Global Restructuring and Insolvency Guide - Singapore

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

Please select a topic from the menu.

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# Initial Considerations

## Can you take security over all types of assets, including accounts receivable?

**Winding-Up**

Yes, creditors can take security over all types of assets (for example, via a floating charge).

**Judicial Management**

Yes, creditors can take security over all types of assets (for example, via a floating charge).

**Scheme of Arrangement**

Yes, creditors can take security over all types of assets (for example, via a floating charge).

## What is the nature of the insolvency process?

**Winding-Up**

A process involving the liquidation of the company's assets, distribution to creditors and contributories, and the eventual winding-up and striking off of the company. A Singaporean company can be wound up either voluntarily or by the court.

A voluntary winding-up may be either of the following:

A member's voluntary winding-up subject to there being a declaration of solvency by the directors of the company

A creditor's voluntary winding-up where the directors have lodged a declaration that the company cannot continue its business by reason of its liabilities.

The key difference between a member's voluntary winding-up and a creditor's voluntary winding-up is that the company gets to appoint the liquidator in the former.

In the alternative, an application can be made to court for the mandatory winding-up for the company. The difference between the voluntary and court-mandated process is the method by which the winding-up is initiated. A company resolution is required in a voluntary winding-up but not in a winding-up by the court.

**Judicial Management**

The judicial management procedure is based on the English administration process and is supervised by an external judicial manager who takes control of the company and its assets. It seeks to achieve any 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 arrangement between the company and its creditors

A more advantageous realization of the company's assets or property than on a winding-up (collectively, the "**Purposes**")

There are two ways in which a company can be placed under judicial management, namely: (i) by an application to the court; or (ii) by a resolution passed by a majority in number and value of creditors present and voting.

Depending on the process, a judicial manager may be appointed by the court, or by a majority in number and value of creditors at the meeting to place the company under judicial management. Once a company enters into judicial management, the judicial manager takes into custody and controls all of the property to which the company is entitled. During this period, all powers conferred and duties imposed on the directors must be exercised and performed by the judicial manager and not by the directors of the company.

**Scheme of Arrangement**

A scheme of arrangement allows the company to vary or modify its obligations in relation to its debts and liabilities owed to its creditors.

## What is the solvency requirement for a company to file a case in this jurisdiction?

**Winding-Up**

Members' voluntary winding-up (for solvent liquidation)

The directors of the company are required to make a declaration of solvency prior to the meeting where the resolution for winding-up is proposed, and the declaration must indicate that the directors, or the majority of them, have:

Made an inquiry into the affairs of the company

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 of solvency loses its effect if:

It was not made at a meeting of directors.

It was not made within five weeks immediately before the passing of the resolution for voluntary winding-up.

Creditors' voluntary winding-up

A creditor's voluntary winding-up may be commenced once the directors of the company have lodged a declaration stating the following:

That the company cannot by reason of its liabilities continues its business

That meetings of the company and of its creditors have been summoned for a date within 30 days after the date of the declaration

Following which, the directors must immediately proceed to appoint a licensed insolvency practitioner to be the provisional liquidator.

Winding-up by the court

The court may order the winding-up if the company is unable to pay its debts.

There are two ways in which an applicant can establish that the company is unable to pay its debts:

Adducing evidence of the company's actual inability to pay its debts

Adducing evidence of a deemed inability to pay its debts

Regarding the former, the applicant need only show that the company's current liabilities exceed its current assets such that it is unable to meet all debts as and when they fall due.

As for the latter, a company is deemed to be unable to pay its debts if:

A creditor to whom the company is indebted in a sum exceeding SGD 15,000,

Serves a written demand at the registered office of the company, requiring the company to pay the sum due

The company has for three weeks after the service of the demand neglected to pay the sum or to secure or compound it to the reasonable satisfaction of the creditor

**Judicial Management**

As set out above, the company may be placed under judicial management only where:

The company is or is likely to become unable to pay its debt.

There is a reasonable probability of achieving one of the aforementioned Purposes.

There are two ways in which a company can be said to be unable to pay its debts, and these are as follows:

By adducing evidence of the company's actual inability to pay its debts

By adducing evidence of a deemed inability to pay its debts

Regarding the former, the applicant need only show that the company's current liabilities exceed its current assets such that it is unable to meet all debts as and when they fall due.

As for the latter, a company is deemed to be unable to pay its debts if:

A creditor to whom the company is indebted in a sum exceeding SGD 15,000

Serves a written demand at the registered office of the company, requiring the company to pay the sum due, and

The company has for three weeks after the service of the demand, neglected to pay the sum or to secure or compound it to the reasonable satisfaction of the creditor.

**Scheme of Arrangement**

No solvency requirement.

## Is there a requirement to demonstrate COMI ("centre of main interests") for a company to file a case in this country?

**Winding-Up**

The Singapore courts may wind up a foreign company that has a "substantial connection" with Singapore.

In determining whether a foreign company has a substantial connection with Singapore, the Singapore courts may have regard to one or more of the following factors, including the COMI of the company:

The company is carrying on business in Singapore or has a place of business in Singapore.

The company is registered under Division 2 of Part XI of the Companies Act.

The company has substantial assets in Singapore.

The company has chosen Singapore as the law governing a loan or other transaction, or the law governing the resolution of one or more disputes arising out of or in connection with a loan or other transaction.

The company has submitted to the jurisdiction of the court for the resolution of one or more disputes relating to a loan or other transaction.

**Judicial Management**

The Singapore courts may place a foreign company into judicial management if it has a "substantial connection" with Singapore.

In determining whether a foreign company has a substantial connection with Singapore, the Singapore courts may have regard to one or more of the following factors, including the COMI of the company:

The company is carrying on business in Singapore or has a place of business in Singapore.

The company is registered under Division 2 of Part XI of the Companies Act.

The company has substantial assets in Singapore.

The company has chosen Singapore as the law governing a loan or other transaction, or the law governing the resolution of one or more disputes arising out of or in connection with a loan or other transaction.

The company has submitted to the jurisdiction of the court for the resolution of one or more disputes relating to a loan or other transaction.

**Scheme of Arrangement**

A foreign company would be able to commence a scheme of arrangement process if it has a "substantial connection" with Singapore.

In determining whether a foreign company has a substantial connection with Singapore, the Singapore courts may have regard to one or more of the following factors, including the COMI of the company:

The company is carrying on business in Singapore or has a place of business in Singapore.

The company is registered under Division 2 of Part XI of the Companies Act.

The company has substantial assets in Singapore.

The company has chosen Singapore as the law governing a loan or other transaction, or the law governing the resolution of one or more disputes arising out of or in connection with a loan or other transaction.

The company has submitted to the jurisdiction of the court for the resolution of one or more disputes relating to a loan or other transaction.

## Is restructuring of both secured and unsecured claims possible?

**Winding-Up**

The rights of secured creditors to deal or realize security over company assets (with the exception of floating charges) are not affected by the winding-up order. Secured creditors (save for those with floating charges over the company's assets) may proceed to realize their security to recover the monies owed to them.

The proceeds from the realization of the company assets (including assets under a floating charge) will be used to pay preferential creditors in priority to all other unsecured debts. If the security realized is inadequate to cover the liability of the company to the secured creditor, the secured creditor may seek to recover the balance as an unsecured creditor.

**Judicial Management**

Yes, in specific instances.

Floating charge

The judicial manager of a company may dispose of or otherwise exercise their powers in relation to any property of the company that is subject to a floating charge as if the property were not subject to security.

Where such property is so disposed of, the holder of the floating charge has the same priority in respect of any property of the company directly or indirectly representing the property disposed of as they would have had in respect of the property subject to the floating charge.

In light of the potential prejudice that may be caused to floating charge holders, the IRDA provides that the court must dismiss an application for a judicial management order if it is opposed by a floating charge holder, and the court is satisfied that the prejudice that would be caused to the floating charge holder is disproportionately greater than the prejudice that would be caused to unsecured creditors of the company if the application is dismissed.

Other forms of security

Where, on an application by the judicial manager, the court is satisfied that the disposal, with or without other assets, of any:

Property of the company subject to any other security (other than a floating charge)

Any goods in possession of the company under a hire purchase agreement, chattel leasing agreement or retention of title agreement,

would be likely to promote one of the aforementioned Purposes, the court may, by an order, authorize the judicial manager to dispose of the property as if it were not subject to the security, or to dispose of the goods, as if all rights of the owner under any such agreement were vested in the company.

Super-priority rescue financing may also be obtained with leave of court. Such financing may be on terms that may compromise existing security over assets

**Scheme of Arrangement**

Yes.

Super-priority rescue financing may also be obtained with leave of court. Such financing may potentially be on terms that may have an impact on existing security over assets.

## Are the claims of creditors and shareholders put into separate classes for purposes of voting and treatment under the plan or scheme?

**Winding-up**

N/A

**Judicial management**

The judicial manager's statement of proposals must be approved by the majority in number and value of creditors in a creditors' meeting. There is no need to classify these creditors.

**Scheme of arrangement**

Creditors may have to be separated into different classes for the purposes of voting.

The Singapore Court of Appeal decision of *Pathfinder Strategic Credit LP v Empire Capital Resources Pte Ltd* [2019] 2 SLR 77 sets out three broad considerations for creditor classification:

The identification of a comparator i.e., the most likely scenario in the absence of scheme approval

An assessment of the relative positions of creditors under the scheme and whether this mirrors their relative positions in the comparator

If there is a difference in the step immediately above, to ascertain whether the extent of the difference is such as to render the creditors' rights "so dissimilar that they cannot sensibly consult together with a view to their common interest"

In other words, if a creditor's position will improve or decline to such a different extent *vis-à-vis* other creditors simply because of the terms of the scheme assessed against the most likely scenario in the absence of scheme approval, then it should be classified differently. A separate meeting should be held for each disparate class of creditors.

However, the courts will take a broad, practical and objective approach in analyzing creditor relationships and ensure that the application of this principle does not lead to an impractical mushrooming of classes that could potentially result in the creation of unjustified minority vetoes.

Depending on the facts of each case, broad examples of types of creditors that may be put in different classes include: (a) secured creditors; (b) creditors with priority and preferential claims and receiving payment in full compared to those receiving payment in part; (c) unsecured creditors; and (d) creditors whose claims are subordinated in liquidation.

Related-party creditors and contingent creditors would generally have their votes discounted.

## Is shareholder approval needed to commence a case? Are shareholders entitled to vote on a plan?

**Winding-up**

Yes, in the case of members' voluntary winding-up. An ordinary resolution (i.e., more than 50% approval) is required where the company is wound up on the expiry of the company or on an event as specified in the company's constitution. A special resolution (i.e., more than 75% approval) is required otherwise.

For court-ordered and creditors' voluntary winding-up, it is the creditors as a whole who have a say in how the liquidators conduct the winding-up process and in the remuneration of the liquidators. This power is exercised through creditors' meetings or through an inspection committee that represents the creditors.

**Judicial management**

Yes, an ordinary resolution is required (unless otherwise provided in the company's constitution) if the judicial management application is brought by the company.

The statement of proposals put forth by the judicial manager will ultimately be voted upon and is contingent on the approval of creditors.

**Scheme of arrangement**

Approval of the company is required in bringing the scheme application.

The proposed compromise or arrangement will not be binding unless it is approved by the statutorily required majority of creditors, members or the holders (or class of holders) of units of shares. The statutory majority required is a majority in number representing three-fourths in value of the creditors, members, or holders of units of shares present and voting either in person or by proxy ("**Requisite Threshold**").

Pre-packaged restructuring

On application by the company, a compromise or arrangement may be approved even though no meeting of the creditors or class of creditors has been held if the court is satisfied, among other things, that the Requisite Threshold would have been obtained had a meeting of the relevant creditors or class of creditors been called.

## Is there an ability to bind minority dissenting creditors (i.e., cramdown)?

**Winding-Up**

In the event the court decides to grant a winding-up order, any such order made by the court is effective and binds all the creditors and contributories of the wound up company. The liquidator may take actions that bind any and all creditors of the company.

Any arrangement entered into between a company about to be or in the course of being wound up and its creditors is, subject to the right of appeal, binding on the company if sanctioned by a special resolution, and on the creditors if acceded to by 75% in value and 50% in number of the creditors.

**Judicial Management**

Yes. The actions of the judicial manager (whose statement of proposals must be approved by a majority of number and value of creditors) will bind all creditors.

**Scheme of Arrangement**

All members or creditors of a company, or all members or creditors of a particular class, are bound by a compromise or arrangement made under Section 210, including members or creditors opposed to it, provided that the requirements of Section 210(3) are met.

The court may also cram down on dissenting classes of creditors and approve the scheme notwithstanding the dissent of one or more classes of creditors provided, among other things, that the scheme receives approval of 50% of number and 75% of the value of all the creditors present and voting at the scheme meeting (regardless of classification) and the scheme does not discriminate unfairly between two or more classes of creditors, and is fair and equitable to each dissenting class.

# Commencing the Process

## Who can commence?

**Winding-Up**

The following parties may make an application for the court to wind up the company

The company

Any director of the company

Any creditor, including a contingent or prospective creditor of the company

A contributor

The liquidator of the company

A judicial manager

In the case of a company that is carrying on or has carried on banking business, the Monetary Authority of Singapore

Various ministers on grounds specified under the law

**Judicial Management**  
  
The company, its directors, or any of its creditor(s). 

**Scheme of Arrangement**

An application may be made by the company, any creditor, member or holder of units of shares of the company, the judicial manager (if the company has been placed under judicial management), or the liquidator (in the case of a company being wound up).

## Is shareholder's consent required to commence proceeding?

**Winding-up**

No, except in members' and creditors' voluntary winding-up.

**Judicial Management**

No, unless the company itself is applying for judicial management.

**Scheme of Arrangement**

No, unless the company itself is applying for the scheme.

## Is there an ability to consolidate group estates?

**Winding-Up**

Technically, no. Each entity in a group must be wound up separately.

**Judicial Management**

Technically, no. Each entity in a group must separately go through the judicial management process.

**Scheme of Arrangement**

Technically, no. Each entity in a group must separately go through the scheme process. However, protection for key subsidiaries of a company undergoing a scheme may be obtained by leave of court.

## Is there any court involvement?

**Winding-Up**

In the case of a court-ordered winding-up, the court issues the winding-up order and appoints the liquidator. Thereafter, the liquidator generally runs the liquidation but the court retains supervisory powers. At the end of the liquidation process, the liquidator will require an order of court to be released and to dissolve the company.

In the case of creditors' or members' voluntary winding-up, the court is generally not involved except in a supervisory role (e.g., removal of liquidators and review of liquidators' remuneration).

**Judicial Management**

As discussed above, a company may be put into judicial management by either (i) an application to the court; or (ii) a resolution of creditors.  
Once appointed, the judicial manager generally runs the judicial management, but the court retains supervisory powers (e.g., approval of super-priority rescue financing, control of the judicial manager's actions, and extension of the judicial management order).

At the end of the judicial management process, the judicial manager will require an order of court to be discharged.

**Scheme of Arrangement**

The typical process for implementing a compromise or arrangement involves two separate court approvals. The court's permission must first be sought to hold a meeting of the creditors or members of a company, or of a class of creditors or members, for the purpose of putting to those creditors or members a proposal to implement a compromise or arrangement between those creditors or members and the company. If the court grants approval to hold the meeting, and the meeting approves of the proposed compromise or arrangement with the requisite statutory majority, then the court's permission must be sought to implement the compromise or arrangement.

Pre-packaged restructuring

While the court must ordinarily grant approval to hold the meeting, parties that have negotiated schemes beforehand can apply for approval of the scheme without having called a scheme meeting. Pre-packaged schemes will be approved if the court is satisfied, among other things, that the requisite majorities would have been obtained had a meeting of the relevant creditors or class of creditors been called.

## Who manages the debtor?

**Winding-Up**

The liquidator.

When making a winding-up application, the applicant must nominate, in writing, a licensed insolvency practitioner to be appointed as liquidator. The applicant may only nominate the Official Receiver to be appointed as liquidator subject to these conditions:

The applicant has taken reasonable steps, but is unable, to obtain the consent of a licensed insolvency practitioner to be appointed as liquidator.

The Official Receiver consents to being nominated to be appointed as liquidator.

In a voluntary winding-up, the liquidator (who must be a licensed insolvency practitioner) is appointed by the members or creditors (depending on whether it is a members' or creditors' winding-up).

**Judicial Management**

The judicial manager.

When an applicant seeks to put the company into judicial management by making an application to court, the applicant must nominate a person who is a licensed insolvency practitioner to act as a judicial manager. Notwithstanding:

A majority in number and value of creditors may oppose the nomination made by the company, and the court may invite the creditors to nominate another person if it is satisfied as to the number and value of the creditors' claims and as to the grounds of their opposition.

The Minister may nominate a person (who need not be a licensed insolvency practitioner) if the Minister considers that public interest so requires.

The court may reject the nomination of the applicant and appoint another person instead.

If the judicial management is intended to be by way of a creditors' resolution, the company may appoint an interim judicial manager (subject to the fulfillment of certain conditions), but it is ultimately the creditors who get to decide the person (who must be a licensed insolvency practitioner) that is appointed as the judicial manager.

**Scheme of Arrangement**

The parties proposing the scheme, or the company, will typically appoint a scheme manager to facilitate the process and the subsequent implementation of the scheme. The court may also appoint a scheme manager.

## What is level of disclosure of process to voting creditors?

**Winding-Up**

In the event of a creditors' voluntary winding-up, a meeting of creditors must be convened following the meeting of the company, and the company must cause notice of the meeting of creditors to be sent simultaneously with the notices of the meeting of the company. The notice must be sent to the creditors at least 10 days before the date of the meeting, and must contain a statement showing the names of all the creditors and the amounts of their claims.

Additionally, the notice of the meeting of creditors must be advertised at least seven days before the date of the meeting in the Gazette and in at least one English newspaper.

Lastly, the directors of the company must cause a full statement of the company's affairs showing in respect of assets the method and manner in which the valuation of the assets was arrived at, together with a list of the creditors and the estimated amount of their claims to be laid before the meeting of the creditors.

**Judicial Management**

Application

Where judicial management is by way of application to the court, notice of the application must be as follows:

Published in the Gazette and in an English local daily newspaper

Sent to the Registrar of Companies

Given to the company (where a creditor is the applicant)

Given to any person who has appointed, or may be entitled to appoint a receiver and manager of the whole (or substantially the whole) of the company's property pursuant to the terms of a floating charge ("Floating Charge Holders")

Creditors' resolution

Where judicial management is intended to be by way of a creditors' resolution, the company must give at least seven days' written notice (in the prescribed form) of its intention to appoint an interim judicial manager to the following:

The proposed interim judicial manager

The Floating Charge Holders

Upon the appointment of the interim judicial manager, the company must:

Lodge a written notice of the interim judicial manager's appointment (in the prescribed form) with the Official Receiver and the Registrar of Companies within three days.

Thereafter publish a notice of the judicial manager's appointment in the Gazette and in an English local daily newspaper within seven days.

As for the creditors' meeting, which must be subsequently convened, the company must:

Give the creditors at least 14 days' written notice of the meeting, together with the following:

A statement showing the names of all creditors and the amounts of their claims

A full statement of the company's affairs showing in respect of the company's assets or property, and the method and manner in which the valuation of assets or property was arrived at

Cause notice of the meeting of creditors to be published at least 10 days before the date of the meeting in an English local daily newspaper

At least one of the directors of the company (as appointed among themselves) and the secretary of the company must also attend the creditors' meeting, and disclose the company's affairs and the circumstances leading up to the proposed judicial management.

Period in which the company is in judicial management

Where a judicial manager (or interim judicial manager) has been appointed:

Every invoice, order for goods, business letter, order form or other correspondence that is issued by the company or the judicial manager

Every website of the company

must state that the affairs, business and property of the company are being managed by the judicial manager.

Once a company has been placed in judicial management, the company must, thereafter, submit a statement of affairs to the judicial manager within 28 days (or such a longer period not exceeding two months as the judicial manager may allow). This statement of affairs would include information on the asset position of the company, the names and addresses of its creditors and information on any secured assets.

Within 90 days of the judicial management order, the judicial manager must do the following:

Send to the Registrar of Companies and to every creditor a statement of the judicial manager's proposals for achieving one or more of the aforementioned purposes

Lay a copy of the statement before a meeting of the company's creditors (summoned for the purpose) on not less than 14 days' notice.

Additionally, the judicial manager must also send a copy of the statement to every member of the company, or publish a notice in an English local daily newspaper stating an address to which members of the company can write to for copies of the statement to be sent to them free of charge.

**Scheme of Arrangement**

Prior to the meeting to approve the scheme, the company must give notice of the meeting. Every notice summoning the meeting which is sent to a creditor, member or holder of units of shares of the company must be accompanied by a statement explaining the effect of the compromise or arrangement — in particular, stating any material interests of the directors (whether as directors, members, creditors, holder of units of shares of the company or otherwise), and the effect thereon the compromise or arrangement in so far as it is different from the effect on the like interests of other persons ("**Statement**").

Where notice is given by way of advertisement, either the Statement, or information as to how the Statement may be obtained, must also be provided.

Additionally, a company intending to make an application for a moratorium under Section 64 of the Insolvency, Restructuring and Dissolution Act 2018 (IRDA) must file an affidavit evidencing, inter alia, creditor support for the proposed compromise or arrangement, along with an explanation of how such support would be essential for the success of the proposed compromise or arrangement. A brief description containing sufficient particulars of the intended compromise must be provided where the company has not proposed the compromise or arrangement. Further to the above, the company must also do the following:

Publish a notice of the application in the Gazette and in at least one English local daily newspaper

Send a copy of the notice published in the Gazette to the Registrar of Companies

Unless the court orders otherwise, the company must also send a notice of the application to each creditor meant to be bound by the proposed compromise or arrangement and who is known to the company.

## What entities are excluded from customary insolvency or reorganisation proceedings, and what legislation applies to them?

**Winding-Up**

Singaporean companies and foreign companies with a "substantial connection" to Singapore may undergo the liquidation process.

However, where the company carries on or has carried on banking business, only the Monetary Authority of Singapore may commence liquidation proceedings.

**Judicial Management**

A judicial management order may not be made in relation to any of the following:

A company after it has gone into liquidation

Banks and finance companies licensed under the Finance Companies Act

Insurance companies licensed under the Insurance Act

Such class of companies as may be prescribed by the minister in the Gazette.

Additionally, a company cannot be placed in judicial management by way of creditors' resolution if a pending judicial management application has not been withdrawn or decided by the court.

**Scheme of Arrangement**

Singaporean companies and foreign companies with a "substantial connection" to Singapore may undergo the scheme of arrangement process.

However, there are certain classes of companies to which the provisions relating to a scheme of arrangement are inapplicable, such as the following:

A company that is a banking corporation

A company that is an airport licensee licensed under section 36 of the Civil Aviation Authority of Singapore Act

A company that is a finance company licensed under section 6 of the Finance Companies Act

A company that is a licensed insurer licensed under section 8 of the Insurance Act

A company that is: (a) a financial institution approved under section 28 of the Monetary Authority of Singapore Act; or (b) holds a merchant bank license, or is treated as having been granted a merchant bank license under the Banking Act

A company that is a specified telecommunication licensee declared under section 32H of the Telecommunications Act

A company that is a covered bond special purpose vehicle

## How long does it generally take for a creditor to commence the procedure?

**Winding-Up**

The duration from the time of the winding-up application to the issuance of a winding-up order is typically two to three months, assuming the application is not heavily contested.

**Judicial Management**

The duration from the time of the judicial management application to the issuance of a judicial management order is typically three to four months, assuming the application is not heavily contested.

**Scheme of Arrangement**

The duration from the time of an application to the court for leave to convene a creditors' meeting to consider a compromise or arrangement to the issuance of the order is typically about two months.

# Effect of Process

## Does debtor remain in possession with continuation of incumbent management control?

**Winding-Up**

No.

Once a winding-up order is made, the company's board of directors is *functus officio* (i.e., mandate has expired). The power and duty of running the company falls to the liquidator.

**Judicial Management**

No.

During the period for which a judicial management order is in force, all powers conferred and duties imposed on the directors will be exercised and performed by the judicial manager and not by the directors. The judicial manager must do all such things as may be necessary for the management of the company's affairs, business, and property.

**Scheme of Arrangement**

Yes, but the company will typically appoint a scheme manager, whose powers, duties and rights are set out in the scheme document.

The existing management of the company will not necessarily be displaced.

## What is the stay/moratorium regime (if any)? Is the stay or moratorium worldwide?

**Winding-Up**

Where any action or proceedings against the company are pending, a stay of proceedings against the company may be obtained at any time after the making of the winding-up application and before the winding-up order is made.

Once the winding-up order is made, no action or proceedings may be commenced against the company or proceeded with except with the leave of the court and upon such terms as the court may impose.

**Judicial Management**

To facilitate the rehabilitation of the company, once an application for a judicial management order is made, or a written notice of the appointment of an interim judicial manager has been lodged (i.e., commencement of the judicial management process by way of a creditors' resolution), an automatic moratorium period arises, following which:

No order may be made, and no resolution may be passed for the winding-up of the company.

No steps may be taken to enforce any security over any property of the company.

No other proceedings may be commenced or continued against the company.

No execution or other legal process may be commenced or continued against the company or its property.

The automatic moratorium will continue until either (i) the date on which the judicial management application is decided by the court or, where the company has lodged a written notice of an interim judicial management (ii) the earliest of either the date of appointment of the judicial manager, the date on which the term of appointment of the interim judicial manager ends, or the rejection of the resolution to place the company under judicial management.

However, the automatic moratorium does not apply to a company that was subject to an earlier application for a judicial management order, or if there had been an earlier written notice of appointment of an interim judicial manager, within the last 12 months.

On making the judicial management order, the aforementioned moratorium will extend to the end of the judicial management process. The scope of the moratorium will also extend to the appointment of receivers and managers and the exercise of any rights of re-entry or forfeiture under any lease over premises occupied by the company. The moratorium does not apply to certain types of security and contractual rights, such as set-off and netting.

**Scheme of Arrangement**

There are two types of moratoriums available: under Section 64 of the IRDA and Section 210(10) of the Companies Act.

Section 64 IRDA moratorium

This moratorium covers: (a) the passing of a winding-up resolution; (b) the appointment of a receiver and manager; (c) the continuation or commencement of any proceedings, execution, distress or any other legal process against the property of the company; (d) the taking of any step to enforce security; and (e) the enforcement of any right of re-entry or forfeiture. The moratorium does not apply to certain types of security and contractual rights such as set-off and netting. The moratorium can also apply worldwide.

Upon filing an application for a stay under Section 64 of the IRDA, the company is granted an automatic moratorium that lasts for 30 days or until the date when the application is heard, whichever is earlier. However, to obtain such a moratorium, the company must meet the requirements set out in Section 64(3), (4), (6) of the IRDA. Such requirements include evidence of support from creditors, a list of creditors and a brief description of the intended scheme of arrangement with sufficient particulars to enable the court to assess whether the intended scheme is feasible and merits consideration by the company's creditors. The automatic moratorium does not apply if within the period of 12 months immediately before the date on which the application is made, the company made an earlier application.

Section 210(10) moratorium

Section 210(10) also provides for a more limited form of moratorium that only covers the commencement and continuation of legal proceedings against the company.

In most cases, the preference is for the moratorium under Section 64 of the IRDA as the automatic interim moratorium arises upon filing of the court application. However, certain types of companies are excluded from applying for a moratorium under the IRDA, such as financial institutions and other types of prescribed companies prescribed that would have to apply under Section 210 for an interim moratorium.

Additionally, the moratorium under the IRDA has more wide-ranging disclosure requirements, both on application and post-application.

## Is there a provision for debtor in possession or rescuer financing or superpriority or priming financing?

**Winding-Up**

Unlike for judicial management and schemes of arrangement, super-priority rescue financing is not expressly provided for in the context of winding-up. However, liquidators can (and do often) arrange for the financing of the costs of liquidation. In such cases, the financing would rank as "costs and expenses of the winding-up" alongside the liquidator's fees and ahead of all other unsecured creditors.

**Judicial Management**

Judicial management is not a "debtor-in-possession" process. However, super-priority rescue financing is provided for.

On the application of the judicial manager, the courts can grant rescue financing the same priority as liquidation expenses if the company is wound up, which means rescue financing would rank above all other preferential debts. If no other financing options are available, the rescue financing might rank above liquidation expenses or be secured by a security interest that has subordinate, equal or superior priority as regards existing security interests, provided that pre-existing security interests are adequately protected.

**Scheme of Arrangement**

The courts can grant rescue financing the same priority as "costs and expenses of the winding-up" (assuming the scheme fails and the company is wound up), which means rescue financing would rank above all other preferential debts. If no other financing options are available, the rescue financing might rank even above liquidation expenses or be secured by a security interest with subordinate, equal or superior priority regarding existing security interests, provided that pre-existing security interests are adequately protected. Nonetheless, the court would not make such an order unless it is satisfied that the applicant had undertaken reasonable efforts to explore other types of financing that did not entail such a priority.

## Can procedure be used to implement a debt-to-equity swap?

**Winding-Up**

N/A

**Judicial Management**

Debt-to-equity swaps may be pursued if the goal of the judicial management is to pursue a scheme of arrangement or to rehabilitate the company.

**Scheme of Arrangement**

There is no restriction on debt-to-equity swaps.

## Are third party releases available?

**Winding-Up**

Yes.

**Judicial Management**

Yes.

**Scheme of Arrangement**

Yes. In appropriate cases, the scheme may incorporate terms that affect third-party rights (including releases). In *Daewoo Singapore Pte Ltd v. CEL Tractors Pte Ltd* [2001] 2 SLR(R) 791, the Singapore Court of Appeal held that a scheme could incorporate an express term that affects the rights of creditors against a third party, such as a guarantor (creditors would release guarantors from their obligations under the guarantees they stood under). Such a scheme would fall within the purview of the statutory arrangement, and is valid and effectual. The company could obtain an injunction or an order of specific performance to compel the creditor to comply with the terms of the scheme.

## Are the proceedings recognised abroad?

**Winding-Up**

Singapore is not a party to any treaty on international insolvency. It has, however, adopted the UNCITRAL Model Law on Cross-Border Insolvency, which may increase the chances of recognition of Singaporean insolvency proceedings overseas.

**Judicial Management**

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**Scheme of Arrangement**

Singapore is not a party to any treaty on international insolvency. It has, however, adopted the UNCITRAL Model Law on Cross-Border Insolvency, which may increase the chances of recognition of Singaporean insolvency proceedings overseas.

## Has the UNCITRAL Model Law been adopted?

**Winding-Up**

Yes.

**Judicial Management**

Yes.

**Scheme of Arrangement**

Yes.

## Can a debtor continue to carry on business during insolvency proceedings?

**Winding-Up**

In a voluntary winding-up (whether members' or creditors') the business of the company ceases from the commencement of the winding-up, except so far as the liquidator thinks is necessary for the beneficial winding-up of the company.

Where a company is wound up by the court, 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. Thereafter, the liquidator must obtain the authority of either the court or the committee of inspection to continue with the business of the company. The liquidator has no power to carry on the business with a view to resuscitating the company or making profits. The liquidator's power to carry on the company's business is to be exercised primarily to enable the business to be sold off as a going concern.

**Judicial Management**

The judicial manager has the power to continue to carry on the business of the company — and will usually do so depending on the goal of the judicial management process. Even if the eventual goal is the winding-up of the company, the judicial manager will usually continue carrying on the company's business so far as is necessary for the beneficial winding-up of the company.

**Scheme of Arrangement**

Usually, the company can and will continue trading during the scheme of arrangement process.

# Other Factors

## Are there any wrongful or insolvent trading restrictions and what is the directors' liability?

**Winding-Up**

Fraudulent trading

A company engages in fraudulent trading where, in the course of the judicial management or winding-up of a company, it appears that any business of the company has been carried on with an intent to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose. On the application of the liquidator or any creditor or contributory of the company, the court may, if it thinks proper to do so, declare that any person, who was knowingly a party to the carrying on of the business in that manner, will be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company.

Such a person may also be separately liable to a fine not exceeding SGD 15,000 or to imprisonment for a term not exceeding seven years, or to both.

Wrongful trading

A company would have traded wrongfully if the company incurs debts or other liabilities:

Without reasonable prospect of meeting them in full when insolvent, or

That it has no reasonable prospect of meeting in full, and which results in the company becoming insolvent.

In such circumstances, the court may, if it thinks proper to do so, declare that any person who was a party to the company trading in that manner is personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court directs, if that person either:

Knew that the company was trading wrongfully

Ought in all the circumstances to have known that the company was trading wrongfully as an officer of the company.

Nonetheless, the court may relieve any person from personal liability subject to these conditions:

The person acted honestly

Having regard to all the circumstances of the case, the person ought fairly to be relieved from personal liability.

Lastly, the company or any interested party may apply to the court for a declaration as to whether a particular course of conduct or transaction would constitute wrongful trading.

**Judicial Management**

Fraudulent trading

A company engages in fraudulent trading where, in the course of the judicial management or winding-up of a company, it appears that any business of the company has been carried on with an intent to defraud the creditors of the company or creditors of any other person or for any fraudulent purpose. On the application of the liquidator or any creditor or contributory of the company, the court may, if it thinks proper to do so, declare that any person, who was knowingly a party to the carrying on of the business in that manner, will be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company.

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Lastly, the company or any interested party may apply to the court for a declaration as to whether a particular course of conduct or transaction would constitute wrongful trading.

**Scheme of Arrangement**

N/A

## What is the order of priority of claims?

**Winding-Up**

In the event of a voluntary winding-up, the IRDA provides that, subject to provisions relating to preferential payments, the property of a company must, on its winding-up, be applied *pari passu* in satisfaction of its liabilities.

The preferential debts that are to be paid in priority to all other unsecured debts are set out in the following order:

First, the costs and expenses of the winding-up incurred by the Official Receiver as the liquidator of the company, including the costs, expenses and remuneration of any licensed insolvency practitioner appointed by the Official Receiver to act as liquidator in the place of the Official Receiver

Second, any other costs and expenses of the winding-up, including the remuneration of the liquidator (apart from any remuneration mentioned in paragraph (a)) and the costs of any audit carried out under section 192 (i.e., regarding the liquidator's accounts);

Third, the costs of the applicant for the winding-up order payable under section 127 (i.e., regarding preliminary costs incurred by the applicant in the course of the proceedings)

Fourth, all wages or salary (whether or not earned wholly or in part by way of commission), including any amount payable by way of allowance or reimbursement under any contract of employment or any award or agreement regulating conditions of employment of any employee, although the amount payable must not exceed such amount as may be prescribed by the Minister by order in the Gazette

Fifth, the amount due to an employee as a retrenchment benefit or ex gratia payment under any contract of employment or any award or agreement that regulates conditions of employment, whether such amount becomes payable before, on or after the commencement of the winding-up, although the amount payable must not exceed such amount as may be prescribed by the Minister by order in the Gazette

Sixth, all amounts due in respect of work injury compensation under the Work Injury Compensation Act (Cap. 354) accrued before, on or after the commencement of the winding-up

Seventh, all amounts due in respect of contributions payable, 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, 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 Income Tax Act (Cap. 134)

Eighth, all remuneration payable to any employee in respect of vacation leave or, in the case of the employee' 's death, to any other person in the employee' 's right, accrued in respect of any period before, on or after the commencement of the winding-up, although the amount payable must not exceed such amount as may be prescribed by the Minister by order in the Gazette

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

Moreover, the debts within each category above rank in the order in which they are specified, although debts of the same class rank equally between themselves and must abate in equal proportions if the property of the company is insufficient to satisfy these debts.

Additionally, where the assets of the company are insufficient to meet any preferential debts specified in the above categories (1), (2), (3), (4), (5), (7) and (8):

Those debts will take priority over the claims of the holders of debentures under any floating charge created by the company (which charge, as created, was a floating charge).

The debts must be paid accordingly out of any property comprised in or subject to that charge.

Only after all the preferential debts are paid will the other unsecured creditors receive anything back. All unsecured debts rank equally, and if there are insufficient funds to pay everyone, the debts are repaid in equal proportions.

**Judicial Management**

There is no statutory priority of claims in judicial management unless the aim of the judicial management is to wind up the company (in which case the winding-up priority of claims would apply).

**Scheme of Arrangement**

There is no statutory priority of claims for schemes of arrangement.

## Do pension liabilities have any priority over other unsecured claims?

**Winding-Up**

Insofar as they are provided for under the employee's contract, pension liabilities are preferred debts that are accorded higher priority than other unsecured creditors.
Employers in Singapore may also be required to contribute to their employees' Central Provident Fund accounts. All amounts due in respect of such contributions payable during the 12 months next before, on or after the commencement of the winding-up by the company are also preferred debts that are accorded higher priority than other unsecured creditors.

**Judicial Management**

None that are specific to the judicial management context.

**Scheme of Arrangement**

None that are specific to the scheme of arrangement context.

## Is it possible to challenge prior transactions?

**Winding-Up**

There are specific provisions relating to the avoidance of antecedent transactions under the IRDA as set out below.

Nonetheless, the time periods relating to: (i) transactions at an undervalue; (ii) unfair preferences; and (iii) extortionate credit transactions, which will be set out below, are only relevant to the extent that the company is unable/becomes unable to pay its debts in consequence of the transaction or preference.

Undervalue transactions

Where a company is in judicial management or is being wound up, and the company has at the relevant time entered into a transaction with any person at an undervalue, the judicial manager or liquidator may apply to the court for an order to restore the company to the position which it would have been in if it had not entered into the transaction.

A company will be regarded as having entered into a transaction with a person at an undervalue in either of these circumstances:

The company makes a gift to that person or otherwise enters into a transaction with that person on terms that provide for the company to receive no consideration.

The company enters into a transaction with that person for a consideration the value of which is significantly less than the value of the consideration provided by the company (in money or money's worth).

However, the IRDA also specifies that the court must not make an order under this section in respect of a transaction at an undervalue under these circumstances:

The company entered into the transaction in good faith and for the purpose of carrying on its business.

At the time the company entered into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

The period in which an undervalue transaction may be challenged is three years prior to the commencement of the judicial management or winding-up, and ending on the date of the commencement of the judicial management or winding-up.

Unfair preferences

Where a company is in judicial management or is being wound up, and the company has at the relevant time given an unfair preference to any person, the judicial manager or liquidator may apply to the court for an order to restore the position to what it would have been if the company had not given that unfair preference.

An unfair preference occurs where a creditor, surety or guarantor is put in a better position than they would have been in by an act of the company, and the act was influenced by a desire to put the creditor, surety or guarantor in a better position.

The relevant time period here is one year prior to the commencement of the judicial management or winding-up. However, if the unfair preference is given to a person who is connected with the company (otherwise than by reason only of being the company's employee), the relevant period is two years before the commencement of the judicial management or the winding-up.

Extortionate credit transactions

The judicial manager or liquidator may apply to the court to challenge the transactions for the provision of credit that were entered into within three years before the commencement of the judicial management or winding-up, if the transaction was extortionate.

Transactions are presumed to be "extortionate," unless the contrary can be proved, if having regard to the level of risk accepted by the person providing the credit, the terms of which require grossly exorbitant payments to be made in respect of the provision of the credit, or are harsh and unconscionable or substantially unfair.

If the court is of the view that the transaction was "extortionate," the court can make various orders, including setting aside the transaction, altering the transaction, or requiring the counterparty to pay monies or give up security.

Floating charges for past value

A floating charge will be rendered invalid, except to the aggregate of the value of the consideration given in return for the creation of the charge (as consists of money paid, goods or services supplied, or to the discharge or reduction of any debt of the company, and any interest payable thereto), under any of these circumstances:

It was created in favor of a person who is connected to the company in the two-year period prior to the commencement of the judicial management or winding-up of the company.

It was created in favor of any other person in the one-year period prior to the commencement of the judicial management or winding-up of the company.

It is created within the period starting on the commencement of the judicial management of the company.

**Judicial Management**

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Nonetheless, the time periods relating to: (i) transactions at an undervalue; (ii) unfair preferences; and (iii) extortionate credit transactions, which will be set out below, are only relevant to the extent that the company is unable/becomes unable to pay its debts in consequence of the transaction or preference.

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Where a company is in judicial management or is being wound up, and the company has at the relevant time entered into a transaction with any person at an undervalue, the judicial manager or liquidator may apply to the court for an order to restore the company to the position which it would have been in if it had not entered into the transaction.

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However, the IRDA also specifies that the court must not make an order under this section in respect of a transaction at an undervalue under these circumstances:

The company entered into the transaction in good faith and for the purpose of carrying on its business.

At the time the company entered into the transaction, there were reasonable grounds for believing that the transaction would benefit the company.

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If the court is of the view that the transaction was "extortionate," the court can make various orders, including setting aside the transaction, altering the transaction, or requiring the counterparty to pay monies or give up security.

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A floating charge will be rendered invalid, except to the aggregate of the value of the consideration given in return for the creation of the charge (as consists of money paid, goods or services supplied, or to the discharge or reduction of any debt of the company, and any interest payable thereto), under any of these circumstances:

It was created in favor of a person who is connected to the company in the two-year period prior to the commencement of the judicial management or winding-up of the company.

It was created in favor of any other person in the one-year period prior to the commencement of the judicial management or winding-up of the company.

It is created within the period starting on the commencement of the judicial management of the company.

**Scheme of Arrangement**

No.

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