Singapore: The push to become Asia-Pacific's leading centre for debt restructuring

Since the 2008 Global Financial Crisis corporate defaults have increased steadily, and law firms have reported an uptick in insolvency and restructuring work in the past few years.

To establish Singapore as a leading centre for international debt restructuring, the corporate rescue mechanisms under the Companies Act (Cap. 50) will be enhanced in the upcoming Omnibus Insolvency Bill, which consolidates Singapore's bankruptcy and corporate insolvency regimes.

In a further step to position Singapore to meet the anticipated increase in demand for restructuring services in the Asia-Pacific region, the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (the Committee) was appointed by the Ministry of Law to recommend initiatives and legal reforms to cement Singapore's status as a leading centre from which to co-ordinate a multi-jurisdictional restructuring.

The Report of the Committee was released on 20 April 2016 with some interesting, and potentially game-changing, recommendations. We examine some of the key recommendations which, if implemented, will promote quick, cost-efficient restructurings with greater transparency and certainty as to outcome.

Expanded jurisdiction over foreign corporate debtors

One of the key recommendations of the Committee was to expand the scope of the Singapore Courts' jurisdiction over foreign corporate debtors:

- Under current Singapore law, a foreign debtor has to establish that it has a *clear connection* or *nexus* to Singapore before jurisdiction will be assumed by the Singapore Courts for restructuring purposes.
- The Committee has proposed significantly widening the scope of the Singapore Courts' jurisdiction to include factors such as where the foreign corporate debtor has:
  - (a) established or moved its head office to, or has registered as a foreign company in, Singapore;
  - (b) opened a bank account in Singapore and transferred funds into it;
  - (c) chosen Singapore law as the governing law for the resolution of disputes arising out of or in connection with the loan or other transaction; and/or
  - (d) submitted to the jurisdiction of the Singapore Courts through its choice of the Singapore Courts as the forum for dispute resolution in its loan documentation.
- The Committee also proposed that the above-mentioned factors and any other relevant factors should be enumerated in a non-exhaustive list, so as to provide guidance and create certainty for foreign corporate debtors.

The Committee's recommendations will allow companies that have a limited nexus to Singapore, but wish for other reasons (including Singapore's strong base of insolvency and restructuring professionals) to conduct their restructurings in Singapore, to do so with the support of the Singapore Courts.

Enhanced statutory moratoriums

The Committee's report proposes to enhance the statutory moratorium in three key areas, so that it more closely resembles the stay of proceedings mechanism under Chapter 11 of the US Bankruptcy Code:

- *Firstly*, subject to certain requirements being met, the moratorium should arise automatically upon the filing of an application for a moratorium. Currently under s 210(10) of the Companies Act, a moratorium will only be granted *after the Court grants* the application.
- *Secondly*, the moratorium should have *in personam* worldwide effect and the availability of injunctive reliefs against the pursuit of foreign proceedings need not be limited to circumstances where the creditor to be restrained has been guilty of oppressive, vexatious or otherwise unfair or improper conduct. In layman's terms, the Singapore Court would have the power to restrain foreign creditors from disobeying the moratorium so long as the creditor in question is subject to the jurisdiction of the Singapore Courts. Given Singapore's status as an international financial hub, this is likely to cover a significant number of financial institutions and entities.
- *Thirdly*, the Court will have the discretion to extend the moratorium to related entities of the debtor company, since many companies and businesses organise themselves across a corporate group structure.

These recommendations, if accepted, will significantly increase the effectiveness of the statutory moratorium in staying creditor action against distressed companies, which might otherwise be frustrated through creditors taking action overseas.

Strengthening the requirements for the disclosure of information

Given that under schemes of arrangements it is contemplated that the management of the distressed company will remain in place, more robust requirements for disclosure are required to safeguard the interests of creditors. The Committee has therefore proposed that an applicant for a statutory moratorium under s 210(10) of the Companies Act be required to give adequate information to allow a reasonable investor to make an informed judgment about the restructuring plan at the time the application for a moratorium is made, rather than when the notice summoning the meeting of creditors is later sent. At the same time, the Committee recognised that full disclosure would be impractical, and suggested that the level of disclosure be confined to the disclosure of basic key information about the debtor and the restructuring. This is to be welcomed as the onus will be on the applicant to ensure that the creditors are being given adequate information to assess the restructuring proposal at the very start of the process.

Specialist insolvency Courts and judge-led approach

Another key feature of the Committee's proposal is the establishment of a dedicated bench of specialist insolvency judges to manage and decide restructuring cases in an expeditious and efficient manner, with highly consistent and predictable judgments. As Singapore develops into a more mature insolvency jurisdiction, the level of complexity and sophistication of the restructurings will increase correspondingly. Having a dedicated bench of specialist insolvency judges will increase market confidence in Singapore as a jurisdiction of choice for restructurings:

- Leading international restructuring experts may be appointed as International Judges of the Singapore International Commercial Court (SICC), which will increase Singapore's attractiveness to non-Singaporean debtors.
- The increased use of mediation in restructurings is also contemplated, given the experience in the US of large complex cases in Chapter 11 proceedings, where the use of mediation is widespread. Singapore is well-placed to handle such mediations through the Singapore International Mediation Centre (SIMC).
- The Committee opined that mediation and arbitration offer useful options to resolve disputes within restructurings, and that local mediation and arbitral institutions, such as the Singapore International Arbitration Centre (SIAC), should develop and promulgate rules and protocols that cater specifically for insolvency-related matters to attract potential

users. The dispute resolution ecosystem in Singapore is fundamentally well-equipped to deal with any such anticipated demand.

Further, given the potential complexity of restructuring cases, especially when cross-border elements are involved, the Committee recommended that the docketed specialist insolvency judge should actively oversee the restructuring. This can be done through proper case management, where all proceedings related to the same insolvency/restructuring can be assigned to the same judge, so that the judge can have a bird's-eye view of the restructuring across the corporate group. The judge will also be in a position to direct parties to pursue more cost-efficient alternative dispute resolution mechanisms, such as mediation and arbitration, where appropriate.

Promoting rescue financing in Singapore

The Committee weighed the pros and cons of attracting hedge funds and investors that buy distressed debts at deep discounts (Distressed Debt Funds) and concluded that such funds can constitute a significant source of rescue financing which is often critical to whether a restructuring can occur and stave off liquidation.

Further, the Committee went a step further than the Insolvency Law Review Committee and recommended not only allowing super-priority for rescue financing (which essentially allows rescue financing to be repaid before all unsecured claims and other administrative expenses claims), but also the provision of super-priority liens (which allows the debtor to borrow fresh funds which are secured by a superior or pari passu ranking security to previously encumbered assets) subject to the Court's approval, with the Court having to satisfy itself that there is proof that no other rescue financing is available and the interests of pre-existing secured lenders are adequately protected. It appears that a key driver behind this recommendation was that of established players in the debtor-in-possession financing industry in the US being used to dealing with such liens, and having super-priority liens would encourage these players to provide rescue financing in Singapore.

Conclusion

- The recommendations in the Committee's report are carefully thought-out to leverage Singapore's existing strengths as a financial and business hub and centre for dispute resolution. If eventually implemented, these will position Singapore advantageously so as to become a leading centre for international debt restructuring.
- The Ministry of Law is currently conducting a six-week public consultation to invite feedback from stakeholders such as lawyers, accountants, insolvency practitioners, banks and funds on the Committee's Report. The consultation is scheduled to end on 31 May 2016. Given that the key infrastructure is already in place, if accepted, we would expect these recommendations to be implemented in short order, which is timely, given that insolvencies and restructurings in the Asia Pacific region are anticipated to increase in the coming years.

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