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The Insolvency, Restructuring and Dissolution Act 2018, (Act No.40 of 2018, the "Act") , which came into force on 30 July, marks, for now at least, the final stage in what has been a far-reaching overhaul of Singapore's insolvency and debt restructuring regime.

This process had started in 2015 with some amendments to the Bankruptcy Act (Cap 20). Then, in 2017, significant amendments were made to the Companies Act (Cap 50), in respect of both judicial management orders and schemes of arrangement. In particular, aspects of the "Chapter 11" procedure of the US Bankruptcy Code were imported into a system that has historically always looked to English company and insolvency law for inspiration - if that is the right word - and provisions were enacted to deal with various aspects of cross-border insolvency.

Now the Act, a massive affair of 527 sections, draws everything together. There is nothing inherently wrong in having individual insolvency - bankruptcy - dealt with in one statutory regime, and corporate insolvency dealt with under another. There are differences and there are similarities between the various sets of procedures. But it was necessary to consult the Bankruptcy Act in order to answer quite fundamental questions in relation to corporate insolvency and the case for consolidation was not seriously arguable. Now, the Bankruptcy Act will be repealed in its entirety, and those provisions in the Companies Act dealing with insolvency will also disappear. Parts 4 to 12 (sections 61 to 272) of the Act deal with corporate insolvency, and Parts 13 to 21 (sections 273 to 437) deal with bankruptcy. Thus, separate provisions now exist enabling the court to make orders restoring the position to what it would have been had the company, or the individual, as the case may be, not entered into a transaction at an undervalue or given an unfair preference to a creditor, following an application by a judicial manager or liquidator of the company (sections 224 to 227) or by the Official Assignee (sections 361 to 365) respectively.

The Act has not confined itself to simply reorganising the existing law. There are some important amendments. The most significant, in the context of corporate insolvency, relates to the troublesome topic of insolvent trading, dealt with in sections 339 and 340 of the Companies Act. Under the old law, the combined effect of sections 339(3) and 340(2) of the Companies Act meant that a criminal conviction was a pre-requisite to the making of a civil claim against an officer of a company for insolvent trading. It was revealed by Mr Edwin Tong, Senior Minister of State for Law, introducing the second reading of the Bill to Parliament, that not surprisingly perhaps, the provisions had not been used in any reported case.

### Wrongful & Fraudulent Trading

Section 239(1) of the Act ("Responsibility for wrongful trading") provides that a company trades wrongfully if it incurs debts or liabilities without reasonable prospect of meeting them in full, when the company is insolvent or becomes insolvent as a result of such debts or liabilities being incurred. The Court is empowered to declare that any person who was knowingly party to the company trading wrongfully shall be personally liable for the company's debts and liabilities so incurred.

The new provision should certainly make company directors sit up and take notice. The lowering of the threshold for establishing personal liability in the event of insolvent trading is a significant measure of reform.

It will be interesting to see how the court interprets the word "knowingly" in this provision. It is also to be found in the old section 340 (1) of the Companies Act (now s. 238 of the Act, "Responsibility for fraudulent trading"). Fraud is a different thing, however. Determining whether a director is " knowingly party " to insolvent trading is likely to raise some interesting questions as to the degree of knowledge required, in particular the question of whether it will be necessary to establish actual knowledge, or " Nelsonian " knowledge (putting the telescope to the blind eye, like the great English admiral) or constructive knowledge, whatever that means. Is the test to be an objective one, based on the standards expected of the hypothetical reasonable director, or subjective, based on the standards of the actual officer? In fashioning its approach, the court will need to bear in mind that the whole point of the amendment is to move away from the need for a criminal conviction; it is the standards of proof and evidence for civil liability that will have to be imposed.

Mention should also be made of section 239(10) pursuant to which a company or a company's counterparty or potential counterparty may apply to court for a declaration that a particular transaction or series of transactions, or course of conduct, does not constitute wrongful trading. It will be interesting to see how often this power is exercised.

### Early Dissolution: Friend or foe?

Sections 209-211 attempt to deal with a problem that is becoming increasingly common and which, one fears, will only get worse in current circumstances: cases of companies being wound up when they have insufficient assets to cover the costs of the winding-up process, let alone distribute anything to creditors and contributories. Dealing with this situation involves the expenditure of much time and public money.

These provisions establish a summary procedure for early dissolution of a company where the liquidator (who will normally be the Official Receiver but can also be a private liquidator acting with the consent of the Official Receiver) has reasonable cause to believe that realisable assets are insufficient to cover the costs of the winding-up, and that the affairs of the company do not require further investigation.

In such circumstances the liquidator may notify the contributories and creditors that the company will be dissolved at the expiry of 30 days; this gives contributories and / or creditors who disagree a chance to appoint a replacement liquidator, or apply to court.

### Schemes of Arrangement

There are some important amendments relating to restructuring too. Of particular interest in the context of schemes of arrangement is section 64, which re-enacts section211B of the Companies Act , but with a new provision, section 64(12)(b), which restricts the operation of the various moratoria ( stays of proceedings) mandated by various provisions in the section. Subsection (12)(b) provides that such moratoria do not affect " the commencement or continuation of any proceedings that may be prescribed by regulations". According to Mr Tong, the Minister's power to make such regulations will be targeted at particular types of proceeding and he made specific reference to writs for an action in rem against a vessel. According to Mr Tong, the filing of a writ in the High Court will not be impeded by the existence of a stay imposed under section 64; leave of court is still required under various subsections in section 64 but the claim against the vessel will be preserved by the filing of the writ.

### Judicial Management

A significant development in the context of judicial management is the enactment of section 94 of the Act ("Judicial management by resolution of creditors"). This effectively enables a company to put itself into judicial management, without the need for a court order, if the creditors agree. The company can go down this route if it believes that there is a reasonable probability of achieving one or more of the statutory objectives of judicial management (now set out in section 89(1). Once the company is placed in judicial management, the process continues in the normal way.

### Limitation of contractual rights under the Act

Section 440 deals with the challenging issue of ipso facto clauses. These clause, increasingly common in commercial contracts, enable one party to a contract to terminate the contract if the other goes into insolvency.

It is completely understandable why the parties to a contract might be prepared to agree to such a provision. A party's insolvency brings with it all sorts of problems, not least to its counterparties, and the existence of an ipso facto clause at least allows a measure of certainty to be provided.

Real difficulties occur, however, when a company is undergoing a debt restructuring exercise. If a substantial number of its counterparties cancel their contracts, the rehabilitation process will be severely hampered.

It is this concern that has prompted the enactment of section 440. Legislators are understandably reluctant to be perceived to be interfering with established contractual rights in the absence of oppression and / or unconscionability. But the fact that other common law jurisdictions have established their own ipso facto regimes, and the determination that Singapore should become a restructuring hub of international standing won the day.

Section 440 provides that no party may by reason only that any restructuring proceedings are commenced act upon certain types of ipso facto clauses. In particular, a party cannot terminate a contract with a company by reason only that the company is insolvent or undergoing restructuring proceedings.

The restriction does not apply to all contracts. Exception is made for "eligible financial contracts", any commercial charter of a ship, or any contract which is likely to affect the economic interest and or national interest of Singapore as may be prescribed, amongst others under s.440(5).

It is not possible to contract out of the ipso facto regime (s 440(3). The restriction does not apply to other insolvency-related proceedings, such as winding-up.

It was mentioned above that the section only applies to certain types of ipso facto clauses. It would not apply, for instance, to a clause which enabled a counterparty to cancel a contract with a construction company if that company failed to meet certain milestones.

There are also amendments to the "cram down" provisions in schemes of arrangement (section 70), the judicial manager's power to assign proceeds from actions brought to unwind actions taken by errant directors in exchange for third-party funding (section 99 and the First Schedule), the removal of imposition of personal liability of the judicial manager as agent of the company, and the nomination of the Official Receiver as liquidator (section 135). There is an entire Division (Division 3 of Part 3) dealing with the regulation of licensed insolvency practitioners.

***Impacts of Covid-19 and the Act***

There is one final important point to note. Amendments have been made to the Act by the COVID-19 (Temporary Measures) Act 2020 ("COVID Act"). These include the following: section 311(1) is amended to raise the threshold for a bankruptcy application from S$ 15,000 to S$ 60,000; section 312 is amended to raise the period giving rise to a presumption of inability to pay debts for an individual from 21 days to six months; similar amendments are made to section 125(a) raising the debt threshold for a company to be deemed unable to pay its debts for the purposes of a winding-up application from S$ 15,000 to S$ 100,000 and raising the time period from 3 weeks to 6 months.

It should be noted that this relief, by default, will last for 6 months beginning from 20 April 2020. The Government will however, monitor the situation and may adjust this period as and when they see fit.

## About The Author

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