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11. CONFLICT OF LAWS

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I. Introduction

12.1 For 2020, there are 13 cases that will be examined in this review. As in previous years, it is useful to note that conflict of laws cases sometimes relate to other areas of law. In these situations, this review will only examine those parts of the case that are relevant to the field of conflict of laws.

II. Jurisdiction and stay of proceedings

12.2 It is trite that before a court can hear a matter, it must be seised of jurisdiction. Jurisdiction can be *in personam* or *in rem*. *In personam* jurisdiction can be established via presence, submission and the court's long-arm discretionary jurisdiction under O 11 r 1 of the Rules of Court[2] ("ROC"). Implicit in all of these is that service of papers on the defendant is required.

12.3 On discretionary jurisdiction, there are three requirements before leave to serve out of jurisdiction is granted. First, the plaintiff's claim must come within one of the heads of claim in O 11 r 1 of the ROC. Second, the plaintiff's claim must have a sufficient degree of merit. Third,

1 The authors are grateful for the unconditional and continuing support of their families. All errors and omissions remain the authors' alone, and all views expressed herein are the authors' alone.
2 Cap 322, R 5, 2014 Rev Ed.

Singapore must be the *forum conveniens* for the dispute. Furthermore, as the application for leave for service out of jurisdiction is usually done *ex parte*, the plaintiff is required to make full and frank disclosure of all the material facts.[3] In cases where leave is granted, parties can challenge the existence of the court's jurisdiction and apply to set aside the writ.

12.4 On the third requirement, that of *forum conveniens*, it is useful to point out that apart from being considered as part of the discretionary jurisdiction analysis (where the existence of jurisdiction is being challenged), a defendant can also apply to the court to stay proceedings on the basis of *forum non conveniens*, essentially asking the court to not exercise its jurisdiction because there is a more appropriate forum elsewhere.

12.5 When considering the requirements for service out of jurisdiction, there is sometimes the danger of adopting too mechanistic an approach, which can lead to missing the forest for the trees. *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal*[4] highlights, *inter alia*, the importance of keeping a strategic and big picture perspective when looking at the requirements for service out of jurisdiction.

A. Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal

Discretionary jurisdiction – Order 11 rule 1

Discretionary jurisdiction – *Forum non conveniens* – Foreign proceedings

Discretionary jurisdiction – *Forum non conveniens* – Time bar

Discretionary jurisdiction – Full and frank disclosure – Continuing obligation

12.6 The related High Court decision was covered in last year's Annual Review.[5] Involving cross-appeals, the appellant in Civil Appeal 31 was Recovery Vehicle 1 Pte Ltd ("RV1"). RV1 was the assignee of debts owed by Industries Chimiques Du Senegal ("ICS") to the assignor, Affert Resources Pte Ltd ("Affert"). Affert, a Singapore-based company, had entered into six contracts with ICS for the purchase and sale of sulphur

3 *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [28], *per* Sundaresh Menon CJ.
4 [2021] 1 SLR 342.
5 See (2019) 20 SAL Ann Rev 251 at 288–291.

("sulphur contracts") and under these sulphur contracts, ICS was to have paid over US$17m to Affert.[6]

12.7 Without having to go into the details, there was a series of transactions whereby Affert acquired shares in ICS. As part of this arrangement, ICS claimed that this debt had been waived by Affert. Affert was subsequently placed in creditor's voluntary winding up and the liquidators sent letters of demand to ICS for payment, before commencing proceedings in the Singapore courts. The debt was subsequently assigned to RV1 who then applied to amend the writ (to replace itself as claimant) and then applied for leave for service out of jurisdiction. RV1 did not disclose the existence of the defence that the debt had been waived. Leave was granted and service was effected on ICS.

12.8 Following this, ICS applied to and obtained from the Dakar Commercial Court a default judgment to the effect that the ICS debt had been waived. It was undisputed that the assignor, liquidator and plaintiff had not been notified of the Dakar proceedings, and they only came to know of it after ICS obtained and served the default judgment on them. The liquidators also applied in Singapore to set aside the waiver as an undervalued transaction. These proceedings were stayed pending the determination of the Dakar judgment appeal.

12.9 ICS subsequently applied to set aside the amended writ and/or leave order. The assistant registrar opined that RV1 had not complied with its duty to make full and frank disclosure. As such, the leave order was set aside. RV1 appealed against this decision.

12.10 On appeal, the High Court held that:

(a) While RV1 did not know of the waiver documents when it filed its amended writ, it had breached its continuing duty to provide full and frank disclosure. Despite this, the judge exercised her discretion not to set aside the leave order.

(b) The requirements in O 11 r 1(*d*)(ii) of the ROC were not satisfied because the sulphur contracts were not governed by Singapore law but by Senegalese law.

(c) The requirements in O 11 r 1(*e*) of the ROC were satisfied because payments were to be made in Singapore, non-payment of which meant that the breach had been committed in Singapore.

(d) Singapore was *forum conveniens* for the matter.

6 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [6]–[7] and [10]–[11].

(e) RV1 could not rely on the time bar in Senegal as it did not show it had acted reasonably in failing to commence timely proceedings in Senegal.

12.11 Both parties cross-appealed and the Court of Appeal was asked to consider the following issues:

(a) what law governed the sulphur contracts;

(b) whether a good arguable case had been established for the purpose of O 11 r 1(*e*);

(c) whether RV1's claim was time barred in Senegal such that it lacked sufficient merit to satisfy an order for service out of jurisdiction;

(d) whether Singapore was *forum conveniens*; and

(e) whether RV1 had breach its duty of full and frank disclosure such that the leave order ought not to have been granted.

12.12 Turning to the first issue on the proper law of the sulphur contracts, the court affirmed the High Court's approach in analysing this issue via the three-stage test in *Pacific Recreation Pte Ltd v S Y Technology Inc*[7] ("*Pacific Recreation*"). On analysis, the High Court had concluded that the law governing the sulphur contracts was Senegalese law.[8] RV1 highlighted the nature of the sulphur contracts being cost, insurance and freight ("CFR") contracts and that the High Court had erred in attaching weight to the goods being discharged in Senegal. RV1 submitted instead that for a CFR contract, weight should be attached to the contemplated place of performance, which it submitted was Singapore.[9]

12.13 Noting that the authorities cited by RV1 did not support its submissions, the court disagreed and opined that the correct approach towards determining the governing law of CFR contracts was no different from the approach towards any other contract.[10] It is useful to note that the Court of Appeal noted (without disapproval) the following factors in the identification of the governing law under stage 2 of *Pacific*

7 [2008] 2 SLR(R) 491 at [36], [37] and [47], *per* V K Rajah JA. See *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [52].

8 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [67].

9 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [53].

10 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [54] and [61].

Recreation: (a) place of contracting; (b) place of performance; (c) place of residence or business of the parties; and (d) nature and subject matter of the contract.[11]

12.14 In the absence of an express choice (stage 1 in *Pacific Recreation*) or a divination of parties' intentions (stage 2), the court would embark on a pragmatic exercise to identify which law has the most connection with the contract in question and the circumstances surrounding the inception of that contract (stage 3). Since RV1 did not actually adduce evidence as to the actual or contemplated place of performance, the court agreed with the High Court's analysis and conclusion that the governing law of the sulphur contracts was Senegalese law.[12] In doing so, it also made three observations. First, taking into account the common commercial purpose of the sulphur contracts, there were clearly many more connections to Senegal.[13] Secondly, the court rightly did not accept RV1's submissions to take into account transactions and documents that occurred after the sulphur contracts.[14] These should have no connection in determining the governing law of the sulphur contracts. Finally, the court refused RV1's curious submission to make its determination of Senegalese law as the governing law a provisional one.[15] This must be correct. RV1 had raised the matter of governing law to satisfy O 11 r 1(*d*)(iii) and would likely not have raised this point had the determination been in its favour. Put simply, RV1 cannot have its cake and eat it too.

12.15 On the second issue, O 11 r 1(*e*) requires a claim to be "brought in respect of a breach committed in Singapore". The High Court had held that the obligation to pay was in Singapore, and non-payment constituted a breach committed in Singapore, thereby satisfying this head of jurisdiction.[16] The Court of Appeal disagreed and made a number of observations.

12.16 First, the High Court had required ICS to show that payment was to be made in Hong Kong. However, the Court of Appeal opined that while ICS may have made this contention, the overall burden remained

11 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [58]–[59].
12 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [65] and [68].
13 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [68].
14 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [70].
15 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [71].
16 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [73].

RV1's to show that there was the existence of a contractual obligation in Singapore and there had been a breach of this contract.[17]

12.17 Secondly, the court opined that in order to satisfy O 11 r 1(*e*), authorities required RV1 to show that Singapore was the *only* place from which performance of the obligation is required.[18]

12.18 Thirdly, RV1 had relied on the general rule from *The Eider*[19] that where there is no express or implied term under the contract stating the place from which payment must be made, the debtor must pay the creditor at the creditor's place of business.[20] Noting that this rule is an established one in English law, the Court of Appeal opined that the "general rule" would clearly have no place in a situation where there is a history of past payments by the debtor to the creditor in respect of the transaction in question in a jurisdiction other than the place of business of the creditor. Further, the rule does not establish the proposition that the debtor must seek out the creditor at the creditor's place of incorporation but instead, the place from which the creditor performs his business.[21]

12.19 On the facts, there was no express term in the sulphur contracts providing where payment was to be made. Further, multiple part payments had been made in Hong Kong thereby displacing the application of the general rule from *The Eider*. In any event, even if the rule applied, it required payment at the creditor's place of business (Hong Kong) and not the creditor's place of incorporation (Singapore). As such, the court held that RV1 had not satisfied the requirements of O 11 r 1(*e*).[22]

12.20 On the third issue, although RV1 had argued at the High Court that the governing law of the sulphur contracts was Singapore, in the context of its submissions on *forum non conveniens*, it had made the argument that Senegal was an unavailable forum because its claim was time barred in Senegal.[23] This is consistent with the argument the authors

17 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [73].
18 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [75].
19 (1893) P 119.
20 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [81].
21 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [83]–[85].
22 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [87]–[90].
23 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [94].

have made elsewhere[24] that there is the possibility of a "stage 0" in the *Spiliada* analysis – any *fora* to be considered have to be available first, before going into identifying and weighing of connecting factors in stage 1.[25]

12.21 The High Court opined that RV1 had not acted reasonably in allowing time to run out. In any event, it did not affect the High Court's conclusion that Singapore was *forum conveniens*.[26] At the Court of Appeal, RV1 sought to argue that the time bar no longer applied, so as to refute ICS position that RV1's claim lacked sufficient merits for the purpose of satisfying the requirements for discretionary service.[27] The court therefore had to consider whether it was correct to let RV1 go back from its factual concession at the High Court to adopt, on appeal, a completely opposing position in the context of its submissions on the merits requirement.

12.22 This necessitated the court to consider the doctrine of approbation and reprobation, and the doctrine of abuse of process. On the former, put simply, the doctrine bars a person, having a choice between two inconsistent courses of conduct and having chosen one, from resiling from that position having taken some benefit from that chosen course. The court opined that since RV1 did not benefit from its earlier position at the High Court (that is, the High Court did not accept RV1's that the claim being time barred made Senegal an unavailable forum), the doctrine of approbation and reprobation did not strictly apply. However, the court was clear in its disapproval of RV1's change in position.[28]

12.23 On the latter, the court opined that for RV1 to then contend on appeal that the time bar no longer applied did constitute an abuse of process. RV1 had made a factual concession after carefully considering its own expert's evidence. And while this concession was made in relation to arguments on natural forum and not on merits, the court's view was that this did not matter and that in any event it would not have accepted RV1's new submission on the time bar as it found the credibility of RV1's

24 See para 12.33 below.

25 See (2018) 19 SAL Ann Rev 273 at 286, paras 11.44–11.45 and (2019) 20 SAL Ann Rev 251 at 264, para 11.45.

26 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [96]–[97].

27 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [98].

28 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [100]–[102].

expert lacking.[29] Practitioners should note that the Court of Appeal helpfully reiterated some considerations it had in mind in evaluating expert evidence (even that on foreign law): (a) content credibility; (b) evidence of partiality; (c) coherence; and (d) evidence in the context of established facts.[30]

12.24 The court also had to consider whether RV1 fell within the "undue hardship" exception under the Foreign Limitation Periods Act.[31] The Court of Appeal clarified that "undue hardship" means excessive or greater hardship than the circumstances warrant. Even though a claimant may have been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault.[32] The Court of Appeal also noted (without disapproval) the English authorities which held that the "undue hardship" must come from the application of the foreign limitation period for a party to avail itself of the exception. In this regard, the court has to look at all the circumstances in order to decide whether the application of the foreign limitation period will cause undue hardship, and impecuniosity could be a relevant consideration.[33]

12.25 Acknowledging that there were no authorities in Singapore considering this matter, the court examined the English authorities and opined that in assessing whether the application of the foreign limitation period would cause undue hardship, some of the relevant factors that may be considered are:[34]

> (a) the objective reasonableness of the time bar under foreign law, although the mere fact that the foreign time bar is shorter than the equivalent time bar under Singapore law would not in and of itself justify a finding of undue hardship. It remains to be seen how this factor will be considered and applied by the court, especially in light of international comity and how Singapore courts have repeatedly cautioned that they will be slow to pass judgment on the quality of justice obtainable in a foreign

29 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [107], [110], [112] and [116]–[117].
30 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [115].
31 Cap 111A, 2013 Rev Ed.
32 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [123].
33 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [126] and [127].
34 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [129].

court[35] (and that must include the objective reasonableness of the law on limitation period and the prescribed duration before time bar kicks in);

(b) the legal and factual complexity of the claim in the context of the applicable foreign time bar; and

(c) whether the plaintiff had, on the particular facts of the case, a reasonable justification for allowing the applicable foreign time bar to set in. In particular, any knowledge of the applicability of a foreign time bar could militate against any finding of undue hardship. In fact, any uncertainty as to the applicability of a particular forum's time bar would all the more have made it necessary to bring proceedings sooner rather than later in order to avoid the risk which the uncertainty gives rise (that is, being out of time).[36]

12.26 Applying these considerations and considering the evidence, the court found that RV1 had obtained the debts against ICS from the liquidators with the knowledge that they might be time barred. Further, there was no evidence that ICS's actions had somehow caused RV1 to be unable to file its claim within the Senegalese limitation period. Thus, undue hardship had not been made out.[37]

12.27 On the fourth issue, the High Court had found that Singapore was *forum conveniens*. On appeal, the court noted that the High Court had focused on the governing law of the waiver because it felt that the waiver was the crux of ICS's defence. However, taking into account that ICS's primary defence was that RV1's claim was time barred, and in light of the Court of Appeal concluding that the time bar remained, the governing law of the sulphur contracts (that is, the law of Senegal) became a weighty factor in the *forum conveniens* analysis. As such, the balance was tilted to Senegal as the natural forum.[38]

12.28 On the final issue, the court noted that while RV1 was not aware of the waiver when it filed its amended writ and obtained the leave order,

35 *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [110], *per* Sundaresh Menon CJ. See also *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494, where Andrew Phang Boon Leong JC cautioned (at [18]) that "comity is to be observed in deed, and not merely in word".

36 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [137].

37 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [134], [138] and [141].

38 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [146]–[150].

it was in breach of its continuing duty to give full and frank disclosure after the waiver came to its knowledge. However, it also agreed with the High Court's exercise of discretion not to set aside the leave order on this basis.[39]

12.29 In closing, apart from noting that the court's approach on the second, fourth and fifth issues is both sensible and correct, it is also useful to make two observations. First, the court's clarification on the approach to determining the governing law of a CFR contract is both correct and helpful. As a matter of principle, there should not be different rules for determining the governing law of different types of contract. The three-stage test from *Pacific Recreation* is perfectly functional as a general approach and has the flexibility within its three stages to adapt to the contexts of different types of contracts.

12.30 The second observation relates to the time bar and how it is connected with the bigger context of applying for leave to serve out of the jurisdiction. In a typical stay application, a time bar is a consideration that occurs at stage 2 of the *forum non conveniens* analysis. In the context of an application for service out of jurisdiction, the burden was for RV1 to show that Singapore was *forum conveniens*.[40] Technically, it did not have to raise the time bar. However, one can understand that it might have done so to shore up its argument that Singapore was *forum conveniens* (because Senegal was unavailable). But by doing so, it locked itself into a situation that then affected the second requirement in an application for service out of jurisdiction, that is, whether the claim had sufficient merits. As the court pointed out, it is important not to adopt a pigeon-hole approach to applying for service out of jurisdiction. Instead, one must remember the dynamic and interconnected nature of the application.[41] This must certainly be correct and is good advice for practice.

12.31 However, the court's observations do raise an interesting question to ponder. Stated simply, what is the significance of an argument that a particular forum is unavailable? In this case, the unavailability was due to a time bar, but it could be unavailable for other reasons (for example, the jurisdictional rules of countries within the European Union).

12.32 In a typical stay application, there are two places where this argument might feature. The first is in stage 2 of the *forum non conveniens*

39 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [151]. See also *Tecnomar & Associates Pte Ltd v SBM Offshore NV* [2020] SGHC 249 at [123]–[125], where Andre Maniam JC summarised the legal principles surrounding full and frank disclosure.

40 *TGT v TGU* [2015] SGHCF 10 at [41], *per* Foo Tuat Yien JC.

41 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [5].

analysis where jurisdiction X has been identified as the natural forum and the plaintiff is arguing that he will face injustice because action has been barred in jurisdiction X.

12.33 The second is to argue that, before one can embark on the *forum non conveniens* analysis, one must first establish the existence of an available alternative forum, a "stage 0" of sorts. Having an action barred in jurisdiction X therefore precludes it as being an available alternative forum. As such, jurisdiction X does not even enter into the two-stage *forum non conveniens* analysis. The authors have previously referred to this as "stage 0" in the *forum non conveniens* analysis and the Court of Appeal appeared to endorse this when it noted that "in determining whether Singapore was the *forum conveniens* for the resolution of the dispute, it was essential to examine whether there was any *available* competing jurisdiction" [emphasis added].[42]

12.34 This analysis does not quite apply in an application for service out of jurisdiction as the focus in the third requirement is for the applicant to show that Singapore is the natural forum. The question of the action being barred in jurisdiction X is not likely to arise in stage 2 but may be raised in stage 1 to bolster Singapore's position as the natural forum. This decision, however, clearly shows that an action being barred in jurisdiction X is relevant at the second requirement (sufficient merits) for service out of jurisdiction. It also means that if it is shown at this point that the case does not have sufficient merits, then it is possible to bypass the third requirement (natural forum) for service out of jurisdiction. It would be helpful for practitioners to remember this when seeking to challenge an application for service out.

B. Allenger, Shiona v Pelletier, Olga

Subject-matter jurisdiction – Claims based on foreign bankruptcy statutes

Subject-matter jurisdiction – Non-justiciability

Submission – Delay

Submission – Waiver

Mareva injunctions – Requirements for issuance

Mareva injunctions – Free-standing injunctions

42 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [3].

12.35 While cases touching on international jurisdiction are commonplace, rare are those which prompt discussion of jurisdictional considerations beyond O 11, *forum non conveniens*, jurisdiction clauses and anti-suit injunctions. *Allenger, Shiona v Pelletier, Olga*[43] ("*Allenger*") is one of those rare cases, involving as it did the scope of the court's subject-matter jurisdiction over foreign statutory claims and the jurisdictional prerequisites for the issuance of Mareva injunctions.

12.36 Richard Pelletier sold shares to buyers in Florida while allegedly misrepresenting the company's value. The buyers obtained arbitral awards against him, then obtained a bankruptcy order against him in the Cayman Islands.[44] By this time, however, Pelletier had initiated several transfers of its assets, including transfers to his wife Olga and to a company he incorporated in the Cayman Islands, allegedly to dissipate them.[45] Shiona Allenger, Pelletier's trustee-in-bankruptcy, initiated proceedings to claw back the transfers in the Cayman courts, and obtained a worldwide Mareva injunction there with permission to enforce overseas.[46]

12.37 Subsequently, Allenger instituted proceedings in Singapore against Olga and the Cayman company ("the Defendants") in Singapore based on two causes of action – s 107(1) of the Cayman Bankruptcy Law ("the Cayman law claim"), and s 73B of Singapore's Conveyancing and Law of Property Act[47] ("the CLPA claim") – and applied for leave for service out and a Mareva injunction to freeze their Singapore assets.[48] Allenger also applied for a stay of all proceedings in Singapore save for that seeking the Mareva injunction.[49]

12.38 The defendants argued that the court should not grant Allenger leave to serve them out of jurisdiction; and that by virtue of that and/or the fact that proceedings were stayed, the Mareva injunction against the defendants should be discharged.[50] This raised two issues: whether the court had jurisdiction over Olga to allow service out of jurisdiction on either the Cayman law claim or the CLPA claim; and if so, whether that sufficed for the issuance of a Mareva injunction. Andrew Ang SJ found that the Defendants' arguments warranted a discharge of the injunction in so far as they pertained only to the Cayman law claim, but that the CLPA

43 [2020] SGHC 279.
44 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [3]–[7] and [12].
45 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [8]–[11].
46 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [2] and [13].
47 Cap 61, 1994 Rev Ed.
48 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [13], [14] and [162].
49 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [14] and [17].
50 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [19].

claim could sustain the injunction. As the bulk of Ang SJ's reasoning dealt with the Cayman law claim, the authors will turn to that first.

12.39 The Defendants' first argument on the Cayman law claim was that Singapore's courts lacked subject-matter jurisdiction over it, because (a) the Supreme Court of Judicature Act[51] ("SCJA") did not confer such subject-matter jurisdiction; (b) Singapore's adoption of the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency[52] ("Insolvency Model Law") suggested that such subject-matter jurisdiction is lacking in Singapore courts; and (c) the applicable Cayman law could not grant such subject-matter jurisdiction to Singapore's courts.[53] Ang SJ dismissed all three sub-arguments.

12.40 First, Ang SJ helpfully clarified that subject-matter jurisdiction refers to the court's authority over the subject matter of that general class of cases. This is distinct from and should not be confused with *in personam* jurisdiction, which refers to the question of whether a person is amenable to the jurisdiction of the court in the sense that he is or can be brought before it.[54] Given that the Singapore High Court is a creature of statute constituted under the SCJA, its jurisdiction is statutorily conferred and circumscribed by that same statute. Therefore, the question of whether the High Court has subject-matter jurisdiction over a claim is a question answered by the construction of the subject-matter jurisdiction conferring statute(s).[55]

12.41 On the subject-matter jurisdiction of Singapore's courts under the SCJA, Ang SJ reasoned that s 16(1) thereof implicitly preserved the position at common law, that the court possessed generally "unlimited subject-matter jurisdiction", while expressly defining only the court's *in personam* jurisdiction over defendants.[56] The only limits on the court's subject-matter jurisdiction, then, were those well-established rules of non-justiciability in the common law, such as (a) the Mozambique rule – the Singapore courts do not have subject-matter jurisdiction over disputes concerning foreign immovable property; (b) the rule against the justiciability of foreign penal, revenue and public law claims;[57] and

51 Cap 322, 2007 Rev Ed.
52 30 May 1997.
53 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [21].
54 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [20].
55 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [23].
56 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [45] and [51]–[52].
57 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [54]. This is also similar to how Singapore courts do not enforce, whether directly or indirectly (through giving legal effect to a foreign judgment), a penal, revenue or public law: *The Republic of the Philippines v Maler Foundation* [2014] 1 SLR 1389 at [68(a)], *per* Chao Hick Tin JA.

(c) potentially a rule against the justiciability of foreign intellectual property rights. By contrast, Ang SJ rejected the Defendants' argument that the text of Art 93 of the Constitution of the Republic of Singapore[58] and s 16(2) of the SCJA suggested that the court's subject-matter jurisdiction should be limited only to "written law" defined as "Singapore Acts and Ordinances".[59] It followed that Singapore courts generally have unlimited subject-matter jurisdiction save when excluded by specific rules of non-justiciability,[60] and no rule excluded claims based on foreign bankruptcy statutes like the Cayman law in question.

12.42 Ang SJ was undoubtedly right to reject the Defendants' arguments on the scope of the court's subject-matter jurisdiction, since they would logically have led to the conclusion that Singapore's courts lacked jurisdiction over *any* claim not based on Singapore statutes – a position contrary to centuries of practice in the common law conflict of laws.[61] Yet, it is unfortunate[62] that Ang SJ did not provide a clearer unifying theory of the exceptions to the court's generally "unlimited" subject-matter jurisdiction (that is, a general theory of non-justiciability at common law), to explain why the Cayman law claim in particular did not fall within those exceptions. This was particularly so because one strand of Ang SJ's reasoning – that courts should not be "precluded from being seised of jurisdiction over such matters … where such matters are *linked* to our jurisdiction" [emphasis added] – suggested a theory of subject-matter jurisdiction which limited the court to claims connected to Singapore.[63] And in this regard, the Defendants may well have responded by arguing that claims based on foreign bankruptcy statutes against foreign defendants are unconnected with Singapore. A more satisfactory line of reasoning might have been that employed by the UK Supreme Court in *Shergill v Khaira*:[64] that claims based on private law rights or reviewable public law matters are always justiciable, save when beyond the "constitutional competence assigned to the courts under … the separation of powers".[65] So understood, exceptions on the court's subject-matter jurisdiction are narrow and linked to well-established constitutional considerations, which exclude arguments that such

58 1999 Reprint.
59 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [26]–[28].
60 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [55].
61 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [30].
62 Though understandable, since the Defendants did not press the point.
63 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [55].
64 [2014] 3 WLR 1.
65 *Shergill v Khaira* [2014] 3 WLR 1 at [42], *per* Lords Neuberger, Sumption and Hodge. For a criticism, see Marcus Teo, "Narrowing Foreign Affairs Non-Justiciability" (2021) 70(2) ICLQ 505 at 521–525.

jurisdiction does not exist over foreign statutory claims unconnected with Singapore.

12.43 The latter two of the Defendants' sub-arguments on the subject-matter jurisdiction of Singapore's courts can be dealt with briefly. On the argument that Singapore's adoption of the Insolvency Model Law excluded the subject-matter jurisdiction of its courts over claims based on foreign bankruptcy statutes, Ang SJ reasoned that the acceptance by Singapore's courts of the common law ancillary liquidation doctrine implied the existence at common law of a general subject-matter jurisdiction over foreign insolvency and bankruptcy statutes.[66] This was unchanged by the adoption of the Insolvency Model Law, which was meant only to "supplement existing laws" in relation to lacunae that did not pertain to the court's subject-matter jurisdiction over foreign bankruptcy or insolvency law claims.[67] On the argument that the Cayman law itself did not grant subject-matter jurisdiction to Singapore's courts, Ang SJ reasoned that foreign statutes need not themselves grant such jurisdiction to Singapore's courts; the question instead is simply whether Singapore's courts have such subject-matter jurisdiction themselves, which will exist subject to common law doctrines of non-justiciability.[68] In other words, the mere fact that the cause of action arose under a foreign legislation is in itself no bar to it being adjudicated in Singapore. Ang SJ's reasoning on both fronts is unimpeachable, but again it is submitted that they would have been fortified by a clearer discussion of common law doctrines of non-justiciability. As it stands, clarification on this thorny point must await another case where arguments as ambitious as the Defendants' in *Allenger* are made again.

12.44 Finally, Ang SJ also discussed the plaintiff's argument on the "principle of modified universalism" which is the idea of domestic courts acknowledging the effects and status of foreign insolvency proceedings in the place of a company's incorporation and that courts will actively assist those foreign insolvency proceedings. The principle in itself cannot be a basis for Singapore courts to find subject-matter jurisdiction (which is a jurisdiction to be derived from Singapore legislation). Rather, the acceptance of the principle in Singapore courts simply means that Singapore courts will be less inclined to find that it has no subject-matter jurisdiction.[69]

66 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [65]–[69].
67 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [70]–[76].
68 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [84] and [87].
69 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [92].

12.45 The Defendants' second argument on the Cayman law claim was that Singapore's courts lacked personal jurisdiction over them as foreign defendants. Since the parties agreed that Singapore was not the natural forum for the Cayman law claim,[70] this would have been a knock-out argument, save for Allenger's riposte that the Defendants had in fact submitted to jurisdiction. Allenger first argued that the Defendants' four-month delay in challenging the court's jurisdiction could not be justified and thus amounted to submission.[71] This was accepted by Ang SJ, who rejected the Defendants' responses, that the delay was caused by their lack of funds for representation and that they had nevertheless acted within time, on grounds that they were simply untrue.[72] Allenger's second argument was that the Defendants had taken a step in proceedings. This was also accepted by Ang SJ, who found that the Defendants had indeed taken steps of their own volition to clarify and then comply with the Mareva injunction.[73]

12.46 The Defendants' third argument on the Cayman law claim was that, despite the above, the requirements for the issuance of a Mareva injunction were still not met. Here, Ang SJ agreed: though the court had subject-matter jurisdiction over the Cayman law claim and though the Defendants had submitted to the court's jurisdiction, Allenger had to *additionally* show that Singapore would be the natural forum for the Cayman law claim. This was not met because parties had agreed that Singapore was not the natural forum,[74] and because stage 2 of the *Spiliada* test was inapplicable in proceedings for service out of jurisdiction.[75] Ang SJ's reasoning here, however, was troubling. At times, Ang SJ suggested that Singapore had to be the natural forum because otherwise the *existence* of the court's jurisdiction over the Defendants would be impugned; for instance, he reasoned Allenger failed on this front because the "Singapore court would first have to have *in personam* jurisdiction over a defendant before it could even grant a Mareva injunction".[76] At other times, however, Ang SJ suggested that Singapore not being the natural forum would only prevent the court from "*exercising* its jurisdiction" [emphasis added] over the Defendants.[77] The former reasoning, however, would have been misplaced, since the Defendants' voluntary submission to proceedings gave the court personal jurisdiction over them.[78] That

70 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [117].
71 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [93(a)] and [97].
72 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [97]–[105].
73 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [109]–[113].
74 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [117].
75 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [158]–[159].
76 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [145].
77 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [123].
78 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [114].

Ang SJ would otherwise have refused leave to serve the Defendants out of jurisdiction should also have been irrelevant, since s 16(1)(*b*) of the SCJA gives Singapore's courts "jurisdiction to hear and try any action *in personam* where … the defendant submits to the jurisdiction of the [court]".

12.47 Ang SJ's reasoning on the natural forum requirement, then, must have been the latter: If a court will not *exercise* its jurisdiction over a defendant, it should not issue a Mareva injunction against him. This conclusion, however, is surprising. Ang SJ considered himself bound to reach that conclusion because of the Court of Appeal's holding in *Bi Xiaoqiong v China Medical Technologies, Inc*[79] ("*Bi Xiaoqiong*"), that "the Singapore court cannot exercise any power to issue an injunction unless it has jurisdiction over a defendant".[80] Yet, the passage from *Bi Xiaoqiong* hardly supports Ang SJ's reasoning, because that case evidently concerned the existence of jurisdiction, not its exercise. There, the Court of Appeal simply adopted Lord Mustill's position in the Privy Council's decision in *Mercedes Benz AG v Leiduck*[81] ("*Mercedes Benz*") that a court need only possess personal jurisdiction over a defendant to issue Mareva injunctions against him. It was irrelevant that the court would not exercise that jurisdiction thereafter; even if the court stayed proceedings, it retained a "residual jurisdiction" over them, which sufficed to support a Mareva injunction against the defendant.[82] Indeed, in *Bi Xiaoqiong* the court did not exercise its jurisdiction: Jurisdiction existed by virtue of the defendant's mere presence in Singapore, and the plaintiff applied to stay proceedings thereafter on grounds that Singapore was *forum non conveniens*.[83]

12.48 Ang SJ's reasoning in *Allenger* on the natural forum requirement thus rests on a novel distinction: while a defendant's presence in Singapore can support a Mareva injunction against him even when Singapore is not the natural forum, his submission to proceedings in Singapore cannot unless Singapore is the natural forum. In principle, however, that distinction is hard to defend: in both scenarios, the court has personal jurisdiction over the defendant; this is derived from some idea of consent or control rather than some connection between the substantive cause of action and the forum. If like cases are to be treated alike, future courts may have to relook Ang SJ's reasoning on this point.

79 [2019] 2 SLR 595.
80 *Bi Xiaoqiong v China Medical Technologies, Inc* [2019] 2 SLR 595 at [119].
81 [1996] 1 AC 284.
82 *Bi Xiaoqiong v China Medical Technologies, Inc* [2019] 2 SLR 595 at [108].
83 *Bi Xiaoqiong v China Medical Technologies, Inc* [2019] 2 SLR 595 at [16] and [18].

12.49 Another related point is this: Ang SJ also took the position that, notwithstanding the submission of a party to the court's jurisdiction, the court may *proprio motu* refuse to exercise its jurisdiction if the issue of natural forum arises and the court is not satisfied that Singapore is the natural forum. Ang SJ went on to provide an example: In a situation where parties submit to the Singapore court's jurisdiction to determine a dispute which is clearly and indisputably connected to a foreign jurisdiction, and the justice of the case does not warrant resolution of the same in the Singapore court, it would run against the tenor of international comity and the basal notion of reaching a fair and just resolution to the dispute for the Singapore court to insist on exercising its jurisdiction.[84] It remains to be seen whether this position would be accepted by future courts, but the consequence is this – unless parties in such a situation enter into an exclusive jurisdiction clause naming Singapore as the exclusive forum to try the dispute, there is no way they could have the Singapore court try the dispute notwithstanding both parties having submitted to the court's jurisdiction. One would have thought that comity should play less of a role (if any) in such situations where jurisdiction is founded through submission (which is more akin to jurisdiction as of right than discretionary jurisdiction).

12.50 Ang SJ also (rightly) held that stage 2 of the *Spiliada* test cannot confer jurisdiction when stage one is not satisfied in a situation for leave for service out. This is because if stage 1 is not satisfied, stage 2 is not engaged at all. As Ang SJ aptly put it, "it would be difficult to see how the court can have such broad discretion to allow a party to litigate in Singapore when its jurisdiction has yet to be established".[85]

12.51 However, having found that the Cayman law claim could not sustain the Mareva injunction, Ang SJ then found that the CLPA claim could. Singapore's courts undoubtedly had subject-matter jurisdiction over the claim (it being based on Singapore law) and personal jurisdiction over the Defendants (by virtue of their submission to proceedings), and Singapore was the natural forum for the claim.[86] The Defendants argued against Allenger's reliance on the CLPA claim on grounds that it was insufficiently pleaded and that only creditors and not trustees-in-bankruptcy had *locus standi* under s 73B of the CLPA, but Ang SJ rejected both arguments.[87] These issues are of little concern, but the authors note that, absent the defendants' submission to proceedings, service out of jurisdiction for a claim under s 73B of the CLPA would likely have

84 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [123].
85 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [157]–[158].
86 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [174].
87 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [162]–[169] and [170]–[173].

been denied since an applicable O 11 jurisdictional gateway would prove elusive.

12.52 As a final note, the authors return to discuss Ang SJ's conclusion on the Cayman law claim, which, surprisingly, Ang SJ himself seemed displeased with. In *obiter*, he criticised *Bi Xiaoqiong*[88] as allowing the "'exploitation' of the principle of territoriality by perpetrators of international frauds"[89] and suggested that *Bi Xiaoqiong* should be overturned either by Parliament or the Court of Appeal.[90] In the process, he cited Lord Nicholls' famous dissent in *Mercedes Benz*[91] that Mareva injunctions should be conceptualised as supportive of the enforcement of judgments rather than ancillary to causes of action.[92]

12.53 The tenor of Ang SJ's statements thus suggests a preference that courts be allowed to issue free-standing Mareva injunctions against any defendant with "substantial assets in Singapore which the orders of the foreign court … cannot or will not reach", *even* when personal jurisdiction is otherwise not established.[93] In this regard, Ang SJ's reasoning in *Allenger* mirrors that of Lord Mustill in *Mercedes Benz*, who lamented his inability to issue free-standing Mareva injunctions.[94] The difference, however, is that Lord Mustill was not constrained by precedent, but attributed his inability to issue free-standing injunctions solely to an interpretive technicality surrounding O 11: All O 11 jurisdictional gateways contemplated the existence of "a proposed action or matter which will decide upon and give effect to rights", and so proceedings solely to issue Marva injunctions could not be brought because they would not have that effect.[95] This technicality, by contrast, did not constrain Lord Nicholls, who cited the fact that foreign defendants could be served under O 11 r 1(b) for proceedings brought solely to obtain a free-standing anti-suit injunction, when the foreign proceedings to be restrained were unconscionable.[96] When the opportunity arises, the Court of Appeal may wish to consider whether *Bi Xiaoqiong* needs revisiting in light of Ang SJ's comments in *Allenger* and the true point of disagreement between Lords Mustill and Nicholls in *Mercedes Benz*.

88 See para 12.47 above.
89 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [151].
90 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [154].
91 See para 12.47 above.
92 *Mercedes Benz AG v Leiduck* [1996] 1 AC 284 at 305.
93 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [151].
94 *Mercedes Benz AG v Leiduck* [1996] 1 AC 284 at 304–305.
95 *Mercedes Benz AG v Leiduck* [1996] 1 AC 284 at 302.
96 *Mercedes Benz AG v Leiduck* [1996] 1 AC 284 at 311.

C. Raffles Education Corp Ltd v Shantanu Prakash

Discretionary jurisdiction – Place of the tort – Conspiracy

Discretionary jurisdiction – Place of the tort – Misrepresentation

Discretionary jurisdiction – *Forum non conveniens* – Video-link evidence

12.54 *Raffles Education Corp Ltd v Shantanu Prakash*[97] ("*Raffles Education*") was a dispute involving an Indian joint venture company incorporated to run a higher education institute in India ("JVC") through a non-profit society ("NPS"). The joint venture began in 2008 between the Raffles Education Group ("REG"), consisting of a Singapore incorporated holding company and two subsidiaries incorporated in Singapore and India respectively, and the Educomp Group, consisting of several companies in Singapore, India and the British Virgin Islands ("BVI"). Both REG and Educomp Group would hold equal shares and have equal responsibility in funding the JVC.[98] In 2015, however, the REG subsidiaries entered into a share purchase agreement with members of the Educomp Group to buy the latter's stake in the JVC, along with a business advisory agreement for members of the Educomp Group to provide advisory services to REG's Singapore subsidiary ("the Agreements"). Under the Agreements, REG would also take over the funding and control of the JVC and the NPS.[99]

12.55 In 2019, REG commenced proceedings in Singapore against Shantanu Prakash, founder of the Educomp Group and president of the NPS, and Dennis Lui, head of the Educomp member providing advisory services, in the torts of misrepresentation and conspiracy. The essence of the REG's complaints were that Prakash and Lui conspired to falsely represent to REG that they and the Educomp Group would give effect to the Agreements – actions which they never intended to and never did follow through with – leading REG to acquiesce in the Educomp Group's failure to fund its portion of the JVC.[100] Prakash and Lui then applied to stay proceedings on grounds that India was a clearly more appropriate forum for the dispute than Singapore.

12.56 To Audrey Lim J, the two most significant connecting factors were the place of the torts alleged, and the availability and compellability of witnesses[101] On the alleged misrepresentation, Lim J reasoned that

97 [2020] SGHC 83.
98 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [4] and [14].
99 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [9]–[10].
100 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [14]–[20].
101 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [36].

this occurred in Singapore because most of the representations which induced REG to enter into the Agreements were received and relied upon by REG and its representatives in Singapore.[102] On the alleged conspiracy, Lim J reasoned that this had also occurred in Singapore. REG consisted of companies incorporated or run by directors based in Singapore,[103] and the conspiring parties identified by REG were Prakash, a Singapore permanent resident ordinarily resident in Singapore, and Lui, a Singapore citizen.[104] This also meant that any alleged conspiracy between Prakash and Lui was more likely to have been hatched in Singapore; and that the acts allegedly performed by Prakash pursuant to the conspiracy, namely instructions to various underlings to make false representations, were likely performed in Singapore.[105] Finally, REG was taken to have suffered damage in Singapore, absent any evidence of losses suffered elsewhere.[106]

12.57 Lim J's conclusion on the place of the conspiracy is correct, but her reasoning is of interest. Since the location of the conspirators and their acts performed pursuant to the conspiracy are significant factors determining the place of the conspiracy,[107] the fact that REG had identified only Prakash and Lui as conspirators, to the exclusion of the other members of the Educomp Group,[108] was significant. To Lim J, it was unobjectionable that REG did this "as a tactical choice to bring their claims within the Singapore forum", since "[t]he Plaintiffs are entitled to decide how they wish to pursue their claims (and will stand or fall by their pleaded case)".[109] The broadness of this proposition seems surprising: after all, a plaintiff which can cherry-pick the conspirators it wants to focus on may influence the place of the conspiracy – and in a dispute which is predominantly legal rather than factual, this can significantly affect the *forum non conveniens* enquiry and thus facilitate forum shopping. But when seen in context, Lim J's reasoning is understandable: If Prakash and Lui were the directing minds of the Eurocorp Group, as REG's case appeared to be, then any conspiracy within the Eurocomp Group really centred around them. Certainly, one should not read *Raffles Education* as authority for the proposition that plaintiffs can plead wide-ranging and complex conspiracies implying the involvement of multiple parties,

102 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [50]–[60].
103 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [67].
104 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [37]–[48] and [66].
105 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [66].
106 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [67].
107 See *EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 at [53], cited in *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [63].
108 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [65].
109 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [65].

only to name as conspirators a select few in order to tailor-fit claims for a particular forum.

12.58 Having established that the place of both the alleged misrepresentation and conspiracy was Singapore, Lim J went on to consider the availability and compellability of witnesses. As a preliminary point, Lim J recognised that courts could not predetermine who the defendant called as witnesses, rejecting in this regard REG's arguments that only "principal witnesses" were to be considered under *forum non conveniens*.[110] However, the defendant still had to show that the foreign witnesses was "at least arguably relevant" to its defence, since "otherwise, that would make it easy to manufacture a connecting factor for the purposes of a stay application".[111] This inclination to balance the defendant's freedom to plead its case with the need to avoid artificial pleadings that manipulate the *forum non conveniens* enquiry is eminently sensible and is also in line with the Court of Appeal's approach in its recent decision in *Ivanishvili, Bidzina v Credit Suisse Trust Ltd*.[112]

12.59 Considering the availability and compellability of witnesses proper, Lim J found that these factors did not weigh against Singapore being the natural forum. Under both enquiries, the possibility of giving evidence via video-link played a significant role. Under witness availability, all but one of the witnesses were based in India, making India a *prima facie* more appropriate forum in this regard.[113] However, in giving "weight" to the factor of witness availability "the court should consider the possibility of obtaining evidence through video-link and the relative distance of India from Singapore" – hence, given India's proximity to Singapore and the lack of explanation "why the Foreign Witnesses' evidence *cannot* be obtained by video-link" [emphasis added], the relative unavailability of witnesses in Singapore did not weigh much against Singapore being the natural forum.[114]

12.60 Under witness compellability, while a witness outside Singapore was *prima facie* not compellable, the willingness of foreign witnesses to "testify in Singapore or via video-link" would be crucial in assessing the weight of this factor.[115] Importantly, in stay applications where the burden of proof in *forum non conveniens* rests on the defendant, it is the defendant who must prove the foreign witness's unwillingness to testify in Singapore or via video-link. Since Prakash and Lui had proffered no

110 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [70].
111 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [69].
112 [2020] 2 SLR 638 at [85]–[87].
113 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [75].
114 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [76].
115 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [77].

such evidence, the *prima facie* non-compellability of the India-based witnesses also did not weigh much against Singapore being the natural forum.[116] Lim J's reasoning on the relevance of video-link evidence to witness availability and compellability is undoubtedly in line with the law's modern trend on the subject, and once again[117] demonstrates the increasing revolutionary impact video-link evidence has on the conduct of international litigation.

12.61 Finally, Lim J considered other less important connecting factors, and noted that they too did not weigh against Singapore being the natural forum. The governing law of REG's claims would be Singapore law, since the place of both torts was Singapore.[118] The parties' locations also pointed toward Singapore, since the REG companies were incorporated or run by directors based in Singapore, and since Prakash and Lui were permanently resident in and a citizen of Singapore respectively.[119] Although some of the acts done pursuant to the alleged conspiracies, like some of the representations made by members of the Educorp Group, were made in India, this was immaterial to the *forum non conveniens* enquiry.[120] Finally, that REG had instituted various civil and criminal proceedings in India against Prakash and Lui was also immaterial, for while there were some overlaps between the issues there and the Singapore proceedings, the causes of action and defendants were different, and the Indian proceedings were also merely in their preliminary stages. All in all, then, India was not a clearly more appropriate forum than Singapore and the stay was refused.

III. Jurisdiction clauses

12.62 When considering matters of jurisdiction, a common creature to encounter is the jurisdiction clause. These provide parties with a choice in selecting where any potential disputes are to be resolved, which in turn provides certainty and costs-savings when any disputes do occur. Jurisdiction clauses can also affect how one approaches an application for a stay of proceedings. Where there is no jurisdiction clause, an application for a stay is determined by the two-stage test from *Spiliada Maritime Corp v Cansulex Ltd*[121] ("*Spiliada*"). In most cases where a jurisdiction clause exists (typically an exclusive foreign jurisdiction clause or a forum

116 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [83].
117 Like the discussion on *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at para 12.92 below.
118 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [85].
119 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [86].
120 *Raffles Education Corp Ltd v Shantanu Prakash* [2020] SGHC 83 at [87].
121 [1987] 1 AC 460.

jurisdiction clause), the court will apply the strong cause test, which holds the applicant for the stay to a higher standard than the typical *forum non conveniens* analysis. Therefore, an important part of the analysis where a jurisdiction clause is in play can relate to its existence, its nature and its scope.

A. Ivanishvili, Bidzina v Credit Suisse Trust Ltd

Jurisdiction Clause – Nature and scope – Forum administration clause

Stay of Proceedings – *Forum non conveniens*

12.63 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd*[122] highlights that the interpretation of the scope of a jurisdiction clause is always contextual, that determining the natural forum is far from a scientific process, and that reasonable people can come to different conclusions on the same facts.

12.64 The facts can be stated simply. The first appellant established the Mandalay Trust with his wife and children (second to fifth appellants) as beneficiaries. The respondent (a Singapore trust company) was the trustee of the Mandalay Trust. The trust assets were managed and invested by Credit Suisse AG ("the Bank"), who was the second defendant at the High Court proceedings. The trust suffered losses as a result of the misconduct of the portfolio manager, who was subsequently convicted in Switzerland on charges of embezzlement, misappropriation and forgery.[123]

12.65 The appellants commenced proceedings against the respondent and the Bank at first instance and both defendants applied for a stay. This was granted on the basis that Switzerland was the more appropriate forum. The respondents' appeal was dismissed by the High Court, which affirmed that the *forum conveniens* was Switzerland.[124]

12.66 The High Court also considered the argument whether the Bank and the trustee had accepted the exclusive jurisdiction of the Singapore courts via the forum administration clause that was in the trust deed. The court concluded that it did not serve as an exclusive jurisdiction clause for all matters relating to the trust and that, in any event, it did not bind the Bank.[125]

122 See para 12.58 above.
123 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [1]–[3].
124 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [20].
125 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [21].

12.67 The respondents subsequently made the strategic decision to discontinue proceedings against the bank and pursue its action against the respondent solely. It also applied to amend its statement of claim to reflect this new focus. As such, the appeal to the Court of Appeal only related to the High Court's decision against the respondent.[126]

12.68 One of the preliminary questions that the Court of Appeal had to address was whether to allow these amendments at such a late stage in the proceedings. The respondent of course argued, *inter alia*, that these amendments were an abuse of process as they fundamentally changed the appellants' position that was presented to the previous courts.[127]

12.69 On this, the Court of Appeal opined that any claimant had the freedom of choice to frame its cause of action in a way such that it would fall within the jurisdiction of their preferred forum. Therefore, that the amendments reconfigured the dispute, such that it reduced the significance of connecting factors pointing to Switzerland in favour of those pointing to Singapore, was in and of itself unobjectionable. It is also unobjectionable for the claimant to discontinue the action against the Bank and, as a result, for the amendments to focus on the alleged wrongdoing of the respondent.[128]

12.70 Noting the belated nature of the amendments, the court held that an appellate court had the discretion to allow amendments to the pleadings if doing so would allow the real issue in controversy between the parties to be determined, and as long as it would be just in all the circumstances. Finding that there was not any real prejudice to the respondent that could not be compensated by costs, the court allowed the amendments.[129]

12.71 Having dealt with this procedural question, the court turned to the two substantive issues before it. The first substantive issue related to the nature and effect of the forum administration clause. Clause 2(a) of the trust deed provided for Singapore to be the initial proper law of trust, and for Singapore to be the forum for the administration of the trust. Clause 2(b) allowed for the respondent trustee to change the proper law

126 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [24]–[25].
127 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [28].
128 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [34], [35] and [37]. A similar approach was taken by the Court of Appeal in *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [28], *albeit* by a different *coram*.
129 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [40]–[41] and [46]–[47].

at which time the courts of the of the jurisdiction of the new proper law would become the "forum for the administration" of the trust.[130]

12.72 Noting that these types of clauses are commonplace, the court observed that the interpretation of forum administration clauses raised two related questions. One was whether the clause conferred jurisdiction on a court (exclusive or not), and the other related to what kinds of disputes the clause covered. The court also noted that there did not exist a special rule of construction for these clauses and much depended on how each clause is framed and the context in which it occurs.[131]

12.73 Turning to the first question, the court opined that the specific reference to Singapore in cl 2(a) likely meant that the courts of Singapore would at least be the appropriate forum to deal with matters of running the trust. Juxtaposed with the mechanism in cl 2(b) (that is, that a change in the proper law would trigger a change in the courts that would become the forum for the administration of the trust), the court concluded that the effect of cl 2 was to be a jurisdiction clause.[132]

12.74 The court then turned to the question of the scope of the clause. The question was whether the forum for the administration clause operated solely in matters relating to the administration of the trust or extended to disputes between trustees and beneficiaries. After examining the differing authorities, the court opined that:

> … the term 'forum for the administration' was intended to refer to the court which would settle questions arising in the day-to-day administration of the trust, and to denote the supervisory and authorising court for actions the trustee might need to take which were not specifically covered by the trust deed or where its terms were ambiguous.

It did not function as an exclusive jurisdiction clause for the settlement of contentious matters between trustees as beneficiaries. As such, the court held that the appellants could not subject the respondent to the exclusive jurisdiction of the Singapore courts.[133] The authors would highlight only two further points:

> (a) First, the Court of Appeal took pains to explain how it was the trustee who (i) drafts the trust deed; and (ii) specifies the terms on which it is willing to undertake the onerous duties of a trustee. Furthermore, in the settlement of a trust there are little negotiations between parties with different interests, and

130 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [50]–[51].
131 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [52]–[53].
132 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [59].
133 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [76] and [80].

generally the beneficiaries have no say at all in the setting up of the trust (or do not even exist at the time of the settlement of trust). These reasons reinforce the conclusion that the exclusive jurisdiction clause in a trust deed of that case *cannot* apply to the respondents.[134] Given that the enforcement of a jurisdiction clause (whether exclusive or not) is premised on the *contractual* bargain struck between the parties,[135] if the respondents were not even privy to the contract (the trust deed), one could argue that the respondents cannot be subject to the exclusive jurisdiction clause contained therein. However, the authors will discuss in this review as well the "quasi-contractual" type of cases where a non-party to a contract who wishes to take the benefit of that contract could be bound by the burden of any jurisdiction or arbitration clause contained therein.[136]

(b) Following the above, the second point is this: The Court of Appeal appears to (implicitly) accept the possibility that a drafter could impose a *mandatory* jurisdiction clause for the resolution of contentious disputes regarding allegations of breach of trust.[137] While this will not be explored in depth for the purposes of this chapter, it is not difficult to imagine the argument that the beneficiary cannot take the benefit of the trust deed and also claim that a breach of trust (under that deed) has occurred without respecting the forum clause which forms part of that instrument.[138] It remains to be seen whether a clearly worded provision mandating all disputes relating to the trust deed be resolved exclusively in a chosen forum could be upheld by the Singapore courts against the beneficiaries who had neither contractual relationship with the trustee nor were (more often than not) involved in the setting up of the trust.

12.75 The determination of the first substantive issue meant that the test to be applied in the determination of the second substantive issue was the doctrine of *forum non conveniens*. On this issue, the High Court had concluded that Switzerland was the natural forum. On appeal, the

134 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [77], [78] and [80].
135 For exclusive jurisdiction clauses, see *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [2], *per* Steven Chong JA. For non-exclusive jurisdiction clauses, see *Shanghai Turbo Enterprises v Liu Ming* [2019] 1 SLR 779 at [79(a)] and [82], *per* Judith Prakash JA.
136 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [56], *per* Quentin Loh J; *VJZ v VKB* [2020] SGHCF 11 at [30], *per* Tan Puay Boon JC.
137 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [78].
138 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [56] and [57].

court was split.[139] The majority of the court weighed the factors and held that Singapore was the natural forum. In coming to this conclusion, the court made a number of observations.

12.76 First, where the dispute revolves around questions of fact, the location and compellability of witnesses is of greater importance. However, the court clarified that compellability is by far the more significant consideration. This must be correct. While the fact that witnesses might have to travel might have been more significant in the past, this is no longer as significant with the use of technology like videoconferencing. Hence, the compellability of witnesses, especially third-party witnesses, should properly be the main focus.[140]

12.77 Secondly, when considering this factor of witnesses, the court emphasised that while the court should look at the evidence (and witnesses) that the claimant is basing its case on, because it is the defendant applying for a stay, the court should also be mindful of any potential prejudice that might be caused to the defendant's case. In doing this, the court will draw inferences from the information available about the defendant's case. While the defendant that is challenging jurisdiction is not mandated to specify his defence on the merits, it is nonetheless the responsibility of the defendant to bring relevant defences and evidence supporting those defences to the attention of the court, failing which the court would simply proceed to consider with what it has on the respective cases.[141] On the facts, the court opined that the defendant could not simply assert the unavailability of evidence or the lack of compellability of witnesses without providing more information about what that evidence might be and the witnesses it was to be sourced from.[142]

12.78 Third, on the availability of documents, the court rightly noted that the location of documents is no longer that significant as they are easily transportable. To that, the authors add that this is even less so with technology. The court pointed out that what is more significant is whether disclosure of the documents is only easily obtained in a particular jurisdiction, in which case the location of the documents becomes more significant. This is similar to the idea of witness compellability being a key consideration under the availability of witnesses factor.[143]

139 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [115] and [154].
140 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [84].
141 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [86].
142 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [94]–[95] and [97].
143 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [98].

12.79 The fourth consideration – the "shape of the litigation" – underscores the importance of pleadings. The Court of Appeal reiterated that a plaintiff may, by carefully selecting the parameters of the pleadings, be able to control to some extent the range of factors to be considered by the court in a *forum non conveniens* analysis.[144] On this factor, the court opined that, with its amended pleadings, the appellants were successful in reshaping its action so that the main focus was on the claims against the trustee. Thus, even though similar facts and events may still be relevant, this does not mean that the shape of the litigation remains the same. Therefore, the High Court's finding that the "theatre of action" was in Switzerland was no longer valid.[145]

12.80 Fifth, on the governing law, the court opined that this clearly pointed to Singapore: Singapore law governed the trust; there were issues of law to be considered in this action; and considering that the civilian jurisdiction of the Swiss courts did not have a substantive doctrine of trusts, the Singapore courts were best placed to decide issues of Singapore trust law.[146] Two sub-points are worth noting:

> (a) The governing law is a particularly significant consideration *where it arises explicitly from a choice of law clause*.[147]
>
> (b) The identified governing law is usually a more significant factor in disputes involving trusts as a trust is not like a commercial contract where it is only necessary to consider the content of the applicable law, but that trustees have to be "intimately aware of their responsibilities under the general law applicable to the trust … Resort to the law governing the trust is central to their responsibilities".[148]

12.81 Finally, the appellant had raised the risk of inconsistent outcomes and findings as a result of overlapping proceedings in different jurisdictions. The court opined that the significance of overlapping proceedings in the *forum non conveniens* analysis began with looking at (a) the identity of the parties; and (b) the causes of action and issues involved. On this, the court noted that there were no pending proceedings against the trustee. Further, in other proceedings by the appellants

144 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [34] and [104].
145 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [105].
146 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [106], [108] and [110].
147 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [106].
148 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [111].

against, *inter alia*, the Bank, there did not exist any overlaps that were sufficiently significant.[149]

12.82 Based on these considerations, the court found Singapore to be the natural forum for the dispute (stage 1); and that there were no real reasons to stay the proceedings nonetheless in the interests of justice (stage 2).[150]

12.83 In closing, it is interesting to note the dissenting judgment of Chao Hick Tin SJ, who disagreed with the majority on the issue of *forum non conveniens*. Chao SJ opined that, with the appellants' amendments to the pleadings, the court must focus on whether the trustee as sole defendant will be prejudiced in defending its case, taking into account that all the alleged losses occurred in Switzerland and that it might not be able to access all the relevant facts and evidence if the case were to be heard in Singapore.[151] Hence, the question to be asked is which jurisdiction the substance of the dispute has the most real and substantial connection with.[152] In considering the substance of the dispute, Chao SJ opined that notwithstanding the appellants' choice to not proceed against the Bank, the Bank's conduct (and those of their agents), as well as instructions issued to them, continue to be relevant in determining the trustee's liability.[153] In this analysis, then, Chao SJ concluded that the claims were very closely linked to Switzerland and that detailed evidence (both documentary and via witnesses) was needed to establish the events that occurred there. Thus, he found Switzerland to be the natural forum.[154]

12.84 By way of observation, it seems like Chao SJ approached the *forum non conveniens* analysis from a bigger picture perspective as opposed to the more granular factors-based approach adopted by the majority. Both approaches are certainly valid and in most cases would yield similar outcomes. Chao SJ seemed more understanding of the trustee being unable to point to specific evidence (both witnesses and documents) it might need, precisely because of the appellants' amendments.[155] He also did not weigh the factor of the governing law as heavily as the majority, instead opining that there was no indication that a Swiss court would have any great difficult applying Singapore law.[156]

149 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [113].
150 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [115].
151 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [130]–[131].
152 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [133].
153 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [135].
154 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [156].
155 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [152].
156 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [154].

12.85 The last noteworthy point raised by Chao SJ is his treatment of the Swiss criminal proceedings. The majority highlighted that it would be desirable for the Swiss criminal proceedings to be concluded so that any relevant conclusions in those proceedings could be taken into account in the Singapore suit.[157] On its face alone, then, the majority's position suggests that the Swiss criminal proceedings was indeed a *related* proceeding which some weight should be given to (except that it was not significant enough to point to Swiss as being the more appropriate forum, under this particular factor's analysis at least). Chao SJ, however, (rightly) opined that the conclusion of the Swiss criminal proceedings (including the fraud employee's guilty plea) did not mean that the facts accepted in those proceedings could be taken at face value. Cross-examination of this witness would therefore be necessary, and the compellability factor points towards Switzerland as the more appropriate forum.[158]

B. Bunge SA v Shrikant Bhasi

Discretionary jurisdiction – Order 11 rule 1(*a*)

Discretionary jurisdiction – *Forum non conveniens* – Video-link evidence

Jurisdiction clause – Privity and scope

Jurisdiction clause – Supersession of dispute resolution clauses

12.86 The dispute in *Bunge SA v Shrikant Bhasi*[159] ("*Bunge SA*") involved a complex series of transactions which had implications on various jurisdictional issues including the reach and impact of jurisdictional clauses. The facts involved a commercial arrangement between Grains and Industrial Products Trading Pte Ltd ("GRIPT") and Bunge SA ("BSA"), two Singapore incorporated or registered companies from the same Bunge Group of companies, on the one hand; and Advantage Overseas Private Limited ("AOPL"), an Indian company, on the other. Under the arrangement, the parties took part in identical transactions every six months, involving products ultimately moving from GRIPT to BSA, with AOPL acting as a middleman. Each transaction consisted of three legs: the first leg involved GRIPT selling products to AOPL; the second involved AOPL selling those products to a United Arab Emirates ("UAE") company; and the third involved the UAE company selling those products to BSA.[160] The first leg was always governed by a contract with a Singapore exclusive jurisdiction clause; the second leg, usually with an

157 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [113(b)].
158 *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] 2 SLR 638 at [137] and [151].
159 [2020] 2 SLR 1223.
160 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [5].

Indian exclusive jurisdiction clause; and the third leg, initially Indian or English and subsequently Singapore exclusive jurisdiction clauses.[161] All contracts also contained a clause waiving *forum non conveniens* arguments.[162]

12.87 One purpose or consequence of the arrangement was that GRIPT and BSA together would earn interest for the sums they paid for the transactions, all while those sums ultimately remained within the Bunge Group, albeit with AOPL acting as a conduit.[163] For each transaction, BSA would transfer a sum to AOPL, to be deposited in AOPL's fixed deposits with the State Bank of India. Consecutively, AOPL would mandate its bank to issue an irrevocable payment undertaking in favour of GRIPT to procure a letter of credit for the sum, or failing that to transfer the sum itself to GRIPT within six months. At the same time, however, AOPL was required to maintain the fixed deposits for a two-year period to facilitate the securing of adequate interest rates. Nevertheless, AOPL would theoretically have no trouble in doing so; every six months, in tandem with AOPLs payment of funds to GRIPT, new funds would be supplied to it from BSA because a new transaction would occur. After the fixed deposits matured upon expiry of the two-year period, the funds would return to the Bunge Group, but AOPL would take a cut for its services.

12.88 The parties' relationship soured when AOPL's bank failed to make a transfer of the sums to GRIPT, under one transaction beginning September 2015, which had been scheduled for March 2016. This, AOPL alleged, was because a new transaction had not happened, which meant that BSA had not transferred a new sum of money to it for the next six-month period, which in turn would force AOPL to break the fixed deposits with its bank, incur late interest penalties, and lose its expected interest. AOPL threatened to bring proceedings in India unless GRIPT and BSA reimbursed it for its losses.

12.89 In response, GRIPT and BSA brought the following claims or applications in Singapore:[164]

> (a) GRIPT sued AOPL for the failure to arrange the transfer of sums from the latter's Bank to GRIPT under the transaction beginning September 2015.

161 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [30] and [39].
162 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [39] and Annex.
163 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [6]–[7].
164 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [8].

(b) GRIPT sued AOPL's bank for the failure to make the transfer of the sums, in particular under the payment undertaking it gave GRIPT to do so in December 2015.

(c) GRIPT and BSA sought a negative declaration against AOPL for liability for any claims AOPL might make against it.

(d) GRIPT and BSA sued Shrikant Bhasi, an erstwhile director and shareholder of AOPL, for breach of contractual and fiduciary duties under the terms of agency agreements he entered into with GRIPT.

(e) GRIPT and BSA sued Bhasi for an indemnity for liability arising from any of AOPL's potential claims against them, under the agency agreements.

12.90 At first instance, the AOPL, the bank and Bhasi argued variously that Singapore's courts lacked and/or should not exercise jurisdiction over them. Hoo Sheau Peng J, in a decision covered in last year's Annual Review,[165] held that (a) and (b) should proceed in Singapore;[166] (c) should be stayed in favour of Indian courts as the natural forum;[167] and (d) and (e) should be stayed in favour of arbitration.[168] After Hoo J's decision was rendered, AOPL commenced proceedings in India against GRIPT and BSA, alleging that they had made assurances to AOPL that the transactions under the parties' arrangement would continue, and that these had been breached causing AOPL loss.[169]

12.91 On appeal, the parties agreed that claim (a) should proceed in Singapore[170] but challenged Hoo J's findings on the other four claims. These, and the issues they raised, will be discussed in turn.

12.92 Claim (b), brought by GRIPT against AOPL's bank for the latter's failure to make the transfer of the sums under the September 2015 transaction, involved a relatively straightforward application of *forum non conveniens* principles. Belinda Ang Saw Ean J, writing for the court, held that the fact that claim (a) would be heard in Singapore was a strong though not determinative factor pointing to Singapore, since the facts underlying claim (b) overlapped substantially with those underlying claim (a). Moreover, while the bank argued that key witnesses were not available or compellable as they were resident in India, Ang J found that availability

165 (2019) 20 SAL Ann Rev 251 at 283–287.
166 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [13] and [16].
167 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [14].
168 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [5].
169 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [12] and [29].
170 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [19]–[20].

was a non-issue since "a side-effect of the ongoing coronavirus pandemic is that witnesses will increasingly have to give evidence by video-link due to travel and other restrictions"; and neither was compellability, since the witnesses had not actually indicated that she would be unwilling to testify in Singapore proceedings.[171] Ang J's conclusion on availability – that COVID-19 exigencies encourage witnesses to be amenable to giving evidence via video-link – is common-sensical.[172] It is also right for her to have considered that the burden of proving unavailability rested on the bank, since it was applying for a stay of proceedings on grounds of *forum non conveniens*.[173] Yet, one wonders how far this point may be pushed in future cases. Should witnesses, for example, who may not have easy access to COVID-safe video-link facilities, be expected to go the extra mile for disputing parties? And if not, how would this affect the court's findings on their amenability?

12.93 Application (c), brought by GRIPT and BSA against AOPL seeking a negative declaration against AOPL for liability for any claims the latter might bring against them, presented more complex issues involving the interpretation of O 11 of the ROC and of jurisdiction clauses in general. Order 11 was at issue due to Hoo J's finding that the court had *in personam* jurisdiction over AOPL for the purposes of application (c) because it had such jurisdiction for the purposes of claim (c). Although parties took no issue with that finding, Ang J noted that it directly contradicted the Court of Appeal's decision in *MAN Diesel & Turbo SE v IM Skaugen SE*[174] that an O 11 jurisdictional gateway had to be satisfied separately for each claim brought against a foreign defendant.[175] Nevertheless, an O 11 head of jurisdiction was satisfied – namely, r 1(*a*) – because AOPL "has property in Singapore in the form of a share in its Singapore subsidiary, even though (as AOPL emphasised) that subsidiary does not feature in [AOPL's claim against GRIPT and BSA]".[176] In this regard, Ang J noted that:[177]

171 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [50].

172 This conclusion was also reached by the authors in last year's Annual Review: (2019) 20 SAL Ann Rev 251 at 301.

173 *Cf* situations where the *forum non conveniens* enquiry forms part of the test for service out of jurisdiction, in which case the party wishing to show that Singapore is *forum conveniens* has the burden of showing that the foreign witnesses have undertaken to give evidence or can be compelled in some way: see *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327, covered in (2019) 20 SAL Ann Rev 251 at 259 and 264–265, paras 11.28 and 11.48.

174 [2020] 1 SLR 327 at [65].

175 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [25].

176 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [26].

177 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [26].

> … the property in Singapore need not have anything to do with the facts in dispute to establish a good arguable case under O 11 r 1(*a*) of the ROC, though the lack of nexus might affect the subsequent natural forum analysis in terms of the strength of the connections.

12.94 With respect, Ang J's interpretation of O 11 r 1(*a*) is problematic. While O 11 and the doctrine of *forum non conveniens* both exist to ensure that a claim is connected with the forum, and while both are considered in applications for service out of jurisdiction, they involve very different enquiries: the former establishes the principled connection between a claim's subject matter and the forum, while the latter assesses the convenience of trying that claim in the forum "given the practicalities of litigation".[178] Ang J's reasoning here does admittedly resonate with that of the Court of Appeal in *Li Shengwu v Attorney-General*,[179] where it was suggested that the doctrine of *forum non conveniens* may establish a sufficient connection between a claim and the forum, and that the satisfaction of O 11 grounds should be reduced to a mere regulatory formality.[180] Yet, given the radical implications of such a development, it is submitted that the Court of Appeal should revisit the issue when a case arises that turns on it; *Bunge SA* was not such a case, since other jurisdictional gateways under O 11 r 1(*d*) were also satisfied.[181]

12.95 The second issue involving application (c) involved the relevant test for the exercise of the court's jurisdiction and involved issues of privity in jurisdiction clauses. GRIPT and BSA argued that the Singapore exclusive jurisdiction clause in the contract governing the first leg of the transaction covered the claim, and so proceedings should only be stayed if there was "strong cause". AOPL, on the other hand, argued that its claim was not based on any contract but rather GRIPT and BSA's breach of its assurances, with the consequence that no exclusive jurisdiction clauses covered it, and the test in *Spiliada*[182] should apply instead.[183]

12.96 Ang J agreed with GRIPT and BSA. AOPL's claim had to fall within the scope of at least one of the exclusive jurisdiction clauses in the contracts governing the first, second or third legs of the transaction because all of those exclusive jurisdiction clauses, regardless of the courts they chose, covered disputes "arising out of or in connection with" that contract. Since dispute resolution clauses "should be given a broad and

178 *Brownlie v Four Seasons Holdings Inc* [2018] 1 WLR 192 at [31], *per* Lord Sumption.
179 [2019] 1 SLR 1081.
180 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [166]; for a criticism, see (2019) 20 SAL Ann Rev 251 at 257.
181 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [26].
182 See para 12.62 above.
183 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [30].

generous interpretation", that phrase was "*in principle* broad enough to cover disputes arising from a legal relationship derived from specific pre-contractual conduct that may have led to parties entering into the contract that contains a dispute resolution clause with this wording" [emphasis in original],[184] such as disputes arising from the assurances which GRIPT and BSA gave AOPL.[185] Between the three jurisdiction clauses, the clause in the contract governing the transaction's first leg should apply: that contract "ha[d] the closest connection" with the "pith and substance" of AOPL's claim against GRIPT or BSA[186] since, being a contract between GRIPT and AOPL, it was the only contract between AOPL and either GRIPT or BSA as parties.[187] Consequently, a Singapore exclusive jurisdiction clause covered AOPL's claim against GRIPT and BSA in India, and thus GRIPT and BSA's application for a negative declaration of liability in relation to that claim in Singapore. And since AOPL could not show strong cause why the jurisdiction clause should be set aside,[188] GRIPT and BSA's application could proceed in Singapore.

12.97 Ang J's reasoning and conclusions on this point were undoubtedly correct, although she could have paid greater attention to the privity issues which the parties' complex arrangements threw up. Jurisdiction clauses are agreements, and so the starting point is that they bind only parties privy to them or the main agreements they are part of. The difficulty, then, would have been that for *none* of the three contracts governing any of the three legs of the parties' transactions were AOPL, GRIPT and BSA *all* privies.[189] The question then would be whether the BSA, a non-party to the first leg contract, could nevertheless take the benefit of the exclusive jurisdiction clause contained therein in its application against AOPL: this is a question of construction, and context will no doubt be key.[190] In this regard, the fact that all of the three contracts existed to create an arrangement between all three parties may have been good grounds to find that BSA should have been able to benefit from the jurisdiction clause in question.[191] Since Ang J glossed over these issues in *Bunge SA*,

184 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [38].
185 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [30].
186 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [42].
187 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [42].
188 A particularly difficult task since it had also expressly waived reliance on any convenience-based factors under the first leg's contract: *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [45].
189 For a more detailed breakdown of the contractual relationships between GRIPT, BSA and AOPL, see *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [10]–[23].
190 Adrian Briggs, *Civil Jurisdiction and Judgments* (Informa Law, 7th Ed, 2017) at para 4.47.
191 See, in particular, the reasoning of the High Court in *VJZ v VKB* [2020] SGHCF 11 at [30], discussed at paras 12.171–12.178 below.

clear answers to these questions, involving the "party scope" of exclusive jurisdiction clauses,[192] must await another day.

12.98 Finally, claims (d) and (e), brought by GRIPT and BSA against Bhasi based on the terms of agency agreements between them, involved the supersession of dispute resolution clauses. The parties had in fact entered into *two* agency agreements, one in 2009 ("the 2009 agreement") and the other in 2016 ("the 2016 agreement"), but while the 2009 agreement contained an arbitration clause, the 2016 agreement contained a Singapore exclusive jurisdiction clause.[193] GRIPT and BSA argued that a provision in the 2016 agreement – stating that the 2016 agreement "shall govern all relationships between the Parties with respect to the activities mentioned in this Agreement and shall supersede the Agency Agreement dated 1 January 2009 (as amended) between the Parties and all other prior written or oral agreements, understandings and/or commitments" – meant that the Singapore exclusive jurisdiction clause should apply rather than the arbitration clause.

12.99 Ang J agreed with GRIPT and BSA, and was right to do so on the facts. Of interest, though, is that she based her conclusion not only on the express wording of the supersession provision but also on the fact that the agency agreements as "not purely *transaction* agreements but ones pertaining to the parties' *ongoing relationship*" [emphasis in original],[194] and thus "in substance a *composite* agreement between the parties" [emphasis in original].[195] It followed that the "most sensible explanation and interpretation of [the supersession] clause [was] that the parties intended for only one dispute resolution mechanism to be in force at any one time, to govern the *disputes* arising from their ongoing relationship as they *materialised*" [emphasis in original].[196] Were the supersession provision to be given a narrower effect (that is, superseding only the main 2009 agreement and not its arbitration clause), "difficulties … may arise from having multiple concurrent dispute resolution mechanisms" apply to different disputes arising at different times in the parties' "ongoing" relationship.[197]

12.100 There is much in Ang J's reasoning above to commend from the perspective of commercial sensibility, since it prevents the fragmentation of disputes involving the same parties arising from the same commercial

192 Adeline Chong, "The 'Party Scope' of Exclusive Jurisdiction Clauses" [2011] LMCLQ 470.
193 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [57].
194 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [63].
195 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [64].
196 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [63].
197 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223 at [63].

relationship. However, future courts should caution against reading Ang J as laying down a hard-and-fast rule that, whenever an agreement purports to vary to supersede a prior agreement involving the same commercial relationship between the same parties, the latter's dispute resolution clause should *necessarily* supersede the former. As the Court of Appeal noted in *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA*,[198] the rule that dispute resolution clauses should be generously construed to avoid dispute fragmentation "is not to be applied irrespective of the context in which the underlying agreement was entered into or the plain meaning of the words".[199] Courts must always ask whether there are "compelling reasons, commercial or otherwise", to conclude that parties had in fact intended different aspects of their relationship to be subject to different dispute resolution mechanisms.[200] In *Bunge SA*, the equivocal language of the supersession provision seemed to suggest the supersession of dispute resolution clauses, and there was no reason why parties would not have intended it. But on different facts, courts may find good grounds arising from text or context to distinguish Ang J's reasoning here.

C. BXH v BXI

Exclusive jurisdiction clause – Presence of both jurisdiction and arbitration clauses – *Paul Smith* approach

Arbitration clause – Assignment of right to arbitrate

12.101 The previous case showed how a jurisdiction clause could supersede a dispute resolution clause. This next case considers the interaction between a jurisdiction clause and an arbitration clause. In last year's Annual Review,[201] the High Court (in the authors' view, rightly) adopted the approach in *Grains and Industrial Products Trading Pte Ltd v State Bank of India*[202] thereby endorsing the decision in *Paul Smith Ltd v H & S International Holding Inc*[203] ("*Paul Smith*"). The present case, *BXH v BXI*,[204] an appeal against Vinodh Coomaraswamy J's decision from the High Court in dismissing an application to set aside an arbitral award, also saw the Court of Appeal endorsing the *Paul Smith* approach.

198 [2016] 5 SLR 455.
199 *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 at [34].
200 *Rals International Pte Ltd v Cassa di Risparmio di Parma e Piacenza SpA* [2016] 5 SLR 455 at [34].
201 (2019) 20 SAL Ann Rev 251 at 283–287, paras 11.113–11.126.
202 See para 12.97 above.
203 [1991] 2 Lloyd's Rep 127.
204 [2020] 1 SLR 1043.

12.102 The Court of Appeal's decision went to great lengths examining issues not directly relevant to the field of conflict of laws including the doctrine of separability under Singapore arbitration laws. For the purposes of this review, the focus will be on the Court of Appeal's decision and reasoning in adopting the *Paul Smith* approach and some observations on the law of assignment.

12.103 The relevant facts can be simply stated. In December 2010, the appellant (BXH) and the parent company of the respondent (BXI) entered into a distributorship agreement.[205] The parent company, the respondent and the appellant later entered into an assignment and novation agreement such that the eventual contracting parties under the distributorship agreement were the appellant and the respondent.[206]

12.104 Dispute arose between the parties later, including that relating to the distributorship agreement which contained both an arbitration and a jurisdiction clause:[207]

(a) Clause 25.8 of the agreement, titled "Governing Law, Jurisdiction and Venue", stated:

> This Agreement shall be governed by and interpreted in accordance with the laws of Singapore, except for its rules regarding conflict of laws. *The jurisdiction and venue for any legal action between the parties hereto arising out of or connected with this Agreement, or the Services and Products furnished hereunder, shall be in a court located in Singapore.* The 'United Nations Convention on Contracts for the International Sale of Goods' does not apply to this Agreement. [emphasis added]

(b) Clause 25.9 of the agreement, which set out the arbitration agreement between the parties, read:

> *Disputes arising out of or in connection with this Agreement shall be finally settled by arbitration which shall be held in Singapore in accordance with the Arbitration Rules of Singapore International Arbitration Center ('SIAC Rules') then in effect.* The arbitration award shall be final and binding on the parties, the award shall be in writing and set forth the findings of fact and the conclusions of law. Any award shall not be subject to appeal. The number of arbitrators shall be three, with each side to the dispute entitled to appoint one arbitrator. The two arbitrators appointed by the parties shall appoint a third arbitrator who shall act as chairman of the proceedings. Vacancies in the post of chairman shall be filled by the president of the SIAC. Other vacancies shall be filled by the respective

205 *BXH v BXI* [2020] 1 SLR 1043 at [5].
206 *BXH v BXI* [2020] 1 SLR 1043 at [8], [9] and [52].
207 *BXH v BXI* [2020] 1 SLR 1043 at [50] and [51].

> nominating party. Proceedings shall continue from the stage at the time of vacancy. If one of the parties refuses or otherwise fails to appoint an arbitrator within thirty (30) days of the date the other party appoints its arbitrator, the first appointed arbitrator shall be the sole arbitrator. All proceedings shall be conducted, including all documents presented in such proceedings, in the English language. The English language version of this Agreement prevails over any other language version. [emphasis added]

12.105 The appellant argued that the arbitration agreement ought not to be given effect for two reasons. First and as between the jurisdiction clause and the arbitration clause, the court should not give effect to the arbitration clause only. Second, the jurisdiction clause, being an earlier clause in the agreement, should prevail over a later inconsistent clause.[208]

12.106 The Court of Appeal agreed with Coomaraswamy J's finding that (adopting the approach in *Paul Smith*) the parties had agreed to resolve substantive disputes in arbitration under cl 25.9, and to resolve disputes arising out of any such arbitration in the Singapore courts in the exercise of their supervisory jurisdiction under cl 25.8.[209]

12.107 This is because substantive disputes over rights and obligations of the parties clearly cannot be the subject of both litigation and arbitration. The Court of Appeal therefore clarified that where parties evince a real intention to have matters resolved by arbitration, the court ought to give effect to that intention. Minor inconsistencies between contractual clauses cannot be allowed to detract from the parties' agreement to arbitrate. Instead, a generous and harmonious interpretation should be given to the purportedly conflicting clauses such as to give effect to the parties' true intention. It would in fact be drastic and very unattractive to find a total failure of the agreed method of dispute resolution just because of inconsistencies between the two clauses.[210]

12.108 The Court of Appeal was fortified in its decision by the fact that the parties "painstakingly" set out in various detail of the arbitration in clause 25.9, including (a) the binding effect of the award on parties; (b) the manner in which the award was to be made; (c) the manner in which the arbitrators were to be appointed; (d) the number of arbitrators; and (e) the language of the proceedings. On the other hand, cl 25.8 provides only for the applicability of Singapore law and the (impliedly exclusive) jurisdiction of the Singapore courts.[211] While the authors do not doubt

208 *BXH v BXI* [2020] 1 SLR 1043 at [53].
209 *BXH v BXI* [2020] 1 SLR 1043 at [59]–[60].
210 *BXH v BXI* [2020] 1 SLR 1043 at [58]–[60].
211 *BXH v BXI* [2020] 1 SLR 1043 at [61].

the correctness and practicality of adopting the *Paul Smith* approach, it is unclear if the parties had negotiated and contemplated in great detail the various mechanics of the arbitration in cl 25.9. It might have been a comprehensive arbitration clause the parties had blindly copied, without much thought, from somewhere else or another agreement. Would this have diminished this aspect of the Court of Appeal's reasoning? Further, it is also not unreasonable to expect the parties to not specify the same depth of detail for the jurisdiction clause – after all, the ROC applicable to Singapore court proceedings would have specified all necessary details already.

12.109 The Court of Appeal also (rightly) dismissed the appellant's reliance on *EJR Lovelock Ltd v Exportles*[212] ("*Lovelock*") to suggest that both cll 25.8 and 25.9 should be rejected *in toto*.[213] The court in *Lovelock* was faced with a dispute resolution clause that consisted of two parts: the first part provided for arbitration in England; and the second part provided for arbitration before the Union of Soviet Socialist Republics Chamber of Commerce Foreign Trade Arbitration Commission in Russia. Lord Denning MR, sitting at the English Court of Appeal, found the two parts to be impossible to reconcile, and the whole clause was thus rejected because it is uncertain and meaningless.[214] Unlike *Lovelock* where both parts of the same clause sent the dispute to arbitration in *different* forums, the situation in *BXH v BXI* is more akin to the *Paul Smith* situation where the court can give a sensible resolution: the parties intended for the substantive dispute to be resolved by arbitration (in accordance with cl 25.9) with Singapore courts retaining supervisory jurisdiction over the arbitration (as *per* cl 25.8).[215]

12.110 It is also worth noting some observations made by the Court of Appeal in dealing with the separate issue of assignment of the right to arbitrate by the respondent to a third party. The Court of Appeal definitively stated that an arbitration agreement does not have a purpose or a life independent of the substantive obligations that it attaches to. The right to arbitrate cannot be seen in isolation – it must necessarily attach to a specific right. Once the substantive right to a debt is assigned away by the respondent, the respondent can no longer arbitrate in relation to that debt.[216] These observations are also useful when dealing with jurisdiction clauses – by extension, it must mean that the right to refer a dispute to any national court under a jurisdiction clause also cannot be seen in

212 [1968] 1 Lloyd's Rep 163.
213 *BXH v BXI* [2020] 1 SLR 1043 at [62].
214 *EJR Lovelock Ltd v Exportles* [1968] 1 Lloyd's Rep 163 at 166.
215 *BXH v BXI* [2020] 1 SLR 1043 at [59], [60] and [62].
216 *BXH v BXI* [2020] 1 SLR 1043 at [75] and [83].

isolation; it must necessarily attach to a specific right. Once the right to refer a dispute relating to a substantive right has been assigned away, the proper party to invoke the jurisdiction clause would no longer be the assignor but the assignee.

D. Chen Yun Hian Christopher v BHNV Online Ltd

Jurisdiction clause – Construction – Nature and scope

Jurisdiction clause – Strong cause – Time bar

Jurisdiction – *Forum non conveniens* –Presumption of *loci delictii* as natural forum

12.111 In *Chen Yun Hian Christopher v BHNV Online Ltd*[217] ("*Chen Yun Hian Christopher*"), the plaintiff commenced proceedings alleging, *inter alia*, conspiracy to defraud and injure him by unlawful means over some investments he had made online.[218] While the suit named six defendants, at the time the jurisdictional challenge applications were being heard before Mavis Chionh JC, the plaintiff had only served the writ on the first, fifth and sixth defendants.[219] The relevant facts were as follows.[220]

(a) The plaintiff was a Singapore surgeon who had executed a contract online with an England incorporated company, BNet Online Limited ("BNet"), for binary options trading.

(b) The first defendant, a Belize incorporated company, was the sole shareholder of BNet. The fifth defendant was an Israeli citizen and in turn the sole shareholder of the first defendant.

(c) The sixth defendant was also an Israeli national and ultimate shareholder of a Belizean company known as CST Financial Services ("CST").[221] Although the sixth defendant was not involved in the agreement between BNet and the plaintiff, and CST's involvement was that it purchased some assets from the first defendant, the plaintiff alleged that the sixth defendant was "a substantial behind the scenes owner".[222]

217 [2020] SGHC 284.
218 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [1].
219 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [4].
220 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [4], [5], [6], [9], [25], [26] and [30].
221 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [4].
222 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [26].

(d) The second to fourth defendants, who were not served the writ at the time of the judgment, were purportedly employees of the first and/or the fifth defendants.

(e) The plaintiff's claims included (i) unlawful means conspiracy to defraud and injure the plaintiff; (ii) breaches of contractual and/or fiduciary duties on the defendants' part by failing to exercise reasonable care and skill in advising the plaintiff on investment matters; (iii) proprietary claim for moneys had and received, which were transferred to the first, fifth and/or the sixth defendant; (iv) misrepresentations and deceits purportedly made by the second defendant which liability can be attributed to the defendants; and (v) that the transactions entered into with the defendants were done so under undue influence.

(f) The contract in question (executed online between the plaintiff and BNet) included a jurisdiction clause which read:[223]

> *This Agreement is construed and enforce[d] in accordance with the laws and regulations of Belize and shall be governed by Belize*, notwithstanding any conflicts of laws principles. Therefore the parties to the agreement (i) *consents* [*sic*] *to any suit, legal action or proceeding in relation to this agreement being brought before the courts of Belize exclusively* (the 'Courts') *as such, this agreement of action in such situation waivers* [*sic*] *any objections to the use of the UK legal system* in resolving such issues or complaints that the proceeding has been brought in an inconvenient forum, (ii) *The competence of the UK courts is therefore agreed herein to hear such action*, (iii) *The courts of Belize ware* [*sic*] *agreed to have exclusive jurisdiction over such actions* (iv) The final judgments of such courts will have binding power over all parties. [emphasis added]

Between 2016 and 2018, the plaintiff, and the first and fifth defendants engaged in settlement talks which the plaintiff subsequently aborted. The Singapore suit was commenced mid-way through settlement talks with the first to fifth defendants on 17 January 2017. The plaintiff then sought and obtained leave to serve the writ and the statement of claim on the first and fifth defendants in England at one of the settlement meetings.[224]

12.112 As against the sixth defendant, the plaintiff amended his statement of claim in April 2018 to include allegations against the sixth defendant, and obtained and served the writ and statement of claim in Israel in January 2019.[225]

223 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [8(d)] and [42].
224 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [27].
225 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [28].

12.113 Meanwhile, the plaintiff also filed a protective writ in Belize against the first defendant on 13 December 2019, purportedly to forestall issues of limitation under Belizean law. The protective writ was served on the first defendant on 12 June 2020.[226]

12.114 Turning first to the first defendant's challenge against the jurisdiction of the Singapore courts to hear the dispute in light of the jurisdiction clause in the contract, it should be noted that the plaintiff did not dispute the validity of the contract and accepted that Belizean law governs the contractual dispute.[227]

12.115 It is trite that the interpretation of a jurisdiction clause is governed by the proper law of the contract, that is, Belizean law, and the court did consider expert opinion on this. The court found that there was a good arguable case that the jurisdiction clause was an exclusive one in favour of the Belizean courts. This conclusion was further supported by the parties choosing Belizean law as the proper law; parties must therefore have intended for Belizean courts to adjudicate the disputes arising from the contract.[228] This conclusion must be correct. What is interesting is that the court referred to a Singapore Court of Appeal decision stating that "[w]hile the court should refrain from ascribing special significance to particular phraseology, this does not mean that the use of certain words cannot be given their ordinary meaning".[229] Does this mean that the court used Singapore law to interpret the jurisdiction clause? The authors suggest that one should not read too much into this, and that this statement was simply used to emphasise that the ordinary meaning of the words itself supported the interpretation that Belizean law concluded.

12.116 The court (rightly) rejected the plaintiff's argument that the jurisdiction clause was void for uncertainty because it purported to operate as an exclusive jurisdiction clause while at the same time referring to two different forums (the courts of Belize and of the UK).[230] The general judicial attitude is that courts will give effect to any reasonable construction which harmonises apparently inconsistent clauses, rather than to hold that they are in conflict.[231] As an observation, it might have worked better for the plaintiff to argue that the jurisdiction clause was

226 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [29].
227 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [43].
228 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [45].
229 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [45].
230 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [46].
231 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [53]–[55]. This is also the position in Singapore: see *China Construction (South Pacific) Development Co Pte Ltd v Spandeck Engineering (S) Pte Ltd* [2005] SGHC 86 at [23].

a "non-exclusive jurisdiction clause" pointing towards both Belize and the UK.

12.117 It is worth noting that the court accepted that the seeming inconsistencies in the jurisdiction clause were "slips of the pen" in transplanting and editing a type of "forum selection clause" and that the mentions of the UK courts in the clause were failures of omissions rather than deliberate inclusions.[232] This finding is further supported by the parties' acknowledgement that the contract was a standard form contract and that careless editing of the standard form contract was evident within the jurisdiction clause itself, which contained several obvious typographical errors.[233] This might be useful in future for parties seeking to reconcile seemingly inconsistent clauses.

12.118 Having found a good arguable case that the jurisdiction clause was an exclusive one, the court next considered the scope of the clause. The clause stated that it applied to "any suit, legal action or proceeding in relation to [the contract]".[234] To this end, the court found that not only would all of the plaintiff's claims include construction of the various clauses in the contract, but the construction of those clauses was also actually a substantial step in establishing the plaintiff's claims. Accordingly, the court rejected the plaintiff's expert's opinion and found that the claims fell within the scope of the exclusive jurisdiction clause.[235]

> (a) The court, taking guidance from interpretation of scope of arbitration clauses, emphasised that the construction of the jurisdiction clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship to be decided in the same form unless the language made it clear that certain questions were intended to be excluded from the scope of the jurisdiction clause.[236] This must be right and, in fact, the authors would go further to say that this should apply with equal force to *any* dispute resolution clause in a contract (even if the chosen mechanism is mediation).
>
> (b) Second, the court also emphasised that it is important to identify the *substance* of the controversy/dispute without paying undue attention to the details of how the matters had been pleaded.[237] Therefore, it matters not that some claims were

232 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [50]–[51].
233 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [52].
234 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [56].
235 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [59].
236 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [58].
237 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [57]–[58].

> "non-contractual" in nature so long the establishment of those claims involved substantially the interpretation of the contract such that it is "in relation to the contract".[238]

12.119 Before turning to the effect of the exclusive jurisdiction clause, a troubling question remains. The contract was between the plaintiff and BNet. As far as one can tell, the first defendant was not a contracting party. How then could the first defendant rely on the exclusive jurisdiction clause contained in the contract?[239] This unfortunately appears to not have been contemplated by the plaintiff, and is also partly contributed by the plaintiff's pleaded claims.[240] The plaintiff claimed, *inter alia*, that the defendants breached their contractual duties; yet, it is unclear if the plaintiff was referring to the BNet contract or to other related contracts. If the latter, and in the absence of a jurisdiction clause, the court would have applied the approach in *Spiliada*[241] to identify the natural forum for the contractual claims against the first defendant in light of the related contract containing an exclusive jurisdiction clause in favour of the Belizean courts.

12.120 Given that the court found that there was an arguable case for an *exclusive* jurisdiction clause, the court went on to consider whether the plaintiff had demonstrated strong cause to justify suing in Singapore regardless. The plaintiff argued that if he were not permitted to litigate in Singapore, his claims in Belize would be "entirely time-barred and irremediable prejudice would result".[242] The court rightly rejected this argument.

12.121 First, the plaintiff had filed a "protective writ" in the Belizean court to ensure that "he will not be foreclosed from seeking justice due to any limitation period".[243] There was therefore, factually, no applicable time bar.

12.122 Second, the court accepted the position in *Halsbury's Laws of Singapore*[244] that:[245]

> … [i]f the party seeking trial in the forum shows that the lapse (*ie*, the failure to take out a protective writ …) was a reasonable one in the circumstances,

238 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [56] and [59].
239 Perhaps an argument similar to the "quasi-contractual" anti-suit injunction cases was being considered? See paras 12.163–12.70 below.
240 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [30].
241 See para 12.62 above.
242 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [64].
243 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [65].
244 *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2020 Reissue) at para 75.121.
245 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [66].

> then he can rely on the time-bar to show exceptional circumstances why the trial should proceed in the forum where his action is not barred. However, if the party had acted unreasonably in allowing the time limitation to lapse in the chosen jurisdiction, the time-bar is merely a neutral factor.

On the facts, the court found that even if there was an applicable time bar, this would have been a result of the plaintiff's own doing since he could have taken out the "protective writ" in Belize earlier, instead of waiting until close to two years after the initiation of the Singapore suit. The plaintiff also did not provide any explanation as to why he could not have filed the "protective writ" in Belize earlier.[246]

12.123 Further, the court also took the position that it would be *unjust* to allow the plaintiff to be released from his contractual obligation under the exclusive jurisdiction clause on the ground that his claims in Belize might be time barred, as this would in essence deprive the first defendant of an accrued defence in the chosen forum.[247] Since the case involved a contractually agreed forum, "it was even more incumbent on the plaintiff to make an effort to protect his legal position in the forum that parties had expressly chosen".[248]

12.124 The authors agree with the court's reasoning and would even go further to add that with the recent clarification by the Court of Appeal in *Shanghai Turbo Enterprises Ltd v Liu Ming*,[249] it will be even harder to rely on the time bar factor *alone* to establish strong cause given that factors that were "foreseeable by the parties at the time of contracting" will generally be given less weight.[250] In fact, parties will be deemed to have agreed to the jurisdiction of a court with the knowledge of how it works, and what it can or cannot do[251] – this arguably must include the limitation period of claims governed by the parties' chosen law. This forecast applies, however, only to *exclusive* jurisdiction clauses. Even though the strong cause test could apply in a non-exclusive jurisdiction clause context (if Singapore is one of the named forums),[252] a defendant seeking to get out of the Singapore suit could potentially rely on the time bar factor if they could show that the time bar issue would be analysed differently in *another* named jurisdiction in the clause.

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246 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [67].
247 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [70].
248 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [70].
249 [2019] 1 SLR 779.
250 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [98]. See also (2019) 20 SAL Ann Rev 251 at 275, para 11.82.
251 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [96].
252 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [88(a)]. For a more detailed discussion on applicability of the strong cause test for non-exclusive jurisdiction clauses, see (2019) 20 SAL Ann Rev 251 at 272–274, paras 11.75–11.80.

12.125 In any event, to the extent the plaintiff's argument suggests that a *different* limitation period could apply if the claim(s) against the first defendant is pursued in Singapore, this is unlikely to be the case if s 3 of the Foreign Limitation Periods Act[253] is applicable.

12.126 As a point to note for practice, since the plaintiff did file a "protective writ" in the Belizean court against the first defendant, instead of applying for a stay in Singapore, the first defendant could put the plaintiff to an election as to which set of proceedings (Singapore or Belizean) he wished to pursue.[254] Practically speaking, this could arguably be a less costly approach since the defendant need only prove that there is an action pending in a foreign court between the same parties and involving the same or similar issues.[255]

12.127 On a related note, the plaintiff also harped on his residency in Singapore seemingly as a factor to establish strong cause.[256] Given that *residency* as a factor is already becoming less significant in identifying the *forum conveniens* under stage 1 of the *Spiliada* framework,[257] it is not surprising that the court rejected this factor as amounting to strong cause. In any case, the court also rightly noted that in modern commercial disputes, including those involving online transactions, a party's current domicile provides little guidance to the natural forum, particularly for individuals who are well heeled with a high degree of mobility.[258]

12.128 Having found that there existed an applicable exclusive jurisdiction clause in favour of Belize and that the plaintiff was unable to demonstrate strong cause,[259] the court then turned to consider whether Singapore was *forum non conveniens* as contended by the fifth and sixth defendants.

12.129 Under stage 1 of the *Spiliada* framework, the court first reiterated that the starting presumption for tortious claims is that the place where the tort occurred is *prima facie* the natural forum for determining that tortious claim. However, the court did not identify the place of tort for the plaintiff's unlawful means conspiracy claim because the constituent

253 Cap 111A, 2013 Rev Ed.
254 *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [63]–[64], *per* Sundaresh Menon CJ.
255 *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd* [2013] 4 SLR 1097 at [26], *per* Andrew Phang Boon Leong JA.
256 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [72].
257 *BDA v BDB* [2013] 1 SLR 607 at [29], *per* Chao Hick Tin JA.
258 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [72].
259 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [73].

acts spanned multiple jurisdictions (including Romania and the UK).[260] Instead of localising the place of tort, the court found that the tortious claim was "so intimately connected to [the] contractual claim that Belizean law, which governed the [c]ontract, also applied to the plaintiff's tortious claim".[261] The court appears to have reached this (in the authors' view, incorrect) position by relying on *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV*[262] and *Trafigura Beheer BV v Kookmin Bank Co*.[263]

12.130 On this point, the authors can accept that the natural forum of the tortious claim as against the fifth and sixth defendants may be displaced by the natural forum of the related contractual claim. This is primarily motivated by the desire to avoid multiplicity of closely related proceedings in different courts of different jurisdictions which would lead to not only unnecessary expense and inconvenience to the parties, but also the risk of conflicting decisions being handed down.[264] However, the finding that this displacement meant that the governing law of the related contract also governed the tortious claims as against the fifth and sixth defendants is a little harder to accept, especially when they were not parties to the underlying contract between the plaintiff and BNet.[265]

12.131 It is also interesting to note that the court accepted the defendants' argument that had the plaintiff thought that Singapore was the proper forum, the plaintiff would not have informed the court previously that he was considering the option of entering into an exclusive choice of jurisdiction agreement with the defendants with a view of naming Singapore as the jurisdiction and forum. The court interpreted this to mean that "the plaintiff's own conduct suggested that he himself did not believe Singapore to be the natural forum".[266] While this is certainly one possible interpretation, perhaps not so much should be made of it since the plaintiff could have suggested such a jurisdiction agreement for tactical reasons (in light of the Choice of Court Agreement Act),[267] which may have meant that he would not have needed to go through the pain and costs of showing that Singapore was *forum conveniens*.

260 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [80].
261 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [80]–[83].
262 [2020] 1 SLR 226.
263 [2006] 1 CLC 1049.
264 *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [78].
265 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [5], [9] and [101].
266 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [88].
267 Cap 39A, 2017 Rev Ed.

12.132 On the factor of availability of witnesses and documents, the court rightly treated them as "neutral factors" given that (a) the relevant witnesses were spread across jurisdictions, including Singapore, the UK and Israel;[268] and (b) the documents were easily transportable between jurisdictions.[269] The authors would simply add that given how the COVID-19 pandemic is both uncertain and unpredictable worldwide, air-travel restrictions imposed across the world are unlikely to be lifted entirely in the foreseeable future. These factors mean that location of witnesses is likely to be viewed by the courts with decreasing significance, and parties will be expected to rely on information and communication technology to ensure that witnesses are available to give evidence through video-link.[270] Instead, the focus by the parties should be on the issue of compellability of witnesses.

12.133 Turning to stage 2 of the *Spiliada* framework, the court left open the question of whether stage 2 is applicable in cases involving leave for service out of jurisdiction.[271] The authors take the position that where a plaintiff has shown that Singapore is the natural forum for the purposes of an application for service out of jurisdiction, it is theoretically possible for a defendant to argue that he would be deprived of a legitimate, personal or juridical advantage in not being able to sue elsewhere. The likelihood of success is, understandably, low. However, where a plaintiff has not been able to show that Singapore is the natural forum, the inquiry should stop there. The requirements for service out of jurisdiction simply have not been met.[272] As Andrew Ang SJ (rightly) explained in a different High Court decision, in an application for leave for service outside of jurisdiction, the court is concerned with the question whether it even has jurisdiction in the first place: "It would be difficult to see how the court can have such broad discretion to allow a party to litigate in Singapore when its jurisdiction has yet to be established."[273] It is therefore unusual for the court in *Chen Yun Hian Christopher* to have gone on to consider whether the plaintiff would be denied substantial justice in Belize. This would have made sense if the plaintiff, having established jurisdiction in Singapore, were faced with a situation where the defendant had successfully shown that Belize was a more appropriate forum. This was not the case here.

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268 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [89].
269 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [90].
270 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [72], *per* Steven Chong JA. See also (2019) 20 SAL Ann Rev 251 at 301, para 11.162.
271 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [91].
272 This point was made in last year's Annual Review in relation to *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226: (2019) 20 SAL Ann Rev 251 at 281–282, paras 11.104–11.110.
273 *Allenger, Shiona v Pelletier, Olga* [2020] SGHC 279 at [157]–[158].

12.134 Having said that, the court made two interesting remarks about stage 2 of the *Spiliada* framework which may apply in another case:

(a) The court remarked that "substantial injustice" under stage 2 did not mean that the plaintiff *must* be allowed to pursue all its claims in the identified foreign court or natural forum, failing which there would be substantial injustice. In other words, the court seemed to be suggesting that so long as there is a real chance that the plaintiff would be able to pursue *some* of his claims in the natural forum, there is *no* substantial injustice.[274]

(b) The court went on to say that even if the plaintiff's claims were time barred in Belize (having earlier found that Belizean law governed the tortious claims), that in itself was actually justice of the case. This was because it would be rare for a plaintiff to be able to say that allowing time to run in an expressly chosen court was not unreasonable.[275] The authors do not disagree that a time bar is relevant under stage 2 of the *Spiliada* framework, and that it was important to consider whether the plaintiff acted *reasonably* in allowing time to lapse (for example, if it was obvious that the plaintiff should have commenced proceedings but did not take steps to issue a protective writ in that forum).[276] The problem, however, is that the court appeared to have found that the plaintiff was *not* reasonable in allowing time to lapse *because* the situation involved an "expressly chosen court". The plaintiff, however, *did not* enter into the jurisdiction agreement (contained in the jurisdiction clause) with the fifth and sixth defendants.[277] The court in its reasoning appeared to have conflated the strong cause analysis under the exclusive jurisdiction clause *vis-à-vis* the first defendant (which is also incorrect, as highlighted above,[278] given that the first defendant appeared to not be a party to the contract between BNet and the plaintiff) with the *Spiliada* analysis for the fifth and sixth defendants.

12.135 The last point is that the defendants did not argue that the plaintiff breached its duty of full and frank disclosure of all material facts to the court. At the very least, one would have expected the plaintiff to inform the court that it had filed a "protective writ" in Belize when it was done on 13 December 2020. Yet, this fact was only disclosed to the court in an affidavit on 4 February 2020.[279] Given that this duty of full and frank

274 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [93].
275 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [94].
276 *TGT v TGU* [2015] SGHCF 10 at [41], *per* Foo Tuat Yien JC.
277 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [101].
278 See para 12.119 above.
279 *Chen Yun Hian Christopher v BHNV Online Ltd* [2020] SGHC 284 at [29].

disclosure is a *continuing* one,[280] one would have thought that this would also be another basis to set aside leave granted to the plaintiff for service out of jurisdiction if raised.

IV. Choice of law

A. Lew, Solomon v Kaikhushru Shiavax Nargolwala

Choice of law – Contract formation

12.136 Choice-of-law considerations are relevant to a conflict of laws analysis in two ways. The first is their impact on jurisdictional questions like an application for a stay where the *lex causae* may be a relevant factor in the identification of the *forum conveniens*. Another way is where the *lex causae* can define the cause of action in order for the jurisdictional provisions under O 11 of the ROC to bite. As already seen above, in *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal*,[281] the court used the three-stage test from *Pacific Recreation*[282] to determine the governing law of a contract.[283]

12.137 Things get significantly more complicated when the existence of the contract itself comes into question. Questions involving the appropriate choice of law rule for contract formation are among the conflict of laws' most complex, although common law courts have been spared of the need to adopt a considered solution by virtue of the relative scarcity of genuine formation disputes. However, *Lew, Solomon v Kaikhushru Shiavax Nargolwala*[284] ("*Solomon Lew*"), Singapore's second formation case in two years following *Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd*[285] ("*Pegaso*"), shows that such disputes are not so rare as to render academic the need for an appropriate choice of law rule. In *Pegaso*, Mavis Chionh JC:[286]

> … favoured the application of the *lex fori* in a case … where the existence of the entire contract is disputed, since it … avoid[s] the circularity of the 'putative proper law' test which assumes that a contract has been formed, and then

280 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [24]. See also (2019) 20 SAL Ann Rev 251 at 289, para 11.130.
281 See para 12.5 above.
282 See para 12.12 above.
283 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [52].
284 [2020] 3 SLR 61.
285 [2019] SGHC 47.
286 *Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd* [2019] SGHC 47 at [73].

> determines the proper law on that basis in order to determine whether the contract has been formed.

In *Solomon Lew*, by contrast, Simon Thorley IJ preferred to refer to the putative proper law, or "the governing law of the contract if the same was concluded",[287] to determine questions of formation.

12.138 Australian billionaire Solomon Lew wanted to purchase a villa in Thailand by way of purchasing shares in a BVI company owning the villa. Since Thai law allowed foreign nationals to own only buildings erected on Thai land but not the land itself, sellers would incorporate offshore companies and apply for building permits and leases of the underlying land in the companies' names, then sell their shares to buyers.[288] The villas were part of a resort managed by one Daniel Meury, through whom Lew communicated his intention to the villa's "owners", Nargolwala and his wife, who were Singapore residents owning shares in the BVI company. Lew and the Nargolwalas then negotiated using Meury as a "go-between";[289] the parties never communicated directly. Subsequently, in October 2017, Meury informed Lew that the Nargolwalas had agreed to the sale and congratulated him on it.[290] The Nargolwalas, however, had not communicated that to Meury, and instead thought that negotiations had not yet concluded.[291] A month later, they agreed to sell the shares to buyers resident in Hong Kong.[292] Lew, who believed himself gazumped, sued the Nargolwalas in Singapore for breach of an oral contract for the sale of shares in the villa; in defence, the Nargolwalas argued, *inter alia*, that no contract between them had formed.

12.139 The first question for Thorley IJ – and the only one that is of concern here – involved the identity of the applicable law to the parties' dispute on the formation of the alleged contract of sale: Lew argued for Singapore law; the Nargolwalas, for Thai law. The parties agreed that, whatever the governing law's identity, it would determine not only whether parties had themselves contracted, but also whether Meury acted as the Nargolwalas' agent in communicating to Lew that they had agreed to sell the villa.[293] Thorley IJ acknowledged that the traditional three-stage choice of law rule applicable to undisputed contracts would raise difficulties if applied to disputed contracts, because it "introduces

287 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [163].
288 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [2].
289 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [17].
290 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [71]–[72].
291 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [62]–[63] and [98].
292 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [153].
293 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [11].

an element of circularity in that it involves first trying to ascertain what the governing law would have been if a contract had been made and then applying that law to determine whether it has in fact been made".[294] However, he reasoned that the alternative *lex fori* solution would be inappropriate, because it would be "too much of a blunt instrument to serve the interests of justice".[295] In this regard, he read Chionh JC in *Pegaso* as "not seeking to lay down a hard and fast rule" in favour of the *lex fori*.[296]

12.140 Instead, Thorley IJ preferred "the three-stage [contract choice of law rule], with necessary adjustments to take into account that there is the fundamental dispute as to the existence of the contract in the first place".[297] In particular:[298]

> (a) at the first "express law" stage, courts should look for the "express law", although this is "unlikely" to exist;
>
> (b) at the second "implied law" stage, courts should look for "the parties' common intention as to the governing law of the contract if the same was concluded"; and
>
> (c) at the third "objective law" stage, courts could apply the law with "the closest connection with the putative contract".

12.141 Importantly, however, unlike the choice of law rule for undisputed contracts, courts should only stop at one of the three stages if on the facts it could "reach a clear conclusion that a particular law should be applied rather than the *lex fori*. In cases of doubt, the counsel of prudence would be to apply the *lex fori*".[299]

12.142 On the facts, Thorley IJ found that Singapore law was the "implied" law on the basis of the Nargolwalas' apparent insistence that the parties instruct Singapore rather than Thai lawyers.[300] If that had not been so, however, factors at the "objective" law stage pointed only marginally in favour of Singapore rather than Thai law, so Thorley IJ would have applied the *lex fori*, which in this case was also Singapore law.[301] Under Singapore law, then, no contract had been formed, because Lew himself did not genuinely believe that an agreement had been reached;[302] Meury

294 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [160].
295 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [162].
296 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [162].
297 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [162].
298 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [163].
299 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [164].
300 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [165].
301 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [169].
302 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [211]–[222].

had no actual or ostensible authority to contract on the Nargolwalas' behalf;[303] and the Nargolwalas had neither ratified nor were estopped from denying Meury's actions.[304] Finally, Thorley IJ noted that, even if Thai law applied, the conclusion would still have been that no contract had been formed.[305]

12.143 Thorley IJ's choice of law reasoning is superficially attractive but, with respect, raises difficulties upon closer inspection.

(a) His choice of law rule, focused on "the governing law of the contract if the same was concluded",[306] falls prey to the same circularity objection Chionh JC raised in *Pegaso*:[307] Why should parties be held to the law they apparently intended to govern the contract when the very formation of that contract is in dispute? A better reference point might be the facts surrounding the parties' pre-contractual negotiations, since those facts are uncontentious and so may properly be used as materials from which the parties' reasonable expectations are determined. Had Thorley IJ's reference at the "implied law" stage to the parties' choice of Singapore law been justified on this basis, his conclusion that there would have been "no circularity in this case" in applying Singapore law[308] would have been defensible.

(b) If one accepts Thorley IJ's putative proper law rule, the exception he created for it, that the *lex fori* should apply if a "clear conclusion" on the parties' actual or objective intentions cannot be reached,[309] is puzzling. After all, if courts applying the contract choice of law rule for undisputed contracts can *always* rely on the objective proper law stage, why in principle should things be different for the rule for disputed contracts? In other words, why should a law that is *marginally* more likely than the alternatives to have been chosen by reasonable parties only govern undisputed contracts when a law *clearly* more likely than alternatives may govern both disputed and undisputed contracts?

12.144 On the facts, Thorley IJ's choice of law rule did not lead to injustice, since the alleged contract did not exist under either Singapore or Thai law. Yet, given the evident need for a principled solution here, it is

303 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [195]–[196] and [224].
304 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [232]–[245].
305 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [259]–[266].
306 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [163].
307 See para 12.137 above.
308 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [166].
309 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [164].

hoped that, as *Solomon Lew* goes on appeal, the question of the appropriate choice of law rule for formation issues will be squarely confronted.

V. Restraint of foreign proceedings

12.145 In international commercial litigation, it is clear that for a potential plaintiff, forum selection is an extremely crucial process for, *inter alia*, substantive, procedural, tactical and strategic reasons. For example, some systems of law have more generous discovery rules[310] or a lengthier period before the limitation period kicks in.[311] While it is the prerogative of a litigant to decide on the forum in which to bring his claim, the common law has developed a set of principles and rules to curb forum shopping and to prevent abuse of process.[312]

12.146 On the other hand, for the defendant faced with multiple proceedings in Singapore and overseas, there are a number of strategic choices he can make. Apart from, *inter alia*, mounting a challenge to the jurisdiction of the court or applying for a stay of proceedings in the relevant jurisdiction, he can also apply to the Singapore court to indirectly stem the foreign proceedings via an anti-suit injunction.

A. Mulacek, Philippe Emanuel v Civelli, Carlo Giuseppe

Restraint of foreign proceedings – Vexation and oppression

Discretionary jurisdiction – *Forum non conveniens*

12.147 *Mulacek, Philippe Emanuel v Civelli, Carlo Giuseppe*[313] involved parallel proceedings in Singapore and Texas, with the respondent being the plaintiff in both, and the appellant seeking a finding that Singapore was the natural forum and that an anti-suit injunction should be issued against the respondent for the Texas proceedings. Briefly stated, Carlos Civelli sued Emanuel Mulacek in both proceedings for breaches of cash loan and share loan agreements, and Mulacek's defence was that his actions were taken pursuant to an "asset management agreement", under which Civelli was a fiduciary for Mulacek and his family members.[314] Mulacek then counterclaimed in both proceedings against Civelli in

310 *Connelly v RTZ Corp plc* [1998] AC 854 at [827G], *per* Lord Goff of Chieveley.
311 *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR(R) 345 at [38], *per* Chao Hick Tin J.
312 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [1], *per* Steven Chong JA.
313 [2020] 2 SLR 616.
314 *Mulacek, Philippe Emanuel v Civelli, Carlo Giuseppe* [2020] 2 SLR 616 at [2]–[3].

breach of trust and fiduciary duties.[315] The Texas proceedings were commenced three days after the Singapore proceedings, but before the papers for the Singapore proceedings were served on Mulacek.[316]

12.148 Valerie Thean J, in a decision covered in last year's Annual Review,[317] stayed Singapore proceedings and dismissed Mulacek's anti-suit application on the grounds that Texas rather than Singapore was the natural forum.[318] However, if Singapore had been the natural forum, Thean J might have entertained arguments that Civelli's conduct had been vexatious and oppressive, since "sustaining action in two jurisdictions in the same subject matter is inappropriate conduct on the part of a plaintiff".[319]

12.149 On appeal, the Court of Appeal upheld Thean J's ruling, making two comments of note. First, Mulacek failed in both appeals because, on the central issue to both – whether Singapore was the natural forum – he "ha[d] not shown that the Judge applied the wrong principles or that she ha[d] taken into account irrelevant facts".[320] The language used here, reminiscent of judicial restraint and exercises of supervisory rather than appellate jurisdiction, has echoed through *forum non conveniens* jurisprudence since Lord Templeman's exhortation in *Spiliada*[321] that "[a]n appeal should be rare and the appellate court should be slow to interfere".[322] Most recently, in the UK Supreme Court's decision of *Lungowe v Verdanta Resources plc*,[323] Lord Briggs lamented that parties often lacked "respect [for] first instance decisions",[324] and suggested that "condign costs consequences" might have to be made against "litigants, and even their professional advisors", to deter such behaviour in the future.[325] With the efficiency of judicial processes being a key concern here, parties would do well to consider whether their arguments on appeal truly cross the threshold deserving of an appellate court's attention.

12.150 Second, while the Court of Appeal's decision on *forum non conveniens* aligned with Thean J's ruling on Mulacek's application for an

315 *Mulacek, Philippe Emanuel v Civelli, Carlo Giuseppe* [2020] 2 SLR 616 at [2].
316 *Mulacek, Philippe Emanuel v Civelli, Carlo Giuseppe* [2020] 2 SLR 616 at [9]; *Civelli, Carlo Giuseppe v Mulacek, Philippe Emanuel* [2019] SGHC 182 at [1].
317 (2019) 20 SAL Ann Rev 251 at 313–315.
318 *Civelli, Carlo Giuseppe v Mulacek, Philippe Emanuel* [2019] SGHC 182 at [47] and [89].
319 *Civelli, Carlo Giuseppe v Mulacek, Philippe Emanuel* [2019] SGHC 182 at [92].
320 *Mulacek, Philippe Emanuel v Civelli, Carlo Giuseppe* [2020] 2 SLR 616 at [7].
321 See para 12.62 above.
322 *Spiliada Maritime Corp v Cansulex Ltd* [1987] 1 AC 460 at 465.
323 [2020] AC 1045.
324 *Lungowe v Verdanta Resources plc* [2020] AC 1045 at [7].
325 *Lungowe v Verdanta Resources plc* [2020] AC 1045 at [14].

anti-suit injunction, the court went further to dismiss any suggestion that Civelli's conduct may have been vexatious and oppressive. It was hard to conclude that the Texas proceedings were "tactically motivated at the time of commencement", since they were commenced only three days after the Singapore proceedings, and Civelli had since elected to proceed in Texas and undertaken to discontinue the Singapore proceedings.[326] Moreover, the fact that Mulacek's family members had joined as defendants in Texas was not oppressive, since their joinder was "*prima facie* necessary to resolve the issues in the Texas proceedings".[327] Parallel proceedings, then, are not *ipso facto* oppressive: a plaintiff may legitimately commence proceedings in two different jurisdictions from the outset before determining the more appropriate forum, as long as in doing so the defendant is not unnecessarily pressured.

B. Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd

Anti-suit injunction – Requirements – Enforcement of arbitration clause against non-party to arbitration agreement

12.151 There are different grounds for obtaining an anti-suit injunction. Typically, a court would grant an anti-suit injunction only if the applicant could show that the foreign proceedings were vexatious and oppressive, or that they were commenced in breach of a legal or equitable right not to be sued. In recent years, however, courts seem to be extending the ambit of an anti-suit injunction and this case considers an extension by way of the "quasi-contractual" cases.

12.152 In *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd*[328] ("*Hai Jiang*"), the plaintiff owner of *MV Seven Champion* ("the vessel") bareboat chartered the vessel to Lewek Champion Shipping Pte Ltd ("LCS"), who in turn sub-bareboat chartered the vessel to EMAS-AMC Pte Ltd ("EMAS"). These three entities then entered into a general assignment under which LCS assigned its rights and interests to the plaintiff.[329]

12.153 As part of these arrangements, LCS undertook to remove and replace the crane on the vessel. LCS entered into an agreement with the defendant for the installation of a new crane. This agreement was governed by Singapore law and contained an arbitration clause. The works were completed but LCS failed to pay outstanding amounts to the

326 *Mulacek, Philippe Emanuel v Civelli, Carlo Giuseppe* [2020] 2 SLR 616 at [9].
327 *Mulacek, Philippe Emanuel v Civelli, Carlo Giuseppe* [2020] 2 SLR 616 at [9].
328 [2020] 4 SLR 1014.
329 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [1]–[3].

defendant. LCS also defaulted in payments under the bareboat charter; the plaintiff then terminated the bareboat charter and demanded payment of outstanding sums. LCS failed to pay and the plaintiff took steps to wind LCS up.[330]

12.154 Prior to the termination of the bareboat charter and the winding up of LCS, the defendant issued an *in rem* writ in Singapore against LCS and also filed a proof of debt in the liquidation of LCS for the same. The defendant also obtained an order from the Sharjah Federal Court of First Instance ("the Sharjah Court") against both the plaintiff and LCS for a precautionary attachment against the vessel, and the vessel was subsequently arrested in Sharjah.[331]

12.155 The defendant then commenced a substantive suit in the Sharjah Court against the plaintiff and LCS ("the Sharjah Proceedings") even though the plaintiff was not a party to the agreement to update the crane and the bareboat charter between the plaintiff and LCS had been terminated. Various offers were made by the plaintiff to provide security, all of which the defendant turned down.[332]

12.156 The plaintiff applied in the Singapore courts for an anti-suit injunction against the defendant. The application was based on two grounds. The first was that the proceedings in the Sharjah Court were vexatious and oppressive, and the second was that the proceedings were in breach of an arbitration agreement.[333]

12.157 The High Court began by reiterating the principles upon which an anti-suit injunction would be issued before looking at whether the requirements for the application had been met.[334] On the requirement of natural forum, the court concluded that Singapore was indeed the natural forum. This must be correct. Most, if not all, of the connecting factors pointed to Singapore, with the vessel's presence being the only, and chance, connection with Sharjah.[335]

330 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [5]–[9].
331 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [10]–[11] and [13].
332 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [14]–[15].
333 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [19].
334 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [20]–[21].
335 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [22]–[24].

12.158 On the question of whether the defendant's actions amounted to vexatious and oppressive conduct, the court opined that it did. In coming to this conclusion, the court took into account a number of factors.

(a) The defendant had named the plaintiff and LCS as being jointly and severally liable despite the bareboat charter having been terminated and the vessel no longer being in LCS's possession. The court did not consider this sustainable.[336]

(b) The period of time between LCS being wound up and the seizing of the vessel was substantial (six months).[337]

(c) The defendant rejected the plaintiff's various offers of security and insisted that the security be furnished by way of a bank guarantee issued by a bank in Sharjah or payment into the Sharjah Court, even though the plaintiff's offers would be available to the defendant so long as either of the defendants' (in the Sharjah proceedings, that is, LCS or the plaintiff in the Singapore suit) liability (to the plaintiff) is established.[338]

(d) Finally, the court saw the Sharjah proceedings as seeking to circumvent the liquidation process in Singapore. Not only was the defendant unable to explain to the court how or why the plaintiff was jointly and severally liable with LCS for the latter's debt to the defendant; the defendant also could not have issued *in personam* proceedings in Singapore having filed a proof of debt in LCS's liquidation here. The court also noted that Sharjah was not an appropriate forum for the resolution of the disputes between the parties.[339]

12.159 The court went on to consider if an anti-suit injunction could also be issued on the basis that the proceedings were in breach of an arbitration agreement. This basis proceeded on two possible grounds. First, the plaintiff had been assigned LCS's rights under the arbitration agreement between LCS and the defendant. Secondly, even if the plaintiff was not a party to the arbitration agreement, it could nonetheless compel the defendant to be bound by that agreement.[340]

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336 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [25(a)].

337 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [25(b)].

338 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [15]–[16] and [25(c)]–[25(d)].

339 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [25(e)]–[25(h)].

340 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [27].

12.160 On this, a number of observations can be made. First, the court had to consider the applicable standard of proof for establishing whether a valid and binding arbitration agreement existed between the parties. The court noted that in stay applications under s 6 of the International Arbitration Act,[341] the standard of proof was that of a *prima facie* case. It also noted that there were no local authorities in the context of an application for an anti-suit injunction. The court opined that it would be incongruous for different tests to be applied in the contexts of an application for a stay and an anti-suit injunction, especially since the underlying query was the same. As such, it held that the applicable standard would be that of a *prima facie* case.[342] It is submitted that as a matter of principle, this similarity of treatment is sensible.

12.161 Next, the court turned its attention to whether the plaintiff could obtain an anti-suit injunction based on the arbitration clause that existed between the defendant and LCS. The plaintiff argued that, on a *prima facie* standard, the plaintiff had shown that LCS had assigned all its rights and interests to the plaintiff under the general assignment agreement which included the rights to "commence, conduct, defend, compromise or abandon any legal or arbitration proceedings", and that this included the right to arbitrate under the agreement between LCS and the defendant.[343] The defendant took the position that the general assignment was focused on assigning rights between LCS and EMAS under the sub-charter.[344] On this issue, the court opined that while it had reservations about whether the rights and benefits of the arbitration clause between LCS and the defendant had been assigned to the plaintiff, the plaintiff did meet the standard of raising a *prima facie* case and that the issue of jurisdiction should be referred to the arbitral tribunal (out of respect for the *kompetenz-kompetenz* principle).[345]

12.162 It is interesting to note that as part of their submissions on this issue, the defendant had argued that its agreement with LCS prohibited the assignment of its rights to a third party. The plaintiff countered that the defendant had constructive notice and, in any event, the decision of *Foamcrete (UK) Ltd v Thrust Engineering Ltd*[346] provided that if the

341 Cap 143A, 2002 Rev Ed.

342 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [30], [32] and [34].

343 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [36]–[38] and [40].

344 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [41].

345 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [45].

346 [2002] BCC 221.

agreement to assign predates the clause prohibiting assignment, then that clause does not operate.[347] Having found that there was a *prima facie* case on the assignment point, the court declined to come to a conclusion on this.[348]

12.163 At this point, the court had already concluded that an anti-suit injunction could be issued on the basis of vexatious and oppressive conduct, or on the basis of the breach of an agreement to arbitrate. The inquiry could have stopped here. However, the court went on to consider the situation whether (and this is the third point of note) even if the plaintiff could not enforce the arbitration agreement as an assignee, it could still compel the defendant's compliance.[349]

12.164 The court, following the line of cases in *Sea Premium Shipping Ltd v Sea Consortium Pte Ltd*[350] ("*Sea Premium*"), decided that it could. The starting point was the principle from the *Aggeliki Charis Compania Maritima SA v Pagnan SpA*[351] ("*Angelic Grace*") which provided that, unless there were good reasons to the contrary, an anti-suit injunction was the remedy where proceedings were begun in breach of an exclusive forum jurisdiction clause.[352] The court also acknowledged the uncontroversial extension of this principle to third parties in certain situations, for example, cases of subrogation or assignment. Third parties could also claim to enforce an exclusive jurisdiction clause where they are contractually entitled to do so or where they have an equitable or statutory right to enforce the contract.[353]

12.165 The *Sea Premium* line of cases went one step further. It established that an applicant might succeed in obtaining an anti-suit injunction against a respondent where the respondent is seeking to sue the applicant, in a jurisdiction other than that named exclusive in the contract, under the same contract which the applicant is denying it was a party to.[354] Presumably, if the respondent is seeking to benefit from suing

347 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [39] and [43].
348 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [43], [44] and [45].
349 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [47].
350 [2001] EWHC 540.
351 [1995] 1 Lloyd's Rep 87.
352 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [54].
353 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [55].
354 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [56].

on a contract to which the applicant is not a party, then it would seem right that the respondent should also be bound to observe the exclusive jurisdiction or arbitration clauses under that same contract upon which their action is based.[355]

12.166 The court, after reviewing the relevant foreign authorities, accepted that the principles expounded in *Sea Premium* are applicable in Singapore.

(a) The applicant must establish four elements: (i) the foreign proceedings must be in breach of the exclusive jurisdiction or arbitration clause; (ii) the applicant must be entitled to enforce the clause; (iii) the clause must be binding and not invalid; and (iv) the claim in the foreign proceedings must fall within the scope of the clause.[356]

(b) While the court did not take a definitive position, it did express its inclination to accept a further consideration of "deliberate and unacceptable forum fragmentation in bringing separate claims in contract and tort in different jurisdictions".[357] What this seems to suggest is that if the respondent in the anti-suit injunction does try to bring *only* tortious claims in the non-contractual forum, the court could still take this into account in granting an anti-suit injunction to the applicant if they are premised on similar facts, presumably driven by the desire to prevent undesirable forum fragmentation.

12.167 This move by the court is both exciting and troubling; exciting because these "quasi-contractual" cases give the anti-suit injunction a lot more flexibility and reach. Its use as a strategic tool in international commercial litigation has therefore been enhanced. However, it is this same measure that also gives rise to concerns.

12.168 The principle in *Angelic Grace*[358] and its extension to third parties in instances of, *inter alia*, assignment and subrogation is easily justifiable on contractual principles. And even if one intuitively appreciates the justice that the *Sea Premium* line of cases is seeking to do, the juridical basis for doing so remains unclear. The court did acknowledge that this

355 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [57].
356 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [81].
357 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [81].
358 See para 12.164 above.

is a developing area and noted three possible bases, advanced by Thomas Raphael,[359] upon which this extension could be justified.[360]

(a) The first is based on estoppel, that is, the respondent should be estopped from denying the existence of the contract under which its substantive claims are made. Presumably, this also includes denying that it is bound under the obligations of that contract.

(b) The second is based on an equitable obligation, that is, the respondent in the anti-suit injunction cannot bring a claim in a forum inconsistent with that agreed under the contract which it alleges exists, or which is the necessary condition of its claims.

(c) The third is that it is vexatious and oppressive to bring an internally inconsistent claim.

12.169 On analysis, these three bases do not assist as much as one would prefer.

(a) On the first ground of estoppel, it is unclear how it applies in the present case. There was no real discussion of any knowledge and reliance on the part of the plaintiff that might have led to an estoppel.

(b) On the second ground of equitable obligation, even if it is accepted that the respondent in the anti-suit injunction cannot bring a claim in a forum inconsistent with that agreed under the contract, it does not really address the extra step needed to justify allowing a third party to hold the respondent to that *contractual* obligation. At the most, one can say that the respondent is acting unconscionably, which constitutes vexation and oppression.

(c) The third ground would seem to be exactly what it is, vexation and oppression.

12.170 At one level, one wonders if the *Sea Premium* line of cases is necessary. Could the anti-suit injunctions in those cases not have been justified on the basis of more traditional grounds? To be fair, perhaps this is like how the cases in the field of restitution were classified as "quasi-contracts" until Birksian theory provided a cohesive framework. It may well be that in the future, a cohesive framework is elucidated such that

359 Thomas Raphael, *The Anti-suit Injunction* (Oxford University Press, 2nd Ed, 2019) at para 7.27; *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [54].

360 *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd* [2020] 4 SLR 1014 at [83].

there is a coherent way of justifying the *Sea Premium* line of cases.[361] It is certainly hoped that the Singapore courts might provide this clarity in future cases.

C. VJZ v VKB

Restraint of foreign proceedings – Jurisdiction clause – Privity and scope

Restraint of foreign proceedings – Vexation and oppression

Discretionary jurisdiction – *Forum non conveniens*

12.171 While *Hai Jiang*[362] demonstrated the potential difficulties with extending the effect of jurisdiction clauses to non-parties, *VJZ v VKB*[363] ("*VJZ*") suggests how, in the appropriate case, such extension may well be called for. *VJZ* involved a dispute on the administration of a deceased's estate, containing assets in multiple jurisdictions including Singapore and Indonesia. An initial dispute between the 15 beneficiaries to the deceased's will led them to attend court-ordered mediation at the Singapore Mediation Centre, culminating in a settlement agreement setting out their respective entitlements and nominating administrators. The settlement agreement also contained a clause submitting "all disputes, controversies, claims or disagreements arising out of or in connection with [the] Agreement, including but not limited to its existence, validity, breach and enforcement" to the exclusive jurisdiction of Singapore's courts.[364]

12.172 Subsequently, administrators were appointed by the Singapore courts pursuant to the settlement agreement. The administrators then published notices in Indonesian newspapers declaring themselves administrators of the deceased's estate and stating that "[a]ll creditors or next-of-kin interested in or having claims against the Estate should give particulars in writing their claims or interest to [the administrators]".[365] VKC, one of the beneficiaries, then brought tortious claims against the administrators in Indonesia, alleging that the published notices "directly affected her rights as a beneficiary" because they encouraged further "claim[s] against the Estate under forced heirship laws in Indonesia", and claiming damages for losses flowing from the notices.[366]

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361 For a criticism, see Paul Myburgh, "Non-Parties, Forum Agreements and Expanding Anti-Suit Injunctions" [2020] LMCLQ 345.
362 See paras 12.151–12.170 above.
363 [2020] SGHCF 11.
364 *VJZ v VKB* [2020] SGHCF 11 at [25] and [39].
365 *VJZ v VKB* [2020] SGHCF 11 at [11].
366 *VJZ v VKB* [2020] SGHCF 11 at [12].

12.173 In response, the administrators applied in Singapore for an anti-suit injunction against VKC. Tan Puay Boon JC first considered whether the exclusive jurisdiction clause in the settlement agreement had any bearing on the application. Here, the primary question was whether the administrators, being non-parties to the settlement agreement,[367] could potentially avail themselves of the benefit of the jurisdiction clause. Tan JC reasoned that they could, based on s 2(1)(*b*) of the Contracts (Rights of Third Parties) Act[368] ("CRTPA") – the application of which parties had not expressly excluded – since, properly interpreted, the exclusive jurisdiction clause purported to confer on the administrators the benefit of the parties' submission of disputes connected with the settlement agreement to the Singapore courts.[369] Admittedly, the plain wording of the clause was ambiguous on whether the beneficiaries had intended to submit all such connected disputes or only those disputes between the beneficiaries themselves, to Singapore courts.[370] But when interpreted in the context of the settlement agreement as a whole, the clause evidently covered all disputes even between beneficiaries and the administrators. This was because the administrators' work was a fundamental part of the settlement agreement, with the majority of the substantive obligations arising thereunder concerning them.[371] Moreover, disputes between beneficiaries *inter se* and disputes between beneficiaries and the administrators were inseparable, because even the former disputes would inevitably involve the administrators, who were tasked to implement the settlement agreement.[372]

12.174 Thus, since the exclusive jurisdiction clause in the settlement agreement purported to confer a benefit on the administrators, they could enforce it against VKC under s 2(1)(*b*) of the CRTPA and seek an injunction as a remedy under s 2(5).[373] This conclusion was undoubtedly correct: it followed directly from conceptualising jurisdiction clauses as contractual agreements, and was certainly in line with the parties' intentions given the settlement agreement's unique subject matter. It is worth noting, though, the limited import of Tan JC's reasoning even to disputes involving contracts not excluding the CRTPA: The exclusive jurisdiction clause in *VJZ* only covered disputes with the administrators as non-parties because of their central role to the performance of the contract. Conversely, then, outside such situations – that is, where the non-party is only conferred a discrete role and benefit under the

367 *VJZ v VKB* [2020] SGHCF 11 at [26].
368 Cap 53B, 2002 Rev Ed.
369 *VJZ v VKB* [2020] SGHCF 11 at [30].
370 *VJZ v VKB* [2020] SGHCF 11 at [40].
371 *VJZ v VKB* [2020] SGHCF 11 at [42]–[43].
372 *VJZ v VKB* [2020] SGHCF 11 at [46]–[48].
373 *VJZ v VKB* [2020] SGHCF 11 at [51].

contract – a standard form exclusive jurisdiction clause like that in *VJZ* is unlikely to cover breaches of the terms involving that non-party. Careful drafting, expressly extending the jurisdiction clause to disputes involving non-parties, would then be needed to keep those non-parties in the jurisdictional fold.

12.175 Having determined that disputes between VKC and the administrators could fall within the scope of the jurisdiction clause if they "ar[ose] out of or in connection with" the settlement agreement, Tan JC then concluded that the dispute underlying VKC's tort claim was such a dispute. This was because (a) the administrators had only performed the allegedly tortious act of publishing notices in the Indonesian newspapers to fulfil their obligations under the settlement agreement; (b) the administrators' defence was that publication was necessitated by VKC's failure to discharge her obligation under the settlement agreement to facilitate their appointments in Indonesia; and (c) the loss VKC had allegedly suffered could only be the loss of her entitlement to the estate as stipulated in the settlement agreement to which she was party.[374] It was also relevant that the jurisdiction clause was broadly worded, and there was no reason to construe it narrowly, especially if doing so would lead to the fragmentation of a complex multijurisdictional dispute.[375] Since the dispute in the Indonesian proceedings fell within the party and material scope of the Singapore exclusive jurisdiction clause, Tan JC found a *prima facie* case that an anti-suit injunction should be granted against VKC. He then also held that there were no strong reasons not to grant the injunction.

12.176 First, Singapore was indeed the natural forum for VKC's claim. The shape of the litigation in particular was defined by the Singapore order appointing the administrators and granting them an indemnity for losses arising from the discharge of their obligations, and by the fact that VKC's claim naturally involved all the other beneficiaries, who were bound by the Singapore jurisdiction clause.[376] The dispute was also closely connected to the settlement agreement which was governed by Singapore law and subject to a Singapore jurisdiction clause;[377] and the primary issue in the tort claim, on whether VKC's legal interest in the estate was harmed, involved the interpretation of that Singapore law contract.[378] One might note that, since VKC's claim fell squarely within the (exclusive) jurisdiction clause, Singapore would by definition have

374 *VJZ v VKB* [2020] SGHCF 11 at [58]–[60].
375 *VJZ v VKB* [2020] SGHCF 11 at [54]–[55].
376 *VJZ v VKB* [2020] SGHCF 11 at [67]–[71].
377 *VJZ v VKB* [2020] SGHCF 11 at [73].
378 *VJZ v VKB* [2020] SGHCF 11 at [75]–[76].

been the natural forum, which would have made Tan JC's exercise to identify the *forum conveniens* for VKC's claim unnecessary; but perhaps this was carried out for the sake of completeness.

12.177 Second, the Indonesian proceedings were vexatious and oppressive, since VKC had instituted them precisely to avoid and undermine the settlement agreement; she omitted mention of the settlement agreement in the Indonesian proceedings, and joined none of the other beneficiaries despite their obvious interest in the result of those proceedings.[379]

12.178 Third, VKC could not show that she would face injustice if the Indonesian proceedings were discontinued; although she argued that her tort claim would not succeed under Singapore law (and would thus not be actionable under the double actionability rule), this was simply a bare assertion, and it was possible that the Singapore law claim in "negligence or misrepresentation" could be brought on the facts.[380] Since there were no strong reasons not to, the administrators were entitled to an anti-suit injunction on the basis of the Singapore exclusive jurisdiction clause.[381]

VI. Recognition of foreign judgment

12.179 In international commercial litigation, obtaining a judgment is only one step in the game. What is often more important than obtaining a judgment is the enforcement of that judgment. Apart from enforcing a foreign judgment at common law by a claim in the courts,[382] a foreign judgment could be recognised and enforced under the statutory routes available. The statutory options available are: (a) the Choice of Court Agreements Act;[383] (b) the Reciprocal Enforcement of Commonwealth Judgments Act;[384] and (c) the Reciprocal Enforcement of Foreign Judgments Act.[385]

12.180 Apart from the enforcement of foreign judgments, foreign litigants may also want their foreign judgments *recognised* in Singapore.

379 *VJZ v VKB* [2020] SGHCF 11 at [83]–[84].
380 *VJZ v VKB* [2020] SGHCF 11 at [89].
381 *VJZ v VKB* [2020] SGHCF 11 at [91].
382 *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 at [13], *per* Chan Sek Keong CJ.
383 Cap 39A, 2017 Rev Ed.
384 Cap 264, 1985 Rev Ed. However, readers should note that the Parliament has passed the Reciprocal Enforcement of Commonwealth Judgments (Repeal) Act 2019 (Act 24 of 2019) to repeal the Reciprocal Enforcement of Commonwealth Judgments Act, although the minister has not notified in the Singapore Gazette when the effective date for the repeal Act is.
385 Cap 265, 2001 Rev Ed.

Intrinsically connected to recognition is the doctrine of *res judicata*. This doctrine states that a decision by a court of competent jurisdiction is, unless reversed on appeal, unimpeachable even if it might be wrong. *Res judicata* is therefore a form of estoppel which gives effect to this policy by disallowing parties to a judicial decision to afterwards relitigate the same question (whether or not the decision is wrong). If the decision is wrong, it must be challenged by appeal (against that judicial decision, if permissible within that legal system) or not at all.[386] Needless to say, this doctrine is only applicable after it has been established that the elements for recognition of the foreign judgments have been satisfied, namely: (a) the foreign judgment is a 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) there is no defence to such recognition.[387]

12.181 Finally, if there are conflicting foreign judgments, the general position is this: A foreign judgment will not generally be given effect if it conflicts with an earlier foreign judgment recognised under the private international law of the forum.[388]

A. Paulus Tannos v Heince Tombak Simanjuntak

Recognition of foreign bankruptcy orders

Defences to recognition – Breach of natural justice – Availability of recourse in foreign court

Defences to recognition – Breach of natural justice – Notice and opportunity to be heard

12.182 *Paulus Tannos v Heince Tombak Simanjuntak*[389] is the successful appeal against Aedit Abdullah J's decision,[390] with the majority consisting of Sundaresh Menon CJ and Tay Yong Kwang JA. A dissenting judgment was delivered by Woo Bih Li J. Both the majority's and minority's judgments will be reviewed in detail below.

386 *The Royal Bank of Scotland NV v TT International Ltd* [2015] 5 SLR 1104 at [71], *per* Sundaresh Menon CJ.

387 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [67], *per* Steven Chong J.

388 *First Global Funds Ltd PCC v PT Bank JTrust Indonesia, TBK* [2020] SGHC 32 at [18], *per* Choo Han Teck J.

389 [2020] 2 SLR 1061.

390 Discussed in last year's review: see (2019) 20 SAL Ann Rev 251 at 315–318, paras 11.199–11.207.

12.183 The appellants were alleged guarantors of a loan granted to a company called PT Megalestari Unggul ("MLU") pursuant to four deeds of personal guarantee dated 26 October 2011 purportedly executed by them. The loan was granted by PT Bank Artha Garha International TbK ("BAG") to MLU. One of the appellants (Paulus Tannos) held 60% of shareholding in MLU.[391]

12.184 MLU was unable to repay the loan when it fell due. After a series of assignments, one Indonesian company, PT Senja Imaji Prisma ("PT Senja"), became one of the creditors under the MLU loan. PT Senja later commenced proceedings in Indonesia for a "Penundaan Kewajiban Pembayaran Utang" ("PKPU") order against MLU and the appellants. The PKPU order allows a creditor who suspects that a debtor may default on its obligations to temporarily suspend the debtor's repayment obligations for the debtor to propose a composition plan to its creditors for the restructuring of its loans. If the debtor fails to propose a composition plan that is approved by the requisite majority of its creditors, this will lead to the making of a bankruptcy order against the debtor.[392]

12.185 On 9 January 2017, the Commercial Court of the Central Jakarta District Court heard PT Senja's application for a PKPU order. While MLU's counsel was present, none of the appellants were present. The Indonesian court granted the application and ordered the parties to undergo an interim debt rescheduling for 45 days to arrive at a composition plan that was agreeable to the creditors ("the PKPU Decision").[393]

12.186 Between 20 January 2017 and 17 February 2017, there were three creditors' meetings held pursuant to the PKPU Decision. The appellants first participated in the PKPU proceedings through its counsel's attendance at these creditors' meetings. The appellants' counsel contended, at these meetings, that (a) the appellants had not received notice of the PKPU application or the PKPU Decision; and (b) the personal guarantees they had allegedly given in relation to the MLU loan were fraudulently obtained and invalid, as reflected in a number of related Indonesian proceedings commenced.[394]

12.187 As the creditors' meetings did not result in a successful composition plan, MLU and the appellants were pronounced insolvent and bankrupt respectively on 22 February 2017. The respondents were then appointed by the Indonesian court as the receivers and administrators

391 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [5].
392 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [6]–[7].
393 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [8].
394 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [9].

of the appellants' estate. The respondents then commenced *ex parte* proceedings in the Singapore High Court for the recognition of the Indonesian bankruptcy orders against the appellants, who were residing and had property in Singapore. Abdullah J recognised the bankruptcy orders and dismissed the setting-aside application taken out by the appellants (which formed the appeal).[395]

12.188 The court did not rule on whether Abdullah J's application of the traditional approach for the common law recognition of foreign judgments to the recognition of personal bankruptcy orders was correct, leaving the question to be decided another day.[396] The Court of Appeal therefore did not go on to consider whether the requirements for recognition had been met.[397]

12.189 The court first considered whether the respondents were in breach of their duty of full and frank disclosure required in an *ex parte* application, in particular on the respondents' failure to disclose the existence of related Indonesian proceedings on the validity of the personal guarantees. The Court of Appeal's comments are a little curious in that they could have said it in more absolute terms.

12.190 First, although it was ultimately not a legally significant consideration for the Singapore court, the court thought that it would have been "prudent" for the respondents to disclose the existence of the related Indonesian proceedings. It, however, then stated that the merits of the Indonesian bankruptcy orders were generally not a question for the Singapore court.[398] The authors in fact would go further to say that since it is not a consideration at all (such proceedings appear to attack the merits or premise of the foreign court order), parties should not be expected to disclose them "out of prudence".

12.191 The court further held that since applicants are only expected to disclose potential defences to the grant of an *ex parte* order, the non-disclosure of the Indonesian proceedings by the respondents would likely *not* warrant setting aside the recognition orders *entirely*.[399] Again, it is unclear what the court meant by the order not being liable to be set aside "entirely". If the court accepts that at the recognition stage, the Singapore court is not concerned with merits of the foreign court order, then the applicant should not be faulted by having the successfully recognised

395 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [1], [3] and [10].
396 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [22].
397 *Heince Tombak Simanjuntak v Paulus Tannos* [2020] 4 SLR 816 at [19].
398 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [26].
399 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [26].

foreign court order set aside (*even partially*) for non-disclosure of defences which lack any potential in resisting a recognition application.

12.192 The next issue the court considered was whether the Indonesian bankruptcy orders were obtained in breach of natural justice. The court reiterated the well-established principles of natural justice in the leading authority of *Adams v Cape Industries plc*:[400] (a) the foreign court, being a court of competent jurisdiction, must have given notice to the litigant that it is about to proceed to determine rights between him and the other litigant; and (b) having given him that notice, the foreign court must have afforded him an opportunity of substantially presenting his case.[401] While the heart of natural justice lies in the concepts of notice and opportunity to be heard, the court acknowledged (without expressly disapproving) that there have been suggestions that categories of what could amount to breach of natural justice are not closed.[402] This perhaps opened the door for further arguments, and a good starting position is that stated in *Adams v Cape Industries plc*: "[T]he ultimate question is whether there has been proof of substantial injustice caused by the proceedings."[403]

12.193 Turning to the facts, the Court of Appeal was concerned with whether the appellants had any legal recourse against the Indonesian bankruptcy orders on their alleged breach of natural justice. The court then remarked that if recourse was being sought from the Indonesian courts, then it was not appropriate for the Singapore court to be commenting on the Indonesian process since any alleged violation of natural justice could be corrected by the Indonesian courts. But if no such recourse was available then the Singapore court would have to treat the Indonesian bankruptcy orders as the "final word from the Indonesian courts" and assess the merits of their recognition on that basis.[404]

12.194 This aspect of the majority judgment is curious and needs some unpacking. What the Court of Appeal seems to be saying is this: If the Indonesian bankruptcy orders could be set aside after the alleged pending appeal and/or judicial review,[405] then perhaps it is not final and conclusive. However, the starting position is that a foreign judgment is no less final merely because it is subject to an appeal, or even if there is

400 [1990] 1 Ch 433.
401 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [28].
402 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [29] and [42].
403 *Adams v Cape Industries plc* [1990] 1 Ch 433 at 570C.
404 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [30].
405 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [30].

actually a pending appeal in that foreign country where the judgment was given.[406]

12.195 Therefore, the court appears to be focusing on the availability of recourse as opposed to the *effect* of the Indonesian bankruptcy orders. Instead, however, the real question should be whether the foreign decision is final for the purposes of *res judicata*. To put it another way, a judgment is final and conclusive on the merits if it is one which cannot be varied, re-opened or set aside *by the court that delivered it*. As long as it is incapable of revision by the court which pronounced it, that foreign judgment is final even though it may be reversed or varied by an appellate court.[407] This, in fact, was also the position taken by Sundaresh Menon JC in *Goh Nellie v Goh Lian Teck*[408] (though it is noted that this was said in the context of issue estoppel).

12.196 Therefore, it should be of no relevance whether or not the appellants had recourse from the Supreme Court of Indonesia on the purported breach(es) of natural justice[409] *unless* it results in the Commercial Court of the Central Jakarta District Court (that is, the court in which the Indonesian bankruptcy orders originated from) re-opening, varying and/or setting aside the Indonesian bankruptcy order. While it can be appreciated that there may be considerations of comity (for example, a Singapore court would be slow to comment on a friendly foreign court's purported breach(es) of natural justice),[410] and similar to how a Singapore court is not prohibited from finding itself to be *forum conveniens* and granting an anti-suit injunction *even if* a competing foreign court has declared itself the natural forum,[411] a Singapore court should be entitled to its own views on whether natural justice has been breached in that foreign court. After all, (a) different judges operating under different legal systems with different legal policies may legitimately arrive at different answers;[412] and (b) in the context of the recognition of foreign judgments, the recognition court is concerned with whether

406 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [69], *per* Steven Chong J.

407 *Manharlal Trikamdas Mody v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 at [140]–[142], *per* George Wei JC.

408 [2007] 1 SLR(R) 453 at [28], *per* Sundaresh Menon JC.

409 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [39].

410 It has been said in the context of *forum non conveniens* that Singapore courts will be very slow to pass judgment on the quality of justice obtainable in a foreign court. See *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [110], *per* Sundaresh Menon CJ.

411 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [107] and [129], *per* Steven Chong JA; (2019) 20 SAL Ann Rev 251 at 304, para 11.173.

412 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [121], *per* Steven Chong JA.

the proceedings in the foreign court offend against the recognition court's own views of substantial justice.[413] The issue of whether a foreign judgment or order should be refused recognition or enforcement because of a breach of natural justice is a question for the recognition court alone to answer.[414]

12.197 In any case, the Court of Appeal went to great lengths to examine whether the appellants had recourse against the Indonesian bankruptcy orders, and concluded that the bankruptcy orders were not in the process of being appealed or set aside.[415] Until and unless there is further clarity from the Court of Appeal on this issue, one can perhaps assume that for allegations of breach of natural justice (and possibly even issues relating to other defences to recognition, including fraud), there appears to be a "carve out", in that a Singapore court may consider foreign judgments or orders attacked on this basis to *not* be "final and conclusive" for the purpose of recognition in Singapore.

12.198 The authors now turn to the next issue of whether there were indeed breaches of natural justice in that the appellants did not have notice of the proceedings or opportunity to be heard. The appellants argued that (a) they did not have actual notice of the PKPU application because the notices were not properly served on them; and (b) they were deprived of the opportunity to argue against it before the PKPU Decision resulted in the Indonesian bankruptcy orders.[416]

12.199 While the court agreed with Abdullah J that the appellants' participation in creditors' meetings held pursuant to the PKPU Decision amounted to submission for the purpose of jurisdiction, it disagreed that this meant that there was no breach of natural justice (specifically, the opportunity to be heard). The court held that the appellants' participation in the creditors' meetings did not necessarily mean the appellants had the opportunity to register their protests against the initiation of the bankruptcy process, which was premised on the underlying debt arising from the personal guarantees they had allegedly given.[417]

12.200 The court examined the minutes of the creditors' meetings, which recorded the appellants' objections over (a) the improper service of the PKPU summons; (b) the appellants' absence at the PKPU hearing; and (c) the validity of the underlying debt. Despite these objections, the

413 *Adams v Cape Industries plc* [1990] 1 Ch 433 at 566G.
414 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [58].
415 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [40]–[41].
416 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [42].
417 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [43]–[44].

appellants were told by the respondents-receivers and the supervising Indonesian judge that the creditors' meetings were not the forum to discuss those matters.[418] The bankruptcy hearing on 22 February 2017 also appeared to be a simplified process in that if the interim debt restructuring was not successful, the Indonesian court had to declare the appellants bankrupt. In fact, the appellants' Indonesian family lawyer did raise issues of lack of notice and validity of the underlying debt at the bankruptcy hearing but was told that the only way forward was to file an appeal. The court thus concluded that there was no scope for the appellants to argue against the validity of the PKPU Decision.[419] Despite the appellants' attendance at the creditors' meetings (through its counsel) and the bankruptcy hearing, the failure to attend the PKPU hearing on 9 January 2017 meant that the Indonesian bankruptcy orders would have followed as a matter of course as long as no composition plan was reached between the creditors and the appellants. Therefore, the court was of the view that the participation was not sufficient to eliminate concerns on lack of opportunity to be heard in the PKPU process.[420]

12.201 This part of the majority's reasoning is also curious. First, the appellants' family lawyer did confirm that he raised the objections to the lack of notice and validity of underlying debt but was told that the way forward was to file an appeal – Was this not evidence of the appellants being "heard" before the Indonesian bankruptcy orders were issued? Perhaps the Court of Appeal was interested in whether the appellants had the opportunity to be heard *substantively* on the merits (and in the Court of Appeal's views, this must happen before the making of the PKPU Decision). Even so, the foreign order to be recognised is the Indonesian bankruptcy order made on 22 February 2017 (which, by then, the appellants' family lawyer had raised objections on several occasions) and not the PKPU Decision (which came before the creditors' meetings). With respect, therefore, this aspect of the reasoning is a little difficult to reconcile.

12.202 Furthermore, it was about a month between the first creditors' meeting on 20 January 2017 and the bankruptcy hearing which resulted in the Indonesian bankruptcy orders on 22 February 2017.[421] It is unclear from the Court of Appeal's judgment if the appellants were able to take out other intervening applications to undo the PKPU Decision before the making of the Indonesian bankruptcy orders (which, in the court's words, would have followed as a matter of course so long as no composition plan

418 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [45]–[46].
419 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [47].
420 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [48].
421 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [45] and [47].

was reached). If there were indeed options available but the appellants were contented to raise objections only at the creditors' meeting (which they have been told by the supervising Indonesian judge that the creditors' meeting was not the appropriate forum),[422] then surely the appellants ought not be allowed to rely on their tardiness to substantiate any allegations of breach of natural justice.

12.203 In any event, given that the court took the position that the appellants had no opportunity to be heard substantively, the court went on to examine if there was proper service of the PKPU applications/summons. Presumably, if there was proper service, then the appellants ought not to be allowed to rely on its non-participation as the premise for allegations of breach of natural justice.

12.204 As a preliminary point on service of the PKPU summons, the court held that it is incumbent on the receivers/respondents to prove that there was proper service.[423] This must be correct. Even though the "non-service" issue was raised as an argument on breach of natural justice,[424] given that this is factually an issue relating to service, the burden remains on the receivers (seeking to have the foreign bankruptcy orders recognised in Singapore) to prove that there was proper service.

12.205 In any case, and leaving aside the appellants' objections as to the authenticity of the underlying personal guarantees (where there was a specified term on method of service), the court was prepared to look behind any such agreement on service method and find that there was no proper service if there was evidence suggesting that delivery of the summons/application was unsuccessful. In this case, the courier service records showed that the delivery of the legal documents had failed because of an incomplete address.[425] The court also did not place any weight on evidence from the bar that the receivers-respondents had conducted their own checks to ensure that the PKPU summons was served properly after being appointed.[426] The respondents' purported reliance on a specific sub-provision of Indonesian civil procedural rules to say that service was proper was also not successful because the respondents provided an incomplete translated version of the relevant provisions and did not produce any expert opinion on Indonesian law on how the rules should be interpreted.[427]

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422 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [46].
423 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [56].
424 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [73], *per* Steven Chong J.
425 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [52]–[53].
426 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [54].
427 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [56].

12.206 Finally, while the court acknowledged that the Indonesian court hearing the PKPU application had considered the issue of service and found that the requisite procedure for summoning the appellants had been satisfied, the court (rightly) held that the recognition court is not bound by findings of the foreign court on whether the requirements of natural justice had been met.[428]

12.207 Turning then to whether the appellants had actual knowledge of the PKPU proceedings, the court made three main points in support of their conclusion that the appellants had no knowledge.

12.208 First, the appellants' case was that they had only learnt of the PKPU proceedings after the PKPU Decision had been advertised in two major Indonesian newspapers on 13 January 2017. What is odd, however, was that the appellants had in fact signed powers of attorney ("POAs") appointing their Indonesian legal counsel on 11 January 2017 to represent them in the PKPU proceedings.[429] After allowing further affidavits to clarify the seeming inconsistencies, the appellants then changed their position to state that they came to know the PKPU proceedings on 10 January 2017 when a print article in a local newspaper was sent to them on 10 January 2017. The article was then sent to the Indonesian legal counsel, who prepared the POAs for their execution.[430] The court was sympathetic to the appellants' inconsistencies and acknowledged that while their evidence was unsatisfactory in some respects, it was consistent with the broader position that they knew of the PKPU proceedings only after the PKPU Decision had been delivered.[431] Again, given the fact that the supporting evidence of the appellants was skimpy (at best) (or evasive, at worst) in that they did not even produce any electronic trail or documentary record showing when the appellants received notice of the print article from an unnamed acquaintance, and when such article was forwarded to their legal counsel (when this supposedly could have been easily adduced) – one would have thought that this was sufficient basis to draw the necessary adverse inference against the appellants' case. After all, they should bear the burden of proving that they did not know of the PKPU proceedings. But the court was prepared to dismiss these red flags and emphasised that there was arguably no evidence suggesting that the appellants knew of the proceedings before the PKPU Decision was made on 9 January 2017.[432]

428 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [58].
429 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [61].
430 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [62].
431 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [64]–[66].
432 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [66].

12.209 The respondents also argued that, further to their case that the appellants were evading service of the PKPU summons to dissipate assets, the bank statements showed that there were substantial outflows of money from the appellants' bank account (more than S$1m in total). However, the court noted that there were substantial inflows as well and it was not possible to conclude that there was a clear effort to dissipate assets from this evidence alone.[433]

12.210 Secondly, MLU's involvement in the PKPU proceedings could not be evidence suggesting of actual knowledge of the appellants. The court noted that one of the appellants was no longer a director of MLU since 2013, and the court also declined to infer that that appellant knew of the PKPU proceedings by mere fact of his majority shareholding in MLU.[434]

12.211 Finally, the court thought that it was also improbable for the appellants to have known of the proceedings and yet chosen to stay away. After all, the appellants took quite a few steps *after* they allegedly knew of the PKPU proceedings (that is, post-issuance of the PKPU Decision) to resist the application, including raising objections on the lack of service and validity of underlying debts at the creditors' meetings and the bankruptcy hearing. The POAs executed also indicated that the appellants were in Singapore on and around 11 January 2017, increasing the likelihood that they would not have had notice of advertisement of the PKPU proceedings. Taken together cumulatively, the court was convinced, on a balance of probabilities, that the appellants were not at the hearing because they did not know about it. Since the making of the PKPU Decision was a precursor to the Indonesian bankruptcy orders, the fact that the appellants had no notice of the PKPU proceedings prior to the making of the PKPU Decision meant that the appellants were deprived of a fair opportunity to be heard by the Indonesian court.[435]

12.212 In response to the last argument, the authors note that Woo J made a noteworthy point that the court does not have to be satisfied about the true motives of the appellants.[436] Therefore, it is not impossible for the appellants to have known of and yet chosen to ignore the PKPU proceedings.

12.213 The authors now turn to Woo J's dissenting judgment. Woo J's dissent stemmed primarily from his dissatisfaction with the appellants'

433 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [66].
434 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [67].
435 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [68]–[70].
436 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [94].

explanation of the inconsistent positions taken on when they actually knew of the PKPU proceedings.[437] The untrue statements compelled Woo J to infer that the appellants knew of but chose not to attend the PKPU proceedings, which explained their inability to provide a clear and consistent explanation of when they first learnt of the PKPU proceedings.[438]

12.214 A second observation of note is this: Woo J remarked that the respondents' attitude towards the duty to disclose material facts in an *ex parte* application was "quite disappointing".[439] The respondents did not disclose another Indonesian court's decision, which was in favour of some appellants finding that the personal guarantees were invalid.[440] In response, the respondents highlighted that the said Indonesian decision had been annulled by the Supreme Court of Indonesia. This, however, happened two months *after* the supporting affidavit for the *ex parte* application was filed by the respondents.[441]

12.215 The authors prefer Woo J's approach over the majority's only because it expects applicants to *only* disclose material facts and not go further to disclose potential *defences* (which appears to be the majority's approach).[442] This difference, in the authors' view, is material: Since the applicant is not expected to dwell at length on potential difficulties with its case in the supporting affidavit,[443] the applicant should only be expected to identify material facts (including adverse ones) and not have to take on the additional step of putting itself in the shoes of the defendant in framing potential defences from those material (adverse) facts.

B. CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd

Recognition of arbitral awards – *Res judicata* – Cause of action estoppel

Recognition of arbitral awards – *Res judicata* – Issue estoppel

Recognition of arbitral awards – *Res judicata* – *Henderson* estoppel

437 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [74]–[93].
438 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [94].
439 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [95].
440 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [96]–[98].
441 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [99].
442 *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061 at [26].
443 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [107], *per* Judith Prakash JA.

12.216 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd*[444] involves the discussion of the doctrine of *res judicata* in relation to an arbitral award. This is useful for the purposes of this chapter, as the principles are, in the authors' opinion, equally applicable in the context of a litigant seeking to prevent the other party from relitigating issues already covered in a previous foreign judgment (assuming the elements to recognition have been satisfied).

12.217 The facts can be stated simply.

(a) The decision concerns striking-out applications taken out by the first defendant against the plaintiff's claims, which were instituted against nine defendants.[445]

(b) The plaintiff, CKR Contract Services Pte Ltd ("CKR"), was the main contractor for a condominium project from 15 January 2013, until its appointment was terminated on 24 October 2014.

(c) The roles of the defendants in the project were as follows: The first defendant was the developer. The second defendant was the project manager. The third defendant was the architectural firm with the fourth and fifth defendants being its employees who worked on the project as the architects. The sixth defendant replaced the plaintiff as the main contractor after its termination. The seventh to ninth defendants were involved in the replacement tender process which the sixth defendant was appointed to replace the plaintiff.[446]

(d) After the plaintiff was terminated as the main contractor pursuant to a notice of termination (which was in turn premised on two termination certificates issued by the third defendant and signed by the fourth defendant) on 24 October 2014, the plaintiff commenced arbitral proceedings on 10 November 2014 against the first defendant pursuant to the parties' arbitration agreement in cl 37 of the Singapore Institute of Architects' Articles and Conditions of Building Contract (Lump Sum Contract)[447] ("the SIA Conditions") which was incorporated into the contract entered into between the plaintiff and the first defendant on 15 January 2013.[448]

444 [2020] 5 SLR 665.
445 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [1].
446 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [5]–[9] and [11].
447 9th Ed, September 2010; reprinted August 2011.
448 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [11]–[12] and [16].

(e) The arbitration was bifurcated into liability and quantum phases. The entire arbitration process took close to five years and involved the issuance of four partial awards.[449] In the liability phase, the plaintiff alleged that the first defendant had wrongfully terminated the contract as it had no valid grounds to do so. The arbitrator found substantially for the first defendant and decided that the first defendant had validly terminated the contract.[450] In the quantum phase, the arbitrator found that the plaintiff was, *inter alia*, liable for liquidated damages for delay and damages payable to the first defendant arising from the valid termination of the contract. The arbitral awards also addressed the issue of (arbitration) costs between the parties.[451]

(f) More than a year after the plaintiff had commenced arbitration against the first defendant and while the liability phase was still pending, the plaintiff commenced an action before the Singapore court against the nine defendants. The first to sixth defendants then applied for a stay of this suit which was granted as a "case management stay" pending the outcome of the arbitration. The plaintiff also, at that time, conceded that it would discontinue the court action if it succeeded in the arbitration.[452] After the conclusion of the arbitration, the plaintiff proceeded with the Singapore action against the nine defendants.[453]

(g) There were also separate related proceedings including the initiation of a suit against the seventh to ninth defendants for, *inter alia*, negligence in the conduct of the replacement tender exercise.[454] Another suit was also initiated against the third and fourth defendants for, *inter alia*, tort of deceit for wrongfully issuing notices and termination certificates.[455] As they are not related to the discussion of *res judicata*, they will not be discussed in this review.

12.218 The central basis of the first defendant's striking-out application was that the matters raised by the plaintiff in the court action had already been decided by the arbitrator and/or ought to have been raised by the

449 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [16]–[19] and [24].
450 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [17].
451 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [18]–[19].
452 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [20].
453 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [21].
454 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [26].
455 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [28].

plaintiff in the arbitration.[456] In this regard, the court summarised the three conceptually distinct, though interrelated, principles under the doctrine of *res judicata*:[457]

> (a) *Cause of action estoppel*. This prevents a party from asserting or denying, as against the other party, the existence of a particular cause of action, the non-existence or existence of which has been determined by a court of competent jurisdiction in a previous litigation between the same parties. The court also reiterated the four requirements for this estoppel to be made out.[458]
>
> (b) *Issue estoppel*. This precludes a party from relitigating an issue and applies where a litigation raises a *question of fact or law* which has already been determined by a court of competent jurisdiction. This applies *even where the causes of action in question are not the same* in the new proceedings as they were in the previous proceedings. The court also reiterated the four requirements that must be met for this estoppel to be made out.[459]
>
> (c) Henderson *estoppel*. This is also known as the "extended doctrine of *res judicata*" or the defence of abuse of process. The focus is on whether in the circumstances a party is abusing the process by seeking to raise an issue which could have been raised before, taking into account all relevant considerations including whether there are *bona fide* reasons an issue that ought to have been raised in the earlier action was not raised, and whether the later proceedings are in substance a collateral attack on the previous decision (which should then be done by way of appeal, if that avenue has not been exhausted).[460]

The three estoppels are primarily motivated by the courts' concern with managing and preventing multiplicity of litigation so as to ensure that justice is achieved for all. It also aims to bring finality to litigation. These two considerations promote the public interest of efficiency and economy in the conduct of litigation, and also prevent litigants from being oppressed

456 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [39]. See also *First Global Funds Ltd PCC v PT Bank JTrust Indonesia, TBK* [2020] SGHC 32 at [20], *per* Choo Han Teck J, where the High Court explained that elements for recognition of a foreign judgment must be satisfied before a foreign judgment can be relied upon to raise the doctrine of *res judicata*.

457 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [40].

458 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [41]–[42] and [60].

459 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [43]–[44].

460 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [47].

and unfairly harassed by legal proceedings. There are two competing interests at play here and the court will exercise its discretion in such a way as to strike a balance between them: first, in allowing a litigant with a genuine claim to have his day in court; and secondly, ensuring that the litigation process would not be unduly oppressive to the defendant.[461]

12.219 The court then helpfully highlighted that *Henderson* estoppel, unlike the other two principles, is based on a more pragmatic rationale of not allowing parties to repeatedly come to court for matters which should have been dealt with in the earlier proceeding(s). It is more concerned with the proper administration of justice than the fact that parties' rights have been extinguished by reason of an estoppel. On the other hand, the cause of action and issue estoppels address considerations which had in fact been raised in earlier proceedings, while *Henderson* estoppel takes it one step further to consider points which *should or ought to* have been raised but were in fact not raised.[462] Following from this, it is theoretically impossible for a party to (successfully) argue both cause of action and/or issue estoppel on the one hand and *Henderson* estoppel on the other for the same *issue*.

12.220 Turning to the substantive striking-out application taken out by the first defendant which is premised on the doctrine of *res judicata*, the court found that the lawful and unlawful means of conspiracy premised on the first improper issuance of the architect's directions and notices were precluded on the basis of both cause of action and issue estoppel.[463] As the considerations for both estoppels are similar, the salient points for these two estoppels analysed by the court are highlighted below:

> (a) First, the court highlighted that the arbitration was a final and conclusive determination on the merits as agreed between the parties in cl 37 of the SIA Conditions, incorporated into the court.[464] The court also reiterated that arbitral awards can be final and conclusive determinations for the purposes of invoking *res judicata*. Further, the court noted that applications for leave to appeal against the arbitral award (presumably under the Arbitration Act)[465] on questions of law had been rejected or withdrawn.[466] This, in any case, should not matter since

461 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [45]–[47], [100] and [133]–[134].
462 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [48].
463 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [53(a)] and [101].
464 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [61] and [62].
465 Cap 10, 2002 Rev Ed.
466 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [62].

"[a] domestic or foreign judgment is no less final merely because it is subject to an appeal".[467]

(b) On the requirement of "identity of parties", the court (implicitly) accepted that the approach is the same for both cause of action and issue estoppel – the focus of the inquiry is whether the principal players in both actions are effectively identical.[468] It therefore did not matter that the arbitration was only between the first defendant and the plaintiff alone, and the court action involved eight other defendants. This was because the conspiracy allegations in the court action mainly concerned the plaintiff on the one side and the first defendant on the other, as was the case in the arbitration – the "principal players" were therefore effectively identical.[469]

(c) Third, on the requirement of "identity of causes of action", the court also emphasised the "substance over form" approach. The emphasis is on the *substance* of the subject matter of the cause of action, rather than mere differences or similarities in the form of the action. The focus is therefore on the identity of the *facts* pleaded, and not the legal points or forms of action raised. This requirement is therefore satisfied so long as the plaintiff seeks to rely on the *same matrix of facts* which were the subject of previous proceedings. It does not matter even if the claims are characterised differently. The task of the court is thus to examine the matrix of factual allegations that the plaintiff is relying on to support its claim, and to determine whether this set of factual allegations was raised and adjudicated upon in the previous proceedings.[470]

(d) Therefore, it did not matter that the plaintiff claimed for breach of contract in the arbitration but was proceeding on a tortious conspiracy claim in the court action. The plaintiff was essentially relying on a materially similar set of facts; therefore, there was identity of causes of action.[471] In particular, the court found that the arbitrator did consider whether the architect's directions ("ADs") were invalid, and in fact did find some ADs to be invalid, but on the grounds that they were beyond the scope

467 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [69], *per* Steven Chong J.

468 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [64]–[65].

469 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [66].

470 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [67]–[68] and [70].

471 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [70], [71], [73], [75] and [78].

of an AD or that the facts on which the AD was issued were inaccurately understood by the third defendant. However, the tribunal did not find that any of the ADs were issued pursuant to illegitimate pressure or interference on the part of the first defendant or its agents (which was an impropriety relied upon by the plaintiff in the court action).[472] An argument that could perhaps be made for the plaintiff, *if* the tribunal did find that *some* ADs were issued pursuant to illegitimate pressure, is that the award issued pursuant to the arbitration between the plaintiff and first defendant alone could not attract the doctrine of *res judicata* given that there was no identity of parties (for consideration of both cause of action and issue estoppel) *even if* there was identity of causes of action.[473]

(e) A last noteworthy point is this: In considering whether there was identity of causes of action, the court appeared to accept that the *remedies* which the plaintiff was pursuing in the court action can be considered. The court then found that the reliefs sought by the plaintiff in the court action were materially similar to those sought for breach of contract in the arbitration.[474] The plaintiff attempted to point out differences between the two sets of relief (that sought in the arbitration and that it was seeking in the court action), including the costs and expenses arising out of disputes in relation to the termination of the contract. This set of costs was clearly not encompassed by the claims in the arbitration since it related to costs incurred *in* the arbitration. However, the court (rightly) rejected the legitimacy of this claim as it was, in effect, seeking to attack the arbitrator's finding in the arbitration and undo the effect of the arbitral awards issued. In other words, the plaintiff's claim for the entirety of the legal costs involved in the arbitration would render the arbitral awards issued "utterly nugatory and bereft of actual effect".[475]

(f) For the requirement of "identity of subject matter" for issue estoppel, the court summarised the essence of the inquiry to be this: The issues must be identical in that (i) the prior decision must traverse the same ground as the subsequent proceeding (in other words, the determination on the issues must be

472 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [79] and [82].

473 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [42(c)] and [44(c)].

474 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [84], [90] and [91].

475 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [90].

fundamental to the previous court's or tribunal's decision);[476] and (ii) the facts and circumstances giving rise to the earlier decision must not have changed or should be incapable of change. Where this is not the case, issue estoppel may not arise.[477]

(g) Following the above, the court noted that the facts and circumstances giving rise to the arbitrator's determination that the contract was validly terminated "have not changed and are not capable of change given that the ADs, Notices and termination are all past events. [Its] attention has also not been drawn to any fresh evidence that will change that factual matrix".[478] In other words, the court appears to be suggesting (and rightly so) that if a party could adduce *fresh* evidence not previously considered in the previous proceedings, that could render the doctrine of *res judicata* inapplicable.

(h) If indeed there is *fresh* evidence not previously considered by that court (or tribunal) of competent jurisdiction, the proper process is to apply to have that evidence considered by that previous court or tribunal, in line with the established rules of procedure. This could come either as consideration of further evidence on appeal (in cases involving court proceedings)[479] or some form of "appeal" against or setting aside the arbitral award with the court in which the arbitration is seated, assuming such mechanism is even available under the laws of the seat.[480] In the context of recognition of foreign judgments, the further evidence could be considered through the lenses of "defences" to recognition involving intrinsic fraud.[481] Accordingly, the doctrine of *res judicata* would be inapplicable in this instance.

12.221 Turning to the second set of factual premises upon which the plaintiff grounded its conspiracy claim – that is, the tender for the replacement main contractor was structured in a manner to maximise

476 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [98].

477 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [94].

478 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [97].

479 For example, further evidence could be adduced on appeal under the *Ladd v Marshall* rule in Singapore. See generally *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341.

480 For example, an arbitral award seated in Singapore could be set aside under the International Arbitration Act (Cap 143A, 2002 Rev Ed) on the ground that the award had been induced or affected by fraud if a party concealed material information and/or suppressed evidence to deceive the tribunal in deciding in that party's favour: *Bloomberry Resorts and Hotels Inc v Global Gaming Philippines LLC* [2021] 1 SLR 1045 at [41], *per* Judith Prakash JCA.

481 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [49], *per* Chao Hick Tin SJ. As this is a decision reported in 2021, this will be covered in next year's review.

costs and inflate the amount claimable from the plaintiff, the court found that issue estoppel (but not cause of action estoppel) had been made out.[482] While this claim was not specifically pursued in the arbitration, the court (rightly) found that the issues were covered extensively by the tribunal when it had to consider whether the sums claimed by the first defendant arising from the appointment of the sixth defendant as the replacement main contractor were unreasonable and/or inflated when the issue of damages payable by the plaintiff to the first defendant was considered.[483] This therefore satisfied the requirement of "identity of subject matter" for the purposes of issue estoppel.[484]

12.222 Turning lastly to the issue of *Henderson* estoppel, as mentioned earlier, it is theoretically impossible for a party to (successfully) argue both cause of action and/or issue estoppel on the one hand and *Henderson* estoppel on the other for the same *issue*. This is why, given the court's finding that the conspiracy claim gave rise to both cause of action and issue estoppel, *Henderson* estoppel did not arise on those facts.[485]

12.223 The last claim which the court considered whether it could be struck out on the basis of *res judicata* is the claim in the tort of intimidation by the plaintiff against the first defendant, who was purportedly vicariously liable for the second defendant's threats made to the plaintiff.[486] While the court considered various fact-specific arguments in the context of striking out (and not under the doctrine of *res judicata* specifically),[487] they are not relevant for the purposes of this chapter.

12.224 Turning to issue estoppel, the court did not accept that the interactions between the second defendant and the plaintiff (where the alleged threats were made) were *fundamental* to the tribunal's eventual conclusions in the arbitration. The tribunal could have reached its conclusion that the contract was validly terminated *independent of* the interactions between the second defendant and the plaintiff's representative (even though this issue was *tangentially* noted by the tribunal).[488]

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482 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [53(b)] and [117].

483 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [106], [110], [112], [114] and [116].

484 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [110].

485 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [118].

486 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [119].

487 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [122]–[125].

488 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [126]–[127].

12.225 On the issue of *Henderson* estoppel, the court also (rightly) opined that "it is not entirely clear that the plaintiff should have raised a specific claim in intimidation … at the arbitration given that the second defendant, who is alleged to be the primary tortfeasor, was not party to the arbitration".[489] In particular, the court has not been persuaded that a party could be estopped under *Henderson* estoppel because it *ought to have* raised a claim against the other party in the previous proceedings even though (i) that party had *only* secondary liability (under the doctrine of vicarious liability); and (ii) the primary tortfeasor was not a party to that previous proceedings (that is, the second defendant who made the purported threats was not a party to the previous arbitration).

(a) The authors suggest, with respect, that the answer to this question lies in the answers to two related issues. First, as is the essence for *Henderson* estoppel,[490] the first defendant ought to have shown that this tort of intimidation claim was part of the *subject matter* of the previous arbitration proceedings. The second issue, and an extension to the issue of "subject matter" for the purposes of private international law, would be whether the issue in question falls within the *scope* of the jurisdiction submitted to the competent court or tribunal (that is, whether this issue falls within the jurisdiction the plaintiff and the first defendant submitted to the tribunal in the arbitration). For court proceedings, the inquiry for *Henderson* estoppel should end at whether the scope of the jurisdiction clause covers the claim in question such that it ought to have been raised in previous proceedings. For arbitration proceedings, however, it is not sufficient for the inquiry to stop at examining the scope of the arbitration clause; it should also go on to consider if that claim was within the tribunal's jurisdiction. After all (at least in Singapore), the tribunal's jurisdiction is demarcated by what the parties *agree* to submit to the tribunal for determination[491] and an award rendered in excess of the tribunal's jurisdiction is liable to be set aside.[492] If it can be shown that the issue falls squarely within the jurisdiction of the arbitral tribunal and was part of the subject matter of the previous arbitration proceedings, then it cannot lie in the mouth of the plaintiff to now pursue further court proceedings to the issue of tort of intimidation when it ought to have done so in the earlier proceedings.

489 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [128].
490 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [58], *per* Steven Chong J.
491 *CAI v CAJ* [2021] SGHC 21 at [203], *per* S Mohan JC.
492 *CDM v CDP* [2021] SGCA 45 at [17], *per* Steven Chong JCA.

(b) In any case, the authors note that the second defendant was *not* a party to the previous arbitration proceedings. Given that the plaintiff did include the second defendant as a party to the court proceedings (although this was later discontinued),[493] this could amount to "*bona fide* reasons why [this] issue which ought to have been raised in the earlier action was not" (and thereby explaining why *Henderson* estoppel should not apply for this claim)[494] since the tribunal could not have ordered and the plaintiff could not have pursued remedies against the second defendant who was not a party to the previous arbitration.

493 *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 at [22].

494 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [71(c)], *per* Chao Hick Tin SJ.