RECENT DEVELOPMENTS IN INSOLVENCY LAWS AND BUSINESS REHABILITATIONS – NATIONAL AND CROSS-BORDER ISSUES

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This paper seeks to survey major changes which have taken place in the Singapore legal landscape of business insolvencies and rehabilitations, as well as to identify and discuss trends and practices adopted or observed by insolvency practitioners and lawyers in Singapore in recent years. Specifically, it is thought to be appropriate to study significant developments from after the major legislative revamp of the Bankruptcy Act in 1995 to the present. It should be noted, however, that this paper is not intended to be an academic or exhaustive review of recent developments in Singapore’s insolvency laws and judicial decisions. The focus will be on key structural and ideological shifts or re-affirmations, with some emphasis on how the Singapore legal regime deals with (or fails to deal with) cross-border insolvencies.

Overview

Singapore law features several regimes which are of relevance when a business falls into financial difficulty. Businesses which are beyond rehabilitation as going concerns or beyond salvage or rescue by investors will be placed in bankruptcy (in the case of a business carried on by an individual or a partnership) or liquidation (in the case of a corporate business). Bankruptcy and liquidation essentially comprises the administration, collection and realisation of the insolvent debtor’s assets by a trustee in bankruptcy or a liquidator (as the case may be), the proving and admission of debts against the bankruptcy or liquidation estate, and the distribution of dividends to creditors. The bankrupt is then discharged from bankruptcy, or the company dissolved and its existence terminated.

In order to stave off bankruptcy or liquidation, an ailing business may present a voluntary arrangement (in the case of an individual) or a scheme of arrangement (in the case of a company) which seeks to implement a compromise or other arrangement with creditors. A voluntary arrangement or a scheme of arrangement is a cram-down mechanism which becomes binding on all creditors subject to it as long as it has been approved by a majority in number of creditors holding at least 75% in value of the total debts and sanctioned by the Court. In the case of a scheme of arrangement, there is an additional requirement that creditors must be constituted into different classes according to the nature of their rights and the effect of the scheme on such rights (for

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instance, in an appropriate case, secured creditors may insist on voting in a different class from unsecured creditors). The approval of the requisite majority of each class has to be obtained in order for the scheme to be binding on that class.

In the case of companies, another alternative to liquidation is judicial management. Although the appellation ‘judicial management’ was borrowed from South African legislation, it is in fact based on the administration regime in the United Kingdom. A company may be placed under judicial management by the Court if it is insolvent and one or more of three purposes may be achieved through judicial management: rehabilitation of its business, the more advantageous realization of its assets than in a liquidation, and the implementation of a scheme of arrangement. A statutory moratorium on creditor action against the company will spring into place from the commencement of judicial management proceedings until the discharge of the judicial management order (or the dismissal of the judicial management petition (as the case may be). When a judicial management order is made, the Court will also appoint a judicial manager who will take possession of and administer the company’s assets and business. One of the main tasks of the judicial manager is to formulate and present a statement of proposals to the company’s creditors for achieving the purpose of purposes of the judicial management. If the statement of proposals is accepted by the creditors, the judicial manager will proceed to implement the proposals. If the statement of proposals is rejected, the judicial manager may revise the proposals to re-submit to the creditors or apply for the judicial management order to be discharged.

Private receivership is a corporate insolvency regime that is given precedence over liquidation as well as judicial management, on account of its being founded on the enforcement of security rights. Where a company has granted a floating charge over all its property and undertaking to a creditor, the debenture will usually confer on the creditor the contractual power to appoint a receiver and manager to administer and realise the company’s assets for the primary purpose for discharging the debts secured by the floating charge. The receiver and manager carries out his tasks as an agent of the company and not the creditor holding the floating charge, but owes few duties to the company or its other creditors. The receiver and manager is not displaced even if the company is placed under liquidation, and the liquidator has to wait until the receiver and manager has completed his task before entering into possession of the company’s assets (if any are left). A company also cannot be placed under judicial management if a receiver and manager has been appointed, or if a secured creditor entitled to appoint a receiver and manager objects to the judicial management. This is subject to a narrow and amorphous exception of public interest.

Cross-border insolvency situations are not very well-provided for under Singapore legislation. Singapore has no international treaties on cross-border insolvency with any other state. Foreign companies and individuals may be placed in liquidation or bankruptcy in Singapore provided there is some sufficient connection such as the presence of assets in Singapore. However, apart from bankruptcy
proceedings in Malaysia,\(^2\) Singapore does not statutorily recognise any insolvency proceedings in any other state, and the courts have had no real opportunity to rule on the position under common law. Neither is there any foreign jurisdiction, apart from Malaysia in the case of bankruptcy proceedings, which statutorily recognise the insolvency proceedings commenced in Singapore courts. Judicial management also applies only to Singapore companies, and foreign companies having business operations in Singapore do not have the benefit of this regime, and may have to rely on informal negotiations with creditors or schemes of arrangement.

**Law Reform**

The superstructure of Singapore’s business insolvency regime is, in comparison with many of the jurisdictions in this region, a sophisticated and stable one. It is largely modelled on legislative provisions in the United Kingdom and Australia and has benefitted from the experience and case law of those jurisdictions. Further, Singapore is fortunate to have a judiciary of robust and adept commercial judges responsible for developing a coherent and instructive body of local case law.

Nonetheless, Singapore has not fully kept up with legislative reform in insolvency law. It has managed, in recent years, to update its legislation in several areas, most notably bankruptcy, but these piecemeal steps have only highlighted the growing need for a comprehensive revamp. It is also becoming increasingly clear that insolvency regimes based on legislation in different foreign jurisdictions, as well as legislation which were in force at different points in time, are difficult to administer and reconcile.

For instance, the corporate liquidation regime\(^3\) is still based on the obsolete UK Companies Act 1948, and has not been updated with the changes brought about by the UK Insolvency Act 1986 and subsequent legislative amendments arising thereafter. In 1995, specific provisions in the UK Insolvency Act 1986 dealing with *bankruptcy* were borrowed to replace the previous Bankruptcy Act, based on the UK Bankruptcy Act 1914, with a new Bankruptcy Act.\(^4\) However, the old system of statutorily importing bankruptcy provisions into the liquidation regime is still present. In particular, the rules with regard to important aspects such as proof of debts, set-off and certain types of vulnerable transactions, are set out in the bankruptcy legislation and then statutorily imported into the corporate liquidation regime.\(^5\) This importation process has given rise to difficulties in practice and in the courts.

The receivership provisions are similarly outdated; they are adopted from the corresponding provisions of the Australian Companies Act 1961, which are no longer in force. Further, being of Australian origin, they do not sit entirely comfortably with

\(^2\) Sections 151 and 152, Bankruptcy Act.
\(^3\) Part X, Companies Act (Cap 50, 1994 Ed).
\(^4\) Bankruptcy Act (Cap 20, 1996 Ed).
\(^5\) Sections 327(2) and 329, Companies Act. See also the *Companies (Application of Bankruptcy Act Provisions) Regulations*.
the rest of the Companies Act which borrows statutory provisions from the UK. The UK administrative receivership regime, introduced by the UK Insolvency Act 1986, has not been adopted in Singapore.

The judicial management regime was introduced in 1987 as a result of the Pan-Electric crisis (the collapse of a public listed company which led to the closure of the Singapore and Kuala Lumpur for an unprecedented three days), and was based on provisions in the UK bill on administration and not the UK legislation itself. As a result, the judicial management provisions differ, in some significant aspects, from the UK legislation. The judicial management statutory provisions\(^5\) and their accompanying subsidiary legislation\(^7\) are not as comprehensive as their UK counterparts. Neither are they as well integrated with the other parts of the Companies Act, with statutory importation of not only certain bankruptcy provisions on vulnerable transactions,\(^8\) but also provisions relating to corporate liquidation\(^9\) and schemes of arrangement.\(^10\)

The recent recommendation by the Companies Legislation and Regulatory Framework Committee\(^{11}\) (‘CLRFC’) to enact an omnibus insolvency legislation is certainly to be welcomed. This is a long-overdue opportunity to revitalise, modernise, rectify and re-organise Singapore’s insolvency laws. The recommended omnibus Insolvency Act and subsidiary legislation will be applicable to both companies and individuals, and the unsatisfactory practice of importing provisions from the Bankruptcy Act into the corporate liquidation and judicial management regimes will become a thing of the past. The omnibus legislation will also set out the common principles and procedures and consolidate and update all core areas, and will be modelled after the UK Insolvency Act 1986. For instance, it will prescribe a common qualification for insolvency practitioners\(^{12}\) and is expected to introduce a uniform set of rules on areas such as proof of debts, insolvency set-off and vulnerable transactions.\(^13\) Further, the omnibus legislation will introduce new insolvency regimes such as the company voluntary arrangement\(^{14}\) and administrative receivership,\(^{15}\) both of which will be discussed further below. It should be noted, however, that certain areas of overlap will still remain. In particular, the provisions governing registration of security interests and schemes of arrangement will remain in the companies legislation,\(^6\) as these relate to issues which are of relevance to all companies and not only insolvent companies.

\(^5\) Part VIII, Companies Act.
\(^6\) Part V, Companies Regulations.
\(^7\) Section 227T, Companies Act.
\(^8\) Section 227Xb, Companies Act.
\(^9\) Section 227X(a), Companies Act.
\(^10\) This Committee was appointed by the Ministry of Finance, the Attorney-General’s Chambers and the Monetary Authority of Singapore in December 1999. Its Final Report was issued in October 2002 and its recommendations were accepted by the Singapore Government on 22 October 2002.
\(^12\) See paragraph 2.3, CLRFC Final Report.
\(^13\) Recommendation 4.2, CLRFC Final Report.
\(^14\) Recommendation 4.3, CLRFC Final Report.
\(^15\) Paragraph 2.4, CLRFC Final Report.
Of course, much work remains to be done. The omnibus insolvency legislation as well as the supporting subsidiary legislation will have to be drafted and circulated for public consultation, before finally being enacted as law. It is expected that the new legislation will be largely based on the UK legislation, but it will be interesting to see how much of the UK position, in particular, the wide changes brought about by the Enterprise Act 2002, will be adopted. It will also be interesting to see the extent to which it will incorporate provisions from other Commonwealth jurisdictions as well as customised provisions to address special situations and problems in Singapore. For instance, with regard to dispositions of a company’s property after the commencement of winding up, the CLRFC has recommended that the Australian approach of exempting certain transactions should be preferred over the English approach that all dispositions are void unless otherwise ordered by the Court.

Creditors’ Rights And Security Interests

Following the traditional pro-creditor bias of English law, Singapore law has generally preferred the rights of unpaid creditors over the interests of an insolvent debtor. A review of recent cases shows the Singapore courts continuing to subscribe to this philosophy. This is best shown in the situation of a creditor seeking to wind up or bankrupt a debtor; an unpaid creditor who has an undisputed debt is generally entitled, almost as of right, to a winding up order or bankruptcy order against the debtor. Unless the debtor company seeks protection under judicial management or injunctive relief pending the presentation of a scheme of arrangement or voluntary arrangement, the courts will usually accede to the creditor’s winding up petition. It should also be noted that, following the English law influence, this deference to creditors’ rights is probably not limited to Singapore creditors; subject to the usual conflicts of laws issues, foreign creditors can expect the same treatment.

A few recent decisions of the Singapore courts illustrate the heavy burden that lies on a debtor company in resisting a winding up petition presented by an unpaid creditor. In order to persuade the Court to dismiss a winding up petition, it is not sufficient to show that the petitioning creditor is the mortgagee of a property which has yet to be realised unless there is clear evidence that the value of the property is more than enough to discharge the creditor’s debts. The fact that a judgment is under appeal does not prevent a judgment creditor from presenting a winding up petition against the judgment debtor. The courts have also declined to exercise any jurisdiction to re-write the terms of a contract which entitle a creditor to obtain a bankruptcy order against a debtor in the event of the debtor’s default on a repayment plan. Neither will a bare statement that the company will present a scheme of

17 Section 259, Companies Act.
18 Paragraph 2.3(h), CLRFC Final Report.
arrangement or place itself under judicial management persuade the court to dismiss the winding up petition. Further, a bare statement by the majority of the company’s creditors that they would like give more time to the company, without any supporting reasons, is unlikely to convince the court not to make a winding up order. A fortiori, a creditor seeking to oppose winding up proceedings so that he would be allowed to execute a judgment against the company for his own benefit will not attract any sympathy.

Some might feel that the eagerness of the courts to uphold creditors’ rights might have led to the demise of businesses that would have survived or even flourished, given a reasonable grace period. This is especially so given the efficiency and expediency of the Singapore courts. An undisputed creditor whose winding up or bankruptcy demand has not been complied with after 21 days may present a winding up or bankruptcy petition against the debtor, and the first hearing of the petition will usually take place within a month from the presentation of the petition. The mere presentation and advertisement of a winding up or bankruptcy petition against a debtor, more often than not, immediately and severely handicaps the debtor in seeking additional financing or refinancing, or generating business revenue. Repeated adjournments of winding up or bankruptcy proceedings are also discouraged by the courts. As such, it might sometimes appear that a besieged company would not have sufficient time and opportunity to organise and discuss with its creditors and to propose a restructuring agreement or compromise.

In practice, however, it is not often that one encounters a case where a salvageable business is prematurely placed under liquidation or bankruptcy. The fact is that most creditors in Singapore would have given indulgence to their debtors to propose and effect compromises long before the commencement of any winding up or bankruptcy proceedings. Frequently, it is only the hopelessly insolvent companies and individuals that face winding up or bankruptcy proceedings. The availability of the scheme of arrangement procedure and the judicial management regime has also ameliorated the problem.

While the courts are robust in issuing winding up and bankruptcy orders at the instance of unpaid creditors, they have also shown that they are always vigilant when it comes to the possible abuse of the winding up or bankruptcy process. For instance, where winding up proceedings are issued in respect of a debt which is not due, or which is substantially disputed, the courts have refused to make a winding up order. Where a director caused a change in the registered address of a company without a proper resolution, and then caused another company controlled by him to serve a

statutory winding up demand at the new registered address, the Court refused to make a winding up order on the ground that there was no proper service.\footnote{Re Specialty Laboratories Asia Pte Ltd [2001] 2 SLR 463.}

In the context of judicial management, the courts have maintained their stand that creditors’ wishes will usually be given paramount consideration. The courts have affirmed the principle that an insolvent company belongs to its creditors and that, unless the company could give sound reasons as to why its creditors’ wishes should be overridden, the Court will not grant a judicial management order against the wishes of the creditors.\footnote{Re Rohrwell Industries Pte Ltd (31 March 1999, unreported).} On the other hand, in an appropriate case, if a majority of the company’s creditors do not support a judicial management, the Court may dismiss the judicial management petition.\footnote{Deutsche Bank AG v Asia Pulp & Paper Co Ltd [2003] SGCA 19, [2003] 2 SLR 320.}

Security interests are given strong regard under Singapore law. A debt secured by a fixed security has priority over all other debts, including statutory preferential debts such as liquidation expenses, employees’ wages and provident fund contributions, and taxes.\footnote{Section 328(1), Companies Act.} A debt secured by floating security has priority over all unsecured debts and ranks after fixed security debts and certain statutory preferential debts.\footnote{Section 328(5), Companies Act.} The courts have also generally upheld legitimate and properly bargained security arrangements in accordance with the commercial intentions of the parties, paying only secondary regard to the form and technicalities of the security arrangements. However, some recent cases have shown that there are limits to the courts’ support and tolerance of the potency of security interests vis-à-vis unsecured creditors.

A registrable security given by a company which is not properly registered under the Companies Act is void against the liquidator of the company,\footnote{Section 131, Companies Act.} but remains valid until liquidation. Accordingly, if the security has been fully realised prior to liquidation, the realisation is valid and will not be unravelled. This leads to a situation whereby the holder of an unregistered security may seek to realise his security before liquidation of the company, while the unsecured creditors of the company will respond by attempting to place the company under liquidation before the security is realised. In one interesting case, the security holder had realised his unregistered security prior to any winding up order being made against the company, but after an unsecured creditor had commenced winding up proceedings by presenting a winding up petition. The Court of Appeal ruled in favour of the unsecured creditors and held that the unregistered security was rendered void upon the presentation of the winding up petition.\footnote{Michael Ng Wei Teck v Oversea-Chinese Banking Corporation Ltd [1998] 2 SLR 1. For a fuller discussion of this case, see Lee Eng Beng, Unsecured Creditor Versus Unregistered Charge (1998) 10 SACJ 241.} As such, it is now open to an unsecured creditor to prevent the realisation of an unregistered charge by commencing winding up proceedings.
up proceedings; the unregistered charge will be rendered void without the unsecured creditor having obtained a winding up order.

In another notable case, the Court of Appeal reversed the High Court and ruled that a clause in banking documentation that empowered the bank, upon default by the borrower, to attach an equitable charge to the property of the borrower was not effective.\textsuperscript{34} Presumably, this type of invisible and springing security was regarded as over-stepping the boundaries. An attempt by a supplier of goods to a department store under a concessionaire agreement to argue that the department store had held the proceeds of sale of the goods on trust for the supplier was also rejected by the Court of Appeal.\textsuperscript{35}

**Cross-Border Liquidations**

Under the Companies Act, any foreign corporate body, association or partnership may be wound up in Singapore. It is clearly untenable, however, to expect the Singapore courts to wind up such entities if they have no rational connection with Singapore, and the approach earlier taken by the courts was to add a judicially-created restriction that a foreign company must have substantial assets in the jurisdiction before a winding up order would be made against it.\textsuperscript{36} More recently, the courts have liberalised their jurisdiction to wind up foreign companies, in line with the authorities in other Commonwealth jurisdictions. It is no longer necessary to show the presence of substantial assets within the jurisdiction. The Court may wind up a foreign company provided that there is a sufficient connection with the jurisdiction and there is a reasonable possibility of benefit accruing to the creditors from the winding up.\textsuperscript{37}

An unsatisfactory feature relating to the liquidation of foreign registered companies in Singapore is the presence of a statutory provision which ring-fences the Singapore assets of the foreign registered company for the payment of debts and liabilities incurred by the foreign entity in Singapore. This issue was brought to the fore in the Court of Appeal’s landmark decision in *Tohru Motorbayashi v Official Receiver*,\textsuperscript{38} where the Court affirmed that, in the Singapore liquidation of a registered foreign company, its Singapore assets are ring-fenced for the payment of Singapore creditors in priority to other creditors. Interpreting section 377(3)(c) of the Companies Act, the Court held that, before a Singapore liquidator of a registered foreign company remits the net assets recovered and realised by him to the foreign liquidator appointed in the place of incorporation, he has to pay off the statutory preferential debts under section 328 of the Companies Act as well as all debts and liabilities incurred by the registered foreign company in Singapore.


\textsuperscript{35} *Hinckley Singapore Trading Pte Ltd v Sogo Department Stores (S) Pte Ltd* [2001] 4 SLR 154.

\textsuperscript{36} *Fong Atk (Far East) Ltd v Eastern Minerals & Trading (1959) Ltd* [1965] 2 MLJ 149.

\textsuperscript{37} *Re Griffin Securities Corporation* [1999] 3 SLR 346.

\textsuperscript{38} [2000] 4 SLR 529.
This conclusion, which the Court could not avoid in light of the clear words of section 377(3)(c), is out of line with internationally-accepted standards of a fair and equitable cross-border insolvency regime, as well as the position under common law. The modern orthodoxy is that all assets of a foreign company should be remitted to the ‘seat of liquidation’ for centralised administration and distribution for the collective benefit of all creditors worldwide. Ring-fencing of assets is directly contrary to this philosophy, and will likely affect the credibility of Singapore’s cross-border insolvency law. It may also lead courts in other jurisdictions to be more reluctant to give assistance to Singapore-based insolvency proceedings, in view of the less than cooperative stance taken by section 377(3)(c).

Section 377(3)(c) also produces practical and conceptual difficulties. It is not easy to determine when a debt or liability is incurred in Singapore, for the purposes of deciding whether it is to be accorded priority under section 377(3)(c). The provision applies only to registered foreign companies, that is, foreign companies which have business operations in Singapore and are registered for that purpose, and has no application to unregistered foreign companies. This is anomalous, since an unregistered foreign company may hold significant assets in Singapore without carrying on business and without having to be registered. The liquidation of such an unregistered foreign company will not attract the application of section 377(3)(c), but will instead be governed by the common law which eschews the concept of ring-fencing.

Hopefully, legislative amendment of section 377(3)(c) will take place in the near future. It is to be noted, however, that the CLRFC has not recommended the enactment of the UNCITRAL Model Law on Cross-Border Insolvency in Singapore, and has suggested that Singapore should wait to see how the Model Law will impact on the legislation of the major common law jurisdictions.

Receivership

Singapore law recognises that powerful and all-encompassing form of security known as the floating charge. The appointment of a private receiver and manager to take possession of and administer the assets of the company is, of course, the principal mode of enforcement of this form of security. This mode of enforcement of security is particularly advantageous to the security holder as it allows him to appoint an insolvency practitioner of his choice to realise the floating charge. The security holder does not enter into possession or assume responsibility or vicarious liability for the realisation of the security. Instead, the receiver and manager is appointed by the security holder, by virtue of a private power of appointment in the terms of the security, to be an agent of the company for the purpose of realising the security

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29 See, for example, the UNCITRAL Model Law on Cross-Border Insolvency and Part III of the World Bank Consultation Draft on Effective Insolvency Systems: Principles and Guidelines (October 2000).
30 Section 368, Companies Act.
31 Chapter 4, CLRFC Report at paragraph 1.3.
(which usually covers the whole of the company’s property and undertaking). The receiver and manager’s primary duty is to realise the security for the benefit of the security holder, and he owes only minimal duties to the company and its other creditors. He can disregard, without personal liability, the unsecured contractual rights that other parties may have against the company but, in his capacity as an agent of the company, he can enforce the company’s contracts. In short, the receiver and manager has all the powers and benefits of being an agent of the company, but few of the liabilities.

Not unexpectedly, under Singapore law, as a corollary of the respect for security rights, the institution of private receivership has been accorded favourable treatment. Private receivership is given precedence over judicial management, as a holder of a floating charge who is entitled to appoint a receiver and manager is given the absolute statutory power to block a judicial management order, unless there are considerations of public interest. One may expect that such a security holder would more often than not exercise this right of veto. The appointment of a receiver and manager for the single-minded purpose of realising the security advances his interests much more than the appointment of a judicial manager to carry out proposals in the collective interests of the company’s creditors as a whole. As one may expect, there are few cases where a holder of a floating charge would consent to the debtor company being placed under judicial management.

Recent Singapore authorities have further endorsed the lofty status of receivership. It has been made clear by the courts that receivership has precedence over liquidation. A receiver and manager of a company continues to have the power to sue to recover the company’s debts which are subject to the security, even after the company has been put under liquidation. The liquidation of a company does not terminate the agency of its receiver and manager, and the receiver and manager continues to have the power to deal with the company’s property as an agent of the company. The only restriction imposed by the liquidation is that the receiver and manager loses the power to create liabilities provable against the company in the liquidation.

The courts have refused to impose general duties of care on security holders and receivers and managers. A security holder does not owe a duty of care to the company in deciding whether to exercise his power to appoint a receiver and manager, but only a duty of good faith. Neither does he have to give a reasonable time to the company to raise the necessary funds to repay the secured debt before he

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42 Section 227B(5)(b), Companies Act.
appoints a receiver and manager; he only has to give time to the company to effect the mechanics of payment.\textsuperscript{47} A receiver and manager has been held to owe only a general duty of good faith, and to assume duties of care only in specific situations such as when exercising his power of sale.\textsuperscript{48} It has also been held that a receiver and manager is not obliged to carry on the business of the company and may decide to close it down but, if he decides to carry on the business, he owes a duty to exercise due care to run it properly and profitably.\textsuperscript{49}

The courts have also allayed the concerns of receivers in relation to their potential personal liability for receivership debts. Section 218(1) of the Companies Act provides that a receiver shall be liable for ‘debts incurred by him in the course of receivership or possession for services rendered, goods purchased or property hired, leased, used or occupied’. A somewhat restrictive reading of this provision has been endorsed by the Court of Appeal. Reversing the High Court, the Court of Appeal has held that the receivers of a company who had caused the company to continue with an arbitration claim against another party and defend that party’s counterclaim are not personally liable for the costs awarded against the company by the arbitration tribunal.\textsuperscript{40} Section 218(1) is confined to situations where a third party has supplied goods or services and has provided a direct benefit to the company.

While this position is entirely supportable as a matter of the interpretation of section 218(1), it seems unduly favourable to receivers as a matter of principle. There is no good reason why a receiver who has caused the company to incur a debt or liability to a third party in the course of receivership should not be personally liable for that debt or liability. By virtue of the nature of receivership, the receiver would be causing the company to incur the debt or liability for the benefit of the security holder and, short of statutory intervention to confer priority on the third party’s claim, it would be fair that the receiver should be personally liable. Provided that he has acted properly, the receiver will be entitled to discharge that debt or liability out of the assets under receivership or, if such assets are insufficient, he can claim on the usual indemnity he would have obtained from the security holder.

Change is expected when the new administrative receivership regime is introduced. Section 218(1) is of Australian origin. The position in the UK Insolvency Act 1986 strikes a fairer balance, prior to the changes brought by the Enterprise Act 2002. It provided that an administrative receiver is personally liable on any contract entered into by him in the carrying out of his functions (except in so far as the contract otherwise provides) and any contract of employment adopted by him in the carrying out of his functions, and he is entitled to an indemnity out of the assets of the company in respect of this liability.\textsuperscript{51}

\textsuperscript{47} Ibid.
\textsuperscript{48} Ibid.
\textsuperscript{49} Ibid.
\textsuperscript{50} Chin Yoke Choong Bobby v Hong Lam Marine Pte Ltd [2000] 1 SLR 137.
\textsuperscript{51} Section 44(1) of the Insolvency Act 1986. This indemnity is charged on and paid out of any property of the company in his custody or under his control in priority to any security held by his appointor: section 45(3) of the Insolvency Act 1986.
A more fundamental issue is whether the private receivership regime in itself should continue to be maintained in its present form. The whole concept of a selfish and non-collective regime seems to be outdated and out of line with modern ideals of insolvency law. The supremacy of security rights is probably not a sufficient basis, as there is no compelling reason why the administration and realisation of security cannot be left to a liquidator or judicial manager, as long as the priority of the security holder to be paid ahead of unsecured creditors is respected and there are sufficient safeguards to balance the interests of the security holder and the unsecured creditors. The law relating to receivership also does not provide any incentives to the receiver to expend efforts to continue the company’s business (other than for the purpose of preserving value) and to attempt a rehabilitation. There is no general duty to do so, and many receivers and managers would naturally be inclined to focus on the realisation of security which is an easier and less risky task.

Nevertheless, it would appear that Singapore would continue to have the private receivership for some time to come. The CLRFC has recommended the introduction of administrative receivership in Singapore, which is essentially a more comprehensive statutory framework, modelled after the relevant provisions in the UK Insolvency Act 1986, to enhance and support the receivership regime. Interestingly, in the UK itself, the administrative receivership regime is on the decline and the administration regime (on which Singapore’s judicial management regime is modelled) has been given precedence. The Enterprise Act 2002, which came into force recently, has restricted the rights of secured creditors to appoint administrative receivers and compelled secured creditors to have recourse to administration rather than administrative receivership. It has further provided that a portion of a company’s assets subject to a floating charge will be made available for the satisfaction of its unsecured debts. The extent to which the new omnibus insolvency legislation will incorporate these developments remains uncertain, and much will probably depend on the consideration by the Government of the views of financial and business community as well as insolvency practitioners.

Judicial Management

Judicial management was introduced in Singapore more than fifteen years ago. The results have been mixed at best. While the core concepts of providing a moratorium on creditor action and an opportunity present proposals for consideration by creditors are a welcome alternative to liquidation and receivership, it cannot be said that judicial management has been a roaring success. A quick review of the major judicial management cases shows that judicial management has been moderately successful in effecting a ‘rescue’ of an insolvent company by way of a take-over of its shares or the acquisition of its assets by an investor. Such

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54 Section 176A and Schedule B1, Insolvency Act 1986 (inserted by sections 248 and 252, Enterprise Act 2002).
transactions can only be negotiated and completed over a substantial period of time, and potential investors may sometimes prefer to deal with Court-appointed judicial managers rather than the management of the company which has caused it to become insolvent. Judicial management may be useful for facilitating such transactions. A common scenario is where an investor injects a new business into an insolvent public listed company and subscribes for new shares in the company in conjunction with a debt restructuring plan, so as to obtain control of a listed vehicle in Singapore. It is questionable, however, whether this is a business rehabilitation in the true spirit of the expression. Quite frequently, the ‘rescue’ simply results in the retention of the corporate shell for the purposes of injecting the assets and maintaining the listing, without any attempt to revive the old business. With regard to true business rehabilitations where a company in judicial management manages to use the opportunity to trade out of its financial difficulties, the record of judicial management is dismal. It is difficult to recall many significant cases where this has taken place.

The experience over the last fifteen years has revealed several weaknesses of the judicial management regime to which the less than impressive scorecard may be attributed.

The fact that the management of the company is displaced by the judicial managers has proved to be a significant drawback. The management of the company may have little incentive to assist the judicial managers to run the company, especially if the judicial managers have been appointed upon the petition of a creditor and not the company itself. The judicial managers may be very competent professionals, but are ultimately accountants who are likely to lack experience and expertise in, and familiarity with, the company’s business operations and assets. Another disadvantage is that the statutory moratorium on creditor action\(^{55}\) does not apply to self-help remedies such as contractual termination clauses, contractual set-off and (arguably) the exercise of the right of re-entry by a landlord onto property leased to the company in judicial management. A company in judicial management may therefore find the credit balances in its bank accounts being set off against liabilities owed to the bank and its contractual rights and benefits, such as distribution and licensee agreements, unceremoniously terminated, not to mention its leased premises being repossessed.

The judicial management regime is not well-supported by legislation. Both the relevant primary and subsidiary legislation are not comprehensive and well-drafted, and have added to the difficulties. For instance, there is no clear provision conferring priority on debts incurred by the company in the course of judicial management or prescribing how these are to be paid.\(^{56}\) In a recent case which garnered intense media attention, the Court ruled that the liability of the company to make employees’ provident fund contributions, which is a statutory preferential claim

\(^{55}\) Sections 227C and 227D(4), Companies Act.

\(^{56}\) See section 227I(3) of the Companies Act which seems to apply only when a judicial manager vacates office.
in liquidation, is not accorded any priority in judicial management.\textsuperscript{57} Another curious provision in the judicial management legislation states that a judicial manager is personally liable on any contract entered into or adopted by him in the carrying out of his functions, unless such personal liability is excluded.\textsuperscript{58} As it is expressly envisaged that a judicial manager may, without restriction, exclude personal liability, the practice is that all judicial managers will ensure that there is such exclusion of personal liability in every case. In fact, it is common practice that the stationery of a company in judicial management will incorporate an express statement that the judicial managers are contracting as agents of the company only and assume no personal liability for all contracts of the company entered into or adopted by them.\textsuperscript{59} The result is that properly advised parties will deal with a company under judicial management only on cash terms, a commodity of which the company is likely to be in short supply.

Also, as stated above, judicial management has, in a fair number of cases, been unsuccessful in reviving a company, and the unfortunate perception which has been created in some quarters is that judicial management is but a pre-cursor to liquidation. Negative publicity tends to attach to judicial management, and this serves to discourage many insolvent companies from resorting to judicial management until it is too late to revive the business or to seek investors.

A further key disadvantage of judicial management is that it does not apply to foreign companies, regardless of whether they have substantial assets or business operations in Singapore. This creates serious difficulties where a foreign company having interests in Singapore goes into insolvency proceedings in its home jurisdiction; the branch in Singapore will not have any statutory protection against creditor action. It is possible to invoke the scheme of arrangement procedure, but in many cases the focus of the rescue or restructuring efforts will be in the home jurisdiction and a concrete plan for the branch in Singapore usually cannot be presented except in tandem with the global restructuring efforts of the headquarters. It may therefore not be possible to present a scheme of arrangement within an acceptable time frame. In the meantime, Singapore creditors might be anxious that the local branch should not be remitting funds out of Singapore and back to headquarters, and commence winding up proceedings to protect their interests. As pointed out above, the legislation provides that, in the Singapore winding up of a registered foreign company, debts and liabilities incurred in Singapore are to be paid before any assets are remitted to the home jurisdiction.\textsuperscript{60} This may, of course, provide further incentive to Singapore creditors to commence winding up proceedings. It would therefore appear that a strong case may be made that judicial management should be extended to be applicable to registered foreign companies.

\textsuperscript{57} Chew Eu Hock Construction Co Pte Ltd v Central Provident Fund Board [2003] SGHC 199.

\textsuperscript{58} Sections 227(1)(b) and 227(2), Companies Act

\textsuperscript{59} Even so, there has been a recent case where the judicial managers of a company might not have done enough to exclude their personal liability: Johannes Budiastri S Kusumo v Ng Wei Teck Michael [2001] 4 SLR 232.

\textsuperscript{60} Section 377(3)(c), Companies Act.
operating in Singapore. In this regard, it is noteworthy that, in the UK, the Enterprise Act 2002 allows the Secretary of State to order that a provision of the Insolvency Act 1986 should be applicable to a foreign company. It remains to be seen whether there will be a similar provision in the forthcoming omnibus insolvency legislation.

Judicial management also has deficiencies in relation to a Singapore company which has substantial assets or subsidiaries in other jurisdictions. As Singapore is not a party to any treaty with other states in relation to insolvency proceedings, other jurisdictions may not recognise the appointment by the Singapore courts of the judicial managers of a company. Practically, especially in jurisdictions in which commercial transactions are frequently entered into on the basis of trust and familiarity, the counter-parties might insist on dealing with the management of the company rather than the judicial managers.

The inability of the judicial management regime to deal effectively with the insolvency of a company having cross-border operations and overseas subsidiaries was highlighted in the judicial management proceedings against Asia Pulp & Paper Co Ltd ('APP'). APP was the Singapore-incorporated holding company of one of the largest producers of paper in the world (the 'APP Group'). APP had no business operations of its own but was an investment holding company with shareholdings in a large number of companies in several countries. The APP Group ran up debts of US$14 billion and became the biggest debt defaulter in Asia. The APP Group then appointed various professional advisers and organised their creditors into a number of creditors’ committees, with a view to implementing a debt restructuring exercise. A judicial management petition presented by two of APP’s bank creditors was dismissed by the Court of Appeal. It was thought that the making of a judicial management order would not achieve any of the statutory purposes, but would instead cause APP’s subsidiaries to stop payments to APP and enter into separate restructuring arrangements with their own creditors. The cooperation of the foreign creditors of the APP Group would also not be forthcoming. Further, the judicial managers would not be able to take control of APP’s assets as the bulk of such assets were located outside Singapore.

Another issue which may need reform or clarification is the role of public interest in judicial management. Currently, it is statutorily provided that the Court may place a company under judicial management for the purposes of implementing a scheme of arrangement, business rehabilitation and/or effecting a more advantageous realisation of its assets than in a winding up. In practice, almost all judicial management petitions rely on one or more of these three purposes. However, the statute also provides that the Court may make a judicial management order on the ground that it is in the public interest to do so. The public interest ground is almost never used, due to the amorphous meaning of public interest and the obvious difficulties in establishing that

61 Section 254, Enterprise Act 2002.
63 Section 227B(1)(b), Companies Act.
64 Section 227B(10)(a), Companies Act.
public interest requires a company to be placed under judicial management. There has also been very little judicial guidance on the nature and scope of the public interest ground. It should be noted that, as discussed above, the public interest ground has a special ability. A secured creditor who is entitled to appoint a receiver and manager is given the statutory right to block a judicial management order, and the public interest ground allows the Court to make a judicial management order notwithstanding the objections of such a secured creditor. Thus, the public interest ground provides for an exceptional instance where the judicial management regime is given precedence over the receivership regime. To date, however, the public interest ground has never been successfully invoked in any reported case to override the right of veto given to a secured creditor entitled to appoint a receiver and manager.

Apart from overriding the objections of a security holder, the public interest ground may also be relevant if judicial management is intended to investigate and pursue corporate wrongdoers. Where a judicial management is based on the usual grounds, inquiries into fraud or other wrongdoing is not a purpose of the judicial management. Apparently, neither is it within the purview of judicial management to render assistance to a foreign investigative or regulatory authority, unless there is evidence that the assistance would further the object of the judicial management order. In the wake of the Barings debacle, an application was made by the Director of the UK’s Serious Fraud Office, for access to certain documents in the possession of a Barings entity which was under judicial management in Singapore. Arguments based on the public interest in the free flow of information between investigative and regulatory agencies in different jurisdictions were presented to the Court. However, the Court declined to make the order on the ground that the judicial managers could be directed to perform an act only in so far as such act is likely to further or advance the object of the judicial management order, and there was no evidence in this regard. Based on this reasoning, it would appear that the conclusion might be different in a case where a judicial management order has been made on the public interest ground.

Schemes Of Arrangement

Traditionally, the use of schemes of arrangement by insolvent companies to effect a compromise or restructuring with their creditors has never been popular in the major Commonwealth jurisdictions which have the scheme of arrangement regime. Schemes were perceived as cumbersome and complicated procedures requiring a great deal of time and effort to prepare and administer. The absence of a statutory moratorium on creditor action pending the presentation of a scheme of arrangement, as well as difficult controversy relating to the proper legal classification of creditors for class meetings, were further strong disincentives.

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65 The only reported case that has referred to the provision is Re Cosmotron Electronics (Singapore) Pte Ltd [1989] 2 MLJ 11.
66 Section 227B(10)(a), Companies Act.
67 The Director of the Serious Fraud Office v The Judicial Managers of Baring Futures (Singapore) Pte Ltd [1996] 2 SLR 89. See also Lee Eng Beng, Barings in Singapore: Application For Access To Documents By A Foreign Investigative Body (1995/96) 2 RALQ 187.
Since the latter part of the 1990s, however, it would appear that schemes of arrangement have been quite frequently used by financially troubled companies in Singapore. A number of public listed companies and many private companies have successfully implemented schemes of arrangement, bucking the trend in many other jurisdictions. The schemes which have been used range from complex structures involving various debt restructuring arrangements to simple debt rescheduling and instalment payment proposals. All in all, it appears fair to say that schemes of arrangement are now regarded in Singapore as an expedient, flexible and useful procedure which is the first port of call for indigent companies who cannot reach a consensual compromise with their creditors and need a cram-down mechanism to implement a debt restructuring plan.

There are several reasons for this. Unlike in the UK, there is a statutory provision empowering the Court to grant a moratorium on legal proceedings against a company which is proposing to present a scheme of arrangement to its creditors.\(^68\) Also, unlike judicial management, the scheme of arrangement procedure is available to foreign companies.\(^69\) On the commercial front, a public listed company which presents a scheme of arrangement will usually not have its shares suspended from trading by the stock exchange, a consideration which is obviously given a lot of weight by the company and, sometimes, by its financial creditors who might have also extended loans to the substantial shareholders of the company on the security of their shareholdings in the company. In contrast, the shares of a public listed company which is placed under judicial management face a substantially higher risk of being suspended from trading during the period of judicial management. Further, given the very modest record of success of judicial management and its perception in many cases as a pre-cursor to liquidation, schemes of arrangement tend to be viewed less negatively by the business and financial community.

Another consideration is that a scheme of arrangement does not displace the existing management and cede total control of the company to Court-appointed officers. This may be important in cases where only the existing management of the company has the expertise and experience in continuing to run the company’s operations, and there is a risk that they may refuse to assist the judicial managers if a judicial management order is made. It may also be important in cases where only the parties dealing with the company, or an investor who intends to inject funds or assets into the company, prefer to deal with the existing management rather than judicial managers. A comprehensively-drafted scheme of arrangement may be used to effect a ‘debtor-in-possession’ type of insolvency regime, with the existing management being in control of the company subject to the supervision of independent insolvency professionals who report directly to the creditors or creditors’ committee.

It should be noted that schemes of arrangement can be used by a company in judicial management. It used to be thought that a scheme of arrangement

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\(^68\) Section 210(10), Companies Act.
\(^69\) Section 210(11), Companies Act.
implemented in judicial management had one advantage over a stand-alone scheme of arrangement. This was because the judicial management provisions suggested that, if a company in judicial management presented a scheme of arrangement, there was no requirement that its creditors be divided into classes for the purpose of voting.70 Given the difficult conceptual issues which could arise in relation to the proper classification of creditors, the obviating of the need for creditor classification could amount to a real advantage in some cases. Recently, however, this perceived advantage has been whittled down considerably, as the Court of Appeal has clarified that the court may still consider creditor classes when its sanction is being sought to a scheme of arrangement implemented by a company under judicial management.71

The single largest contributing factor to the success of the scheme of arrangement procedure in Singapore must, however, be the courts. They have adopted a sensible, practical and flexible approach towards schemes of arrangement, and have shown restraint in interfering on legal or technical grounds in bona fide and reasonable commercial arrangements between an insolvent company and its creditors. At the same time, they have balanced this approach by putting in place sufficient safeguards for the protection of creditors interests. Thus, the Court of Appeal has emphasised that a scheme of arrangement is essentially a contract which is given binding force through the assistance of the statute.72 The Court of Appeal has also declined to impose any restrictions on the nature of the compromises which a scheme of arrangement may implement. It is now law in Singapore that there is nothing to prevent a scheme of arrangement from containing a provision which discharges the liability of a third party guarantor.73 The Court of Appeal has also recently reversed a High Court ruling that the pari passu principle applies to a scheme of arrangement.74 The Court noted that a scheme of arrangement is a corporate rescue mechanism which may have to discriminate amongst creditors and that the application of the pari passu principle would decrease the flexibility of schemes.

However, where appropriate, the courts have not shied away from examining whether a scheme of arrangement is fair to the creditors and whether it is intended to achieve some other illegitimate purpose and deprive the creditors of any advantage they would get in a liquidation.75 The courts have made it clear that a scheme can contain any term as though it were a contract, provided that the scheme is not in any way unfair or discriminatory and that the majority creditors in approving the scheme were acting bona fide.76 Accordingly, where it is shown that the requisite level of support for a scheme of arrangement was achieved by the use of the votes of creditors

70 Section 227X(a), Companies Act.
73 Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd [2001] 4 SLR 35.
74 Hitachi Plant Engineering & Construction Co Pte Ltd v Eltraco International Pte Ltd [2003] SGCA 38.
76 Daewoo Singapore Pte Ltd v CEL Tractors Pte Ltd [2001] 4 SLR 35.
related to the company, the courts have been vigilant to prevent any abuse. In particular, the courts will discount the votes of related creditors whose claims are not adequately established by evidence to the other creditors.\textsuperscript{77} The courts have further mandated that creditors should be put in possession of such information as is necessary to make a meaningful choice, failing which a scheme would not be sanctioned.\textsuperscript{78} The courts have also been unsympathetic to schemes the primary purpose of which is to avoid investigations into its affairs, and have refused to sanction such schemes.\textsuperscript{79} On the other hand, where a scheme of arrangement has been duly approved by the creditors and sanctioned by the Court, it is very difficult for a creditor to challenge the scheme or seek to be excluded from the scheme; any complaints have to be raised at the time that the sanction of the court is being sought.\textsuperscript{80}

It is likely that the new omnibus insolvency legislation will introduce the company voluntary arrangement procedure, as this has been recommended by the CLRFC.\textsuperscript{81} This is broadly similar to the scheme of arrangement procedure, with some simplifications in the process. Given the success of the scheme of arrangement procedure thus far, it remains to be seen to what extent the company voluntary arrangement procedure will supplant the scheme of arrangement procedure.

**Bankruptcy**

The verdict on the revamped bankruptcy regime introduced in 1995 is a generally positive one. It has significantly simplified and streamlined procedures and, while advocating a more liberal discharge regime, it has established more effective measures to ensure accountability by and supervision over bankrupts.\textsuperscript{82}

One of the major changes brought about by the 1995 revamp was to eradicate the technicalities with regard to acts of bankruptcy and provide that the insolvency of a debtor could be established by showing that he had failed to comply with a bankruptcy demand for payment. Where a debt cannot be disputed, a creditor need not obtain a judgment against the debtor before sending a bankruptcy demand to his debtor, the non-compliance of which may then be used to found the commencement of bankruptcy proceedings. The onus is on the debtor to apply to the Court to set


\textsuperscript{78} Wah Yuen Electrical Engineering Pte Ltd v Singapore Cables Manufacturers Pte Ltd [2003] SGCA 23.

\textsuperscript{79} Re Halley’s Departmental Store Pte Ltd [1996] 1 SLR 6.

\textsuperscript{80} See Hitachi Plant Engineering & Construction Co Pte Ltd v Eltraco International Pte Ltd [2003] SGCA 38.

\textsuperscript{81} Recommendation 4.2, CLRFC Final Report.

\textsuperscript{82} Prosecutions for bankruptcy offences have apparently also been stepped up. Bankrupts have been prosecuted for leaving the jurisdiction without consent of the Official Assignee and for obtaining credit without disclosing their bankruptcy status: PP v Choon Kian Hwee [2002] 4 SLR 776; PP v Ong Ker Seng [2001] 4 SLR 180; Tay Hak Kwong v PP (MA No 302 of 2001, PS 2341-2345 of 2001, 17 November 2001); Raghavan Gopinath v PP (MA No 353 of 2000/01, OA No 210 of 2000, 11 January 2001).
aside a bankruptcy demand on certain grounds, which included that the bankruptcy
demand is not in compliance with the statutory requirements and the debt is disputed
on substantial grounds. Not unexpectedly, the courts have had to entertain quite a
few such applications since the introduction of this procedure.

Admirably, the courts have taken a practical rather than technical approach
towards the setting aside of bankruptcy demands. The general observation is that the
courts have rightly been more concerned with the substance of the matter and the risk
of injustice, rather than the question of whether the statutory and technical
requirements of the statutory demand have been met. This is in line with the
approach that has been taken with respect to winding up demands against corporate
debtors.\textsuperscript{83} Assertions that the demanded debt is bona fide disputed, or that the debtor
has a counterclaim or set-off, have not been accepted in the absence of credible and
concrete evidence, and technical objections which cause no substantive prejudice to
the debtor have been overruled. For instance, one of the favourite defences which
debtors have raised is that the creditor serving the bankruptcy demand (usually a bank)
had earlier taken possession of a mortgaged property and disposed of it at an
undervalue and in breach of his mortgagee’s duties. This type of objection has in
most cases been dismissed as there was no real supporting evidence.\textsuperscript{84} Valuation
reports suggesting that the value of the mortgaged property is higher than the price
obtained by the creditor have not been accepted as sufficient evidence, if it is shown
that the creditor had in fact taken appropriate steps to market the property in the open
market.\textsuperscript{85}

Objections against the form of bankruptcy demands have also largely been
unsuccessful. It has been held that a bankruptcy demand does not have to disclose or
deduct the value of security over property which is owned by a third party and not the
debtor; it only has to do so in respect of security over the property of the debtor
himself.\textsuperscript{86} Neither does a statutory demand have to disclose or deduct the value of
security over property owned by the debtor himself, if such security was given in
respect of another debt and there is no surplus value in the security.\textsuperscript{87} It has also been
held that it not an abuse of process for a creditor to issue two statutory demands
against a debtor, if each statutory demand was issued in respect of a different
judgment debt against the debtor.\textsuperscript{88}

\textsuperscript{83} Re DAYANG CONSTRUCTION AND ENGINEERING PTE LTD [2002] 3 SLR 379.
\textsuperscript{84} MANJIT KAUR MONICA v STANDARD CHARTERED BANK (6 October 2000, unreported); GOH CHIN SOON v
VICKERS CAPITAL LTD [2001] 1 SLR 728; GOH CHIN SOON v OVERSEA-CHINESE BANKING CORPORATION LTD
(30 January 2001, unreported); GOH CHIN SOON v OVERSEA-CHINESE BANKING CORPORATION LTD (12
September 2001, unreported).
\textsuperscript{85} MANJIT KAUR MONICA v STANDARD CHARTERED BANK (6 October 2000, unreported).
\textsuperscript{86} RE LOH LEE KEOW [2001] 2 SLR 503; SIA LENG Tuen v HKR PROPERTIES LTD [2002] 1 SLR 83.
\textsuperscript{87} GOH CHIN SOON v OVERSEA CHINESE BANKING CORPORATION LTD (OSB No 114 of 2000, 30 January
2001, unreported).
\textsuperscript{88} GOH CHIN SOON v OVERSEA-CHINESE BANKING CORPORATION LTD (OSB No 600029 of 2001, RA No
On the other hand, bankruptcy demands have been set aside by the courts if they contain insufficient information to properly account for the demanded debt,\(^\text{89}\) if there is a doubt that they have been properly served on the debtor,\(^\text{90}\) or if there is a substantial dispute in relation to the demanded debt.\(^\text{91}\)

The bankruptcy regime introduced in 1995, especially after amendment in 1999,\(^\text{92}\) also made it easier for bankrupts to be discharged from bankruptcy and start life anew. It is no longer necessary in any every case for a bankrupt to apply to the Court for a discharge from bankruptcy. The Official Assignee has the discretion to issue a certificate of discharge bankruptcy where the total value of the proved debts in a bankruptcy is not more than $500,000 and the debtor has been in bankruptcy for at least 3 years.\(^\text{93}\) The Official Assignee also has the power to annul a bankruptcy order where a bankrupt has paid his debts in full\(^\text{94}\) or where the bankrupt’s creditors has accepted a composition or scheme of arrangement by special resolution, that is, by a majority in number and at least 75% in value of the creditors.\(^\text{95}\) However, the courts have reminded that the Official Assignee’s power to issue a certificate of discharge is not absolute and unfettered, and is subject to the supervision of the courts.\(^\text{96}\) In any case, it appears that, even with the power given to the Official Assignee to issue a certificate of discharge, over the last few years, more people are still being made bankrupt than being discharged.\(^\text{97}\)

Consistent with the spirit of the revamp in 1995, the courts have taken a liberal approach in cases where an order of discharge from bankruptcy is required, particular where the cause of the bankruptcy is business failure. In *Re Stah Ool Choe*,\(^\text{98}\) an application was made by a former entrepreneur who had been in bankruptcy for more than 10 years, with total debts of more than S$140 million. He had been earning only a small salary and contributed about S$36,000 over the past 5 years. The High Court allowed his application, noting that the revamped Bankruptcy Act has made it easier for bankrupts to be discharged. The Court further observed that the scheme of the Bankruptcy Act was designed to balance two concerns: firstly, the recognition that those who became bankrupt as a result of economic depression rather than moral blame should be given a second chance so that the social cost of waste of entrepreneurial resources could be reduced, and, secondly, there should be safeguards against those who use dishonest or fraudulent methods in conducting their business affairs to the detriment of their creditors.

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89. *C & K Credit Pte Ltd v Lee Chin Kwee Kalvin* [2003] 1 SLR 141.
94. Section 123A, Bankruptcy Act.
95. Section 95A, Bankruptcy Act.
96. *Re Ng Lai Wor* [1996] 3 SLR 106.
Another procedure introduced in 1995 was the voluntary arrangement which is modelled after the procedure of the same name in the UK Insolvency Act 1986. An individual faced with bankruptcy proceedings or a bankruptcy demand may apply to the Court for a 42-day interim order which grants him protection from bankruptcy proceedings while he makes a proposal to his creditors to be administered by a nominee appointed by him. The proposal is approved if it is supported by a majority in number and more than 75% in value of his creditors present and voting at a creditors’ meeting. Since its inception, the voluntary arrangement procedure has been fairly popular, but it would appear that many voluntary arrangements fail to be approved by the requisite majority of the creditors. This is perhaps a consequence of the voluntary arrangement procedure being invoked too late in the day.

The courts have generally taken the same practical and commercial approach towards voluntary arrangements as they have towards scheme of arrangement procedure. They have been reasonably liberal in granting interim orders so that debtors have an opportunity to present a proposal for their creditors’ consideration, and have also refrained from imposing any technical restrictions on the type of arrangements which may be put in place. However, where creditors’ interests become unfairly prejudiced, the courts will exercise their supervisory powers to ensure that the voluntary arrangement procedure is not being abused, or used to delay the enforcement by the creditors of their rights where there was no reasonable proposal which could be presented. For instance, the courts have discharged an interim order where there was no person who was qualified and willing to act as the nominee, or where the proposal was not a serious and viable one.

**Vulnerable Transactions**

Under Singapore law, there are a number of categories of transactions entered into by a company or individual which may become vulnerable to be set aside or rendered void in the event of the company’s liquidation or judicial management or the individual’s bankruptcy. Under the Companies Act, dispositions of a company’s property are void if effected after the presentation of a winding up petition pursuant to which a winding up order is subsequently made, registrable charges which are not duly registered are void in the liquidation of the chargor, and a floating charge granted by an insolvent company without receiving any fresh moneys is void if the company is placed in liquidation less than 6 months later. A conveyance of property with the intent to defraud one’s creditors is also void. The relevant provisions are based on English statutory provisions of considerable vintage, and the law in relation to these provisions are mostly well-settled.

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99 Sections 45-56, Bankruptcy Act.
100 Re Lim Wee Beng Eddie (23 May 2001, unreported).
101 Section 259, Companies Act.
102 Section 131, Companies Act.
103 Section 330, Companies Act.
104 Section 73D, Conveyancing and Law of Property Act.
Of more interest are the new categories of vulnerable transactions introduced in 1995 by the Bankruptcy Act, which are not only applicable in the bankruptcy of individuals but are also legislatively imported into the corporate liquidation and judicial management regimes. There are three such categories of transactions: transactions at an undervalue, unfair preferences and extortionate credit transactions. In essence, these are transactions entered into by a debtor which are regarded as improperly or unfairly prejudicing the rights of the creditors of the debtor or which unduly benefits particular creditors over other creditors. The Court is given the power to make a wide range of orders to reverse the effect of such transactions.

Since the introduction of these categories, quite a number of cases on transactions at an undervalue and unfair preferences have come before the courts. Again, pragmatism is the order of the day when dealing with these cases. The courts have applied the provisions with their purpose very much in mind, and have been robust in impugning transactions which, as a matter of substance, undermine the integrity and effectiveness of the insolvency regimes. Technical or legalistic objections have generally been unsuccessful.

A transaction at an undervalue is a transaction entered into by an insolvent debtor, less than 5 years prior to the commencement of the insolvency proceedings, pursuant to which the debtor gives away significantly more value than what he receives. If the transaction is entered into with a party who is associated with the debtor, there is no need to prove that the debtor was insolvent at the time of the transaction; such insolvency is presumed. Applying these provisions, the courts have set aside transactions which clearly prejudice the estate of the debtor, such as a gift of an interest in property by a debtor prior to his bankruptcy. More complicated transactions have also not escaped the scrutiny of the courts. Where an insolvent company paid two sets of rent to a related company for the lease of the same premises and for the same period, the Court had no hesitation in holding that the payment of one set of rent paid for that period did not make commercial sense and constituted a transaction at an undervalue. Similarly, a novation agreement whereby an insolvent company sought to transfer its rights and liabilities under a building contract to another company has been held to be a transaction at an undervalue, if the benefits given up by the insolvent company are in fact more than what it would receive by way of the discharge of its liabilities. In coming to this conclusion, the Court had to undertake a detailed examination and valuation of the benefits parted with and received by the insolvent company, even though this was not an easy

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105 Section 329, Companies Act.
106 Section 227T, Companies Act.
107 Sections 98-103, Companies Act.
108 Sections 102 and 103(4), Bankruptcy Act
109 Section 98, Bankruptcy Act.
110 Section 100(3), Bankruptcy Act.
112 Re Libra Industries Pte Ltd [2000] 1 SLR 84.
113 Buildspeed Construction Pte Ltd v Theme Corp Pte Ltd [2000] 4 SLR 776.
exercise given the nature of the benefits in question. It is also to be noted that such an approach appears to be contrary to English authorities which have held that that a transaction at an undervalue can only be upheld where the two sets of consideration are such as to be capable of valuation in monetary terms and customarily disposed of for value.\footnote{Re M C Bacon [1990] BCLC 324. This view has been followed on several occasions in England: see Memes v National Bank of Kuwait SAK [1984] BCC 119 at 128-129; Agriculture Mortgage Corp v Woodward [1995] 1 BCLC 1 at 5-6; Phillips v Brewin Dolphin Bell Lavrie Ltd [1999] 1 BCLC 714 at 724.}

On the other hand, the courts have had regard to the reality of commercial practice in determining whether a transaction was entered into at a significant undervalue. Indeed, it is statutorily provided that, where a transaction is entered into by the company in good faith and for the purpose of carrying on its business and, at the time of the transaction, there were reasonable grounds for believing that the transaction would benefit the company, it would not be open to challenge as a transaction at an undervalue.\footnote{Regulation 6, Companies (Application of Bankruptcy Act Provisions) Regulations.} Thus, the purchase of shares by an insolvent company at a price 20% above their book value was held not to be a transaction at an undervalue, where there was evidence that the directors honestly thought that it was a fair and reasonable price and that it was in the interests of the company to purchase the shares.\footnote{Show Theatres Pte Ltd v Show Theatres Pte Ltd [2002] 2 SLR 144.}

It would be more difficult to establish a transaction at an undervalue in the case of a payment of a debt. The Court of Appeal recently ruled that the payment of a debt by an insolvent company to an associated company was not a transaction at an undervalue, in the absence of sufficient evidence to show that the obligation of the insolvent company to pay the debt was not worth the full value of the payment.\footnote{Mercator & Noordstar NV v Velstra Pte Ltd [2003] SGCA 37.} The Court refused to take into account the fact that the insolvent company went into liquidation subsequent to the payment for the purpose of determining the value of the consideration. In the Court’s view, this would undermine the efficacy of business.

The courts have been more conservative in relation to the scope of unfair preferences. This is understandable, given the entrenched view that the mere fact of payment or giving additional security by a debtor to one of his creditors should not, without more, amount to the giving of an unfair preference, unless there is an element of impropriety or blameworthiness. This position is also borne out under the legislation. An unfair preference is any act done by an insolvent debtor which has the effect of placing one of his creditors in a better position than he would have been in the liquidation, judicial management or bankruptcy (as the case may be) of the debtor, less than 6 months prior to the commencement of the insolvency proceedings.\footnote{Sections 99 and 100, Bankruptcy Act.} Unlike transactions at an undervalue, however, a mental element is also required to be established. It must be shown that, in giving the unfair preference, the debtor was
influenced by a desire to confer the effect of a preference on the recipient. A stricter position applies where an unfair preference is given by a debtor to a creditor who is an associated party; the applicable time frame is 2 years prior to the commencement of insolvency proceedings instead of 6 months, and the existence of a desire to confer the benefit of a preference is presumed. These stricter rules have turned out to be very important in practice.

Empirically, it has been difficult to establish an unfair preference where the recipient of the benefit is a party unrelated to the insolvent debtor, because of the difficulty in establishing the necessary desire on the part of the insolvent company. The Singapore courts have adopted the English position that there has to be a positive and subjective wish to improve the creditor’s position in the event of its insolvent liquidation, and that such wish must have influenced the decision to confer the preference. The requisite desire is not present where the insolvent debtor gives a preference for proper commercial considerations, such as responding to pressure from a creditor.

Indeed, there has been no reasoned case where the Court has granted relief in respect of an unfair preference is given by a debtor to a creditor which is also not an associated party. The cases in which unfair preferences have been ordered to be reversed by the Court involved unfair preferences given by the insolvent company to an associated party, in which the requisite desire was established by the presumption triggered as a result of the association between the parties. Thus, repayments made by an insolvent company to its related company have been ordered by the Court to be reversed as unfair preferences.

There have also been instances where, although the unfair preference was given to an associated party, the presumption of the existence of the requisite desire was held to be rebutted. Payments made by an insolvent company to its related company for the latter’s supply of raw materials and payment of salaries, without reference to specific invoices, were held not to be unfair preferences because there was an established practice for such payments and the presumption had been rebutted. This appears to set a low threshold for the rebuttal of the presumption, and perhaps should best be viewed against the particular circumstances of the case. In another case, the fact that the unfair preference was the payment of reasonable legal fees by the debtor to her solicitors in the ordinary course of business was held to be sufficient to rebut the presumption.

Another set of issues relating to transactions at an undervalue and unfair preferences relates to the legislative importation of the relevant provisions into the

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119 Section 99(4), Bankruptcy Act.
120 Section 100(1)(b), Bankruptcy Act.
121 Section 100(3), Bankruptcy Act.
122 Re Libra Industries Pte Ltd [2000] 1 SLR 84.
123 Re Libra Industries Pte Ltd [2000] 1 SLR 84.
124 Re Libra Industries Pte Ltd [2000] 1 SLR 84.
corporate liquidation and judicial management regimes. This has caused difficulties and uncertainty.\textsuperscript{126} The problems arise from the fact that provisions in the bankruptcy of individuals are being made to apply in the significantly different scenarios of corporate liquidation and judicial management, without a comprehensive or well-conceived set of supporting provisions to ensure a smooth importation process.\textsuperscript{127}

It is envisaged that these problems will be eradicated once the new omnibus insolvency legislation takes effect. In any case, it is not possible to document the controversies here, and suffice to say that various issues have necessitated judicial clarification. For instance, where the Bankruptcy Act measures the vulnerability time frame backwards from the date of the bankruptcy petition, the courts have had to consider what is the relevant point of reference in the case of a voluntary liquidation.\textsuperscript{128} The courts have also had to decide that it is not only transactions which would be rendered ‘void or voidable’ in the bankruptcy of an individual that would be applicable to companies in liquidation, despite the fact that those restrictive words are used in the importation provision.\textsuperscript{129} The issue of when a company is associated with another company for the purpose of triggering the lengthened vulnerability period and the presumptions has also given rise to two Court of Appeal decisions.\textsuperscript{130} One of these decisions ruled that any two companies with a common director would be deemed as associated companies, creating a stir in commercial and financial circles.\textsuperscript{131} Even the constitutionality of the subsidiary legislation\textsuperscript{132} that purports to assist in the importation process has been challenged; the Court of Appeal has had to rule that the subsidiary legislation was not ultra vires the Constitution.\textsuperscript{133}

**Insolvent Trading**

The issue of whether and when the directors of an insolvent company have a duty to have regard to creditors’ interests in the conduct of the company’s business and affairs has, in recent years, become increasingly important. In Singapore, there is no general duty on the directors of an insolvent company to cease trading or to take steps to place the company under liquidation or judicial management. Instead, the approach is to impose criminal and civil liability on directors who improperly cause a company to continue incurring debts and liabilities to the prejudice of the company’s creditors. The issue is addressed by both the common law and statute in Singapore. Unfortunately, the legal position remains somewhat uncertain; in particular, the


\textsuperscript{127} In particular, the subsidiary legislation known as the Companies (Application of Bankruptcy Act Provisions) Regulations has caused a substantial amount of uncertainty and difficulty.

\textsuperscript{128} *Buildspeed Construction Pte Ltd v Theme Corp Pte Ltd* [2000] 4 SLR 776.

\textsuperscript{129} *Buildspeed Construction Pte Ltd v Theme Corp Pte Ltd* [2000] 4 SLR 776.

\textsuperscript{130} *Mercator & Noordstar NV v Velstra Pte Ltd* [2003] SGCA 37; *Show Theatres Pte Ltd v Shaw Theatres Pte Ltd* [2002] 4 SLR 145.

\textsuperscript{131} *Show Theatres Pte Ltd v Show Theatres Pte Ltd* [2002] 4 SLR 145.

\textsuperscript{132} Companies (Application of Bankruptcy Act Provisions) Regulations.

\textsuperscript{133} *Show Theatres Pte Ltd v Show Theatres Pte Ltd* [2002] 4 SLR 145.
questions of whether it is a subjective or objective inquiry, and whether dishonesty or recklessness is always required, have not been clearly answered. For instance, it is not settled whether a director of a company who subjectively and honestly believes that the company’s business will revive (even though the company is hopelessly insolvent) and that he is taking a correct course of action for the interests of the creditors will nevertheless be liable. Neither is it settled whether a director of an insolvent company who takes a course of action which is merely negligent, but not fraudulent or wildly irresponsible, should be laden with liability.

There have been recent occasions when the courts have had the opportunity to consider the duties and liabilities of directors of insolvent companies. Unfortunately, in all these cases there was clear dishonest conduct, such as fraudulent sale and resale transactions, fraudulent investment schemes, and false accounts, and the courts had no difficulty in fixing liability on the directors and did not discuss further the finer distinctions which needed to be drawn.

For instance, the High Court expressly adopted the common law principle that, when a company becomes insolvent, its directors are under a duty to act honest and in good faith in the interests of the company and, in this context, the interests of the company’s creditors become the dominant factor in what constitutes the benefit of the company as a whole. On the facts, which involved false accounting to induce third parties to continue to deal with the company, this duty was clearly breached. However, if one were to study the formulation of the duty, it may be seen that there are still many uncertainties which need to be resolved.

The misfeasance of fraudulent trading, that is, being a knowing party to the carrying on of a company’s business with intend to defraud creditors or with a fraudulent purpose, is another important weapon in the arsenal against improper and irresponsible corporate conduct. Interestingly, until 1998, this misfeasance had never been considered in any reported case. More recently, the High Court has made it clear that a person would be regarded as intending to defraud a creditor if he intends that the creditor shall never be paid or alternatively if he intends to obtain credit or carry on obtaining credit when the rights and interests of the creditor are being prejudiced in a way which the defendant himself has generally regarded as dishonest. Further, a trader can intend to defraud if he obtains credit when there is a substantial risk of the creditor not getting his money or not getting the whole of his money and the defendant knows that that is the position and knows he is stepping beyond the bounds of what ordinary decent people engaged in business would regard as honest. Again, this formulation is not entirely clear, involving both subjective and objective concepts. Further, this approach has subsequently been rejected by the Privy Council in a Hong Kong case involving the same statutory provision; it was

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134 Tan Hung Yeoh v Public Prosecutor [1999] 3 SLR 93.
135 Tong Tien See Construction Pte Ltd v Tong Tien See [2002] 3 SLR 76.
136 Tong Tien See Construction Pte Ltd v Tong Tien See [2002] 3 SLR 76.
137 Section 340(1), Companies Act.
held that real dishonesty needs to be proved before fraudulent trading may be established.\textsuperscript{139}

There is another statutory provision which incorporates a more objective inquiry, namely, that an officer of an insolvent company should not be knowingly a party to the contracting of a debt if he had, at the time the debt was contracted, no reasonable or probable ground of expectation that the company would be able to pay the debt.\textsuperscript{140} However, this imposes only criminal liability, and not both criminal and civil liability as in the case of fraudulent trading. Further, there is little case law on this provision, as it is based on a short-lived Australian provision. The Singapore courts have never had any occasion to consider the scope of this provision. It is possible that this provision will be replaced, when the new omnibus insolvency legislation is enacted, by the more comprehensively-drafted wrongful trading provision in the UK legislation.\textsuperscript{141}

\textsuperscript{139} Aktieselskabet Dansk Skibsforsikring v Brothers [2001] 2 BCLC 324.

\textsuperscript{140} Section 339(3), Companies Act.

\textsuperscript{141} Section 214, Insolvency Act 1986.