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Insolvency Professionals under the Omnibus Insolvency

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With the passing of the Insolvency, Restructuring and Dissolution Act 2018 (IRDA) in October 2018, Singapore is reaching the final stages of a decade-long process to update and reform its bankruptcy and corporate insolvency regimes. The piecemeal amendments over the years have been collated and tidied; and the often-archaic language has been given a modern buff and shine. It is in many respects a masterpiece of clarity and its drafters deserve great credit.

While the major reforms have justifiably taken the share of attention, one important and sometimes overlooked focus of the IRDA has been to buttress the regulation of insolvency professionals. Defalcations have fortunately been few and far between; but the drafters have clearly appreciated that modernisation does not entail slack regulation. To the contrary – the law needs to evolve to keep up with new ways of undertaking corrupt business.

The headline reform in this respect has been the introduction of licensing rules for insolvency practitioners, set out in sections 47 to 60 of the IRDA. It replaces the existing system by which approved liquidators are gazetted under section 9 of the Companies Act and introduces a complete suite of licensing, investigative, disciplinary and appeals processes. The licensing officer is now given statutory powers to investigate license holders and issue written directions where a contravention has been found. Provisions have been drafted to criminalise various acts and omissions, including a catchall provision by which the licensing officer is empowered to levy a fine or suspend or revoke the license of a misbehaving insolvency professional who had breached the IRDA but not otherwise committed an offence.

These developments will be much welcomed by the community. Insolvency professionals are already subject in varying degrees to the oversight of the Court, creditors, Official Receiver and the Accounting and Corporate Regulatory Authority. Yet insolvency practice is highly specialised and involves unique challenges. Liquidators and judicial managers control significant and valuable assets of the insolvent company. The opportunities for misfeasance are correspondingly wide. At the same time, as was recently noted by Chief Justice Sundaresh Menon, speaking extra-judicially:[1]

> *"Insolvency law and practice is, at its core, about the endeavour to recycle capital, usually in difficult circumstances. It entails the effective deployment of legal tools, human ingenuity, and sound business judgment in the mission to maximise the prospects of business recovery, and, when this is not possible, of maximising the realisation of value."*

Any insolvency regime must therefore facilitate the professional to maximise recovery for businesses, and if not possible, value for creditors. It is for this good reason that insolvency professionals (in particular judicial managers) are and should be permitted considerable latitude in continuing the business of the company, and where this is impractical or impossible, to exercise their best commercial judgment realise what they can of the company's assets within the confines of the law for the benefit of creditors.

One significant focus in recent years has been to facilitate the raising of funds to pursue an insolvent company's causes of action. For solvent companies, the cost and uncertainty of litigation often deters even strong cases from being brought. For insolvent companies, the understandable reluctance to stake the company's limited resources on chancy litigation poses an even higher barrier. The estate costs rule[2] is a further deterrent for insolvency professionals.

Third-party funding is therefore touted as a win-win solution. The insolvent company is not required to put its funds at risk, but if the action is brought successfully would be able to realise some value for creditors. The path to third-party funding has been smoothed in recent years by a number of decisions of the High Court. In *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 the Singapore High Court clarified that a liquidator could permissibly sell the company's causes of action or even the proceeds of such causes of action without offending the doctrine of champerty. This case was followed by *Solvadis*

1 Keynote address at the 18th Annual Conference of the International Insolvency Institute 2018 in New York, 25 September 2018
2 See *Ho Wing On Christopher and others v ECRC Land Pte Ltd* (in liquidation) [2006] 4 SLR(R) 817 at [9]

Commodity Chemicals Gmbh v Affert Resources Pte Ltd [2018] 5 SLR 1337 and *Re Fan Kow Hin* [2018] SGHC 257 ((in the bankruptcy context). It is safe to say that third party funding for insolvent companies has become an established practice.

What the IRDA will change is to require a liquidator to obtain the prior authorisation of the Court or the Committee of Inspection before either bringing proceedings on behalf of the company or assigning the proceeds of his statutory causes of action. Further, any assignment of proceeds must be done in accordance with regulations which remain to be promulgated. (A judicial manager will however be empowered to do all these things without requiring authorisation from the Court or creditors.)

These are welcome changes, in two important respects. Firstly, it is now statutorily provided that a liquidator may assign the proceeds of his statutory causes of actions to a funder. A distinction is traditionally drawn between a company's causes of action, which may be sold or assigned as the company's property, and a liquidator's causes of action (such as proceedings to void transactions as unfair preferences) which are personal to the liquidator and cannot be assigned. The IRDA preserves that position, but now permits the monetisation of such claims by allowing the assignment of the proceeds.

Secondly, it is stated that such assignment may take place only in line with regulations, and even then, only with leave of Court or the Committee of Inspection. None of these requirements are in the existing regime. Responsible liquidators typically do seek Court or creditor approval. This is because of the manifold opportunities for abuse or mischief. One may well imagine funding arrangements that provide for unscrupulous liquidators and funders to collude to cream off the bulk of the gains from litigation, with little or no ultimate benefit to creditors, for instance, by "mis-pricing" the sale of the cause of action. It is heartening to note that there will be regulations promulgated which, it is anticipated, will likely require liquidators to provide proper disclosure of the assignment and funding process.

It remains to be seen if the IRDA will kickstart litigation funding in the insolvency context in Singapore, but the amendments to the existing regime are a bright, but cautious start, and show that the drafters are alive to the potentials for misuse.

Apart from the regulations for assignment of proceeds, all the other assorted rules and regulations remain to be gazetted as subsidiary legislation. Insolvency professionals will know how important these can be to their daily practice, and it is hoped (with confidence, on the basis of the IRDA) that the rules to be promulgated will be commercial, practical and clear.

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