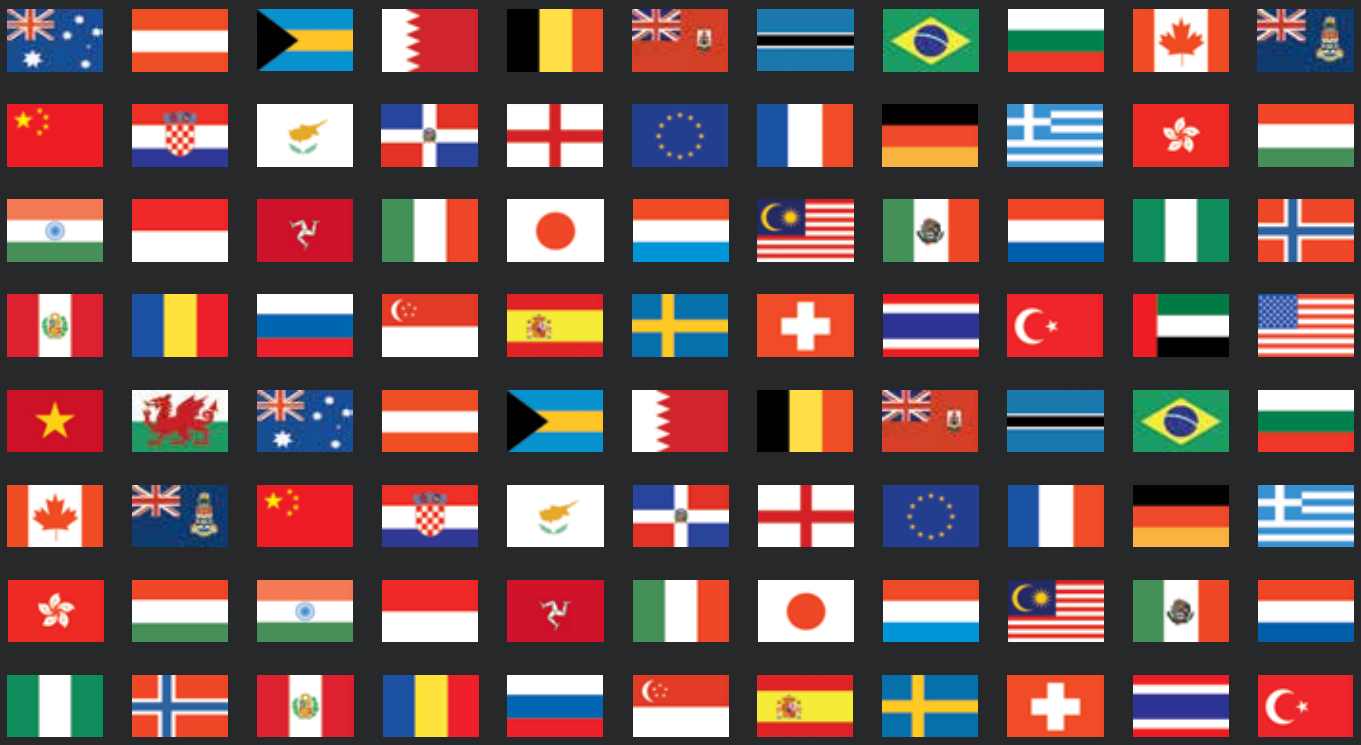
Restructuring & Insolvency

Contributing editor
Bruce Leonard



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GETTING THE DEAL THROUGH

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Legislation

1 What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?

The answers set out below are with reference to companies only, and do not cover any other entities unless expressly stated otherwise. The term 'bankruptcy' in Singapore law refers only to the insolvency of individuals, but any references to 'bankruptcy' in this chapter refer to the liquidation and winding up of companies.

The liquidation and winding up of companies is governed by the Companies Act (the Act) and its related subsidiary legislation, as are schemes of arrangements and judicial management (ie, reorganisations).

Under the Act, the most common ground to wind up a company on the grounds of insolvency is that the company is unable to pay its debts (section 254(1)(e) of the Act). Under section 254(2) of the Act, a company is deemed to be unable to pay its debts if:

- a demand for a sum exceeding S$10,000 due to a creditor has been duly served on the company requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;
- execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
- it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due; and in determining whether a company is unable to pay its debts the court shall take into account the contingent and prospective liabilities of the company.

A company is not insolvent at law merely because its current liabilities exceed its current assets. Rather, a creditor either has to show that the company has failed to meet a current demand for a debt already due, or whether, on balancing the overall liabilities against the assets of the company, there was a deficit. Under the latter question, such overall liabilities would include present, future and contingent creditors of the company, and the assets to be valued include all assets of the company, and not just current assets.

Courts

2 What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?

Applications for the liquidation or reorganisation of a Singapore company come under the sole purview of the Singapore High Court. Singapore does not have specialised insolvency courts dealing exclusively with insolvency matters, although most insolvency matters now appear to be fixed before judges who have expertise in this area. There are no limitations on the High Court's jurisdiction or power to deal with matters pertaining to corporate insolvency.

Excluded entities and excluded assets

3 What entities are excluded from customary insolvency proceedings and what legislation applies to them? What assets are excluded from insolvency proceedings or are exempt from claims of creditors?

While the winding-up regime under the Act applies to all of the following companies, additional requirements as to their winding up are imposed under their industry-specific legislation: electricity licensees (Electricity Act), companies carrying on insurance or insurance broking business (Insurance Act), trust companies (Trust Companies Act) and designated clearing houses (Securities and Futures Act).

The insolvency of individuals (Bankruptcy Act), limited liability partnerships (Limited Liability Partnerships Act) and registered business trusts (Business Trusts Act) are dealt with under their respective legislation and its related subsidiary legislation.

Assets of the company that have securities (mortgages, charges, pledges among others) against them would generally be excluded from the claims of creditors, unless the security holders choose to forfeit their security over the relevant assets, in which case the assets so forfeited would return to the general pool of the company's assets (see questions 6 and 7).

Public enterprises

4 What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

There is no specific legislation that regulates the insolvency of a government-owned enterprise (ie, a company that is partially or wholly owned by the state or state-owned companies), and generally procedures and creditors' remedies that are applicable to all companies incorporated under the Act will apply to insolvent government-owned enterprises. There are public interest exceptions to various insolvency regimes that may apply (although not exclusively) to government-owned enterprises. A court may exercise its discretion not to wind up an insolvent company on public interest grounds, or may grant an order to place a company under judicial management even where the statutory purposes (see question 12) are not met.

Protection for large financial institutions

5 Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

While there is specific legislation that regulates the insolvency of specific institutions with a 'public interest' element, such as insurance or insurance broking companies (the Insurance Act), securities exchanges or securities market (the Securities and Futures Act), electricity licensees (the Electricity Act) and railway licensees (the Rapid Transit Systems Act), Singapore has not enacted legislation to deal with financial difficulties of institutions solely on the grounds that such institutions are 'too big to fail'.

Secured lending and credit (immoveables)

6 What principal types of security are taken on immoveable (real) property?

The principal types of security taken on immoveable (real) property are legal mortgages and equitable mortgages.

Secured lending and credit (moveables)

7 What principal types of security are taken on moveable (personal) property?

The most common form of security taken on moveable property is a charge, either fixed or floating. Pledges, liens and retentions of title are less common and less popular.

Unsecured credit

8 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

If an unsecured creditor has obtained a final judgment from the courts in its favour but is still unable to obtain payment from the debtor, it may seek to enforce judgment for the payment of a debt in the following ways:

- issuing a writ of seizure and sale over moveable or immoveable property;
- applying to garnish any debt due or accruing to the debtor from some third party, including money in a bank account; or
- applying for the appointment of a receiver by way of equitable execution.

Such applications, if not heavily contested, will usually take about 21 days from the date of the filing of the writ.

The creditor may also seek to wind up the debtor. The process of applying for a winding up usually takes about 21 days to about 35 days from the date of the application to wind up to the date a winding-up order is obtained. Subsequently, the liquidation and distribution of the company's assets by the liquidator may take from six months to two years, but the length of time taken will ultimately depend on the complexity of the company's operations and whether there are any disputes.

There are no provisions dealing with 'pre-judgment attachments' as such but where court proceedings have been commenced, a creditor may apply for an injunction to freeze the debtor's assets if it can show that there is a risk that it will dissipate them and thereby frustrate any judgment obtained against it.

Where a foreign creditor seeks to bring proceedings against a debtor in Singapore, no special procedures apply except that it may be required to provide security for the debtor's legal costs (in the event costs are awarded against that foreign creditor). Where a foreign creditor has already obtained a foreign judgment against the Singaporean debtor, it may register the judgment with the Singapore courts and, once registered, the judgment may be enforced as if it were a local judgment. This procedure is only available if the foreign judgment is one that falls under the Reciprocal Enforcement of Foreign Judgments Act or the Reciprocal Enforcement of Commonwealth Judgments Act. If the judgment is one that falls outside these two acts, the foreign creditor will need to commence proceedings to sue on the foreign judgment as a debt.

Voluntary liquidations

9 What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

A debtor's voluntary winding up may be commenced by its members. To commence a members' voluntary liquidation, the company's board of directors must make a statutory declaration that they have inquired into the affairs of the company and are of the opinion that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up. The members should then pass a special resolution to voluntarily wind up the company. They will have to pass an ordinary resolution to appoint a liquidator for the purposes of winding up the affairs and distributing the assets of the company.

If no statutory declaration of solvency is made by the directors, the liquidation will proceed as a creditors' voluntary winding up. In addition to the special resolution of the members to voluntarily wind up the company, the company must also convene a meeting of its creditors to consider the proposal for a voluntary winding up. The company will appoint a liquidator, subject to any preference the creditors may have as to the choice of liquidator.

The company must cease to carry on its business. The corporate state and powers of the company will, notwithstanding anything to the contrary in its articles of association, continue until it is dissolved. Any transfer of shares, not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members made after the commencement of the winding up, will be void.

Involuntary liquidations

10 What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects?

To involuntarily wind up a company, a creditor must apply to court. For the court to grant its application, it must establish that the company is unable to pay its debts either on the basis of the cash-flow test (ie, the company is unable to pay its debts as they fall due) or the balance-sheet test (ie, its liabilities exceed its assets). The applicant may also show that the company has failed to pay a sum demanded (where the sum must exceed S$10,000) within three weeks after the demand, or that execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company was returned unsatisfied in whole or in part.

If the court orders that the company be wound up, the winding up is deemed to have commenced at the time of presentation of the application. Once a winding-up order is made (or provisional liquidator appointed), there is an automatic stay of any action against the company, and no action or proceeding may proceed, or be commenced, except by leave of the court. Any disposition of the company's property or any share transfer made after the commencement of the winding up is void unless the court orders otherwise.

Voluntary reorganisations

11 What are the requirements for a debtor commencing a formal financial reorganisation and what are the effects?

The Act provides for two forms of formal financial reorganisation: a scheme of arrangement pursuant to section 210 of the Act or a judicial management under Part VIIIA of the Act. While only the company may apply for a scheme of arrangement, both the company and its creditors may apply for an order of judicial management. As the question refers to a debtor commencing a financial reorganisation, we look here only at the scheme of arrangement. Judicial management will be dealt with in question 12.

To propose a scheme of arrangement, the company must apply to court for an order summoning a meeting of the creditors of the company, the members of the company, the holders of units of shares or class of holders or units of shares of the company, or a class of such persons. If the court grants the order, the company must send out a notice summoning the meeting and the notice must contain a statement explaining the effect of the proposed compromise or arrangement. The proposal must be approved at the meeting by a majority in number representing three-quarters in value of each class of creditor or member present and voting at the meeting, unless the court orders otherwise. If the meeting approves the scheme, it must be approved by the court, which may grant its approval subject to such alterations or conditions as the court thinks just.

A scheme of arrangement that has been thus approved is binding on all creditors and members of the company.

Involuntary reorganisations

12 What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

A company or its creditors may apply to court for an order that the company be placed under the judicial management of a person known as a judicial manager. The court may grant such an order if it is shown that the company is or will be unable to pay its debts but that there is a reasonable prospect of rehabilitating the company or of preserving all or

part of the business as a going concern, or that otherwise the interests of creditors would be better served than by resorting to a winding up.

If the court grants an order for judicial management, the business and property of the company will be managed by a judicial manager for a period of 180 days subject to any further extensions that the court may grant and the board of directors becomes functus officio. In addition, during the period of the judicial management:

- the company may not be wound up;
- no receiver and manager of the whole of the company's property may be appointed; and
- there will be a moratorium on legal proceedings against the company and any steps to enforce any security or quasi-security save with leave of court or the consent of the judicial manager.

Mandatory commencement of insolvency proceedings

13 Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result? What are the consequences if a company carries on business while insolvent?

There is no express duty on a company to commence insolvency proceedings at any particular time. However, various rules apply to the directors of a company that has become insolvent and directors may choose to commence insolvency proceedings in order to avoid the effects of these rules:

- A director or other officer of a company may be criminally liable if he or she is knowingly a party to the contracting of a debt when he or she had no reasonable or probable ground of expectation at the time of the company being able to pay the debt. He or she may also be declared personally liable without limitation of liability for the payment of the whole or any part of the debt.
- A director's fiduciary duty to act in the company's best interest will, when the company is insolvent or near insolvent, also include taking into account the interests of its creditors. While creditors may not sue the director for a breach of this duty, the company (acting through its liquidators) may do so.

A company is generally not precluded from carrying on business while insolvent. However, the liquidator of the company has the power to recover property of the company which has been improperly dissipated while the company was insolvent, by avoiding the transaction as either an unfair preference or a transaction at an undervalue (see question 39).

Doing business in reorganisations

14 Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities? What powers can directors and officers exercise after insolvency proceedings are commenced by, or against, their corporation?

Where a company is not currently insolvent but is reorganising under a scheme of arrangement, there is no legal prohibition against the company continuing to carry on business. Its ability to carry on business will depend on the terms of any agreement with its creditors. Any conditions applicable to the use or sale of the assets of the business or whether any special treatment is given to creditors who supply goods or services after the filing is determined by the terms of any agreement between the company and its creditors. Creditors who supply goods or services to allow the company to carry on business during the scheme of arrangement are usually provided special treatment for such debts to be paid for in preference to other creditors in order for the company to continue its business. While there is often a scheme manager administering the scheme of arrangement, the powers of the company's directors remain intact and unaffected.

Where the company is under judicial management, the judicial manager will take over the management of the company from its board of directors, and he or she is empowered to do all such things as may be necessary for the management of the affairs, business and property of the company. In addition, company property that is subject to a security or quasi-security may be sold as if it were unencumbered if the judicial manager obtains the authorisation of the court and provided that the proceeds are used toward discharging the secured debt.

The company's creditors must be given a statement of the judicial manager's proposals for achieving the survival of the company as a going concern (or achieving any other purpose for which he has been appointed). Such proposals would include the use or sale of the assets of the business or whether any special treatment is given to creditors who supply goods or services during the period of judicial management. They vote on whether to accept those proposals, with or without modification. Once approved, the judicial manager must manage the company's affairs, business, and property in accordance with the proposals. The creditors may establish a committee to monitor the judicial manager's progress. Any revisions require the approval of a majority of the creditors. A creditor may also seek relief from the court on the ground that the company's affairs, business or property is being managed by the judicial manager in a manner that is unfairly prejudicial to the interests of the creditors or members. The court has wide powers to grant relief if such a situation is established.

Stays of proceedings and moratoria

15 What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

After a winding-up application is presented, there is no automatic stay of legal proceedings against the company. Instead, the court has discretion to make an order staying or restraining further proceedings in the action or proceedings on the application of the company, a creditor or a contributory. Once a winding-up order is made or a provisional liquidator appointed, there is an automatic stay of proceedings against the company unless the court gives leave for the proceedings to continue. Such leave will be granted if the court considers that, on the balance of convenience and the demands of justice, it is necessary that the action be continued. Conversely, leave will not be granted if it can be shown that the claim is one that could just as easily be dealt with in the winding up.

Upon the filing of a judicial management application, no order to wind up the company can be made and no legal proceedings (including enforcement of security) may be commenced or continued against the company or its property except with leave of the court. This moratorium continues upon the granting of an order for judicial management, but upon the granting of the judicial management order, apart from the court granting leave for proceedings to commence or continue, the judicial manager also has the power to allow individual claims against the company to proceed. In deciding whether to grant leave, the court will balance the interests of the applicant against the interests of the other creditors in seeking to give effect to the objectives of judicial management and the purpose of the moratorium, having regard to all the circumstances of the case and the likelihood of adverse consequences to the interested parties.

There is no automatic moratorium on actions against the company while a scheme of arrangement is being proposed. However, an application may be made to court for an order that proceedings pending against the company be stayed. A court will consider whether there is a scheme with sufficient particulars to enable it to assess that it is feasible and merits due consideration by the creditors when it is eventually placed before them in detailed form. The court also has to be satisfied that there is or that there would be a bona fide application.

Post-filing credit

16 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

A liquidator is expressly empowered under the Act to raise any money required for the expenses of the liquidation by giving security over the assets of the company. If unsecured loans have been taken out by the liquidator post-liquidation, the post-liquidation creditors are entitled to priority over the pre-liquidation creditors if the loan was necessary for the beneficial realisation of the company's undertaking.

A judicial manager is expressly empowered under the Act to borrow money and grant security in respect of such loans over the property of the company.

Set-off and netting

17 To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

In a winding up, contractual and equitable rights of set-off are displaced by statutory set-off provisions. Credits, debts or other dealings may be set off against each other only if they are mutual. Also excluded from any set-off are debts or liabilities that are not provable in bankruptcy or which arise by reason of an obligation incurred at a time when the creditor had notice that a winding-up application relating to the company was pending.

When a company is under judicial management, the moratorium on civil proceedings does not include self-help remedies such as contractual set-off (*Electro Magnetic (S) Ltd (under judicial management) v Development Bank of Singapore Ltd* [1994] 1 SLR 734).

Sale of assets

18 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

The sale of specific assets of companies pursuant to schemes of arrangement or under judicial management or by the liquidator is treated no differently from the sale of assets in any other situation. As a general rule, liabilities do not pass with assets but the owner of a new asset may take it subject to any encumbrances as to title that may have affected the seller. Stalking horse arrangements and credit bidding are not common but, in theory, are accepted as being possible. Although there is no reported decision on whether the Singapore Court would accept a credit bid, the Court would probably look at certain factors which include, inter alia, whether the bidder is a secured creditor or an unsecured creditor, whether the bid is made for secured collateral only or includes other assets, and whether the sale of the assets is a part of a reorganisation plan or a stand-alone sale. A creditor who was assigned rights by way of a legal assignment of the rights of a secured creditor should in theory be allowed to place a credit bid as this was a right that was vested with the original secured creditor.

Intellectual property assets in insolvencies

19 May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

Whether an IP licensor or owner may terminate a debtor's right to use intellectual property assets licensed to it while the debtor is subject to winding-up proceedings depends on the terms of the licence agreement entered into between the parties. Quite commonly, the insolvency of the licensee is an event of default under the licence agreement that entitles the licensor to terminate the licensee's rights to use the licensed assets. A liquidator has no better right than the insolvent licensee and would not ordinarily be entitled to terminate the insolvent licensee's agreement with a licensor or owner of intellectual property rights and continue to use these rights or assets for the benefit of the insolvent licensee unless this is contractually provided for in the licence agreement. However, it would be highly unlikely that the terms of a licence agreement would so provide.

Personal data in insolvencies

20 Where personal information or customer data collected by an insolvent company is valuable to its reorganisation, are there any restrictions in your country on the use of that information in the insolvency or its transfer to a purchaser?

Protection of personal data in Singapore is regulated under the Personal Data Protection Act 2012 (the PDPA). Pursuant to the Fourth Schedule to the PDPA, an organisation may disclose personal data about an individual without the consent of the individual in the circumstances set out therein. Specifically, one of the circumstances is when personal data is disclosed to a party or a prospective party to a business asset transaction with the organisation (paragraph 1(p) of the Fourth Schedule to the PDPA). 'Business asset transaction' means the purchase, sale, lease, merger or amalgamation or any other acquisition, disposal or financing of an organisation or a portion of an organisation or of any of the business or assets of an organisation other than the personal data to be disclosed under paragraph 1(p).

The disclosure under paragraph 1(p) is subject to the following conditions:

- the personal data are about an employee, customer, director, officer or shareholder of the organisation;
- relate directly to the part of the organisation or its business assets with which the business asset transaction is concerned; and
- in the case of disclosure to a prospective party to a business asset transaction:
  - the personal data must be necessary for the prospective party to determine whether to proceed with the business asset transaction; and
  - the organisation and prospective party must have entered into an agreement that requires the prospective party to use or disclose the personal data solely for purposes related to the business asset transaction.

Finally, if the organisation enters into the business asset transaction, the employees, customers, directors, officers and shareholders whose personal data are disclosed shall be notified that the business asset transaction has taken place and that the personal data about them has been disclosed to the party.

Rejection and disclaimer of contracts in reorganisations

21 Can a debtor undergoing a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

The making of a judicial management order does not (unless contractually specified) affect the contracts to which the company is a party. The judicial manager does not have the liquidator's power to disclaim onerous contracts; nor does he have the receiver's powers to cause the company to breach its contracts. The judicial manager has the statutory power to adopt a contract, pursuant to which personal liability will be attached, subject to any disclaimer. For contracts not adopted by the judicial manager, the judicial manager may choose not to perform them, following which the other contracting party may claim for damages for non-performance of the contract by the company. This is subject, however, to any contracts that may be avoided as unfair preferences and transactions at an undervalue, as to which see question 39.

The judicial manager is personally liable for any contract entered into or adopted by him unless he disclaims the liability. However, as an agent of the company the judicial manager is entitled to be indemnified out of the assets of the company in respect of this liability.

Arbitration processes in insolvency cases

22 How frequently is arbitration used in insolvency proceedings? Are there certain types of insolvency disputes that may not be arbitrated? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?

Our answer to question 15 as to moratoria applies equally to arbitration proceedings for contractual and other civil disputes. However, the insolvency proceedings themselves and claims arising from statutory insolvency provisions are non-arbitrable, especially when third-party creditors of the insolvent company would be affected (*Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] SGCA 21).

Successful reorganisations

23 What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?

There are no mandatory features required of a scheme of arrangement under section 210 of the Act. The scheme must be approved by a majority in number representing three-quarters in value of the creditors or class of creditors or members or class of members present and voting at the meeting. Separate meetings for each class will need to be called, and the test for determining the constitution of classes is that a class should comprise those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.

A scheme may incorporate the involvement or participation of an outsider who is neither a member nor a creditor of the company, but its binding force in relation to that outsider is derived from the scheme as a contract, or some other contract between that outsider and the company, and not the order of court. The scheme may also incorporate an express term requiring creditors to release guarantors of the company's obligations, although such a provision would have to be enforced by the company, and not, it would seem, by the guarantors who are non-parties.

The above issues do not arise in a judicial management.

Expedited reorganisations

24 Do procedures exist for expedited reorganisations?

There are no formal procedures for expedited or 'pre-packaged' reorganisations in Singapore. However, the Court of Appeal in Singapore has noted that all matters relating to schemes of arrangement should be done on an expedited basis as time is of the essence in such matters (*The Royal Bank of Scotland NV and another v TT International Ltd* [2012] SGCA 9).

Unsuccessful reorganisations

25 How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

A scheme of arrangement will be defeated if it fails to secure the requisite statutory majority of votes in its favour (as to which see question 23) or the sanction of the court (even if the requisite statutory majority of votes is obtained). In deciding whether to sanction the proposed scheme, the court will consider whether the statutory procedure has been complied with, whether the resolutions are passed by the requisite majority in value and in number at meetings duly convened, whether the classes of creditors are fairly represented by those who attended the meeting, whether the scheme is fair and reasonable, and whether the company's creditors have been provided with sufficient information in order for them to make an informed decision. Where the creditors have passed the necessary resolutions, the court will generally not interfere with their decision as the creditors would be in a better position to determine for themselves what is in their commercial interests. However, if the court is not satisfied as to the bona fides of the resolutions, it may decline to approve the scheme of arrangement.

The terms of the approved scheme will usually set out the consequences of any breach by the company of the provisions therein. For example, it may be stipulated that the failure by the company to make payment of an instalment to the creditors will result in the termination of the scheme. However, it is also possible to include a fixed 'cure period' in the scheme document conferring upon the company the right to remedy any default by it within the 'cure period' stipulated.

A judicial management order may be prematurely discharged if:

- the creditors decline to approve the judicial manager's proposals;
- the court so orders by reason of the judicial manager acting in a manner unfairly prejudicial to the creditors or members; or
- it appears on the application of the judicial manager that the purposes of the judicial management order cannot be discharged.

When the judicial management order is discharged, the judicial manager automatically vacates office.

Insolvency processes

26 During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

We approach this question with respect to a court-ordered winding up of a company. It should be noted that a company may also be voluntarily wound up by creditors when it is insolvent.

Once the court has ordered a company to be wound up, it will appoint a liquidator. Within 14 days of his or her appointment, the liquidator must lodge with the Registrar of Companies and with the official receiver a notice of his appointment and of the situation of his or her office.

Within 14 days from the date of the winding-up order, the directors and such other persons specified in the Act must submit to the liquidator a statement as to the affairs of the company as at the date of the winding-up order showing:

- the particulars of its assets, debts and liabilities;
- the names and addresses of its creditors;
- the securities held by them respectively;
- the dates when the securities were respectively given; and
- such further information as is prescribed or as the liquidator requires.

The liquidator must then as soon as practicable submit a preliminary report to the official receiver:

- as to the amount of capital issued, subscribed and paid up and the estimated amount of assets and liabilities;
- if the company has failed, as to the causes of the failure; and
- whether, in his or her opinion, further inquiry is desirable as to any matter relating to the promotion, formation or failure of the company or the conduct of the business thereof.

The liquidator may summon general meetings of the creditors or contributories for the purpose of ascertaining their wishes, and he must do so if so required by the creditors or contributories. Otherwise, he or she may exercise his or her own discretion in the management of the affairs and property of the company and the distribution of its assets.

The company's creditors and contributories may require the appointment of a committee of inspection to act with the liquidator, but no such committee need be appointed if not so required. Where no committee of inspection is appointed, the official receiver will act in its stead. For more on the committee of inspection, see question 28.

After a period of six months from the date of appointment, the liquidator must within one month lodge with the official receiver an account of his or her receipts and payments and a statement of the position in the winding up, and this must be done every six months thereafter. Upon such lodgement, the liquidator must notify every creditor and contributory that the account has been made up. The notification must be made when he or she next forwards any report, notice of meeting, notice of call or dividend. The notice must inform the creditors and contributories when and where the account may be inspected.

Creditors and contributories are also permitted to inspect the liquidator's minute books.

As a general rule, creditors may not bring proceedings against third parties in relation to losses suffered by the company. However, there are two exceptions where a creditor may apply to court rather than depending on the liquidator to do so: where the company has engaged in fraudulent trading, and where a promoter or an officer of the company has misapplied or retained or become liable or accountable for any money or property of the company or been guilty of any misfeasance or breach of trust or duty in relation to the company.

Can a reorganisation plan provide for release of liabilities owed by third parties not part of the debtor group?

A scheme of arrangement can release a debt owed by a third party where the scheme of arrangement expressly provides for such and if the requisite creditor approval has been obtained under the scheme.

Enforcement of estate's rights

27 If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

A creditor may not bring legal proceedings against a third party for and on behalf of the company in liquidation. As a practical matter, however, a creditor may take an assignment of the claim from the company in which case the right to the fruits of the claim will belong to him or her (*Re Vanguard Energy Pte Ltd* [2015] SGHC 156).

Creditor representation

28 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

As noted in question 26, in a compulsory liquidation, the general body of creditors and contributories can compel the appointment, and decide the composition, of a committee of inspection, which will consist of members of this general body.

The committee of inspection plays a supervisory role in relation to the liquidator, who has a duty to have regard to their directions in administering the assets of the company. In addition, the liquidator must be authorised by the committee of inspection (or the court) to do any of the following:

- carry on business for more than four weeks after the making of the winding-up order;
- pay any class of creditors in full;
- compromise claims by or against the company; and
- appoint solicitors to assist in his or her duties.

Court sanction is required for any member of the committee of inspection to receive payment for services rendered by him or her in connection with the administration of the assets, or for any goods supplied by him or her to the liquidator for or on account of the company. Such sanction may only be ordered where the service performed is of a special nature. In addition, the express sanction of the court is required for the payment of any remuneration to a committee member for services rendered by him or her in the discharge of the duties attaching to his or her office as a member of such committee.

In a judicial management, the creditors may appoint a committee to supervise the judicial manager. This committee cannot interfere with the management of the company, but may require the judicial manager to furnish it with such information as it may require.

Insolvency of corporate groups

29 In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes? May assets be transferred from an administration in your country to an administration in another country?

As each member of a corporate group is a separate legal entity, insolvency proceedings involving companies within the corporate group proceed separately. The assets and liabilities of each company within a corporate group are also dealt with separately. Assets can be transferred from a company in liquidation with a branch in Singapore to the main liquidation overseas, but this is subject to the assets in Singapore being used to settle all liabilities in Singapore first (see question 47).

Appeals

30 What are the rights of appeal from court orders made in an insolvency proceeding? Does an appellant have an automatic right of appeal or must it obtain permission to appeal? Is there a requirement to post security to proceed with an appeal and, if so, how is the amount determined?

Court orders made in an insolvency proceeding may be appealed as of right. Generally, there is no specific requirement to post security in relation to such an appeal.

Claims

31 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Are there provisions on the transfer of claims? Must transfers be disclosed and are there any restrictions on transferred claims? Can claims for contingent or unliquidated amounts be recognised? How are the amounts of such claims determined?

Once a winding up has commenced, the liquidator will issue a notice calling on the company's creditors to lodge a proof of debt on a date specified in the notice (as determined by the liquidator). This date must be at least 14 days after the date of the notice. The notice itself must be made in the following three ways:

- by advertisement in such newspaper as the liquidator thinks is convenient;
- writing to every person who, to the knowledge of the liquidator or judicial manager, claims to be a creditor of the company and whose claim has not been admitted; and
- writing to every person mentioned in the statement of affairs as a creditor who has not proven its debt.

A proof of debt must, in any event, be filed by a creditor within three months after the winding-up order is made.

All debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, are admissible to proof against the company. Upon receiving the proofs, the liquidator then assesses the proofs. Where the value of the debt does not bear a certain value, the liquidator may make a just estimate of it. A creditor who is dissatisfied with the decision of the liquidator may appeal to the court.

A creditor proving his debt shall deduct therefrom all trade discounts, but he shall not be compelled to deduct any discounts, not exceeding 5 per cent on the net amount of his claim, which he may have agreed to allow for payment in cash.

Interest can be claimed by a creditor up to the rate of 5.33 per cent per annum from the time when the debt or sum was payable until the time of payment.

Modifying creditors' rights

32 May the court change the rank of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

The priority of creditors claims are governed by the Act, and the court may not change the rank of a creditor's claim. Pursuant to section 300 of the Act, all unsecured property of a company must be applied pari passu in satisfaction of its liabilities.

Priority claims

33 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

Secured creditors need not prove their debts but can realise their security and obtain full satisfaction. If the security is inadequate, they may prove as unsecured creditors for the balance.

For unsecured creditors, the Act provides that the following preferential debts have priority (in the order set out below) over a floating charge holder and over other unsecured creditors, in order of priority:

- costs and expenses of the winding up;
- wages and salaries of employees up to a maximum of five months' salary or S$12,500 (whichever is less), with the remainder being an unsecured debt;
- retrenchment benefits and ex gratia payments under the Act up to a maximum of S$12,500, with the remainder being an unsecured debt;
- compensation to an employee for injuries suffered in the course of employment under the Work Injury Compensation Act;
- amounts due in respect of contributions payable during the 12 months before, on or after the commencement of the winding up by the employer of any person relating to employees' superannuation or provident funds;
- remuneration in respect of holiday leave;
- taxes; and
- gratuity and retrenchment benefits under the Employment Act.

The cap of five months' salary or S$12,500 applies to the total amount of wages or salaries and retrenchment benefits or ex gratia payments that may be due.

Employment-related liabilities in restructurings

34 What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?

In a liquidation, various employee claims are classed as preferential debts. See question 33.

Pension claims

35 What remedies exist for pension-related claims against employers in insolvency proceedings and what priorities attach to such claims?

Pension-related claims against employers in insolvency proceedings are granted priority under the Act if the pension is an approved scheme under Singapore law. Such claims are granted priority as long as they are payable during the 12 months before, on or after the commencement of the winding up by the employer.

Environmental problems and liabilities

36 In insolvency proceedings where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

There is no legislation in Singapore which relates to responsibility for environmental problems caused by companies specifically involved in insolvency proceedings. Generally, legislation which relates to environmental issues accords the relevant government authorities with broad powers to require any person (which would include any company or association or body of persons, corporate or unincorporated) who has caused the environmental problem to remediate the damage caused. As such, the relevant government authority could require the insolvency administrator in charge of the insolvent company or any other third party that had caused the environmental problem to remediate the damage caused (see for example, section 18 of the Environmental Protection and Management Act).

The environmental-related legislation also generally imposes personal liability on any person (be it an insolvency administrator, officers or directors of the company or otherwise) who has committed an offence and/or is complicit in the commission of an offence as stipulated under the relevant legislation.

Liabilities that survive insolvency proceedings

37 Do any liabilities of a debtor survive an insolvency or a reorganisation?

No liabilities will survive the liquidation and dissolution of an insolvent company. Similarly, in the case of a scheme of arrangement, no liabilities of any creditors will survive if all payments are successfully made pursuant to the scheme (although an unliquidated tort claim covered by insurance may be an exception to this rule): *SAAG Oilfield Engineering (S) Pte Ltd (formerly known as Derrick Services Singapore Pte Ltd) v Shaik Abu Bakar bin Abdul Sukol* [2012] SGCA 7.

Distributions

38 How and when are distributions made to creditors in liquidations and reorganisations?

This question is relevant only for liquidations. A liquidator may, from time to time, declare interim dividends. Once he or she has fully realised all the company's assets, a final dividend will be declared. In either case, before declaring a dividend, the liquidator must give notice of his or her intention to do so. The notice is to be made no more than two months before the declaration. It is to be published in the gazette, and written notice must be sent to every creditor mentioned in the statement of affairs who has not proved its debt.

Transactions that may be annulled

39 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?

A liquidator and a judicial manager have the power to set aside unfair preferences and transactions at an undervalue given when a company was insolvent or as a result of which the company became insolvent. A transaction at an undervalue can be challenged if it took place within five years before the presentation of a winding-up application. An unfair preference which is not also a transaction at an undervalue and which is given to an associate of the company can be challenged if it took place within two years before the presentation of the winding-up application. Any other unfair preference can be challenged if it took place within six months before the presentation of the winding-up application.

A floating charge on the undertaking or property of a company created within six months of the commencement of the winding up is invalid except to the amount of any cash paid to the company at the time of or subsequently to the creation and in consideration of the charge together with interest on that amount at the rate of 5 per cent per annum unless it can be proved that the company was solvent immediately after the creation of the charge.

A liquidator is empowered to recover the excess consideration or excess value received by directors of a company on a sale to or purchase from the company of property for a consideration other than shares occurring within the two years before the commencement of the winding up. Where what was sold to the directors is a business, the liquidator can also recover any goodwill or profits that might have been made from the business.

Any security created by a registrable but unregistered charge is void against the liquidator of the company or any creditor of the company.

Dispositions of the property of the company, including things in action, and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the court will be void, unless the court orders otherwise. Conveyances of property with intent to defraud creditors are also voidable.

Proceedings to annul transactions

40 Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

Voidable transactions may only be attacked by a liquidator or judicial manager, with the exception of transactions defrauding

Update and trends

As part of the Ministry of Law's ongoing review of the insolvency laws of Singapore, the Insolvency Law Review Committee was appointed in late 2010 to review the existing the existing bankruptcy and corporate insolvency regimes. The committee issued its final report in 2013, wherein it recommended the enacting of a new omnibus Insolvency Act that would consolidate and update the core areas of Singapore's bankruptcy and corporate insolvency laws. The Ministry of Law has also obtained public feedback on the report, where general consensus regarding the new omnibus Insolvency Act was received. We understand that the relevant authorities are currently preparing the draft of the omnibus Insolvency Bill. The reforms include, among others, allowing for super-priority for rescue financing, cram-down provisions similar to those in US Chapter 11 proceedings, judicial management being made available to foreign companies and the adoption of the UNCITRAL Model Law on Cross-Border Insolvency.

In addition, a second committee was formed in 2015 (the committee to strengthen Singapore as a restructuring hub) to facilitate cross-border restructurings in Singapore. The recommendations include, among others, super priority liens, an automatic one-month moratorium when a scheme of arrangement is applied for, the moratorium being extraterritorial to the extent that it restrains creditors subject to the jurisdiction of the Singapore courts. Further, to facilitate a group restructuring, injunctive relief may be obtained to restrain proceedings against related entities.

creditors, which may be attacked by any person thereby prejudiced. See question 39 regarding the relevant time periods.

Directors and officers

41 Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

While the company's directors and officers are not generally personally liable for their corporation's obligations, they may be held personally liable if they have breached certain provisions in the Act. For example, breach of directors' fiduciary duties to the company under section 157; wrongful trading under section 339(3); or fraudulent trading or misfeasance under sections 340 and 341 respectively. See question 13 for more information.

Groups of companies

42 In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

Parents and affiliated corporations are treated as separate legal entities and as such will, in the majority of cases, not be held responsible for the liabilities of their subsidiaries or affiliates unless the court is of the view that the corporate veil of the companies should be pierced. This would only be done in exceptional circumstances such as when the corporate veil is a mere facade that is concealing the true facts, or when the group is essentially trading or acting as one company. While it is possible in theory, it is unlikely that a court will order a distribution of group company assets pro rata in the absence of strong reasons to pierce the corporate veil of the companies involved.

Insider claims

43 Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?

No, there are no such restrictions insofar as those transactions from which the claim arises are not an unfair preference or transactions at an undervalue (see question 39 above).

Creditors' enforcement

44 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

A debenture holder may have the power, pursuant to a provision in the debenture, to appoint a private receiver and manager. Similarly, a legal mortgagee's power of sale can be exercised without resort to court provided the conditions under the mortgage for its exercise have arisen. A court order is necessary only if the mortgagor refuses to give up possession of the land voluntarily or if the lender wishes to foreclose instead of exercising his power of sale.

Corporate procedures

45 Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

If a company is not carrying on business or is not in operation, the Registrar of Companies may order that it be struck off the Register of Companies after sending or publishing the requisite notices. The company is dissolved upon the publication of the notice of dissolution in the gazette. The assets of the company, if any, are vested in the official receiver.

Conclusion of case

46 How are liquidation and reorganisation cases formally concluded?

At the end of a successful judicial management, if the objectives have been achieved the company will emerge from judicial management and carry on business. However, if the judicial management is unsuccessful, the judicial manager will apply to the court for the company to be wound up and a liquidator will be appointed.

In a court-ordered liquidation, the liquidator may apply to the court to be released and the company dissolved when he or she has realised the property of the company and issued a final dividend, if any.

International cases

47 What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Singapore is not a party to any international treaties with regard to cross-border corporate reorganisation and rescue matters. There is also no special statutory provision in Singapore that deals with cross-border insolvency, reorganisation and rescue issues. The adoption of the UNCITRAL Model Law on Cross-Border Insolvency has been recommended for adoption in Singapore in the future.

If a foreign company goes into liquidation in its place of incorporation or origin, it may be concurrently wound up in Singapore and a liquidator for Singapore will be appointed by the court. If the foreign company is registered in Singapore or has or intends to carry on business in Singapore, the liquidator may only recover and realise the assets of the foreign company in Singapore and must pay the net amount recovered and realised to the foreign liquidator after paying any debts and satisfying any liabilities incurred in Singapore by the foreign company. In paying off the foreign company's debts and liabilities in Singapore, the Singaporean regime for priority of debts will apply (*Tohru Motobayashi v Official Receiver & Another* [2000] 4 SLR 529). This ring-fencing provision does not apply to an unregistered foreign company or a company which does not carry on or intends to carry on business in Singapore (*Beluga Chartering GmbH (in liquidation) & Ors v Beluga Projects (Singapore) Pte Ltd (in liquidation) & Anor (deugro (Singapore) Ptd Ltd, non-party)* [2014] SGCA 14 (*Beluga Chartering*)).

If an insolvent foreign company, whether registered or not, is not concurrently wound up in Singapore, the application of the ancillary liquidation doctrine does not arise and any issues that arise before the Singapore courts would instead involve questions of recognition (ie, the recognition of the title of the foreign liquidator and the recognition of the foreign proceedings). Whether and how the Singapore court will render assistance to foreign winding up proceedings will depend on the circumstances of each case (*Beluga Chartering)*.

COMI

48 What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

The concept of COMI is not generally recognised in this jurisdiction. However, in *Re Opti-Medix Ltd (in liquidation)* [2016] SGHC 108, the Singapore High Court recognised a Japanese bankruptcy trustee's powers over a company incorporated in the British Virgin Islands, with operations in Japan based on the application of COMI principles. See question 47 on the ring-fencing of assets.

Cross-border cooperation

49 Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

See question 47.

Cross-border insolvency protocols and joint court hearings

50 In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

There are no cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries. There are no reported decisions of the Singapore courts where the court has communicated with or held joint hearings with courts in other countries in cross-border cases.

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