10. 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

10.1 For 2011, there are fifteen cases which will be examined in this review.

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

Stay of proceedings

Forum non conveniens

10.3 There are a number of strategic choices that are available to a defendant when faced with a suit in the Singapore courts. One option is to apply to the court to stay the proceedings based on *forum non conveniens*. *Yap Shirley Kathreyn v Tan Peng Quee* [2011] SGHC 5 is a clear illustration of such an application. In this case, the plaintiff sued the defendant in Singapore for amounts due under a partnership agreement and the defendant cross-sued in the Malaysian courts. The defendant applied to the Singapore courts to stay the proceedings. The assistant registrar granted the application which was upheld on appeal by Choo Han Teck J. By way of summary, in an application for stay of proceedings based on *forum non conveniens*, the defendant has the burden of proving that there was a distinctly more appropriate forum elsewhere. If this is established, then the plaintiff has to show that there were valid reasons or circumstances based on the ends of justice, why the court should nonetheless not grant a stay. In this case, the court decided that Malaysia was the natural forum based on where the partnership was formed, where the witnesses resided and the desire to avoid duplicity of proceedings which might lead to inconsistent decisions and thereby adversely affect comity. In the absence of reasons and circumstances why a stay should not be allowed, the defendant's application was granted.

Application of forum non conveniens *in the family law context*

10.4 Applications for a stay of proceedings based on *forum non conveniens* also often surface in the context of family law. In *AQD v AQE* [2011] SGHC 92, the parties, both foreign nationals, each filed for divorce in Singapore and England. While there were also applications for custody, care and control, and access, the main question before the court was whether the divorce proceedings should be heard in Singapore or England. This case is instructive in that the court reconfirms the position that the court that would hear the main matter would also hear the ancillary matters and this is in the greater service of ensuring "the fairest and most expeditious way of adjudicating the entire action". What is striking in this case is that the court adopted a robust and forward looking approach to the determination of which jurisdiction was the natural forum. Choo Han Teck J took into account the intended relocation of the wife and the children to England (pointing towards England as the English courts could better determine the best interests of the children in the light of the wife's lifestyle and children's new schooling schedule), the no fault basis for divorce in both England and Singapore (making the location of evidence and witnesses a neutral point as both parties acknowledged that the marriage had broken down irretrievably) and the location of assets (pointing to the English courts being more able to anticipate the future conduct and circumstances of the parties taking into account the standard of living in England and the potential earning capacity of parties in their respective contexts).

Order 11 application and forum conveniens

10.5 When a party seeks to serve proceedings out of the jurisdiction under O 11 of the Rules of Court (Amendment) Rules 2011 (Cap 322, S75/2011) the doctrine of *forum non conveniens* is also relevant. As part of establishing the requirements for service out of the jurisdiction, the plaintiff must show that Singapore is the *forum conveniens* for the dispute. In *ITC Global Holdings Pte Ltd (in liquidation) v ITC Ltd* [2011] SGHC 150, the plaintiff (a commodities trading company incorporated in Singapore) commenced proceedings against the defendant (the sole shareholder of the plaintiff and incorporated in India). The plaintiff had alleged that the defendant had caused it to grant advances to a third party thereby benefiting from it directly, but with no commercial benefit to the plaintiff. The causes of action included tort, contract, restitution, breach of fiduciary duties and breach of statutory duties under the Companies Act (Cap 50, 1994 Rev Ed).

10.6 There was no dispute that the matters fell within the nexuses provided by O 11 and that there was a sufficient degree of merit in the claim. While it was argued that there was a non-disclosure of material

facts, the court found that this allegation was unfounded. As such, the only requirement of an O 11 application for service out of the jurisdiction that was in question was whether Singapore was *forum conveniens*. It was decided this would also resolve the application by the defendant to stay the proceedings based on *forum non conveniens*.

10.7 In determining the question of whether Singapore was *forum conveniens*, apart from considering the personal connections of the parties and the location of the witnesses (which the court found were equivocal), the court looked at the question of what law governed the causes of action. While the court found that the substance of the tort was committed in India and therefore governed by Indian law, the other claims (including under the Companies Act) were more appropriately determined by a Singapore court. This tipped the scales for the court and the court concluded that Singapore was *forum conveniens*.

Forum non conveniens, *action* in rem, *comity, forum shopping,* lis alibi pendens, *neutralisation of advantages*

10.8 When considering an application for stay of proceedings based on *forum non conveniens*, the court is sometimes faced with the existence of proceedings in other jurisdictions. This matter came up for the court's consideration in *The Reecon Wolf* [2012] SGHC 22. This was an *in rem* action involving a collision between the plaintiff's vessel, the Capt Stefanos, with the defendant's vessel, the Reecon Wolf. The defendant commenced proceedings in Malaysia and the plaintiff responded by suing in Singapore by arresting the Reecon Wolf. Applications to stay the proceedings were filed in both jurisdictions. In Singapore, the application was dismissed at first instance and the assistant registrar's decision went on appeal before Belinda Ang Saw Ean J. At the time of the hearing of the appeal, the Malaysian courts had dismissed the stay application before it. Put another way, subject to the outcome of the appeal lodged in that case, the Malaysian courts were going to hear the decision.

10.9 In considering this matter, the court reiterated the two-stage test from *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") and opined that of all the factors that were submitted, three were foremost in the learned judge's mind. These were the existence of concurrent proceedings, the place of the tort and considerations of comity. On the balance, stage one pointed to Malaysia as the more appropriate forum. The court also concluded that the plaintiff would not suffer any juridical advantages from having the matter heard in Malaysia. As such, the action in Singapore was stayed.

10.10 In the process of making its findings, the court made a number of observations that were noteworthy. First, the court opined that

concurrent proceedings were relevant in determining which jurisdiction was the natural forum at stage one of the test in the *Spiliada*.

10.11 Secondly, and this is related to the first point, considerations of international comity are vital when considering the factor of concurrent proceedings. It is undesirable for different jurisdictions to issue contradictory decisions on the same matter. This was a real concern since the Malaysian courts had already decided that it was going to hear the matter as the natural forum.

10.12 Thirdly, it was important at stage two of the test in the *Spiliada* to distinguish between legitimate juridical advantages as opposed to practical advantages such as faster trial time or enhanced damages. In this case, the statutory limits in Singapore were higher than in the Malaysian courts and this did not qualify as a legitimate juridical advantage. Doing otherwise would only promote forum shopping.

10.13 Finally, the court opined that an action *in rem* did not affect the law relating to *forum non conveniens* or the court's discretion. There is no presumption in favour of the plaintiff and the question remained one of determining the more appropriate forum for the dispute. The court acknowledged that there was one difference in that an action meant that there was security for the claim by way of a maritime lien. This would qualify as a legitimate advantage in stage two of the test in the *Spiliada*. However, this advantage could be neutralised by the defendant submitting to the jurisdiction of the alternative forum and posting adequate security there. This is consistent with cases finding that time bars in other jurisdictions could be neutralised by the defendant waiving the limitation.

Forum non conveniens, *choice of law*

10.14 As one of the matters that can be considered at stage one of the test in the *Spiliada*, the *lex causae* or law governing the cause is often a significant factor, especially if the governing law is sufficiently different from the law in Singapore. The rationale, of course, is that, the courts of the jurisdiction of the governing law would be most appropriate to interpret and apply that law. In *Vorobiev Nikolay v Lush John Frederick Peters* [2011] SGHC 55, the plaintiff commenced proceedings for fraudulent/negligent misrepresentation and conspiracy. The defendants applied for a stay on the basis that Switzerland was the more appropriate forum. At first instance the assistant registrar ordered a stay and the plaintiff appealed.

10.15 One point to note was that stage 1 of the test in the *Spiliada* should not be seen as a quantitative exercise. It was a qualitative exercise

that involved assigning weights to each factor and then weighing them in the balance.

10.16 By way of illustration, a key factor in this case was what law governed the torts in question. According to the court, both parties felt that this was a significant factor, but did not agree on the governing law. On this point, the court opined that the substance of the torts of misrepresentation and conspiracy occurred in Switzerland. As such, the governing law of both torts was Swiss law. Since the place of the tort is also *prima facie* the natural forum (citing *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [106]), and taking into account the desirability of a foreign court applying its own law, the court concluded that Switzerland was the natural forum. As this finding was not displaced by other factors in stage one or stage two, the court dismissed the plaintiff's appeal.

Forum non conveniens*, stage 2 considerations*

10.17 The two-stage approach expounded in the test from the *Spiliada* for *forum non conveniens* can be a complex one requiring delicate balancing of not only the factors in stage 1, but considerations of justice in stage 2. Further, the courts must be sensitive to considerations of comity and practicality. In *Shafeeg bin Salim Talib v Helmi bin Ali bin Salim bin Talib* [2011] SGHC 165, the plaintiffs were, by grant of letters of administration by the Singapore court, administrators of the deceased's estate. One of the deceased's assets was a 16.972% share in an Egyptian "civil property company" established in Cairo by the deceased together with some members of his family. The defendants were removed as directors/managers of this company, which was placed under temporary receivership. The plaintiffs, as administrators, commenced proceedings seeking various remedies against the defendants who applied to strike out the claim. They also applied for a stay of proceedings based on *forum non conveniens*. Both applications were denied at first instance and the defendants appealed.

10.18 On appeal, the High Court found that the plaintiffs had no *locus standi* to commence these proceedings and allowed the appeal *vis-à-vis* the application to strike out the claim (this is briefly discussed later, at paras 10.60ff below). This was sufficient to dispose of the matter, but the court went on to discuss the appeal relating to *forum non conveniens* which is of interest here.

10.19 The court applied the standard two-stage analysis from the *Spiliada* and at stage 1, concluded that the Egyptian courts were clearly the more appropriate forum to hear this dispute. The factors that were persuasive were that the governing law relating to the company was Egyptian law (it made more sense for courts of a foreign jurisdiction to

apply their own laws especially when that law may be quite different from that of the forum), the relevant documentation was in Egypt and that there were three pending cases before the Egyptian courts involving the plaintiffs, the defendants and the receiver relating to the affairs of the company (allowing the Singapore action to continue would lead to the risk of contradictory outcomes thereby endangering comity).

10.20 At stage 2, the plaintiffs made two arguments to show why a stay should nonetheless not be granted, on the basis that they would be denied substantial justice should the matter not be heard in the forum. First, they argued that proceedings in Egypt would take longer and may require them to put up security for costs. The court found this unpersuasive and rightly so. These were procedural disadvantages and were mere inconveniences which by themselves would not lead to injustice. Secondly, they argued that only Singapore could issue effective orders to compel the defendants to deliver the documents and assets. Whilst the court acknowledged this as a relevant factor, it adopted a robust approach and noted that, since the defendants were concurrently beneficiaries of the deceased's estate, they would be likely to comply with lawful orders of the receiver.

10.21 As mentioned, the application to stay the proceedings was denied at first instance. In coming to this decision, the learned assistant registrar took into account the "current political state" of Egypt and opined that justice required the action be heard in Singapore. The High Court felt it was necessary to address this. The court noted that while the issue is correctly stated *ie*, whether the political situation in Egypt would mean that the plaintiffs would be denied substantial justice, there was no evidence that the political uncertainty had resulted in the Egyptian judicial institutions ceasing to function and in fact, there was evidence to the contrary.

10.22 This must be correct and the writer would like to add a caution that our courts should be slow in every case to conclude that parties might be denied substantive justice especially by way of political upheaval. While this factor is relevant, considerations of it must be tempered with as full a picture as possible so as to preserve international comity.

Distinction between disputing jurisdiction and a stay application, when a late stay application will be allowed, basis of appeal from a discretion, burden of showing difference/similarity in laws

10.23 A stay application based on *forum non conveniens* can sometimes lead to a myriad of related questions. In *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 ("*Sun Jin Engineering*"), the court had to address some of these questions. This was an appeal from a

case digested in the previous year's Annual Review, *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2010] 3 SLR 684. For ease of reference, the statement of facts is reproduced here.

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

10.25 At the High Court, Woo Bih Li J was faced with two issues. First was whether the respondent should have been allowed to apply for a stay at all. Secondly, if he was not precluded, whether a stay of proceedings based on *forum non conveniens* should be granted. The High Court found in favour of the respondent on both issues and the matter was further appealed.

10.26 On the first issue, two points were raised. The first was the appellants' argument that the act of the respondent, by including in the stay application a prayer to strike out substantially the whole of the statement of claim as an alternative to the stay of proceedings, constituted taking steps in the Singapore action that precluded the respondent from applying for a stay. This was easily dealt with by the court who correctly pointed that there is a distinction between disputing the court's jurisdiction and asking the court not to exercise its jurisdiction. The latter presupposes that the jurisdiction of the court is established. It is therefore arguable that once an application for a stay has been made, one cannot dispute the court's jurisdiction. It is, however, not arguable that accepting a court's jurisdiction means that one cannot apply for a stay. In this sequence, the two are not mutually incompatible.

10.27 The second point on this first issue was that the respondent was precluded from applying for a stay because it was out of time. The Rules of Court provide clear timelines for the filing of a stay application but the court also has the discretion to extend time. The question, of course, is when the court should exercise this discretion? On this, the court emphasised the principle that a balance needs to be struck between instilling procedural discipline in civil litigation and permitting parties to present the substantive merits of their respective cases to the court notwithstanding some procedural irregularities: *Sun Jin Engineering* at [20]. A test often used to strike this balance between the competing interests of procedural justice and substantive justice is the test of

prejudice and that the court must in each case balance the competing interests of the parties concerned.

10.28 By way of *obiter*, the court noted that the Singapore courts took a less strict approach to applications for extension of time in interlocutory matters as opposed to applications for extension of time to file a notice to appeal. The court also noted that in the latter type of application, the courts would have regard to four factors (*Sun Jin Engineering* at [29]), "namely: (a) the length of the delay; (b) the reasons for the delay; (c) the chances of the defaulting party (*ie*, the would-be appellant) succeeding on appeal if the time for appealing were extended; and (d) the degree of prejudice to the would-be respondent if the extension of time were granted".

10.29 Applying these considerations (albeit more leniently), the court agreed with the findings of Woo J that the lateness in filing the application for a stay was not brought about by bad faith or overreaching and the lateness was a case of either oversight or unfamiliarity with the Rules of Court. The length of the delay was relatively short and the application for a stay was not an afterthought. There was merit in the application. The court opined that any prejudice caused to the appellants could be addressed by way of an appropriate costs order. As such, it upheld the decision of the High Court.

10.30 In dealing with this issue, the court took the opportunity to comment on two matters. First, the court noted Woo J's concerns regarding *Chan Chin Cheung v Chan Fatt Cheung* [2010] 1 SLR 1192 ("*Chan*") and identified Woo J's two main reservations. The first reservation related to Woo J interpreting the test of prejudice as (*Sun Jin Engineering* at [34]), "being only to prevent a defaulting party from being deprived of the opportunity to present its case to the court on the merits". On this reservation, the Court of Appeal opined that the test of prejudice adopted in *Chan* had much wider application and cited as an example a situation where the court is confronted with the question of whether it should exercise its discretion to extend time to enable an act to be carried out under the Rules of Court.

10.31 Woo J's second reservation was that the test of prejudice placed an unfair burden on the plaintiff to show good reasons why a defendant should not be allowed to make his application for a stay late as this meant that defendants could make plaintiffs (*Sun Jin Engineering* at [38]), "endure copious interlocutory applications after the defence was filed and yet still escape the fate of being precluded from applying for a stay of proceedings out of time". On this, the Court of Appeal acknowledged that while this was in theory a problem, in practice the court would take into account the number of interlocutory applications a defendant makes and the amount of delay before a stay application is

filed when deciding whether to grant an extension of time. Further, the court would be able to sanction abuse of its process either through a costs order or find that the procedural irregularities in question are irremediable.

10.32 Secondly, the court acknowledged the possibility of a party having waived the right to apply for a stay of proceedings by virtue of one's lateness but declined to say more since the matter was not addressed at the High Court nor was it raised on appeal.

10.33 On the second issue of whether a stay of proceedings should have been granted, after reiterating the settled legal position that a court, in hearing an appeal against such a decision involving an exercise of a discretion whether to stay proceedings, should only review that decision and should not exercise an independent discretion, affirmed the decision of Woo J. Specifically, the court was swayed by the availability of material witnesses in the Maldives, that the governing law was the law of Maldives and that the appellants would suffer no injustice by having to sue in the Maldives.

10.34 On the point relating to the governing law, the court took an interesting approach, which bears mentioning. Ordinarily, where the governing law is a foreign law, the assumption is that the courts of that jurisdiction would be the natural forum as they would be in a better position to apply their own law. This argument decreases in strength when the governing law is similar to the law of the forum. At trial, it is settled that foreign law must be proved as a matter of fact and where it is not proved, the presumption that the foreign law is similar to the law of the forum operates.

10.35 The question arises as to on whom, at the stage of an application for a stay, is the burden of showing that the foreign law is different (or similar) from Singapore law. Singapore courts do not seem to speak with one voice on this. It is clear that a court can take judicial notice of similarities or differences between the laws. However, barring this situation, should an applicant for a stay have to show that the laws of the two competing jurisdictions are different (on the basis that the party asserting the proposition has the burden of proving it) or that the respondent should have to show that the laws of the two competing jurisdictions are similar (on the basis that they are resisting the application)? If we take the position that where there is an absence of proof, the laws are presumed to be the same, then the applicant should logically bear the burden of showing the difference.

10.36 In this case, the Court of Appeal seems to have taken the position that the respondent must show that the laws of the two competing jurisdictions are similar and noted (*Sun Jin Engineering*

at [60]), that there was a failure "to show that Maldivian law on breach of contract and the tort of conspiracy is the same as the corresponding areas of Singapore law". It would be helpful at some point for the Court of Appeal to examine this question and provide definitive guidance.

Jurisdiction clauses, non-exclusive, treatment under forum non conveniens *analysis*

10.37 *Forum non conveniens* is, of course, not the only ground upon which a stay application can be made. Parties may choose to incorporate into their contracts a choice of jurisdiction clause which can provide for the exclusive or non-exclusive jurisdiction of the courts of a particular forum. The treatment of these two different types of jurisdiction clauses should of course be different. *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2011] SGHC 185 is a straightforward treatment of a non-exclusive jurisdiction clause. In this case, there was a non-exclusive foreign jurisdiction clause in favour of the Hong Kong SAR and the learned judge treated this, and it is submitted correctly, as a strong factor pointing the natural forum under the two-stage *forum non conveniens* analysis.

10.38 In *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503, the plaintiffs sued the defendants for payments due under various contracts entered with the defendants. The contract provided for the non-exclusive jurisdiction of the Singapore courts. The defendants commenced proceedings in Australia for damages based on negligent misrepresentation. The plaintiffs applied to restrain the proceedings in Australia while the defendants applied to stay proceedings in Singapore. At first instance, the stay application was denied and the antisuit injunction granted.

10.39 On appeal, in relation to the application for a stay, the court applied the two-stage analysis from the *Spiliada*, where the non-exclusive jurisdiction clause was a factor in the identification of the natural forum. This, of course, pointed to Singapore.

10.40 One of the factors that the court took into account at stage 1 was the alleged place of the tort. This is important as there are authorities that stand for the proposition that there is a presumption that the place where the tort occurred is the natural forum. On analysis, the court found that the place where the tort occurred was Singapore and as such the *lex causae* was Singapore.

10.41 However, the court also noted that even if it was found that the tort had occurred in Australia, this may not be sufficient to displace Singapore as a natural forum because the tort action was more properly seen as a defence to the contractual claim rather than a claim in and of

itself. In fact, there were valid policy concerns in allowing parties to displace what would otherwise be a natural forum by counter-claiming in tort elsewhere, which, while it may be a separate and distinct cause of action, is in substance, a defence to the main action. This would amount to forum shopping and should be discouraged by the courts. This was sufficient to dispose of the appeal against the assistant registrar's decision not to grant a stay.

Non-exclusive jurisdiction clauses, conflicting contractual clauses, interpretation and construction

10.42 The complexities of international legal transactions today can give rise to the existence of different contracts between different and overlapping parties and sometimes the courts are asked to consider potentially conflicting provisions in these contracts. In *Astrata (Singapore) Pte Ltd v Tridex Technologies Pte Ltd* [2011] 1 SLR 449 ("*Astrata*"), there were two agreements: a bilateral supply agreement ("Supply Agreement") between the parties which provided for arbitration and an escrow agreement ("Escrow Agreement") between the parties and an escrow agent which provided for the non-exclusive jurisdiction of the Singapore courts. An application was made by the escrow agent for a declaration as to whether the respondents were entitled under the Escrow Agreement to the release of certain documents. The appellant applied for a stay on the basis that even though the Escrow Agreement provided that the parties submit to the non-exclusive jurisdiction of the Singapore courts, the court should stay the proceedings based upon the arbitration clause found in the Supply Agreement between the appellant and respondents despite the fact that the escrow agent was not a party to that agreement.

10.43 The court rightly declined to do so stating that (*Astrata* at [58]):

> This is clearly not a case of a stay in favour of, or to assist, arbitration agreed to by the parties. This is an invitation to this court to derogate from the express agreement of the parties to the Escrow Agreement submitting to the non-exclusive jurisdiction of Singapore courts in respect of disputes arising from the same agreement.

10.44 On appeal, the Court of Appeal opined that it was a matter of construction whether the non-exclusive jurisdiction clause in the Escrow Agreement was wide enough to cover all matters relating to the escrow property regardless of whether the dispute was bilateral or trilateral. The court went on to hold that clause 18(a) of the Escrow Agreement was drafted in a way that all disputes arising out of the Escrow Agreement were subject to the non-exclusive jurisdiction of the court of Singapore. Further, this finding was not displaced by other words or provisions in the Escrow Agreement. As such, the court affirmed the decision to deny the stay application.

Jurisdiction clauses, right of one party to sue elsewhere, treatment under forum non conveniens *analysis*

10.45 Whilst the conceptual distinctions between an exclusive or non-exclusive jurisdiction clause and a forum and foreign clause are relatively clear, in practice, this is not always the case. Sometimes, a provision may be drafted in the language of a non-exclusive clause, but when combined with an agreement not to object to the choice of jurisdiction, can give the provision the effect of an exclusive jurisdiction clause. As such, it requires the court to look beyond the form of the clause. In *Citibank NA v Robert* [2011] 3 SLR 465, the defendant, signed a guarantee on behalf of an Indonesian company in favour of the plaintiff bank. The guarantee provided for the non-exclusive jurisdiction of the Indonesian courts. It also provided that the plaintiff could submit any dispute arising out of the guarantee to any court having jurisdiction over the defendant's assets. When the Indonesian company defaulted, the plaintiff commenced proceedings against the defendant in Singapore. The defendant applied to stay the proceedings which, at first instance, was dismissed.

10.46 This was dismissed on appeal, with the court finding that the defendant had failed to show strong cause warranting the grant of a stay. This case is noteworthy and troubling for a number of reasons.

10.47 If we were to take the starting position that exclusive jurisdiction clauses are to be treated differently from non-exclusive jurisdiction clauses, then it follows that the threshold test for a court allowing a breach of an exclusive jurisdiction clause must be higher than the threshold test for non-exclusive jurisdiction clauses. While the authorities are not unanimous, there is general agreement that when it comes to an exclusive jurisdiction clause, a party seeking to breach the clause must show strong cause why it should be allowed to. When the clause in question is a non-exclusive one, the forum the clause points to is simply a factor to consider in the standard two-stage *forum non conveniens* analysis. This case seems to conflate some of these distinctions.

10.48 In coming to its decision, the court opined that, since creative drafting can lead to "endless permutations of jurisdiction clauses", it was important to construe each jurisdiction clause carefully to determine the precise ambit of the agreement between parties. The writer is in full agreement with this.

10.49 However, the court went on to make the point that (*Astrata* at [14]):

> … different factual circumstances may call for an application of different principles and approaches …, and it would be futile to attempt to exhaustively categorise each scenario.

With respect, the writer disagrees. The purpose of construing the precise ambit of the agreement between the parties is so as to identify which is the relevant type of jurisdiction clause (exclusive/non-exclusive; forum/foreign) because that would inform the court as to what test to apply. The court seems to have blurred the distinction, at least between an exclusive and non-exclusive clause by saying that (*Astrata* at [13]):

> … the court, upon construing the terms of agreement between parties, would ordinarily give effect to those contractual intentions, unless the defendant has strong cause to renege.

This seems to apply the test of "strong cause" (typically used for exclusive jurisdiction clauses) to all clauses.

10.50 To be fair, the court may well be making the point that these conceptual distinctions are artificial and that the fundamental principle is to hold parties to their contractual agreement. The writer has no quarrel with this. The difficulty is that without the traditional distinctions referred to earlier, it is tremendously hard to assess whether the threshold for allowing a party to breach a jurisdiction clause has been met.

10.51 In this case, consistent with the learned judge's stated approach, the court did not make a determination as to whether the clause was exclusive or non-exclusive. The test which the court brought to bear also does not give us any clue as the learned judge refers to both strong cause and *forum non conveniens*.

10.52 In substance, the court seemed to have applied the strong cause test applicable to an exclusive jurisdiction clause as, on the facts, mere convenience was not enough. Applying the traditional distinctions, this is correct if the clause in question was in substance an exclusive jurisdiction clause. Clause 13 gave the plaintiff the right to sue in a jurisdiction outside of Indonesia. There was no provision preventing the defendant from objecting to the jurisdiction. However, it would not be difficult to argue that this is a logical implication of giving the plaintiff this choice. Therefore, despite the lack of clarity, it can be said that the conclusion that the court arrived at was not incorrect.

Characterisation and choice of law

Foreign revenue law, characterisation, lex fori

10.53 Central to any legal proceedings involving international elements is the determination as to what law governs the cause of action, *ie*, the *lex causae*. This is done through choice of law rules that point one towards the law of a particular jurisdiction as the *lex causae*.

10.54 Sometimes, a preceding step is necessary. One may need to characterise the matter in order to decide which choice of law rule to apply or, as in the case of *Her Majesty's Revenue & Customs v Hashu Dhalomal Shahdadpuri* [2011] 2 SLR 967, such characterisation may assist the court in striking out the case. In this case, the plaintiff is a body responsible for collecting the revenue of customs and excise and value added tax in the UK. It obtained a worldwide mareva injunction against the defendants (who are Singapore residents and the alleged officers and agents of an Indonesian incorporated company) in England and commenced simultaneous proceedings in Singapore and Hong Kong. The plaintiff's case was that the defendants were involved in an unlawful conspiracy to defraud the plaintiff.

10.55 It is not necessary to go into the details of this case save to note two matters. First, it was trite that if the plaintiff's claim was in reality a direct or indirect enforcement of a foreign revenue rule, then the Singapore court would not assist in such an action. This position is well-accepted and was the position adopted by *Relfo Ltd v Bhimji Velji Jadva Varsani* [2008] 4 SLR(R) 657. Whether this claim was an enforcement of a foreign revenue rule would depend upon the characterisation of the claim.

10.56 Secondly, in terms of characterisation of the claim, while the Singapore court may have regard to how foreign courts have characterised the claim, it is clear that it is the law of the forum, *ie*, the *lex fori* that makes this determination.

10.57 Applying the *lex fori*, the court opined that the plaintiff's claim was indeed caught by the foreign revenue rule and discharged the mareva injunction and struck out the action.

Proper law of contract, incorporation of choice of law clause

10.58 In an action based on contract, determining the proper law of the contract is crucial. The three-stage test for determining the proper law of a contract is relatively straightforward. The court will first see if there is an express provision of the governing law. In the absence of an express provision, the court will look to see if the intention of the

parties as to the governing law can be inferred from the circumstances. Finally, if there is no joy by this stage, the court will determine which system of law the contract has its most close and real connection. This test was reaffirmed in *The Dolphina* [2012] 1 SLR 992. In this case, the court was faced with a document that did not have an express choice of law clause. However, this document incorporated the terms of a charterparty that had a choice of law clause pointing to English law. The court concluded that the general words of incorporation were sufficient to incorporate the choice of law clause in the charterparty and that this amounted to an express choice of law.

10.59 The case of *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503, which was a case relating to, *inter alia*, stay of proceedings (see discussion at para 10.68ff below), was an example of how the court determined the governing law of the contract question using the third stage of the test.

Locus standi*, administrators of estate*

10.60 Apart from jurisdictional questions, it is sometimes necessary to determine preliminary matters such as whether the parties have the standing to sue. This came up for consideration in *Shafeeg bin Salim Talib v Helmi bin Ali bin Salim bin Talib* [2011] SGHC 165 (discussed at para 10.17ff above). Put simply, the plaintiffs, as Singapore administrators of the deceased's estate ("Singapore Grant"), were seeking various remedies against the defendants who were former directors/managers of an Egyptian company of which the deceased was a founder. The defendants applied to strike the claim out and in the alternative for a stay of proceedings based on *forum non conveniens*. Both applications were denied at first instance.

10.61 The question before the court was whether the plaintiffs, as administrators under the Singapore Grant, had the right, title and interest in the deceased's shares in the company to commence legal action with respect to those shares. The court opined that this question was determined according to the *lex fori*, in this case Singapore law. Looking at the text of the Singapore Grant, it become clear that the plaintiffs did not have title to the deceased's shares and, as such, did not have the *locus standi* to commence these legal proceedings. The court therefore allowed the appeal to strike out the claim.

Garnishee proceedings, beneficial ownership of funds, existence of trust, governing law

10.62 In today's world of complex business transactions, it is sometimes not clear where beneficial ownership of monies and properties reside. This becomes especially important when enforcement

of judgments are being sought; more specifically in the garnishee proceedings case of *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR (Deuteron (Asia) Pte Ltd garnishee)* [2011] SGHC 123. The judgment creditor, Westacre Investments, sought to enforce an English judgment against the judgment debtor Yugoimport SDPR by garnishing funds in the account of the garnishee, Deuteron (Asia) Pte Ltd. The judgment debtor, of course, denied being the beneficial owner of the funds, claiming instead to be holding them in trust for third parties based on four documents relating to a military equipment supply contract. These were a supply agreement ("Supply Agreement"), a pre-protocol document ("Pre-Protocol Document"), a commission agreement ("Commission Agreement") and a protocol document ("Protocol Document"). It is not disputed that each of these was a valid contract.

10.63 For our purposes, it is not necessary to go into the complex history of the garnishee proceedings save to note that provisional garnishee orders had been made and would be made final by the court unless the judgment debtor could show that it did not have beneficial ownership of the funds in question. The judgment debtor's argument was that the four documents in question were for the purpose of the judgment debtor to contract on behalf of third party suppliers with the buyer for the supply of military equipment. The fund in the garnishee's account therefore belonged to the suppliers.

10.64 It was therefore necessary for the court to consider if the four documents created a trust of the kind alleged by the judgment debtor according to the proper law of the four trust documents. After reviewing the three-stage approach used in *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491, Choo Han Teck J examined each document to identify its proper law.

10.65 For the Supply Agreement, the governing law was expressly Indian law. The Commission Agreement did not have an express governing law. It had two clauses pointing to the courts of Belgrade and Yugoslavia which could imply that the laws of these jurisdictions would govern. The learned judge, however, adopted the approach of the Court of Appeal in *JIO Minerals FZC v Mineral Enterprises* [2011] 1 SLR 391 at [81] that it is possible to infer that the parties intended that a contract be governed by the same law that governs a closely related contract. Choo J went on to hold that the Supply Agreement was so closely related to the Commission Agreement that it was reasonable to infer that the parties intended that Indian Law also governed the Commission Agreement.

10.66 Interestingly, the learned judge did not apply the same analysis to the Pre-Protocol Document and Protocol Document. Instead, he held

that as the main actor in the Pre-Protocol Document and Protocol Document was the garnishee who had to effect payments to the suppliers from the monies kept in its Singapore bank account, the law of Singapore had the closest and most real connection.

10.67 Having made these determinations, Choo J went on to consider whether, under their respective governing laws, the four documents created any kind of trust. After reviewing the evidence, the court concluded that no trust had been created and the judgment debtor was the beneficial owner of the funds. As such, the court finalised the garnishee order.

Anti-suit injunctions

Non-exclusive jurisdiction clauses, duplication of proceedings, compellability of witnesses, vexatious and oppressive conduct

10.68 Sometimes, parties involved in international commercial litigation are faced with suits abroad. When this happens, there are a number of strategic choices available to them. They can acquiesce and allow the proceedings to continue. They can seek to stem the proceedings of the court in the relevant jurisdiction (whether by a challenge to jurisdiction or an application for a stay). They can also apply to the Singapore court to indirectly stem the foreign proceedings via an antisuit injunction. *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503 ("*Telesto Investments*") was one such case where proceedings were commenced in Singapore and Australia by each of the parties. This case was discussed in relation to stays of proceedings and non-exclusive jurisdiction clauses (at para 10.38ff above) earlier. The defendants had commenced proceedings in Australia despite there being a non-exclusive contractual submission to the Singapore courts. The plaintiffs applied to restrain the proceedings in Australia and at first instance, the antisuit injunction was granted.

10.69 On appeal, the court dismissed the appeal holding that the Australian proceedings were indeed vexatious and oppressive. In the course of doing so, the court made a number of helpful observations.

10.70 First, it is important to note that an antisuit injunction is not the flipside of a stay of proceedings. Put another way, just because an application for stay of proceedings is refused in Singapore does not automatically mean that an antisuit injunction should be issued against foreign proceedings. As an antisuit injunction will affect the foreign processes of the court (even though it operates *in personam*), considerations of comity must be utmost and this imposes a higher standard than that of a stay application.

10.71 Secondly, one of the grounds for an antisuit injunction is if the foreign proceedings are in breach of any agreement between the parties not to be sued in that jurisdiction. The classic example of this would be where there was an exclusive jurisdiction clause pointing to a jurisdiction other than the one sued in. It was argued that this should be extended to a situation that involved a non-exclusive jurisdiction clause. Reliance was had on *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571 at 114 ("*Sabah Shipyard*"), for the proposition that "where a non-exclusive jurisdiction clause is in force, the court may infer an intention not to bring or continue parallel proceedings in foreign countries after an action has been commenced in the primary forum stated in the non-exclusive jurisdiction".

10.72 The court declined, and it is submitted rightly, to accept this proposition and opined that (*Telesto Investments* at [120]): "[t]o hold otherwise would blur the distinction between exclusive jurisdiction clauses and non-exclusive jurisdiction clauses and render any such distinction illusionary or redundant". The court distinguished *Sabah Shipyard* on the basis that the antisuit injunction in that case was granted on the grounds that the foreign proceedings were vexatious and oppressive. The existence of a non-exclusive jurisdiction clause does give rise to a right not to be sued elsewhere and duplication of litigation of parallel proceedings is an inherent risk of using a non-exclusive jurisdiction clause.

10.73 Thirdly, quite apart from a right not to be sued elsewhere, a separate and independent ground upon which one could obtain an antisuit injunction is that the foreign proceedings were vexatious and oppressive. It however, took more than multiplicity of proceedings and thereby the danger of conflicting judgments, to qualify as vexation and oppression. The timing and sequence of the proceedings would also be given little weight. Furthermore, it was crucial for the enjoining court to be the natural forum.

10.74 On the facts, the court seemed to have decided that there was vexation and oppression on two grounds. First, on the balance of justice, given the court's finding that there were no material differences between the laws of Australia and Singapore on the issue of misrepresentation, it followed that there would be no injustice to the defendants if the Australian proceedings were restrained by the grant of an antisuit injunction: *Telesto Investments* at [155]. Second, the court opined that it was oppressive for the defendants to pursue the claim in Australia in circumstances where the plaintiffs were unable to compel the attendance of a key witness at the trial. As such, the defendant's appeal was dismissed.

Foreign judgments

Registration of foreign judgment, application to set aside registration, pending appeal in foreign court, absence of full and frank disclosure

10.75 In international commercial litigation, what is sometime 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, when the country from which the judgment originates is provided for by the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("RECJA") and the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) ("REFJA"), that judgment can be registered in Singapore and enforced accordingly. However, there are considerations of justice and convenience which came up for consideration in *Madihill Development Sdn Bhd v Sinesinga Sdn Bhd (transferee to part of the assets of United Merchant Finance Bhd)* [2012] 1 SLR 169.

10.76 The judgment creditor obtained a judgment from the High Court of Kuala Lumpur and registered it in Singapore whilst there was an appeal pending in the Malaysian courts. The judgment debtors applied to set aside the registration, which at first instance was dismissed. The judgment debtors than appealed arguing that the judgment should not have been registered in the first place because there was an impediment to registration in that s 3(2) of the RECJA prohibited registration as long as there was an existing appeal or a right and intention to appeal.

10.77 In considering this matter, the court made a number of noteworthy observations. The court considered the interaction between O 67 of the Rules of Court (Cap 622, R 5, 2006 Rev Ed) ("ROC") and s 3(2) of the RECJA. The former represented procedural rules which facilitate the "orderly, efficient and convenient disposal of legal processes" before the court. The latter provided the legal bases upon which registration may be permitted or set aside.

10.78 Order 67 provided for a two-stage process for registering judgments. The first stage was an *ex parte* application by the judgment creditor and the second stage, an application to set aside the registration. On hearing the application to set aside, the considerations in the RECJA would come into play. These considerations included instances of impediments to registration that were known at the time of registration (O 67 stage one) or were only known or ascertainable at a later point. On this analysis, the argument that a foreign judgment could not be registered as long as there was an appeal or a right and intention to appeal could not be correct. Otherwise, a foreign judgment would be incapable of registration even if the judgment debtor intended to but

had not yet appealed. This is, of course, sensible if we assume that the judgment creditor had no knowledge of either the appeal or the intention to appeal.

10.79 It is relevant, of course, when the judgment creditor does have knowledge. When making an *ex parte* application, the applicant must file a supporting affidavit making full and frank disclosure. In this case, a judgment creditor would have to depose that the registration would not fall within any of the cases mentioned in s 3(2) of the RECJA.

10.80 In this case, the appeals against the Malaysian judgment were filed five months before the application for registration of the foreign judgment. On this, the court opined that there was no deliberate attempt to mislead the court and that there was probably some miscommunication. The court considered it significant that the fact of the appeals being filed were not something that was hidden and that there was no prejudice to the judgment debtor.

10.81 By way of clarification, the court cannot be saying that it is acceptable to not have full and frank disclosure as long as the fact of the appeal is not hidden. The lack of full and frank disclosure must surely taint the application. The writer submits that these latter facts formed part of the court's conclusion that there was no attempt to mislead the court.

10.82 In its characteristically robust manner, the court also opined that even if there was a reason to set aside the registration, since all appeals to the Malaysian court had been exhausted, it would be overly technical to ask the court to set aside this registration only to have the judgment creditor reapply.

10.83 On these analyses, the application to set aside was dismissed.