SINGAPORE UNVEILS NEW 'OMNIBUS' INSOLVENCY, RESTRUCTURING AND DISSOLUTION BILL

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Legal Briefings – By **Paul Apáthy, Emmanuel Chua and Rowena White**

Singapore's new Insolvency, Restructuring and Dissolution Bill (the **Omnibus Bill**) was passed by parliament on 1 October 2018 and is expected to come into force later this year or in early 2019.

The Omnibus Bill, which was introduced to parliament on 10 September 2018, consolidates Singapore's corporate and personal insolvency and restructuring laws into a single enactment. It also generally updates the insolvency legislation and introduces a significant number of new provisions, particularly in respect of corporate insolvency.

Businesses, financiers and advisors operating in Singapore, or dealing with Singapore connected counterparties, are encouraged to review the provisions of the new legislation ahead of it coming into force.

Some of the more noteworthy changes include:

- mandating licensing, qualifications, standards and disciplinary measures for insolvency practitioners;
- standalone voidable transactions provisions for corporate insolvency;
- a new wrongful trading provision;
- allowing 'out of court' commencement of judicial management;

- permitting judicial managers to assign the proceeds of certain insolvency related claims;
- restricting the operation of contractual 'ipso facto clauses' upon the commencement of certain restructuring and insolvency procedures; and
- modifying the operation of the scheme of arrangement cross class 'cram down' power.

In this note we provide:[1]

- a quick explanation as to how Omnibus Bill fits into Singapore's broader restructuring and insolvency law reform process; and
- an overview and some commentary in respect of the key changes (outlined above) introduced by the Omnibus Bill.

WHERE DID THE OMNIBUS BILL COME FROM?

The Omnibus Bill is the latest in a series of reforms in the Singapore insolvency and restructuring sphere in recent years, and comes hot on the heels of wide-ranging and substantive changes to Singapore's Companies Act (Cap. 50) (**Companies Act**) enacted in May 2017 which included the introduction of concepts inspired by Chapter 11 of the US Bankruptcy Code.

Historically, Singapore's insolvency law and practice has derived from English law and practice, and has therefore had much in common with the regimes in similar common law countries such as the United Kingdom, Australia and Hong Kong.

In December 2010, the Singapore Ministry of Law convened the Insolvency Law Review Committee (**ILRC**) to review Singapore's bankruptcy and corporate insolvency regimes. In its report of 4 October 2013, the ILRC recommended (amongst other things) enhancements to the corporate rescue mechanisms and the adoption of the UNCITRAL Model Law on Cross-Border Insolvency, which would be enacted by way of a consolidated insolvency act.

This report of the ILRC was followed by the constitution by the Ministry of Law of a Committee to Strengthen Singapore as an International Centre for Debt Restructuring (the **CSSICDR**), which was tasked with recommending initiatives to enhance Singapore's effectiveness as a centre for international debt restructuring. The CSSICDR issued its Final Report on 20 April 2016, setting out 17 recommendations including introducing a rescue financing regime, and strengthening the quality of Singapore based insolvency professionals.

Based on the recommendations set out in these two reports, the Ministry of Law undertook a three–stage approach to update and strengthen Singapore's insolvency and restructuring laws:

- the Bankruptcy (Amendment) Act 2015 (Act 21 of 2015) amended the Bankruptcy Act (Cap. 20) (**Bankruptcy Act**) and implemented recommendations from the 2013 ILRC report relating to personal insolvency, in particular the discharge framework for bankrupts;
- the Companies (Amendment) Act 2017 (Act 15 of 2017) enacted in May 2017 amended the Companies Act and introduced significant updates to the corporate restructuring and insolvency framework, largely based on recommendations in the 2016 CSSICDR report that were intended to increase the attractiveness of Singapore as a venue for cross border debt restructuring. Among other things, these amendments made significant changes to the Singapore scheme of arrangement procedure, including introducing several concepts inspired by Chapter 11 of the US Bankruptcy Code, such as a broad 'world-wide' stay, debtor-in-possession rescue financing and a cross-class cram down mechanic; and
- the Omnibus Bill comprises the final element of these reforms, which is the focus of this note. It was submitted for First Reading in the Singapore Parliament on 10 September 2018 and passed on 1 October 2018. It is intended to implement the remaining recommendations for reform contained in the 2013 ILRC and 2016 CSSICDR reports.

OVERVIEW OF KEY CHANGES IN THE OMNIBUS BILL

CONSOLIDATION OF INSOLVENCY LEGISLATION

Singapore's existing insolvency and restructuring legislative framework is mainly contained in the Bankruptcy Act (with respect to personal insolvency) and the Companies Act (with respect to corporate insolvency), and the related regulations.

The Omnibus Bill seeks to consolidate the relevant statutory provisions into a single enactment. In its Press Release of 10 September 2018, the Ministry of Law emphasised the desirability of common principles and practices across personal and corporate insolvency, enhanced clarity, consistency and access to Singapore laws by users, and the need to address uncertainty arising out of cross-referencing across various pieces of insolvency legislation.

The Bankruptcy Act will be repealed, and provisions in the Companies Act relating to corporate insolvency and restructuring will be deleted, at the same time as the Omnibus Bill comes into force.[2]

In addition to consolidating the insolvency laws into a single enactment, the Omnibus Bill makes a number of substantive changes to Singapore insolvency and restructuring law. These substantive changes predominantly relate to corporate restructuring and insolvency, with the new personal bankruptcy provisions largely reflecting the existing Bankruptcy Act.

LICENSING AND REGULATORY REGIME FOR INSOLVENCY PRACTITIONERS

The Omnibus Bill establishes a new licensing and regulatory regime for Singapore insolvency practitioners. A person will not be able to act as a liquidator, judicial manager or receiver of a corporation unless duly licensed.[3]

The Omnibus Bill contains:

- minimum qualifications for eligibility to hold an insolvency practitioner license (and provides for further requirements to be prescribed);[4]
- the process for the grant and renewal of insolvency practitioners' licenses (including the ability to impose conditions on licenses);[5] and
- a framework for the control and discipline of practitioners, granting licensing officers the power to revoke licenses on specified grounds, or impose various penalties on license holders.[6]

The new regulatory regime will be administered by the Insolvency and Public Trustee's Office under the Ministry of Law.[7]

NEW CORPORATE VOIDABLE TRANSACTION PROVISIONS

Under existing Singapore legislation, the provisions relating to voidable transactions are largely found in the Bankruptcy Act. The Companies Act provides that those provisions also apply, with the necessary modifications, in the case of corporate insolvency. In some cases this has given rise to inconsistencies and uncertainty as to the application of these provisions in a corporate insolvency context.

The Omnibus Bill sets out provisions which separately deal with voidable transactions in the context of personal and corporate insolvency respectively.[8] Definitions of certain relevant concepts have also been introduced, such as when a corporation would be deemed an associate of another corporation for the purposes of determining whether a company has given an unfair preference or created a floating charge that is susceptible to being unwound. These concepts appear to have been adapted from the United Kingdom’s Insolvency Act 1986.

WRONGFUL TRADING PROVISION

The Omnibus Bill introduces a new 'wrongful trading' provision to replace the existing insolvent trading regime. Under existing law, civil liability for ‘insolvent trading’ only arises where there has been a criminal conviction. In practice, therefore, civil liability for insolvent trading liability is seldom, if ever, pursued in Singapore.

Under the new section 239, a company will “trade wrongfully” if it incurs debt or liabilities, when insolvent (or becomes insolvent as a result of incurring such debt or liability), without reasonable prospect of meeting them in full.[9]

The term ‘insolvent’ is not actually defined in the Singapore legislation for these purposes. However, there is Singapore case law indicating that the court will look to both the cash flow test and the balance sheet test to determine insolvency for other purposes – this approach may well also be applicable here.[10]

A judicial manager, liquidator or creditor or contributory of the company may apply to the court for an order declaring that any person who was a party to the company trading wrongfully is personally liable for all or any of the debts or other liabilities of the company if that person:[11]

- knew the company was trading wrongfully; or
- as an officer of the company, ought, in all the circumstances to have known that the company was trading wrongfully.

However, the court may relieve a person from personal liability where the person acted honestly and, having regard to all the circumstances of the case, the person ought fairly to be relieved from personal liability.[12]

The provision has the potential to significantly widen the ambit of personal liability risk where a company is insolvent. It can be used not merely to target directors, but also other employees, contractors or counterparties of the company if they were "*party to the company trading in that manner*". The quantum of liability can also be very high – potentially the person can be liable for all debts of the company.

There is also criminal liability for wrongful trading under the provision, which can arise even if the company never enters judicial management or liquidation.[13] However, it is no longer necessary to establish criminal liability for the civil provisions to apply.

In an attempt to mitigate potential concerns about the risks arising under this provision, there is also a new provision allowing parties to seek the court's declaration as to whether a particular course of conduct, a particular transaction or a particular series of transactions of the company at the time of and after such application would constitute wrongful trading.[14] Such a declaration can be made on confidential terms.[15]

These amendments reflect recommendations in the 2013 ILRC report,[16] which in turn were based on the UK 1982 Report of the Review Committee on Insolvency Law and Practice. However, this approach to wrongful trading was not actually adopted in the United Kingdom and therefore this reflects a novel and untested approach to the concept of wrongful trading.

Directors and others dealing with distressed Singapore corporates will need to pay close attention to this new wrongful trading provision. Given the seemingly wide ambit there is the potential for liability to arise unexpectedly.

OUT OF COURT APPOINTMENT OF JUDICIAL MANAGERS

At present, a company may only be placed into judicial management through an order of the court.

The Omnibus Bill introduces an alternative method for entry into judicial management by allowing a company to be placed in judicial management by following an 'out of court' process.[17] This process involves, among other things, the company calling a meeting of creditors at which a resolution is passed by a majority in number and value of the company's creditors present and voting to place the company into judicial management.

This gives effect to Recommendation 6.5 of the ILRC's 2013 report, which considered that such a change would reduce the expense, formality and delay associated with obtaining a formal judicial management order. The Committee also thought that this change may reduce the stigma of having to be subject to the formal judicial process.

This approach is unusual – 'voluntary' out of court appointments in other similar regimes (such as United Kingdom or Australian administration procedures) can simply proceed on the basis of a resolution of directors – no creditor meeting or resolution is required (albeit in the United Kingdom prior notice must be given to a qualifying floating charge holder). It is unclear why Singapore considers an additional creditor resolution to be desirable, especially given calling such a meeting would involve additional time and expense.

ASSIGNMENT OF PROCEEDS OF CLAIMS BY JUDICIAL MANAGERS

In addition, the Omnibus Bill will permit liquidators and judicial managers to assign proceeds of actions involving undervalue transactions, unfair preferences, extortionate credit transactions, fraudulent or wrongful trading, or delinquent company officers.[18] The Omnibus Bill anticipates that further regulations would be promulgated providing for this in more detail.[19]

This power of assignment will allow judicial managers to assign the proceeds of actions relating to the above categories in favour of third party funders, who can then pursue these actions in the name of the Company. The right of liquidators to assign proceeds of claims has been recognised by the Singapore courts (in the case of *Re Vanguard Energy Pte Ltd* [2015] SGHC 156, which we discuss here) in a winding up scenario (but is not currently available to a judicial manager). More recently, the Singapore High Court also permitted an application permitting a commercial third-party funding arrangement in the ongoing winding up of Trikomsel Oke Tbk to proceed.

RESTRICTIONS ON IPSO FACTO CLAUSES

In the insolvency context, an ipso facto clause is a contractual provision that allows one party to terminate or modify the operation of the contract (or provides for this to occur automatically) by reference to the counterparty's insolvency. The exercise of contractual termination clauses can make it difficult for companies to be restructured or rescued within a formal insolvency regime. Accordingly, some insolvency regimes seek to restrict the operation of ipso facto clauses.

Under existing Singapore law, there are no restrictions on the exercise of ipso facto clauses upon the formal insolvency of a Singapore company.

The Omnibus Bill introduces a new provision restricting the operation of ipso facto clauses in certain circumstances.[20] The proposed Singapore provision is based on the corresponding provisions in the Canadian insolvency legislation.[21]

The new provision will restrict (among other things) the ability of contractual counterparties to terminate or amend, or claim an accelerated payment under any agreement with the company (or to termination or modify any right or obligation under any agreement) by reason only that specified proceedings have commenced in respect of the company or that the company is insolvent.[22] By implication therefore, counterparties will not be precluded from exercising contractual rights on other substantive grounds, such as non-payment or non-performance by the insolvent company.

The specified proceedings to which the ipso facto restrictions will apply are creditor schemes of arrangement and judicial management.[23]

The legislation will not prohibit a person from requiring payments to be made in cash for goods, services or leased property after the commencement of the proceedings, and it will not require the further advance of money or credit.[24]

There is an 'anti avoidance' provision that provides that any contractual provision that has the effect of permitting *"anything that, in substance, is contrary to [the provision] is of no force or effect."*[25]

Certain specified classes of contracts will be exempt from this prohibition, including government contracts, ship charters and 'eligible financial contracts' which are to be prescribed.[26] The scope of ‘eligible financial contracts’ will be very important for financiers contracting with Singapore companies.

In addition, a counterparty may also apply to the court for a declaration that the restriction does not apply to it, if the counterparty can satisfy the Court that the operation of the restriction would *“likely cause the applicant significant financial hardship.”*[27]

This new ipso facto provision is probably the single most controversial aspect of the reforms. In 2013 the Insolvency Law Review Committee considered, but ultimately rejected, the adoption of a restriction on the enforcement of ipso facto clauses.[28] It is interesting to see that Singapore opinion appears to have changed on the merits of such restrictions in the space of five years.

Australia has also recently adopted a statutory stay on the operation of ipso facto clauses (the Australian provisions are significantly more detailed than the Singapore provisions). This has introduced some complexity and uncertainty into the operation of many commercial and financial contracts in the context of the insolvency of an Australian company. It is not yet clear whether the Australian reforms will significantly improve the ability to rescue or restructure companies in that jurisdiction.

MODIFYING THE OPERATION OF THE SCHEME OF ARRANGEMENT CROSS CLASS ‘CRAM DOWN’ POWER

Section 211H of the Companies (Amendment) Act 2017 introduced a cross class "cram down" mechanism for Singapore schemes of arrangement. This mechanic applies to schemes of arrangement involving multiple classes of creditor. Where the scheme is approved by the requisite majorities of at least one class of creditor, the legislation provides that, in certain circumstances, another non-consenting class of creditors can be compulsorily bound to the scheme.

The procedure contained in section 211H was based on the ‘cram down’ mechanic contained in section 1129(b) of the US Bankruptcy Code, which permits a plan of reorganisation in a Chapter 11 case to be confirmed notwithstanding that the plan has not been approved by one or more classes of creditor, provided that the requirements of the US Bankruptcy Code are met and certain creditor protections are satisfied.

The Singapore cram down mechanism, as currently enacted, may be more difficult to utilise in practice. The main difficulty when applying the provision arises from its incorporation of the US "absolute priority rule"[29] as one of the conditions of 'cramming down' junior creditors. This requires (among other things, and subject to certain exceptions) that to cram down an unsecured class of creditor, existing shareholders may not retain any of their shares in the company unless all unsecured creditors are paid in full. In practice, this effectively requires that the shares of existing shareholders be divested. The issue with the implementation of this rule in Singapore arises because, unlike in a US Chapter 11 case,[30] there is no specific mechanism designed to compulsorily divest shareholders of their shares as part of a Singapore scheme of arrangement. The existing law in Singapore therefore relies (in many cases) on the voluntary divestment of shares by shareholders in order to cram down unsecured creditors, which may be difficult to achieve in practice.

In light of feedback received on this issue, the Ministry of Law has introduced section 70(4)(ii)(B) in the recent Omnibus Bill. This effectively removes the absolute priority requirement in respect of shareholders by eliminating the requirement that shareholders be divested of their shares in the company if unsecured creditors are to be crammed down. The new provision does this by simply stating that no member shall "*retain any property <u>of the company</u> on account of … the member's interest*", in place of the current restriction against a member retaining "*any property on account of … the member's interest*", which would include the members' shares.

Whilst this intended solution appears to solve the technical issue preventing the operation of the cross class cram down, it does raise a significant policy issue. The absolute priority rule is an important aspect of cram down under the US Bankruptcy Code. The rule is intended to help protect junior creditors from being 'squeezed out' by senior creditors and shareholders acting in concert to force through a reorganisation and reflects the general principle of insolvency law that creditors should be repaid out of the assets of an insolvent company before any distribution is made to shareholders. Whilst the scope of the rule continues to be subject to ongoing debate in the United States, it provides an important touchstone to help ensure fair treatment between classes. Accordingly, policy consideration should be given to whether it is desirable to adopt the United States cram down mechanic in Singapore without this aspect of the rule applying to existing shareholdings.

The issue could have practical implications in the Singapore market. For example, in the context of bond defaults (a number of which have arisen in recent years) retail bondholders who rank behind senior debt could in some cases be vulnerable to squeeze out tactics under the proposed formulation in the Omnibus Bill.

This risk will be mitigated in some cases by other protections in the Singapore legislation. For example, the Singapore cross class cram down power may only be utilised where 75% by value and a majority in number of all creditors attending and voting (across both consenting and non-consenting classes) vote in favour of the scheme. The risk is therefore most likely to arise where junior creditors comprise a relatively small proportion of the overall capital structure. It is also a requirement that no creditor in the dissenting class receives (under the terms of the scheme) an amount that is lower than what the court estimates the creditor would receive in the most likely scenario if the scheme does not take effect. However, notwithstanding these protections, there could still be scenarios (under the proposed Singapore provisions) where junior creditors have their claims extinguished for minimal compensation under a scheme (if the alternative to the scheme is liquidation, under which they are forecast to receive nothing), while shareholders retain some or all of their shares in the company (effectively allowing shareholders to retain some or all of the additional value created through the restructuring, at the expense of junior creditors).

NEXT STEPS

The Omnibus Bill is now expected to come into force in the coming months once it receives presidential assent and a commencement date is appointed. The Omnibus Bill anticipates that it will apply to corporate restructuring and insolvency processes that begin, or in respect of which an application is made, on or after the commencement date.31

NOTE

Our comments in this article were based on the first reading of the Omnibus Bill as introduced to Parliament on 10 September 2018. It is possible that subsequently there were further amendments to the Omnibus Bill (as a result of the Parliamentary debates), which resulted in changes to the final Omnibus Bill as passed by the Parliament. However, given the short time period within which the Omnibus Bill was introduced and passed, and the lack of public discussion on it, we do not expect that there were substantial changes to the original Omnibus Bill.

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ENDNOTES

1. Our comments in this article were based on the first reading of the Omnibus Bill as introduced to Parliament on 10 September 2018.

2. Omnibus Bill, sections 525 and 526.

3. Omnibus Bill, section 48(1).

4. Omnibus Bill, section 50.

5. Omnibus Bill, sections 51 and 52.

6. Omnibus Bill, sections 56 to 60.

7. Ministry of Law Press Release dated 11 September 2018: https://www.mlaw.gov.sg/content/minlaw/en/news/press-releases/omnibus-bill-introduced-to-update-singapore-insovlency-debtrestructuring-laws.html.

8. The bulk of the provisions on transactions voidable in personal insolvency are in Division 6 of Part 17 (sections 361 to 366) of the Omnibus Bill, and those related to corporate insolvency are largely in Division 3 of Part 9 (sections 224 to 229) of the Omnibus Bill.

9. Omnibus Bill, section 239(12).

10. *Parakou Shipping Pte Ltd (in liquidation) v Liu Cheng Chan & Ors* [2017] SGHC 15 [64].

11. Omnibus Bill, section 239(1).

12. Omnibus Bill, section 239(2).

13. Omnibus Bill, section 239(6) and (7).

14. Omnibus Bill, section 239(10).

15. Omnibus Bill, section 239(11).

16. 2013 ILRC Report, pages 205-208.

17. Omnibus Bill, section 94.

18. Omnibus Bill, section 144(1)(g); First Schedule, paragraph (f).

19. Omnibus Bill, section 449.

20. Omnibus Bill, section 440.

21. Bankruptcy and Insolvency Act 1985 (Canada), section 65.1 and Companies' Creditors Arrangement Act 1985 (Canada), section 34.

22. Omnibus Bill, section 440(1).

23. Omnibus Bill, section 440(6).

24. Omnibus Bill, section 440(2).

25. Omnibus Bill, section 440(3).

26. Omnibus Bill, section 440(5).

27. Omnibus Bill, section 440(4).

28. ILRC 2013 report, pages 117-122.

29. US Bankruptcy Code, section 1129(b)(2)(B).

30. The US mechanism in this regard is contained in section 1129(b) of the US Bankruptcy Code.

31. Omnibus Bill, section 526. Specific transitional rules apply for the different proceedings.

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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