Insolvency, Restructuring and Dissolution Bill passed

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AUTHORS

Tan Meiyen

Thenuga Vijakumar

Introduction

The much-anticipated Insolvency, Restructuring and Dissolution Bill was passed on 1 October 2018. The bill aims to ensure that Singapore's restructuring and insolvency laws remain relevant and progressive to support its position as a global restructuring hub.

The bill is the last of three phases implementing the recommendations from the Insolvency Law Review Committee in October 2013 and the Committee to Strengthen Singapore as an International Centre for Debt Restructuring in April 2016 to strengthen Singapore's debt restructuring ecosystem.

Phases 1 and 2

The first phase consists of amendments to the Bankruptcy Act in July 2015 to:

- encourage institutional creditors to exercise financial prudence when granting credit; and
- create a more rehabilitative discharge framework for bankrupts.

The second phase consists of amendments to the Companies Act in May 2017 to:

- enhance the corporate rescue and restructuring processes; and
- position Singapore as a forum of choice for debt restructuring.

Some of the major changes in the second phase include the following:

- Super-priority status for rescue financing has been introduced in both schemes as well as judicial management to grant rescue financiers a security interest over a company's property that is equal to or higher than the existing security interest provided that there is adequate protection for the existing security interest.
- In relation to schemes of arrangement, changes include:
  - the availability of an automatic stay on the filing of a stay application pending the formal hearing of the stay application;
  - the court's ability to order worldwide *in personam* stays against a wide range of acts including the enforcement of security against the company and future proceedings;
  - the extension of stays to companies relating to an entity undergoing a scheme of arrangement even when the companies are not themselves undergoing schemes;
  - the introduction of the ability to cram down dissenting classes of creditors; and
  - the availability of pre-packaged, expedited schemes that can be implemented with prior negotiations with major creditors without needing to call for a meeting of creditors.
- As regards judicial management, changes include:
  - the introduction of a lower threshold that companies need to meet to enter into a

judicial management. Companies must now demonstrate that they are 'likely to become' unable to pay their debts instead of 'will be' unable to pay their debts;
    - extending the judicial management regime to foreign companies with a sufficient connection to Singapore;
    - the introduction of an amendment to sanction any scheme proposed from more than 50% in number and more than or equal to 75% in value of creditors, as opposed to only 75% in value; and
    - the introduction of a requirement for secured creditors which oppose an application to show that making a judicial management order will cause disproportionately greater prejudice to them than the prejudice caused to unsecured creditors if the judicial management order is not made.
- As regards cross-border insolvency, the United Nations Commission on International Trade Model Law 1997 has been adopted to facilitate the recognition process for foreign insolvency and rehabilitation representatives and proceedings.

Phase 3

The third phase entails a holistic update of Singapore's insolvency and restructuring laws through the enactment of an omnibus legislation which will, among other things, consolidate personal and corporate insolvency and restructuring laws – which are presently governed by the Bankruptcy Act and the Companies Act, respectively – into the Insolvency, Restructuring and Dissolution Act. The Bankruptcy Act will be repealed and the provisions relating to corporate insolvency and restructuring in the Companies Act will be removed. There will no longer be a need to cross reference separate and different legislations. This will enhance the clarity, consistency and access to Singapore's insolvency and restructuring laws for businesses as well as restructuring and insolvency practitioners so that they will be able to carry out their functions without the need to navigate primary and subsidiary legislation when advising clients.

Regulatory regime over insolvency practitioners

Sections 47 to 60 of the Insolvency, Restructuring and Dissolution Act will establish a regulatory regime over practitioners that act as officeholders in restructuring and insolvency proceedings. The Ministry of Law's Insolvency and Public Trustee's Office will administer this regime, which will include the imposition of minimum qualifications and conditions for granting and renewing licences to practise as an insolvency practitioner.

Qualified persons who may be granted a licence include public accountants, chartered accountants and solicitors.

These sections will also introduce a disciplinary framework for errant practitioners in respect of breaches of conduct. A licensing officer will be empowered to:

- carry out investigations;
- require the production of documents and information; and
- issue written directions to an officeholder.

Other proposed amendments focus on enhancing the debt-restructuring regime to provide greater opportunity for the rehabilitation of companies in financial distress and are discussed in greater detail below.

Judicial management

Judicial management is a restructuring process in which a distressed company that has a reasonable probability of rehabilitation, or of preserving all or part of its business, is granted a moratorium against all claims made by creditors for a requested period and placed under the management of a court-appointed officer. The role of judicial management is to grant a financially distressed company breathing space to return to financial health. The present regime requires a company that wishes to enter judicial management to seek court approval for such an order.

The Insolvency, Restructuring and Dissolution Act will introduce a new Section 94, which will allow a company to be placed under judicial management by obtaining a resolution of its creditors, without the need to seek court approval for a judicial management order. A majority in number and value of

the company's creditors (present and voting) at a meeting convened under this section must resolve to place the company under judicial management.

Availability of third-party funding to judicial managers and liquidators

A second key change is the express empowerment of judicial managers and liquidators to assign the proceeds of actions relating to:

- transactions at an undervalue;
- unfair preferences;
- extortionate credit transactions;
- fraudulent and wrongful trading; and
- delinquent officers facilitating third-party funding.

In 2013 the Ministry of Law accepted the recommendation of the Insolvency Law Reform Committee that an action which is statutorily vested in a liquidator should not be assignable but instead remain vested in the liquidator. However, it was accepted that the liquidator may assign the fruits of statutory causes of action to third-party funders, provided that appropriate safeguards manage the extent to which a third-party funder can control the conduct of proceedings.

In 2015 in the case of *Re Vanguard Energy Pte Ltd* ([2015] SGHC 156) the High Court considered whether three shareholders of an insolvent company could fund its continuation of three court actions, as the liquidators of said company were unwilling to pursue the claims on account of the company's impecuniosity. After consideration, the High Court permitted the funding arrangement, the salient terms of which were as follows:

- The company will provide co-funding for 50% of the solicitor-and-client costs (up to $300,000) to pursue the claims and the three shareholders (the assignees) will fund the remainder of the costs, including party-and-party and other legal costs.
- Any sums recovered by the company are to be paid to it up to the sum that it has co-funded and then to the assignees. Any surplus will be paid to the company.
- The assignees will indemnify the company against any shortfall between the sum recovered and the amount co-funded, and for any damages, compensation, costs, security, interest or disbursements which the company agrees to or is ordered to pay, apart from what the company co-funds.
- The liquidator will retain full control of the legal proceedings save for the shareholders' agreement on the choice of solicitors and any settlement or discontinuance of the claim.
- All rights, title and interests of the company and liquidators over the recovered sums that equal the funds provided by the assignees will be sold to them by way of assignment.

In 2017 Singapore passed legislation that abolished the torts of maintenance and champerty and clarified that Singapore-seated international arbitrations may be funded by third parties to the arbitration.

More recently, in September 2018, the High Court granted the liquidators of Trikomsel Pte Ltd and Trikomsel Singapore Pte Ltd a declaration that a third-party funder may fund investigations and potential claims into the companies' corporate collapse. The judge declared that the proposed funding arrangement did not offend the common law on maintenance and champerty.

Section 99 of the Insolvency, Restructuring and Dissolution Act read with the first schedule and Section 144 of the bill in respect of judicial managers and liquidators, respectively, will empower judicial managers and liquidators to assign the proceeds of actions relating to:

- transactions at an undervalue;
- unfair preferences;
- extortionate credit transactions;
- fraudulent trading;
- wrongful trading; and
- delinquent officers facilitating third-party funding.

Section 204(2) of the Insolvency, Restructuring and Dissolution Act will also allow a creditor to

apply to the court to:

- issue an order prior to giving an indemnity for costs of litigation;
- recover assets, pay money or give an indemnity to protect or preserve any assets; or
- indemnify a liquidator in relation to the liquidator's expenses.

Read together with Sections 99 and 144 of the Insolvency, Restructuring and Dissolution Act, these provisions will expressly empower judicial managers and liquidators to engage and increase their access to third-party funding. The new sections in the Insolvency, Restructuring and Dissolution Act will expressly establish a judicial manager's and liquidator's ability to seek third-party funding.

Termination of winding up

Under the current regime, when an insolvent company becomes solvent or for some other reason finds that it should no longer be wound up, it can obtain only a stay of the winding-up proceedings for a limited period or permanently from the court. The winding-up proceedings cannot be terminated.

With the introduction of Section 186 of the Insolvency, Restructuring and Dissolution Act, the courts will be specifically empowered to terminate a winding up in addition to staying winding-up proceedings. The courts may also give such directions as they consider fit for the resumption of the company's management and control, including directions on electing directors through a general meeting of the company's members.

Summary process for company dissolution

The Insolvency, Restructuring and Dissolution Act will also introduce Sections 209 to 211 to provide for the early dissolution of a company where it is being wound up and the Official Receiver is the appointed liquidator. In the event that the Official Receiver has reasonable cause to believe that the company's realisable assets are insufficient to cover the expenses of the winding up and the affairs of the company require no further investigation, the company may be dissolved.

The Official Receiver may issue a notice that the company will be dissolved and struck off the register 30 days after the date of the notice unless:

- a different person is appointed for the purpose of continuing the liquidation; or
- an order is made that the company not be struck off and dissolved.

Such notice must be given to, among others, all creditors that have filed proofs of debt and all contributories of the company, and it must be advertised in at least one English-language local daily newspaper. An order that the company not be struck off and dissolved may be obtained on the ground that:

- its realisable assets are sufficient to cover the expenses of the winding up;
- the affairs of the company require further investigation; or
- early dissolution is inappropriate for any other reason.

Realisation of security

Section 223 of the Insolvency, Restructuring and Dissolution Act will require secured creditors of an insolvent company that is being wound up to realise their security within 12 months after the winding up's commencement, or such further period as the liquidator may determine, in order to be entitled to any interest in respect of their debt. Where a company is in judicial management and a secured creditor has obtained the leave of the courts or the judicial manager's consent to enforce their security, they must do so within 12 months after the date on which leave or consent was given, or such further period as the judicial manager may determine, in order to be entitled to interest in respect of their debt.

Wrongful trading

A company is said to have traded wrongfully if it incurs debts or liabilities without a reasonable prospect of meeting them in full when it is insolvent or becomes insolvent as a result of the incurrence of such debt.

Currently, company officers must be found to be criminally liable for wrongful trading before any application to impose civil liability for the same can be made. Section 239 of the Insolvency, Restructuring and Dissolution Act empowers the courts to declare that any person who was a knowing party to a company's wrongful trading is personally responsible for its debts or liabilities before criminal liability is established.

Foreign companies

Under Section 250 of the Insolvency, Restructuring and Dissolution Act, the liquidator of a foreign company that has established a place of business or carries on business in Singapore will be able to apply to the courts to appoint a liquidator to the foreign company for Singapore. The Singapore liquidator will be obliged to, among other things, obtain a court order if they intend to pay out any creditor of the foreign company to the exclusion of others. The Singapore liquidator must recover and realise only the assets of the foreign company in Singapore, unless otherwise ordered by court. They must also be satisfied that the interests of creditors in Singapore are adequately protected before paying any amount recovered and realised in Singapore to the foreign liquidator.

Restriction on* ipso facto *clauses

The Insolvency, Restructuring and Dissolution Act will also introduce a restriction on clauses which permit the termination or modification of a contract on the occurrence of a specified trigger event, such as:

- the insolvency of the company;
- an application to propose a scheme of arrangement; or
- the commencement of judicial management.

Known as '*ipso facto*' clauses and found in a wide variety of contracts, such clauses are based on the rationale that if a counterparty is, or is likely to become, insolvent then it will no longer be able to continue to perform the contract, resulting in an anticipatory breach of contract.

This automatic trigger poses great difficulties for companies seeking to restructure. Any chance that a company may have had of being saved as a going concern could be undermined or entirely lost through the automatic termination of key contracts. As a result, jurisdictions such as the United States and Australia have introduced legislation to restrict *ipso facto* clauses with the aim of maximising the chances of companies surviving rather than accelerating their demise.

The Insolvency Law Review Committee and the Committee to Strengthen Singapore as an International Centre for Debt Restructuring did not recommend introducing restrictions on the enforcement of *ipso facto* clauses when they issued their reports in 2013 and 2016, respectively. The committees considered, among other things, that the courts would be burdened by having to decide on the commercial benefits or risks of adopting certain contracts and decided that the imposition of such a burden was inappropriate.

However, industry feedback received in the past year (ie, between the second and third phases of the update of Singapore's insolvency and restructuring laws) has resulted in a reassessment of the need for such restrictions and a greater focus on affording a company the maximum opportunity to survive. As a result, Section 440 of the new Insolvency, Restructuring and Dissolution Act will limit the exercise of *ipso facto* clauses when the bill comes into force.

In this respect, the speed at which such feedback has been received and acted on reflects that legislators have kept their ears to the ground and is testament to Singapore's overall practical and pragmatic approach to its development as a global restructuring hub.

Comment

It is still early days, even for the amendments that came into force in 2017, and it is likely that the full effect of these latest changes will be seen only in a year or two. Nevertheless, Singapore's determination, coupled with its speed and efficiency in implementing change, will mean that these latest changes are unlikely to be the final chapter in its transformation into a global restructuring hub.

For further information on this topic please contact Tan Meiyen or Thenuga Vijakumar at Oon & Bazul LLP by telephone (+65 6223 3893) or email (meiyen.tan@oonbazul.com or thenuga.vijakumar@oonbazul.com). The Oon & Bazul LLP website can be accessed at www.oonbazul.com.

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