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11. CONFLICT OF LAWS

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I. Introduction

11.1 For 2019, there are 11 cases that will be examined in this review. As in previous years, it is useful to note that conflict of laws cases sometimes relate to other areas of law. In these situations, this review will only examine those parts of the case that are relevant to the field of conflict of laws. Further, as 2019 appears to have been a bumper year, in the interests of space, the authors have chosen to focus on the significant Court of Appeal cases and have provided briefer mentions and highlights of the High Court cases in this chapter.

II. Jurisdiction and stay of proceedings

11.2 It is trite that before a court can hear a matter, it must be seized of jurisdiction. Jurisdiction can be *in personam* or *in rem*. *In personam* jurisdiction can be established via presence, submission and the court's long-arm discretionary jurisdiction under O 11 r 1 of the Rules of Court[2] ("ROC"). Implicit in all of these is that service of papers on the defendant is required.

11.3 On discretionary jurisdiction, there are three requirements before leave to serve out of jurisdiction is granted. First, the plaintiff's claim must come within one of the heads of claim in O 11 r 1 of ROC. Second, the plaintiff's claim must have a sufficient degree of merit. Third,

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2 Cap 322, R 5, 2014 Rev Ed.

Singapore must be the *forum conveniens* for the dispute. Furthermore, as the application for leave for service out is usually done *ex parte*, the plaintiff is required to make full and frank disclosure of all the material facts.[3] In cases where leave is granted, parties can challenge the existence of the court's jurisdiction and apply to set aside the writ.

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

A. Li Shengwu v Attorney General

Discretionary jurisdiction – Order 11 rule 1

11.5 In an O 11 application, common heads of jurisdiction used are rr 1(*d*) (contract) and 1(*f*) (tort). *Li Shengwu v Attorney-General*[4] discussed some of the less commonly invoked jurisdictional limbs under O 11 of the ROC. The facts can be stated briefly. In July 2017, Li Shengwu published a post on his Facebook page, the material parts of which stated that "the Singapore government is very litigious and has a pliant court system. This constrains what the international media can usually report".[5] The Attorney-General ("AG") wrote to Shengwu informing him that the post was made in contempt of court and requested him to rectify this issue.[6] These requests were not complied with and the AG commenced proceedings for leave to apply for an order of committal,[7] and leave was granted by the High Court.[8]

11.6 In September 2017, the AG applied for and obtained leave to serve out of jurisdiction the committal papers on Shengwu. The papers were duly served on at Shengwu's address in Cambridge, Massachusetts, US.[9] Shengwu's application to set aside service of the committal papers was dismissed as was his application for leave to appeal against the dismissal. Shengwu then sought and obtained leave from the Court of Appeal to

3 *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [28], *per* Sundaresh Menon CJ.
4 [2019] 1 SLR 1081.
5 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [6].
6 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [7].
7 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [9].
8 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [13].
9 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [9] and [14].

appeal against the dismissal of his application to set aside service of the committal papers.[10]

11.7 The decision went to great lengths examining (a) whether the AG is entitled to raise a new point on appeal;[11] and (b) the basis for the High Court to exercise jurisdiction over a foreign contemnor at the time of the commencement of proceedings,[12] which are not relevant to the field of conflict of laws. For the purposes of this review, it is sufficient to note that the High Court and Court of Appeal have inherent jurisdiction to hear contempt cases by virtue of their very existence as the institutions in which the judicial power of the State is vested, and charged with safeguarding and superintending the proper administration of justice.[13] Personal jurisdiction is established over the foreign contemnor and service is made in accordance with s 16 of the Supreme Court of Judicature Act[14] ("SCJA") read with O 11 of the ROC. This requirement applies to *both* civil and criminal contempt.[15] The Court of Appeal then proceeded to consider the four different O 11 limbs relied upon by the AG on appeal.

11.8 The first limb considered was O 11 r 1(*t*), which permits service out of jurisdiction if the claim is "for an order of committal under Order 52". Importantly, this jurisdictional limb only came into effect from 1 October 2017, *after* Shengwu allegedly committed contempt on 15 July 2017.[16]

11.9 The Court of Appeal rejected the AG's argument that O 11 r 1(*t*) had retrospective effect. It applied the principles governing retrospective application of legislation, which consist of broadly two steps.[17] Step one involved a single overarching inquiry into parliamentary intent and if ambiguity persisted, then the inquiry would shift to step two which took into account various assumptions like, *inter alia*, "simple fairness". On the facts, the Court of Appeal opined that on step one, it was already unlikely that retrospective effect was intended. However, it proceeded to the second step on the assumption that there was an ambiguity and concluded that the high degree of unfairness that could be caused if O 11 r 1(*t*) was to apply retrospectively was great; therefore, the limb should only be applied prospectively.[18]

10 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [16]–[17].
11 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [25]–[47].
12 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [48]–[123].
13 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [111].
14 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [115].
15 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [121].
16 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [128].
17 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [131].
18 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [134].

11.10 The Court of Appeal's reasoning on the latter fairness point is particularly noteworthy. As it noted, proper service in accordance with any limb under O 11 r 1 is necessary to establish jurisdiction over the foreign contemnor. If limb (*t*) was not in force at the time Shengwu allegedly committed contempt, the court would not have jurisdiction over him by virtue of service pursuant to that limb. Therefore, to hold limb (*t*) to apply retrospectively would be to open Shengwu to a liability for which he was not previously liable. This, in the Court of Appeal's view, constituted unfairness, particularly in light of the penal consequences that could follow upon a finding of contempt.[19] The Court of Appeal's reasoning must be correct. The authors would only go on to add a subsidiary point – given that effect of service in compliance with O 11 is considered to be an "exorbitant jurisdiction" (as the foundation for a court is primarily territorial),[20] the court should be even more cautious and slower in reading retrospective effect into *any* O 11 limb.

11.11 Turning to O 11 r 1(*p*), service out is permissible if the claim is founded on a "cause of action" arising in Singapore. The Court of Appeal interestingly cited its earlier decision of *Multistar Holdings Ltd v Geocon Piling & Engineering Pte Ltd*[21] (interpreting O 20 r 5 on amendment of pleading to introduce new "cause of action") as authority for interpreting "cause of action" under limb (*p*) to mean "the essential factual material that supports a claim".[22]

11.12 The Court of Appeal rejected the AG's reliance on O 11 r 1(*p*), as the limb concerns a claim brought in *civil* proceedings. A committal proceeding, however, is quasi-criminal in nature. Further, committal proceedings apply the criminal standard of proof beyond a reasonable doubt, and the court in punishing contempt is empowered to impose penal orders (as opposed to civil reliefs or remedies) such as ordering the contemnor's imprisonment or fine. Therefore, the court held that O 11 r 1(*p*) is clearly inapplicable in the present context.[23]

11.13 Next, the Court of Appeal considered and rejected the AG's argument that O 11 r 1(*s*) was applicable in the present case. Order 11 r 1(*s*) allows for service out if the claim concerns the construction, effect, or enforcement of any written law. As O 8 r 2(13) of the Australian Federal Court Rules 1979 is *in pari materia* with O 11 r 1(*s*), the court

19 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [133] and [135].
20 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [94].
21 [2016] 2 SLR 1.
22 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [137].
23 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [138].

acknowledged that Australian cases interpreting O 8 r 2(13) would be useful. [24]

11.14 After considering various Australian decisions, the Court of Appeal held that a claim which "concern the enforcement of any written law" refers to *only* two situations: (a) where the legislation in question specifically prescribes that a particular claim or application may be made thereunder (that is, it gives the party a right to pursue a particular claim or application); or (b) the claim is brought on the basis of a contravention of particular provisions in that legislation (that is, it prescribes a certain consequence upon the Act itself being contravened).[25]

11.15 Importantly, the Court of Appeal made the point that the specific sub-limb "enforcement of any written law" under O 11 r 1(*s*) contemplates provisions conferring rights on a private litigant, who can rightly claim to enforce, as opposed to provisions conferring power on the court, like (the former) s 7 of the SCJA. Accordingly, committal proceedings pursuant to s 7 of the SCJA cannot be a claim to enforce a "written law" contemplated by limb (*s*).[26]

11.16 The court also opined that the AG's seeking for punishment for contempt could not be equated with "enforcement of any written law". Punishment under civil contempt is to regulate the court's own processes to ensure compliance with its orders and directions, and not with any particular "written law". Further, the purpose of punishing for contempt is to protect the proper administration of justice and to vindicate the courts' authority – these interests underlie the entire system of the administration of justice and are not particular to, nor expressed in, any written law at the time the alleged contempt was committed.[27]

11.17 The last limb considered by the Court of Appeal was O 11 r 1(*n*), which permits service out if the claim is:

> … made under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act (Cap 65A), the Terrorism (Suppression of Financing) Act (Cap 325) or any other written law.

Here, the AG framed the committal application as one brought under O 52 of the ROC read with s 7(1) of the SCJA. The Court of Appeal

24 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [142].
25 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [143] and [147].
26 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [147].
27 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [148].

accepted this to be a claim brought under a written law,[28] and a number of noteworthy points can be made here.

11.18 The appellant argued that limb (*n*)'s reference to "written law" required an explicit statutory provision either setting out or creating the relevant legal basis, or setting out relevant elements of the claim. As the Singapore's contempt of court law was based on common law, the requirement in limb (*n*) was not met. This was rejected by the Court of Appeal for being too "narrow" a reading[29] and opined that the "written law" relied on by the AG (s 7 of the SCJA) is not a provision "having no or only a very tangential relation" to the claim in question.[30] Put another way, an applicant who wishes to rely on limb (*n*) (specifically the sub-limb "any other written law") must draw a *not* tangential connection to an existing statutory provision. This appears not to be *that* difficult a task; it is satisfied even if the identified statutory provision is not one that sets out or creates legal basis for the claim or sets out relevant elements of the claim.

11.19 The appellant also argued that permitting a claim under a power-conferring provision like s 7 of the SCJA may lead to absurd results. If a plaintiff is permitted to refer to *any* power-conferring provision to establish his claim, there will be no incentive to "even to attempt to corral his facts and evidence to satisfy the constituent elements of the cause of action".[31] In rejecting this argument, the Court of Appeal had two responses.

11.20 First, the Court of Appeal opined that the concern raised was overstated, simply because the power-conferring provisions themselves would *likely* set out the requirements before those powers may be invoked by the party and exercised by the court – this in itself imposes a restrictions on when a claim may properly be made under that statutory provision.[32]

11.21 Second, for those situations where the power-conferring provisions did not contain specific in-built restrictions, the Court of Appeal opined that the current requirements in establishing *in personam* jurisdiction over a foreign defendant were sufficient to "prevent the claimant from bypassing the requirement to establish the constituent elements of his cause of action and simply claiming the ultimate relief

28 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [150] and [152].
29 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [151]–[153].
30 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [154].
31 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [156].
32 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [158]–[160].

which he seeks in order to obtain leave for service out of jurisdiction".[33] An applicant who seeks to claim under the general powers of s 18 read with para 14 to the First Schedule of the SCJA, for example, is required to make out a good arguable case that the facts justify the exercise of those powers. The "standard at which the court assesses the [merits] is no more than that the evidence should disclose that there is a serious issue to be tried", and in this regard, a mere statement by a deponent that he believes there is a good cause of action is insufficient.[34] And if that were not enough of a safeguard, the court also explained that the requirement that Singapore be the *forum conveniens* would also filter out cases where claimants try to bypass the need for a requisite connection with Singapore by choosing to frame his claim under s 18(1) of the SCJA, avoiding other limbs which require some connection to Singapore (for example, O 11 rr 1(*d*), 1(*e*) and 1(*f*)).[35]

11.22 The reasoning here is curious. Order 11 is accepted to be an exorbitant jurisdiction, involving considerations of international comity. Perhaps the appellant's argument is that the requirement to satisfy a head of jurisdiction under O 11 itself needs to be carefully delimited and defined.[36] And while it is true that the other requirements for service out (that is, the plaintiff's claim must have a sufficient degree of merit and Singapore must be *forum conveniens*) can be the gatekeeper against claimants who attempt to short-circuit the O 11 inquiry (by not identifying the relevant limb(s) under O 11), this can also be problematic. In terms of the requirement for the claim to have a sufficient degree of merit, it is often taken that satisfying one of the heads of jurisdiction in O 11 is enough to satisfy the second requirement. Further, would it be so difficult to show Singapore is the *forum conveniens*? After all, the applicant will still have a relatively substantive connecting factor to Singapore, that is, the application of a (power-conferring) Singapore statutory provision. Even without going into the possibility of a foreign court applying the SCJA (after all, domestic statutes generally do not have extra-territorial reach),[37] a Singapore court could easily say that there would be greater expense and inconvenience resulting from having a foreign court interpret and apply a Singapore statute, and thus yet another reason pointing away from the foreign forum.[38]

33 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [161].
34 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [162]–[164].
35 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [166].
36 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [94].
37 *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 at [41], *per* Chan Sek Keong CJ.
38 *JIO Minterals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [97], *per* Andrew Phang Boon Leong JA.

11.23 Regardless, this Court of Appeal decision is clear that a plaintiff may apply for service out under O 11 r 1(*n*) for a claim invoking *general powers* of the High Court under s 18(1) of the SCJA. How the Court of Appeal will sieve out cases with little or no connection to Singapore remains to be seen.

11.24 Finally, the appellant mounted an *ejusdem generis* argument submitting that the scope of "written law" in limb (*n*) must be circumscribed by the colour and flavour of the two examples of written law explicitly stated in the limb itself: (a) the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act[39] ("CDSA"); and (b) the Terrorism (Suppression of Financing) Act[40] ("TSFA").[41] The Court of Appeal rejected this and held that there was no room for the application of *ejusdem generis* as it was difficult to identify a common and dominant feature between the two statutes. Additionally, the use of the word "any" in the residuary phrase "or any other written law" suggests that any and all statutes fall to be captured by limb (*n*).[42]

11.25 Without examining the Court of Appeal's reasoning in detail and with respect, the authors would only note that a possible common thread between the statutes are claims aimed at deterring and combating money laundering effectively, and depriving criminals of the enjoyment of the benefits of their crime. The CDSA has, after all, been widely acknowledged as a legislation enacted to "combat cross-border crimes and protect Singapore's hard-earned reputation as a global financial hub".[43] As for the use of "any", the authors note that its use under s 12(6)(*a*) of the Income Tax Act[44] has not prevented the High Court on previous occasions from applying the *ejusdem generis* principle.[45]

11.26 Applying the principles to the facts, the Court of Appeal found that the AG had satisfied that there was a good arguable case to claim the court's power to punish for contempt under s 7(1) of the SCJA.[46] In any event, the Court of Appeal also noted that a similar case is unlikely to come before the courts again given that the AG can now rely on the newly enacted O 11 r 1(*t*) of the ROC to apply for service out of jurisdiction against a foreign contemnor.[47]

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39 Cap 65A, 2000 Rev Ed.
40 Cap 325, 2003 Rev Ed.
41 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [168].
42 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [169]–[170].
43 *Huang Ying-Chun v Public Prosecutor* [2019] 3 SLR 606 at [57], *per* See Kee Oon J.
44 Cap 134, 2008 Rev Ed.
45 *ACC v Comptroller of Income Tax* [2011] 1 SLR 1217 at [26], *per* Andrew Ang J.
46 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [167].
47 *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [173].

B. MAN Diesel & Turbo SE v IM Skaugen SE

Discretionary jurisdiction – Order 11 rule 1

Discretionary jurisdiction – *Forum non conveniens*

11.27 *MAN Diesel & Turbo SE v IM Skaugen SE*[48] was an appeal from Vinodh Coomaraswamy J's decision.[49] In this case, the first plaintiff ("Skaugen"), a company incorporated in Norway, purchased six marine engines from the German-incorporated first defendant ("MAN Diesel") for installation in six ships to be built by a third party. The engines were delivered and installed but did not perform as represented. After failed attempts to resolve the matter, the plaintiffs commenced proceedings (on its own behalf and as assignee of the respective causes of actions) via discretionary jurisdiction alleging misrepresentation, negligence and fraud.[50]

11.28 At first instance, the writ and leave to serve out of the jurisdiction was set aside as the assistant registrar found that Singapore was *forum non conveniens*. On appeal, the High Court found that there was a good arguable case that the plaintiffs' claims came within O 11 rr 1(*f*)(ii) and 1(*p*) of ROC, that Singapore was *forum conveniens*, and allowed the appeal.[51]

11.29 The Court of Appeal dealt with a preliminary objection by the appellant – that is, the respondents have not adduced any documentary evidence supporting the transfer and subsequent transfer of claim to them. The court did not go into the specific factual disputes, but merely reiterated that the court need only be satisfied that the plaintiffs have a good arguable case and that their claims fall under O 11. Thus, the court ought to only look primarily at the plaintiff's case, and not to attempt to try disputes of fact on affidavit.[52]

11.30 Between the High Court's decision and the hearing before the Court of Appeal, there had been further developments to the matter and the Court of Appeal had to consider whether it was entitled to take into account subsequent developments. The Court of Appeal endorsed the High Court's holding that the court is entitled, during the setting aside

48 [2020] 1 SLR 327.

49 *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123. The High Court decision was reviewed last year: see (2018) 19 SAL Ann Rev 273 at 280–287, paras 11.24–11.46.

50 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [7] and [11]–[13].

51 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [23]–[24].

52 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [17]–[18].

application, to take into account events subsequent to the respondents obtaining leave *ex parte*.[53]

11.31 In last year's review, the authors had agreed with the High Court's finding and took the position that events after the *ex parte* application may be considered at the *inter partes* hearing to set aside leave for service out since the High Court hearing the *inter partes* application is hearing the matter *de novo*.[54] The Court of Appeal decision takes it one step further to say that *even the appellate court* can and should examine all the available evidence before it as opposed to the state of evidence when the application was first heard and decided, in order to determine whether service out of jurisdiction should be allowed or set aside.[55] However, the Court of Appeal also cautioned that *only* developments that are relevant to the *forum non conveniens* analysis will be considered by the courts. In so far as any attempts to raise wholly unmeritorious matters on the pretext of them being "subsequent developments", courts will not allow such abuse of process to happen.[56]

11.32 The Court of Appeal justified this approach on the bases of principle, coherence and policy.[57] First, on principle, the approach furthers the purpose of the doctrine of *forum non conveniens* which is to decide which of the competing fora has the most real and substantial connection with the matter. As the inquiry is a dynamic one, there is no reason why the court is limited to having to go back in time in order to determine whether *in personam* jurisdiction should be extended over the foreign defendant.[58]

11.33 Second, the approach promotes coherence and consistency in the law. Subsequent developments can be taken into account for stay applications. There should therefore be no reason why subsequent developments may not be taken into account in a service out application, especially since the same normative considerations apply to both applications. Additionally, the Court of Appeal also emphasised that where the same normative considerations underlie different areas of the law, the law should strive to speak with one voice. On this note, the court noted that as subsequent developments may be considered in an appeal against the grant of an anti-suit injunction ("ASI"), this leans towards the approach endorsed.[59]

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53 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [49]–[50].
54 (2018) 19 SAL Ann Rev 273 at 285–286, paras 11.42–11.43.
55 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [52].
56 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [55].
57 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [51].
58 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [52].
59 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [53].

11.34 Third, as a matter of policy, this approach allows cases to be dealt with more expeditiously, which saves time and costs for all parties.

11.35 The authors now examine the Court of Appeal's analysis under O 11 rr 1(*f*)(ii) and 1(*p*) of the ROC. As a preliminary point, the Court of Appeal agreed with the appellant that the High Court ought to have viewed the four distinct claims pursued in the statement of claim separately in determining whether each of them standing alone would be able to satisfy one or more of the jurisdictional gateways in O 11 r 1, rather than treating them as a single aggregate claim.[60] This is also the position adopted in England – the general rule is that permission has to be obtained within the four corners of the long-arm statute for each separate claim made against him.[61]

11.36 That the claims have been assigned to the plaintiffs-respondents, in and of itself, cannot convert a claim which does not satisfy the jurisdictional requirement under O 11 r 1 into an otherwise valid claim. In other words, the jurisdictional requirements are assessed from the perspective of the *original* assignor as the plaintiff, and not the ultimate assignee. The original assignor, if it was suing in its own capacity, must have been able to bring the claim against the defendant. This must be correct, otherwise parties can effectively sidestep the jurisdictional requirements by assigning their alleged claims to a party whose own claim is not able to satisfy one or more of the limbs under O 11 r 1 of the ROC.[62] It is immaterial that the assignments were pursuant to transfers within companies of the same group and/or related entities.[63] The Court of Appeal also reiterated the possibility that courts may grant leave to allow a plaintiff to only pursue good parts of its claim(s).[64]

11.37 On the jurisdictional requirement of O 11 r 1(*f*)(ii), the respondents argued that the limb was satisfied as all the shipowners would have suffered damage that resulted directly from the misrepresentation as they arose out of the same series of transaction.[65] The Court of Appeal rightly rejected this argument. The inquiry under O 11 r 1(*f*)(ii) is whether the claim is wholly or partly founded on damage *suffered in Singapore*. The fact – that any given shipowner suffered damage that directly resulted from the misrepresentation – in itself cannot satisfy the

60 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [60], [64] and [65].
61 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [69].
62 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [66] and [70].
63 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [75].
64 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [66].
65 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [71].

limb, *unless* the damage can be traced to Singapore[66] and the damage suffered is *not* merely trivial (although it need not be significant).

11.38 The Court of Appeal went on to clarify that O 11 r 1(*f*)(ii) contemplates two different kinds of claims. On the one hand, it contemplates that a claim which is wholly or partly founded on damage can rely on the said limb so long as there is damage suffered in Singapore. Additionally, the recovery of this claim can include damage suffered elsewhere. Such a claim requires damage as an element to the tortious action. On the other hand, it also allows for the recovery of damages in respect of damage suffered in Singapore. Even if the plaintiff has suffered damage elsewhere, the recovery is only limited to damage suffered within Singapore. Such a claim does not involve damage as an element to the tortious cause of action.[67]

11.39 The court then took, as the starting position, the rebuttable presumption that the damage for the claim is suffered in the jurisdiction where the relevant entity is incorporated.[68]

11.40 On the *type* of damage that qualifies under O 11 r 1(*f*)(ii), the Court of Appeal made it clear that it is the financial act of incurring the loss (in this case, the increased fuel expenditure), and *not* the end result of such damage (that is, reduced distributions or dividends).[69] This must be right, as the respondents' argument appears to grant *carte blanche* to Singapore-incorporated entities-plaintiffs whenever they allegedly suffered damage from a tortious act of the foreign defendant; there would appear to not be any need to examine the facts to identify where the damage was suffered, since the end result would inevitably be in the form of reduced income (and, eventually, declared dividends, if any) suffered by the Singapore-incorporated entities-plaintiffs. Out of the four claims pursued, only two claims (referred to as the Somargas SG Claim and the GATX Claim) belonging to Singapore-incorporated entities were found to have satisfied O 11 r 1(*f*)(ii).[70]

11.41 Moving to O 11 r 1(*p*), last year's review noted the distinction drawn by the High Court between the "substance test for *lex loci delicti*" as propounded in *JIO Minerals FZC v Mineral Enterprises Ltd*[71] ("*JIO Minerals*") and the "cause of complaint" test decided in *Distillers*

66 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [72].
67 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [77].
68 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [78].
69 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [80] and [95].
70 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [33] and [176(c)].
71 [2011] 1 SLR 391.

Co (Biochemicals) Ltd v Laura Anna Thompson[72] ("*Distillers*"). The authors submitted that this distinction was hard to follow as both tests were one and the same. Both sought to identify a particular location or jurisdiction where the substance of the cause of action arose even though the ingredients to the cause of action might occur in more than one jurisdiction and over a period of time.[73]

11.42 A similar reasoning was adopted by the Court of Appeal in rejecting the distinction drawn by the High Court and noting that *Distillers* was authority for the substance test and is the test to be applied both in the context of O 11 r 1(*p*) and in determining the *lex loci delicti*.[74] In support of this conclusion, the court noted that the substance test had been applied recently in the context of O 11 r 1(*p*),[75] and that *JIO Minerals* (through endorsing *Distillers*) was implicit authority for the position that the substance test applies to O 11 r 1(*p*); the court was also persuaded by the fact that this was also the position in England.[76]

11.43 The Court of Appeal also disagreed with the High Court that a more "plaintiff-centric" approach ought to be adopted under O 11 r 1(*p*). Since O 11 jurisdiction is an exorbitant one, there is no justification why the *in personam* jurisdiction should be made more plaintiff-centric to extend its extra-territorial reach.[77] There is also no reason for courts to adopt different tests under O 11 r 1(*p*) in determining where a tortious cause of action arose, and in stay applications when identifying the *lex loci delicti*. This is especially so when the former is an anterior inquiry to determine if Singapore can even exercise jurisdiction over the foreign defendant. To adopt a different test is simply unsupported by precedent and principle.[78]

11.44 Applying the substance test as expounded in *Distillers*,[79] the Court of Appeal opined that Germany was where the cause of action arose as it was where the misrepresentation to the true fuel efficacy of the engines was made, received and relied upon.[80]

72 [1971] 1 AC 458.
73 See (2018) 19 SAL Ann Rev 273 at 284–285, para 11.40.
74 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [101].
75 *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [54], *per* Audrey Lim JC.
76 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [102]–[104].
77 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [112].
78 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [113].
79 See para 11.41 above.
80 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [118].

11.45 In relation to the Court of Appeal's analysis of *forum non conveniens*, there are a number of noteworthy points. First, in last year's review, it was noted that the High Court considered the availability of Germany and Norway as a factor in stage 1 of the *Spiliada* analysis. The authors went on to suggest that, for conceptual clarity, there could be a qualifying stage (a "stage zero" of sorts) where any *fora* to be considered have to be available first, before going into identifying and weighing of connecting factors in stage 1.[81] This approach was implicitly used by the Court of Appeal where they first considered whether Germany or Norway were even available *fora* before considering whether they were more appropriate *fora* than Singapore.[82] On the facts (which involved interpretation of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters),[83] the Court of Appeal held that Germany and Norway were both available *fora* under the *Spiliada* analysis.[84]

11.46 Secondly, it is interesting to note that the Court of Appeal took into account the respondents' act in offering to stay the Singapore proceedings in favour of Norwegian proceedings.[85] While the Court of Appeal did not articulate this specifically, it would appear that a party's conduct in the Singapore proceedings could be considered during a setting aside of service out and/or stay application, and in this case, would likely to have weakened any argument that there were no related/parallel proceedings if such positions were taken.

11.47 Thirdly, the Court of Appeal went into great lengthy discussions on the possible transfer to the Singapore International Commercial Court ("SICC"). It cautioned that the SICC factor should not, in itself, be allowed to displace a foreign jurisdiction which is the more appropriate forum based on an application of the conventional connecting factors. Full appreciation must be given to other factors such as whether Singapore law is substantially similar to that foreign law, and whether there are complex issues of law.[86] This must be right, as the antique judicial chauvinism has been long replaced by the respect for judicial comity.[87]

11.48 Fourthly, the Court of Appeal also considered the High Court's treatment on availability of witnesses. The High Court regarded this as

81 See (2018) 19 SAL Ann Rev 273 at 286, paras 11.44–11.45.
82 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [130]–[135].
83 30 October 2007; entry into force 1 January 2010.
84 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [134].
85 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [125].
86 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [139] and [144].
87 *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494 at [17]–[18], *per* Andrew Phang Boon Leong JC.

a neutral factor as the appellants did not identify any of the key witnesses who cannot be compelled to give evidence in Singapore. The Court of Appeal appeared to take the *prima facie* position that unless evidence to the contrary is shown, it must be accepted that (a) a Singapore court cannot compel foreign witnesses to testify in court; and (b) foreign witnesses cannot be compelled to give evidence via video-link.[88] Presumably, the party wishing to show that Singapore is *forum conveniens* has the burden of showing that the foreign witnesses have undertaken to give evidence or can be compelled in some way.

11.49 Fifthly, on the availability of documents, the Court of Appeal noted that in modern times, this is a factor to be given limited weight since documentary evidence is easily transportable. Further, the Court of Appeal also noted that translation ought to be given little weight since there was nothing to suggest that the documents in the present case are so complex that there would be difficulties translating them from one language to another.[89] On this second point, the authors would respectfully suggest a nuance in that, apart from complexity of the documents in any given case, one should also consider the volume of documents that need translation. Since there is the consideration on minimisation of costs and expenses to be incurred by parties in the *Spiliada* analysis,[90] *even if* the translation is not complex, if there are voluminous documents to be translated from a foreign language to Singapore, this might well amount to a factor pointing *away* from Singapore to that foreign jurisdiction.

11.50 Sixthly, on the parallel proceedings in Norway, the Court of Appeal rightly remarked that the ends of justice were best served by a *single composite trial* hearing all the claims.[91] It would thus not be ideal for two out of four claims to be pursued locally (since they have satisfied the requirement of O 11 r 1(*f*)(ii)), and for the remaining claims to be pursued elsewhere as they do not satisfy any jurisdictional gateway under O 11.

11.51 The final noteworthy point is that, oddly, the respondents argued that service out should not be set aside as the respondents must be allowed to return to Singapore to seek justice in the event the appellants succeed in raising the time bar defence in the Norwegian proceedings. The Court of Appeal rightly rejected this reason as a justification for Singapore courts to extend its *in personam* jurisdiction over a foreign defendant when

88 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [148].
89 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [150].
90 *JIO Minterals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [41], *per* Andrew Phang Boon Leong JA.
91 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [152].

it has been found to not be the appropriate forum under the *Spiliada* analysis.[92] This must be correct and the authors simply observe that the same conclusion would have been reached through the application of s 3 of the Foreign Limitation Periods Act.[93]

C. Shanghai Turbo Enterprises Ltd v Liu Ming

Submission – Step in proceedings

Discretionary jurisdiction – Order 11 rule 1

Non-exclusive jurisdiction clause – Stay of proceedings – Strong cause test

Discretionary jurisdiction – Full and frank disclosure

11.52 When a jurisdiction clause is in play, it becomes important for the court to make a determination of the extent of the legal obligations of that clause so as to give it effect. Jurisdiction clauses are typically classified into those that are exclusive and non-exclusive, and its classification would determine its effect. This classification and its effects were examined in *Shanghai Turbo Enterprises Ltd v Liu Ming*[94] ("*Shanghai Turbo*"), which was an appeal from Hoo Sheau Peng J's decision in the High Court.[95]

11.53 The High Court had set aside leave previously granted to serve the writ out of jurisdiction on the respondent ("Liu Ming") on two bases: (a) that Singapore was *forum non conveniens*; and (b) Shanghai Turbo Enterprises Ltd ("Shanghai Turbo") (the appellant) had not made full and frank disclosure of material facts during the *ex parte* application seeking leave for service out.[96] The facts are worth revisiting, as the appellant raised new arguments which were accepted by the Court of Appeal in reversing Hoo J's decision.

11.54 The appellant is a company incorporated in the Cayman Islands but listed on the Singapore Stock Exchange ("SGX"). The appellant wholly owns a Hong Kong-incorporated entity, Best Success (Hong Kong) Ltd ("Best Success"). Best Success in turn wholly owns a Chinese company, Changzhou 3D Technological Complete Set Equipment Ltd ("CZ3D"). The three companies together are a group in the business of precision

92 *MAN Diesel & Turbo SE v IM Skaugen SE* [2020] 1 SLR 327 at [162].
93 Cap 111A, 2013 Rev Ed.
94 [2019] 1 SLR 779.
95 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2018] SGHC 172. Hoo Sheau Peng J's High Court decision was reviewed in last year's chapter: see (2018) 19 SAL Ann Rev 273 at 287–289, paras 11.47–11.53.
96 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [2].

engineering.[97] The respondent held various positions in the three companies, including being the former executive director and then the chief executive officer of the appellant. The respondent also owned some 29.9998% of the shareholding in the appellant.[98]

11.55 On 27 June 2017, the appellant commenced a suit in Singapore against the respondent for some alleged breaches of the service agreement between them, which they had concluded on 1 May 2016. These alleged breaches generally concerned contractual prohibitions on the respondent post-termination of the agreement.[99]

11.56 As the respondent resided in China, the appellant applied for and obtained leave to serve the writ of summons, statement of claim and the service order out of jurisdiction, relying on cl 17 of the service agreement:[100]

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

11.57 While the leave to serve out of jurisdiction was granted on 5 July 2017, service attempts were unsuccessful. On 13 March 2018, the respondent's solicitors informed the appellant's solicitors that they had instructions to accept service on the respondent's behalf. On 14 March 2018, the respondent entered appearance.[101]

11.58 Prior to the respondent's entering appearance, the appellant obtained interim injunctions against two non-parties (Lin Chuanjun and Zhang Ping, whom the appellant alleged were acting in concert with the respondent) and the respondent against, *inter alia*, the calling of general meeting.[102] On 9 March 2018, the non-parties took out a separate summons (SUM 1173) to, *inter alia*, (a) effectively seek a discharge of the interim injunction earlier granted to the appellant; and (b) restrain the appellant from doing anything which would reduce the chances of certain resolutions being passed.[103] At the hearing of SUM 1173 filed by the non-parties, the respondent took it upon himself to argue and support their application. Written submissions were filed and extensive

97 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [5].
98 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [6].
99 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [7] and [8].
100 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [9].
101 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [10].
102 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [27].
103 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [28].

oral arguments were made by the respondent's solicitors in support of SUM 1173.[104] The judge hearing SUM 1173 eventually granted an interim injunction on 16 March 2018 restraining the appellant from issuing new shares or securities pending further hearing of SUM 1173, and recorded the respondent's undertaking as to damages.[105]

11.59 After entering appearance in the suit, the respondent took out an application on 20 March 2018 to set aside leave granted for service out of jurisdiction.[106] On 22 March 2018, the respondent filed an affidavit in support of SUM 1173 stating, *inter alia*, that his participation in SUM 1173 should not be taken as a submission to jurisdiction because SUM 1173 was necessary to stop the appellant from diluting his shareholding and to protect his interests and rights.[107]

11.60 Before the Court of Appeal, the appellant raised two new arguments. First, by actively supporting SUM 1173, the respondent had taken a step in the proceedings and submitted to the jurisdiction of the Singapore courts. Second, the second half of cl 17 was a valid non-exclusive jurisdiction clause ("NEJC"), which had the effect of requiring the respondent to show strong cause why the matter should not be tried in Singapore.[108]

11.61 As a preliminary point, the Court of Appeal observed that since the writ of summons and statement of claim were served on the respondent's solicitors in Singapore on 14 March 2018, jurisdiction over the respondent was established under O 10 of the ROC. There was therefore no issue of discretionary jurisdiction under O 11. However, as the appellant did not raise this point, the Court of Appeal proceeded to also consider the appeal on the various arguments raised in relation to O 11.[109]

11.62 Dealing with the first new argument on submission to jurisdiction, the Court of Appeal accepted that cases interpreting a "step in the proceedings" in the context of a stay application in favour of arbitration are useful in this instance as the principles are substantially similar. If the defendant has taken a "step in the proceedings", his conduct would have amounted to a submission to jurisdiction.[110] Conceptually, the only difference between this situation and a stay application in favour

104 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [30].
105 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [30] and [31].
106 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [11].
107 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [30].
108 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [20].
109 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [24].
110 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [32].

of arbitration is that, in the arbitration context, the defendant does not deny the *existence* of the court's jurisdiction; he only seeks to dissuade the court from *exercising* such jurisdiction. In the present situation, the defendant was contending that the court had jurisdiction to begin with.[111]

11.63 The Court of Appeal opined that whether a defendant's conduct amounts to a submission to jurisdiction is a question of fact in each case.[112] It found that the respondent's participation in SUM 1173 amounted to an invocation of the court's jurisdiction and an implied acceptance that the court had jurisdiction to try the suit (that is, the respondent does not deny the *existence* of the court's jurisdiction).[113] First, the respondent supported SUM 1173 even though his participation was not necessary (as it was an application by the non-parties against the appellant). Second, SUM 1173 was in substance an application for an interim injunction against the appellant. The respondent even gave an undertaking for damages, which was recorded by the Judge.[114]

11.64 The Court of Appeal also rejected several of the respondent's arguments on why his conduct did not amount to a submission to jurisdiction. It did not think that the respondent's express reservations of his right to challenge the court's jurisdiction could salvage conduct which was obviously meant to invoke the court's jurisdiction.[115] The Court of Appeal categorically held that there is *no* blanket rule that no conduct would ever amount to a submission if it was accompanied by a reservation of that party's right to challenge jurisdiction.[116] So even if there exists an express reservation of the right to apply to challenge the court's jurisdiction, the key question is whether the defendant's conduct evinces an unequivocal, clear and consistent intention to submit to the jurisdiction of the court.[117] A party's conduct will only amount to a submission where it cannot be explained. If the conduct may be explained on some other basis which does not involve a submission to jurisdiction, it will not be interpreted as a submission.[118] Some examples of such other bases include taking a neutral procedural step to safeguard one's position in the event the jurisdictional challenge is dismissed, or a step taken to smother rather than advance the hearing on the merits.[119] Where a party's conduct clearly and unequivocally signifies a submission

111 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [44].
112 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [32].
113 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [33].
114 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [33].
115 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [35].
116 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [36].
117 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [37].
118 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [37].
119 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [39].

to jurisdiction, the submission *cannot* be salvaged by a mere reservation. Even the filing of a jurisdictional challenge or a stay application may not suffice if the challenge is fundamentally inconsistent with the nature of the defendant's acts.[120]

11.65 In this case, the Court of Appeal found that by invoking the court's jurisdiction to grant an interim injunction against the appellant, the respondent's conduct unequivocally signified his acceptance and invocation of the court's jurisdiction and could not realistically be construed in any other way.[121] If the respondent indeed thought that the Singapore courts lacked jurisdiction to try the dispute, what would have been proper was for the respondent to apply to set aside both the interim injunction granted to the appellant and the leave for service out of jurisdiction on that basis.[122]

11.66 Moving to the jurisdictional limbs under O 11, the appellant relied on limbs (*d*)(iii), (*d*)(iv) and (*r*). An appellant merely has to meet the standard of a good arguable case that one or more of the various conditions listed under O 11 has been satisfied. To this end, a "good arguable case" merely requires the appellant to have "the better of the argument". This formulation reflects that the threshold is more than a mere *prima facie* case but is different from the standard of a balance of probabilities. The Court of Appeal has also cautioned that while courts may grapple with questions of law at this stage, courts should not delve into contested factual issues.[123]

11.67 As a preliminary point, the Court of Appeal proceeded on the basis that, as a floating choice of law was not valid, cl 17 did not disclose a valid express choice of law.[124] It bypassed the second stage in determining the governing law of the service agreement since the same factors are considered and addressed at the third stage, and concluded that Singapore law bore the closest and most real connection to the service agreement.[125]

11.68 The Court of Appeal considered significant that the appellant was listed on the SGX, had always held its annual general meetings and board meetings in Singapore, and was subject to SGX listing rules. Resolutions, regulations and directions given to the respondent by the appellant

120 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [38].
121 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [39], [42], [44] and [48].
122 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [42].
123 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [49].
124 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [50].
125 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [50].

had to comply with Singapore laws and SGX rules and regulations.[126] Additionally, the contemplation of applicability of Singapore statutes in the service agreement (as opposed to no Chinese statutes being referred to at all) pointed towards Singapore law.[127] The Court of Appeal also did not accord any weight as to where the service agreement was (allegedly) executed as this was a contested factual issue.[128]

11.69 An interesting aside to note is that O 11 r 1(*d*)(iii) reads "… being a contract which … is by its terms, or by *implication*, governed by the law of Singapore …" [emphasis added]. Therefore, while one would have expected that the first and second stages in determining governing law of the contract could fall within limb (*d*)(iii), it is less clear whether the governing law determined pursuant to the third stage – identifying the law that bore the closest and most real connection to the contract – could fall under the said limb. If there had been any question about this, the Court of Appeal's decision has clearly put it to rest.

11.70 The Court of Appeal next considered both limbs (*d*)(iv) and (*r*) of O 11 r 1 together as both limbs were relied upon by the appellant on the premise of the existence of cl 17 in the service agreement – that parties had submitted to the non-exclusive jurisdiction of the courts of Singapore (and the People's Republic of China).[129]

11.71 A preliminary issue considered was the validity of the choice of law and choice of jurisdiction clause – cl 17 of the service agreement. The validity of such clauses, like any contractual term, would generally depend on the governing law of the contract.[130] At the High Court, Hoo J considered the validity of cl 17 under both Singapore and Chinese law as she did not come to a conclusive landing on the proper law of the service agreement.[131] The Court of Appeal, however, disagreed with this approach. Since only one party can have the "better of the argument" regarding which is the governing law, the court should form a view on this and apply that position consistently to the remaining issues.[132] Since the Court of Appeal had previously found that Singapore law had the most real and closest connection to the service agreement, the validity of cl 17 was considered under Singapore law.

126 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [50(a)].
127 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [50(c)].
128 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [51(c)].
129 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [53].
130 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [54].
131 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2018] SGHC 172 at [41], *per* Hoo Sheau Peng J.
132 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [54].

11.72 Turning to the validity issue, the Court of Appeal agreed with the High Court that an invalid jurisdiction clause could *in principle* be severed from the contract.[133] However, the Court of Appeal disagreed that the invalid choice of law clause could not be severed from the second part of the clause, that is, the choice of jurisdiction provision.

11.73 The Court of Appeal considered three English decisions referred to by the parties and concluded that the choice of law provision was not expressed to be interdependent on the choice of jurisdiction provision in cl 17. In other words, the court excised the first half of cl 17 (the invalid choice of law provision), and interpreted the remaining half of the clause to mean that parties submitted to the non-exclusive jurisdiction of both Singapore and China.[134] The court found that the word "and" connecting both the choice of law and choice of jurisdiction provisions was merely conjunctive, and did not convey any interdependence or contingency. The choice of jurisdiction provision was thus not parasitic upon the choice of law, such that the former had to fall with the latter.[135]

11.74 The Court of Appeal acknowledged one main difficulty with its interpretation – the presence of the phrase "and each parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/ *or* People's Republic of China" [emphasis added]. The Court of Appeal accepted that this phrase normally carries a disjunctive meaning but, given that the parties were "not very precise" with their choice of words throughout the service agreement, nevertheless found that the parties must have intended to submit to both *fora*.[136] This reasoning is a bit problematic given that subjective intentions of parties surely should not be allowed to override literal reading of the clause.

11.75 Be that as it may, the court established that the NEJC remains valid after being severed from the invalid choice of law provision. It is trite that a jurisdiction clause is interpreted according to the *lex contractus*, and its effect on the jurisdiction of the forum is a matter for the *lex fori*.[137] It is the effect that the Court of Appeal has proscribed to this NEJC that is particularly noteworthy. In the past, an NEJC was treated as a factor, albeit a strong one, in the *forum non conveniens* analysis.[138] However,

133 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [55].
134 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [64], [66] and [67].
135 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [64].
136 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [68].
137 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [81].
138 See *P T Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* [1996] SGHC 285 at [63], *per* Lai Siu Chiu J; *Industrial & Commercial Bank Ltd v Banco Ambrosiano Veneto SPA* [2000] SGHC 188 at [14], *per* Judith Prakash J; *OCBC Capital Investment Asia Ltd v Wong Hua Choon* [2010] 4 SLR 904 at [21], *per* Andrew Ang J;
(cont'd on the next page)

in this case, the Court of Appeal required the defendant to show strong cause why the matter should not be heard if the suit was brought in the forum which the defendant had agreed to submit (non-exclusively) to, if Singapore was one of the named forum in the NEJC.[139] This finding leads to two permutations where a NEJC exists.

> (a) If Singapore is named in the NEJC, the defendant must show strong cause why he should not be bound to his contractual agreement to submit. He will need to point to factors which were not foreseeable at the time of contracting to establish strong cause.[140] Pertinently, the Court of Appeal declined to decide whether this approach should apply equally to a NEJC which was not freely negotiated.[141]
>
> (b) If Singapore is *not* a named forum in the NEJC, the defendant may apply for a stay or set aside service on the basis that Singapore is *forum non conveniens*. In that case, Singapore courts will apply the *Spiliada* test to identify the *forum conveniens*. The added gloss here is that the weight attributable to the NEJC would depend on circumstances of the case, including (i) whether the clause formed part of a closely negotiated contract or was a standard term in a contract of adhesion; and (ii) whether the forum named in the NEJC was chosen for its neutrality.[142]

11.76 The Court of Appeal arrived at this new approach by reasoning that an exclusive jurisdiction clause ("EJC") is similar to an NEJC in that in both situations, parties have agreed that if they were sued in the named forum, they would submit to the jurisdiction of that forum. Therefore, neither party should be allowed to avoid a forum to which they have contractually agreed to submit to unless strong cause is shown.[143] Put another way, the Court of Appeal interpreted the respondent, by agreeing to cl 17, to have consented to the exercise of jurisdiction by the courts of both Singapore and China, and waived any objection thereto. This would therefore reduce the risk of jurisdictional challenges if proceedings were brought in the named forums.[144]

11.77 Having said that, the Court of Appeal did caveat that the analysis adopted in this judgment should not be applied unthinkingly to all

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and *Morgan Stanley Asia (Singapore) Pte v Hong Leong Finance Ltd* [2013] 3 SLR 409 at [58], *per* Belinda Ang Saw Ean J for some examples.

139 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [88].

140 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [88(a)].

141 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [90].

142 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [88(b)].

143 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [73]–[74].

144 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [84].

jurisdiction clauses which do not have the same legal effect.[145] In other words, when dealing with a NEJC, the first step is always to scrutinise the terms of that clause to identify what the contractual bargain struck between parties was – in relation to choice of jurisdiction – should a dispute arise.[146]

11.78 The Court of Appeal's reasoning is curious. By agreeing to cl 17, could the parties not have consented to merely the *existence* (and not the exercise) of the jurisdiction? After all, this clause has a real effect in establishing a head of jurisdiction under O 11 rr 1(*d*)(iv) and 1(*r*) – it makes it easier for the plaintiff to sue in the chosen (non-exclusive) forum. Does the obligation have to extend to waiving an objection to the exercise of jurisdiction? The court had read into cl 17 the obligation to waive any objection thereby converting the effect of a NEJC to that of an EJC. This is a marked departure from the arguably clear expression of the parties' intent to consent to an NEJC.

11.79 Even if the Court of Appeal's reasoning were to be accepted, it is again odd for the court to posit that a defendant must be reneging on the contractual bargain struck when he files a challenge to the exercise of jurisdiction, including an application to set aside leave for service out of jurisdiction.[147] Such applications, if successful, are premised on the fact that despite the existence of a valid choice of jurisdiction clause, jurisdiction *over the defendant* is *not* perfected. This could be because there was a problem with service, or that some of the legal requirements needed to obtain leave for service out of jurisdiction have not been satisfied. Therefore, with respect, it would be incorrect to treat *all* applications to set aside a court order granting the plaintiff leave to serve out of jurisdiction as amounting to an attempt to be released from the NEJC.

11.80 Regardless, the applicable standard now for a defendant attempting to resist proceedings in Singapore, when Singapore is a named forum in the NEJC, is that of "strong cause". The Court of Appeal clarified that this "strong cause" test is the same as that in the context of an EJC, with some of the following adaptions to fit the analysis being taken from the perspective of a defendant.[148]

145 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [83].
146 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [82].
147 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [86].
148 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [94]–[95].

11.81 The strong cause test focuses on five factors.[149] The last two, (d) and (e), concerns the inquiry of whether the plaintiff's conduct in applying for a stay constitutes an abuse, and whether the defendant would be prejudiced by having to defend in Singapore, by considering the further sub-factors listed therein respectively.

11.82 The first three, (a) to (c), look at the location of evidence/witnesses, whether the *lex causae* is foreign law, and the countries to which parties are connected to respectively. Because the strong cause test reflects the philosophy that the court should generally give effect to contractual bargains struck by parties, factors (a) and (c) have little weight if they were foreseeable at the time the parties agreed on the NEJC. Parties will be deemed to have agreed to the jurisdiction of a court with knowledge of how it works, and what it can or cannot do; thus, complaints about the procedure of that court will rarely amount to strong cause.[150] Given the high threshold of the strong cause test, it should come as no surprise that the Court of Appeal found that the respondent had not shown strong cause why the suit should not be tried in Singapore.[151] To this, the authors would add that with this threshold, establishing strong cause would be considered a rarity indeed.

11.83 The last point discussed was that of the obligation on the plaintiff (appellant) to make full and frank disclosure of material facts at the *ex parte* stage when leave for service out was sought. The Court of Appeal clarified that while the applicant must identify crucial points for and against the application for service out, the applicant is not required to canvass arguments against his own case *as thoroughly as his opponent would* if present. There is a balance to be struck between protecting the defendant from abuse and unduly impeding the plaintiff from serving proceedings.[152] As such, the Court of Appeal disagreed with the High Court entirely that there was no full and frank disclosure of material facts and opined that it was sufficient that Shanghai Turbo's supporting affidavit identified the grounds under O 11 to be relied upon. It was not necessary for the supporting affidavit to identify and dwell at length on the potential difficulties with its case. The Court of Appeal also noted that while it is *good practice* to append the statement of claim to the supporting affidavit, this is not a strict requirement under the ROC. Overall, the Court of Appeal found that there had not been any material non-disclosure.[153]

149 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [94].
150 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [96].
151 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [97].
152 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [105].
153 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [107].

D. Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV

Jurisdiction – Discretionary jurisdiction – Natural forum

11.84 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV*[154] is an important Court of Appeal judgment that discussed both the topic of jurisdiction and restraint of foreign proceedings; it will thus be covered under both sections I and II. The case involved a complex web of corporate relationships. The second to sixth appellants were Singapore-incorporated companies that operated rigs. They were owned by the first appellant, Oro Negro Drilling Pte Ltd ("Oro Negro"), as the sole shareholder whose only activity was to function as a holding company of and to receive funds from the second to sixth appellants. Oro Negro was in turned owned by the first respondent ("Integradora"). Mexican-incorporated Integradora provided oilfield services, via Perforadora (99.25% owned by Integradora), to Mexican state-owned Petroleos Mexicanos ("Pemex").[155]

11.85 Oro Negro financed the rigs through Nordic Trustee ASA ("NT") via a bond agreement which provided for, *inter alia*, amendments to the constitutions of the second to sixth appellants to allow NT to appoint an independent director with the power to veto any attempt by the appellants to place themselves in insolvency-related proceedings, and restricting any proposed constitutional amendments contrary to these requirements (cl 13.5(a)).[156] The bond agreement also provided for a declaration of default if the appellants, Integradora or Perforadora took steps to liquidate themselves or place themselves in insolvency-related proceedings (cl 15.1(g)).[157] As part of the financing arrangement, fixed charges (governed by Singapore law and subject to the exclusive jurisdiction of the Singapore courts) over the appellants' shares were granted and cl 4.7 of the share charges provided for compliance with cl 13.5(a) of the bond agreement as though it were set out in the share charges.[158] Accordingly, the appellants' constitutions were amended to

154 [2020] 1 SLR 226.

155 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [6]–[7].

156 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [13].

157 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [15].

158 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [16].

reflect these obligations (collectively referred to as Art 115A) and an independent director was appointed accordingly. [159]

11.86 The relationship between Pemex and Perforadora soured when Pemex proposed new terms which would have caused significant revenue loss to the appellants and possibly caused Oro Negro to default on the bond agreement.[160] Despite Perforadora having to agree to these terms, Pemex subsequently refused to implement them. The second and third respondents, both directors of the appellants at the material times, granted wide-ranging powers of attorney to Guerra lawyers without the knowledge or approval of the independent director.[161]

11.87 Both Integradora and Oro Negro also subsequently passed resolutions appointing the Guerra lawyers as counsel for the purpose of filing *concurso* (a court-sanctioned debt restructuring process for insolvent companies provided for by Mexican legislation) petitions and granting them powers of attorney.[162]

11.88 When NT came to know of Perforadora's *concurso* application, NT declared a default of the bond agreement, replaced all of the appellants' directors and perfected its security over the Oro Negro shares owned by Integradora. NT then transferred those shares to its nominee, which then effectively become the controller of Oro Negro.[163]

11.89 Subsequently, Guerra filed a *concurso* petition on behalf of Oro Negro and Integradora, also without the knowledge or approval of the independent director. On learning about these petitions, the new directors passed resolutions to rescind the power of attorneys that had been granted.[164]

11.90 From October 2017 to May 2018, there were various applications and counter-applications in the Mexican courts revolving around the

159 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [18].

160 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [20]–[21].

161 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [22].

162 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [22] and [24].

163 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [26].

164 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [27]–[28].

Oro Negro *concurso* petition which are not of concern for the purposes of this review save to note the fact of their existence.[165]

11.91 In January 2018, the appellants commenced proceedings in Singapore seeking declarations that, *inter alia*, resolutions passed by Integradora were *ultra vires*, and the respondents had no authority to cause the appellants to bring or maintain *concurso* petitions on the appellants' behalves.[166] The appellants also sought permanent injunctions against the respondents from relying on the resolutions to, and from beginning or maintaining any legal action on the appellants' behalves.[167] The appellants also simultaneously applied for and obtained interim injunctions against the respondents (mirroring the permanent ones sought) and the court's leave to serve on the respondents in Mexico.[168]

11.92 The respondents subsequently applied to set aside the interim injunctions and the order to serve out of jurisdiction, followed by another application for a declaration that Guerra was not bound by the interim injunctions or in the alternative, specific variations on the interim injunctions.[169]

11.93 At first instance, the High Court set aside the interim injunctions and service order as Singapore was not the natural forum for the dispute. The court also found, *inter alia*, that the appellants had acted in bad faith, had not made full and frank disclosure, and that the respondents had not acted in breach of Art 115A of the appellants' constitution.[170]

11.94 The appeal dealt with a number of issues. What is of interest for this review are two aspects of the judgment relating to natural forum and ASIs.

11.95 As part of the application for leave to serve outside the jurisdiction, the appellants had to show that it had a good arguable case, that there was a serious question to be tried (a requirement that is usually met by meeting the requirement of good arguable case), and that Singapore

165 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [30]–[34].
166 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [35].
167 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [36].
168 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [37].
169 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [38].
170 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [40]–[44].

was the natural forum. Before turning to look at the natural forum requirement, the Court of Appeal found that the first two requirements were satisfied.[171]

11.96 On natural forum, the court affirmed the application of the two stage *Spiliada* test and noted that in an application for service out, the appellants (as plaintiffs) bore the burden at stage one of showing that Singapore was the more appropriate forum than other competing *fora* (in this case Mexico).[172] Again, the court is seen taking the "stage zero" approach[173] – the court clarified that the question whether Singapore was the more appropriate forum for the action only arises for determination if the court was *first satisfied that there was at least another available forum*.[174] Since the main issue was whether the Oro Negro *concurso* petition was in breach of Art 115A, the court concluded that between Singapore and Mexico, Singapore was clearly the more appropriate forum for deciding this matter.[175] In coming to this conclusion, the court considered the following factors.

11.97 First, the nature of the query was legal rather than factual. This was important as the nature of the dispute would assist the court in determining the weight attributable to each connecting factor. Because the issue was legal in nature and involved the governance and internal management of the appellants, the Court of Appeal, disagreeing with the High Court, opined that the place of incorporation of the appellants (that is, Singapore) was the more appropriate forum to resolve these matters.[176]

11.98 Two subsidiary points are noteworthy here. The Court of Appeal clarified that issues relating to duties owed by an officer to a company are to be determined by *lex incorporationis* (law of the company's place of incorporation).[177] It went on to hold that a person who accepts an appointment as a director with notice of the company's articles would be taken to have entered into a contract with the company to serve on the

171 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [54].
172 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [80].
173 See para 11.45 above.
174 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [80(a)].
175 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [81].
176 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [82].
177 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [59].

terms of its articles.[178] Additionally, a company's place of incorporation is also *prima facie*, the more appropriate forum to try disputes concerning its corporate governance or internal management.[179] This indicates, *prima facie*, that *lex incorporationis* will be a significant factor in identifying the *forum conveniens* for disputes concerning breach(es) of company's constitution by officers of the company.

11.99 Secondly, the court also disagreed with the High Court that substantial weight was to be placed on the Mexican proceedings. Those proceedings considered matters incidental to the *concurso* proceedings. They did not affect the question of whether those proceedings were filed in breach of Art 115A. As such, they were not relevant for the purposes of determining the natural forum for the Singapore proceedings.[180]

11.100 Thirdly, because the matter related to the appellant's corporate governance and internal management, this pointed to the *lex incorporationis* which was Singapore. And since, the nature of the query was legal, Singapore was the more appropriate forum to interpret and apply Singapore law.[181]

11.101 Fourthly, the court acknowledged that in relation to the alleged tort claims against Integradora, the law of the place of the tort (*lex loci delicti*), that is, Mexican law, applied and this pointed to Mexico as an appropriate forum. However, the court opined that because the tort claims were inextricably linked with the non-tortious ones, it made more sense to have all the issues determined in one forum, in this case Singapore.[182]

11.102 There were a number of other factors (including location of witnesses, and civil and criminal proceedings elsewhere) that the court considered irrelevant or neutral and which was insufficient to displace Singapore as the natural forum.[183] One important point of note is that the Court of Appeal expressly cautioned against unnecessary reliance on experts' evidence on foreign law, which may lead to significant wasted costs. The Court of Appeal reminded counsel not to rush into filing

178 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [62], [68] and [69].
179 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [82]–[83].
180 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [85].
181 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [87]–[89].
182 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [90]–[91].
183 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [92].

expert evidence without first considering the relevance *and* materiality of expert evidence on foreign law.[184]

11.103 The Court of Appeal's analysis must be correct. It is nuanced and focuses on the crux of the matter before the court, rather than a mechanistic application of the *Spiliada* approach in stage one. On this basis, it reinstated the order to serve out of jurisdiction.[185]

11.104 For completeness, it is useful to mention that the court noted that there were conflicting authorities on the question of whether stage two of the *Spiliada* test applied in the context of an application for service out.[186] It is curious, however, that the court stated it in these terms:

> … whether the Singapore court can nevertheless grant leave for service out if the plaintiff can show that substantial justice cannot be done in the otherwise appropriate foreign forum.

11.105 This assumes that should the plaintiff not satisfy the requirements in stage one, he nonetheless might still succeed if he could show that he would suffer substantial injustice in the more appropriate foreign forum. However, as the Court of Appeal found that Singapore was the natural forum (thereby satisfying stage one) on the facts, the court left the question of applicability of stage two for unsuccessful plaintiffs at stage one open.

11.106 With respect, it is submitted that the position should be that if the plaintiff cannot show that Singapore is the natural forum in stage one, the inquiry stops there. In other words, stage two *cannot* even be engaged if stage one is not even satisfied. It is only if stage one is satisfied that the inquiry moves to stage two where the possible injustice that the defendant may suffer as a result of being served outside Singapore might be considered. At this stage, whether the defendant will be deprived of a legitimate personal or juridical advantage should he have to defend the matter in Singapore will be considered.

11.107 Seen this way, it mirrors how the application of the test is seen in *Spiliada Maritime Corp v Cansulex Ltd*[187] ("*Spiliada*") in the context of an application for a stay. In that context, the defendant bears the burden of

184 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [94].

185 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [98].

186 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [80(d)].

187 [1987] 1 AC 460.

showing there is a more appropriate forum (than Singapore) elsewhere and, if it cannot, the inquiry stops there. If it satisfies stage one, then the inquiry moves to stage two, where the court considers whether being required to sue overseas deprives the plaintiff of a legitimate personal or juridical advantage.[188]

11.108 If this analysis is accepted, then, having found Singapore to be the natural forum, the court needs to go on to consider if the defendant would have suffered injustice as a result of being deprived of a legitimate personal or juridical advantage. On the facts, it is submitted that this is not likely to have been the case.

11.109 Following from this, it would not be unfair to ask, in the context of an *ex parte* application (which many applications to serve outside the jurisdiction are), how does the defendant show such deprivation in stage two if he is not present? This is in large part why full and frank disclosure of material facts on the part of the applicant-plaintiff is so important.

11.110 On this point, the court below had found that the appellants had not made full and frank disclosure and had also, on that basis, set aside the order to serve out. The Court of Appeal, and it is submitted correctly, disagreed. The facts that the court of first instance had focused upon as not being disclosed were simply not material to the issue that was before the Singapore courts.[189]

11.111 Finally, it was extremely odd that the non-party, Mendez, applied to vary the interim injunctions to clarify that he was not bound by them.[190] The Court of Appeal rightly rejected his application – Mendez ought to have sought legal advice on whether he was bound by the interim injunctions granted. If he indeed thought he was not bound by them, he could have simply ignored the orders. It would then fall upon the appellants to take out enforcement proceedings against Mendez.[191] It was also odd for Mendez's counsel to argue that his application to vary/clarify the interim injunction did not amount to a voluntary submission since it was merely defensive in nature. As the Court of Appeal recently endorsed in a separate decision – there is no blanket rule that defensive steps could

188 *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Ltd* [2001] 1 SLR(R) 104 at [16], *per* Chao Hick Tin JA.

189 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [95]–[97].

190 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [50]–[51] and [115].

191 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [113].

not amount to "steps in the proceedings".[192] If Mendez really thought that there existed no jurisdiction (*as opposed to exercise of jurisdiction*) over him by the Singapore courts (if so advised by his counsel) as he "was neither the servant nor agent of the respondents", Mendez could simply just act as he wished without regard for the interim injunction; and he could make the necessary substantive arguments when enforcement proceedings were taken out against him for compliance with the interim injunction.

11.112 For the purposes of this chapter, apart from dealing with the question of natural forum, the court also made some observations relating to ASIs. The observations on ASIs will be covered below.[193]

E. Grains and Industrial Products Trading Pte Ltd v State Bank of India

Discretionary jurisdiction – Order 11 rule 1

Discretionary jurisdiction – *Forum non conveniens*

Exclusive jurisdiction clause – Strong cause test

Exclusive jurisdiction clause – Presence of both jurisdiction and arbitration clause – Paul Smith's approach

Negative declaration – Useful purpose requirement

11.113 *Grains and Industrial Products Trading Pte Ltd v State Bank of India*[194] is a case involving a complex series of transactions involving merchanting trade transactions for the sale and purchase of agricultural commodities. For the purpose of this brief mention, it is sufficient to note that the plaintiffs are claiming against:[195]

(a) the first defendant ("SBI") for damages;

(b) the second defendant ("AOPL") for damages (and also applying for a declaration of non-liability in relation to AOPL's prospective claim); and

(c) the third defendant, Bhasi (a former agent of the group of companies that the plaintiffs were part of), for breach of agency

192 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [42], *per* Judith Prakash JA.

193 See paras 11.152–11.153 below.

194 [2019] SGHC 292.

195 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [43].

and for indemnity against liability from AOPL's prospective claim.

11.114 The plaintiffs obtained leave to serve out of the jurisdiction and the defendants applied to set aside leave and, in the alternative, stay the proceedings.[196]

11.115 The interesting point about the preliminary argument on defendants' submission to the jurisdiction of the Singapore courts is that the amended writ and statement of claim were served on the defendants' solicitors via e-Litigation.[197] Readers would recall that in *Shanghai Turbo*,[198] the Court of Appeal remarked (in *obiter*) that the writ of summons and statement of claim which were served on the defendant at his solicitors' offices in Singapore meant that the originating process was served within jurisdiction pursuant to O 10 of the ROC. Accordingly, the service out of jurisdiction order was essentially redundant.[199] The High Court rightly rejected the same argument here *only* because, unlike Liu Ming's solicitors, the defendants' solicitors did not have instructions to accept service of the writ in Singapore.[200] After dismissing the preliminary argument on submission, the High Court considered the claims against each of the defendants.

11.116 On the claim against SBI, the court held that SBI did not meet the burden of showing that India was *forum conveniens*; as such, its stay application was dismissed.[201]

11.117 On the claim against AOPL for breach of contract, the court held that Singapore was *forum conveniens* and that the defendant had not satisfied the burden for a stay based on strong cause.[202] On the application for the declaration of non-liability, the court held that the declaration did not serve a useful purpose and further stayed the proceedings because Singapore was *forum non conveniens*.[203]

196 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [61] and [63].
197 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [74].
198 See para 11.83 above.
199 See para 11.92 above.
200 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [76].
201 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [205]–[207].
202 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [92] and [109].
203 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [135].

11.118 On the claims against Bhasi, the court declined the application to set aside, finding that the requirements for leave to serve out had been met.[204] The stay application based on *forum non conveniens* was also unsuccessful but the court stayed proceedings in favour of arbitration.[205]

11.119 There are a number of points to note which will be considered in more general terms. First, it seems that the High Court accepted without question that just because Bhasi had property in Singapore (in the form of cash in bank accounts and shares in Singaporean entities, including AOPL), O 11 r 1(*a*) was fulfilled.[206]

11.120 Second, the question arose as to whether the court can take into account belated additions to the writ of summons and statement of claim when considering whether to set aside leave for service out. The court first noted that the Court of Appeal in *Man Diesel & Turbo SE v IM Skaugen SE*[207] had considered and allowed a similar point, but in relation to new evidence that surfaced after the initial application for leave to serve out had been made.[208] Acknowledging the difference between *Man Diesel & Turbo SE v IM Skaugen SE* and the present case, the court opined that since the new cause of action and arguments were based on facts and evidence known to parties at the time the writ was first filed, and leave had been obtained to amend the pleadings, it was permissible to consider the new developments.[209] This robust approach that saves time and cost, and is consistent with principle and policy, must be correct.

11.121 Third, as for the claim against AOPL, there was an EJC in favour of Singapore and the court found that the defendant had not discharged the burden of strong cause. What is noteworthy is that the court applied the position taken by the Court of Appeal in *Shanghai Turbo*,[210] specifically, that the strong cause test was applicable to both exclusive and non-exclusive forum jurisdiction clauses.[211] The application of the test to the facts was unremarkable save for two things.

204 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [163], [164], [170] and [173].
205 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [193].
206 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [164].
207 See para 11.27 above.
208 See paras 11.30–11.34 above.
209 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [86].
210 See para 11.83 above.
211 See paras 11.106–11.107 above.

11.122 When the court applied the test, it did not seem to exclude or weigh less the factors that were foreseeable at the time the parties agreed to the jurisdiction clause[212] (save for a passing reference in relation to the applicable law).[213] Readers will recall that this was the position taken by the Court of Appeal in *Shanghai Turbo* in relation to an NEJC.[214] Unless the court did so without being explicit about it, it would mean that the strong cause test, as applied to a NEJC is more stringent than that applied to an EJC. It is submitted that this would be a difficult position to defend. If anything, the test for an EJC should be more stringent and at the very least, the application of the strong cause test should be comparable regardless of the jurisdiction clause's exclusivity.

11.123 On the factor of compellability of witnesses, the court seems to accept that the witnesses who were compellable only in India would nonetheless be willing to testify in Singapore because they were employees of SBI, whose interests would be aligned with AOPL. This is especially since there was no evidence that they were not prepared to do so.[215] While there is no suggestion that the court is incorrect in coming to this conclusion, it seems a little at odds with *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra*[216] where the Court of Appeal seems to have assumed that witnesses would not be willing to testify and as such would require evidence that they would be compellable.[217] Following from this, should no evidence of compellability be available, then perhaps some kind of confirmation or undertaking from counsel should be required.

11.124 Fourth, in analysing whether Singapore was *forum non conveniens* for the negative declaration, the plaintiffs had argued that a stay should not be granted (even though India was *forum conveniens*) because there would be the likelihood of delays for the matter to be heard.[218] In deference to comity, the court acknowledged the efforts made by the Indian courts to reduce its backlog and opined that any delay there was insufficient for the court to conclude that it would amount to substantial injustice. The position in theory must be accurate,[219] but the conclusion is rather

212 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [92]–[108].
213 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [104].
214 See paras 11.106 and 11.111–11.113 above.
215 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [101].
216 See para 11.115 above.
217 See para 11.125 above. See also para 11.48 above.
218 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [120] and [122].
219 The Singapore courts are not – and cannot be – a convenient means for obtaining (here, summary) judgment just because the plaintiff is of the view that it would take

(cont'd on the next page)

curious. The plaintiffs had indicated that it would take 12–18 years for the matter to be heard. Perhaps the court was swayed by the defendants' estimate of three years and five months. But this does beg the question: how long would a delay have to be to qualify as "substantial injustice" under stage 2 of *Spiliada*? One would have thought that 12 years might be pushing it. And in the context of a stay based on a jurisdiction clause, one could say this was still acceptable because parties chose that jurisdiction, and arguably potential duration of a litigation in the chosen jurisdiction is something foreseeable. However, in the context of a stay based on *forum non conveniens*, perhaps a stronger argument of substantial injustice exists?

11.125 Fifth, it is interesting to note that in deciding whether a declaration of non-liability should have been granted, the court noted that applications for such declarations were viewed with suspicion but that this has given way to considerations of utility.[220] Put another way, applicants need to show that the declaration will serve a useful purpose and is not simply an attempt at forum shopping. An example of a useful purpose is where the defendant is unwilling to proceed with his claim and a negative declaration may be useful in forcing the issue. Where proceedings are already underway, or conversely hypothetical, this points away from there being a useful purpose.[221]

11.126 Finally, the court had to consider the interaction and impact of an NEJC (cl 11.2) and an arbitration clause (cl 13).[222] The court adopted the approach in *Paul Smith Ltd v H & S International Holding Inc*[223] and interpreted the jurisdiction clause as a submission to the Singapore court's supervisory jurisdiction over the arbitration.[224]

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a longer time to obtain judgment in the foreign court: *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494 at [45], *per* Andrew Phang Boon Leong JC.

220 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [128]–[132].

221 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [132].

222 *Grains and Industrial Products Trading Pte Ltd v State Bank of India* [2019] SGHC 292 at [138].

223 [1991] 2 Lloyd's Rep 127 at 129–130, *per* Steyn J.

224 See also *BXI v BXH* [2020] 3 SLR 1368 at [241]–[244] where the approach in *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 was also adopted. For completeness, an appeal to the Court of Appeal in *BXI v BXH* was also made (see [2020] 1 SLR 1043). As the *BXI v BXH* Court of Appeal judgment was made in 2020, the decision will be considered in next year's Ann Rev. For now, it is sufficient to note that the Court of Appeal agreed with the High Court's approach in giving effect to parties' intention to have matters resolved by arbitration.

F. Recovery Vehicle 1 Pte Ltd v Industries Chimigues Du Senegal

Discretionary jurisdiction – Order 11 rule 1

Discretionary jurisdiction – *Forum non conveniens* – Foreign proceedings

Discretionary jurisdiction – *Forum non conveniens* – Time bar

Discretionary jurisdiction – Full and frank disclosure – Continuing obligation

11.127 In *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal*,[225] the plaintiff was the assignee of debts owed by the defendant ("ICS") to the assignor.[226] ICS claimed that this debt had been waived by the assignor as part of a series of transactions to acquire ICS's shares.[227] Proceedings against ICS had been commenced by liquidators prior to their assigning this debt to the plaintiff.[228] After assignment, the plaintiff applied to amend the writ (to replace itself as plaintiff) and then applied for leave for service out. Leave was granted and service was effected on ICS who subsequently entered appearance.[229] It was after leave for service out was obtained that the plaintiff received documentation from ICS' lawyers about the waiver of the debt.[230]

11.128 Following this, ICS applied to and obtained from the Dakar Commercial Court a default judgment to the effect that the ICS debt had been waived. It was undisputed that neither the assignor, liquidator nor plaintiff had been notified of the Dakar proceedings.[231] There is a pending appeal in Dakar by the liquidators on this default judgment.[232] The liquidators had also applied in Singapore to set aside the waiver as an undervalue transaction to which a stay was granted pending the

225 [2019] SGHC 289.
226 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [1]–[2] and [10].
227 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [3]–[6].
228 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [8].
229 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [11].
230 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [11]–[12] and [22].
231 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [13]–[14].
232 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [15].

determination of the Dakar judgment appeal. This decision by the registrar has been appealed and is also pending.[233]

11.129 As against the plaintiff, ICS had applied to set aside service of the amended writ, for a declaration that the court had no jurisdiction over ICS and for a stay of proceedings. The leave order was discharged at first instance, which led to the instant appeal revolving around whether a case for service out had been made, and if it had, whether a stay should be granted.[234] The High Court allowed the appeal and a number of observations may be made.[235]

11.130 The court reiterated the importance and need for applicants to make full and frank disclosure. This was not just as a matter of fairness as between the parties, but as a duty owed to the court. The obligation is a continuing one which means that if an applicant comes into possession of information relevant for service out (that needs to be disclosed) *even after* leave has been obtained, the applicant must apprise the court of such information.[236] This is so even if the applicant is of the view that the documents containing those information may have been a sham (in this case, the plaintiff alleged that the waiver was a sham or an undervalue transaction) – the weight to be given to such documents would have been for the court's determination and does not affect the applicant's duty to disclose.[237] It is less clear from the judgment whether the duty to disclose ceases *if* the information came into the applicant's possession *after* service out has been effected. Out of prudence, it may be best to apprise the court at any time since the duty is a continuing one. If full and frank disclosure has not been made, even if it were innocent, the court may, in its discretion, set aside leave.[238] However, as it was discretionary, the court chose to go on to consider the other issues.

11.131 On the heads of jurisdiction, there is nothing significant to note. The plaintiff had relied on quite a number of heads and, for the most

233 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [16].
234 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [17]–[18].
235 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [86]–[87] and [92].
236 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [24].
237 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [25].
238 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [26].

part, it was a straight analysis of the provision as applied to the facts.[239] It is sufficient to note that the court held O 11 r 1(*e*) was made out as the breach of contract (non-payment of debt) happened in Singapore. The court arrived at this conclusion by applying the general proposition that a debtor must seek out his creditor at the creditor's place of business and pay him there if the contract does not expressly or impliedly provide for the place of payment.[240] The court also refused to consider any head that had not been pleaded.[241] As a matter of procedure, this must be correct.

11.132 To determine whether there was a sufficient degree of merit, the court considered the effect of the waiver and the Dakar judgment. On the former, the court was unconvinced about the validity of the waiver as it was not clear if there was an agreement in the first place or if consideration had been given.[242] And even if validity was not in question, the court seemed to be swayed by the plaintiff's argument that it was a sham.[243]

11.133 On the latter, the court held that the Dakar judgment did not defeat the plaintiff's claim at the jurisdictional stage. The judge's reasoning is curious. She noted that the appeal on the Dakar judgment was pending and at its conclusion the Dakar appeal judgment could serve as a defence in Singapore proceedings.[244] While this is not wrong, barring any question about the appeal or service, one wonders if the defendant can simply argue that there is no debt to sue upon and that the plaintiff is claiming for breach of an obligation to pay an extinguished debt. Be that as it may, the court went on to note that service of the Dakar proceeding papers was not properly effected.[245] Perhaps this is the key point. At common law, the court will not recognise a foreign judgment if that court did not have international jurisdiction as determined by the forum, that is, Singapore.[246] In the present case, it is unclear if this requirement had been satisfied especially when service had not been effected.

239 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [27]–[60].
240 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [41].
241 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [58].
242 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [50]–[52].
243 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [53].
244 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [54].
245 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [55].
246 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [71], *per* Steven Chong J.

11.134 On the stay application based on *forum non conveniens*, the court carried out a fairly straightforward analysis and considered factors like, *inter alia*, governing law of the waiver, place of breach and witness convenience.[247] But three points stand out.

11.135 First, the defendant argued that the Dakar proceedings were at an advanced stage and that there was the possibility of conflicting judgments.[248] The court noted that the default judgment was obtained without due notice given. It also found that the Dakar proceedings had been commenced by ICS to bolster its case for a stay application, and that the risk of conflicting judgments was not significant.[249]

11.136 Second, as part of the *forum non conveniens* analysis, the plaintiff had raised the possibility of a transfer to the SICC in Singapore. The court correctly noted that parties needed to articulate the particular quality or feature of the SICC that would make it more appropriate for this dispute to be heard by the SICC. A bare assertion, as it appears to have been in this case, is insufficient.[250]

11.137 Finally, the court considered the effect of a possible time bar in Senegal and concluded that the claimants (whether in the form of the liquidators or the plaintiff) did not act reasonably in letting time run out in Senegal.[251] This is correct in terms of the law and the conclusion. What is interesting is that the court felt it had to consider this point. The existence of a time bar is typically a stage 2 consideration in the *Spiliada* analysis and usually considered *after* the defendant had successfully shown that there was a more appropriate forum elsewhere.[252] On the facts, it would seem that this burden had not been met and consideration of the time bar factor would not have been necessary.

247 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [60]–[86].

248 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [70].

249 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [72]–[75].

250 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [80]. This is similarly emphasised in *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [75].

251 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 at [83]–[84].

252 *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR(R) 345 at [38], *per* Chao Hick Tin J.

G. Ivanishvili, Bidzina v Credit Suisse AG

Exclusive jurisdiction clause – Stay of proceedings

Discretionary jurisdiction – Stay of proceedings – *Forum non conveniens* – Foreign witnesses' considerations

11.138 The facts of *Ivanishvili, Bidzina v Credit Suisse AG*[253] are, briefly: The first plaintiff established the Mandalay Trust with his wife and children (second to fifth plaintiffs) as beneficiaries. The second defendant (a Singapore trust company) was the trustee of the Mandalay Trust.[254] The first defendant bank was mandated to manage and invest the trust assets.[255] Apart from the trust, the first plaintiff also held other accounts with the first defendant in his own stead and through a BVI company.[256] Without going into the details, various transactions relating to the trust were carried out. It was subsequently discovered that the first plaintiff's relationship manager with the bank had misconducted himself leading to, *inter alia*, a loss in value of the Mandalay Trust.[257] The relationship manager was charged and convicted in Geneva and Switzerland of, *inter alia*, embezzlement and forgery.[258] The plaintiffs commenced proceedings in Singapore claiming breach of trust, misrepresentation and negligence. The first plaintiff also sued the first defendant in relation to his non-trust accounts.[259] For completion's sake, there were also multiple ongoing proceedings (both civil and criminal) arising out of the same series of transactions in Switzerland, New Zealand and Bermuda.[260]

11.139 The defendants applied for a stay. At first instance, a stay was granted. The plaintiffs appealed. The court dismissed the appeal and held that Geneva was *forum conveniens* by applying the *Spiliada* test.[261]

11.140 The analysis of the factors – governing law, witnesses, evidence, shape of the litigation and transfer to the SICC – was straightforward with two points to note.

11.141 First, the court considered the dispute to revolve around matters of fact,[262] which made the factors of witnesses and evidence weightier.

253 [2019] SGHC 6.
254 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [1] and [2].
255 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [6].
256 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [8].
257 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [10].
258 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [11] and [16].
259 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [12]–[13].
260 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [15]–[23].
261 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [3].
262 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [58], [66] and [78].

Further, the lack of compellability of witnesses in Singapore weighed significantly on the court.[263] Interestingly, the court also considered other factors such as (a) the fluency of language of the witnesses (the foreign witnesses are more fluent in French than in English); and (b) logistical inconvenience arising from time differences and language interpretations to and from French. These are arguments parties may consider raising in *forum non conveniens* analysis in a fact-centric dispute involving foreign witnesses.

11.142 Second, in terms of the shape of the litigation, the court held that misrepresentation is the backbone of the claim, and one that is framed against the bank in the wider case narrative.[264] Both these pointed to Geneva. The court also opined that while the plaintiffs will lose certain advantages by having the matter heard in Geneva, the loss of these advantages did not amount to a denial of justice.[265]

11.143 What is curious was the treatment of the two separate jurisdiction clauses that was in play. The first was the forum administration clause in the trust deed. The court went into some discussion on whether the jurisdiction clause amounted to an *exclusive* one. The court seemed to agree that the clause would be an exclusive one when the dispute concerns trust duties or trust assets involving just the trustee, settlor and/or the beneficiaries. This does not, however, mean that it is an EJC for all kinds of litigation, extending even to non-parties (in this case, the bank) to the trust deed containing the forum administration clause.[266]

11.144 The court also opined that ordinarily, a court which is the forum of administration will often be the *forum conveniens*.[267] However, the present dispute also involved assets and claims against the bank that went beyond the trust. Further, the bank (which was joined in the suit as a co-defendant) was also not a party to the trust deed and therefore not covered by the clause. The forum administration clause could therefore not be determinative of the issue of jurisdiction.[268]

11.145 As for the foreign EJC pointing to Geneva, this was in relation to the first plaintiff's dealings with the bank outside of the trust and did not cover the second to fifth plaintiffs.[269]

263 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [63].
264 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [69]–[70].
265 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [72] and [74].
266 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [42]–[44].
267 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [43].
268 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [45]–[46].
269 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [47]–[50] and [54].

11.146 It is clear that there was an intertwining of parties and claims. In relation to the first plaintiff's claims against the bank outside the trust, a stay would have been the correct outcome not because Geneva was *forum conveniens* but because the parties had agreed to the exclusive jurisdiction of Geneva (the bank's address) and the first plaintiff had not shown strong cause why a stay should not be granted.[270]

11.147 In relation to the trust claim, on the assumption that the forum administration clause was exclusive, the position must surely be reversed. A stay should not be granted unless the second defendant could show strong cause. And while the factors pointing to Geneva were weighty, it is submitted that they were not weighty enough to show strong cause. Hence, it would seem that the fact that the bank was joined in the trust claim changed the dynamic somehow. Can the strong cause test be bypassed in this way? Had the claims and parties not been intertwined, could one not say that a stay should not have been granted in relation to the trust claim? Could parties not argue that a multiplicity of proceedings is inevitable especially when they have by their contractual arrangement deliberately arranged for different forums to have exclusive jurisdiction over different disputes?[271]

11.148 To be fair, the court did consider whether a case management stay should have been granted and declined to make a partial stay in respect of the bank or the claims against it because the claims revolved around Geneva.[272] Surely, this is exactly the reason why a partial stay would have been warranted – holding parties to their contractual bargains?

11.149 To be clear, the authors do not dispute that it makes sense for the entirety of this matter to be heard in Geneva. It is just unclear what the impact of the forum administration clause is and how a lack of stay in relation to the trust claim is justified. Hopefully the courts will have an opportunity to provide guidance and clarity at an appropriate point in the future.

II. Restraint of foreign proceedings

11.150 In international commercial litigation, it is clear that for a potential plaintiff, forum selection is an extremely crucial process for,

270 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [69], *per* Steven Chong JA.

271 *Car & Cars Pte Ltd v Volkswagen AG* [2010] 1 SLR 625 at [49], *per* Andrew Ang J.

272 *Ivanishvili, Bidzina v Credit Suisse AG* [2019] SGHC 6 at [77]–[78]. See also the recent Court of Appeal decision in *Rex International Holding Ltd v Gulf Hibiscus Ltd* [2019] 2 SLR 682 on case management stay in the context of arbitration.

inter alia, substantive, procedural, tactical and strategic reasons. For example, some systems of law have more generous discovery rules,[273] or a lengthier period before the limitation period kicks in.[274] While it is the prerogative of a litigant to decide on the forum in which to bring his claim, the common law has developed a set of principles and rules to curb forum shopping and to prevent abuse of process.[275]

11.151 On the other hand, for the defendant faced with multiple proceedings in Singapore and overseas, there are a number of strategic choices he can make. Apart from, *inter alia*, mounting a challenge to the jurisdiction of the court or applying for stay of proceedings in the relevant jurisdiction, he can also apply to the Singapore court to indirectly stem the foreign proceedings via an ASI.

A. Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV

Restraint of foreign proceedings – Definition

11.152 The facts of *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV*[276] have been covered above.[277] This section covers the discussion on ASIs. As ASIs can indirectly affect proceedings in foreign friendly courts, the Singapore courts are generally cautious about issuing ASIs and will as a matter of course take into account considerations of comity.[278]

11.153 In this case, the appellants had applied for interim and permanent injunctions against the respondents and their agents from acting on behalf of the appellants. The respondents and the court of first instance had characterised these injunctions as ASIs. This is clearly incorrect. The Court of Appeal made it clear that the injunctions sought were not ASIs in that they did not seek to restrain the respondents from pursuing any action in their own stead against the appellants. Therefore, considerations of comity did not come into play and the court opined that the interim injunctions would not have the effect of interfering with

273 *Connelly v RTZ Corp plc* [1998] AC 854 at [827G], *per* Lord Goff of Chieveley.
274 *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR(R) 345 at [38], *per* Chao Hick Tin J.
275 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [1], *per* Steven Chong JA.
276 See para 11.84 above.
277 See paras 11.84–11.152 above.
278 *Sun Travels & Tours Pte Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [69], *per* Steven Chong JA.

justice in Mexico. As such, the Court of Appeal held that the court below had erred in setting aside the interim injunctions.[279]

B. Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra

Anti-suit injunction – Requirements

Anti-suit injunction – Vexatious and oppressive conduct

Anti-suit injunction – Comity – Impact of foreign judgment on natural forum of dispute on proceedings in Singapore

11.154 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra*[280] addressed some novel arguments regarding the grant of ASI. This Court of Appeal decision was an appeal from Kannan Ramesh J's decision, which was reviewed in last year's chapter.[281] The facts before the High Court can be simply stated:

> (a) The main dispute between the parties concerned the ownership of a single share in a British Virgin Islands ("BVI")-incorporated company, Million Dragon Wealth Ltd ("MDWL"). MDWL was in turn the sole shareholder of 22 other BVI-incorporated companies. Each of the subsidiary companies own one unit in a condominium development in Singapore known as Newton Imperial.[282]
>
> (b) Prior to July 2014, MDWL's share was registered in the name of the respondent's daughter, Pooja. On 8 July 2014, Pooja executed a memorandum transferring the MDWL's share to Anil for a sum of US$1.[283]
>
> (c) In 2015, the appellant's (Lakshmi's) husband, Anil, commenced Suit 821 in Singapore against the respondent, Darsan, for (i) a declaration that Darsan held certain assets on trust for him and that Darsan convey the assets back to him; (ii) an account and inquiry of the trust assets and all traceable proceeds of the same; and (iii) a transfer of all books and records of MDWL and profits earned from the rental of the 22 Newton Imperial units.[284] The factual premise of Suit 821 is pursuant to

279 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [99]–[100].
280 [2019] 2 SLR 372.
281 See (2018) 19 SAL Ann Rev 273 at 280–287, paras 11.24–11.46.
282 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [9].
283 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [10].
284 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [17].

an oral agreement which provided for Darsan to hold on trust certain assets belonging to Anil.[285]

(d) Anil later passed away and Suit 821 went into inactivity because the Lakshmi was involved in a separate suit over the appointment of the administratrix of Anil's estate. On 15 May 2017, Lakshmi's solicitors wrote to the court, copying the Darsan's solicitors, informing them that (i) the dispute over the appointment of the administratrix of Anil's estate was close to an amicable resolution between the parties involved; and (ii) with the expected settlement, there would be a single administratrix who would administer Anil's estate, including the conduct of Suit 821.[286]

(e) On 16 May 2017, Darsan instituted separate legal proceedings against Anil's estate in the BVI ("BVI 83").[287] In BVI 83, Darsan claimed that (i) the units purchased by the MDWL subsidiaries were funded by him, by way of interest-free loans to the subsidiaries; and (ii) there was allegedly an agreement between Darsan and Anil (made orally) that the interests in the units would be transferred to Anil upon full payment of those loans extended.[288]

(f) In BVI 83, Darsan sought four reliefs, namely: (i) a declaration that he was the sole beneficial owner of MDWL's share; (ii) an order that Darsan's name be entered as the sole registered shareholder in MDWL's register of members; (iii) an account of rental payments received in the 22 Newton Imperial units since July 2014; and (iv) damages for breach of contract; or alternatively, (v) repayment of the loan extended.[289] The factual premise of BVI 83 was that MDWL share was to be transferred to Anil upon his payment of certain sums to Darsan equivalent to the amount of interest-free loan Darsan had extended to MDWL.[290]

(g) Approximately one month after BVI 83 was commenced, Lakshmi took out an originating summons in Singapore for an ASI ("OS 627") against Darsan for the commencement of BVI 83.[291]

285 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [11] and [15].
286 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [20]–[21].
287 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [22].
288 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [24].
289 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [25].
290 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [11].
291 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [26].

11.155 At the High Court, the applicant was unsuccessful in obtaining an ASI. Post Ramesh J's decision, there were new factual developments to OS 627. The Court of Appeal allowed an application for these new facts to be introduced.[292]

> (a) After Lakshmi was unsuccessful in obtaining an ASI in Singapore against Darsan, she sought to set aside leave for service out for BVI 83 and, in the alternative, stay BVI 83. Lakshmi's BVI application was rejected. The reasons were two-fold. First, the BVI court found that Lakshmi was precluded by the doctrine of issue estoppel from raising the same arguments she had raised in her application for an ASI before the Singapore High Court, before the BVI court to set aside service out of jurisdiction. Second, the BVI court, on the application of *Spiliada* principles, did not find Singapore to be the more appropriate forum. In fact, the BVI court found that Singapore was *not* an available forum given that Ramesh J, in OS 627, determined Singapore to be *forum non conveniens*.[293]
>
> (b) Darsan amended his defence filed in Suit 821 to clarify the factual basis of his defence, which was that Pooja had transferred MDWL's share to Anil pursuant to an oral agreement between Darsan and Anil concluded in June 2014.[294]

11.156 After setting out the relevant facts, the Court of Appeal reiterated the well-established principles governing ASIs.[295] The court did not discuss the issues of (a) whether Darsan was amenable to the jurisdiction of the Singapore court; and (b) any possible injustice to Darsan in terms of deprivation of advantages sought in foreign proceedings with the grant of ASI, as these were issues not challenged by Darsan.[296] The court's judgment thus focused on three issues:[297]

> (a) identifying the *forum conveniens* for the dispute;
>
> (b) determining if the pursuit of BVI 83 by Darsan was vexatious or oppressive; and
>
> (c) considering whether the Court of Appeal was prohibited from issuing ASI after the BVI court's refusal to stay BVI 83.

292 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [38].
293 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [36]–[37].
294 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [42] and [43].
295 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [49]–[50].
296 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [51].
297 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [52].

11.157 After stating the principles in the determination of the natural forum, the Court of Appeal went to consider the various connecting factors in this case.[298] The first connecting factor was the governing law of the dispute. Ordinarily, the general principle is that a foreign court will more reliably apply its own law. As such, the *lex causae* is a strong pointer towards the more appropriate forum.[299] In this case, however, the court determined this factor to be of "limited utility and relevance"[300] because:

> (a) First, there was no suggestion by either Darsan or Lakshmi that the BVI or Singapore court would apply different principles that would affect the outcome of the dispute, particularly since both BVI and Singapore are common law jurisdictions.[301] The Court of Appeal then opined that within the common law system, there is usually little difficulty in one forum applying the laws of another. Governing law becomes a weightier factor if it involves the court having to apply an unfamiliar system of law.
>
> (b) Second, the key issues in dispute between the parties are factual and not legal in nature – it is dependent on the factual question of which party's version of the agreement concluded is accurate.[302] Therefore, this factor becomes less weighty. However, this factor becomes weightier if the dispute turns on questions of the law (especially if the legal issues are complex), or if the dispute turns on questions of interpretation of the law (compared to one which merely involves the application of the law).[303]

11.158 By way of a side observation, it seems odd that Darsan appeared to be "faulted" by having the governing law being given less weight because he did not suggest that the BVI or Singapore court would apply different principles notwithstanding that they were common law jurisdictions. Perhaps the practical lesson here is to plead the differences in the law so that this connecting factor may be weighed appropriately.

11.159 The second connecting factor considered was the existence of foreign proceedings. In weighing this factor, the Court of Appeal will consider the following:[304]

298 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [53]–[54].
299 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [56].
300 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [55].
301 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [55].
302 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [55].
303 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [57].
304 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [59].

(a) the degree of overlap of issues between the foreign and forum proceedings;

(b) the stage at which the foreign proceedings are at. The more advanced they are, the greater the attention given to this consideration. However, little or no weight will be given to the fact that there are foreign proceedings *if* they are commenced for strategic reasons to bolster the case of a clearly more appropriate forum elsewhere;

(c) the existence of the "Cambridgeshire factor". This is where the court recognises that foreign proceedings that involve very complex facts and call for highly specialised expert evidence can build up highly specialised expertise in that foreign jurisdiction between the time the foreign suit is commenced until the forum's consideration of the *Spiliada* analysis. As such, the more the expertise that has been built, the weightier this factor will be; and

(d) the risk of conflicting judgments arising from concurrent proceedings. This usually arises in the context of complex litigation involving multiple issues and/or litigants. This consideration is unlikely to carry any weight if the competition is between that of the Singapore court and *just* another foreign jurisdiction, as the risk can be avoided with just trial in either forum alone.

11.160 The first consideration – the degree of overlap of issues between foreign and forum proceedings – merits further discussion. The Court of Appeal helpfully clarified that one key inquiry in determining the existence of *lis alibi pendens* is whether there are same or similar issues arising from the same factual matrix. In particular, the Court of Appeal cautioned focusing on reliefs sought *alone* as determinative of whether the foreign proceedings qualified as *lis alibi pendens*. While relevant, the nature of reliefs sought cannot be determinative – especially in "reversed parties" situations (where the defendant in forum proceedings sues the plaintiff in foreign proceedings), as it would not be unexpected for the plaintiff in the foreign proceedings to be seeking dissimilar reliefs from the plaintiff in the forum suit.[305]

11.161 At the High Court, Ramesh J took the position that there were no overlapping issues. The Court of Appeal disagreed and opined that

305 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [65].

the 2014 agreement was of significance in both suits. As such, there was a clear overlap.[306]

11.162 The third connecting factor was the location of witnesses. With the availability of information and communication technology such as possibility of video-link evidence, the physical location of witnesses is less significant these days since witnesses are not required to travel to the forum country. This is more so given the recent COVID-19 pandemic that has caused several travel restrictions to be implemented to curb the spread. However, the more important consideration is whether the witnesses are compellable.[307] On this factor, the Court of Appeal helpfully clarified a few key points:

> (a) Before the court can go on to consider issues of location and compellability, it must meet the threshold inquiry that the party has to sufficiently demonstrate that the evidence of that witness is "at least arguably relevant".[308]
>
> (b) The location of witnesses plays a greater role in cases where the substantive dispute between the parties is largely *factual* (as opposed to legal) in nature.[309]
>
> (c) The compellability of witnesses is significant where the witnesses intended to be called are not within the control of either party to the dispute, but are what the Court of Appeal termed as "third-party witnesses".[310]
>
> (d) The Court of Appeal also expressed its preference to have expert evidence on the compellability of Singapore witnesses (whose evidence was, in Lakshmi's case, relevant) in BVI proceedings. In any event, the Court of Appeal proceeded on the common-sense approach that while there is no clear evidence on compellability of Singapore witnesses in BVI proceedings, what is clear is that these witnesses are clearly compellable in Singapore. On a practical point, then, it is therefore crucial for all parties to seek and submit expert evidence to explain whether witnesses in a particular jurisdiction are compellable in the other competing forum.[311]

11.163 On the facts, the Court of Appeal disagreed with Ramesh J's holding that the relevance of third-party witnesses is unclear. Further to

306 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [70].
307 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [72].
308 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [576].
309 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [73].
310 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [73].
311 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [73].

the Court of Appeal's finding that Suit 821 and BVI 83 are two sides of the same coin, the Court of Appeal agreed with Lakshmi that the third-party witnesses identified are both relevant and material to determination of the substantive dispute.[312]

11.164 Another connecting factor considered was the subject matter of the dispute. The Court of Appeal accepted Lakshmi's argument that although parties were contesting over the legal and beneficial ownership of the MDWL's share, the share was only of consequence and of interest because of the 22 Newton Imperial units. The Court of Appeal therefore accepted that, in substance, the dispute was over the interest in the 22 Newton Imperial units. Following this point, the Court of Appeal accorded no weight to the fact that the dispute was over shares of a BVI-incorporated company ("MDWL").[313] As the court neatly put it, the *Spiliada* analysis aims to identify the forum that has the most real and substantive connection with the dispute, to identify the natural forum for the resolution of the same. Therefore, in identifying subject matter of dispute, the Court of Appeal reminded courts to look beyond the reliefs sought by parties and instead to consider the real nature and substance of the parties' dispute.[314]

11.165 The Court of Appeal also considered but quickly dismissed the significance of the following connecting factors:

(a) In Darsan's case, the place of performance/breach was a neutral factor as it did not conclusively point to a specific jurisdiction. In failing to rectify the register of MDWL to reflect Darsan's interest, the BVI could be the natural forum for the dispute. However, the Court of Appeal noted that it could also be argued that the jurisdiction where payment was due to be made could be the place of breach. This factor alone did not point to any one jurisdiction being clearly the more appropriate forum for the dispute.[315]

(b) Again, in Darsan's case, the place of enforcement of judgment was in the BVI since he was seeking to rectify the register of shareholders for MDWL. The Court of Appeal thought this had little significance given that Lakshmi had given an undertaking to abide by the decision of the Singapore courts in the BVI.[316]

312 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [74]–[75].
313 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [80]–[82].
314 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [83].
315 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [85].
316 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [86].

(c) The place of contracting was immaterial since the 2014 agreement was concluded orally over the telephone when Darsan was in Hong Kong, and Anil in India.[317]

11.166 The second issue that the Court of Appeal considered was whether the pursuit of BVI 83 was vexatious or oppressive. The court disagreed with Ramesh J and found that Darsan acted in a vexatious or oppressive manner in pursuing BVI 83.[318] The court's reasoning was two-fold.

11.167 First, the Court of Appeal placed particular emphasis on the timing of the commencement of BVI 83 on two fronts, namely, (a) the time lapse between the accrual of the alleged cause of action and commencement of the foreign proceeding; and (b) the immediate commencement of foreign proceedings by Darsan as soon as he was made aware that Suit 821 was on the brink of settlement.

11.168 Second, the Court of Appeal also found that Darsan had deliberately avoided instituting a counterclaim in Suit 821 for his alleged share in MDWL's share, and instead commenced BVI 83. The Court of Appeal accepted that Darsan had the right to seek legal recourse in the judicial system of his choice, but found that this right was exercised in bad faith in the present case.[319]

11.169 The third and final issue is an interesting one. At appeal, Darsan's case was that even if Singapore were found to be *forum conveniens* and the pursuit of BVI 83 was vexatious or oppressive, the Court of Appeal was nevertheless precluded from granting ASI in light of the BVI court's holding that BVI was the natural forum. This was grounded on reasons of comity and the doctrine of issue estoppel.[320] The Court of Appeal rightly rejected both arguments.

11.170 On issue estoppel, the Court of Appeal rejected the contention that where the foreign court has declined to stay its proceedings, an issue estoppel operates to preclude the court hearing the ASI application from considering merits of the application. It does not prevent the applicant for an ASI before the Singapore court from advancing arguments on *forum non conveniens*.[321]

317 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [87].
318 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [88].
319 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [94]–[97].
320 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [98].
321 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [99] and [105].

11.171 The Court of Appeal opined that the legal principles upon which an application for *forum non conveniens* is based are different from that of an ASI, which includes an additional requirement of vexatious or oppressive conduct on the defendant's part. As the considerations are different, determination of one cannot operate as an issue estoppel on the other.[322]

11.172 This conclusion is also supported by policy. If a determination of *forum non conveniens* could operate as an issue estoppel on an application for an ASI, the court that is second in time would effectively always be precluded from considering the application before it, even though a stay application and an ASI application are different in nature. This would mean that the outcome of any such applications is also dependent on the scheduling of the hearings by the courts, over which the parties would have no control whatsoever.[323] Even when Darsan tried to argue that the issue estoppel was on a narrower ground – that Lakshmi was precluded from relitigating the specific issue of natural forum, this same policy consideration would apply to prevent an arbitrary outcome.[324]

11.173 On the final point of whether principles of comity can operate to prohibit a Singapore court from considering an ASI application *if* the foreign court has already decided that it is the natural forum, the Court of Appeal took a nuanced and balanced approach. The court accepted that it is generally for the court in which proceedings are brought to determine whether it is the natural forum. Because different judges operating under different legal systems with different legal policies may legitimately arrive at different answers, it is not for a Singapore court to decide how a foreign court should determine the matter. The stronger the connection of the foreign court with the parties and the dispute, the stronger the argument against intervention by the Singapore courts.[325] However, where a defendant deliberately carves out a specific issue of a pending suit and commences proceedings in a foreign jurisdiction in respect of this issue, as in this instance, it is unsurprising that the foreign court would find itself to be *forum conveniens*.[326] Hence, the Court of Appeal opined that where the foreign court has declined to stay its proceedings, comity does not preclude a Singapore court from granting the ASI if it finds that (a) it is *forum conveniens*; and (b) the defendant acted in a vexatious or oppressive manner in commencing the foreign proceedings.[327]

322 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [99].
323 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [103].
324 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [103]–[104].
325 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [121].
326 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [122].
327 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [107] and [129].

11.174 A final policy reason advanced by the Court of Appeal was this: an intervening decision by a foreign court not to stay its proceedings which is rendered while an appeal against a lower Singapore court's refusal to grant the ASI is pending, should not on its own change the outcome of the appeal. To allow comity to operate in such a manner would mean that the outcome of the appeal is dependent on the scheduling of the hearing. This goes against the core of the grant of an ASI, that is, whether the ends of justice require that the injunction be granted, and not whether which hearing happens first.[328]

C. Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd

Anti-suit injunction – Breach of arbitration agreement – Requirements

Anti-enforcement injunction – Breach of arbitration agreement – Requirement of exceptional circumstances

Anti-enforcement injunction – Comity considerations

11.175 ASIs concern, broadly, restraining conduct of the defendant in two categories: (a) restraining the defendant from vexatious or oppressive conduct by instituting foreign proceedings, and (b) restraining the defendant from instituting foreign proceedings in breach of any agreement between the parties. It has been observed how the Court of Appeal dealt with the former category in *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra*.[329] For the latter category, *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd*[330] ("*Sun Travels*") will be examined. This Court of Appeal decision is an appeal from Belinda Ang Saw Ean J's decision, whose judgment has been covered in last year's chapter.[331] The facts before Ang J were as follows:

> (a) The plaintiff (respondent in the appeal before the Court of Appeal), Hilton International Manage (Maldives) Pvt Ltd ("Hilton"), a Maldivian-incorporated company, entered into a management agreement in 2009 with the defendant resort operator (appellant in the appeal), Sun Travels & Tours Pvt Ltd ("Sun"), to manage its resort in the Maldives.[332]

328 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [134].
329 See para 11.118 above.
330 [2019] 1 SLR 732.
331 See (2018) 19 SAL Ann Rev 273 at 303–307, paras 11.99–11.111.
332 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [6].

(b) Disputes arose between the parties and in May 2013, Hilton commenced arbitration proceedings pursuant to an arbitration agreement contained in the management agreement.[333] The International Chamber of Commerce Court of Arbitration fixed Singapore as the seat of the arbitration.[334] The arbitral tribunal issued a final award in August 2015 in Hilton's favour which Hilton sought to enforce in the Maldives in December 2015. Sun resisted enforcement on the basis that the contract was void for misrepresentation and fraudulent misrepresentation.[335]

(c) After travelling through (i) the Large Property and Monetary Claims division; and (ii) the Enforcement Division of the Maldivian Civil Court, both of which declined jurisdiction, the matter was appealed to the Maldivian High Court, which eventually found, in April 2017, that the Civil Court did have jurisdiction to enforce the arbitral awards.[336]

(d) While these first enforcement proceedings were moving through the system, Sun commenced separate proceedings in Maldives in October 2016 against Hilton for misrepresentation and other breaches. These claims were similar to those brought by Sun in the arbitration, and the reliefs sought by Sun in both the Maldivian suit and the arbitration were the same.[337] In January 2017, an oral hearing took place before the Maldivian Civil Court for Sun's civil suit, and the court directed that it would determine the procedural and/or jurisdictional matters at the same time as the merits of the case. Judgment in favour of Sun was delivered in March 2017 ("the March Judgment").[338] Hilton appealed against the March Judgment in March 2017, and Hilton's appeal remained pending for the purposes of consideration of this case.[339]

333 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [9].
334 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [10].
335 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [14] and [17].
336 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [16], [18]–[19] and [21].
337 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [23].
338 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [28] and [33].
339 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [36].

(e) In the second enforcement proceedings in Maldivian Civil Court, enforcement further to the arbitral award was refused, in June 2017, on the basis of the March Judgment in favour of Hilton.[340]

(f) In July 2017, Hilton took out an originating summons in the Singapore High Court for (i) a permanent ASI against Sun from commencing and/or proceeding against Hilton in Maldives in relation to disputes arising from the management agreement; (ii) a declaration that the arbitral awards were final, valid and binding on the parties; and (iii) a declaration that Sun's civil suit in the Maldives were in breach of the arbitration agreement.[341]

(g) In November 2017, Ang J made, *inter alia*, the following orders:[342]

(i) Sun was permanently restrained from taking any steps in reliance on the March Judgment, or any decision upholding the March Judgment.

(ii) The arbitral awards were final, valid and binding on the parties.

(iii) Sun's claim before the Maldivian Civil Court was in breach of the arbitration agreement contained in the management agreement.

(iv) Nothing in the order prevented Sun from objecting to recognition or enforcement of the arbitral award.

11.176 The three broad issues considered by the Court of Appeal were (a) the nature of Sun's Maldivian suit; (b) the correctness in granting the injunctive relief; and (c) the correctness in granting the declaratory relief.[343] This review will consider the first two issues as they relate to conflict of laws issues. On the third issue, it is sufficient to note that the Court of Appeal held Ang J was correct in granting declaratory relief.[344]

340 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [22] and [35].

341 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [37].

342 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [40].

343 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [50].

344 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [143].

11.177 Briefly on the first issue, the Court of Appeal rejected Sun's submission that its Maldivian suit was part of its resistance to enforcement of the arbitral award. The court noted that the claims brought and relief sought by Sun in the Maldivian suit were similar to those in the arbitration. Sun was therefore not merely adopting a defensive posture in resisting enforcement of the award, but was essentially reviving (and did revive) its claim for damages for misrepresentation and breach of the management agreement when these claims had been considered and dismissed by the tribunal. The court, however, also noted that while it was Sun who began the Maldivian suit, it was Hilton who allowed Sun's Maldivian suit to be used as a basis for resisting enforcement of the arbitral award because of Hilton's delay in seeking injunctive relief[345] and this would be relevant in considering the second issue.

11.178 Turning to the second substantive issue, the court reiterated the five-factor test laid down when determining whether to grant an ASI[346] and acknowledged that a breach of an agreement had been regarded as a separate basis on which an ASI could be granted, and this was distinct from the basis of vexatious or oppressive conduct.[347] Therefore, in cases involving a breach of an arbitration agreement or an EJC, this is sufficient for anti-suit relief to be granted unless strong reasons exist, and provided the injunction is sought promptly and before the foreign proceedings are too far advanced.[348]

11.179 As an aside, the authors would pause here to note that while the Court of Appeal mentioned *only* arbitration and jurisdiction agreements, it should come as no surprise when, *eventually*, Singapore courts start granting ASIs against defendants who breached an agreement to *mediate*. With the push for alternative dispute resolution worldwide, and the recent signing of Singapore Convention on Mediation,[349] there is no reason why courts, as upholders of bargains, should not give practical effect to agreements entered into by commercial persons on how they want to resolve their differences.[350]

345 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [52]–[57].

346 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [66].

347 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [67].

348 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [68].

349 7 August 2019.

350 *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738 at [45], *per* V K Rajah JA.

11.180 The Court of Appeal's explanation on how comity and delay interplay in the context of ASIs is noteworthy. The starting position is that an ASI is generally regarded as an indirect interference with foreign proceedings and therefore inconsistent with normal relations between friendly sovereign states and subversive of the best interests of the international trade system.[351] Therefore, when it comes to granting ASIs on the premise of vexatious or oppressive conduct of the defendant, courts are even more cautious, in the interest of comity between sovereign states, about granting injunctive relief simply because of the need to avoid casting doubt on the fairness or adequacy of the foreign court processes, and respect for the foreign court's view on whether their proceedings were vexatious or oppressive.[352]

11.181 However, when it comes to granting an ASI to enforce an EJC or an arbitration agreement, courts generally do not regard this as a breach of comity as it is about requiring a party to "honour his contract".[353]

11.182 Of course, this is not to say that comity considerations can never be engaged – they are engaged generally when there is delay in seeking injunctive relief.[354] In the context of breaches of arbitration or EJCs, comity considerations involve respect for the operation of different legal systems, which prioritises the avoidance of wasting judicial time and costs that might be manifested in abandoned proceedings or by a party being precluded from relying on the judgment of the rival court.[355]

11.183 The Court of Appeal went on to explain the significance of comity considerations in the context of granting ASIs to prevent a breach of any agreement between the parties.

> (a) The longer the delay and the more advanced the foreign court proceedings become, the stronger the considerations of comity would be. The longer an action continues without any attempt to restrain it, the less likely a court is to grant an injunction as more time, effort and expense will be wasted by the abandonment of proceedings that compliance with an ASI would

351 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [69].
352 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [72].
353 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [70] and [73].
354 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [75].
355 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [77]–[78].

bring about.[356] Comity requires the consideration of not only the defendant's incurred expenses, but also third parties' interests, including the foreign court and other third parties involved in the litigation.[357]

(b) A delay cannot be justified on the basis that jurisdictional objections are being raised in the foreign court. This would be patronising and work against comity. This approach is also premised on the basis that an applicant cannot, without seeking or threatening injunctive relief, resist the foreign proceedings on jurisdictional grounds, only to seek injunctive relief when its challenge failed.[358]

(c) A lack of promptness *alone* cannot justify the refusal of an ASI. The passage of time must be coupled with (i) knowledge that the foreign judgment was sought; and/or (ii) prejudice or detriment. Without knowledge, there can be no delay that would make the applicant's conduct inequitable or unconscionable. Therefore, one key inquiry is the time at which it had become sufficiently clear that an application for anti-suit relief was justified.[359]

11.184 The Court of Appeal then went on to consider anti-enforcement injunctions, which was what Hilton was seeking against Sun. An anti-enforcement injunction is as good as nullifying the foreign judgment (or stripping the judgment of any legal effect) when only that foreign court can set aside or vary its own judgments.[360] As such, comity plays an even larger role here compared to when foreign proceedings (commenced in breached of an arbitration or EJC) have yet to be concluded. The court took into account the following considerations:

(a) First, there is the usual concern about wasting judicial time and costs brought about by precluding reliance on judgment of that foreign court.[361]

356 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [82].

357 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [77].

358 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [84]–[86].

359 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [108]–[110].

360 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [98].

361 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [78].

(b) Second, it would be a greater interference for Singapore courts to grant an injunction that would interfere or purport to interfere with the delivered judgment of a foreign court of competent jurisdiction, than that given where foreign proceedings were still in their infancy. There is a need for respect for decisions of foreign courts properly given within their jurisdictions.[362]

(c) Third, an anti-enforcement injunction, if it is to be enforced in other countries, would preclude foreign courts from considering whether the judgment in questions should be recognised or enforced in their own jurisdictions. This would also constitute interference with foreign judicial processes.[363]

11.185 Given the above considerations, the Court of Appeal opined that anti-enforcement injunctions cannot be granted on the same premise as ASIs. Something over and above the usual requirements for an ASI, amounting to "exceptional circumstances", must be demonstrated.[364] The Court of Appeal discussed two such instances:

(a) An anti-enforcement injunction may be justified where a judgment has been procured by fraud.[365] However, where the applicant knew of the fraud before judgment was delivered and chose to remain silent, the appropriateness of the anti-enforcement relief must be considered in light of the silence, which may well alter where equities lie.[366] One interesting question would be whether Singapore courts will draw a distinction between "extrinsic" and "intrinsic" fraud as they do in the enforcement of foreign judgment proceedings.[367] The authors would suggest that this exception is likely to capture both intrinsic and extrinsic fraud – as ultimately it depends on whether the equities are in favour of granting the relief in response to the defendant's unconscionable conduct.

(b) An anti-enforcement injunction may also be justified where the applicant could not have sought relief before the

362 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [92]–[93].

363 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [97].

364 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [99].

365 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [100].

366 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [112].

367 *Eleven Gesellschaft Zur Entwicklung Und Vermarktung Von Netzwektechnologien MBH v Boxsentry Pte Ltd* [2014] SGHC 210 at [102], *per* Tan Siong Thye J.

> foreign judgment was given because he had no means of knowing that the judgment was being sought until it was served on him such as where the judgment was obtained too quickly or secretly to enable an injunction to be obtained.[368]

11.186 Pertinently, the Court of Appeal rejected as amounting to an exceptional circumstance where parties had entered into the (arbitration or exclusive jurisdiction) agreement in favour of one jurisdiction after the judgment had been obtained in another jurisdiction. This is because upholding of the parties' agreement does not in and of itself entitle a party to an anti-enforcement injunction.[369]

11.187 The Court of Appeal explained that exceptional circumstances must tie back to the notion of unconscionability.[370] Both the anti-suit and anti-enforcement injunctions are forms of equitable relief. As such, the circumstances under which an anti-enforcement injunction may be granted are very much informed by equitable considerations.[371] This is an interesting and helpful clarification. In last year's chapter, the authors noted how any consideration of a lack of *bona fides* on the part of the applicant fits with the consideration of the broader principle that the granting of an injunction is an equitable relief which must serve the ends of justice.[372] The Court of Appeal can be seen thinking along similar lines here.

11.188 Finally, the Court of Appeal stated categorically that there is no closed list of exceptional circumstances justifying the grant of an anti-enforcement injunction. However, any new category would be recognised only when the equities of the case are in favour of granting the anti-enforcement injunction, either as a response to unconscionable conduct (in cases of fraud) or when the applicant has not lost its entitlement to equitable relief on account of unconscionable delay.[373]

11.189 Applying the principles to the case at hand, the Court of Appeal found that Hilton could and should have simultaneously sought injunctive

368 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [101].
369 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [101]–[104].
370 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [105].
371 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [107].
372 (2018) 19 SAL Ann Rev 273 at 302, para 11.98.
373 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [113].

relief from the Singapore court when the Maldivian suit was commenced by Sun. Hilton's failure to do so allowed the Maldivian proceedings to reach an advanced stage.[374] In particular, the Court of Appeal found that Hilton had ample opportunity to seek injunctive relief, but was content to wait until that there were two Maldivian judgments against it and a pending appeal, by which time it was far too late.[375] Therefore, there were no exceptional circumstances warranting the grant of an anti-enforcement injunction.[376]

11.190 As a parting point to note, the court rightly rejected Hilton's argument that comity considerations could be accorded less weight in the present case because the March Judgment was not long and the effort expended on it must have been negligible. The Court of Appeal opined that judgment length cannot and should not be used as a proxy for judicial time and resources.[377] Additionally, to reach such a conclusion would inevitably be an attack on the adequacy and fairness of foreign proceedings.

11.191 *Sun Travels*[378] has been helpful in providing clarity to the place of comity in relation to ASIs and the circumstances in which an anti-enforcement injunction might be issued. It also serves as an important reminder to parties that whenever there is a breach of *any* dispute resolution agreement, parties should seek anti-suit relief without delay, even if they wish to *concurrently* make jurisdictional objections in that foreign court where proceedings were commenced in breach of the agreement.

D. Civelli, Carlo Giuseppe v Mulacek, Philippe Emanuel

Anti-suit injunction – Forum non conveniens

Anti-suit injunction – Oppressive and vexatious conduct

Jurisdiction – Discretionary jurisdiction – Stay of proceedings – *Forum non conveniens*

374 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [118].

375 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [119].

376 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [125].

377 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [123].

378 See para 11.138 above.

11.192 Moving to *Civelli, Carlo Giuseppe v Mulacek, Philippe Emanuel*,[379] there is a complex background to the suits in this case but for the purpose of this brief mention, the plaintiff and the defendant's business relationship began in 2002 ostensibly involving, *inter alia*, financing of drilling operations, asset management, and a joint venture.[380] The defendant was sued in Texas (on a matter unrelated to the present case) and approached the plaintiff for a loan to pay his legal fees and again for a loan of share to resolve the Texan dispute.[381]

11.193 The plaintiff sued the defendant first in Singapore for money due on a loan and then in a further suit for the loan of shares. Both these suits were commenced in Singapore. He followed by claiming against the defendant in Texas, for breach of contract, breach of trust, breach of fiduciary duty, negligence and conspiracy. The defendant was served in Texas by way of substituted service for all proceedings.[382]

11.194 In response to being served with the Texas writ, the defendant, who had earlier filed a defence and counterclaim, filed an application for an ASI to restrain the Texan action.[383] The plaintiff then applied to stay the defendant's counterclaim, on the basis of *forum non conveniens*, with an undertaking that he would discontinue both suits should the ASI application be dismissed. After it was pointed out that the application for stay was not filed in time, the plaintiff applied for an extension of time to apply for a stay.[384] At the High Court, the application for the ASI was denied and the stay granted.[385]

11.195 The court noted that (a) the *forum non conveniens* analysis was common to both the stay and ASI applications; and (b) the plaintiff's claim in Texas encompassed and was wider than the Singapore suits.[386]

11.196 On *forum non conveniens*, after conducting a straightforward analysis, the court held that Texas was the natural forum.[387] The governing law of the claims, party connections, witnesses and their compellability, and multiplicity of proceedings, all pointed overwhelmingly to Texas. In

379 [2019] SGHC 182.
380 *Civelli, Carlo Giuseppe v Mulacek, Philippe Emanuel* [2019] SGHC 182 at [4]–[10].
381 *Civelli, Carlo Giuseppe v Mulacek, Philippe Emanuel* [2019] SGHC 182 at [1] and [11].
382 *Civelli, Carlo Giuseppe v Mulacek, Philippe Emanuel* [2019] SGHC 182 at [1], [11], [13] and [24]–[27].
383 *Civelli, Carlo Giuseppe v Mulacek, Philippe Emanuel* [2019] SGHC 182 at [2] and [27].
384 *Civelli, Carlo Giuseppe v Mulacek, Philippe Emanuel* [2019] SGHC 182 at [2], [28] and [34].
385 *Civelli, Carlo Giuseppe v Mulacek, Philippe Emanuel* [2019] SGHC 182 at [3].
386 *Civelli, Carlo Giuseppe v Mulacek, Philippe Emanuel* [2019] SGHC 182 at [48]–[49].
387 *Civelli, Carlo Giuseppe v Mulacek, Philippe Emanuel* [2019] SGHC 182 at [82] and [88].

relation to the factor of multiplicity of proceedings, it was argued that the Singapore courts was hindered by the Texan court's finding that Texas was *forum conveniens*. The High Court applied the position in *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra*[388] and held that it was entitled to issue an ASI if (a) Singapore was *forum conveniens*; and (b) the foreign proceedings were vexatious and oppressive.[389] Because of its conclusion that Texas was *forum conveniens*, the application for an ASI failed on this requirement.

11.197 The court nonetheless went on to briefly consider whether the plaintiff's conduct was oppressive. Without explicitly saying that it was, the court did indicate that sustaining actions in two jurisdictions relating to the same subject matter was inappropriate conduct.[390] Presumably, this would mean that if the court had found Singapore to be the natural forum, an ASI could have been justifiable. Unsurprisingly, the court also hinted at possible adverse cost consequences given the plaintiff's inappropriate conduct.[391]

11.198 While the defendant raised three objections to the plaintiff's application for a stay to the counterclaim, it is worthy to note the court's response to the argument that a plaintiff who has commenced multiple proceedings should in general be made to face up to the situation he has chosen to create. As such, the plaintiff cannot seek to stay the counterclaim while maintaining his claim in Singapore. The court acknowledged the validity of this point but also noted that, in some cases, fairness and common sense might nonetheless justify a stay. In this case, because the plaintiff undertook to discontinue his Singapore suits if the application for the ASI was dismissed, the court saw staying the counterclaim and dismissing the ASI as the most sensible way for the multiple actions to be heard in Texas, the *forum conveniens*.[392]

III. Recognition of foreign judgment

A. Heince Tombak Simanjuntak v Paulus Tannos

Foreign bankruptcy orders

Finality of foreign judgment pending appeal

Defences – Abuse of process

388 See para 11.117 above.
389 See para 11.119 above.
390 *Civelli, Carlo Giuseppe v Mulacek, Philippe Emanuel* [2019] SGHC 182 at [92]–[93].
391 *Civelli, Carlo Giuseppe v Mulacek, Philippe Emanuel* [2019] SGHC 182 at [108].
392 *Civelli, Carlo Giuseppe v Mulacek, Philippe Emanuel* [2019] SGHC 182 at [95]–[97].

11.199 *Heince Tombak Simanjuntak v Paulus Tannos*[393] involved the recognition of foreign bankruptcy orders under the common law. On the facts, the Indonesian court issued various bankruptcy orders against the respondents. The receivers and administrators applied successfully in Singapore to have these orders recognised so that the respondents' property in Singapore could be administered, realised and distributed. The respondents then applied to set aside recognition.[394] Since the grounds for recognition had been met, and no defence was applicable, the High Court granted orders for recognition and assistance.[395]

11.200 Two main points can be noted. First, the court applied the traditional approach for the common law recognition of foreign judgments: (a) the judgment is made by a court of competent jurisdiction; (b) the foreign court possesses what would be considered international jurisdiction over the respondents; (c) the judgment is final and conclusive; and (iv) there are no applicable defences.[396] On a side note, the requirement for the judgment to be for a monetary amount did not apply here.

11.201 In applying this approach, the court was not convinced that a distinction had to be drawn between the recognition of foreign judgments and foreign bankruptcy orders. While the latter was effective against the whole world and the former only against the parties, the court felt that recognition of bankruptcy orders was no different from recognition of corporate insolvency orders.[397]

11.202 The court also rejected the argument that, because there was an appeal pending in Indonesia, the orders were not final and conclusive. The High Court opined that even if there was an appeal pending, it did not make the orders any less final and conclusive. This must be correct and is consistent with the treatment of foreign money judgments.[398] What is odd, however, is that the High Court thought that a pending appeal against that foreign judgment justified a modification or stay of any recognition order granted, until the resolution of that appeal.[399] It would seem inappropriate for the respondents to seek a stay of recognition of the foreign judgment before the Singapore courts when the respondents did not attempt to seek a stay of execution of that foreign judgment before the foreign court, or that the respondents were unsuccessful in doing

393 [2019] SGHC 216.
394 *Heince Tombak Simanjuntak v Paulus Tannos* [2019] SGHC 216 at [1] and [3]–[5].
395 *Heince Tombak Simanjuntak v Paulus Tannos* [2019] SGHC 216 at [13].
396 *Heince Tombak Simanjuntak v Paulus Tannos* [2019] SGHC 216 at [19].
397 *Heince Tombak Simanjuntak v Paulus Tannos* [2019] SGHC 216 at [20]–[22].
398 *Heince Tombak Simanjuntak v Paulus Tannos* [2019] SGHC 216 at [26]–[27].
399 *Heince Tombak Simanjuntak v Paulus Tannos* [2019] SGHC 216 at [13] and [58].

so (that is, the foreign court did not think it appropriate to grant such a stay). If so, would the High Court's position not be running afoul of the rationale of finality – that the foreign judgment must be treated as valid until interfered by a competent superior court[400] – by indirectly usurping the role of the competent foreign superior court by granting a stay or modifying the recognition order? Regardless of the correctness of this approach, it is clear from the High Court's decision that the evidential burden rests on the respondents to show that there is a pending appeal in the foreign forum.[401]

11.203 The court also declined to impose a new requirement of reciprocity. The respondents had suggested a requirement that mirrored the policy of the foreign court whose order is being sought to be recognised. The argument is this: because Indonesia would not have recognised a Singapore bankruptcy order, Singapore should not recognise an Indonesian one. The High Court correctly opined that while this might be appealing from a policy perspective, this would be a significant departure from the common law approach.[402]

11.204 Secondly, the respondents had raised two different defences to recognition. On the defence of breach of natural justice, the court held that the respondents had received adequate notice and noted that it had even participated in parts of the proceedings.[403]

11.205 On the defence of fraud, the respondents argued the guarantees upon which the orders were based had been fraudulently obtained. They also argued that they had been misled about their rights to appeal and been prevented from making certain arguments by the Indonesian court.[404]

11.206 The High Court held that there was no evidence of extrinsic fraud as the respondent's allegations related *not* to the applicant's actions, but the Indonesian court's; and in any case, the court's response was not improper.[405] As for the allegations of intrinsic fraud, the court held that this seemed more like the respondents attempting to relitigate issues that had already been resolved.[406]

400 *Gustave Nouvion v Freeman* (1889) 15 App Cas 1 at 11.
401 *Heince Tombak Simanjuntak v Paulus Tannos* [2019] SGHC 216 at [28].
402 *Heince Tombak Simanjuntak v Paulus Tannos* [2019] SGHC 216 at [54].
403 *Heince Tombak Simanjuntak v Paulus Tannos* [2019] SGHC 216 at [40].
404 *Heince Tombak Simanjuntak v Paulus Tannos* [2019] SGHC 216 at [41]–[42].
405 *Heince Tombak Simanjuntak v Paulus Tannos* [2019] SGHC 216 at [46].
406 *Heince Tombak Simanjuntak v Paulus Tannos* [2019] SGHC 216 at [45].

11.207 The respondents argued that the applicants had fraudulently enforced the orders in an Indonesian company. While noting that the applicants might have acted illegally in that instance of enforcement, the court held that this did not affect the legitimacy of the orders themselves.[407] This must be right, as the Singapore courts should not assume the role of an "international busybody".[408] And while the conduct of the applicants was material to whether Singapore should recognise the orders, the conduct in question was not egregious enough to warrant a denial of recognition and assistance. The level of improper conduct had to be so egregious to meet the threshold of "abuse of process".[409]

407 *Heince Tombak Simanjuntak v Paulus Tannos* [2019] SGHC 216 at [48].

408 *People's Insurance Co Ltd v Akai Pty Ltd* [1997] 2 SLR(R) 291 at [12], *per* Choo Han Teck JC.

409 *Heince Tombak Simanjuntak v Paulus Tannos* [2019] SGHC 216 at [49]. After all, the concept of abuse of process pervades the whole law of civil procedure: *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd* [2018] 2 SLR 159 at [99], *per* Steven Chong JA.