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Insolvency Practitioners Association of Singapore Limited

IPAS Limited

IPAS Update

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Dear IPAS Associate/Fellow,

We are glad to bring you the inaugural IPAS Update on the recent trends and developments in the insolvency profession.

Message from Chairman

Dear Associates/Fellows

This is the first of a continuing series of technical updates for associates and fellows as part of our initiatives on relevant Continuing Professional Education.

On behalf of the Board, we wish to thank Mr Lee Eng Beng, Chairman of the Technical Standards and Practices Committee, and Mr Andrew Chan, Director, IPAS, for their contributions. Members are encouraged to contribute articles of interest.

Yours sincerely,
DON M HO, FIPAS
Chairman

Join IPAS

Invitation to join the Insolvency Practitioners Association of Singapore

Technical Updates

Right of JM to pursue clawbacks end when judicial management terminates

Neo Corp Pte Ltd (under judicial management) v Neocorp Innovations Pte Ltd and Another Application [2005] 4 SLR 681; [2005] SGHC 167 decides that the right (pursuant to section 227T of the Companies Act read with the provisions of the Bankruptcy Act relating to clawbacks) of a judicial manager to challenge a transaction on the basis that of an unfair preference and a transaction at an undervalue ends with the process of judicial management. In this respect, the case also decides that such right of challenge in judicial management does not continue into insolvent liquidation.

The net effect of the decision is that while there is a separate right for liquidators in insolvent winding up to challenge transactions on the basis that they amount to a transaction at an undervalue or an unfair preference, the relation back period begins from the date of the commencement of winding up (which commonly in compulsory liquidation is the date of filing of the petition for winding up). The period of relation back ranges from six months to two years in the case of unfair preference and five years in the case of transactions at an undervalue. In contrast, the relation back period in judicial management that preceded winding up goes back from the date of the earlier petition for judicial management, with the consequence that normally more transactions can be caught.

Accordingly, judicial managers deciding whether to put the company into liquidation should give serious consideration to whether that the later period that clawbacks in winding up applies to results in any loss of potentially

Limited (IPAS)

Pursuant to the recommendations of the Company Legislation and Regulatory Framework Committee, the Insolvency Practitioners Association of Singapore Limited (IPAS) was incorporated on 12 April 2005 with the support of the Institute of Certified Public Accountants of Singapore (ICPAS), the Law Society of Singapore (Lawsoc) and the Official Receiver and Official Assignee. The members of IPAS are ICPAS and the Lawsoc.

IPAS cordially invites you to apply to be an Associate or a Fellow of IPAS.

For the invitation letter and application form, **click here**.

Law and Practice of Corporate Insolvency

LexisNexis has extended the concessionary rate to include the purchase of Update(s) ONLY. In addition, this promotion will be valid until end November 2006. Below is a breakdown of the discount structure for the corporate insolvency publication (main volume) and the updates:

IPAS ASSOCIATES/FELLOWS

New Purchasers:

Main Volume - 15% discount
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valuable clawbacks.

(Andrew Chan, Allen & Gledhill)

Personal liability of liquidators

Practitioners should be aware of the decision of *Ho Wing On Christopher and Others v ECRC Land Pte Ltd (in liquidation)* [2006] SGHC 16 which decides:

Liquidators suing unsuccessfully in the name of the company being wound up would have their claims to remuneration or monies payable to themselves stand behind those of the successful parties in the litigation, when it comes to payment out of the assets of the company. Accordingly, if there are insufficient assets to pay a liquidator, the liquidator concerned should be aware of the scheme of priorities and where deemed desirable, take steps to ensure that there are sufficient indemnities or covers for the liquidators remuneration and expenses.

In the absence of improper or wrongful conduct, a liquidator would not normally have to make good payments previously made to third parties, if there are subsequently insufficient funds to pay the winning party. Liquidators would, however, have to plough back monies previously paid to themselves out of the assets of the company in satisfaction of the costs of the winning party.

(Andrew Chan, Allen & Gledhill)

Winding up petitioners may seek authority to operate bank account

Nova Leisure Pte Ltd v Dynasty Theatre Nite-Club KTV & Lounge Pte Ltd [2005] 1 SLR 466 decides that the court would not on an application by a liquidator authorize the liquidator to operate a bank account different from the Companies Liquidation Account. The judge in *Nova Leisure*, however, left open the possibility that the position may be different where it is the petitioner for winding up who applies to operate the bank account. Practitioners may wish to note that an application to enable the liquidator to operate a bank account different from the Companies Liquidation Account succeeded in Companies Winding Up 2005/R in the matter of *SPH Mediaworks Limited*. In the *Mediaworks* case, the application was made by the petitioner, and the court was satisfied on the facts that an order could be granted. Fellows and associates of IPAS who may wish to find out more about the arguments made in the *Mediaworks* case may contact a fellow of IPAS, Ashok Kumar of Allen & Gledhill.

(Andrew Chan, Allen & Gledhill)

No ringfencing in liquidation of unregistered foreign companies

There are two types of foreign companies in Singapore: registered foreign companies who carry on business operations in Singapore, and unregistered foreign companies who have a presence in Singapore but whose activities fall

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short of business operations (for example, the holding of property). Both types of foreign companies may be wound up in Singapore on the ground of insolvency and have their Singapore assets realised by a Singapore liquidator.

In 2000, the Court of Appeal ruled in *Tohru Motobayashi v Official Receiver* [2000] 4 SLR 529 that s 377(3)(c) of the Companies Act requires the Singapore liquidator of a registered foreign company to pay the net proceeds of realisation of the assets in Singapore to the liquidator of the registered foreign company for the place where it was formed or incorporated after paying any debts and satisfying any liabilities incurred in Singapore by the registered foreign company. Effectively, this means that the Singapore assets of a registered foreign company are ring-fenced for the payment of debts and liabilities incurred in Singapore and only the surplus will be remitted to the principal liquidation.

In *RBG Resources plc (in liquidation) v Credit Lyonnais* [2006] 1 SLR 240, the High Court decided that s 377(3)(c) does not apply to the liquidator of an unregistered foreign company and that the common law position will apply to him. In other words, the liquidator of an unregistered foreign company has to remit the proceeds of realisation of the company's Singapore assets to the liquidator in the company's place of incorporation for distribution to the worldwide creditors of the company. It follows that there is ring-fencing in the liquidation of a registered foreign company, but not in the liquidation of an unregistered foreign company. This may be difficult to justify as a matter of policy or logic, but will remain the position unless and until s 377(3)(c) is amended to remove its ring-fencing effect.

(Lee Eng Beng, Rajah & Tann)

Solvency statements under s 7A of the Companies Act

The new s 7A of the Companies Act lays down the requirements for a "solvency statement" which the directors of a company may make in order to allow the company to effect a proposed redemption of preference shares out of its capital, a proposed giving of financial assistance or a proposed reduction of its share capital. S 7A is likely to become a provision of practical importance. At the same time, it is also significant for its elaboration on and extended definition of the concept of insolvency.

In making a solvency statement, the directors of the company have to make three declarations. First, the directors have to declare that they have formed the opinion that, as regards the company's situation at the date of the statement, there is no ground on which the company could then be found to be unable to pay its debts. Secondly, they have to declare that they have formed the opinion that the company will be able to pay its debts in full within 12 months from a winding up of the company commenced within 12 months of the solvency statement (if such a winding up is intended), or within 12 months of the solvency statement (if no winding up is intended).

Thirdly, the directors have to declare that they have formed the opinion that the value of the company's assets is not less than the value of its liabilities

(including contingent liabilities) and will not, after the proposed redemption, giving of financial assistance or reduction (as the case may be), become less than the value of its liabilities (including contingent liabilities). In this regard, the directors must have regard to the most recent financial statements of the company meeting applicable accounting requirements set out in the Companies Act and all other circumstances that the directors know or ought to know affect, or may affect, the value of the company's assets and the value of its liabilities (including contingent liabilities). They may also rely on valuations of assets or estimates of liabilities that are reasonable in the circumstances. Further, in determining the value of a contingent liability, the directors may take into account the likelihood of the contingency occurring, and any claim the company is entitled to make and can reasonably expect to be met to reduce or extinguish the contingent liability.

(Lee Eng Beng, Rajah & Tann)

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Insolvency Practitioners Association of Singapore Limited (IPAS)
Company Registration Number 200504856G
20 Aljunied Road, #06-02 CPA House, Singapore 389805
Telephone: +(65) 6749 8060, Fax: +(65) 6749 8061, Email: technical@icpas.org.sg