IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 280

Originating Summons No 773 of 2019

In the matter of Section 354B of the Companies Act (Cap 50)

And

In the matter of Article 15 of the UNCITRAL Model Law on Cross-Border Insolvency

And

In the matter of Rooftop Group International Pte Ltd

(1) Rooftop Group International Pte Ltd
(2) Darren Scott Matloff

… *Applicants*

And

(1) Triumphant Gold Limited
(2) Polar Ventures Overseas Limited

… *Non-parties*

JUDGMENT

[Insolvency Law]— [Cross-border insolvency] — [Recognition of foreign insolvency proceedings]

Version No 1: 27 Oct 2020 (22:41 hrs)

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Re Rooftop Group International Pte Ltd and another (Triumphant Gold Ltd and another, non-parties)

[2019] SGHC 280

High Court — Originating Summons No 773 of 2019
Aedit Abdullah J
15 August 2019

3 December 2019 Judgment reserved.

Aedit Abdullah J:

Introduction

1 In these proceedings, Rooftop Group International Pte Ltd ("the first applicant"), a Singapore-incorporated company, and its putative foreign representative, Mr Darren Scott Matloff ("the second applicant") seek recognition of ongoing US Chapter 11 proceedings, and assistance under the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (30 May 1997) ("the Model Law") as enacted in the Tenth Schedule of the Companies Act (Cap 50, 2006 Rev Ed) ("CA"). Triumphant Gold Limited ("TGL") and Polar Venture Overseas Limited, the non-parties in these proceedings and creditors of the first applicant, do not oppose recognition of the US Chapter 11 proceedings as a foreign non-main proceeding, but disagree on the scope of the assistance to be afforded. The non-parties also oppose the recognition of the second applicant as the first applicant's foreign representative.

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Background

2 The first applicant manufactured and sold toys and hobby-grade drones, using the trade name "Propel RC®". It claims to have had some success in the United States ("US") market.[1] As it was, the first applicant obtained a licence to produce "Star Wars" drones for the 2016 holiday season. "Star Wars" is, of course, a science fiction franchise of some contemporary popularity, presently owned by Disney, an entertainment conglomerate. Sales would have been promising. However, the launch of the drones was postponed to 2017 despite production being underway.[2] This caused the first applicant, which had taken loans from external lenders, including the non-parties, to encounter liquidity problems. The maturity dates of these loans were extended, with additional financing obtained, although at increased interest rates.[3] In the end, the "Star Wars" drones did not perform as hoped.[4]

3 Litigation was pursued by TGL, which eventually culminated in the first applicant filing for Chapter 11 in the US Bankruptcy Court for the Northern District of Texas ("the US Chapter 11 Proceedings").[5] The US worldwide moratorium granted was, as is customary in these things, not complied with by TGL, which continued proceedings in Singapore. These were then followed by the present application to seek the assistance of the Singapore courts.[6]

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1 Applicants' submissions at paras 1–2.

2 Applicants' submissions at paras 3–4.

3 Applicants' submissions at para 6.

4 Applicants' submissions at para 7.

5 Applicants' submissions at paras 8–11.

6 Applicants' submissions at paras 13–14.

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Summary of the applicants' case

4 The applicants seek:[7]

(a) recognition of the US Chapter 11 Proceedings as a foreign main proceeding, or alternatively, as a foreign non-main proceeding;

(b) the recognition of the second applicant as the foreign representative of the first applicant; and

(c) a moratorium against:

(i) the winding up of the first applicant;

(ii) the commencement or continuation of legal proceedings against the first applicant;

(iii) the commencement, continuation or levy of any execution, distress or other legal process against any property of the first applicant; and

(iv) the right to transfer, encumber or otherwise dispose of any property of the first applicant.

5 Specific to [4(c)(ii)] above, the applicants originally sought that the proceedings in Originating Summons No 544 of 2018 ("OS 544/2019") and Suit No 252 of 2019 ("S 252/2019") be stayed. By way of background, OS 544/2019 is an application by TGL to enforce a share charge it holds over 44 shares in the first applicant which are presently held in the name of Gandiva Investments Limited ("GIL"). Suit 252/2019 is an action by TGL against the first applicant,

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7 Applicants' submissions at para 15.

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Asian Express Holdings Ltd ("AE") and GIL for sums loaned to the first applicant and guaranteed by the other two defendants. Summary judgment has already been obtained by TGL against the first applicant. AE and GIL have filed Summons No 4022 of 2019 in S 252/2019 for a stay pending the disposal of these proceedings. At the hearing before me, the applicants clarified that they only sought a stay of enforcement of the summary judgment obtained against the first applicant; they did not oppose the proceedings in S 252/2019 continuing against AE and GIL.

6 It was argued that the US Chapter 11 Proceedings are a foreign main proceeding as the first applicant's centre of main interest ("COMI") was in the US.[8]

The non-parties' case

7 The non-parties do not contest recognition of the US Chapter 11 Proceedings as a foreign non-main proceeding. They do, however, contend that the US Chapter 11 Proceedings are not a foreign main proceeding as the first applicant's COMI was in Singapore or that the presumption in favour of the place of incorporation, *ie*, Singapore, applies.[9] The non-parties also object to the recognition of the second applicant as the first applicant's foreign representative as he will not act impartially, and will favour the shareholders' and his own interests.[10]

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8 Applicants' submissions at paras 51–81.

9 Affidavit of Hiroyuki Mukaibo ("TGL's affidavit") at paras 73–77.

10 TGL's affidavit at paras 79–81.

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8 The non-parties further contend that any assistance granted to the US Chapter 11 Proceedings should not include a stay of legal proceedings in OS 544/2019 and S 252/2019.[11]

Decision

9 The first applicant's COMI is situated in Singapore, by virtue of the presumption in favour of the place of incorporation. Recognition is thus granted to the US Chapter 11 Proceedings as a foreign non-main proceeding under Art 17 of the Model Law. Although there are serious concerns about the second applicant's fitness to serve as the first applicant's foreign representative, the Model Law does not allow the Singapore court to appoint another person in the second applicant's stead. Stays are not granted against the proceedings for the enforcement of the share charge against GIL in OS 544/2019, as well as the continuation of the suit against GIL and AE in S 252/2019.

Analysis

10 The analysis will proceed as follows:

(a) whether the US Chapter 11 Proceedings are foreign main or non-main proceedings;

(b) what assistance is to be granted to the US Chapter 11 Proceedings; and

(c) whether the second applicant should be recognised as the first applicant's foreign representative.

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[11] Non-parties' submissions at para 4(c).

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Whether the US Chapter 11 Proceedings are foreign main or non-main proceedings

11 The determination of whether the US Chapter 11 Proceedings are foreign main or non-main proceedings turns on whether the first applicant's COMI lies in the US or in Singapore.

COMI

The law

12 I examined the law on this area in *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] 4 SLR 1343 ("*Zetta Jet (No 2)*"). In brief:

(a) The relevant date for ascertaining the COMI of a company is the date on which the application for recognition is filed (at [61]).

(b) The presumption under Art 16(3) of the Model Law operates such that the place of the debtor company's registered office is presumed to be its COMI. This presumption may be displaced if various factors which are ascertainable by third parties, particularly creditors and potential creditors of the debtor company, point to a different location as being its COMI (at [76]).

(c) It is material, in determining which factors to take into consideration in a COMI determination, to consider how likely it is that a creditor would weigh a particular factor in mind when deciding whether to afford credit to the debtor company (at [78]).

(d) There should be an element of settled permanence or intended permanence in the factors considered (at [79]).

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(e) The focus is on determining the centre of gravity of the objectively ascertainable factors. Such determination will be based on a robust and entirely qualitative analysis (at [80]).

(f) Where there are disputed facts, the court will have to make the best conclusions it can in the circumstances. Where the factors considered do not clearly tip in favour of a particular location, the presumption would operate, and the location of the registered office will be taken to be the debtor company's COMI (at [81]).

(g) In undertaking an analysis on where a debtor company's COMI is located, the court's focus is on actual facts on the ground rather than on legal structures (at [82]).

As presently advised, I do not see any reason to depart from this approach, though I do note that there has been some criticism of my adopting the US approach in fixing the date of the COMI determination as that of the recognition application. This, however, is not the appropriate case to reconsider the issue as the date for the COMI determination of the first applicant is not material. Indeed, none of the parties sought to raise arguments on this point.

Arguments on COMI

13 The applicants argue that the first applicant's COMI was in the US. No operations were conducted out of Singapore; no employees were based here.[12] The business of the first applicant was in the US: it was originally organised and operated through a US company in California, but was restructured to take

12 Applicants' submissions at para 59.

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advantage of the tax regime in Singapore.[13] The primary asset of the first applicant, the Propel RC brand, is widely recognised in the US, and derives most of its goodwill there, with a presence in many major retailers. The US accounted for 90% of the yearly sales of Propel products.[14] Presently, the Rooftop group has ceased its manufacturing, sales and distribution business. The first applicant instead engages in the licensing of its intellectual property ("IP") rights, which are its only assets and are governed by Californian law.[15] The IP rights are overwhelmingly registered in the US.[16] The place of central administration of the first applicant is in the US, particularly as the second applicant was and continues to be the sole decision maker: he is a US citizen and has been operating the first applicant from the US.[17] His status as the primary person in charge of the first applicant's administration is readily ascertainable by the creditors.[18] Importantly, the second applicant is recognised as a significant person within the first applicant by the non-parties, as he is insured as a key man under the loan agreements with the non-parties.[19] The fact that investor presentations and creditors meetings were in Singapore; that negotiations on the loan agreements took place in Hong Kong; and that the loan agreements provided for Singapore law as the governing law with provisions for disputes to be settled in the Singapore courts or Singapore-seated arbitration, do not point to Singapore as the COMI.[20]

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13 Applicants' submissions at paras 60–62.

14 Applicants' submissions at para 63.

15 Applicants' submissions at para 64.

16 Applicants' submissions at para 65.

17 Applicants' submissions at paras 66–68.

18 Applicants' submissions at para 69.

19 Applicants' submissions at paras 72–73.

20 Applicants' submissions at paras 74–77.

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14 The non-parties argue, citing *Zetta Jet (No 2)*, that the relevant factors are those objectively ascertainable by third parties, particularly creditors and potential creditors.[21] That the second applicant is the sole decision maker, that he is a US citizen and that he has been living in and operating the first applicant from the US since 2014 are outweighed by the fact that as far as the majority of the creditors are concerned, meetings with the second applicant took place in Singapore and Hong Kong.[22] There was no representation that the first applicant was a US based entity, unlike in *Zetta Jet (No 2)*.[23] Letters of support by the first applicant's creditors were all addressed to its registered address in Singapore.[24] Most of the first applicant's creditors are also not based in the US.[25] All of the loan agreements entered into by the first applicant provide for either Singapore or Hong Kong as the governing law and jurisdiction, with the majority pointing to Singapore. In fact, an arbitration was commenced by the first applicant in the Singapore International Arbitration Centre over the validity of the loan agreements entered into with TGL which was heard and determined.[26] The IP rights were licenced to a Hong Kong company with a place of business in China; the registration of these rights in the US do not point to a US COMI.[27] No evidence was given that the majority of the first applicant's employees prior to 2019 were based in the US. In contrast, an investor presentation made in April 2018 stated that the majority of the employees were employed in and operated

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21 Non-parties' submissions at para 5–6.

22 Non-parties' submissions at para 10.

23 Non-parties' submissions at para 12.

24 Non-parties' submissions at para 14.

25 Non-parties' submissions at para 15.

26 Non-parties' submissions at paras 16–17.

27 Non-parties' submissions at para 18.

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out of Asia.[28] Thus, the applicants have not rebutted the presumption of the first applicant's COMI being in the place of incorporation.

Consideration of the factors

15 The following factors do point to the US as the first applicant's COMI:

(a) the second applicant, the primary decision maker for the first applicant, being a US citizen;

(b) the first applicant's sales being primarily concentrated in the US; and

(c) the first applicant's main assets, its IP rights, being substantially registered in the US.

16 The factors pointing away from the US as the first applicant's COMI are:

(a) the first applicant not making any representation online, or elsewhere, that it was a US based entity;

(b) the first applicant's creditors were not generally located in the US; and

(c) the first applicant entering into loan agreements specifying that either Singapore or Hong Kong law was to apply.

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28 Non-parties' submissions at para 19.

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17 The factors specifically pointing to Singapore as the first applicant's COMI are:

(a) the first applicant's creditor meetings being held in Singapore, though I would note that some were also held in Hong Kong; and

(b) the first applicant being incorporated in Singapore, which under Art 16(3) of the Model Law leads to a presumption that its COMI is in Singapore.

18 The factors relied upon by the applicants to establish that the COMI of the first applicant was in the US were not, on examination, sufficient to displace the presumption in favour of Singapore. The fact that sales were in the US would not have signalled on its own a US COMI: sales may occur in an entirely different country from where the creditors and other third party observers would expect the centre of gravity to be. Similarly, that the primary assets of the first applicant at present (*ie*, its IP rights) may be registered in the US is not a significant determinant: assets may be held in various countries, and the place of registration would not preclude dealings in those assets in other countries. I do not think that any creditor would have been influenced by the location of the registration of such rights. Similarly, the fact that the second applicant is a US citizen, or may have been largely present in the US, would not also point definitively to the US as the first applicant's COMI. In this regard, there was little evidence that would have been available to third parties demonstrating that operational decisions of the first applicant were being made in the US. I could not see that any creditor would regard the US as the centre of gravity of the first applicant simply because of the second applicant.

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19 On the other hand, the fact that creditor meetings were held in Singapore or Hong Kong would not seem to help either. These may have been entirely fortuitous or arranged for the convenience of some of the first applicant's creditors. Furthermore, it would appear that funds were raised by the first applicant from creditors in a number of jurisdictions including Singapore, the US, Hong Kong, China and the United Kingdom, to name a few.[29] Seen in this light, the nationality, residence or origin of the creditors would not be a material factor in determining the first applicant's COMI.

20 Taking all these factors together, I cannot conclude that the first applicant's COMI was in the US as of the date of application for recognition: while a substantial part of the applicant's activities are or were US centric, they were not such as to outweigh the presumption in favour of the place of registration. These factors were not to my mind the sort of factors that would weigh heavily in a creditor's mind; a different conclusion might have been reached had there been stronger evidence of corporate direction and management being centred in the US.

21 While it is correct that the time for assessment of a debtor company's COMI, as I laid down in *Zetta Jet (No 2)*, is at the point of application, it does not follow that all possible factors extant at that point would go towards determining the COMI. The focus is on factors which are *objectively ascertainable* by third parties (see *Zetta Jet (No 2)* at [76]). Thus, the fact that the second applicant may have been in sole control at this point, would not be determinative.

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[29] 1st affidavit of the second applicant at pp 1097–1105.

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22 Overall, the factors in support of the US being the first applicant's COMI do not tip the balance sufficiently. In the circumstances, the presumption under Art 16(3) of the Model Law operates to lead to the answer that Singapore is the first applicant's COMI. The consequence of this conclusion is that the proceedings in the US are not foreign main proceedings for the purposes of the Model Law. Recognition and assistance can however be granted to the US Chapter 11 Proceedings as foreign non-main proceedings, with the scope of assistance governed by Art 21 of the Model Law.

Public policy

23 The applicants argue that there was no lack of *bona fides* on their part in commencing the US Chapter 11 Proceedings and the present application.[30] This appears to be raised primarily to deal with the arguments against the appointment of the second applicant as the foreign representative of the first applicant, and is considered in detail below (at [47]). In any event, I do not see anything in this case that would raise a public policy issue of the sort considered in *Re Zetta Jet Pte Ltd and others* [2018] 4 SLR 801 .

Non-compliance with the US worldwide moratorium

24 The applicants referred to the non-compliance by TGL of the US moratorium, which under the Bankruptcy Code 11 USC (US) § 362 (1978), has worldwide effect, at least from the perspective of the US.[31] Any alleged non-compliance is a matter solely for the US courts, and is immaterial and irrelevant in Singapore under present law. The Singapore courts do not compel

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30 Applicants' submissions at paras 82–105.

31 Applicants' submissions at para 27.

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compliance with foreign injunctions; neither do the Singapore courts expect foreign courts to enforce its injunctions or moratoria. What assistance can be rendered to the US Chapter 11 Proceedings is another matter.

Assistance under the Model Law

25 From the findings above, assistance would be available on the basis that the US Chapter 11 Proceedings are recognised as a foreign non-main proceeding. The scope of such assistance is not necessarily narrower than that for foreign main proceedings. Under Art 20 of the Model Law, a moratorium automatically operates upon recognition of a foreign main proceeding. In comparison, under Art 21 of the Model Law, the court may in respect of a foreign proceeding, whether main or non-main, grant any appropriate relief where necessary to protect the property of the debtor company or the interests of its creditors, including:

> (*a*) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's property, rights, obligations or liabilities, to the extent they have not been stayed under Article 20(1)(*a*);
>
> (*b*) staying execution against the debtor's property to the extent it has not been stayed under Article 20(1)(*b*);
>
> (*c*) suspending the right to transfer, encumber or otherwise dispose of any property of the debtor to the extent this right has not been suspended under Article 20(1)(*c*);
>
> (*d*) providing for examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, rights, obligations or liabilities;
>
> (*e*) entrusting the administration or realisation of all or part of the debtor's property located in Singapore to the foreign representative or another person designated by the Court;
>
> (*f*) extending relief granted under Article 19(1); and
>
> (*g*) granting any additional relief that may be available to a Singapore insolvency officeholder, including any relief provided under section 227D(4) of this Act [in respect of a Judicial Management order].

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26 The primary difference is thus that in respect of foreign non-main proceedings, stays and other orders are granted at the discretion of the court. In exercising such discretion, the court will be mindful of a number of considerations. The general inclination would be to grant such orders to assist the foreign representative in the performance of her functions to the same degree and extent as would be granted to a local insolvency representative. This would serve the objectives of modified universalism as endorsed in *Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party)* [2014] 2 SLR 815. That inclination would be displaced where factors point to the need to address any overriding interests within the jurisdiction, such as possible societal concerns or employee rights, for instance.

27 Assistance of a particular form may not be granted if in the same circumstances it may be denied or is not available to a local representative. This issue was considered by the English High Court in *Fibria Celulose S/A v Pan Ocean Co Ltd and another* [2014] Bus LR 1041. The court found that the phrase "any appropriate relief" in Art 21(1) of the Model Law did not extend to the granting of relief which would not have been available when dealing with a domestic insolvency (at [108]). Such a reading is also supported by the UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2013) <http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> (accessed 19 November 2019) ("the 2013 Guide"), where para 189 states that "the court is not restricted unnecessarily in its ability to grant any type of relief that is available *under the law of the enacting State* …" [emphasis added].

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28 Further, as is noted in the Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, UNCITRAL, 30th Sess, UN Doc A/CN.9/442 (1997) at para 158, the interests and authority of a representative of a foreign non-main proceeding are typically narrower than those of a representative of a foreign main proceeding; care should be taken to avoid giving unnecessarily broad powers to the foreign representative of a foreign non-main proceeding which may interfere with the administration of another insolvency proceeding, particularly a main proceeding elsewhere. But these are questions for another day, as the parties here do not contest these points.

29 The following may be ordered in the present case:

(a) a moratorium on the commencement of proceedings against the first applicant, save for the qualifications to be dealt with below (at [31]–[40]);

(b) an order that no resolution may be passed for the winding up of the first applicant; and

(c) an order that no execution, distress or other legal process may be commenced, continued or levied against any property of the first applicant.

30 The primary difficulty relates to the orders sought concerning the barring of the transfer of shares in the first applicant.

Barring the transfer of shares in the first applicant in OS 544/2019

31 The applicants point to s 259 of the CA as showing that a moratorium can be granted to prevent the transfer of shares in the first applicant. This is

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raised in the context of the applicants' arguments that OS 544/2019 should be stayed, with the result that TGL is prevented from enforcing the share charge over shares in the second applicant held by GIL (see [5] above).[32]

32 The non-parties argue that OS 544/2019 should not be stayed as the express wording of Art 20 and Art 21 of the Model Law provide that any stay ordered is to protect the debtor's property and assets. OS 544/2019 does not concern any of the first applicant's assets as the relief sought is the rectification of the register of the first applicant's members.[33] The same view was taken by the US court overseeing the US Chapter 11 Proceedings, which decided that none of the pending actions in Singapore courts in fact constituted direct claims against the first applicant or its assets.[34]

33 Section 259 of the CA reads:

> **Avoidance of dispositions of property, etc.**
>
> **259.** Any disposition of the property of the company, including things in action, and any transfer of shares or alteration in the status of the members of the company made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void.

34 Section 259 of the CA is, in its marginal note, clearly targeted at avoiding the disposition of the company's property and is part of Division 2 in Part X of the CA, which is concerned with the consequences of the presentation of a winding up petition. Where winding up has commenced, any change of the membership of the company or transfer of its shares would go against the

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32 Applicants' submissions at paras 117–136.

33 Non-parties' submissions at paras 62, 65.

34 Non-parties' submissions at para 67; see also 4th affidavit of Loh Yu Chin Deborah at p 11 lines 12–16.

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freezing of the position of the company as at the point of winding up by the court. The primary objective appears to be to maintain the status quo: see Ian Fletcher, *The Law of Insolvency* (Sweet & Maxwell, 5th Ed, 2017) at para 26-004.

35 As s 259 of the CA is concerned with winding up by the court, and is intended to preserve the position on liquidation, it does not provide any indication or guidance as to whether any similar prohibition should be part of the assistance given to a foreign insolvency representative under the Model Law. Here, the moratorium sought against the share transfer is clearly intended to head off any change in control of the first applicant, and hence the restructuring effort. There is no apparent reason why the Singapore courts should step in to prevent such an event. It may be that any such share transfer would be contrary to the stay imposed in the US Chapter 11 Proceedings (though the non-parties argue that it is not), but that in itself does not require that the Singapore courts similarly bar that transfer. The point of the assistance in the Model Law is to ensure the orderly and equitable distribution of assets and to facilitate the process of restructuring wherever possible. It is not intended to protect or preserve a party's position within the company in the case of a dispute between shareholders, or to prevent a different view being taken subsequently in the foreign proceedings about the direction of the restructuring, or whether restructuring efforts should even be maintained. Thus, the assistance in Singapore cannot be directed to prevent the transfer of shares in the first applicant.

36 In addition, the fact that the parties have subjected the debts in respect of which the share charge over the first applicant's shares was given by GIL to TGL to dispute resolution, with a determination having been made, would be a factor pointing against any stay or moratorium by the court, especially where

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no assets or property of the first applicant that would otherwise be available to the general pool of creditors is at stake.

37 In this context therefore, the possibility of the second applicant being displaced from control over the first applicant is a *non sequitur* to the protection of and consolidation of assets that would be at the core of the assistance rendered under the Model Law.

38 It can be argued that the US Chapter 11 Proceedings would be effectively negated because of the change of control of the first applicant that would follow from the displacement of the second applicant. This may indeed be a possible consequence, but I do not understand the Model Law to require that a recognising court preserve and protect the foreign proceedings.

39 It follows from the above discussion that a stay is not imposed on the proceedings in OS 544/2019.

Enforcement of S 252/2019

40 Both the applicants and the non-parties took the position in the hearing before me that the proceedings in S 252/2019 should be allowed to proceed against AE and GIL, while enforcement of the summary judgment obtained against the first applicant in those proceedings should be stayed (see [5] above). It is therefore unnecessary for me to consider whether S 252/2019 should be carved out of any moratorium imposed on the commencement or continuation of legal proceedings against the first applicant.

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Recognition of the foreign representative

41 The non-parties argue that the second applicant should not be recognised as the foreign representative. It is said that the court has a discretion to designate another person to administer the property, taking into account the interests of the creditors as required by Art 21(1) and Art 22(1) of the Model Law. Recognition of a foreign proceeding does not automatically lead to the recognition of the appointed foreign representative. In support of this proposition, the non-parties relied on:

(a) paras 192 and 196 of the 2013 Guide;[35]

(b) the Report of the Working Group on Insolvency Law on the Work of its Twentieth Session, UNCITRAL, 30th Sess, UN Doc A/CN.9/433 (1996);[36] and

(c) the Report of the Working Group on Insolvency Law on the Work of its Twenty-First Session, UNCITRAL, 30th Sess, UN Doc A/CN.9/435 (1997).

42 The non-parties raise a number of arguments to show that the second applicant should not be recognised as the first applicant's foreign representative.

43 First, the second applicant is an undischarged bankrupt, having filed for voluntary bankruptcy under Chapter 7 of the US Bankruptcy Code 11 USC (US) § 362 (1978) just a day after the present application was made. This sequence of events leads to the conclusion that they were deliberately timed by the second

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35 Non-parties' submissions at para 27.

36 Non-parties' submissions at para 29.

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applicant such that his personal bankruptcy would not affect his recognition as the first applicant's foreign representative.[37]

44 Second, the second applicant has acted in a manner prejudicial to the first applicant's creditors by giving priority to its shareholders. He caused the first applicant to file a frivolous arbitration claim disputing its debts to TGL as a delaying tactic to protect his shareholding. The arbitration was so unmeritorious that it caused the first applicant to incur legal fees of about $360,000, in addition to being ordered to pay indemnity costs of about $400,000 to TGL.[38] The second applicant might also have engaged in fraudulent transfers of the first applicant's assets in order to stifle recovery by its creditors.[39]

45 Third, the second applicant has not been truthful in disclosing the financial position of the first applicant. In the arbitration proceedings commenced against TGL, he falsely represented that the first applicant was in a stable financial position in order to avoid having to give security for costs.[40] The second applicant also understated the debts owed by the first applicant to TGL in the US Chapter 11 Proceedings.[41]

46 Fourth, the second applicant has disregarded Singapore court orders. After summary judgment was obtained against him in Suit No 450 of 2018, a related proceeding to enforce a personal guarantee, contempt of court proceedings were commenced against the second applicant for breaches of

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37 TGL's affidavit at para 81; non-parties' submissions at paras 35–36.

38 Non-parties' submissions at paras 38–42.

39 TGL's affidavit at para 70.

40 Non-parties' submissions at para 47.

41 Non-parties' submissions at para 53.

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examination of judgment debtor orders which he chose not to dispute on the issue of liability.[42]

47 The applicants argue that there was no lack of *bona fides* on their part. The purpose of commencing the US Chapter 11 Proceedings was to ensure that the first applicant's creditors would reap the greatest possible recovery. In this regard, the proposed sale of its assets is being supervised by the US courts.[43] The non-parties' allegations of dissipation of the first applicant's assets are unsubstantiated.[44] The US court overseeing the US Chapter 11 Proceedings had already heard and dismissed TGL's objections to their continuation.[45]

48 Having considered the authorities relied upon by the non-parties, I do not think that it is open to me to appoint a different person as the foreign representative of the first applicant.

49 The definition of the term "foreign representative" is set out in Art 2(*i*) of the Model Law:

> "foreign representative" means a person or body, including one appointed on an interim basis, *authorised in a foreign proceeding* to administer the reorganisation or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding; [emphasis added]

It would appear from a plain reading of the provision that the appointment of a particular person as the foreign representative is a matter which falls to be determined by the foreign proceeding itself.

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42 Non-parties' submissions at paras 44–46.

43 Applicants' submissions at paras 100–101.

44 Applicants' submissions at para 102.

45 Applicants' submissions at para 103.

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50 On the other hand, Art 21(1)(*e*), which the non-parties argue entitles the Singapore court to appoint a different person to act as the foreign representative of the US Chapter 11 Proceedings, states:

> 1. Upon recognition of a foreign proceeding, whether a foreign main proceeding or a foreign non-main proceeding, where necessary to protect the property of the debtor or the interests of the creditors, the Court may, *at the request of the foreign representative*, grant any appropriate relief, including —
>
> …
>
> (*e*) entrusting the administration or realisation of all or party of the debtor's property located in Singapore to the foreign representative or another person designated by the Court;
>
> …
>
> [emphasis added]

Two observations can be made about the wording of the provision. First, the application for relief is to be made by the foreign representative. Second, the provision entitles the court to entrust the administration or realisation of the debtor's property to a person other than the foreign representative. Nothing in the provision suggests that the court may, of its own accord, decide to appoint a different person as the foreign representative of a foreign proceeding. In contrast, I find that the wording of Art 21(1)(*e*) of the Model Law actually suggests that the foreign representative cannot be displaced, even if the court is of the view that the interests of local creditors might be better served by having some other person administer or realise the locally-based assets.

51 That being said, I should state that I have some concerns that the second applicant, in acting as the first applicant's foreign representative, may not discharge his duties even-handedly.

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52 Here, the dispute between the parties appears to have gone beyond the background level of litigation that is often a part of modern business life. The actions taken by the second applicant on behalf of the first applicant have brought him into direct conflict with its creditors. The second applicant's actions in causing the first applicant to bring an arbitration disputing the debts owed to TGL caused the latter to incur significant costs (see [44] above). It appears that there was little evidence in support of the first applicant's claims in the arbitration, with the final award noting that the claim was "largely without merit".[46]

53 There is also the fact that the second applicant has been adjudged bankrupt in the US, which would bar him from acting as a director of the first applicant here. Such disqualification is provided for by s 148 of the CA, which states:

> **Restrictions on undischarged bankrupt**
>
> **148.**—(1) Every person who, being an undischarged bankrupt (whether he was adjudged bankrupt by a Singapore Court or a foreign court having jurisdiction in bankruptcy), acts as director of, or directly or indirectly takes part in or is concerned in the management of any corporation, except with the leave of the Court or the written permission of the Official Assignee, shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 2 years or to both.

The prohibition against bankrupts acting as insolvency officers here is founded on local policy considerations. A person who is an undischarged bankrupt is *prima facie* not fit to take part in the management of a company, especially one with limited liability: see *Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell Asia, 3rd Ed, 2009) at para 7.39. There is no evidence

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46 1st affidavit of the second applicant at p 967.

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before the court that the second applicant had made such an application to the court or the Official Assignee under s 148(2) of the CA to allow him to continue acting as a director of the first applicant despite his disqualification.

54 Finally, there is the issue of the second applicant's wilful disobedience of Singapore court orders. Following the hearing of the present application, the second applicant was, on 11 November 2019, found guilty on three charges of contempt by disobedience and sentenced to a fine of $20,000 by Pang Khang Chau J.

55 To my mind, these factors taken together demonstrate that the second applicant is ill-suited to adequately protect the interests of the first applicant's creditors.

56 In the circumstances, given the limitations of the Model Law, the second applicant will continue to act as the foreign representative recognised by the US Chapter 11 Proceedings. Though I am minded to appoint a different person to oversee any assets of the first applicant located in Singapore, there is no evidence that any such assets exist. For the avoidance of doubt, however, I would require a specific application for leave from the applicants before any steps are taken to oversee any such assets. I also note that court to court communications with the court overseeing the US Chapter 11 Proceedings to explore how the interests of overseas and local creditors can be protected may be explored, if needed.

Common law recognition

57 The applicants alternatively invoke common law recognition as a basis on which OS 544/2019 can be stayed.

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58 I do not consider that common law recognition is available in the present case. In general, where the Model Law is applicable to the subject matter, the court would be slow to allow common law recognition to be invoked as an alternative. The existence of a detailed recognition regime created by legislation displaces the need for common law doctrine to apply. Thus, in most, if not all, foreign corporate insolvency proceedings, recognition should be made under the Model Law. The invocation of the common law should only be for situations where recognition is not catered for by the Model Law, which would appear to be highly unlikely given its structure. I would thus see the scope for common law recognition to be limited to foreign personal bankruptcy proceedings, and little else besides.

Conclusion

59 Recognition is granted to the US Chapter 11 Proceedings as foreign non-main proceedings, with assistance granted as follows:

(a) a moratorium on the commencement of proceedings against the first applicant;

(b) an order that no resolution may be passed for the winding up of the first applicant; and

(c) an order that no execution, distress or other legal process may be commenced, continued or levied against any property of the first applicant.

For the avoidance of doubt, the moratorium in (a) does not apply to TGL's application in OS 544/2019 against GIL to enforce its share charge over the first applicant's shares. The stay of proceedings similarly does not apply to

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proceedings brought by TGL in S 252/2019 to enforce guarantees given to it by AE and GIL for the first applicant's debts.

60 Cost directions will be given separately, and time for any appeal or other application is extended in the meantime.

Aedit Abdullah
Judge

Tay Kang-Rui Darius, Lee Lieyong Sean and Loh Yu Chin, Deborah (Blackoak LLC) for the applicants;
Mohamed Nawaz Kamil and Lau Hui Ming Kenny (Providence Law Asia LLC) for the non-parties.

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