Cross-Border Restructuring Takes Flight in the SICC – Analysis of *Re PT Garuda Indonesia (Persero) Tbk and another matter* [2024] SGHC(I) 1

Introduction

The Singapore International Commercial Court (**SICC**) issued its first cross-border restructuring decision in *Re PT Garuda Indonesia (Persero) Tbk and another matter* [2024] SGHC(I) 1 (***Re PT Garuda***). This decision marks the dawn of cross-border restructuring matters heard in the SICC – a development which we had foreshadowed and discussed in a previous article (Cross-Border Restructuring and Insolvency in the SICC).

Re PT Garuda concerned an application by the national carrier PT Garuda Indonesia (Persero) Tbk (**Garuda Indonesia**) for the recognition of its "Penundaan Kewajiban Pembayaran Utang" (i.e., "suspension of payments" proceeding) under Indonesian law (**PKPU Proceeding**), and the recognition and enforcement of the restructuring plan that was approved as part of the PKPU Proceeding and homologated by the Jakarta Commercial Court (**Composition Plan**).

The SICC recognised the PKPU Proceeding and also recognised and enforced the Composition Plan (subject to certain carve-outs) under the UNCITRAL Model Law on Cross-Border Insolvency (as adopted with modifications in the Third Schedule to the Insolvency, Restructuring and Dissolution Act 2018) (**Model Law**).

Brief Overview

- In its first ever cross-border restructuring matter, the SICC recognised Garuda Indonesia's PKPU (i.e., "suspension of payments") Proceeding and Composition Plan under the UNCITRAL Model Law on Cross-Border Insolvency.
- The threshold to establish the public policy exception is high and will succeed only if the recognition and grant of relief is contrary to the "*fundamental public policy of Singapore*".
- Attempts to challenge the merits of the foreign jurisdiction's insolvency regime by juxtaposing it against Singapore's are impermissible and contrary to the spirit of modified universalism as envisaged by the Model Law.

Certain creditors objected to the recognition of the PKPU Proceeding and Composition Plan on public policy grounds. The SICC dismissed these objections and affirmed that foreign proceedings and foreign plans would not be denied recognition lightly. The fact that creditors are afforded different treatment under Indonesian restructuring law from what they would have been entitled to under Singapore restructuring law is not a sufficient basis to deny recognition.

Creditors' Objections to Recognition

Creditors of Garuda Indonesia, Greylag Goose Leasing 1410 Designated Activity Company (**Greylag 1410**) and Greylag Goose Leasing 1446 Designated Activity Company (collectively, **Greylag Entities**) raised two main objections against recognition:

(a) The Premature Application Objection: The recognition of the PKPU Proceeding should be denied because the application was brought prematurely in light of the pending proceedings before the Indonesian courts.

(b) The Public Policy Objection: The recognition of the PKPU Proceeding should be denied because it was in breach of Singapore public policy.

For completeness, the Greylag Entities also challenged the recognition of the Composition Plan (as opposed to only the PKPU Proceeding) under the Model Law. The General Division of the High Court of Singapore had previously held that a foreign plan such as the Composition Plan can be recognised under the Model Law (see *Re Tantleff, Alan* [2023] 3 SLR 250), and the SICC reached the same conclusion, albeit holding that such recognition should be granted under the *chapeau* in Article 21(1) of the Model Law as part of "*any appropriate relief*" as opposed to Article 21(1)(g) (for "*any additional relief that may be available to a Singapore insolvency holder*").

Premature Application Objection

The Greylag Entities argued that the recognition application was filed prematurely, as there was a pending proceeding in Indonesia relating to the decision of the Jakarta Commercial Court to homologate the Composition Plan (**Homologation Decision**). The Greylag Entities had made multiple unsuccessful applications to challenge the Homologation Decision. What remained outstanding was their appeal to the Indonesia Supreme Court seeking to nullify the Homologation Decision (**Nullification Appeal**). It was also common ground between the parties that save for the Nullification Appeal, there were no further avenues for the Greylag Entities to challenge the Homologation Decision and the Composition Plan under Indonesian law.

Dismissing this argument, the SICC held that there was no legal basis for the objection as Article 17 of the Model Law does not require a foreign proceeding to be concluded or for all avenues of appeal and review in the foreign jurisdiction to be exhausted before the recognition application is brought. The SICC highlighted the mandatory language of Article 17 – that the foreign proceeding "*must be recognised*" once the requirements therein are satisfied. It also took into account Article 17(4) which deals with a foreign proceeding that is subsequently terminated by the foreign court. As such, the recognition application granted by the Singapore courts can always be terminated if the order commencing the foreign proceeding has been reversed by an appellate court in the foreign jurisdiction.

The SICC observed that, if the Greylag Entities succeeded in the Nullification Appeal, it would be open to them to seek termination of both the recognition of the PKPU Proceeding and any ancillary relief granted in support thereof under Article 17(4).

Public Policy Objection

The Greylag Entities raised two points under this objection: (a) that creditors were not treated fairly and equitably in the PKPU Proceeding; and (b) that there was inadequate disclosure of information during the PKPU Proceeding.

When evaluating whether there has been a breach of the right to fair and equitable treatment, the focus is on procedural fairness. The SICC held that the foreign proceedings need not mirror Singapore law. Instead, the question was whether the affected creditors had a full and fair opportunity to vote, were given adequate disclosure of information to aid them in casting an informed vote and had a full and fair opportunity to be heard in the foreign proceedings in a manner consistent with the standards of due process under Singapore law.

Public policy exception – high threshold

The SICC held that the threshold to establish the public policy exception under Article 6 of the Model Law is high and that a challenge against recognition on the "public policy" exception will succeed only if the recognition and grant of relief is contrary to the "***fundamental*** *public policy of Singapore*". The Greylag Entities failed to meet this high standard in respect of their two objections (*viz*., lack of fair and equitable treatment of creditors and inadequate disclosure).

Fair and equitable treatment of creditors

First, the Greylag Entities argued that there was unfair treatment of the unsecured creditors in the PKPU Proceeding because there was lack of proper classification of the unsecured creditors for the purposes of voting on the Composition Plan. They argued that proper classification into further sub-classes was needed because the terms offered to the unsecured creditors differed. There were also private negotiations with selected unsecured creditors to the exclusion of other unsecured creditors.

The SICC held that the submissions were legally and factually unsustainable, and plainly did not show that the PKPU Proceeding and the voting of the Composition Plan were conducted in a manner contrary to Singapore public policy.

The SICC took into account the parties' Indonesia law experts, who stated that the only requirement for the purpose of voting is that the creditors are provided with the draft composition plan. After that, all secured and unsecured creditors vote in the same class, i.e., all unsecured creditors are placed in the same class for voting purposes. The experts also agreed that there is no requirement under Indonesian law to offer the same repayment terms, as long as unsecured creditors within the same category are treated equally.

The SICC also noted that the Greylag Entities' arguments on the lack of classification of unsecured creditors was a criticism of the structure of the Indonesia insolvency regime. The SICC stated that such arguments impermissibly seek to examine the merits of the Indonesian insolvency law by juxtaposing it against Singapore's with a view to identity any perceived "shortcomings". Such an approach, in the SICC's view, was contrary to the spirit of modified universalism envisaged by the Model Law.

Inadequate disclosure

Second, the Greylag Entities argued that the financial status of the subsidiaries was opaque to the creditors throughout the PKPU Proceeding and that this significantly compromised their rights to vote on the Composition Plan.

The SICC did not accept these submissions, noting that the factual basis of the allegation was not set out in the affidavit of the Greylag Entities' director, and the argument was raised for the first time in the Greylag Entities' written submissions.

The SICC took into account that Garuda Indonesia had kept its creditors updated on the restructuring *via* circulars, including circulating a revised version of the restructuring term sheet. Further, the SICC noted that there was no allegation that Garuda Indonesia had rejected any request for such information. Rather, there was no attempt to request such information.

Key Takeaways

There are two key takeaways here. First, in which situations would the public policy exception be established. Second, the extent of intervention by the Singapore court in recognition applications.

Public policy exception – situations

The SICC very helpfully listed the situations where challenges brought under Article 6 are likely to succeed:

(a) Where recognition is sought in respect of a foreign proceeding commenced in breach of a moratorium over legal proceedings;

(b) Where the relief sought under the Model Law is prohibited in the forum state or where compliance with orders for such reliefs would open individuals to criminal prosecution;

(c) Where the foreign representatives acted in bad faith or failed to make full and frank disclosure of material facts to the receiving court;

(d) Where recognition is sought of a foreign proceeding commenced in breach of the recognising court's order granted in a prior proceeding; or

(e) Where there is a failure to accord due process to the creditors and other relevant stakeholders in the foreign insolvency process.

The SICC also suggested that Singapore public policy may be engaged where the insolvency proceedings or foreign court orders are tainted by fraud.

Singapore court in recognition applications

The SICC's approach in *Re PT Garuda* strongly suggests that the Singapore courts cannot be used to further any collateral litigation in respect of the restructuring. In essence, Singapore will not become an extension of any ongoing litigation in the foreign jurisdiction.

In this regard, the SICC noted that the Greylag Entities had not explained why their public policy complaints were not raised in the PKPU proceedings or any applications and appeals therefrom. Consequently, the SICC stated that since such complaints were not raised before the Indonesia court, it was impermissible for the Greylag Entities to raise in Singapore points of substantive law under Indonesian law.

It is also interesting to note that the SICC referred to the UNCITRAL Model Law on International Commercial Arbitration in its analysis of the public policy exception. Given the Singapore court's very established policy of minimal curial intervention in arbitral proceedings, it remains to be seen whether there will be a similar development in cross-border restructuring matters.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

Adnaan NOOR
Partner – Indonesia Practice
Partner – Restructuring & Insolvency
Partner – Special Situations Advisory
d: +65 6416 2477
e: adnaan.noor
@wongpartnership.com
Click here to view Adnaan's CV.

Muhammed Ismail NOORDIN
Partner – Restructuring & Insolvency
Partner – Special Situations Advisory
d: +65 6517 3760
e: muhammedismail.konoordin
@wongpartnership.com
Click here to view Ismail's CV.

Connect with WongPartnership.

WPG MEMBERS AND OFFICES

- contactus@wongpartnership.com

SINGAPORE

-
WongPartnership LLP
12 Marina Boulevard Level 28
Marina Bay Financial Centre Tower 3
Singapore 018982
t +65 6416 8000
f +65 6532 5711/5722

CHINA

-
WongPartnership LLP
Shanghai Representative Office
Unit 1015 Link Square 1
222 Hubin Road
Shanghai 200021, PRC
t +86 21 6340 3131
f +86 21 6340 3315

INDONESIA

-
Makes & Partners Law Firm
Menara Batavia, 7th Floor
Jl. KH. Mas Mansyur Kav. 126
Jakarta 10220, Indonesia
t +62 21 574 7181
f +62 21 574 7180
w makeslaw.com

MALAYSIA

-
Foong & Partners
Advocates & Solicitors
13-1, Menara 1MK, Kompleks 1 Mont' Kiara
No 1 Jalan Kiara, Mont' Kiara
50480 Kuala Lumpur, Malaysia
t +60 3 6419 0822
f +60 3 6419 0823
w foongpartners.com

MIDDLE EAST

-
Al Aidarous Advocates and Legal Consultants
Abdullah Al Mulla Building, Mezzanine Suite 02
39 Hameem Street (side street of Al Murroor Street)
Al Nahyan Camp Area
P.O. Box No. 71284
Abu Dhabi, UAE
t +971 2 6439 222
f +971 2 6349 229
w aidarous.com

-
Al Aidarous Advocates and Legal Consultants
Oberoi Centre, 13th Floor, Marasi Drive, Business Bay
P.O. Box No. 33299
Dubai, UAE
t +971 4 2828 000
f +971 4 2828 011

PHILIPPINES

-
Gruba Law
27/F 88 Corporate Center
141 Valero St., Salcedo Village
Makati City 1227, Philippines
t +63 2 889 6060
f +63 2 889 6066
w grubalaw.com

wongpartnership.com