The Insolvency Review

Eighth Edition

Editor
Donald S Bernstein

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THE INSOLVENCY REVIEW

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CONTENTS

PREFACE

This eighth edition of *The Insolvency Review* once again offers an in-depth review of market conditions and insolvency case developments in key countries. A debt of gratitude is owed to the outstanding professionals around the globe who have dedicated their time and talents to this book. As always, their contributions reflect diverse viewpoints and approaches, which in turn reflect the diversity of their respective national commercial cultures and laws.

This year's book is being published as the world continues to cope with the covid-19 pandemic. Some countries are more affected than others but one thing is clear: in addition to the tragic impact of the pandemic on the lives and health of so many around the world, the economic hardship on individuals and businesses is extensive. This impact goes well beyond those directly affected by the virus. In many countries, lockdowns have affected a number of economic sectors. Airlines, hospitality, entertainment, dining and retail, just to name a few, have seen their revenues collapse and enormous numbers of jobs lost. The impact on employees in these sectors has been tragic, and the effect on consumers has rippled through other sectors as well. Governmental stimulus efforts have cushioned some of this impact but even so we are now seeing record numbers of business failures. These numbers will only grow until the pandemic is under control.

As can be seen in these pages, insolvency professionals and courts are coping with the resulting onslaught of business insolvencies to the best of their ability. Still, efforts to rescue and restructure businesses and save jobs are of no avail if revenues cannot timely be restored. Insolvency proceedings can be a holding action, but they cannot create revenue to allow a business to survive. The insolvency system then becomes merely an orderly means of shutting businesses down and distributing their assets.

One question to ask is whether, where businesses revenues collapse owing to an exogenous event such as a pandemic, the fact that investors and employees in some economic sectors absorb losses and hardships that are disproportionate to those in other sectors is not highly arbitrary. Some cogently argue that these costs, which are imposed by actions taken by governments, businesses and individuals to protect the public's health and wellbeing, should be absorbed by the public sector and allocated through tax policy rather than having them absorbed by the unlucky employees and stakeholders of the affected businesses.

Another question is whether allowing the collapse of these businesses, which were viable before the pandemic, will not also make the return to normal more difficult after the worst is behind us. Rather than idling for a while and then resuming, the affected economic engines are being shut down. Their lights are literally going out. Over the long run, will it be more time-consuming and costly to reconstruct these economic engines anew, and then crank them up and restart them, than it would be to support them so they can idle for a time and then resume in their current form?

Of course, for businesses to remain intact they must be provided with liquidity and capital, and programmes have been adopted in a number of countries to provide this, at least temporarily. Payment moratoria also have played a role in some countries, though these moratoria inevitably force some of the costs onto private sector parties (for example, landlords).

Frankly, there may be no good answers to these questions.

Next year, we may be in a better position to assess the economic damage done by the pandemic and how successful countries have been in preserving their business infrastructure, restoring employment and mitigating the arbitrary impacts described above. In the meantime, it is up to the insolvency system to take up the slack as best it can. I know that insolvency professionals, especially the authors contributing to this volume, are up to the task.

As I do each year, I want to thank each of the contributors to this book for their efforts to make *The Insolvency Review* a valuable resource. As each of our authors knows, this book is a challenging undertaking every year, and particularly so in this year of covid-19. As in previous years, my hope is that this year's volume will help all of us, authors and readers alike, reflect on the larger picture, keeping our eye on likely, as well as necessary, developments, on both the near and distant horizons.

Donald S Bernstein
Davis Polk & Wardwell LLP
September 2020

Chapter 21

SINGAPORE

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: (1) winding up; and (2) rehabilitative procedures, comprising the judicial management procedure and schemes of arrangement.

Formerly, the relevant laws were primarily encapsulated in the Companies Act and subsidiary legislation like the Companies (Winding Up) Rules and the Companies Regulations. Some provisions in the Bankruptcy Act and Bankruptcy Rules, which ordinarily govern personal insolvency, applied to corporate insolvency as well. In 2018, Parliament passed the Insolvency Restructuring and Dissolution Act (the Insolvency Act), which consolidated all relevant provisions into an omnibus statute. The Insolvency Act came into operation on 30 July 2020. In addition to the Insolvency Act, there are industry-specific regimes that replace or supplement various aspects of the general insolvency provisions.[2]

ii Policy

The passage of the Insolvency Act in 2018 marks the latest in a series of significant changes to Singapore's insolvency landscape over the past decade, following the recommendations of the Insolvency Law Review Committee (ILRC) and the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (DRC), whose mandates were to propose initiatives 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. Among other changes, provisions introduced in 2017 included:

a granting 'super-priority' for lenders who provide rescue financing to distressed companies;

b allowing for the 'cram-down' of dissenting creditors in schemes of arrangements;

c facilitating 'pre-packaged' restructuring;

d enhanced 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 Insolvency Act (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 which 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 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 Insolvency Act.

4 Section 246(1)(d) of the Insolvency Act. See Section I.vii below.

5 Section 166 of the Insolvency Act.

6 Section 160(1) of the Insolvency Act.

7 Section 163(1) of the Insolvency Act.

8 Section 144 of the Insolvency Act.

9 Section 147 of the Insolvency Act.

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; or

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

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

In Singapore, there appears to be a certain stigma attached to companies placed under judicial management as 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 would introduce confidence and stability if creditors do not trust existing management. Moreover, directors may themselves prefer being replaced by a judicial manager to avoid facing the risk of civil or criminal liability 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] there are exceptions that are excluded from the judicial regime entirely and 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 the creditors decline to approve the judicial manager's statement of proposals,[15] if the court so orders by reason of the judicial manager's unfairly prejudicial actions,[16] or if it appears that the purposes of the judicial management order cannot be achieved.[17]

The Insolvency Act also introduces 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 Insolvency Act.

11 Insolvency Law Review Committee, Report of the Insolvency Law Committee: Final Report 2013, at Chapter 6, paragraph 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 Insolvency Act.

13 Section 91(8) of the Insolvency Act.

14 Section 111(1) of the Insolvency Act.

15 Section 108(5) of the Insolvency Act.

16 Section 115(a) and (b) of the Insolvency Act.

17 Section 112(1) of the Insolvency Act.

18 Section 94 of the Insolvency Act.

19 Section 94(1) of the Insolvency Act.

20 Section 94(11)(d) of the Insolvency Act.

Schemes of arrangement

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

While a company does not need to be insolvent to deploy a scheme, they 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 majority in number representing three-fourths in value of the creditors (or each class of creditors) present and voting approves the scheme; and 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] may have extraterritorial effect[25] or extend 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 'cram-down' on dissenting classes of creditors, which allows the court to sanction a scheme even if the approval thresholds 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 (such as prescribed financial institutions) are prevented from using some of these restructuring tools.[31]

iv Starting proceedings

Winding up

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

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

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

23 Section 210 of the Companies Act.

24 Section 64 of the Insolvency Act.

25 Section 64(5)(b) of the Insolvency Act.

26 Section 65 of the Insolvency Act.

27 Section 71 of the Insolvency Act.

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

29 Section 70 of the Insolvency Act.

30 Section 67 of the Insolvency Act.

31 Section 63(3) of the Insolvency Act.

32 Section 124(1) of the Insolvency Act.

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. While this can be established through actual proof that the company is cash-flow insolvent or balance-sheet insolvent, applicants often rely on the statutory presumption of insolvency.[34] 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.[35] The statutory demand requirements have been temporarily relaxed as part of relief measures to assist businesses in financial difficulties because of the covid-19 pandemic.

For the period pending the determination of the winding up application, the court may appoint a provisional liquidator if there is a *prima facie* case for winding up; and if the court is satisfied in the circumstances of the case that a provisional liquidator should be appointed. 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.[36]

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.[37] Upon the filing of the statutory declaration, the directors must immediately appoint a provisional liquidator.[38]

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.[39] Within one day of the meeting of the company, the company must convene a meeting of the company's creditors.[40] At this meeting, the creditors may nominate the liquidator – their choice prevails over the company's choice.[41] 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.[42]

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.[43] Within five weeks, the company must convene an extraordinary general meeting to pass a special resolution in favour of winding up voluntarily[44] and the appointment of a liquidator.[45]

33 Section 125(1) of the Insolvency Act.
34 Section 125(1)(e) read with Section 125(2)(a) of the Insolvency Act.
35 Section 125(2)(a) of the Insolvency Act.
36 Section 138 of the Insolvency Act.
37 Section 161(1) of the Insolvency Act.
38 Section 161(1) of the Insolvency Act.
39 Section 166(1) of the Insolvency Act.
40 Section 166(1) of the Insolvency Act.
41 Section 167 of the Insolvency Act.
42 Section 169 of the Insolvency Act.
43 Section 163 of the Insolvency Act.
44 Section 163(3)(b) of the Insolvency Act.
45 Section 164(1) of the Insolvency Act.

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 High Court.[46] The applicant bears the burden of establishing two requirements to the court's satisfaction:[47]

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.

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.[48] If the judicial management order is granted, a moratorium will continue to apply during the period the company is in judicial management.[49]

An interim judicial manager may be appointed for the period pending the determination of the judicial management application.[50] The functions, powers and duties of such interim judicial manager are prescribed by the court.

The Insolvency Act 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).[51]

Schemes of arrangement

A scheme may be commenced by the company, its creditors or shareholders.[52]

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 protect the company from creditor action when pursuing the implementation of the scheme of arrangement.[53]

In this regard, a moratorium may be sought under either Section 210(10) of the Companies Act or Section 64 of the Insolvency Act. The moratoria under Section 64 of the Insolvency Act provides relatively stronger protection to debtors.[54] Among other things, this enhanced moratorium regime provides for an automatic moratorium lasting up to 30 days from the date of application;[55] restrains creditors from enforcing their security interests; and

46 Sections 90 and 91 of the Insolvency Act.
47 Section 91(1) of the Insolvency Act.
48 Section 95 of the Insolvency Act.
49 Section 96(4) of the Insolvency Act.
50 Section 92 of the Insolvency Act.
51 Section 94 of the Insolvency Act.
52 Section 210(1) of the Companies Act.
53 Section 210(10) of the Companies Act and Section 64 of the Insolvency Act.
54 See Insolvency Law Review Committee, Report of the Insolvency Law Review Committee: Final Report (2013) at paragraph 7 and 16.
55 Section 64(8) of the Insolvency Act.

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.[56]

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 been proposed yet, 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.[57]

The Section 211B moratorium can also be extended, on application, to related entities of the scheme company.[58]

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 (the 'leave stage');[59]

b notice of the creditors' meeting, the scheme document and an explanatory statement setting out the effects of the scheme, is 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;[60]

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, the court will consider sanctioning the scheme at a subsequent hearing (the 'sanction stage');[61] 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).[62]

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.[63]

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

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

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

58 Section 65(1) of the Insolvency Act. See also Committee to Strengthen Singapore as an International Centre for Debt Restructuring, Report of the Committee (2016) at Chapter 3, paras 3.15 to 3.15.

59 Section 210(1) of the Companies Act.

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

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

62 Section 210(5) of the Companies Act.

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

a that the requisite statutory majority at a duly convened meeting of the creditors had 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 which a man of business or an intelligent and honest man, being a member of the class concerned and acting in respect of his interest, would reasonably approve.[64]

While the implementation of a scheme generally follows the abovementioned 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 stage are skipped). This concept of the 'pre-pack' scheme is adapted from Chapter 11.[65] 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.[66] 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 and prospects and such other information necessary to enable to the creditor to make an informed decision, were made.[67]

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,[68] and may carry on the business of the company for the first four weeks so far as is necessary for the winding up thereof. Thereafter, the liquidator can only carry on the company's business with authority of either the court, or the committee of inspection.[69]

The liquidator is an officer of the High Court and the exercise of a liquidator's powers is subject to the control of the court.[70]

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.[71]

64 *The Royal Bank of Scotland NV v. TT International Ltd* [2012] 2 SLR 213 at [70].
65 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.
66 Section 71 of the Insolvency Act.
67 Section 71 of the Insolvency Act.
68 Section 140 of the Insolvency Act.
69 Section 144(1)(a) of the Insolvency Act.
70 Section 144(3) of the Insolvency Act.
71 Section 137(2) of the Insolvency Act.

Judicial management

Likewise, 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,[72] 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.[73]

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 his or her appointment.[74] 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,[75] the proposal must be implemented.[76]

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 functions.[77] Correspondingly, creditors are also entitled to apply to court for relief if they considers 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.[78]

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 adviser 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.[79]

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 such person be answerable to the court and must report to the creditors.[80]

72 Sections 99(1) and 99(2) of the Insolvency Act. Save that directors continue to owe certain specific duties that primarily enable the judicial manager to carry out his or her duties: Sections 105, 106, and 243 of the Insolvency Act.

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

74 Section 107(1) of the Insolvency Act.

75 Section 108(3) of the Insolvency Act.

76 Section 110 of the Insolvency Act.

77 Section 99(5) of the Insolvency Act. The judicial manager is an officer of the Court whether or not he or she is appointed by the court (Section 89(4) of the Insolvency Act).

78 Section 115 of the Insolvency Act.

79 See Section I. iv, 'Schemes of arrangement' above.

80 *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.[81]

For example, electricity licensees under the Electricity Act (Chapter 89A) are precluded from entering judicial management without the consent of the Energy Market Authority (EMA).[82] If an electricity licensee is nearing insolvency, the EMA may apply to the Ministry of Trade and Industry for a special administration order.[83]

The Monetary Authority of Singapore (MAS) also has a range of powers under the Monetary Authority of Singapore Act (Chapter 186) to resolve non-viable financial institutions. Among other things, the MAS can assume control of and manage the business of certain prescribed financial institutions,[84] effect a compulsory transfer of business[85] or effect a compulsory restructuring of share capital.[86] 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 and whether it is in the public interest to do so.[87]

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:[88]

a whether Singapore is the company's centre of main interests (COMI);[89]

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.

81 Examples include legislation relating to insurance or insurance broking companies (Insurance Act (Chapter 142)), securities exchanges or securities market (Securities and Futures Act (Chapter 289)), electricity licensees (Electricity Act (Chapter 89A)) and railway licensees (Rapid Transit Systems Act (Chapter 263A)).

82 Electricity Act, Section 29(7)(b).

83 Electricity Act, Section 29(1).

84 Monetary Authority of Singapore Act, Section 33.

85 Monetary Authority of Singapore Act, Section 57.

86 Monetary Authority of Singapore Act, Section 69.

87 Monetary Authority of Singapore Act, Section 50.

88 Section 246(3) of the Insolvency Act.

89 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.

To facilitate the conduct and coordination of cross-border insolvencies, Singapore has adopted the Model Law,[90] which allows a foreign insolvency office-holder to apply to the Singapore courts for recognition of his or her appointment and the foreign insolvency proceedings,[91] and seek relief in aid of the foreign insolvency proceedings.[92]

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[93] and the Modalities of Court-to-Court Communication,[94] 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.[95]

II INSOLVENCY METRICS

The covid-19 pandemic has adversely affected the Singapore economy, as the rapid spread of the virus across the globe and measures taken to contain it have dampened business activity and consumer confidence. Singapore's GDP contracted sharply in the first quarter of 2020, reflecting a combination of travel restrictions, supply-side disruptions and the attendant decline in external and domestic demand.[96]

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 to -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 globally and in Singapore in particular.[97]

The rate of non-performing bank loans saw a mild increase from 2.01 per cent in the fourth quarter of 2019 to 2.29 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.

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

91 Articles 15 to 17 of the Third Schedule of the Insolvency Act.

92 Article 19 of the Third Schedule of the Insolvency Act.

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

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

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

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

97 Ministry of Trade and Industry Singapore, press release (MTI Downgrades 2020 GDP Growth Forecast to '-7.0 to -4.0 Per Cent'), accessible at https://www.singstat.gov.sg/-/media/files/news/gdp1q2020.pdf.

End of period	Overall	Building and construction	General commerce	Manufacturing	Transport, storage and communications	Professional and private individuals	Housing and bridging	Others
2019								
II	1.77	1.00	1.43	3.63	8.40	0.65	0.43	1.36
III	1.96	1.03	1.47	4.55	9.36	0.71	0.44	1.51
IV	2.01	1.17	1.47	4.71	9.49	0.74	0.41	1.59
2020								
I	2.29	1.12	3.98	4.21	9.63	0.83	0.41	1.56
II P	2.67	1.16	5.74	4.29	11.02	0.98	0.53	1.79
Figure: MAS statistics: Banks: Non-Performing Loans by Sector.[98]								

III PLENARY AND ANCILLARY INSOLVENCY PROCEEDINGS

In the landmark decision *Re Design Studio Group Ltd* in May 2020,[99] the Singapore High Court approved a US$62 million rescue financing package to the Design Studio Group, which incorporated a roll-up of a bank lender's pre-existing debt. A roll-up is a feature of a rescue financing deal that upgrades the priority of a rescue lender's pre-existing debt into a super-priority debt. This is achieved by applying a portion of the rescue financing proceeds towards paying the pre-existing debt of the rescue lender.

Prior to the decision, it was uncertain if 'roll-ups' were permissible under the legislation as Parliamentary reports[100] and previous case law[101] appeared to indicate that the rescue financing regime was aimed at giving super-priority only for additional financing provided to the company (and not to promote the priority of pre-existing debt).

The court accepted that 'roll-ups' could be permitted depending on the circumstances of the case and held that:

a the plain reading of 'rescue financing' in Section 211E(9) of the Companies Act is sufficiently broad to encompass roll-ups (at [42]);

b there is no legislative intent to prohibit all roll-ups from constituting rescue financing (at [44]);

c in the case of roll-ups, only roll-ups which ultimately create some new value for the company should be regarded as rescue financing. New funds that are almost entirely used to repay old debts create little new value, and are not roll-ups, which should be regarded as rescue financing. The amount of new funds put in as new value should not merely be a minuscule or token amount (at [46]);

d the terms and conditions of each roll-up have to be scrutinised on a case-by-case basis (at [46]); and

e the nature of the incoming financing should be that it provides support for the company in the restructuring and leads to some benefit for it (at [46]).

In the circumstances of the case, the court ultimately granted the rescue financing orders sought for the following reasons:

98 Monetary Authority of Singapore, Monthly Statistical Bulletin (Money and Banking, accessible at https://www.mas.gov.sg/statistics/monthly-statistical-bulletin/money-and-banking.

99 *Re Design Studio Group Ltd* [2020] SGHC 148

100 Singapore Parliamentary Debates, Official Report (10 March 2017), vol 94.

101 *Re Attilan Group Ltd* [2018] 3 SLR 898.

a no alternative financing was available – the court was satisfied that there was a bona fide and genuine attempt at obtaining other sources of funding, but none of the alternative proposals could match the terms offered by HSBC (at [59]);

b the terms of proposed financing were fair, reasonable and adequate (at [60]);

c fresh capital and new facilities would allow the Design Studio Group to continue work and take up new projects to keep the group as a going concern (at [63]);

d the court considered that the proposed financing might in fact be the only viable possibility, given that financing had largely dried up because of the covid-19 pandemic (at [63]); and

e the proposed financing would be in the creditors' best interests as without financing to continue the company's operations, the scheme would not be viable, and the unsecured creditors could potentially receive a nil return in a liquidation scenario (at [65]).

IV ANCILLARY INSOLVENCY PROCEEDINGS

In *Re Rooftop Group International Pte Ltd* [2019] SGHC 280, the Singapore High Court granted recognition of the applicant company's US Chapter 11 proceedings as foreign non-main proceedings pursuant to the Model Law. The court reaffirmed the principles set out in *Re Zetta Jet Pte Ltd* [2019] 4 SLR 1343 for determining the COMI of a debtor company. Among other things, the court held that the focus of the determination is on factors that are objectively ascertainable by third parties and such determination will be based on a robust and qualitative analysis.[102]

After examining various factors that pointed to either the US or Singapore being the company's COMI, the court held that the factors that pointed to the US were not such as to outweigh the presumption in favour of Singapore (being the place of the company's registered office). The court did not consider the factors in favour of the US, such as the company's sales being primarily concentrated in the US and its main assets (its intellectual property rights) being substantially registered in the US, as important factors in a creditor's mind when ascertaining where the company's COMI is located. Accordingly, as the company's COMI was presumed to be in Singapore, the Chapter 11 proceedings could not be recognised as a foreign main proceedings but were instead recognised as foreign non-main proceedings.[103]

The court granted assistance in aid of the US Chapter 11 proceedings by ordering a moratorium on the commencement of proceedings against the company. However, the court declined to grant a stay on an action by certain creditors to enforce a charge over shares in the company. The court held that the point of the assistance in the Model Law was to ensure the orderly and equitable distribution of assets and to facilitate the process of restructuring wherever possible, but the Model Law was not intended to protect or preserve a party's position within the company in the case of a dispute between shareholders.[104] Accordingly, the creditors' action to enforce the charge over shares in the company was allowed to proceed.

102 *Re Rooftop Group International Pte Ltd* [2019] SGHC 280 ('Rooftop Group') at [12].

103 Rooftop Group at [22].

104 Rooftop Group at [35].

V TRENDS

To ameliorate the economic impact of the covid-19 pandemic, legislation has been passed to provide temporary relief to businesses that are unable to fulfil their contractual obligations because of the pandemic.[105] Under the legislation, businesses can seek protection from legal proceedings and enforcement action if their inability to perform their contractual obligations is to a material extent caused by covid-19.[106] The relief applies to certain scheduled contracts, including loan facilities secured against any commercial or industrial immovable property, construction contracts and tourism-related contracts, and located in Singapore from stipulated types of legal action in relation to the inability to perform certain contracts as a result of covid-19.[107]

The monetary threshold for a statutory demand against a company has also been temporarily increased from S$10,000 to S$100,000.[108] The time period for a company to satisfy a statutory demand, failing which it is presumed to be unable to pay its debts and hence liable to be wound up, has increased from 21 days to six months.[109] The easing of the statutory demand requirements makes it more difficult for creditors to succeed in winding up applications against companies.

Additionally, the Singapore government has enacted a series of measures to help companies with their cash flow in the current situation. These measures include deferment of income tax payments, property tax rebates and the introduction of new financing schemes to promote commercial lending by financial institutions.[110]

Overall, owing to these various relief measures, it is anticipated that creditors and contracting counterparties of financially distressed companies are likely to prefer out-of-court consensual workouts instead of commencing legal proceedings or enforcement action.

105 COVID-19 (Temporary Measures) Act 2020 (No. 14 of 2020).
106 Part 2 of COVID-19 (Temporary Measures) Act 2020 (No. 14 of 2020).
107 The Schedule of COVID-19 (Temporary Measures) Act 2020 (No. 14 of 2020).
108 Section 22(1)(a) of COVID-19 (Temporary Measures) Act 2020 (No. 14 of 2020).
109 Section 22(1)(a) of COVID-19 (Temporary Measures) Act 2020 (No. 14 of 2020).
110 Singapore Government, Budget 2020 Stabilisation and Support Package, accessible at: https://www.singaporebudget.gov.sg/budget_2020/budget-measures/stabilisation-and-support-package.

Appendix 1

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