

International Corporate Rescue



Published by:

Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

www.chasecambria.com

Annual Subscriptions:

Subscription prices 2017 (6 issues)

Print or electronic access:

EUR 730.00 / USD 890.00 / GBP 520.00

VAT will be charged on online subscriptions.

For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

© 2020 Chase Cambria Company (Publishing) Ltd

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, mechanical, photocopying, recording or otherwise, without prior permission of the publishers.

Permission to photocopy must be obtained from the copyright owner.
Please apply to: permissions@chasecambria.com

The information and opinions provided on the contents of the journal was prepared by the author/s and not necessarily represent those of the members of the Editorial Board or of Chase Cambria Company (Publishing) Ltd. Any error or omission is exclusively attributable to the author/s. The content provided is for general purposes only and should neither be considered legal, financial and/or economic advice or opinion nor an offer to sell, or a solicitation of an offer to buy the securities or instruments mentioned or described herein. Neither the Editorial Board nor Chase Cambria Company (Publishing) Ltd are responsible for investment decisions made on the basis of any such published information. The Editorial Board and Chase Cambria Company (Publishing) Ltd specifically disclaims any liability as to information contained in the journal.

H&C S Holdings Pte Limited: Singapore's New Moratorium Goes Global

Jennifer Meech, Barrister, Enterprise Chambers, London, UK

Synopsis

In *H&C S Holdings Pte Limited* [2019] EWHC 1459, the High Court of England and Wales recognised a moratorium under section 211B of the Republic of Singapore's Companies Act ('the Singapore Companies Act') as foreign main proceedings. It is understood that this is the first time that the moratorium had been recognised internationally. The judgment does not go into detail as to why it was appropriate to recognise the proceedings, this article sets out in more detail the evidence and submissions that were before the court.

The Singaporean regime

In 2017 sections 211A to 211J were added to the Singapore Companies Act following the recommendations of two law reform committees. Section 211B provides that where a company has proposed a compromise or arrangement to its creditors, or where it intends to do so, moratorium relief can be sought from the court. The filing of an application creates an automatic moratorium which lasts either until the hearing of the application or for 30 days, whichever is shorter.

On hearing the application for a moratorium the court must be satisfied that the applicant has made, or undertakes to make, an application to court to convene a meeting of creditors, or an application to approve a compromise or arrangement already agreed. The court must further be satisfied that the application is made in good faith. This latter requirement was made clear in the leading case on the section *Re IM Skaugen KE and other matters* [2018] SGHC 259.

The Singaporean proceedings

H&C S Holdings Pte Limited ('H&C') is a Singaporean registered company primarily engaged in the trading of commodities within the iron and steel industry. It suffered trading difficulties in the second half of 2018 due in part to the economic slowdown in the PRC.

On 21 January 2019 H&C, which intended to propose a scheme to its creditors, issued a summons in

the Singaporean Court seeking a moratorium under section 211B. The filing of that summons created an automatic moratorium as set out above.

H&C's application came before Justice Vidodh Coomaraswamy in the Singaporean Court on 19 and 20 February 2019. Despite opposition from several creditors the Judge granted H&C a six-month moratorium.

The English application

H&C made an application for recognition of the moratorium under the Cross Border Insolvency Regulations 2006 ('CBIR') on 28 February 2019. Recognition in England was necessary because there were two arbitrations ongoing in the jurisdiction between H&C and Glencore International AG ('Glencore').

Glencore, which had been one of the creditors who unsuccessfully opposed the moratorium in Singapore, were served with the recognition application. At the final hearing, before ICC Judge Jones, Glencore did not support or oppose the recognition application but sought to vary the automatic stay.

Article 15 of the Model Law on Cross-Border Insolvency ('the Model Law') (as it appears at schedule 1 to the CBIR) provides that a foreign representative can apply for recognition of foreign proceedings. Foreign representatives are usually office holders but the lack of an office holder is no bar to recognition. In *Re 19 Entertainment Ltd* [2016] EWHC 1545 the company itself had applied for and received recognition for proceedings under chapter 11 of the US Bankruptcy Code ('Chapter 11').

Article 2 of the Model Law defines foreign proceeding as 'a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.' As the Singaporean moratorium had not previously been recognised it was necessary for ICC Judge Jones to be addressed on whether it satisfied Article 2. Detailed written submissions were provided before the hearing.

Reference was made to the Guide to Enactment and interpretation of the UNICITRAL Model Law 2014 ('the Guide of Enactment') which is referred to within the CBIR. Further, as the CBIR and the Guide of Enactment make clear, harmonised application is important and so several US cases were referred to.

ICC Judge Jones considered evidence from Patrick Ang of Raja & Tann Singapore LLP regarding the nature of the Singaporean moratorium. The submissions made on behalf of H&C followed the sub-headings set out in the Guide of Enactment.

Collective proceeding for the purpose of reorganisation or liquidation

The Guide of Enactment makes it clear that the definition of 'collective proceeding' is broad but that the Model Law is not intended to be used merely as a collection device for a particular creditor or group of creditors. Mr Ang's evidence was that sections 211A to 211J only applied to a compromise between a company and its creditors and not, for example, to an arrangement between a company and its members.

The court was referred to the fact that Chapter 11 proceedings have previously been recognised in England and English schemes of arrangement are regularly recognised in the United States.

The Guide of Enactment makes clear that interim proceedings can be recognised.

Pursuant to a law relating to insolvency

Mr Ang's evidence was that the moratorium is 'an integral part of the Singapore insolvency regime', indeed section 211B and the sections around it are within the definition of 'Singapore insolvency law' within the Singaporean Companies Act.

Under the control or supervision of a foreign court

The Guide of Enactment provides (at paragraph 74) that the supervision 'may be potential rather than actual' and that it could be control exercised by an insolvency representative where that person is subject to the control or supervision of the court. The Guide

also provides that expedited proceedings, at which the court exercises some control at a late stage, are not to be excluded.

Mr Ang's evidence was that the Singapore Court would need to approve the convening of a creditors' meeting and would have to approve any scheme. He also explained that every proof of debt received for the purpose of voting in the meeting would be adjudicated upon by a person appointed by the court to serve as chairman. If there is any dispute between chairman and creditor this is adjudicated by another court appointee.

Variation of the moratorium

ICC Judge Jones, following *Re 19 Entertainment* extended the automatic moratorium so that it reflected a moratorium in an English administration. However, the Judge also varied the moratorium to allow the arbitrators in one of the arbitrations against Glencore to publish its award where the final hearing had already taken place.

Comment

There was little difficulty in getting the Singaporean moratorium recognised: it was not opposed by Glencore who appeared by counsel and ICC Judge Jones did not require detailed oral submissions. This case is clear authority (albeit at first instance) that the Singaporean moratorium should be recognised in England and Wales. Indeed, as the Model Law should be applied harmoniously it may well be used as authority elsewhere.

However, it should be noted that other jurisdictions have not welcomed the moratorium so warmly. In *CW Advanced Technologies Limited* [2018] HKCFI 1705 Harris J stated (obiter) that the moratorium should not be recognised in Hong Kong. Indeed, that had been the position argued by the *amicus curiae*. As Hong Kong has not adopted the Model Law, the question before the court was different but one of the court's concerns was whether the Singaporean moratorium was in fact a collective insolvency proceeding. It may be that that point can be reargued in the future.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, US Corner, Economists' Outlook and Case Review Section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

International Corporate Rescue has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
- Identify and assess potential problems and avoid costly mistakes.

Editor-in-Chief: Mark Fennessy, Proskauer Rose LLP, London

Emanuella Agostinelli, Curtis, Mallet-Prevost, Colt & Mosle LLP, Milan; Scott Atkins, Norton Rose Fulbright, Sydney; James Bennett, KPMG, London; Prof. Ashley Braganza, Brunel University London, Uxbridge; Dan Butters, Deloitte, London; Geoff Carton-Kelly, FRP Advisory, London; Gillian Carty, Shepherd and Wedderburn, Edinburgh; Charlotte Cooke, South Square, London; Katharina Crinson, Freshfields Bruckhaus Deringer, London; Hon. Robert D. Drain, United States Bankruptcy Court, Southern District of New York; Simon Edel, EY, London; Matthew Kersey, Russell McVeagh, Auckland; Prof. Ioannis Kokkoris, Queen Mary, University of London; Professor John Lowry, University College London, London; Neil Lupton, Walkers, Cayman Islands; Nigel Meeson QC, Conyers Dill Pearson, Hong Kong; Professor Riz Mokal, South Square, London; Mathew Newman, Ogier, Guernsey; Karen O'Flynn, Clayton Utz, Sydney; Professor Rodrigo Olivares-Caminal, Queen Mary, University of London; Christian Pilkington, White & Case LLP, London; Susan Prevezer QC, Quinn Emanuel Urquhart Oliver & Hedges LLP, London; Professor Arad Reisberg, Brunel University, London; Jeremy Richmond, Quadrant Chambers, London; Daniel Schwarzmann, PricewaterhouseCoopers, London; The Hon. Mr Justice Richard Snowden, Royal Courts of Justice, London; Anker Sørensen, De Gaulle Fleurance & Associés, Paris; Kathleen Stephansen, New York; Dr Artur Swierczok, CMS Hasche Sigle, Frankfurt; Meiyen Tan, Oon & Bazul, Singapore; Stephen Taylor, Isonomy Limited, London; Richard Tett, Freshfields Bruckhaus Deringer, London; The Hon. Mr Justice William Trower QC, Royal Courts of Justice, London; Mahesh Uttamchandani, The World Bank, Washington, DC; Robert van Galen, NautaDutilh, Amsterdam; Miguel Virgós, Uría & Menéndez, Madrid; L. Viswanathan, Cyril Amarchand Mangaldas, New Delhi; Prof. em. Bob Wessels, University of Leiden, Leiden, the Netherlands; Maja Zerjal, Proskauer Rose, New York; Dr Haizheng Zhang, Beijing Foreign Studies University, Beijing.

For more information about *International Corporate Rescue*, please visit www.chasecambria.com