Restructuring & Insolvency

Recognising Foreign Proceedings under Singapore's Restructuring and Insolvency Regime

Court of Appeal Clarifies Whether Company Must be Insolvent

Introduction

Restructuring and insolvency proceedings often span different jurisdictions, requiring the cooperation of the respective countries' insolvency regimes. In its role as an international hub for restructuring and insolvency, Singapore has in place a framework for the effective management of cross-border insolvency proceedings. This takes the form of the UNCITRAL Model Law on Cross-Border Insolvency, which has been enacted in Singapore in an adapted form ("**SG Model Law**").

As part of the SG Model Law, Singapore courts may recognise foreign restructuring and insolvency proceedings, as well as foreign representatives in such proceedings. This allows for the Singapore courts to support the reorganisation or liquidation efforts by granting orders such as stays of proceedings or execution against the company or its assets in Singapore, examination and taking of evidence, and granting powers of administration to the foreign representatives.

In *Ascentra Holdings, Inc (In Official Liquidation) & 2 Ors v SPGK Pte Ltd* [2023] SGCA 32, the Singapore Court of Appeal ("**Court**") was faced with a fundamental question regarding the scope of the SG Model Law and what proceedings it covers. The Court had to determine whether a company has to be insolvent before the relevant proceedings may be regarded as foreign proceedings.

The Court held that the SG Model Law does not require a company to be insolvent or in severe financial distress before a proceeding concerning that company may be recognised as a foreign proceeding. While the SG Model Law does require that such proceedings be conducted "under a law relating to insolvency or adjustment of debt", it is sufficient if the law under which the relevant proceeding is conducted includes provisions dealing with the insolvency of a company or the adjustment of its debts.

Here, the appellant company was undergoing a voluntary liquidation in the Cayman Islands along a legislative "track" which applied to solvent companies. The Court held that this qualified as a foreign proceeding under the SG Model Law and recognised it as a foreign main proceeding in Singapore. The Court further granted the appellant liquidators of the company recognition as foreign representatives.

Lee Eng Beng SC and Walter Yeo of Rajah & Tann Singapore LLP successfully represented the appellants as instructed counsel in this appeal.

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Brief Facts

The first appellant (the "**Company**") had commenced voluntary liquidation proceedings in the Cayman Islands under the Companies Act (2021 Revision) (Cayman Islands) ("**Cayman Act**"). The Grand Court of the Cayman Islands appointed the second and third appellants as the Company's Liquidators.

The Company was solvent at the time of proceedings, as accepted by the Liquidators. The liquidation of the Company was being conducted pursuant to provisions in the Cayman Act that provided for the dissolution of solvent companies.

The appellants made an application in Singapore pursuant to Article 15 of the Third Schedule to the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed), which gives effect to the SG Model Law. The appellants sought orders:

- recognising the Company's liquidation in the Cayman Islands as a foreign main proceeding within the meaning of Article 2(*f*) of the SG Model Law;
- recognising the Liquidators as foreign representatives of the Company within the meaning of Article 2(*i*) of the SG Model Law; and
- granting the Liquidators such powers in relation to the Company's property and assets as are available under Singapore insolvency law.

The Company had possible claims against the respondent, a Singapore company. The Singapore application would enable the Liquidators to pursue these claims against the respondent. In turn, the respondent resisted the appellants' application.

Holding of the High Court

The SG Model Law allows for the recognition of "foreign proceedings" by the Singapore courts. "Foreign proceedings" are defined in Article 2(*h*) of the SG Model Law, and have the following requirements:

- The proceeding must be collective in nature.
- The proceeding must be a judicial or administrative proceeding in a foreign State.
- The proceeding must be conducted under a law relating to insolvency or adjustment of debt.
- The property and affairs of the debtor company must be subject to control or supervision by a foreign court in that proceeding.
- The proceeding must be for the purpose of reorganisation or liquidation.

On the third requirement above, the High Court Judge ("**Judge**") interpreted the words "under a law relating to insolvency" as referring to a body of rules which governs a company that is insolvent. The Judge thus found that the Company's Cayman liquidation was not a "foreign proceeding" because the legislative track under which the liquidation was commenced does not apply to a company that is

insolvent or in severe financial distress. The Judge accordingly dismissed the appellant's application.

Holding of the Court of Appeal

The Court of Appeal allowed the appellant's appeal, overturning the decision of the Judge. The Court held that that there is no requirement under the SG Model Law for a company to be insolvent or in severe financial distress before a proceeding concerning that company may be recognised as a foreign proceeding. Applying this position, the Court found that the Company's Cayman liquidation qualified as a foreign proceeding and exercised its jurisdiction to recognise the Cayman liquidation as a foreign main proceeding in Singapore.

Whether the SG Model Law applies to solvent dissolution

The Court held that Article 2(*h*) of the SG Model Law should be interpreted broadly to include foreign proceedings concerning companies that are neither insolvent nor in severe financial distress.

- **Ordinary meaning** – The ordinary meaning of the relevant provisions of the SG Model Law do not indicate any express requirement for a company to be insolvent or in severe financial distress for a proceeding concerning that company to be recognised as a foreign proceeding.

- **UNCITRAL Model Law** – The Court was not satisfied that the drafters of the UNCITRAL Model Law intended to exclude solvent companies from the scope of the UNCITRAL Model Law for the purposes of recognition.

- **Other jurisdictions** – The weight of the authorities in other jurisdictions favoured the Court's interpretation, which would enable the recognition of proceedings concerning solvent companies as foreign main proceedings.

- **Practical concerns** – The respondent raised certain practical concerns with the broad interpretation, but the Court held that such concerns could be easily dealt with.

The Court thus held that the requirement that a proceeding be conducted "under a law relating to insolvency or adjustment of debt" under Article 2(*h*) of the SG Model Law would be satisfied as long as the law (or the relevant part of the law) under which the relevant proceeding was conducted included provisions dealing with the insolvency of a company or the adjustment of its debts.

Whether the Cayman liquidation was a foreign proceeding

Applying the above position, the Court held that the Company's Cayman liquidation was a foreign proceeding under Article 2(*h*) of the SG Model Law. In particular, the Court considered the Cayman liquidation's fulfilment of the following requirements:

- **Law relating to insolvency** – The Cayman liquidation was a proceeding being conducted "under a law relating to insolvency or adjustment of debt". The provisions under which Cayman liquidation were being conducted were contained within the Cayman Act, which contained other provisions dealing with insolvency, adjustment of debt, arrangements and reconstructions.

- **Collective proceeding** – The Cayman liquidation was a collective proceeding.

- **Purpose of liquidation** – The Cayman liquidation was conducted for the purpose of liquidation within the meaning of Article 2(*h*) of the SG Model Law adopted by the Court.

Grant of orders sought

The Court held that it had jurisdiction to recognise the Company's Cayman liquidation as the Company had property situated in Singapore. The Court further held that the requirements for recognition under Article 17 of the SG Model Law were satisfied, meaning that the Court was obliged to recognise the Company's Cayman liquidation as a foreign main proceeding in Singapore.

Concluding Words

The Court's decision provides welcome clarity to the scope of the SG Model Law, clarifying that solvent companies undergoing liquidation in a foreign jurisdiction are not excluded from its operation. This is of particular importance as the insolvency frameworks in numerous jurisdictions allow for solvent liquidation. Companies utilising such avenues should not be denied the tools made available under the SG Model Law to administer the liquidation.

The Court highlighted that its interpretation of the SG Model Law better coheres with its ordinary meaning and reflects Parliament's intention to include proceedings concerning solvent companies within the scope of the SG Model Law. The Court was satisfied that such an interpretation is consistent with the overall purpose of the UNCITRAL Model Law.

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

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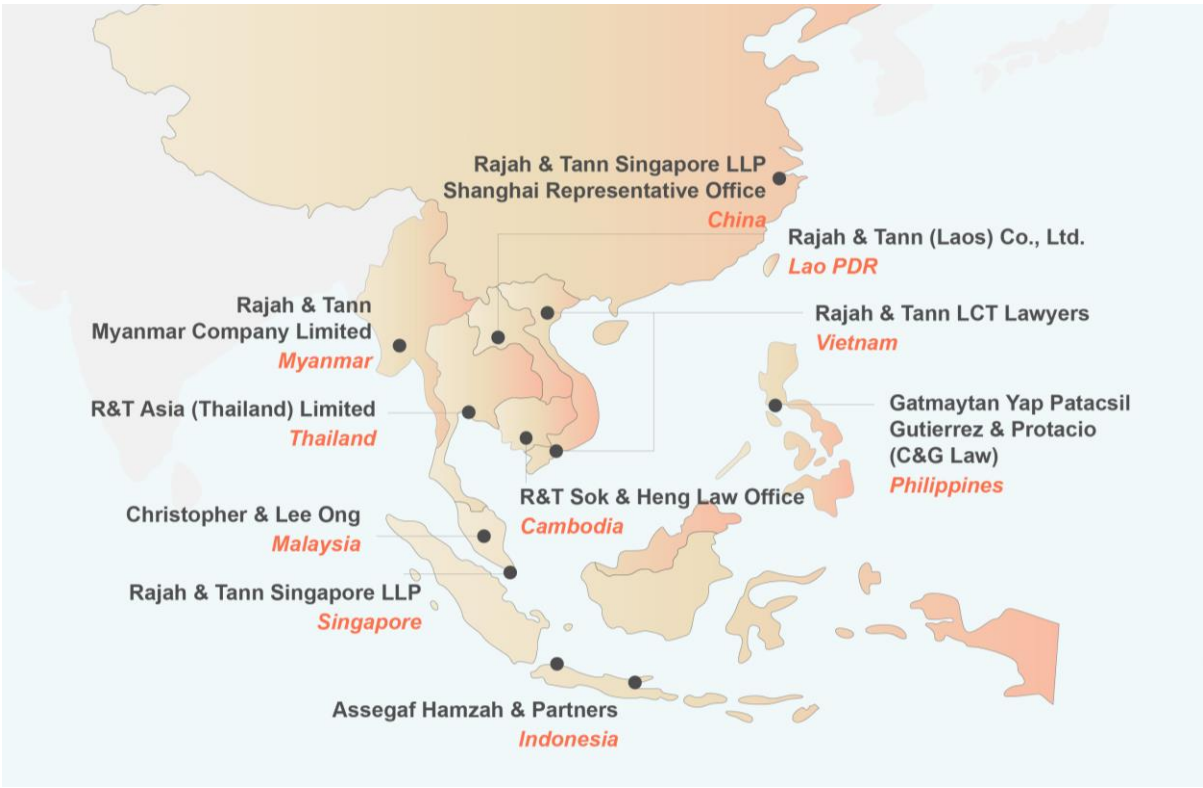

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