

Restructuring & Insolvency

# Ordering the Production of Documents in Winding Up – Court Confirms Extra-Territorial Effect of Order

## Introduction

When a company is being wound up or is in judicial management, the Court may – upon the application of the liquidator, the judicial manager, or a creditor – order the production of documents or information relating to the company, as well as the attendance of the company's officers and the people holding the relevant books and records. This facilitates the obtaining of documents or information for the purpose of determining the reasons for the company's demise.

In *Xu Wei Dong v Midas Holdings Ltd* [2022] SGHC 268, the Singapore High Court confirmed that this power applies both locally and extra-territorially in respect of persons and documents located abroad. The Court also set out the factors it would consider in determining whether to grant such an order. Here, the Court granted an order against the former auditors of a company in liquidation for the production of documents relating to the audits carried out, despite the fact that one of the auditors was based in Hong Kong.

The Court's decision provides welcome clarity on whether such orders can be made against individuals and entities located outside of Singapore. It also demonstrates the approach taken by the Court to determine the grant of such orders.

This Update provides a summary of the key points of the decision.

## Brief Facts

The Company in question was a Singapore company, and was the holding company of subsidiaries incorporated in Singapore and in the People's Republic of China ("**PRC**"). The Auditors were from a group of accounting firms, and were based in Singapore and Hong Kong respectively (referred to here as "**Mazars SG**" and "**Mazars HK**").

Mazars SG was the external auditor of the Company from 2012 to 2017, issuing auditors' reports from FY 2012 to FY 2016. These reports were prepared with the assistance of Mazars HK, which audited the subsidiaries incorporated in the PRC.

The Company instructed Mazars SG to stop work on the audit for 2017. Mazars HK had discovered potential irregularities relating to the bank accounts of the PRC subsidiaries and informed the Company,

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and further investigations were carried out. Mazars SG informed the Company that the audit reports could not be relied on due to certain discrepancies uncovered.

The Company was subsequently placed under liquidation, and the Liquidator was appointed. Various requests were made of the Auditors to provide documents relating to the audits for 2012 to 2017 ("**Documents**"). The Auditors provided some documents to the Liquidator but resisted production of the remaining documents.

The Liquidator sought an order under section 285 of the Companies Act ("**CA**") for the Auditors to disclose the requested Documents.

### Holding of the High Court

The Court granted the order sought by the Liquidator. In reaching its decision, the Court considered:

- (a) Whether section 285 of the CA has extra-territorial effect in respect of persons and documents located abroad, such that it applies to Mazars HK; and
- (b) Whether the section 285 order should be granted on the facts.

#### Extra-territorial effect

When a company is being wound up or is in judicial management, section 285 of the CA previously allowed the Court to order the production of documents or information relating to the company, as well as the attendance of the company's officers and the people holding the relevant books and records.

Section 285 of the CA has since been repealed, but the Court's power in this regard has essentially been preserved in section 244 of the Insolvency, Restructuring and Dissolution Act ("**IRDA**"). The Court's ruling on section 285 of the CA is thus likely to apply to section 244 of the IRDA as well.

The Court held that section 285 of the CA has extra-territorial effect. This was based on the wording of the provision, its objective, and the application of local case law.

The Court considered the presumption against extra-territoriality, which provides that a statute is to only apply to activities in Singapore if it is silent on its geographical scope. However, the Court found that the presumption was displaced as section 285 of the CA was couched in sufficiently wide terms to cover a person or entity based in a foreign jurisdiction. Further, the purpose of section 285 of the CA showed that it was meant to operate extra-territorially.

The Court elaborated that section 285 of the CA was intended to assist the liquidator in determining the events that led to a company's demise and to take steps to maximise returns to the company's creditors. This would be served through extra-territorial application, particularly in this day and age, where commercial transactions are often international in nature, groups of companies span across borders,

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and listings often involve foreign businesses and entities. The Court highlighted that the global nature of commerce, the presence of listed entities from overseas, and even data storage practices meant that information would often be located overseas, and that limiting the operation of the Court's power to material and persons within the territory would hamper the proper operation of liquidation.

Finally, the Court found that local case law supported the position that section 285 of the CA does indeed operate extra-territorially.

#### Grant of order

The Court will only grant an order under section 285 of the CA if it is satisfied that:

- (a) The documents are reasonably required;
- (b) There is a reasonable belief that they can be provided by the parties against whom the order is sought; and
- (c) The balance of interest lies in favour of such an order.

Here, the Court was satisfied that these requirements had been met.

- (a) **Reasonably required** – The Documents were reasonably required by the Liquidator for the carrying out of his duties, which was to understand how the audits were conducted and the Auditors' basis for issuing the Audit Reports.
- (b) **Reasonable belief** – There was a reasonable belief that the Auditors would be able to assist, given that Mazars SG was the Company's statutory auditor for the relevant period and prepared the Audit Reports with the assistance of Mazars HK.
- (c) **Balance of interest** – The balance of interest lay in favour of the disclosure of the Documents. The Auditors submitted that the grant of the order would result in oppression to the Auditors, either because the application was unnecessary or because the production of the Document would expose the Auditors to possible contravention of PRC law. However, the Court found that the Documents were necessary as the Liquidator did not possess the necessary information. The Court also cast doubt on the possible contravention of PRC law, and found that the Auditors had not shown that the alleged possible contravention would cause oppression.

### Concluding Words

The Court's power to order the attendance of officers of the company and the production of documents relating to the company is an important tool to assist the liquidator or judicial manager in unravelling the accounts and affairs of the company. The Court's decision provides welcome confirmation that this power extends to individuals and documents located in a foreign jurisdiction. Otherwise, such

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documents and information could be hidden from the reach of the liquidator or judicial manager simply by moving them out of the jurisdiction.

The decision also demonstrates that parties will not be able to resist such orders by merely alleging oppression or prejudice. Factors that seek to tilt the balance of interest must be sufficiently established before they carry any legal weight.

For further queries, please feel free to contact our team below.

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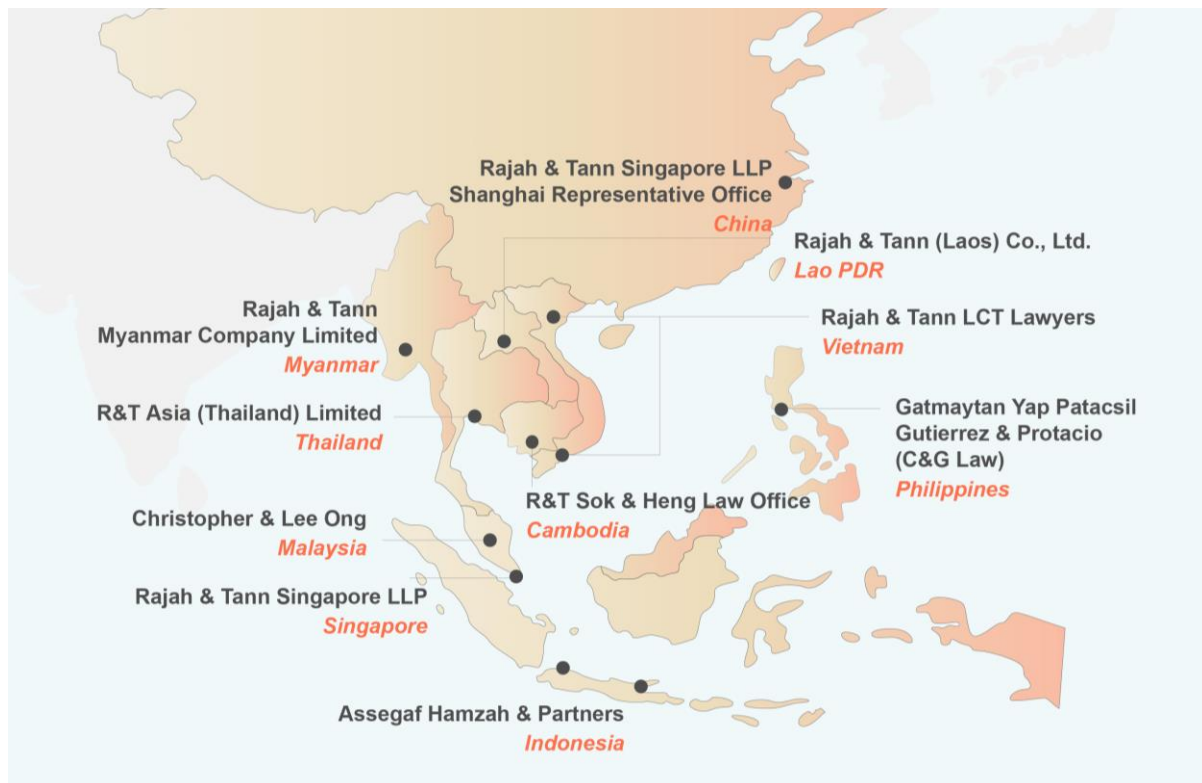
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