Restructuring & Insolvency

Contributing editors
Catherine Balmond and Katharina Crinson

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GETTING THE DEAL THROUGH

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General

1 Legislation

What main legislation is applicable to insolvencies and reorganisations?

The main legislation applicable to corporate insolvencies and reorganisations in Singapore is the Companies Act (Chapter 50) (the Act), read with its related subsidiary legislation.

Insofar as natural persons are concerned, the governing legislation is the Bankruptcy Act (Chapter 20).

On 24 August 2017, Singapore's Minister of Law announced that an omnibus Insolvency Act is expected to be enacted in the second half of 2018 to consolidate Singapore's corporate and individual insolvency and debt reorganisation regimes.

2 Excluded entities and excluded assets

What entities are excluded from customary insolvency or reorganisation proceedings and what legislation applies to them? What assets are excluded or exempt from claims of creditors?

The winding up of limited liability partnerships, registered business trusts, real estate investment trusts and banks are respectively governed by the Limited Liability Partnerships Act (Chapter 163A), the Business Trusts Act (Chapter 31A), the Securities and Futures Act (Chapter 289) and the Banking Act (Chapter 19).

Further, companies in certain industries may be subject to additional requirements imposed on them by industry-specific legislation (eg, designated clearing houses (Securities and Futures Act (Chapter 289)), electricity licensees (Electricity Act (Chapter 89A)), insurance broking businesses (Insurance Act (Chapter 142)) and trust companies (Trust Companies Act (Chapter 336))).

Generally, assets that are subject to security interests (eg, mortgages, charges and debentures) are excluded from the claims of creditors as the debtor is not beneficially entitled to the encumbered asset.

3 Public enterprises

What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

Generally, procedures and remedies available to creditors under the Act are applicable to government-owned enterprises.

The Singapore High Court (SHC), which oversees applications for winding up, may decline to make a winding-up order on public interest grounds. The court may also make other orders, such as a judicial management (JM) order, if it considers that it would be in the public interest to do so.

4 Protection for large financial institutions

Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

Singapore has not enacted legislation to specifically provide for institutions that are considered 'too big to fail'.

5 Courts and appeals

What courts are involved? What are the rights of appeal from court orders? Does an appellant have an automatic right of appeal or must it obtain permission? Is there a requirement to post security to proceed with an appeal?

Bankruptcy and liquidation fall within the jurisdiction of the SHC. A bankruptcy or winding-up order may be appealed, respectively, to a Judge in Chambers or to the Singapore Court of Appeal (SGCA). There is no appeal against a decision of the SGCA.

An appeal to the SGCA requires the appellant to deposit the sum of S$10,000 in court for the respondent's costs.

On 20 July 2016, the Ministry of Law indicated its intent to have insolvency and restructuring cases heard by a dedicated bench of judges of the SHC. It is, however, unclear the extent to which this has been implemented.

Types of liquidation and reorganisation processes

6 Voluntary liquidations

What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

A corporate debtor may be voluntarily wound up upon application by the debtor itself through its members by the passing of a special resolution.

Whether the voluntary liquidation proceeds as a members' voluntary liquidation (MVL) or a creditors' voluntary liquidation (CVL) depends on the solvency of the debtor. This is determined by the board of directors, which must issue a statutory declaration as to the debtor's solvency.

If such a declaration is made, the voluntary liquidation proceeds as an MVL. Otherwise, the winding up proceeds as a CVL. The main difference between an MVL and a CVL is that in the latter, the creditors' choice of liquidator prevails. An MVL may be converted to a CVL if it is subsequently discovered that the debtor is insolvent.

Upon commencement of a voluntary liquidation, the company ceases to carry on its business except to the extent that the liquidator deems necessary for a beneficial winding up. However, the corporate state and corporate powers of the company continue until it is dissolved. Any transfer of shares not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members made after the commencement of winding up, is void.

7 Voluntary reorganisations

What are the requirements for a debtor commencing a voluntary reorganisation and what are the effects?

A corporate debtor may commence a voluntary reorganisation under the Act either via a scheme of arrangement (a scheme) or by way of an application for a JM order. In the former case, the debtor management remains in control of the company whereas in the latter case, a judicial manager is appointed. The appointment of judicial managers renders the debtor's board of directors functus officio.

Both local and foreign companies may avail themselves of either mode of voluntary reorganisation, although in the latter case certain statutory criteria have to be met: see question 13.

Scheme

A scheme is generally a three-stage process.

The first stage is an application to court for leave to convene a meeting of the company's creditors or class of creditors to consider and approve a compromise or arrangement. This may be brought by, among others, the company, the creditors or the judicial managers. Where leave is granted, the company will send out a notice summoning the meeting to the creditors (the creditors' meeting), together with a statement explaining the effects of the proposed scheme.

Second, at the creditors' meeting, the creditors or classes of creditors will vote to approve the scheme. The statutory threshold to approve a scheme is a majority in number representing at least three-quarters in value of each class of creditors present and voting at the meeting.

Third, if the requisite approval from the creditors is obtained, then the court has jurisdiction (but is not bound) to sanction the scheme. See also question 12.

The scheme takes effect as a statutory contract as between the company and its creditors and the creditors inter se once the order of court sanctioning the scheme is lodged with the Registrar of Companies (the Registrar).

The Companies (Amendment) Act 2017 (the 2017 Act) introduced several additions to the scheme regime. These are summarised as follows:

(i) where two or more classes of creditors are voting, the court may 'cramdown' a dissenting class of creditors provided the court is satisfied that:
   - a majority in number of the aggregate number of creditors sought to be bound by the compromise or arrangement who were present and voting either in person or by proxy at the relevant meeting have agreed to the compromise or arrangement;
   - the majority in number referred to in (i) above represents three-quarters in value of the creditors sought to be bound by the compromise or proposal; and
   - the court is satisfied that the compromise or arrangement does not discriminate unfairly between two or more classes of creditors, and is fair and equitable in respect of each dissenting class. To date, there has been no reported decision as to what constitutes unfair discrimination and what would be considered fair and equitable;

(ii) pursuant to the newly introduced section 211I of the Act, the court is empowered to sanction a proposed scheme without the company having a creditors' meeting if the court is satisfied that, had a meeting been held, it would have obtained the relevant approval of the applicant's creditors;

(iii) an automatic 30-day moratorium arising once an application for leave to convene a creditors' meeting is made (or intended to be made);

(iv) an extension of the scope of the moratorium that the court may order (that brings the moratorium in line with the automatic stay procedures applicable in JM, including a stay of realisation of security interests); and

(v) new provisions relating to rescue-financing and the priority given to individuals or institutions providing such rescue finance.

JM order

The court will only make a JM order where it can be shown that the company:

- is or will be unable to pay its debts; and
- one or more of the following may be achieved:
  - there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern;
  - a scheme may be approved; or
  - that the JM will enable a more advantageous realisation of the company's assets than on a winding up.

The 2017 Act also introduced several key changes to the JM regime. The salient changes are set out below:

- foreign companies may apply to be placed in JM provided that they can satisfy the court that they are 'liable to be wound up' pursuant to section 351 of the Act (the JM regime was previously limited to Singapore companies only) (see question 13);
- the solvency threshold for the court to make a JM order has been lowered; and
- the availability of 'super priority' for rescue financing in a JM (see question 22).

8 Successful reorganisations

How are creditors classified for purposes of a reorganisation plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?

Where schemes are concerned, the general test is that creditors who are present and voting are classed according to the similarity (or dissimilarity) of their legal rights.

Creditors are therefore classed according to what their relative positions would be in the realistic alternative to the scheme. Consequently, if the alternative to the scheme is compulsory liquidation, the court will consider whether creditors have been correctly classified by reference to how they would rank in a liquidation scenario.

Following a recent decision of the SGCA, the votes of both wholly-owned subsidiaries and related party creditors are to be wholly discounted.

The former is easily provable. As to the latter, whether or not a particular creditor of a scheme company is considered to be a related party is a matter of fact. The SGCA indicated that the presence of factors such as those listed below will support a finding that such creditors are related parties, and that their votes at the creditors' meeting should be discounted accordingly:

- whether the scheme company controls the creditor or vice versa;
- whether the scheme company and the creditor have common shareholders who hold a less than 50 per cent but more than a de minimis stake in both companies;
- whether the creditor and the scheme company have common directors; or
- where the directors or the creditors are related by blood, adoption or marriage.

The SGCA further clarified that the mere assignment of debt from a related party to a third party does not attach related creditor status to the assignee third party. The determination of whether a creditor is a related party depends on a factual analysis of the particular creditor's connection with the scheme company.

It is settled law in Singapore that the terms of the scheme may validly release non-debtor parties (eg, third parties, guarantors or officers of the company).

9 Involuntary liquidations

What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects? Once the proceeding is opened, are there material differences to proceedings opened voluntarily?

There are various grounds on which a debtor may be placed into involuntary liquidation. The most common grounds are where the debtor is unable to pay its debts or where the creditor establishes that it is just and equitable that the debtor be wound up.

A debtor is considered unable to pay its debts if it is unable to pay its debts as they fall due (the cashflow test) or if its liabilities exceed its assets (the balance sheet test). The cashflow test is generally preferred. Where a statutory demand is served by the creditor on the debtor in respect of an undisputed debt exceeding S$10,000 (or such other sum where the undisputed portion exceeds S$10,000), and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor, an evidential presumption arises that the debtor is unable to pay its debts. The creditor may then rely upon this presumption in its application to place the debtor in compulsory liquidation.

The winding up is deemed to have commenced from the date the winding-up application is filed. From that date, statutory restrictions kick in to preserve the company's assets, namely:

- any disposition of the company's property and any transfer of shares or alteration in the status of the company's members made after the commencement of winding up is void, unless the court orders otherwise;
- no action may proceed or be commenced against the company except by leave of the court; and
- any attachment, sequestration, distress or execution that is not perfected after the commencement of winding up is void.

10 Involuntary reorganisation

What are the requirements for creditors commencing an involuntary reorganisation and what are the effects? Once the proceeding is opened, are there any material differences to proceedings opened voluntarily?

Involuntary reorganisations may only be initiated by creditors in the context of a JM or by a liquidator where the debtor is in insolvent liquidation. Otherwise, see questions 7 and 9.

11 Expedited reorganisations

Do procedures exist for expedited reorganisations (eg, 'prepackaged' reorganisations)?

See question 7. Please note, however, that this is not a 'pre-packaged' sale of assets, but an expedited approval of a scheme. The court may sanction a proposed scheme without the company holding a creditors' meeting if the court is satisfied that, had a meeting been held, it the relevant approval of the applicant's creditors would have been obtained.

12 Unsuccessful reorganisations

How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

Scheme

A proposed reorganisation by way of a scheme is defeated where the requisite approval from the creditors present and voting at the creditors' meeting is not obtained or if the court declines to sanction the scheme, or if the creditors are incorrectly classed for the purposes of voting (in the which case the court does not have jurisdiction to sanction the scheme, but may now – under the 2017 Act – order a revote).

Even where the statutory threshold is met, the court may decline to sanction the scheme if it is not satisfied that the statutory majority had voted in a manner that is representative of the interests of each class of creditors in the scheme; or that the scheme is reasonable. In determining this, the court will likely consider factors such as whether the votes of wholly-owned subsidiaries and related party creditors have been fully discounted, or whether creditors had assigned their debts for the sole purpose of boosting the headcount and allowing the scheme to be passed (where otherwise, it would not).

The court has a supervisory role in the performance of a scheme. The court has the power to review, reverse, modify or give such direction or make such order as the court thinks fit to 'cure' any breach of the compromise or arrangement.

JM order

The court will decline to make a JM order where it is unsatisfied that the making of such an order would achieve the goals set out in question 7.

Where a JM order is made, the judicial managers will present a statement of proposals to creditors. In this case the threshold for approval of the statement of proposals is determined by a majority in number of creditors representing a majority in value of the company's debt.

13 Corporate procedures

Are there corporate procedures for the dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

Under the Act, the term 'corporation' includes both local and foreign companies.

The Registrar has wide powers to strike off both local and foreign companies on various grounds. This includes, but is not limited to, situations where the Registrar has reasonable cause to believe that the company is not carrying on business or is not in operation, where the foreign company has no place of business in Singapore or if a foreign company fails to appoint an authorised representative within six months after the date of the death of its sole authorised representative.

Comparatively, in liquidation, a local company is dissolved upon the application by the liquidator once the winding up has been completed. This is usually accompanied or preceded by the liquidator's final report and the declaration of a final dividend to the company's creditors (if assets are available for distribution).

Foreign companies may be wound up in Singapore only by an order of court where it can be shown that the requirements in section 351 of the Act are met. A winding-up order against a foreign company will only be made where it can be shown that the foreign company has a substantial connection with Singapore.

In this respect, the 2017 Act enumerates a list of factors to be considered in determining if such a substantial connection exists. These are:

- Singapore is the centre of main interests of the company;
- the company is carrying on business in Singapore or has a place of business in Singapore;
- the company is a foreign company that is registered under division 2 of Part XI of the Act;
- the company has substantial assets in Singapore; or
- the company has chosen Singapore law as the law governing a loan or other transaction, or the law governing the resolution of one or more disputes arising out of or in connection with a loan or other transaction.

The company has submitted to the jurisdiction of the court for the resolution of one or more disputes relating to a loan or other transaction.

Where Singapore is the principle place of liquidation of that foreign company, the local liquidators will then adopt the same procedure with respect to the dissolution of local companies.

14 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

A scheme is formally concluded when the terms of the scheme are performed.

A JM order may be discharged upon an application by the judicial managers stating that the purposes specified in the JM order have either been achieved or are incapable of achievement.

In a court-ordered winding up, a liquidator would apply for an order that he or she be released and that the company be dissolved after realisation of all of the company's property or so much thereof as is realisable and a final dividend is given, if any, to the creditors.

In a voluntary winding up, as soon as the affairs of the company are fully wound up, the winding up is concluded in a manner similar to that in a compulsory liquidation.

Insolvency tests and filing requirements

15 Conditions for insolvency

What is the test to determine if a debtor is insolvent?

See question 9.

16 Mandatory filing

Must companies commence insolvency proceedings in particular circumstances?

Directors of insolvent companies owe fiduciary obligations to the general body of the company's creditors. Where it is clear that the company's debts cannot be repaid, the directors should – but are not obliged to – place the company in liquidation, or in a scheme or JM, as a matter of prudence.

Directors and officers

17 Directors' liability – failure to commence proceedings and trading while insolvent

If proceedings are not commenced, what liability can result for directors and officers? What are the consequences for directors and officers if a company carries on business while insolvent?

Directors and officers of an insolvent company owe fiduciary duties to the company's general body of creditors. They therefore risk being in breach of these duties if they carry on the business of the company without due regard for the creditors' collective interests.

That said, there is no rule per se that a company may not carry on business if it is insolvent. However, if an officer of a company knowingly contracts a debt, which, at the time he or she had no reasonable or probable ground to expect that the company would be able to repay, then that officer shall be guilty of an offence and shall be liable on conviction to a fine of up to S$2,000 or to a prison term of up to three months.

A director may also incur criminal liability if in the course of winding up it appears that any business of the company was carried on with the intention of defrauding creditors.

Further, the court may make an order disqualifying a director from being a director or being involved in the management of a company for a period of up to five years where – in the context of an insolvent company – the director's conduct makes him or her unfit to be a director or be involved in the management of other companies.

18 Directors' liabilities – other sources of liability

Apart from failure to file for proceedings, are corporate officers and directors personally liable for their corporation's obligations? Are they liable for corporate pre-insolvency or pre-reorganisation actions? Can they be subject to sanctions for other reasons?

A company's directors and agents are generally not personally liable for the company's debts or obligations. However, a director of a company may be held personally liable in respect of antecedent transactions made by that company that are subsequently set aside by the court as these are considered breaches of the director's fiduciary duty to the general body of creditors (eg, by procuring an undue preference). See question 47.

A director must at all times act honestly and use reasonable diligence in the discharge of his or her duties. A director must also not make improper use of his or her position to gain an advantage for him or herself or any other person or to cause detriment to the company. A director of a company found to be in breach of the above duties will incur both civil and criminal liability:

- Civil liability – the errant director will be liable to the company for any profit made by him or her or for any damage suffered by the company as a result of the breach; and
- Criminal liability – the director shall be liable on conviction to a fine of up to S$5,000 or to imprisonment of up to 12 months.

19 Shift in directors' duties

Do the duties that directors owe to the corporation shift to the creditors when an insolvency or reorganisation proceeding is likely? When?

Under Singapore law, a company director's fiduciary duty to act in the company's best interests shifts to act in the company's creditors' best interests where the company is insolvent or near insolvency.

20 Directors' powers after proceedings commence

What powers can directors and officers exercise after liquidation or reorganisation proceedings are commenced by, or against, their corporation?

In a scheme, the management of the company remains vested in the existing board of directors.

In JM, all the directors' powers are transferred to the judicial managers for the duration of the JM order, and all directors' powers of management cease.

All powers of the directors of a company in liquidation cease upon the appointment of a liquidator, except to the extent approved by the liquidator.

Matters arising in a liquidation or reorganisation

21 Stays of proceedings and moratoria

What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

Liquidation

Once a winding-up application has been filed against the company, the company or any creditor may apply to stay or restrain any action or proceeding pending against the company and the court may do so on such terms as it thinks fit.

Once a winding-up order is made, all actions or proceedings against the company are automatically stayed and may only be proceeded with or commence with the leave of court and on such terms as the court may impose.

Reorganisations – scheme

Under the 2017 Act, a company may apply for an automatic 30-day moratorium provided it has made an application for leave to convene a creditors' meeting or it undertakes to do so as soon as practicable. In the latter case, it need only provide a brief description of the proposed compromise or arrangement. This moratorium may be dismissed or extended by the court depending on the circumstances of the case.

Prior to the 2017 Act, the moratorium was limited to actions or proceedings against the debtor company within Singapore only. In contrast, the moratorium now may have extra-territorial effect and also includes, among other things, an express power to prevent creditors from realising their security interests.

This brings the scheme moratorium more in line with the protection afforded to the debtor company by a JM order.

Creditors are entitled to challenge the moratorium or the terms thereof.

Reorganisations – JM

Upon an application for JM, a stay on all action or proceedings (including the realisation of security and execution against the company's assets) automatically arises and leave of court (subject to such terms as the court may impose) must be obtained in order to realise security or continue with any such proceedings against the company.

Where the JM order is made, any receiver or manager shall vacate office, any application to wind up the company shall be dismissed and, for the period the JM order is in effect:

- no order may be made, and no resolution may be passed, for the winding up of the company;
- no receiver or manager may be appointed over any property or undertaking of the company;
- no other proceedings may be commenced or continued against the company, except with the consent of the judicial manager, or with the leave of the court and subject to such terms as the court imposes;
- no execution, distress or other legal process may be commenced, continued or levied against any property of the company, except with the consent of the judicial manager, or with the leave of the court and subject to such terms as the court imposes;
- no step may be taken to enforce any security over any property of the company, or to repossess any goods under any chattels leasing agreement, hire-purchase agreement, or retention of title agreement, except with the consent of the judicial manager, or with the leave of the court and subject to such terms as the court imposes; and
- despite sections 18 and 18A of the Conveyancing and Law of Property Act (Chapter 61), no right of re-entry or forfeiture under any lease in respect of any premises occupied by the company may be enforced, except with the consent of the judicial manager, or with the leave of the court and subject to such terms as the court imposes.

22 Doing business

When can the debtor carry on business during a liquidation or reorganisation? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

Liquidations

Save for the period of four weeks immediately after the making of a winding-up order, a company in liquidation is not permitted to carry on its business without express approval from of the court or of the company's committee of inspection and it may only do so insofar as is necessary for the beneficial winding up of the company.

Reorganisations

Where a company is reorganising under a scheme or a JM, there is no prohibition against it carrying on its business. The terms of the scheme may provide for special treatment given to creditors who supply goods or services, allowing the company to carry on business for the duration of the scheme. In a JM, this may be sanctioned by the judicial manager.

The 2017 Act introduced 'super priority' provisions for rescue financing in scheme and JM scenarios. This is intended to incentivise and protect investors seeking to inject fresh capital into the distressed company. In general terms, where an investor comes forward to inject fresh capital, the court may order that the new investor enjoy 'super priority' in respect of such funds injected or obligations incurred, and may do so by:

- treating the debt as a cost or expense of winding up;
- giving the debt priority over all other preferential debts;
- securing the debt with a security interest over the company's property, whether subject to an existing interest or not; or
- where the property in question is already subject to a security interest, granting the rescue financier security that is subject to, equal or superior to an existing security interest.

The court will only order the creation of a security interest equal or superior to an existing security interest over property where there is 'adequate protection' provided for the existing security holder.

In both a scheme and a JM, the creditors may collectively or individually exercise oversight by making the necessary inquiries into the running of the company's business. Ordinarily, the judicial manager will seek the creditors' approval before proceeding with certain transactions or courses of action.

Insofar as a scheme is concerned, under the 2017 Act, a creditor may now apply to court to restrain the debtor company from disposing of its property other than in good faith and in the ordinary course of the business.

23 Post-filing credit

May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is or can be given to such loans or credit?

Yes. The liquidator and judicial managers are expressly authorised by the Act to do so.

Any monetary obligations incurred by the liquidator or judicial managers are payable out of the assets of the company and considered as part of the liquidator's or judicial manager's costs and expenses.

In a JM or a scheme, 'super priority' may be afforded to certain creditors who provide rescue financing (see question 22).

24 Sale of assets

In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

The sale of assets is generally governed by the law of contract. Where the asset is subject to a security interest, judicial managers may dispose of or deal with the charged property provided that the proceeds are used to discharge sums secured by the security. In a liquidation, the liquidator may not sell assets fully encumbered by a security interest as these are assets to which the company is not beneficially entitled.

25 Negotiating sale of assets

Does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

In theory, yes. These procedures are however not commonplace in Singapore. It has recently been held by the SHC that the liquidator has the power to assign a company's cause of action to a third party for value.

26 Rejection and disclaimer of contracts

Can a debtor undergoing a liquidation or reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

A liquidator may disclaim an unprofitable contract entered into by the debtor prior to liquidation. However, the liquidator may not do so where a person interested in the contract makes an application in writing to the liquidator requiring the liquidator to decide if he or she will disclaim the contract, and the liquidator does not disclaim the contract within a period of 28 days (or such further period as is allowed by the court) after receipt of the application.

Further, the court may, on an application by a person entitled to the benefit or subject to the burden of a contract made with the company, order the rescission of that contract and award damages for the non-performance of the contract, and any damages payable to that person under the order may be proved by him or her as a debt in the winding up.

Judicial managers, unlike a liquidator, have no power to disclaim onerous contracts entered into by the debtor company prior to the JM order. Judicial managers are personally liable on any contract entered into or adopted by them in the carrying out of their functions, and are entitled to be indemnified in respect of such liability out of the company's property. Judicial managers may, however, by giving notice to a counterparty disclaim any personal liability under a contract previously entered into by the debtor.

27 Intellectual property assets

May an IP licensor or owner terminate the debtor's right to use the IP when a liquidation or reorganisation is opened? To what extent may IP rights granted under an agreement with the debtor continue to be used?

Contractual provisions that provide for the re-vesting of property upon insolvency are generally void on the grounds that this deprives the insolvent estate of property to which it is beneficially entitled. However, this is ultimately a question of the contract in question.

In relation to rights to use intellectual property (IP), there is no reason in principle why such a right cannot terminate upon insolvency unless the bargain between the parties conferred proprietary interests in such IP on the insolvent party.

Whether the debtor can continue to use the IP rights after insolvency or a reorganisation depends on the terms on which the IP was granted.

28 Personal data

Where personal information or customer data collected by a company in liquidation or reorganisation is valuable, are there any restrictions in your country on the use of that information or its transfer to a purchaser?

The Personal Data Protection Act 2012 (No. 26 of 2012) requires organisations to protect personal data in its possession or under its control by making reasonable security arrangements to prevent unauthorised access, collection, use disclosure, copying, modification, disposal or similar risks.

29 Arbitration processes

How frequently is arbitration used in liquidation or reorganisation proceedings? Are there certain types of disputes that may not be arbitrated? Can disputes that arise after the liquidation or reorganisation case is opened be arbitrated with the consent of the parties?

Disputes arising in liquidation or reorganisation proceedings between the company and specific creditors may be referred to arbitration where the parties have agreed to do so, or where the underlying contract giving rise to the dispute provides for disputes to be referred to arbitration, and provided that the affected creditor obtains the leave of court to be excluded from any moratorium in place at the time.

Issues relating to the insolvency proceedings themselves and claims arising from statutory insolvency provisions are generally considered non-arbitrable.

Creditor remedies

30 Creditors' enforcement

Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

A secured creditor may appoint a private receiver, pursuant to such a right provided for under the security documents. The circumstances under which a private receiver may be appointed, as well as the powers of the private receiver, are usually provided for in the security documents.

31 Unsecured credit

What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available?

A judgment creditor may seek to enforce a judgment by applying for a writ of seizure and sale, applying for a garnishee order or appointing a receiver. The process typically takes between 7 to 21 days and provides a window for a competing creditor to file a winding-up application to halt the execution process, particularly in large-scale winding up.

While the court has the power to order pre-judgment attachments, it is unclear as to whether this applies solely to natural persons. A plain reading of the Debtors' Act (Chapter 77) suggest that it cannot apply to corporate debtors.

In any case, pre-judgment attachment is not common and may only be ordered in exceptional circumstances.

Creditor involvement and proving claims

32 Creditor participation

During the liquidation or reorganisation, what notices are given to creditors? What meetings are held and how are they called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are the liquidator's reporting obligations?

In a liquidation, notice will be issued to the company's creditors, informing them of the day on which they are to prove any debts or claims they might have, at least 14 days before the day so fixed. Notice must also be given at least 14 days before a liquidator declares any dividends to a company's creditors. Where the winding up of the company is voluntary, the company's members must meet to pass a special resolution resolving to wind up the company. A director or officer of a company must submit to the liquidator a statement of the company's affairs showing, as at the date of the winding-up order, the particulars of the company's assets, debts and liabilities, the names and addresses of its creditors and the securities held by them respectively, the dates when such securities were given, and any further information as is prescribed or as the official receiver or the liquidator requires.

In a scheme, the company or any of its members must apply to the court to convene a meeting of its creditors or class of creditors. If the meeting is summoned, then the company must send out a notice summoning the meeting to the creditors, together with a statement explaining the effects of the proposed scheme and in particular stating any material interests of the directors, whether as directors or as members, creditors or holders of shares of the company or otherwise, and the effect thereon of the scheme insofar as it is different from the effect on the like interests of other persons.

Under the 2017 Act, a creditor who files a proof of debt in the scheme now is entitled to inspect the whole or any part of a proof of debt filed by any other creditor (subject to secrecy or other obligations restricting inspection).

Where a JM order is made, the judicial managers must within 60 days (or such longer period as the court may allow) send to the Registrar and to all creditors a statement of his or her proposals for achieving one or more of the purposes of whose achievement the JM order was made and lay a copy of said statement before a meeting of the creditors.

33 Creditor representation

What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

If at a meeting of creditors summoned pursuant to a JM order, the creditors approve the judicial manager's proposals, the meeting may establish a committee for the purpose of calling on the judicial managers to furnish it with such information relating to the judicial manager's exercise of his or her functions.

In a liquidation scenario, a committee of inspection may be appointed, comprising representatives from the insolvent debtor's creditors. The liquidator may only exercise certain powers with the permission of the committee of inspection.

34 Enforcement of estate's rights

If the liquidator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong? Can they be assigned to a third party?

Yes, the SHC has held that a liquidator may assign for value a cause of action belonging to the company (or the benefits thereof) to a third party (which includes a creditor). The fruits of any remedy pursued by that third party will enure for the benefit of the third party.

Alternatively, creditors may elect to place a liquidator in funds to pursue certain claims. Where such claims are successful, the court may make such order as it thinks just with respect to the distribution of the recovered assets and the amount of those expenses so recovered with a view to giving the funding creditors an advantage over others in consideration of the risks run by them in so doing.

35 Claims

How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Can claims for contingent or unliquidated amounts be recognised? Are there provisions on the transfer of claims and must transfers be disclosed? How are the amounts of such claims determined?

Creditors' claims are submitted to the liquidator in the form of proofs of debt submitted together with relevant supporting documentation. Creditors have three months after a winding-up order is made to submit their proofs of debt, which are adjudicated upon by the liquidator. A creditor has a right of appeal to the SHC in respect of the amount admitted to proof by a liquidator.

A claim acquired at a discount is generally provable for its full face value, unless part of the full claim is waived.

Interest on claims against the company cease upon the making of a winding-up order.

36 Set-off and netting

To what extent may creditors exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

In a winding up, debts or dealings may be set-off against each other where there have been mutual credits, debts or other dealings between the company and any creditor. Set-off is not possible in respect of any debt that is not provable, or which arises by reason of an obligation incurred at a time when the creditor had notice that a winding-up application was pending. Contractual set-off, unlike legal set-off, does not survive insolvency.

In the context of a company under JM, a creditor's right of set-off continues to be applicable and is not affected by the moratorium on civil proceedings against the company.

37 Modifying creditors' rights

May the court change the rank (priority) of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

Save for the answers above relating to super priority afforded to persons who provide rescue financing, the general position is that the court may not change the priority of a creditor's claim.

38 Priority claims

Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

In a winding up, the ranking of claims by unsecured creditors to be paid in priority to all other unsecured debts is as follows:

(i) costs and expenses of the winding up;
(ii) wages and salaries of employees up to a maximum of five months' salary or S$10,000, whichever is less;
(iii) retrenchment benefits and ex gratia payments up to a maximum of S$10,000;
(iv) work injury compensation payable to an employee under the Work Injury Compensation Act;
(v) amounts due in respect of contributions payable during the 12 months before, on or after commencement of winding up relating to employees' superannuation or provident funds;
(vi) remuneration payable in respect of vacation leave; and
(vii) taxes payable.

In addition, and as noted above, the 2017 Act allows for rescue financing to be paid off with 'super priority'.

Where the assets of the company are insufficient to meet the preferential debts specified above in (i), (ii), (iii), (v) and (vi), such debts will have priority over the claims of debenture holders under any floating charge created by the company.

39 Employment-related liabilities

What employee claims arise where employees' contracts are terminated during a restructuring or liquidation? What are the procedures for termination? (Are employee claims as a whole increased where large numbers of employees' contracts are terminated or where the business ceases operations?)

The employees might have claims in respect of unpaid wages, retrenchment benefits and ex gratia payments, work injury compensation, superannuation or provident funds and vacation leave. For the ranking in priority of such claims, see question 38.

40 Pension claims

What remedies exist for pension-related claims against employers in insolvency or reorganisation proceedings and what priorities attach to such claims?

Pensions are granted priority in a company's liquidation, provided that they are payable during the 12 months before, on or after the commencement of winding up by the employer; and they are payable under an approved scheme under Singapore law.

These priorities in liquidation are not automatically imported into a winding up, although the court has the power to do so.

41 Environmental problems and liabilities

Where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator personally, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

Legislation pertaining to the protection of the environment confers broad powers on the relevant government authorities to require any person (including companies) who has caused an environmental problem to remediate the damage. Accordingly, it is possible for the relevant government authority to require an insolvency administrator or any other third party responsible for the environmental problem to remediate any damage caused by the environmental problem.

42 Liabilities that survive insolvency or reorganisation proceedings

Do any liabilities of a debtor survive an insolvency or a reorganisation?

All of a debtor's liabilities are extinguished following its winding up. Similarly, if a debtor fulfils its obligations pursuant to a scheme, then its liabilities will be extinguished to the extent that is provided under the terms of the scheme, upon the conclusion of the scheme.

43 Distributions

How and when are distributions made to creditors in liquidations and reorganisations?

A liquidator may declare interim dividends to a company's creditors.

After the liquidator has realised all of the company's property, or as much of the company's property as, in his or her opinion, can be realised, the liquidator may issue a final dividend.

In a reorganisation, the distributions to creditors will depend on the terms of the agreements reached therein.

Security

44 Secured lending and credit (immoveables)

What principal types of security are taken on immoveable (real) property?

Security over immoveable property is usually in the form of either a legal mortgage or an equitable mortgage. This is usually supported by the lodgement of the mortgage against the title of the property under the Land Titles Act (Chapter 157).

45 Secured lending and credit (moveables)

What principal types of security are taken on moveable (personal) property?

Security over moveable property is usually in the form of a fixed or a floating charge. Other forms of security include pledges and liens.

As there are only four recognised forms of security (mortgage, charge, lien and pledge), quasi-security has emerged in respect of personal property such as retention of title, sale and buy-back and hire-purchase agreements.

Clawback and related-party transactions

46 Transactions that may be annulled

What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? Who can attack such transactions?

Liquidators and judicial managers alike may set aside antecedent transactions on the basis that they amount to an undue preference (ie, either an unfair preference or a transaction at an undervalue).

A transaction at an undervalue can be annulled if it took place within five years of the winding-up application. An unfair preference that is not also a transaction at an undervalue can be set aside if made within six months of the winding-up application, or two years if the unfair preference is given to an associate of the company.

A floating charge on a company's property created within six months of the commencement of the winding up is invalid unless it is proved that the company immediately after the creation of the charge was solvent. However, this rule does not apply where cash is paid to the company at the time of or subsequently to the creation of and in consideration for the charge together with interest on the amount of cash paid at the rate of 5 per cent per annum.

A liquidator may recover any consideration received by a company's directors in respect of any property acquired by that company that is in excess of the value of the property thus acquired, the relevant clawback period being two years. Further, any disposition of a company's property, including any transfer of shares or alteration in the status of the members of the company, made after the commencement of winding up is void unless otherwise directed by the court.

Any charge created over a company's property that is registrable but not registered is void against the liquidator and any creditor of that company.

47 Equitable subordination

Are there any restrictions on claims by related parties or non-arm's length creditors (including shareholders) against corporations in insolvency or reorganisation proceedings?

Apart from the rules against undue preferences outlined in question 46, there are no restrictions on claims by related parties or non-arm's length creditors.

Groups of companies

48 Groups of companies

In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

Parent and affiliated corporations are regarded as separate legal entities. Accordingly, they will ordinarily not bear any liability incurred by their subsidiaries or affiliates. In exceptional circumstances, the court may 'lift the corporate veil' and hold liable the controller of a company: it may do so where it is satisfied that the company is an alter ego of the controller, or that the company is a mere device, façade or sham.

49 Combining parent and subsidiary proceedings

In proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes?

Each member of a corporate group has its own separate legal personality. Therefore, insolvency proceedings within the corporate group against separate entities will, prima facie, proceed separately.

That said, it is possible, in the interest of saving time and costs, that liquidations of parents and their subsidiaries be heard together, or that the same liquidators be appointed over several related companies.

The assets of subsidiaries may not be pooled to the parent for distribution purposes. The only assets available for distribution purposes are the shares in the subsidiaries. However, the liquidators may choose to wind up the subsidiaries – in which case, the assets will be distributable in the main liquidation provided that the subsidiaries' own debts are fully settled first.

International cases

50 Recognition of foreign judgments

Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

The statutory regime for the recognition of foreign judgments consists of the Reciprocal Enforcement of Commonwealth Judgments Act (RECJA) and the Reciprocal Enforcement of Foreign Judgments Act (REFJA). RECJA applies in respect of other Commonwealth countries, while REFJA applies in respect of foreign countries that afford reciprocal treatment to Singapore judgments (currently only Hong Kong). Under this statutory regime, foreign money judgments may be registered and enforced in Singapore.

If a party obtains judgment in a foreign jurisdiction to which neither RECJA nor REFJA applies, that party may commence a common law action for the judgment debt and apply for summary judgment on the ground that there is no defence to the claim.

Singapore is not a signatory to any treaty on international insolvency or on the recognition of foreign judgments.

51 UNCITRAL Model Law

Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Yes, with effect from 23 May 2017, through the enactment of the 2017 Act.

52 Foreign creditors

How are foreign creditors dealt with in liquidations and reorganisations?

Following the 2017 Act, foreign creditors are treated no differently from local creditors in liquidations and reorganisations.

53 Cross-border transfers of assets under administration

May assets be transferred from an administration in your country to an administration of the same company or another group company in another country?

Singapore is a signatory to the Model Law. Under the Model Law, the foreign representative may apply for recognition of the foreign proceeding, and subsequently request that the court grant him or her the power to administer or realise all or part of the company's property in Singapore in support of the foreign administration.

54 COMI

What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

There is no statutorily prescribed test for the determination of the COMI. Under the Model Law, a debtor's COMI is presumed to be where it has its registered office. However, this may be rebutted by evidence to the contrary (eg, evidence of another jurisdiction in which most of the debtor's dealings occur, most money is paid in or out and most decisions are made). In summary, a debtor's COMI is where the bulk of its business is carried out.

55 Cross-border cooperation

Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

The formal adoption of the Model Law codified international cooperation with other member states in parallel insolvency proceedings. In particular, the Model Law provides the basis for:

- the recognition of ongoing insolvency proceedings in one jurisdiction as being a foreign main (or non-main) proceeding, with other jurisdictions either facilitating or taking the lead of the insolvency process;
- the repatriation of locally-based assets to the principal place of liquidation (the jurisdiction of the main proceeding), subject to the protection of certain statutory rights accruing to the creditors of the jurisdiction from which the assets are repatriated; and
- the communication between the respective courts or insolvency professionals engaged in the various jurisdictions involved in the cross-border insolvency, to ensure a smooth and orderly realisation of assets on a regional, international or global scale.

56 Cross-border insolvency protocols and joint court hearings

In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

There has been significant activity of late in relation to cross-border insolvency cooperation involving Singapore.

In October 2016, Singapore hosted a Judicial Insolvency Network (JIN) conference attended by insolvency judges from 10 jurisdictions to discuss cooperation in cross-border insolvency matters. At the conclusion of the conference, draft guidelines were prepared for consideration in the judges' respective jurisdictions. The guidelines address key aspects of communication and cooperation among courts, insolvency representatives and other parties involved in cross-border insolvency proceedings, including providing for joint hearings. The JIN conference is expected to take place every two years in various jurisdictions.

In February 2017, Singapore implemented guidelines for greater cooperation and communication for cross-border insolvency proceedings between its Supreme Court and the United States bankruptcy court for the district of Delaware. Under the guidelines, joint hearings involving the different courts may be held, enabling evidence to be recorded and arguments to be heard simultaneously. More such guidelines involving other jurisdictions are expected to follow suit.

On 21 August 2017, Singapore and China entered into a memorandum of understanding to cooperate on legal and judicial matters. This is expected to strengthen and expand opportunities for the courts of both jurisdictions to cooperate and promote wider economic progress and security.

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