Feature

KEY POINTS
- Singapore's new regime combines elements of the US Ch 11 process with the traditional creditor scheme of arrangement.
- Companies may apply for a broad moratorium that can apply to acts outside of Singapore. Moratoriums can also be granted in respect of certain related companies.
- There is a (cross-class) cram down mechanic in respect of unsecured debt, but its effectiveness in practice is uncertain.
- The changes include introduction of a "pre-packaged scheme" which bypasses the requirement for scheme meetings, where it can be demonstrated the outcome is a foregone conclusion.
- It remains to be seen the extent to which foreign courts will recognise and give effect to a Singapore scheme.

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Singapore's new "supercharged" scheme of arrangement

In this article, the authors consider aspects of Singapore's new "supercharged" scheme of arrangement procedure and its potential use in cross border restructurings.

INTRODUCTION

Singapore is seeking to become an international debt restructuring hub, akin to London or New York. This aspiration is unambiguously conveyed in the title of the 'Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring' released on 20 April 2016 (the 2016 Report). The 2016 Report recommended that this be achieved by:

- enhancing Singapore's legal framework for restructuring;
- creating a restructuring friendly ecosystem by increasing the availability of rescue financing and strengthening the quality of insolvency professionals; and
- addressing the "perception gap" by communicating the benefits of debt restructuring in Singapore to a wider audience and increasing the involvement of Singapore professionals, judges and academics in international organisations, conferences and research.

A key aspect of these recommendations has now been implemented, with the Singapore Parliament passing the Companies (Amendment) Act 2017 (the Act) which amends Singapore's Companies Act (Cap 50) (Companies Act). The Act introduces sweeping changes to Singapore's restructuring and insolvency framework, including significant amendments relating to schemes of arrangement, judicial management and cross-border insolvency.

Central to the reforms is the augmentation of the scheme of arrangement process with a number of new provisions, some of which were adopted from the United States Bankruptcy Code (the Bankruptcy Code). This article focusses on certain aspects of this new "supercharged" scheme of arrangement procedure, and its potential use in cross border restructurings.

SCHEMES OF ARRANGEMENT

Prior to these law reforms, the Singapore scheme of arrangement regime closely followed that found in England. The Act introduces a number of measures to "supercharge" Singapore creditor schemes of arrangement (which only apply in respect of a compromise or arrangement between a company and its creditors or any class thereof) including:

- an expanded jurisdiction for foreign companies to access Singapore schemes;
- enhanced moratoriums (including a "world-wide" stay and extension of the moratorium to related companies);
- (cross-class) creditor cram downs;
- "pre-packaged" schemes that bypass the requirement for scheme meetings;
- priority rescue funding;
- a formal proof of debt regime; and
- various other creditor protections.

Given that (similarly to the English scheme of arrangement regime) the Singapore regime has not been meaningfully updated since its introduction over 100 years ago, these changes are nothing short of revolutionary. Many of these new provisions are based on concepts found in Ch 11 of the Bankruptcy Code. By adopting these concepts, Singapore is seeking to create a new regime that incorporates the "best of both worlds" of the scheme of arrangement and Ch 11 procedures.

APPLICABILITY OF SINGAPORE SCHEMES TO FOREIGN COMPANIES

Key to becoming an international debt restructuring hub is enabling foreign companies to avail themselves of Singapore's scheme of arrangement procedure.

A scheme of arrangement may be proposed in respect of any "company", which means in this context any corporation liable to be wound up under the Companies Act. The Act has expanded this concept by specifically providing that a foreign company may (only) be wound up in Singapore if it has a "substantial connection" with Singapore.

A court may rely on the presence of one or more of the following matters in determining that the company has a substantial connection with Singapore:

- Singapore is the centre of main interests of the company;
- the company is carrying on business in Singapore or has a place of business in Singapore;
- the company is a foreign company that is registered under Division 2 of Part XI of the Companies Act;
- the company has substantial assets in Singapore;
- the company has chosen Singapore governing law for a loan or other transaction (or for the resolution of a dispute arising out of a loan or other transaction); or

- the company has submitted to Singapore's jurisdiction for the resolution of a dispute relating to a loan or other transaction.

The substantial connection concept appears to be a development of the "sufficient connection" test applied by the English courts when determining if there is jurisdiction to wind up a foreign company in England, and which also forms the basis for jurisdiction in respect of schemes of arrangement. The English courts have developed this test in the context of schemes of arrangements to facilitate the use of English schemes to restructure European and other foreign companies, relying on many of the sorts of matters contemplated above.

ENHANCED MORATORIUMS

The Act provides that where a company proposes, or intends to propose, a scheme of arrangement the court may, on the application of the scheme company, grant a moratorium order.

The company must provide specific information in support of such application, including evidence of support from the company's creditors for the scheme of arrangement and an explanation of how such support would be important for the success of the scheme. The company must also provide a list of every secured creditor and the 20 largest unsecured creditors of the company, and (if the scheme has not yet been proposed) a brief description of the intended scheme which is sufficient to enable the court to assess whether the intended scheme is feasible and merits consideration by the company's creditors.

The scope of the moratorium order is potentially very broad – it may restrain:

- winding up resolutions;
- appointment of receivers;
- legal proceedings against the company;
- execution, distress or other legal process against property of the company;
- any step to enforce any security over any property of the company, or to repossess any goods held under lease, hire-purchase or retention of title arrangements; and
- re-entry or forfeiture under any lease in respect of property occupied by the company.

Upon application, and at the court's discretion, the moratorium order may be expressed to apply to acts outside of Singapore (provided the relevant person is within the jurisdiction of the Singapore court). This is similar in concept to the "world-wide" automatic stay provided for under Ch 11 of the Bankruptcy Code, which has extraterritorial reach through the personal jurisdiction of the US bankruptcy courts that can extend to acts outside of the US.

While a Singapore court order may not have quite the global clout of one issued by a US bankruptcy court, Singapore is nonetheless a significant financial hub for the Asia-Pacific region. Financial institutions operating in the region will be wary of infringing such an order. Foreign trade creditors may be less deterred.

Moratorium orders may also be granted by the Singapore court with respect to a holding or subsidiary company of the scheme company, where:

- the related company plays a necessary and integral role in the scheme;
- the scheme will be frustrated if a restrained action is taken against the related company; and
- the creditors of the related company will not be unfairly prejudiced by the order.

Remarkably, it appears the related company may be a foreign company without a substantial connection to Singapore.

The most obvious utility of a "group moratorium" order would be to obtain protection not only for a borrower, but also all of the guarantors of debt subject to the scheme. However, there may well be more creative applications of such an order. The moratorium could therefore be a powerful tool to assist with multi-national group restructurings (that goes even beyond what is normally available in Ch 11 of the Bankruptcy Code).

However, the Singapore courts will need to be vigilant that these moratoriums do not become too easily accessible or abused by debtors – merely intending to propose a scheme is a low bar, and there are no limits on the period for which the courts may grant moratorium orders.

The Act also introduces an automatic 30 day moratorium, in respect of the scheme company itself, which runs from the date that the application is made for a moratorium order. This interim moratorium is available to a company only once within any 12 month period, and applies only to acts within Singapore. The interim moratorium ceases 30 days after the application for a moratorium order is made (or the date on which the application is decided on by the court, if this date is earlier than 30 days).

CROSS-CLASS CREDITOR CRAM DOWNS

The Act creates a mechanism to force one or more non-consenting classes of creditors to be bound by the scheme of arrangement, if:

- the scheme is approved by a majority in number, representing at least 75% of the value, of those present and voting at the meeting of at least one class of creditors;
- the scheme is also approved by creditors comprising a majority in number, representing at least 75% of the value, of those present and voting at the meeting(s) of scheme creditors as a whole; and
- the scheme is "fair and equitable" to each dissenting class of creditors and does not "discriminate unfairly" between two or more classes of creditors.

The concept of "fair and equitable" has been adopted from the Bankruptcy Code, and requires that:

- no creditor in the dissenting class receive less under the scheme than it is estimated by the court to receive in the most likely scenario if the scheme is not passed;
- if the creditors in the dissenting class are secured, they must receive deferred cash payments totalling the amount secured (and security preserved until such time), be given a charge over the proceeds of their secured asset or be entitled to realise the "indubitable equivalent" of the security; and
- if the creditors in the dissenting class are unsecured, they must either be paid out in full, or the scheme must not provide for any creditor or shareholder subordinate to the dissenting creditor to receive or retain any property (for these purposes, the term "unsecured", appears to be intended to include secured creditors to the extent of any shortfall claim that cannot be satisfied from the secured collateral).

In principle, this cross-class cram down mechanic addresses a key weakness of the scheme of arrangement procedure. Whilst the requisite majority of creditors can bind the minority within a class, if the rights of creditors are sufficiently dissimilar they will need to form a separate class. In practice, this can create a veto for junior classes of creditors, unless an alternative mechanism (such as an English pre-packaged administration share sale, combined with inter-creditor release mechanics) can be employed to "burn them off".

However, the Singapore cram down mechanism may be difficult to utilise as drafted for a number of reasons. The Act incorporates (as described in the last bullet above) what is known in the US as the "absolute priority rule". This rule requires (among other things) that to cram down an unsecured creditor existing shareholders may not retain any of their shares in the company unless all unsecured creditors are paid in full (subject to the "new value", "gifting" or other exceptions, to the extent they are available). The rule effectively requires the shares of existing shareholders to be divested, a power which is provided for in the Bankruptcy Code by way of a shareholder cram down power. Unfortunately, no such power to cram down shareholders (or otherwise divest their shareholding in the company) exists under the Act or existing Singapore law. Effectively, therefore (unless a different interpretation of these provisions is adopted in Singapore), it appears the Singapore cram down may rely on shareholders agreeing to *voluntarily* divest their shares for no value, or on traditional enforcement type methods of "burning off" equity (eg enforcement of share security or sale through a pre-planned insolvency process).

The requirement that the scheme of arrangement be approved by creditors reflecting at least 75% by value and 50% by number of schemed creditors (present and voting) *as a whole* also seems somewhat arbitrary. This potentially means that a cram down could only reliably be used where the dissenting creditors comprise a relatively small part of the capital structure (regardless of whether they can be demonstrated to be completely underwater or receiving a significantly better recovery than in liquidation).

PRE-PACKAGED SCHEMES

The Act introduces the concept of "pre-packaged schemes". The court may, on the application of the company, make an order approving a creditor scheme of arrangement even though no meeting of creditors (or class thereof) has been ordered or held.

Creditors intended to be bound by the scheme must be notified of the application, and provided a statement that contains:

- information concerning the company's property and financial prospects;
- information on how the proposed scheme will affect the rights of those creditors; and
- such other information as is necessary to enable the creditor to make an informed decision whether to approve the proposed scheme.

The court may not approve the scheme unless it is satisfied that, had a meeting of the (relevant) creditors been summoned, creditors comprising a majority in number, representing at least 75% of the value, of those present and voting at the meeting of each relevant class would have approved the scheme. The Act does not specify what evidence would be required to demonstrate to the court that the scheme would have been approved. However, it could be expected that scheme voting or lock-up agreements signed by the requisite majorities would be an appropriate basis to draw this conclusion.

It should be noted that the pre-packaged scheme mechanic cannot be used in conjunction with the cross-class cram down provisions.

This provision helps address a common criticism of schemes of arrangement; that they can be expensive and lengthy processes. The provision effectively allows a company to dispense with both the court hearing to convene a meeting of creditors, and the meeting itself, if it can be demonstrated that the outcome of the meeting is a forgone conclusion. This efficiency is to be welcomed.

FORMAL PROOF OF DEBT REGIME

The Act sets out a detailed and formal proof of debt process for creditor schemes. This new process appears focussed on determining creditor claims for voting rather than dividend purposes.

Where a meeting of creditors is summoned, the Act requires that creditors are notified of the manner and period within which to file proofs of debt. Failure to comply with these requirements will disallow a creditor from voting at the meeting.

Once a creditor has filed a proof of debt they are entitled to inspect another creditor's proof of debt, and to object to:

- the rejection of its proof of debt;
- the admission of another creditor's proof of debt; or
- a request by another creditor to inspect its proof of debt.

Every proof of debt is to be adjudicated by the court appointed chairman of the meeting. If there is any dispute in respect of the inspection, admission or rejection of any proof of debt such dispute is to be determined by an "independent assessor". The independent assessor is appointed either by agreement of all parties to the dispute, or by the court (upon application by any party to the dispute or the company). If a party to the dispute disagrees with the determination of the independent assessor, that person may file a "notice of disagreement" for the court to consider that dispute when the court hears the application for approval of the scheme.

Previously there was no formal statutory process for determining creditor claims in schemes of arrangement. Where the issue arose in practice, it was typically dealt with in two stages:

- the chairman of the creditors' meeting had the power to admit disputed or unliquidated claims for voting purposes at a value determined by the chairman;
- the terms of the scheme itself could provide a mechanism for assessing the nature of claims with uncertain values (such as assessment by an adjudicator) for the purposes of dividends under the scheme.

In practice however, in the case of schemes that are restructuring financial debt, it is unusual for there to be any significant disagreement as to its quantum.

These provisions in the Act appear to be a response to the Singapore case of *Royal Bank of Scotland NV v TT International Ltd* [2012]

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SGCA 9. In that case a creditor scheme was passed by a "razor thin margin" of creditors, and there were allegations that the scheme chairman (also the proposed scheme manager) had made inappropriate decisions to allow and disallow various creditor claims which influenced the outcome. Whilst the Singapore Court of Appeal made a number of helpful statements in that case as to proper practice, Singapore's Insolvency Law Review Committee formed the view that there should nevertheless be a formal legislative framework for determining proofs of debt in schemes.

Given that the new provisions appear to focus on the determination of proofs of debt for voting purposes, arguably it would still be permissible for the scheme documentation to provide for claim determination mechanics for dividend purposes.

There is a risk that this more formal proof of debt regime, including the ability of creditors to contest each other's claims, could in some cases protract the scheme timetable if it requires all proof of debt related disputes to be determined by the independent assessor prior to the scheme meeting.

FOREIGN RECOGNITION OF SINGAPORE SCHEMES

A key aspect of whether these law reforms will be effective is whether a Singapore scheme of arrangement will be recognised and given effect to in those foreign jurisdictions where dissenting creditors might seek to enforce their debt or security claims subject to the scheme.

The rule in *Gibbs* (named after the eponymous 1890 case *Gibbs & Sons v Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399 (*Gibbs*)) may be an obstacle to recognition. *Gibbs* is an English Court of Appeal decision that held that a debt may only be discharged by the governing law of that debt. This is a significant barrier for the recognition in England of a Singapore scheme that seeks to compromise English law governed loans or bonds. This is problematic given the prevalence of the use of English law in international finance. Furthermore, the *Gibbs* rule is also likely to apply in a number of other common law jurisdictions (eg Hong Kong).

Having said that the rule in *Gibbs* has attracted criticism of late, including in the recent Singapore case of *Pacific Andes Resources Development Ltd* [2016] SGHC 210. It is therefore possible that common law jurisdictions may move towards a willingness to recognise a debt discharge in accordance with the law of the debtor's centre of main interests (even when the debt itself is not governed by that law).

The UNICITRAL Model Law on Cross Border Insolvency (Model Law) is also an important consideration. The Model Law has been adopted in a number of key jurisdictions around the world, and allows courts in those jurisdictions to recognise a "foreign proceeding" and provide various forms of assistance (including recognising the effectiveness of a discharge of debt under that foreign proceeding).

The Model Law defines "foreign proceeding" as a:

> "collective or judicial proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation."

It is not clear that a Singapore scheme of arrangement is a "foreign proceeding" for these purposes because, among other things, it is arguably not a true insolvency process (at least in the traditional sense). However, the position will depend on how the Model Law is implemented in each relevant country. The US has adopted a broad concept of a foreign proceeding in Ch15 of the Bankruptcy Code (its implementation of the Model Law), under which US courts have regularly been willing to recognise and give effect to English schemes of arrangement that compromise or discharge New York law governed debt, where it can be demonstrated that the "centre of main interests" of the debtor company is in the UK.

SINGAPORE AS A DEBT RESTRUCTURING HUB

Singapore has already been successful in establishing itself as an arbitration hub and now seeks to compete with London and New York as an international centre for debt restructuring.

There are a number of factors that act in Singapore's favour. The new "supercharged" Singapore scheme of arrangement procedure established by the Act introduces a lot of the powerful tools of the Ch 11 process (as outlined above), but still retains much of the relative flexibility, speed and cost efficiency of the scheme of arrangement procedure that has made it such a popular mechanic for cross border restructurings. Whilst there remain some potential issues with the new legislation (some of which are noted above), Singapore has demonstrated an ability to quickly supplement its legislation where required. It can therefore be expected that should any significant problems emerge in practice with the new legislation they will be resolved reasonably swiftly.

In addition, Singapore has already established itself as an important financial and professional services hub for Asia. Its proximity to and central role in the region makes it a natural venue for South East Asian restructurings. It also has the advantage of an English derived common law legal system that is well understood, and a well-regarded judiciary.

Whether it can become a true global player will however depend in part on the ability of Singapore to attract international restructuring professionals to the jurisdiction, and the development of a sophisticated "ecosystem". Also of critical importance will be the extent to which Singapore debt restructurings are accepted and recognised in other key jurisdictions.

We look forward to seeing how this new procedure works in practice, and whether other jurisdictions will consider enacting similar reforms. ■

Further Reading:

- Super priority in rescue financing – lifeline or lassoo? [2017] 5 JIBFL 286
- Discharge of debts: how foreign insolvencies may affect English law obligations [2016] 4 JIBFL 210
- LexisNexis RANDI blog: Schemes of arrangements: pushing the boundaries of jurisdiction