IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHCR 6

High Court Suit No 96 of 2015 (Summons No 3879 of 2015 and Summons No 5334 of 2015)

Between

(1) IM Skaugen SE
(2) IM Skaugen Marine Services Pte Ltd

… *Plaintiffs*

And

(1) MAN Diesel & Turbo SE
(2) MAN Diesel & Turbo Norge AS

… *Defendants*

JUDGMENT

[Choses in Action] — [Assignment]

[Civil Procedure] — [Transfer to SICC]

[Conflict of Laws] — [Choice of Law] — [Tort]

[Conflict of Laws] — [Jurisdiction] — [Discretionary] — [SICC]

[Conflict of Laws] — [Natural Forum] — [SICC]

[Conflict of Laws] — [Presumption of similarity]

[Evidence] — [Proof of evidence] — [Presumptions]

[Tort] — [Misrepresentation] — [Alteration of position]

[Tort] — [Misrepresentation] — [Fraud and deceit]

[Tort] — [Misrepresentation] — [Inducement]

[Tort] — [Misrepresentation] — [Negligent]

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IM Skaugen SE and another
v
MAN Diesel & Turbo SE and another

[2016] SGHCR 6

High Court — Suit No 96 of 2015 (Summons No 3879 of 2015 and Summons No 5334 of 2015)
Zhuang WenXiong AR
12; 26 February; 4 March 2016

18 April 2016 Judgment reserved.

Zhuang WenXiong AR:

1 A marine diesel engine manufacturer allegedly tampered with fuel consumption test results for a certain class of engines that were installed in the ships of a multi-national shipping conglomerate. The manufacturer authored promotional material in Germany, had sales meetings with the Norwegian holding company of the shipping conglomerate either in Denmark or Norway, provided fuel specifications to a Chinese builder, which installed the engines in China, and the fuel consumption tests were conducted in Germany. The ships, equipped with the engines, pass through the hands of various subsidiaries of the shipping conglomerate, some of which were incorporated in Singapore; their claims are assigned to a Norwegian company and a Singaporean company within the shipping conglomerate. The German manufacturer and a wholly-owned Norwegian subsidiary are sued in Singapore. What law governs the claim? Should the Singapore High Court

assume long-arm jurisdiction? How would the recent establishment of the Singapore International Commercial Court affect the assumption of long-arm jurisdiction?

The facts

2 IM Skaugen SE, incorporated in Norway (hereinafter "Skaugen Norway"), and IM Skaugen Marine Services Pte Ltd, incorporated in Singapore (hereinafter "Skaugen Singapore"; collectively, Skaugen Norway and Skaugen Singapore shall be referred to as the plaintiffs), are part of the IM Skaugen group of companies ("the Skaugen Group"). Skaugen Norway is the principal holding company of the Skaugen Group. The Skaugen Group is in the business of providing marine transportation services in the oil and gas industry.

3 MAN Diesel & Turbo SE, incorporated in Germany (hereinafter "MAN Germany"), is a manufacturer of marine diesel engines. MAN Diesel & Turbo Norge AS, incorporated in Norway (hereinafter "MAN Norway"; collectively MAN Germany and MAN Norway shall be referred to as the defendants), is a wholly-owned subsidiary of MAN Germany. MAN Norway provides sale support to MAN Germany.

4 Skaugen Norway entered into four shipbuilding contracts with China Shipbuilding Trading Company Limited and Zhonghua Shipyard ("the Chinese shipbuilders") in July 2000 for the design, building, sale and delivery of four 8,400 m^3 gas carriers. Skaugen Norway had the contractual right to choose the engine. The contracts contained London Maritime Arbitration Association arbitration clauses and were governed by English law.[1] Skaugen

[1] Skaugen's 1st affidavit at p 79.

Norway entered into discussions with several manufacturers of marine diesel engines, including MAN Germany and MAN Norway, for the supply of an engine and was assisted in this regard by Norgas Carriers AS, the Skaugen Group's Norwegian management company.

5 In the course of negotiations in or around July 2000, MAN Germany and/or MAN Norway provided Skaugen Norway with a copy of a project planning manual ("PPM") for a "Four-stroke Diesel Engine L+V 48/60" ("the MAN Engine"). The plaintiffs say that the negotiations took place in Norway while the defendants say that negotiations took place in Copenhagen, Denmark. The PPM "provide[d] customers and consultants with information and data for planning plants incorporating four-stroke engines from the current MAN B&W programme"; "[f]or concrete projects you will receive the latest editions in each case with our quotation specification or with the documents for order processing."[2] The PPM stated that the fuel consumption of the Man Engine under ISO conditions at a load of 85% was 180 g/kWh.

6 In August 2000, Skaugen Norway entered into four novation agreements with Somargas Limited ("Somargas Cayman"), a company incorporated in the Cayman Islands which was 50% owned by Skaugen Norway and 50% owned by GATX Third Aircraft Corporation ("GATX"). The novation agreements transferred Skaugen Norway's rights, benefits, obligations and liabilities under the four shipbuilding contracts to Somargas Cayman. Skaugen Norway, purportedly acting on behalf of Somargas Cayman in September 2000, opted for the MAN Engine to be installed in the four vessels.

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2 Skaugen's 1st affidavit at p 160.

7 The Chinese shipbuilders entered into four sales contracts with MAN Germany on 26 September 2000 for the provision of four MAN engines.[3] An arbitration clause provided for arbitration under the auspices of The China International Economic and Trade Arbitration Commission. These sales contracts explicitly stated that "[t]he technical specification and the scope of supply as per the technical agreement signed on Aug.24,2000". Zhonghua Shipyard and MAN Germany entered into the aforementioned technical agreement, dated 24 August 2000,[4] with an attached technical specification dated 23 August 2000 stating that the fuel consumption level under ISO Standards 3046/1 at a load level of 85% without attached pumps was 180 g/kWh.[5] The technical specification was in turn subject to MAN Germany's General Conditions of Delivery, which stated that the jurisdiction for all disputes arising out of the contract was Augsburg (in Germany) with MAN Germany also having the right to bring an action at the place of the purchaser's registered office; and that the contract was governed by German law.

8 MAN Germany and MAN Norway delivered to the Chinese shipbuilders a document on 24 November 2000 entitled "6. Kraftstoffsystem Fuel System" ("FSI").[6] This document represented that the fuel consumption of the MAN Engine at a load of 100% under ISO conditions with attached pumps and a tolerance of +3% was 193.64 g/kWh.[7] The document was then transmitted by the Chinese shipbuilders to Skaugen Norway.

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3 Nijsen's 1st affidavit at p 35.

4 Nijsen's 1st affidavit at p 81.

5 Nijsen's 1st affidavit at p 86.

6 Skaugen's 1st affidavit at p 198.

7 Skaugen's 1st affidavit at para 23; Statement of Claim at para 23.

9 Vintergas Limited ("Vintergas") and the Chinese shipbuilders entered into two further shipbuilding contracts in May 2001 for the construction of two 10,000 m^3 gas carriers. Vintergas is a company incorporated in the Cayman Islands and is 50% owned by Skaugen Norway and 50% owned by GATX. These contracts likewise contained London Maritime Arbitration Association arbitration clauses and were governed by English law.[8] Skaugen Norway purported to act on behalf of Vintergas in all matters relating to the 10,000 m^3 carriers and instructed the Chinese shipmakers to install MAN engines. The Chinese shipbuilders entered into two sales contracts with MAN Germany on 20 June 2001 for the provision of two MAN engines. These contracts also explicitly stated that "[t]he details of the specification, the scope of supply as well as Commissioning as per the Technical Agreement dated Aug.24,2000".[9]

10 The six MAN Engines were manufactured and delivered in 2001 and 2002. Prior to delivery, the engines were put through factory acceptance tests ("FATs") conducted in MAN Germany's Augsburg factory. The six engines were tested in May 2001, August 2001, November 2001, February 2002, May 2002 and June 2002. During a FAT, an engine is mounted on a test stand, also termed a test bed. The engine is operated at various settings and the performance and consumption data is collected and recorded. At the end of each FAT, a "Shop Test Protocol" would be prepared, which recorded *inter alia* the performance data. Representatives of MAN Germany conducted the FATs, all of whom are allegedly German nationals residing in Germany. The documentary evidence discloses that:

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8 Skaugen's 1st affidavit at p 262.

9 Nijsen's 1st affidavit at p 67.

(a) MAN Norway had representatives present at five of the FATs, but according to the defendants they were not involved in conducting the FATs;

(b) Representatives from the Chinese shipbuilders were present at the very first FAT in May 2001;

(c) Representatives expressed to be from Skaugen were present at three tests;

(d) For those tests where Skaugen was absent, representatives from "Norwegian Gas Carriers" (one test); "Norgas Carriers A/S" and "Det Norske Veritas" (one test); and "Norgas" (one test) were present.

11 The results of the FATs purported to show that the rate of fuel consumption of the MAN engines was below the values stated in the PPM and the FSI.

12 The engines were installed in six vessels ("the Vessels"); the first four are the subject of the first tranche of contracts in July 2000 while the fifth and sixth are the subject of the second tranche of contracts in September 2000: they are the Norgas Orinda, Norgas Shasta, Norgas Napa, Norgas Sonoma; Norgas Petaluma and Norgas Alameda. The Vessels were delivered between October 2002 and October 2003.

13 MAN Germany issued a press release in May 2011 stating that there were indications of possible irregularities during the handover of four-stroke marine diesel engines and it was possible to externally influence fuel consumption values to display results that deviated from those actually measured. MAN Germany also said that it had informed the public

prosecutor's office in Munich of this and would co-operate closely.[10] MAN Germany was eventually fined 8.2 million euros in March 2013 by the Local Court of Augsburg.

14 MAN Germany then wrote to Skaugen Norway on 31 January 2012 about the possibility that fuel consumption values displayed and recorded during handover were externally influenced and incorrect.[11] Subsequently on 3 April 2012 MAN Germany wrote to Norgas Carriers AS (the then managers of the Vessels) conceding that there were indications that the fuel consumption values for three engines were "externally influenced in an improper manner during [FATs]".[12] On 22 June 2012 MAN Germany wrote to Skaugen Norway, this time conceding that there were indications that the fuel consumption values for three engines were "externally influenced in an improper manner during [FATs]".[13]

15 The parties thereafter attempted to settle but negotiations broke down in September 2013 and there was a dispute over whether a binding settlement was reached. While Skaugen and MAN Germany did not enter into a direct contractual relationship for the MAN engines installed in the Vessels, they did enter into such a direct contractual relationship for three other batches of engines that are not the subject of the current suit. This suit is not the first time that the parties have found themselves at legal loggerheads. One round of ICC arbitration, commenced in September 2013 between Skaugen Norway and Skaugen Singapore, and MAN Germany, concluded that the parties had not

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10 Nijsen's 1st affidavit at p 338.

11 Nijsen's 1st affidavit at p 340.

12 Nijsen's 1st affidavit at p 342.

13 Nijsen's 1st affidavit at p 345.

concluded a binding settlement agreement. The parties are currently separately engaged in arbitration in the Danish Institute of Arbitration, arbitration in the ICC, and litigation in the Norwegian courts. GATX and some Skaugen entities had also purportedly assigned their claims to the plaintiffs, and there is some controversy over whether the assignors had claims to begin with. I deal with these facts more fully later on in the judgment.

The pleadings and arguments

16 The plaintiffs, in their statement of claim, plead that representations were made in the PPM, FSI and FATs that the MAN engines consumed fuel at a certain rate, but these were false; and the plaintiffs were induced to rely and did rely on those representations. The plaintiffs have also provided particulars of alleged negligence and fraud.

17 The defendants applied (Summons No 3879 of 2015 is MAN Germany's application while Summons No 5334 of 2015 is MAN Norway's application) to set aside service *ex juris* of the writ; alternatively for proceedings to be stayed on the grounds of *forum non conveniens*; and in the further alternative, for a stay on case management grounds pending the determination of other proceedings. They argue that the claim does not fall within any of the gateway provisions enumerated in O 11 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed): the plaintiffs are not the proper claimants; none of the relevant acts or omissions constituting the alleged tort had occurred in Singapore (O 11 r 1(*f*)(i)); the damage allegedly suffered did not occur in Singapore (O 11 r 1(*f*)(ii)); and the alleged cause of action did not arise in Singapore (O 11 r 1(*p*)). Singapore is also not the *forum conveniens* – Germany or alternatively Norway is the appropriate forum. Lastly proceedings should be stayed pending the resolution of disputes elsewhere.

18 The plaintiffs resist the defendants' application and argue that O 11 r 1 is satisfied: the torts occurred at least in part in Singapore and damage has been suffered in Singapore. The defendants have not discharged their burden of showing that Singapore is the *forum conveniens* – and in this respect due regard must be had for the recent establishment of the Singapore International Commercial Court ("SICC"). The proceedings should not be stayed on case management principles because the other proceedings pertain to different subjects.

The issues

19 I shall deal with the following issues:

(a) What is the test for the assumption of long-arm jurisdiction by the Singapore High Court in light of the establishment of the SICC?

(b) Do the plaintiffs have the requisite *locus standi*?

(c) What is the applicable law?

(d) Do the plaintiffs have a good arguable case that their claim satisfies one or more of the limbs of O 11?

(e) Would the SICC have jurisdiction for the purposes of applying *Spiliada*?

(f) Is Singapore the *forum conveniens*?

What is the test for the assumption of long-arm jurisdiction by the Singapore High Court in light of the establishment of the SICC?

20 The parties were in agreement that O 11 r 1 of the Rules of Court applies to the service *ex juris* of writs. But the parties differed over how the

principles enunciated in *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") should apply, and in particular whether less weight should be placed on certain factors because of the recent establishment of the SICC.

21 I pause to briefly set out the law as it currently stands. Service *ex juris* will be allowed to stand if and only if: the plaintiff shows a good arguable case that its claim falls within one of the limbs of O 11 r 1 (*Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd* [1999] 3 SLR(R) 1156 ("*Bradley Lomas*") at [14]); the plaintiff's claim has a sufficient degree of merit, that is, there is a serious issue to be tried (*Bradley Lomas* at [14]); and Singapore is the *forum conveniens* (*Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications*") at [26]). In this respect, if a plaintiff can show a good arguable case that his tort claim falls within one of the limbs of O 11 r 1, he would *a fortiori* satisfy the lower standard of there being a serious issue to be tried (*Bradley Lomas* at [18]).

22 I am bound to apply the above – O 11 r 1 is subsidiary legislation; while *Bradley Lomas* and *Zoom Communications* are decisions of the Court of Appeal. The establishment of the SICC does not alter the applicable legal principles, at the High Court level, in respect of the long-arm jurisdiction of the High Court (but see [141]–[145] below). But a factors-based test is applied to determine if Singapore is the *forum conveniens*. A factors-based test for adjudication is, according to Sunstein, marked by several features, some of which include: multiple and diverse relevant criteria; the difficulty of describing relevant factors *ex ante*; and pertinently the absence of a clear, *a priori* sense of the weight of the criteria (Cass R Sunstein, "Problems with Rules", (1995) 83 Cal L Rev 953 at pp 998–999). This is confirmed by case law. *BDA v BDB* [2013] 1 SLR 607 held that the *Spiliada* test is a factors-based test, with the weight to be placed on the various factors varying with

each factual matrix; a factor that proves to be the tipping point in one case might not be that important in another (at [24]). *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 held that the weight of the various connecting factors is not a numbers game and it is legal significance which is decisive (at [85]); as such, an appellate court would not interfere with what is an exercise of discretion by a lower court unless a judge has misdirected himself as a matter of principle; or had taken into account matters he should not have taken into account or had not taken into account matters which he ought to have taken into account (at [84]).

23 It is therefore perfectly consistent with the factors-based *Spiliada* test for a court to take the presence of the SICC into account in determining whether Singapore is the *forum conveniens*. The *raison d'etre* of the SICC is the provision of an "internationally accepted dispute resolution procedural framework for the resolution of international commercial disputes in accordance with substantive principles of international law" (Report of the Singapore International Commercial Court Committee (29 November 2013), last accessed on 9 March 2016 and available at https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex%20A%20-%20SICC%20Committee%20Report.pdf ("Report of the SICC Committee") at para 14); and to that end, amongst other things, foreign counsel may appear in the SICC (s 36P of the Legal Profession Act (Cap 161, 2009 Rev Ed); foreign law may be determined on the basis of submissions rather than proof (O 110 r 25 of the Rules of Court); and International Judges from both common law and civil law jurisdictions have been appointed (pursuant to Art 95(4)(c) of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint)).

24 In the context of *Spiliada*, and depending on the exact facts of the case, it is conceivable for certain factors to have less weight because of the presence of the SICC. For instance, the ability of foreign counsel to directly submit on foreign law, without the need for the content of foreign law to be proven through expert evidence, could obviate the inconvenience of trying a claim that is governed by foreign law.

25 Nonetheless, the presence of the SICC should affect the weight assigned to *Spiliada* factors in the context of the assumption of long-arm jurisdiction if and only if the case is transferred from the High Court to the SICC upon the plaintiff successfully resisting the application to set aside service *ex juris*; and for the weight assigned to *Spiliada* factors in the context of a stay on the grounds of *forum non conveniens*, likewise if and only if the case is transferred from the High Court to the SICC upon the plaintiff successfully resisting the application for a stay. This must necessarily follow – if the case is not transferred upon successful resistance then the court ought not to have allowed the presence of the SICC to influence the weight assigned to the *Spiliada* factors in the first place.

26 I deal with the provisions relating to the transfer of cases from the High Court to the SICC. Section 18A of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") states that the SICC is a division of the High Court; s 18D of the same provides for the SICC having jurisdiction where (*a*) the action is international and commercial in nature; (*b*) the action is one that the High Court may hear and try in its original civil jurisdiction; and (*c*) the action satisfies such other conditions as the Rules of Court may prescribe. Section 18J(2) of the SCJA in turn states that the High Court may transfer a case commenced in the High Court to the SICC in accordance with the Rules of Court. O 110 r 7(1)(*a*) of the Rules of Court in turn supplements s

18D of the SCJA and states that the SICC has jurisdiction where the claims between the plaintiffs and the defendants named in the originating process when it was first filed are of an international and commercial nature; while O 110 r 7(1)(*c*) states that the Court has jurisdiction if the parties do not seek any relief in the form of or connected with a prerogative order. O 110 r 7(2)(*a*) states that the SICC has the jurisdiction to hear and determine a case transferred to it under O 110 r 12. O 110 r 12(1) in turn provides that a case commenced in the High Court may be transferred to the Court, and vice versa. O 110 r 12(4) in particular states that:

> A case may be transferred from the High Court to the Court only if the following requirements are met:
>
> (*a*) the High Court considers that —
>
> (i) the requirements in Rule 7(1)(a) and (c) are met; and
>
> (ii) [Deleted by S 756/2015 wef 01/01/2016]
>
> (iii) it is more appropriate for the case to be heard in the Court;
>
> (*b*) either —
>
> (i) a party has, with the consent of all other parties, applied for the transfer in accordance with Rule 13; or
>
> (ii) the High Court, after hearing the parties, orders the transfer on its own motion.

27 O 110 r 7(2)(*a*) of the Rules of Court expressly provides for the SICC having jurisdiction if a case is transferred to the SICC from the High Court under O 110 r 12. This could suggest that the question of the internal allocation of jurisdiction between the High Court and the SICC as a division of the High Court must be determined cleanly and sequentially only after the question of the (long-arm) jurisdiction of the High Court has been answered; and this could be argued to be a bar to the application of the *Spiliada* principles with a transfer to the SICC in mind. This is a position that Professor Yeo Tiong Min SC could be construed to have taken: the High Court should

decide the question of its own jurisdiction (in the private international law sense) before deciding if the case should be transferred to the SICC (Yeo Tiong Min SC, "Staying Relevant: Exercise of Jurisdiction in the Age of the SICC", Eighth Yong Pung How Professorship of Law Lecture 2015 at para 41, available at http://law.smu.edu.sg/sites/default/files/law/CEBCLA/YPH-Paper-2015.pdf and last accessed on 9 March 2016 ("*Yeo Tiong Min*")).

28 I do not agree with such a strict separation. The application of the doctrine of *forum conveniens* must keep up with the times, not just in terms of technological advancement but also with respect to institutional advances in dispute resolution. The SICC is at the cutting-edge in the latter regard.

29 The requirement of the local forum being the *forum conveniens* for the assumption of long-arm jurisdiction in fact pre-dates the *Spiliada* decision and has a long pedigree: in *Strauss and Co v Goldschmid* (1892) 8 TLR 512 it was held that "the convenience of the action being tried here or in the foreign country must… be considered" (at 513); in *Rosler v Hilbery* [1925] Ch 250 it was held that a court, in exercising its discretion whether to allow service *ex juris* would in particular "pay attention to what is the forum conveniens" (at 259); and in *Mauroux v Soc Com Abel Pereira Da Fonseca SARL* [1972] 1 WLR 962 it was held that the O 11 requirement that the case must be a proper one for service out of the jurisdiction "must include the issue of forum conveniens" (at 965B). This is because the ability to assume long-arm jurisdiction is a statutory exception to the general rule that a defendant must be personally served with a writ within the territory in order for a court to assume jurisdiction; and it was meant to mitigate injustice to local plaintiffs who could not personally serve a writ ("British Precedents for Due Process Limitations on In Personam Jurisdiction", (1948) 48 Colum L Rev (author unknown) at p 607). But as a counterbalance the courts were mindful that they ought to be

"exceedingly careful" and should seriously consider whether "[the] Court ought to put a foreigner who owes no allegiance here, to the inconvenience and annoyance of being brought to contest his rights in this country" (*Société Générale de Paris v Dreyfus Brothers* (1885) 29 ChD 239 at 242–243). As a matter of brute empirical fact, the level of inconvenience and annoyance suffered by defendants has been decreasing: journeys that took days by ocean liner now take hours by plane; letters took weeks to arrive but emails are now instantaneous. Collins criticised in 1972 what he perceived to be "a tendency in the recent cases… to be somewhat less strict than what the authorities require" (Lawrence Collins, "Some Aspects of Service Out of the Jurisdiction in English Law", (1972) 21 Int'l & Comp LQ 656 at p 659) but with respect increasing laxity would have been justified by technological advancement. The Singapore Court of Appeal has gone so far as to recognise that "[t]he physical location of witnesses is no longer a vital or even very material consideration with the advent of video-link technology… [t]his applies a fortiori to the physical location of documents" (*Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 ("*Siemens*") at [11]). In much the same vein the SICC "represents a new way of thinking about international dispute resolution" and is the "first court of its kind in Asia that caters to foreign parties and foreign laws" (*Singapore Parliamentary Debates, Official Report* (4 November 2014) vol 92 (Hri Kumar Nair, Member of Parliament for Bishan-Toa Payoh Group Representation Constituency and K Shanmugam, Minister for Law respectively)).

30 It would be inexcusably artificial to exclude the SICC from the *Spiliada* calculus. The tail should not be allowed to wag the dog; and technical intricacies should not determine the substantive content of the law where this would be contrary to common reason. I note that Prof Yeo Tiong Min SC has

also taken the view that "the common law requires all factors to be taken into consideration, and this must include the possibility of transfer to the SICC" (*Yeo Tiong Min* at para 47), and, to reiterate, the possibility of transfer to the SICC must be considered simultaneously with the High Court's assumption of long-arm jurisdiction, lest the court take into account considerations that it ought not have taken into account were it to transpire that proceedings would not or ought not be transferred to the SICC.

31 After I reserved judgment, *Accent Delight International Ltd v Bouvier, Yves Charles Edgar* [2016] SGHC 40 ("*Accent Delight*") was released. This decision is in fact perfectly consistent with the foregoing paragraphs of this section. The plaintiffs claimed that they were wrongfully overcharged for fine art. The defendants were served as of right, and applied to stay proceedings on the ground of *forum non conveniens*. The High Court, in the initial portion of the judgment, did not appear to consider the SICC as part of the *Spiliada* calculus, but from the case report it appears that this is because the parties did not argue that *Spiliada* ought to be applied differently in light of the SICC. Further submissions on whether the case ought to be transferred to the SICC were requested, and the court thereafter held towards the end of the judgment that "the perceived advantages (to the defendants) or disadvantages (to the plaintiffs) of Switzerland being the forum will be levelled out if this Suit remains in Singapore but is transferred to the SICC" (at [111]). This is a clear reference to the SICC being taken into consideration as part of the *Spiliada* calculus.

32 I shall consider the issue of transfer alongside *forum conveniens* in a later section.

Do the plaintiffs have the requisite *locus standi*?

33 The plaintiff must show a good arguable case that its claim falls within one of the limbs of O 11 r 1 and this is but an aspect of that. Nonetheless this is a threshold issue because the plaintiffs' tort claim would fall *in limine* if they do not have the requisite *locus standi*.

34 The Vessels underwent several changes in ownership. Neither Skaugen Norway nor Skaugen Singapore have ever had direct ownership of the Vessels — the Vessels were only delivered between October 2002 and 2003; the rights under the first tranche of shipbuilding contracts were assigned to Somargas Cayman in August 2000; and Vintergas was the entity which contracted with the Chinese shipbuilders for the second tranche of shipbuilding contracts. Somargas Cayman and Vintergas entered into novation agreements with Somargas Ltd, a Hong Kong company 50% owned by Skaugen Norway and 50% owned by GATX (hereinafter "Somargas I"), in March 2002 to transfer all their respective rights, benefits, obligations and liabilities under all six contracts to Somargas I. Somargas I entered into an earnings before interest, tax, depreciation and amortization ("EBITDA") agreement with Norgas Limited and Norgas Carriers AS in June 2002 to pool the earnings and expenses of the Vessels.

35 In December 2004, Skaugen Singapore (then known as Norgas Carriers Pte Ltd) was awarded Approved International Shipping Enterprise ("AIS") status by the Maritime and Port Authority of Singapore; in order to obtain tax breaks, the Skaugen Group agreed to conduct and manage their shipping business out of Singapore. In December 2009, Somargas I incorporated a Singapore subsidiary, Somargas II Pte Ltd ("Somargas II"); and later on the same month Skaugen Norway transferred its 50% stake in

Somargas I to Somargas II. In February 2011, Somargas I transferred its ownership in the vessels and allegedly all its assets and liabilities to Somargas II. The Vessels thereafter were re-registered under the Singapore flag. Also in February 2011, Somargas II and Norgas Carriers AS entered into a ship management agreement to manage the vessels. In December 2011, Somargas I was liquidated; shares in Somargas II were equally distributed between Skaugen Singapore and GATX (which subsequently transferred these shares to GATX Asia Investments Pte Ltd ("GATX Asia"). In January 2012, Skaugen Singapore, Somargas II and other entitles in the Skaugen Group entered into a Norgas Pool Agreement in order to obtain the best possible commercial market terms for vessels in the pool. The pool manager is Norgas Carriers Pte Ltd, a Singapore-incorporated company in the Skaugen Group. In April 2013, Skaugen Norway and other entities in the Skaugen Group entered into an agreement with GATX and GATX-related entities to restructure: Skaugen Singapore would purchase GATX Asia's 50% stake in Somargas II; three vessels would be fully owned by three separate GATX-related entities, all incorporated in Singapore; and three vessels would remain fully owned by Somargas II. Somargas II then sold the Norgas Sonoma to SGPC1 Pte Ltd in June 2013 for refinancing purposes; Skaugen Marine Investment Pte Ltd ("Skaugen Marine"), a wholly owned subsidiary of Skaugen Norway, owns 35% of the shares in SGPC1. In April 2014, Skaugen Singapore transferred its shares in Somargas II to Skaugen Marine. In November and December 2014, Somargas II sold Norgas Ptaluma and Norgas Napa to Gasmar AS and Zhonghua Hull No 451 LLC respectively, and both were bareboat chartered back to Skaugen Marine.

36 The plaintiffs assert that the current and former owners and charterers of the vessels have assigned their rights, title and interest in the claims against

MAN, including MAN Germany and MAN Norway, to the plaintiffs. The documentary evidence discloses two agreements. A Claims Transfer Agreement was entered into between GATX Corporation (not to be confused with GATX Third Aircraft Corporation, for which "GATX" has been defined as shorthand) and Skaugen Norway on 23 June 2014, governed by New York law. This agreement does not mention anything about GATX Corporation acting on behalf of its subsidiaries, but the first clause of the preamble does say that "GATX and [the Skaugen Group], directly and indirectly through their subsidiaries, have been partners in a joint venture related to the manufacturer ownership and operation of [the Vessels] with a share of 50 % each…".[14] The plaintiffs have since filed an affidavit exhibiting letters from the GATX subsidiaries (dated 25 February 2016) that as at the date of the Claims Transfer Agreement, they did transfer and did authorise GATX Corporation to transfer the claim to Skaugen Norway.[15] An assignment agreement was entered into between Skaugen Singapore, Somargas II and Skaugen Marine on 27 January 2015 and purported to assign the claims of Somargas II and Skaugen Marine to Skaugen Singapore; and one Morits Skaugen, who affirms that he is the Chief Executive Officer of Skaugen Norway and Chairman of the Skaugen Group, signed the assignment agreement on behalf of all three parties. Despite all three parties being Singapore-incorporated companies, the assignment agreement was stated to be governed by the laws of Norway. The assignment agreement does not refer to Somargas II and Skaugen Marine acting on behalf of any other Skaugen-related entity. Clause A of the preamble does however state that "the Parties constitute current or former – direct or indirect – owners or charterers of [the

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14 Skaugen's 1st affidavit at p 691.

15 Khoo Eu Shen's 4th affidavit, exhibiting Skaugen's intended 5th affidavit, at paras 11–13

Vessels]…".[16] The plaintiffs assert on affidavit that Somargas I transferred its ownership in the Vessels as well as all its assets and liabilities to Somargas II in or around February 2011; and Somargas II was successor to the business of Somargas.

37 The defendants point out that the plaintiffs have never had any claims vested in them in their own capacity; cannot claim for reflective loss; have not adduced any evidence that Somargas Cayman or Vintergas have assigned any chose of action and the mere transfer of physical property does not transfer the chose of action in respect thereof; nor any evidence that Somargas I had assigned any claims to Somargas II. While Somargas II was a previous owner, it is inconceivable for Somargas II to have taken ownership in reliance on any of the purported representations made by the defendant.

38 I preface by analysing the conflicts of law issues thrown up by the assignments. The plaintiffs neither pleaded nor led any evidence on the content of any foreign law. The defendants have not of course filed their defences, but they have in their submissions pointed out that the plaintiffs have not shown that the assignments were effective under their proper laws.

39 The defendants' submissions in this regard are simplistic. There are two choice of law rules applicable. The first is that the assignability of a cause of action is governed either by the law which governs that cause of action or the *lex fori*. In the leading case of *Trendtex Trading Corp v Credit Suisse* [1982] AC 679 ("*Trendtex*"), the House of Lords applied English law to determine the issue of assignability, but it is unclear if English law was applied *qua lex fori* or the law of the cause of action. I note that an Australian

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16 Skaugen's 1st affidavit at p 695.

case, *Salfinger v Niugini Mining (Australia) Pty Ltd (No 3)* [2007] FCA 1532, has construed *Trendtex* as standing for the latter, but I need not decide the point because Singapore law is both the *lex fori* and the *lex causae* (see [47] and [87] below). The second is that the intrinsic validity of an assignment is determined by the proper law of the assignment (*Republica de Guatemala v Nunez* [1927] 1 KB 669).

40 In any event the defendants have not adduced any evidence of the content of any foreign law; this brings the presumption of similarity into play. There is a distinction between the rule of pleading that the pleading of foreign law is voluntary and the rule of evidence that where the content of foreign law is not proved or not sufficiently proved it is presumed to be similar to the substantive *lex fori* (implicit in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT Holdings*") at [60] and [63]; see also Tan Yock Lin, "Rationalising and Simplifying the Presumption of Similarity of Laws" (2016) 28 SAcLJ 172 particularly at para 1). Therefore it is the second rule – the rule of evidence – that is at play here. As the authorities stand it is clear that a defendant who raises the spectre of foreign law must "prove the difference" (*EFT Holdings* at [61]); there is a "presumption that unless the contrary be proved the general law of a foreign country is the same as the [*lex fori*]" (*The Parchim* [1918] AC 157 at 161). It is incumbent on the defendants, having raised foreign law, to prove the content thereof. Not having done so, I am impelled to presume that the content of foreign law is identical to that of Singapore law. Furthermore I note that the plaintiffs have not been accorded the opportunity of adducing expert evidence with respect to the content of any foreign law on this issue and if the presumption of similarity were not applicable I would have adjourned the matter to allow the plaintiff to adduce the said evidence.

41 A "good arguable case" (*Bradley Lomas* at [14]) entails one side having "a much better argument on the material available" but at the same time the court "must be concerned not even to appear to express some concluded view on the merits" (*Canada Trust Co v Stolzenberg* [1998] 1 WLR 547 at 555F–G).

42 I emphasise "case", and the word is reproduced in O 11 r 2(2) of the Rules of Court. The interlocutory battle over jurisdiction is fought over affidavits, and it would be neither proper nor opportune for a court to examine particular sub-aspects of a plaintiff's case with a fine-tooth comb. A court ought to embark on a broad-brush enquiry into whether the plaintiff has made out a good arguable case that the claim falls within a particular limb of O 11. If a defendant contends that only certain isolated aspects of the plaintiff's claim are questionable, this should not ordinarily be conflated with the assumption of long-arm jurisdiction, and should be dealt with after the jurisdictional stage through a summons to strike out specified paragraphs in the statement of claim. If this were not the position, the burden on the plaintiff at the jurisdictional stage would be immense, and a failure to defend a particular point would be tantamount to that point being struck out; proceedings would also be protracted due to plaintiffs being obliged to defend every single point for fear that a particular point may turn out to be crucial later. This clearly contradicts the general principle that a court cannot express a concluded view on the merits (*supra* at [41]).

43 Such is the case here. What is clear and beyond dispute is that Somargas II was from February 2011 to April 2013 direct owners of all the six Vessels and is currently the bareboat charterer of two; and Somargas II was one of the parties to the assignment agreement which purported to assign claims to Skaugen Singapore. On the broad point of whether Somargas I did

indeed assign its claims (from before Somargas II was direct owner) to Somargas II, the defendants make much of the lack of documentary evidence. But the lack of documentary evidence at this stage is not *ipso jure* fatal. It is true that a statutory assignment must be in writing (s 4(8) of the Civil Law Act (Cap 43, 1999 Rev Ed)) but an equitable assignment does not. There does not even need to be an agreement between the assignor and assignee: an equitable assignment need take no particular form and equity has always looked to the intent rather than the form (*Coulter v Chief Constable of Dorset Police* [2004] 1 WLR 1425 at [12]). All that is needed is a sufficient expression of an intention to assign (*ibid*) and conduct may be adequate evidence of such an intention (see *eg, Damayanti Kantilal Doshi v Indian Bank* [1998] 3 SLR(R) 851, cited in Tan Yock Lin, *Personal Property* (Academy Publishing, 2014) ("*Tan Yock Lin*") at para 18.047). The defendants submit that the transfer of physical property does not transfer the chose of action in respect thereof, and cited Marcus Smith QC & Nico Leslie, *The Law of Assignment* (Oxford University Press, 2nd Ed, 2013) in support. But the particular paragraph relied upon (para 2.72) was cited out of context and is reproduced here:

> It is possible to describe a chose of action in a single sentence: a chose in action 'describes all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession'. It follows that because the rights in a chose cannot be enforced by taking physical possession, the essence of a chose in action is that is a right or interest in an intangible.

The paragraph was concerned with defining what a chose of *action* is (as opposed to a chose in possession: see also *Tan Yock Lin* at para 01.11). Indeed as conduct may be adequate evidence of an intention to assign, the fact of transfer may be sufficient to ground an inference that Somargas I did intend to assign its claims to Somargas II. Morits Skaugen did aver that all assets and liabilities – not just the physical Vessels – were transferred from Somargas I to

Somargas II, and it was the understanding that Somargas II would thereafter operate or continue the business interests of Somargas I. The defendants do not raise any evidence to contradict this. It would have been unlikely for Somargas I to have been liquidated in December 2011 without ensuring that all valuable assets were transferred or otherwise assigned to Somargas II, especially as MAN Germany had issued a press release in May 2011 informing the public at large about possible irregularities.

44 I do however note that there is some doubt over the claims post-April 2013. Three of the Vessels were transferred to GATX-related subsidiaries; one has since been sold to SGPC1 (which is 35% owned by Skaugen Marine); and the remaining two were sold but the purchasers were not identified. With respect to the GATX-related subsidiaries there was no mention of GATX Corporation acting on their behalf when the Claims Transfer Agreement was entered into in June 2014. The three subsidiaries which are the current owners of three of the Vessels have written on 25 February 2016 that they did indeed authorise GATX Corporation but this is almost two years after the fact. There is also neither any averment nor indication that SGPC1, owner of one Vessel, assigned its claim to the plaintiffs. But I have already stated that a court ought to take a broad-brush approach and not be bogged down in minute points.

45 I also hold that the purported assignments are not void due to maintenance or champerty. This is because there is a well-recognised exception, namely, a genuine and legitimate commercial interest in the assignment of the right to litigate (*Trendtex Trading Corp v Credit Suisse* [1982] AC 679).

46 I therefore conclude that the plaintiffs have shown a good arguable case that they do have the requisite *locus standi*.

What is the applicable law?

47 This is an issue which must be determined before O 11 is considered because of the double actionability rule – the (alleged) wrong must be actionable not only under the *lex fori* but also the *lex loci delicti* (*Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*") at [53]; but see also [93] below); but subject to the exception that the *lex fori*, *lex loci delicti*, or a third law may solely apply if the *lex fori* and/or *lex loci delicti* are purely fortuitous and the application of either or both would result in injustice and unfairness ("the flexible exception") (*Rickshaw Investments* at [58]). As an aside, the *lex loci delicti* is literally Latin for the law of the place where the wrong was committed (*Rickshaw Investments* at [53]).

48 The plaintiffs and defendants disagreed on where the location of the tort was in the context of O 11 r 1(*p*), that is, whether the claim is founded on a cause of action arising in Singapore, and repeated much the same arguments in the context of the applicable *lex loci delicti*. The parties were agreed as to the test to be applied, but the plaintiffs submitted that this is Germany and German law; the defendants submitted that this is Singapore and Singapore law.

49 The plaintiffs have, in their statement of claim, pleaded particulars of the torts of fraudulent misrepresentation and negligent misrepresentation. I pause to note that, under the common law rules of conflict of laws, the identification of the place where the tort occurred is an issue that is governed by the *lex fori* (*Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1996] 1 WLR 387 at 392C); and it cannot be otherwise because the forum cannot apply a foreign law that has yet to be identified.

50 The test for where a misrepresentation has occurred is set out in *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*"):

(a) The general test for where a tort has occurred is looking back at the events constituting the tort and asking where in substance the cause of action arose ("the substance test") (at [90], citing *Distillers Co (Biochemicals) Ltd v Laura Anne Thompson* [1971] AC 458 at 468);

(b) This is crystallised into a more certain rule for some torts in some circumstances. For misrepresentations, the place of the tort is in general the place where the representation is received and acted upon (at [91], citing *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The "Albaforth")* [1984] 2 Lloyd's Rep 91 ("*The Albaforth*") at 92);

(c) Where the misrepresentation occurred in one jurisdiction to an unspecified class of persons and was received and relied upon in a second jurisdiction, the place of the tort is the former (at [91], citing *Cordova Land Co Ltd v Victor Brothers Inc* [1966] 1 WLR 793 ("*Cordova Land*") at 801).

(d) Where receipt and reliance occur in different jurisdictions, the court must fall back on the substance test (at [93] and [94]).

51 It may be argued that the circumstances fall within the rule in *Cordova Land*. But there are insuperable difficulties in ascertaining the exact location where reliance occurred. For instance it was Skaugen Norway that acted on behalf of Somargas Cayman and Vintergas initially in selecting the MAN engines – did reliance take place in Norway, where Skaugen Norway was incorporated, or did reliance take place in the Cayman Islands where

Somargas Cayman and Vintergas were incorporated? Furthermore the reliance comprises not only the initial selection of engines but also the use of the ships equipped with the engines (see [79] below), and it is impossible to point to one location where the ships were used.

52 There is also some evidence that receipt and reliance occurred in different jurisdictions with respect to the FAT results. The documentary evidence discloses that representatives from "Skaugen" (it is unclear which Skaugen entity) were present at three FATs and representatives from Skaugen-related entities were present at the other three FATs. The FAT results were therefore received in Germany. However none of the pleaded acts of reliance took place in Germany.

53 I am therefore impelled to apply the substance test, and in this regard I stress that the entire point of the adoption of the substance test is avoiding the "mechanical solution involved in an outright choice between the place of acting and the place of harm" (*Dicey and Morris on the Conflict of Laws* vol 2 (Lawrence Collins gen ed) (Stevens & Sons Limited, 11th ed, 1987) ("*Dicey and Morris*") at p 1387).

54 I have already dealt with the difficulty of pinpointing an exact location whereupon reliance occurred (at [51] above). It is also difficult to pinpoint a definitive location where receipt occurred. The Fuel Information System document was received by the Chinese shipbuilders and then transmitted to Skaugen Norway. Does receipt refer to the place where the misrepresentation was initially received by an intermediary, in which case receipt was in China, or the place where the misrepresentation was eventually transmitted to, in which case receipt was in Norway? These difficulties are compounded where what is essentially the same representation is contained and repeated in three

documents, with each document being received separately. It is impossible to point to *the* place of receipt when the PPM was received in one of Norway or Denmark (the parties disagree on this); the FSI was received in China or Norway; and the FAT results were received in Germany.

55 Amid the miasma of uncertain connections with respect to receipt and reliance there remains one constant: all the purported representations were made by MAN Germany; the FATs took place in Germany; and the PPM, FSI and FAT results were authored in Germany, all of which essentially made and mutually reinforced the misrepresentation that fuel consumption was lower than what the engines actually consumed. Looking back on the series of events constituting the tort, the cause of action in substance arose in Germany. German law is the *lex loci delicti*.

56 I add that it would not be justified for me to analyse the misrepresentations on a document-by-document basis. This is wholly unsupported by the authorities. "Where a number of statements form a single representation because they are connected by express reference or identity of subject-matter, they must be considered together to ascertain whether their joint effect is a true or false representation" (Spencer Bower, Turner & Handley, *Actionable Misrepresentation* (Butterworths, 4th Ed, 2000) ("*Spencer Bower*") at para 93). This is *a fortiori* for what is essentially a single representation that is repeated across three documents, and whereupon acts of reliance cannot be cleanly disentangled and attributed to individual documents.

57 Another potential counterargument is that the tort of misrepresentation, whether fraudulent or negligent, is complete only when acted upon (*Briess v Woolley* [1954] AC 333 at 353; *Goldrich Venture Pte Ltd and another v*

Halcyon Offshore Pte Ltd [2015] 3 SLR 990 ("*Goldrich*") at [41]); and because various entities acted upon the misrepresentation at various times, each instance of reliance by each entity must be analysed separately, and *The Albaforth* must apply to each aforesaid instance, namely that the place of the tort is where the representation is received and acted upon ("the separate tort thesis"). The plaintiff did not rely on the separate tort thesis explicitly, but argued that the place of the tort must be taken to be in Singapore because the Vessels were transferred to and continue to be owned by Singapore entities, continue to be registered and sail under the Singapore flag; and damage arising from excess fuel consumption is suffered in Singapore.

58 There is no authority that the separate tort thesis is applicable in general to all torts (depending on when the tort in question is taken to be complete) or in particular to the tort of misrepresentation. The only tort that the thesis applies to is defamation, whereby each instance of publication gives rise to a separate tort (*Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 ("*Lee Hsien Loong*") at [34] and [35], in turn citing *Berezovsky v Michaels* [2000] 1 WLR 1004 ("*Berezovsky*") at 1002–1003). But publication is quantitative in a way that reliance is not. If the same defamatory article is published 500 times in Malaysia and 500 times in Singapore, it is easy to conclude that 500 torts have occurred in Singapore and 500 in Malaysia. Acts upon representations cannot and should not be counted in the same way. Take the simple case of a seller misrepresenting that his goods are of a better quality than they turn out to be. The buyer acts upon that misrepresentation by entering into a contract with the seller in Singapore stipulating that payments are to be made in two tranches, and thereafter remitting funds situated in Swiss bank account for the first tranche and funds situated in a Hong Kong bank account for the second tranche. It would be contrived to state that three torts

have occurred. On the instant facts, these difficulties are exacerbated by the plaintiffs acting upon the misrepresentations through the use of the Vessels (see also [79] below), which consume fuel at a higher rate than that represented. Is a court to count each trip taken by each of the Vessels as a separate tort? What should be construed as a trip?

59 Quite apart from the artificiality and difficulty in counting distinct torts, allowing a plaintiff to avail himself of the separate tort thesis would undermine the *raison d'etre* of our jurisdictional rules as to when a defendant outside of the jurisdiction may be sued in Singapore. The entire point of these jurisdictional rules is the recognition that a foreigner should not easily be put to the inconvenience and annoyance of being brought to contest his rights in Singapore (see [28] above). A plaintiff, defamed on an Internet blog, as a starting point will be able to claim in defamation in the Singapore courts so long as if he can show that the article was downloaded and accessed once in Singapore, and he confines himself to claiming for that one publication. If the article has been published a thousand times in Malaysia but only once in Singapore, recourse may of course be had to the doctrine of abuse of process (*Lee Hsien Loong* at [30]); but the doctrine is one of last resort, and if the root of the problem is the separate tort thesis then it would surely be simpler to not apply the thesis in the first place. This is exactly what was done in England after *Berezovsky* was handed down by the House of Lords. The separate tort thesis has been overruled legislatively in England by s 8 of the Defamation Act 2013 (c 26); this was passed partly in response to criticism that the English courts were becoming the preferred location for defamation actions (Joint Committee on the Draft Defamation Bill, *Draft Defamation Bill: Report* (HL Paper 203; HC 930-I, 19 October 2011 at paras 54–56).

60 Indeed the separate court thesis was not applied by the Court of Appeal in *JIO Minerals*. The first appellant sent a letter of offer via email to the respondent, which contained a representation that the first appellant had a high grade iron ore reserve amounting to one million tonnes. The respondent acted upon the representation twice, by remitting funds from India and conducting drilling works in Indonesia. The court applied the substance test and concluded that the "place of the *tort* was Indonesia" (emphasis added), thereby holding that one tort governed by Indonesian law arose. Significantly, the court did not hold that two torts had arisen from the two acts of reliance, as this would have necessitated each tort being governed by its own *lex loci delicti*.

61 I therefore decline to extend the separate tort thesis to misrepresentation; and particularly in the light of the different direction English law has taken, it may perhaps be opportune for a future Court of Appeal to relook the applicability of the separate tort thesis to defamation.

62 I conclude this section by declining to apply the flexible exception. I do not see any unfairness or injustice that would be occasioned by the application of either Singapore law or German law; and *Rickshaw Investments* makes it clear that a Singapore court "must not be quick to apply the exception" (at [57]).

Do the plaintiffs have a good arguable case that their claim satisfies one or more limbs of O 11?

63 The plaintiffs rely on O 11 rr 1(*f*)(i), 1(*f*)(ii) and 1(*p*). I deal first with whether a tort has arisen before dealing with each of the above limbs *seriatim*.

Has a tort arisen?

64 In order to satisfy O 11 r 1(*f*)(i), a plaintiff must show a good arguable case that he has a cause of action in tort (*Bradley Lomas* at [18]) and he would *a fortiori* satisfy the lower standard of there being a serious issue to be tried (*ibid*). The same must obtain for O 11 r 1(*f*)(ii). I note that the language is slightly different – (*f*)(i) refers to a claim "founded on a tort" whereas (*f*)(ii) refers to "damage… caused by a tortious act or omission". This is not a material difference. An act or omission can properly be described as being tortious only if a tort is actually made out.

Lex fori

65 The elements for fraudulent misrepresentation are: first, there must be a representation of fact made by words or conduct; second, the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff (restated, there must be inducement); third, it must be proved that the plaintiff had acted upon the false statement (*ie,* there must be reliance); fourth, it must be proved that the plaintiff suffered damage by so doing and fifth, the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true (*Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435 at [14]).

66 The elements for negligent misrepresentation are: first, the defendant must have made a false representation of fact; second, the representation induced actual reliance (see *e.g. Fong Maun Yee v Yoong Weng Ho Robert* [1997] 1 SLR(R) 751 at [52]); third, the defendant must owe a duty of care; fourth, there must be a breach of that duty of care; and fifth the breach must

have caused damage to the plaintiff (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100).

67 I deal first with whether there were false representations of fact; this is an element common to both species of misrepresentation. The PPM and FSI represented that fuel consumption was at a certain level and the FAT results represented that fuel consumption was lower than that stated in the aforementioned two documents. MAN Germany then admitted in a press release that there were possible irregularities during handover of four-stroke marine diesel engines, in that it was possible to externally influence fuel consumption values. MAN Germany then wrote to Norgas Carriers AS and Skaugen Norway, admitting that three MAN engines were externally influenced in an improper manner during FATs. I note that all the six MAN engines were identically designed, and all were manufactured and tested in the same factory operated by MAN Germany; it is therefore highly probable that the fuel consumption values for the other three MAN engines were similarly tampered with. The plaintiffs have undoubtedly shown on a good arguable case basis that there were false representations of fact.

68 I turn to inducement and reliance, issues which the parties had devoted much time to. Both are common elements to both species of misrepresentation. I deal first with the events surrounding the initial acquisition of the Vessels. Skaugen Norway, acting on behalf of Somargas Cayman, selected MAN Engines for the first four shipbuilding contracts after receiving the PPM. Skaugen Norway, acting on behalf of Vintergas, then selected MAN Engines for the subsequent two shipbuilding contracts after receipt of the PPM and the Fuel Information System document. The six engines were tested prior to delivery in 2001 and 2002. The FAT results

showed fuel consumption at certain levels, and Skaugen Norway accepted the engines.

69 With respect to the PPM, the defendants argue that there was a disclaimer: "for concrete projects you will receive the latest editions in each case with our quotation specification or with the documents for order processing" and therefore the PPM did not contain any actionable misrepresentations. Taken in isolation this may be the case; but the PPM was followed up with the FSI which confirmed the fuel consumption levels in the former (see [5] and [7] above). Furthermore the FAT results that were allegedly tampered with showed fuel consumption levels below those in the PPM and FSI. Cumulatively the three documents made essentially the same representation that the MAN engines consumed fuel at or below a certain rate. The disclaimer *per se* does not get the plaintiffs very far (see also [71] below).

70 The defendants had another string to their bow, and argued that the FSI was provided to the Chinese shipbuilders for the purpose of enabling the Chinese shipbuilders to choose the correct components for the construction of the vessels. They place much weight on the proposition that an indirect recipient of a statement can only bring a claim in misrepresentation if it can be shown that the representor intended for him to have acted in reliance on the statement (see also [77] below).

71 I have no quarrel with the mentioned proposition but it is inapplicable to the instant facts simply because Skaugen Norway directly received the PPM and Somargas Cayman and Vintergas (for which Skaugen Norway was acting on behalf of and whose claims have been assigned to the plaintiffs) directly received FAT results, and indeed the defendants do not dispute this. With respect to the FATs, the documentary evidence discloses that representatives

from "Skaugen" (it is unclear which Skaugen entity) were present at three FATs and representatives from Skaugen-related entities were present at the other three FATs. As I have mentioned the representations were such that they were essentially repeated across three documents, and the plaintiffs directly received two of them. What I do take issue with is the defendants' implicit position that the misrepresentations as to fuel consumption must be analysed on a document-by-document basis (a point I made at [56] above and repeat here).

72 Furthermore misrepresentations are regarded as continuing until they are acted upon (*Briess v Woolley* [1954] AC 333). Looking at events holistically, the plaintiffs (or Somargas Cayman and Vintergas which had assigned their claims to the plaintiffs) acted on the misrepresentations not just by initiating the chain of contracts that led to the installation of MAN engines in the Vessels, but by adhering to and causing the Chinese shipbuilders to adhere those contracts all the way to fruition and ultimately accepting the MAN engines when they were delivered (instead of exercising their contractual right to reject the engines, see [75] below).

73 The misrepresentations as to fuel consumption were undoubtedly material. The fuel consumption of a marine diesel engine is one of its important attributes: "[m]ateriality may be so clear and the probability of inducement so great that actual inducement may be found with little or no other evidence" (*Spencer Bower* at para 127). Additionally fuel consumption was of enough importance to the plaintiffs that the shipbuilding contracts with the Chinese shipbuilders contained provisions that provided for certain consequences to follow if fuel consumption was higher than expected (nevertheless see [75] below).

74 I now analyse the events after delivery, particularly the transfers of ownership to various Skaugen-related entities. The defendants essentially argue that representations were not made directly to subsequent successors in title, and the successors could not have relied on the representations in taking ownership or possession of the vessel and it was never within the defendant's reasonable contemplation that any successors would place any reliance. If at all only Somargas Cayman and Vintergas relied upon them; and the successors in title only took ownership because of corporate restructuring and not representations as to fuel consumption levels. The plaintiffs argue that misrepresentations do not have to be made directly; the defendants did intend for the misrepresentations to be received by successors in title; and the said successors did rely on the misrepresentations.

75 The defendants argue that the six shipbuilding contracts contained clauses which limited the loss suffered if fuel consumption was higher than expected and therefore successors in title cannot claim for their losses. Clause 5 of article I of the initial four shipbuilding contracts between Skaugen Norway and the Chinese shipbuilders which stated that "the [shipbuilder] guarantees that the fuel oil consumption of the Main Engine is not to exceed the chosen Main Engine Supplier's guaranteed specific fuel consumption…" Clause 3 of article III of the same spells out certain consequences if the fuel consumption "as determined by shop trial" (a clear reference to what in this judgment's parlance is a FAT) was greater than certain percentages:

Percentage	Consequence
3%	Contract price reduced by USD 90,000
Between 3% and 5%	Contract price reduced by USD 30,000 for each additional percent above 3% (pro-rated fractionally)

5% and above	Contract price reduced by USD 200,000, or the buyer may reject the vessel and rescind

76 I do not see how this assists the defendants. Firstly, the defendants are not privy to the contracts between the Chinese shipbuilders and either Skaugen Norway or Vintergas. Secondly, the clauses refer to fuel consumption "as determined by shop trial" and therefore implicitly assume the veracity of the FAT results. The clauses do not envisage the FAT results being tampered with and do not apply to losses flowing from such a scenario. Thirdly, assuming *arguendo* that the defendants can avail themselves of clauses in shipbuilding contracts despite not being privy to them, the clauses are not exclusion clauses that purport to exclude or limit liability for fraud or negligence on the part of a third party engine manufacturer.

77 The cases establish that the fact of a representation being made indirectly is not a bar, provided that the representation is made in the contemplation that the representation will continue in force and be acted on by that indirect representee (*Goldrich* at [43]). There is evidence that the defendants did not draw any distinctions between individual entities within the Skaugen Group, and knew that representations would be transmitted to and acted upon by those individual entities. There were indications right from the outset that Skaugen Norway would be acting on behalf of related entities. The first four shipbuilding contracts were novated by Skaugen Norway to Somargas Cayman prior to the Chinese shipbuilders entering into the first four supply contracts with MAN Germany; and it was Vintergas that entered into the subsequent two shipbuilding contracts. Despite this representatives from "Skaugen" were the ones who attended the FATs. Furthermore when MAN Germany wrote about the possible tampering, they wrote not just to the managers of the Vessels, but also directly to Skaugen Norway; and one letter

dated 22 June 2012 even explicitly stated that "[a]ccording to our information you [Skaugen Norway] were the initial owner of the engines…" despite the initial owners being Somargas Cayman and Vintergas. Therefore the successors in title, so long as they are Skaugen-related entities, are indirect representees within the contemplation of the defendants.

78 Nonetheless the manner in which a representee acts upon a representation must also be within the contemplation of the representor. Thus in *William Peek v Gurney* (1873) LR 6 HL 377, a fraudulent share prospectus circulated to the public was calculated to induce reliance only in initial subscribers and not purchasers who had bought through the stock exchange; but in *Possfund Ltd v Diamond* [1996] 1 WLR 1351, another case concerning a fraudulent prospectus, the court refused to strike out an action brought by aftermarket purchasers because there was expert evidence that the established purpose of a prospectus was no longer confined to inducing investors to become placees and extended to inducing the public to make aftermarket purchases.

79 However, a share in a company is not equivalent to a marine diesel engine. The former is an incorporeal chose in action (*Pacrim Investments Pte Ltd v Tan Mui Keow Claire* [2005] 1 SLR(R) 141 at [20] or at least something incorporeal and *sui generis* (*Tan Yock Lin* at para 19.002); the latter is a corporeal chattel. A distinction may have been drawn between initial subscribers and aftermarket purchasers of shares in companies; but it is doubtful if a similar distinction can or should be drawn between an initial purchaser and subsequent owners of marine diesel engines. A marine diesel engine is a corporeal object that is used to propel ships; and despite the defendants' protestations to the contrary the utilisation of a marine diesel engine to propel ships is surely something that was within their contemplation.

Indeed there is case authority that the use of a corporeal object that is the subject of a misrepresentation constitutes an act upon that misrepresentation. In *Langridge v Levy* (1837) 2 M & W 519, the plaintiff's father bought a gun from the defendant who fraudulently warranted the gun to have been manufactured by a reputable gun manufacturer and to be good, safe and secure. The plaintiff "used the gun, and thereby sustained the damage which is the subject of this complaint" (at 532); the defendant was held liable.

80 The plaintiffs have therefore shown a good arguable case that they were induced to rely, and did rely on the defendants' misrepresentations.

81 It also goes without saying that the successors in title have suffered damage: either from having had to purchase more fuel, or from a diminution of the market value of the Vessels due to the now public knowledge of the actual higher fuel consumption levels. The appropriate measure of damages is of course not an issue that is before me.

82 I now analyse elements specific to each species of misrepresentation. For fraudulent misrepresentation the plaintiffs must also show that the representation must be made with the knowledge that it is false or in the absence of any genuine belief that it is true. MAN Germany has admitted that there were indications that the fuel consumption values of three engines were "externally influenced in an improper manner during [FATs]" (at [14] above). It appears that MAN Germany had systematically tampered with FAT results, not only for the six engines that are the subject of this suit but for a plethora of other engines, as evidenced by the May 2011 press release and the subsequent criminal proceedings whereby MAN Germany was fined 8.2 million euros. The plaintiffs certainly have a good arguable case in this regard. Therefore the

plaintiffs have shown, on a good arguable basis, that all the elements for fraudulent misrepresentation have been met.

83 I turn to negligent misrepresentation. It is well established that a manufacturer owes a duty of care to end users (*Donoghue v Stevenson* [1932] AC 562). It is factually foreseeable that end users will be harmed if the fuel consumption of a marine diesel engine is represented to be less than what it actually is; there is sufficient proximity because first, the defendants possessed greater knowledge of its own products; second, the plaintiffs were in a position of vulnerability because the defendants were the ones with the requisite skill to conduct the FATs and were in full control of the whole testing process; and third the plaintiffs were actually present during the testing process and the defendants knew full well that Skaugen entities would be the end users of the MAN engines. There are no policy considerations which militate against the imposition of a duty of care. There were obviously breaches of this duty of care, in that the fuel consumption values represented were inaccurate. Therefore the plaintiffs have shown, on a good arguable basis, that all the elements for negligent misrepresentation have been met.

Lex loci delicti

84 I turn to actionability under the *lex loci delicti*. Both the plaintiffs' and defendants' experts agree that the plaintiffs have a claim under §826 of the German Civil Code ("BGB"):

> A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.

There are essentially two elements: the defendants intentionally inflicted damage; and the intentional infliction of damage must be *contra bonos mores*, or in a manner contrary to public policy.

85 I had earlier held that the misrepresentations were intended to induce and did induce reliance (principally at [73] and [77]–[80]). This corresponds with damage being inflicted intentionally. I had also earlier held that damage was actually suffered (at [72] and [81])

86 I turn to the requirement of *contra bonos mores*. The experts are divided on this. The defendants' expert, Prof Stephan Lorenz, says that in determining whether an act is *contra bonos mores*, all the circumstances must be analysed, but nonetheless case law has held that this requirement is satisfied if an injurer acts recklessly or unconscionably; the plaintiffs' expert, Dr Nadine Elisabeth Herrmann, says that a court will analyse whether the behaviour is reprehensible, as may be evidenced by the objectives pursued or means used, the attitude exposed or the consequences incurred. The defendants do not press this point, and correctly so: this requirement is met regardless of which standard is adopted; the defendants had tampered with FAT results, and represented fuel consumption levels to be lower than their actual levels. I find that the plaintiffs have shown on a good arguable basis that this element has been met.

87 The issue of limitation under German law also arises. Under s 3 of the Foreign Limitation Periods Act (Cap 111A, 2013 Rev Ed), a Singapore court shall apply the limitation periods of the *lex causae* (and Singapore limitation law shall not apply). Section 3(2) of the same makes it clear that this is so even where the foreign law falls to be considered for the purpose of actionability; this is a clear reference to the double actionability rule.

88 Prof Lorenz first relies on the standard limitation period of three years (§195 of the BGB). But I agree with Dr Herrmann, who pointed out that this only runs when the creditor has obtained knowledge of the circumstances giving rise to the claim and the identity of the obligor, or would have obtained such knowledge if he had not shown gross negligence (§199(1) of the BGB). On the facts this suit was filed in the Singapore High Court on 28 January 2015. MAN Germany wrote to Skaugen Norway about indications of improper external influence on 22 June 2012; and before this MAN Germany wrote to Skaugen Norway on 31 January 2012 about the possibility of external influence. The suit was filed within three years of both dates. I do not consider that time should start running from the May 2011 press release, because the press release was not directed specifically at Skaugen Norway and did not identify any particular engines.

89 Prof Lorenz and Dr Herrmann both agree that there is a long-stop limitation period of ten years regardless of the knowledge of the plaintiff (§199(3) of the BGB). Dr Herrmann points out that it is possible for defendants to waive the right to plead a limitation defence, and that MAN Germany did waive such a right: until 31 December 2013 in one letter; 31 December 2014 in a second letter; and 31 March 2015 in a third. This suit was filed on 28 January 2015. Prof Lorenz does not comment on this, presumably because these waivers were not brought to his attention.

90 I find that these waivers are effective with respect to both the standard limitation (at [88]) and long-stop limitation (at [89]). Therefore the claim is actionable under German law, the *lex loci delicti*.

91 There remain three loose ends to tie up. Firstly, the experts were at odds as to whether the plaintiffs had a claim under §823(2) and §263 of the

BGB. I need not decide this point because I have already found that the plaintiffs have a good arguable claim under §826 of the same.

92 Second, both experts agreed that there was a defence under §831 of the BGB, whereby liability in damages would not apply if an employer-principal shows that he has exercised reasonable care in selecting and supervising an employee-agent. Prof Lorenz did not come to a concluded view on this and conceded that MAN Germany would "have to establish that all operating procedures are managed in a way that guarantees continuous monitoring of all employees". Dr Herrmann said that she is not currently aware of facts that could allow the defendants to invoke this defence. I agree with Dr Herrmann – the systematic and repeated tampering of FAT results suggests that, at the very least, upper management had acquiesced to a culture that allowed such tampering to happen. I find, on a good arguable case basis, that the §831 defence is not applicable.

93 Thirdly, it does not appear that the plaintiffs have a claim in German law under something analogous to the common law tort of negligence. This is not a barrier. Lord Wilberforce, in the House of Lords decision of *Boys v Chaplin* [1971] AC 356 (at 389F), held that civil liability under the *lex loci delicti* is a condition for actionability under the *lex fori*:

> I would, therefore, restate the basic rule of English law with regard to foreign torts as requiring actionability as a tort according to English law, subject to the condition that civil liability in respect of the relevant claim exists as between the actual parties under the law of the foreign country where the act was done.

This passage was cited with approval in the subsequent Court of Appeal decision of *Coupland v Arabian Gulf Oil* [1983] 1 WLR 1136 (at 1146C) and the Privy Council decision of *Red Sea Insurance Co Ltd v Bouygues SA* [1995]

1 AC 190 (at 199D). I agree. The "double actionability" rule is a misnomer insofar as the label suggests that an action is governed by two different laws. The true position is that the *lex fori* is applied to the extent that it is congruent with the rights available under the *lex loci delicti*.

94 This reading of Lord Wilberforce is supported by the context. *Boys v Chaplin* overruled *Machado v Fontes* [1897] 2 QB 231 which had held criminal liability under the *lex loci delicti* would be sufficient, and it was in that context that a majority of the House of Lords required civil liability. There is no indication that civil liability entails correspondence. It must also be significant that the majority referred to *civil* liability as opposed to tortious liability. *Dicey and Morris* took this to mean that "[i]t is sufficient if, by [the *lex loci delicti*] his liability to pay damages is contractual, quasi-contractual, quasi-delictual, proprietary or *sui generis*" (at p 1372). The position is surely *a fortiori* where the claim is actionable under the *lex loci delicti* as a delict.

95 Thus if the plaintiffs have an actionable civil claim under German law, the condition for the actionability of Singapore law would have been met and they would be able to claim in both fraudulent and negligent misrepresentation.

O 11 r 1(f)(i)

96 The plaintiffs argue that the requirement of an act or omission occurring in Singapore is met because they have relied upon the misrepresentations in Singapore. The defendants argue that only the defendant's acts or omissions are relevant to the enquiry.

97 I agree with the defendants. The Singapore Court of Appeal, in *Bradley Lomas*, stated in no uncertain terms that the commission of the

constituent act or omission is by the defendant (at [18]). The English Court of Appeal, in *Metall und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391 ("*Metall und Rohstoff*"), in interpreting "an act committed within the jurisdiction" of Ord 11 r 1(1)(f) of the Rules of the Supreme Court 1965 (SI 1965 No 776) (UK) ("RSC") held that the acts must be those of the putative defendant (at 437G).

98 Indeed the facts of *Newsat Holdings Limited v Zani* [2006] 1 Lloyd's Rep 707 are directly on point. The claimants were incorporated to exploit an investment opportunity in relation to an orbital satellite slot owned by the Seychelles Republic, and during the course of a meeting, the defendant made various representations to the effect that the filing relating to the Seychelles slot had been properly made on the basis of true and accurate information and were not open to challenge. The claimants sued for fraudulent misrepresentation and attempted to rely on r 6.20(8)(b) of the Civil Procedure Rules 1998 (SI 1998 No 3132) (UK) (that is, a claim in tort "where the damage sustained resulted from an act committed within the jurisdiction" and one of the successor provisions to RSC Ord 11 r 1(1)(f)), arguing that they had acted in reliance on the representations by making various investment decisions in London, thereby incurring significant wasted expenditure. The court cited *Metall und Rohstoff* with approval (at [35]) and held that the acts must be those of the defendant (at [45]); proceedings were therefore set aside.

99 The plaintiffs therefore cannot rely on O 11 r 1(*f*)(i). The defendant-centricness of O 11 r 1(*f*)(i) is any case counter-balanced by O 11 r(*f*)(ii), which is plaintiff-centric (a point also made by the Court of Appeal in *ABCI v BFT* [2003] 2 Lloyd's Rep 146 at [41]).

O 11 r 1(f)(ii)

100 The defendants argue that only direct injury or damage is relevant, and the claim must be in respect of recoverable and quantifiable losses for damage or injury suffered; and the plaintiffs have admitted to the Oslo Conciliation Board that damages and losses were suffered in Norway. The plaintiffs simply argue that damage was suffered in Singapore because of increased fuel consumption.

101 It is unclear if the damage incurred must be direct. *Booth v Phillips* [2004] 1 WLR 3292 held that it was sufficient that "damage was sustained within the jurisdiction" (this is the literal language of CPR r 6.20(8)(a)) and the ordinary and natural meaning must prevail (at [32]–[44]); in contrast, *ABCI v BFT* [2003] 2 Lloyd's Rep 146 held that there must be "direct damage sounding in monetary terms which the wrongful act produced upon the claimant" (at [44]).

102 What is clear is that it is not necessary for all the damage to have been suffered in Singapore. O 11 r 1(*f*)(ii) literally reads that the claim needs only be "partly founded on" damage within Singapore; and *Metall und Roshstoff*, interpreting the far more restrictive RSC Ord 11 r 1(1)(f), which does not refer to partly founded damage within the jurisdiction and merely reads that "damage was sustained… within the jurisdiction", held that it was unnecessary for all the damage to have been sustained within the jurisdiction for "it could lead to an absurd result if there were no one place in which all the plaintiff's damage had been suffered" (at 437D).

103 I decline to follow the authorities requiring direct damage. This is for three reasons. Firstly RSC Ord 11 r 1(1)(f) and CPR r 6.20(8)(a) are more

restrictive than O 11 r 1(*f*)(ii) of our Rules of Court and do not explicitly allow for *ex juris* service if damage is only partially sustained in the forum. The restrictiveness of the English provisions suggests that the connection to England must be strong, and readily grounds the inference that damage must be direct. Secondly a clean line in the sand cannot be drawn between direct and indirect damage. The test for remoteness in tort was at one point in time predicated on directness (*Re Polemis* [1921] 3 KB 560) but this was *de facto* overruled in the *Wagon Mound (No 1)* [1961] AC 388 *inter alia* because it was difficult for one to distinguish between the direct and indirect (at 426). I illustrate – if a man is knocked down in Johor Bahru but hospitalised in Singapore, is the damage arising from the hospitalisation direct or indirect? Thirdly, insofar as directness is a control mechanism that is a thinly-veiled value judgment on whether a Singapore court ought to assume jurisdiction, it would be preferable for a court to transparently weigh the competing considerations. In this respect it is already incumbent on a court to consider if Singapore is the *forum conveniens* when considering whether to assume jurisdiction – and if the damage sustained could be said to be "indirect", this would likely correlate with or be a significant factor contributing to the finding that Singapore is not the *forum conveniens*. Briggs agrees: "the correct approach is, in practice, not to be too clever or analytical… but to rely on the principle of *forum conveniens* to screen out those cases in which the damage connection with [the forum] is too weak or tenuous to justify service out" (Adrian Briggs, *Civil Jurisdiction and Judgments* (Informa Law, 6th ed, 2015) at p 486).

104 A plaintiff invoking O 11 r 1(*f*)(ii) is in generally not restricted to only claiming damage suffered in Singapore (*Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2013 Reissue) at para 75.051). Nonetheless at least a part of

the damage must be suffered in Singapore, and case law requires this damage to be significant (see *eg, Metall und Rohstoff* at 437D and *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* [2005] QB 699 ("*Jones*") at [29]). I had earlier held that the separate tort thesis does not apply to misrepresentation (see [57]–[61] above); a plaintiff therefore cannot contend that multiple torts have arisen and significant damage has been suffered in Singapore in respect of some of those torts.

105 The requirement of some significant damage being suffered in Singapore is amply met on the facts. Somargas II, a Singapore subsidiary, was the direct owner of all the Vessels between February 2011 and April 2013. It is true that it is not enough to merely show that a company has its seat in Singapore (*The Eras Eil Actions* [1992] 1 Lloyd's Rep 570 at 591), but Somargas II suffered damage by operating Vessels which consumed fuel at a higher than represented rate, and once this became public knowledge, diminution in the market value of the Vessels. Even after April 2013, three GATX-related entities, incorporated in Singapore, continue to own three of the Vessels to date.

106 I therefore conclude that the plaintiffs have shown a good arguable case that O 11 r 1(*f*)(ii) is satisfied.

Would the SICC have jurisdiction for the purposes of applying *Spiliada*?

107 I restate the legislatively prescribed requirements for transfer. A case may be transferred from the High Court to the SICC if:

(a) The action is international and commercial in nature (O 110 r 12(4)(*a*)(i) and O 110 r 7(1)(*a*) of the Rules of Court, read with O 110 rr 1(2)(*a*), 1(2)(*b*) and 1(3) of the same);

(b) The parties do not seek any relief in the form of, or connected with, a prerogative order (O 110 r 12(4)(*a*)(i) and O 110 r 7(1)(*c*) of the Rules of Court);

(c) It is more appropriate for the case to be heard in the SICC (O 110 r 12(4)(*a*)(iii) of the Rules of Court); and

(d) Either

(i) a party has with the consent of all parties applied for transfer (O 110 r 12(4)(*b*)(i) of the Rules of Court); or

(ii) the High Court, after hearing the parties, orders the transfer on its own motion (O 110 r 12(4)(*b*)(ii) of the Rules of Court).

108 The claim is international in nature. O 110 r 1(2)(*a*) invokes the concept of a place of business. The phrase "place of business" has been defined to literally mean the place at which that party carries out business at the relevant time (O 110 r 1(3)(*b*)(i)) or where a party carries out business in multiple places, the place with the closest relationship to subject matter of the dispute at that time (O 110 r 1(3)(*b*)(ii)). O 110 r 1(2)(*a*) is disjunctive, and r 1(2)(*a*)(iii)(A) is satisfied. I list the substantial obligations performed: the marine engines were manufactured and tested in Germany and delivered to the Chinese shipbuilders in China; the FAT results, the PPM and FSI were authored in Germany; and the FSI was delivered to the Chinese shipbuilders in China. All of the above is take place in states different from Norway and Singapore, the places of business of Skaugen Norway and Skaugen Singapore. Therefore the plaintiffs have their places of business in a different state from the state in which a substantial part of the obligations of the commercial relationship between the parties is to be performed. O 110 r 1(2)(*a*)(iii)(B) is

also satisfied. I had earlier concluded that, on an application of the substance test, the *lex loci delicti* is German law (see [50]–[59] above, and [55] in particular). I repeat the same analysis, and hold that the subject matter of the dispute is most closely connected with Germany; and Norway and Singapore, the places of business of Skaugen Norway and Skaugen Singapore, are states different from Germany.

109 The claim is commercial in nature. O 110 r 1(2)(*b*)(i) makes it clear that a claim can be commercial regardless of whether it is contractual. The claim pertains to misrepresentations made in the course of the supply of marine diesel engines, which falls neatly within r 2(*b*)(i)(A), namely, a trade transaction for the supply or exchange of goods or services.

110 The parties do not seek any relief in the form of, or connected with, a prerogative order.

111 O 110 r 12(4)(*a*)(iii) of the Rules of Court imposes the requirement that it be more appropriate for the case to be heard in the SICC. It is clear that O 110 r 12(4)(*a*)(iii) refers to appropriateness as a matter of internal allocation of jurisdiction and does not import appropriateness *à la Spiliada*. O 110 r 12 is entitled "Transfer of proceedings to or from Court", and deals with transfers from the High Court to the SICC and vice versa; while O 110 r 12(3)(*a*)(ii) also imposes the requirement of appropriateness for transfers from the SICC to the High Court.

112 I consider the requirement of appropriateness to be a counterweight to the dichotomies of "international" and "commercial" in O 110 r 7(1)(*a*). O 110 r 1 defines "international" and "commercial" in very broad terms, with the result that both are easily satisfied. A case may satisfy the formal requirements

of "international" and "commercial" and yet not be substantially so. Take, for example, a husband who, through a company incorporated in the Cayman Islands for which he is the sole shareholder and director, contracts with another company incorporated in the British Virgin Islands, for which his wife is the sole shareholder and director. The contract pertains to the acquisition of a valuable Singapore-incorporated subsidiary, wholly owned by the husband's company, at a price markedly below market value, and the subsidiary is duly transferred to the wife's company. The wife thereafter files for divorce. Amidst the spectre of ancillary matrimonial proceedings, the husband files suit in the Singapore High Court seeking to rescind the transfer of the subsidiary on the ground of undue influence. The formal requirements of "international" and "commercial" are met. But, as a matter of substance, this is a dispute between husband and wife relating to (quasi-)matrimonial property, and it would not be more appropriate for this dispute to be heard in the SICC. Cases of this ilk are precisely the sort that the requirement of appropriateness is met to filter out. The Report of the SICC Committee supports this reading of O 110 r 12(4)(*a*)(iii); the Committee recommended that the SICC be empowered to decline to admit clearly inappropriate cases, and gave the example of a matrimonial dispute (at para 28).

113 Therefore I hold that, where a potential transfer to the SICC from the High Court is concerned, a case is more appropriately heard in the SICC if the case is in substance both international and commercial in nature.

114 This dispute is undoubtedly, in substance, international and commercial in nature. For the former, the prime movers, Skaugen Norway and MAN Germany, are based in different states, and the MAN engines were supplied through the Chinese shipbuilders as intermediaries. With respect to

the latter, there can be no denying that the supply of marine diesel engines was on arms-length commercial terms.

115 O 110 r 12(4)(*b*)(ii) of the Rules of Court is also met. Under the Rules of Court it is not possible for a party to file a contested summons seeking a transfer of the case to the SICC; a summons for transfer can only be filed if all parties consent (O 110 r 12(4)(*b*)(i) of the Rules of Court). O 110 r 12(4)(*b*)(ii) requires the High Court to have heard the parties; but there is no requirement for this hearing to be separate or specially convened. In practice related applications are routinely heard together in one summons (see *eg* para 37A of the Supreme Court Practice Directions), or related summonses routinely fixed to be heard together. During the course of these proceedings, the plaintiffs first mooted the possibility of transfer, both through their written submissions and in oral argument; and this was rebutted orally by the defendants. I thereafter also directed both parties to file further written submissions on the issues of *locus standi* and transfer. The parties have therefore been heard on the issue of transfer.

116 I therefore hold that, for the purposes of considering if Singapore is the *forum conveniens*, the requirements for transfer to the SICC are met.

Is Singapore the forum conveniens?

117 During oral arguments, the defendants confirmed that they were not relying on *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd* [2013] 4 SLR 1097 despite on-going parallel proceedings (see [15] above). I note that all the other proceedings pertained to different engines, save for the litigation in the Norwegian courts. Nonetheless the plaintiffs have said that the proceedings in Norway were commenced in order to prevent any potential

claim there from being time-barred, and they fully intend to stay proceedings in Norway if the defendants' instant applications are dismissed. I therefore apply conventional *Spiliada* principles. The burden lies on the plaintiffs to show that Singapore is the *forum conveniens* (*Zoom Communications* at [71]–[75]).

118 The plaintiffs essentially argued that this was an international case with dispersed connections, and no other forum could be said to be more appropriate than Singapore (*Siemens* at [4]). The defendants contended that Germany or alternatively Norway is more appropriate.

119 *Rickshaw Investments* cited *The Albaforth* with approval for the proposition that the place where a tort occurred is *prima facie* the natural forum for determining the claim (at [35]). In *VTB Capital plc v Nutritek International Corpn* [2013] 2 AC 337 ("*VTB Capital (SC)*"), the Supreme Court squarely considered *The Albaforth* and essentially held that it was good law. The place of commission of a tort is a relevant start point, and if viewed in isolation, establishes on a *prima facie* basis that place as the appropriate jurisdiction (at [51]). I henceforth refer to this as "the Albaforth principle".

120 *Rickshaw Investments* also stands for the separate proposition that a court is more adept at applying the law of its own jurisdiction than a foreign court, and this will result in savings in time and resources (at [42]). *VTB Capital (SC)* similarly concluded that it is generally preferable that a case should be tried in the country whose law applies (at [46]). I henceforth refer to this as the "home advantage principle".

121 I do not propose to rehearse the analysis in *Rickshaw Investments* and *VTB Investments (SC)*. Rather, I shall analyse how the continued vitality of the

double actionability rule in Singapore would affect the application of the home advantage principle.

122 Singapore is an anomaly in this regard. Major common law jurisdictions have abolished the rule: Australia (by the High Court of Australia in *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 ("*Renault v Zhang*")); Canada (by the Supreme Court of Canada in *Tolofson v Jensen* (1994) 120 DLR (4th) 289) and England (by Parliament via the Private International Law (Miscellaneous Provisions) Act 1995 (c 41) for all torts except defamation). The double actionability rule is also unknown to the civil law; civilian systems mostly apply the *lex loci delicti* (C G J Morse, "Choice of Law in Tort: A Comparative Survey" (1984) 32 Am J Comp L 51).

123 The applicability of the double actionability rule in Singapore but not elsewhere could increase the weight of the home advantage principle. Let us assume that, on an application of Singapore private international law rules, the *lex loci delicti* is the law of Cantonia and the flexible exception is not applicable. The private international law rules of Cantonia do not contain the double actionability rule and point towards the application of the substantive law of Cantonaia as the *lex causae*. There would be tremendous cost and time savings for the dispute to be heard in Cantonia, not just because the Cantonia court would be applying Cantonian law, but also because the Singapore court would be grappling with both Singapore and Cantonian law.

124 I had earlier concluded that German law is the *lex loci delicti*. Both parties' experts were asked for their opinion on the private international law rules of Germany, and both agreed that tort claims are governed by the law of the country in which the liable party has acted, subject to the choice of the injured party to opt for the law of the country in which the injury occurred

(Art 40 of the Introductory Act to the Civil Code ("EGBGB")). But under Art 41 of the EGBGB there is an overriding exception which obliges the court to apply the law of the country with the closer connection to the case than that applicable under Art 40 of the same. Both experts agreed that Germany was the country in which the liable party acted. However Prof Lorenz said that if Skaugen were to opt for the law of the country in which the injury occurred, the Art 41 exception would oblige German law to be applied, while Dr Herrmann said that it cannot be assumed that German law has a closer connection than Norwegian, Chinese or Singaporean law. I agree with Prof Lorenz that the defendant-sided connections pointing towards three or more jurisdictions are individually weaker than the plaintiff-sided connections pointing towards Germany (see also [51]–[55] above). I therefore conclude that if this dispute were to be tried in Germany, the German courts would apply German law.

125 I analyse availability. Prof Lorenz opines that a German court would assume jurisdiction over the claim against MAN Germany because MAN Germany is statutorily seated in Germany (Arts 4 and 63 of Regulation (EU) No 1215/2012, commonly known as the recast Brussels I Regulation); and against MAN Norway because the claim against MAN Norway is closely connected to the claim against MAN Germany (Art 6 of the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, commonly known as the new Lugano Convention). Dr Herrmann however points out that the new Lugano Convention contains the court first seised rule (Art 27), and because the plaintiffs have initiated proceedings in Norway, the German court would decline jurisdiction in favour of the Norwegian court. Prof Lorenz, in reply, argues that Art 27(1) only mandates a stay until the jurisdiction of the Norwegian courts is established,

and the stay could be lifted if for any reason Norwegian proceedings end without a decision or a legally binding settlement. I note that the plaintiffs are in the driver seat for Norwegian proceedings and have indicated that they will stay those proceedings if the defendants' applications before me are dismissed; it is well within the plaintiffs' power to stay or discontinue proceedings in Norway and sue in Germany instead. The plaintiffs cannot assert unavailability if this unavailability is due to their own actions. I agree with Prof Lorenz and conclude that Germany is an available forum.

126 The enquiry into whether Singapore is the *forum conveniens* must take into account the likely issues in dispute (*Dresdner Kleinwort Ltd v CIMB Bank Bhd* [2008] 3 SLR(R) 761 at [32]). These are likely to centre on *inter alia* whether the claims of the successors in title were validly assigned; whether the defendants' misrepresentations were made with the intention that they should be acted upon; whether the defendants had assumed responsibility or were otherwise proximate enough such that a duty of care arose; whether the defendants knew that the representations were false; whether and how the plaintiffs and successors in title had acted upon those misrepresentations; the quantum of the damage suffered by the plaintiffs, and whether this should be measured in terms of the diminution in the value of the Vessels and/or past and prospective fuel purchases in excess of the expected fuel consumption level and whether either or both are heads claimable under German law; and the content of German law, potential defences therein and their application to the facts, including whether the defendants' actions were *contra bonos mores*, whether the plaintiffs' claim is time-barred and whether the §831 defence of reasonable care in selection and supervision of employees applies. As can be seen complex issues of both law and fact will arise.

127 The Albaforth principle is applicable to the facts at hand, but I attribute less weight to this because determining the location of the tort was not a straightforward exercise; while Germany could be said to be the "location" of the tort on an application of the substance test, significant acts upon the misrepresentations occurred outside of Germany (see [50]–[61] above).

128 I attribute more weight to the home advantage principle. The defendants have proven that a German court will apply German law to the claim (see [125] above). It is true that the claim throws up complex issues of German law. Nonetheless the ordinarily greater cost, inconvenience and difficulty of a Singapore court applying German law will be considerably mitigated by the SICC empanelling International Judge(s) from civilian countries and determining German law on the basis of submissions rather than proof (O 110 r 25 of the Rules of Court); and to that end the parties may be represented by German counsel (s 36P of the Legal Profession Act).

129 But this is only half of the equation: the double actionability rule obliges a Singapore court, including the SICC, to apply Singapore law and this falls exactly within the scenario painted at [123] above. Let us assume that the SICC grants an application allowing parties to submit on, rather than prove, foreign law since this is cheaper and more convenient. The parties would have had to engage two sets of lawyers, one German and the other Singaporean (O 110 r 25(2) of the Rules of Court requires all parties to be represented by counsel who are competent to submit on the relevant questions of foreign law). Needless to say, Singaporean counsel would have to go beyond being instructing solicitors, and will have to actively argue and submit on Singapore law. This is not dispute that is merely fact-centric – complex issues of fact, law, and mixed fact and law will arise (see [126] above). While there will be some overlap in the factual and legal issues, there remain contentious issues

unique to each system of law – for instance, duty of care in the tort of negligence in Singapore law, and *contra bonos mores* in German law. Fact-finding and argumentation would necessarily be more protracted. All in all there would be considerable cost and time savings for the claim to be tried in a German court that applies only German law.

130 Other factors do not displace the weight of the home advantage principle. Witness location is in favour of Germany: the *dramatis personae* and moving minds of MAN Germany and Skaugen Norway are based in Europe and it would be more convenient for the trial to be heard in Germany, where MAN Germany is based and which is closer to Norway where Skaugen Norway is based; but I place little weight on this factor because physical location is no longer a vital consideration (*Siemens* at [11]). Neither party has raised witness compellability as an issue (*cf*, *Abdul Rashid bin Abdul Manaf v Hii Yii Ann* [2016] SGHCR 1).

131 The defendants point out that the bulk of the documentary evidence is in Germany. Documentary evidence regarding the misrepresentations is plaintiff-centric and located in Germany, but documentary evidence regarding acts upon representations and damage is defendant-centric and located outside of Germany. This is a neutral factor. In any event not much weight can be placed on this factor because the availability of digitisation services obviates the need to physically ship documents across international borders.

132 The defendants also submit that they will face data protection issues if the case were to proceed in Singapore. An Alexander Nijsen, the head of MAN Germany's "Four-Stroke Marine" business unit for MAN engines, attests that MAN Germany has been advised that German data protection laws are applicable. International data transfers from a European Union country to

Singapore requires special justification on a document-by-document basis in order to be considered legitimate and this would add considerably to the costs of litigation.[17] I have no hesitation whatsoever in rejecting this submission due to want of proof. Nijsen is not a legally trained person and is in no position to advise on the content of German law, which in this court should ordinarily be proven by expert evidence (*Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [60]). He has neither cited any law nor exhibited any advice purportedly received; and at any rate even if any advice were to be exhibited I would place no weight on it because the mandatory requirements of O 40A r 3 have not been met ("*Pacific Recreation*" at [61]–[88]).

133 Lastly the plaintiffs argue that they have serious reservations on whether it will be accorded justice in the event that claims were to be heard in Germany. The plaintiffs have experienced substantial difficulty in Germany in attempting to obtain access to case files for the criminal proceedings against MAN Germany. An Augsburg Regional Court, on appeal, declined to grant access; Skaugen Norway has filed a Constitutional Complaint alleging due process violations on the part of the Augsburg courts, namely that it was denied sufficient time to make submissions and was denied access to various briefs filed by MAN Germany.[18] Additionally if the case were to be heard in Germany it would be difficult for the plaintiffs to obtain discovery of documents.

134 I note that there is some controversy over whether denial of justice and juridical advantage issues belong to a second stage when *Spiliada* is applied in

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17 Nijsen's 2nd affidavit at para 58

18 Dr Herrmann's 1st affidavit at pp 17–21

the context of *ex juris* service. The English Court of Appeal, in *VTB Capital v Nutritek International* [2012] 2 Lloyd's Rep 313, held that the trial judge was wrong to have applied *Spiliada* in two stages. The Supreme Court did not endorse the Court of Appeal on this point and merely commented that if there was an error it would not have had any impact on force and weight of the trial judge's analysis (*VTB Capital (SC)* at [44]).

135 I agree that the issue of whether *Spiliada* ought to be applied at one go or in two stages in the context of *ex juris* service is a red herring that is not outcome determinative. Lord Goff of Chieveley set out the two stages of *Spiliada* in the context of defendants being served as of right, and whereby a defendant bears the burden of persuading the court that there is another available forum which is *prima facie* the appropriate forum, and if the court is so satisfied the burden shifts to plaintiff to show that there are special circumstances by reason of which justice requires that the trial should nevertheless take place in the forum (*Spiliada* at 476D–F).

136 The two stages are only necessary in order to reverse the burden. If a defendant is served *ex juris* the burden rests on the plaintiff (*Spiliada* at 480H). In *ex juris* cases, so long as the burden rests on the plaintiff throughout it does not matter if *Spiliada* is applied by a court at one go or in two stages. In practice, a plaintiff deploys all his *Spiliada* arguments at one go, because *Spiliada* hearings are not bifurcated: a court does not make an interim ruling that the plaintiff has failed to show that the forum is more appropriate, and then proceed to invite the plaintiff to show special circumstances.

137 I reject the plaintiffs' argument that they will be denied justice. *The Abidin Daver* [1984] AC 398 required positive and cogent evidence of the alleged injustice (at 411D). This is not met on the case. The plaintiffs were

denied discovery of documents in criminal proceedings, allegedly due to what the common law would classify as breaches of natural justice and from this base they mount an implicit attack on the German courts, saying that they will not be accorded justice in related civil proceedings. This simply does not follow.

138 I also reject the plaintiffs' further argument that regard should be had to the difficulty of obtaining discovery in civil proceedings in Germany. Lord Goff in *Spiliada* specifically said that a plaintiff may derive advantages, including a more complete procedure of discovery, but a court should not deterred from granting a stay because of the deprivation such advantages provided that a court is satisfied that substantial justice is done (at 482E–F). A common law court cannot sit in judgment over civil law procedure. Taken in isolation limited pre-trial discovery obligations may seem alien to common law eyes, but this is explained by two features unique to civil law systems. Firstly there is no strict dichotomy between trial and pre-trial; and there is also no strict dichotomy between discovering evidence and presenting it (John H Langbein, "The German Advantage in Civil Procedure" (1985) 52 U Chi L Rev 823 at p 826). Secondly civil law judges play an active inquisitorial role and are "responsible for eliciting relevant evidence" (Geoffrey C Hazard Jr, "Discovery and the Role of the Judge in Civil Law Jurisdictions" (1997) 73 Notre Dame L Rev 1017 at p 1019); indeed, party-led discovery is anathema and seen as a usurpation of judicial power (*ibid* at p 1022). As such the more limited discovery regime in civil law jurisdictions cannot be taken to be a juridical disadvantage for the purposes of *Spiliada*.

139 Taking into account the establishment of the SICC, the plaintiffs have failed to show that Singapore is clearly the *forum conveniens*, because Germany is more appropriate than Singapore. I do not need to consider the

defendants' alternative submission that Norway is more appropriate than Singapore. Assuming *arguendo* that I cannot take the establishment of the SICC into account, Germany would *a fortiori* be more appropriate than Singapore because I would place even more weight on the home advantage principle: complex issues of German law would have to be resolved on the basis of expert evidence without the benefit of having a civil law judge on the coram.

Conclusion

140 Because Singapore is not the *forum conveniens*, I grant the defendants' applications to set aside service *ex juris* of the writ. I do not need to consider whether the case should be stayed on stay management principles. I shall hear the parties on costs.

Coda – whither *Spiliada* and the double actionability rule?

141 My judgment applies the existing paradigm to the facts. But the SICC is a paradigm shift in the field of dispute resolution, and raises the question writ large as to whether there ought to be concomitant paradigm shifts in *forum non conveniens* and the choice of law rules for tort. I have kept to the existing paradigm for two reasons: firstly the parties did not argue that a paradigm shift should occur, and it would have been a breach of natural justice for me to herald a paradigm shift; secondly the existing paradigm is deeply entrenched and the edifice of case law comprises many Court of Appeal decisions that are binding on the High Court. It is the Court of Appeal, the apex court of the land, that is ideally placed and indeed empowered to herald paradigm shifts (Practice Statement (Judicial Precedent) [1994] 2 SLR 689). I make only brief comments.

Forum non conveniens

142 The Report of the SICC Committee posed the question of whether "the traditional *Spiliada* test… remains modern and relevant to the SICC" (at para 27) but did not answer it and presumably left this to the courts.

143 I observe that *Spiliada* is increasingly inapplicable in England due to the advent of European Union law. Under the Brussels I Regulation and the Lugano Convention it is clear that an English court has no power to stay proceedings on *forum non conveniens* grounds in favour of another EU member or Lugano Convention state (*Dicey, Morris and Collins on the Conflict of Laws* vol 1 (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 15th ed, 2012) at para 12-015), and the Court of Justice of the European Communities in *Owusu v Jackson* held that an English court which has been conferred jurisdiction under Art 2 of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (commonly known as the Brussels Convention) did not have the power to stay proceedings on *forum non conveniens* grounds in favour of a non-EU member. I also observe that Australia declined to follow *Spiliada*; the High Court of Australia, in *Voth v Manildra Flour Mills* (1990) 171 CLR 538 ("*Voth*"), held that the test was whether the local forum is clearly inappropriate.

144 As a matter of principle it is seems incongruous that an international commercial court set up to cater to foreign parties and foreign laws (for the exact Parliamentary Debates quote see [29] above) would find itself hamstrung by rules on the assumption of long-arm jurisdiction that date back to laws promulgated in the 1800s (see Zhuang WenXiong, "*Burgundy*, The Bifurcation of Jurisdiction and Its Future Implications" (2015) 27 SAcLJ 222

at paras 6–8) which are rooted in outmoded conceptions of sovereignty as being tantamount to territorial control (see Alex Mills, "Rethinking Jurisdiction in International Law" (2014) 84(1) The British Yearbook of International Law 187 at pp 204–205). There is an ineluctable tension between the jurisdictional requirement of internationality (s 18D of the Supreme Court of Judicature Act and O 110 r 7 of the Rules of Court) and the *Spiliada* test, which is concerned with the comparative appropriateness of Singapore as compared to an available foreign jurisdiction. I leave aside clear cases with no obvious centre of gravity and dispersed links to many jurisdictions, for which no foreign jurisdiction can be said to be more appropriate than Singapore. For penumbral cases, the stronger the links to a foreign country, the more likely that a claim is international; but also the more likely that the foreign jurisdiction will be found to be more appropriate.

145 I note that where a case is commenced in the SICC, O 110 r 8 of the Rules of Court states that the SICC may decline to assume jurisdiction if it is "not appropriate for the action to be heard in the [SICC]". O 110 r 8 refers to appropriateness as a matter of private international law and not internal allocation of jurisdiction, because the latter is governed by O 110 r 12. This is supported by O 110 r 8(2), which exhorts the SICC not to decline to assume jurisdiction solely on the ground that the dispute between the parties is connected to a jurisdiction other than Singapore if there is a written jurisdiction other than Singapore. The phrase "not appropriate" ostensibly obliges the SICC to apply the clearly inappropriate test of *Voth*, and not the clearly more appropriate test of *Spiliada*. From this it is but a short leap to argue that, if a case meets the requirements for transfer from the High Court to the SICC, the High Court should apply the private international law rules of the SICC – that is, *Voth* instead of *Spiliada*.

Double actionability

146 I had earlier already observed that Singapore appears to be one of the final frontiers in a Commonwealth that has by and large forsaken double actionability (see [122] above). The onerous and expensive requirement to potentially prove the actionability of one's claim in two laws would likely deter plaintiffs with foreign tort claims from litigating in Singapore in general and the SICC in particular. This is manifestly at odds with the avowed goal of the SICC to cater to foreign parties and international disputes.

147 The double actionability rule has been criticised. The Supreme Court of Canada, in *Tolofson v Jensen*, abolished double actionability and made the following comments:

> (a) *Phillips v Eyre* (1870) LR 6 QB 1, one of the early cases promulgating the double actionability rule, referred to actionability in England as a matter of jurisdiction and not choice of law (at [24]–[26]). *Machado v Fontes* wrongly interpreted *Phillips v Eyre* as requiring actionability in England as a matter of choice of law (at [27]–[28);
>
> (b) From the general principle that a state has exclusive jurisdiction within its own territories it is axiomatic that the law to be applied in torts is the law of the place where the activity occurred (at [43]). This has the advantage of certainty, ease of application and certainty (at [44]);
>
> (c) If a Canadian court, in adjudicating on wrongs committed in another country, were to apply Canadian law, the court would be

defining the nature and consequences of an act done in another country – something that flies against the territoriality principle (at [47]);

(d) The adoption of double actionability can be explained by Britain being a colonial power and the perception that British laws were superior to those of other lands, and the practical consideration that proof of laws of far-off countries would not have been easy (at [48]);

(e) The fact of a claim not being actionable under the *lex fori* is better dealt with through *forum non conveniens* or the doctrine of public policy (at [51]).

148 On a similar note, the High Court of Australia, in *Renault v Zhang* abolished double actionability and the majority made the following comments:

(a) The application of the *lex fori* is originally rooted in the perception that tort is intimately connected with the criminal law, but today tort is about the expedient distribution of risk (at [46]–[47]);

(b) The application of the *lex fori* may also be seen as an expression of public policy considerations before the development of a body of case law, precluding, on public policy grounds, what otherwise would be a choice of foreign law as the *lex causae* (at [48]);

(c) To the extent that the first limb of the double actionability rule was intended to operate as a technique of forum control, the court should frankly recognise that the question is about public policy and confront directly the issues that this may present (at [60]).

149 Kirby J also said that:

(a) The rule upholding the law of the place of the wrong is that which commands almost universal contemporary allegiance (at [128]);

(b) The rules of private international law exist to fulfil foreign rights and duties, not destroy them (at [129]);

(c) The ordinary expectations of most parties are that the law of the place of the wrong will govern the rights and duties of the parties and this will conduce towards certainty, allow easier advice, and decrease the temptation to forum shop (at [130]);

(d) A choice of law rule that permits a plaintiff to pick and choose, according to the forum it selects, the law that would be applied, would derogate from the effective control of a given law area over those aspects of its law, and allow defendants to minimise exposure to risk (at [131]).

150 I note that the latest Court of Appeal decision applying the double actionability rule, *EFT Holdings*, pre-dates the establishment of the SICC and counsel in that case had not argued for the abolishment of the double actionability rule.

151 I conclude by observing that the defendants in *Accent Delight* have filed summonses for leave to appeal to the Court of Appeal. These summonses are scheduled to be heard on 3 May 2016. *Accent Delight* throws up the issue of whether *Spiliada* ought to be applied differently or another test adopted altogether, albeit in the context of defendants, served as of right, applying to stay proceedings. Given this, and on the assumption that the plaintiffs intend to appeal, I encourage the parties to jointly request for an expedited appeal to a High Court Judge, and if there is a further appeal to the Court of Appeal, to apply for that further appeal to be heard at the same time as *Accent Delight* in the Court of Appeal.

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