CORPORATE INSOLVENCY - PROPOSED INSOLVENCY ACT

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Introduction

On 4 October 2013, an Insolvency Law Review Committee (the "**Committee**") comprising of insolvency practitioners, academics and stakeholders issued a report setting out major recommendations to the insolvency regime in Singapore. The main proposal revolved around the enactment of a new Insolvency Act (the "**New Insolvency Act**"), one which seeks to consolidate and update key areas of Singapore's laws pertaining to personal bankruptcy and corporate insolvency as well as incorporating established common principles and procedures.

This comprehensive review of the insolvency regime in Singapore is timely in light of the increasingly integrated globalised economy that we live in which brings with it issues pertaining to cross-border insolvency and how assets of multinational companies situated in multiple jurisdictions are to be dealt with.

Some of the major recommendations set out in the report include housing the bankruptcy and corporate insolvency regimes under one single legislation for easier access and greater clarity as well as better coordination between the different insolvency systems.

Other recommendations involved increasing Singapore's attractiveness as a corporate restructuring hub by adopting the United Nations Commission on International Trade Law's (UNCITRAL) Model Law on Cross-Border Insolvency (the "**Model Law**"), and doing away with ring-fencing in the winding up of foreign companies (except in certain circumstances).
In finalising its recommendations, the Committee engaged in consultations with stakeholders such as the Monetary Authority of Singapore, the Supreme Court, the Accounting and Corporate Regulatory Authority ("**ACRA**") and the Association of Banks in Singapore.

Some of the recommendations are highlighted below:

Proof of Debts

One of the proposals involves the rationalisation and unification of the legal position on proofs of debt. The objective would be to come up with a consistent and unified set of principles and rules applicable to all forms of insolvency proceedings. One of the main problems with the current position is that claims for unliquidated damages arising from tort are not provable in bankruptcy and insolvent liquidation, but may be provable in solvent liquidation. This distinction is arbitrary and without good justification and the Committee has proposed that the position be changed such that the test of provability would be the same for all insolvency proceedings. Another point relates to permitting any claim against an individual or company that is valid and enforceable under the general law to be provable under the insolvency law, as is the approach under the UK Insolvency Act.

Receivership

The Committee recommended that the receivership regime should be retained in Singapore with only procedural amendments to be updated. The Committee proposed that the receivership regime be retained in Singapore as abolishing receivership would be tantamount to undermining the attractiveness and usefulness of floating charges. Moreover, a floating charge is registrable and all parties dealing with a company that has granted a floating charge should be taken as having notice of it. These parties can decide how best to structure their dealings with the company, whether it is to obtain fixed security from the company, transact on a cash basis or otherwise.

Liquidation

1. One of the main proposals revolve around the introduction of a system of summary liquidation in Singapore, akin to the position in the UK, whereby the Official Receiver ("**OR**") should be empowered to make an application to ACRA to seek an early dissolution of the company if it appears that (a) the realisable assets of the company are insufficient to cover the expenses of the winding-up, and (b) the affairs of the company do not require any further investigation, and by giving reasonable notice to the creditors and contributors. The OR's duties cease as soon as notice is given to the creditor or contributors. A creditor or contributory who opposes such action may apply for the appointment of a private liquidator, or appeal to the court against the OR's decision. Similar powers to invoke the summary liquidation procedure should be extended to private liquidators subject to an additional condition that the consent of the OR is obtained. An appeal against the decision of the OR shall lie with the courts.

The purpose of such a change is to ensure that the resources of the OR can be used more efficiently, especially when the company being wound up has insufficient or no assets to fund the administration of the liquidation.

2. The OR should continue to remain as the liquidator of last resort. However, in addition to the introduction of a procedure for summary liquidations, the OR should be empowered to outsource liquidations to private liquidators.
3. Section 328(1)(a) of the Companies Act (the "**CA**") should be amended to confer priority on the OR's fees vis-à-vis the other debts identified in that section, i.e. the taxed costs of the applicant for the winding-up order and the costs of an audit carried out pursuant to section 317 of the CA. This priority should also extend to the expenses and fees of private liquidators, in cases where the OR has outsourced liquidations to these private liquidators. Amongst other reasons, the Committee was of the view that expenses and fees of the OR ought to enjoy priority over all creditors as unlike the petitioning creditor, who is in a position to decide whether or not to proceed with a winding-up application (and incur its associated costs), the OR, once appointed, is obliged to proceed to administer the liquidation of the company. The Committee also recommended that this priority

should also extend to the expenses and fees of private liquidators, where the OR has outsourced liquidations to these private liquidators.

Judicial Management

The judicial management regime offers an alternative to liquidation where one or more of three statutory purposes may be achieved: (a) the survival of the company or the whole or part of its undertaking as a going concern, (b) the implementation of a scheme of arrangement, and (c) a more advantageous realisation of the company's assets than in a liquidation.
Amongst others, the Committee recommended the following:

1. The judicial management regime should be retained in the New Insolvency Act but with legislative reforms in certain areas to address the deficiencies of the existing judicial management regime.
2. The courts should be given the overriding discretion to grant a judicial management order even where secured creditors who may appoint a receiver over the whole or substantially the whole of the company's assets object to such an appointment. The court should exercise such discretion if the prejudice that will be caused to the unsecured creditors in the event that a judicial management order is not made is wholly disproportionate to the prejudice that will be caused to the secured creditors if a judicial management order is made. It is suggested that such an approach will strike a better balance between the interests of a holder of a floating charge and those of unsecured creditors as currently the scale is tilted more in favour of the floating charge holders whose veto rights can only be overridden by the courts "if the public interest so requires", which in practice is too narrow and imposes too high a threshold.
3. Clear provisions should be made for the priority of debts incurred during the course of judicial management and that the debts incurred by the judicial manager on behalf of the company should have priority over the fees of the judicial manager. This is so as to provide counterparties trading with the company in judicial management with some form of assurance that the judicial manager would not incur such debts without having solid grounds to expect to be able to repay the same. This additional confidence in dealing with a company in judicial management may go far in helping the judicial management achieve its statutory purposes.
4. Provisions that expressly provide that our courts may grant stays of proceedings with an extraterritorial scope should not be introduced. The prohibition against the commencement of the legal process for proceedings instituted in a foreign court is generally only enforced where the creditor has been guilty of oppressive, vexatious or otherwise unfair or improper conduct. The Committee is of the view that this position should be retained given the need to recognise the comity amongst States. It would seem that the better mechanism to restrain creditors from proceeding against the company overseas would be to apply for recognition and a stay of proceedings in the foreign State's courts, instead of introducing provisions for an extra-territorial stay. For example,

under the Model Law, if a debtor's assets are threatened by creditor collection efforts in a jurisdiction other than the country where a main bankruptcy or insolvency proceeding is pending, a representative of the debtor can seek injunctive relief from the courts of the country in question by seeking recognition of the host nation's proceeding. Accordingly, stay provisions with extraterritorial reach are unnecessary in Model Law countries.

Schemes of Arrangement

1. Sections 210, 211 and 212 of the Companies Act should be retained in the Companies Act with additional statutory support provided for in the New Insolvency Act where the company seeks a statutory moratorium against its creditors. Creditors should, however, have recourse to the court for an order that the additional statutory support in the New Insolvency Act will apply to a scheme of the arrangement, even if no moratorium has been sought by the company (for example, where the company is proposing to compromise creditor rights through the scheme).
2. The scope of the statutory moratorium for schemes of arrangement should be no narrower than the moratorium in judicial management, and the court should be given discretionary powers to alter the scope of the moratorium to be granted to the company. This would allow the court to tailor the scope of the moratorium in each case according to its circumstances.
3. In addition, it is proposed that cram-down provisions should be introduced to allow a scheme of arrangement to be passed over the objections of a dissenting class of creditors, subject to the requirement that the requisite majorities in number and value of creditors must have been obtained overall. However, the court should require a high threshold of proof that the dissenting class is not prejudiced by the cram-down.

Cross-Border Insolvency

The Committee recommended the following:

1. The judicial management regime should be extended to cover all foreign companies.
2. The Model Law should be adopted in Singapore, with the appropriate modifications and exclusions. The adoption of the Model Law is particularly attractive as it sets out a comprehensive framework for international cooperation which lends far greater clarity and certainty than the existing provisions in the Companies Act and the common law. This increased certainty and clarity will help provide greater predictability of process and outcome and reduce the overall costs of obtaining recoveries or dividends from the cross-border insolvency process, in turn drawing foreign investments to Singapore.
3. Ring-fencing as a general rule for the winding up of foreign companies (whether or not registered to

do business in Singapore) should be abolished as it is contrary to internationally-accepted standards of a fair and equitable cross-border insolvency regime and will affect the credibility of Singapore's cross-border insolvency law. However, as envisaged by Article 21 and 22 of the Model Law, the court will have the discretion to prohibit, restrict, or subject to conditions, the remission of assets of a foreign company in winding up in Singapore to the principal foreign liquidation if it is not satisfied that the interests of Singapore creditors will be adequately protected if they were to prove their claims in the foreign insolvency proceeding.

4. The abolition of ring-fencing should not extend to regulated industries where the interests of local creditors have to be protected, particularly, the financial sector. The above recommendation, therefore, should not affect the promulgation or continued operation of any other ring-fencing legislation which is applicable to any specific type of companies or industries