Published on 3 March 2022

Case Comment

THE SINGAPORE COURT OF APPEAL'S FIRST REPORTED DECISION ON THE MODEL LAW ON CROSS-BORDER INSOLVENCY

United Securities Sdn Bhd v United Overseas Bank Ltd [2021] 2 SLR 950

[2022] SAL PRAC 6

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I. Introduction

1 The Singapore Court of Appeal considered for the first time in *United Securities Sdn Bhd v United Overseas Bank Ltd*[2] ("*USSB v UOB*") the principles applicable to recognition of foreign proceedings under the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law") as enacted in Singapore by way of s 252 of the Insolvency, Restructuring and Dissolution Act 2018[3] ("IRDA") ("SG Model Law").[4]

2 As highlighted by the Court of Appeal in *USSB v UOB*, the SG Model Law provides procedural mechanisms to facilitate the conduct of cross-border insolvencies and gives effect to four principles:[5]

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1 The author would like to thank Sim Kwan Kiat, Head of Restructuring, Rajah & Tann Singapore LLP for his insightful comments.
2 [2021] 2 SLR 950.
3 2020 Rev Ed.
4 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) Third Schedule.
5 *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] 2 SLR 950 at [5].

(a) the "access" principle which sets out the circumstances in which a "foreign representative" of an insolvent debtor has rights of access to the Singapore courts in order to seek recognition and relief;

(b) the "recognition" principle which deals with the Singapore courts' recognition of foreign insolvency proceedings as either a foreign "main" or "non-main" proceeding;

(c) the "relief" principle which deals with both interim and permanent relief that the Singapore court may provide after it recognises foreign proceedings as "main" or "non-main"; and

(d) the "co-operation and co-ordination" principle which obliges courts and insolvency representatives in different jurisdictions to communicate with each other and co-operate to ensure the fair administration of the debtor's estate.

3 The Court of Appeal's decision discussed the "recognition" and "relief" principles. Not only does it provide important guidance as to the parameters of the automatic stay imposed upon the recognition of a foreign main proceeding, the Court of Appeal also took the opportunity to elucidate the requirements for recognition of a "foreign proceeding" under the SG Model Law.

II. Brief facts of the case

4 The issues in this case arose from a set of parallel proceedings in Singapore and Malaysia after United Securities Sdn Bhd ("USSB"), a Malaysian company, was wound up by the Malaysian courts (the "Malaysian Winding-Up Proceeding").

5 The parallel proceedings were commenced in Malaysia and Singapore in relation to a loan agreement and a debenture creating a fixed charge over the shares beneficially owned by USSB in a company, City Centre Sdn Bhd ("CCSB"), in favour of United Overseas Bank Limited ("UOB"), under which USSB had defaulted. These agreements were governed by Singapore law.

6 In Malaysia, this took the form of a writ action commenced by USSB for, amongst others, a declaration against UOB that surplus funds in the liquidation estate of CCSB ("Surplus Funds") were not subject to the debenture (the "Malaysian Writ Action").

7 UOB, on the other hand, applied to the Singapore courts for, amongst others, a declaration against USSB that its rights under the debenture were valid and exercisable, including its security over the rights attached to the CCSB shares and the right to the Surplus Funds (the "Singapore Proceeding").

8 UOB applied to the Malaysian courts for a stay of the Malaysian Writ Action. The Malaysian Court of Appeal eventually allowed the application, finding that Singapore was the more appropriate forum for the dispute. USSB applied for leave to appeal, and the matter remained pending at the time of the Court of Appeal's decision in *USSB v UOB*.

9 In Singapore, USSB applied for a stay of the Singapore Proceeding on the basis that Singapore was not the appropriate forum. When this was dismissed, USSB immediately filed a new application seeking the Singapore court's recognition of the Malaysian Winding-Up Proceeding and the Malaysian Writ Action as "foreign main proceedings" or "foreign non-main proceedings" under the SG Model Law, and a stay of the Singapore Proceeding pursuant to Arts 20 and/or 21 of the SG Model Law.

III. Commentary

A. Interpretation of the SG Model Law

10 It is important to bear in mind that in interpreting the various provisions of the SG Model Law, due consideration needs to be given to the texts and guides developed by UNCITRAL as well as the case law from other jurisdictions. This would include, amongst others, the *UNCITRAL Model Law on Cross-Border Insolvency with Guide To Enactment and Interpretation* (the "*Guide*"), the *Practice Guide on Cross-Border Insolvency Cooperation*, *UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective* ("*The Judicial Perspective*"), the *Digest of Case Law on the UNCITRAL Model Law on*

Cross-Border Insolvency, and the *Case Law on UNCITRAL Texts*.[6] This is in fact encapsulated in s 252(2) of the IRDA.

11 After all, the Model Law is meant to provide procedural mechanisms to facilitate more efficient administration of cases in which the insolvent debtor has assets or debts in more than one jurisdiction without laying down any substantive principles of insolvency law. As such, uniformity in the Model Law's application would ensure predictability in the handling of cross-border insolvency cases. The Court of Appeal in fact specifically highlighted in *USSB v UOB* that it had taken this approach in interpreting the relevant provisions and that it was cognizant of Article 8 of the SG Model Law, which provides that "regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith".[7]

12 The Court of Appeal also endorsed the High Court's observations in *Re Zetta Jet Pte Ltd*[8] at [38] 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".[9]

B. Stay of the Singapore Proceeding

13 In *USSB v UOB*, there was no dispute that the Malaysian Winding-Up Proceeding was a "foreign main proceeding" under the SG Model Law. It was also not seriously disputed that the Singapore Proceeding was an "individual action or individual proceeding 'concerning the debtor's property, rights, obligations or liabilities'" which fell within the scope of the automatic stay arising under Art 20(1)(*a*) of the SG Model Law.

14 However, even though the Singapore Proceeding fell within the scope of the stay and suspension arising under Art 20(1), such stay and suspension are subject to Art 20(2)

6 These texts are available at <https://uncitral.un.org/en/texts/insolvency> (accessed 31 January 2022).
7 *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] 2 SLR 950 at [28].
8 [2019] 4 SLR 1343.
9 *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] 2 SLR 950 at [28].

of the SG Model Law. Article 20(2) provides that the stay and suspension are "the same in scope and effect as if the debtor had been made the subject of a winding up order" under the IRDA and "subject to the same powers of the Court and the same prohibitions, limitations, exceptions and conditions as would apply under the law of Singapore in such a case".

15 Article 20(2) is intended to grant protection to those classes of people who would normally receive protection in insolvency proceedings commenced in the enacting State.[10] The Court of Appeal observed, taking guidance from the *Guide* and *The Judicial Perspective*, that this is so that recognition of a foreign proceeding has its own effects rather than importing the consequences of the foreign law into the insolvency system of the enacting State; and that it is in line with the basic approach of the Model Law, which is not to attempt a substantive unification of insolvency law but to provide a procedural framework for co-operation between jurisdictions in order to facilitate and promote a uniform approach to cross-border insolvency.[11]

16 In addition, Art 20(3) of the SG Model Law stipulates that the automatic stay and suspension under Art 20(1) do not affect certain rights which would have been exercisable if the debtor had been made the subject of a winding-up order under the IRDA. This includes any right to take any steps to enforce security over the debtor's property.[12]

17 Thus, the Court of Appeal went on to consider what the position would have been if USSB had been wound up by the Singapore courts. Under the IRDA, no action or proceeding may be proceeded with or commenced against the debtor upon a winding-up order being made, except by the leave of the Singapore court and in accordance with such terms as the court may impose[13]. As observed by the Court of Appeal, "it is

10 *Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency* (2021) at p 61, Art 20(2).

11 *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] 2 SLR 950 at [35].

12 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) Third Schedule, Art 20(3)(*a*).

13 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) s 133.

well established [under Singapore law] that leave will readily be granted to secured creditors to proceed with enforcing their security, notwithstanding any stay of proceedings that arises upon the winding up of the debtor"[14] so long as it can show a *prima facie* case that has been "brought *bona fide*, underpinned by credible facts and is, even without a serious investigation of the factual matrix, capable of succeeding if and when heard".[15] This is because, as explained by the Court of Appeal in *SCK Serijadi Sdn Bhd v Artison Interior Pte Ltd*[16] at [11], the secured creditors' security is regarded as standing apart from the pool of assets available for *pari passu* distribution amongst unsecured creditors.

18 The Court of Appeal proceeded to grant leave to UOB to continue with the Singapore Proceeding in accordance with Arts 20(2) and 20(3) of the SG Model Law. In doing so, the Court of Appeal had regard to the case of *Kim and Yu v STX Pan Ocean Co Ltd*[17] where the High Court of New Zealand granted leave to a secured creditor to continue its claim, "consistent with usual practice … where leave would normally be given for secured creditors to commence or continue proceedings to establish their security".[18]

19 In other words, the ordinary principles and practice that apply under Singapore law to a stay of proceedings arising upon a winding-up order being made would apply similarly to the stay and suspension arising under Art 20(1) of the SG Model Law.

20 From a practical perspective, this means that, as with local winding-up proceedings, the onus lies on the secured creditor to seek and obtain leave of the court to commence or continue any proceedings against the debtor, following any automatic stay arising under Art 20(1) of the SG Model Law.

21 However, whilst a secured creditor in local winding-up proceedings would be able to easily find out whether a company

14 *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] 2 SLR 950 at [39].
15 *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] 2 SLR 950 at [40].
16 [2019] 1 SLR 680.
17 [2014] NZHC 845.
18 *Kim and Yu v STX Pan Ocean Co Ltd* [2014] NZHC 845 at [29]–[30] and [43].

is the subject of a winding-up application[19] or has been wound up in Singapore,[20] it may not be as easy for a secured creditor affected by any stay and suspension arising under the SG Model Law to find out whether there is such a stay and suspension in place unless the foreign representative has notified creditors of the application or recognition order. In this regard, the author notes that there is no legislative requirement for notification to be given upon a recognition order being made. Further, applications for recognition under the SG Model Law are typically made on an *ex parte* basis. As such, it would very much depend on the Singapore court to make directions as it thinks fit, including directions for the publication of notices and the making of any inquiry;[21] or on its own motion, modify or terminate the stay and suspension under Art 20(1) or any part of it on such terms and conditions as it thinks fit.[22]

22 The author also notes that the foreign proceedings in *USSB v UOB* are liquidation proceedings. What if the foreign proceedings are instead for the purpose of reorganisation and the secured creditor is seeking to enforce its security over the debtor's property, which is also the subject of a reorganisation proposal? Would the Singapore court take into account the foreign reorganisation proposal in determining whether to grant leave to the secured creditor to enforce its security and require the secured creditor to demonstrate why it should be permitted to enforce its security rights notwithstanding the ongoing reorganisation? In this author's view, there is potentially scope for the court to do so as part of its broad discretion in determining

19 Not only must notice of a winding-up application be published in the Gazette and a local daily newspaper under r 66 of the Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020 (S 603/2020), a litigation search conducted would also reveal whether there are any pending winding-up proceedings against a company.

20 A liquidator is required to notify the Registrar of Companies of his or her appointment under s 191 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed), and the status of the company would be reflected on *bizfile*, the business filing portal of the Accounting and Corporate Regulatory Authority.

21 Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020 (S 603/2020) r 17.

22 Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) Third Schedule, Art 20(6).

whether to grant leave and, if so, on what terms. It would appear artificial to only consider in a hypothetical vacuum whether leave should be granted assuming that the debtor had been the subject of a winding-up order in Singapore. The court would however also consider, amongst other things, whether the interests of the secured creditor are adequately protected; and this is a factor which, in the author's view, may hold some significance in the determination as to whether leave should be granted.

23 As regards the stay sought by USSB under Art 21 of the SG Model Law at first instance, the Court of Appeal declined to grant this for the same reason that UOB was *prima facie* a secured creditor. The Court of Appeal considered that the grant of a discretionary stay of proceedings was not necessary to protect the property of the debtor or the interests of the creditors, where the security is regarded as standing apart from the pool of assets available for *pari passu* distribution to unsecured creditors in the liquidation of USSB.[23]

C. Recognition of the Malaysian Writ Action

24 The Court of Appeal's decision on the stay of the Singapore Proceeding following the recognition of the Malaysian Winding-Up Proceeding was sufficient to dispose of the appeal. However, the Court of Appeal took the opportunity to set out its views on the issue of recognition of the Malaysian Writ Action given that this was one of the first few cases concerning the requirements for recognition of a "foreign proceeding" under the SG Model Law.

25 Having regard to the *Guide*, the Court of Appeal held that there are at least four cumulative attributes required for a proceeding to constitute a "foreign proceeding", which "are cumulative" and "should be considered as a whole":[24]

23 *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] 2 SLR 950 at [45]–[47].

24 *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] 2 SLR 950 at [53].

(a) the proceeding must involve creditors collectively;

(b) the proceeding must have its basis in a law relating to insolvency;

(c) the court must exercise control or supervision of the property and affairs of the debtor in the proceeding; and

(d) the purpose of the proceeding must be the debtor's re-organisation or liquidation.

26 In the discussion on the first attribute regarding a "collective" proceeding, the Court of Appeal had regard to the position taken in other jurisdictions such as New Zealand and the US that a "collective" proceeding is one that considers the rights and obligations of the debtor's creditors generally, and should be distinguished from private proceedings which concern the rights and obligations *vis-à-vis* a single creditor or secured creditor. In particular, the Court of Appeal discussed various US cases which held that receivership proceedings concerned only with secured creditors' interests and were not collective proceedings for purposes of the Model Law.[25]

27 As for the second attribute relating to a basis in a law relating to insolvency, the Court of Appeal held that the court, in determining this issue, "should adopt a commonsense approach which focuses on the substance of the relevant law"[26] and that the question to be determined was whether the relevant law "deals with or addresses insolvency or severe financial distress".[27] Thus, notwithstanding that the proceedings might involve an insolvent company, one needs to inquire as to whether the *law* on which the proceedings was based related to insolvency.

28 Liquidation proceedings are a classic example of proceedings fulfilling the third attribute concerning the court's exercise of control or supervision of the debtor's property and affairs. However, whilst the control or supervision must be "formal

25 *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] 2 SLR 950 at [59]–[61].
26 *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] 2 SLR 950 at [66].
27 *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] 2 SLR 950 at [66].

in nature", it "may be potential rather than actual" and may be exercised directly by the court or indirectly through an insolvency representative.[28] As such, debtor-in-possession proceedings, or proceedings in which the court only exercises control or supervision at an earlier or later stage, could still satisfy this third attribute.[29] This would thus cover scheme of arrangement proceedings under s 64 of the IRDA (or the predecessor s 211B of the Companies Act[30] (in effect prior to 30 July 2020)), which have been recognised as foreign proceedings under the Model Law in the United Kingdom[31] and Brazil.[32]

29 The fourth attribute concerns whether the *purpose* of the proceeding is the reorganisation or liquidation of the debtor. The *Guide* recognises that the types of proceedings which might not be eligible for recognition could take a potentially large number of forms and that it would be difficult to address them in a general rule of recognition.[33] As such, instead of trying to do so, the *Guide* sets out several examples of proceedings that do not satisfy this requirement, such as proceedings that are designed to prevent dissipation and waste, rather than to liquidate or reorganise the insolvent estate.[34]

30 The Court of Appeal was of the view that the Malaysian Writ Action bore none of these attributes, and was accordingly not a "foreign proceeding" under the SG Model Law. In this

28 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2014) at para 74.

29 These are examples of proceedings that involve the requisite control and supervision by the court, as set out in paras 74–75 of the UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2014).

30 2020 Rev Ed.

31 H & CS Holdings Pte Ltd's moratorium order under s 211B of the Companies Act (2020 Rev Ed) (in effect prior to 30 July 2020) was recognised in England. See *H & CS Holdings Pte Ltd v Glencore International AG* [2019] EWHC 1459 (Ch).

32 Prosafe SE and Prosafe Rigs' moratorium order under s 64 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) was recognised in Brazil. See Ben Clarke, "Norway's Prosafe Secures Recognition in Brazil's First Model Law Ruling" *Global Restructuring Review* (9 August 2021).

33 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2014) at para 78.

34 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2014) at para 77.

case, it was clear to the Court of Appeal that the Malaysian Writ Action was an ordinary civil action commenced under a court's civil jurisdiction where the issues to be determined were not based on any law that dealt with insolvency or severe financial distress. It also did not involve any control or supervision by the Malaysian court over USSB's property and affairs as its role was simply to determine the issues in dispute, as it would do in any ordinary civil action. Nor was the purpose of the Malaysian Writ Action for USSB's reorganisation or liquidation; instead, it was to determine the parties' rights, obligations and liabilities under the loan agreement and the debenture.

31 USSB also sought to rely on the English Court of Appeal's decision in *Rubin v Eurofinance SA*[35] ("*Rubin (CA)*") to argue that by way of analogy to US adversary proceedings[36] that were recognised under the Model Law in *Rubin (CA)*[37] on the basis that such adversary proceedings were "part of collecting the bankrupt's assets with a view to distributing them to creditors",[38] the Malaysian Writ Action should similarly be recognised under the SG Model Law.

32 The Court of Appeal was of the view that the Malaysian Writ Action was clearly distinguishable from US adversary proceedings,[39] and hence did not have to decide whether *Rubin (CA)* was correct.

33 The Court of Appeal held that the Malaysian Writ Action was not part of any insolvency plan approved by the Malaysian court nor an integral part of the Malaysian Winding-Up Proceeding.[40] The Malaysian Writ Action also did not arise from

35 [2011] 2 WLR 121.

36 "Adversary proceedings" are lawsuits commenced in the US bankruptcy court, which may take the form of lien avoidance actions, actions to avoid preferences, actions to avoid fraudulent transfers, or actions to avoid post-petition transfers. These are the equivalent of avoidance actions such as "undervalue transaction" and "unfair preference" claims in Singapore.

37 *Rubin v Eurofinance SA* [2011] 2 WLR 121 was subsequently overturned on appeal by the UK Supreme Court in *Rubin v Eurofinance SA* [2012] 3 WLR 1019, although on a different point of law.

38 *Rubin v Eurofinance SA* [2011] 2 WLR 121 at [25] and [60].

39 *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] 2 SLR 950 at [73].

40 *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] 2 SLR 950 at [73].

any mechanism available in the insolvency regime. In contrast, the proceedings recognised in *Rubin (CA)* arose from the use of mechanisms specially available in the insolvency regime to allow the debtor's insolvency representative to bring actions against third parties for the collective benefit of all creditors.[41]

34 As such, it remains to be seen whether avoidance actions commenced by an insolvency representative would fall within the scope of the SG Model Law. Based on *Rubin (CA)*, a cause of action based on the rules of the insolvency proceedings, such as proceedings to set aside an unfair preference, would satisfy such criteria. However, any claims in contract, tort or property, even though commenced by an insolvency representative, would seemingly fall outside of that scope because these are claims that the debtor would have had even without the availability of the insolvency regime.

35 Lastly, whilst this was not an issue relevant in *USSB v UOB*, it is apposite to note that the *Guide* provides that whether a foreign proceeding possesses or possessed the requisite elements to fall within the scope of the Model Law would be determined at the time the application for recognition is considered.[42]

IV. Concluding words

36 It is increasingly common for the assets and liabilities of a company to be spread across different countries. When it comes to the restructuring or insolvency of the company, complications may arise in the form of parallel proceedings in separate jurisdictions.

37 To aid the resolution of such difficulties, the Model Law provides a framework for cooperation between jurisdictions. It sets out a uniform system by which the courts of one jurisdiction may recognise foreign proceedings and grant the appropriate relief, including a stay of local proceedings. It is, however,

41 *Rubin v Eurofinance SA* [2011] 2 WLR 121 at [61].
42 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2014) at para 66.

important to bear in mind that the stay of local proceedings is circumscribed by the principles and practices that apply under Singapore law to a stay of proceedings arising upon a winding-up order being made.

38 The Court of Appeal's decision in this case therefore provides an important guide to the application of the SG Model Law, clarifying the principles and factors involved in the recognition of foreign proceedings and the parameters of the stay and suspension arising under Art 20(1) of the SG Model Law.