Corporate and individual bankruptcy under one roof

What to expect in the upcoming Insolvency Bill

DENTONS RODYK

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A new Insolvency Bill in the works is expected to further transform Singapore's bankruptcy landscape, perhaps most notably by consolidating the existing individual and corporate bankruptcy legislation. At present, the rules relating to corporate and personal insolvency are generally housed separately- within the Companies Act (Cap 50, 2006 Rev Ed) and the Bankruptcy Act (Cap 20, Rev Ed 2009) respectively. This Bill would impact virtually every type of company as many will find themselves concerned with insolvency laws during their lifecycle.

In this article we explore the business rationale behind the changes and the nature of the expected amendments.

Phases of transformation

Singapore has made great strides to become an international debt restructuring hub. The Singapore Parliament last year made extensive changes to Singapore's insolvency laws via the Companies (Amendment) Act 2017 (the Act), drawing on the experience of other jurisdictions.

Indeed, Singapore became the first common law jurisdiction in recent years to introduce a hybrid scheme mixing the best elements of the UK regime with those of the US, seeking to create the optimum environment for businesses and investors involved in debt restructuring.

However, as Minister for Law K Shanmugam pointed out in his keynote address at the Singapore Insolvency Conference 2017, there is still work to be done. Separate regimes for corporate and personal bankruptcy carry the potential for each to develop independently of the other, despite the obvious commonalities between them. Certain provisions also straggle behind in subsidiary legislation, such as the Companies (Application Of Bankruptcy Act Provisions) Regulations (Cap 50, Rg 3, 1996 Rev Ed). This creates uncertainty as to how the interplay between both Acts is to be balanced.

In that same keynote address, the Minster for Law announced that we may soon expect a new Insolvency Bill that will bring, under an omnibus legislation, laws governing both personal and corporate restructuring and insolvency. This feature is just one amongst other new features that serve to further develop laws that aid businesses in distress. We discuss some of the key changes we can expect to be made via the new Insolvency Bill below.

Expected changes

(i) Consolidation

One primary expected change is the consolidation of the personal and corporate insolvency regimes which could iron out the kinks in each Regime and to bring each into alignment.

For instance, the current rules concerning the avoidance of transactions will likely be streamlined to apply to companies and individuals equally. Under the corporate insolvency regime, in the time leading up to the filing of the winding up petition, certain debtor companies may be tempted to dispose of their assets by transferring to other entities within the group so as to place these assets out of the reach of creditors.

The existing insolvency laws allow the liquidator to take steps to avoid such transactions if certain requirements are met. In the case where the recipient company is related (i.e. an "associate"), these requirements are easier to meet. However, when it comes to companies in a similar position – matters become more complicated since provisions defining an "associate" and governing avoidance are located within the Bankruptcy Act.

The Court of Appeal encountered such a problem in *Show Theatres Pte Ltd (in liquidation) v Shaw Theatres Pte Ltd and another* [2002] 2 SLR(R) 1143: it was then not clear whether an associate of the insolvent Show Theatres would include two companies which exercised certain control over it. The Court rightly pointed out at [17] that "*much of the difficulty arose because provisions meant to be applicable to the bankruptcy of an individual are made to apply to the winding up or judicial management of companies.*"

Although the specific issue concerning whether a company exercising control constitutes an associate has been clarified, the current misalignment between the Bankruptcy Act and Companies Act persists in other areas. Thus, an omnibus piece of legislation that dovetails the respective provisions certainly holds promise.

(ii) Outstanding Recommendations of the Insolvency Law Review Committee

In his speech, the Minister for Law also announced that the proposed Insolvency Bill would cover areas that were recommended by the Insolvency Law Review Committee (the Committee) that have not yet been enacted in the 2017 changes. In particular, the Minister made reference to a framework within which insolvency practitioners would be governed, increasing accountability and the general quality of services.

It seems that we can also expect other recommendations that the Committee made, but have yet to be covered by the existing regulations. Some of the substantive recommendations include:

1. Standardisation on the rules of proof of debts across all insolvency proceedings. Presently, section 327(1) which makes "*all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages*" provable in winding up, contains a carve-out for the winding up of insolvent companies. The carve-out would instead be governed by the separate set of rules embodied in section 87(3) of the Bankruptcy Act. As a result, currently, some debts which are not provable in an insolvent liquidation are provable in the liquidation of a solvent company. These rules are important to businesses as they dictate what debts may be recovered in the event of insolvency.

2. Imposition of a bar on the realisation of security after 12 months from the winding up order. This would extend the existing equivalent rule under the Bankruptcy Act into the corporate sphere. At present, it is not clear on the face of the provisions, whether this bar in section 76(4) of the Bankruptcy Act, applies to corporate insolvency pursuant to section 327(2) of the Companies Act. If this recommendation is adopted, businesses who intend to look to security must therefore remain vigilant in the enforcement of security; delay could cost them dearly.

3. A noteworthy proposal relating to matters other than harmonisation of the regimes is the introduction of summary liquidation. If adopted, the Official Receiver or private liquidator will be able to seek an early dissolution where the following conditions are met:

    a. The realisable assets of the company are insufficient to cover the winding-up expenses;

    b. The affairs of the company do not require any further investigation;

    c. The creditors and contributories are given reasonable notice; and

    d. In the case of a private liquidator, the Official Receiver's consent is obtained.

This would improve efficiency in clear-cut cases, and enable creditors to more quickly recover as much of their debts as possible. In the context of liquidation, any lost time may exacerbate the already depreciating value of some of an insolvent company's assets.

Conclusion

The Minister suggested that the Insolvency Bill was likely to be presented in the latter half of 2018. Ultimately, this Bill would impact virtually every type of company as many will find themselves concerned with insolvency laws during their lifecycle – whether as creditor, shareholder, supplier, potential claimant or lender to an insolvent company, or indeed as the beneficiary of an insolvency regime. It would therefore serve businesses to keep an eye on developments as Singapore's dynamic bankruptcy legislation continues to progress.

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Key contacts

Ajinderpal Singh
Senior Partner
Litigation, Dispute Resolution and Arbitration

D +65 6885 3619
E ajinderpal.singh@dentons.com

Mark Jerome Seah
Partner
Litigation, Dispute Resolution and Arbitration

D +65 6885 3652
E mark.seah@dentons.com

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