Singapore: A Restructuring Entrepôt

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Singapore was founded as a trading post of the British East India Company in 1819 and achieved initial success as an entrepôt due to its strategic location and free port status. While modern Singapore has moved rapidly from its humble beginnings, it nevertheless seeks to become an entrepôt in a different field altogether, namely, debt restructuring.

A debt restructuring not only provides distressed companies with an opportunity to restructure financially, but more fundamentally, operationally; neither of which are priorities when times are good. In this regard, Singapore has two main regimes that provide distressed companies with restructuring opportunities:

1. **Schemes of Arrangement:** The first is a scheme of arrangement, which is a court-approved agreement between a company and its members or creditors. Section 210 of the Companies Act provides the statutory framework for schemes of arrangement. The Section 210 framework allows the debtor to bind different classes of creditors and/or shareholders to a scheme of arrangement, provided that a majority in number representing three-fourths in value of the class of creditors present and voting (either by person or in proxy) at the meeting votes in favour of the scheme.
2. **Judicial Management:** The second is judicial management, which is a temporary court-supervised recovery plan that aims to give viable companies in financial trouble a more even chance to rehabilitate themselves and be restored to profitability, or at the very least, trade as a going concern. The Singapore judicial management regime is similar to the United Kingdom's administration regime.

In July 2016, the Ministry of Law accepted the recommendations of a specially constituted Committee to Strengthen Singapore as an International Centre for Debt Restructuring. The proposed measures (the "**Measures**") draw from the best aspects of the insolvency regimes globally, including those of the United Kingdom (traditionally perceived as a creditor friendly jurisdiction) and the United States (traditionally perceived as a debtor friendly jurisdiction), and are customised to fit our regional practices and conditions.

The Measures, which will be formally introduced as part of the larger Companies (Amendment) Bill in 2017, enhance the current restructuring ecosystem, injecting greater certainty and flexibility to respond to the complex restructurings of this age, while retaining safeguards in respect of creditor rights. The revised restructuring regime will, among other things, (i) open the Singapore courts' jurisdiction to a greater number of companies that may wish to restructure in Singapore, regardless of where they are incorporated; (ii) provide breathing room to such companies and their related entities attempting, in good faith, to formulate a restructuring plan; and (iii) facilitate easier access to rescue financing.

Welcoming foreign debtor companies—Clarifying and extending the restructuring jurisdiction

The new restructuring regime will open up Singapore as a restructuring venue to considerably more foreign debtor companies.

The central criteria for Singapore courts to assume jurisdiction for the purposes of a restructuring is that of a clear connection or nexus of the company to Singapore.

Currently, schemes of arrangements can only be invoked by foreign corporations that are "*liable to be wound up*" under the Companies Act. In other words, for schemes of arrangements, the test of whether jurisdiction is established boils down to a test of whether the court's insolvency jurisdiction can be invoked in respect of a foreign corporate debtor. In practice, that would require the courts to determine if a sufficient nexus exists by looking to the factors establishing a connection with Singapore (which are not statutorily specified) as applied to the case before the court. This includes for example, the presence of assets (bank accounts, property) or creditors in Singapore (whether local of foreign).

In order to give greater clarity to foreign companies that wish to restructure in Singapore, the Measures set out a non-exhaustive list of factors that will be taken into account by the courts to determine if a sufficient nexus exists.

The factors are:

a. where the foreign corporate debtor has established or moved its head office to Singapore or has been registered as a foreign company in Singapore;

b. where the foreign corporate debtor has opened a bank account in Singapore and transferred funds into it;

c. where the foreign corporate debtor has chosen Singapore law as the governing law in its transaction documents; and/or

d. where the foreign corporate debtor has chosen the Singapore courts as the forum for dispute resolution in its transaction documents. This is in turn bolstered by Singapore's implementation of the 2005 Hague Convention on Choice of Courts Agreements, which strengthens enforcement of agreements which specify Singapore courts as the exclusive dispute resolution forum.

The Measures will also make judicial management (which did not extend to foreign companies previously) available to foreign companies and thereby effectively open up one of Singapore's major rehabilitative regimes to foreign debtor companies. Unlike the English administration regime, judicial management offers an automatic statutory moratorium upon filing of the judicial management application, which is helpful to prevent sudden disruptions to the business arising from creditor enforcement actions.

The promulgation of specific but non-exhaustive factors to establish the requisite connection or nexus injects greater certainty and clarity as to whether and when the restructuring jurisdiction of the Singapore courts can be invoked in respect of a foreign corporate debtor. Nevertheless, these non-exhaustive factors still provide the courts with the flexibility and discretion to make a case by case determination of novel facts or factors establishing a connection or nexus in more complex scenarios.

A further point to note is that the Measures will allow for a holistic restructuring of a corporate group's debts (see also the automatic stays for related entities below). This is because the connecting factors are potentially very wide ranging. For instance, supposing that the factor of Singapore law being

the governing law of a loan document is sufficient in a particular factual scenario to establish a nexus, then that would mean that in respect of a cross border financing transaction, third party security grantors whose security documents are governed by Singapore law may invoke the restructuring jurisdiction of the Singapore courts. Effectively, the Measures may open up the restructuring regime to holding companies and subsidiaries, being entities that often offer third party guarantees or securities for loans that their subsidiaries or, as the case may be, holding companies, take up.

More breathing space for debtors—Automatic stays on creditor actions

Extending automatic stays to schemes of arrangements
Foreign corporate debtors coming into Singapore to conduct their restructurings will be provided swift respite from creditors, allowing a safe harbour to focus on formulating a cohesive rehabilitative plan.

Under the current framework, an automatic moratorium arises only when a judicial management application is made. However, no such automatic moratorium exists in respect of a scheme of arrangement, in which case a moratorium has to be applied for. Thus, there is potentially a period during which the value of the distressed entity may be eroded by way of creditor enforcement actions.

Consistent with Chapter 11 proceedings in the United States (where an automatic stay is granted upon the filing of a petition), the new restructuring regime will grant an automatic stay of creditor actions in respect of schemes of arrangements upon filing of an application under Section 210 of the Companies Act.

That said, Singapore is not adopting an absolute debtor friendly position as the grant of a moratorium on application is subject to the twin safeguards of (i) disclosing the scheme to relevant interested parties, such as certain unsecured creditors (who may apply to lift the moratorium if necessary), and (ii) the limited duration of the moratorium (one month from the filing of the application, which may be extended by the courts if required).

Extending automatic stays to related entities
Separately, the Measures will also extend moratoriums in restructurings to related entities of a debtor in appropriate cases. As a safeguard, such extension would not be granted as a matter of course, but instead would only be granted when it is shown that (i) the related entity or entities are relevant to the restructuring and (ii) including such entity or entities in the moratorium would contribute to the success of the restructuring.

The new restructuring regime will likely make Singapore a more attractive jurisdiction for debt restructurings, and the Singapore courts' facilitative and commercially sensitive approach bodes well for stakeholders looking for practical solutions in their restructurings.

Extraterritorial reach

While the United States takes the approach of a global stay of creditor action, the Measures adopt a more targeted approach, albeit with extraterritorial effect. Thus, the Singapore courts will only be able to grant injunctions against creditors (whether local or foreign) who are subject to the *in personam* jurisdiction of the Singapore courts. In this regard, Singapore's adoption of the UNCITRAL Model Law on Cross Border-Insolvency is also timely.

Potential application

The potential application of the enhanced moratorium will be wide-ranging and significant in cross-border restructurings. As Singapore is a key financial and commercial hub in Asia, Singapore is frequently a significant jurisdiction in a cross-border restructuring and conducting a restructuring in Singapore allows for orderly regulation of on-shore and off-shore debt.

Due to the lack of clarity under the current framework for restructuring of foreign corporate debtors, foreign companies frequently resorted to a parallel scheme of arrangement in Singapore, which mirrors the on-shore debt restructuring plan in its home jurisdiction.

With the new framework focusing on the cross-border aspects of restructuring, including the enhanced moratorium that automatically comes into effect and can extend to related entities of the debtor (whether local or foreign), Singapore is poised to deliver a streamlined and expedient process for global restructurings.

Significantly increasing the prospect of new money—Priority in rescue finance

Additionally, the new restructuring regime in Singapore will also encourage greater availability of rescue financing to corporate debtors attempting a restructuring in Singapore.

A crucial determinant of the success of a restructuring is often whether fresh financing can be obtained and on what terms. New money is frequently needed to tide the distressed company over and provide working capital to turn the distressed company around.

Under the current regime, as it is in the United Kingdom, there is no priority accorded to rescue financing vis-a-vis existing creditors.

The Measures adopt the United States' approach and will grant "super priority" status in respect of rescue financing. This allows rescue financing to be paid ahead of other administrative expense claims.

In the case where the rescue financing is extended on a secured basis, the Measures also provide that the courts may grant a super-priority lien in respect of the secured assets. A super priority-lien is a security that is ranked either *pari passu* or senior to existing security interests.

Acknowledging that the adoption of super-priority liens represents an intrusion into existing contractually negotiated proprietary rights, the courts will only allow such super-priority liens to be granted if it can be shown that (i) no other rescue financing is available and (ii) the existing secured creditors are adequately protected, for instance by requiring the value of the overlapping security to be such that it is significantly over-collateralised in respect of the existing secured debts.

With the advent of super priority financing and super priority liens, lenders are encouraged to extend much needed rescue financings. These proposed changes alleviate the current difficulties faced in raising new capital. This is a significant and helpful departure from the current regime, which currently requires the surrender of security by existing security holders in order to provide collateral for rescue financings, and where rescue financing is often only disbursed after a scheme of arrangement is sanctioned by the courts, since priority is expressly provided as a term of the scheme of arrangement and only becomes binding following court approval of the scheme of arrangement.

What lies ahead

The new restructuring regime will likely make Singapore a more attractive jurisdiction for debt restructurings, and the Singapore courts' facilitative and commercially sensitive approach bodes well for stakeholders looking for practical solutions in their restructurings. The progressive nature of the Singapore courts is illustrated in recent case law:

— The Singapore High Court granted recognition of a Japanese bankruptcy trustee's powers over a BVI company with operations in Japan and assets in Singapore based on the application of COMI principles (even though no winding up order made in BVI or recognition of Japanese bankruptcy order obtained in BVI) (*Re Opti-Medix Ltd* [2016] SGHC 108).

— The Singapore High Court exercised its inherent jurisdiction to grant an interim stay of proceedings against Hanjin Shipping and its Singaporean subsidiaries in support of Korean rehabilitative proceedings (*Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd)* [2016] SGHC 195).

— The Singapore High Court granted a moratorium to a company, prior to the application to convene a meeting of scheme creditors, provided there was a sufficiently detailed proposal (*Re Conchubar Aromatics Ltd* [2015] SGHC 322).

Indeed these are exciting times for restructuring professionals as Singapore positions itself as a restructuring entrepôt. Much opportunity abounds for restructuring in or connected to Singapore and the restructuring community has much to look forward to once the new restructuring regime takes effect. ■

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