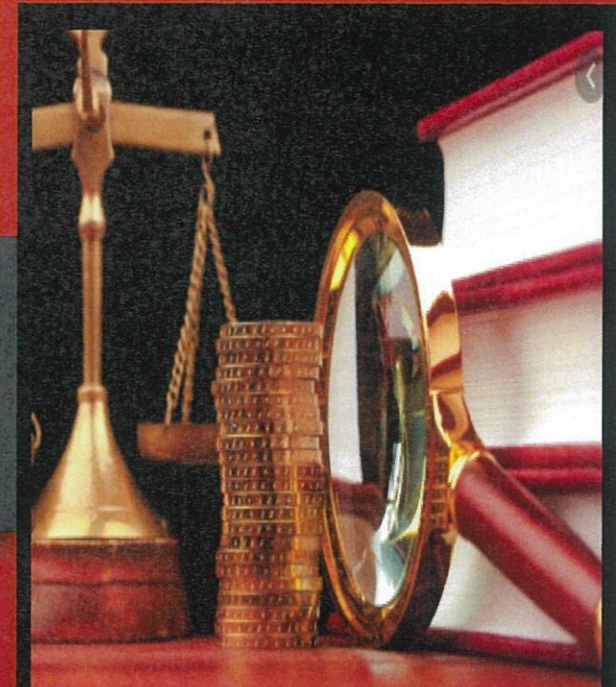


INSOLVENCY RESTRUCTURING AND DISSOLUTION ACT - 2018 (IRDA)

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1. TYPES OF INSOLVENCY PROCEDURES

- The rules governing insolvency procedures in Singapore have been consolidated in the new omnibus Insolvency, Restructuring and Dissolution Act 2018 (“IRDA”). These include:

1. INSOLVENCY

2. RESTRUCTURING

3. DISSOLUTION

a) Receivers & Managers

b) Schemes of Arrangement

c) Judicial Management

a) Voluntary Liquidation

b) Creditors Winding Up

c) Courts Winding Up

1. TYPES OF INSOLVENCY PROCEDURES

2. RESTRUCTURING

a) Receivers & Managers:

A process where a receiver or a manager is appointed either privately or via court order to take control of assets and realise their value to the best advantage of the debenture holder.

b) Schemes of Arrangement:

Court sanctioned arrangements between a debtor company and its creditors to compromise its debt obligations.

c) Judicial Management:

A process where the creditors of the Company or manager takes over the affairs and managements of a company with a view to rehabilitating the business as a going concern.

3. DISSOLUTION

a) Liquidation:

A process where a liquidator is appointed over a company to wind up its affairs and realise its assets for distribution equitably to the company's creditors.

2. THE INSOLVENCY, RESTRUCTURING AND DISSOLUTION ACT 2018

- ❑ The Insolvency, Restructuring and Dissolution Act 2018 will come to effect w.e.f. 30.07.2020. The bankruptcy act (chapter 20 of the 2009) was repealed. Portions of Companies Act (Chapter 50) was also repealed or replaced with amendments.
- ❑ Prior to IRDA there was no dedicated regime for the licensing and regulations of insolvency practitioners.
- ❑ Section 50 of the IRDA now expressly provides that Solicitors can act as Liquidators, Judicial Managers or Receivers as well, a move which is in line with the practice in other jurisdictions.

3. SIMPLIFIED INSOLVENCY PROGRAMME (SINGAPORE)

The IRDA act was amended and called IRDA (Amendment) act 2020 with the relevant provisions recently commencing on 29.JAN.2021.

The SIP is in fact part of a suite of measures to help MICRO and small companies (MSCS) in view of COVID-19.

It provides simpler, faster and lower cost processes for

- 1) Debt restructuring
- 2) Winding up (The value of its realisable unencumbered assets not exceeding S\$ 50,000)

4. License is required from the ministry of law to practice as liquidator, judicial manager or receiver

- ❖ 50(2) Qualified person: “qualified person” means any person who:
 - a) Is a solicitor.
 - b) Is a public accountant.
 - c) Is a chartered accountant with in the meaning given by Singapore Accountancy Commission.
 - d) Possesses such other qualification as the minister may prescribe by order in the Gazette.
- ❖ A public register of licensed insolvency practitioners will also be set up that is free for any party to inspect. (Section 54 IRDA)

5. INSOLVENCY PRACTITIONER'S LICENCE

An insolvency practitioner's licence will not be required if a person:

wishes to be appointed as a liquidator in a member's voluntary winding up case, or a scheme of arrangement case commenced under the Act.

6. RESTRICTION OF IPSO FACTO CLAUSES

IPSO FACTO Clauses entitle an innocent party to terminate a contract and /or exercise remedies upon the occurrence of certain contractually stipulated events.

Sec 440(1) of the IRDA prohibits a party from terminating a contract with an insolvent Company, or from taking certain action.

6. RESTRICTION OF IPSO FACTO CLAUSES

❖ What is an *ipso facto* clause?

Ipso facto - “by that very fact”

- ❖ In the context of restructuring and insolvency, ipso facto clauses refer to clauses which specify that an event of default has occurred “by that very fact” of the company having filed for winding-up, a moratorium for the purposes of a scheme, or judicial management.

6. RESTRICTION OF IPSO FACTO CLAUSES

- ❖ Section 440(1) of the IRDA applies a prohibition on termination or acceleration of contract by reason of the company's insolvency and is as follows:

“No person may, at any time after the commencement, and before the conclusion, of any proceedings by a company—

(a) *Terminate or amend, or claim* an accelerated payment or forfeiture of the term under, any agreement (including a security agreement) with the company;

or

(b) *Terminate or modify* any right or obligation under any agreement (including a security agreement) with the company,

by reason only that the proceedings are commenced or that the company is insolvent”

- ❖ However, there is no statutory definition of what it means to “*amend*” or “*modify*” contractual rights and obligations. Whether the Court will construe these terms broadly or narrowly remains to be seen in future cases.

6. RESTRICTION OF IPSO FACTO CLAUSES

- ❖ In any event, Section 440(5) of the IRDA provides several exceptions to the restriction on *ipso facto* clauses:
 - ❑ Any contract that is a licence, permit or approval issued by the Government or a statutory body;
 - ❑ Any contract that is likely to affect the national interest, or economic interest, of Singapore;
 - ❑ Commercial charters of ships;
 - ❑ Financial contracts and agreements subject to a treaty to which Singapore is a party, as may be prescribed.
- ❖ Further, a contract party may apply for an exemption if it satisfies the Court that the operation of the restriction would likely cause the applicant significant financial hardship. What constitutes “significant financial hardship” is not statutorily defined and will be left to the courts to determine.

7. SCHEMES OF ARRANGEMENT - OVERVIEW

Stage 1 - Hearing to convene meeting

- When the company is ready to propose a scheme for approval to its creditors, it may make an application to the Court for an order to convene a meeting.
- After the Court orders the convening of a meeting, a notice of meeting and explanatory statement must be issued to creditors of the company.

Stage 2 - Hearing to convene meeting

- At the meeting, voting to approve the scheme will take place.
- Creditors classified according to similar legal interests.
- The requisite approval threshold is a majority in number and 3/4 in value of the creditors present and voting either in person or proxy.

Stage 3 - Sanction hearing

- Once creditors' approval is obtained, the company must then apply to court for an order sanctioning the scheme.
- A court must be satisfied of certain matters before it sanctions the scheme:
 - Applicable statutory provisions have been complied with.
 - The scheme was fairly represented and generally just and fair to classes of creditors.
 - The scheme is one where a man of business, being a member of the class concerned would reasonably approve.

7. PART 5 - SCHEME OF ARRANGEMENT

Sec 64 - POWER OF COURT TO RESTRAIN PROCEEDING ETC; AGAINST COMPANY,

ABC Pte. Ltd. (real name of the company is withheld for confidentiality).

A company has filed an application to high court under sec 64 of IRDA seeking order that

1. For a period of 6 months from the date of the application or until further order:
 - a) No resolution shall be posed for a winding up to the company.
 - b) No appointment shall be made of any receiver or manager over any property or undertaking of the company.
 - c) No proceeding whether before a court, arbitral tribunal or administrative agency.
 - d) No execution distress or other legal process on the company except the leave of the court.
 - e) No step may be enforce any security over any property of the company.
 - f) No right of re-entry or forfeiture under any lease in respect of any premises occupied by the company shall be enforced or exercised.

The company is advised by EY CORPORATE ADVISORS Pte. Ltd. and legally advised by RAJAH & TANN SINGAPORE LLP

7. SCHEME OF ARRANGEMENT

The director who has made an affidavit and filed to high court, has mentioned the following:

1. Reductions in facilities provided to the company by its financial lenders.
The banks have issued letters of demand, facilities reduced to 'NIL' and proposing an instalment plan for repayment.
2. Banks and customers have taken insurance for the credit provided. The insurance companies have withdrawn insurance coverage for the loans extended to the company resulting in the loss of credit.

3.		
	Secured creditors of the company	US\$ 64,254,537
	Largest unsecured and unrelated creditors of the company	US\$ 186,832,928
		<hr/> US\$ 251,087,465

Final Status:

- 1a) One of the banks has filed on 16.02.2021 a winding up application of the company and it will be heard in Court on 12.03.2021.
- 1b) 7 Banks have jointly filed an application to High Court on 23.02.2021 to appoint Judicial Managers to manage the affairs of the Company and it will be heard on Court on 12.03.2021.
- 2) The outcome of the affidavit filed for 6 months moratorium at the high court is not known.

Scheme of Arrangement

- Scheme of arrangement are generally a “debtor-in-possession” regime, where the companies existing management remains in charge. A scheme manager is usually appointed to oversee the implementation of the scheme, but he does not displace the management.

BY WAY OF CONTRAST

Judicial Manager

- The judicial manager is an independent “outsider” who takes over running of the company above statutory purposes. He owes a duty to act in the interest of the companies creditors as a whole, and must act as quickly and efficiently as is reasonably practicable.
- Judicial manager is an officer of the court, he can compel the production of documents or information from the previous management.

8. JUDICIAL MANAGEMENT

- ❖ Judicial management aims to preserve and rehabilitate the company as a going concern under the supervision of the Court. This is done via the appointment of an insolvency practitioner, usually a public accountant other than the company's auditor, to manage the company with a view to rehabilitating it. This court-appointed judicial manager is independent and acts as an officer of the court.
- ❖ Involves the imposition of a moratorium to protect the company against creditor claims while steps are taken to nurse the company back to good financial health. These steps take the form of a judicial manager's proposals, which must be approved by creditors in order to be implemented and effective.

8. JUDICIAL MANAGEMENT

- ❖ Unlike the scheme of arrangement, judicial management is not a debtor-in-possession regime. This arguably gives greater protection and assurance to the company's creditors by providing independent oversight over the affairs of the company, as the incumbent management may be seen to have caused the company to be in such a parlous financial situation.
- ❖ The Judicial management process is also envisaged to be relatively quicker than schemes of arrangement via the imposition of timelines, with judicial management orders being in force for 180 days, subject to any application for extensions of time.

8. JUDICIAL MANAGEMENT - OVERVIEW

- ❖ Effect of JM application:
 - Interim moratorium imposed
 - The court may appoint an interim judicial manager upon application for JM
- ❖ Once the JM order is made, it shall, unless otherwise discharged, remain in force for 180 days from the date of making of the order. Duration is open to extension upon application by the Judicial Manager.

8. JUDICIAL MANAGEMENT - OVERVIEW

- ❖ Once a Judicial Manager is appointed, all powers conferred and duties imposed on the directors shall be exercised and performed by the Judicial Manager and not by the directors.
- ❖ The Judicial Manager will then take control of all property belonging to the company. This includes taking possession of company's records, securing premises, reviewing operations and meeting key employees.
- ❖ A Judicial Manager is empowered to do all such things necessary for the management of the affairs, business and property of the company and all other things the court may sanction. Specific powers include:
 - The power to sell/dispose of the property of the company.
 - The power to borrow money and grant security over the company's property.
 - The power to bring/defend action/legal proceedings in the name and on behalf of the company, including pursuing avoidance transaction claims to recover assets of the company.

8. JUDICIAL MANAGEMENT - OVERVIEW

- ❖ A Judicial Manager must make a proposal within 60 days of the JM order and present it to a meeting of creditors. This can include proposing that the company enter into a scheme of arrangement, or realise certain of its assets in a particular manner. Generally, the Judicial Manager will have either of these aims:
 - Judicial Management as a more advantageous realization of the company's assets than in winding-up.
 - Survival of the company or business.
- ❖ The threshold for approval of the Judicial Manager's proposal is a simple majority in number and value of creditors present and voting either in person or proxy at the creditor's meeting.

8. JUDICIAL MANAGEMENT - CIVIL CLAIM FROM AN OFFICER OF A COMPANY FOR “INSOLVENT TRADING”

Under the old law the combined effect of sec 339(3) and 340(2) of the companies act meant that a criminal conviction was a prerequisite to the making of a civil claim against an officer of a company for “insolvent trading”.

8. JUDICIAL MANAGEMENT

‘INSOLVENT TRADING’ UNDER SEC 339(3) OF THE COMPANIES ACT
‘FRAUDULENT TRADING’ UNDER SEC 340(1) OF THE COMPANIES ACT

The IRDA has largely kept the provision on Fraudulent Trading but has also introduced a new concept of “WRONGFUL TRADING” which replaces the old concept of “INSOLVENT TRADING”.

IRDA also introduces a new statutory defence [Sec239(2)] which allows the Singapore court to relieve the person declared responsible from the personal liability if the person acted honestly and having regards to all circumstances of the case the person acted fairly to be relieved from personal liability.

8. JUDICIAL MANAGEMENT :

Sec 227B(1) of the companies act

- A company could only apply to court to be placed under judicial management if it “is or will be unable to pay its debts”.

Sec 227B(1) after amendment

- A company to be placed under judicial management if the court was satisfied that the company “is or likely to become unable to pay its debts”

JUDICIAL MANAGEMENT

UNSECURED
CREDITORS



8. JUDICIAL MANAGEMENT UNDER THE IRDA:

- ✓ Prior to the enactment of the IRDA, a Company could only be placed under JM by an order of the court
- ✓ Sec 94 of the IRDA now provides that instead of applying to court for a JM order, a company can be placed under Judicial Management if a majority of the creditors (in number and value) so approve after requisite notices and documents have been filed and a creditor's meeting called.
- ✓ Once the Company is placed under JM pursuant to Sec 94 it is under the supervision of the court.

9. APPOINTMENT OF JUDICIAL MANAGER - SECURED CREDITORS VETO POWER

❖ Before the amendments:

If the holder of a floating charge (a secured creditor) objected to a judicial management application by the company, the court would be compelled to dismiss the application unless it was against public interest.

❖ After the amendments:

Court has the discretion to override an objection to a judicial management application in certain defined circumstances.

10. JUDICIAL MANAGEMENT - FLOATING CHARGE HOLDER MAY APPOINT JUDICIAL MANAGER

IRDA allows the holder of floating charge over the whole or substantially the whole of the corporations assets to appoint the judicial manager in a court application.

The court must appoint the person nominated by such a holder as judicial manager.

11. THIRD PARTY FUNDING TO JUDICIAL MANAGERS AND LIQUIDATORS

Distressed companies do not usually have sufficient funds to pursue claims. Third party funding agreements are a useful tool to enable a distressed company to pursue such claims and realise a greater recovery for its creditors.



12. DISQUALIFICATION FROM APPOINTMENT AS RECEIVERS & MANAGERS

The following are not qualified to be appointed.

- a) A company or corporation.
- b) Undischarged bankrupt.
- c) A chargee or other security holder of any property of the company.
- d) An auditor of the company.
- e) A director, secretary of the company.
- f) Any individual who is not a licensed insolvency practitioner.

13. RESCUE FINANCING

- Super priority rescue finance and super priority liens are Chapter 11 concepts that allow new money or security to be injected or granted on the basis that, in the case of super priority finance (usually referred to as DIP finance), it can be repaid ahead of existing secured, unsecured and preferential creditors on the basis that providers of such finance are generally granted super priority liens. This is subject to the existing secured creditors receiving 'adequate protection'.
- Super priority rescue finance is available to companies undergoing restructuring via a scheme of arrangement or judicial management process.

13. RESCUE FINANCING

- Rescue financiers can expect to obtain the following types of priority:
 - ❑ **Treated as costs** and expenses of winding-up (i.e. one of the preferential debt)
 - ❑ Given priority **over preferential debt** and unsecured debt
 - ❑ Given **security over company's property** not subject to security interest
 - ❑ Given a **subordinate security interest** over property that is subject to an existing security interest
 - ❑ Given a security interest over company's property that **is equal to or higher** than the existing security interest, if there is **adequate protection** for the existing security interest
- Note that the Court in *Re Attilan Group Ltd* [2017] SGHC 283 clarified that in order for superpriority status to be granted for rescue financing, applicants need to produce evidence that it was unable to obtain financing on normal terms (i.e. without superpriority status).

13. RESCUE FINANCING

- What is “adequate protection”?
- ❑ The Court orders the company to make one or more **cash payments** to the holder, the total amount of which is sufficient to compensate the holder for any decrease in the value of the holder’s existing security interest that may result from the making of the order
 - ❑ The Court orders the company to provide to the holder **additional or replacement security** of a value sufficient to compensate the holder for any decrease in value of the holder’s existing security interest that may result from the making of the order; or
 - ❑ The Court grants any relief (other than compensation) that will result in the realisation by the holder of **indubitable equivalent** of the holder’s existing security interest.
 - What amounts to “indubitable equivalent” will be a matter for the Singapore Courts to decide on, as it is not statutorily defined.

14. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

- ❑ Section 252 of the IRDA imports the UNCITRAL Model Law on Cross-Border Insolvency with some modifications to the Singapore insolvency regime.
- ❑ Key Elements:
 - Access: gives *representatives of foreign insolvency* proceedings and creditors a *right of access* to the courts of an enacting State to seek assistance and authorise representatives of local proceedings being conducted in the enacting State to seek assistance elsewhere.
 - Recognition: Accord recognition to orders issued by foreign courts commencing qualifying foreign proceedings and appointing the foreign representative.
 - ❖ A qualifying foreign proceeding should be recognized as either a main proceeding, taking place where the debtor had its *COMI* at the date of commencement, or a *non-main proceeding*, taking place where the debtor has an *establishment*.

14. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

□ Key Elements:

- Relief: Includes *interim relief* at the discretion of the court between the making of an application for recognition and the decision on that application, an *automatic stay upon recognition* of main proceedings and *relief* at the discretion of the court for both *main and non-main proceedings* following recognition.
- Cooperation: Expressly empowers courts to *cooperate* in the areas governed by the Model Law and to *communicate* directly with *foreign counterparts*. Cooperation between courts and *foreign representatives* and between representatives, both foreign and local, is also authorised.

14. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

- ❑ 'The ring-fencing' rule (where the assets of the foreign company in Singapore are to be applied to pay off Singapore creditors first before they can be remitted to other jurisdictions) in respect of foreign companies has been abolished.
 - However, 'ring-fencing' for specific financial entities such as banks and insurance companies will still be retained
- ❑ As a supplement to the insolvency regime in Singapore, a network of insolvency judges from Singapore and other jurisdictions has been set up (the Judicial Insolvency Network or "JIN") to encourage communication and cooperation amongst different national courts.
 - JIN has already issued Guidelines to address key aspects of and the modalities for communication and cooperation amongst courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including the conduct of joint hearings.



THANK YOU



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