SINGAPORE COURT OF APPEAL LIFTS AUTOMATIC STAY IN RECOGNITION APPLICATION UNDER SINGAPORE'S UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

Authors:

Samuel Loh, *Senior Associate, BlackOak LLC.*
Stanley Tan, *Associate, BlackOak LLC.*

I. INTRODUCTION

In *Ascentra Holdings, Inc (in official liquidation) and others v SPGK Pte Ltd [2023] 2 SLR 421* ("***Ascentra (No. 1)***"), the Court of Appeal recognised the solvent court-supervised voluntary liquidation of Ascentra Holdings, Inc (in official liquidation ("**Ascentra**") as a foreign main proceeding under Singapore's adapted enactment of the UNCITRAL Model Law on Cross-Border Insolvency (the "**SG Model Law**") as set out in the Third Schedule of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "**IRDA**").

Generally, upon recognition as a foreign main proceeding, an automatic stay and suspension arises pursuant to Article 20(1) of the SG Model Law (the "**Automatic Stay**"). This Automatic Stay is the same in scope and effect as that which arises under a Court-ordered liquidation under Section 133 of the IRDA.

However, pursuant to Article 20(6) of the SG Model Law, this automatic stay is subject to the Court's power to modify or terminate the Automatic Stay in whole or in part, either altogether or for a limited time and on such terms and conditions as the Court thinks fit.

In the more recent decision of *Ascentra Holdings, Inc (in official liquidation) and others v SPGK Pte Ltd* [2024] SGCA 2 ("***Ascentra (No. 2)***"), the Court of Appeal, for the first time, determined that this was an appropriate case to terminate the Automatic Stay. BlackOak LLC acted for SPGK Pte Ltd ("**SPGK**"), the respondent in Ascentra (No. 2), who was successful in terminating the Automatic Stay.

II. BACKGROUND

Ascentra is currently in a solvent court-supervised voluntary liquidation in the Cayman Islands ("**Ascentra's Cayman Liquidation**") with Ms Chua Suk Lin Ivy and Mr Graham Robinson appointed as the joint official liquidators over Ascentra (together, the "**Liquidators**") by the Grand Court of the Cayman Islands.

The first appellant is Ascentra, and the second and third appellants are the Liquidators. The Respondent is SPGK, a company incorporated in Singapore and a wholly-owned subsidiary of Shang Peng Gao Ke, Inc ("**SPGK Cayman**"), a company incorporated in the Cayman Islands.

Ascentra and the Liquidators maintain that Ascentra has potential claims against, among others, SPGK Cayman, and another company incorporated in Singapore, Scuderia Bianco Pte Ltd ("**Scuderia Bianco**"). In this regard, it was alleged that SPGK Cayman owed certain sums of money to Ascentra, some of which is held by SPGK and Scuderia Bianco.

Accordingly, the recognition of Ascentra's Cayman Liquidation was sought in Singapore under the SG Model Law as a foreign main proceeding. This was granted in *Ascentra (No. 1)*. However, as Ascentra's Cayman Liquidation is a *solvent* one, the question arose whether such recognition should be made subject to conditions.

III. COURT OF APPEAL'S DECISION

Termination of the Automatic Stay

The Court of Appeal agreed with SPGK that the Automatic Stay should be terminated.

In coming to its decision, the Court of Appeal held that Ascentra's Cayman Liquidation should not be regarded as a court-ordered winding up which entails an automatic stay on all legal proceedings against the company under Singapore law. This was because Ascentra's Cayman Liquidation was commenced as a (solvent) voluntary liquidation which, under Singapore law, would not attract the operation of the automatic moratorium that is engaged upon the court making a winding up order pursuant to section 133 of the IRDA (*Ascentra (No. 2)* at [17]).

The Court of Appeal further held that, even if Ascentra's Cayman Liquidation was regarded as a court-ordered winding up, it was correct in principle to terminate any moratorium that is engaged as a result.

The purpose of the moratorium in Section 133 of the IRDA is to prevent all proceedings against the company that could result in any unsecured creditor "*stealing a march*" on their fellow unsecured creditors. Accordingly, the following factors which the Court should take into account in determining whether permission should be granted for a claimant to commence proceedings against a company in respect of which a winding up order has been made despite the moratorium under Section 133 of the IRDA, are helpful in considering whether to terminate the Automatic Stay:

(a) the timing when the application for permission was made (including the stage to which proceedings have progressed, as well as any delay in bringing the application for permission and whether pre-trial procedures were likely to be required or beneficial);

(b) whether the claimant is attempting to obtain a benefit not otherwise available to it through the conventional winding up procedure, such as by filing a proof of its debts;

(c) the existing remedies, specifically, whether the claim can be dealt with within the insolvency regime; and

(d) a matrix of factors including the views of the majority creditors, the need for an independent inquiry and the choice of liquidator.

Pertinently, the Court of Appeal further clarified that it is not the case that the Automatic Stay should only be maintained in respect of insolvent companies. The concern that creditors might rush to satisfy their claims against a debtor company, while arising predominantly in the context of insolvent companies, may arise in a solvent, voluntary liquidation should it subsequently transpire that the company is

insolvent. Additionally, a moratorium might be necessary to ensure the co-ordinated and orderly dissolution or successful rehabilitation of a company.

In this case, the Court of Appeal held that it was neither argued nor shown that there is a risk of Ascentra's creditors attempting to steal a march over one another. Additionally, no reasons were provided for why the Automatic Stay would be necessary in the context of Ascentra's Cayman Liquidation. None of the factors set out above have also been engaged so as to justify the preventing of the commencement of legal proceedings against Ascentra in Singapore. Accordingly, the Court of Appeal agreed with SPGK that the Automatic Stay should be terminated.

IV. COMMENTARY

The Court of Appeal's decision here provides welcome guidance on the applicable principles and factors in determining when the Automatic Stay may be lifted. In particular, the policy objective of the Automatic Stay is to prevent creditors from "*stealing a march*" over one another when there is a limited pool of assets to be distributed (*i.e.*, the "*common pool*" problem). Therefore, the existence of the Automatic Stay is more justifiable where the debtor is insolvent or in financial distress (given that there would likely be insufficient assets to repay unsecured creditors in full).

That said, the Court of Appeal had stated in no uncertain terms that the Automatic stay need not necessarily be maintained only in respect of insolvent companies. In this regard, the Court of Appeal has highlighted two possible situations where the Automatic Stay may be maintained outside the insolvency context: (i) in the context of a solvent, voluntary liquidation, should it subsequently transpire that the company is insolvent and thus creditors might rush to satisfy their claims against the debtor company ("**Situation 1**"), and (ii) to ensure the co-ordinated and orderly dissolution or successful rehabilitation of a company ("**Situation 2**").

While Situation 1 is clear that the Court is concerned about the risk of the debtor becoming insolvent, it is unclear whether the Court is also concerned about the potential insolvency of the debtor in Situation 2. Therefore, in the context of a solvent liquidation, will the Court not terminate the Automatic Stay only if the failure to ensure a co-ordinated and orderly dissolution would result in the debtor's solvent liquidation becoming an insolvent one?

Further, while the burden of proof would lie on the party seeking to terminate or modify the Automatic Stay, it appears that the Court would require the debtor to provide cogent reasons and evidence for why the Automatic Stay should not be terminated when the debtor is solvent and does not face the risk of creditors "*stealing a march*". For example, possibly where the sale of the debtor's business as a going concern would be greater in value than in a piecemeal sale of the debtor's assets and any creditor action which would not be prevented by the Automatic Stay may prevent the sale from going through.

While *Ascentra (No. 1)* makes it clear that there is no requirement under the SG Model Law for a company to be insolvent or in severe financial distress before the foreign insolvency proceeding concerning that company may be recognised as a foreign proceeding under the SG Model Law, this does not mean that the automatic reliefs which are granted in the event of such recognition as a foreign

main proceeding will be maintained. *Ascentra (No. 2)* indicates the courts' willingness to terminate the Automatic Stay in appropriate circumstances, such as in the context of a solvent, voluntary liquidation where there is no risk of unsecured creditors "*stealing a march*" over other unsecured creditors.