IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 229

Suit No 896 of 2014
(Summonses Nos 893 and 1045 of 2016)

Between

Humpuss Sea Transport Pte Ltd (in compulsory liquidation)

… Plaintiff

And

(1) PT Humpuss Intermoda Transportasi TBK
(2) PT Humpuss Transportasi Kimia

… Defendants

JUDGMENT

[Civil procedure] — [Striking out]

[Abuse of process]

[Conflict of laws] — [Foreign judgments] — [Recognition]

[Conflict of laws] — [Natural forum]

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Humpuss Sea Transport Pte Ltd (in compulsory liquidation)
v
PT Humpuss Intermoda Transportasi TBK and another

[2016] SGHC 229

High Court — Suit No 896 of 2014 (Summonses Nos 893 and 1045 of 2016)
Steven Chong J
25 July 2016

18 October 2016 Judgment reserved.

Steven Chong J:

Introduction

1 This is another attempt by the 1st and 2nd defendants to halt the action commenced by the plaintiff's present liquidators ("the liquidators") in Singapore to recover substantial inter-company loans in excess of US$100 million and to set aside various transfers of shares in related companies and ships from the plaintiff and its subsidiaries to the 2nd defendant. The previous attempt was an application to set aside the service of the writ in Indonesia, which I dismissed – see *Humpuss Sea Transport Pte Ltd (in compulsory liquidation) v PT Humpuss Intermoda Transportasi TBK and another* [2015] 4 SLR 625.

2 On this occasion, the defendants mounted two separate applications: one to strike out the action and another to stay the action in favour of

Indonesia. I heard both applications together. At the end of the hearing, I found no merit in the striking out application and dismissed it summarily. The striking out application was based solely on the extended doctrine of *res judicata*. The doctrine is a judicial expression of the need to prevent abuse of the court's process and is typically invoked to prevent a litigant from raising new points and arguments which should have been raised in earlier proceedings. Here, the 1st and 2nd defendants sought to apply the doctrine on the premise that the plaintiff's causes of action in the Singapore action, which are separate and distinct from the causes of action in the Indonesian proceedings, should and ought to have been raised in the earlier Indonesian insolvency proceedings involving the 1st defendant. Quite apart from the fact that the Indonesian proceedings do not involve the 2nd defendant, I found, for reasons elaborated at [74]–[84] below, that there was no basis for applying the extended doctrine of *res judicata* at all.

3 However, the stay application, grounded on the doctrine of *forum non conveniens*, merited closer examination following an observation I made at the end of the hearing. There are three seemingly distinct claims in the Singapore action. Both parties approached the stay application on the basis that all three claims should either proceed in Singapore or be stayed in favour of Indonesia. Initially, no specific submission was made for a halfway house of staying some but not all the three claims. When this scenario was raised as a possible outcome of the stay application, counsel for the 1st and 2nd defendants, Mr Rakesh Kirpalani, understandably seized on this option to submit that the claims against the 1st and 2nd defendants in respect of the inter-company loans should be stayed even if the court is not minded to stay the restructuring transactions. This decision will therefore examine, *inter alia*, the circumstances in which a court may exercise its discretion to stay some but not

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all the claims in a Singapore action in favour of another jurisdiction, as well as the propriety of doing so. It will also consider whether, in determining the natural forum for the adjudication of the claim, the difficulties in the enforcement of any judgment of the Singapore action in the foreign jurisdiction would be a relevant factor to determine or to displace the natural forum.

4 I start with an outline of the background facts common to both applications (at [5]–[40]). I then give my grounds for dismissing the striking-out application since it has raised some interesting legal points (at [41]–[85]) followed by my decision on the stay application (at [86]–[131]).

Background facts

The parties

5 The parties to this action are all part of the Humpuss group of companies.[1] The plaintiff is incorporated in Singapore.[2] It was placed in compulsory liquidation on 20 January 2012.[3] Both the 1st and 2nd defendants are incorporated in Indonesia.[4] The 1st defendant was also listed on the Jakarta Stock Exchange.[5] The 1st defendant is the sole shareholder of the plaintiff and owns 99% of the 2nd defendant.[6]

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1 3rd Affidavit of Theo Lekatompessy, dated 26 February 2016, at para 8

2 Statement of Claim ("SOC"), dated 18 August 2014, at para 1

3 SOC at para 11

4 SOC at paras 7 and 10

5 SOC at para 7

6 SOC at paras 8–9

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The nature of the Singapore action

6 In the statement of claim filed on 18 August 2014, the liquidators seek the repayment of two inter-company loans which remain unpaid. The plaintiff's unaudited financial statements for 2009 record that, as at 31 December 2009, there was a loan amount of US$72,608,916 due from the 1st defendant to the plaintiff and a loan amount of US$39,542,815 due from the 2nd defendant to the plaintiff.[7]

7 The liquidators also seek to set aside a number of transactions which the plaintiff purportedly entered into between July and December 2009 as part of an alleged restructuring of the Humpuss Group ("restructuring transactions").[8] Two categories of restructuring transactions are being impugned.

(a) First, the transfers of the plaintiff's shares in four companies to the 2nd defendant. The abbreviated names of the four companies (and the plaintiff's shareholding therein) are Cometco (51%), Silverstone (100%), Humolco (60%), and MCGC II (45%). Silverstone is incorporated in Panama and the remaining three companies are incorporated in Liberia. The 2nd defendant agreed to pay the plaintiff US$27,372,715 for the Cometco shares, US$8,907,170 for the Silverstone shares, US$600 for the Humulco shares, and US$2,700 for the MGCC II shares.[9] The liquidators allege that the plaintiff has not received any payment from the 2nd defendant for the share transfers.[10]

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7 SOC at paras 25–29 and pp 34–35

8 SOC at para 22

9 SOC at paras 31, 39, 44, 49

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(b) Second, the transfer of four vessels from the plaintiff to the 2nd defendant. The plaintiff is the registered owner of one of these vessels, the *Sapta Samudra*. The 2nd defendant agreed to purchase the *Sapta Samudra* for US$4,020,000.[11] The registered owners of the three remaining vessels – the *Dasa Samudra*, the *Griya Asmat* and the *Nawa Samudra* – are three single-ship subsidiaries of the plaintiff incorporated in Panama.[12] The 2nd defendant agreed to purchase the three vessels for US$3,920,000, US$11,856,000, and US$2,100,000 respectively.[13] The liquidators allege that the plaintiff and its subsidiaries have not received any payment from the 2nd defendant for the transfers of any of the four vessels.

8 The liquidators' primary claim is that all the restructuring transactions – including the plaintiff's transfer of the three vessels through its subsidiaries – are transactions at an undervalue within the meaning of s 98 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) read with s 329(1) of the Companies Act (Cap 50, 2006 Rev Ed), with the result that the court would be bound to make an order for restoring the position to what it would have been if the plaintiff had not entered into the restructuring transactions (s 98(2) Bankruptcy Act). As an alternative, the liquidators claim that the restructuring transactions are voidable for being conveyances intended to defraud the plaintiff's creditors within the meaning of s 73B of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed).[14]

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10 SOC at paras 35, 41, 46, 51

11 SOC at para 66

12 SOC at para 4

13 SOC at paras 66, 83, 91

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The nature of the Indonesian Proceedings

9 The 1st defendant is currently in a court-assisted debt restructuring process in Indonesia. On 26 September 2012, a creditor of the 1st defendant filed a *Penundaan Kewajiban Pembayaran Utang* ("PKPU") petition against the 1st defendant in Indonesia.[15]

PKPU proceedings

10 PKPU proceedings in Indonesia are similar to the process in Singapore by which a company may propose a scheme of arrangement. PKPU proceedings are governed by Law No 37 of 2004 on Bankruptcy and Suspension of Obligation for Payment of Debts ("Law No 37").[16]

11 The term "PKPU" broadly refers to a suspension of debt payment obligations.[17] It is a judicial process by which a debtor may propose a composition plan to its creditors to restructure its debts and reorganise its business operations.[18] The process starts when a creditor files a PKPU application with the Commercial Court for the temporary suspension of the debtor's debt payments.[19] If the court approves the application, it will grant a temporary PKPU order. It will also appoint a supervisory judge who oversees the PKPU process, and one or more administrators who are to manage the

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14 SOC at pp 35 and 37

15 2nd Affidavit of Anang Fahkcrudin, dated 2 July 2016, at pp 670–672

16 3rd Affidavit of Tony Budijaja, dated 10 June 2016, TB-1 ("Budijaja's Expert Opinion") at para 2.1; 1st Affidavit of Fabian Buddy Pascoal, dated 1 February 2016, FBP-2 ("Pascoal's Expert Opinion") at para 17

17 Budijaja's Expert Opinion at para 2.1

18 Pascoal's Expert Opinion at para 16

19 Budijaja's Expert Opinion at para 2.3; Pascoal's Expert Opinion at para 22

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debtor company's assets during the PKPU proceedings.[20] The temporary PKPU order releases the debtor from its payment obligations for 45 days, which may be extended on the approval of the creditors. The administrator must give public notice of the PKPU order and summon the debtor and its creditors to attend a hearing within that 45-day period.[21] At this hearing, the Commercial Court will decide whether or not to approve the composition plan.

12 Before the hearing, the creditors are entitled to file their claims with the administrator, who will review the claims and decide whether to admit or deny the submitted claims.[22]

13 The debtor may present a composition plan to the creditors either at the hearing or at a creditor's meeting between the grant of the temporary PKPU order and the hearing.[23] The requisite majority of creditors needed to accept the composition plan is a majority in number of the creditors and at least two-thirds in value of each class of creditors (*ie*, secured and unsecured) who attend and vote at the meeting or hearing.[24] If the composition plan is not accepted, the company will be placed in bankruptcy.[25]

14 The composition plan must be approved by the court before it becomes final and binding on all creditors of the debtor. Article 286 of Law No 37 states that an approved composition plan shall bind "all creditors" save for any

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20 Budijaja's Expert Opinion at para 2.4; Pascoal's Expert Opinion at paras 20–21

21 Budijaja's Expert Opinion at paras 2.5–2.6; Pascoal's Expert Opinion at para 23

22 Budijaja's Expert Opinion at paras 2.7–2.8; Pascoal's Expert Opinion at paras 26–28

23 Budijaja's Expert Opinion at para 2.9

24 Budijaja's Expert Opinion at para 2.11; Pascoal's Expert Opinion at para 32

25 Budijaja's Expert Opinion at para 2.12; Pascoal's Expert Opinion at para 33

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secured creditor who voted against the plan – Article 281 of Law No 37 prescribes how these secured creditors will be repaid.[26] Which other creditors are bound by the plan is not quite clear. The defendants' expert on Indonesian law was of the view that the approved composition plan would bind all unsecured creditors, including those unsecured creditors who did not participate in the PKPU proceedings.[27] The liquidators' expert on Indonesian law noted that the ratified composition plan would bind all unsecured creditors[28] but did not comment specifically on whether unsecured creditors who did not participate in the PKPU proceedings would also be bound.

15 The court's approval of the composition plan is recorded in a judgment known as a "Homologation Judgment".[29] Under Indonesian law, the court can refuse to approve the composition plan for a number of reasons; for example, if the debtor's assets are much more than the amount agreed in the composition plan.[30] If the court does not approve of the composition plan, it will place the company in bankruptcy.

PKPU proceedings involving the 1st defendant

16 The temporary PKPU order in respect of the 1st defendant was granted on 12 October 2012 by the Commercial Court of the Central Jakarta District Court.[31] The order appointed an administrator and directed that he summon the

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26 Budijaja's Expert Opinion at paras 2.20–2.21; Pascoal's Expert Opinion at paras 34–35

27 Pascoal's Expert Opinion at para 37

28 Budijaja's Expert Opinion at para 2.20

29 Budijaja's Expert Opinion at para 37; Pascoal's Expert Opinion at para 2.19

30 Budijaja's Expert Opinion at para 2.17; Pascoal's Expert Opinion at para 37

31 Theo Lekatompessy's 3rd Affidavit at Tab 44

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1st defendant and its creditors to appear at a hearing. On 16 October 2012, the administrator gave notice to the 1st defendant's creditors through Indonesian newspapers and the State Gazette that a first creditors' meeting would be held on 19 October 2012, a second creditors' meeting on 9 November 2012, and the hearing on 26 November 2012.[32]

17 At the first meeting on 19 October 2012, the administrator informed the creditors of the PKPU and its legal consequences.[33] The 1st defendant presented a composition plan to the administrator on 1 November 2012.[34] At the second meeting on 9 November 2012, the claims submitted against the 1st defendant were verified and the composition plan was discussed.[35] A third creditors' meeting was held on 23 November 2012 at which the composition plan was approved by the creditors.[36] All secured creditors and all unsecured creditors save for one voted in favour of the plan.[37] At the hearing on 26 November 2012, the Commercial Court approved the composition plan by issuing a Homologation Judgment on the same date.[38] Any subsequent reference to the composition plan will be to this part of the Homologation Judgment.[39]

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32 Theo Lekatompessy's 3rd Affidavit at para 69

33 Theo Lekatompessy's 3rd Affidavit at para 70

34 Theo Lekatompessy's 3rd Affidavit at para 72

35 Theo Lekatompessy's 3rd Affidavit at para 90

36 Theo Lekatompessy's 3rd Affidavit at para 97

37 Theo Lekatompessy's 3rd Affidavit at p 990

38 Theo Lekatompessy's 3rd Affidavit at p 993

39 Theo Lekatompessy's 3rd Affidavit at pp 976–985

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18 The former liquidators (the present liquidators having been appointed on 6 August 2013) did not attend any of the meetings or the hearing. One of the former liquidators had, on 13 November 2012, written to inform the administrator that the plaintiff had not submitted a claim against the 1st defendant in the PKPU and had no intention of doing so.[40]

19 In the composition plan, unsecured creditors of the 1st defendant were placed in category 3. The plaintiff was placed under sub-category 3.4, which was for creditors who did not present claims but whose debts were nevertheless recognised by the 1st defendant.[41] The plaintiff was the only creditor in sub-category 3.4 and the value of its claim was stated to be US$52.8m. According to the defendants' expert on Indonesian law, unless there is a challenge by any other creditor, the debtor company may admit a debt even if the creditor did not submit a claim to the administrator.[42] This point was not challenged by the plaintiff's expert on Indonesian law. Under the composition plan,[43] and as approved in the Homologation Judgment,[44] the 1st defendant was to pay the plaintiff US$10m in the form of assets and cash within a year of the "PKPU decision", with the balance to be paid on 3 March 2033. To-date, no payment has been made to the plaintiff.[45]

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40 Theo Lekatompessy's 3rd Affidavit at para 92

41 Theo Lekatompessy's 3rd Affidavit at pp 956 and 981

42 Pascoal's Expert Opinion at para 29

43 Theo Lekatompessy's 3rd Affidavit at pp 983–984

44 Theo Lekatompessy's 3rd Affidavit at pp 971–972

45 Bob Yap's 3rd Affidavit at para 2.3.5

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The Postponement Judgment

20 On 16 October 2013, two of the 1st defendant's unsecured creditors filed a "letter of Miscellaneous Charge" to procure a postponement of its payment obligations under the Homologation Judgment.[46] They did so because the South Jakarta District Court had, on 12 September 2013, issued a decree ordering that an expert team conduct an audit on the 1st defendant for the fiscal years 31 December 2007 through 31 December 2012.[47] This audit was prompted by allegations that there had been irregularities in transactions between the 1st defendant and the plaintiff, namely, the procurement, lease, and sale of vessels, as well as an inter-company loan. The two unsecured creditors were concerned that they would suffer loss should the 1st defendant pay the plaintiff and the expert team were subsequently to find that there was some illegal act by the 1st defendant and/or the plaintiff causing the debt transactions between them to be "considered to have never happened", *ie*, fictitious.[48]

21 After considering the letter of Miscellaneous Charge, the Central Jakarta District Court issued what is known as a Postponement Judgment on 8 November 2013.[49]

22 The Postponement Judgment provides, *inter alia*, that the 1st defendant is to postpone implementation of its repayment obligation to the plaintiff under the Homologation Judgment until an enforceable court judgment is

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46 Defendants' Submissions at para 118; Theo Lekatompessy's 3rd Affidavit at p 1181

47 Defendants' Submissions at para 113

48 Theo Lekatompessy's 3rd Affidavit at p 1195

49 Theo Lekatompessy's 3rd Affidavit at pp 1145–1225

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issued following the outcome of the expert team's investigation. To date, no such enforceable court judgment has been issued.

23 It will be convenient at this juncture to set out the alleged link between the liquidators' claims in this action and the claims allegedly admitted in the composition plan. A clear understanding of this link, if any, is vital to the proper determination of both the striking out and the stay applications.

The 1st defendant's outstanding liability to the plaintiff

24 The defendants' position is that the inter-company loan owing from the 1st defendant to the plaintiff was admitted into the composition plan. There are two parts to this submission.

25 First, the defendants claim that the amount due under the inter-company loan was in fact US$71,696,402. The defendants accepted that, as reflected in the plaintiff's 2009 unaudited accounts, the 1st defendant owed the plaintiff US$72,608,917 as at 31 December 2009.[50] However, they submitted that the amount of the debt was reduced to US$71,696,402 on account of payments amounting to $912,515 made by the 1st defendant to the plaintiff's suppliers on its behalf between 1 January 2010 and 31 October 2011.[51]

26 Next, the defendants allege that in 2011, a company incorporated in the British Virgin Islands named Teldar Equity Asset Inc ("Teldar") entered into a "guarantee agreement" with the plaintiff, by which it agreed to bear all the debts owed by the 1st defendant to the plaintiff.[52] The only evidence the 1st

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50 Theo Lekatompessy's 3rd Affidavit at para 79

51 Theo Lekatompessy's 3rd Affidavit at para 80; Defendants' Submissions at para 83

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defendant has produced is a single-page extract from the 1st Defendant's 2012 Annual Report reporting the existence of this guarantee agreement under a section on legal cases and contingent liabilities.[53] In translation, the extract states:

> Registration bills by Teldar Equity Asset Inc ("Teldar") (continued)
>
> In 2011, Teldar and [the plaintiff] entered into guarantee agreement whereby Teldar will bear the entire payment of the [1st defendant's] and SDI's debts to [the plaintiff] (including all of its debt to the [plaintiff's] subsidiaries). Guarantee made by Teldar kept applicable until debts to [the plaintiff] and its subsidiaries have been fully paid by Teldar and Teldar has billing rights to the [1st defendant's] amounted to its guaranteed amount.
>
> As previously explained on October 12, 2012, Pengadilan Niaga decided the Company was in PKPU process and on that basis, and then Teldar issued its bills to the Company by registering such bills to PKPU process totaling US$140,945,586.

Under this arrangement, Teldar became a creditor of the 1st defendant for the sum of US$140,945,586 which purportedly included the US$71,696,402 owed by the 1st defendant to the plaintiff.[54]

27 In the composition plan, Teldar was placed in sub-category 3.3 as an unsecured creditor with debts that the 1st defendant admitted, but which had been registered late.[55] The amount the 1st defendant owed Teldar was stated to be US$140.9m. The defendants claim that the plaintiff's claim of US$71,696,402 is included in this amount.

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52 Theo Lekatompessy's 3rd Affidavit at para 81

53 Theo Lekatompessy's 3rd Affidavit at p 1044

54 Theo Lekatompessy's 3rd Affidavit at para 82

55 Theo Lekatompessy's 3rd Affidavit at pp 956 and 981

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28 The liquidators deny that the debt has been assigned to Teldar. They assert that on the face of the 1st defendant's 2012 Annual Report, Teldar appears only to have guaranteed the 1st defendant's liabilities; it does not follow that the 1st defendant's liability to the plaintiff has been extinguished.[56] The liquidators also question the legitimacy of the alleged guarantee. The date of the supposed guarantee agreement was 2011; the plaintiff, however, ceased trading in end November 2009.[57]

29 In any case, Teldar thereafter assigned the 1st defendant's debt of US$140,945,586 (including the US$71,696,402 owed to the plaintiff) to a Panama-incorporated company named Athens Investment Fund SA ("Athens") on or about 11 October 2013.[58] Athens was not a creditor of the 1st defendant in the PKPU proceedings and was hence not listed in the Homologation Judgment or composition plan. On 25 November 2013, Athens filed a civil claim in the Jakarta District Court against the 1st defendant to recover this sum.[59] The fact that the Homologation Judgment had been passed in respect of the 1st defendant's debts did not seem to bar Athens from instituting this suit.

30 The 1st defendant and Athens entered into a settlement agreement dated 26 November 2013 by which the 1st defendant agreed to repay Athens the sum of US$140,945,586 in two tranches.[60] The South Jakarta District

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56 Affidavit of Bob Yap Cheng Ghee, dated 10 June 2016, at para 6.4.3

57 Affidavit of Bob Yap Cheng Ghee at para 6.44

58 Defendants' Submissions at para 117

59 Theo Lekatompessy's 4th Affidavit, dated 14 July 2016, at para 80

60 Theo Lekatompessy's 4th Affidavit at pp 710–711

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Court issued an order dated 4 December 2013 approving the deed of settlement.[61] There is no evidence that the 1st defendant has repaid Athens.

The 2nd defendant's outstanding liability to the plaintiff

31 The defendants submit that the plaintiff's claims against the 2nd defendant have also been admitted into the composition plan.

32 The defendants assert that there is no separate inter-company loan of US$39,542,815 owed to the plaintiff because this figure is the amount owed to the plaintiff for the restructuring transactions.[62] I note that the liquidators have not provided any specific documentation for this inter-company loan other than the plaintiff's 2009 unaudited accounts.

33 The defendants say that pursuant to the restructuring transactions, the 2nd defendant originally owed the sum of US$40,303,184.90 to the plaintiff.[63] This sum corresponds to the total amount of consideration for the *Sapta Samudra* and the shares in the four companies as currently stated in the statement of claim.

34 The defendants say that this sum was reduced to US$39,542,815 by payments made by the 2nd defendant to the plaintiff's suppliers.[64] There is no evidence of what these payments were.

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61 Theo Lekatompessy's 4th Affidavit at p 728

62 Theo Lekatompessy's 3rd Affidavit at para 89

63 Theo Lekatompessy's 3rd Affidavit at para 85

64 Theo Lekatompessy's 3rd Affidavit at para 85

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35 Next, the defendants say that during the period from 1 January 2009 to 31 October 2011, the 2nd defendant made payments to the plaintiff's suppliers amounting to US$1,732,819. The only evidence of this is a balance sheet which does show that the sum owing from the 2nd defendant to the plaintiff was reduced from US$39,542,815 to US$37,809,996 as at 31 October 2011.[65]

36 It is then alleged that the 2nd defendant's debts to the plaintiff were transferred to the 1st defendant with the plaintiff's approval.[66] This assertion was based on two pieces of evidence. First, there was a letter which a former liquidator, Mr Cosimo Borrelli, wrote to the Indonesian Stock Exchange on 29 October 2012. The purpose of the letter was to explain that an announcement made by the 1st defendant on the Stock Exchange on 22 October 2012 was misleading.

37 The paragraph in Mr Borrelli's letter which the defendants rely on was meant to counter the suggestion in the announcement that the 1st defendant and its subsidiaries were fully operating, independent, and profitable. It read as follows.[67]

> [The plaintiff] also has substantial claims against [the 1st defendant] following the transfer of almost all the important assets of [the plaintiff] and its subsidiaries to [the 1st defendant] and [the 2nd defendant] in 2009 without any consideration being paid by them. The following assets and equity interests were transferred out from [the plaintiff] or [the plaintiff's] subsidiaries to [the 2nd defendant] for a total purported consideration of USD58,179,185 but actually nothing has been paid to [the plaintiff] or [the plaintiff's] subsidiaries for these assets as at this date. Investigations

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65 Theo Lekatompessy's 3rd Affidavit at p 1057

66 Defendants' Submissions at para 89

67 Defendants' Submissions at para 79; Theo Lekatompessy's 3rd Affidavit at p 1007

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into the value of the assets that were transferred are ongoing but it is likely to be substantially higher.

Assets	Transfer Consideration USD
Vessel – Dasa Samudra	3,920,000
Vessel – Griya Asmat	11,856,000
Vessel – Nawa Samudra	2,100,000
Vessel – Sapta Samudra	4,020,000
100% equity interest in Silverstone Development Inc	8,907,170
60% equity interest in Humolco Trans Inc	600
51% equity interest in Cometco Shipping Inc	27,372,715
45% shareholding in MCGC II Inc	2,700
Total	58,179,185

38 The defendants' expert on Indonesian law suggests that the effect of Mr Borrelli's letter under Indonesian law is that the plaintiff had consented to the 1st defendant's taking over of the 2nd defendant's debts to the plaintiff.[68] The plaintiff's expert disagrees. His view is that under Indonesian law, the 2nd defendant's debts to the plaintiff under the restructuring transactions were contractual obligations, which could only be assigned by way of novation. This could only be achieved if the parties to the contract and the assignee – the plaintiff and both defendants – executed a notarial deed.[69]

68 Pascoal's Expert Opinion at paras 55–58

69 Budijaja's Expert Opinion at paras 4.2–4.4

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39 The second piece of evidence relied on is a letter from the 1st defendant to the administrator in the PKPU, dated 7 November 2012, informing him that the 1st defendant owes the plaintiff US$52,770,113.82.[70] This number roughly matches the US$52.8m that represented the value of the plaintiff's claim as a creditor of the 1st defendant under sub-category 3.4 in the composition plan (see [19] above). There is, annexed to this letter, a table showing that this sum comprises the net balance owing to the plaintiff for the *Sapta Samudra* and the shares in the four companies, which is US$37,809,996, and the net balance owing to the plaintiff's subsidiaries for the other three vessels, which is US$14,960,117.64. It appears from the table that the net balance for these three remaining vessels has also been reduced by part payments and inter-company payments from US$17,916,000 (as claimed in the statement of claim) to US$14,960,117.64.

40 In short, the defendants appear to suggest that it is the 1st defendant who now owes US$52.8m to the plaintiff *and its subsidiaries* for the transfers of the shares and vessels to the 2nd defendant. It was this debt that was recognised in the composition plan as due from the 1st defendant to the plaintiff. This debt comprises the US$37,809,996 owed by the 2nd defendant to the plaintiff for the *Sapta Samudra* and the shares in the four companies, and the US$14,960,117.64 owed by the 2nd defendant to the plaintiff's single-ship subsidiaries for the three other vessels.

The application to strike out this action

41 Summons 893 of 2016 is the defendants' striking-out application. The defendants sought to strike out the plaintiff's action solely under O 18

[70] Theo Lekatompessy's 3rd Affidavit at p 1061

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r 19(1)(*d*) of the Rules of Court (Cap 322, R5, 2014 Rev Ed), that is, for being "an abuse of process of the Court". The application was not premised on O 18 r 19 (1)(*a*)–(*c*).

42 The court's power to strike out an action under O18 r 19(1)(*d*) allows it to forestall any improper use of its machinery. But the power conferred by O 18 r 19 in general is a draconian one and ought not to be exercised save in plain and obvious cases (see *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [18] and [33]).

The parties' submissions

43 The defendants relied solely on the extended doctrine of *res judicata* to strike out the plaintiff's action under O 18 r 19(1)(*d*). Their key arguments were as follows:[71]

(a) The plaintiff could and should have raised its claims in the PKPU proceedings. Instead, it chose not to participate.

(b) The inter-company loans and the restructuring transactions were settled by the composition plan as approved by the Indonesian court in the form of the Homologation Judgment.

(c) The plaintiff was in effect attempting to reopen the Homologation Judgment. This would be prejudicial to the defendants and creditors who had voted in favour of the composition plan.

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[71] Defendants' Submissions at para 156

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(d) By embarking on these proceedings, the plaintiff was in effect asking the Singapore court to pass its own judgment on the Homologation Judgment, which is a final and binding court judgment on all the 1st defendant's creditors.[72]

44 The liquidators' response, broadly speaking, is that the extended doctrine of *res judicata* has no application to their claims:[73]

(a) As regards the claims against the 2nd defendant, there was neither identity of parties nor identity of subject matter, as required by the extended doctrine of *res judicata*. The PKPU proceedings only concerned the 1st defendant.

(b) However, even as regards the 1st defendant, the extended doctrine would still not apply because the Homologation Judgment was not a final and conclusive decision on the merits in respect of the plaintiff's claim against the 1st defendant.

(c) In fact, a determination by the Singapore court on the merits of the plaintiff's claims would be a premise for the plaintiff to seek enforcement proceedings against the 2nd defendant in Indonesia or a variation of the Homologation Judgment and/or Postponement Judgment as against the 1st defendant. This is because a judgment from a Singapore court can serve as evidence that a wrong debt has been admitted in the composition plan.[74] It would hence be undesirable

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72 Defendants' Submissions at para 181

73 Plaintiff's Submissions at para 4.1.1

74 Plaintiff's Submissions at para 4.6.2

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for the plaintiff's claims to be prevented from proceeding by reason of the extended doctrine of *res judicata*.

Have the liquidators' claims been included in the Composition Plan?

45 Central to the defendants' case for striking out the plaintiff's claims in the Singapore proceedings on the basis of *res judicata* is the *assumption* that the *subject matter* of the liquidators' claims have all been included in the composition plan. On this assumption, they argue that the liquidators ought to have raised their claims as objections in the PKPU proceedings which they were aware of. To do so now would be re-opening the Homologation Judgment which is final and binding on all the 1st defendant's creditors, including the plaintiff. That, they submit, would be an abuse of process.

46 I should state upfront that this assumption on which their entire case is based suffers from many evidential and logical gaps.

The claim against the 1st defendant

47 The defendants' submission that the liquidators should be precluded from claiming the inter-company loan from the plaintiff to the 1st defendant because it has been admitted into the composition plan was beset by a number of fundamental problems.

48 The amount Teldar supposedly agreed to be liable for was a staggering US$140m. Yet there is no evidence at all of the actual agreement by which such a huge debt was transferred. If this transaction is legitimate, it would be reasonable to expect that Teldar would not assume such a huge liability without some formal documentation. Furthermore, there is no apparent reason why it would do so. Teldar is a company incorporated in the British Virgin

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Islands whose relationship to the 1st defendant is not known. The exact breakdown of the US$140.9m shown in the Homologation Judgment as owing to Teldar was not provided. Therefore, without the actual guarantee agreement in evidence, it is simply not possible to verify (a) the legitimacy of the alleged transfer; (b) that the sum of US$140m is owing by the 1st defendant to Teldar, as alleged; and (c) that the sum included the inter-company loan which was originally due and owing by the 1st defendant to the plaintiff. This is merely a bald assertion by the 1st defendant.

49 Further, for Teldar to have taken on the 1st defendant's liability to the plaintiff for the inter-company loan, the plaintiff must have given its consent. The defendants have not explained how and when the plaintiff did so.

50 The next point is the most crucial. Even assuming Teldar had validly taken over the 1st defendant's liability for the inter-company loan, Teldar would only become a creditor of the 1st defendant for the inter-company loan amount of US$72,608,916 if it had *first* repaid that loan to the plaintiff. Only then would it be entitled to look to the 1st defendant for recovery. That is precisely what the 1st defendant's 2012 Annual Report suggests: Teldar would be entitled to the sum of US$140m when the "debts to [the plaintiff] and its subsidiaries [had] been fully paid by Teldar" (see [26] above). Quite plainly, that has not occurred.

51 Finally, the defendants' own case is that Teldar has since assigned the inter-company loan of US$72,608,916 to Athens. But their ostensible reason for striking out this claim is that it has already been included in the composition plan. However, if Athens has taken over that debt, then it is indeed curious that Athens has brought a civil claim against the 1st defendant

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for the same debt in the South Jakarta District Court instead of seeking to vary the Homologation Judgment to be included as a creditor in the composition plan.

The claims against the 2nd defendant

52 As for the liquidators' claims against the 2nd defendant, the 1st defendant asserts that it took over the restructuring transactions from the 2nd defendant and, on that basis, invited me to find that these claims have been included in the composition plan. There are two cumulative difficulties with this submission.

53 First, the effect of Mr Borrelli's letter under Indonesian law may be disputed. But since it is written in English, there is no question of its plain meaning being lost in translation. On the face of that letter, it is immediately apparent that there is no mention of the plaintiff consenting to the 1st defendant taking over the debts owed by the 2nd defendant to the plaintiff. Mr Borrelli's letter was not even addressed to the 1st or 2nd defendants, but to the Indonesian Stock Exchange instead. It was written for the specific purpose of highlighting the plaintiff's claims against the 1st defendant to the Stock Exchange. It would require a somewhat contrived reading of the letter to yield the effect sought by the defendants.

54 Second, even if the plaintiff had consented to the 1st defendant taking over the 2nd defendant's liability for the restructuring transactions, it would not mean they had consented to the 1st defendant's quantification of liability at US$37,809,996 to take into account two sets of payments made on the plaintiff's behalf (see [34]–[35] above). There is no hint in Mr Borrelli's letter of the sum having been reduced in this way. The other piece of evidence is the

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1st defendant's letter to the administrator but there is no evidence that the plaintiff was even aware of this letter.

55 As for the inter-company loan to the 2nd defendant, the defendants have no evidence to show that it was in reality one and the same with the debt owed by the 2nd defendant to the plaintiff under the restructuring transactions. They do not dispute that the loan was recorded in the plaintiff's financial statements for 2009, as pleaded in the statement of claim.

56 From the above analysis, it would appear that there are significant difficulties in the defendants' assertion that the liquidators' claims against them have been included in the composition plan. That having been said, I will now turn to explain why I found, in any event, that the requirements for the application of the extended doctrine of *res judicata* were not satisfied to strike out the liquidators' claims.

57 The defendants' case on *res judicata* was unusual, to say the least. It will be necessary to first examine the rationale and scope of the extended doctrine of *res judicata* as it applies to domestic judgments before examining its application and effect on foreign judgments and, in particular, foreign judgments rendered by an insolvency court such as the PKPU proceedings.

Res judicata and domestic judgments

58 I start with *res judicata* as it applies to domestic judgments. The general principles have been set out authoritatively by the Court of Appeal in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 ("*TT*"). The plea of *res*

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judicata encompasses three distinct but interrelated legal principles: cause of action estoppel, issue estoppel, and the extended doctrine of *res judicata*, also known as the defence of abuse of process (see *TT* at [98]). Cause of action estoppel and issue estoppel apply to preclude a party from raising a claim or issue which has been determined by a court of competent jurisdiction in previous litigation between the same parties (see *TT* at [99]–[100]). The extended doctrine of *res judicata* goes further by precluding a party from raising claims or issues which, though not brought before the court, and therefore not specifically determined, nevertheless ought properly to have been raised and argued. The extended doctrine thus extends cause of action estoppel and issue estoppel to such claims or issues which were "so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them" (see *Greenhalgh v Mallard* [1947] 2 All ER 255 at 257, cited in *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit and another appeal* [2000] 1 SLR(R) 53 ("*Ching Mun Fong*") at [23]). The same public interest underlies cause of action estoppel, issue estoppel, and the extended doctrine of *res judicata*: "that there should be finality in litigation and that a party should not be twice vexed in the same matter" (see *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 ("*Johnson*") at 31; see also *TT* at [98]).

The origin of the extended doctrine

59 The origin of the extended doctrine is commonly said to be *Henderson v Henderson* (1843) 3 Hare 100 ("*Henderson*"). It is worth noting that *Henderson* was concerned with the preclusive effect of proceedings in a foreign court. Two brothers, Bethel and Jordan, were partners in their father's

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business. Jordan died intestate in Newfoundland and his widow sued Bethel in Newfoundland for, among other things, sums of money he had failed to account for under the partnership. Judgment was granted in her favour. Bethel tried to resist enforcement of the judgment in England by arguing that it was actually Jordan (and, upon his death, his widow) who owed him money under the partnership. Bethel did not raise this argument in Newfoundland. This prompted Sir James Wigram VC to observe (at 115):

> … where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which [the] parties, exercising reasonable diligence, might have brought forward at the time.

60 Thus stated, the extended doctrine applies only if a matter has been decided by a court of competent jurisdiction and "the same parties" raise matters which "properly belonged to the subject of litigation". Subsequent cases, however, have added two refinements to the doctrine: there is no requirement that the parties must be the same or that "every point which properly belonged to the subject of litigation" must have been brought.

No requirement of identity of parties

61 The requirement of identity of parties has since been dispensed with. Indeed, it is precisely because the parties are different that cause of action and issue estoppels are generally inapplicable and resort must be had, as a result,

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to the extended doctrine. Thus, a plaintiff may be precluded from suing a defendant who should have been sued in previous proceedings (see *Bradford & Bingley Building Society v Seddon Hancock and others (Third Parties)* [1999] 1 WLR 1482 at 1491). Conversely, a defendant may invoke the extended doctrine to preclude a plaintiff who could have brought a claim against him in previous proceedings, but who did not, from now doing so (see *Kwa Ban Cheong v Kuah Boon Sek and others* [2003] 3 SLR(R) 664 at [32]).

62 Thus, the liquidators' submission that the extended doctrine of *res judicata* could not bar the plaintiff from suing the 2nd defendant solely on the premise that the PKPU proceedings were only in respect of the 1st defendant must be rejected.

Matters which properly belonged to the subject of litigation

63 There is also no requirement that every point which could have been taken in previous proceedings should have been, so as to render the raising of it in subsequent proceedings necessarily an abuse of process. That would be, as Lord Bingham observed in *Johnson* at 31, to adopt too dogmatic an approach. Rather, the court is to determine whether there is an abuse by looking at all the circumstances of the case. The court may consider, in particular, whether the later proceedings constitute a collateral attack upon the previous decision, whether there is fresh evidence that might warrant re-litigation, whether there are *bona fide* reasons why an issue that ought to have been raised in the earlier action was not, and whether there are other special circumstances that might justify allowing the case to proceed (see *Goh Nellie v Goh Lian Teck* [2007] 1 SLR(R) 453 ("*Goh Nellie*") at [53]; *Low Heng Leon Andy v Low Kian Beng Lawrence (administrator of the estate of Tan Ah Kng, deceased)* [2013] 3 SLR 710 at [58]).

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64 The defendants argued that the liquidators' present claims constitute a collateral attack on the Homologation Judgment and therefore an abuse of process.[75] However, this argument would not be relevant unless it is first established that the liquidators' claims were "the subject of litigation in, and of adjudication by, a Court of competent jurisdiction" (*Henderson*; see [59] above). The defendants' case is that the liquidators' claims are part of the subject matter of the Homologation Judgment passed by the Indonesian court[76] . I have expressed my serious reservations as to whether this submission is borne out by the facts before me (see [47]–[56] above). Approaching this submission as a matter of law, however, where a foreign judgment is concerned, recognition of the foreign judgment is the process by which one determines that a matter has been the subject of litigation in a court of competent jurisdiction. I now elaborate on that requirement.

The extended doctrine of res judicata and foreign judgments

Recognition of foreign judgments

65 Recognition of a foreign judgment is a necessary prerequisite for it to be *res judicata* before our courts either through cause of action or issue estoppel or by virtue of the rule in *Henderson*. In *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and others* [2013] 1 SLR 1254, Belinda Ang Saw Ean J noted at [155]:

> With regard to foreign judgments (as opposed to locally obtained judgments), as was the case here, the operation of the doctrines of res judicata and abuse of process is qualified. A prerequisite is that the foreign judgment must be recognised within the forum of Singapore for it to have any effect (see

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75 Defendants' Submissions at paras 183–184

76 Defendants' Submissions at paras 157 and 168(b)

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> Peter Barnett, Res Judicata, Estoppel, and Foreign Judgments (Oxford University Press, 2001) at p 24).

George Wei JC made a similar observation in *Manharlal Trikamdas Mody and another v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 ("*Manharlal*") at [135]: "the principle that the doctrine of *res judicata* applies to foreign judgments *entitled to recognition* is well established and undoubtedly part of Singapore law" (emphasis added).

66 Recognition is the process by which the domestic court determines that a foreign judgment is entitled to have legal effect in the forum. It is therefore a prelude to enforcement, which is the primary but not only purpose for which recognition can be sought. A party who relies on a foreign judgment to prevent the matters therein from being re-litigated by the other party is essentially aiming "to establish a negative proposition and seeks that recognition alone be accorded to that judgment. There is no question of enforcement" (see *Dicey, Morris and Collins on The Conflict of Laws* (Lord Lawrence Collins gen ed) (Sweet & Maxwell, 15th Ed, 2012) ("*Dicey*") at para 14-005).

67 The tests for recognition and for enforcement are the same. Recognition in this case is governed by the common law rule because the statutory schemes in Singapore for recognising and enforcing foreign judgments only apply to judgments from specified countries, which do not include Indonesia. The common law rule is that a foreign judgment will be recognised if (a) it is the final and conclusive judgment of a court which, (b) according to the private international law of Singapore, had jurisdiction to grant that judgment, and (c) if there is no defence to its recognition (see *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014]

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2 SLR 545 ("*Aksa*") at [13] and [17]). I will examine each of these requirements in turn.

(1) Final and conclusive judgment

68 As a starting point, the foreign judgment must be final and conclusive on the merits. The party who seeks to rely on the judgment has the burden of proving that it is final (see *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853 ("*Carl Zeiss*") at 936, 949, and 971).

69 There are two aspects to finality. First, the judgment must be conclusive of the merits of the case. This means that the decision is one which cannot be varied, re-opened or set aside *by the court that delivered it* (see *The "Bunga Melati 5"* [2012] 4 SLR 546 at [81]). This aspect of finality applies whether *res judicata* is being invoked in respect of a domestic or a foreign judgment (see KR Handley, *Spencer Bower and Handley: Res Judicata* (LexisNexis, 4th Ed, 2009) at para 5.01). A domestic or foreign judgment is no less final merely because it is subject to an appeal or a stay of execution (see *Goh Nellie* at [28] and *Manharlal* at [142]–[144]).

70 In addition, where a foreign judgment is concerned, finality is to be assessed by asking whether the foreign court rendering the judgment would itself regard it as final and conclusive. Thus, Lord Reid stated in *Carl-Zeiss* that it would "verge on absurdity" to regard as conclusive something in a foreign judgment which the foreign court would not regard as conclusive (at 919). In *The "Bunga Melati 5"* at [86], the Court of Appeal endorsed Lord Reid's statement as a "principled approach" which applies in Singapore. Although these observations were made in the context of issue estoppel, in my

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view, they are equally applicable when considering the extended doctrine of *res judicata*.

(2) International jurisdiction

71 Next, the forum court recognising the judgment must be satisfied that, according to its own rules of private international law, the foreign court rendering the judgment had jurisdiction to give that judgment, *ie,* jurisdiction in the "international sense". Rule 43 of *Dicey*, at p 690, lists four grounds of jurisdiction: presence in the foreign country, filing a claim or counterclaim before the foreign court, voluntarily submitting to the jurisdiction of the foreign court by appearing in the proceedings, and agreeing to submit to the jurisdiction before the commencement of proceedings. Rule 43 applies equally to judgments in foreign insolvency proceedings (see *Rubin and another v Eurofinance SA and others* [2013] 1 AC 236).

72 The only possible ground of the Indonesian court founding jurisdiction against the plaintiff for the purposes of the PKPU proceedings in this case would be voluntary submission. The other grounds are clearly inapplicable. Whether a defendant has voluntarily submitted to the jurisdiction of the foreign court is to be determined without exclusive reference to the law of the forum or the law of the foreign court. It is in that sense that the jurisdiction is "international". As Andrew Ang J held in *Aksa* (at [26]), the court must not only consider the general framework of its own procedural rules, but also the domestic law of the court where the steps were taken.

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(3) No defences to recognition

73 For the purposes of explaining this last requirement, it is sufficient to quote the following summary from *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2016 Reissue) at para 75.209:

> Generally, a foreign judgment would not be given effect to, in spite of the satisfaction of the requirements discussed above, if its recognition or enforcement (as the case may be) would be contrary to the fundamental public policy of the forum, where it would conflict with an earlier judgment from the forum or an earlier foreign judgment recognised under the private international law of the forum, or if the foreign judgment had been obtained by fraud or in breach of principles of natural justice, or if it would amount to the direct or indirect enforcement of foreign penal, revenue or other public laws.

The applicability of the extended doctrine to this case

74 Applying the principles articulated above to the present case, I find that the Homologation Judgment is not capable of having any preclusive effect, based on the extended doctrine of *res judicata*, either against the 1st defendant or the 2nd defendant.

Not final and conclusive

75 The Homologation Judgment is not final and conclusive. It is not a foreign judgment which can be recognised as giving rise to any *res judicata* effect.

76 The liquidators submitted that the Homologation Judgment is not final and conclusive for two reasons. First, under Indonesian law, it can be annulled. Second, the Homologation Judgment can be varied to include an omitted debt through the filing of a miscellaneous charge in the same Court that granted it.[77]

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77 The possibility that the Homologation Judgment may be annulled or set aside does not *per se* mean it is not final and conclusive for the purposes of recognition in this forum. The approach to default judgments is instructive here. A foreign judgment obtained in default of one party's appearance may be regarded as final and conclusive even though it may be set aside by the same court which rendered it. As long as the judgment is intended to be final, it remains final until a defendant takes steps to set it aside (see *Dicey* at para 14-023). In this case, the experts both point out that the Homologation Judgment can be annulled if the debtor fails to comply with the terms of the composition plan.[78] Annulment depends on an event in the future which may or may not happen. As long as the Homologation Judgment was intended to be final and conclusive, the possibility of annulment will not change that; if it has in fact been annulled, the judgment is obviously no longer final and conclusive.

78 That brings me to the liquidators' second argument, which I accept: the Homologation Judgment is not intended to be final and conclusive because it can be varied. The general rule is that "[a] foreign judgment which is liable to be abrogated or varied by the court which pronounced it is not a final judgment" (see *Dicey* at para 14-023). Here, there are two ways in which the Homologation Judgment can be varied.

79 First, the defendants' expert on Indonesian law suggested (and the plaintiff's expert agreed) that the plaintiff could file a miscellaneous charge to include a debt omitted from the composition plan. While the experts on Indonesian law did not offer a definition of a "miscellaneous charge", it

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[77] Plaintiff's Submissions at para 4.5.6

[78] Budijaja's Expert Opinion at para 2.2.2; Pascoal's Reply Opinion at para 8(b)

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appears to be an application filed by a creditor requesting the court to determine issues arising out of a Homologation Judgment. In this case, the defendants argued that the plaintiff could seek repayment of the US$72,608,916 inter-company loan it claims in the present Singapore action by filing a miscellaneous charge to ask for an order for such payment.[79] Besides suggesting that the Homologation Judgment is capable of being varied, I note in passing that this submission by the defendants' expert on Indonesian law implies that the US$72,608,916 inter-company loan had not in fact been admitted into the composition plan by Teldar's assumption of liability, as the defendants contended. This is entirely in line with my observations at [47] to [56] above on the defendants' significant difficulties in establishing, at this stage, that the *subject matter* of the liquidators' claims have been included in the composition plan.

80 Second, the plaintiff's expert on Indonesian law added that the judgment could also be varied if the admitted debts were fraudulent conveyances.[80] This was based on Article 3(1) of Law No 37, which was the basis on which the Postponement Judgment was granted.[81] It was accepted by the Central Jakarta District Court that the investigation of the 1st defendant's debt to the plaintiff might affect the 1st defendant's obligation to pay its debt to the plaintiff based on the Homologation Judgment.[82] The 1st defendant's debt might be "deemed invalid because of the legal violation in the transaction."[83]

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79 Pascoal's Expert Opinion at para 53; Budijaja's Expert Opinion at para 2.23

80 Budijaja's Expert Opinion at paras 2.27–2.28

81 Theo Lekatompessy's 3rd Affidavit at p 1184

82 Theo Lekatompessy's 3rd Affidavit at p 1194

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81 In addition, since finality is to be assessed by asking whether the foreign court would itself treat the judgment as *res judicata*, it is relevant to note that Athens was able to file a civil claim in an Indonesian court against the 1st defendant even though, on the defendants' case, Athens became a creditor of the 1st defendant after taking over its debt to Teldar, which was admitted in the composition plan. This lends weight to the opinion of the plaintiff's expert on Indonesian law that the Homologation Judgment does not preclude the liquidators from commencing its claims in a Singapore court.[84]

No international jurisdiction

82 Even if the Homologation Judgment was final and conclusive, I would have found that the Indonesian court did not have jurisdiction over the plaintiff, who did not participate at all in the PKPU proceedings. The defendants rely on the fact that the plaintiff "was aware of the PKPU proceedings but deliberately chose not to participate in the same".[85] In *Rubin*, the majority of the UK Supreme Court found that a judgment based on fraudulent conveyances given in a New York court could not be enforced in England against a party who did not appear and who therefore could not be treated as having submitted to the jurisdiction of the foreign court (see [168]–[169], *per* Lord Collins and [189], *per* Lord Mance). Similarly, the plaintiff here cannot be taken to have submitted to the jurisdiction of the Indonesian court simply because it had the chance of proving its debts there. This point was also addressed in Adrian Briggs, *Civil Jurisdiction and Judgments* (Informa Law, 6th Ed, 2015) at para 7.81, where the author opined that if an

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83 Theo Lekatompessy's 3rd Affidavit at p 1220

84 Budijaja's Expert Opinion at para 3.15

85 Defendants' Submissions at para 168(a)

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absentee plaintiff is *simply notified of* but plays no part in the proceedings, it is impossible to say that the foreign court could be jurisdictionally competent to bind him by its judgment or order. The resulting judgment would not preclude the claimant from commencing a claim in another forum.

83 The mere fact that the 1st defendant had unilaterally included the plaintiff as a creditor in the composition plan cannot in itself constitute the plaintiff's submission to the jurisdiction of the Indonesian court for the purposes of the Homologation Judgment. Although the plaintiff was listed as a creditor in the Homologation Judgment, it had no right to vote on the composition plan since it did not present any claims.[86] That is plainly insufficient to amount to any voluntary submission to the Indonesian court in respect of the PKPU proceedings.

84 I can therefore see no basis for holding that the plaintiff should be precluded from pursuing its claims here on the basis of the extended doctrine of *res judicata*.

Conclusion on the striking out application

85 For the reasons stated above, I dismissed the striking out application with costs to the plaintiff, which I fixed at $10,000 plus reasonable disbursements to be agreed if not taxed.

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[86] Theo Lekatompessy's 3rd Affidavit at pp 972–973

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The application for a stay of proceedings

86 Summons 1045 of 2016 is the defendants' application for a stay of the Singapore proceedings in favour of Indonesia on the ground of *forum non conveniens*.

The legal basis for the stay application

87 The applicable test is the *Spiliada* test (see *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460). It is at the court's discretion whether or not to grant a stay of proceedings on the ground of *forum non conveniens*. It will do so only if there is some other available forum which is clearly or distinctly more appropriate for the trial of the action. The inquiry proceeds in two stages. At the first stage, the defendant bears the legal burden of showing that there is an available and more appropriate forum. The factors which may indicate the appropriateness of any available forum include the relative convenience and expense of trial in a forum, the substantive law applicable to the dispute, and the residence or place of business of the parties. The party asserting any one factor bears the evidential burden of proving it, and the weight to be attached to each factor will depend on the facts of each case. If, upon considering all the factors, the court is satisfied that there is some other available forum more appropriate for the trial of the action, it will ordinarily grant a stay unless there are circumstances in which justice requires that a stay be refused. The legal burden shifts to the plaintiff, at this second stage of the inquiry, to prove that such special circumstances exist (see *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw*") at [13]–[15]; *CIMB Bank v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 ("*Dresdner*") at [26]; *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO*") at [38]–[40]).

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88 It should be recalled that the plaintiff seeks the following reliefs in the Singapore proceedings: (a) the recovery of an inter-company loan of US$72,608,916 from the 1st defendant; (b) the recovery of an inter-company loan of US$39,542,815 from the 2nd defendant; and (c) the setting aside of the restructuring transactions as against the 2nd defendant. These are three distinct claims.

89 Up to the hearing of this application, the defendants did not make any distinction between any of the claims in aid of its stay application. There was no specific submission that, even if the court should be minded to deny the stay in respect of the restructuring transactions, it should nonetheless stay the claims in respect of the inter-company loans against the 1st and 2nd defendants. The defendants only adopted this argument belatedly in response to a point I had raised in the course of the hearing. Nonetheless, I will first examine whether a court can grant a stay in respect of some of the plaintiff's claims but not the others. I will refer to this as a "partial stay".

Partial stay of proceedings

90 There are very few decisions where a partial stay has been granted on *forum non conveniens* grounds. There are two permutations for a partial stay in this case.

91 First, one might stay a claim as against one defendant but not the other defendants. A distinction may be drawn, for example, between the 1st defendant who is already a party in the PKPU proceedings and the 2nd defendant who is not. A stay against one of several defendants is permissible if the actions against them are not closely related and there is no possibility of inconsistent decisions being reached by courts in different

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jurisdictions. *Itochu Steel Asia Pte Ltd v C V Wira Mustika Indah and others* [1999] SGHC 321 ("*Itochu*") is a case where such a partial stay was granted. A Singapore-incorporated company brought an action against an Indonesian partnership and two Indonesian citizens. The action against the 1st and 3rd defendants was based on dishonoured bills of exchange. The 2nd defendant guaranteed the liability of the 3rd defendant. Only the 2nd defendant applied to stay the action on the basis of *forum non conveniens*. Amarjeet Singh JC granted the stay, finding that the action on the guarantees had the closest and most real connection with Indonesia (at [21]). The plaintiff had objected to the stay on the premise that the action against the 2nd and 3rd defendants would be more effectively disposed of together in Singapore. In response Singh JC observed that the evidence required to establish liability against the 2nd and 3rd defendants was very different; in addition, the validity of the guarantees under Indonesian law was in issue, which made it more appropriate that the action against the 2nd defendant be resolved by an Indonesian court (at [22]–[24]).

92 If the case against the defendants raises the same issues and relies on the same evidence, to grant a partial stay would allow the defendants to be sued separately in different jurisdictions, with the undesirable prospect of inconsistent judicial decisions. In such circumstances, it would not be in the interests of justice to grant a partial stay. This was made clear in *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Ltd and another* [2001] 1 SLR(R) 104 ("*Hutan*") at [24] to [26]. In that case, the plaintiff sued a company to recover two debts, and the president of the company who had acted as guarantor for both debts. The guarantor did not challenge the jurisdiction of the Singapore courts. The company, relying on the *Itochu* decision, sought a stay of the action against it. Having explained the

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undesirability of two actions raising common issues being tried in two jurisdictions, the Court of Appeal found that, notwithstanding that the guarantees were governed by Indonesian law, the ends of justice would be better served if both actions were disposed of in Singapore.

93 I should mention that the partial stay in *Itochu* was brought about *as a result* of the nature of stay application which was *only* filed by the 2nd defendant. Similarly, in *Hutan*, the court was confronted with a partial stay because the other defendant did not contest the jurisdiction of the Singapore court to hear the case. Here, the circumstances are slightly different because *both* defendants are seeking, in the alternative, a partial stay for some but not all the claims as against *both* defendants.

94 Another form of partial stay is to stay one of the claims against a defendant, but not the rest. This is the sort of partial stay which both defendants are seeking in the alternative. This may be appropriate where the forum is eminently the natural forum for deciding on one claim but not the others. As an example *Hyslop v Society of Lloyd's* (1992) 6 PRNZ 204 comes close, though strictly speaking it was about a stay based on an exclusive jurisdiction clause rather than *forum non conveniens*. A member of Lloyd's sought the cancellation of registration documents by which she became a member. Her claims were based on misrepresentation, negligence, breach of implied terms, and under two New Zealand statutes: the Fair Trading Act 1986 and the Securities Act 1978. English law was the governing law and there was an exclusive jurisdiction clause in favour of England. The defendants sought a stay of all proceedings. Holland J declined to stay the claims based on the New Zealand statutes. This was because the statutes were designed for the protection of the New Zealand public, the factual and legal matters relevant to

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the statutory causes of action concerned New Zealand, and the objection based on the exclusive jurisdiction clause had little force in the face of a provision in the statutes which precluded contracting out of them.

95 Further afield, jurisprudence from the United States supports the possibility of a partial stay by which a court retains jurisdiction over some claims and chooses to stay the rest on the ground of *forum non conveniens*. An oft-cited case in point is *Scottish Air International Inc v British Caledonian Group, PLC*, 81 F 3d 1224 (2nd Cir 1996) which illustrates the propriety of granting a partial stay if the forum is eminently the appropriate forum for one claim but not others. In that case, the plaintiffs' claim for contempt of court in breaching a court order embodying a settlement agreement was heard by the New York Court. Another claim for the reinstatement of directors to the board of directors of a Scottish airline was dismissed on *forum non conveniens* grounds. The New York Court took the view that a court in the United Kingdom would be the natural forum for that action. In the court's view, because the claim for breaching a court order could "by definition" only be decided by a New York Court, it was not inappropriate to decide that claim while dismissing the rest of the claim on *forum non conveniens* (at 1235). They had earlier found that the UK was the more appropriate forum for the latter claim because it had a "more substantial interest" in the board composition of a Scottish corporation (at 1234). In the court's view, the doctrine of *forum non conveniens* should be flexible enough to accommodate a partial stay. Otherwise, the *forum non conveniens* analysis could be skewed "by joining claims that lack merit" (at 1235).

96 In my view, a partial stay would be particularly relevant where claims pursuant to a forum's statutory laws are brought alongside other claims. The

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possibility of a partial stay might discourage litigants from tacking on claims with no obvious connection to the forum to claims which do. However, as the cases of *Itochu* and *Hutan* have elucidated, the court must be alert to the degree of overlap between the claims. Any partial stay, whether as against one of multiple defendants or in respect of one of multiple claims, would be impermissible if there is a high degree of overlap in the claims leading to the possibility of inconsistent decisions by different courts.

97 In the present case, the claims to recover the inter-company loans might appear to be distinct from the claim to set aside the restructuring transactions. Going by the statement of claim alone, there appears to be little if any overlap in the facts surrounding the three claims. In principle, it is open to me to stay the proceedings as regards one or more of the claims while declining to do so for the rest. I should mention that Mr Kirpalani's submission is that I should stay the claims for recovery of the inter-company loans as against *both* the 1st and 2nd defendants even if I should decline to do so for the restructuring transactions. In other words, he treated the inter-company loans against the 1st and 2nd defendants *collectively*. He did not submit that I should treat each of the inter-company loan claims separately because they are against different defendants. Hence, I will first consider what the natural forum for the restructuring transactions is, before addressing my mind to the natural forum for the inter-company loan claims as a whole against both defendants.

The restructuring transactions

98 In my judgment, the natural forum for the restructuring transactions must be Singapore. This is because, at the first stage of the *Spiliada* test, the connecting factors would point overwhelmingly in favour of Singapore.

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However, even if Indonesia is found to be the more appropriate forum at the first stage, at the second stage, the unavailability in the Indonesian court of the statutory remedies exclusive to our insolvency laws would constitute special reason to refuse a stay in any event.

99 Attempts to stay claims for oppression of a minority shareholder under s 216 of the Companies Act have been rejected on a similar basis. In *Transtech Electronics Pte Ltd v Choe Jerry and others* [1998] 1 SLR(R) 1014, Judith Prakash J (as she then was) held that the action was based on a Singapore statute which concerns a Singapore company subject to that statute. Even if the action could be brought in the foreign court, it would not be the most appropriate court to resolve a dispute which turned on the meaning and scope of a Singapore statute (at [19]). This point was amplified in *Fan Heli v Zhang Shujing and others* [2016] 1 SLR 1457 by Aedit Abdullah JC, who noted that the "predisposition" should be to regard the Singapore court as the natural forum (at [26]). The s 216 claim is necessarily premised on events which take place between the shareholders of a Singaporean company. The law governing the affairs of the Singapore company would necessarily be Singapore law. Consequently, the "centre of gravity" of such a claim would be Singapore (at [25]). In any event, the unavailability of s 216 remedies in the foreign court would constitute grounds to refuse a stay under the second stage of the *Spiliada* test (at [45]).

100 Similarly, since the plaintiff is a Singapore-incorporated company presently in liquidation in Singapore, and the setting aside of the restructuring transactions is sought under Singapore law, the connecting factors point overwhelmingly to Singapore as the natural forum. Furthermore, I agree with the liquidators that the rights to set aside the restructuring transactions are

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exclusive to the liquidators by the operation of Singapore's insolvency laws.[87] The plaintiff would be prejudiced if the action to set aside the restructuring transactions is stayed as the liquidators would not be able to pursue this remedy elsewhere. The defendants have not been able to establish that the claims based on the restructuring transactions could be brought in Indonesia. The absence of these remedies in the foreign court would be a strong ground to refuse a stay under the second stage of the *Spiliada* test in any event.

101 To rebut the liquidators' point on the absence of a remedy in relation to the restructuring transactions in the Indonesian courts, the defendants argued that under Indonesian law, the plaintiff can pursue an *actio Pauliana* which is a right given under Indonesian law to a creditor to demand the cancellation of a debtor's fraudulent transactions.[88] This right is found in Article 1341 of the Indonesian Civil Code and Articles 41–48 of Law No 37.[89] Therefore, they submitted that the plaintiff could commence an action to annul the restructuring transactions for being fraudulent conveyances, and then seek to vary the composition plan based on the *actio Pauliana*.[90]

102 I fail to see the relevance of this submission. The plaintiff here is seeking to set aside the restructuring transactions as against the 2nd defendant. The *actio Pauliana* is an avoidance remedy against a company in insolvency. Article 41 of Law No 37 provides:[91]

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87 Plaintiff's Submissions at para 6.3.1

88 Defendants' Submissions at para 231

89 Pascoal's Reply Opinion: 2nd Affidavit of Fabian Buddy Pascoal, dated 14 July 2016, at para 27

90 Defendants' Submissions at paras 231–232

91 Budijaja's Expert Opinion at para 2.30

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> (1) In the interest of the bankruptcy assets, annulment may be requested to the Court for all legal acts of the Debtor who has been declared bankrupt which prejudice the interests of the Creditors, which were conducted before the declaration of bankruptcy was rendered.

It has not been shown that the 2nd defendant is a "[d]ebtor who has been declared bankrupt". I cannot see how the *actio Pauliana* remedy is available as against the 2nd defendant. It follows that the second part of the submission that the plaintiff could seek to vary the composition plan based on *actio Pauliana* is irrelevant. However, it did not escape my attention that this very suggestion by the defendants is at odds with their submission in the striking-out application that the 2nd defendant's debts for the restructuring transactions have already been transferred to the 1st defendant.

103 The defendants also raised the argument that the agreements for the restructuring transactions are governed by Indonesian law and contain exclusive jurisdiction clauses in favour of Indonesia.[92] It would therefore be more satisfactory for the Indonesian courts to decide on matters engaging Indonesian law. I cannot agree. What is in issue is the effect of the plaintiff having entered into those agreements and not the enforcement of the agreements themselves. It is precisely because the agreements are accepted as having been executed that the liquidators now seek to avoid those transactions on the plaintiff's behalf based on the grounds available under our insolvency laws. Nor is the plaintiff seeking to enforce the restructuring transactions as against the 2nd defendant. Therefore, what is material is the law applicable to the claim to set aside the restructuring transactions, and not the law applicable to the transactions themselves.

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[92] Defendants' Submissions at para 218

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104 Neither of the defendants' arguments detracts from my conclusion that the natural forum for the restructuring transactions is Singapore.

The inter-company loans

105 I turn to the inter-company loans. The first step is to compare the relative appropriateness of Singapore and Indonesia by reference to the factors connecting this dispute to each forum.

106 In their submissions, the defendants presented a table in Annex A listing as many as 12 connecting factors, with a view to showing that most of the connecting factors pointed to Indonesia. I did not find the presentation of the factors in this manner particularly helpful. In the words of Chao Hick Tin JA in *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 at [19], the *Spiliada* test is:

> … not an exercise in comparing the sheer number of connecting factors which point to this or that jurisdiction. What matters is the weight to be given to each connecting factor in the light of all the circumstances of the case. In a finely-balanced case … a single connecting factor could well be decisive.

107 The connecting factors themselves cannot be analysed in a vacuum but must be examined, and weighed, in the context of the issues in dispute between the parties (see *UBS AG v Telesto Investments Ltd and others and another matter* [2011] 4 SLR 503 at [54]). They must shed light on the ultimate question: where the case is suitably to be tried, having regard to the interest of the parties and the ends of justice (see Q*&M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR 494 at [13]). In answering this question, the court should consider both the anticipated defence and the claim (see *Civil Jurisdiction and Judgments* at para 4.28).

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Relative convenience and expense of trial

108 I first analyse the connecting factors with reference to the relative convenience and expense of trial. There are two relevant aspects in particular to consider: the location of the likely witnesses and the documents pertaining to the inter-company loans.

(1) Location of witnesses

109 I bear in mind the following general principles. The court hearing an application for a stay should not predetermine the witnesses the parties are to call. It suffices that the defendant can show that evidence from foreign witnesses is at least arguably relevant to its defence (see *JIO* at [67]). The importance of the location and compellability of witnesses increases if the main disputes revolve around questions of fact (see *Rickshaw* at [19]). The location of witnesses is only significant for third-party witnesses who are not in the employ of the parties, as it could give rise to issues of compellability (see *Dresdner* at 69]).

110 The liquidators indicated their intention to call a witness to testify on the nature of the Teldar guarantee agreement. They also plan to call the plaintiff's auditors to give evidence as the inter-company loan claims were recorded in its audited financial statements. All their potential witnesses are ordinarily resident in Singapore.[93] The defendants did not identify any specific witness they might call to testify on the inter-company loans. They only indicated the witnesses they would call to testify in respect of the restructuring transactions. Given the omission of the defendants to identify any possible

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93 Plaintiff's Submissions at para 6.5.3

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witnesses they might call to testify on the inter-company loans, it would appear that the location of witnesses points in favour of Singapore.

(2) Location of documents

111 The liquidators stated that the inter-company loans were recorded in the plaintiff's audited financial statements and these documents are likely to be in the possession of the plaintiff or its auditors.[94] The question of Teldar and Athens' involvement will inevitably feature in the dispute over the inter-company loans and, on this, the defendants note that the "agreements and judgments relating to Teldar and Athens" are "of Indonesian origin".[95]

112 In *John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428, the Court of Appeal regarded the fact of documents being located in Indonesia as insignificant to the question of where the natural forum was. Chao Hick Tin JA observed at [40] that "documentary evidence is, in this modern age, easily transportable between jurisdictions" and that any inconvenience occasioned by having to transport them could be addressed "by an appropriate order for costs and disbursements". The location of the documents in this case is thus a neutral factor.

Substantive law applicable to the dispute

113 The governing law is always an important factor in determining the natural forum because it is generally preferable, all other things being equal, that a case should be tried in the country whose law applies, as Lord Mance noted in *VTB Capital plc v Nutritek International Corporation* [2013] 2 AC

94 Plaintiff's Submissions at para 6.6.6

95 Defendants' Submissions at para 228

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337 at [46]. There will be savings in time and resources if a court applies the law of its own jurisdiction to the substantive dispute (see *Rickshaw* at [52]).

114 The liquidators submit that the law applicable to the inter-company loans is Singapore law. It relies on the three-step test for determining the governing law of a contract as set out in *Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] 2 SLR(R) 285 at [82] and endorsed by the Court of Appeal in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 at [36]. Under that test, the governing law of a contract will be (a) that expressly provided for by the parties in the contract; or (b) the implied choice of the parties as gleaned from their intentions at the time of contracting; or (c) the system of law with which the contract has the closest and most real connection. The liquidators submit that, because there are no known written agreements for the inter-company loans, the governing law of the loans must be the law with which the loans have the closest and most real connection. That law is Singapore law because the loans were extended by the plaintiff, a Singapore company, and were reflected in its unaudited accounts.[96]

115 Before forming a view of the governing law of any claim, the court must characterise "the true issue or issues thrown up by the claim and defence" (see *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] WLR 387 at 407).

116 As mentioned earlier, the identity of the natural forum has to be assessed with reference to the anticipated defence. Although the defendants

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[96] Plaintiff's Submissions at para 6.4.9

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have not filed a defence, they have in the course of this application purported to explain the current status of the two inter-company loans. Those explanations are relevant in determining the applicable law.

117 As regards the inter-company loan to the 2nd defendant, the defendants say that there was no such inter-company loan because the amount of the loan was in fact what was owed to the plaintiff under the restructuring transactions. The defendants do not dispute that the plaintiff's accounts do record a loan extended to the 2nd defendant. In my view, whether the inter-company loan to the 2nd defendant existed or not is a factual inquiry and does not raise issues requiring the application of the governing law.

118 That leaves the inter-company loan to the 1st defendant. It bears repeating that the fact of the loan is not disputed. The 1st defendant is, however, relying on the alleged assignment to Teldar as a defence to liability under the loan. The defendants submit that the transfer of the inter-company loan from the 1st defendant to Teldar will raise issues of Indonesian law.[97] They submit that the governing law of the Teldar guarantee is Indonesian law and the liquidators have not disputed that.

119 It may not be entirely clear whether the law applicable to the dispute over the 1st defendant's inter-company loan is Singapore or Indonesian law. Despite that, I do not think the fact that the court in Singapore may have to address questions of Indonesian law should weigh significantly against its hearing the case. Where the competing fora have domestic laws which are substantially similar, or if the legal issues in a case are straightforward, the

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97 Defendants' Submissions at para 216

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identity of the governing law will be a factor of little significance (see *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2010] 4 SLR 904 at [33]). For a start, I am not satisfied that there is any material difference between the laws of the two jurisdictions on this issue. Both experts are *ad idem* that under Indonesian law, the obligations under a contract cannot be assigned without the express consent of the other party; if such consent is given, it would then constitute a novation of the original contract.[98] That is essentially the law in Singapore as well (see *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 103, cited in *Cassa di Risparmio di Parma e Piacenza SpA v Rals International Pte Ltd* [2016] 1 SLR 79 at [102]).

120 Furthermore, the resolution of this legal issue is fairly straightforward. The 1st defendant does not dispute the existence of the inter-company loan from the plaintiff. The legal issue is confined to the inquiry whether the plaintiff had consented to Teldar taking over the 1st defendant's liability for the inter-company loan. This will in turn require an examination of what amounts to consent under the applicable law. Even if Indonesian law is the applicable law, there is no basis for me to conclude that this will necessarily be a complex legal issue given the paucity of evidence on the Teldar guarantee agreement and the absence of any suggestion to the contrary.

121 On the whole, I find that the governing law is a neutral connecting factor.

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98 Budijaja's Expert opinion at para 4.3; Pascoal's Reply Opinion at para 50

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Residence or place of business of parties

122 The plaintiff is incorporated in Singapore while the defendants are incorporated in Indonesia. The geographical location of the parties does not point strongly towards either jurisdiction.

Difficulties of enforcing a judgment in Indonesia

123 The defendants highlighted the fact that a foreign court judgment is not readily enforceable under Indonesian law. Accordingly, the liquidators would still have to commence fresh proceedings in Indonesia to obtain a remedy against the defendants in Indonesia.[99]

124 This cannot be a factor in favour of the Indonesian court as a forum to hear the disputes. In *Bayerische Landesbank Girozentrale v Kong Kok Keong and another action* [2002] 1 SLR(R) 485 ("*Bayerische Landesbank*"), the argument was that even if a bank was successful in its claim for monies under credit facilities granted to the defendant, it would still have to enforce the judgment in Malaysia where the defendant was resident; it would therefore be more convenient to deal with liability and enforcement in the same forum. Lee Seiu Kin JC (as he then was) considered that it was the bank's choice where it wanted to sue; it was not for the defendant to complain that enforcement would be more difficult (at [13]). More pertinent to the present case is *Ang Ming Chuang v Singapore Airlines Ltd (Civil Aeronautics Administration, third party)* [2005] 1 SLR(R) 409 where, as in this case, there was some evidence that SIA would not be able to enforce a judgment of a Singapore court in Taiwan and would have to sue afresh (at [53]). Woo Bih Li J echoed

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[99] Defendants' Submissions at para 206

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Lee JC's observation in *Bayerische Landesbank*: any difficulty in enforcement was a problem for the plaintiff and not for a defendant to raise in a stay application (at [54]).

125 I agree entirely with these observations. In any event, it should not be assumed that the liquidators will only enforce any judgment it obtains here in Indonesia. The defendants assumed the liquidators might have good reason to do so since both defendants' assets are located in Indonesia. However, the choice of forum for the purposes of enforcement is the liquidators' prerogative.

126 Further, I should add that it is intuitively wrong for a defendant to raise enforcement difficulties in aid of any stay application. As noted by the British Columbia Supreme Court in *Imagis Technologies Inc v Red Herring Communications Inc*, 2003 BCSC 366 at [36], such a submission suggests that the defendants do not intend to discharge any judgment that may be obtained in this jurisdiction. Otherwise, this factor would be irrelevant. It is obvious though that no weight can be given to a party's assertion that it will not respect a judgment of this court. Hence, I agree with the observation at [37] that difficulties in enforcement cannot *per se* be a factor in an application for a stay of proceedings.

Conclusion on the natural forum for the inter-company loans

127 The location of witnesses points towards Singapore. While the applicable law may point either way, that would be of no consequence to the stay application given my finding that there is no material difference in the laws of the two jurisdictions on the relevant issues. None of the factors point towards Indonesia as the more appropriate forum for the adjudication of the

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inter-company loans against the 1st and 2nd defendants. The defendants have therefore not discharged their burden under the first stage of the *Spiliada* test.

128 In addition, there is considerable overlap between the plaintiff's claim against the 2nd defendant for the restructuring loans and the inter-company loan which makes it more expedient if both disputes are heard in the same forum. Taking the 2nd defendant's case at its highest, its defence is that the inter-company loan does not exist independent of the restructuring transactions. It would hence be incongruous for the 2nd defendant to apply to stay *this claim* in favour of Indonesia when its defence is that there is no such claim. The defendants' case for partial stay is that both loans should be examined collectively. Since the defendants have treated the inter-company loans collectively, it stands to reason that both should be heard in the same forum, *ie*, the Singapore court. Given my finding that the claim for the inter-company loan against the 2nd defendant should not be stayed, on that ground alone, the submission for a partial stay in respect of both inter-company loans should be rejected.

129 In any event, it is the defendants' case that the 1st defendant has taken over the 2nd defendant's liability for the restructuring transactions. It follows that the presence of the 1st defendant will be required to determine the identity of the party who is liable to the plaintiff for the restructuring transactions. That being the case, it would make eminent sense for the claim against the 1st defendant for the inter-company loan to be heard in Singapore as well.

130 In the circumstances, for the reasons set out above, it would not be appropriate to grant a partial stay in respect of the claims for the inter-company loans.

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Conclusion on the stay application

131 In the result, I dismiss the stay application in its entirety with costs which I fix at $6,000 inclusive of disbursements.

Steven Chong
Judge

David Chan and Tan Aik Thong (Shook Lin & Bok LLP) for the plaintiff;
Rakesh Kirpalani Gopal, Allen Lye and Wong Su Ann (Drew & Napier LLC) for the first and second defendants.

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