From left, United States Bankruptcy Court for the Southern District of New York, Supreme Court of Singapore, The High Court of England and Wales at the Rolls Building.

ENHANCING SINGAPORE AS AN INTERNATIONAL DEBT RESTRUCTURING CENTRE FOR ASIA AND BEYOND

A note from Indranee Rajah S.C., Senior Minister of State for Law and Finance

THE NEED FOR AN INTERNATIONAL DEBT RESTRUCTURING HUB IN ASIA

23 May 2017 is a date for Singapore insolvency practitioners to remember.

That's when the Companies Act amendments for our enhanced debt restructuring regime came into effect - 24 months from the time the Committee to Strengthen Singapore as an International Debt Restructuring Centre began its work, culminating in a Report[1] and 10 weeks from the time the Bill was passed in Parliament.[2]

This heralds an exciting new chapter for debt restructuring work in Asia.

It will create opportunities for all professionals in the debt restructuring space - lawyers, accountants, valuers and financiers who specialise in distressed debt.

It also signals hope for Asian companies in financial distress or on the brink of insolvency. The enhanced regime offers greater flexibility and options for such companies to restructure and survive. Successful restructurings not only allow the company to carry on as a going concern but generally result in better outcomes for employees, creditors and investors as a whole.

[1] The recommendations in the Committee's report were summarised in my Note of 26 July 2016 which can be accessed at https://www.mlaw.gov.sg/content/minlaw/en/news/legal-industry-newsletters/note-by-senior-minister-of-state-for-law--indranee-rajah-s-c---08.html.

[2] My Note of 21 March 2017 on the Bill may be accessed at https://www.mlaw.gov.sg/content/minlaw/en/news/legal-industry-newsletters/note-by-senior-minister-of-state-for-law-and-finance--indranee-r.html.

In recent times we have seen many big names either go under or face financial difficulty – Hanjin Shipping, China Fishery Group, Swiber Holdings, Ezra Holdings and Swiss Co. With a still uncertain economic outlook and unprecedented debt levels in Asia – non-bank borrowers will have to repay bonds of over US$280 billion in Asia[3] and US$27 billion in Singapore[4] over the next 4 years – there will undoubtedly be demand for restructuring ahead.

With the enhanced regime in force, we are well placed to meet this demand.

WHAT'S NEW? - A UNIQUE HYBRID REGIME

Our new law incorporates the best features of the world's leading debt restructuring regimes.

Hitherto the debt restructuring regime in our Companies Act was modelled on the English Companies Act with some variations derived from Australian legislation, and had two key features:

(i) **Schemes of arrangement** (where the debtor remains in possession); and

(ii) **Judicial management** (akin to the English administration, where the management of the debtor is displaced and a professional or trustee takes possession).

The enhanced regime retains these two features but builds upon and strengthens them by adding key elements of Chapter 11 of the US Bankruptcy Code which have been instrumental in establishing the US as a pre-eminent debt restructuring centre.

Our scheme of arrangement or Debtor-in-Possession (DIP) regime is now enhanced by the following Chapter 11 features:

(i) **DIP financing** (or rescue financing) will now be available to companies in distress, for which the Court can grant super-priority over all other creditors. This encourages the injection of fresh funds to rescue troubled debtor companies (section 211E);

(ii) Protection from law suits and other legal action by virtue of:

   a. **an automatic 30 day moratorium against creditor action** immediately upon the filing of an application by the debtor company. This applies even if the restructuring proposal has not been fully worked out and there is only an intention to present a restructuring proposal as soon as practicable. The court can extend the moratorium if it is satisfied there are good reasons to do so (section 211B(8));

   b. **worldwide effect of such moratoriums**, provided that the injuncted parties are subject to *in personam* jurisdiction of the Singapore courts (section 211B(5); and

   c. **extension of moratoriums to the debtor company's related entities**, which was previously unavailable (section 211C);

[3] https://www.bloomberg.com/gadfly/articles/2016-07-24/asian-corporate-defaults-are-just-getting-started
[4] https://www.bloomberg.com/news/articles/2017-03-20/singapore-s-looming-debt-wall-fuels-concern-after-ezra-stumbles

(iii) **Cross-class cram-down of dissenting classes**. This prevents a small minority class of creditors from stymieing reasonable proposals which have majority support (section 211H); and

(iv) **Pre-packaged schemes of arrangement**, which allows for fast-tracking of schemes that have been pre-negotiated (section 211I).

Likewise, our judicial management (or professional-in-possession) regime has been enhanced by the following:

(i) **Super-priority for rescue financing** (section 227HA);

(i) **Extension to foreign companies**. Previously, judicial management orders could not be extended to foreign companies, making it difficult to deal with a foreign debtor or its related entities (section 227AA); and

(i) **Relaxation of the test for judicial management**. Previously, one had to show that the company was actually insolvent before a judicial management order could be made. However, industry feedback was that this was often too late. Now one only needs to show that it is likely that the company will become insolvent. The relaxation of the test allows a company to be put into judicial management earlier in the day, which increases the prospects of a successful rehabilitation (section 227B).

Singapore is the first common law system in the world to introduce this unique hybrid regime which combines the flexibility of the English regime with the powerful arsenal of US Chapter 11 provisions. Think of it as analogous to a merger of English rugby with American football – the rules and features are all familiar but there is now a completely new game in town, open to international stakeholders.

Carve Outs

In the course of the public consultations, we received various requests for carve outs from the enhanced regime. These have been addressed in our Government Response.[5]

In summary, the Companies Act provides for two types of carve outs – by institution and by transaction.

[5] For more information, please see 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 at https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/responses-to-feedback-received-from-public-consultation-on-propo.html, and Supplementary Response to Feedback Received on Companies (Amendment) Act 2017 to Strengthen Singapore as an International Centre for Debt Restructuring at https://www.mlaw.gov.sg/content/minlaw/en/news/public-consultations/supplementary-response-to-feedback-received-on-companies--amendm.html (Supplementary Response).

– Specified companies are carved out.[6] These include (i) banks and financial institutions, which fall under the Monetary Authority of Singapore's resolution framework and have special rules that protect customer deposits in insolvency; and (ii) special purpose vehicles (SPVs) for approved securitisation transactions and covered bonds. While the enhanced regime is unlikely to be used for these SPVs due to their orphan company structure, these two types of SPVs have nevertheless been carved out to give financial markets certainty.

– There are also carve outs for certain arrangements, such as derivative transactions in relation to closeout netting. While the exercise of netting and set-off rights under these contracts are not affected by the moratoriums, this carve out ensures that rights under surrounding security interest arrangements are not affected by the moratoriums.[7]

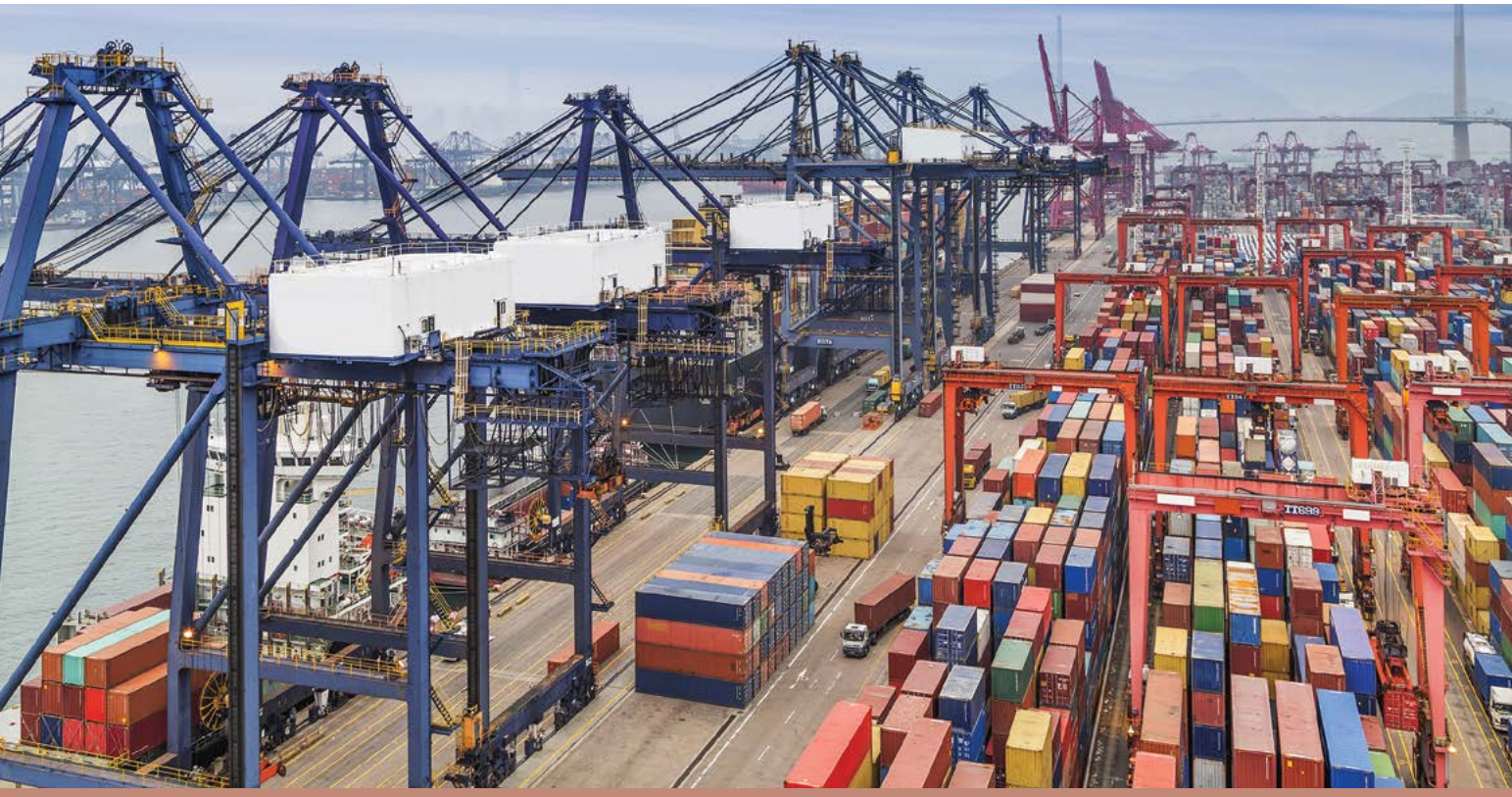
There is currently no carve out for admiralty and maritime claims. This is similar to the position in the US and the UK. In this regard it should be noted that:

– There is no change in the law with respect to the pursuit of maritime claims in liquidation and judicial management situations.

– The only difference is that now, if an automatic or court-ordered moratorium in a scheme situation is in place, maritime claimants will have to apply for leave to proceed with their claims (in the same way that they have always had to do in liquidation and judicial management situations). There are well established principles on how the courts will deal with applications for leave in respect of maritime claims in these situations. These are not affected by the new legislation.

– In urgent cases e.g. imminent expiry of limitation period, the writs and applications for leave should be filed simultaneously. MinLaw understands that the Supreme Court Registry will accept the filings and thereafter the Court will decide if the claim may proceed.[8]

[6] See Companies (Prescribed Companies and Entities) Order 2017.
[7] See Companies (Prescribed Arrangements) Regulations 2017.
[8] For discussion on feedback given by the shipping industry, please see Supplementary Response (link at foonote 5 above)



As these are early days yet, it will be necessary to see how the moratoriums and carve outs work in practice. These may have to be augmented, refined or adjusted over time.

Abolition of Ring-Fencing Rule

Previously, liquidators of foreign companies were required to ring fence Singapore assets to pay off debts incurred in Singapore first before repatriating funds to the foreign company's principal place of liquidation. The ring fencing rule is now abolished, save in respect of debts of specified financial entities, such as banks and insurance companies (Section 377).

The abolition of ring fencing levels the playing field for local and foreign creditors, providing parity of treatment in Singapore insolvency proceedings. This removes a previous source of dissatisfaction among foreign creditors and aligns Singapore with established practice in jurisdictions such as the US, UK and Australia.

RESCUE FINANCING AND VALUATIONS

With rescue financing now in the picture, we can expect two further developments:

- First, funds and other investors specialising in distressed debt will now enter the Singapore restructuring space; and
- Second, there will be increased demand for high quality business valuations, as this will be critical in determining whether, and if so to what extent, rescue financing should be provided.

Funds lawyers should take note and reach out to clients with distressed debt portfolios.

The latter development presents opportunities for the accounting firms and others in the valuation industry. It's also good news for graduates of the valuation course run by the Singapore Accountancy Commission (SAC) in conjunction with the Nanyang Technological University.[9]

ENFORCEMENT

A question often asked is the enforceability of Singapore restructuring orders. Creditors and debtors want to know if they can be enforced overseas, particularly in jurisdictions where the debtor company's or its related entities' assets are located.

The short answer is that the enforceability of a Singapore restructuring order is no different from that of the US and UK courts. Enforceability depends on a variety of things which include:

- Multilateral or bilateral arrangements;
- Whether the foreign jurisdiction has a framework for enforcement of orders made by other courts;
- Reciprocity; and
- Practical ability to enforce even absent the above factors.

Singapore judgments and orders are enforceable in many jurisdictions under the following:

[9] For more information, please see http://www.nbs.ntu.edu.sg/Programmes/NEE/CVA/Pages/default.aspx.

– **UNCITRAL Model Law on Cross-Border Insolvency (Model Law)** which provides enacting states with a modern, harmonised and fair procedural framework to effectively address cross-border insolvency cases.

  Of the 42 states which have enacted the Model Law (with Singapore being the latest adoptee), **Chapter 15 of the US Bankruptcy Code** and **UK Cross-Border Insolvency Regulations 2006** have been frequently used for recognition of Singapore orders – allowing domestic US and UK orders to be granted in support of Singapore proceedings.

– **Common law**. In addition to national legislation, the common law provides a further avenue for recognition of insolvency proceedings. Courts recognise the desirability and practicality of a universal collection and distribution of assets in a single main proceeding, and offer assistance to achieve this.

Roundtable organised by Milbank, Tweed, Hadley & McCloy LLP and GIC event on Singapore's enhanced debt restructuring regime.

– **The principle of reciprocity**. Even where there are no multilateral or bilateral arrangements, many courts (including those of civil law systems) will accord recognition to the judgments of other countries on the principle of reciprocity i.e. they will enforce our judgments if we will enforce theirs (subject of course to certain rules and exceptions e.g. fraud or public policy). Recently, we have seen this principle being applied more generally in a civil and commercial matter in China, where a Singapore judgment was accorded recognition by the Nanjing Intermediate People's Court on this basis.[10]

There are also practical considerations which facilitate the enforcement of Singapore orders. In the same way that New York's and London's status as financial hubs enable the US and UK to enforce their court orders, likewise our status as a financial centre does the same.[11] Many financial institutions and corporate vehicles through which funds for multinational conglomerates are raised (and their officers) are present in Singapore and hence subject to the jurisdiction of the Singapore courts, even though the debtors' operations may be overseas.

This is not to say that there are no challenges in enforcing Singapore orders, particularly in jurisdictions whose legal regimes are less developed. However, these challenges are no different from those encountered by orders emanating from other courts dealing with cross-border matters, including those of the US and UK.

[10] 高尔集团股份有限公司申请承认和执行新加坡高等法院民事判决案 .

[11] Singapore is ranked as the top financial centre in Asia (Global Financial Centres Index 21).

SPECIALIST JUDGES

A key aspect of being an international debt restructuring centre is to have judges who are well versed in both the legal and commercial aspects of restructuring and insolvency.

The Committee's recommendation for a dedicated bench of specialist judges to hear restructuring and insolvency cases has been accepted. Parties who bring their restructuring cases before our courts will have the assurance of knowing that the judges presiding over their cases will have the requisite experience and knowledge to deal with cross-border restructuring.

JUDICIAL INSOLVENCY NETWORK

Past experience in complex cross-border insolvencies such as Lehman Brothers and Nortel has highlighted the importance of effective communication and corporation between judiciaries.

Previously communication between courts in parallel insolvency proceedings was scarce or on an ad hoc basis. This created uncertainty, delays, and at times conflicting court orders.

To address this, the Singapore Supreme Court hosted a conference in October 2016, which attracted insolvency judges from 10 jurisdictions,[12] and resulted in the establishment of the Judicial Insolvency Network (JIN).

JIN is a network for insolvency judges to share experiences, exchange ideas, identify areas for judicial cooperation and develop best practices. JIN is a highly innovative and useful channel for a coordinated approach to cross-border restructuring and insolvency and facilitation of international enforcement.

Presenting a wood carving of Singapore's old Supreme Court to Chief Judge Morris of the US Bankruptcy Court for the Southern District of New York.

[12] Australia (Federal Court of Australia and New South Wales), British Virgin Islands, Canada (Ontario), Cayman Islands, England & Wales, Hong Kong SAR (as observer), United States (Southern District of New York and Delaware), and Singapore. Judges from Bermuda, Japan and South Korea were kept informed of the proceedings at the conference at their request.

May 2017 study visit to the US Bankruptcy Court for the Southern District of New York which included discussions with judges and leading members of the New York bankruptcy bar.

At the inaugural JIN meeting in Singapore, the participating judges produced a best practices guide (JIN Guidelines) to assist stakeholders in a cross-border insolvency develop protocols for court-to-court communication and cooperation.

To date, the JIN guidelines have been adopted by the US Bankruptcy Courts for the District of Delaware and the Southern District of New York, England and Wales, Bermuda, British Virgin Islands and Singapore. More are expected in the coming months.

CAPABILITY BUILDING

As an international financial centre from which many of the world's leading financial institutions conduct cross-border lending, Singapore has a strong base of multinational talent involved in regional debt restructuring work. These range from legal professionals to accounting and other financial experts.

Nevertheless, it remains crucial for Singapore to continually produce, attract and retain professionals of the highest quality to contribute to the debt restructuring ecosystem. An important aspect of this involves strengthening our existing professionals, while ensuring a pipe-line of talent with inter-disciplinary knowledge and skills.

To achieve this, we are looking into improving the training and education opportunities for insolvency professionals to upgrade their skills and non-insolvency professionals to transit into the sector.

An important feature will be to facilitate the acquisition of cross-disciplinary skills, so that professionals have greater breadth and depth of expertise. One option being explored is to allow legal practitioners who attend courses run by the accounting profession to count these courses towards their continuing professional development (CPD) requirements and vice versa for accountants attending legal courses.

We will work with the Law Society, SAC, Institute of Singapore Chartered Accountants and our universities to provide continuing education and training that is multi-disciplinary in nature to enable our professionals to acquire deep expertise and comprehensive skillsets in restructuring and insolvency.

JOURNEYING AHEAD TOGETHER

We brought our enhanced regime into being in an expedited time frame of 24 months from start to end. This was possible only due to the combined and concerted efforts of many contributors, both in Singapore and internationally, including industry, professionals, academics, judiciary and government.

We thank all involved for their sterling efforts, and look forward to continuing and extending these strong partnerships and collaborations as we embark on this exciting phase of development as an international debt restructuring hub for Asia.

– Indranee Rajah S.C., Senior Minister of State for Law and Finance
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