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AVANT-GARDE TOOLS IN RESCUE FINANCING

Developing the Practice and Use of Roll-Ups and Cross-Collateralisations in Singapore

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The introduction of super-priority rescue financing provisions to Singapore's insolvency framework adds a further bow to its attractiveness as a restructuring hub. At the same time, these tools open up avenues for abuse and predatory practices, to the detriment of the beleaguered debtor and its other creditors. This article addresses some of these issues in the context of roll-ups and cross-collateralisations, and provides suggestions as to how the rescue financing framework in Singapore may be further strengthened.

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I. Introduction

1 Singapore continues to cement its position as a key nodal jurisdiction for managing transnational insolvencies in Asia. Amongst other features, the Insolvency, Restructuring and Dissolution Act 2018[1] ("IRDA") provides for an array of tools to stimulate and incentivise a successful turnaround.

2 Two mechanisms which have come to the fore in recent years in the context of rescue financing are "roll-ups" and "cross-collateralisations". A "roll-up" involves the use of newly input financing to pay off existing pre-petition debt of the lender. This in turn effectively upgrades the priority of the rescue lender's pre-petition debt, which is paid off and "rolled up" into the super-priority post-petition debt.[2] "Cross-collateralisation" refers to the granting of the debtor's assets as collateral for both new and pre-existing loans.[3] Through cross-collateralisation, super-priority is conferred on the pre-petition debts through the use of the debtor's assets as collateral for both the new and existing loans.

3 Both processes seek to address the traditional reluctance of existing creditors to extend further credit to a company in distress. By permitting lenders to salvage a non-performing loan, a strong commercial incentive is created for existing creditors to provide rescue financing, which in turn increases the prospects of a successful turnaround. However, these tools have also been criticised as being contrary to the *pari passu* principle by allowing the rescue financier to alter the priority of its pre-petition debts. There are also concerns that such a rescue financier would wield a significant amount of influence in the restructuring process, potentially to the detriment of the general body of unsecured creditors.[4]

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1 2020 Rev Ed.

2 *Re Design Studio Group Ltd* [2020] 5 SLR 850 at [7].

3 *Re Design Studio Group Ltd* [2020] 5 SLR 850 at [14].

4 The debtor's recourse to cramdown mechanisms in such scenarios will be curtailed by the elevated priority of the rescue financier's pre-petition debt. See Sanford U Mba, *New Financing for Distressed Businesses in the Context of Business Restructuring Law* (Springer International Publishing, 2019) at pp 182 and 183.

4 This article (a) examines the current landscape in Singapore and the US; and (b) considers how principles in relation to the approval of roll-ups and cross-collateralisations may be further developed in Singapore.

II. Current landscape in Singapore

5 Under the IRDA, rescue financing is defined as financing which is either necessary for the survival of a company that obtains the financing, or necessary to achieve a more advantageous realisation of the company's assets than on a winding up of the company (or both).[5] Where this is the case, subject to the fulfilment of further pre-conditions specific to each type of rescue financing, the court may exercise its discretion to grant super-priority to the debt arising from the rescue financing. This may include treating the rescue financing as if it were part of the costs and expenses of the winding up, granting the rescue financing priority over all unsecured debts and preferential debts, and securing the rescue financing through the grant of a security interest over the debtor's property.[6]

6 In *Re Design Studio Group Ltd*[7] ("*Re Design Studio*"), the court approved a S$62.08m rescue financing package to the applicant and related companies ("DSG Group"), which was provided by the holding company's major shareholder (S$12.08m) and the DSG Group's sole secured lender (S$50m). Without the rescue financing, the group would enter into liquidation, with little prospect of recovery for its unsecured creditors. Notably, more than S$14.4m of the package would be directed towards repaying pre-existing liabilities owed to the major shareholder and the secured lender.[8]

7 The court exercised its discretion to grant the rescue financing priority over all unsecured debts and preferential debts, notwithstanding that part of these funds were used to repay the

5 Insolvency, Restructuring and Dissolution Act 2018 s 67(9).
6 Insolvency, Restructuring and Dissolution Act 2018 ss 67(1)(*a*)–67(1)(*d*).
7 [2020] 5 SLR 850.
8 *Re Design Studio Group Ltd* [2020] 5 SLR 850 at [38].

debtor's pre-existing debt. In so doing, the court considered that the term "rescue financing" was sufficiently broad to encompass roll-ups, and that there was no express legislative prohibition against roll-ups.[9] The court noted that this was consistent with its earlier findings in *Re Attilan Group Ltd*[10] ("*Re Attilan*") that a rescue financer is not prohibited from stipulating conditions in the grant of its rescue finance.[11]

8 Nevertheless, the court emphasised that only roll-ups which ultimately create new value for the company should be regarded as rescue financing. This would be determined with reference to the circumstances of the specific case, although the court stressed that the new value should not be a "minuscule or token amount" and that the rescue financing should not be "almost entirely" used to repay old debts.[12]

9 Assuming the proposed roll-up constitutes rescue financing, the court will consider whether to exercise its discretion to grant super-priority to the roll-up with reference to factors including (a) creditors' interests – that is, the extent to which other unsecured creditors are likely to benefit or be prejudiced; (b) the viability of the proposed restructuring; (c) the availability of alternative financing; and (d) whether the terms of the proposed financing were reasonable and in the exercise of sound judgment.[13] Special note would be given to the interests of specific creditors whose priorities would be lowered following the roll-up.[14]

10 The position as regards cross-collateralisations in Singapore is less clear. In *Re Design Studio*, whilst the court was referred to US case authorities on cross-collateralisation, it declined to address the question of whether cross-collateralisation would constitute rescue financing as the issue was not before it.[15]

9 *Re Design Studio Group Ltd* [2020] 5 SLR 850 at [42].
10 [2018] 3 SLR 898.
11 *Re Design Studio Group Ltd* [2020] 5 SLR 850 at [43].
12 *Re Design Studio Group Ltd* [2020] 5 SLR 850 at [46].
13 *Re Design Studio Group Ltd* [2020] 5 SLR 850 at [33] and [34].
14 *Re Design Studio Group Ltd* [2020] 5 SLR 850 at [52]–[54].
15 *Re Design Studio Group Ltd* [2020] 5 SLR 850 at [56].

III. The US position

11 Similar to Singapore, the US Bankruptcy Code does not explicitly authorise or prohibit roll-ups. The US courts have historically been wary of roll-up arrangements, although court approval has become more commonplace in recent years. In this regard, the courts will carefully scrutinise roll-up provisions and tend to grant its approval only if there is no alternative financing available, and where such financing is essential to the debtor's prospects of reorganisation.

12 One of the largest roll-up bankruptcy financings approved by the US courts is reported in the decision of *In re Lyondell Chem Company*[16] ("*Re Lyondell*"), which involved a roll up of 50% of a term loan facility of US$6.5bn and a full roll-up of a US$1.5bn asset-based revolving credit facility. The factors considered by the Southern District of New York ("SDNY") Bankruptcy Court were similar to those encapsulated in *Re Attilan*, and included whether the financing (a) involved reasonable business judgment; (b) was negotiated in good faith; and (c) is in the best interest of the estate.

13 Notwithstanding concerns around the relatively onerous terms (including terms relating to maturity date, and pricing terms which were described as "disappointing"),[17] the roll-up was approved, taking into account the lack of alternative financing options. The court made it clear that its decision was driven by necessity given the challenging economic conditions at the time and limited availability of credit, and that the parties should be "wary of using this case as a precedent … especially … after the liquidity markets have loosened up".[18]

16 Case No 09-10023 (Bankr SDNY, 2009).
17 David Griffiths, "Roll-up, Roll-up, Read All about It!", *Weil Restructuring* (6 October 2010).
18 David Griffiths, "Roll-up, Roll-up, Read All about It!", *Weil Restructuring* (6 October 2010), citing Robert Gerber J's statement in the restructuring of Lyondell Chemical Co.

14 Since then, several US bankruptcy courts have established guidelines[19] addressing the circumstances under which roll-ups and cross-collateralisations may be permitted. For example, the SDNY Bankruptcy Court has classified roll-ups and cross-collateralisations as "extraordinary provisions" which must be "disclosed conspicuously" in any motion and require "substantial cause shown, compelling circumstances and reasonable notice".[20] There is also a well-established list of factors that the court will consider in deciding whether to permit the use of these mechanisms, including:[21]

(a) the extent of notice provided to interested parties;

(b) a comparison to the terms that would be available absent the roll-up or cross-collateralisation;

(c) the degree of support amongst interested parties; and

(d) whether an undue advantage will be given to pre-petition lenders without a countervailing benefit to the estate.

15 One other key factor raised by the US courts is the proportion of new funds channelled towards the pre-petition debt.[22] Similar to *Re Design Studio*, the roll-up financing must provide access to meaningful new capital rather than serve as a mere enhancement of the lender's position.

16 As regards cross-collateralisation arrangements, the US courts appear to be split over whether this is permissible under

19 See, *eg*, Local Rules for the United States Bankruptcy Court, District of Delaware (effective 1 February 2022) rr 4001-2(a)(i)(O) and 4001-2(a)(i)(N).

20 United States Bankruptcy Court, Southern District of New York, "In the Matter of the Adoption of Guidelines for Financing Requests" (General Order No M-274, 9 September 2002).

21 United States Bankruptcy Court, Southern District of New York, "In the Matter of the Adoption of Guidelines for Financing Requests" (General Order No M-274, 9 September 2002) at pp 6–8.

22 Randall Klein & Jacob Marshall, "DIP financing: What's New; What's Not; And What's Coming" (42nd Annual Southeastern Bankruptcy Law Institute Seminar, 31 March –2 April 2016) at p 8, referring to *In re Constar International Holdings LLC* Case No 13-13281 (Bankr D Del, 2014), where a 20% roll-up was favoured over a 40% roll-up against the debtor's preference.

the US Bankruptcy Code.[23] On one hand, detractors of cross-collateralisation argue that cross-collateralisation is contrary to the fundamental priority scheme of the Bankruptcy Code and reduces the pool of assets available to unsecured creditors if the restructuring fails.[24] On the other, proponents in certain circumstances recognise that cross-collateralisation may be essential to enable the debtor to continue as a going concern.[25] Where court approval has been granted, this has generally been with reluctance and upon the satisfaction of specific requirements such as the provision of adequate notice.[26]

17 The United States Court of Appeals for the Eleventh Circuit was the first appellate court to address the issue of cross-collateralisations on the merits[27] – see *In re Saybrook Manufacturing Co Inc*[28] ("*Re Saybrook*"). In that case, the court held that cross-collateralisations were inconsistent with the Bankruptcy Code which did not expressly authorise cross-collateralisations as an acceptable method of post-petition financing.[29] In this regard, the court took the view (a) that §§ 364(c) and 364(d) of the Bankruptcy Code refer only to future post-petition extensions of new credit and do not authorise the granting of security to secure pre-petition loans;[30] and (b) that cross-collateralisation is directly contrary to the fundamental priority scheme of the Bankruptcy Code, and beyond the scope of the court's inherent equitable power.[31]

23 See, *eg*, *In re Sun Runner Marine Inc* 945 F 2d 1089 at 1094 (9th Cir, 1991); *cf In re Keystone Camera Products Corporation* 126 BR 177 at 182 (Bankr DNJ, 1991).
24 Sanford U Mba, *New Financing for Distressed Businesses in the Context of Business Restructuring Law* (Springer International Publishing, 2019) at p 183.
25 *In re Vanguard Diversified Inc* 31 BR 364 at 366 and 367 (Bankr EDNY, 1983).
26 *In re General Oil Distributors Inc* 20 BR 873 at 876 (Bankr EDNY, 1982).
27 *Collier on Bankruptcy* (Henry J Sommer & Richard Levin eds) (LexisNexis, 16th Ed, 2024) at para 364.06.
28 963 F 2d 1490 (11th Cir, 1992).
29 *In re Saybrook Manufacturing Co Inc* 963 F 2d 1490 at 1494 and 1495 (11th Cir, 1992).
30 Stating that the court the "may authorize the obtaining of credit or the incurring of debt", but not the securing of pre-petition unsecured or undersecured debt.
31 *In re Saybrook Manufacturing Co Inc* 963 F 2d 1490 at 1495 (11th Cir, 1992).

18 Post-*Re Saybrook*, the US courts have reached varying conclusions as to the validity of cross-collateralisations.[32] A number of US jurisdictions have issued guidelines that apply when faced with motions to approve cross-collateralisation arrangements, suggesting that cross-collateralisation may still be appropriate in certain circumstances,[33] notwithstanding that it is a "disfavoured practice".[34] In this regard, commentators have also suggested that cross-collateralisation may be appropriate if the debtor can show that the lender was the only source of funds to keep the business going, and that doing so would enhance the recoveries of the general unsecured body, notwithstanding the near-term sacrifice of the debtor's unencumbered assets.[35]

IV. Roll-ups and cross-collateralisations: reform, development and further issues

19 Both roll-ups and cross-collateralisation serve the important function of incentivising the provision of credit, particularly in challenging market conditions.

20 However, the reality is that such rescue financing mechanisms are susceptible to abuse. At the outset, the dominant pre-insolvency secured lender often enjoys a first mover's advantage and generally possesses significant influence over the terms of the reorganisation plan,[36] which may be exercised to its primary benefit and the potential detriment of other creditors.

32 *Collier on Bankruptcy* (Henry J Sommer & Richard Levin eds) (LexisNexis, 16th Ed, 2024) at para 364.06.

33 See, *eg*, paras 14(a)–14(d) above.

34 See *Collier on Bankruptcy* (Henry J Sommer & Richard Levin eds) (LexisNexis, 16th Ed, 2024) at para 364.06, United States Bankruptcy Court, Southern District of New York, "In the Matter of the Adoption of Guidelines for Financing Requests" (General Order No M-274, 9 September 2002) and United States Bankruptcy Court, Northern District of California, "Guidelines for Cash Collateral & Financing Motions & Stipulations" (effective 1 January 2006) at para E1, noting that the court will not "ordinarily approve" cross-collateralisation clauses.

35 *Collier on Bankruptcy* (Henry J Sommer & Richard Levin eds) (LexisNexis, 16th Ed, 2024) at para 364.06.

36 Frederick Tung, "Financing Failure: Bankruptcy Lending, Credit Market Conditions, and the Financial Crisis" (2020) 37 *Yale Journal on Regulation* 651 at 657.

From the perspective of preserving control over the debtor's assets and improving its pre-petition position, financing on terms incorporating roll-ups and cross-collateralisation makes significant commercial sense.

21 From a debtor's perspective in a debtor-in-possession restructuring environment, the rehabilitating debtor is primarily focused on its own survival, at times, even at the expense of equal treatment of creditors. Moreover, existing relations with a prior lender tend to discourage the exploration of alternative sources of financing, which may have been undertaken by a more objective receiver or trustee.[37]

22 It is therefore ever important to scrutinise the terms of rescue financing – particularly those that feature roll-ups and/or cross-collateralisation – to ensure that real value ultimately endues to the debtor and its creditors at large. Against this backdrop, we analyse whether cross-collateralisation is permissible under Singapore's present legislative framework, and the controls and factors that ought to apply when deciding whether to grant roll-ups/cross-collateralisations priority status.

A. Cross-collateralisation: Is it permissible in Singapore?

23 Whether financing arrangements subject to cross-collateralisation will be recognised as rescue financing and thereafter accorded priority status under the IRDA remains an open question.

24 Whilst the court in *Re Design Studio* declined to address these issues,[38] its observations on roll-ups qualifying as rescue financing suggest that it will be inclined to decide likewise when faced with proposed financing arrangements incorporating cross-collateralisation. In particular, the court's findings: (a) that the plain meaning of "rescue financing" in s 67(9) of the IRDA is

37 *In re Texlon Corporation* 596 F 2d 1092 at 1098 (2nd Cir, 1979). See also George Triantis, "Debtor-in-Possession Financing in Bankruptcy" in *Research Handbook on Corporate Bankruptcy Law* (Barry E Adler ed) (Edward Elgar Publishing, 2020) at p 190.

38 *Re Design Studio Group Ltd* [2020] 5 SLR 850 at [56].

broad enough to encompass roll-ups; and (b) that the same provision does not prohibit a rescue financier from stipulating conditions in the grant of rescue finance, appear to be similarly applicable to cross-collateralisations.

25 Perhaps the more pertinent issue is whether the legislative framework, specifically, ss 67(1)(*c*) and 67(1)(*d*) of the IRDA which deal with the granting of security interests over rescue financing, even permits the court to grant super-priority to financing arrangements involving cross-collateralisation.

26 In this regard, it is arguable that a pre-petition debt over which cross-collateralisation is sought cannot constitute a debt "arising from any rescue financing", and thus does not fall within the ambit of ss 67(1)(*c*) and 67(1)(*d*). In the authors' view, however, this would be an unduly restrictive reading of the relevant provisions. To illustrate, it is theoretically possible for an existing lender to propose an arrangement in which fresh funds (amounting to the sum of the pre-petition debt and a portion of fresh funds) are disbursed on the condition that the pre-petition debt would be repaid, and on a subsequent date, seek a security interest pursuant to ss 67(1)(*c*) and 67(1)(*d*) over the entirety of the fresh moneys. In this scenario, there is little doubt that the entirety of the fresh funding would constitute debt "arising from … rescue financing". An expansive reading of s 67 to facilitate this exercise, which essentially cross-collateralises the pre-petition debt, would negate the need for such creative engineering, and arguably be consistent with the permissive approach adopted in *Re Design Studio.* In any case, it would be helpful to obtain more certainty on the position, whether by way of legislative amendments or a conclusive pronouncement from the Singapore courts.

27 For completeness, there is US authority[39] which suggests that the express terms of §§ 364(c) and 364(d) of the US Bankruptcy Code do not allow for the cross-collateralisation of pre-petition debt.[40] Whilst ss 67(1)(*c*) and 67(1)(*d*) of the IRDA

39 *In re Saybrook Manufacturing Co Inc* 963 F 2d 1490 at 1495 (11th Cir, 1992).
40 See para 17 above.

were "adapted" from §§ 364(c)(2), 364(c)(3) and 364(d)(1) of the US Bankruptcy Code,[41] the authors do not think that the same conclusion need necessarily be followed in Singapore. First, the language used in §§ 364(c) and 364(d) of the US Bankruptcy Code differs from that under ss 67(1)(*c*) and 67(1)(*d*) of the IRDA. Second, the US courts have subsequently issued guidelines relating to motions to approve cross-collateralisation arrangements, thereby suggesting that cross-collateralisation may be permissible within the ambit of the US Bankruptcy Code in certain circumstances.[42]

28 There is also an argument that the phrase "to be obtained" in ss 67(1)(*c*) and 67(1)(*d*) of the IRDA (which is casted more narrowly than ss 67(1)(*a*) and 67(1)(*b*) relating to debt arising from any rescue financing "obtained, or to be obtained") indicates a deliberate legislative choice to omit pre-petition debt. In the authors' submission, the better view is that the use of the phrase "to be obtained" simply means that an application for priority over rescue financing under ss 67(1)(*c*) and 67(1)(*d*) must be sought before such rescue financing arrangement is put in place.[43]

B. Strengthening the framework – factors and considerations in granting priority status over roll-ups and cross-collateralisations

29 In *Re Design Studio*, the Singapore High Court stressed the importance of rescue financing mechanisms creating "new value" for the company. Understandably, the court held that the amount of new funds that must be injected "cannot be stated with any meaningful precision in the abstract", and would need to be considered against the circumstances of the specific case.[44]

41 Harold Foo & Beverly Wee, *Annotated Guide to the Singapore Insolvency Legislation* (Academy Publishing, 2023) at paras 06.135 and 06.136.

42 See para 18 above.

43 This appeared to be the interpretation taken by Ang Cheng Hock J in an unreported decision in February 2020 in an application by Swee Hong Ltd. See, Lionel Chan, "DIP Financing – the Singaporean Way", *Lexology* (17 July 2020).

44 *Re Design Studio Group Ltd* [2020] 5 SLR 850 at [46].

30 Whilst it may not be possible to prescribe definitive quantitative guidance, to the extent that further qualitative guidance can be set out, this would assist potential rescue financiers and distressed entities in the assessment and development of viable restructuring options.

31 In the US context, it has been suggested that the US bankruptcy courts would pay careful attention to the amount of the rolled-up debt as a percentage total of the new funds injected ("Percentage of Rolled-up Debt")[45] – presumably on the basis that a lower percentage entails more available funds and a higher chance of the proposed arrangement being blessed. At first blush, this appears to be a straightforward proposition that introduces certainty. However, a survey by the authors of cases from 2009 to 2023 in which the US courts approved roll-ups suggests a more nuanced picture, with the Percentage of Rolled-up Debt ranging from 16.7% to as high as 87.8%.[46]

32 The wide variance suggests that factors other than the Percentage of Rolled-up Debt will be given significant consideration. For example, the SDNY Bankruptcy Court in *Re Lyondell* took into account the then-ongoing global financial crisis and the "very limited present availability of credit" during the economic downturn before ultimately approving rescue financing which rolled-up 59% of the new moneys injected.[47] Notably, the court made it clear that more convincing evidence will have to be adduced "after the liquidity markets have loosened up".[48] Likewise in Singapore, the court in *Re Design Studio* took especial notice of the economic climate resulting from the

45 Richard J Cooper *et al*, "Recent Developments in DIP Financing for International and Domestic Debtors", *Global Restructuring Review* (27 November 2023).

46 Admittedly, a small sample size of 11 cases were considered for this exercise, and the conclusion that there is a lack of an underlying trend may not be truly representative of the situation.

47 David Griffiths, "Roll-up, Roll-up, Read All about It!", *Weil Restructuring* (6 October 2010).

48 David Griffiths, "Roll-up, Roll-up, Read All about It!", *Weil Restructuring* (6 October 2010), citing Robert Gerber J's statement in the restructuring of Lyondell Chemical Co.

Covid-19 pandemic in assessing the viability of alternatives to the proposed financing in that case.[49]

33 Nevertheless, the Percentage of Rolled-Up Debt continues to serve as a useful starting point to determine the appropriate level of judicial scrutiny. In circumstances where the Percentage of Rolled-up Debt is higher, greater scrutiny should be given to the terms of the proposed financing and conditions surrounding the same, specifically to ensure that the interests of the borrower and other creditors are not unfairly compromised. In particular, the authors suggest that specific regard should be paid to the following factors:

(a) The broader circumstances surrounding the proposed restructuring. This spans the state of the economy at large, and sector and geographic issues that may have an impact on the availability of credit.

(b) The availability of alternative financing, and whether the debtor had made reasonable attempts in the circumstances to obtain financing without resorting to super-priority.

(c) Whether the fresh funds (that is, not rolled up) are sufficient to enable the company to undertake the contemplated restructuring process, irrespective of the Percentage of Roll-up Debt.

(d) The relative benefit of the proposed rescue financing accrued to the debtor and other creditors, as opposed to the existing lender.

(e) The amount of moneys to be owed to the proposed rescue financier, in comparison to other creditors. A lower ratio may suggest a lesser impact on the interests of the other creditors, although this is ultimately fact specific.

49 *Re Design Studio Group Ltd* [2020] 5 SLR 850 at [63].

V. Conclusion

34 In the Second Reading of the Companies (Amendment) Bill,[50] which sought to introduce provisions for super-priority for rescue financing, Edwin Tong[51] remarked that "[t]he US experience in Chapter 11 proceedings has been that rescue financings are invariably value enhancing and are usually associated with a higher probability of successful recovery".[52] Roll-ups and cross-collateralisations push the limits of this analysis. In providing further incentive for rescue financing and essential credit to be extended, they also open the door to predatory practices from opportunistic creditors seeking to elevate their pre-petition position and extract maximum value out of a distressed situation, to the detriment of other creditors.

35 As Singapore continues to mature as a restructuring jurisdiction of choice, it is inevitable that *avant-garde* solutions such as roll-ups and cross-collateralisations will feature more prominently. Careful scrutiny and a keen understanding of the various factors at play will be essential to maintaining an appropriate balance between encouraging much needed investment and ensuring that the process is not abused for the benefit of selected parties.

50 Bill No 13/2017.

51 A Member of Parliament for Marine Parade Group Representation Constituency (GRC) and a member of the Insolvency Law Review Committee, and the Committee to Strengthen Singapore as an International Centre for Debt Restructuring.

52 Singapore Parl Debates; Vol 94, Sitting No 43; [10 March 2017] (Edwin Tong, Member of Parliament (Marine Parade)).