Surviving the COVID-19 crisis – A legal perspective for businesses and corporates in Singapore

DENTONS RODYK

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In less than two months, the economy, as we know it, has gone topsy-turvy. Corporates are facing unprecedented challenges amidst the ongoing COVID-19 crisis. Demand for many products and services has been severely affected. On the supply side, production and the delivery of services has stalled. Many have to battle the slowdown in business activities, mounting debts, disruptions in the supply chain and manage the corresponding reduction in operating cash flow, with no certainty as to when this crisis will end.

The World Health Organisation has declared the COVID-19 crisis a global pandemic. Lockdowns, stay home orders and social distancing measures are being implemented across multiple jurisdictions to prevent the spread of the virus. This has already had a significant impact on numerous industries, with travel and hospitality being some of the hardest hit. Many fast growth entities and small and medium enterprises (SMEs) are trimming their workforce or operations to reduce costs whilst some are shutting down their businesses. Many investors remain cautious, often narrowing their focus to companies with sufficient liquidity to survive the turmoil. Economists and governments anticipate a recession, as many corporates already stand on the brink of bankruptcy.

In such difficult times, business owners need to consider the measures to protect their businesses and minimise losses. In this context, companies may be keen to know some of options available to assist them. Start-ups or early-stage growth entities that have limited runway with existing funds in particular, may need to take pre-emptive action to continue on their growth trajectory.

This article therefore seeks to summarise certain key considerations for businesses looking to survive the crisis. It focuses on certain ways in which businesses can reduce costs and streamline operations so that they are better positioned to protect their bottom line and be ready for any upturn of the economy. This is not intended as legal advice, and legal assistance can be sought on any of these options if any corporate is interested:

(A) Keeping the Workplace Safe and Healthy

The first thing for all corporates to ensure is that the workplace remains as safe as possible for employees and visitors. This allows for business sustainability. It translates into putting a plan in place to minimise the risk of employees, directors and shareholders being exposed to the coronavirus, and importantly to ensure that the business continues notwithstanding an outbreak within the company. Many have already implemented Business Continuity Plans that include ‘Work from Home’ strategies. Such plans typically organise employees into teams which can adhere to rotating work schedules to prevent business disruptions. The Ministry of Manpower (MOM) also recommends that all employers place their employees on work from home arrangements wherever possible. This is especially important for vulnerable employees (e.g. older employees, pregnant employees, and employees with pre-existing medical conditions).

For those in the process of formulating or reviewing their plans, it would be noteworthy to include the following to

ensure business stability and continuity of operations:

- Communication protocols to customers, suppliers and shareholders as part of contingency plans. There should also be continuing communication and updates to the employees that provide up-to-date, accurate information and precautions that they should take to protect themselves against COVID-19. This is so that obligations can hopefully continue to be met and business can continue notwithstanding the temporary closure of the workplace;
- A remote work policy that as far as possible allows the continuation of operations while employees work from home. Such a set-up should have measures to maintain the privacy of records and preserve confidentiality;
- Measures to reduce close physical interactions amongst employees and visitors to the office, for example, by using tele-conferencing or video-conferencing facilities to avoid physical meetings wherever possible. Social distancing should be encouraged in order to reduce the risk of infections spreading. Employers should accordingly take steps to ensure wider physical spacing (at least 1 metre apart, where possible) for workstations, seats in meeting rooms, pantries, rest areas and other congregation points;
- Travel declarations from employees and visitors, coupled with restrictions on overseas travel. Given the spike of imported cases of COVID-19, employers should also consider the imposition of a Leave of Absence for all employees returning to Singapore, or those with close family members returning, if these employees have not already been issued with Stay at Home Notices; and,
- Increased frequency in the cleaning of common areas and high contact places with disinfectant.

MOM has conducted enforcement operations to ensure workplace compliance with Government advisories on safe distancing measures, with stop work orders being issued against employers who fail to meet satisfactory standards. It is imperative that employers ensure that workplaces where groups of workers congregate including factories, construction sites, shipyards as well as offices including collaborative workspaces, have adequate social distancing arrangements.

As part of the business continuity framework, corporates may also wish to review their insurance policies to determine if there is sufficient coverage for workplace safety, key persons' insurance, business interruption and medical claims.

(B) Leveraging on Government Support

The Singapore government has released a package to help Singaporean corporates weather the COVID-19 crisis. In what Deputy Prime Minister Heng Swee Keat at the parliamentary sitting on 26 March 2020 described as a Resilience Budget, an unprecedented S$48 billion would be committed to further support the evolving COVID-19 situation. While some of these measures are aimed at assisting households, businesses are a substantial focus, with aspects of the budget addressing, amongst others, loan capital, wage offsets, property tax rebates of up to 100 per cent, deferment of corporate income tax to address concerns of cash flow, costs and credit. There is notably special support for the sectors that are hardest hit. Employers should review the package and its details to determine how the suite of measures can support their business

(C) Managing Headcount and Salaries

If employers need to reduce salaries or the number of their employees as part of cost-cutting measures, employers must ensure that such measures are in accordance with the relevant employment contracts and legal requirements.

Further, employers must notify the MOM if they:

- Implement any cost-saving measures affecting their employees' salaries (excluding adjustments to discretionary payments such as bonuses and increments);
- Are registered in Singapore; and
- Have at least 10 employees.

In the event any redundancy is planned, it is mandatory to submit a retrenchment notification to MOM where an employer has a business registered in Singapore, employs at least 10 employees, and retrenches 5 or more employees within a period of 6 months. Retrenchment includes the termination of employees due to redundancy or reorganisation of the employer's profession, business, trade or work. This includes situations where companies undergo liquidation, receivership or judicial management.

The notification requirement is intended to assist the relevant government agencies with helping the affected employees find alternative employment and/or to identify relevant training which can enhance their employability. Guidance should also be taken from the relevant Tripartite guidelines and advisories (including the Tripartite Advisory on Managing Excess Manpower and Responsible Retrenchment).

For further guidance, please also note the links below (with reference to Ministry of Manpower - Singapore's manpower regulatory authority):

1. Mandatory notification of cost-saving measures (applies to Singapore-registered employers with 10 or more employees, who are reducing employee salaries).
2. Mandatory notification of retrenchments (applies to Singapore-registered employers with 10 or more employees who retrench 5 or more employees within 6 months)

If the employees are unionised, the relevant union(s) should be consulted as early as possible. The collective agreement with the union should also be reviewed to determine the company's rights/obligations under the relevant collective agreement.

The guiding principle is that of responsible retrenchment. This will help employers avoid unnecessary disputes with affected employees or a transgression of the law.

Our colleagues have also shared insights on managing excess manpower in the following article - What employers need to know — Managing excess manpower in light of COVID-19

(D) Corporate Restructuring

The current situation also presents an opportunity for corporates to consider reorganizing their business operations or restructuring their legal entities so as to streamline themselves for better efficiency and agility. For example, it has already been observed by the authors that fund managers have started to redomicile their funds from offshore jurisdictions like the Cayman Islands to Singapore. This allows them to streamline their funds and operations and enjoy cost savings by dealing with all the service providers in one jurisdiction under the Variable Capital Company framework (see our article on Variable Capital Company – New Entity launched to attract new Funds to Singapore for guidance).

Corporates can also transfer their headquarters to Singapore or sell or acquire entities (at attractive valuations), re-organise entities within a larger group, dissolve dormant entities or liquidate certain non-performing entities. We discuss one such option, namely amalgamation, below.

Amalgamation allows two or more companies to merge or combine so that the property, rights, privileges, liabilities

and obligations of the amalgamating companies are transferred to, and vest in, one amalgamated (either new or continuing) company by 'operation of law' (by the application of the relevant statutory rules under the Companies Act of Singapore and not through agreement or court order).

Under the standard form amalgamation scheme, any two or more companies may combine and continue as one entity. Short-form amalgamation is a relatively easier and shorter process which allows members of each amalgamating company, by **special resolution** at a general meeting, to resolve to approve the amalgamation which can be between:

a. A company and one or more of its wholly owned subsidiaries; or
b. Two or more wholly owned subsidiaries of the same parent.

The parties are free to choose, upon amalgamation, one of the amalgamating companies to be the amalgamated company or to form a new company for that purpose. There are a number of procedural steps to be completed, by both the board and members of an amalgamating company. This is to facilitate a successful merger before the shareholders in the discontinuing corporation(s) can become shareholders in the amalgamated company.

Organisational changes, if structured correctly, can bring about potential savings in tax. For example, stamp duty savings or relief can be obtained through exemptions available from *ad valorem* stamp duty provided in the Stamp Duties Act (Cap 312) (Stamp Duties Act) under section 15 for:

a. The transfer of the undertaking or shares in respect of a scheme for the reconstruction of any company or companies, or the amalgamation of companies; or
b. The transfer, conveyance or assignment of any beneficial interest in any asset between associated companies.

This can benefit companies looking to restructure their group companies if the relevant criteria for stamp duty relief (under section 15 of the Stamp Duties Act) are satisfied.

(E) Debt Restructuring

Companies facing mounting debt can consider entering into a scheme of arrangement with their creditors. With the 2017 amendments to the Singapore Companies Act (Cap. 50) (Companies Act), the restructuring regime in Singapore now provides greater flexibility for both local and foreign distressed companies looking to restructure their debt in Singapore. The insolvency provisions in the Companies Act and the Bankruptcy Act (Cap. 20) have been consolidated into the Insolvency, Restructuring and Dissolution Act 2018 (IRDA). Although the IRDA has been passed by Parliament, the IRDA has not yet come into effect.

A successful scheme can be an integral part of keeping the business moving forward. Essentially, the legislative framework under the Companies Act enables distressed companies to seek a court-supervised restructuring process while creditors are restrained from commencing or proceeding with legal action against them via a moratorium.

(i) The Pre-Scheme Moratorium

A company that wishes to consider proposing a scheme of arrangement may make an application to restrain creditors from commencing legal proceedings against the company's property or from filing a winding up application against the company under section 211B of the Companies Act (Pre-Scheme Moratorium). Upon filing the application, an automatic moratorium lasting 30 days will take effect.

Once an application for a Pre-Scheme Moratorium is filed, a hearing will be fixed during the 30 days of the automatic moratorium and any further extensions of the moratorium will largely be premised on the feasibility and merits of the proposed scheme and the creditors' support (or lack thereof). The court may also require the company to furnish

information concerning the company's financial affairs such as cash flow statements and profitability forecasts in determining what orders to make.

As an alternative to a Pre-Scheme Moratorium, the company may make an application for a moratorium under section 210(10) of the Companies Act, which has some differences from the Pre-Scheme Moratorium.

(ii) Extra-Territorial Effect and Group Protection

The Pre-Scheme Moratorium may also have extra-territorial effect so long as the Singapore Courts have personal jurisdiction over that person. For example, a Singapore-incorporated creditor cannot commence foreign proceedings against the company's foreign assets in that foreign jurisdiction.

Sometimes a company, comprising part of a larger group, may wish to restructure the group as a whole. The court also has the power to extend the Pre-Scheme Moratorium to related entities of the company that are relevant to the group's restructuring process (section 211C of the Companies Act). The company must show that these related entities play a "necessary and integral role" in the scheme and that the creditors of the related entities will not be unfairly prejudiced.

(iii) Super-Priority Rescue Financing

With the 2017 amendments to the Companies Act, companies can now obtain rescue financing and seek the court's approval to confer super-priority on that rescue financing. This is to alleviate the difficulty that distressed companies may encounter in obtaining fresh financing.

Distressed companies may apply to court to have that rescue financing elevated in priority over the unsecured debts of the company, the preferential debts, or even to have that debt secured by the assets of the company (whether encumbered or not). There are certain requirements that must be met to demonstrate that the financing deserves super priority protection. For instance, the company must show the court that it has made reasonable efforts to obtain financing on a normal unsecured basis before it can seek to elevate the rescue financing.

(iv) The Scheme Meeting

Schemes of arrangement vis-à-vis creditors require the requisite support from creditors. As such, assuming the court has allowed the company to convene a meeting of creditors for the approval of a scheme of arrangement, the company would then have to do so to put the proposed scheme to a vote.

At the time of writing this article, legislation is being discussed to allow companies carry out such scheme meetings notwithstanding the restrictions on large gatherings that the Singapore government has imposed to reduce the spread of COVID-19. Such legislation aims to reduce the number of participants in physical meetings and for others to participate virtually, notwithstanding any contrary provisions to the company's constitution. Companies and chairpersons of such scheme meetings may also be required to put in place arrangements to allow participants of meetings to cast their votes in writing or electronically.

(v) Other Options to Address Debt

Other options to deal with debt include judicial management, and in the case of insolvent or non-performing companies in a group, it may at times make commercial sense to streamline operations and liquidate such entities, especially if they are no longer the focus of the business.

Concluding Remarks

Legal assistance can be sought on any of the above options from Dentons Rodyk who stands ready to support

business entities in their fight during these challenging times, so that they can emerge stronger, leaner and better than before.

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