2017 Singapore Insolvency and Restructuring Reforms

June 2017
## Contents

- Introduction ....................................................... 1
- 1. Better accessibility to Singapore’s corporate rescue and restructuring framework for foreign companies 2
- 2. Chapter 11 style - Rescue financing / DIP financing .................. 3
- 3. Enhanced moratoriums with extra territorial effect .................. 4
- 4. Increased disclosure, cram-downs and pre-packs ..................... 6
- 5. The adoption of UNCITRAL Model Law .......................... 8
- Conclusion .................................................................. 1
- Your contacts ......................................................... 1
Introduction

The Singapore Companies Act (Amendment) Act 2017 (the “Act”) significantly overhauls Singapore’s corporate rescue and restructuring framework. In doing so, Singapore has adopted a number of key features from Chapter 11 of the US Bankruptcy Code.

The amendments discussed in this client alert came into effect on 23 May 2017.

This client alert highlights the main amendments of the Act that corporate debtors, lenders and distressed investors should be aware of, in particular the Singapore Companies Act now provides:

1. better accessibility to Singapore’s corporate rescue and restructuring framework for foreign companies;
2. US Chapter 11 style rescue/DIP financing;
3. enhanced moratoriums with extra territorial effect;
4. increased disclosure, cram-downs and prepacks; and
5. for the adoption of UNCITRAL Model Law;

There is no doubt that the introduction of this Act greatly improves the legal framework for debt restructurings in Singapore. We envisage that this Act will put Singapore firmly on the map as a key centre for international debt restructurings providing debtors, lenders, alternative capital providers and distressed investors access to internationally recognised and highly familiar restructuring tools and techniques.
1. Better accessibility to Singapore's corporate rescue and restructuring framework for foreign companies

Pursuant to the provisions of the Act, a Singapore Court may assume jurisdiction over a foreign debtor if that foreign debtor has a "substantial connection" with Singapore. While this does not change the existing position under Singapore case law, the Act goes further and seeks to clarify the position by expressly spelling out that a "substantial connection" is established through the demonstration of one or more of the following factors:

A. the centre of main interests of the debtor is located in Singapore. This ties into Singapore's adoption of the UNICITRAL Model Law (see below);

B. the debtor is carrying on business in Singapore or has a place of business in Singapore;

C. the debtor is registered as a foreign company in Singapore;

D. the debtor has substantial assets in Singapore;

E. the debtor 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/or

F. the debtor 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 Committee to Strengthen Singapore as an International Centre for Debt Restructuring (the "Committee") tasked with recommending the legal reforms behind the Act made it clear that in developing the list of factors listed above, significant consideration was given to the established criteria that the leading international centres for debt restructuring of London and New York use. We envisage that loosening the noose of the Singapore Courts to match those of London and New York will result in an increase in restructurings being conducted in Singapore, laying the foundations for Singapore to become a true hub for debt restructuring on the global stage.
2. Chapter 11 style - Rescue financing / DIP financing

Rescue financing is financing that is either or both:

(i) necessary for the survival of a debtor that obtains the financing;

(ii) necessary to achieve a more advantageous realisation of the assets of a debtor that obtains the financing, than on a winding up of that debtor.

It is vital for most debtors who are going through a corporate rescue and restructure to be able to tap into rescue financing. In order to encourage financiers to offer such rescue financing to distressed debtors, the Act has adopted a range of incentives offered to debtors and financiers in Chapter 11 of the US Bankruptcy Code.

Under both schemes of arrangement and judicial management proceedings, a Singapore Court may, on application by the debtor, make an order that any rescue financing obtained by a debtor will:

(i) be treated as part of the costs and expenses of the winding up if the debtor is later wound up;

(ii) enjoy priority over preferential debts if the debtor is later wound up;

(iii) be secured by a security interest on property of the debtor not otherwise subject to any security interest or be secured by a subordinate security interest on property of the debtor that is subject to an existing security interest if the debtor would not have been able to obtain unsecured rescue financing from any other person; or

(iv) be secured by a security interest, on property subject to an existing security interest, of the same or a higher priority than the existing security interest if the debtor would not have been able to obtain rescue financing from any other person unless it was secured in such a manner and there is adequate protection for the interests of the existing security interest.

In order to “prime” – leap frog in priority over pre-existing lenders under option (iv) above, "adequate protection" is defined in the Act as including:

(i) making cash payments to compensate for decrease in value of security;

(ii) providing replacement liens; or

(iii) providing "indubitable equivalent".

The provision for rescue financing in the Act opens the doors for debtors and creditors to complete bona fide, long lasting, corporate rescue and restructures. It is a welcome addition and no doubt many distressed investors will see a window of opportunity in this new feature.
3. Enhanced moratoriums with extra territorial effect

One of the key provisions of the Act is the enhancement of the moratorium provisions in Singapore's corporate rescue and restructuring framework, akin to those contained in Chapter 11 of the US Bankruptcy Code. The moratorium provisions have been enhanced through three key features:

I. an automatic 30-day moratorium now arises upon the filing of an application for a moratorium (protection against enforcement) for both schemes of arrangement and judicial management;

II. moratoriums granted by Singapore Courts can be ordered to have worldwide effect to the extent Singapore can assert jurisdiction over the relevant creditor via the "substantial connection" test; and

III. moratorium orders may be extended to entities related to the debtor.

Each of these features are discussed in more detail below.

I. Automatic Moratoriums

The Act has streamlined the procedure for obtaining an interim moratorium in both judicial management and schemes of arrangement. Now, an automatic 30 day moratorium arises upon the mere filing of an application for a moratorium under the Singapore Companies Act, providing debtors with the required breathing space to use their best efforts to formulate a bona fide restructuring plan.

To safeguard creditors against debtors abusing the automatic 30 day moratorium, the Act imposes stringent requirements and limitations on debtors including to debtors being obliged to:

A. publish a notice of the application in the Gazette and in at least one English local daily newspaper (with a copy of such notice being required to be sent to the Registrar) when an application for a moratorium is made to the Singapore Courts;

B. send a notice of the application to each of its creditors proposed to be bound by the automatic moratorium (unless a Singapore Court orders otherwise); and

C. furnish:

(iii) a brief description of the intended compromise or arrangement;

(iv) if possible, evidence of support from the creditors for the moratorium; and

(v) a list of all the secured and the twenty largest unsecured creditors of the debtor.

Furthermore, no automatic moratorium may be granted against a debtor more frequently than once every twelve months.

II. Worldwide effect

Pursuant to the Act, moratoriums granted under the Singapore Companies Act may now be expressed to apply to any person within the jurisdiction of the Singapore Courts. The rationale for the introduction of this provision is that, given the global economic reach of Singapore, foreign creditors are unlikely to be able to ignore a moratorium imposed by the Singapore Courts save where their assets or connections in Singapore are completely non-existent.

III. Extension to entities related to the debtor

Significantly, the Singapore Courts are now empowered for schemes of arrangement (but not for judicial management) to grant moratoriums on the application of a debtor's subsidiary, holding company or ultimate holding company (a "Related Company"). As the Committee states in its report on recommended legal reforms for Singapore's corporate rescue and restructuring

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4 Previously an automatic 30 day moratorium was only granted in connection with judicial management.
5 New section 211B in the Singapore Companies Act.
6 New section 211B in the Singapore Companies Act.
7 New Section 211C(1) in the Singapore Companies Act.
framework, many businesses organise themselves across a corporate group structure and therefore a moratorium imposed solely on the debtor will have limited effect if creditors are able to take action against related corporate entities that are a necessary and integral part of the restructuring plan.

However, as with the imposition of the automatic moratorium, the Act imposes stringent requirements on related parties being able to apply for a moratorium to safeguard against abuse and so a related party may only make an application for a moratorium if all of the following conditions are satisfied:

A. no order has been made and no resolution has been passed for the winding up of the Related Company;

B. the moratorium order issued in relation to the original debtor is in force;

C. the Related Company plays a necessary and integral role in the scheme;

D. the scheme would be frustrated if an action is taken against the Related Company; and

E. a Singapore Court is satisfied that the creditors of the Related Company will not be unfairly prejudiced by the moratorium order⁸.

Enhancing the moratorium provisions through these three key features is essential in ensuring that corporate rescue and restructures are not frustrated through disparate creditor action. These three features are an essential component of all leading modern restructuring frameworks and will be greatly appreciated by both debtors and creditors in the throws of a complex debt restructuring in Singapore.

⁸ New Section 211C(2) of the Singapore Companies Act.
4. Increased disclosure, cram-downs and pre-packs

The rules and procedures governing schemes of arrangement and judicial management have been enhanced under the Act so that for schemes of arrangement:

I. a clear framework for the continuous disclosure of information from the debtor to its creditors throughout the restructuring process;

II. provision for cram-downs allowing schemes of arrangement to be approved notwithstanding that there are certain dissenting classes of creditors; and

III. provisions of a framework for pre-packaged restructurings,

are now provided for in the Act and for judicial management:

IV. foreign debtors can now be placed into judicial management; and

V. a debtor's access to judicial management is now easier.

Each of these enhancements are discussed in more detail below.

**SCHEMES OF ARRANGEMENT**

I. Disclosure of information

One vital component of Chapter 11 of the US Bankruptcy Code is the requirement for debtors to provide adequate information to the creditors. It is a must for any successful corporate restructuring completed on a debtor in possession form.

The Act follows suit and bolsters the disclosure of information provisions in the Singapore Companies Act ensuring that there is a continuous flow of information from the debtor to its creditors throughout the restructuring process. Consequently, the Singapore Court when issuing a moratorium order must order the debtor to submit to the Singapore Court, within such time as the Singapore Court may specify, sufficient information relating to the debtor's financial affairs to enable its creditors to assess the feasibility of the scheme including but not limited to the following information:

A. a report on the valuation of each of the debtor's significant assets;

B. if the debtor acquires or disposes of any property or grants security over any property – information relating to the acquisition, disposal or grant of security no later than 14 days after the date of the acquisition, disposal or grant of security;

C. periodic financial reports of the debtor and its subsidiaries;

D. forecasts of the profitability and cashflow from the operations of the debtor and its subsidiaries.

Such flow of information is vital in enabling creditors to make informed judgments about proposed restructuring plans and is key to Singapore being seen as a fair international centre for debt restructuring.

II. Cram-downs

One of the crucial reforms of the new Act is the introduction of "cram down" provisions allowing schemes of arrangement to be approved notwithstanding that there are certain dissenting classes of creditors. The rationale for such "cram down" provisions is to prevent dissenting creditors from undermining schemes of arrangement in particular where they are "out of the money", and to facilitate the timely restructuring of distressed companies in Singapore.

Under the Act, a Singapore Court may approve a scheme, where there are one or more dissenting classes if:

(i) a majority in number of the creditors meant to be bound by the scheme and who were present and voting either in person or by proxy at the relevant meeting (the "Majority") have agreed to the scheme;

(ii) the Majority represents three-fourths in value of the creditors meant to be bound by...
the scheme and who were present and voting either in person or by proxy at the relevant meeting; and

(iii) the Singapore Court is satisfied that the scheme does not discriminate unfairly between two or more classes of creditors and is fair and equitable to each dissenting class10.

A scheme is not "fair and equitable" for the purposes of the Act unless, amongst other conditions, dissenting creditors receive at least as much under the scheme as they would most likely receive were the scheme not to become binding.

III. Pre-packaged restructurings

Pre-packaged restructurings11 are increasingly being used in the leading international centres for debt restructurings. Singapore has taken heed of this and consequently, under the Act, Singapore Courts are now able to approve schemes of arrangement without any meetings of creditors being ordered or held where the following conditions12 are satisfied:

(i) each creditor meant to be bound by the scheme is provided with information concerning the debtor's financial condition and prospects, information on the manner in which the terms of the scheme will affect the rights of that creditor and such other information as is necessary to enable the creditor to make an informed decision whether to agree to the terms of the scheme;

(ii) a notice is published in the Gazette and in at least one English local daily newspaper with a copy of such notice published sent to the Registrar;

(iii) a notice and copy of the application is sent to all creditors sought to be bound; and

(iv) the court is satisfied that had a meeting of creditors / classes been held, the scheme would have passed13.

Both cram-downs and pre-packaged restructurings have become a vital part of all modern restructuring frameworks and are particularly attractive to large corporate debtors which need to restructure their debts in large and complex restructurings in a cost and time efficient manner.

These enhancements to the rules and procedures governing schemes of arrangement bring Singapore in line with the leading international centres for debt restructuring and is an important step forward in Singapore achieving its objective of becoming a global restructuring hub.

JUDICIAL MANAGEMENT

IV. Judicial management for foreign debtors

In line with the objection of increasing accessibility for foreign debtors, foreign debtors may also now be placed under judicial management in Singapore14.

V. Easier access to judicial management

The Act has lowered the threshold for judicial management from a debtor that "is or will be unable to pay its debts" to one that "is or is likely to become" unable to pay its debts15. The Act also now obligates parties with the ability to appoint a receiver who object to the appointment of a judicial manager to demonstrate that the appointment of a judicial manager would cause disproportionately greater prejudice than the prejudice to unsecured creditors if judicial management was denied16.

10 New Section 211H of the Singapore Companies Act.
11 A pre-packaged restructuring involves a restructuring plan that is pre negotiated between the debtor and key creditors before the commencement of formal court proceedings.
12 Further conditions are imposed where the debtor in question is a banking corporation or licensed insurer.
13 New Section 211I of the Singapore Companies Act.
14 New Section 227AA of the Singapore Companies Act.
15 Amendment to Section 227B(5) of the Singapore Companies Act.
16 Amendment to Section 227B of the Singapore Companies Act.
5. The adoption of UNCITRAL Model Law

An integral aspect of any cross-border restructuring is how any agreed restructuring plan is implemented overseas given that there are often significant aspects of a debtor’s business which have little or no connection with the restructuring centre\(^\text{17}\).

The UNICITRAL Model Law on Cross Border Insolvency (the "Model Law") is the leading international initiative on the recognition of foreign insolvency and restructuring proceedings. It provides a clear framework for jurisdictions to recognise and assist foreign jurisdictions and now has the force of law in Singapore pursuant to the Act, albeit with certain modifications in its application. To underline the significance of this development, Chapter 15 of the US Bankruptcy Code is internationally recognised as a key tool to cross border restructurings. Chapter 15 is quite simply, the US’ adoption of the UNCITRAL Model Law.

In addition to the US, the Model Law has been adopted in many other key jurisdictions including the United Kingdom, Australia, Canada, New Zealand, Japan and South Korea. While relying on the Model Law has its limitations in that not all jurisdictions have adopted the Model Law (in particular, many of the jurisdictions surrounding Singapore such as Indonesia), that limitation is not unique to Singapore and the Committee have made it clear that support will be given to international efforts to increase the adoption of the Model Law together with entering into bilateral or multilateral agreements with other countries for the recognition and enforcement of restructuring proceedings.

The implementation of the Model Law into Singapore’s corporate rescue and restructuring framework is to be welcomed as it will bring about much greater clarity and cooperation in resolving cross-border insolvencies in Singapore - a must in Singapore’s objective in becoming an international centre for debt restructuring.

\(^{17}\) Report of the Committee on recommended legal reforms for Singapore’s corporate rescue and restructuring framework.
Conclusion

The legislative developments introduced by the Act are wide ranging and represent a significant improvement to the restructuring and insolvency landscape in Singapore. The changes have come at an important time given the rising number of defaults both across the region and locally in Singapore, particularly in the oil and gas, shipping and offshore marine sectors. As a result, we expect that the improved legal framework for undertaking debt restructurings in Singapore is likely to be welcomed by corporate debtors, lenders and distressed investors and Singapore will, in time be a true hub for international debt restructurings.

Should you have any queries in relation to the above, please do let us know.

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