Directors' duties in the zone of insolvency

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Singapore directors who continue to trade while the company is insolvent face liability for wrongful trading under s 239 IRDA, which applies where the company incurs debts without reasonable prospect of meeting them. They also face liability for fraudulent trading under s 238. They also face disqualification. The crypto cases have sharpened the practical content of these duties. Continuing to accept deposits into a yield product after the platform's own counterparties have defaulted is the paradigm of incurring debts without prospect of repayment. Statements to customers that conceal the position may convert a civil wrong into fraud under s 424A Penal Code (see Chapter I).[1]

The Swiss equivalent is the duty to notify the court of over-indebtedness under Art. 725b CO, with personal liability under Art. 754 CO for delay. Both systems punish the same conduct, the continuation of a platform that has already lost its customers' assets. Singapore's practitioners have the sharper investigative tools, because the interim judicial manager arrives within weeks and reports publicly.

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Cross-border perspective

A dual-hub group with a Zug GmbH as issuer and a Singapore Pte Ltd as the customer-facing exchange should plan its insolvency geography before it needs it. If the Singapore entity fails, the s 64 moratorium will protect it in Singapore but not the Zug entity's Swiss assets, which Singapore creditors can attach in Switzerland only if they obtain a Swiss title. If the Zug entity fails, the Swiss bankruptcy will be recognised in Singapore under the Model Law within weeks. The Swiss administrator will then take control of the Singapore subsidiary's shares and of any tokens the Zug entity holds at Singapore exchanges. Intra-group loans, token lending between the entities and shared custody arrangements should be documented on the assumption that two insolvency officers in two systems will one day read them. The customer agreement of the Singapore entity should state the trust position in words a liquidator cannot misread.

Notes

1. Insolvency, Restructuring and Dissolution Act 2018, ss 238–239, Singapore Statutes Online. ↩

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