

12. CONFLICT OF LAWS¹

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I. Introduction

12.1 As with recent years, the number of conflicts cases decided by Singapore courts in 2024 was sizeable. The authors have thus confined themselves to select ten cases from the Court of Appeal and the High Court which seem of particular importance.

II. Jurisdiction and stays of proceedings

A. Cheong Jun Yoong v Three Arrows Capital Ltd

Jurisdiction – Service out – *Situs* of cryptoassets

12.2 Judges called to rule on cryptoassets-related issues are in an unenviable position. In domestic law, matters are complex enough: disagreements range from whether cryptoassets are property, to what type of property they might be, who owns them, and what rights might be had in relation to them. Layering private international law rules on top of these issues only muddies the waters further. In *Cheong Jun Yoong v Three Arrows Capital Ltd*,² (“*Three Arrows Capital*”) the General Division

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 [2024] 4 SLR 907.

of the High Court (“General Division”) was called to wade through these marshes when, in a jurisdictional challenge, the *situs* of cryptoassets was put in issue.

12.3 Cheong Jun Yoong (“Cheong”) held cryptoassets in wallets and accounts belonging to him, and invested them for himself and on behalf of others. In 2020, Cheong entered into an agreement with the founders of Three Arrows Capital Ltd (“TAC”), a British Virgin Islands (“BVI”) company with its headquarters in Singapore, to launch an independent fund on the latter’s platform (“DC Fund”). The agreement, dubbed the Independent Fund Agreement, was governed by BVI law. It provided that Cheong would have full control over the DC Fund, including the ability to move assets in and out of the DC Fund, and that the assets in the DC Fund would be siloed from TAC’s other funds. Pursuant to the Independent Fund Agreement, TAC opened sub-accounts for Cheong within its accounts on two cryptocurrency exchanges (“DC Sub-Accounts”). Cheong and investors in the DC Fund then transferred cryptoassets into the DC Sub-Accounts and used some of those cryptoassets to purchase other assets (collectively, “DC Assets”). Subsequently, TAC indicated its intention to move its operations to Dubai, and so in June 2022, Cheong procured the transfer of “all the DC Assets that were in the DC Sub-Accounts”³ to a Singapore company he had incorporated (“DVPL”).

12.4 In July 2022, TAC went into liquidation in the BVI. In August 2022, the BVI proceedings were recognised as foreign main proceedings in Singapore. On 4 November 2022, Cheong obtained permission in Singapore to seek a declaration that TAC held the DC Assets on trust for him and the DC Fund’s other investors. On that same day, TAC instituted proceedings in the BVI, seeking a declaration that it beneficially owned the DC Assets.

12.5 In Cheong’s application in Singapore for service out on TAC, he relied on three separate factors to demonstrate sufficient nexus to Singapore, alleging that TAC was ordinarily resident in or carrying on business in Singapore;⁴ that his claim was to assert proprietary rights to movable property situated in Singapore;⁵ and that his claim was founded on a cause of action that arose in Singapore.⁶ Naturally, he also argued that Singapore was the natural forum for his claim, and that it raised a serious issue to be tried.

3 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907 at [24].

4 Supreme Court Practice Directions 2021 para 63(3)(a).

5 Supreme Court Practice Directions 2021 para 63(3)(i).

6 Supreme Court Practice Directions 2021 para 63(3)(p).

(cont’d on the next page)

12.6 Chua Lee Meng J, sitting in the General Division, granted Cheong permission to serve TAC out of jurisdiction. On the factors giving rise to a sufficient nexus, Chua J held that Supreme Court Practice Directions 2021 (“PD”) para 63(3)(a) was not satisfied since TAC, having ceased trading since it was placed in liquidation, was no longer carrying on business in Singapore at the time of Cheong’s application.⁷ However, PD paras 63(3)(i) and 63(3)(p) were both satisfied.

12.7 Practice Directions para 63(3)(i) was satisfied because some of the DC Assets – namely, the cryptoassets – were situated in Singapore at the time of Cheong’s application. In reaching this conclusion, Chua J reasoned that the *situs* of a cryptoassets was where it could be controlled, which in turn depended on where its controller resided. Control rather than physical presence was important: since “a cryptoasset has no physical presence and exists as a record in a network of computers ... it best manifests itself through the exercise of control over it”.⁸ Moreover, Chua J noted that cryptoassets are transferrable only by persons who possess both the related public address (described as analogous to “an account number”) and private key (described as a “password”, albeit “mathematically linked to the public address so that it is not possible to change”).⁹ It thus followed that the controller of a cryptoasset “is ... the person who controls the private key to the cryptoasset linked to that key”.¹⁰ Finally, it was the controller’s place of residence rather than domicile which was important, since residence “is a better indicator of where the control is being exercised”, and since “where the person resides is normally where he can be sued”.¹¹ Applying this test, Chua J held that there was a good arguable case that the cryptoassets forming part of the DC Assets were situated in Singapore, “since DVPL (and by extension, [Cheong]) controlled the private key to the assets”, and since “[b]oth DVPL and [Cheong] [were] resident in Singapore”.¹²

12.8 Practice Directions para 63(3)(p) was satisfied because Cheong’s cause of action arose in Singapore. Chua J reasoned that, since Cheong’s claim was “a trust claim, the cause of action arose where in substance the trust in favour of the claimant arose”.¹³ In this regard, Cheong had a good arguable case that the alleged trust arose in Singapore, since it arose out of the Investment Fund Agreement which was negotiated and concluded in Singapore, and since the creation of the DC Sub-Accounts and the

7 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907 at [49].

8 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907 at [60].

9 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907 at [61].

10 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907 at [61].

11 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907 at [63].

12 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907 at [53] and [57].

13 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907 at [66].

transfer and investment of the DC Assets all took place when TAC was headquartered and operating in Singapore.¹⁴

12.9 Singapore, moreover, was the natural forum for the trial of Cheong's claims. The main witnesses – the parties to the Independent Fund Agreement, namely Cheong and TAC's two founders – were all Singapore citizens and resident in Singapore at the time the events occurred.¹⁵ Other traders related to TAC which were involved in the handling of the DC Assets were based in Singapore and Hong Kong.¹⁶ TAC's administrators and auditors, who could give evidence on how the DC Fund was operated, were also incorporated and registered in Singapore respectively.¹⁷ Further, while the governing law of the Independent Fund Agreement was BVI law, this was not a weighty factor, since parties' dispute was largely factual, *ie*, whether TAC and its employees acted pursuant to the Independent Fund Agreement.¹⁸ Moreover, while TAC had commenced BVI parallel proceedings, these were only at an early stage, and had no other relevance.¹⁹

12.10 Finally, Cheong's claim raised a serious issue to be tried on the merits, given that there was evidence that TAC and Cheong had indeed treated the DC Fund as being under Cheong's sole control and being separate from TAC and its other assets.²⁰

12.11 After Chua J issued his judgment, TAC sought leave to appeal from the Appellate Division of the High Court ("Appellate Division"). In the interim, the BVI court dismissed Cheong's application to set aside service on him in Singapore, in the proceedings TAC had commenced against him there ("BVI Judgment"). Notwithstanding this, the Appellate Division denied TAC leave to appeal, on grounds that Chua J had decided no questions of general principle or importance for the first time, and had not committed a *prima facie* case of error. On the natural forum enquiry, Chua J had not wrongly weighted the factors he considered.²¹ Moreover, the BVI Judgment, which had decided that BVI was the natural forum for trial, was of little relevance: the BVI court had reached that conclusion on the basis that Cheong had submitted to its jurisdiction, but it was "well-settled under Singapore law" that submission

14 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907 at [69].

15 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907 at [73].

16 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907 at [74].

17 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907 at [75].

18 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907 at [78].

19 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907 at [80]–[82].

20 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907 at [83]–[84].

21 *Three Arrows Capital Ltd v Cheong Jun Yoong* [2024] 1 SLR 419 at [36]–[37].

pertained only to the existence rather than exercise of jurisdiction.²² In addition, Chua J’s holding that PD para 63(3)(p) was satisfied, because the alleged trust arose in Singapore, addressed only “questions of a factual character, not principle”.²³

12.12 However, the Appellate Division’s response to Chua J’s reasoning on the *situs* of cryptoassets is noteworthy. It first noted that, contrary to TAC’s arguments, the BVI Judgment had *not* held that cryptoassets were situated where their owners rather than controllers resided. Instead, the BVI court had only “accepted the principle that the presumptive owner of a cryptoasset is the person who acquired lawful control over it”, and to that end, it “described the control of a private key as an ‘important issue’”.²⁴ Thus:²⁵

[T]he [BVI] court did not have to decide on whether the *situs* of a cryptoasset should be determined by reference to its owner or controller. This was because the [BVI] court relied on the presumption that a cryptoasset’s controller was also its owner, and this presumption was not displaced. Accordingly, the BVI Judgment does not provide a differing approach from that taken by [Chua J].

[emphasis in original omitted]

12.13 The meaning of this passage is unclear. If the BVI court had presumed that a cryptoasset’s controller was its owner, then it must have held that ownership rather than control determined the *situs*. Otherwise, no presumption would have been necessary. And so, the BVI court’s ruling on the *situs* point must necessarily have differed from Chua J’s, that control rather than ownership determined the *situs*. But perhaps more important is what came after: the Appellate Division acknowledged that the *situs* issue “does not affect the outcome of the Judge’s decision”, because either way, Cheong had satisfied PD para 63(3)(p).²⁶

12.14 Given the Appellate Division’s equivocal treatment of Chua J’s reasoning on the *situs* issue, *Three Arrows Capital*²⁷ is clearly not strong authority for the proposition that cryptoassets are situated where their controller resides. On one view, this is a shame. The main alternative – the place where their owner resides – seems problematic, given that ownership is an inherently legal concept (as opposed to

22 *Three Arrows Capital Ltd v Cheong Jun Yoong* [2024] 1 SLR 419 at [39]. In any case, the natural forum inquiry is for the Singapore court to determine under its own law; no foreign judgment can be relied on as estoppel.

23 *Three Arrows Capital Ltd v Cheong Jun Yoong* [2024] 1 SLR 419 at [33].

24 *Three Arrows Capital Ltd v Cheong Jun Yoong* [2024] 1 SLR 419 at [31].

25 *Three Arrows Capital Ltd v Cheong Jun Yoong* [2024] 1 SLR 419 at [31].

26 *Three Arrows Capital Ltd v Cheong Jun Yoong* [2024] 1 SLR 419 at [32].

27 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907.

control which may be a brute fact) which presupposes a governing law conferring it.²⁸ Yet, situating a cryptoasset where its controller resides raises problems of its own, at least if we accept Chua J's reasoning that the controller is the person who controls the related private key. After all, a private key is information which "unlocks" the ability to transfer cryptoassets, and information (or the thing it exists on, like crypto wallets) can be "stolen" or duplicated. What happens, then, if the "thief" of a private key runs off with it to another jurisdiction: Will that alter the cryptoasset's *situs*? And what happens if the private key is duplicated, and the copies are now in the hands of different controllers residing in different jurisdictions: Will the relevant cryptoasset now be situated in several places at the same time?

12.15 To be fair, these concerns, which essentially relate to certainty and security of title, are more critical for choice of law than jurisdiction, and *Three Arrows Capital* involved the latter. This is perhaps why, as with (other?) intangible property, some argue that the law that governs title to cryptoassets should not be the *lex situs*, but another system of law which better provides certainty and security.²⁹ However, even in the jurisdictional context, the ability for crypto "copiers" to multiply the available fora for trial to determine title seems problematic. And in light of the wording of PD para 63(3)(i) – covering claims involving rights to movable property "*situated* in Singapore" [emphasis added] – the concept of the *situs* may be unavoidable here, unless courts cite the fact that the PD para 63(3) factors are technically stated to be "non-exhaustive".

12.16 Given these complications, it is perhaps for the best that *Three Arrows Capital* will not be the last word on the *situs* of cryptoassets. Indeed, this may be what Chua J himself envisioned:³⁰

... Cryptoassets are a new type of property which have no physical presence. Courts have to adapt and evolve rules to ascribe a *situs* to them, not unlike how courts evolved rules ascribing a *situs* to choses in action which were once said to have no location ... It is no surprise that in the process in which the rules evolve, different judges have arrived at different conclusions.

28 Matthias Lehmann, "Digital Assets in the Conflict of Laws: A Comparative Search for the 'Ideal Rule'" [2024] Sing JLS 197 at 201.

29 See, eg, Michael Ng, "Choice of Law for Property Issues Regarding Bitcoin Under English Law" (2019) 15(2) *Journal of Private International Law* 315; Koji Takahashi, "Law Applicable to Proprietary Issues of Crypto-assets" (2022) 18(3) *Journal of Private International Law* 339; Tan Shao Wei, "Transnational Transactions on Cryptoasset Exchanges: A Conflict of Laws Perspective" [2022] Sing JLS 384; and Matthias Lehmann, "Digital Assets in the Conflict of Laws: A Comparative Search for the 'Ideal Rule'" [2024] Sing JLS 197.

30 *Cheong Jun Yoong v Three Arrows Capital Ltd* [2024] 4 SLR 907 at [65].

B. Maag, Daniel v Lalit Kumar Modi

Jurisdiction – Service out – Tort of malicious falsehood

Jurisdiction – Service out – Defamation

12.17 The torts of defamation and malicious falsehood receive somewhat anomalous treatment in the law of jurisdiction, in two senses. The first is the “separate tort thesis”: each distinct actionable publication constitutes a separate tort, so a tortfeasor who makes several such publications in several jurisdictions will have committed a tort in all of them. The second is a territorial limitation: each publication is deemed to have caused damage only in that jurisdiction. In *Maag, Daniel v Lalit Kumar Modi*,³¹ (“*Maag v Modi*”) the General Division touched on these rules and their interaction with the rules on service out contained in the Rules of Court 2021 and the related Supreme Court Practice Directions 2021 (“PD”).

12.18 In May 2023, Lalit Kumar Modi (“Modi”) published posts on X which Daniel Maag and Gurpreet Gill Maag (“Maags”), a couple who were resident in Singapore and who worked in private banking and venture capital, alleged contained malicious falsehoods and defamatory material directed at them (“Posts”). In September 2023, the Maags sued Modi, alleging that the Posts were published in Singapore, and obtained leave to serve Modi in the UK on that basis. Thereafter, the Maags applied to amend their statement of claim to include allegations that the Posts were also published in India and the UK, and that as a result the Maags suffered pecuniary and reputational damage in India, the UK and Singapore. Modi objected to the amendments in so far as they related to damage allegedly suffered by the Maags outside Singapore. He argued that the Maags would not have been able to obtain leave to serve out for such claims, and that they should not therefore now be entitled to bring them.

12.19 The central question, then, was whether the Maags would have been able to get leave to serve out for claims in the torts of malicious falsehood and defamation based on publications outside Singapore with damage caused outside Singapore (“Amended Claims”). If so, their amendments would be allowed.³² The main contention was whether the Amended Claims could satisfy the requirement in PD para 63(2)(a), that “there is a good arguable case that there is sufficient nexus to Singapore”. Practice Directions para 63(3)(f) was of particular relevance:

31 [2025] 3 SLR 1093.

32 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [55].

- (f) the claim:
- (i) is founded on a tort, wherever committed, which is constituted, at least in part, by an act or omission occurring in Singapore; or
 - (ii) is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring

12.20 At first instance, the assistant registrar (“AR”) allowed the Maags’ amendments. On Modi’s appeal, Dedar Singh Gill J, sitting in the General Division, reversed the AR’s decision in part.

12.21 Gill J first held that the Amended Claims could not satisfy PD para 63(3)(f)(i), because of the separate tort thesis. Since each publication was a distinct tort, publications in the UK and India could not amount to torts constituted wholly or partly on an act occurring in Singapore, even if identical publications occurred in Singapore. In this regard, Gill J rejected the Maags’ argument that the separate tort thesis should be abolished in the law of defamation: the point had been decided here in *Lee Hsien Loong v Review Publishing Co Ltd*,³³ and continued to be good law in other common law jurisdictions like the UK and New Zealand.³⁴ Gill J also rejected the Maags’ other argument, that the separate tort thesis did not apply in the tort of malicious falsehood. He held that “the same principles of publication apply to the law of defamation and malicious falsehood”,³⁵ even if they vindicated different kinds of losses, with defamation being concerned with reputation and the tort of malicious falsehood being concerned with pecuniary losses.³⁶

12.22 Gill J was more circumspect on PD para 63(3)(f)(ii). Citing the Court of Appeal’s decision in *MAN Diesel & Turbo SE v IM Skaugen SE*,³⁷ (“*IM Skaugen*”) he first emphasised the following:³⁸

... This jurisdictional gateway allowed the court to assume jurisdiction based on damage suffered in Singapore and encompassed two kinds of claims: (a) claims founded on damage, where damage is part of the cause of action; and (b) claims for the recovery of damages, where damage is not part of the cause of action. Crucially, the Court of Appeal endorsed the following passage at para 75-051 of *Halsbury’s Laws of Singapore* vol 6(2) (LexisNexis, 2016 Reissue) which clarifies the significance of such a distinction:

33 [2007] 2 SLR(R) 453.

34 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [76]–[78].

35 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [70].

36 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [68].

37 [2020] 1 SLR 327.

38 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [82].

... The phrase ‘wholly or partly’ qualifies only [category (a) claims]. The significance of this is that if damage is suffered both in Singapore and elsewhere, a claim founded on all the damage wherever occurring can be brought in Singapore (since the claim needs only be partly founded on the damage in Singapore), whereas if the claim is only for the recovery of damages and not founded on damage, the claim is restricted to the damage suffered in Singapore.

[emphasis in original omitted]

12.23 The tort of malicious falsehood was arguably an example of a category (a) claim, since it required the claimant to establish that he had suffered special damage.³⁹ In this regard, the Amended Claims in the tort of malicious falsehood could fall within PD para 63(3)(f)(ii), in so far as the Maags pleaded pecuniary losses occurring at least partly in Singapore.⁴⁰

12.24 The tort of defamation, by contrast, was an example of a category (b) claim, since it was actionable without proof of any reputational damage, the latter being relevant only at the remedial stage.⁴¹ Here, the Maags argued that defamation embraced a “very broad concept of reputation”, under which “reputational damage arising from the publication of defamatory material in other jurisdictions can be suffered in Singapore”.⁴² Gill J disagreed, reiterating the territorial limitation: “reputational damage is suffered in the place where the defamatory material is published”.⁴³ It followed that only the Amended Claims in the tort of defamation which were based on publications in Singapore fell within PD para 63(3)(f)(ii).

12.25 However, Gill J then noted that the Maags had alleged in their proposed amendments that publications made in India and the UK might be *republished* in Singapore. In particular, the Maags had alleged that their “social and commercial networks comprise persons in India, the UK and Singapore”, who “are likely to know each other and *repeat the [defamatory] words to each other*” [emphasis in original].⁴⁴ It was those repetitions that would constitute republications. Gill J then reasoned that Modi might remain liable for those republications, since “under the law of defamation, a defendant who is liable for the original publication of a defamatory statement is also liable for all subsequent republications which are the natural and probable consequence of his

39 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [84].

40 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [84]–[88].

41 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [83].

42 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [91].

43 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [94].

44 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [97].

act”.⁴⁵ However, a republication would “merely go towards the damages to be assessed for the cause of action for the original publication”, and would not “constitute a separate cause of action against the original publisher” [emphasis in original omitted].⁴⁶ Nevertheless, all this showed that the Maags had “a good arguable case that such a claim” [emphasis in original omitted] - based on a foreign defamatory publication which could foreseeably be, and was actually, republished in Singapore – was a category (b) claim under PD para 63(3)(f)(ii).⁴⁷ This claim, though, could only be limited to damages for reputational losses suffered in Singapore, not in the UK or India.⁴⁸

12.26 Next, Gill J considered, and dismissed, the Maags’ argument that the Amended Claims which did not fall under PD para 63(3)(f) might nevertheless be allowed because the PD para 63(3) gateways are stated to be “non-exhaustive”. He reasoned that the practice directions should not be “read expansively to allow [claimants] to recover damages for losses sustained overseas in their claims in libel” [emphasis in original omitted].⁴⁹ This was so for two reasons.

12.27 Firstly, since PD para 63(3) reproduced “verbatim” the gateways contained in O 11 r 1 of the Rules of Court,⁵⁰ this “suggest[ed] an intention to have some degree of continuity in the law”.⁵¹ In this regard, it was incorrect for the Maags to suggest that the court in *IM Skaugen*⁵² had held that tort claims for damage suffered overseas in part could be brought in Singapore. That case involved negligence and misrepresentation, which were torts with damage as an element, and so had no application to claims in defamation, which is a tort actionable without damage.⁵³ It was also unhelpful for the Maags to rely on case law from other common law jurisdictions, like the UK Supreme Court’s decision in *FS Cairo (Nile Plaza) LLC v Brownlie*⁵⁴ and the Hong Kong Court of Final Appeal’s decision in *Employees Compensation Assistance Fund Board v Fong Chak Kwan*,⁵⁵ which both held that “damage” in the tort gateway could be defined broadly to include “indirect damage”. This was because the UK and Hong Kong had differently-worded tort gateways, which did

45 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [98].

46 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [98].

47 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [98].

48 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [98] and [100]–[107].

49 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [112].

50 2014 Rev Ed.

51 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [113].

52 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327.

53 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [115].

54 [2021] 3 WLR 1011.

55 [2022] 5 HKC 426.

not draw any distinction between torts with damage as an element and torts without.⁵⁶

12.28 Secondly, giving a claimant the ability to sue in Singapore for reputational damage sustained outside Singapore risked “the wastage of judicial resources in adjudicating claims which have nothing to do with [Singapore] but are merely an attempt to vindicate the claimant’s global reputation”.⁵⁷ This was especially because “Internet communication enables individuals to communicate instantaneously with a potentially vast global audience” [emphasis in original omitted].⁵⁸ And since any defamatory publication might potentially have global reach, any claim in defamation might potentially seek to vindicate the claimant’s global reputation.

12.29 Finally, Gill J addressed various arguments made by Modi that the Maags’ amendments should be denied on other grounds. Some involved allegations of insufficient particularisation. These were generally not well received.⁵⁹ Others involved allegations that the Maags pleaded losses that did not correspond to the nature of the claims brought or did not occur in Singapore at all. These received mixed responses.⁶⁰ Still, others suggested that the Maags had committed an abuse of process by introducing new claims based on overseas publication and damage after obtaining leave to serve out. These held some water, but were not sufficient to deny those amendments that satisfied the gateways discussed above.⁶¹

12.30 *Maag v Modi* demonstrates how the separate tort thesis is balanced out by the territorial limitation on damage. If every defamatory or maliciously false publication could be taken to cause damage outside the jurisdiction in which publication occurs, this would create a far greater risk of forum shopping, which even *forum non conveniens* may not completely abate. Yet, one can see the artificiality of the territorial limitation. If an actionable statement is published by a news outlet with global reach, and it is then disseminated widely across social media, it makes little sense to say that damage is suffered only where the original publication occurred. In light of that, Gill J’s point that PD para 63(3)(f)(ii) remains available for claims based on defamatory publications made elsewhere which are *republished* in Singapore, seems logical.

56 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [116]–[121].

57 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [114].

58 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [114].

59 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [137], [139] and [145]–[148].

60 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [139], [143] and [149]–[154].

61 *Maag, Daniel v Lalit Kumar Modi* [2025] 3 SLR 1093 at [161].

12.31 Practice Directions para 63(3)(f)(ii) itself, however, remains a problem. True enough that its wording distinguishes between torts for which damage is an element and torts for which it is not, making it easier for courts to establish jurisdiction over the former kinds of claims (“partly” based on damage in Singapore) as compared to the latter (“wholly” based on damage in Singapore). But the justification for drawing this distinction for the purposes of international jurisdiction remains elusive. It is not obvious why torts like negligence and malicious falsehoods should be taken to have a “sufficient nexus” with Singapore even if much of the damage is suffered elsewhere, while torts like defamation are taken to have such a “sufficient nexus” only when all the damage is suffered here. And while a claimant should not be able to vindicate his “global reputation” in Singapore simply because he suffers some damage here, it is unclear why it is acceptable for him to vindicate his global pecuniary losses caused by malicious falsehoods simply because some of those losses were felt here. The fact that other common law jurisdictions like the UK and Hong Kong do not draw the distinction enshrined in PD para 63(3)(f)(ii) only underscores the point that discarding it might be the right move. And since the PD para 63(3) factors are now “non-exhaustive”, judges are free to make that move themselves.

III. Jurisdiction clauses

A. *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd*

Anti-suit injunctions – Foreign proceedings against non-party to dispute resolution clause

Anti-suit injunctions – Risk of forum fragmentation

12.32 In *Asiana Airlines, Inc v Gate Gourmet Korea Co Ltd*,⁶² (“*Asiana Airlines*”) the Court of Appeal considered whether a breach of an arbitration agreement might be relied upon to obtain an anti-suit injunction (“ASI”) preventing foreign court proceedings against a non-party to the same arbitration agreement, laying down general principles applicable to both arbitration agreements and exclusive jurisdiction clauses (“EJCs”).⁶³

12.33 *Asiana Airlines Inc* (“*Asiana*”), a Korean company operating in air travel, entered into a joint venture company with Gate Gourmet Switzerland (“*GGS*”) to form Gate Gourmet Korea Co Ltd (“*GGK*”), a Korean company providing catering and other services to the airline industry. *GGK* and *Asiana* then entered into a catering agreement for

62 [2024] 2 SLR 279.

63 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [2].

GGK to be Asiana's exclusive caterer at Incheon Airport for a 30-year term starting July 2018. Both the joint venture and catering agreements contained arbitration agreements.

12.34 At this time, Asiana was controlled by one Park Sam-Koo ("Chairman Park"). It was later revealed that both the joint venture and catering agreements were part of a "Package Deal" whereby Chairman Park planned to raise funds for his own benefit, by selling Asiana's catering licence to the Gate Gourmet Group in return for some investment in another company. Asiana claimed that it was unaware of the Package Deal during the negotiations of the catering and joint venture agreements, and that it only discovered the arrangement much later when Chairman Park was indicted by the Korean Prosecution Office on 26 May 2021 for criminal offences involving embezzlement and breach of trust.⁶⁴

12.35 On 24 January 2022, Asiana commenced court proceedings in the Incheon District Court against GGK, seeking, *inter alia*, a declaration that the catering agreement was null and void pursuant to the Korean Civil Code ("Incheon Proceedings"). Asiana argued that the Package Deal was a breach of trust by Chairman Park, which GGK participated in when it entered into the catering agreement, and that this rendered the catering agreement – including the arbitration agreement therein – null and void under Korean law.⁶⁵ GGK responded, *inter alia*, that the Korean Proceedings should be dismissed because it was initiated in breach of the catering agreement's arbitration agreement.

12.36 On 13 October 2022, Asiana commenced proceedings in the Seoul Southern District Court ("Seoul Proceedings") against GGS, as well as two of the Gate Gourmet Group's former directors, Schmitz and Rossinyol ("Directors"). Asiana argued that Schmitz and Rossinyol, as employees of GGS, were actively involved in the unlawful conduct of Chairman Park's Package Deal and were liable for tortious acts under Korean law. Asiana also argued that GGS was vicariously liable, under Korean law, for the alleged acts of its directors.⁶⁶

12.37 GGK, GGS and the Directors then sought and obtained ASIs in the Singapore International Commercial Court, in respect of both the Incheon and Seoul Proceedings. On Asiana's appeal, the ASIs were sought to be maintained on two separate bases:

- (a) First, that GGS should be granted an ASI that extends to the claims against the Directors on the basis that the foreign

64 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [8] and [13].

65 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [16].

66 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [17].

proceedings were in breach of the arbitration clause contained in the joint venture agreement between GGS and Asiana, despite the Directors not being party to the joint venture agreement.

(b) Second, that the Directors should be granted an ASI on the basis that the foreign proceedings would be vexatious and oppressive to them if allowed to continue.⁶⁷

12.38 The Court of Appeal allowed Asiana’s appeal in part, varying the ASIs to exclude Asiana’s claims against the Directors.

12.39 The Court of Appeal reasoned that a party to an arbitration clause or an EJC may apply for an ASI to prevent proceedings commenced by another party against a non-party where it can show either:⁶⁸

(a) that upon a true construction of the clause, parties had agreed that, if either party sued the non-party, they would do so only in the exclusive forum (“True Construction Ground”); or

(b) that the real purpose for suing the non-party is to bypass the exclusive forum clause in a manner making the foreign proceedings vexatious and oppressive between the parties to the clause (“Real Purpose Ground”).

12.40 To the extent the non-party is able to show that it would be vexed and oppressed by the foreign proceedings, the non-party too would be able, in his own right, to seek an ASI.⁶⁹ The foreign proceedings could be considered vexatious or oppressive if the conduct of the party in suing the non-party is “unconscionable.”⁷⁰ This was a high threshold, with non-exhaustive examples of such behaviour including situations where:⁷¹

(a) foreign proceedings were instituted in bad faith or for no good reason, or were bound to fail, or would cause extreme inconvenience;

(b) where foreign proceedings amounted to an unlawful attack on the plaintiff’s legal rights; or

(c) where foreign proceedings are duplicative of Singapore proceedings, which the ASI respondent had voluntarily engaged with, or which had progressed significantly before the foreign proceedings commenced.

67 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [57] and [59].

68 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [84].

69 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [84].

70 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [90].

71 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [89].

12.41 Turning first to the True Construction Ground, the starting position was to ascertain whether the contracting parties contemplated that the exclusive forum clause would also avail in respect of claims against non-parties to the agreement. Privity required that such clauses will not apply to non-parties absent clear indication otherwise.⁷² Moreover, the principle – that rational businessmen are likely to have intended all disputes arising out of or connected with the relationship into which they had entered would be decided by the same court – cannot apply with the same force when considering claims brought by or against non-parties.⁷³

12.42 Where contracting parties had clearly considered whether non-parties should benefit from or bear the burden of rights and obligations agreed between the contracting parties, the absence of any express language in the EJC that provides for its application to claims brought by or against third parties indicates that it was not intended to have that effect.⁷⁴ Moreover, the existence of other contractual provision concerning non-parties, which indicates an intention that non-parties should not acquire rights as against the contracting parties by virtue of the contract, may be a further indication that the EJC was not intended either to benefit or prejudice such third parties.⁷⁵

12.43 Conversely, where contracting parties intend that any claim relating to the contract be subject to the EJC even where it is one brought by or against a non-contracting party, clear words should be used expressly setting out this intention, the parties to be affected, and if relevant, the manner in which submission of non-contracting parties to the jurisdiction of the chosen court is to be ensured.⁷⁶

12.44 The guiding principles relating to the True Construction Ground seem logical and sound. The authors would add just one gloss: the approach has to be subject to the *lex contractus*. In other words, in the event there are certain contractual interpretation rules peculiar to specific governing law that displaces the guidelines set out in *Asiana Airlines*⁷⁷ (which appear to have been applied as principles of the *lex fori*), those foreign contractual interpretation rules, because of the chosen *lex contractus*, must take precedence.

72 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [72(1)] and [73].

73 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [72(2)].

74 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [72(3)].

75 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [72(4)].

76 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [72(7)].

77 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279.

12.45 Turning to the Real Purpose Ground, an ASI may also be granted where the court finds that the foreign action has been brought against the non-party for “ulterior reasons”, such as to bypass or avoid the constraints of the exclusive forum clause. In the latter category, among the key considerations is whether in pursuing the foreign proceedings the ASI respondent is, in truth, seeking to evade its obligations under the exclusive forum clause or is in some way acting in bad faith. In this situation, if the court grants the ASI, the court will have been satisfied that the action against the non-party was not being pursued for a legitimate purpose.⁷⁸

12.46 The Court of Appeal’s reasoning here is a bit concerning, and its example of a case where an ASI respondent sought to “avoid the constraints of the exclusive forum clause” – *Clearlake Shipping Pte Ltd and Gunvor Singapore Pte Ltd v Xiang Da Marine Pte Ltd*⁷⁹ (“Clearlake”) – does not appear to provide more clarity.

12.47 In *Clearlake*, Xiang Da Marine Pte Ltd (“Xiang Da”) chartered a vessel to Clearlake Shipping Pte Ltd (“Clearlake Shipping”) who in turn subchartered the vessel to Gunvor Singapore Pte Ltd (“Gunvor”). As a result of alleged misrepresentations made by Xiang Da to a Chinese company, Xiang Da commenced third-party proceedings in Singapore, where it sued Clearlake Shipping for breach of contract, and Gunvor in the tort of misrepresentation. Clearlake Shipping relied on the EJC, while Gunvor argued that the Singapore proceedings were vexatious and oppressive, to obtain an ASI against Xiang Da.⁸⁰ Andrew Burrows QC, sitting as a judge of the High Court, observed that Xiang Da manipulated its third-party claims to try to avoid being caught by the English EJC in the charter. As Xiang Da dealt directly with Clearlake Shipping, and the alleged misrepresentation was provided to it by Clearlake Shipping, the most obvious misrepresentation claim open to Xiang Da would be against Clearlake Shipping, rather than Gunvor. The judge therefore found that Xiang Da’s choice to sue Gunvor and not Clearlake Shipping in tort was a “procedural manoeuvre” designed to evade the EJC.⁸¹

12.48 The approach in *Clearlake* is not free from difficulties. For starters, it appears to examine the merits and substance of the claims in foreign proceedings to determine if those claims were a “procedural manoeuvre” employed to avoid the constraints of the exclusive forum

78 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [77].

79 [2020] 1 All ER (Comm) 61.

80 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [74].

81 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [74]; *Clearlake Shipping Pte Ltd and Gunvor Singapore Pte Ltd v Xiang Da Marine Pte Ltd* [2020] 1 All ER (Comm) 61 at [34(ii)].

clause. This means that arguments going to the merits of the claims would be determined at the stage where the court only has the benefit of affidavit evidence and documentary exhibits (without benefit of cross-examination nor parties' arguments on merits of the claim) to address the query of whether an ASI should be granted.⁸² More fundamentally, it is not immediately clear why Xiang Da's "procedural manoeuvre" was objectionable. After all, the general rule in an adversarial system of civil procedure is that the claimant can choose the person against whom to proceed, and to leave out any person against whom he does not desire to proceed.⁸³

12.49 Finally, the Court of Appeal rejected Asiana's argument that a distinction should be drawn between principles applicable to an arbitration agreement and an EJC, because a court's jurisdiction is provided for at law and an arbitral tribunal's jurisdiction, on the other hand, is founded upon consent.⁸⁴ Both arbitration clauses and EJCs represent the agreed conferral of jurisdiction upon a particular dispute resolution forum, in circumstances where none might otherwise exist. To safeguard party autonomy, ASIs are granted to restrain proceedings commenced in breach of both EJCs and arbitration clauses.⁸⁵

12.50 On the facts of the case, the Directors were not entitled to an ASI on both the True Construction and Real Purpose Ground. On the former, as the Directors had signed the joint venture agreement in their capacity as representatives of GGS, they were not themselves parties to that agreement,⁸⁶ and there was nothing in that agreement to suggest that it was intended by Asiana and GGS to apply to the directors. Asiana was accordingly not in *prima facie* breach of the joint venture arbitration agreement by commencing or continuing the Seoul Proceedings against the Directors.⁸⁷

12.51 On the Real Purpose Ground, the Court of Appeal also did not find any evidence of bad faith on Asiana's part for suing the Directors in Korea. The respondents were not able to demonstrate that Asiana's suit against the Directors in the Seoul Proceedings had the effect or purpose of frustrating or subverting the operation of the joint venture arbitration

82 See also *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [88]–[93].

83 *Value Monetization III Ltd v Lim Beng Choo* [2024] SGHC 304 at [24].

84 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [79] and [83].

85 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [80]–[83].

86 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [99].

87 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [102].

agreement.⁸⁸ Indeed, as what we suggested earlier at para 12.48, the Court of Appeal said that, “It should be open to Asiana – as with any other litigant – to bring a suit in a forum of its choice, against whomever it wants, subject to the limits imposed by exclusive forum clauses as agreed upon between contracting parties.”⁸⁹ There was no basis for depriving Asiana the option of suing other parties to safeguard a situation where it fails to obtain relief against GGS.⁹⁰

12.52 Accordingly, the ASI granted in respect of the claims against the Directors in the Seoul Proceedings were set aside.⁹¹

B. COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills

Jurisdiction clause – Scope – Interpretation of “arising out of or in connection with” the contract

12.53 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills*⁹² (“*COSCO Shipping*”) is a useful Court of Appeal decision that clarified the ambit and scope of the phrase “arising out of or in connection with this contract”.⁹³

12.54 COSCO Shipping Specialized Carriers Co Ltd (“COSCO”), a Chinese company, chartered a vessel it owned to its Dutch subsidiary, which in turn subchartered it to PT OKI Pulp & Paper Mills (“PT OKI”), an Indonesian company. PT OKI owned and operated a port facility in Palembang, Indonesia, which comprised a port warehouse, a jetty and a trestle bridge connecting the jetty to the mainland. Both the head- and subcontracts of affreightment contained an identical cl 61, which read as follows:⁹⁴

61) Arbitration & Governing law

This Carter Party [*sic*] shall be governed by English law and any dispute arising out of or in connection with this Contract, including any question regarding its existence, validity or termination shall be referred to and finally resolved

88 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [103] and [105].

89 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [103].

90 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [104].

91 *Asiana Airlines, Inc v Gate Gourmet Korea Co, Ltd* [2024] 2 SLR 279 at [108].
92 [2024] 2 SLR 516.

93 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [1].

94 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [13].

by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre (SIAC) for the time being in force ...

12.55 Contracts of carriage entered into between COSCO (as carrier) and its subsidiary (as shipper), were contained in nine bills of lading, which incorporated the terms of the Head COA,⁹⁵ including the arbitration agreement in cl 61.⁹⁶

12.56 On 31 May 2022, the vessel departed PT OKI's jetty, bound for the two discharge ports named in the bills of lading. Twenty minutes after the vessel had cast off from the jetty, she allided with the trestle bridge. This caused a section of the trestle bridge to collapse.

12.57 PT OKI issued a letter of demand to COSCO in respect of the alleged claims arising out of the allision. COSCO then commenced a High Court admiralty action seeking to limit its liability arising out of the allision under the Merchant Shipping Act 1995.⁹⁷ COSCO named both its subsidiary and PT OKI as defendants, but only served the originating claim on PT OKI as the head charterer.⁹⁸ The subsidiary filed a Notice of Intention Not to Contest the originating claim, but PT OKI filed a Notice of Intention to Contest.⁹⁹

12.58 PT OKI thereafter commenced proceedings against COSCO in Indonesia for losses arising out of the allision, including an order for COSCO to pay approximately US\$269m for its "material losses, plus ... deferred interest".¹⁰⁰ Both parties' expert witnesses agreed that the Indonesian proceedings concerned the substantive merits of PT OKI's claim against COSCO. PT OKI's expert, in particular, expressed the view that its cause of action against COSCO in the Indonesian proceedings was in tort and that the claim was not brought pursuant to any bills of lading or charterparty that may be governed by non-Indonesian law.¹⁰¹

95 See *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [13].

96 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [14].

97 2020 Rev Ed.

98 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [18].

99 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [19]–[20].

100 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [21].

101 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [22].

12.59 Finally, COSCO commenced arbitration against PT OKI in Singapore, seeking declarations of non-liability and various reliefs in respect of losses arising out of the allision, and applied for an ASI to restrain PT OKI from pursuing the Indonesian proceedings.¹⁰² The General Division dismissed the ASI application, and COSCO appealed.

12.60 The issues for the Court of Appeal's determination were: (a) what are the matter(s) or dispute(s) which the parties have raised or foreseeably will raise in the foreign court proceedings; and (b) whether such matter(s) or dispute(s) fall within the scope and ambit of the arbitration agreement.¹⁰³ These issues mirror the two-stage test which the court accepted as the "general approach", *ie*:¹⁰⁴

(a) at the first stage, the court should first determine what are the matter(s) or dispute(s) which the parties have raised or foreseeably will raise in the foreign court proceedings ("Identification Issue"); and

(b) at the second stage, the court must then ascertain whether such matter(s) or dispute(s) fall within the scope and ambit of the arbitration clause (or dispute resolution clause) ("Scope Issue").

12.61 The objective of the "general approach" is to determine whether the claim, defence and/or counterclaim are sufficiently "connected" such that it could be said that they arise out of or are in connection with the contract. The inquiry does not start with any presumption that the parties must have intended for all their competing claims to be decided in the same forum, because that would depend on the nature of the competing claims and the express language of the agreement. Instead, forum fragmentation is a "fact of life with dispute resolution agreements, and one must not overstate the strength of the 'one-stop shop' presumption articulated in [*Fiona Trust & Holding Corp v Privalov*]"¹⁰⁵ If upon examining the text of the agreement and the nature of the competing claims, a claim is not

102 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [30].

103 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [53].

104 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [68].

105 See *Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [4], citing *Fiona Trust & Holding Corp v Privalov* [2008] 1 Lloyd's Rep 254.

within its ambit, then forum fragmentation is inevitable and the courts should not steer away from that outcome.¹⁰⁶

12.62 In approaching the Identification Issue, the court must ascertain the substance of the dispute between the parties.

(a) This involves looking at the claimant’s pleadings but “not being overly respectful to the formulations in those pleadings which may be aimed at avoiding a reference to arbitration by artificial means”.¹⁰⁷

(b) The exercise also involves a consideration of the defences which may be skeletal (as the defendant would be seeking a reference to arbitration), and all reasonably foreseeable defences to the claim or part of the claim.¹⁰⁸

(c) The reason for this is because an ASI application is often made at a preliminary stage before any substantive defence has been filed. Therefore, regard must be had not only to the formulation of the pleaded claims in the foreign proceedings but also the defences or reasonably foreseeable defences that may be raised as well as cross-claims relating to the same matter, where appropriate. The court is ultimately concerned with identifying the substance of the controversy between the parties and this cannot be treated as synonymous or limited to the claimant’s pleaded causes of action.¹⁰⁹

(d) However, the merits of an identified or reasonably foreseeable defence and/or cross-claim are generally irrelevant. The genuineness or merits of the dispute is a matter which should properly be left to the arbitral tribunal (or courts of the chosen forum) to assess.¹¹⁰ This is however subject to the appropriate control mechanisms, such as “where it can be shown that the party seeking an anti-suit injunction has acted abusively” (*ie*, in abuse of process). The threshold for abusive conduct however is “necessarily high”.¹¹¹

106 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [5].

107 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [71].

108 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [71].

109 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [72].

110 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [88].

111 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [93].

12.63 There is no universal test because the ascertainment of the relevant “connection” is a highly fact-specific inquiry that requires the court to consider all relevant circumstances.¹¹² But the Court of Appeal accepted the following tests as being useful guides:

(a) Firstly, the “Causative Connection Test” suggests that a tort claim may be said to arise “in connection with” the contract where: (i) there are parallel claims in tort and contract (for example a claim for breach of a duty of care); and (ii) where the claim arises in tort but is in a “meaningful sense causatively connected with the relationship created by the [contract] and the rights and obligations arising therefrom” [emphasis in original omitted].¹¹³ This test however does not require the claims or defences to be connected to the *legal relationship* constituted under the contract.¹¹⁴ Bearing in mind that these are merely useful guides, that the tort claim is not parallel to or could not be recast as a contractual claim does not necessarily mean that such a claim could not be said to have arisen out of or in connection with the contract.¹¹⁵

(b) Secondly, the “Closely Knitted Test” focuses on whether the relevant claims and cross-claims arise out of the contract. A tortious claim arises out of a contract if there is a “sufficiently close connection between the tortious claim and a claim under the contract”. For there to be “a sufficiently close connection ... the claimant must show either that the resolution of the contractual issue is necessary for a decision on the tortious claim, or, that the contractual and tortious disputes are so closely knitted together on the facts that an agreement to arbitrate on one can properly be construed as covering the other” [emphasis in original omitted].¹¹⁶ The inquiry concerned the question of inseparability between the facts that found the contractual and non-contractual causes of action respectively. This was a question

112 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [79].

113 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [74].

114 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [100]–[101].

115 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [79].

116 See *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1994] 1 Lloyd’s Rep 168 at 89, cited in *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [76].

of fact to be determined in the light of all the circumstances of the case.¹¹⁷

12.64 By contrast, the Court of Appeal disagreed with the General Division’s approach in examining the claim and defence as discrete matters rather than as a composite inquiry to determine the connection between the two. In considering whether a matter was within the scope of an arbitration agreement, the court should take into account the foreseeable defences, and not separate them into two lines of inquiry.¹¹⁸

12.65 Applying the principles to the facts, the Court of Appeal determined that COSCO’s defence (to PT OKI’s claims in the Indonesian proceedings) of “errors of navigation” (which was contractually provided for under the head COA as incorporated into the bills of lading) and COSCO’s cross-claim for breach of the warranty of safe port, all shared a common connection – namely, what was the cause of the allision.¹¹⁹

(a) The fact that PT OKI’s claim was brought in its capacity as a jetty owner and not as a shipper did not change the fact that the allision occurred in the performance of the contract of carriage which also provided for the contractual defence of “errors of navigation”.¹²⁰

(b) The Court of Appeal thought that the parties “must have ... contemplated that a pure tort claim for damage to the Trestle Bridge, caused during the performance of the contracts of carriage between the parties and where the foreseeable lines of defence included recourse to the provisions of those contracts, should be subject to the Arbitration Agreement”.¹²¹

(c) The way the parties pleaded their cases in the various fora, the tortious claim, the cross-claim and the contractual defence arose out of the very same facts leading to the incident. Consequently, it was clear that the parties’ dispute arose out of or

117 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [76].

118 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [95]–[96].

119 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [94] and [99].

120 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [100].

121 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [102].

were in connection with the underlying contracts of carriage in line with the “causative connection” or “closely knitted” tests.¹²²

12.66 The last issue the Court of Appeal considered was whether or not the court should concern itself with the prospects of enforcement of the ASI. Given that PT OKI was based in Indonesia with no known presence in Singapore, there was some difficulty in enforcing the ASI against PT OKI if granted.

12.67 The Court of Appeal reaffirmed the principle that no consideration should be given as to whether or not the injunction could be enforced; otherwise, there would be one law for the law-abiding and another for the lawless and truculent.¹²³

12.68 The *COSCO Shipping*¹²⁴ decision is sound and useful as the Court of Appeal provided several helpful guiding factors in determining the scope and ambit of the phrase “arising out of or in connection with the contract”. That said, it is evident from the analysis of the Court of Appeal that this is ultimately a fact-centric exercise; with much dependent on the wording of the dispute resolution clause and the matter(s) and dispute(s) in question. Given how the Court of Appeal could quite easily identify a “common denominator” in the cross-claims, defences and foreign claims in *COSCO Shipping*, it would appear difficult for future ASI respondents to seek to argue that its foreign claims (whether contractual, tortious or otherwise in nature) do not fall within the scope and ambit of the phrase “arising out of or in connection with the contract”.

C. STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd

Anti-suit injunctions – Delay

12.69 Five years ago when we covered the case of *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd*,¹²⁵ (“*Sun Travels*”) we cautioned that “whenever there is a breach of *any* dispute resolution agreement, parties should seek anti-suit relief without delay, even if they wish to *concurrently* make jurisdictional objections in that foreign court where proceedings were commenced in breach of the

122 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [103].

123 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516 at [107]–[108] and [112].

124 *COSCO Shipping Specialized Carriers Co, Ltd v PT OKI Pulp & Paper Mills* [2024] 2 SLR 516.

125 [2019] 1 SLR 732.

agreement”.¹²⁶ *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd*¹²⁷ (“*STS Seatoshore*”) is an example of how a party’s tardiness caused itself to lose the right to an anti-suit relief, even where the ASI respondent admitted that it had acted “in breach of the arbitration agreement”.¹²⁸

12.70 STS Seatoshore Group Pte Ltd (“STS”) was a company incorporated in Singapore and was in the business of freight and marine logistics. Wansa Commodities Pte Ltd (“Wansa”) was a company incorporated in Singapore and was in the business of commodities trading. Wansa traded in bauxite that was mined in Guinea and which was then later sold to buyers in the People’s Republic of China.¹²⁹ Wansa engaged STS to provide barging/transportation services in respect of bauxite at a barge terminal in Guinea.¹³⁰ Parties’ agreement contained an English governing law clause. It also stated that any dispute arising out of or in connection with the agreement or any non-contractual obligations connected with it shall be resolved by the parties by means of an amicable settlement, and that, in the event the parties cannot reach an amicable settlement, the parties agreed to resolve disputes by arbitration in Singapore.¹³¹

12.71 On 4 April 2024, Wansa brought proceedings against STS in the Commercial Court of Conakry (“CCC”), in the Republic of Guinea, seeking an injunction compelling STS to perform obligations under their agreement to load bauxite for transshipment at the minimum loading rate of 25,000 tonnes of bauxite per day. The CCC granted this. On 15 April 2024, STS filed an application to revoke the injunction, arguing that Wansa failed to first amicably settle the parties’ dispute as required by their arbitration agreement, and that there was also no urgency warranting Wansa’s resort to an injunction.¹³² Thereafter, for the rest of April, Wansa applied for further orders from the Guinean courts to give effect to the initial order, which STS repeatedly protested on grounds, *inter alia*, of the arbitration agreement.

126 Joel Lee Tye Beng & Leow Wei Xiang Joel, “Conflict of Laws” (2019) 20 SAL Ann Rev 251 at para 11.191.

127 [2024] SGHC 266.

128 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [15(c)].

129 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [7]–[8].

130 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [9].

131 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [10].

132 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [17(a)]–[17(b)].

12.72 On 14 May 2024, STS commenced arbitration proceedings against Wansa in Singapore, claiming that Wansa had committed breaches of the arbitration agreement by applying to and obtaining from the Guinean courts an injunction against STS.¹³³

12.73 On 23 May 2024, the CCC held that STS's argument that the CCC lacked jurisdiction failed because STS raised its jurisdictional objection after it had presented arguments on the merits before the CCC. In other words, the CCC decided that it had jurisdiction to determine the matter. The CCC then went on to give its decision on the merits of Wansa's claims, including holding that STS was obliged to pay Wansa compensation of approximately US\$577,000.¹³⁴

12.74 On 27 May 2024, STS appealed to the Court of Appeal of Conakry ("CCA").¹³⁵ At the same time, Wansa's lawyers objected to the jurisdiction of the Singapore arbitral tribunal on the basis that "a case between the exact same parties, involving the exact same subject matter, arising out of the exact same set of facts and circumstances" was pending before a Guinean court". Wansa's lawyers stated that Wansa would not be participating in the Singapore arbitration.¹³⁶

12.75 From end-May to June 2024, STS sought various orders from the Guinean courts, compelling Wansa to perform its obligations under the agreement.

12.76 Finally, on 3 July 2024, STS applied for a permanent ASI restraining Wansa from maintaining legal proceedings in the CCC, CCA and other Guinean courts, as well as any other proceedings in breach of the parties' Singapore arbitration agreement. Also on the same day, STS applied and obtained an interim ASI on the same terms.¹³⁷

12.77 The General Division considered, *inter alia*, (a) whether it should order the permanent ASI sought in STS's originating application;¹³⁸

133 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [37]–[38].

134 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [21(a)]–[21(c)].

135 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [22].

136 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [40].

137 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [3].

138 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [75(a)].

(b) whether the interim ASI should be set aside on ground of material non-disclosure,¹³⁹ and (c) whether STS should pay damages to Wansa.¹⁴⁰

12.78 Kristy Tan JC refused to grant the permanent ASI sought by STS because STS had unduly delayed the commencement of the originating application, “such that considerations of comity militate against the grant of anti-suit relief”.¹⁴¹

12.79 Tan JC emphasised that by the time STS filed the originating application before the General Division on 3 July 2024, “multiple sets of court proceedings had been heard and multiple Guinean judgments and court orders had been issued in those proceedings” [emphasis in original omitted].¹⁴² Considering the circumstances, Tan JC, applying the principles in *Sun Travels*,¹⁴³ refused STS’s application for anti-suit relief.

12.80 Firstly, STS unduly delayed in commencing the originating application for anti-suit relief. This tardiness allowed the Guinean court proceedings to “progress to an advanced stage. Given the vast amount of the Guinean courts’ time and costs that would potentially be wasted if the permanent anti-suit injunction sought ... were granted, respect for the operations of the Guinean legal system impel[led] [her Honour] to exercise [her] discretion against granting such an injunction”.¹⁴⁴

(a) Tan JC was of the view that STS “could and should have applied to the Singapore court for anti-suit relief once Wansa’s Main Action was commenced. There was no legal necessity for STS to commence an arbitration before applying for anti-suit relief”.¹⁴⁵ While STS was entitled to contest the jurisdiction of the Guinean courts, Tan JC rightly remarked that STS could and should have “simultaneously sought anti-suit relief from the Singapore court”.¹⁴⁶ Instead of doing so, STS waited until

139 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [75(d)].

140 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [75(e)].

141 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [76].

142 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [78].

143 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732.

144 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [83].

145 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [84].

146 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [85].

the Guinean courts had rejected STS's jurisdictional challenges before belatedly turning to the Singapore court. To allow STS's application for a permanent ASI in these circumstances (*ie*, after STS obtained unfavourable outcomes on its jurisdictional challenges before the Guinean courts) would, in Tan JC's views, have been the reverse of comity and should not be countenanced.¹⁴⁷

(b) Tan JC also rejected STS's arguments that the Guinean court proceedings were "not well-advanced".¹⁴⁸ The existence of several pending appeals in the Guinean courts indicated that the Guinean court proceedings had "progressed to such an advanced stage that appeals against judgments and court orders are due to be heard".¹⁴⁹

(c) That the Guinean court proceedings were "not advanced because the Guinean courts allegedly did not consider evidence tendered by the parties or [made] factual findings; only made 'interlocutory or provisional orders'; and did not examine the substantive merits of the dispute"¹⁵⁰ were also rejected by Tan JC. She observed that there was "no getting round the fact that multiple hearings have been conducted before, and multiple judgments and orders have been issued by, the Guinean courts".¹⁵¹ STS failed to give any answer to the waste of Guinean judicial resources that would have ensued if anti-suit relief was granted.¹⁵²

12.81 Secondly, STS's prayer for Wansa to be restrained from pursuing legal proceedings in Guinea, was in substance an anti-enforcement injunction to enjoin Wansa from relying on or enforcing the Guinean court orders and judgments. Such an injunction was, in Tan JC's views, an "indirect interference with the execution of the Guinean judgments and court orders ... which is an additional and important consideration

147 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [85].

148 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [86].

149 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [86].

150 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [86].

151 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [86(c)].

152 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [86(c)].

upon which [her Honour exercised] discretion against granting the injunction sought”¹⁵³

12.82 Tan JC was not wrong to have placed weight on how advanced the Guinean proceedings were and the number of Guinean court orders and judgments issued, owing in part to STS’s conduct before the Guinean courts and tardiness before the Singapore courts. That said, the decision appears to have overlooked the fact that STS seemingly submitted to the jurisdiction of the Guinean courts when STS participated in Wansa’s main action before the CCC and made arguments on the merits of the dispute.¹⁵⁴

12.83 Perhaps oddly, Wansa did not attempt to have the Guinean court judgments recognised at common law before the Singapore courts. Wansa could have raised arguments of issue estoppel and/or *Henderson v Henderson*¹⁵⁵ estoppel against STS.

12.84 Tan JC was of the view that the interim ASI ought to also be set aside for material non-disclosure.¹⁵⁶ STS had failed to bring to the court’s attention, at the application for interim ASI, the contents of the CCC judgment which recorded it: (a) rejecting STS’s jurisdictional objection for tardiness; (b) rejecting STS’ defences and finding that STS had failed to perform its loading obligations without valid reason; (c) ordering STS to perform its contractual obligations; and (d) ordering STS to pay damages to Wansa for breach of contract. These matters were in Tan JC’s views material because they “bring to the fore that what STS really sought in [the originating application] was an anti-enforcement injunction ... [which] would affect the court’s assessment of whether anti-suit relief should be granted”.¹⁵⁷ STS was obliged to disclose the contents of the judgment “in a manner that would encapsulate reasonable characterisations that Wansa might place” on the judgment.¹⁵⁸ Moreover, STS also failed to disclose that it had brought the 10 June 2024 application against Wansa for Wansa’s alleged breach of the affreightment contract, an application

153 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [87].

154 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [19(b)], [19(c)] and [21(a)].

155 (1843) 3 Hare 100.

156 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [109].

157 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [112].

158 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [113].

which the Guinean courts had dismissed and the decision of which was being appealed by STS.

12.85 The last issue on inquiry as to damages determined by Tan JC is interesting. Tan JC first observed that in law, it was implied that STS had provided an undertaking as to damages when it applied for the interim ASI.¹⁵⁹

12.86 In determining whether to exercise discretion to enforce an undertaking as to damages, the court considers: (a) whether the interim injunction was wrongly sought; and (b) whether any special circumstances militate against the enforcement of the undertaking.¹⁶⁰ These principles applied in the circumstances given that the interim ASI was also an interim injunction.

12.87 However, Tan JC did not find any basis to order an inquiry as to damages on the facts. Wansa failed to adduce any credible evidence to support an arguable case that it had suffered loss by reason of the interim ASI; it also failed to address any case of loss in either its affidavits or submissions.¹⁶¹

12.88 Prior to the decision of *STS Seatoshore*,¹⁶² it was not common to see the issue of enforcement of undertaking as to damages being discussed in ASI decisions. To that end, Tan JC's clarifications as to the principles behind the court's exercise of discretion is surely welcomed. This will be an important tool for practitioners to deploy, especially in cases where the ASI claimant has submitted to the jurisdiction of the foreign courts or is otherwise abusing the Singapore court's process(es) such that the ASI claimant ought not to have applied for the interim ASI.

159 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [116].

160 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [117].

161 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266 at [117].

162 *STS Seatoshore Group Pte Ltd v Wansa Commodities Pte Ltd* [2024] SGHC 266.

IV. Choice of law

A. **Nicholas Eng Teng Cheng v Government of the City of Buenos Aires**

Choice of law – Companies – Lifting of the corporate veil

12.89 The content of the choice of law rule for the lifting of the corporate veil has long been the source of controversy. Candidates for the connecting factor include the *lex incorporationis*, the governing law of the relevant claim and the *lex fori*.¹⁶³ In *Nicholas Eng Teng Cheng v Government of the City of Buenos Aires*,¹⁶⁴ (“*Nicholas Eng*”) the Court of Appeal took the first option, but added, with a twist, the possibility of displacing that for another law more closely connected to the issue.

12.90 The Buenos Aires Government had agreed to purchase COVID-19 test kits from HN Singapore Pte Ltd (“HN Singapore”), under a contract governed by Argentine law, with delivery to be made within 20 days of the payment of the purchase price. Nicholas Eng Teng Cheng (“Eng”) was HN Singapore’s sole director and shareholder. All parties knew that the test kits to be sold and purchased were to be manufactured and supplied by a third-party company in China.

12.91 Shortly after the purchase price was paid, China imposed export bans on COVID-19 test kits manufactured there, resulting in HN Singapore’s failure to deliver the kits on time. The Buenos Aires Government terminated the agreement, and HN Singapore refunded the purchase price, less a sum which it claimed was spent on non-refundable charges (“balance purchase price”). The Buenos Aires Government sued HN Singapore for breach of contract, claiming the balance purchase price, and also sued Eng for the same, arguing that HN Singapore’s corporate veil could be lifted. It also brought a separate claim against Eng for allegedly having fraudulently misrepresented that HN Singapore would be able to deliver the test kits on time.

12.92 At first instance, the Lee Seiu Kin J dismissed the claim against Eng in misrepresentation, on grounds that Eng did not know, when the sale and purchase agreement was concluded, that the Chinese export restrictions would be imposed.¹⁶⁵ However, the claim against Eng for breach of contract succeeded, on grounds that HN Singapore’s

163 Adeline Chong & Yip Man, *Singapore Private International Law* (Oxford University Press, 2023) at paras 11.20–11.25.

164 [2024] 1 SLR 608.

165 *Government of the City of Buenos Aires v HN Singapore Pte Ltd* [2023] SGHC 139 at [122]–[123].

corporate veil could be lifted. In this regard, Lee J seemed to assume that the governing law of the contract claim would also govern whether HN Singapore's corporate veil could be lifted in relation to it¹⁶⁶ – and since Argentine law governed the former, it should also govern the latter. Under Argentine law, a company's corporate veil could be lifted if it was undercapitalised relative to the transaction it entered into.¹⁶⁷ Since the purchase price for the COVID-19 test kits was US\$1,770,000, while HN Singapore's paid-up capital was S\$1, this requirement was obviously met.

12.93 The Court of Appeal affirmed Lee J's ruling on misrepresentation,¹⁶⁸ but allowed Eng's appeal on breach of contract, finding that the Buenos Aires Government's claim to that effect should also be dismissed. Central to this was the court's reasoning that a company's *lex incorporationis* should, in general, govern the question of whether its corporate veil should be lifted. This, reasoned the court, was because "the law of incorporation is linked inextricably to the company's corporate personality and its relationship with its members", and so this same law which created a company's separate legal personality should also govern the existence of exceptions thereto.¹⁶⁹

12.94 By contrast, neither the governing law of the claim made against the company and its controller, nor the *lex fori*, were suitable candidates. The governing law of the claim, usually the *lex contractus* of the contract allegedly breached by the company, was unsuitable because it might lead the issue to be governed by various different laws if various different claims were brought against the company.¹⁷⁰ The *lex fori*, by contrast, was unsuitable, because it was generally the case that the "jurisdiction in which a company is incorporated has a paramount interest in maintaining the corporate structure and in regulating the situations where the piercing of the corporate veil is permitted".¹⁷¹ Moreover, even though the *lex incorporationis* would not generally govern the remedies available for claims brought against a company, corporate veil-piercing was not accurately described as a "remedy", since it is "intimately connected with

166 *Government of the City of Buenos Aires v HN Singapore Pte Ltd* [2023] SGHC 139 at [140] and [143].

167 *Government of the City of Buenos Aires v HN Singapore Pte Ltd* [2023] SGHC 139 at [141].

168 *Nicholas Eng Teng Cheng v Government of the City of Buenos Aires* [2024] 1 SLR 608 at [53]–[54].

169 *Nicholas Eng Teng Cheng v Government of the City of Buenos Aires* [2024] 1 SLR 608 at [39]–[40].

170 *Nicholas Eng Teng Cheng v Government of the City of Buenos Aires* [2024] 1 SLR 608 at [34].

171 *Nicholas Eng Teng Cheng v Government of the City of Buenos Aires* [2024] 1 SLR 608 at [40].

the status of the company as a separate legal entity and its relationship with its members”.¹⁷²

12.95 However, the court then added that the *lex incorporationis* was only a default connecting factor. Instead, “In a case where the interests of justice render it necessary, the court may decide to apply the law of the forum or some other more appropriate law when it considers the question of whether the corporate veil ought to be lifted in that particular case.”¹⁷³ The court then reasoned that:¹⁷⁴

... Where the court ... wishes to [lift the corporate veil] as a matter of its policy ... [but] where the law of incorporation is [not the law of the forum] and the court considers that a liability has been shielded by using a company that is subject to that law which does not permit the lifting of the corporate veil, the court may nonetheless lift the corporate veil in such situations by applying the law of the forum. ...

12.96 On the facts, though, it was clear that Singapore law governed the question of whether HN Singapore’s corporate veil could be lifted. This was because Singapore law was both the *lex incorporationis* as well as the *lex fori*. In this regard, the only grounds on which the Buenos Aires Government had argued that HN Singapore’s corporate veil should be lifted under Singapore law was that the company was essentially Eng’s *alter ego*.¹⁷⁵ But this allegation was not supported by the facts: HN Singapore had not been incorporated solely for the transaction at issue (it was established three years earlier and had other prior business dealings), and Eng had not treated HN Singapore’s bank account or its other rights and obligations as his own.¹⁷⁶ Since HN Singapore’s corporate veil could not be lifted, the contract claim against Eng failed.

12.97 The Court of Appeal’s endorsement of the *lex incorporationis* as the default connecting factor seems sound. In principle, it is certainly arguable that, since the effect of veil-piercing is to strip a company of its legal personality, the same law which creates that legal personality should

172 *Nicholas Eng Teng Cheng v Government of the City of Buenos Aires* [2024] 1 SLR 608 at [35].

173 *Nicholas Eng Teng Cheng v Government of the City of Buenos Aires* [2024] 1 SLR 608 at [41].

174 *Nicholas Eng Teng Cheng v Government of the City of Buenos Aires* [2024] 1 SLR 608 at [42].

175 *Nicholas Eng Teng Cheng v Government of the City of Buenos Aires* [2024] 1 SLR 608 at [44].

176 *Nicholas Eng Teng Cheng v Government of the City of Buenos Aires* [2024] 1 SLR 608 at [47]–[49].

also govern when it should be taken away.¹⁷⁷ And practically speaking, the *lex incorporationis* promotes clarity and certainty (unlike the governing law of the claim) and obviates forum shopping (unlike the *lex fori*).

12.98 More doubtful, however, is the court's choice to carve out an exception to the *lex incorporationis*. For starters, it is unclear whether the exception can be invoked in favour of the *lex fori* only, or also another governing law like that which governs the claim brought against the company. As we saw above, the court first stated that the exception allows "the court ... to apply the law of the forum or some other more appropriate law" [emphasis added].¹⁷⁸ But later, on the facts, the Court reasoned that Singapore law had to govern the question of whether HN Singapore's corporate veil should be lifted, because it was both the *lex incorporationis* and the *lex fori*. The fact that the governing law of the contract claim was Argentine law was not discussed.

12.99 Confining the exception to the *lex fori* also creates problems. When will "the interests of justice" demand that the *lex fori*, rather than the *lex incorporationis*, should govern the issue of veil-piercing? Surely it cannot be enough that the *lex fori* creates a result that the court views as more "just", for example, if the *lex incorporationis* recognises no doctrine of veil-piercing. That, if anything, would be a recipe for forum shopping. Nor can it suffice that the *lex incorporationis* is fortuitous (for example, if the company is incorporated somewhere solely for tax reasons) if the *lex fori* is equally fortuitous. As the Court of Appeal reasoned in *Lew, Solomon v Kaikhushru Shiavax Nargolwala*,¹⁷⁹ it "would be illogical ... to apply the law of the forum ... regardless of whether the forum had anything to do with the parties or the subject matter".¹⁸⁰ So perhaps the exception would also require the *lex fori* to be more closely connected to the veil-piercing question than the *lex incorporationis*. But when will this be the case, unless the *lex fori* is not also the governing law of the claim brought against the company?

12.100 *Nicholas Eng*¹⁸¹ is undoubtedly a landmark case, being the first decision from an apex common law court to squarely address the choice

177 A counterpoint may be that it is one thing to ignore a company's legal personality and another to attribute its liabilities to another person, and that lifting the corporate veil does both.

178 *Nicholas Eng Teng Cheng v Government of the City of Buenos Aires* [2024] 1 SLR 608 at [41].

179 [2021] 2 SLR 1.

180 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [73].

181 *Nicholas Eng Teng Cheng v Government of the City of Buenos Aires* [2024] 1 SLR 608.

of law rule for the lifting of the corporate veil.¹⁸² The court's preference for the *lex incorporationis* is also generally to be welcomed. Unfortunately, the uncertainty that surrounds the exception to that default rule – in terms of both its scope and its manner of operation – suggests that this decision is unlikely to deter further litigation on this front.

B. Darsan Jitendra Jhaveri v Lakshmi Anil Salgaocar

Foreign law illegality – Non-contractual claims

12.101 In recent years, Singapore's courts have rendered several judgments addressing different issues arising out of doctrines of foreign law illegality, namely *Foster v Driscoll*¹⁸³ and *Ralli Brothers v Compania Naviera Sota y Aznar*¹⁸⁴ (“*Ralli Brothers*”). One such issue concerns whether these doctrines apply to non-contractual claims. On one occasion, the Court of Appeal held that they were limited to contractual claims,¹⁸⁵ but on another, it suggested *obiter* that they might apply also to certain claims for unjust enrichment.¹⁸⁶ In *Darsan Jitendra Jhaveri v Lakshmi Anil Salgaocar*,¹⁸⁷ (“*Jhaveri v Salgaocar*”) the Appellate Division was asked whether foreign law illegality might bar claims for breach of trust and breaches of fiduciary duties, and expressed *obiter* the view that it might not.

12.102 Darsan Jitendra Jhaveri (“Darsan”) and Anil Vassudeva Salgaocar (“Salgaocar”)¹⁸⁸ were once close friends and business associates. From 2005–2012, various British Virgin Islands and Singapore Special Purpose Vehicles (“SPVs”) were incorporated, which were funded by Salgaocar and for whom Darsan was the sole director and shareholder. Salgaocar alleged that Darsan held all these SPVs on trust for him (“2003 Trust”), pursuant to an oral agreement between them in 2003 (“2003 Agreement”), and that Darsan had since acted in breach of trust by, *inter alia*, transferring trust

182 Cf *VTB Capital plc v Nutritek International Corp* [2013] 2 AC 337 and *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, where neither party pleaded foreign law and English law thus governed by default.

183 [1929] 1 KB 470.

184 [1920] 2 KB 287.

185 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [26]. See Joel Lee Tye Beng, Leow Wei Xiang Joel & Marcus Teo Wei Ren, “Conflict of Laws” (2021) 22 SAL Ann Rev 268 at paras 12.139–12.147.

186 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [172]. See Joel Lee Tye Beng, Leow Wei Xiang Joel & Marcus Teo Wei Ren, “Conflict of Laws” (2022) 23 SAL Ann Rev 267 at para 12.93.

187 [2024] SGHC(A) 27.

188 Salgaocar passed away on 1 January 2016, hence the original action was continued by his widow, Lakshmi Anil Salgaocar, in her capacity as the sole administratrix of his estate.

assets to himself, making other unauthorised transfers and preventing Salgaocar from dealing with trust assets. Darsan's defence, *inter alia*,¹⁸⁹ was that the 2003 Agreement was unenforceable for illegality. In particular, he claimed that the 2003 Agreement breached Indian Tax and Financial Regulation statutes ("Indian Statutes"), and that *Foster v Driscoll*¹⁹⁰ and *Ralli Brothers*¹⁹¹ thus precluded its enforcement. Salgaocar's response was that the 2003 Agreement and the 2003 Trust were enforceable, because they did not breach the Indian Statutes, and that in any event, *Foster v Driscoll* and *Ralli Brothers* "extend only to claims for breach of contract".¹⁹²

12.103 At first instance, Kannan Ramesh JAD, sitting in the General Division, ruled in Salgaocar's favour, on grounds, *inter alia*, that the 2003 Agreement did not contravene any of the Indian Statutes. This was for various reasons: some simply did not cover any of Salgaocar's conduct,¹⁹³ others were not in force when the Agreement was entered into,¹⁹⁴ and still others had no extraterritorial ambit beyond India.¹⁹⁵ As a result, Ramesh JAD held that it was "not necessary ... to address [Darsan's] arguments based on the line of authority in *Foster* and *Ralli Bros*".¹⁹⁶

12.104 The Appellate Division upheld Ramesh JAD's decision in its entirety. For our purposes, only the Appellate Division's ruling on illegality is relevant. The Appellate Division first agreed with Ramesh JAD's conclusions that the 2003 Agreement did not breach any of the Indian Statutes.¹⁹⁷ However, the Appellate Division then noted that it was not strictly speaking relevant whether the 2003 Agreement was illegal and unenforceable, but whether the 2003 Trust was illegal and unenforceable, since "a valid and enforceable contract does not constitute a pre-requisite for the creation of a trust".¹⁹⁸ Finally, the Appellate Division noted that:¹⁹⁹

189 He also claimed unsuccessfully that the 2003 Agreement and the Trust did not exist, that he had not committed any breaches thereof, and that the Trust was void for uncertainty. These defences do not concern us here.

190 [1929] 1 KB 470.

191 *Ralli Brothers v Compania Naviera Sota y Aznar* [1920] 2 KB 287.

192 *Darsan Jitendra Jhaveri v Lakshmi Anil Salgaocar* [2024] SGHC(A) 27 at [61].

193 *Lakshmi Anil Salgaocar v Darsan Jitendra Jhaveri* [2023] SGHC 47 at [175]–[177] and [182]–[187].

194 *Lakshmi Anil Salgaocar v Darsan Jitendra Jhaveri* [2023] SGHC 47 at [172]–[173] and [181].

195 *Lakshmi Anil Salgaocar v Darsan Jitendra Jhaveri* [2023] SGHC 47 at [171].

196 *Lakshmi Anil Salgaocar v Darsan Jitendra Jhaveri* [2023] SGHC 47 at [189].

197 *Darsan Jitendra Jhaveri v Lakshmi Anil Salgaocar* [2024] SGHC(A) 27 at [107]–[138] and [140].

198 *Darsan Jitendra Jhaveri v Lakshmi Anil Salgaocar* [2024] SGHC(A) 27 at [139].

199 *Darsan Jitendra Jhaveri v Lakshmi Anil Salgaocar* [2024] SGHC(A) 27 at [141].

In any event, the current position under Singapore law is that the principles in *Foster v Driscoll* and *Ralli Brothers* are restricted in their application to claims in contract ... While the Court of Appeal in *Esben Finance* expressed the provisional view ... that *Foster v Driscoll* and *Ralli Brothers* could potentially apply to claims for unjust enrichment, this was not an expression of their opinion that these principles could be extended to all non-contractual claims. Indeed, [Darsan] raised no further points ... to convince us that the principles in *Foster v Driscoll* and *Ralli Brothers* should be extended to cover claims for breaches of trust and/or fiduciary duties. On this basis, the respondents' claims for breaches of the 2003 Trust would not be barred by any foreign illegality pertaining to the December 2003 Agreement.

12.105 That statement is, of course, *obiter*, and litigants should be cautious on relying on it in the future. In particular, it must be borne in mind that *Jhaveri v Salgaocar* involved breaches of *custodial* duties relating to trust assets. In these circumstances, a resulting trust will typically arise²⁰⁰ even if an agreement purportedly creating an express trust “fails” for illegality, and enforcing that trust will likely not stultify the policy of the law rendering the agreement illegal. *Jhaveri v Salgaocar*²⁰¹ thus does not stand for the wider proposition that *any* claim for breach of fiduciary duties will be immune from foreign law illegality.

12.106 Evidently, these issues require careful attention, in a case where the court has the benefit of considered submissions. But this is par for the course in the complex area of foreign law illegality, and – if nothing else – demonstrates that the law here is far from settled.

V. Recognition and enforcement of foreign judgments

A. Gonzalo Gil White v Oro Negro Drilling Pte Ltd

Anti-enforcement injunctions – Comity

Foreign judgments – Issue estoppel – Identity of issues

12.107 It is common in international commercial litigation for proceedings to be commenced by the same parties in different jurisdictions. In this situation, injunctive relief may be sought to restrain foreign proceedings. Sometimes, despite such relief being obtained, a foreign judgment is obtained in breach of an injunction and then enforcement or recognition sought in the jurisdiction of the enjoining

200 If available under the governing law of the agreement or the *lex situs* of the assets.

201 *Darsan Jitendra Jhaveri v Lakshmi Anil Salgaocar* [2024] SGHC(A) 27.

court. The Court of Appeal in *Gonzalo Gil White v Oro Negro Drilling Pte Ltd*²⁰² (“*White v Oro Negro*”) explores these issues in some detail.

12.108 There is a history of litigation in the Singapore and Mexican courts, but for our purposes, the facts can be stated thus. The appellant Gonzalo Gil White had, until September 2017, been a director of six Singapore incorporated companies, collectively the respondents in this case. Without the knowledge and approval of the respondents’ independent director, the appellant, with Alonso Del Val Echeverria, granted a power of attorney on behalf of each respondent to lawyers in a Mexican firm called Guerra González y Asociados (“Guerra Lawyers”). The Guerra Lawyers subsequently filed insolvency petitions on behalf of the respondents in Mexico which led to the commencement of insolvency proceedings against them (“*Oro Concurso*s”). The respondents’ articles of association prohibited the initiation of the *Oro Concurso*s without the approval of the respondents’ independent director.

12.109 These petitions were subsequently discovered by the respondents’ directors, and the respondents’ shareholder Oro Negro Drilling Pte Ltd. The directors of each respondent passed a resolution revoking all authority previously given to any person to represent the respondents. Powers of attorney were also granted to a Mexican law firm called Cervantes Sainz Abogados SC to represent the respondents in all Mexican proceedings.

12.110 The respondents filed HC/OS 126/2018 (“OS 126”) in the General Division for injunctive relief to restrain, *inter alia*, the appellant from commencing, continuing or maintaining the proceedings in Mexico. Interim injunctions and leave to serve OS 126 outside Singapore were also obtained. The appellant’s application to set aside the interim injunction and leave to serve outside Singapore were granted by the General Division and upheld by the Court of Appeal.²⁰³ The Mexican proceedings continued in breach of these injunctions.

12.111 These injunctions remained in force until final judgment was obtained in favour of the respondents at the General Division. In doing so, the court rejected the appellant’s argument that: (a) OS 126 was an abuse of the court’s process as it relitigated issues in the *Oro Concurso*s; (b) the grant of final relief would breach judicial comity; and (c) the relief sought would be futile. The matter was then appealed to the Court of Appeal.

202 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307.

203 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226.

12.112 On appeal, the Court of Appeal opined that the grounds raised by the appellant, *ie*, abuse of process, *res judicata*, breach of judicial comity and the futility of the permanent injunction were all based on the argument that there was an identity of issues in OS 126 and the *Oro Concurisos*.²⁰⁴

12.113 In terms of identity of issues between OS 126 and the *Oro Concurisos*, the court first stated that, “The issues had to be identical in the sense that the prior decision must have traversed the same ground as the subsequent proceeding, and the facts and circumstances giving rise to the earlier decision must not have changed or were incapable of change ...”²⁰⁵ Further, the burden of proof was on the party seeking to resist the later decision.

12.114 Having said this, the court acknowledged that the question was complicated by the application of different laws in Mexico and Singapore.²⁰⁶ Does the requirement of a “same issue” require that the “same question of law” be involved? Could an issue of law ever be identical if it has been determined with reference to a law that is materially different from the law of the forum?²⁰⁷

12.115 In constructing an answer to this, the court endorsed the approach adopted by the UK Supreme Court in *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)*²⁰⁸ (“*Kabab-Ji*”), that the question of identity of issues had to be examined at two levels. The first was whether the issues as framed before the two competing courts have been framed in the same manner. If they had, then the second level was whether the legal issues, albeit the same or substantially similar, had arisen from the different laws of the competing jurisdictions. If it had, then there was no identity of issues.²⁰⁹ Even if the competing courts appeared to be engaged on the same issues when stated abstractly, identity of issues would not have been established if these issues were ultimately governed by different laws.²¹⁰ Put another way, it was not a matter of form but substance.

12.116 On the facts, the appellant had framed the issues before the Mexican courts in a broad way and had also chosen to focus on the consequences of the decisions in the *Oro Concurisos* to draw a similarity

204 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [55].

205 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [83].

206 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [85].

207 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [85].

208 [2021] UKSC 48.

209 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [87].

210 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [90].

with OS 126.²¹¹ The court pointed out the error of this latter move, reiterating that the question was not whether there was an identity of consequences between the decisions of the two competing jurisdictions but whether there is an identity of issues between them.

12.117 The court went on to opine that there was no identity of issues based on the two levels of analysis suggested by *Kabab-Ji*. At the first level, the issues before the two courts were already different.²¹² And even if they had been the same, the issues would have been governed by different laws.²¹³ As such, identity of issues had not been established. This in turn would mean that the grounds of abuse of process and transnational issue estoppel would not have been made out.²¹⁴

12.118 This was sufficient to dispose of the appeal. However, the court went on to address three points that were raised by the appellant in relation to abuse of process. Firstly, the appellant had argued that the relief granted in OS 126 was in effect the same as those sought in the Mexican proceedings. The court, quite rightly, dismissed this argument. The court stated that, “The decision of the court itself to grant the relief sought by the respondents on its own varied terms cannot be an abuse of the court’s own processes.” [emphasis in original omitted].²¹⁵

12.119 Secondly, the appellant argued that in determining whether there was an abuse of process, the court had to take into account the respondent’s motives for their application. The court emphasised that its role was to prevent an abuse of its own process and that a proper invocation of its jurisdiction does not somehow become an abuse of process simply because of how a successful applicant was going to use the court’s judgment.²¹⁶

12.120 Thirdly, the appellant argued that the respondent did not raise in the Mexican proceedings the issues in OS 126, and as such an abuse of process as established by *Henderson v Henderson*²¹⁷ existed. The court despatched this by noting that the respondents simply could not have raised the points dealt with in OS 126 before the Mexican courts once the

211 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [91].

212 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [92].

213 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [93].

214 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [93].

215 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [95].

216 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [96].

217 (1843) 3 Hare 100.

Mexican courts had decided that Art 115A²¹⁸ would not be given effect in Mexico.²¹⁹

12.121 The appellant had also made a point about how the relief sought in OS 126 would have been futile and that “equity does not act in vain”.²²⁰ After briefly examining possible explanations for this adage, the court opined that injunctive relief should be not withheld merely because there was a distinct possibility that another court might not give effect to it.²²¹ The Singapore courts can grant relief to restrain breaches of Singapore law, and “whether a foreign court may choose to give or not to give effect to Singapore’s orders was strictly irrelevant and should not operate to bar the granting of the relief”.²²²

12.122 In the interests of completion, it is important to note that the court made observations relating to comity, and the requirement of identity of parties in insolvency proceedings.

12.123 On comity, the appellant had argued that the relief sought by the respondent was an anti-suit or anti-enforcement injunction. As such, a consideration of comity was necessary in determining whether relief should be granted.²²³ Considering this, the court opined that the true nature of the relief sought was not in essence an anti-suit or anti-enforcement injunction. It did not restrain the appellants from maintaining proceedings in Mexico. Instead, it restrained them from purporting to act on behalf of the respondents.²²⁴ While the effect may have been the same, its essence was different.

12.124 As such, considerations of comity did not apply. Acknowledging the elastic and ambiguous nature of comity, the court clarified that comity is a concept that operates between nations, and not between courts of nations.²²⁵ This is consistently the position when courts consider, *inter alia*, the doctrine of *forum non conveniens*, anti-suit injunctions, and the recognition/enforcement of foreign judgments. The court took the view that comity is a concept closely connected to the principle of sovereignty of states.²²⁶ This translates into two aspects. Firstly, it is the sovereignty of foreign states which is the basis on which their actions are to be respected.

218 See *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [2].

219 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [97].

220 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [110].

221 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [111].

222 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [111].

223 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [67].

224 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [68].

225 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [71].

226 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [74].

Secondly, and this is the flip side, any application of comity must be balanced against domestic sovereignty.²²⁷ A court would therefore not recognise or enforce a foreign sovereign act if it would undermine the operation of laws in the forum.²²⁸

12.125 Therefore, when the appellant sought to rely on a foreign judgment which post-dated and was obtained in breach of an earlier judgment of the forum that enjoined them, it is unsurprising that the courts of the forum would recognise the foreign judgment because of considerations of comity. To do so would have been at the expense of the court's role to protect its jurisdiction and orders.²²⁹

12.126 On identity of parties, the court below had suggested that a modified approach is needed for insolvency proceedings.²³⁰ Specifically, in determining the requirement of identity of parties, the court should look for a person over whom the insolvency court exercised jurisdiction in entering judgment or in making an order rather than for a "party".²³¹ The thinking was that the effect of a judgment in insolvency proceedings binds the world, unlike in civil proceedings where the judgment binds only the parties.²³²

12.127 The Court of Appeal opined that there was no need for a modified approach. The court stated that in determining who benefits from the effects of decisions relating to abuse of process or transnational issue estoppel, the common law has always drawn a distinction between judgments *in personam* (affecting the parties *inter se*) and judgments *in rem* (operating against the world).²³³ Noting that the court below had not referred to any authorities for its modified approach, adopting that approach would create a third category of judicial decisions, in addition to those *in personam* and *in rem*. This would be a radical change in the law²³⁴ and in the present case, would not have been necessary at all because the doctrine of abuse of process was not limited to relitigation between the same parties²³⁵ as long as some connection between the

227 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [78].

228 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [79].

229 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [80].

230 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [141].

231 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [149].

232 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [144].

233 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [101].

234 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [102].

235 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [107].

party seeking to relitigate the issue and the proceeding in which that issue had been determined.²³⁶

12.128 *White v Oro Negro*²³⁷ is largely a commendable decision, and the outcome reached undoubtedly correct. However, the court's endorsement of the second limb of *Kabab-Ji's*²³⁸ test for identity of issues may have been unwise. The requirement that the relevant issue must generally have been decided in prior foreign proceedings, under the *same law* that is applicable in Singapore proceedings, seems unduly restrictive, and is inconsistent with earlier English²³⁹ and Hong Kong²⁴⁰ decisions. Moreover, on the facts, no endorsement of *Kabab-Ji's* second limb was necessary: the issues decided in Mexico, and those decided in Singapore, were not even framed similarly.

B. Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd

Foreign judgments – Issue estoppel – Insolvency set-off and other cross-claims

12.129 *Res judicata* brings closure and finality to a matter such that it cannot be subsequently relitigated. Closely connected to this is issue estoppel where issues previously conclusively determined in a judgment cannot be relitigated in a subsequent case, even if the claims differ. *Res judicata* seeks to ensure that court resources are not unnecessarily burdened with redundant proceedings.

12.130 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd*²⁴¹ addresses the applicable principles of *res judicata* and particularly, in the context of insolvency proceedings.

12.131 The Singapore incorporated first appellant, Kyen Resources Pte Ltd (“Kyen”), had been wound up and the second and third appellants were the appointed liquidators (“Kyen Liquidators”). The appellants were collectively termed the “Kyen Appellants”. The Hong Kong incorporated respondent Feima International (Hongkong) Ltd (“Feima”), had also been wound up and liquidators similarly appointed (“Feima Liquidators”).

236 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [108].

237 *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307.

238 *Kabab-Ji SAL (Lebanon) v Kout Food Group (Kuwait)* [2021] UKSC 48.

239 *The Sennar (No 2)* [1985] 1 WLR 490 at 498–499.

240 *First Laser Ltd v Fujian Enterprises (Holdings) Co Ltd* [2012] HKCFA 52 at [48]–[49].

241 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266.

12.132 Kyen and Feima were members of a group of companies and under a management and administrative services agreement, Feima agreed to provide Kyen certain management and administrative support services. The Feima Liquidators lodged a proof of debt for US\$49,355,996.30 in Kyen's liquidation, for sums due from goods sold and delivered by Feima to Kyen and payments made by Feima on Kyen's behalf. After a series of correspondence between the Kyen and Feima liquidators revolving around evidence relating to the debt, the Kyen Liquidators rejected the claim on two alternative grounds. Firstly and primarily, that Kyen's cross-claims against Feima exceeded Feima's claim. Secondly, Feima provided insufficient evidence to prove the alleged debt.

12.133 Feima appealed against this rejection to the General Division in HC/OS 828/2021 ("OS 828"). Originating Summons 828 was allowed in part and Feima's proof of debt was admitted to the extent of US\$32,079,540.97, being the sum pursued by Feima before the judge. In doing so, the judge held, *inter alia*, that the Kyen Liquidators were not justified in rejecting Feima's proof of debt by accounting for the cross-claims as those involved complex disputes of fact, and that the cross-claims did not satisfy the requirements for an insolvency set-off.

12.134 The Kyen Liquidators appealed against the judge's decision and lodged a proof of debt in Feima's liquidation for the sum of US\$159,308,190.27 based on the cross-claims. Kyen's claim was, unsurprisingly, rejected by the Feima Liquidators. Kyen challenged the rejection in the Hong Kong Court of First Instance in HCCW 309/2018 ("HK Proceedings").

12.135 Before the appeal from OS 828 could be heard, Feima filed CA/SUM 22/2023 ("SUM 22") seeking orders for (a) a stay of the appeal; (b) a restraint on foreign proceedings; and (c) that Kyen be required to elect between pursuing the appeal and the HK Proceedings. Feima argued that as a result of Kyen placing the cross-claims before the Hong Kong courts by lodging the proof of debt and challenging its rejection in the HK Proceedings, it was inappropriate for the same issue to also be considered in the appeal.

12.136 In an unexpected plot twist, Feima reversed its position and the parties informed the court that they had consented to the HK Proceedings being heard after the resolution of SUM 22 and/or the hearing of the appeal. While this made SUM 22 unnecessary, the court felt that it was nonetheless important to address the implications of the cross-claims being an issue in both the appeal and the HK Proceedings.

12.137 On appeal, there were two main issues before the court. Firstly, whether the Kyen Liquidators were permitted to account for the cross-

claims when adjudicating Feima's proof of debt. Secondly, whether the doctrines of *res judicata* and election precluded Kyen Appellants from pursuing the cross-claims.

12.138 This review is not concerned with the court's view on the first issue²⁴² and it is sufficient to note that the court found that the Kyen Liquidators were not entitled to exercise a set-off on the basis of the cross-claims. While this made it unnecessary to consider the second issue, the court felt that its views might be helpful in future cases.

12.139 The second issue is predicated on the argument that the Kyen Appellants were estopped from pursuing the cross-claims by the doctrine of *res judicata* because its proof of debt had been rejected by the Feima Liquidators.²⁴³

12.140 The court considered it significant that the present case involved the liquidation of two companies based in different jurisdictions. In Kyen's liquidation, the cross-claims were asserted by the Kyen Liquidators as a set-off in the adjudication of Feima's proof of debt. This decision was challenged by the Feima Liquidators. As Singapore was the seat of Kyen's liquidation, it was for the courts here to determine whether the set-off was permissible. Conversely, the permissibility of the cross-claims asserted by Kyen in Feima's liquidation was for the courts of Hong Kong to determine. The cross-claims were properly asserted before the Singapore and Hong Kong courts for different purposes and were distinct in nature.²⁴⁴ As such, both the doctrines of *res judicata* and election did not apply.

12.141 The court went on to consider the gatekeeping mechanisms that defined the boundaries of transnational issue estoppel as set out in *Merck Sharp & Dohme Corp v Merck KGaA*.²⁴⁵ One of these limitations is that transnational issue estoppel would not arise in respect of any issue which the court ought to determine under its own law. Further, questions of public policy are to be reserved for the courts of the forum.²⁴⁶ It followed that the Kyen Liquidators' decision to set off the cross-claims was a matter

242 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [31]–[59].

243 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [61].

244 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [63].

245 [2021] 1 SLR 1102.

246 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [55].

of Singapore law and public policy and that the Singapore courts would not be bound by any decision of the Hong Kong courts.²⁴⁷

C. Powercom Co, Ltd v Sunpower Semiconductor Ltd

Foreign judgments – Final and conclusive – Appellate decisions

12.142 *Powercom Co, Ltd v Sunpower Semiconductor Ltd*²⁴⁸ explores the question of when a foreign judgment is considered final and conclusive for the purposes of enforcement in Singapore.

12.143 The facts are straightforward. Both parties were companies incorporated in Taiwan. The plaintiff sold solar cells and photovoltaic inverters to the defendant, and when the latter did not make payment, the plaintiff commenced proceedings in the Taiwan Taipei District Court and obtained judgment on 7 June 2013. The defendant's appeals to the Taiwan High Court and then the Taiwan Supreme Court were dismissed on 23 September 2014 and 18 May 2016 respectively.

12.144 The plaintiff subsequently sought to enforce the District Court judgment in Singapore on 11 July 2019. The defendant opposed this application by arguing that the District Court judgment was precluded by the six-year limitation period provided under s 6(1)(a) of the Limitation Act 1959.²⁴⁹

12.145 The issues therefore revolved around the question of when does a judgment become final and conclusive for the purposes of enforcement. The defendant argued that the District Court judgment was final and conclusive and the time would begin to run on 7 June 2013. The plaintiffs argued instead that the District Court judgment only accrued and became final and conclusive after the Taiwan Supreme Court had rendered its judgment on 18 May 2016.

12.146 As a starting point, the court acknowledged that the requirement for recognition and enforcement is that the judgment be final and conclusive in the particular court in which it was pronounced. A judgment (including a default judgment) is not any less final and conclusive even if the judgment may be appealed,²⁵⁰ and will remain final and conclusive until it is set aside on appeal.

247 *Kyen Resources Pte Ltd v Feima International (Hongkong) Ltd* [2024] 1 SLR 266 at [64].

248 [2024] SGHC 89.

249 2020 Rev Ed.

250 *Powercom Co, Ltd v Sunpower Semiconductor Ltd* [2024] SGHC 89 at [11].

12.147 Counsel for the plaintiff submitted that under Taiwanese law, *res judicata* only applies after the Taiwan Supreme Court rendered judgment. In other words, for the purposes of enforcement, the District Court judgment only became final and conclusive on 18 May 2016. The General Division agreed with this and found in favour of the plaintiff.

12.148 It is clear that the court was motivated by the equities of the situation. In this case, the defendant was seeking to rely on the delay created by his appeals. The court opined that, “It would be absurd to allow the losing party to appeal against the first instance judgment, and also argue in the same breath that the first instance judgment is deemed final and conclusive such that the cause of action to enforce that judgment has accrued.”²⁵¹ It went on to opine that this would be “an open invitation to a defaulting party to mount appeal after appeal merely to let the time limitation run its course.”²⁵²

12.149 We suggest that are two ways to rationalise the court’s conclusion.

12.150 While the outcome of this decision is understandable, it is not entirely clear the basis upon which the court came to this conclusion. The court seems to suggest that until all appeals have been determined, a court decision of first instance would not be final and conclusive.²⁵³ This clearly flies in the face of the accepted approach that a judgment remains final and conclusive even while on appeal.

12.151 Firstly, the court is suggesting a different approach to thinking about whether a foreign decision is final and conclusive. In so far as an appeal is pending, the court could take the view that the foreign decision is not final and conclusive for the purposes of enforcement until the appeal has been determined. Presumably, where no appeal is pending, the traditional approach applies.

12.152 Secondly, while it is the courts of the forum that will determine whether a decision is final and conclusive for the purposes of enforcement, it will make this determination after considering the law of the jurisdiction of the issuing court. Therefore, the law of the jurisdiction of the issuing court should be a weighty factor in the forum court’s determination. In this case, both parties’ experts agreed that for the purposes of Taiwanese law, the District Court judgment became binding

251 *Powercom Co, Ltd v Sunpower Semiconductor Ltd* [2024] SGHC 89 at [13].

252 *Powercom Co, Ltd v Sunpower Semiconductor Ltd* [2024] SGHC 89 at [13].

253 *Powercom Co, Ltd v Sunpower Semiconductor Ltd* [2024] SGHC 89 at [13].

only after the avenues of appeal to the Taiwan Supreme Court had been exhausted.²⁵⁴

12.153 We feel that the latter explanation is what the court had intended, as it explains the decision without changing the traditional position.

12.154 As a matter of practice, perhaps what the plaintiff should have done was to have filed for enforcement when the District Court judgment was obtained (or within the limitation period). The defendant would then have been free to apply for a stay of enforcement pending the outcome of the appeal.

254 *Powercom Co, Ltd v Sunpower Semiconductor Ltd* [2024] SGHC 89 at [7].