Approval for Super Priority Rescue Financing - What does an applicant need to show a Singapore court?

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Introduction

For the first time, the Singapore High Court has ruled on whether to grant 'super priority' for debts arising from rescue financing under the amended insolvency laws via the Companies (Amendment) Act 2017 (the Act). 'Super priority' was one of the central topics discussed in Dentons Rodyk's series of seminars for financial institution clients held in September 2017 over 3 days.

These provisions were inspired by the Chapter 11 bankruptcy process in the United States, allowing for "Debtor-In-Possession" (DIP) financing to be arranged by a company under the United States Bankruptcy Code 11 USC (Chapter 11) bankruptcy process.

In its decision, the Singapore High Court declined to grant priority status to funds to be advanced to the Attilan Group, finding that the applicant must first expend reasonable efforts to seek out non-priority sources of financing (and provide supporting evidence thereof), before seeking super priority rescue financing.

Below, we discuss the implications of the High Court's decision in *Re: Attilan Group Ltd* [2017] SGHC 283 (Re: Attilan) for companies seeking 'super priority' for debts arising from rescue financing.

Background & Executive Summary

The Singapore Parliament recently made extensive changes to Singapore's insolvency laws via the Companies (Amendment) Act 2017 (the Act). The amendments are part of Singapore's efforts to make it an international debt restructuring hub and include mechanisms to 'supercharge' scheme of arrangements, facilitate easier access to judicial management, and enhance moratoriums against creditors – all of which are intended to aid companies trying to navigate out of deep debt.

In September 2017, Dentons Rodyk conducted a seminar series over 3 days for financial institution clients which touched on these recent changes, where leading insolvency experts from Dentons US, UK and Australia provided a comparative perspective of the laws and shared their "war stories" from their jurisdictions.

One of the central provisions discussed during the Dentons Rodyk seminars was section 211E of the Companies Act (Cap. 50) relating to super priority for debts arising from rescue financing. Now, in Re: Atillan, the Singapore High Court has provided guidance to this new provision where the applicant sought, *inter alia*, for proposed rescue financing to be given super priority in the event of the applicant's winding up. This case is notable for being the first reported case on section 211E and provides an insight into how the Singapore court will approach this new provision in the future.

After considering both the parties' submissions, as well as taking guidance from similar provisions in, and US cases relating to Chapter 11, the High Court declined to grant super priority to the proposed rescue financing.

The Applicant must expend reasonable effort to seek out less disruptive sources of financing

In *Re: Attilan*, Attilan Group Limited (the Applicant) sought for sums to be disbursed by a subscriber under a subscription agreement to be treated as rescue financing and be afforded super priority over other creditors' claims (in the event of a winding up). The Applicant sought this in conjunction with a scheme of arrangement which would turn around its poor financial status. Phillip Asia Pacific Opportunity Fund Ltd, one of its creditors, (Phillip Asia) opposed both the scheme and the application for super priority.

The Honourable Justice Aedit Abdullah, notwithstanding Phillip Asia's opposition to the scheme to be put to the creditors, allowed the calling of a meeting of the Applicant's creditors to consider the scheme. However, the learned Judge rejected the application for super priority on several grounds. Most notably, the learned Judge noted that while the Companies Act was silent on the necessary standard of proof, the court "must be sufficiently satisfied on a balance of probabilities that there is a basis" to grant the application. In this regard, the company making the application must put forth evidence that it has taken **reasonable efforts** to attempt to secure financing that would not be disruptive to the expected priority of creditors.

In other words, a company must

i. first try to obtain financing without super priority terms and
ii. show in evidence that it has done so. Mere allegations or unsubstantiated assertions would hold no water with the Court.

The learned Judge further explained that having a requirement for hard evidence was grounded in policy, due to the disruptive nature of a successful super priority application.

Applying the above to the facts of *Re: Attilan*, the learned Judge agreed with Phillip Asia in that the Applicant had failed to show adequate evidence of any efforts, let alone reasonable efforts, being expended by it to secure funding without any super priority. While it was accepted on the face of the Applicant's affidavit that the Applicant had indeed entered into discussions and negotiations to seek out financing, it was not obvious that these negotiations were in respect of financing without super priority terms. There was no concrete evidence adduced, such as correspondence with financial institutions clearly indicating rejection or negotiation.

As such, it was correctly deduced that it would be "*next to impossible*" for the court to determine whether the Applicant had access to other funds without tangible evidence being produced. On a separate note, the learned Judge rejected the Applicant's argument that its unstable financial position made it pointless to even attempt to search for other sources of financing.

On the basis of the above, the learned Judge declined to grant super priority status to the proposed rescue financing.

Possible guidance from US law

The learned Judge made numerous references to the provisions of Chapter 11 and to US case law, which may provide us with further guidance as to how Singapore courts will be approaching the new section 211E. For instance, the case of *In re Western Pacific* was raised by Phillip Asia and considered by the learned Judge in the judgment. In

that case, it was held that in order for the court to give super priority to a debt, four conditions had to be fulfilled: (a) the proposed financing has to be in the 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; and (d) no better offers, bids or timely proposals are before the court. Although the learned Judge considered these factors largely irrelevant to *Re: Attilan*, he did acknowledge that they could potentially be relevant considerations in future cases involving super priority applications.

What is clear from this judgment is that the Singapore Court will chart its own course although US caselaw "…could be helpful in illuminating the appropriate construction of the newly enacted provisions in the CA concerning rescue financing…". The learned Judge emphasized that "…the US authorities and doctrine are referred to only as a useful guide as [Singapore] develop[s] our own law in this area. [The Singapore court] may stick close to the US position, or we may depart from it: much will depend on the arguments put before us."

Implications and Lessons Learnt

There are three key lessons which should inform future efforts by companies to obtain 'super priority' rescue financing.

1. As we highlighted at our September 2017 seminar series, US caselaw will be highly persuasive but the Singapore Court, bearing in mind the differences between the US Chapter 11 regime and what has been introduced in Singapore, will chart its own course.This was the approach taken by the learned Judge in *Re: Attilan*.
2. It is common for courts to ask: where is the evidence?This is amplified in this case where the Court held that: "the grant of super priority should not ordinarily be resorted to and the courts would be slow to do so unless it is strictly necessary". Would-be creditors and distressed companies would do well to keep this in mind, and should exercise due care and diligence in making sure that all reasonable options are exhausted before super priority rescue financing is sought. If it is truly the case that no practical options remain, parties would do well to adduce clear contemporaneous documentary evidence to this effect in their applications.Bare assertions will not meet the mark.
3. Potential applicants should further note the comments of the learned Judge at [56] of the judgment: "some thought should be given by applicants to the appropriate type or level of super priority sought, and they should also be prepared to provide the rationale for what they seek". In the same vein, potential applicants should specify right at the start of proceedings which limb of section 211E they are relying on; it is important to do because any opposing creditor can then formulate its submissions accordingly.

Ultimately, thorough planning and effort must be expended before a company applies to court for super priority, given its impact on all stakeholders. Singapore courts have made it clear they will not simply rubber-stamp an applicant's proposal.

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