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WMH LAW CORPORATION

Corporate Rescue Mechanisms in Singapore

Civil Litigation Practice Series





“Corporate Rescue”

Company in Financial Distress - Liquidation Inevitable?

Introduction

At WMH Law Corporation, our lawyers represent both individuals and corporations in various insolvency, winding-up, judicial management applications and other restructuring related matters.

In this article, we seek to provide a roadmap of the various corporate rescue mechanisms available to companies facing financial distress in Singapore.

Singapore's Statutory Restructuring Regime

As a starting point, one should look towards the Companies Act (Cap.50).

In fact, in 2017, the Companies Act (Cap.50) was amended to augment Singapore's corporate debt restructuring framework where, amongst other

changes, it incorporated elements of Chapter 11 of the U.S. Bankruptcy Code.

In a nutshell, the fundamental purpose of “corporate rescue mechanisms” is essentially to “rehabilitate the company and achieve a better realization of assets than possible on liquidation” (**Re Wan Soon Construction Pte Ltd [2005] SGHC 102**)

In this article, we will consider the following:-

- (a) Schemes of Arrangement (private arrangements or Court sanctioned);
- (b) Judicial Management;
- (c) A comparison between Schemes of Arrangement and Judicial Management.

Schemes of Arrangement

Schemes of Arrangement encompass a wide range of compromise agreements between the company and its creditors.

For example, where creditors agree to accept a “haircut” for the repayment of their debt or agree to certain repayment plans that allow the company some breathing space.

Such arrangements/agreements may be reached privately between the company and its creditors.

Where, however, it is not possible to obtain the agreement of all its creditors, a company may approach the High Court for a court sanctioned Scheme of Arrangement.

In the context of Scheme of Arrangements, the Court serves two main functions:-

- 1) Ensure that the procedure stipulated under the Companies Act (Cap.50) are complied with; and
- 2) Determine that the scheme proposed is fair and reasonable.

The classification of creditors for voting purposes in a Section 210 scheme of arrangement has always been problematic.

The Court of Appeal in **The Royal Bank of**

Scotland NV and others v TT International Ltd and another appeal [2012] SGCA 9 explained that “*The starting principle is simple enough: those creditors whose rights are so dissimilar to each other's that they cannot sensibly consult together with a view to their common interest must vote in different classes (“the dissimilarity principle”)*”

But exactly which legal rights are to be compared and in what situations? The Court of Appeal further explained “*that if a creditor's (or a group of creditors') position will improve or decline to such a different extent vis-à-vis other creditors simply because of the terms of the scheme (and not because of its own unique circumstances, ie, its “private interests”)* assessed against the most likely scenario in the absence of scheme approval (“the appropriate comparator”), then it should be placed in a different voting class from the other creditors.”

It is also significant to note that there is no automatic moratorium on actions against the company whilst a Scheme of Arrangement is being proposed.

As such, what often happens as part of proposing a Scheme of Arrangement is that the company in question will also apply to the High Court for a moratorium. During such moratorium period, creditors may not commence/continue any legal proceedings against the company (Section 210(10) of the Companies Act (Cap.50)).

“compromise”

Judicial Management

A judicial management is a temporary court sanctioned rescue plan where a judicial manager is put in charge of the company's management and who attempts to rehabilitate the company.

Section 227A of the Companies Act (Cap. 50) makes clear that an application may be made to the High Court under section 227B for an order that a company be placed under the judicial management of a judicial manager, where a company considers that:-

- a. *"the company is or will be unable to pay its debts"; and*
- b. *"there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern or that otherwise the interests of creditors would be better served than by resorting to a winding up".*

Section 227B further provides that the High Court may make a judicial management order if:-

- a. It is satisfied that the company is or is likely to become unable to pay its debts; and
- b. It considers that the making of the order would be *"likely to achieve"* one or more of the following purposes, namely:

- i. The survival of the company, or the whole or part of its undertaking as a going concern;
- ii. The approval under section 210 or 211I of a compromise or arrangement between the company and any such persons as are mentioned in that section;
- iii. A more advantageous realisation of the company's assets would be effected than on a winding up.

Once a judicial management application is filed, an automatic moratorium takes effect. No steps can be taken to wind up the company and legal proceedings against the company cannot be commenced or continued unless with prior leave of court.

Once a judicial management order is made, the company's board of directors becomes functus officio (i.e. they are displaced). In its place, the judicial manager takes over the helm of the company.

The envisioned role of a judicial manager is precisely to make *"an objective prognosis of the patient [the company] and apprise the court of his findings and views. Often, **his mandate would be to save the company** and, if this is not possible, to minimize the fragmentation of assets and to maximize the sale proceeds from the company's assets"*.

"the provision of a breathing space"



Schemes of Arrangement v. Judicial Management

Schemes of Arrangement	Judicial Management
To allow the company the opportunity and flexibility to reach a compromise on its debt with its creditors	To afford a company some breathing space (by the imposition of the automatic moratorium) to rehabilitate and restore its profitability
The company's management (Board of Directors) remain in power and continue to make decisions for and run the company	The company's management (Board of Directors) is functus officio. An independent auditor steps in to run the company.
No automatic moratorium	Automatic moratorium



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