The Insolvency, Restructuring and Dissolution Act ("the Act") was passed by Parliament on 1 October 2018. The Act together with its 48 related pieces of subsidiary legislation, comes into force on 30 July 2020. The Act is a consolidation of Singapore's insolvency laws for both individual and corporate insolvency under a single piece of legislation. With the implementation of the Act, the Bankruptcy Act (Chapter 20) is repealed, and provisions in the Act relating to corporate insolvency and restructuring are removed.

Key Features of the Act

Bankruptcy

Institutional Creditors
The definition of "institutional creditor" has been expanded to include a holder of a capital markets services licence granted under section 86 of the Securities and Futures Act. This means that a holder of a capital market services licence is now required to appoint a private trustee to administer the bankruptcy when applying to make a debtor bankrupt.

A corporation in respect of which 2 or more institutional creditors together control more than half of the voting power is also required to appoint a private trustee to administer the bankruptcy when applying to make a debtor bankrupt.

Secured Creditor
A secured creditor who intends to claim interest in respect of a debt must notify the Official Assignee or the Trustee in Bankruptcy of its intention within 30 days after the making of a bankruptcy order.

Debt Repayment Scheme Threshold
The maximum debt threshold for the Debt Repayment Scheme is increased from $100,000 to $150,000.

Judicial management

Court Order not required

A company may obtain a resolution of its creditors to place itself into judicial management where the company considers that it is, or is likely to become, unable to pay its debts , and there is a reasonable probability of achieving some or more of the purposes of judicial management. Under the new process, this may be achieved through a simple majority of creditors (in number and in value) present and voting at a meeting held at a time and place convenient to the majority in value of the creditors. However, a floating charge holder who is entitled to appoint a receiver and manager of substantially the whole of the company's property must consent to such an attempt to place the company under judicial management. Once the company is placed into judicial management, the judicial management process will continue in the same manner and under the supervision of the court, similar to the case where it is done under court order.

No personal liability

The Act provides that the judicial manager of a company is deemed to be the agent of the company. As the personal liability provision in the relevant section of the Companies Act has been removed, this would mean that there is no personal liability imposed on the judicial manager for any contract, including any contract of employment, entered into or adopted by him in the carrying out of his functions.

New grounds for creditor or member to seek court order to protect interests

A creditor or member of the company will be able to apply to court for an order to protect the interests of the creditors or members on new grounds such as where the judicial management should not have been commenced at all, that there are no proper grounds for continuing the judicial management, or that the judicial manager is not managing the company according to the approved proposals.

Receivership

A receiver or manager will be personally liable on any contract entered into by him in the performance of his function as a receiver or manager (except insofar as the contract otherwise provides) and, to the extent of any qualifying liability, on any contract of employment adopted. However, he is entitled to an indemnity out of the property of the company or corporation.

Winding Up

Prior authorisation

In a court winding up, the liquidator is now required to obtain prior authorisation from the Court or the committee of inspection before bringing or defending any action or other legal proceeding in the name and on behalf of the company or before appointing a solicitor for that purpose or appointing a solicitor to assist the liquidator in the liquidator's duties. This is not required previously.

Termination by court

The courts are now empowered to terminate a winding up in addition to staying winding-up proceedings under Section 186 of the Act. The courts may also give such directions as they consider fit for the resumption of the management and control of the company, including directions for the convening of a general meeting of members of the company to elect directors of the company to take office upon the termination of the winding. Under the previous regime, when an insolvent company became solvent or for some other reason finds that it should no longer be wound up, the court could only order a stay of the

winding-up proceedings for a limited period or permanently as winding-up proceedings could not be terminated.

Early Dissolution
The Act provides for the early dissolution of a company where it is being wound up and the Official Receiver is the appointed liquidator. In the event that the Official Receiver has reasonable cause to believe that the company's realisable assets are insufficient to cover the expenses of the winding up and the affairs of the company require no further investigation, the company may be dissolved.

The Official Receiver may issue a notice that the company will be dissolved and struck off the register 30 days after the date of the notice unless:

- action is taken for the appointment of another liquidator for the purposes of continuing the liquidation; or
- an order is made that the company not be struck off and dissolved.

All Modes of Winding Up
An arrangement, entered into between a company about to be or being wound up and its creditors, is binding on the company and its creditors for every mode of winding up. This was applicable only to a company in a voluntary winding up under the old regime.

Third Party Funding

The powers of liquidators and judicial managers has been enlarged to permit them to assign proceeds of claims relating to transactions at undervalue, undue preferences, extortionate credit transactions, fraudulent or wrongful trading, or delinquent officers, in favour of third-party funders in exchange for them funding the action in the name of the company. This is to facilitate the pursuit of such actions notwithstanding the company's lack of financial resource in order to recover monies or assets for the distressed company.

Restriction on ipto facto clauses

Ipso facto clauses entitle an innocent party to terminate a contract and/or exercise certain remedies upon the occurrence of certain stipulated events, such as the insolvency or restructuring of the other party. This automatic trigger poses great difficulties for companies seeking to restructure.

Section 440 of the Act prohibits a party from terminating a contract or modifying the terms of the contract with an insolvent company, or to take certain actions (by relying on a contractual provision) by reason of the company's insolvency or commencement of scheme of arrangement or judicial management proceedings. It also provides that any contractual provision that has the effect of permitting anything that, in substance, is contrary to this provision to be of no force or effect.

The Act does not prohibit a person from requiring payments to be made in cash for goods, services or leased property after the commencement of the proceedings, or requiring the further advance of money or credit.

Certain specified classes of contracts are exempted from this prohibition. These include government contracts, commercial ship charters and eligible financial contracts as prescribed under the Insolvency, Restructuring and Dissolution (Prescribed Contracts under Section 440) Regulations 2020.

Under the aforesaid Regulations, financial contracts that are prescribed as eligible financial contracts includes:

(a) any derivatives contract, margin lending agreement or securities contract;
(b) any master netting agreement, securities lending or repurchase agreement, commodities lending or repurchase contract or spot contract, that contains a netting arrangement or set-off arrangement;
(c) any contract or agreement that is a covered bond, or connected with a covered bond or the issuing of a covered bond;
(d) any contract or agreement that is, or that is directly connected with, a debenture;
(e) any agreement to clear or settle transactions relating to a derivatives contract;
(f) any contract for the offer of asset-backed securities by a securitisation special purpose vehicle, or any contract connected with such offer of asset-backed securities or the securitisation transaction pursuant to which the securities are issued;
(g) any contract that creates a mortgage, charge, pledge, lien or other type of security interest that is recognised by law, being a mortgage, charge, pledge, lien or other security interest that secures an obligation under a prescribed financial contract;
(h) any contract providing for a guarantee, letter of credit, title transfer of assets, or other credit support arrangement in respect of an obligation under a prescribed financial contract.

In addition, a counterparty may also apply to the Court for a declaration that the restriction does not apply to it, if the counterparty can satisfy the Court that the operation of the restriction would "likely cause the applicant significant financial hardship."

Realisation of security

Section 223 of the Act requires secured creditors of an insolvent company that is being wound up to realise their security within 12 months after the commencement of the winding up, or such further period as the liquidator may determine, in order to be entitled to any interest in respect of their debt. Where a company is in judicial management and a secured creditor has obtained the leave of the courts or the judicial manager's consent to enforce their security, they must do so within 12 months after the date on which leave or consent was given, or such further period as the judicial manager may determine, in order to be entitled to interest in respect of their debt.

Wrongful trading

A company is said to have traded wrongfully if it incurs debts or liabilities without a reasonable prospect of meeting them in full when it is insolvent or becomes insolvent as a result of the incurrence of such debt.

Under the old regime, company officers must be found to be criminally liable for wrongful trading before any application to impose civil liability for the same can be made. Section 239 of the Act empowers the courts to declare that any person who was a knowing party to a company's wrongful trading is personally responsible for its debts or liabilities before criminal liability is established.

A company or any party to, or interested in becoming party to, the carrying on of business with a company, may apply to the court for a declaration that a particular course of conduct, transaction or series of transactions would not constitute wrongful trading.

Foreign companies

Under Section 250 of the Act, the liquidator of a foreign company that has established a place of business or carries on business in Singapore will be able to apply to the courts to appoint a liquidator to the foreign company for Singapore. The Singapore liquidator will be obliged to, among other things, obtain a court order if they intend to pay out any creditor of the foreign company to the exclusion of others. The Singapore liquidator must only recover and realise the assets of the foreign company in Singapore, unless otherwise ordered by court. The Singapore liquidator must be satisfied that the interests of creditors in Singapore are sufficiently protected before making payments to the foreign liquidator.

Regulation of Insolvency Practitioners

The Act establishes a new licensing and regulatory regime for insolvency practitioners acting as officeholders in insolvency and restructuring proceedings.

The regime sets out the requirements for the grant and renewal of an insolvency practitioner's licence, imposing common minimum standards of professional conduct a licensee must uphold when undertaking his appointment as an insolvency officeholder. There is also a disciplinary framework in place to punish errant office holders.

An insolvency practitioner's licence is not required if a person:

- wishes to be appointed as a liquidator in a members' voluntary winding up or a scheme manager in a scheme of arrangement case commenced under the Act; or
- intends to only administer insolvency or debt restructuring cases

There is a six-month transitional period (from 30 July 2020 to 30 January 2021) provided to allow a person to perform insolvency or debt restructuring work commenced under the Act without an insolvency practitioner's licence, whilst his or her application for an insolvency practitioner's licence is being considered by the Licensing Officer. This is provided that he or she possesses the necessary qualifications to do the same under the Bankruptcy Act and / or the Companies Act. In the event the application for a licence is not successful, any appointments undertaken during this period will have to cease.

Electronic Delivery, Virtual Meetings and Resolution by Correspondence

The Act sets out rules in respect of delivery by electronic means as well as through Internet websites. However, electronic delivery does not apply to the issuance of a statutory demand or a written demand, which can form the basis of a bankruptcy or winding up application if unsatisfied.

The Act also provides for meetings of creditors, contributories, committee of inspection or creditors' committee to be held by electronic means. A relevant officeholder may also seek to obtain the passing of a resolution by creditors or contributories by correspondence.

Conclusion

The Act consolidates Singapore's personal and corporate insolvency and restructuring laws into a single piece of legislation. It also updates relevant laws to be aligned with international best practices. It is

important for industry players to be familiar with the changes and for insolvency practitioners to take note of the new licensing regime.

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