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INSOLVENCY CASE UPDATE:

Paulus Tannos v Heince Tombak Simanjuntak & others [2020] SGCA 85

Recognition of Indonesian bankruptcy orders in Singapore

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In split decision, Singapore Court of Appeal refuses recognition of Indonesian bankruptcy orders for breach of natural justice

Significant holdings:-

a. The question of whether there has been a breach of natural justice in a foreign court is one which the Singapore court alone can decide.

b. Non-compliance with the proper rules of service resulting in a party not being given a right to be heard amounts to a breach of natural justice, on which basis the Singapore court can refuse to recognise the foreign order in question.

1. Bankruptcy Proceedings in Jakarta, Indonesia

Through an agreement concluded in 2011, PT Bank Artha Graha Internasional Tbk ("**BAG**") granted a loan of IDR200bn to PT Megalestari Unggul ("**MLU**" or "**the Principal Debtor**"). As security for this loan, deeds of personal guarantees were also purportedly signed by four individuals (collectively, "**the Guarantors**").

The loan fell due in October 2012, but MLU was unable to repay it. BAG subsequently assigned its accounts receivables to another Indonesian company, which in turn assigned its accounts receivables to PT Senja Imaji Prisma ("**PT Senja**" or "**the Creditor**").

On 8 December 2016, the Creditor commenced a process known as *Penundaan Kewajiban Pembayaran Utang* ("**PKPU**") in Jakarta. This process allows a debtor to propose a composition plan to its creditors for the restructuring of its loans, failing which a bankruptcy order can be made.

On 9 January 2017, the Commercial Court of the Central Jakarta District Court granted the PKPU application. Neither the Guarantors nor their counsel were present. They would later contend that they did not know of this hearing, forming the basis of their argument that there was a breach of natural justice.

There followed three creditors' meetings between 20 January and 17 February 2017, at which the Guarantors were represented by counsel. However, no agreement was reached, and the Guarantors were declared bankrupt in Indonesia on 22 February 2017. Three receivers were appointed (collectively, the "**Receivers**").

2. Recognition Proceedings in Singapore

On 28 December 2017, the Receivers applied *ex parte* in Singapore for recognition of the bankruptcy orders made in Indonesia. This was granted by the High Court.

This decision was reversed on appeal to the Court of Appeal (the "**CA**"). The majority, consisting of Chief Justice Sundaresh Menon and Justice of Appeal Tay Yong Kwang, accepted the position of the Guarantors that they did not have actual notice of the commencement of the PKPU proceedings and the hearing on 9 January 2017. The minority, Justice Woo Bih Li, dissented, disbelieving the Guarantors on this point.

In coming to their decision, the majority considered the following.

First, though the Guarantors (through their counsel) attended the creditors' meetings starting on 20 January 2017, they repeatedly protested the improper service of the PKPU summons, their absence at the PKPU hearing and their objections to the validity of the underlying debt. They also attempted to bring appeal and/or judicial review proceedings to the Supreme Court of Indonesia, but were unable to do so because the Central Jakarta District Court refused to forward the relevant papers to the Supreme Court on the basis that Indonesian Bankruptcy Law does not allow any legal action to be taken against PKPU decisions.

Second, there was evidence that service of the PKPU proceedings by registered mail had been unsuccessful. The courier service records showed that delivery of legal documents had failed, with the reason stated being "*incomplete address*".

Third, the Creditor's advertisement of the PKPU proceedings in the *Rakyat Merdeka* on 27 December 2016 had not been proven to be in accordance with Indonesian law for the purposes of service. The Receivers failed to adduce any expert opinion on Indonesian law regarding when this mode of service could apply, and therefore whether it applied to the present case.

Fourth, it was irrelevant that the Central Jakarta District Court hearing the PKPU application may have considered the issue of service and made a finding that the requisite procedure had been satisfied. As a matter of Singapore law, the issue of whether a foreign judgment or order should be refused recognition or enforcement because of a breach of natural justice is a question for the recognition court alone (in this case, the Singapore court) to answer.

The majority judges concluded by observing that it would not have made sense for the Guarantors to have intentionally stayed away from the PKPU hearing had they in fact known about it, considering especially their conduct in seeking to vindicate their position immediately thereafter during the creditors' meetings as well as in attempting to pursue appeal and/or judicial review proceedings.

3. Strong words from the dissenting judge

Justice Woo Bih Li ("**Justice Woo**") dissented from the majority judges on the factual issue of whether the Guarantors did in fact have actual notice of the PKPU proceedings before the hearing in the

Central Jakarta District Court on 9 January 2017. He found it significant that the Guarantors had, on 11 January 2017, executed powers of attorney to allow Indonesian counsel to act for them in the PKPU proceedings. This was two days before the date of two advertisements, being 13 January 2017, which the Guarantors cited as the reason for them coming to know of the PKPU hearing.

The CA allowed the Guarantors to file further affidavits to explain this discrepancy. Their explanation was accepted by the majority judges, but not Justice Woo.

In *obiter dicta*, Justice Woo also had strong words for the conduct of the Receivers. As they had applied *ex parte* for recognition of the Indonesian orders, they had a duty of full and frank disclosure to the Court. However, they failed to inform the Singapore High Court that two of the Guarantors had in fact obtained judgment from the District Court of Bekasi, Indonesia declaring that the guarantees were invalid. This was upheld by the High Court of Bandung on appeal. In response, the Receivers submitted that the Supreme Court of Indonesia had annulled this decision on 6 March 2018. However, this did not help them, as their application for recognition to the Singapore High Court had been made in December 2017. Thus, the decisions of the District Court of Bekasi and the High Court of Bandung should have been disclosed to the Singapore High Court at the outset.

4. Conclusion

Whilst Singapore does allow for the recognition of foreign personal bankruptcy orders on a common law basis, it remains important that the law and procedure of the jurisdiction which had first granted the bankruptcy order had been properly complied with. Non-compliance with rules of procedure on service of the relevant legal proceedings leading to doubts over whether a debtor was given an opportunity to be heard can result in a refusal to recognise the foreign bankruptcy order because of a breach of natural justice. The question of whether there has been a breach of natural justice in the foreign court is one that can be decided by the Singapore court alone. Further, applicants coming to Court on an *ex parte* basis should be alive to their duty to make full and frank disclosure, even of proceedings pending appeal in a foreign jurisdiction.