Singapore's Bold New Restructuring Laws Take Effect

The Singapore Companies (Amendment) Act 2017 ("Act")¹, which came into force on 23 May 2017, introduced significant new legislative tools to rescue distressed companies and significantly enhanced Singapore’s schemes of arrangement and judicial management processes.

The Act also introduced into Singapore law the UNCITRAL Model Law on Cross Border Insolvency ("Model Law") facilitating the recognition of cross border insolvency processes in Singapore.

We summarise the key changes effected by the Act below. Please see our earlier Client Alert: Singapore Restructuring & Insolvency Reform Update: A New Hub for Insolvency and Restructuring for more details on the background to these changes.

1. Creditors’ Schemes of Arrangement

The amendments introduced significant changes to the existing Scheme of Arrangement ("Scheme") provisions. A Scheme is a compromise between a company facing financial difficulties and its creditors, which gives the management of company a respite through a court-sanctioned moratorium to restrain any debt enforcement actions.²

The following new provisions adopt features of the United States Bankruptcy Code, including chapter 11:

- automatic moratorium from the date an application is made plus the capacity for a pre-application moratorium and a moratorium in relation to related entities of the debtor company, in each case with extra-territorial effect;
- super-priority rescue (DIP) financing;
- cram downs; and
- pre-packs.

Automatic and strengthened, extra-territorial Moratorium

The amendments will enhance the existing Scheme moratorium³ in four main ways:

a) Pre-application moratorium – To give a distressed company breathing room to put forward a restructuring proposal to its creditors, a company may apply for a moratorium where it proposes, or intends to propose, a Scheme. Such pre-application moratoriums were previously only available under the common law.

b) Automatic moratorium – A 30-day moratorium will automatically arise upon the filing of an application for a moratorium order to the Court, or until the application is decided by the Court, whichever is earlier.

¹ which relevantly amends the Singapore Companies Act (Chapter 50 of the 2006 Revised Edition) ("Companies Act").
² For background in relation to Schemes, see the discussion on Schemes in the Baker McKenzie Global Restructuring & Insolvency Guide.
³ which was provided for pursuant to section 210(10) of the Act and which allowed for the court to grant a moratorium on the application of the scheme company.
c) **Worldwide in personam moratorium** – The court may now grant a moratorium extending to creditor actions outside of Singapore if the creditor is in Singapore or within the jurisdiction of the Singapore courts.

d) **Related entities** – Where a moratorium is granted in relation to a company, related entities such as the subsidiaries or holding companies may if necessary for the Scheme also apply for a moratorium.

Singapore’s position goes beyond the automatic stay applicable in US chapter 11 in that it expressly provides for applications for a moratorium in respect of related entities, whether or not located in Singapore, which could be very useful in the debt restructuring of large corporate groups with international subsidiaries. In a U.S. chapter 11 case, the court may only use its equitable powers to enjoin actions against related entities if the debtor can demonstrate that failure to do so will have a direct adverse effect upon the debtor.

The wider moratorium provides significant comfort that Schemes will not be held hostage by dissenting or errant creditors, whether in Singapore or elsewhere.

**Super-priority Rescue (DIP) Financing**

The amendments, which mirror the debtor-in-possession (DIP) financing provisions application in US chapter 11, also include provisions allowing the Court to grant 'super priority' to rescue financing loans that are necessary for the survival of the company as a going concern or to achieve a more advantageous realisation of the assets of the company.

The rescue financing may have the same priority as liquidation expenses if the company is wound up, which means rescue financing indebtedness might rank above all other preferential debts.

If no other financing options are available, the rescue financing might either rank even above liquidation expenses or be secured by a security interest that has subordinate, equal or superior priority as regards existing security interests, provided that there is "adequate protection" of the pre-existing security interests. There is a substantial body of US jurisprudence on this concept of "adequate protection", which may be persuasive before the Singapore courts.

By altering the risk profile of existing debts, super-priority rescue financing will allow lenders to provide working capital to troubled but viable companies which in turn will enable these companies the liquidity to restructure and continue as going concerns.

If existing lenders elect not to participate in any rescue financing, then it could be expected that they might seek to challenge any rescue financing. Nonconsensual priming under chapter 11 is rare.

**Cram down**

Mirroring the provisions under chapter 11, the amendments empower the Court to "cram down" on dissenting classes of creditors and approve the Scheme if certain conditions are met, including the following:

- the requisite majority approval in value and number was obtained at the Scheme meeting(s) from the creditors to be bound by (and voting at) the Scheme; and

- the Scheme does not discriminate unfairly between 2 or more classes of creditors, and is fair and equitable to each dissenting class.

"Cram down" provisions prevent errant creditors from holding out on a viable Scheme in the hopes of receiving a larger payout.
The "cram down" amendments also adopt the 'appropriate comparator' test at common law, and specifically provide for the Court to appoint a suitably experienced expert to assist the Court as to the amount a creditor of each class would likely receive if the Scheme did not become binding on the company and all classes of creditors (presumably to try and head off protracted valuation disputes).

**Pre-packs**

The amendments also allow the Court, subject to certain safeguards, to approve a pre-packaged Scheme without a court-ordered Scheme meeting having occurred (or any actual voting by creditors on the proposed Scheme), where the Court is satisfied that had a meeting of the relevant creditors or class of creditors occurred, the requisite majorities would have been obtained.

This allows fast-tracking of pre-negotiated Schemes, and seeks to replicate the limited time in which a pre-pack chapter 11 can be approved, being as little as 30 to 45 days, compared to the normal minimum Scheme timeframe (which is generally around 3 to 6 months from application).

The scheme company is only required to give notice of an application to approve a Scheme in respect of which a Scheme meeting has not been held if the Court so directs. Without such notice, though, it may make it more difficult to obtain recognition of the Scheme in other jurisdictions if it appears that sufficient procedural fairness has not been afforded to creditors.

### 2. Judicial Management

To encourage more troubled companies to proactively use the Judicial Management corporate rescue mechanism (which involves a judicial manager being appointed to the company together with an automatic moratorium)⁴, the amendments liberalise the regime in the following ways:

a) **Earlier application** – The Court need only be satisfied that the company "is likely to become", as opposed to that the company "will be", unable to pay its debts.

b) **No automatic bar on creditor opposition** – If a person who has appointed, or is entitled to appoint, a receiver and manager pursuant to a security interest objects to the appointment of a judicial manager, this objection will not be an automatic bar to that appointment. The person making the objection must show that the prejudice to that person is disproportionately greater than that caused to unsecured creditors if the application is dismissed.

c) **Rescue financing** – When a judicial management order is in force, a judicial manager is also empowered to apply to the Court for priority for rescue financing, even where no Scheme has been proposed.

### 3. Cross-border Insolvency: adoption of the Model Law

Foreign companies and liquidators now have a clearer picture of the basis on which Singapore courts will deal with cross-border restructuring or winding up with the following 3 new developments:

a) **Adoption of the UNCITRAL Model Law on Cross-Border Insolvency** ("Model Law")⁵ – Singapore is one of few Asian countries⁶ to have adopted the Model Law, which was enacted in the US⁷, UK and Australia more than ten years ago, as well as by 43 other States. Adoption of the Model Law by the Act will allow foreign representatives to apply to the High Court of

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⁴ For background in relation to Judicial Management, see the discussion on Judicial Management in the Baker McKenzie Global Restructuring & Insolvency Guide

⁵ new Division 6 of Part X.

⁶ the others being Japan, the Philippines and the Republic of Korea.

⁷ in chapter 15 of the US Bankruptcy Code.
Notably, the Model Law as incorporated in the Act has no requirement of reciprocity with the State in which the foreign proceeding is occurring. The Model Law as adopted is substantially in the same form as the Model Law, and also provides for international cooperation and communication between courts and representatives, and for concurrent insolvency proceedings.

b) **Availability of Singapore restructuring tools to foreign companies** – Schemes and Judicial Management are no longer available only to a company incorporated in Singapore. The amendments set out the factors which would make a foreign company have a "substantial connection with Singapore" and so become liable to be wound up pursuant to the Companies Act (and in that way become subject to the Court's jurisdiction for restructuring by Scheme or Judicial Management). The factors are as follows:

- Singapore is the centre of its main interests
- where it is carrying on business or has a place of business in Singapore
- it is a foreign company registered under Division 2 of Part XI of the Companies Act
- it has substantial assets in Singapore
- it has chosen Singapore law to govern a loan or other transaction or
- it has submitted to the jurisdiction of the Court.

c) **Abolition of the ring-fencing rule** – Other than in respect of banks, insurance companies and certain other licensed financial intermediaries, a Singapore liquidator of a foreign company will no longer give Singapore creditors priority over other creditors and must pay the amount realised from the assets of the foreign company to the foreign liquidator. In a related development, on 1 February 2017 the Supreme Court of Singapore and the United States Bankruptcy Court for the District of Delaware adopted the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters ("Guidelines")\(^{11}\). The Guidelines have also been adopted by the US Bankruptcy Courts for the District of Delaware and the Southern District of New York, two of the leading jurisdictions for cross border insolvency. This is the first time that a judicial communication and cooperation framework for cross-border insolvency has been adopted in Singapore.

### 4. Subsidiary Legislation

To implement amendments to the Act, the following subsidiary legislation has also been passed and is in effect:

a) **The Companies (Proof of Debts in Schemes of Arrangement) Regulations 2017** sets out the procedure by which proof of debts may be made, opposed and adjudicated upon. This procedure had previously been substantially governed by the common law.

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\(^{8}\) the Act incorporates the modified US form of the definition of foreign proceeding, which is:

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

\(^{9}\) in amended section 351.

\(^{10}\) in amended section 377.

\(^{11}\) Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters
b) **The Companies (Prescribed Companies and Entities) Order 2017** sets out the categories of entities that cannot be subject to Schemes, Judicial Management and the Model Law. These entities are generally of public importance such as banks and other financial institutions.

c) **The Companies (Prescribed Arrangements) Regulations 2017** sets out the types of security interests\(^{12}\) the exercise of which is not affected by a moratorium applicable in a Scheme or Judicial Management.

**Further thoughts**

The amendments effected by the Act are part of an ongoing and concerted effort by the Singapore government and judiciary to liberalise the Singapore restructuring and insolvency framework.

Recent case law has shown a significant shift in favour of a more universalist approach to cross-border restructuring and insolvency. Examples include *Beluga Chartering GmhH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party)\(^{13}\)*, *Re Opti-Medix Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party)\(^{14}\)* and *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd)\(^{15}\)*, all of which are discussed in our recent article: Common law to the rescue: bridging gaps in international and domestic restructuring and insolvency regimes – a case study.

Given the recent amendments and the patently pro-universalist approach of the Singapore government and judiciary, Singapore-listed companies as well as foreign companies with sufficient connection to Singapore in actual or likely distress are likely to consider Singapore as their restructuring and insolvency jurisdiction of choice, potentially combined with chapter 15 recognition in the US\(^{16}\). The increasing trend of Asian debtors seeking chapter 11 relief may well be reversed by the implementation of these very debtor-friendly reforms.

The reforms also offer significant opportunities for the development of an Asian DIP finance market, derived from the US model. Similarly, the operation of the reforms in practice is likely to result in some degree of adoption of relevant US chapter 11 procedures although it remains to be seen if Schemes under the Act will have such a high degree of judicial involvement as well as other feature of chapter 11 (such as well advised Committees funded by the estate of the debtor company).

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\(^{12}\) Such "security interest" is defined as a "mortgage, charge, pledge, lien or other type of security interests" recognised by law and which secures an obligation under either (i) a securities contract; (ii) a derivatives contract; (iii) a master netting agreement (iv) a securities lending or repurchase agreement.

\(^{13}\) [2014] 2 SLR 815.

\(^{14}\) [2016] SGHC 108.

\(^{15}\) [2016] SGHC 195.

\(^{16}\) Recognition under chapter 15 of schemes, particularly UK schemes, is a well-worn and fairly certain path.
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