SINGAPORE ENACTS KEY RESTRUCTURING LAW REFORMS

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Legal Briefings – By **Paul Apáthy** and **Emmanuel Chua**

The Singapore Government has just passed the Companies (Amendment) Bill 13/2017 (the **Bill**), which contains major changes to Singapore's restructuring and insolvency laws. As planned, these changes are expected to come into effect at the latest by the second quarter of 2017,[1] and will be a major shake-up to the restructuring landscape of the region.

The reforms are a crucial part of Singapore's push to become an international debt restructuring hub. We discussed a number of the key changes in our earlier note[2] '*Singapore unveils major debt restructuring law reforms*' released in November last year.

The Bill that has been passed incorporates changes as a result of the Ministry of Law's public consultation on draft legislation which closed in December 2016 (**Public Consultation**). The Ministry received feedback from local and international respondents who largely welcomed the proposed amendments as helpful in modernising Singapore's restructuring and insolvency laws.

The Ministry of Law also published the Ministry's Response to Feedback from Public Consultation on the Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring (**Response Paper**) at the same time as introducing the Bill to Parliament, summarising the more substantive comments received on the draft legislation and the reasoning for adopting or rejecting those suggestions. The Response Paper is expected to be a helpful aid in the interpretation of the provisions in the Bill.

The Bill is largely similar to the previous draft legislation. However, some of the significant new changes include:

- extending the scope of moratoriums available (in appropriate circumstances) to holding companies in addition to subsidiaries of the scheme company;
- providing that certain types of companies, and certain arrangements (such as set-off or netting) may be excluded from the operation of the scheme and judicial management moratorium provisions;
- providing more flexibility with the new proof of debt procedure for schemes;
- establishing the initial creditor support requirement for a company to obtain a moratorium order when proposing a scheme; and
- requiring that for rescue funding to be afforded priority status, among other things it must be necessary to enable the business to continue as a going concern.

The changes are timely given the expected continued slump in Singapore's offshore and marine sector and the expectation of increased bond defaults in the region in coming months.

This update:

- briefly summarises the main thrust of the reforms in the Bill, and the history of the reforms;
- explains the key changes contained in the Bill from the previous draft legislation; and
- comments on the expected next steps.

RECAP – SINGAPORE'S DEBT RESTRUCTURING LAW REFORMS

The Bill is a key aspect of a broader project to both modernise Singapore's restructuring and insolvency law procedures and to position Singapore as a venue of choice for undertaking cross border restructurings of troubled companies.

In April 2016, the Committee to Strengthen Singapore as an International Centre for Debt Restructuring issued its report on achieving these goals (the **2016 Report**). The 2016 Report made 17 recommendations to improve Singapore's attractiveness in this regard, which covered a range of both legal and broader institutional changes, in three broad categories:

- providing an enhanced framework for restructuring, including tailored restructuring processes and procedures;
- creating a restructuring friendly ecosystem in Singapore, including rescue finance and a deep bench of restructuring experts; and
- communicating the benefits of conducting a debt restructuring in Singapore.

The Ministry of Law released draft legislation for public consultation on 21 October 2016, which addressed many of the legislative changes recommended either in the 2016 report or an earlier, more detailed report issued by Singapore's Insolvency Law Review Committee (the **2013 Report**). The Singapore Ministry of Law sought public feedback on this draft legislation by 2 December 2016.[3]

'SUPERCHARGED' SCHEME OF ARRANGEMENT

A key aspect of these law reforms is to 'supercharge' the scheme of arrangement procedure with a number of provisions introduced to broaden its availability and make it more powerful and flexible as a general 'debtor-in-possession' debt restructuring regime. It does this by incorporating a number of additional concepts, many of which were adopted from the US Chapter 11 process. These include:

- **broad jurisdiction**: making it easier for foreign companies to satisfy the jurisdictional tests to propose a Singapore scheme of arrangement;
- **worldwide stay**: introducing a broad 'worldwide' moratorium on creditor action against the company (and in some cases certain related companies) where a scheme has been proposed;
- **DIP rescue funding**: allowing 'debtor in possession' priority funding to be obtained by a company during the scheme process;
- **cram downs**: creating a mechanism to 'cram down' certain dissenting classes of creditors;
- **proof process**: prescribing a specific proof of debt process for creditors to establish their claims for the purpose of voting in a scheme;
- **fast track process**: permitting the court, in some circumstances, to approve a scheme of arrangement without holding a meeting of creditors; and

- **procedural adjustments**: including a number of protections for creditors such as the right to demand a re-vote on a scheme of arrangement and permitting judicial review of acts, omissions and decisions in respect of the scheme, after the scheme has been approved.

OTHER CHANGES

Further changes include:

- **easier access to judicial management**: allowing foreign companies to file for judicial management in Singapore and making it easier for companies to access this procedure;
- **rescue funding in judicial management**: introducing mechanisms whereby a judicial manager can seek an order to give priority to rescue finance that was incurred to achieve the purposes of judicial management; and
- **UNCITRAL Model Law**: giving effect to the UNCITRAL Model Law on Cross-Border Insolvency to allow foreign insolvencies to be more easily recognised in Singapore.

THE BILL – WHAT IS NEW?

Following the Public Consultation process, the draft legislation was incorporated into the Bill, which had its first reading on 28 February 2017. The Bill changed from the 2016 draft legislation in two substantial ways:

- modifications have been made to reflect some of the submissions received during the consultation process; and
- the Bill now also incorporates a number of general corporate law amendments that do not specifically relate to restructuring or insolvency.

Broadly speaking, the majority of substantive policy submissions arising from the Public Consultation were not accepted by the Ministry. However, there were some substantive points that were adopted, as well as various adjustments relating to more technical details. As a whole, the Bill generally continues to reflect the measures referred to in our recap above (and as described in our previous note).[4]

We summarise below the most significant changes made in the Bill in respect of the restructuring and insolvency aspects from the previous draft legislation, and some of the more significant submissions that were not accepted.

KEY CHANGES INCLUDED IN THE BILL

Some of the more significant changes in the Bill (from the December draft legislation) include:

- **specific exclusions**: the Ministry accepted that the new scheme and judicial management procedures would not be appropriate for certain types of companies (e.g. banks) and that certain financial market arrangements (e.g. certain set-off and netting arrangements) should also be excluded from the operation of the moratoriums.[5] The Bill now provides for subsidiary legislation to exclude such entities and transactions from the operation of these provisions;

- **support for scheme**: the Government specifically requested public input on the initial level of support that a company must show in order to obtain the scheme moratorium. The Bill requires that a person applying for a moratorium show *"evidence of support from the company's creditors for the intended or proposed compromise or arrangement, together with an explanation of how such support would be important for the success of the intended or proposed compromise or arrangement"*;

- **other moratorium adjustments**: a few adjustments were made to the operation of the scheme moratorium, including that:
    - the automatic moratorium is now only available once in a 12 month period (to prevent abuse through repeated filings);
    - relevant parties may now apply to the court to vary the scope of a moratorium order (rather than simply apply for its discharge);
    - the moratorium available to subsidiaries of the scheme company has been extended to also include holding companies of the scheme company;

- **super priority funding**: changes have been made to the formulation of the requirements for rescue financing being afforded priority status. The Bill now confirms that (among other things) the rescue funding must be *"necessary to enable the business* *to continue as a going concern"*;

- **proof of debt flexibility**: the Court will now have the power to grant relief or time to a purported creditor to comply with the requirements of the proof of debt framework, or to approve an alternate framework for proof of debt that is proposed by the company;
- **cram down comparator**: the comparator for the position of a potentially crammed down creditor under a scheme (i.e. what the scheme has to be at least as good as) is now the position of that creditor should the scheme not pass. This is in place of the comparator (under the previous draft legislation) which compared the scheme outcome to the position of that creditor should the company be wound up.

SIGNIFICANT SUBMISSIONS THAT WERE NOT ADOPTED

Some of the more significant submissions that were not adopted in the Bill included:

- restricting the operation of *ipso facto* clauses where a scheme is proposed or moratorium is granted;
- including a mechanism to cram down shareholders;
- abolishing the scheme of arrangement 'head count' test;
- fixed time periods for scheme moratoriums;
- restricting the application of moratoriums to creditors subject to the scheme;
- limiting the application of the moratorium to real property leases unless the lessee company continues to perform the lease (including pay rent);
- deleting or amending the formal proof of debt system; and
- giving floating charge holders increased power to block a judicial manager from dealing with their secured rights.

Hopefully there will be an opportunity for some of these suggestions to be considered further at a later date.

USEFUL CLARIFICATIONS

The Response Paper also provided some useful statements as to the intention behind certain provisions in the Bill, including:

- recognising that a scheme of arrangement moratorium should be scoped appropriately and should not generally restrict creditors unless they are subject to the proposed scheme;
- clarifying that the initial automatic moratorium is only intended to apply to acts in Singapore, in contrast to the subsequent moratorium order which would (if the court so orders) have extraterritorial effect;
- stating that nothing in the rescue finance provisions is intended to preclude a company from raising finance or granting security where it would otherwise be permitted to do so (without needing a court order); and
- confirming that the provisions relating to fast-track (or pre-packaged) scheme approval are not intended to apply in circumstances where the parties are utilising the cram down provisions.

Whilst these statements are not legally binding, they will nonetheless provide useful guidance to courts when interpreting the relevant provisions of the Bill.

WHERE TO FROM HERE?

The Bill has been passed by the Singapore Parliament, but still (as of the date of this note) requires presidential assent before passing into law. The date of commencement of the law changes will be notified in the Gazette, but the expectation is that the Bill will come into effect at the latest by the second quarter of 2017.

This Bill is the first in a series of law reforms intended to overhaul Singapore's insolvency framework, and increase the attractiveness of Singapore as an international hub for restructuring.

These reforms are especially timely given the continued slump in the offshore and marine and other key sectors which are expected to lead to increased defaults in the coming months. However, it remains to be seen if they increase Singapore’s competitiveness as a forum for cross border insolvency and restructuring. There is some ‘devil in the detail’ with a number of the provisions needing to be worked through in practice and tested by the courts. As recognised in the 2016 Report, there are also broader factors that will affect Singapore’s success in attracting cross-border restructurings, including whether Singapore has the right professional and financial ecosystem, and the extent to which foreign courts will recognise Singapore schemes.

There is also more restructuring and insolvency law reform to come. In addition to the subsidiary legislation and regulations that are expected to be enacted shortly to support and give effect to these amendments, the 2013 Report contained a number of other law reform recommendations, including the consolidation of Singapore's personal bankruptcy and corporate insolvency laws into one Act. These further reforms may provide an opportunity to fine tune the regime introduced by the Bill.

In the meantime, stakeholders across the region will need to rapidly become familiar with Singapore's new debt restructuring regime which will likely come into effect shortly.

ENDNOTES

1. As of the date of this note, we are not aware that the Bill has received presidential assent (at which point it would become an Act). The commencement date has not yet been formally gazetted.

2. Singapore unveils major debt restructuring law reforms.

3. A discussion of these proposed amendments can be found in our previous article article.

4. Singapore unveils major debt restructuring law reforms.

5. However, it does not appear that the moratorium in the legislation actually prevents the operation of set-off or netting in any event.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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