

**PROPOSED SECTION 212A COMPANIES ACT:  
A CONCEPT PAPER**

**17 July 2009**

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## **1 Introduction**

1.1 The Ministry of Law (MinLaw) and the Insolvency & Public Trustee's Office (IPTO) would like to seek your/your organisation's feedback on possible amendments to Part VII (sections 210 to 212) of the Companies Act.

1.2 We are considering amendments to Part VII of the Companies Act by way of introduction of a new section 212A to cater for schemes of arrangement in respect of companies that are insolvent or approaching insolvency. A concept paper has been prepared with extensive input obtained from consultations between IPTO and selected resource persons, from amongst members of the Insolvency Practitioners Association of Singapore. We thank all the individuals concerned for their valuable input.

1.3 You may send your submissions in electronic or hard copy form. The submission should reach IPTO no later than 30 September 2009, via e-mail to [Malcolm\\_TAN@ipto.gov.sg](mailto:Malcolm_TAN@ipto.gov.sg) or by mail to the following address:

Attn: Mr. Malcolm Tan  
Section 210/212A Feedback  
The URA Centre East Wing  
45 Maxwell Road, #06-11  
Singapore 069118.

1.4 MinLaw and IPTO reserve the right to make public all or parts of any written submission. Respondents may request that any part of their submission that they believe to be proprietary, confidential or commercially sensitive be kept confidential.

1.5 Please note that this feedback exercise is in the nature of a closed consultation to solicit the views of key stakeholders. We would be obliged if the contents of the consultation paper are kept in confidence and not disseminated beyond what is necessary to provide input.

## 2 Background and Overview

2.1 The Company Legislation & Regulatory Framework Committee had in 2002 recommended, *inter alia*, the introduction of omnibus insolvency legislation (which would apply to both companies and individuals) that would set out common principles and procedures and consolidate and update all core areas of insolvency. It is recognised that this is a major undertaking, which is currently underway.

2.2 Pending the introduction of an omnibus Insolvency Act (possibly in late 2010 or 2011), the Ministry of Law is considering changes to the legislation relating to insolvent corporate restructuring. It is proposed to focus on fine-tuning sections 210 to 212 in Part VII of the Companies Act ('CA'), which relate to schemes of arrangements. If in the course of consultations, there are changes to other related provisions pertinent to insolvent corporate restructuring (in particular, judicial management) that are pressing and can be expediently implemented, this can also be considered in the present round of recommendations. We also seek your feedback on whether there is a pressing need for these changes now or whether it would be more appropriate to consider introducing these changes together with the main body of the proposed omnibus insolvency legislation.

2.3 Section 210 CA in its present form may apply generally to both solvent and insolvent companies. It is noted that Part VII CA, within which section 210 is contained, also deals with mergers and amalgamations of companies. Section 210 has however often been successfully used for companies that are insolvent or are approaching insolvency. Practical experience suggests that the section 210 regime has worked well in Singapore as a corporate rescue mechanism, but can be further improved to enhance its utility.

2.4 One concern is that any proposals to amend section 210 CA may impact both solvent and insolvent companies, given the existing legislative framework. To address this concern, it is proposed that a new section **212A** be introduced. This new section is intended to apply specifically to companies that are insolvent or approaching insolvency and will contain features to facilitate reorganization and rescue of the whole or part of its business as a going concern, without having to resort to section 210 or judicial management.

2.5 The proposed s 212A would mainly supplement the present Section 210 (as well as the current sections 211 and 212, which are ancillary to section 210). We set out below some thoughts on features which may be included in the proposed new provision. Feedback is sought on these features, as well as on any other recommendations relevant to Part VII CA or to any legislation relating to insolvent corporate restructuring.

### 3 Proposal for a new s.212A – a 3-stage framework

3.1 The present procedure under section 210 typically involves three main stages –

- a) obtaining a court order for a meeting of members and/or creditors to consider the proposal,
- b) obtaining the approval of the proposal from members and/or creditors in the meeting, and
- c) obtaining court sanction for the approved proposal.

3.2 We propose to adopt the same basic three-stage approach for the new section 212A, with some modifications to address concerns that have surfaced in practice under section 210.

#### *A Obtaining a court order for a meeting to consider the proposal*

##### *A1 Requisite threshold*

A1.1 The current section 210 does not set out any pre-requisite for its operation. It is proposed to emphasize that the re-organisation procedure under the new section 212A should only be applicable to companies facing financial difficulties. An applicant (be it the company, its creditors or its members) may thus obtain a court order for creditors/members to consider a re-organisation proposal under section 212A only if the Court is satisfied that the said company is **insolvent or approaching insolvency**.<sup>1</sup>

A1.2 If such a threshold requirement is adopted, an ancillary question that arises is what should be the test for insolvency/approaching insolvency and what should be the threshold by which the Court should be satisfied before deciding that the section applies. Also, what if it is subsequently determined that the company is in fact solvent but the Court has already made orders in connection with section 212A?

A1.3 In respect of the test for insolvency, one possible guide is the series of provisions applicable in the case of judicial management (which in turn go back to winding up provisions relating to the inability of the company to pay debts). See sections 227B(1)(a), 227B(12) and 254(2) CA.

A1.4 As for the threshold for insolvency, there are arguably merits in support of a less stringent test, *e.g.* a good arguable case, at the stage when seeking leave to convene a meeting of creditors; or alternatively, a more stringent test, *e.g.* the usual requirements of a balance of probabilities for satisfying the Court of the insolvency of the company, when seeking approval of the scheme.

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<sup>1</sup> It is not intended that this additional requirement for insolvency will remove the usual requirements to convene a meeting of creditors or to approve the scheme, but act as the initial threshold for section 212A to operate.

A1.5 As to finality, it is proposed that (subject only to appeals) any determination of insolvency (in order for section 212A to apply) at the stage of approving the scheme should be final. This would be consistent with the approach that once approved, the scheme becomes binding.

A1.6 It is nevertheless recognised that as with the winding up (and judicial management) provisions, there are problems accompanying the definition of insolvency. A company which is solvent on a balance-sheet basis may still face pressure from its creditors and may wish to enter into a scheme with its creditors. Further, if a company seeking to invoke section 212A has to assert that it is insolvent, this will discourage listed companies from using the procedure. There will be issues arising from SGX rules, and the listing may even be suspended if SGX views that section 212A imposes a threshold similar to that in judicial management.

A1.7 An alternative and more flexible approach is for the proposed section 212A to apply to any proposed arrangements with creditors, regardless of whether a company is solvent or insolvent. The primary advantage of such an approach is that it would encourage companies to seek relief at an early stage if necessary, instead of leaving it till the point where the insolvency threshold is reached.

A1.8 Feedback is sought as follows:

- a. Whether an 'insolvent or approaching insolvency' threshold is necessary and if so, what are the pertinent issues in introducing this threshold requirement? [In this context, one possible precedent to refer to is Ireland's Companies (Amendment) Act 1990, which sets out the framework for their corporate rescue regime, *i.e.* examinership.]
- b. If you agree that there should be an insolvency threshold for the applicability of the proposed section 212A, what are your views, if any, on the applicable test or threshold for proving insolvency in order for the new section to apply?
- c. If the proposal of an insolvency threshold for the applicability of the proposed section 212A is not supported, are there other methods of addressing the concern set out in paragraph 2.4 above? For example, the proposed section 212A may be restricted to schemes with creditors. This means that to the extent a company that is solvent or approaching insolvency wishes to enter into arrangements with its creditors, these provisions will kick in.

## A2 *Company's proposal*

A2.1 If the insolvency threshold is adopted, once the court is satisfied that the 'insolvency' prerequisite is satisfied, and that the proposal is *bona fide*, the court will assess whether the proposal is feasible and merits due consideration by the creditors/members when placed before them in detailed form.<sup>2</sup> When the above prerequisites are satisfied, the court may grant an order for a meeting of the creditors and/or members to be summoned.

A2.2 After the order of court has been obtained, relevant reports would be forwarded to the company directors as soon as possible (possibly within a specified time frame) and such reports would also be made available for inspection by shareholders and creditors within a specified time frame before the meeting ordered by the court.

A2.3 Currently, s 210(1) provides that an application for a scheme of compromise or arrangement between a company and its creditors can be initiated by the company itself (*i.e.* the management), any creditor, or any member of the company. In the case of a company that is being wound up, the liquidator may make the application. In order to retain maximum flexibility, it is proposed that all these parties be allowed to make the necessary application to the Court under the proposed s 212A.

## A3 *Judicial moratorium*

A3.1 Currently where a company is not in liquidation and a scheme is proposed between the company and its creditors, or any class of them, the Court may, pursuant to section 210(10) CA, restrain further proceedings against the company except with the permission of the Court.

A3.2 The moratorium provides breathing space to a company in a manner similar to a moratorium in judicial management, and applies to restrain proceedings against the company brought by unsecured creditors of the company. However the moratorium does not extend to secured creditors. Under the current regime, restructuring/rehabilitation of the company may be difficult, if not impossible, when the secured creditors decide to enforce their security.

A3.3 We are therefore considering the extension of the moratorium provision (in section 210(10) CA) to include enforcement by secured creditors so that the implementation of the proposed scheme of arrangement would not be undermined. Consideration is also being given to extending other aspects of the moratorium in judicial management to schemes of arrangement, *i.e.* the right to repossess goods under any hire-purchase agreement, chattels leasing agreement or retention of title agreement. It is acknowledged that such an extended moratorium should be subject to an adequate protection safeguard, *e.g.* by requiring that adequate notice of applications to be served

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<sup>2</sup> In the application under s.212, the proposal must provide sufficient particulars to enable the court to assess that the plan is feasible and merits due consideration by the creditors/members when placed before them in detailed form.

on all secured creditors, and allowing them a right to be heard by the Court hearing the application.

A3.4 The basic premise is that an applicant for restructuring should make a concurrent application to the Court for a moratorium. The Court would then exercise its discretion on whether to grant the application for a moratorium.

A3.5 Moving further, we are also considering whether it is feasible to extend the moratorium provision to apply automatically for a limited period of say, 30 days from the date of the filing of an application to convene a meeting under section 210(1) CA, much like the judicial management provisions in the CA. This may prove advantageous, especially when a company is in the process of restructuring, since it allows the company to concentrate on advancing the scheme. Any moratorium beyond the 30 days will need the approval of the Court, and will have to be applied for in the usual manner.

A3.6 However, it is appreciated that an automatic moratorium may seriously affect the rights of creditors. In order to protect the interests of creditors and to prevent frivolous applications for insolvent schemes of arrangement, consideration should be given to incorporating a requirement of “good faith” for the applicant to set out how the moratorium will advance the purpose of the restructuring. Appropriate remedies can be considered if it is subsequently determined that the application had not been made in good faith.

A3.7 Further, there may be a need to minimise the risk that during the period of the moratorium, the company dissipates its assets or continues to trade in a manner which is prejudicial to the interests of its creditors. One of the possible ways in which this risk may be addressed is to allow a creditor or the company itself to apply for the appointment of an interim scheme administrator to oversee the company's operations and affairs during the relevant period. There could be other safeguards which can be considered.

A3.8 The appointment of a scheme administrator could either be discretionary (*i.e.* upon the application of one of the company or a creditor), or it could be mandatory. The latter has precedent in the Irish examinership system<sup>3</sup>, which strikes a balance between leaving management in control of the company, but with the added supervision of an independent third party. In the Irish model, although the management remains in control of the company during the course of the restructuring exercise, a Court appointed examiner will be appointed who will examine the financial affairs of the company and endeavour to put together a scheme of arrangement, for the approval of the Court. The appointment of an examiner is a pre-requisite for the company to obtain the benefit of the ‘period of protection’, during which there will be a judicial moratorium on actions against the company.

A3.9 Feedback is sought as follows:

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<sup>3</sup> Introduced in the Irish Companies (Amendment) Act 1990.

- a. What are your views on the possibility of extending the moratorium in relation to schemes of arrangement to enforcement of security and/or to repossession of goods under any hire-purchase agreement, chattels leasing agreement or retention of title agreement? What other sorts of enforcement action do you think such an extended moratorium should cover?
- b. If you support the extension of the moratorium, what possible safeguards would you suggest that would not overly restrict the implementation of the extended moratorium?
- c. What are your views on an automatic moratorium for a specified short period of time, and whether 30 days is an appropriate period, subject to the imposition of a requirement of good faith, or the applicant satisfying the Court on how it would advance the purpose of restructuring?
- d. If automatic moratorium is not applicable, under what circumstances should the moratorium be granted?
- e. Whether the appointment of a scheme administrator would provide a sufficient safeguard to ensure that the creditors' interests are not unduly prejudiced during the period of moratorium? Should the appointment of a scheme administrator be discretionary or should it be mandatory? If this is not sufficient, what other possible safeguards can be introduced?

## **B Meeting of Creditors/Members to approve the Proposal**

### *B1 Pre-approval of classification of creditors/members*

B1.1 The present section 210(3) requires a 75% majority of creditors/members in value of the creditors or class of creditors or members or class of members present and voting at the meeting to approve the scheme.

B1.2 Presently, separate meetings must be held for creditors and members and different classes of creditors and members, of the company. It is the responsibility of the applicant to determine what meetings are necessary, and to specify the creditors or members, or classes of creditors or members requirement to attend each meeting. The Court will not give any guidance as to what constitutes a class in any particular case before it.

B1.3 It is currently not possible to obtain the approval of the Court for the classes selected for meetings of creditors at the preliminary stage. The applicant therefore takes a risk on the matter and any creditor can appear at the final hearing for the sanctioning of

the scheme - weeks after the scheme was launched - to object that the classes were not correctly selected and to oppose the scheme on this ground.

B1.4 In order to avoid the possibility of the scheme being derailed by an eleventh hour objection, it is worthwhile considering the introduction of a provision allowing the Court to pre-approve the classification of creditors before the Scheme is voted on. Such a provision has the potential to save costs for the applicant / company given that it is unlikely that a creditor will be able to object at the sanction hearing and risk having the scheme rejected weeks after it has been launched.

B1.5 Another consideration is whether the pre-approval given by the Court should bind creditors who were notified by the company of its application to the Court for pre-approval and given the opportunity to object. This will encourage a company to apply for pre-approval. Conversely, pre-approval should not bind creditors who were not given notice. In this respect, it should be noted that the English Courts do allow pre-approvals on a limited basis.

B1.6 It is however acknowledged that one drawback is that at the early stages, creditors may not yet have a full say or appreciate the consequences of pre-approval of classes by the Court. It may therefore be necessary that any pre-approval only becomes final at the stage when the Court approves the scheme. As a counter-balance, however, where sufficient disclosure has been given to the Court for pre-approving the classification, the Court approving the scheme with the pre-approved classification (including classification into a single class) should only depart from the pre-approval classification for good reason.

B1.7 In addition, we are considering the introduction of provisions in which a scheme of arrangement is made binding on the company and its creditors. This is somewhat akin to the cram-down provisions that apply in jurisdictions such as the United States which is essentially the involuntary imposition by a Court of a reorganization plan over the objection of some classes of creditors. Courts should be given the discretion to sanction the scheme, if it is just and equitable to do so, even though the classes were improperly constituted. The discretion can be exercised if for example it is found that there is no prejudice to the other creditors. Ultimately, the Court should have a wide discretion whether or not to approve the scheme.

B1.8 Feedback is sought as follows:

- a. What are your views on the possibility of pre-approvals of classes of creditors by the Court?
- b. If you agree to the concept of pre-approvals, what are your views on the Court being conferred the discretion to pre-approve classes, which pre-approval should not (where there has been sufficient disclosure to the Court granting

- the pre-approval of the classification) be departed from by the Court approving the scheme, except for good reason?
- c. What are your views, if any, on the concept of mandating the confirmation of a plan over the objections of dissenting classes, *i.e.* cram down?
  - d. If you agree with the concept of cramming down or of a binding Court sanction of a proposed scheme, what safeguards, if any, would you like to see?

## **C Court Sanction of the proposed Scheme and termination of the Scheme**

### *C1 Court sanction and registration with ACRA required*

C1.1 After the meeting upon the order of court has approved the scheme, like the current section 210, it is proposed that the scheme must be sanctioned by the court before it becomes binding on the company, its creditors and members. The court's sanction serves firstly to ensure that the statutory procedure has been complied with and that the requisite majority has passed the resolution to approve the scheme, and secondly that the scheme is fair and reasonable.

C1.2 As is the current practice for section 210, the scheme under section 212A should take effect only after the court order has sanctioned the scheme and the court order has been registered with the ACRA.

### *C2 Termination of the Scheme*

C2.1 It is usual (in fact crucial) for a scheme of arrangement to provide for the scenarios under which the scheme will come to an end. For example, it may be provided that a Scheme shall terminate if the Company fails to promptly perform and discharge any of its obligations under the Scheme or upon a final payment to creditors/members.

C2.2 Under the current regime, the Court is ordinarily not able to make any orders amending or terminating a scheme once it is in operation. Uncertainty may arise if after a certain amount of time it appears that the terminating event will not occur. As a result, the Scheme will then be left in subsistence indefinitely.

C2.3 In this regard, we are considering the introduction of a provision to allow for the scheme to be terminated by a requisite vote at a meeting of creditors, or on the decision of the scheme administrator, if it appears that the scheme is not going to achieve its objectives. This should be a default provision that would apply if the scheme does not contain clear provisions otherwise for its termination.

C2.4 Feedback is sought as follows:

- a. Should we introduce a default provision providing for termination of the scheme (in the absence of clear provisions otherwise)?
- b. If you are in favour of having of such a default provision, what in your view would be the prerequisite essential terms and conditions applicable before the default provision takes effect?
- c. Is it desirable to provide that if the scheme fails, the process should move smoothly into liquidation?

**4. Miscellaneous issues**

4.1 We are considering issues such as the desirability of having rules for the adjudication of proof of debts, the information which ought to be in the Explanatory Statement and in the scheme itself, as well as the appointment and duties of a scheme administrator.

4.2 In addition, we are considering the introduction of a provision to empower the Court to amend the scheme in certain situations *e.g.* to correct an obvious mistake in the scheme. This however, must be balanced with the fundamental principles behind a scheme *i.e.* finality and certainty. The Court should not be granted powers to fundamentally alter the substance of a scheme.

4.3 We are also considering the viability of importing the clawback provisions in the Bankruptcy Act to the scheme which will have reference to the date of filing of an application for a scheme of arrangement. This may be desirable as it facilitates the restructuring of the company. However, we are also aware that clawbacks may affect the legitimate interests of third parties who have had dealings with the company within the clawback period without notice of the impending scheme. We also acknowledge that there could be concerns about the application of assets that are clawed back, *e.g.* whether they will be used to advance the purpose of the scheme or merely to pay for the costs or fees of the scheme.

4.4 In this context, consideration will also be given to the preservation of the operation of the clawback provisions that currently apply in judicial management and liquidation – *i.e.* that the operation of clawback provisions will not be affected or prejudiced by the period that the company goes into the proposed scheme.

4.5 We are also considering the desirability of introducing specific distress financing provisions to allow current or new creditors that extend fresh funds the ability to recover them ahead of all other creditors. This is commonly referred to as ‘super-priority

financing'. The intention is to attract potential creditors to extend funds to the ailing company to allow it to carry on essential operations or to continue trading, and to further the restructuring exercise.

4.6 Feedback is sought on the above issues, particularly -

- a. Whether a detailed set of provisions for proofs of debts should be introduced. Issues that can be considered include the impact of having a system of adjudication of proofs of debt on the cost and the time-factor in schemes of arrangement.
- b. Would it be desirable to legislatively provide for the Court to have power to amend or modify a scheme? If yes, under what circumstances should the Court have the power to amend or to modify a scheme? Should the Court be allowed to change the substance of what the creditors and the Company have agreed to?
- c. Whether it is expedient to import clawback provisions (*i.e.* the provisions relating to unfair preference and undervalued transactions from the Bankruptcy Act) to the scheme.
- d. What safeguards should be put in place in order that the operation of the clawback does not unfairly prejudice the interests of third parties, and to ensure the proper application of assets that have been clawed back.
- e. Should specific provision be made to give a super-priority for fresh finance or credit? If yes, under what circumstances should this super-priority be accorded, and how should it be done? Should it be automatic in certain circumstances or by way of Court approval? How would an ordinary creditor be able to challenge super-priorities?

### **Importation of judicial management provisions**

4.7 Consideration should be given on whether to confer on the Court the discretion to apply to schemes of arrangement suitable and relevant judicial management provisions. These provisions will be identified in due course. This would provide flexibility in terms of enabling the Court to fashion and adopt the provisions of judicial management that may be beneficial to the scheme regime. It is appreciated, however, that a liberal importation of the judicial management provisions to schemes of arrangement without appropriate safeguards may be prejudicial to legitimate creditor interests. Accordingly, it is suggested that a standard be imposed for its importation, *e.g.* where the Courts are satisfied that it would be just and equitable to do so and the interests of creditors are not

unfairly prejudiced. It is recognised that Court involvement is therefore crucial, and this methodology would probably require greater Court supervision.

4.8 It is recognised however that this approach may create uncertainty in the law and may give rise to practical difficulties. The scheme administrator may be placed in a very difficult position. An alternative approach would be to identify the relevant judicial management provisions that can suitably be used in schemes of arrangement and to directly incorporate them into the proposed section 212A. This would essentially provide the scheme administrator with additional ‘judicial management’ tools. A corollary issue would then be whether the scheme administrator should be able to make use of these tools from the onset or whether he requires the leave of Court to do so.

4.9 Feedback is sought as follows –

- a. Should there be a provision to enable the Court to import and adapt for the purposes of schemes of arrangements, the provisions of judicial management?
- b. What are the judicial management provisions that could potentially be applicable to schemes of arrangement?
- c. If you agree that we should have such a provision, what should be the standard for importation and adaptation? In addition, what safeguards (if any) should be in place?
- d. Alternatively, should identified judicial management provisions be directly incorporated into the proposed section 212A? If so, which provisions should apply, and how should they operate, e.g. should there be another application to Court to allow the scheme administrator to exercise these powers, or should they be available to him from the onset?

## **5. Conclusion**

5.1 The proposed amendments to introduce a new section 212A Companies Act are intended to incorporate features to facilitate more effective restructuring for companies that are insolvent or approaching insolvency, by modifying the existing scheme of arrangement mechanisms. It is, however, acknowledged that every new regime may bring about additional compliance costs, albeit direct costs in the form of fees for professional advice and services for administering the new regime, or for advice in considering which regime is appropriate for the circumstances of the company.

5.2 Feedback is therefore sought as follows –

- a. Is there a need for a new regime bridging the current s 210 schemes of arrangement and judicial management? If so, would it be appropriate to introduce such a scheme prior to the introduction of the proposed omnibus insolvency legislation, or would it be preferable to incorporate any changes into the omnibus legislation?
- b. What are concerns that may arise from any new regime, and would the implementation and compliance cost justify its introduction in the current economic climate?

5.3 Minlaw and IPTO invite your feedback on the proposals. It would be appreciated if your feedback can reach the designated recipient in paragraph 1.3 by 30 September 2009.

The Insolvency & Public Trustee's Office  
Ministry of Law