Celebrating and Reflecting on 25 Years of the Model Law on Cross Border Insolvency: The Newbie's Take – Singapore and the Model Law

Introduction

1 On the occasion of the 25th anniversary of the Model Law, this paper aims to give a brief survey of cases in Singapore, in terms of recognition and assistance decisions, as well as its impact on insolvency work in Singapore and regionally in South-East Asia. Singapore adopted the Model Law relatively recently, in 2017. It has in this time been able to build on the learning and experience of judges, jurists and lawyers from various jurisdictions which have been engaged with the Model Law and its interpretation for a far longer period. While some part of the Singapore experience has been a response to its specific enactment of the Model Law, it is hoped that the Singapore cases will be of interest and consideration for other jurisdictions, including those that have yet to adopt the Model Law.

2 In this survey, Singapore decisions on the Model Law, are examined, drawing out a few areas, highlighting differences in approach from those of other jurisdictions, particularly the US and England & Wales. What this survey will hopefully illustrate is that the approach taken has been in line with the enacted text of the Model Law, and the policy objectives underlying its introduction in Singapore. The Model Law was made part of Singapore law as one piece of a framework intended to ensure that Singapore provides efficient and fair processes in insolvency and restructuring, not just domestically but within the wider region. Some challenges remain in the regional context, particularly as a number of jurisdictions have not yet enacted the Model Law, leaving those seeking recognition and assistance having to navigate a patchwork of different systems. But one is confident, with continued effort on the part of

the various stakeholders in the region, that these challenges will be overcome with time.

Caveat

3 The cases discussed here are generally mine: I am afraid the published decisions on the Model Law in Singapore appear to all be mine, save for that of the Court of Appeal in *United Securities Sdn Bhd (in receivership and liquidation) and another v United Overseas Bank Ltd* [2021] SGCA 78; that case was an appeal against my decision. I am hopeful that we may see some published judgments from my colleagues in the coming year. I am also hopeful that while there may be differences in nuances and emphases, substantial differences in approach are not likely.

The Enactment of the Model Law in Singapore

4 The UNCITRAL Model Law was introduced by way of amendment to the Companies Act, coming into force in 2017. The Model Law is now part of the Insolvency, Dissolution and Restructuring Act 2018 (2020 rev ed), "IRDA". At the time of introduction, the Model Law amendments were part of very substantive changes to our insolvency and restructuring regime, including the introduction of automatic moratoria, super priority financing, and cram down mechanisms. This was the culmination of several years of work by the Committee to Strengthen Singapore as an International Centre for Debt Restructuring, co-chaired by Justice Kannan Ramesh, who is well known to members of the International Insolvency Institute.

Scope of enactment

5 In Singapore, the Model Law only applies to corporate insolvency: *Heince Tombak Simanjuntak and ors v Paulus Tannos and ors* [2020] 4 SLR

816. Common law judgment recognition rules are applied, and this probably extends to assistance as well. In addition, it does not apply to non-corporate entities, such as trusts: *Re Tantleff, Alan* [2022] SGHC 147, which will be discussed further below.

General approach

6 The general approach manifested in the cases considering applications under the Model Law does not differ substantially from other jurisdictions, though some outcomes may differ. The usual approach to legislative interpretation in the Commonwealth is adopted: a purposive approach is mandated by the Interpretation Act, and elaborated upon by case law. Again, as is common with a number of jurisdictions, the enacting legislation specifically provides for reference to UNCITRAL materials: under s 252 of the IRDA, documents relating to the Model Law that are issued or part of the record of the preparation of the Model law maintained by UNCITRAL and its working group , as well as the 'Guide to the Enactment of the Model Law on Cross-Border Insolvency' (UN A/CN.9/442) are relevant for the purposes of interpretation. In addition, it was noted in *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] 4 SLR 1343 ("*Zetta Jet No 2*"), the 2013 guide, though not specifically mentioned in IRDA, was also considered relevant: para 37. Where any conflict arose between the 1997 and 2013 guides, the former would trump.

7 Bearing in mind that it is a model law, with the specific objective of promoting orderly winding up across borders, great store is set by comity, and harmonization, or at least convergence, as far as possible, while giving effect to the language of what has been enacted. In *Zetta Jet No. 2*, it was noted, at para [38]:

> … I bear in mind the preamble to the Singapore Model Law, emphasising co-operation and efficiency between the courts of States involved in cross-border insolvency, and Art 8 of the Singapore Model Law, which requires regard to be paid to the Singapore Model Law's international origin and the promotion of uniformity in its application. I am of the view that the Singapore courts should 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.

8 The cases in Singapore show that results do not differ for difference's sake. The approaches in other jurisdictions are considered, though admittedly, the focus would be on the case law from the larger English-speaking jurisdictions, namely the United States, England & Wales and Australia.

9 In addition, given the relatively recent adoption of the Model Law in Singapore, we have striven to try to publish as far as possible, to provide guidance to our own lawyers and insolvency practitioners, as well as those abroad. We do take note of critique, and stand ready, where properly advised, to reconsider our approaches, if need be.

Areas of divergence

10 There are a number of areas though where the application of the Model Law may differ somewhat from those in other jurisdictions. While these differences have arisen, they do not to represent substantial departure from the basic tenets and approach of the Model Law. Such differences are to be expected from the use of a model law framework, and just reflect the inevitable differences that would arise from its adoption in different national systems. These areas are:

(a) The public policy exception;

(b) At which point the Centre of Main Interests ("COMI") should be ascertained;

(c) The factors going to the determination of COMI ;

(d) The relevance of Chapter 11 administration as a factor in COMI determination;

(e) The scope of the Model Law;

(f) The reliefs that may be granted; and

(g) Restrictions on repatriation of funds.

The Public policy exception

11 The first published case on the Model Law was *Re Zetta Jet Pte Holdings and others* [2018] 4 SLR 801 ("*Zetta Jet")*. In that case, after Chapter 11 proceedings were commenced against two companies that were part of the Zetta Jet group, an injunction was obtained in Singapore, prohibiting one of the companies or its shareholders from carrying out any further steps in the US proceedings. Nonetheless, US proceedings were continued, including the conversion of the Chapter 11 proceedings into Chapter 7. On the application of the Chapter 7 trustee for recognition of the Chapter 7 proceedings under the Model Law, it was found that the pursuit of the US proceedings in the face of the Singapore injunction contravened the public policy of Singapore. Assistance was denied under Article 6 of the Model Law. What was granted was limited recognition, to allow the US trustee to appear before the court that granted the injunction, to repair or justify non-compliance.

12 Article 6 of the Singapore enactment reads:

> Nothing in this Law prevents the Court from refusing to take action governed by this Law, if the action would be contrary to the public policy of Singapore.

13 Article 6 in Singapore differs from that enacted in most other jurisdictions, where recognition could be denied only if it would be 'manifestly contrary' to public policy. That would on the face of it presumably set a very high bar. No publicly disclosed position was available as why the Singapore enactment differs. It must have been done deliberately, lowering the standard of what would count as crossing the Article 6 threshold. Such a lower standard would perhaps be divergent from other jurisdictions but would be an intended consequence of the parliamentary intention.

14 It was found on the facts of *Zetta Jet* that non-compliance with the injunction was a violation of public policy. The court could not overlook such disobedience, granting assistance to foreign proceedings violating the terms of the injunction. In addition, it was noted that even under the narrower notion of public policy in the other implementations of the Model Law, the same result could arise, as exemplified in the decision in *In re Gold and Honey, Ltd* 410 BR 357 (2009), in which the Bankruptcy Court for the Eastern District of NY denied recognition of an Israeli receivership proceeding, being manifestly contrary to public policy because it was obtained in violation of stay orders by the US courts.

15 It must be emphasised that there is no suspicion or anathema of Chapter 11 or similar proceedings in the US or elsewhere. It is recognised that there may be strong reasons, arising out of commercial or strategic legal grounds, that may convince parties to pursue insolvency or restructuring proceedings in New York or London. While it would be hoped that once the Singapore insolvency regime becomes better known and appreciated, it would be more commonplace

in major restructuring efforts, it should win out on merit, and the Singapore courts would not jealously deny recognition and assistance simply because parties went elsewhere. But the Singapore justice system does need to be protected: those who ignore Singapore court orders cannot hope to obtain assistance subsequently from those very same courts.

At which point COMI should be determined

16 There has been some difference in position as to when COMI should be determined. In *Zeta Jet No 2*, the US position was followed, in determining COMI as of the date of the application for recognition. A number of reasons underly this. The language of the definitions laid out in Article 2 indicates that the assessment should be made at the time of the application. Additionally, it is relevant that taking the assessment as of this date would allow the possibility of shifting of the COMI. A shift or transfer of the COMI is not a bad thing: where substantial connections exist, that points to that COMI being the appropriate forum for restructuring or insolvency, even if the shifts occurred after the date of the foreign insolvency application. In comparison, the English and European position, taking the relevant date as of the foreign application, freezes the situation too early. That in Australia, that COMI would be determined as of the date of the recognition hearing, would leave things too uncertain, though perhaps in most situations there would not really be that much a difference between the US and Australian positions.

Factors going to the determination of COMI

17 In determining where COMI is situated, there are probably no substantial differences in the Singapore approach to the Model Law. What is important is how likely it is that a creditor would weight a particular factor in

mind deciding whether to give credit: for example, where the business has a strong cross-border element, such as in *Zetta Jet*, the creditor may not regard the physical location of moveable assets as being that important, as opposed to fixed assets. As done in other jurisdictions, there should be a settled position or permanence, even if there was an intention to move the COMI, i.e that the intention is not a vacillating one: see para [79] to [83], *Zetta Jet No. 2*. The use of the concept of the nerve centre, as adopted in some US cases, is useful, but in *Zetta Jet No. 2*, it was noted that what was more crucial was the centre of gravity of the various objectively ascertainable factors.

18 These observations bore in mind that there would not be a full trial of all the allegations or assertions. If there is a dispute, the court will need to make the best assessment it can, and where the scale is finely balance, it is likely that the presumption in favour of the place of incorporation would have to be given effect to.

19 What may also be noted is that the focus of the determination is on the actual practical effect, rather than legal structures. It may be that no distinction should be drawn between a company and its related entities in a group. It is not necessary always to distinguish between separate corporate entities; the activities of the group may be more relevant: *Zetta Jet No. 2*, para [83].

Chapter 11 administration as a factor in COMI determination

20 The fact that the administration of the company may have been taken over by insolvency representatives in a jurisdiction does not confer COMI on that jurisdiction. In both *Zetta Jet No 2* and in *Re Tantleff*, the activities of the chief restructuring officer and the trustee were not material in the assessment of COMI. What was important was the centre of the gravity of the company's

commercial activity, while it was active. In contrast, the activities of the insolvency representative would only have occurred once the foreign court had determined it had appropriate jurisdiction for whatever reason. The US position, in cases such as *In re Fairfield Sentry Ltd* 714 F 3d 127 (2nd Cir, 2013), which found that liquidation activities were relevant in the determination of COMI, was not followed.

21 The company may, as noted above, attempt COMI shifts, as an operating business before a foreign insolvency representative is appointed. *Zetta Jet No 2* stands for the proposition that this may be attempted even up to the application in Singapore for recognition of the insolvency proceedings. What is excluded from consideration is the fact that the insolvency representative has been appointed.

Scope of the Model Law

22 As I had noted above, the Singapore enactment is limited to corporate entities. In *Tantleff*, it was concluded that recognition and assistance could not be rendered in respect of that part of Chapter 11 proceedings concerning a real estate investment trust. As noted above, the Model Law implemented in Singapore applies to corporate entities only. While a REIT would appear to be a corporate entity for the purposes of Chapter 11, a REIT would not be a corporation under Singapore law, and thus would not be governed by the Model law. It was noted that in *Rubin and anor v Eurofinance SA and Ors* [2010] 1 All ER (Comm 81), (HC), the English High Court found that a US business trust was an entity subject to the Model Law. The main impetus for this would appear to be to promote uniformity and consistency. While this objective underlay the Model Law, this was not sufficient to bring in business trusts or

REITs within the ambit of the model law in Singapore given the clear language in Singapore legislation to allow for that: para [25] to [28] of *Tantleff*.

The relief that may be granted

23 This is a developing area in Singapore. In *Re Rooftop Group International Pte Ltd and another (Triumphant Gold Ltd and another, non-parties)* [2020] 4 SLR 680 ("*Rooftop*"), there were doubts expressed that assistance could be given beyond what was available to a local insolvency representative. However, in *Tantleff*, it was accepted that Article 21(1)(g), allowed recognition of including Chapter 11 plans and confirmation orders. On a purposive reading, it was noted that the government in responding to public consultation, noted that the wording of Art 21(1)(g) followed that of the US rather than the UK. While there was difference in wording between the US and Singapore versions these were not material. In granting recognition, the Court must ensure that the foreign order was made in circumstances in which the interested parties' interests were adequately protected, meeting the requirements in Article 22(1). The approach of the UK Supreme Court decision in *Rubin v Eurofinance SA* [2012] 3 WLR 1019, that the Model Law as enacted in the UK did not cover recognition of judgments, was not followed.

Limitations on expatriation

24 There may be situations in which recognition and assistance may be circumscribed. In *Rooftop*, in the context of US non-main proceedings, it was noted that the Court may not exercise its powers of assistance if there were overriding interests within the jurisdiction, such as societal concerns or employee rights that would have to be protected: para [26]. Modified universalism does give space for such considerations.

25 In most applications for recognition thus far, it is usually ordered that no repatriation of funds out of Singapore is to take place without leave of court. The intention is to allow interested parties, especially employees or possibly some classes of trade creditors, the opportunity to argue for retention of funds. The precise circumstances have not as yet had to be considered – most of the recognition cases do not seem to involve very substantial presence or operations in Singapore. In most situations, nothing really arises, and recently, one repatriation request was granted by letter where all possible interested parties did not object to the movement of funds out of Singapore.

Common Law recognition of proceedings and judgments

26 It may be of interest that a common law concept of COMI was adopted. In Singapore, in between the announcement that amendments to our law would be introduced enacting the Model Law, and their actual coming into force, this common law COMI was used as a basis for recognition of foreign insolvency and restructuring: *Re Taisoo Suk* [2016] 5 SLR 787, *Re Opti-Medix* [2016] 4 SLR 312. COMI was recognized as a useful and relevant concept for corporate entities, giving a jurisdiction sufficient interest and connection in the winding up or restructuring of the corporate entity. Taken together with the recognition by the Singapore Court of Appeal in *Beluga Chartering GMbH v Beluga Projects (Singapore) Pte Ltd and anor* [2014] 2 SLR 815 that modified universalism was increasingly the preferred approach, it was considered appropriate to adopt COMI as a connecting factor. An important consideration is that the place of incorporation, while important, cannot be determinative, given the way many corporations operate. There may be various factors driving the choice of a specific place of incorporation, including tax and confidentiality. What can be more important in determining relevant locus of substantive

connections would be factors such as the business operations, the economic and financial activity, and the expectations of creditors and other stakeholders.

27 As to whether there is any difference between Model Law COMI and common law COMI, it may be that the presumption in favour of the place of incorporation is perhaps less strong in the common law, though ideally they should be aligned: *Zetta Jet No. 2* at para [73]. But it remains to be seen how the concept of common law COMI develops, if at all.

28 Common law COMI is not a uniquely Singapore concept. The HK Court of First Instance has adopted a similar approach in a number of cases, approving of *Opti-medix*: see *Global Brands Group Holding Ltd (in liquidation)* [2022] HKCFI 1789.

29 It has been expressed by me on a number of occasions that in cases governed by the Model Law that there may be much scope for the concurrent use of common law recognition on the basis of common law COMI. It may be possible to persuade the court that common law COMI can operate concurrently, as a kind of backstop or alternative, or in respect of judgment recognition, but when and how, is a matter to be elaborated on. A large part of this reluctance stems simply from the fact that the Singapore Court of Appeal has not had the occasion to consider the approach.

The Future

30 Singapore is supportive of the ongoing work undertaken in respect of both recognition of insolvency judgments and that for group enterprises. My colleague, Justice Kannan Ramesh, has I believe spoken on aspects of these on a number of occasions.

31 An important challenge for us is promoting a regional approach to cross-border insolvency. Unlike Europe, there is no single overarching supra national legal framework in place, nor is it likely, because of our different history and challenges. Our region does not even share a single language of administration and judicial work, unlike much of South America. While English is commonly used and understood throughout the region, primary materials are, outside the common law jurisdictions of the Commonwealth and the Philippines, not in English, and translations are not yet as readily available as they should be. Steps are being taken of course to address this, not just with respect to insolvency but across a number of areas of commercial law.

32 Specifically in relation to insolvency and restructuring, the benefits of the Model Law have to be reiterated. Most of our large, commercially, important jurisdictions have not as yet adopted it, though I understand India in particular is moving in that direction. Modified universalism is a worthwhile objective, balancing cooperation and restraint against specific imperatives. The broader adoption of the Model Law and the other work that is being undertaken will help promote greater certainty and rationality in the resolution of corporate failures, removing the impetus for a race for assets, with accompanying litigation and hiking transaction costs.

33 This effort calls for building on the engagement that is already undertaken by many organisations in the region, including INSCOL, the World Bank, UN agencies such as UNCITRAL and newer entities such as the Council of ASEAN Chief Justices. Bilateral efforts such as the Malaysia- Singapore 'Protocols on Court-to-Court Communications and Cooperation in Admiralty, Shipping and Cross-Broder Corporate Insolvency Matters' also an important step on the road to greater regional integration and interconnectedness in insolvency matters.

34 There is space for the III through its members to promote the Model Law and international best practices even more, through outreach to the various Asian jurisdictions. This can be pursued through engagement with the law firms, university faculty and students, as well as government agencies. I encourage those of you with presence in the region to continue to advocate and support efforts to promote the common law.

Conclusion

35 The developments in the interpretation of the Model Law in Singapore noted here do show that while there may be on occasion differences in approach, largely because of the specific text enacted, the Singapore court does appreciate the objectives of the Model Law, namely promoting certainty and cooperation, so as to ensure the best possible, most orderly outcome, for those affected by corporate insolvency. It is to be hoped that the benefits of the Model Law will commend itself to other jurisdictions in the region, and that wider adoption will be achieved before too long. That calls for continued support and work by all stakeholders in the region, including those III members with an interest and presence in Asia.

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