IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 240

Originating Application No 400 of 2023

In the matter of Part 11 and Section 252 of the Insolvency, Restructuring and Dissolution Act 2018

And

In the matter of Genesis Asia Pacific Pte Ltd

Between

(1) Genesis Asia Pacific Pte Ltd (in its capacity as a foreign representative for Genesis Asia Pacific Pte Ltd)
(2) Genesis Asia Pacific Pte Ltd

… *Applicants*

Originating Application No 402 of 2023

In the matter of Part 11 and Section 252 of the Insolvency, Restructuring and Dissolution Act 2018

And

In the matter of Genesis Global Holdco, LLC

Between

(1) Genesis Asia Pacific Pte Ltd (in its capacity as a foreign representative for Genesis Global Holdco, LLC)
(2) Genesis Global Holdco, LLC

… *Applicants*

Originating Application No 403 of 2023

In the matter of Part 11 and Section 252 of the Insolvency, Restructuring and Dissolution Act 2018

And

In the matter of Genesis Global Capital, LLC

Between

(1) Genesis Asia Pacific Pte Ltd (in its capacity as a foreign representative for Genesis Global Capital, LLC)
(2) Genesis Global Capital, LLC

… *Applicants*

JUDGMENT

[Insolvency Law — Cross-border insolvency — Recognition of foreign representative — Whether corporate entity can be foreign representative]
[Insolvency Law — Cross-border insolvency — Recognition of foreign representative — Whether debtor can be its own foreign representative]

Re Genesis Asia Pacific Pte Ltd (in its capacity as a foreign representative for Genesis Asia Pte Ltd) and another and other matters

[2023] SGHC 240

General Division of the High Court — Originating Applications Nos 400, 402 and 403 of 2023
Aedit Abdullah J
6, 17 July 2023

31 August 2023 Judgment reserved.

Aedit Abdullah J:

1 These are the originating applications of three companies, namely Genesis Asia Pacific Pte Ltd ("GAP"), Genesis Global Holdco, LLC ("Holdco") and Genesis Global Capital, LLC ("GGC") (collectively, the "Applicant Companies"), seeking, among others, recognition of their respective proceedings ("Chapter 11 Proceedings") under Chapter 11 of the United States Bankruptcy Code 11 USC (US) (1978) ("US Bankruptcy Code") as foreign main proceedings, or alternatively as foreign non-main proceedings. These applications are made pursuant to the United Nations Commission on International Trade Law ("UNICTRAL") Model Law on Cross-Border Insolvency (30 May 1997) ("the Model Law"), which is enacted in Singapore by virtue of s 252(1) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA") and which is found in the Third Schedule to the IRDA. Significantly, the Applicant Companies also seek recognition of GAP's

appointment as the "foreign representative" of each of the Applicant Companies within the meaning of Art 2(*i*) of the Model Law. The purpose of obtaining recognition in these forms is to head off enforcement actions so that the Chapter 11 Proceedings are not disrupted in Singapore.

2 After hearing the Applicant Companies on 6 July 2023, I granted recognition of the Chapter 11 Proceedings as foreign main proceedings in respect of Holdco and GGC but as foreign non-main proceedings in respect of GAP. However, at that time, I reserved my decision in respect of GAP's appointment as the foreign representative of the Applicant Companies. I directed the Applicant Companies to make further submissions on the issues of whether: (a) a corporate entity such as GAP should be recognised as a "foreign representative" under the Model Law, and (b) whether a debtor such as GAP can be its own "foreign representative" for the purposes of the Model Law. In most recognition applications in Singapore relating to Chapter 11 proceedings thus far, the foreign representatives appointed by the US courts have usually been natural persons to whom the Singapore court can look should there be issues, and who can be held to the same or similar standards as a Singapore insolvency practitioner.

3 Having considered the further submissions, I am satisfied that the Model Law as implemented in Singapore permits such recognition to be granted. Accordingly, I grant recognition of GAP's appointment as the foreign representative of each of the Applicant Companies within the meaning of Art 2(*i*) of the Model Law, subject to a reporting requirement. This judgment is published to record these orders and my brief reasons, for the assistance of counsel and practitioners in this area in Singapore.

Brief background

4 By way of background, which I will state in brief, the Applicant Companies are involved in cryptocurrency dealings. Holdco and GGT provide lending and borrowing, spot trading, derivatives and custody services for both digital assets and fiat currencies. Holdco and GGC were incorporated in Delaware, while GAP was incorporated in Singapore as a wholly-owned subsidiary of Holdco.

5 Following the recent turmoil in the cryptocurrency market, including the collapse of FTX, as well as the restructuring of various other players, the Applicant Companies commenced the Chapter 11 Proceedings seeking to restructure their businesses. An order was made on 26 January 2023 by the US Bankruptcy Court for the Southern District of New York ("US Bankruptcy Court") authorising GAP to act as the foreign representative of the Applicant Companies to seek recognition of the Chapter 11 Proceedings, to request the High Court to lend assistance to the US Bankruptcy Court in protecting the Applicant Companies' property, and to seek any other appropriate relief that the High Court deems just and proper.

6 It was against this context that the present applications arose to, among others, protect the Applicant Companies from proceedings or other enforcement steps in Singapore that may derail the Chapter 11 Proceedings.

My decision: GAP is recognised as a foreign representative of the Applicant Companies

7 As I mentioned above, the only question that remained in the present application is whether I should grant recognition of the US Bankruptcy Court's appointment of GAP as the foreign representative of the Applicant Companies.

In granting recognition, I accordingly answer in the affirmative the two specific issues of whether: (a) a corporate entity such as GAP should be recognised as a "foreign representative" under the Model Law, and (b) whether a debtor such as GAP can be its own "foreign representative" for the purposes of the Model Law. Additionally, while there may be some concerns about the possibility of conflict of interest if GAP is recognised to be its own foreign representative, I conclude that the appropriate course is to grant recognition but to impose a reporting requirement to ensure that conflict does not arise.

A corporate entity can be a foreign representative

8 I turn first to explain my reasons for concluding that a corporate entity such as GAP can be recognised as a "foreign representative" for the purposes of Art 2(*i*) of the Model Law.

9 As a preliminary point, I note that insolvency practitioners appointed in Singapore are natural persons, even if, as is often the case, they are partners in firm or officers of a corporation. Indeed, s 50(1) of the IRDA provides that an individual is not eligible to be granted, or to hold or continue to hold, an insolvency practitioner's licence unless the individual is a "qualified person" or is for the time being exempted under s 50(2) of the IRDA by the Minister. Assuming, in general cases, that no exemption by the Minister applies under s 50(2), a "qualified person" is exhaustively defined in s 50(3) of the IRDA as meaning any person who: is a solicitor; a public accountant; a chartered accountant within the meaning given by s 2(1) of the Accounting and Corporate Regulatory Act 2004 (2020 Rev Ed); or possesses such other qualifications that the Minister may prescribe by order in the *Gazette*. As the specific categories of persons listed in s 50(3) relate to functions which may only be held by natural

persons, it is clear that only natural persons are "qualified person[s]" who can be insolvency practitioners.

10 Nevertheless, the fact that corporate entities are not appointed as insolvency practitioners, who perform functions including those of a liquidator or judicial manager, in the local context is not reason in itself not to recognise corporate entities as foreign representatives in an application that is connected with foreign proceedings. Rather, the first port-of-call should be the text of the Model Law, first read in its proper context within the other provisions of the Model Law and the IRDA, and thereafter against the legislative purpose or object of the statute (see the Court of Appeal decision of *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [37]).

11 Accordingly, having regard to the text of the statute and its context, Art 2(*i*) of the Model Law defines a "foreign representative" as follows:

> "foreign representative" means a **person or body**, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding
>
> [emphasis added]

It is noteworthy that a foreign representative is defined to mean a "person" or "body". As these words are not defined in the Model Law or the IRDA, recourse may be had to the general definitions found in s 2(1) of the Interpretation Act 1965 (2020 Rev Ed), which applies in every written law enacted before, on or after 28 December 1965. Section 2(1) defines "person" to include "any company or association or *body of persons*, *corporate* or unincorporate" [emphasis added]. Applying this definition to Art 2(*i*) of the Model Law, this would mean that the meaning of a "person" would be broad enough to include corporate entities. Moreover, unlike s 50(3) of the IRDA which imposes

requirements on the qualifications of insolvency practitioners which may only be fulfilled by natural persons, there is also nothing in the Model Law or the IRDA that suggests that the term "person or body" in Art 2(*i*) should be interpreted to only refer to natural persons. Indeed, the references to "foreign representative" in the Model Law are mostly found in the context of the foreign representative's right to apply to the High Court for various forms of assistance (see, for eg, Arts 9, 10, 15, and 20), and there is no reason why a corporate entity would not be able to perform these functions.

12 Furthermore, as the Applicant Companies point out, the word "persons" are used elsewhere in the Model Law to refer to what must be corporate entities. For instance, paragraph (*c*) of the Preamble to the Model Law refers to the "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested *persons, including the debtor*" [emphasis added]. Similarly, Art 22(1) of the Model Law provides that "[i]n granting or denying relief … the Court must be satisfied that the interests of the creditors … and other interested *persons, including if appropriate the debtor*, are adequately protected" [emphasis added]. As "debtor" is defined in the Art 2(*c*) of the Model Law to mean a corporation, it must follow that the definition of "person" in Art 2(*i*) includes corporate entities.

13 This conclusion is further reinforced by the extraneous materials relating to the Model Law. As I observed in *Re Tantleff, Alan* [2023] 3 SLR 250 at [30] ("*Re Tantleff*"), s 252(2)(*b*) of the IRDA allows the court, in interpreting the Model Law as enacted in Singapore, to have regard to the "Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency", UNCITRAL, 30th Sess, UN Doc A/CN.9/442 (1997) ("the UNCITRAL 1997 Guide"). In the same paragraph of *Re Tantleff*, I also observed that the UNCITRAL 1997 Guide was revised in 2013 and that the court may refer to the revised guide – *ie*, the

"UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation" (2013) <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> (accessed 22 August 2023) ("the UNCITRAL 2013 Guide") – in areas where the UNCITRAL 1997 Guide is silent, although the UNCITRAL 1997 Guide prevails in the event of conflict between the two guides (see also the High Court decision of *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] 4 SLR 1343 at [37]).

14 As regards these two documents, the UNCITRAL 1997 Guide is silent on whether a corporate entity can be recognised as a "foreign representative" for the purposes of Art 2(*i*) of the Model Law. However, the UNCITRAL 2013 Guide does expressly state that a foreign representative under the Model Law can be the debtor-in-possession itself, and I reproduce the relevant paragraph as follows:

> 86. … The fact of appointment of the foreign representative in the foreign proceeding to act in either or both of those capacities is sufficient for the purposes of the Model Law; article 15 requires either a certified copy of the decision appointing the representative, a certificate affirming the appointment or other evidence of that appointment that is acceptable to the receiving court. ***The definition in subparagraph (d)* [*ie*, Art 2(*i*) of the Model Law] *is sufficiently broad to include debtors who remain in possession after the commencement of insolvency proceedings***.
>
> [emphasis added]

From the extract above, if debtors-in-possession, which are corporate entities, are included within the definition of Art 2(*i*), then it must be necessarily inferred that the term "person or body" in Art 2(*i*) includes corporate entities.

15 Indeed, foreign decisions have granted recognition of a corporate entity as a foreign representative. On this point, the "Digest of Case Law on the UNCITRAL Model Law on Cross-Border Insolvency" (2021) published by UNCITRAL ("the Digest") states at p 46 that while the Model Law does not define the words "person" or "body" in its definition of a "foreign representative", courts have found that a foreign representative can be a firm of accountants, on the basis that a firm can constitute a "person" (see the US Bankruptcy Court decision of *In re Petition of Ernst & Young Inc, as Receiver of Klytie's Developments, Inc, Klyties' Developments, LLC, Efrat Friedman, and Hidai Friedman, Debtors in a Foreign Proceeding* (2008) 383 BR 773 at 777). Similarly, a "body" has been interpreted as meaning "an artificial person created by a legal authority" (see the US Bankruptcy Court decision of *In re Oversight and Control Commission of Avánzit, SA, Debtor* (2008) 385 BR 525 at 540). For the reasons above, I respectfully agree with the approach in those decisions and hold that the definition of a "person" or "body" under Art 2(*i*) of the Model Law is sufficiently broad to include corporate entities such as GAP.

16 Nevertheless, this is not to say that there are no practical challenges that arise from the recognition of corporate entities as foreign representatives. Accountability for actions is best laid at the feet of specific individuals. In contrast, entities are not readily held accountable: their governance structure has to be considered, and the influence or power of individuals weighed in determining what can be ascribed to them rather than to others or the entity as a whole. Punishment for infraction is likely to be less of a deterrence since it is dissipated through the entity's structure. In that sense, responsibility becomes diffused. It might therefore be more difficult to deter misconduct on the part of corporate foreign representatives as compared to foreign representatives who are natural persons.

17 However, while such problems may exist, it may be possible to mitigate the risk of improper conduct by non-individuals by close monitoring and readiness to intervene by the courts. The possibility of misconduct, whether intentional or otherwise, and how accountability should be imposed, can thus be addressed by the court according to the circumstances of each case, and does not appear to be a general reason to reject a corporate entity as a recognised foreign representative.

A debtor can be its own foreign representative

18 I turn now to the second issue, which is whether a debtor such as GAP can be its own foreign representative for the purposes of the Model Law. While the position of an individual in such cases may need to be canvassed in other jurisdictions, it does not arise in the present applications as the local enactment of the Model Law only applies to corporations (see Art 2(*c*) of the Model Law, where a "debtor" is defined to only include corporations).

19 The issue in the present applications arises because a corporate entity wearing the two hats of being a foreign representative on one hand, and concurrently being the subject of the foreign proceedings on the other, potentially faces issues of conflict between its interests as a debtor and its duties as a foreign representative to act in the interest of the creditors. In other words, the issue is whether the applicant corporation can be expected to act in the interests of the creditors across jurisdictions.

20 The question of conflict was considered in the Digest, as well as in the US Bankruptcy Court decision of *In re Cenargo International, PLC, et al, Debtors* (2003) 294 BR 571 at 598, where Judge Robert D Drain noted that the definition of a "foreign representative" was carefully constructed to include a

debtor-in-possession as a "body" authorised to administer a proceeding relating to insolvency (see also Jay Lawrence Westbrook, "Multinational Enterprises in General Default" 76 Am Bankr LJ 1 at 13). In the same vein, the US Bankruptcy Court also observed in *In re: Sergey Petrovich Poymanov, Debtor in a Foreign Proceeding* (2017) 571 BR 24 at 35 that there is no requirement that the foreign representative satisfy a disinterested test or be free from conflict of interest. In interpreting § 101(24) of the US Bankruptcy Code, which defines a "foreign representative" and which is materially similar to Art 2(*i*) of the Model Law, the court reasoned that the text of § 101(24) was not ambiguous on this point, and that it would be inappropriate for the court to read any additional requirements into that provision. I respectfully agree with these decisions and can do no better than to observe that the UNCITRAL 2013 Guide confirms this approach at paragraph 86, which states that the definition of a "foreign representative" is "sufficiently broad to include debtors who remain in possession after the commencement of insolvency proceedings" (see [14] above). This makes clear that while there might be some conflict of interest in a debtor being its own foreign representative, the Model Law does not prevent such a result.

21 This conclusion is further reinforced when one considers the operation of the debtor-in-possession regime in the IRDA, which is broadly similar to the debtor-in-possession regime in Chapter 11 Proceedings. In this regard, the regime under the IRDA does not require the controller of a company to be an independent person before reliefs similar to those available under the Model Law can be granted. A company may be protected by a moratorium under s 64(1) of the IRDA even if it is not under the control of a specified person who is an independent party. Instead, the company would usually remain in the control of its pre-restructuring directors and shareholders. Any control is exerted

by the court, but even then, the power is not all that broad, being limited to the largely blunt instrument of either extending or declining to extend the moratorium under s 64(7) of the IRDA.

22 As such, this shows that a choice was made by the legislature in Singapore to permit companies to undergo restructuring while allowing their management to retain control, and without requiring the intervention of an independent party, similar to an administrator or judicial manager, who would owe duties as an officer appointed by the court. Given this adoption of a debtor-in-possession framework domestic restructuring under the IRDA, I can see no reason for refusing to give effect to a debtor-in-possession arrangement instituted by foreign proceedings. In other words, that there is no apparent policy against the recognition of a foreign company as its own foreign representative for the purposes of the Model Law.

23 Be that as it may, requirements may be imposed to manage the risk of conflicting interests. These risks can be addressed by a reporting regime by letter, at least for this case. The foreign representative should periodically update the court on the progress of its restructuring activities and disclose any developments that have affected, or have a real prospect of affecting, the interests of the creditors in Singapore. This will enable the court to monitor the impact of the restructuring activities in Singapore, and consider whether any intervention or restriction is necessary. If need be, the court may withdraw its assistance. To my mind, this balances the need for international cooperation between courts involved in cases of cross-border insolvency, against the risk of a conflict between the foreign representative's interests and its duty to act in its creditors' interests.

Conclusion

24 The application will thus be granted. Directions will be given for a further hearing to settle the orders, including the laying down of the reporting requirements.

Aedit Abdullah
Judge of the High Court

Alexander Lawrence Yeo, Jo Tay Yu Xi and Yeoh Tze Ning (Allen & Gledhill LLP) for the applicants.