Singapore's new insolvency law: a status report on the progress of the new regime

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Insolvency laws used to be a strictly territorial matter. However, given the increasing interconnectedness of the world, Courts have adopted a more universalist approach and have begun to recognise the insolvency laws of other jurisdictions. As a reflection of its cosmopolitan and global outlook, the laws and the Courts of Singapore have adopted a more international approach towards the application of insolvency laws. Foreign companies considering restructuring their debts in Singapore are likely to find themselves in Singapore an environment with a robust framework for debt restructuring and skilled professional advisors.

On 1 October 2018, the Singapore Parliament passed the Insolvency, Restructuring and Dissolution Act 2018 (**IRDA**) which came into force on 30 July 2020, in the middle of the global COVID-19 pandemic. Where previously Singapore's personal insolvency and corporate insolvency statutes were found in separate codes, the IRDA had the effect of consolidating Singapore's corporate insolvency and restructuring laws into one omnibus act. The IRDA is the culmination of recommendations proposed by various committees which were set up to enhance Singapore's debt restructuring provisions and to refine the existing laws. Several of the key changes were pivoting towards a friendlier regime for corporate rescue and debt restructuring, adapting from Chapter 11 of the US Bankruptcy Code certain rescue provisions, and implementing the UNCITRAL Model Law on Cross Border Insolvency. These reforms have garnered international attention and Singapore was recognised as the "Most Improved Jurisdiction" at the inaugural Global Restructuring Review Awards in June 2017. These reforms seek to position Singapore as a forum of choice for foreign debtors to restructure, create new opportunities for Singapore's professional services, and support Singapore's position as an international legal, financial, and business centre.

In this article, we discuss two main options a company may have at its disposal: the moratorium and rescue financing. We also explore how multinational corporations (**MNCs**) can potentially avail themselves of Singapore's robust cross-border insolvency regime.

Moratorium

Section 64 of the IRDA gives the Court the power to make one or more orders restraining certain actions and proceedings against the company (a moratorium), on an application by a company that has proposed a compromise or an arrangement with its creditors, or intends to do so. Prior to 2017, the Court had no power to grant a moratorium until a company had filed an application in Court to propose a scheme of arrangement with its creditors. With the recent amendments, companies can make an application to Court for a moratorium as long as it can show evidence that it is intending to propose one and if the statutory requirements are met.

Upon the filing of the application, an automatic 30-day moratorium will take effect and the Court will schedule a first hearing within these 30 days to hear the views of the creditors (if any) and to decide whether to grant a further extension. These extensions can go on for years. In the case of Hyflux Limited, the Court granted a moratorium for more than 2 years before creditors applied to place the company into judicial management.

Hyflux Limited (**Hyflux**) is a Singaporean water treatment company listed on the Singapore Stock Exchange. Hyflux filed for bankruptcy protection in May 2018 and obtained an automatic 30-day moratorium. While it sought to restructure its debts and negotiate financial aid from third-party investors, Hyflux continued to seek moratorium extensions from the Court which ranged from 4 – 6 months.

Although Hyflux managed to obtain some in-principle rescue deals from various investors like the Indonesian consortium, SM Investments, and the Middle Eastern utility firm, Utico, those rescue deals ultimately fell through. Hyflux was ultimately placed into judicial management by a group of creditors. On 27 July 2020, a group of banks obtained the approval from the Singapore High Court to file an application against Hyflux to put Hyflux into judicial management. On 16 November 2020, the Singapore High Court placed Hyflux into judicial management thereby ousting the board of directors of Hyflux and installing judicial managers nominated by the banks.

Under Singapore's insolvency regime, the judicial management procedure occupies an intermediate step between debt restructuring and liquidation. The Court may grant a creditor's application to place a company into judicial management and to install a judicial manager. When this happens, the board of directors become *functus officio* and the judicial manager becomes empowered to deal with the assets of the company. The judicial manager's mandate is to try and ensure the survival of the company as a going concern or to obtain a more advantageous realisation of the company's assets than on a winding-up.

The purpose behind a moratorium is to allow companies breathing room to restructure their debts and to negotiate a compromise with their key lenders and creditors. Companies may also seek an opportunistic investor to rescue the company from insolvency.

The moratorium also has some extraterritorial effect and allows the Singapore Courts to restrain the commencement of proceedings in foreign jurisdictions as long as the Singapore Court has *in personam* jurisdiction over the party seeking to be enjoined. For example, the Singapore Court may restrain a Singaporean bank from commencing proceedings in the UK to enforce a claim over the debtor's assets in the UK as part of the scope of the moratorium. In an unreported decision, the UK's High Court of Justice Business and Property Courts of England and Wales recognised the moratorium granted by the Singaporean court to H&C S Holdings Pte Ltd as a foreign main proceedings under the UNCITRAL Model Law. As such, it is likely that in other jurisdictions where the UNCITRAL Model Law has been implemented, moratorium orders granted by the Singapore Courts may similarly be recognised as foreign main proceedings.

Finally, another key feature of the moratorium is its ability to facilitate group restructurings. Where an order for a moratorium has been made in relation to a company, its subsidiaries or holding company may also apply for similar moratoria to be made in order to facilitate group restructuring efforts. Although Singapore has not adopted the UNCITRAL's Model Law on Enterprise Group Insolvency promulgated in 2019, the provisions under the IRDA provide a similar purpose and recognise the need for insolvency proceedings relating to multiple debtors who are also members of the same corporate group.

Indeed, the Singapore High Court recognised the importance of "making available moratorium relief to related companies of the applicant – subsidiaries, holding company or ultimate holding company - if those companies play a necessary and integral role in the compromise of the applicant." (*Re IM Skaugen SE and other matters [2019] 3 SLR 979; [2018] SGHC 259* at [63]) It may therefore be possible for foreign entities of a group to seek moratorium orders in Singapore as part of the group restructuring efforts and then seek to enforce them in their own jurisdiction, with Singapore recognised as the foreign main proceeding.

Rescue Financing

In the United States, the concept of super-priority rescue financing (also known as DIP financing) is not new and have

been part and parcel of the Chapter 11 process for a long time. However, the concept of rescue financing has only recently gained traction in Singapore and was only introduced in the 2017 amendments to the Companies Act.

In Singapore, companies planning to propose a scheme of arrangement or undergoing judicial management may obtain rescue financing (also known as DIP financing) from other creditors. The statutory scheme allows that rescue financing to be repaid before all other administrative expense claims in a debtor company's winding-up. Thus, should the scheme of arrangement or judicial management fail to rescue the company in distress, the rescue financing will be paid out in priority to all other claims (hence "super-priority").

Super-priority status provides an important framework for rescue financing in the US, and is a vital plank in the US rescue finance industry. The granting of such super priority status is important because it provides assurance that the rescue financing will be paid out of the unsecured assets of the borrower first, ahead of all unsecured claims and other administrative expenses claims, should the restructuring fail.

There are four (4) levels of priority that the Court can grant:

- To treat the debt as if it were a cost or expense of the winding-up;
- To elevate the debt in priority over all preferential debts and other unsecured debts if the company would not have been able to obtain such financing without it being granted such priority;
- For the debt to be secured by a security interest not otherwise subject to any existing security or to confer a subordinate security interest on the debtor company's property already subject to an existing interest; and,
- For the debt to be secured by a security interest of the same or higher priority than an existing security interest.

In general, the higher the level of priority being sought after, the more the company has to do to justify the level of priority and persuade the Court. This is because the higher levels of priority may prejudice existing security holders.

The question of whether to grant super-priority to rescue financing is largely based on the Court's discretion. The Court will consider factors such as:

- The creditor's interests: whether the other creditors would be unfairly prejudiced from the arrangement or beneficial to them.
- The viability of the restructuring: how the rescue financing will be used, whether it would create new value for the company.
- Alternative financing: whether better financing proposals are available, in particular, whether there were proposals that did not require super-priority.
- Terms of the proposed financing: whether the terms were reasonable and in the exercise of sound business judgment.

(*Re Design Studio Group Ltd and other matters [2020] 5 SLR 850; [2020] SGHC 148* (**Re Design Studio**) at [23] – [33])

In the case of *Re Design Studio*, the Singapore High Court also considered whether "roll-ups" were allowed under Singapore's rescue financing regime. A roll -up refers to the practice of using newly injected post-petition financing to pay off existing pre-petition debt, such that the pre-petition debt is effectively paid off and "rolled up" into the super-priority post-petition debt (*Re Design Studio* at [7]). The Singapore High Court held that there was no legislative

prohibition against roll-ups but highlighted that one factor a future Court should especially consider is the extent to which other unsecured creditors are likely to benefit or be prejudiced if super-priority were to be permitted in such an arrangement (*Re Design Studio* at [53]).

Given the vast jurisprudence in the United States on DIP financing and super-priority, the Singapore Courts have found US case law to be persuasive and they have applied the factors and considerations articulated by US cases. For example, in *Re Design Studio*, the Singapore High Court cited the case of *In re Lyondell Chemical Company, et al 402 BR 596 (Bankr, SDNY, 2009)* and observed that roll-ups have been allowed in the US.

Application to Foreign Companies

The scope of these restructuring provisions are not limited to locally-incorporated companies but also apply to foreign-incorporated companies.

Section 246(1)(d) of the IRDA allows for unregistered foreign companies to be wound up if they have a “substantial connection” with Singapore. In the same vein, a foreign company may seek to rely on Section 64 of the IRDA if it can demonstrate a “substantial connection” with Singapore. As mentioned earlier, foreign entities of a group may also potentially seek bankruptcy protection from the Singapore Courts if they form part of the group’s restructuring plan. Section 246(3) of the IRDA provides a list of non-exhaustive factors that the Court may rely on in determining whether an unregistered company has a “substantial connection” with Singapore. They include:

- Singapore is the centre of main interests (**COMI**) of the company;
- the company is carrying on business in Singapore or has a place of business in Singapore;
- the company is a foreign company that is registered under the Singapore Companies Act;
- the company has substantial assets in Singapore;
- the company has chosen Singapore law as the law governing a loan or other transaction, or the law governing the resolution of one or more disputes arising out of or in connection with a loan or other transaction; and
- the company has submitted to the jurisdiction of the Court for the resolution of one or more disputes relating to a loan or other transaction.

The list of factors are not exhaustive and are potentially broad enough to allow a wide variety of foreign companies to rely on these provisions as long as they have some commercial nexus to Singapore.

In the case of *Re PT MNC Investama TBK [2020] SGHC 149* (***Re PT MNC Investama***), the Singapore High Court held that an Indonesian company listed on the Indonesian stock exchange had the requisite standing to apply for an extension of a moratorium. The High Court found that the fact that the company’s debts were traded on the Singapore Stock Exchange indicated a substantial connection with Singapore. It indicated that the company had substantial business activity in Singapore that was not merely transient. The fact that it was subject to Singapore’s regulations or laws in the listing of its securities was also a strong indicator of a company’s substantial connection to Singapore.

The Court noted that the list of factors was not exhaustive and definitive and the indications of substantial connection were not closed. The Court went on to observe that a substantial connection encompasses the presence of business activities, control, and assets in Singapore. These activities involve some permanence or permanent effect, and exclude activities of a merely transient nature.

In contrast to the case of *Re PT MNC Investama*, the case of *Re Pacific Andes Resources Development Ltd and*

other matters [2018] 5 SLR 125 (***Pacific Andes***) was decided before amendments were made to the Companies Act in 2017 and took a much more limited approach to the extension of the automatic stay. These amendments made in 2017 allowed the Court to extend the moratorium to cover the subsidiaries of a group and to actions taken extra-territoriality under then sections 211B and 211C of the Companies Act. Since the enactment of the IRDA, these provisions have been ported over as Section 64 and 65 of the IRDA.

In *Pacific Andes*, Pacific Andes Resources Development Ltd (**PARD**) and 3 of its subsidiaries applied to the Singapore High Court to extend moratoria against proceedings to be brought against them by their creditors in Singapore and elsewhere. The applicants were part of a cluster of companies of the Pacific Andes Group and the companies in the group were incorporated in various jurisdictions, none of which were incorporated in Singapore. The main business of the group was in the production of fishmeal and fish oil and the supply of frozen fish and related products. The production of fishmeal took place in Peru through various operating entities there and these entities were in turned controlled by China Fishery Group Limited (**China Fishery**). PARD held an indirect equity interest in China Fishery.

As part of the Pacific Andes Group's efforts to restructure, bankruptcy protection applications were filed by various group companies in Peru, the United States, and Singapore. China Fishery filed for Chapter 11 proceedings in the United States Bankruptcy Court, South District of New York while PARD and 3 of its subsidiaries filed for extensions of moratoria in the Singapore High Court.

The Singapore High Court, however, only granted PARD an extension of the moratorium but refused to do so for the 3 subsidiaries. The Court reasoned that it did not have the jurisdiction to grant moratoria covering the subsidiaries because the subsidiaries were not incorporated in Singapore, did not have any assets in Singapore nor had any nexus to Singapore. The subsidiaries therefore did not have any standing to seek relief from the Singapore High Court. However, the Court had jurisdiction over PARD because, although incorporated in Bermuda, it was listed in Singapore and conducted economic activity in Singapore. The Court found that PARD's COMI was in Singapore. The Court went on to say that the fact that the subsidiaries, all of which were separate legal entities, were wholly owned by PARD and were part of a group restructuring plan that was interdependent and interconnected did not justify lifting the corporate veil such that the subsidiaries could be regarded as "one composite entity".

The Court noted that the formulation of a group restructuring plan involved many moving parts and required the involvement of multiple jurisdictions. The Court suggested that, given the territoriality of the moratorium, the proposition of a parallel scheme in the COMI of the subsidiaries may have been the appropriate solution in this case (at [52]). The Court also observed that this case illustrated the need for communication and cooperation between courts and the insolvency administrators of the respective insolvency proceedings in the formulation of what is effectively a group restructuring plan (at [75]).

With the statutory amendments to the Companies Act in 2017 and the IRDA, the case of *Pacific Andes* would likely be decided much more differently today.

Cross-Border Insolvency

Besides the availability of debt restructuring provisions to foreign companies with a "substantial connection" to Singapore, the Singapore Courts have also recognised and given effect to foreign liquidation proceedings and officeholders. With the adoption of the UNCITRAL Model Law on Cross-Border Insolvency (**Model Law**), the Singapore Courts even an even more robust framework to support the restructuring efforts of foreign companies.

In *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd) [2016] 5 SLR 787*, the Singapore High Court granted Hanjin Shipping Co Ltd's (**Hanjin**) application in Singapore for a stay of all proceedings in Singapore. Hanjin

was a company incorporated in Korea with two wholly-owned subsidiaries in Singapore. Hanjin had filed an application for rehabilitation proceedings in the Korean Bankruptcy Court and the foreign representative brought an application for a stay of all proceedings in Singapore under the Court's inherent jurisdiction to do so.

Although the Model Law was not adopted at that time, the High Court recognised the Korean rehabilitation proceedings under common law and granted orders to restrain and suspend any enforcement and execution proceedings in Singapore. This allowed some of Hanjin's vessels to dock at the Singapore ports after days of being marooned at sea, for fear of being seized by creditors.

After the Model Law was adopted in Singapore, the Singapore High Court had the opportunity to consider the application of a US Chapter 7 Trustee for recognition in Singapore, in the decision of *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener) [2019] 4 SLR 1343* (**Re Zetta Jet No 2).** Under Article 17(2) of the Model Law, the foreign proceeding must be recognised as a foreign main proceeding if it is taking place in the state where the debtor has its COMI. Under the Model Law, it is presumed that the place of the debtor's registered office is its COMI. However, the presumption is rebuttable and the Singapore Courts may go on to consider other factors such as:

- the location from which control and direction was administered;
- the location of clients;
- the location of creditors;
- the location of employees;
- the location of operations;
- dealings with third parties; and
- the governing law.

The Singapore High Court eventually granted the US Chapter 7 proceedings recognition in *Re Zetta Jet No 2*.

Conversely, other jurisdictions have also recognised orders of the Singapore Courts. In *Re Contel Corporation Ltd [2011] SC (Bda) 14 Com*, the Supreme Court of Bermuda recognised a scheme of arrangement sanctioned by the Singapore Courts. These decisions reflect a trend towards universalism and international comity in the area of cross-border insolvency.

Singapore is a regional hub and headquarters for many MNCs in Asia. Besides the recognition of foreign insolvency proceedings, MNCs may also consider commencing restructuring or insolvency proceedings in Singapore as a springboard into other jurisdictions where they may have assets or a commercial presence. Singapore's debt restructuring orders have been recognised in foreign jurisdictions (for example, the UK and Bermuda) and with the Model Law, Singapore can also be recognised as the foreign main proceedings in those jurisdictions.

Concluding Remarks

As the world's largest international law firm, Dentons is best placed to advise and represent multinational clients on how best to structure and implement their cross-border debt restructuring plans whether in Singapore or in other locations.

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