ALLEN & OVERY

October 2017

Restructuring Across Borders

Singapore: corporate restructuring and insolvency procedures

Contents

Introduction

When a corporate borrower in Singapore faces financial difficulties, the main restructuring and insolvency options are:

- scheme of arrangement;
- judicial management; and
- liquidation.

In May 2017, the Companies Act was amended to enhance these three options to make the legal framework more amenable to corporate rescues, and to make Singapore a more attractive venue for cross-border restructuring.

Creditors with the benefit of security may elect to enforce their security. Security enforcement is essentially a self-help remedy rather than a collective restructuring or insolvency procedure and, if available to a creditor, will often represent the best method of recovery.

Enforcement of security

The main forms of security available under Singapore law are:

- mortgage over land;
- mortgage over shares;
- security over contracts, receivables, bank accounts, plant and machinery, and intellectual property; and
- fixed and floating charge over all assets of a company (otherwise known as a debenture).

Singapore law recognises the concept of trusts.

Security under Singapore law, including those forms set out above, may be enforced by exercising self-help remedies provided under the relevant security instrument (save where judicial management is in force) and without the need to rely on traditional insolvency procedures involving a court process. In a judicial management situation, a secured creditor may not enforce his security against the security provider unless the judicial manager or the court consents.

Security documents usually provide the secured creditor with the power to appoint a receiver, who in turn is given a number of powers to deal with the secured assets including the power to sell or take possession of the secured assets, and to carry on any business of the security provider in any manner the receiver thinks fit.

Receivership is regulated by Part VIII of the Companies Act which: (1) imposes on receivers some of the obligations of other insolvency administrators; and (2) applies the priority rules for preferential creditors applicable in a liquidation or a receivership under a floating charge.

Security over land

Enforcement of security over land can take place by: (1) appointing a receiver under section 24(1)(c) of the Conveyancing and Law of Property Act; (2) obtaining possession of the mortgaged property either by consent or by court order and subsequently exercising the power to sell the mortgaged property under section 24(1)(a) of the Conveyancing and Law of Property Act; or (3) obtaining an order for foreclosure. In practice, the most commonly exercised mode of enforcement is (2).

On enforcement, the secured creditor will give notice to the security provider or the occupier of the property to deliver up possession within one month. If possession is not delivered voluntarily, an application may be filed with the High Court for an order for possession.

Debenture

A debenture creating a fixed and floating charge customarily provides for the crystallization of the floating charge and the enforceability of the fixed charge upon the occurrence of an event of default. Singapore law gives wide powers to parties to define events of default and recognises automatic crystallization upon an event of default occurring.

Corporate restructuring

When a company has been deemed insolvent[1] under the provisions of the Companies Act, there are two broad approaches available to a company and its creditors: (1) corporate restructuring or (2) liquidation.

Where corporate restructuring is being considered, there are two court assisted processes available under Singapore law:

- scheme of arrangement; and
- judicial management.

Both processes provide for a type of debt restructuring plan approved by its creditors to be put in place in order for the company to continue to trade.

1 The term “insolvent” is not defined under Singapore law. The High Court of Singapore has held that while there is no single test for insolvency, the two tests usually applied are: (a) an inability to meet a demand for a debt which has become due (see section 254(2)(a) and (b) of the Companies Act) and (b) an excess of liabilities over assets (see section 254(c) of the Companies Act).

Scheme of arrangement

A scheme of arrangement is a court sanctioned arrangement which represents the agreement between a company and its creditors under which the creditors agree to forgo all or part of their claim against the company, or simply to reschedule their debts, while allowing the company to continue to trade. The Companies Act provides that the court may order the convening of a meeting of creditors or any class of creditors, upon an application by the company, a shareholder, a creditor or a liquidator to vote on a scheme. If the court sanctions a scheme agreed to by a majority in number (or such number as the court may order) and three-quarters in value of creditors, it becomes binding on all creditors.

In addition to its binding nature, the benefit of a scheme of arrangement to the company is that its current management remains in place with full powers to carry on the business, subject only in certain cases to oversight by an insolvency professional.

Where the application is made by the company and that application is to propose a compromise or an arrangement between the company and its creditors or any class of its creditors, an automatic moratorium will apply. The moratorium is for a period of 30 days commencing after the date the application is made unless the court makes a decision on the application before the end of that time period. The court may either dismiss the application, in which case, the moratorium will end, or the court will grant the application to allow the company to call meeting of its creditors, in which the moratorium will continue until such time as the court may decide. To avoid abuse of the automatic moratorium, it will only apply if the company has not in the last 12 months made an earlier application to propose a compromise or an arrangement with its creditors to which the automatic moratorium applied.

The company may also apply to have the moratorium extended to its parent or subsidiary (the **related company**). It may do so if it can establish that the related company plays a necessary and integral role in the compromise or arrangement, the compromise or arrangement will be frustrated if the moratorium is not extended to the related company, and the creditors of the related company will not be unfairly prejudiced by the extension of the moratorium to the related company.

When granting a party’s application for a scheme of arrangement to be considered by the creditors, the court will order that the company convene a meeting of its creditors within a specific period of time. Under new provisions that came into force in May 2017, the company can however dispense with holding the meeting of creditors and seek court approval without the formal holding of the meeting if it can satisfy the court that if a meeting were to be held, the minimum approval requirements would be met. If the meeting is convened, the approval of the members and creditors of the company to the scheme of arrangement must be obtained. As discussed above, a majority in number of the creditors is required to approve the scheme. That majority in number (or such number as the court may order) must also represent three-fourths in value of the creditors. The company (through the assistance of an insolvency professional engaged by the company) would normally send to the creditors and the members explanatory circulars explaining the details of the scheme. If the details of the scheme are not fairly put to the creditors and the members, the court may decline to sanction the scheme. Even if the requisite majority of votes are obtained at the meeting, the scheme will not bind the company and its members and creditors until the court approves it.

The function of the court is three-fold. Firstly, it must be satisfied that the statutory procedures under the Companies Act have been complied with (e.g., that the resolutions are passed by the requisite majority in value and in number at meetings duly convened and held). Secondly, the court must be satisfied that those who attended the meeting were fairly representative of the class of creditors or the class of members (where applicable), and the statutory majority did not coerce the minority in order to promote interests adverse to those of the class whom the statutory majority purported to represent. Thirdly, the court must determine whether the scheme is one which a man of business or an intelligent or honest man, being a member of the class concerned and acting in respect of his interest, would reasonably approve. The court will look at the scheme to decide if it is a reasonable one and the issue is often whether the scheme strikes a balance between the various interests involved which could reasonably be approved by the meetings. The court will, however, in cases where the minority object, be strongly influenced by a big majority vote, for, provided that the scheme is fair and equitable, the court will not itself judge on its commercial merits.

Under new provisions that came into force in May 2017, if the requisite majority of votes is not obtained, the court may in certain circumstances override the decision. It has the power to do this if it finds that the scheme is being blocked by a small minority of creditors. This can occur because when voting for a scheme of arrangement, creditors are sorted into classes and each class of creditors votes separately on the scheme. Each class must meet the minimum requirements for approval: a majority in number of the creditors in that class, which majority in number must also represent at least three-quarters in value of the creditors in that class. If a class of creditors is small, for example, it consists of only one or two creditors, a single creditor may have the power to block a scheme of arrangement. Under the new provisions, the court may cram all the creditors into a single class. If that single class meets the minimum requirements for approval, and if the arrangement does not, in the view of the court, discriminate unfairly between the classes of creditors and is fair and equitable to each dissenting class, the court may approve the scheme

Judicial management

Judicial management is a court assisted corporate rescue process under Part VIIIA of the Companies Act, intended, as with a scheme of arrangement, to enable a debt restructuring plan between a company and its creditors to be entered into.

A judicial manager is appointed by the court upon an application presented by the company, its directors, or a creditor. The court will give an order for judicial management only if:

- it is satisfied that the company is or is likely to become unable to pay its debts; and
- it considers that the company following the appointment of a judicial manager would be likely to achieve one of the following:
  - the survival of the company or the whole or part of its undertaking as a going concern;
  - the approval of a compromise or scheme of arrangement between the company and its creditors; or
  - a more advantageous realisation of the company's assets than could be effected on a winding up.

Unless discharged earlier or extended by the court, a judicial management order remains in force for 180 days. During this period, all powers conferred and duties imposed on the directors of the company shall be exercised and performed by the judicial manager. However, the making of a judicial management order has no effect on the rights of the shareholders of the company.

Upon presentation by a party of an application for the appointment of a judicial manager, a moratorium comes immediately into force. Accordingly, even while such an application is pending, the company has extensive immunity from liquidation and other legal proceedings unless with the leave of the court. The moratorium covers the commencement of legal proceedings, the enforcement of security, the repossession of goods on hire purchase or under a chattels leasing agreement or subject to a retention of title agreement, execution of a judgment and the levying of distress. An application for judicial management may therefore be used to stave off a compulsory winding up or to prevent execution being levied against the company's property.

The applicant may nominate the judicial manager who must be an approved company auditor who is not the auditor of the company. The court has the power to reject the nomination of the applicant and to appoint another person. The creditors may also oppose the applicant's nomination of the person proposed as judicial manager. This may be done by the majority in number and value of the creditors (including contingent or prospective creditors). The statement must also be sent to all the members of the company.

Once a judicial manager is appointed, he has 60 days (or such longer period as the court may allow) to formulate and present before the creditors of the company, at a meeting called for that purpose, a statement of his proposals for the achievement of the purposes for which the order was made.

A creditor is not entitled to vote at the meeting unless he has first lodged a proof of debt. In addition, a creditor may not vote: (a) in respect of any unliquidated or contingent debt or any debt the value of which is unascertained; or (b) if, in the case of a secured creditor, his security covers the debts owed to him. However, a secured creditor may vote if he surrenders the security or if part of the debt owed to him is unsecured.

Any proposal made by the judicial manager must be approved by the majority of the creditors in number and value. Creditors may propose modifications to the judicial manager's proposals at the creditors' meeting. However, such modifications will only be effective if the judicial manager consents to them.

Once the creditors approve the judicial manager's proposal, the judicial manager will manage the affairs, business and property of the company in accordance with the proposal. The proposal may not be substantially revised unless the creditors approve the change. When, in the view of the judicial manager, the purposes of the judicial management order under which he was appointed have been achieved or are incapable of being achieved, he must apply to court to discharge the order.

Superpriority for rescue financing

A company undergoing judicial management or seeking the approval of its creditors to a compromise or arrangement may require additional financing if it is to have a chance of reviving itself. However, potential investors may not be willing to take on the risk of providing additional financing to an already financially troubled company. The new provisions introduced in the Companies Act in May 2017 also empower the court, on the application of the company, to order that superpriority be granted to a person that provides rescue financing to the company.

Superpriority may be granted by the court upon the application of the company if it can establish that the person would not provide the financing without it. Rescue financing is financing that is necessary for the survival of the company as a going concern, or to achieve a more advantageous realisation of the company's assets than on winding up. Superpriority may be granted at four levels:

- the debt takes priority together with the costs and expenses of the winding up but behind secured creditors
- the debt takes priority above all preferential and unsecured debts, behind only secured creditors;
- the debt is secured by a security interest over

property of the company that is unsecured or by a subordinate security interest over secured property; and

- the debt is secured by a security interest over already secured property of the company and takes the same or higher priority over the existing security.

Liquidation

There are two types of winding up procedures under which Singapore companies are dissolved:

- voluntary winding up; and
- winding up by the court.

Voluntary liquidation

A company may be voluntarily wound up by its members (if it is solvent) or by its creditors (if it is insolvent).

If the company is solvent, a majority of its directors make a declaration of solvency, stating that they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up. The declaration must be lodged with the Accounting and Corporate Regulatory Authority. The company must then, within five weeks of this declaration, resolve by special resolution to voluntarily wind up the company, and appoint one or more liquidators for the winding up.

If the company is insolvent, the director make a statutory declaration in the prescribed form that the company cannot by reason of its liabilities continue its business and that meetings of the company and of its creditors have been summoned for a date within one month of the date of the declaration. The declaration must be lodged with the Official Receiver and the Accounting and Corporate Regulatory Authority. The directors must immediately appoint an approved liquidator to be the provisional liquidator. The company, and its creditors, at their respective meetings each resolve to wind up the company voluntarily and nominate a person to be a liquidator in the winding up.

Compulsory liquidation

Under the Companies Act, a company may be wound up by a court order if an application for winding up is presented by the company, any creditor (including contingent or prospective creditors), any shareholder, the liquidator, the minister for finance or a judicial manager.

A winding up order will be made if one or more of the grounds set out in the Companies Act exist, the most notable one being a company's inability to pay its debts under section 254(1)(e) of the Companies Act.

The liquidator may carry on the company's business so far as is necessary for the beneficial winding up for a period of up to four weeks after the making of the winding up order.

Once a company is placed into liquidation following a winding up order by the court, the liquidator is vested with the powers to run the company for the purpose of winding up the company's business, realising and distributing the assets to its creditors and members. The liquidator also has the power to apply to the court to nullify unfair preference transactions[2] (if made in the six months prior to the date of commencement of the winding up) and transactions at an undervalue[3] (if made in the five years prior to the date of the commencement of the winding up).

Any distributions made by a liquidator from the realisation of assets must be made in accordance with the statutory order of priority:

- payments to secured creditors;
- costs and expenses of the winding up including the liquidator's remuneration;
- wages and salaries of employees up to a maximum of five months' salary or S$12,500 (whichever is less);
- retrenchment benefits and ex-gratia payments under the Companies Act up to a maximum of S$12,500;
- compensation to employees for injuries suffered in the course of employment under the Work Injury Compensation Act;
- all amounts due in respect of contributions payable to provident funds during the 12 months next before, on or after the commencement of the winding up by the company;
- remuneration to employees in respect of vacation leave;
- taxes;
- gratuity and retrenchment benefits under the Employment Act;
- floating charge secured creditors;
- unsecured creditors; and
- payment to shareholders.

2 Section 329 of the Companies Act and Sections 99 and 103 of the Bankruptcy Act.

3 Section 100(1)(a) of the Bankruptcy Act.

Cross-border issues

The amendments to the Companies Act in May 2017 also included the adoption of the UNCITRAL Model Law on Cross-Border Insolvency. Accordingly, foreign companies not registered to do business in Singapore may nevertheless still apply to a Singapore court for restructuring, judicial management, or winding up if it can show that it has a substantial connection with Singapore. In deciding whether a foreign company has a substantial connection with Singapore, the Singapore courts may rely on the presence of one or more of the following matters:

- Singapore is the centre of main interests of the foreign company;
- the foreign company is carrying on or has a place of business in Singapore ;
- the foreign company is registered as a foreign company in Singapore;
- the foreign company has substantial assets in Singapore;
- the foreign 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;

- the company has submitted to the jurisdiction of the Singapore courts for the resolution of one or more disputes relating to a loan or other transaction.

The term “centre of main interests” is not defined. The term is taken from the UNCITRAL Model Law on Cross-Border Insolvency, and English cases that have considered that term will be helpful in deciding how our own courts are likely to interpret it. English courts have looked at and applied the following factors in a series of cases:

- the company’s jurisdiction of incorporation;
- where the company’s business is conducted or where it pursues its economic activities;
- the location of its board meetings or central administration;
- the location of its assets;
- the jurisdiction and governing law of its contracts; and
- how it presents itself to third parties.

The application of the Model Law will also allow representatives of foreign companies to apply to the Singapore courts for recognition of the foreign insolvency proceedings and to request for assistance and cooperation with those proceedings. Upon recognition of the foreign insolvency proceedings, the court may entrust the distribution of all or part of the foreign company’s property located in Singapore to the foreign representative, provided that it is satisfied that that interests of creditors in Singapore are adequately protected.

Key contacts

If you require advice on any of the matters raised in this document, please call any of our partners or your usual contact at Allen & Overy.

Lian Chuan Yeoh

Counsel
Corporate Regulatory

Tel +65 6671 6075
lianchuan.yeoh@allenovery.com

Cerintha Chia

Counsel
Banking

Tel +65 6671 6036
cerintha.chia@allenovery.com

Allen & Overy LLP

50 Collyer Quay, 09-01 OUE Bayfront, Singapore 049321

Tel +65 6671 6000

Allen & Overy LLP

One Bishops Square, London E1 6AD, United Kingdom

Tel +44 20 3088 0000

Fax +44 20 3088 0088

www.allenovery.com