Singapore's enhanced corporate debt restructuring mechanisms – One year on

Just under a year has passed since the major overhaul of Singapore's insolvency and corporate restructuring laws through the Companies (Amendment) Act 2017 ("**CAA 2017**"). By incorporating proven and effective restructuring mechanisms available in other established insolvency regimes, Singapore has sought to create a conducive environment for novel corporate rescue and rehabilitation approaches. This was a significant step in the overall push to develop Singapore as a debt restructuring hub in the Asia Pacific region.

While the tools for restructuring introduced by CAA 2017 have not been fully utilised and some of the radical changes remain untested before the Singapore courts (there are presently only two reported cases that address the new amendments: *Re Zetta Jet Pte Ltd and others* [2018] SGHC 16 ("***Re Zetta Jet***") and *Re Attilan Group Ltd* [2017] SGHC 283 ("***Re Attilan Group***")), there still exists a healthy interest in these enhanced restructuring mechanisms, with a number of attempts to utilise these mechanisms seen by the end of 2017.

This Update takes a brief look at recent developments in respect of CAA 2017.

Utilisation of enhanced stay orders in support of restructuring

Power of Court to order stays in favour of debtor-company with worldwide effect

CAA 2017 empowers the Singapore courts to order stays in support of restructuring that have worldwide *in personam* effect. This means that so long as any creditor subject to the Singapore courts' *in personam* jurisdiction takes steps anywhere in the world contrary to the terms of any stay ordered by the Singapore courts, contempt proceedings may be commenced against that creditor in Singapore. Since the implementation of CAA 2017, Nam Cheong Limited, PT Bakrieland Development Tbk ("**Bakrieland**"), and EMAS Offshore Limited ("**EOL**") have been granted stay orders of this nature.

Safeguards for creditors at Court's discretion

To give creditors comfort, these stay orders come with built-in safeguards in the form of undertakings imposed on the debtor. The scope of such safeguards are at the court's discretion.

For example, in their application to the High Court under section 211B(1) of the Companies Act ("**CA**"), EOL was required by the court to provide relevant information in line with the wording of section 211B(6) of the CA. The High Court also expressly considered whether EOL would in any way be unable to meet any of the requirements of that provision.

On the other hand, in Bakrieland's application for a stay of proceedings under section 211B(1) of the CA, the High Court did not make any orders for Bakrieland to provide relevant information under section 211B(6) of the CA (as reflected in the Order of Court). Assuming there were no further supplementary orders of court, this suggests that there might be some discretion as to whether the applicant company will be ordered to provide the information set out in section 211B(6) of the CA to the court, in order to obtain a stay of proceedings under section 211B(1) of the CA. The Singapore courts have

not had occasion to provide a written decision in Bakrieland's case, but a possible threshold based on Bakrieland's application may simply be a requirement to submit sufficient information to satisfy a court that a creditor can assess the feasibility of any proposed scheme. This could lower the threshold to information which an applicant company may include in any brief explanatory statement to its creditors when it proposes its scheme of arrangement.

(Ir)relevance of section 210(10) of the CA?

The flexible approach the High Court has taken towards the enhanced stays introduced by CAA 2017 brings into question the relevance of section 210(10) of the CA, which also allows the court to grant a stay of proceedings (albeit only over existing proceedings, and without any extra-territorial effect). When the enhanced stays were first introduced by CAA 2017, it was thought that the ability to still rely on section 210(10) of the CA would appeal to debtors who may not be amenable to meeting the more onerous requirement to provide the laundry list of relevant information required under section 211B of the CA. However, the relevance of a section 210(10) stay is reduced if the order to provide relevant information under section 211B(6) of the CA is discretionary in nature.

Super-priority for rescue financing

CAA 2017 has also introduced super-priority rescue financing. The relevant provisions in section 211E of the CA were examined by the High Court in *Re Attilan Group*. While the issues that arose in that case did not allow the High Court to provide guidance on the substantive aspects of section 211E of the CA, the court helpfully clarified what is expected (procedurally) in an application for super-priority for rescue financing.

Re Attilan Group - some guidance on requirements for application under section 211E of the CA

Broadly, to obtain an order for super-priority under section 211E of the CA, apart from convincing the court to exercise its discretion to make the order, the applicant will need to establish that:

(a) the proposed financing constitutes "rescue financing" under section 211E(9) of the CA; and
(b) the condition(s) under the limb(s) of section 211E(1) of the CA which the application is being brought under has been met.

The High Court in *Re Attilan Group* has provided some clarification to prospective financiers by stating that the threshold for qualifying as "rescue financing" under section 211E CA will be met where:

(a) the debtor-company is undergoing some financial difficulty;
(b) a financier makes a proposal for financing that outlines the relevant terms and conditions; and
(c) the financier, if an existing creditor of the company, does not have any obligation to inject the funds that will be advanced as part of the proposal into the company.

In addition, the High Court in *Re Attilan Group* provided clarity on what is expected to be included in the application for super-priority under section 211E of the CA. It must at least be shown that:

(a) alternative sources of financing were sought but rejected, such as correspondence relating to any negotiations that took place with potential financiers;

(b) the alternative sources of financing in (a) must specifically not include the type of priority sought in the application; and
(c) the alternative sources of financing in (a) must have been sought before the application was made (some evidence should also be provided to support the belief that the terms on which priority is sought are the best possible ones the company can obtain).

The High Court in *Re Attilan Group* held that the applicant-company will also have to show that reasonable attempts were made to secure financing on a normal basis, where the order sought under section 211E of the CA is for the rescue financing to obtain priority as if it were a liquidation expense. This is despite the fact that the CA does not specifically prescribe this (as is the case with provisions such as section 211E(1)(b) of the CA).The High Court also clarified that applicants will need to satisfy the court of the above-mentioned matters on a balance of probabilities. Where this evidentiary threshold cannot be met, an application under section 211E of the CA will fail.

Additionally, drawing from case law on rescue financing in the United States of America ("**USA**"), the High Court in *Re Attilan Group* provided the following list of factors that it could consider when exercising its discretion to make any orders under section 211E of the CA:

(a) the proposed financing has to be in exercise of sound and reasonable business judgment;
(b) no alternative financing is available on any other basis;
(c) such financing is in the best interest of the creditors;
(d) no better offers, bids or timely proposals are before the court;
(e) the proposed credit transaction is necessary to preserve the assets of the estate and is necessary, essential and appropriate for the continued operation of the debtor's business;
(f) the terms of the financing agreement are fair, reasonable and adequate in the light of the circumstances of the debtor and proposed lender; and
(g) the financing agreement was negotiated in good faith and at arm's length between the debtor and the agents and the proposed lender.

The flexible and fact-centric approach taken by the Singapore courts towards section 211E of the CA suggests that Singapore may be able to support a broader rescue financing market as the use of enhanced restructuring mechanisms introduced by CAA 2017 among debtors (from Singapore and abroad) increases.

Assistance in respect of foreign insolvency proceedings

UNICITRAL Model Law on Cross-Border Insolvency adapted with modifications

Alongside developing itself as a centre for debt restructuring, Singapore has enhanced its ability to support restructurings that take place in foreign jurisdictions by adopting, through CAA 2017, the UNCITRAL Model Law on Cross-Border Insolvency ("**Model Law**"), with certain modifications to adapt it for application in Singapore.

Under the Model Law, the Singapore courts may refuse recognition of a foreign insolvency representative's appointment on the grounds of public policy. The High Court in the recent case of *Re Zetta Jet* provided some insight to the Singapore courts' approach towards the "public policy" consideration when granting recognition under the Model Law to a foreign representative appointed in foreign insolvency proceedings.

Re Zetta Jet – insight on "public policy" consideration in applications for recognition under the Model Law

In *Re Zetta Jet*, the debtor-company was placed in proceedings under Chapter 11 of Title 11 of the United States Code ("**US Bankruptcy Code**") (i.e., a supervised debt restructuring process) ("**Chapter 11 Proceedings**"). This was later converted to proceedings under Chapter 7 of the US Bankruptcy Code (i.e., a liquidation process) ("Chapter 7 Proceedings"). A trustee was appointed by the US Bankruptcy Court in the Chapter 11 Proceedings to manage the company. He was, subsequently, also appointed as the trustee in the Chapter 7 Proceedings. However, prior to his appointment (and after the Chapter 11 Proceedings had commenced), some of the shareholders of the company had sought and obtained an *ex-parte* injunction in Singapore to restrain the other shareholders and the company from taking any steps in the Chapter 11 Proceedings ("***Ex-parte* Injunction**").

The trustee appointed over the debtor-company (now in Chapter 7 Proceedings) then applied in Singapore for his appointment to be recognised under the Model Law. One of the issues before the Singapore court was whether the *Ex-parte* Injunction had any impact on the recognition of his appointment.

The High Court noted that under Singapore's adopted legislation based on the Model Law, recognition may be refused if it is "*contrary*" to public policy. This is contrasted with the template wording of the Model Law where recognition may be refused only if is "*manifestly contrary*" to public policy. The High Court noted that the deliberate omission of the word "manifestly" signifies that the standard of the public policy exclusion in Singapore would be lower than that in other jurisdictions where the Model Law has been enacted unmodified. Although declining to lay out the specific threshold for the public policy exclusion, the High Court in *Re Zetta Jet* emphasised that the standard would at least require the denial of an application by a foreign insolvency representative that was appointed under proceedings restrained by a Singapore court.

Of note is the High Court's understanding of the realities of foreign restructurings. Although acknowledging that the full recognition of the trustee appointed over the debtor-company in the Chapter 7 Proceedings in *Re Zetta Jet* may undermine the administration of justice in Singapore due to the *Ex-parte* Injunction being in force, the High Court still granted limited recognition to the trustee so as to give the company an opportunity to apply to set aside the *Ex-parte* Injunction. This stems from the High Court's recognition in *Re Zetta Jet* of a need to prevent covert actions by foreign insolvency professionals acting through the company to bypass the effects of ongoing or existing foreign insolvency proceedings.

Recognition of outcome of foreign restructuring proceedings under CAA 2017

While the Model Law provides an easier path for recognition and assistance to be rendered to foreign insolvency proceedings, this assistance may only go towards procedural matters. It is uncertain whether the Model Law allows recognition of the substantive outcome of a foreign insolvency or restructuring process.

Two Approaches: Recognition Approach and Interlocking Reorganisation Approach

Over the past year, two different approaches regarding the recognition of the outcome of foreign restructuring proceedings in Singapore have emerged, namely:

(a) where an applicant company applies for an order in Singapore for the recognition of the substantive outcome of a foreign restructuring process ("**Recognition Approach**"); and
(b) where an applicant company applies for leave from both the Singapore High Court and the US Bankruptcy Court to conduct a joint creditors' meeting, and for the restructuring proposal to be approved and sanctioned as both a scheme of arrangement in Singapore and a plan under Chapter 11 of the US Bankruptcy Code ("**Interlocking Reorganisation Approach**").

Recognition Approach applied

WongPartnership acted as the Singapore counsel in the restructuring of EMAS Chiyoda Subsea Limited and its subsidiaries ("**ECS Group**"), and successfully obtained recognition in Singapore of the substantive outcome of the ECS Group's restructuring under Chapter 11 of the US Bankruptcy Code ("**ECS Chapter 11 Plan**"). The court granted a declaration that "*all claims against the [debtor] are with effect from [the effective date of the ECS Chapter 11 Plan], validly, effectively and completely satisfied, discharged and released in exchange for the treatment to be accorded to them under the [ECS Chapter 11 Plan], pursuant to the [order of the US Bankruptcy Court approving ECS Chapter 11 Plan]*". Significantly, this means that the discharge of the applicant companies' debts (whether governed by foreign law or Singapore law) under the laws of the USA was recognised and given effect to under Singapore law. This is contrary to the English law position where an English law governed debt can only be validly discharged by a process under English law (i.e., the *Gibbs* principle).

Interlocking Reorganisation Approach being applied

In the restructuring of Ezra Holdings Ltd ("**Ezra**"), the proposal involved a plan under Chapter 11 of the US Bankruptcy Code, as well as a scheme of arrangement under the enhanced restructuring mechanism introduced by CAA 2017. Both the proposed scheme and plan are in the same document, with provisions included for the thresholds under both mechanisms to be met before either comes into effect. To facilitate such an "interlocking" multi-jurisdictional restructuring, Ezra has also put forth a proposed protocol (developed based on the Judicial Insolvency Network guidelines) for the US Bankruptcy Court (Southern District of New York) and the Singapore High Court to communicate and facilitate Ezra's cross-border restructuring.

Conclusion

The flexibility afforded by the enhanced restructuring framework under CAA 2017, combined with a forward-thinking and commercially aware bench, point to Singapore being in a good position to compete effectively against other major restructuring jurisdictions to become a debt restructuring centre in its own right in the near future.

If you would like information on this or any other area of law, you may wish to contact the partner at WongPartnership that you normally deal with or any of the following:

Joel CHNG
Partner – Banking & Financial Disputes Practices
d: +65 6517 8707
e: joel.chng@wongpartnership.com
Click here to view Joel's CV.

Stephanie YEO
d: +65 6517 3796
e: stephanie.yeo@wongpartnership.com

Muhammed Ismail NOORDIN
d: +65 6517 3760
e: Muhammedismail.KONoordin@wongpartnership.com

WPG MEMBERS AND OFFICES

- contactus@wongpartnership.com

SINGAPORE

-
WongPartnership LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore 018982
t +65 6416 8000
f +65 6532 5711/5722

CHINA

-
WongPartnership LLP
Beijing Representative Office
Unit 3111 China World Office 2
1 Jianguomenwai Avenue, Chaoyang District
Beijing 100004, PRC
t +86 10 6505 6900
f +86 10 6505 2562
-
WongPartnership LLP
Shanghai Representative Office
Unit 1015 Link Square 1
222 Hubin Road
Shanghai 200021, PRC
t +86 21 6340 3131
f +86 21 6340 3315

MYANMAR

-
WongPartnership Myanmar Ltd.
Junction City Tower, #09-03
Bogyoke Aung San Road
Pabedan Township, Yangon
Myanmar
t +95 1 925 3737
f +95 1 925 3742

INDONESIA

-
Makes & Partners Law Firm
Menara Batavia, 7th Floor
Jl. KH. Mas Mansyur Kav. 126
Jakarta 10220, Indonesia
t +62 21 574 7181
f +62 21 574 7180
w makeslaw.com

wongpartnership.com

MALAYSIA

-
Foong & Partners
Advocates & Solicitors
13-1, Menara 1MK, Kompleks 1 Mont' Kiara
No 1 Jalan Kiara, Mont' Kiara
50480 Kuala Lumpur, Malaysia
t +60 3 6419 0822
f +60 3 6419 0823
w foongpartners.com

MIDDLE EAST

-
Al Aidarous Advocates and Legal Consultants
Abdullah Al Mulla Building, Mezzanine Suite 02
39 Hameem Street (side street of Al Murroor Street)
Al Nahyan Camp Area
P.O. Box No. 71284
Abu Dhabi, UAE
t +971 2 6439 222
f +971 2 6349 229
w aidarous.com
-
Al Aidarous Advocates and Legal Consultants
Zalfa Building, Suite 101 - 102
Sh. Rashid Road
Garhoud
P.O. Box No. 33299
Dubai, UAE
t +971 4 2828 000
f +971 4 2828 011

PHILIPPINES

-
ZGLaw
27/F 88 Corporate Center
141 Sedeño Street, Salcedo Village
Makati City 1227, Philippines
t +63 2 889 6060
f +63 2 889 6066
w zglaw.com/~zglaw