IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 149

Originating Summons No 455 of 2020

In the Matter of Section 211B(1) of the Companies Act
(Cap 50, 2006 Rev Ed)

PT MNC Investama TBK

… *Applicant*

BRIEF GROUNDS

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Introduction

1 These are brief grounds issued to assist interested parties as to the reasoning of the Court in granting an extension of a moratorium under s 211B of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"). In particular, I focus on my finding that the applicant company (the "Applicant") had the requisite standing to make the application for such an extension.

Brief background

2 The Applicant, which is listed on the Indonesia Stock Exchange, is an investment company holding interests in various industries, including media, financial services, lifestyle property, and energy, through various subsidiaries. In 2018, pursuant to an Indenture dated 11 May 2018, the Applicant issued USD$231,000,000 worth of 9% Senior Secured Notes, due in May 2021 (the "Notes"). These Notes, importantly for the purposes of the present case, are

listed on the Singapore Stock Exchange. They are secured by moneys in a debt service account, and pledges of shares in some of the Applicant's subsidiaries.

3 The 2020 Coronavirus pandemic has apparently gravely affected the Applicant and its subsidiaries, engendering a significant decrease in income and increasing the repayment burden under the Notes. The increased repayment burden is explicable on the basis that the Applicant's income is primarily denominated in Indonesian Rupiah ("IDR") while its liabilities are in US Dollars ("USD"), with the latter having appreciated against the IDR over the course of the pandemic. The Applicant was therefore unable to top up the amount in the aforementioned debt servicing account prior to the making of an interest payment due in May 2020, though it did release funds from that account in order to meet the said interest payment. Put in other words, the debt servicing account has been drawn-down to pay the May 2020 interest payment, and has not been topped up to its initial levels. The failure to top up the debt servicing account is a failure on the part of the Applicant to meet its obligations under the Notes.

4 Given its financial difficulties, the Applicant intends to propose a scheme of arrangement under s 210(1) of the Companies Act. It therefore sought the moratorium which is the subject of the present application to protect it while negotiations are ongoing. A video meeting was held with some noteholders in May 2020, at which there was some discussion of the present difficulties faced by the Applicant and its subsidiaries, as well as of potential future courses of action. Some matters relating to potential future courses of action remain under discussion with the noteholders.

5 Subsequent to the Applicant filing this application, it sought an adjournment of the hearing of this application as a number of its noteholders

wanted time to consider their position with respect to the moratorium extension. However, I turned down the Applicant's request for an adjournment and interim extension as that would functionally have been an extension of the automatic moratorium without the statutory requirements for such an extension having been fulfilled beforehand. Instead, I required the company to establish that it had met those requirements before any extension was granted.

6 In the event, I was so satisfied, and granted a two month extension of the moratorium until August 2020. These brief grounds will only touch on the question of the legal standing of the Applicant, a foreign company, to apply for a moratorium under s 211B of the Companies Act.

Standing

7 The Applicant argued that it fulfilled the requirements under the Act and had a substantial connection to Singapore through a number of factors. I accepted that the Applicant was indeed eligible to apply for protection under s 211B of the Companies Act, particularly as the Notes were traded on an exchange in Singapore.

The statutory framework

8 Section 211B of the Companies Act does not itself specify which companies are eligible to seek a moratorium. Rather, s 211A(1) of the Companies Act provides that ss 211B to 211J "only apply to a case that involves a compromise or an arrangement between a company and its creditors …" Section 211A(3) in turn defines a company for the purposes of s 211B as "any corporation liable to be wound up under [the Companies Act]." Companies which are prescribed by the Minister are excluded from being able to seek a

moratorium under s 211B of the Companies Act, but no such exclusion operates against the Applicant.

9 Winding-up is governed by Part X of the Companies Act. The provisions apply to companies, which as defined under the Act are companies which are incorporated under the Act or pursuant to any corresponding previous written law: s 4 of the Companies Act. The Applicant, being incorporated in Indonesia and not under the Act, would thus not qualify under the general provisions. However, as argued by the Applicant, s 351 of the Companies Act governs the winding up of companies not registered under the Act. This includes the Applicant, which is not thus registered. Section 351(1)(*d*) of the Companies Act provides that foreign (unregistered) companies may be wound up in Singapore only if they have a substantial connection with Singapore.

10 The Applicant therefore had to make out that it has a substantial connection to Singapore, which would then render it liable to be wound up under s 351 of the Companies Act, and therefore eligible for moratorium protection under s 211B of the said Act.

11 What a "substantial connection" within the meaning of s 351(1)(*d*) of the Companies Act entails is not defined under the Act, but s 351(2A) provides that:

> For the purposes of subsection (1)(*d*), the Court may rely on the presence of one or more of the following matters to support a determination that a foreign company has a substantial connection with Singapore:
>
> a) Singapore is the centre of main interests of the company;
>
> b) the company is carrying on business in Singapore or has a place of business in Singapore;

> c) the company is a foreign company that is registered under Division 2 of Part XI;
>
> d) the company has substantial assets in Singapore;
>
> e) the company has chosen Singapore law as the law governing a loan or other transaction, or the law governing the resolution of one or more disputes arising out of or in connection with a loan or other transaction;
>
> f) the company has submitted to the jurisdiction of the Court for the resolution of one or more disputes relating to a loan or other transaction.

Conclusions on standing

12 None of the factors explicitly listed as supporting the existence of a substantial connection with Singapore could be invoked by the Applicant. In particular, its business activities, control, and administration were primarily situated in Indonesia. The Notes are governed by New York law. There has also been no submission to Singapore law or invocation of Singapore law in any dispute. Subsection (2A) is not, however, an exhaustive and definitive list; that is, the indications of substantial connection for the purposes of s 351 are not closed. In furtherance of this point, the Applicant specifically relied on the Notes being traded on the Singapore exchange as a consideration bringing it within the ambit of s 351(1)(*d*) of the Companies Act.

13 Looking at the expressed list in s 351(2A) of the Companies Act, a substantial connection clearly encompasses the presence of business activities, control, and assets in Singapore. These activities involve some permanence or permanent effect, and exclude activities of a merely transient nature. Indications of submission or acceptance of Singaporean jurisdiction or law would also be illustrative of a substantial connection with Singapore. Taking the expressed list as a starting point, therefore, it may be analogised that having the company securities traded on a Singapore exchange is akin to substantial

business activity that is not merely transient. Being subject to Singapore regulations or laws in the listing of its securities is also a strong indicator of a company's substantial connection to Singapore. I therefore accept that, on the facts of this case, the Applicant has a substantial connection with Singapore within the meaning of s 351(1)(*d*) of the Companies Act, and by extension, has the requisite standing to seek a moratorium under s 211B of the said Act.

14 I note for completeness that the Applicant raised a number of other factors to buttress its argument that it had a substantial connection with Singapore. It pointed to the fact that the debt service account is situated in Singapore, the fact that the Notes were arranged by Singapore-based banks, and the fact that the account charge over the debt service account is governed by Singapore law. As I have already found that the fact of the Applicant's securities being traded on the Singapore exchange would, in and of itself, suffice to establish a substantial connection with Singapore for the purposes of s 351(1)(*d*) of the Companies Act, I do not need to make any finding on the weight to be placed on the factors outlined in this paragraph.

Miscellaneous issues on standing

15 I pause at this point to note that, in addition to its above-canvassed arguments, the Applicant had also pointed to *Re Pacific Andes Resources Development Ltd* [2018] 5 SLR 125 ("*Pacific Andes*") to support its contention that it had the requisite standing to seek a moratorium under s 211B of the Companies Act.

16 In *Pacific Andes*, this Court held that, *inter alia*, the fact of the applicant company's listing on the Singapore stock exchange was sufficient for jurisdiction to be established in respect of a s 210(10) Companies Act

moratorium. I note that, strictly speaking, what was found in *Pacific Andes* was that the holding company had a sufficient connection or *nexus* to Singapore because, among other things, it was listed in Singapore and conducted economic activity here. It was also found that the raising of funds in Singapore by the applicant company through the issuing of bonds was a further factor fortifying the conclusion that a *nexus* with Singapore existed, notwithstanding the fact that the bonds were governed by English law: *Pacific Andes* at [7] and [73]. Whether either of listing or the issuing of bonds alone and without the other would be sufficient to give rise to sufficient nexus to Singapore was not considered in that case.

17 I also note that *Pacific Andes* was decided in September 2016, before s 351(2A) of the Companies Act came into force, though whether or not that militates towards the adoption or otherwise of the reasoning in *Pacific Andes* is an open question.

18 In sum, what other considerations may suffice to constitute a "substantial connection" with Singapore within the meaning of s 351(1)(*d*) of the Companies Act would best be left to development in future cases. I note the decision of the Bankruptcy Court for the Southern District of New York in *In re Berau Capital Resources Pte Ltd* 540 BR 80 (Bankr SDNY 2015) that the applicant company could file for recognition of its Singapore-based bankruptcy proceedings in New York under Chapter 15 of the United States Bankruptcy Code ("Bankruptcy Code") despite not having a place of business in the United States as would typically be required under s 109(a) of the Bankruptcy Code. The Court found that the requirements of s 109(a) of the Bankruptcy Code were nonetheless satisfied as the applicant in that case a) had deposited money to retain New York lawyers, b) had US dollar-denominated debt issued under New York law, with the choice of New York as the forum for disputes, and c) had an

agent to receive service in New York. It is an interesting question whether in the same circumstances, a Singapore court would find that there was a "substantial connection" with Singapore on any further ground beyond s 351(2A)(*e*) of the Companies Act, *i.e.* that there was a transaction governed by Singapore law disclosed. However, as this issue does not squarely arise on the facts, I will say no more at this point.

Other requirements

19 In relation to the other requirements for the moratorium sought, I was satisfied that the other requirements as outlined in *Re IM Skauge*n *SE and other matters* [2019] 3 SLR 979 have been met as well.

Conclusion

20 For the above reasons, I granted the orders sought. I note for completeness that the Applicant withdrew its request for the second prayer at the oral hearing, and that I therefore made no order in that regard.

Aedit Abdullah
Judge

Tan Mei Yen and Thenuga Vijakumar (Oon & Bazul LLP) for the applicant.