RECOGNITION OF FOREIGN INSOLVENCIES AT COMMON LAW: SINGAPORE SETS COMI PRECEDENT

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Legal Briefings – By **Paul Apáthy**, **Emmanuel Chua** and **Truman Biro**

IN BRIEF

For the first time, a court has adopted the 'centre of main interest' (**COMI**) as grounds at common law to recognise foreign insolvency proceedings.

The decision earlier this year by the High Court of Singapore (the **Court**) recognised a Japanese bankruptcy trustee appointed to companies incorporated in the British Virgin Islands (**BVI**):

- which primarily operated in Japan (ie, their COMI was in Japan); and
- had assets (and minor administrative operations) in Singapore.

The Court ordered that all of the Singaporean assets and records be collected and vested in the Japanese bankruptcy trustee.

The decision was significant because Singapore does not have a comprehensive legislative framework recognising foreign insolvency proceedings (it has not yet adopted the UNCITRAL Model Law on Cross-Border Insolvency - **Model Law**). Recognition of foreign insolvencies in Singapore therefore largely depends on common law principles. Historically, the common law has only recognised foreign insolvencies processes in the jurisdiction in which the company is incorporated.

The Court in *Re Opti-Medix* held that a Singaporean court will now recognise a foreign insolvency proceeding in the jurisdiction of the company's COMI. This represents a move to modernise common law recognition principles and harmonise them with the COMI approach that is now reflected in cross border insolvency legislation in a significant number of countries around the world due to the success of the Model Law.

It will be interesting to see how this case is received in other common law jurisdictions (especially those, such as Hong Kong, that have not yet adopted the Model Law), and whether the principle is developed further in Singapore. In particular, it remains to be seen whether this new common law COMI test is intended to replace or merely supplement the pre-existing place of incorporation test.

The case also illustrates the willingness of the Singaporean courts to adopt a facilitative approach and develop the law relating to cross border insolvency where necessary to deliver practical solutions for stakeholders. This seems to be a positive indication for Singapore's broader stated ambition to become an Asian debt restructuring hub and the Singapore Ministry of Law's major insolvency law reform package.

Given this, the case may be the forerunner of much more significant Singapore cross border insolvency law developments in the near future.

FACTS

Medical Trend Limited (**MTL**) and Opti-Medix Limited (**OPM**) (together, the **Companies**) were incorporated in the BVI. They provided debt factoring services to medical institutions in Japan and funded this through note issuances which were governed by Singaporean law (though the notes were only marketed in Japan with Japanese brokers). The note proceeds were placed in a Singaporean bank account before being lent to customers in Japan. There were no Singaporean group entities (although it was recognised that the companies were possibly under an obligation to register as foreign companies conducting business in Singapore).

The Companies' debt factoring activities were unprofitable and the Companies began to issue notes to finance coupon and principal payments to existing noteholders. The Securities and Surveillance Commission of Japan became aware of this and suspended the issuance of further notes, promptly resulting in payment default by the Companies and the appointment of a Japanese bankruptcy trustee by order of the Tokyo District Court.

There were only three Singaporean creditors (relating to administrative services) who were owed very small amounts relative to the debts owed to Japanese entities, and no creditors in the BVI.

ISSUE IN OPTI-MEDIX

The Japanese bankruptcy trustee, the applicant in the case, sought to gain access to the Singaporean bank accounts and funds of the Companies.

However, Singapore has not yet adopted the Model Law and there are limited grounds for assisting foreign insolvency processes under existing Singaporean legislation. Whilst at common law there was precedent for courts granting recognition (and granting assistance to) a foreign liquidator appointed in the country of the company's incorporation, in this case the companies were BVI incorporated and no liquidator had been appointed in that jurisdiction.

The Japanese bankruptcy trustee therefore sought orders that the court recognising the Japanese trustee in bankruptcy (and assistance in collecting in the Singaporean assets of the Companies) on a novel basis – that there was no likelihood of insolvency proceedings in the BVI, but that the Japanese court should be considered the principal court of liquidation as there were no other liquidation proceedings and the COMI of the Companies was in Japan.

This application went beyond the scope of existing common law authority.

THE DECISION – RECOGNITION BASED ON COMMON LAW COMI TEST

The Court granted the recognition orders, stating:

"I allowed the application, and granted recognition of the bankruptcy orders of the Tokyo District Court and of the appointment of the Applicant as the Bankruptcy Trustee of the Companies. In particular, I ordered that all moveable assets and records be vested in the Applicant as Bankruptcy Trustee, and that he be empowered to collect and recover those assets and records. This entitled him to, inter alia, stop payments and request information in respect of accounts held in the names of the Companies."

The Court referred to the decision of the Singapore Court of Appeal in *Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation*) [2014] 2 SLR 815 (**Beluga**). Beluga noted that under the common law a court should recognise a properly appointed foreign liquidator from the place of incorporation of the relevant company as the representative of that company. Such recognition was granted in the unreported Singaporean case of *Re Cosimo Borrelli* (High Court of Singapore, Originating Summons No 762 of 2010) in respect of a Cayman liquidation.

However, the Court also noted that there was nothing in the *Beluga* judgement that precluded the recognition of a liquidator on other grounds (i.e. other than the jurisdiction of incorporation), such as COMI.

The Court acknowledged that the place of incorporation test accorded with 'legal logic' but may be "*an accident of many factors*". By contrast, the Court commended the practicality of the COMI test by stating that the "*COMI will likely be the place where most dealings occur, most money is paid in and out, and most decisions are made. It is thus the place where the bulk of the business is carried out, and for that reason, provides a strong connecting factor to the courts there.*"

Whilst there was no previous decision on whether a foreign liquidation could be recognised on the basis of COMI, the issue had been touched on by Lord Hoffman and Lord Collins in the English cases of *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 (***Re HIH***) and *Rubin v Eurofinance SA* [2013] 1 AC 236, respectively. Lord Hoffman suggested that a COMI recognition test "*may be more appropriate*" than one based purely on the place of incorporation. Lord Collins, in contrast, doubted it was open to the courts to introduce a new basis for recognition of foreign insolvency proceedings at common law. The Court dismissed Lord Collins' concerns, citing Mr Tom Smith, QC, writing in *Cross Border Insolvency*, who suggests that Lord Collins "*overstated the extent to which the existing common law authorities give an exclusive role to the place of incorporation" and that "it is difficult to see why the common law could not develop a broader test on the concept of 'centre of main interests' as envisaged by Lord Hoffman in HIH.*"

The Court also considered whether the common law COMI test should include the presumption in favour of the registered office (as per the Model Law). The Court considered this was a "*sound default rule*" in the absence of evidence to the contrary, providing certainty and regularity. It also had the benefit of harmonising the common law and statutory applications of the COMI test (the Court recognising the likely future adoption of the Model Law in Singapore).

However, in the case of the Companies, the Court stated that the presumption was rebutted by clear objective and ascertainable evidence that the COMI of the Companies was in Japan.

IMPLICATIONS OF THE DECISION

The case will be of most immediate relevance to insolvency practitioners appointed to non-Singaporean companies who seek access to assets and information of those companies held in Singapore. It confirms the willingness of the Singaporean courts to recognise and assist liquidators (in appropriate cases) notwithstanding the absence of the Model Law or other Singaporean statutory framework.

However, more intriguing questions arise when considering the details and possible further implications of the case.

Was the decision made on the basis of the common law COMI test?

The case was primarily decided on the basis that the common law should adopt COMI as a basis for the recognition of foreign liquidators at common law. Whilst the Court referred to an 'alternative justification' based on practicality, only a single paragraph in the judgement was devoted to this suggestion, and no substantive authority was given for this rationale.

Was it necessary to pay Singaporean creditors before remitting the funds to Japan?

The Japanese bankruptcy trustee, as part of his application, had given an undertaking to pay all Singaporean preferential and other debts before remitting any funds out of Singapore.

This appears to have been done because of the concern that the Companies may have been required to register as foreign companies in Singapore under section 368 of the Singaporean Companies Act (the **Act**). Section 377(3) of the Act provides that if a Singaporean liquidator is appointed in respect of a foreign registered company then such liquidator can only pay to the foreign liquidator the net proceeds from realising the assets in Singapore after paying any debts and satisfying any liabilities incurred in Singapore by the foreign company. This local 'ring-fencing' provided for under section 377(3) has been heavily criticised on a number of grounds, (See, *Report of the Insolvency Law Review Committee (Final Report)*, 2013, Singapore, p 239ff) and it is currently proposed that it should be abolished as part of Singapore's insolvency law reforms.

However, in the current case there did not appear to be any need for such ring-fencing. Because there was no local Singaporean liquidator appointed, arguably the ring-fencing requirements in section 377(3) were never formally engaged. Furthermore, the Court's decision, to the extent it was based on the COMI test, did not appear to rely on the undertaking to pay of local creditors – this was only mentioned in connection with the *'alternative justification*'.

As matters stood, it therefore appears that such an undertaking would not, strictly speaking, have been required. Having said that, provision of the undertaking was probably prudent as it precluded any argument that a foreign company could simply circumvent the ring-fencing requirement under section 377(3) by not appointing a Singapore liquidator.

Why didn't the parties appoint a Singaporean liquidator?

The undertaking also raises the question why the parties didn't simply follow the 'normal' route of appointing a liquidator in Singapore. There appear to be two key reasons for this.

First, given all that was required was the collecting in of money in Singaporean bank accounts, appointment of a Singaporean liquidator was potentially 'overkill' and would involve significant time and cost. Secondly, if a liquidator were appointed then the existing law would most likely require the funds to be remitted to the BVI. If the Companies were required to register under section 368 of the Act then section 377(3) would apply to such liquidation. Section 377(3)(c) requires the Singaporean liquidator to pay the net amount recovered to "*the liquidator of that foreign company for that place where it was formed or incorporated*". This would have precluded payment to the Japanese bankruptcy trustee as the Companies were incorporated in the BVI. If the Companies were unregistered and the Court conducted an ancillary liquidation, then following *Beluga* the Court would also be required to remit to the BVI (unless the Court were to similarly expand the doctrine in relation to ancillary liquidations as well).

Is the COMI test supplemental to the place of incorporation test?

The decision is not entirely clear whether the Court considered that the COMI test should replace the place of incorporation as the basis for determining which foreign liquidation to recognise. On the one hand, the Court referred to the Court of Appeal's statements in the Beluga case that a liquidator properly appointed under the law of incorporation would be recognised in Singapore, but then said that it "*did not see anything in that judgment that precluded recognition on other grounds, such as COMI*." However, it is clear from Lord Hoffman's passage in Re HIH (which the Court relied on) that he considered the COMI test would be a replacement for the place of incorporation test (describing it as "more appropriate").

The issue did not arise in the present case as no liquidators were appointed in the BVI. However, were BVI liquidators also appointed the COMI test and place of incorporation tests would have had led to conflicting results and it would have been necessary for the Court to determine which test took precedence.

The COMI test also raises the question whether a Singaporean court would ever be willing under the common law to recognise a foreign liquidator of a Singaporean incorporated company (where no such liquidator was appointed in Singapore) and remit Singapore assets overseas. Such a scenario is not possible with a place of incorporation test, but is perfectly feasible if recognition is based on COMI (as has been demonstrated by cases under the Model Law such as the English case of *Re 19 Entertainment Ltd* [2016] EWHC 1545 (Ch)).

HOW WIDELY DOES COMMON LAW RECOGNITION APPLY?

Most cases concerning recognition of foreign insolvency proceedings under common law (including this one) have related to liquidations, and the language of the decisions is framed in that manner. However, there is nothing in principle to prevent recognition of other 'rescue' or 'reorganisation' forms of foreign insolvency process such as administration or Chapter 11.

Recognition of foreign liquidators at common law has traditionally determined who is entitled to act on behalf of the insolvent company and have control of its assets. This was broadly the nature of the orders in this case. However the courts may also give further assistance to a foreign insolvency office-holder to the extent it is compatible with domestic insolvency law. Such orders could potentially include orders restraining actions by creditors in the local jurisdiction or orders facilitating the implementation of a foreign restructuring. Whilst there have historically been few examples of such orders being made under the common law, the growing prevalence of cross border restructurings suggests that these could be a useful tool in future and an area for further development of the law.

Will the decision be followed in other common law jurisdictions?

The common law rules of recognition have had significantly less work to do since the introduction of the Model Law in many jurisdictions. In such common law countries (including the United Kingdom, Canada, Australia and New Zealand) there may be little need for applicants to rely on the Singaporean decision to obtain recognition of insolvency proceedings in the jurisdiction of the company's COMI. Given the statutory response to cross border insolvency in such countries there may also be more credence paid to Lord Collins' suggestion that further reform should be determined by Parliament rather than the courts.

It will however be of particular interest to see whether the decision is adopted by the courts of Hong Kong. Similarly to Singapore, Hong Kong is a global financial centre, and a common location for insolvent companies to have assets or operations. It has not adopted the Model Law and, unlike in Singapore, there are no prospects of it being adopted imminently. The adoption of a COMI test for recognition of foreign insolvency processes at common law in Hong Kong would therefore be particularly valuable (as would the broader development of the assistance that the courts will provide at common law).

Future Singaporean developments

The decision evinces the rapidly changing approach to cross border insolvency and restructuring in Singapore. As noted by the Court, recent court decisions and the anticipated adoption of the Model Law in Singapore are "indicators that Singapore is warming to Universalist notions in its insolvency regime."

Indeed, the Singaporean government has shown great enthusiasm to become a global leader in this regard. The report of the *Committee to Strengthen Singapore as an International Centre for Debt Restructuring*, released earlier this year, contained a number of further law reform and policy proposals aiming to promote Singapore as the venue of choice for attracting and resolving debt restructurings across the region.

MORE INFORMATION

For more information or possible implications to your business contact Paul Apáthy or Emmanuel Chua.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

PAUL APÁTHY
PARTNER, SYDNEY

+61 2 9225 5097
paul.apathy@hsf.com

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