**Access to post-petition / DIP financing is an essential component of any restructuring – Singapore & USA**

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1. **Introduction**
   1. Many jurisdictions globally have insolvency and restructuring regimes. Whilst these regimes often have broadly similar goals to rehabilitate distressed companies and efficiently exit insolvent companies, the approaches taken vary significantly. Some of the key differences relate to: (i) whether they are debtor in possession type systems or if management is displaced; (ii) if the Court has a supervision role or not; (iii) the various criteria to be able enter into the process; (iv) the timeframes involved; and (v) whether there is rescue financing available post entry into a process.
   2. This paper will focus on the role and importance of the availability of financing to a successful restructuring. Whilst such financing is often referred to by different terms such as DIP financing or post-petition financing, for the purposes of this paper it will be referred to as “rescue financing” throughout. In reviewing this area, the paper will primarily focus on two jurisdictions, Singapore and the United States. These jurisdictions have been chosen as they represent the old and the new, with the United States restructuring regime being long established and a pioneer of rescue financing and Singapore being a recent arrival to the cross-border restructuring market and seeking to adopt some of the key feature of the United States rescue financing provisions.
2. **Overview of the United States legal position**
   1. Subject to meeting the relevant criteria, companies experiencing financial distress may seek to restructure under Chapter 11 of the United States Bankruptcy Code (“**US Code**”). Once a company is admitted under Chapter 11 it can seek sanction for rescue financing under section 364 of the US Code. Subsections a) to d) set out details of the incentives that companies can offer lenders, these are seen as becoming “increasingly attractive”[[1]](#footnote-1) as you move through the subsections. Lenders can obtain an administrative expense priority under section 503(b) of the Code pursuant to section 364(a) of the US Code. If the company is unable to obtain unsecured financing, the company may seek Court authorisation for secured funding under section 364(c) which would give the lender a priority, a lien over unsecured property of the company or a junior lien on secured property of the company. Going one step further, section 364(d) allows a company, subject to sanction of the Court, to give a lender a senior or equal lien on property already secured provided there is adequate protection of the existing lien holder. Adequate protection can be provided in a variety of forms and will depend on several factors such as the risk to the secured lender, the intended use of the loan and the what the company has available to offer[[2]](#footnote-2).
3. **Overview of the Singapore legal position** 
   1. Singapore’s journey to becoming a modern international centre for debt restructuring started in 2010, when the Ministry of Law formed an Insolvency Law Review Committee which reported in 2013 and the committee’s recommendations were broadly accepted by the Singapore government in 2014[[3]](#footnote-3). This led to the establishment of a committee to Strengthen Singapore as an International Centre for Debt Restructuring (“**SICDR**”). The SICDR committee report formed the basis of future legislative changes.
   2. The Companies (Amendment) Act 2017 came into force on 31 March 2017. Key changes included incorporating elements of US Chapter 11 into the existing scheme of arrangement framework and adopting the UNCITRAL Model Law on Cross-border Insolvency[[4]](#footnote-4). Further reforms were brought in through the Insolvency, Restructuring and Dissolution Act 2018 (“**IRDA**”) which came into effect on 30 July 2020 .
   3. This combining of some features from Chapter 11 with the existing scheme of arrangement framework has been referred to by some as a ‘hybrid scheme’, with the key additions being the availability of a moratorium, a cross class cramdown and rescue financing[[5]](#footnote-5). Whilst the scheme of arrangement is available in many common law jurisdictions, it is noteworthy that with the exception of Singapore, most schemes of arrangement globally do not have any form of rescue financing available[[6]](#footnote-6).
   4. Despite all these debtor friendly initiatives being introduced which reduce the power of unsecured creditors, the pro creditor bias of Singapore remains largely intact in respect of secured creditors who are still entitled to appoint a global receiver to the assets before the company applies for a moratorium[[7]](#footnote-7).
   5. In a study of global rescue financing systems, the Singapore and the United States systems were the only permanent schemes that were ranked by the author as ‘strong’, with numerous developed countries, including the United Kingdom, France and Germany being ranked as ‘weak’ and other developed jurisdictions, such as New Zealand, the Cayman Islands and Hong Kong having no rescue financing systems[[8]](#footnote-8).
4. **Development of the United States rescue financing market** 
   1. Rescue financing became codified in the United States in 1978 when the US Code was passed by Congress, though its use and the amounts involved increased in the early 1990’s[[9]](#footnote-9). Whilst lending to a business in bankruptcy appears to be inherently risky, there are reasons why a lender would choose to do so. For example, the interest rates on offer can be attractive, with the highest interest rate noted on any rescue during 2019 being 20% (noting this was at a time of very low official interest rates)[[10]](#footnote-10). During the Covid-19 pandemic, lenders sought high interest rates on loans and sometimes the right to participate in capital raises on leaving bankruptcy at pre-agreed amounts. This assisted the companies in being able to exit bankruptcy and allowed lenders an opportunity to partake in substantial potential upside, particularly in industries whose valuations had been unduly hit by the pandemic[[11]](#footnote-11). Given the significant increases in the Federal Reserve interest rate over the past two years, the costs of rescue financing are likely to stay high. In the recent case of Gol Airlines, U.S. Bankruptcy Judge Martin Glenn expressed some concern about a 15% interest rate on funding being by provided a group of bondholders. He approved an initial amount of USD350 million of a USD950 million loan and he noted “I’m not writing a blank check”[[12]](#footnote-12). As such, it appears that whilst interest rates can be quite high which is not unreasonable in the circumstances in which this type of debt is provided, the United States bankruptcy court remains vigilant to ensure that the costs are reasonable on a commercial basis and that the funding is genuinely necessary.
   2. As well as receiving a high interest rate, existing lenders can use rescue financing to protect their existing position by helping the company to restructure and thereby achieving a higher recovery than in a liquidation, and also through the availability of a roll-up of existing debt. A debt roll-up arrangement typically requires the company to draw down a certain amount to pay off some of the pre-petition debt of the lender which then “rolls-up” the pre-petition debt to post-petition debt, thereby improving the lenders prospects of recovery[[13]](#footnote-13). In recent years, roll-ups have become fairly standard in rescue financing in the United States[[14]](#footnote-14). Over time, creditors have sought to roll-up ever more amounts of pre-petition debt, with examples of cases where applications were made to the Court to approve rescue financing where 66%-75% of the facility was to be used to pay pre-petition debt with only a minority of the funds available to the company for use in the restructuring[[15]](#footnote-15). Despite push back from creditors and concerns cited by the Judge in one case, the rescue financing was approved[[16]](#footnote-16).
   3. Given that there is often a pressing need for rescue financing nearly immediately on entering Chapter 11, there seems to be an increasing number of cases where businesses secure commitments for the required rescue financing ahead of the filing and then seek to have this approved by the Court during the hearing for the first day motions. This was recently seen in the cases of Gol Airlines[[17]](#footnote-17) and Instant Brands[[18]](#footnote-18).
5. **Development of the Singapore rescue financing market** 
   1. Rescue financing has only been available in Singapore for a few years. The proposal for rescue financing with a super priority was made by the SICDR, which noted that existing lenders are often the source of funding and whilst super priority can be a contentious issue, the SICDR considered that the requirement for Court approval would provide protection for existing secured creditors[[19]](#footnote-19).
   2. The relevant provisions for rescue financing are contained in section 67 of the IRDA. It provides that a company that has applied to convene scheme meetings or for a moratorium may seek an order that debt financing be: (i) treated as an expense of winding up; (ii) have priority of preferential and unsecured creditors; (iii) be secured by a new security interest over unsecured property or a subordinate security interest on a property that is subject to an existing security interest; or (iv) be secured by a new security interest over already-secured property, of the same priority as or higher priority than that security interest. These provisions closely track those set out at section 364 of the US Code.
   3. The first case to come before the Singapore Court following the implementation of the legislative reforms was Re: Attilan Group Ltd and in that case, the Judge made clear that it is an important consideration whether the company can demonstrate that reasonable efforts were made to explore other types of financing which did not entail a super priority and as they failed to do so here, sanction was not granted[[20]](#footnote-20). This initial rejection was, however, followed by several successful cases were the Court did grant sanction for rescue financing.
   4. In 2020, the Court granted a super priority rescue financing package in the case of Design Studio[[21]](#footnote-21). The Court considered that whilst roll-ups were permissible under the legislation, there had to be clear value derived from the new money advanced[[22]](#footnote-22). This case was, however, uncontested and the Court noted there was likely to be further refinement of the factors to consider in future contested cases[[23]](#footnote-23). There have been no further cases involving roll ups in Singapore since Design Studio, so further developments on this are likely over time.
   5. Whilst Singapore has lofty goals to become a major international restructuring centre, a 2023 survey of Insolvency Practitioners, found that Singapore has not yet achieved this aspiration[[24]](#footnote-24). The Singapore Court is, however, respected internationally with the English Court recently commenting that Singapore judgments are held in “extremely high regard”[[25]](#footnote-25)
6. **A comparison between rescue financing in the United States and Singapore**
   1. Whilst the Singapore rescue financing regime has been modelled on the United States’ system, it is not a simple like-for-like copy. Unlike the United States, Singapore has legislated a definition of rescue financing in its legislation and Singapore requires Court approval for all types of rescue financing whereas in the United States a company can incur debts and expenses in the ordinary course of business and the lender can get an administrative priority without the need for Court approval[[26]](#footnote-26). Furthermore, whilst roll-ups and cross collateralisations are relatively common in the United States, there appears to have been only one roll-up granted in Singapore since the implementation of the rescue financing regime[[27]](#footnote-27).
   2. The differences highlighted are interesting in that one area that has been criticised in the use of rescue financing is around the use of roll-ups, cross collateralisations and the degree of control given to lenders (see below) and the Singapore system seems to be trying to avoid some of these issues. This makes sense when one considers that the United States’ system has been developing organically over four decades whilst Singapore is still very much in the early stages and finding its way in the world of cross border restructuring and rescue financing. Furthermore, the nascent stage of the Singapore market is illustrated by the handful of cases involved, whereas in the United States large companies appear to be able to line up substantial rescue financing in advance of filing for Chapter 11 due to the maturity of the market there.
   3. Aside from rescue financing, the Singapore system has also faced some criticism in its use of extended moratoriums on debtor in possession cases which eventually ended up in liquidation anyway, with Hyflux being a high-profile example[[28]](#footnote-28). These teething issues are to be expected and are part of a learning curve as Singapore aims to grow into the key restructuring jurisdiction in South East Asia.

1. **Arguments around rescue financing**
   1. Rescue financing has been a long-standing feature of United States bankruptcy law. Singapore also clearly identified access to rescue financing as one of the things needed to advance its jurisdiction as a global restructuring hub. There are a number of reasons why access to rescue financing is considered important to restructuring cases, but the key one is that many companies will have little to no cash resources remaining at the time that they enter a restructuring process and may not be able to fund continued operations or to pay for restructuring costs and expenses without new financing. Therefore, the availability of rescue financing assists in allowing viable businesses to restructure.
   2. An OECD paper in 2016 notes the availability of rescuing financing as one of the key features of an insolvency regime[[29]](#footnote-29). The World Bank’s Principles for Effective Insolvency and Creditor/Debtor Regimes also state that businesses should have access to financing, including with a right to a repayment priority in exceptional circumstances[[30]](#footnote-30). A 2001 study focused on firms in Chapter 11 found that firms which received rescue financing were more likely to emerge from bankruptcy and are quicker to emerge from bankruptcy, both via restructuring and liquidation (where a restructuring does not prove possible)[[31]](#footnote-31). A study on rescue financing regimes in 30 countries concluded that it was desirable to have a rescue financing regime in place[[32]](#footnote-32).
   3. On the opposing side, consideration has to be given to the impact of rescue financing on the restructuring process. In particular, concerns have been raised that rescue financing, specifically in the United States, has evolved to a point where the rescue financing lenders exert excessive control through the conditions to their financing which in effect upsets the balance between the needs of debtors and the rights of creditors[[33]](#footnote-33). An argument is advanced that the concerns about protecting secured creditors are overstated and lenders, even secured ones, should accept partial responsibility when insolvency occurs and therefore they should not be overly protected or put in a position to control the process[[34]](#footnote-34). There appears to be some merit in that argument and in particular, there is a good argument that the secured creditor, whilst entitled to receive their money back, should not benefit from collecting high amounts of default and penalty interest or other ‘fees’ whilst unsecured creditors are left facing a zero recovery.
2. **Conclusion**
   1. As restructuring professionals, we have all been in the situation where immediate cash flow constraints have led to an overall viable business being unable to continue to trade through a restructuring and therefore having to be liquidated. Intuitively, we therefore are likely to be supportive of the availability of rescue financing as it provides us with options and time to assist clients going through a restructuring. The review of the literature in this paper shows that there is broad support that the availability of rescue financing is a positive driver for restructuring, though further and updated empirical analysis in this area would be welcome.
   2. Whilst the United States is the most developed market for rescue financing and considered to be the gold standard, Singapore is the new kid on the block. The use of rescue financing in Singapore is still developing and there is limited examples and case law so far. It is however, positive that Singapore has embarked on this journey and their progress over the past few years can be seen as a template for others to follow. On a personal basis, their embrace of a modern restructuring regime is a jarring juxtaposition with Hong Kong’s continued failure to legislate any type of restructuring process. Whilst Hong Kong is partly protected from competition from Singapore in that Hong Kong remains the natural location for matters relating to mainland China, it does not bode well for the prospects of Hong Kong being chosen as a location for restructuring for businesses located in other Asian countries.
   3. Whilst the concerns raised about rescue financing and the potential for lenders to assert too much control and influence are reasonable and merit consideration, it seems like those issues could be managed with minor changes to the legislation or increased judicial scrutiny and they certainly do not merit the scrapping of rescue financing.
   4. Given a number of major global restructuring hubs such as the United Kingdom, Hong Kong and the Cayman Islands have no real rescue financing available, it is difficult to conclude that rescue financing is an essential element of all restructurings, though it certainly does seem to positively assist.

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