MINISTRY OF LAW
SINGAPORE

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 (the "Draft Bill")

1 Introduction

1.1 The Ministry of Law ("**MinLaw**") would like to thank all respondents to the public consultation on the Draft Bill, which took place from 21 Oct 2016 to 2 Dec 2016.

1.2 We received feedback from various local and international respondents, including financial institutions, accountants, lawyers, professional associations and academics.

1.3 Most respondents welcomed the proposed amendments to strengthen Singapore's restructuring and corporate rescue framework, stating that the amendments were timely and helpful in modernising Singapore's restructuring and insolvency laws.

1.4 Respondents provided views on substantive policy issues as well as drafting suggestions. We have carefully considered all the suggestions received and have incorporated much of the feedback into a revised Bill.

1.5 This response addresses only the feedback relevant to substantive policy matters.[1]

2 Exclusion from the Proposed Provisions

2.1 A number of respondents made a case for certain entities and types of transactions to be excluded or carved out from the proposed amendments. The requests for carve outs fell into two broad categories:

[1] For the avoidance of doubt, references to specific sections in this document refer to sections in the version of the Companies (Amendment) Bill that was released for public consultation between 21 October 2016 and 2 December 2016. A copy of the aforementioned Bill may be downloaded here.

(i) To exclude financial institutions from the effect of the amendments, thus precluding them from restructuring under the new scheme provisions and judicial management; and

(ii) To exclude specific types of transactions from the moratorium and super-priority provisions.

2.1 Exclusion of Financial Institutions and Other Entities

2.1.1 MinLaw recognises that the new schemes may not be appropriate for all types of potential debtors. In the case of regulated financial institutions, the resolution regime administered by the Monetary Authority of Singapore ("**MAS**") provides a more appropriate mechanism for such entities, as compared to a scheme of arrangement or judicial management.

2.1.2 Furthermore, MinLaw appreciates that schemes of arrangement and judicial management may not be appropriate for certain securitisation entities, such as the Approved Special Purpose Vehicle. While the feedback requested for the exclusion of such entities from the moratorium and super-priority provisions (as creditor rights are viewed as paramount in such instances), these concerns are more appropriately addressed by an exclusion from the regimes entirely.

2.1.3 In order to cater for appropriate exclusions, the revised Bill empowers the Minister to exclude companies or classes of companies, such as financial institutions, from the new scheme provisions and judicial management. The list of institutions to be excluded is being finalised in consultation with MAS.

2.2 Exclusion of Specific Types of Transactions

Exclusion from the Moratorium

2.2.1 A number of respondents suggested carving out certain types of transactions from the moratoriums under the new scheme provisions (section 211B) and judicial management (section 227D).

2.2.2 In particular, these respondents felt that set-off and netting rights, which have significant impact on financial institutions and thus financial systems, should not be subject to the new moratorium provisions. It was proposed that transactions such as derivatives, exchange traded and/or centrally cleared contracts and securitisation transactions, be carved out.

2.2.3 MinLaw recognises that there are certain categories of transactions where the moratoriums under the new scheme and judicial management provisions would have a disproportionately adverse impact on markets.

2.2.4 Therefore, the revised Bill allows the Minister to prescribe certain arrangements, including set-off or netting arrangements, to be excluded from the scheme and judicial management moratoriums. This is consistent with the position in the US Bankruptcy Code, where certain financial contracts are excluded from the automatic stay of proceedings granted upon the filing of bankruptcy proceedings.

2.2.5 The list of excluded entities (at para 2.1.3 above) and list of excluded transactions will be provided in subsidiary legislation.

2.2.6 Furthermore, the exclusion of prescribed transactions from the moratorium addresses a further concern that set-off and netting rights should be preserved under the UNCITRAL Model Law on Cross-Border Insolvency ("**Model Law**"). Under the Model Law, a Singapore court may not grant relief or co-operation that is contrary to the provisions of the Companies Act. Since certain prescribed arrangements, including set-off and netting arrangements, are excluded from the moratorium under the Companies Act, the enforcement of these arrangements may not be restrained under the Model Law.

2.2.7 Lastly, one respondent requested certain transactions involving the private wealth management industry be excluded from the moratorium. Specifically, the carve out was requested in respect of certain liabilities and/or collateral provided to secure exposures (i) against private investment companies, which are private exempt companies, purely acting as investment holding companies (and not operating any business) and (ii) for margin lending transactions.

2.2.8 We will not be including such transactions among the excluded classes of transactions referred to in para 2.2.4 above as the proposed exclusions could not be justified.

Exclusion from the Super-Priority Provisions

2.2.9 A number of respondents sought carve outs for certain transactions from the super-priority rescue financing provisions in schemes (section 211E) and judicial management (section 227HA).

2.2.10 It was suggested the super-priority provisions should not allow rescue financing to be granted priority status over charges held by financial institutions:

(i) Over real estate (commercial or residential); and

(ii) As security in connection with derivatives and repurchase agreements, exchange traded and/or centrally cleared contracts, securitisation transactions, and margin lending transactions in relation to companies that are purely investment holding companies.

2.2.11 The argument was made that financial institutions may be subject to regulatory requirements to enforce their collateral in a timely manner. Hence, the respondents argued that it is crucial to preserve such security and the certainty of enforcement of such security.

2.2.12 Having considered the arguments, MinLaw will not be implementing either suggestion:

(i) For the exclusion of charges held by financial institutions over real estate (at para 2.2.10(i) above), as banks are often lenders to debtor companies, it is necessary to provide that rescue financing may be granted super-priority status over the banks' security. This provides distressed entities with an opportunity to procure rescue financing, in order to facilitate a debt restructuring. At the same time, there are sufficient safeguards to ensure that the bank's security is not unfairly prejudiced; in particular, the Court must be satisfied the existing security holders are adequately protected before granting a super-priority lien.

(ii) For the exclusion of specific transactions (at para 2.2.10(ii) above), these concerns are more appropriately addressed by the exclusions from the moratorium (at para 2.2.4 and 2.2.5 above). Where transactions are excluded from the moratorium, creditors' rights of enforcement may be exercised, which obviates any issue of existing security being affected by super-priority financing. Accordingly, a separate carve out from the super-priority provisions is not necessary.

Furthermore, insofar as transactions are not excluded from the moratorium, a carve out is not necessary given super-priority may only be granted where existing security is adequately protected. This is consistent with approach in the US Bankruptcy Code.

(I) Feedback on Scheme of Arrangement Provisions

3 Section 211B: Moratorium

3.1 Scope of the Moratorium Granted by the Court

Free-Standing Moratorium

3.1.1 Feedback was received suggesting an expansion of the scope of the proposed moratorium to include a free standing moratorium, i.e. where there is no intention for a debtor to propose a scheme of arrangement. This addresses situations where a company does not need to restructure by compromising its debts, but instead requires breathing room from creditor enforcement action to dispose of its assets and pay off its liabilities.

3.1.2 MinLaw notes this feedback. The focus of the Bill, however, is to strengthen Singapore's existing scheme of arrangement regime and does not purport to grant relief where there is no intention to propose a scheme. Therefore, there is no intention at the moment to expand the scope of the moratorium to provide for such situations.

Situations Where Company May Not Apply for Moratorium

3.1.3 We received a comment that section 211B should clarify when a company is precluded from applying for a moratorium, in particular when (i) the company is subject to a judicial management order; (ii) a Singapore court has recognised a foreign representative in respect of a foreign main proceeding; and (iii) a receiver has been appointed over all or substantially all of the assets of the company.[2]

3.1.4 While we agree with the rationale in respect of (i) and (ii), clarification is unnecessary since the existing moratoriums in place under the respective regimes remove any need to apply for a moratorium under section 211B. In respect of (iii), the appointment of such a receiver should not preclude the efforts of a company to restructure via a scheme of arrangement.

Veto of Person Entitled to Appoint a Receiver and Manager

3.1.5 Additionally, some respondents argued that veto rights should be provided to any person who has appointed or is entitled to appoint a receiver and manager over a company's property, provided the prejudice caused to such a person is disproportionately greater than the prejudice to unsecured creditors if the application were dismissed. This is similar to the position in judicial management.

3.1.6 We will not be including this amendment in the revised Bill, as judicial management and schemes of arrangement differ significantly. Furthermore, the expansion of the moratorium in schemes of arrangement aims to provide breathing room to debtors attempting to restructure their debts.

[2] Similar feedback was provided in respect of section 211C.

Fixed Time Period for a Moratorium

3.1.7 One respondent suggested specifying a time frame for the moratorium, specifically, 4 months with extensions to be granted in limited circumstances. This would be similar to the 2016 European Commission proposal for a Directive on Preventative Restructuring Frameworks.[3]

3.1.8 MinLaw notes this feedback. However, this suggestion has not been included, as the Court hearing the matter is best placed to determine the appropriate length of a moratorium to be granted in a given case.

Creditors Restrained by the Moratorium

3.1.9 We received feedback that the scope of orders granted under section 211B(4) should be limited to creditors that will be subject to the proposed scheme. The argument is that (i) a creditor scheme is generally used as a pre-insolvency tool to deal with specific financial claims; and (ii) this preserves the relationship between the company and its counterparties (e.g. suppliers), which may preserve the company's goodwill and value.

3.1.10 MinLaw agrees that a moratorium should be scoped appropriately and it should not generally restrict creditors who are not subject to the proposed scheme. Notwithstanding the above, the starting point is that the moratorium applies to all creditors. However, this is subject to the Court's power to impose terms and conditions to meet the demands of any given case. The provision thus gives the Court sufficient flexibility to balance the competing interests in a particular case.

Prohibition of Ipso Facto *Clauses*

3.1.11 Some respondents suggested that the moratorium should prohibit *ipso facto* clauses, because such clauses create uncertainty. Hence, restricting the applicability of *ipso facto* clauses avoids the risk of creditors not party to the scheme

[3] Similar feedback was provided in respect of Section 211C.

opportunistically terminating or amending their contracts solely on the basis that the company has proposed a scheme.[4]

3.1.12 This proposed suggestion has not been accepted. The restriction on enforcement of *ipso facto* clauses was previously considered in detail by the Insolvency Law Review Committee. After considering various arguments for and against such a prohibition, the Committee recommended that restrictions on the enforcement of *ipso facto* clauses should not be introduced.[5] This recommendation has been accepted by the Government.

<u>Limit Scope of Restraint on Re-entry or Forfeiture of Leases</u>

3.1.13 MinLaw received a suggestion that section 211B(4)(f), which prevents re-entry or forfeiture under any lease in respect of any premises occupied by the company, should be limited in its scope.[6] In particular, the company should fulfil all its obligations under the lease, including any covenants to pay rent, before it can enjoy the benefits of the moratorium.

3.1.14 We understand the concern that this provision may be onerous to landlords, who are required to perform their contractual obligations despite the possibility of not receiving payment. Nonetheless, this concern is ameliorated by the recourse for creditors to apply for leave to enforce their right of re-entry or forfeiture. The Court may then exercise its discretion to grant leave in accordance with established principles, similar to the moratorium in judicial management.

3.2 Documents to Be Filed with Section 211B Application

<u>Section 211B(3)(a): Evidence of Support from Creditors</u>

3.2.1 In the Draft Bill, MinLaw requested input on whether the two requirements set out in square brackets at section 211B(3)(a) were feasible. Further, if both

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[4] Similar feedback was provided in respect of judicial management.
[5] See page 117 and 132 of the Final Report of the Insolvency Law Review Committee (2013).
[6] Similar feedback was provided in respect of section 211B(8)(f).

requirements were feasible, MinLaw requested views on whether an applicant should comply with one or both requirements.

3.2.2 We received extensive feedback, both for and against the proposed requirements. A number of respondents noted the two proposed requirements would likely give rise to uncertainty, particularly whether a company had fulfilled either requirement.

3.2.3 After considering all the comments, MinLaw has amended this provision to require the applicant to show evidence of creditor support for the scheme, together with an explanation of the importance of these supporting creditors to the success of the scheme.

3.2.4 This amended requirement thus reduces the uncertainty arising from the proposed requirements, which may prevent a company from receiving protection at a critical juncture of the restructuring efforts. At the same time, this amended requirement provides sufficient information for the Court and other interested parties scrutinising the application to determine whether an extended moratorium should be granted/application to set aside should be made.

Section 211B(3)(c): List of 20 Unsecured Creditors

3.2.5 We received a suggestion to remove the requirement to provide a list of 20 unsecured creditors who are not related to the company and have the largest claims against the company (section 211B(3)(c)). It was argued that the proposed scheme may have no bearing on these creditors.

3.2.6 After considering this suggestion, the requirement has nevertheless been retained. At the point of filing a section 211B application, the scheme may still be in preliminary draft form and thus the debtor is unable to ascertain with clarity which creditors will be affected and which class they belong to. Therefore, this requirement provides general information on the identity of the unsecured creditors who are likely to have significant weight in the restructuring. This also implements a recommendation of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring ("**Debt Restructuring Committee**").[7]

3.3 Section 211B(8): Automatic Moratorium

Automatic Moratorium Should Not Be Adopted

3.3.1 Two respondents argued that the automatic moratorium under section 211B(8) should not be adopted. Alternatively, the automatic moratorium period should be shortened and the provision limited to Singapore-incorporated companies.

3.3.2 Separately, another respondent argued the scope of the moratorium (in terms of creditor action that may be restrained) should be narrowed, aligning with the scope in judicial management (section 227C).

3.3.3 This provision implements a recommendation of the Debt Restructuring Committee, which considered this issue in detail.[8] It would be counterproductive to further narrow the scope of the moratorium, which aims to provide breathing room to debtors.

Prevention of Abuse Arising from Repeat Applications

3.3.4 We received a suggestion to restrict a company from taking advantage of the automatic moratorium (unless the Court orders otherwise), if the company benefitted from an automatic moratorium in the preceding 12 months. This prevents abuse through repeated applications.

3.3.5 We have accepted this suggestion and incorporated it into the revised Bill.

[7] See recommendation 3.10 of the Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (20 April 2016).
[8] See recommendations 3.8 to 3.10 of the Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (20 April 2016).

Application of Automatic Moratorium Extraterritorially

3.3.6 In response to a request for clarification, the automatic moratorium does not have extraterritorial effect, as a Court order is required to give a moratorium extraterritorial effect.

3.4 Section 211B(9): Application for Discharge of Moratorium

3.4.1 One respondent suggested extending the persons who may apply under section 211B(9) for a discharge of the moratorium to include the company, receiver, judicial manager, liquidator or foreign representative of the company.

3.4.2 MinLaw agrees with part of this suggestion. We have extended the persons who may apply for a discharge in the revised Bill to include the company and receiver. However, a judicial manager will not apply for a discharge under this section since a separate judicial management moratorium will be in place. Similarly, a company in liquidation would be unable to apply for a moratorium (see section 211B(1)).

3.4.3 On a related issue, MinLaw has accepted feedback that an applicant should be permitted to seek a variation to the scope of the moratorium under section 211B(9) (instead of only a discharge) to preserve flexibility.

3.4.4 Lastly, in response to a request for clarification, failure to satisfy the requirements in section 211B(3) are *not* the only grounds upon which a moratorium may be discharged under section 211B(9). The Court *must* grant such an application where the requirements in section 211B(3) are not satisfied. There may be other circumstances that *may* result in a discharge of the moratorium.

4 Section 211C: Moratorium against Subsidiary of Company

4.1 Scope of the Moratorium

4.1.1 One respondent commented that the moratorium should be extended to other entities within the corporate group e.g. a group 'finance company' that raises funds on behalf of the company. These companies may not be subsidiaries of the company granted a moratorium under section 211B.

4.1.2 In a similar vein, we received feedback that the moratorium should be extended to holding companies. Extending the moratorium to subsidiaries, but not holding companies, limits the Court's ability to protect the entire corporate group structure.

4.1.3 We recognise the importance of protecting a corporate group structure in order to facilitate the restructuring of a distressed entity. Therefore, the revised Bill extends the scope of the moratorium under this section to holding companies. However, there is a concern that broadening the scope further to other related entities may be over-inclusive. In such a scenario, the related entity may apply for a separate moratorium and request both applications to be heard together.

4.1.4 As a corollary of the importance of protecting corporate groups, MinLaw has not accepted a suggestion to narrow this provision, such that it applies only to companies with 'substantial connection' to Singapore or to Singapore-incorporated companies.

4.2 Documents to Be Filed with Section 211C Application

4.2.1 Lastly, one respondent suggested the introduction of a requirement to provide evidence of support from the subsidiary's creditors. This mirrors the requirement under section 211B(3)(a).

4.2.2 However, this suggestion has not been accepted as the moratorium under section 211C can only be granted after a moratorium is granted under section 211B. Thus, the concern of whether there is support for the restructuring efforts would have been examined in the section 211B application.

5 Section 211D: Restraint of Disposition of Property during Moratorium

5.1 Request for Removal of Section 211D

5.1.1 One respondent suggested removing this provision as it is more appropriate to discharge the moratorium and allow creditors to enforce their rights against the company.

5.1.2 We have not accepted this suggestion, as section 211D provides prospective protection to creditors while the moratorium is in place. This balances the interests of the company (by allowing it to benefit from a moratorium) and creditors (by preventing abuse of the moratorium by the company at the expense of the creditors).

5.1.3 Nevertheless, we appreciate that the rationale of this provision may be unclear due to the heading of section 211D, “Avoidance of disposition of property, etc.”. This possibly connotes avoidance provisions in insolvency law, which are retrospective in nature. Hence, the heading of this provision has been amended in the revised Bill to accurately reflect the intent of the provision to provide prospective protection to creditors.

5.2 Effect of Breach of Restraint Order

5.2.1 Next, some respondents suggested specifying the effect of the breach of a restraint order under section 211D, e.g. render the disposition void, and the position of third parties who acquire the property of the company.

5.2.2 We appreciate that the effect of a breach should be made known in order to deter debtors from breaching such orders. Nonetheless, it is unnecessary to prescribe the effects of breach, since it would amount to breach of a court order and will be addressed by the Court. Additionally, introducing such a provision in the Companies Act is undesirable as it would affect third party rights.

5.3 Others

5.3.1 Lastly, we have also accepted these further suggestions:

(i) Section 211D should extend to dispositions made by any company that is granted a moratorium under section 211C, as the rationale for section 211D (at para 5.1.2) similarly applies where a company benefits from a section 211C moratorium;

(ii) Section 211D should apply to prohibit dispositions which are either not in good faith or not in the ordinary course of business; and

(iii) Removal of section 211D(1)(b), as there is unlikely to be a disposition carried out in the ordinary course of business, that also materially prejudices creditors or significantly diminishes property of the company.

6 Section 211E: Super-Priority for Rescue Financing

6.1 Scope of the Super-Priority Provision

6.1.1 One respondent stated the scope of this section should be narrowed. Super-priority should only be available to the extent of the equity of redemption in a property. As such, the provision would enable debtors to override negative pledge covenants and contractual restrictions against the creation of such security.

6.1.2 MinLaw appreciates the negative effects of an excessively broad super-priority provision, as it may unfairly prejudice existing security holders. In view of this, the grant of super-priority liens is subject to safeguards to ensure existing security holders are not unfairly prejudiced. In particular, the Court must be satisfied there is adequate protection of the existing security holders.

6.1.3 Additionally, the introduction of super-priority liens in Singapore was recommended by the Debt Restructuring Committee, after detailed consideration of arguments for and against such an introduction.[9]

[9] See recommendations 4.1 to 4.6 of the Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring (20 April 2016).

6.1.4 On a related issue, we received comments that the provision should clarify that nothing in the section prohibits a company from raising finance or granting security without a court order where it would otherwise be permitted to do so.[10] Of particular importance is section 211E(1)(c) – the grant of subordinate security or security over property not subject to any existing security – as the security granted under this section may be granted consensually even without this provision.

6.1.5 We agree that the new provisions should not preclude a company from raising finance or granting security where it would otherwise be permitted to do so without a court order. The new provisions are thus additions to the company's existing options (prior to these amendments). The provisions in the Draft Bill do not purport to prevent a company from raising finance or granting security where it is permitted to do so without a court order. Consequently, we are of the view that no further clarification is necessary.

6.2 Section 211E(1): Evidence of Support from Creditors

6.2.1 In the Draft Bill, MinLaw sought input on which of the two requirements set out in square brackets in sections 211E(1)(c)(i) and (d)(i)[11] would be preferable.

6.2.2 We received extensive feedback on the two proposed requirements. The majority of respondents supported the term "necessary to enable" the company's business to continue as a going concern. A minority of respondents suggested either raising or lowering this standard:

(i) One respondent suggested a lower standard of "appropriate", as there should be few hurdles for a company to obtain super-priority financing. At the same time, the lower standard of "appropriate" provides sufficient protection from abusive over-leveraging or unnecessary debt.

[10] This comment applies similarly in judicial management (see section 227HA).
[11] MinLaw also requested feedback in respect of section 227HA(2), which is drafted in similar terms.

(ii) In contrast, another respondent suggested a higher threshold through the inclusion of additional safeguards for existing creditors. For example, the Court must be satisfied the restructuring has reasonable prospects of success and/or the purpose of rescue funding has reasonable prospects of being achieved (such as a more advantageous realisation of the company's assets).

6.2.3 Additionally, some respondents suggested including an alternative purpose for rescue financing: "necessary to enable preservation of the company's assets" (e.g. preserve assets in a period leading up to a sale of the company's assets by way of a scheme).

6.2.4 After detailed consideration of the comments received, we have adopted the term "necessary to enable" in the revised Bill. This threshold strikes an appropriate balance between the existing creditors and debtor. While conferring super-priority status on rescue financing aids the rescue of the company, this must be balanced against the potential prejudice to existing creditors of the company.

6.2.5 Further, in respect of para 6.2.3, we agree that one of the purposes of rescue financing should be to enable the preservation of a company's assets. Therefore, the revised Bill has been amended accordingly.

6.2.6 Lastly, we received a request for clarification on the evidence to be provided by a debtor to show that he was unable to obtain credit in order to make a super-priority application.[12]

6.2.7 MinLaw does not intend to prescribe the manner in which this requirement may be fulfilled. Nonetheless, as these provisions are based on the US Bankruptcy Code, our Courts may take guidance from the approach in the US.

[12] A similar request for clarification was made in respect of the super-priority provision in judicial management (at section 227HA).

6.3 Section 211E(4): Effect of Appeal

6.3.1 We received a comment that it is unnecessary to adopt section 211E(4), which provides that the reversal or modification of an order made for super-priority shall not affect the validity of the debt incurred, or any priority or security so granted. The respondent argued that unlike the US, the time taken for the appeal to be heard in Singapore is relatively short.

6.3.2 We agree that the time for appeal of orders in Singapore is relatively short. However, this must be balanced with the urgency of a debtor's need for rescue financing in certain cases. The provision therefore expressly allows the Court in appropriate cases to stay the incurring of such debt or granting of such priority or security interest, pending appeal.

6.3.3 On a related issue, we received feedback that in the event the company is eventually wound up, any security interest granted under this section should not be vulnerable to claw back under the avoidance provisions. We agree with this comment and the amendment is reflected in the revised Bill.

7 Section 211F: Filing, Inspection and Adjudication of Proof of Debts

7.1 Request for Removal of Section 211F

7.1.1 Feedback was received that this provision should be removed and replaced with restrictions on voting by the company, related entities and directors of such entities. The argument was made that the introduction of a mandatory formal proof of debt system will significantly extend the time and cost involved in the scheme process. Furthermore, the proposed provisions risk being misused as a deliberate delaying tactic, e.g. dissenting creditors can appeal the claims of other creditors.

7.1.2 We note the concerns relating to the introduction of a mandatory formal proof of debt system, especially its potential to delay the scheme process. However, as recommended by the Insolvency Law Review Committee, the statutory enactment of a formal proof of debt system addresses the lack of an effective and binding proof of debt regime in practice (rules are usually contained in the explanatory statement, which has no binding force).[13] Furthermore, it provides a uniform set of rules and procedures governing the filing and adjudication of proofs.

7.1.3 Nonetheless, in view of the concerns raised, MinLaw has amended the provision in the revised Bill to provide flexibility in the proof of debt system. In particular, the Court will be given powers to (i) grant relief or allow time for a person to comply with the requirements of the proof of debt framework; or (ii) approve an alternate framework for proof of debts that is proposed by the company.

7.2 Provision for Agents, Trustees or Attorneys to File Proof of Debts

7.2.1 A further suggestion was to introduce provisions to expressly allow agents, trustees or attorneys appointed under finance documents to file claims of proof collectively on behalf of all lenders or creditors that have rights under those documents, and to split the voting of such claims in any manner as reflecting the lenders'/creditors' instructions. This reduces the administrative burden of requiring individual bondholders or syndicated lenders to prove their individual claims.

7.2.2 We appreciate the administrative difficulties in a scheme process, especially in a large company with a significant number of creditors. That being said, this suggestion may be implemented without such an express provision. The company itself may provide for such a proof of debt mechanism in the notice summoning the meeting mentioned in section 211F(1).

8 Section 211H: Power of Court to Cram-Down

8.1 Abolish Requirement of Majority in Number Holding 75% in Value of All Creditors to Approve the Scheme

8.1.1 One respondent suggested abolishing the requirements under section 211H(3)(a) and (b) that require a majority in number of creditors holding 75% of value

[13] See page 143 of the Final Report of the Insolvency Law Review Committee (2013).

of *all* creditors to be bound by the scheme to vote in favour of the scheme. It was argued that this requirement is unnecessary and overly restrictive.

8.1.2 While we appreciate the arguments in favour of a lower threshold, this provision implements a recommendation of the Insolvency Law Review Committee after detailed consideration of various countervailing arguments.[14] The requirement thus acts as a safeguard in a cram-down scenario.

8.2 Define the Phrase "Discriminate Unfairly" in Section 211H(3)(c)

8.2.1 Another suggestion was to define the phrase "discriminate unfairly" under section 211H(3)(c) and remove limbs (i) and (ii) in section 211H(4)(b). The respondent argued that the current provisions may result in reliance on jurisprudence developed in other jurisdictions, which applies in a substantially different legal context.

8.2.2 MinLaw is of the view that the phrase "discriminate unfairly" and limbs (i) and (ii) should be retained. This provision aims to introduce a mechanism similar to cram-down in the US Bankruptcy Code. While jurisprudence from other jurisdictions may be relied by our Courts for guidance, our Courts will be free to develop jurisprudence on the use of cram-down provisions that would be suitable in the local context.

8.3 Amend the Comparator in Section 211H(4)(a)

8.3.1 MinLaw has accepted the suggestion to amend the comparator under section 211H(4)(a) to the creditors' position in the event the scheme was not passed (rather than if the company were wound up). This aligns the provision with the common law position.

8.4 Introduction of Shareholder Cram-Down

8.4.1 Lastly, a respondent raised a concern that shareholders with no real economic interest may obstruct a proposed scheme. The shareholder veto (as shareholders must approve an issue of new shares) means shareholders still retain value and

[14] See page 154 of the Final Report of the Insolvency Law Review Committee (2013).

prevent satisfaction of the absolute priority rule in subsection 4(b)(ii)(B). Therefore, a provision should be included, which allows for share capital to be transferred (or extinguished and reissued) to creditors or another party as part of a scheme without the approval of shareholders. This is subject to the Court being satisfied that the shareholders and subordinated debt holders do not have any real economic interest in the company.

8.4.2 We have considered this concern and note the issue of a *de facto* shareholder veto is not uncommon in schemes involving debt-equity swaps, where shareholder approval is required to issue new shares. There is no present intention to provide powers for the Court to compel shareholders in creditor schemes to issue new share capital/transfer existing share capital in the manner suggested.

8.4.3 In any event, subsection 4(b)(ii)(B) is unlikely to create a veto for shareholders. The section protects dissenting creditors by ensuring that shareholders (who by reason of being last in the distribution of dividends in a liquidation scenario) do not receive any property over the dissenting creditor class.

9 Section 211I: Pre-Packaged Schemes

9.1 Abolish Requirement for Majority in Number to Approve the Scheme

9.1.1 A respondent suggested removing the requirement of a majority in number to approve the scheme in section 211I(2)(d). Fulfilling this requirement is particularly problematic where there is no scheme meeting. For example, the number of creditors in a class may continue to change, right up to the time the meeting is held because debt may be traded.

9.1.2 We understand that in a large class of creditors, fulfilling the requisite requirements may be complicated. However, this requirement has increased importance precisely because there is no scheme meeting. This provision is intended to apply in cases where it is clear that the statutory requirements are fulfilled.

Consequently, this provision may not be appropriate in the scenario that is envisaged by the respondent.

9.2 Introduction of Civil Liability for Default

9.2.1 In addition to section 211I(5), which provides for criminal liability in the event of default in complying with any requirement under that section, one respondent suggested the introduction of civil liability as well. The justification is that a company's failure to comply with the requirements may cause loss to creditors, which would not be compensated by criminal penalties.

9.2.2 We agree that criminal penalties will not compensate creditors for losses sustained by breach of the requirements. In such circumstances, creditors may commence civil proceedings against the company or its officers, for losses sustained as a result of such breach. In view of this available recourse, the proposal was not accepted.

9.3 Interaction with Section 211H

9.3.1 In response to a request for clarification, the new provisions under section 211I are not intended to apply in conjunction with section 211H (cram-down).

10 Judicial Management Provisions

10.1 Scope of Judicial Management

10.1.1 On a preliminary issue, MinLaw has rejected arguments to limit the scope of judicial management to locally incorporated companies or Singapore-registered branches of foreign companies. This extension of judicial management to foreign companies comports with the recommendation of the Insolvency Law Review Committee.[15]

[15] See page 229 of the Final Report of the Insolvency Law Review Committee (2013).

10.2 Section 227B: Veto Right of a Floating Charge Holder

10.2.1 We received a comment that as a result of the watering down of the floating charge holders' veto rights, floating charge holders should be provided greater power to block a judicial manager from dealing with their secured rights, or granted greater protection in that regard. This maintains the balance between the interests of debtor companies and floating charge holders.

10.2.2 We will not be implementing this suggestion, as it runs counter to the balance between receivership and judicial management that was recommended by the Insolvency Law Review Committee.[16]

10.3 Section 227HB: Priority of Debts

10.3.1 We received feedback that this provision should not be enacted, since judicial management is not intended to distribute the debtor's property to creditors. This provision may create confusion as to whether a judicial manager may distribute the debtor's property to creditors.

10.3.2 We accept this feedback in the context of the current Draft Bill. We note however that the Insolvency Law Review Committee recommended that statutory preferential debts be accorded due priority across all insolvency regimes.[17] Hence, this recommendation will be addressed at a later stage in a comprehensive review of preferential debts in all insolvency regimes, when the rest of the Committee's recommendations are implemented.

11 UNCITRAL Model Law on Cross-Border Insolvency

11.1 Art 13: Access of Foreign Creditors to a Proceeding under Singapore Insolvency Law

11.1.1 We received a suggestion that Art 13(2) should be amended to state that a foreign tax claim is not to be given a lower priority solely because it is a foreign creditor.

[16] See page 89 of the Final Report of the Insolvency Law Review Committee (2013).
[17] See page 20 of the Final Report of the Insolvency Law Review Committee (2013).

This would amend the common law rule preventing enforcement of foreign revenue law.

11.1.2 This suggestion is noted. However, there is no present intention to amend existing law in respect of recognition of foreign tax claims in Singapore insolvency proceedings.

11.2 Art 21: Relief that May Be Granted Upon Recognition of a Foreign Proceeding

11.2.1 In respect of Art 21(1)(g), we received a comment that despite similar wording in their respective provisions, the UK and US differ in their approaches on the scope of relief that may be granted. It was therefore suggested that Singapore should signal whether the US or UK approach should be adopted in respect of relief that may be granted under Art 21(1)(g).

11.2.2 After consideration of this issue, the suggestion has been noted and accepted. Thus, this provision has been amended to align the wording with the US provision in Chapter 15 of the US Bankruptcy Code.

12 Prescription of Guidelines

12.1 Notice and Advertisement Requirements

12.1.1 Lastly, we received feedback that time periods for notice and advertisement, content and information to be provided in such notices and advertisements etc. should be prescribed.

12.1.2 This suggestion has been noted. Relevant guidelines will be provided in subsidiary legislation or practice directions.

13 Conclusion

13.1 MinLaw would like to thank all respondents to the public consultation for their insightful feedback, which has been of great help in the preparation of the revised Bill.

MINISTRY OF LAW

27 February 2017