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# 12. CONFLICT OF LAWS[1]

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## I. Introduction

12.1 In recent years, the Singapore courts, at various levels, have been very active in the conflict of laws. This is indicative of the increasing numbers of transnational interactions and highlights the importance of being on the lookout for issues relating to private international law. Unlike in the early days, it is no longer feasible to digest every case relating to the conflict of laws. As such, the authors have chosen to focus on cases which are noteworthy. By and large, this will include cases from the Court of Appeal and some High Court cases. For 2021, there are 11 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. In addition, the authors have also chosen to examine the recent changes in the Rules of Court 2021 ("ROC 2021") which came into effect on 1 April 2022.

## II. Jurisdiction and stay of proceedings

12.2 It is trite that before a court can hear a matter, it must be seised of jurisdiction over the parties (which is distinct from "subject matter

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.

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jurisdiction").[2] Jurisdiction can be *in personam* or *in rem*. *In personam* jurisdiction can generally be established, as *per* s 16(1) of the Supreme Court of Judicature Act 1969,[3] 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 under O 11 r 1 of the *old* Rules of Court[6] ("ROC") to allow service out of jurisdiction. These requirements will first be briefly discussed.

### *A. Rules of Court 2014*

12.4 There have been some changes to establishing *in personam* jurisdiction with the implementation of the Rules of Court 2021 this year. The relevant differences are discussed below.

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

12.6 On the third requirement, that of *forum conveniens*, it is useful to point out that apart from being considered as part of the discretionary jurisdiction analysis (where the existence of jurisdiction is being

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

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challenged), a defendant can also apply to the court to stay proceedings on the basis of *forum non conveniens*, essentially asking the court to not exercise its jurisdiction because there is a more appropriate forum elsewhere.[9]

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

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

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

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

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

12.8 The importance of the duty of full and frank disclosure cannot be overemphasised. The Court of Appeal confirmed that it would not hesitate to order costs on an indemnity basis against litigants who evinced a flagrant disregard of their duty of full and frank disclosure owed to the court.[12]

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

10 [2021] SGCA 36.

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

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

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### *B. Rules of Court 2021*

12.9 The Rules of Court 2021, which was gazetted on 1 December 2021, took effect on 1 April 2022. For the purposes of this review, the focus will be on the new provisions relating to (a) service out of jurisdiction under O 8 r 1(1) of the ROC 2021; and (b) challenging the jurisdiction of the Singapore courts under O 6 r 7(4) of the ROC 2021.

12.10 Turning first to the provisions on service out of jurisdiction: From a literal reading of O 8 r 1(1) of the ROC 2021 alone, it would appear that a claimant only needs to prove one of two things – that the Singapore court either has jurisdiction *or* is the appropriate forum. While it remains to be seen how the provision will be interpreted by the courts, the authors' reading of the provisions is as follows.

12.11 Under the first limb, it would appear that a claimant succeeds in establishing jurisdiction of the Singapore courts over the dispute in one of the three scenarios below:[13]

> (a) The dispute falls within the scope of a jurisdiction clause that confers *exclusive* jurisdiction on courts of Singapore. In such a situation, the exclusive jurisdiction will be given full contractual force (until and unless it is invalidated) and Singapore courts will be seised of jurisdiction over the dispute unless the defendant is able to convince the Singapore court to not exercise jurisdiction by showing "strong cause".[14]
>
> (b) The dispute falls within the scope of a jurisdiction clause that confers *non-exclusive* jurisdiction on the courts of Singapore, which forum parties have agreed to submit their disputes to, and the claimant commences an action first. In such a situation, the Singapore court will be seised of jurisdiction over the dispute and the defendant will be required to show strong cause if he wishes to convince the Singapore court to not exercise jurisdiction. This is because while the claimant may sue in any jurisdiction, the claimant is "promised the defendant's submission if the claim is brought in the named jurisdiction".[15] In other words, the Singapore courts have interpreted the parties to have consented to the *exercise of jurisdiction* by the named forum (that is, Singapore) and waived any objection thereto, thereby

13 For completeness, the authors note that a different interpretation has been suggested in Ian Mah & Aaron Yoong, "Service Out under the New Rules of Court" *Singapore Academy of Law Journal* (published on e-First 23 May 2022) at para 18.

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

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

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reducing the risk of jurisdictional challenges if proceedings are brought in the named forum.[16]

(c) Where the Choice of Court Agreements Act 2016[17] ("CCAA") applies (that is, agreements that, *inter alia*, were concluded *after* 1 October 2016 and which designated a Singapore court as the chosen court to resolve their dispute),[18] a Singapore court is seised of jurisdiction under s 11(1) of the CCAA. Furthermore, the chosen Singapore court, as *per* s 11(2) of the CCAA, cannot refuse to exercise jurisdiction on the ground of *forum non conveniens*.[19]

12.12 As to the second limb, it would appear that all the claimant needs to show is that the Singapore court is "the appropriate court". While this, at first blush, seems to suggest that an analysis of the *Spiliada* factors identifying the *forum conveniens* would be sufficient, this is not entirely true when one considers the requirements additionally set out in the Supreme Court Practice Directions 2021 ("SCPD 2021").

12.13 The SCPD 2021 requires the claimant to state, in the supporting affidavit for an application for service out of jurisdiction, the relevant information on the following in showing why the Singapore court is the appropriate court to try the dispute:[20]

(a) There is a good arguable case that there is sufficient nexus to Singapore.

(b) Singapore is the *forum conveniens*.

(c) There is a serious question to be tried on the merits of the claim.

12.14 In determining whether there is a good arguable case and whether there is sufficient nexus to Singapore, para 63(3) of the SCPD 2021 reproduces a similar (non-exhaustive) list of factors which the court can consider in determining appropriateness. This list is materially similar to that set out in O 11 r 1 of the old ROC. This amendment, instead of reproducing the same O 11 factors in the ROC 2021, is deliberate. It is said that under the ROC 2021, the claimant no longer needs to "scrutinise the long list of permissible cases in the hope of fitting into one or more descriptions. It also avoids the possibility that a particular category of

16 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [82]–[84] and [88], *per* Judith Prakash JA.
17 2020 Rev Ed.
18 Choice of Court Agreements Act 2016 (2020 Rev Ed) s 24(1).
19 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [95] and [98].
20 Supreme Court Practice Directions 2021 paras 63(2) and 63(3).

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cases which could and should be heard in Singapore is actually not in the list".[21]

12.15 The retaining of the O 11 grounds in the SCPD 2021 is sound. After all, there is a need to establish nexus with the forum so that Singapore courts do not inadvertently become an "international busybody".[22] The retention of the O 11 grounds in the SCPD 2021 on the one hand gives the court the flexibility to determine what is "appropriate" without needing to insist on a fulfilment of a O 11 ground in the old ROC, and at the same time ensures that there is sufficient nexus with the forum before it decides to seize jurisdiction over the dispute.[23]

12.16 The ROC 2021 definitely leaves the door open for Singapore courts to hear claims that do not fall within any of the grounds for service out (that is, grounds in O 11 of the old ROC and now para 63(3) of the SCPD 2021). It must be remembered that under the old ROC, the Court of Appeal had already taken a (dangerously) wide reading of O 11 r 1(*n*) when it said that an applicant who wished to rely on this limb needed to draw a *not* tangential connection to an existing statutory provision.[24] This could even extend to a claim under a power-conferring provision like the former s 7 of the Supreme Court of Judicature Act which simply reads: "The High Court and the Court of Appeal shall have power to punish for contempt of court."[25]

12.17 With such a wide reading of O 11 r 1(*n*) (now para 63(3)(n) of the SCPD 2021), it is doubtful whether there is even any need for a claimant to rely on a non-established category to convince a Singapore court to exercise jurisdiction over a claim against a foreign defendant. In any case, it has been helpfully clarified by Sundaresh Menon JC in *Lee Hsien Loong v Review Publishing Co Ltd*[26] that the key inquiry is whether the claimant is seeking to bring the foreign defendant into the home jurisdiction to pursue a claim for injury arising within jurisdiction.[27] This, the authors submit, is what the service out grounds seek to establish as "nexus" with the forum.

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21 *Civil Justice Commission Report* (29 December 2017) ch 6 at para 2 (Chairman: Justice Tay Yong Kwang).

22 *R1 International Pte Ltd v Lonstroff AG* [2014] 3 SLR 166 at [55], *per* Judith Prakash J.

23 For a summary of the interests the requirements to establishing *in personam* jurisdiction intend to safeguard, see *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453.

24 The danger in such an expansive reading has been briefly covered in an earlier review: see (2019) 20 SAL Ann Rev 251 at 257, para 11.22.

25 Cap 322, 2007 Rev Ed. See *Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [140], [150] and [152].

26 [2007] 2 SLR(R) 453.

27 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [30].

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12.18 Finally, readers should also note O 8 r 1(3) of the ROC 2021, which allows for service out *without leave*, provided this is allowed under a contract between the parties. This new provision was formerly not present in the old ROC. This provision is to be distinguished from O 8 r 2(1)(*a*) of the ROC 2021, which allows the claimant, after obtaining leave for service out, to serve the originating process "according to the manner contractually agreed between the parties". In other words, *unless* the contractual provisions on communications between the parties contemplate a scenario where a sender could send correspondences and/or documents to an address which is *outside the country* of the sender, the claimant cannot rely on O 8 r 1(3) of the ROC 2021 to avoid seeking leave of court.

12.19 The authors now turn to the provisions on resisting jurisdiction by the defendant under O 6 r 7 of the ROC 2021. Order 6 r 7(5) provides for two possible grounds in which a defendant may challenge the Singapore court's jurisdiction: (a) the court has no jurisdiction to hear the action; or (b) the court should not exercise jurisdiction to hear the action. The former seems to mirror the establishment of jurisdiction under the first limb of O 8 r 1(1) of the ROC 2021. So a challenge on any of the three grounds set out above[28] would fall within this sub-provision.

12.20 The second limb merits more discussion. Order 6 r 7(5)(*b*) repeats the usual challenge that could be launched by a defendant – that Singapore is *forum non conveniens* – as summarised above.[29] What is interesting is the effect of O 6 r 7(5)(*b*) when read with O 6 r 7(6) of the ROC 2021: A defendant is *not* taken to have submitted to jurisdiction *even if* he challenges jurisdiction on the basis that the Singapore court should not *exercise* jurisdiction to hear the action (as opposed to challenging *existence* of the Singapore court's jurisdiction). This, however, is fundamentally at odds with the existing principles on submission to jurisdiction.

12.21 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".[30] If the conduct can be explained on some other basis which does not involve a submission to jurisdiction, it will not be interpreted as a submission.

28 See para 12.11 above.
29 See para 12.6 above.
30 See (2019) 20 SAL Ann Rev 251 at 269, para 11.64.

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12.22 However, if a defendant asks a court to *not exercise* jurisdiction, the defendant is essentially accepting that that court is seised of jurisdiction over the dispute but should nevertheless not exercise that jurisdiction for other reasons (for example, that court is not the appropriate one to try the action).[31]

12.23 A literal reading of the ROC 2021 therefore seems to have changed the rules of the game a little – a foreign defendant is no longer considered to have submitted to the jurisdiction of the Singapore courts *even if* he launches a challenge *only* against the exercise of jurisdiction by the Singapore courts. This can have further repercussions when one seeks to enforce a Singapore judgment in a foreign jurisdiction when the jurisdiction in Singapore was obtained via discretionary jurisdiction. Typically, discretionary jurisdiction is not taken to satisfy the requirements of "international jurisdiction" for the purposes of the recognition and enforcement of foreign judgments. Depending on that foreign jurisdiction's private international laws and, in particular, their equivalent requirement (if any) of the judgment-issuing court possessing "international jurisdiction",[32] the Singapore claimant, in light of O 6 r 7(6) of the ROC 2021, could potentially be deprived of the argument that the Singapore defendant had implicitly accepted that the Singapore court possessed jurisdiction over the parties when the Singapore defendant argued that Singapore was *forum non conveniens*. More importantly, it remains to be seen how this local position – accepting that a challenge to exercise of jurisdiction is *not* submission – influences (if at all) the position on the requirement of "international jurisdiction" under recognition of foreign judgments. Can a defendant who unsuccessfully challenged the exercise of jurisdiction by the foreign court now argue that the plaintiff cannot rely on that challenge to say that there was acceptance of existence of jurisdiction and hence "international jurisdiction" because, locally, such challenges are also not viewed as a submission to jurisdiction?

12.24 Another point of note is this: The "reservation" that a defence filed under O 6 r 7(5)(*b*) is not a submission to jurisdiction only appears, in the context of an originating claim, in O 6 r 7(6) of the ROC 2021 (which referred to O 6 r 7(4) of the ROC only). In other words, should a defendant fail to raise this at the first instance in his defence filed under O 6 r 7 of the ROC 2021, he cannot avail himself to the reservation in O 6 r 7(6) and therefore runs the risk of submitting to the jurisdiction

31 *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [45], *per* Sundaresh Menon CJ.

32 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [71], *per* Steven Chong J.

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of the Singapore court should he raise *only* the ground of *forum non conveniens* later.

12.25 Coming back to the conceptual difficulties, it is now clear that what is traditionally understood as a stay application, if taken out under O 6 r 7 of the ROC 2021, cannot be taken to be an acceptance of the *existence* of the court's jurisdiction. In so far as the Singapore Court of Appeal may have held otherwise,[33] this would no longer be good law with the enactment of the ROC 2021.

12.26 Relatedly, what remains unclear in ROC 2021 is whether *substituted* service out of jurisdiction is still allowed. Under O 11 r 3(1) of the old ROC, the court may grant leave for substituted service out of jurisdiction.[34] The equivalent of O 11 r 3(1) is missing in ROC 2021, and the provisions on substituted service (that is, O 7 r 7 of the ROC 2021) curiously appear *only* under O 7, titled "Service in Singapore". This "lacuna" could perhaps be bridged with the court's general powers to do what it considers necessary to ensure that justice is done (provided for in O 3 r 2(2) of the ROC 2021), but it remains to be seen whether the Singapore courts will view this as a lacuna or a deliberate act in excluding substituted service out of jurisdiction. After all, nothing has been said about the latter in the relevant materials (that is, (a) the Civil Justice Commission Report;[35] (b) the Report of the Civil Justice Review Committee; (c) the Public Consultation on Civil Justice Reforms;[36] and (d) the Response to Feedback from Public Consultation on the Civil Justice Reforms);[37] and this in itself could be an argument against the latter position.

12.27 Finally, it is useful to keep in mind the tool of forum election which could also be deployed by a defendant at this stage should the requirements of common claimant *lis alibi pendens* be satisfied. The claimant will then have to decide whether he wishes to pursue the Singapore proceedings before the defendant is required to show why the Singapore court does not have jurisdiction or should not exercise the jurisdiction so seised. It is also worth noting that the foreign defendant

33 See, *eg*, *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [45], [53] and [56], *per* Sundaresh Menon CJ.

34 *CLM v CLN* [2022] SGHC 46 at [77].

35 *Civil Justice Commission Report* (29 December 2017) (Chairman: Justice Tay Yong Kwang).

36 *Public Consultation on Civil Justice Reforms: Recommendations of the Civil Justice Review Committee and Civil Justice Commission* (26 October 2018).

37 *Response to Feedback from Public Consultation on the Civil Justice Reforms: Recommendations of the Civil Justice Commission and the Civil Justice Review Committee* (11 June 2021).

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should consider requesting the claimant to consider making an election *before* taking out an application to bolster its position for costs in the event a court application is eventually necessitated due to the claimant's refusal.[38]

### *C.* TA Private Capital Security Agent Ltd v UD Trading Group Holding Pte Ltd

Forum non conveniens – Preliminary question – Existence of a real dispute or controversy

12.28 In an application for stay of proceedings based on *forum non conveniens*, the applicant-defendant will typically have to show that there is a more appropriate forum elsewhere (at Stage 1 of the *Spiliada* test) before the plaintiff shows at Stage 2 that he would be deprived of a legitimate, personal or juridical, advantage if the proceedings were to be stayed.

12.29 In *TA Private Capital Security Agent Ltd v UD Trading Group Holding Pte Ltd*,[39] the plaintiffs commenced proceedings against the defendant for over US$63m, being moneys owed to Rutmet Inc ("Rutmet"), a Canadian registered corporate entity, by its trade creditors. These sums were guaranteed by the defendant to Rutmet via a corporate guarantee. Rutmet's rights to enforce the guarantee (purportedly) resided in the second plaintiff, as financier of Rutmet, either by way of assignment or power of attorney.[40]

12.30 Rutmet was initially joined as a co-plaintiff. It subsequently applied to discontinue the action against the defendant, but this was objected to by the plaintiffs. Applying *In re Mathews Oates v Mooney*,[41] leave was then granted to remove Rutmet as a co-plaintiff and to add it as a co-defendant instead. As a matter of procedure, where co-plainitffs disagree, the name of one is struck out as plaintiff and added as defendant. The statement of claim was subsequently amended to reflect this change.[42]

12.31 Rutmet then applied to stay the action on the basis of *forum non conveniens* in so far as it related to Rutmet as a co-defendant. It is

38 For a recent decision discussing forum election, see *The Big Fish* [2021] SGHCR 7 at [27]–[31].
39 [2021] SGHCR 10.
40 *TA Private Capital Security Agent Ltd v UD Trading Group Holding Pte Ltd* [2021] SGHCR 10 at [2]–[3].
41 [1905] 2 Ch 460.
42 *TA Private Capital Security Agent Ltd v UD Trading Group Holding Pte Ltd* [2021] SGHCR 10 at [4]–[5].

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important to note that while Rutmet was named as a co-defendant, the plaintiffs had made no substantial claim against Rutmet and no remedy whatsoever had been sought by the plaintiffs against Rutmet. The plaintiffs and Rutmet had also confirmed that nothing controversial would arise out of the plaintiffs' assertion of Rutmet's default of its obligations under its financing terms with the plaintiffs.[43]

12.32 The question before the court was not the typical application of the *Spiliada* test. Instead, the court opined that the matter revolved around a preliminary ground of principle, that is, whether an application for a stay should be entertained if there was no real dispute underlying the specific proceedings upon which the stay related to.[44]

12.33 On reviewing the authorities, the court noted that the *forum non conveniens* inquiry was really about identifying "some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, *i.e.* in which the case may be tried more suitably for the interests of all the parties and the ends of justice".[45] From this, the court extrapolated that in order for this query to be meaningful, there had to be a real tension in deciding between competing *fora*. Where this tension did not exist, that is, where the underlying claim did not give rise to a real dispute or controversy, it would be appropriate to decline a stay application, at the outset, without having to go through the *forum non conveniens* analysis.[46] The court went on to conclude that since there was no substantial claim between the plaintiffs and Rutmet, the application for a stay had to fail.[47]

12.34 It is difficult to know what to feel about this decision. At one level, one can appreciate the court's desire to be robust and to not have to go through an unnecessary *forum non conveniens* analysis. However, this approach does provide some food for thought.

12.35 First, the court's approach here is reminiscent of the "no defence" argument that was put forward in, *inter alia*, *The Rainbow*

43 *TA Private Capital Security Agent Ltd v UD Trading Group Holding Pte Ltd* [2021] SGHCR 10 at [6]–[9] and [13].
44 *TA Private Capital Security Agent Ltd v UD Trading Group Holding Pte Ltd* [2021] SGHCR 10 at [14].
45 *TA Private Capital Security Agent Ltd v UD Trading Group Holding Pte Ltd* [2021] SGHCR 10 at [16].
46 *TA Private Capital Security Agent Ltd v UD Trading Group Holding Pte Ltd* [2021] SGHCR 10 at [17]–[18].
47 *TA Private Capital Security Agent Ltd v UD Trading Group Holding Pte Ltd* [2021] SGHCR 10 at [22]–[23].

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*Joy*[48] and *Q & M Enterprises Sdn Bhd v Poh Kiat*.[49] By way of a quick refresher, the "no defence" point is usually advanced in Stage 2 of the *Spiliada* test to argue that even if the defendant has shown that there was a more appropriate forum elsewhere (thereby satisfying Stage 1 of the test), since the defendant has no real defence, the proceedings should nonetheless not be stayed. It should also be noted that the "no defence" argument can also be raised before Stage 1 as a way to bypass the *forum non conveniens* analysis. It is here that the parallel with the instant case becomes more obvious.

12.36 The Court of Appeal had previously clearly stated that the "no defence" argument had no place in a stay application based on *forum non conveniens* because it would be bringing in a substantive matter during what was essentially a jurisdictional query.[50]

12.37 While it might not necessarily be the same thing, the court's approach in this case seems to be going down a very similar road, that is, a stay need not be considered because no real dispute or controversy exists. It is suggested that caution needs to be exercised here as the court seems to be making a determination about substance (based on counsel's assurances) during a jurisdictional phase.

12.38 It is useful to note that the court drew guidance from the English Court of Appeal decision in *Elena Baturina v Alexander Chistyakov*[51] ("*Baturina*"), where the claimant owned a company who made loans to a company owned by the defendant. The claimant sued the defendant, alleging that the latter had induced the claimant to make the loans via her company. However, the claim was not for personal loss and the pleadings revolved around the loan made between the companies. As such, it is entirely arguable that the wrong parties were involved or that no action was made out as between these parties. It would have made more sense for the defendant to apply for the action to be struck out, as opposed to a stay based on *forum non conveniens*.

12.39 It is therefore not surprising that, in those circumstances, the English Court of Appeal in *Baturina* considered the claim unsustainable and that the application for a stay did not need to be considered. However, it is an entirely different thing to suggest that *Baturina* stands for the proposition that where there is no real dispute or controversy, the

48 [2005] 3 SLR(R) 719 at [27], *per* Chao Hick Tin JA.
49 [2005] 4 SLR(R) 494 at [32] and [48].
50 *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd* [2017] 2 SLR 814 at [94], *per* Judith Prakash JA.
51 [2014] All ER (D) 38.

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application for a stay can be dispensed with. Even if *Baturina* stood for the position that an application for a stay can be dispensed with where there is no real dispute or controversy, taking into account the Singapore Court of Appeal's approach to the "no defence" argument, one should think thrice before adopting this position.

12.40 Further, and with respect, the circumstances in *Baturina* were quite different from the present case. There was no suggestion that the parties were not the right ones or that the cause of action pleaded was "bad" in the sense that *Baturina* used it.

12.41 Perhaps what the court really meant was that Rutmet *only* became a co-defendant "in name" as it was, as a co-plaintiff, unable to come to an agreement with the co-plaintiffs to discontinue the suit against the first and original defendant. The fact that there were no claims made against Rutmet is key – there were essentially no claims which the court could conduct the *Spiliada* analysis to identify the *forum conveniens*. An attempt to stay the proceedings *vis-à-vis* Rutmet from a *forum non conveniens* perspective was therefore wholly inappropriate; perhaps a striking-out application as it "discloses no reasonable cause of action"[52] could have been more appropriate.

12.42 As for Rutmet's position, Rutmet appeared to be arguing that the plaintiffs lacked the *locus* to pursue Rutmet's rights against the first and original defendant. This is perhaps what Rutmet meant when it said: "[T]here is currently a multiplicity of court proceedings … which are ongoing in Ontario … which … could have an impact on the issues around … the assignment of Rutmet's rights to the plaintiffs."[53] If one follows this train of thought, the plaintiffs' *locus* to exercise Rutmet's rights against the first and original defendant is thus doubtful. In this event, what Rutmet could have done is to strike out the claim for want of *locus*.[54]

## III. Jurisdiction clauses

12.43 When considering matters of jurisdiction, a common creature to encounter 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.

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52 *Ok Tedi Fly River Development Foundation Ltd v Ok Tedi Mining Ltd* [2022] SGHC 83 at [64].

53 *TA Private Capital Security Agent Ltd v UD Trading Group Holding Pte Ltd* [2021] SGHCR 10 at [12].

54 *Hin Leong Trading (Pte) Ltd v Rajah & Tann Singapore LLP* [2022] SGCA 28 at [15], *per* Judith Prakash JCA.

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

12.45 Before it can be characterised as a "jurisdiction clause", it is crucial for the clause, to borrow the words used in the CCAA, to actually designate one or more specific courts of a jurisdiction to decide any dispute that may arise in connection with a particular legal relationship.[55] In other words, the clause must clearly specify that litigation in a particular court(s) is the binding form of dispute settlement agreed between the parties. As seen in *Cheung Teck Cheong Richard v LVND Investments Pte Ltd*[56] (*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.[57]

12.46 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.

12.47 A slightly different analysis takes place where the jurisdiction clause is an exclusive one and to be given effect under the CCAA, as seen in *6DM (S) Pte Ltd v AE Brands Korea Ltd*,[58] which will now be discussed.

### *A.* 6DM (S) Pte Ltd v AE Brands Korea Ltd

Exclusive foreign jurisdiction clause – Interpretation of scope of jurisdiction clause

Exclusive foreign jurisdiction clause – Section 12(1) of the Choice of Court Agreements Act 2016 – Applicable standard for assessing validity and scope of jurisdiction clause

55 Choice of Court Agreements Act 2016 (2020 Rev Ed) s 2(1)(*b*).
56 [2021] 2 SLR 890.
57 *Cheung Teck Cheong Richard v LVND Investments Pte Ltd* [2021] 2 SLR 890 at [30]–[32].
58 [2021] SGHC 257.

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Exclusive foreign jurisdiction clause – Section 12(1)(*c*) of the Choice of Court Agreements Act – Definition and threshold of "manifest injustice"

Exclusive foreign jurisdiction clause – Section 12(1)(*c*) of the Choice of Court Agreements Act – Definition and threshold of "manifestly contrary to the public policy of Singapore"

Exclusive foreign jurisdiction clause – Section 12(1) of the Choice of Court Agreements Act 2016 – Considerations for stay or dismissal of Singapore proceedings

Exclusive forum jurisdiction clause – Section 11(2) of the Choice of Court Agreements Act 2016 – Where exercise of jurisdiction cannot be declined

Jurisdiction – Submission – Whether service of statutory demand can amount to submission to jurisdiction of Singapore courts

Discretionary jurisdiction – Full and frank disclosure

12.48 This decision involves two related proceedings – the suit concerns, *inter alia*, the setting aside of service out of jurisdiction done on the foreign defendants, and the originating summons concerns an application for an injunction against the commencement of winding-up proceedings against the Singapore plaintiff ("the OS"). This is a long judgment, and only the parts that are relevant to this review will be covered.

12.49 6DM (S) Pte Ltd ("6DM"), a Singapore incorporated company, commenced a Singapore suit against three related corporate entities alleging, *inter alia*, fraudulent misrepresentations, lawful and/or unlawful means conspiracy, breach of an implied agreement and/or collateral contract and unjust enrichment:[59]

(a) The first defendant, AE Brands Korea Ltd ("ABK"), was a South Korea incorporated company.

(b) The second defendant, Asahi Beer Asia Ltd ("ABA"), was a Hong Kong incorporated company.

(c) The third defendant, Asahi Premium Brands Ltd ("APB"), was a UK incorporated entity.

(d) ABK, ABA and APB ("the Asahi Entities") were all defendants to the suit and the OS.

59 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [1]–[3] and [7].

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(e) The fourth defendant to the suit was ABA's regional markets development manager Asia Pacific, Federico Bogna.

(f) The fourth defendant to the OS was Asahi brands Germany GMBH ("ABG"), a German incorporated company.

12.50 The agreements relevant to the dispute are as follows:[60]

(a) 6DM entered into an agreement dated 8 March 2013 with an entity called SABMiller Brands Europe as ("SABMiller") for distribution of some products. This 2013 agreement stated, *inter alia*, that (i) the laws of England and Wales were the governing law of the contract; and (ii) the courts of England and Wales had exclusive jurisdiction to settle any dispute in connection with the agreement ("the 2013 Agreement").

(b) SABMiller was later acquired by the Asahi Group (which comprised the Asahi Entities) and ABK took over the business and assumed all of SABMiller's rights, benefits, obligations and liabilities under the distribution agreement with 6DM. The agreement as of 1 April 2016 stated that (i) English law was the governing law of the contract; and (ii) the "local courts have exclusive jurisdiction to settle any dispute" ("the 2016 Agreement").

(c) On 15 March 2017, 6DM entered into a third-party distribution agreement with another entity called Asahi Europe Ltd. APB later assumed all of this entity's rights, benefits, obligations and liabilities under this agreement. The 2017 agreement stated, *inter alia*, that (i) the laws of England and Wales were the governing law of the contract; and (ii) the courts of England and Wales had exclusive jurisdiction to settle any dispute in connection with the agreement ("the 2017 Agreement").

(d) On 1 February 2020, 6DM and ABA entered into a third-party distribution agreement which stated, *inter alia*, that (i) the laws of England and Wales were the governing law of the contract; and (ii) the courts of England and Wales had exclusive jurisdiction to settle any dispute in connection with the agreement ("the 2020 Agreement").

12.51 In July 2020, the Asahi Entities terminated the 2016, 2017 and 2020 Agreements ("the distribution agreements") with 6DM. On 2 October 2020, 6DM commenced the Singapore suit for loss and damage allegedly caused by the Asahi Entities and Bogna. On 4 December 2020,

60 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [8]–[11].

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6DM was granted leave to serve the writ out of jurisdiction. The Asahi Entities issued a statutory demand on 6DM on 22 January 2021 and 6DM later took out the OS on 15 February 2021 to enjoin the Asahi Entities and ABG from commencing winding-up proceedings against 6DM.[61]

12.52 The first issue considered by the High Court was whether the suit should be stayed or dismissed pursuant to s 12 of the CCAA.

12.53 As clarified by the High Court – at common law, an application to stay proceedings premised on an exclusive *foreign* jurisdiction clause would be determined by a two-stage analysis.[62]

> (a) At the first stage, the court would examine if the party seeking to rely on the EJC had discharged its burden of showing "a good arguable case" that an EJC which governed the dispute in question existed.
>
> (b) To establish a good arguable case, the plaintiff-applicant had to have the better of the argument, on the evidence before the court, that the agreement existed and applied to the dispute. This formulation reflected that the threshold was more than a mere *prima facie* case but was different from the standard of a balance of probabilities. In determining whether the applicant had established a good arguable case, the court could grapple with questions of law but should not delve into contested factual issues.
>
> (c) At the second stage, the party in breach of the EJC would be required to demonstrate "strong cause amounting to exceptional circumstances"[63] why he should not be held to the jurisdiction agreement.

12.54 Moving to the framework under the CCAA, the High Court similarly identified a two-stage/step analysis under s 12 of the CCAA: First, the court had to consider whether there existed an exclusive choice of court agreement or EJC. Second, if the court was satisfied that an EJC existed, the court had to stay or dismiss the case unless it was shown that one of the five exceptions under s 12(1) of the CCAA applied.[64]

61 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [13]–[14].
62 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [23].
63 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [23].
64 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [25].

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12.55 The High Court then considered the competing arguments and concluded that the same "good arguable case" standard under common law should apply to the first stage under s 12 of the CCAA.[65]

12.56 In interpreting any provision under the CCAA, the High Court identified the Explanatory Report on the 2005 Hague Choice of Court Agreements Convention[66] ("the Explanatory Report") to be a highly relevant and useful source of reference. This report confirmed that it was the court seised (but not chosen) that was responsible for deciding the existence and scope of the EJC. The court also noted that the Explanatory Report, however, did not go further to state the applicable standard of review to be adopted by the court in coming to its decision.[67]

12.57 It was argued that an alternative standard to that of a "good arguable case" was the "*prima facie*" standard applied by Singapore courts in assessing the existence and scope of an arbitration clause to determine whether a stay should be granted in favour of arbitration. This standard was applied in the context of arbitration out of respect for the *kompetenz-kompetenz* principle which provided that an arbitral tribunal was to be the first arbiter of its own jurisdiction. The High Court did not think that this standard should apply because there was no equivalent principle of *kompetenz-kompetenz* in the context of EJCs.[68] This reasoning is not incorrect, as the Court of Appeal in an earlier case took pains to explain how the adoption of *prima facie* approach cohered with the *kompetenz-kompetenz* principle.[69]

12.58 Mavis Chionh Sze Chyi J further highlighted how, in the context of s 12 of the CCAA, unlike arbitration, there was no equivalent appeal process from the putative tribunal/court to a supervisory court.[70] It was simply not possible for the chosen court in an EJC to be the first arbiter of its own jurisdiction and for the court seised (but not chosen) to have the final say. Once a court seised decided to stay or dismiss the proceedings on the grounds of s 12 of the CCAA, the chosen court's determination of its jurisdiction could not be appealed by way of recourse to the court seised. The authors are a little unsure about this reasoning. In the situation highlighted by Chionh J, the stay or dismissal of proceedings by the seised

65 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [34].
66 Trevor Hartley & Masato Dogauchi, *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention* (Hague Conference on Private International Law, 2013).
67 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [27]–[29].
68 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [30]–[31].
69 *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [65] and [67], *per* Sundaresh Menon CJ.
70 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [31].

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court (that is, Singapore court) is simply a recognition of the applicability of the EJC. If the chosen court later decides to seize jurisdiction, all is well and good. If the chosen court refuses to accept that it has jurisdiction, nothing stops the plaintiff from reinstituting another suit in Singapore (assuming the earlier suit was dismissed) or lifting the stay over the previous Singapore proceedings. It therefore does not necessarily follow that a lack of an equivalent appeal process means that the *prima facie* standard should be rejected.

12.59 Finally, Chionh J also recognised that the issue in the first stage of a stay application under s 12(1) of the CCAA was similar to the issue to be considered under common law in the first stage of an application for a stay based on a foreign EJC: "It makes sense, therefore, that a similar approach is applied in both instances."[71]

12.60 Further, the court opined that where normative considerations underlay different areas of the law, the law should strive to speak with one voice.[72] The good arguable case standard and strong cause test were devised to deal with stay applications in the EJC context at common law. The rationale was, *inter alia*, that "contracts freely entered into must be upheld and given full effect".[73] By the same token, s 12 of the CCAA sought to ensure that "the exclusive character of the choice of court agreement is … respected".[74] Given the same normative considerations, this was yet another reason for the same standard to apply.

12.61 While it is correct that the Explanatory Report does not state the applicable standard of review, the Explanatory Report does state that:[75]

> … the Member States viewed this … convention as achieving for such agreements and the resulting judgments what the 1958 New York convention on the Recognition and Enforcement of Foreign Arbitral Awards accomplishes for agreements to arbitrate and the resulting awards.

Perhaps this might allude to the applicability of the *prima facie* standard. One can certainly advance an argument that notwithstanding the same normative considerations, different standards apply at common law and under the CCAA because the considerations behind the enactment of the

71 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [32]–[33].
72 See (2019) 20 SAL Ann Rev 251 at 260, para 11.33.
73 *The Asian Plutus* [1990] 1 SLR(R) 504 at [9].
74 Trevor Hartley & Masato Dogauchi, *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention* (Hague Conference on Private International Law, 2013) at para 141.
75 Trevor Hartley & Masato Dogauchi, *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention* (Hague Conference on Private International Law, 2013) at p 27, para 1.

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CCAA (as gleaned from the Explanatory Report) are different. If indeed the CCAA is intended to mirror the Convention on the Recognition and Enforcement of Foreign Arbitral Awards[76] ("1958 New York Convention"), the *prima facie* standard should (naturally) apply. Further, the "good arguable standard" was formulated with the intention to not *too easily* establish *in personam jurisdiction* over a foreign defendant who may not have connection with our jurisdiction.[77] This is one of the reasons why the standard is pegged high(er). But the same consideration does not apply when a Singapore court is examining a (forum or foreign) EJC, which is motivated by considerations of, *inter alia*, party autonomy.

12.62 Be that as it may, having determined the applicable standard to determining the existence and scope of a jurisdiction clause under s 12 of the CCAA, Chionh J turned to consider the second stage of the test under s 12(1) of the CCAA – that is, once an applicant has shown a good arguable case that a foreign EJC exists and governs the dispute in question, the Singapore court is required to not hear the case (by staying or dismissing the proceedings), even if it has jurisdiction under national law:[78]

> (a) Such a situation could happen, for example, when jurisdiction was established over the defendant as of right, that is, with the writ being served personally on the defendant within the jurisdiction.[79]
>
> (b) It could also happen if the foreign defendant took a step in proceedings which amounted to submission to the jurisdiction of the Singapore courts, though in this scenario it remains to be seen how a Singapore court would treat arguments made under s 12(1)(*c*) of the CCAA. In other words, could the resisting party argue that allowing the Singapore suit to be stayed or giving effect to the EJC would "lead to a manifest injustice"? This situation is explored further below.

In the scenarios above, the Singapore court must stay or dismiss the Singapore proceedings if there is a valid foreign EJC and the dispute falls within the scope of the clause (assessed on a good arguable case standard), and it does not matter that the party resisting the stay or dismissal manages to show "strong cause", unless he falls within one of the five exceptions specified under s 12(1) of the CCAA.[80]

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76 330 UNTS 3 (10 June 1958; entry into force 7 June 1959).
77 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [26].
78 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [37] and [39].
79 *PT Gunung Madu Plantations v Muhammad Jimmy Goh Mashun* [2018] 4 SLR 1420 at [67].
80 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [38].

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12.63 Chionh J also made a few helpful clarifications about the scope of s 12(1) of the CCAA:

> (a) Given the mandatory language in s 12(1) of the CCAA (similar to s 6(2) read with s 6(1) of the International Arbitration Act 1994),[81] the Singapore court had *no* discretion to refuse a stay under the CCAA.[82]
>
> (b) The grounds in which a Singapore court, when it is *not* the chosen court in the EJC, could choose to *not* stay or dismiss the Singapore proceedings were closed/limited to the five exceptions listed in s 12(1) of the CCAA. There was simply no room for the Singapore court to introduce other grounds.[83] This was reinforced by a reading of s 12(2) of the CCAA, which expressly allows a Singapore court to stay or dismiss the case on grounds *other than* a valid foreign EJC. Given Chionh J's interpretation of s 12(1) of CCAA (which must be correct), it would seem that parties seeking to resist stay or dismissal would now rely more extensively on the "manifest injustice" or "public policy" ground in s 12(1)(*c*) of the CCAA.

Assuming all requirements have been satisfied, in the face of a valid foreign EJC, it would appear that a Singapore court has no other option but to stay or dismiss the case. One may then wonder what the utility of s 12(2) of the CCAA is. Perhaps s 12(2) of the CCAA is intended to allow courts the flexibility to still stay or dismiss proceedings where it is seised of jurisdiction through the operation of one of the exceptions under s of 12(1) of the CCAA, notwithstanding a valid foreign EJC.

12.64 The next issue considered is whether the 2016 Agreement was a foreign or forum EJC. The jurisdiction clause read:[84]

> 22.1 This Agreement is governed by the English law.
>
> 22.2 Each party irrevocably agrees that the *local courts* have exclusive jurisdiction to settle any dispute or matter arising under or in connection with this Agreement, including a dispute regarding the existence, validity or termination of this Agreement or the consequences of its nullity.

12.65 6DM's position on the scope and nature of the EJC shifted a few times, significantly, over the course of the proceedings:[85]

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81 2020 Rev Ed. See also *Tomolugen Holdings Ltd v Silica Investors Ltd* [2016] 1 SLR 373 at [137], *per* Sundaresh Menon CJ.
82 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [36].
83 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [36]–[37].
84 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [10].
85 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [15] and [40].

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(a) In its written submissions dated 22 April 2021, 6DM stated that it "does not dispute that the Agreements are governed by English law and contain jurisdiction clauses in favour of the English courts".[86]

(b) At the oral hearing on 29 April 2021, 6DM argued that although the contracting parties for the 2016 Agreement had nominated English law as the governing law, the EJC was in favour of the Singapore courts because the reference in that EJC to "local courts" was actually a reference to "Singapore courts".

(c) In its written submissions of 20 May 2021, 6DM argued that the dispute in the Singapore suit fell outside the scope of the 2016, 2017 and 2020 Agreements and that the EJCs in the agreements were therefore irrelevant to the suit.

(d) In its further submissions of 3 June 2021, 6DM stated that it would no longer pursue the argument on the (ir)relevance of the EJCs.

(e) Yet in its final submissions on 13 September 2021, 6DM reprised the argument that the dispute in the Singapore suit did not arise under or in connection with the 2016, 2017 and 2020 Agreements. Pertinently, 6DM did not explain the reasons for this *volte-face*.

12.66 Notwithstanding 6DM's various (unexplained) changes in position highlighted above, the High Court proceeded to consider 6DM's arguments that the EJC in the 2016 Agreement was in favour of Singapore courts. While it seems that this was not argued by the Asahi Entities, the situation surely engaged both the doctrines of (a) approbation and reprobation; and (b) abuse of process, doctrines which were discussed in last year's review:[87]

(a) The approbation and reprobation doctrine bars a person, having a choice between two inconsistent courses of conduct and having chosen one, from resiling from that position having taken some benefit from that chosen course. While it is unclear whether 6DM benefited from its position in its written submissions dated 22 April 2021, the rationale behind the policy surely bites – the doctrine discourages the adoption of inconsistent attitudes, and stark shifts in positions will be viewed with circumspection and scepticism.[88]

86 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [40].
87 See (2020) 21 SAL Ann Rev 314 at 320–321, paras 12.22–12.23.
88 *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2021] 1 SLR 342 at [100], *per* Steven Chong JA.

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(b) Relatedly, given that the various arguments on the scope and nature of the EJC were *not* raised in the same instance as *alternatives* but were raised consecutively, they could also be "treated as an abuse of process in order to protect the integrity of the judicial process and to safeguard the administration of justice".[89]

12.67 Given 6DM's lack of explanation for its (repeated) changes in position, the two doctrines highlighted above could be yet another reason for rejecting 6DM's position, which will now be considered.

12.68 First, the High Court judge astutely pointed out that the interpretation of the EJC was a question of English law, which was the governing law of the 2016 Agreement. It is unclear if parties adduced proof of English law (whether by adducing raw sources or expert opinion),[90] but Chionh J applied English contractual principles and found that the EJC in the 2016 Agreement was an EJC in favour of the courts of England and Wales.[91]

12.69 A factor that influenced Chionh J's decision was that the 2013 Agreement, which the 2016 Agreement sought to renew, also contained an EJC, except that it expressly named the courts of England and Wales.[92] How the Asahi Entities could have taken the point further is this:

(a) One argument that has featured in arbitration cases is that:[93]

> … unless there is a clear and express indication to the contrary, it may usually be assumed that parties to two closely related agreements involving the same parties and concerning the same subject matter would not have intended to refer only disputes arising under one contract to court and not those arising under the second contract.

(b) One may of course argue that the 2017 and 2018 Agreements were executed by 6DM on the one hand, but with different Asahi entities on the other. However, the fact is that all the EJCs in the 2013, 2017 and 2020 Agreements (between 6DM and Asahi related entities) giving the courts of England and Wales exclusive jurisdiction must have influenced or had some bearing on how the EJC in the 2016 Agreement was to be interpreted.

89 *BWG v BWF* [2020] 1 SLR 1296 at [56], *per* Steven Chong JA.
90 *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 at [54], *per* V K Rajah JA.
91 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [42] and [46].
92 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [45].
93 *Econ Piling Pte Ltd v NCC International AB* [2007] SGHC 17 at [16].

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> After all, it has been said (although in a slightly different context) that rational businessmen are likely to have intended that any dispute arising out of their relationship should be decided by the same tribunal.[94]

12.70 Another argument worth noting for practitioners, as gleaned from Chionh J's judgment, is that given that the governing law was English law, the parties were likely to have intended for the term "local courts" to refer to the English courts who were best placed for the application of its own laws. It would not have made commercial sense for the parties to have consciously decided on 1 April 2016 to switch the choice of court clause to a court other than that of England and Wales (the named court in the 2013 Agreement, which the 2016 Agreement was a renewal for).[95]

12.71 The authors next consider the judgment on whether the dispute in the suit falls within the scope of the EJC of the agreements. As a preliminary point, 6DM appeared to have conflated the issues of *choice of law* and *scope* of the jurisdiction clause when it argued that its claims on fraudulent misrepresentation and conspiracy should not be governed by the EJCs.[96] The former concerns what the applicable law to decide the identified dispute is, and the latter, the breadth of the EJC to decide if the chosen court is where parties have agreed that the identified dispute should be heard/tried.

12.72 Chionh J applied the trite principles in *Fiona Trust & Holding Corp v Privalov*[97] and *Tomolugen Holdings Ltd v Silica Investors Ltd*[98] that rational business people would have intended any claims (including non-contractual ones) which arose out of their relationship to be decided by the same tribunal. 6DM's claims which concerned, *inter alia*, when the distribution agreements were concluded and the respective parties' rights and obligations under the same were inevitably claims that arose under or in connection with the agreements, and therefore fell within the scope of the EJCs.[99]

12.73 Finally, Chionh J also rightly rejected 6DM's argument that the EJCs did not apply because one of the parties to the suit, Bogna, was not a party to the agreements and was not bound by the EJCs:[100]

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94 *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd* [2017] 2 SLR 814 at [79], *per* Judith Prakash JA.
95 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [46].
96 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [48]–[50].
97 [2007] UKHL 40.
98 [2016] 1 SLR 373.
99 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [52]–[55].
100 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [56].

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(a) Even if the dispute involved a non-party, so long as it fell within the scope of the EJC the suit had to be stayed under the CCAA. Even if the CCAA did not apply, at common law, the Singapore court would have been minded to stay the suit unless strong cause was shown.

(b) What would follow was that the suit *vis-à-vis* the non-party would be considered under the *Spiliada* framework (if the non-party did raise such a challenge) and the multiplicity of closely related proceedings possibly continuing simultaneously before different courts in different jurisdictions would be considered in the overall inquiry whether Singapore was *forum conveniens* for the dispute between 6DM and Bogna.[101]

12.74 The next attempt to resist stay or dismissal of the Singapore suit by 6DM was the invoking of the exceptions under s 12(1)(*c*) of the CCAA. In particular, 6DM alleged that giving effect to the EJCs would lead to a manifest injustice or would be manifestly contrary to the public policy of Singapore. This was premised on the argument that grant of a stay or dismissal *vis-à-vis* the Asahi Entities would lead to multiple sets of proceedings in more than one jurisdiction and thus the fragmentation of the dispute.[102]

12.75 Chionh J provided some helpful clarifications on the contents of the two exceptions in s 12(1)(*c*) of the CCAA:[103]

(a) The threshold for establishing either limb of the exception was a *high* one. The High Court cited (without disapproval) the commentaries stating that the court seised could proceed under this exception "only in unusual circumstances, and with the greatest circumspection".[104] The provision did not permit the seised court to disregard a choice of court agreement simply because it would not be binding under domestic law.

(b) The phrase "would lead to or be" meant that the manifest injustice or violation of public policy was highly probable in that case. The exception should not be invoked on the speculative possibility that something undesirable might happen if the choice of court agreement was honoured. A threshold level of reasonable certainty that an unacceptable result would result was required.

101 *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [70], *per* Chao Hick Tin JA.
102 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [58].
103 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [60]–[61].
104 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [61].

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(c) The phrase "manifest injustice" could cover the exceptional case where one of the parties would not get a fair trial in the chosen court, perhaps because of bias or corruption, or where there were other reasons specific to that party that would preclude him from bringing or defending proceedings in the chosen court. It might also relate to the particular circumstances in which the agreement was concluded – for example, if it was the result of fraud.

(d) The phrase "manifestly contrary to the public policy of Singapore" referred to violations of rules or policies that reflect basic norms or principles of Singapore; it did not permit the court seised to hear the case simply because the chosen court might violate, in some technical way, a mandatory rule of Singapore. The term "public policy" also referred to legal policy and did not implicate political policy of a state at a given point in time.

12.76 Interestingly, Chionh J later in the judgment went further (and seemingly too far) to say that a party who sought to invoke *any* of the exceptions in s 12(1) of the CCAA had to exceed a high threshold and demonstrate exceptional circumstances before the exception would be engaged.[105]

12.77 While it remains to be seen whether the other Singapore courts will pick up and engage this position directly, the authors would simply say that the word "manifest" appears *only* in s 12(1)(*c*) of the CCAA and not in the other exceptions. This is of course not to say that the other exceptions can or should be invoked *lightly*, especially if the purpose of the CCAA is to respect parties' choice of court agreement. Take s 12(1)(*e*), for example: there is nothing "exceptional" that a party needs to show except that the chosen court has already decided to not hear the case.

12.78 Turning to 6DM's arguments, they were rightly dismissed by Chionh J.

(a) First, 6DM did not articulate a specific public policy of Singapore that was supposedly, manifestly contravened by the upholding of the EJCs in the agreements. This is not surprising; the *possibility* of fragmentation of the dispute alone cannot be a contravention of "basic norms or principles of Singapore".[106] After all, while undesirable (for reasons of, *inter alia*, costs and inconsistent findings), it is not uncommon or unexpected that disputes involving cross-border transactions may need to

105 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [66].
106 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [58] and [67].

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be resolved in different *fora* or even through different dispute resolution mechanisms.

(b) Second, any "undesirability" was couched by 6DM in very *tentative* terms.[107] This simply could not pass the required threshold level of reasonable certainty that an unacceptable result would materialise.[108]

(c) Third, even if indeed Bogna could not be joined as a party to the English proceedings against the Asahi Entities, there was still the possibility of a case management stay on the Singapore proceedings against Bogna, which mitigated the risk of parallel proceedings and inconsistent findings.[109]

12.79 As a final note for the second limb of s 12(1)(*c*) of the CCAA, the authors would add that from a literal reading of the provision, it seems insufficient (or even immaterial) if the agreement in which the EJC is a part of is contrary to the public policy of Singapore. It is the *enforcement* of the EJC that must be contrary to the public policy of Singapore for the exception to apply.

12.80 The next plank of arguments raised by 6DM was that notwithstanding the EJCs, the Asahi Entities had submitted to the jurisdiction of the Singapore courts by virtue of the statutory demand served on 6DM.[110] What merits discussion is Chionh J's holding that the service of statutory demand was *not* a "step" within the Singapore suit and therefore could not be taken to be a "step" in the Singapore proceedings for the purposes of finding submission to the jurisdiction.[111]

12.81 It is interesting that 6DM did not raise the argument of imputed or inchoate submission. This refers to how a party's consent to the jurisdiction of a court in relation to certain claims may be imputed to other claims in some circumstances. This usually happens, in the context of examining international jurisdiction, where the subsequent claim concerns the same subject matter and is related to the original claim.[112] This must of course be contextualised under s 16(1) of the Supreme Court

107 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [67].
108 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [61].
109 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [68]. For the considerations of a case management stay, see *Rex International Holding Ltd v Gulf Hibiscus Ltd* [2019] 2 SLR 682.
110 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [70]–[71].
111 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [87].
112 *Giant Light Metal Technology (Kunshan) Co Ltd v Aksa Far East Pte Ltd* [2014] 2 SLR 545 at [48]–[50].

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of Judicature Act, which confers on Singapore courts jurisdiction over a defendant where, *inter alia*, the defendant submits to jurisdiction.[113]

12.82 In other words, can the Asahi Entities' invoking of the Singapore court's winding-up jurisdiction through service of statutory demand for debts arising under the *same* agreements be (a) construed as submission to the Singapore court's jurisdiction which is then (b) *also* treated as submission for the purposes of the suit? While the term was not expressly used, 6DM did indeed try to argue along the lines of inchoate submission.

12.83 In response, the Asahi Entities took pains to explain how the winding-up jurisdiction of the court was not concerned with determining the merits of the parties' disputes, which was accepted by Chionh J.[114] The fixation on "merits of the dispute" is not random as a "step" is deemed to have been taken if a party employs court procedures which enable him to defend proceedings *on their merits*.[115]

12.84 Chionh J also paid particular attention to the reservation in the statutory demand, which expressly stated that nothing in the demand would constitute a submission to the Singapore courts of any dispute arising under or in connection with the agreements.[116] Readers may recall from previous reviews that such 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.[117]

12.85 Chionh J also explained that the issuance of statutory demand was not premised on the Singapore courts having jurisdiction over the suit. This was yet another reason in favour of the Asahi Entities that they had not submitted to the jurisdiction of the Singapore courts.[118]

12.86 Perhaps one possible argument for the Asahi Entities (which was not discussed in the judgment) is that the debts pursued in the statutory demand were *different* from the claims pursued by 6DM in the suit. Even if they arose from the same agreements and were bound by the same EJCs, the submission of one claim/dispute to a particular court could not mean

113 *Iskandar bin Rahmat v Law Society of Singapore* [2021] 1 SLR 874 at [71], *per* Sundaresh Menon CJ.
114 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [72] and [82].
115 *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 at [55], *per* V K Rajah JA.
116 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [81].
117 See (2019) 20 SAL Ann Rev 251 at 269–270, para 11.64 and *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [38], *per* Judith Prakash JA.
118 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [80].

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that the other claims/disputes had also been submitted to the same court. After all, a defendant who submits to the jurisdiction in respect of the claim set out in a writ (or now known as an originating claim) does not necessarily submit to the jurisdiction in respect of other claims which, in the exercise of its procedural discretion, the court allows to be introduced by later amendment of the claim.[119] Therefore, Chionh J's finding that the Asahi Entities did not submit to the Singapore court's jurisdiction by virtue of the service of the statutory demand must be correct.

12.87 Regardless, Chionh J's judgment now adds a further gloss to principles on submission – the "step" so construed to be submission must be within the suit itself.[120] While it is unlikely that the argument of inchoate submission could pass the test of conduct evincing clear and unequivocal submission to the jurisdiction, one can only wait for the next case that comes along to test the limits of (inchoate) submission.

12.88 As highlighted above,[121] a Singapore court must stay or dismiss the case under s 12(1) of the CCAA so long as the dispute falls within a valid exclusive foreign EJC, *even if the Singapore court has jurisdiction under its national law*.[122] The grounds on which the Singapore court can stay or dismiss the case in the face of an exclusive foreign EJC are limited to the five exceptions set out in s 12(1) of the CCAA. Chionh J therefore clarified that s 12(1) of the CCAA, if triggered, would mandate the Singapore courts to stay or dismiss the case *even if* there was submission to the jurisdiction of the Singapore courts by the defendant.[123]

12.89 Perhaps what 6DM was trying to argue was that giving effect to the exclusive foreign EJC in a situation where the defendant has clearly submitted to the jurisdiction of the Singapore courts would "lead to a manifest injustice" or "be manifestly contrary to the public policy of Singapore". Indeed, this was the angle that Chionh J considered and dismissed for completeness:[124]

> (a) Chionh J did not think that 6DM was prejudiced in any way with the commencement of the Singapore proceedings given that this was a result of its own conduct in commencing the suit notwithstanding the EJCs in favour of the English courts.

119 *Lakshmi Anil Salgaocar v Hadley James Chilton* [2018] 5 SLR 725 at [36]–[37].
120 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [79].
121 See para 12.62 above.
122 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [37] and [39].
123 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [88].
124 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [89].

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(b) Chioh J also did not think that the prejudice suffered (if any) met the high threshold required under s 12(1)(*c*) of the CCAA.

12.90 For reasons stated above,[125] the authors agree that the Asahi Entities had not submitted to the jurisdiction of the Singapore courts. Even assuming *arguendo* that the Asahi Entities did submit to the jurisdiction of the Singapore courts, it is difficult but not impossible for the "manifest injustice" limb to be made out if the application under s 12(1) of the CCAA was taken out relatively late in the day (which, admittedly, was not the case here). This could happen, for example, after pleadings have been filed and exchanged:

(a) In such a situation (and also assuming that Singapore law is the chosen governing law), it could be argued that given the defendant's acceptance of the plaintiff's repudiatory breach of the EJC,[126] giving effect to the EJC would lead to manifest injustice as it would be allowing the defendant to go back on his acceptance of the claimant's repudiatory breach.

(b) Further, substantial time, effort and resources would have also been expended by both parties and the Judiciary in progressing with the case. These will be wasted if a stay or dismissal was granted under s 12(1) of the CCAA. This is yet another injustice to bring the scale closer to that of "manifest".

(c) The defendant's delay could have also amounted to "waiver", that is, waiving his rights to rely on the EJCs and invoke s 12(1) of the CCAA, though, admittedly, this reason on its own is unlikely to constitute "waiver".[127] Since the defendant accepted the repudiatory breach and simultaneously waived his right to invoke the EJC, this is yet another step closer to "manifest injustice".

(d) Given that the main motivation for giving effect to jurisdiction clauses (whether through the statutory regimes or at common law) is party autonomy and commercial certainty,[128] a party should also be held to his acceptance of a repudiatory breach (which is in any case irrevocable).[129]

125 See para 12.86 above.

126 *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd* [2018] 2 SLR 1207 at [51]–[52], *per* Judith Prakash JA.

127 *The Jian He* [1999] 3 SLR(R) 432 at [47], *per* Chao Hick Tin JA.

128 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [72] and [114]–[115], *per* Steven Chong JA.

129 *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd* [2018] 2 SLR 1207 at [81], *per* Judith Prakash JA.

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12.91 In the hypothetical above, it is also not impossible for the court to stay proceedings *with conditions*. Chionh J in her judgment considered whether a stay or dismissal should be granted and provided some helpful guidance:[130]

> (a) A stay would be appropriate in cases where part of the dispute between the parties fell outside the scope of their EJC. In such cases, it would be appropriate to stay the part of the dispute which fell within the scope of the EJC while allowing the remainder of the dispute to proceed in the Singapore proceedings.
>
> (b) In cases where the entirety of the dispute fell within the EJC, there was no principled reason to stay the Singapore proceedings instead of dismissing the proceedings.

12.92 Even though the dispute did fall entirely within the scope of the EJC,[131] Chionh J seemed prepared to grant a stay instead of a dismissal of the Singapore proceedings to address the concerns on whether the English courts would assume jurisdiction over ABK. This concern, however, was entirely speculative since 6DM did not adduce any expert evidence on English law to substantiate its concerns.[132] Since the dispute fell entirely within the EJC, the Singapore suit as against the Asahi Entities was unexpectedly dismissed.[133]

12.93 What was not considered by Chionh J is whether a Singapore court can impose a conditional stay of proceedings. This seems to be impermissible from a literal reading of s 12(1) of the CCAA, and particularly so when compared to s 6(2) of the International Arbitration Act, which expressly allows a court to impose conditions on a stay as it thinks fit.[134]

12.94 Another argument considered and dismissed by Chionh J was 6DM's reliance on s 11(2) of the CCAA. This section provides that a Singapore court that has jurisdiction under s 11(1) of the CCAA (that is, an exclusive forum jurisdiction clause) cannot decline to exercise jurisdiction on the ground that the dispute *should be* decided in a court of another state. A literal reading of the words "should be" suggests considerations of *forum non conveniens*. But, as explained by Chionh J with reference to the Explanatory Report, s 11(2) concerns two situations.

130 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [91].
131 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [55] and [57].
132 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [91].
133 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [92].
134 *The Navios Koyo* [2022] 1 SLR 413 at [30], *per* Steven Chong JCA.

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12.95 The first situation is where a Singapore court being the named forum in the EJC is faced with arguments of improper forum.[135] The Singapore court cannot decline to exercise jurisdiction on this argument alone. This must be right, if party autonomy is the bedrock of the CCAA, given that arguments on *forum conveniens* surely cannot be allowed to triumph an EJC.

12.96 The second situation concerns the doctrine of *lis pendens* applied by civil law countries, which requires a court to stay or dismiss proceedings if another court has been seised first in proceedings involving the same cause of action between the same parties.[136] As a side note, the concept of *lis alibi pendens* is quite different in Singapore – it matters not that the foreign court has been seised of jurisdiction first (unless the defendant in that foreign suit accepted the repudiatory breach and submitted to the jurisdiction of that foreign court). The foreign defendant is still entitled to come to Singapore (assuming Singapore is the chosen forum) to seek an anti-suit injunction ("ASI").

12.97 6DM's argument, which was rightly dismissed by Chionh J, was that if the EJC in the 2016 Agreement was understood to be in favour of the Singapore courts, then that EJC should be enforced at the expense of the EJCs in the 2017 and 2020 Agreements because once a Singapore court was found to have jurisdiction under s 11(1) of the CCAA, s 11(2) would prohibit Singapore from declining to exercise jurisdiction.[137] The argument seems to miss the point – if indeed 6DM's situation materialises, perhaps what would happen, with the operation of both ss 11(1) (for the forum EJC in the 2016 Agreement) and 12(1) of the CCAA (for the foreign EJCs in the 2017 and 2020 Agreements), is that the part of the dispute that relates to the 2017 and 2020 Agreements will either be stayed or dismissed with the part of the dispute that relates to the 2016 Agreement to proceed in the Singapore courts.

12.98 In any event, if indeed the EJC in the 2016 Agreement (concluded on 1 April 2016) was a *forum* EJC, the CCAA would have been inapplicable given that the CCAA does not apply to jurisdiction agreements concluded before 1 October 2016.[138] There were some arguments on contractual effect of renewal of the agreements that are not relevant for the purposes of this review. It suffices to note that while 6DM's arguments appeared

135 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [95].

136 Trevor Hartley & Masato Dogauchi, *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention* (Hague Conference on Private International Law, 2013) at paras 133–134.

137 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [94]–[95].

138 Choice of Court Agreements Act 2016 (2020 Rev Ed) s 24(1); *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [98].

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untenable, the arguments ought to have been considered in light of the governing law which was English law.[139]

12.99 For completeness, Chionh J also considered and found that s 24(2) of the CCAA – which sets out when the CCAA is inapplicable *vis-à-vis* other contracting states – was inapplicable given that the agreements in question were concluded after the Convention of 30 June 2005 on Choice of Court Agreements[140] ("Hague Convention") entered into force in the UK (on 1 October 2015).[141]

12.100 The last major discussion relates to Chionh J's "fallback position" – even if she was incorrect as to the interpretation of the EJC in the 2016 Agreement and the applicability of the CCAA, she would nevertheless have set aside the service out of jurisdiction effected on the Asahi Entities.[142]

12.101 Chionh J found that 6DM had (deliberately) breached its duty to make full and frank disclosure, which would have warranted the setting aside of the leave for service out of jurisdiction.[143]

12.102 First, 6DM in its supporting affidavit to seek leave for service out of jurisdiction did not reproduce in the text of the affidavit the EJCs in the three distribution agreements, nor did it address the effect of the governing law clause and EJC in each agreement.[144] Instead, 6DM stated that it was "advised that 6DM's claims do not arise under or are in connection with the [a]greements, and the exclusive jurisdiction clauses are thus irrelevant to the present [s]uit".[145] This, in Chionh J's opinion, was "neither here nor there", given that materiality is to be decided by the court and not by the applicant or its legal advisers.[146]

12.103 Second, 6DM also did not highlight the EJC in favour of the English courts (at least for the 2017 and 2020 Agreements). Instead, 6DM stated that the "[a]greements are governed by English law". This was a conflation and confusion of the issue of the choice of *forum* and the governing law of the contract. This mere disclosure of material facts without more or devoid of the proper context was found to be insufficient

139 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [100]–[103].
140 30 June 2005; entry into force 1 October 2015.
141 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [104]–[105].
142 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [106].
143 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [111], [120] and [134].
144 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [107]–[108].
145 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [108].
146 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [108] and [115].

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to constitute full and frank disclosure.[147] Whether material facts had been disclosed would be assessed objectively, with the focus on whether the facts in question were matters that the court would likely take into consideration in making its decision.[148] This was a duty owed to the court and did not depend on whether the foreign defendant pointed out any material non-disclosure on the part of the claimant.[149]

12.104 From a practice perspective, it is important to note what Chionh J has said that should have been done by 6DM: The relevant EJCs ought to have been reproduced in full in the affidavit and explanations should have been given why the disputes did not arise under or in connection with the agreements. 6DM should have also gone further to explain what the effect of the three EJCs would be should the court find that the dispute did in fact arise under or in connection with any of the agreements, including why the 2016 Agreement's EJC should not be construed to be in favour of the English court and why the EJCs in the other two agreements should not be enforced. All these would naturally include the effects of the EJCs and applicability of the CCAA.[150]

12.105 Chionh J also found Singapore to be *forum non conveniens*.[151] This was an unremarkable application of the *Spiliada* test. What is worth mentioning are the following points:

> (a) The governing law carried less weight as a connecting factor in favour of England because the key issues in contention were factual in nature (for example, whether certain representations were made and whether Bogna had authority to make high-level commercial decisions).[152]
>
> (b) The place where the breaches (that is, representations) allegedly occurred was also given limited weight given that this presupposed that 6DM's claims had been made out.[153]
>
> (c) Chionh J also highlighted that the existence of the EJCs in favour of the English courts in the 2017 and 2020 Agreements was a factor which pointed away from Singapore as the *forum conveniens*.[154] This is alluding to the argument that a multiplicity

147 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [108] and [112].
148 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [117].
149 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [119].
150 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [113]–[114] and [117].
151 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [133].
152 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [130].
153 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [131].
154 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [132].

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of closely related proceedings continuing simultaneously before different courts in different jurisdictions is undesirable.[155]

(d) 6DM also sought to play up the fact that it was a Singapore incorporated company.[156] While the nationality of the parties is no doubt a relevant factor in the *Spiliada* framework, the authors suggest that arguments on this point must be meaningfully made in the context of identifying the appropriate forum. In other words, the connecting factors identified must be relevant to the dispute and substantially connected to the case at hand. For example, a company's place of incorporation is undoubtedly more relevant in disputes concerning its corporate governance or internal management.[157] The link here between 6DM's place of incorporation and the dispute in question was unfortunately, extremely tenuous.

(e) 6DM also alluded to ease of enforcement if the proceedings were allowed to proceed in Singapore, as any Singapore judgment could be enforced against the products distributed by the Asahi Entities in Singapore.[158] This is an odd argument. Ease of enforcement is usually raised in cases when the dispute is over that specific property and the relief sought is over or related to that property.[159] In this case, enforcement could take many forms. As such, the location of the products was not a strong, if at all relevant, factor.

(f) Finally on the location of witnesses, Chionh J did not seem to think that the factor pointed conclusively to Singapore as the natural forum given that there were some important witnesses outside of the jurisdiction.[160]

12.106 The witness location factor merits some discussion. First, this factor is likely less important these days with the COVID-19 pandemic, war, (some) political instability and frequent changes to air travel restrictions across the world. Parties will be expected to rely on information and communication technology to ensure that witnesses are available to give evidence through video-link. The focus of the inquiry

155 *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [70], *per* Chao Hick Tin JA.
156 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [124].
157 See (2019) 20 SAL Ann Rev 251 at 279–280, para 11.98.
158 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [125].
159 *Eng Liat Kiang v Eng Bak Hern* [1995] 2 SLR(R) 851 at [34], *per* L P Thean JA.
160 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [126].

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therefore (rightly) turned to the location of witnesses who were not within the control of either party to the dispute, that is, third-party witnesses.[161]

12.107 Second, the authors also note that judgments discussing the Evidence (Civil Proceedings in Other Jurisdictions) Act 1979[162] ("ECPJA") seem to have died down in the last decade. This could be largely a result of lack of submissions on this statute by parties. The ECPJA is a useful tool, in the *Spiliada* analysis, for parties seeking to downplay the significance of Singapore-based witnesses because the Singapore-based witnesses can still be compelled to give evidence *from* Singapore pursuant to the ECPJA.[163]

12.108 Generally, the ECPJA allows a party, on application, to seek an order for evidence to be obtained in Singapore to be used in foreign proceedings, provided:[164]

> (a) the application is made pursuant to a request issued by a foreign court; and
>
> (b) the evidence sought is for *civil proceedings* in the foreign court, which has been defined to mean any "civil or commercial matter" but does not include proceedings arising out of any fiscal, monetary or revenue law or measure.

12.109 Therefore, the Asahi Entities could have (at least for the witness location factor), in response to 6DM's argument, raised the ECPJA to tilt the scale away from Singapore as *forum conveniens*.

12.110 The last issue relevant for this review is this: What should the test and standard for a stay of winding-up proceedings be if the debt in question arose from a contract that contains an EJC? Chionh J did not conclusively take a position but highlighted that "either the *prima facie* standard or the good arguable case standard (rather than the triable issue standard) should apply to the winding-up proceedings".[165]

12.111 It is beyond the scope of this review to examine the various reasons for and against the *prima facie* standard and come to a considered decision. Some reasons will simply be highlighted below, which suggest the authors' inclination towards the *prima facie* standard.

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161 See (2019) 20 SAL Ann Rev 251 at 301, para 11.162 and (2020) 21 SAL Ann Rev 314 at 363, para 12.132.

162 2020 Rev Ed.

163 See, *eg*, *Chan Chin Cheung v Chan Fatt Cheung* [2010] 1 SLR 1192 at [36].

164 Evidence (Civil Proceedings in Other Jurisdictions) Act 1979 (2020 Rev Ed) ss 2 and 3.

165 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [138].

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12.112 Following the arguments above,[166] perhaps the applicable standard is the *prima facie* standard. The drafters of the Hague Convention (and therefore drafters of the CCAA) intended for the statutory regime to mirror that under the 1958 New York Convention, which inevitably includes the *prima facie* standard of review on whether the dispute falls within the scope of a valid EJC. To adopt a different standard would be inconsistent in treating EJCs in a CCAA situation and in a winding-up situation. This, perhaps, also explains the purpose of the exception in s 12(1)(*e*) of the CCAA – should the chosen court later refuse to exercise jurisdiction, another contracting state (for example, Singapore) can proceed with the proceedings seemingly instituted in breach of the foreign EJC under the recognised exception.

12.113 One remaining concern, then, is this: EJCs that do not come within the purview of the CCAA continue to be treated with greater scrutiny under "a good arguable" case standard. But there is nothing inherently wrong with this because the lowering of the standard under the CCAA regime is simply a result of statutory intervention (and the Hague Convention).

12.114 Regardless of what the standard under the CCAA is, the standard of review for an EJC in resisting a winding-up application cannot be *lower* than that under the CCAA. Otherwise, this would encourage creditors to abuse the court's winding-up jurisdiction as a means to avoid the parties' agreed method of dispute resolution in the EJC, or to pressure the alleged debtor into payment by using the draconian threat of liquidation.[167] In any case, Chionh J's decision clearly illuminated various unclear (and unspoken) areas in the CCAA. It will be interesting to see how the law under the CCAA continues to develop.

### *B.* Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd

Exclusive foreign jurisdiction clause – Test for and effect of submission to court/jurisdiction

Exclusive foreign jurisdiction clause – Test for waiver of right to rely on jurisdiction clause

12.115 Having examined how jurisdiction clauses are dealt with by Singapore courts at an early stage of the proceedings, *Reputation*

166 See para 12.61 above.

167 *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 at [72] and [88], *per* Steven Chong JA.

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*Administration Service Pte Ltd v Spamhaus Technology Ltd*[168] examines what happens to the party that belatedly asserts applicability of an EJC.

12.116 This suit concerned a contractual claim in which the respondent-plaintiff claimed from the appellant-defendant arrears of commission payable under an alleged agreement for resale of spam control services. The appellant denied such a contract and, as an alternative position, argued that any contractual relationship should be governed by a "Resellers' Agreement" which the appellant executed with an associate of the respondent-plaintiff (Spamhaus Research Corp ("SRC")) in 2009.[169] This Resellers' Agreement contained an EJC in favour of the courts of England and Wales.[170]

12.117 From November 2016 onwards, the appellant started dealing with the respondent instead of SRC. The respondent highlighted that there was (a) no new formal agreement concluded between the appellant and the respondent; and (b) no novation or assignment of the Resellers' Agreement from SRC to the respondent. While the court (rightly) did not attempt to try these factual issues, the court noted that it was "arguable that between 2016 and 2019, the appellant and the respondent were dealing with each other on the terms of the Resellers' Agreement".[171]

12.118 On 16 August 2019, the respondent commenced a suit in Singapore premised on the Resellers' Agreement. The appellant then entered an appearance on 30 August 2019 and filed the defence on 9 September 2019. Thereafter, parties were involved in several interlocutory applications including (a) a summary judgment application filed by the respondent in December 2019 which was contested by the appellant; (b) a notice to produce the Resellers' Agreement filed by the appellant in December 2019 and complied with by the respondent; and (c) a striking-out application filed by the appellant in January 2020 which the appellant alleged that the respondent lacked standing.[172]

12.119 After the striking-out and summary judgment applications were dismissed, the respondent took out an application to stay the suit on

168 [2021] 2 SLR 342.

169 *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 at [1].

170 *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 at [6].

171 *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 at [7]–[8].

172 *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 at [11]–[12].

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the basis of the EJC in the Resellers' Agreement in June 2020, about ten months since the appellant entered appearance on 30 August 2019.[173]

12.120 The stay application was dismissed both by the assistant registrar and the judge at the High Court level. On appeal, the Singapore Court of Appeal found that the appellant had submitted to the Singapore court's jurisdiction and in so doing waived its right to rely on the EJC.[174] The Court of Appeal's judgment is worth unpacking as it clarifies the principles on waiver and submission respectively, points which counsel might have conflated during its submissions.

12.121 Submission is established where a party has taken a "step" that is incompatible with the position that the Singapore court does not have jurisdiction. This may be inferred through a step that is only necessary or only useful if (a) any objection to the existence of the local court's jurisdiction has been waived; or (b) no such objection has ever been entertained at all.[175]

12.122 Waiver, on the other hand, is established where a party has taken a "step" that is incompatible with the position that the Singapore court should *not* assume jurisdiction over the matter, such as where a party takes a step demonstrating a clear intention not to have the dispute determined by the Singapore court.[176]

12.123 In both inquiries, the step taken must be clear and unequivocal. Each inquiry involves a question of fact to be determined in the circumstances of the particular case. Accordingly, a party could conceivably take a step that is a clear submission as well as a clear waiver of rights.[177]

12.124 In this case, the Court of Appeal found that the appellant had taken several steps which clearly and unequivocally demonstrated that the appellant submitted to the Singapore court's jurisdiction and intended to have the dispute heard in Singapore:[178]

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173 *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 at [13].

174 *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 at [14] and [17].

175 *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 at [20(a)].

176 *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 at [20(b)].

177 *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 at [21].

178 *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 at [22]–[24].

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(a) First, the appellant filed its defence on 9 September 2019. In the Court of Appeal's words, "a defence clearly indicates an intention to defend the suit in question; it would only be useful to a defendant if such defendant wishes to contest the suit within the jurisdiction".[179] Further, the appellant denied and chose not to admit the respondent's allegations in its defence – this indicated that the appellant was prepared to go to trial in Singapore to put the allegations to the test.

(b) Second, the appellant contested the summary judgment application taken out by the respondent. The primary defence raised was that the respondent had no standing to sue.

(c) Third, the appellant also took out a striking-out application, which was a clear invocation of the Singapore court's powers to strike out the statement of claim on the basis that the respondent lacked standing. This again was an intention to contest the suit on its merits.

(d) The steps taken by the appellant were also unaccompanied by any protest against the court assuming jurisdiction over the parties. The raising of the EJC in the appellant's reply affidavit and written submissions to contest summary judgment were also not done in the context of a jurisdictional objection (or even a preference for the dispute to be heard in the chosen court). Instead, the EJC was raised to supplement the argument that the respondent lacked the standing to sue.[180] Given the appellant's conduct, which clearly indicated that it had intended to defend the suit on their merits (that is, filing of defence, resisting summary judgment and filing a striking-out application),[181] it would not have mattered even if it had an express reservation of rights. The express reservation, even if present, could not salvage a party's conduct that clearly and unequivocally signified a submission to jurisdiction.[182] Furthermore, assertions in an affidavit alone were also ineffective and inadequate to constitute a dispute as to the court's jurisdiction. Instead, a foreign defendant would be expected to challenge as *per* the manner prescribed in the rules of court, failing which he would be taken to have submitted to

179 *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 at [23].

180 *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 at [25]–[26].

181 *Carona Holdings Pte Ltd v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 at [55], *per* V K Rajah JA.

182 *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [36]–[39], *per* Judith Prakash JA.

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the court's jurisdiction *or at least* have waived any jurisdictional irregularity that may have existed.[183]

(e) Finally, the appellant also failed to promptly make its jurisdictional objection. Under the ROC, the appellant could have objected to the court's assumption of jurisdiction without filing a defence, yet the appellant went ahead to file a defence. The Court of Appeal also rejected the appellant's representative's contention that he was unaware of the EJC in the Resellers' Agreement until the respondent complied with the notice to produce because, *inter alia*, the representative did sign the Resellers' Agreement and had to be taken to know the contents of the agreement, including the EJC. Even after the Resellers' Agreement was shown to the appellant pursuant to the notice to produce, the appellant did not take out a stay application but instead sought to strike out the statement of claim on the basis of lack of standing.[184] These considerations supported the Court of Appeal's finding that the appellant submitted to the jurisdiction of the Singapore courts.

12.125 The Court of Appeal's reasoning on waiver merits some unpacking for clarity:

(a) Given that the Resellers' Agreement was the contract to which the dispute related (which was the position that both the appellant and respondent took), one would have thought that the initiation of Singapore court proceedings would be a breach of the EJC/agreement on the part of the respondent.

(b) The breach must operate as a repudiation of the jurisdiction agreement, giving the appellant the option to either accept the repudiatory breach or affirm the contract. The authors are cognisant of the fact that given the governing law of the Resellers' Agreement was the law of England and Wales, the relevant principles on contractual repudiation are, for the purposes of this review, not materially dissimilar from Singapore law.

(c) In this case, the appellant's conduct can be characterised as a "waiver by election" – by electing to proceed with the Singapore suit, the appellant waived his rights to affirm the contract and insist on litigation in the courts of England and

183 *Westbridge Ventures II Investment Holdings v Anupam Mittal* [2021] SGHC 244 at [81].

184 *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 at [27] and [29]–[32].

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Wales.[185] This is probably what the Court of Appeal was referring to when it said the appellant waived "its contractual right to invoke the EJC".[186]

12.126 That said, it seems the appellant did not raise before the Court of Appeal arguments on s 12(1) of the CCAA. If raised, the appellant could have argued that s 12(1) of the CCAA mandates the Singapore court to stay proceedings *even if* the appellant did submit to the Singapore court's jurisdiction. After all, it seems that parties were dealing with each other on the terms of the Resellers' Agreement (which contained the foreign EJC) from November 2016, which was after the Hague Convention had entered into force in the UK.[187] If so, the inquiry would then move to whether, given the progress of the Singapore proceedings, giving effect to the foreign EJC would lead to a manifest injustice, or fall under any other exception in s 12(1) of the CCAA. Unfortunately, this was not raised, and conflict of laws enthusiasts can only wait for the test case to try the boundaries of the exceptions under s 12(1) of the CCAA.

## IV. Choice of law

12.127 Choice of law considerations are relevant to a conflict of laws analysis in two 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*.[188] Another example is where the *lex causae* can define the cause of action to establish nexus between our jurisdiction and the dispute (whether under the old ROC or the ROC 2021).

12.128 Things get significantly more complicated when the existence of the contract itself comes into question. Questions involving the appropriate choice of law rule for contract formation are among the conflict of laws' most complex, although common law courts have been spared of the need to adopt a considered solution by virtue of the relative scarcity of genuine formation disputes.

185 See also *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd* [2018] 2 SLR 1207 at [95]–[96].
186 *Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 at [19].
187 *6DM (S) Pte Ltd v AE Brands Korea Ltd* [2021] SGHC 257 at [105].
188 *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [47], *per* Sundaresh Menon CJ.

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## *A.* Lew, Solomon v Kaikhushru Shiavax Nargolwala

Choice of law – Contract formation

12.129 *Lew, Solomon v Kaikhushru Shiavax Nargolwala*[189] ("*Solomon Lew*"), a decision covered in last year's review,[190] involved the law which should govern the formation of international contracts. Australian billionaire Solomon Lew wanted to purchase a villa in Thailand. Since Thai law prohibited foreign nationals from owning Thai land, Lew's plan was to purchase shares in a British Virgin Islands ("BVI") company owning the villa instead.[191] The villas were part of a resort managed by one Daniel Meury, through whom Lew communicated his intention to the villa's "owners", the Nargolwalas, who were Singapore residents owning shares in the BVI company. Thereafter, the parties negotiated using Meury as an intermediary. In October 2017, Meury informed Lew that the Nargolwalas had agreed to the sale; the Nargolwalas, however, had never communicated that to Meury, and instead believed that negotiations were still ongoing. In November 2017, the Nargolwalas sold the shares to Hong Kong buyers. Lew then sued the Nargolwalas in Singapore for breach of contract, and in defence they responded that no contract had formed. The questions thus arose: Which law governed the question of whether a contract had been formed, and had Meury acted as the Nargolwalas' agent in communicating to Lew that they had agreed to sell the villa? Lew argued for Singapore law and the Nargolwalas, for Thai law.

12.130 The controversy on choice of law for contract formation is well known, with courts and commentators tending to prefer either the substantive *lex fori*[192] or the law of the putative contract (that is, "the governing law of the contract if the same was concluded")[193] – and criticising the other choice as perpetuating forum shopping or logical circularity respectively. At first instance, Simon Thorley IJ preferred a "three-stage" rule focused on the law of the putative contract, with a qualifier that, if there was no "clear conclusion" in favour of a particular law, "the counsel of prudence would be to apply the *lex fori*".[194] On the facts, an "implied" choice had been made: the Nargolwalas had insisted that Singapore lawyers be instructed, and Lew readily agreed, so the parties clearly intended that Singapore law would govern "the alleged oral

189 [2020] 3 SLR 61.
190 (2020) 21 SAL Ann Rev 314 at 365–369.
191 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [2].
192 See *Pegaso Servicios Administrativos SA de CV v DP Offshore Engineering Pte Ltd* [2019] SGHC 47 at [73].
193 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [163].
194 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [163]–[164].

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contract".[195] Under Singapore law, then, no contract between Lew and the Nargolwalas existed since Meury lacked any authority to conclude a sale on the Nargolwalas' behalf.[196]

12.131 On appeal, Lew challenged Thorley IJ's findings that no contract had been formed. Jonathan Mance IJ, with whom the rest of the Court of Appeal agreed, dismissed Lew's appeal without resolving the choice of law question, reasoning that Meury lacked authority to contract on the Nargolwalas' behalf under either Singapore or Thai law.[197] However, the Nargolwalas had also appealed against a cost order issued against them by Thorley IJ, who believed their insistence that Thai law governed the formation issue had been "opportunistic" and unreasonable.[198] To determine whether the Nargolwalas' arguments for Thai law were reasonable, Mance IJ thus had to consider the choice of law question afresh.

12.132 On the choice of law rule that governed contract formation, Mance IJ preferred "a three-stage approach analogous to that applicable where there is no dispute about the existence of a contract, focusing necessarily on the circumstances of the transaction or relationship alleged to have given rise to a concluded contract".[199] This three-stage rule was as follows:

> (a) At the first stage, courts would ask whether "two parties sitting down to contractual negotiations might agree between themselves that the issue should, in the event that it arose, be determined under a particular law".[200]
>
> (b) At the second stage, courts would ask whether "parties have agreed on some, though not all, of the suggested or necessary terms", and if so whether those terms included "what law will govern the contract, if and when it is agreed".[201]
>
> (c) At the third stage, courts would ask "which legal system [parties'] factual complex or issue is most closely connected", focusing on the "interchanges between parties who later find themselves in dispute about whether a contract has been concluded".[202]

195 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [165]–[166].
196 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2020] 3 SLR 61 at [195]–[196] and [224].
197 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [57] and [31].
198 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [90]–[91].
199 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [76].
200 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [70(a)].
201 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [70(b)].
202 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [70(c)].

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12.133 Mance IJ disapproved of Thorley IJ's reasoning that the *lex fori* could apply if no clear conclusion in favour of a particular law could be reached by the third stage: even when the balance of factors in favour of one law was "slight", the court had to instead apply the "most appropriate law" among the contenders.[203] This was because applying the *lex fori* to a substantive issue simply because "proceedings happened to be brought in [the forum]" would prevent the "attainment of uniform solutions"[204] and frustrate parties' "reasonable expectations".[205]

12.134 Mance IJ also acknowledged that there could be "extreme case[s]" where the law applicable under his three-stage rule would "give rise to grave injustice", such as a law under which "silence in response to an offer amounts to consent".[206] In this situation, however, the appropriate response was not to apply the *lex fori* but to find "that no contract at all came into existence under any law".[207]

12.135 Mance IJ also justified his approach by reference to the "chief purpose" of private international law, that is, in an internationalist spirit, to identify the most appropriate law to govern any particular issue. The identification of this law normally involved another three-stage process (which should not be seen as a rigid process): (a) characterisation of the relevant issue – whether it be as an issue of contract, tort, unjust enrichment, revenue, public law, crime, marriage, divorce, civil procedure or any other of the manifold possibilities; (b) selection of the rule of conflict of laws which laid down a connecting factor for that issue; and (c) identification of system of law which was tied by that connecting factor to that issue. The three-stage approach therefore gave effect to what would be regarded as the reasonable expectations of the parties.[208]

12.136 Applying his three-stage rule, Mance IJ held that the Nargolwalas' arguments that Thai law governed the formation issue were reasonable. The Nargolwalas had not actually insisted on Singapore lawyers; instead, they actually suggested that Bangkok lawyers might have been better, and this was particularly evident when the court focused on parties' correspondence prior to or at the point when Lew alleged a contract had been formed.[209] Other factors also pointed to Thailand: the villa was in Thailand, Lew and Meury were alleged to have contracted in Thailand, and the transaction's complex nature was necessitated by Thai law

203 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [70(c)].
204 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [70].
205 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [79].
206 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [77].
207 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [77].
208 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [71]–[72].
209 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [86].

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restrictions.[210] By contrast, the Nargolwalas' Singapore residence carried little weight, and their references at times to Singapore lawyers were at best cancelled out by their references to Thai lawyers.[211] It was thus "highly arguable that the decision should on proper analysis have been in favour of Thai law", and so costs were ordered against Lew instead of the Nargolwalas.[212]

12.137 One of the authors is on the record as supporting Mance IJ's judgment in *Solomon Lew*.[213] Properly understood, the three-stage rule he laid down avoids the difficulties associated with the *lex fori* and the law of the putative contract, because it focuses on law most closely connected with the parties' *pre-contractual negotiations*. This was evident from Mance IJ's focus not on the disputed contract itself but on "the transaction or relationship alleged to have given rise to a concluded contract",[214] and his reasoning that courts should apply "the law with the closest connection to their negotiations"[215] or the law which the parties "negotiate[d] on the basis of, or with reference to".[216] Further, if in domestic law courts look to the parties' negotiations to determine whether they have contracted, it makes eminent sense – and certainly aligns with parties' reasonable commercial expectations – that they should do the same to determine the law that governs the question of whether they have contracted. Mance IJ's three-stage rule is thus consonant with the underlying philosophy of choice of law rules – famously espoused by Mance LJ himself in *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC*[217] – that such rules should "aim, in an internationalist spirit, to identify the most appropriate law to govern any particular issue" which "give[s] effect to the reasonable expectations of its user[s]".[218]

12.138 In general, then, *Solomon Lew* provides a welcome solution to a difficult choice of law issue which is likely to be influential in future disputes in Singapore and other common law jurisdictions. The only important question that remains involves the factors which courts should look to when identifying the subjectively chosen or objectively applicable law. From Mance IJ's judgment, it seems that the place where the parties' lawyers carry on business, the subject matter of the proposed

210 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [87]–[88].
211 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [89].
212 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [87] and [93].
213 See para 12.129 above. Marcus Teo, "A Negotiation-Based Choice of Law Rule for Contract Formation" [2021] LMCLQ 427 at 429–431.
214 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [76].
215 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [67].
216 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [65].
217 [2001] QB 825 at [26]–[27].
218 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [71]–[72].

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deal, the place of the parties' negotiations and the laws which the parties would necessarily have had to consider when negotiating, are factors.[219] However, other factors may be possible – because it sufficed for the Nargolwalas to show (and for Mance IJ to find) that their arguments for Thai law were reasonable to resolve their appeal, the court did not need to identify definitively the law that would have governed the formation issue under Mance IJ's three-stage rule, and so a fuller discussion which may have identified other relevant factors was not had. It is hoped that, when the issue next arises, further clarification on the relevant factors will be provided.

### *B.* Ang Jian Sheng Jonathan v Lyu Yan

Foreign law illegality – *Foster v Driscoll*

Foreign law illegality – Non-contractual claims

12.139 *Foster v Driscoll*[220] ("*Foster*") is one of two doctrines of foreign law illegality which prevents the enforcement of contractual claims which are illegal under the law of a third state (that is, other than the *lex fori* and the governing law of a contract). In brief, it bars the enforcement of contracts when the parties have a common intention to perform an illegal act in a foreign and friendly state, even if the contract does not necessitate the performance of that act. While questions remain about *Foster*'s precise scope,[221] one that is rarely asked is whether the doctrine can prevent the enforcement of *non*-contractual claims as well. In *Ang Jian Sheng Jonathan v Lyu Yan*[222] ("*Jonathan Ang*"), the Court of Appeal expressly addressed this issue for the first time in Singapore, reasoning that *Foster* applied only to contractual claims.

12.140 Lyu Yan, a Chinese national resident in Singapore, wanted to transfer money from China to Singapore. She enlisted the help of one Joseph, who advised her to transfer Chinese Renminbi from her Chinese bank account to the Chinese bank accounts of his associates in Singapore, Jonathan and Derek, after which they would transfer Singapore dollars from their Singapore bank account to Lyu's Singapore bank account.[223] One aspect of this transaction required Lyu to acquire fictitious loan documents to deceive her Singapore bank into thinking that Jonathan and

219 *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 at [87]–[89].
220 [1929] 1 KB 470.
221 For a discussion, see Tan Yock Lin, "Tainted Contracts in the Conflict of Laws" (2020) 32 SAcLJ 1003 at 1008–1015.
222 [2021] 1 SLR 1091.
223 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [3]–[4].

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Derek's transfers to her were loan repayments.[224] Lyu made the transfer in China but received nothing in Singapore. She then sued Joseph for breach of contract, and sued him along with Jonathan and Derek for unlawful means conspiracy and unjust enrichment.

12.141 At first instance, Choo Han Teck J ruled in favour of Lyu against all three defendants.[225] Jonathan and Derek, however, appealed on two grounds, both of which were dismissed by Andrew Phang JCA, delivering the judgment for the Court of Appeal, First, Jonathan and Derek argued that they too were innocent participants in the transaction and that they had also been duped, because they had transferred Lyu's Renminbi to a further party named "Allan", who then absconded with the money. Phang JCA rejected this argument, noting that Jonathan and Derek had provided little positive evidence that they had actually dealt with this "Allan".[226]

12.142 Second, Jonathan and Derek argued that the rule in *Foster* barred Lyu's non-contractual claims against them. Phang JCA rejected this argument on two grounds. The first was that Lyu did not, at the time she contracted with Joseph, have the requisite mental state to trigger the rule in *Foster*. In particular, *Foster*'s rule "only applies if Jonathan and Derek can show that Lyu Yan intended, or at the very least knew, that the [transfer] violated Chinese law",[227] and while Lyu evidently knew that an outright transfer of moneys from Chinese to Singaporean bank accounts was illegal under Chinese law, she thought the transaction Joseph advised her to perform was a "workaround" which, "as structured, [was] perfectly legitimate under Chinese law".[228] This was notwithstanding the fact that Lyu procured "fictitious loan documents" to convince her Singapore bank that any moneys she would receive from Jonathan and Derek, were the transaction to have been carried out, were loan repayments, because "this at its highest might show Lyu Yan's knowledge of some potential illegality under *Singapore* law" rather than Chinese law.[229] Thus, although the transaction as structured would in fact have involved parties performing an act in China that was illegal under Chinese exchange control laws, Lyu did not intend to breach Chinese law because she thought the transaction was legal under Chinese law.

12.143 There are two further noteworthy points to the *inapplicability* of *Foster*'s rule on the facts. First, Choo J at the first instance already found,

224 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [18].
225 See *Lyu Yan @ Lu Yan v Lim Tien Chiang* [2020] SGHC 145.
226 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [11]–[14].
227 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [16].
228 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [17].
229 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [18].

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after considering the relevant expert evidence adduced by parties, that Lyu's agreement with Joseph would violate Chinese law.[230] The Court of Appeal, however, took pains to explain how Lyu did not know or intend for the said agreement to violate Chinese law.[231] This is significant because the intention to perform the illegal act need not be shared by the contracting parties, but it must have been the intention of the party who is now seeking to enforce the contract.[232]

12.144 Phang JCA then reasoned that, even if Lyu had known the transaction breached Chinese law, *Foster* still would not have applied because it only applied to contractual claims.[233] *Foster* did not bar non-contractual claims based on the restitution of unjust enrichment received under a contract illegal under foreign law "even though these non-contractual claims have the economic effect of enforcing the void and unenforceable contract".[234] This was in fact what Jonathan and Derek had argued: ordering them to make restitution to Lyu in Singapore would "entail the economic equivalent of enforcing the [transaction]", which would thus stultify the purpose of the Chinese foreign exchange law.[235] In this regard, *Foster* was contrasted with the doctrine of illegality laid out in *Ochroid Trading Ltd v Chua Siok Lui*[236] ("*Ochroid Trading*"), where the Court of Appeal had reasoned that claims for the restitution of unjust enrichment received under a contract illegal under domestic law would be barred if restitution stultified the policy underlying the rule rendering the contract illegal. This difference between *Foster* and *Ochroid Trading* could be attributed to the fact that the former was a rule "pertaining to the conflict of laws" rather than "domestic illegality".[237]

12.145 Phang JCA, however, expressed concerns that "[p]ossible difficulties" arose if *Foster* and *Ochroid Trading* were "read together" (that is, applied, as separate doctrines, to the same facts), because there would be "a possible anomaly between contracts governed by Singapore law on the one hand and those not governed by Singapore law on the other".[238] This was because a claim for the restitution of unjust enrichment received under a contract which was illegal under Singapore law could be barred if allowing it would stultify the purpose of the relevant Singaporean criminal law, but a claim for the restitution of unjust enrichment received under

230 *Lyu Yan @ Lu Yan v Lim Tien Chiang* [2020] SGHC 145 at [16].
231 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [21].
232 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [257].
233 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [26].
234 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [26].
235 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [23].
236 [2018] 1 SLR 363.
237 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [30] and [23].
238 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [31]–[32].

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a contract which was illegal under foreign law would not be barred even if allowing it would stultify the purpose of the relevant foreign criminal law. In other words, "recovery via non-contractual means [would] be narrower for [the applicant] when the contract is governed by Singapore law, and broader when the contract is governed by foreign law".[239] Phang JCA considered this an unsatisfactory state of affairs because there was "no principled reason" for it.[240] Nevertheless, there was one "commonality" between *Foster* and *Ochroid Trading*: under both, "the concept of policy serves as a limiting factor to ensure that the illegality involved does not inflexibly defeat recovery where such recovery is justified".[241]

12.146 Phang JCA's reasoning in *Jonathan Ang* on the application of *Foster* to non-contractual claims was necessarily brief and exploratory, since they were only *obiter* comments made in a judgment delivered *ex tempore*. With respect, however, there are two problems with Phang JCA's reasoning. First, if the difference that he identified when *Foster* and *Ochroid Trading* are read together is indeed unprincipled, the fact that "policy" operates under both rules cannot mitigate that difference. While it is true that the public policies of the forum can influence how both the rules in *Ochroid Trading* and *Foster* operate, those public policies perform that function in different ways in those two contexts. Under *Ochroid Trading*, courts ask whether *barring* the plaintiff's claim would give effect to the forum's public policies (which would otherwise be stultified by the claim). However, under *Foster*, courts can only ask whether they should deny recognition to the relevant foreign criminal or quasi-criminal law under the public policy exception to give effect to the forum's public policies, which would have the effect of *allowing* the plaintiff's claim. It follows that arguments based on the same public policies of the forum are unlikely to consistently resolve differences between *Foster* and *Ochroid Trading*.

12.147 A more fundamental difficulty with Phang JCA's reasoning, however, lies with the very proposition that *Foster* bars only contractual claims. As authority, Phang JCA cited *Lilly Icos LLC v 8PM Chemists Ltd*[242] ("*Lilly Icos*"), but there that proposition was simply conceded by parties and so accepted by the court without argument. In reality, however, there are quite a number of authorities applying *Foster* to non-contractual claims. In English law, *Foster* was applied to bar a claim based on a constructive trust in *Re Emery's Investment Trust*[243] and a defence

239 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [34].
240 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [34].
241 *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [34].
242 [2010] FSR 4 at [266], cited in *Ang Jian Sheng Jonathan v Lyu Yan* [2021] 1 SLR 1091 at [26].
243 [1959] 2 WLR 461 at 468–469.

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to a claim for the restitution of unjust enrichment in *Barros Mattos Jr v MacDaniels Ltd*.[244] It would also have barred a claim for breach of copyright in *The Bodley Head Ltd v Flegon*[245] if parties had, in acquiring the copyright in question, agreed to perform an act in the territory of the state that criminalised it. In Singapore law, *Foster* would have applied to bar a claim for "money had and received" in *Brooks Exim Pte Ltd v Bhagwandas Naraindas*[246] if it could have been shown that parties intended to breach the foreign law in question. While Phang JCA was, of course, not bound by these authorities, his omission to even consider them leaves his comments on the scope of *Foster* to non-contractual claims doubtful, especially given that it was based on an unquestioning acceptance of an unreasoned proposition adopted in *Lilly Icos* and that he found the apparent difference it created between *Foster* and *Ochroid Trading* problematic. It is hoped that the Court of Appeal will address this important question of *Foster*'s scope more fully if and when it arises for consideration again.

### *C.* EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd

Foreign law illegality – *Foster v Driscoll*

Foreign law illegality – *Euro-Diam Ltd v Bathurst*

12.148 While *Jonathan Ang*[247] saw the Court of Appeal doubling down on well-established rules of foreign law illegality, in *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd*[248] ("*EFG Bank v Surewin*") the High Court did the opposite by gesturing in the direction of reform. In recent years, there have been interesting developments in the law on disputes involving foreign illegality: existing well-established rules of foreign law illegality, like the rules in *Foster*[249] and *Ralli Brothers v Compania Naviera Sota y Aznar*[250] ("*Ralli*"), have gradually been replaced or brought into alignment with rules of domestic illegality. Several English High Court decisions have expressly adapted the "proportionality" test laid out in *Patel v Mirza*[251] ("*Patel*") to disputes involving foreign illegality, after

244 [2005] 1 WLR 247 ("*Barros Mattos Jr*") at [41]–[44]. While *Barros Mattos Jr* has been criticised in Singapore (see *Esben Finance Ltd v Wong Hou-Lianq Neil* [2021] 3 SLR 82 at [228]–[232]), this was in relation to the application of *Foster v Driscoll* [1929] 1 KB 470 to defences rather than its application to causes of action based on unjust enrichment.

245 [1972] 1 WLR 680 at 687–688.

246 [1995] 1 SLR(R) 543 at [1] and [14].

247 See para 12.139 above.

248 [2021] SGHC 227.

249 See para 12.139 above.

250 [1920] 2 KB 287.

251 [2017] AC 467.

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concluding that it would be unprincipled to adopt different approaches depending on the provenance of the illegality in question.[252] By contrast, this "revolution" in the law on foreign illegality[253] seemed not to reach Singapore's shores: despite having adopted its own "proportionality" test for domestic (common law) illegality disputes in *Ting Siew May v Boon Lay Choo*[254] ("*Ting Siew May*") three years before *Patel*, Singapore's courts had generally not considered whether that test should apply in foreign illegality disputes as well.[255] *EFG Bank v Surewin*, however, marks a beginning of a conscious shift in that direction: there, Vinodh Coomaraswamy J consciously adapted and applied *Ting Siew May* to a breach of Taiwanese insurance regulations. Unfortunately, the reasons he gave for doing so were brief and, with respect, unsatisfactory, leaving much unclear about whether, why, and to what extent *Ting Siew May* should supplant or buttress existing doctrines like *Foster* and *Ralli*.

12.149 A Taiwanese insurance company ("the Insurance Company") entered into an arrangement with a Swiss bank ("the Bank"), ostensibly to invest its assets through a BVI investment company ("the Investment Company") it owned. In 2008, the bank established a unit trust ("the Trust") and appointed a Jersey company as trustee ("the Trustee") under a Jersey law trust deed. The Trustee then opened an account with the bank's Singapore branch ("the Account"). The Insurance Company subscribed to all of the Trust's units, and in return transferred substantial assets into the account. The Bank then extended a credit facility to the Investment Company through its Singapore branch ("the Facility") in consideration of the Trustee executing a charge, governed by Singapore law, over all current and future assets in the Account in favour of the Bank ("the Charge"). Finally, the Insurance Company granted the Bank a discretionary investment management mandate over the assets in the account, governed by Taiwanese law and subject to arbitration in Taiwan ("the Mandate").

12.150 In reality, the arrangement was a scheme hatched by one Teng Wen-Chung, the chairman and majority shareholder of the Insurance

252 See, *eg*, *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [297]–[341] and *El Haddad v Al Rostamani* [2021] EWHC 1892 (Ch) at [79]–[93].

253 Marcus Teo, "Foreign Law Illegality: *Patel*'s New Frontier?" (2021) 80(1) Camb LJ 32 at 32.

254 [2014] 3 SLR 609.

255 While *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 ("*Ting Siew May*") was applied to dispute involving a breach of US bankruptcy regulations in *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2020] 4 SLR 85, there the court apparently saw nothing unusual about what he was doing, and thus did not consider in any detail whether, in principle, *Ting Siew May* should even apply to foreign illegality disputes.

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Company, and his associates to defraud the Bank and pocket the proceeds. From 2008 to 2012, the Investment Company drew sums on the Facility and paid to third parties, which eventually transferred the sums to Teng. Eventually, the scheme unravelled, and Teng was convicted in Taiwan of criminal breach of trust and money laundering in 2019. Meanwhile, in 2014, Taiwanese authorities had taken control of the Insurance Company and caused it to terminate the Mandate, which constituted an event of default under the Facility, leading the Bank to terminate it. The Bank then first (successfully) sued Teng in Singapore under an indemnity he had given it for the Investment Company's liabilities,[256] but this judgment went unsatisfied. The Bank then commenced new proceedings in Singapore against the Insurance Company, seeking a declaration that the Charge was valid and enforceable. The Insurance Company resisted the declaration on two alternative grounds: first, that the Charge only gave the Bank a security interest in the assets in the Account subject to the Insurance Company's interest in the assets as beneficiary of the Trust; And, second, that the Charge was unenforceable "by reason of illegality under Taiwanese law" because its subscription for the units in the Trust and its consent to the Charge were in breach of Taiwanese financial regulations.[257]

12.151 On the status of the Bank's security interest, Vinodh Coomaraswamy J found that the Trustee had committed a breach of trust when it executed the Charge because it had acted without the Insurance Company's consent (as required under the trust deed) when it executed the Charge (although consent was subsequently given).[258] Whether the Bank's security interest under the Charge prevailed over the Insurance Company's beneficial interest in the assets in the Account – an issue governed by Singapore law, as the *lex situs* of the assets[259] – thus turned on the question of whether the Bank was a *bona fide* purchaser of the security for value in good faith without notice.[260] Here, the Insurance Company argued that the Bank had constructive notice of facts that should have put it on inquiry as to the (im)propriety of the Charge at the time when it was executed, for various reasons – all of which were rejected by Coomaraswamy J, who eventually ruled in favour of the Bank.[261] Noteworthy here is the Insurance Company's argument that the Bank should have been put on notice by the fact that it was illegal under Taiwanese law for the Insurance Company to subscribe to all the

256 See *Teng Wen-Chung v EFG Bank AG, Singapore Branch* [2018] 2 SLR 1145.
257 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [39].
258 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [149].
259 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [154].
260 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [151].
261 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [187]–[255].

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units of the Trust, because the Taiwanese Insurance Act 1929 ("TIA") precluded insurance companies from acquiring certain categories of foreign securities, which the units fell within, without the approval of the Taiwanese Financial Supervisory Commission.[262] Coomaraswamy J agreed that the subscription was indeed illegal under Taiwanese law for want of the Commission's approval,[263] but stated that this fact did not put the Bank on notice because the Bank had formed a considered (albeit ultimately incorrect) view, on the basis of several independent Taiwanese legal opinions, that the subscription would not contravene Taiwanese law.[264] The Bank was thus a *bona fide* purchaser of the security for value in good faith without notice, and so its security interest was not subject to the Insurance Company's beneficial interest in the assets.

12.152 On the argument on illegality under Taiwanese law, the Insurance Company relied on two doctrines of foreign law illegality. The first was that the rule in *Foster* applied in relation to the breach of the TIA to render the Charge unenforceable. Coomaraswamy J dismissed this argument on grounds that *Foster*'s rule required the plaintiff to have intended to breach foreign (Taiwanese) law,[265] and required that the intended act was "to be performed in a country in which it is illegal".[266] Since the Bank could not have intended to breach Taiwanese law because it genuinely thought the subscription would be legal, and since the subscription did not involve the performance of acts in Taiwan,[267] *Foster*'s rule was not triggered.

12.153 The second rule the Insurance Company relied on was the rule in *Euro-Diam Ltd v Bathurst*[268] ("*Euro-Diam*"). The Insurance Company argued that the Charge was unenforceable under the *Euro-Diam* rule because the illegal act in question (subscribing to the units) had "tainted" the Charge.[269] The *Euro-Diam* rule involved a two-stage test to determine whether a contract could be rendered unenforceable by virtue of being "tainted" by another: first, "whether the transaction from which the taint is said to arise would be enforceable under the law of the forum, applying the correct connecting factor"; and second, "whether the

262 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [218]–[220].
263 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [223]–[224].
264 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [229]–[244].
265 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [257].
266 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [262].
267 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [262]–[263]. The place of subscription was likely Jersey, which was where the Trust was constituted, although Vinodh Coomaraswamy J did not discuss this point.
268 [1990] 1 QB 1.
269 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [264].

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illegality of that transaction is sufficiently connected to the claim before the forum that the claim should be unenforceable".[270] On the first stage, Coomaraswamy J reasoned that its application would be "artificial" on facts like those before him, when the subject matter said to taint parties' agreement was not another illegal unenforceable contract but an illegal act (that is, the subscription to units).[271] In such situations, "[a] question more meaningful than the enforceability of the [tainting] transaction is whether there is any foreign illegality".[272] On the facts, there was foreign illegality in the form of the breach of the TIA committed by the Insurance Company when it subscribed to the units.[273]

12.154 Proceeding to the second stage, Coomaraswamy J noted that while the *Euro-Diam* rule originally assessed the existence of a "sufficient connection" between tainting act and tainted contract using the rules in *Bowmakers Ltd v Barnet Instruments Ltd*[274] ("*Bowmakers*") (whether the plaintiff had to plead and prove his illegality to bring his claim) and *Beresford v Royal Insurance Co Ltd*[275] ("*Beresford*") (whether enforcement would permit the plaintiff to benefit from his crime),[276] these rules should no longer be used because they were dated rules that no longer reflected the state of the law on domestic illegality.[277] Instead, "the question now [should be] whether refusing to enforce the tainted contract would be a proportionate response to the foreign illegality, based on the factors in *Ting Siew May*",[278] namely:[279]

(a) the object, intent, and conduct of the parties;

(b) the nature and gravity of the illegality;

(c) whether allowing the claim would undermine the purpose of the prohibiting rule;

270 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [265].
271 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [268]–[269].
272 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [276].
273 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [278].
274 [1945] 1 KB 65.
275 [1938] AC 586.
276 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [279]. For a discussion of the two rules, see *Teng Wen-Chung v EFG Bank AG, Singapore Branch* [2018] 2 SLR 1145 at [19].
277 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [279].
278 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [280].
279 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [283], citing *Ting Siew May v Boon Lay Choo* [2014] 3 SLR 609 at [70].

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(d) the remoteness or centrality of the illegality to the contract; and

(e) the consequences of denying the claim.

12.155 On the facts, then, the Charge was not tainted by the illegal act (the breach of the TIA). On factor (a), the Bank did not intend to facilitate the breach because it believed that the subscription was not illegal,[280] and had not conducted itself in a contumelious manner because it had formed that opinion despite its due diligence.[281] On (b) and (c), the breach of the TIA was not grave and enforcing the Charge would not undermine the TIA's purpose because under Taiwanese law that breach would likely not have rendered the Charge void *ab initio*; in practice, sanctions were taken only against errant insurance companies themselves rather than on investors like the Bank.[282] On (d), the illegal subscription was not central to the Charge, for while "the subscriptions [were] the *sine qua non* of the [Charge], "[n]o step related to the subscriptions was taken under the [Charge] which [the Trustee] executed".[283] Finally, on (e), it would be disproportionate to deny enforcement of Charge because it would deprive the Bank of the entirety of its security, and the original debt it secured was entirely unenforceable because it was owed by the Investment Company which had since been struck off the BVI companies register.[284] In conclusion, then, the breach of the TIA could not taint the Charge so as to render it unenforceable.[285]

12.156 *EFG Bank v Surewin* is noteworthy as the second instance of a Singapore court applying rules of domestic illegality to a dispute involving foreign illegality, and the first instance where this was done consciously:[286] Coomaraswamy J used the need to reform the *Euro-Diam* rule as an avenue through which *Ting Siew May*[287] could be introduced, reasoning that the old rules of domestic illegality on which *Euro-Diam*[288] was based (*Bowmakers* and *Beresford*) had to make way for new rules of domestic illegality (*Ting Siew May*).[289] But *EFG Bank v Surewin* still leaves

280 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [285].
281 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [290].
282 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [298]–[299].
283 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [304].
284 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [306] and [308].
285 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [312].
286 See para 12.148, n 255 above.
287 See para 12.148 above.
288 See para 12.153 above.
289 *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [279]–[280].

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much to be desired because Coomaraswamy J still failed to address the more fundamental question: whether it is sound in principle for courts to base their approach to foreign illegality on rules of domestic illegality at all.

12.157 This fundamental difficulty had been recognised by Andrew Phang JA, albeit in *obiter*, in the Court of Appeal's earlier decision upholding the Bank's claim against Teng for his indemnity. There, he noted that "*Bowmakers* and *Beresford* concerned illegality within the local context, and it has been suggested that cases concerning local illegality should be reasoned differently from cases involving foreign illegality, which in turn ought to be resolved with reference to conflict of laws rules",[290] namely *Foster* and *Ralli*.[291] Phang JA was correct to be hesitant. The principled underpinnings of rules of domestic and foreign illegality are different: while "[t]he public policy underpinning the law relating to domestic illegality is … consistency … that underpinning both *Ralli* and *Foster v Driscoll* is international comity".[292] More importantly, these theoretical foundations are also to an extent *mutually incompatible*. In the law of domestic illegality, proportionality tests like *Patel*[293] and *Ting Siew May* exist to uphold the "integrity of the [domestic] legal system" by ensuring that it is "coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand".[294] But the assumption made in those domestic illegality disputes, that laws within the *same* legal system should be coherent, cannot be made in foreign illegality disputes because there is no reason to think that laws between *different* systems should be coherent – indeed, the opposite assumption of incoherence is the very reason why rules of private international law, which regulate the *conflict* of laws, exist at all. Instead, then, what is needed is not "coherence" but "comity" between different legal systems; and a test meant to maintain comity between legal systems will be very different from one meant to ensure consistency within one legal system.

12.158 Two concrete examples of how *Ting Siew May*'s proportionality test is an ill fit for disputes involving foreign law illegality, where comity rather than consistency is needed, can be given. First, it is unclear how factor (b) of *Ting Siew May*'s proportionality test, concerning the "nature and gravity of the illegality", can be applied in a reliable manner to foreign

290 *Teng Wen-Chung v EFG Bank AG, Singapore Branch* [2018] 2 SLR 1145 at [24].

291 See also *Ryder Industries Ltd v Chan Shui Woo* [2016] 1 HKC 323 at [36], *per* Lord Collins (reasoning that it is "wrong" to treat a dispute involving foreign law illegality "as if it were a purely internal … case", and instead "well establishes rules of the conflict of laws").

292 *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [331].

293 See para 12.148 above.

294 *Patel v Mirza* [2017] AC 467 at [99]–[100].

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illegality. While a court may be well placed to determine the gravity of a particular breach of domestic criminal or regulatory laws, it is unlikely to have that same familiarity with breaches of foreign criminal or regulatory laws – especially given that the kind of breaches generally implicated in foreign law illegality disputes (that is, breaches of exchange control, banking or customs regulations) are not acts of clear or obvious moral turpitude, with their seriousness varying tremendously between legal systems.[295] How important will a breach of foreign regulations be? Must courts consider the international political context or the foreign state's political culture in answering this question?[296] And what if it is unclear how serious the foreign state treats the breach in question, because the law seems to be directed at important concerns in theory, but in practice is not scrupulously enforced or even disregarded by enforcement agencies?[297]

12.159 A domestic court can only go so far in making these enquiries before it breaches comity because comity involves according "*respect*" [emphasis added] to foreign legal systems,[298] and respect is not accorded when a foreign state's political priorities are subject to rigorous scrutiny. Yet this is precisely the kind of scrutiny that fine-toothed and contextual proportionality tests like *Patel* and *Ting Siew May* require. In *EFG Bank v Surewin*, Coomaraswamy J avoided these difficulties by conflating factors (b) and (c) and reducing the latter to a question of whether the breach would have rendered the Charge unenforceable under Taiwanese law.[299] But doing this waters down much of the proportionality test's complexity and nuance, which defeats the purpose of adopting it over existing doctrines of foreign law illegality in the first place: even under *Foster*'s rule, "a sufficiently serious breach of foreign law which reflects

295 See Marcus Teo, "Foreign Law Illegality: *Patel*'s New Frontier?" (2021) 80(1) Camb LJ 32 at 34.

296 See, *eg*, *Foster v Driscoll* [1929] 1 KB 470 at 510 (where the foreign law breached was the US Constitution, and the court was evidently concerned not to "furnish a just cause for complaint by the United States Government against [the UK] Government").

297 Compare *Magdeev v Tsvetkov* [2020] EWHC 887 (Comm) at [337] and [340] (where the breach of the laws of United Arab Emirates ("UAE") involved "visa fraud" which was "a serious matter" involving "national security", but there was evidence that the UAE authorities might take "a less serious view" when the offence was committed "by an affluent investor"); and *Barros Mattos Jr v MacDaniels Ltd* [2005] 1 WLR 247 at [36] (where the fact the relevant Nigerian foreign exchange regulations were not enforced but "underprioritized" in practice did not justify "turn[ing] a blind eye to it").

298 Adrian Briggs, "The Principle of Comity in Private International Law" (2011) 354 *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 65 at 91; Timothy Endicott, "Comity among Authorities" (2015) 68 *Current Legal Problems* 1 at 8.

299 See para 12.155 above.

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important policies of the foreign state" is needed to render contracts unenforceable.[300]

12.160 Second, rules of domestic illegality do not accommodate a fundamental concern that arises only in disputes involving foreign illegality: whether the foreign legal system is sufficiently connected to the contract so as to render the contravention of its laws a legitimate concern. A fundamental premise of private international law is that while different jurisdictions may legislate on a particular subject matter, only the laws of jurisdictions which are *sufficiently connected* to that subject matter should be given effect. Comity, after all, is only accorded to foreign law when respect is due, and that will only be so when it is "more properly [that foreign state's] business to deal with what has happened"[301] or when that foreign state is "particularly involved" with the dispute's subject matter.[302] Thus, for example, choice of law rules allocate disputes to the law of the state most closely connected with its subject matter. Doctrines of foreign law illegality also contain such a requirement of sufficient connection: *Foster*'s rule requires that parties intend to perform their contract by performing an act in a state where it would be illegal, and *Ralli*'s rule requires that the contract's place of characteristic performance be a state where it would be illegal.[303]

12.161 By contrast, rules of domestic illegality contain no connecting factors, because it is taken for granted that the breach of (domestic) law is something the forum's courts should be concerned about.[304] Thus, it is not a prerequisite under *Ting Siew May*'s proportionality test that the legal system under which the law is breached must be sufficiently connected to the contract. This means that, if a foreign state legislates extraterritorially to regulate matters which have objectively no connection with it, a court applying *Ting Siew May* would still have to refuse enforcement of a contract which breaches that law if (a) the parties knew that their acts would breach the law as scoped by the foreign legislature; (b) the breach would be considered grave in the foreign legal system; (c) the breach would render the contract unenforceable in the foreign state's courts;

300 *Ryder Industries Ltd v Chan Shui Woo* [2016] 1 HKC 323 at [57].

301 Adrian Briggs, "The Principle of Comity in Private International Law" (2011) 354 *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 65 at 104.

302 Timothy Endicott, "Comity among Authorities" (2015) 68 *Current Legal Problems* 1 at 9.

303 *Toprak Mahsulleri Ofisi v Finagrain Compagnie Commerciale Agricole Et Financiere SA* [1979] 2 Lloyd's Rep 98 at 106–107.

304 As Vinodh Coomaraswamy J himself noted, where the law breached is domestic law "[t]here is a strong policy imperative for the Singapore courts to advance the policy objectives of the Singapore legislature": *EFG Bank AG, Singapore Branch v Surewin Worldwide Ltd* [2021] SGHC 227 at [291].

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(d) contractual performance was an overt step in breaching the law; and (e) the consequences of barring relief would not be too onerous for the plaintiff. Non-enforcement would then seem to be a proportionate outcome for the breach of foreign law even though the relevant foreign legal system had objectively no business in insisting that its law be respected in the first place. If courts are to avoid such problematic outcomes in the future, they must recognise that *Ting Siew May* can only be applied in foreign illegality disputes if it is first established, as a prerequisite, that the relevant foreign legal system is sufficiently connected to the dispute. Or perhaps courts might simply recognise that existing doctrines of foreign law illegality like *Foster* and *Ralli*, which have such a sufficient connection requirement built into them, are adequate.

## V. Restraint of foreign proceedings

12.162 In international commercial litigation, it is clear that for a potential plaintiff, forum selection is an extremely crucial process for, *inter alia*, substantive, procedural, tactical and strategic reasons. For example, some systems of law have more generous discovery rules,[305] or a lengthier period before the limitation period kicks in.[306] While it is the prerogative of a litigant to decide on the forum in which to bring his claim, the common law has developed a set of principles and rules to curb forum shopping and prevent abuse of process.[307]

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

### *A.* PT Karya Indo Batam v Wang Zhenwen

Anti-suit injunctions – Vexation and oppression – *Lis alibi pendens* and doctrine of forum election

Anti-suit injunctions – Vexation and oppression – *Lis alibi pendens* and multiplicity of proceedings

305 *Connelly v RTZ Corp plc* [1998] AC 854 at 872G, *per* Lord Goff of Chieveley.

306 *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR(R) 345 at [38], *per* Chao Hick Tin J. Though this is less relevant of a consideration in Singapore given s 3(1) of the Foreign Limitation Periods Act 2012 (2020 Rev Ed).

307 *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [1], *per* Steven Chong JA.

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Anti-suit injunctions – Vexation and oppression – Burden of proof

Anti-suit injunctions – Equitable remedy – Unclean hands

12.164 *PT Karya Indo Batam v Wang Zhenwen*[308] illustrates the considerations the court takes into account when deciding whether to order an ASI, including the interface between notions of comity as well as the doctrine of forum election.

12.165 The facts can be stated simply. The Indonesia incorporated plaintiff PT Karya Indo Batam ("PTKIB") and the Singapore incorporated fourth defendant Oxley Batam Pte Ltd ("OBPL") were equal shareholders in a company, PT Oxley Karya Indo Batam ("PT OKIB"), for the purposes of developing an integrated commercial and residential project in Batam ("the Batam Project"). Under the joint venture, the PT KIB was to obtain the land for the project and OBPL was to manage its construction.[309]

12.166 In February 2020, the plaintiff commenced proceedings in Singapore, against, *inter alia*, the fourth defendant alleging loss and damage as a result of defendants' various actions. In August 2020, the plaintiff commenced proceedings in Batam against the joint venture company, which was settled. However, shortly thereafter, proceedings were commenced in Batam against the fourth defendant and the joint venture company. Proceedings were then commenced the next day in the Central Jakarta District Court against the fourth defendant, among others.[310]

12.167 The fourth defendant applied to the Singapore court to restrain the plaintiff from pursuing the actions in Indonesia and from commencing any further actions against the defendants.[311]

12.168 The court acknowledged the four principles governing an ASI were clear and uncontroversial:[312]

(a) The jurisdiction was to be exercised when the "ends of justice" required it;

(b) Where the court decided to grant an ASI, its order would be directed not against the foreign court but against the parties so proceeding or threatening to proceed.

308 [2021] 5 SLR 1381.
309 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [3]–[7].
310 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [8] and [11]–[13].
311 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [16].
312 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [17].

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(c) An injunction would only be issued to restrain a party who was amenable to the jurisdiction of the court, against whom an injunction would be an effective remedy.

(d) Since such an order would indirectly affect the foreign court, the jurisdiction was one which had to be exercised with caution.

12.169 The court then went on to review the five factors relevant to the determination of whether an ASI should be granted:[313]

(a) whether the injunction respondent was amenable to the jurisdiction of the Singapore court;

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

(c) the alleged vexation or oppression to the injunction claimant if the foreign proceedings were to continue;

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

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

12.170 It is useful to point out here that not all the factors need to apply at the same time. There are generally two bases to ground an ASI.[314] Factor (c) refers to the first basis, that of vexatious and oppressive conduct on the part of the respondent. The second basis is captured in factor (e) where the proceedings are in breach of an agreement, for example, a jurisdiction agreement, between the parties. While it is possible to conceive of a factual matrix where both these bases might exist, it is clear that it is generally easier to obtain an ASI based on a breach of an agreement between the parties (for example, an arbitration or an exclusive jurisdiction agreement), than it is on having to show vexatious and oppressive conduct. So, while not mutually exclusive, it is important to make clear that conceptually, these are two different grounds.

12.171 Factors (a) and (d) are generally applicable across all applications for an ASI. The tricky one is factor (b). The requirement for the enjoining forum to be the natural forum is in the interests of international comity as an injunction will necessarily affect, *albeit* indirectly, the foreign

313 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [18].
314 See (2019) 20 SAL Ann Rev 251 at 305–307, para 11.175.

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court.[315] This is especially when the basis for the injunction is vexatious and oppressive conduct. However, when the basis is on the breach of an agreement, it can be argued there is no requirement for the enjoining forum to be the natural forum.

12.172 In this case, the fourth defendant was basing its application on vexatious and oppressive conduct. The court noted that the respondent did not dispute that it was amenable to the jurisdiction of the Singapore court and that Singapore was the natural forum for the dispute. It also accepted that if vexation and oppression was proven to exist, an ASI would not cause it injustice.[316] Hence, the outcome of this application hinged on whether the actions in Indonesia were vexatious and oppressive.

12.173 Before looking at this question, the court made a preliminary observation in relation to *locus standi*. The applicant had curiously submitted that it had *locus standi* even though the application would benefit others that were not party to the Singapore action.[317]

12.174 The court referred to *PT Sandipala Arthaputra v STMicroelectronics Asia Pacific Pte Ltd*[318] and opined that as long as the applicant had a legitimate interest in protecting the integrity of the Singapore proceedings, it would not affect the applicant's *locus* even if the ASI had the effect of benefiting others who were not party to the Singapore proceedings.[319] This must be correct. In any case, in such a situation, there is *prima facie* nothing prohibiting the enjoined party from pursuing foreign proceedings against the non-parties to the Singapore injunction proceedings.

12.175 On whether the actions in Indonesia were vexatious and oppressive, the court concluded that they were, on the basis that the proceedings were duplicitous.[320] At this point, it is important to note the court's choice of words. The court was careful to draw a distinction between *duplicity* of proceedings (*lis alibi pendens*) and *multiplicity* of proceedings, making it clear that mere multiplicity of proceedings was insufficient to show vexation and oppression.[321] Noting that the multiplicity of proceedings in this case involved the same plaintiff over every proceeding (the "common plaintiff" scenario), the inquiry

315 See (2019) 20 SAL Ann Rev 251 at 304, para 11.173.
316 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [19].
317 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [22].
318 [2015] 5 SLR 873.
319 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [24].
320 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [27].
321 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [28]–[29], [48] and [57].

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necessitated an examination of the issues brought before, and the reliefs sought in, the Singapore and foreign courts.[322]

12.176 Looking at the actions before it, the court concluded that the actions were duplicitous because:[323]

(a) the Indonesia actions were subsets of the Singapore action;

(b) the issues pleaded were substantially the same or could have been included in the Singapore action;

(c) the plaintiff did not satisfactorily explain or justify why some co-defendants (who were non-parties to the Singapore proceedings) had been added to the foreign actions; and

(d) the reliefs sought in the Indonesia actions were not unique (that is, they could be obtained in Singapore).

12.177 Two preliminary points are of note. First, the defendant-applicant curiously did not invoke the doctrine of forum election and compel the plaintiff to make an election as to which set of proceedings he wished to pursue when it could have done so.[324] After all, the doctrine of forum election is relatively easier to invoke than applying for an ASI. Once a common plaintiff *lis alibi pendens* is established by the defendant, the burden of proof then shifts to the plaintiff to justify the continuance of the concurrent proceedings by showing very unusual circumstances. If he fails to demonstrate such unusual circumstances, he will have to make an election.[325]

12.178 The second point is that on vexation and oppression. Determining whether foreign proceedings are vexatious and oppressive is not an exact science. However, whether one considers the duplicity and therefore the risk of inconsistent judgments, the arguably extreme inconvenience caused, or possibly the hint of bad faith in the sequence of events, one could argue that there would have been enough here for the court to have held that vexation and oppression was shown.

12.179 What is interesting is that the court did not immediately do this. Instead, the court considered whether the applicant, having shown duplicity of proceedings, nonetheless still bore the burden of showing that the proceedings were vexatious and oppressive, or if the burden shifted

322 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [30]–[33].
323 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [46].
324 *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265 at [65].
325 *Yusen Air & Sea Service (S) Pte Ltd v KLM Royal Dutch Airlines* [1999] 2 SLR(R) 955 at [27], *per* M Karthigesu JA; *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd* [2013] 4 SLR 1097 at [31]–[37], *per* Andrew Phang Boon Leong JA.

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to the respondent to show that there were very unusual circumstances so that the proceedings were not vexatious or oppressive.

12.180 After considering *dicta* from cases like *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd*,[326] *Koh Kay Yew v Inno-Pacific Holdings Ltd*[327] and *Beckkett Pte Ltd v Deutsche Bank AG*,[328] the court opined that in a common plaintiff *lis alibi pendens*, the concerns of wasting judicial resources and the risk of conflicting decisions applied equally in applications for forum election and ASIs. As such, in a common plaintiff situation, the court held that in an application for an ASI, once the applicant could establish *lis alibi pendens*, the burden then shifted to the respondent "to prove the existence of very unusual circumstances showing that the concurrent proceedings are not vexatious or oppressive, to displace the *prima facie* finding that the concurrent proceedings are vexatious or oppressive".[329] Effectively, this mirrors the structure of the test for forum election.

12.181 There are a number of observations that can be made here. First, the doctrine of forum election only applies in common plaintiff situations. However, ASIs do not just occur in common plaintiff situations. It often happens that one party commences proceedings in Singapore and the other party sues outside of Singapore (a "reversed parties" *lis alibi pendens*). In such a situation, forum election does not apply whereas an application for an ASI is still entirely possible. Is the position now such that in a reversed parties situation, an application for an ASI also mirrors the forum election test? Or does one continue with the typical approach where one simply considers whether the factual matrix provides circumstances which point to vexatious and oppressive behaviour?

12.182 Secondly, while *lis alibi pendens* is *the* factor considered in forum election, in an application for an ASI, *lis alibi pendens* will itself not carry the day as it is only part of a number of possible ways in which vexatious and oppressive behaviour can be established. These include imposing oppressive foreign procedures on the applicant, instituting proceedings in bad faith and conduct in foreign proceedings leading to extreme inconvenience.[330]

12.183 It is interesting to note here that the court, having found that the *lis alibi pendens* constituted vexation and oppression, and that under

326 [2013] 4 SLR 1097.
327 [1997] 2 SLR(R) 148.
328 [2011] 1 SLR 524.
329 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [56].
330 *John Reginald Stott Kirkham v Trane US Inc* [2009] 4 SLR(R) 428 at [47], *per* Chao Hick Tin JA; *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503 at [128].

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the new approach the respondent did not rebut the presumption, found it unnecessary to consider other circumstances of the case to determine if the Indonesia proceedings were vexatious or oppressive (for example, whether they had been commenced in bad faith). But if it had and the analysis required the factor of bad faith to tip the scales over to vexation and oppression, should the new position be similarly applied here?

12.184 While there is admittedly an elegance to having the tests for forum election and ASIs mirror one another, with respect, it is submitted that this is not necessary.

12.185 After all, while the policy concerns underlying both types of applications might be the same, the basis upon which both applications operate are not. In an anti-suit application, the focus is on the conduct of the respondent and its effect on the applicant. If vexatious and oppressive conduct is shown, say as a result of bad faith institution of proceedings, should the respondent really be able to argue that this bad faith should be excused because of the existence of very unusual circumstances? There are already safeguards to ensure that the respondent is not treated unfairly. For one, the respondent is able to respond to the allegations of vexation and oppression made by the applicant. This is all part of putting the applicant to proof. And, to be fair, perhaps this is what the court meant, that is, the evidential (as opposed to legal) burden of proof shifting to the respondent. For another, one of the four principles in granting ASIs is that "the jurisdiction is to be exercised when the 'ends of justice' require it".[331] The court would of course exercise its judgment and wisdom where a respondent might suffer injustice should an ASI be granted.

12.186 Traditionally, in determining vexation and oppression, the court "should look at all the circumstances of the case [to determine whether the foreign proceedings are vexatious or oppressive]".[332] It is troubling that the judgment can be read to say that on a *prima facie* level, a common plaintiff *lis alibi pendens* alone can satisfy the requirement of vexation and oppression. Assuming that the court did not intend to depart from a holistic examination, perhaps it would be better to state that duplicitous proceedings (that is, common plaintiff *lis alibi pendens*) are *prima facie* vexatious or oppressive rather than there is a "*prima facie finding* that [such] concurrent proceedings are vexatious or oppressive".[333] The former recognises that common plaintiff *lis alibi pendens* is a strong indicator of vexatious or oppressive conduct in the grand scheme of things.

331 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [17(a)].
332 *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 at [19], *per* Yong Pung How CJ.
333 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [56].

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12.187 It would be helpful if the courts could at a future opportunity provide some further clarification and guidance on these matters.

12.188 For the sake of completeness, two final matters that the respondent had argued by way of opposing the application for an ASI will be considered.

12.189 First, the respondent had argued that the applicant should apply for a stay in the Indonesian courts first, before looking to an ASI in Singapore. Granting an ASI would breach comity because it would prevent the Indonesia courts from deciding whether those actions ought to be stayed.[334]

12.190 The court made short work of this. Observing that the Singapore position was clear on this matter, the court noted that as long as Singapore was the natural forum and that the actions of the respondent were vexatious and oppressive, it would not be a breach of comity to grant an ASI even if the foreign courts had declined to stay its own proceedings. It was even more so in this case when the applicant had not even been served in the Indonesian actions.[335] This must be correct. It cannot be that the ASI applicant must seek to stay proceedings in the foreign court first. The courts have already previously made clear that ASIs should be applied for in a timely fashion,[336] and *one can* concurrently make jurisdictional objections in that foreign court.[337] In fact, if one adopted what the respondent suggested, that is, to apply for a stay in the foreign jurisdiction first, one's chances of obtaining an ASI subsequently may be prejudiced.

12.191 Second, the respondent argued that because the applicant had filed a request with the Batam City Land Office to block the land in question, this was tantamount to an injunction application and thereby submitting to the jurisdiction of the Indonesian Courts. The respondent went on to further argue that by not disclosing this request when applying for an ASI, the applicant had breached its obligation to make full and frank disclosure. As such, the respondent alleged that the applicant had acted in bad faith and did not come to court with "clean hands".[338]

334 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [60]–[61].
335 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [62].
336 See (2019) 20 SAL Ann Rev 251 at 309–310, para 11.183 and *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 at [77], [84]–[86] and [108]–[110], *per* Steven Chong JA.
337 See (2019) 20 SAL Ann Rev 251 at 313, para 11.191.
338 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [65]–[68].

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12.192 Arguments on "clean hands" are important in ASI applications as an ASI is, after all, an equitable remedy.[339] It is good to see the court giving the respondent's arguments the attention they deserved. Again making short work of this, the court found that the request was not made to a court and did not qualify as an application for an injunction (and therefore the act could not be taken to be a submission to jurisdiction of the Indonesian courts). Further, since the anti-suit application was not made *ex parte*, the applicant did not bear the duty of full and frank disclosure. The court therefore concluded that the applicant did not apply for an ASI in bad faith.[340]

12.193 On the last point, however, it would appear that the duty to give full and frank disclosure *only* in *ex parte* applications for ASIs may no longer be the default position. Order 13 r 1(5) of the ROC 2021 requires an applicant for an injunction to disclose to the court all material facts that the party knows or reasonably ought to know, including any matter that may affect the merits of the party's case adversely. Given that O 13 r 1(5) of the ROC 2021 applies to injunctions generally, it is arguable that an ASI applicant will be required to give full and frank disclosure in its supporting affidavit moving forward (at least when ROC 2021 are the applicable rules).

### *B.* VKC v VJZ

Anti-suit injunctions – Jurisdiction clause – Privity and scope

Anti-suit injunctions – Vexation and oppression

12.194 A court will typically grant an ASI when proceedings have been begun in breach of either a jurisdiction agreement or an arbitration agreement. *VJZ v VKB*,[341] another decision covered in last year's review,[342] looks at the interplay between ASIs and jurisdiction clauses and involved the distribution of a deceased's estate which led to a dispute between 15 beneficiaries, including one VKC. The dispute culminated in proceedings in Singapore, which went to mediation and resulted in a settlement agreement between all beneficiaries signed in 2018 ("the 2018 Agreement"). This agreement set out the beneficiaries' respective entitlements, nominated administrators for the estate and contained a provision stating that "[p]arties hereby submit to the exclusive jurisdiction of the Courts of Singapore".[343] Individuals nominated as administrators

339 See (2018) 19 SAL Ann Rev 273 at 302, para 11.98.
340 *PT Karya Indo Batam v Wang Zhenwen* [2021] 5 SLR 1381 at [69]–[70].
341 [2020] SGHCF 11.
342 (2020) 21 SAL Ann Rev 314 at 378–381.
343 *VKC v VJZ* [2021] 2 SLR 753 at [7].

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under the agreement then applied for and were issued several orders in Singapore, including one that enabled and compelled them, as third parties, to implement the 2018 Agreement and administer the estate in accordance with that agreement.[344]

12.195 When the administrators published notices in Indonesian newspapers stating that "[a]ll creditors or next-of-kin interested in or having claims against the Estate should give particulars in writing their claims or interest to [the administrators]",[345] VKC sued them in tort in Indonesia, alleging that the published notices "directly affected her rights as a beneficiary" because they encouraged further claims to be brought against the estate in Indonesia, thereby diluting her share of the estate.[346] The administrators then applied to the High Court for an ASI to restrain VKC from proceeding against them in Indonesia. Tan Puay Boon JC granted the application on the basis of the EJC in the 2018 Agreement, reasoning that, although the administrators were not parties to that agreement, they were entitled to take the benefit of the jurisdiction clause contained therein by virtue of s 2(1)(*b*) of the Contracts (Rights of Third Parties) Act[347] ("CRTPA"),[348] the application of which parties had not excluded. Since there was no strong cause to decide otherwise, an ASI was issued against VKC in relation to the Indonesian proceedings.

12.196 On appeal by VKC in *VKC v VJZ*[349] ("*VKC*"), Belinda Ang Saw Ean JAD, writing for the unanimous Court of Appeal, upheld the ASI but on a different basis. Ang JAD disagreed with Tan JC's decision to issue the injunction on the basis of the jurisdiction clause in the 2018 Agreement, on grounds that s 2 of the CRTPA did not apply to jurisdiction clauses, for three reasons.

12.197 First, s 9 of the CRTPA made provision for third parties to rely on or be bound by an arbitration clause contained in a contract, while no such provision had been made for jurisdiction clauses. This omission implied that jurisdiction clauses fell outside the CRTPA's remit.[350]

12.198 Second, the legislative history of s 1 of the UK Contracts (Rights of Third Parties) Act 1999,[351] which s 2 of Singapore's CRTPA was *in pari materia* to, suggested that jurisdiction clauses had been omitted from the

344 *VKC v VJZ* [2021] 2 SLR 753 at [8].
345 *VKC v VJZ* [2021] 2 SLR 753 at [9]
346 *VKC v VJZ* [2021] 2 SLR 753 at [10].
347 Cap 53B, 2002 Rev Ed.
348 *VJZ v VKB* [2020] SGHCF 11 at [30].
349 [2021] 2 SLR 753.
350 *VKC v VJZ* [2021] 2 SLR 753 at [59] and [70].
351 c 31.

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UK Act's express provisions precisely because that Act was not meant to apply to them. When the bill was first introduced to the UK parliament, it contained no provisions on either jurisdiction or arbitration clauses, and a prior Law Commission report[352] had recommended that such clauses not be covered by the proposed bill because "such agreements cannot operate satisfactorily unless any entitlement of the third party to enforce the arbitration agreement carries with it a duty on the third party to submit to arbitration (or to comply with the jurisdiction agreement)", which "was incompatible with the proposed reforms which were concerned with the conferring of rights and benefits on third parties but not with the imposition of duties and burdens".[353] When the bill was eventually modified in Parliament, it made provision only for arbitration but not jurisdiction clauses, "following extensive discussion of the difficulties surrounding it".[354]

12.199 Third, even if the CRTPA could allow third parties to rely on jurisdiction clauses under s 2(1)(*b*), this could only occur to the extent that third parties could rely on arbitration clauses under s 9[355] – but that section could only apply if specific conditions were met, and the facts of the dispute before the court did not meet those conditions. Section 9 provided only for two situations. First, s 9(1) applied "where a contract contains a promise by the promisor to confer a conditional benefit on a third party, that being an enforceable *substantive right*, subject to a *procedural condition* that [third party] may enforce it only by arbitration" [emphasis in original].[356] The effect of this section was that a third party wishing to enforce such a "substantive right" was allowed, but in any event would be bound, to bring her claim to arbitration.[357] Second, s 9(2) applied "where a term of the contract gives a unilateral right to [the third party] to require that a dispute with [the promisor] of an identified description (*eg*, a claim in tort) be submitted to arbitration".[358] This section would therefore "only be applicable where the contract on its true construction gives a third party a right to arbitrate".[359] On the facts, s 9(1) was inapplicable because the administrators were not relying on any "substantive right" against VKC; instead, they were seeking to prevent

352 United Kingdom, Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties* (Report No 242) (31 July 1996).
353 *VKC v VJZ* [2021] 2 SLR 753 at [66].
354 *VKC v VJZ* [2021] 2 SLR 753 at [70].
355 *VKC v VJZ* [2021] 2 SLR 753 at [60].
356 *VKC v VJZ* [2021] 2 SLR 753 at [63].
357 *VKC v VJZ* [2021] 2 SLR 753 at [62], [64] and [70].
358 *VKC v VJZ* [2021] 2 SLR 753 at [63].
359 *VKC v VJZ* [2021] 2 SLR 753 at [62] and [70].

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VKC from enforcing (third contractual) rights against them and so only asserting a "procedural right" to be sued only in Singapore.[360]

12.200 As a coda to her discussion on this point, Ang JAD also noted that the administrators had not argued that the principle recently discussed in *Hai Jiang 1401 Pte Ltd v Singapore Technologies Marine Ltd*[361] applied here.[362] This was unsurprising; this principle of "quasi-contractual" ASIs, issued via an exercise of the court's equitable jurisdiction to allow a third party to rely on a jurisdiction clause against a party which alleged that the third party was in fact party to the relevant contract, could not possibly have applied, since VKC was not arguing that the administrators were party to the 2018 Agreement. Ang JAD thus said no more on the issue, save to note that it was a "complex and developing area of anti-suit injunction law".[363]

12.201 Having disagreed that the administrators were entitled to an ASI on the basis of the jurisdiction clause, Ang JAD then nevertheless upheld the injunction on grounds that the Indonesian proceedings were vexatious and oppressive. First, all recognised that VKC was amenable to the jurisdiction of Singapore's courts.[364]

12.202 Second, the Court of Appeal considered whether Singapore was *forum conveniens*. The Indonesian tortious claim was most connected to events and transactions in Singapore since (a) there were ongoing legal proceedings in Singapore involving the administration of the estate which commenced before the Indonesian proceedings; and (b) the subject matter of the alleged tort in the Indonesian proceedings had "strong links" to the 2018 Agreement and the entitlements of the other beneficiaries.[365] Moreover, while the place of the alleged tort was Indonesia, this was only so because the administrators had published the relevant notice there. The administrators' appointment in Indonesia "did not go smoothly" compared to their appointment in other jurisdictions where the deceased had assets, because the family which VKC belonged to "was said to be unco-operative";[366] by contrast, "the relevant events and transactions had

360 *VKC v VJZ* [2021] 2 SLR 753 at [65]. Belinda Ang Saw Ean JAD did not discuss s 9(2) of the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) because it was clear that the jurisdiction clause in the settlement agreement did not itself give the administrators a procedural right to sue and be sued only in Singapore.
361 [2020] 4 SLR 1014. See (2020) 21 SAL Ann Rev 314 at 371–378, paras 12.151–12.170.
362 *VKC v VJZ* [2021] 2 SLR 753 at [73].
363 *VKC v VJZ* [2021] 2 SLR 753 at [73].
364 *VKC v VJZ* [2021] 2 SLR 753 at [22].
365 *VKC v VJZ* [2021] 2 SLR 753 at [27]–[29].
366 *VKC v VJZ* [2021] 2 SLR 753 at [28].

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a closer connection to Singapore".[367] Finally, while the governing law of the tort claim was Indonesian law, the central issues raised by any such claim would have involved an interpretation of Singapore law agreements like the 2018 Agreement and Singapore court orders, which meant that Singapore law governed "key aspects" of the parties' dispute.[368] In fact, from the way VKC framed its Indonesian tortious claims (that is, the respondents' act of publishing the notices was false and misleading and directly affected the appellant's rights as a beneficiary of the estate), it would appear to be an allegation premised on the administrators' breach of duties in administering the estate. It was therefore not surprising for the court to find Singapore law to be the applicable governing law and Singapore to be the more appropriate forum.

12.203 Third, the Indonesian proceedings were vexatious and oppressive. The Indonesian proceedings were hopeless and bound to fail because VKC could not identify any loss which the expert evidence had established as recoverable under Indonesian law.[369] In fact, VKC could not show that she would have established any loss at all. Although she had argued that the administrators had encouraged further claims to dilute her share of the estate, under the 2018 Agreement VKC had priority in the estate's distribution, so any further claims would have prejudiced only other beneficiaries.[370] Moreover, VKC and the other beneficiaries had signed a second settlement agreement in 2019 which *reversed* her priority in the estate's distribution ("the 2019 Agreement"), an act which she would not have performed had she genuinely believed that further claims in Indonesia would dilute the estate.[371] For the last-mentioned reason, VKC's continuation of the Indonesian proceedings was also in bad faith because any possible dilution of her share of the estate was "a new circumstance of her own creation" after signing the 2019 Agreement,[372] and because VKC had not even disclosed to the Indonesian court that she had entered into the 2018 Agreement but instead relied on the deceased's will from 1995 which the 2018 and 2019 Agreements superseded.[373] This last point is noteworthy. Bad faith in the institution of foreign proceedings can amount to vexation or oppression. The applicant for an ASI can attempt to show bad faith in the respondent's institution of foreign proceedings based on what the respondent has disclosed to the foreign court. Suppression of full facts and true state of affairs can go

367 *VKC v VJZ* [2021] 2 SLR 753 at [30].
368 *VKC v VJZ* [2021] 2 SLR 753 at [31]–[34].
369 *VKC v VJZ* [2021] 2 SLR 753 at [44].
370 *VKC v VJZ* [2021] 2 SLR 753 at [45].
371 *VKC v VJZ* [2021] 2 SLR 753 at [45]–[48].
372 *VKC v VJZ* [2021] 2 SLR 753 at [49].
373 *VKC v VJZ* [2021] 2 SLR 753 at [50].

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towards establishing bad faith on the part of the respondent in instituting foreign proceedings.

12.204 Pertinently, however, the Court of Appeal cautioned that:[374]

> … even where it is plain and obvious on its face that a case is bound to fail, it would still be prudent not to solely rely on pleas that the foreign proceedings are doomed to failure. Instead, the court should look elsewhere for evidence of unconscionability arising from the conduct of the [other party].

This approach must be correct; it would have been difficult for a court to definitively conclude that a foreign claim was bound to fail based on affidavits alone at a preliminary stage.

12.205 Finally, VKC would not suffer material injustice if the Indonesian proceedings were ceased, and any juridical advantage which she lost by having to cease the Indonesian proceedings was not legitimate but "hopelessly and cynically invoked and pursued" for the same reasons.[375]

12.206 Although the ultimate result reached in *VKC* remains correct, Ang JAD's reasoning on the applicability of the CRTPA to jurisdiction clauses – with respect – leaves much to be desired. The crux of Ang JAD's reasoning was that s 2(1)(*b*) of the CRTPA only enabled third parties to enforce contractual terms which conferred "substantive rights", not "procedural rights" like the right to invoke jurisdiction clauses. However, the plain wording of s 2(1)(*b*) does not qualify it in that manner. On the contrary, as Yeo Tiong Min has argued,[376] it would be absurd to read it to that effect. Two of Yeo's arguments are particularly persuasive, to the effect that the CRTPA's plain wording – which must take precedence in its interpretation[377] – requires s 2(1)(*b*) to apply to "procedural rights".[378]

12.207 First, s 2(1) only states that third parties can enforce contractual "terms" which purport to confer benefits on it – either expressly (s 2(1)(*a*)) or impliedly (s 2(1)(*b*)). The section does not at any point

374 *VKC v VJZ* [2021] 2 SLR 753 at [43].
375 *VKC v VJZ* [2021] 2 SLR 753 at [51].
376 Yeo Tiong Min, "The Effect of Choice of Court Agreements on Third Parties", lecture in Yong Pung How Professorship of Law Lecture 2022 (25 May 2022).
377 See s 9A(2) of the Interpretation Act 1965 (2020 Rev Ed) and *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [43]. Moreover, as Yeo has argued, even extrinsic materials in s 2(1) of the Contracts (Rights of Third Parties) Act 2001 (2020 Rev Ed) suggest that it enables third parties to enforce procedural rights without simultaneously enforcing substantive rights: Yeo Tiong Min, "The Effect of Choice of Court Agreements on Third Parties", lecture in Yong Pung How Professorship of Law Lecture 2022 (25 May 2022) at paras 45–51.
378 Yeo Tiong Min, "The Effect of Choice of Court Agreements on Third Parties", lecture in Yong Pung How Professorship of Law Lecture 2022 (25 May 2022) at para 57.

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distinguish between procedural and substantive "terms" – or even mention those concepts – so the kinds of "terms" covered by s 2(1)(*a*) must equally be covered by s 2(1)(*b*) and *vice versa*. This means that, if s 2(1)(*b*) cannot entitle third parties to enforce jurisdiction clauses, then neither can s 2(1)(*a*), which means courts must refuse to enforce even clauses expressly stated to be for the benefit of third parties.[379]

12.208 Second, interpreting s 2(1)(*b*) as enabling third parties to enforce jurisdiction clauses only in tandem with "substantive rights" would have the absurd knock-on effect of rendering s 9(2) of the CRTPA otiose. Ang JAD interpreted s 9(2) as giving third parties to arbitration clauses the ability to enforce them when sued by a contracting party[380] – that is, to invoke a procedural right to be brought to arbitration *by itself*. However, because s 9(2) states that it only applies "[w]here a third party has a right under s 2 to enforce a term", if s 2(1) only entitles third parties to enforce jurisdiction clauses when they enforce substantive rights, then s 9(2) would only entitle third parties to enforce arbitration clauses when they enforce substantive rights, which will never be the case when the third party is being sued by a contractual party.[381] The only way to ensure that Parliament did not legislate s 9(2) into being in vain, then, is to recognise that it – and therefore s 2(1) – gives third parties the benefit of procedural rights.

12.209 The authors agree with Yeo's reasoning, and only wish to weigh in in support of his reading of s 2(1)(*b*) of the CRTPA by highlighting the injustice that Ang JAD's reading would have led to on the facts of *VKC*[382] itself had VKC's Indonesian proceedings not also been found to be vexatious and oppressive. The central premise of the common law doctrine of privity is that third parties generally should not obtain primary contractual rights because they have not agreed to be bound and/or have not provided consideration.[383] The CRTPA is said to alter this paradigm because it grants third parties rights to enforce benefits without conferring burdens on them. The administrators in *VKC*, however, were put in the opposite position of having been conferred burdens by the 2018 Agreement (through the Singapore court orders giving effect to them) *without* having received one of the main benefits due to the promisees thereunder: the ease of having any claims against them being brought in

379 Yeo Tiong Min, "The Effect of Choice of Court Agreements on Third Parties", lecture in Yong Pung How Professorship of Law Lecture 2022 (25 May 2022) at para 54.

380 *VKC v VJZ* [2021] 2 SLR 753 at [63].

381 Yeo Tiong Min, "The Effect of Choice of Court Agreements on Third Parties", lecture in *Yong Pung How Professorship of Law Lecture 2022* (25 May 2022) at paras 56–57.

382 See para 12.196 above.

383 Stephen Smith, "Contracts for the Benefit of Third Parties: In Defence of the Third-party Rule" (1997) 17(4) OxJLS 643 at 645–649.

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Singapore rather any of the other jurisdictions which the deceased had assets in. Indeed, as Tan JC noted at first instance, "the vast majority of the substantive clauses [in the 2018 Agreement] dealing with the actual terms and operation of the settlement concerned the Administrators"[384] – it seems odd and unjust that a jurisdiction clause which covered the 2018 Agreement could not be invoked by the very parties which bore most of the obligations and would most likely be sued thereunder. If the law is unable to avail litigants in the position of the administrators of the benefit of jurisdiction clauses, this is a problem which should be rectified by overruling *VKC* or amending the CRTPA if necessary.

## VI. Recognition of foreign judgment

12.210 In international commercial litigation, obtaining a judgment is only one step in the game. What is often more important than obtaining a judgment is the successful enforcement of that judgment. A foreign judgment can either be recognised and enforced through the statutory regimes or as a debt at common law. The statutory regimes are: (a) the CCAA, (b) the Reciprocal Enforcement of Commonwealth Judgments Act 1921[385] ("RECJA"); and (c) the Reciprocal Enforcement of Foreign Judgments Act 1959[386] ("REFJA").

12.211 At common law, a foreign judgment is enforced as an action in debt.[387] 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.[388]

12.212 Apart from the enforcement of foreign judgments, foreign litigants may also want their foreign judgments *recognised* in Singapore. Intrinsically connected to recognition is the doctrine of *res judicata*. This

384 *VJZ v VKB* [2020] SGHCF 11 at [42].

385 2020 Rev Ed ("RECJA"). However, readers should note that Parliament has passed the Reciprocal Enforcement of Commonwealth Judgments (Repeal) Act 2019 (Act 24 of 2019) to repeal the RECJA, although the Minister has not notified in the *Singapore Gazette* when the effective date for the repeal Act is. The intention is that the Reciprocal Enforcement of Foreign Judgments Act 1959 (2020 Rev Ed) will be the only statutory regime that governs the reciprocal enforcement of foreign judgments.

386 2020 Rev Ed.

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

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

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doctrine states that a decision by a court of competent jurisdiction is, unless reversed on appeal, unimpeachable even if it might be wrong. *Res judicata* is therefore a form of estoppel which gives effect to this policy by disallowing parties to a judicial decision to afterwards relitigate the same question (whether or not the decision is wrong). If the decision is wrong, it must be challenged by appeal (against that judicial decision, if permissible within that legal system) or not at all.[389] Needless to say, this doctrine is only applicable after it has been established that the elements for recognition of the foreign judgments have been satisfied, namely: (a) the foreign judgment is a final and conclusive judgment of a court which, (b) according to the private international law of Singapore, had jurisdiction to grant that judgment, and (c) there is no defence to such recognition.[390]

12.213 Finally, if there are conflicting foreign judgments, the general position is this: A foreign judgment will not generally be given effect if it conflicts with an earlier foreign judgment recognised under the private international law of the forum.[391]

### *A.* Ong Han Nam v Borneo Ventures Pte Ltd

Recognition of foreign judgments – *Res judicata* – Issue estoppel

Recognition of foreign judgments – *Res judicata* – *Henderson* estoppel

12.214 *Ong Han Nam v Borneo Ventures Pte Ltd*[392] ("*Ong Han Nam*") revolved around warranties given by Ong Han Nam (the defendant) as part of a subscription agreement with Borneo Ventures Pte Ltd ("Borneo Ventures") (the plaintiff) concerning Sutera Harbour Group Sdn Bhd ("SH Group"). SH Group was the parent company of Sutera Harbour Golf and Country Club ("SHGCC"), which in turned owned the leasehold interest in a plot of land ("the Sembulan Land"). Within the Sembulan Land, a power plant housed on a smaller plot ("the Subject Land") was developed and originally owned by Profound Heritage Sdn Bhd ("PHSB"), a company also owned by the defendant.[393] Pursuant to a subscription agreement, the plaintiff purchased 77.5% of the shareholding

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

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

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

392 [2021] 1 SLR 1248.

393 *Borneo Ventures Pte Ltd v Ong Han Nam* [2020] SGHC 91 at [11].

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in SH Group from the defendant. As part of this, the following warranties were given:[394]

> (a) that SHGCC was the sole legal and beneficial owner of the Sembulan Land, including the Subject Land ("the Land Warranty");[395]
>
> (b) that the assets held by the SH Group at the time would not be disposed of except in the ordinary course of business ("the Asset Disposal Warranty");[396] and
>
> (c) that any transactions involving disposal of the SH Group's assets would be conducted at arm's length ("the Arm's Length Warranty").[397]

12.215 Before this, however, PHSB transferred ownership of the power plant to another of the defendant's companies, Omega Brilliance Sdn Bhd ("OBSB"), and not long after, SHGCC sold the Subject Land to OBSB for a nominal amount of RM1,000. These transactions were not disclosed to the plaintiff, who contended that these amounted to breaches of the defendant's contractual warranties.[398]

12.216 SHGCC commenced proceedings in Malaysia against the defendant and OBSB for the defendant's breach of fiduciary duties to SHGCC in relation to the selling of the Subject Land to OBSB at a gross undervalue.[399] The defendant argued that SHGCC's interests in the Subject Land had always been subject to PHSB's (or OBSB's) interests which arose from a shared understanding between SHGCC and PHSB (and later, OBSB), that the developer of the power plant would be the occupier as well as owner of the Subject Land ("the Common Expectation").[400]

12.217 The Malaysian High Court accepted the defendant's contention about the existence of the Common Expectation and recognised PHSB and OBSB as the owner of the Subject Land. SHGCC's claims were dismissed at the High Court, and then later at the Court of Appeal. Leave was not granted for further appeal to the Federal Court of Malaysia.[401]

394 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [1], [4] and [7].
395 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [10]–[11] and [16].
396 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [12] and [16].
397 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [13]–[14] and [16].
398 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [7] and [8].
399 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [2].
400 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [32].
401 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [22] and [51].

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12.218 The plaintiff commenced proceedings in Singapore. At first instance, the court found that the defendant had breached all three warranties. It also declined to recognise the Malaysian judgment on the ground that it had been procured by fraud.[402]

12.219 At the Court of Appeal, the issues before the court were:[403]

(a) whether there had been a breach of the warranties given by the defendant;

(b) whether the Malaysian proceedings prevented the plaintiff from litigating the issue of the Common Expectation; and

(c) the appropriate reliefs to grant to the plaintiff.

12.220 For the purposes of this review, the focus will be on the second issue: the effect of the Malaysian judgment on the Singapore proceedings.

12.221 As a starting point, the court set out the requirements for the recognition of a foreign judgment – these requirements have been discussed above.[404] The Court of Appeal noted that the High Court had declined to recognise the Malaysian judgment because of fraud.[405]

12.222 The court reiterated the distinction in Singapore between extrinsic and intrinsic fraud. Stated simply, the former could be argued without the existence of fresh evidence. This would include bribery of an advocate or a witness, or some kind of collusion. The latter, intrinsic fraud, which would include perjury at trial, would only form a legitimate defence if "fresh evidence has come to light which reasonable diligence on the part of the defendant would not have uncovered and the fresh evidence would have been likely to make a difference in the eventual result of the case".[406] The former has been described to be fraud going to the jurisdiction of the court while the latter has been described as fraud going to the merits of the judgment.[407]

12.223 The court went on to consider whether each type of fraud was made out. On extrinsic fraud, the court noted that the acts in question would be the failure of the defendant and OBSB to disclose all material facts at the trial.[408] It is curious that this failure to disclose was classified

402 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [24]–[25].
403 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [30].
404 See paras 12.211–12.212 above.
405 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [48].
406 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [49].
407 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [49].
408 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [50].

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as extrinsic fraud. It would seem that this would qualify as perjury or fraud during trial, going to the merits of the judgment, which would fall squarely within the category of intrinsic fraud.[409] The distinction is important because extrinsic fraud does not require the production of fresh evidence. Having said that, it did not matter in this case because the court opined that the non-disclosure did not lead to the Malaysian court's judgment.[410] This is important – the key question (that was answered in the negative) was whether the perjury produced the Malaysian judgment. While the judge in the Singapore High Court might have disagreed with the findings of the Malaysian court or thought that the defendant did not behave with integrity, it was quite another matter to say that fraud had been perpetuated and that the Malaysian court had been misled.[411]

12.224 In terms of intrinsic fraud, the court opined that the requirement was not satisfied – there was no new evidence which emerged after trial that was not discoverable with due diligence. Further, even if new evidence had been discovered, the court opined that it would not have been material to the Malaysian court's findings. As such, the defence of fraud had not been made out and could not be a bar to recognising the Malaysian judgment.[412]

12.225 The court then went on to consider the impact of the Malaysian judgment and noted that the doctrine of *res judicata* involved the three interrelated principles of cause of action estoppel, issue estoppel and the extended doctrine of *res judicata*. As the causes of action in Malaysia and Singapore were different, only issue estoppel and the extended doctrine of *res judicata* were argued.[413] It should be noted that these doctrines were discussed in the transnational context and the judgment of *Ong Han Nam* should be read with the caution raised in *Merck Sharp & Dohme Corp v Merck KGaA*[414] ("*Merck Sharp & Dohme Corp*").

12.226 On issue estoppel, apart from needing to have a judgment that meets the requirements of recognition (which the Court of Appeal agreed with the trial judge existed), the court noted that issue estoppel also required both identity of parties and subject matter in relation to

409 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [49]. See also *Eleven Gesellschaft Zur Entwicklung Und Vermarktung Von Netzwerktechonologien MBH v Boxsentry Pte Ltd* [2014] SGHC 210 at [101]–[103].

410 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [51].

411 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [51] and [54].

412 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [55].

413 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [56].

414 [2021] 1 SLR 1102. See paras 12.237–12.260 below.

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the two actions. It was on these two latter requirements that the Court of Appeal parted ways with the trial judge.[415]

12.227 In terms of identity of parties, it was argued that the plaintiffs were different in the Malaysia and Singapore actions, The plaintiffs also argued, relying on *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301*[416] ("*Lee Tat*"), that the rights sought to be enforced were also different. As such, they contended that identity of parties was not established.[417]

12.228 On this point, the court noted that *Lee Tat* involved a situation where the plaintiffs were the same in both actions and there was an attempt to argue that identity of parties did not exist because different rights were being enforced. In the present case, the parties were different, but the court noted that the law had not taken a narrow view of what identity of parties meant.

12.229 The Court of Appeal noted that "issue estoppel may arise in civil actions between the same parties *or their privies*" [emphasis added].[418] The court therefore examined whether SHGCC could be regarded as Borneo Ventures's privy. The required commonality was a direct interest in the subject matter of the litigation, a parallel or corresponding interest in that subject matter and not simply a financial interest in the result of the action. The court also opined that where group companies were involved, it was important to consider the relationship between those companies within that group corporate structure. Where there were shared or close connections, these would be relevant factors in considering whether privity of interest existed between them.[419]

12.230 On the facts, the court noted that the plaintiff owned 77.5% of SH Group which in turn wholly owned SHGCC. SHGCC was effectively under the plaintiff's control, and the plaintiff was conducting the claim in Malaysia against the defendant. Had SHGCC succeeded, the plaintiff would have been able to directly benefit from that outcome. The plaintiff therefore had a parallel interest in the subject matter of the Malaysian action between SHGCC and the defendant. As such, the court concluded that SHGCC was a privy of the plaintiff. Therefore, there was identity of parties.[420] Two observations can be made here. First, this analysis seems to allow transnational issue estoppel to bypass the doctrine of separate

415 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [57]–[58].
416 [2005] 3 SLR(R) 157.
417 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [62].
418 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [59].
419 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [63]–[64].
420 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [61] and [65].

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legal personality in company law. Establishing that SHGCC was a privy of the plaintiff seems easier than piercing the proverbial corporate veil. Secondly, the comment that the plaintiff was "effectively conducting the claim made by SHGCC in the Malaysian suit"[421] appears to have been made in disregard of the distinct roles between the shareholders and the board of directors.[422] Even though Borneo Ventures owned SHGCC, it might not have been in the position to dictate the trial strategy and make decisions for SHGCC in the Malaysian suit.

12.231 Be that as it may, having established identity of parties, the court turned its attention to identity of subject matter. On this, the court concluded that this had been established as both the Malaysian and Singapore actions revolved around the ownership of the Subject Land. In particular, the Court of Appeal opined that Borneo Ventures could not cast doubt on the Common Expectation point without attacking the Malaysian judgment.[423] Having shown that issue estoppel was established, the court went on to consider the doctrine of extended *res judicata*.

12.232 Extended *res judicata*, also known as abuse of process, prevents a party from raising an issue in subsequent proceedings when it should have been raised in the earlier one. To allow that party to do so could amount to an abuse of process. The court disagreed with the trial judge's rejection of this defence. The court noted that to show abuse of process, one needed to show "some connection … between the party seeking to relitigate the issue and the earlier proceeding where that essential issue was litigated, which would make it unjust to allow that party to reopen the issue".[424] The court emphasised that the critical factor was not the repeated claims by the same plaintiff or against the same defendant, but the question of fairness or oppressiveness. The analysis was a fact specific one and depended on circumstances including:[425]

> (a) whether the later proceedings are nothing more than a collateral attack upon the previous decision;
>
> (b) whether there is fresh evidence that warranted re-litigation;
>
> (c) whether there are *bona fide* reasons why an issue which ought to have been raised in the earlier action was not; and
>
> (d) whether there are other special circumstances that justify allowing the case to proceed.

421 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [65].
422 *Ezion Holdings Ltd v Teras Cargo Transport Pte Ltd* [2016] 5 SLR 226 at [20].
423 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [66]–[67].
424 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [71].
425 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [69]–[71].

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12.233 On the facts, the court identified two matters which pointed to abuse of process. First, the plaintiff's arguments against the existence of Common Expectation, which had already been determined by the Malaysian court, was a collateral attack against the Malaysian judgment. Secondly, the plaintiff's attempts to relitigate the issue of the ownership of the Subject Land, also already determined by the Malaysian courts, were oppressive to the defendant.[426]

12.234 One may be forgiven for thinking that these matters seem more akin to issue estoppel than extended *res judicata*. After all, both involve dealing with subject matter that has already been determined as between the same parties or their privies. This does not fit within the situation where a party is seeking to raise an issue which it should have in the earlier action *and did not*. However, the abuse of process seems clearer when one considers that the plaintiff could have been joined as a co-plaintiff in the Malaysian action. Put another way, these were attempts by the plaintiff to have two bites of the cherry. Having said that, one should not be surprised if the interrelation between issue estoppel, cause of action estoppel and extended *res judicata* also means there would be overlaps. In this case, the overlap is both obvious and significant, whereas in other cases, extended *res judicata* may catch cases where the estoppels are not made out.

12.235 The Court of Appeal also made a passing remark on how Borneo Ventures's attempt to characterise the Malaysian judgment as having been procured by fraud as contradicting its earlier stated position that, *inter alia*, (a) the issue of ownership was irrelevant; and (b) SHGCC was estopped from denying OBSB's proprietary interest.[427] This was perhaps something the appellant could have argued – that the taking of inconsistent positions amounted to an abuse of process, a point which was discussed above.[428] Note though, that the use of the term "abuse of process" by the court in this case seems to have been done in a different context, that is, specifically in the context of discussing oppressiveness *vis-à-vis* the extended doctrine of *res judicata*.[429]

12.236 *Ong Han Nam*'s decision should be read with the next case, which is also another Court of Appeal decision (the *coram* of which consists of Judith Prakash JCA as well), which provides nuance to why the principles of *res judicata* should be applied with an appreciation of the transnational context in private international law.

426 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [73]–[74].
427 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [75].
428 See para 12.66 above.
429 *Ong Han Nam v Borneo Ventures Pte Ltd* [2021] 1 SLR 1248 at [71] and [75]–[76].

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## *B.* Merck Sharp & Dohme Corp v Merck KGaA

Recognition of foreign judgments – Transnational issue estoppel – Limitations

Recognition of foreign judgments – Transnational issue estoppel – "*Arnold* Exception"

12.237 *Merck Sharp & Dohme Corp*[430] clarified some principles on "transitional issue estoppel", a topic foreshadowed in last year's review when the authors suggested that the doctrine of *res judicata* in the arbitration context could be equally applicable in the context of foreign judgments.[431]

12.238 The decision revolved around the recognition of foreign judgments arising out of litigation around the use of the name "Merck". The facts leading to this litigation can be simply put. The predecessors of the appellant and the respondent had entered into an agreement (co-existence agreement) in 1970 to govern the use of "Merck" in various jurisdictions. In 1975, a letter set out various clarifications to the co-existence agreement. In spite of this, the parties found themselves litigating the use of the name in a number of jurisdictions.[432]

12.239 In 2018, the respondent and Merck Pte Ltd commenced proceedings in Singapore against the appellant (and three others) for trade mark infringement, passing off and breach of contract. Relevant to the Singapore proceedings was the effect of three preceding English judgments. These were:[433]

(a) a preliminary decision on 21 November 2014 by the High Court of England and Wales that the governing law of the 1970 agreement and the 1975 letter was German law ("the English Preliminary Decision");

(b) a decision on 15 January 2016 by the English High Court, interpreting various clauses of the 1970 agreement, specifically holding that cl 7 precluded the appellant from using the name "Merck" on its own as a firm name or company name in "the rest of the world" (defined as "all countries other than those … where specific arrangements [had been] made". The High Court

430 See para 12.225 above.
431 See discussion of *CKR Contract Services Pte Ltd v Asplenium Land Pte Ltd* [2020] 5 SLR 665 in (2020) 21 SAL Ann Rev 314 at 393–402, paras 12.216–12.225.
432 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [3]–[4].
433 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [7]–[8].

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of England and Wales also held that the appellant had breached this agreement ("the HCEW Decision"); and

(c) the English Court of Appeal decision on 24 November 2017 affirming the HCEW Decision ("the ECA Decision").

12.240 As part of the Singapore proceedings, the respondent subsequently applied for summary judgment against the appellant for breach of the co-existence agreement, and for preliminary determinations that the appellant was bound by the English Preliminary and the ECA Decisions (specifically on the interpretation of cl 7).[434] The High Court dismissed the summary judgment application but held that the appellant was bound by the English decisions through the operation of issue estoppel. In coming to his decision, the judge held that:[435]

(a) the English decisions were from a court of competent jurisdiction, were final and conclusive, and there were no applicable defences to its recognition;

(b) the application of issue estoppel did not require a formal application to recognise the foreign judgments; and

(c) there was identity of parties even if there were other parties in the English proceedings that were not part of the Singapore proceedings, and there was identity of issues.

12.241 On appeal, the appellant focused on the High Court's decision that it was bound by the ECA Decision on the interpretation of cl 7. Specifically, the appellant disagreed that there was identity of parties and identity of issues, and also argued that the ECA Decision was incapable of forming an issue estoppel as the findings were confined to acts committed in the UK.[436]

12.242 The Court of Appeal had to determine three matters:[437]

(a) whether, as a preliminary matter, the doctrine of abuse of process prevented the appellant from mounting the appeal in the manner that it did;

(b) whether the appellant was estopped from disputing the English Court of Appeal's interpretation of cl 7; and

434 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [10].
435 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [11]–[12].
436 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [14].
437 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [19].

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(c) whether the judge correctly found that the ECA Decision on the interpretation of cl 7 of the 1970 Agreement was suitable for determination under O 14 r 12 of the ROC.

12.243 As the first and third issues do not directly relate to conflict of laws, they will be discussed briefly.

12.244 On the first issue, the court opined that a party adopting inconsistent positions in the same or related proceedings could (a) amount to an abuse of process; or (b) offend the doctrine of approbation and reprobation.[438] In this case, the appellant's inconsistent position was arguing that the High Court was wrong in finding there was identity of parties (for the purposes of establishing issue estoppel) in relation to the English Court of Appeal's interpretation of cl 7 when it did not take issue with the High Court's finding in respect of identity of parties in relation to the English Preliminary Decision on governing law. However, the court held that this inconsistency did not amount to abuse of process and could be addressed by the court disregarding the appellant's arguments concerning identity of parties in relation to cl 7. The court also opined that the appellant's conduct did not offend the doctrine of approbation and reprobation as the appellant did not receive any benefit as a result of the inconsistent positions it had taken.[439]

12.245 In terms of issue estoppel, the court began by affirming that foreign judgments were capable of raising an issue estoppel. As such, the rationale underlying domestic issue estoppel also extended to transnational issue estoppel, subject to certain modifications. This was also, in the court's view, consistent with the legislative policy of the CCAA, where s 13(1) provides for a recognised foreign judgment to have the legal effect of a judgment issued by a Singapore court. Such a judgment could give rise to issue estoppel.[440] Although it remains to be seen whether such judgments will be viewed through the lenses of transnational or domestic issue estoppel – given that they are to have the legal effect of a Singapore-issued judgment, this suggests that the considerations for transnational issue estoppel may not apply at all.

12.246 The court went on to consider the historical developments and bases for recognition of foreign judgments and noted that the recognition of foreign judgments and the doctrine of *transnational* issue estoppel were undergirded by considerations of comity and reciprocal respect between independent jurisdiction's courts. However, these considerations had to

438 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [20].
439 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [21]–[22].
440 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [25].

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be balanced against recognising the court's role in administering justice and safeguarding the rule of law in its own jurisdiction. To achieve this balance, the court opined that even as the court applied the same elements for issue estoppel in the international context as it would in the domestic context, it would have to be particularly careful in delineating the outer limits of issue estoppel in an international context and being mindful of the possibility of adopting "the *Arnold* exception".[441] These three points are discussed below.

12.247 Turning to the elements for transnational issue estoppel, the court identified that there needed to be (a) a foreign judgment that was capable of being recognised; and (b) identity of issue and parties. As acknowledged by the High Court, the foreign judgment needed to "be a final and conclusive decision on the merits by a court of competent jurisdiction that ha[d] transnational jurisdiction over the party sought to be bound, and there [are] no defences to the recognition of the judgment".[442] Recognition did not require any formal application or any special procedure beyond the normal pleading rules.[443]

12.248 The Court of Appeal added, however, that care had to be taken when the recognising court was faced with multiple competing foreign judgments. While the instant case did not present such a problem, the court provided some helpful guidance in such a situation:[444]

> (a) Where there were competing foreign judgments, the first in time would prevail for the purposes of creating an estoppel. This would promote finality and discourage parties from engaging in related litigation in a bid to obtain a more favourable outcome. This would also be in line with the legislative policy behind s 15(1)(*e*) of the CCAA and s 5(1)(*b*) of the REFJA.
>
> (b) Where there was a foreign judgment which conflicted with a local judgment (whenever occurring), the local judgment would prevail. This would give priority to the *res judicata* effect of local judgments and would supposedly be consistent with the legislative policy behind s 15(1)(*d*) of the CCAA.

12.249 On this second point, the policy basis for this position is not entirely clear. While detractors may decry the spectre of judicial chauvinism, if a choice must be made, it is defensible that a local judgment has priority. The recognising court will be most familiar and comfortable

441 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [34].
442 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [35].
443 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [35].
444 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [36].

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with the legal principles and policy considerations applied. This is also consistent, as the court pointed out, with s 15(1)(*d*) of the CCAA which confers upon the General Division of the High Court ("High Court (General Division)") the discretion to refuse recognition of a foreign judgment where an inconsistent local judgment exists. In this same vein, the court opined that the common law defences to the recognition of foreign judgments should converge with those provided for in conventions and statutes. This rested on the notion that the recognising court could and should have regard to legislative developments in coming to its conclusion on the appropriate balance to strike between comity, international relations and the need to aid in the development of a transnational system of justice, while also safeguarding the rule of law within its jurisdiction.[445] No doubt the development of this convergence will be observed in the near future.

12.250 Apart from these guidelines, the court also left the approach to two matters open for future consideration. The first is a situation where a foreign judgment is handed down when local proceedings on the same or substantially the same subject matter have been commenced and are pending. The *amicus* suggested, in line with the desirability of bringing litigation to an end and that a rule of non-recognition might incentivise the strategic initiation of pre-emptive local proceedings to prevent recognition of an impending foreign judgment, that the foreign judgment could nonetheless be recognised in such circumstances. The court noted that the concerns of pre-emptive litigation could be addressed by having due regard to all the circumstances, including how the foreign judgment came to be issued within the particular time frame and whether there was undue haste or any action by a party that was suggestive of a deliberate attempt to pre-empt the recognition of the foreign judgment in Singapore.[446] The extremely fact-centric approach suggested by the court is to be preferred. This is not the forum for a full discussion, but readers should note how the Court of Appeal dealt with competing foreign judgments in the context of issuing an ASI in breach of arbitration agreement in *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd*[447] should such an issue arise for consideration.

12.251 The second is, before a foreign judgment can be recognised at common law, whether the foreign issuing jurisdiction must similarly recognise Singapore judgments. While the court acknowledged that the

445 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [37].
446 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [38].
447 [2019] 1 SLR 732. See also (2019) 20 SAL Ann Rev 251 at 305–313, paras 11.175–11.191 for a discussion on the case.

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idea of reciprocity was consistent with both considerations of comity (and was what was identified to be a basis for recognition of foreign judgments) and what was provided for in various pieces of legislation, it also noted that reciprocity might not be the only touchstone and could also be falling out of favour. As such, it was content to defer the matter for future consideration.[448]

12.252 Having established that there was a foreign judgment capable of being recognised, the elements to establish issue estoppel was identity of issue and parties. The court noted that the general position was that there was no difference in approach between establishing issue estoppel in a local or foreign context. However, the court cautioned that in relation to establishing identity of issue in a foreign context, care had to be taken in interpreting foreign judgments. In particular, caution had to be exercised in determining:[449]

> (a) what was exactly decided by the foreign court and whether the specific issue was necessary, as opposed to collateral, to the foreign judgment;
>
> (b) whether the foreign court's decision on that issue (as opposed to the final judgment as a whole) was final and conclusive; and
>
> (c) whether the party (against whom the estoppel is sought against) had the opportunity to raise that issue.

12.253 The second point above merits further discussion. The court drew a distinction between the question of whether the foreign judgment as a whole was final and conclusive and the question of whether the decision on the specific issue was final and conclusive. In order for a foreign judgment to give rise to issue estoppel, not only did the foreign judgment as a whole have to be final and conclusive, but the decision on the specific issue had to also be final and conclusive under the law of the foreign judgment's originating jurisdiction. This was because a foreign judgment would not be given greater preclusive effect in Singapore than the judgment would be accorded in the foreign jurisdiction.[450] The effect, as alluded to by the court, was that if the foreign legal system in question did not have either a doctrine of issue estoppel or a doctrine with the same underlying basis and operation, the relevant findings of that foreign court could not be final and conclusive.[451] This all the more emphasised the need to be alive to inter-jurisdictional differences and to consider

448 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [39].
449 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [40].
450 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [41]–[43].
451 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [43].

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expert evidence on what precisely the position was under the law of the foreign jurisdiction in question.

12.254 The appellant had argued that there was no identity of issue because in the English proceedings, the respondent had relied only on cl 7 of the 1970 agreement, whereas in the Singapore proceedings, it had relied on cll 5, 6 and 7. The court held that cll 5 and 6 related to the question of breach whereas cl 7 revolved around matters of interpretation. While the clauses allegedly breached might differ (that is, cll 5 and 6), in so far as the issue of interpretation of cl 7 was concerned, it was an identical issue in both the English and Singapore proceedings. Further, any arguments on how cll 5 and 6 could interrelate with or inform the interpretation of cl 7 were not aired in the English proceedings; therefore, this line of argument was barred by the doctrine of abuse of process (also known as the *Henderson* estoppel).[452] This must be correct – the proper approach perhaps is for the appellant to pursue an appeal against the English decision and raise these (new) arguments.

12.255 The appellant also argued that issue estoppel was not made out because the ECA Decision was limited to acts committed in the UK. The court also dismissed this, opining that the appellant had misapprehended the statements made in the ECA Decision as being made in the context of the interpretation of cl 7 when the statements were made in the context whether breach had occurred.[453]

12.256 The remaining point left to be considered was the appellant's concession that issue estoppel would apply to the ECA Decision of cl 7, a position which the respondent also accepted. The parties were therefore found to be in agreement with each other. As such, the court dismissed the appeal.[454] Having done so, the court went on to make a number of observations that were relevant to transnational issue estoppel.

12.257 First, the court accepted that issue estoppel did not apply to any judgment (foreign or local) on a "pure" question of law that did not affect parties' rights, liabilities or legal relationship. Issue estoppel is essentially about precluding parties from relitigating what a prior competent court of law has already decided about their dispute; it is not applicable in determinations of pure questions of law that do not affect the actual dispute. This is probably of the same tune as the trite principle that, generally, the court will decline to hear cases or arguments that do not

452 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [47].
453 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [48].
454 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [49]–[50].

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involve an issue that is "live" between the parties, as it is not the duty of the court to render advice or comment upon hypothetical issues.[455]

12.258 Second, the court noted that there might be situations where, even if the elements of issue estoppel had been established, a transnational issue estoppel might nevertheless still not arise. This was due to the recognising (local) court's lack of familiarity with the procedure of the judgment issuing (foreign) court and the need to ensure that prejudice would not be done to a party who might have had difficulties defending a matter in that foreign jurisdiction.[456] As such, it was important to have gatekeeping mechanisms to define the outer boundaries of issue estoppel – in other words, these considerations had to be taken into account in determining whether issue estoppel could arise through recognition of a foreign judgment, *even if* the elements of issue estoppel had been made out. The court identified four possible "gatekeeping mechanisms":

> (a) Where an issue existed such that the court of the forum ought to make a determination under its own law, transnational issue estoppel should not apply. This could be where (i) there was an applicable mandatory law of the forum (which applied irrespective of the foreign elements of the case and irrespective of any choice of law rule); (ii) the issue engaged with the public policy of the forum; or (iii) the issue was a procedural one (as defined for the purposes of conflict of laws); in other words, it was not a "decision on the merits".[457] For example, a foreign court X's finding of issue estoppel (possibly due to a judgment from foreign court Y) is a procedural one such that a Singapore court would not be estopped by foreign court X's finding of issue estoppel.[458]
>
> (b) Where a foreign judgment that was incapable of having transnational impact because its application was territorially limited, for example, where it related to (i) findings on the validity of a patent within a jurisdiction; or (ii) findings concerning the public policy of a (foreign) jurisdiction, there could be no question of according binding effect.[459]
>
> (c) Where the transnational issue estoppel was sought to be applied against a party who was a defendant in the foreign proceedings, extra caution was necessary. The defendant could

455 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [62], *per* Judith Prakash JCA.
456 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [52]–[53].
457 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [55].
458 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [55].
459 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [56].

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have faced difficulties or strategically chosen not to deploy significant resources defending a minor point in that foreign jurisdiction. The court provisionally opined that where a defendant could show *bona fide* reasons for its actions, the Singapore court could find that the foreign defendant was not estopped on that issue in the local proceedings.[460] On this, playing devil's advocate for a moment, in such a situation, should the foreign defendant not be expected to set aside or appeal against that judgment in the foreign jurisdiction? It also appears odd that such a reason (that is, a strategic reason to not deploy significant resources in defending a minor point) in itself is not a hurdle in enforcing that foreign judgment (a seemingly more draconian effect) but is able to prevent an *effect* (that is, operation of issue estoppel) of recognising that foreign judgment. As pointed out in another commentary, it is an extremely uncomfortable position for a foreign judgment to be, on the one hand, recognised as final and conclusive for the purposes of enforcement and yet, on the other hand, refused recognition for the purposes of establishing issue estoppel.[461]

(d) Where the foreign judgment conflicted with the public policy of the recognising jurisdiction, issue estoppel could be denied. This could be where the foreign judgment might be considered perverse or where there was a sufficiently serious error:[462]

(a) The former point appears to have been inspired by the position in the UK and Australia, as noted elsewhere in the judgment.[463] The reference to the position in the CCAA is also interesting, which suggests that the scope of this public policy consideration applies more narrowly to the *effects* of recognising or enforcing the foreign judgment (as opposed to the foreign judgment as a whole).

(b) The latter point could include a situation where the foreign judgment makes an error in applying the law of the recognising jurisdiction. On this specific point, the court recognised that a delicate balance needed to be struck between sitting as a *de facto* appellate court and ensuring the correct application of Singapore law,

460 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [57].
461 Zhuo Jiaxiang & Kenny Lau, "The Contours and Limits of Transnational Issue Estoppel" [2021] SAL Prac 22 at para 24.
462 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [58].
463 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [53].

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and left the question open for determination in a future appropriate case.[464]

12.259 The third and final observation relates to the *Arnold* exception to issue estoppel. This applies where further material relevant to the correct determination of an issue in the earlier proceedings becomes available to a party and that material could not have been earlier adduced by reasonable diligence. This exception had been given both broad[465] and narrow[466] interpretations in domestic issue estoppel cases. The court noted the submissions of *amicus curiae* Yeo that the narrow approach should apply, with some modifications, to transnational issue estoppel. It also recognised that applying the *Arnold* exception would create some challenges and acknowledged Yeo's suggested possible approaches to addressing these. As with the preceding matters, the court chose to leave this matter for another time.

12.260 This judgment provides an in-depth look at the bases and elements of issue estoppel, as well as the limitations that might apply. While it can be said that the court has raised more questions about issue estoppel than it has answered, it must be acknowledged that apart from achieving a sensible outcome on the appeal before it, the court has provided important nuance which will guide the court decisions of tomorrow.

### *C.* Tan Hock Keng v Malaysian Trustees Bhd

Enforcement of foreign judgments – Reciprocal Enforcement of Commonwealth Judgments Act – Definition of "appeal" in resisting registration of foreign judgment

Enforcement of foreign judgments – Considerations for stay of execution post-enforcement/post-registration

12.261 There are two decisions associated with *Tan Hock Keng v Malaysian Trustees Bhd*[467] in 2021 – the first is a decision of a Registrar's appeal at the High Court (General Division) delivered by Philip Jeyaretnam JC, and another is an appeal against the decision of the Registrar's appeal

464 *Merck Sharp & Dohme Corp v Merck KGaA* [2021] 1 SLR 1102 at [59]–[61].

465 *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2009] 1 SLR(R) 875; *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2011] 1 SLR 998.

466 *The Royal Bank of Scotland NV v TT International Ltd* [2015] 5 SLR 1104.

467 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162; *Tan Hock Keng v Malaysian Trustees Bhd* [2021] SGHC(A) 18.

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at the Appellate Division of the High Court ("High Court (Appellate Division)"). The facts can be stated briefly:[468]

(a) A Malaysian trust company, Malaysian Trustees Bhd ("MTB"), entered into a settlement agreement with Tan Hock Keng which was later issued as a consent judgment by the High Court of Malaya at Kuala Lumpur on 8 November 2019.

(b) When the terms of the consent judgment were not complied with, MTB filed an application to the Malaysian court for certification of a true copy of the consent judgment under the Malaysian Reciprocal Enforcement of Judgments Act 1958.[469] This application was allowed on 13 August 2020. Tan subsequently filed an originating summons in Malaysia on 28 September 2020 seeking, *inter alia*, "a reasonable extension of time to comply with [his] obligations pursuant to the [consent judgment]" ("Malaysia OS 455").[470]

(c) On 4 November 2020, MTB took out proceedings in Singapore to register the Malaysian consent judgment under the RECJA. The consent judgment was registered on 27 November 2020 but was successfully set aside on 22 March 2021 upon Tan's application. Before the High Court (General Division)'s hearing, the Malaysia OSS 455 was dismissed by the High Court of Malaya at Kuala Lumpur (Commercial Division) because, *inter alia*, the consent judgment was final and binding on the parties. Tan, however, immediately filed an appeal against the High Court of Malaya's decision on 7 May 2021 and the appeal was due to be heard on 15 March 2022.

(d) In Singapore, MTB's appeal to the High Court (General Division) was allowed on 17 May 2021. Before the High Court (Appellate Division)'s hearing, Tan filed a suit in Malaysia ("Malaysia Suit 437") to, *inter alia*, challenge the validity of the consent judgment. This was, however, diametrically the opposite of Tan's position in Malaysia OS 455, where he, *inter alia*, affirmed the validity and binding nature of the consent judgment. The further appeal to the High Court (Appellate Division) was eventually dismissed on 30 June 2021.[471]

(e) For completeness, it should be added that the same appellant tried, unsuccessfully, this year to seek leave to appeal

468 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 at [4]–[8]; *Tan Hock Keng v Malaysian Trustees Bhd* [2021] SGHC(A) 18 at [4]–[7].

469 No 99 of 1958.

470 *Tan Hock Keng v Malaysian Trustees Bhd* [2021] SGHC(A) 18 at [20].

471 *Tan Hock Keng v Malaysian Trustees Bhd* [2021] SGHC(A) 18.

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from the High Court (Appellate Division) to the Court of Appeal.[472]

12.262 The consent judgment obtained in Malaysia was registrable under s 3(1) of the RECJA (read with s 5(1) of the RECJA and para 4 of the Schedule to the Reciprocal Enforcement of Commonwealth Judgments (Extension) (Consolidation) Notification)[473] provided (a) it was just and convenient to do so considering all the circumstances of the case; and (b) there were no applicable restrictions under s 3(2) of the RECJA.[474]

12.263 At the High Court (General Division) level, Tan argued that the consent judgment should not be registered because Malaysia OS 455 qualified as a "pending appeal" which prohibited registration under s 3(2) of the RECJA.[475] As the word "appeal" is not defined in RECJA, Tan argued that it should be given the same meaning as that used in s 2(1) of the REFJA – "appeal" includes any proceedings by way of discharging or setting aside a judgment or an application for a new trial or stay of execution. This was rightly rejected by Jeyaretnam JC for the following reasons:

(a) First, Jeyaretnam JC considered the history of the RECJA and REFJA and concluded that the two statutes were intended to have *different* meanings of "appeal" (with the definition in the REFJA being broader than that in the RECJA). The context in which "appeal" was used in the REFJA was similar to enforcement of foreign judgments at common law: a foreign judgment would still be taken to be "final and conclusive" even though it could be subject to a pending appeal.[476] This was what Jeyaretnam JC termed as the recent legislative policy of permitting enforcement of foreign judgments even if they were under appeal or subject to a setting-aside application, while giving the registering court discretion to set aside the registration or adjourn the setting-aside application pending disposal of the appeal under the REFJA. A similar judicial attitude was also seen in the High Court decision of *Heince Tombak Simanjuntak v Paulus Tannos*,[477] covered in a previous review.[478]

472 *Tan Hock Keng v Malaysian Trustees Bhd* [2022] SGCA 14 at [28].
473 1999 Rev Ed.
474 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 at [9].
475 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 at [10(a)].
476 Reciprocal Enforcement of Foreign Judgments Act 1959 (2020 Rev Ed) s 3(5); *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [69], *per* Steven Chong J.
477 [2020] 4 SLR 816 at [13] and [58], *per* Aedit Abdullah J.
478 See (2019) 20 SAL Ann Rev 251 at 316–317, para 11.202.

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(b) The context in which "appeal" is used in the RECJA was, however, different – the foreign judgment would not be registered if it was subject to a pending appeal. The RECJA restricted registration where there was a pending appeal, unlike the REFJA or common law enforcement. It was more restrictive than the other regimes, and Jeyaretnam JC rightly found that there was simply nothing in the RECJA that supported a wider reading of the word "appeal" than its literal meaning.[479]

12.264 the High Court (Appellate Division) agreed with Jeyaretnam JC. The noteworthy takeaways are highlighted below:

(a) First, the HCAD clarified that the lack of a statutory definition of "appeal" alone did not necessarily mean that extrinsic materials beyond the statute or case law had to be referred to. Instead, primacy had to be given to the text of the provision and the statutory context. To this end, the High Court (Appellate Division) gave a helpful working definition of the word "appeal": a proceeding involving a relationship of superior and inferior court intended to correct an error made in the inferior court.[480]

(b) Malaysia OS 455 therefore could not be an "appeal" for the purposes of the RECJA because it was neither a challenge against the consent judgment nor an attempt to correct anything about the consent judgment.[481]

(c) Second, and as a general principle, the High Court (Appellate Division) clarified that statutory meanings for the same words could only be borrowed from other statutes if used in the same sense in both statutes, or if the statutes were *in pari materia*.[482] While both the RECJA and REFJA allowed registration of foreign judgments in Singapore, they were not *in pari materia*. The requirements to registration were different: The REFJA first considered whether substantial reciprocity of treatment would be given to Singapore judgments in those foreign jurisdictions before allowing final and conclusive judgments to be registered. The RECJA on the other hand registered foreign judgments if it was considered "just and convenient", provided there were no applicable restrictions. Given that the word "appeal" was couched

479 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 at [22], *per* Philip Jeyaretnam JC.

480 *Tan Hock Keng v Malaysian Trustees Bhd* [2021] SGHC(A) 18 at [18]–[19], *per* Belinda Ang Saw Ean JAD.

481 *Tan Hock Keng v Malaysian Trustees Bhd* [2021] SGHC(A) 18 at [21].

482 *Tan Hock Keng v Malaysian Trustees Bhd* [2021] SGHC(A) 18 at [23]–[24].

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in different inquiries in both the REFJA and RECJA, the High Court (Appellate Division) held that the definition of "appeal" in the REFJA could not be used for the same word in RECJA.[483]

12.265 Even if the definition of "appeal" under the REFJA was adopted, Malaysia OS 455 could not amount to an "appeal" as Malaysia OS 455 affirmed the validity and binding nature of the consent judgment:

(a) The first prayer sought was for a declaration that the consent judgment was valid and binding.[484] The prayers sought in Malaysia OS 455 notably were not for discharging, setting aside, applying for a new trial or staying the execution of the consent judgment.

(b) Another reason given by the High Court (Appellate Division) was that the definition of "appeal" in the REFJA was an *inclusive* one. This meant that the word would have its natural meaning and in addition the special meaning given to it by the inclusive definition. Tan's approach, which sought to introduce some wider and broader understanding of "appeal", was too far removed from the statutory language and ordinary meaning of the word "appeal".[485]

12.266 Tan also argued that the registration of the consent judgment prior to the final disposal of Malaysia OS 455 violated public policy under s 3(2)(*f*) of the RECJA. In particular, Tan argued that allowing the consent judgment was assisting the plaintiff to circumvent the application of Malaysian law and the Malaysian court process.[486] This argument seems to stem from a misapprehension of the RECJA and was rightly rejected by Jeyaretnam JC:

(a) Section 3(2)(*f*) of the RECJA restricts registration when the foreign judgment relates to a "cause of action which for reasons of public policy … could not have been entertained by the registering court". While Tan was not incorrect that the source of public policy could be statutory or common law,[487] Tan was not arguing that the *underlying cause of action* contravened Singapore public policy.[488]

483 *Tan Hock Keng v Malaysian Trustees Bhd* [2021] SGHC(A) 18 at [25]–[27].
484 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 at [16]; *Tan Hock Keng v Malaysian Trustees Bhd* [2021] SGHC(A) 18 at [20].
485 *Tan Hock Keng v Malaysian Trustees Bhd* [2021] SGHC(A) 18 at [30]–[31].
486 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 at [23].
487 *Poh Soon Kiat v Desert Palace Inc* [2010] 1 SLR 1129 at [114], *per* Chan Sek Keong CJ.
488 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 at [24].

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(b) The attempt to argue non-registration because of a breach of public policy *generally* (that is, without reference to underlying cause of action) was also unsuccessful and rightly so, given that the list of restrictions in s 3(2) of the RECJA offers no room for the court to include additional restrictions.[489]

(c) In any event, the supposed public policy advocated by Tan – that the registration of consent judgment would be a breach of international comity and Singapore's public policy – could not be correct.[490] Foreign judgments, at common law, were allowed enforcement even if they were subject to appeal or stay of execution.[491] If this was already allowed for enforcement of foreign judgments at common law, Tan's proposed public policy must be incorrect.

This argument was also not pursued on appeal to the High Court (Appellate Division).

12.267 The last point considered by the High Court (Appellate Division) was whether there were any circumstances rendering it not "just and convenient" to register the consent judgment. Even if the appeal in Malaysia OS 455 was successful, Jeyaretnam JC thought that this would have *only* given Tan more time to comply with the consent judgment. This was an insufficient basis because Jeyaretnam JC thought that MTB had a *prima facie* right to the fruits of the consent judgment and should not be deprived of this right just because Tan was seeking more time to comply with it.[492] This argument was also not pursued on the further appeal to High Court (Appellate Division). While the outcome is not incorrect, the authors would simply add that:

(a) If indeed Tan is later successful with his appeal in Malaysia OS 455, the effect is as good as a stay of execution for the payment obligation (alone) in the consent judgment.

(b) At that time, the proper course would have been for Tan to apply for a stay of execution in Singapore against the registered foreign judgment.[493]

(c) To allow the registration of the foreign judgment notwithstanding a successful appeal in Malaysia OS 455 could be usurping the foreign court's role in deciding when

489 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 at [25].
490 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 at [26].
491 *Humpuss Sea Transport Pte Ltd v PT Humpuss Intermoda Transportasi TBK* [2016] 5 SLR 1322 at [69], *per* Steven Chong J.
492 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 at [29].
493 Discussed at para 12.269 below.

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should the claimant be entitled to the fruits of its action in the consent judgment.

12.268 It should be noted that at the hearing before the High Court (Appellate Division), Tan applied to adduce further evidence on matters relating to Malaysia Suit 437 as one of the factual premises for his appeal against the decision of the High Court (General Division). This further evidence was disallowed primarily because Malaysia Suit 547 was a development after the High Court (General Division) hearing entirely of Tan's own making, and not a factor which Jeyaretnam JC's decision was premised on:[494]

(a) The disallowing of further evidence must be correct – to allow Tan to do so would be tantamount to a fresh hearing to resist registration on an entirely different factual premise, and not an appeal against the decision of the High Court (General Division).

(b) What Tan could (and should) have done instead is perhaps to take out a fresh application to resist registration of the consent judgment. In such a situation and without going into the details, Tan would of course have to deal with possible arguments on *res judicata* (possibly *Henderson* estoppel)[495] and abuse of process[496] but that would have been at least a procedurally proper option.

12.269 The last point to discuss is Tan's application to *stay* the execution of the foreign judgment registered in Singapore. This was (rightly) refused at the High Court (General Division) level because the consent judgment was not subject to any stay of enforcement in Malaysia.

(a) The High Court (Appellate Division) agreed with the High Court (General Division) and emphasised this: Absent additional reasons, Singapore courts should not afford Tan a stay of execution that Malaysia itself had not granted.[497]

(b) This is consistent with what the authors had advocated in an earlier review: It would be inappropriate for a defendant to seek a stay of recognition of foreign judgment before the Singapore courts when the defendant did not attempt to seek a stay of execution of that foreign judgment before the foreign

494 *Tan Hock Keng v Malaysian Trustees Bhd* [2021] SGHC(A) 18 at [12]–[15].
495 See (2020) 21 SAL Ann Rev 314 at 395, para 12.218(c).
496 *ED&F Man Capital Markets Ltd v Straits (Singapore) Pte Ltd* [2020] 2 SLR 695 at [37]–[39], *per* Steven Chong JA.
497 *Malaysian Trustees Bhd v Tan Hock Keng* [2021] SGHC 162 at [30]; *Tan Hock Keng v Malaysian Trustees Bhd* [2021] SGHC(A) 18 at [33].

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court, or the defendant was unsuccessful in doing so. Any stay of execution granted in this instance should be discouraged as it could be construed as a breach of international comity by (indirectly) usurping the role of the competent foreign court that granted the foreign judgment in the first place.[498]

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498 See (2019) 20 SAL Ann Rev 251 at 316–317, para 11.202.

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