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Rescue financing

First successful super priority rescue financing completed in Singapore

David Chew discusses the super priority rescue financing regime in Singapore and takes a closer look at Asiatravel.com Holding Ltd's successful super priority rescue financing



DHC Capital advised Asiatravel.com Holdings Ltd (SGX: 5AM) on this ground breaking super priority rescue financing transaction and in this article, we will take a closer look at the rescue financing provisions, the approach adopted by the Singapore Courts, key cases and the next steps in the evolution of rescue financing in Singapore.

Introduction

Singapore introduced major reforms to its debt restructuring regime with the Companies (Amendment) Act 2017 coming into effect on 23 May 2017. The reforms based on the US Chapter 11 regime were introduced to support debtor-led restructurings through a “turbo charged” scheme of arrangement regime and includes rescue financing provisions allowing the grant of super priority status.

The rescue financing provisions – Section 211E

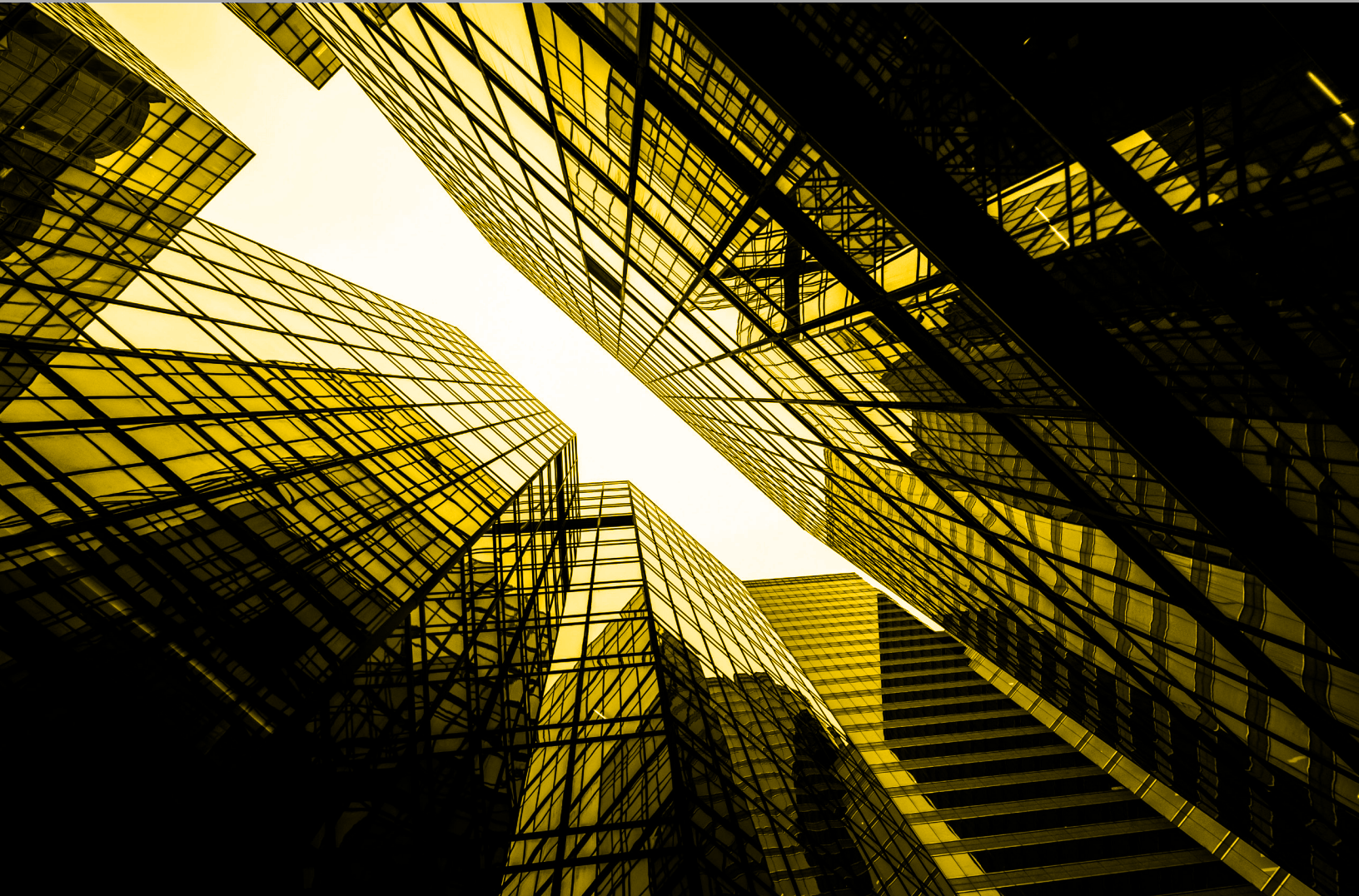
The rescue financing provisions under Section 211E of the Companies Act (“Act”) allow the Court to grant an order that the rescue financing be afforded super priority where a company has made an application to convene a meeting for the purposes of a scheme of arrangement under Section 210(1) of the Act or for a scheme moratorium under Section 211B of the Act. In summary, the Court can make one or more of the following orders in respect of any debt arising from any rescue financing obtained:

- **Section 211E(1)(a):** Treated as part of the costs and expenses of the winding up;
- **Section 211E(1)(b):** Priority over all the preferential debts and all other unsecured debts;
- **Section 211E(1)(c):** Secured by a security interest on property not otherwise subject to any security interest or that is subordinate to an existing security interest; and
- **Section 211E(1)(d):** Secured by a security interest on property subject to an existing security interest, of the same priority as or higher priority than that existing security interest.

Four levels of super priority



1 Oon & Bazul LLP, a Singapore based law firm acted as legal counsel to Asiatravel.com Holdings Ltd



The Court's approval for a rescue financing order is subject to the following pre-conditions being met:

- **Reasonable efforts made to secure rescue financing without super priority**

The company would not have been able to obtain the rescue financing unless super priority was given – statutorily applies only to Section 211E(1)(b) to (d) and is expected under Section 211E(1)(a);

- **Adequate protection**

There is adequate protection for the interests of the holder of the existing security interest (in the event the security is “primed”) – applies only to Section 211E(1)(d); and

- **Meets definition of rescue financing**

The proposed financing must constitute “rescue financing” as defined in Section 211E(9) – (i) financing necessary for the survival of a company that obtains the financing and/or (ii) financing necessary to achieve a more advantageous realisation of the assets than on a winding up.

Attilan Group Ltd

The Singapore High Court considered the Section 211E super priority rescue financing regime in *Re Attilan Group Ltd* [2017] SGHC 283 (“**Attilan**”).

The Court declined to grant the super priority order in Attilan. The primary reason was that there was insufficient evidence of any efforts, let alone reasonable efforts being expended to secure financing without any super priority.

The Court’s written judgment provides clarity and guidance on the approach the Court will use in assessing an application for super priority rescue financing. We do not intend to cover all the points raised and instead provide a summary of the key points below:

- **Reasonable efforts**

Demonstrate that reasonable efforts were undertaken to secure the financing without the type of super priority sought and provide credible evidence of the same. The undertaking of reasonable efforts does not mean it is necessary to source credit from “every possible source”;

- **Pre-conditions**

There can be pre-conditions stipulated by the rescue financier in the grant of its rescue finance;

- **Pre-existing financing arrangements**

The proposed rescue does not have to be entirely “new”. The financing can be additional financing from an existing creditor so long as it is at the option of the creditor and its exercise of that option can be made contingent on obtaining super priority status;

- **Type of priority**

Application should state the type or level of super priority sought under Section 211E(1) and the rationale; and

- **Other factors**

Factors that the Court will consider include: (i) the proposed financing is an exercise of sound and reasonable business judgment, (ii) no alternative financing is otherwise available, (iii) such financing is in the best interest of the creditors, (iv) that no better offers, bids or timely proposals are before the Court, (v) necessary to preserve the assets and is necessary, essential and appropriate for the continued operations, (vi) terms are fair, reasonable and adequate in light of the circumstances of the debtor and proposed lender and (vii) the financing agreement was negotiated in good faith and at arm’s length.

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The Court declined to grant the super priority in Attilan because there was insufficient evidence of any efforts, let alone reasonable efforts being expended to secure financing without any super priority

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Asiatravel.com Holdings Ltd

Asiatravel.com Holdings Ltd (“ATH”) is an online travel company established in 1995 and is listed on the Catalist Board of the Singapore Stock Exchange. ATH faced cash flow difficulties once a convertible note subscription with Chinese investor Zhonghong Holding Co Ltd (“Zhonghong”) fell apart. The convertible note would have seen Zhonghong invest S\$10 million (US\$7.39 million) in ATH in exchange for a 26% equity stake. Considering the cash flow difficulties, ATH filed a Court application for a moratorium under Section 211B.

On 8 April 2019, the Singapore High Court granted ATH priority over all the preferential debts specified in Section 328(1)(a) to (g) of the Act and all unsecured debts pursuant to Section 211E(1)(b). This is the first successful application for super priority rescue financing under Section 211E.

ATH successfully showed that that it would not have been able to secure rescue financing from any person or entity without giving them super-priority status and they had undertaken “reasonable effort” to explore alternative types and sources of financing that did not entail super priority. This included appointing a financial advisor to seek financing on their behalf. ATH also demonstrated that the rescue financing from the white knight investor was in ATH’s best interests, necessary and essential to preserve their assets and continue as a going concern.

“ The undertaking of reasonable efforts does not mean it is necessary to source credit from every possible source ”

Asiatravel.com – Key factors to establish

1

Importance of establishing that reasonable efforts were undertaken to obtain financing on a non super priority basis and provide evidence of such efforts. Credible evidence includes preparation of an information memorandum outlining the terms of the financing sought and correspondence with potential rescue financiers

2

Importance of establishing that reasonable efforts were undertaken to obtain the best available terms of financing and/or that no alternative financing is available

3

Importance of establishing that the proposed financing is critical and essential to the survival of the company as a going concern

4

It is possible for rescue financing to be given on non-monetary terms as the white knight’s financing took the form of inventory for sale

Conclusion

The ATH case as an important first step in the evolution of super priority rescue financing in Singapore. It is also the first step in developing a broader rescue financing market where over time funds and other investors specialising in distressed situations will actively participate in primary and secondary distressed debt transactions in Singapore.

The rescue financing reinforces the guidelines in Attilan and sets the minimum requirements expected by the Court in terms of process in an application for super priority rescue financing under Section 211E(1)(a) and Section 211E(1)(b) (i.e. first 2 priority levels).

Looking ahead – The potential areas to be addressed as rescue financing evolves include:

- **Applications under Section 211E(1)(c) or Section 211E(1)(d)**

We view the process requirements to be largely similar as the statutory conditions in Section 211E(1)(b) broadly mirror the terms in Section 211E(1)(c) and Section 211E(1)(d);

- **Additional complexities associated with applications under Section 211E(1)(d)**

The issue of priming existing security and the statutory condition that there is “adequate protection” for

existing security interests. This will likely involve issues around security valuation (and key assumptions and approaches used), valuation debates and inter-creditor issues; and

- **Strategy and structuring**

Increasing importance as offensive rescue financing lenders (i.e. rescue financing provided by new third-party lenders such as distressed funds) motivated by the opportunity to control the process, earn attractive returns and greater priority with the benefit of the Court's approval compete against defensive rescue financing lenders (i.e. rescue financing provided by existing secured lenders) motivated to protect the existing loan, avoid being primed and maintaining control of the process. Defensive strategies available to existing secured lenders to protect the existing loan include – (i) use of a roll-up rescue financing whereby the pre-filing secured debt is “rolled up” into the rescue financing loan by using the rescue financing proceeds to satisfy the pre-filing secured loan, (ii) use of cross-collateralisation to improve the collateral value for its secured interest and (iii) use of rescue financing to “clean up” pre-filing loan documents when there is ambiguity in the documents underpinning the pre-filing loan, or if there is a dispute regarding the perfection or priorities.

“ *The ATH case is a ground breaking transaction and an important first step in the evolution of rescue financing and developing a broader rescue financing market in Singapore* ”


About DHC Capital

DHC Capital is an investment banking and financial advisory firm specialising in solving critical business challenges of companies facing liquidity pressures or financial stress.

DHC Capital provides independent and conflict-free advice on financial and operational restructuring to corporates, creditors, investors and other stakeholders, both in and out of Court. DHC Capital also advises clients on structuring and executing bespoke capital raising and accelerated M&A transactions to meet short term liquidity requirements, raise capital to unlock shareholder value or meet growth objectives. DHC Capital will further provide directors or executives into corporates, which are entering a restructuring process, being restructured, exiting a restructuring process or on behalf of creditors and investors to monitor and protect their investments.

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About David Chew

David is a Partner and Founder of DHC Capital.

David has over 20 years of experience in restructuring, turnaround and special situations having worked as an advisor with Ernst & Young and Arthur Andersen, investment banker with Morgan Stanley, in senior management as a CRO, CFO and interim CFO and Board member to distressed companies.



David has worked with and advised private and publicly listed corporates, creditors, private equity and debt funds and investors across the full range of the restructuring transaction cycle, including crisis stabilisation, business and strategic reviews, strategic option analysis including planning and implementing in and out of Court solutions, operational turnaround, debt restructuring / schemes of arrangement, distressed M&A, rescue financing and refinancing. He also advises corporates requiring urgent financing during periods of market and sector specific dislocation or financial stress.

David has been involved in high profile and complex transactions across Asia Pacific, including transactions in Australia, Brunei, China, Hong Kong, India, Indonesia, Malaysia, Singapore, Thailand and Vietnam. He has experience across multiple sectors including, manufacturing, construction, mining and metals, oil & gas, real estate, tourism and leisure and shipping.

As an investment banker, David was involved in the sourcing, structuring and execution of high yield, stressed and distressed investment opportunities across Asia Pacific for Morgan Stanley prop books.