

Restructuring & Insolvency

Singapore Court of Appeal Considers Application of UNCITRAL Model Law on Cross-Border Insolvency for the First Time

Introduction

As Singapore continues to advance its position as an international hub for restructuring and insolvency, it has implemented a number of changes to its legislative framework. One of the key developments has been the adoption of the UNCITRAL Model Law on Cross-Border Insolvency ("**Model Law**"), which has been given force of law in Singapore. The Model Law provides procedural mechanisms to facilitate the conduct of cross-border insolvencies.

The case of *United Securities Sdn Bhd (in receivership and liquidation) and another v United Overseas Bank Ltd* [2021] SGCA 78 was the first instance in which the Singapore Court of Appeal has considered the application of the Model Law. The Court of Appeal considered the principles relating to the recognition of foreign proceedings and when local proceedings should be stayed in favour of foreign proceedings.

In this case, the Singapore Court of Appeal accepted that Malaysian insolvency proceedings constituted the foreign main proceeding, but declined to grant a stay of Singapore proceedings, allowing the Respondent bank to continue with its court application for declarations relating to its security interests. The decision demonstrates that local proceedings will not always give way to foreign main proceedings, highlighting the relevant factors that the court will take into account.

The Respondent was successfully represented by Lee Eng Beng S.C. and Torsten Cheong of Rajah & Tann Singapore LLP.

Brief Facts

The 1st Appellant ("**USSB**") was a Malaysian company which was wound up by the Malaysian court (in the Malaysian Winding-Up Proceeding), and the 2nd Appellant was USSB's liquidator. USSB was the beneficial owner of the issued shares of another company ("**CCSB**") which had also been wound up by the Malaysian court.

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The Respondent bank had entered into a Loan Agreement to provide USSB with credit facilities. As part of the arrangement, USSB executed a Debenture creating a fixed charge ("**Charge**") over the CCSB shares in the Respondent's favour.

USSB eventually defaulted on the loan. Both USSB and CCSB were subsequently wound up in Malaysia. As part of this, CCSB sold off certain assets. After paying its debts, a sum of money remained ("**Surplus Funds**").

Parallel proceedings were commenced in Malaysia and Singapore concerning USSB's and the Respondent's rights and obligations under the Loan Agreement and Debenture.

- (a) Malaysian Writ Action – USSB applied to the Malaysian court for, among other things, a declaration that the Surplus Funds were not subject to the Charge and that the Respondent was not entitled to the Surplus Funds.
- (b) Singapore Proceedings – The Respondent applied to the Singapore courts for, among other things, a declaration that its rights under the Debenture were valid and exercisable, including its security over the rights attached to the CCSB shares and the right to the Surplus Funds.

The Respondent applied to the Malaysian courts for a stay of the Malaysian Writ Action. The Malaysian Court of Appeal eventually allowed the application, finding that Singapore was the more appropriate forum for the dispute. The Appellants applied for leave to appeal, and the matter remained pending at the time of the present decision.

In the meantime, USSB applied to the Singapore courts to stay the Singapore Proceedings. When this was dismissed, the Appellants commenced this application seeking the Singapore court's recognition of the Malaysian Winding up Proceeding and the Malaysian Writ Action as "foreign main proceedings" or "foreign non-main proceedings" under the Model Law. Consequent to such recognition, the Appellants further sought a stay of the Singapore Proceedings pursuant to Articles 20 and/or 21 of the Model Law.

Holding of the Court of Appeal

The Court of Appeal declined to grant a stay of the Singapore Proceedings. In reaching its decision, the Court of Appeal took the opportunity to set out some of the applicable principles regarding the Model Law.

Article 20 of the Model Law

To facilitate the organised conduct of cross-border insolvency, the Model Law allows a domestic court to stay or restrain domestic action or proceedings once foreign insolvency proceedings are commenced. However, the Model Law contains certain restrictions and exceptions to such stay or restraining orders.

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Under Article 20(1) of the Model Law, upon the recognition of a foreign proceeding as a "foreign main proceeding", the following stays and suspensions automatically arise:

- (a) actions or proceedings concerning the debtor's property, rights, obligations, or liabilities are stayed;
- (b) execution against the debtor's property is stayed; and
- (c) the right to transfer, encumber, or dispose of any property of the debtor is suspended.

However, this is subject to Article 20(2), which delineates the ambit of such stay or suspension by making such stay or suspension the same as what would have been available under Singapore law had the debtor been wound up in Singapore, meaning that it would be subject to the same powers of the court and the same prohibitions, limitations, exceptions and conditions as would apply under Singapore law.

Further, Article 20(3) provides certain specific exceptions, stating that stays and suspensions do not affect the rights of the creditor to (among others) take any steps to enforce security over the debtor's property.

Application

The parties agreed that the Malaysian Winding-Up Proceeding was a foreign main proceeding under the Model Law. The Court of Appeal further found that the Singapore Proceedings fell within the scope of the automatic stay arising under Article 20(1)(a) of the Model Law.

However, under Singapore insolvency law, the court will generally permit secured creditors to proceed with enforcing their security, notwithstanding any stay of proceedings that arises upon the winding up of the debtor.

In this case, it was clear that the Respondent was, even based on a preliminary review, a secured creditor. Furthermore, the Singapore Proceedings were directed at allowing the Respondent to establish its purported rights as a secured creditor against USSB. Therefore, notwithstanding the recognition of the Malaysian Winding Up Proceeding and the resulting automatic stay, the Court of Appeal allowed the Respondent to proceed with the Singapore Proceedings.

Article 21 of the Model Law

Article 21 provides that, upon recognition of a foreign proceeding, the court may grant appropriate relief to protect the property of the debtor or the interests of the creditors, including a stay of proceedings.

The Court of Appeal declined to grant a discretionary stay of the Singapore Proceedings pursuant to Article 21 as it was not necessary to protect the property of USSB or the interests of the creditors. The Respondent was a secured creditor, and its security stood apart from the pool of assets available for distribution amongst unsecured creditors.

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Malaysian Writ Action

Although the holding on the Malaysia Winding Up Proceeding was sufficient to dispose of the appeal, the Court of Appeal set out its views on whether the Malaysian Writ Action could be recognised as a "foreign proceeding" under the Model Law.

The Court of Appeal set out the four attributes required for a proceeding to constitute a "foreign proceeding":

- (a) the proceeding must involve creditors collectively;
- (b) the proceeding must have its basis in a law relating to insolvency;
- (c) the court must exercise control or supervision of the property and affairs of the debtor in the proceeding; and
- (d) the purpose of the proceeding must be the debtor's re-organisation or liquidation.

The Court of Appeal was of the view that the Malaysian Winding Up Proceeding bore none of these attributes, and was accordingly not a foreign proceeding under the Model Law.

Concluding Words

It is increasingly common for the assets and liabilities of a company to be spread across different countries. When it comes to the restructuring or insolvency of the company, complications may arise in the form of parallel proceedings in separate jurisdictions.

To aid the resolution of such difficulties, the Model Law provides a framework for cooperation between jurisdictions. It sets out a uniform system by which the courts of one jurisdiction may recognise foreign proceedings and grant the appropriate relief, including a stay of local proceedings.

The Court of Appeal's decision in this case provides an important guide to the application of the Model Law, clarifying the principles and factors involved in determining whether to recognise foreign proceedings and whether to grant a stay of proceedings.

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

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