CHAPTER 19

MACAU INSOLVENCY LAW AND CROSS-BORDER INSOLVENCY ISSUES

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I BANKRUPTCY PROCEDURES IN MACAU: AN OVERVIEW

Macau insolvency law is divided into bankruptcy and insolvency laws *stricto sensu*. The former applies to merchants, irrespective of the fact that they are individuals or corporations; the latter applies to non-merchant persons (eg liberal professionals and nonprofessionals). Therefore, Macau law kept the traditional division between specific proceedings considering the quality of the person involved. The main difference being the conditions that trigger the insolvency: if the debtor is a merchant, bankruptcy amounts to a situation of economic impotence, meaning that he is unable to pay his debts when they fall due; if the debtor is a non-merchant, insolvency represents a negative economic situation, that is the debtor assets are insufficient to cover his debts.[1]

The rationale for the different conditions to consider an insolvency of a merchant or a non-merchant is based on the assumption that even if a merchant has more debts than assets, but is able to fulfil his obligations in due time because he can raise credit in the market. Therefore, the market understands him as a trustful debtor. That is the reason why there is no need for the intervention of public authorities that could trigger a situation, where the merchant would be put into a kind of quarantine preventing him getting credit and therefore precipitating an insolvency situation. As long as the money rolls, there is no cause for concern. Supposedly, that would not be the case with a non-merchant and therefore the law satisfies itself with a negative financial situation.[2] Nevertheless, the insolvency procedures are quite similar in both cases since article 1187 of the Civil Procedure

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1 Carlos Alberto da Mota Pinto *Teoria geral do direito civil* (3rd ed, Coimbra Editora, 1986) at 246; Augusto Teixeira Garcia *Consequências da extinção dos efeitos da falência sobre a situação jurídica do falido* (BFDUM, Ano XIII, vol. 26 2008) at 329.

2 Mota Pinto, above n 1.

Code[3] considers as applicable to the insolvency of non-merchants, the rules set forth in the previous sections on bankruptcy. A merchant is considered bankrupt if he cannot pay his debts as they fall due (article 1043[4]).

A bankruptcy procedure starts either by the presentation of the debtor to the court or by a claim brought by any of its creditors or by the Public Prosecutor. The debtor has the duty to present himself to the court within 15 days of failing to pay one or more debts that, considering the amount or the circumstances in which default took place, evidence his/her incapacity to pay his debts as they fall due (article 1047/1). Therefore the requisites are not two but rather one: The incapacity to pay debts as they fall due (article 1043). This incapacity should obviously be demonstrated and the law assumes that even the default of a single debt could be enough to prove that incapacity.[5] However, it should be reiterated that bankruptcy does not equal a deficit in the assets of the debtor: he may well have assets enough to cover all his liabilities but be unable to pay on due time his debts. Therefore, the debtor will be bankrupted.[6]

Any creditor or the Public Prosecutor can bring an insolvency proceeding as long as it can be ascertained from any of the situations recognised in article 1082 (eg absence from the business without anyone representing the debtor). Following the presentation of the debtor with indication of all of its creditors, as well as the amounts of the debts involved, the court will notify all known creditors. After that, the creditors meeting will be called where preventive measures will be discussed in order to prevent the bankruptcy either by an agreement to abdicate part of the credits (eg 75%) or to postpone the due date of the credits or both. This is called a "*concordata*". Creditors can also agree to incorporate a private company formed with the assets of the debtor in which each creditor will have a share proportional to his credits against the debtor. This is called a creditor's agreement. Both agreements that will prevent a judgment of bankruptcy have to be approved by the

3 The discipline of insolvency is contained in the Civil Procedure Code of 1999, Book V, Chapter III, articles 1043 through 1194.

4 All legal rules mentioned without identification of the law to which they belong are from the Civil Procedure Code, approved by Decree-Law n. 55/99/M of 5th October, entered into force on 1 November 1999.

5 All in all, it seems that there is no significant difference between articles 1043 (as of 1082/a) and section 327 of HK Companies Ordinance that considers as reason for an involuntarily winding up of a company its inability to pay its debts (with a different understanding), see Susan Kendall *Foreign lenders welcome more protection in China* IFLR.com 1 January 2005 <www.iflr.com/Article/1978503/Foreign-lenders-welcome-more-protection-in-China.html>.

6 Jorge Manuel Coutinho de Abreu *Curso de direito commercial* (vol. I, Almedina, 1998) at 104; Kendal seems to be of a different understanding.

court. If the court is not satisfied with them, it will reject them and bankruptcy will be declared (article 1081). Normally, however, the court will follow the creditor's decision.

Once the insolvency proceedings begin, the court immediately appoints a bankruptcy administrator (article 1049/1, a); 1050) who will help and supervise the debtor both in running his business as well as managing his other assets (article 1051/1). To help the bankruptcy administrator in the fulfilment of his tasks, the court nominates some of the creditors (article 1051/2). The bankruptcy administrator can propose to the court any measure that he thinks fit to prevent any act that might turn out to be detrimental to the creditor's interests, mainly to prevent asset stripping (article 1051). Therefore, it cannot be said that Macau Law does not allow for preventive measures before a bankruptcy is declared. What the court cannot do is appoint a bankruptcy administrator if a bankruptcy proceedings has not started against the debtor.

In the aftermath of Zhu Kuan Group insolvency, the mother company being incorporated in Macau, the bankruptcy proceedings should have been filed in Macau. However winding-up proceedings were started in Hong Kong. The reason for that, according to some authors,[7] was that Macau, unlike Hong Kong, lacks a "pre-liquidation asset protection. Instead Macau relies heavily on post-liquidation claw-back measures which would give ZKG ample time to strip assets to whatever extent possible." When these authors refer to pre-liquidation asset protection, they mean the possibility to appoint a provisional liquidator as under s 193 of the Companies Ordinance (Hong Kong). However, the appointment of a provisional liquidator depends on whether a winding-up proceeding has been filed and jeopardy to the assets has been demonstrated, as stated by the High Court of Hong Kong in the *Legend* case.[8]

As we saw, it cannot be said that Macau lacks a pre-liquidation assets protection. Once a bankruptcy proceeding has been filed, the court will appoint a bankruptcy administrator, who can take the necessary steps to ensure that creditor's interests are not put into jeopardy. He will not substitute the debtor in running his business and managing his other assets but he will supervise him, which normally and as long as the task is performed with the required diligence will prevent most of the unpleasant surprises.

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7 Kendall, above n 5; Vincent A. Pace "The Bankruptcy of the Zhu Kuan Group: A Case Study of Cross-Border Insolvency Litigation against A Chinese State-Owned Enterprise" (2006) 27 U. Pa. J. Int 'l Econ. L at 565.

8 *Re Legend International Resorts Ltd* [2006] HKCA 74.

Furthermore, if bankruptcy proceedings are brought by creditors under any of the situations indicated in article 1082, an interim measure can be sought for as long as the bankruptcy proceedings are not filed. So if the situation upon which the creditors base their petition of bankruptcy is the one referred in article 108/d) (assets stripping), until they file for bankruptcy they can ask the court for an interim measure that prevents the debtor performing any transaction over his assets. If the court finds the allegations to be true, it will grant the petitioned measure. So it does not seem that Macau law does not have the tools to deal with such situations, nor that it "relies heavily on claw-back measures".

In cases when those bankruptcy preventive agreements (eg *concordata*) cannot be reached, the court will declare the bankruptcy. This will have effects on the debtor's situation both personally as well as patrimonial. All his assets present and future will be apprehended, constituting the bankruptcy estate, in order to be liquidated in favour of the creditors. The debtor will not be allowed to conduct business unless authorised by the court on the proposal of the administrator of the bankruptcy. All contracts will be terminated unless the administrator decides otherwise.

Once the bankruptcy has been declared, the debtor can no longer conclude any act that might have consequences against the assets of the bankrupt estate. Furthermore, some acts concluded before the judgment of bankruptcy was passed can be resolved and others can be impugned according to civil law (articles 600 and 601 Civil Code[9]), but the law presumes bad faith for that purposes (*Actio Pauliana*), easing the way for the bankruptcy and liquidation proceedings (articles 1104).

The administrator will collect all monies owed to the bankrupted and liquidate all assets. After that, payments will be made to creditors proportionally to its credit. Secured creditors will be paid first. If the assets of the bankrupted are not enough to satisfy the bankruptcy costs, the court will declare the insolvency proceedings extinguished. The debtor will be unable to conduct business for five years. However, if the court finds that the debtor has dealt in the course of business with normal diligence, it can declare immediately the extinction of the bankruptcy against the debtor (article 1183).

The measures that creditors can agree upon, which will prevent bankruptcy (*concordata e acordo de credores*) can also be agreed after a bankruptcy has been declared (article 1175). In this case those agreements will stay the bankruptcy and eventually will finish the proceedings (article 1183/1, a)).

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9 Approved by Decree-Law n. 39/99/M of 3 August; entered into force on 1 November 1999.

II CROSS-BORDER INSOLVENCY ISSUES

There are no rules specifically aimed at dealing with cross-border insolvency. Nevertheless, some rules do have consequences or suppose cross-border insolvency proceedings. Macau insolvency rules are dependent on the principle of territoriality. Hence foreign insolvency proceedings will not have effects in Macau, unless the foreign judgment is recognized according to the relevant rules (article 1199 ff). Nevertheless, even if a foreign insolvency judgment is recognized and executed in Macau, creditors in Macau are not to be affected. In fact, there are provisions both in banking law (section 25) and in the Commercial Code (section 83) to ensure creditors in Macau will not be worse off. Both rules have the same goal: a foreign insolvency proceeding will only be able to affect the debtors assets (representation) in Macau, after all Macau creditors have been paid. In fact, although according to Macau law, representations do not have legal personality and therefore are not a separate legal entity, the law does treat them in this respect as if they were in order to grant creditors in Macau a preference over the assets in Macau of the representation. However, not all assets in Macau of the debtor are under that provision, only those that are part or affected to the representation in Macau of the debtor. After all Macau creditors have been paid, the remaining assets can be used to satisfy the other debts of the bankrupt. When we speak of Macau creditors, this does not mean that the creditor has to be a resident rather the debt has its origin in Macau, regardless of the origin of the creditor.

These rules are aimed at protecting the creditors in Macau although the winding-up in Macau might be ancillary to the main foreign winding-up of the company. This is a consequence of a territoriality approach to insolvency and contrary to the universalist approach, according to which the insolvency should be a unitary process with only one set of proceedings recognized all over the world.[10] The said legal rules create their own separate insolvency proceedings to pay all Macau creditors from assets in Macau, although only the assets belonging to the representation in Macau. It is also contrary to the universality theory of insolvency, which says that an insolvency proceeding has worldwide effect over the assets of the insolvent company, wherever they might be found. In short, these rules create a ring-fencing of assets in favour of Macau creditors.

Critics against ring-fencing rules are well known, being mainly that they are not in line with modern insolvency theory; it is not possible to ring-fence assets that

10 Chan Sek Keong "Cross-Border Insolvency Issues affecting Singapore" (2011) 23 SAcLJ at 418.

can be moved easily out of the jurisdiction; it might invite reciprocal treatment by other jurisdictions, which may affect Macau assets invested abroad.[11]

Some[12] said that ring-fencing amounts to non-tariff trade barriers but this seems to overstate the case against the practice especially by countries with small economies. If this were to be true, which is that it amounted to trade barriers, those provisions would have already been repealed.[13] Actually ring-fencing works to the advantage or benefit of local creditors. But since these are those whose credits are born in Macau, it favours both residents as non-residents. Although ring-fencing amounts to a preference of local creditors (those whose credits are born in Macau) in face of foreign creditors (those whose credits are born outside Macau), local creditors somehow contributed to the assets of the insolvent company in Macau, whereas non-local creditors have not.[14]

Furthermore, it seems that ring-fencing, whether directly or indirectly, is a common practice. For instance, Singapore has ring-fencing rules since 1967 in the Company Law (section 377 (3) (c) Singapore Companies Act) and 1970 in the Banking Law (original section 56 and now sections 61-62A).[15] Even the UNCITRAL Model Law on Cross-Border Insolvency 1997 seems to be open to this kind of measure although indirectly. Considering that article 21(2) of the Model Law says: "Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in this State to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in this State are adequately protected." According to explanation of article 21(2) of the UNCITRAL Model law, it is said "the model law contains several safeguards designed to ensure the protection of local interests before assets are turned over to the foreign representative". Those

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11 Chan Sek Keong, above n 10, at 418, 423.

12 Singapore's Chief Justice Spigelman in his 2008 Address, according to Chan Sek Keong, above n 10, at 418.

13 Chan Sek Keong, above n 10, at 419.

14 Chan Sek Keong, above n 10, at 419.

15 Chan Sek Keong, above n 10, at 419. The Courts in Singapore have held this understanding in several cases (Chan Sek Keong, above n 10, at 425, 431). In *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd* [2013] 2 SLR 1035, however, the Singapore High Court held that the court had a discretion to disapply Section 377(3)(c) of the Companies Act. In what has been viewed as a shift from the territoriality approach to a universalism approach (Stamford Law Corporation, Cross-border insolvencies –Building blocks towards universalism, in Legal developments in Singapore (July 2014) <www.legal500.com/c/singapore/developments/27233>.

safeguards include the following: the general statement of the principle of protection of local interests in article 22, paragraph 1; the provision in article 21, paragraph 2, (the court should not authorize the turnover of assets until it is assured that the local creditor's interests are protected); article 22, paragraph 2 (the court may subject the relief that it grants to conditions it considers appropriate). The truth is that article 22, paragraph 1 does not mention, contrary to article 21, paragraph 2, the interests of local creditors rather the interests of creditors and other interested parties as well as the debtor. Paragraph 2 of article 22 seems on the other hand particularly suited for such measures of protection of the local creditors.

The USA has adopted the UNCITRAL Model Law on Cross-Border Insolvency. Nevertheless, section 1512 (b) of the US Bankruptcy Code provides that when recognition of a foreign proceeding has been granted, the court may entrust the distribution of the debtor`s assets in the US to the foreign representative "provided that the court is satisfied that the interests of the creditors in the United States are sufficiently protected."[16] Japan also has adopted the UNCITRAL Model Law on Cross-Border Insolvency. In articles 25 and 31 of its Law on Recognition of Foreign Proceedings, it provides that a foreign representative is only entitled to turning over assets to a foreign country after specific approval of the court and it must be satisfied that local creditors are not unfairly prejudiced before granting approval. This is considered by some as a considerable departure from article 21(2) of the Model Law[17].

Thus, the Macanese legal provisions that have been discussed earlier seem not to be in contradiction with the approach of the Model Law. Whether ring-fencing might invite retaliatory measures by other countries is something we cannot tell, but considering the said provisions of the UNCITRAL Model Law on Cross-Border Insolvency and the use that several member States have made of it, one would say that such a case would not be foreseeable.

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16 S. Chandra Mohan "Cross-Border Insolvency Problems: Is the UNCITRAL Model Law the Answer?" (2012) 21(3) International Insolvency Review at 213.

17 S. Chandra Mohan, above n 16, at 214.