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12. CONFLICT OF LAWS[1]

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I. Introduction

12.1 In recent years, the Singapore courts, at various levels, have been very active in the conflict of laws. This is indicative of the increasing numbers of transnational interactions and highlights the importance of being on the lookout for issues relating to private international law. Unlike in the early days, it is no longer feasible to digest every case relating to the conflict of laws. As such, the authors have chosen to focus on cases which are noteworthy. By and large, this will include cases from the Court of Appeal, Appellate Division of the High Court ("High Court (Appellate Division)") and General Division of the High Court ("High Court (General Division)"), including those emanating from the jurisdiction exercised by the Singapore International Commercial Court ("SICC"). For 2022, there are ten cases that will be examined in this review. As usual, while conflict of laws cases can sometimes relate to other areas of law, this review will only examine those parts of the cases that are relevant to the field of conflict of laws.

12.2 The Rules of Court 2021 ("ROC 2021") were implemented last year and the relevant provisions relating to conflict of laws have been covered in last year's review. In this review, the authors will address some

1 The authors are grateful for the unconditional and continuing support of their families. All errors and omissions remain the authors' alone, and all views expressed herein are the authors' alone.

additional points consequential to some decisions handed down and observations on ROC 2021 made in other commentaries.

II. Jurisdiction and stay of proceedings

12.3 It is trite that before a court can hear a matter, it must be seised of jurisdiction over the parties (which is distinct from "subject matter jurisdiction").[2] Jurisdiction can be *in personam* or *in rem*. *In personam* jurisdiction can generally be established, as *per* s 16(1) of the Supreme Court of Judicature Act 1969,[3] (a) via service of originating process on the defendant whether within or outside of Singapore; or (b) if a defendant submits to the jurisdiction of the Singapore courts.[4] Jurisdiction is established as of right against a local defendant as there is no legal impediment to service. Therefore, leave of court is not required to effect service in this scenario.[5]

12.4 Where it concerns a foreign defendant, however, there are requirements to be satisfied before the court will exercise its long-arm discretionary jurisdiction under O 11 r 1 of the *old* Rules of Court[6] ("ROC 2014") to allow service out of jurisdiction. These requirements will first be briefly discussed.

A. Rules of Court 2014

12.5 On discretionary jurisdiction under the ROC 2014, there are three requirements before leave for service out of jurisdiction is granted.[7] First, the plaintiff's claim must come within one of the heads of claim in O 11 r 1 of the ROC 2014. Second, the plaintiff's claim must have a sufficient degree of merit. Third, Singapore must be the *forum conveniens* for the dispute. Furthermore, as the application for leave for service out of jurisdiction is usually done *ex parte*, the plaintiff is required to make full and frank disclosure of all the material facts.[8] In cases where leave is granted, parties can challenge the existence of the court's jurisdiction and apply to set aside service of the writ.

2 *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [1].
3 2020 Rev Ed.
4 *Law Society of Singapore v CNH* [2022] 3 SLR 777.
5 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [67].
6 2014 Rev Ed.
7 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [50], *per* Steven Chong JA.
8 *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [28], *per* Sundaresh Menon CJ.

12.6 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.[9]

12.7 On the last requirement of full and frank disclosure, the recent Court of Appeal's decision in *Tecnomar & Associates Pte Ltd v SBM Offshore NV*[10] provided some helpful reminders:[11]

(a) "This is a duty that is owed to the [court] and is driven by the need for the [court] to satisfy itself that the case is a proper one for service out of jurisdiction."[12]

(b) Such a duty invariably extends to furnishing information and facts that may go towards rebutting the applicant's claim, that is, relevant to the opponent's case. The applicant may disagree with the opponent's case, but it remains incumbent on it to candidly disclose all such information.

(c) "Whether there is material non-disclosure of facts [is] to be determined by reference to facts disclosed at the time of the application."[13] While this may seem intuitive, the applicant in *Tecnomar & Associate Pte Ltd v SBM Offshore NV* tried, unsuccessfully, to rely on affidavits filed *after* the leave application to argue its case against material non-disclosure.

(d) If the court finds the suppression/non-disclosure to be deliberate, the court will ordinarily discharge the *ex parte* order for service out of jurisdiction.

12.8 The importance of the duty of full and frank disclosure cannot be overemphasised. The Court of Appeal confirmed that it would not hesitate to order costs on an indemnity basis against litigants who evince a flagrant disregard of their duty of full and frank disclosure owed to the court.[14]

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9 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [53], *per* Steven Chong JA.

10 [2021] SGCA 36.

11 *Tecnomar & Associates Pte Ltd v SBM Offshore NV* [2021] SGCA 36 at [12]–[15] and [18]–[19].

12 *Tecnomar & Associates Pte Ltd v SBM Offshore NV* [2021] SGCA 36 at [12].

13 *Tecnomar & Associates Pte Ltd v SBM Offshore NV* [2021] SGCA 36 at [14].

14 *Tecnomar & Associates Pte Ltd v SBM Offshore NV* [2021] SGCA 36 at [26]–[29], *per* Steven Chong JCA.

B. Rules of Court 2021

12.9 The ROC 2021, which was gazetted on 1 December 2021, took effect on 1 April 2022. In last year's review, the authors set out their interpretation of the new provisions relating to (a) service out of jurisdiction under O 8 r 1(1) of the ROC 2021; and (b) challenging the jurisdiction of the Singapore courts under O 6 r 7(4) of the ROC 2021.[15]

12.10 Turning to service out of jurisdiction under ROC 2021: from a literal reading of O 8 r 1(1) of the ROC 2021 alone, it would appear that a claimant only needs to prove one of two things – the Singapore court either has jurisdiction *or* is the appropriate forum. In particular, the authors argued in last year's review that a claimant succeeds in establishing jurisdiction over the dispute under the *first* limb of O 8 r 1(1) of the ROC 2021 when, *inter alia*, the dispute falls within the scope of a jurisdiction clause that confers (a) exclusive jurisdiction on courts of Singapore ("EJC") or (b) non-exclusive jurisdiction on the courts of Singapore ("NEJC"), which forum parties have agreed to submit their disputes to, and the claimant commences an action first.[16]

12.11 It has, however, been argued in another commentary that the EJC and NEJC situations should fall within the "appropriate court"/second limb under O 8 r 1(1) of the ROC 2021, given that they fall within O 11 rr 1(*d*)(iv) and 1(*r*) of the ROC 2014 respectively, which are now paras 63(3)(d)(iv) and 63(3)(r) of the Supreme Court Practice Directions 2021 ("SCPD 2021").[17] The authors, however, prefer the initial interpretation for two reasons:

> (a) First, it must be remembered that practice directions are generally *administrative* in nature. The manner in which the SCPD 2021 is thus structured should not take precedence over the literal reading of O 8 r 1(1) of the ROC 2021, especially given that practice directions do not have force of substantive law and are intended to be no more than a direction for administrative purposes.[18]
>
> (b) Furthermore, the intention behind the new O 8 r 1(1) – that is, enumerating just *two* alternative limbs for permitting service out of jurisdiction – is to make it "unnecessary for a claimant to scrutinise the long list of permissible cases set out in

15 See (2021) 22 SAL Ann Rev 268 at 271–277, paras 12.9–12.27.
16 See (2021) 22 SAL Ann Rev 268 at 271–272, para 12.11.
17 See Ian Mah & Aaron Yoong, "Service Out under the New Rules of Court" (2023) 35 SAcLJ 174at 181 and 185, paras 18 and 26.
18 *South East Enterprises (Singapore) Pte Ltd v Hean Nerng Holdings Pte Ltd* [2012] 3 SLR 864 at [61].

the [ROC 2014]".[19] This therefore reinforces the authors' position that the literal reading of O 8 r 1(1) should capture both the EJC and NEJC situations.

12.12 The second point relates to service out of jurisdiction. In last year's review, the authors highlighted how it is unclear in ROC 2021 whether *substituted* service out of jurisdiction is still allowed given that the provision on substituted service curiously appears *only* under O 7, titled "Service in Singapore".[20]

12.13 Lee Seiu Kin J in the decision of *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")*[21] ("*CHEFPIERRE*") held that *substituted* service out of jurisdiction may be ordered pursuant to O 8 r 2(1) of the ROC 2021. This is so for three reasons:

(a) Order 8 r 2(1) does not appear to prescribe a closed list as to how service out of originating process or other court documents could be effected out of Singapore.[22]

(b) The drafters of ROC 2021 did not intend to drastically change the regime relating to jurisdiction in general, including that on service out of jurisdiction. Rather, the intention was to simplify things.[23]

(c) The power of the court to allow substituted service out of jurisdiction is one of considerable vintage and if the drafters of ROC 2021 had intended to curtail this power in such a radical fashion, there would have been express and specific language to that effect.[24]

12.14 Lee J was also persuaded that, on the facts, to find otherwise would be to deprive the claimant of the only practical manner of effecting service on the defendant.[25]

12.15 While Lee J's decision appears defensible on policy grounds, it appears to be a strained reading of the provision, no less because O 8 r 2(1), as *per* the Table of Derivations, is intended to replace O 11 rr 3(2),

19 *Civil Justice Commission Report* (Chairman: Justice Tay Yong Kwang) (29 December 2017) ch 6 at para 2.
20 See (2021) 22 SAL Ann Rev 268 at 276, para 12.26.
21 [2022] SGHC 264.
22 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [88].
23 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [89].
24 *Janesh s/o Rajkumar v Unknozwn Person ("CHEFPIERRE")* [2022] SGHC 264 at [90].
25 *Janesh s/o Rajkumar v Unknown Person ("CHEFPIERRE")* [2022] SGHC 264 at [91].

3(3), 4(1), 4(2) and 4(3) of the ROC 2014. None of these provisions were used and/or interpreted in the manner which Lee J did in *CHEFPIERRE*.

12.16 Instead, the court's power to order substituted service out of jurisdiction could be justified under O 3 r 2(2) of the ROC 2021. This provision allows the court to do whatever the court considers necessary on the facts of the case to ensure that "justice is done" or to prevent an abuse of the process of the court, so long it is not prohibited by law and is consistent with the "Ideals" of the ROC 2021.

C. Shen Sophie v Xia Wei Ping

Forum non conveniens – Discretionary jurisdiction – Double actionability rule

Forum non conveniens – Discretionary jurisdiction – Applicability of Stage 2 of *Spiliada* test

12.17 In *Shen Sophie v Xia Wei Ping*[26] ("*Shen Sophie*"), Western Water Corporation ("WWC") was incorporated in Samoa in 2002 and had as its purpose the construction and operation of wastewater treatment facilities in China. It was founded by the first defendant, a US citizen and the plaintiff's younger brother. After an initial capital injection by the first defendant of US$500,000 was insufficient, he approached the plaintiff for financial assistance who then invested about US$1.2m. No share certificates were issued to the plaintiff even though the first defendant had represented to the plaintiff that she was the largest shareholder in WWC. There was disagreement as to whether her shareholding was 45% or should have been 70%.

12.18 The third defendant, Alpheus Management Ltd, was a company incorporated in the British Virgin Islands. Its only shareholder was the second defendant, the nephew of the first defendant. Sometime before 2017, WWC's entire shareholding was taken over by the third defendant. In 2017, WWC was fully sold to Goldwind International Holdings (HK) Limited.

12.19 According to the plaintiff, she found out about the sale in 2018 and claimed she had no notice, nor did she consent to the sale. What followed was a series of suits in California, Hangzhou and Singapore revolving around what the plaintiff alleged was a breach of fiduciary obligation and a conspiracy to injure her.

26 [2022] SGHC 206.

12.20 There is no need to traverse the foreign proceedings save to note that the proceedings in Hangzhou had been withdrawn and that those in California were pending.

12.21 The plaintiff commenced proceedings in Singapore and applied for leave to serve out of jurisdiction, and an application to freeze assets. There were various related applications due to difficulties experienced while effecting service on the defendants. For the purpose of this review, and to avoid descending into madness, it is sufficient to note that the first and third defendants appeared before the Singapore courts and applied to set aside the leave to serve out of jurisdiction for lack of meeting the requirements for service out, and for not having made full and frank disclosure. They also argued, in the alternative, that service was not validly effected.

12.22 In determining whether the order to serve out of jurisdiction should be set aside, Goh Yihan JC first traversed the three requirements necessary to establish discretionary jurisdiction.[27] These are:

> (a) a good arguable case that the claim falls within one of the heads of jurisdiction under O 11 of the ROC ("the jurisdictional gateway requirement");[28]
>
> (b) there is a serious question to be tried on the merits of the case;[29] and
>
> (c) Singapore is the natural forum for the action ("the natural forum requirement").

12.23 The court also noted that these requirements are to be considered holistically, such that findings in relation to each of the requirements should be consistent with the others,[30] and that due to the *ex parte* nature of an application for leave to serve out of jurisdiction, the plaintiff is obligated to make full and frank disclosure of material facts.[31]

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27 *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [61].

28 The Rules of Court (2014 Rev Ed) have been superseded by the Rules of Court 2021 ("ROC 2021"). But the practical requirements for discretionary jurisdiction have largely been preserved under O 8 of the ROC 2021.

29 It is generally accepted that this requirement is satisfied when the first requirement is met. See *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [99]. This is a lower standard of proof than a "good arguable case" (see the decision of the Court of Appeal in *Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd* [1999] 3 SLR(R) 1156 at [18]).

30 *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [61], citing *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [51].

31 *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [62], citing *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [105].

12.24 The court concluded that these requirements had not been met and set aside the order to serve out of jurisdiction.[32] In doing so, the court made two interesting observations that will now be explored.

12.25 First, one of the questions the court had to consider was whether the tort choice of law rules (the double actionability rule) are a matter to be properly considered in an application for leave for service out of jurisdiction, and, if so, at what points in the analysis they should be considered.

12.26 The court noted that the High Court cases take two different positions. One position is represented by *IM Skaugen SE v MAN Diesel & Turbo SE*,[33] where the court opined that the double actionability rule is applicable, and is relevant in both determining whether the jurisdictional gateway requirement has been met, and in helping determine whether Singapore is the natural forum.[34]

12.27 The other position, represented by *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama*[35] ("*Nippon Catalyst*"), was that the double actionability rule is not relevant for an application for service out of jurisdiction.[36] To be fair, the court observed that the views in *Nippon Catalyst* related more to the natural forum requirement.[37]

12.28 In coming to a conclusion on this matter, the court considered views expressed by the authors in an earlier review.[38] It noted that the predecessor provision of O 11 r 1(*f*) required the claim to be "founded on a tort". This would naturally require the application of the substance of the tort test to identify the location of the tort and, if the location was not Singapore, then attract the application of the double actionability rule.[39]

12.29 However, the present language of O 11 r 1(*f*) does not technically require the identification of the location of the tort. As such, there is no real need to apply the substance of the tort test or the double actionability rule. Further, applying the double actionability rule at this point would be

32 In doing so, the court did not find it necessary to consider the questions of whether the plaintiff had made full and frank disclosure, and whether the writ had been validly served. See *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [136]–[137].
33 [2018] SGHC 123.
34 *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [67], citing *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123 at [82], [85] and [210].
35 [2018] SGHC 126.
36 *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [68], citing *Nippon Catalyst Pte Ltd v PT Trans-Pacific Petrochemical Indotama* [2018] SGHC 126 at [60].
37 *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [69].
38 See (2018) 19 SAL Ann Rev 273 at 283.
39 *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [72].

to import a choice of law rule into a jurisdictional question. Apart from a conceptual objection to this, practically, it would require foreign law to be proved via expert evidence at a jurisdictional stage.[40]

12.30 Having said this, the court also acknowledged the view that identifying the location of the tort and applying the double actionability rule at the jurisdictional stage would save time and costs by sieving out claims that might eventually fail at trial.[41]

12.31 Balancing these considerations, the court opined that the double actionability rule is relevant to applications for service out of jurisdiction. To be clear, because the parties' submissions had differed in relation to the relevance of the double actionability rule at the natural forum requirement, the court indicated that its view was limited to only that requirement.[42] Having said that, the authors feel it would be safe to conclude that the double actionability rule would also be applicable at the jurisdictional gateway requirement.

12.32 Before moving on to considering the court's views on natural forum, it is useful to note for completion that the court held that the plaintiff did not establish a good arguable case based on the heads of jurisdiction in O 11. Evidence was scant and sometimes contradictory, and it was insufficient for the purposes of satisfying the jurisdictional gateway requirement.[43]

12.33 The court went on to consider if the natural forum requirement for service out of jurisdiction had been met, that is, whether Singapore was the natural forum for this dispute. The court reaffirmed the application of the two-stage test from *Spiliada Maritime Corp v Cansulex Ltd*[44] ("*Spiliada*") where Stage 1 involved identifying the forum with the most real and substantial connection with the dispute through various connecting factors.[45]

12.34 The analysis of the factors in Stage 1 are unremarkable save to note that most, if not all, of the factors did not point to Singapore as the natural forum.[46] It is worth noting that the court, after having decided that the double actionability rule was relevant, looked to identifying the place of the tort and concluded that it did not support the argument that

40 *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [73].
41 *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [73].
42 *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [75].
43 *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [76]–[98].
44 [1987] AC 460.
45 *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [102].
46 *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [105]–[131].

Singapore was the natural forum.[47] Therefore, the plaintiff was unable to satisfy Stage 1 of the test from *Spiliada*.

12.35 This, however, then leads to the second noteworthy point. The court considered the question of whether Stage 2 of the *Spiliada* test would still apply when Stage 1 had not been satisfied. Put another way, if Singapore had not been shown to be the natural forum, could the application for leave to serve out of jurisdiction still, nonetheless, be rescued by a consideration of Stage 2?

12.36 As a starting point, the court agreed with the position that the *Spiliada* test should apply in the same way whether it was a standard *forum non conveniens* application (where jurisdiction had been established as of right) or an application for leave to serve out of jurisdiction.[48] The only difference would be on whom the burden fell at each stage of the test.

12.37 In a standard *forum non conveniens* application, the defendant has the burden to show at Stage 1 that there is a more appropriate forum elsewhere. If Stage 1 is satisfied, then the burden falls onto the plaintiff at Stage 2 to show that she would be deprived of a legitimate juridical or legal benefit if she has to sue in that forum. It is useful to note that where the defendant does not satisfy Stage 1, the inquiry ends there. The defendant does not get to argue at Stage 2 that substantive justice would, nonetheless, be better achieved in the competing forum. While this might mean that there is a bias in favour of the forum, that is, Singapore, this is not objectionable because jurisdiction had been properly obtained by the plaintiff.

12.38 In an application for leave to serve out of jurisdiction, it is often represented that it is the flip side of a standard *forum non conveniens* application. Because the plaintiff seeks to activate Singapore's extra-territorial jurisdiction, she must show at Stage 1 that Singapore is the natural forum. Once shown, it is open to the defendant to argue at Stage 1 that she will suffer injustice, perhaps by proving deprivation of legitimate juridical or legal benefit, if made to defend the matter in Singapore. It should follow, however, that if the plaintiff does not succeed at Stage 1, the inquiry ends there and Stage 2 does not come into play.

12.39 However, the court seemed to accept the position that even when Singapore is not shown to be the natural forum, the court can turn its mind to Stage 2 and allow the plaintiff to argue that Singapore should,

47 *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [113]–[123].

48 *Shen Sophie v Xia Wei Ping* [2022] SGHC 206 at [133], citing Yeo Tiong Min SC, "Exit, Stage 2, for the Plaintiff in Service out of Jurisdiction?" (2021) 33 SAcLJ 1237.

nonetheless, hear the matter because substantial justice would otherwise be denied.[49] Having said that, the court opined that, even applying this, the plaintiff did not show that she would be denied substantial justice if the matter were to be heard elsewhere.[50]

12.40 This seems to broaden the scope of discretionary jurisdiction quite significantly. This is justified in the judgment by considerations of access to justice and an acknowledgment that in common law systems the global trend is tending towards enlarging the scope of extra-territorial jurisdiction.[51]

12.41 The approach does not sit entirely comfortably. Putting aside the discomfort that this would essentially lead to an asymmetric application of the *Spiliada* test, it renders meaningless the purpose of Stage 1, at least in an application for leave to serve out of jurisdiction. Why would the plaintiff need to establish that Singapore is the natural forum in the first place anymore? If the consideration is about access to justice, then perhaps the two-stage test should be replaced with the question of where, in the interests of substantial justice, the matter should be heard. This will of course bring with it the attendant risks of comparing systems of justice and potentially claims of chauvinism.

12.42 Further, if this approach were to be taken, then should there also be a change in how this question should be approached in a *forum non conveniens* application? Should the defendant who cannot show the existence of a more appropriate forum elsewhere nonetheless be able to argue that the matter should still be heard there, or is it perhaps time to replace the *Spiliada* test with a less procedurally bound approach?

12.43 At this point, what remains clear is that the *Spiliada* test is alive and well, and that there are authorities suggesting that Stage 2 may be treated differently in the case of an application for leave to serve out of jurisdiction. It is hoped that at an opportune time, the Court of Appeal might provide some guidance.

D. Kuswandi Sudarga v Sutatno Sudarga

Forum non conveniens – Burden of proof and requisite standard for Stage 1 of *Spiliada* test

49 *Shen Sophie* [2022] SGHC 206 at [133].
50 *Shen Sophie* [2022] SGHC 206 at [134].
51 *Shen Sophie* [2022] SGHC 206 at [133].

Forum non conveniens – Applicability of Stage 2 of *Spiliada* test in applications for service out of jurisdiction when plaintiffs/claimants are unable to demonstrate that Singapore is the more appropriate forum in Stage 1

12.44 *Kuswandi Sudarga v Sutatno Sudarga*[52] is a decision of the High Court (General Division) on an application for setting aside leave granted for service out of jurisdiction. The plaintiff sued the defendant, who was also his brother, for his supposed entitlement to 35% of moneys earned from the family businesses ("the Funds") under alternative heads of claim – resulting trust, express trust, common intention constructive trust, proprietary estoppel and unjust enrichment.[53]

12.45 After the plaintiff obtained leave to serve the writ of summons and statement of claim in Indonesia, the defendant applied to set aside the leave order. The defendant failed at the first instance. On appeal, Chua Lee Ming J dismissed the defendant's appeal.[54]

12.46 Chua J first reiterated the trite principles on service out of jurisdiction, including the following:[55]

> (a) Where a defendant applies to set aside an order for service out of jurisdiction, the burden remains on the plaintiff to demonstrate that the requirements for service out (that is, (i) the plaintiff's claim must come within one of the heads of claim in O 11 r 1 of the ROC 2014; (ii) the plaintiff's claim must have a sufficient degree of merit; and (iii) Singapore must be the proper forum for the trial of the action) are satisfied.
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> (b) Singapore would be the more appropriate forum if it has the most real and substantial connection with the disputes raised. This involves an application of the two-stage *Spiliada* test. At the first stage, the court considers whether there is *prima facie* a more appropriate forum for the case to be tried. If the court concludes that there is a more appropriate forum, then it will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should, nonetheless, not be granted.

52 [2022] SGHC 299.
53 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [4] and [16]–[17].
54 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [2] and [18]–[20].
55 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [22]–[28].

12.47 On appeal, the defendant's sole contention was that the plaintiff had failed to discharge his burden of showing that Singapore was a more appropriate forum than Indonesia.[56]

12.48 The parties disagreed on the requisite standard for Stage 1 of the *Spiliada* test. The defendant argued that the plaintiff had to show that Singapore was the more appropriate forum. In other words, it was not enough that Singapore and Indonesia were equally appropriate forums under Stage 1 of the *Spiliada* test.[57]

12.49 On the other hand, the plaintiff argued that under Stage 1 of the *Spiliada* test, it was sufficient if he was able to show that Singapore was at least comparatively equal to the other competing forums. If Singapore was comparatively equal to the other available forum, it followed that the other available forum could not be more appropriate than Singapore. In other words, it could not be rebutted that Singapore was the proper forum if no forum could be said to be comparatively more appropriate than any other.[58]

12.50 While *Spiliada* principles are applied in applications for both service out of jurisdiction and stay of proceedings on grounds of *forum non conveniens*, Lee J emphasised the difference in burden of proof. In the latter context (that is, in an application for stay of proceedings), the burden is on the defendant to persuade the court to exercise its discretion to stay proceedings in which jurisdiction over the defendant has been established. This is done by showing that there is another forum that is more appropriate than Singapore. If the defendant is unable to do so, there would be insufficient reason to stay proceedings which have been properly commenced in Singapore. If the available competing forums are equally appropriate, the defendant would have failed to discharge his burden in showing that there is another forum more appropriate than Singapore.[59]

12.51 On the other hand, in an application for leave to serve out of jurisdiction, the plaintiff has the burden to persuade the court to exercise its *in personam* jurisdiction over a foreign defendant. In such a case, the plaintiff must demonstrate that Singapore is the more appropriate forum if there is a competing forum available. Merely showing that Singapore is a comparatively equally appropriate forum would not be sufficient because the plaintiff would have failed to show that Singapore is the more

56 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [31].
57 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [32(a)].
58 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [33(a)] and [37].
59 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [39].

appropriate forum. It follows that if the available competing forums are equally appropriate, the plaintiff would have failed to discharge his burden and the Singapore court would not exercise jurisdiction over the case.[60]

12.52 Lee J's decision must be correct. As has been said by the Court of Appeal in *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV*[61] ("*Oro Negro*"), the plaintiff bears the burden of demonstrating that Singapore is on balance the more appropriate forum in service out applications. It is irrelevant whether Singapore is the more appropriate forum "by a hair or a mile".[62]

12.53 The Court of Appeal in *Oro Negro* went on to observe that it is an open question whether the second stage of the *Spiliada* test would be engaged if Singapore is not the more appropriate forum.[63] Implicit in this is that the plaintiff must, at the first stage, show that Singapore is the more appropriate forum. If the plaintiff is only able to show that Singapore is an equally appropriate forum as another competing available forum, then Singapore cannot be said to be, "on balance, the more appropriate forum".[64]

12.54 Having clarified the burden of proof and requisite standard, Lee J proceeded to consider the connecting factors to Singapore. The following observations by Lee J in analysing the connecting factors are noteworthy.

12.55 First, Lee J rejected the defendant's argument that the plaintiff's pleaded case being founded on alleged agreements between the plaintiff and the defendant in Indonesia was a connecting factor in favour of Indonesia as the more appropriate forum. Lee J thought that was a neutral factor because it did not have anything to do with the nub of the dispute, which was whether parties intended to create some sort of trust over the Funds that were transferred to Singapore.[65] This must be correct. As cautioned by the Court of Appeal, it is important to see what the case is about, and connections which have little or no bearing on the

60 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [40].
61 [2020] 1 SLR 226.
62 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [80(b)] and [80(c)], *per* Steven Chong JA.
63 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [80(d)], *per* Steven Chong JA.
64 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2020] 1 SLR 226 at [80(b)].
65 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [43]–[44].

adjudication of the issues in dispute between the parties will carry little (or no) weight.[66]

12.56 Second, Lee J also did not consider the fact that the defendant was resident in Indonesia to be a weighty factor in favour of Indonesia as the more appropriate forum. This was because the defendant was a Singapore permanent resident with businesses and properties in Singapore, and would come to Singapore fairly regularly. Further, both Singapore and Indonesia are relatively near to each other.[67] These are useful arguments practitioners can make in relation to *any* foreign witness relevant to the dispute, that is, frequency and necessity of travel to Singapore by that particular witness; and the distance between the foreign country in which the witness is resident and Singapore.

12.57 Third, Lee J also noted that neither Indonesian nor Singapore courts can compel foreign witnesses to give evidence.[68] On another point relating to evidence, it is common ground that a Singapore court can order disclosure of documents whereas an Indonesian court cannot. This was found to be a relevant consideration which pointed to Singapore as the more appropriate forum.[69] A useful argument is that the defendant could have raised the Evidence (Civil Proceedings in Other Jurisdictions) Act 1979,[70] which allows for evidence to be obtained through examination of witnesses and/or production of documents in civil proceedings instituted in other jurisdictions, to tilt the scale away from Singapore as *forum conveniens*.[71]

12.58 Fourth, Lee J made a number of useful points on the governing law of the claims pursued by the plaintiff.

12.59 In a claim in unjust enrichment, "the obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation":[72]

> (a) If the obligation arises in connection with a contract, the proper law … is the proper law of the contract.
>
> (b) If the obligation arises in connection with a transaction concerning an immovable property, the proper law is the [*lex situs*].

66 *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [41], *per* Andrew Phang Boon Leong JA.
67 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [46] and [47].
68 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [48].
69 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [69] and [73].
70 2020 Rev Ed.
71 See (2021) 22 SAL Ann Rev 268 at 303, paras 12.108–12.109.
72 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [56].

(c) If the obligation arises in any other circumstances, the proper law is the law of the country where the enrichment occurs.

In this case, given that the Funds were received in Singapore by the defendant,[73] the enrichment occurred in Singapore, and this pointed to Singapore law as the proper law of the plaintiff's claim in unjust enrichment.[74] In particular, the recovery of the enrichment was not premised on any particular relationship between the parties that had an Indonesian governing law angle.[75]

12.60 Lee J considered but did not conclusively decide what the applicable law for the plaintiff's claims should be, based on resulting trust and common intention constructive trust, because all the competing options pointed towards Singapore law as the governing law.[76] The competing options were: (a) the law of the forum; (b) the choice of law rule for unjust enrichment; (c) the law most closely connected to the trust; and (d) the property choice of law rules which would typically be the *lex situs*.[77]

12.61 It remains to be seen what the courts will decide in future cases.[78] But an obvious argument against option (a) is the objection to forum shopping. This option may incentivise plaintiffs to institute claims in Singapore, even if the trust claims have no connections to Singapore, if the plaintiffs find that Singapore law recognises and favours their trust claims.

12.62 On the other hand, it would appear that there is some merit in option (b). After all, from a Singapore perspective, both unjust enrichment and resulting trust share a similar juridical basis in that they both give effect to the absence or vitiating of the transferor's intent to benefit the recipient.[79]

12.63 As for the plaintiff's final claim premised on proprietary estoppel, given that both options pointed to Singapore law as the governing law,

73 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [6], [7] and [14].
74 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [57].
75 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [59].
76 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [67].
77 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [65].
78 See discussion at paras 12.112–12.124 below on *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 for an extended discussion on what the applicable governing law should be for a claim relating to constructive and resulting trusts.
79 *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048 at [48], *per* V K Rajah JA.

Lee J also did not conclusively decide whether the test was the *lex situs* or the law with the closest connection.[80]

12.64 Lee J eventually found that Singapore was clearly the more appropriate forum under Stage 1 of the *Spiliada* test.[81]

12.65 Lee J also took the opportunity to lay down principles on Stage 2 of the *Spiliada* test. The defendant's argument that Stage 2 does not apply to an application for leave to serve out of jurisdiction was rejected by Lee J.[82] Lee J did not agree with the English decision of *Konamaneni v Rolls Royce Industrial Power (India) Ltd*[83] and the Singapore High Court (General Division)'s decision in *Allenger, Shiona v Pelletier, Olga*[84] ("*Allenger*") that Stage 2 is not engaged if the plaintiff is unable to even establish that the forum is the proper forum at Stage 1.[85]

12.66 Lee J was of the view that the approach in *Allenger* gives greater legitimacy to Stage 1 than Stage 2 of the *Spiliada* test. This also assumes that each of the two stages has a different foundational basis. Lee J reasoned that the *Spiliada* test is about identifying the appropriate forum, and at its core its foundational basis is that of justice. Both stages are part of the *Spiliada* test which seeks to identify the forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice. This, in Lee J's view, justifies the inclusion of Stage 2 in applications for service out of jurisdiction *even if* the plaintiff is not able to show that Singapore is the more appropriate forum at Stage 1.[86]

12.67 Lee J also offered two more reasons for his approach.

(a) Andrew Ang SJ's reason *against* allowing a plaintiff to establish *in personam* jurisdiction under Stage 2 of the *Spiliada* test if the plaintiff is unable to even show that Singapore is *forum conveniens* at Stage 1 was that it is difficult to see how the court can have such broad discretion to allow a party to litigate in Singapore when its jurisdiction has yet to be established in Stage 1.[87] In response, Lee J remarked that the "broad discretion" might have been an overstatement. This is because, independent of the *Spiliada* test, there are also other requirements before

80 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [68].
81 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [74].
82 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [76].
83 [2002] 1 WLR 1269.
84 [2022] 3 SLR 353.
85 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [77]–[80].
86 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [80]–[83].
87 *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [158].

leave for service out of jurisdiction can be granted, including the requirement that the claim must fall within at least one of the limbs set out in O 11 r 1 of the ROC 2014. It may not be an exercise of "broad discretion" if the plaintiff is, after all, able to establish the existence of a ground of jurisdiction.[88]

(b) Lee J also found it unacceptable that the court should deny a plaintiff access to it where the circumstances are such that justice requires that he should be given access though the defendant is outside the territory.[89] This reason is, however, in conflict with the caution by judges in previous decisions that Singapore courts should not inadvertently become an "international busybody".[90] It may also incentivise forum shopping, in that it may arrogate to the Singapore courts jurisdiction over a dispute which belongs more appropriately to the courts of another jurisdiction; thus, the grant of the plaintiff's application for service out jurisdiction in Singapore may involve a breach of comity towards the courts of another (more appropriate) jurisdiction.[91]

12.68 Lee J therefore concluded that Stage 2 of the *Spiliada* test applies to an application for leave to serve out of jurisdiction. He also noted that this was the same approach taken in *Shen Sophie*.[92]

12.69 It remains to be seen whether Lee J's approach will be followed in future cases. Pertinently, Lee J's approach does resemble the approach taken in the new ROC 2021, that is, claimants are no longer required to scrutinise the long list of permissible scenarios under O 11 r 1 of the ROC 2014 in the hope of fitting into one or more descriptions. The focus instead is on whether it can be shown that the Singapore court is the appropriate court to hear the action.[93]

III. Jurisdiction clauses

12.70 When considering matters of jurisdiction, a common creature encountered is the jurisdiction clause. This provides parties with a choice in selecting the forum in which any potential disputes are to be resolved,

88 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [84].
89 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [85].
90 *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 at [55].
91 *The Reecon Wolf* [2012] 2 SLR 289 at [34].
92 *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [86] and [88]. See discussion at paras 12.17–12.43 above and related critique of this position.
93 The approach to establish *in personam* jurisdiction over foreign defendants under the new Rules of Court 2021 has been discussed extensively by the authors in last year's review: see (2021) 22 SAL Ann Rev 268 at 271–273, paras 12.9–12.17.

which in turn provides certainty and costs-savings when the disputes do occur.

12.71 Jurisdiction clauses can also affect how an application for a stay of proceedings is treated. Where there is no jurisdiction clause, an application for a stay is determined by the two-stage test under the *Spiliada* framework, although it has been observed how this would be done slightly differently under the ROC 2021.[94]

12.72 Before a clause can be characterised as a "jurisdiction clause", it is crucial for it, to borrow the words used in the Choice of Court Agreements Act 2016[95] ("CCAA"), to actually designate one or more specific courts of a jurisdiction to decide any dispute that may arise in connection with a particular legal relationship.[96] In other words, the clause must clearly specify that litigation in a particular court(s) is the binding form of dispute settlement agreed between the parties. As seen in *Cheung Teck Cheong Richard v LVND Investments Pte Ltd*[97] (*albeit* in the context of arbitration), the Court of Appeal found that the clause in question did not amount to an agreement to submit the dispute to arbitration. The clause merely provided that the parties were at liberty to refer the dispute to either arbitration or court proceedings after considering mediation and was entirely neutral as to what dispute resolution mechanism was to be used after mediation was considered.[98]

12.73 In most cases where a jurisdiction clause exists (typically an exclusive jurisdiction clause or a non-exclusive *forum* jurisdiction clause), the court will apply the strong cause test, which holds the applicant of the stay to a higher standard than the typical *forum non conveniens* analysis. Therefore, an important part of the analysis where a jurisdiction clause is in play is its existence, nature and scope.

12.74 There has also been some (legal) creativity over the years in the drafting of a jurisdiction clause, including what has been described in some jurisdictions as a "unilateral or asymmetrical" exclusive jurisdiction clause. Such a clause usually subjects one party, Party *A*, to the exclusive jurisdiction of the courts of one jurisdiction if Party *A* wishes to pursue legal proceedings against the other party, Party *B*. However, Party *B* is not

94 See (2021) 22 SAL Ann Rev 268 at 272–273, paras 12.12–12.17.
95 2020 Rev Ed.
96 Choice of Court Agreements Act 2016 (2020 Rev Ed) s 3(1)(*b*).
97 [2021] 2 SLR 890.
98 *Cheung Teck Cheong Richard v LVND Investments Pte Ltd* [2021] 2 SLR 890 at [30]–[32].

so constrained by the asymmetrical or unilateral exclusive jurisdiction clause should Party *B* wish to pursue legal proceedings against Party *A*.[99]

12.75 Under the common law, if the claim which falls within the *foreign* jurisdiction clause is one that is pursued by Party *A*, the asymmetrical or unilateral exclusive *foreign* jurisdiction clause should be treated like no other symmetrical exclusive foreign jurisdiction clause and the strong cause test should be applied to determine whether Party *A* is justified to be released from his contractual bargain.[100]

12.76 What happens, however, if an asymmetrical or unilateral exclusive forum jurisdiction clause happens in a CCAA context, that is, the asymmetrical exclusive forum jurisdiction clause is contained in an agreement that was concluded after 1 October 2016? The discussion of the next case addresses this squarely.

A. Credit Suisse AG v Owner of the Vessel "CHLOE V"

Asymmetrical or unilateral exclusive jurisdiction clause – Definition

Asymmetrical or unilateral exclusive foreign jurisdiction clause – Applicability of the CCAA

12.77 While the decision in *Credit Suisse AG v Owner of the Vessel "CHLOE V"*[101] primarily relates to an application for security for costs, it is the part that discusses the applicability of the CCAA to asymmetrical or unilateral exclusive foreign jurisdiction clauses that is particularly relevant for this review.

12.78 The claimant was Credit Suisse AG and the defendant was Chloe Navigation Ltd, the registered owner of the marine vessel "CHLOE V".[102] In the course of Credit Suisse AG's application for security for costs against the defendant, it came to the attention of the High Court (General Division) that the counterclaims fell within the scope of an asymmetrical or unilateral exclusive foreign jurisdiction clause.[103] The clause subjected the defendant to the "exclusive jurisdiction of the courts of England if it wished to pursue legal proceedings against the claimant, but not the

99 *Credit Suisse AG v Owner of the Vessel "CHLOE V"* [2022] SGHCR 9 at [10]; *TMT Co Ltd v The Royal Bank of Scotland plc* [2018] 3 SLR 70 at [72].

100 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [112], *per* Steven Chong JA.

101 [2022] SGHCR 9.

102 *Credit Suisse AG v Owner of the Vessel "CHLOE V"* [2022] SGHCR 9 at [1].

103 *Credit Suisse AG v Owner of the Vessel "CHLOE V"* [2022] SGHCR 9 at [9]–[10].

same *vis-à-vis* the claimant in respect of any legal proceedings that the claimant would pursue against the defendant".[104]

12.79 The High Court (General Division) therefore, on its own motion having taken judicial notice of the CCAA, had to consider two issues:

> (a) "whether an asymmetrical or unilateral jurisdiction clause may be regarded as an exclusive jurisdiction clause falling within the scope of the CCAA given that the United Kingdom and Singapore are both [c]ontracting [s]tates to the Hague Convention since the time before the parties concluded the jurisdiction clause" in question;[105] and
>
> (b) assuming the asymmetrical or unilateral jurisdiction clause does fall within the scope of the CCAA, "whether the Singapore court, not being a chosen court, is required to stay or dismiss the defendant's counterclaim".[106]

12.80 In response, the parties' respective positions were as follows:

> (a) The defendant argued that no stay or dismissal of its counterclaims should be ordered because there was no application on the claimant's part seeking such an order.[107]
>
> (b) The claimant accepted that there should be no stay or dismissal of the defendant's counterclaims because, *inter alia*, the CCAA is not intended to apply to asymmetrical or unilateral jurisdiction clauses.[108]

12.81 The High Court (General Division) eventually agreed with the claimant that asymmetrical or unilateral jurisdiction clauses do not fall within the ambit of the CCAA, *even though* a literal reading of the definition of "exclusive choice of court agreements" in s 3 of the CCAA may potentially include such clauses:[109]

> (a) First, the court referred to the Explanatory Report to the Convention of 30 June 2005 on Choice of Court Agreements ("Hague Convention") (which, in the court's opinion, was an instructive material) which highlighted that "[i]t was agreed by the Diplomatic Session that, in order to be covered by the Hague

104 *Credit Suisse AG v Owner of the Vessel "CHLOE V"* [2022] SGHCR 9 at [10].
105 *Credit Suisse AG v Owner of the Vessel "CHLOE V"* [2022] SGHCR 9 at [11].
106 *Credit Suisse AG v Owner of the Vessel "CHLOE V"* [2022] SGHCR 9 at [11].
107 *Credit Suisse AG v Owner of the Vessel "CHLOE V"* [2022] SGHCR 9 at [12].
108 *Credit Suisse AG v Owner of the Vessel "CHLOE V"* [2022] SGHCR 9 at [13]–[15].
109 *Credit Suisse AG v Owner of the Vessel "CHLOE V"* [2022] SGHCR 9 at [16].

Convention, the agreement must be exclusive irrespective of the party bringing the proceedings".[110]

(b) Second, the English Court of Appeal in *Etihad Airways PJSC v Flother*[111] ("*Etihad Airways*") similarly opined that the Hague Convention should be interpreted as not applying to asymmetrical or unilateral jurisdiction clauses.[112]

(c) Third, the Court of Appeal in *Etihad Airways* also observed that there was some debate over a proposal by a delegate to amend the definition of "exclusive choice of court agreement" (currently s 3 of the CCAA) to make clear that it included asymmetrical jurisdiction agreement (by inserting the words "for some or all of the parties to the agreement") but this proposal was eventually withdrawn, having found no support.[113]

12.82 The court therefore eventually held that an order for a stay or dismissal of the defendant's counterclaim could not fundamentally even begin to be engaged under the CCAA given that the CCAA is not intended to apply to asymmetrical or unilateral exclusive jurisdiction clauses.[114] Accordingly, the court also left open the question of whether s 12 of the CCAA (grant of a stay or dismissal order) may be invoked on the court's own motion or whether it has to be applied for by a party.[115]

12.83 The High Court (General Division)'s decision is sound and coheres with the drafters' intent behind the Hague Convention. It remains to be seen how the courts will, in a future case, deal with the second unanswered question – that is, whether a stay or dismissal order under s 12 of the CCAA can be given by the court on its own motion or whether it needs to be sought for by a party in an application. One argument that ought to be considered in this scenario is this: if one accepts that, at (common) law, a party could potentially accept another party's repudiatory breach of the dispute resolution clause (whether an arbitration or a jurisdiction agreement) by accepting jurisdiction of and engaging in the dispute on the merits before the non-chosen forum,[116] then, arguably, one can also interpret the (innocent contracting) party's non-invocation of s 12 under the CCAA as his acceptance of the

110 *Credit Suisse AG v Owner of the Vessel "CHLOE V"* [2022] SGHCR 9 at [16]–[17].
111 [2022] QB 303.
112 *Credit Suisse AG v Owner of the Vessel "CHLOE V"* [2022] SGHCR 9 at [15].
113 *Credit Suisse AG v Owner of the Vessel "CHLOE V"* [2022] SGHCR 9 at [18].
114 *Credit Suisse AG v Owner of the Vessel "CHLOE V"* [2022] SGHCR 9 at [19].
115 *Credit Suisse AG v Owner of the Vessel "CHLOE V"* [2022] SGHCR 9 at [11] and [19]–[20].
116 *Marty Ltd v hualon Corp (Malaysia) Sdn Bhd* [2018] 2 SLR 1207 at [81], [82] and [85], *per* Judith Prakash JA.

repudiatory breach of the breaching party. In this scenario, it would then not make sense for the court to, on its own motion, invoke s 12 of the CCAA to order a stay of dismissal of proceedings.

IV. Choice of law

12.84 The choice of law process is predominantly concerned with determining the governing law of a dispute, claim or issue. The choice of law process is primarily relevant to a court at the merits stage: if the Singapore court has jurisdiction over a dispute and is exercising it, choice of law rules determine the law that governs issues arising from parties' claims and defences. But choice of law considerations are also relevant at the jurisdictional stage; for example, as a relevant factor in the identification of the *forum conveniens*,[117] and in identifying the law that defines the cause of action to establish a nexus between Singapore and the dispute (whether under the ROC 2014 or the ROC 2021).

12.85 There are, however, exceptional conflict of laws rules that courts apply to the merits of a dispute which are *not* choice of law rules and do not determine the governing law. Some of these rules direct the court to disapply rules found in the foreign *lex causae* (like the public policy exception) or replace those rules with domestic rules (like rules governing the identification and enforcement of forum mandatory statutes). Other rules direct the court to disapply rules found in the foreign *lex causae* when enforcing such rules would contravene the law of a *third* state (like doctrines of foreign law illegality). The relationship between the choice of law process and these exceptional conflicts rules that supervene over it remains vexed.

A. Esben Finance Ltd v Wong Hou-Lianq Neil

Foreign law illegality – Non-contractual claims

Foreign law illegality – Defences

12.86 In recent years, disputes involving doctrines of foreign law illegality have come before Singapore courts with increasing frequency. Such disputes typically centre around two doctrines. First, there is the rule in *Foster v Driscoll*[118] ("*Foster*"), which bars the enforcement of contracts when the parties have a common intention to perform it by committing an illegal act in a foreign and friendly state, even if the contract does

117 *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [47], *per* Sundaresh Menon CJ.

118 [1929] 1 KB 470.

not necessitate the performance of that act. Second, there is the rule in *Ralli Brothers v Compañia Naviera Sota y Aznar*[119] ("*Ralli*"), which bars the enforcement of contracts when performance would be illegal under the law of the characteristic place of performance. The prevalence of foreign law illegality disputes may well be attributable to the uncertainty surrounding the scope and limits of the two doctrines. In *Esben Finance Ltd v Wong Hou-Lianq Neil*[120] ("*Esben Finance*"), the Court of Appeal took the opportunity to address two such uncertainties: whether the *Foster* and *Ralli* rules can apply to non-contractual claims; and whether they can apply to defences.

12.87 *Esben Finance* involved several transfers of funds from four companies within the WTK Group ("the Group"), two incorporated in the British Virgin Islands and another two incorporated in Liberia ("the Claimant Companies"), to one Wong Hou-Lianq Neil, the grandson of the Group's founder. The Group consisted mainly of Malaysian companies but also included some "offshore" companies incorporated outside Malaysia, including the Claimant Companies. The Group was controlled by its founder until 1993, when he passed control to his three sons, Neil's father and his two uncles. However, from 1993 until 2013, Neil's father was "the leading spirit" of the Group, controlling its day-to-day management and shutting Neil's uncles out from the Group's affairs.[121] In 2013, Neil's father passed away, and his uncles gained control over the Group. They then discovered that, from 2001 to 2012, Neil's father had authorised 50 payments from the Claimant Companies to Neil without their knowledge.

12.88 The Claimant Companies brought claims for restitution of all 50 payments, alleging, *inter alia*, that the payments had unjustly enriched Neil at the Claimant Companies' expense because the payments had been made with a "lack of consent" on the part of the Claimant Companies. Neil raised three different defences in relation to three different groups of payments:

(a) The first group of 11 payments were alleged to be personal gifts to Neil made by his father.

(b) The second group of three payments were alleged to be directors' fees, shareholder dividends and/or gifts to Neil.

(c) The third group of 36 payments were alleged to be transferred to Neil pursuant to an alleged "practice" carried

119 [1920] 2 KB 287.
120 [2022] 1 SLR 136.
121 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [4].

> out between Group companies with the object of evading Malaysian taxes.

The tax-evasive practice which formed the alleged basis of the third group of payments involved the mode of payments made between Group companies for the provision of logging services.[122] Prior to 2001, these payments were made entirely between Malaysian companies within the Group. After 2001, however, a portion of these payments were made by "offshore" companies (including the Claimant Companies) instead, on the original payers' behalf, to Neil's bank account in Singapore. By moving those payments "offshore" to Neil, the original recipient of the payments prior to 2001, a Malaysian company within the Group, could declare a lower amount of income and thus pay a lower amount of income tax to the Malaysian authorities.[123]

12.89 The trial judge, Henry Bernard Eder IJ, found that most of the Claimant Companies' claims in unjust enrichment were time barred under s 6(1) read with ss 6(7) and 29(1) of the Limitation Act 1959.[124] However, had they not been time barred,[125] the claims relating to the first two groups of payments would have succeeded as there was no evidence that the payments were made for the reasons Neil alleged.[126] By contrast, Eder IJ accepted that the third group of payments had indeed been paid to Neil pursuant to the pleaded tax-evasive practice.[127] Importantly, however, Eder IJ also considered whether Neil's "defence" to those claims on the third group of payments, namely, that they had been made under the tax-evasive practice, might be barred on grounds that the practice was illegal under s 114(1) of Malaysia's Income Tax Act 1967[128] ("ITA(MY)"). This provision made it "an offence for a person to wilfully and with intent evade tax and to omit from a return any income which should be included", as when that person does not inform the Malaysian tax authorities "of all the facts relevant to an assessment" of income tax.[129]

12.90 Eder IJ accepted that the tax-evasive practice was performed with "the deliberate intention by [Neil] of evading taxes in Malaysia; and that such conduct was unlawful under the laws of Malaysia".[130] However, the doctrines of foreign law illegality did not bar Neil's "defence". *Foster*'s

122 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [175] and [209].
123 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [213].
124 2020 Rev Ed.
125 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [128].
126 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [148] and [171].
127 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [194].
128 No 47 of 1967.
129 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [210].
130 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [217].

rule did not apply: that doctrine can only bar claims based on contracts which parties intended to perform in a manner which violated the law of a foreign state, but cannot apply to bar "defences" like Neil's reliance on the tax-evasive practice.[131] *Ralli*'s rule also did not: that rule only bars the enforcement of contractual obligations which are frustrated by a "supervening illegality" under the law of the place of performance. Section 114(1) of the ITA(MY) is not such a supervening illegality; the performance of the payment obligations to Neil was not illegal under the place of performance (Singapore); and Neil was not seeking to enforce any agreement but rather rely on one to establish a lack of unjust enrichment.[132] Eder IJ thus concluded that Neil was not barred from relying on the tax-evasive practice to defeat the Claimant Companies' claims for the third group of payments.

12.91 On appeal, Andrew Phang JCA, writing for the Court of Appeal, affirmed Eder IJ's decision on the claims for the first and second groups of payments. While the Limitation Act does not apply to claims for restitution of unjust enrichment, Phang JCA agreed that there was no evidence that the payments were made for the reasons Neil alleged.[133] However, Phang JCA overturned Eder IJ's decision on the claims for the third group of payments, reasoning that Neil had not been enriched at the Claimant Companies' expense. Although funds had been transferred from the Claimant Companies to Neil pursuant to the tax-evasive practice, the Claimant Companies had only been vested with those funds to enable them to play their part in the tax-evasive practice in the first place, so their "net position" was unchanged by their acts of payment made pursuant to the practice.[134]

12.92 In *obiter*, however, Phang JCA considered whether, if Neil had been unjustly enriched at the Claimant Companies' expense, Neil's "defence" based on the tax-evasive practice would be barred by doctrines of foreign law illegality. This question could be divided into two sub-questions: first, whether doctrines of foreign law illegality like those in *Foster* and *Ralli* can bar claims in unjust enrichment; and second, whether those doctrines can bar not just claims but defences to unjust enrichment.[135]

12.93 The answer to the first question – whether the *Foster* and *Ralli* doctrines can bar claims in unjust enrichment – was a "yes", though

131 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [222]–[233].
132 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [235].
133 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [192] and [253].
134 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [147] and [155].
135 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [169].

in a "provisional" sense.[136] Phang JCA first identified a "fundamental principle" underlying both *Foster* and *Ralli*, that "a claim ought to be unenforceable if it offends the principle of international comity", which he called the "Comity Unenforceability Principle".[137] He then reasoned that this Comity Unenforceability Principle is a "head of common law illegality"; therefore, "[p]ut simply, if permitting recovery under a contract would result in the contravention of the laws of a foreign country, then the principle of comity would prevent such recovery".[138] Thus, there is "in principle" no reason the Comity Unenforceability Principle should not bar claims in unjust enrichment, since "[t]he underlying principle of comity would apply equally in [that] situation as it does in the [contractual]".[139] Phang JCA then drew an analogy to statutory illegality, noting that, *per Ochroid Trading Ltd v Chua Siok Lui*[140] ("*Ochroid Trading*"), where a contract claim is barred on grounds of statutory illegality, a claim for restitution of the enrichment transferred under the now-unenforceable contract will be barred too if restitution would stultify the relevant statutory provision's underlying policy.[141] Likewise, "the principle of stultification would indeed be engaged", and a claim in unjust enrichment barred, if allowing restitution "would stultify the policy (of international comity) underlying the Comity Unenforceability Principle".[142] Finally, Phang JCA noted that, while in *Ochroid Trading* the "principle of stultification" had been applied to facts where the claim in unjust enrichment arose when a contract was rendered unenforceable by statutory illegality, there is "no reason in principle or logic" why the principle of stultification cannot bar claims in unjust enrichment arising independent of a void or unenforceable contract.[143]

12.94 The answer to the second question – whether the *Foster* and *Ralli* doctrines can also bar defences to claims in unjust enrichment – was also "yes", but "even more provisional as well as tentative" than the first.[144] Phang JCA reasoned that "there is support from the perspective of general principle … that illegality or repugnance to public policy bars defences as well as claims, subject to the principle of stultification".[145] This is so for three reasons. First, the Comity Unenforceability Principle, that "the recognition of a position illegal under foreign law would be

136 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [172].
137 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [168].
138 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [172].
139 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [172].
140 [2018] 1 SLR 363.
141 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [175].
142 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [176].
143 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [177].
144 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [178].
145 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [182].

repugnant to domestic public policy", "applies with equal force" to both claims and defences because both are "legal positions".[146] Second, while disabling a defence on grounds of illegality might seem to lead to "harsh and arbitrary results",[147] this is acceptable because, under the doctrine of illegality, "the court is not focused on achieving justice between the parties".[148] Thus, "the courts, in deciding not to give effect to a defence that offends the policy of international comity, do not do so for the sake of the claimant" but to uphold "the fundamental domestic public policy of international comity".[149] It is also relevant that "the [claimant] in unjust enrichment is using illegality as a shield against the respondents' defence, and not as a sword".[150] Third, rejecting a defence on grounds of illegality would allow the unjust enrichment claim to succeed, "thereby resulting in a return to the *status quo ante*", which is "no different in effect from rejecting a claim on the basis of its illegality or allowing it to proceed despite such illegality".[151]

12.95 *Esben Finance* has been noted as a landmark decision for the law on unjust enrichment in Singapore, in light of the court's holding on the Limitation Act's non-applicability to unjust enrichment claims and its recognition of "lack of consent" as an unjust factor.[152] But Phang JCA's judgment also makes an important contribution to doctrines of foreign law illegality, addressing often overlooked but practically important aspects thereof, and is laudable for that reason alone. Yet, the *Esben Finance* judgment also raises many questions – in part because of the tentative and preliminary sense in which Phang JCA's comments on foreign law illegality were made, but also because of the gaps and inconsistencies in his reasoning.

12.96 First, consider Phang JCA's reasoning on why doctrines of foreign law illegality should apply to unjust enrichment claims. There are, for starters, some positive things to be said about it. The first is that it correctly reneges on Phang JCA's earlier judgment in *Jonathan Ang v Lyu Yan*[153] ("*Jonathan Ang*"), where he suggested that "*Foster v Driscoll* can only be used to defeat a claim in contract, and is not applicable in relation to non-contractual claims".[154] As noted in last years' review,

146 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [183].
147 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [181].
148 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [184].
149 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [185].
150 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [186].
151 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [189].
152 See Rachel Leow & Timothy Liau, "A Pyrrhic Victory for Unjust Enrichment in Singapore? *Esben Finance Ltd v Wong Hou-Lianq Neil*" (2023) 86(2) Mod L Rev 518.
153 [2021] 1 SLR 1091.
154 *Jonathan Ang v Lyu Yan* [2021] 1 SLR 1091 at [22].

the proposition Phang JCA accepted in *Jonathan Ang* was based on an unreasoned concession on the law made in a single English High Court decision and overlooked the fact that *Foster*[155] had been applied in various English and Singapore cases to bar non-contractual claims.[156] Phang JCA's prompt reconsideration of *Jonathan Ang* is thus to be commended.

12.97 Another positive aspect of Phang JCA's reasoning here is his affirmation that the Comity Unenforceability Principle, upon which both the principles in *Foster* and *Ralli* were based, is a head of "common law illegality".[157] Locating foreign law illegality at this point within the conceptual landscape of illegality in Singapore law has significant ramifications. Prior to *Esben Finance*, several Singaporean High Court decisions had begun submitting foreign law illegality disputes, ordinarily subject to the *Foster* and *Ralli* tests, to the test in *Ting Siew May v Boon Lay Choo*[158] ("*Ting Siew May*") instead,[159] which requires courts to apply a multifactorial "proportionality" test to determine whether a contract, though not on its face illegal, should nevertheless be unenforceable because parties intend to perform it in a manner that involves an illegal act.[160] The factors include the object, intent and conduct of the parties; the nature and gravity of the illegality; whether allowing enforcement would undermine the purpose of the prohibiting rule; the remoteness or centrality of the illegality to the contract; and the consequences of denying the claim.[161] However, applying the *Ting Siew May* proportionality test to disputes involving illegality under foreign law raises problems. That test, unlike those in *Foster* and *Ralli*, does not address the important preliminary question of whether the foreign legal system whose law is allegedly breached by parties' intended mode of performance is sufficiently connected to their contract to render the contravention of its laws a legitimate concern for Singapore's courts.[162]

12.98 Thus, by noting that the Comity Unenforceability Principle is a head of "common law illegality", Phang JCA took foreign law illegality disputes outside the reach of *Ting Siew May*. As Phang JCA noted in *Ochroid Trading*,[163] *Ting Siew May* only applies to contracts which are *not* caught by statutory illegality or established heads of common law

155 See para 12.86 above.
156 See (2021) 22 SAL Ann Rev 268 at 317–318, para 12.147.
157 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [172].
158 [2014] 3 SLR 609.
159 See, *eg*, *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2020] 4 SLR 85 and *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227.
160 *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [70].
161 *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [70].
162 See (2021) 22 SAL Ann Rev 268 at 326–327, paras 12.160–12.161.
163 See para 12.93 above.

illegality – when a head of common law illegality applies, the enforcement of the contract is simply prohibited with no consideration of *Ting Siew May*'s proportionality test.[164] Similarly, when a contract is alleged to be illegal under the Comity Unenforceability Principle, no proportionality test should apply – the court should apply a categorical rule to determine whether the contract is enforceable.

12.99 But this is where the problems begin. What are the categorical rules that should apply when it is alleged that a claim in *unjust enrichment* should be barred for illegality under foreign law? Phang JCA was clear that, whatever those rules are, they have to operate in tandem with the principle of stultification. However, he was unclear on whether existing doctrines of foreign law illegality – like those in *Foster* and *Ralli* – would be used. All he said was that the Comity Unenforceability Principle should apply to unjust enrichment claims, but that principle is an abstraction of the policy underlying *Foster* and *Ralli*, not *Foster* and *Ralli* themselves. Indeed, elsewhere in his judgment, Phang JCA noted that "a rule *similar* to that in *Foster v Driscoll* does indeed apply to claims in unjust enrichment" [emphasis added],[165] implying that it is not the *Foster* and *Ralli* rules but other rules, adapted to unjust enrichment claims, that might apply.

12.100 Why does it matter whether courts apply the *Foster* or *Ralli* rules or some other rule, in tandem with the principle of stultification, to determine whether claims in unjust enrichment should be barred on grounds of foreign law illegality? The answer is that, when one stops to think about it, the *Foster* and *Ralli* rules cannot apply unaltered to all types of unjust enrichment claims. Here, one should differentiate between two types of unjust enrichment claims: claims which are dependent on the existence of a void or unenforceable contract (like claims based on a failure of consideration); and claims which are independent (like claims for unlawfully levied taxes and some claims for mistaken payments). For unjust enrichment claims dependent on void or unenforceable contracts, it is possible to imagine the *Foster* and *Ralli* rules working in tandem with the principle of stultification. The court may first ask whether the relevant contract is unenforceable under the rule in *Foster* or *Ralli*; if so, it seems a natural next step to ask whether ordering restitution of the benefits transferred under that unenforceable contract would stultify the purpose of the foreign rule which rendered the contract. However, for unjust enrichment claims arising independent of any void or unenforceable contract, a similar analysis would be impossible: there is no preliminary stage at which the rules in *Foster* and *Ralli* can be applied before the

164 *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [39]–[40].
165 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [176].

stultification question is considered. Phang JCA may have been clear that the principle of stultification should also apply to unjust enrichment claims arising independent of a contract; unfortunately, he gave no indication as to how this would work.

12.101 So, if not the rules in *Foster* and *Ralli*, *what* is the rule that the court will apply in tandem with the principle of stultification to a claim in unjust enrichment alleged to be illegal under a foreign law? One may ask: Why is it important that there be a prior rule in the first place? Why can courts not simply apply the principle of stultification by itself to foreign law illegality disputes? The answer is that, as noted last year, it is a fundamental premise of the conflict of laws that while different jurisdictions may legislate on a particular subject matter, only the laws of jurisdictions which are sufficiently connected to that subject matter will be given effect. Existing doctrines of foreign law illegality come pre-fitted with such a requirement of sufficient connection: *Foster*'s rule applies when parties intended to perform their contract in a state where performance would be illegal, while *Ralli*'s rule applies when the contract's place of characteristic performance is a state where performance would be illegal. But the principle of stultification, being a rule of domestic illegality, does not come pre-fitted with a sufficient connection requirement. It says nothing about whether the policy underlying the rule of foreign law, which would allegedly be stultified if the claim in unjust enrichment were permitted, should even be a legitimate concern for Singapore's courts.

12.102 Thus, Phang JCA's position that the Comity Unenforceability Principle applies to all claims in unjust enrichment, even those not contingent on a void or unenforceable contract, cannot work in practice without a prior rule determining whether the foreign law allegedly stultified by the claim is sufficiently connected to the unjust enrichment claim to bar it. Lest this problem seems academic, note that it would have arisen on the facts of *Esben Finance* had Phang JCA found that Neil was indeed enriched at the Claimant Companies' expense. Assuming for the moment that doctrines of foreign law illegality can disapply defences, the question arises: Should the Claimant Companies have been able to invoke the doctrine of illegality based on s 114(1) of the ITA(MY) to disapply Neil's "defence" relying on the tax-evasive practice? Recall that the offence was of intentional non-declaration of income to avoid income tax. And note that this offence is not an offence of *actively* performing an act but *omitting* to perform. Thus, if the Claimant Companies had sued Neil for breach of the agreement encapsulating the tax-evasive practice instead of bringing an unjust enrichment claim against him, the claim would not have been barred by the rule in *Foster* (which requires parties to intend to perform the contract by performing an *act* in a country where it would be illegal) or *Ralli* (which requires the contract's performance to be illegal under the law of the characteristic place of performance). This

is because there was no sufficient connection between the tax-evasive practice and the country which criminalised it (Malaysia), given that (by design) no part of the practice actually occurred in Malaysia. Whether the connection that unjust enrichment claims or defences must have to foreign laws rendering them illegal should be similar is an open question. The point is simply that *some* connection requirement is needed, and that, for unjust enrichment claims arising independent of a contract where the *Foster* and *Ralli* rules cannot apply, no prior rule establishing any connection between the unjust enrichment claim or defence and the relevant foreign law currently exists.

12.103 Second, consider Phang JCA's reasoning on why doctrines of foreign law illegality should apply to *defences* to unjust enrichment claims. At first instance, Eber IJ noted an abundance of academic opinion against using the doctrine of illegality to bar defences, on grounds that it would produce "artificial, arbitrary and unjust result[s]".[166] Phang JCA dismissed these concerns by reasoning that the doctrine of illegality was never concerned with justice *inter partes* but only with "the integrity of the courts", and so it was perfectly legitimate for the courts to use the doctrine of illegality to disable defences and "allow claims to succeed on a false basis".[167]

12.104 With respect, however, Phang JCA's reasoning rests on a misunderstanding of how the doctrine of illegality – the traditional conception thereof that Phang JCA himself adopted[168] – operates to disable claims. A proper understanding of the doctrine as traditionally conceived should have led to the conclusion that it cannot disable defences while leaving claims intact. This is because the doctrine of illegality, as traditionally understood, is a *jurisdictional* rule rendering a dispute tainted by illegality *non-justiciable*, rather than a substantive rule operating on the merits of parties' cases.

12.105 As Lord Mansfield CJ put it in *Holman v Johnson*,[169] in a passage which Phang JCA cited with approval in *Ochroid Trading*:[170]

166 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [231].

167 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [184].

168 *Cf* the conception of the doctrine which protects the integrity of the legal system by preserving "harmony" between the civil and criminal law without producing "arbitrary, unjust or disproportionate" results: see *Patel v Mirza* [2017] AC 467 at [108]. At first instance, Henry Bernard Eder IJ adopted this conception of the doctrine of illegality, which led him to conclude that a blanket rule of disabling illegal defences, which would have a "disproportionate effect" on the defendant, was unjustifiable: *Esben Finance Ltd v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [232].

169 (1775) 1 Cowp 341.

170 *Holman v Johnson* (1775) 1 Cowp 341 at 343; cited with approval in *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363 at [23]–[26].

> The principle of public policy is this: *ex dolo malo non oritur actio*. *No Court will lend its aid* to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there *the Court says he has no right to be assisted*. It is upon that ground the court goes; not for the sake of the defendant, but because they *will not lend their aid* to such a plaintiff. [emphasis added]

12.106 Note that Lord Mansfield's canonical description of the role of the court in the doctrine of illegality is phrased in *passive* terms – this is not an accident. The court is said to be refusing to adjudicate on the dispute *at all*, not adjudicating and actively disabling the claimant's claim. This is why it is truly possible to say that the doctrine of illegality, as traditionally conceived, is concerned not with the merits of parties' cases but with the integrity of the legal system. The court is not judging the merits of the claimant's claim. Instead, it is refusing to adjudicate on the entire dispute, so as to protect the dignity of the legal system by distancing itself from the illegal enterprise. In other words, when the claimant's claim is founded on an illegality, the court is not seeking a particular substantive outcome by denying the claimant's claim; instead, it is washing its hands off the entire affair by simply refusing to adjudicate upon the dispute *in toto*.

12.107 The exact same language was used by Sankey LJ in *Foster*:[171]

> [T]he mere fact that a vendor of goods knows that the purchaser proposes to run them into a country where they are prohibited by some revenue law is not sufficient to render the contract of sale illegal, but if beyond mere knowledge the vendor actively engages in an adventure to get the goods into such country, *the Court will not assist the parties to the adventure entertaining or settling any dispute between the parties arising out of the contract*. [emphasis added]

12.108 Thus, the traditional conception of the doctrine of illegality – which Phang JCA adopted and which doctrines of foreign law illegality are based on – operates as a jurisdictional rule (by rendering the entire dispute non-justiciable) rather than a rule that operates on the merits (by disabling the claimant's claim).[172] This point about the precise nature of the doctrine of illegality is rarely made because it makes no practical difference to how the doctrine operates on *claims*: either understanding of the doctrine will lead to the outcome that the claim caught by the doctrine fails (either because the entire dispute is non-justiciable or because the claimant's claim is specifically disabled). However, that illegality is a jurisdictional rather than substantive rule is crucially important to the question of whether it can apply to defences *while leaving claims intact*.

171 *Foster v Driscoll* [1929] 1 KB 470 at 518.
172 See Lord Mance, "Justiciability" (2018) 67(3) ICLQ 739 at 752.

This is because non-adjudication of a dispute on grounds of illegality, as traditionally conceived, cannot lead to the conclusion that a claim should succeed because a defence caught by the doctrine is disapplied on the substance. Instead, non-adjudication of the dispute means precisely that: the entire dispute, *including the claimant's claim*, will not be entertained.

12.109 This is why applying the doctrine of (foreign law) illegality to bar defences can be described as unjust: illegality can only disapply defences while leaving claims intact if the court is directly intervening in the substance of parties' dispute and making it so that the claimant must succeed by rendering the defendant legally defenceless. The injustice becomes clearer when one considers how the principle that illegality only operates when parties are *in pari delicto* would apply if illegality could operate on both claims and defences. Where parties are *in pari delicto* and illegality applies to a claim, the defendant gets away scot-free and the losses lie where they fall. The defendant wins out because she escapes liability, but this outcome is warranted not because the defendant deserves to escape liability but because the claimant does not deserve a remedy. But where parties are *in pari delicto* and illegality applies to a defence while leaving the claim intact, the outcome is that the claimant will succeed. Here, the claimant wins out because she gets her claim – but it is hard to explain *why* the claimant should win out, when she is likewise equally blameworthy for the illegality. Should the proper outcome not be that *both parties* have their claims and defences denied? And even if this effectively leads to the outcome that the defendant gets away scot-free, is it not better to let both wrongdoing parties escape liability instead of punishing (only) one of two wrongdoing parties?

12.110 Thus, even on Phang JCA's traditional understanding of the doctrine of (foreign law) illegality, the doctrine should not be able to disapply defences while leaving claims intact, since that would lead to the unjust outcome of allowing a claimant to succeed against a defendant whose defence relies on an illegal act when both parties are *in pari delicto*. Again, lest this concern seems like an academic one, note that it would also have arisen on the facts of *Esben Finance* had Phang JCA found that Neil was indeed enriched at the Claimant Companies' expense, and that Neil's "defence" that he was enriched pursuant to the tax-evasive practice could be subject to the doctrine of illegality. The Claimant Companies, after all, were *equally* part of the tax-evasive practice – as mentioned, they received the funds they subsequently passed on to Neil only because of their role in that practice as intermediaries within a broader tax evasion scheme.[173] To deny Neil his defence based on the tax-evasive practice and thus leave him exposed to the Claimant Companies' claims in unjust

173 *Esben Finance Ltd v Wong Hou-Lianq Neil* [2022] 1 SLR 136 at [155].

enrichment when those companies were equally active participants in that practice would be to permit one wrongdoer to claim against another wrongdoer. Surely the dignity and integrity of the legal system would not be upheld by such an outcome.

12.111 While Phang JCA's judgment in *Esben Finance* has given courts and commentators much to work with to identify the precise boundaries of doctrines of foreign law illegality, it has unfortunately not supplied much by way of clear and sound guidance. Given the frequency with which foreign law illegality features in Singaporean decisions, it is hoped that such guidance will be forthcoming soon.

B. Perry, Tamar v Esculier, Bonnet Servane Michele Thais

Choice of law – Characterisation

Choice of law – Liability for breach of trust

Choice of law – Restitution of mistaken payments

12.112 Nearly two decades after Yeo Tiong Min's seminal *Choice of Law for Equitable Doctrines*,[174] the content of choice of law rules applicable to claims in equity remain mired in controversy. Part of this controversy arises from the ambiguity in the term "equitable doctrine": some doctrines (like dishonest assistance and knowing receipt) are true equitable claims while others (like specific performance) are remedies available for common law claims. While the distinction between equitable claims and remedies is usually clear, the lines are blurred on "claims for a resulting or constructive trust". This is because the resulting or constructive trust is essentially a remedy or response that the law imposes when some normatively significant fact in the parties' relationship warrants it: a failure to establish an express trust, a transfer made presumptively without an intention to make a gift, a common intention to share property, the misuse of a fiduciary position, the unconscionable retention of property *etc*. This conceptual blurriness surrounding the idea of a "claim for a resulting or constructive trust" thus creates thorny questions around the content of the choice of law rule for such claims – questions which the High Court in *Perry, Tamar v Esculier, Bonnet Servane Michele Thais*[175] ("*Perry v Esculier*") had to confront.

12.113 *Perry v Esculier* involved a Ponzi scheme run by the Lexinta Group through the use of several companies. In 2014, a first group of investors

174 Yeo Tiong Min, *Choice of Law for Equitable Doctrines* (Oxford: Oxford University Press, 2001).

175 [2022] 4 SLR 243.

("the Initial Investors") entered into an asset management agreement, governed by Swiss law, which expressly listed three of the Lexinta Group's companies as contracting parties. Pursuant to this agreement, the Initial Investors transferred funds to another company within the Lexinta Group ("LGL"), incorporated in Hong Kong, which was not expressly listed as a party to the agreements. Subsequently, from 2015, the Initial Investors sought to withdraw their investment from the Lexinta Group but were persuaded by the Lexinta Group's controller, Bismark Badilla, to delay their withdrawal until April 2016. Come April 2016, a second group of investors ("the Subsequent Investors") had entered into similar asset management agreements with the Lexinta Group. Thereafter, from August 2016 to February 2017, a sum of around US$25m was paid to LGL by the Subsequent Investors in instalments, and a sum of around US$10m was paid to the Initial Investors by LGL in instalments, with payments to LGL being interspersed with payments out from LGL. Subsequently, the nature of the Ponzi scheme came to light, and the Subsequent Investors discovered that the funds they had transferred to LGL had been paid to the Initial Investors.

12.114 The Subsequent Investors then brought proceedings against the Initial Investors. The Subsequent Investors claimed that they retained equitable title to the funds they paid to LGL because LGL was not party to the asset management agreements, and so LGL held the sums on trust for them. The Subsequent Investors thus asserted a proprietary claim over the funds now legally held by the Initial Investors, arguing that LGL held those funds on resulting or constructive trust for them upon receipt, that LGL committed a breach of trust by transferring the funds to the Initial Investors, and that the Initial Investors were liable to account for the funds because they had notice of the Ponzi scheme's nature.

12.115 Simon Thorley IJ dismissed the Subsequent Investors' claim on grounds that LGL *was* a party to the asset management agreements between the Subsequent Investors and the Lexinta Group companies, properly construed, and so LGL did not hold the funds it received on trust for the Subsequent Investors.[176] In *obiter*, however, Thorley IJ considered whether, if LGL had not been party to the asset management agreements, the funds would have been held by LGL for the Subsequent Investors on trust and the Initial Investors would have been liable in relation to LGL's breaches of trust. This turned on the question of the governing law of the Subsequent Investors' claim for breach of trust. The parties agreed that the issue raised by the Subsequent Investors' breach of trust claim was properly characterised as "proprietary".[177] The Subsequent Investors

176 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [98]–[100].
177 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [103].

then argued that the claim was governed by the *lex situs* of the funds they had paid to LGL, which were now situated in the Initial Investors' Singapore bank accounts. Thorley IJ rejected this argument on grounds that it was insufficiently pleaded, but also on grounds that the *lex situs* was an inappropriate connecting factor for claims for title to intangible property like the funds.[178]

12.116 Thorley IJ then seemed to recharacterise the issue raised by the Subsequent Investors' claim: while the claim for breach of trust involved the assertion of a "proprietary right", this right was "equitable, not legal" and was "asserted either by virtue of a resulting or constructive trust."[179] He then reasoned that the correct connecting factor was the law "which is most closely connected to the putative trust".[180] Here, the relevant connecting factors included the location of the trust assets, but also the underlying relationship and transfers of assets which led to the putative resulting or constructive trust, as well as the location of the alleged breach of trust.[181] In the present dispute, a "significant factor" was the fact that "the putative trust arises out of the contractual arrangements between the [Subsequent Investors] and Lexinta",[182] and these contracts were governed by Swiss law.[183] This outweighed the other factors which the Subsequent Investors relied on, such as the fact that the funds were in a Singapore bank account, LGL was a Hong Kong company and the sums were initially paid by the Subsequent Investors to a Hong Kong bank account, and the Initial and Subsequent Investors were the nationals of and resident in various different countries.[184] Under Swiss law, the Subsequent Investors had no claim because the Initial Investors could only be subject to legal liability for receiving the funds if they were shown, on a high burden of proof, to have had actual or constructive knowledge of the Lexinta Group's fraud.[185] Even under Hong Kong law, the Subsequent Investors would also have failed because the Initial Investors could show that they were "*bona fide* purchaser[s] for value without notice".[186]

12.117 The identity of the governing law of the question of whether a resulting or constructive trust arises in the claimant's favour remains controversial. Two opposing views are identifiable: one favouring the law

178 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [104]–[106].
179 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [107].
180 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [110].
181 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [110].
182 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [117].
183 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [115].
184 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [111] and [117].
185 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [134]–[135].
186 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [185].

governing the cause of action which the claimant asserts entitles him to such a trust arising in his favour;[187] and the other favouring the *lex situs* of the assets which the claimant alleges is held on trust for him.[188] In *Rappo, Tania v Accent Delight International Ltd*,[189] the Court of Appeal proceeded on the assumption that the former view was correct – that the governing law of the question of whether parties were in a fiduciary relationship would determine whether "the equitable remedies of constructive trusts and tracing" were available[190] – but the parties had not really disputed the point. *Perry v Esculier*, then, represents a Singapore court's first considered take on the issue, and Thorley IJ's rejection of the *lex situs* in favour of the law "which is most closely connected to the putative trust"[191] is thus noteworthy for that reason alone.

12.118 Thorley IJ's judgment also has the merits of being correct, at least on its rejection of the *lex situs* as the connecting factor for the issue of whether a resulting or constructive trust arises in the claimant's favour. The argument in favour of the *lex situs* generally rests on the idea that "rights in property are ultimately at stake".[192] In other words, since what the claimant really wants when he is seeking a declaration of a resulting or constructive trust is a proprietary remedy, the issue before the court is really whether or not he has title to the putative trust's assets, and which is a proprietary issue governed by the *lex situs*. A superficial problem with this argument, as Thorley IJ pointed out,[193] is that the *lex situs* does not invariably govern all questions of title.

12.119 A more fundamental problem with the argument in favour of the *lex situs* is that it assumes that the legitimate object of the conflict of laws' process of characterisation need not be a claim but a *remedy*. As mentioned, this is precisely what a resulting or constructive trust is: a remedy or response that the law imposes when some normatively significant fact in the parties' relationship warrants it. However, it is axiomatic that the conflict of laws characterises claims (or rather, issues arising out of claims)

187 See, *eg*, *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury & Jonathan Harris gen eds) (Sweet & Maxwell, 16th Ed, 2022) at pp 1592–1597; *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2022 Reissue) at para 75.406.

188 See, *eg*, Robert Stevens, "Resulting Trusts in the Conflict of Laws" in *Restitution and Equity Volume 1: Resulting Trusts and Equitable Compensation* (Peter Birks & Francis Rose eds) (Routledge, 1st Ed, 2000) at p 154; Adeline Chong, "The Common Law Choice of Law Rules for Resulting and Constructive Trusts" (2005) 54(4) ICLQ 855 at 873–883.

189 [2017] 2 SLR 265.

190 *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [74].

191 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [110].

192 *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 16th Ed, 2022) at p 1594.

193 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [106].

rather than remedies.[194] For example, when a claimant seeks an order of specific performance for a contract to buy land, it is the claim (breach of contract) and not the remedy (specific performance) that is characterised and to which a choice of law rule is applied. Similarly, when a claimant seeks a declaration of a trust in his favour, it should be his claim (for breach of fiduciary duties or unconscionable retention, for example) and not the remedy (the resulting or constructive trust) that is characterised and to which a choice of law rule is applied.

12.120 There is a good reason why the conflict of laws must characterise claims rather than remedies for choice of law purposes.[195] A fundamental concern of the conflict of laws is the need to prevent the claimant from unilaterally selecting the governing law.[196] One under-appreciated means by which the conflict of laws prevents such unilateral selection of the governing law is *the application to strike out foreign law claims before the claim is submitted to the choice of law process*. Acting at this preliminary stage is important: the conflict of laws generally recognises that claimants are free to plead claims as they see fit, but if claimants could bring vexatious and frivolous claims simply to take advantage of a particular choice of law rule, they would effectively have a "choice of choice of law".[197] At this preliminary stage, however, it is impossible to strike out foreign law pleadings on grounds of legal unsustainability. For example, if a claimant pleads a foreign law claim for loss caused by the defendant's monopolistic and anti-competitive acts, a Singapore court will likely characterise this as a tort claim and apply the tort choice of law rule, even though Singapore law recognises no claim on those facts. This is because courts take an "internationalist" approach to the characterisation of foreign law claims:[198] just because a claim does not exist under Singapore law does not mean it should be rejected, because the legal sustainability of a foreign law claim is a question for the foreign applicable law. Nevertheless, even at this preliminary pre-choice of law stage, it is possible to strike out foreign law pleadings for *factual unsustainability*. The claimant must still show that the facts he pleads (and which he says corresponds to elements of a cause of action under the foreign applicable law) do exist, since otherwise the claim will fail regardless of the applicable law's identity.

194 *Macmillan Inc v Bishopsgate Investment Trust (No 3)* [1996] 1 WLR 387 at 399.

195 Leaving aside the doubtful possibility that, as a matter of Singapore law, the availability of remedies remains a question for the *lex fori* (*contra Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367 at [16]–[22]).

196 This is why choice of law rules exist in the first place; if they did not, and the *lex fori* governed every claim, a claimant could choose the governing law of his claim simply by choosing a forum to sue in.

197 See Adrian Briggs, "Choice of Choice of Law?" [2003] LMCLQ 12.

198 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [71].

12.121 The application to strike out foreign law pleadings on grounds of factual unsustainability thus plays an important role in limiting the claimant's ability to unilaterally select the governing law. Importantly, however, such a striking-out application can target only pleadings of foreign law *claims* and not *remedies*. This is because any argument that a claimant is entitled to a particular type of remedy *in response* to a particular type of claim cannot be falsified on factual grounds: for example, while a defendant can factually disprove the proposition that there was an agreement between himself and the claimant or that it was breached, he cannot factually disprove the proposition that the claimant is entitled to punitive damages in response to breaches of contract if under the law which the claimant alleges should govern his claim such damages would be available. In other words, the question of the availability of a particular remedy in response to a particular claim, as distinct from the question of whether the facts entitling the claimant to that remedy exist, is a pure question of law. The result is that *no pleading that a particular foreign law claim entitles the claimant to a particular type of remedy can be struck out at the pre-choice of law stage*. For example, if a claimant pleads that he is an entitled to an account of the defendant's profits arising from the defendant's monopolistic and anti-competitive behaviour rather than mere damages, and this is indeed so under the law which the claimant alleges is the governing law, this pleading cannot be struck out at the preliminary pre-choice of law stage for legal unsustainability (because legal sustainability is a question for the *lex causae*) or factual unsustainability (because the availability of remedies is a pure question of law).

12.122 This is why courts cannot characterise remedies pleaded by the claimant to determine the applicable choice of law rule for his claim. Since a claimant's pleading that he is entitled to a particular remedy in response to a particular claim cannot in practice be falsified at the preliminary pre-choice of law stage, if that pleading were allowed to determine the choice of law applicable to his claim, the claimant would be given the unilateral ability to select the governing law. And this is why Thorley IJ was correct to reject the argument that a claim for a resulting or constructive trust is governed by the *lex situs* of the assets which the claimant alleges are held on trust for him. A claim for a resulting or constructive trust is a pleading about a remedy, which means that when the claimant alleges that his foreign law claim entitles him to a resulting or constructive trust in his favour, this pleading cannot be falsified at the pre-choice of law stage. Thus, a claimant could simply argue that he is entitled to a resulting or constructive trust over the defendant's assets in response to any (contract or tort) claim he brings, and thereby unilaterally cause the *lex situs* of those assets to govern his claim, rather than the law that should apply under the (contract or tort) choice of law rule. Such an outcome would

be contrary to the conflict of laws' fundamental concern to prevent the claimant from unilaterally selecting the governing law.

12.123 Yet, while Thorley IJ was correct to reject the *lex situs*, his decision to apply the law "most closely connected to the putative trust"[199] stands on less sure footing. This connecting factor is frequently applied to claims based on express trusts and operates similarly to the third "objective governing law" stage of the contract choice of law rule. However, it is an odd fit for a claim for a resulting or constructive trust: since the resulting or constructive trust is a remedy, the very existence of that trust is in doubt, and so the issue is not the interpretation or enforcement of the trust but its very formation. And logically, the formation of a trust must be determined by events that predate rather than post-date the putative trust's formation. An analogy here may be drawn with the choice of law rule for contract formation, which focuses on "the negotiation or transaction which has allegedly given rise to a contract"[200] and thus excludes consideration of "matters post-dating the making of any such agreement".[201] Of the various factors that Thorley IJ considered, only one predated the formation of the alleged resulting or constructive trust: "the underlying relationship and transfers of funds which led to the putative resulting or constructive trust".[202] Thankfully, he considered this a "significant factor", which tipped the applicable law question in favour of Swiss law.[203]

12.124 But there is a more fundamental problem with Thorley IJ's selection of a trust-related connecting factor to determine the governing law of a claim for a resulting or constructive trust. At the risk of repetition, note again that a resulting or constructive trust is a *remedy* the law imposes when some normatively significant fact in the parties' relationship warrants it. And again, it would be unprincipled for courts to characterise the remedy the claimant seeks, rather than the claim he alleges that remedy responds to, to determine the governing law of his claim. A better solution would be to focus on the obligation which the claimant relies on to seek a trust in his favour. On the facts, and on the assumption that LGL was not a party to the asset management agreements, the Subsequent Investors claim was a straightforward claim for the restitution of mistaken payments: they transferred money to LGL only because they mistakenly believed that LGL would invest it for them under the asset management agreements. And restitutionary claims

199 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [110].
200 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [64] and [79].
201 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [84].
202 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [110].
203 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [117].

based on obligations arising in connection with a contract are generally subject to the governing law of that contract: if a restitutionary obligation arising from a mistaken payment relating to a contract's subject matter is governed by that contract's governing law,[204] so too should an obligation arising from a mistaken payment relating to the parties to a contract. And on the facts, then, the Subsequent Investors claim for restitution of their mistaken payments – and the question of whether LGL held those payments on resulting or constructive trust for them – should have been determined by Swiss law *qua* the governing law of the asset management agreements.

V. Restraint of foreign proceedings

12.125 In international commercial litigation, it is clear that for a potential plaintiff, forum selection is an extremely crucial process for, *inter alia*, substantive, procedural, tactical and strategic reasons. For example, some systems of law have more generous discovery rules[205] or a lengthier period before the limitation period kicks in.[206] 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 prevent abuse of process.[207]

12.126 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 anti-suit injunction ("ASI").

12.127 An ASI is essentially an order of court compelling a party who is amenable to the jurisdiction of the court to refrain from instituting or continuing with proceedings abroad.[208] The Singapore courts often discuss the grant of ASIs in generally two distinct bases: (a) to protect a legal right not to be sued in a foreign court where the dispute is governed by an arbitration or an exclusive forum jurisdiction clause; or (b) in

204 *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [46]–[49].
205 *Connelly v RTZ Corp plc* [1998] AC 854 at 872G, *per* Lord Goff of Chieveley.
206 *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR(R) 345 at [38], *per* Chao Hick Tin J. However, this is less relevant of a consideration in Singapore given s 3(1) of the Foreign Limitation Periods Act 2012 (2020 Rev Ed).
207 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [1], *per* Steven Chong JA.
208 *BCS Business Consulting Services Pte Ltd v Baker, Michael* [2023] 1 SLR 1 at [1].

exercise of the court's equitable jurisdiction in circumstances where the commencement or pursuit of the foreign proceedings amounts to conduct that is vexatious and oppressive.[209]

12.128 2022 was an extremely interesting year for ASI. Both *VEW v VEV*[210] ("*VEW*") and *BCS Business Consulting Services Pte Ltd v Baker, Michael A*[211] ("*BCS Business*") represent two different scenarios where the usual ASI factors discussed in the *locus classicus* of *Beckkett Pte Ltd v Deutsche Bank AG*[212] ("*Beckkett*") and *John Reginald Stott Kirkham v Trane US Inc*[213] will be departed from.

A. VEW v VEV

Anti-suit injunctions – Vexation and oppression – Application under the UK Matrimonial and Family Proceedings Act 1984

12.129 *VEW* is significant as it deals for the first time with the principles to be applied in an application for an ASI in the context of foreign English proceedings brought under Part III of the UK Matrimonial and Family Proceedings Act 1984[214] ("MFPA"). It also highlights the importance of balancing of competing public policies.

12.130 The facts can be stated simply. The parties met in England and moved into the respondent's UK property ("the Property") in 2009. After marrying in Italy in 2011, they moved to Singapore in 2012. The appellant wife filed for a divorce in the UK in 2018 and the respondent husband filed for divorce in Singapore shortly thereafter. The wife failed in her application for a stay of the Singapore divorce proceedings and subsequently engaged by filing a defence. The marriage was dissolved by the Singapore courts in 2019.

12.131 At the hearing on ancillary matters, the District Judge ordered that the Property belonged to the respondent husband only and excluded it from the pool of matrimonial assets. The appellant wife did not appeal against these orders. Instead, the appellant obtained leave to apply for financial relief under Part III of the MFPA in the UK. Leave was limited to orders against the respondent's interest in the Property pursuant to

209 *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503 at [109]; *Hilton International Manage (Maldives) Pvt Ltd v Sun Travels & Tours Pvt Ltd* [2018] SGHC 56 at [58]; *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 4 SLR 1023 at [17].
210 [2022] 2 SLR 380.
211 [2023] 1 SLR 1.
212 [2011] 2 SLR 96.
213 [2009] 4 SLR(R) 428.
214 c 42.

s 15(1)(c) of the MFPA. She subsequently filed an application under Part III of the MFPA ("Part III application") on 3 September 2020. This was to provide financial relief in situations of need even if financial provision might have been provided pursuant to a prior overseas divorce by the relevant court in that particular jurisdiction.[215]

12.132 This led to the husband applying in Singapore for an ASI against this Part III application. At first instance, the application for an ASI was granted and dismissed on appeal to the High Court. Leave was granted for the matter to be appealed to the High Court (Appellate Division), which was then transferred to the Court of Appeal.

12.133 The appellant argued that her application under Part III of the MFPA was not in itself vexatious and oppressive, and would not constitute relitigating the division of matrimonial assets before the English court. She also argued that, as Part III was designed to weed out meritorious claims, due weight should be given to the fact that the English Court had granted leave. The appellant's final argument was that the respondent had delayed applying for the ASI, and as such did not come to the court with clean hands.

12.134 Skipping to the end for the moment, the appellant succeeded on the grounds that vexation and oppression had not been established,[216] and the ASI was set aside. Having decided this, the court found it unnecessary to consider the point of whether the respondent had come to the court with clean hands.[217]

12.135 There are a number of noteworthy observations relating to ASIs that this case raises. Before looking at this and by way of background, it is useful to note that in dealing with the appeal, the court first considered the background and provisions of Part III of the MFPA.[218] It noted that Ch 4A of the Women's Charter 1961[219] was modelled after Part III of the MFPA and was intended to allow a Singapore court to grant financial relief to an applicant where no relief was available in the foreign court, or where the relief was inadequate or unfair.[220]

12.136 The court then moved on to consider the principles relating to the grant of an ASI. These are familiar and well accepted:[221]

215 *VEW v VEV* [2022] 2 SLR 380 at [3].
216 *VEW v VEV* [2022] 2 SLR 380 at [106].
217 *VEW v VEV* [2022] 2 SLR 380 at [107].
218 *VEW v VEV* [2022] 2 SLR 380 at [29]–[34].
219 2020 Rev Ed.
220 *VEW v VEV* [2022] 2 SLR 380 at [36].
221 *VEW v VEV* [2022] 2 SLR 380 at [42].

(a) "the jurisdiction is to be exercised when the 'ends of justice' require it";

(b) "where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed";

(c) "an injunction will only be issued restraining a party who is amenable to the jurisdiction of the court"; and

(d) "since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution".

12.137 The court also noted five factors ("the *Lakshmi* factors") applicable in deciding whether to grant an ASI. These five factors are whether:[222]

(a) the defendant is amenable to the jurisdiction of the Singapore court;

(b) Singapore is the natural forum for resolution of the dispute between the parties;

(c) the foreign proceedings would be vexatious or oppressive to the plaintiff if allowed to continue;

(d) the ASI would cause any injustice to the defendant by depriving the defendant of legitimate juridical advantages sought in the foreign proceedings; and

(e) the institution of foreign proceedings is or will be in breach of any agreement between the parties.

12.138 Having said that, the court acknowledged that the last factor is a separate ground, different from vexation and oppression, upon which an ASI may be based[223].

12.139 Turning then to the ground of vexation and oppression, the court noted that whether this ground has been made out involves an assessment and evaluation of a list of factors (which is not closed) and that the court will also consider the balance of justice to the parties and notions of comity.[224]

12.140 With this background, some observations can now be made about this case.

222 *VEW v VEV* [2022] 2 SLR 380 at [43].
223 *VEW v VEV* [2022] 2 SLR 380 at [43].
224 *VEW v VEV* [2022] 2 SLR 380 at [44]–[46].

12.141 First, the court drew a useful distinction between what the typical contexts for an ASI are and what contexts might require a different treatment.

12.142 The court noted that the District Judge had applied the *Lakshmi* factors in deciding whether to grant an ASI in the context of a Part III application, and opined that this was not appropriate.[225] The court noted three cases,[226] including one that involved family proceedings,[227] where the *Lakshmi* factors had been applied in what was considered to be a typical context.

12.143 The court then went on to distinguish the typical context from this situation where the foreign proceedings had been initiated under an English statute (Part III of the MFPA), and where Singapore has enacted its own legislation modelled after that English statute (Ch 4A of the Women's Charter).[228]

12.144 How does the present context affect the application of the *Lakshmi* factors? It would appear that only two of the *Lakshmi* factors are really affected. The second factor requires Singapore to be the natural forum for resolving the matter. The District Judge had found that Singapore was the natural forum.[229] Without disagreeing with this finding, the Court of Appeal held that the natural forum requirement was not applicable in this context. The structure of the interaction between Part III of the MFPA and Ch 4A of the Women's Charter by definition envisions the involvement of more than just one jurisdiction.[230]

12.145 Part III of the MFPA provides a statutory right of relief to a party even if the financial matters have been already been determined by the final court.[231] And while s 16(2) of the MFPA lists factors which are common to a *forum non conveniens* analysis, the MFPA does not require the English courts to determine the natural forum. Instead, those factors assist the English courts to determine if an order should be made when a foreign court had already considered the matter.[232]

225 *VEW v VEV* [2022] 2 SLR 380 at [48].
226 *Munib Masri v Consolidated Contractors International Co SAL* [2008] EWCA Civ 625; *Aliye Ayten Ahmed v Mehmet Mustafa* [2014] EWCA Civ 277; *AQN v AQO* [2015] 2 SLR 523.
227 *AQN v AQO* [2015] 2 SLR 523.
228 *VEW v VEV* [2022] 2 SLR 380 at [54].
229 *VEW v VEV* [2022] 2 SLR 380 at [65].
230 *VEW v VEV* [2022] 2 SLR 380 at [66].
231 *VEW v VEV* [2022] 2 SLR 380 at [56].
232 *VEW v VEV* [2022] 2 SLR 380 at [66], citing the UK Supreme Court's findings in *Agbaje v Agbaje* [2010] UKSC 13.

12.146 Similarly, the court noted that Ch 4A of the Women's Charter recognises that in matters of divorce and ancillary matters, injustice may occur if all matters were to be heard in one forum. As such, it is also premised on the notion that more than one forum is involved. And while s 121F of the Women's Charter does embody a test for the appropriate forum, it applies specifically to providing financial relief and is to be balanced off with other policy considerations specific to that context. The notion of natural forum was not intended to apply generally.[233]

12.147 The other factor that is affected is the third one. This requires finding the foreign proceedings vexatious or oppressive to the plaintiff if allowed to persist. The court noted that vexation and oppression is often made out in circumstances where the foreign proceedings:[234]

(a) "were instituted in bad faith or for no good reason";

(b) "are bound to fail";

(c) "will cause extreme inconvenience";

(d) "amount to an unlawful attack on the respondent's legal rights"; or

(e) "are duplicative of Singapore proceedings".

12.148 Acknowledging that while these considerations are still relevant in this context, the court emphasised that the simple act of commencing proceedings under Part III of the MFPA cannot by itself be vexatious and oppressive. This would render such any application ineffective and defeat the purpose of Part III and would not be consistent with comity. The reverse would also be true, that is, an application under Ch 4A of the Women's Charter being rendered ineffective by a foreign ASI.[235]

12.149 This approach is further supported by the existence of a leave mechanism in Part III whose purpose is to filter out unmeritorious cases.[236] The court opined that the question of whether to grant leave overlaps with the question of whether an ASI is justified. Again, there are similar provisions in Ch 4A of the Women's Charter.

12.150 This is not to say that a case of vexation and oppression could never be made out in this particular context. The court highlighted that it must have the ability to maintain the integrity of its proceedings

233 *VEW v VEV* [2022] 2 SLR 380 at [67], citing the Singapore High Court's findings in *UFM v UFN* [2018] 3 SLR 450.
234 *VEW v VEV* [2022] 2 SLR 380 at [44].
235 *VEW v VEV* [2022] 2 SLR 380 at [72]–[73].
236 *VEW v VEV* [2022] 2 SLR 380 at [74].

and safeguard its own public policy.[237] If Part III proceedings were an unwarranted interference with Singapore's judgments and court processes, the court could consider this vexatious and oppressive. By way of example, the court raised the situation where the party applies for Part III proceedings when the Singapore court has reserved judgment on ancillary matters and is deliberating.[238]

12.151 Turning to the second observation, should an ASI have been issued? This depended on whether the English proceedings would constitute a relitigation of matters that had already been settled by the Singapore courts. In considering this, it is important to note that the analysis must be one of substance and not merely form.[239] Where relitigation in substance has occurred, then the court must keep in mind the policy concerns of conflicting judgments[240] and the potential for an English order to supplant (as opposed to supplement) the order of the Singapore court,[241] thereby bringing into question the finality of judgments of the Singapore courts.[242]

12.152 Having said that, the court concluded that there was no attempt at relitigation and that these concerns did not arise in this case. The Singapore courts had excluded the Property from the pool of matrimonial assets and no question of division in relation to it had been considered. As such, the Part III proceedings were not a relitigation and reduced the policy concerns of conflicting judgments or supplantation.[243]

12.153 At first blush, this distinction might seem a little forced. What might have been a more persuasive argument is that the appellant's application under Part III of the MFPA was not an attempt to undermine the earlier Singapore judgment *rejecting* the classification of the Property as a matrimonial property. After all, the appellant was granted leave to apply in the UK for financial relief limited to orders against the respondent's interest in the Property.[244] Nothing has been said about relitigating the issue of whether the Property can be considered a matrimonial property and be subjected to division. In other words, the basis on which the appellant claimed against the Property before the UK Court was different from the basis on which she claimed against the Property before the Singapore court.

237 *VEW v VEV* [2022] 2 SLR 380 at [77].
238 *VEW v VEV* [2022] 2 SLR 380 at [77].
239 *VEW v VEV* [2022] 2 SLR 380 at [5].
240 *VEW v VEV* [2022] 2 SLR 380 at [84].
241 *VEW v VEV* [2022] 2 SLR 380 at [85].
242 *VEW v VEV* [2022] 2 SLR 380 at [86].
243 *VEW v VEV* [2022] 2 SLR 380 at [90].
244 *VEW v VEV* [2022] 2 SLR 380 at [13].

12.154 The respondent had also tried to argue that the appellant should have exhausted her remedies in Singapore before making a Part III application. The court opined that seeking recourse via Part III of the MFPA did not depend on whether the appellant had accepted the decision of the Singapore court, or appealed it or that appeal's outcome.[245] In the premises, vexation and oppression had not been shown and the ASI was set aside.

12.155 Third, the court provided clarification as to the appropriate test to be used for an ASI. In the law relating to ASIs, there has never been absolute clarity as to the various bases that support the issuing of an ASI. The original test used was promulgated in *Société Nationale Industrielle Aerospatiale v Lee Kui Jak*.[246] Over time, however, other tests like "unconscionability" or "unconscionable conduct" began to enter the vernacular.[247]

12.156 It was suggested by counsel for the appellant that the test of "vexatious and oppressive" conduct could be subsumed under the larger umbrella of unconscionable conduct.[248] Rejecting this, the court opined that the latter term was vague and a legal term of art in equity, and instead endorsed the test of vexatious and oppressive conduct.[249]

12.157 While it could be argued that the court's endorsement of the vexatious and oppressive conduct test is limited to the facts of this case, it is submitted that it should apply to the general law relating to ASIs. The court stated its observations in general terms, and it would make no sense for different tests to be applied in different contexts. The court had already taken great pains to point out the differences in the application of the *Lakshmi* factors in this context, but the test remains the same.

12.158 What is unclear is whether a "breach of legal or equitable right not to be sued" (a generally accepted basis for an ASI) is a separate test from the vexatious and oppressive conduct test, or is simply a way of establishing it.[250] Further, it is unclear how this affects the Court of Appeal's approach in *Beckkett*,[251] where the court relied on the notion of unconscionable conduct from *Turner v Grovit*[252] to enjoin the appellant

245 *VEW v VEV* [2022] 2 SLR 380 at [92] and [97].
246 [1987] 1 AC 871.
247 *Turner v Grovit* [2002] 1 WLR 107.
248 *VEW v VEV* [2022] 2 SLR 380 at [69].
249 *VEW v VEV* [2022] 2 SLR 380 at [69].
250 See analysis in Chng Wei Yao Kenny, "Breach of Agreement *versus* Vexatious Oppressive and Unconscionable Conduct" (2015) 27 SAcLJ 340.
251 See para 12.128 above.
252 [2022] 1 WLR 107.

from continuing foreign proceedings. In *Beckkett*, the appellant had engaged in behaviour that amounted to an egregious abuse of court process. The court there said that:[253]

> … once there is an abuse of the court's process, the matter ceases to be a case involving only the competing interests of the parties concerned – the public interest in ensuring that the judicial process is not abused is engaged, and the court must intervene, where it is able to do so, to prevent its process from being abused.

12.159 Of course, consistent with this court's endorsement of the vexatious and oppressive conduct test, the appellant's behaviour in *Beckkett* could be interpreted as vexatious and oppressive conduct and the focus on the ends of justice allowed for the court to take into account public interests.

12.160 Be that as it may, this court's endorsement is a good first step and it is hoped that at a future point, more guidance will be provided.

12.161 Finally, this case highlights the importance of both comity and reciprocity. The notion of comity already features greatly in ASIs. However, in this particular case, the court was mindful that how it approached Part III of the MFPA would affect how foreign jurisdictions approached Ch 4A of the Women's Charter[254] and seemed to intertwine considerations of comity with reciprocity. Perhaps this is an indication that reciprocity will feature more highly as a basis for the common law recognition and enforcement of foreign judgment. After all, this seems to be the direction in which statutory frameworks for recognition and enforcement are going. The CCAA provides for, *inter alia*, the recognition and enforcement of judgments resulting from choice of court agreements in other contracting states. Reciprocity is built into the framework. The Reciprocal Enforcement of Foreign Judgments Act 1959[255] ("REFJA") makes this even more explicit. It allows the Minister the power to extend the REFJA to courts of a foreign country, subject to reciprocity.[256] Similarly, if the level of reciprocity from any country (to which the REFJA applies) is not commensurate, the Minister may order judgments of that country unenforceable.[257]

253 *Beckkett Pte Ltd v Deutsche Bank AG* [2011] 2 SLR 96 at [19].
254 *VEW v VEV* [2022] 2 SLR 380 at [62] and [76].
255 2020 Rev Ed.
256 Reciprocal Enforcement of Foreign Judgments Act 1959 (2020 Rev Ed) s 3.
257 Reciprocal Enforcement of Foreign Judgments Act 1959 (2020 Rev Ed) s 12.

B. BCS Business Consulting Services Pte Ltd v Baker, Michael A

Anti-suit injunctions – Requirements

Anti-suit injunctions – Protection of forum court's processes, jurisdiction or judgments

Anti-suit injunctions – Natural forum – Establishing sufficient interest or sufficient connection on the part of the forum court to the dispute

12.162 In *VEW*,[258] it can be seen how the court clarified that some of the *Lakshmi* factors would be inapplicable given that specific situation. *BCS Business*[259] is another situation where those same factors (referred to as the *Kirkham* factors[260] in the judgment) would be departed from.

12.163 As mentioned earlier, there are generally two bases upon which an ASI is granted. In *BCS Business*, the Court of Appeal made clear a third ground upon which an ASI can and should, in the authors' views, be granted: prevention of abuse of the forum's court process and the protection of the court's jurisdiction and judgments. The grant of the ASI on this ground is premised on the exercise of the court's inherent jurisdiction.[261]

12.164 The principles and considerations on whether an ASI should be granted would differ and depend on whether that is made in the exercise of the court's equitable jurisdiction or in exercise of the court's inherent jurisdiction to protect the court's processes, jurisdiction and judgments. The focus is also different. The court in the former situation focuses on the effect the foreign proceedings have on the litigant who is seeking the ASI (that is, whether the foreign proceedings vex and/or oppress the ASI applicant). In the latter situation, the court focuses on the disruption the foreign proceedings might cause to Singapore's proceedings and judgments from the perspective of the court.[262] It is the second scenario that the Court of Appeal is concerned with.

258 See para 12.128 above.
259 See para 12.128 above.
260 *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 438 at [28]–[29], *per* Chao Hick Tin JA.
261 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [1].
262 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [2].

12.165 The facts relevant for discussion are as follows:[263]

(a) The first appellant, BCS Business Consulting Services Pte Ltd ("BCS"), was a Singapore incorporated company. The second appellant, Weber, was a director and the sole shareholder of BCS. The third appellant, Renslade Holdings Limited ("Renslade"), was a Hong Kong incorporated company with Weber as its sole shareholder.

(b) The respondent, Michael, was an executor of the estate of the deceased, Chantal. Chantal was the co-inventor of a compound, "Ethocyn", which was used in various cosmetics and beauty products. The rights to the inventions and patents of Ethocyn were initially assigned to some Californian companies controlled by Chantal. These rights were later, following some US bankruptcy proceedings against Chantal's companies, sold to a New Zealand company, transferred to a Singapore Renslade company and eventually transferred to BCS on 1 April 2022.

(c) Over the years, the Ethocyn rights yielded substantial income and profits under a supply and distribution agreement between BCS and Nu Skin International Inc ("Nu Skin"). These payments were later transferred from BCS to Renslade.

(d) In October 2016, Chantal passed away and Michael was appointed the executor. Michael then commenced proceedings, in November 2017, as executor on behalf of Chantal's estate in Singapore alleging, *inter alia*, that the appellants had breached their fiduciary duties as trustees under an oral trust or oral agreement ("the Trust") to hold and manage the assets for Chantal.

(e) The appellants denied that there was any kind of agreement between Chantal and Weber for Weber to acquire and hold the Ethocyn rights and any income or proceeds generated on trust for Chantal. Further, Chantal had in the course of the US bankruptcy proceedings declared that the sale of the Ethocyn rights from Chantal's companies to the Singapore Renslade company was done at arm's length and in good faith.

(f) Michael prevailed before the SICC. The SICC found that there was a trust validly constituted and governed by Singapore law. This trust was enforceable notwithstanding the allegations of illegality. Even though "Chantal's false declarations to the US Bankruptcy Court were undoubtedly part of the basis upon

263 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [3]–[4], [7]–[12], [16], [19], [23]–[26] and [32].

which the court had approved the sale of the Ethocyn rights to [the Renslade company] and [Chantal] had intended to conceal her interests at the material time", it would be disproportionate to refuse the enforcement of the Trust.[264] The appeal against the SICC decision was dismissed by the Court of Appeal.

(g) While the proceedings were pending before the SICC, BCS commenced proceedings, in October 2019, in California against Michael and one of Chantal's companies in the US, BCS Pharma Corporation.

(h) On 3 October 2019, Michael and one of the BCS defendants in the Californian proceedings applied for the Californian proceedings to be dismissed on the basis of *forum non conveniens*. This was disallowed by the US District Court.

(i) On 24 June 2020, the parties in the Californian proceedings agreed to stay those proceedings pending the appeal against the SICC's decision in Singapore. The US District Court ordered the stay of the Californian proceedings on 30 June 2020.

(j) The appellants also unsuccessfully applied to stay the execution of the Singapore judgment pending disposal of the Singapore appeal.

(k) After the dismissal of the appeal against the SICC's decision on 19 January 2021, the US District Court lifted the stay over the Californian proceedings in March 2021.

(l) On 27 April 2021, BCS amended its complaint in the Californian proceedings to add additional defendants and to introduce additional causes of action including a claim in judicial estoppel, which was premised on representations that Chantal had made in some bankruptcy proceedings in the US. BCS was therefore seeking a declaratory judgment to estop Michael and other defendants in the Californian proceedings from asserting the existence of the Trust. BCS filed a further amended complaint in the Californian proceedings on 27 August 2021.

(m) Following the dismissal of the Singapore appeal against the SICC's decision, proceedings continued for the taking of the accounts. The SICC rendered its decision on 27 December 2021 for payment due on the taking of accounts.

(n) In light of the ongoing Californian proceedings, Michael applied, on 17 June 2021, for an ASI to restrain BCS from prosecuting or continuing to prosecute the Californian

264 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [19].

> proceedings. This was granted by the SICC in so far as the proceedings related to the existence, validity and/or enforceability of the Trust. The appellants were also restrained from prosecuting such proceedings in the US and anywhere else in the world against Michael or the beneficiaries of the estate in so far as these related to the same subject matter.

12.166 The principal focus of the appeal before the Singapore Court of Appeal was whether an ASI should be granted to stop BCS from pursuing its judicial estoppel claim in the Californian proceedings. If BCS was successful in its judicial estoppel claim, it would effectively prevent the defendants in the Californian proceedings from relying on the Trust as a defence to the various claims pursued by BCS in those proceedings.[265]

12.167 BCS in its judicial estoppel claim in the Californian proceedings essentially alleged that:[266]

> (a) Chantal had, in the US bankruptcy proceedings, asserted that the sale of the Ethocyn rights and assets was an arms-length transaction, and that neither she nor her companies had been given or promised any interest in the purchase of the rights; and
>
> (b) Chantal had also disclaimed her interest in the Ethocyn rights and assets. BCS therefore sought a declaratory judgment from the US court that, on the basis of Chantal's prior statements in judicial proceedings, the US defendants were judicially estopped from asserting the existence of the trust.

12.168 BCS's claim in judicial estoppel was therefore premised on Chantal's false declarations in the US bankruptcy proceedings and her allegedly false representations about her net worth in the stipulation of settlement filed by her in May 2001. Based on this, BCS asked that the US District Court grant a declaratory judgment that the US defendants would be judicially estopped from asserting the existence of a trust, that the sale of the Ethocyn rights in the bankruptcy action was anything other than an arms-length transaction, and that Chantal retained any rights in Ethocyn after the sale.[267]

12.169 BCS sought, unsuccessfully, to deny that the claim in judicial estoppel undermined the SICC judgment. BCS said that the claim in judicial estoppel in the Californian proceedings was to treat the issue of enforcement as a "sword" as opposed to a shield. The Court of Appeal

265 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [29].
266 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [30].
267 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [58].

rightly rejected this, no less because the distinction was not meaningful. In particular, the prevention of the US defendants in the Californian proceedings from asserting the existence of a trust relating to the Ethocyn rights and assets in that action, and BCS's position before the SICC that the Trust would be unenforceable under Californian and Singapore law, were merely different sides of the same coin.[268]

12.170 In particular, the SICC determined that the Trust was not illegal, void or unenforceable as being contrary to public policy under Singapore law. Even if it was, the appellants nevertheless held the trust assets and moneys under a resulting trust for the estate. The SICC also found that this was so even if Chantal's purpose of creating the Trust was illegal, and that Chantal's false declarations in the US bankruptcy proceedings did not rise to the level of a fraud on the court and did not violate US public policy.[269]

12.171 It was therefore clear to the Court of Appeal that if BCS were to succeed in its claim in judicial estoppel in the Californian proceedings, the SICC's judgment would be undermined. In particular, the SICC's finding that, throughout each stage of the development of the Ethocyn business, to the date of Chantal's death and beyond, Chantal had always been the beneficial owner of the Ethocyn rights and the Trust assets and moneys, would also be contradicted.

12.172 The Court of Appeal first clarified the two different jurisdictional bases on which an ASI is granted:[270]

> (a) First (and this is the more commonly discussed ground), an ASI may be granted, in the exercise of the court's equitable jurisdiction, to restrain unconscionable conduct or the unconscientious exercise of legal rights. This is directed at protecting a litigant who is being vexed or oppressed by his opponent, and the focus is on the personal equities between the parties.
>
> (b) Second, an ASI may be granted because there is an interference with the due process of the court and there is a need to protect the processes, jurisdiction or judgments of the forum. This has also been described as the "abuse of the forum court's process" ground. It is founded on the inherent power of

268 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [59]–[60].
269 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [61].
270 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [53]–[54].

> the forum court to protect the integrity of its processes once set in motion, and is the counterpart of the court's power to grant a stay of proceedings to prevent its processes from being abused. The focus is on the disruption by the foreign proceedings to the forum court's processes and judgments.

12.173 The overriding principle of the court's broad power in granting an ASI – whether in the exercise of its inherent jurisdiction or equitable jurisdiction – is that the injunction will only be granted where it is in the interests of justice to do so. To this end, the Court of Appeal was careful and clarified that the categories of cases engaging these two bases are not closed.[271]

12.174 For the second basis in particular, that is, that there is a need to protect the processes, jurisdiction or judgments of the forum, the Court of Appeal confirmed that the second and fourth *Kirkham* factors are less relevant.[272] The Court of Appeal helpfully summarised the instances thus far where an ASI can be sought on that basis:[273]

> (a) where the defendant to an ASI seeks to relitigate abroad a case in which judgment has already been obtained against him in the forum court;
>
> (b) where insolvency proceedings have been commenced in the forum court and the defendant attempts, by way of the foreign proceedings, to obtain an advantage over other creditors; and
>
> (c) where the defendant to an ASI seeks to litigate abroad issues which could and should have been the subject of a decision in the forum court.

12.175 It is accepted that the courts of two different jurisdictions can have jurisdiction over the same dispute, and concurrent proceedings in different jurisdictions do not necessarily constitute vexatious and oppressive conduct. But where a judgment on the merits has already been issued, it would be hardship nevertheless for one of the parties to have to litigate matters which have already been determined in his favour before another court.[274] In this situation, both bases of the grant of ASI are engaged.

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271 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [55].

272 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [34] and [56].

273 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [65]–[66].

274 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [67].

12.176 It is almost inevitable that whenever there are two actions pending before the courts in two different jurisdictions in respect of the same dispute, one of the two courts would issue a judgment before the other.[275] The Court of Appeal then considered the significance of such a development (that is, issuance of a judgment by a court) in the exercise of the discretion in deciding whether to grant an ASI.

12.177 First, where the foreign court has issued a judgment, it would ordinarily not be appropriate to order an ASI which would interfere with that judgment by preventing reliance abroad on or compliance with that judgment, even if the Singapore court, which is the forum court, had already issued a judgment.[276]

12.178 While the ASI defendant would be faced with an issue estoppel in proceedings before the forum court and the foreign judgment would not be enforceable in the forum court's jurisdiction if it is inconsistent with a previous decision of a competent forum court, it would be wrong nonetheless for an ASI to be issued by the forum court to prevent the reliance of the foreign inconsistent judgment by the ASI defendant before the issuing foreign court or in any other third countries.[277]

12.179 On the facts, however, this consideration did not concern the Court of Appeal because the court was concerned with a situation where only the forum court (that is, Singapore) has issued a judgment. Under such circumstances, the considerations of an abuse of forum court's process and relitigation in the foreign jurisdiction would apply.[278]

12.180 The Court of Appeal's hesitation to grant an injunction to prevent the reliance of a foreign judgment is not unfamiliar or new. In *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd*[279] ("*Sun Travels*"), the Court of Appeal (although constituted by an almost entirely different *coram*) was similarly reluctant to grant an injunction to restrain the "ASI defendant" from relying on a Maldivian judgment that contradicted an earlier obtained arbitral award.[280]

12.181 Where the foreign court has already issued a judgment, any application to enjoin a party from relying on or enforcing that foreign judgment should generally be refused not least because such an injunction

275 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [70].
276 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [71].
277 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [71].
278 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [71].
279 [2019] 1 SLR 732.
280 [2019] 1 SLR 732. See also (2019) 20 Sal Ann Rev 251 at 305–313, paras 11.175–11.191.

would necessarily not have been sought with sufficient promptitude.[281] Comity considerations would come to the forefront in this scenario.[282]

12.182 First, there is a need to respect the operation of different legal systems. This requires, where possible, the avoidance of wastage of judicial time and costs that would inevitably be occasioned by a grant of an injunction to preclude a party from relying on the judgment of that foreign court.[283] 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. There is a need for respect for decisions of foreign courts properly given within their jurisdiction.[284] Finally, an anti-enforcement injunction would also potentially preclude foreign courts from considering whether the judgment in question should be recognised or enforced in their own jurisdiction. This constitutes an interference with foreign judicial processes.[285]

12.183 But the Court of Appeal's labelling of the injunction in this scenario/discussion as "ASI" is curious, especially when the injunction in effect seeks to restrain the "ASI defendant" from relying abroad on or complying with that foreign judgment.[286] Such an injunction should be more appropriately termed "anti-enforcement injunction". However, *Sun Travels* is after all a decision in the context of a breach of an arbitration agreement. It remains to be seen whether the requirement to establish exceptional circumstances, tied to the notion of unconscionability, needs to be satisfied before the injunction (or, more precisely, an anti-enforcement injunction) can be granted.[287] It is the authors' position that this must surely be a relevant consideration.

12.184 The second consideration is the status of the two proceedings at the time the ASI is sought. While the need to protect the judgments of the forum court extends to anticipated judgments of the court, such a need

281 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [89], *per* Steven Chong JA.
282 (2019) 20 Sal Ann Rev 251 at 310–311, para 11.184.
283 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [78], *per* Steven Chong JA.
284 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [92]–[93], *per* Steven Chong JA.
285 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [97], *per* Steven Chong JA.
286 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [71].
287 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [105], *per* Steven Chong JA.

is underscored where a judgment has already been issued by the forum court at the time the ASI is sought.[288]

12.185 On the facts, Michael only sought the ASI after the appeal against the SICC judgment on the merits, that is, after the Singapore courts had conclusively determined the enforceability of the Trust and other rights of the executor of the estate in relation to the Trust assets and moneys. To the extent that BCS's claims in the Californian proceedings sought to challenge or relitigate the findings in the SICC judgment, that would, in the Court of Appeal's view, clearly constitute an abuse of the forum court's process and vexatious and oppressive conduct.[289]

12.186 Third, "[w]here the injunction is sought on the basis that the defendant's conduct constitutes an abuse of the forum court's process, it is not generally necessary to demonstrate that the forum court is the natural forum for the dispute which is the subject matter in the foreign court".[290]

12.187 This discussion on natural forum came about because BCS sought to argue that California was the natural forum for its claims in the Californian proceedings, including the judicial estoppel claim.[291]

12.188 The Court of Appeal clarified at the outset that in considering the grant of an ASI, the natural forum requirement is dictated by comity considerations to satisfy that the forum court has sufficient interest or connection with the case before it can grant an ASI:[292]

> This is because the forum court has no superiority over a foreign court in deciding what the justice between the parties requires, and comity suggests that the foreign court should decide whether the action in that court should proceed. There must therefore be a good reason why the decision to stop the foreign proceedings should be made here rather than there.

The natural forum requirement is thus a proxy for the forum court to establish sufficient interest in the dispute.[293]

288 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [72].
289 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [72].
290 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [73].
291 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [45].
292 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [74].
293 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [74].

12.189 In single forum cases:[294]

> … where an ASI is sought to restrain a party from proceeding in a foreign court which alone has jurisdiction over the relevant dispute, it may nevertheless be possible to establish a sufficient connection with the forum court in which the ASI is sought …. This may be the case when there is a need to protect the jurisdiction of the forum court in the administration of ongoing insolvency proceedings …, where the relevant transactions may be considered as predominantly of the character of the forum court …, or to protect the public policies of the forum ….

12.190 Thus, although the requirement for sufficient interest is naturally met where the court issuing the ASI is the natural forum for the proceedings, a forum court may still have sufficient interest notwithstanding it may not be the natural forum for the dispute in the foreign proceedings. In the context of an injunction being sought on the basis that the defendant's conduct constitutes an abuse of the forum court's process, "sufficient interest" on the part of the forum court will generally be self-evident given that the injunction is necessary for the protection of the processes, jurisdiction or judgments of the forum court. The forum court "is the only appropriate court to assess the question of whether its processes need protection, and clearly has a 'sufficient interest' doing so".[295]

12.191 The key inquiry is therefore not the dates in which the foreign and forum proceedings were commenced, but when the specific claim to which the ASI seeks to enjoin was introduced in the foreign proceedings. In the present case, the judicial estoppel claim was introduced in the Californian proceedings after the SICC judgment was handed down and after that SICC judgment was upheld on appeal. It was therefore a case where a judgment on the merits had been issued in the forum court (that is, the Singapore court) which was in substance identical to the specific dispute raised in the foreign proceedings. In this situation, the Court of Appeal remarked that it would be plainly incongruous and disingenuous for the party resisting the ASI (that is, BCS) to suggest that the natural forum for that dispute is nonetheless in some other jurisdiction. The need to protect the judgment of the forum court is even more compelling than simply to examine the sterile question as to whether the natural forum for the dispute is in another jurisdiction.[296]

294 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [75].
295 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [73] and [76].
296 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [77].

12.192 At this point, the authors would highlight that it is interesting that BCS did not raise the argument of delay on the part of Michael in seeking the ASI. While it might have been disingenuous for BCS to argue that the natural forum requirement was not satisfied, Michael could arguably be faulted for not being prompt in seeking an injunction (or, more precisely, an ASI) against BCS when the stay on the Californian proceedings was lifted by the US District Court *after* the SICC judgment was upheld on appeal in Singapore. In particular, there was arguably a delay of about two months between the first time the judicial estoppel claim was introduced in the Californian proceedings and the application for an ASI by Michael with the Singapore court.[297] While two months is arguably not a significant delay, it would at least put Michael on the defence to justify why the *prima facie* lack of promptness coupled with knowledge were insufficient to justify the refusal of an ASI.[298] The Court of Appeal would also have to examine Michael's conduct and reasons to satisfy itself that the period of two months should be justifiably tolerated.

12.193 Turning to the facts before the Court of Appeal, the court noted that the claims in the Californian proceedings substantially rested on the factual premise that:[299]

> (a) BCS had 'obtained the rights to Ethocyn from [Renslade's Singapore company]' with 'all rights in Ethocyn … to be owned by [BCS] with no ownership interest retained by [Chantal]'; … (b) BCS 'did not hold the rights in trust for [Chantal] or [her estate]; … (c) [Michael] had 'fraudulently alleged' that [Chantal] had retained ownership of the rights and assets of [Chantal's companies] [notwithstanding] the sale of those rights to [Renslade].

From the examination of the factual premise, it was clear to the Court of Appeal that the claim in judicial estoppel directly contradicted the findings in the SICC judgment that, *inter alia*, the Ethocyn rights were eventually transferred to Renslade and later BCS, and that all income and proceeds from the exploitation of the Ethocyn rights would be held on trust for Chantal. The SICC had also found that the Trust would be recognised under Californian law, and it was enforceable notwithstanding BCS's argument on illegality and public policy concerning Chantal's supposed misrepresentations made in the US bankruptcy proceedings.[300]

12.194 Furthermore, "[i]f BCS were to be successful in its judicial estoppel claim in the [Californian proceedings], that would have an

297 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [25], [32] and [77].

298 *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [108]–[110], *per* Steven Chong JA.

299 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [79].

300 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [79].

impact on the efficacy of any orders made by the SICC [on payment due on the taking of accounts]". The Court of Appeal found this to be a clear "abuse of the forum court's process by BCS in seeking to subvert the proceedings in [the SICC suit], before the quantum of the appellants' liability to the respondent had been ascertained by the forum court".[301]

12.195 The appellants sought to argue that they could not reasonably be expected to have raised the doctrine of judicial estoppel before the SICC because "(a) the doctrine does not apply here; and (b) the judicial estoppel claim is a matter of procedure governed by the *lex fori*, and would therefore … have been rejected by the SICC [since it is] a procedural rule that is only applicable in the US".[302] The Court of Appeal rightly rejected these arguments:

(a) First:[303]

> … [i]t is inherent in a world with different legal systems that parties may rely on the same subject matter to formulate different causes of action. The different labelling of an underlying cause of action or defence is not decisive in assessing whether the appellants ought to have raised it [before the SICC]. What is crucial is to examine the substance of the cause of action or defence raised in the foreign proceedings.

On the facts, the Court of Appeal found that the substance of the claim in judicial estoppel, when properly examined, is substantially the same as the enforceability of the Trust issue which was raised and decided in the SICC judgment.

(b) Second, and on the facts, the appellants also raised other US doctrines before the SICC, including fraud on the court under the US Federal Rules of Civil Procedure. The SICC was therefore justified in finding that it was entirely unsatisfactory that the appellants did not raise the judicial estoppel claim before the SICC.[304]

(c) Third, it appeared to the Court of Appeal that this was a situation where the judicial estoppel claim was an afterthought or kept in reserve. It was not the situation where the appellants had raised the defence but were disallowed by the SICC on procedural grounds. The Court of Appeal agreed with the SICC that "the timing of the claim suggests that it was 'strategically

301 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [85].
302 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [80].
303 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR(R) 1 at [81].
304 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [82]–[83].

> concealed by BCS, to be deployed in the event [the appeal against the SICC judgment] did not end in its favour".[305]

12.196 The authors would also add that it is not entirely true that BCS was not able to raise an equivalent of the judicial estoppel claim in Singapore. It was open to BCS to perhaps argue for a stay of proceedings on the basis of the deprivation of a juridical advantage and/or raise an argument of *res judicata* or an argument on estoppel generally.

12.197 Finally, the Court of Appeal also did not think that the fact that the judicial estoppel claims engaged issues of US public policy militated against comity to grant an ASI in this case. While the Court of Appeal accepted that:[306]

> … considerations of comity do weigh in the court's determination of whether the injunction ought to be granted and requires that the jurisdiction be exercised with caution …, the principle of comity must be weighed against the affront to the integrity of the forum court's processes, jurisdiction and judgments. … Comity arguments do not assist a plaintiff who commences a 'duplicate law suit' in a foreign jurisdiction after a judgment has been handed down, and continues that foreign action even after an appeal on the judgment has been concluded. In that situation, it is the plaintiff's own acts that placed both the forum and foreign courts in an 'unhappy position in so far as comity [is] concerned'.

12.198 Finally, the Court of Appeal also considered but rejected the appellants' argument that the doctrine of judicial estoppel was a juridical advantage that BCS could enjoy only before the US courts, and injustice was occasioned to it as the ASI extinguished BCS's only opportunity to be heard on that claim. On the facts, the introduction of the judicial estoppel claim in the Californian proceedings three months after the SICC judgment was upheld on appeal suggested to the Court of Appeal that any such juridical advantage was cynically created, and was pursued as another route for the appellants to contest what had already been the subject to the SICC judgment upheld on appeal. The Court of Appeal found the ASI to be fully justified given that more injustice would be occasioned to the respondent in having to relitigate matters already decided were the injunction not issued.[307]

12.199 In any event, as explained above in relation to some doctrines under Singapore law, it is not correct to say that BCS is deprived of the

305 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [84].
306 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [86].
307 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [92]–[93].

only opportunity to raise the judicial estoppel claim with the grant of the ASI.

12.200 To recap, the *Kirkham* factors are as follows:[308]

(a) whether the defendants are amenable to the jurisdiction of the Singapore courts;

(b) the natural forum for resolution of the dispute between the parties;

(c) the alleged vexation or oppression to the plaintiffs if the foreign proceedings are to continue;

(d) the alleged injustice to the defendants as an injunction would deprive the defendants of the advantages sought in the foreign proceedings; and

(e) whether the institution of the foreign proceedings is in breach of any agreement between the parties.

12.201 In summary, it would appear that so long as an ASI applicant can show that the ASI defendant is seeking to undermine the forum court's processes, jurisdiction and judgments (for example, seeking to pursue a claim that has already been decided in Singapore), that would in itself satisfy the grant of an ASI. In those situations, the first *Kirkham* factor would have already been satisfied given that jurisdiction would have been established in the first place in the first suit before the forum.

12.202 The decision of *BCS Business* has also demonstrated how the second and fourth *Kirkham* factors are less relevant in this context. The third *Kirkham* factor is also naturally satisfied given that there is sufficient interest in the forum court to protect its processes, jurisdiction or judgments.[309]

12.203 The authors would suggest, in line with the approach in *Sun Travels*,[310] that the applicant in such a situation must also satisfy that there was no delay on its part in seeking the injunctive relief.

12.204 On a final note, there seems to be a clash between *VEW*[311] and *BCS Business* on two fronts.

308 *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 438 at [28]–[29], *per* Chao Hick Tin JA.

309 *BCS Business Consulting Services Pte Ltd v Baker, Michael A* [2023] 1 SLR 1 at [77].

310 See para 12.180 above.

311 See para 12.128 above.

12.205 The first clash is in terms of the notion of "unconscionable conduct". *VEW* endorsed the test of vexatious and oppressive conduct and rejected the suggestion that the test of vexatious and oppressive conduct could be subsumed under the larger umbrella of unconscionable conduct.[312] It is therefore unclear whether this means that cases like *Beckkett*,[313] which relied on unconscionable conduct to deal with instances of abuse of the court's processes, are still correct. Yet, *BCS Business* not only affirmed that the court could issue an ASI to deal with abuse of the court's processes, but also that the categories of cases are not closed.

12.206 However, the authors would suggest that this seeming clash is illusory. *VEW* did not deal with a situation where an abuse of the court's process was in issue. It was simply about whether parallel proceedings are vexatious and oppressive. The court simply rejected the test of unconscionable conduct as a more abstract test for whether an ASI should be issued in the context of the first basis referred to by the Court of Appeal in *BCS Business*. The rejection of unconscionable conduct in *VEW* should not be taken to apply to the second basis stated by *BCS Business*, which is protecting the integrity of the court's processes. Therefore, both *VEW* and *BCS Business* can continue to stand together and provide helpful clarification as to the application of the *Lakshmi/Kirkham* factors in their respective contexts.

12.207 Second, it may appear at first blush that *VEW* contradicts the decision by the Court of Appeal under the SICC in *BCS Business*. After all, *VEW* was not discussed in *BCS Business* at all. This is also another illusory clash.

12.208 *VEW* is a decision discussing ASIs in the context of the equivalent of proceedings under Ch 4A of the Women's Charter. Those proceedings contemplate there being a Singapore judgment in the first place on the similar issues that are later before the foreign court: for example, the Singapore judgment may have already decided on the division of matrimonial property and the applicant later goes before a foreign court to seek financial reliefs against those properties and/or assets, which were the subject of the earlier foreign judgment on division of matrimonial properties and/or assets, situated in that foreign country. The nature of that statutory mechanism thus contemplates there may be what one may perceive to be an undermining of the earlier Singapore judgment. But the Court of Appeal did not think that this should be refused or disallowed, because there are already "built-in" mechanisms that are sensitive to such comity considerations. This is why the Court of Appeal went to great

312 See para 12.156 above.
313 See para 12.128 above.

lengths in *VEW* to explain what these "safety valves" against a foreign applicant seeking to undermining the Singapore court's orders are.[314]

12.209 On the other hand, *BCS Business* is more generally concerned with the situation where a party who has lost before the Singapore court attempts to undermine the Singapore judgment by seeking to commence same or similar claims in a foreign jurisdiction. This is what was observed in *Sun Travels*, *albeit* in the arbitration context.

12.210 All in, *BCS Business* is definitely a decision to be welcomed. The authors also expect to see more innovative arguments seeking to expand the premise of *BCS Business*'s decision moving forward.

VI. Recognition and enforcement of foreign judgment

12.211 In international commercial litigation, obtaining a judgment is only one step in the game. What is often more important than obtaining a judgment is the successful enforcement of that judgment. A foreign judgment can either be recognised and enforced through the statutory regimes or as a debt at common law. The statutory regimes are: (a) the CCAA; and (b) the REFJA. There was a third regime, the Reciprocal Enforcement of Commonwealth Judgments Act 1921,[315] that was repealed on 1 March 2023.

12.212 At common law, a foreign judgment is enforced as an action in debt.[316] The foreign judgment may be enforced if it is (a) "a money judgment"; (b) "pronounced by a court of competent jurisdiction"; and (c) "final and conclusive between the parties".[317] Finally, "so long as the foreign judgment was not procured by fraud, or in breach of natural justice, or its enforcement in Singapore would not be against the public policy", the foreign judgment would be treated as creating a debt or a new cause of action that is independent of the underlying dispute in which that foreign judgment was given.[318]

314 See paras 12.149–12.150 above.

315 2020 Rev Ed ("RECJA"). However, readers should note that Parliament has passed the Reciprocal Enforcement of Commonwealth Judgments (Repeal) Act 2019 (Act 24 of 2019) to repeal the RECJA, although the Minister has not given notice in the *Singapore Gazette* when the effective date for the repeal Act is. The intention is that the Reciprocal Enforcement of Foreign Judgments Act 1959 (2020 Rev Ed) will be the only statutory regime that governs the reciprocal enforcement of foreign judgments.

316 *Bellezza Club Japan Co Ltd v Matsumura Akihiko* [2010] 3 SLR 342 at [10].

317 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 at [21].

318 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 at [21].

12.213 Apart from the enforcement of foreign judgments, foreign litigants may also want their foreign judgments *recognised* in Singapore. Intrinsically connected to recognition is the doctrine of *res judicata*. This doctrine states that a decision by a court of competent jurisdiction is, unless reversed on appeal, unimpeachable even if it might be wrong. *Res judicata* is therefore a form of estoppel which gives effect to this policy by disallowing parties to a judicial decision to afterwards relitigate the same question (whether or not the decision is wrong). If the decision is wrong, it must be challenged by appeal (against that judicial decision, if permissible within that legal system) or not at all.[319] Needless to say, this doctrine is only applicable after it has been established that the elements for recognition of the foreign judgments have been satisfied, namely: "(a) [the foreign judgment] is a final and conclusive judgment of a court which, (b) according to the private international law of Singapore, had jurisdiction to grant that judgment, and (c) … there is no defence to such recognition".[320]

12.214 Finally, if there are conflicting foreign judgments, the general position is this: a foreign judgment will not generally be given effect if it conflicts with an earlier foreign judgment recognised under the private international law of the forum.[321]

A. Sang Cheol Woo v Spackman, Charles Choi

Enforcement of foreign judgment – Requirement of "final and conclusive" and commencement of limitation period

Enforcement of foreign judgment – Arguments on merits of the underlying claims

Enforcement of foreign judgment – Defences to enforcement of foreign judgment at common law – Breach of natural justice

Enforcement of foreign judgment – Enforcement of "judgment on a judgment" at common law

12.215 In *Sang Cheol Woo v Spackman, Charles Choi*[322] ("*Sang Cheol Woo*"), the plaintiff, Sang Cheol Woo, brought claims against the first defendant, Charles Choi Spackman, to enforce three foreign judgments.

319 *The Royal Bank of Scotland NV v TT International Ltd* [2015] 5 SLR 1104 at [71], *per* Sundaresh Menon CJ.

320 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [67].

321 *First Global Funds Ltd PCC v PT Bank JTrust Indonesia, TBK* [2020] SGHC 32 at [18].

322 [2022] SGHC 298.

These were the Seoul High Court judgment, the Korean Supreme Court judgment and the New York judgment against Spackman.[323]

12.216 Woo also brought claims against all the defendants in lawful and unlawful means conspiracy. Kwek Mean Luck J's decision in *Sang Cheol Woo* concerns the claims on enforcement of foreign judgments against Spackman.[324]

12.217 The facts leading to the issuance of the Seoul High Court judgment are as follows:[325]

> (a) "On 25 July 2003, Woo commenced a civil action in the Seoul District Court … against Spackman (and other co-defendants) for losses he allegedly suffered from market manipulations by Spackman and inflation of the value of shares in a Korean company".[326]
>
> (b) "From 21 July 2004 to 14 November 2008, various documents for the [Seoul District Court] proceedings were served on Spackman by way of 'public notice'", which "is a permissible substitute for personal service under Korean law". "On 28 July 2008, the [complaint] and other [court papers] (including the [summons of pleading] and [sentence date]), were personally served on Spackman."[327]
>
> (c) "Spackman never appeared in the Seoul proceedings, which proceeded against him by way of public notice. On 5 November 2008, the Seoul District Court dismissed Woo's claims and found in favour of Spackman."[328]
>
> (d) On 2 December 2008, Woo appealed against the Seoul District Court's decision. The parties did not dispute that Spackman was personally served with the appeal documents from the Seoul High Court, that is, (i) notice of appeal; (ii) the appellate brief; (iii) the preparatory pleading; and (iv) notice of hearing date, which reminded parties that they should attend the hearing on 1 September 2011.
>
> (e) The appeal was heard before the Seoul High Court about five months after personal service of the appeal documents was effected on Spackman, on 1 September 2011. Spackman chose

323 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [1].
324 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [2].
325 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [3]–[9].
326 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [3].
327 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [3].
328 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [3].

not to appear in the appeal proceedings as he believed that there was little risk of judgment being entered against him.

(f) On 29 September 2011, Woo obtained the Seoul High Court judgment against Spackman. The Seoul High Court deemed Spackman to have admitted to Woo's claims. This "Deemed Confession Rule" was permissible under Art 150, para 3 of the Korean Civil Procedure Act[329] when Spackman did not appear in court and did not object to Woo's arguments even after receiving a lawful service not based on public notice. The Seoul High Court ordered Spackman and other defendants to pay damages with interest to Woo.

(g) On 28 October 2011, Spackman filed an appeal to the Korean Supreme Court. The appeal was dismissed on 31 October 2013. The Korean Supreme Court held that "'there is no reason to continue reviewing the case', it was 'proper for the [Seoul High Court] to accept Woo's claims against Spackman and 'it cannot be reasoned that the [Seoul High Court] committed an error' by applying the [Deemed Confession Rule]".[330]

(h) Relatedly, the two other co-defendants also appealed to the Korean Supreme Court and their cases were remanded back to the Seoul High Court for re-examination. The Seoul High Court on re-examination reversed the first Seoul High Court's judgment on 21 August 2014, and that judgment was affirmed by the Korean Supreme Court on 12 February 2015.

(i) On 26 April 2017, Spackman filed an application for retrial with the Seoul High Court. This application was dismissed by the Seoul High Court on 21 December 2017 because there was no ground for retrial. The Seoul High Court observed that the appeal documents were duly served on Spackman by personal service, and not by public notice. Interestingly, the Seoul High Court also observed that it would have dismissed Woo's claims against Spackman if it were not for the operation of the Deemed Confession Rule against Spackman. However, the Seoul High Court opined that "it cannot be said that it is against good faith and fairness or shall be rectified by a retrial procedure because such outcome is inevitable under Korean Civil Procedure System when it adopts the adversarial system".[331]

329 Act No 547 of 1960.
330 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [6].
331 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [8].

(j) Spackman's appeal against the Seoul High Court's decision to not order a retrial was dismissed by the Korean Supreme Court on 30 May 2018.

12.218 On 11 September 2018, the Supreme Court of the State of New York granted summary judgment in Woo's favour, allowing the enforcement of the Seoul High Court judgment issued on 29 September 2011.[332]

12.219 On 6 May 2022, the Hong Kong Court of First Instance granted judgment in Woo's favour, allowing the enforcement of the Seoul High Court judgment issued on 29 September 2011. While the Singapore suit was being heard by Kwek J, Spackman's appeal against the Hong Kong Court of First Instance's decision was pending.

12.220 In the Singapore suit before Kwek J, Woo sought to enforce the three foreign judgments (that is, the judgments obtained from the Seoul High Court, Korean Supreme Court and the Supreme Court of the State of New York) by way of a common law action.[333]

12.221 Spackman decided, at the last minute of the trial of the Singapore suit, to not give evidence before the court and to be cross-examined. There was no good reason for Spackman's absence notwithstanding his having agreed in advance to attend trial. As a result, Spackman's affidavit of evidence-in-chief was not received in evidence, save for portions that Woo was willing to accept.[334]

12.222 Spackman's first argument against the enforcement of the Seoul High Court judgment related to time bar. The Singapore suit was commenced by Woo on 25 February 2019. Spackman cited s 6(1)(*a*) of the Limitation Act, which states that an action founded on a contract shall not be brought after the expiration of six years from the date on which the cause of action accrued, and argued that the cause of action accrued when the Seoul High Court judgment became "final and conclusive" on 29 September 2011, the date that judgment was pronounced. On this basis, Spackman argued that Woo was not able to enforce the Seoul High Court judgment because the limitation period for its enforcement had expired.[335] Furthermore, as both Woo's and Spackman's Korean law experts agreed that the Seoul High Court could not vary or set aside its own judgment, Spackman therefore argued that the Seoul High

332 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [10].
333 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [1] and [17].
334 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [12]–[16].
335 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [19]–[20].

Court judgment was final and conclusive when it was pronounced on 29 September 2011.[336]

12.223 Woo argued that the Seoul High Court judgment only became final and conclusive from the moment the Korean Supreme Court judgment was rendered on 31 October 2013, affirming the decision in the Seoul High Court judgment.[337]

12.224 On the question of whether a foreign judgment is final and conclusive, Spackman submitted that this was an issue to be decided under Singapore law and not under foreign law, that is, law of the foreign judgment issuing court. Spackman further argued that the principle articulated in *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK*[338] ("*Humpuss*"), that finality is to be assessed from the perspective of the foreign court, was said in the context of issue estoppel and was therefore inapplicable in the context of enforcement of a foreign judgment.[339]

12.225 Kwek J rightly rejected both arguments from Spackman on the finality issue. First, whether a foreign judgment is final is something to be decided by asking whether the foreign court would regard that judgment as final and conclusive. This is why it is necessary to have evidence of foreign law.[340] Therefore, Spackman was wrong to argue that finality is an issue to be decided by the *lex fori* – in this case, Singapore law.

12.226 Second, the argument that principles articulated in issue estoppel context can be distinguished from principles articulated in the context of enforcement of foreign judgments is surely unsustainable. A foreign judgment must first be recognised before it can be enforced in Singapore,[341] and issue estoppel is simply a result of recognising or giving effect to a foreign judgment.[342] Spackman's attempt to distinguish principles articulated in *Humpuss* as inapplicable in Woo's context was therefore correctly dismissed by Kwek J.

336 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [30].
337 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [21].
338 [2016] 5 SLR 1322.
339 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [27]–[28].
340 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [32], [35(a)] and [42]. See also *Eleven Gesellschaft Zur Entwicklung Und Vermarktung Von Netzwerktechonologien MBH v Boxsentry Pte Ltd* [2014] SGHC 210 at [79].
341 *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545 at [15].
342 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [65].

12.227 Kwek J reaffirmed the two aspects of finality of foreign judgments:[343]

> (a) The first aspect of finality applies when *res judicata* is being invoked in respect of a domestic or a foreign judgment. A final decision is one which cannot be varied, re-opened or set aside by the court that delivered it.
>
> (b) The second aspect of finality applies only to foreign judgments, that is, finality is assessed by asking whether the foreign court rendering the judgment would regard that judgment as final and conclusive. It would verge on absurdity that a Singapore court should regard as conclusive something in a foreign judgment the foreign issuing court would not itself regard as conclusive. The fact that a judgment may be altered or varied on appeal would not render that judgment any less final or conclusive.

12.228 The authors would go on to suggest that another good indicator of whether a foreign judgment is final and conclusive is whether that foreign judgment can already be enforced in that jurisdiction. Of course, a foreign judgment is no less final and conclusive even though execution proceedings had been stayed.[344] But if that foreign judgment is not subject to any stay of enforcement/execution in that foreign jurisdiction, then this is all the more another indicator that that foreign judgment is "final and conclusive" from the perspective of the foreign issuing court.

12.229 On the facts, Kwek J found that both Korean law experts agreed that a Korean judgment becomes "final" when it is no longer amenable by the same court. Such a "final" judgment becomes conclusive (that is, *res judicata*) when the decision is either no longer subject to further appeal or all the appeals have been resolved. Thus, in both experts' views, the Seoul High Court judgment became "final and conclusive" when the Korean Supreme Court affirmed the Seoul High Court judgment on 31 October 2013. In other words, the matters were not *res judicata* until the Korean Supreme Court's determination on 31 October 2013. The limitation period therefore only started running from 31 October 2013.[345]

12.230 Kwek J also found another justification for his approach in s 4(1)(*a*) of the REFJA, which provides that a person may apply to register a foreign judgment within six years after the date of any appeal decision

343 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [31]–[34] and [36].
344 *Manharlal Trikamdas Mody v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 at [142].
345 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [43]–[45].

against that foreign judgment in the foreign jurisdiction. Kwek J reasoned that the common law should generally be developed in a manner that is compatible and consistent with the REFJA, which covers a broadly similar area.[346]

12.231 If Kwek J's position is that at common law, a foreign judgment is only "final and conclusive" after the appeal is disposed of (and therefore the limitation period only starts running from the date the foreign appellate court affirms the lower foreign court's decision), then this appears a rather unsustainable and untenable position. As pointed out by Philip Jeyaretnam JC in *Malysian Trustees Bhd v Tan Hock Keng*,[347] the context in which "appeal" is used in REFJA is similar to the enforcement of foreign judgments at common law: a foreign judgment would still be taken to be "final and conclusive" even though it could be subject to a pending appeal.[348] On the facts, the limitation period only started running from the date of the Korean Supreme Court judgment because under Korean law, the Seoul High Court judgment was deemed to be final only when the decision was either no longer subject to further appeal or all the appeals had been resolved.[349]

12.232 The second argument raised by Spackman against enforcement was that the Seoul High Court judgment was not a judgment on the merits.[350] Spackman cited *Poh Soon Kiat v Desert Palace Inc*[351] as authority for the proposition that a judgment must be on the merits before it can be enforced at common law.

12.233 Kwek J found that the Seoul High Court judgment was one "on the merits". For a judgment to be "on the merits":[352]

> (a) the judgment must establish certain facts as proved or not in dispute;
>
> (b) the judgment must state the relevant principles of law applicable to such facts; and
>
> (c) the judgment must express a conclusion with regard to the effect of applying those principles to the factual situation concerned.

346 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [46]–[48].
347 [2021] SGHC 162.
348 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 at [21]–[22]. See also (2021) 22 SAL Ann Rev 268 at 361–362, para 12.263.
349 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [43].
350 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [49].
351 [2010] 1 SLR 1129.
352 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [52].

12.234 On the facts, the Seoul High Court judgment did establish certain facts based on the Deemed Confession Rule, state the relevant principles of law, apply the law to the facts and express a conclusion. The Seoul High Court's application of the Deemed Confession Rule in establishing its finding of facts did not make that foreign judgment any less of a judgment on the merits.[353]

12.235 While Kwek J did not expressly state that Spackman's argument on the merits requirement was dismissed, Kwek J did identify the principle that a default judgment obtained in a foreign court can also be considered "final and conclusive". Kwek J went on to observe that a judgment can still be on the merits of the case even if the plaintiff won the case as a result of the defendant's failure to appear or enter a defence.[354] Therefore, Spackman must be wrong to argue that there is a requirement for the judgment to be one "on the merits".

12.236 Perhaps the conceptually neater way is to accept the position that, to enforce a foreign judgment, that judgment need only be a "money judgment" and be one that is "final and conclusive".[355] In other words, there is no separate requirement for that foreign judgment to be one "on the merits". This explains why a consent judgment can also be recognised in Singapore even though it is not obtained through a judicial examination and pronouncement on the merits.[356]

12.237 The third argument mounted by Spackman was that the Seoul High Court did not have international jurisdiction over him as he did not submit to the jurisdiction of the Seoul District Court or the Seoul High Court, and did not take part in the proceedings before these courts.[357] On the other hand, Woo argued that Spackman had voluntarily submitted to the jurisdiction of the Seoul High Court by appealing against the Seoul High Court judgment on the merits.[358]

12.238 Woo's position was rightly accepted by Kwek J. Kwek J found that Spackman had submitted to the jurisdiction of the Korean courts and the Seoul High Court when Spackman filed and participated in the appeal against the Seoul High Court judgment to the Korean Supreme Court. Spackman also filed and participated in a related retrial application to

353 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [56].
354 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [54].
355 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [50].
356 *Cost Engineers (SEA) Pte Ltd v Chan Siew Lun* [2016] 1 SLR 137 at [60].
357 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [58].
358 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [59].

the Seoul High Court, and later unsuccessfully appealed to the Korean Supreme Court on the Seoul High Court's refusal to order a retrial.[359]

12.239 In particular, Spackman took those steps in the Korean courts without raising any issues in respect of the Korean courts' jurisdiction.[360] The authors would go further to say that it would be difficult for Spackman to successfully argue that he did not submit to the Korean courts' jurisdiction even if he did raise issue in respect of the Korean courts' jurisdiction. Taking a leaf out of the Court of Appeal's decision in *Shanghai Turbo Enterprises Ltd v Liu Ming*,[361] Spackman's conduct, that is, seeking to reverse the Seoul High Court judgment on the merits, "unequivocally signified his acceptance and invocation of the court's jurisdiction and could not be realistically construed in any other way".[362]

12.240 In other words, a foreign defendant in Spackman's scenario has three options:

(a) If the foreign defendant takes the view that there was no jurisdiction over him by the foreign court, the defendant ought to and is expected to appeal solely on the basis that there was no existence of jurisdiction, rather than appeal against the lower foreign court's decision on the merits. By inviting the appeal court to decide in his favour on the merits, the defendant must be taken to have submitted to the jurisdiction of the original court.[363]

(b) Assuming the foreign defendant has no assets for the foreign plaintiff's enforcement in that foreign jurisdiction, the defendant takes a risk and challenges the foreign plaintiff's ability to establish "international jurisdiction" when seeking to enforce that foreign judgment in Singapore. If indeed, as what Spackman suggested, there are concerns of enforcement of the default judgment in that foreign jurisdiction, then without submitting to that foreign court's jurisdiction, the foreign defendant appears to only be left with option (a) above.

(c) The foreign defendant appeals on the merits (that is, what Spackman did in this case) and will be taken by Singapore courts to have submitted to that foreign jurisdiction.

359 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [65]–[66].
360 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [65].
361 [2019] 1 SLR 779.
362 See (2019) 20 SAL Ann Rev 251 at 270, para 11.65.
363 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [62] and [64].

12.241 The fourth argument raised by Spackman against enforcement at common law was that the manner in which Woo obtained the Seoul High Court judgment was in breach of natural justice. The burden for establishing breach of natural justice rested on Spackman.[364]

12.242 Spackman submitted that breaches of natural justice could extend beyond the two categories identified in *Paulus Tannos v Heince Tombak Simanjuntak*,[365] that is, the concepts of notice and of the opportunity to be heard.[366]

12.243 On the facts, Kwek J first found that there was no breach of natural justice based on the two categories identified in *Paulus Tannos v Teince Tombak Simanjuntak*. Due notice in this context is concerned with notice of the proceedings and not of the steps necessary to defend those proceedings. If the defendant had knowledge of the foreign proceedings, the lack of due notice defence cannot be used by that defendant:[367]

> (a) Spackman had notice of the case against him in the Seoul High Court when Spackman was personally served with the appeal documents on 21 April 2011. This was not disputed by the parties.[368]
>
> (b) Spackman even went further to say in his affidavit that he had chosen not to appear at the proceedings before the Seoul High Court because he took the view that Woo's claims were completely frivolous and vexatious, and this view had already been vindicated and reinforced by the Seoul Central District Court.[369]

12.244 Spackman's argument that the categories of breach of natural justice are not confined to the two categories described above must conceptually be correct. Woo, on the other hand, not only argued that the extension of breach of natural justice beyond the two identified categories is not part of Singapore law, but also argued that the court has no discretion to withhold recognition of foreign judgments at common law.[370] Kwek J appears to have agreed with Woo when Kwek J criticised Spackman for providing "no legal authority to support the extension of breach of natural justice to include a breach of a reasonable expectation

364 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [68]–[69].
365 [2020] 2 SLR 1061 at [28].
366 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [73].
367 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [70].
368 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [4] and [71].
369 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [71]–[72].
370 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [76]–[78].

that the procedural rules of the foreign justice system are complied with".[371]

12.245 But, as suggested in an earlier review, the Court of Appeal in *Paulus Tannos v Heince Tombak Simanjuntak*[372] acknowledged, without express disapproval, that there have been suggestions that the categories of what could amount to breach of natural justice are not closed. This position in itself opened the door for further arguments, and a good starting position, as suggested in the earlier review, is whether there has been proof of substantial injustice caused by the proceedings.[373]

12.246 In any event, Spackman failed to specifically identify what other categories of breach of natural justice there could be, but instead went on to give particular events relating to the Korean proceedings that supposedly offended notions of substantial justice. Spackman's argument was that "the procedural irregularity led to the [Seoul High Court judgment] being obtained in circumstances contrary to the requirements of natural justice".[374] Many of Spackman's identified events were actually arguments that sought to attack the merits of the underlying claim in the foreign judgment, which a Singapore court in the context of enforcing a foreign judgment at common law will not examine:[375]

> (a) Spackman claimed that it offended notions of substantial justice for him to remain liable under the Seoul High Court judgment because of the application of the Deemed Confession Rule, notwithstanding that the claim by Woo was one of conspiracy between the defendants and that the Korean courts had declared some other co-defendants innocent of any wrongdoing on the facts.[376] This is plainly an argument on the merits of the Seoul High Court judgment.
>
> (b) Spackman claimed that causation was not found by the Korean courts, who found that there were no acts which caused any loss or damage to Woo. Spackman further argued that the Seoul High Court ought not to have applied the Deemed Confession Rule without first giving him notice.[377]

371 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [82].
372 See para 12.242 above.
373 See (2020) 21 SAL Ann Rev 314 at 385, para 12.192.
374 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [75] and [81].
375 *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545 at [61].
376 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [75(a)].
377 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [75(b)] and [75(c)].

(c) Spackman further argued that he was deprived of the opportunity to remove the effect of the Deemed Confession Rule or substantially present his case by way of an appeal.[378] It is not clear if indeed, on the facts, Spackman was deprived of the opportunity to present his case on the application of the Deemed Confession Rule by the Seoul High Court. But Kwek J did find that a violation of the Deemed Confession Rule is a legitimate ground of appeal under Korean law, and on the facts, the correctness in the application of the Deemed Confession Rule was something that the Korean Supreme Court did conclude on.[379] This appears yet again to be another argument on the merits of the Seoul High Court judgment.

12.247 Kwek J appears to have rejected Spackman's argument on the Deemed Confession Rule on the basis that there is no requirement under Korean law for the defaulting party, that is, Spackman, to first be notified of the existence of the potential application of the Deemed Confession Rule.[380]

12.248 This is curious. Two defences available to enforcement of a foreign judgment at common law are that the enforcement would be contrary to public policy and the proceedings in which the foreign judgment was obtained were contrary to natural justice.[381] While keeping in mind how Singapore courts have repeatedly cautioned that they will be slow to pass judgment on the quality of justice obtainable in a foreign court,[382] the examination of whether proceedings were contrary to natural justice and whether enforcement would be contrary to public policy requires examination of the facts themselves as against concepts of public policy and natural justice from a Singapore law perspective, and not solely considering whether or not those complaints were permissible and/or justified under that relevant foreign law.

12.249 Kwek J also went to great lengths to explain that there was no breach of substantive justice when the Seoul District Court found in Spackman's favour and did not apply the Deemed Confession Rule. For one, this is odd, as Kwek J pointed out that Spackman was effectively

378 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [75(c)].
379 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [6], [80(c)] and [83]–[85].
380 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [83].
381 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 at [21].
382 *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [110], *per* Sundaresh Menon CJ. See also *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494, where Andrew Phang Boon Leong JC cautioned (at [18]) that "comity is to be observed in deed, and not merely in word".

claiming that there was a breach of natural justice because he succeeded before the Seoul District Court.[383] Leaving this oddity aside, the point is that Spackman had the opportunity, when he appealed against the Seoul High Court judgment, to dispute the applicability of the Deemed Confession Rule, or the lack thereof, before the Korean Supreme Court.[384] On this note, there can be no reasonable complaint of natural justice.

12.250 Kwek J also rightly considered that Spackman did not, in his appeal to the Korean Supreme Court, argue that the failure to apply the Deemed Confession Rule against him by the Seoul District Court constituted a breach of substantive justice.[385] This suggests that Spackman's submission was thus an afterthought. In examining whether there was proof of substantial injustice caused by the proceedings, the Singapore court should not ignore entirely the possibility of the correction of error within the procedure of a foreign court which itself provides fair procedural rules and a fair opportunity for remedy.[386] This seems to suggest that the allegation of breach of natural justice is one of "last resort". The Singapore defendant must be prepared to explain why it was not possible to remedy the complaint of breach of natural justice in the foreign jurisdiction. For example, the defendant may have some ground to stand on in a situation where the foreign plaintiff swiftly brings enforcement proceedings of that foreign judgment in Singapore before the foreign appeal proceedings remedying the breach of natural justice are even heard.

12.251 The last argument against the enforcement of the Seoul High Court judgment at common law was that the enforcement of that judgment would contravene Singapore's public policy. Spackman premised his argument on the fact that "there was no wrongdoing by Spackman and no damage suffered by Woo".[387]

12.252 Spackman further argued that "the sums ordered to be paid under the [Seoul High Court judgment] [were] punitive and/or manifestly excessive given the penal nature of the 20% interest rate that the Seoul High Court ordered to be payable on the judgment sum from 30 September 2011 until the date of full repayment".[388] Spackman asked that the punitive interest component part of the Seoul High Court judgment be severed.[389]

383 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [87].
384 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [6], [80(c)] and [84]–[85].
385 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [92].
386 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [92].
387 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [96].
388 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [96].
389 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [96].

12.253 On the facts, Kwek J accepted that the rationale behind the imposition of 20% interest rate in Korea, that is, "to deter litigants from delaying litigation and consequently delaying claimants from being able to enjoy the fruits of litigation", does not offend any "fundamental principle of justice" or ideas of "morality, decency, human liberty"; nor does it offend the general community in Singapore.[390] Kwek J therefore found that the enforcement of the Seoul High Court judgment would not be contrary to the public policy of Singapore.[391]

12.254 Turning to the Korean Supreme Court judgment, Kwek J agreed with Spackman that that the judgment was not enforceable in Singapore. Whether a foreign judgment is a money judgment should be determined according to that foreign law. On this basis, Kwek J agreed with Spackman that the language of the Korean Supreme Court judgment did not order Spackman to pay a definite sum of money to Woo.[392]

12.255 Kwek J's judgment on the unenforceability of the Korean Supreme Court judgment must be correct. It appears odd for Woo to be enforcing *both* the Korean Supreme Court and the Seoul High Court judgments. Given that at common law, foreign judgment is enforced as an action in debt,[393] the foreign judgment declaring the debt in this case was the Seoul High Court judgment. The Korean Supreme Court judgment merely confirmed the correctness of the Seoul High Court's decision, thereby rendering the Seoul High Court judgment "final and conclusive". It would have seemed appropriate for Woo to enforce the Seoul High Court judgment and bring in the Korean Supreme Court judgment as *evidence* to support his argument on the finality and conclusiveness of the Seoul High Court judgment, instead of enforcing the Korean Supreme Court judgment.

12.256 Kwek J also dismissed Woo's enforcement of the New York judgment in Singapore. This part of Kwek J's decision on the enforceability of a "judgment on a judgment" is interesting and is worth examining further.

12.257 On the facts, the New York judgment only declares the enforceability of the Seoul High Court judgment in New York, pursuant to the New York Civil Practice Law and Rules. The judgment expressly states:[394]

390 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [97] and [101].
391 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [101].
392 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [102]–[105].
393 See (2021) 22 SAL Ann Rev 268 at 342, para 12.211.
394 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [106].

> Plaintiff Sang Cheol Woo moved this Court for summary judgment in lieu of complaint against Defendant Charles C. Spackman, pursuant to N.Y. CPLR 3213 and 5303, for the recognition in New York of a foreign civil money judgment in the Republic of Korea … against Charles C. Spackman.

12.258 One of the reasons for Kwek J rejecting the enforceability of the New York judgment in Singapore appears to be that the judgment therein was only in relation to the enforcement of the Seoul High Court judgment against Spackman's assets in the state of New York and not in Singapore.[395]

12.259 This seems to be missing the point. It would also be logical to argue that this same argument could apply to the Seoul High Court judgment: that the Seoul High Court intended for its judgment to have effect against Spackman within Korea until and unless otherwise ordered. The real inquiry, for the purposes of enforcing a foreign judgment at common law in Singapore, should be whether or not the New York judgment created an obligation which the judgment creditor could sue to enforce in an action.[396] If it did, then the New York judgment should *also* be enforceable at common law against Spackman. The question then becomes whether the Singapore enforcing court would allow double recovery by the judgment creditor on what is essentially the same underlying debt, that is, arising from the Seoul High Court judgment. This could, for example, operate by way of a defence to the enforcement at common law,[397] that is, the enforcement of the New York judgment is arguably contrary to Singapore's public policy if the enforcement permits in effect double recovery.

12.260 Second, Kwek J also did not accept that the Hong Kong court's decision of *Morgan Stanley & Co International Ltd v Pilot Lead Investments Ltd*[398] ("*Morgan Stanley*") should form part of Singapore law.[399]

12.261 In *Morgan Stanley*, the Hong Kong court opined that a Singapore judgment, which in turn enforced a default judgment issued by the High Court of England, would be enforceable in Hong Kong if the judgment

395 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [107].

396 *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545 at [17]. See also *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [30], *per* Sundaresh Menon CJ.

397 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [73].

398 [2006] 4 HKC 93.

399 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [108], [109] and [112].

creditor adduced evidence that the Singapore judgment was final and conclusive under Singapore law.[400]

12.262 Kwek J declined to allow enforcement of a "judgment on a judgment" because Woo did not present any principled basis for regarding *Morgan Stanley* as good law in Singapore. Furthermore, Kwek J also agreed with Spackman that this approach could cause confusion especially when the plaintiff seeks to enforce both the original and "secondary judgment" in the same jurisdiction, in particular when both judgments are for different sums and at different interest rates.[401]

12.263 Another reason against the enforcement of a "judgment on a judgment" was that relating to time bar. It would appear that a foreign plaintiff can circumvent the issue of time bar and seek "unlimited extensions" by registering a foreign judgment in various jurisdictions before enforcing the last obtained foreign judgment in Singapore. This could again be dealt with by way of considering it as a defence to the enforcement at common law,[402] that is, the enforcement of the last secondary judgment is arguably contrary to Singapore's public policy if the enforcement permits an excessive extension of the time bar defence which would otherwise have been available to the judgment debtor had the judgment creditor sought to enforce the original foreign judgment in Singapore.

12.264 The last argument considered by Kwek J was Woo's argument that Spackman was estopped from relitigating the findings made in the Hong Kong judgment on the enforceability of the Seoul High Court judgment. This is a very odd argument. Spackman correctly argued that the Hong Kong judgment was concerned solely with the enforcement of the Seoul High Court judgment in Hong Kong, and not in Singapore.[403] Kwek J rightly dismissed Woo's argument on this point. There was simply no identity of issues. Even if there were similar arguments on breach of natural justice raised before the Hong Kong courts, those were breaches of natural justice examined under Hong Kong law. The issue of whether a foreign judgment should be refused recognition or enforcement because of a breach of natural justice is a question for the recognition court alone to answer.[404]

400 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [108].
401 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [111].
402 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [73].
403 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [114].
404 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [116].

12.265 In summary, Kwek J allowed Woo to enforce the Seoul High Court judgment in Singapore but not the Korean Supreme Court or the New York judgment.[405]

12.266 As a matter of strategy, it is understandable why Woo threw in the proverbial kitchen sink by seeking to enforce all three foreign judgments. Conceptually, it would appear that the enforcement of the Korean Supreme Court judgment was rightly disallowed.

12.267 While Kwek J's decision does establish a precedent that a "judgment on a judgment" cannot be enforced at common law in Singapore, the authors have tentatively preferred, on first principles, that such an approach is possible, with the ancillary issues to be addressed under the defences to enforcement of such judgments. It remains to be seen whether there will be judgment creditors who will attempt to enforce such a judgment moving forward.

B. Ha Chi Kut v Chen Aun-Li Andrew

Foreign judgments – Money judgments

Foreign judgments – Reciprocal Enforcement of Foreign Judgments Act 1959

12.268 Conventional wisdom dictates that common law doctrines on the recognition and enforcement of foreign judgments rest on the "obligation theory".[406] This theory holds that the fact that a foreign court renders judgment for a certain sum of money against a defendant whom it has international jurisdiction over creates an implied debt for that judgment sum which can be enforced in Singaporean courts. The obligation theory, however, often faces criticism, most recently brought by the Court of Appeal in *Merck Sharp & Dohme Corp v Merck KGaA*[407] ("*Merck*"), for "presupposing what it is supposed to explain",[408] that is, for failing to explain why the common law should enforce foreign judgments at all. These criticisms are effective because the obligation theory, properly understood, is a purely descriptive theory of how the common law "enforces" foreign judgments – it explains, at least in part, why the common law enforces certain kinds of foreign judgments but not others – and not a justificatory theory for why this happens. Instead, that justification, as the court noted in *Merck*, comes from "considerations

405 *Sang Cheol Woo v Spackman, Charles Choi* [2022] SGHC 298 at [118].
406 See Adrian Briggs, "Recognition of Foreign Judgments: A Matter of Obligation" (2013) 129(1) LQR 87.
407 [2021] 1 SLR 1102.
408 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [30].

of transnational comity and reciprocal respect among courts of independent jurisdictions":[409] courts enforce foreign judgments to ensure that private commercial parties' reasonable expectations of certainty in transactions and dispute resolution are upheld. Yet, despite the obligation theory's justificatory deficit, it continues to exert a strong influence on the enforcement of foreign judgments in Singapore, so much so that important facets of the law turn on it. The two decisions in *Ha Chi Kut v Chen Aun-Li Andrew*[410] ("*Ha Chi Kut*") and *Chen Aun-Li Andrew v Ha Chi Kut*,[411] in the General and Appellate Divisions of the High Court respectively, are a demonstration of this.

12.269 The foreign judgment in *Ha Chi Kut* arose out of Hong Kong proceedings commenced in 2003. A Hong Kong company sued its consultant, who counterclaimed for unpaid fees. In 2012, the Hong Kong Court of First Instance ("HKCFI") dismissed the company's claim and allowed the consultant's counterclaim, with costs awarded to the latter "to be taxed if not agreed".[412] In 2013, the consultant applied to have the company's director and sole shareholder made jointly and severally liable for the costs, and a judge of the HKCFI issued an order allowing this ("the 2013 Order"). Lengthy taxation proceedings commenced thereafter, prolonged by the consultant passing away and his widow joining herself as party, finally culminating in 2020 in a costs certificate issued by a taxing master of the HKCFI ("the 2020 Certificate"). The parties agreed that the 2013 Order and the 2020 Certificate had merged into a single judgment ("the Collective Judgment").[413]

12.270 In June 2021, the widow brought proceedings to register the Collective Judgment in Singapore under s 4(1) of the REFJA. The director applied to set aside registration on grounds that it would be contrary to s 4(1)(*a*), which stipulated that registration had to be "within 6 years after the date of the judgment".[414] The director argued that this date was that on which the 2013 Order was issued, because "the 2020 Certificate is not a judgment capable of being registered independently of the 2013 Order".[415] The widow responded that the six-year time limit ran from the date the 2020 Certificate was issued instead, because only then did a "judgment for an ascertainable amount of costs" arise.[416]

409 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [33].
410 [2023] 3 SLR 283.
411 [2023] 1 SLR 341.
412 *Ha Chi Kut v Chen Aun-Li Andrew* [2023] 3 SLR 283 at [6].
413 *Ha Chi Kut v Chen Aun-Li Andrew* [2023] 3 SLR 283 at [67].
414 *Ha Chi Kut v Chen Aun-Li Andrew* [2023] 3 SLR 283 at [33]–[34].
415 *Ha Chi Kut v Chen Aun-Li Andrew* [2023] 3 SLR 283 at [26].
416 *Ha Chi Kut v Chen Aun-Li Andrew* [2023] 3 SLR 283 at [27].

12.271 At first instance, Pang Khang Chau J concluded that the six-year time limit in s 4(1)(*a*) of the REFJA began from the date costs were taxed, and so upheld the Collective Judgment's registration. His reasoning proceeded in three steps. First, at common law, an action to enforce a foreign costs order would only be time barred six years after the date the costs were quantified. A common law action to enforce a foreign judgment arose only when there was a "foreign money judgment" (that is, a judgment for a "definite sum of money"), and this action, being one on an implied debt, was subject to the six-year limitation period under s 6(1)(*a*) of the Limitation Act.[417] Thus, the six-year limitation period "for enforcing … a [foreign] costs order would not commence until the amount of costs is quantified".[418] Second, under the pre-2019 version of the REFJA, the registration of a foreign cost order could similarly only be set aside for being out of time six years after the date the costs were quantified. Parliament had intended that the REFJA should replicate "the substantive principles of the common law applicable to foreign judgments in general",[419] and so the REFJA's six-year time limit for registration was meant to "provide the same period as was allowed at common law for bringing an action on a foreign judgment".[420] Third, while the 2019 amendments to the REFJA provided for the registration of foreign non-money judgments if the Minister by order specified that such judgments issued by specific foreign courts could be registered, the only Hong Kong judgments that could be registered under the REFJA remained money judgments.[421]

12.272 On this basis, Pang J held that the director's arguments, that the six-year time limit for the registration of the Collective Judgment under the REFJA began running when the 2013 Order was issued, were erroneous. Since under the REFJA, both pre- and post-2019, only Hong Kong money judgments could be enforced, and since a money judgment was a judgment for a definite sum of money, the 2013 Order, being an award for an indefinite not-yet-taxed sum of costs, was not (yet) a money judgment.[422] Instead, "[t]he Collective Judgment came into being as a judgment for an ascertainable amount of costs, and consequently as a final money judgment, when the 2020 Certificate was issued".[423] The widow's registration of the Collective Judgment was therefore not time barred.[424]

417 *Ha Chi Kut v Chen Aun-Li Andrew* [2023] 3 SLR 283 at [32]–[33].
418 *Ha Chi Kut v Chen Aun-Li Andrew* [2023] 3 SLR 283 at [35].
419 *Ha Chi Kut v Chen Aun-Li Andrew* [2023] 3 SLR 283 at [43].
420 *Ha Chi Kut v Chen Aun-Li Andrew* [2023] 3 SLR 283 at [47].
421 *Ha Chi Kut v Chen Aun-Li Andrew* [2023] 3 SLR 283 at [51]–[52].
422 *Ha Chi Kut v Chen Aun-Li Andrew* [2023] 3 SLR 283 at [61] and [64].
423 *Ha Chi Kut v Chen Aun-Li Andrew* [2023] 3 SLR 283 at [68].
424 *Ha Chi Kut v Chen Aun-Li Andrew* [2023] 3 SLR 283 at [74].

12.273 The director's appeal was dismissed by Debbie Ong JAD, delivering the High Court (Appellate Division)'s unanimous judgment. At this stage, the director argued that the date on which the Collective Judgment was issued was when the 2013 Order was issued, the 2013 Order being itself a money judgment under REFJA post-2019 amendments.[425] This was because the REFJA's "purpose and legislative object" had changed after the amendments, such that a money judgment should now be read as a judgment for "a sum of money although the quantum was not defined".[426] Ong JAD disagreed, essentially reasoning that all the 2019 amendments had done was expand on the kinds of judgments that could be registered under the REFJA, including several non-money judgments, without altering the definition of "money judgments" itself.[427] Her conclusion was buttressed by the facts that the REFJA itself continued to define a "money judgment" as a "judgment under which a sum of money is payable",[428] that the REFJA was meant to preserve "the rights at common law of foreign judgment creditors",[429] and that the REFJA operated separate schemes for the registration of money and non-money judgments.[430] Thus, the 2013 Order was not in itself an enforceable money judgment, because it did not create "a liability to pay a *sum of money*" [emphasis in original] – this happened only when it merged with the 2020 Certificate to create the Collective Judgment.[431]

12.274 If the High Court's two decisions in *Ha Chi Kut* seem unremarkable, this is only because of how undoubtedly correct they are as a matter of positive law. The common law has long recognised that an untaxed foreign cost order is unenforceable because "until taxation there [is] no final judgment".[432] This proposition flows directly from the obligation theory of foreign judgments. The reason why the common law permits the enforcement of only foreign judgments for a *definite* sum of money to be taxed is precisely that the "enforcement" of such a judgment proceeds by way of an action on a debt,[433] which is precisely an obligation to pay a definite sum of money. And the nature of the

425 *Chen Aun-Li Andrew v Ha Chi Kut* [2023] 1 SLR 341 at [4].
426 *Chen Aun-Li Andrew v Ha Chi Kut* [2023] 1 SLR 341 at [5].
427 *Chen Aun-Li Andrew v Ha Chi Kut* [2023] 1 SLR 341 at [9].
428 *Chen Aun-Li Andrew v Ha Chi Kut* [2023] 1 SLR 341 at [13]. See s 2 of the Reciprocal Enforcement of Foreign Judgments Act 1959 (2020 Rev Ed).
429 *Chen Aun-Li Andrew v Ha Chi Kut* [2023] 1 SLR 341 at [11].
430 The registration of the latter, unlike the former, being subject to the condition that registration be "just and convenient": see *Chen Aun-Li Andrew v Ha Chi Kut* [2023] 1 SLR 341 at [12]. See also s 4(3A) of the Reciprocal Enforcement of Foreign Judgments Act 1959 (2020 Rev Ed).
431 *Chen Aun-Li Andrew v Ha Chi Kut* [2023] 1 SLR 341 at [13].
432 *Beatty v Beatty* [1924] 1 KB 807 at 816.
433 See *Dicey, Morris & Collins on the Conflict of Laws* (Lord Collins of Mapesbury & Jonathan Harris gen eds) (Sweet & Maxwell, 16th Ed, 2022) at p 724, fn 95.

debt action permeates the structure of such enforcement proceedings at common law (and under statutory registration mechanisms like the REFJA) which usually culminate in a summary judgment (or skip straight ahead to execution post-registration) – the law can move so quickly precisely because, the debt having been established, its quantum is uncontroversial. The reasoning in *Ha Chi Kut* is thus unimpeachable in so far as the common law continues to embrace the obligation theory.

12.275 However, that *Ha Chi Kut* so categorically affirmed the orthodox obligation theory is itself of significance, especially in the wake of *Merck*. As observed above, the Court of Appeal in *Merck* disparaged the obligation theory as being capable only of describing why the common law enforces certain kinds of foreign judgments but not others, without explaining why the law enforces foreign judgments in the first place – only "comity", or the need to respect foreign laws and judgments to uphold parties' reasonable expectations, can do the latter. Yet, as Yeo Tiong Min SC has pointed out, "comity" suffers from the converse problem: it "can only explain the phenomenon of recognition, but the common law resorted to [the theory of] obligations to explain *which* judgments could be recognised" [emphasis added].[434] In other words, various common law rules on the requirements that must be met before a foreign judgment may be enforced in Singapore can only be explained if the law continues to embrace the obligation theory. The rule affirmed in *Ha Chi Kut*, that only foreign judgments for definite sums of money can be enforced, is a prime example. As Yeo notes:[435]

> In deploying the law of obligations to deal with foreign *in personam* judgments, the common law is committed to the requirement for a fresh action, for that is the only way to enforce an obligation in private law. If the rationale is no longer founded on private law and is based on transnational comity and mutual judicial respect, then there is no reason to adhere to the procedure mandated by the doctrine of obligations any further, and *foreign monetary and non-monetary judgments should in principle be directly enforceable.* [emphasis added]

12.276 Singapore's common law rules on the enforcement of foreign judgments thus face something of an existential crisis post-*Merck*, even if statutory regimes like the REFJA remain insulated because they remain based on the obligation theory. If the obligation theory is to be jettisoned at common law, long-standing common law rules like the requirement that foreign judgments be for definite sums of money must be rethought

434 Yeo Tiong Min, "The Changing Global Landscape for Foreign Judgments", lecture in Yong Pung How Professorship of Law Lecture 2021 (6 May 2021) at para 42.

435 Yeo Tiong Min, "The Changing Global Landscape for Foreign Judgments", lecture in *Yong Pung How Professorship of Law Lecture 2021* (6 May 2021) at para 69.

or (somehow) re-explained on the basis of "comity".[436] If the common law in this area is not to devolve into chaos – an outcome which the judgments in *Ha Chi Kut* seem at pains to avoid – guidance on why the rules are as they are, or on what the rules should be instead, is sorely needed.

C. Panircelvan s/o Kaliannan v Ee Hoong Liang

Foreign judgments – Defences – Fraud

Foreign judgments – Defencese Breach of natural justice

12.277 *Sang Cheol Woo*[437] considered the defence of breach of natural justice in an action to resist recognition and enforcement of a foreign judgment. *Ee Hoong Liang v Panircelvan s/o Kaliannan*[438] ("*Panircelvan*") takes a close look at the defence of fraud and to a lesser extent the defence of breach of natural justice.

12.278 It is not necessary to go into the facts save to say that the respondents had obtained a summary judgment against the appellant in the US courts. The respondents then sought common law enforcement of the US summary judgment in the Singapore courts which was allowed at first instance.

12.279 The matter was appealed to the High Court and dismissed. At the High Court, the appellant resisted recognition and enforcement on the basis that the US judgment had been obtained by fraud and was in breach of natural justice. The appellant then appealed to the High Court (Appellate Division), which also failed. In dismissing the appeal, the court made a number of observations about the defences of fraud and natural justice, which will now be discussed.

12.280 First, the appellant had alleged that fraud had been committed as the respondents had failed to disclose settlement payouts (from a class-action suit) in the US proceedings. The High Court (General Division) had opined that the respondents had failed to explain their failure to disclose the settlement payouts. The appellate court disagreed on this procedural point and opined that it was the appellant's burden to show that disclosure of the settlement payouts was required and that not doing so was dishonest. It was insufficient for him to merely assert dishonesty and to shift the burden to the respondents to explain their

436 The prospects for the latter seem dim: If comity requires respect to be given to foreign judgments to uphold parties' reasonable expectations, what is the concern that the judgment has established liability but not yet the quantum thereof?

437 See para 12.215 above.

438 [2022] SGHC(A) 40.

lack of disclosure.[439] This must be correct. It is trite that the person who asserts must prove. On this basis, the court opined that the appellant had failed to discharge his burden and the ground of fraud was not made out on this basis.[440] The court nonetheless went on to consider the parties' arguments on the point of fraud.

12.281 Second, the court acknowledged[441] that where fraud was concerned, the relevant authorities were the Court of Appeal cases of *Hong Pian Tee v Les Placements Germain Gauthier Inc*[442] and *Ong Ham Nam v Borneo Ventures Pte Ltd*[443] ("*Borneo Ventures*"). These authorities recognised the distinction between intrinsic and extrinsic fraud, and that the fundamental effect of this distinction is that with intrinsic fraud, new evidence must have become available which could not have come to light without reasonable diligence on the appellant's part.[444] The appellant was of course seeking to argue that the fraud was extrinsic, thereby being entitled to raise the matter without any new evidence.

12.282 *Borneo Ventures* characterises the difference between intrinsic and extrinsic fraud as:[445]

> (a) Extrinsic fraud refers to fraud taking place outside trial. This includes bribery of a solicitor, counsel, or a witness; collusion with a representative party to the prejudice of beneficial interest; fraud going to the jurisdiction of the court; and perjury during discovery.
>
> (b) Intrinsic fraud refers to fraud taking place within trial. This includes false statements made at the trial which were met by counter-statements by the other side, and adjudicated upon by the Court; fraud going to the merits of the judgment; and perjury at trial.

12.283 On appeal, and without much analysis, the court concluded the fraud was intrinsic as the appellant's argument went to the merit of the judgment, where the appellant had an opportunity to examine and challenge the fact that was alleged to be fraudulent.[446] This becomes clearer when read in the context of the High Court's helpful observations about the characterisation between intrinsic and extrinsic fraud. The High Court opined that "one key differentiating characteristic, is whether the alleged fraud took place within a trial process, where the party alleging fraud may have discovered the fraud or traced the connection between

439 *Ee Hoong Liang v Panircelvan s/o Kaliannan* [2022] SGHC(A) 40 at [7].
440 *Ee Hoong Liang v Panircelvan s/o Kaliannan* [2022] SGHC(A) 40 at [8].
441 *Ee Hoong Liang v Panircelvan s/o Kaliannan* [2022] SGHC(A) 40 at [14].
442 [2002] 1 SLR(R) 515.
443 [2021] 1 SLR 1248.
444 *Ee Hoong Liang v Panircelvan s/o Kaliannan* [2022] SGHC(A) 40 at [15].
445 *Ong Ham Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [49].
446 *Ee Hoong Liang v Panircelvan s/o Kaliannan* [2022] SGHC(A) 40 at [16].

the fraud and the judgment".[447] In cases of extrinsic fraud, it is harder for the fraud to be discovered and traced to the eventual judgment.[448] Where intrinsic fraud exists, a party engaged in the trial would be in a better position to discover the fraud and connect it to the judgment.[449]

12.284 Read together, it is clear that both the General and Appellate Divisions of the High Court agree that in this case, the fraud involved was intrinsic and, as such, new evidence was required.

12.285 The appellant had cited *Eleven Gesellschaft Zur Entwicklung Und Vermarktung Von Netzwerktechonologien MBH v Boxsentry Pte Ltd*[450] ("*Boxsentry*"), a case involving a default judgment where the court found that a failure to disclose facts amounted to extrinsic fraud. He argued that it was because there was no trial and that, by analogy, this reasoning should extend to summary judgments.[451] The court disagreed, drawing a distinction between a summary judgment and a default judgment. Unlike a default judgment, a summary judgment motion is one where the appellant had the opportunity to contest it. In this case, he did not; as such, the fraud was intrinsic.[452]

12.286 With respect, this presents a bit of a paradox. If the distinction between intrinsic and extrinsic fraud is whether it occurred within the trial process, that is, where the party alleging fraud may have discovered the fraud or traced the connection between the fraud and the judgment, then the appellant's argument is not far-fetched. In situations involving a default judgment and a summary judgment, there is technically no trial.

12.287 If the distinction is based on whether one had the opportunity to contest it, it is not entirely accurate to say that in a default judgment, the appellant would not have had the opportunity to contest it. Technically, if one has been validly served and chooses to do nothing thereby resulting in a default judgment, one still has the opportunity to contest. It may subsequently be objectionable for him to raise fraud on the basis of abuse of process or Henderson estoppel, but it should not turn on whether it was intrinsic or extrinsic.

12.288 It seems odd that in respect of the same behaviour, a failure to disclose is characterised as extrinsic in one situation and intrinsic in another. This occurred because the present court, while not bound by

447 *Panircelvan s/o Kaliannan v Ee Hoong Liang* [2022] SGHC 190 at [30].
448 *Panircelvan s/o Kaliannan v Ee Hoong Liang* [2022] SGHC 190 at [31].
449 *Panircelvan s/o Kaliannan v Ee Hoong Liang* [2022] SGHC 190 at [32].
450 [2014] SGHC 210.
451 *Ee Hoong Liang v Panircelvan s/o Kaliannan* [2022] SGHC(A) 40 at [17].
452 *Ee Hoong Liang v Panircelvan s/o Kaliannan* [2022] SGHC(A) 40 at [17].

Boxsentry, wanted to distinguish it from the facts in this case. Perhaps the cleaner solution would have been to overrule *Boxsentry*. Clarification from the Court of Appeal at an opportune time would be welcome.

12.289 Be that as it may, having found that this was a case of intrinsic fraud, the court turned its mind to the question of whether the non-disclosure would have come to light had the appellant exercised due diligence. It held that the appellant could have discovered the non-disclosure had it participated in the US proceedings. As such, the appellant failed on this ground.[453]

12.290 Third, the appellant also resisted recognition and enforcement based on breach of natural justice. While there was a largely factual inquiry about whether certain documents were before the US Court of Appeal, the High Court (Appellate Division) also made helpful clarifications in relation to breach of natural justice.

12.291 The appellant had relied on cases relating to the setting aside of arbitral awards for breach of natural justice. The court held that these cases were not relevant as a court determining a challenge to an arbitral award does so in exercise of supervisory jurisdiction. In contrast, where recognition and enforcement of a foreign judgment is being sought, the enforcing court does not exercise supervisory jurisdiction of that foreign court.[454]

12.292 The court went on to opine that where the defence of breach of natural justice was raised, the key question was whether due process had been accorded to the appellant in the court that issued the judgment.[455] This revolved around the question of whether the appellant had been given notice and had the opportunity of being heard.[456] On this, the court concluded that due process had been accorded to the appellant.[457] Sufficient notice had been given,[458] and the appellant had failed to avail

453 *Ee Hoong Liang v Panircelvan s/o Kaliannan* [2022] SGHC(A) 40 at [22]–[24].
454 *Ee Hoong Liang v Panircelvan s/o Kaliannan* [2022] SGHC(A) 40 at [29].
455 *Ee Hoong Liang v Panircelvan s/o Kaliannan* [2022] SGHC(A) 40 at [30].
456 *Panircelvan s/o Kaliannan v Ee Hoong Liang* [2022] SGHC 190 at [56], citing *Paulus Tannos v Heince Tombak Simanjuntak* [2020] 2 SLR 1061.
457 *Ee Hoong Liang v Panircelvan s/o Kaliannan* [2022] SGHC(A) 40 at [30].
458 *Panircelvan s/o Kaliannan v Ee Hoong Liang* [2022] SGHC 190 at [57].

himself of the opportunity to be heard on more than one occasion.[459] As such, the appellant also failed on this ground.

459 *Panircelvan s/o Kaliannan v Ee Hoong Liang* [2022] SGHC 190 at [59].