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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 number 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 and some from the High Court. For 2023, there are eight 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 case that are relevant to the field of conflict of laws.

II. Jurisdiction and stay of proceedings

12.2 It is trite that before a court can hear a matter, it must be seized of jurisdiction over the parties (as opposed to having "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

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.

2 *Allenger, Shiona v Pelletier, Olga* [2022] 3 SLR 353 at [1].

Court of Judicature Act 1969,[3] via (a) 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]

12.3 Where it concerns a foreign defendant however, there are requirements to be satisfied before the court will exercise its long-arm discretionary jurisdiction. The authors have discussed these requirements under O 11 r 1 of the Rules of Court 2014[6] and under O 8 r 1(1) of the Rules of Court 2021[7] ("ROC 2021") in earlier chapters.[8]

A. Beltran, Julian Moreno v Terraform Labs Pte Ltd

Jurisdiction – Submission – Step in the proceedings – Application for further and better particulars

Jurisdiction – Submission – Step in the proceedings – Application for production of documents

Jurisdiction – Submission – Step in the proceedings – Rules of Court 2021

Jurisdiction – Submission – Step in the proceedings – Striking out

12.4 A court may also have jurisdiction where a defendant has submitted to the jurisdiction of that forum. Where this has happened, the defendant would fail in his or her challenge on the existence of the forum's jurisdiction, but may nonetheless raise a *forum non conveniens* challenge.[9]

12.5 As covered in previous reviews, the key question in determining whether a party has submitted to a court's jurisdiction is whether the conduct evinces an "unequivocal, clear and consistent intention to submit to the jurisdiction of the court".[10] If the conduct can be explained on some

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 S 914/2021.
8 See Joel Lee Tye Beng, Leow Wei Xiang Joel & Marcus Teo Wei Ren, "Conflict of Laws" (2021) 22 SAL Ann Rev 268 at 271–277.
9 *Three Arrows Capital Ltd v Cheong Jun Yoong* [2024] 1 SLR 419 at [39], *per* Valerie Thean J.
10 See Joel Lee Tye Beng & Leow Wei Xiang Joel, "Conflict of Laws" (2019) 20 SAL Ann Rev 251 at para 11.64.

other basis which does not involve a submission to jurisdiction, it will not be interpreted as a submission.

12.6 Under the ROC 2021, the filing of a defence under O 6 r 7(4) is not a "submission to jurisdiction" because, among other things, there is an express "reservation" in O 6 r 7(4) of the ROC 2021. A defendant should therefore raise his challenge against jurisdiction at the first instance in his defence filed under O 6 r 7 of the ROC 2021, or he runs the risk of submitting to the jurisdiction of Singapore. It is this last scenario that merits more discussion and which was the subject of the decision in *Beltran, Julian Moreno v Terraform Labs Pte Ltd*[11] ("*Terraform*").

12.7 *Terraform* is a decision of two appeals. The first concerned the first defendant's appeal against the decision of the assistant registrar ("AR") for having dismissed an application for stay of proceedings on the ground that "the parties [had] agreed to refer their dispute to arbitration". The second concerned the second and third defendants' appeal against the AR's decision for having dismissed the application for stay of proceedings on case management grounds.[12]

12.8 The claimants were individuals who purchased cryptocurrency tokens ("UST") issued by the first defendant, Terraform, a Singapore-incorporated company in the business of developing software and applications on the Terra blockchain. Terraform also provided a platform for its development and sale of decentralised financial products and services. One of the projects Terraform built was the Anchor Protocol, a lending and borrowing platform where users could stake their UST in consideration for promised returns calculated on an annualised yield basis.[13]

12.9 The second defendant, Kwon Do Hyeong ("Kwon"), was Terraform's co-founder, shareholder, director and chief executive officer. The third defendant, Nikolaos Alexandros Platias ("Platias"), was Terraform's co-founder and head of research and also one of the co-founders of the Anchor Protocol. The fourth defendant, Luna Foundation Guard Ltd ("Luna"), was an organisation supporting the growth of the Terraform's UST platform.[14]

12.10 The originating claim was a representative action filed by two individuals on behalf of themselves and 375 other individuals.

11 [2024] 4 SLR 674.
12 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [1].
13 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [4].
14 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [5].

They sought relief against the defendants for, *inter alia*, making several misrepresentations that induced them to purchase the USTs, stake them on the Anchor Protocol and hold the UST while its value plummeted.[15]

12.11 Kwon and Platias allegedly made some of the misrepresentations on the UST ("Terra Representations") in a white paper published in April 2019, which also appeared on Terraform's website ("Terra Website").[16]

12.12 Platias also made some misrepresentations relating to the Anchor Protocol ("Anchor Representations") on the website of the Anchor Protocol ("Anchor Website") and another white paper published in July 2020.[17]

12.13 Some eight claimants were induced by the Terra Representations alone, some 195 claimants were induced by the Terra Representations and the Anchor Representations and some 174 claimants were induced by all the representations.[18] When the value of the UST plummeted, the claimants alleged that in reliance on the misrepresentations, they held onto their UST and sued for their loss and damage suffered in the sum of around US$65m.[19]

12.14 The parties did not dispute that both the Terra and Anchor Websites, where the claimants alleged the misrepresentations were made, contained terms requiring the parties to resolve disputes by arbitration. The Terra Website in particular also contained terms and conditions accessible via a hyperlink entitled "Terms of Use" ("Terra Terms of Use"). Clause 13 of the Terra Terms of Use stated that the terms shall be governed by the laws of Singapore and that any dispute shall be resolved exclusively by confidential, binding arbitration seated in Singapore in accordance with the SIAC Rules. The Anchor Terms of Service required the parties to resolve any dispute by arbitration in Singapore in accordance with the SIAC Rules.[20]

12.15 What is relevant for this review is the court's holding on "step in the proceedings". The law on taking a "step in the proceedings" is relevant in *Terraform* because Terraform was seeking to stay the proceedings under s 6(1) of the International Arbitration Act 1994,[21] *ie*, an application to the court to stay the proceedings, in light of an arbitration agreement

15 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [7].
16 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [8]–[9].
17 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [10].
18 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [12].
19 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [13].
20 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [14]–[17].
21 2020 Rev Ed.

to which the dispute in the proceedings related, before taking any step in those proceedings.[22]

12.16 The court examined three separate steps taken by Terraform and found that each of them, taken alone, showed that Terraform had submitted to the Singapore court's jurisdiction. This analysis is useful for litigants who wish to get out of an existing jurisdiction agreement. A Singapore claimant faced with a late jurisdictional challenge raised by the defendant, premised on a *foreign* jurisdiction agreement, may make a two-pronged argument.

12.17 First, that the defendant has submitted to the Singapore court's jurisdiction because the defendant has taken a step in the Singapore proceedings, which is the focus of the subsequent paragraphs. Second, that the claimant, by instituting Singapore proceedings in breach of the foreign jurisdiction agreement, has committed a repudiatory breach of that jurisdiction agreement and the defendant has, by engaging the claimant in the Singapore court proceedings on the merits of the dispute, accepted the claimant's breach of the jurisdiction agreement.[23]

12.18 Coming back to *Terraform*, the court repeated the following trite principles.

12.19 The starting position is that a "step in the proceedings" is an act which indicates an intention that the court proceedings should proceed instead of arbitration. This intention may be shown where the acts of the defendant are objectively inconsistent with the making and maintaining of a challenge to the court's jurisdiction. In other words, an act will be taken to be a "step in the proceedings" where it cannot be explained, except on the assumption that the defendant accepts that the court should be given jurisdiction, or that any objection to the (Singapore) court's jurisdiction has been waived or has never been entertained.[24]

12.20 An act which goes toward the advancement of a jurisdictional challenge will not constitute a "step in the proceedings", and this could include a request for further and better particulars ("FBPs") and a request for production of documents for the purpose of deciding whether to bring a jurisdictional challenge. But if these steps go beyond the purpose of deciding whether to bring a jurisdictional challenge and indicate that

22 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [36].
23 *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd* [2018] 2 SLR 1207 at [85].
24 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [37]–[38].

the defendant intends to defend the court proceedings, then such steps would be considered to be "steps in the proceedings".[25]

12.21 Certain acts may appear to engage the court's powers but are nevertheless consistent with a jurisdictional challenge.[26] For example:

> (a) A defendant resisting an injunction is generally seen as the defendant taking a step which merely parries a blow by the claimant, and does not constitute a "step in the proceedings". Such an act is not inconsistent with a jurisdictional challenge as it is meant to safeguard the defendant's position pending the determination of the jurisdictional challenge.[27]
>
> (b) Similarly, an application which was filed on the basis that the claimant had failed to obtain leave under the Companies Act before commencing proceedings against a company which was the subject of a judicial management application is not a "step in the proceedings" because the issue of leave had to be resolved before the question of a stay of the court could be addressed. Without leave to commence proceedings, the company could not rightfully be before the court. So, some applications which may relate to the propriety of the proceedings *in limine*, or at the threshold, are not inconsistent with a jurisdictional challenge even though they may appear to engage the court's powers.[28]

12.22 The court also (rightly, in the authors' opinion) clarified that the determining factor on whether a party has taken a step in the proceedings is not whether the acts taken by that party are procedural, but whether that party has employed court procedures to enable him to defeat or defend the proceedings on their merits. The focus is on whether the act itself enables or advances a future engagement of the merits of the action. The court's assessment, conducted on an objective basis, would be done in a practical and commonsensical way which considers the circumstances surrounding the defendant's act.[29]

12.23 Therefore, while an application for security for costs, or an application for disclosure of documents, or attending a summons for directions are procedural acts, they can be taken to indicate that the defendant intends to engage and advance the court proceedings.[30]

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25 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [39].
26 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [40].
27 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [40].
28 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [41].
29 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [43]–[44], [46] and [58].
30 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [43]–[44].

Another example would be an application for bifurcation of the hearing on liability and damages given that such applications are intended to ensure an efficient conduct of a trial on its merits.[31]

12.24 Therefore, an equivocal act, *ie*, an act which may be consistent with either acceptance of the court's jurisdiction or the maintenance of a jurisdictional challenge, will not be considered a "step in the proceedings". But the court also cautioned that it would look beyond the parties' claims that its actions were intended to support its jurisdictional challenge and examine whether the substance of the conduct was indeed so. The parties should not be allowed to equivocate or hedge their actions – they should be decisive in whether they are insisting on arbitration in preference to litigation, and disingenuous reservations will be disregarded.[32]

12.25 Under the former rules of court, a defendant seeking to challenge the jurisdiction of the court had no option to file a defence objecting to jurisdiction alone (as opposed to defence on the merits). The effect was to expose the defendant to the risk of a judgment in default of a defence being entered against him if he failed to file a defence within the stipulated deadline. A defendant seeking to challenge the jurisdiction of the Singapore court therefore had to be proactive by applying for a stay of proceedings and seeking an extension of time to file his defence until after the application for stay of proceedings had been determined.[33]

12.26 Under the ROC 2021, a defendant can file a defence contesting jurisdiction alone to avoid a default judgment. It is also expressly stated in the ROC 2021 that the filing of a defence contesting jurisdiction does not amount to a submission to the court's jurisdiction. This is to ensure that jurisdictional challenges are dealt with expeditiously with a view to prevent delays, and to ensure the efficient use of court resources and save costs. The ROC 2021 draws a clear distinction between a defence contesting jurisdiction alone and a defence on the merits of the claimant's claims. Order 6 r 7(4) of the ROC 2021 in particular provides that the defendant who is challenging the jurisdiction of the court need not file and serve a defence on the merits but must file and serve a defence stating the ground on which the defendant is challenging the court's jurisdiction.[34]

12.27 On this note, the court rightly rejected Terraform's argument that a defendant could choose to file a defence on the merits of the claims

31 See generally *Dai Yi Ting v Chuang Fu Yuan* [2023] 3 SLR 1574 on the purpose for bifurcation of the hearing on liability and damages.
32 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [45].
33 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [48]–[49].
34 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [50]–[52].

with a defence contesting jurisdiction of the Singapore court. This was against the plain reading of and rationale behind O 6 r 7(4) of the ROC 2021.[35] The court was also not sympathetic towards Terraform's counsel's admission that "Terraform may have been wrong in filing a [Defence with] paragraph-by-paragraph response". The court said that the transitional phase for the ROC 2021, during which the courts would be generally more sympathetic when dealing with non-compliance occasioned by lack of familiarity with the ROC 2021, ended on 30 June 2022. Importantly, whether Terraform or its counsel might have misunderstood the ROC 2021 was irrelevant as the court assessed whether a party had taken a "step in the proceedings" on an objective basis.[36]

12.28 Hri Kumar Nair J also repeated the trite principles that the making of a reservation by itself is not determinative of whether an act constituted a step in the proceedings.[37] Readers will recall from previous reviews that express reservations are relatively low in utility given that the key question is still whether the defendant's conduct evinces an unequivocal, clear and consistent intention to submit to the jurisdiction of the court.[38] An express reservation is not a panacea – it will not save an act that is inconsistent with the bringing of a jurisdictional challenge from being a "step in the proceedings".[39]

12.29 In fact, an express reservation under the ROC 2021 has even less utility than the case under the old ROC. Under the old ROC, a defendant had no option to file a defence to contest jurisdiction only. So, a defendant, in some cases, understandably would file a defence within the stipulated deadline with an express reservation to avoid a default judgment being entered against him. Under the ROC 2021, however, a defendant had the option of filing a defence contesting the jurisdiction alone, so there was no reason for a defendant to file a defence contesting the merits of the claim as well with an express reservation. This goes against the provisions of the ROC 2021, which is that a defendant seeking to challenge the jurisdiction of the Singapore court should promptly file a defence stating the ground upon which the defendant seeks to challenge the jurisdiction.[40]

35 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [54]–[55].
36 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [58].
37 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [59]–[60].
38 See Joel Lee Tye Beng, Leow Wei Xiang Joel & Marcus Teo Wei Ren, "Conflict of Laws" (2021) 22 SAL Ann Rev 268 at para 12.84.
39 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [64].
40 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [60]–[62].

12.30 But the court acknowledged that express reservations could still be of some use, *eg*, in affidavits, where the defendant may, if his statements are equivocal, include a reservation to make his position clear.[41]

12.31 The court then examined Terraform's conduct in the proceedings, *ie*, (a) Terraform filed a defence on the merits and a counterclaim; and (b) Terraform filed a single application pending trial ("SAPT") seeking substantive reliefs relating to the merits of the action, including a request for FBPs, request for production of documents and an application to strike out the claims.[42]

12.32 First, Terraform's filing of a defence on the merits was a step in the proceedings because Terraform need not have filed a defence on the merits if Terraform indeed wanted to challenge the jurisdiction of the Singapore court. In other words, Terraform's filing of a defence on the merits affirmed the correctness of the court proceedings and demonstrated its willingness to accede to the court's jurisdiction on the matter. The reservations Terraform included in its defence, *ie*, the "Defence is filed without prejudice to [Terraform's] contention that the Court has no jurisdiction over the case and/or should not exercise jurisdiction over the case … and is not to be construed as a submission to the jurisdiction of the Court", do not change the court's analysis that Terraform had submitted to the court's jurisdiction.[43]

12.33 Second, Terraform sought, unsuccessfully, to further argue that its filing of the defence on the merits was a "neutral procedural step" because it was not certain of its position on jurisdiction since there was a lack of information in the statement of claim and that the claimants only served their FBPs on 13 January 2023, after Terraform filed its defence on 24 November 2022.[44] The court rightly rejected this argument. If Terraform indeed needed more time to confirm whether it wished to file a jurisdictional challenge, it could have applied for an extension of time to file its defence contesting jurisdiction until after the FBPs had been served on it, or taken other steps to resolve the uncertainties surrounding the potential jurisdictional challenge.[45]

12.34 The court also found that Terraform's filing of a counterclaim was an acceptance of the court's jurisdiction to decide on the merits of the dispute.[46] The court's position here was curious, not least because

41 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [64].
42 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [66].
43 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [20] and [71].
44 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [73].
45 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [73]–[74].
46 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [75].

a defendant could submit to the jurisdiction of the Singapore court in respect of a claim in the statement of claim, but not necessarily so in respect of other claims in the same statement of claim. In other words, the submission of one claim or dispute to a particular court does not necessarily mean that all other claims or disputes between the parties had also been submitted to the same court.[47] On the facts, it was not clear what were the "various declarations" counterclaimed by Terraform but if they related to the same claims advanced by the claimants, then Nair J would have been right to say that Terraform's filing of the counterclaim was an acceptance of the Singapore court's jurisdiction. The court also disregarded Terraform's "disingenuous reservations" in the defence and counterclaim.[48]

12.35 Third, instead of filing their application to challenge the court's jurisdiction according to the timeline directed by the court and agreed between the parties, on 6 February 2023, Terraform filed a "Request for Permission to File Application" ("Request Application") which sought the court's permission to file an application for various reliefs, including FBPs, production of documents, striking out and stay of proceedings.[49] At a case conference on 8 February 2023, the court informed the parties that the Registry would reject the Request Application and the court granted the defendants, including Terraform, more time to file the jurisdictional challenges.[50]

12.36 The filing of the Request Application, in the court's view, constituted a "step in the proceedings". The court rightly rejected the argument that it mattered not that the Request Application was rejected by the court. What mattered was that Terraform filed such an application which was unrelated to Terraform's jurisdictional challenge, and which therefore evinced an intention to submit to the court's jurisdiction.[51] Even an application that was withdrawn or one which the party no longer wished to proceed with could not undo the "step" taken in the proceedings amounting to a submission to jurisdiction.[52]

12.37 Fourth, the FBPs Terraform sought went beyond what was necessary to ascertain the applicability of the arbitration clauses to the claims in the suit. An application for FBPs would not constitute a "step in the proceedings" if it was sought to guide the defendant as to

47 Joel Lee Tye Beng, Leow Wei Xiang Joel & Marcus Teo Wei Ren, "Conflict of Laws" (2021) 22 SAL Ann Rev 268 at para 12.86.
48 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [20] and [75].
49 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [26].
50 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [28].
51 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [80]–[83].
52 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [83].

whether he should allow the action to proceed in court or apply for a stay of proceedings. But the FBPs Terraform sought did not concern its jurisdictional challenge. Instead, they related to merits of the claimant's claims for a breach of contract, deceit and conspiracy. Such requests would only be necessary if Terraform accepted the court's jurisdiction and intended to engage the Singapore court over the merits of the suit.[53]

12.38 Another set of FBPs requested by Terraform also related to the quantum of damages which it might be liable to the claimants. These requests were again inconsistent with Terraform's jurisdictional challenge and there was no reason why such information was needed unless it intended to engage the court's jurisdiction to assess the quantum of damages.[54]

12.39 Terraform also argued that even if a request for FBPs might not have clearly related to jurisdiction, it might have had relevance to the overall case which a party wished to bring to support its jurisdictional challenge or it might have been necessary for the party to determine if the asserted claim(s) fell within the scope of the arbitration agreement. The court rejected Terraform's argument. On the facts, Terraform failed to explain how its request for FBPs were relevant to its jurisdictional challenge.[55]

12.40 The court also rightly rejected Terraform's argument that it had made the request for FBPs on behalf of the other defendants who were fully entitled to address the claimants' claims in court.[56] Even if this were true, it did not change the fact that Terraform had, objectively, taken a "step in the proceedings". In any case, the other two defendants had been properly named as parties to the originating claim so there was no reason why those two defendants could not have filed those FBPs on their own and needed Terraform to file the request for them.

12.41 Fifth, Terraform's application to strike out the proceedings was also taken to have been a "step in the proceedings". A striking out application on the basis that it was unmeritorious signified a submission to the court's jurisdiction to resolve the dispute on the merits.[57]

12.42 Here, Terraform sought to strike out the suit on various bases, including on the basis that: (a) the claimant's pleaded claims lacked material averments and/or particulars and/or disclosed no reasonable

53 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [84]–[87].
54 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [92]–[94].
55 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [88]–[89].
56 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [90].
57 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [95].

cause of action; (b) there was a lack of sufficient common interest between the claimants for the action to have continued as representative proceedings; and (c) that some of the claimants had not been authorised to bring the representative proceedings.[58]

12.43 The first identified basis, *ie*, that the pleaded claims lacked material averments and/or particulars, was clearly inconsistent with Terraform's jurisdictional challenge. The court viewed that part of the application was an invitation for the court to exercise its jurisdiction over the action by assessing whether the pleaded claims contained sufficient particularity.[59] Asking the court to examine the allegations in the pleadings to determine if there is a cause of action which has some form of success relates directly to the merits of the claim and is also inconsistent with Terraform's jurisdictional challenge.[60]

12.44 The second basis, *ie*, the propriety of the suit as a representative action, was also inconsistent with Terraform's jurisdictional challenge. If Terraform was contesting jurisdiction on the basis of the arbitration clauses, there was no reason for it to have asked the court to determine the propriety of the suit as a representative action unless it was inviting the court to exercise jurisdiction over the suit.[61]

12.45 Sixth, Terraform's request for production of certain representative action agreements was also inconsistent with its jurisdictional challenge. Those agreements were relevant to the propriety of the representative action and had nothing to do with Terraform's jurisdictional challenge. Whether the representative claimants had obtained proper written consent to bring the suit had nothing to do with whether the claim should be arbitrated.[62]

12.46 Finally, the court also considered and rightly rejected Terraform's argument that the SAPT was a "fall-back application". This was not even necessary under the ROC 2021 where a defendant could simply have filed a defence contesting jurisdiction alone. Under the ROC 2021, a SAPT was only relevant and invoked after the jurisdictional challenge was heard and dismissed.[63]

12.47 Overall, the court found that Terraform had taken various steps in the proceedings, including the filing of the Request Application and the

58 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [96].
59 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [97].
60 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [101].
61 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [99]–[100].
62 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [104]–[107].
63 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [108]–[116].

SAPT (which included the request for FBPs, production of documents and striking out applications). This demonstrated that Terraform had employed court procedures to enable it to defeat or defend the suit on the merits in the Singapore court. Accordingly, Terraform had waived its right to object to the court's jurisdiction.[64]

12.48 Although the court was dealing with arbitration clauses in *Terraform*, the principles articulated and applied there are equally applicable to a claimant seeking to defeat a defendant's challenge of the Singapore court's jurisdiction on the basis of a foreign jurisdiction clause, assuming the defendant has taken "step(s) in the proceedings". Alternatively, these principles could also be relevant to situations where a defendant seeks to argue Singapore is *forum non conveniens*.

B. Xitrans Finance Ltd v Rappo, Tania

Forum non conveniens – Lifting stay of proceedings – Delay in foreign proceedings

Forum non conveniens – Lifting stay of proceedings – Time bar

12.49 In the 2017 Annual Review of Singapore Cases, the authors covered the decision in *Xitrans Finance Ltd v Rappo, Tania*[65] ("*Rappo*"), where the Court of Appeal granted a *forum non conveniens* stay of proceedings in favour of the Swiss courts.[66] Six years later, one of the respondents in the appeal, Xitrans Finance Ltd ("Xitrans"), applied to partially lift the stay of proceedings *vis-à-vis* the appellants, *ie*, Yves Charles Edgar Bouvier ("Bouvier"), MEI Invest Limited ("MEI") and Tania Rappo ("Rappo"). The other appellant was Accent Delight International Ltd ("Accent"). Both Accent and Xitrans were British Virgin Islands-incorporated companies owned by the family trusts of Dmitry Rybolovlev[67] ("Rybolovlev").

12.50 Rappo, Rybolovlev and MEI Invest will be collectively referred to as the "Appellants". Accent and Xitrans will be collectively referred to as the "Respondents".

12.51 The facts can be briefly recapped as follows. In or around 2000, Rappo first met Rybolovlev. She became close to the Rybolovlev family. Rappo later introduced Bouvier, a businessman in the international art scene, to Rybolovlev. Bouvier controlled and used MEI Invest for his

64 *Beltran, Julian Moreno v Terraform Labs Pte Ltd* [2024] 4 SLR 674 at [117]–[118].
65 Joel Lee Tye Beng, "Conflict of Laws" (2017) 18 SAL Ann Rev 284 at paras 11.28–11.48.
66 [2023] SGCA 22.
67 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [2]–[3].

business purposes. Since 2002, Bouvier was involved in Rybolovlev's acquisition of artwork. Over this period, Bouvier was specifically involved in Rybolovlev's acquisition of 38 pieces of art. Out of these 38 pieces of art, six were acquired between August 2003 and July 2007 ("Category 1 Transactions"), two were acquired between July 2007 and December 2007 ("Category 2 Transactions") and 30 were acquired between February 2008 and September 2014 ("Category 3 Transactions").[68]

12.52 Xitrans applied to partially lift the stay over the Category 1 and 2 Transactions. For these transactions, Xitrans was the purchaser and this was why Accent was not involved in the applications.[69]

12.53 Sometime towards the end of 2014, the relationship between Bouvier and Rybolovlev broke down. In December 2014, Rybolovlev learned from the seller of one of the paintings that the seller received only US$93.5m in sales proceeds. Accent, however, had paid Bouvier US$118m for that same painting. This led Rybolovlev to believe that Bouvier had been dishonestly inflating sale prices for many of the artwork he had purchased through Bouvier.[70]

12.54 On 9 January 2015, Accent's and Xitrans' Swiss lawyer made a criminal complaint in Monaco against "Bouvier and any participant" in the purchases. On 27 February 2015, the Swiss lawyer wrote to the investigating judge of the criminal complaint to join Rappo and Rybolovlev's daughter as civil parties to the proceedings against Bouvier.[71]

12.55 On 12 March 2015, Xitrans and Accent commenced the Singapore suit. They alleged that Bouvier had breached his fiduciary duties as their agent and committed the tort of deceit. Xitrans and Accent also alleged that MEI Invest and Rappo were liable for dishonest assistance and knowing receipt, and that all the Appellants conspired to wrongfully cause them loss.[72]

12.56 On 15 April 2014, Bouvier and MEI applied to stay the Singapore proceedings on the grounds that there was a *lis alibi pendens* in Monaco and that Switzerland was the appropriate forum for the determination of the Respondents' claims. On 22 April 2015, Rappo similarly applied for a stay of the Singapore proceedings on grounds that both Monaco and Switzerland were more appropriate fora than Singapore.[73]

68 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [3]–[4] and [9].
69 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [9].
70 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [10].
71 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [11].
72 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [12].
73 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [13].

12.57 On 17 March 2016, the Singapore High Court dismissed the applications for stay of Singapore proceedings. On 18 April 2017, the Singapore Court of Appeal allowed the appeal on, *inter alia*, the basis that Switzerland was clearly the more appropriate forum for the parties' dispute.[74]

12.58 Before the Court of Appeal in 2017, the Respondents argued that Switzerland was not available as a forum because, under the Swiss Federal Act on Private International Law of 18 December 1987 (the "PILA"), the Swiss courts did not have jurisdiction over the dispute. The parties called experts to testify on Swiss law and the Court of Appeal preferred the views of the Appellants' expert that the Swiss courts would have jurisdiction over the parties' dispute by virtue of the written undertakings of the Appellants that they "recognise[d] and accept[ed] the jurisdiction of the civil courts of Geneva, Switzerland, in respect of any dispute in connection with the sale of artworks to [the Respondents] and/or any related transactions".[75]

12.59 The Court of Appeal was satisfied that the written undertakings were sufficient to provide the Swiss courts with a firm footing on which to assume jurisdiction and that the language of the undertakings was broad enough to encompass the claims brought by the Respondents against the Appellants.[76]

12.60 At the hearing before the Court of Appeal in 2017, the Respondents' lawyers suggested that the written undertakings were not wide enough and that further challenges to the Swiss courts' jurisdiction could be expected. In response, both Bouvier's and Rappo's lawyers "clarified and confirmed to [the Court of Appeal] that the appellants' written undertakings were intended to be expressed in the 'widest possible sense' and, specifically, that the appellants would submit to the Swiss courts' determination on the merits of any claims that the respondents might bring against them in Switzerland in respect of the matters set out in [the Singapore suit]."[77]

12.61 These undertakings were given against the backdrop that a foreign court could be considered an available forum even if this came about only as a result of the defendant's voluntary submission to the

74 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [14]–[15].
75 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [16]; *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [94].
76 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [16]; *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [96], *per* Sundaresh Menon CJ.
77 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [16]; *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [97].

jurisdiction of that foreign court, even though it would not have been available without the defendant's undertaking.[78]

12.62 At the 2017 Court of Appeal hearing, the Respondents also argued that "if, for some reason, the Swiss courts decided not to assume jurisdiction were the proceedings in Singapore to be stayed, the Respondents would effectively be shut out from seeking any remedies for the wrongs which they have allegedly suffered." The Court of Appeal rightly rejected the argument then:[79]

> We do not agree. We have explained our view that the Swiss courts would have jurisdiction under the PILA, given the undertakings from the appellants to submit to adjudication there. Apart from this … if the Swiss courts were to decide, upon a commencement of an action by the respondents there, that they do not have jurisdiction, it will be open to the respondents to return to the Singapore courts to seek an order lifting the stay so that they might continue to pursue their action here. After all … at the first stage of the *Spiliada* framework, the court is engaged in only a *prima facie* determination of whether there is some other available forum that is more appropriate for the trial of the case. Since a court which grants a stay remains seised of the proceedings and may in principle lift the stay at a later date … if the premise on which it decides to grant a stay should turn out to be mistaken or unduly optimistic, we see no reason why the stay cannot, in such 'exceptional circumstances which strike at the very basis on which the stay was granted', be revisited.

12.63 On 8 March 2017, the Respondents filed a criminal complaint with the Public Prosecutor's office in Bern, Switzerland, against Bouvier, Rappo and others in respect of the 38 acquisitions of artwork.[80]

12.64 Under Swiss law, one who has suffered harm as a result of an alleged criminal offence may obtain civil compensation by attaching their civil action to the criminal proceedings. The Respondents therefore also asserted their civil claims against Bouvier and Rappo in the criminal complaint pursuant to Art 119(2)(b) of the Swiss Code of Criminal Procedure.[81]

12.65 In September 2017, the criminal complaint was transferred from the Public Prosecutor's Office in Bern to the Public Prosecutor's Office

78 *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [98], *per* Sundaresh Menon CJ.

79 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [18]; *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [101], *per* Sundaresh Menon CJ.

80 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [20].

81 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [20].

in Geneva. On 16 October 2019, the Respondents filed a supplementary criminal complaint against Bouvier, MEI Invest and Rappo.[82]

12.66 Between March 2017 and the summer of 2020, the Swiss Public Prosecutor ("Swiss PP") investigated the criminal complaints. On 14 December 2020, the Swiss PP informed the parties that the Swiss criminal proceedings would be discontinued.[83]

12.67 On 29 January 2021, the Respondents wrote to the Swiss PP to object to the discontinuance of the Swiss criminal proceedings. On 12 May 2021, the Respondents sent a further letter to the Swiss PP to state that they would refer the matter to the Geneva Court of Appeal on the grounds of denial of justice unless the Swiss PP resumed the investigations.[84]

12.68 On 28 May 2021, the Respondents filed an application to refer the Swiss PP's discontinuance of the Swiss criminal proceedings to the Geneva Court of Appeal. On 15 September 2021, the Swiss criminal proceedings were formally discontinued by the Swiss PP through the issuance of a dismissal order. On 27 September 2021, the Respondents appealed against the Swiss PP's issuance of the dismissal order. On 26 July 2022, the Geneva Court of Appeal issued its decision. The Geneva Court of Appeal held that:[85]

> (a) There was no denial of justice or unjustified delay by the Swiss PP in the Swiss criminal proceedings.
>
> (b) The conditions for dismissal were not met. The continuation of the Swiss criminal investigations in keeping with fundamental rights of the accused persons was perfectly achievable.
>
> (c) That said, some of the transactions complained of occurred outside the 15-year limitation period for the investigation of criminal offences under Swiss law. For such transactions, the investigation could not be continued.
>
> (d) The dismissal order was thus annulled in respect of the offences which fell within the 15-year limitation period.

12.69 Given that the Geneva Court of Appeal's decision was given in July 2022, the Geneva Court of Appeal identified Category 1 Transactions

82 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [21].
83 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [22].
84 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [22].
85 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [22]–[24].

as those which fell outside the 15-year limitation period and for which the criminal investigations could not continue.[86]

12.70 Following the Geneva Court of Appeal's decision, the parties exchanged written correspondence on the status of the civil claims that could no longer be pursued in the Swiss criminal proceedings.[87]

(a) On 22 August 2022, the Respondents' Singapore lawyers, Drew & Napier LLC ("D&N"), wrote to Rappo's Singapore lawyers, Tan Kok Quan Partnership ("TKQP") and Bouvier's Singapore lawyers, Allen & Gledhill LLP ("A&G"). In that letter, D&N explained the effect of the Geneva Court of Appeal's decision and stated that the civil law claims asserted by the Respondents and committed prior to July 2007 could no longer be determined in the Swiss criminal proceedings. D&N also stated that the Respondents were nevertheless entitled to independently pursue civil law claims derived from the criminal offences committed prior to July 2007. D&N then asked A&G and TKQP to state by 31 August 2022 whether their respective clients took the same position.

(b) On 16 September 2022, A&G responded to say that Bouvier and MEI disagreed with Accent's and Xitrans' position as communicated in D&N's letter dated 22 August 2022.

(c) On 20 September 2022, TKQP informed D&N that Rappo "sees no reason to comment on [their] clients' position and rights under Swiss law … Indeed, it is [their] clients' prerogative to pursue any claims in Switzerland as they are entitled and advised by their Swiss counsel."

(d) D&N then wrote to the Supreme Court Registry to provide a material update in relation to the proceedings in Switzerland. D&N explained the Geneva Court of Appeal's decision and effect of the decision on the Category 1 Transactions in the Swiss criminal proceedings. D&N stated the following and asked that the stay be lifted so that the claims in the Singapore suit could resume and proceed to a final determination on the merits:

> … both [Rappo] and [Bouvier and MEI Invest] have refused to accept that [Accent and Xitrans] can proceed with the [civil claims concerning the Category 1 Transactions], notwithstanding that the stay of proceedings which [Rappo, Bouvier and MEI Invest] previously obtained from the Singapore Court … was premised on

86 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [25].
87 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [26]–[31].

> [their] then-position that all the claims in [the Singapore suit] could be pursued and determined on the merits in Switzerland.

(e) A&G and TKQP also wrote to the Supreme Court Registry to disagree with D&N's position that the stay should be lifted.

12.71 On 11 January 2023, Xitrans applied to the Singapore Court of Appeal to partially lift the stay of proceedings. By this time, the Category 2 Transactions also fell outside the 15-year limitation period.[88]

12.72 The parties agreed that: (a) as a consequence of the Geneva Court of Appeal's decision, both Category 1 and 2 Transactions could no longer be investigated in the Swiss criminal proceedings; and (b) the civil claims arising from those transactions also could not be pursued in the Swiss criminal proceedings ("Discontinued Civil Claims"). The investigations in the Swiss criminal proceedings in respect of the Category 3 Transactions are ongoing.[89]

12.73 Turning to the application to lift the stay of the Singapore proceedings, the Court of Appeal first stated the basis on which the applications were being considered: if the premise on which the court decides to grant a stay should turn out to be mistaken, the court may, in such exceptional circumstances which strike at the very basis on which the stay was granted, exercise its discretion to lift the stay.[90] It would appear, for now, that this is the only ground in which Singapore courts would be prepared to lift a stay of proceedings.

12.74 Xitrans argued that although the Discontinued Civil Claims could no longer be pursued in the Swiss criminal proceedings, it was nonetheless entitled to pursue those claims in independent Swiss civil proceedings.[91] Curiously, if Xitrans truly believed it was entitled to do so, why did Xitrans not simply commence civil proceedings in Switzerland?

12.75 Xitrans also, oddly, argued that the Appellants reneged on the undertakings given to the Court of Appeal in 2017 and so there had been a departure from the basis on which the stay of proceedings was ordered, and so the stay should be lifted. In particular, Xitrans took issue with the fact that Rappo and Bouvier "clearly intend[ed] to prevent a determination on the merits of the claims by making complicated arguments that the [Discontinued Civil Claims] [were] time-barred".

88 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [25] and [31].
89 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [25].
90 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [32] and [45]–[46].
91 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [33].

In other words, for the Appellants to abide by their undertakings, there should not be any time bar challenges made in respect of the Respondents' claims in Switzerland.[92]

12.76 Rappo's counterargument was also odd. Rappo adduced expert evidence on Swiss law to say that a time bar is a substantive defence, and so she argued that she was entitled to raise a time bar objection without departing from her undertaking to submit to the Swiss courts' jurisdiction.[93]

12.77 Xitrans' argument unfortunately misses the point. It was the Appellants' prerogative to raise arguments on limitation period, and these arguments did not go towards attacking the jurisdiction of the foreign court. Indeed, issues of time bar which arise from the expiry of statutory limitation periods are treated as "admissibility" (and not "jurisdictional") issues in the international arbitration context. A time-barred claim is stale and defective. The issue of bringing the claims out of time fall outside the issue of jurisdiction (*ie*, scope of consent to arbitration) which the arbitral tribunal can decide.[94]

12.78 The Court of Appeal approached the issue as construing the scope of the undertakings given by the Appellants. In this regard, the Court of Appeal first noted that the undertakings were given to satisfy the Singapore court that the Swiss courts would have jurisdiction over the parties' dispute, in light of Art 6 of the PILA. Article 6 provides that:[95]

> In matters involving an economic interest, a court shall have jurisdiction *if the defendant proceeds on the merits without reservation, unless such court denies jurisdiction to the extent permitted by Article 5, paragraph 3*. [emphasis added]

12.79 Against the backdrop of the PILA, Rappo's argument makes more sense. As the Court of Appeal explained, the undertakings allowed the Court of Appeal to be satisfied that the Appellants would proceed on the merits without reservation before the Swiss courts, which would have jurisdiction by virtue of Art 6 of the PILA.[96] So an argument on time bar, as testified by Rappo's expert witness, is construed as a substantive defence which goes towards the merits of the matter.[97] So the time bar argument would not affect the Swiss court seizing jurisdiction under Art 6 of the PILA.

92 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [33]–[35].
93 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [39].
94 *BBA v BAZ* [2020] 2 SLR 452 at [73] and [80], *per* Quentin Loh J.
95 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [52].
96 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [52].
97 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [39].

12.80 Xitrans, however, argued that based on the further undertakings, which referred to an agreement to submit to the Swiss court's "determination on the merits of the Respondents' claims", the Appellants agreed to submit to a determination on the merits of the parties' underlying dispute.[98] The Court of Appeal rejected this argument.

12.81 The Court of Appeal first opined that, having regard to Art 6 of the PILA, the undertakings were given in response to the Respondents' suggestion at the 2017 hearing before the Court of Appeal that those undertakings were not "wide enough" and that "further challenges to the jurisdiction of the Swiss courts could be expected". Against this context, what the parties actually agreed was that the dispute would be submitted "on the merits" understood in the context of Art 6 of the PILA, *ie*, the Appellants were entitled to raise time bar arguments given that those arguments do not defeat the Swiss courts' jurisdiction over the dispute under Art 6 of the PILA.[99]

12.82 Second, Xitrans' interpretation does not accord with the parties' agreement at the 2017 hearing before the Court of Appeal. Xitrans' interpretation, if accepted, that the parties agreed to submit the underlying dispute before the Swiss courts for determination on the merits, would mean that the Appellants would have to give up a number of substantive defences typically available to litigants, including making arguments that the Respondents' claims ought to be struck out for procedural irregularity. This cannot be what the parties agreed based on the undertakings given.[100] The Court of Appeal must be correct on this reasoning. Xitrans' interpretation, if accepted, would also mean that the Appellants, having given the undertakings, are not allowed to challenge even if the Respondents chose to not serve the papers for their claims before the Swiss courts on the Appellants. This is not what the undertakings say, nor does that appear to be what the parties contemplated when the undertakings were given in 2017.

12.83 The Court of Appeal therefore rejected Xitrans' position, which was a misinterpretation of the undertakings. The Court of Appeal in imposing the undertakings in 2017, wanted to ensure that the Swiss courts, which were determined to be clearly the more appropriate forum, would be in a position to deal with the Respondents' claims in accordance with applicable law and procedure. While the Court of Appeal at that time insisted on a submission to jurisdiction and a waiver

98 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [49] and [53].
99 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [54].
100 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [55].

of any jurisdictional objection, it did not require the Appellants to give up substantive defences.[101]

12.84 The Court of Appeal then concluded that the Appellants continued to accept and recognise the jurisdiction of the Swiss courts to hear the dispute, and that the time bar challenge, if raised, would not be a jurisdictional challenge. And so, the Appellants had not breached the undertakings and there had therefore been no departure from the basis upon which the stay of proceedings was granted.[102]

12.85 The Court of Appeal, in particular, held that the invocation of a limitation defence goes to the merits of a claim and does not go to jurisdiction.[103] It is not immediately clear if this was said as a general position, or if this was a finding peculiar to *Xitrans Finance Ltd v Rappo Tania*. The authors would argue that it is the latter. But even so, taking the cue from *BBA v BAZ*, it would appear that issues of time bar are generally treated as non-jurisdictional arguments. The situation could be different if a party, like Rappo, gave an undertaking to submit to the jurisdiction of Swiss courts and Swiss law treats time bar arguments as jurisdictional challenges. In that situation, there could be room to argue that Rappo cannot raise jurisdictional challenges. Of course, the short counter-response would be to scrutinise what Rappo exactly meant when the undertakings were given, which was what the Singapore Court of Appeal did in this case.

12.86 As a secondary ground, Xitrans argued that given that a number of years had passed without significant process in Switzerland, the elapsed length of time and absence of significant progress were additional factors in support of a lifting of the stay of proceedings.[104]

12.87 Unlike the first argument which was premised on a misinterpretation of the undertakings, the Singapore Court of Appeal thought that Xitrans' second argument on the length of delay in the Swiss proceedings had some merit. While not explicitly stated in its 2017 judgment, the Court of Appeal said that when it granted the stay it likely assumed that there would be no delay amounting to a denial of substantial justice in the Swiss courts.[105]

101 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [56].
102 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [57]–[58].
103 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [57].
104 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [36].
105 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [60].

12.88 That said, the Singapore Court of Appeal did not think that the delay of six years in this case amounted to a denial of substantial justice. Also, the Geneva Court of Appeal, which examined the Swiss PP's issuance of the dismissal order, did not think that there was unjustified delay by the Swiss PP in the Swiss criminal proceedings. Given the general policy that a court would be slow to pronounce that a litigant had experienced a deprivation of substantial justice in a foreign forum with a well-established and well-recognised system of justice, the Singapore Court of Appeal did not think that there was unjustified delay here.[106]

12.89 Finally, the Singapore Court of Appeal also considered Rappo's counter-argument that a lifting of a stay would fragment the Respondents' case against the Appellants, which would be undesirable. There would be a risk of duplicative proceedings and inconsistent findings. The Court of Appeal accepted that this factor weighed against revoking the stay in the manner sought by Xitrans, *ie*, for the Discontinued Civil Claims to continue in Singapore and the remaining claims to continue in the Swiss criminal proceedings.[107]

12.90 Overall, the Court of Appeal did not find any basis or reasons to exercise its "continuing discretion" to revoke the stay of proceedings granted. A Singapore court will not exercise its continuing discretion to lift a *forum non conveniens* stay to allow litigants to reagitate settled issues because they happen to encounter inconveniences or setbacks in prosecuting their claims in the foreign forum.[108]

III. Jurisdiction clauses

12.91 When considering matters of jurisdiction, a common creature that is encountered is the jurisdiction clause. This provides parties a choice in selecting where any potential disputes are to be resolved, which in turn provides certainty and costs savings when the disputes do occur.

12.92 To be characterised as a "jurisdiction clause", it is crucial for the clause, to borrow the words used in the Choice of Court Agreements Act 2016,[109] 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. In other words, the clause must clearly specify that litigation in a particular court is the binding form of dispute settlement agreed between the parties. As seen in *Cheung Teck Cheong Richard v LVND*

106 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [60]–[61].
107 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [41] and [62].
108 *Xitrans Finance Ltd v Rappo, Tania* [2023] SGCA 22 at [63].
109 2020 Rev Ed. See s 2(1)(*b*).

Investments Ptd Ltd[110] (*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.[111]

12.93 Jurisdiction clauses also affect how an application for a stay of proceedings is treated. In most cases, where a jurisdiction clause exists (typically an exclusive jurisdiction clause ("EJC") or a non-exclusive *forum* jurisdiction clause), the court will apply the strong cause test, which holds the applicant for 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.

12.94 Of course, with the complexities of the modern commercial world, transactions are often captured, not in one contract, but over several. *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress*[112] ("*Allianz Capital Partners*") examines the question of whether an EJC in one contract can apply to a dispute arising from a different contract.

A. Allianz Capital Partners

12.95 The facts in *Allianz Capital Partners* can be stated simply. The respondent was an employee of the appellant, Allianz Capital Partners GmbH, Singapore Branch ("ACP-S"), a Singapore branch of a German company, Allianz Capital Partners GmbH ("ACP"). Her employment contract, which contained an EJC in favour of Singapore, provided for her possible participation in interest programmes organised by the appellant. She was selected to participate in an interest programme (the "Incentive Plan") where ACP had the discretion to allocate to an eligible employee an Incentive Award, that represented a certain percentage of the performance fees that ACP had received in respect of investments made by ACP within a calendar year. Incentive Awards were offered to the respondent in 2018, 2019 and 2020. She accepted these awards and were accordingly bound by the terms of the Incentive Plan.

110 [2021] 2 SLR 890.
111 *Cheung Teck Cheong Richard v LVND Investments Pte Ltd* [2021] 2 SLR 890 at [30]–[32].
112 [2023] 1 SLR 1618.

12.96 These terms provided for the annual vesting of each Incentive Award in 25% tranches over four years. They also provided that if an employee ceased employment before the vesting period was complete, entitlement to vested and unvested awards would depend on whether that employee was classified as a "Good Leaver", a "Normal Leaver" or a "Bad Leaver". A "Good Leaver" would result in that employee remaining entitled to vested and unvested Incentive Awards, whereas a "Normal Leaver" would only be entitled to vested Incentive Awards.

12.97 The respondent resigned in June 2021, and ACP subsequently informed her that she was a "Normal Leaver". Predictably, the respondent felt she should have been properly classified as a "Good Leaver".

12.98 In November 2021, ACP-S sought a court declaration that for the purposes of the terms of the Incentive Plan, the respondent was a "Normal Leaver". This triggered the respondent to apply for a stay of proceedings arguing that Germany was the more appropriate forum to hear the dispute.

12.99 At first instance, the application for a stay was dismissed on the grounds that the dispute fell within the scope of an EJC in the employment contract. This was reversed on appeal to the High Court. While the High Court accepted that in some cases a jurisdiction clause in one contract could apply to disputes arising from another, the EJC in the employment contract only applied to disputes arising out of the employment contract and did not apply to a dispute arising out of the Incentive Plan. Accordingly, the court held that Germany was the more appropriate forum to determine this matter and stayed the proceedings. ACP-S appealed to the Appellate Division of the High Court.[113]

12.100 On appeal, the Appellate Division noted that it had to determine whether the dispute fell within the scope of the EJC. If it did, then it had to consider whether the respondent had shown strong cause why a stay should nonetheless be granted. If it did not, then it had to identify the more appropriate forum for this matter.[114]

12.101 Turning to these questions, the court first addressed two preliminary matters. First, it noted that the party relying on the

113 *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [18]–[22].

114 *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [25].

jurisdiction clause, *ie*, ACP-S, had to establish a "good arguable case" that the dispute fell within the scope of the clause.[115]

12.102 Secondly, it noted that while the parties were proceeding from the premise that the employment contract and the Incentive Plan were separate contracts, the court opined that it was important to examine if this was indeed so. If they were not, then the matter was moot. On this latter point, the court examined the wording of both contracts and opined that the two contracts were indeed separate.[116]

12.103 Having come to this conclusion, the court turned to the case of *Fiona Trust & Holding Corporation v Privalov*[117] ("*Fiona Trust*"). In that case, Lord Hoffman opined that in relation to the construction of an arbitration clause, one should presume that "parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal … unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction".[118]

12.104 The Appellate Division noted that the Singapore courts had adopted the *Fiona Trust* presumption in situations involving arbitration agreements[119] and in situations involving jurisdiction clauses in "single contract scenarios" (whether a jurisdiction clause in a single contract applies to disputes that do not arise out of the contract).[120]

12.105 It also noted that while the Singapore courts have also applied the *Fiona Trust* presumption in situations involving jurisdiction clauses in multi-contract scenarios,[121] it has not yet had the chance to consider the application of the "Extended *Fiona Trust* Principle" in Singapore.[122]

115 *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [26].
116 *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [26]–[34].
117 [2007] Bus LR 1719.
118 *Fiona Trust & Holding Corporation v Privalov* [2007] Bus LR 1719 at [13].
119 *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] 3 SLR 414; see *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [36].
120 *Bunge SA v Shrikant Bhasi* [2020] 2 SLR 1223; see *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [37].
121 *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd* [2017] 2 SLR 814; see *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [39].
122 *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [40].

12.106 The Principle was first coined in *Terre Neuve SARL v Yewdale Ltd*,[123] which surveyed the case law and distilled the circumstances under which, as a matter of construction, jurisdiction clause in one contract may be interpreted to extend to another contract.[124] The Principle states as follows:[125]

> (a) As a matter of contractual interpretation, the wording of the clause in Contract A must be fairly capable of applying to disputes in Contract B.
>
> (b) The Principle normally applies where:
>
> (i) the parties to Contract A and Contract B are the same;
>
> (ii) Contract A and Contract B are interdependent;
>
> (iii) Contract A and Contract B were concluded at the same time as part of a single package or transaction; and/or
>
> (iv) Contract A and Contract B dealt with the same subject matter (if concluded at different times).

12.107 Making it clear that the Principle was separate and different from the argument that an arbitration or jurisdiction clause in one contract had been incorporated in another,[126] and that the court had excluded from its analysis where the agreements had competing jurisdiction clauses,[127] the court opined that that "the Principle provided a sound and useful framework for determining the proper ambit of a jurisdiction clause in multi-contract scenarios".[128]

12.108 Having said that, the court cautioned that the factors set out in the framework only served as guides to ascertain the parties' intentions as to how disputes arising under separate agreements should be resolved and the ultimate question was "whether the outcome from the application of the Principle was one that the parties, as rational business people, had sensibly envisaged in the context of their commercial relationship".[129]

123 [2020] EWHC 772 (Comm).
124 *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [42].
125 *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [42].
126 *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [43].
127 *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [47].
128 *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [45].
129 *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [46].

12.109 The court went on to apply the Principle to the facts of the case. First, it opined that the wording of the jurisdiction clause in the employment contract was capable of applying to the dispute arising under the Incentive Plan. It noted that while the choice of law clause was limited to disputes arising from employment contract, the jurisdiction clause had no such limiter and expressed Singapore to be the forum to which "any dispute" had to be referred to.[130] The court declined to read the additional words "under the Employment Contract" after "any dispute" and noted that the fact that the Incentive Plan did not itself provide for a jurisdiction clause was consistent with the suggestion that the employment contract's jurisdiction clause would be applicable.[131]

12.110 Second, the court opined that both the Employment Contract and the Incentive Plan were interdependent contracts. Both were negotiated as part of the same package and the respondent's right to participate in the Incentive Plan was part of the employment contract. Further, her continued participation in the Incentive Plan was conditional on her continued employment, and the vesting of her entitlements dictated in part by circumstances surrounding the termination of her employment.[132]

12.111 Third, the court held that both contracts were concerned with the same subject matter. It opined that for the purposes of applying the Principle, there was no need for the subject matter of both contracts to be identical and it was sufficient for both contracts to have related to the same overall subject matter.[133]

12.112 Finally, the court held that both contracts were concluded between the same parties. While the company was party for the employment contract and Incentive Plan, and ACP-S and ACP respectively, were different, the court noted that ACP-S was a branch of ACP and for all practical purposes, the parties did not make a distinction between ACP or ACP-S and perceived both to be the same entity. It is important at this point to note that for the purposes of applying the Principle, the court did not draw fine lines about whether the two company parties in question were separate legal entities. The position seems to be that even though there were technically different legal entities as parties in the two contracts, this did not detract from the fact that for all intents

130 *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [53].

131 *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [54].

132 *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [57]–[61].

133 *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [65].

and purposes, the different entities were essentially the same. Taking into account the complexities of commercial transactions, this must be correct and reflects the same broad approach the court took in determining whether both contracts essentially dealt with the same subject matter.[134]

12.113 Having decided that the EJC applied to a dispute arising under the Incentive Plan, the court considered whether, in spite of the clause's applicability, a stay should nonetheless be granted. The court opined that the respondent did not meet the threshold of "showing exceptional circumstances amounting to strong cause" and as such, allowed the appeal.

B. Qompass Voyage Ltd v APACPAY Pte Ltd[135]

12.114 This case explores the interesting situation where a defendant denies a contractual relationship with the claimant and yet seeks to rely on an EJC that would have been incorporated into the contract, had one existed.

12.115 The Hong Kong-incorporated claimant, Qompass Voyage Limited ("QVL"), provided online travel platform services while the Singapore-incorporated defendant, APACPAY Pte Ltd ("APL"), provided digital payment and online payment gateway services.

12.116 QVL entered into a merchant service agreement with APL for its payment processing and ancillary services. Under the agreement, monthly and transaction processing fees were payable to APL, and APL was to settle with QVL once a week for sums received from payments made through APL.

12.117 After a period of dealings, QVL was subsequently notified that APL had ceased operations and services, and that it would contact QVL to confirm and repay the outstanding balance owed. QVL informed APL of the total outstanding balance but did not receive a response nor the payment of the outstanding US$253,089.34.

12.118 APL's position was that no contract existed between itself and QVL and that QVL had contracted with an English-incorporated payment services company Cosmopay Holdings Limited ("Cosmopay"). Cosmopay used APL's services as a payment gateway for its own clients and when APL ceased operations, it had met its obligations to Cosmopay.

134 *Allianz Capital Partners GmbH, Singapore Branch v Goh Andress* [2023] 1 SLR 1618 at [69]–[75].

135 [2023] SGHCR 20.

QVL's claim would therefore lie with Cosmopay. QVL's position was that despite having contracted with Cosmopay, the intention of the parties was for APL to directly provide payment processing services to QVL and charge the requisite fees.

12.119 There is no dispute that, had there been a contract between QVL and APL, it would have incorporated an EJC. It is also clear that a service agreement had not been signed between QVL and APL. While denying the existence of the agreement, APL nonetheless applied for a stay based on the EJC *if it had existed*.

12.120 The question facing the court then was whether, in a stay application, APL could argue that an EJC existed and applied, while at the same time denying a contractual agreement with QVL.

12.121 The court first considered the applicable principles relating to a stay, both at common law and under the Convention on Choice of Court Agreements[136] ("CCA"). The court also acknowledged that if there were an applicable jurisdiction agreement here, the CCA would apply in this case and a stay would be granted unless it would lead to "manifest injustice" or be "manifestly contrary to the public policy of Singapore".[137]

12.122 In order for APL to succeed, it had to satisfy the burden of showing a "good arguable case" that the EJC existed and governed the dispute in question. The court opined that a jurisdiction agreement could only exist if there was a contractual relationship between the parties in the first place. Without that contractual relationship, a jurisdiction agreement could not be said to have existed between them. As such, by denying that a contract did not exist between it and QVL, APL could not then argue that an exclusive jurisdiction agreement existed.[138]

12.123 In coming to this conclusion, the court went on to make some further observations. First, in making its argument, APL had adopted inconsistent positions. The court opined that if by taking an inconsistent position a party had secured a benefit, *eg*, obtaining a judgment, in its favour, then it might attract the application of the abuse of process doctrine. Apart from this, there was nothing objectionable to a party adopting alternative and inconsistent positions in its litigation strategy.[139]

136 (30 June 2005) (entered into force 1 October 2015); *Qompass Voyage Ltd v APACPAY Pte Ltd* [2023] SGHCR 20 at [10]–[14].
137 *Qompass Voyage Ltd v APACPAY Pte Ltd* [2023] SGHCR 20 at [15].
138 *Qompass Voyage Ltd v APACPAY Pte Ltd* [2023] SGHCR 20 at [23] and [31].
139 *Qompass Voyage Ltd v APACPAY Pte Ltd* [2023] SGHCR 20 at [24].

12.124 Secondly, APL had relied on *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd*[140] ("*Hai Jiang*") to justify why it should be allowed to rely on the EJC, even when denying the existence of a contract.

12.125 *Hai Jiang* involved an application for an anti-suit injunction based on a number of grounds. One specific ground was on the basis of an arbitration clause in a contract which the applicant was denying it was a party to. The court there had followed the *Sea Premium*[141] line of cases and opined that if the respondent was seeking to benefit from suing on a contract to which the applicant was not a party, then that respondent should also be bound to observe the exclusive jurisdiction or arbitration clauses under that same contract upon which their action was based.

12.126 The court in this case distinguished *Hai Jiang* on two grounds. First, *Hai Jiang* did not stand for a general proposition that a party can enforce a jurisdiction agreement even where it denies the existence of any contractual relationship with the other party. In *Hai Jiang*, the applicant's entitlement to an anti-suit injunction flowed from the conduct of the respondent in bringing and maintaining the foreign proceedings. Secondly, the *Hai Jiang* principle was not relevant in a stay application, where the basis of the application is the enforcement of a jurisdiction agreement between the parties.[142]

12.127 Third, QVL had relied on QVL's reliance on APL's failure to challenge the jurisdiction in proceedings brought by Supersoft Limited against APL. QVL argued that this failure to challenge jurisdiction, when contrasted with the position it took in the present case, revealed evasive or inconsistent conduct, which in turn meant that APL's jurisdictional challenge in this case was suspect. The court rightly pointed out that there were many reasons why APL might have acted differently in that case. In any event, whether a jurisdiction clause existed and applied in the present case was to be determined by the facts of the present case.[143]

12.128 Finally, the court turned its mind to the question of, in the event a stay was justified, whether it should nonetheless be refused. This would happen if the enforcement of the EJC would lead to "manifest injustice" or be "manifestly contrary to the public policy of Singapore".[144] The court opined that the threshold for establishing either of these limbs was a high

140 [2020] 4 SLR 1014. See Joel Lee Tye Beng, Leow Wei Xian & Marcus Teo Wei Ren, (2020) 21 SAL Ann Rev 314 for a digest of this case.
141 *Sea Premium Shipping Ltd v Sea Consortium Pte Ltd* [2001] EWHC 540 (Admlty).
142 *Qompass Voyage Ltd v APACPAY Pte Ltd* [2023] SGHCR 20 at [29].
143 *Qompass Voyage Ltd v APACPAY Pte Ltd* [2023] SGHCR 20 at [33].
144 *Qompass Voyage Ltd v APACPAY Pte Ltd* [2023] SGHCR 20 at [34].

one and not a mere speculative possibility.[145] "Manifest injustice" would cover situations where parties would not get a fair trial in the chosen court, or if there were other reasons which would preclude that party bringing or defending proceedings in the chosen court. "Manifestly contrary to the public policy of Singapore" would cover situations where basic policies of public order or norms of the state were violated with extremely serious consequences.[146] The court opined that, in the circumstances of this case, neither of these limbs would have been made out.[147] To be clear, since the court had found that the EJC did not exist, it was technically not necessary to consider this issue and did so only for the sake of completeness.

IV. Choice of law

12.129 Choice of law considerations are relevant to a conflict of laws analysis in a number of ways. The first is the impact upon jurisdictional questions like an application for a stay where the *lex causae* may be a relevant factor in the identification of the *forum conveniens*.[148] Another example is where the *lex causae* can define the cause of action to establish a nexus between Singapore and the dispute (whether under the old ROC or the ROC 2021). Finally, the *lex causae* will be the set of rules that determines parties' substantive rights and obligations at trial.

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

Choice of law – Characterisation

Choice of law – Restitution of mistaken payments

Choice of law – Resulting and constructive trusts

12.130 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais*[149] ("*Perry v Esculier*") is a decision on appeal from one covered in the 2023 Annual Review of Singapore Cases,[150] touching on the difficult topic of choice of law rules for claims for a resulting or constructive trust. The facts involved a Ponzi scheme, operated by the Lexinta Group of companies. Thereunder, investors would enter into asset management agreements ("AMAs") with

145 *Qompass Voyage Ltd v APACPAY Pte Ltd* [2023] SGHCR 20 at [35].
146 *Qompass Voyage Ltd v APACPAY Pte Ltd* [2023] SGHCR 20 at [35].
147 *Qompass Voyage Ltd v APACPAY Pte Ltd* [2023] SGHCR 20 at [36]–[38].
148 *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [47], *per* Sundaresh Menon CJ.
149 [2023] 2 SLR 30.
150 See Joel Lee Tye Beng, Leow Wei Xiang Joel & Marcus Teo Wei Ren, "Conflict of Laws" (2022) 23 SAL Ann Rev 267 at paras 12.112–12.124.

various companies in the Group, but eventually transfer their funds to another company in the Group not party to those agreements ("LGL"). In 2014, one group of investors (the "Initial Investors") signed AMAs and transferred a lump sum to LGL. In 2016, the Initial Investors demanded a return on their investment. From 2016 to 2017, a second group of investors (the "Subsequent Investors") signed similar AMAs and transferred sums in several tranches to LGL. LGL then simultaneously paid sums out to the Initial Investors. Neither group of investors suspected that they were taking part in a Ponzi scheme.

12.131 When the scheme collapsed, the Subsequent Investors sued the Initial Investors. In particular, they alleged that the funds they transferred to LGL, which LGL then transferred to the Initial Investors, "were subject to various trusts which the [Subsequent Investors] were entitled to trace and recover".[151] The question then arose: what law governed the Subsequent Investors' claims? The Subsequent Investors argued for Hong Kong law, being LGL's *lex incorporationis*, or Singapore law, being the *lex situs* of the funds because the Initial Investors' bank accounts were in Singapore. The Initial Investors argued for Swiss law, which was the governing law of the AMAs.

12.132 At first instance, Simon Thorley IJ held that the Subsequent Investors' claim, being one "relating to constructive and resulting trusts",[152] was governed by the law "most closely connected to the putative trust".[153] On the facts, this was Singapore law, being the law governing the AMAs out of which "the putative trust arises".[154] That factor alone would not always be "decisive",[155] but here it outweighed the other factors, like the fact that the funds were in Singapore bank accounts, that LGL was incorporated in Hong Kong, that the funds were paid out from LGL's Hong Kong bank account, and that the investors were of various nationalities.[156]

12.133 On appeal, Steven Chong JCA, writing for the Court of Appeal, did not appear to endorse Thorley IJ's analysis which focused on the law governing the "putative trust". Instead, Chong JCA held that "in determining the applicable law to claims in equity, it is important to

151 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2023] 2 SLR 30 at [4].
152 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [107]
153 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [109].
154 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [117].
155 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [117].
156 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [111] and [117].

ascertain the foundational sources from which the relevant equitable rights and remedies arise".[157] In this case, then:[158]

> The 'legal foundation' of the [Subsequent Investors'] claim was contractual because the [Subsequent Investors'] investments, which were the subject of the alleged breach of trust, were made pursuant to the AMAs. Without the AMAs, the [Subsequent Investors] would not have invested in the Lexinta Group … [s]ince the AMAs included an express choice of Swiss law, Swiss law applied to govern the present dispute.

12.134 From that passage, one might be tempted to think that Chong JCA essentially characterised the Subsequent Investors' claim as an equitable claim parasitic on a contractual claim, which should thus be governed exclusively by the *lex contractus*. But other passages of his judgment suggest that Chong JCA was adopting a more broad-based multifactorial approach:[159]

> … While we [would] not go so far as to endorse the proposition that equitable concepts and doctrines would always be dependent on other established categories of law, we accept that such categories remain relevant and important considerations.
>
> …
>
> … it is the quality and not the quantity of the connecting factors that is crucial in the analysis. The search is for those connections with the most relevant and substantial association with the dispute. In our judgment, the quality of the AMAs as the very reason for the investments outweighed the quality of the other connecting factors identified by the appellants which would give rise to either Hong Kong law or Singapore law being the governing law of the dispute.

12.135 Thus, it seems that Chong JCA adopted a multifactorial analysis to determining the governing law of the Subsequent Investor's claim. The governing law of the AMAs was only one, albeit the most significant, factor in the analysis. The difference between Chong JCA's approach and Thorley IJ's, then, is that while both involved the balancing of multiple factors, Chong JCA focused on discovering the law most closely connected to the Subsequent Investors' "claims in equity",[160] while Thorley IJ focused on the law most closely connected with the "putative trust".[161]

12.136 On the facts, any difference between Chong JCA's approach and Thorley IJ's was inconsequential: both led to the application of Swiss law,

157 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2023] 2 SLR 30 at [44].
158 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2023] 2 SLR 30 at [46].
159 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2023] 2 SLR 30 at [44] and [47].
160 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2023] 2 SLR 30 at [44].
161 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2022] 4 SLR 243 at [109].

under which the Subsequent Investors' claim failed because Swiss law recognised no claim against the Initial Investors absent bad faith.[162] But correct in its result though it might be, Chong JCA's judgment raises two important questions.

12.137 First, was Chong JCA right to focus on the law connected to the claim rather than the putative trust? The authors think that he was, for the same reasons given in the discussion of Thorley IJ's decision last year.[163] The problem with focusing on the "putative trust" when determining the governing law for claims for a resulting or a constructive trust is precisely that it focuses on the trust itself. This focus would be justified if the court were faced with an express trust, because the trust constitutes the obligation between claimant and defendant, from which the claimant's claim arises. By contrast, a resulting or constructive trust is imposed in response to some other normatively significant fact: *eg*, to fulfil the transferor's ineffectual intention to create an express trust for herself or a third party, to protect the transferor's interest in her property, to give effect to the trust and confidence a principal has reposed in a fiduciary, or to otherwise remedy wrongs.[164] In other words, a resulting or constructive trust is a remedy rather than a (primary) obligation giving rise to a claim.

12.138 For choice of law purposes, it makes no sense to focus on the remedy sought (*ie*, the "putative trust") rather than the claim said to give rise to it. After all, no claimant is entitled to a remedy without first establishing her claim. And so, if the remedy the claimant seeks could be used as the basis for determining the law which governs whether and what claim she has, the claimant will be allowed to bootstrap herself into a governing law simply by pleading that she is entitled to a particular remedy. For example, a claimant who sues for breach of contract, and who would be entitled only to damages under the *lex contractus*, may nevertheless gain a proprietary remedy if she simply alleges that the defendant holds any profits she made on trust for the claimant, and if the law most closely connected to the putative trust gives the claimant that remedy. Chong JCA was therefore right to focus on the claim rather than the remedy.

12.139 Second, however, what was the precise choice of law rule Chong JCA applied, and how did it lead him to Swiss law? As mentioned,

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162 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2023] 2 SLR 30 at [34] and [49].

163 Joel Lee Tye Beng, Leow Wei Xiang Joel & Marcus Teo Wei Ren, "Conflict of Laws" (2022) 23 SAL Ann Rev 267 at paras 12.123–12.124.

164 See generally, Ying Khai Liew, "Choice of Law Rules in Australia for Resulting and Constructive Trusts" (2022) 44(3) Sydney LR 441.

Chong JCA reasoned that the "legal foundation" of the claim was "contractual", because the Subsequent Investors had transferred money to LGL "pursuant to the AMAs".[165] However, Chong JCA could not have been applying the contract choice of law rule, since the AMAs between the Subsequent Investors and the Lexinta Group obviously imposed no obligations on LGL (which was not party to them) or the Initial Investors (who simply received the moneys from LGL). Nor, for the same reason, could Chong JCA have been applying the contract choice of law rule by proxy to determine the governing law of the Subsequent Investors' equitable claims. Furthermore, Chong JCA also could not simply have been applying well-established choice of law rules for claims for "breach[es] of … fiduciary duties".[166] He did, admittedly, appear to characterise the Subsequent Investor's claims as such.[167] However, the two cases he cited here, *Rickshaw Investments Ltd v Nicolai Baron von Uexkul*[168] ("*Rickshaw Investments*") and *Rappo*,[169] applied the governing law of a related contract to determine questions about the existence and breach of fiduciary duties, on facts where (unlike in *Perry v Esculier*) the related contract was between the putative fiduciary and its putative principal.

12.140 What seems to have happened, then, is that Chong JCA developed and applied some general residual choice of law rule for unidentifiable equitable claims. This rule, it would seem, applies the law most closely connected to those claims derived from a multifactorial analysis, under which "established categories of law such as contract and tort … remain [only] relevant and important considerations".[170] On the facts, then, the governing law of the AMA was applied, not truly because the AMAs were the "legal foundation" of the Subsequent Investors' claim, but because they were the weightiest relevant factor. In Chong JCA's defence, it might be said that, since the "reach of equity is far and wide",[171] the recognition of such a residual general choice of law rule for equitable claims was always inevitable and perhaps even long overdue. Indeed, in *Rickshaw Investments*, the Court of Appeal expressly acknowledged "the possibility that future legal developments might result in equitable obligations constituting a separate established category in so far as choice of law is concerned".[172]

165 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2023] 2 SLR 30 at [46].
166 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2023] 2 SLR 30 at [46].
167 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2023] 2 SLR 30 at [46].
168 *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [83].
169 *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [77].
170 *Perry, Tamar v Esculier, Bonnet Servane Michele Thais* [2023] 2 SLR 30 at [44].
171 *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2022 Reissue) at para 75.506.
172 *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [81].

12.141 But the common law should be developed only when necessary. And, with great respect, it might not have been necessary for Chong JCA to develop it in *Perry v Esculier*. Instead, he could have engaged in the same multifactorial analysis, and reached the same conclusion in favour of Swiss law, had he properly characterised the Subsequent Investors' claim as a restitutionary one and applied existing choice of law rules for restitutionary claims.

12.142 The restitutionary characterisation was indeed available. Any obligations the Initial Investors owed the Subsequent Investors stemmed from the fact that the Subsequent Investors made a mistaken payment, when it transferred funds to LGL on the erroneous belief that they were partaking in a genuine investment scheme. A restitutionary claim, in turn, is generally governed by the law of the place of enrichment,[173] which in this case would have been Singapore law. Yet, as the Court of Appeal noted in *CIMB Bank Bhd v Dresdner Kleinwort Ltd*:[174]

> [I]n view of the diverse situations in which a restitutionary claim may arise, the place of enrichment may not always be the place with which the claim has the closest connection … [there may be] a case where there is a 'pre-existing relationship between the parties which, though not contractual, may justify giving weight to the law which governed that relationship in the search for the law with which the obligation to make restitution has its closest connection'.

12.143 The Initial Investors and the Subsequent Investors were from different jurisdictions. They dealt with the Lexinta Group, itself comprised of companies from different jurisdictions. Both groups of investors were thus essentially strangers. Only two facts connected them. The first was that they both paid money to LGL, a Hong Kong-incorporated company. But the fact seems largely inconsequential in a restitutionary claim: given LGL's role in the scheme, Hong Kong was only a "temporary staging post for the money and never its journey's end".[175] The second, more important fact was that the only reason both groups of investors paid money to LGL was because of the AMAs. It is in *this* sense that Chong JCA could have said that the AMAs were the "legal foundation" of the Subsequent Investors' restitutionary claim: they were the most salient facts that connected the two groups of investors. And so, Swiss law, which governed the AMAs, could also have governed the Subsequent Investors' restitutionary claim against the Initial Investors.

173 *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [31].
174 *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [59].
175 *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312 at [42].

B. Horizon Capital Fund v Ollech David

Proof of foreign law – Interlocutory proceedings

Proof of foreign law – Presumption of similarity

12.144 A claimant or defendant who wants to rely on foreign law must generally plead its applicability and prove that it would give her a viable claim or defence. At trial, this typically requires a litigant to adduce foreign law evidence showing, on the balance of probabilities, that the court of the relevant foreign state would rule in its favour on the same facts. In interlocutory applications, too, the proof of foreign law may be required where the content of the foreign applicable law arises for consideration, *eg*, in summary judgment or *forum non conveniens* applications when the applicable law is obviously foreign. At these interlocutory stages, however, less foreign law evidence will be required, because neither party has to prove anything on a balance of probabilities. Instead, only an arguable case on foreign law (*eg*, that the party resisting summary judgment has an arguable claim or defence under foreign law, or that the party seeking the stay can point to arguable difference between Singapore and foreign law) will be required.

12.145 Whenever it might be called for, establishing the content of foreign law, to the requisite standard of proof, may prove difficult. After all, foreign law evidence may often be patchy, vague, non-existent, or simply too expensive to cobble together. To overcome these evidential difficulties, Singapore courts profess to apply a "presumption of similarity", *ie*, that Singapore and foreign law are similar. It is well-established that the presumption can be applied at trial, although not in every such circumstance. As Chan Sek Keong CJ said in *D'Oz International Pte Ltd v PSB Corp Pte Ltd*[176] ("*D'Oz International*"), "the presumption is a rule of convenience which the courts may resort to unless it is unjust and inconvenient to do so". In interlocutory applications, however, the presumption has proven particularly controversial: courts[177] and commentators[178] have long expressed opposition to the idea that it should have any role to play here. But in *Horizon Capital Fund v Ollech David*[179] ("*Horizon Capital Fund*"), Goh Yihan JC took the position that these objections should not be overblown. He held – correctly, in

176 [2010] 3 SLR 267 at [25].

177 *National Shipping Corporation v Arab* [1971] 2 Lloyd's Rep 363 at 366; *The Polessk* [1996] 2 Lloyd's Rep 40 at 43–44.

178 Richard Fentiman, "Laws, Foreign Laws, and Facts" (2006) 59(1) CLP 391 at 410; Tan Yock Lin, "Rationalising and Simplifying the Presumption of Similarity of Laws" (2016) 28 SAcLJ 172 at 193–196.

179 [2023] SGHC 164.

the authors' opinion – that the presumption should still be applicable in interlocutory applications.

12.146 *Horizon Capital Fund* involved a summary judgment application based on a claim under a guarantee. Horizon had extended a credit facility to Lemarc, under which it loaned $1.5m to Lemarc. The credit facility agreement was governed by Swiss law and required the execution of several guarantees, including one by David Ollech, to secure Lemarc's indebtedness. Horizon and Lemarc also entered into a memorandum of understanding ("MOU"), stating that Horizon had to consider requests for further financing from Lemarc. Horizon was obliged not to "unreasonably withhold" these funds[180] and would incur a liability to Lemarc of $2.25m for every year it did so.

12.147 When Lemarc failed to repay the loan, Horizon sued David on the guarantee and sought summary judgment. David resisted the application by pleading a defence of set off, alleging that Horizon had breached the MOU by unreasonably refusing to entertain Lemarc's requests for financing for two years, which gave Lemarc a claim of $4.5m against Horizon. Horizon countered that there was no evidence that it breached the MOU, and that in any case the credit facility agreement excluded any right of set off David might have.[181] Summary judgment was granted by AR Deborah Tang, and David's appeal against her decision was dismissed by Goh JC, primarily on grounds that David's allegations that Horizon had unreasonably refused Lemarc financing lacked evidence.[182]

12.148 In *obiter*, however, Goh JC pointed out that, had there been credible evidence that Horizon had breached the MOU, he would have set aside the summary judgment and allowed David's defence to proceed to trial. This was because there would then have been a triable issue whether, as Horizon alleged, the credit facility agreement excluded David's right of set off.[183] This was a question of Swiss law, which governed the credit facility agreement (and presumably also David's guarantee). Horizon had sought to foreclose this issue by relying on the presumption of similarity: "the court should simply apply Singapore law in interpreting the Facility Agreement", under which David might not have a right of set off.[184] Goh JC rejected this as an overly broad statement of the law: prior Singapore cases on the presumption of similarity concerned its use at trial, and English cases had "caution[ed] against summary judgment

180 *Horizon Capital Fund v Ollech David* [2023] SGHC 164 at [9(b)].
181 *Horizon Capital Fund v Ollech David* [2023] SGHC 164 at [54].
182 *Horizon Capital Fund v Ollech David* [2023] SGHC 164 at [63]–[67].
183 *Horizon Capital Fund v Ollech David* [2023] SGHC 164 at [68].
184 *Horizon Capital Fund v Ollech David* [2023] SGHC 164 at [69].

being granted on the presumption that foreign law is the same as the *lex fori*".[185]

12.149 Yet, this did not mean that the presumption of similarity could never be relied on in interlocutory applications. Instead:[186]

> … making a summary determination based on the presumption of similarity might occasion injustice if, for instance, it is improbable that the foreign law in question is similar to the *lex fori*. This can be the case if the *lex fori* belongs to a different legal tradition from the foreign law in question, or if the rule of the *lex fori* is clearly unique. In such circumstances, to shut out a defendant's defence simply because he has not adduced sufficient evidence of the content of foreign law at the interlocutory stage would be premature.

12.150 On the facts, then, Horizon would not have been able to rely on the presumption, because "the legal traditions of Switzerland and Singapore are different".[187]

12.151 The authors' view, as mentioned, is that Goh JC's holding, that the presumption should be available in interlocutory proceedings, is correct. To see why, we must first understand what the "presumption of similarity" really is.

12.152 On one view, the presumption of similarity is a rule which shifts the legal burden of disproving similarity between Singapore and foreign law onto the defendant. For example, in *Goh Chok Tong v Tan Liang Hong*,[188] it was said that "foreign law is presumed to be the same as English law until the contrary is proved".[189] The idea conveyed here, as Tan Yock Lin has noted, is that the presumption applies automatically and regardless of whether foreign law is likely similar to Singaporean law: "[T]he basic fact giving rise to the presumption is not that the party pleading foreign law has adduced some evidence of foreign law to raise the presumption but simply that he has pleaded foreign law."[190]

12.153 If the presumption of similarity is triggered automatically and shifts the legal burden of disproving similarity onto the party resisting foreign law, it is easy to see why its application can sometimes be,

185 *Horizon Capital Fund v Ollech David* [2023] SGHC 164 at [69]–[70].
186 *Horizon Capital Fund v Ollech David* [2023] SGHC 164 at [72].
187 *Horizon Capital Fund v Ollech David* [2023] SGHC 164 at [73].
188 [1997] 1 SLR(R) 811.
189 *Goh Chok Tong v Tan Liang Hong* [1997] 1 SLR(R) 811 at [84]. See also *Dynamit AG v Rio Tinto Co Ltd* [1918] AC 260 at 295 and *PT Pan Indonesia Bank Ltd TBK v Marconi Communications International Ltd* [2005] 2 All ER 325 (Comm) at [70].
190 Tan Yock Lin, "Rationalising and Simplifying the Presumption of Similarity of Laws" (2016) 28 SAcLJ 172 at 197.

as Chan CJ put it in *D'Oz International*, "unjust and inconvenient".[191] Why should a claimant who might be required to forward a claim under foreign law nevertheless be allowed to proceed on the basis of Singapore law, until the defendant proves the difference?[192] Gathering foreign law evidence, after all, may be impractical – why should the defendant rather than the claimant bear that difficulty? Moreover, this unfairness becomes particularly pronounced when the claimant seeks to rely on the presumption of similarity in interlocutory applications like summary judgment applications. Here, given the preliminary nature of the enquiry, the defendant is typically only required to adduce evidence showing that she has an arguable defence.[193] But if the claimant can rely on the presumption here, the defendant would be saddled at this interlocutory stage with the burden of proving, on a balance of probabilities, that foreign law would grant her a defence.[194]

12.154 On another view, however, the "presumption of similarity" is really no more than a logical inference about the content of foreign law which the courts can draw in certain cases. In English law, this view was adopted by Lord Leggatt in *Brownlie v FS Cairo (Nile Plaza) LLC*[195] ("*Brownlie*"), where he held that the "presumption" would only be "applied" (*ie*, drawn) when it is "reasonable to expect that the applicable foreign law is likely to be materially similar to [the *lex fori*] on the matter in issue".[196] This is because the presumption is "only ever a basis for drawing inferences about the probable content of foreign law in the absence of better evidence".[197] Thus:[198]

> … as a matter of broad generalisation the presumption is more likely to be appropriate where the applicable foreign law is another common law system rather than a system based on Roman law … [and] also as a matter of broad generalisation, the presumption is less likely to be appropriate where the relevant domestic law is contained in a statute …

12.155 If the "presumption of similarity" is merely an inference of fact, drawn when reasonable, most concerns about unfairness and

191 *D'Oz International Pte Ltd v PSB Corp Pte Ltd* [2010] 3 SLR 267 at [25].
192 Note, also, that a claimant may need to make a case on foreign law even when she does not wish to plead foreign law. If the defendant satisfies the court that foreign law should apply, the claimant must then plead and prove a positive case on it (see *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] 3 WLR 1011 at [163]–[164]).
193 Richard Fentiman, "Laws, Foreign Laws, and Facts" (2006) 59(1) CLP 391 at 410.
194 Richard Garnett, "Determining the Appropriate Forum by the Applicable Law" (2022) 71(3) ICLQ 589 at 624–625.
195 [2021] 3 WLR 1011.
196 *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] 3 WLR 1011 at [126].
197 *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] 3 WLR 1011 at [149].
198 *Brownlie v FS Cairo (Nile Plaza) LLC* [2021] 3 WLR 1011 at [144]–[145].

inconvenience disappear. A claimant who must make her case on foreign law can never simply rely on the "presumption" to require the defendant to prove the exact content of foreign law on a balance of probabilities. Instead, the claimant must show why, given the nature of the foreign legal system and the particular claim she is forwarding, it would be reasonable for the court to conclude that foreign law and Singapore law are likely to be materially similar. The expense and inconvenience of establishing foreign law will then lie principally with the claimant, and will shift to the defendant only when the claimant has shown that – absent further evidence – Singapore and foreign law are likely materially similar. Moreover, if the "presumption of similarity" so understood does not produce unfairness at trial, it should equally not produce unfairness in interlocutory applications.[199] Even in the latter context, all the court would do is determine whether – on the scant foreign law evidence before it at that preliminary stage – there is an arguable case that Singapore and foreign law are materially similar or materially different. If the latter is arguable, or if both cases are arguable, the defendant's defence should proceed to trial.

12.156 Goh JC did not explicitly cite *Brownlie* in *Horizon Capital Fund*, but it seems obvious that he had the same view of the "presumption of similarity" in mind as Lord Leggatt did. This is why Goh JC was correct to say that the "presumption" might justifiably be used in interlocutory proceedings. If the "presumption" is a mere logical inference, it can be justifiably drawn in interlocutory proceedings in (only) the same circumstances as any other inference may be: when it is reasonable for the court to do so, on the basis of the other evidence before it.

V. Recognition of foreign judgment

12.157 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 CCA; and (b) the Reciprocal Enforcement of Foreign Judgments Act 1959[200] ("REFJA"). On 15 February 2023, the Minister for Law announced that the Reciprocal Enforcement of Commonwealth Judgments (Repeal) Act 2019[201] would come into operation on 1 March 2023, and since that

199 Which explains why Lord Leggatt concluded that "there is more scope for relying on the presumption of similarity at an early stage of proceedings … [than] at trial" (*Brownlie v FS Cairo (Nile Plaza) LLC* [2021] 3 WLR 1011 at [147]).

200 2020 Rev Ed.

201 Act 24 of 2019.

date, the Reciprocal Enforcement of Commonwealth Judgments Act 1921[202] was repealed.[203]

12.158 At common law, a foreign judgment is enforced as an action in debt.[204] 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. Finally, so long as the foreign judgment was not procured by fraud or in breach of natural justice, or its enforcement in Singapore would 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.[205]

12.159 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*, which is what *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV*[206] ("*Oro Negro*") is concerned with.

A. Oro Negro

Recognition of foreign judgments – Breach of judicial comity

Recognition of foreign judgments – *Res judicata* – Abuse of process

Recognition of foreign judgments – *Res judicata* – Transnational issue estoppel

12.160 In the 2019 Annual Review of Singapore Cases, the authors covered the Court of Appeal's decision in *Oro Negro* on interim injunction and *forum non conveniens*. In particular, the Court of Appeal found that Singapore is *forum conveniens* for the issues concerning corporate governance and internal management of a Singapore company.[207] Four years later, the High Court handed down its decision on the merits of the suit. It bears emphasising that at the time of writing this chapter, the Singapore Court of Appeal handed down its written grounds of decision

202 2020 Rev Ed.
203 Reciprocal Enforcement of Commonwealth Judgments (Repeal) Act 2019 (Act 24 of 2019) at s 2(1).
204 *Bellezza Club Japan Co Ltd v Matsumura Akihiko* [2010] 3 SLR 342 at [10].
205 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 at [21].
206 [2020] 1 SLR 226.
207 Joel Lee Tye Beng & Leow Wei Xiang Joel, "Conflict of Laws" (2019) 20 SAL Ann Rev 251 at paras 11.84–11.111.

to affirm Vinodh Coomaraswamy J's decision at the High Court level.[208] This chapter will examine and analyse the Court of Appeal's decision in the 2024 Annual Review of Singapore Cases.

12.161 The facts can be briefly recapped as follows. All six plaintiffs (collectively referred to as the "Oro Negro Companies") were Singapore-incorporated companies and had their centre of main interests in Mexico. The first plaintiff was a holding company whose assets were all of the shares in the second to sixth plaintiffs. The first plaintiff was the sole shareholder of the remaining five plaintiffs.[209]

12.162 The first defendant, a company incorporated in Mexico (Integradora), was the sole shareholder of the first plaintiff until September 2017.[210]

12.163 The second and third defendants were directors of the Oro Negro Companies until September 2017. The third defendant was the only defendant who appeared to oppose the Oro Negro Companies' application to enter final judgment on the originating summons.[211]

12.164 Another Mexican company, Perforadora, was a subsidiary of Integradora.[212]

12.165 The Oro Negro Companies needed some funds, and so the first plaintiff issued over US$900m in bonds in January 2014. The bond agreement was governed by Norwegian law and the third defendant signed the bond agreement in his capacity as a director of the first plaintiff.[213]

12.166 Under the bond agreement, the appointed bond trustee was entitled to appoint one director for each plaintiff (the "ID"). The ID's vote was required under all circumstances and in all cases for any plaintiff to commence any insolvency or restructuring proceedings anywhere in the world. The first plaintiff also charged all of its shares in the second to sixth plaintiffs to the bond trustee for the benefit of the bondholders.

208 See generally *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307.
209 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [1] and [20].
210 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [21]–[22].
211 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [24]–[26].
212 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [27]–[28].
213 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [29]–[30].

The Oro Negro Companies' constitutions were also amended to include a new Art 115A in compliance with the bond agreement. Article 115A prohibited each plaintiff and its directors from carrying into effect an insolvency matter unless two conditions were met, *ie*, the plaintiff's shareholder had to vote in favour of doing so by way of ordinary resolution and that the plaintiff's ID voted in favour of doing so. Article 115A was entrenched by a further article in each plaintiff's constitution preventing each plaintiff from amending its constitution in a manner inconsistent with the bond agreement without first securing a resolution of the bondholders approving the amendment.[214]

12.167 Between 2015 and 2017, the Oro Negro Companies' solvency was threatened and risked triggering an event of default under the bond agreement. On 31 August 2017, the second and third defendants exercised their powers as directors of the Oro Negro Companies to grant a power of attorney on behalf of each plaintiff to ten named lawyers in a Mexican law firm called Guerra Gonzalez y Asociados (the "Guerra Lawyers"). Each power of attorney empowered the Guerra Lawyers to file proceedings on each plaintiff's behalf, including a statutory court-supervised restructuring procedure in Mexico called the *concurso*.[215]

12.168 The second and third defendants intended these powers of attorney to empower the Guerra Lawyers to file a *concurso* petition in the Oro Negro Companies' names without complying with Art 115A. It was their position that Art 115A was ineffective when the powers of attorney were granted to the Guerra Lawyers because: (a) as a matter of Mexican insolvency law and public policy, Art 115A was a legal impediment to filing a *concurso* petition; and (b) Art 115A was a fetter on their fiduciary duty as directors of each plaintiff to act in each of their best interests.[216]

12.169 On 11 September 2017, the Guerra Lawyers filed a *concurso* petition on behalf of Perforadora. This constituted an event of default under the bond agreement, which would allow the bond trustee to displace the defendants' ownership and control of the Oro Negro Companies and to vest the control and ownership in the bondholders' nominee.[217]

214 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [32]–[38].

215 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [9] and [42].

216 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [43].

217 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [44].

12.170 On 20 September 2017, Perforadora executed a written resolution to engage the Guerra Lawyers to file a *concurso* petition on behalf of the first plaintiff and to empower the Guerra Lawyers to seek or resist any kind of proceedings on behalf of the first plaintiff. On the same day, the first plaintiff executed a written resolution to the same effect for the second to sixth plaintiffs (collectively referred to as the "Shareholders' Resolutions").[218]

12.171 On 25 September 2017, as a result of Perforadaora's *concurso* petition, the bond trustee declared an event of default under the bond agreement. The bond trustee then exercised its powers under the bond agreement to submit to the Oro Negro Companies pre-signed letters from the second and third defendants resigning as directors of each plaintiff and to appoint in their place their replacement directors nominated by the bondholders with effect from 25 September 2017.[219]

12.172 On 29 September 2017, the Guerra Lawyers filed *concurso* petitions for Integradora and the Oro Negro Companies (the "*Concurso* Petitions"). The third defendant accepted that when the *Concurso* Petitions were filed, the plaintiffs' directors had failed to comply with Art 115A. The bond trustee and the Oro Negro Companies' directors who were in office on 29 September 2017 were also unaware that the Guerra Lawyers had filed the *Concurso* Petitions.[220]

12.173 On 4 October 2017, the bond trustee procured the transfer to itself of all of the first plaintiff's shares held by Integradora such that the bondholders, from 4 October 2017, assumed *de jure* ownership of the Oro Negro Companies.[221]

12.174 On 6 October 2017, the bondholders' appointed directors learned of the *Concurso* Petitions for the first time. On 9 October 2017, the directors of the Oro Negro Companies passed a resolution for each of the companies to: (a) revoke all authority previously given by the Oro Negro Companies to any person, whether by way of a power of attorney or otherwise; (b) appoint nine lawyers from another Mexican law firm, Cervantes Sainz Abogados SC (the "Sainz Lawyers"), to represent the Oro Negro Companies in all Mexican proceedings in respect of any disputes

218 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [45].

219 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [46].

220 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [47]–[48].

221 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [50].

with Integradora and Perforadora; and (c) to grant a power of attorney to the Sainz Lawyers clothing them with the necessary authority.[222]

12.175 From 9 October 2017, both the Guerra Lawyers (relying on the 31 August 2017 powers of attorney) and the Sainz Lawyers (relying on the 9 October 2017 powers of attorney) claimed to be the lawful legal representatives of the Oro Negro Companies in the *Concurso* Petitions.[223]

12.176 The following events took place before the Mexican courts:

(a) In May 2018, on the Sainz Lawyers' application, the *concurso* court dismissed the *Concurso* Petitions on the ground that the Oro Negro Companies' directors failed to comply with Art 115A before carrying into effect the Shareholders' Resolutions and filing the *Concurso* Petitions.[224]

(b) In June 2018, the *concurso* court dismissed the Guerra Lawyers' motion for the *concurso* court to reconsider its decision.

(c) In September 2018, on the Guerra Lawyers' appeal, the *amparo* court annulled the *concurso* court's decision and directed the *concurso* court to consider whether Art 115A was in conflict with principles of Mexican insolvency law.[225] An *amparo* court has the jurisdiction to hear appeals from the *concurso* court on constitutional grounds. The *amparo* court has the power to annul the *concurso* court's decision but does not have the power to go further and decide the underlying legal issue for itself. The *amparo* court must instead remit the issue to the *concurso* court for reconsideration in light of the *amparo* court's reasons for annulling the *concurso* court's decision.[226]

(d) In September 2019, the *concurso* court reaffirmed its decision to dismiss the *Concurso* Petitions for failure to comply with Art 115A. The Guerra Lawyers again appealed to the *amparo* court.[227]

222 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [52].
223 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [53].
224 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [57].
225 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [57].
226 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [16]–[17].
227 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [58].

(e) In February 2021, the *concurso* court, dealing with Integradora's and Perforadora's *concursus*, decided to suspend the effects of the bond trustee's declaration of an event of default. It held that Art 87 of the *Ley de Concursos Mercantiles*[228] ("LCM") empowered the *concurso* court to legally disregard cl 15.1(g) of the bond agreement, which was the clause that gave the bond trustee the power to declare an event of default and to take any step in relation to any insolvency matter.[229]

(f) In June 2021, the *amparo* court again annulled the *concurso* court's decision and directed the *concurso* court to consider whether it had the power to disapply Art 115A for the sole purpose of considering whether to admit the *Concurso* Petitions on the grounds that Art 115A was in conflict with principles of Mexican insolvency law and Mexican public policy.[230]

(g) In December 2020, the *concurso* court again reaffirmed its decision to dismiss the *Concurso* Petitions for failure to comply with Art 115A. The Guerra Lawyers again appealed to the *amparo* court.[231]

(h) In June 2021, the *amparo* court again annulled the *concurso* court's decision and directed the *concurso* court to consider whether a particular clause in the bond agreement (which led to the declaration of an event of default and the transfer of Integradora's shares in the first plaintiff under the bond agreement) and Art 115A were nullified by Art 87 of the LCM. Article 87 of the LCM renders unenforceable any term in a contract that imposes a detriment on a merchant by the mere fact of commencing insolvency or restricting proceedings.[232]

(i) On 1 December 2021, the *concurso* court admitted the *Concurso* Petitions. The *concurso* court held that for the sole and exclusive purpose of considering whether to admit the *Concurso* Petitions, Art 87 of the LCM had the effect of excluding the legal impediments in Art 115A of the Oro Negro Companies' constitutions. The *concurso* court found, among other things,

228 This is the "Mexican Business Reorganisation Act" which governs *concurso* proceedings in Mexico.

229 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [40] and [67].

230 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [58].

231 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [59].

232 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [8] and [59].

that although each plaintiff was incorporated in Singapore, it had its centre of main interests in Mexico.[233]

(j) In January 2022, the Sainz Lawyers appealed to the *amparo* court and the decision of the *amparo* court was still pending at the time Coomaraswamy J gave his decision.[234]

12.177 There were also *concurso* relating to Integradora and Perforadora before the Mexican courts which are irrelevant for the purposes of this review. Ultimately, by decisions in August 2022 and November 2022, the *concurso* court relied on its February 2021 decision to recognise the Guerra Lawyers as the legal representatives of the plaintiffs in filing and maintaining the *Concurso* Petitions pursuant to the Shareholders' Resolutions and the 31 August 2017 powers of attorney. As a result, the *Concurso* Petitions continued on the basis that: (a) the Oro Negro Companies' directors did not have to comply with Art 115A to carry into effect the Shareholders' Resolutions and file the *Concurso* Petition; and (b) the Guerra Lawyers (and not the Sainz Lawyers) have the authority to represent the Oro Negro Companies in the *concursos*.[235]

12.178 Concurrently, the following events took place before the Singapore courts:

(a) In January 2018, about four months after the Guerra Lawyers filed the *Concurso* Petitions, the Oro Negro Companies filed the originating summons to seek the orders reproduced below:[236]

> (a) A declaration that **each of the** 'Resolutions in writing of Sole Shareholder', **specified in Annex A, purporting to authorize members of Guerra to seek a** concurso **on the plaintiffs' behalf, is ultra vires and/or incapable of enabling the plaintiffs to seek any** concurso or any other insolvency matter, without procuring the vote of approval from the plaintiffs' independent director Cochrane;
>
> (b) A declaration that t**he first and/or second and/or third defendants, whether by themselves, their servants or agents or howsoever and whether by way of the** 'Resolutions in writing of Sole Shareholder of the Company' **specified in Annex A or otherwise,**

233 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [60].

234 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [61].

235 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [62]–[69].

236 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro, SAPI de CV* [2019] SGHC 35 at [46]; *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [71]–[72] and [77].

> **have no authority to cause and shall not cause the Plaintiffs to commence, continue and/or maintain any** concurso **petition** or insolvency action and/or any other legal action including in Mexico or elsewhere, purportedly on behalf of the plaintiffs;
>
> …
>
> (d) **An injunction to restrain the first and/or second and/or third defendants, whether by themselves, their servants or agents or howsoever, from relying on and/or continuing to rely on the '*Resolutions in writing of Sole Shareholder of the Company*' specified in Annex A, to cause the plaintiffs to commence, continue and/or maintain any *concurso* petition** or insolvency action and/or any other legal action including in Mexico or elsewhere, purportedly on behalf of the plaintiffs;
>
> (e) An injunction to restrain the first and/or second and/or third defendants, whether by themselves, their servants or agents or howsoever, **from commencing, continuing and/or maintaining any concurso petition** or insolvency action and/or any other legal action including in Mexico or elsewhere, purportedly on behalf of the plaintiffs.
>
> [emphasis in original in italics; emphasis in bold added]

(b) In January 2018, on the Oro Negro Companies' *ex parte* application, the General Division of the High Court granted interim injunctions (until the originating summons had been heard and determined) to prevent the defendants from "commencing, continuing or maintaining the [*Concurso* Petitions] or any other insolvency matter on behalf of any of the [Oro Negro Companies] whether in reliance on the Shareholders' Resolutions or otherwise".[237]

(c) In September 2018, on the defendants' *inter partes* application, the interim injunctions were dismissed.[238]

(d) In September 2019, the Singapore Court of Appeal allowed the Oro Negro Companies' appeal and restored the interim injunctions. The injunctions remained in force from September 2019 until March 2023, when Coomaraswamy J entered final judgment in favour of the Oro Negro Companies in the originating summons, including granting permanent injunctions in terms of the interim injunctions.[239]

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237 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [72(c)] and [73].

238 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [74].

239 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [75].

(e) Since March 2020, the Oro Negro Companies sought to join four of the Guerra Lawyers as defendants to the originating summons but they were unsuccessful in effecting service on those individuals. On 4 May 2022, the Oro Negro Companies elected to discontinue the proceedings against the Guerra Lawyers.[240]

12.179 Coomaraswamy J's discussion on the bases for the grant of the declaratory reliefs is not relevant for the purposes of this review. It is sufficient to note that his Honour (correctly) held that each plaintiff must establish a legal basis for the declaratory and injunctive reliefs, and that legal basis must either be a cause of action or a statutory basis recognised by Singapore law.[241]

12.180 The Oro Negro Companies primarily rested the legal basis for its reliefs on contract, *ie*, that there was an implied contract incorporating Art 115A of the company's constitution with the third defendant such that the third defendant cannot breach Art 115A.[242] In this regard, Coomaraswamy J held that where a term in a company's constitution imposes an obligation or confers a right on a person appointed to an office within a company, including but not limited to the office of director, and that person is aware of that term, accepts appointment as a director of the company and thereafter acts as a director of the company, that term is *prima facie* incorporated into an implied contract between that office-holder and the company. This is, however, subject to contrary agreement, *eg*, (a) where the office-holder enters into an express and separate contract which excludes the relevant terms in the constitution, (b) is inconsistent with the terms in the constitution or (c) expressly provides that it sets out exclusively the terms on which the office-holder has been appointed.[243]

12.181 Coomaraswamy J found that the third defendant had breached the implied contract. Article 115A expressly obliged each director of the Oro Negro Companies not to carry into effect any filing for *concurso* unless the independent director had voted in approval.[244] As for the first defendant,

240 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [76].

241 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [79] and [85].

242 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [80].

243 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [104].

244 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [106]–[109].

Coomaraswamy J was of the view that it induced the third defendant to breach his implied contract with the Oro Negro Companies.[245]

12.182 The third defendant's grounds for resisting the reliefs are relevant for the purposes of this review.

12.183 First, the third defendant argued that the originating summons was an abuse of process of the court. It duplicates the *Concurso* Petitions and amounts to an impermissible attempt to relitigate issues that have been decided against the Oro Negro Companies by the Mexican courts.[246]

12.184 The originating summons, in the third defendant's words, duplicated the *Concurso* Petitions in three respects. First, both proceedings were between the same parties. Second, both parties raised the same or similar issues on the same underlying facts. Third, the Oro Negro Companies sought the same final relief in the originating summons as they did in the *Concurso* Petitions. Determining the originating summons on the merits risked giving rise to two undesirable consequences of duplicate proceedings.[247]

12.185 Although the Mexican proceedings were insolvency proceedings and the Singapore proceedings were proceedings in a civil dispute, Coomaraswamy J did not have any difficulty finding that there was identity of parties between the *Concurso* Petitions and the originating summons:[248]

> (a) Coomaraswamy J first drew a distinction between civil proceedings and insolvency proceedings. A judgment in civil proceedings has four fundamental effects against *only* the parties to the proceedings. First, it terminates the court's power to alter the parties' substantive rights and obligations in the proceedings, leaving the court to exercise only an ancillary or adjectival power relating to the interpretation or implementation of the judgment. Second, the judgment resolves the *lis* by adjudication and with finality, rendering its subject matter *res judicata*. Third, the judgment binds the parties to comply with its terms. Fourth, the

245 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [124] and [128].

246 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [132].

247 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [134].

248 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [137] and [150].

judgment merges the parties' pre-judgment substantive rights and obligations into the judgment.[249]

(b) There is no identical concept of a "party" in insolvency proceedings. The objective in commencing insolvency proceedings is not to get the court to enter a judgment vindicating a private right by changing the *status quo* for the individual benefit of a claimant asserting a *lis*. Instead, the objective is to get the court to enter a judgment effecting a fundamental change in the status of the debtor for the collective benefit of all those who have an interest in its estate. A judgment in insolvency proceedings therefore is quite different from a judgment in civil proceedings; the former does not bind only those persons who are parties to the proceedings as a matter of civil procedure but it binds the whole world. The effect of the judgments or orders is not confined to the persons who are parties to the insolvency proceedings in the narrow procedural sense. The orders will bind those persons over whom the court exercises its personal jurisdiction and against whom it directs its orders, so long as it does so in accordance with the applicable insolvency law and rules of civil procedure. So, when applying the abuse of process analysis to insolvency proceedings, it is "far more meaningful to look for a person over whom the insolvency court exercised jurisdiction in entering judgment or in making an order rather than for a 'party' as that concept has developed as a matter of civil procedure".[250]

(c) Applying the "extended test", Coomaraswamy J accepted that there was identity of parties with regard to the third defendant in the decisions of the Mexican courts relating to the *Concurso* Petitions. The effect of the decisions was that the third defendant was restored as a director of the Oro Negro Companies.[251]

(d) It should be emphasised that the Court of Appeal appeared to not agree with this part of Coomaraswamy J's decision.[252] The authors will no doubt review the Court of Appeal's decision in great detail in the 2024 Annual Review of Singapore Cases.

249 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [143].

250 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [144] and [148]–[149].

251 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [150].

252 See generally *Gonzalo Gil White v Oro Negro Drilling Pte Ltd* [2024] 1 SLR 307 at [99]–[108], *per* Steven Chong JCA.

12.186 Coomaraswamy J, however, rejected the third defendant's argument that the originating summons raised three issues which the Mexican courts had already adjudicated upon in their decisions leading to the findings in the *Concurso* Petitions.[253] In his Honour's view, the issues before the Mexican courts in the *Concurso* Petitions and in the originating summons operated on "two separate and parallel planes".

12.187 First, the issues arose under different bodies of law in different systems of law. The issues in the originating summons before Coomaraswamy J arose under Singapore contract, tort and company law. They were: (a) whether the third defendant breached his implied contract with the Oro Negro Companies; (b) whether Integradora induced the third defendant to breach the implied contract; and (c) whether the corporate acts which the Oro Negro Companies undertook upon and by reason of the event of default were valid.[254]

> (i) On the other hand, in Coomaraswamy J's view, the issues before the Mexican courts in the *Concurso* Petitions arose under Mexican insolvency law and public policy. They were whether the Mexican courts were entitled or obliged under Art 87 of the LCM and Mexican public policy to disapply Art 115A of the Oro Negro Companies' constitution, in deciding whether to admit the *Concurso* Petitions and to disregard the bond agreement in determining the consequences of the event of default.[255]
>
> (ii) Accordingly, Coomaraswamy J was of the view that the issues before the Mexican courts and before him arose "under two different bodies of law within two different systems of law. There [was] no identity of issues."[256]

12.188 Coomaraswamy J's decision, probably motivated by sympathies for the Oro Negro Companies, was intuitively correct. But the reasoning is, with respect, suspect.

12.189 First, the third defendant appeared to be making an argument on "transnational issue estoppel" (and specifically, "issue estoppel"), which was most recently discussed in *The Republic of India v Deutsche Telekom*

253 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [151]–[152] and [155].

254 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [153].

255 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [153].

256 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [153].

AG[257] ("*Deutsche Telekom*"). But the third defendant curiously stopped short of identifying the argument to be "transnational issue estoppel".

12.190 Foreign judgments are capable of giving rise to issue estoppel if three elements are met. Briefly, the elements are: (a) the existence of a foreign judgment that is capable of being recognised in the jurisdiction in which issue estoppel is invoked (*ie*, final and conclusive decision on the merits by a court of competent jurisdiction that has transnational jurisdiction over the party sought to be bound); (b) identity of issues; and (c) identity of parties.[258]

12.191 As explained by the Court of Appeal, the doctrine of issue estoppel is grounded in the principle of finality of litigation. If an issue has been canvassed and finally dealt with by a court, then a party cannot reopen that issue in a fresh action and it would be an abuse of process to do so. In a transnational setting, the analysis is more nuanced. The approach taken by a common law court towards judgments or decisions of a foreign court is informed by principles of comity, *ie*, the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws. In other words, international comity requires the Singapore courts to generally treat the foreign court's judgment with great respect and be slow to pass judgment on the reasoning in the foreign court's decision.[259]

12.192 In the context of transnational issue estoppel however, there is a balance to be struck between considerations of comity and the recognising court's constitutional role as the guardian of the rule of law within its own jurisdiction. In that regard, the Court of Appeal accepted the following considerations as important in guiding the court in applying transnational issue estoppel:[260]

> (a) First, it is irrelevant that the court invoking transnational issue estoppel may form the view that the decision of the foreign court was wrong either on the facts or on the law.

257 [2024] 1 SLR 56.

258 *Gomez, Kevin Bennett v Bird & Bird ATMD LLP* [2023] 1 SLR 450 at [49], *per* Hoo Sheau Peng J; *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [64], *per* Sundaresh Menon CJ.

259 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [67], *per* Sundaresh Menon CJ.

260 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [68]–[69], *per* Sundaresh Menon CJ.

(b) Second, the court must be cautious before concluding that the foreign court had made a final decision on the relevant issue because the procedures of the latter may be different and it may not be easy to determine the precise issues that were decided.

(c) Third, the determination of the issue must be a necessary part of the foreign court's decision.

(d) Fourth, the application of issue estoppel is subject to the overriding consideration that it must work justice and not injustice. Thus, the correct approach is to apply the principles identified unless there are special circumstances such that it would be unjust to do so. Whether there are such special circumstances would of course depend on the facts of the case.

12.193 In *Deutsche Telekom*, the Court of Appeal was of the view that the doctrine of transnational issue estoppel could and should be applied by a Singapore enforcement court when determining whether preclusive effect should be accorded to a seat court's decision going towards the validity of an arbitral award. So, awards that are set aside on grounds such as procedural irregularities are differentiated from awards that are set aside on grounds with a "distinctly domestic flavour", such as arbitrability or the violation of public policy, such that cases in the latter category generally do not attract the doctrine of issue estoppel. As an example, no question of issue estoppel can arise where the public policy of the enforcement court's jurisdiction is in issue because the question of what that public policy is or requires will not have been previously considered by the seat court. There would be no identity of subject matter in such a situation because domestic public policy is unique to each state.[261]

12.194 So, coming back to Coomaraswamy J's reasoning on "identity of issues" which mirror the analysis undertaken in "transnational issue estoppel", it would be odd to say that there was no identity of issues simply because the issues arose "under two different bodies of law within two different systems of law".[262] That, at first blush, appears to be the *ratio decidendi* of the case, *ie*, if the foreign decision is decided under their foreign law, there can be no identity of issues. This cannot be a gatekeeper to disapplying "transnational issue estoppel"; a case heard by the foreign court, even if applying Singapore law, can quite easily be characterised to be applying that foreign court's law (*albeit* applying Singapore law under their conflict of laws rules). Taking another example, would a foreign

261 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [86] and [101], *per* Sundaresh Menon CJ.

262 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [153].

court supposedly applying Singapore law, but in truth applying its own (foreign) laws through the application of the presumption of similarity (possibly arising from the parties' failure to plead or prove the content of Singapore law) [263] be treated as applying Singapore law to give rise to an "identity of issues"?

12.195 It was also unclear, from the judgment, whether the Mexican courts attempted to apply Singapore law at all in the Mexican proceedings or the *Concurso* Petitions. If the Mexican courts did, that would appear to be another argument against the (mis)characterisation that the issues arose under "two different bodies of law within two different systems of law".

12.196 Further, the Oro Negro Companies in the originating summons were seeking, *inter alia*, a declaration that each of the Shareholders' Resolutions "is ultra vires and/or incapable of enabling the plaintiffs to seek any *concurso*".[264] This, on its face, appears to be an attempt to challenge or undo the Mexican courts' decisions in February 2021 and December 2021, which allowed the *Concurso* Petitions to continue on the basis that: (a) "the [Oro Negro Companies'] directors did not have to comply with Article 115A in order to carry into effect the Shareholders' Resolutions and file the Concurso Petitions"; and (b) "the Guerra Lawyers (and not the Sainz Lawyers) have the authority to represent the [Oro Negro Companies]" in the *Concurso* Petitions.[265] One point, following from this and which appears to be unargued, is this: could the Oro Negro Companies not have taken to have "submitted" that issue of whether the Shareholders' Resolutions were *ultra vires* and incapable of enabling the Oro Negro Companies to seek any *concursos* before the Mexican, and not the Singapore, court?

12.197 In any case, one has to examine Coomaraswamy J's decision more closely to identify the proper *ratio decidendi* of the decision. The focus of the analysis is not so much whether the foreign court was applying a foreign law, but the issue that confronted the foreign court. Coomaraswamy J took pains to explain the procedural history in Mexico no doubt to emphasise that upon some appeals by the Guerra Lawyers made to the *amparo* court, the issue the *concurso* court had to consider was whether it "had the power to disapply Article 115A for the sole purpose of considering whether to admit the [*Concurso* Petitions] on

263 See the recent decision of *Ollech David v Horizon Capital Fund* [2024] 1 SLR 287 at [56]–[57], *per* Andre Maniam J.

264 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [77] and [78(a)].

265 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [69].

the grounds that Article 115A was in conflict with principles of Mexican insolvency law and Mexican public policy".[266]

12.198 In other words, the Mexican courts were deciding issues of its own public policy, and not of Singapore law. This analysis bears close resemblance to that commonly seen in applications to enforce or set aside arbitral awards on grounds of public policy, also discussed in *Deutsche Telekom*. This was why in *Deutsche Telekom*, the court held that "no question of issue estoppel can arise where the public policy of the enforcement court's jurisdiction is in issue (or … the arbitrability of a dispute, which is a question that is determined by reference to the enforcement court's public policy)".[267]

12.199 One must be careful when applying decisions on "transnational issue estoppel" in an arbitration context to international commercial litigation matters. There are policy reasons peculiar to the international arbitration context that may not be that relevant to international commercial litigation. For one, the doctrine of "transnational issue estoppel" is particularly relevant where a Singapore enforcement court considers a foreign seat court's decision on the validity of an arbitral award out of respect for "the parties' choice of the arbitral seat".[268]

12.200 Coomaraswamy J had a second reason to his decision on there being no "identity of issues". The second sense in which the issues operate on separate planes is that in the originating summons the question is the authority of a director of the Oro Negro Companies to carry into effect the Shareholders' Resolutions without complying with Art 115A. This is a question of Singapore law. The issue before the Mexican courts was whether Art 87 of the LCM and Mexican public policy allowed the Mexican courts to disapply Art 115A in considering the issue of authority.[269]

12.201 The third defendant's argument was that the Oro Negro Companies sought in the originating summons the same relief they sought in the *Concurso* Petitions, *ie*, relief intended to prevent the Guerra Lawyers from continuing the *Concurso* Petitions, whether in reliance

266 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [58] and [60].

267 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [86], *per* Sundaresh Menon CJ.

268 *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 at [96] and [98], *per* Sundaresh Menon CJ.

269 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [154].

on the Shareholders' Resolutions or otherwise. This argument was also rejected by Coomaraswamy J.[270]

12.202 It is odd for "reliefs" to be examined in a "transnational issue estoppel" analysis. The focus should be on the issues, and not the reliefs, before the foreign court. More importantly, Coomaraswamy J again grounded his decision on the fact that the relief he granted could not be based "even indirectly on a Mexican statute or on Mexican public policy".[271]

12.203 Coomaraswamy J ultimately decided against the third defendant on his argument on "abuse of process". Notably, Coomaraswamy J made clear that "it is not an abuse of process for persons who are parties to one set of proceedings in one jurisdiction to commence proceedings against the same persons in another jurisdiction raising different issues and seeking different relief".[272]

12.204 The third defendant's argument that the originating summons was an abuse of process of the court because the originating summons was, in substance, an attempt to mount a collateral attack on the decisions of the Mexican courts was also rejected.[273] Unsurprisingly, Coomaraswamy J again reiterated that there was no "relitigation of issues" and therefore there was no collateral attack on the earlier Mexican decisions which were premised on issues concerning Mexican insolvency law and public policy.[274]

12.205 The third defendant's other argument that the Oro Negro Companies were barred by the extended doctrine of *res judicata* (*ie*, *Henderson* estoppel) was also, in very few words, dismissed by Coomaraswamy J.[275] This is unfortunate, no less because it is not immediately clear why the Oro Negro Companies cannot be faulted for not having raised these issues before the Mexican courts. On the facts, it would appear that the Oro Negro Companies must have raised and won on those issues, which is why the *amparo* court had to specifically

270 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [156] and [160].
271 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [158].
272 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [161].
273 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [132].
274 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [163] and [166].
275 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [167]–[168].

direct the *concurso* court to disapply Art 115A on grounds of Mexican insolvency laws and public policy.

12.206 If so, and having sat by allowing those *amparo* directions to take its course notwithstanding the Oro Negro Companies having obtained the interim prohibitory injunction, could the Oro Negro Companies not be faulted for the state of affairs (*ie*, much like the respondent in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd*[276] ("*Sun Travels*") which allowed the foreign proceedings to reach an advanced stage instead of obtaining injunctive relief promptly)?

12.207 It is also not immediately clear why the *Henderson* estoppel could not succeed. After all, the doctrine was intended to bar a party from arguing points in later proceedings when those points, with reasonable diligence, could and should have been raised in the earlier proceedings.[277]

12.208 Perhaps Coomaraswamy J was (understandably) sympathetic to the Oro Negro Companies. His Honour in no uncertain terms said that he did not accept that the Guerra Lawyers were conducting the *Concurso* Petitions independently of Integradora and the third defendant.[278] The fact is that the *Concurso* Petitions proceeded notwithstanding the interim injunction granted by the Singapore Court of Appeal in 2019. It would have been more preferable (and on arguably firmer grounds) had Coomaraswamy J grounded his decision on the basis that a foreign judgment (*ie*, the Mexican decisions) should not be given effect if it conflicts with an earlier local judgment (in this case, the Court of Appeal's decision granting the interim injunction).[279]

12.209 It would also appear that there were some missteps by the Oro Negro Companies in the five-year period leading to the hearing of the originating summons on the merits, including:

> (a) The Oro Negro Companies took more than two years to effect service of the originating summons on the Guerra Lawyers. Perhaps they thought it necessary to add them as parties to the action, as required under *Karaha Bodas Co LLC v Pertamina*

276 [2019] 1 SLR 732 at [118], *per* Steven Chong JA.

277 *Lim Oon Kun v Rajah & Tann Singapore LLP* [2023] SGHC 222 at [47], *per* Goh Yihan JC.

278 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [209].

279 *Merck KGaA v Merck Sharp & Dohme Corp* [2019] SGHC 231 at [18]–[19], *per* Lee Sieu Kin J.

Energy Trading Ltd,[280] to bind them to the declaratory reliefs they were seeking before the court.[281]

(b) The Oro Negro Companies curiously never attempted to obtain an interim mandatory injunction, as opposed to the interim prohibitory injunction to "prevent the defendants from commencing, continuing or maintaining the [*Concurso* Petitions] or any other insolvency matter on behalf of any of the [Oro Negro Companies] whether in reliance on the Shareholders' Resolutions or otherwise".[282] Could they not have sought from the Singapore court an interim mandatory injunction for the third defendant and/or Integradora to terminate and/or procure the Guerra Lawyers to terminate the *Concurso* Petitions before the Mexican courts, over and above the interim prohibitory injunction to not commence and/or maintain any insolvency proceedings in any jurisdiction?

(c) It is also not clear (i) if the Oro Negro Companies, as a matter of Mexican law, took any step to have the interim prohibitory injunction granted by the Singapore Court of Appeal in 2019 recognised before the Mexico *concurso* and *amparo* courts, or at least inform the foreign courts about the interim prohibitory injunction, and (ii) if the parties adduced evidence to show that this was possible under Mexican law, such that the Oro Negro Companies' failure to do so coupled with their act of "submitting" the issues over the authority of the Guerra Lawyers to the Mexican insolvency courts become additional hurdles for them on the merits. Indeed, the Oro Negro Companies' willingness and efforts undertaken before the Mexican courts to substantively engage on the issues on (A) the validity of the Shareholders' Resolution, (B) the effect of the August 2017 powers of attorney and (C) the authority of the Guerra Lawyers to represent the Oro Negro Companies in the *Concurso* Petitions arguably made it unfair for them to now complain before the Singapore courts when seeking permanent injunctive reliefs.

12.210 Regardless, it remains to be seen how Singapore courts discuss "transnational *Henderson* estoppel" in future cases.

280 [2006] 1 SLR(R) 114 at [14(e)], *per* Judith Prakash J.

281 *Aavanti Offshore Pte Ltd v Bab Al Khail General Trading* [2020] SGHC 50 at [70], *per* Aedit Abdullah J.

282 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [72(c)] and [73].

12.211 The third argument which Coomaraswamy J rejected was that granting the Oro Negro Companies the permanent injunctions they sought would breach international comity. The third defendant argued that the injunctions would operate as anti-suit injunctions in so far as they prevented the third defendant from continuing the *Concurso* Petitions. They would also operate as anti-enforcement injunctions given that they prevented the third defendant from taking the benefit of the decisions of the Mexican courts.[283]

12.212 Coomaraswamy J rightly rejected the characterisation of the reliefs sought as "anti-suit injunctions". The declaratory reliefs sought to affect the actions of the defendants *qua* agents of the Oro Negro Companies, and not in their personal capacities.[284] In so far as the declarations prevented the defendants from maintaining the *Concurso* Petitions, they did not prevent the defendants from maintaining any proceedings in their personal capacities.

12.213 The third defendant also argued that the permanent injunctions were, properly classified, an anti-enforcement injunction in so far they prevented the third defendant from taking the benefit of the decisions of the Mexican courts.[285] Given how the third defendant phrased their argument, it appears odd that Coomaraswamy J was particular in highlighting that the permanent injunctions did not restrain the *plaintiffs* (*ie*, the Oro Negro Companies) from enforcing the decisions of the Mexican courts. That was not the third defendant's argument.

12.214 The Mexican courts expressly recognised the Guerra Lawyers as being authorised by the August 2017 powers of attorney (granted by the first defendant, Integradora) to represent the Oro Negro Companies in the Mexican insolvency proceedings.[286] The permanent injunction attacked that decision head-on by restraining the first defendant (and the third defendant) from commencing, continuing or maintaining any insolvency matter in Mexico or elsewhere purportedly on behalf of any of the Oro Negro Companies.[287]

283 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [169].

284 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [72(b)], [72(c)], [78(d)]–[78(f)] and [172]–[176].

285 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [170] and [183].

286 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [45], [47]–[48], [69] and [70(f)].

287 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [78(e)].

12.215 There are nonetheless merits in Coomaraswamy J's criticism of the third defendant's argument. What the third defendant sought to argue was not that the permanent injunction was an anti-enforcement injunction, but again was a collateral attack on the decision of the Mexican *concurso* court on the validity of the Shareholders' Resolution, the effect of the August 2017 powers of attorney and the authority of the Guerra Lawyers to represent the Oro Negro Companies in the *Concurso* Petitions. These are issues which the Oro Negro Companies (through the Sainz Lawyers) appeared to have submitted to and engaged the Mexican courts substantively on. It would seemingly lie ill in the plaintiffs' mouths to then complain that the defendants ought not to have continued to fight the *Concurso* Petitions. This appeared to have not been properly argued by the third defendant before Coomaraswamy J. As a result, Coomaraswamy J focused his decision on how the situation before him was different from that sought in *Sun Travels*.[288]

12.216 The third defendant's final argument, which was dismissed, was that the originating summons should fail because the reliefs the Oro Negro Companies sought were futile. In particular, the third defendant argued that given the findings in the Mexican proceedings, the Mexican courts had already recognised the August 2017 powers of attorney as continuing in force and sufficient to empower the Guerra Lawyers to maintain the *Concurso* Petitions as the Oro Negro Companies' agents. The only way those findings could be set aside and the *Concurso* Petitions halted was by a subsequent decision of the Mexican courts, and not through the reliefs granted in the Singapore originating summons.[289]

12.217 It is not immediately clear if there is any legal basis for the third defendant's submission, but this will be a useful argument to keep in mind for litigants in international dispute matters because Coomaraswamy J did not reject this argument for a lack of legal basis. His Honour found that at some point, the plaintiffs would have to commence proceedings in Singapore to recognise the *concurso* proceedings as a "foreign proceeding" within the Insolvency, Restructuring and Dissolution Act 2018,[290] and so the reliefs granted would still be useful to the plaintiffs.[291]

288 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [193]–[195].

289 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [201]–[204].

290 Act 40 of 2018.

291 *Oro Negro Drilling Pte Ltd v Integradora de Servicios Petroleros Oro Negro SAPI de CV* [2023] SGHC 297 at [208].

B. Ramesh Vangal v Indian Overseas Bank

Foreign judgments – Section 6(1) Reciprocal Enforcement of Foreign Judgments Act 1959

Foreign judgments – Stay of recognition proceedings

12.218 Whether at common law or under the REFJA, the recognition or registration of foreign judgments promotes "comity", in the sense of according deference to foreign institutions and their decisions for the purpose of protecting the rights and legitimate interests of litigants.[292] Of course, not every foreign judgment may be recognised or registered: only those which meet the criteria for recognition, and against which no defences to recognition can be raised, will qualify. Moreover – and more importantly for the purposes of this review – proceedings to recognise or register a foreign judgment may be *stayed* if the judgment is appealable and/or being appealed in the courts of the relevant foreign state at the material time. The common law has long recognised this power,[293] and s 6(1)(*b*) of the REFJA explicitly codifies it, although it uses the language of an *adjournment* of applications related to registration instead of a stay. And in *Ramesh Vangal v Indian Overseas Bank*[294] ("*Ramesh Vangal*"), a Singapore court addressed, for the first time, the principles governing when and on what terms courts should grant such stays or adjournments.

12.219 *Ramesh Vangal* involved a judgment rendered by the Hong Kong Court of First Instance (the "Judgment"), in favour of the Indian Overseas Bank for a debt owed to it by one Ramesh Vangal. The Judgment was issued in January 2018, and Ramesh filed an appeal to the Hong Kong Court of Appeal in February 2018 (the "HK Appeal"). In August 2019, the Bank applied to register the Judgment in Singapore under the REFJA. In May 2021, the Bank served a Notice of Registration on Ramesh, who then filed an application to the Hong Kong Court of First Instance to stay the execution of the Judgment pending the disposal of the HK Appeal (the "First HK Stay Application")

12.220 In June 2021, Ramesh then applied to set aside the registration of the Judgment in Singapore. In May 2022, the AR granted an adjournment under s 6(1)(*b*) of the REFJA until the HK Appeal had been disposed of. In July 2022, on the Bank's appeal, Philip Jeyaretnam J varied the adjournment period until after the First HK Stay Application was disposed of. In November 2022, the Hong Kong Court of First Instance dismissed the First HK Stay Application. In December 2022,

292 *Hilton v Guyot* (1895) 159 US 113 at 163–164.
293 *Scott v Pilkington* (1862) 2 B&S 11 at 41.
294 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261.

Ramesh applied to the Hong Kong Court of Appeal to stay the execution of the Judgment pending the disposal of the HK Appeal (the "Second HK Stay Application"). Ramesh then applied for another adjournment for proceedings relating to the registration of the Judgment in Singapore. Jeyaretnam J dismissed this application, and Ramesh appealed that decision to the Appellate Division of the High Court, essentially on grounds that Jeyaretnam J had improperly exercised his discretion under s 6(1)(*b*) of the REFJA.

12.221 The Appellate Division dismissed Ramesh's appeal. Woo Bih Li JAD, delivering the Appellate Division's unanimous decision, first laid out several principles that should govern the discretion to grant adjournments under s 6(1)(*b*) of the REFJA. In general, the court had to balance the judgment creditor's interest "in the fruits of its success" against the judgment debtor's interest "that the foreign appeal is not rendered nugatory", to determine what "best accords with the interests of justice".[295] In this balancing exercise, the following were relevant factors:

> (a) the time taken for foreign proceedings to conclude, especially if this meant that adjournment would lead to "excessive delays" for the judgment creditor;[296]
>
> (b) whether the judgment debtor made an offer to provide security;[297]
>
> (c) whether the judgment debtor would be able to recover the judgment sum, or conversely whether it would suffer "irremediable harm", if the foreign judgment were registered but the foreign appeal then succeeded[298]; and
>
> (d) whether the foreign appeal was "*bona fide*" or "will be prosecuted with due diligence".[299]

12.222 Finally, Woo JAD emphasised that it would be "inappropriate for the Singapore court to assess the merits of the appeal pending in the foreign court, especially when foreign law or complex issues of law and fact are involved".[300]

295 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [44(a)].
296 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [44(b)].
297 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [44(c)].
298 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [44(d)].
299 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [44(e)].
300 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [44(f)].

12.223 On the facts, then, the balance of justice weighed in favour of no further adjournment being granted, because:

(a) A further adjournment would occasion "significant delays" to the Bank's prejudice.[301] This was because the HK Appeal had already taken several years and the Second HK Stay Application might not be heard for some time.[302] Ramesh's further argument that the delay in the HK Appeal was the Bank's fault should be disregarded, because it would not have been in the Bank's interests to delay the HK Appeal, and because in any case, these concerns could be addressed by the Hong Kong courts.[303] Moreover, while it was admittedly true that the Bank had itself delayed the service of the Notice of Registration on Ramesh for 40 months, Jeyaretnam J had already taken this delay into consideration when upholding the first adjournment.[304]

(b) Ramesh had made no offer to provide security, despite Jeyaretnam J having indicated that this would have been a factor weighing in favour of a further adjournment,[305] and indeed continued to equivocate on whether he might be willing to do so.[306] Moreover, it was the judgment debtor's responsibility to offer security, not the judge's duty to ask for it.[307]

(c) Ramesh would have no difficulties recovering the judgment sum from the Bank if the HK Appeal succeeded, because the Bank was "a major Indian nationalised bank" with branches in Hong Kong and Singapore.[308] While Ramesh argued that he might be made bankrupt if he had to pay the judgment sum, resulting in "irreparable harm to his reputation, business and personal finances", he produced no evidence of his assets and means from which the court could assess the likelihood and gravity of said harm.[309]

(d) While the HK Appeal was *bona fide*, this factor alone was not conclusive, and in this case was outweighed by the other factors.[310]

301 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [52].
302 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [52].
303 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [83].
304 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [51].
305 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [52].
306 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [77].
307 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [76].
308 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [5] and [78].
309 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [79]–[80].
310 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [75].

12.224 Ramesh also made several allegations that Jeyaretnam J had improperly prejudged the merits of the HK Appeal, which Woo JAD dismissed. First, Ramesh alleged that the very fact that an adjournment was not granted even though the Second HK Stay Application and the HK Appeal had not yet been heard amounted to prejudgment, because Jeyaretnam J had improperly assumed that both would fail.[311] Woo JAD held that this would plainly be "an undue restriction of the Judge's exercise of [the s 6(1)(*b*)] discretion",[312] especially because the First HK Stay Application had already failed.[313] Second, Ramesh alleged that the failure to grant a second adjournment effectively amounted to "a Singapore court … impos[ing] Singapore-type timelines on a foreign court", which "might be judicial chauvinism and contrary to international comity".[314] Woo JAD reasoned that this argument improperly assumed that the delay the Bank would suffer, due to the length of time it might take for the Second HK Stay Application and the HK Appeal to be disposed of, was the only factor Jeyaretnam J considered – in reality, that was merely one factor balanced against others.[315] Moreover, no chauvinism or breach of comity would arise from the mere fact that no adjournment was granted, since the basis for that decision was not a criticism of the efficacy of the Hong Kong judicial system but an overall concern of the balance of interests between judgment creditor and judgment debtor.[316]

12.225 Woo JAD's decision in *Ramesh Vangal* provides much-needed clarity on when adjournments under s 6(1)(*b*) of the REFJA might be granted. It seems likely that courts will also apply Woo JAD's framework to applications to stay proceedings to recognise and enforce foreign judgments at common law. The content of the framework, moreover, seems eminently sensible, especially as it prevents judgment debtors from stalling recognition or registration proceedings indefinitely by filing or applying for multiple (potentially frivolous) appeals and stays in the relevant foreign state.

12.226 One aspect of *Ramesh Vangal*, however, warrants further discussion: the proposition that Singapore's courts should not assess the merits of the appeal before the foreign court. This prohibition seems sensible, but *why* should it exist? Woo JAD provided two reasons. The first is that Singapore courts may not "be sufficiently adept at assessing the merits of the appeal", especially where "the foreign judgment comes from a civil law jurisdiction" or "the case involved complex issues of law and

311 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [46] and [48].
312 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [49] and [73].
313 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [49].
314 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [54].
315 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [55]–[56].
316 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [57].

fact".[317] The second is that assessing the merits of the appeal would place the Singapore court "in the unenviable position of critiquing the decision of a foreign court", and "Singapore courts are often slow to pass judgment on the quality of justice in a foreign court for reasons of comity".[318]

12.227 In the authors' opinion, Woo JAD was right to conclude that a Singapore court should not consider the merits of a foreign appeal in considering whether to stay or adjourn recognition or registration proceedings. But with respect, his Honour's reasons for reaching that conclusion suffered from two problems. For starters, two reasons will not always dovetail: all foreign judgments may equally deserve "comity", but a Singapore court will not always be equally ill-equipped to assess a foreign judgment's merits. More fundamentally, Woo JAD's second reason is unconvincing. It is true that "comity" requires that Singapore courts should be slow to pass judgment on the quality of justice in a foreign court. However, holding that a foreign court has applied the governing law of a claim wrongly does not amount to a judgment on the quality of the justice it delivers. If that were so, a Singapore court applying foreign law under a choice of law rule could never, in determining the content of the applicable law, find that one foreign judgment which constitutes one piece of evidence about foreign law should be disregarded because it contradicts other conflicting and better-reasoned foreign judgments. In that situation, the Singapore court is equally saying "I think the foreign court got it wrong", but no one doubts that that is something the Singapore court is perfectly entitled to do in the choice of law context. Why, then, should it be considered a breach of comity in the foreign judgment context?

12.228 The answer is that it is precisely the foreign judgment context that matters. As mentioned above, the reason why the conflict of laws allows the recognition and enforcement of foreign judgments is to preserve the rights and legitimate interests of litigants. Importantly, these legitimate interests include, in this particular context, the interest in the finality of litigation by an appropriate court. "Finality", so understood, is not an objective separate from "comity"[319] – rather, courts accord comity to foreign judgments *for the purpose* of achieving an appropriate degree of finality. It is for this reason that, in determining whether a foreign judgment should be recognised or registered, a Singapore court does not judge the merits of the foreign court's decision. It would thus be equally unwarranted for the Singapore court to judge the merits of any possible or pending foreign appeal, when considering whether the proceedings to

317 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [43].
318 *Ramesh Vangal v Indian Overseas Bank* [2023] 2 SLR 261 at [43].
319 *Cf*, *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [32].

recognise or register the foreign judgment should be stayed or adjourned. Finality, in both cases, will be elusive if the merits of the foreign judgment are open for reassessment.