapore law in such a situation.[109]

Under Singapore law, it is well established that leave will readily be granted to secured creditors to proceed with enforcing their security, notwithstanding any stay of proceedings that arises upon the winding up of the debtor.[110] Because, the Singapore Action was directed at allowing the respondent bank to establish its purported rights as a secured creditor against the Malaysian company, the Court of Appeal granted leave to the respondent bank to proceed with the Singapore Action notwithstanding the automatic stay arising under Article 20 of the Model Law.[111] The grant of a discretionary stay under Article 21 of the Model Law was also declined on similar grounds.[112]

V TRENDS

As mentioned in Section I, significant legislative changes have been made in recent years to enhance the restructuring tools available in Singapore's insolvency laws. In the latest of these legislative reforms, the Supreme Court of Judicature Act 1969 has been amended to clarify that the Singapore International Commercial Court (SICC) has jurisdiction to hear cross-border restructuring and insolvency matters. This is an important step as the SICC provides 'a conducive, if not, perhaps natural forum, for cross-border insolvency matters that have a significant foreign element', as observed by Edwin Tong SC, the Minister for Culture, Community & Youth and Second Minister for Law, in his keynote speech at the Singapore Insolvency Conference 2021.[113]

The SICC is uniquely tailored for handling matters with cross-border elements, as it has a deep bench of renowned international judges hailing from various jurisdictions such as Australia, Canada, France, Hong Kong, India, Japan, the United Kingdom, and the United States.[114] Foreign lawyers are also permitted to appear before the SICC and submit on questions of foreign law in specific cases.[115] The SICC has also appointed the eminent Judge

109 *United Securities Sdn Bhd (in receivership and liquidation) and another v. United Overseas Bank Ltd* [2021] 2 SLR 950 at [34].

110 *United Securities Sdn Bhd (in receivership and liquidation) and another v. United Overseas Bank Ltd* [2021] 2 SLR 950 at [39] to [41].

111 *United Securities Sdn Bhd (in receivership and liquidation) and another v. United Overseas Bank Ltd* [2021] 2 SLR 950 at [44].

112 *United Securities Sdn Bhd (in receivership and liquidation) and another v. United Overseas Bank Ltd* [2021] 2 SLR 950 at [45] to [48].

113 Ministry of Law website, Speech by Minister For Culture, Community & Youth, and Second Minister For Law Edwin Tong SC at the Singapore Insolvency Conference 2021 (13 October 2021), accessible at: https://www.mlaw.gov.sg/news/speeches/2021-10-13-speech-by-edwin-tong-singapore-insolvency-conference-2021.

114 Singapore International Commercial Court website, Judges, accessible at: https://www.sicc.gov.sg/about-the-sicc/judges.

115 Legal Profession Act 1966, s 36P(2).

Christopher S. Sontchi, one of the world's leading insolvency judges, serving as Chief Judge of the United States Bankruptcy Court for the District of Delaware from 2018 to 2021, as one of its international judges.[116]

Having the capability and processes to deal adeptly with foreign law issues is especially important in cross-border restructuring and insolvency matters because there are a myriad of issues where domestic and foreign laws may not perfectly align,[117] necessitating a choice of law determination and the application of foreign law in addition to (or in lieu of) domestic law where appropriate.[118]

These developments in the SICC help to reinforce the strong position that Singapore holds as a centre for restructuring,[119] as seen in the recent Singapore restructurings of Oslo-listed Prosafe SE (which received recognition of its Singapore moratorium and scheme in Brazil[120]) and Indonesia-listed PT Pan Brothers Tbk (which received recognition of its Singapore moratorium in Indonesia[121] and the recognition of its Singapore scheme in the United States[122]). With the addition of the SICC to the Singapore restructuring toolkit, it further enhances the jurisdiction's ability to serve as a nodal jurisdiction for coordinating cross-border restructurings.

116 Singapore Courts website, News and Resources, Media Release: Appointments, extension of appointments and reappointments of Supreme Court judges and international judges to the Singapore International Commercial Court (15 November 2021), accessible at: https://www.judiciary.gov.sg/news-and-resources/news/news-details/media-release-appointments-extension-of-appointments-and-reappointments-of-supreme-court-judges-and-international-judges-to-the-singapore-international-commercial-court.

117 Such issues include the priority conferred to employees or trade creditors, the applicability of set-off, the avoidance of preferences, the validity of third-party releases, and the preservation or termination of contracts and licences.

118 Allan L. Gropper, 'The Curious Disappearance of Choice of Law as an Issue in Chapter 15 Cases' 9 *Brooklyn Journal of Corporate, Finance and Commercial Law* (2014).

119 Aurelio Guerra-Martinez, 'Building a restructuring hub: Lessons from Singapore', 10-2021 Research Collection Singapore Management University School of Law. Available at: <https://ink.library.smu.edu.sg/sol_research/3465>.

120 Ana Carolina Monterio, 'Brazil's first recognition of a foreign proceeding under the Model Law on Cross-Border Insolvency', 18 August 2021, Singapore Global Restructuring Initiative blog accessible at: <https://ccla.smu.edu.sg/sgri/blog/2021/08/18/brazils-first-recognition-foreign-proceeding-under-model-law-cross-border>. Debtwire, COURT: Prosafe obtains recognition of Singapore scheme of arrangement in Brazil, leading the way in the country (29 December 2021).

121 Catherine Shen, 'Landmark Indonesian Recognition of Singapore Moratorium', 16 August 2021, Singapore Academy of Law blog, accessible at: <https://www.sal.org.sg/blog/2021-Emmanuel-Chua>.

122 *In re PT Pan Brothers Tbk*, Chapter 15, Case No. 22-10136-mg, Order Granting (1) Recognition of Foreign Nonmain Proceeding; (2) Recognition of Foreign Representative; (3) Recognition of Sanction Order and Related Scheme; and (4) Related Relief and Additional Assistance under Chapter 15 of the Bankruptcy Code (United States Bankruptcy Court Southern District Of New York).

Appendix 1

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