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# Common law to the rescue: bridging gaps in international and domestic restructuring and insolvency regimes – a case study

**KEY POINTS**

- While domestic and international legislative reform is important and necessary, the common law remains a powerful tool in developing the law.
- The Singaporean courts have adopted the common law centre of main interest (COMI) test as grounds for the recognition of foreign insolvency proceedings.
- The Singaporean courts have used the common law to find a director personally liable for procuring an undue preference by way of a finding of breach of fiduciary duty, even though such liability was not provided for under statute.

## INTRODUCTION

Domestic restructuring and insolvency regimes in many jurisdictions are often made up of a patchwork of laws. Even in jurisdictions with more comprehensive regimes, there can still be gaps and other shortcomings. These difficulties become more acute when one looks at cross-border restructuring and insolvencies, where much work remains to be done to create a transnational framework for coordinating between different jurisdictions.

In this context, this article considers recent decisions of the Singapore and Hong Kong courts where the common law has been used to bridge some significant gaps, and provided a flexible and sensible way to overcome apparent shortcomings, in domestic and cross-border legal frameworks.

## CROSS-BORDER RESTRUCTURING AND INSOLVENCY

Increased globalisation means that it is increasingly common for insolvency proceedings to take place across multiple jurisdictions. Many jurisdictions provide a statutory framework for the recognition of foreign insolvencies and those administering them. For EU member states, this framework will include the EU Insolvency Regulations, and many EU member states and other countries have also implemented the UNCITRAL Model Law on Cross-Border Insolvency ('the Model Law').

The statutory corporate insolvency laws of both Singapore and Hong Kong, however, do not expressly provide a framework for recognising foreign insolvencies, instead relying on recognition under the common law. Typically, the Singapore and Hong Kong courts have only permitted recognition where the foreign insolvency takes place in the jurisdiction where the debtor company is registered, as opposed to looking at the centre of main interest (COMI) of the debtor(s), as is the case under statutory regimes such as the EU Insolvency Regulations and Model Law.

The Singapore courts, however, have recently adapted common law recognition to enable the application of a COMI test (*Re Opti-Medix Ltd (in liquidation) and another matter* [2016] SGHC 108 ('*Re Opti-Medix*')). This is a significant extension of the common law, and closes a significant gap between the common law and regimes such as those under the EU Insolvency Regulations and the Model Law.

*Re Opti-Medix* concerned insolvencies of two companies incorporated in the BVI, Medical Trend Ltd and Opti-Medix Ltd. The companies' main business was factoring receivables from medical institutions in Japan, which was funded by non-recourse notes issued by the companies. The notes were governed by Singapore law, but were solely marketed in Japan by Japanese brokers. The companies could not sustain their businesses and subsequently, in November 2015, bankruptcy orders were sought and obtained from the Tokyo District Court. The applicant was appointed as their bankruptcy trustee. The majority of the companies' creditors were Japanese, though each company had one or two Singapore creditors. The companies held some balance monies in various Singapore bank accounts. The Applicant applied to the Singapore High Court seeking recognition of his appointment as bankruptcy trustee to enable him to ascertain, administer and dispose of the companies' assets in Singapore.

The court granted the recognition orders, approving the use of the companies' COMI, Japan, as the basis for recognition, rather than their place of incorporation. Japan was where the bulk of the business and transactions of the companies occurred, and this was found to be sufficient for the court to recognise the appointment of the applicant in Singapore. The court commented that whilst there

was already common law precedent for granting recognition to foreign liquidators appointed in the country of the company's incorporation (see *Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation)* [2014] SGCA 14), in this case a liquidator had not been appointed in the country in which the companies were incorporated. However, the court stated that there was nothing in *Beluga* which prevented the recognition of a liquidator on grounds other than the jurisdiction of incorporation, such as COMI.

The court added that even if it had not adopted the COMI test as the basis for recognition, recognition of the Tokyo orders could be justified on practical grounds. Indicative of a broader shift in Singapore's approach to cross-border insolvency towards acceptance of principles of judicial comity and universalism, the court stated that where the interests of the forum are not adversely affected by a foreign order the courts should lean towards recognition.

This same approach can also be seen in the more recent case of *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd)* [2016] SGHC 195 ('*Re Taisoo Suk*'). In this case, the Singapore High Court was asked and agreed to recognise and render assistance in respect of Korean rehabilitation orders.

On 31 August 2016, Hanjin Shipping Co Ltd ('Hanjin'), the largest container-shipping firm in Korea, filed an application for rehabilitation proceedings to the Korean Bankruptcy Court, which subsequently granted provisional orders to preserve Hanjin's assets. In *Re Taisoo Suk*, an ex parte application was made by Hanjin to the Singapore High Court seeking interim orders for, inter alia, recognition of Hanjin's Korean rehabilitation proceedings, restraint of all pending proceedings against Hanjin and its Singapore subsidiaries or any enforcement or execution against any of their assets, and a stay of all present proceedings against Hanjin and its Singapore subsidiaries.

The court granted the orders sought. In its judgment, the court referred to *Beluga*, where the Court of Appeal commended the benefits of a 'universalist' approach in winding up and noted that Singapore courts could render assistance to foreign winding up proceedings. In *Re Taisoo Suk*, the court confirmed that although the observations in *Beluga* were made in the context of winding-up proceedings, such observations extended to the recognition of foreign restructuring and rehabilitation proceedings.

In determining whether recognition of the Korean rehabilitation proceedings should be granted, the court considered the common law COMI test (the court was satisfied that Hanjin's COMI was in Korea), as well as the impact of the rehabilitation process itself on creditors. The court confirmed that recognition and assistance would not be given in respect of foreign rehabilitation proceedings if those proceedings would lead to a result that would be unfair to the creditors as a whole. In this instance, the court was satisfied that the proposed steps in the rehabilitation proceedings would in its general process be fair to foreign, including Singaporean, creditors.

> 'The willingness of the courts to use the common law in a flexible way to make up for absences in the existing legal framework is not just confined to the sphere of cross-border insolvency and restructuring'

The Hong Kong judiciary has similarly confirmed its willingness to recognise and render assistance to foreign liquidators in the recent cases of *Re Rennie Produce (Aust) Pty Ltd (In Liquidation in Australia)* (HCMP 1640/2016, 26 August 2016) ('*Re Rennie*') and *Re Joint Official Liquidators of Centaur Litigation SPC (In Liquidation)* (HCMP 3389/2015, 3391/2015 and 3393/2015, 10 March 2016).

In both cases, the Hong Kong courts recognised the liquidators appointed by the foreign court, and granted the liquidators powers that are available to them as a matter of foreign law (on the basis that the same powers are available to liquidators under Hong Kong law). Such powers included the ability to take possession of the assets and books and records of the company, and to bring legal proceedings. In *Re Rennie* the court went further than previous cases in indicating that such orders will become the norm in these types of applications.

## BEYOND CROSS-BORDER INSOLVENCIES

The willingness of the courts to use the common law in a flexible way to make up for absences in the existing legal framework is not just confined to the sphere of cross-border insolvency and restructuring. In the recent case of *Living the Link Pte Ltd (in creditors' voluntary liquidation) and others v Tan Lay Tin Tina and others* [2016] SGHC 67 ('*Living the Link*'), the Singapore High Court showed that the common law can also be used to overcome gaps and limitations in domestic insolvency laws.

Directors owe a fiduciary duty to act in the best interests of the company. When the company is profitable, this requires consideration of the shareholders' interests. But when the company is insolvent or nearing insolvency, directors may be required to consider the interests of the company's creditors. In *Living the Link*, the Singapore High Court held that a director who made preferred payments to related entities of a company on the verge of insolvency was in breach of her fiduciary duties to protect the interests of the company's creditors and was, in a significant extension to the existing law, therefore personally liable for such payments as a result.

Living the Link Pte Ltd ('Living') was a retailer of ladies' apparel and fashion merchandise managed by its director and sole shareholder, Tina Tan Lay Yin ('Tina Tan'). Living was part of the Link Group of companies which included Alldressedup International Pte Ltd and Link Boutique Pte Ltd (together, the 'Associate Companies').

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Tina Tan was also the director and sole shareholder of the Associate Companies. In May 2010, Living was placed in creditors' voluntary liquidation. Its main creditors were its landlord, to whom Living owed arrears in rent and was liable for premature termination of its tenancy agreement, and the Associate Companies.

The liquidators brought an action to reverse certain transactions recorded between Living and the Associate Companies prior to Living's liquidation. They argued that such transactions constituted undue preferences made with a desire to prefer the Associate Companies over Living's other creditors, most notably the landlord. Additionally, the liquidators sued Tina Tan on the basis that she was in breach of her fiduciary duty to ensure that the company's assets were not misapplied to the prejudice of creditors' interests.

The Singapore High Court found that the transactions in question amounted to undue preferences; the transfers of inventory and shares from Living to the Associate Companies were effected when it had already been decided that Living would not proceed as a going concern and were therefore influenced by the desire to prefer the Associate Companies. Importantly, the court further concluded that Tina Tan, in procuring such transactions, was necessarily in breach of her fiduciary duty (as Living's director) to ensure that Living's assets were not misapplied to the detriment of the creditors' interests. Mr Justice Chong commented that the fact that the purpose of this fiduciary duty mirrors that of the statutory avoidance provisions renders such an inference 'practically inevitable in every case', although there may be exceptional circumstances where a director may be found to have acted bona fide in the best interests of the company even if they procured an undue preference.

The court stated that holding a director who procured an undue preference directly responsible for restoring the company to the position it would have otherwise been in was not only just, but also in line with the fiduciary duty owed by a director to creditors when a company is insolvent or nearing insolvency. Tina Tan was liable to repay the sum of SGD 2,053,878.31 to Living, representing the total value of the undue preferences. This liability was joint and several with the liability of the Associate Companies to repay this sum.

## CONCLUSION

Insolvency and restructuring law is constantly evolving, and certainly increased globalisation demands that new laws are made to deal with the practical implications of this. This is partly being addressed by both domestic legislation (eg reform of the existing insolvency and restructuring legislative frameworks in Singapore, Hong Kong and other jurisdictions) and international legislation (eg the possible extension of the Model Law to include the recognition and enforcement of insolvency-related judgments). However, the common law still has an important role to play and indeed is a powerful tool for ensuring that insolvency and restructuring law develops in a sensible and practical way with the potential to overcome the inevitable gaps in the law that arise. ■

*Further reading*

- 'The train now departing': insolvency and cross border recognition reform – Hong Kong's missed opportunity? (2015) 4 CRI 143
- Common law assistance and cross border insolvency: from modified universalism to supra-territoriality (2015) 1 CRI 3
- From discord to harmony: the future of cross-border insolvency (2015) 5 CRI 198