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Foreign bank mergers, universal succession and the Singapore Banking Act

***Jacob Agam and another v BNP Paribas SA* [2017] SGCA(I) 01**

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In *Jacob Agam and another v BNP Paribas SA* [2017] SGCA(I) 01, the Singapore Court of Appeal delivered its first judgment for an appeal from the Singapore International Commercial Court. The Court of Appeal held that Section 55B of the Banking Act, Chapter 19 of Singapore (the "**Banking Act**") is permissive, not mandatory. Section 55B provides a method for the voluntary transfer of the business of a bank in Singapore (as defined in the Banking Act) but does not compel the bank to proceed under such method. In other words, a foreign bank which is licensed in Singapore is free to effect a merger under a foreign law (e.g. the laws of its jurisdiction of incorporation) and is not required to obtain the approval of the Singapore court for a voluntary transfer under Section 55B. Similarly, Section 14A of the Banking Act, which deals with mergers of a bank and its wholly-owned bank subsidiaries, is also permissive, not mandatory. Accordingly, a foreign bank is not required to proceed under Section 14A and seek the approval of the Minister and is free to effect a merger with its wholly-owned bank subsidiaries under a foreign law.

Introduction

On 18 May 2017, the Singapore Court of Appeal ("**Court of Appeal**") in *Jacob Agam and another v BNP Paribas SA* [2017] SGCA(I) 01 delivered its first judgment for an appeal from the Singapore International Commercial Court ("**SICC**"). The case involved the construction of certain provisions in the Banking Act relating to mergers

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and voluntary transfers of business of banks. The Court of Appeal upheld the decision of the SICC[1] and the decision provides useful guidance on the issue of whether a foreign bank merger is required to comply with certain provisions of the Banking Act.

Facts and decision

BNP Paribas Wealth Management ("**BNP WM**") was a bank incorporated in France and a wholly-owned subsidiary of BNP Paribas SA ("**BNPP**"). In 2010, BNP WM, acting out of its Singapore branch, advanced loans to certain companies owned by Jacob and Ruth Agam (the "**Appellants**") who also guaranteed the loans. The loans were not repaid in full at maturity and in November 2015, BNP WM commenced proceedings in the Singapore High Court for the recovery of approximately €30 million from the Appellants in their capacity as guarantors. In April 2016, the proceedings were transferred to the SICC.

In October 2016, BNP WM merged with BNPP pursuant to a merger agreement (the "**Merger Agreement**") governed by French law which provided for a merger pursuant to the French Commercial Code. As a result, BNP WM was dissolved and its assets and liabilities were transferred to BNPP under the doctrine of universal succession under French law. Accordingly, BNPP filed an application to be substituted for BNP WM in the SICC proceedings. The SICC ordered the substitution and the Appellants are appealing against the order.

The Court of Appeal considered a number of points raised by the appeal.

Subrogation

First, the Appellants argued that the use of the word "subrogation" (or, more accurately, the French term "*sera subrogée*") in the Merger Agreement suggests that BNPP is subrogated to the rights of BNP WM and can only sue in BNP WM's name. Since BNP WM no longer exists, there was no legal person with standing to sue the Appellants. The Court of Appeal disagreed. It held that, regardless of the meaning under French law,[2] the meaning of "subrogation" cannot be given the common law meaning because it would contradict the entire substance of the Merger Agreement. The Merger Agreement provided for the dissolution of BNP WM and the universal transfer of its assets and liabilities to BNPP. Therefore, it cannot be the case that the parties contemplated BNP WM to have to continue to exist for BNPP to enjoy the rights transferred to it. Furthermore, the concept of subrogation under common law does not extend to liabilities but the Merger Agreement clearly involves a "subrogation" to all assets and liabilities of BNP WM.

[1] In *BNP Paribas Wealth Management v Jacob Agam and another* [2017] SGHC(I) 2.
[2] There was no expert evidence on the meaning of "subrogation" under French law.

Section 55B of the Banking Act

Second, there was a question as to whether Section 55B is mandatory in nature. Section 55B relates to the voluntary transfers of the business of a bank in Singapore and it was introduced in 2007 to enhance the role of the Monetary Authority of Singapore ("**MAS**") in bank resolution by providing a means for private sector resolution. In the case of foreign banks licensed in Singapore, the transfer would relate to only its Singapore business (namely, the business "reflected in its books in Singapore in relation to its operations in Singapore"). However, Section 55B is not confined to transfers in a distress or insolvency scenario. For example, it has been used when banks "subsidiarise" – a recent example was the transfer by The Hongkong and Shanghai Banking Corporation Limited ("**HBAP**"), Singapore Branch of its retail banking and wealth management business to HSBC Bank (Singapore) Limited (a wholly-owned subsidiary of HBAP) in 2016 by way of a scheme under Sections 55B and 55C of the Banking Act.

In the present case, it is clear that Section 55B(1) will apply to a merger between BNP WM and BNPP because BNP WM being a foreign bank licensed in Singapore will be a "bank in Singapore". Section 55B(1) requires, among other things, the approval of the Singapore High Court if a transfer is effected thereunder. However, Section 55B(2) goes on to state that:

> "*Subsection (1) is without prejudice to the right of a bank to transfer the whole or any part of its business under any law*."

The Appellants argued that the words "without prejudice" indicates that a bank is not free to disregard the requirements under Section 55B(1) and that "any law" refers to Singapore law so the French law merger would not be covered by the saving provision in any event. The Appellants also advanced a number of policy reasons for a restrictive reading of the provision.

The Court of Appeal rejected the Appellant's arguments and held that Section 55B(2) is to be construed as being permissive. Section 55B(1) provides for a means of effecting a voluntary transfer of business but it is not intended to be the only means. Section 55B(2) makes that clear and there is a distinction between "any law" and "any written law". The latter refers to the Constitution and to Singapore legislation (*cf*: the Interpretation Act, Chapter 1 of Singapore) but the former is not so restricted and there is no reason to have to construe Section 55B(2) so restrictively.

Section 14A of the Banking Act

Finally, on the basis that "any law" refers to Singapore law, the Appellants submitted that because BNP WM did not proceed under Section 55B, the only other method of merger open to them was Section 14A of the Banking Act.

The Court of Appeal's pithy response was "That submission is incorrect.". Like Section 55B, the Court of Appeal held that Section 14A is permissive, not mandatory. Section 14A provides a mechanism for banks to merge with their wholly-owned bank subsidiaries but it does not compel a bank to choose this method.

Conclusions

This decision is welcome for a number of reasons. It is a "double first", being the first Court of Appeal decision for an appeal from the SICC and also the first decision providing guidance on Sections 14A and 55B of the Banking Act. It reflects a commercial and robust interpretation of Singapore legislation which will give market participants comfort that they have freedom to organise their commercial affairs and that their commercial arrangements will be recognised in Singapore.

Foreign banks operating in Singapore will also be relieved to know that corporate restructurings in their home jurisdiction, to the extent that it involves an entity with a Singapore branch that is licensed in Singapore, will be recognised by the local courts. Although it is customary to inform MAS of such business transfers, it does not imply that the approval of MAS or the Singapore courts will be required. In the present case, such notification was made and because BNP WM ceased to exist, the Singapore branch accordingly surrendered its banking licence in Singapore.

Second, it is also consistent with the recent decision in *JX Holdings Inc and another v Singapore Airlines Ltd*[3] where the Singapore High Court recognised the doctrine of universal succession in the context of a corporate restructuring of a Japanese company. In that case, a Japanese company ("**X**") underwent a series of corporate restructurings and certain Singapore shares purchased by X were vested in the successor ("**Y**"). However, the share register of the Singapore company still reflected X as the shareholder and Y sought to rectify the register. The Singapore High Court recognised for the first time that the doctrine of universal succession applies in Singapore. This was on the basis of international comity and that matters relating to the status of a company fall to be determined by the laws of the jurisdiction of incorporation of the company. As such, where such laws recognise that the new entity has the status of a "universal successor", with the attendant consequence that it inherits all the assets and liabilities of its predecessor, the Singapore courts will also recognise such status.[4] Succession can be found even though the new entity inherits only a part of the patrimony of the predecessor, as long as this is the position under the laws of the jurisdiction of incorporation and the intent was nevertheless that the new entity would be the successor to that part of the assets and liabilities it received.[5] This is a departure from the prevailing view under English law which requires a complete transfer of all assets and liabilities. Although it was strictly speaking *obiter*, the Singapore High Court also stated that even if the predecessor continues to exist, the doctrine of universal

[3] [2016] 5 SLR 988.
[4] *Ibid*, at [43].
[5] *Ibid*.

succession could still apply, depending on what is recognised under the laws of the jurisdiction of incorporation.[6]

In short, *Jacob Agam and another v BNP Paribas SA* is a welcome decision which continues the trend of recognising the doctrine of universal succession and the emphasis placed by the Singapore courts on international comity and commercial pragmatism.

[6] *Id*, at [40].