IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 292

Suit No 438 of 2018
(Summons No 3235 of 2018)
(Registrar's Appeal No 227 of 2018)

Between

(1) Grains and Industrial Products Trading Pte Ltd
(2) Bunge SA

… *Plaintiffs*

And

(1) State Bank of India
(2) Advantage Overseas Private Limited
(3) Shrikant Bhasi

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure] — [Jurisdiction] — [Submission]
[Civil Procedure] — [Stay of proceedings]
[Conflict of Laws] — [Jurisdiction]
[Conflict of Laws] — [Choice of jurisdiction] — [Exclusive]
[Conflict of Laws] — [Choice of jurisdiction] — [Non-exclusive]
[Arbitration] — [Agreement]
[Arbitration] — [Conflict of laws] — [Curial law]

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v
State Bank of India and others

[2019] SGHC 292

High Court — Suit No 438 of 2018 (Summons No 3235 of 2018) (Registrar's Appeal No 227 of 2018)
Hoo Sheau Peng J
12 November 2018, 28, 29 January, 22 February, 16 April, 10 May, 28 June, 10 July 2019

30 December 2019

Hoo Sheau Peng J:

Introduction

1 Suit No 438 of 2018 ("Suit 438") is the plaintiffs' action against the defendants in connection with merchanting trade transactions for the sale and purchase of agricultural commodities. The defendants mounted various jurisdictional challenges in respect of the claims.

2 By Summons No 3235 of 2018 ("SUM 3235"), the second and third defendants sought to set aside the order for service out of jurisdiction of the writ on them. In the alternative, they sought a stay of the proceedings on grounds that Singapore is not the *forum conveniens*. The third defendant, Shrikant Bhasi ("Mr Bhasi"), also sought, in the alternative, a stay in favour of arbitration. On 16 April 2019, I granted SUM 3235 in part. To elaborate, I declined to set aside

the order for service out of jurisdiction. Out of two claims against the second defendant, Advantage Overseas Private Limited ("AOPL"), I ordered that the claim for declaratory relief (*ie,* the "Negative Declaration Claim" described at [47] below) be stayed in favour of India, but not the claim for a sum of US$50m (*ie,* the "AOPL US$50m Claim" described at [45] below). As for the plaintiffs' two claims against Mr Bhasi (*ie,* the "Agency Breach Claim" and the "Indemnity Claim" described at [55]–[57] and [59] below respectively), I ordered a stay in favour of arbitration. The parties have appealed against aspects of the decision unfavourable to them, with leave granted on 10 July 2019 to AOPL and Mr Bhasi to lodge their appeals.

3 By Summons No 2544 of 2018 ("SUM 2544"), the first defendant, State Bank of India ("SBI"), sought to have the proceedings brought against it stayed on grounds of *forum non conveniens*. SUM 2544 was dismissed by an assistant registrar, and Registrar's Appeal No 227 of 2018 ("RA 227") was SBI's appeal against the decision. On 22 February 2019, I dismissed RA 227. Pursuant to leave granted on 10 July 2019, SBI has appealed against this outcome.

4 These are my full reasons in respect of SUM 3235 and RA 227.

Facts

The parties

5 The first plaintiff, Grains and Industrial Products Trading Pte Ltd ("GRIPT"), and the second plaintiff, Bunge SA ("BSA"), are both part of the Bunge group of companies ("Bunge"). Bunge is a global agribusiness company

dealing in various agricultural commodities.[1] GRIPT is a Singapore-incorporated company, and BSA is incorporated in Switzerland.[2] David Alan Rigby ("Mr Rigby") was a senior director of the Trade and Structured Finance ("TSF") division of Bunge's Financial Services Group ("FSG").[3] Tan Jwee Peng Calvin ("Mr Tan") was an employee of GRIPT, and his role in the Bunge group was that of a manager in the same TSF division of Bunge's FSG.[4]

6 SBI is an Indian bank headquartered in Mumbai, India. SBI is licensed to operate in Singapore and has a Singapore branch ("SBI Singapore").[5] At the material time, Saurabh Srivastava ("Mr Srivastava") was the branch manager of SBI's Small and Medium Enterprises branch at Gwalior, Madhya Pradesh, India ("SBI Gwalior").[6]

7 AOPL is a company registered in India, and was involved in the various Indian merchanting trade transactions which comprised the backdrop to Suit 438.[7] Maneesh Kumar Singh ("Mr Singh") was AOPL's managing director.

8 Mr Bhasi is an Indian national, and was a former agent of the Bunge TSF division. Mr Bhasi's role as agent included originating and facilitating Indian merchanting trade transactions, dealings and relationships with various

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1 1st Affidavit of David Alan Rigby ("Rigby 1") at para 12.

2 Rigby 1 at paras 10, 11.

3 Rigby 1 at para 1.

4 1st Affidavit of Tan Jwee Peng Calvin ("Tan 1") at para 1.

5 Rigby 1 at para 13.

6 1st Affidavit of Saurabh Srivastava ("Srivastava 1") at para 9.

7 Rigby 1 at para 14.

counterparties in India, including AOPL.[8]

9 Bunge's TSF division operated as a global business on a "hub and spoke" model. The "hubs" were the key centres where the majority of TSF division's employees were located and from which commercial decisions were made. The "spokes" were where smaller numbers of TSF division staff were based to perform support functions. The "hubs" relevant to the transactions in question were located in Singapore and Geneva, and the former was where Mr Tan was based. The relevant "spoke" was located in India – the staff located there would report to Mr Tan. Mr Bhasi was also located in India at the material time.[9]

Background to the dispute

Indian merchanting trade transactions

10 The plaintiffs' claims against the various defendants arose in connection with various Indian merchanting trade transactions involving Bunge and AOPL. I briefly set out, in general terms, merchanting trade (as explained by the parties), before describing the specific arrangement between Bunge and AOPL.

11 Merchanting trade involves the sale and purchase of cargo by an Indian entity (*ie*, the merchanting trader). The Indian merchanting trader would purchase cargo from an offshore seller, before on-selling that same cargo to an offshore buyer.[10] While such trades involve physical cargo (the Bunge merchanting trades utilised cargo in transit between the load port and

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8 2nd Affidavit of Shrikant Bhasi ("Bhasi 2") at paras 23–24.

9 Rigby 1 at paras 18–19.

10 Rigby 1 at para 29.

discharge port), the cargo does not physically enter India. Instead, transfer of ownership is effected by exchanging photocopies of the bills of lading pertaining to the cargo. In this way, the Indian merchanting trader (*ie,* the intermediary) takes ownership of the cargo *on paper*, but never actually takes delivery of the physical cargo before it is on-sold to the offshore buyer.[11]

12 This flow of goods comes accompanied by a flow of funds (the consideration for the cargo) in the opposite direction from the offshore buyer to the offshore seller, also routed through India. In the interim, the funds routed to India could be placed in interest-bearing Indian bank accounts. According to AOPL and Mr Bhasi, the true purpose of the Bunge-AOPL merchanting trade transactions was "interest arbitrage". At the time, Indian banks were offering some of the highest interest rates. In other words, the putative trade flows were being used as a cover for routing and parking funds in Indian banks.[12] On their part, the plaintiffs accepted that these arrangements meant that interest could be earned, but denied that the merchanting trades were entered into for purposes of interest arbitrage.[13]

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11 Rigby 1 at paras 29–30.

12 2nd and 3rd Defendants' Written Submissions dated 18 January 2019 ("DWS") at paras 29, 38; 4th Affidavit of Maneesh Kumar Singh ("Singh 4") at paras 24–34.

13 Plaintiffs' Reply Submissions dated 18 January 2019 ("PRS") at s/n 15; Rigby 1 at paras 43–44.

The Bunge-AOPL merchanting trade structure

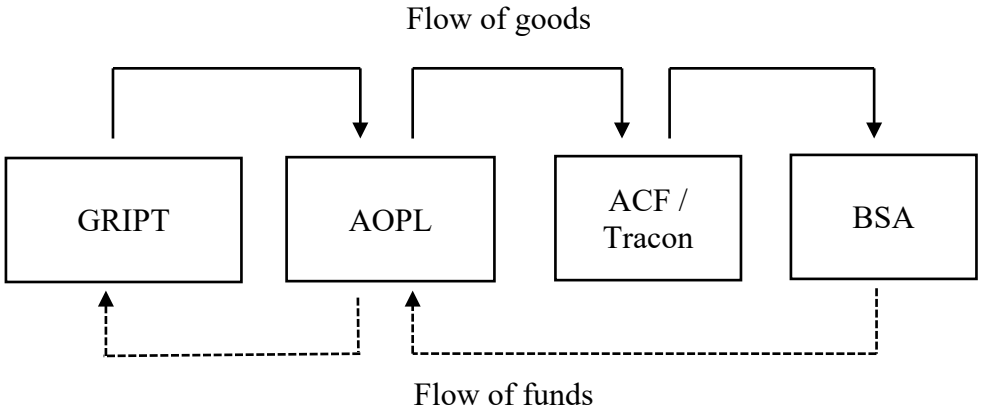

Figure 1: Flow of goods and funds in the Bunge-AOPL merchanting trade structure

13 The merchanting trade between Bunge and AOPL involved flows of goods and funds between four entities. As was previously mentioned, GRIPT and BSA were both Bunge entities, and were the offshore seller and offshore buyer respectively. AOPL was the Indian merchanting trader and either Arabian Commodities FZE ("ACF") or Tracon General Trading LLC ("Tracon") would act as the offshore intermediary. ACF and Tracon were companies registered in the United Arab Emirates ("UAE").

14 Under this merchanting trade structure (henceforth referred to as the "Bunge-AOPL merchanting trade structure"), the four entities would enter into a series of contracts[14] with each other for the sale and purchase of cargo. These contracts would be: (a) between GRIPT and AOPL; (b) between AOPL and

[14] Singh 4 at para 20(a).

ACF; and (c) between ACF and BSA.[15]

15 As was mentioned, the flow of goods was effected by exchanging photocopies of the relevant bills of lading. Title to the cargo therefore passed from GRIPT to AOPL, then to ACF, and finally to BSA.[16]

16 As for the flow of funds, this was set in motion by BSA. BSA would make an advance payment against the cargo it was to receive from ACF. In practice, BSA would advance the funds directly to AOPL, instead of paying ACF.[17]

17 As between AOPL and GRIPT, payment was made by letters of credit, with maturity of six months, issued by AOPL's bank for the benefit of GRIPT.[18] The aforementioned advance paid into AOPL's bank account by BSA provided the margin for the issuance of the letter of credit in GRIPT's favour.[19] Upon issuance of the letter of credit, GRIPT could negotiate the letter of credit with a negotiating bank and thereby receive the funds immediately. However, AOPL's bank would not have to make payment to the negotiating bank until the maturity of the letter of credit some six months after its issuance. In the meantime, the funds remained in AOPL's account, and interest could be earned on this deposit.[20]

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15 Rigby 1 at para 33; Singh 4 at para 20(a).

16 Singh 4 at para 25; DWS at para 23.

17 11th Affidavit of David Alan Rigby ("Rigby 11") at para 26; Singh 4 at para 20(b).

18 Singh 4 at para 20(d).

19 Singh 4 at para 20(e).

20 Singh 4 at para 20(g).

18 According to AOPL, these funds were placed in one-year fixed deposits. Sometime after late 2014, the funds were placed in two-year fixed deposits instead, so as to secure higher interest rates.[21] However, this arrangement came with a particular risk. As mentioned, the letters of credit matured at the six-month mark, after which the funds would have to be paid out to the negotiating bank, potentially breaking the fixed deposit. Should the fixed deposit be broken, AOPL would not only lose the benefit of the interest that would otherwise have been earned on the deposit, but would also be liable to penalties for early termination of the deposit.[22] Importantly, the maturity date of the letter of credit could not simply be extended as Indian regulations required that each merchanting trade take no longer than nine months to complete and therefore did not permit a letter of credit to remain open longer than that period.[23] Therefore, in order that the fixed deposit would not be broken, AOPL had to ensure that sufficient funds stood in its account to maintain the deposit.

19 In practice, AOPL was able to maintain sufficient funds by engaging in multiple trades at a time. In essence, so long as BSA advanced fresh funds (pursuant to a second or subsequent trade) to AOPL before the maturity of the first letter of credit, AOPL would be able to maintain its fixed deposit. AOPL refers to these subsequent trades as "roll-over trades". Since the letters of credit issued by AOPL were kept open for six months, three roll-over trades would be engaged in in the course of maintaining a two-year fixed deposit.[24]

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21 Singh 4 at paras 36–38.

22 Singh 4 at para 39(c).

23 Singh 4 at para 39(b).

24 Singh 4 at paras 39(d)–(e), 40–41.

20 Besides the use of letters of credit, another key feature of the payment arrangements between AOPL and GRIPT was the use of irrevocable payment undertakings ("IPU"). Pursuant to each AOPL-GRIPT contract, AOPL was obliged to procure from its bank an IPU in GRIPT's favour. Essentially, the IPU was an undertaking given by AOPL's bank that it would, upon receipt of the funds advanced by BSA, (a) issue a letter of credit to the benefit of GRIPT; and (b) failing which, remit the funds advanced by BSA to GRIPT. The IPUs were procured by AOPL by way of a "mandate letter" sent by AOPL to its bank, SBI, instructing it to issue the IPU.[25]

Deferred mandate trades

21 The foregoing description pertains to ordinary merchanting transactions between Bunge and AOPL. The transactions which formed the subject matter of the present proceedings were, by contrast, "*deferred mandate* trades". Deferred mandate trades differed from ordinary trades in one main respect. In an ordinary trade, AOPL would be required to procure the issuance of a letter of credit within days (usually two days) of receipt of the advance from BSA. In deferred mandate trades, AOPL was given a much longer time to procure the issuance of the letter of credit. In the period between when the advance from BSA was received and when the letter of credit had to be issued, AOPL would have use of the funds advanced.[26]

22 The parties disagree as to the *purpose* of these deferred trades. AOPL claims that the deferred mandate trades were a means of financing AOPL. According to AOPL, BSA had capital but was having trouble procuring trade

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25 Rigby 1 at para 37; DWS at paras 51, 53.

26 3rd Affidavit of Maneesh Kumar Singh ("Singh 3") at paras 34–40.

flows to justify the injection of funds to AOPL. The deferred mandate trades thereby allowed AOPL to then enter into the necessary roll-over trades with third parties.[27] There were two methods by which AOPL would repay Bunge:[28]

(a) Onshore repayment: the repayment of funds to Bunge would be received by GRIPT from AOPL. AOPL would procure a letter of credit issued in favour of GRIPT, and GRIPT (as a Bunge entity) would receive repayment through the letter of credit (much like in an ordinary merchanting trade).

(b) Offshore repayment: the repayment of funds to Bunge would be effected by a payment from AOPL to ACF, and ACF would then make repayment to BSA.

23 On their part, the plaintiffs deny that they had a shortage of trade flows, and that the deferred mandate trades were a means of financing AOPL's procurement of alternative trade flows from third parties.[29] Rather, the deferred mandate trades were much like ordinary trades in that they were simply intended to be performed. There is therefore no issue of repayment; AOPL would receive title to the goods from GRIPT, and GRIPT would receive payment for the goods via the letter of credit issued by AOPL's bank.[30]

The September 2015 Bunge-AOPL merchanting trades

24 I turn now to the specific trades which form the subject of Suit 438.

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27 DWS at paras 58–59.

28 Singh 4 at paras 67–75.

29 PRS at s/n 21.

30 PRS at s/n 21.

25 The key Bunge-AOPL deferred mandate trade was that entered into on 14 September 2015.[31] It comprised three back-to-back contracts between GRIPT, AOPL, ACF and BSA, taking the contractual form as depicted above in Figure 1. I refer to these contracts collectively as "the September 2015 Bunge-AOPL String Sale contracts", which pertain to the "17172A Trade". These were:[32]

(a) The AOPL-GRIPT Contract: Contract No GRIP S15-17172A-1118 dated 14 September 2015 between AOPL as buyer and GRIPT as seller, for the sale and purchase of cargo for a total price of US$50m, as amended by an amendment agreement.

(b) The ACF-AOPL Contract: Contract No AOPL/15-16/EXP/0132 dated 14 September 2015 between ACF as buyer and AOPL as seller, for the sale and purchase of cargo for a total price of US$50,025,000, as amended by an amendment agreement.

(c) The BSA-ACF Contract: Contract No BSA P15-17172A-1797 dated 14 September 2015 between BSA as buyer and ACF as seller, for the sale and purchase of cargo for a total price of US$50m, as amended by an amendment agreement.

26 It should be noted that the 17172A Trade was executed alongside two other deferred mandate US$50m trades (which I refer to as the "17173A" and "17174A Trades"). For the 17172A, 17173A and 17174A Trades, a total of US$150m was therefore advanced by BSA to AOPL.

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31 Statement of Claim (Amendment No 1) ("SOC") at para 26.

32 5th Affidavit of David Alan Rigby ("Rigby 5") at para 35, pp 130–151.

27 On 15 September 2015, AOPL wrote to its bank, SBI, by way of a letter in relation to the 17172A Trade ("15 September 2015 Mandate Letter"):[33]

> (a) to inform SBI that export receivables in the amount of US$50m were payable to AOPL under the ACF-AOPL Contract, and that this amount should be credited into AOPL's SBI bank account and earmarked for making payment to GRIPT under the AOPL-GRIPT Contract;
>
> (b) to authorise and instruct SBI, upon receiving the US$50m, to issue in favour of GRIPT letter(s) of credit in the amount of US$50m; and
>
> (c) to undertake to SBI that, if for whatever reason any letter(s) of credit were not issued by 15 December 2015, or if AOPL refused to accept the documents drawn under any of the letter(s) of credit, the full US$50m would immediately become due and payable to GRIPT, and SBI was authorised and instructed to remit the same to GRIPT.

28 Accordingly, on 18 September 2015, SBI issued an IPU to GRIPT ("the 18 September 2015 IPU") by which it undertook, upon receipt of the US$50m in export receivables, to issue in GRIPT's favour letter(s) of credit in the amount of US$50m by 15 December 2015, failing which it would pay the full amount of US$50m to GRIPT no later than five business days after 15 December 2015.[34]

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33 Rigby 5 at para 38, p 155.

34 Rigby 5 at para 40, p 154.

The 18 September 2015 IPU was authenticated by way of a SWIFT message sent to GRIPT's bank.[35]

29 On that same day,[36] BSA remitted the sum of US$50m directly to AOPL's bank (*ie*, SBI), bypassing ACF, as was the usual practice, pursuant to a notice of assignment given by ACF to BSA, notifying BSA that the US$50m payable by BSA to ACF under the BSA-ACF Contract had been assigned by ACF to AOPL.[37]

30 Subsequently, on 10 December 2015:[38]

(a) the AOPL-GRIPT Contract was amended to extend the date for the shipment by GRIPT of goods from 21 December 2015 to "[l]atest by 4th March 2016", and the letter of credit issue date to "by 29th February 2016"; and

(b) similar amendments were made to the other two September 2015 Bunge-AOPL String Sale contracts.

31 Consequential amendments were then made to the related Mandate Letter and IPU to extend the deadline for the issue of the letter(s) of credit for GRIPT's benefit to 29 February 2016.[39] Accordingly, a fresh Mandate Letter and IPU were issued by AOPL and SBI respectively on 15 December 2015 ("15 December 2015 Mandate Letter" and "15 December 2015 IPU"

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35 Rigby 5 at para 42.

36 2nd Affidavit of Maneesh Kumar Singh ("Singh 2") at para 29(a).

37 Rigby 5 at para 45.

38 Rigby 5 at para 46, pp 134, 140 and 150.

39 Rigby 5 at para 48.

respectively).[40] The 15 December 2015 IPU was authenticated via SWIFT message on 16 December 2015.[41]

32 On 24 February 2016, Mr Singh (AOPL) wrote to Mr Tan (Bunge) in response to the latter's request for AOPL to acknowledge certain sums as outstanding. Mr Singh confirmed that a total of US$66,402,483.59 remained outstanding, including the US$50m owing under the AOPL-GRIPT Contract.[42]

33 On 25 February 2016, Mr Rigby personally attended at AOPL's offices. Sometime between 1 and 3 March 2016, Mr Singh endorsed a letter ("the Admission Letter") stating that US$65m remained outstanding, comprising US$50m under the AOPL-GRIPT Contract specifically (*ie*, pertaining to the 17172A Trade) and US$15m under a separate trade (the 17174A Trade).[43]

34 On 29 February 2016, GRIPT sent a shipment confirmation in relation to the US$65m worth of cargo which GRIPT was to transfer to AOPL pursuant to the 17172A and 17174A Trades. This was sent via email from Mr Tan to Mr Singh and Murali Krishna ("Mr Krishna").[44]

35 However, SBI did not issue the requisite letter(s) of credit in GRIPT's favour by 29 February 2016. SBI also did not pay the US$50m to GRIPT within five business days of 29 February 2016.[45] According to the plaintiffs, the

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40 Rigby 5 at paras 48–49, pp 170–171.

41 Rigby 5 at para 51.

42 Rigby 11 at para 125, p 133.

43 Rigby 5 at para 85(2), p 219; Rigby 11 at para 123.

44 Tan 1 at p 10.

45 Rigby 5 at para 52.

US$50m remains unaccounted for. According to AOPL, the US$50m was instead paid to Atlantic Industrial & Trading Pte Ltd ("AIT"), a Singapore-incorporated company, and then ultimately repaid to ACF.[46] According to SBI, Bunge had released SBI of its obligations under the 15 December 2015 IPU.

The agency relationship between GRIPT and Mr Bhasi

36 Mr Bhasi began his involvement with the Bunge group from around 2001. He was appointed as an agent in 2006 to originate deals for the TSF division in India,[47] by introducing Indian merchanting trade counterparties to Bunge.[48] A number of agency agreements were concluded between Mr Bhasi and various Bunge entities. For present purposes, I shall only set out the two pertinent ones:

(a) The Agency Agreement between Mr Bhasi and GRIPT dated 1 January 2009, amended by Addendum Nos 1–6 ("1st GRIPT Agency Agreement"). This agreement expired on 31 December 2015.[49]

(b) The Agency Agreement between Mr Bhasi and GRIPT dated 1 January 2016, amended by Addendum No 1 dated 11 April 2017 ("2nd GRIPT Agency Agreement").[50]

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46 Singh 4 at paras 90, 153, 154.

47 Bhasi 2 at paras 23–24.

48 Bhasi 2 at para 29.

49 Rigby 1 at pp 442–456.

50 Bhasi 2 at pp 110–120.

37 The 2nd GRIPT Agency Agreement was terminated by way of a letter dated 8 November 2017, and Mr Bhasi's relationship with Bunge therefore came to an end in November 2017.[51]

The relationship between AOPL and Mr Bhasi

38 One of the entities which Mr Bhasi procured, in his capacity as agent, as a counterparty for the purposes of Bunge's merchanting trade transactions was AOPL.[52] AOPL was incorporated in 2004. At the point of incorporation, Mr Bhasi was a 50% shareholder and director of AOPL.[53] By late 2007, he had resigned from his directorship and relinquished his shareholding.[54]

39 In 2011, a further shuffle in the ownership of AOPL took place, giving rise to the following shareholding: Asian Business Connections Private Limited ("ABC"), a company which is 99.9937% owned by Mr Bhasi (85%), Mr Singh (5%), Jijo John (5%) and Gagan Sharma (5%).[55] ABC was also the holding company for several companies, which comprised most, if not all, of the group of companies known as the "Carnival Group".[56]

40 Following the transfer of AOPL shares to ABC, an agreement of share transfer dated 4 January 2012 (as amended by an addendum dated 20 June 2014) ("Agreement of Share Transfer") was entered into between ABC, Mr Singh and Jijo John. The Agreement of Share Transfer provided that ABC would not

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51 Bhasi 2 at paras 31–33, p 122.

52 Bhasi 2 at paras 36–38.

53 Bhasi 2 at para 34.

54 Bhasi 2 at paras 39–45.

55 Bhasi 2 at para 51.

56 Bhasi 2 at para 83.

exercise its rights as a shareholder of AOPL, and that those rights were to remain with Mr Singh and Jijo John. Further, management control of AOPL would remain with Mr Singh (as managing director).[57] According to Mr Bhasi, the effect of the Agreement of Share Transfer was to ensure that the beneficial ownership of the AOPL shares remained with Mr Singh and Jijo John.[58]

The Kantawala Letter

41 BSA received a letter dated 16 March 2018 from one Sujay Kantawala, AOPL's Indian counsel ("the Kantawala Letter").[59] In brief, the Kantawala Letter was a letter of demand made against Bunge for the sum of about US$277m (1800 crores in rupees) in damages. The key allegations were as follows:[60]

(a) Sometime around the first quarter of 2015, BSA insisted that AOPL maintain two-year fixed deposits with SBI.

(b) BSA gave assurances to AOPL (and SBI) ("the Assurances") that whenever BSA entered into a merchanting trade transaction with AOPL, BSA would subsequently enter into roll-over merchanting trade transactions with AOPL to ensure that AOPL's fixed deposits with SBI would remain unbroken for the two-year periods. BSA had also represented that the contractual relationship between the parties would be "continuous and regular".

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57 Bhasi 2 at paras 52–53.

58 Bhasi 2 at para 54.

59 Rigby 1 at pp 86–90.

60 Rigby 1 at para 50.

(c) These Assurances were said to have been given to AOPL and SBI in meetings with SBI officials in Mumbai and Geneva and also via letter from BSA to SBI.

(d) BSA breached the Assurances by failing to enter into roll-over merchanting trade transactions with AOPL, thus forcing AOPL to reduce the sums held on deposit with SBI, with the result that AOPL has suffered loss and/or liabilities to SBI in the sum of approximately US$277m.

(e) BSA was liable to compensate AOPL for the aforementioned losses suffered. AOPL demanded for such compensation within 15 days of receipt of the Kantawala Letter.

(f) Should the demanded compensation not be paid by the 15-day deadline, AOPL intended to bring legal proceedings against BSA before the Indian civil and criminal courts in respect of the above.

In this judgment, I refer to the threatened legal proceedings, which have yet to be brought, as the "Kantawala Claim".

42 On 27 March 2018, Bunge responded with a holding reply.[61] On 26 April 2018, the plaintiffs commenced Suit 438.

The claims

43 In sum, the plaintiffs' claims against the defendants are as follows:

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61 Rigby 1 at para 52.

(a) by GRIPT against SBI: for the sum of US$50m or damages to be assessed in respect of SBI's alleged breach of the 15 December 2015 IPU ("the SBI IPU Claim");[62]

(b) by GRIPT against AOPL: the AOPL US$50m Claim, being the claim for the sum of US$50m due and payable under the AOPL-GRIPT Contract;[63]

(c) by the plaintiffs against AOPL: the Negative Declaration Claim for a declaration of non-liability in respect of the matters alleged in the Kantawala Letter;[64] and

(d) by the plaintiffs against Mr Bhasi:

(i) the Agency Breach Claim for damages in respect of breaches of contractual and fiduciary duties allegedly owed to the plaintiffs, and or for an account and payment of any sums received or earned by Mr Bhasi by virtue of his breach of duties;[65] and

(ii) the Indemnity Claim for indemnity or a declaration of indemnity in respect of any liability flowing from the Kantawala Claim.[66]

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62 SOC at para 93(1).

63 SOC at para 93(1A).

64 SOC at para 93(2).

65 SOC at para 93(3)(i) and 93(3)(iii).

66 SOC at para 93(3)(iv).

44 I now proceed to set out more details in respect of each of the claims, and the defendants' responses to the allegations as contained in the affidavits filed for these applications.

The claims against AOPL: the AOPL US$50m Claim and the Negative Declaration Claim

(1) The AOPL US$50m Claim

45 According to the plaintiffs, AOPL was obliged under the AOPL-GRIPT Contract to arrange for SBI to issue letter(s) of credit for the sum of US$50m to GRIPT's benefit or to pay the same to GRIPT by 29 February 2016.[67] However, AOPL failed to discharge these obligations (see [35] above), and was therefore in breach of the AOPL-GRIPT Contract. The plaintiffs pointed to the Admission Letter as evidence of acknowledgment of the debt.[68]

46 AOPL's defence was that the US$50m allegedly outstanding under the AOPL-GRIPT Contract (*ie*, relating to the 17172A trade) had already been remitted by AOPL to ACF, and that the plaintiffs' claim for the US$50m therefore lies against *ACF*, and not AOPL.[69] To elaborate, AOPL alleged the following:

(a) The US$50m was part of a larger tranche of deferred mandate trades entered into with the purpose of putting AOPL in funds so that it could continue to maintain its lucrative fixed deposits with SBI (see

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67 SOC at paras 35(1), 68A.

68 Plaintiffs' Written Submissions in Response to 2nd and 3rd Defendants' Applications in Summons 3235/2018 (Appendix 1) ("PWS(A)") at para 57.

69 DWS at para 117.

[21]–[23] above). This consisted of the 17172A Trade, 17173A Trade and 17174A Trade.

(b) The *entire sum* of US$150m involved in the 17172A Trade, 17173A Trade and 17174A Trade was used to enter into merchanting trades with AIT to sustain roll-overs, in view of the alleged shortage of trade flows from Bunge. These transactions were structured such that the relevant funds were ultimately returned to ACF: see [25(b)] above.[70]

(2) The Negative Declaration Claim

47 The plaintiffs sought a declaration of non-liability in respect of the matters alleged in the Kantawala Letter, which centred around the Assurances allegedly made by BSA to the effect that the plaintiffs would continue with the Indian merchanting trade transactions on an ongoing basis.[71] In brief, the plaintiffs denied having ever given the Assurances to AOPL (or SBI), and in any case denied that they were liable for any loss suffered by AOPL.[72] As far as I am aware, no such proceedings have been commenced by AOPL against the plaintiffs in India.[73]

The claim against SBI: the SBI IPU Claim

48 GRIPT's claim against SBI was based entirely on the 15 December 2015 IPU issued by SBI, in which the bank undertook to issue letter(s) of credit for the sum of US$50m to GRIPT's benefit, or, failing that, to pay the same to

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70 DWS at para 81, Singh 4 at paras 133–140.

71 SOC at para 42.

72 SOC at para 45.

73 PRS at para 148.

AOPL within five working days of 29 February 2016.[74] According to GRIPT, the US$50m that SBI was bound to pay to it under the 15 December 2015 IPU had been "earmarked" from the moment those funds were remitted into AOPL's SBI account by BSA.

49 SBI did not dispute that it had received the 15 September 2015 Mandate Letter (as described at [27(a)]–[27(c)] above), that it had issued the 18 September 2015 IPU to GRIPT, that SWIFT authentications had been sent, and that BSA had remitted the sum of US$150m into AOPL's bank account with SBI Gwalior on 18 September 2015.[75] Rather, SBI's position was that it was not liable because Bunge had released SBI from its obligations under the 15 December 2015 IPU.

50 According to SBI's Mr Srivastava, he had on 21 September 2015 received a telephone call from AOPL's Mr Singh, informing him that:

(a) GRIPT was unable to sell the cargo to AOPL under the AOPL-GRIPT contracts in the 17172A, 17173A and 17174A Trades because GRIPT did not have the required cargo; and

(b) GRIPT had instructed AOPL to source for the relevant cargo, and therefore AOPL had purchased cargo from AIT so that AOPL could continue to on-sell the cargo to ACF under the ACF-AOPL Contract.[76]

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74 SOC at para 69.

75 Srivastava 1 at paras 17, 21, 24–25.

76 Srivastava 1 at para 26.

51 That same day, AOPL issued three letters to SBI, authorising it to pay the aggregate sum of US$150m (in respect of all three trades) to AIT for the purchase of the cargo.[77]

52 Importantly, Mr Srivastava claimed that he had, on that same day, verified that Bunge's instructions were as per Mr Singh's account (see [50(a)]–[50(b)] above) via a telephone call to either of two persons whom Mr Srivastava believed to be Bunge's representatives – Trupti Jadhav ("Ms Jadhav") or Sunil Ambujakshan ("Mr Ambujakshan").[78] There is no documentary evidence of this alleged confirmation. Having received the alleged confirmation, SBI accordingly remitted the sum of US$150,000,003.25 to AIT on 21 September 2015.[79]

53 The same process was repeated when the amended 15 December 2015 IPU was issued (see [31] above): Mr Srivastava received instructions from Mr Singh that: (a) AOPL had purchased the cargo from AIT and had sold the cargo to ACF; (b) AOPL had yet to sell ACF all the required cargo to ACF under the AOPL-ACF Contract; and (c) AIT required more time to sell all the required cargo to AOPL. He then confirmed this via telephone call with either Ms Jadhav or Mr Ambujakshan, before issuing the amended 15 December 2015 IPU.[80]

54 Following this, Mr Srivastava claimed that:[81]

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77 Srivastava 1 at para 27.

78 Srivastava 1 at para 28.

79 Srivastava 1 at para 29.

80 Srivastava 1 at paras 30–36, p 71.

81 Srivastava 1 at paras 37–39.

(a) Sometime around February or March 2016, Mr Singh informed him over the phone that AOPL had performed its obligations under the September 2015 Bunge-AOPL String Sale contracts.

(b) On 3 March 2016, AOPL issued a letter to SBI informing it to treat the 15 December 2015 Mandate Letter as "Null and Void", given that GRIPT has not supplied the commodities as per their contract.[82]

(c) Mr Srivastava thereafter called either Ms Jadhav or Mr Ambujakshan, who confirmed Mr Singh's and AOPL's information (as at [(a)] and [(b)] above), and confirmed that SBI had fulfilled its obligations.

The claims against Mr Bhasi: the Agency Breach Claim and the Indemnity Claim

(1) The Agency Breach Claim

55 The plaintiffs claimed that Mr Bhasi had acted in breach of his express or implied contractual and fiduciary duties as agent not to be in any situation or engaged in any activity that might create a conflict of interest between himself and GRIPT and/or BSA ("the No Conflict Terms") found within the GRIPT Agency Agreements.[83] According to the plaintiffs, Mr Bhasi breached these duties because at the time he introduced AOPL to Bunge as a potential trade counterparty, he was interested in AOPL by virtue of his directorship and substantial shareholding in ABC. The plaintiffs claimed that Mr Bhasi even

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82 Srivastava 1 at p 82.

83 SOC at paras 60, 77–89.

falsely represented to the plaintiffs that he had ceased to be involved with AOPL.[84] The alleged false representations occurred by way of:

(a) oral representations by Mr Bhasi in an interview on 3 December 2015 with Francis Soh, a senior manager at Bunge (the "3 December 2015 Interview");[85]

(b) oral representations by Mr Bhasi to Mr Rigby and other members of Bunge at various unknown times during his agency;[86] and

(c) providing a copy of the Agreement of Share Transfer to Bunge on an unknown date, as evidence of Mr Bhasi's divestment of any beneficial interest in AOPL.[87]

56 Although not pleaded, the plaintiffs later further claimed that Mr Bhasi had been in a conflict of interest by virtue of his being a personal guarantor of AOPL, and by ABC being a corporate guarantor, in relation to AOPL's obligations under a letter of arrangement from SBI dated 7 April 2016 (the "Letter of Arrangement").[88]

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84 SOC at paras 64–66, 77; Rigby 1 at para 87; 3rd Affidavit of David Alan Rigby ("Rigby 3") at paras 46–49.

85 Rigby 3 at paras 46–48; 1st Affidavit of Francis Soh at para 12(6).

86 Rigby 3 at para 49.

87 Rigby 3 at para 50.

88 Rigby 9 at paras 22–23; Rigby 1 at pp 402–419.

57 As against Mr Bhasi, the plaintiffs claimed damages for breach and an account of any profits Mr Bhasi received or earned by virtue of his interests and connections with AOPL and/or his directorship and shareholding of ABC.[89]

58 Mr Bhasi made three points in reply:

(a) Mr Bhasi did not have any interest in AOPL. Mr Bhasi did not deny his interest in ABC, but argued that ABC did not have any beneficial ownership of AOPL owing to the Agreement of Share Transfer (see [39] above), which left the beneficial interest with Mr Singh and Jijo John.[90]

(b) Even if he did have an interest in AOPL, Bunge knew of this, as early as 2013 or 2014, and must therefore be taken to have waived any breach in this regard:[91]

(i) The plaintiffs were in possession of the Agreement of Share Transfer which clearly sets out the relationship between ABC and AOPL.

(ii) ABC's ownership of AOPL would have been revealed through Bunge's own "know your client" checks.

(iii) AOPL sends its yearly audit reports to Bunge, which records ABC's ownership of AOPL.

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89 SOC at paras 89 and 93(3).

90 Bhasi 2 at paras 52–55, pp 128–142; DWS at para 124; 2nd and 3rd Defendants' Responsive Submissions dated 28 January 2019 ("DRS") at para 88.

91 Bhasi 2 at paras 56–57, 94, p 158; 4th Affidavit of Shrikant Bhasi ("Bhasi 4") at paras 23–25, pp 27–56; DWS at paras 90 and 124; DRS at paras 88(a)–(c), 89.

(c) Mr Bhasi denies, to some extent, that he made the false representations with regard to his non-involvement with AOPL, as alleged.[92]

(2) The Indemnity Claim

59 As mentioned in relation to the Negative Declaration Claim, the plaintiffs denied having ever given the alleged Assurances to AOPL or SBI. However, *if* such Assurances were given, they must have been given by Mr Bhasi (without Bunge's knowledge, consent or authority). This would have been in breach of cll 2, 3 and 11 of both GRIPT Agency Agreements, which provided that Mr Bhasi did not have the authority to make final decisions that would bind GRIPT and/or BSA ("the No Authority Terms").[93] Mr Bhasi was therefore liable to indemnify the plaintiffs against the Kantawala Claim, should it be brought.

60 Mr Bhasi's response was threefold. First, the Indemnity Claim was entirely based on speculation because the basis for the Indemnity Claim – that Mr Bhasi was the one who had given the alleged Assurances to AOPL or SBI – ran counter to the plaintiffs' primary position that the Assurances were never made.[94] Second, Mr Bhasi was not liable to indemnify the plaintiffs because he had not breached the No Authority Terms.[95] Third, the plaintiffs have not shown that they have suffered any losses as a result of the alleged breaches.[96]

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92 Bhasi 4 at paras 48–53.

93 SOC at paras 58 and 67.

94 Bhasi 3 at paras 28–35.

95 Bhasi 3 at para 48.

96 Bhasi 3 at paras 49–50.

SUM 3235, SUM 2544 and RA 227

61 As mentioned earlier, Suit 438 was commenced on 26 April 2018. On the same day, the plaintiffs sought leave to serve the writ out of jurisdiction on AOPL and Mr Bhasi under O 11 r 1 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC").[97] The application was heard *ex parte*, and leave was granted on 3 May 2018.

62 When filed, the writ of summons was endorsed with all the claims, save for the AOPL US$50m Claim. When the statement of claim was filed on 18 May 2018, as against AOPL, there was only the Negative Declaration Claim (and not the AOPL US$50m Claim). On 13 June 2018, the plaintiffs applied for leave to amend the statement of claim, and for an order for the service of the amended writ of summons and statement of claim on AOPL and Mr Bhasi *vide* Summons No 2740 of 2018 ("SUM 2740"). On 29 June 2018, the application was granted by the assistant registrar.[98] In the amended writ of summons and Statement of Claim (Amendment No 1), the AOPL US$50m Claim was added.

63 On 13 July 2018, AOPL and Mr Bhasi applied *vide* SUM 3235 for the following:

(a) Prayer 1: to set aside the order granting leave for service out of jurisdiction in respect of the claims against them;

(b) Prayer 2: in the alternative, "without prejudice" to Prayer 1, a stay of proceedings in favour of Indian courts on the ground that Singapore was not the proper forum for the disputes; and

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97 Summons No 1964 of 2018.

98 Order of Court No 4315 of 2018.

(c) Prayer 3: further or alternatively, "without prejudice" to Prayer 1, a stay of proceedings in respect of the claims against Mr Bhasi in favour of arbitration.

64 As for SBI, it filed its application *vide* SUM 2544 for a stay of proceedings on 4 June 2018. This was on the basis that India was clearly or distinctly the more appropriate forum for the trial on the SBI IPU Claim.[99] An assistant registrar heard and dismissed the application on 24 August 2018. On 5 September 2018, SBI appealed against the decision *vide* RA 227.

Applicable legal principles

65 These jurisdictional challenges concerned a number of issues. I begin by setting out the various applicable legal frameworks.

66 Where a foreign defendant – who was served out of the jurisdiction in relation to a suit in Singapore – applies for a stay of proceedings under O 12 r 7(2) of the ROC, the issue is whether Singapore courts should decline to assume jurisdiction on the ground that Singapore is not the proper forum for the dispute. Generally, in such stay applications, the question is whether the foreign jurisdiction is clearly or distinctly more appropriate than Singapore for the determination of the claim. The applicable test is the two-stage analysis established in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"), as applied in Singapore in cases including *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*") at [12].

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[99] 1st Defendant's Written Submissions (RA 227) dated 9 November 2018 ("D1WS") at para 4.

67 At Stage 1 of the *Spiliada* test, the court determines if there is *prima facie* some other available forum that is more appropriate for the case to be tried. Relevant connecting factors include the following (*JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [42]; *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2016 Reissue) ("*Halsbury's Laws of Singapore*") at paras 75.090–75.095):

(a) The personal connections of the parties and the witnesses. The compellability of the witnesses is also an important factor (*Rickshaw Investments* at [23] and [25]).

(b) The connections to relevant events and transactions.

(c) The law applicable to the dispute.

(d) The existence of proceedings elsewhere. This raises potential issues of duplication of resources as well as the risk of conflicting judgments.

(e) The overall "shape of the litigation".

It is the quality, not the quantity, of connecting factors that is crucial in the analysis. The search is for the connecting factors which have the "most relevant and substantial associations" with the dispute at hand (*Rappo, Tania v Accent Delight International Ltd and another and another appeal* [2017] 2 SLR 265 at [70]). The burden at Stage 1 lies on the defendant.

68 If the defendant succeeds at Stage 1, the burden shifts to the plaintiff at Stage 2 to satisfy the court that justice nonetheless requires that a stay should not be granted, even though the court is not *prima facie* the natural forum (*Rickshaw Investments* at [14]; *Zoom Communications Ltd v Broadcast*

Solutions Pte Ltd [2014] 4 SLR 500 ("*Zoom Communications*") at [75]). The court will consider whether substantial justice can be obtained by the plaintiff in the *prima facie* natural forum. Where having trial in the foreign forum will amount to a deprivation of substantial justice, then a stay may be denied.

69 In contrast to a stay application, where the foreign defendant applies for a setting aside of the order granting leave to serve out of jurisdiction under O 12 r 7(1)(*c*), he challenges the *existence* of the Singapore courts' jurisdiction on grounds that Singapore is not the proper forum (and thus, one of the requirements for valid service out of jurisdiction has not been satisfied). Here, a threshold issue is whether the defendant has submitted to the jurisdiction of the Singapore courts. If it is found that there is no such submission, the next question is whether the order for service out of jurisdiction should be set aside, because of any of the following (*Zoom Communications* at [26]–[29]):

(a) the plaintiff's claim does not come within one of the heads of claim in O 11 r 1 of the ROC;

(b) the plaintiff's claim does not have a sufficient degree of merit;

(c) the plaintiff failed to provide full and frank disclosure of all material facts when it made its *ex parte* application for the order for service out of jurisdiction; or

(d) Singapore is not the proper forum for the trial of the action (as per the same *Spiliada* test above).

The plaintiff must establish a "good arguable case" that the claim falls within one of the sub-paragraphs of O 11 r 1 of the ROC, and show sufficient degree of merit by demonstrating that there is a serious question to be tried on the merits

of the case: *Bradley Lomas Electrolok Ltd and another v Colt Ventilation East Asia Pte Ltd and others* [1999] 3 SLR(R) 1156 at [18]–[19]. Here, the burden of proof remains on the plaintiff to demonstrate that Singapore is the proper forum (*Zoom Communications* at [72]–[75]).

70 However, the applicable test in relation to stay applications changes where there exists an agreement between parties to litigate in Singapore – whether by an exclusive jurisdiction clause or a non-exclusive jurisdiction clause (because in the latter case, the plaintiff is promised the defendant's submission if the claim is brought in the named jurisdiction): *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 ("*Shanghai Turbo*") at [84]–[86]. In such a case, the test is not simply whether the foreign jurisdiction is the more appropriate forum. Rather, the court will generally hold parties to their contractual commitment to litigate in Singapore, unless there is "strong cause" amounting to exceptional circumstances why the proceedings brought in Singapore should be stayed. The burden lies with the party seeking the stay to show strong cause: *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd and another and another appeal* [2017] 2 SLR 814 ("*Trisuryo*") at [84].

71 The same "strong cause" test applies in relation to an application to set aside leave to serve out pursuant to O 12 r 7(1)(*c*) of the ROC. I note at this juncture that AOPL and Mr Bhasi had argued to the contrary. Citing *Zoom Communications*, AOPL and Mr Bhasi contended that the strong cause test had no application to such setting aside applications because the burden of proof in such cases is always on the plaintiff. This is not correct. The "strong cause" test applies to any challenge to jurisdiction, whether by an application to set aside a court order granting the plaintiff leave to serve out of jurisdiction or to stay those proceedings in favour in proceedings elsewhere: *Shanghai Turbo* at [86]. This is because both applications amount to attempts on the defendant's part to be

released from his contractual obligations, which should ordinarily be binding on grounds of party autonomy and the sanctity of contract. The onus accordingly lies on the defendant to justify why the court should allow him to do so.

72 In determining whether a party has shown "strong cause", the task for the court is not simply to undertake a balancing exercise to determine which forum is more convenient, but to ask why the party seeking the stay should be permitted to be relieved of its contractual obligation to sue (or be sued) in the agreed forum: *Trisuryo* at [84]. The factors which the court will take into account include (*Shanghai Turbo* at [94], citing *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1977–1978] SLR(R) 112 at [11]):

> (a) in what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts;
>
> (b) whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respect;
>
> (c) with what country either party is connected and, if so, how closely;
>
> (d) whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; and
>
> (e) whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:
>
> (i) be deprived of security for their claim;
>
> (ii) be unable to enforce any judgment obtained;
>
> (iii) be faced with a time-bar not applicable here; or
>
> (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.
>
> In applying factor (d), it should be borne in mind that it encapsulates the inquiry of whether the applicant is acting abusively in applying for a stay of proceedings …

73 What amounts to exceptional circumstances depends on the facts, but generally, factors within the contemplation of the parties at the time of contracting should carry less weight than unforeseen factors: *Shanghai Turbo* at [88(a)]. Thus, although fragmentation of proceedings may amount to strong cause against enforcing a jurisdiction agreement, it may not if the fragmentation is foreseeable at the time the contract was formed: *Halsbury's Laws of Singapore* at para 75.121.

Preliminary Issue: Whether AOPL and/or Mr Bhasi accepted service of the amended writ

74 As a preliminary point, the plaintiffs argued that attempts by AOPL and Mr Bhasi to contest jurisdiction should be dismissed because they had already submitted to the jurisdiction of the Singapore courts as follows:

> (a) AOPL's and Mr Bhasi's counsel, Shook Lin & Bok LLP ("SLB"), did not object to the plaintiffs' prayer in SUM 2740 (to amend the writ of summons and the statement of claim) for an order that the amended writ be served on AOPL and Mr Bhasi without any further requirement that leave be obtained for service of the amended writ out of jurisdiction; and
>
> (b) the amended writ and Statement of Claim (Amendment No 1) were served on SLB via e-Litigation on 29 June 2018, and this service was accepted without any reservation or qualification.[100]

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100 Plaintiffs' Written Submissions in Response to 2nd and 3rd Defendants' Applications in Summons 3235/2018 ("PWS") at paras 30–36.

75 Having perused the record of SUM 2740, it was clear to me that neither AOPL nor Mr Bhasi had, by their conduct of the proceedings, evinced any unequivocal intention to submit to the jurisdiction of the Singapore courts. On the contrary, the notes of argument for SUM 2740 record that SLB had made it clear that they were attending only as observers, and that their attendance was not to be taken as a step in the proceedings or as submission to jurisdiction. In the circumstances, the fact that SLB did not object to SUM 2740 could not be taken to be a submission to jurisdiction. Notably, counsel for the plaintiffs, Allen & Gledhill LLP ("A&G"), did not argue at the hearing of SUM 2740 that anything should be made of SLB's attendance at the hearing or the fact that they were not objecting to the application.[101]

76 I agreed with AOPL and Mr Bhasi that in these circumstances, the filing of the amended writ and Statement of Claim (Amendment No 1) on e-Litigation did not constitute valid service of the same on SLB. By all accounts, SLB did not have instructions to accept service of the writ in Singapore. In fact, as just mentioned, AOPL and Mr Bhasi had expressly reserved their position on jurisdiction. The only reason why A&G were able to serve the amended writ and Statement of Claim (Amendment No 1) via e-Litigation was because AOPL and Mr Bhasi had entered an appearance. An entry of appearance does not constitute waiver of one's right to mount a challenge to jurisdiction.[102]

77 For these reasons, I reject the preliminary point that there was submission to the jurisdiction of the Singapore courts.

The claims against AOPL

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101 DRS at para 21.

102 DRS at paras 27–30, 32.

78 To recapitulate, as against AOPL, there were two claims: the AOPL US$50m Claim by GRIPT and the Negative Declaration Claim by the plaintiffs. AOPL applied to set aside the order granting leave for service out of jurisdiction, and in the alternative, a stay of the proceedings in favour of the Indian courts. As mentioned at the outset at [2], I refused to set aside the order for leave to serve the writ out of jurisdiction on AOPL. While I allowed the stay of proceedings in respect of the Negative Declaration Claim in favour of the Indian courts, the AOPL US$50m Claim is to remain in Singapore.

The AOPL US$50m Claim

79 In relation to the AOPL US$50m Claim, there were two key issues before me:

(a) whether the AOPL US$50m Claim may be taken into consideration for the application to set aside the service of the writ on AOPL; and

(b) whether Singapore is the proper forum for the dispute.

Whether the AOPL US$50m Claim may be taken into consideration

80 It will be recalled that the AOPL US$50m Claim was a belated addition to the writ of summons and the statement of claim (see [61]–[62] above). A preliminary issue is whether the court has a discretion to take the AOPL US$50m Claim into consideration in the application to set aside the service of the writ out of jurisdiction, or whether the court must assess the application based only on the facts and claims as they existed at the time leave was granted.

81 A similar point was canvassed in *IM Skaugen SE and another v MAN Diesel & Turbo SE and another* [2018] SGHC 123 ("*Skaugen (HC)*"), which

was relied on by the plaintiffs. In *Skaugen (HC),* after the *ex parte* application for leave had been granted, but before the setting aside application was made, the plaintiffs had commenced concurrent proceedings – with the very same subject matter – in Norway against the defendants: *Skaugen (HC)* at [173]. Vinodh Coomaraswamy J held that, at the setting aside application, the court has a discretion to take into account evidence of events occurring *after* leave is granted *ex parte*: *Skaugen (HC)* at [190]. The court disagreed with the defendants' argument that their setting aside application should be determined based on the facts as they existed at the time of the plaintiffs' *ex parte* application for leave, and excluding consideration of the fact of the Norwegian proceedings, and the fact that proceedings in Germany were no longer available.

82 In support of their argument before Coomaraswamy J, the defendants had cited the English authority of *ISC Technologies Ltd and another v James Howard Guerin and others* [1992] 2 Lloyd's Rep 430 ("*ISC Technologies*"). However, the court instead preferred the competing line of English authorities rejecting the position in *ISC Technologies*: at [187]–[188]. The leading case in that line of cases was *NML Capital Ltd v Republic of Argentina* [2011] 2 AC 495 ("*NML Capital*").

83 In *NML Capital*, the claimant had obtained judgment in New York against the defendant in respect of a series of bonds issued by the defendant. The claimant sought to enforce the New York judgment in England, and, in the enforcement proceedings, sought leave for service out of jurisdiction. It was a requirement of the English Civil Procedure Rules that the claimant show, *inter alia*, why the prospective defendant was "not absolutely immune from suit", and the claimant argued that the defendant had contractually waived its right to assert state immunity. Leave was granted, and the defendant sought to set aside the order for leave on the ground that it enjoyed state immunity from the

jurisdiction of the English courts. At the hearing of the setting aside application, the claimant conceded that the bases on which it had asserted that the defendant was not entitled to state immunity were erroneous. Instead, the claimant sought to rely on certain alternative grounds (the details of which I shall not set out). The defendant contended that it was not open to the claimant to invoke these alternative grounds for contending that immunity did not apply when these had not been relied on in the original *ex parte* application, and that the proper course was for the claimant to make a fresh application for leave. On appeal to the UK Supreme Court, Lord Phillips rejected the defendant's procedural objection, holding that "procedural rules should be the servant not the master of the rule of law", and that the overarching objective of the rules is to deal with cases expeditiously and efficiently (at [74]). Accordingly, where there is valid basis for subjecting an out-of-jurisdiction defendant to jurisdiction, it should not be mandatory for a claimant (seeking to invoke new grounds) to start again. Instead, the court has discretion as to the order that will best serve the overriding objective: *NML Capital* at [75].

84 I also note that in an earlier case of *William Jacks & Co (Singapore) Pte Ltd v Nelson Honey & Marketing (NZ) Ltd* [2015] SGHCR 21 ("*William Jacks*"), the assistant registrar relied on *NML Capital*, and held that, in the absence of any finding that the plaintiff's conduct was an abuse of process, a new cause of action and/or an O 11 r 1 head of jurisdiction may be relied on by the plaintiff in a setting aside application. This is even if that new cause of action or O 11 r 1 head of jurisdiction was not relied upon in the *ex parte* application for service out of jurisdiction. In *Skaugen (HC)*, the court observed that *William Jacks* was different from *Skaugen (HC)* in that *William Jacks* did not involve new facts, but a new cause of action on the same existing facts (at [185]). Nevertheless, it affirmed the decision in *William Jacks*, noting that otherwise,

costs and time would be wasted, whether by the plaintiff having to file a fresh originating process even where there is a good arguable case that his additional causes of action come within a head of jurisdiction in O 11 r 1 of the ROC, or by the defendant having to take out a second setting aside application based on the fresh originating process: *Skaugen (HC)* at [189]. The court remarked that the approach in *William Jacks* was subject to the court's overarching power to prevent an abuse of process on the part of the plaintiff: *Skaugen (HC)* at [189], [193].

85 Lastly, I note that *Skaugen (HC)*'s holding that the court is entitled, during setting aside applications, to take into account subsequent events has recently been endorsed by the Court of Appeal in *Man Diesel & Turbo SE and another v IM Skaugen SE and another* [2019] SGCA 80 ("*Skaugen (CA)*") at [50]. Three reasons underpinned this – principle, coherence and policy (at [52]–[55]).

(a) As a matter of principle, the approach in *Skaugen (HC)* furthers the objective of *forum non conveniens*, *ie*, to select the more appropriate forum. This inquiry is a *dynamic* one.

(b) As a matter of consistency, subsequent events can be considered in stay applications, and there is no reason why the approach should be any different for setting aside applications – the same normative considerations in [85(a)] above apply to both applications.

(c) As a matter of policy, only subsequent developments that are relevant to the *forum non conveniens* analysis will be considered. In this connection, if parties "raise wholly unmeritorious matters on the pretext of them being 'subsequent developments' … the concept of abuse of process … would apply in its full force".

86 Turning back to the present case, its facts are different from that in *Skaugen (HC)* as it did not concern new evidence occurring after leave is granted. The present case was more akin to the facts of *William Jacks* and *NML Capital*, as it concerned a new cause of action and new arguments being relied on at the setting aside stage – which in this case were premised on facts which were known to the parties at the time the writ was filed, and based on evidence existing at the time of the writ. Nevertheless, the same reasoning as in *NML Capital, Williams Jacks* and *Skaugen (HC)*, especially the *obiter* at [189] of *Skaugen (HC)* cited above, applied. To ignore the AOPL US$50m Claim would leave it open for the plaintiffs, upon the order for leave being set aside, to issue a fresh writ based on the additional cause of action, and then seek leave to serve that writ out of the jurisdiction. This circuitous route would only waste costs and time for the parties, which could be avoided if the court simply considered the additional cause of action at the hearing to set aside service of the writ. Furthermore, the reasoning supporting the consideration of subsequent events cited in *Skaugen (CA)* also supports the consideration of new causes of action: the inquiry at the setting aside stage for the more appropriate forum is a dynamic one; as long as the new causes of action are relevant and meritorious, they should be considered.

87 Indeed, as stated above at [62]–[63], the plaintiffs had, by 29 June 2018, already obtained leave to amend the writ of summons and the statement of claim so as to include the AOPL US$50m Claim, and to serve the amended documents on AOPL and Mr Bhasi. It bears noting that this was well before the application to challenge jurisdiction filed by AOPL and Mr Bhasi on 13 July 2018, although a little after SBI's application filed on 4 June 2018 to stay the proceedings on *forum non conveniens* grounds. In my view, there was no evidence to suggest that the addition of the AOPL US$50m Claim was an abuse of process on the

part of the plaintiffs. The plaintiffs had sought to pursue this additional claim expeditiously, and, as stated below at [89(b)], there was a sufficient degree of merit to the claim. On the whole, it did not seem to me that the claim was only added so as to resist the jurisdictional challenges by SBI, AOPL and Mr Bhasi.

88 Therefore, following *Skaugen (HC)*, I do not see any reason why the AOPL US$50m Claim should not be taken into consideration for the purposes of the setting aside application.

Whether Singapore is the proper forum for the claim

89 Before I turn to the natural forum issue, I briefly set out my views as to the other limbs of the *Zoom Communications* test (set out at [69] above).

(a) Limb (a) – a good arguable case on the heads of jurisdiction under O 11 r 1 of the ROC: AOPL did not contest this, and rightly so. It was clear that at least O 11 r 1(*d*)(iv) was made out (*ie,* the claim is brought to obtain relief in respect of a breach of contract, being a contract which contains a jurisdiction clause in favour of Singapore).

(b) Limb (b) – that the claim has a sufficient degree of merit: AOPL submitted that the AOPL US$50m Claim was wholly without basis, and that the sums claimed were due from ACF rather than AOPL (see [46] above).[103] This was a matter to be tried at the trial. It bears mention that the threshold is not a high one – all that is required is that there be a serious question to be tried – and I was satisfied that the threshold was met.

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103 DWS at paras 96–100, 121.

90 As to whether Singapore is the natural forum, GRIPT pointed out that there was an applicable exclusive jurisdiction clause in favour of Singapore.[104] The AOPL US$50m Claim arose in relation to the AOPL-GRIPT Contract, cl 2 of which provides as follows:[105]

> Governing law and jurisdiction:
>
> …
>
> 2. The courts of Singapore have exclusive jurisdiction to settle any dispute arising out of or in connection with this contract (including a dispute regarding the existence, validity or termination of this contract) (a 'Dispute'). The Parties agree that the courts of Singapore are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary. This Clause is for the benefit of [GRIPT] only. As a result, [GRIPT] shall not be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. …

91 The AOPL US$50m Claim was founded upon AOPL's alleged breach of its obligations under the AOPL-GRIPT Contract to arrange for SBI to issue letter(s) of credit. It clearly falls within the ambit of the exclusive jurisdiction clause above. On AOPL's part, it seemed to have accepted that the AOPL US$50m claim is "related to" the AOPL-GRIPT Contract.[106] As a result, the burden fell on AOPL to show strong cause before it would be allowed to renege on its agreement to litigate the dispute in Singapore.

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104 PWS at paras 60–62.

105 Rigby 5 at p 144.

106 DRS at para 61.

(1) Whether strong cause was shown

92 As discussed at [70]–[73] above, the court's task is to determine whether there existed exceptional circumstances amounting to "strong cause". In doing so, I considered the following factors both individually and holistically: (a) connections of the parties to the dispute; (b) availability of witnesses; (c) the applicable law; and (d) the impact of related proceedings and the overall "shape of the litigation".

(A) CONNECTIONS OF PARTIES TO THE DISPUTE

93 AOPL argued that the parties to the dispute were closely related to India. AOPL, an Indian merchanting trader, and SBI, an Indian bank, were the key players in the Indian merchanting trade transactions:[107]

(a) AOPL was incorporated in India, with its offices, executives and documents all located in India.[108] Against this, GRIPT had argued that AOPL had a wholly-owned subsidiary in Singapore – Advantage Overseas Singapore Pte Ltd ("AOSPL"),[109] but as AOPL rightly pointed out, AOSPL was a separate legal entity unrelated to the dispute.[110]

(b) The relevant banking entity involved in India was SBI's Gwalior branch.[111]

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107 DWS at para 173.

108 DWS at para 174(a).

109 PWS at para 80(2).

110 DRS at para 104(b).

111 DWS at para 182.

94 On the other hand, GRIPT was incorporated in Singapore and carried on business in Singapore.[112] AIT, the entity to whom AOPL allegedly paid the US$50m, was also a Singapore-registered company.[113] Against this, AOPL argued that GRIPT's Singapore connection was fortuitous and irrelevant to the Bunge-AOPL merchanting trade structure. GRIPT was simply a part of Bunge's overall FSG operations. In this regard, it was of greater relevance that Bunge was operating out of India and had a presence in India.[114] GRIPT's reply was that Bunge operated on a "hub and spoke" model, and that the Singapore "hub" was more closely related to the dispute than the India "spoke".[115]

95 I consider the implications of Bunge's "hub and spoke" structure further below, and taking into account those findings, in my view, the parties' connections were split across Singapore and India. No strong cause was shown on this factor. For completeness, I note that the other entities relating to the 17172A Trade, ACF and Tracon, constituted a neutral factor as they were UAE companies.[116]

(B) AVAILABILITY OF WITNESSES

96 Witness availability should ordinarily be given more weight over mere convenience and cost savings, and the importance of the location and the compellability of the witnesses take on greater significance where the main

112 PWS at para 80(1).

113 PWS at para 102, 120; PRS at s/n 39.

114 DRS at para 104(a); DWS at paras 179–180.

115 PRS at s/n 34.

116 DWS at para 183.

disputes revolve around questions of fact, as was the case in the present proceedings: *JIO Minerals* at [71]; *Rickshaw Investments* at [19].

97 The AOPL US$50m Claim, in particular, centred on three crucial questions of fact:

(a) Whether Bunge had instructed AOPL to source for trade flows from its trading partners, including AIT, so that AOPL could on-sell the said cargo to ACF under the 17172A, 17173A and 17174A Trades.

(b) Whether Ms Jadhav or Mr Ambujakshan had, as Mr Srivastava alleged, purported to give assent to or confirmation of (on Bunge's behalf) AOPL's instruction to SBI to release the US$150m (earmarked for GRIPT under the 15 December 2015 IPU) to AIT instead.

(c) If indeed the said assent and/or confirmation had been given, whether Ms Jadhav and/or Mr Ambujakshan were duly authorised by Bunge to give the said assent and/or confirmation.

98 AOPL argued that issues [97(a)] and [97(b)] above were key, and that the witnesses relevant to those factual issues were in India, many of whom could not be compelled to give evidence in Singapore. They included, in the main:[117]

(a) Bunge's representatives, Ms Jadhav and Mr Ambujakshan, one of whom gave the confirmation;

(b) AOPL's employees, Mr Singh and Mr Krishna, who were together responsible for instructing SBI to issue the letter of credit to

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117 DWS at para 258.

GRIPT. Further, since the plaintiffs appeared to deny that the Admission Letter was signed by Mr Singh on Mr Rigby's insistence, but did not dispute that Mr Rigby had gone to AOPL's offices in India to procure Mr Singh's signature, evidence from Mr Singh as to the circumstances under which he had signed the Admission Letter would be pertinent. Mr Singh had also allegedly received instructions from GRIPT to purchase cargo from AIT;[118]

(c) SBI's employees, Mr Srivastava and one Razdan; and

(d) ACF's sole director, Anil Varghese, who is an Indian national – given AOPL's allegation that the funds were eventually paid to ACF, and the US$50m was therefore due from ACF.[119]

99 In contrast, GRIPT argued that the key factual issue was that in [97(c)]; quite apart from whether or not Ms Jadhav or Mr Ambujakshan had given the alleged confirmation, the real issue was whether they had the requisite authority to do so.[120] The key witnesses on this issue were located in Singapore:

(a) In the Bunge-AOPL String Sales, and in particular the September 2015 Bunge-AOPL String Sale, the "hubs" were GRIPT's office in Singapore and BSA's office in Geneva (see [9] above). The commercial, legal, financial and operational aspects of these string sales were performed out of Singapore by TSF employees based in GRIPT's

118 DRS at para 154; DWS at para 256.

119 DRS at para 155.

120 PWS at paras 92(7) and 119.

Singapore office.[121] In fact, Mr Singh himself[122] had stated that "senior employees from the Bunge Group" had explored with AOPL whether AOPL could source for alternative trade flows, and had informed AOPL that Bunge would advance moneys to AOPL in order for it to obtain trade flows from alternative sources. These senior Bunge employees who were based in Singapore would thus need to be called as witnesses.[123]

(b) In particular, Mr Tan was to give evidence:

(i) that there was no shortage of trade flows from GRIPT (and therefore no need for GRIPT or Bunge to instruct AOPL to source for trade flows from AIT);[124]

(ii) of the standard process that applied on the rare occasions where GRIPT did consent to the release of an IPU given (and therefore, as to whether the 15 December 2015 IPU had been waived in the course of the 17172A Trade);[125] and

(iii) to respond to Mr Srivastava's allegations that Ms Jadhav or Mr Ambujakshan knew about and had all relevant information and document in relation to the GRIPT contracts.[126] In fact, they reported directly to Mr Tan, were not decision-makers for Bunge

121 PWS at paras 84–86.

122 Singh 3 at paras 32–33.

123 PWS at para 126.

124 PWS at para 92(6).

125 PWS at para 92(13).

126 PWS at para 92(14).

and were only involved in administrative matters. They thus had no evidence to give.[127]

(c) GRIPT named some other potential witnesses who were based in Singapore. One was Won Lee Kiew ("Mr Won"), who was the TSF Operations Manager at the material time, and whom Mr Tan reported to. Mr Won was also responsible for determining whether the September 2015 Bunge-AOPL String Sales was a transaction that TSF should participate in.[128] Mr Won was no longer in Bunge's employ. Other potential witnesses were several Bunge staff based in Singapore who handled the commercial and financial aspects of the transactions, as well as the operational staff under Mr Tan.[129]

(d) GRIPT also argued that in light of the defendants' account that the US$50m was transferred to AIT, the evidence of AIT's chief executive officer, Daniel Amarilla ("Mr Amarilla") who resided in Singapore, would be more readily available should the trial be held in Singapore.[130]

100 In my judgment, the twin factual issues of (a) whether Bunge had given the instructions/confirmations to AOPL and SBI, and (b) whether those instructions/confirmations were authorised, were both at the forefront. Ultimately, both were questions that needed to be answered for the determination of the claim. The evidence of witnesses in the Bunge "spoke" in

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127 PRS at s/n 34.

128 PWS at paras 87–88.

129 PWS at paras 89–90.

130 PWS at para 103.

India, relating to the former issue, and the evidence of witnesses in the Bunge "hub" in Singapore, relating to the latter, were thus equally important.

101 Ultimately, in my view, the witness availability factor was finely balanced and did not pull strongly in favour of either jurisdiction:

(a) Those who were in the employ of each party were compellable, whether in India or Singapore.

(b) Regarding the witnesses compellable only in Singapore:

(i) While Mr Won was no longer in Bunge's employ, I agreed with AOPL that his role seemed peripheral – the key actor managing the operations was Mr Tan.

(ii) I did not think Mr Amarilla's evidence would be of particular importance, given that the plaintiffs did not even dispute that AOPL had procured the trade flows from AIT.[131]

(c) Regarding the witnesses compellable only in India:

(i) Mr Srivastava and Razdan remained employees of SBI and therefore could be procured to testify on behalf of SBI in Singapore. While they could not be compelled to give evidence on behalf of AOPL in Singapore, there was some reason for either of them to do so – given that the positions of SBI and AOPL are fairly aligned.[132] Certainly, there was no evidence that they were not prepared to do so.

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131 DRS at para 169.

132 DWS at para 260.

(ii) As for Ms Jadhav and Mr Ambujakshan, GRIPT argued that the defendants would easily be able to procure their attendance in Singapore since Mr Ambujakshan was now an employee of AOPL, and Ms Jadhav was employed by a company within Mr Bhasi's Carnival Group.[133] While I was of the view that Ms Jadhav was not compellable in Singapore – even if she was in the employ of the Carnival Group of companies – there is no indication that Ms Jadhav will not give evidence in Singapore.

Certainly, the threshold of "strong cause" was not reached on this factor.

(C) APPLICABLE LAW

102 As stated above, the starting point of the analysis is that the AOPL-GRIPT Contract, from which the AOPL US$50m Claim arose, was expressly governed by Singapore law.[134] According to AOPL, that was not the end of the inquiry. The focus ought not to be on the AOPL-GRIPT Contract, but on the Bunge-AOPL merchanting trade structure as a whole. On AOPL's case, this structure was devised entirely to evade Indian regulations on the inflow of foreign investment so that all involved might benefit from the interest arbitrage. This raised questions as to whether the overall string and structure of transactions (which included the AOPL-GRIPT Contract) would be void for illegality in the place of performance, *ie*, India:

(a) Indian foreign capital restrictions under its Foreign Exchange Management Act 1999 ("FEMA") prohibited unauthorised payments

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133 PWS at paras 96, 122.

134 8th Affidavit of David Alan Mr Rigby ("Rigby 8") at para 65(9).

into and out of India. The *raison d'être* of the Bunge-AOPL merchanting trade structure was to work around this prohibition by creating a pretext for the inflow and outflow of funds from Bunge into India via the Indian merchanting trade counterparties.[135]

(b) The Reserve Bank of India's Circular 115 placed certain restrictions on merchanting trade transactions (*eg*, the maximum tenor of letters of credit mentioned at [18] above), and required, amongst other things, that merchanting traders had to be genuine traders of goods, and not mere financial intermediaries.[136] The particular characteristics of the Bunge-AOPL merchanting trade structure reflect the parties' attempts to work around those restrictions.[137]

(c) The financing which Bunge provided in the course of the deferred mandate trades potentially flouted the FEMA and RBI's regulations on external commercial borrowings.[138]

(d) The IPUs which SBI gave were bank guarantees of US$50m, which may have exceeded the regulatory limit of US$20m per transaction.[139]

103 According to AOPL, resolution of the dispute will inevitably require consideration of these Indian regulations[140] to determine the legal effect of their

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135 DWS at para 194.

136 DWS at para 198(d); DRS at para 109(b).

137 DWS at paras 199–202.

138 DWS at para 210; DRS at para 109(c).

139 DWS at paras 226, 228; DRS at para 109(d).

140 DWS at para 188; DRS at para 105.

contravention (if any), and whether the relevant contractual obligations could be preserved notwithstanding their illegality.[141] On this front, the Indian courts were better placed to address these issues of Indian law, as these questions could not be meaningfully answered by a Singapore court, even with expert evidence, not least because the Singapore courts ought not to opine on such matters of Indian public policy, which the Indian courts had an interest in deciding. These factors, AOPL submitted, amounted to strong cause.[142]

104 I was unpersuaded by AOPL's argument that these factors demonstrated strong cause. While the Indian regulations above may explain why the transactions were structured the way they were, they did not affect the specific dispute – which pertains to AOPL's obligations under the AOPL-GRIPT Contract. More importantly, the parties were well aware of these Indian laws/regulations when they nevertheless agreed to the exclusive jurisdiction clause. As stated (see [73] above), factors within the contemplation of the parties at the time of contracting carry less weight in the determination of whether strong cause has been shown.

105 I was likewise unpersuaded by AOPL's argument that there was strong cause on the basis that the dispute involved a determination of illegality which, on account of public policy, should be left to the Indian courts. I note that neither AOPL nor Mr Bhasi adduced any expert evidence of Indian law to make good their point. Further, a similar argument was recently made to and rejected by the Court of Appeal. In *Trisuryo*, the Court of Appeal held that, when addressing the question of jurisdiction, "foreign illegality is generally a matter that should

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141 DWS at paras 212–215.

142 DWS at para 211; DRS at paras 106–108.

be considered when determining the substantive merits of the action" (at [61]). This is because adjudication of the existence of foreign illegality involves a judgment on the merits, a full hearing and findings of fact, for which the stay application would not be the appropriate forum.

106 In any event, these do not amount to strong cause in light of the other factors taken in totality. One such factor was, as just mentioned, the fact that the governing law of the AOPL-GRIPT contract was Singapore law, as stipulated by its express choice of law clause.

(D) RELATED PROCEEDINGS / SHAPE OF THE LITIGATION

107 Finally, I also considered the relationship between the AOPL US$50m Claim and the Negative Declaration Claim, the latter of which I decided to stay in favour of the courts in India (see [135] below). AOPL and Mr Bhasi argued that the AOPL US$50m Claim should, on that basis, also be decided in India because the 17172A Trade was relevant to the Kantawala Claim. In other words, the Singapore court should decline to exercise jurisdiction in relation to the AOPL US$50m Claim to prevent fragmentation of the proceedings, and the resulting duplication of time and costs.[143]

108 I disagreed. In my judgment, strong cause was not shown in respect of the AOPL US$50m Claim, regardless of whether the Negative Declaration Claim remained in Singapore or not. While the AOPL US$50m Claim was connected to some extent to the Negative Declaration Claim by way of their common background and factual matrix, the connection was not a crucial one. In particular, the Negative Declaration Claim would involve a determination of

143 DWS at paras 298–300.

the fact and quality of the alleged Assurances given *in relation to Bunge's alleged obligation to enter into rollover trades*, and had little to do with the string contracts and AOPL's obligations arising thereunder. Hence, the mere fact that the Negative Declaration Claim will be litigated in India does not amount to strong cause justifying a stay of the AOPL US$50m Claim in breach of the parties' agreement to litigate that claim in Singapore.

(2) Conclusion

109 In sum, AOPL failed to show strong cause as to why the court should allow it to breach its contractual agreement. For the foregoing reasons, I rejected the application to set aside the order for service out of jurisdiction, and I did not stay the proceedings in respect of the AOPL US$50m Claim.

The Negative Declaration Claim

110 I turn next to the Negative Declaration Claim, which was the plaintiffs' claim against AOPL for a declaration of non-liability in respect of AOPL's (prospective) Kantawala Claim.

111 Given my finding that the plaintiffs had established basis for leave for service out of jurisdiction on AOPL based on the AOPL US$50m Claim, it was no longer necessary for me to deal with the question of whether the order for service out ought to be set aside. In the O 11 r 1 analysis, the court is concerned only with whether it has *some* basis for establishing personal jurisdiction over the foreign defendant. Once the existence of personal jurisdiction is established over a particular defendant, as was the case here, it seems to me that the question is whether the court would, in its discretion, decline to exercise its personal jurisdiction over that defendant in respect of a particular claim because, for example, there is another more appropriate forum for that claim.

112 Therefore, the key issue before me was whether Singapore is the proper forum for the dispute (which I analyse under the rubric of whether a stay of proceedings should be granted). In addition, I also considered the question as to whether the claim for a declaration of non-liability serves a useful purpose (or is an illegitimate attempt at forum-shopping). I answered both issues in the negative, and granted a stay of the proceedings in favour of the courts in India on grounds that Singapore was *forum non conveniens*.

Stay on forum non conveniens *grounds*

(1) Stage 1

113 In my judgment, AOPL had discharged its burden at the first stage of the *Spiliada* test (see [67] above) in showing that there was another available forum abroad that was clearly more appropriate than the Singapore forum, *ie*, India.

114 The connecting factors tied this dispute closely to India. I begin with the applicable law. The Negative Declaration Claim was for non-liability – in contract, tort or otherwise[144] – against AOPL. On the plaintiffs' own case, the central issues were (a) whether the plaintiffs had given the alleged Assurances so as to give rise to a binding obligation to continue to maintain a certain volume of trade with AOPL (to enable it to roll-over the deposits with SBI); and (b) if so, what loss AOPL had suffered by the plaintiffs' failure to keep those Assurances. On the facts before me, it seemed to me likely that Indian law would apply in determining whether any such assurances (if given) would have contractual effect. While the contracts between GRIPT and AOPL were

144 PWS at para 20.

governed by Singapore law, or subject to the jurisdiction of Singapore courts, the other legs of the transaction were governed by Indian law (the AOPL-ACF leg) or English law (the ACF-BSA leg). However, unlike the AOPL US$50m Claim, which was focused exclusively on the AOPL-GRIPT Contract, the Kantawala Claim was founded on Assurances pertaining to the overarching relationship between the parties. That relationship was born of dealings in India, using Indian intermediaries and Indian banks, and involving funds kept in Indian bank accounts.

115 In respect of a potential tortious claim, the *lex loci delicti* would be the governing law, and it was important therefore to identify the place of the tort. In all probability, this would be India. The plaintiffs submitted that the authority to make such assurances could only validly originate from the Singapore "hub", and the witnesses relevant to that issue would be members of Bunge senior management in Singapore. However, the very fact of any Assurances being made at all was disputed by the plaintiffs as well. Despite the lack of particulars regarding the surrounding facts, from the evidence before me, it appeared that the Assurances were made in India and/or Geneva, but *not* in Singapore (see [41(c)] above). The factual question of the Assurances being made was hence more closely linked with the India "spoke", even if the "hub" was in Singapore. I noted also that on the plaintiffs' own case, the Assurances would have emanated from Mr Bhasi (who was at the time largely based in India) and would have been received by AOPL in India. These factors pointed in favour of India as well.

116 I also noted the presence of other proceedings related to the Negative Declaration Claim. While the AOPL US$50m Claim was somewhat connected to the Negative Declaration Claim by way of their common background, the connection was not a crucial one. I refer to [108] above, and reiterate that the

key facts disputed in the Negative Declaration Claim were separate and distinct. The Negative Declaration Claim related more to the fact and quality of the alleged Assurances given, and less to the specific contracts entered into by the parties.

117 The Indemnity Claim against Mr Bhasi was arguably more factually intertwined with the Negative Declaration Claim. However, as explained below, I found that the Indemnity Claim should properly be referred to arbitration. It was therefore not a relevant consideration in favour of Singapore or Indian courts.

118 Therefore, at Stage 1, Singapore was not clearly the more appropriate forum. Instead, on the facts, India was a forum which was clearly more appropriate.

(2) Stage 2

119 At Stage 2, the plaintiffs failed to discharge their burden to show that justice nevertheless required that a stay should not be granted.

120 The plaintiffs had relied on the alleged prejudice and injustice that would result if its claims were to proceed in India due to the substantial delays in the Indian courts.[145]

121 Generally, delay in foreign courts will be disregarded, but extensive and severe delay may amount to a denial of substantial justice (*Halsbury's Laws of Singapore* at para 75.097, citing *Mohd Noor v Tunku Ibrahim Ismail Ibni Sultan*

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145 PWS at paras 181–183.

Iskandar Al-Haj [2001] 3 SLR(R) 260 at [34] and *Marconi Communications International Ltd v PT Pan Indonesian Bank Ltd TBK* [2005] EWCA Civ 422 at [77]). For instance, in *The "Vishva Ajay"* [1989] 2 Lloyd's Rep 558 at 560, the court held that delay in the magnitude of six to ten years amounted to a denial of justice.

122 The question then was the likely extent of delays should proceedings be brought in India. The plaintiffs' position was that:

(a) If the plaintiffs' claims were brought in India, only the Bombay High Court would have jurisdiction to adjudicate, not the Commercial Court of Bhopal.[146]

(b) There was a likelihood of delay to the disposal of claims brought in the Bombay High Court of about 12 to 18 years.

123 In contrast, the defendants' position was that:

(a) If the plaintiffs' claims were brought in India, either the Bombay High Court or the Commercial Court of Bhopal would have jurisdiction to adjudicate the suit. The latter would be the appropriate forum to institute action.[147]

(b) Should action be instituted in the Commercial Court of Bhopal, the estimated time for the final adjudication of the actions (including appeals) would be three years and five months.[148]

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146 1st Affidavit of Zal Andhyarujina at p 23, para 22(b)(iv); DWS at para 278.

147 1st Affidavit of Salman Khurshid ("Khurshid 1") at p 11.

148 Khurshid 1 at p 12.

124 In determining which Indian court had jurisdiction, all experts applied the Indian Code of Civil Procedure 1908, which governed matters such as the jurisdiction of courts. Section 20 provides that a plaintiff could institute proceedings:[149]

> (a) where the cause of action wholly or partly arose;
>
> (b) where the defendant resides, or carries on business or personally works for gain; and
>
> (c) if there are two or more defendants, where any of them resides or carries on business or personally works for gain, provided that either leave of the court is obtained, or the defendants who do not reside or carry on business or personally work for gain at that place acquiesce in that court.

125 In respect of the Negative Declaration Claim, it seemed incorrect to conclude that the Bhopal courts would have jurisdiction under the Code of Civil Procedure. A closer reading of the evidence of the defendants' expert revealed that jurisdiction in Bhopal was founded on Mr Bhasi's residence in Bhopal.[150] However, where AOPL is the sole defendant in the Negative Declaration Claim, and AOPL is deemed to carry on business in Mumbai (which is within the territorial jurisdiction of the Bombay courts), it would seem that, on the defendants' expert's evidence, the Bombay High Court will have jurisdiction should the Negative Declaration Claim be litigated there.[151]

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149 Khurshid 1 at pp 12–13.

150 Khurshid 1 at p 14, para 16 and 17.

151 Khurshid 1 at p 14, para 15.

126 That being said, I was not convinced by the plaintiffs' arguments. For one, efforts have been made to implement shorter timelines through the passing of the Indian Commercial Courts Act 2015 and the Commercial Courts, Commercial Division and Commercial Appellate Division of the High Court's (Amendment) Ordinance 2018.[152] Even if there might have been substantial delays in the courts of India in the past, due recognition should be given to the efforts made in recent years to reduce the backlog of cases. In any event, the principle of international comity demands that due deference be accorded to a foreign sovereign. The courts have shown general hesitance to "stigmatise [a foreign] legal system" by holding that delays in the foreign courts are so egregious as to amount to substantial injustice: *Konamaneni and others v Rolls Royce Industrial Power (India) Ltd and others* [2002] 1 WLR 1269 at [177]. Given the evidence that was before me, I did not see a compelling reason to breach the principle of comity.

127 Besides the factor of delay, the plaintiffs did not raise any other requirements of justice that demanded the Negative Declaration Claim be heard in Singapore.

Utility of a claim for a declaration of non-liability

128 Quite apart from the question of whether Singapore was the natural forum for the claim (which I have determined in the negative), in the context of claims for declarations of non-liability, it has also been suggested that the court ought to consider and ensure that the negative declaration is sought for a valuable purpose and is not an illegitimate attempt to pre-empt the jurisdiction in which the dispute between the parties is to be resolved: *New Hampshire*

152 Khurshid 1 at p 15, para 19 to p 21, para 39.

Insurance Company v Phillips Electronics North America Corporation [1998] ILPr 256 ("*New Hampshire*") at [13]:

> Where leave to serve out of the jurisdiction a writ claiming a negative declaration is challenged, the court will have to consider both the question of whether there is justification for seeking that relief and the separate question of whether England is the appropriate forum in which to seek it. The two questions will, however, cover common ground where the possibility exists that the plaintiff in the English proceedings will be sued by the defendant in an alternative jurisdiction. It is in that situation that the court must be particularly careful to ensure that the negative declaration is sought for a valid and valuable purpose and not in an illegitimate attempt to pre-empt the jurisdiction in which the dispute between the parties is to be resolved.

129 This principle has received consideration in our courts. In *Mizuho Corporate Bank Ltd v Cho Hung Bank* [2004] 4 SLR(R) 67 ("*Mizuho*"), the defendant sought a stay of the Singapore proceedings based on a letter of credit it issued for the purchase of a cargo of gas oil. Arguing that South Korea was the more appropriate forum, the defendant had commenced proceedings in South Korea for a negative declaration of liability under the letter of credit. The court rejected the argument, and noted that claims for negative declarations "must be viewed with great caution in all situations involving possible conflicts of jurisdictions since they obviously lend themselves to improper attempts at forum shopping" (at [13]).

130 The position now seems more nuanced. I refer to Prof Yeo Tiong Min's commentary on this point in *Halsbury's Singapore* at para 75.100:

> It used to be thought that a claim for a negative declaration (a declaration of non-liability) was to be discouraged in itself as a tool used for forum shopping, and as such it was to be viewed with grave suspicion. The more modern thinking is that it can be a legitimate defensive tool, even if used to establish jurisdiction. It is jurisdictionally neutral device in the sense that the defendant who uses it to establish jurisdiction in a forum is in no different position from a plaintiff who establishes

> jurisdiction in a forum by commencing proceedings. Thus, from the substantive point of view, *a negative declaration could be granted so long as it serves a useful purpose, and the court will scrutinise carefully the utility of the declaration sought. From a jurisdictional point of view, the remedy sought will be scrutinised carefully to ensure that the party seeking it was not merely forum shopping. To this end, the imminence of foreign proceedings is a highly relevant factor to consider in answering both questions.* … [emphasis added]

131 It would therefore seem that the inherent suspicion with which claims for negative declarations were treated has now given way to a test based on the *utility* of the declaration sought. If it can be shown that the negative declaration serves a "useful purpose", that would ordinarily suffice to show that the party seeking it was not merely forum-shopping.

132 This brings us to the question of what constitutes a "useful purpose". I suggest that the following considerations are relevant:

(a) One example of a negative declaration having a useful purpose is where the person against whom it is sought is "temporising" (*ie*, is not prepared to come forward and make his claim). Then, it may be proper for the plaintiff to "force the issue" by bringing a negative declaration claim, to "fix the timing and venue of litigation": *Bristow Helicopters Ltd v Sikorsky Aircraft Corpn* [2004] EWHC 401 (Comm) ("*Bristow Helicopters*") at [25].

(b) Relatedly, the existence of imminent or, *a fortiori*, current foreign proceedings would be a highly relevant consideration. If foreign proceedings have already been commenced by the natural plaintiff, there is arguably less utility to the hearing of a claim for a negative declaration in the forum. It would also seem more likely that the party seeking the

negative declaration seeks to do so only as a means of forum-shopping, to pre-empt the foreign proceedings: *New Hampshire* at [13].

(c) Generally, a negative declaration will not be appropriate where it is premature or hypothetical, *viz*, where no claim has been made or threatened against the plaintiff: *New Hampshire* at [9].

133 Applying the above, I was of the view that the plaintiffs had failed to establish that their Negative Declaration Claim had any "useful purpose". The thrust of the plaintiffs' argument in this regard was that the threat of suit from AOPL was a real and imminent one, relying on the same key facts at [168] below.[153] While I accepted that the threat of the Kantawala Claim being brought was a real one, the *imminence* of the action in fact worked to the plaintiffs' *disadvantage* here. As mentioned, in determining whether the Negative Declaration Claim had utility, the following considerations are strongly indicative: (a) where there is a real, and not purely hypothetical, threat of proceedings (see [132(c)] above); and (b) where the natural plaintiff (*ie*, AOPL) had been temporising. In my view, the haste with which the plaintiffs had commenced Suit 438 – which included the Negative Declaration Claim – was telling (see also [41]–[42] above):

(a) The Kantawala Letter was sent on 16 March 2018.

(b) Bunge's reply to the Kantawala Letter was sent on 27 March 2018, in which it essentially gave a holding response – the reply stated that Bunge was "conducting an investigation into the facts raised", and requested that AOPL "bear with [Bunge] while [it] consider[ed] [its]

153 Plaintiffs' Further Submissions (Negative Declaration) at para 60.

legal position" as it could not respond within the 15-day deadline stipulated in the Kantawala Letter.[154] There was no follow-up correspondence from Bunge on this matter thereafter.

(c) Suit 438 was commenced in Singapore on 26 April 2018.

134 In essence, what the plaintiffs did was to rush to Singapore to commence Suit 438 little more than a month after the Kantawala Letter was sent. This was not a case where, like in *Bristow Helicopters*, AOPL had been "temporising" for some time, or had clearly indicated that it was not intending to come forward to make its claim. While I accept that AOPL has, to date, not yet commenced proceedings in India in respect of the Kantawala Claim, that does not detract from the fact that *at the time the plaintiffs commenced Suit 438*, there was absolutely no indication that AOPL would not be proceeding with its claim.

Conclusion

135 I therefore held that there was no "useful purpose" to the negative declaration sought by the plaintiffs. My primary reason for granting the stay in favour of India, however, remains my finding that India was the more appropriate forum for the determination of the dispute. Accordingly, I granted the stay of proceedings in relation to the Negative Declaration Claim in favour of India.

The claims against Mr Bhasi

136 I turn next to the plaintiffs' claims against Mr Bhasi for breaches of the 1st and 2nd GRIPT Agency Agreements. In particular, two sets of breaches are

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154 Rigby 1 at p 92.

complained of – the Agency Breach Claim and the Indemnity Claim (see [43(d)] above). As mentioned at [63] above, Mr Bhasi sought to set aside service of the writ endorsed with these claims, or a stay of the proceedings in favour of the Indian courts, or to stay the claims in favour of arbitration pursuant to the arbitration clauses in the GRIPT Agency Agreements. In sum, I granted a stay of the proceedings in favour of arbitration.

Setting aside of order to serve out of jurisdiction

137 There was some dispute as to which GRIPT Agency Agreement applied to the two claims against Mr Bhasi (see [182]–[184] below). I was of the view that the application to set aside should be rejected regardless of which GRIPT Agency Agreement applied. For any claim under the 1st GRIPT Agency Agreement, the connecting factors pointed towards Singapore, and for any claim under the 2nd GRIPT Agency Agreement, strong cause would need to be shown, and was not shown by Mr Bhasi as to why he should be allowed to breach his agreement. I now turn to the key issues before me which concerned:

(a) whether Singapore is the proper forum for the dispute, based on either of the GRIPT Agency Agreements;

(b) whether any of the O 11 r 1 grounds are satisfied; and

(c) whether there is a case of sufficient merit.

1st GRIPT Agency Agreement

138 The unique feature of the 1st GRIPT Agency Agreement was that it appeared on its face to contain both an arbitration clause and a non-exclusive jurisdiction clause. The relevant clauses are as follows:[155]

> **12. Governing Law**
>
> 11.1. This Agreement shall be governed by, and construed in accordance with, the law of Singapore.
>
> 11.2. The Parties agree to submit to the non-exclusive jurisdiction of the Courts of Singapore.
>
> **13. Arbitration**
>
> Any dispute shall be referred to the final and binding arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre …

139 An important preliminary issue was therefore how cll 11.2 and 13 should be construed. In particular, the question was whether one of the two took precedence over the other, and if so, which clause had primacy. This would determine the applicable test for the setting aside application. If the parties had indeed agreed to submit to the non-exclusive jurisdiction of the courts of Singapore, that would mean that the plaintiffs had been promised Mr Bhasi's submission if and when claims were brought against him in the courts of Singapore. Accordingly, any challenge to the Singapore courts' jurisdiction – whether in the form of a setting aside or stay application – would amount to an attempt to be released from the non-exclusive jurisdiction clause, and Mr Bhasi would have to show strong cause to succeed: *Shanghai Turbo* at [85]–[86] and [91] (see [71] above).

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155 Rigby 1 at p 445.

140 The plaintiffs' position was that cll 11.2 and 13, read together, merely gave the parties the option to *mutually* agree to refer certain matters to arbitration, without excluding either party's right to elect to bring proceedings in Singapore (or any other forum having jurisdiction) instead of pursuing arbitration. The plaintiffs argued that this construction was not unusual, citing *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 SLR 362 ("*Dyna-Jet (CA)*") as a case where the Singapore courts were willing to give effect to dispute resolution clauses providing parties with the option to elect between arbitration or litigation.[156]

141 In contrast, Mr Bhasi took the position that the reference to the "non-exclusive jurisdiction of the Courts of Singapore" in cl 11.2 had the limited purpose of conferring jurisdiction on the Singapore courts to award interim relief in support of any putative arbitration before the Singapore International Arbitration Centre; there was no intention to submit the substance of any dispute to the Singapore courts for resolution.[157] In his arguments, Mr Bhasi relied on the decision of *PT Tri-MG Intra Asia Airlines v Norse Air Charter Limited* [2009] SGHC 13 ("*Norse Air*").

142 In *Norse Air*, the contract in question was much like that in the present case – it contained, on its face, an agreement to arbitrate under the heading "Arbitration" as well as a jurisdiction clause under the heading "Governing Law and Jurisdiction". After undertaking a survey of the position in other jurisdictions, the assistant registrar in *Norse Air* adopted the English approach and held that the two seemingly contradictory clauses could be reconciled by

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156 PWS at para 195; PRS at s/n 32.

157 DWS at para 158; Bhasi 3 at para 73.

reading the purported jurisdiction clause as a submission to the Singapore court's supervisory jurisdiction over the arbitration.

143 This approach – where the jurisdiction clause was construed as a reference to the law governing the arbitration, *ie*, the curial law or the *lex arbitri* – was in my view well-founded both as a matter of principle and authority. The landmark case on this subject is the English High Court decision of *Paul Smith Ltd v H & S International Holding Inc* [1991] 2 Lloyd's Rep 127 ("*Paul Smith*"). In *Paul Smith*, the licensing agreement contained an arbitration clause entitled "Settlement of Disputes", by which it was agreed that any disputes shall be adjudicated upon under the Rules of Conciliation and Arbitration of the International Chamber of Commerce ("ICC"). The agreement also contained an exclusive jurisdiction clause entitled "Language and Law", which provided that "[t]he courts of England shall have exclusive jurisdiction *over it* to which jurisdiction the parties hereby submit" [emphasis added in *Paul Smith*]. In that case, the Court of Arbitration of the ICC had confirmed London as the place of arbitration. On its face, the court acknowledged that it was clear that the phrase "over it" referred to the agreement between the parties. However, the court held that it should be construed as referring to curial law instead because treating the arbitration clause to be *pro non scripto* (*ie*, as though it were not written) would be unattractive in the context of an international commercial contract. The same approach has been subsequently applied by the English High Court: see *Shell International Petroleum Co Ltd v Coral Oil Co Ltd* [1999] 1 Lloyd's Rep 72; *Axa Re v Ace Global Markets Limited* [2006] EWHC 216 (Comm); *McConnell Dowell Constructors (Aust) Pty Ltd v National Grid Gas plc* [2006] EWHC 2551 (TCC).

144 I noted that the approach in *Paul Smith* seems to be the prevailing view and has been described as a "sensible, if somewhat inventive" approach to the

interpretation of what was, in truth, two competing and contradictory dispute settlement clauses (Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 2nd Ed, 2014) at pp 784–787):

> A related problem arises from ill-drafted provisions that provide both an arbitration mechanism and a choice-of-court clause. …
>
> In a frequently-cited English case, [*Paul Smith*], one clause of a contract provided that any disputes 'shall be adjudicated [*sic*] upon' under the ICC Rules of Arbitration, while another clause provided that the 'Courts of England shall have exclusive jurisdiction.' The court reached the sensible, if somewhat inventive, conclusion that the reference to English courts was only a designation of the courts with supervisory jurisdiction … thereby giving full effect to the unhappily-worded arbitration clause. …
>
> …
>
> Decisions by national courts in other jurisdictions and arbitral awards are to the same effect, generally seeking to give effect to clauses that refer to both arbitration and national court proceedings. In most cases, courts and arbitral tribunals interpret references to national court proceedings narrowly to include only review of the arbitral award or some other type of judicial assistance for the arbitral process.

145 The plaintiffs argued that the present case should be distinguished from that in *Norse Air*: the arbitration clause in *Norse Air* incorporated the Rules of Conciliation and Arbitration of the ICC, which do not specify the seat of the arbitration. There was therefore a gap in the arbitration clause. The plaintiffs argued that the assistant registrar considered the non-exclusive jurisdiction clause in *Norse Air* as a clause intended by the parties to fill the gap in the arbitration agreement, *ie*, to specify the seat of the arbitration. Clause 13 of the 1st GRIPT Agency Agreement in the present case referred to the Singapore International Arbitration Centre ("SIAC") Rules. While the precise edition of the SIAC Rules is not contractually specified, the versions in force at the time of contracting until the expiry of the agreement all provide for Singapore as the default seat of arbitration. Therefore, it could not have been the parties'

intention for cl 11.2 of the 1st GRIPT Agency Agreement to refer to a submission to the Singapore court's supervisory jurisdiction over the arbitration when that has already been provided for by the reference to the SIAC Rules 2016.[158]

146 In my judgment, the approach taken in *Norse Air* was applicable to the present case. In construing agreements, the court should strive to give effect to all clauses in a contract. In this regard, infelicity in the contractual language will have to be endured, especially if the consequence of not doing so would be to disregard the existence of an arbitration clause: *Ace Capital Ltd v CMS Energy Corporation* [2008] EWHC 1843 (Comm) at [95]–[96], cited in *Norse Air* at [40]. In the present circumstances, the *Norse Air* approach balanced these considerations.

147 For completeness, I should add that I was not persuaded by the plaintiffs' objections at [145] above. For one, the court in *Norse Air* did not cite "gap-filling" as the basis for its decision. The key concern which drove the court's reasoning was the need to reconcile the inconsistency, while giving effect to the intentions of the parties to the contract in a way which made commercial sense. I pause here to refer to *BXH v BXI* [2019] SGHC 141 ("*BXH*"), which was decided after I gave my decision but which warrants mention. In *BXH*, the court was similarly faced with a contract containing both an arbitration clause which referred to the SIAC Rules (and which in fact expressly stated that the arbitration was to be "held in Singapore"), as well as an exclusive jurisdiction clause in favour of the Singapore courts. The court endorsed and applied the *Norse Air* approach, noting that that approach, whilst "not perfect", was the only

158 PRS at s/n 32.

practical approach to the interpretation of those seemingly contradictory clauses (*BXH* at [242]–[243]).

148 I also rejected the plaintiff's proposed interpretation as set out at [140] above; *viz*, that cll 11.2 and 13 should be read as providing alternatives from which the plaintiffs could elect, citing *Dyna-Jet (CA)* (see [140] above). *Dyna-Jet (CA)* concerned an arbitration clause which permitted one of the parties to elect to refer the dispute to arbitration, and this was made clear by the permissive language of the clause: "If no amicable settlement is reached through discussions, at the election of Dyna-Jet, the dispute *may* be referred to and personally settled by means of arbitration proceedings, …" [emphasis in original omitted, emphasis added in italics]. This is wholly different from cl 11.2 in the present case, which provides for *mandatory* reference to arbitration.

149 In conclusion, I agreed with Mr Bhasi's interpretation of the inter-relation between the two clauses: that the reference to the Singapore courts was in relation to the supervisory role of the court. Without any jurisdiction clause in favour of the Singapore courts, the ordinary *Zoom Communications* test applied to Mr Bhasi's setting aside application.

(1) The Agency Breach Claim

150 Mr Bhasi argued that, in relation to the personal connection of the parties and the applicable law, all indications pointed towards India being the natural forum:

(a) Even though Mr Bhasi was now a Singapore citizen, he was habitually resident in India.[159] In fact, it was Mr Bhasi's past Indian nationality and Indian connections which Bunge was interested in and sought to leverage on at the material time to carry out business in India.

(b) ABC was incorporated in India, and all its records would only be available from government bodies in India.[160]

(c) The Agency Breach Claim hinged on the issue of Mr Bhasi's beneficial ownership of AOPL (since Mr Bhasi could only have acted in conflict of interest if he had an interest in AOPL). In this regard, AOPL was an India-incorporated company, and the question of beneficial ownership fell to be determined by the *lex situs*, *ie*, Indian law. The Share Transfer Agreement expressly provided for Indian law as the governing law,[161] and for arbitration in India.[162]

(d) Another issue in dispute was whether the Letter of Arrangement (see [56] above) was an agreement that Mr Bhasi would act as a personal guarantor of AOPL (further evidencing Mr Bhasi's personal interest in AOPL). This had to be determined in accordance with its applicable law. Although the Letter of Arrangement made no express provision for the governing law, it must be Indian laws given that the Letter of Arrangement was entered into between Indian entities.[163]

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159 DWS at para 187.

160 DWS at para 186.

161 DWS at para 238.

162 DRS at para 127.

163 DRS at para 132(a).

(e) Given that the plaintiffs claim an account of profits from Mr Bhasi made through AOPL (see [57] above), the question of whether AOPL made any profits from the trades within the Bunge-AOPL merchanting trade structure will have to be determined. In this regard, since AOPL's profits were obtained by way of interest earned on the fixed deposits placed in SBI, if the merchanting trade contracts which facilitated these profits are found to have breached RBI's Circular 115 and are therefore held void *ab initio*, then there would be no profits to speak of (see [102] above).[164]

151 I did not find Mr Bhasi's submissions on the applicable laws persuasive. Further, I did not consider the Bunge-AOPL merchanting trade structure to be at the centre of the Agency Breach Claim. Instead, the key issues were Mr Bhasi's interest in AOPL and what constituted a waiver of breach under the No Conflict Terms which turns on the proper interpretation of those terms (see [58(b)] above). In this regard, I considered it significant that the parties had agreed in the 1st GRIPT Agency Agreement that the agency relationship was to be governed by Singapore law, and that Singapore courts were to have a supervisory role pursuant to cl 11.2. As regards the Letter of Arrangement, it was purely speculation on Mr Bhasi's part that the Letter of Arrangement would necessarily be governed by Indian law despite no express stipulation to that effect, and accordingly I placed little weight on it. In any case, I agreed with the plaintiffs' submission that even if Indian law was the *lex situs*, it did not follow that an Indian court had to determine the case. A Singapore court, assisted by Indian law experts, would also be capable to do so.[165]

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164 DRS at paras 135–140.

165 PRS at s/n 38.

152 On the issue of witness availability, the plaintiffs argued that the crucial witnesses were to be found in Singapore:[166]

(a) Francis Soh: to testify on the alleged false representations made by Mr Bhasi, given that he had conducted the 3 December 2015 interview with Mr Bhasi (see [55(a)] above). Also, he would testify as to Bunge's ethics and compliance policies;

(b) Kevin Chew: to testify on Bunge's alleged knowledge of Mr Bhasi's relationship with AOPL;

(c) Kee Fong Wong: to testify on the evidence relating to the circumstances surrounding the termination letter dated 8 November 2017 (see [37] above);

(d) Dundee Zhang of the Singapore finance team: to testify on the sums paid to Mr Bhasi pursuant to the Agency Agreements, which was relevant to the claim for account of profits.

153 Mr Bhasi argued that the following witnesses brought the dispute closer to India:

(a) Signatories to the Share Transfer Agreement, who could testify on its meaning. They were all Indian nationals ordinarily resident in India. They included Mr Singh and Jijo John amongst three others. These witnesses could only be compelled by Indian courts.[167]

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166 PWS at para 93.

167 DWS at para 266.

(b) Bunge's then-senior executives who could testify of their knowledge of Mr Bhasi's relationship with AOPL, which was in issue because the plaintiffs claim that Mr Bhasi hid ABC's ownership of AOPL from Bunge. Other than Mr Rigby, these witnesses included Simon Brotherton, Matthew Carter, Daniel Rudolph and Nataraj Subramaniam ("Mr Subramaniam"), all of whom were not based in Singapore. Crucially, Mr Subramaniam was a shareholder of AOPL at the same time as Mr Bhasi was, and must have had knowledge of Mr Bhasi's connection with AOPL. Both Mr Subramaniam and Daniel Rudolph were no longer in Bunge's employment, and the former was resident in India.[168]

154 In my view, most of the crucial witnesses were indeed located in Singapore, where the relevant Bunge "hub" was located. Most of the purported India-based witnesses whom Mr Bhasi had put forward were not in fact based in India. Daniel Rudolph, for example, was based in the USA.[169] As for Mr Subramaniam, who was based in India, I was unconvinced that he could offer significant evidence in relation to Bunge's knowledge of Mr Bhasi's alleged interest in AOPL. In determining whether Bunge could have waived any breach of the No Conflict Terms, the crucial question was one of attribution of knowledge (*eg*, see *Ho Kang Peng v Scintronix Corp Ltd (formerly known as TTL Holdings Ltd* [2014] 3 SLR 329 at [47]–[48]). As the plaintiffs rightly pointed out, Mr Subramaniam was unlikely to be a relevant witness because he was not a decision-maker on behalf of GRIPT or BSA.[170] While Francis Soh,

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168 DWS at paras 271–274.

169 7th Affidavit of David Alan Rigby at para 125.

170 PWS at para 169 and 173.

Kee Fong Wong and Dundee Zhang were still employees of Bunge and their attendance could therefore be procured, Kevin Chew was not, as Mr Bhasi himself acknowledged.[171] By Mr Bhasi's own evidence, Kevin Chew had knowledge of Mr Bhasi's relationship with AOPL from the genesis of Bunge's relationship with AOPL, and throughout the course of Mr Bhasi's agency relationship with Bunge.[172]

155 Viewed in totality, the connecting factors pointed towards Singapore, and Singapore was the proper forum in respect of the Agency Breach Claim brought under the 1st GRIPT Agency Agreement.

(2) The Indemnity Claim

156 As for the Indemnity Claim (see [59] above), Mr Bhasi argued that this claim was based on the Kantawala Claim (which he argued would be clearly governed by Indian laws), and therefore the governing law in relation to the Indemnity Claim would likewise be Indian law.[173] This was misconceived – the jurisdictional considerations regarding the plaintiffs' primary liability under the Kantawala Claim are separate and distinct from those regarding the attribution of secondary liability to Mr Bhasi. It was the latter which the Indemnity Claim was concerned with, and in that regard, I note that the Indemnity Claim was founded on provisions of the 1st and/or 2nd GRIPT Agency Agreement(s), which expressly provided for Singapore law as the governing law.

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171 DRS at para 157.

172 Bhasi 2 at para 38, 43, 86–87.

173 DRS at para 66.

157 Mr Bhasi argued that the connecting factor of relevant witnesses for the Kantawala Claim also applied to the Indemnity Claim.[174] He claimed that the crucial witnesses on whether the Assurances were made were Mr Subramaniam, Mr Singh and himself.[175] In particular, it was argued that Mr Subramaniam's evidence would be relevant as he was involved in designing the Bunge-AOPL merchanting trade structure.[176]

158 I had difficulty seeing these other witnesses' relevance to the central issues in the Indemnity Claim – whether Mr Bhasi made the Assurances, and whether any such action was a breach of the No Authority Terms. Mr Bhasi would be the most important witness regarding his own acts, and would be able to testify on his own behalf.

159 Apart from this, the points regarding availability of witnesses in relation to the issue at [97(a)] above, and the accompanying witnesses at [98(a)] and Mr Singh, were largely repeated by Mr Bhasi.[177] Further, it was argued by Mr Bhasi that the FEMA and regulations made thereunder (see [102] above) were germane because it would affect the plaintiffs' liability for any failure to provide the promised trade flows.[178] However, I did not think the merchanting trade transactions, and their legality, carried significance in the Indemnity Claim beyond comprising the factual background to the alleged breach. I acknowledged that part of the Assurances were alleged to be made in Mumbai,

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174 DWS at para 244.

175 DWS at para 245–247.

176 DWS at para 246.

177 DWS at paras 248–254.

178 DS at paras 212–214, 216.

India (see [41(c)] above). However, in my view, the fact that Singapore law governed the No Authority Terms was pivotal.

160 In the circumstances, I was of the view that Singapore was the proper forum in relation to the Indemnity Claim.

2nd GRIPT Agency Agreement

161 The 2nd GRIPT Agency Agreement provided for the exclusive jurisdiction of the courts of Singapore. It was therefore for Mr Bhasi to show strong cause to depart from his agreement to submit to Singapore jurisdiction.

162 At [155] and [160] above, I have found that Singapore, and not India, was the natural forum for hearing the dispute in relation to the claims against Mr Bhasi in so far as they are based on the 1st GRIPT Agency Agreement. In my judgment, those same reasons apply *a fortiori* towards showing that Mr Bhasi did not demonstrate that there existed circumstances amounting to strong cause as to why he should be allowed to renege on the exclusive jurisdiction clause in the 2nd GRIPT Agency Agreement. The governing law of the 2nd GRIPT Agency Agreement was also Singapore law, and the same considerations regarding witness availability applied.

163 For all of the foregoing reasons, I held that Singapore was the natural forum for the plaintiffs' claims against Mr Bhasi (limb (d) of the test in *Zoom Communications* – see [69(d)] above). I turn next to whether the plaintiffs have made out a good arguable case on the O 11 r 1 ROC grounds, and whether the claims have a sufficient degree of merit (see [69(a)]–[69(b)] above).

O 11 r 1 grounds

164 The plaintiff relied on the following limbs of O 11 r 1 of the ROC. The first was O 11 r 1(*a*), because Mr Bhasi has property in Singapore in the form of cash in bank accounts and shares in three Singaporean entities, including AOSPL. This was not disputed by Mr Bhasi.[179] The second was O 11 rr 1(*d*)(iii) and 1(*d*)(iv), given that the 1st and 2nd GRIPT Agency Agreements expressly provided for Singapore law as governing law.[180] In my judgment, it was clear that these limbs were established.

Sufficient degree of merit

165 At the next stage, Mr Bhasi argued that both claims against him lacked a sufficient degree of merit. In respect of the Agency Breach Claim, he argued that he had no interest in AOPL. Even if he did, Bunge was well aware of it (see [58(a)]–[58(b)] above).[181] The plaintiffs' position was that (a) there was no waiver of Mr Bhasi's conflict of interest;[182] (b) even if ABC's ownership of AOPL was known, Mr Bhasi's being a personal guarantor of AOPL was not;[183] and (c) the Share Transfer Agreement was a sham document used by Mr Bhasi to mislead Bunge.[184] In my judgment, these were all questions of fact to be answered at trial. In other words, there was a dispute between the parties on the above points, and a serious question on the merits to be tried (see [69] above).

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179 PWS(A) at paras 19–20; 1st Affidavit of Shrikant Bhasi at para 9.

180 PWS(A) at para 23.

181 DRS at paras 88–91.

182 PWS(A) at para 52; PRS at s/n 12.

183 PWS(A) at para 53.

184 PWS(A) at para 28.

166 In respect of the Indemnity Claim, Mr Bhasi argued that it lacked sufficient merit because it was wholly speculative.[185] He argued that, as a matter of Singapore law, a declaration of indemnity in respect of *potential* liability would not be granted, bearing in mind that the liability in respect of which the plaintiffs seek an indemnity was in effect a contingency upon a contingency – that liability would only arise *if* AOPL eventually brought the Kantawala Claim against the plaintiffs, and *if* AOPL succeeded in that claim.[186]

167 Mr Bhasi's submission was as follows. Where a plaintiff was facing a possible claim by a third party who had not, at that juncture, made that claim, it would be inappropriate to order the defendant to indemnify the plaintiff in respect of any loss it may suffer *vis-à-vis* the third party. Instead, the issue should be reserved with liberty to apply for directions when the real issues could be determined and damages quantified: *Freight Connect (S) Pte Ltd v Paragon Shipping Pte Ltd* [2015] 5 SLR 178 ("*Freight Connect*") at [49] and [53]–[54], affirming *Eastern Oceanic Corp Ltd v Orchard Furnishing House Building Co* [1965–1967] SLR(R) 25. Reasons for this included the fact that if and when the precise claim was made by the third party against the plaintiff, difficult issues – *eg*, concerning the differences in the contract between the plaintiff and defendant as compared with those between the plaintiff and the third party, and the obligation of the third party to mitigate damages – might arise. A declaration of indemnity may prejudice or preclude a proper determination of such issues: *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 at 303, affirmed in *Freight Connect* at [52].

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185 DWS at para 126.

186 DRS at paras 68–70.

168 The plaintiffs sought to distinguish the facts of the present case from the above cases. While the above cases involved the situation where the third party claims had not been "made, articulated or advanced in any form", the Kantawala Claim in the present case was more advanced:[187]

(a) The Kantawala Letter was a written letter of demand from AOPL to Bunge. It contained a statement to the effect that, should the demands therein not be met, AOPL would "initiate appropriate legal action and/or proceedings in Civil and Criminal Courts of India". There was no indication that AOPL was withdrawing those allegations.

(b) The board of AOPL had passed a resolution as early as 15 November 2017 authorising the bringing of proceedings against Bunge for US$277m.[188]

(c) The damage AOPL alleged to have suffered has already been quantified as "INR 1800 crores (approx. USD 277 million)".

169 The plaintiff further relied on the following authorities:[189]

(a) In the case of *Padden v Arbuthnot Pensions & Investments Ltd* [2004] EWCA 582 ("*Padden*"), the English Court of Appeal granted a declaration that the plaintiff was entitled to be indemnified by the defendant in respect of any liability which the plaintiff might incur to a third party. It did so because, on the facts, there was a "*real prospect* that [the third party] may bring proceedings against [the plaintiff]"

187 PWS(A) at paras 70–72.

188 Bhasi 2 at p 156 (Exhibit SB-14).

189 PWS(A) at paras 62 and 65.

[emphasis added]; the third party's solicitor had "articulated that possibility", but the third party was "holding off for the moment" (at [35]).

(b) In *Shepherd Homes Ltd v Encia Remediation Ltd* [2007] EWHC 1710 (TCC) ("*Shepherd Homes*"), the English High Court held that "although [it could not] predict" that the third party would in due course recover from Shepherd Homes Ltd, it was "clear that such claims [would] be made", and that "some [would] be successful".[190] Therefore, a declaration of indemnity was granted.

170 In my judgment, the plaintiffs had shown sufficient degree of merit by showing that there was a serious question of fact and law to be tried on the merits of the case. As regards the factual basis for the claim, I acknowledged that time has elapsed since the Kantawala Letter was sent, and the Kantawala Claim had not been brought in India. That said, the facts at [168] disclosed a real prospect that the Kantawala Claim would be brought. As regards the legal basis for the claim, whether the position in *Freight Connect* should be reconsidered in light of *Padden* and *Shepherd Homes* (which did not appear to have been cited to the Court of Appeal in *Freight Connect*) was a question for the trial court to determine.

BSA's standing

171 I turn to Mr Bhasi's contention that BSA did not have standing to bring the claims. According to the plaintiffs, both plaintiffs had standing in both claims against Mr Bhasi. The 1st GRIPT Agency Agreement defined

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190 Plaintiffs' Bundle of Authorities (SUM 3235) Vol 2, Tab 39, at [734].

"Principal" to mean both GRIPT and its "permitted assigns", which included GRIPT's "affiliated companies" – Mr Bhasi was therefore an agent of *both* GRIPT and BSA.[191] In any event, both the 1st and 2nd Agency Agreements obliged Mr Bhasi to provide services, as an agent, to BSA and GRIPT, and Mr Bhasi did in fact do so in respect of the Bunge-AOPL String Sales.[192]

172 Mr Bhasi argued that BSA has no *locus standi* to claim against him based on the 1st and 2nd GRIPT Agency Agreements.[193] The Agency Agreements provided for GRIPT's "permitted assigns", which required an assignment such that the affiliated company steps into the shoes of the Principal (as per cl 10.2). This meant that there could only have been one Principal at any point in time; *both* GRIPT and BSA could not have standing to sue.[194] Therefore, the claims were devoid of merit to the extent that they were brought by BSA because BSA lacked *locus standi* (see [172] above).

173 I set out cl 10.2 of the 1st GRIPT Agency Agreement below which substantially mirrors cl 10.2 of the 2nd GRIPT Agency Agreement:[195]

> **10. Assignability**
>
> …
>
> 10.2 The Agent shall however no objection [*sic*] to the assignment or transfer by the Principal of any of its right or obligations under this Agreement, to the Principal's affiliate companies.

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191 SOC at para 50.

192 SOC at paras 51–52.

193 Bhasi 3 at paras 15–21; DRS at paras 79–86.

194 DRS at paras 82-85.

195 Rigby 1 at p 444.

In my view, the issue of BSA's standing was not uncontroversial, and would require the determination of whether cl 10.2 of each of the GRIPT Agency Agreements allowed for GRIPT's rights under the GRIPT Agency Agreements to be assigned to BSA, and the effect of such assignment on GRIPT's rights. The resolution of this dispute will be dependent on the facts supporting each interpretation of the GRIPT Agency Agreements (to be elicited at the trial). It did not mean that the claims were without a sufficient degree of merit.

Stay in favour of arbitration

174 For the above reasons, I declined to set aside the order for service of the writ on Mr Bhasi, or to stay of proceedings on the ground of *forum non conveniens*. The remaining question was whether this court should nonetheless decline to exercise its jurisdiction and stay the proceedings in favour of arbitration, pursuant to s 6 of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("IAA"). Sections 6(1) and 6(2) of the IAA provide as follows:

> **Enforcement of international arbitration agreement**
>
> **6.**—(1) Notwithstanding Article 8 of the Model Law, where any party to an arbitration agreement to which this Act applies institutes any proceedings in any court against any other party to the agreement in respect of any matter which is the subject of the agreement, any party to the agreement may, *at any time after appearance and before delivering any pleading or taking any other step in the proceedings*, apply to that court to stay the proceedings so far as the proceedings relate to that matter.
>
> (2) The court to which an application has been made in accordance with subsection (1) shall make an order, upon such terms or conditions as it may think fit, staying the proceedings so far as the proceedings relate to the matter, *unless it is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed.*
>
> [emphasis added]

175 Where the applicant can establish that (a) there was a valid arbitration agreement between the parties to a dispute; (b) the dispute fell within the scope of the arbitration agreement; and (c) the agreement was not null and void, inoperative or incapable of being performed, the court should grant the stay proceedings in favour of arbitration: *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 at [63].

176 The parties joined issue on two key issues:

(a) whether Mr Bhasi had repudiated the arbitration agreement in the 1st GRIPT Agency Agreement, thereby rendering it inoperative; and

(b) whether the claims against Mr Bhasi fell within the scope of the arbitration agreement in the 1st GRIPT Agency Agreement.

Whether Mr Bhasi repudiated the agreement to arbitrate

177 An arbitration agreement may become inoperative as a result of contract law doctrines, such as discharge by breach, by agreement, or by waiver, estoppel, election or abandonment: *Dyna-Jet Pte Ltd v Wilson Taylor Asia Pacific Pte Ltd* [2017] 3 SLR 267 at [162].

178 The plaintiffs submitted that Mr Bhasi was not entitled to rely on the arbitration agreements (in the 1st GRIPT Agency Agreement) as he had taken a step in the proceedings and thereby waived his right to arbitrate or repudiated the arbitration agreement.[196] In particular, Mr Bhasi had sought, in SUM 3235, the alternative remedy of a stay *in favour of Indian courts*, which was unqualified (as being without prejudice to his application to refer the dispute to

196 PWS at paras 200, 203.

arbitration).[197] In other words, Mr Bhasi did not wish to be bound by the arbitration agreement because the reliefs he sought in SUM 3235 showed that he believed that the Indian courts were the most appropriate forum to determine the claims against him, and that was his first and primary preference.[198] While Mr Bhasi had not yet commenced proceedings before the Indian courts, by making an unqualified application for a stay in favour of the Indian courts as his primary relief, he had "conveyed the same message".[199]

179 I had no hesitation in rejecting this argument. Generally, a "step" is deemed to have been taken by an applicant if the applicant employs court procedures to defeat or defend those proceedings *on their merits*, or he proceeds beyond a mere acknowledgement of service of process by evincing an *unequivocal intention to participate in the court proceedings* in preference to arbitration: *Carona Holdings Pte Ltd and others v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 ("*Carona Holdings*") at [55]; *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (receiver and manager appointed)* [2018] 2 SLR 1207 at [83]. Where a foreign defendant prays for a stay of proceedings on improper forum grounds, as an alternative to a prayer challenging the existence of the Singapore courts' jurisdiction, he cannot be regarded to have taken a step in the proceedings. Such a defendant is not prejudiced in his primary application challenging the existence of the Singapore courts' jurisdiction: *Zoom Communications* (at [44]–[45]).

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197 PWS at para 201(4).

198 PWS at para 201(6).

199 PWS at para 202.

180 In light of *Carona Holdings* and *Zoom Communications*, it was clear that Mr Bhasi's actions did not constitute taking a "step" in the proceedings which evinced an unequivocal intent to abandon his right to arbitrate. All that Mr Bhasi had done was to seek as one of two potential reliefs, that the proceedings be stayed in favour of the Indian courts (the other being a stay in favour of arbitration). Mr Bhasi's primary prayer ultimately challenged the very existence of the Singapore courts' jurisdiction. The fact that he did not expressly caveat that his request for a stay in favour of the Indian courts was without prejudice to his alternative request for a stay in favour of arbitration did not mean that he intended to abandon his right to arbitrate in favour of litigation in India. In my view, this was a very long way off from establishing an unequivocal intent to forgo arbitration.

Whether the disputes fell within scope of a valid arbitration agreement

181 The next issue was whether the claims against Mr Bhasi fell within the scope of a valid arbitration agreement.

182 A complication arose because the two GRIPT Agency Agreements contained different jurisdictional clauses. The question which therefore arose was whether the plaintiffs' claims against Mr Bhasi had arisen under 1st GRIPT Agency Agreement, the 2nd GRIPT Agency Agreement, or both.

183 On the one hand, the plaintiffs based their claims against Mr Bhasi on *both* the 1st and 2nd GRIPT Agency Agreements – these were the operative agreements during the period of 1 January 2012 to 8 November 2017 (see [36(a)]–[37] above), which was when Mr Bhasi acted concurrently as (a) agent of GRIPT and BSA in their dealings with AOPL for the Bunge-AOPL String Sales; and (b) a director and substantial shareholder of ABC, which owned

almost 100% of AOPL shares, and/or as a guarantor of AOPL's financial obligations.[200] On this footing, the plaintiffs submitted that the claims against Mr Bhasi were subject to:[201]

(a) the non-exclusive jurisdiction of the Singapore courts where they relate to breaches between 1 January 2009 to 31 December 2015, pursuant to the non-exclusive jurisdiction clause in the 1st GRIPT Agency Agreement; and

(b) the exclusive jurisdiction of the Singapore courts where they relate to breaches between 1 January 2016 and 8 November 2017 pursuant to the exclusive jurisdiction clause in the 2nd GRIPT Agency Agreement.

184 On the other hand, Mr Bhasi argued that the claims against him were more closely associated with the 1st GRIPT Agency Agreement, and that therefore the arbitration clause in the 1st GRIPT Agency Agreement applied to the claims against him.[202]

185 Where different contracts contain competing arbitration clauses and jurisdiction clauses in favour of litigation in national courts, the key question is which dispute resolution clause the parties objectively intended to apply. Proceedings will be stayed in favour of arbitration if the claim arose out of, or is more closely connected with the contract which contains the arbitration clause, even if the other competing jurisdiction agreement was wide enough, on

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200 PWS para 65; SOC at para 77.

201 PWS at para 66.

202 DWS at paras 138–139.

a literal reading, to cover the dispute: *Oei Hong Leong v Goldman Sachs International* [2014] 3 SLR 1217 ("*Oei Hong Leong*") at [25]–[26], citing *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 3 SLR 821 at [26]. To determine which contract is more closely connected to the dispute, the court must consider the "pith and substance" of the dispute as it appears from the circumstances in evidence: *Oei Hong Leong* at [36].

186 On the Agency Breach Claim (see [55]–[58] above), Mr Bhasi argued that this claim was more closely connected to the 1st GRIPT Agency Agreement (which spanned Mr Bhasi's relationship with GRIPT from 2009 to 2015) as that was when ABC had acquired and increased its shareholding in AOPL.[203] The plaintiffs, on their part, argued that what was pertinent was the dates the merchanting transactions were entered into between Bunge and AOPL while Mr Bhasi still allegedly retained a personal interest in AOPL. However, in this regard, 425 of the total of 534 transactions entered into fell within the period covered by the 1st GRIPT Agency Agreement and 109 transactions fell within the period covered by the 2nd GRIPT Agency Agreement.[204]

187 Bearing the foregoing in mind, I turned to consider which agreement the "pith and substance" of the dispute was more closely connected to. In this regard, I noted the following:

(a) A far larger proportion of the period during which Mr Bhasi was allegedly acting in conflict of interest, and the vast majority of

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203 DWS at paras 148–149.

204 PRS at s/n 31; Rigby 1 at pp 105–114.

transactions tainted by the said conflict of interest (425 out of 534), fell to be covered by the 1st GRIPT Agency Agreement.

(b) As regards the nature of the breach, the alleged breach was a *continuing* one, and should not be characterised as separate breaches simply because of the splicing of time periods by the 1st and 2nd GRIPT Agency Agreements. The pith and substance of the Agency Breach Claim related to events occurring within the period covered by the 1st GRIPT Agency Agreement – the dates of the alleged acquisition of interest in AOPL and the Agreement of Share Transfer fell within that period. In respect of the false representations allegedly made by Mr Bhasi (see [55] above), while the dates of all these representations have not been enumerated, the plaintiffs had relied on answers given by Mr Bhasi during the 3 December 2015 Interview (*ie*, within the period covered by the 1st GRIPT Agency Agreement).

188 Accordingly, taken in totality, the Agency Breach Claim against Mr Bhasi was more closely connected with the 1st GRIPT Agency Agreement.

189 I turn next to the Indemnity Claim. According to Mr Bhasi, since this claim was factually predicated on the Kantawala Letter which contained allegations as to events around the first quarter of 2015, the Assurances which Mr Bhasi was alleged to have given would have been given during that same time. The relevant breach would accordingly have been that of the No Authority Terms in the 1st GRIPT Agency Agreement.[205]

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205 DWS at paras 142–144.

190 The plaintiffs' only response was that situating the Assurances within the first quarter of 2015 was speculative, given that AOPL could, but had not, made known when these alleged Assurances were made.[206]

191 In my view, it is clear from these allegations in the Kantawala letter that the alleged Assurances would have been given within the first half of 2015:[207]

(a) The alleged Assurances were to the effect that Bunge would commit to entering into roll-over trades with AOPL so as to maintain AOPL's interest-bearing deposits with SBI.

(b) It was sometime in the first quarter of 2015 that Bunge allegedly insisted on fixing the period of deposits for a period of two years (thus necessitating the repeat of roll-over transactions every six months until the two-year deposit matured).

(c) The quantum of transactions "under this understanding reached a peak level … in the first half of 2015".

192 In the circumstances, it is clear that the Indemnity Claim was also more closely connected to the 1st GRIPT Agency Agreement.

Conclusion

193 In sum, while the Singapore courts had jurisdiction over the two claims against Mr Bhasi, I considered that the Singapore courts should decline jurisdiction in favour of arbitration in respect of both claims. Accordingly, I

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206 PRS at s/n 31.

207 Rigby 1 at p 88.

stayed the Agency Breach Claim and the Indemnity Claim against Mr Bhasi in favour of arbitration pursuant to s 6(1) of the IAA.

194 For completeness, after I handed down my decision on 16 April 2019 to stay the claims against Mr Bhasi in favour of arbitration, the plaintiffs requested that certain conditions be imposed on the stay order. For present purposes, I highlight the following conditions:

(a) that the stay order apply to all claims against Mr Bhasi, which for avoidance of doubt included claims, issues, controversies and disputes arising out of or in connection with the 1st and 2nd GRIPT Agency Agreements; and

(b) that the stay order be made conditional on Mr Bhasi submitting irrevocably to arbitration in relation to the claims against him, in accordance with the 1st GRIPT Agency Agreement.[208]

The SBI IPU Claim

195 Finally, I now turn to RA 227, the appeal seeking a stay in relation to the SBI IPU Claim, on the basis that Singapore is not the proper forum to determine the dispute. SBI sought to show that India was clearly or distinctly the more appropriate forum for the trial on the SBI IPU Claim.

196 The 15 December 2015 IPU did not have any jurisdiction clause, and hence the standard *Spiliada* test applied. GRIPT argued that there was a close relationship between the SBI IPU Claim and the AOPL US$50m Claim – they both arose from the same factual background of the same US$50m default in

208 Plaintiffs' Further Submissions (Negative Declaration) at paras 88–92.

the September 2015 Bunge-AOPL String Sale. Due to this close link between the two claims, they should be heard together (in Singapore, given the exclusive jurisdiction clause in favour of Singapore in the AOPL-GRIPT Contract).

197 SBI's contention in this regard was that the issue of potential multiplicity of proceedings or inconsistent decisions should be a factor considered at Stage 2 and not Stage 1 of the *Spiliada* test. SBI's submission rested on the authority of *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Ltd and another* [2001] 1 SLR(R) 104 ("*PT Hutan*"), where the court had accepted the factor of multiplicity of proceedings as relevant under the Stage 2 inquiry (*PT Hutan* at [22]).[209] SBI further pointed out that at that time of the hearing of RA 227, it had not yet been decided whether the various claims against AOPL should be heard in Singapore. Therefore, the court should not (a) assume the claims against AOPL are to be determined in Singapore; and (b) on that basis, determine that the SBI IPU claim should also be tried in Singapore to prevent the multiplicity of proceedings that would arise.[210]

198 At the outset, I noted that there would not be any arbitrary assumption being made that the AOPL US$50m Claim would be heard in Singapore, given that the matter was decided on its own merits before me at the same time. More importantly, it was important to understand the thrust of the holding in *PT Hutan*. The court in *PT Hutan* took pains to stress that it did not really matter whether the *Spiliada* test was considered a two-stage process or one-stage process. The ultimate question that had to be answered was where the case

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209 D1WS at para 143.

210 D1WS at paras 144–145.

should be suitably tried having regard to the interests of the parties and the ends of justice: *PT Hutan* at [17].

199 In any event, I was of the view that even if at Stage 1 of the *Spiliada* analysis, the issue of the multiplicity of proceedings that would arise if the SBI IPU Claim were to be heard in India (while the AOPL US$50m Claim remained in Singapore) was not considered, the connecting factors relied on by SBI were insufficient to show that India was clearly or distinctly more appropriate than Singapore for the determination of the claim.

200 In the SBI IPU Claim, the key issue between the parties was whether SBI could rely on the revocation instructions from AOPL and oral confirmations of the same from Bunge representatives, Ms Jadhav and Mr Ambujakshan, so as to release the money to AIT and not to GRIPT. I refer to the respective contentions above at [48] and [49]. On SBI's case, the confirmations validly emanated from the Indian spoke of Bunge. On GRIPT's case, the confirmations from Bunge were denied. However, if they were indeed made, they could only have validly emanated from the Singapore "hub". In this regard, the issues were twofold: (a) whether AOPL, Mr Ambujakshan and Ms Jadhav in fact made those representations; and (b) whether Mr Ambujakshan and Ms Jadhav were authorised to make those representations to SBI that it had been released from its obligations under the 15 December 2015 IPU by Bunge.

201 As in the AOPL US$50m Claim, the former question was more closely linked to the "spoke" in India, and the latter may be more closely linked to the "hub" in Singapore. In particular, as SBI submitted in relation to the former question, it was Bunge's representatives in India who dealt with SBI at all

material times, while none of the Singaporean staff of Bunge communicated with SBI at all material times.[211]

202 Unsurprisingly, the key witnesses relied on by both parties were largely similar to that of the AOPL US$50m Claim (see [98]–[99] above).[212] Again, just as in the AOPL US$50m Claim, these two factual issues were just as equally important, and the factual connections were finely balanced.

203 For completeness, I noted GRIPT's submissions that the applicable law of the 15 December 2015 IPU was English law, and all three underlying contracts relating to the September 2015 String Sale provided for Singapore law as the governing law.[213] However, I considered the former factor to be neutral (as it was neither Singapore or Indian law). I gave little to no weight to the latter factor – the String Sale contracts had peripheral relevance to the SBI IPU Claim, given that they were not the basis on which this claim was founded. The heart of the disputed issues in relation to this claim also did not turn on the interpretation of those agreements.

204 I also noted SBI's submission that SBI's documents relevant to the SBI IPU Claim were located in India. However, weighing against this was GRIPT's relevant documents primarily being located in Singapore. On the balance, the outcome was a neutral one on this factor.

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211 D1WS at paras 97 and 131.

212 D1WS at para 121; 1st Plaintiff's Response Submissions (RA 227) ("P1WS") at paras 76–81.

213 P1WS at para 90.

205 Having considered the factors relied on by SBI, I thought they were insufficient to discharge its burden to show that India was clearly or distinctly more appropriate a forum than Singapore for the determination of the SBI IPU Claim. Given that the inquiry ended at Stage 1 of the *Spiliada* test, there was no need to further address SBI's argument[214] that it should not be prejudiced by the exclusive jurisdiction clause in the AOPL US$50m Claim that it was not party to, and that the SBI IPU Claim should not be brought to Singapore because of the AOPL US$50m Claim. Also, there was no need to proceed to Stage 2 of the *Spiliada* analysis.

206 Nonetheless, for completeness, I would add that on a holistic analysis of the SBI IPU Claim, the fact that the AOPL US$50m Claim was to be heard in Singapore made it overwhelmingly clear that Singapore was the natural forum for the SBI IPU Claim to be heard. While the AOPL US$50m Claim was a separate and distinct claim, the factual issues were intricately intertwined with those in the SBI IPU Claim. In order to prevent inconsistent findings from any concurrent proceedings, and to save inconvenience, time and costs, there was even more reason that they should be heard together. With AOPL remaining a party in the proceedings relating to the AOPL US$50m Claim, key witnesses of AOPL would be available in Singapore – including Mr Ambujakshan, who was now an employee of AOPL (see above at [98]) – for the purposes of dealing with the SBI IPU Claim.

207 In sum, I was of the view that SBI did not discharge its burden of showing that India was clearly or distinctly the more appropriate forum for the trial of the SBI IPU Claim. Accordingly, I dismissed RA 227.

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214 D1WS at paras 155–159.

Conclusion

208 The outcome of the matters was as follows:

(a) Prayer 1 of SUM 3235 was dismissed, and the order granting leave to serve out of jurisdiction was not set aside;

(b) Prayer 2 of SUM 3235 was granted in part, in that the Negative Declaration Claim was to be stayed in favour of Indian jurisdiction;

(c) Prayer 3 of SUM 3235 was granted, in that the Agency Breach Claim and the Indemnity Claim against Mr Bhasi were to be stayed in in favour of arbitration pursuant to s 6 of the IAA and the court's inherent power of case management; and

(d) The AOPL US$50m Claim and the SBI IPU Claim were to remain in Singapore, with RA 227 dismissed.

209 The fragmentation of the proceedings was indeed unfortunate. However, in no small part, this arose from the various jurisdiction and arbitration agreements between the parties which had to be given effect.

210 For SUM 3235, I fixed the total costs at S$50,000, being S$12,500 in relation to each of the four claims. I then apportioned the costs as follows:

(a) For the plaintiffs, I apportioned S$20,000 out of S$50,000: comprising of S$12,500 for succeeding fully in arguing for the AOPL US$50m Claim to remain in Singapore, and S$7,500 for succeeding in resisting the setting aside of the service of the writ out of jurisdiction in relation to the three other claims under Prayer 1 (being S$2,500 for each of the three other claims).

(b) For the defendants, I apportioned S$30,000 out of S$50,000: S$10,000 for each claim successfully stayed on various grounds – *ie*, the Negative Declaration Claim, the Agency Breach Claim and the Indemnity Claim.

211 The net outcome was that the defendants were awarded S$10,000 as costs for the application. Similarly, I allowed the defendants one-fifth of the disbursements (including the experts' fees) which amounted to S$4,370.

212 As for RA 227, I ordered costs of S$12,000 to be paid by SBI to GRIPT, with disbursements to be agreed if not taxed.

Hoo Sheau Peng
Judge

Ang Hui Ming Vivian, Yap Yin Soon, Ho Pey Yann, Dorcas Seah Yi Hui and Douglas Lok Bao Guang (Allen & Gledhill LLP) for the 1st and 2nd plaintiffs;
Gary Leonard Low, Vikram Ranjan Ramasamy, Priya d/o Gobal and Kellyn Lee Miao Qian (Drew & Napier LLC) for the 1st defendant;
Sarjit Singh Gill SC, Probin Stephan Dass, Jamal Siddique Peer and Leong Woon Ho (Shook Lin & Bok LLP) for the 2nd and 3rd defendants.