

ALTERNATIVES TO BANKRUPTCY – THE DEBT REPAYMENT SCHEME (“DRS”)

Bankruptcy law should generally be inclined towards debtor rehabilitation, and bankruptcy should only come about as a last resort. A debt repayment scheme (“DRS”) has been proposed to help wage-earner debtors with relatively small debts to avoid bankruptcy. This article examines the key features of such schemes and other related debt rehabilitation models in various jurisdictions. These features will help in understanding the core concepts underpinning the likely framework of the proposed DRS legislation.

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I. Introduction

1 In an increasingly credit-based and consumer-centric world, a “culture of consumption” has become prevalent,¹ with many consumers overlooking the dangers of overextending their credit. The rapid growth in the volume and varieties of consumer credit has led to an inevitable increase in the number of overcommitted debtors. A pivotal challenge common to many bankruptcy regimes is how to provide relief from the burden of previously-incurred and often accumulating debt, while seeking to protect creditors and safeguard their interests.

2 Bankruptcy regimes generally seek to attain a fair balance between the interests of debtors and creditors alike. Nevertheless, it has been observed that no balancing of any kind can take place unless there is first agreement about the objectives of bankruptcy law, the interests deserving of attention and the relative weight to be assigned to them.² Even where there may often be a considerable degree of consensus about the basic values and goals, there may be disagreement across different jurisdictions over the appropriate means for achieving them. These observations cannot be ignored if one is to adopt a pragmatic approach towards law reform.

1 A term coined by R D Manning, *Credit Card Nation: The Consequences of America's Addiction to Credit* (2001)

2 J S Ziegel, *Comparative Consumer Insolvency Regimes* (2003) at p 168.

3 For some debtors, bankruptcy may be the only practical means of staying off creditors. But a record of bankruptcy will obviously have an adverse effect on an individual's credit status. The long-term consequences of bankruptcy may not be foreseen, let alone wholly understood. Alternatives to bankruptcy are thus necessary features in all bankruptcy regimes. These are primarily negotiated schemes aimed at affording debtors a means of avoiding the disabilities and associated stigma of a bankruptcy record. Such alternatives aim to promote responsible debt settlement and individual debtor rehabilitation. The primary objective is to afford debtors a fresh start. Such alternatives can take various different forms, having regard to the basic values and framework of the bankruptcy laws in place in their respective jurisdictions.

II. A brief overview of the Singapore bankruptcy context

4 In Singapore, the affairs of bankrupts are administered by the Official Assignee, who heads the Insolvency and Public Trustee's Office ("IPTO").³ The Official Assignee does not take on any role prior to bankruptcy. He is not statutorily empowered to do so. There is no system of independent oversight or control in respect of pre-bankruptcy conduct. There are no provisions to compel debtors and creditors to work towards negotiating settlement of their debts. Within the current bankruptcy framework, a debtor usually has little option but to succumb to a creditor who is intent on forcing him into bankruptcy. Upon bankruptcy, a debtor loses control of his assets and will face a range of restrictions on his lifestyle, including restrictions on travel and managing businesses.

5 As in most bankruptcy regimes, the bankruptcy regime in Singapore recognises that bankruptcy should always be a matter of last resort for financially-distressed debtors. In some instances, the debtor may yet avoid bankruptcy by entering into an individual voluntary arrangement ("IVA") with his creditor(s). The IVA is the sole alternative bankruptcy procedure currently available in Singapore. Less commonly, a debtor may be able to obtain an annulment of bankruptcy by tendering full payment in discharge of his debts, or he may enter into a composition of his debts.

6 More often than not, upon being made bankrupt, the debtor is expected to extricate himself from bankruptcy by means of various modes of discharge. While there is no automatic discharge from

3 Any views expressed in this paper are my own, and do not reflect those of IPTO or the Ministry of Law. I will of course also bear sole responsibility for all errors and omissions.

bankruptcy in Singapore, s 125 of the Bankruptcy Act now at least permits the Official Assignee to exercise discretion to discharge a bankrupt, subject to certain preconditions, after a minimum period of three years.⁴ This mode of discharge has proved successful in assisting bankrupts with debt levels of \$500,000 or less to be released from bankruptcy in a reasonably short period of time.⁵

7 Bankruptcy levels in Singapore are relatively low, although the rate at which bankruptcy orders have been made has increased substantially over the last ten years.⁶ The majority of the 25,000-odd undischarged bankrupts are individual debtors. The statistics maintained by IPTO at the time of writing indicate that about 82% of all bankrupts have debts which do not exceed \$500,000.⁷ Approximately 43% of all bankrupts have debts of \$100,000 or less, while 22% of all bankrupts have debts of \$50,000 or less.

III. Preliminary proposal for a debt repayment scheme

8 The feasibility of introducing a debt repayment scheme (“DRS”) as an alternative to bankruptcy was recently examined in Singapore. A scheme modelled loosely on the wage reorganisation scheme found in Chapter 13 of the US Bankruptcy Code has been proposed.⁸ The study team led by the Official Assignee found various features of Chapter 13 to be capable of adaptation within the Singapore context. Preliminary consultation with key stakeholders such as the Association of Banks, the Law Society and the Insolvency Practitioners’ Association of Singapore revealed general support for the scheme. Thereafter, a public consultation exercise was conducted and feedback has been obtained, also indicating general support for the scheme.⁹

9 As mentioned during the Minister’s speech at the Committee of Supply Debate in March 2007, the proposed DRS is based on Chapter 13

4 Section 125 “discharge by certificate”, as it has become commonly known, was introduced in the last major reform of the Bankruptcy Act in 1995.

5 Approximately 1,200 bankrupts have been discharged *via* the s 125 route since 1995. Approximately 29% were discharged within five years of bankruptcy.

6 Currently there are around 25,000 undischarged bankrupts out of a population of approximately 4.6m. In 1997, the total number of undischarged bankrupts was 12,674.

7 Source: IPTO, Ministry of Law

8 *Supra* n 1.

9 For the DRS consultation paper, see: www.minlaw.gov.sg/ipto/corporate/Downloads/DRS_consultation_paper.pdf. As for the collation of key aspects of feedback and the response from the Ministry of Law, see: www.minlaw.gov.sg/ipto/corporate/Downloads/Response_DRS_Annex_B.pdf.

of the US Bankruptcy Code.¹⁰ At the time of writing, work on the draft legislation is nearing completion. Once the draft legislation is finalised, a further round of public consultation is scheduled to commence. Pending the completion of the draft DRS legislation, this article seeks to examine the key features of other models of debt rehabilitation and repayment schemes currently existing in other jurisdictions. These features will help in understanding the likely basic framework of our forthcoming DRS legislation.

IV. Chapter 13 of the US Bankruptcy Code¹¹

10 Chapter 13 of the US Bankruptcy Code is often referred to as the “wage-earner chapter”, more for convenience than precision, as the scheme is only available to individual debtors who have a regular source of future wages. The scheme is designed to enable them to develop a plan for full or partial debt repayment. In principle, Chapter 13 is still a form of bankruptcy, although for practical purposes it operates very differently from the more conventional Chapter 7 form of bankruptcy, which is commonly understood to take the form of a “straight bankruptcy” or “liquidation” as opposed to a Chapter 13 “reorganisation”.

11 Prior to 2005, a debtor could not be compelled to undergo Chapter 13 as it was a voluntary scheme. Amendments to the US Bankruptcy Code by virtue of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005¹² resulted in the creation of a “means test” to help differentiate those who can afford to repay at least part of their debts and those who cannot. Thus, based on the premise that a debtor who can pay should repay his debts, individuals with income above the state median must undergo a Chapter 13 scheme. They will not be eligible for a Chapter 7 bankruptcy. Under current bankruptcy

10 The Senior Minister of State for Law, Associate Professor Ho Peng Kee announced the decision to implement a DRS on 2 March 2007: http://notesapp.internet.gov.sg/_48256DF20015A167.nsf/LookupContentDocsByKey/GOVI-6YWCSZ?OpenDocument. As the draft legislation has yet to be finalised at the time of writing, this article will draw primarily on material that is available in the public domain, including the Public Consultation Paper released by the Insolvency and Public Trustee’s Office (“IPTO”) in April 2007, inviting feedback on the proposed DRS. I wish to separately acknowledge the assistance I have obtained from the study report prepared in December 2005 by the IPTO study team led by Mr Sarjit Singh, former Official Assignee and Public Trustee. I owe the team a sincere debt of gratitude for the wealth of information they have collated in relation to this topic.

11 Sources: <http://www.uscourts.gov/bankruptcycourts/bankruptcybasics/chapter13.html>; http://www.usdoj.gov/ust/eo/ust_org/about_ustp.htm.

12 With effect from 17 October 2005.

laws, debtors must also undergo credit counselling within 180 days after filing for Chapter 13.

12 Essentially, filing for Chapter 13 will require the debtor to propose and carry out a repayment plan outside of the bankruptcy regime under Chapter 7. The plan will involve submission of a portion of his post-petition earnings for a period of between three to five years to pay pre-petition debts. The bankruptcy court will have to determine whether to approve the repayment plan. Creditors are then paid over an extended period of time under court supervision and protection. Payments will be made to creditors out of post-petition income, net of living expenses. Creditors need not be fully paid but should get at least as much as they would have obtained under Chapter 7 bankruptcy. By adopting the means test, the court-ordered plan eliminates the option of recourse to Chapter 7, which would otherwise enable avoidance of payment of debts while obtaining a discharge of those debts. In some instances, Chapter 7 cases may also be converted to Chapter 13 bankruptcies.

13 Creditors are entitled to challenge the debtor's proposals under the payment plan, but once the plan is approved, creditors are stayed from prosecuting their claims on any debt recovery. Apart from the stay or moratorium on creditors' claims, including the opportunity to avoid mortgage foreclosure, Chapter 13 offers the debtor the advantage of retaining ownership and possession of his assets. The debtor will have to file with the court the following:

- (a) schedules of his assets and liabilities;
- (b) a schedule of his current income and expenditure;
- (c) a schedule of executory contracts and unexpired leases;
- and
- (d) a plan for repayment of his debts.

14 The debtor must file the plan of repayment within 15 days of the filing of the petition. The plan must provide for the payments of fixed amounts to the standing trustee on a regular basis. Within 30 days after the filing of the plan, even if the plan has not yet been approved by the court, the debtor must start making payments to the standing trustee. A meeting of creditors is held in every case but creditors rarely attend such meetings preferring to let the standing trustees deal with the debtor. During this meeting, the debtor is examined regarding his financial affairs and the proposed terms of the plan. In Chapter 13, the creditors do not vote on the plan. The Chapter 13 plan requires only court approval.

15 After the meeting of creditors is concluded, the bankruptcy judge must determine at a confirmation hearing whether the plan is feasible and meets the standards for confirmation set forth in the Bankruptcy Code. If the plan is confirmed by the bankruptcy judge, the Chapter 13 trustee commences distribution of the funds received in accordance with the plan. If the plan is not confirmed, the debtor has a right to file a modified plan or the debtor may file for bankruptcy under Chapter 7 instead. If the modified plan is not confirmed, the case is dismissed and the court may authorise the trustee to retain a specified amount for costs but all other funds paid to the trustee are returned to the debtor.

16 The provisions of a confirmed plan are binding on the debtor and each creditor. Once the court confirms the plan, it is the responsibility of the debtor to make the plan succeed. The debtor must make regular payments to the trustee. Furthermore, the debtor may not incur any significant new credit obligations without consulting the trustee as such credit obligations may have an impact upon the execution of the plan. If the debtor fails to make payments in accordance with the confirmed plan, this may result in dismissal of the case or its conversion into a bankruptcy case.

17 In Chapter 13, the US Trustee appoints a standing trustee to serve in all Chapter 13 cases. The standing trustee is not a government employee but the operator of a private business. The standing trustee does not receive a salary from the Government. He receives a percentage from the funds disbursed to creditors under the Chapter 13 plan instead. The number of Chapter 13 standing trustees is kept low so as to enable them to generate sufficient income to be viable businesses. The primary role of the standing trustee is to serve as a disbursing agent, collecting payments from debtors and making distributions to creditors. The other duties of the trustee are to review the debtor's Chapter 13 plan, raise plan issues, if any, with the debtor and to resolve those plan issues with the debtor. All payments under the plans are made to the standing trustee who will disburse them to the creditors according to the plan. To ensure that the standing trustee performs his task faithfully, he is required to furnish a security bond.

18 The Chapter 13 debtor is entitled to a discharge upon successful completion of all payments under the Chapter 13 plan. The discharge has the effect of releasing the debtor from all debts provided for under the plan. Certain long-term debts such as home mortgages, debts for alimony and child support, debts arising from death or personal injury and debts for restitution or a criminal fine will not be discharged. To the extent that these types of debts are not fully paid pursuant to the Chapter 13 plan, the debtor will still be responsible for these debts after the discharge.

V. A broad survey of alternatives to bankruptcy in other jurisdictions

19 Common law jurisdictions like Australia, Canada, the UK and Hong Kong also have alternative statutory schemes in place to enable the debtor to avoid bankruptcy and enter into an arrangement with his creditors. These are voluntary debtor-driven schemes and need not necessarily depend on creditors' assent or involve applications to the court for approval. In Scotland, a voluntary debt arrangement scheme has also been in place since 2004. Some common features underpinning these schemes include the desire to provide less formal alternatives to bankruptcy at low cost to the users, anchored by the principle that the interests of both debtors and creditors may be better served by not resorting to bankruptcy except as a last resort.

A. *Australia*¹³

20 Under the Australian insolvency regime, there are two major alternatives to bankruptcy. One is the personal insolvency agreement under Pt X of the Australian Bankruptcy Act. This procedure enables a debtor to come to an arrangement with his creditors and avoid bankruptcy. It is designed for debtors who have a reasonable amount of assets or are operating a business. The debtor makes a proposal to his creditors, which must be supported by a special majority (75% in value and 50% in number of those creditors who vote) for it to proceed. The arrangement is administered by a registered trustee and is legally binding on all creditors. Failure to abide by it may lead to bankruptcy.

21 The other procedure which enables the debtor to come to an arrangement with his creditors and avoid bankruptcy is the debt agreement under Pt IX of the Australian Bankruptcy Act. As with the Pt X arrangements, a special majority is required for the debt agreement to proceed. The person administering the arrangement does not have to be a registered trustee. Any person, including the debtor or a friend or a family member, can administer a debt agreement although in practice most are administered by fee-earning businesses. It is designed as a more informal low-cost procedure, to cater to debtors with fewer assets and relatively low incomes.

13 Source: <http://www.itsa.gov.au/dir228/itsaweb.nsf/docindex/part+x->part+x?opendocument>.

B. New Zealand¹⁴

22 In New Zealand, a summary instalment order (“SIO”) enables a formal arrangement between a debtor and his creditors, allowing him to pay back all, or an agreed part, of his debts by instalments. SIOs are usually for three years, but where there are special circumstances, may extend to five years. Where a person has assets or income, an SIO may be considered as an alternative to bankruptcy. The debtor or any of his creditors (with the debtor’s consent) may apply for entry into an SIO. The Official Assignee may grant an SIO if the total unsecured debts, excluding student loans, fines, penalties and reparation orders, are less than NZ\$40,000 and the debtor is unable to pay those debts immediately.

23 Before granting an SIO, the Official Assignee will allow the debtor and his creditors to make representations. After the Official Assignee makes an SIO, creditors cannot begin or continue proceedings unless the person subject to the SIO fails to meet their SIO obligations. There is a moratorium on any pending court proceedings, unless the Official Assignee gives permission for the case to proceed. Creditors who have furnished satisfactory documentary evidence (for example invoices and signed agreements) of amounts owed will be entitled to apply to be included as a creditor in the administration of the SIO for the amount of the debt, object to the acceptance or rejection of other creditors’ claims, and apply to the Official Assignee to resolve claim disputes.

C. Canada¹⁵

24 The Canadian Bankruptcy and Insolvency Act (“BIA”) provides ways for insolvent debtors to avoid bankruptcy by negotiating arrangements with their creditors for the compromise of their debts and the reorganisation of their financial affairs. The debtor may apply to court for a consolidation order under Pt X of the Act. A consolidation order sets out the amount and times when the debtor’s payments are due to the court. The court will distribute these payments to the creditors. This procedure lets the debtor pay off his debts over three years and frees him from creditor harassment and wage garnishment under the Act. Unlike bankruptcy, the debtor does not lose his assets.

25 The BIA also allows the debtor to make a consumer proposal to his creditors. This is an offer made by the debtor to his creditors to reduce the amount of his debts, extend the time he has to pay off his

14 Source: <http://www.insolvency.govt.nz/cms/summary-instalment/learn-about-summary-instalment-orders>.

15 Source: <http://www.bankruptcy-canada.ca/consumer-proposals/consumer-proposals.htm>.

debts or provide some combination of both. If the proposal is accepted, the creditors will not be able to take legal steps to recover their debts from the debtor. When the proposal is fully performed, the debtor will be relieved of all the debts that were in the proposal. If the debtor defaults on the proposal, the debtor may face bankruptcy.

D. UK¹⁶ and Hong Kong¹⁷

26 In the UK, the debtor may enter into an IVA with his creditors. The Hong Kong scheme of IVAs is similar to that existing in the UK. This is a formal proposal to pay part or all of his debts. The IVA is a court-based scheme which is regulated by the UK Insolvency Act. The debtor's proposal under an IVA must undergo preliminary scrutiny by an insolvency practitioner who must report to the court whether a meeting of creditors should be held to consider the proposal.

27 If the court approves the insolvency practitioner's report, a meeting of creditors will be convened. At the meeting, the creditors vote on whether to accept the debtor's proposals. If enough creditors (over 75% in value of creditors present and voting) vote in favour, the proposals are accepted. They are then binding on all creditors who had notice, or were entitled to receive notice of the meeting. The insolvency practitioner supervises the arrangement and pays the creditors in accordance with the accepted proposal. On successful completion of the IVA, the debtor is released from all the debts under the arrangement. If the debtor defaults under an IVA, any creditor may petition for his bankruptcy.

E. Scotland¹⁸

28 The debt arrangement scheme ("DAS") was introduced into Scotland in November 2004. In respect of multiple debts, the only statutory form of debt management available in Scotland is the DAS under the Debt Arrangement and Attachment (Scotland) Act 2002. Statutory debt management prevents a creditor from using diligence (civil court recovery) or bankruptcy against a debtor. Under the scheme, anyone with debt problems (who has surplus income, more than one debt and is not otherwise excluded by the regulations) may volunteer to set up an arrangement. This will be done through a registered debt counsellor. A debt counsellor must be approved under the regulations and work in Scotland to register a debtor with the scheme. There are

16 Source: <http://www.insolvency.gov.uk/bankruptcy/alternativestobankruptcy.htm>.

17 Source: <http://www.oro.gov.hk/eng/publications/ivaguide.htm>.

18 Source: <http://www.scotland.gov.uk/News/Releases/2004/11/30101012>.

approved advisers in place throughout Scotland to administer the scheme.

29 Under the terms of the DAS, debtors will have a period within which they must pay back their debts at an agreed rate approved by their creditors. Creditors who do not respond to repayment proposals within 21 days will be deemed to have approved the scheme. Typical repayment periods might be around five years. Provided that the debtor keeps up the repayments under the programme, creditors will not be able to enforce their debts through the courts. The debtor is not allowed any further credit, and if the debtor fails to meet the agreed terms of the scheme including any variations made while the programme is in place, he will forfeit the protection of the scheme.

VI. The proposed DRS in Singapore – Rationale and features

A. *Limitations of the IVA scheme*

30 Currently, the only pre-bankruptcy procedure available under the Singapore Bankruptcy Act is the IVA. The IVA is a court-based scheme which was introduced fairly recently in 1995, based on the UK IVA model. Under this scheme, a debtor may present a voluntary arrangement which seeks to implement a compromise or other arrangement with the creditors. The voluntary arrangement becomes binding on all creditors subject to it, as long as it has been approved by a majority in number of creditors holding at least 75% in value of the debts and the arrangement has been sanctioned by court.

31 The Singapore experience suggests that the IVA scheme, while useful in certain contexts, is not well suited to meet the needs of most consumer debtors. Debtors are often unable to obtain the requisite majority approval from the creditors. Moreover, the process is court-based and can be protracted and costly for consumer debtors. The majority of these debtors do not avail themselves of this process. IVAs may work best particularly where there are complex debtor proposals such as might feature in business or partnership debts. There have, however, been relatively few successful IVAs in Singapore.¹⁹ It would appear that these have largely involved business debtors with relatively large debt levels. Creditors are generally more inclined to support IVAs in such cases, as the debtors in question retain at least some portion of assets.

19 On average, there have been only about four successful IVAs out of seven IVAs per year over the last five years.

B. *The Study Team's recommendations and feedback received after consultation*

32 In their study report leading to the decision to implement the DRS, the Study Team led by the Official Assignee came to the conclusion that a simple, inexpensive and non-court based procedure should be introduced to complement the IVA scheme already in place. Such a scheme should be aimed at facilitating wage-earning debtors to repay their debts. The Study Team, therefore, recommended the introduction of a wage reorganisation scheme, which eventually took the form of the DRS. The Study Team's original proposals underwent refinement and modification in the course of feedback obtained on the proposed DRS through stakeholder and general consultation.²⁰ The feedback received thus far has generally been positive and there has been general support for the scheme.

33 Respondents who provided feedback queried whether the qualifying cap of \$100,000 should be raised or lowered. Some respondents further suggested that the qualifying criteria for debtors be expanded so that more debtors would be able to benefit from the DRS. For instance, there were suggestions that debtors who were operating businesses should not be excluded altogether from the DRS.²¹ There was mixed feedback on whether self-petitioners for bankruptcy should be allowed to participate in the scheme. Some were concerned that this could lead to an erosion of financial discipline, while others felt that the DRS should be more inclusive, being a scheme intended to help those who recognise their own financial distress. There were also suggestions that creditors should be allowed to vote on the repayment plan.

34 In principle, the general consensus is that the DRS should remain a debtor-driven scheme which will not require the court's approval. It will be administered under the Official Assignee's direct supervision. It will apply for all wage-earning debtors with reasonably manageable debt levels (currently proposed at up to \$100,000). It will come into effect upon a bankruptcy application, whether initiated by a debtor or his creditor. If the debtor does not qualify for the scheme or, having qualified, fails to honour his obligations under the proposed repayment plan, any of his creditors may proceed with the bankruptcy application against him.

20 *Supra* n 9 – for the collated feedback to the Discussion Paper as well as IPTO/Minlaw's response.

21 Debtors who are currently engaged in business would thus not qualify for the DRS, since they are unlikely to have a regular income stream and may incur further credit.

35 The DRS legislation is currently still in the drafting stage and the scheme is not likely to be implemented until after 2008. It is nonetheless possible at this juncture to outline a broad sketch of the operational framework, based on the principles set out in the DRS consultation paper, feedback received as well as the published response from IPTO and the Ministry of Law.

VII. A possible operational DRS framework

A. *Scheme administration*

36 Unlike the US Chapter 13, the DRS will not be a court-based scheme, primarily to save costs and to allow greater flexibility in its administration. This appears to be the approach favoured in New Zealand's SIO scheme and Scotland's DAS as well. Among the preliminary proposals, there were plans for the Official Assignee to outsource the administrators' functions and appoint suitably-qualified administrators from a panel. The appointed administrator would be empowered to perform functions similar to those carried out by the US standing trustees. These administrators will need to have the requisite expertise in financial management.

37 At the time of writing, it is envisaged, however, that the task of DRS administration will be undertaken by the Official Assignee's team of officers, at least during the initial phase of implementation. This will help to ensure closer supervision and overall case monitoring to facilitate a managed transition into the new scheme. The proposed arrangement mirrors the SIO scheme in New Zealand, where the Official Assignee assumes the responsibility for the approval and monitoring of the SIO. In due course, the idea of permitting private sector-based administrators to assist in the DRS may be revisited.

38 The duties of the DRS administrator will include going through the repayment plan with the debtor, holding creditors' meetings and resolving any plan issues with the debtor. Once the plan is implemented, the DRS administrator will monitor the case. The debtor will make regular payments directly to the Official Assignee who will then disburse the appropriate sums to the creditors until the payments under the plan have been completed. The debtor will then be released from his obligations under the plan.

B. *Qualifying criteria*

39 The general qualifying criteria should reflect the policy objectives of a low-cost, flexible and informal repayment arrangement.

Bearing in mind the target group of debtors the DRS is intended to assist, the general qualifying criteria are as follows:

- (a) the debtor must not have been a bankrupt in the five years preceding his entry into the scheme, nor can he have undergone a voluntary arrangement or a DRS in the same period of time;
- (b) the debtor must be a wage-earner or be in receipt of a regular income at the time of his entry into the scheme; and
- (c) the unsecured debts of the debtor must not exceed \$100,000, and these unsecured debts shall include liquidated damages awarded against the debtor, if any.

40 Business-owners, partners and sole-proprietors are likely to be excluded from the scheme on account of the uncertainty over whether they can be assured of sources of regular income. However, present wage-earner debtors whose debts were incurred in the course of their previous business should not be excluded, nor should debtors whose debts were incurred by reason of their having provided a guarantee for a business. The proposed debt limit is capped at \$100,000. Given the proposed maximum duration of any plan under the scheme, *ie*, five years, any higher limit would not be realistic. The cap represents a practicably manageable figure for most wage-earning debtors, enabling them to make reasonable headway towards repaying the debt within the stipulated time-frame.

C. *Commencement of the DRS*

41 The prerequisite before DRS can commence is an application for bankruptcy, whether by a creditor or by the debtor. The court, on receiving the application for bankruptcy and the supporting affidavit, will examine it to be satisfied that the application meets the suggested qualifying criteria set out above.²² If these criteria appear to be met, the court may then adjourn the hearing of the bankruptcy application and refer the case to the Official Assignee to determine the applicability of the scheme to the debtor. The adjournment granted by the court may be for a period of up to but not exceeding six months.

42 In confirming that the DRS should apply to the debtor in question, the Official Assignee will also be required to look at the contingent liabilities of the debtor. Such liabilities will include the following:

22 At para 39.

- (a) the amount of secured debt owed by the debtor;
- (b) the amount of debt owed by the debtor to a creditor who would have been a preferential creditor pursuant to s 90 of the Bankruptcy Act;
- (c) guarantees provided by the debtor, if any, and the value of these guarantees;
- (d) the value of any joint and several liability that the debtor may be subject to, excluding those referred to in (a) or (b) above; and
- (e) any damages awarded against the debtor which remain unliquidated.

43 If the Official Assignee finds that the scheme is not applicable to the debtor, for example in view of the size of the unsecured debt exceeding the \$100,000 limit, he may issue a certificate to that effect, confirming the inapplicability of DRS. Thereafter, the parties will return to the court with this certificate, whereupon the adjourned bankruptcy proceedings will continue against the debtor. If the Official Assignee is of the view that any repayment plan devised would not be a realistic one given the size of the debtor's total contingent liability and his known unsecured liability, then notwithstanding the fact that the scheme is *prima facie* applicable to the debtor, the Official Assignee may advise that the debtor is not suitable to enter the scheme. In such a situation, the adjourned bankruptcy hearing will also resume and a certificate will be similarly issued by the Official Assignee. Such a certificate will not bar the debtor from benefiting from the scheme if he meets the criteria in the future.

44 If, in the opinion of the Official Assignee, the scheme is applicable to the debtor, the Official Assignee will work with the debtor to devise a repayment plan which will be presented to the creditors at a meeting. The creditors need not be given voting rights as the plan will be devised having regard to the protection of their interests. In any event, creditors should expect to receive no less under any repayment plan than they would have otherwise received had the debtor been made a bankrupt. Upon the plan being finally approved, the parties will inform the court, and thereafter the adjourned bankruptcy application before the court will be deemed to have been withdrawn.

D. Devising the repayment plan

45 As with the US Chapter 13 scheme, the debtor should declare all his assets, liabilities, his income and household expenditure to the Official Assignee. The debtor's monthly expenditure and liabilities include any loan or mortgage repayments, income tax payments and

insurance premium payments, whilst the assets include his income, all shareholdings, property (movable and immovable) and savings which are not statutorily protected. The Official Assignee will then devise the repayment plan on the basis of what is declared. The debtor is expected to co-operate in the realisation of all his non-statutorily protected assets for the benefit of his creditors as well as to make the necessary adjustments to his lifestyle to ensure the maximum amount of disposable income to be made available for distribution to his creditors under the repayment plan.

46 In addition to the criteria that the total unsecured debt of the debtor cannot exceed \$100,000 at the commencement of the plan, the repayment plan should not exceed a total period of five years. The proposed five-year maximum duration appears to be a common feature in most jurisdictions with comparable schemes. There is usually also a cap on the extent of debt to qualify for the schemes, as repayment can only be realistically achieved provided wage-earners are able to maintain the course of proposed payments.

47 In the event that in the course of the repayment plan, a secured creditor realises his security, and there is a shortfall arising from the inadequacy of the amount realised to discharge the debt in question, the Official Assignee should have the discretion to extend the repayment plan for a further period of up to two years provided that the shortfall, taken with the total unsecured debt determined by the Official Assignee at the commencement of the plan, does not exceed \$150,000. A similar position should be adopted in respect of contingent debts which only crystallise after the DRS has come into operation.

E. Provable debts

48 Debts incurred by the debtor prior to the commencement of the repayment plan under the scheme should be provable against the debtor. These would include business debts for which the debtor stood guarantor or which were incurred by him if he were previously engaged in business prior to his becoming a wage-earner. Debts which would have constituted preferential debts under bankruptcy, for example debts owed to the Comptroller of Income Tax, should be provable debts if incurred prior to the commencement of the plan.

49 To maintain consistency with the bankruptcy regime, it would be preferable to respect and accord the same preferential treatment to such debts in the scheme, but in order to ensure that the ordinary creditors do receive at least as much as, if not more than, what they would have in bankruptcy, the plan should be devised such that all the preferential debts of the debtor are paid in full within the first two years of the plan.

F. Failure of the plan

50 Once the plan commences, the debtor must be committed to meet and fulfil the requirements expected of him. This is another critical feature of alternative schemes in other jurisdictions – the success of the schemes does not depend on whether they are mandatory but rather on the incentives for qualifying debtors to use the scheme in good faith to their best advantage, to obtain a fresh start. For this reason, every comparable scheme in question is a voluntary scheme, premised on debtor discipline and self-help.

51 In the event that debtors fail to honour their DRS obligations, the Official Assignee may find that the plan has failed and issue a certificate to that effect. Examples of conduct which may result in the Official Assignee making a finding of failure would include the debtor engaging in business in the course of the plan, or where the Official Assignee discovers that the debtor has been dishonest and failed to fully disclose all his assets or has taken steps to conceal his assets from the Official Assignee. A consequence of failure and the issuance of a certificate as such by the Official Assignee to that effect is that the debtor may be made a bankrupt, and may be barred from benefiting from the scheme in the future. The relevant certificate may be relied upon by any creditor who was a creditor subject to the repayment plan to commence bankruptcy proceedings against the debtor.

G. Completion of the plan

52 Once the debtor successfully completes all payments as provided for under the plan, the debtor will be released from all the provable debts under the plan. The exception would be all the debts which cannot be released by operation of law and for policy reasons, for example fines imposed by the court and payments made pursuant to divorce proceedings. For consistency with the bankruptcy regime, it would be preferable to adopt the list stated in s 127 of the Bankruptcy Act. The exception will be those debts which the debtor did not disclose to the Official Assignee or debts for which no proof of debt was filed with the Official Assignee.

53 The Official Assignee will also issue a certificate confirming the successful completion of the scheme by the debtor. This certificate may be revoked by the Official Assignee under certain conditions. For instance, the debtor may not have disclosed all his assets or may have failed to disclose any disposal of any property or assets in the course of the scheme, which but for the disposal, would have comprised part of his estate. Such a revocation may amount to a failure of the scheme by the debtor, and could result in his being declared a bankrupt upon the application of a creditor who was previously bound by the scheme

relying on the certificate of revocation/failure issued by the Official Assignee.

VIII. Summary: a checklist of key concepts and issues

54 As a matter of general policy, Singapore bankruptcy law ought to be inclined towards debtor rehabilitation. Where bankruptcy can be forestalled, it should; bankruptcy should only come about as a last resort. There is increasing recognition of the need to afford debtors a fresh start, even though the law currently still does not provide for automatic discharge in any form. The interests of creditors will of course also need to be adequately safeguarded. The proposal for DRS was a logical extension of these core policy objectives, and is entirely in line with developments in other jurisdictions.

55 The key features of the proposed DRS have been set out above. The core concepts underpinning the scheme may be summarised as follows. It must be debtor-driven, and thus it should operate as a voluntary scheme. Whether each individual DRS will succeed depends very much on the individual debtor himself; it is a scheme premised on self-help. It should also ensure that the debtor is able to work out a realistic payment scheme, which is reasonably within his means having regard to his wage-earning capacity. Foreseeably, DRS will work best in a climate of earnest debtor co-operation, commitment and good faith; dishonest or uninterested debtors are unlikely to find any solace in the DRS.

56 The incentives for debtors to abide by DRS are fairly obvious. A successful DRS will allow the debtor to avoid bankruptcy altogether, while ensuring that he retains control over his assets pending completion of the repayment plan. As in the US Chapter 13 experience and elsewhere in other jurisdictions with analogous schemes, these will remain the core advantages of DRS as an alternative bankruptcy scheme. These are the crucial differences for a debtor who may otherwise find himself drawn into the conventional bankruptcy regime, and its attendant consequences and complications.

57 There may be a perception that the process of waiting to be released from debt will ultimately not be much faster whether a debtor comes under DRS or bankruptcy. In this regard, DRS will have to present itself clearly as a more cost-effective, efficient and expeditious alternative to bankruptcy. For this purpose, the process should not be court-based and should not depend on rigid adherence to formal rules of procedure. To assist debtors in building up individual financial discipline, basic financial management education and counselling

should be a feature of the DRS. This is mandatory under the post-2005 US Chapter 13 model.

58 Whether DRS implementation will succeed will also depend much on securing support and buy-in for the scheme from creditors. From the creditors' perspective, a key element to be observed is that their rights should not be compromised under DRS, given that the law would have entitled them to proceed with bankruptcy. Thus, following the US Chapter 13 model, DRS should ensure that creditors should be able to obtain repayments as much as – and ideally more than – they would have received if the debtor had been adjudged bankrupt.

59 Contrasted with bankruptcy, DRS should generally be characterised by a more flexible, pragmatic and accessible approach. The proposed DRS recognises that modification of a scheme may be necessary because of changed circumstances. For example, creditors who were not disclosed in the statement of affairs may be permitted to add on their proofs of debt even after the DRS has commenced, even if this might result in the \$100,000 threshold being exceeded, provided they do not materially affect the debtor's ability to repay. It would be impractical to unravel the DRS simply because of the subsequent proposed inclusion of, say, a relatively small debt of a few thousand dollars.

IX. Conclusion

60 DRS will be introduced in Singapore as the primary alternative to bankruptcy to complement the existing bankruptcy regime. At the time of writing, we await the draft DRS legislation and a further round of public consultation. It is expected that the key features of DRS as proposed by the Study Team will be retained. Once the initial implementation issues are ironed out, DRS should prove to be a useful initiative to assist more debtors with managing their debt burden.
