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Client update: *Re Tantleff, Alan* [2022] SGHC 147

_Re_ Tantleff, Alan, was an application for the recognition of the US Chapter 11 Proceedings and the Chapter 11 Plan and Confirmation Order. The Singapore High Court held that the Model Law does not apply to a Real Estate Investment Trust (REIT), clarified the factors that will be considered in determining the COMI of a company, and found that the Singapore Courts are empowered to recognise and enforce foreign orders and judgments under Art 21(1)(g) of the Model Law.

1. *Re Tantleff, Alan* [2022] SGHC 147 was an application brought by Mr Alan Tantleff, in his capacity as a foreign representative of three entities, for amongst others the recognition of (i) their Chapter 11 proceedings in the United States Bankruptcy Court ("**US Chapter 11 Proceedings**") and (ii) their Chapter 11 liquidation plan and its confirmation order ("**US Chapter 11 Plan and Confirmation Order**"), pursuant to the UNCITRAL Model Law on Cross-Border Insolvency (30 May 1997) (the "**Model Law**"), as adopted in Singapore under s 252(1) of the Insolvency, Restructuring and Dissolution Act 2018(2020 Rev Ed) ("**IRDA**")**.**

2. These three entities, were the Eagle Hospitality Real Estate Investment Trust ("**EH-REIT**"), Eagle Hospitality Trust S1 Pte Ltd ("**S1**") and Eagle Hospitality Trust S2 Pte Ltd ("**S2**") (collectively, the "**Singapore Chapter 11 Entities**"), which were part of a group of companies which run and invest in hospitality businesses in the United States.

Proceedings or orders concerning the restructuring of a REIT will not be recognised under the Singapore Model Law – only proceedings involving corporate entities will be recognised

3. The Court found that for a foreign proceeding or order to be recognised in Singapore, the entity in question must first fall within the scope of the Model Law as implemented in Singapore; it must be a corporate entity.

4. In this regard, the Court observed that EH-REIT was not a corporation with a separate legal personality but a REIT. Consequently, it did not fall within the definition of a "*debtor*" within the meaning of Art 2(c) of the Model Law. This was noted to be contrary to the UK position in the case of *Rubin and another v Eurofinance SA and others* [2010] 1 All ER (Comm) 81 ("**Rubin (EWHC)**"), wherein the English High Court found that the Model Law applied to business trusts, and business trusts fell within the definition of a "*debtor*" under the Model Law as enacted in the UK.

5. The Court noted that common law recognition may be available for the restructuring of EH-REIT. However, the proper party to bring the application would be the trustee of EH-REIT, DBS Trustee Limited, not Mr Alan Tantleff.

Factors to consider when determining the COMI

6. The presumption under Art 16(3) of the Model Law that the place of the debtor company's registered office is its centre of Main Interest ("**COMI**") may be displaced "*if the place of the company's central administration and various factors which are objectively ascertainable by third parties, particularly creditors and potential creditors of the debtor company, point the COMI away from the place of registration to some other location*" (at [37]).

7. The Court held that although S1 and S2 were incorporated in Singapore, the presumption of Singapore being the COMI was rebutted by the following facts:

    a. S1 and S2 were not active, operational companies but simply part of a group of companies which has its main business operations and assets in the US;

    b. The substantial assets of S1 and S2 were immovable fixed properties in the US;

    c. At the time of their respective voluntary petitions for relief under Chapter 11, S1 and S2 did not have creditors in Singapore but only in the US. Thereafter, even though there were some smaller Singapore creditors (all of whom had been paid under the Chapter 11 process), this was not found to shift the centre of gravity in determining the COMI; and

    d. US law was the governing law of various agreements between the respective Singapore Chapter 11 Entities and their creditors.

8. Thus, the Court recognised the Singapore Entities' Chapter 11 Proceedings in relation to S1 and S2 as foreign main proceedings within the meaning of Art 2(f) and pursuant to Art 17(2)(a) of the Model Law.

9. Separately, the Court found that (i) the control and supervision of the US Bankruptcy Court in the Singapore Entities' Chapter 11 Proceedings, (ii) the activities of Mr Alan Tantleff as the chief restructuring officer and subsequently as Liquidating Trustee are all not relevant factors in determining that the COMI of S1 and S2 is in the US. In this regard, the Court emphasized that the *"jurisprudential basis of the COMI requirement is to determine the centre of gravity of the company's commercial activity, that is, where it was centred while it was alive and flourishing"* (at [45]). The position taken by the Singapore Court departs from the US position, where the activities of the debtor company post the commencement of formal proceedings are considered relevant to the determination of COMI.

Recognition of the Chapter 11 Plan and Confirmation Order - Art 21(1)(g)

10. Since the US Chapter 11 Proceedings in relation to S1 and S2 were recognised as foreign main proceedings (see paragraphs [7] & [8] above), the recognition of the Chapter 11 Plan and Confirmation Order in relation to S1 and S2 was granted as additional relief under Art 21(1)(g) of the Model Law. The Court left the issue of whether a Singapore Court could recognise a post-confirmation plan of liquidation (or other foreign insolvency judgments) as a "*foreign proceeding*" under Art 2(h) open for future determination.

11. In granting this additional relief, the Court preferred and adopted the US position over the UK position that foreign insolvency orders and judgments may be recognised and enforced locally (c.f. UK Supreme Court decision in *Rubin v Eurofinance SA* [2012] 3 WLR 1019 ("**Rubin (UKSC)**") wherein it was held that the recognition and enforcement of foreign insolvency judgments were not one of the reliefs available under Art 21 of the UK Model Law).

12. The Court further held that in granting recognition and enforcement of such foreign insolvency judgments and orders, the Singapore Court should pursuant to Article 22(1) of the Model Law, scrutinise the circumstances in which the foreign order was granted and ensure that interested parties were given an opportunity to be heard and that the relevant creditors and stakeholders are adequately protected.

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