An analysis of the judgment of the High Court of the Republic of Singapore in the matter of Ascentra Holdings, Inc. (in Official Liquidation), its interpretation of "*a law relating to insolvency*", and its possible consequences for the recognition of Cayman Islands liquidations.

Nienke Lillington

(5606 words)

An analysis of the judgment of the High Court of the Republic of Singapore in the matter of Ascentra Holdings, Inc. (in Official Liquidation), its interpretation of "*a law relating to insolvency*", and its possible consequences for the recognition of Cayman Islands liquidations.

1 Introduction

1.1 This paper reflects on the recent judgment of the Honourable Justice Vinodh Coomaraswamy in the High Court of the Republic of Singapore In the matter of Ascentra Holdings, Inc. (in Official Liquidation) [2023] SGHC 82 (the "**Judgment**"). In the Judgment, the learned Judge considers the meaning of the words "*a law relating to insolvency*" in the context of an application by the Joint Official Liquidators ("**JOLs**") of Ascentra Holdings, Inc. (in Official Liquidation) ("**Ascentra**") for the recognition in Singapore of Ascentra's liquidation (a liquidation pursuant to Cayman Islands law), as foreign main proceedings. The Judgment, in which Ascentra's application was refused, will have considerable consequences for the recognition of Cayman Islands liquidations in Singapore, and potentially has wide-ranging consequences for countries similarly operating a system based on the UNCITRAL Model Law on Cross-Border Insolvency (the "**Model Law**").

2 Background

2.1 Ascentra is an exempted company, incorporated under the laws of the Cayman Islands. Prior to its liquidation, Ascentra was engaged in the sale of health and beauty products and computer communication software, mainly for the Asian market. Ascentra has multiple subsidiaries in various jurisdictions, including an entity incorporated in Singapore.

2.2 Ascentra's liquidation proceedings were commenced as a voluntary liquidation in the Cayman Islands on 1 June 2021, pursuant to a resolution

passed by its shareholders.[1] Pursuant to section 124(1) of the Cayman Islands Companies Act (as amended) (the "**Cayman Companies Act**"), and Order 15, rule 1(1) of the Cayman Islands Companies Winding Up Rules, 2018 (the "**CWR**"), a voluntary liquidator is obliged to apply to the Grand Court for an order that the liquidation be continued under the supervision of the Court, unless the directors of the company make a "*declaration of solvency*" within 28 days of the commencement of the voluntary liquidation. A declaration of solvency is to be made on the basis of a cash flow test. As none of the directors of Ascentra made a declaration of solvency the voluntary liquidator applied for Ascentra's liquidation to be brought under the supervision of the Grand Court.

2.3 Subsequent to a Supervision Order being made (and the company therefore entering official liquidation), a liquidator appointed in the Cayman Islands is required to summarily determine whether (in his opinion) the company should be regarded as solvent, insolvent or of doubtful solvency.[2] A solvency determination is made on a balance sheet test. In the case of Ascentra, the JOLs determined that it was solvent (the "**Solvency Determination**"), and a certificate was accordingly filed at Court. A solvency determination may be changed at any time if a liquidator is of the view that the original determination is no longer justified.[3] As a matter of Cayman Islands law the solvency determination has important practical consequences for the liquidation, e.g. it affects whether the liquidation committee should consist of the company's creditors or its contributories.[4]

2.4 By originating summons of 6 January 2022 filed in Singapore's High Court, the JOLs sought recognition of Ascentra's liquidation in Singapore, as a "foreign main proceeding" within the meaning of article 2(f) of the Model

[1] See also: section 117 of the Cayman Islands Companies Act (as amended).
[2] CWR: O. 8, r. 1(1).
[3] CWR: O. 8, r. 1(2).
[4] In re Herald Fund SPC, Cause No. FSD 27 of 2013 (Grand Court of the Cayman Islands, unreported) ("**Re Herald Fund SPC**"), para. 3.

Law as adopted in Singapore by way of Part 11 and the Third Schedule to the Insolvency, Restructuring and Dissolution Act 2018 (No. 40 of 2018) ("**IRDA**").[5] The originating summons (the "**Recognition Application**") was heard on 25 March 2022 and 27 May 2022, and following an *ex tempore* judgment of the High Court (on 27 May 2022), the Judgment was handed down on 3 April 2023.

3 The Judgment

3.1 Judge Coomaraswamy refused the Recognition Application on the basis that Ascentra's liquidation does not fall within the definition of "*foreign proceedings*" in the meaning of the Model Law, as adapted in article 2(h) of the Third Schedule of the IRDA.

3.2 Article 17 of the Third Schedule provides that "*proceedings must be recognised if – (a) it is a foreign proceeding within the meaning of Article 2(h)*" (emphasis added) of the Third Schedule. Article 2(h) of the Third Schedule in turn defines "*foreign proceeding*" as "*a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation*". Consequently, the elements which need to be present under Singapore law for liquidation proceedings to be recognised are the same as in art. 2(a) of the Model Law, namely, that:

(a) The proceeding must involve creditors collectively;

(b) The proceeding must have its basis in a law relating to insolvency or adjustment of debt (summarily referred to as "*a law relating to insolvency*");

[5] The Third Schedule of the IRDA (the "**Third Schedule**") sets out Singapore's adaptation of the Model Law.

(c) The court must exercise control or supervision of the property and affairs of the debtor in the proceedings; and

(d) The purpose of the proceeding must be the debtor's reorganisation or liquidation.[6]

3.3 In re Ascentra it was common ground between the parties, and the Judge agreed, that only the second element was in issue; i.e. whether Ascentra's liquidation was pursuant to "*a law relating to insolvency*", and the Judge committed to taking a purposive approach to the interpretation of the term.[7]

3.4 In reviewing the Recognition Application, the Judge considered: (i) the ordinary meaning of the words "*a law relating to insolvency*"; (ii) the purpose and intent of the Model Law on the basis of UNCITRAL's preparatory records and guidance; and (iii) the interpretation of the term "*foreign proceedings*" in international case law.

(A) The ordinary meaning of art. 2(h) of the Third Schedule of the IRDA

3.5 In considering the ordinary meaning of the words "*a law relating to insolvency*", the Judge started by examining the meaning of "*insolvency*". The Judge found that, as a matter of Singapore law, a company is deemed insolvent if it is unable to pay its debts as they fall due at present *and* into the reasonably near future (which he considered to be the next 12 months). Insofar as it would be necessary to consider the meaning of insolvency in the foreign proceedings, the Judge concluded (without the benefit of expert evidence on Cayman Islands law) that there is no material difference between the concept of insolvency under Cayman law and Singapore law;

[6] In the matter of Ascentra Holdings, Inc. (in Official Liquidation) [2023] SGHC 82 ("**In re Ascentra**"), para. 22; "*UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2013)*", para. 66.
[7] In re Ascentra, para. 28.

and that the statutory tests for insolvency are the same as between the two jurisdictions.[8]

3.6 The Judge subsequently considered the meaning of the word "*law*", which he concluded could also include judge-made law and which, in any event, included the Cayman Companies Act.[9]

3.7 Finally, the Judge considered the meaning of "*relating to*". The Judge found that simply because provisions in relation to liquidation could be found in a law, such as the Cayman Companies Act, this should not lead to the conclusion that, therefore, the entirety of the Cayman Companies Act should be deemed a law "relating to" insolvency. The Judge considered that approach would lead to a subordination of substance over form, whereby proceedings entirely unrelated to the liquidation of companies could be deemed to be proceedings "relating to" insolvency.[10] He consequently found that, just because a foreign proceeding is commenced under a body of rules which are located in a statute that also governs insolvency generally, is insufficient to designate such a proceeding as taking place pursuant to "a law relating to insolvency".[11]

3.8 The Judge went on to consider the **purpose** of the Model Law.[12]

(B) The purpose and intent of the Model Law on the basis of UNCITRAL records and documents

3.9 The Judge found that the Model Law "was conceived to advance the principle of modified universalism", based on the principle that "national

[8] In re Ascentra, paras. 43 to 52.
[9] Ibid., paras. 53 to 57.
[10] The Judge gave the example that, until July 2020, corporate insolvencies in Singapore were governed by the Companies Act (2006 Rev Ed), which act allowed a shareholder to seek relief from the court on the ground that the affairs of a company were being conducted oppressively. In re Ascentra, paras. 60 and 61.
[11] In re Ascentra, paras. 58 to 69.
[12] In this context, it is helpful to note that section 252 of the IRDA gives the Model Law the force of law in Singapore, in the form in which it appears in the Third Schedule to the IRDA.

courts should … strive to administer the estate of an insolvent company in cooperation with the courts in the country of the principal liquidation, to ensure that all of the company's assets are distributed to its creditors under a single system of distribution."[13] Judge Coomarawasmy found that "construing 'law relating to insolvency' as including laws governing the liquidation of a solvent company is not necessary to promote the purpose of the Third Schedule",[14] and in relation to Ascentra that "[t]he purposes of the Model Law are in no way engaged when recognition is sought of a foreign proceeding involving a company which is neither insolvent nor in severe financial distress, ie a solvent company such as Ascentra. None of the concerns or risks which arise in the case of a company which is insolvent or in severe financial distress are even remotely present when a solvent company goes into liquidation. … the assets of the company will, by definition, suffice to pay all creditors in full … . There is simply no justification for imposing an automatic moratorium on actions against a company under Art 20 of the Model Law."[15]

3.10 The Judge continued to consider the **intent** of the Model Law by looking at the UNCITRAL Working Group reports[16] (the "**Reports**") and the UNCITRAL Model Law on Cross-Border Insolvency Guides of 1997 (the "**1997 Guide**") and 2013 (the "**2013 Guide**").[17]

---

[13] In re Ascentra, para. 74.
[14] Ibid., para. 79.
[15] In re Ascentra, para. 78.
[16] "*Cross-Border Insolvency: Report on UNCITRAL-INSOL Colloquium on Cross-Border Insolvency*", UNCITRAL, Colloquium on Cross-Border Insolvency, 27th Sess., UN Doc A/CN.9/398 (1994); "*Cross-Border Insolvency: Report on UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency*", UNCITRAL, First Multinational Judicial Colloquium on Cross-Border Insolvency, 28th Sess., UN Doc A/CN.9/413 (1995); "*Report of the Working Group on Insolvency Law on the work of its eighteenth session*", UNCITRAL, Working Group V: Insolvency Law, 18th Sess., UN Doc A/CN.9/419 (1995); "*Report of the Working Group on Insolvency Law on the work of the nineteenth session*", UNCITRAL, Working Group V: Insolvency Law, 19th Sess., UN Doc A/CN.9/422 (1996); "*Report of the Working Group on Insolvency Law on the work of the twenty-first session*", UNCITRAL, Working Group V: Insolvency Law, 21st Sess., UN Doc A/CN.9/435 (1997). In re Ascentra, paras. 81 to 84.
[17] "*Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*", 30th Sess., UN Doc A/CN.9/442 (1997) (the "**1997 Guide**"); "*UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2013)*" (the "**2013 Guide**").

3.11 He concluded on the basis of the Reports of the UNCITRAL Working Group that the definition of "foreign proceeding" was to be interpreted broadly simply to avoid "a proceeding commenced under a law that was functionally applicable to companies that are insolvent or in severe financial distress from falling outside the scope of the Model Law …. It was not intended to bring a solvent liquidation within the Model Law."[18]

3.12 The Judge also attached particular significance to the 2013 Guide's discussion of the term "insolvency", in relation to which the 2013 Guides states that: "the word 'insolvency' relates to various types of collective proceedings commenced with respect to debtors that are in severe financial distress or insolvent. … A judicial or administrative proceeding to wind up a solvent entity where the goal is to dissolve the entity … are not insolvency proceedings within the scope of the Model Law",[19] and "pursuant to a law relating to insolvency" in relation to which the 2013 Guide states that:

3.13 "This formulation is used in the Model Law to acknowledge the fact that liquidation and reorganization might be conducted under law that is not labelled as insolvency law (e.g. company law), but which nevertheless deals with or addresses insolvency or severe financial distress. The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained and irrespective of whether the law that contained the rules related exclusively to insolvency. A simple proceeding for a solvent legal entity that does not seek to restructure the financial affairs of the entity, but rather to dissolve its legal status, is likely not one pursuant to a law relating to insolvency or sever financial distress."[20]

[18] In re Ascentra, para. 85.
[19] 2013 Guide, para. 48; In re Ascentra, para. 94.
[20] 2013 Guide, para. 73; In re Ascentra, para. 98.

3.14 Both the Reports and the 1997 Guide and 2013 Guide led the Judge to conclude that the Model Law was only intended to apply to companies that are either insolvent or in severe financial distress.[21] In the circumstances, he did not accept Ascentra's submission that the meaning of "foreign proceeding" in the Third Schedule of the IRDA was intended to encompass solvent liquidations, where the company is neither insolvent nor in severe financial distress.

(C) International Case Law

3.15 Judge Coomaraswamy considered authorities from four jurisdictions, namely: Singapore, the United States, England and Australia.

3.16 The Judge first considered United Securities Sdn Bhd (in receivership and liquidation) a.anor. v United Overseas Bank[22] ("**United Securities**"); a Singapore judgment. As one of the first cases to be heard after the promulgation of the Third Schedule of the IRDA, the Judge in United Securities was careful to set out the various criteria for obtaining recognition. However, the judgment in United Securities did not include a discussion of the solvency position of the company. The applicant relied on this lacuna to argue that the solvency position of the company was irrelevant to the test under article 2(h) of the Third Schedule. However, Judge Coomaraswamy concluded that the considerations in relation to "*foreign proceeding*" in United Securities were *obiter dicta*, but that (in any event) the lack of discussion had been simply due to the fact that the company's insolvency was not in dispute.

3.17 The Court also discussed the (older) decision in Re Chow Cho Poon (Private) Ltd ("**Re Chow**"),[23] in which the Judge had concluded that "*the whole of the winding up provision [in the Companies Act] … might be classified as 'a law*

[21] In re Ascentra, para. 99.
[22] United Securities Sdn Bhd (in receivership and liquidation) a.anor. v United Overseas Bank [2021] 2 SLR 950.
[23] Re Chow Cho Poon (Private) Ltd (2011) 80 NSWLR 507.

relating to insolvency', even though the particular winding up was ordered on the just and equitable ground alone and, so far as this court has been told, without any finding (express or implied) of insolvency."[24] Judge Coomaraswamy declined to follow Re Chow, on the basis that the judgment itself recognised that its interpretation of "*law relating to insolvency*" was contrary to the ordinary meaning of the words.[25]

3.18 Moving to the US authorities, Ascentra relied heavily on the decision in Re Betcorp Limited (in Liquidation) ("**Re Betcorp**"),[26] a 2009 decision of the Nevada Bankruptcy Court, and argued that the US authorities should be given great weight by the Singapore High Court in circumstances where the United States' definition of "*foreign proceedings*" (in section 101(23) of Chapter 15 of the US Bankruptcy Code 11 USC (US) (1978)) had been adopted in article 2(h) of the Third Schedule of the IRDA. Summarily this meant that the definition of "*foreign proceedings*" includes the words "*adjustment of debt*"; a term not found in the Model Law.

3.19 In Re Betcorp, the shareholders of an Australian company resolved to liquidate the company as its gambling operations in the United States had become unworkable due to the passage of a new law. The company was solvent. The application for recognition of the foreign proceedings in the United States occurred in order to prevent litigation, instigated in the United States, from continuing. Judge Markell held that the terms "*law related to insolvency or the adjustment of debts*" did not require the company to be either insolvent or to be contemplating using law to adjust any debts.[27]

[24] Re Chow, para. 51; In re Ascentra, para. 156.
[25] In re Ascentra, para. 158.
[26] Re Betcorp Limited (in Liquidation) (2009) 400 BR 266.
[27] Ibid., para. 282.

3.20 Relying on Re Agrokor DD and in the matter of the Cross-Border Insolvency Regulations 2006 ("**Re Agrokor**"),[28] and Judge Matthew's finding therein that he should not "*slavishly follow the decisions of other countries' courts where they are based on different adaptations of the Model Law or do not accord with the preparatory materials … that led to the [Cross-Border Insolvency Regulations 2006]*",[29] Judge Coomaraswamy declined to allocate special weight to Re Betcorp.

3.21 Instead, he considered that Judge Markell, of the Nevada Bankruptcy Court, had come to the wrong conclusion on the basis that he had misinterpreted the intention of Australia's Parliament, following its adaptation of the Model Law, in concluding that voluntary liquidations fell within the Model Law. Judge Coomaraswamy found accordingly on the basis of consultation papers which had been drafted for Australia's Parliament at a time when they were merely gathering views on the adoption of the Model Law.[30]

3.22 The Judge also sought to distinguish further authorities relied upon by the applicant, which followed Re Betcorp, such as Re ABC Learning Centres Ltd ("**Re ABC**")[31] and Re Manley Toys Limited ("**Re Manley Toys**").[32]

3.23 In Re ABC, the US Bankruptcy Court found that a debtor company's voluntary winding up fell within the definition of "*a law relating to insolvency*" on the basis that the winding up had been initiated pursuant to the Australian Corporations Act, which contains numerous provisions addressing corporate insolvency and the adjustment of corporate debt. Judge Coomaraswamy distinguished that judgment on the basis that the company's board of directors was of the view that the company was "*likely to become insolvent*", thereby "*suggesting that the debtor company, while*

[28] Re Agrokor DD and in the matter of the Cross-Border Insolvency Regulations 2006 [2017] All ER (D) 83 (Nov).
[29] Re Agrokor, para. 36; In re Ascentra, para. 117.
[30] In re Ascentra, para. 135.
[31] Re ABC Learning Centres Ltd (2010) 445 BR 318.
[32] Re Manley Toys Limited 580 BR 632 (NJ US Bankruptcy Court, 2018).

not insolvent, was nonetheless in severe financial distress."[33] Similarly, in Re Manley Toys, the debtor company's voluntary liquidation in Hong Kong had been recognised by the New Jersey Bankruptcy Court because the liquidation had been commenced under the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap 32) (HK), which sets out the framework for liquidating a company. The Judge, again, distinguished the decision on the basis that "*the debtor company went into voluntary liquidation because it was facing numerous legal actions and was also financially troubled*".[34]

3.24 Judge Coomaraswamy instead preferred to follow the decision of the English courts in Re Sturgeon Central Asia Balanced Fund (in Liquidation) Carter v Bailey a.anor. (as foreign representatives of Sturgeon Central Asia Balanced Fund Ltd) ("**Re Sturgeon**")[35]

3.25 In Re Sturgeon, a Bermuda company was wound up on just and equitable grounds under section 161 of the Companies Act 1981 (Bermuda) following a "*breakdown in the basis on which the [c]ompany was set up and investors were being denied their rights*".[36] On appeal Judge Briggs concluded that the law had taken a "*wrong turn*" in Re Betcorp, and that "*[i]t would be contrary to the stated purpose and object of the Model Law to interpret "foreign proceeding" to include solvent debtors and more particularly include actions that are subject to a law relating to insolvency but have the purpose of producing a return to members not creditors*."[37] Judge Briggs considered it necessary to ask whether a company was either insolvent or in severe financial distress.[38]

[33] In re Ascentra, para. 126.
[34] Ibid., para. 127.
[35] Re Sturgeon Central Asia Balanced Fund (in Liquidation) Carter v Bailey a.anor. (as foreign representatives of Sturgeon Central Asia Balanced Fund Ltd [2020] EWHC 123 (Ch).
[36] Re Sturgeon, para. 9.
[37] Ibid., para. 117.
[38] Ibid., para. 121.

3.26 Judge Coomaraswamy found that the interpretation of the Model Law, as applied in Re Sturgeon, was followed in Re Agrokor where the Judge found that "*[i]t is in fact the insolvency, actual or threatened, of one company which triggers the proceeding, and the law under which the proceeding is brought is accordingly in principle a law relating to insolvency for this purpose*."[39]

3.27 As a final step, Judge Coomaraswamy considered sections 116(c) and 117(1)(a) of the Cayman Companies Act as the basis upon which Ascentra's voluntary winding up had been commenced following a shareholders' resolution, in conjunction with section 124 of the Cayman Companies Act, which provision requires a voluntary liquidator to make an application for a supervision order in the absence of a declaration of solvency signed by the directors of a company. The Judge considered that those provisions *cannot* apply to companies that are insolvent or in severe financial distress; that they only apply to solvent companies.[40] He also concluded that Ascentra's liquidation would result in Ascentra's creditors being paid in full, with surplus to be returned to its shareholders.[41]

4 Analysis; Consequence for Cayman Liquidations

4.1 Judge Coomaraswamy's Judgment is interesting in circumstances where the United States Bankruptcy Court of the Southern District of New York (the "**US Bankruptcy Court**") *has* recognised Ascentra's liquidation in the Cayman Islands as a foreign main proceeding, and the JOLs as foreign representatives. The US Bankruptcy Court granted a recognition order on 6 December 2021, following the JOLs' petition for recognition on 27 October 2021.

[39] Re Agrokor, para. 73.
[40] In re Ascentra, paras. 162 to 165.
[41] Ibid., para. 167.

4.2 The Judgment is therefore to be contrasted with the prior recognition of Ascentra's liquidation by the US Bankruptcy Court, but is furthermore significant for multiple additional reasons, including the Judge's apparent suggestions that a company's solvency should be considered as a factor in recognition applications under the Model Law, and the consequences of the Judgment for the recognition of Cayman Islands liquidations in other jurisdictions which apply the Model Law.

4.3 In relation to the recognition of Cayman Islands liquidations, it is important to be aware that Part V of the Cayman Companies Act is the Cayman Islands' only primary legislation dealing with the insolvency of companies. It is indisputably a law relating to insolvency. Part V of the Cayman Companies Act sets out the different ways in which a company may be liquidated. There are, under Cayman Islands law, three ways in which a company may be wound up, namely: (i) a compulsory liquidation, via court order (section 90(a) of the Cayman Companies Act); (ii) a voluntary liquidation, including by special resolution (section 90(b) of the Cayman Companies Act);[42] or (iii) under the supervision of the court (section 90(c) of the Cayman Companies Act). The Judge's finding that a liquidation commenced pursuant to sections 116(c) and 117(1)(a) (a voluntary liquidation by way of special resolution), and continued as an official liquidation pursuant to section 124 of the Cayman Companies Act, can only apply to solvent liquidations, is wrong as a matter of Cayman Islands law.

4.4 In any event, where a Supervision Order is granted, following a voluntary liquidation, the Supervision Order takes effect in the same manner as though the Court had made a compulsory winding up order (see sections 132 and 133 of the Cayman Companies Act). Nevertheless despite such liquidations taking place under the exact same law and provisions, Judge

[42] Sections 90(b)(i) and 116(c) of the Cayman Companies Act.

Coomaraswamy found that one liquidation does fall within "*a law relating to insolvency*" and the other does not.

4.5 In order to come to that conclusion, the Judge appears to have looked beyond the law (pursuant to which the liquidation was granted) to the actual solvency status of the company concerned, on the basis of his conclusion that the Model Law was never intended to apply to solvent companies.[43] In relation to Ascentra, Judge Coomaraswamy came to the conclusion that it was solvent. The Judge came to that conclusion despite the fact that the Supervision Order was granted because the directors refused to sign a declaration of *solvency* (which is *prima facie* evidence that the company is cash-flow insolvent),[44] and despite the JOLs reserving the right to change their Solvency Determination from time to time.

4.6 The Judge has not addressed the practical difficulties of his decision, in terms of the consequences of a change in the solvency determination. Could a company reapply for recognition and be granted recognition at that stage? What happens when a company is recognised following an 'insolvent' solvency determination, but where that status is subsequently changed by the official liquidator to 'solvent'? Does the company lose its recognition?

4.7 Whatever the answer may be, the analysis adopted by Judge Coomaraswamy appears contrary to the intention of the UNCITRAL Working Group on Cross-Border Insolvency (the "**Working Group**") in its preparation of the Model Law. It was, for example, expressly stated in the Report of the 18th session of the Working Group that "*the recognition provision should not place the recognizing court in the position of having to determine de novo whether the proceedings sought to be recognized in fact*

[43] In re Ascentra, para. 3.
[44] In the matter of OVS Capital Management (Cayman) Limited [2017 (1) CILR 232].

involved an insolvency" (emphasis original).[45] It is to be noted that the working draft of the definition of "foreign proceedings" resulting from the work of the 18th session is very similar to the provision which was included in the Model Law. It was recorded that the definition of "foreign proceedings" should go to: "*insolvency proceedings in the broad sense, so as to cover both liquidation and reorganization proceedings*",[46] and that including the words "law relating to insolvency", "*would permit the recognizing court to avoid examining de novo whether the proceeding was an insolvency proceeding*" (emphasis original).[47] The aim to achieve a broad interpretation of "foreign proceedings" was reiterated in the Report of the 19th session of the Working Group which confirmed that the definition should cover both liquidations and reorganisations, generally.[48]

4.8 However, it is evident from the 2013 Guide that mixed signals are being sent in circumstances where the Guidance narrows down the scope of the Model Law to companies that experience "*severe financial distress or insolvency*".[49] The words "severe financial distress" do not feature in the Model Law, and are themselves open to interpretation, particularly in circumstances where the 2013 Guide also confirms that the Model Law covers "*laws that prevent or address … financial distress*" (emphasis added).[50]

4.9 The Re Betcorp line of authorities advocate for a broad interpretation of the words "law relating to insolvency", as also promoted in the 2013 Guide,[51] and is based on the acceptance that "*a law could be a law relating to insolvency if insolvency was one of the grounds on which a proceeding*

[45] "*Report of the Working Group on Insolvency Law on the work of its eighteenth session*", UNCITRAL, Working Group V: Insolvency Law, 18th Sess., UN Doc A/CN.9/419 (1995), para. 30.
[46] Ibid., para. 96.
[47] Ibid., para. 106.
[48] UNCITRAL, Working Group V: Insolvency Law, 19th Sess, UN Doc A/CN.9/422 (1996), para. 48.
[49] 2013 Guide, e.g. para. 1.
[50] Ibid., para. 67.
[51] Ibid., para. 73.

could be brought".[52] Judge Matthews in Re Agrokor followed that line of thinking stating that: "*It is in fact the insolvency, actual or threatened, of one company which triggers the proceeding, and the law under which the proceeding is brought is accordingly in principle a law relating to insolvency for this purpose*" (emphasis added).[53] The more recent case of Re Global Cord Blood Corporation ("**Re Global Cord**"),[54] a decision of the US Bankruptcy Court for the Southern District of New York followed Re Betcorp. In Re Global Cord joint provisional liquidators ("**JPLs**") had been appointed, but no winding-up proceedings had been commenced (although the Court had authorised the JPLs to do so. Nevertheless, the Court found that the proceedings were pursuant to a law relating to insolvency and that "*[t]he relevant test is not whether the currently pending proceeding concerns insolvency or adjustment of debtors, or even whether the current proceeding in some sense relates to those objectives, but rather whether the proceeding is being brought under a "law" that "relat[es] to" insolvency or adjustment of debt*."[55] In this case the Cayman proceedings did not receive recognition, but it was on the basis of a lack of "collective proceedings" and a "purpose of reorganization or liquidation".

4.10 As a significant number of both solvent and insolvent liquidations in the Cayman Islands proceed under the same legal provisions, it is unclear how the Judgment (and the approach to "*foreign proceedings*" embodied therein) may impact future applications for recognition of Cayman Islands liquidations.

4.11 The Judgment has potentially far reaching consequences internationally too, as jurisdictions which have adopted the Model Law tend to look at the case law of similar jurisdictions to guide their adjudication of applications.

[52] Re Agrokor, para. 73.
[53] Re Agrokor, para. 73. See also: Re Stanford International Bank Ltd [2010] EWCA Civ 137, at paras. 15 and 24.
[54] Re Global Cord Blood Corporation, United States Bankruptcy Court of the Southern District of New York, Case No. 22-11347 (DSJ).
[55] Ibid., p. 22.

There is now a significant body of case law in favour of a broad interpretation of "*law relating to insolvency*" (following Re Betcorp) as well as a more restrictive body of case law following Re Sturgeon.

4.12 Judge Coomaraswamy appears to have relied heavily on the specific fact pattern of the insolvencies following the Re Betcorp jurisprudence in order to distinguish authorities which were aligned with Re Betcorp. By way of example, in relation to Re ABC he noted that the directors had indicated that the company was "*likely to become insolvent*". However, it was clearly not at the time of the recognition application.[56] Similarly, in Re Manley Toys, the Judge allocated weight to the fact that the company was "*financially troubled*" even though it was not insolvent.[57] These passages in the judgments betray an inconsistency. Insofar as the Judge is suggesting that those cases were pursuant to "*a law relating to insolvency*" as the entities involved were 'close to' insolvency or 'likely to become' insolvent, the question arises as to where the threshold lies. When is the likelihood of insolvency of an entity sufficient to result in its liquidation falling within a law relating to insolvency?

4.13 It appears that Judge Coomaraswamy would consider a foreign liquidation to fall within the definition of "foreign proceeding" in circumstances where the debtor company is either insolvent already or likely to become insolvent within the next 12 months.[58] However, liquidations are often volatile, and it may not necessarily be easy to predict how the liquidation will unfold.[59] The uncertainty which results is exactly what the Model Law was aiming to prevent.

[56] In re Ascentra, para. 126.
[57] Ibid., para. 127.
[58] Ibid., para. 46.
[59] This is why Order 8, Rule 1(2) of the CWR allows for a solvency determination to be changed by the official liquidation at any time. See also Mr Justice Jones judgment in Re Herald Fund SPC, where he explained at paragraph 3 that: "*Inevitably, liquidators are called upon to make such determinations at a very early stage when it may well be apparent that the final outcome of the liquidation will turn upon the resolution of a myriad of different contingencies*".

5 Conclusion

5.1 The Judgment In re Ascentra sets an unworkable precedent by requiring the Singapore Courts to conduct a review of the solvency of an entity, in the form of an unclear financial threshold, before being able to assess the merits of its recognition application. The requirement for such a solvency test will create uncertainty both in relation to the recognition of Cayman Islands liquidations, but also potentially in relation to a myriad of foreign proceedings. The vaguely described test is furthermore contrary to the aim of the Model Law of creating certainty and encouraging international cooperation without the need for a *de novo* consideration of solvency of the entity concerned or whether the proceedings sought to be recognised are insolvency proceedings.

5.2 However, Judge Coomaraswamy may be forgiven for the conclusions he came to in light of the mixed signals sent by the various reports of the Working Group as well as the 1997 Guide and 2013 Guide. Whether a broad approach to the words "a law relating to insolvency", or a more narrow interpretation, wins the day on the global stage remains to be seen.

5.3 The Judgment is currently the subject of an appeal. It will be interesting to see what the Singapore Court of Appeal's assessment will be of the issues under consideration.

BIBLIOGRAPHY

Legislation:

- Cayman Islands Companies Act (2023 Revision), Part V.
- Cayman Islands Companies Winding Up Rules, 2018, Order 8.
- Singapore Insolvency, Restructuring and Dissolution Act 2018 (No. 40 of 2018), Third Schedule.

Authorities:

- Re Agrokor DD and in the matter of the Cross-Border Insolvency Regulations 2006 [2017] All ER (D) 83 (Nov).
- Re Betcorp Limited (in Liquidation) (2009) 400 BR 266.
- Re ABC Learning Centres Ltd (2010) 445 BR 318.
- Re Chow Cho Poon (Private) Ltd (2011) 80 NSWLR 507.
- ANZ National Bank Ltd v Sheahan and Lock [2013] 1 NZLR 674.
- In re Herald Fund SPC, Cause No. FSD 27 of 2013 (Grand Court of the Cayman Islands, unreported).
- In the matter of OVS Capital Management (Cayman) Limited [2017 (1) CILR 232].
- Re Manley Toys Limited 580 BR 632 (NJ US Bankruptcy Court, 2018).
- In re Sturgeon Central Asia Balanced Fund Ltd (in liquidation) [2019] BW LR 1809; [2019] EWHC 1215 (Ch).
- Re Sturgeon Central Asia Balanced Fund (in Liquidation) Carter v Bailey a.anor. (as foreign representatives of Sturgeon Central Asia Balanced Fund Ltd [2020] EWHC 123 (Ch).
- United Securities Sdn Bhd (in receivership and liquidation) a.anor. v United Overseas Bank [2021] 2 SLR 950.
- Re Global Cord Blood Corporation, United States Bankruptcy Court of the Southern District of New York, Case No. 22-11347 (DSJ).
- In the matter of Ascentra Holdings, Inc. (in Official Liquidation) [2023] SGHC 82

UNCITRAL Materials:

- "*Cross-Border Insolvency: Report on UNCITRAL-INSOL Colloquium on Cross-Border Insolvency*", UNCITRAL, Colloquium on Cross-Border Insolvency, 27th Sess., UN Doc A/CN.9/398 (1994);

- "*Cross-Border Insolvency: Report on UNCITRAL-INSOL Judicial Colloquium on Cross-Border Insolvency*", UNCITRAL, First Multinational Judicial Colloquium on Cross-Border Insolvency, 28th Sess., UN Doc A/CN.9/413 (1995);

- "*Report of the Working Group on Insolvency Law on the work of its eighteenth session*", UNCITRAL, Working Group V: Insolvency Law, 18th Sess., UN Doc A/CN.9/419 (1995);

- "*Report of the Working Group on Insolvency Law on the work of the nineteenth session*", UNCITRAL, Working Group V: Insolvency Law, 19th Sess., UN Doc A/CN.9/422 (1996);

- "*Report of the Working Group on Insolvency Law on the work of the twenty-first session*", UNCITRAL, Working Group V: Insolvency Law, 21st Sess., UN Doc A/CN.9/435 (1997)

- "*Cross-Border Insolvency: Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*", 30th Sess., UN Doc A/CN.9/442 (1997)

- "*UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2013)*"