THE LIMITS OF RING-FENCING IN CROSS-BORDER INSOLVENCY

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Author: Lorraine Liew.

In March this year, the High Court in Beluga Chartering addressed a unique provision of Singapore's Companies Act that requires local liquidators to ring-fence a foreign company's assets for the settlement of the debts it incurred in Singapore before they transmit its assets to overseas liquidators and creditors. This decision exploring the implications of section 377 on Singapore's cross-border insolvency legal framework is timely considering the ongoing review of Singapore's insolvency laws.

A summary of the factual background

Beluga Chartering GmbH ("**Beluga Chartering**"), a company registered in Germany, went into insolvent liquidation. Its Singapore liquidators applied to have its only known asset in Singapore transferred to a global pool of funds for the German liquidators to distribute to creditors worldwide under a single insolvency scheme. However, section 377(3)(c) of Singapore's Companies Act imposes a duty on liquidators to first settle the debts that the foreign company has incurred in Singapore before transmitting its assets overseas.

Since Beluga Chartering was still liable for judgment debts in Singapore, the issue before the High Court was whether, under the Companies Act or general law, the Singapore liquidators had the power to transmit the asset to the foreign liquidators before the judgment creditors were paid.

In coming to his decision, the High Court judge examined the scope of the winding-up provisions in the Companies Act, and in particular, section 377.

Winding up provisions apply to all foreign companies

It was argued that Beluga Chartering's liquidators were not subject to the duties contained in the Companies Act since it was an unregistered company that neither had a place of business nor carried on business in Singapore. However, the judge held that the relevant winding-up provisions applied to all foreign companies since Parliament could not have intended to exempt a foreign company simply because it was not registered under the Companies Act.

Singapore's insolvency statutory scheme is not territorially restricted. Although the liquidation in Singapore was ancillary to the principal liquidation in Germany, it did not mean that the winding-up provisions would not apply or that the Singapore liquidators' only duty was to remit the assets.

However, the Singapore court will only give a winding-up order to a foreign company if it has a sufficient connection with Singapore, usually when the company has substantial assets in Singapore.

The ancillary liquidation doctrine

Beluga Chartering establishes that section 377(3)(c) confers on Singapore liquidators not simply a power but an obligation to transmit the assets to the foreign liquidators, subject to the key proviso that debts in

Singapore have been settled. This alters the usual common law pari passu rule that places debts on an equal footing regardless of the place in which they were incurred and regardless of whether the liquidating company is foreign or Singapore-incorporated. The judge noted that this ring-fencing provision does not have an equivalent in English or Australian legislation and common law, but being statutory, the rule must apply until the legislation has been amended.

However, the judge went on to say that common law gives the Singapore court the discretion to disapply the liquidators' statutory obligations, provided that the disapplication is appropriate in the circumstances, and is consistent with justice and Singapore public policy. He derived support from English law, of which Singapore's insolvency framework is based.

In the House of Lords decision of Re HIH, Lord Hoffman supported the implementation of a single system distribution and held that a common-law discretion which exists separately from any statutory obligation could be used to advance the objective of co-operation between the English Courts and the courts of the principal liquidation. The discretion to disapply an obligation under English insolvency law can be exercised as long as the English court is of the view that the foreign jurisdiction is more appropriate for the purpose of dealing with all the insolvency.

The judge in Beluga Chartering asserted that this discretion exists in Singapore's law as well. He emphasised that the ancillary liquidation doctrine is neither expressly nor impliedly contained in Singapore's Companies Act, but is "nevertheless a long-standing part of Singapore law" as it has been introduced by earlier cases.

The outcome of Beluga Chartering

Despite concluding that the court could decide to allow the liquidators to transmit the asset abroad without first repaying its judgment debts, the judge declined to do so.

His reason for the decision was that although it was clear that Beluga Chartering did not carry on business in Singapore, it "came as close as a foreign company can to doing so without actually doing so". Beluga Chartering's wholly-owned Singapore subsidiaries had promoted its business and played a part in obtaining the contract that yielded the asset in question. Furthermore, the bulk of the judgment debts were owed to these Singapore subsidiaries for payment of their employees' salaries. Since Beluga Chartering had obtained the asset through the efforts of the Singapore subsidiaries, it would not have been consistent with justice and public policy to transfer the assets to be distributed globally. Given the severe degree of Beluga Chartering's insolvency, the Singapore judgment creditors would have been substantially prejudiced if the asset was divided equally with creditors worldwide while the global creditors would not have been substantially enriched.

Therefore, although the usual position is that where the foreign company does not carry on business in Singapore the Court is likely to disapply the ring-fencing provision, Beluga Chartering's exceptional facts mean that the statutory position should be upheld.

Conclusion

Despite its outcome, Beluga Chartering indicates that the inclination of the Singapore Courts is to co-operate with foreign jurisdictions in order to ensure that an insolvent company's assets are distributed under a single system. However, as was the case in Beluga Chartering, the Court may decide that such a transmission is inconsistent with justice and Singapore public policy.

This position perhaps can be contrasted with the more territorial approach in Rubin, a 2012 decision of the English Supreme Court, where the Court declined to give effect to a judgment of a foreign court that was aimed at recovering assets transferred by an insolvent company in that jurisdiction to the UK. The judge in Beluga Chartering did not consider Rubin in his assessment of Re HIH, so it remains to be seen whether the willingness to co-operate, as can be seen in Beluga Chartering's interpretation of section 377, will extend to enforcing foreign judgments in the context of cross-border insolvency.