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SUPER PRIORITY RESCUE FINANCING: LESSONS FROM THE US AND SINGAPORE – A COMMENTARY*

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A. What is Super Priority Rescue Financing?

Super Priority Rescue Financing (“**SPRF**”) is a court-sanctioned rescue financing mechanism under the Companies Act 2016 ("**CA 2016**"), operative from 1 April 2024. It is available in two restructuring contexts: a Scheme of Arrangement ("**SoA**") under Section 368B of CA 2016 and Judicial Management ("**JM**") under Section 415A of CA 2016.

In practical terms, SPRF allows a financially distressed company to borrow new money during restructuring proceedings, with that new loan ranked ahead of existing creditors including secured creditors — in the event of liquidation. By granting rescue financiers priority or security over other creditors, SPRF makes it commercially viable for

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lenders to extend credit to companies that would otherwise be unable to obtain financing.

Although SPRF provides more wriggle room for debtor companies which are facing financial distress, SPRF disrupts the primacy of creditor's interests, creates financial agency conflicts and transfers wealth from existing creditors to new lenders or shareholders[1]. Malaysian Courts therefore act as gatekeepers under Sections 368B and 415A CA 2016, sanctioning SPRF only upon strict conditions being satisfied.

For businesses navigating financial distress, SPRF can be the difference between survival and liquidation. For lenders and investors considering rescue financing, understanding how courts will apply these provisions is essential.

B. Why SPRF Exists?

Winding up a distressed company is not always the right answer. A company struggling with cash flow may still have a viable business worth saving. Liquidation destroys that value permanently, to the detriment of creditors, employees, and the wider economy. Denying a distressed company access to credit only accelerates that destruction by foreclosing value-preserving opportunities before restructuring can take hold. Critically, where a viable company is refused financing and forced into insolvency, the recovery rate available to its existing creditors is reduced as a direct consequence.

SPRF addresses this by making rescue financing commercially viable. However, without the assurance of priority repayment, no rational lender will extend credit to a company already in distress. SPRF provides that assurance by placing the rescue lender ahead of existing creditors, including secured creditors, in the event of winding up.

The benefits are well-documented[2]. A lender's willingness to provide rescue financing signals to the market that the business retains commercial viability, encouraging suppliers, employees and counterparties to maintain their relationship with the company. Empirical evidence from established rescue financing jurisdictions confirms that financed companies reorganise more successfully, exit insolvency faster, and where lenders attach governance conditions to the financing, emerge as better-managed businesses[3].

[1] See George G. Triantis, A Theory of the Regulation of Debtor in Possession Financing, 46 Vanderbilt Law Review 901 (1993)
[2] See Aurelio Gurrea Martinez, Debtor in Possession Financing in Reorganization Procedures Regulatory Models and Proposals for Reform (2023), European Business Organization Law Review, 24, 555-582.
[3] Sandeep Dahiya et al, Debtor in Possession Financing and Bankruptcy Resolution: Empirical Evidence, (2003), 69 Journal of Financial Economics, 259-280

C. Who Funds SPRF?

The availability of rescue funding is fundamental to the practical effectiveness of SPRF. Financing may come from a range of sources, including existing shareholders, strategic investors, specialist rescue financiers and financial institutions seeking to improve their position in the creditor hierarchy by upgrading existing debt to super priority status. Funding may be structured as primary rescue financing or sourced through the distressed debt or private credit markets. The latter referring to privately negotiated loans extended by non-bank lenders.

In Malaysia, the rescue financing market remains at a nascent stage. Bank appetite for SPRF lending under Sections 368B and 415A CA 2016 is as yet untested. The private credit market in Asia, while growing, has considerable room for further development. Rescue financing carries higher risks for lenders, balanced against the prospect of improved returns and enhanced security ranking. Whether sufficient funding will be available to support SPRF applications in practice remains to be seen.

D. Court's Consideration

Based on the US and Singaporean experiences, there are lessons to be learned by Malaysia in relation to SPRF. These lessons are salient points to be noted because they would facilitate effective implementation of SPRF under the CA 2016.

Courts should approve DiP based financing only when it is likely to fund value enhancing projects and not simply projects that redistribute wealth from existing creditors to new lenders and shareholders[4]. Thus, in scrutinizing the application, the courts should consider the following[5]:

i) whether the financing is absolutely necessary?

ii) is alternative financing unavailable on less intrusive terms?

iii) is the proposed value of funds value maximizing?

iv) do the benefits outweigh the prejudice to existing creditors?

[4] See George G. Triantis, A Theory of the Regulation of Debtor in Possession Financing, 46 Vanderbilt Law Review 901 (1993)
[5] *Ibid*

To determine whether a financing in question is value maximizing, the courts should look for evidence that the financing is reasonably likely to preserve or increase the value of the business compared with available alternatives. Among the indicators are:

i) the company has a realistic restructuring plan

ii) the financing preserves going concern value

iii) no less prejudicial financing is available

iv) independent financial evidence supports application

v) existing creditors not worse off overall

vi) the financing is necessary.

All the above guiding principles have been adopted and adapted into the Companies Act 2016 by virtue of Section 368B and Section 415A CA 2016 and likewise in Singapore by virtue of Section 67 and Section 101 IRDA 2018. Hence, in interpreting the CA 2016 provisions for SPRF, Singapore's case law are useful references for Malaysia.

Another dimension that should be taken into consideration by the Malaysian Courts is David A Skeel Jr's argument that introduced distinction between loan oriented and loan and control financing[6]. In short, another salient point to note is that DiP model financing could be turned into a tool for control of debtor companies by the new lenders or investors. Skeel Jr submitted that based on the US experience, DiP lenders have evolved into influential participants in Chapter 11 governance and not merely as liquidity providers. This happens when the new creditors impose conditions which exert some form of control or influence to ensure the debtor company survives insolvency and manages to exit bankruptcy. This aspect should be assessed and considered by the Courts because it may touch on other regulatory aspects such as competition law and matters pertaining to veil of incorporation. On the other hand, SPRF financing with more effective control imposed by the new lenders may lead to better governance of the debtor companies, enabling them to navigate insolvency better and exit bankruptcy much earlier.

[6] David A Skeel Jr, Past, Present and Future of Debtor in Possession Financing, 25 Cardozo Law Review 1905 (224)

In Singapore, the Courts have been very cautious in allowing applications for SPRF [7]. It is submitted that it is an organic development pace considering it was early days of implementation of SPRF in Singapore and it is not because of distrust of the effectiveness of SPRF as a rescue/restructuring mechanism. However, SPRF jurisprudence has been developing rather healthily in the jurisdiction. This can be seen from the 9 successful SPRF deals which have been completed in Singapore as at end 2025 [8]. Most cases were applications under Section 67 IRDA 2018 and involved simpler capital structures involving bilateral banking facilities and unsecured creditors[9]. In some cases, SPRF has been used not just as a tool to inject fresh capital but also as access to information and management - ultimately becoming the new majority equity owner [10].

The first case to apply for SPRF under the now Section 67 IRDA 2018 was *Attilan Group Ltd (Attilan)* [11]. However, the court refused to grant SPRF to *Attilan* under the now Section 67 IRDA 2018. In this case the Court also set out the guidelines for future SPRF applications in Singapore under IRDA 2018. *Asiatravel.com Holdings Ltd (ATH)*[12] was the first successful SPRF application under Section 67 IRDA 2018. The case established the "reasonable efforts" requirement before the Court grants SPRF[13]. *Swee Hong Ltd (Swee Hong)*[14] is the first case granting security over unencumbered assets and illustrated how the court can "customize" relief to suit the financing needs of restructuring that rescue financiers may be granted more than one form of protection. *Re Design Studio Group Ltd and other matters*[15] is the first case approving roll-up financing and set out the leading principles governing judicial discretion in rescue financing applications. *Zipmex Group (Zipmex)*[16] is another significant case law from Singapore because it was the first major crypto restructuring using SPRF. Furthermore, the case involved cross-border insolvency because it involved creditors and operations across multiple jurisdictions. This case also illustrates that SPRF is not a guarantee that the debtor company will successfully exit insolvency. *NutryFarm International Ltd (NF)*[17] is the first case of judicial management SPRF for a firm under JM by virtue of Section 101 IRDA 2018.

[7] See David Chew, Super Priority Rescue Financing – Singapore Perspective, Singapore Management University (2025) at ccla.smu.edu.sg
[8] *Ibid*
[9] *Ibid*
[10] *Ibid*
[11] [2017} SGHC 283 and [2018] 3 SLR 898
[12] There is no published neutral citation because the application was handled via an unreported oral/ chamber judgement delivered by Justice Kannan Ramesh.
[13] The applicant debtor company need to satisfy the Court that it has genuinely explored less prejudicial financing before applying for SPRF and must produce credible evidence of those efforts. This requirement is a form of safeguard for existing creditors.
[14] SGX QF6. The case does not have a formal written public law report citation because it was an unreported decision delivered in chambers by Justice Ang Cheng Hock.
[15] [2020] SGHC 148
[16] [2022] SGHC 196 and [2022] SGHC 306
[17] (SGX: AZT) ('NFI') - There is no stand alone published (formal written) citation for this specific application as updates were handled via SGX Corporate Announcements rather than a reported landmark law report.

Among the key differences between the Malaysian and Singaporean SPRF regime is that Singaporean Courts accepted roll-up financing structures whereby existing debt is consolidated into new super priority debt[18]. Currently, CA 2016 neither expressly provides for nor prohibits roll-up financing for SPRF. Singapore's IRDA 2018 too neither expressly allow nor prohibit roll-ups[19]. It is yet to be seen if roll-up financing will be allowed by the Malaysian Courts since Malaysian jurisprudence on SPRF is still in its infancy. However, if the Malaysian Courts were to allow roll-up financing for SPRF under CA 2016, it should be assessed thoroughly lest the law be abused. This is because roll-up financing could be used to circumvent creditor priority or block competing financiers or protect existing investments rather than maximize value) or over-securitize assets.[20]

Another difference is, Malaysia only has three levels of priority whilst Singapore has four[21]. Malaysia does not have Administrative Expense Priority – where SPRF loan will be treated as part of winding up cost. Hence, this gives very high priority to SPRF granted with this level of priority. In Malaysia, SPRF loan is given priority after winding up costs. Whether Malaysia should adopt Administrative Expense Priority in the future, only time will tell.

E. Way Forward

Although Malaysia's corporate rescue and restructuring ecology is not as advanced as that of the US and Singapore, the fact which needs to be noted is SPRF does not guarantee the company will be rescued from insolvency and eventually liquidation. There are other factors at play, which add to the complexities of restructuring and exiting bankruptcy. This can be seen in the Singaporean case, Zipmex[22]. As explained earlier, Zipmex Group are cryptocurrency companies which operate in several jurisdictions. The group sought creditor protection in Singapore due to financial distress. Despite SPRF application granted by the Court, the corporate rescue and restructuring failed due to, among others, legal complexities in multi-jurisdictional operations. In this regard, harmonization of restructuring laws across the region should be the way forward.

[18] See: Re Design Studio Group Ltd and other matters [2020] SGHC 148 and New SilkRoutes Group Ltd HC/SUM 1378/2013
[19] Emmanuel Duncan Chua et al, Avant-Garde Tools in Rescue Financing – Developing the Practice and Use of Roll-Ups and Cross Collateralisations in Singapore, [2024] Singapore Academy of Law (SAL) Prac 23
[20] *Ibid*
[21] See Section 368B (1) CA and Section 415A (1) CA 2016 for Malaysia. Section 67 (1) IRDA 2018 and Section 101 (1) IRDA 208
[22] [2022] SGHC 196 and [2022] SGHC 306

Singapore's case law development on SPRF shows the importance of expertise in restructurings and corporate rescue mechanism. Hence, there is a need to develop expertise and competence in subject matter among the judiciary and legal fraternity. Singapore's SPRF jurisprudence illustrates the importance of having members of the judiciary and legal fraternity who are knowledgeable of the subject matter and creative without going beyond the boundaries of the law. The practice of insolvency law indeed requires multidisciplinary knowledge which includes accountancy, taxation, business and economy expertise apart from law. Thus, upskilling and training of judges and lawyers are key. The existence of specialist courts in Kuala Lumpur and Shah Alam facilitates the way forward for Malaysia in empowering corporate rescue and restructuring[23].

Another important lesson to be learned from both the US and Singapore is the need for clear guidelines to be developed by the Courts. Of course, the broad principles have been provided under Section 368B CA 2016 and Section 415A CA 2016 but as most are aware, guidelines would give clarity and certainty in the interpretation and application of the law. The guidelines required include: approval standards, the meaning and threshold of adequate protection, whether roll-up financing is allowed and if it is, the safeguards to be applied and priming liens[24].

For Malaysia, in moving forward with SPRF, the question of availability of funding for SPRF is equally important even if Malaysia does not aim to be a hub for restructuring in the region like Singapore. This is to ensure SPRF could be effectively implemented in the jurisdiction. The number of financially distressed companies applying for SPRF under the CA 2016 would be scarce if it is difficult to obtain funding, either because of lack of supply or because under the current ecology, it does not attract the interest of potential lenders. However, these are also dependent on the demand for SPRF funding – a chicken and egg cycle which would require a government push. As such, the Malaysian Government should work together with Bank Negara Malaysia and financial industry players to develop a distressed debt and private credit market and build a secondary loan market.

[23] Lee Shih, My Say: New Companies (Amendment) Act Strengthens Restructuring and Corporate Rescue Landscape, The Edge Malaysia (11 April 2024)
[24] *Ibid*

F. Conclusion

Malaysia's adoption of SPRF provisions in 2024 is a positive step towards a more empowered and dynamic insolvency legislation in corporate rescue and restructuring which are in line with international standards. Lessons learned from the US as the originator of the DiP financing model and also Singapore as a fellow Commonwealth jurisdiction are useful signposts / guidance which could facilitate[24] the development of Malaysian jurisprudence in corporate rescue and restructuring. Malaysia should also be supportive of harmonization of insolvency law in the region, to facilitate cross border insolvency law enforcement especially with the enactment of the Cross-Border Insolvency Act which came into operation on 28 August 2026. These would increase Malaysia's competitiveness ranking in terms of ease of doing business which eventually will attract more investments into the country's economy.

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