Asia Pacific Guide to Lending and Taking Security - Singapore

If things go wrong

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# 1. Please provide a brief description of the insolvency regime. In particular what rights and duties do unsecured and secured lenders have on the insolvency of a debtor? Are there any other matters of concern?

In Singapore, the usual process by which a company is dissolved is known as a winding-up. Other insolvency-related processes in Singapore include judicial management, a scheme of arrangement and receivership. The Insolvency, Restructuring and Dissolution Act 2018 (No. 40 of 2018) (IRDA) is the main piece of insolvency legislation in Singapore.

Winding-up

When a company is wound up, its assets or the proceeds of its assets are used to pay off creditors, after which the balance, if any, is distributed pro rata among shareholders. Companies may be wound up voluntarily or compulsorily. A company may initiate a members’ or creditors’ voluntary winding-up (the former only when the company is insolvent at the time of the winding-up). A compulsory winding-up may take place by order of the court. The IRDA specifies certain persons and classes of stakeholders who may apply to the court to wind up the company. The court may order the winding-up of the company in certain circumstances. The usual ground is when the company is unable to pay its debts. The most common method of establishing the company's inability to pay its debts is to serve on the company a statutory demand for an undisputed debt exceeding SGD 15,000. A company is deemed unable to pay its debts if, among others, it fails to pay or secure or compound the amount within three weeks after the demand is served. In both types of winding-up, a liquidator will be appointed to realize and distribute the company's assets in accordance with the IRDA.

Ranking of debts

Subject to the bankruptcy/insolvency laws discussed below, generally speaking, to the extent that the loan is unsecured, a lender’s claim against the borrower would rank pari passu with other unsecured claims. If the loan is secured by security over an asset of any security provider, then to the extent of the value of the asset subject to the security that may be realized through the enforcement of that security, the lender's claims against the security provider will generally have priority over the claims of other creditors of that security provider.

The IRDA sets out certain exceptions to the general pari passu principle and provides for preferential debts to be paid in priority to all other unsecured debts. These are (in the following order and priority):

Costs and expenses of the winding-up, including the following:

Those incurred by the official receiver as the liquidator of the company, including the costs, expenses and remuneration of a licensed. insolvency practitioner to act as liquidator in the place of the official receiver.

The liquidator's remuneration and the costs of any audit carried out under the IRDA.

The applicant's costs for the winding-up order payable under the IRDA.

All wages or salary (whether earned wholly or in part by way of commission), including any amount payable by way of allowance or reimbursement under any contract of employment, award or agreement regulating conditions of employment of any employee up to a limit as prescribed by the minister by order published in the Singapore Gazette (presently prescribed as SGD 13,000 as at the date of this publication).

The amount due to an employee as a retrenchment benefit or ex gratia payment under any contract of employment, award or agreement that regulates conditions of employment, whether that amount becomes payable before, on or after the commencement of the winding-up to a limit as prescribed by the minister by order published in the Singapore Gazette (presently prescribed as SGD 13,000 as at the date of this publication).

All amounts due in relation to work injury compensation under the Work Injury Compensation Act 2019 accrued before, on or after the commencement of the winding-up.

All amounts due in relation to contributions payable during the 12 consecutive months before, on or after the commencement of the winding-up by the company as the employer of any person under any written law relating to employees' superannuation or provident funds or under any scheme of superannuation that is an approved scheme under the law relating to income tax.

All remuneration payable to any employee in respect of vacation leave or, in the case of their death, to any other person in their right, accrued in respect of any period before, on or after the commencement of the winding-up to a limit as prescribed by the minister by order published in the Singapore Gazette (presently prescribed as SGD 13,000 as at the date of this publication).

The amount of all tax assessed and all goods and services tax due under any written law before the commencement of the winding-up or assessed at any time before the time fixed for the proving of debts has expired.

The above preferential debts (except the amounts due in relation to workers' injury compensation under the Work Injury Compensation Act 2019 and taxes) must be paid out of the proceeds of any property subject to any floating charge created on the company's property, in priority to the claims of the holder of the floating charge, if the company's assets available for payment of general creditors are insufficient to meet any of these preferential debts.

The IRDA also provides that where any winding-up assets have been recovered under an indemnity for costs of litigation given by certain creditors, protected or preserved by the payment of moneys or the giving of an indemnity by creditors, or where expenses in relation to which a creditor has indemnified a liquidator have been recovered, a Singapore court may make any order that it thinks just in relation to the distribution of those assets and the amount of the expenses recovered with a view to giving those creditors an advantage over others in consideration of the risks run by them in taking that action.

Further, rescue financing may be extended to the debtor company during a scheme of arrangement or judicial management. If such arrangements preceded winding-up, it would rank as the costs and expenses of the winding-up above all preferential debts. Such rescue financing may also be secured by the debtor company's assets. In such cases, it may rank below, equally or even above existing security interests, depending on whether the financing could have been obtained without such security and on whether there is adequate protection for existing security holders.

# 2. Is it possible to obtain a moratorium before insolvency?

There are two corporate rescue mechanisms in Singapore that allow for a moratorium to be obtained before the commencement of any winding-up proceedings namely judicial management and schemes of arrangement.

Under the judicial management regime, an interim moratorium will be effective from the date an application is made for a judicial management order. However, an application for judicial management ought only to be made if, among other things, the applicant considers that the company is or is likely to be unable to pay its debts. This, therefore, means that a company may make an application to the court for itself to be placed under the judicial management of a judicial manager even if it is not technically insolvent, as long as it is facing impending insolvency.

Conversely, the scheme of arrangement regime does not require there to be insolvency or impending insolvency. There are two routes by which a company may apply for a moratorium in support of a scheme or proposed scheme.

The first is under Section 64 of the IRDA ("**Section 64 Stay**"), where the company may apply for a moratorium when it proposes or intends to propose a scheme, as long as it, among others, undertakes to make a scheme application as soon as practicable. A Section 64 Stay may (subject to the court's order) apply to acts outside of Singapore. An automatic 30-day moratorium arises once an application for a Section 64 Stay is made. Related companies, i.e., subsidiaries, holding and ultimate holding companies, of the scheme company may also apply for a moratorium if, among other requirements, they play a necessary and integral role in the scheme and the scheme will be frustrated if such a moratorium is not granted.

The second is under Section 210(10) of the Companies Act. This is a more limited form of moratorium that does not come with the automatic stay (but a company can apply for one), the worldwide effect or the possibility of related companies moratoriums available under the Section 64 Stay. However, unlike the Section 64 Stay, the application under Section 210(1) of the Companies Act may be made in a summary way by any member, creditor or holder of units of shares of the company, and is not expressly subject to the same extensive disclosure requirements (both on application and post-application) or the carve-outs for netting and other arrangements. However, an application under Section 210(10) of the Companies Act may only be made after a scheme is proposed, with the scheme being of sufficient particularity for the court to make a broad assessment that there is a reasonable prospect of the scheme working and being acceptable to the general run of creditors. However, this scheme need not be of the same degree of particularity or of the same terms as the plan that is to be presented to the creditors for voting.

# 3. When a company is the subject of a formal insolvency procedure, can the company’s pre-insolvency transactions be set aside?

Briefly, under Singapore insolvency laws, if a Singapore company enters into a winding-up, certain transactions (including the granting of security or guarantees) may be set aside by order of court on application of the liquidator or judicial manager. There are several grounds for setting aside transactions and they are discussed below.

Transactions at an undervalue

A transaction entered into by the company at any time within three years prior to the commencement of its winding-up or judicial management may be set aside if it was at an undervalue and if, at the time the transaction was entered into, the company was insolvent or became insolvent as a consequence of the transaction. A transaction is deemed to be entered into at an undervalue if it was entered into with a person on terms that meant that the company receives either no consideration or a consideration worth significantly less than the value of the consideration provided by the company to the person. The company's insolvency at the time of the transaction is presumed unless proven otherwise if the person who entered into the transaction is connected (otherwise than by reason only of being the company’s employee) to the insolvent company. However, a transaction at an undervalue will not be set aside if the court is satisfied that the company entered into the transaction in good faith and for the purpose of carrying on its business and that at the time the company did so, there were reasonable grounds for believing that the transaction would benefit the company.

Unfair preferences

Any act of the company carried out within one year prior to the commencement of the winding-up or judicial management of the company (or within two years prior to the commencement of the winding-up or judicial management of the company for transactions involving associates of the company) may be set aside if classified as an unfair preference. The requirement is satisfied if, at the time the act was done, the company was insolvent or became insolvent as a consequence of the act, and that act has the effect of putting the person preferred in a better position than that person would have been in if the act had not been carried out. However, a Singapore court would not make an order setting aside the act as an unfair preference if it was satisfied that the company, when giving the preference, was not influenced by a desire to put that person in a better position.

Extortionate credit transactions

Where a company is in judicial management or is being wound up, any transaction involving the provision of credit to the company within three years prior to the commencement of the winding-up or judicial management of the company that is extortionate may be set aside by order of court on application by the liquidator or judicial manager. Unless proved to the contrary, a transaction is presumed to be extortionate if, with regard to the risk accepted by the person providing the credit, the terms require grossly exorbitant payments to be made (whether unconditionally or in certain contingencies) in relation to the provision of the credit or if the terms are harsh and unconscionable or substantially unfair.

Registrable but unregistered charges

Any security created by a registrable but unregistered charge is void against the liquidator of the company or any creditor of the company. This applies to a company incorporated in Singapore and the branch of a foreign company registered in Singapore.

Floating charges for past value

A floating charge in relation to the undertaking or property of the company created within one year of the commencement of the winding-up or judicial management (or within two years for transactions involving person connected with the company) or on or after the commencement of judicial management of the company up to the date the company enters into judicial management is invalid except in relation to the amount of any money received or reduction in its debts, or a reduction of an interest owing to the chargee at the time of, or after, the creation of, and in consideration for, the charge. Where the chargee is not connected with the company, the floating charge will not be invalidated unless the company is insolvent at the time the charge is created or becomes insolvent in consequence of the transaction under which the charge is created.

The IRDA now expressly empowers liquidators and judicial managers to assign proceeds of actions relating to, among others, transactions at an undervalue, unfair preferences and extortionate credit transactions. This provides the option for liquidators to obtain third-party funding to pursue claims related to the categories above, which would otherwise not have been pursued.

# 4. When can a lender enforce its security? Can security be enforced out of court following an event of default (or other contractual trigger event), or is a court order required? Are there any restrictions that apply before a lender may enforce its security?

Generally, when and how a lender can enforce its security depends on the contractual agreement between the lender and the borrower. A lender can generally enforce its security without court involvement. The security document will typically provide when the security is enforceable. For instance, on the occurrence of an event of default such as failure to pay, breach of certain obligations and insolvency and/or if the lender has accelerated the loans. The type of security interest that the lender holds also affects how the security can be enforced. A well-drafted security document would usually expressly provide for the right to possession, a power of sale or the option to appoint a receiver, which the lender can enforce out of court based on the terms of the agreement, usually on default (or a continuing default) by the borrower. These remedies can be cumulative and not mutually exclusive. Enforcement powers may also be implied by statute and common law if not expressly provided.

There may be overriding restrictions or limitations on the lender's enforcement power. If there is a Section 64 Stay, a moratorium pursuant to Section 210 (10) of the Companies Act, or a moratorium following a judicial management application, then enforcement of any security over the debtor company may not be possible except with leave of court. Further, Section 440 of the IRDA also renders void any contractual provisions that purport to:

(a) terminate or amend, or claim an accelerated payment or forfeiture of the term under any agreement with the company; or

(b) terminate or modify any right or obligation under any agreement with the company

at any time after the commencement of judicial management or scheme of arrangement proceedings by reasons only that the proceeds are commenced or that the company is insolvent.

Enforcement powers might also be contractually limited, such as when there are intercreditor arrangements governing enforcement and standstill agreements that restrict enforcement over specified periods of time. Additionally, foreclosure as a remedy can only be effected by an order of the court.

# 5. Do any limitation periods apply in relation to bringing an action to enforce security?

No action is permitted to be brought to enforce a mortgage or charge after the expiration of 12 years from the date when the right to receive the money secured by the mortgage or charge has accrued. Additionally, no foreclosure action in relation to mortgaged personal property is permitted to be brought after the expiration of 12 years from the date on which the right to foreclose accrued. However, the right to foreclose on the property subject to the mortgage or charge is not deemed to accrue as long as that property comprises any future interests or any life insurance policy that has not matured or been determined.

Further, no action to recover arrears of interest payable in relation to any sum of money secured by a mortgage or other charge or payable in respect of the proceeds of the sale of land (or to recover damages in respect of those arrears) is permitted to be brought after the expiration of six years from the date on which the interest became due.

# 6. Is there any particular way in which secured assets must be liquidated on enforcement (e.g., by auction or court sale)?

A lender is under a duty to act in good faith and to take reasonable steps to obtain a fair price when exercising a power of sale. The lender would be entitled to choose when to sell the secured property and need not wait until the potential sale price improves before selling it. However, the lender has a duty to obtain the best price that can be reasonably obtained at the time of sale. In addition, the lender would have to act with reasonable care and skill and to act fairly in exercising its power of sale.

Most sales by secured parties are carried out without the need to obtain a court order to effect the sale. A court is unlikely to interfere in the sale as long as the lender complies with its duties as mentioned above. However, these duties mean that the lender would not be permitted to sell the assets to itself, unless it does so through a court sale. A common and reasonable way of ensuring that a lender properly discharges its duties is by having the secured assets sold through a public auction.

# 7. Are there any particular legal or practical difficulties or delays in enforcing security?

Enforcement of security is usually the last resort for a lender because enforcement can have very serious and far-reaching consequences for the borrower. These include cross-default by the borrower under any other security agreements that it has entered into and the eventual winding-up of the borrower. Therefore, in practice, a lender would usually explore and exhaust other options in relation to a borrower's default before exercising its right of enforcement.

If the lender decides to enforce its security, the borrower or third-party creditors may also challenge the validity of that security. This may cause delays in the enforcement process. It is therefore common for a lender to seek a security review by its lawyers, which would examine the effectiveness and enforceability of its security, before proceeding with enforcement.

As mentioned in the answer to question 4 of this section, if there are intercreditor arrangements, standstill agreements and statutory restrictions, these may cause difficulties in relation to the enforcement of security. In addition, if winding-up proceedings have already commenced or if the borrower is under judicial management, or steps are taken to enter into a scheme of arrangement, the company may be protected by a moratorium which prohibits enforcement against the secured assets by lenders except with permission from the court.

Another difficulty that arises in relation to the enforcement of security is if the debtor's assets either cannot be located or have been removed from Singapore. With respect to locating the debtor's assets, if the lender has obtained a judgment or an order for payment against the debtor, it may apply to the court for an order that the debtor or the debtor's officers attend before a registrar of the court and be orally examined in relation to where the property is situated. In relation to the risk of the debtor removing assets out of Singapore, the lender may seek a Mareva injunction to restrain the debtor from doing so, pending the outcome of any legal action commenced against the debtor.

Note that the remedy of possession is rarely used in commercial transactions. One reason for this is the possibility of the lender being exposed to liabilities while in possession of the asset, e.g., the possibility of becoming liable for environmental damage if the asset in possession is land. Another reason is the additional burden placed on the lender in possession to account to the borrower for any income and profit received. Further, if the lender takes possession of a profit-yielding asset, it is under a duty to ensure that reasonable profits are continually collected in relation to that asset. If profits (in excess of the sum due to the lender) that would have been received were not received due to the willful neglect of the lender (e.g., if the lender did not lease out the property when it could have done so), it could be liable to the borrower for the loss of those profits that are in excess of the sum owing to the lender. Because of these concerns, a receiver's appointment is generally preferred over a lender taking possession of the secured assets by itself.

For personal and corporate guarantees, the enforcement is typically through the commencement of legal proceedings. Usually, a claim under a guarantee should be fairly straightforward and therefore capable of being summarily disposed of without the need for discovery or trial. However, in practice, these summary disposals of enforcement actions are sometimes not possible if the guarantor or primary debtor raises issues such as duress, undue influence or misrepresentation in relation to the execution of the guarantee. In these situations, the lender may find that it has to incur the substantial time and expense to enforce the guarantee.

Finally, in most security documents involving international parties, it is fairly common for parties to provide for arbitration (or other alternative dispute resolution mechanisms, e.g., mediation or expert determination) as the mode of dispute resolution as opposed to having recourse to national courts. In such cases, there may be a risk that enforcement may be met by arguments by the debtor alleging that its liability is disputed and ought to be determined by way of arbitration before enforcement can be resorted to. This presents a risk of delay in enforcing the security — particularly if recourse to national courts is required as part of the enforcement process (e.g., court-ordered receivers, foreclosure, etc.).

# 8. In relation to enforcement, are there any specific requirements to be borne in mind if the lender is a foreign entity?

There are generally no specific requirements in relation to enforcement actions by a foreign entity. However, if a foreign lender commences court proceedings in Singapore against a defaulting borrower, the foreign lender may, on the application of the defendant borrower, be ordered to pay security for the defendant's costs in the proceedings if it appears that the foreign lender will be unable to pay the defendant's costs if the defendant is successful. In such cases, the legal proceedings may be stayed until that security is provided.

A foreign entity could be classified as a moneylender under the Moneylenders Act. If so, a loan granted by an unlicensed moneylender, together with the security given under that loan, will be unenforceable. Therefore, it is advisable to check if the lender falls into the classification of a moneylender under the Moneylenders Act (as discussed in the answer to question 1 of the "When considering whether to lend" section) and for the lender to be licensed if it does not qualify for an exemption or fall under a category of excluded moneylender.

# 9. Is there any reason why you think that arbitration rather than litigation might be advantageous in resolving disputes under the finance documents, and if so, why? Please outline the relative merits of arbitration and litigation, including the ease of enforcement of foreign judgments and foreign awards from different jurisdictions. Is it possible to rely on a hybrid enforcement provision that allows the lenders to opt for either arbitration or litigation as they see fit?

Enforcement

The main advantage of arbitration is the general ease of enforcement of an arbitral award in more than 150 countries under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, to which Singapore is a signatory. The convention lays down a system for the mutual recognition and enforcement of arbitral awards among countries that are parties to the convention without reviewing the merits of the arbitral award. The result is that arbitral awards receive greater recognition internationally than most national court judgments.

Flexibility

Flexibility is another key advantage of arbitration because an arbitral tribunal must conduct the arbitration according to the parties' agreement and their reasonable requirements. The parties are free to choose their arbitration rules or select their own procedures in their arbitration agreements. Parties can select a neutral forum. They can also decide on the arbitrators with subject matters expertise in the areas of dispute. Conversely, in litigation, rules of court dictate the procedures and these are often more rigid than arbitration rules.

Confidentiality

Confidentiality is another compelling advantage of arbitration if the parties want to avoid publicity or if the dispute involves commercially sensitive matters. Furthermore, the private and less formal settings in arbitration tend to be more collegial than traditional courtroom litigation, therefore better for preserving business relationships between the parties.

Time

Time could also be a reason for preferring arbitration to litigation. On the one hand, arbitration is generally regarded as the more efficient dispute resolution mechanism when compared to litigation. However, with the greater flexibility in arbitration rules, the length of arbitrations could also greatly depend on the parties' conduct. For example, the parties may attempt to  delay arbitration for tactical reasons by repeatedly seeking for extensions of arbitration timelines. On the other hand, Singapore's courts are widely perceived to be efficient and reliable. Therefore, it is arguable that there is no clear advantage in efficiency when preferring arbitration to litigation in Singapore.

Costs

Costs are traditionally considered to be lower for arbitration than for litigation. However, this may not necessarily be the case; instead, increasingly, the opposite might be true. The cost of commencing arbitration is generally more expensive than filing a claim in court. The fees of a three-arbitrator tribunal are also likely to be high, depending on the choice of arbitrators. Comparatively, the cost of litigation is relatively standard but can also be high if, for example, the process involves extensive discovery and protracted interlocutory applications.

Right of appeal

A disadvantage of arbitration is the possibility of inconsistent outcomes as compared to litigation in common law jurisdictions, including Singapore, which follow the principle of stare decisis, i.e., where precedents from higher courts are binding on the lower courts. Arbitral awards are also usually final with limited scope for appeal on the merits. Conversely, litigants generally have a right to appeal on the merits against a court judgment. However, the finality of arbitral awards could be an advantage for parties seeking to move on quickly from the dispute rather than having disputes drag on for years due to the possibility of an appeal.

**Election of the dispute resolution mechanism**

Asymmetric arbitration clauses (i.e., allowing only one party to elect between arbitration and litigation) are generally enforceable in Singapore.

# 10. Are asymmetrical jurisdiction clauses enforceable? (By this we mean clauses that allow the lenders, but not the borrowers, to make certain choices in relation to choice of jurisdiction and how to litigate. These types of clauses allow the lenders, but not the borrowers, to commence proceedings in any court they choose, but restrict the borrowers to commencing proceedings in one jurisdiction only. This may also allow the lenders, but not the borrowers, to choose whether to litigate the finance documents before a court or to submit to arbitration in relation to them, but restrict the borrowers to either litigation or arbitration, as specified in the agreement).

An asymmetric jurisdiction clause freely entered into between the parties will generally be enforced by the Singapore courts. Similarly, asymmetric arbitration clauses are also enforceable in Singapore.

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