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Asia-Pacific Restructuring Review

2025

An updated look at Singapore's DIP financing regime

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Generated: August 17, 2024

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An updated look at Singapore's DIP financing regime

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Summary

IN SUMMARY

Singapore's DIP financing regime was introduced to much fanfare in 2017 as a step towards positioning Singapore as a global restructuring hub; however, uptake of the regime has been poor. Nevertheless, the handful of cases that have made use of the framework reveal interesting trends in the courts' interpretation of the legislation. Although US case law remains persuasive, and the Singapore regime draws much inspiration from the US equivalent, the Singapore regime should not mirror the US regime given its original purpose and the idiosyncrasies of the Asian market. There remains reason to be optimistic about the future of Singapore's regime, and it is expected to be put to greater use in the coming years.

DISCUSSION POINTS

- DIP financing in Singapore
- Application of Singapore's DIP financing framework
- Trends in super-priority applications
- Comparison between the Singapore and US DIP financing regimes
- Opportunities and pitfalls for debtors and creditors

REFERENCED IN THIS ARTICLE

- Insolvency, Restructuring and Dissolution Act 2018
- Companies Act 2006
- US Bankruptcy Code
- *Re Attilan Group Ltd*
- *Re Design Studio Group Ltd and other matters*

INTRODUCTION

Singapore's debtor-in-possession (DIP) financing provisions were first introduced to much fanfare in 2017 with the passing of the Companies (Amendment) Act 2017. The regime was the first rescue finance framework in Asia-Pacific and came in the early days of Singapore's concerted efforts to position itself as a global restructuring hub; however, despite the uniqueness of the offering and the palpable parliamentary support, Singapore's DIP financing offering has yet to make the impact it seemed destined for.

This article takes stock of Singapore's DIP financing regime and considers the plausible causes of its seemingly poor uptake. It analyses the points debtors should be mindful of to make a successful application under the regime and provides an argument for why there is still reason to be cautiously optimistic about the regime's success in Asia-Pacific.

DIP FINANCING IN SINGAPORE

The regime, originally housed in the Singapore Companies Act 2006 (the Companies Act), has since been rolled into section 67 of the updated Insolvency, Restructuring

and Dissolution Act 2018 (IRDA) as part of Singapore's effort to consolidate its insolvency-related legislation into a single piece of legislation. At the time of the IRDA's passing, Parliament acknowledged the concept of rescue financing as the 'lifeblood of a successful restructuring'.[1]

There are many benefits to DIP financing that have been succinctly summarised in academic literature as 'preserving value for the benefit of society as a whole'.[2] DIP financing incentivises the debtor's counterparties to maintain their provision of goods and services (be it labour or loans) to viable but financially distressed companies, thereby preventing those companies from becoming non-viable businesses and allowing them to continue to pursue value-creating projects.[3] Singapore, taking its cue from the United States, recognises not only the importance of DIP financing as a tool for restructuring but also a gap in the Asia-Pacific market and, therefore, an opportunity to elevate Singapore's restructuring and insolvency offering.

Until recently, Singapore was the only jurisdiction across Asia-Pacific to extend super-priority status to incentivise rescue financing, albeit subject to certain conditions.[4] Other popular forums for restructuring and insolvency matters, including Australia and Hong Kong, permit debtors to raise post-filing debt but do not go so far as to offer debtors the option of priming liens.

The granting of super-priority status to a financing arrangement is not a binary decision, and the legislation is structured to give the courts flexibility to decide the level of priority that should be granted to the proposed indebtedness.[5] These levels (collectively 'super priority') are set out in section 67(1), paragraphs (a) to (d) of the IRDA:

Section	Description	Conditions	Level of priority
67(1)(a)	Parity with costs and expense: debt is treated as if it were part of the costs and expenses of the winding up contemplated in section 203(1)(b) of the IRDA.	Winding up must occur so that the creditor can obtain payments at this level.	Lowest
67(1)(b)	Priority over unsecured debt: debt will have priority over all preferential debts set out in section 203(1), paragraphs (a) to (i) of the IRDA and all other unsecured debts.	Winding up must occur so that the creditor can obtain payments at this level. The debtor must not have been able to obtain the rescue financing from any person unless such priority is granted.	Low
67(1)(c)	New security interests: debt may	The debtor must not have been able to	High

	be secured by a security interest on property not otherwise subject to any security interest or that is subordinate to an existing security interest.	obtain the rescue financing from any person unless such security is granted.	
67(1)(d)	Priming: debt may be secured by a security interest on property already subject to an existing security interest, of the same priority as or a higher priority than that existing security interest.	The debtor must not have been able to obtain the rescue financing from any person unless such security is granted. Adequate protection is granted to the holders of the existing security interest.	Highest

APPLICATION OF SINGAPORE'S DIP FINANCING FRAMEWORK

Since the framework's initial introduction in 2017, there have been a handful of applications for super priority. These cases, while notably scarce, are helpful markers in illuminating the general trend of Singapore's jurisprudence on rescue financing and developing the courts' interpretation of the legislation.

Attilan

In July 2017, Attilan applied for super-priority financing under section 67(1), paragraphs (a) to (b) of the IRDA (at the time, section 211E(1), paragraphs (a) to (b) of the Companies Act). It cited its loss-making status as grounds for being unable to raise funds through bank borrowings or equity issuances. It then made an offer of super priority to the opposing creditor, Philip Asia, on 3 August 2017.

In its judgment,[6] the court declined to allow sums disbursed under a subscription agreement to be treated as rescue financing and be granted super priority over other preferential and unsecured claims in the event of a winding up. The key takeaways from the judgment are as follows:

- Applicants must demonstrate that reasonable efforts were taken to secure alternative financing without the type of super priority sought. Credible evidence showing the same (eg, correspondence relating to negotiations with other possible rescuers) is expected and '[mere] unsubstantiated assertions cut no ice'.[7] Evidence of these attempts must be from attempts made before the section 67 application, not after the fact.[8]
- Preconditions to the financing stipulated by the rescue financier are not fatal to the application as such preconditions are not prohibited under the relevant legislation.[9]

- The rescue financing need not be 'entirely new' but may be additional financing from an existing creditor or even premised on a prior obligation. To qualify for super priority in this case, the obligation to inject new funds should not stem from a pre-existing obligation but rather should either be a new stand-alone obligation or be at the option of the creditor (the exercise of which can be made contingent on it obtaining super-priority status for these injected funds).[10]
- The application should specify from the outset which limb of section 67(1) is being invoked so that opposing creditors may have adequate notice to prepare any arguments accordingly.[11]
- Further conditions the court will also consider relevant in an application under section 67 are[12] whether the proposed financing follows sound and reasonable business judgement, alternative financing is available on any other basis, the financing is in the best interest of the creditors, and better offers, bids or timely proposals are before the court.
- The court will consider US case law where appropriate in 'illuminating the appropriate construction'[13] of Singapore's DIP financing provisions.

While Attilan was unsuccessful in its application for super priority to be ascribed to its proposed financing, it remains significant in shaping the way Singapore's DIP financing legislation is interpreted and applied. Aedit Jestablished several key considerations for the court, which continue to be adhered to in the cases that have followed, including the standard of proof an applicant must meet to make out its case for super priority being 'on a balance of probabilities'.[14] The IRDA and the Companies Act are silent on this point.

Aedit J's ruling also shed light on the efforts an applicant is expected to take and produce evidence of to persuade the court that it was not able to obtain rescue financing from any alternative person or under any alternative priority arrangement. The requirement for hard evidence is grounded in policy, owing to the disruptive nature of a successful super-priority application.

As the first application of its kind in Singapore, the most crucial takeaway from Attilan is the amount of sway US jurisprudence is likely to have over Singapore's interpretation of its own DIP financing regime. While it is no secret that Singapore's legislation takes inspiration from the United States, the degree to which the court found US case law to be persuasive in this case provides helpful insight into how the courts may approach the interpretation of section 67(1) of the IRDA in future cases.

Asiatravel

Asiatravel successfully obtained an order for super-priority financing under section 67 (1)(b) of the IRDA (at the time, section 211E(1)(b) of the Companies Act).[15] It had approached existing creditors and documented their negotiations and correspondence to use as evidence of their unwillingness to provide any further financing. Asiatravel had also engaged a third-party investment banking and financial advisory firm, DHC Capital, to identify and approach other potential lenders to provide further financing. DHC Capital approached a total of nine other potential lenders, none of which were willing to provide any financing for various reasons.

Asiatravel was the first successful application for super priority in Singapore. Asiatravel's appointment of a financial adviser to seek financing on its behalf was deemed acceptable

evidence of reasonable efforts being taken to secure alternative rescue financing without the type of super priority sought in the application.

Swee Hong

Swee Hong had been granted a moratorium order under section 64(1) of the IRDA (at the time, section 211B of the Companies Act).[16] It then successfully obtained an order for super-priority financing under section 67(1), paragraphs (b) and (c) of the IRDA.[17]

Swee Hong's debt of up to S$3.1 million was granted security by way of a first-ranking fixed charge over unencumbered assets (plant and machinery), and, in the event of a winding up, priority was to be granted over all preferential debts specified in section 203(1), paragraphs (a) to (i) of the IRDA up to an amount of S$2.9 million.

This judgment highlights that reasonable efforts to explore alternative types and sources of financing that did not entail super priority must be shown. Applicants must also demonstrate that the proposed super-priority financing is in the best interests of the creditors. This can be illustrated by the fact that no better offers or proposals were available and can include assessing the overall restructuring (eg, outcomes of the scheme of arrangement) against a comparator (ie, the most likely scenario in the absence of the scheme being approved, which need not necessarily be insolvent liquidation).

Applicants must demonstrate that the proposed super-priority financing is caught by the definition of 'rescue financing' and is necessary for continued operations and to preserve its value as a going concern.

Design Studio

Design Studio successfully applied for super priority for its proposed rescue financing to be provided by Hongkong and Shanghai Banking Corporation (HSBC) and a major shareholder, DEPA United PJSC (DEPA), under section 67(1)(b) of the IRDA (at the time, section 211E(1)(b) of the Companies Act).[18] The purpose of the proposed financing was to allow Design Studio to continue business operations as a going concern by funding working capital and providing bonding facilities for customer projects.

HSBC proposed to provide S$39.3 million in new money (totalling a S$50 million contribution when combined with HSBC's existing financing). DEPA proposed to provide S$8.38 million in new money (totalling a S$12 million contribution when combined with DEPA's existing financing). The new money financing would essentially allow HSBC and DEPA to upgrade the priority status of their existing financing following the granting of a super-priority order. It was acknowledged that HSBC was Design Studio's sole secured creditor. As such, no other creditors' rights would be prejudiced or otherwise affected by the proposed financings.

Design Studio was the first case of 'roll-up' financing[19] being approved. Roll-up financings fall under the definition of 'rescue financing' in the Companies Act insofar as they are necessary for the survival of the debtor as a going concern (eg, by supporting operational working capital needs or preserving asset value in the event of a winding up).[20] The court noted that there is no express prohibition of roll-ups and the fact that the new funds are used to pay off pre-existing debt will, therefore, not prevent roll-up financings from being included in the definition of rescue financing, which is sufficiently broad.[21]

Whether the courts were willing to accept roll-ups as a form of rescue financing had been a notable open question in secondary literature following Attilan. Design Studio showcases

not only the increasing sophistication of the Asia-Pacific market and appetite for these highly structured arrangements, but also the courts' willingness to define rescue financing widely and in the debtor's favour. That is not to say that the courts will grant such applications blindly: the court in Design Studio used the case as an opportunity to clarify the line of inquiry that the courts will take and the level of rigour they are willing to exercise in their interrogation of the proposed financing.

With the first issue resolved, the court summarised the main subsequent factors to be considered in its decision, namely whether:[22]

- other creditors' interests are unfairly prejudiced (the court should assess whether those creditors are adequately protected);[23]
- the restructuring is viable;
- alternative financing has been reasonably explored; and
- the terms of the proposed financing are in good faith, for a proper purpose, and fair, reasonable and adequate.

In particular, the court explained that while evidence of reasonable attempts to procure alternative financing should be submitted, it is not necessary for the applicant to show that financing was sought from every possible source.

The court also stressed the importance of establishing the viability of the restructuring and whether there is a good probability that it will succeed and rescue financing would constitute new funding to create new value. New money is a key factor the court will consider in determining whether the rescue financing 'create[s] new value' for the debtor.[24]

The court referred heavily to a combination of the parliamentary debates and committee reports on the relevant provisions to ascertain the relevant factors to be considered to interpret the legislation correctly.[25] As in Attilan, the court also referenced US case law in determining the relevant factors to consider.[26]

New Silkroutes

In 2023, New Silkroutes successfully applied for super priority for its proposed rescue financing to be provided by an existing creditor, 2810198 Ontario Inc (Ontario) under section 67(1)(b) of the IRDA. Ontario proposed to provide new money financing to New Silkroutes of S$5.9 million for its working capital requirements, restructuring costs and cash distributions to be made under the then-proposed scheme of arrangement. Ontario's new facility was effectively a roll-up of Ontario's existing working capital loan to the Company. The application was uncontested.

New Silkroutes affirmed the decision in Design Studio that roll-up financing is a permitted form of rescue financing under the Companies Act and is eligible for super priority.[27]

Other Cases

There have been two other successful applications for super priority: one was lodged by No Signboard Holdings Ltd (No Signboard) in 2022 and another was lodged by NutryFarm International Limited (NutryFarm) in 2024.

No Signboard's successful application for super priority confirmed that requiring a successful application for super-priority status as a condition precedent to a rescue financing will not be fatal to the application.[28]

NutryFarm successfully applied for super priority for its proposed rescue financing to be provided by an existing creditor, Corpbond IV, under section 67(1)(a) of the IRDA. NutryFarm, incorporated in Bermuda but listed on the Singapore stock exchange (SGX), had already been placed under judicial management. This case confirms that a foreign company listed on the SGX has sufficient nexus to Singapore to make an application under section 67(1).[29]

TAKING STOCK

The super-priority applications submitted to date reveal some interesting trends.

Low Usage

The small number of cases remains the elephant in the room. Despite the buzz and slew of commentary following the regime's introduction, take-up has been slow. The regime's lack of significant uptake also comes at a time of unprecedented economic disruption: the covid-19 pandemic and high interest rate environment that followed have indisputably supressed investor confidence and depressed market activity – all of which have made financing difficult to obtain.

This has resulted in an increase in overall domestic restructuring and insolvency activity, with small and medium-sized enterprises representing the bulk of transactions and proceedings. This means that such proceedings are more likely to be predominantly onshore affairs. Nevertheless, this has failed to translate into a corresponding increase in the usage of Singapore's DIP financing framework.

Attilan and Design Studio remain the most significant cases, dating back to 2017 and 2020, respectively. There has been little jurisprudential development since, which has left several questions unanswered. For example, it is unclear whether a cross-collateralisation arrangement would be granted super priority.[30] The absence of contested cases has also left open the question of what constitutes adequate protection for existing security holders.-[31]

Most interestingly, the applications that have been made are clustered towards the lower to mid end of the priority scale (mainly levels 1, 2 and 3). This has left the highest level of super priority (priming under section 67(1)(d) of the IRDA) unused. The effect of this is that the application of Singapore's DIP financing regime has not been as radically different from its Asia-Pacific counterparts as expected, with multiple Asia-Pacific jurisdictions also offering some combination of priority in line with levels 1, 2 and 3.[32]

Several plausible reasons exist for the regime's relatively low uptake, especially when compared with the well-worn path in the US market, including:

1. a perceived preference for simplicity and out-of-court restructuring by Singapore-based debtors and investors, who may feel unequipped to implement more complex new money structures through the courts or to overcome the uncertainty associated with being the first to use the new structures;
2. a debtor's preference for leveraging its cross-border connections to use a more tried-and-tested forum such as the United States;
3.

cost-benefit considerations, which may lead parties to deprioritise this option because the costs of an application to court, even if uncontested, may be seen as prohibitive; and

4. greater reliance on workouts and the strength of banking relationships to restructure distressed situations.

Regarding point (1), existing stakeholders remain the bulk of creditors that ultimately extend rescue financing to debtors. A majority of the DIP financing examples discussed above involve DIP facilities extended by existing creditors. Although Singapore is in a unique position, there may be a degree of inertia, bolstered by the lack of tested examples, slowing the Singapore market's enthusiasm for DIP financing among existing lenders and perhaps even more so for third-party creditors.

Regarding point (2), the bright lights of the US Bankruptcy Court appear to have remained too tempting for some debtors with US connections. In 2023, Singapore-incorporated Eagle Hospitality Group (Eagle Hospitality)[33] opted to structure its debt restructurings around a reorganisation plan in the United States under Chapter 11 of the US Bankruptcy Code, which featured a new money DIP financing facility.[34] While Eagle Hospitality ultimately sought and successfully obtained recognition orders in Singapore under section 252 of the IRDA, the reason it did not choose Singapore as the main forum for its restructurings, in which the same financing could technically be achieved, is unknown.[35]

Points (3) and (4) are largely self-explanatory and require no further elaboration.

Ultimately, it is difficult to determine these reasons empirically and definitively, and it remains to be seen whether the use of Singapore's DIP financing regime will pick up in the coming years.

Significance Of Parliamentary Intention

All the reported judgments refer to parliamentary debates or committee reports. This reflects the courts' willingness, if not desire, to strictly adhere to what can be ascertained of Singapore's parliamentary intention behind the legislation while the body of jurisprudence behind it is still in its infancy. This also signifies a cautious approach to a new area of law in Singapore. It is, therefore, helpful that Parliament has endeavoured to provide unambiguous guidance on the same.

Cross-references to such material are expected to decline over time as more case law develops; however, the cautiously expansive attitude of the courts seems clear, and it is anticipated that the cases following Attilan and Design Studio will only further entrench this trend.

Persuasiveness Of US Case Law

In the absence of domestic precedents, it is not surprising that the courts have relied on US case law to inform their interpretation of the legislation. Many provisions of the IRDA, including section 67(1), have been drafted with guidance from the wording of the US Bankruptcy Code.

The US model has been honed over the approximately 45 years since its introduction, and the resulting body of US case law dwarfs anything Singapore can produce in the short to medium term. A large range of DIP financings are used in the United States, with varying

levels of complexity and engineering – all of which provide learning opportunities for both the courts and stakeholders.

Flexibility Of The Courts

The courts have been open to multiple DIP financing structures and have expressed their willingness to consider the merits of each arrangement.[36] This could be interpreted as the courts' acknowledgement of the highly bespoke nature of DIP financings and restructurings. Although the courts have not left the door open to all arrangements,[37] debtors should feel empowered to present substantiated applications for super priority regardless of the lack of precedent.

APPLES AND ORANGES: SINGAPORE–US REGIME COMPARISON

The US model is the nearest comparator to Singapore's DIP financing regime. The wording and structure of section 67(1) of the IRDA closely mirrors the language used in section 364 of the US Bankruptcy Code, from which it drew its inspiration. This has given US case law a fair degree of significance in the Singapore courts, and domestic judges have found it to be both informative and persuasive.

The natural conclusion may be that the interpretation of Singapore's DIP financing regime should exactly mirror the US model. This notion should be discouraged, and Singapore's jurisprudence should develop objectively to better reflect the originating purpose of its DIP financing regime (ie, to position Singapore as a sophisticated global restructuring hub) and the particular requirements of stakeholders in the Asian market.[38]

First, it is a misconception that section 67(1) of the IRDA should be read exactly like section 364 of the US Bankruptcy Code. The threshold for super priority to be granted under the IRDA is arguably higher than that of its US counterpart and diverges from the US Bankruptcy Code on several points, including the following:

- Singapore requires court approval for any type of super priority across all forms of post-petition and debts and expenses. This is not required in the United States, where the new debt can be incurred in the ordinary course of business as an administrative expense.[39]
- Singapore requires that the court be satisfied that the proposed financing comprises a rescue financing as defined in the IRDA, whereas there is no similar requirement in the US statutory provisions for the proposed financing to be necessary for the survival of the company as a going concern or to achieve a more advantageous realisation of its assets.[40]

Singapore's general mirroring of the US model makes these departures all the more intentional and significant.

Further, the much older US model was introduced in a very different market and has had decades to develop. This has seen the coming and going of many trends, preferences and motivations. For example, roll-ups saw an increase in popularity in the United States during the global financial crisis because of the tightening credit markets, the balance sheet challenges faced by several banks and the economic downturn – all of which made it more difficult for distressed debtors to obtain financing from new creditors. Distressed debtors turned to existing creditors to continue their operations.

The US courts appeared to be more lenient in helping debtors avoid liquidation, with Lyondell's US$8 billion DIP financing emerging as one of the largest commercial rescue financings during this period.[41] The approval of the financing in Lyondell was highly specific to the facts of the case and the economic climate at the time, which was acknowledged in Design Studio.[42] As such, it might not be fair to conclude that the US model is uniformly and staunchly in support of, for example, roll-ups and that Singapore should follow suit.

The US DIP financing regime has also seen its own share of changes in popularity. While it is currently experiencing an increase in usage,[43] this does not automatically mean the same will or should be true for Singapore, which is a very different market.

OPPORTUNITIES AND PITFALLS FOR DEBTORS AND CREDITORS

While the slow uptake of Singapore's DIP financing regime may be somewhat puzzling, the emerging jurisprudence on its application is refreshingly clear. Parties should be assured of the courts' desire to give effect to parliamentary intention, especially where Parliament has been so uniquely unequivocally in favour of the regime's usage. The purpose behind the legislation and its inspiration have been widely documented both in and out of court, and US case law offers a wealth of experience from which to draw inspiration.

Debtors seeking to apply for super priority under the IRDA should not be put off by the lack of precedent. While it may be in its seventh year, development of the legislation is still in its infancy. Applicants should be guided by the courts' attitude and be confident in submitting new and novel structures.

Those seeking to use it, however, should come prepared. The courts have made it clear that super priority disrupts the expected priority of a company's creditors,[44] so applications must be supported by a strong argument that the financing is necessary and that no alternative can be found. Applicants should present a thorough and well-considered case supported by sound evidence and transaction structures that fit the legislative requirements and emerging case law. Where possible, they should also consider coordinating with their creditors to come to agreements to minimise the risk of challenges and questions of prejudicing their interests without adequate protection. The extent to which an applicant must go to show adequate protection is unclear, but it is recommended to err on the side of caution given the leanings of the courts so far.

COMMERCIAL CONSIDERATIONS FOR SUCCESSFUL DIP FINANCING

The importance of aligning the interests of the prospective DIP financier and the existing creditors cannot be overstated. This is well illustrated by Asiatravel and Design Studio-. Where possible, debtors and prospective financiers should initiate discussions early to establish common ground on the requirements of the existing creditors (eg, compensation, deleveraging and covenants) and take positive steps to justify the need for a super-priority financing to these creditors. An independent third-party opinion in support of super-priority financing will be helpful in making the case to the existing creditors.

Effective project management discipline goes a long way to demystifying the process of obtaining DIP financing and overcoming some of the challenges of low usage outlined in this article. In this regard, the costs of obtaining DIP financing should be clearly mapped out so stakeholders can perform a simple cost-benefit analysis of those costs against the perceived benefits. The process and intervening steps should also be clearly outlined with time frames, and efficiencies should be sought wherever possible.

There is no substitute for proper preparation. For example, parties should consider the evidentiary standard established in Attilan (ie, the balance of probabilities) and analyse, as a commercial matter, whether this standard can be met. Financial analysis demonstrating the impact of the proposed DIP financing to the survivability of the debtor and the implications for various constituencies in the debtor's value chain (eg, employees, suppliers and creditors) should be compiled and tested against the alternative scenario. This analysis, if positive, will also serve a double duty of persuading the existing creditors of the need for DIP financing.

Finally, professional advisers should be engaged to conduct the necessary due diligence, financial analysis and market soundings and to render legal advice.

In summary, a successful commercial strategy requires a DIP financier with skin in the game and an approach that minimises execution risk.

CONCLUSION

It is too early to write off Singapore's DIP financing regime. The restructuring and insolvency space in Singapore, and Asia-Pacific, is becoming increasingly sophisticated, with companies and lenders seeking new opportunities and structures to achieve their goals. Although the number of applications for super priority under the IRDA have not been as high as expected, this should not be seen as a failure of Singapore's overall restructuring and insolvency regime; rather, it shows that the overall regime is robust and varied enough to offer multiple alternatives.

There remains reason to be optimistic about the performance of Singapore's DIP financing in the coming years, and it is expected to be put to greater use as more pan-Asian large-ticket restructurings and distressed debt situations come to market. Large multi-jurisdictional restructurings and distressed debt situations will also see different types of creditors, debtors and restructuring situations appearing before the court. aThese features, coupled with the potential for larger transaction sizes, should also provide greater opportunities for third-party creditors to provide DIP financings.

**** The authors would like to thank Karen Yap for her contribution to this article. Karen was recently a managing director at Credit Suisse and has over 20 years' experience in risk assessments and mitigation in private credit financing and executing high-return exits across diverse markets.***

Endnotes

[1] Edwin Tong, Second Reading Bills: Insolvency, Restructuring and Dissolution Bill, Parliament No. 13, Session No. 2, Volume No. 94, Sitting No. 83 (1 Oct 2018).

[2] Aurelio Gurrea-Martínez, 'The Treatment of Debtor-in-Possession Financing in Reorganization Procedures: Regulatory Models and Proposals for Reform', European Business Organization Law Review (Forthcoming, 2023), Singapore Management University School of Law Research Paper No. 3/2022 9 (revised 3 Feb 2023), p 3.

[3] ibid.

[4] Malaysia is the second Asia-Pacific jurisdiction to enact similar provisions. It did so under its Companies (Amendment) Act 2024, which came into effect on 1 April 2024.

[5] The rescue financing may be proposed or may have already been obtained.

[6] Re Attilan Group Ltd [2017] SGHC 283.
[7] ibid at [72].
[8] ibid at [73].
[9] ibid at [54].
[10] ibid at [77].
[11] ibid at [56].
[12] ibid at [65]–[67].
[13] ibid at [51].
[14] ibid at [57].
[15] In re Asiatravel.comHoldings Ltd and AT Reservation Network Pte Ltd (2019) [unreported]; Ben Clarke, 'Online travel platform obtains Singapore's first super priority order', GRR (16 Apr 2019).
[16] 'Swee Hong granted moratorium of 6 months', The Business Times (13 June 2019).
[17] Press release, 'Application for Super Priority under Section 211e of the Companies Act (Cap. 50)', Swee Hong Limited (17 Feb 2020); Jordan Fermanis, 'Engineering company granted second super priority financing in Singapore', GRR (24 Feb 2020).
[18] Re Design Studio Group Ltd and other matters [2020] SGHC 148.
[19] 'Roll-up' financing permits an existing creditor to inject new money by way of a new facility, a part of which will repay the existing creditor's pre-filing debt in full or in part. This has the effect of upgrading the existing creditor's pre-filing debt in the post-filing universe by granting it super priority in the latter.
[20] Design Studio at [39].
[21] ibid at [41]–[42].
[22] Ibid, [33].
[23] The degree of creditor opposition can also be considered.
[24] Design Studio at [25].
[25] ibid at [24]–[30].
[26] ibid at [31]–[34].
[27] Press release, 'Grant of Super Priority Status to Proposed Rescue Financing and Extension of Moratorium', New Silkroutes Group Limited (3 July 2023).
[28] Annual Report, 'A New Chapter', No Signboard Holdings Ltd (11 Jan 2024).
[29] Press release, 'Update on Application for Super Priority Rescue Financing under Section 101(1)(a) of the Insolvency, Restructuring and Dissolution Act 2018'. NutryFarm International Limited (17 Jan 2024).

[30] Following the approval of the roll-up financing in Design Studio, there has been speculation that the courts could be similarly persuaded to grant super priority to cross-collateralisation arrangements. This has not been tested, and the argument has detractors (eg, Gurrea-Martínez argues that a literal interpretation of the law would reject this hypothesis as a new lien would only be possible for new financing obtained after obtaining approval from the court (Gurrea-Martínez, p. 14)).

[31] It is possible that, as the courts find US case law persuasive overall, the Singapore market will mirror the US model where existing security holders often work in tandem with the debtor to pre-agree terms and provide rescue financing to avoid contested cases.

[32] Australia, China, Indonesia, Japan, Myanmar, New Zealand, South Korea and Thailand all offer administrative expense priority and security interest over unencumbered property (ie, levels 1 and 3) as types of super priority (see Guerra-Martinez, Table 1).

[33] Re Tantleff, Alan [2023] 3 SLR 250; [2022] SGHC 147 (Eagle Hospitality).

[34] Eagle Hospitality featured US$100 million in new money debtor-in-possession (DIP) financing from new lender Monarch Alternative Capital. The purpose of the DIP facility was to meet the working capital needs of the Eagle Hospitality Group (Eagle Hospitality) while a sale of its properties was arranged. Bank of America, a pre-existing lender and facility agent, initially objected to the arrangement on the grounds that the quantum of the facility was too large and allowed Eagle Hospitality to drag out its Chapter 11 Proceedings for much longer than necessary. It eventually agreed to a settlement after it became clear that the sale of the properties would allow Eagle Hospitality to pay off Bank of America's claims in full.

[35] This is not to say that there were no good reasons for choosing the United States as its restructuring form. The assets of Eagle Hospitality being sold as part of its bankruptcy sale included multiple hotels located in the United States. Its DIP finance lender, Monarch Alternative Capital, also operates out of New York.

[36] Design Studio at [46].

[37] Specifically, all types of roll-ups in Design Studio.

[38] There are fundamental differences in the financing environment in Asia that influence transaction terms and structures. Although there is undoubtedly some transference from the US markets to Asia-Pacific markets, this is by no means a wholesale adoption of US terms and structures in the commercial arena.

[39] US Bankruptcy Code, section 364(a).

[40] IRDA, section 67, paragraphs (1) and (9).

[41] In re Lyondell Chemical Company, et al 402 BR 596 (Bankr SDNY 2009); John J Rapisardi and George A Davis, 'Lyondell: the largest commercial DIP in history', Butterworths Journal of International Banking and Financial Law (July/Aug 2009).

[42] Although the Court was persuaded by Design Studio's argument that the 'aftermath of the 2008 sub-prime failures . . . was similar to the present economic climate in the wake of COVID-19'. See Design Studio at [63].

[43] Reorg reported that DIP pursuits featured in 100 per cent of all prepackaged Chapter 11 Proceedings above US$100 million in 2024. See Josh Neifeld, Jason Sanjana and Ian

Howland, 'Prepackaged DIPs Gaining Popularity, Offer Lucrative Terms to Lenders', Reorg (12 Apr 2024).

[44] Attilan at [61].

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