CORPORATE INSOLVENCY, RESTRUCTURING, AND RECOVERY IN THE COVID-19 WORLD - PART 1

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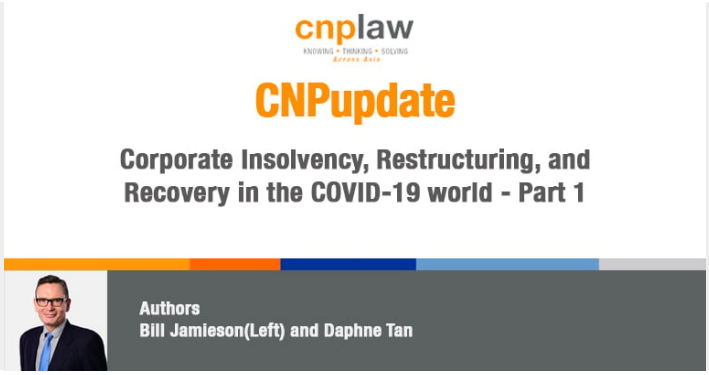

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Introduction

There is little doubt that the COVID-19 pandemic has contributed to the present economic recession in Singapore and elsewhere. Even absent the pandemic, however, data from the Ministry of Trade and Industry and the Ministry of Law from mid to late 2019 portended a recession in the near future. The Ministry of Law's 23 July 2020 announcement that the Insolvency, Restructuring, and Dissolution Act of 2018 ("**Act**") would come into force on 30 July 2020 is therefore much welcomed. This article provides a brief overview of two major changes brought about by the Act, particularly in light of the modifications to the Act brought about by the COVID-19 Temporary Measures Act of 2020 ("**COVID-19 Act**") and constitutes part 1 of our multi-part series on corporate insolvency, restructuring, and recovery in the COVID-19 world.

What is the Insolvency, Restructuring, and Dissolution Act of 2018 and how is it relevant to companies and business-owners?

Passed in parliament and assented to by the President of Singapore as early as 1 October and 31 October 2018, respectively, the Act consolidates Singapore's corporate and individual insolvency laws into a single instrument, introduces a new regulatory regime for the licensing of insolvency practitioners, and

modernizes Singapore's insolvency laws.
C-suite executives, shareholders, and entrepreneurs would do well to note the changes brought about by the Act. An example that is of crucial importance is section 440, which modifies contractual rights of commercial parties, going so far as to affect contracts that were entered into prior to the commencement of the Act.

What are the key changes brought about by the Act?

Ipso facto clauses are no longer enforceable, unless "significant financial hardship" can be shown

Section 440 of the Act provides for the unenforceability of ipso facto clauses from the date of the commencement of the Act. An ipso facto clause is a clause which renders the insolvency or impending or prospective insolvency of a company an event of default under a contract that would entitle the other party(ies) to the contract to accelerated payment or forfeiture, howsoever structured or phrased. The only exception is if the party relying upon such an ipso facto clause applies to the Singapore Courts for a declaration that section 440 is not to apply. Proof that the applicant will suffer "significant financial hardship" in the absence of the declaration is necessary. "Significant financial hardship" is not defined.
Certain contracts and agreements are excluded from the scope of the section. Eligible financial contracts as may be prescribed in subsidiary legislation, contracts that constitute licences, permits, or approvals issued by a Government or statutory body, and prescribed agreements that are the subject of a treaty to which Singapore is a party are but some examples.
Section 440 falls within the ambit of sections 525 and 526 (savings and transitional provisions) of the Act. However, save for the very specific circumstances prescribed under those sections, there is no general saving or transitional provision which preserves the enforceability of ipso facto clauses within contracts entered into before the commencement of the Act, unlike in other jurisdictions (such as Australia). Consequently, the default position would appear to be that ipso facto clauses are simply unenforceable in Singapore from 30 July 2020 moving forward, regardless of the date the contract was entered into by the contracting parties. Those who have commenced legal action solely on the basis of ipso facto clauses and who have yet to have their cases substantively heard on the merits may be confronted with the question as to whether that action has been rendered unsustainable as a result of section 440. Even further, those who have had their cases substantively heard but have yet to obtain judgment may have to face the prospect of a re-trial, in light of the commencement of the Act.

The monetary threshold at which the presumption of insolvency can be invoked based on expired and unsatisfied statutory demands in

the case of companies has been increased from S$10,000 to S$15,000 (and for foreign or unregistered companies, from S$2,000 to S$15,000 also). Note, however, that for the duration of the prescribed period of 20 April 2020 to 19 October 2020 the threshold is S$100,000 and a statutory demand will not expire unsatisfied until after six (6) months have passed since its service on the debtor

Section 254(1) of the Companies Act as at the date of this article provides for the circumstances in which a company may be wound up by the High Court of Singapore. Section 254(1)(e) provides that one such circumstance is when the company is unable to pay its debts. The most common means by which a creditor proves the inability of a debtor-company to be unable to pay its debts to the creditor is under section 254(2)(a), which provides that the debtor-company is deemed to be unable to pay its debts if a creditor (by assignment or otherwise) to whom it is indebted more than $10,000 has served a statutory demand on the debtor-company and that statutory demand remains unsatisfied after the expiry of three (3) weeks. In the case of unregistered companies the monetary threshold under the Companies Act is as of writing a sum exceeding S$2,000. With the commencement of the Act the monetary threshold will be brought in line to a sum exceeding S$15,000.

Upon the commencement of the Act, section 254 of the Companies Act will be repealed. In its place is section 125 of the Act, which mirrors section 254 save that the monetary threshold has been increased from more than S$10,000 to more than S$15,000. Note, however, that the COVID-19 Act modifies the Act such that for the duration of the prescribed period of **20 April 2020** to **19 October 2020** at the first instance, the monetary thresholds for the presumption of insolvency under the Act are modified from more than S$15,000 to more than S$100,000, with the timeline for the expiry of statutory demands extended from three (3) weeks to six (6) months. Interestingly, the COVID-19 Act does not modify the provisions of the Companies Act or the Act relating to the insolvency of unregistered companies.

Section 26 of the COVID-19 Act contains extensive saving and transitional provisions which limit the impact of the COVID-19 Act on applications and statutory demands filed and served before the commencement of the prescribed period.

Conclusion

The supply and demand-side shocks brought about by the pandemic have impacted several major industry sectors severely, and many others significantly. Few expect to emerge unscathed. The Singapore government has in response shown real, significant, and substantive support to companies and business-owners in the form not only of monetary subsidies but also the COVID-19 Act. Upon the commencement of the Act, companies can avail themselves to the further relief of section 440 of the Act and the deemed insolvency provisions of the Act as modified by the COVID-19 Act.

We hope that this article has provided you with a useful outline of the relevant provisions. The next instalments in our multi-part series will address the remaining changes brought about by the Act.