11. CONFLICT OF LAWS

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Introduction

11.1 For 2016, there are 13 cases that will be examined in this review.

11.2 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

11.3 It is trite that before a court can hear a matter, it must be seized of jurisdiction. Jurisdiction can be *in personam* or *in rem* and there are certain circumstances in which the jurisdiction of the court can be challenged.

Impact of application of foreign law

Foreign immovables

11.4 *L Manimuthu v L Shanmuganathan*[1] ("*L Manimuthu*") involved a long-running dispute between siblings over the assets of their deceased parents. The plaintiffs entered into a compromise agreement with the defendant in 2010 intended to be a comprehensive disposal of their father's assets in Singapore and India. Under the agreement, the defendant agreed to pay S$1.05m in instalments and to divide one-ninth of the sale proceeds of the Singapore property among the parties equally. In return, the defendant would acquire sole interest in the moneylending business. These obligations were not fulfilled. The plaintiffs sued for the S$1.05m under the compromise agreement as well as claiming, *inter alia*, that the defendant was a trustee of the father's estate in Singapore and had breached fiduciary duties in relation to running the father's moneylending business in Singapore. The

1 [2016] 5 SLR 719.

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defendant's position was that the compromise agreement was unenforceable as it was signed under duress or illegal. The defendant also counterclaimed under the compromise agreement (presumably in the alternative) for his share of his parents' estate in India.

11.5 This case revolves around the validity of the compromise agreement. As Edmund Leow JC noted:[2]

> The very purpose and effect of a compromise agreement is to extinguish all prior disputes, functioning as a complete settlement of differences between parties; a party reneging on the mutual compromise would be in breach of contract. The issues between parties, having been resolved by a compromise agreement, cannot be litigated so as to ensure commercial certainty and efficacy of the administration of justice …

He went on to note that a compromise agreement "can only be impugned on limited grounds by which normal contracts are usually challenged, such as illegality, fraud, duress and undue influence, *etc*".

11.6 Before the court could consider the issue of the validity of the compromise agreement, it had to deal with the jurisdictional challenges that the defendant had mounted which were that foreign law was applied in this case and that the Singapore court had no jurisdiction over issues of title to the foreign immovable properties. These were dealt with quickly by the court.

11.7 On the first challenge relating to the application of foreign law, just because a matter before the court would see the application of foreign law did not deprive it of jurisdiction. To argue this would be to go against the very basis of private international law. To be fair, perhaps this challenge was incorrectly framed and should better be described as an invitation to the court to decline to exercise jurisdiction because of *forum non conveniens* where the application of foreign law is a relevant connecting factor. This would be consistent with one of the defendant's other arguments that there were parallel proceedings occurring in India.

11.8 On the second challenge, the court accepted that under the rule in *The British South Africa Co v The Companhia de Moçambique*[3] (*viz*, *Moçambique* rule), the Singapore court had no jurisdiction over issues of title to the foreign immovable properties. However, the court elegantly noted that this did not preclude the court from making a judgment, *in personam*, by declaring the relative interests of the parties to the properties under the compromise agreement.

2 *L Manimuthu v L Shanmuganathan* [2016] 5 SLR 719 at [13].
3 [1893] AC 602.

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11.9 With the jurisdictional challenges out of the way, the matter was fairly easily disposed of by the court of which two aspects relating to conflict of laws can be noted. First, in order to determine the validity of the compromise agreement, one had to identify and then apply the governing law of the agreement. The court noted that the applicable test in determining the governing law for the dispute would be the three-stage test set out in *Overseas Union Insurance Ltd v Turegum Insurance Co*[4] ("*Overseas Union*") but did not have to go through the analysis as the defendant did not specifically plead the content of Indian law (presumably as a possible competing governing law to Singapore law). As such, and this is the second point to note, absent such proof of Indian law, the presumption of similarity operates and the court would assume that Indian law is the same as the law of the forum which would then be applied.

11.10 On this basis, the court held that the compromise agreement was validly entered into and that the vitiating factors of duress or illegality were not made out. As such, the court found in favour of the plaintiffs. With respect to the counterclaim, the court found in favour of the defendant and because of the lack of jurisdiction to make orders against foreign immovables, ordered, *in personam*, the plaintiffs to transfer to the defendant the outstanding assets owing to the defendant pursuant to the compromise agreement. For completeness, one should note that the parties have appealed to the Court of Appeal.

In rem – *Admiralty jurisdiction of the High Court* – Lex fori – *Consideration of foreign law*

11.11 *The Min Rui*[5] involved a claim for loss and damage to a consignment of steel structures shipped on board the Min Rui, a Hong Kong registered vessel, from China to Brazil. The *in rem* writ was issued against the defendant on 16 December 2014; the Min Rui (by this time renamed Qi Dong) was arrested in February 2015 and which was subsequently lifted after security was provided on behalf of the defendant. At the time of the issuance of the writ, although the defendant was still the registered owner on the Hong Kong Shipping Register, he had sold the Min Rui in October 2014. The argument, therefore, was that the arrest of the Min Rui was not proper as the defendant was no longer the beneficial owner of the Min Rui.

11.12 On this, Belinda Ang Saw Ean J held that at the time of the issuing of the writ, beneficial title to the ship had passed to the

4 [2001] 2 SLR(R) 285; see also *L Manimuthu v L Shanmuganathan* [2016] 5 SLR 719 at [8].

5 [2016] 5 SLR 667.

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purchaser and as such, the plaintiff could only proceed against the defendant *in personam*. In coming to this conclusion, the court applied the *lex fori*, that is, Singapore law to the determination of who held beneficial ownership. Under this, the ship's register served as a record upon which a *prima facie* inference of ownership was made. This inference could be rebutted by evidence of someone else being the beneficial owner.

11.13 While it is trite that matters of procedure are governed by the *lex fori*, it is not entirely clear the relevance of foreign law to determining jurisdictional matters. It was clear that the court held that matters of jurisdiction and, in this case, the question of beneficial ownership are to be determined by the *lex fori* and this is both sensible and defensible. However, the court left open the possibility of foreign law informing the court's decision.

11.14 While there is some practical sense to looking at relevant foreign laws in making a jurisdictional determination, this suggests that the reference to the *lex fori* is not only to the forum's domestic laws but also to its conflict of laws rules.[6] This is unusual because it goes against the usual understanding that reference to the *lex fori* governing matters of procedure and jurisdiction refers to the forum's domestic rules. This new formulation also opens the Pandora's box of *renvoi*, which perhaps is a box best left closed.

11.15 This formulation did not create problems in this case as the foreign laws which were possibly relevant, the law governing the sale of the ship (English law), and the law of the place of the register (Hong Kong) did not seem to have been pleaded separately. As such, Singapore law applied by default on the assumption that the foreign laws were similar to Singapore law. However, it would be interesting to speculate what would happen if either English or Hong Kong law had provided for a different conclusion.

11.16 This decision has been appealed and it would be helpful for the Court of Appeal to provide more, if not definitive, clarity on this.

Forum non conveniens

Stay of proceedings

11.17 A mainstay in international commercial litigation is an application for a stay of proceedings based on the doctrine of *forum*

6 *The Min Rui* [2016] 5 SLR 667 at [59].

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non conveniens. It is well-accepted that the doctrine of *forum non conveniens* consists of two stages, as established in *Spiliada Maritime Corp v Cansulex Ltd*[7] ("*Spiliada*"). The first stage seeks to see whether there exists a more appropriate forum than Singapore and this burden falls on the defendant who is applying for the stay. If it is shown that there is a more appropriate forum, then the burden shifts to the plaintiff in Stage 2 to show that the action should, nonetheless, not be stayed because it would deprive the plaintiff of a legitimate juridical or personal advantage. At the end of the day, the doctrine of *forum non conveniens* seeks to identify the best location to hear the matter in the interests of justice. The next two cases are a relatively straightforward application of this doctrine.

Lex causae – *Actions in equity*

Foreign public policy

11.18 *Southern Realty (Malaya) Sdn Bhd v Chen Jia Fu Darren*[8] ("*Southern Realty*") involved shares in a Singapore company (held by the first and third defendants) which was a special purpose vehicle for, in turn, holding shares in two Indonesian companies. The plaintiff had transferred shares in the Indonesian companies to the Singapore company and claimed, based on an oral agreement, that the defendant held the shares of the Indonesian companies in trust for the plaintiff. The defendants applied to stay the proceedings, submitting that Indonesia was the natural forum for the dispute.

11.19 After reviewing the law relating to stays of proceedings based on *forum non conveniens*, the court concluded that at Stage 1 of the test from *Spiliada*, the defendants had shown that Indonesia was a more appropriate forum. Apart from the usual connecting factors of convenience – expense, the location of the assets, and business dealings – the court considered three factors also persuasive. First, the court found that the governing law was Indonesian law. In doing so, the court reaffirmed the position established in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull*[9] that where equitable duties arise from a contractual obligation, the choice of law governing those duties should stem from the contract. Secondly, the defendants were arguing, as a defence, that the agreement to create a trust over the shares in the Singapore company was contrary to Indonesian public policy, which prohibited the holding of Indonesian company shares on behalf of another. As matters of foreign public policy are best left to the foreign courts in question, this

7 [1987] AC 460.
8 [2016] 5 SLR 1307.
9 [2007] 1 SLR(R) 377.

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strongly pointed in favour of Indonesia. Finally, the court noted that there were related proceedings in Indonesia and while they were not parallel proceedings, they would entail similar factual inquiries. To avoid contradictory findings of fact and in the interests of promoting international comity, a stay, at least pending the outcome of the Indonesian proceedings, was justifiable.

11.20 At Stage 2, the plaintiff argued that he would be unable to obtain a remedy in Indonesia as the courts might not recognise a trust over the shares in the Singapore company. This was disposed of easily by the court by pointing out that this perceived "injustice" stemmed from a concern, not from the Indonesia courts hearing the action, but by the application of Indonesian law to the matter. This did not constitute a sufficient basis to refuse a stay in the interests of justice at Stage 2.

11.21 As such, the court ordered a limited stay pending the outcome of the Indonesian proceedings. For completion, one should note that this matter is on appeal to the Court of Appeal.

Conspiracy

11.22 In *Trung Nguyen Group Corp v Trung Nguyen International Pte Ltd*[10] ("*Trung Nguyen*"), the plaintiff company (incorporated in Vietnam) was in the business of producing, processing, and distributing coffee. Its chairman married the second defendant and ran their business through the plaintiff. The first defendant was incorporated in Singapore, supplying the plaintiff's coffee products to international clients. In 2013, the marriage deteriorated and the second defendant was dismissed from her position in the plaintiff and she petitioned for divorce in Vietnam. Shortly after, the plaintiff commenced proceedings in Singapore claiming a fraudulent transfer of the plaintiff's shares in the first defendant to the second defendant, an inducement of breach of contract of the first defendant with the plaintiff and theft of the plaintiff's seals and certificates. The defendants applied for a stay on the basis that Vietnam was the more appropriate forum. The court applied the doctrine *forum non conveniens* and ordered a stay in favour of Vietnam.

11.23 While this was a fairly straightforward application of the *Spiliada* two-stage test, there are a number of points worthy of note. Firstly, a key factor in favour of Vietnam was the governing law. After noting that the main cause of action was the tort of conspiracy, the court opined that the place of the commission of the tort was Vietnam and that the place where the tort occurred is *prima facie* the natural forum

10 [2016] SGHC 256.

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for determining the claim. Secondly, the applicants had brought to the court's attention that there were pending proceedings in Vietnam. While the court did find some relevance in this submission in that some of the proceedings might lead to inconsistent findings of fact, the court noted that some of the proceedings might have begun for the purpose of bolstering the stay application and as such, did not give it much weight. Thirdly, at Stage 2 of the *Spiliada* test, the plaintiff had submitted that a stay would cause it injustice as it would not, *inter alia*, be able to obtain remedies in Vietnam that would impact upon the first defendant, a Singapore company. Although the court did not find this sufficient to satisfy the refusal of a stay, it was sufficiently persuaded to provide a limited stay pending the outcome of proceedings in Vietnam. This was to the court's mind, a happy medium, as it gave effect to the finding that Vietnam was the appropriate forum for the dispute and, at the same time, allowed for the plaintiff to seek recourse in Singapore at a later, more appropriate point.

Whether disadvantages are related to substantive claims or procedural mechanisms

Effect of the Singapore International Commercial Court

11.24 *Accent Delight International Ltd v Bouvier, Yves Charles Edgar*[11] ("*Accent Delight*") involved equitable and proprietary claims in relation to artwork. The defendants were involved in sourcing art pieces for one Dmitriy Rybolovlev who controlled the plaintiff companies. The plaintiff claimed that the first defendant had breached its fiduciary obligation as agent, by fraudulently inflating the prices of the artworks with the knowing assistance of the third defendant, and commenced proceedings in both Singapore and Monaco. Based on these parallel proceedings, the defendants applied to the court to compel the plaintiff to elect a forum and in the alternative, stay proceedings based on the doctrine of *forum non conveniens*.

11.25 The doctrine of forum election based on the parallel proceedings was a non-starter as the plaintiffs indicated that it would be willing to discontinue the actions in Monaco should the court find in their favour in relation to the stay application. That left the doctrine of *forum non conveniens*.

11.26 On this, the application of Stage 1 of the *Spiliada* test was unremarkable and involved a standard analysis of connecting factors. In the balance, the court opined that the defendants had not met the burden of showing that there was a more appropriate forum elsewhere.

11 [2016] 2 SLR 841.

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In fact, Stage 1 seemed to point more to Singapore as the natural forum. This itself was sufficient to dispose of the application. However, the court went on to consider Stage 2 and this was where there were some noteworthy observations.

11.27 The plaintiff's main point in relation to Stage 2 was that, if proceedings were stayed in favour of Switzerland, it would suffer injustice as Swiss law did not recognise equitable and proprietary claims. Therefore, it became crucial to determine whether this disadvantage was of the type that would satisfy the burden in Stage 2.

11.28 It is well-accepted that Stage 2 is really about a search for substantive justice and that, generally, corresponding advantages and disadvantages of each forum are ignored. For example, the fact that one forum has more advantageous discovery mechanisms over another is not sufficient. Similarly, the fact that one forum can provide a certain type of remedy not available in another is also not sufficient. And, therein lies the rub. Were the equitable or proprietary claims ones which were considered procedurally advantageous (and, therefore, not satisfying the burden in Stage 2) or sufficiently substantive (such that they did)?

11.29 On this, the court, after drawing guidance from relevant authorities, held that the equitable and proprietary claims were more appropriately classified as substantive law and not merely procedural remedies. These claims could not be easily re-characterised in a way that the Swiss courts would recognise. As such, the plaintiff would likely satisfy Stage 2 and successfully prevent a stay.

11.30 For completion, it is interesting to note that the court observed, at the end of the judgment, that the perceived advantages or disadvantages to the parties of Switzerland being the forum may be addressed by transferring the case to Singapore International Commercial Court ("SICC"). It is not clear what the court meant by this. Presumably, this might be a reference to some of the factors like familiarity with foreign law and legal systems, or fluency with the language in which the evidence might be in. How SICC fits into a *forum non conveniens* analysis, however, still remains to be seen.

Choice of law

11.31 In *Kioumji & Eslim Law Firm v Rotary Engineering Ltd*[12] ("*Kioumji & Eslim*"), the defendants entered into a contract with a Saudi Arabian company, for the design and construction of an integrated

12 [2016] SGHC 218.

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petroleum refinery and petrochemical complex in Saudi Arabia. The work was completed but full payment was not made. The defendants entered into a Proxy Agreement with the plaintiffs whereby the plaintiffs would negotiate a settlement on behalf of the defendants with the Saudi company and would receive a percentage of the proceeds as professional fees. In relation to the Proxy Agreement, there was some dispute about what work and how much work was done but what was undisputed was that the claim was settled and the professional fees were not paid.

11.32 In a separate but related conversation, the second plaintiff entered into a joint venture with the second and third defendants. Under this joint venture, the then second plaintiff was to have received an equity share in one of the subsidiaries owned by the first plaintiff. This did not happen.

11.33 The plaintiffs commenced proceedings in Singapore for breach of the Proxy Agreement and the Joint Venture Agreement ("JVA"), and for conspiracy between the defendants to cause the first defendant to breach the two agreements. The defendants applied to stay the proceedings in favour of Saudi Arabia.

11.34 After reviewing the law relating to *forum non conveniens*, the court held that the defendants did not discharge their burden in showing that Saudi Arabia was a more appropriate forum than Singapore. In his clear analysis, many of the factors were either neutral or pointed to Singapore. Two points may be noted about his analysis. Firstly, the court rightly pointed out that in light of modern technology, factors like location of witnesses and evidence were no longer of significance. If anything, location of the witnesses became more significant when considering whether they could be compelled to give evidence.

11.35 Secondly, while it is trite that the governing law is often a significant consideration in that foreign law is best interpreted by that country's courts, the court went on to say that the significance is sometimes lessened because courts are now in a better position to hear expert opinion on foreign law and make determinations. The court found that the JVA and the tort of conspiracy were governed by Singapore law and that the Proxy Agreement being expressly governed by Saudi law was insufficient to tip the scales.

11.36 This was sufficient to dispose of the matter but the court went on to consider some of the Stage-2 arguments raised by the plaintiffs had the matter been stayed. The plaintiffs submitted that the second plaintiff would not be able to enter Saudi Arabia and that they would not get a fair trial, and expressed concern about the weight the Saudi courts would give to the testimonies of female and non-Muslim witnesses. On

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the first two points, the court was unconvinced. On the third point, the court adopted a robust, and submitted to be correct, approach. It opined that parties, especially in commercial situations, who chose a particular governing law would be taken to have done so with knowledge of the requirements and rules of that system. Further, on the facts, the testimony to be given by the plaintiffs' only female witness was not on a central point; and, in respect of the contentious matters, both sides would have non-Muslim witnesses.

Partial stay

Relevance of enforceability of foreign court judgment

11.37 The parties in *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK*[13] ("*Humpuss Sea Transport*") were all part of the Humpuss group of companies. This case involved the liquidators of the plaintiff claiming against the defendants for repayment of two intercompany loans and to set aside two categories of transactions which the plaintiffs purportedly entered into as part of an alleged restructuring of the Humpuss Group. The first defendant was in a court-assisted debt-restructuring process in Indonesia which the liquidators did not participate in but which resulted in a Homologation Judgment that took into account the plaintiff's claims as creditor.

11.38 The defendants applied to strike out the plaintiff's claim as well as to stay proceedings. The effect of the Homologation Judgment will be explored later in this review. For the moment, we will focus on the court's comments as they relate to *forum non conveniens*. The court found that the defendants did not meet the burden of showing that Indonesia was the more appropriate forum. The court's analysis was fairly standard but there were two noteworthy comments. First, the defendants had highlighted, in support of a stay, that a foreign judgment will be challenging to enforce under Indonesian law. Presumably, this meant the Homologation Judgment would be challenging to enforce in Indonesia. The court correctly pointed out that this cannot be a factor in favour of staying the proceedings. The plaintiffs should have taken this into consideration and, nonetheless, chosen to sue in Singapore.

11.39 The second relates to the notion of a partial stay. A partial stay can occur where proceedings are stayed against one defendant but not another. Where the issues against the defendants are the same, this runs the risk of inconsistent judgments from different jurisdictions. A partial stay can also occur where there is a stay against the defendant in respect of one of the claims but not another. This may be appropriate where the

13 [2016] 5 SLR 1322.

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forum is the natural forum for deciding on one claim but not another. The court opined that where claims pursuant to a forum's statutory laws are brought alongside other claims, a partial stay may become particularly relevant. The possibility of a partial stay may also discourage litigants from tacking on claims with no obvious connection to the forum to claims which do. In this case, the court held that a partial stay was neither appropriate nor necessary.

Discretionary jurisdiction – Impact of SICC

11.40 Apart from stay applications, the approach in *Spiliada* is also relevant in O 11 applications to exercise the long-arm jurisdiction of the courts. The plaintiff must show, as one of the requirements, that Singapore is the natural forum, before the court will exercise its discretionary jurisdiction.

11.41 A recent institutional development in Singapore is the establishment of SICC. As SICC is a division of the High Court, the Rules of Court[14] ("RoC") provide for the possibility of transferring cases from the High Court to SICC. The question then arises as to what the effect of SICC is on the *forum non conveniens* analysis. It was mentioned earlier that the court in *Accent Delight* had cursorily noted that SICC may balance out some of the advantages and disadvantages, presumably in the *forum non conveniens* analysis, although it is not clear how exactly. This same matter came up for consideration in *IM Skaugen SE v MAN Diesel & Turbo SE*[15] ("*IM Skaugen*"), albeit in the context of an application of service out.

11.42 In this case, the plaintiffs were part of the Skaugen Group, which was in the business of providing marine transportation services in the oil and gas industry. The defendants were German manufacturers of marine diesel engines. The plaintiffs entered into contracts with Chinese shipbuilders, who in turn ordered engines from the defendants based on representations made by the defendants. The engines were delivered and installed and did not perform as represented. Attempts to settle the matter amicably broke down and the plaintiffs commenced proceedings via discretionary jurisdiction alleging misrepresentation, negligence, and fraud. The defendants applied to set aside the writ and, alternatively, for the matter to be stayed based on *forum non conveniens*.

11.43 The court had to consider, *inter alia*, what the impact of SICC had, if any, on the *forum conveniens* analysis. The problem can be stated

14 Cap 322, R 5, 2014 Rev Ed.
15 [2016] SGHCR 6.

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simply. Should the High Court decide the question of *forum conveniens* in a service-out application before deciding whether it is appropriate for transfer to SICC or is it something that can be done at the same time and, therefore, making SICC a relevant consideration in the *forum conveniens* analysis?

11.44 The court disagreed with Prof Yeo Tiong Min's view that the position should be the former stating that "[t]he application of the doctrine of *forum conveniens* must keep up with the times, not just in terms of technological advancement but also with respect to institutional advances in dispute resolution."[16]

11.45 As this is all relatively new, it is difficult to say with any kind of accuracy, which is the correct view. Conceptually speaking, it is important not to put the cart before the horse. Logically, in order for the High Court to be able to transfer jurisdiction to SICC, it must first be seized of jurisdiction. And, in an application for service out of the jurisdiction, it must first be shown that Singapore is the natural forum for the dispute and that must be done with assuming that the matter will be transferred to SICC. Of course, one could criticise this view of being overly pedantic. However, it is important not to gloss over what can be a very real problem. For example, assume, as it was found in this case, that the matter was governed by German law. *Ceteris paribus*, one could say that Germany was like the natural forum. Assume further that the argument advanced was that SICC has a German judge and that in today's modern world, proving foreign law is not as daunting as it used to be. As such, this was sufficient to tip the scales in favour of Singapore and leave to serve out was granted. However, there was no guarantee that the matter would be transferred. In which case, we are faced with a situation where the court in Singapore has to deal with foreign matters when they should be heard by a foreign court.

11.46 To be fair, the court in this case did say that "the presence of the SICC should affect the weight assigned to *Spiliada* factors in the context of the assumption of long-arm jurisdiction if and only if the case is transferred from the High Court to the SICC",[17] which means that "if the case is not transferred … then the court ought not to have allowed the presence of the SICC to influence the weight assigned to the *Spiliada* factors in the first place." However, this presents a chicken-and-egg dilemma. How does the court decide whether to take into account SICC if the decision to transfer has not been made? And, how can the decision to transfer be made if jurisdiction is not founded in the first place?

16 *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [28].
17 *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [25].

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11.47 It is a thorny problem. Perhaps the practical solution, and perhaps this is what the court was saying, is that the question of jurisdiction is best heard at the same time as that of transfer. Fine and well. However, it is important not to conflate the two questions. They are, at the end of the day, separate queries.

11.48 Before the court considered the question of *forum conveniens*, the court had concluded that the requirements for transfer had been met.[18] Interestingly, the court specifically stated "for the purposes of considering if Singapore is the *forum conveniens*, the requirements for transfer to the SICC are met." This meant that the court considered the question of transfer before the question of whether Singapore was the *forum conveniens* for the purpose of establishing jurisdiction.

11.49 The court went on to consider whether Singapore was the *forum conveniens* and interestingly did not seem to give SICC much weight in the analysis. In an involved analysis, it considered the factor of governing law, German law, as being significant and bolstered by other connecting factors, and concluded that Singapore was not the natural forum. To be fair, the court did indicate, regardless of whether it took into account SICC, the conclusion was the same.[19]

11.50 As a parting shot, the court opined at the end of the judgment that perhaps *Spiliada* may no longer be relevant in the age of SICC and drew on examples from the European Union ("EU") and Australia.[20] The court even went on to suggest that the High Court should follow the example of SICC and apply the "clearly inappropriate forum" test as opposed to the test from *Spiliada*. To this, caution is recommended when making such a significant shift. EU operates within a context that Singapore does not. While Australia has chosen to go its own way, it is the minority in the common law world. And, the fact that the RoC relating to SICC have gone the way of Australia may simply mean that there are special circumstances applying to SICC. The adage "if it ain't broke, don't fix it" springs to mind and in the present context, the *Spiliada* approach "ain't broke".

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18 *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [107]–[116].
19 *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [139].
20 *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [142]–[145].

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Jurisdiction clause

Stay of proceedings – Exclusive foreign jurisdiction clause – Strong cause – Cause of action not recognised

11.51 Apart from the grounds of *forum non conveniens*, a stay of proceedings can also be based on a jurisdiction clause. *SKP Pradiksi (North) Sdn Bhd v Trisuryo Garuda Nusa Pte Ltd*[21] involved parties that were investment holding companies in Malaysia and Singapore. The plaintiff Malaysian companies claimed that the defendant Singapore company held shares in two Indonesian companies on trust for them. The defendant applied for stay proceedings on the basis of the jurisdiction clauses in the shares sale–purchase deeds in favour of Indonesia and, in the alternative, on the basis of *forum non conveniens*.

11.52 In resolving this matter, the court adopted a two-step process. The first was to identify whether the jurisdiction clauses were exclusive. On this, the court adopted the defendant's expert opinion (and in the absence of contrary evidence from the plaintiff) that under Indonesian law, the clause was indeed exclusive. The nature of a jurisdiction clause is determined by the proper law of the contract in which the clause is contained. On the assumption that Indonesia law either expressly or impliedly governed the purchase deeds, the court's approach must be correct.

11.53 The second stage was then to determine the impact on the jurisdiction clause. On this, the law of the forum applied and the court applied the strong-cause test to determine whether to stay the proceedings. The plaintiffs' main argument against the stay was that the concept of trusts was not fully recognised under Indonesian law and if the action were stayed, then they would be deprived of justice. The court was convinced by this and ordered a stay.

11.54 For completion, it is useful to note three matters. Firstly, the court went on to consider the stay application based on *forum non conveniens*. There is nothing remarkable to the analysis and the court found that the defendant had not discharged his burden at Stage 1 in showing that there was a more appropriate forum elsewhere. Secondly, this case is related to *Southern Realty*, which was discussed earlier.[22] Finally, leave was given by the court for the defendant to appeal on the basis that the defendant had argued that the stay should be granted so that Singapore did not circumvent the laws of a friendly

21 [2016] SGHC 200.

22 See para 11.18 above.

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foreign state and that it would be useful for the Court of Appeal to give some clarity on how a Singapore court should view trust arrangements involving trust property situated in a foreign jurisdiction which either does not recognise trusts or which expressly prohibits trusts.

Choice of law

11.55 Choice of law considerations are relevant to a conflict-of-laws analysis in two ways. The first is by impacting upon jurisdictional questions like an application for a stay where the *lex causae* may be a relevant factor in the analysis. Another example is where the *lex causae* can define the cause of action in order for our jurisdictional provisions to bite. The second and more direct way of choice of law intersects with the conflict-of-laws analysis which is, of course, in determining the relevant foreign law to determine the issue at hand.

11.56 There are a number of cases, some of which have already been explored earlier, that fall into the first category.

Conspiracy

11.57 The facts of *Trung Nguyen* have been traversed earlier.[23] That case involved a claim of conspiracy to breach a supply agreement. The plaintiff had submitted that the place of the tort was Singapore and that Singapore law should govern the issue. The court applied the test from *EFT Holdings Inc v Marinteknik Shipbuilders (S) Pte Ltd*[24] to determine the place of tort for a claim in conspiracy. Taking into account a number of connecting factors, the court opined that the place of the tort was Vietnam and along with the other connecting factors in the *forum non conveniens* analysis, granted a partial stay in favour of Vietnam.

Contract and tort

11.58 In *Kioumji & Eslim*, the plaintiffs sued for breach of a Proxy Agreement and a JVA, and for conspiracy between the defendants to cause the first defendant to breach the two agreements.

11.59 In determining the proper law of a contract, the applicable test in determining the governing law for the dispute will be the three-stage test set out in *Overseas Union* and affirmed by the Court of Appeal in *Pacific Recreation Pte Ltd v S Y Technology Inc*.[25] The court will first look

23 See para 11.22 above.
24 [2013] 1 SLR 1254.
25 [2008] 2 SLR(R) 491.

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to the parties' express choice, then an implied one and, failing which, look for the law which has the most real and closest connection based on objective grounds.

11.60 In terms of the Proxy Agreement, the proper law was clear in that it provided for the contract to be governed by the laws of the Kingdom of Saudi Arabia. Barring any argument about validity or other vitiating factors, an express choice is usually a final indicator of the governing law of the contract.

11.61 In terms of the JVA, there was dispute about the existence of the agreement. However, assuming the agreement did exist, there was no express agreement as to the governing law. The court opined that the parties did not impliedly select a governing law and based on objective circumstances, held that the JVA had the closest and most real connection to Singapore law.

11.62 In terms of the tort of conspiracy, the court reiterated that the place where a tort occurred is, *prima facie*, the natural forum for determining the claim. Applying the factors from *EFT Holdings Inc v Marinteknik Shipbuilders (S) Pte Ltd*,[26] the court opined that the tort occurred in Singapore and would be governed by Singapore law.

11.63 Based on these findings along with the other factors, the court held that the Stage-1 burden to show there was a more appropriate forum elsewhere had not been discharged and the application for a stay was denied.

Discretionary jurisdiction – Tort – Misrepresentation – Double actionability

11.64 *IM Skaugen*[27] was a case where choice of law came up for consideration in the context of an application of service out. The case involved claims of misrepresentation and the court had to determine whether Singapore was the natural forum in order to grant leave for service out under O 11 rr 1(*f*) and 1(*p*).

11.65 One of the factors considered was the *lex causae* of the claim, which required a determination of where the tort occurred, which in turn relied upon the "substance" test that seeks to answer the question: "where in substance did the cause of action arise"? If the substance test points to the forum, then the *lex fori* will apply. If the test points

26 [2014] 1 SLR 860.
27 See para 11.41 above.

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elsewhere, then the double actionability rule from *Boys v Chaplin*[28] will apply unless the court chooses to apply the "flexible exception" which operates when "the *lex fori* and/or *lex loci delicti* are purely fortuitous and the application of either or both would result in injustice and unfairness."[29]

11.66 Applying the substance test, the court concluded that the place where the tort occurred was Germany and, therefore, German law was the *lex loci delicti*. The court did not think that the "flexible exception" applied and as such, held that the double-actionability rule applied.

11.67 Having determined this, the court then had to consider whether, for the purposes of O 11 r 1, a tort had occurred as measured by the *lex fori* and the *lex loci delicti*. The court held that it had and even though the tort was not identical in both the relevant jurisdictions, as long as the claim attracted civil liability under the law of the foreign country, it was actionable in the *lex fori*. On this analysis, the heads of jurisdiction were satisfied even though, at the end of the day, the court set aside the writs as Singapore was not the natural forum.

Contract – Validity of agreement

11.68 The one case that fell into the latter category of choice of law determining the *lex causae* is *L Manimuthu*. This involved the parties entering into a compromise agreement intended to be a comprehensive disposal of their father's assets in Singapore and India. The defendant had challenged the validity of the agreement alleging duress and illegality.

11.69 The court correctly identified that these matters were to be governed by the proper law of the contract. The proper law was to be determined in accordance with the three-stage test.[30] Unfortunately, the court did not go on to apply the three-stage test as the defendant had failed to plead Indian law. This meant that even if the court were to find that the proper law was Indian law, because of the lack of proof of foreign law, the court would assume Indian law was identical to Singapore law and apply Singapore law. On this basis, the courts found that the defences of illegality and duress were not made out and held the compromise agreement valid.

28 [1971] AC 356.
29 *IM Skaugen SE v MAN Diesel & Turbo SE* [2016] SGHCR 6 at [47].
30 See para 11.59 above.

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Contract – Proper law– Whether applicable to tort

Whether reference to *lex causae* includes reference to a jurisdiction's private international law rules – *Renvoi*

11.70 There were two cases that focused on choice of law. The first was *Ong Ghee Soon Kevin v Ho Yong Chong*.[31] In this case, the Malaysian plaintiff alleged that he was induced to buy shares in Amaru Inc through misrepresentations and negligent misstatements made by the Singaporean defendant who was an employee of the Singapore branch of Crédit Agricole (Suisse) SA. The matter was actually resolved by the court on the basis that factually, a misrepresentation or misstatement had not actually been made. Nonetheless, the court did go on to make some observations about choice of law that are noteworthy, albeit *obiter*.

11.71 First, the court had mentioned, in passing, the substance test[32] because the defendant had argued, *inter alia*, that the tort occurred in Switzerland and was, therefore, governed by Swiss law. The court noted with approval the decision of the court below, which found that the tort occurred in Singapore as it was the place where the representations were received and acted upon. This would, therefore, mean that the double-actionability rule would apply in that the matter claimed would have to be actionable in Switzerland (as the *lex loci delicti*) and Singapore (as the *lex fori*). On this, the defendant attempted to argue that the cause of action, while certainly actionable in Singapore was not actionable in Switzerland. The court made short work of this by correctly finding that as long as the claim led to some kind of civil liability under Swiss law, it was sufficient to satisfy the double-actionability requirement.

11.72 Secondly, one of the arguments made by the defendant was that the contract between the plaintiff and the bank extended to him and that the actions against the defendant personally were, therefore, covered by Swiss law (which was the expressed proper law of the contract). He was, therefore, entitled to a defence under Swiss law, *which extended to tortious actions*. On this point, the court made short work of this, holding that the contract did not extend to the defendant. However, the court went on to consider whether it was possible for the proper law of contract to govern tortious actions arising out of that contract. The court opined that, interpretively, the relevant clause did not exclude non-contractual disputes from the operation of the clause. The court went on to acknowledge that in Singapore, there is scant authority on this matter and it remains an open question although there is persuasive academic and extra-judicial writing in favour of this position.

31 [2017] 3 SLR 711.
32 See para 11.65 above.

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11.73 Finally, having found that Swiss law was the proper law of the contract, the court considered the question of whether, when Singapore rules of private international law refer to a foreign law, it refers only to the domestic rules of that jurisdiction or includes its private international law rules as well. This, of course, refers to the "R-Word" which was also mentioned by the same judge in *The Min Rui*.[33] Much ink has been wasted on the thorny problem of *renvoi* and one which should not be expected to be resolved anytime soon, least of all in this review. The court in the present case mentions three possible approaches. The first is to adopt a blanket policy of only referring to one or the other. The second is to decide on a position based on the category of law engaged. The third is to decide on a case-to-case basis based on policy considerations. The court did not come to any conclusion on this save that it is generally accepted that references to foreign law as the proper law of a contract refer to that jurisdiction's domestic rules and that this seems to indicate that the English common law adopt the second approach.[34]

11.74 While the court is correct on the first premise, that is, that in contractual matters, reference to a foreign proper law refers to that jurisdiction's domestic rules, it is not clear that the second approach is the approach of the English common law. Another way to view this is that many jurisdictions do not have a unified view or a consistent intra-jurisdictional view (or, indeed, a view at all) save that in contractual matters, reference is only made to that jurisdiction's domestic rules. There seems to be some attraction to extending this view to all categories of private international law. After all, there is value to having certainty and finality when a Singapore court refers to a foreign jurisdiction's laws without having to worry that that jurisdiction may then point to another jurisdiction's laws, which may then shunt it on further, leading to possible endless loops and increased time and costs arising from the necessity of proving the laws of numerous jurisdictions. While the "no *renvoi*" approach is not a perfect one, it is a practical one presenting the least number of difficulties.

11.75 By way of closing, it is important to reiterate that these observations by the court are *obiter* and do not have to do with the disposition of the case. Perhaps the Court of Appeal will one day provide clarity on some of these issues when an appropriate case appears.

33 See para 11.11 above.

34 *Ong Ghee Soon Kevin v Ho Yong Chong* [2017] 3 SLR 711 at [106].

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Corporations – Corporate succession

11.76 The second case, *JX Holdings Inc v Singapore Airlines Ltd*,[35] involved an application for the rectification of the defendant's register to reflect the first plaintiff as legal owner to certain shares. Essentially, the shares in the defendant were initially owned by a Japanese company which ceased to exist after various corporate restructuring exercises. Its assets and liabilities were vested in the second plaintiff, who in turn underwent an "absorption-type split" under Japanese law, under which part of its assets and liabilities (including the Shares) were transferred to the first plaintiff. There was no dispute by the defendant that the shares had passed to the second plaintiff by operation of law but the defendant did dispute that this had also occurred with the first plaintiff.

11.77 The court correctly identified this matter as one relating to the corporation as a legal person and its attendant consequences, and that this was a matter that was governed by the law of the place in which it was incorporated. This pointed to Japan. The court opined that:[36]

> [W]here the law of incorporation recognises a succession of corporate personality from one corporate entity to another, then the law of the forum will recognise not just the changed status of the company, but also the fact that the successor has inherited the rights and liabilities of its predecessor …

11.78 After reviewing the authorities, the court held that in an absorption-type split under Japanese law, the change in ownership in the shares from the second to the first plaintiff was by way of succession and not transfer. Therefore, the first plaintiff was the legal owner of the shares.

Foreign judgments

11.79 In international commercial litigation, obtaining a judgment is only one step in the game. What is often more important than obtaining a judgment is the enforcement of that judgment. The Reciprocal Enforcement of Commonwealth Judgments Act[37] ("RECJA") and Reciprocal Enforcement of Foreign Judgments Act[38] ("REFJA") provide for the registration of judgments from certain prescribed jurisdictions. Once registered in Singapore, that judgment can be enforced accordingly. Where a judgment comes from a jurisdiction that is not

35 [2016] 5 SLR 988.
36 *JX Holdings Inc v Singapore Airlines Ltd* [2016] 5 SLR 988 at [22].
37 Cap 264, 1985 Rev Ed.
38 Cap 265, 2001 Rev Ed.

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covered by the RECJA or REFJA, then a judgement debtor will have to enforce that judgment at common law initiating a claim in the Singapore courts.

Recognition and enforcement

Common law enforcement – Nature of judgment – Res judicata

11.80 In order for a foreign judgment to be recognised and enforced in Singapore, it must meet certain characteristics. The case of *Humpuss Sea Transport*[39] considered these characteristics. This case involved the liquidators of the plaintiff claiming against the defendants for repayment of two intercompany loans and to set aside two categories of transactions which the plaintiffs purportedly entered into as part of an alleged restructuring of the Humpuss Group. The first defendant was in a court-assisted debt-restructuring process in Indonesia which the liquidators did not participate in but which resulted in a Homologation Judgement that took into account the plaintiff's claims as creditor. The defendant argued that the present claims were an abuse of process as *res judicata* applied.

11.81 On this point, the court opined that recognition of a foreign judgment was a necessary prerequisite for it to be *res judicata*. This required it to be a final and conclusive decision of a court that had jurisdiction to grant that judgment and that no defence to its recognition existed. Applying the law to the Homologation Judgment, the court held that it was not final and conclusive as it could be varied to include a debt that had been omitted or if the admitted debts were fraudulent. The court went on to further opine that even if the Homologation Judgment were final and conclusive, the issuing court did not possess international jurisdiction (obtainable via presence or submission) over the plaintiffs such that the judgment would be *res judicata* over their claims. As such, the application to strike out the plaintiff's claims were dismissed.

Judicial settlements – Mediation agreements

11.82 The number of legal systems and the plethora of processes within often mean that we will encounter a creature that does not quite fit with the forum's conception of a judgment. *Shi Wen Yue v Shi Minjiu*[40] was such a case. The facts are relatively straightforward. The first defendant borrowed money from the plaintiff, which was not

39 See para 11.37 above.
40 [2016] SGHCR 8.

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repaid. The plaintiff sued in the Zhou Shan City District People's Court and obtained a judgment in his favour. The defendant appealed against the judgment but the appeal did not proceed. Instead, the parties entered into a mediation agreement. The Zhou Shan Intermediate Court recorded the terms in what the Singapore court refers to as a Mediation Paper. The defendant was recalcitrant as ever and the plaintiff initiated enforcement proceedings in China as well as suing in Singapore for summary judgment on the basis that the Mediation Paper was a foreign judgment.

11.83 The question before the Singapore court was whether the Mediation Paper was a judgment and the court began by acknowledging "the law of the foreign country where an official act occurs which determines whether that official act constitutes a final and conclusive judgment".[41] At the same time, the court issued a timely reminder that "when adjudicating upon a conflict of laws issue, a common law court must be conscious of the unexamined assumptions and biases of the common law."[42]

11.84 Turning to this question then, the court noted that the Mediation Paper seemed functionally equivalent to a common law consent judgment in that it was capable of execution without further order. However, upon closer examination, the court opined that the Mediation Paper was more akin to a judicial settlement rather than a consent judgment. Yet, having made this conclusion, the court went on to consider whether the Mediation Paper was, nonetheless, enforceable outside of China.

11.85 After traversing various provisions of The People's Republic of China Civil Procedure Law, the court concluded that the Mediation Paper was enforceable *qua* agreement outside of China and specifically in this case, in a common law jurisdiction. As such, the court granted summary judgment in favour of the plaintiffs.

11.86 It is not entirely clear whether the court had granted summary judgment by recognising and enforcing the Mediation Paper (thereby treating it as similar to a foreign judgment, that is, it is final and conclusive, the foreign court possessed international jurisdiction, and that there were no applicable defences) or because a clear cause of action had been made out and there was no real defence to the claim (thereby treating the Mediation Paper as evidencing the agreement to pay). The writer suspects it is the former and if this is so, then apart from the lexical implications (this area being more accurately called "recognition

41 *Shi Wen Yue v Shi Minjiu* [2016] SGHCR 8 at [6].
42 *Shi Wen Yue v Shi Minjiu* [2016] SGHCR 8 at [15].

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and enforcement of foreign determinations"), will all the requirements of recognition and enforcement still apply or may some modification be necessary to accommodate the myriad of processes that exist in the various legal systems? In this case, it would appear that the Mediation Paper met all the requirements.

11.87 For the sake of completion, it is useful to note that the defendants have obtained permission to appeal and it is hoped that the appeal can shed further clarity on this.

Foreign divorce judgment – Whether recognition is against public policy – Extended doctrine of res judicata

11.88 The final case we will look at is an appeal from a case reviewed last year. *Yap Chai Ling v Hou Wa Yi*[43] involved a divorce judgment of a Shanghai court and the question arose as to whether recognition of that judgment would be contrary to Singapore public policy. At the time of the marriage in Shanghai in 1991, the man had only obtained a decree *nisi* in respect of his first marriage. As such, he was still married. Realising this on his return to Singapore, the husband then obtained a decree absolute. The marriage was then registered in Singapore. The marriage eventually broke down and the husband commenced divorce proceedings in Shanghai, which was contested by the wife on the basis that the initial Shanghai marriage was void as the husband did not have capacity to marry. The Shanghai court held that while the Shanghai marriage was invalid at its inception, it was validated from the date of the grant of the decree absolute in respect of the husband's first marriage.

11.89 Subsequently, the wife commenced divorce proceedings in Singapore. A decree *nisi* was ordered and ancillary orders for the division of the Singapore assets eventually made. The wife appealed against these ancillary orders and while the appeal was pending, the husband passed away, leaving his estate to the appellants. The appellants then made several applications over a period of time which culminated in an attempt to set aside the Singapore decree *nisi* and its ancillary orders. The appellants argued, *inter alia*, that the decree *nisi* was a nullity because the marriage had already been dissolved by the Shanghai courts. The district judge refused this application and the appeal to the High Court was similarly dismissed. They held that it would be contrary to public policy to recognise the Shanghai divorce judgment because the Shanghai court had ruled that even though the initial marriage was void as a result of the husband's incapacity, the "irregularity" was resolved once the husband obtained a decree absolute for the first marriage. The

43 [2016] 4 SLR 581.

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Shanghai court was, therefore, seen to be regularising a bigamous union and this was contrary to the public policy of Singapore. As such, the Shanghai divorce judgment was ineffective and that the Singapore decree *nisi* for the present marriage was still valid.

11.90 At the Court of Appeal, the court highlighted the importance of balancing off the application of public policy considerations against the consideration of comity of nations when dealing with a cross-jurisdictional matter. As a starting point, the court asked the logically prior question as to whether there was a valid marriage between the couple at the time the divorce judgment was rendered. On this, the court concluded in the affirmative. There was also no dispute that a Shanghai divorce judgment would be effective to bring an end to the marriage. The court then went on to note that the public policy of both Singapore and China were the same in relation to marriage, that is, both regimes recognise only monogamous marriages. Just because an initial technically bigamous marriage was subsequently rendered legally valid under Chinese law, did not bring the public policies of Singapore and China into conflict. Recognising the Shanghai divorce judgment would only require the Singapore courts to recognise that there was a subsisting marriage between the parties at the time of the divorce judgment and did not amount to an acknowledgment that bigamous marriages may be regularised. As such, the Court of Appeal disagreed with the High Court and held that recognising the Shanghai divorce judgment was not against public policy.

11.91 However, this did not dispose of the matter. The court went on to consider why the Shanghai divorce judgment had not been brought up during the Singapore divorce proceedings, which led to the grant of the decree *nisi*. During the Singapore proceeding, the district judge had questioned the parties as to the effect of the Shanghai divorce judgment. It transpired that the husband had filed two applications for a declaration that the Shanghai divorce judgment had dissolved the marriage and had withdrawn both applications. As such, the court held that the doctrine of extended *res judicata* now prevented the appellants (as representatives of the deceased husband) from arguing that the grant of the decree *nisi* was a nullity.

11.92 The appeal was, therefore, dismissed.

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