STEPHENSON HARWOOD
(SINGAPORE) ALLIANCE

December 2019

Going Concerns

Restructuring and insolvency

"They provide legal advice that takes into account practical considerations."

Chambers Asia Pacific 2019

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Introduction

Welcome to the 3rd edition of Going Concerns where we strive to bring you the latest updates on restructuring and insolvency law. In this issue, we provide:

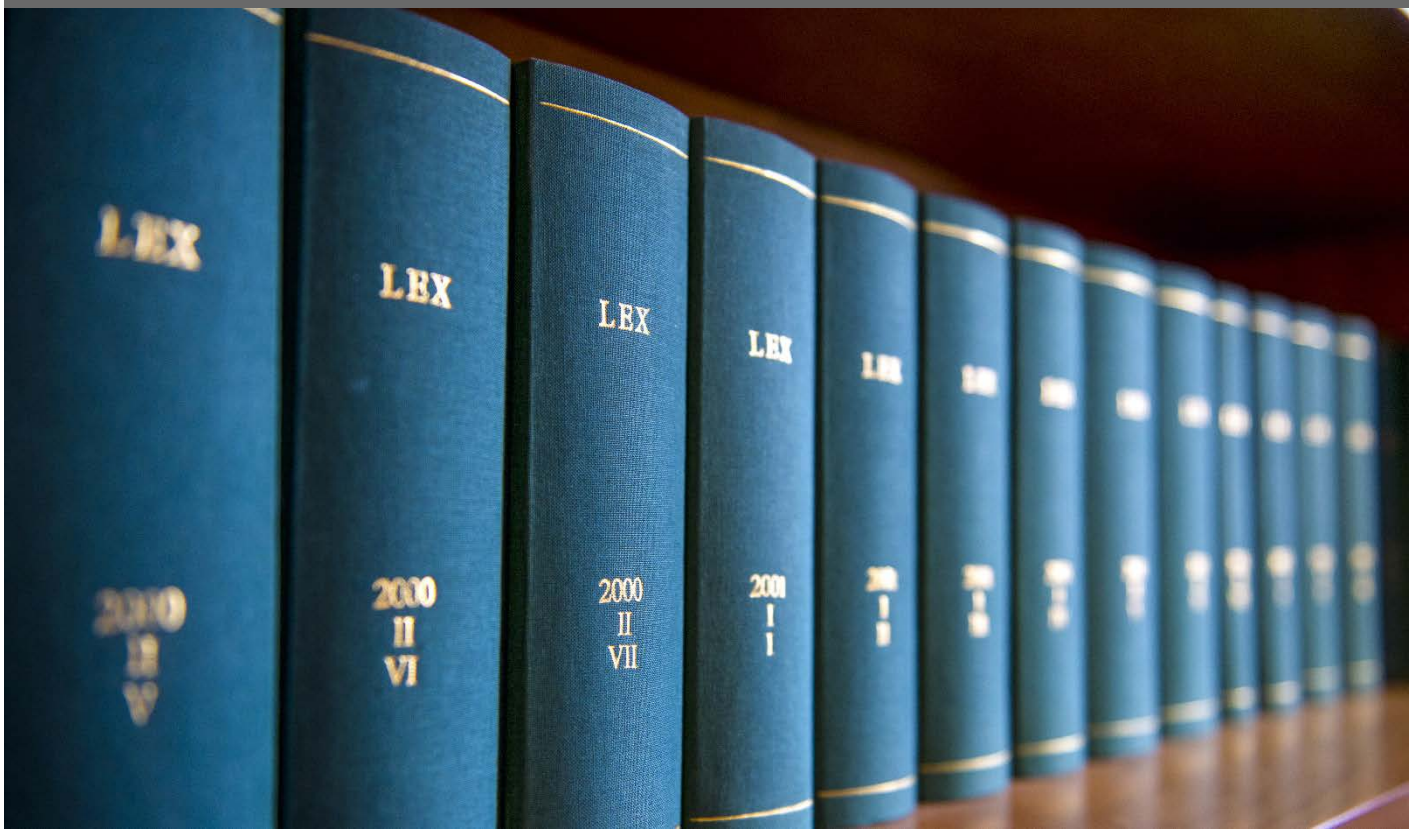
1. An update on the extent of financial disclosure that may be ordered against a company undergoing a scheme moratorium under s. 211B(6) of the Singapore Companies Act (Cap. 50);

2. A further commentary on the Insolvency, Restructuring and Dissolution Bill;

3. A commentary on the Singapore recognition process of foreign bankruptcies; and

4. A case study on *Sit Kwong Lam v Petrolimex Singapore Pte. Ltd* [2019] HKCA 1220, and the requirements that the Court will look at before granting a stay/ dismissal of a bankruptcy petition in Hong Kong and the impact in Singapore.

We hope you enjoy reading this issue as much as we have enjoyed preparing it. If you have any comments or would like to learn more about any topic, please feel free to contact us.



What is the extent of financial disclosure for a company under a scheme moratorium?

This article addresses the extent of financial disclosure that may be ordered against a company undergoing a scheme moratorium under s. 211B(6) of the Singapore Companies Act (Cap. 50) ("**Companies Act**"). For completeness, we also look at the types of financial disclosures available in the United Kingdom ("**UK**") and the United States ("**US**").

Singapore

Pursuant to s. 211(B)(6) of the Companies Act, the Singapore court may order the disclosure of financial information of the debtor company to allow its creditors to assess the feasibility of the intended or proposed scheme of arrangement. This may include:

1. a report on the valuation of each of the debtor company's significant assets;
2. if the debtor company acquires or disposes any property or grants security over any property – information relating to the acquisition, disposal or grant of security, such information to be submitted not later than 14 days after the date of the acquisition, disposal or grant of security;
3. periodic financial reports of the debtor company and its subsidiaries; and
4. forecasts of the profitability, and the cash flow from the operations, of the debtor company and its subsidiaries.

From experience however, the debtor company is usually reluctant to release much financial information (at least which may be necessary for the creditors to assess the feasibility of the intended or proposed scheme of arrangement) in fear that the released financial information would reveal the true extent of its financial downfall and drive away potential investors. Further, the types of financial disclosure as envisaged in s. 211(B)(6) of the Companies Act may simply not be robust enough for creditors.

This has led to a situation where the creditors are compelled to seek widened court-ordered financial disclosures and we had the opportunity to apply on behalf of a secured lender in this regard involving a local offshore marine services firm. In that matter, we successfully obtained, amongst others, an order requiring the debtor company to (in addition to those set out in s. 211(B)(6) of the Companies Act) provide periodic updates to creditors on the progress of restructuring in relation to proposed investors.

For completeness, the Singapore courts have previously granted disclosure of the following:

1 audited financial reports and management accounts (*Re IM Skaugen SE and other matters* [2019] 3 SLR 979 – which we were involved in);

2 financial models for certain projects; a cashflow forecast and valuation; liquidation analysis; and

3 a summary of investor search processes (*Hyflux Ltd v SM Investments Pte Ltd* [2019] SGHC 236).

Given the current state of financial disclosure in Singapore, we looked to other jurisdictions (being UK and US) to see how they have approached this subject.

United Kingdom

Similar to the Singapore approach, a statutory moratorium can be sought when a company is in administration. The primary objective of applying for administration of a company in the UK is to save the company so that it can continue to carry on its business.

Further to Rule 3.6(1) and Rule 3.6(3) of the Insolvency Rules 2016 in the UK, when applying to the English courts for the administration of the company, the applicant must submit a witness statement in support of the application stating the following:

1 the debtor company's financial position, specifying the debtor company's assets and liabilities;

2 details of any security known or believed to be held by its creditors;

3 a statement that an administrative receiver has been appointed if that is the case;

4 details of any insolvency proceedings in relation to the debtor company, including any petition that has been presented for the winding up of the company so far as known to the applicant; and

5 any other matters which, in the applicant's opinion, will assist the court in deciding whether to make such an order.

Once a company is in administration, pursuant to Paragraph 47(2) of the Insolvency Act 1986, any officer of the company may be required to provide a statement of affairs of the debtor company, including details of its assets, liabilities and creditors.

It would appear that both Singapore and UK prescribe similar types of financial disclosures but the US approach (as set out below) however provides a much clearer and comprehensive procedure for financial disclosures which could potentially be adopted in Singapore.

United States

In the US, a company can file for Chapter 11 proceedings under the United States Bankruptcy Code ("**Chapter 11**"). Chapter 11 may involve the reorganisation of a business and thus bears similarity to a company applying for a scheme of arrangement in Singapore.

Similar to the rehabilitative procedures in Singapore and the UK, when filing for bankruptcy under Chapter 11, unless the court orders otherwise, the debtor must file a series of prescribed forms, setting out the following:

1 a schedule of assets and liabilities;

2 a schedule of current income; and

3 expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs.

Thereafter, the debtor must also file a written disclosure statement and a reorganisation plan for the company. The disclosure statement must contain sufficient information on the assets, liabilities and business affairs of the company to allow a creditor to determine the company's plan of reorganisation. The information required is subject to the discretion of the court and the circumstances of the case.

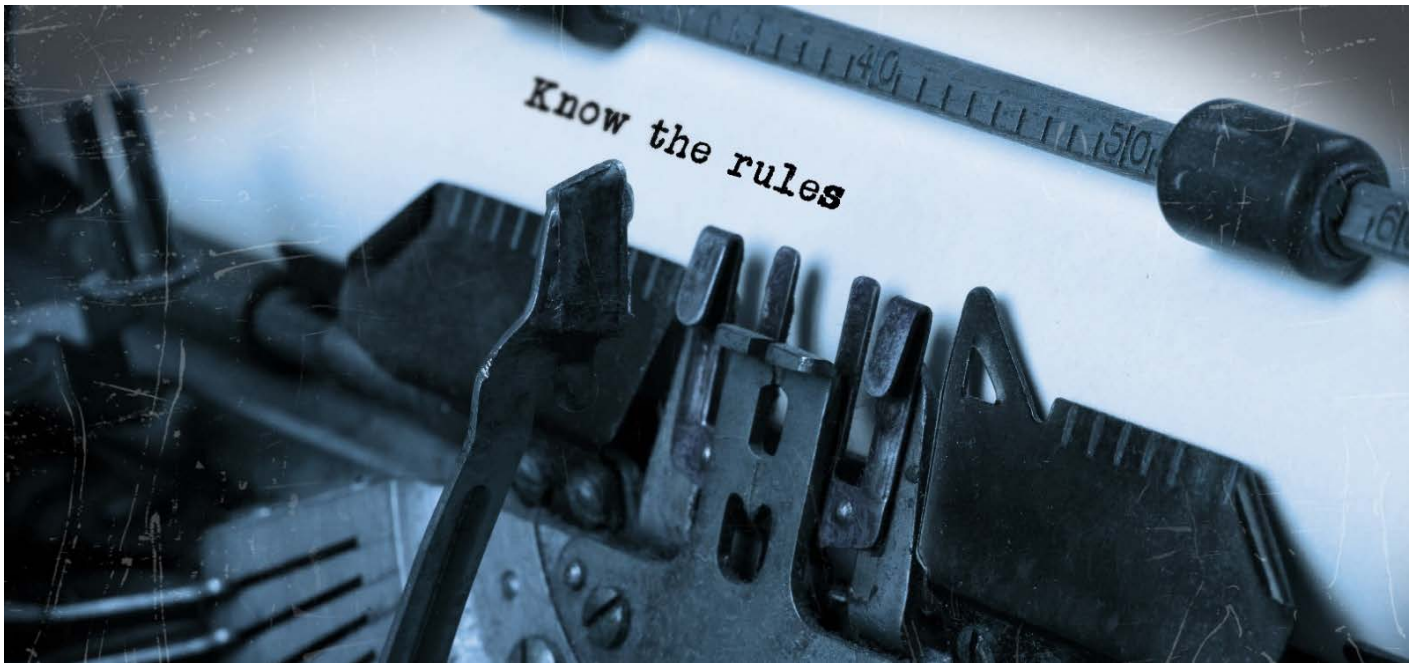
The procedure for financial disclosures in the US is much more detailed and clearer as compared to both the UK and Singaporean approach. This is because the prescribed forms under the US regime requires the debtor company to go into detail as regards the disclosure requirements as compared to the UK and Singaporean regimes which arguably, allows the debtor company to "fudge" the financial disclosures (as the requirements are more vague).

Conclusion

The disclosures available in Singapore bears much similarity to the UK. Given the comprehensive nature of the prescribed forms for a company filing for Chapter 11 in the US, there is arguably room for improvement with respects to the financial disclosures available to creditors in Singapore. However, we think this is unlikely to be adopted in Singapore for now given that a driving force behind the 2017 Companies Act amendments was to attract distressed companies to restructure their debts and liabilities from the US to Singapore – this probably came with a conscious decision to leave out the comprehensive US financial disclosure regime to create a more debtor friendly restructuring local landscape.

The Omnibus Bill: A major reform to Singapore's insolvency and restructuring system

The new Insolvency, Restructuring and Dissolution Bill (the "**Bill**") was introduced to the Singapore Parliament on 10 September 2018 and is part of a reform of Singapore's insolvency and restructuring landscape in accordance with recommendations made by the Insolvency Law Review Committee and the Committee to Strengthen Singapore as an International Centre for Debt Restructuring. As at the date of this article, the Bill has yet to come into force but may become so in 2020.



Our **briefing note** dated 5 October 2018 on the Bill previously addressed, amongst others, two major changes which the Bill will bring about in Singapore's insolvency and bankruptcy landscape: (1) the restriction on the enforcement of ipso facto clauses; and (2) the requirement on creditors to realise their security within 12 months after the commencement of the winding up of the company. We will be going through further amendments and their effect on the Singapore restructuring and insolvency landscape in this article.

Insolvency practitioners

The Bill introduces a new licensing and regulatory regime for persons acting as liquidators, judicial managers, receiver or manager of the property of a company or a trustee of a bankrupt's estate. This includes the minimum qualifications and conditions for the grant and renewal of licences as well as a

disciplinary framework for licence holders in breach of their duties as insolvency practitioners. With such a regime, this introduces a system of accountability and would likely raise the overall quality of services offered by insolvency practitioners.

Clarity on voidable transactions

The Bill codifies and consolidates the existing law on the Singapore Court's powers on voidable transactions. At present, voidable transactions for personal and corporate insolvency are governed largely by the Bankruptcy Act and the Companies Act (with the necessary modifications as regards corporate insolvency) which can cause some confusion as to which provisions would apply in corporate insolvency proceedings. Sections 361 to 366 and Sections 224 to 229 of the Bill now bring clarity by consolidating the provisions which deal with voidable transactions regarding both personal and corporate insolvency respectively in the Bill.

Further, the Bill introduces new provisions which allows liquidators to assign the proceeds of any action to relating to voidable transactions such as transactions at an undervalue or unfair preferences (see section 144(1)(g) of the Bill). This is read in conjunction with the Civil Law (Amendment) Act 2017 which abolished the tort of maintenance and champerty and allowed third party funding for, amongst others, insolvency proceedings. The Bill therefore provides clarity that such recovery actions relating to voidable transactions may be funded by third parties.

Winding up

Section 186 of the Bill empowers the Singapore Court to stay and/or terminate the winding up order of a company. This means the winding up order may be terminated and the Court may give directions for the resumption of the company's management and control of the company by its officers after the winding up has been terminated. By contrast, the Singapore Court presently only has powers to stay a winding up order pursuant to section 279 of the Companies Act and parties would have to seek a permanent stay to achieve the effect of terminating the winding up order.

Sections 209 and 210 of the Bill further provides a summary form of dissolution of a company where there is reasonable cause to believe that the realisable assets of the company are insufficient to cover the expenses of the winding up and the affairs of the company do not require any further investigation.

> This is a welcomed addition given that creditors may be reluctant to spend money to wind up a debtor company (in the present insolvency regime) when there is little prospect of recovery given the debtor company's lack of assets. This time and cost efficient method may be attractive to creditors seeking to wind up errant debtor companies swiftly.

Judicial management

As regards judicial management, the Bill brings about new reforms to judicial management and scheme of arrangement procedures alike. The Bill introduces an alternative method for a company to enter into judicial management. Under the existing provisions of the Companies Act, a company may only be placed under judicial management by the Court. Section 94 of the Bill provides an alternative 'out of court' procedure for a company to be placed into judicial management through a creditors' resolution. The Bill seeks to, through this new alternative procedure, reduce the costs, formality, stigma and time taken associated with obtaining a formal judicial management order.

Schemes of arrangement

Section 211H of the Companies Act introduced a cross class cram down mechanism for schemes of arrangement which was based on section 1129 of Chapter 11 of the US Bankruptcy Code ("**US Chapter 11**") in most aspects. In particular, section 211H of the Companies Act and section 1129 of the US Chapter 11 requires junior claims (i.e. claims that are subordinated to the claim of a creditor in the dissenting class) to not retain any property unless the more senior claims are paid in full (i.e. the absolute priority rule) (see section 211H(4)(b)(ii)(B) of the Companies Act and section 1129(2)(B)(ii) of the US Chapter 11). This means that shareholders (i.e. junior claimants) could not retain their shares unless the unsecured creditors (i.e. the more senior claimants) are paid in full.

In Singapore, there has been considerable difficulty in the application of section 211H cross class cram downs due to, amongst other reasons, the lack of a statutory mechanism to compulsorily divest shareholders of their shares in the debtor company. The cross class cram down was therefore dependent on shareholders

voluntarily divesting their shares, which is difficult to achieve in practice.

Section 70(4)(b)(ii)(B) of the Bill therefore seeks to address this issue by adding the words (as bolded underlined below):

"*where the creditors in the dissenting class are unsecured creditors, the terms of the compromise or arrangement must not provide for any creditor with a claim that is subordinate to the claim of a creditor in the dissenting class, or any member, to receive or retain any property* ***of the company*** *on account of the subordinate claim or the member's interest.*"

The addition of the words "*of the company*" therefore makes it clear that shareholders do not need to divest their shares before a cram down can be made. As Senior Minister of State for Law, Mr. Edwin Tong, mentioned at the Second Reading Speech on the Insolvency, Restructuring and Dissolution Bill, "*… the cram-down provisions introduced were "not concerned with adjustments to shareholder interests*."

That said, the principle behind the 'absolute priority rule' was to protect smaller creditors from being "squeezed out" by larger and senior creditors and shareholders acting together to force their own agenda through the reorganisation. Further, this rule is also a reflection of the general principle that creditors have priority in a liquidation scenario to recover from the debtor company before shareholders. It therefore remains to be seen whether this amendment by way of section 70(4)(b)(ii)(B) of the Bill will lead to smaller unsecured creditors having their claims sidelined in favour of the company's shareholders.

Conclusion

Overall, the Bill brings about a welcome change to restructuring and insolvency practitioners and local businesses in Singapore. By codifying existing restructuring and insolvency principles into a single Act, this removes the need to cross-reference restructuring and insolvency concepts amongst various statutes, in turn improving the accessibility of restructuring and insolvency practices in Singapore.

Recognition of foreign bankruptcies in Singapore

Unlike the recognition process of a foreign insolvency proceeding involving a corporation set out in the UNCITRAL Model Law on Cross-Border Insolvency (recently enacted under the Singapore Companies Act (Cap.50))there is little guidance (whether statute or case law) insofar as recognition in Singapore of a personal bankruptcy is concerned. We had the opportunity to be involved in the latter recognition process recently.

Background facts

Our clients were appointed as the joint and several trustees in bankruptcy of a Hong Kong resident ("**HK Bankrupt**") pursuant to a bankruptcy order ("**HK Bankruptcy Order**") by the High Court of the Hong Kong Special Administrative Region ("**HK High Court**").

In the course of our clients' investigations into the HK Bankrupt's affairs, our clients discovered that the HK Bankrupt held bank accounts with various Singapore banks. Our clients accordingly reached out to the various Singapore banks for assistance but despite providing copies of the HK Bankruptcy Order, the Singapore banks stated that they were unable to assist unless, amongst others, the HK Bankruptcy Order was recognised in Singapore.

Given the above, we were instructed to apply for recognition of the HK Bankruptcy Order and the application was sought on the grounds that the Singapore court had the inherent jurisdiction to recognise the HK Bankruptcy Proceedings pursuant to Order 92 Rule 4 of the Rules of Court (Cap. 322) and that the circumstances of the case were in favour of granting the recognition order.

Court's inherent jurisdiction pursuant to Order 92 Rule 4 of the Rules of Court (Cap. 322)

As mentioned, there is little guidance (whether statute or case law) in Singapore on the recognition process of foreign bankruptcies. There have however been a line of Singapore cases setting out the common law position on how to obtain recognition of foreign insolvency proceedings involving corporations.

In those cases, the Singapore courts adopted a modified universalist approach whereby the Singapore courts should, so far as is consistent with justice and public policy, cooperate with the courts in the country of principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.

To this end, the Singapore courts took the view that they could render assistance to foreign insolvency proceedings depending on circumstances (see *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd)* [2016] 5 SLR 787 ("***Taisoo***") citing *Beluga Chartering GmbH (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party* [2014] 2 SLR 815 ("***Beluga***")). Further, while the observations in *Beluga* were in the context of recognition of a foreign corporate insolvency order, *Taisoo* held that the same principles should apply to other forms of insolvency proceedings, including restructuring and rehabilitation. By extension, it was arguable that assistance should be rendered to foreign bankruptcies given that they are, similar to corporate insolvencies, collective proceedings to realise assets of the debtor in order to maximise recovery for the general body of creditors.

The circumstances were in favour of granting the recognition order

Next, the circumstances were in favour of granting the recognition order for 3 reasons:

1. It could not be disputed that the HK High Court had the jurisdiction to make the HK Bankruptcy Order given that the HK Bankrupt was domiciled in HK (holder of a HK identity card and had a HK residential address) and had submitted to the jurisdiction of the HK High Court (having filed his Statement of Affairs with the HK High Court).
2. There was a need for the recognition order to be granted. As mentioned, the Singapore banks refused to assist our clients, which inevitably hampered our clients' ability to complete their investigations into the affairs and assets of the HK Bankrupt and to further conduct an orderly resolution of the bankruptcy estate to satisfy the claims against the HK Bankrupt.
3. Lastly, the recognition order would not adversely affect the interests of creditors in Singapore. The HK Bankrupt did not disclose that he had creditors in Singapore in his Statement of Affairs and the recognition order was therefore unlikely to prejudice any local creditors.

Spanner in the works

As it turned out, the HK Bankrupt made an application to annul the HK Bankruptcy Order in the HK High Court before the recognition hearing. The Singapore court however agreed (at the recognition hearing) that until the HK Bankrupt was successful in annulling the HK Bankruptcy Order, there was no reason to stall recognition but keeping in mind the annulment possibility, the Singapore court granted a *limited* recognition – this allowed our clients to obtain assistance from the Singapore banks but with the restriction that the HK Bankrupt's Singapore assets were not to be dealt with or disposed of pending the disposal of the annulment application at first instance.

Heince Tombak Simanjuntak and others v Paulus Tannos and others [2019] SGHC 216 ("*Heince*")

Just one week after the recognition hearing against the HK Bankrupt, the Singapore court issued a written judgment for the recognition of a foreign (Indonesian) Bankruptcy Order (*Heince*).

The approach taken by the Singapore court in both cases are largely consistent, with the latter expounding further on the requirement that the foreign bankruptcy order must be final and conclusive. The requirements, as set out in *Heince*, for the recognition of a foreign bankruptcy order are as follows:

1. The foreign bankruptcy order is made by a court of competent jurisdiction.
2. The court must have jurisdiction on the basis of:
    a. the debtor's domicile or residence; or
    b. submission by the debtor to the jurisdiction of the court.
3. The foreign bankruptcy order must be final and conclusive (and the fact that the judgment may be subject to appeal would not be fatal to the judgment being final and conclusive).
4. No defences to recognition to apply.

Conclusion

There is a growing trend of cross-border bankruptcies as more individuals hold assets across multiple jurisdictions. Clarity as to how the Singapore courts would render assistance to a foreign personal bankruptcy is therefore a much welcomed addition and it will be interesting to see if the Singapore Parliament will eventually enact specific legislation for the recognition of personal bankruptcies, much like it did for foreign insolvency proceedings.

Staying / dismissing bankruptcy applications in HK on the basis of an arbitration clause: New requirement to take steps to commence arbitration?

Sit Kwong Lam v Petrolimex Singapore Pte. Ltd [2019] HKCA 1220 ("***Sit Kwong Lam***") is the latest case involving the troubled Brightoil group, in particular its former Chairman, Mr. Sit Kwong Lam ("**Debtor**"), and discusses the requirements that the Court will look at before granting a stay/dismissal of a bankruptcy petition in Hong Kong.

Background facts

The Debtor had executed a deed of personal guarantee dated 23 April 2018 ("**PG**") to Petrolimex Singapore Pte Ltd ("**Petitioner**") to guarantee the punctual payment of US$30,253,600 by Brightoil Petroleum (Singapore) Pte Ltd ("**Brightoil SG**") to the Petitioner on or before 10 July 2018. Brightoil SG failed to do so and requested for additional time. The Petitioner, Brightoil SG and Debtor thereafter entered into a settlement agreement on 12 July 2018 ("**Settlement Agreement**"). Pursuant to the Settlement Agreement, the Debtor executed an addendum ("**Addendum**") to the PG which had the following "arbitration" clause: "*All other terms and conditions of the PG, including the arbitration clause, shall remain unchanged and this Addendum shall constitute an integral part of the PG.*"

The Petitioner presented the bankruptcy petition on 23 October 2018. The Debtor opposed the bankruptcy and relied on, amongst others, the case of *Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449 ("***Lasmos***") to ask for the Court to exercise its discretion to stay or dismiss the petition due to the existence of an arbitration clause.

Harris J in *Lasmos* departed from previous authorities and held that a creditor's petition to wind up a company should "*generally be dismissed*" where three requirements are met – 1) if a company disputes the debt relied on by the petition; 2) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and 3) the company takes the step required under the arbitration clause to commence the contractually mandated dispute resolution process (which might include preliminary stages such as mediation in accordance with rule 32 of the Companies (Winding-Up) Rules, Cap 32H, demonstrating this ("**Step 3**"). *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)* [2015] Ch 589, upon which the *Lasmos* approach was based on, did not make any mention of the requirement of Step 3.

The Court of Appeal in *Sit Kwong Lam* appeared to agree that debtors must comply with the third *Lasmos* requirement as it would make no sense to dismiss or stay an insolvency petition on the mere existence of an arbitration agreement when the debtor has no genuine intention to arbitrate (referring to *But Ka Chon v Interactive Brokers LLC* [2019] HKCA 873). Debtors should therefore be discouraged from making opportunistic attempts to invoke *Lasmos* to delay bankruptcy / insolvency proceedings when there is no genuine intention to arbitrate.

> Ultimately, the Court of Appeal in *Sit Kwong Lam* found that the Debtor did not take any genuine steps to commence arbitration. Further, the PG itself did not have an arbitration clause and instead referred disputes to the Hong Kong courts.

While the Singapore courts have referred to the *Lasmos* case in 2 recent decisions (i.e. *VTB Bank (Public Joint Stock Co) v Anan Group (Singapore) Pte Ltd* [2018] SGHC 250 ("***VTB***") and *BWF v BWG* [2019] SGHC 81 ("***BWF v BWG***")), the Singapore courts have not discussed much (if any) on Step 3 and whether Step 3 will be adopted in Singapore. On this note, *VTB* and *BWF v BWG* address a separate interesting development (whether the applicable standard to stay insolvency proceedings is that of the triable issues standard (see *VTB*) or a *bona fide prima facie* standard (see *BWF v BWG*)) which we will be sure to cover in upcoming issues of Going Concerns.

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