IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 289

Suit No 724 of 2018 (Registrar's Appeal No 179 of 2019)

Between

Recovery Vehicle 1 Pte Ltd

… *Plaintiff*

And

Industries Chimiques Du Senegal

… *Defendant*

JUDGMENT

[Civil Procedure] — [Service] — [Service of writ out of jurisdiction]
[Conflict of Laws] — [Natural forum]

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16 December 2019

Audrey Lim J:

Background

1 Affert Resources Pte Ltd ("Affert"), is a Singapore company that is under compulsory liquidation. The defendant, Industries Chimiques Du Senegal ("ICS"), is a company incorporated in Senegal. Between May 2012 and June 2013, Affert supplied six batches of sulphur to ICS ("the Sulphur Contracts") and issued six invoices totalling US$22,298,264.60 ("the Six Invoices"). Partial payment of US$5,291,000 had been made on the Sulphur Contracts, and the total amount outstanding is US$17,007,263.60 ("the ICS Debt").[1]

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[1] Damian John Prentice's 1st affidavit dated 9 October 2018 ("Prentice's 1st affidavit) at [4] and pp 15–26; Alassane Diallo's 1st affidavit dated 21 January 2019 ("Diallo's 1st affidavit") at [9].

2 The plaintiff, Recovery Vehicle 1 Pte Ltd ("RV1"), is a Singapore company that is in the business of recovering stressed debts. It is the assignee of the current suit ("the Suit") against ICS for the ICS Debt (see [10] below). By Registrar's Appeal No 179 of 2019 ("RA 179") RV1 appeals against the decision of the registrar who had set aside its writ and service of it out of jurisdiction on ICS in the Suit.

Acquisition of ICS's shares and waiver of the ICS Debt

3 Around August 2014, Indorama Holdings B.V. ("Indorama", incorporated in the Netherlands), purchased Senfer Africa Limited's ("Senfer", incorporated in Cyprus) 66% stake in ICS ("the Acquisition"). Senfer and Affert are ultimately controlled by the Archean group ("Archean Group") based in India.[2] According to ICS, the Acquisition was done through the following transactions[3]:

(a) Senfer and Indorama entered into a Share Transfer Agreement on 20 August 2014 ("STA"), pursuant to which Indorama paid Senfer US$11m for the shares.

(b) Senfer, Indorama, Archean Industries Pte Ltd (incorporated in India, and the ultimate holding company of Senfer) and Indorama Corporation Pte Ltd (a Singapore company) entered into an Assumption for Debt for Change in Control of [ICS] dated 20 August 2014 ("ADA"). In further consideration for 66% of Senfer's shares in ICS, Indorama paid USD$30m to Senfer's creditor banks to settle all its debts. This was

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2 Diallo's 1st affidavit at [10].

3 Alassane Diallo's 2nd affidavit dated 8 March 2019 ("Diallo's 2nd affidavit") at [19] and pp 66–72, 74–119 and 121–124.

in addition to the purchase price of US$11m that Indorama paid under the STA.

(c) Senfer, Indorama, Archean Industries Pte Ltd and Indorama Corporation Pte Ltd also executed a side letter dated 20 August 2014 ("Side Letter"), where "Indorama shall cause [ICS] to pay to [Senfer]" US$9m as full and final settlement of all of ICS's related-party debts as at 30 June 2014, which included the debt owed by ICS to Affert of USD$17.28m.

The ADA, STA and Side Letter are collectively referred to as the Acquisition Documents.

4 ICS explained that pursuant to the Acquisition, it was expressly agreed around October 2014 that Affert would unconditionally waive and forgo all its past claims against ICS including claims in respect of the Sulphur Contracts ("the Waiver"), based on the following documents ("Waiver documents"):[4]

(a) First, one of Affert's then director, Syam Kumar ("Syam") sent an email on 1 October 2014 to Indorama's Munish Jindal stating "As per the overall understanding on take over of ICS by Indorama, we, hereby, agree to consider the dues of ICS to us as part of the overall consideration for the transaction" ("Affert's 1 October 2014 Email").[5]

(b) Next, Affert addressed a letter to ICS dated 7 October 2014 where Affert expressly stated that for the US$17,277,886 due to it, "We confirm that we will not claim this amount as per our understanding"

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4 Diallo's 1st affidavit at [10] and [21]–[23].

5 Diallo's 1st affidavit at [21] and pp 37–38.

and "We hereby confirm that we will not in future dispute or make any claim on ICS or its subsidiaries for any sort of dues to [Affert]." ("Affert's 7 October 2014 Letter").[6]

5 The Waiver was also mentioned in a Deed of Termination dated 24 March 2015 ("DOT") executed among ICS, Affert and Transfert Fzco ("Transfert") where, in the preamble of the DOT, "[Affert] further confirmed in their letter dated 7 October 2014 to ICS that they have no further claim on ICS for any amounts whatsoever."[7]

6 ICS explained that the Side Letter expressly stated that ICS would pay Senfer the US$9m as full and final settlement of all related parties' outstandings provided that all the relevant related parties (which would have included Affert) "send the required confirmations to this effect to ICS". It was pursuant to this, the STA and the ADA, that the Waiver was provided by Affert to ICS via Affert's 1 October 2014 Email and Affert's 7 October 2014 Letter.[8]

Affert's liquidation and the filing of the Suit

7 On 8 February 2017, Affert placed itself into creditor's voluntary winding up, and appointed Foo Kon Tan LLP ("FKT") as its liquidators.[9] FKT sent a letter of demand dated 7 June 2017 to ICS to claim the ICS Debt ("FKT's 7 June 2017 Letter").[10] ICS's Senegalese lawyers responded on 3 July 2017 stating that "All amounts then due from ICS to Affert were settled as part of the

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6 Diallo's 1st affidavit at [22] and pp 39–40.

7 Diallo's 1st Affidavit at [23] and p 44.

8 Diallo's 2nd affidavit at [19(e)].

9 Diallo's 3rd affidavit dated 4 May 2019 ("Diallo's 3rd affidavit") at pp 93–95.

10 Diallo's 3rd affidavit at p 92.

acquisition of ICS from [the Archean Group] by [Indorama] in 2014" and denied that it owed any amount to Affert ("ICS's 3 July 2017 Letter"). In that letter, the lawyers also attached Affert's 7 October 2014 Letter and the DOT. The letter was received by FKT on 24 July 2017.[11]

8 On 18 September 2017, Affert was compulsorily wound up by Solvadis Commodity Chemicals GMBH ("Solvadis") in Companies Winding Up No 17 of 2017, and its current liquidators are AAG Corporate Advisory Pte Ltd ("the Liquidators"). The Liquidators sent a letter of demand dated 26 September 2017 to ICS to recover the ICS Debt.[12] On 18 July 2018, the Liquidators filed the Suit against ICS to claim the ICS Debt.

9 In its letter dated 7 February 2019 to RV1's lawyers, the Liquidators claimed that it was only around 31 October 2018 that they first knew of the existence of FKT's 7 June 2017 Letter, ICS's 3 July 2017 Letter, the correspondences pertaining to Waiver and the DOT.[13]

Affert's assignment of receivables to RV1 and service of writ in the Suit

10 Affert (via the Liquidators) and RV1 then entered into a Deed of Assignment of Receivable dated 17 September 2018, whereby Affert assigned the ICS Debt and the claim in the Suit to RV1 with effect from 29 August 2018.[14]

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11 Diallo's 2nd affidavit at [7] and pp 20–40.

12 Damian John Prentice's 2nd affidavit dated 8 February 2019 ("Prentice's 2nd affidavit") at pp 44–47.

13 Prentice's 2nd affidavit at [10] and pp 41–42.

14 Prentice's 1st affidavit at [3] and p 7.

11 RV1 then filed an amended writ on 4 October 2018 ("the Amended Writ") in the Suit to replace itself as the plaintiff. On 9 October 2018, RV1 applied for leave to serve the Amended Writ out of jurisdiction on ICS (via Summons No 4699 of 2018 ("SUM 4699")), and leave was obtained on 11 October 2018 ("the Leave Order"). The Amended Writ was served on ICS on 26 November 2018 and ICS entered appearance on 17 December 2018.

12 RV1 claimed that around 22 October 2018, it received a letter dated 10 October 2018 from ICS's Senegalese lawyers which enclosed ICS's 3 July 2017 Letter to FKT which included the Waiver and DOT ("ICS's 10 October 2018 Letter"). In that letter, ICS also stated that "all amounts due from ICS to Affert have been settled as part of the acquisition of ICS from [the Archean Group] by [Indorama] in 2014 and therefore, there is nothing due and payable from ICS". RV1 claimed that that was the first time it was informed about the Waiver.[15]

The Senegalese proceedings

13 On 19 December 2018, ICS applied by summons to the Dakar Commercial Court in Senegal for a "Declaration to Extinguish Debt" on the basis of the Waiver (Affert's 7 October 2014 Letter).[16] Whilst ICS claimed to have fulfilled the procedural requirements for service of the summons in the Dakar proceedings, it was not disputed that neither Affert, the Liquidators nor RV1 were notified of the summons[17] and only knew of the Dakar proceedings when ICS obtained a default judgment and served that on Affert and the Liquidators (see [14] and [15] below).

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15 Prentice's 2nd affidavit at [8].

16 Diallo's 2nd affidavit at [24] and p 135.

17 Notes of Evidence of 6 November 2019 ("6/11/19 NE").

14 On 23 January 2019, the Dakar Commercial Court rendered a default judgment, holding that Affert's 7 October 2014 Letter constituted a unilateral act of debt relief, was valid under Senegalese law, and that Affert had waived the ICS Debt. The finalised default judgment was released on 19 February 2019 ("the Dakar Default Judgment").[18] On 21 and 28 February 2019, ICS's lawyers disclosed the summons and the Dakar Default Judgment to RV1, and to Affert and the Liquidators respectively.[19] ICS is in the process of effecting official service of the Dakar Default Judgment on the Liquidators.[20]

15 On 21 June 2019, the Liquidators appealed against the Dakar Default Judgment to the Dakar Court of Appeal and the matter is pending.[21]

OS 544 of 2019 – Liquidators' application to set aside Waiver

16 On 24 April 2019, the Liquidators applied by Originating Summons No 544 of 2019 ("OS 544") to set aside the Waiver as an undervalue transaction. OS 544 was served on ICS in Senegal on 7 June 2019.[22] On 11 October 2019, pursuant to ICS's application, the registrar granted a stay of OS 544 pending the determination of the Senagelese proceedings. The Liquidators have filed an appeal against the registrar's decision, and the matter is pending.

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18 Diallo's 2nd affidavit at [25] and pp 135–149.

19 Diallo's 2nd affidavit at [26] and pp 151–167.

20 Diallo's 2nd affidavit at [27].

21 Diallo's 4th affidavit dated 6 September 2019 ("Diallo's 4th affidavit") at [16]; 6/11/19 NE.

22 RV1's Written Submissions dated 23 July 2019 ("RV1's Submissions") at [20] – see table of events at no. 54.

ICS's application to set aside the Amended Writ

17 On 22 January 2019, ICS took out Summons No 383 of 2019 ("SUM 383") to set aside the Amended Writ filed by RV1 and the service of it, and for a declaration that the court had no jurisdiction over ICS in respect of the subject matter of the claim or the relief/remedy sought. Alternatively, the proceedings in the Suit should be stayed on the basis that Singapore is not the proper forum or that the court should exercise its discretion to grant a case management stay.

18 The registrar allowed ICS's application and discharged the Leave Order. He found that there was no full and frank disclosure by RV1 of the Waiver that was brought to its attention in October 2018, and the requirements under O 11 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC") had not been met. RV1 appealed against that decision in RA 179.

Issues

19 The issues before me essentially are:

(a) Whether RV1 has made out a case for service out of jurisdiction of the Amended Writ under O 11 r 1 of the ROC. In this regard, the issue of whether RV1 had made full and frank disclosure to the court should be considered.

(b) If the requirements under O 11 r 1 of the ROC are met, whether a stay should be granted on the basis that Singapore is not the proper forum, or alternatively whether a case management stay should be granted.

Applicable principles

20 Before the court will grant leave for service out of jurisdiction, the plaintiff must show that: (a) the claim comes within the scope of O 11 r 1 of the ROC; (b) the claim has a sufficient degree of merit; and (c) Singapore is the *forum conveniens* (*Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications*") at [26]). In relation to the first requirement, there must be a good arguable case (a standard higher than a mere *prima facie* case) made out on one of the heads of claims under O 11 r 1 (*Li Shengwu v Attorney-General* [2019] 1 SLR 1081 at [163]–[164]). As for *forum conveniens*, the plaintiff must prove that Singapore is the proper forum. It is sufficient if he shows that Singapore is, on balance and in the final analysis, the more appropriate forum to try the dispute, and it is irrelevant whether Singapore is the more appropriate forum "by a hair or by a mile" (*Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 at [6] and [8]).The plaintiff also has a duty to make full and frank disclosure in an *ex parte* application for leave to serve out of jurisdiction, and this includes facts that are unfavourable to his case. The obligation to disclose is a continuing one, to inform the court of any new circumstances that might have occurred between the time when leave was granted and when process was served (see *Manharlal Trikamdas Mody and another v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 ("*Manharlal*") at [78] and [84]).

Full and frank disclosure

21 ICS claimed that RV1 failed to disclose that Affert had waived all its claims against ICS through the Waiver. The Waiver was expressly brought to FKT's attention through ICS's 3 July 2017 Letter. Even if RV1 was previously unaware of the Waiver, the Waiver was brought to its attention by 22 October

2018.[23] Next, RV1 failed to disclose that, by the DOT, Affert had released ICS of its remaining payment obligation in respect of the cargo carried by Transfert (in the sum of US$1,120,837). By the time the DOT was executed, ICS had paid Affert about US$4,680,000 out of a total of US$5,800,837 for the Transfert cargo.[24] Also, ICS's 10 October 2018 Letter was written to RV1 prior to the commencement of the Suit to inform that all amounts due from ICS to Affert had been settled. RV1 should have reviewed all relevant financial documents and corporate records before making a decision to take over the recovery of the debts and receivables of a company in liquidation.[25]

22 RV1 asserted that when it filed SUM 4699 to obtain leave to serve the Amended Writ out of jurisdiction, it did not know of the existence of the Waiver documents and DOT. It first found out about these documents around 22 October 2018 after the Leave Order had been granted. ICS's 10 October 2018 Letter was received by RV1 only on 22 October 2018 and that was the first time RV1 had sight of ICS's 3 July 2017 Letter.[26] RV1 then informed the Liquidators who reviewed Affert's records but they did not locate ICS's 3 July 2017 Letter and were not aware of the alleged settlement of debt owed by ICS. The Liquidators then wrote to FKT to check if FKT was aware of the alleged documents. In any event, RV1 alleged that the Waiver was a sham and a transaction at undervalue (or no value) which can be set aside by the

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23 Diallo's 3rd affidavit at [8].

24 Diallo's 1st affidavit at [19] and [24]; Diallo's 2nd affidavit at [15]–[16]; ICS's Written Submissions dated 29 July 2019 ("ICS's Submissions") at [52]; Prentice's 2nd affidavit at [13].

25 Diallo's 1st affidavit at [25] and exhibit AD-7; Diallo's 2nd affidavit at [12].

26 Prentice's 2nd affidavit at [7]–[9].

Liquidators. As the ICS Debt was a genuine sum, it was misleading for ICS to allege that RV1 had breached its duty of full and frank disclosure.[27]

23 I accept that RV1 did not know about the Waiver documents and DOT when it filed the Amended Writ on 4 October 2018 or when the Leave Order was granted on 11 October 2018. Whilst FKT knew of the Waiver documents and DOT in July 2017, there was no evidence that it had informed the Liquidators or RV1 about them. I accept that RV1 received ICS's 10 October 2018 Letter around 22 October 2018 (which ICS conceded to be the case), which enclosed the Waiver documents and DOT.[28] Also, the Liquidators had known only around 31 October 2018, of FKT's 7 June 2017 Letter, ICS's 3 July 2017 Letter, the correspondences relating to the settlement in October 2014 and the DOT.

24 However, RV1 has a continuing obligation to give full and frank disclosure, even after the Leave Order was obtained and before the Amended Writ was served out of jurisdiction on ICS. By 22 October 2018, RV1 knew about the Waiver documents and DOT, and it was all along advised by lawyers. There was no explanation as to why RV1 did not, in the one month after becoming aware of the Waiver documents and DOT and before serving the Amended Writ on ICS, inform the court of these documents, which were material facts that could potentially have an adverse impact on RV1's case.

25 RV1's counsel (Mr Chan) merely stated that they had not properly advised their client because they were unsure whether the Waiver documents were genuine. However, Mr Chan agreed that the weight to be given to such

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27 Prentice's 2nd affidavit at [13]–[16].

28 Diallo's 3rd affidavit at [8(a)].

documents would have been for the court's determination and did not affect RV1's duty to disclose. Hence, that RV1 may have alleged that the Waiver was a sham or an undervalue transaction did not change the fact that the Waiver documents and DOT were material and should have been placed before the court. Even if ICS did not complain about RV1's breach of continuing obligation of full and frank disclosure until three days before the hearing of SUM 383, this was irrelevant to RV1's duty to make full and frank disclosure. Further, I failed to appreciate Mr Chan's argument that ICS did not come to court with clean hands because it had concealed the existence of the Dakar proceedings and Dakar Default Judgment until after the latter was obtained.[29] RV1's continuing obligation of full and frank disclosure was in relation to its application for leave to serve out of jurisdiction. It knew about the Waiver documents and DOT a month before it served the Amended Writ on ICS and well before ICS commenced the Dakar proceedings.

26 RV1's duty to make full and frank disclosure is not merely a matter of fairness between the parties but is one *owed to the court*. Even if the non-disclosure is innocent, the duty on the applicant is onerous and if he fails to discharge it, leave granted may be set aside (*Manharlal* at [78]–[79]). That said, the court's power to set aside leave granted to serve out of jurisdiction is a discretionary one and it is entitled to examine all the circumstances of the case to determine whether that is to be exercised (*Lee Hsien Loong v Review Publishing Co Ltd and another and another suit* [2007] 2 SLR(R) 453 at [57] and [60]). In this regard, the merits of the dispute, in light of the Waiver documents and DOT, must be considered. As such, I turn now to the merits.

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[29] RV1's Submissions at [7(1)(d)] and [7(1)(e)].

O 11 grounds

27 Before me, RV1 premised its claim on the basis of O 11 r 1(*d*)(i), (*d*)(iii), (*e*), (*f*)(i), (*f*)(ii), (*o*), (*p*) and (*s*) of the ROC.[30]

O 11 r 1(d)(i)

28 RV1 submitted that the claim in the Suit is brought to enforce a contract or to recover damages or obtain a relief in respect of a breach of a contract made in Singapore or made as a result of an essential step taken in Singapore. The Six Invoices, which were in English, were issued in Singapore by a Singapore entity (Affert); Affert's Singapore address is reflected on the Six Invoices and bills of lading; and two of the six shipments of sulphur showed the letter of credit issuing bank as Affert's banker in Singapore.[31]

29 I find that RV1 has not shown a good arguable case that either the Sulphur Contracts were made in Singapore or that they were made *as a result of* an essential step taken in Singapore. It is not disputed that the Sulphur Contracts were all oral, and that the Six Invoices were not the contract documents. This was clear even from RV1's affidavit and the Amended Writ.[32] There was no evidence that the negotiations leading to the execution of the Sulphur Contracts were done or partly done in Singapore. ICS attested that Affert was not involved in the discussions pertaining to the sale of the sulphur to ICS, and it was Archean Group's Ranjit Pendurthi (based in India) who was communicating with Alassane Diallo (a director and the Chief Executive

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30 RV1's Submissions at [8(4)]; Notes of Evidence of 7 October 2019 ("7/10/19 NE").

31 Prentice's 1st affidavit at [5]; 7/10/19 NE.

32 Prentice's 1st affidavit at [5(3)]; Statement of Claim in the Suit at [1]; 7/10/19 NE.

Officer of ICS) ("Diallo") and his team in Senegal on the matter.[33] Mr Chan conceded that RV1 did not have evidence of where the Sulphur Contracts were made or to show that the place of negotiation of the Sulphur Contracts was Singapore; he in fact stated that it could even be Hong Kong.[34]

30 Mr Chan asserted that the "essential step" taken in Singapore for the purposes of O 11 r 1(*d*)(i) of the ROC was the issuing of the Six Invoices.[35] However, the Six Invoices (and even the bills of lading and letters of credits) were issued *after* the Sulphur Contracts *had been concluded* and hence the Sulphur Contracts were not made as a result of them.

(a) In any event and naturally, Affert's address stated on such documents would be a Singapore address as it is a Singapore entity with Singapore as its only place of business.

(b) That letters of credit showed the issuing bank for Affert to be a Singapore branch did not support RV1's contention that the Sulphur Contracts were made in Singapore or made as a result of an essential step taken in Singapore. As ICS's counsel (Mr Lim) pointed out, RV1's case rests on only two of six letters of credit and which pertained to only two shipments of sulphur, when five payments were made by ICS to Affert's bank branch in Hong Kong.[36]

(c) In this regard, Mr Chan's reliance on the Sulphur Contracts being on Cost and Freight terms and on the Incoterms 2010: International

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33 Diallo's 1st affidavit at [37].

34 Prentice's 2nd affidavit at [30]; 7/10/19 NE; RV1's Submissions at [12(2)].

35 7/10/19 NE.

36 7/10/19 NE.

Chamber of Commerce rules for the use of domestic and international trade terms ("Incoterms") was misconceived. First, Mr Chan asserted that the Sulphur Contracts were deemed to be performed when the goods were loaded at the port of loading – but none of the ports of loading were Singapore.[37] Second, the Incoterms merely state that the seller must provide the goods and the commercial invoice *in conformity with the contract of sale*. The Incoterms do not support the contention that the Six Invoices are the Sulphur Contracts or that the issuing thereof was an essential step taken in Singapore resulting in the Sulphur Contracts.

(d) The place of issue of the Six Invoices did not necessarily bear a correlation to the place where the Sulphur Contracts were formed.

31 Next, that the Six Invoices (and other documents) may have been issued in English is neutral, given that Singapore is hardly the only country having English as its principal language of commerce and given that English is the *lingua franca* of international business (*Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [38]). Finally, Mr Chan submitted that Senegal was not the place where the contract was made – but this is irrelevant to the analysis. RV1 must show a positive case that the contract was made in Singapore or made as a result of an essential step taken in Singapore. Even if the Sulphur Contracts were not made in Senegal, it did not therefore mean that they were made in Singapore and nowhere else. As Mr Chan asserted, the negotiations leading to the Sulphur Contracts could have been in Hong Kong (see [29] above).

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37 RV1's Submissions at [12(4)].

O 11 r 1(d)(iii)

32 Next, RV1 submitted that the Sulphur Contracts were by its terms, or by implication, governed by Singapore law. The Court of Appeal in *Pacific Recreation* (at [36]) set out a three-stage test in determining the governing law of a contract. The first stage is to examine the contract to see if it states expressly what the governing law should be. In the absence of an express provision, the second stage is to see whether the intention of the parties as to the governing law can be inferred from the circumstances. If this cannot be done, the third stage is to determine with which system of law the contract has its most close and real connection.

33 I am not satisfied that RV1 has shown a good arguable case in this regard. There was no written contract and hence no express terms of the governing law of the Sulphur Contracts. RV1 has also not been able to show me that the parties' intent that Singapore law would be the governing law could be inferred from the circumstances, or that the system of law the Sulphur Contracts had its closest and most real connection was Singapore law.

34 First, that Affert is a Singapore entity did not therefore point to the parties' intent for Singapore law to be the governing law of the Sulphur Contracts, as the counterparty, ICS, is based in Senegal. Second, that English was the medium of the Six Invoices (and other documents) was inconclusive and neutral. Third, as for the bills of lading, Mr Chan agreed that there was no evidence that they were endorsed in Singapore or were all given to Affert in Singapore to be transmitted to ICS.[38] The place of issue of four bills of lading were Dubai, Canada, Poland and Spain and the endorsement on two bills of

[38] 7/10/19 NE.

lading were of banks based abroad.[39] Even if some of the bills of lading endorsed by the banks were sent by Affert to ICS, and hence showed that Affert had taken steps to ensure that the cargo was released to ICS, this did not alter my finding. Affert, being a party to the Sulphur Contracts, had to ensure compliance with its obligations therein to deliver the goods to ICS.

35 Next, RV1 relied on the DOT (which related in particular to the Transfert cargo), which provided that any dispute arising out of the DOT would be governed by Singapore law and the dispute was to be resolved by arbitration under the Singapore International Arbitration Centre ("SIAC") Rules with the seat of arbitration in Singapore. The DOT was signed by Syam in Singapore on Affert's behalf, even if ICS and Transfert signed the DOT in Senegal and Dubai respectively.[40] RV1 thus asserted that the parties to the DOT would not have intended Singapore law to govern the DOT if they had not also intended the Sulphur Contracts to be governed by Singapore law. In my view, it would be inappropriate to draw such an inference. The DOT was not part of the Sulphur Contracts and was executed *two to three years after* the Sulphur Contracts. The DOT related only to the Transfert cargo (whereas the Sulphur Contracts related to other cargoes as well) and was executed by Transfert, in addition to Affert and ICS, to govern their rights and obligations on the outstanding sums owing under the Sulphur Contracts long after the goods had been delivered.

36 The ADA, STA and Side Letter, which RV1 sought to rely on to point to Singapore law as the governing law of the Sulphur Contracts, do not support

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39 7/10/19 NE; Diallo's 1st affidavit at pp 76–84; Prentice's 2nd affidavit at [31(3)] and [31(4)].

40 Diallo's 1st affidavit at p 44.

RV1's case. Neither Affert nor ICS were parties to the Acquisition Documents.[41] The Acquisition Documents were executed one to two years after the Sulphur Contracts and pertained to Indorama's acquisition of shares in ICS, and which is not the subject matter of RV1's claim in the Suit. In addition, the STA is expressly stated to be governed by Senegalese law with a jurisdiction clause in favour of the Senegal courts, and the ADA is expressly stated to be governed by English law with disputes to be resolved by arbitration with the seat of arbitration in London.

37 As such, I could not infer from the circumstances the intention of the parties as to the governing law. Moving on to the third stage of the test in *Pacific Recreation*, I was of the view that, on balance, the law with the closest and most real connection to the Sulphur Contracts was Senegalese law. First, ICS had attested that the pre-contractual discussions or negotiations were between representatives of ICS (based in Senegal) and the Archean Group (based in India), and RV1 has not shown how Affert was involved in the negotiations. Second, the place of discharge of the cargo was Senegal and the cargo was delivered in Senegal. As for place of payment, Mr Chan agreed that all the partial payments made thus far of US$5,291,000 under the Six Invoices/Sulphur Contracts were to Affert's account in Hong Kong.[42] Hence, I find that Senegal bore a closer and more real connection to the Sulphur Contracts than Singapore. Even if the invoices were issued by Affert in Singapore, that is neither here nor there as they were issued after the contracts were formed, and Affert, being the seller of the sulphur had only one place of business (*ie*, Singapore). Ultimately, the proper law of the contract must be ascertainable at the time the contract came

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41 7/10/19 NE; Damian John Prentice 3rd affidavit dated 29 March 2019 ("Prentice's 3rd affidavit") at [14].

42 7/10/19 NE.

into existence. As the court stated in *Pacific Recreation* at [48], the third stage aims to consider, on balance, which law has the most connection with the contract and the circumstances surrounding the *inception* of that contract.

38 Finally, Mr Chan argued that O 11 r 1(*d*)(iii) is fulfilled as the key issue is whether the Waiver should be set aside, and the law on setting aside the Waiver is Singapore law pursuant to the Liquidators' powers under the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") and/or Bankruptcy Act (Cap 20, 2009 Rev Ed) ("Bankruptcy Act").[43] This misses the point. The application to set aside the Waiver as an undervalue transaction is the Liquidators' sole preserve. It is not the subject matter of RV1's claim in the Suit and the Waiver is not the contract or claim that RV1 relies on to found jurisdiction O 11 r 1 of the ROC.

39 In the round, I am not satisfied that RV1 has made out a good arguable case under O 11 r 1(*d*)(iii).

O 11 r 1(e)

40 RV1 then asserted that the claim in the Suit was brought in respect of a breach committed in Singapore which was preceded or accompanied by a breach committed out of Singapore that rendered impossible the performance of so much of the contract as ought to have been performed in Singapore. The parties' arguments centred on whether there was any obligation to be performed in Singapore for there to be a breach committed in Singapore. RV1 asserted that it was entitled to payment on the Sulphur Contracts in Singapore.[44] ICS argued

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43 RV1's Submissions at [8].

44 RV1's Submissions at [9].

that as the previous partial payments were made by ICS to Affert's bank account with the Bank of India in Hong Kong, this clearly demonstrated that the parties had in their course of dealings agreed or intended for ICS's payment obligations to be performed in Hong Kong.[45]

41 In this regard, the court should first look at the terms of the contract to see if it expressly provides for the place of payment. Where no place of payment is provided by the contract, the court looks at whether a term can be implied from the circumstances and course of dealing between the parties. If not, the rule that the debtor must seek out his creditor at the creditor's place of business and pay him there would apply (see, *eg*, *The Eider* [1893] P 119 at 129; *Bell & Co v Antwerp, London and Brazil Line* [1891] 1 QB 103 ("*Bell & Co*") at 106–107; *Komaia Deccof and Co SA and others v Perusahaan Pertambangan Minyik dan Gas Bumi Negara* [1982] HKCA 253 ("*Komaia Deccof*") at [9] and [12]). The parties are largely in agreement on the general proposition.[46]

42 There were no express terms of payment as the Sulphur Contracts were oral. However, it could not be said that the circumstances or course of dealings showed that ICS's payment obligation for the ICS Debt was Hong Kong instead of Singapore, or that Affert was only entitled to be paid in Hong Kong in respect of the ICS Debt. This is even if, as Mr Lim submitted, Affert would, at the material time, seem to have no other employees besides Syam and Vandana Bounsle ("Vandana") and that Affert's affairs were conducted by

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45 ICS's Submissions at [97].

46 6/11/19 NE; RV1's Further Submissions (8 October 2019) at [1]; ICS's Submissions at [90]–[92].

representatives of the Archean Group.[47] Whilst Syam is based in Hong Kong, Vandana is based in Singapore. It was not disputed that Affert was incorporated in Singapore and had only one place of business, which is Singapore. The Six Invoices from Affert pertaining to the Sulphur Contracts bore Affert's Singapore address. Whilst Affert had one bank account (with the Bank of India) in Hong Kong, it had four bank accounts (with the Bank of India, OCBC Bank and Standard Chartered Bank) in Singapore and those were live accounts. Even the Bank of India (Hong Kong branch) which Affert used, reflected Affert's Singapore address on the bank statements and other documents (such as those pertaining to letters of credit).[48] A letter of indemnity given by Affert to the owners of the vessel for a cargo (the subject matter of one of the Six Invoices) bore Affert's Singapore address. Even Syam (who is based in Hong Kong) had signed the DOT in Singapore on Affert's behalf. It could not be said that Affert had no business or activity in Singapore.

43 I find that the payment obligation to Affert, being a Singapore entity, was in Singapore, *ie*, Affert had a right to be paid in Singapore. That Affert may have agreed to accept partial payment on previous occasions in Hong Kong was insufficient to show that it had agreed with ICS to accept all future payments on the Sulphur Contracts (*ie*, the ICS Debt) only in Hong Kong or that Affert had waived its right to be paid in Singapore. It was hard to believe that had Affert informed ICS to make the remainder payment on the Sulphur Contracts to its Singapore bank accounts, ICS would have been able to refuse and would have refused on the basis that Affert was entitled to be paid in Hong Kong only.

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47 6/11/19 NE; Andreas Weimann's 1st affidavit dated 7 April 2017 ("Andreas Weimann's 1st affidavit) filed in OS 279/2017 at [33]–[34].

48 Andreas Weimaan's 1st affidavit at p 464; 6/11/19 NE; Prentice's 2nd affidavit at pp 92–95.

44 In *Thompson v Palmer* [1893] 2 QB 80, the plaintiff engineer carried on business at Newcastle, and was employed by the defendants to design and superintend the construction of docks in Spain. The contract between the parties did not expressly provide where the plaintiff would be paid. The English Court of Appeal held that from the contract, the implication was that the plaintiff would be paid at Newcastle where he generally carried on business and the plaintiff had a right to be paid there. This was even though the plaintiff had spent some time in Spain to superintend the construction of the docks.

45 In *Drexel v Drexel* [1916] 1 Ch 251 ("*Drexel*"), the plaintiff wife and defendant husband were Americans who married in America and then went to reside in England where their children were educated. Subsequently the parties separated, and while they still lived in England, the defendant was connected with a banking business in America and paid short visits to America. They executed a deed of separation (prepared by American lawyers), signed by the plaintiff in England and the defendant in America, where the husband agreed to pay the wife an allowance by monthly instalments. At the time the plaintiff issued a writ against the defendant to enforce the deed, the latter was domiciled in France. The court held that the allowance was payable to her wherever she might be living and that she had a right to be paid in England if she so desired. This was even though there was an arrangement for payment to be made to the wife on an American bank and even if the American payments had gone on for years. The court (at 260) stated that what it had to consider was "not what was done, but what the plaintiff had a right to have done under the terms of the agreement". Whilst *Drexel* pertains to payment of maintenance, the authority and general proposition (at [41] above) are no less applicable to a contract of services or goods as in the present case. The payment in *Drexel* was nevertheless premised on a contract (the deed of separation) and pertains to where a person is legally entitled to be paid.

46 In *Komaia Deccof*, the plaintiffs had received payments in New York from the defendant. The High Court (in *Komala Deccof & Co SA and others v Perusahaan Pertambangan Minyik dan Gas Bumi Negara (Pertamina)* [1981] HKCFI 89 at [13] and [15]) found ample evidence for a set practice of payment to the second plaintiff in New York, and settlements between the defendant and the first and second plaintiffs were that payments were wholly or mainly outside Hong Kong. The Court of Appeal in *Komaia Deccof* held at [14], that the "receipt and acceptance of money in country A is not necessarily inconsistent with an obligation to pay in country B", and found that the plaintiffs had a place of business in Hong Kong and were entitled to be paid there.

47 ICS cited a number of cases, but they essentially turn on the facts. For instance, in *Comber v Leyland and Bullins* [1898] AC 524, the defendant (who carried on business in Brazil) was to hold the moneys for the plaintiffs in Brazil and to turn it to bank bills to remit to the plaintiffs. The House of Lords held (at 530–531 and 534) that the defendant's obligation was to be performed in Brazil, that his obligation ceased when he sent the bank bills from Brazil and that there was no obligation incumbent on him until the bank bills reached the plaintiffs in England. The relevant documents appeared to expressly provide, as regards the place of performance of the contract, that putting bank bills named in the post in the foreign country was to be the performance of the contract. Hence all that the defendant had to do was done in Brazil, and as such, the plaintiffs' application to serve the writ out of jurisdiction under the equivalent of O 11 r 1(*e*) of the ROC failed. In *Cuban Atlantic Sugar Sales Corporation v Compania De Vapores San Elefterio Limitada* [1960] 1 QB 187, the English Court of Appeal found (at 193–195) that the contract could be performed in the UK or elsewhere, that until the nomination of a port had been made, it could not be said that there was a contract to be performed within the UK, and that there was no breach within the UK because the time of nomination never arrived.

48 As such, I find that RV1 has made out a good arguable case under O 11 r 1(*e*) of the ROC.

Effect of the Waiver

49 I go on to consider the Waiver, which is ICS's defence to the ICS Debt, to determine if RV1's claim has a sufficient degree of merit. RV1 asserted that the relevant documents showed that US$17,007,263.60 was owing from ICS to Affert and that the Waiver was a sham as no consideration was received by Affert pursuant to the Acquisition which was essentially between Senfer and Indorama and of which Affert was not a party to.

50 ICS claimed that sufficient consideration had been provided for the Acquisition and Waiver.[49] Whilst consideration must move from the promisee, there is no requirement for the consideration to move to the promisor but may move to a third party (*The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at para 04.021, citing *Tsu Soo Sin nee Oei Karen v Ng Yee Hoon* [2008] SGHC 30 ("*Tsu Soo Sin*") at [104]).[50] RV1 submitted that *Tsu Soo Sin* is distinguishable. Whilst consideration may move to a third party, there were *mutual promises between the promisor and promisee* that constituted sufficient consideration (although the promisee's performance of the counter-promise had benefitted a third party). Likewise, in *Wartsila Singapore Pte Ltd v Lau Yew Choong and another suit* [2017] 5 SLR 268 at [161], another authority cited by Mr Lim, one LYC had promised to provide an undertaking to Wartsila to pay the outstanding bills in return for Watsila's counter-promise to LYC to give more favourable payment terms. In

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49 Diallo's 2nd affidavit at [19]–[21].

50 6/11/19 NE.

reply, ICS submitted that it had provided good consideration to Affert, and there was no requirement for mutual promises to be made between the promisor and promisee and no requirement for there to be a request to pay a third party.[51]

51 Here, Affert (the promisor) had "promised" ICS (the promisee) to waive the ICS Debt. ICS claimed that pursuant to the Side Letter it would, in return, pay US$9m to Senfer as full and final settlement of all ICS's related-party debts which included the ICS Debt (see [3] above). Mr Lim submitted that at that time, ICS had a genuine dispute with Affert for damage to its factory caused by the low-quality Solvadis cargo and ICS's forbearance to sue Affert for the damage constituted sufficient consideration to Affert.[52] However, ICS's purported forbearance to sue Affert for the Solvadis cargo and that this constituted consideration to Affert for the Acquisition and Waiver, was not stated in any of ICS's affidavits. Mr Lim also submitted that Affert benefitted indirectly since payment for the Acquisition was made to the Archean Group, which Affert is part of.[53] I am not persuaded that payments made to the Archean Group (or Senfer), which is a separate legal entity from Affert, constitutes sufficient consideration to Affert. There was no suggestion that Affert received any cash payment or other benefits – based on ICS's claim, the payment of US$8m made by ICS was to Affert's *associated companies*.[54]

52 ICS's own arguments also raises the issue of whether the Waiver would be valid if ICS was not a party to it and had not made a mutual promise to RV1.

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51 ICS's Reply Submissions on Consideration dated 4 December 2019 ("ICS's Reply Submissions") at [6], [9] and [10].

52 ICS's Reply Submissions at [6].

53 ICS's Reply Submissions at [7] and [14].

54 ICS's Reply Submissions at [9].

While ICS submitted otherwise, it was not apparent that there was any counter-promise *from ICS* and *to Affert* in relation to the Waiver. Neither ICS nor Affert was a party to the Side Letter, and it was clear from the Side Letter that it was *Indorama* who "shall cause" ICS to pay Senfer the US$9m. For a compromise to be enforceable, there must be: (a) an identifiable agreement *between Affert and ICS* that was complete and certain; (b) consideration; and (c) an intention to create legal relations (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 322 at [46]). According to ICS, the Waiver agreement was made in October 2014.[55] Whilst Affert's 7 October 2014 Letter was addressed to ICS, it is unclear that Affert negotiated *with ICS* for the Waiver. Affert's 7 October 2014 Letter addressed to ICS came about in negotiations between Syam (of Affert) and Munish Jindal (of Indorama) (see Affert's 1 October 2014 Email), and was sent by Syam to Munish Jindal and not to ICS. It is not apparent that ICS had a mutual agreement with Affert in relation to the Waiver or what counter-promise *ICS* made *to Affert*, even if there was consideration that flowed to another party and not to Affert. Further, whilst the DOT was signed by ICS and Affert (and Transfert), this was not the Waiver (it being executed some six months after the Waiver documents), and hence could not be relied on by ICS to show any counter-promise on its part for the Waiver.

53 Even if there was no issue as to the legal validity of the Waiver, there is force to RV1's assertion that the Waiver was a sham. RV1 had referred to Vandana's answers to a questionnaire in examination of judgment debtor proceedings initiated by Solvadis against Affert, wherein Vandana (as director of Affert) confirmed that the ICS Debt was due and payable by ICS ("Vandana's affidavit"). Vandana's affidavit was affirmed on 26 October 2015, more than a

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55 Diallo's 1st affidavit at [10], [21] and [22]; 6/11/19 NE.

year after the Waiver documents, and seven months after the DOT was executed.[56] Vandana's evidence would cast doubt on the Waiver documents. In this regard, it is pertinent to note that ICS did not, in its affidavit in reply, address RV1's assertion above or Vandana's affidavit, but merely stated that it disagreed with "RV1's totally baseless and quite incredible accusations … that ICS was "acting in concert" with Affert's former directors ([Syam] and [Vandana]) in matters concerning the Waiver."[57]

54 Next, I deal with the Dakar Default Judgment, whereby the Waiver was regarded as having extinguished the ICS Debt. I find that this did not, at the jurisdictional stage, defeat RV1's claim as having insufficient merit. The Liquidators have appealed against the Dakar Default Judgment and the matter is currently before the Dakar Court of Appeal. Even if the matter proceeds all the way to the highest court of Senegal and that court determines that the Waiver extinguishes the ICS Debt, that ICS could raise this as a defence to the Suit would not preclude RV1 from proceeding on the Suit.

55 Also, there is merit in RV1's assertion that the service of the summons in the Dakar proceedings (see [13] above) was not properly effected. ICS had left the summons with the Public Prosecutor's Office of Senegal ("Senegal PP"), which the Senegal PP was to forward to the Senegal Ministry of Justice which would in turn forward it to the Senegal Ministry of Foreign Affairs ("MFA") which would then forward it to the Singapore MFA for the purposes of effecting service on Affert in Singapore. Mr Houda, ICS's expert, opined that ICS's service on the Senegal PP constituted proper service on Affert, whereas

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56 Prentice's 3rd affidavit at [10(5)] and exhibit DP-11; 6/11/19 NE.

57 Diallo's 3rd affidavit at [8(c)].

RV1's Senegalese lawyer, Mr Kebe, stated that service of the summons would be satisfied only when the Singapore MFA serves the summons on Affert. Whilst I do not make a determination on the matter, there is merit in Mr Kebe's view as the Senegal PP may never forward the summons onwards. Indeed, both Mr Chan and Mr Lim were unable to inform me where the summons currently is or whether it has even reached the Singapore MFA.[58]

Conclusion on O 11 r 1(e)

56 In the round, I find that RV1 has made out a good arguable case under O 11 r 1(*e*) of the ROC and that RV1's claim in this regard has sufficient merit.

O 11 r 1(f)(i), 1(f)(ii), 1(o), 1(p) and 1(s)

57 Given the above, I do not find it necessary to deal with O 11 r 1(*f*)(i), 1(*f*)(ii), 1(*o*), 1(*p*) and 1(*s*), and I will dispose of these heads of claim briefly.

58 RV1's premise for an action under O 11 r 1(*f*)(i), 1(*f*)(ii), 1(*o*) and/or 1(*p*) is based on a claim in tort for dishonest assistance and knowing receipt and for breach by Affert's directors of their duties for entering into the Waiver without any consideration to Affert.[59] RV1 thus intends to claim for damages and an account from the directors as a trustee or fiduciary. I was not minded to grant leave on any of the above heads of claim under O 11 r 1. No such cause or causes of action have been pleaded in the Amended Writ or Statement of Claim, and in any event, any such claims above would require RV1 to amend the Statement of Claim to include new parties/defendants (namely Affert's directors). Unless and until RV1 formally applied to amend its Amended Writ

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58 6/11/19 NE.

59 6/11/19 NE; Prentice's 2nd affidavit at [24].

and Statement of Claim and put in the proposed draft amendments for the court to properly consider whether they satisfy O 11 r 1(*f*)(i), 1(*f*)(ii), 1(*o*) and/or 1(*p*) and cross the jurisdictional threshold, it would be premature for me to consider RV1's application on that basis.

59 My reasoning similarly applies to RV1's arguments on O 11 r 1(*s*) which must be a claim concerning the construction, effect or enforcement of any written law. In any event, Mr Chan conceded that *RV1* would not have a cause of action in this regard, as the "written law" pertained to the *Liquidators*' cause of action to set aside the Waiver as an undervalue transaction pursuant to its powers under the Companies Act or Bankruptcy Act.

Whether Singapore is *forum conveniens*

60 I next determine whether Singapore is *forum conveniens*. In this regard, I set out the parties' respective case and proceed to examine the various factors.

Parties' cases

61 RV1 asserted the following as connecting factors pointing to Singapore:[60]

> (a) Affert's liquidation is taking place in Singapore and is subject to the Singapore court's jurisdiction. The Liquidators have filed OS 544 to ask the court to determine the Waiver as an undervalue transaction, and this matter is subject to the Singapore court's jurisdiction and governed by Singapore law.

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60 Prentice's 2nd affidavit at [20]–[34]; Prentice's 3rd affidavit at [25]; RV1's Submissions at [15].

(b) The DOT provides that any dispute arising out of the DOT would be governed by Singapore law and the dispute is to be resolved by arbitration under the SIAC Rules, with the seat of arbitration in Singapore. The DOT also referred to Affert's 7 October 2014 Letter, which thus implied that Singapore law governed the Waiver. Additionally, the Waiver set out in Affert's 7 October 2014 Letter had Affert's letterhead with its Singapore address, and hence it was likely signed in Singapore.

(c) The DOT referred to a Settlement Agreement dated 7 May 2014, entered into among ICS, Affert and Transfert (see further at [65] below), which expressly stated that it would be governed by Singapore law and subject to the exclusive jurisdiction of the Singapore courts.

(d) The DOT and Waiver documents were entered into by Affert's directors without any consideration to Affert and amounted to a breach of their duties as directors of a Singapore company. The breach occurred in Singapore in relation to the DOT (which Syam signed before a Singapore notary public) and the damage was suffered by Affert in Singapore.

(e) All the documents exchanged or executed by Affert and ICS were in English and not French which is the official language of Senegal. This strongly indicates that the parties did not intend the governing law to be Senegalese law.

(f) ICS has not shown evidence that the Acquisition was negotiated and completed in Senegal or what its governing law was.

(g) Affert is entitled to be paid in Singapore, its place of business.

(h) There was little or no connection to Senegal. Affert played a substantial role in the performance of the Sulphur Contracts even though it procured the sulphur from a supplier to on-sell to ICS.

(i) The limitation period to sue on the Six Invoices in Senegal has expired. In any event, even if Senegalese law applied to any part of the dispute, the Suit could be transferred to the Singapore International Commercial Court ("SICC").

62 ICS asserted that the following connecting factors point to Senegal:[61]

(a) ICS is incorporated in and has its place of business in Senegal.

(b) The Acquisition and Waiver were negotiated and completed in Senegal, and the governing law of the Waiver is Senegalese law.

(c) The Waiver was discussed and agreed in concert with the acquisition of ICS, the latter of which was negotiated and completed in Senegal. As part of the Acquisition, the Waiver documents were executed. The STA was executed in Senegal and the parties expressly agreed to submit their disputes to the Dakar court. The Acquisition Documents were all signed in Senegal.

(d) The Dakar Default Judgment had determined that Affert had waived the ICS Debt. The Dakar Commercial Court had accepted jurisdiction of the dispute between ICS and Affert. Further, parallel proceedings in Senegal have progressed to a clearly advanced stage.

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61 Diallo's 1st affidavit at [48]–[49]; Diallo's 2nd affidavit at [18]–[29] and [36]; Diallo's 3rd affidavit at [10]–[11]; ICS's Submissions at [127]–[132].

(e) The Six Invoices indicate Senegal as the port of discharge of the sulphur cargo, and none of the port of loading was Singapore.

(f) Archean Group's Ranjit Pendurthi is based in India, and communicated directly with Diallo (of ICS) and his team in Senegal for all matters on the sale of the sulphur to ICS. ICS did not discuss or negotiate with Affert on the procurement of the sulphur or liaise with anyone in Singapore. Affert was only an intermediary in the transactions whilst ICS was the consignee of the cargo, it only came into the picture after ICS and Archean Group had agreed on all the key details of the shipment, and its role was purely administrative to assist with the documentation.

(g) ICS's witnesses involved in the cargo transactions and who negotiated the Acquisition and Waiver on ICS's behalf are mostly domiciled or resident in Senegal or Nigeria, and not in Singapore.

Law governing the Waiver

63 I deal first with the law governing the Waiver, as the Waiver is the crux of ICS's defence to the ICS Debt. RV1 asserted that the governing law is Singapore law whereas ICS asserted it is Senegalese law. In this regard, there was no express choice of law in relation to the Waiver, and thus the court looks at whether the intention of the parties as to the governing law can be inferred from the circumstances. If not, the court determines which system of law the Waiver has its closest and most real connection. I find that the law governing the Waiver is Singapore law and not Senegalese law. Based on the circumstances, the intention of the parties must have been for the governing law of the Waiver to be Singapore law, and even if that was not the case, I would

have found that the system of law the Waiver had its closest and most real connection with is Singapore law.

64 The Waiver documents themselves point towards Singapore law, and not Senegalese law, as the governing law.

(a) Affert's 1 October 2014 Email was sent by Syam from his Singapore email account to Indorama's Munish Jindal – Indorama is incorporated in the Netherlands. At that time, the agreement or parties corresponding were Affert and Indorama; ICS was not in the picture.

(b) Next, the correspondences showed that Affert's 7 October 2014 Letter, although addressed to ICS, was sent by Syam to Munish Jindal of Indorama, via email, wherein Syam stated to Munish Jindal "As desired, herewith our letter. Kindly [acknowledge] receipt."[62] The Letter was written on Affert's letterhead bearing Affert's Singapore address. Again, ICS was not in the picture.

(c) The Waiver is *given by and emanated from* Affert, and related to Affert's act of waiving the ICS Debt owed to it. It cannot be seriously suggested that Affert (a company incorporated in Singapore, and was the one giving the waiver in relation to the ICS Debt that was owed to it) would have intended the Waiver to be governed by Senegalese law. It was more likely that the intention was for the Waiver to be governed by Singapore law. In any event, the Waiver documents came about from Affert's communication with Indorama (not ICS) and even Affert's 7

62 Diallo's 1st affidavit at pp 39–40.

October 2014 Letter was sent to Indorama. Indeed, ICS did not execute the Waiver documents.

65 Next, I turn to the DOT, executed by Transfert, Affert and ICS. The DOT, which explicitly referred to the Waiver and a Settlement Agreement (also between Transfert, Affert and ICS) ("SA"), was relied on by ICS to support the validity of the Waiver, and is thus closely connected to the Waiver documents. The SA was executed on 7 May 2014, whereby Affert and ICS jointly agreed to pay Transfert for a batch of sulphur (which formed one of the Six Invoices). The purport of the DOT was to render full and final settlement of all claims among Transfert, Affert and ICS in connection with the SA. Essentially the DOT terminated the SA, and also reiterated that "Affert had confirmed in [Affert's 7 October 2014 Letter] to ICS that they have no further claim on ICS for any amounts whatsoever." Whilst the DOT was executed after the Waiver documents, the SA preceded the Waiver documents. The SA stated Singapore law as the governing law with the SA subject to the exclusive jurisdiction of the Singapore courts. The governing law of the DOT was also expressly stated to be Singapore law and any disputes arising from the DOT was to be resolved by arbitration seated in Singapore and under the SIAC Rules. Whilst Syam was purported to be based in Hong Kong, he signed the DOT in Singapore. Given the inter-relation among the Waiver documents with the DOT and SA, the latter two being expressly governed by Singapore law, it was more likely than not that the Waiver was also intended to be similarly governed by Singapore law.

66 As for the Acquisition Documents, they did not support ICS's position that the Waiver was intended to be governed by Senegalese law or had its closest and most real connection with Senegal. Whilst the STA was expressly stated to be governed by Senegalese law, the ADA was expressly stated to be governed by English law with disputes to be resolved by arbitration unde the LCIA Rules

with the seat of arbitration in London. The Side Letter did not state an express governing law or jurisdiction clause, but explicitly referred to the ADA (which is governed by English law). Hence, even if the Waiver was part of the overall consideration of the Acquisition as Mr Lim asserted, the fact is that not *all* of the Acquisition Documents point to Senegalese law as the governing law. Pertinently, both Affert (who had given the Waiver documents) and ICS were not parties to the Acquisition Documents.

67 As such, I find that the governing law of the Waiver was intended to be Singapore law, alternatively it had its closest and most real connection with Singapore law. As ICS's defence is that the Waiver had extinguished the ICS Debt, the law of the Waiver is a significant factor in favour of Singapore.

OS 544 – Liquidators' application to set aside Waiver

68 The Liquidators have applied by OS 544 to set aside the Waiver as an undervalue transaction and filed an application in Senegal to set aside the Dakar Default Judgment. It is not disputed that the Liquidators' application to set aside the Waiver as an undervalue transaction is exclusive to them, subject to the Singapore court's jurisdiction and governed by Singapore law. The effect of the Waiver as ICS's defence in the Suit is a crucial issue and closely related to the Liquidators' application to set aside the Waiver. This must also be seen in the light of RV1's claim that the Waiver is a sham transaction. As such, the Singapore court's decision in relation to the Waiver in OS 544 would potentially have a material bearing on ICS's defence in the Suit. Hence, that there are proceedings in relation to the setting aside of the Waiver which can only be brought in Singapore, is another factor in support of Singapore as the forum for the trial of the dispute in relation to the ICS Debt. This is coupled with my finding that the law which the Waiver has its closest and most real connection

with is Singapore law. Whilst OS 544 has been stayed pending the final determination of the Senegelese proceedings, this did not make a difference to my analysis as the Liquidators have appealed against the stay order.

Place of breach of Sulphur Contracts

69 I had earlier found that ICS's payment obligation to Affert for the ICS Debt was in Singapore. Given that RV1's claim against ICS is for the failure to pay the ICS Debt resulting in a breach of the Sulphur Contracts, the breach of the Sulphur Contracts occurring in Singapore would be a connecting factor that tilts the balance in favour of Singapore as the proper forum for the trial of the dispute. This was a factor that was considered to be relevant in *Zoom Communications*. That said, this factor is not as strong as the factors pertaining to the law of the Waiver and the proceedings brought by the Liquidators to set aside the Waiver (as discussed above), given that ICS does not seem to be disputing the existence or validity of the ICS Debt but essentially claiming that the debt had been extinguished by the Waiver. Nevertheless taking the dispute as a whole – the place of breach of the Sulphur Contracts, coupled with the law governing the Waiver and whether the Waiver was an undervalue transaction that could have an impact on ICS's defence to the ICS Debt – would significantly tilt the balance in favour of Singapore.

Dakar proceedings and Dakar Default Judgment

70 ICS submitted that the Dakar proceedings have progressed to an advanced stage and the Senegalese courts have assumed jurisdiction of the dispute on the Waiver with the Liquidators having appealed against the Dakar Default Judgment. It also submitted that there were common facts and issues in the Suit and the Dakar proceedings and a risk of conflicting decisions if they were heard in two separate jurisdictions.

71 Where there appears to be related or parallel proceedings, the factors to be considered would include the degree to which the respective proceedings have advanced, the degree of overlap of issues and parties, and the risk of conflicting judgments (*Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd and another appeal* [2013] 4 SLR 1097 ("*Virsagi Management*") at [39]–[40]). Whilst ICS may have obtained the Dakar Default Judgment which pertained to a common issue in the Suit (*ie*, the Waiver), I find that this was not a factor that weighed significantly in favour of Senegal being the more appropriate forum.

72 First, I am not convinced that the proceedings in the Dakar courts are at such an advanced stage to tilt the balance towards Senegal. The Dakar Default Judgment was obtained *in default of appearance*, and it is not disputed that neither Affert, the Liquidators nor RV1 was actually notified of the summons. Thus, they could not have challenged the merits of the case in the first instance at the Dakar courts until the Liquidators filed an appeal in June 2019 against the Dakar Default Judgment. Whilst the parties to the Senegalese proceedings have filed submissions in the Senegalese court, the court has yet to render a decision and in any case, there is a further avenue of appeal.[63]

73 In *Virsagi Management*, the Court of Appeal stated (at [39]) that the advanced stage of proceedings may be disregarded if the proceedings had been deliberately advanced at the instance of the party seeking to rely on this as a factor, and little or no weight will be given to the fact that there are foreign proceedings if they are commenced for strategic reasons to bolster the case of a clearly more appropriate forum elsewhere. There is merit in Mr Chan's

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63 6/11/19 NE.

submissions as to the *bona fides* of ICS in applying for the stay application, and I find that the Dakar proceedings were commenced and advanced to bolster ICS's case of a more appropriate forum in Senegal. The Dakar proceedings were commenced shortly after the Amended Writ was served on ICS and ICS entered appearance. The summons and Dakar proceedings were never brought to the attention of Affert, the Liquidators or RV1, until after the Dakar Default Judgment was obtained. This is in contrast to RV1 having been informed *directly* of the Waiver and DOT when ICS's Senegalese lawyers corresponded *with RV1* on ICS's debt due to Affert (via ICS's 10 October 2018 Letter), and of the Dakar Default Judgment by ICS's Singapore lawyers (see [14] above). Even when ICS filed SUM 383 to set aside the Amended Writ and service of it, it did not mention nor disclose the Dakar proceedings in the supporting affidavit despite ICS's basis for SUM 383 being that the Singapore court had no jurisdiction and alternatively that Singapore was not the proper forum for the dispute. This is given that the validity of the Waiver was a central argument in ICS's claim in SUM 383, as seen from its extensive elaboration of the Waiver and the background to it when it filed the supporting affidavit for SUM 383. Coupled with ICS's assertion that service on the Senegal PP alone constituted proper service on Affert, I could not but infer that ICS was attempting to conceal the Senegalese proceedings from Affert, RV1 or the Liquidators until it obtained the Dakar Default Judgment.

74 Further, I am of the view that whatever the decision of the Dakar appellate court may be, this will not lead to a significant risk of conflicting judgments. The parties do not dispute the validity of the Sulphur Contracts, the ICS Debt or that the Waiver was given by RV1. The dispute in the Suit centres on the validity of the Waiver and its legal effect. Whilst the validity of the Waiver is also the issue in the Dakar proceedings, Mr Lim has stated that ICS

is not merely relying on the Waiver as a defence to the ICS Debt in the Suit, but intends to raise other defences.

75 Moreover, that the Singapore and Dakar courts may arrive at different results in relation to the validity or effect of the Waiver must also be considered in the light that the Singapore courts may apply Singapore law to the Waiver (as opposed to the Dakar courts applying Senegalese law) in the substantive hearing of the dispute pertaining to the ICS Debt, and the potential outcome of the Liquidators' application to set aside the Waiver as an undervalue transaction in OS 544. As such, the fact that there were proceedings in Senegal is not a factor that weighs significantly in favour of Senegal being the more appropriate forum.

Other factors

76 Next, I consider the factors below to be neutral or evenly balanced.

Parties' place of incorporation, place of transaction and performance of Sulphur Contracts

77 I find that the place of transaction and the performance of the Sulphur Contracts are neutral factors. Whether or not Affert played a substantial role in the procurement of the Sulphur Contracts (which ICS asserted that it did not) or that the law with the most connection to the Sulphur Contracts was Senegalese law was neutral. There was no dispute as to the validity of the Sulphur Contracts or that they were performed or that the ICS Debt would have been due but for the Waiver defence. Mr Lim also agreed that the place of discharge of the cargo, being Senegal, was a neutral factor.[64] Likewise that the Six Invoices bore Affert's Singapore address is neutral. As for ICS's incorporation and place of

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business in Senegal, this is balanced by the fact that Affert and RV1 are incorporated and have their place of business in Singapore.

Witness convenience and compellability

78 In the present case, the main dispute centres on the validity of the Waiver and whether it extinguished the ICS Debt. Even if ICS intends to call witnesses who negotiated the Acquisition and Waiver and who were involved in the sulphur transactions, these witnesses were not all based in Senegal. Whilst ICS intends to call Neeraj Gupta (a director of ICS) and Diallo who are based in Senegal, it also intends to call Manish Mundra (a director of ICS), Munish Jindal and one Anil Kumar who are all based in Nigeria.[65] Syam and Vandana are based in Hong Kong and Singapore respectively, and Achean Group's Ranjit Pendurthi, who ICS asserted had communicated directly with Diallo and his team in Senegal in relation to the Sulphur Contracts, is based in India. As for RV1, its representative Damian Prentice is based in Singapore. Hence, regardless of whether the dispute pertaining to the ICS debt is heard in Singapore or Senegal, the issue of witness compellability will arise.

Language of documents

79 RV1 submitted that apart from the STA which contained both the French and the English language, all other contracts or material documents are in English and an English-speaking forum is preferable for the resolution of this dispute.[66] Again, this is a neutral factor and there is no suggestion that the Senegalese courts are not competent to deal with English-language documents or that the documents cannot be translated into the local language if necessary.

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65 ICS's Submissions at [116(d)].

66 RV1's Subs at [15(4)].

Availability of transfer to the SICC

80 The possibility of a transfer of the Suit to the SICC may be a relevant factor to be considered in determining whether Singapore is the more appropriate forum. This factor however, in and of itself, is insufficient to displace a foreign jurisdiction that is found to be the more appropriate forum based on the other conventional connecting factors (*MAN Diesel & Turbo SE and another v IM Skaugen SE and another* [2019] SGCA 80 ("*MAN Diesel*") at [144]). Nevertheless, to rely on this factor, RV1 must articulate the particular quality or feature of the SICC that would make it more appropriate for this dispute to be heard by the SICC and prove that the dispute is of a nature that lends itself to the SICC's capabilities. The court must also consider whether the requirements for a transfer to the SICC are satisfied (*Rappo, Tania v Accent Delight International Ltd and another and another appeal* [2017] 2 SLR 265 at [124]). RV1 has not articulated the particular quality or feature of the SICC that would make it more appropriate for this dispute to be heard there or show that the dispute is of a nature that lends itself to the SICC's capabilities.

Acquisition Documents

81 ICS asserted that the Acquisition Documents are relevant for they are part of the factual matrix in understanding the context of the Waiver.[67] Only connections relevant to the dispute in the Suit should be considered (*JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [109]). The Acquisition Documents were executed one to two years after the Sulphur Contracts, and pertained to the acquisition by Indorama of shares in ICS which is not the subject matter of RV1's claim in the Suit. Even if they were relevant,

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67 Diallo's 3rd affidavit at [13].

the governing law of the Acquisition Documents points to different jurisdictions (see [66] above).

Time bar

82 RV1's Senegalese lawyer, Mr Kebe, deposed that the time-bar to sue under the Six Invoices is either two or five years; whilst Mr Houda, ICS's expert, opined that it is two years.[68] In either case, any suit on the Six Invoices would now be time-barred in Senegal. To rely on the time-bar factor, the plaintiff must show that it did not act unreasonably in failing to commence proceedings within time in the alternative forum, such as by issuing a protective writ there (*The Jian He* [1999] 3 SLR(R) 432 at [33], and *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [141]). Whilst those cases involved a foreign jurisdiction agreement, the Court of Appeal in *MAN Diesel* at [162] has applied this principle in the context of leave applications where no such agreement exists.

83 The Six Invoices were issued between May 2012 and June 2013. Having issued the Waiver in October 2014, Affert would not have been expected to commence proceedings in relation to payments under the Sulphur Contracts. It was only when Affert had placed itself in voluntary winding up on 8 February 2017 that its then liquidators FKT, presumably not knowing about the Waiver, sent a letter of demand to ICS for the ICS Debt. At that date, the Six Invoices had not expired on the five-year limitation period in Senegal, although it would have expired if the limitation period was two years.[69] Nevertheless, FKT did not

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68 Mouhamed Kebe's 1st affidavit dated 11 April 2019 at [14]–[17]; Khaled Abou El Houda's Legal Opinion (3 May 2019) at [6.12.1].

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commence any defensive proceedings in Senegal (despite having seen fit to send a letter of demand to ICS), and no reasons were provided for this.

84 When Affert was compulsorily wound up on 18 September 2017, the Liquidators sent a letter of demand to ICS on 26 September 2017 to recover the ICS Debt. By then, the Liquidators knew of the Six Invoices and the ICS Debt, but they did not commence any defensive proceedings in Senegal or explain why it did not do so. This is even on the basis that if the longer five-year limitation period in Senegal applied, the time bar would have yet to be engaged in relation to at least three of the Six Invoices.[70] The Liquidators, being the original plaintiff in the Suit, has not explained how it had acted reasonably in this regard. That RV1 subsequently became the assignee of the ICS Debt did not change the analysis. It was incumbent on RV1 to conduct due diligence before it entered into the Deed of Assignment with Affert/the Liquidators and weigh the possible risks of taking the assignment.

85 As such, RV1 cannot rely on the unavailability of Senegal (as the alternative forum to pursue the dispute) to tilt the balance to Singapore.

Conclusion on forum conveniens and leave for service out of jurisdiction

86 In the round, the law governing the Waiver, that the Liquidators of Affert (being under compulsory liquidation) have applied to set aside the Waiver as an undervalue transaction, and the place of the breach of the Sulphur Contracts, would point towards Singapore as the proper forum for the trial of the dispute of the Six Invoices and ICS Debt. I did not find the Dakar proceedings to tilt the balance to Senegal, and other factors were neutral or

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balanced. As ICS's main defence is that the Waiver had extinguished the ICS Debt, the proper law of the Waiver would be a material consideration. Having found Singapore to be the more appropriate forum, ICS's challenge on the basis that Singapore is *forum non conveniens* would fail.

87 Hence, I find RV1's claim came within the scope of O 11 r 1(*e*) of the ROC, that its claim has a sufficient degree of merit and that Singapore is the *forum conveniens*. I thus exercise my discretion to grant RV1 leave to serve the Amended Writ out of jurisdiction, even though I found that RV1 had not disclosed the Waiver documents and DOT to the court after obtaining the Leave Order when it should have done so. That said, I turn to whether a case management stay should be granted.

Case management stay

88 A claimant has the right to choose its cause of action and to sue the party it wishes to sue in whichever forum it wishes. This fundamental right is subject to other higher-order concerns that warrants its derogation. Further, for case management concerns to be relevant at all, there must be the existence or a real risk of overlapping issues (*Rex International Holding Ltd and another v Gulf Hibiscus Ltd* [2019] SGCA 56 ("*Rex International*") at [9] and [11]). Pursuant to s 18 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) read with para 9 of the First Schedule, and also under the inherent jurisdiction of the court, the court has the full discretion to stay any proceedings before it (*Chan Chin Cheung v Chan Fatt Cheung and others* [2010] 1 SLR 1192 at [47]). The underlying concern is the need to ensure the efficient and fair resolution of the dispute (*BNP Paribas Wealth Management v Jacob Agam and another* [2017] 3 SLR 27 ("*BNP Paribas*") at [35]). The factors that may be considered by the

court in the exercise of its discretion have been set out in various cases (see *BNP Paribas* at [34]) which bears no repeating.

89 I had found that the Dakar proceedings are not at such an advanced stage. Further, the Court of Appeal in *Rex International* (at [11]) stated that the overlapping issues that would attract a case management stay is one where the proper ventilation of the issues depended on the resolution of the issues in the other forum, which I do not find to be the case here. Whilst there was some overlap in the Singapore and Dakar proceedings on the issue of the validity of the Waiver, I had found that there would not be a significant risk of conflicting judgments. In any event, the application to set aside the Waiver as an undervalue transaction (an issue that may affect the Waiver and ICS's defence in the dispute) can only be brought by the Liquidators in the Singapore courts. As for the principle of international comity, this works both ways, especially given that I have found Singapore to be the proper forum to hear the dispute (see *BNP Paribas* at [53] and [54]).

90 Finally, the Suit was commenced and the Amended Writ served on ICS, even before ICS commenced the Senegalese proceedings which led to the Dakar Default Judgment. I had found that the Dakar proceedings (which were not brought to the attention of Affert, the Liquidators or RV1 at the material time) were brought and advanced to bolster ICS's case of a more appropriate forum in Senegal. The *bona fides* of ICS's stay application would be a relevant consideration in the exercise of my discretion whether to grant a case management stay.

91 For the reasons above, I would not exercise my discretion to grant a case management stay.

Conclusion

92 In conclusion, RV1's appeal in RA 179 is allowed. I will hear parties on costs.

Audrey Lim
Judge

Chan Wai Kit Darren Dominic and Ng Yi Ming Daniel (Characterist LLC) for the plaintiff/appellant;
Lim Wei Loong Ian, Ngo Shuxiang, Nicholas and Li Wanchun (TSMP Law Corporation) for the defendant/respondent.