INSOLVENCY & RESTRUCTURING - SINGAPORE

First recognition of US bankruptcy proceedings as foreign main proceedings under Singapore Model Law

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Introduction

Re Zetta Jet Pte Ltd ([2019] SGHC 53) is a landmark decision by the Singapore High Court on the recognition of foreign bankruptcy proceedings and the public policy exception under the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, as adopted by Singapore in the Tenth Schedule of the Companies Act (the Singapore Model Law).

This is the first reported decision in Singapore that:

- deals with the test adopted to recognise foreign bankruptcy proceedings, whether as a foreign main proceeding or foreign non-main proceeding under the Singapore Model Law; and
- interprets the public policy exception under Article 6 of the Singapore Model Law.

Facts

In *Re Zetta Jet Pte Ltd*, the applicants were seeking recognition of foreign insolvency proceedings commenced by Zetta Jet Pte Ltd (Zetta Jet Singapore), a Singapore-incorporated company and its wholly-owned subsidiary Zetta Jet USA, Inc (Zetta Jet USA) – together the Zetta entities – in the United States (the US bankruptcy proceedings), as well as the trustee appointed by the US Trustee's Office, overseen by the US Department of Justice and approved by the US Bankruptcy Court (the trustee) in those proceedings.

In September 2017 voluntary Chapter 11 bankruptcy proceedings were filed by the Zetta entities in the US Bankruptcy Court. Under US law, a worldwide moratorium on all proceedings against the Zetta entities was automatically imposed on this filing. Shortly after, Asia Aviation Holdings Pte Ltd (the intervener), a shareholder of Zetta Jet Singapore, obtained an injunction in Singapore enjoining Zetta Jet Singapore from continuing with the US bankruptcy proceedings (the Singapore injunction). The US bankruptcy proceedings were continued after the issuance of the Singapore injunction. Subsequently, the Chapter 11 proceedings were converted to Chapter 7 bankruptcy proceedings. The trustee, appointed in respect of the Zetta entities in the Chapter 11 proceedings, was thereafter also appointed in the Chapter 7 proceedings.

The intervener opposed the application for recognition and argued that it was contrary to public policy in view of the subsisting Singapore injunction. The applicants argued that the US Bankruptcy Court should not be denied recognition and that it would be unable to resist the Singapore injunction without recognition in Singapore. The Singapore High Court agreed with the applicants and granted limited recognition to the trustee only for the purposes of applying to set aside or appeal against the Singapore injunction or matters directly related to such applications, such as time extensions.

Applicability of public policy exception under Article 6 of Singapore Model Law

The Singapore injunction was subsequently discharged by consent and the applicants revisited the issue of full recognition before the Singapore High Court. The intervener continued to object to the

recognition application and argued that the trustee's breach of the Singapore injunction in continuing the US bankruptcy proceedings amounted to contempt and remained so even after the discharge of the injunction. Further, the intervener claimed that recognition of the US bankruptcy proceedings would undermine the administration of justice in Singapore and urged the court to refuse recognition under Article 6 of the Singapore Model Law on the ground that the trustee's breach of the discharged Singapore injunction was contrary to Singapore's public policy.

The Singapore High Court found in the applicants' favour that the public policy exception under Article 6 of the Singapore Model Law did not apply in the present case for the court to refuse recognition of the US bankruptcy proceedings. The court held that although the trustee had breached the Singapore injunction as mentioned in *Re Zetta Jet Pte Ltd* ([2018] 4 SLR 801), it did not follow that such breach remained a ground for refusal of recognition after the Singapore injunction had been discharged and the court issuing the order was content to let the order be discharged. The court held that there was no reason to deny recognition on the basis of public policy. Nonetheless, the court cautioned that parties that breached orders issued by Singapore courts would have to answer for their conduct if they ever needed to look to assets or information in Singapore and that those advising in restructuring and insolvency matters abroad would do well to take note of this.

Zetta Jet Singapore's centre of main interests

The Zetta entities and the trustee applied for the US bankruptcy proceedings to be recognised in Singapore as a foreign main proceeding within the meaning of Article 2(f) of the Singapore Model Law. The intervener argued that the US bankruptcy proceedings in relation to Zetta Jet Singapore were neither foreign main nor non-main proceedings under Article 17(2) of the Singapore Model Law. The intervener contended that Zetta Jet Singapore's senior management, employees, facilities, operations, business and creditors were all located in Singapore and that these factors indicated that Zetta Jet Singapore had no establishment in the United States.

Relevant date for determining a debtor's centre of main interests

To determine whether Zetta Jet Singapore's centre of main interests was the United States and therefore the US bankruptcy proceedings should be recognised as a foreign main proceeding under the Singapore Model Law, the Singapore High Court had to decide on the relevant date for determining a debtor's centre of main interests. The court examined the various positions taken by the English/EU, US and Australian courts as to the relevant date for determining Zetta Jet Singapore's centre of main interests:

- the English/EU position: the date of commencement of the foreign insolvency proceedings;
- the US position: the date on which the application for recognition is filed; and
- the Australian position: the date on which the application for recognition is heard.

The court ultimately accepted the applicants' argument that the preferred approach should be that of the United States for the following reasons:

- Although the definitions in Article 2 of the Singapore Model Law do not expressly specify the date on which a centre of main interests is to be ascertained, the definitions use the present tense, which indicate that what matters are the circumstances when the application for recognition is made, which is in line with the US position.
- Postponing the centre of main interests determination until the application for recognition is made accepts that, in contemporary practice, various entirely legitimate measures can be taken to shift a debtor's centre of main interests to another jurisdiction (eg, to create a jurisdictional nexus for the opening of insolvency proceedings). Such measures may not all be in place by the time of the foreign insolvency application (ie, the operative date under the English/EU position). The Singapore High Court stated that it is not objectionable to grant companies the discretion to select the jurisdiction that will offer the best prospect of achieving an effective restructuring solution. While there may be only one main insolvency proceeding, a debtor's centre of main interests can change. The court was of the view that a neutral stance should be taken in respect of any purported changes to the centre of main interests in order to recognise the applicant's autonomy, subject to any public policy concerns. The Singapore Model Law appears to recognise that a debtor's centre of main interests may change. For example, Article 17(4) of the Singapore Model Law states that:

> *provisions of Articles 15 to 16, this Article and Article 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have fully or partially ceased to exist; and in such a case, the Court may, on the application of the foreign representative or a person affected by the recognition, or of its own motion, modify or terminate recognition, either altogether or for a limited time, on such terms and conditions as the Court thinks fit.*

Article 18 provides that from:

> *the time of filing the application for recognition of the foreign proceeding, the foreign representative must inform the Court promptly of-*
>
> > *(a) any substantial change in the status of the recognised foreign proceeding or the status of the foreign representative's appointment; and*
> >
> > *(b) any other foreign proceeding or proceeding under Singapore insolvency law regarding the same debtor that becomes known to the foreign representative.*

Articles 17(4) and 18 require the foreign representative to notify the court of any change in circumstances and entitle the court to modify or terminate recognition. This would include where there is a change in the debtor's centre of main interests.

Thus, the court held that the US position provides greater certainty and better accords with the commercial realities and language of the Singapore Model Law.

Factors to be considered in determining centre of main interests

Having decided the relevant date for determining a debtor's centre of main interests, the Singapore High Court explored the approaches of various jurisdictions when deciding which factors it should consider in its centre of main interests assessment. The court agreed with the presumption under Article 16 of the Singapore Model Law that the debtor's registered office is presumed to be its centre of main interests in the absence of proof to the contrary.

The court considered numerous factors in its assessment of Zetta Jet Singapore's centre of main interests, namely:

- the location from which control and direction was administered;
- the location of clients;
- the location of creditors;
- the location of employees;
- the location of operations;
- dealings with third parties; and
- governing law.

The court also highlighted that in *Young, Jr, in the matter of Buccaneer Energy Limited v Buccaneer Energy Limited* ([2014] FCA 711), Justice Jagot had noted that to ignore a company's group structure would be to ignore the commercial realities which the Australian Model Law attempts to address. The court further stated that the US approach of identifying a company's 'nerve centre' is useful, but not determinative. It is one of several factors that must be weighed in the round. The court focused on the objectively ascertainable factors and explained that its analysis would be robust and entirely qualitative, especially since the proceedings would not involve a full trial of the facts.

The court accorded various factors differing weight and held that in this case, the most important factor was the location of the primary decision-makers, which the applicants had submitted was the United States. The court accordingly accepted the applicants' submission that the presumption that Zetta Jet Singapore's centre of main interests was Singapore had been rebutted by proof showing that it was, in fact, the United States. Pursuant to Article 17(2) of the Singapore Model Law, the court recognised the US bankruptcy proceedings as a foreign main proceeding.

Relief granted

The Singapore High Court granted the automatic stay reliefs which stem from the recognition of a foreign main proceeding, as well as the following reliefs:

- an order allowing the trustee to examine witnesses, take evidence and obtain delivery of information concerning the Zetta entities' property;
- an order allowing the trustee to be entrusted with the power to realise the Zetta entities' assets located in Singapore with a direction that the trustee should apply for leave of court to repatriate any assets to locations outside Singapore. The Singapore High Court also ordered that the power granted should not be exercised within Singapore to prejudice rights granted by Zetta Jet Singapore to any person in respect of any real property located in Singapore;
- an order allowing the trustee to pursue claims under avoidance provisions of the Companies Act and Section 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed); and
- an order granting the trustee powers available to a liquidator under Singapore insolvency law.

Comment

Re Zetta Jet Pte Ltd serves as an important and useful guide for applications for recognition of foreign insolvency proceedings in Singapore under the Singapore Model Law, as well as for its interpretation of the Article 6 public policy exception in Singapore.

In this groundbreaking decision, the Singapore High Court ruled on several matters relating to the Singapore Model Law for the first time, which can be summarised as follows:

- whether a breach of an injunction granted by the court is a ground for it to refuse recognition of foreign insolvency proceedings under Article 6 of the Singapore Model Law after the injunction has been discharged;
- the relevant date for determining a debtor's centre of main interests;
- the factors to be considered in determining a centre of main interests; and
- whether the foreign representative can be granted the powers available to a liquidator under Singapore insolvency law and under Article 21(1)(g) of the Singapore Model Law.

Prior to the issuance of this judgment, the trustee and the Zetta entities had successfully applied for and obtained interim relief on an urgent basis from the Singapore High Court for the power to bring and defend any action or other legal proceedings in the name and on behalf of Zetta Jet Singapore and Zetta Jet USA.

Finally, this decision – particularly in relation to the determination of a debtor's centre of main interests – accords with the Singapore position in respect of forum selection. In this respect, the Singapore High Court cited the Honourable Chief Justice Menon of the Supreme Court in his keynote address at the 18th Annual Conference of the International Insolvency Institute 2018 (25 September 2018). Chief Justice Menon had stated that:

> *forum selection is not just permissible, but also, I suggest, the necessary and responsible thing to do. When a company approaches insolvency, it is widely accepted that a director has a fiduciary duty to consider the interests of the creditors. This duty should extend, in appropriate cases, to identifying the forum that will allow for the best restructuring outcome.*

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