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THE SINGAPORE EXPERIENCE IN THE ADMINISTRATION OF INSOLVENCY REGIME

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Introduction

The history of insolvency laws has gone as far back in time as the Roman law in about 451 B.C. However, its principal object has remained more or less the same since then, which is, to ensure a just distribution of the assets of an insolvent person and in more recent times, an insolvent company amongst his or its creditors.

Sir Joseph Chamberlain, President of the Board of Trade, during his introduction of the 1883 Bankruptcy Bill into the English Parliament stated that:

> *Every good bankruptcy law must have in view two main, and at the same time, distinct objects. First, the honest administration of bankrupt estates, with a view to the fair and speedy distribution of the assets among the creditors whose property they were; secondly, following the idea that prevention was better than cure, to do something to improve the general tone of commercial morality, to promote honest trading, and to lessen the number of failures.*

These words are still valid as the basis of our insolvency regime in the social and economic context of our present day society. Singapore being one of the important trading and financial centres in the region, must ensure that it has an effective and efficient insolvency regime so that its foreign investors and local entreprenuers and technopreneurs alike can be imbued with confidence in its legal and economic infrastructure. But how to achieve such an effective and efficient insolvency regime, and what is the role of the judiciary and the appointed insolvency regulator in such a regime?

The courts have traditionally played the custodian role in most of the insolvency regimes that we find in the world. In some countries, the courts have to administer the entire insolvency process, and ensure that the objectives enunciated by Sir Joseph Chamberlain are attained. In other countries, the administration of the insolvency process is split between the judiciaries and the appointed insolvency regulators. Sometimes the judiciaries play a bigger role, at other times, they leave it to the insolvency regulators to assume the main role of the administrator of insolvency estates.

In Singapore, the judiciary presides over pre-insolvency court applications and makes the relevant insolvency orders (bankruptcy order for individual insolvency and company winding up order for corporate insolvency). But its role is very much reduced after the making of the insolvency orders when the administrator is appointed to administer the insolvency estates.

This paper does not propose to examine the pros and cons of the different insolvency regimes but aims to share with the participants of the Forum, the framework of Singapore's insolvency regime and its experience in the administration of insolvency estates.

Individual Insolvency (Bankruptcy)

All bankruptcy proceedings take place in the Singapore High Court. Singapore's bankruptcy regime started with the Bankruptcy Ordinance of 1888 which was introduced in 1888 when Singapore was part of the British Straits Settlement. The Ordinance was based on the English Bankruptcy Act 1883. For 107 years, the structure and laws established by the Ordinance remained intact. In 1995, substantial amendments were made to the old bankruptcy laws in order to keep pace with the social and economic developments in Singapore.

The objectives for the Bankruptcy Act of 1995 (hereinafter the Bankruptcy Act) were to:

(a) improve the administration of the affairs of bankrupts and protect creditors' interests without stifling entrepreneurship;
(b) strike a fair balance between the interests of the debtor, the creditor and society;
(c) ensure greater accountability of bankrupts in the administration of their estates; and
(d) promote speedier discharges of bankrupts

In order to achieve these objectives, some key reforms were introduced in the Bankruptcy Act. Some of these reforms help the High Court to perform its role better in bankruptcy proceedings as they streamlined and simplified the bankruptcy procedures, while others reduced the High Court's role. We will now look at the administration of the Singapore Insolvency Regime in greater details.

Pre-bankruptcy proceedings

(i) Streamline and update cumbersome, complex and archaic bankruptcy procedures

The Bankruptcy Act has done away with outdated, cumbersome and technical procedures which contributed to substantial delay in the administration of the bankruptcy process before 1995. The bankruptcy procedures found in the Bankruptcy Act are streamlined and simplified to ensure greater efficiency in bankruptcy administration and lower costs. The simplified procedures are as follows:

(a) the outmoded concepts of acts of bankruptcy (under the old bankruptcy law there were ten prescribed acts of bankruptcy) were replaced with the single ground of inability to pay as the basis for commencing bankruptcy proceedings;

(b) the petitioning creditor can either prove actual inability or rely on the presumption of inability to pay on the part of the debtor[1].

(c) the minimum debt that is liquidated and payable immediately by the debtor to the petitioning creditor before the latter could present a bankruptcy petition in court was raised from the former S$500 under the old bankruptcy law to S$2,000 in 1995 and then further to S$10,000 in 1999. The Bankruptcy Act also provided that the amount can be raised further by the Minister for Law.

(d) petitioning creditors are not required to obtain judgements in order to commence bankruptcy proceedings except for debts incurred outside Singapore; and

(e) the two-tier court orders, namely, receiving and adjudication orders, were replaced with the single bankruptcy order.

The High Court is in full control of the pre-bankruptcy proceedings, and the new procedures have greatly assisted the High Court in administering the pre-bankruptcy process and in determining whether a bankruptcy order ought to be made in a particular case. The High Court now only needs to determine three issues at the hearing of a bankruptcy petition:

(a) whether it has jurisdiction to hear a petition[2] :

[1] The presumption of inability to pay can arise by:
(a) non-compliance with statutory demand for debt within 21 days of service by the petitioning creditor, or
(b) return of execution of judgement wholly or partially unsatisfied; or
(c) absconding of debtor to defeat, delay or obstruct creditor.

[2] Section 60 of the Bankruptcy Act. This provision on jurisdiction of the High Court remains essentially the same as that provided in the old Bankruptcy Act. The High Court would have jurisdiction if the debtor :
(i) is domiciled in Singapore;
(ii) is ordinarily resident or has had place of residence in Singapore within one year before presentation of petition;
(iii) carried on business in Singapore within one year before presentation of petition; or
(iv) has property in Singapore.

(b) whether a petitioning creditor is entitled to present a petition against his debtor[3]; and
(c) whether the debtor is unable to pay the petitioning creditor's debt[4].

(ii) Reduce instances where parties resort to bankruptcy proceedings and encourage settlement of debts.

Creditors, many a times, institute bankruptcy proceedings in the hope of compelling their debtors to pay up their debts. These creditors do not usually ascertain whether bankruptcy proceedings are cost effective or whether they would produce any fruitful result, neither do they explore alternatives to recover their debts.

The Bankruptcy Act therefore introduced a moratorium scheme known as voluntary arrangement for debtors to explore debt settlement with their creditors in order to avoid bankruptcy proceedings. Under this scheme, if the court grants an interim order, all proceedings against the debtor would be stayed. The objective is to give the debtor opportunity to put forth debt settlement proposals to his creditors without disruptions of other legal proceedings commenced by his creditors. The High Court plays an important role here because it may make an interim order if it thinks that the debtor's proposal is serious and viable and that it would be appropriate to do so for the purposes of facilitating the consideration and implementation of the debtor's proposal. If a majority of the creditors accept the debtor's proposal, bankruptcy would be avoided for the debtor.

Post bankruptcy order proceedings

(i) The Official Assignee's power to enforce bankrupt's legal obligations.

The Official Assignee is appointed by the High Court as the bankruptcy administrator in more than 99% of all bankruptcy estates in Singapore. Prior to 1995, the powers of the Official Assignee were limited and thus severely hampered in the administration of bankruptcy estates. The Official Assignee could not adequately enquire into the bankrupt's affairs or conduct. The bankrupt's movements outside Singapore could not be effectively checked and prosecutions could not be instituted for breach of the bankrupt's essential legal obligations.

Under the current bankruptcy law, the Official Assignee is empowered with greater authority so that he can administer bankruptcy estates more effectively. The Official Assignee may now, for example, exercise the following powers:

(a) detain a bankrupt's passport and other travel documents to prevent him from leaving the country without the Official Assignee's consent;
(b) enter the premises, take inventory and seize assets of bankrupts without the leave of court;
(c) carry on any business of the bankrupt so far as is necessary for winding it up beneficially; and
(d) grant approval to bankrupt to act as director of a company or manage a business without the leave of court.

The Bankruptcy Act also enhances the scope of offences. Breach of duties, which under the old bankruptcy law only amounted to contempt of court, are now made into offences, attracting stiffer penalties and the Official Assignee could prosecute any bankrupt who is in breach of their statutory duties. In addition, the Bankruptcy Act also enhanced the sentences to be imposed upon conviction by the court.

(ii) Power of the Official Assignee to set aside antecedent transactions.

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[3] Section 61 of the Bankruptcy Act. No bankruptcy petition shall be presented in court unless at the time the petition is presented:
(i) the amount of the debt or the aggregate amount is not less than S$10,000
(ii) the debt is for a liquidated sum payable to the petitioning creditor immediately;
(iii) the debtor is unable to pay the debt; and
(iv) where the debt is incurred outside Singapore, such debt is payable by virtue of a judgement which is enforceable by execution in Singapore.

[4] Section 62 of the Bankruptcy Act

The Bankruptcy Act has effective procedures for asset realisation for the benefit of creditors. The Official Assignee is empowered to make application to the High Court to set aside antecedent transactions entered into by bankrupts before their bankruptcy. The provisions[5] on antecedent transactions such as undervalue transactions, unfair preferences and extortionate credit transactions were adopted from the UK Insolvency Act 1986. As such, case authorities from UK on antecedent transactions would be persuasive.

(iii) Official Assignee's power to discharge a person from bankruptcy.

Under the old bankruptcy law, it was not possible for a bankrupt to be discharged unless he settled his debts in full or proposed a debt settlement offer that was acceptable to his creditors. Many creditors were also not prepared to accept realistic proposals for settlements. In other words, there was very little incentive for bankrupts to actively seek a discharge by disclosing their assets and to co-operate with the Official Assignee in the administration of the estates. This difficulty in obtaining a discharge had led to an increasing number of undischarged bankrupts over the years. As a result, it was extremely difficult to monitor the bankrupt's conduct or recover assets.

A new scheme of discretionary discharge by the certificate of the Official Assignee was introduced in the Bankruptcy Act to address the above weakness of the old law. This mode of discharge was the first of its kind in the world when it was introduced in 1995. It has since received much international attention[6]. It was seen as a balance between the inflexible discharge regime under the old law and the automatic discharge schemes in some developed countries. Automatic discharge was rejected as a suitable scheme for Singapore because it does not encourage settlement of debts, and the maintenance of financial discipline and commercial morality.

Under the scheme of discretionary discharge, a bankrupt must be in bankruptcy for more than 3 years and his total debts must not exceed S$500,000 before he can qualify to be considered for discharge. The Official Assignee will then look into the following factors to determine whether the bankrupt deserved to be discharged from bankruptcy:

(a) The cause of his bankruptcy;
(b) The age of the bankrupt and the number of years he has been in bankruptcy;
(c) The bankrupt's conduct during his bankruptcy period;
(d) His assets and contributions to the bankruptcy estate;
(e) The extent of his co-operation with the Official Assignee; and
(f) the interests of all parties including public interest

If the Official Assignee decides to issue a certificate of discharge in favour of the bankrupt, the High Court's approval would not be required unless a creditor disagrees with the Official Assignee's decision and applies to court to challenge the Official Assignee's decision.

The Bankruptcy Act also retained the mode of discharge by debt settlement. However, it streamlined the process such that the requirement of a meeting of creditors to be convened to resolve whether to accept the bankrupt's debt settlement proposal is replaced by voting through correspondence. But more importantly for the efficiency of the administration process, the Bankruptcy Act also empowered the Official Assignee to issue certificates of annulment to bankrupts who have settled their debts in full or whose debt settlement proposals are accepted by a majority of creditors. This new administrative step removed the former requirement of annulment of bankruptcy orders by court order in debt settlement cases.

Corporate Insolvency

The judiciary's role in corporate insolvency is concentrated at the beginning and at the tail end of the process. From the time the winding-up order is made until the ultimate dissolution of the company, the Official Receiver, as liquidator of the company, takes the helm in the administration of the case.

[5] Sections 98 to 103 of the Bankruptcy Act

[6] In September 1998, the Commonwealth Association for Public Administration and Management awarded a Certificate of Achievement to the Singapore Insolvency Service for the implementation of the discretionary mode of discharge which it commented as "truly innovative and worthy of recognition".

The Official Receiver's office is a government department which becomes by operation of law the liquidator of any company in respect of which a private liquidator is not appointed[7]. Private liquidators are officers of the court and are subject to the supervision of the Committee of Inspection if one is appointed, the High Court and the Officer Receiver. Private liquidators have to be "approved liquidators", that is, company auditors approved by the Minister as a liquidator.

The source of corporate insolvency law in Singapore is encapsulated in the Companies Act. The first of such legislation in force in Singapore (then part of the Straits Settlements) drew its roots from the Indian Companies Act 1866. After numerous repeals and replacements, the Singapore Companies Act 1967 was enacted. This Act was based on the Companies Act 1961 of Victoria, Australia. In the main, Singapore company law is based on principles established in England over the last century or so. Singapore law differs in detail from English law, but the underlying principles are largely the same.

There are 2 types of winding up : voluntary winding up by the members or the creditors and compulsory winding up by the Court. The difference between the 2 types of winding up lies in the manner of initiation of the winding up : in the former, a resolution by the company has to be passed while in the latter, there has to be a presentation of a petition for winding up to the court by a party with the *locus standi* to do so. As there is no involvement by the Judiciary or the Official Receiver in voluntary winding up, the rest of this paper will focus on compulsory winding up and how the duties and responsibilities of the Official Receiver lend support to that of the judiciary.

Pre-winding Up Proceedings

The role of the Official Receiver is minimal prior to the making of the winding up order. At any time after the presentation of a winding up petition but before the making of the winding up order, the Court may appoint the Official Receiver as provisional liquidator, whereupon the Official Receiver may exercise the powers of a liquidator in the administration of the case. Further, the Official Receiver acts as amicus curiae at winding up proceedings, assisting the High Court by ensuring that all the documents (eg petition, memorandum, affidavits) submitted by the Petitioning Creditors comply with the statutory requirements.

Other powers of the Court at the pre-winding up stage include the power to stay or restrain any pending action or proceedings against the company after the presentation of the winding up petition. Also, any disposition of the company's property or even alteration in the status of the company's members at this stage are void unless the Court orders otherwise. After the winding up order is made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except with the leave of the Court.

Post-winding up Order Proceedings

Once the winding up order is made and the Official Receiver is appointed as the liquidator, the Official Receiver takes full control of the administration of the case : from conducting investigations to the realisation of assets to the admission and adjudication of proofs of debt filed against the company as well as the declaration of dividends to creditors. When in doubt, the Official Receiver may apply to the Court for directions in relation to any particular matter arising in the course of administration[8].

The Official Receiver also acts as a supervisory body over private liquidators. The Official Receiver is required by law to take cognizance of the conduct of private liquidators and to conduct any investigations into complaints against private liquidators.[9] Where necessary, the Official Receiver may lodge a complaint of the private liquidator's neglect or misfeasance to the Court for action to be taken against the private liquidator. Unless private liquidators give security to the satisfaction of the Official Receiver, that person shall not be allowed to act as the liquidator of the company. Also, private liquidators have to allow the Official Receiver access to information and facilities for inspecting the books and documents of the company as well as prepare the necessary reports, forms and accounts to the Official Receiver as required by law.

[7] Section 263 of the Companies Act
[8] Section 273(3) of the Companies Act

[9] Section 265 of the Companies Act

The Official Receiver also institutes criminal prosecutions and civil actions. For example, when a company director refuses to file a statement as to the affairs of the company as at the date of winding up, the Official Receiver may prosecute the offender in court[10]. In addition, on the application of the Official Receiver that the conduct of any director of a company renders him unfit to be a director or to manage a company, the Court may make an order disqualifying that person from being a director for up to 5 years[11]. Further, the Official Receiver may apply to the Court to exercise its avoidance powers as regards certain transactions, for example, those conducted at an undervalue or where there was unfair preference[12]. The Official Receiver also may bring or defend any legal proceedings in the name and on behalf of the company.

During the administration of the case, the Official Receiver may apply to the Courts to summon and examine on oath officers of the company or persons known or suspected to possess the company's property or supposed to be indebted to the company. Moreover, on proof of probable cause for believing that a director is about to abscond or remove or conceal his property for the purpose of evading payment of calls, the Official Receiver may apply to the Courts for an order that the director be arrested and his property seized and safely kept until such time the Court orders.

Further, the liquidator has the power to disclaim land that is burdened with onerous covenants, shares in corporations, unprofitable contracts and any other property which is otherwise unsaleable or not readily saleable by reason of requiring the possessor to pay money or to perform some onerous act. This power may be exercised only with the leave of the court, which may be granted subject to conditions.

In the area of development of the law, the Official Receiver is actively involved in reviewing and recommending changes to the law on corporate insolvency as is the Official Assignee in the area of bankruptcy laws[13]. The Official Receiver also sits on the Corporate Regulation and Government Policy Committee, a body which reviews and considers corporate legislation and policies in Singapore.

Conclusion

As such, it can be seen that the judiciary in Singapore in both individual and corporate insolvency proceedings, plays a more active role in the initial stages of the insolvency process. After the making of the insolvency orders, it adopts essentially a supervisory role. It is the Official Assignee or the Official Receiver who takes effective control of the entire administration of the case from the date of the bankruptcy or winding up order until the date of discharge. This arrangement has worked well for Singapore's insolvency regime. The ultimate aim in our insolvency regime is to combine the laws involving individual and corporate insolvency into a single statute to enable a streamlining of practices and procedures in our efforts to more effectively and efficiently administer insolvency matters in Singapore.

[10] Section 270 of the Companies Act

[11] Among the conditions in section 149(6) that have to be satisfied before the Court disqualifies a director includes a breach of fiduciary duty by the director and a misapplication or retention of the company by the director. Other factors the Court has to take into consideration include the extent of the director's responsibility for the causes of the company becoming insolvent and the extent of responsibility for any disposition of the company's property after the commencement of winding up.

[12] Sections 98 to 103 of the Bankruptcy Act are applicable by virtue of section 329 of Companies Act.

[13] One of the more recent reforms to the Companies Act includes the restriction of undischarged bankrupts from acting as a director or taking part in the management of the company except with the leave of Court or the written permission of the Official Assignee.