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Restructuring across borders

Singapore

Corporate restructuring and insolvency procedures | January 2024

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Contents

Introduction

Under Singapore's restructuring and insolvency laws, in general, creditors with the benefit of security may elect to enforce their security. Security enforcement is essentially a self-help remedy rather than a collective restructuring or insolvency procedure and, if available to a creditor, may represent the best method of recovery.

Where restructuring is to be considered, the choice of procedure will depend largely on whether there is a business to be rescued. If there is, an informal bank rescue or workout outside of any of the formal insolvency procedures (ie a restructuring of the company on an informal, consensual basis by agreement between the company and its principal lenders or creditors) may be appropriate. Alternatively, a restructuring or rescue may be conducted using one of the formal rescue procedures (ie scheme of arrangement or judicial management).

If there is no business to be rescued and the debtor is beyond saving, it may be more appropriate to put the company into liquidation, the formal dissolution procedure for Singapore companies.

The main statute that governs the restructuring and insolvency framework, whether of companies or individuals, is the Insolvency, Restructuring and Dissolution Act 2018 (**IRDA**), which came into force on 30 July 2020. The IRDA consolidated provisions on insolvency from the Companies Act and the Bankruptcy Act into one omnibus statute.

The implementation of the IRDA is the final part of a legislative push to make the legal framework more amenable to corporate rescues, and to make Singapore a more attractive venue for cross-border restructuring.

The first part of the legislative push saw the Companies Act amended in May 2017 to enhance the three options set out above for restructuring and insolvency. The IRDA, while substantially a consolidation of existing laws, also introduced a number of additional changes, including:

– the ability for a company to enter judicial management by way of a resolution of creditors and without requiring an order of court; and

– a stay on *ipso facto* clauses under certain circumstances.

These two changes are discussed below under the sections: "Judicial management by creditors' resolution" and "Stay on the use of ipso facto clauses" respectively.

Security

Enforcement of security

There are generally no restrictions as to the assets which may be provided as security to lenders.

The main forms of security which are commonly provided as security in bank financings under Singapore law are:

– mortgage over land;

– mortgage over shares;

– security over contracts, receivables, bank accounts, plant and machinery, and intellectual property; and

– fixed and floating charge over all assets of a company (otherwise known as a debenture).

Singapore law recognises the concept of trusts.

Security under Singapore law, including those forms set out above, may be enforced by exercising the self-help remedies provided for under the relevant security instrument (save where a moratorium under a scheme of arrangement or judicial management is in force) and without the need to rely on traditional insolvency procedures involving a court process. In a judicial management situation, a secured creditor may not enforce his or her security against the security provider unless the judicial manager or the court consents. In a scheme of arrangement situation, where a moratorium is in place, a secured creditor may not enforce his or her security against the security provider unless the court consents.

Security documents usually provide the secured creditor with the power to appoint a receiver, who in turn is given a number of powers to deal with the secured assets, including the power to sell or take possession of the secured assets, and to carry on any business of the security provider in any manner the receiver thinks fit.

Receivership is regulated by Part 6 of the IRDA which: (1) imposes on receivers some of the obligations of other insolvency administrators; and (2) applies the priority rules for preferential creditors applicable in a liquidation or a receivership under a floating charge.

Security over land

Enforcement of security over land can take place by: (1) appointing a receiver under section 24(1)(c) of the Conveyancing and Law of Property Act 1886; (2) obtaining possession of the mortgaged property either by consent or by court order and subsequently exercising the power to sell the mortgaged property under section 24(1)(a) of the Conveyancing and Law of Property Act 1886; or (3) obtaining an order for foreclosure. In practice, the most commonly exercised mode of enforcement is (2).

On enforcement, the secured creditor will give notice to the security provider or the occupier of the property to deliver up possession within one month of the notice. If possession is not delivered voluntarily, an application may be filed with the High Court for an order for possession.

Debenture

A debenture creating a fixed and floating charge customarily provides for the crystallisation of the floating charge and the enforceability of the fixed charge upon the occurrence of an event of default. Singapore law gives wide powers to parties to define events of default and recognises automatic crystallisation upon an event of default occurring.

Corporate restructuring processes

When a company has been deemed insolvent[1] under the provisions of the IRDA, there are two broad approaches available to a company and its creditors: (1) corporate restructuring; or (2) liquidation.

Where corporate restructuring is being considered, there are two processes available under Singapore law:

– scheme of arrangement; and

– judicial management.

Both processes provide for a type of debt restructuring plan approved by the company's creditors to be put in place in order for the company to continue to trade.

[1] The term "insolvent" is not defined under Singapore law. The Court of Appeal has held that the test for whether a company is solvent is whether its current assets exceed its current liabilities such that it is able to meet all debts as and when they fall due (the cash flow test). While courts used to also apply the balance sheet test which compares a company's total assets with its total liabilities, the Court of Appeal held in 2021 that this test is not applicable to determining whether a company is insolvent.

Corporate restructuring processes (cont.)

Scheme of arrangement

A scheme of arrangement is a court-sanctioned arrangement which represents the agreement between a company and its creditors (or any class of its creditors) under which the creditors may agree, for example, to forgo all or part of their claim against the company, or simply to reschedule their debts, while allowing the company to continue to trade. These are simple examples of restructurings which might be effected through a scheme of arrangement.

The IRDA provides that the court may order the convening of a meeting of creditors or any class of creditors to, upon an application by the company, a shareholder, a creditor or a liquidator, vote on a scheme. If the court sanctions a scheme agreed to by a majority in number (or such number as the court may order) and three-quarters in value of creditors (or any classes of them), it becomes binding on all creditors subject to the scheme of arrangement.

In addition to its binding nature, the benefit of a scheme of arrangement to the company is that its current management remains in place with full powers to carry on the business, subject only in certain cases to oversight by an insolvency professional.

Where the application is made by the company and that application is to propose a compromise or an arrangement between the company and its creditors or any class of its creditors, an automatic moratorium will apply.[2] There are certain procedural requirements for the moratorium filing including, for example, a need to show some creditor support for the proposed restructuring (or at least the moratorium) and certain information to be provided to the court.

Assuming those formalities are complied with, upon an application being made, the initial moratorium is for a period of 30 days commencing after the date the application is made unless the court makes a decision on the application before the end of that time period. The court may either dismiss the application, in which case, the moratorium will end, or the court will grant the application to allow the company to call a meeting of its creditors, in which case, the moratorium will continue until such time as the court may decide. To avoid abuse of the automatic moratorium, it will only apply if the company has not in the last 12 months made an earlier application to propose a compromise or an arrangement with its creditors to which the automatic moratorium applied.

[2] There is another moratorium which continues to be available under the Companies Act, which existed and pre-dates the amendments and introduction of the new moratorium, which can be applied for by the creditors or shareholders of a debtor as well as the debtor itself. But the "old" moratorium is less broad than the new moratorium, so is therefore not the first option for a properly prepared and advised debtor.

Corporate restructuring processes (cont.)

Scheme of arrangement (cont.)

The company may also apply to have the moratorium extended to its holding companies or subsidiaries (a **Related Company**), including those Related Companies outside of Singapore. It may do so if it can establish that: (1) the Related Company plays a necessary and integral role in the compromise or arrangement; (2) the compromiseor arrangement will be frustrated if the moratorium is not extended to the Related Company; and (3) the creditors of the Related Company will not be unfairly prejudiced by the extension of the moratorium to the Related Company.

There will also be a stay on the triggering of *ipso facto* clauses and this is discussed in greater detail below in the section headed "Stay on the use of *ipso facto* clauses". When granting a party's application for a scheme of arrangement to be considered by the creditors, the court will order that the company convene a meeting of its creditors within a specific period of time. The company can however dispense with holding the meeting of creditors and seek court approval without the formal holding of the meeting if it can satisfy the court that if a meeting were to be held, the minimum approval requirements would be met. If the meeting is convened, the approval of the creditors of the company to the scheme of arrangement must be obtained. As discussed above, a majority in number of the creditors is required to approve the scheme. That majority in number (or such number as the court may order) must also represent three-fourths in value of the creditors. The company (through the assistance of an insolvency professional engaged by the company) would normally send the creditors explanatory circulars explaining the details of the scheme in advance of the meeting of the creditors. If the details of the scheme are not fairly put to the creditors, the court may decline to sanction the scheme. Even if the requisite majority of votes are obtained at the meeting, the scheme will not bind the company and its creditors until the court approves it.

Corporate restructuring processes (cont.)

Scheme of arrangement (cont.)

The function of the court is three-fold. Firstly, it must be satisfied that the statutory procedures under the IRDA have been complied with (eg that the resolutions are passed by the requisite majority in value and in number at meetings duly convened and held). Secondly, the court must be satisfied that those who attended the meeting were fairly representative of the class of creditors, and the statutory majority did not coerce the minority in order to promote interests adverse to those of the class whom the statutory majority purported to represent. Thirdly, the court must determine whether the scheme is one which a man of business or an intelligent or honest man, being a member of the class concerned and acting in respect of his interest, would reasonably approve. The court will look at the scheme of arrangement to decide if it is a reasonable one and the issue is often whether the scheme of arrangement strikes a balance between the various interests involved which could reasonably be approved by the meetings. The court will, however, in cases where the minority objects, be strongly influenced by a big majority vote, for, provided that the scheme is fair and equitable, the court will not itself judge on its commercial merits.

If the requisite majority of votes is not obtained, the court may in certain circumstances override the decision. It has the power to do this if it finds that the scheme of arrangement is being blocked by a small minority of creditors. This can occur because when voting for a scheme of arrangement, creditors are sorted into classes and each class of creditors votes separately on the scheme of arrangement. Each class must meet the minimum requirements for approval: a majority in number of the creditors in that class, which majority in number must also represent at least three-quarters in value of the creditors in that class. If a class of creditors is small, for example, it consists of only one or two creditors, a single creditor may have the power to block a scheme of arrangement. In such a situation, the court may cram all the creditors into a single class. If that single class meets the minimum requirements for approval, and if the arrangement does not, in the view of the court, discriminate unfairly between the classes of creditors and is fair and equitable to each dissenting class, the court may approve the scheme of arrangement.

Corporate restructuring processes (cont.)

Judicial management by order of court

Under the IRDA, a company may seek to enter judicial management by one of two ways: (1) by obtaining a court order for judicial management; or (2) by obtaining a creditors' resolution for judicial management. The latter process is discussed in the section "Judicial management by creditors' resolution" below. In both cases, judicial management is a corporate rescue process under Part 7 of the IRDA, intended, as with a scheme of arrangement, to enable a debt restructuring plan between a company and its creditors to be entered into.

In judicial management by order of court, a judicial manager is appointed by the court upon an application presented by the company, its directors, or a creditor. The court will give an order for judicial management only if:

- it is satisfied that the company is or is likely to become unable to pay its debts; and
- it considers that the company following the appointment of a judicial manager would be likely to achieve one of the following:
  - the survival of the company or the whole or part of its undertaking as a going concern;
  - the approval of a compromise or scheme of arrangement between the company and its creditors; or
  - a more advantageous realisation of the company's assets or property than could be effected on a winding-up.

Unless discharged earlier or extended by the court, a judicial management order remains in force for 180 days. During this period, all powers conferred and duties imposed on the directors of the company shall be exercised and performed by the judicial manager. However, the making of a judicial management order has no effect on the rights of the shareholders of the company.

Upon presentation by a party of an application for the appointment of a judicial manager, a moratorium comes immediately into force. Accordingly, even while such an application is pending, the company has extensive immunity from liquidation and other legal proceedings, and the commencement of any proceedings requires the leave of the court.
The moratorium covers the commencement of legal proceedings, the enforcement of security, the repossession of goods on hire purchase or under a chattels leasing agreement or subject to a retention of title agreement, execution of a judgment and the levying of distress. An application for judicial management may therefore be used to stave off a compulsory winding-up or to prevent execution being levied against the company's property.

There will also be a stay on the triggering of ipso facto clauses and this is discussed in greater detail below in the section headed "Stay on the use of ipso facto clauses".

The applicant may nominate the judicial manager who must be a licensed insolvency practitioner who is not an auditor of the company. The court has the power to reject the nomination of the applicant and to appoint another person.

Corporate restructuring processes (cont.)

Judicial management by order of court (cont.)

The creditors may also oppose the applicant's nomination of the person proposed as judicial manager. This may be done by a majority in number and value of the creditors (including contingent or prospective creditors). The statement must also be sent to all the members of the company.

The court must also dismiss an application for a judicial manager where: (1) a floating charge holder opposes the making of the order; and (2) the court is satisfied that the prejudice caused to the floating charge holder if the order was granted would disproportionately outweigh the prejudice caused to the company's unsecured creditors if the application for judicial management was dismissed. In addition to the right to oppose the application, a floating charge holder may nominate its own appointee to the role of judicial manager. The court must appoint the person nominated by such a holder as judicial manager unless it would not be appropriate because of the particular circumstances of the case.

Once a judicial manager is appointed, he or she has 90 days (or such longer period as the court may allow) to formulate and present before the creditors of the company, at a meeting called for that purpose, a statement of his or her proposals for the achievement of the purposes for which the order was made.

A creditor is not entitled to vote at the meeting unless he or she has first lodged a proof of debt. In addition, a creditor may not vote: (1) in respect of any unliquidated or contingent debt or any debt the value of which is unascertained; or (2) if, in the case of a secured creditor, his or her security covers the debts owed to him or her. However, a secured creditor may vote if he or she surrenders the security or if part of the debt owed to him or her is unsecured.

Any proposal made by the judicial manager must be approved by a majority of the creditors in number and value. Creditors may propose modifications to the judicial manager's proposals at the creditors' meeting. However, such modifications will only be effective if the judicial manager consents to them.

Once the creditors approve the judicial manager's proposal, the judicial manager will manage the affairs, business and property of the company in accordance with the proposal. The proposal may not be substantially revised unless the creditors approve the change. When, in the view of the judicial manager, the purposes of the judicial management order under which he or she was appointed have been achieved or are incapable of being achieved, he or she must apply to court to discharge the order.

Corporate restructuring processes (cont.)

Judicial management by creditors' resolution

The IRDA also allows companies to seek judicial management by way of a creditors' resolution instead of by way of a court order. Where a company: (1) considers that it is, or is likely to become, unable to pay its debts; and (2) there is a reasonable probability of achieving one or more of the purposes of judicial management (listed above – see the section headed "Judicial management by order of court"), a company may enter judicial management if it obtains the approval of a majority of its creditors in number and value present and voting at a creditors' meeting convened to consider a resolution to place it under judicial management.

The process by which a company may enter judicial management without a court order is set out in the IRDA, the key steps of which include the following:

- the company must give at least seven days' notice of its intention to propose to be placed under judicial management to its proposed interim judicial manager and any person who holds a floating charge over the whole (or substantially the whole) of the company's assets;
- the members of the company resolve to appoint the interim judicial manager;
- the holder(s) of the floating charge agrees to the appointment of the interim judicial manager;
- the interim judicial manager is appointed no later than 21 days from the date of the notice;
- various documents and declarations must be lodged with the Official Receiver and Registrar of Companies by the interim judicial manager and the board of directors;
- the company must give notice to all its creditors of a creditors' meeting to be held within 30 days after the date of the lodgement by the interim judicial manager. The notice must contain the information prescribed in the IRDA; and
- if the requisite majority of creditors resolve to place the company under judicial management, it will enter judicial management. If the requisite majority is not obtained, the process ends.

If the creditors resolve to place the company under the judicial management of a judicial manager, then the process continues as described in the section "Judicial management by order of court" above.

As with the standard method of applying for judicial management, there will be a moratorium over proceedings against the company during the period. In this case, the moratorium will commence upon the company lodging a notice of appointment of the interim judicial manager instead of upon the filing of an application for judicial management in court. The moratorium will not apply if the company had within the past 12 months sought to be placed under judicial management (either by creditors' resolution or by court application).

It is also worth highlighting that a holder of a floating charge over the whole (or substantially the whole) of the company's assets may block a judicial management as its consent is a precondition to the appointment of the interim judicial manager. By contrast, where an application to court for judicial management is made, the floating charge holder's opposition will only block the judicial management if the court is of the view that the prejudice that would be caused to it if the order is made is disproportionately greater than the prejudice that would be caused to unsecured creditors of the company if the application is dismissed.

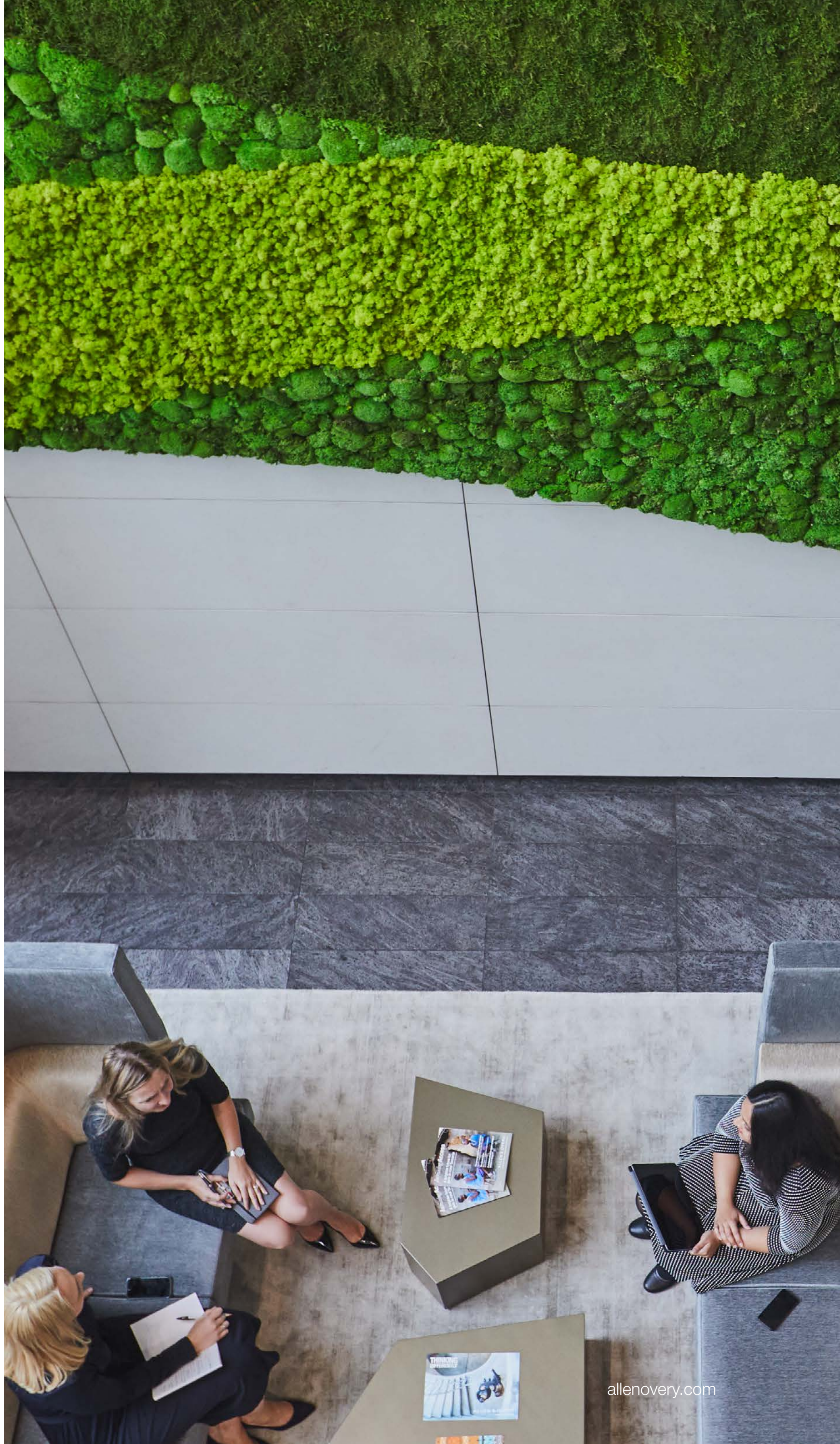
Superpriority for rescue financing

A company undergoing judicial management or seeking the approval of its creditors to a compromise or arrangement pursuant to a scheme of arrangement may require additional financing if it is to have a chance of reviving itself. However, potential investors may not be willing to take on the risk of providing additional financing to an already financially troubled company. The IRDA empowers the court, on the application of the company, to order that superpriority be granted to a person that provides rescue financing to the company.

Superpriority may be granted by the court upon the application of the company if it can establish that: (1) reasonable efforts were made to secure rescue financing without superpriority and such rescue financing would not be provided without it; (2) there is adequate protection for the interests of the holder of the existing security in the event that security is "primed" (ie where the rescue financing is secured by security over already secured property of the company); and (3) the financing constitutes "rescue financing". Rescue financing is financing that is necessary for the survival of the company as a going concern, or to achieve a more advantageous realisation of the company's assets than would be realised on a winding-up.

Superpriority may be granted at four levels:

- the debt takes priority together with the costs and expenses of the winding-up but behind secured creditors;
- the debt takes priority above all preferential and unsecured debts, behind only secured creditors;
- the debt is secured by a security interest over property of the company that is unsecured or by a subordinate security interest over secured property; and
- the debt is secured by a security interest over already secured property of the company and takes the same or higher priority over the existing security.

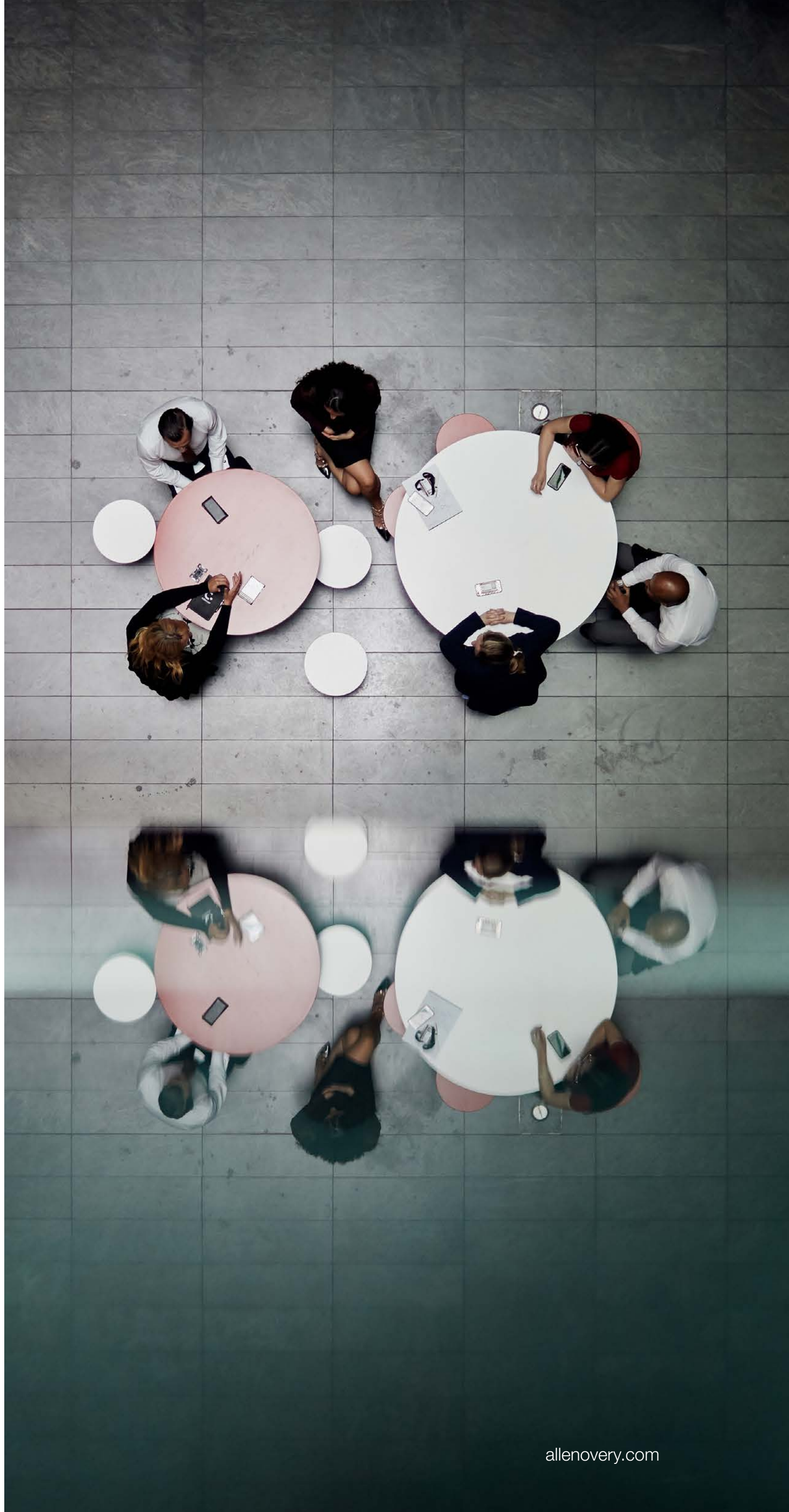


Stay on the use of ipso facto clauses

Ipso facto clauses are clauses that allow a party to terminate or modify a right (among other things) under a contract or accelerate payment obligations thereunder upon the occurrence of certain specified events.

Section 440 of the IRDA imposes a stay on the use of *ipso facto* clauses. The provision prevents a party from relying on its right under such clauses where it seeks to do so by reason only that the company is insolvent or has commenced proceedings for judicial management or a scheme of arrangement. Accordingly, where some other event of default has occurred (eg a failure to pay) that triggers the right, the right may still be exercised. The practical effect of this provision is to incentivise companies to apply for restructuring via a scheme of arrangement or judicial management earlier rather than later, before defaults occur under its contracts. It seeks to remove a potential barrier to applying for restructuring or judicial management arising from a company being concerned that such an application will result in the automatic termination of material contracts or lines of credit.

For a more granular analysis of the scope of section 440 of the IRDA (as well as detailed analysis of each of the noteworthy changes under the IRDA), please refer to our bulletin **here**.



Liquidation

There are two types of winding-up procedures under which Singapore companies are dissolved:

– voluntary winding-up; and

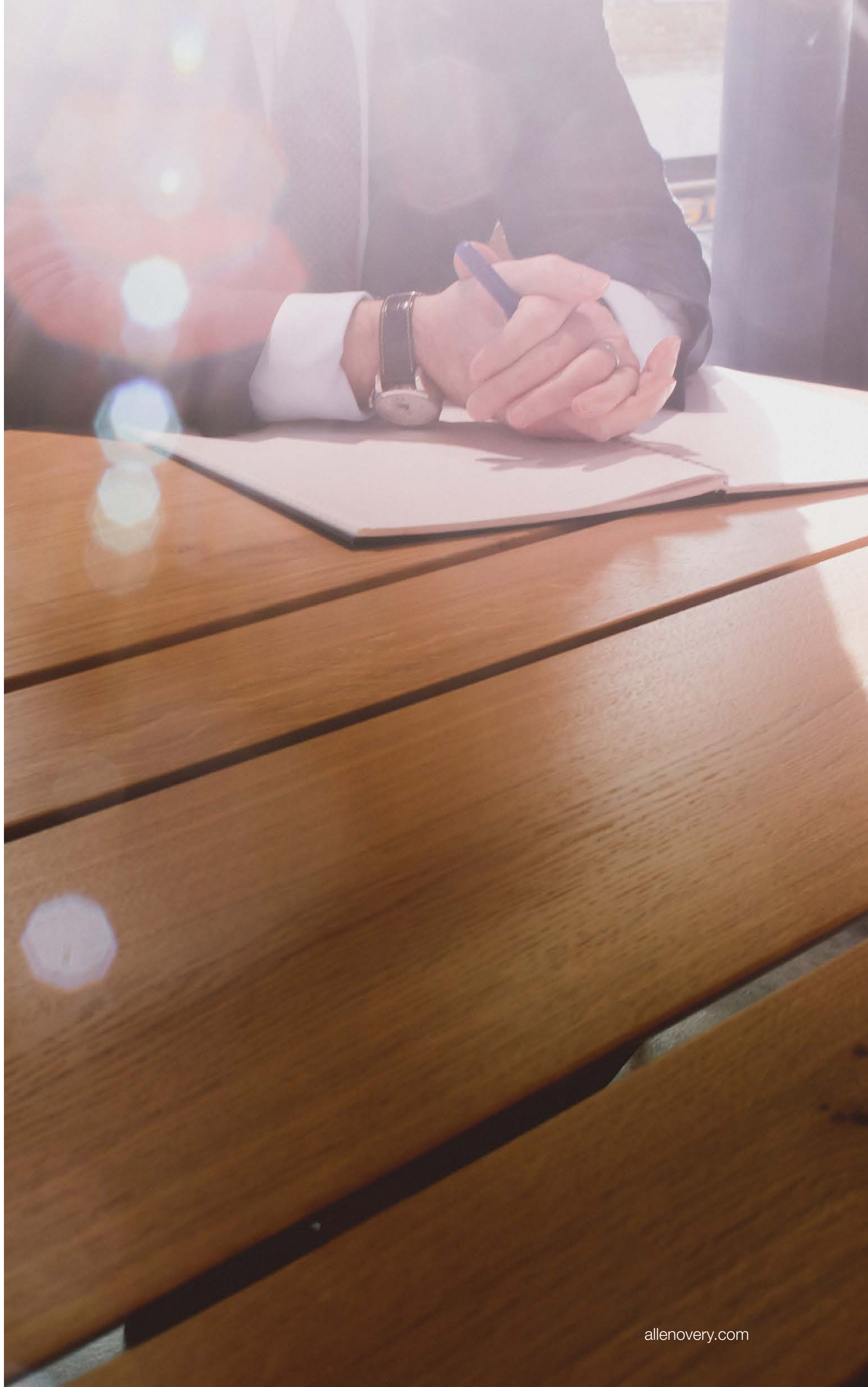
– winding-up by the court.

Voluntary liquidation

A company may be voluntarily wound up by its members (if it is solvent) or by its creditors (if it is insolvent).

If the company is solvent, a majority of its directors must make a declaration of solvency, stating that they have formed the opinion that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding-up. The declaration must be lodged with the Accounting and Corporate Regulatory Authority. The members of the company must then, within five weeks of this declaration, resolve by special resolution to voluntarily wind up the company, and appoint one or more liquidators for the winding-up.

If the company is insolvent, the directors must all make a statutory declaration in the prescribed form that the company cannot by reason of its liabilities continue its business and that meetings of the company and of its creditors have been summoned for a date within one month of the date of the declaration. The declaration must be lodged with the Official Receiver and the Accounting and Corporate Regulatory Authority. The directors must immediately appoint an approved liquidator to be the provisional liquidator. The company, and its creditors, at their respective meetings must each resolve to wind-up the company voluntarily and nominate a person to be a liquidator in the winding-up.



Liquidation (cont.)

Compulsory liquidation

Under the IRDA, a company may be wound up by a court order if an application for winding-up is presented by the company, any director of the company, any creditor (including contingent or prospective creditors), any shareholder, the liquidator, the minister for finance or a judicial manager.

A winding-up order will be made if one or more of the grounds set out in the IRDA exist, the most notable one being a company's inability to pay its debts under section 125(1)(e) of the IRDA.

The liquidator may carry on the company's business so far as is necessary for the beneficial winding-up for a period of up to four weeks after the making of the winding-up order.

Once a company is placed into liquidation following a winding-up order by the court, the liquidator is vested with the powers to run the company for the purpose of winding-up the company's business, and realising and distributing the assets to its creditors and members. The liquidator also has the power to apply to the court to nullify unfair preference transactions[3] (generally, if made in the period starting one year before the date of commencement of the winding-up) and transactions at an undervalue[4] (if made in the period starting three years before the date of the commencement of the winding-up).

Any distributions made by a liquidator from the realisation of assets must be made in accordance with the following statutory order of priority:

- payments to secured creditors;
- costs and expenses of the winding-up including the liquidator's remuneration;
- wages and salaries of employees up to a maximum of five months' salary or S$13,000 (whichever is less);
- retrenchment benefits and ex-gratia payments under the IRDA up to a maximum of five months' salary or S$13,000 (whichever is less);
- compensation to employees for injuries suffered in the course of employment under the Work Injury Compensation Act;
- all amounts due in respect of contributions payable to provident funds during a period of 12 consecutive months commencing not earlier than 12 months before and ending not later than 12 months after the commencement of the winding-up;
- remuneration to employees in respect of vacation leave;
- taxes;
- gratuity and retrenchment benefits under the Employment Act;[5]
- floating charge secured creditors;
- unsecured creditors; and
- payment to shareholders.

[3] Sections 225 and 226 of the IRDA.
[4] Sections 224 and 226 of the IRDA.
[5] Section 47 of the Employment Act.

Cross-border issues

A foreign company not registered to do business in Singapore may apply to a Singapore court for restructuring under a scheme of arrangement, judicial management or winding-up if it can show that it has a substantial connection with Singapore. The scope of entities that can use the Singapore restructuring and winding-up procedures is broad, and deliberately so because Singapore has a publicly stated ambition to be a regional restructuring and insolvency hub. The UNCITRAL Model Law on Cross-Border Insolvency has been made a part of the IRDA and accordingly representatives of foreign companies may apply to the Singapore courts for recognition of the foreign insolvency proceedings and to request for assistance and cooperation with those proceedings. Upon recognition of the foreign insolvency proceedings, the court may entrust the distribution of all or part of the foreign company's property located in Singapore to the foreign representative, provided that it is satisfied that the interests of creditors in Singapore are adequately protected.

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If you require advice on any of the matters raised in this document, please contact any of our partners or your usual contact at Allen & Overy, or email rab@allenovery.com

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Further information

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To access this resource, please **click here**.

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