CROSS-BORDER INSOLVENCY IN SINGAPORE

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In promoting itself as an international debt re-structuring hub, Singapore has seen a slew of legislative reforms and structural changes. Of particular note are the amendments to the Companies Act (Cap. 50) in May 2017 and the establishment of the Judicial Insolvency Network ("**JIN**") which aims to promote communication and cooperation between courts in various jurisdictions.

Paradigm shift in attitude towards cross-border insolvency

Given the increasingly borderless nature of modern business and economic landscapes, demands for greater convergence, connectivity and cooperation between jurisdictions, especially within the realm of insolvency laws, inevitably follow.

Singapore's shift towards the Universalist approach is vital to realizing its ambition to become an international debt restructuring hub.

On the legislative front, the shift is reflected by the recent amendments to local insolvency legislation to adopt the UNCITRAL Model Law on Cross-Border Insolvency and strengthen the Scheme of Arrangement and Judicial Management regimes. In particular, these amendments also abolish archaic territorial rules such as ring-fencing of assets in the liquidation of foreign companies in Singapore,[1] and the ad hoc approach in recognizing foreign insolvency proceedings whereby the Singapore Courts previously considered rendering assistance to foreign winding up proceedings, depending on the particular circumstances before it.[2]

The judiciary is also a key champion of the convergence of laws and judicial attitudes with international standards. As the Singapore High Court in *Re Opti-Medix Ltd (in liquidation) and another matter* [2016] SGHC 108 rightly observed:

> *In cross-border insolvency, there has been a general movement away from the traditional, territorial focus on the interests of the local creditors,* ***towards recognition that universal cooperation between jurisdictions*** *is a necessary part of the contemporary world.* ***Under a Universalist approach, one court takes the lead while other courts assist in administering the liquidation. This is the most conductive to the orderly conduct of business and resolution of business failures across jurisdictions.*** *The tone of the approach in Beluga and the telegraphed adoption of the UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997) (the "Model Law") in Singapore are indicators that* ***Singapore is warming to Universalist notions in its insolvency regime****.*

Apart from the establishment of the JIN (discussed in detail below), the judiciary's commitment to the Universalist approach is also demonstrated by the strengthening of support facilities and resources, including a dedicated bench of Specialist Judges to hear insolvency matters, as well as the option to have international restructuring matters heard by leading international restructuring experts appointed as International Judges of the Singapore International Commercial Court – one of the latest initiatives which is surely gaining traction as a prime destination for international commercial dispute resolution.

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[1] Companies Act (Cap. 50, 2006 Rev Ed), section 377(3)(c).
[2] *Beluga Chartering GmBH (in liquidation)* [2014] SGCA 14 at [98] and [99]

Amendments to Insolvency Legislation in May 2017

Adoption of the UNCITRAL Model Law on Cross Border Insolvency

By its incorporation of the UNCITRAL Model Law on Cross Border Insolvency ("**Model Law**") in the Tenth Schedule of the Companies Act (Cap. 50), Singapore became the 42nd State in the word to have adopted the Model Law. Other States which have adopted the Model Law include Australia, the British Virgin Islands, Great Britain, Greece, Japan, New Zealand, Philippines, Poland, Korea, South Africa and the United States.

The application of the Model Law now allows:

- the recognition of foreign insolvency proceedings upon satisfaction of simplified proof requirements,[3] upon which an automatic stay and suspension of proceedings would apply[4] - this can be contrasted against the previous ad hoc approach set out by the Court of Appeal in *Beluga Chartering GmBH (in liquidation)* [2014] SGCA 14);

- the Singapore Court to grant interim relief in aid of foreign main proceedings, including staying execution against the debtor's property and entrusting the administration or realisation of the debtor's property in Singapore to the foreign representative to protect and preserve the value of property that is perishable, susceptible to devaluation or otherwise in jeopardy;[5]

- the Singapore Court to communicate and cooperate to the "*maximum extent possible*" with foreign courts or foreign representatives (the effects of which will be discussed below);[6] and

- the coordination between Courts to ensure consistency in decisions made across jurisdictions in concurrent insolvency proceedings.[7]

Case Study on Recognition of Foreign Insolvency Proceedings - *Re: Zetta Jet Pte Ltd and others* [2018] SGHC 16

Zetta Jet Pte Ltd ("**Zetta Jet Singapore**") and Zetta Jet USA Inc ("**Zetta Jet USA**") filed voluntary Chapter 11 bankruptcy proceedings in the US Bankruptcy Court. Shortly thereafter, some of Zetta Jet Singapore's shareholders commenced a suit in Singapore against Zetta Jet Singapore for breach of the Shareholders' Agreement by commencing the Chapter 11 bankruptcy proceedings, and successfully obtained an injunction order from the Singapore High Court which prevented Zetta Jet Singapore from carrying out further steps in relation to the US bankruptcy proceedings ("**Singapore Injunction**").

The US bankruptcy proceedings continued nonetheless, in breach of the Singapore Injunction, and were later converted to Chapter 7 bankruptcy proceedings. In December 2017, Zetta Jet USA and Zetta Jet Singapore applied for recognition of the Chapter 7 bankruptcy proceedings in Singapore and for the trustee in bankruptcy to be recognized as a foreign representative for the purposes of the Model Law.

The Singapore High Court rejected the applicants' argument that the Centre of Main Interests ("**COMI**") of both Zetta Jet Singapore and Zetta Jet USA was USA as they should be treated as a single whole, noting that it was "*essential to observe the separate corporate personalities*". Considering Zetta Jet Singapore's COMI to be Singapore, it concluded the Chapter 7 bankruptcy proceedings in relation to Zetta Jet

[3] Articles 9, 15 to 17 of the Model Law
[4] Article 20 of the Model Law
[5] Article 19 of the Model Law
[6] Articles 25 to 27 of the Model Law
[7] Articles 28 to 30

Singapore qualified for recognition as foreign main proceedings.

However, the Singapore High Court hesitated to grant full recognition of the Chapter 7 bankruptcy proceedings on the grounds that it would be against the public policy of Singapore. This was because the continuation of the US bankruptcy proceedings had been in breach of the Singapore Injunction and had thereby undermined the administration of justice. Nonetheless, in recognising that the trustee would not be able to deal with the injunction otherwise, the Court granted limited recognition to the Chapter 7 proceedings only for the purposes of setting aside or appealing the Singapore Injunction.

Scheme of Arrangement Regime Enhanced

The existing Scheme of Arrangement regime (which allows a company to come to a compromise with its creditors through a court-sanctioned moratorium) have been significantly enhanced by major amendments.

In particular, the new regime borrows key concepts from the US Chapter 11 regime and the US Bankruptcy Code:

- **Super priority for rescue financing** (a concept borrowed from DIP financing feature in the US Chapter 11 Model): to encourage the provision of working capital by rescue financiers for troubled companies which businesses remain viable. Since the application is to be made by the company, it is up to the rescue financiers to negotiate the level of priority;

- **Automatic moratorium**[8] (including options for worldwide application): at the same time, ensuring protection of creditors' interests by

  - requiring disclosure of information by the applicant under section 211B(6), including a report on valuation of the company's significant assets and information relating to acquisition/disposal/grant of security of property etc; and

  - making available the option for creditors to apply to prevent dissipation of assets under section 211D;

- **Cram-down mechanisms for dissenting classes of creditors**: at the same time, the absolute priority rule (which allows shareholders to be compensated only after creditors' claims are settled to the satisfaction of the Court) protects dissenting classes of creditors who are crammed down; and

- **Pre-pack schemes** which may be approved without the need to call a creditors' meeting, thereby providing a fast-track option (as fast as 1 month) compared to the normal Scheme timeframe (3 to 6 months from the date of application).

Case Study on Super-Priorty Rescue Financing - *Re: Attilan Group Ltd [2017] SGHC 283*

Attilan Group Ltd ("**Attilan**") applied for leave to convene a creditors' meeting to consider a proposed scheme of arrangement, and for super priority to be granted in respect of rescue financing sought to be obtained under section 211E of the Companies Act, having obtained shareholders' approval for the issuance of loan notes to the Subscriber.

The Singapore High Court declined to give the proposed financing from the Subscriber super priority, highlighting that the Court must be sufficiently satisfied on a balance of probabilities that there is a basis for

[8] Section 211B(8) of the Companies Act

the matters raised in the affidavit to satisfy the requirements for super-priority financing, and that such application will fail if the Court retains a doubt on a balance of probabilities as to the applicant's evidence. In this case, Attilan did not show that sufficient evidence of any efforts to secure financing without any super priority, and that it was objectively in such an abysmal financing health that no financial aid could have been reasonably received without any offer of super priority.

The Court also considered that it would be next to impossible for it to determine whether other sources of funds were available unless the applicant adduces sufficient evidence such as failed negotiations and attempts with other potential lenders. In this case, it was insufficient for Attilan to state that its management had approached and discussed with several parties for source for financing since it is unclear whether these discussions were in respect of financing without super priority.

Judicial Management Regime Enhanced

The Judicial Management regime has also been enhanced in scope, making it easier for troubled companies to achieve rehabilitaiton:

- Foreign companies liable to be wound up under the Companies Act may also apply for judicial management;

- Companies may apply for judicial application at an earlier stage, when they are "*likely to become*" unable to pay debts, as opposed to the earlier test whereby it had to be shown that the company "*will be*" unable to pay its debts;

- Sanction required for scheme of arrangement regime available to the judicial manager has been reduced from 75% in value to more than 50% in number and more than or equal to 75% in value;

- Secured creditors' veto powers have been watered down in that they must now show that making of a judicial management order will cause disproportionately greater prejudice to it than prejudice to unsecured creditors.

Judicial Insolvency Network

Singapore was a pioneer participant of the JIN, which comprises judges from Australia, Bermuda, the British Virgin Islands, Canada, the Cayman Islands, England and Wales, Singapore and the USA. The JIN Guidelines, issued in February 2017, supplements the Model Law and sets out key features to be reflected in a protocol or order of court for communication and cooperation among courts, and insolvency representatives and other parties in cross-border insolvency proceedings. In particular, the JIN Guidelines:

- suggests mechanisms for communication between Courts in respect of administrative matters (e.g. making of submissions, rendering of decisions, coordination of administrative, procedural or preliminary matters;

- suggests procedure and facilities for communication of substantive issues (e.g. transcription of hearings); and

- provides for the possibility of joint hearings to be conducted between courts.

The JIN Guidelines signifies the Singapore Court's commitment to the Universalist approach and convergence with international standards, and brings about the following key benefits:

- provides a common default framework for communication and cooperation between Courts, reducing uncertainty where attempts for communication were made on ad hoc basis;

- keeps Courts informed of proceedings in different jurisdiction, thereby avoiding situations of conflicting court orders / judgments; and

- allows more efficient case management and sharing of information, avoiding wasted time and costs.

The JIN scheme has been first implemented between the Singapore and United States Bankruptcy Court for the joint hearing of Ezra Holdings where issues relating to conflicts of laws may arise. The proceedings are still ongoing.

Further developments in store for Singapore

The changes discussed above are merely preludes of more exciting changes awaiting the insolvency landscape in Singapore.

On the legislative front, we can expect an omnibus Insolvency Bill to be introduced in the next half of 2018. The proposed Bill is expected to streamline insolvency legislation in Singapore (currently straddling the Companies Act and Bankruptcy Act), and implement further recommendations of the Insolvency Law Reform Committee (the "**Committee**"), such as the introduction of a framework for the regulation of insolvency professionals.

Structurally, Singapore has also dedicated to strengthening the quality of insolvency professionals based in Singapore, following the Committee's recommendations for "*[m]ulti-disciplinary training by the law, business and accountancy faculties of the local universities [to] be developed to build up the knowledge and expertise of the insolvency profession*". In this regard, the Singapore Management University now offers cross-disciplinary restructuring and insolvency module.

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