10. CONFLICT OF LAWS

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Introduction

10.1 For 2010, there are 15 cases which will be examined in this review.

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

Jurisdiction

Non-justiciability, Mocambique *rule, whether parties can consent*

10.3 It is generally accepted that a court does not have jurisdiction over a matter involving foreign immovables. While this rule, established by *British South Africa Co v Companhia de Moçambique* [1893] AC 602 (referred hereafter the *Moçambique* rule), has exceptions and been criticised, it remains for the moment good law. The *Moçambique* rule came up for consideration in *Ng Teck Sim Colin v Hat Holdings Pte Ltd* [2010] 4 SLR 840 ("*Ng Teck Sim Colin*").

10.4 This case involved a property in Phuket which had a villa upon it. Under Thai law, ownership of the land is separate from ownership of buildings on that land. Hence, separate transfers and registrations are required for legal ownership of both land and house to pass to a purchaser. The plaintiffs purchased the land and paid for the construction of the villa. The named owner of the villa upon it was Sarot, an architect who was issued a construction permit (expiring in April 2001) to construct the villa. The permit was transferred to the plaintiffs in March 2006.

10.5 The sale of the land and the villa to the defendants was thwarted when the Phuket Land Office rejected the transfer on the grounds that the construction permit that was transferred to the plaintiffs was invalid. The solution agreed to by the parties was for Sarot to transfer the villa directly to the defendants. The land was successfully registered and paid

for. It is not necessary for us to get into the ensuing complicated series of events relating to the transfer of the villa. It is sufficient to note that registration of the transfer of the villa was effected and when the final payment was not forthcoming, the plaintiffs sued for breach of contract. For our purposes, the crux of the defence was, *inter alia*, that the plaintiffs did not transfer "good, proper and perfect legal title" to the defendants.

10.6 When asked if the *Moçambique* rule was an obstacle to the court determining the issues relating to title to the villa, both parties suggested that the court could adjudicate because the respective claims were founded on contract. After examining the law and factual matrix of this case, the court concluded that central to the matter was whether the plaintiffs or Sarot had good title to transfer to the defendants. As such, this involved determination of title to foreign land and was excluded by the *Moçambique* rule. This conclusion is unsurprising and there are two further points that can be noted about this matter.

10.7 First, the court acknowledged the exceptions to the *Moçambique* rule and noted that these exceptions were based on the existence of an *in personam* obligation arising out of contract or equity. In those cases, the obligations did not depend on the law of the *locus* of the immovable property for their existence. This was not the situation in this case where title is not an incidental question but is the principal issue. This clarity of statement from the court is a welcome one.

10.8 Secondly, the court considered the possibility of parties consenting to the court adjudicating on disputes of title. Put another way, can parties consent out of the *Moçambique* rule? The court declined to accept this suggestion and opined that mere consent of the parties could not prevent the operation of the *Moçambique* rule. This conclusion is correct if we accept (as the court pointed out in *Ng Teck Sim Colin* at [37]) that "[t]he *Moçambique* principle is one based on considerations of comity of nations. It recognises that where land (and this includes the building thereon) is concerned, a sovereign is entitled to assert a double prerogative, to make laws for its own country and to have those laws adjudicated in its own courts exclusively".

Stay of proceedings

Forum non conveniens

10.9 Faced with the suit in Singapore, one can apply to the court to stay the proceedings based on, *inter alia*, *forum non conveniens*. *Piong Michelle Lucia v Yuk Ming Cheung* [2010] SGHC 110 ("*Piong Michelle Lucia*") was a straight application of this doctrine where the plaintiff

had sued the defendant for defamation who applied for a stay of proceedings. The assistant registrar found in favour of the defendant and on appeal, this was upheld by Quentin Loh JC. Put simply, in an application for stay of proceedings based on *forum non conveniens*, the defendant had the burden of proving that there was a distinctly more appropriate forum elsewhere. If this was established, then the plaintiff had to show that there were valid reasons or circumstances based on the ends of justice why the court should, nonetheless, not grant a stay. The court in this case decided that Hong Kong was a distinctly more appropriate forum than Singapore and in the absence of reasons and circumstances why the court should not grant a stay, granted the defendant's application.

Importance in family cases for the same court to consider main and ancillary matters

10.10 In a family law context, *ALJ v ALK* [2010] SGHC 255 made some observations on *forum non conveniens vis-à-vis* main and ancillary matters before the court. The parties, both foreign nationals and Singapore permanent residents, were married in Singapore. The deterioration of the marriage was followed by a stormy period that included incidences of violence, abduction of the children and death threats to a third party. There was an application by the wife for an order of interim custody, care and control. An attempt to stay this application by the husband was dismissed. The husband commenced divorce proceedings and ancillaries in Singapore and the wife counterclaimed. Interim judgment was granted by the District Court and the ancillary matters were transferred to the High Court.

10.11 While the husband did not formally apply to stay the ancillary proceedings, it was clear to the court that his objective was to have the ancillary matters determined by the Californian courts. Woo Bih Li J declined to stay the proceedings on the basis that, despite some connecting factors to California, it was not clearly the more appropriate forum to resolve the ancillary matters. In coming to this conclusion, the learned judge took into account that the divorce proceedings in Singapore were far progressed and an interim judgment had been granted. Since the reasons for the breakdown of the marriage might be relevant to the ancillary issues of custody, care and control and division of matrimonial assets, it made practical sense for the same court to consider both the main divorce and the ancillary matters than to divide the issues to be decided in separate jurisdictions.

O 11 application and Forum Conveniens

10.12 The doctrine of natural forum is also a consideration when it comes to an application for service out of the jurisdiction under O 11 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("Rules of Court"). As part of establishing the requirements for service out of the jurisdiction, the plaintiff must show that Singapore is the *forum conveniens* for the dispute. This matter came up for the court's consideration in *Holdrich Investment Ltd v Siemens AG* [2010] 1 SLR 1237 (HC) ("*Holdrich Investment Ltd*") and *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 (CA) ("*Siemens AG*").

10.13 The plaintiff, a Hong Kong company, sued the defendant, a German company, for commissions due for consultancy services provided by the plaintiff. When payment of the commission was not forthcoming, the plaintiff commenced proceedings in Singapore and obtained leave to serve the writ of summons on the defendant outside the jurisdiction. The defendant subsequently applied for and obtained a discharge of the leave order. The plaintiff appealed and the question revolved around whether Singapore was *forum conveniens*. The High Court found in favour of the plaintiff and held that Singapore was the more appropriate forum for the dispute. The defendant appealed.

10.14 The judgment of the Court of Appeal is instructional in a number of ways. First, Chao JA disagreed with counsel for the defendant's submission that the Singapore court should compare all the connecting factors pointing towards Singapore against all the connecting factors pointing away from Singapore when determining *forum conveniens*. The learned judge clarified that since *forum conveniens* analysis is to identify the most appropriate forum in which to try the substantive dispute, the connecting factors which point away from Singapore must point to a more appropriate forum than Singapore.

10.15 Secondly, the court made some observations on the burden of proof in a *forum non conveniens* analysis. It is the accepted position that in an O 11 application, the plaintiff has the burden of showing that Singapore is *forum conveniens* whereas the defendant bears the burden when there is an application to stay the proceedings after jurisdiction has been established. Chao JA made a distinction between proving the existence of a fact (a question of fact) which goes towards showing whether a jurisdiction is the *forum conveniens* or not (a question of law). In the former category, the person alleging the fact has the evidential burden of proving it. This is separate from the legal burden of establishing whether a jurisdiction is, "on balance and in the final analysis, the most appropriate forum to try the dispute": *Siemens AG* at [8]. What is important is that a plaintiff does not have to show that

Singapore is the most appropriate forum by far and "it matters not whether Singapore is the most appropriate forum by a hair or by a mile": *Siemens AG* at [8].

10.16 Thirdly, in application to the facts, the Court of Appeal continued its nuanced approach to assessing the connecting factors. Technology has lessened the weight traditionally placed on the location of witnesses and evidence. What tipped the scales for both the High Court and the Court of Appeal was the choice of Singapore law as the governing law for the consultancy agreement. While not accepting that a choice of law was tantamount to making a choice of forum, the choice of Singapore law took on greater weight when the issues in the matter were mixed questions of fact and law. Noting the general approach that there is a preference for the laws of any particular jurisdiction to be applied by the courts of that jurisdiction, this factor was a strong indicator in favour of Singapore. In the absence of stronger factors pointing elsewhere as a more appropriate forum, the court affirmed the High Court's decision that Singapore was the *forum conveniens* and that the plaintiff should be granted leave for service out of the jurisdiction.

Singapore* versus *Australian approach, relativity of natural forum, witness compellability, choice of law

10.17 The Singapore court's approach to *forum non conveniens* is not the only approach; a contrasting one is that of the Australian courts. *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals FZC*") explores the differences in this approach as well as considers the impact of choice of law considerations and witness compellability as factors in stage 1 of the *forum non conveniens* analysis.

10.18 The first defendant had irrevocable rights of mining and marketing of iron ore concessions granted by the owners of these concessions, an Indonesian company, PT JIO Energi Resources. The exclusive mining agreement between PT JIO Energi Resources and the first defendant represented that it owned iron ore concessions with an estimated reserve of one million tonnes, contained a choice of law clause selecting the laws of Ajman, UAE, as its governing law and provided for disputes to be resolved by arbitration. A copy of this agreement was sent to the plaintiff, an Indian company interested in mining iron ore in Indonesia. The plaintiff then entered into an investment agreement with the first defendant to buy 50% of its shares.

10.19 A dispute subsequently arose as to the actual amount of iron ore deposits that existed and the plaintiff demanded the return of the amount it invested in the first defendant. Part of this amount was returned and the plaintiff commenced proceedings seeking a declaration that the investment agreement was validly rescinded and claiming the return

of the balance of its investment amount. In the alternative, the plaintiff sought damages under the Misrepresentation Act (Cap 390, 1994 Rev Ed). The defendants applied to stay the proceedings arguing that Indonesia was the more appropriate forum for the trial. At first instance, the assistant registrar granted the application and this was overturned on appeal to the High Court. The defendants appealed.

10.20 At the Court of Appeal, apart from providing a helpful and succinct review of the applicable law, it was reaffirmed that the Singapore approach to *forum non conveniens* is different from the approach taken by the Australian courts. The Australian approach is for the court to only grant a stay when it is shown that the forum is a clearly inappropriate forum. By way of contrast, the approach expounded in the *locus classicus Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 and adopted in Singapore, is that a stay will only be granted if it can be shown that there is a more appropriate forum elsewhere. Whether any particular forum is the natural forum is a relative question. Just because there are no or few connecting factors pointing to Singapore does not mean that Singapore is not a natural forum. It is necessary to show the existence of a more appropriate forum elsewhere. If there is not another forum which has weightier connecting factors pointing to it or that the connecting factors pointing elsewhere are split among various jurisdictions which each alone do not outweigh the factors pointing to Singapore (*à la Siemens AG* (above, para 10.12)), then no stay will be granted.

10.21 In terms of the analysis and application, the Court of Appeal was swayed by a number of factors. First, the court disagreed with the finding of the High Court that the evidence of the Indonesian witnesses was immaterial. While a defendant applying for a stay should not be permitted to assert, without substantiation, that it requires foreign witnesses, they should at least show that evidence from foreign witnesses is at least arguably relevant to its defence. The court opined that the defendants in this case had at the very least met that threshold and that the presence of the witnesses in Indonesia pointed to Indonesia as an appropriate forum.

10.22 While acknowledging that the location of non-party witnesses was no longer as significant (in this case due to the ability to obtain evidence through video-link and the proximity of Indonesia to Singapore), the compellability of witnesses takes on increased significance.

10.23 The starting point is that the Singapore court cannot compel a foreign witness to testify in person in Singapore or via video-link. Referring to the decision in *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2010] 3 SLR 684 (discussed later in paras 10.30–10.41), the court

clarified that while it is not necessary (albeit preferable) for the defendant to lead evidence on the compellability of the witnesses in the Indonesian courts, the court must be persuaded that it would be more likely for the witnesses to testify if the dispute were heard there.

10.24 While the court did not explicitly make this point, there must presumably be some substantiation that there is an increased likelihood for the witnesses to testify in the foreign court. Otherwise, since the Singapore court in every case cannot compel a foreign witness to testify, it would be too easy for a defendant to manufacture this as a connecting factor.

10.25 It is useful to mention that the court considered that, while the location of witnesses is clearly a stage 1 consideration in the *forum non conveniens* analysis, the factor of compellability of a witness was relevant at both stage 1 and stage 2.

10.26 The court also considered choice of law considerations to be a significant factor. The significance of the *lex causae* for the *forum non conveniens* analysis is that any forum would be more adept at applying its own law. Subject to considerations of a common history and similarity between legal systems (which may lessen the significance of this factor), if the *lex causae* points to a foreign law, then that is a factor in favour of that jurisdiction. The converse, of course, applies.

10.27 As a starting point, the court characterised the claims, identifying the bases of the various claims as contractual, restitutionary, tortious and statutory. The choice of law analysis undertaken by the court will be examined in more detail in the Choice of Law section of this chapter (see paras 10.66–10.73). For the moment, it is sufficient to note that the court found that the *leges causae* of the contract, restitution and tort claims did not point to Singapore. Nor did the Misrepresentation Act (above, para 10.19) apply in this case. On balance, the choice of law factors pointed to Indonesia as a more appropriate forum.

10.28 For the sake of completion, in its analysis, the court also considered the place where the tort occurred and general connecting factors with Singapore. The latter was dismissed as being irrelevant to the dispute. The former pointed to Indonesia but this factor was not decisive as the tortious action was an alternative claim.

10.29 The court, therefore, held that Indonesia was a more appropriate forum than Singapore and allowed the appeal.

When a late stay application will be allowed, availability of forum, level of development of foreign legal system

10.30 The Rules of Court (above, para 10.12) provide clear timelines for the filing of a stay application. *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2010] 3 SLR 684 had to consider whether an applicant was precluded from applying for a stay due to a delay in application. It also considered a number of considerations relevant to stage 2 of the *forum non conveniens* analysis.

10.31 In this case, the defendant worked as a project manager in the Maldives for a Malaysian company that was controlled by the plaintiff, a Singapore company. The plaintiff commenced proceedings against the defendant for breach of duty contending that he was the plaintiff's employee and had been seconded to the Malaysian company. After filing his defence, the defendant applied for a stay of proceedings based on *forum non conveniens* arguing that Maldives was a more appropriate forum. The stay was granted at first instance and the plaintiff appealed.

10.32 On appeal, the High Court was first faced with whether the defendant was precluded from applying for stay because it was out of time. Woo Bih Li J, citing the Court of Appeal decision in *Chan Chin Cheung v Chan Fatt Cheung* [2010] 1 SLR 1192 ("*Chan Chin Cheung*"), noted that the test was whether there was prejudice to the plaintiff which could not be compensated by costs. He opined that there was no such prejudice and as such the defendant was not precluded from filing the stay application.

10.33 Having held this, the court went on to make a number of observations that will have implications for practice. While filing a defence did not preclude a defendant from applying for a stay *per se*, the court felt it was clear that in the natural flow of litigation, a stay application should precede the filing of a defence. Once there is an application for a stay (which should contain a prayer for an extension of time to file the defence pending the outcome of the stay application), a plaintiff should refrain from insisting that the defendant file a defence. In the worst case, if a defence had to be filed to forestall a default judgment, then it should be made clear that the defence is filed without prejudice to the stay application.

10.34 The court also expressed some reservation with the test expounded by the Court of Appeal in *Chan Chin Cheung* (above, para 10.32). The court felt that the existing test placed an unfair burden on the plaintiff to show good reasons why a defendant should not be allowed to make his application for a stay late when the burden should be on the party who is making the late application to show good reasons why a late application should be allowed. It would appear that if the

court had applied this test, it would have found that the defendant had not met this burden and disallowed the stay application.

10.35 Although these *dicta* do not override the test presently used by the Court of Appeal, there is intuitive appeal to the arguments put forward. While the two approaches may at first blush seem incompatible, it is submitted that they could be reconciled by a 2-stage test, not dissimilar to that for *forum non conveniens*. At the first stage, the party seeking to apply for a stay out of time must show good reasons. If this is satisfied, then the application should be allowed unless the plaintiff shows at stage 2 that there would be prejudice suffered by the plaintiff which could not be compensated by costs.

10.36 The court's application of stage 1 of the *forum non conveniens* analysis is unremarkable. Among the connecting factors considered were the employment contract, the location where the defendant's services were provided and the availability of witnesses. On the last factor, the court was more concerned with the compellability of the witnesses in the Maldives. Although admitting that the legal position regarding compellability was not clear due to conflicting expert opinion, the court opined that even if the witnesses were not compellable, the defendant would have a better chance of obtaining the assistance of the witnesses should the matter be heard in Maldives. The court concluded that, on the balance, the defendant had shown that Maldives was a more appropriate forum for the case to be heard.

10.37 Turning to stage 2, the court was faced with three arguments relating to why the plaintiff would be unfairly prejudiced should the proceedings be stayed. First, the plaintiff argued that there was no available forum in the Maldives. This was dismissed by the court stating that just because the Maldivian court may not apply Singapore law does not make that forum unavailable.

10.38 Secondly, the plaintiff argued that since there was an earlier Maldivian judgment (commenced by the defendant against the Malaysian company and therefore not the subject of the proceedings before the Singapore court) ruling that the defendant was the employee of the Malaysian company, the plaintiff would be prejudiced should the matter be heard in the Maldives. Again, this was rightly dismissed by the court holding that the plaintiff was not a party to that matter and that it was open to the Maldivian court to subsequently rule differently.

10.39 Finally, the plaintiff ran the argument that it would be unfairly prejudiced if it had to sue in the Maldives because the law there was not as developed. The court reiterated that a Singapore court should not pass judgment on the competence or independence of the judiciary of another country, as this would undermine the comity between nations.

While the court did not make it explicit, it would be equally incorrect to pass judgment on the development of the law or legal system of another country. Again, it was rightly pointed out that just because the avenues for recourse in the foreign jurisdiction were different from the forum does not make it any less appropriate.

10.40 It is somewhat surprising that these three arguments were run in a bid to satisfy stage 2 of the *forum non conveniens* analysis as it is clear from the jurisprudence that these would not have satisfied the broader goal of identifying the forum where the case should be tried having regard to the interest of the parties and the ends of justice.

10.41 The court's disposal of these arguments was correct, as was its decision to dismiss the appeal. There has been a further appeal to the Court of Appeal and its judgment will be considered in the Annual Review for 2011.

Non-exclusive jurisdiction clause, waiver of objection, forum non conveniens

10.42 A commonly found clause in commercial contracts is the choice of forum or jurisdiction clause. The usual permutations of these clauses are between a forum or foreign clause and whether the clause is exclusive or not exclusive. Transactional lawyers have also come up with variations on these themes such as the multi-jurisdiction clause and clauses where a party waives one's right to object on the grounds of *forum non conveniens*. *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2010] 4 SLR 904 ("*OCBC Capital Investment Asia Ltd*") considers the intersection between a non-exclusive jurisdiction clause coupled with a waiver of objection clause and how it impacts upon the *forum non conveniens* analysis.

10.43 In this case, the parties entered into an agreement by which the defendant agreed to indemnify the plaintiff if the plaintiff sold any of its shares in the defendant's company within a stipulated period and the price was below a stipulated "floor-price". Subsequently, the parties verbally agreed to extend the period involved but the defendant later refused to sign the documentation. The plaintiff sued the defendant for breach of the verbal agreement and the latter sought a stay of the proceedings in favour of the courts of Malaysia on the ground of *forum non conveniens*. The defendant's application was dismissed at first instance and he appealed.

10.44 Clause 9.5(a) in the agreement contained a non-exclusive jurisdiction clause in favour of the Malaysian courts and was coupled with a waiver of any objections to proceedings in any court on the

grounds of *forum non conveniens*. Clause 9.5(b) allowed the plaintiff to commence proceedings in any other jurisdiction.

10.45 The plaintiff contended that, by virtue of the waiver of objection in cl 9.5(a), the defendant was prevented from seeking to stay proceedings in Singapore based on *forum non conveniens*. The defendant argued that the waiver of objection only applied to the courts in Malaysia and not elsewhere. If the plaintiff was correct, then the burden on the defendant to show why the Singapore court should stay the proceedings became more onerous.

10.46 The court agreed with the defendant's interpretation and opined that the *forum non conveniens* analysis would apply. On analysis, the court concluded that while Malaysia was an appropriate forum, the defendant had not discharged his burden of showing that there was a more appropriate forum elsewhere and dismissed the appeal. There is nothing of particular interest in the *forum non conveniens* analysis save that, where there exists a non-exclusive jurisdiction clause, that jurisdiction becomes an appropriate forum. The defendant would still have to show that that jurisdiction is more appropriate than Singapore.

10.47 There are, however, three observations that can be made. First and as a preliminary point, it is clear that the decision in this case turned on the interpretation of cl 9.5. The interpretation of a contract is governed by the proper law of the contract, which in this case was expressed to be Malaysian law. While there was no discussion by the court on this point, whether because Malaysian and Singapore laws are sufficiently similar or that foreign law was not proved and the presumption of similarity of laws applied, it is important to bear in mind that in another case, the difference in laws relating to the interpretation of contracts may be significant.

10.48 Secondly, it is clear that a non-exclusive jurisdiction clause, coupled with a waiver of objection on the basis of *forum non conveniens*, can create what is in effect an exclusive jurisdiction clause (as was the case in *Bambang Sutrisno v Bali International Finance Ltd* [1999] 2 SLR(R) 632). When this occurs, the defendant would have to show strong cause instead of the lower *forum non conveniens* standard of there being a more appropriate forum elsewhere. Having held that the waiver of objection applied only to cl 9.5(a), the latter applied.

10.49 Finally, the court's interpretation of cl 9.5 is acceptable. However, holding that the waiver of objection related only to the non-exclusive jurisdiction of the Malaysian courts created a situation where, in effect, the parties were bound by an exclusive jurisdiction clause in favour of Malaysia and yet the plaintiff could proceed elsewhere at its whim. While the factual matrix in this case did not give rise to any odd

situations, it would not be difficult to imagine such a situation. For instance, if Wong had been the one to commence proceedings in Malaysia, then OCBC would equally not be able to object on grounds of *forum non conveniens*. However, OCBC could then proceed in other jurisdictions, effectively setting up a situation of multiplicity of proceedings. Not fatal, but odd. The writer speculates that the intention of cl 9.5 might have been to give OCBC the right to proceed in all jurisdictions while binding only Wong to an exclusive jurisdiction clause. If this is correct, then perhaps this clause provides an object lesson for the commercial practitioner in drafting.

Clash of dispute management provisions, non-exclusive jurisdiction clauses coupled with waiver of objection on forum non conveniens*, "real defence" – Distinction between courts and modes*

10.50 As commercial transactions get more complex, there are often different dispute management provisions provided for in different agreements, yet all relating to the same transaction. *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821 ("*Transocean Offshore*") considered such a situation. The plaintiff and defendant were parties to a drilling contract. As a condition precedent of the drilling contract, the parties had to enter into an escrow agreement to establish an account for the deposit of moneys by the defendant before a certain date. Failure to do so entitled the plaintiff to terminate the drilling contract. The drilling contract provided for arbitration in the event of a dispute. The escrow agreement provided for the non-exclusive jurisdiction of the Singapore courts coupled with a waiver of jurisdictional objection. The defendant failed to deposit the escrow amount and the plaintiff commenced proceedings suing for breach and repudiation of the escrow agreement.

10.51 The defendant sought to stay the proceedings based on the arbitration provisions in the drilling contract. The plaintiff resisted the application relying on what was in effect an exclusive jurisdiction clause in favour of Singapore. At first instance, the assistant registrar allowed the defendant's application. The plaintiffs appealed. The High Court held that the jurisdiction clause trumped and allowed the appeal.

10.52 There are a number of noteworthy points. First, the court reaffirmed the position in *Bambang Sutrisno v Bali International Finance Ltd* [1999] 2 SLR(R) 632 that a non-exclusive forum jurisdiction clause coupled with a waiver of one's right to objection to the court's jurisdiction on the ground of *forum non conveniens* created, in effect, an exclusive forum jurisdiction clause. Any party wishing to depart from being bound by such a clause would have to show exceptional circumstances amounting to strong cause.

10.53 Secondly, deciding which clause trumped was an exercise in construction which took into account the scope of the arbitration clause and the intention of the parties in deliberately carving out the escrow agreement from the drilling contract and giving it its own dispute management provisions. The court, finding support from English cases, also opined that where there were different but related agreements containing overlapping and inconsistent dispute resolution clauses, one should examine which agreement gave rise to or was more closely connected to the claim. It is that agreement's dispute management provisions that should apply to the claim.

10.54 Thirdly, the plaintiff, relying on *The Hung Vuong-2* [2000] 2 SLR(R) 11, argued that there was no real defence to the claim that needed to be referred to a court for determination. It is clear that whether a real defence exists is relevant in so far as to determine whether strong cause exists. What is of interest is that the court distinguished *The Hung Vuong-2* on the basis that, in that case, it had a transnational element in that the choice was between the courts of two different jurisdictions. The learned judge opined that where the choice was between different modes of dispute resolution, this consideration did not apply. This must be correct. To this, the writer would add that *The Hung Vuong-2* involved an exclusive foreign jurisdiction clause and the plaintiff was arguing that a stay should not be allowed because the defendant did not genuinely desire trial, *ie*, the defendant had no real defence to the claim, in the contractually agreed jurisdiction. It is not clear if the same considerations apply when we are dealing with an exclusive forum jurisdiction clause. After all, why would a defendant argue that it had no real defence to the action that was started by the plaintiff, in accordance with the forum jurisdiction clause, in Singapore?

10.55 Finally, by way of *obiter*, the court opined that even if the claim did fall within the scope of the arbitration clause, this agreement to arbitrate was waived by the parties entering into the subsequent escrow agreement with its jurisdiction clause. While this view is plausible, it does present some difficulties. The existence of an arbitration clause is not incompatible with an exclusive jurisdiction clause, even within the same document. When the clauses occur across different documents in a complex transaction, one should not be too quick to conclude that a later one overrides or is seen as a waiver of an earlier one. While subsequent acts can be seen as a waiver of a contractual right, it would be odd, for example, to suggest that a post-dispute agreement to submit a matter to arbitration or mediation would amount *per se* to a waiver of an exclusive jurisdiction clause in the initial agreement. Whether it does or not should depend on the intention of the parties and determined on the facts of each case.

Lis alibi pendens

10.56 *Forum non conveniens* is only one basis upon which proceedings in court may be stayed. Parties can also apply to stay proceedings based on contractual grounds (clauses or agreements relating to arbitration, mediation or jurisdiction) as well as *lis alibi pendens* (multiplicity of proceedings). *Lis alibi pendens* came up for consideration in two cases, *Lanna Resources Public Co Ltd v Tan Beng Phiau Dick* [2011] 1 SLR 543 ("*Lanna Resources*") and *RBS Coutts Bank Ltd v Brunner Hans-Peter* [2010] SGHC 342 ("*RBS Coutts Bank*").

10.57 For the ground of *lis alibi pendens* to be made out, the plaintiff must have commenced proceedings in more than one jurisdiction and the parties to the sets of proceedings, the issues being decided and the reliefs claimed must be the same. In *Lanna Resources*, the High Court held, affirming the decision of the assistant registrar, that this ground was not made out.

10.58 In *RBS Coutts Bank* (above, para 10.56), the defendant was the employee of the plaintiff. A plan was implemented by the RBS Group (of which the plaintiff was part of) whereby employees' bonuses would be paid out, as a deferred award, by way of RBS bonds to be issued in three separate instalments. The defendant received notification of his deferred award and the requirement that he remain with the plaintiff until the entire deferred award had vested. Leaving prematurely, unless for specific "good leaver" reasons (of which being made redundant was one), would mean that the as yet unvested instalments would be forfeited. The RBS Group also gave some of its employees the option of applying for a cash advance against the value of their deferred award. The defendant took up this opportunity and entered into a loan agreement which contained an exclusive jurisdiction clause in favour of Singapore and that should the deferred award lapse (as a result of the defendant leaving), the loan and accrued interest would become payable. As life would have it, the defendant's employment with the plaintiff was terminated and it was disputed whether this was lawful and what its effect was on the deferred award. The defendant commenced proceedings in Zurich arguing that he had effectively been made redundant and claimed payment of, *inter alia*, the deferred award instalments. The plaintiff commenced proceedings in Singapore claiming repayment of the loan. The defendant applied for a stay based on *lis alibi pendens*.

10.59 The learned assistant registrar held that while the proceedings in Zurich was not identical with the proceedings in Singapore, the two proceedings were inextricably intertwined as the determination of the Swiss action would affect whether the loan was repayable. The outcome of the Singapore proceedings would require a determination of whether

the deferred award had lapsed. This was precisely what was before the Swiss court and that there was a substantial risk that the Singapore courts and the Swiss courts could reach differing conclusions on this issue. As such, the court opined that this ground was made out.

10.60 A number of observations can be made about this case. First was the little matter of the exclusive jurisdiction clause in the loan agreement. In ordinary circumstances, where a defendant sought to stay proceedings in Singapore and there was an exclusive foreign jurisdiction clause at play, the court would not usually stay proceedings, as doing so would be assisting a breach of a contractual arrangement. It is, therefore, curious that the court not only granted a stay but also considered the existence of the exclusive forum jurisdiction clause in the stay analysis a neutral one.

10.61 The reason for this move becomes clearer, and this is the second observation, that the stay granted was a temporary one. Following the approach of the Court of Appeal in *Chan Chin Cheung* (above, para 10.32) and drawing guidance from Australian decisions on granting a limited stay based on multiplicity of proceedings (see list of factors at *RBS Coutts Bank* (above, para 10.56) at [26]), the learned assistant registrar opined that temporarily staying the Singapore proceedings and allowing the Swiss proceedings to proceed before the Singapore one would minimise the risk of conflicting outcomes and promote international comity. Unlike in cases of a permanent stay, this temporary stay does not amount to assisting the defendant in breaching the exclusive forum jurisdiction clause as the plaintiff could still continue with the present action in Singapore to determine its rights under the loan agreement after the resolution of the Swiss action.

Choice of Law

Injunction, on-demand bond, governing law, whether procedural matter or substantive right

10.62 It is trite that matters of procedure are governed by the *lex fori* whereas matters of substance are governed by the *lex causae*. The line between matters of substance and procedure are not always clear. *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329 explored this distinction *vis-à-vis* an injunction restraining the defendant from receiving money pursuant to a call on an advance payment on-demand bond. For our purposes, the facts can be simply stated. As part of a contract engaging the plaintiff to construct a power plant, the defendant made an advance payment to the plaintiff. The amount of this advance was secured by an on-demand bond, governed by English law, procured by the plaintiff in favour of the defendant to be

paid upon receipt of a written demand stating various conditions including the requirement for a notice of default to be issued to the plaintiff. Subsequently, a notice of default was issued and after that a written demand calling on the bond. The plaintiff obtained an *ex parte* injunction restraining the defendant from receiving money and the defendant applied to set the injunction aside.

10.63 The crux of the matter was whether Singapore law (as the *lex fori*) or English law (as the proper law of the bond) governed the injunction. This turned on whether the restraining of a demand on an on-demand bond was a procedural or substantive matter. This was significant because Singapore law diverged from English law in that unconscionability formed an extra ground for restraining a call on an on-demand bond. If it was a substantive matter, then English law governed and unconscionability was excluded as a ground for restraint.

10.64 The court considered the purpose of the bond and opined that the "essence of an on-demand bond was that the bank had to pay according to its guarantee, on demand, without proof or conditions" and that "any restraint on the right of the beneficiary to receive immediate payment upon a demand on the bond would effectively deprive him of such right to immediate payment": *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia* [2010] 2 SLR 329 at [30]. The court went on to conclude that this was a substantive right vested in the plaintiff and therefore governed by English law.

10.65 While this case provides a clear statement about the substantive nature of the restraint on an on-demand bond, since the court went on to find that no fraud or acts of unconscionability were perpetrated by the defendant, the decision to set aside the injunction would have remained.

Location of tort, governing law of tort

10.66 While choice of law rules are significant in assisting the court to identify the law to be applied at trial, they are also significant when helping the court identify, at the jurisdictional stage, what is the natural forum for the dispute. The rule of thumb is that foreign law is best applied by the courts of that jurisdiction. As part of the *forum non conveniens* analysis in *JIO Minerals FZC* (above, para 10.17), the court took into account choice of law considerations at stage 1 of the *forum non conveniens* analysis. The facts and issues of this case have been stated earlier (at paras 10.17–10.19) and we will proceed directly to the court's comments on choice of law.

10.67 On the contractual claim, the court considered the three-stage approach for determining the governing law of a contract. These stages

require first the identification of an express governing law (*ie*, whether the contract expressly states its governing law); in the absence of that, to look for an implied governing law (*ie*, whether the governing law can be inferred from the intentions of the parties); and, in the absence of that, identifying an objective law (*ie*, the law which has the closest and most real connection with the contract).

10.68 Since there was no explicit choice of law provided for in the investment agreement, the court examined the factual matrix to see if a governing law could be implied. Referring to various authorities, the court opined that it was possible to infer that the parties intended that a contract be governed by the same law that governs a closely related contract. In this case, the exclusive mining agreement was governed by the law of the UAE and was an integral part of the investment agreement. As such, the court concluded that the investment agreement was also governed by the law of the UAE.

10.69 On the law governing the restitutionary claim, the court opined that (applying *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [41]) the choice of law analysis for the restitutionary claim was the same as that for the contract claim because the former is consequential on the failure of the investment agreement. By this reasoning, the *lex causae* of the restitutionary claim was also the law of the UAE.

10.70 On the *lex causae* of the tort claim, after reiterating that the tort choice of law rule in Singapore is the double actionability rule, the court went on to consider where the tort had been committed (for the purposes of determining the *lex loci delicti*). Acknowledging the challenge of this task when the elements of a tort may have occurred in different jurisdictions, the court went on to apply the substance of the tort test and opined that the place where the tort occurred was Indonesia and, therefore, the *lex loci delicti* was Indonesian law.

10.71 The statutory claim is based on the Misrepresentation Act (above, para 10.19) and the court had to consider the operation of the general presumption against extraterritoriality of a statute in the context of conflict of laws. This required the determination of parliamentary intention with the choice of laws rules as tools to this end. The court noted that there were two overlapping aspects of the presumption (as set out in *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2009) at para 75.292).

10.72 On the first aspect, that the statutory provision only applies if the *lex causae* is the *lex fori*, since the *lex causae* of both the contractual and tortious claim was not Singapore law, the court opined that

parliament did not intend the Misrepresentation Act (above, para 10.19) to have extraterritorial effect in this case.

10.73 The second aspect of the presumption is that the statute is only intended to affect activities occurring within the territory of the forum or to activities abroad of nationals of the forum. This presumption can be displaced by clear parliamentary intention. Noting that the Misrepresentation Act is silent as to whether it has extraterritorial effect and that in contrast with the Prevention of Corruption Act or the Traditional Chinese Medicine Practitioners Act, the Misrepresentation Act is not intended to serve a regulatory or protective function, the court opined that the presumption against extraterritoriality had not been displaced.

Anti-suit injunctions

Duplication of proceedings, election, vexatious and oppressive conduct, unconscionability, comity, public policy, public interest

10.74 When parties are faced with multiple proceedings in Singapore and elsewhere, there are a number of strategic choices available to them. They can acquiesce and allow the proceedings to continue. They can seek to stem one proceeding or the other by challenging the jurisdiction of the court or to apply for a stay of proceedings in the relevant jurisdiction. They can also apply to the Singapore court to indirectly stem the foreign proceedings via an anti-suit injunction or by putting the plaintiff to an election. Many of these issues came up for consideration in *Beckkett Pte Ltd v Deutsche Bank AG* [2011] 1 SLR 524 (HC); [2011] 2 SLR 96 (CA).

10.75 This case with its various legal proceedings and application has taken much of the court's time and resources. This current incarnation through the High Court and the Court of Appeal deals with the respondent's application to restrain the appellant from continuing with its proceedings in Indonesia. The procedural history and factual matrix can be summarised thus. The appellant was the guarantor of a loan granted by the respondent and had pledged shares as security for the loan. Due to a default on the loan, the shares were sold and the appellant commenced proceedings seeking to set aside the sale of the shares or alternatively, claiming damages for wrongful undervalued sale. The respondent counterclaimed for the amount outstanding on the loan. Both claims were dismissed by the High Court and the parties appealed. Between the times when the appeal was heard and the Court of Appeal handed down its judgment, the appellant commenced proceedings in Indonesia relying on the same grounds as those in the Singapore action and claiming the same reliefs. The Indonesian claim

failed at the District Court and the matter was appealed to the Indonesian High Court. Throughout this time, the Indonesia action and its appeal was not disclosed to the Singapore Court of Appeal. After the Singapore Court of Appeal handed down its judgment, the respondent applied to the assistant registrar to restrain the appellant from continuing with its appeal to the Indonesian courts. Before the outcome of this application, the Indonesian High Court dismissed the appellant's appeal and the appellant appealed further to the Indonesian Supreme Court. The assistant registrar ordered the appellant to elect between proceeding with the Indonesian action and proceeding with the assessment of damages in the Singapore action. The appellant elected the former and the respondent successfully appealed to the High Court where Prakash J granted an anti-suit injunction restraining the appellant from proceeding further with the Indonesian action. The appellant then appealed to the Court of Appeal which was similarly dismissed.

10.76 A number of issues were decided by the assistant registrar that did not go on appeal to the High Court. The findings that were unchallenged was that there was a duplication of the actions in Singapore and Indonesia (which the High Court by way of *obiter* agreed with) and that the respondent did not act in any bad faith which may have precluded it from applying for an anti-suit injunction. In its appeal to the High Court, the respondent argued that the assistant registrar had erred in that he should have granted an anti-suit injunction instead of allowing the appellant the right of election.

10.77 By way of a preliminary comment, it is useful to note a practical point made by Judith Prakash J in the High Court judgment (*Beckkett Pte Ltd v Deutsche Bank AG* [2011] 1 SLR 524). It is curious that the respondent, when faced with proceedings in Indonesia, chose to challenge the jurisdiction of the Indonesian courts rather than apply for an anti-suit injunction, which it could have done in parallel. No satisfactory explanation for this was offered to the court. The High Court made it clear that the respondent's actions to challenge jurisdiction and later argue the merits of the case would in ordinary circumstances prejudice its application for an anti-suit injunction. That it did not do so in this case only meant that the appellant's actions in these circumstances were so unacceptable that it would not sit well with the court not to enjoin the appellant. From a practitioner's perspective then, when faced with multiple proceedings, one must not only be aware of the possible strategic choices available either singly or in tandem but of the timing of these choices.

10.78 This trilogy of judgments is of some interest with regard to what constitutes grounds for granting an anti-suit injunction and where considerations of justice, public policy and comity fit into this

determination. It is clear that vexatious and oppressive conduct constitute grounds for the granting of an anti-suit injunction and the assistant registrar had found that the appellant's actions in proceeding in Indonesia were vexatious and oppressive. At the High Court, Prakash J agreed that this ground was made out and went on to state in strong terms that any concurrent proceedings in different jurisdictions against the same defendant for the same reliefs arising out of the same cause of action always constituted vexatious and oppressive conduct. The learned judge went on to opine that what made this case "particularly egregious" was that the Indonesian proceedings were only started after the proceedings in Singapore had been concluded, appealed to the Court of Appeal and was simply awaiting judgment. Where the High Court parted ways with the assistant registrar was what the ends of justice required. The assistant registrar had opined that it would be unjust to grant an anti-suit injunction as it would deprive the appellant of its efforts expended in the Indonesian proceedings. Prakash J disagreed, opining that the stage of the Indonesian proceedings was not a legitimate benefit of the appellant's to be taken into consideration. The appellant's Indonesia action was an attempt to hedge its bets and that doing so was an abuse of the process of the Singapore courts. Giving the appellant the right of election was in effect a second bite at the cherry and "undermined the processes of the Singapore courts and the principle of finality of litigation": *Beckkett Pte Ltd v Deutsche Bank AG* [2011] 1 SLR 524 at [43].

10.79 As an anti-suit injunction indirectly affects the courts of a foreign jurisdiction, courts are sensitive to considerations of comity. In fact, considerations of comity take on increasing importance the more advanced the stage of the proceedings in question. However, it is clear from the High Court judgment that even at the advanced stage of the Indonesian proceedings, considerations of comity must be tempered with considerations of public policy, which in this case took precedence. The High Court states this strongly (*Beckkett Pte Ltd v Deutsche Bank AG* [2011] 1 SLR 524 at [46]):

> It cannot be acceptable to our public policy to permit a litigant to begin a duplicate law suit in a foreign jurisdiction just after being heard by the Court of Appeal. I would go so far as to say that it cannot be acceptable to permit the start of such a duplicate law suit after the completion of a full trial in Singapore, even though judgment may have been reserved and not yet delivered.

10.80 The High Court's approach and conclusions must surely be correct. On appeal, the Court of Appeal did not discuss whether the appellant's actions constituted vexatious or oppressive behaviour. While not explicitly approving of Prakash J's judgment, the Court of Appeal, adopting Lord Hobhouse's dicta in *Turner v Grovit* [2002] 1 WLR 107, opined that an abuse of the court's process constituted a species of

unconscionability and wrongful conduct that was grounds for granting an anti-suit injunction. This ground went beyond considerations of justice of the parties involved but involved the public interest in not having the court's process abused. In such a case, a court must act to prevent this abuse and the Court of Appeal did indeed act by dismissing the appeal amidst strong expressions of disapproval of the appellant's actions.

10.81 There are three noteworthy points arising out of the Court of Appeal's judgment. First is that the grounds of unconscionability for granting an anti-suit injunction is separate from that of vexatious and oppressive behaviour. In this respect, the High Court judgment seems to have juxtaposed both these grounds and the Court of Appeal's clarity in its judgment is to be welcomed.

10.82 Secondly, applications for anti-suit injunctions have typically revolved around considerations of justice as it related to the parties. The ground of unconscionability and the extreme nature of this case brought into play a "higher" level of considerations where the court and the public have interests.

10.83 Finally, the Court of Appeal had responded, out of deference to appellant's counsel, to the appellant's arguments. One of these arguments was that considerations of comity favoured allowing the appellant to continue with its Indonesian action. As the High Court had looked at considerations of comity when coming to its decision, it is interesting to note that the Court of Appeal turned the appellant's argument on its head. It opined that the appellant's actions put the Singapore and Indonesian courts in potential breach of comity and that the way to preserve comity was to grant anti-suit injunction before the Indonesia Supreme Court could deliver its judgment thereby obviating a situation where an inconsistent judgment might be delivered.

Foreign judgments

Finality of foreign judgment and exceptions to enforcement

10.84 Apart from registration (where provided for by the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) and Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed)), foreign judgments can be enforced at common law by a claim in the courts. The parameters and exceptions to this were explored in *Bellezza Club Japan Co Ltd v Matsumura Akihiko* [2010] 3 SLR 342 ("*Bellezza Club Japan Co Ltd*").

10.85 The plaintiff had obtained judgment against the defendant in the Tokyo District Court. This judgment was subsequently upheld by the Supreme Court of Japan. The plaintiff obtained partial satisfaction of the judgment sum in Japan and sought to enforce the remainder in Singapore by applying for a summary judgment based on that judgment. Summary judgment was granted and the defendant appealed.

10.86 There were a number of grounds of appeal. There are two that are relevant to the conflict of laws (the other two relating to issues, not of enforceability but to set-off). The first ground of appeal was that the Tokyo judgment was not final and conclusive as there were pending suits in Japan between the parties and if these were decided in the defendant's favour, it would have been possible to apply for a retrial of the initial action and have the Tokyo judgment set aside. Secondly, the defendant also argued that it was against the public policy of Singapore to enforce the Tokyo judgment because it was founded on transactions and guarantees that were in violation of the laws in Japan.

10.87 As a starting point, the court considered, as well settled, that a foreign judgment was enforceable at common law in Singapore as long as it was a money judgment that was final and conclusive as between the parties. The defendant's first ground of appeal was directed at this point. The court opined that the test of finality of a judgment is that it renders the issues between the parties *res judicata* and that it is no less final and conclusive even if the judgment may be altered or varied on appeal. The law by which finality is to be tested is the law of the jurisdiction from which the judgment originates.

10.88 The court considered expert evidence on this point and concluded that the Tokyo judgment was final and conclusive and that the possibility of a retrial was contingent upon the defendant's success in the pending suits and in fulfilling conditions set out in Art 338 of the Japanese Code of Civil Procedure. That the Tokyo judgment had already been enforced unconditionally in Japan supported this conclusion.

10.89 The court acknowledged that there were three exceptions to the general rule of enforcement. These were if the judgment was tainted by fraud, or if its enforcement would be contrary to public policy, or if the proceedings in which the judgment was obtained were contrary to natural justice. The defendant's second ground of appeal was directed at this point. The court disposed of this easily as the question of whether the guarantees, which formed the basis of the Tokyo judgment, were "against the public order, morals, or fair and equitable principles of law in Japan" had already been raised, argued and adjudicated in favour of the plaintiff by the Tokyo High Court. In the absence of fresh evidence of fraud (which could not have been uncovered with reasonable

diligence at the time of the trial), the Singapore would not reopen the merits of the case.

Issue estoppel

10.90 Apart from the ability to have a foreign judgment enforced in Singapore, the foreign judgment can also be used as a defence, either by way of a cause of action estoppels or issue estoppel. The latter came up for consideration in *Equatorial Marine Fuel Management Services Pte Ltd v The "Bunga Melati 5"* [2010] SGHC 193 ("*Equatorial Marine*"). This case involved a number of issues of which issue estoppel was only one, but this is what the writer will focus on for the purposes of this chapter.

10.91 The plaintiff had sued the defendant under contract, or alternatively unjust enrichment, to recover payments for bunkers supplied to vessels of the defendant. The plaintiff had earlier commenced a similar action in the United States District Court for the Central District of California and obtained a Rule B attachment order over one of the defendant's vessel, in the port of Long Beach, California. After failed negotiations, the defendant applied to vacate the attachment order and to strike out the action. The California District Court allowed the defendant's applications on the basis that the plaintiff had failed to establish a valid *prima facie* case against the defendant for breach of contract or unjust enrichment. An appeal to the United States Court of Appeals for the Ninth Circuit was also subsequently dismissed.

10.92 In the Singapore courts, the defendant's argument was that the issues of breach of contract and unjust enrichment had been considered and determined by the US courts and therefore raised an issue estoppel.

10.93 The learned judge first noted the conditions to establish an issue estoppel. These were (*Equatorial Marine* at [107]):

> (a) The judgment must be given by a foreign court of competent jurisdiction;
>
> (b) The judgment must be final and conclusive on the merits;
>
> (c) There must be identity of parties in two sets of proceedings;
>
> (d) There must be identity of subject matter, which means that the issue decided by the foreign court must be the same as that arising in the proceedings at hand.

10.94 The court went on to note that requirements (a), (c) and (d) were not in issue. The question that the court turned its mind to was whether the foreign judgment was final and conclusive on the merits.

10.95 Counsel for the defendant submitted that it was immaterial that the determinations of the foreign court were made in the interlocutory context of considering a jurisdictional challenge. The foreign court had considered evidence and full arguments and its determination should be taken as final and conclusive on the merits.

10.96 The court agreed that, for the purpose of raising an issue estoppel, it is possible for a ruling made at the interlocutory stage to qualify as being final and conclusive on the merits. However, it correctly cautioned (*Equatorial Marine* at [113]) that "it is critical to appreciate the precise nature of the determination made by the courts in such cases that has been regarded as final and conclusive."

10.97 The learned judge noted that the authorities before the court essentially dealt with questions of jurisdiction at this interlocutory stage and it was these determinations as to jurisdiction that were considered final and conclusive.

10.98 In contrast, the US proceedings dealt with the issues of the defendant's liability only for the purpose of deciding whether the attachment order should be vacated and "only to the extent that the plaintiff had failed to establish a prima facie case": *Equatorial Marine* at [115]. The court, therefore, concluded that there were no final conclusive findings sufficient to raise an issue estoppel.

Proof of foreign law

Presumption of similarity of laws

10.99 When the law governing a matter before the court is that of another jurisdiction, it is trite that the foreign law must be pleaded and proven. In the absence of this, the court is entitled to presume that the foreign law is the same as the laws of the forum. This presumption of similarity of laws is a rule of convenience but its applicability is not always a foregone conclusion. Instances in which it may not apply were considered in *JIO Minerals FZC* (above, para 10.17) and in *D'Oz International Pte Ltd v PSB Corp Pte Ltd* [2010] 3 SLR 267 ("*D'Oz International*").

10.100 The former case (the facts of which have been set in paras 10.17–10.19) involved an application for a stay based on *forum non conveniens*. One of the factors being considered was the law governing the tort claim. The court concluded that the *lex loci delicti* was Indonesian law. While noting that the presumption of similarity of laws would generally apply where foreign law had not been pleaded or proven, the court went on to note that even when this had not been

done, the court could take judicial notice that the laws of other jurisdiction is likely to be different.

10.101 As a parting observation, it is important to note that this matter was at the jurisdictional stage and that for the purposes of a *forum non conveniens* analysis, it was sufficient for a court to note that the laws of a foreign jurisdiction might be different. Presumably, when the matter goes to trial, it becomes more important to actually specify the content of the foreign law in question and where there is a failure to prove and plead this, the presumption should apply (subject to possible exceptions alluded to in *D'Oz International*: see discussion in paras 10.102–10.108).

10.102 The latter case involved a franchise agreement for the defendant's system for operating and running education and training centres. The plaintiff sought to establish and operate such a training centre in China and made a part payment of $120,000 for the franchise fee.

10.103 Due to the promulgation by China of a regulation which required parties to a "joint venture educational institution set-up" in China to be educational institutions, and following unsuccessful applications for an educational licence for the plaintiff, the plaintiff rescinded the contract on the grounds of *force majeure* and sought a refund of $120,000. The defendant took the position instead that there was no event of *force majeure*, terminated the contract and sought the payment of the balance of the franchise fee.

10.104 At the District Court, it was found that Chinese law governed the franchise agreement, and under Chinese law, the promulgation of the regulation constituted an event of *force majeure*. However, since the parties only entered into legal relations after the promulgation of the regulation, the plaintiff was not entitled to rescind the agreement on the grounds of *force majeure*. The plaintiff's claim was, therefore, dismissed.

10.105 Surprisingly, the defendant's counterclaim was also dismissed on the basis that the defendant did not adduce any evidence that it had any right to enforce the franchise agreement against the plaintiff under Chinese law.

10.106 Both parties cross-appealed to the High Court. The plaintiff's appeal was allowed. On the facts, Chan Sek Keong CJ held that legal relations between the parties had commenced before the promulgation of the regulation. Since the promulgation of the regulation constituted an event of *force majeure*, the plaintiff was entitled to rescind the contract and claim a refund.

10.107 The defendant's appeal was predicated on the High Court upholding the decision to dismiss the plaintiff's claim, *ie*, no event of *force majeure* existed. Since the High Court opined otherwise, the defendant's appeal automatically failed. However, by way of *obiter*, Chan CJ observed that the presumption of similarity of laws was a rule of convenience where the court would presume foreign law to be the same as the *lex fori* in any case where foreign law was not pleaded or not proved. However, exceptions to this rule existed and the question to be asked is (*D'Oz International* at [25]) "whether, in the circumstances of the case, it would be unjust to apply it against a party so as to make him liable on a claim subject to foreign law when the claimant had failed to prove what the foreign law was and how liability was established under that foreign law." Admitting that it would be arduous to exhaustively identify when a court would not assume that the unproved provisions of foreign law are identical with those of the *lex fori*, Chan CJ left the question for another day.

10.108 These observations must surely be correct and while it would have been nice to have a bit more guidance as to when a court would invoke the exception, the starting point is that the presumption of similarity of laws applies. As a matter of practice then, it is, therefore, important for the party who wishes to challenge this presumption to raise the exception to the attention of the court.