9. CONFLICT OF LAWS

Joel **LEE** Tye Beng
LLB (Hons) (Wellington), LLM (Harvard), DCH (AIH);
Barrister and Solicitor (New Zealand), Advocate and Solicitor (Singapore);
Associate Professor, Faculty of Law, National University of Singapore.

Introduction

9.1 For 2007, there are nine cases which will be examined in this review.

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

9.3 For the sake of completion, it is appropriate to mention that two cases reported in 2007 have already been reviewed last year. These cases are *Westacre Investments Inc v State-Owned Co Yugoimport SDPR* [2007] 1 SLR 501 and *Swift-Fortune Ltd v Magnifica Marine SA* [2007] 1 SLR 629.

Stay of proceedings – *Forum non conveniens*

9.4 There were four cases relating to stay of proceedings. The first was *Datacraft Asia Ltd v Kaufman, Gregory Laurence* [2007] SGHC 111.

9.5 The first plaintiff, a Singapore company, was the 100% shareholder of the second plaintiff, a majority shareholder in DCJ. The defendants were minority shareholders in DCJ. DCJ was formed as a result of a series of mergers of Japanese companies. It was discovered by the defendants that the value of one of the predecessor companies was inflated and that the plaintiffs had overpaid for their shares in that company. In exchange for evidence of this, the plaintiffs, in a letter agreement, agreed to pay the defendants 30% of any sum recovered from the perpetrators. Subsequently, the plaintiffs informed the defendants of the amount they were entitled to and when asked for a breakdown, the plaintiffs refused to provide any details on the basis that there was a confidentiality clause in the settlement agreement with the perpetrators.

9.6 The defendants commenced proceedings in the High Court claiming that the plaintiffs owed a fiduciary duty to account for the

moneys due. The court held, and this was subsequently affirmed by the Court of Appeal, that the defendants were not entitled to seek a disclosure of information and documents relating to the settlement from the plaintiffs.

9.7 The defendants subsequently commenced proceedings in Japan against the perpetrators and DCJ for damages in relation to the inflated valuation of the predecessor company. The plaintiffs responded by commencing these proceedings in Singapore alleging that the Japanese proceedings breached cl 8 of the letter agreement. The defendants applied for a stay based on the arguments of *forum non conveniens*, *lis alibi pendens* and issue estoppel.

9.8 With regards to *forum non conveniens*, the court considered stage 1 of the test from *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 ("*The Spiliada*") and concluded that Japan was the more appropriate forum. The writer agrees with the court's analysis of the connecting factors. This was in and of itself sufficient to dispose of the matter.

9.9 It is appropriate to make two comments at this point. First, it is interesting that the court came to this conclusion after a lengthy discussion of *lis alibi pendens*, issue estoppel and stage 2 of the test from *The Spiliada*. It is submitted that it would have been far more efficient to consider this matter first before looking at all the other issues. This is especially so in relation to stage 2 of the test in *The Spiliada*.

9.10 Secondly, the court engaged in an extensive discussion of the doctrine of *lis alibi pendens*. At certain points in the judgment, it was not clear if the court was discussing *lis alibi pendens* as a separate doctrine or as part of the doctrine of *forum non conveniens*. In fairness, *lis alibi pendens* used to be a separate ground for the staying of proceedings. With the development of *forum non conveniens*, *lis alibi pendens* became subsumed under the two-stage test from *The Spiliada*. This distinction is significant because if *lis alibi pendens* is a separate ground for a stay, then meeting its requirements is sufficient. If it is part of *forum non conveniens*, then meeting its requirements only establishes it as a factor to be considered in the two-stage test. It can be inferred that the court took the latter view and it is submitted that this is correct. The existence of multiple proceedings is only a factor in the two-stage test and is a relevant consideration in both the stages.

9.11 Finally, and this does not relate to *forum non conveniens*, the court considered the defendants' arguments that there might be the operation of issue estoppel. It is interesting to note that there was no need for the court to consider this since there did not exist a final and conclusive judgment for an issue estoppel in the first place. Be that as it

may, the court opined that the requirement of identity of parties was not met even though the Japanese courts were likely to deal with the same subject matter. As such, issue estoppel had not been established.

9.12 At the end of the day, while the court took a somewhat circuitous route, it is submitted that it came to the correct conclusion.

9.13 The second case was *Exxonmobil Asia Pacific Pte Ltd v Bombay Dyeing & Manufacturing Co Ltd* [2007] SGHC 137. In this case, the parties entered into a contract for the purchase of paraxylene, a raw material used in the manufacture of polyester. The plaintiff was to ship and deliver the paraxylene to Mumbai. The defendant subsequently claimed that it was unable to take delivery, invoking the *force majeure* provision in the contract. It also claimed that it was entitled to repudiate the contract based on fraud and misrepresentation. The plaintiff rejected these claims and, upon the defendant refusing to take delivery, sold the paraxylene to another party at a loss. It then commenced proceedings against the defendant for the loss arising from the breach of contract.

9.14 The defendant applied for a stay of proceedings based on *forum non conveniens* alleging that India was the more appropriate forum for the resolution of the dispute. The assistant registrar dismissed the application. On appeal to the High Court, the appeal was dismissed. While the decision of Tan Lee Meng J did not advance the law with regards to *forum non conveniens*, it is useful to make two observations.

9.15 First, the main argument for the defendant in favour of a stay concerned the location and compellability of witnesses. It was claimed that a key issue in this matter was the breakdown of its plant in India and as such the defendant needed to call a number of Indian witnesses to testify as to the breakdown. On this argument, Tan J considered the point made in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 where the Court of Appeal opined that, unlike in the past, the location and the compellability of witnesses is no longer as compelling a factor. The importance of this factor depends on whether, inter alia, the issues in question revolve around issues of fact. The writer submits that in an increasingly global and technologically-enabled world, taking a more nuanced approach to the factors enunciated in *The Spiliada* is a step in the right direction.

9.16 Secondly and by way of *obiter*, Tan J noted that the defendant had applied in India for a declaration that the contract was not binding. While the defendant did not argue this as a ground for a stay, the court opined that even if they had, the existence of competing foreign proceedings did not automatically warrant a stay. This is especially where the proceedings were commenced for the purpose of

demonstrating the existence of a competing jurisdiction or were at a preliminary stage. On the facts, the court held that the proceedings in Bombay were not a sufficient reason for a stay of the proceedings in Singapore.

9.17 The third case was *Murakami Takako v Wiryadi Louise Maria* [2007] 1 SLR 1119 (HC), [2007] 4 SLR 565 (CA).

9.18 The appellant was the executrix of her father's estate in Indonesia. Prior to his death, he had divorced the first respondent and commenced ancillary proceedings in Indonesia for the division of their matrimonial assets. These proceedings culminated in a judgment of the Supreme Court of Indonesia ("Judgment 203") declaring, *inter alia*, that all assets that had been acquired during the marriage were joint assets and these included moveable and immoveable assets outside Indonesia. The court also ordered the first respondent to deliver, *inter alia*, half of all the joint assets to the appellant. The Supreme Court of Indonesia also delivered Judgment 1265 which ruled that the second to fourth respondents were heirs of the testator and Judgment 2696 which ruled that the second to fourth respondents were entitled to a one-quarter share of the testator's estate under Indonesian law.

9.19 The appellant commenced proceedings in Singapore for recovery of the Singapore properties as well as properties not adjudicated in Indonesia. Before the trial, the Senior Assistant Registrar granted applications by the first, second and third respondents to withdraw certain counterclaims subject to the condition that they were not to bring in Singapore any action for the same, or substantially the same, causes of action as those made in their original counterclaims. Subsequently at trial, the respondents sought to amend their pleadings including a set of counterclaims. The appellant objected to the application and the trial judge, Andrew Ang J, dismissed these objections. This was appealed to the Court of Appeal.

9.20 For our purposes, the parts of the judgment relevant to the conflict of laws relate to the issues of *forum non conveniens* and the impact of the foreign judgment.

9.21 With regards to *forum non conveniens*, the respondents had made a claim with respect to the money in the Daiwa NY Account. The appellant argued, both in the High Court and on appeal, that New York was the more appropriate forum. In both cases, there was little evidence, if at all, adduced to show that New York was the more appropriate forum. Further, the court also opined that there were more factors pointing to Singapore than New York. As such, the Court of Appeal affirmed the High Court's decision to dismiss this argument. A noteworthy point is that the court, in response to the respondent's

argument that *forum non conveniens* is not relevant to an application to amend pleadings, made a clear statement that the doctrine of *forum non conveniens* is applicable to an amendment to pleadings in the same way that it applies to service outside the jurisdiction.

9.22 The court also addressed the issue of the impact of the various foreign judgments. This will be dealt with in paras 9.50 to 9.57.

9.23 The fourth case was *VH v VI* [2008] 1 SLR 742. The petitioner, a French national, commenced divorce proceedings in Singapore against the respondent, a Swedish national. The parties were married in Sweden, were both Singapore permanent residents and had two children. While certain interlocutory applications had been filed, the Singapore proceedings were at a nascent stage. The respondent commenced divorce proceedings in Sweden and applied for a stay of the Singapore proceedings. The petitioner attempted to stay the proceedings in Sweden but failed in her application and subsequent appeals. She then applied to the Singapore courts for an anti-suit injunction. The High Court issued an interim injunction prohibiting the respondent from proceeding with the Swedish proceedings pending the hearing and disposal of the anti-suit application. The respondent disregarded this order and applied for and obtained a divorce decree from the Swedish Courts. The matter came before Kan Ting Chiu J and the two matters facing the court was whether the Singapore proceedings should be stayed and whether an anti-suit injunction should be granted.

9.24 On the application for a stay of proceedings, the respondent argued that Sweden was a more appropriate forum because there were more connecting factors linking the parties there, that the proceedings in Sweden were more advanced than the Singapore ones, that Sweden allowed a dissolution of the marriage on a fault-free basis and that ancillary matters could be settled more expeditiously. The court dismissed the application, opining that the respondent had not shown that Sweden was a more appropriate forum and that there was no need to consider stage 2 of the test from *The Spiliada*.

9.25 A number of observations can be made at this point. First, the court did not consider the purported differences between Swedish and Singapore law to be significant. This must be correct. The court should not engage in a comparative exercise of the laws of competing fora in determining whether there is a more appropriate forum elsewhere. This would smack of judicial chauvinism.

9.26 Secondly, the court also did not consider significant the advanced stage of proceedings in Sweden. While the court did not address its reasons explicitly, it appeared significant to the court that the

respondent commenced the proceedings in Sweden some 13 months after he had participated in the Singapore proceedings.

9.27 The third observation is a somewhat speculative one. The court's refusal of a stay can be explained by there being insufficient factors connecting the matter to Sweden so as to satisfy stage 1 of the test in *The Spiliada*. However, the court seemed to consider it significant that the respondent had "by his conduct [led] the petitioner and the Singapore court to believe that he accept[ed] Singapore to be the appropriate forum to deal with the divorce" (at [23]) and had been content to proceed in Singapore (at [29]). It is not clear how this factor fits within stage 1 of *The Spiliada* test. It is submitted that this consideration might be better taken into account at stage 2 of the test by arguing that the respondent's conduct would lead to injustice to the petitioner and as such would justify a refusal of a stay. While the finding of the court with regards to this point would have been the same, it would keep the two stages of *The Spiliada* test conceptually clear.

9.28 The court's observations relating to anti-suit injunctions will be considered in paras 9.76 to 9.80.

Jurisdiction clauses

9.29 There was one case relating to jurisdiction clauses. *Bulthaup GMBH & Co KG v KHL Marketing Asia-Pacific Pte Ltd* [2007] SGDC 64 involved a dispute around a trade partnership agreement. The plaintiffs terminated the agreement and claimed for various sums due. The defendants applied to set aside the writ and service as well as for a stay based on a foreign jurisdiction clause and *forum non conveniens*. The Deputy Registrar dismissed the application and the defendants appealed.

9.30 In a well-reasoned judgment, District Judge Aedit Abdullah considered three questions. First, the nature of the jurisdiction clause in the agreement. Second, whether the defendants had, nonetheless, accepted the jurisdiction of the Singapore courts. Finally, whether the defendants had established strong cause sufficient for the court to stay proceedings.

9.31 On these issues, District Judge Aedit Abdullah opined that the clause in question was an exclusive jurisdiction clause in favour of Germany and that the defendants had not made an unequivocal choice in favour of the Singapore courts hearing the matter. He also opined that the plaintiffs had not shown strong cause sufficient for the court to stay proceedings in favour of the chosen forum.

9.32 There are three noteworthy points in this case. The first relates to the approach the court took in interpreting the jurisdiction clause. The court noted that there were no issues of formation involved and that there was no question that the governing law of the contract was German Law. In determining whether the clause was exclusive and whether the dispute in question was within the scope of that clause, German law would apply and that since there was no proof that German law was different from the *lex fori*, the presumption that German law was identical to Singapore law applied. With regard to both these matters, this approach is both trite and correct and the writer agrees with the learned District Judge that even though the court did not explicitly specify that it was exclusive, a robust approach to interpretation points to that conclusion.

9.33 Secondly, the court noted that the parties seemed to have used the term "submission" interchangeably with "waiver" or "election". The learned District Judge correctly pointed out that the notion of "submission" was technically an acceptance of the jurisdiction of the courts which did not preclude the application for a stay. However, he went on to point out that these concepts all sought to answer the question whether the parties had made an unequivocal choice in favour of the Singapore courts. Again, the writer agrees with this approach. Often, one gets mired in legal tests and it is refreshing to see an approach that approaches the issue simply and practically. On the facts, the court concluded, and it is submitted, correctly that a request for further and better particulars to solicitors for the other party did not constitute an unequivocal indication of choice.

9.34 Finally, the court noted that where an exclusive jurisdiction clause existed, the courts will hold parties to their contractual choice unless strong cause is shown otherwise. To show strong cause, the plaintiffs argued that the defendants had no real defence. While this was not made explicit, it is clear that the court seems to accept that the notion of no real defence is a concept that goes to showing strong cause as opposed to a way of bypassing the strong cause test. This is consistent with the position established in *The Rainbow Joy* [2005] 1 SLR 589 (HC), [2005] 3 SLR 719 (CA). The court concluded that there was an indication of a real defence and that strong cause had not been proved.

Choice of law

9.35 There were two cases relating to choice of law. The first was *S Y Technology Inc v Pacific Recreation Pte Ltd* [2007] 2 SLR 756 (HC), *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] SGCA 1. The plaintiff respondent, a company incorporated in the United States, agreed to provide financial assistance to a China-incorporated company,

Shanghai Pacific, for a project *via* a contract between itself, Shanghai Pacific and Mr Lee (who incorporated the defendant appellant, Pacific Recreation Pte Ltd ("PRPL") as well as PAPL). Under this contract, the plaintiff respondent agreed to procure the issue of standby letters of credit as security for a loan to be extended to Shanghai Pacific by the Industrial and Commercial Bank of China. Security for the assistance was given by way of a deed of indemnity in favour of the plaintiff respondent executed under seal by the defendant appellant, PAPL and Mr Lee. Shanghai Pacific defaulted on the loans and the plaintiff respondent reimbursed the issuer of the standby letters of credit. When payment of the total sum demanded from PRPL and PAPL was not forthcoming, winding-up applications against both PRPL and PAPL were filed.

9.36 PAPL and PRPL denied that they were liable to pay the amount demanded because the deed was unenforceable. They argued that the deed was governed by Chinese law and was invalid because it had been entered into pursuant to a contract which was void under Chinese law. The plaintiff respondent argued that the deed was governed by Singapore law and was enforceable.

9.37 At the High Court, Judith Prakash J held that the deed was governed by US law and that since neither party had submitted any evidence relating to US law, this was presumed to be the same as Singapore law which provided that the deed, as an indemnity separate from the principal, was still valid.

9.38 On appeal, the Court of Appeal disagreed with Prakash J's conclusion that the deed was governed by US law. Interestingly, this was not because of a legal analysis of the factors connecting the deed to the US but on the basis that US law was not one of the choices available to the court. By unilaterally choosing US law and concluding it was similar to Singapore law since there was no proof of US law, the parties were deprived of an opportunity to address the court on this issue. It is important to note that a court is not limited to considering the issues canvassed before it but any conclusions it drew had to be reasonable as a matter of inference or from the arguments made by the parties. In this case, the court felt that the conclusion that US law governed was not reasonable.

9.39 Having said this, the court opined that the procedural flaw did not mean that Prakash J's decision had to be set aside. The court considered the three-stage test in determining the governing law of a contract and noted that the parties had not expressly chosen a governing law. It went on to consider various factors that might lead to an inference of the parties' choice of governing law. The court found these factors to be inconclusive. It finally shifted to the third stage which

sought to determine the law which had the closest and most real connection with the contract. The court held that this was Singapore law thereby coming to the same practical decision as the High Court.

9.40 Three comments relating to conflict of laws can be made here. First, the case reiterates the three-stage test for determining the governing law of a contract and engages in a clear analysis of the factors to be taken into account at stages 2 and 3. The writer does not propose to recreate the court's analysis here. Suffice it to say, the court was lucid and nuanced in its analysis.

9.41 Secondly, it is interesting the way the court chose to clarify the difference between the second and third stages of the test in determining the governing law of a contract. The court stated that the difference lay not in the factors to be taken into consideration, but in the weight which is to be accorded to these factors. This seems contrary to the conceptual argument that factors to be considered at stage 2 have to relate to some subjective indication of the parties' intention and that those in stage 3 do not (thereby creating a wider pool of factors to consider). Having said that, the court's approach not to apportion equal weight on all factors is not inconsistent with this argument. In practice, this would mean that at stage 2, factors that are strongly inferential of any intention as to the governing law would have more weight than factors that do not.

9.42 Finally, the court made some useful pronouncements, by way of *obiter*, relating to the proof of foreign law. Briefly, the court opined that expert evidence on foreign law was preferable to raw sources of foreign law. Where raw sources are used, they must meet the requirements of the Evidence Act (Cap 97, 1997 Rev Ed) and the court is not obliged to accord them any evidentiary weight. Expert evidence must be contained in an affidavit of the expert and should contain a *curriculum vitae* detailing the expert's relevant experience with special regard to the issue on which the expert's opinion is sought. The expert's opinion should not advocate a party's cause but should be the independent product of that expert. The purpose of expert evidence was not merely to place the content of foreign law before the court but also to obtain the expert's opinion as to that law's effect. This is especially important where the law was not settled in the foreign jurisdiction.

9.43 The second case was *TQ v TR* [2007] 3 SLR 719. The petitioner, a Swedish national, and the respondent, a Dutch national, executed a prenuptial agreement before their marriage in the Netherlands. The prenuptial agreement provided essentially for each party to keep their own assets. Three children and two shifts of jurisdiction later, the marriage was dissolved in Singapore and the issues of custody, care and

control of the children, maintenance and division of matrimonial assets came before Choo Han Teck J.

9.44 While this was a landmark case for family law in that it enforced a foreign prenuptial agreement, the writer will only consider the conflict of laws aspect to it. On this, Choo J identified the issue as whether the prenuptial agreement should be enforced. After going through a complex and somewhat convoluted reasoning process involving considerations of the domicile of the parties, the court upheld the prenuptial agreement and did not order the division of assets.

9.45 It is not clear why the court found it necessary to consider the domicile of the parties. Choo J states that the domicile determines the issue of matrimonial assets. While correct, this only applies in the absence of a prenuptial agreement. Where a prenuptial agreement exists, it will be given effect according to its proper law subject to any overriding considerations of the forum. The question then is what the proper law of this prenuptial agreement was. This was not a question that was explicitly posed by the court. On the assumption that an express choice of law did not exist, then one had to determine this through either the inferred intention of the parties or through objective factors. It is here that the domicile of the parties could have some relevance. Considering that the prenuptial agreement was executed under Dutch law and the various connections the parties had with the Netherlands, the proper law of the contract was likely to be Dutch law.

9.46 Assuming the prenuptial agreement was valid according to its proper law, then this would determine the rights of the parties *vis-à-vis* the matrimonial assets subject to overriding considerations of the forum.

9.47 These considerations can take one of two forms. The first is whether the prenuptial agreement offends the public policy of the forum. Since prenuptial agreements had at some point been considered contrary to public policy, the court could have disregarded it. As mentioned earlier, this case represents a landmark decision in recognising and giving effect to such agreements. Presumably, this must mean that the foreign prenuptial agreement did not offend public policy.

9.48 The second form is whether the prenuptial agreement is overridden in some way by the effect of forum mandatory statutes. In this case, the applicable statute is the Women's Charter (Cap 353, 1997 Rev Ed). The court considered the provisions in s 112 and opined that it was entitled to take into account the prenuptial agreement and give effect to it.

9.49 As mentioned earlier, the writer has focussed only on the conflict of laws aspect to this judgment. For an analysis of this case from both the conflict of laws and family law perspectives, see Ong, "Prenuptial Agreements and Foreign Matrimonial Agreements: *TQ v TR*" (2007) 19 SAcLJ 397.

Foreign judgments

9.50 There were three cases relating to foreign judgments. The first was *Murakami Takako v Wiryadi Louise Maria* [2007] 1 SLR 1119 (HC), [2007] 4 SLR 565 (CA). This case was discussed earlier in relation to stay of proceedings (at paras 9.17 to 9.21) and involved three judgments of the Supreme Court of Indonesia and their impact.

9.51 One of the questions that faced the court was whether the respondents' counterclaims were time-barred. Their claims, which were based on Judgment 203, were filed six years after Judgment 203 had been handed down. Their arguments were that Judgment 203 was either an *in rem* judgment (and, therefore, not subject to any limitation period under the Limitation Act (Cap 163, 1996 Rev Ed)) or that, even if it was an *in personam* judgment, their rights had been implicitly acknowledged by the appellant in her statement of claim.

9.52 The High Court accepted the former argument and opined that Judgment 203 was an *in rem* judgment. The Court of Appeal disagreed and opined that the nature of the judicial proceedings and the intention of the Supreme Court of Indonesia as to the effect of the order on the parties to the proceedings led them to conclude that Judgment 203 merely declared the rights of the parties and bound the parties personally. As such, it was an *in personam* judgment.

9.53 They then went on to consider the respondents' alternative argument that their rights had been implicitly acknowledged by the appellant in her statement of claim. The court considered the preconditions for such an acknowledgement. First, to operate as an acknowledgement, it was not necessary for an admission to be direct or explicit as long as the statement or act constitutes a sufficiently clear admission of the title or claim to which it is alleged to relate. This acknowledgment must, of course, stem from a voluntary desire to admit such claim. Secondly, a mere reference in subsequent proceedings to the rights of a party under an existing judgment may be insufficient and such reference may be for the purpose of denying the existence of such rights. The court found this to be the effect of various paragraphs in the re-amended statement of claim. However, the court did opine that there was sufficient acknowledgment of the defendant respondents' rights in

certain paragraphs of the original statement of claim such that s 26(1) of the Limitation Act operated to extend the period of limitation.

9.54 The second question facing the court *vis-à-vis* the impact of the foreign judgment related to the jurisdiction of the Indonesian court on a judgment *in rem* on movables and immovables situated outside Indonesia. The argument was that Singapore should not enforce a foreign judgment *in rem* if the subject matter was not situated in that foreign country when the judgment was given. Considering the Court of Appeal's conclusion that Judgment 203 was a judgment *in personam*, there was no need to address this issue. However, since the trial judge had expressed an opinion on this matter, the Court of Appeal wanted to provide some clarifications.

9.55 The High Court had opined that although a court of a foreign country did not have jurisdiction to adjudicate upon the title to or the right to possession of any immovable situated outside that country, this rule did not apply when the claim related to the proceeds of the sale of such property as opposed to the title to the property. The Court of Appeal disagreed and opined that this confused the claim with the legal basis of the claim. If a foreign court did not have jurisdiction to pronounce on the title of immovable property in Singapore, the fact that the property has been turned into proceeds of sale does not change the legal basis of the claim which remains the foreign judgment itself.

9.56 With respect to movables, the High Court had opined that courts of a foreign country had jurisdiction to determine the succession to all movables (wherever situated) of a testator or intestate dying domiciled in such a country. As such, there was no reason why a Singapore court would not recognise Judgment 203 as binding on the parties in relation to movable properties situated outside Indonesia. The Court of Appeal pointed out that the trial judge was incorrect in that the Indonesian court was not exercising testamentary but matrimonial jurisdiction. However, the outcome was correct as a judgment made in matrimonial proceedings would be similarly binding on the parties and recognisable and enforceable by a Singapore court.

9.57 The final question facing the court *vis-à-vis* the impact of the foreign judgment related to whether Judgments 1265 and 2696 were binding. The latter ruled that the second and fourth respondents were entitled to a one-quarter share of the testator's estate and it was argued that since the judgment was currently the subject of review by the Supreme Court of Indonesia, it could not form the basis of the respondents' counterclaim. The trial judge had agreed with this submission but opined that the counterclaims were not based solely on Judgment 2696 but on Judgment 1265 as well. The Court of Appeal approved this approach. In doing so, it dismissed the plaintiff appellant's

argument that Judgment 1265 was time barred since it was an *in rem* judgment.

9.58 The second case was *Perwira Affin Bank Bhd v Lee Hai Pey* [2007] 3 SLR 218. This case involved the plaintiff bank, the defendant guarantor and a 20-year saga of the bank attempting to register and enforce a Malaysian judgment in Singapore. The facts, while long-winded, are relatively straightforward.

9.59 In 1988, summary judgment was obtained against the defendant who appealed to the High Court of Malaya and failing there, appealed to the Supreme Court of Malaysia. While this appeal was pending, the plaintiff registered the judgment in Singapore under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed). This was successfully set aside by the defendant on the grounds that an appeal against the judgment was pending in Malaysia.

9.60 When the appeal was dismissed in 1994, the bank registered the judgment for a second time in 1995 only to have it set aside again by the defendant on the grounds that more than six years had elapsed from the date of the original judgment and, therefore, it was no longer enforceable in Malaysia without the leave of court. As the bank had not obtained leave from the Malaysian court, it would not have been just and convenient to register the judgment.

9.61 The bank, not to be daunted, obtained leave from the High Court of Malaya to execute the judgment and registered the judgment in Singapore for the third time in October 1996. In a two-pronged effort, the defendant applied to set aside the Malaysian court order granting leave and in Singapore to set aside the registration.

9.62 The former application was dismissed by the senior assistant registrar of the High Court in Kuala Lumpur and an appeal to the Malaysian Court of Appeal was naturally filed. The appeal was pending when the latter application came before the assistant registrar who dismissed the application. The defendant appealed to the judge in chambers. This appeal was allowed in part in that Warren Khoo J (as he then was) ordered a stay of proceedings on the third registration order. Subsequently, the defendant's appeal to the Malaysian Court of Appeal was dismissed and his application to the Federal Court for leave to appeal further was dismissed in October 2004.

9.63 The bank filed an application for the third registration order to be perfected which was of course contested. The assistant registrar granted the application and the defendant appealed to the High Court where Prakash J dismissed the appeal.

9.64 The arguments on appeal centred around the effect of Khoo J's judgment when he allowed a partial appeal and ordered a stay. The bank's position was that Khoo J had dismissed the appeal to set aside the third registration order and had only granted a stay of the enforcement proceedings pending the defendant's appeal to the Malaysian courts to determine the validity of the order that had given the bank leave to execute the judgment after the prescribed period.

9.65 The defendant's position is that Khoo J did not dismiss his application to set aside the registration of the Malaysian judgment. As such, he was entitled to proceed afresh with his application to set aside the third registration order. It was, of course, the defendant's following argument that it was not just and convenient to register the Malaysian judgment.

9.66 Prakash J considered these arguments and Khoo J's decision and opined that had Khoo J set aside the third registration order, there would have been no need to grant a stay of proceedings. This latter action indicated that it was not just and convenient to allow further enforcement action in Singapore in respect of the Malaysian judgment for the time being until the outcome of the Malaysian appeal was clear.

9.67 As such, the assistant registrar was correct to consider the proceedings that came before her as a continuation of the 1997 hearing and the issue was whether it was just and convenient to allow the Malaysian judgment to be enforced. The bank was not to be penalised for the apparently long delay in enforcing the judgment, as the delay had resulted from the defendant's utilisation of his right of appeal in Malaysia and the stay order. Now that the Malaysian appeal process had been exhausted, it was just and convenient that the bank be allowed to perfect the order and enforce the judgment.

9.68 Two brief points may be made with regard to this case. First, it is striking that the defendant was able to stave off a judgment creditor for over 20 years through a process of applications and appeals. The writer is heartened to note that despite the 20-year delay in enforcing the judgment, the court will take into account the actions of the parties in contributing to any delay when considering whether it is just and convenient to register a foreign judgment. This must be correct.

9.69 Secondly, it is clear from the history of this case that any proceedings (in, but arguably not restricted to, the jurisdiction from which the judgment originates) that casts some doubt on the certainty of the judgment that is sought to be registered and enforced is relevant to the consideration of "just and convenient". This seems right. However, when faced with such a situation, it is submitted that a court does not have to set aside the application but can choose to stay proceedings until

that uncertainty is resolved. This was done by Khoo J with regards to the third registration order and it is submitted that this could also have been done with respect to the first registration order. If it had been done then, it may not have taken this long for the plaintiff to reap the fruits of its judgment.

9.70 As an aside, it should be noted that the saga may be ongoing. The defendant has indicated an intention to appeal further.

9.71 The final case was *The Vasiliy Golovnin* [2007] 4 SLR 277. The facts are somewhat complicated. Cargo aboard *The Chelyabinsk* was to be discharged at Lome. The bills of lading were held by the plaintiff banks. There were subsequently conflicting instructions from the third plaintiff, Banque Cantonale and the head charterer. When *The Chelyabinsk* arrived in Lome, the Lome courts heard a number of applications and made orders relating to the discharge of the cargo. This eventuated in the cargo being discharged in Lome after which the plaintiff banks obtained a Lome court order for the arrest of *The Chelyabinsk*. The defendant owners of *The Chelyabinsk* succeeded in having the arrest set aside by the Lome court (referred to as "the Lome Release Order"). This was not appealed by the plaintiff banks. They subsequently arrested *The Vasiliy Golovnin*, a sister ship in Singapore. The defendant succeeded in setting aside the warrant of arrest on the basis that the plaintiff banks had failed to disclose material facts when making its application, that there was an issue estoppel and that there was a lack of an arguable case by the plaintiff banks. The plaintiff banks appealed the assistant registrar's decision.

9.72 From a conflict of laws perspective, what is of interest in this case is how a foreign judgment can give rise to an issue estoppel. The rationale is, of course, to prevent a party to that foreign action from vexing another party to that action by seeking to reopen an issue already resolved by the foreign court. On appeal and on this point, Tan Lee Meng J upheld the assistant registrar's decision that there was an issue estoppel.

9.73 Three observations can be made here. First, the court made it clear that an arrest of a vessel which was previously released from arrest in another jurisdiction is, without more, not an abuse of process. However, there will be an abuse of process if a vessel is arrested on grounds in respect of which there is issue estoppel.

9.74 Secondly, Tan J's judgment sets out conveniently the three requirements for an issue estoppel to arise. These are: (a) the judgment must be from a court of competent jurisdiction and final and conclusive on its merits; (b) the parties to the foreign action are the same as those before the courts of the forum; and (c) the issue before the courts of the

forum is identical to those considered by the foreign court. The court considered these three requirements and opined that they were satisfied.

9.75 On the last requirement and this is the third observation, the plaintiff banks contended that the issues were not identical because the court was only required to determine whether or not it was "entitled to and ought to exercise its admiralty jurisdiction over the vessel intended to be arrested" and that the merits of arrest were considered against the procedural and substantive requirements of each jurisdiction. It is submitted that this argument was rightly rejected by Tan J. Accepting this argument would mean that one could resurrect all the arguments in favour of an arrest in Singapore even though these had been exhaustively considered and decisively rejected by the foreign court. This would in turn mean that issue estoppel could never be established in Singapore in the case of the arrest of a vessel.

Anti-suit injunctions

9.76 There was one case involving anti-suit injunctions. This was *VH v VI* [2008] 1 SLR 742 of which the aspects relating to stay of proceedings was discussed earlier (paras 9.23–9.27). This involved divorce proceedings in Singapore and the Singapore courts had issued an interim injunction prohibiting the respondent from proceeding with the Swedish divorce proceedings pending the hearing and disposal of the petitioner's application for an anti-suit injunction. The respondent disregarded this order and applied for and obtained a divorce decree from the Swedish courts.

9.77 On the petitioner's application for an anti-suit injunction, the court affirmed the principles around granting an injunction and concluded that the Swedish proceedings were not vexatious and oppressive to the petitioner. As such, this application was refused.

9.78 Three observations can be made here. First, in coming to the conclusion that ends of justice would not be served by an anti-suit injunction, the court took into account the petitioner's delay in applying for an anti-suit injunction as well as the respondent's diligence in following through with the Swedish proceedings. While correct, this conclusion seems harsh to the petitioner. It was not as if the petitioner did not take any action whatsoever. Her application to stay the Swedish proceedings and her subsequent appeals were unsuccessful. While the petitioner could be faulted in her litigation strategy, it seems unfair to attribute untoward delay to her.

9.79 Secondly, this chain of events has resulted in a situation where even though the Singapore proceedings subsist, if the Swedish divorce

decree were valid, there is no longer a marriage for the Singapore courts to dissolve. This means that the petitioner will not be able to obtain financial relief in Singapore as this is ancillary to the court's matrimonial jurisdiction.

9.80 Finally, the respondent obtained his outcome in the Swedish court in breach of an interim anti-suit injunction against him. The court considered that there was a real case for arguing that this was in contempt of court but stopped short of concluding this. While the court did not award the respondent costs as a result of his conduct, it is somewhat galling that it has left the petitioner with no remedy in Singapore.