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11. CONFLICT OF LAWS

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Introduction

11.1 For 2018, there are nine cases that will be examined in this review. As in previous years, it is useful to note that conflict of laws cases sometimes relate to other areas of law. In these situations, this review will only examine those parts of the case that are relevant to the field of conflict of laws.

11.2 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*. *In personam* jurisdiction can be established via presence, submission and the court's long-arm discretionary jurisdiction under O 11 r 1 of the Rules of Court[1] ("ROC"). Implicit in all of these is that service of papers on the defendant is required.

11.3 On discretionary jurisdiction, there are three requirements before leave to serve out of jurisdiction is granted. First, the plaintiff's claim must come within one of the heads of claim in O 11 r 1 of ROC. Second, the plaintiff's claim must have a sufficient degree of merit. Third, Singapore must be the *forum conveniens* for the dispute. Furthermore, as the application for leave for service out is usually done *ex parte*, the plaintiff is required to make full and frank disclosure of all the material facts.[2] In cases where leave is granted, parties can challenge the existence of the court's jurisdiction and apply to set aside the writ.

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1 Cap 322, R 5, 2014 Rev Ed.

2 *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [28], *per* Sundaresh Menon CJ.

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

Jurisdiction – Discretionary jurisdiction – Foreign defendant – Mareva injunctions

11.5 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun*[3] illustrates the dynamic between discretionary jurisdiction and *forum conveniens* nicely, and also in the context of an application for a Mareva injunction. In this case, the defendant, Muhammad Jimmy Goh Mashun ("Jimmy"), a citizen and resident of Indonesia, was an employee and director of the plaintiff, PT Gunung Madu Plantations ("PT"), a Jakarta-domiciled company. PT commenced proceedings in Singapore against Jimmy for various breaches of employment and director's duties and applied for leave to serve out of the jurisdiction, which was granted. Jimmy was purportedly served, and a default judgment issued, upon which PT obtained garnishee orders. On learning of these orders, Jimmy applied for, *inter alia*, an order to set aside the writ and service. PT in turn applied for a Mareva injunction against Jimmy in respect of his assets in Singapore.[4] The court held that as Singapore was not the natural forum, it did not have *in personam* jurisdiction. As such, it set aside service and denied PT's application for a Mareva injunction.

11.6 The court made a number of helpful comments. First, it reiterated the position that it was insufficient to found discretionary jurisdiction simply because one could meet one of the heads of jurisdiction under O 11 r 1. In this case, PT relied on O 11 r 1(*a*) which permitted service out of the jurisdiction if relief is sought against a person who has property in Singapore. This by itself was insufficient. A plaintiff also needed to show that the claim had a sufficient degree of merit and that Singapore was the *forum conveniens*.[5] On the facts,

3 [2018] 4 SLR 1420 at [64].

4 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [13].

5 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [29] and [33].

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Singapore had nothing to do with the causes of action. As such, the orders for service out were wrongly made and had to be set aside.[6]

11.7 Second, the court also reiterated that to successfully rely on O 11 r 1(*b*) of the ROC for service out of jurisdiction, the injunction must be part of the substantive relief of the plaintiff's cause of action against the defendant. By itself, an application for an interlocutory injunction will not suffice as it is not a cause of action; it cannot stand on its own but is dependent on a pre-existing cause of action.[7] Since PT did not apply for a Mareva injunction as part of its substantive relief, they would not have been able to rely on r 1(*b*).[8]

11.8 Third, the court highlighted that in order for a Singapore court to grant a Mareva injunction, it must not only satisfy the requirements of a Mareva injunction but also keep in mind the requirement of *forum conveniens*, especially when the application for the Mareva injunction is not combined with an application for service out of jurisdiction.[9]

11.9 Fourth, PT had argued that s 4(10) of the Civil Law Act[10] ("CLA") read with s 16(2) of the Supreme Court of Judicature Act[11] ("SCJA") gave the court jurisdiction and power to grant a Mareva injunction against a foreign defendant in aid of foreign court proceedings.[12] In response, the court clarified that when considering whether to grant a Mareva injunction, there were two questions. The first was whether the court had *in personam* jurisdiction over the defendant. If this was answered in the affirmative, then the second question was whether the court had the power to grant the Mareva injunction. Section 4(10) of the CLA dealt with the second question. By itself, s 4(10) of the CLA did not confer jurisdiction on the court.[13] This must, of course, be correct and since the court had decided that Singapore was *forum non conveniens*, the second question need not be considered. As such, the court left the question of whether a Singapore

6 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [31] and [38].
7 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [35].
8 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [36].
9 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [60]–[63].
10 Cap 43, 1999 Rev Ed.
11 Cap 322, 2007 Rev Ed.
12 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [41].
13 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [49]–[50].

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court could issue a Mareva injunction in support of foreign proceedings unanswered.[14]

11.10 Fifth, the court noted that there would be instances where an urgent application for a Mareva injunction might be made before the originating process is served on the defendant and acknowledged that this might give rise to the argument that the court did not have power to grant a Mareva injunction before service had been made. The court opted not to come to a definite conclusion but indicated that it thought that the court would have jurisdiction if the facts supported the assumption that service of the originating process would eventually be effected.[15]

11.11 From the above, it is clear that service is needed, or the assumption that service would be effected, before a Mareva injunction can be granted. This suggests that, moving forward, applicants seeking a Mareva injunction *before* service of the originating process should, in the supporting affidavit for the Mareva injunction, undertake to seek leave for service of the originating process out of jurisdiction or risk having their application dismissed for want of *in personam* jurisdiction.

11.12 As a final point and for completion, it is curious to note that the court made a passing observation that primary or secondary legislation might be amended in the future to remove the requirement for service to found jurisdiction or for Singapore to be *forum conveniens* for leave to serve out of the jurisdiction.[16] It is unclear what this might mean except that such an occurrence might be possible. However, taking into account Sundaresh Menon JC's (as he then was) observations in *Lee Hsien Loong v Review Publishing Co Ltd*[17] of the need for stringent satisfaction of the requirements before a court will hold that it has *in personam* jurisdiction over foreign defendants,[18] it is submitted that the probability of this occurrence is low.

14 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [53]. However, see *China Medical Technologies, Inc v Wu Xiaodong* [2018] SGHC 178, which held that s 4(10) of the Civil Law Act (Cap 43, 1999 Rev Ed) did give the court the power to order a Mareva injunction in aid of foreign proceedings.

15 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [65]–[66].

16 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [51].

17 [2007] 2 SLR(R) 453.

18 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [23], [26] and [29], *per* Sundaresh Menon JC.

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Jurisdiction – Discretionary jurisdiction – Order 11 rule 1

11.13 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama*[19] elaborated on and provided clarity to some of the heads under O 11 r 1 of the ROC. The facts can be stated simply. The Singapore-incorporated plaintiff, Nippon Catalyst Pte Ltd ("Nippon"), leased to the first defendant, Indonesian-incorporated PT Trans-Pacific Petrochemical Indotama ("TPPI"), various catalysts to be installed in TPPI's Indonesian refinery. The refinery ceased operations and TPPI defaulted on the rent due for the catalysts. The parties negotiated an extension of lease with a reduction of sums owing from TPPI and a new schedule of payments.[20] Unfortunately, the refinery ceased operations again and TPPI entered into a composition agreement with its debtors, including Nippon.[21] This saw Nippon owning 4.46% of TPPI's shares, and Pertamina, the second defendant (and also TPPI's largest single shareholder), owning 48.59% of TPPI.[22] Despite the parties failing to conclude an agreement on TPPI's continued use of the catalysts, TPPI resumed operations and continued to use the catalysts without consent.[23]

11.14 Nippon commenced legal proceedings for, *inter alia*, tort of conversion and detinue, and unlawful conspiracy with the second defendant.[24] As both defendants were foreign, Nippon applied for leave to serve outside the jurisdiction. This failed at first instance and Nippon appealed.[25] For completion, it should be noted that the court found that the conversion claim, *prima facie*, fell within the scope of a valid arbitration agreement between the parties.[26] This is, however, outside the scope of this review.

11.15 On appeal, the High Court held that Nippon's claims could not succeed because they did not fall within O 11 rr 1(*f*)(ii) and 1(*p*), and

19 [2018] SGHC 126.
20 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [2]–[4].
21 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [5].
22 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [2].
23 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [7].
24 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [2] and [7].
25 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [9].
26 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [43].

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also did not meet the requirement that Singapore was the *forum conveniens*.[27] There are a number of noteworthy points to consider.

11.16 First, Nippon relied on O 11 r 1(*f*)(ii) which provided for service out of jurisdiction where "the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring". It argued that because payments due to it by TPPI were not paid into their Singapore bank account, this constituted damage suffered in Singapore thereby satisfying O 11 r 1(*f*)(ii). The court opined that this was insufficient. A plaintiff having a bank account in Singapore that it uses to transact with a defendant does not necessarily lead to the conclusion that the plaintiff has suffered damage in Singapore when non-payment occurs. In particular, Nippon also did not explain in its supporting affidavits how it has suffered damage just because TPPI had failed to make payments to its Singapore bank account.[28]

11.17 *Prima facie*, this must be correct. It should not be taken to mean, however, that non-payment could not, in some instances, be sufficient to qualify as damage suffered. Take, for example, a simple contract where services are provided and payment is to be transferred into the plaintiff's bank account. It is submitted that, in this instance, non-payment constitutes damage suffered for the purposes of satisfying O 11 r 1(*f*)(ii). It would therefore depend on how the cause of action is characterised. However, in this case, for the torts of conversion, detinue and unlawful conspiracy, it would be fair to say that non-payment would not by itself constitute damage suffered.

11.18 Second, Nippon also relied on O 11 r 1(*p*) which provides for service out of jurisdiction where the claim is founded on a cause of action arising in Singapore. The court opined that the starting position is to examine where in substance the cause of action arose. As Nippon was alleging tortious causes of action, the court applied the "substance of the tort" test from *JIO Minerals FZC v Mineral Enterprises Ltd*[29] ("*JIO Minerals*"), by examining the series of events constituting the elements of the tort to determine where in substance the cause of action arose.[30] At this point, it is useful to note that the court's approach arguably differs from that stated in *IM Skaugen SE v MAN Diesel & Turbo SE*.[31]

27 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [51], [54] and [63].
28 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [51] and [52].
29 [2011] 1 SLR 391 at [90], *per* Andrew Phang Boon Leong JA.
30 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [54].
31 [2018] SGHC 123. Discussed at paras 11.38–11.40 below.

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11.19 Following from this approach, and this is the third point, the court provided some helpful discussion on locating the place of the tort for the tort of conversion, detinue and conspiracy. For conversion, the court reiterated that the essence lies in the unlawful appropriation of another's chattel, whether for the defendant's own benefit or that of a third party. On the facts, therefore, since the goods were held onto by TPPI in Indonesia, the court viewed Indonesia to be the place of the tort of conversion.[32]

11.20 For the tort of detinue, the court opined that the location where the goods were wrongfully detained was significant. Since Indonesia was the place where the goods were wrongfully detained and where the refusal to return the goods was made, Indonesia was the place of the tort of detinue.[33]

11.21 For the tort of conspiracy, the court reiterated the usual key factors: identity; importance and location of conspirators; the locations where any agreements or combinations took place; the nature and place of the concerted acts or means; the location of the plaintiff; and places where the plaintiff suffered losses. On the facts, the court drew the inference that because the parties were located in Indonesia, any agreement forming the alleged conspiracy must have taken place in Indonesia.[34]

11.22 Fourth, as part of the inquiry for leave to serve out, it had to be shown that Singapore was the *forum conveniens*. As the court engaged in a straightforward application of the approach in *Spiliada Maritime Corp v Cansulex Ltd*[35] ("*Spiliada*"), it is sufficient to note that the court took into account the *loci delicti* and the location of evidence and witnesses.[36] It is curious to note that, as part of briefly discussing the difference in burdens of proof between an application to serve out and a standard application to stay proceedings on the basis of *forum non conveniens*, the court indicated that the burden is on the defendant to show that "Singapore is *not* the proper forum" [emphasis in original].[37] It is submitted that this might have been a misstatement by the court.

32 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [56].
33 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [57].
34 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [58].
35 [1987] 1 AC 460.
36 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [63].
37 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [48].

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There is no indication in the judgment and it should not be taken that the court was attempting to change the standard test from *Spiliada* – which is the need to show that there is a more appropriate forum elsewhere.[38]

11.23 Finally, while the court found that Singapore was not the *forum conveniens* and thus the leave for service out was rightly set aside, the court nevertheless ordered a stay of the conversion, joint tortfeasor and conspiracy claims.[39] For conceptual clarity, a stay of proceedings operates when the court has jurisdiction but is persuaded to refrain from exercising such jurisdiction, on the basis that the dispute should either be arbitrated or litigated elsewhere.[40] On the other hand, when application to set aside leave previously granted for service out is successful, it is a holding that there is no existence of *in personam* jurisdiction over the foreign defendant. To be fair, Pertamina did apply to set aside the *ex parte* order and in the alternative, apply for a stay. By ordering a stay, the court was implicitly acknowledging it had jurisdiction but was refraining from exercising it. While technically not correct, it bears no real outcome in this case and is noted as a curiosity.

Jurisdiction – Discretionary jurisdiction – Order 11 rule 1

Jurisdiction – Discretionary jurisdiction – Standing

Jurisdiction – Discretionary jurisdiction – Full and frank disclosure

Jurisdiction – Discretionary jurisdiction – *Forum non conveniens*

11.24 *IM Skaugen SE v MAN Diesel & Turbo SE*[41] also involved applications under O 11 rr 1(*f*) and 1(*p*). The first plaintiff ("Skaugen"), a company incorporated in Norway, purchased six marine engines from the German-incorporated first defendant ("MAN Diesel") for installation in six ships to be built by a third party. The engines were delivered and installed, but did not perform as represented. After failed attempts to resolve the matter, the plaintiffs commenced proceedings

38 *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [77], *per* Sundaresh Menon CJ; *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [69], *per* Sundaresh Menon CJ.

39 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [66].

40 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [44], *per* Judith Prakash JA.

41 See para 11.18 above.

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via discretionary jurisdiction alleging misrepresentation, negligence and fraud.[42] The defendant applied to set aside the writ and, alternatively, for the matter to be stayed based on *forum non conveniens*.

11.25 At first instance, while the assistant registrar found that Skaugen's claims satisfied O 11 r 1(*f*), the court also opined that Singapore was not the *forum conveniens*. As such, the writ and leave to serve out of the jurisdiction was set aside.[43] The parties cross-appealed.[44]

11.26 As a starting point, it is useful to dispense with two arguments the defendant made: (a) the plaintiff did not have standing to sue;[45] and (b) it had not made full and frank disclosure.[46]

11.27 On the issue of standing, there was an admittedly complicated chain of transfers in the ownership and operation of the ships. For the purposes of this review and without going into the specifics of the laws relating to assignment, it is sufficient to note that on analysis, the High Court opined that the plaintiff did have standing to sue.[47] It is interesting to note that while the court considered the question of *locus standi* as part of the second requirement of establishing discretionary jurisdiction, namely, that the claim must have a sufficient degree of merit in that there must be a serious question to be tried,[48] as the court's analysis progressed, it began to speak in terms of the burden of the first requirement, that is, a good arguable case.[49] This should not be surprising as the second requirement is often subsumed under the first. This also seems consistent with *Lakshmi Anil Salgaocar v Hadley James Chilton*[50] ("*Hadley James*") where the court examined the issue of *locus standi* under the requirement of a good arguable case.[51]

11.28 On the matter of disclosure, without going into the fact-heavy analysis, it is sufficient to note that the court found that the plaintiff did not fail to make full and frank disclosure.[52] The court also observed that even if there was a failure to make full and frank disclosure at the *ex parte* hearing, it could only result in setting aside the specific leave

42 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [1]–[3].
43 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [3].
44 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [30].
45 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [52]–[55].
46 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [73].
47 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [72].
48 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [42].
49 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [43].
50 [2018] 5 SLR 725.
51 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [58] and [65]–[67].
52 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [74].

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granted at that *ex parte* application and did not prohibit the plaintiff from re-applying for leave to serve the writ out of jurisdiction.[53] Oddly, the court *appears* to discourage the setting aside of leave as a result of lack of full and frank disclosure, as it would "serve little purpose except to waste time and costs".[54] This position is, with respect, a little troubling. The proper administration of justice imposes a full and frank disclosure on the applicant in an *ex parte* application for leave to serve out of jurisdiction, so that the court may satisfy itself as to the correctness of extension of *in personam* jurisdiction to foreign defendants.[55] However, when the court finds that the applicant was less than forthcoming during the *ex parte* stage, the court has a discretion to set aside leave granted for service out of jurisdiction.[56] While the court is not bound to do so, surely the court cannot exercise this discretion in favour of not setting aside on the basis of saving time and costs, otherwise this would inevitably encourage non-disclosure on the understanding that the consequences may not be as dire as they appear to be.

11.29 With these preliminary points out of the way, we now consider the approach the court took in relation to O 11 rr 1(*f*) and 1(*p*).

11.30 On O 11 r 1(*f*), the court started off with the position that to determine whether a tort is justiciable in Singapore, it was first necessary to ascertain where the tort was committed. This required the application of the "substance of the tort" test which entailed looking at the events constituting the tort and asking where, in substance, the cause of action arose.[57] Applying the test to the tort of misrepresentation, the court opined that the heart of the misrepresentations was made, received and relied upon in Germany. As such, the *loci delicti* was Germany.[58] This conclusion would next entail the application of the double-actionability rule which required the tort to be actionable in the *loci delicti* and the forum.[59]

11.31 The court held that the tort was actionable in the *loci delicti* and, by way of *obiter*, opined that this is to be determined at the time the action was commenced. So even if the limitation period in the *loci delicti* had expired at the time of the consideration of the question, as long as it had not expired at the time of commencement, that was

53 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [79].
54 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [79].
55 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [99].
56 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [56], *per* Sundaresh Menon JC.
57 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [87].
58 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [107].
59 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [82] and [108].

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enough.[60] The court also held that the tort was actionable in the forum Singapore, on the assumption that all the acts constituting the tort were carried out in Singapore.[61] For the sake of completion, it should be noted that the court also did not find any good reason to apply the flexible exception to the double-actionability rule.[62]

11.32 A number of points can be made here. First, it is interesting that the court felt, in the face of a possible foreign tort, that it had to embark on the substance of the tort test and the accompanying double-actionability analysis *before* considering the two limbs of O 11 r 1(*f*).

11.33 It is possible to argue that this is unnecessary. The language of O 11 r 1(*f*) does not technically require the identification of the location of the tort. Order 11 r 1(*f*)(i) provides for service out where "the claim is founded on a tort, wherever committed, which is constituted, at least in part, by an act or omission occurring in Singapore". Order 11 r 1(*f*)(ii) provides for service out where "the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring". On the face of it, both limbs appear agnostic about needing to identify the location of the tort.

11.34 In relation to O 11 r 1(*f*), the only time one might say it would be useful to identify the location of the tort is where the tort purported to be sued upon is not one which is recognised as a tort in either the *loci delicti* or the forum. In this case, identification of the location of the tort will give us the two jurisdictions, the *loci delicti* and the forum by which to measure the actionability of that tort.

11.35 Having said that (and putting aside the conceptual criticism that applying the double-actionability rule is to essentially import a choice of law rule into a jurisdictional question), from a practical perspective, it may be sensible for the court to identify the location of the tort and apply the double-actionability rule now rather than to let the matter pass through at the jurisdictional stage only to fail the double-actionability rule at trial.

11.36 Secondly, it needs to be acknowledged that the weight of precedent was felt by the court, which acknowledged that the double-actionability rule was an anachronism and despite calls for the abolition of this rule, until this was done, whether through statute or judicial law-making, it was bound to apply the double-actionability rule in

60 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [112].
61 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [113] and [119].
62 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [130]–[131].

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considering a case for service out of the jurisdiction under O 11 rr 1(*f*)(i) and 1(*f*)(ii).[63]

11.37 Third, the plaintiffs sought to localise the tort in Singapore by arguing that the defendant's omission to rectify the misrepresentation occurred in Singapore. The court, however, did not accept this argument, and decided that O 11 r 1(*f*)(i) had not been satisfied.[64] However, for O 11 r 1(*f*)(ii), the court found that damage had been suffered in Singapore and as such, this head was satisfied.[65]

11.38 On O 11 r 1(*p*), the court at first instance had found that the cause of action did not arise in Singapore and the rule had not been satisfied. On appeal, the plaintiffs attempted to draw a distinction between the substance of the cause test from *JIO Minerals*[66] and the alleged "cause of complaint" test in *Distillers Co (Biochemicals) Ltd v Laura Anne Thompson*[67] ("*Distillers*").[68] The court accepted this distinction and found that the cause of complaint occurred in Singapore; therefore, this head of jurisdiction was satisfied.[69]

11.39 In doing so, the court, while acknowledging that *JIO Minerals* cited *Distillers* as authority for the substance test, drew a distinction between a test which asks "where in substance did this cause of action arise?"[70] (*Distillers*) and one which asks "where in substance did the tort take place?"[71] (*JIO Minerals*). The distinction, according to the court, was that the latter test was a more general and factual question focused on identifying the location of the tort.

11.40 With respect, the court's reasoning is a bit hard to follow. While it is true that *Distillers* worded the test as "cause for complaint",[72] it is submitted that this test was essentially asking where, in substance, the cause of action arose. The Privy Council rejected the "whole cause of action must arise within the jurisdiction" and the "last ingredient of the cause of action must arise within the jurisdiction" tests in favour of a more nuanced, robust approach which acknowledged that, despite the

63 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [83]–[85].
64 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [137]–[139].
65 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [145]–[148].
66 See para 11.18 above.
67 [1971] 1 AC 458.
68 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [151].
69 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [166]–[168].
70 *Distillers Co (Biochemicals) Ltd v Laura Anne Thompson* [1971] 1 AC 458 at 468E, *per* Lord Pearson.
71 *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [90], *per* Andrew Phang Boon Leong JA.
72 *Distillers Co (Biochemicals) Ltd v Laura Anne Thompson* [1971] 1 AC 458 at 469G, *per* Lord Pearson.

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ingredients of a cause of action occurring in more than one jurisdiction and over a period of time, it was possible to identify where the substance of the cause of action arose. And the answer to this question would be the identification of a particular location or jurisdiction. It would seem that this is what the test in *JIO Minerals* also seeks to achieve. If the court had adopted this approach, then this head of jurisdiction would not have been satisfied as essentially, the same analysis that applied to identify the location of the substance of the tort would apply equally to the question of cause of action.

11.41 Be that as it may, the court found that two heads of jurisdiction had been satisfied under O 11 r 1 and turned to the question of whether Singapore was the *forum conveniens*. On this, the court found that Singapore was the *forum conveniens* as both Germany and Norway were no longer available as competing *fora*.[73] A number of points may be noted on the court's findings in relation to *forum non conveniens*.

11.42 First, one of the interesting issues addressed was whether events *after* the *ex parte* application ought to be considered by the court at the *inter partes* hearing to set aside leave previously granted for service out of jurisdiction. In this case, the defendant had applied to set aside service and to stay proceedings based on *forum non conveniens*, and argued that the former application must be determined on facts at the time the leave was secured *ex parte* whereas the latter application can be determined on the factual position today. This was important because Germany had initially been an available forum, but was subsequently no longer available. If the defendant's argument was accepted, then the analysis in each situation would lead to a different outcome.[74]

11.43 Fortunately, the court adopted a practical approach to this. Taking into account the court's interests in preventing an abuse of process, saving time and costs, and balancing the justice between the parties, the court held that there exists a discretion for courts to consider evidence of events occurring after leave is granted *ex parte* and, where applicable, for the plaintiff to include new heads of jurisdiction under O 11 and/or causes of action, rather than foreclosing such a possibility and requiring the plaintiff to start all over again.[75] As such, the court took the position that the unavailability of Germany as a forum was a relevant factor in both the setting aside and stay applications.[76] This must be right, as the judge hearing the *inter partes*

73 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [202] and [237].
74 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [179].
75 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [184], [187], [188] and [189].
76 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [197].

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application to set aside leave for service out is surely hearing the matter *de novo*, such that events that took place after the *ex parte* application can and must be taken into account by the court.

11.44 Secondly, as the *loci delicti* was identified as Germany, this meant that it was *prima facie* an appropriate forum for the claim. However, Germany had become unavailable as a forum by reason of the applicability of the Lugano Convention, arising from proceedings instituted in Norway. Between Norway and Germany, the Lugano Convention applies the "court first seized" rule such that the institution of legal proceedings in Norway obliges the German courts to cede jurisdiction to the Norway courts.[77] Norway had also become unavailable because the Norwegian Court of Appeal had held that the matter should not be litigated at all because the plaintiffs were bound by arbitration clauses.[78] The High Court held that Germany and Norway's unavailability could not be disregarded and, as such, only Singapore remained.

11.45 It is interesting to note that in doing so, the court considered the availability of Germany and Norway as a factor in stage 1 of the *Spiliada* analysis. Traditionally, stage 1 consists of identifying connecting factors between the matter and particular *fora*. There is no express requirement that a particular forum must be a "possible" one. Perhaps, there could be a qualifying stage – a "stage 0" of sorts where *fora* to be considered have to be available first, before going into the identifying and weighing of connecting factors in stage 1. This notion of unavailability of a particular forum would bypass the entire *Spiliada* analysis. Of course, one could say that this is much ado about nothing. Apart from appealing to conceptual clarity, the court in this case would have come to exactly the same conclusion.

11.46 Finally, on the assumption that the court was wrong and that Germany and Norway were both still available *fora*, the court went on to other connecting factors. The court's analysis here was relatively straightforward so there is no need to examine it closely save for the court's comments in relation to the SICC. The defendants had argued that since the *lex loci delicti* was German law, it was more appropriate for a German court to apply its own law.[79] The court disagreed and held that the possibility of a transfer to the SICC was both a relevant consideration in the *Spiliada* analysis and substantially mitigated the challenge of having to apply German law. Noting that a transfer to the

77 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [202] and [205].
78 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [236]–[237].
79 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [211].

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SICC would save costs and time, the court also opined that in a dispute where:[80]

> … the factual and legal connections are distributed across diverse and geographically divided jurisdictions, this was the archetypal dispute which was better dealt with by the SICC's international panel of judges.

Jurisdiction – Discretionary jurisdiction – Order 11 rule 1

Jurisdiction – Discretionary jurisdiction – *Forum non conveniens*

Contract choice of law – Floating choice

11.47 Apart from dealing with the court's discretionary jurisdiction, *Shanghai Turbo Enterprises Ltd v Liu Ming*[81] also dealt with the treatment of floating choice of law clauses. The facts of Shanghai Turbo can be simply stated. The plaintiff, Shanghai Turbo Enterprises Ltd ("Shanghai Turbo"), sued the defendant, Liu Ming, in Singapore for, *inter alia*, breaches of non-competition and confidentiality obligations under a service agreement which contained a choice of law and choice of jurisdiction clause which read:[82]

> This Agreement shall be governed by the laws of Singapore/or People's Republic of China and each of the parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/or People's Republic of China.

11.48 Shanghai Turbo relied on cl 17 to establish three heads of O 11 r 1: first, that the agreement was governed by Singapore law (r 1(*d*)(iii)); second that the dispute related to a contract with a term conferring jurisdiction on the Singapore courts (r 1(*d*)(iv)); third, that the defendant had, by an agreement, submitted to the jurisdiction of the Singapore courts (r 1(*r*)).[83] Leave to serve the writ out of the jurisdiction on Liu Ming in the People's Republic of China ("China") was successfully obtained as were three interim injunctions.[84] Liu Ming subsequently entered appearance and applied to the Singapore courts to set aside service.

80 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [213]–[216].
81 [2018] SGHC 172.
82 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2018] SGHC 172 at [11] and [15].
83 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2018] SGHC 172 at [14].
84 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2018] SGHC 172 at [17]–[19].

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11.49 The High Court set aside service because it found that Singapore was not the *forum conveniens* and that the plaintiff had not made full and frank disclosure at the *ex parte* stage. The analysis on these points are unremarkable. Of note are the observations the court made in relation to the heads of jurisdiction relied upon by the plaintiff.

11.50 First, on the head that the agreement was governed by Singapore, the court first reiterated the three-stage test for identifying the proper law of a contract.[85] Noting that there was a clause which identified Singapore and China law but did not actually make a choice, the court correctly held that this floating choice of law clause was not valid as the proper law of a contract must be ascertainable at the time the contract comes into existence.[86]

11.51 The court therefore went on to consider the next stages of the test. Acknowledging the futility of looking at the implied intention of parties in stage 2 (since parties had expressly turned their minds to the question in stage 1 but had not made a valid choice), the court focused on stage 3.[87] After considering the connecting factors pointing to both China and Singapore, the court chose not to make a conclusive finding about the governing law but oddly held that for the purposes of showing a good arguable case for the purposes of r 1(*d*)(iii), this was sufficient.[88]

11.52 Secondly, on the heads of the dispute relating to a contract with a term conferring jurisdiction on the Singapore courts, and the defendant having submitted to the jurisdiction of the Singapore courts by agreement, the court opined that as a matter of construction, the choice of jurisdiction part of cl 17 was not severable from the invalid floating choice of law part. It should be noted that following from the court's inconclusive finding of the governing law of the contract, the court (oddly) examined the validity of the choice of jurisdiction clause under both competing governing laws. The court's conclusion was that under both Chinese and Singapore law, the choice of jurisdiction was also not valid and therefore these heads were not satisfied.[89]

11.53 For the sake of completion, it is important to note that an appeal to the Court of Appeal was made.[90] As the judgment was handed down in 2019, it will be considered in next year's Ann Rev. It is

85 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2018] SGHC 172 at [22].
86 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2018] SGHC 172 at [30]–[32].
87 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2018] SGHC 172 at [33]–[34].
88 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2018] SGHC 172 at [39].
89 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2018] SGHC 172 at [41]–[54].
90 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779.

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sufficient to note here that the Court of Appeal agreed with the High Court's finding on the floating choice of law but disagreed with the point on severability. It also found that the defendant had, through his actions, submitted to the jurisdiction of the Singapore courts. More significantly, the Court of Appeal departed from precedent and set out a different approach in relation to non-exclusive forum jurisdiction clauses.

Jurisdiction – Submission – Prior suit

Jurisdiction – Discretionary jurisdiction – Order 11 rule 1

Jurisdiction – Discretionary jurisdiction – Order 11 rule 1 – *Locus standi*

11.54 The case of *Hadley James*[91] is another useful decision which helpfully clarified several areas on the law relating to discretionary jurisdiction over foreign defendants. The plaintiff, Lakshmi Anil Salgaocar ("Lakshmi"), was the widow of Anil Vassudeva and was suing in her capacity as a beneficiary of his estate.[92] This was the same plaintiff as that in the case of *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra*[93] ("*Lakshmi*") which is discussed below. The first and second defendants were joint receivers (appointed by the British Virgin Islands ("BVI") court) of the third defendant, Million Dragon Wealth Ltd ("MDWL"), a BVI company.[94] The main dispute involved, essentially, Lakshmi's claim that the receivers were not entitled to carry out certain acts pursuant to the receivership.

11.55 In 2016, Lakshmi first commenced Suit 966 in Singapore restraining the receivers from carrying out certain acts.[95] This was subsequently discontinued and Lakshmi commenced fresh proceedings ("Suit 202") claiming that the receivers breached a duty of care owed to the estate by acting in bad faith, *inter alia*, by the appointment of a consultant; by demanding for release of moneys held in escrow; and by demanding payment of rental income belonging to MDWL's subsidiaries.[96] Lakshmi obtained leave to serve out of the jurisdiction and the receivers applied to set aside the leave, which was granted.[97]

91 See para 11.27 above.
92 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [3].
93 [2018] SGHC 90.
94 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [4].
95 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [6].
96 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [8].
97 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [12].

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11.56 The court discussed a number of matters relating to this application, some of which are a straightforward application of the law. These will not be discussed. There are, however, a few points that are worthy of note.

11.57 First, Lakshmi (unsuccessfully) argued that the receivers' submission to Singapore courts in Suit 966 ought to render them unable to challenge jurisdiction in the later suit.[98] As a general principle, the court held that where a defendant took a step in a previous suit which has been discontinued, it would not be appropriate to infer that he has submitted to the jurisdiction of the Singapore courts in a separate fresh suit, notwithstanding that there may be some overlap in the parties and the subject matter of both suits.[99] The plaintiff should not be allowed to "use a sprat to catch a mackerel" – it would be unfair to the foreign defendant if he has no opportunity to reconsider his position if the plaintiff later adds new claims, or if other parties seek to be added to the claim.[100]

11.58 On the facts, the court found that the nature of the claims and reliefs sought in both Suits 966 and 202 were different: In Suit 966, Lakshmi was seeking to restrain the receivers from carrying out certain acts, whereas in Suit 202, Lakshmi sought to claim for damages for their alleged breaches of duties. It would therefore be unfair to transplant the receivers' submission to jurisdiction in Suit 966 to the present Suit 202.[101]

11.59 The court also affirmed that the entering of appearance to dispute the court's jurisdiction as *per* the manner(s) set out under O 12 r 7(1) of the ROC did not amount to submission to Singapore's jurisdiction.[102]

11.60 The court also specifically considered and held that the receivers' act of seeking recognition of their BVI court's appointment as receivers for MDWL did not constitute submission to jurisdiction. Unlike the filing of a counterclaim or defence, such an application was not premised on the Singapore courts having jurisdiction over Lakshmi's dispute over their alleged breaches of duties.[103] What is apparent from the discussion is the judicial attitude in being cautious in finding jurisdiction over foreign defendants – finding of a step that

98 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [14].
99 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [36].
100 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [37].
101 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [38].
102 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [42].
103 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [39].

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amounts to submission jurisdiction is both a context and dispute specific exercise.

11.61 Second, it is trite that a good arguable case that the claim(s) fall under one of the grounds set out under O 11 r 1 must be established by the plaintiff. The court clarified that it is at this stage that any question about the *locus standi* of the plaintiff to make the claim should be considered.[104] In this case, Lakshmi was suing as the beneficiary of the estate which was the sole shareholder of MDWL.

11.62 On the facts, and applying the law on *locus standi* of beneficiaries to sue on behalf of estate to which they belong, the court found that Lakshmi lacked the *locus standi* for her claims against the receivers. As the receivers did not owe any duty to shareholders of MDWL, any losses allegedly suffered by MDWL through receivers' breaches of duties could not be claimed by Lakshmi in her capacity as a shareholder through the estate.[105] This must be correct. This was sufficient to dispose of the matter.

11.63 Third, while the court went on to consider arguments based on the heads of jurisdiction under O 11 r 1, the discussion was unremarkable save for the court's thoughts on r 1(*b*). On this, the court opined that two requirements had to be satisfied before jurisdiction was founded over a foreign defendant. First, the injunction must form part of the substantive relief sought by the plaintiff before the ground can be relied upon. In other words, an interim injunction is not itself a cause of action and cannot, without a pre-existing cause of action, found jurisdiction under O 11 r 1(*b*).[106]

11.64 Second, the act which the plaintiff sought to restrain the foreign defendant from doing must amount to an invasion of some legal or equitable right belonging to the plaintiff in the forum and enforceable here by a final judgment for an injunction. This again reinforces the point that an interim injunction to preserve the state of affairs pending final resolution of the dispute is insufficient.[107] This requirement therefore explains the court's rejection of Lakshmi's argument that a plaintiff may still rely on O 11 r 1(*b*) where it has causes of action *independent* from the interim restrain. Since Lakshmi was not seeking any injunction as a substantive relief from her causes of action pleaded, Lakshmi could not rely on this ground.[108]

104 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [47].
105 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [56].
106 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [61].
107 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [62].
108 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [63].

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11.65 Finally, since the defendants were BVI-court-appointed receivers of MDWL, the court considered the need for Lakshmi to have obtained leave from the BVI courts before commencing action. In many insolvency regimes, receivers are, by default, immune from litigation *qua* their court-appointed roles unless prior approval of the appointing court is sought. This is to ensure that frivolous claims are filtered out to avoid unnecessary and expensive legal proceedings which may fragment assets and hurt creditors.[109] The receivers argued that Lakshmi did not make out a good arguable case as she had not obtained the requisite leave from the BVI courts.[110] The court agreed that leave of the BVI courts should have been obtained before the proceedings were commenced. To be clear, the denial or grant of leave by the foreign appointing court is not determinative of the Singapore court's jurisdiction, but it is a factor in considering whether a good arguable case had been made out and/or if Singapore is the appropriate forum for the suit.[111]

11.66 At one level, the decision of the court on this issue is a practical one. However, the reasoning is a little hard to follow. While the requirement to obtain leave of the court (which appointed the receivers) makes eminent sense in the domestic context, requiring one to obtain leave of a foreign court before commencing proceedings in Singapore is a bit more of a leap. This exact argument was raised and the court opined that drawing such a distinction was unjustifiable as the appointing court had an interest in protecting receivers from having to defend frivolous litigation, regardless of where it occurred. It would therefore seem like this requirement stems from some consideration of comity, to protect the interests of foreign courts.

11.67 It remains unclear if leave is necessary only in instances of discretionary jurisdiction or if it extends to jurisdiction via presence or submission. If the rationale presented is accepted, then it should extend to all methods of obtaining jurisdiction. It is also unclear how a denial of leave by the foreign court actually affects the founding of jurisdiction. For instance, if the Singapore court obtains leave via presence, surely it would not lose jurisdiction simply because leave is not obtained? Similarly, how would a denial of leave impact the *forum non conveniens* analysis? Would a lack of leave make Singapore less *forum conveniens*? Or make the foreign jurisdiction more appropriate? On a related point, is it to be assumed that in every case involving a foreign court-appointed receiver, leave must be obtained? Or is there some kind of proof required?

109 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [69].
110 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [68].
111 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [71].

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11.68 As mentioned, the rationale for requiring leave makes sense. But perhaps a different way to address the intent of the rationale is for the receivers to obtain a declaration from the court which appointed them, which can then be used as some form of issue estoppel.

11.69 Admittedly, this issue will only arise where the plaintiff seeks to sue foreign court-appointed receivers (or other similar instances), but it would be welcome if more clarity can be provided by the court in future decisions.

Exclusive jurisdiction clause – Stay of proceedings – Standard to show application of clause

Exclusive jurisdiction clause – Stay of proceedings – Strong cause test – Relevance of merits of possible defence(s)

Exclusive jurisdiction clause – Stay of proceedings – Strong cause test – Factor (d) of *The Eleftheria* factors – Reformulation – Abuse of process

Exclusive jurisdiction clause – Stay of proceedings – Strong cause test – Denial of justice

Exclusive jurisdiction clause – Stay of proceedings – Strong cause test – Impact of standard form contracts

11.70 An exclusive jurisdiction clause ("EJC") ordinarily means that the contracting parties have agreed that the named forum is the only jurisdiction to which their contractual disputes should be heard and tried. When an agreement contains an EJC and a party in breach of the EJC institutes proceedings in Singapore, an option available to the aggrieved party is to apply for a stay of Singapore proceedings on the basis that there is an EJC which mandates parties to bring their dispute to the contractual forum (assuming Singapore is not the contracted forum). Typically, a stay will be granted unless the plaintiff can show strong cause. In the past, the court would take into account the argument that the defendant had no genuine defence and refuse the stay. *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd*[112] ("*Vinmar Overseas*") represents a significant and welcome change in the law relating to EJC.

112 [2018] 2 SLR 1271.

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11.71 The parties, both Singapore-incorporated companies, entered into four contracts (between December 2013 and October 2014) for the sale and purchase of chemical commodities. The appellant Vinmar Overseas (Singapore) Pte Ltd ("Vinmar") would then resell these to its customers. Each contract had an EJC which referred disputes to the High Court of England.[113] In November 2014, Vinmar entered into another contract with the respondent, PTT International Trading Pte Ltd ("PTT"), to purchase styrene monomer. For the purposes of this review, it is sufficient to note that a dispute arose and Vinmar terminated the contract. PTT commenced proceedings in Singapore and Vinmar applied for a stay on the basis of the EJC. It is useful to note, as a preliminary point, that the parties were in dispute as to whether the EJC was part of the November 2014 contract.

11.72 At first instance, the court found the EJC had been agreed to and was therefore part of the contract. However, it also held that there was strong cause to refuse a stay because Vinmar did not have a genuine defence. Vinmar's appeal was dismissed on the same basis. The matter then went before the Court of Appeal. In allowing the appeal, the court made a number of important observations and developments which will now be explored.

11.73 First, the court affirmed that, in an EJC application, the applicant bears the burden of showing "a good arguable case" that an exclusive jurisdiction agreement exists and governs the dispute in question.[114] It is important to note that while the test of "good arguable case" appears in different contexts, this test does not bear the same meaning throughout and is dependent on the particular context. In the context of an EJC application, the court opined that the applicant must, on the evidence before the court, have the "better of the argument" that the exclusive jurisdiction agreement exists and applies to the dispute. The court went on to clarify that the threshold is more than a mere *prima facie* case, but less than the standard of a balance of probabilities given the limits inherent in the stage at which the application is being heard.[115] In determining this question, the court may grapple with questions of law but should not delve into contested factual issues.[116] This clarification is helpful and must surely be correct. On the facts, the court found that Vinmar had made out a good arguable case that the

113 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [10], *per* Steven Chong JA.

114 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [41], *per* Steven Chong JA.

115 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [45], *per* Steven Chong JA.

116 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [46], *per* Steven Chong JA.

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EJC has been incorporated into its agreement with PTT by their previous course of dealings.[117]

11.74 Second, this finding meant that a stay would ordinarily be granted unless PTT can establish "strong cause" to refuse a stay.[118] At first instance and at initial appeal, the courts found strong cause because Vinmar did not have a genuine defence. In addressing this question, the Court of Appeal first reaffirmed *The Eleftheria* factors in considering whether the strong cause test is fulfilled.[119] The court went on to note that the "merits of the defence" argument was not one of the original factors from *The Eleftheria*.[120] Instead, it seemed to have been imported via factor (d) which provided for a consideration of "whether the defendants genuinely desired trial in the foreign country, or are only seeking procedural advantages".[121]

11.75 The Court of Appeal traced the history on the merits inquiry under factor (d) and identified the two common rationales which the Commonwealth decisions, including Singapore, have articulated in justifying undertaking a merits inquiry.[122] Stated briefly, first, where there is no genuine defence, there cannot be any dispute to be referred to the foreign court ("the No Dispute Rationale"). Second, where there is no genuine defence as to liability, it followed that the defendant did not genuinely desire trial in the contractual forum, but was applying for the stay to secure procedural advantages ("the No Desire for Trial Rationale"). The Court of Appeal also observed, *inter alia*, that while Hong Kong and the UK may have previously taken the position in assessing merits of the defence under the strong cause test, they have since departed from such a position.[123]

11.76 The court noted that the "merits of the defence" argument did not apply in a *forum non conveniens* analysis and that the distinction between this and the argument's application in an application in an EJC context was unsustainable. The Court of Appeal departed from its earlier decisions, and held, through a restatement, that in determining

117 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [68], *per* Steven Chong JA.
118 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [69], *per* Steven Chong JA.
119 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [71], *per* Steven Chong JA.
120 [1996] 1 Lloyd's Rep 237.
121 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [71], *per* Steven Chong JA.
122 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [76], *per* Steven Chong JA.
123 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [97]–[103], *per* Steven Chong JA.

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whether to grant a stay in an EJC application, the merits of the defence are irrelevant.[124] Instead, factor (d) under *The Eleftheria* framework should read: "Whether the plaintiff is acting abusively in applying for a stay of proceedings."[125]

11.77 The court shared its thinking for this departure from precedent. First, party autonomy meant that when parties choose an EJC, there is the expectation that any and all related disputes will be brought to the contractual forum, regardless of the merit of the claim. By examining the genuineness of the defendant's defence, the court is not giving effect to the parties' agreement by ignoring the parties' choice of forum.[126] Secondly, EJCs are intended to provide for certainty of venue to minimise costs. The "merits of the defence" argument meant that significant costs are expended at the interlocutory stage of proceedings to have the non-contractual forum determine the merits of party's defences, which may turn on contested issues of fact and foreign law, thereby delaying the resolution of dispute. Thirdly, abandoning the "merits of the defence" argument would align the law governing EJC applications with the positions on stay applications under the *forum non conveniens* and International Arbitration Act[127] ("IAA") framework. It would also align with the position where the granting of anti-suit injunctions to enforce an EJC is not dependent on merits of the defence to the claim.[128]

11.78 The third observation relates to the court's reformulation of factor (d). The court opined that the initial formulation wrongly focused the court on whether the defendant desired for trial in the contractual forum. It also wrongly suggested that it was improper for the defendant to seek procedural advantages in applying for a stay. On this latter point, the court opined that there was nothing wrong with a party seeking the procedural advantages of the contractual forum. The contractual forum may have been chosen for those very procedural advantages. To deprive them of such advantages would be to deny the very basis of the jurisdiction agreement.[129] Having said that, the court cautioned that this must be distinguished from pursuing tactical

124 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [113], *per* Steven Chong JA.
125 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [130], *per* Steven Chong JA.
126 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [114], *per* Steven Chong JA.
127 Cap143A, 2002 Rev Ed.
128 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [119], *per* Steven Chong JA.
129 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [122(b)], *per* Steven Chong JA.

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advantages by abusing court processes,[130] hence the reformulation of factor (d) to whether the plaintiff is acting abusively in applying for a stay of proceedings. On this, the court cautioned that the threshold for this should be high and instances rare. One example provided by the court is where an applicant admits to liability and quantum but seeks a stay for no reason other than an alleged inability to pay. Another example is where the defendant starts a media campaign in the contractual forum to malign the plaintiff, thereby undermining the prospects of a fair trial.

11.79 Fourthly, the court identified denial of justice as one other general ground for refusing stay application.[131] This might occur if the contractual forum had been dissolved by the time the dispute arose, or was not realistically available to determine the dispute because war had broken out in the jurisdiction.[132] Additionally, there may be very exceptional cases where trial in the contractual forum would be so overwhelmingly difficult or inconvenient that a stay would effectively deny the plaintiff access to justice. However, the Court of Appeal has cautioned that such cases should be few and far between, given that inefficiencies of the contractual forum would have been foreseeable at the time of contracting, and the parties should thus be bound by their choice and consequence.[133] This is sensible. On a conceptual point, it is unclear if the court intended the "denial of justice" point to be analysed under factor (d). It might be more appropriate to analyse it under factor (e), where there is the consideration of whether the plaintiff would be prejudiced by having to sue in the chosen forum.

11.80 Fifthly, the court peripherally considered the question of whether the reformulation of principles should apply with equal force to standard form contracts where the plaintiff was not in a position to negotiate. The court noted two competing considerations. On the one hand, consistency in the law justifies the same approach in dealing with EJCs. Additionally, standard form contracts have no less contractual force than freely negotiated ones. On the other hand, while the central principle that underlies the law on EJC is party autonomy, this principle arguably applies with less force in a situation where the plaintiff had no

130 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [122], *per* Steven Chong JA.

131 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [128], *per* Steven Chong JA.

132 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [133], *per* Steven Chong JA.

133 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [134], *per* Steven Chong JA.

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say in the fact or choice of the jurisdiction clause.[134] As it did not arise on the facts, the Court of Appeal merely expressed its tentative preference for the same principles to apply to standard form contracts.[135]

11.81 Sixth, the court acknowledged, but did not express any view on, the legitimate concerns arising from fragmentation of legal proceedings across multiple jurisdictions because the dispute involves multiple parties, some of whom are not contracting parties to the same EJC.[136] These concerns – duplication of proceedings, inconsistent findings and incentivising a rush to judgment – could all potentially establish strong cause to refuse a stay.

11.82 The Court of Appeal also re-affirmed the existing principles on time bars: absent a compelling reason, the expiry of a time bar in the contractual forum would have been self-induced by the plaintiff's choice to sue in a non-contractual forum in breach of the EJC.[137]

11.83 Finally, the court considered the possibility of prospective overruling and noted that this would be done only when departing from the normal retroactivity of a judgment was "necessary to avoid serious and demonstrable injustice to the parties or to the administration of justice".[138] It opined that there was no evidence that the EJC was specifically drafted on the law pre-*Vinmar* and while PTT will suffer some prejudice from this change in the law, it can be addressed by an order as to costs.[139]

134 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [137], *per* Steven Chong JA.
135 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [136] to [138], *per* Steven Chong JA.
136 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [139], *per* Steven Chong JA.
137 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [141], *per* Steven Chong JA.
138 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [143], *per* Steven Chong JA.
139 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [144]–[145], *per* Steven Chong JA.

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Restraint of foreign proceedings – Requirements

Restraint of foreign proceedings – Equitable remedy – Unclean hands

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

11.85 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra*[140] provides helpful insights into the law governing the grant of anti-suit injunction. In this case, the second defendant, MDWL, was a BVI-incorporated company and the sole shareholder of 22 other BVI-incorporated companies with each holding one unit in a condominium development in Singapore.[141]

11.86 In 2015, the plaintiff's (Lakshmi's) husband, Salgaocar commenced Suit 821 in Singapore against the first defendant, Darsan, for a declaration that Darsan held certain assets (including six units of the condominium) on trust for him.[142] Salgaocar later passed away and the suit went into inactivity.

11.87 In 2017, Darsan commenced a BVI suit against Salgaocar's estate that the units purchased by the MDWL subsidiaries were funded by him, by way of loans to the subsidiaries, and there was allegedly an agreement between Darsan and Salgaocar that the interests in the units would be transferred to Salgaocar upon full payment of those loans extended.[143] Lakshmi applied for an interim anti-suit injunction against Darsan from proceeding with the BVI proceedings.[144]

11.88 First, the court helpfully summarised the elements necessary to establish an anti-suit injunction. The court listed two categories, *generally*: (a) an anti-suit injunction will be granted unless there are "strong reasons" not to do so when foreign proceedings are commenced in breach of a jurisdiction or arbitration agreement between the parties;[145] and (b) in the absence of a jurisdiction or arbitration

140 See para 11.54 above.
141 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [2].
142 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [5].
143 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [8].
144 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [9].
145 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [16] and [18].

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agreement, an anti-suit injunction will *only* be granted when the ends of justice require it.[146]

11.89 Noting that the present matter did not fall into the first category, the court went on to list the four elements necessary in category (b) cases: (i) the defendant must be amenable to the jurisdiction of the Singapore court; (ii) Singapore must be the natural forum for resolution of the dispute between the parties; (iii) the alleged vexation or oppression to the plaintiffs if the foreign proceedings are to continue must be proven; and (iv) there must be no injustice to the defendants (such as deprivation of advantages available in the foreign proceedings) with the grant of the injunction.[147]

11.90 The court's analysis on whether Singapore was the *forum conveniens* was straightforward and unremarkable save for two observations. First, the court did not find the existence of Suit 821 to be a material consideration. As Suit 821 had not proceeded beyond the pleadings stage, it could not be argued that the "Cambridgeshire Factor" argument (that is, it would contribute to efficiency, expedition and economy for the same set of counsel and experts involved in the litigation to handle new proceedings that might be commenced when complex proceedings were already underway and had progressed to a substantial extent) came into play.[148] Further, the court also found that the central issues in the BVI proceedings and in Suit 821 were different, with Suit 821 focusing on whether Darsan and Salgaocar entered into an agreement in 2003, and BVI proceedings focusing on whether the same parties entered into another agreement in 2014.[149]

11.91 Second, the court also took a nuanced analysis of the nature of the evidence to be given by the allegedly relevant witnesses highlighted by Lakshmi. To this end, the court noted that the facts relating to development and collection of rent for the condominium development were not significant to the issues raised in the BVI proceedings; as such, the location of these witnesses was not material in the *forum non conveniens* analysis.[150] This approach must be right – defendants must establish the relevance of the evidence of the witnesses before courts can attribute weight to the location of these witnesses in the *forum non conveniens* analysis, otherwise it would be all too easy for defendants to manufacture a connecting factor.[151]

146 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [17].
147 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [17(a)]–[17(d)].
148 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [48].
149 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [49].
150 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [53].
151 *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [67], *per* Andrew Phang Boon Leong JA.

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11.92 On balance, the court found that Singapore was not the natural forum.[152] This was sufficient to dispose of the application. After all, the Singapore courts should not assume the role of an "international busybody" when it is not the proper forum for the dispute.[153] However, the court did go on to consider whether the other elements had been met, presumably for the sake of completeness.

11.93 The court opined that the BVI action was not vexatious or oppressive and that even if it had been, the injunction would not have deprived the defendant of advantages. On this, the court rightly rejected Darsan's argument that the granting of an anti-suit injunction would cause him to have to begin fresh proceedings in Singapore to vindicate his rights, before commencing separate proceedings in the BVI to obtain his desired remedies. The court did not find this argument compelling as it would be true in many cases where an anti-suit injunction is granted.[154] Indeed, if such an argument is allowed to succeed, any and every defendant would be able to raise this consideration and no anti-suit injunction is likely ever to be granted.

11.94 Additionally, any supposed deprivation can be mitigated by undertakings, as was done in this case. Lakshmi indicated that she was prepared to undertake to consent to judgment in the BVI on terms identical to any Singapore judgment that Darsan might obtain. The court regarded these undertakings as effectively diminishing any difficulty or risk that Darsan might face as a result of having to commence separate and subsequent proceedings in the BVI to obtain his desired remedies.[155]

11.95 Interestingly, the court went on to consider if the applicant had come to court with clean hands. Darsan argued that (a) there was an abuse of process on Lakshmi's part given her delay in taking out the application and on the part of her counsel in not notifying his local counsel of the anti-suit injunction application; and (b) Lakshmi had sought to mislead the court by not raising the discontinuance of the Singapore proceedings and alleging the overlapping of issues between the Singapore and foreign suit. The court rejected both these arguments and opined that the applicant did not come with unclean hands.[156]

152 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [56].
153 *People's Insurance Co Ltd v Akai Pty Ltd* [1997] 2 SLR(R) 291 at [12], *per* Choo Han Teck JC.
154 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [65].
155 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [66].
156 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [70]–[72].

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11.96 On the abuse of process point, the court accepted that a three-week period was not an inordinately long period of time such that a party is considered to not have come to the court with clean hands, especially because Lakshmi understandably would have had to sought advice from both her foreign and local counsels.[157] This suggests that the longer a party waits in obtaining an anti-suit injunction, the greater the hurdle that party has to overcome as such conduct, on the basis of this judgment, may amount to coming to Singapore courts without clean hands.

11.97 Additionally, while the court was silent on whether non-notification to the opposing party in an anti-suit injunction could amount to "abuse of process" such that the conduct would disentitle the applicant to the equitable relief, the court found that, on the facts, the notice given to foreign counsel of Darsan instead of his local counsel was a genuine misunderstanding on Lakshmi's part.[158]

11.98 While cases in the past have acknowledged that an anti-suit injunction is an equitable remedy,[159] this case was the first to explicitly accept and apply the consideration of "unclean hands". On one level, this is unremarkable because the courts of equity have always required that parties come with clean hands. On another level, making this explicit may have the effect of making it a requirement of obtaining an anti-suit injunction. It is submitted that the former view is preferable. The court had to address it because it was argued by Darsan. Further, any consideration of a lack of *bona fides* on the part of the applicant fits very comfortably with the consideration of the broader principle that the granting of an injunction must serve the ends of justice.[160] However, it also does mean that in appropriate cases, other forms of conduct could disentitle the applicant to an anti-suit injunction. Arguably, the conduct complained of must have an immediate and necessary relation to the equity sued for, and it must be a depravity in the legal as well as moral sense to justify the invoking of the court's conscience to not grant the equitable relief.[161]

157 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [71(a)].
158 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2018] SGHC 90 at [71(b)].
159 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [52], *per* Quentin Loh J.
160 *Bank of America National Trust and Savings Association v Djoni Widjaja* [1994] 2 SLR(R) 898 at [11], *per* L P Thean JA; *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [25], *per* Chao Hick Tin JA.
161 *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2012] 1 SLR 32 at [92], *per* Chao Hick Tin JA.

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Restraint of foreign proceedings – Breach of arbitration clause – Effect of delay

Anti-enforcement injunction – Requirements

11.99 The preceding case of *Lakshmi* considered the issuing of an anti-suit injunction under the head of vexation and oppression. *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd*[162] dealt with whether an anti-suit and an anti-enforcement injunction should be issued based on the breach of an arbitration clause.

11.100 The facts can be stated simply. The plaintiff, Hilton International Manage (Maldives) Pvt Ltd ("Hilton"), a Maldivian-incorporated company, entered into an agreement in 2009 with the defendant resort operator, Sun Travels & Tours Pvt Ltd ("Sun"), to manage its resort in the Maldives. Dissatisfied with Hilton's performance, Sun terminated the agreement in April 2013, which Hilton accepted on the basis that it was a wrongful repudiation.[163] In May 2013, Hilton commenced arbitration proceedings pursuant to an arbitral agreement in the agreement.[164] The arbitral tribunal issued a final award in August 2015 in Hilton's favour which Hilton sought to enforce in the Maldivian Civil Court in December 2015.[165] Sun resisted enforcement on the basis that the agreement was void for misrepresentation and for fraudulent misrepresentation. After travelling through the Large Property and Monetary Claims and the Enforcement Divisions of the Civil Court, both of which declined jurisdiction, the matter was appealed to the Maldivian High Court.[166]

11.101 While the first enforcement proceedings were moving through the system, Sun commenced separate proceedings in October 2016 against Hilton for misrepresentation and other breaches. Judgment was obtained in March 2017 and Hilton's appeal of this remained pending for the purposes of the consideration of this case.[167]

162 [2018] SGHC 56.
163 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [7].
164 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [8].
165 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [11]–[12].
166 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [14]–[15].
167 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [16]–[19].

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11.102 A month later, in April 2017, the Maldivian High Court found that the Civil Court did have jurisdiction to enforce arbitral awards. In the same month, Hilton recommenced enforcement proceedings in the Maldivian Civil Courts, which Sun once again resisted with the same arguments it had made in the first enforcement proceedings. In these second enforcement proceedings, the Civil Court in June 2017 refused enforcement of the award on the basis of the March 2017 judgment in favour of Hilton.[168]

11.103 In July 2017, Hilton applied to the High Court of Singapore, seeking, *inter alia*, a permanent anti-suit injunction restraining Sun from commencing and/or proceeding with any action in the Maldivian courts in relation to disputes arising from the agreement.[169] In disposing of this matter, the court had to consider three issues: whether it had jurisdiction over the defendant; whether it had the power to grant a permanent anti-suit injunction for an arbitration seated in Singapore where arbitration proceedings have already concluded, and the award issued; and whether it should grant the permanent anti-suit injunction in the circumstances of this case.[170]

11.104 The first issue can be dealt with briefly. Sun had to apply for leave to serve out. The court held that by agreeing to be bound by the ICC Court's decision to fix the seat in Singapore and agreeing to the terms of reference expressing Singapore was the seat of the arbitration, the parties had agreed to Singapore law being the curial law and submitting to the Singapore courts' supervisory jurisdiction over matters arising out of or in relation to the arbitration agreement. This gave the Singapore courts jurisdiction over the matter for the purposes of an O 11 application.[171] The court also seems to have rightly taken the position that an anti-suit injunction to prevent the breach of an arbitration agreement could only be granted by the court exercising supervisory jurisdiction over the arbitration, namely, the courts from the seat of the arbitration.[172] This jurisdiction is also the most appropriate forum in which an anti-suit injunction would be sought.[173]

168 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [15].
169 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [20].
170 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [21].
171 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [29].
172 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [28].
173 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [30].

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11.105 On whether the court had power to issue a permanent anti-suit injunction, the court first acknowledged that it did not have power under the IAA because that power was limited to interim injunctions.[174] It also did not have power under s 4(10) of the CLA for the same reason.[175] Instead, the court opined that its power to "grant all reliefs and remedies at law and in equity", which stemmed from s 18(2) read with para 14 of the First Schedule to the SCJA, included the equitable remedy of a permanent injunction.[176] Further, the court's power was not curtailed by Art 5 of the United Nations Commission on International Trade Law Model Law on International Commercial Arbitration.[177]

11.106 On the final issue of whether the court should issue the injunction, the court made a number of noteworthy observations. First, the court acknowledged that in the ordinary course of things, a breach of an arbitration agreement would satisfy the requirements for an anti-suit injunction provided that the application is made without delay, the foreign action is not well advanced, and there is no other reason why the injunction should not be granted.[178] The court also clarified that, in such circumstances, "good reason" must be shown why the jurisdiction should not be exercised to grant the anti-suit injunction, and the burden of establishing such "good reason" rests upon the party in breach of the arbitration agreement.[179] While not the same phraseology, one can imagine this "good reason" standard to be similar, if not equivalent, to the standard of "strong cause" one needs to fulfil in attempting to similarly breach an agreement to submit a dispute to a particular forum under an exclusive jurisdiction agreement.[180]

11.107 This leads to the second point, which is how this analysis is altered when court proceedings are commenced after the arbitration has concluded and an arbitral award issued. To answer this, the court first identified two implied negative obligations arising from an arbitration agreement. The first is that the parties agree not to pursue claims that

174 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [39].

175 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [41]–[42].

176 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [43].

177 A/40/17, annex I; A/61/17, annex I (21 June 1985; amended 7 July 2006). *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [44] and [46].

178 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [48].

179 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [48].

180 *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd* [2017] 2 SLR 814 at [80], *per* Judith Prakash JA.

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are covered by the arbitration agreement in any other forum. This obligation exists regardless whether arbitration proceedings are ongoing or even proposed.[181] The second is that parties agree to not set aside or attack any award issued other than through mechanisms provided for.[182] The court went on to opine that after an arbitration has been concluded, it would not make sense to rely on the first negative obligation. Instead, the second negative obligation comes into play and not honouring the award by, *inter alia*, seeking in foreign litigation to re-open matters decided in the arbitration would be a breach of this obligation. Having said this, the court went on to counsel caution. While the defendant's actions could likely be considered vexatious and oppressive, and even an abuse of the court's process, it is for the foreign court to determine whether there is an abuse of its process and not for the Singapore court to interfere via an anti-suit injunction, especially when the foreign proceedings are well advanced.[183] This consideration must surely be correct.

11.108 On the facts, the court found that Sun's institution of the Maldivian action for misrepresentation and other breaches was squarely a breach of its negative obligation not to set aside or challenge the arbitral award other than through setting aside procedures in accordance with the law of the seat court. This is because the Maldivian action instituted by Sun essentially relitigated the same issues and damages that were already determined in the arbitration proceedings.[184] Interestingly, the court's reasoning suggests that the grant of an anti-suit injunction pursuant to a breach of an arbitration agreement could be justified on two *separate* grounds:[185] one for protection of substantive rights pursuant to the agreement,[186] and another for protection from vexatious and oppressive conduct.

11.109 Third, apart from considering how advanced foreign proceedings are, the applicant's delay in applying for an anti-suit injunction is an important consideration, as are any consequences of the delay.[187] This must also be correct.

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181 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [53].

182 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [54]–[55].

183 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [55].

184 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [58].

185 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [58].

186 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232 at [65], *per* Quentin Loh J.

187 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [63].

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11.110 Taking into account the second and third points, the court opined that the applicant should have applied for an anti-suit injunction much earlier and as the foreign proceedings were so far advanced, an anti-suit injunction was not justified. However, the court granted a limited permanent anti-suit injunction restraining Sun from relying upon the March 2017 judgment.[188] This is curious. The court had essentially issued an anti-enforcement injunction. While there is no quarrel that the court had the power to do so, one would think that the threshold for granting an anti-enforcement injunction would be higher than that for an anti-suit injunction. If it was not appropriate for an anti-suit injunction to be granted here, it is respectfully submitted that an anti-enforcement injunction should not have been granted either.

11.111 For the sake of completion, it is important to note that this matter had been appealed to the Court of Appeal and a judgment handed down in 2019. As such, the Court of Appeal judgment will be considered in next year's Ann Rev. It is sufficient to note here that the Court of Appeal allowed the appeal in part and opined that there were no exceptional circumstances in favour of granting the anti-enforcement injunction.

Enforcement of foreign judgment – Choice of Court Agreements Act – Definition of terms

Enforcement of foreign judgment – Choice of Court Agreements Act – Order 111 rule 2(3)(*a*)

11.112 In international commercial litigation, obtaining a judgment is only one step in the game. What is often more important than obtaining a judgment is the enforcement of that judgment. Apart from enforcing a foreign judgment at common law by a claim in the courts,[189] the Choice of Court Agreements Act[190] ("CCAA") is a fairly recent addition to the recognition and enforcement of a foreign judgment by the statutory route, joining the Reciprocal Enforcement of Commonwealth Judgments Act[191] and Reciprocal Enforcement of Foreign Judgments Act.[192]

188 *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [64].
189 *Poh Soon Kiat v Desert Palace Inc* (trading as Caesars Palace) [2010] 1 SLR 1129 at [13], *per* Chan Sek Keong CJ.
190 Cap 39A, 2017 Rev Ed.
191 Cap 264, 1985 Rev Ed.
192 Cap 265, 2001 Rev Ed.

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11.113 *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd*[193] is the first judgment to discuss the requirements to be fulfilled before a foreign judgment can be recognised and enforced pursuant to the CCAA. Pursuant to s 13 of the CCAA, Ermgassen & Co Ltd ("Ermgassen") made an *ex parte* application for the recognition and enforcement of a summary judgment made by the High Court of Justice of England and Wales, Queen's Bench Division, against a Singapore-registered company, Sixcap Financials Pte Ltd.[194]

11.114 Briefly, the following requirements must be fulfilled before a foreign judgment can be recognised and enforced under s 13 of the CCAA:

(a) The foreign judgment must be pursuant to a dispute on an international case.[195]

(b) The dispute must be governed by an exclusive choice of court agreement.[196]

(c) The dispute must relate to a civil or commercial matter.[197]

(d) The foreign judgment must be a final judgment on the merits of the dispute, issued by a court of the contracting state to the Convention of 30 June 2005 on Choice of Court Agreements[198] ("Hague Convention").[199]

11.115 The court made a number of helpful observations in relation to these requirements. First, the court reiterated the conceptual distinction between recognition and enforcement of foreign judgments under s 13(2) of the CCAA: recognition means that the court addressed gives effect to the determination of the legal rights and obligations made by the court of origin, while enforcement means the application of the legal procedures of the court addressed to ensure that the defendant obeys the judgment given by the court of origin. Thus, a decision to enforce the judgment must logically be preceded or accompanied by the

193 [2018] SGHCR 8.
194 *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8 at [4].
195 Section 8 read with s 4 of the Choice of Courts Agreement Act (Cap 39A, 2017 Rev Ed).
196 Section 8 read with s 3 of the Choice of Courts Agreement Act (Cap 39A, 2017 Rev Ed).
197 Choice of Courts Agreement Act (Cap 39A, 2017 Rev Ed) s 8.
198 30 June 2005; entry into force 1 October 2015.
199 Section 13(2) read with s 2(1) of the Choice of Courts Agreement Act (Cap 39A, 2017 Rev Ed).

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recognition of the judgment. In contrast, recognition need not be accompanied or followed by enforcement.[200]

11.116 Secondly, while the phrase "civil or commercial matter" is not defined under the CCAA, the court took guidance from the Explanatory Report on the 2005 Hague Choice of Court Agreements Convention 2013, published by the Hague Conference on Private International Law ("the Explanatory Report"), and provided some helpful remarks. The phrase is primarily intended to exclude public law and criminal law. Importantly, the reason for the phrase is that in some legal systems "civil" and "commercial" are regarded as separate and mutually exclusive categories. Therefore, the fact that in some legal systems, commercial proceedings are a subcategory of civil proceedings should not affect the usual, common-sensical interpretation of this phrase.[201]

11.117 Third, elaborating on the requirement of a "foreign judgment", the court noted that the CCAA is not intended to enforce any procedural ruling.[202] It is not entirely clear what the term "procedural ruling" encompasses, apart from s 10 of the CCAA making it clear that the CCAA cannot be relied upon to enforce any interim measure. Regardless, for parties seeking to resist recognition and/or enforcement of foreign judgments under the CCAA, this is one argument to keep in mind – that the CCAA does not allow enforcement of procedural rulings.

11.118 Fourth, the court took the position, supported by the Explanatory Report, that unless it is a default judgment that is sought to be enforced, the assumption is that the defendant was notified, subject to production of evidence to the contrary.[203] It follows that where the recognition and/or enforcement involves a default judgment, the applicant must satisfy the court that the foreign defendant was notified of the foreign proceedings. While it is probably technically more accurate to say that in every case of recognition/enforcement the court must be satisfied that the foreign defendant was notified, the court's approach is a practical one and it is not unreasonable to assume notification except in the situation of a default judgment.

11.119 Admittedly, the CCAA makes no express reference for the applicant to prove that the foreign defendant was notified of the foreign proceedings on which the foreign judgment was premised. However, it cannot be denied that notice of proceedings is a fundamental

200 *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8 at [11].
201 *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8 at [8].
202 *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8 at [9].
203 *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8 at [22].

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requirement, the lack of which could entitle the foreign defendant to resist recognition and/or enforcement of foreign judgment at common law.[204] Further, O 112 r 2(2)(*h*) of the ROC requires the applicant to state in his supporting affidavit, for the application to recognise and/or enforce the foreign judgment, whether there are any circumstances under Pt 3 of the CCAA that would entitle the court to refuse to recognise or enforce the foreign judgment. This is surely an obligation on the applicant to support his assertion in his supporting affidavit that there are no grounds under Pt 3 of the CCAA present to justify the refusal, in particular, assuring the court that the defendant was notified of the foreign proceedings which the foreign judgment was premised on, such that s 14(*a*) of the CCAA is not "triggered" to oblige the court to refuse recognition and/or enforcement.

11.120 Finally, O 111 r 2(3)(*a*) of the ROC requires the applicant to exhibit, to the supporting affidavit, a complete and certified copy of the foreign judgment, including the reasons for the decision of the court. On the facts, the applicant exhibited, *inter alia*, the foreign summary judgment order, which did not contain detailed reasoning.[205] The court did not find this to be fatal to the application. Relying on the Explanatory Report, the court held that as each State retains its discretion to determine the consequence of failure to produce the required documents, this meant that the failure to produce a required document is not invariably fatal in all cases.[206] Additionally, the court also noted that the drafters of the Hague Convention were of the view that excessive formalism should be avoided; the judgment-creditor should be allowed to rectify omissions if the judgment-debtor was not prejudiced.[207]

11.121 This is curious. Order 111 r 2(3) begins with mandatory language: "The supporting affidavit *must* exhibit …" [emphasis added]. It is unusual that the court would take the position that the intention expressed in an Explanatory Report could override the mandatory language of the ROC. And while excessive formalism should be avoided, the Explanatory Report also said to do so only when there is no prejudice to the judgment-debtor.[208] It is submitted that in an *ex parte* application where the defendant is not present to defend his own interest, the need to exhibit *all* necessary documents is even more pressing. It is therefore surprising that the court, while acknowledging

204 *Adams v Cape Industries plc* [1990] 1 Ch 433 at 563H, *per* Slade LJ.
205 *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8 at [20].
206 *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8 at [24(a)].
207 *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8 at [24(b)].
208 *Ermgassen & Co Ltd v Sixcap Financials Pte Ltd* [2018] SGHCR 8 at [24(b)].

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that the applicant could have done better, nonetheless found that O 111 r 2(3)(*a*) was satisfied.

11.122 Be that as it may, the court's clarifications on the requirements of the CCAA are to be welcomed. It would be interesting to see the development of the CCAA regime as more applications are brought before the Singapore courts.

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