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11. CONFLICT OF LAWS

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Introduction

11.1 For 2017, there are nine cases that will be examined in this review. This excludes *Ong Ghee Soon Kevin v Ho Yong Chong*,[1] which was reported in the previous year.[2]

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

11.3 It is trite that before a court can hear a matter, it must be seized of jurisdiction. Jurisdiction can be *in personam* or *in rem*. *In personam* jurisdiction also includes the court's long-arm discretionary jurisdiction under O 11 r 1 of the Rules of Court.[3] There are certain circumstances in which the jurisdiction of the court can be challenged. In addition, a party can apply to the court to exercise its discretion not to hear the matter.

Stay of proceedings

11.4 One of the strategic actions a defendant can take is to apply for a stay. Staying proceedings based on the doctrine of *forum non conveniens* is a mainstay in international commercial litigation. It is well-accepted that the doctrine of *forum non conveniens* consists of two stages (as established in *Spiliada Maritime Corp v Cansulex Ltd*)[4] ("*Spiliada*"). Stage 1 seeks to see if there exists a more appropriate forum than Singapore and this burden falls on the defendant who is applying for the stay. If it is shown that there is a more appropriate forum, then the burden shifts to the plaintiff in Stage 2 to show that the action should, nonetheless, not be stayed because it would deprive the plaintiff of a

1 [2017] 3 SLR 711.
2 See (2016) 17 SAL Ann Rev 275 at 292–293, paras 11.70–11.75.
3 Cap 322, R 5, 2014 Rev Ed.
4 [1987] AC 460.

legitimate juridical or personal advantage. At the end of the day, the doctrine of *forum non conveniens* seeks to identify the best location to hear the matter in the interests of justice.

Forum non conveniens

11.5 *Sinco Technologies Pte Ltd v Singapore Chi Cheng Pte Ltd*[5] ("*Sinco Technologies*") revolved around an attempt by the plaintiff (incorporated in Singapore) to acquire the shares of a Chinese company, Zhuhai Chi Cheng Technology Co Ltd ("ZCC"). The first defendant held the majority of shares in ZCC and the second defendant was a director of the first defendant. There was a long series of negotiations and interactions which saw the plaintiff signing a letter of intent, paying a deposit of US$3m and subsequently another advance payment of US$2.6m. According to the plaintiff, signing the letter of intent and making these payments were based on a series of representations made by the defendants. A disagreement arose about whether the plaintiff was liable to bear ZCC's daily operating expenses and the transaction fell through. The plaintiff sought the return of the US$5.6m that had already been paid. US$2.6m was returned but it was the defendants' position that the deposit of US$3m was a penalty for the plaintiff's breach of contract. As such, it was not refundable. The plaintiff commenced proceedings in Singapore for misrepresentation and unjust enrichment. It is also facing a suit in China by the shareholders of ZCC. The defendants have applied to stay proceedings in Singapore on the basis of *forum non conveniens*.

11.6 The court began by reviewing the two-stage test from *Spiliada* and identifying which party bore the respective burdens of proof at each stage. The court then found that the factors at Stage 1 pointed overwhelmingly in favour of China as the more appropriate forum and the plaintiff would not be deprived of substantive justice should the stay be granted. In doing so, the court reinforced the point that at Stage 1, it was the weight, and not quantity, of factors that was significant and that at Stage 2, showing differences and procedures in remedies is insufficient to fend off a stay.

11.7 Although this case is a straight forward application of the *forum non conveniens* analysis from *Spiliada*, it is interesting to note that the court began the analysis by seeking to identify the proper law of the contract. It is not clear, however, to what contract the court was referring. The share transfer agreement was not signed. Yet, it seems like the court went through the standard three-stage test for determining the

5 [2017] SGHC 234.

proper law of the contract. It opined that since the share transfer agreement was not signed, there was no express choice. Fair enough. It is odd, however, that the court then proceeded to look at an implied choice law, considering that an unsigned share transfer agreement should also be fatal to the existence of an implied choice. The court then went on to consider various factors, some of which properly point to an implied choice (had the share transfer agreement been signed) while others were standard connecting factors pointing to China as an appropriate forum.

11.8 To be clear, identifying the *lex causae*, which could be the same as or derived from the proper law of the contract, is often an important factor in the *Spiliada* analysis. If the *lex causae* is a foreign law, the general argument is that the courts of a foreign jurisdiction are often better placed to apply their own law. However, it is confusing why it would be necessary to identify the proper law of the contract in this case. The causes of action were in misrepresentation (whether fraudulent or negligent) and unjust enrichment. Even if there was a need to connect these causes of action to a contract (in order to derive a *lex causae*), the relevant contract should have been the letter of intent.

11.9 With respect, the court seems to have conflated the three-stage test for identifying the proper law of a contract with identifying the factors that point to the natural forum in Stage 1 of the *forum non conveniens* analysis. This is not to say that the conclusion that the court came to was wrong. At the end of the day, the *Spiliada* test clearly pointed to China as the natural forum. It is important, however, for the relationship between the *lex causae* and Stage 1 of the *Spiliada* test to be clear and kept separate from the three-stage test for identifying the proper law of a contract.

Forum non conveniens – *Choice of Law*

11.10 *Rotary Engineering Ltd v Kioumji & Eslim Law Firm*[6] ("*Rotary Engineering*") was an appeal from the High Court.[7] The facts can be stated simply here. The defendants entered into a contract with a Saudi Arabian company, for the design and construction of an integrated petroleum refinery and petrochemical complex in Saudi Arabia. The work was completed but full payment was not made. The defendants entered into a Proxy Agreement with the plaintiffs whereby the plaintiffs would negotiate a settlement on behalf of the defendants with the Saudi

6 [2017] 1 SLR 907.

7 See (2016) 17 SAL Ann Rev 275 at 282–284, paras 11.31–11.36 for the background of the High Court decision on the choice-of-law issue; see also *Kioumji & Eslim Law Firm v Rotary Engineering Ltd* [2016] SGHC 218.

company and would receive a percentage of the proceeds as professional fees. The claim was settled and the professional fees were not paid. In a separate conversation, the second plaintiff entered into a joint venture with the second and third defendants, where the second plaintiff was to have received an equity share in one of the subsidiaries owned by the first plaintiff. This did not happen.

11.11 The plaintiffs commenced proceedings in Singapore for breach of the Proxy Agreement and the Joint Venture Agreement, and for conspiracy between the defendants to cause the first defendant to breach the two agreements. The defendants applied to stay the proceedings in favour of Saudi Arabia. At first instance, the High Court held that the defendants did not discharge their burden in showing that Saudi Arabia was a more appropriate forum than Singapore. On appeal, the Court of Appeal found for the defendants and ordered a stay. There are a number of noteworthy points in this judgment.

11.12 The first was a point the Court of Appeal made in passing in response to counsel for the plaintiff. Counsel had expressed that, within the context of the two-stage test from *Spiliada*, even if a defendant had succeeded in showing that there was a more appropriate forum elsewhere (at stage 1), it would not be exceptional for the court to refuse a stay at Stage 2. This view was righted by the court, which opined that if Stage 1 has been satisfied, the stay would ordinarily be granted unless justice requires otherwise. It should therefore not be taken that fending off a stay would be a matter of course and would at the least be considered something unusual.

11.13 Secondly, the court made an observation about the applicable approach for appellate intervention in applications for a stay. Because the court at first instance is exercising a discretion, an appellate court cannot intervene simply because it disagrees with the outcome of the discretion. It can only intervene if the court at first instance had "erred in principle, took into account irrelevant matters, failed to take into account relevant matters, or made a decision that was plainly wrong".

11.14 At first instance, the court had opined that where parties had not expressly or implied chosen a law, an objective inquiry analysing various connections was called for and having gone through this query, the court held that the governing law of the Joint Venture Agreement was Singapore.

11.15 On this, the Court of Appeal disagreed. Apart from the place of contracting (which was Singapore), the shares to be received were in a Saudi company, and the plaintiff was to have taken a management role in a Saudi company to develop business in Saudi Arabia with an injection of funds from another Saudi company and with negotiations

occurring in Saudi. As such, the proper law of the Joint Venture Agreement should have been Saudi law.

11.16 Of course, in the larger *forum non conveniens* analysis, this is only one factor which may not have changed the conclusion that the lower court had arrived at. However, in this case, the Court of Appeal opined that the proper law of the Joint Venture Agreement was so weighty that it swayed the balance to Saudi Arabia. In their analysis, the two agreements, both governed by Saudi law, were central to the causes of action involved.

11.17 Thirdly, the plaintiffs had made two arguments in relation to Stage 2 of the *Spiliada* test. First, they argued that because the plaintiff had been accused of forgery, he would be unable to pursue proceedings in Saudi Arabia. Second, they argued that the courts of Saudi Arabia discounted the evidence of non-Muslim witnesses and female witnesses in relation to their counterparts.

11.18 On the first argument, the court disposed of this by observing that the person who had initially made the accusation of forgery has repeatedly stated in sworn affidavits that the accusation was baseless and in error. Further, there was evidence that the complaints were being withdrawn and no evidence that there were ongoing investigations. As such, the court felt that the plaintiff need not be particularly concerned.

11.19 On the second argument, the court noted that not only did counsel make the point about certain types of evidence being discounted and that it would affect this case, he sought to argue that this consideration affected the Saudi legal system as well. The court chose not to go so far. It accepted that while it would be possible, in principle, to establish a sufficient risk of injustice by taking into account the generally applicable rules of evidence of the foreign legal system, it must still be established that there is in fact such a risk of injustice on the facts of the case that is before the court. In this case, no such risk of injustice existed. There were non-Muslim witnesses on both sides and key testimony of the plaintiffs would come from a Muslim man.

11.20 Finally, the court made the observation that when a matter is stayed on the basis of *forum non conveniens*, this is different from a discontinuance or dismissal. The stay is only suspensory, which means that the court remains seized of the proceedings. The consequence of this is that the court may lift the stay at a later point if the premise upon which the stay was granted was incorrect or mistaken. Having said that, the court emphasised that lifting a stay would happen in only the most exceptional circumstances and that parties should not take this as an opportunity to attempt to revive issues that had already been resolved.

Forum non conveniens – Lis alibi pendens *and comity*

11.21 *Lis alibi pendens* (disputes pending elsewhere) is sometimes raised in the context of an application for a stay based on *forum non conveniens*. This, and the notion of international comity arose in *Best Soar Ltd v Praxis Energy Agents Pte Ltd*.[8] The respondent (a Singapore company) contracted to supply bunker fuel to the applicant owner (a British Virgin Islands ("BVI") company) of *The Silvia Ambition* for a time charter. The fuel was delivered and an invoice issued, the latter remaining unpaid for over 18 months. A second invoice was issued, this sum for the initial sum and accrued interest. This too remained unpaid and the respondent arrested *The Silvia Ambition* in Beirut, Lebanon and commenced proceeding in the Commercial Court in Beirut. The applicant filed an objection claiming wrongful arrest and seeking damages. *The Silvia Ambition* was released after the applicant furnished security by way of bank guarantee.

11.22 The applicant then applied to the Singapore courts seeking, *inter alia*, a declaration that it was not liable to the respondent under the contract and that *The Silvia Ambition* had been wrongly arrested. It also sought an injunction to restrain the respondent from pursuing its claim or enforcing any judgment obtained. The respondent applied for a stay based on *forum non conveniens* and case management grounds (pending the outcome of the Lebanon proceedings). At first instance, the stay was granted and the applicant appealed.

11.23 On appeal, the court went over the familiar principles from *Spiliada* and examined the factors before affirming the decision of the court below. A number of points about this judgment can be made.

11.24 Firstly, at Stage 1, some factors like the personal connections of parties and witnesses were neutral, as were the factors of expense and convenience. The proper law of the contract pointed to Singapore (although the court felt it unnecessary to address this point). The court thought significant the factor of the location of the tort of wrongful arrest and the law governing that tort. Both these pointed to Lebanon.

11.25 Secondly, on the element of *lis alibi pendens*, the court reiterated the position that *lis alibi pendens* was not a separate ground for a stay. It was a factor to be taken into consideration when the court is considering the doctrines of forum election and *forum non conveniens*. Put simply, where there are parallel proceedings, there is always the concern of duplication of resources and conflicting judgments. On this point, after noting that forum election was not an issue in this case, the

8 [2018] 3 SLR 423.

court opined that the proceedings in Lebanon did constitute *lis alibi pendens* (presumably in relation to the Singapore proceedings) and that it was a relevant factor to be considered in the *forum non conveniens* analysis.

11.26 Thirdly, the court took into account international comity and opined that this favoured Lebanon as the more appropriate forum for the claim for wrongful arrest as the Executive Bureau in Beirut (a division of the first instance courts in Lebanon), which made the Arrest Order, was the more appropriate court to determine whether the arrest was wrongful under Lebanese law.

11.27 Having decided that Lebanon was the more appropriate forum and there not being any merit to the arguments put forward at Stage 2 of the *forum non conveniens* analysis, the court dismissed the applicant's appeal.

Stay of proceedings – Forum non conveniens – *Intersection with forum election and with Singapore International Commercial Court ("SICC")*

11.28 *Rappo, Tania v Accent Delight International Ltd*[9] ("*Accent Delight*") was an appeal from *Accent Delight International Ltd v Bouvier, Yves Charles Edgar*.[10] This case involved equitable and proprietary claims in relation to artwork. The appellant defendants were involved in sourcing art pieces for one Rybolovlev who controlled the respondent plaintiff companies. The plaintiff claimed that the first defendant had breached its fiduciary obligation as an agent fraudulently inflating the prices of the artworks with the knowing assistance of the third defendant and commenced proceedings in both Singapore and Monaco. Based on these parallel proceedings, the defendants applied to the court to compel the plaintiff to elect a forum and, in the alternative, stay proceedings based on the doctrine of *forum non conveniens*.

11.29 At first instance, both stay applications were dismissed. The plaintiffs were not compelled to elect a forum as they undertook to discontinue their civil proceedings in Monaco. The court also declined to stay proceedings as it found that Singapore was the natural forum for the dispute. The judge also considered the possibility of transferring the matter to SICC for resolution. On appeal, the defendants succeeded.

9 [2017] 2 SLR 265.

10 [2016] 2 SLR 841; see also (2016) 17 SAL Ann Rev 275 at 281–282, paras 11.24–11.30.

11.30 There are a number of noteworthy observations about this case. First, on the identity of the natural forum, the Court of Appeal traversed the standard approach from *Spiliada* where at Stage 1, the defendants had to show that some other jurisdiction, in this case, Switzerland, was a more appropriate forum than Singapore. In doing so, they highlighted the importance of focusing on the quality and not quantity of the connecting factors, acknowledging that in the international commercial context, there could be a large number of contacts, albeit insubstantial. As such, the task of the court is to search for relevant and substantial connections with the matter.

11.31 On this, the court thought the most significant connecting factor was that of the governing law of the dispute. It opined that the alleged breach of fiduciary obligations arose out of the contractual relationships between the parties and, applying the three-stage analysis for determining the proper law of a contract, concluded that the governing law was Swiss law.

11.32 While this conclusion was sufficient to persuade the court that, at least at Stage 1, Switzerland was the more appropriate forum, the court briefly considered the connections the witnesses provided. These connections also overwhelmingly pointed in favour of Switzerland.

11.33 Secondly, as part of the *forum non conveniens* analysis, the court had to turn its mind to the question of whether Switzerland (and Monaco) qualified as alternative fora in the first place. Logically speaking, before one can assert that another forum is a more appropriate forum, it must be premised on the assumption that it is available in the first place. In this case, the defendants argued that they Swiss courts did not have jurisdiction over the dispute under the Swiss Federal Act on Private International Law.[11] As a preliminary point, it is not clear whether the availability of a forum is a consideration that integrated into the *forum non conveniens* analysis or is in effect a question that must be answered before Stage 1 of the *forum non conveniens* analysis can be triggered.

11.34 In any case, the court found that the undertakings the defendants provided to submit to the jurisdiction of the Swiss courts was sufficient to overcome this hurdle. Put another way, an undertaking to submit to the jurisdiction of a foreign court makes that foreign court available even if it would not have been available without the undertaking. And, this is a move that can be done even on appeal. Further, should the foreign court choose not to accept jurisdiction, it

11 Federal Act on Private International Law of 18 December 1987 (Switzerland).

would be open to the plaintiff to return to the Singapore courts to seek a lifting of the stay.

11.35 For the sake of completion, it is useful to note that the court also briefly considered if Monaco would constitute an available alternative forum and concluded that it was.

11.36 Thirdly, the court considered whether any considerations of justice would mitigate against a stay. The main argument advanced by the plaintiff was that it would be unable to obtain the remedy of constructive trusts and tracing in the Swiss courts. The court reiterated the importance of caution in pronouncing that a foreign forum, especially if it operates an established and recognised system of justice, would deprive a party of substantive justice. In this case, the court opined that a difference in remedy does not lead to a conclusion of injustice and concluded that the plaintiff would receive a hearing of the dispute that was procedurally and substantively fair.

11.37 Fourthly, the court helpfully provided guidance on the intersection of SICC and the doctrine of *forum non conveniens*. The defendant had argued that the judge in the court below had, incorrectly, taken into account the possibility of a transfer to SICC when deciding on the stay applications. The court first noted and accepted the learned judge's clarification that she had not taken this factor into account. However, the court went on to say that even if she did, she was entitled to do so as this was a relevant factor in determining whether Singapore was the *forum conveniens*. The abilities and resources of SICC cannot be ignored in determining whether proceedings in Singapore should be stayed. The court did, however, emphasise that this should not result in the Singapore courts refusing to grant a stay in all cross-border cases. The possibility of transfer to SICC is but one factor which can be overridden by others factors in the *forum non conveniens* analysis. Any defendant seeking to rely on this factor will need to show the specific quality or feature of SICC that makes it more appropriate for the matter to be heard by SICC in Singapore. Further, it would also be important to show that the transfer requirement to SICC are likely to be satisfied.

11.38 This guidance provided by the court is extremely helpful and to be welcomed. What is also welcome is the court noting a passing comment made by the SICC Committee in its report as to whether the *Spiliada* test continues to be relevant in the age of SICC, and affirming that it remains relevant.

11.39 Finally, the court addressed the question of how the doctrines of forum election and *forum non conveniens* intersected. The plaintiffs argued that the two doctrines were alternative remedies. Put another way, one could not seek to rely on both doctrines at the same time. The

concern expressed was that if, via the doctrine of forum election, the plaintiff selected Singapore, the defendant could then via the doctrine of *forum non conveniens* stay the proceedings in Singapore, thereby depriving the plaintiff of an outcome. On this point, the court traversed the authorities and noted that the doctrine of forum election was based on preventing the possibility of conflicting decisions and an abuse of domestic and foreign court processes whereas the doctrine of *forum conveniens* was about determining the appropriateness of exercising its jurisdiction over the dispute. The conceptual bases for these applications, as was for an anti-suit injunction, were different. It was therefore open for a defendant to apply to compel the plaintiff to elect between proceeding in Singapore and a foreign jurisdiction, and then applying for a stay based on *forum non conveniens* or an anti-suit injunction respectively. The court opined that while it is possible for a plaintiff to be routed on two fronts by a shrewd defendant, no issue of unfairness arises because of the different conceptual bases.

11.40 However, having said that, the court provided guidance, as a matter of practice, on the appropriate sequence to consider applications where both *forum non conveniens* and forum election come into play. The court opined that it was sensible to first consider the application based on *forum non conveniens*. If the court concludes that Singapore was not the natural forum, proceedings would be stayed and that would be the end of the matter. There would be no need to consider forum election. Only if the court had concluded that Singapore was the natural forum would the plaintiff then be put to an election between forums. This was the approach the court adopted in this case. Since it had concluded that Singapore was not the natural forum, it did not go on to consider if the proceedings in Monaco was *lis alibi pendens*.

Forum non conveniens – *Discretionary jurisdiction – Exclusive jurisdiction clause*

11.41 A stay of proceedings can also be based on an exclusive foreign jurisdiction clause. In *TMT Co Ltd v The Royal Bank of Scotland plc*,[12] the plaintiff (a Liberian company) contracted with the first defendant through an FFA Account Agreement which contained an asymmetric jurisdiction agreement and a choice-of-law clause in favour of English law. Under this agreement, the Plaintiff traded in forward freight agreements and options. A USD Call Deposit Account was also opened to facilitate these trades. The plaintiff eventually made losses and debts owed to the first defendant were not paid. The plaintiff commenced proceedings in England on a number of grounds but these were settled

12 [2017] SGHC 21.

and captured in a settlement agreement, which provided for English law to apply and for the English courts to have exclusive jurisdiction. The plaintiff subsequently began proceedings in Singapore against the first defendant, its Singapore branch (second defendant), its ex-chief executive officer (third defendant) and two former employees (fourth and fifth defendants). Jurisdiction over the second and fifth defendants were as of right and jurisdiction over the remaining defendants was via the long-arm jurisdiction of the courts. The defendants (except the fourth, who did not enter an appearance) applied to stay the proceedings on the grounds of, *inter alia*, the exclusive jurisdiction clause in favour of England and the doctrine of *forum non conveniens*. At first instance, the court granted the stay. The plaintiff then appealed.

11.42 To be clear, there were two jurisdiction clauses in play: one in the settlement agreement and the other in the FFA Account Agreement.

11.43 In relation to the settlement agreement, much of the judgement involved the learned judge examining the settlement agreement and determining if its scope was wide enough to cover the claims in Singapore. Without needing to go into details, the court held that it was. The exclusive jurisdiction clause in favour of England therefore applied to this matter and as such, proceedings against the first defendant should be stayed on this basis. The coverage of this stay could be extended to the remaining defendants by way of the corporate, executive or employment relationships that existed.

11.44 Once this was established, the plaintiff could fend off the stay by showing exceptional circumstances amounting to "strong cause" why the court should nonetheless allow him to breach his promise to sue in England. The plaintiff did not lead evidence on this point and as such, a stay was granted.

11.45 The court went on to consider the jurisdiction clause in the FFA Account Agreement. As mentioned, the jurisdiction clause in this agreement was an asymmetric or a unilateral one. Put simply, the plaintiff was obligated to sue in the English courts while the defendant had the option to sue in other courts. The plaintiff sought to argue that the clause in question was not an exclusive one and apparently a vague attempt was also made to claim the clause unenforceable. These arguments did not take with the court.

11.46 *Forum non conveniens* was the alternative ground put forward for a stay. On this, the court opined that England was the more appropriate forum. It came to this conclusion taking into account that the location of the evidence and witnesses pointed to England as did the governing law.

11.47 It is useful to note at this point that the court considered the two different ways *forum non conveniens* was relevant. The first was of course a straight stay application. This would have applied to the second and fifth defendants, who were served as of right, and if the stay could not have been based on the jurisdiction clause. In this instance, the burden was on the defendant to show that there was a more appropriate forum elsewhere. The second was via one of the requirements for an application for leave to serve out and this would have applied to the first, third and fourth defendants. If the plaintiff succeeded in showing that, *inter alia*, Singapore was the natural forum, then leave to serve out would be granted. The defendants who had been served in this manner could then apply to set aside service if it could be shown that Singapore was not the natural forum. Having concluded that England was the natural forum, a stay would also have been granted on this basis and leave to serve out would also have been set aside.

11.48 As such, the appeal was dismissed.

Exclusive jurisdiction clause – Strong cause

11.49 *BGC Partners (Singapore) Ltd v Tan Wee Hiong Kevin*[13] was an example of a case where there existed an exclusive foreign jurisdiction clause and where a stay was fended off because the plaintiff managed to satisfy the court that strong cause existed. It was also a consideration of this issue in the context of application to serve outside the jurisdiction.

11.50 This matter revolved around three agreements. The first two (an employment contract and a Cash Advance and Distribution Agreement and Promissory Note) were between the plaintiff and defendant, Kevin. These agreements contained a non-exclusive choice of the Singapore courts. The third Partnership Agreement was between Kevin and BGC Holdings, and contained a choice of Delaware law and an exclusive choice of the Delaware courts. The plaintiff commenced proceedings in Singapore against Kevin for failing to repay an outstanding loan. Kevin counterclaimed for wrongful termination and wrongful forfeiture of his partnership units. For the latter counterclaim, Kevin had to seek for leave to serve outside the jurisdiction on BGC Holdings, a limited partnership formed in Delaware.

11.51 An application for service out of jurisdiction required the plaintiff to show, *inter alia*, that Singapore was the appropriate forum to consider the matter. In an ordinary application, this meant showing that Singapore was the natural forum based on the principles in *Spiliada*.

13 [2017] SGHC 214.

However, as there was an exclusive jurisdiction clause in favour of the courts of Delaware between the parties, the standard on Kevin was higher, requiring him to show strong cause why the Singapore courts should assume jurisdiction. At first instance, the court held that Kevin had shown strong cause and granted him leave to serve outside the jurisdiction. BGC Holdings appealed and the appeal was dismissed.

11.52 The court came to this conclusion taking into account that, even though the main and counterclaims were separate and distinct, the main issues revolved around the circumstances in which Kevin was terminated. The actions under the Partnership Agreement flowed from this termination and therefore were intimately connected. Having the suits heard in different jurisdictions gave rise to the possibility of inconsistent findings and it was therefore in the interests of justice to hear all the claims in Singapore.

11.53 It is already difficult to say in any particular case if strong cause had been shown. For a period of time, strong cause seemed to be set at such a high standard that it appeared extremely difficult for a party to show exceptional circumstances amounting to strong cause. In this case, there are certainly factors connecting the matter to Singapore, even enough to argue that Singapore was the *forum conveniens*. However, it is not clear if this was enough to rebut the position that a stay should be granted and to justify the plaintiff's breach of contract. Perhaps this case is simply the next in a relatively recent trend of cases where the courts have been more open to find strong cause.

Forum non conveniens – *Choice of law, illegality and public policy, and* lis alibi pendens – *Exclusive jurisdiction clause – Strong cause*

11.54 *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd*[14] ("*SKP Pradiksi*") was an appeal from two cases.[15] This case involved a Singapore company (Trisuryo Garuda Nusa) which was set up by Suryo Tan as a special purpose vehicle for holding shares in two Indonesian companies that were experiencing difficulties with Indonesian authorities. The SKP Companies (which were Malaysian holding companies) transferred shares in the Indonesian companies to Trisuryo and claimed, based on an oral agreement with Suryo Tan, that it held the shares of the Indonesian companies in trust for the SKP Companies. Suryo Tan claimed that the shares were sold to Trisuryo in return for its

14 [2017] SGCA 49.

15 See *Southern Realty (Malaya) Sdn Bhd v Chen Jia Fu Darren* [2016] 5 SLR 1307 and *SKP Pradiksi (North) Sdn Bhd v Trisuryo Garuda Nusa Pte Ltd* [2016] SGHC 200. See also (2016) 17 SAL Ann Rev 275 at 279–280, paras 11.18–11.21 and 288, paras 11.51–11.54 respectively for digests of these two cases.

assistance. The shares were transferred pursuant to two deeds that contained exclusive jurisdiction clauses in favour of the Indonesian courts. Two different proceedings were commenced, one against Trisuryo and the other against Suryo Tan.

11.55 Trisuryo applied for a stay based on the exclusive jurisdiction clauses and, in the alternative, *forum non conveniens*. The application was dismissed as the court found that there was strong cause to fend off a stay because Indonesia did not recognise the concept of a trust and a stay would leave the SKP Companies without a remedy. Further, on the alternative ground, the court found that Singapore was *forum conveniens*. On the other hand, Suryo Tan applied for a stay based on *forum non conveniens*, arguing that Indonesia was the natural forum. The court granted the application, holding, *inter alia*, that since the claim raised issues of Indonesian public policy, the Indonesia courts were best placed to decide this. Both outcomes were appealed. On appeal, the Court of Appeal found that, in the matter against Suryo Tan, Singapore, and not Indonesia, was the *forum conveniens* and allowed the appeal. However, in the matter against Trisuryo, the court found that there was strong cause and upheld the decision of the lower court not to order a stay, despite the existence of an exclusive jurisdiction clause in favour of the Indonesian courts.

11.56 As a preliminary comment, while the legal basis for each appeal was different, the tests to obtain or fend off a stay had a number of overlapping factors. As such, it is only sensible to note the Court of Appeal's judgment on both appeals together, only making specific distinctions where necessary. As a primer for the following comments, it is useful to briefly state the tests for a stay. A stay application based on *forum non conveniens* will be granted if the defendant can show that there is a more appropriate forum elsewhere and can be fended off if the plaintiff can show that it would be deprived of a legitimate personal or juridical advantage. Where a foreign exclusive jurisdiction clause exists, a stay will ordinarily be granted unless the plaintiff can show exceptional circumstances amounting to strong cause why a stay should not be granted.

11.57 Firstly, in relation to the jurisdiction clauses, the court agreed with the judge at first instance that the jurisdiction clauses in favour of Indonesia were exclusive. It also agreed that the scope of the clauses covered the dispute in question.

11.58 Secondly, the court considered that the *lex causae* in this case was a crucial consideration in large part because if the *lex causae* was Indonesian law, then the cause of action would fail regardless of where it was heard. The court traversed the law relating to the governing law of a trust and accepted the position that where the equitable duties arise

from an independent category like contract or a tort, the choice-of-law analysis will be based on that independent category.

11.59 On this, the court noted that the claim against Suryo flows from the alleged breach of the initial oral agreement and set about the task of identifying the proper law governing that agreement. As there was no expressed governing law, the court looked at what the parties might have intended by implication and this pointed to Singapore law. In doing so, the Court of Appeal disagreed with the conclusion by the court of first instance that the governing law was Indonesian. The court of first instance had been swayed by the fact that Trisuryo had no business operations of its own and that the oral agreement was part of the parties' larger Indonesian ventures. The Court of Appeal opined that the parties' choice of corporate structure to effect their agreement, that is, a Singapore incorporated vehicle, was key as a pointer to Singapore law governing. This conclusion was bolstered by the observation that it would be odd for parties to intend a law to apply to their transaction that would not have given effect to their agreement.

11.60 Thirdly, the court took into account how public policy fits within the *forum non conveniens* analysis. One of the issues was whether Indonesian law and public policy prohibited trust arrangements of the sort in this case. The court at first instance felt that these matters were better determined by the Indonesian courts. The Court of Appeal disagreed, opining instead that even if Indonesian law and public policy did prohibit these sorts of trust arrangements, that was not determinative of whether a stay would be granted. It was one factor out of a host of factors that point towards the jurisdiction in which the case may be tried more suitably for the interests of all the parties and for the ends of justice.

11.61 Fourthly, the court of first instance was concerned that adjudicating upon the matters, even if it were governed by Singapore law, would be contrary to the public policy of a foreign friendly nation and as such be against comity. In doing so, the judge relied upon *Peh Teck Quee v Bayerische Landesbank Girozentrale*[16] ("*Peh Teck Quee*"). The Court of Appeal disagreed, opining that *Peh Teck Quee* was a case where illegality in the place of performance was raised as a substantive defence to the claim. And at trial, it would be open to the defendants to argue that illegality tainted the trust agreement and should not be enforced. However, the court took pains to highlight that arguments concerning breaches of the law of the place of performance was not something that was appropriate to consider at the jurisdictional stage. They were matters that are properly canvassed at trial where the court

16 [1999] 3 SLR(R) 842.

would have the benefit of full facts and argument in order to make a sensible determination.

11.62 Finally, the court considered the factor of parallel proceedings. The existence of parallel proceedings are relevant in a *forum non conveniens* application as it is important to avoid the risk of conflicting judgments. In weighing this factor, the court would consider the degree of overlap and how advanced the foreign proceedings were. And, this latter consideration may be nullified if the foreign proceedings were commenced for the purpose of bolstering the stay application in Singapore. And again, the court highlighted that the existence of parallel proceedings was not itself determinative and had to be holistically considered in the *forum non conveniens* analysis. In this case, the Court of Appeal opined that the defendants had commenced Indonesian proceedings for the purpose creating a set of concurrent proceedings. As such, *lis alibi pendens* should bear little weight in the overall analysis.

Choice of law

11.63 Choice-of-law considerations are relevant to a conflict of laws analysis in two ways. The first is by impacting upon jurisdictional questions like an application for a stay where the *lex causae* may be a relevant factor in in the analysis. Another example is where the *lex causae* can define the cause of action in order for our jurisdictional provisions to bite.

11.64 We have already seen this in various cases already reviewed. In determining the governing law of a contract, the court will look first to see if the parties have expressly chosen a law, then look at surrounding circumstances to see if the parties can be said to have made an implied choice and, in the absence of both, identify the law that has the closest connection with the contract. This three-stage test was applied in *Sinco Technologies*[17] and *Rotary Engineering*.[18]

11.65 There were a couple of cases where it was necessary to determine the governing law in relation to fiduciary obligations. The general approach here is if the fiduciary obligation arose from a more established category like contract or tort, then the governing law of those categories would apply. This approach was applied in *Accent Delight*[19] and *SKP Pradiksi*.[20]

17 See para 11.5 above.
18 See para 11.10 above.
19 See para 11.28 above.
20 See para 11.54 above.

11.66 The second and more direct way choice of law intersects with the conflict of laws analysis is of course in determining the relevant law, which could be foreign, to determine the issue at hand. There was one case that fell into this category.

Choice of Law – Insolvency – Registration of charges and priorities

11.67 *Duncan, Cameron Lindsay v Diablo Fortune, Inc*[21] involved liens under a bareboat charter against a Singapore company in liquidation. The liens, exercised by Diablo, were not registered under the Companies Act[22] and as such, would have been void as against liquidators and creditors. The question that concerns this review was what law governed the registration of charges and priorities in insolvency matters.

11.68 Diablo's argument was that because the bareboat charter was governed by English law, the same law should similarly govern the registration of charges and this provided that foreign companies (that is, a Singapore incorporated company) was not subject to the requirement for charges to be registered.

11.69 The court disagreed and opined that just because a foreign company was not subject to the registration requirements in England did not mean that it was not subject to the registration requirements in its country of incorporation. Regardless of the law governing the creation of the charge or the location of the property involved, this is to be distinguished from the law governing the priority of such interests and distribution of assets in the insolvency of a company. On this latter matter, the court opined that applicable law is the *lex fori concursus*, the law of the State in which the insolvency proceedings are commenced, in this case Singapore.

Restraint of foreign proceedings

11.70 When parties are faced with multiple proceedings in Singapore and elsewhere, there are a number of strategic choices available to them. Apart from, *inter alia*, mounting a challenge to the jurisdiction of the court or applying for a stay of proceedings in the relevant jurisdiction, one can also apply to the Singapore court to indirectly stem the foreign proceedings via an anti-suit injunction.

11.71 For an application for an anti-suit injunction to succeed, the respondents have to be amenable to the jurisdiction of the Singapore

21 [2017] SGHC 172.
22 Cap 50, 2006 Rev Ed.

courts, the Singapore courts needed to be the natural forum for the resolution of the dispute and the continuance of the foreign proceedings would have to be vexatious or oppressive to the applicants or be a breach of an agreement between the parties. The court will also take into account whether the granting of an injunction would unjustly deprive the respondents of any advantages sought in the foreign proceedings.

Breach of right not to be sued – Arbitration agreement – Legitimate interest – Vexatious and oppressive conduct – Requirement of natural forum

11.72 In *BC Andaman Co Ltd v Xie Ning Yun*,[23] the five plaintiffs applied for anti-suit injunctions to restrain the defendants from continuing their proceedings in the Thai courts and from commencing proceedings in breach of an arbitration agreement between the defendants and the first four plaintiffs. The facts involve a complicated corporate structure revolving around a joint venture. Stated as simply as possible, the defendants entered in a joint venture with Deutsche Bank. A joint venture vehicle, Ace (the third plaintiff) was created to redevelop the land in the Blue Canyon Project (owned by Murex, the fifth plaintiff). Ace was owned by Legacy (the second plaintiff and owned by the defendants) and RREEF (a fund of Deutsche Bank). Ace in turn held shares in Andaman (the first plaintiff) and together with Andaman held shares in Legacy Thailand (the fourth plaintiff). Ace and Legacy Thailand also held shares in Murex.

11.73 In 2005, Ace took a bridging loan from Deutsche Bank which was secured by the defendants' shares in Legacy and Legacy's shares in Ace. One year later, the first four plaintiffs and the defendants entered into a shareholders' agreement to govern their relationship in relation to the Blue Canyon Project. Under this agreement, Legacy had pre-emption rights in RREEF's shares in Ace. This agreement also had a choice of English law clause as well as an arbitration clause in favour of Singapore. Deutsche Bank's interest in the loan and charges was eventually assigned to Prominent, a BVI-incorporated company who demanded immediate payment of the bridge loan. When Ace failed to make payment, Prominent appointed receivers over Legacy who in turn removed the defendants as directors of Legacy and Ace, as well as terminated the defendants' employment with Murex.

11.74 And that's how the fight started. The defendants first commenced proceedings in the BVI against the five plaintiffs and related parties for conspiracy for RREEF to sell its shares in Ace free of

23 [2017] 4 SLR 1232.

Legacy's pre-emption rights. An application for a stay resulted in a consent order where the defendants would refer its claims against the BVI stay applicants to arbitration in Singapore. The defendants then commenced proceedings in Thailand and, almost a year later, arbitration proceedings in Singapore. The defendants subsequently informed the arbitral tribunal that they were discontinuing the arbitration proceedings as they had concerns about the fairness of the proceedings and commenced a second set of proceedings in Thailand. The arbitral tribunal then issued its final award, dismissing the defendants' claims, with prejudice.

11.75 The plaintiffs applied to the Singapore courts for, *inter alia*, a permanent anti-suit injunction to restrain the defendants from pursuing its Thai proceedings and any proceedings that are in breach of the arbitration agreement. At the same time, they also applied for an interim anti-suit injunction on the same terms. On this application, the court granted an interim anti-suit injunction in favour of Legacy and Ace but not for the others.

11.76 At the High Court, the judge first traversed the law relating to anti-suit injunctions before opining that Legacy and Ace were entitled to a permanent anti-suit injunction. In addition, the court also found that Legacy Thailand and Andaman were also entitled to a permanent anti-suit injunction. However, the court concluded that Murex was not so entitled.

11.77 There are a number of noteworthy comments about this case. Firstly, the court noted that as an anti-suit injunction indirectly affects foreign proceedings, it was important to keep in mind the importance of international comity. Therefore, a court should not issue an anti-suit injunction unless it has a legitimate interest in the dispute. Legitimate interest in the dispute can be established where, *inter alia*, substantive proceedings have been concluded in the courts of the forum or there was an exclusive jurisdiction clause pointing to the courts of the forum. On this, the court acknowledged that this was not present in the case here before the court but opined that legitimate interest would similarly be satisfied if there were interests to be protected arising from arbitral proceedings in Singapore or to enforce an arbitration agreement referring matters to arbitral proceedings in Singapore. Further, it also acknowledged that the defendants were amenable to the jurisdiction of the Singapore courts.

11.78 Secondly, the court explored the various bases upon which an anti-suit injunction could be granted. One of these grounds was the breach of a legal or equitable right not to be sued. This clearly referred to the arbitration agreement where the first four plaintiffs were entitled to have their matter resolved by arbitration. The court opined that this

applied to Legacy and Ace. The defendants had commenced their second Thai proceedings almost immediately after the arbitration proceedings in Singapore closed in an attempt to relitigate the merits of a matter that had been referred to arbitration.

11.79 In relation to Legacy Thai and Andaman, the court also felt that they were entitled to a permanent anti-suit injunction. Both were parties to the shareholders' agreement that contained an arbitration clause in favour of Singapore. And, even though they were not added as parties to the Singapore arbitration proceedings, they were being sued in the second Thai proceedings, putting the defendants in breach of the arbitration agreement. The court also noted the interconnectedness between the plaintiffs and that the matter that was before arbitration and in the BVI courts were substantially the same as the second Thai proceedings. In a situation where substantially the same claim is being pursued against related defendants, the court did not think it right that the defendants could selectively proceed against different combinations of the parties leading those parties to incur the expense and inconvenience of having to mount defences in different locations. The court opined that the ends of justice are best served by a single composite action where all the claims can be resolved.

11.80 Thirdly, Murex was not as fortunate. It was not party to the shareholders' agreement and could not claim the protection of the arbitration clause. Therefore, any anti-suit injunction would have to be granted on the basis of vexatious and oppressive conduct. Apart from establishing the existence of vexatious and oppressive conduct, Singapore had to be the natural forum before it could grant relief. Alas, the court opined that the natural forum was Thailand and granting an anti-suit injunction would go against comity.

11.81 In the interests of completion, it is important to note that the official report of this case only contains the judgment in relation to Murex. For the full judgment, readers are referred to the unreported version of the judgment.[24]

24 *BC Andaman Co Ltd v Xie Ning Yun* [2017] 4 SLR 1232.