THE ART OF THE PRE-PACK GUIDE

SECOND EDITION

Editors
Jacqueline Ingram and Ryan Cattle

The Art of the Pre-Pack

Second Edition

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Publisher's Note

Global Restructuring Review is delighted to publish this new edition of *The Art of the Pre-Pack*, one of our most popular technical guides.

'Pre-packs' – private negotiations followed by (the briefest) formal insolvency to cement the deal – remain a hot topic in restructuring across the world. While the term is universal, the details vary greatly according to location.

This volume aims to cut through the noise to the underlying common traits. As with so much in this field of professional practice, pre-packs often represent the market finding a solution faced with shortcomings in other mechanisms. In that sense, pre-packs have a certain evolutionary beauty but are also ephemeral – remove the flaws that make them necessary and they may cease to occur. While they are a feature of life, this book will help you master them.

We are grateful to the wisdom of the eminent practitioners who have distilled the art of the pre-pack for us, and we welcome your comments and feedback.

If you enjoy this book, you may be interested in its sister *The Art of the Ad Hoc*, also available on the GRR site and in print. Please write to us at insight@globalrestructuringreview.com for more information.

Last, my personal thanks to the team at Milbank, as editors of this guide, for their vision, and to my colleagues, particularly on the production side, for the elan with which they have brought it to life.

David Samuels
February 2022

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Pre-packs in the global context

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Singapore

Lauren Tang, Jeffrey Tanner and Chit Yee Ooi[1]

Singapore has in recent years sought to be an international centre for debt restructuring to address the demand for restructuring work in the Asia-Pacific region,[2] with major reforms initially set out in the Companies Act (Chapter 50) (the Companies Act) and now re-enacted into the Insolvency, Restructuring and Dissolution Act (No. 40 of 2018) (IRDA) (which came into force in 2020). The reforms appear successful, with an increasing number of foreign companies utilising Singapore's restructuring regime.

One particular reform was the introduction of pre-pack arrangements, with due consideration given to both UK and US systems: the US Chapter 11 pre-pack arrangement was ultimately adopted as it offered greater flexibility to the companies in designing a restructuring plan and retained court supervision of the process.[3]

Brief overview of key restructuring tools in Singapore

Pre-insolvency processes: scheme of arrangement and judicial management

While the major reforms are set out in the IRDA, the Companies Act should also be referred to when considering restructuring and insolvency.

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1 Lauren Tang is a partner, Jeffrey Tanner is a senior associate and Chit Yee Ooi is an associate at Stephenson Harwood (Singapore) Alliance. Singapore law aspects of this chapter were written by Lauren Tang and Chit Yee Ooi of Virtus Law LLP (a member of the Stephenson Harwood (Singapore) Alliance).

2 Ministry of Law, Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (20 April 2016) at [1.5]–[1.6].

3 ibid., [3.40].

Scheme of arrangement

A scheme of arrangement is a compromise or an arrangement between a company and its creditors or members that has been sanctioned by a court. The scheme of arrangement binds all parties, creditors or members, even if the creditor or member did not agree to the scheme.[4]

A company that wishes to enter into a scheme of arrangement will have to make an application to the court for the court to order a meeting of creditors to vote on the proposed arrangement.[5] At this stage, the company will need to disclose such information that would assist the court in determining whether and how the creditors' meeting is to be concluded, such as the classification of creditors, the proposal's realistic prospects of success and any allegation of abuse of process.[6]

If leave is granted to hold a creditors' meeting, the proposed arrangement will have to be approved by a majority in number, representing three-quarters in value, of the creditors or class of creditors present and voting either in person or by proxy.[7] In this regard, the creditors must be classified separately when their rights are so dissimilar to each other that they could not sensibly consult together with a view to their common interest (i.e., a creditor's position would improve or decline to such a different extent against other creditors simply because of the terms of the scheme, assessed against the most likely scenario in the absence of scheme approval).[8]

For example, in the case of *Re Econ Corp Ltd* [2004] 1 SLR(R) 273, where the proposed scheme offered to pay all creditors at least $4,000, it was held that creditors whose claims are $4,000 or less should be classed separately because they would be paid in full under the scheme; but in a winding up, their claims would rank *pari passu* with those of the other unsecured creditors.[9] On the other hand, in the case of *Pathfinder Strategic Credit LP and another v. Empire Capital Resources Pte Ltd and another appeal* [2019] 2 SLR 77, where two groups of creditors had rates of recovery differing by around 3 per cent, the court took the view that the

4 Section 210(3AA) of the Companies Act.

5 Section 210(1) of the Companies Act.

6 *Pathfinder Strategic Credit LP and another v. Empire Capital Resources Pte Ltd and another appeal* [2019] 2 SLR 77 (*Pathfinder v. Empire Capital*) at [50].

7 Section 210(3AB) of the Companies Act.

8 *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v. TT International Ltd and another appeal* [2012] 2 SLR 213 (*RBS v. TT International*) at [140].

9 *Re Econ Corp Ltd* [2004] 1 SLR(R) 273 at [81].

difference was not material, the two groups of creditors would be able to sensibly consult together with a view to their common interest and could therefore be classified together.[10]

After the creditors' meeting is held, the company will then attend before the court for a second time, and request that the court sanctions the proposed arrangement. Even if the company has acquired the requisite threshold of approval from the creditors of the proposed scheme in the meeting, the creditors who dissented during the meeting can appear before the court to voice their concerns or objections to the proposed scheme. The court has the discretion to decide if it wishes to approve the proposed scheme or grant its approval subject to such alterations or conditions as it thinks just.[11] For example, in the case of *Wah Yuen Electrical Engineering Pte Ltd v. Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629, the court refused to sanction the scheme as, among other reasons, the company did not provide sufficient information to its creditors to allow them to assess whether the returns under the proposed scheme were greater than what they could expect in a liquidation.[12]

The court may also order a revote of the proposed scheme, including reclassifying any creditor for the purposes of voting or revising the weight to be attached to the vote of any creditor at the further meeting.[13] This was done in the case of *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v. TT International Ltd and another appeal* [2012] 2 SLR 213.

Even if the company has not acquired the requisite threshold of approval of the proposed scheme in respect of all its classes of creditors, as long as the company has obtained the requisite threshold of approval in respect of one class of creditors, the company may apply to the court to cram down on the other classes of creditors that did not vote in favour of the scheme (i.e., the court approves the scheme despite the objection of a class of creditors).[14] The court can grant such order if a majority in number, representing three-quarters in value of the creditors meant to be bound by the proposed arrangement who were present and voting agreed to the proposed arrangement, and the court is satisfied that the proposed

10 *Pathfinder v. Empire Capital* at [90].

11 Section 210(4) of the Companies Act.

12 *Wah Yuen Electrical Engineering Pte Ltd v. Singapore Cables Manufacturers Pte Ltd* [2003] 3 SLR(R) 629 at [37].

13 Section 69 of the IRDA.

14 Section 70(1) of the IRDA.

arrangement does not discriminate unfairly between the classes of creditors and is fair and equitable to the dissenting class.[15] Thus far, there is no reported case of such cram-down provision being used in Singapore.

The requirement for court sanction therefore ensures that minority creditors remain protected against any proposed restructuring to be undertaken by the company; and the company will not be unfairly deprived of restructuring by minority creditors.

Moratorium

Where the company proposes, or intends to propose, a scheme of arrangement, the company may apply to the court for a moratorium to be imposed, for such period as the court thinks fit.[16] This moratorium will usually last for about three to six months (though it may be extended by application to court) and is intended to provide the company with some breathing space to devise a scheme of arrangement.[17] The company may only make an application for a moratorium if, among others, the company makes or undertakes to the court to make an application to the court for a creditors' meeting to be summoned for the purposes of voting for a scheme of arrangement.[18] Further, the company must provide the court with information relating to creditor support of the proposed scheme of moratorium.

If a scheme of arrangement has been proposed, the company must provide evidence of creditor support of the proposed scheme and an explanation of the importance of that support to the proposed scheme to assist the court to make a broad assessment as to whether there was a reasonable prospect that the proposed arrangement would work and be acceptable to the general run of creditors. If the scheme has yet to be proposed to the creditors, the company must provide evidence of creditor support of the moratorium and the importance of the same; and a brief description of the intended scheme of arrangement, containing sufficient particulars to enable the court to assess whether the intended scheme of arrangement is feasible and merits consideration by the company's creditors.[19] The court would likely grant the moratorium if the statutory requirements are fulfilled and the application was brought *bona fide*.

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15 Section 70(3) of the IRDA.

16 Section 64(1) of the IRDA.

17 *The Ocean Winner and other matters* [2021] 4 SLR 526 at [49].

18 Section 64(2) of the IRDA.

19 Section 64(4) of the IRDA; *Re IM Skaugen SE and other matters* [2019] 3 SLR 979 (*Re IM Skaugen*) at [48(c)], [58].

Critically, upon such an application being made, the company gets the benefit of an automatic moratorium for 30 days.[20] A creditor may apply to the court for an order that such an automatic moratorium does not apply to the company,[21] and the court must grant the creditor's application if the company did not provide the court with the requisite information it was supposed to in its application for the moratorium.[22]

The moratorium can be extended to restrain conduct outside Singapore. However, this does not mean that the moratorium is 'extraterritorial'; the party to be restrained will still need to be in Singapore or be within the jurisdiction of the court.[23]

A related company may also apply to the court for a similar moratorium to be granted to it on, among others, the basis that the related company plays a necessary and integral role to the scheme of arrangement; the scheme of arrangement will be frustrated if actions are taken against the related company; and the creditors of the related company will not be unfairly prejudiced by the making of the order.[24]

Super priority financing

A company may also apply to the court for an order that if the company is wound up, the debt arising from any rescue financing obtained or to be obtained by the company is to have priority over other debts of the company.[25] The rescue financing must be necessary for the survival of the company as a going concern or to achieve a more advantageous realisation of the assets of the company, than on a winding up.[26]

In deciding whether to grant super priority, the court will consider, among other factors, whether the company has made reasonable attempts to try to secure financing on a normal basis (i.e., without any super priority); or whether the circumstances reasonably dictate that alternative sources of financing would be unavailable since the company was facing financial difficulties.[27]

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20 Sections 64(8) and 64(14) of the IRDA.
21 Section 64(10) of the IRDA.
22 Section 64(11) of the IRDA.
23 *Re IM Skaugen* at [39].
24 Section 65(1) and 65(2) of the IRDA.
25 Section 67(1) of the IRDA.
26 Section 67(9) of the IRDA.
27 *Re Attilan* [2018] 3 SLR 898 at [61], [63].

In the case of *Re Design Studio Group Ltd and other matters* [2020] 5 SLR 850, the court granted an order for the rescue financing to be given super priority even though part of the rescue financing provided was to pay off existing debt because the court considered, among others, that the proposed financing was in the creditors' best interests.[28] Without the financing, the company would likely go into liquidation and there is a possibility of a nil return to no more than 3.94 cents to a dollar to the unsecured creditors;[29] on the other hand, the proposed financing would enable the company to perform its projects and the unsecured creditors to receive an interim distribution of up to 8.12 cents to a dollar.[30]

Judicial management

Judicial management is another useful restructuring tool. Unlike in a scheme, a third-party licensed insolvency practitioner (the judicial manager) exercises all powers conferred, and performs all duties imposed on the directors; he or she manages the company in place of the directors.[31] This is particularly useful when the creditors no longer trust the directors to run the company, but still believe that the company may be rehabilitated.

The role of the judicial manager is to achieve one of the following purposes: (1) the survival of the company as a going concern; (2) the company's entry into a scheme of arrangement; or (3) a more advantageous realisation of the company's assets or property than on a winding up.[32] The judicial manager must therefore, within 90 days of the company's entry into judicial management, lay a copy of the statement of proposals for achieving one or more of the above-mentioned purposes before a meeting of the company's creditors for approval.[33] If the proposals are not approved by a majority in number and value of the creditors (present and voting either in person or by proxy), the court may discharge the company from judicial management or make such other order as it thinks fit.[34]

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28 *Re Design Studio Group Ltd and other matters* [2020] 5 SLR 850 at [64].
29 ibid., at [65].
30 ibid., at [40].
31 Section 99(2) of the IRDA.
32 Section 89(1) of the IRDA.
33 Section 107(1) of the IRDA.
34 Section 108 of the IRDA.

A company, or its creditors, may, through an application to court or a creditors' resolution, place a company under judicial management if it considers that the company is, or is likely to become, unable to pay its debts; and there is a reasonable probability of achieving one of the above-mentioned purposes.[35]

A company is usually placed under judicial management for a period of 180 days, though the judicial manager may obtain an extension of its term of office (and therefore the length of the judicial management period) by making an application to court or obtaining the approval of a majority in number and value of the creditors of the company.[36] The judicial manager also has a duty to apply to the court to discharge the company from judicial management if it appears to the judicial manager that one or more of the purposes of judicial management has been achieved, or none of the purposes is capable of achievement.[37]

Moratorium

Where a company makes an application for a judicial management order or has appointed an interim judicial manager in a judicial management to be commenced by a creditors' resolution, an automatic moratorium arises.[38] Subsequently, when the company enters judicial management, the company will continue to be subject to a moratorium.[39]

Super priority financing

Similar to that of a scheme of arrangement, the judicial manager may also apply to the court for an order that, if the company is wound up, the debt arising from any rescue financing obtained or to be obtained is to have priority over the other debts of the company.[40]

Insolvency processes: liquidation

There are three forms of liquidation: court-ordered winding up, creditors' voluntary liquidation and members' voluntary liquidation. In all three forms of liquidation, a licensed third-party practitioner or the Official Receiver will act as a liquidator and manage the company. He or she must take into his or her custody

35 Sections 90 and 94 of the IRDA.
36 Section 111 of the IRDA.
37 Section 112(1) of the IRDA.
38 Section 95(1) of the IRDA.
39 Section 96(4) of the IRDA.
40 Section 101(1) of the IRDA.

or control all the property and things in action to which the company is or appears to be entitled.[41] The aim of liquidation is to realise the assets of the company and distribute the same to the creditors of the company.

Court-ordered winding up

The company, its director, creditor or contributory may apply to court for the company to be wound up.[42] In particular, the creditor may do so on the grounds that the company is unable to pay its debts.[43] A company is deemed to be unable to pay its debts if the creditor has served a written demand on the company of more than S$15,000 that remains unsatisfied after three weeks; or if the court is satisfied that a company is unable to pay its debts after taking into account the contingent and prospective liabilities of the company.[44]

At the time of application to court and prior to the winding-up order being made, the applicant may also apply to court to stay or restrain further proceedings in the action or proceeding.[45] After a winding-up order has been made, no action or proceeding may be proceeded with or commenced against the company except by the leave of the court.[46]

Creditors' voluntary liquidation

A company that is insolvent may also wind itself up voluntarily. The process is first through a special resolution of the company, and second through a resolution by the creditors.

The voluntary winding up commences where a provisional liquidator has been appointed or at the time of the passing of the resolution for winding up.[47] The company must cease to carry on its business, except so far as is required for the beneficial winding up of the company.[48] At such point, no action or proceeding may be proceeded with or commenced against the company except by the leave of the court.[49]

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41 Section 140(1) of the IRDA.
42 Section 124(1) of the IRDA.
43 Section 125(1)(e) of the IRDA.
44 Section 125(2) of the IRDA.
45 Section 129 of the IRDA.
46 Section 133 of the IRDA.
47 Section 161(6) of the IRDA.
48 Section 162(1) of the IRDA.
49 Section 170(2) of the IRDA.

Members' voluntary liquidation

A company that is solvent may wind itself up voluntarily by a special resolution of the company. The directors of the company must make a declaration to the effect that the company will be able to pay its debts in full within a period not exceeding 12 months after the commencement of the winding up.[50] As a director who makes such a declaration without having reasonable grounds will be guilty of an offence,[51] the directors would usually prefer to wind the company up through a court-ordered winding up or creditors' voluntary liquidation.

Can a restructuring be implemented on a pre-packaged basis?

Pre-pack scheme of arrangement

Recent reforms in 2017 have allowed for the scheme of arrangement to be implemented on a pre-pack basis. It was considered that pre-packs could generate significant time and cost savings and would allow for large corporate debtors to restructure their debts in large and complex restructurings, or the restructuring plan to be approved swiftly to preserve the business operations of the debtor.[52] A pre-pack scheme can be approved within two months from application.

A pre-pack scheme of arrangement allows for a court to sanction a scheme of arrangement even though no meeting of creditors has been ordered by the court.[53] This means that instead of making two applications to the court (i.e., once for the court to hold a creditors' meeting and another for the court to sanction the scheme), the company will only need to make one application to the court (i.e., once for the court to sanction the scheme). However, the court will only sanction the scheme of arrangement if (1) the company has provided the creditors that are meant to be bound by the arrangement with the relevant information necessary for the creditors to make an informed decision (e.g., information about the company's property, assets and business; how the scheme of arrangement will affect the rights of the creditors; and any material interests of the directors in the scheme); (2) the notice of the company's application to the court has been published to the public and sent to each creditor meant to be bound by the scheme; and (3) the court is satisfied that had a meeting of creditors been summoned, the

50 Section 163(1) of the IRDA.

51 Section 163(4) of the IRDA.

52 Ministry of Law, Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (20 April 2016) at [3.33].

53 Section 71(1) of the IRDA.

company would have obtained the requisite level of support from its creditors as would be required in a normal scheme of arrangement (i.e., a majority in number representing three-quarters in value of the creditors or class of creditors).[54]

To demonstrate that the proposed scheme has the requisite level of support from the company's creditors, the company may solicit votes from its creditors prior to the application to court,[55] or use lock-up or creditor-support agreements.[56]

To maintain some degree of protection of the creditors, the cram-down provision that is available under an ordinary scheme of arrangement is not available in a pre-pack scheme of arrangement.[57]

Simplified Debt Restructuring Programme

With businesses facing financial distress arising from the covid-19 pandemic, there have also been temporary reforms to assist micro and small companies that require support to restructure their debts to rehabilitate their business, such as the Simplified Debt Restructuring Programme (SDRP).[58] The SDRP is adapted from the existing pre-pack scheme of arrangement under the IRDA. Though the SDRP was initially intended to be only applicable until 28 July 2021, it has now been extended for a further 12 months to 28 July 2022.[59]

A company may make an application to the Official Receiver for itself to be placed under the SDRP.[60] To be accepted into the SDRP, the company's annual sales turnover must not exceed S$10 million; it must not have more than 30 employees and 50 creditors; and its liabilities must not exceed S$2 million.[61] Further, the company's circumstances must not make it unsuitable for acceptance

54 Section 71(3) of the IRDA.

55 Ministry of Law, Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (20 April 2016) at [3.41].

56 Manoj Pillay Sandrasegara and Sim Kwan Kiat, Jurisdictional Report Singapore at [61].

57 Ministry of Law, Ministry's Response to Feedback from Public Consultation on the Draft Companies (Amendment) Bill 2017 to Strengthen Singapore as an International Centre for Debt Restructuring (27 February 2017) at [9.3.1].

58 Ministry of Law, Simplified Insolvency Programme (5 October 2020) at [2] and [5].

59 Ministry of Law, Extension of Application Period for the Simplified Insolvency Programme (26 July 2021) at [1] <https://www.mlaw.gov.sg/news/press-releases/extension-of-application-period-for-simplified-insolvency-programme#:~:text=Extension%20of%20Application%20Period%20for%20the%20Simplified%20Insolvency%20Programme,-26%20JUL%202021&text=The%20Ministry%20of%20Law%20(%E2%80%9CMinLaw,the%20current%2028%20July%202021.> (accessed on 2 September 2021).

60 Section 72E(1) of the IRDA.

61 Section 72F(2) of the IRDA.

into the programme. Such circumstances include if it was already undergoing an insolvency or restructuring proceeding such as winding up, judicial management or scheme of arrangement.[62]

Once the company is accepted into the SDRP, a third-party restructuring adviser will by appointed to assist the company in formulating a proposed arrangement with its creditors; seek the creditors' agreement for the proposed scheme; and apply to court for sanction of the proposed scheme.[63] In determining whether to sanction the scheme, the court must be satisfied that had a meeting been held, a majority of at least two-thirds in value of the creditors or class of creditors, present and voting, would have voted in favour of the scheme. The threshold for the court's sanction is therefore lower than that of a pre-pack scheme of arrangement, which requires a majority of at least three-quarters in value of the creditors or class of creditors.

An SDRP is meant to last for only 90 days, though the company may make an application to the Official Receiver to extend the default period once, not exceeding 30 days.[64] It is therefore intended that the restructuring adviser will assist the company in making an application to the court for the approval of the scheme within the 90 days.

Case study: Hoe Leong Corporation Ltd. (Hoe Leong)

Hoe Leong was the first company to obtain the court's sanction of a pre-pack scheme of arrangement under Section 211I of the Companies Act (re-enacted in largely the same terms under section 71 of the IRDA) and this was done in around two months.[65]

Overview of pre-restructuring structure

At the end of November 2017, Hoe Leong had owed about S$63 million to its bank creditors and S$14 million to its controlling shareholder, Hoe Leong Co. (Pte) Ltd. Hoe Leong proposed a scheme of arrangement, seeking to restructure

62 Section 72F(3) of the IRDA.

63 Section 72L of the IRDA.

64 Section 72Q of the IRDA.

65 Debby Lim, 'Singapore's First "Pre-Packaged" Scheme of Arrangement' (5 February 2021) <https://ccla.smu.edu.sg/sgri/blog/2021/02/06/singapores-first-pre-packaged-scheme-arrangement> (accessed on 5 September 2021).

its debts of about S$20 million as vessel loans and spare part loans to be repaid by the group and extinguish the remaining debt through the allotment, issuance and distribution of new shares in the company.[66]

Overview of implementation options

Hoe Leong successfully obtained the court's sanction of the scheme in just over two months from the issuance of the scheme document. In planning for the application of the pre-pack scheme of arrangement, Hoe Leong considered the Procedural Guidelines for Prepackaged Chapter 11 Cases in the United States Bankruptcy Court for the Southern District of New York (Chapter 11 Procedural Guidelines).[67]

Process to achieving 'pre-packaged deal'

On 17 November 2017, Hoe Leong issued the scheme document (along with the explanatory statement, ballot form and proof of debt) to its scheme creditors.[68]

As one of the factors for the court's sanction of the proposed scheme of arrangement is whether the proposed scheme would have been approved by the requisite majority in number representing three-quarters in value of the creditors had a meeting of creditors been called, Hoe Leong sought to use the ballot forms (which had been adapted from the Chapter 11 Procedural Guidelines) to provide such evidence of creditor support.[69]

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66 Hoe Leong, Proposed Scheme of Arrangement – Overview of the Proposed Scheme of Arrangement; Filing of Moratorium Application (23 November 2017) at [2] <https://links.sgx.com/FileOpen/20171123%20-%20Hoe%20Leong%20-%20Ann%20OverviewofSOA_FINAL.ashx?App=Announcement&FileID=479534> (accessed 5 September 2021).

67 Debby Lim, 'Singapore's First "Pre-Packaged" Scheme of Arrangement' (5 February 2021) <https://ccla.smu.edu.sg/sgri/blog/2021/02/06/singapores-first-pre-packaged-scheme-arrangement> (accessed on 5 September 2021).

68 Hoe Leong, Proposed Scheme of Arrangement (17 November 2017) at [1] <https://links.sgx.com/FileOpen/HLC%20-%20Scheme%20of%20Arrangement.ashx?App=Announcement&FileID=479089> (accessed 5 September 2021).

69 Shook Lin and Bok LLP, 'Singapore's first "pre-packaged" scheme of arrangement' (April 2018) <https://shooklin.com/images/publications/2018/Apr/Singapores-first-pre-packaged-scheme-of-arrangement.pdf> (accessed on 5 September 2021).

The deadline for the scheme creditors to return the completed ballot form was initially set on 4 December 2017, but was subsequently extended to 7 December 2017.[70] The intention behind the extension of time appeared to be to allow Hoe Leong to be guided by the Chapter 11 Procedural Guidelines, to provide 21 days from the mailing of the scheme documents to the deadline for voting.

The creditors were classified into two categories: secured creditors and unsecured creditors. Some of the secured creditors were classified together with the unsecured creditors in respect of the unsecured portion of their debt because it was considered that the rights of the secured creditors in respect of the unsecured portion of their debt was sufficiently similar to that of the unsecured creditors.[71]

It was found that there was overwhelming support for the scheme; Hoe Leong therefore proceeded to make the application on 5 January 2018.[72] The court heard the application on 22 January 2018 and approved the scheme of arrangement.[73] The main issues that the court considered were whether (1) the statutory requirements of Section 211I of the Companies Act had been complied with; (2) adequate notice was provided to the scheme creditors; and (3) the scheme creditors were properly classified for the purposes of voting.[74]

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70 Hoe Leong, Proposed Scheme of Arrangement – Extension of Time for Submission of the Ballot Forms by the Scheme Creditors (5 December 2017) <https://links.sgx.com/FileOpen/HLC%20-%20Extension%20Of%20Time.ashx?App=Announcement&FileID=480947> (accessed on 5 September 2021).

71 Debby Lim, 'Singapore's First "Pre-Packaged" Scheme of Arrangement' (5 February 2021) <https://ccla.smu.edu.sg/sgri/blog/2021/02/06/singapores-first-pre-packaged-scheme-arrangement> (accessed on 5 September 2021).

72 Hoe Leong, Proposed Scheme of Arrangement – Application for Court's Approval of the Scheme (5 January 2018) <https://links.sgx.com/FileOpen/HLC_Application%20for%20Approval.ashx?App=Announcement&FileID=484332> (accessed on 5 September 2021).

73 Hoe Leong, Proposed Scheme of Arrangement – Court Approval of Proposed Scheme of Arrangement (22 January 2018) <https://links.sgx.com/FileOpen/HLC%20-%20Court%20approval%20of%20Scheme.ashx?App=Announcement&FileID=485997> (accessed on 5 September 2021).

74 Shook Lin and Bok LLP, 'Singapore's first "pre-packaged" scheme of arrangement' (April 2018) <https://shooklin.com/images/publications/2018/Apr/Singapores-first-pre-packaged-scheme-of-arrangement.pdf> (accessed on 5 September 2021).

Implementation and outcome

The scheme of arrangement was successfully implemented, with the proofs of debt of the scheme creditors being adjudicated by 7 May 2018[75] and the shares issued to the scheme creditors on 8 May 2018.[76]

Case study: Re DSG Asia Holdings Pte Ltd (DSG Asia)

DSG Asia is the first company whose application for a pre-pack scheme of arrangement was reported to be refused by the court.

Overview of pre-restructuring structure

DSG Asia is one of nine companies within a group of companies, whose ultimate holding company is Design Studio Group Ltd (the DSG Group).[77] The DSG Group was in financial difficulties; and each of the nine companies proposed a scheme of arrangement to its creditors with the schemes being inter-conditional on each other.[78] It was contemplated that the assets of the DSG Group could be pooled together for the restructuring and redistribution to creditors.[79] However, the schemes fell through as six out of nine of the companies were unable to obtain the requisite level of creditor support for the schemes.[80]

Overview of implementation options

The DSG Group therefore sought to restructure its debts in a different manner. In late February 2021, DSG Asia executed a deed poll to be the primary obligor of all claims made against the DSG Group, before proceeding to propose a pre-pack scheme of arrangement.[81]

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75 Hoe Leong, Proposed Scheme of Arrangement – Final Proof of Debt and Issue Price of Scheme Shares (7 May 2018) <https://links.sgx.com/FileOpen/HLC%20-%20Final%20POD.ashx?App=Announcement&FileID=504378> (accessed on 5 September 2021).

76 Hoe Leong, Proposed Scheme of Arrangement – Listing and Quotation of the Scheme Shares (8 May 2018) <https://links.sgx.com/FileOpen/HLC_Ann%20-%20LQN.ashx?App=Announcement&FileID=504741> (accessed on 5 September 2021).

77 *Re DSG Asia Holdings Pte Ltd* [2021] SGHC 209 at [3].

78 ibid., [4].

79 ibid., [4].

80 ibid., [7].

81 ibid., [8].

Process to achieving a 'pre-packaged deal'

In early March 2021, DSG Asia began the vote solicitation for the pre-pack scheme, and votes continued to be accepted until late April 2021.[82] DSG Asia was able to achieve the requisite level of creditor support for the pre-pack scheme.

When the creditors raised questions as to the inclusion of related creditors' votes in the new vote solicitation, the DSG Group informed the creditors that voting by the related creditors was no longer a live issue as the related creditors' claims had been assigned to a potential white knight, Allington Advisory Pte Ltd (Allington).[83]

In May 2021, DSG Asia proceeded to make an application for the court's sanction of the pre-pack scheme.[84] In June 2021, Allington entered into a binding term sheet whereby Allington would invest and acquire a majority stake in the holding company of the DSG Group, and provide emergency working capital to the companies in the DSG Group, with the facility being secured by various assets of the DSG Group.[85]

In determining whether to sanction the scheme, the court held that the applicants for a pre-pack scheme will only need to establish a clear case that the statutory requirements have been fulfilled. The court recognised that the statutory framework is meant to expedite matters for the applicant; and a stricter approach may be unduly narrow.[86]

The court's decision in DSG Asia's application turned on two issues: first, the adequacy of DSG Asia's disclosure of information to its creditors; and second, the classification of Allington for the purposes of voting.[87]

On the issue of the adequacy of DSG Asia's disclosure of information, DSG Asia had not disclosed the purchase price at which Allington acquired the related creditors' rights. The court held that the purchase price was information necessary to enable the creditors to make an informed decision of whether to agree to the scheme because it would allow the creditors to assess whether the scheme treated them fairly in comparison to Allington.[88] DSG Asia's argument that it was Allington that refused to consent to the disclosure on the basis that it is commercially sensitive information, and so the non-disclosure should not be held

82 ibid., [9].
83 ibid., [10].
84 ibid., [12].
85 ibid., [11].
86 ibid., [31].
87 ibid., [15].
88 ibid., [38]–[39].

against DSG Asia, failed because adequate disclosure is a requirement for DSG Asia to make an application for the court's sanction of the pre-pack scheme of arrangement.[89]

On the issue of the classification of Allington for the purposes of voting, the court held that Allington's interest as a potential investor was relevant to the classification of creditors because Allington would only be able to acquire DSG Asia if the scheme was approved.[90] It was therefore held that Allington should be placed in a separate class for the purposes of voting. As a result, DSG Asia could not obtain the requisite level of support from its creditors.[91]

Owing to the issues relating to the inadequacy of DSG Asia's disclosure of information to its creditors and Allington's classification for voting purposes, DSG Asia's application for the court's sanction of a pre-pack scheme of arrangement was refused.

Other considerations of the court

For completeness, the court accepted that Allington's role as a rescue financier was irrelevant to the issue of classification, as its claim as a rescue financier was excluded from the scheme of arrangement.[92]

Further, the court accepted that the fact that the original nine applications for scheme of arrangements failed and the DSG Group had then proposed a pre-pack scheme of arrangement was not in and of itself an indication of lack of *bona fides* or an abuse of process. The court will consider whether any assignment of debts was genuine and made at arm's length.[93]

The DSG Group's use of the deed poll structure to consolidate the claims against the companies through the pre-pack scheme was also not in and of itself a basis for declining to approve the scheme. The court recognised that the scheme manager had explored other alternatives, including refinancing and sale of the DSG Group's business, and it was only after the scheme manager had found them to be practically unachievable and not feasible that the scheme manager landed on using the deed poll to consolidate the debts.[94]

89 ibid., [40]–[41].
90 ibid., [60].
91 ibid., [46].
92 ibid., [61].
93 ibid., [65]–[66].
94 ibid., [73].

Conclusion

With the adoption of the pre-pack scheme of arrangement in Section 71 of the IRDA, an increasing number of companies can be seen availing themselves of the new restructuring process – around five companies have applied to the court for sanction of a pre-pack scheme from 2020 to 2021 each year, in comparison to only one company in 2019.

Along with the introduction of the SDRP, which incorporates the process of the pre-pack scheme of arrangement, it is evident that the reforms are pushing towards more efficient manners of restructuring and insolvency processes. At the moment, the SDRP is only a temporary measure to deal with the impact of the covid-19 pandemic. A possible reform could be to make the SDRP a permanent measure.

APPENDIX 1

About the Authors

Lauren Tang
Stephenson Harwood (Singapore) Alliance

Lauren is a partner at Stephenson Harwood (Singapore) Alliance an experienced commercial litigator with a focus on restructuring and insolvency.

Her highlights include advising and assisting one of the first foreign companies in successfully obtaining a scheme moratorium after the 2017 amendments to the Singapore Companies Act (Cap. 50) (which resulted in the first reported judgment on the requirements of a scheme moratorium); representing a major secured lender on the collapse of a well-known Singapore oil trader (Hin Leong Trading); advising on one of the first pre-pack schemes approved under section 71 of Singapore's Insolvency, Restructuring and Dissolution Act since it came into effect in July 2020; and acting for the agent bank of a syndicate of banks in the restructuring of the obligations of a business trust through the placing of its trustee manager under a scheme of arrangement, which was the first of its kind.

She has also acted for a global freight forwarder in a complex Singapore High Court matter involving allegations of breach of duty of care; acted for a Singapore public listed company and its subsidiary in a complicated vessel-related dispute and acted for a cryptocurrency purchaser against a distributor in a successful SIAC arbitration.

Jeffrey Tanner
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Jeffrey is a senior associate at Stephenson Harwood (Singapore) Alliance and is recognised as a leading transactional lawyer known for his expertise in banking, finance and marine and energy transactional matters.

He specialises in all aspects of banking and finance including asset finance, finance leasing, project finance, mezzanine finance, seller credit finance, corporate finance, ECA finance (with a particular focus on K-sure, KOBC, Sinosure and GIEK) and limited recourse finance.

Jeffrey has significant experience of advising on restructurings, schemes of arrangement and distressed debt matters, chartering, operation and maintenance, joint ventures, framework agreements, joint development agreements (including LNG-to-gas projects), loan portfolio sales, sale and leasebacks and JOLCO structures.

With over a decade of private practice experience, Jeffrey has built a strong reputation in the Asia-Pacific region where he has been based since 2012.

Jeffrey is recognised as a 'Recommended Lawyer' in both Asset Finance and Shipping categories in *The Legal 500 Asia Pacific*.

Chit Yee Ooi
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Chit Yee is an associate at Stephenson Harwood (Singapore) Alliance with a focus on commercial litigation and dispute resolution.

She has assisted in a broad variety of contentious matters ranging from contractual disputes to defamation and enforcement actions; and in advising clients on investigations, and insurance and employment contracts.

Chit Yee also has experience in restructuring and insolvency, wherein she assisted in advising on one of the first pre-pack schemes approved under section 71 of Singapore's Insolvency, Restructuring and Dissolution Act since it came into effect in July 2020; the recognition of foreign restructuring proceedings and foreign judgments in Singapore; and the scheme manager of a petroleum company on the adjudication of proofs of debt.

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'Pre-packs' remain a hot topic in the world of restructuring but the details differ greatly depending on where one practises. Until now, there hasn't been a book that cuts through the surface elements to the underlying common traits. This guide solves that.

The Art of the Pre-Pack draws on the wisdom of 30 pre-eminent practitioners from around the world to distil the essence of a successful pre-pack. It is a companion to Global Restructuring Review's *The Art of the Ad Hoc*, on how to work successfully with the ad hoc committees. Find both volumes on www.globalrestructuringreview.com.

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