Recognising foreign solvent winding-up proceedings in Singapore
Ascentra Holdings, Inc (in official liquidation) and others v SPGK Pte Ltd
[2023] SGCA 32; [2023] 2 SLR 421

I. Executive Summary

When a company is wound up, assuming they are all based in the same jurisdiction, domestic laws regulate the debtor company, its assets, and its creditors. Liquidators are then tasked with ensuring the proper distribution of the debtor company's assets. But what happens when a case involves cross-border elements, for instance, when the debtor company's assets or creditors are based in more than one state? In such scenarios, liquidators face greater obstacles in fulfilling their duties. Their powers may not extend beyond the domestic jurisdiction, i.e., where the winding-up proceedings commence.

To better assist states in dealing with such cases, UNCITRAL issued the UNCITRAL Model Law on Cross Border Insolvency (the "**UNCITRAL Model Law**") in 1997. Designed to encourage cooperation and coordination between jurisdictions, it provides a model framework for states to adopt. In 2017, Singapore adopted the UNCITRAL Model Law into the Tenth Schedule of the Companies Act (Cap 50, 2006 Rev Ed).[1] Some substantive changes were made to the template in Singapore's version of the UNCITRAL Model Law ("**SG Model Law**").

Ascentra Holdings, Inc (in official liquidation) and others v SPGK Pte Ltd [2023] 2 SLR 421 ("***Ascentra Holdings***") was one such case involving cross-border elements. After commencing voluntary winding-up proceedings in the Cayman Islands, the court-appointed liquidators sought to have this proceeding be recognised in Singapore. Successful recognition by the Singapore courts would enable the liquidators to explore the possibility of pursuing claims in Singapore against SPGK Pte Ltd ("**SPGK Singapore**"), a Singapore-incorporated company.

The High Court ("**HC**") refused to grant such recognition. Ascentra Holdings, Inc ("**Ascentra**") was solvent at the point of winding-up, and the HC held that while foreign *insolvent* liquidation proceedings are entitled to recognition under the SG Model Law, foreign *solvent* liquidation proceedings are not. Ascentra and its liquidators appealed.

The Court of Appeal ("**CA**") reversed the HC's decision, holding that there was no requirement under the SG Model Law that a company be insolvent or in severe financial distress before a proceeding concerning that company may be recognised in Singapore.

II. Material Facts

Ascentra was in the business of selling health, beauty products, and communications software in Hong Kong, Taiwan, and Singapore. After a series of shareholder disputes over the strategic direction of the company, the shareholders resolved to wind up Ascentra and appointed Mr Graham Robinson ("**Mr Robinson**") as their liquidator. After the members' voluntary liquidation of Ascentra failed to progress (for reasons not disclosed in the proceedings), Mr Robinson filed a petition to the Grand Court of the Cayman Islands (the "**Cayman Grand Court**") for the liquidation to proceed under the Cayman Grand Court's supervision. The Cayman Grand Court allowed the petition, and appointed Mr Robinson and Ms Chua Suk Lin Ivy ("**Ms Chua**", and collectively with Mr Robinson, the "**Liquidators**") as the joint official liquidators of Ascentra. Shortly after, the Liquidators filed a certificate with the Cayman Grand Court, stating their determination that Ascentra was solvent. The same was expressed to Ascentra's shareholders.

In 2022, the Liquidators filed an application to the HC pursuant to Article 15 of the SG Model Law, seeking the following orders from the Singapore court:

[1] At present, the text of the SG Model Law can be found in the Third Schedule to the Insolvency, Restructuring, and Dissolution Act 2018 (Act 40 of 2018).

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

The Liquidators sought these powers with a view towards pursuing possible claims against the respondent, SPGK Singapore.

The HC dismissed the application. Pursuant to Article 17 of the SG Model Law, it held that the Singapore court cannot exercise its power to recognise any proceeding unless it is a "foreign proceeding" within the meaning of Article 2(*h*) of the SG Model Law ("**Article 2(*h*)**"). The main issue before the HC was whether Ascentra's Cayman Liquidation fulfilled all requirements to be a "foreign proceeding". One of the requirements under Article 2(*h*) was that the foreign proceeding must have its basis "*in a law relating to insolvency*". However, the HC held that Ascentra's Cayman Liquidation failed this requirement, as it was deemed to have commenced under Cayman Islands legislative provisions that "[do] *not and cannot apply to a company that is insolvent or in severe financial distress*".

Accordingly, the Judge concluded that Ascentra's Cayman Liquidation did not qualify as a "foreign proceeding" under the SG Model Law and thus could not be recognised in Singapore. The HC further observed that the SG Model Law was never intended to apply to a solvent company, which Ascentra undeniably was. Dissatisfied, Ascentra and the Liquidators appealed to the CA.

III. Issues on Appeal

The main issue on appeal was whether Ascentra's Cayman Liquidation fell under the definition of "foreign proceeding" in Article 2(*h*), despite Ascentra's status as a solvent company.

Article 2(*h*) defines "foreign proceeding" as "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, *under a law relating to insolvency or adjustment of debt* in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation". Therefore, the main question was whether Ascentra's Cayman Liquidation was being conducted "*under a law relating to insolvency or adjustment of debt*" in accordance with Article 2(*h*).

Preliminarily, the CA considered whether the phrase "*law relating to insolvency*" refers narrowly to the specific provision(s) under which the foreign proceeding was conducted (the "**Narrow Approach**"), or more broadly, to the general statutory regime or part of the relevant legislation containing those specific provision(s) (the "**Broad Approach**"). The Narrow Approach was favoured by the HC, which interpreted Article 2(*h*) as requiring the proceeding in question to be commenced under a *specific* provision that relates to insolvency.

The CA disagreed and held that the Broad Approach should be taken. As long as the relevant proceeding is being conducted under a law which *contains* provisions relating to insolvency or adjustment of debt, that proceeding should be regarded as being conducted under a law relating to insolvency or adjustment of debt for the purposes of Article 2(*h*). The following issues were dealt with by the CA in turn:
(a) Whether the scope of Article 2(*h*) extends to solvent companies;
(b) Whether solvent companies are excluded under the UNCITRAL Model Law;
(c) The prevailing approach to the interpretation of the UNCITRAL Model Law in foreign jurisdictions;

(d) Possible practical concerns that may arise on the adoption of the Broad Approach.

The CA concluded, upon considering these issues, that the term "foreign proceedings" under Article 2(*h*) should be interpreted broadly to include within its ambit foreign proceedings concerning companies that are neither insolvent nor in severe financial distress.

A. Whether the scope of Article 2(h) extends to solvent companies

The CA held that there is no express requirement for a company to be insolvent or in severe financial distress under the SG Model Law. Based on the ordinary meaning of the relevant provisions in the SG Model Law, the solvency of a company was not a relevant consideration for the purposes of recognition. Nothing in Article 2(*h*) or otherwise expressly requires companies to be insolvent or in severe financial distress. Moreover, the SG Model Law already provides for a presumption of insolvency in specific cases. Article 31 of the SG Model Law presumes the insolvency of a company upon the recognition of a proceeding involving that company as a foreign main proceeding. If insolvency was indeed a pre-requisite for the recognition of a foreign proceeding, then Article 31 would be largely superfluous.

Further, in considering the terms in Article 2(*h*), the legislative purpose of a statute should ordinarily be gleaned from the text itself, which has primacy over any extraneous material. An ordinary reading of the plain text revealed that Article 2(*h*) had been drafted broadly to refer to proceedings conducted under laws *relating to* insolvency or adjustment of debt. This is contrary to, for example, a law *applicable only to* insolvent companies.

Moreover, the CA held that the phrase "*under a law relating to insolvency or adjustment of debt*" must be interpreted as a whole. This was in contrast to the HC decision, which focused on the interpretation of the words "*under a law relating to insolvency*", but largely excluded the consideration of the words "*or adjustment of debt*".

Turning to the meaning of "*adjustment of debt*", the CA noted that Article 2(*h*) (of the SG Model Law) was adapted from Article 2(*a*) of the UNCITRAL Model Law. Article 2(*a*) of the UNCITRAL Model Law defines "foreign proceeding" as "a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, *pursuant to a law relating to insolvency* in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." When Parliament adopted the UNCITRAL Model Law as the SG Model Law, in creating Article 2(*h*) from Article 2(*a*) it added the words "*or adjustment of debt*" after the words "*relating to insolvency*". Significantly, the same words "*or adjustment of debt*" was also found in section 101(23) of the United States Bankruptcy Code 11 USC (US) §101 (1978). Taking reference from US jurisprudence, the inclusion of "*adjustment of debt*" would thus mean that Article 2(*h*) permits the recognition of foreign proceedings involving the restructuring of a company's debts, and/or the reorganisation of a company's affairs through schemes of arrangement.

The CA held that neither of the above categories requires the company in question to be insolvent or in severe financial distress as a prerequisite for commencement. For example, corporate reorganisations in respect of solvent companies may be commenced in the US. Similarly, in Singapore, schemes of arrangement could be used to reorganise the share capital of a solvent company, or in the reconstruction or merger of a group of companies. Thus, the CA concluded that the deliberate inclusion of the words "*or adjustment of debt*" in Article 2(*h*) positively suggested a parliamentary object to extend the SG Model Law to proceedings concerning *solvent* companies.

B. Whether solvent companies are excluded under the UNCITRAL Model Law

The CA held that extending the scope of Article 2(*h*) to solvent companies is consistent with the aims of the UNCITRAL Model Law. As originally contemplated by its drafters, the UNCITRAL Model Law was intended to be focused primarily on companies that are either insolvent or in severe financial

distress. In that context, for the purposes of Article 2(*a*) of the UNCITRAL Model Law, the CA agreed with the HC that proceedings pursuant to a "*law relating to insolvency*" generally do not include proceedings concerning solvent companies.

However, the CA disagreed with the HC's view that broadening the scope of Article 2(*h*) to include solvent companies would undermine the purpose of the UNCITRAL Model Law. The preparatory material of the UNCITRAL Model Law did not suggest that solvent companies were meant to be excluded from the application of its processes. Notably, the UNCITRAL Working Group V, which drafted the UNCITRAL Model Law, was reluctant to expressly prescribe a requirement of insolvency. This was despite its awareness that Article 2(*a*) of the UNCITRAL Model Law had "*given rise to diverse interpretation in case law*". The Working Group V further espoused that to further detail the definition of "foreign proceeding" would be unnecessary, since the aim of the UNCITRAL Model Law was not to *unify*, but to *clarify* insolvency laws. In this regard, the words "*a law relating to insolvency*" already provided a desirable degree of flexibility. Therefore, the CA concluded that recognising proceedings involving solvent companies would not be inconsistent with the primary purpose of the UNCITRAL Model Law.

The CA further noted that interpreting Article 2(*h*) as encompassing solvent companies was also consistent with the overall purpose of the UNCITRAL Model Law. The key principle underlying the UNCITRAL Model Law is the cooperation and coordination principle. Courts, insolvency representatives, and other stakeholders are obliged to communicate and cooperate in order to secure an orderly dissolution and/or the successful rehabilitation of the company. The solvency status of the company in question will not affect the application of this principle. As long as the requirements of Article 2(*h*) are satisfied, the rationale for recognising the foreign proceeding would still be engaged, even if the company is solvent.

C. The prevailing approach to the interpretation of the UNCITRAL Model Law in foreign jurisdictions

The CA noted that taking this interpretation is broadly harmonious with the approaches taken in other jurisdictions. Article 8 of the SG Model Law mandates that in the interpretation of the SG Model Law, regard is to be had to its international origin and the need to promote uniformity in its application. As far as possible, Singapore courts ought to attempt to "*tack as closely as possible to the general interpretive trends taken in other jurisdictions that apply the Model Law in its various enactments*". And in a majority of cases surveyed by the CA across the US, the UK, Australia, and New Zealand, courts have held that the scope of their adaptations of the UNCITRAL Model Law includes proceedings involving solvent companies.

D. Possible practical concerns that may arise on the adoption of the Broad Approach

Lastly, the CA opined that any practical concerns arising from an adoption of the Broad Approach may easily be dealt with. The HC had been concerned that taking the Broad Approach may result in any type of proceeding, no matter how far removed it may be from any connection to insolvency, being recognised as a "foreign proceeding", simply because it was commenced under a provision which happened to be found in a statute which deals generally with insolvency. However, the CA saw this concern as somewhat overstated. It is not necessarily the case that a foreign proceeding would be granted recognition under Article 2(*h*) by virtue of its basis "*in a law relating to insolvency*". There are at least four other criteria that must be met. For instance, the proceeding must be collective in nature, a judicial or administrative proceeding, and must be for the purpose of reorganisation or liquidation.

The CA also rejected SPGK Singapore's argument that adopting the Broad Approach may allow solvent companies to take advantage of the SG Model Law. SPGK Singapore claimed that recognising a proceeding concerning a solvent company may risk granting that company an automatic moratorium.

For instance, under Article 20(1) of the SG Model Law, when a foreign proceeding is granted recognition as a foreign main proceeding, any commencement or continuation of individual actions or proceedings concerning the company's property, rights, obligations or liabilities is stayed. This would (it claimed) accord solvent companies a shield against litigation that they would otherwise not be entitled to. However, the CA noted that the SG Model Law already provides for Singapore courts to recognise foreign proceedings without an accompanying moratorium being maintained. Article 20(6) of the SG Model Law expressly provides that the court may "…*modify or terminate such stay and suspension or any part of it … on such terms and conditions as the Court thinks fit*".

SPGK Singapore further argued that recognising a proceeding concerning a solvent company may risk an absurd outcome: of that solvent company being subject to the presumption of insolvency. It pointed to Article 31 of the SG Model Law as presuming the insolvency of a company upon the recognition of a proceeding involving that company as a foreign main proceeding. However, the CA noted that Article 31 was expressly qualified by the words "*[i]n the absence of evidence to the contrary*". A solvent company would have evidence proving its solvency. It is therefore inconceivable that a solvent company would be presumed to be insolvent.

The CA further held that taking the Narrow Approach could introduce some measure of complexity at the recognition stage. Based on the Narrow Approach, recognition would only be granted to foreign proceedings involving *insolvent* companies. Consequently, the Singapore court would be required to determine whether the company in question is insolvent or in severe financial distress under the law of the *foreign* state. Applicants for recognition must then be prepared to not only adduce evidence as to the financial status of the company, but also prove its insolvency or severe financial distress under *foreign* law. This unduly raises the threshold for recognition. The CA accepted that a light threshold should be imposed instead, which can then be tempered by granting recognition or relief subject to the imposition of appropriate conditions.

IV. Conclusion

The CA held 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 under the SG Model Law. Further, the requirement in Article 2(*h*) that the proceeding should take place under a "*law relating to insolvency or adjustment of debt*" would be satisfied, as long as the law or the relevant part of the law under which the proceeding is conducted includes provisions dealing with the insolvency of a company or the adjustment of its debts.

The CA held that the Ascentra's Cayman Liquidation fulfils the Article 2(*h*) requirement of being conducted under a law "*relating to insolvency or adjustment of debt*". The proceeding was commenced under provisions contained within Part V of the Cayman Companies Act, which indisputably dealt with the insolvency or adjustment of debt of a company.

V. Lessons Learnt

Due to globalisation, insolvency-related problems with cross-border elements have become increasingly common in recent years. Specifically, the question of whether foreign solvent proceedings are accorded the same treatment as foreign insolvency proceedings under the UNCITRAL Model Law have been hotly contested in its enacting jurisdictions. This case gave the CA the opportunity to clarify Singapore's position on this issue.

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