SQUIRE PATTON BOGGS

Substantial Connections and Extended Moratoriums

Why the Insolvency, Restructuring and Dissolution Act 2018 (IRDA) May Continue to Attract Restructuring Proponents to Singapore

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The economic landscape continues to remain challenging, or, in some cases, looks to be getting worse, thereby impacting trading conditions across borders. It is likely that in most jurisdictions, trading conditions will worsen before they stabilise and, ultimately, improve.

Many businesses have interests stretching beyond their home jurisdictions. Enterprises are increasingly organising their activities on a regional and global scale, forming production chains including inputs that cross national boundaries. With the advent of sophisticated communications and information technology, as well as interconnected capital markets, cross-border trade is no longer the preserve only of large multinational corporations. These factors have led to an increasing number of situations where Australian enterprises are involved in matters where cross-border insolvency issues arise. That trend is not likely to change. If anything, it will likely gain acceleration if, and when, distress levels increase.

In cross-border contexts, the additional complexities surrounding restructuring processes and insolvencies necessarily result in increased – and more intricate – uncertainties, complex risk matrixes and, ultimately, increased exposure to contentious engagements and escalated costs. It would be of overall benefit to businesses in all countries to have adequate mechanisms in place to deal efficiently and effectively with cross-border distress. Across the Asia-Pacific region, the complexities in cross-border restructurings are further increased by significant differences in the financial, political, and legal fabrics of the relevant markets. Some are highly developed and market leading in most senses (for example, Australia and Singapore), while others are middle powers who nevertheless have significant influence, including by attracting major enterprises and industry investments (for example, Malaysia), while other markets are still relatively untapped and emerging (for example, Vietnam). In that context, the importance of adopting policies that promote efficiency, reduce legal uncertainties and transaction costs, and enhance international trading efficiencies, is paramount but not without major challenges.

The Model Law and the IRDA

Singapore has been strategically focused on enhancing its position as a key regional (if not global) jurisdiction for cross-border restructuring for several years. In 2015, the Singapore International Commercial Court (**SICC**) was established, with a mandate to determine international commercial disputes. Singapore adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency as part of the extensive changes to its debt restructuring regime in 2017.

In 2018, the **IRDA** was introduced to further solidify Singapore's position as an emerging powerhouse in regional cross-border restructuring. The IRDA came into effect in 2020 and, despite its relatively infancy, it has already attracted significant legal traffic and restructures, both court- and creditor-sanctioned. Most recently, on 1 October 2022, the SICC took jurisdiction over international restructuring matters emanating in Singapore generally.

The key benefits of SICC's jurisdiction being involved under the IRDA are beyond the scope of this article but, for present purposes, it suffices to note that the potential benefits are significant.

The IRDA provides director, or debtor-in-possession, driven mechanisms under the supervision of the court and, often, a restructuring officer or foreign representative. Directors who consider their entities may be at risk of economic distress can seek financial relief by proposing a compromise or scheme of arrangement to creditors. That proposal is included within an application and filed with the court. The application may only be made if no order has been made, and no resolution passed, for the winding up of the company.[1]

Once an application is filed, an automatic moratorium period applies, starting on the date the application is filed, to the earlier of either 30 days or the date on which the application is decided by the court.[2] Once filed, the moratorium period applies, and restrictions are imposed in order to provide interim protection to companies, including by ensuring:[3]

- No order may be made, and no resolution may be passed for the winding up of the company
- No receiver may be appointed over any property or undertaking of the company
- Proceedings may not be commenced or continued against the company, except with leave of the court
- No enforcement or other legal process against any property of the company may be issued, commenced, or executed without leave of the court
- No step may be taken to enforce any security over any property of the company
- No step may be taken restraining the enforcement of any right of entry, without leave of the court

1 IRDA, Section 64(2)(a).

2 IRDA, section 64(14).

3 IRDA, section 64(1)(a).

Winding up of Foreign Corporations and Interaction with Model Law

A foreign corporation may be wound up, or be made subject to restructuring, in Singapore, if it can be established that the foreign company has a substantial connection with Singapore.[4] It may be that Singapore is the centre of main interests of the company, or the company is carrying on business in Singapore.[5] Alternatively, depending on the country that the corporation is registered in, the Model Law may apply. Recognition of foreign representatives, or foreign restructuring or external administration processes, lies at the heart of the IRDA and, evidently, the Model Law.

By the recognition of a foreign representative, the Model Law (and IRDA) seek to provide relatively simple and expedient processes for cross-border insolvencies to be interconnected. In doing so, the intention is to avoid multiple restructuring processes occurring across many foreign jurisdictions, with the consequent downsides not limited to competing interests, increased costs, and delays, all of which likely result in diminished realisable values and compromised creditor interests.

Singapore is a major financial hub and it has many intersecting interests with other key jurisdictions in the Asia Pacific region, even though some of those countries have not yet adopted the Model Law. Vietnam and Malaysia, by way of example, have not adopted the Model Law, despite being closely linked to the financial, commercial and, in some cases, legal, institutions of Singapore.

In that context, obvious difficulties would arise for a foreign representative seeking to obtain recognition and gain control of assets and entities operating within non-member states, even if he were recognised under the IRDA by the SICC. Accordingly, while Singapore will continue to attract restructuring business, invoking its jurisdiction in a regional sense will not be without challenges. Those challenges will include, but will not be limited to, resistance from creditors (including potentially significant secured creditors) from regional non-member states, increased costs, transactional uncertainties, realisable value losses, and protracted processes which will likely be complicated by everything from language barriers to reduced access to working capital or creditor support. These are all factors that a foreign representative must have regard to before advising on a restructuring process, and certainly before filing an application under the IRDA (or otherwise).

Potential Impacts of the IRDA on Australian Restructuring Interests

Australia has adopted the Model Law and can recognise foreign proceedings, including foreign restructuring proceedings that may concern or impact Australian companies, creditors, property, or assets domiciled in Australia.[6] In fact, Australia was a global leader in advocating for the adoption of the Model Law. However, despite the seemingly widespread praise for the Model Law, it may be fair to ask what the benefits are for Australia in its enactment. On one level, enacting the Model Law does more to assist foreign administrations than it does to assist domestic ones. However, that is not to say there are no benefits. The key benefits, in terms of equality of treatment for Australian creditors, ease of recovering assets from foreign jurisdictions, and more efficient treatment of international restructuring filings involving Australian enterprises, are evident.

Singapore will continue to attract significant restructuring filings under the IRDA, potentially at the expense of Australia's regime. However, given the level of consistent and strategic investments made by Singapore into its regime and institutions (including via legislative reform) under the IRDA and the SICC, one can appreciate that that may be so. Going forward, if Australia seeks to maintain (if not further develop) its position as a key jurisdiction in the Asia-Pacific region, it could do worse than to seriously consider, and, where appropriate, implement, legislative reforms via the recently announced review,[7] to level the regional restructuring playing field.

Contacts

Masi Zaki
Partner, Sydney
T +61 2 8248 7894
E masi.zaki@squirepb.com

Kate Spratt
Associate, Sydney
T +61 2 8248 7841
E kate.spratt@squirepb.com

4 IRDA, section 245(3).

5 IRDA, section 245(3)(a) and (b).

6 Cross Border Insolvency Act 2008 (Cth), section 6.

7 Parliamentary Joint Committee on Corporations and Financial Services Inquiry, Announced 28 September 2022.

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squirepattonboggs.com

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