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Insolvency Law Responses to COVID-19: What does the Temporary Relief from Wrongful Trading Tell Us about Singapore's New Insolvency Law Regime?

Stacey Steele*

The Singapore Government introduced temporary measures to relieve officers from new wrongful trading provisions as part of its response to COVID-19 in April 2020. The provisions establishing liability for wrongful trading are set out in the Insolvency, Restructuring and Dissolution Act 2018 (Singapore) (the "IRDA") – which is yet to become effective. Singapore's measures are in line with the position taken by many other jurisdictions, but they come at a time when the IRDA provisions aren't even operative. This post asks, "what does this temporary relief from wrongful trading liability tell us about Singapore's new insolvency law regime?"

New wrongful trading provisions in the IRDA

Singapore's existing fraudulent and insolvent trading provisions were substantially reformed and a new liability for wrongful trading was introduced in 2018 by the IRDA as part of a package of reforms to strengthen Singapore's status as an international hub for debt restructuring. Under section 239(1) of the IRDA:

> If, in the course of the judicial management or winding up of a company or in any proceedings against a company, it appears that the company has traded wrongfully, the Court… may… declare that any person who was a party to the company trading in that manner is personally responsible… for all or any of the debts or other liabilities of the company as the Court directs, if that person:
>
> - knew that the company was trading wrongfully; or
> - as an officer of the company, ought, in all the circumstances, to have known that the company was trading wrongfully.

Any of the following persons may make an application for a declaration under section 239(1):

- the judicial manager of the company;
- the liquidator of the company;
- the Official Receiver;
- any creditor or contributory of the company, with the leave of —
  - o the judicial manager or the liquidator, as the case may be; or
  - o the Court.

Furthermore, section 239(6) provides that:

> Where a company has traded wrongfully, every person who was a party to the wrongful trading and who:
>
> - knew that the company was trading wrongfully; or
> - as an officer of the company, ought, in all the circumstances, to have known that the company was

> trading wrongfully,
>
> shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 3 years or to both.

According to section 239(12) of the IRDA, a company trades wrongfully if:

- the company, when insolvent, incurs debts or other liabilities without reasonable prospect of meeting them in full; or
- the company incurs debts or other liabilities:
  - that it has no reasonable prospect of meeting in full; and
  - that result in the company becoming insolvent.

The Singapore wrongful trading regime reflected in these provisions is potentially a powerful tool for creditors and liquidators, because:

- liability is not limited to directors or officers of the company. Liability applies to "any person who was a party to the company trading" and thus may apply to stakeholders such as financiers.
- in addition to personal liability for the debts incurred, a person will be guilty of an offence if the Court finds that the company traded wrongfully and they knew or ought to have known. It appears at first glance that there is no dishonesty requirement for the offence to apply and it will be interesting to see how the Courts interpret this provision. The Australian regime, for example, requires dishonesty for an offence of insolvent trading.

The IRDA was passed by Parliament on 1 October 2018 and was expected to become effective in early 2019, but as at the time of writing in May 2020 it is not in force.

Despite the IRDA and thus the new wrongful provisions having yet to come into force, the Singapore Government's response to COVID-19 involves temporary relief from certain parts of the regime.

Singapore COVID-19 response measures: suspending the duty to prevent wrongful trading

Singapore's COVID-19 (Temporary Measures) Act 2020 (No. 14 of 2020) ("Temporary Measures Act") was passed on 7 April 2020 and assented to by the President on the same day. Section 23(2) of the Temporary Measures Act provides relief from the wrongful trading provisions in the IRDA by providing that:

> For the purpose of section 239(6) of the Insolvency, Restructuring and Dissolution Act 2018 (including that provision as applied by the Variable Capital Companies Act 2018), a company or variable capital company is not to be treated as incurring debts or other liabilities without reasonable prospect of meeting them in full if the debt or other liability is incurred:
>
> - in the ordinary course of the company's or variable capital company's business;
> - during the prescribed period; and
> - before the appointment of a judicial manager or liquidator of the company or variable capital company.

The Minister may set a prescribed period for this safe harbor not exceeding six months which may be extended or shortened more than once (section 3).

The measures mean that officers of companies subject to judicial management or winding up in Singapore and other relevant persons who might otherwise *be found guilty of an offence and convicted or fined for wrongful trading* will be protected to the extent that the debts are incurred during the prescribed period "in the ordinary course" before the commencement of the proceeding.

Similar relief is provided under sections 22(2) and 22(4) (respectively) of the Temporary Measures Act in relation to section 339(3) of the Companies Act and paragraph 93(3) of the Fifth Schedule of the Limited Liability Partnerships Act which set out *offences* for officers who were "knowingly a party to the contracting of a debt" with "no reasonable or probable ground of expectation" of that debt being able to be paid.

However, the Temporary Measures Act does not suspend Singapore's fraudulent trading provisions set out in section 238 of the IRDA and the other legislation which apply where business is "carried on with intent to defraud creditors … or for any fraudulent purpose".

Importantly, it also appears that the Temporary Measures Act *does not relieve officers of the possibility that a Court will declare them personally responsible* where a company is found to have traded wrongfully under section 239(1).

Maintaining the Court's discretion in this regard may reflect a desire to avoid any unintended consequences of the relief measures. Findings of personal liability under that provision may be dealt with leniently by the Courts to the extent that a debt was incurred during the COVID-19 prescribed period, because under section 239(2), courts have the following power in any event:

> Where the Court makes any declaration under subsection (1), the Court may relieve, in whole or in part and on such terms as the Court thinks fit, the person declared responsible under that declaration from the personal liability for which he or she is declared responsible, if:
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> - the person acted honestly; and
> - having regard to all the circumstances of the case, the person ought fairly to be relieved from the personal liability.

What does the relief from the wrongful trading provisions tell us about Singapore's insolvency regime?

The Temporary Measures Act tells us at least three things about Singapore's insolvency regime.

Timing of the IRDA: First, the Temporary Measures Act indicates that the Government expects that the IRDA may come into force within the next six months. The reasons for the delay in the IRDA coming into force are not clear. The move to address the wrongful trading provisions in the Temporary Measures Act means that even if the IRDA becomes effective, relief from the provisions in section 239(6) at least will apply from the commencement of the legislation if it falls within the prescribed period.

International trends: Secondly, the modifications demonstrate that governments globally are watching what other jurisdictions are doing to try and mitigate the impact of COVID-19 on business. The Singapore Government's measures followed steps taken in Australia and Germany to provide relief from the duty to prevent insolvent trading and the obligation to file for insolvency (respectively). In Germany, the response was built on experience form 2013 and 2016 where floods devastated parts of the country, leading to the relaxation of the obligation. This insolvency "me too" movement has also seen Singapore and other jurisdictions (including Australia) increase the monetary thresholds for winding up a company and the time for companies to respond to payment demands, making it more difficult for creditors to commence proceedings in the first place. However, the focus on relief from the offence in section 239(6) means that the Temporary Measures Act may be interpreted as being less generous than jurisdictions which have provided relief for *personal liability* when it comes to wrongful trading.

Creditor v debtor tensions: Thirdly, and most interestingly, the relief from Singapore's wrongful trading provisions highlights the continued tension between creditor and debtor interests reflected in the formulation of these provisions and Singapore's insolvency law reforms in the 2010s. The personal liability imposed by these types of provisions provide a statutory exception to the general principle that corporate debts are owed by the company as a separate legal entity and not by the company's officers. Wrongful trading regimes are typically supported by reformers who believe that these types of provisions incentivise officers of companies, especially directors, to make decisions which appropriately consider the interests of unsecured creditors. Moreover, they argue that the provisions can help to increase the pool of assets available to unsecured creditors where the company enters liquidation. However, wrongful trading regimes are criticized for a perceived "chilling effect", because officers become risk averse in light of the potential for personal liability, fines and criminal conviction. According to this line of thinking, such intimidated officers will file for insolvency even in circumstances where it may have been possible for the company to trade out of financial difficulties. It is this potential for premature filings which the Temporary Measures Act and other similar insolvent trading relief measures are designed to avoid in the context of COVID-19.

Conflicting goals of insolvency law reform?

The IRDA was the product of an overdue review of Singapore's personal and corporate insolvency regime which resulted in a comprehensive report and suite of reform proposals being submitted to the Ministry of Law by the Insolvency Law Review Committee in October 2013. Before the omnibus legislation reflected in the IRDA could be finalised, however, members of the business and legal community in Singapore lobbied the Government to immediately introduce reforms to make Singapore's insolvency regime more restructuring friendly by adopting concepts from the United States' Chapter 11 procedure. Those reforms became effective in 2017. The goal is to make Singapore an international debt restructuring hub.

Previously, Singapore's insolvent trading provisions required that an officer be convicted under section 339(3) of the Companies Act before civil liability could be triggered under s 340(2) of the Companies Act to pay the whole or part of the debt incurred by the company. The Committee which reviewed Singapore's insolvency law regime reported that they were not aware of these provisions having ever been relied on successfully as at 2013. Accordingly, the Committee found that these provisions did not appear to be a credible threat to officers of companies in Singapore.

Looking to rebalance the tension between creditors and debtors reflected in these types of provisions, the Committee considered and rejected other jurisdictional approaches, including Australia's insolvent trading approach, in their 2013 review. The Committee concluded that, "[T]here should be more latitude afforded to a director to continue to trade in the reasonable expectation that, although the company is insolvent, it is most likely to be able to trade out of its present difficulties". Australia's insolvent trading regime is considered one of the most aggressive towards director liability globally and prior to reforms in 2017 it was criticised for encouraging directors to file for formal proceedings too quickly and discouraging qualified people from taking on directorships in a startup.

The introduction of the new provisions in Singapore reflected a recognition that the existing insolvent and fraudulent trading regime made it too difficult to hold officers to account and a new approach was needed in the form of the new wrongful trading provisions. Moreover, as noted above, the new provisions apply to any persons, not just directors or other officers. However, the Temporary Measures Act suspends the offence of wrongful trading to encourage companies to continue trading during COVID-19. Debtors and creditors in Singapore will likely want to be confident that they will not fall foul of the wrongful trading provisions.

Conclusion

The Temporary Measures Act underscores the continuing tension between legislative interventions designed to directly support creditors in the face of a global push for insolvency regimes which support restructuring. These tensions are dramatically played out in the context of wrongful trading provisions and their close cousins known as insolvent trading and fraudulent trading. Global efforts to combat COVID-19 through insolvency law reforms which provide relief from wrongful trading and similar regimes suggest that this tension will continue.

For more background on the Singapore reforms, see: Stacey Steele, Ian Ramsay, Miranda Webster, "Insolvency law reform in Australia and Singapore: Directors' liability for insolvent trading and wrongful trading" (2019) 28(3) *International Insolvency Review* 363-391.

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* Stacey Steele, A/Professor, Asian Law Centre, Melbourne Law School, The University of Melbourne.

*** This post reflects my personal opinions. Statements do not represent the views or policies of my employers, past or present, or any other organisation with which I am affiliated. Thanks to A/Professor Andrew Godwin and A/Professor Aurelio Gurrea Martinez for their comments on drafts of this post.

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