IN THE APPELLATE DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2025] SGHC(A) 10

Appellate Division / Civil Appeal No 67 of 2024

Between

Finaport Pte. Ltd.

… *Appellant*

And

Techteryx Ltd.

… *Respondent*

Appellate Division / Civil Appeal No 67 of 2024 (Summons No 5 of 2025)

Between

Finaport Pte. Ltd.

… *Appellant*

And

Techteryx Ltd.

… *Respondent*

In the matter of Originating Application No 474 of 2024

Between

Finaport Pte. Ltd.

… *Applicant*

And

Techteryx Ltd.

… *Respondent*

GROUNDS OF DECISION

[Conflict of Laws — Restraint of foreign proceedings — Breach of legal or equitable right not to be sued — Breach of multi-tiered dispute-resolution clause by way of foreign *Vandepitte* proceeding]

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v
Techteryx Ltd and another matter

[2025] SGHC(A) 10

Appellate Division of the High Court — Civil Appeal No 67 of 2024 and Civil Appeal No 67 of 2024 (Summons No 5 of 2025)
Kannan Ramesh JAD, See Kee Oon JAD and Hri Kumar Nair J
19 May 2025

21 July 2025

Kannan Ramesh JAD (delivering the grounds of decision of the court):

Introduction

1 The grant or refusal of a contractual anti-suit injunction ("ASI") stands at an intersection between two principles – namely, the principle of upholding the sanctity of contractual bargains by enforcing the performance of an agreement that is violated by a party by their continuation of foreign legal proceedings and the interest in preserving comity and friendly relations between jurisdictions. This is because an ASI, while operating *in personam*, indirectly interferes with a foreign court's discretionary exercise of jurisdiction over the conduct of legal proceedings brought in its forum (see *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd* [2019] 1 SLR 732 ("*Sun Travels*") at [67]–[69]).

2 Is the contractual ASI an option where the ASI applicant's contract is with a party said to be the trustee of the ASI respondent, and *not* with the party instituting the foreign proceedings (*ie*, the ASI respondent) that is sought to be restrained? This question was engaged in the present appeal, which brought into focus the procedural short-cut recognised by the Privy Council in *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70 ("*Vandepitte*") to enable the putative beneficiary to enforce the contractual rights of the putative trustee against the ASI applicant. Since the chose in action arose out of a contract to which the ASI respondent was unquestionably a stranger, was the ASI respondent bound to observe the dispute-resolution provisions in that contract – here, a multi-tiered dispute-resolution clause (the "MTDR Clause") – and, if it failed to do so, could it be said to have breached that contract by bringing and continuing the claim, thereby engaging the court's equitable jurisdiction to grant a contractual ASI to uphold the ASI applicant's contractual rights? These were the central questions in the present appeal, AD/CA 67/2024 (the "Appeal"), which concerned the decision of a Judge of the High Court (the "Judge"), to dismiss Finaport Pte Ltd's ("Finaport") application for an ASI to restrain foreign proceedings brought by the ASI respondent, Techteryx Ltd ("Techteryx"), without first complying with the MTDR Clause. The full grounds of his decision, issued on 27 December 2024, may be found at *Finaport Pte Ltd v Techteryx Ltd* [2024] SGHC 329 (the "GD"). Finaport appealed against the Judge's decision *in toto*.

3 Having considered the parties' submissions, we allowed the Appeal in part, and made orders restraining the continuation of the foreign proceedings arising out of the agreement between Finaport and Techteryx's putative trustee, First Digital Trust Ltd ("FDT"), prior to the satisfaction of the pre-conditions established in the MTDR Clause. We also allowed, by consent, Finaport's

summons to adduce further evidence in AD/SUM 5/2025 (the "Further Evidence Summons"), though, as will become apparent later in these grounds, that evidence was irrelevant to the Appeal. These are the full grounds of our decision.

Factual background

Dramatis personae

4 The appellant, Finaport, was a company incorporated in Singapore with its principal business being the provision of wealth management services and investment advice. The respondent, Techteryx, was a British Virgin Islands entity, and the plaintiff in the relevant foreign proceedings, namely, HCA No 161 of 2023 before the Hong Kong Special Administrative Region Court of First Instance (the "Hong Kong Proceedings"), against *inter alios* Finaport.

5 Another defendant in the Hong Kong Proceedings was FDT, a public company incorporated in Hong Kong. Its principal business was the provision of escrow services.

6 In 2020, Techteryx was desirous of acquiring TrueCoin LLC's business in "TrueUSD" stablecoins. As they are commonly known, stablecoins are digital currencies involving the provision of tokens with a stable pegged value to a fiat currency – in this case, the United States Dollar ("USD") – the value of which was maintained with a reserve of USDs (or USD equivalents) kept in escrow accounts. Techteryx appointed FDT as the custodian of the USD reserves held in escrow. FDT's role as custodian was subject to three contractual agreements between FDT and Techteryx entered into between 28 September 2020 and 13 January 2021 (the "Custodianship Agreements"). The governing law of the Custodianship Agreements was Hong Kong law, with exclusive or

non-exclusive jurisdiction clauses providing for submission to the jurisdiction of the Hong Kong courts.

7 FDT subsequently appointed Finaport to act as investment manager in relation to the management of the USD reserves held in escrow, pursuant to a contract between FDT and Finaport dated 18 March 2021 entitled the Discretionary Investment Management Agreement (the "DIMA"). Techteryx was *not* a party to the DIMA. The DIMA was governed by Singapore law, and cl 24.3 provided as follows:

> Parties shall first attempt to settle any complaint or dispute relating to or in connection with this Agreement including any question regarding its existence, validity or termination or an alleged breach thereof by negotiation. If the Parties do not meet or the dispute cannot be settled through negotiation within 30 days from the date of notice for a meeting issued by a Party to the other Party, then any one Party may take step [*sic*] to refer the dispute for mediation at the Singapore Mediation Centre ("SMC"). In the event the dispute is not settled by mediation for whatever reason(s) within 90 days from the date the dispute is referred to the SMC, any Party may then refer the dispute for final resolution by litigation in the Courts. Parties hereby submit to the non-exclusive jurisdiction of the Singapore Courts.

8 Clause 24.3 of the DIMA contained the aforementioned MTDR Clause (see at [2] above), *viz*, the requirement for the contracting parties (*ie*, FDT and Finaport) to attempt to settle their dispute through negotiation, then mediation before the Singapore Mediation Centre (the "SMC"), with court litigation only being available thereafter, and minimum timelines established respecting each tiered stage of their dispute-settlement process. It bears mentioning that cl 24.3 of the DIMA could not be complied with by FDT unless FDT first adhered to cl 24.2 of the DIMA, in the following terms:

> In the event of any dissatisfaction or dispute, the Client [FDT] shall first lodge a formal written feedback or complaint with the Investment Manager [Finaport] addressed to its Compliance

> Department. The Investment Manager shall respond to a feedback or complaint within 5 working days.

9 In our view, the use of the words "shall first lodge" were clear. The effect was that if FDT felt aggrieved by Finaport's purported failure to properly perform its role as their investment manager under the DIMA, it *first* had to channel that grievance to Finaport's Compliance Department *before* the relevant rights of referral to negotiation, then mediation, then litigation thereafter, would be properly triggered under the MTDR Clause, which immediately followed the wording at [8] above. As such, cl 24.2 was relevant to the construction of cl 24.3 of the DIMA, when applying a holistic or "whole contract" approach to contractual interpretation (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 at [131]).

The Hong Kong Proceedings

10 On 3 February 2023, Techteryx commenced the Hong Kong Proceedings against FDT as the *sole* defendant, alleging that FDT had committed a breach of trust by mismanaging the USD reserves.

11 On 6 December 2023, Techteryx sought permission from the Hong Kong Court of First Instance to add three defendants to the proceedings, *viz*, Finaport and two legal entities ("ACFF" and "Aria DMCC") alleged to have been parties to FDT's breach of trust. Permission was granted and the amended writ was served on Finaport on 28 December 2023.

12 At that stage, the causes of action in the Hong Kong Proceedings may be broadly divided into two categories –

(a) First, that FDT breached the Custodianship Agreements, as well as its other duties owed to Techteryx in managing the USD reserves *qua*

custodian, trustee, and fiduciary, by causing US$468m of the reserve funds in escrow to be invested in ACFF, of which US$456m were later transferred to Aria DMCC at ACFF's direction. We abbreviate this as the "Breach of Trust Claim".

(b) Second, that Finaport, *qua* investment manager to FDT, failed to exercise reasonable skill and care in providing investment management services to FDT, resulting in FDT's misapplication of the reserves and the investments in ACFF. This "gross negligence" was pleaded to be a breach of the DIMA, implied contractual duties of reasonable skill and care, and concurrent tortious duties of care. We abbreviate this as the "DIMA Claim".

13 In instituting the DIMA Claim against Finaport, Techteryx sought to exercise FDT's contractual rights under the DIMA despite being a stranger to that contract. It sought to do so by invoking the *Vandepitte* procedure referred to at [2] above, in the following terms:

> The Plaintiff [Techteryx] makes this claim against the 2nd Defendant [Finaport] as the beneficiary of the trust of which the 1st Defendant [FDT] was a trustee and whose assets have been lost or dissipated as a result of the 2nd Defendant's acts and omissions.

14 Unlike FDT, Finaport did not file a defence on the merits in the Hong Kong Proceedings. Instead, on 21 May 2024, Finaport filed a summons seeking a declaration that the Hong Kong Court of First Instance "has no jurisdiction over [Finaport] in respect of the subject-matter of [Techteryx's] claim". The hearing of that jurisdictional challenge had been adjourned pending disposal of the Appeal.

The ASI Application

15 On 17 May 2024, Finaport filed its application in HC/OA 474/2024 (the "ASI Application"), primarily seeking an injunction to restrain Techteryx "from pursuing, continuing and/or proceeding with" the Hong Kong Proceedings *in toto* before the Hong Kong Court of First Instance and, alternatively, a narrower prayer for Techteryx to be restrained from pursuing or continuing the DIMA Claim against Finaport (albeit, in *any* forum, *ie*, not limited to the Hong Kong Court of First Instance). This narrower prayer was later withdrawn before the Judge at the hearing below.

16 Prior to that hearing, counsel for Finaport wrote to the court on 29 July 2024, placing before the Judge developments in the Hong Kong Proceedings *post*-dating the filing of the ASI Application (the "Bayfront Letter"). These included the jurisdictional challenge filed on 21 May 2024 referenced at [14] above, and Finaport's supporting affidavit thereof.

The Judge's decision

17 At the hearing on 30 July 2024, the Judge dismissed the ASI Application and fixed costs at $9,000 (including disbursements and GST) in favour of Techteryx.

18 The Judge's reasons for dismissing the ASI Application are summarised as follows –

(a) First, on Finaport's arguments seeking a ***non*-contractual ASI**:

(i) The natural forum of the dispute was Hong Kong and not Singapore, as the DIMA Claim was an inseparable part of the wider factual matrix concerning FDT's alleged misapplication of

the USD reserves, and by extension, inseparable from the Breach of Trust Claim, the natural forum of which was indubitably Hong Kong, on account of the exclusive jurisdiction clauses in the Custodianship Agreements selecting Hong Kong, and that factor was not outweighed by *inter alia* the fact that the DIMA was governed by Singapore law and provided for the non-exclusive jurisdiction of Singapore courts (see the GD at [48]–[49], [52]–[53], and [59]–[62]); and

(ii) There were no grounds to find that Techteryx's claims in the Hong Kong Proceedings were vexatious or oppressive, since:

(A) Techteryx's *ius standi* to invoke the *Vandepitte* procedure against Finaport was a question of procedural law, governed by Hong Kong law, and the Hong Kong courts had not been given the opportunity to determine if factual pre-conditions – such as FDT's status as putative trustee to Techteryx – to invoke the *Vandepitte* procedure had been satisfied (see the GD at [89]–[91]), and none of the other factors highlighted by Finaport met the high bar of showing Techteryx's *Vandepitte* claim was bound to fail (see the GD at [93]–[107]); and

(B) Finaport's argument that Techteryx's substantive DIMA Claim was bound to fail on its merits was also not made out, since there was no support for Finaport's view that Techteryx would be bound by FDT's concessions in their pleadings in the Hong Kong Proceedings (see the GD at [112]–[118]), and Finaport failed to show that Techteryx's conduct before the Hong Kong Court of First

Instance supported the inference that they were conducting the Hong Kong Proceedings in bad faith (see the GD at [119]–[144]); and

(b) Second, the Judge rejected Finaport's argument for a **contractual ASI**, for the following reasons:

(i) First, nothing Techteryx did in the conduct of the Hong Kong Proceedings could possibly amount to a breach of any term of the DIMA, because Techteryx was not party to the DIMA, and therefore, not bound by it (see the GD at [152] and [163]);

(ii) Second, the *Vandepitte* procedure's import was to confer only procedural advantages upon the beneficiary and not any substantive advantages in respect of the beneficiary's rights and obligations. Techteryx's side-stepping the MTDR Clause's pre-conditions to litigation constituted a procedural, as opposed to substantive, benefit. Thus, it was a benefit that could properly be conferred on Techteryx by invoking the *Vandepitte* procedure (see the GD at [157]–[158]);

(iii) Third, it would have been impossible for Techteryx to comply with the MTDR Clause without the voluntary co-operation of FDT, since Techteryx, as a stranger to the MTDR Clause, had no power to unilaterally issue the requisite notice for a meeting to negotiate and to refer the dispute to SMC mediation, which rights were only conferred on the contracting parties, *viz*, FDT and Finaport. The result would have been to render the *Vandepitte* procedure inefficacious in respect of the DIMA Claim (see the GD at [159]–[160]); and

(iv) Finally, although the *Vandepitte* procedure could not be used by a beneficiary to circumvent an arbitration clause or an exclusive jurisdiction clause, the MTDR Clause in the DIMA was not analogous, as a breach thereof did not give rise to "a civil wrong giving [Finaport] a substantive legal remedy against [Techteryx]" (see the GD at [162]–[164]).

The Appeal and Further Evidence Summons

19 On 27 August 2024, Finaport lodged the Appeal against the whole of the Judge's decision to dismiss the ASI Application. Additionally, on 14 February 2025, Finaport filed the Further Evidence Summons, that sought *inter alia* to:

(a) regularise the developments in the Hong Kong Proceedings of which the Judge had been apprised in the Bayfront Letter (see at [16] above), by appending those documents as exhibits to its supporting affidavit; and

(b) adduce additional documents concerning *further* developments *post*-dating the Judge's decision below.

20 The most significant of these further developments was that Techteryx had, on 28 November 2024, filed an application to amend their pleadings in the Hong Kong Proceedings, with permission being granted on 6 December 2024.

21 These amendments added two defendants to Techteryx's claims in the Hong Kong Proceedings, and instituted fresh claims against *all six* defendants in "fraud, fraudulent misrepresentation, and/or conspiracy", by alleging that all of them acted in concert to deceive Techteryx with regard to the investments (or purported investments) into ACFF, which were alleged to be non-existent or

fictitious. We abbreviate these *fresh* causes of action as the "Fraud Claims" from hereon.

22 Crucially, the Fraud Claims stood on a different footing from those in the ASI Application for two key reasons. First, those claims were not instituted against Finaport by invoking the *Vandepitte* procedure to exercise the rights of FDT under the DIMA, but alleged that Finaport was *personally* involved in the fraud and conspiracy mentioned at [21] above that had purportedly injured Techteryx. Accordingly, nothing within the DIMA could bear any relevance in governing the Fraud Claims. Secondly, the Fraud Claims did not fall within our appellate jurisdiction. They had not been put before the Judge below as they *post*-dated his decision (see at [17] and [20] above). Accordingly, there being no first-instance decision of the General Division of the High Court which had refused to injunct Techteryx's continuance of the Fraud Claims – *per* s 35 of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) – we were satisfied that we did not have jurisdiction to injunct them in the exercise of our appellate civil jurisdiction. Indeed, Finaport accepted this point when we put it to their counsel in oral submissions. The consequence of these points was that, as we alluded to at [3] above, the further evidence pertaining to the Fraud Claims was irrelevant to the Appeal.

23 For completeness, Finaport also raised a new point in oral submissions which it had not highlighted in their Appellant's Case, as required under O 19 r 31(1)(*b*) of the Rules of Court 2021, namely, that the holding of the choses in action under the DIMA by FDT on trust for Techteryx was contrary to the non-assignment clause in cl 23.3 of the DIMA; therefore, Techteryx was precluded from invoking the *Vandepitte* procedure so as to prosecute the DIMA Claim. No leave was sought for this new point to be made, which was not put before the Judge below. Although our correspondence to parties of 15 May 2025 had

indicated that counsel should come prepared to address us on the authorities of *Harmer v Armstrong* [1934] Ch 65 ("*Harmer*") and *Barbados Trust Co Ltd v Bank of Zambia and another* [2007] 2 All ER (Comm) 445 ("*Barbados Trust*"), and Finaport based its new arguments of non-assignability upon *dicta* expressed in *Barbados Trust*, that letter was *not* an invitation for counsel to introduce new arguments without leave of court or prior notice in their respective cases.

24 We drew parties' attention to these authorities only in so far as they shed light upon the doctrinal underpinnings of the *Vandepitte* procedure (see at [43]–[45] below), that being salient to an issue that *was* canvassed below, *viz*, whether the effect of the *Vandepitte* procedure is to allow the beneficiary to circumvent procedural limitations governing the underlying contractual claim.

25 Consequently, we did not consider Finaport's fresh arguments based on the non-assignment clause in the DIMA, given that the Judge did not have any opportunity to consider those arguments in the first-instance proceedings, and in light of the undue prejudice which would have been occasioned to Techteryx if Finaport had been permitted to pursue that new point at such a late juncture without the benefit of advance notice in their Appellant's Case (see *TG Master Pte Ltd v Tung Kee Development (Singapore) Pte Ltd and another* [2024] 1 SLR 690 at [59], applying *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 at [38]). Nevertheless, we make the following brief observations in *obiter*.

26 We did not agree with Finaport's arguments that the non-assignment provision in cl 23.3 of the DIMA had the effect of preventing FDT from declaring itself a trustee of its choses in action under the DIMA for a third party's benefit. The effect of such a declaration of trust is not to assign any legal rights to the third party. FDT and Finaport alone remain the contracting parties

with legal rights under the DIMA, even in that scenario. Given that a declaration of trust differs in character from an assignment, the question is whether a non-assignment clause's wording can be construed so broadly as to prohibit not only an assignment of legal rights but a trust over the fruits of a chose in action, that being a matter of contractual interpretation (see *Devefi Pty Ltd v Mateffy Perl Nagy Pty Ltd* (1993) 113 ALR 225 at 236). "Such a limitation upon the freedom of the party is not lightly to be inferred"; thus, a non-assignment clause "is prima facie restricted to assignments of the benefit of the obligation and does not extend to declarations of trust of the benefit" (see *Don King Productions Inc v Warren and others* [2000] Ch 291 ("*Don King*") at 319–320 (*per* Lightman J), cited with approval by Rix LJ in *Barbados Trust* at [80]).

27 Hence, even if Finaport had been permitted to pursue that new point, we had doubts as to whether cl 23.3 of the DIMA was sufficiently clear or broad enough to prohibit declarations of trust. It states only that the contracting parties may not "delegate, assign, transfer, or otherwise dispose of" rights under the DIMA without the prior written consent of the other contracting party. Finaport relied upon the case of *Goldkorn v MPA (Construction Consultants) Ltd and another company* [2025] EWHC 385 (TCC), in which Mr Jonathan Acton Davis KC (sitting as a Deputy Judge of the English High Court) expressed the view (at [67]–[68]) that the effect of a clause prohibiting assignment of claims for damages was to prevent a third party from using the *Vandepitte* procedure to enforce its terms with a claim for damages for breach. With respect, we did not agree. Instead, we preferred the view of Lightman J in *Don King* that "[a] declaration of trust in favour of a third party of the benefit of obligations or the profits obtained from a contract is different in character from an assignment", and "[i]f one party wishes to protect himself against the other party declaring

himself a trustee, and not merely against an assignment, he should expressly so provide" (at 319 and 321). Clause 23.3 of the DIMA did not do that.

28 Lastly, although Techteryx had initially resisted the grant of the Further Evidence Summons, and filed their affidavit on 24 February 2025 in *opposition* thereto, by the time their Respondent's Case came to be filed on 1 April 2025, Techteryx agreed to the Further Evidence Summons being granted. Hence, as parties were agreed on its grant (although not the incidence of costs therefor), we allowed the Further Evidence Summons by consent (see at [3] above) and made no orders as to costs.

Structure of our analysis

29 We turn now to set out our reasons for allowing the Appeal in part, more specifically, by our granting a contractual ASI to restrain a breach of the MTDR Clause in the DIMA. We note that there was some confusion as to whether Finaport was primarily seeking a contractual or non-contractual ASI, and which was the alternative submission between them. Finaport's Appellant's Case focussed more on their arguments for a *non*-contractual ASI, yet it framed their submissions as being made "[f]urther and/or in the alternative". At the hearing before us, Finaport clarified that its primary case was that it was entitled to a non-contractual ASI, and with its claim for a contractual ASI having been made only as a "further ground". Indeed, although Finaport had focussed more on their arguments for a non-contractual ASI, both before the Judge below and before us – which resulted in the Judge devoting most of his analysis in the GD to their claim for a non-contractual ASI – it was clear to us that their arguments for a non-contractual ASI were devoid of merit, whereas a more principled case could be made for a contractual ASI based on a breach of the MTDR Clause.

30 Accordingly, we proceed to set out our reasons for granting a contractual ASI on the basis of a breach of cl 24.3 of the DIMA, before we set out, briefly, the reasons why we were *not* persuaded that a non-contractual ASI may be granted on the ground that the Hong Kong Proceedings were vexatious or oppressive to Finaport.

Issue 1: Contractual ASI

The parties' positions

Finaport's submissions

31 Finaport argued that Techteryx's pursuit of the DIMA Claim in the Hong Kong Proceedings without satisfying the procedural pre-requisites in the MTDR Clause of the DIMA constituted a breach of contract which a contractual ASI ought to restrain. While Techteryx was not a party to the DIMA itself, it sought to invoke FDT's contractual rights under the DIMA, and hence, could not fairly seek to be placed in a better position than FDT if they had sought to enforce the DIMA against Finaport. In this regard, Finaport drew an analogy with what it called "derived rights" cases, where a third party who acquired a contractual right to sue by way of assignment, subrogation, or operation of law, would remain bound by procedural limitations in the original contract, such as arbitration and exclusive jurisdiction clauses. For example, Finaport relied on the English Court of Appeal Civil Division case of *Airbus SAS v Generali Italia SpA and others* [2019] 4 All ER 745, which held (at [95]–[97]) that insurers exercising rights of subrogation to make a non-contractual claim would remain bound by an arbitration or exclusive jurisdiction clause to the same extent as their insured would have been.

32 In so far as Techteryx attempted to distinguish an MTDR Clause from an arbitration or exclusive jurisdiction clause, Finaport submitted that such a distinction was unprincipled. Where the pursuit of court litigation constitutes a breach of a contractual obligation, the court's jurisdiction to enforce the contract and restrain a violation of that undertaking is engaged all the same, regardless of whether the clause being breached is characterised as an MTDR Clause or an arbitration or exclusive jurisdiction clause.

33 In answer to Techteryx's arguments that the MTDR Clause could not be complied with because Finaport would not be obliged to negotiate or mediate with Techteryx as a stranger to the DIMA, Finaport acknowledged at the hearing before us that they would be obliged to recognise Techteryx's status as a beneficiary to the rights under the DIMA, and negotiate and mediate with them, in the event that the Hong Kong courts affirm Techteryx's status in exercising those rights.

Techteryx's submissions

34 First, Techteryx distinguished the *Vandepitte* procedure from "derived rights" cases on the basis that there had been no transfer of contractual rights in the DIMA from FDT to Techteryx, and thus, no question of whether an assignee acquired a contractual right together with a procedural burden annexed thereto arose. Here, Techteryx sought not to acquire any rights under the DIMA in their own name, but to use the benefits of the *Vandepitte* procedure to conflate two causes of action into one, validly deriving procedural advantages in the process.

35 Second, Techteryx distinguished an MTDR Clause from an arbitration or an exclusive jurisdiction clause on the basis that the latter conferred rights and obligations "which exert a material effect on the determination of parties'

substantive rights", and cannot be circumvented by the *Vandepitte* procedure; whereas, an MTDR Clause merely provided a tiered structure which set out "a method for how a dispute should be resolved", but left the "parties' substantive rights … unaffected" in the process.

36 Third, Techteryx argued that it could not comply with the MTDR Clause in the DIMA, because even if Techteryx had attempted to negotiate or mediate with Finaport, it had no contractual right to initiate either process as a third party to the DIMA. Moreover, prior to Finaport's acknowledgment at the hearing before us at [33] above, Finaport had not previously indicated that it was even prepared to negotiate or mediate with Techteryx. Techteryx characterised this as "a catch-22 situation" which deprived it of the benefits of the *Vandepitte* procedure.

37 For completeness, although Techteryx made submissions in their Respondent's Case that the MTDR Clause did not, on its proper construction, impose a mandatory obligation to negotiate or mediate before proceeding to litigation, Techteryx abandoned that argument before us, and confirmed when questioned that ***FDT*** *would be bound* by the MTDR Clause to negotiate and mediate with Finaport prior to their proceeding to court litigation to resolve disputes arising under the DIMA. In any event, we would have reached the same view on the text of the MTDR Clause itself (see at [7] above), which, on its plain wording – specifically, the opening words of "shall first attempt" – imposed a mandatory step-by-step process before the contracting parties could proceed to litigation, *viz*, a right to refer the dispute to SMC mediation would arise only after 30 days had elapsed from the notice for a meeting to negotiate being issued, and a right to refer the dispute to litigation would arise only after 90 days had elapsed from the date of the referral to SMC mediation. Moreover, as we observed at [8] above, this step-by-step process was prefaced by a *prior*

procedural step that FDT had to undertake in relation to their dispute with Finaport, *viz*, referral to their Compliance Department for redress, followed by five working days for them to attempt to resolve the grievance, *per* cl 24.2 of the DIMA.

38 In so far as the word "may" was used within the MTDR Clause – and contrary to Techteryx's submission – that was *not* an indication that the MTDR Clause was merely permissive or facultative, but was a descriptor of the *elective* procedural rights to refer to SMC mediation and to institute court litigation that were conferred on a contracting party *only after* the prior *obligatory* steps had been cleared beforehand. The structure of the MTDR Clause was clear: the parties "shall first" attempt to settle disputes through negotiation, then "within 30 days from the date of notice … *then* any one Party may … refer the dispute for mediation" [emphasis added], and then, "within 90 days from the date the dispute is referred to the SMC, any Party *may then refer* the dispute" [emphasis added] to litigation. Hence, in context, the words "may then refer" confer an elective right to pursue court litigation *conditional upon* the *prior* satisfaction of the previous steps. The word "then", which follows the word "may", indicates the imperative sequence of the MTDR Clause. Accordingly, we did not agree with Techteryx that the word "may" indicated that the MTDR Clause was non-mandatory; but, this point was ultimately rendered moot by Techteryx disclaiming this argument in their oral submissions.

Our decision: Finaport was entitled to the grant of a contractual ASI as the commencement and continuation of the Hong Kong Proceedings would be in breach of the MTDR Clause in the DIMA

39 It was established by the Court of Appeal in *Sun Travels* at [67]–[68] that a contractual ASI may be granted irrespective of whether the conduct of foreign proceedings is vexatious or oppressive to the ASI applicant or

constitutes unconscionable conduct on the ASI respondent's part. The basis for contractual ASIs is the Chancery court's equitable jurisdiction to ensure that contractual bargains are honoured. Hence, as it was not Techteryx's case that Finaport had displayed any dilatory conduct or unreasonable delay in the Hong Kong Proceedings, constituting "strong reasons" to refuse a contractual ASI on the grounds of comity and unconscionable conduct, and notwithstanding that a contractual breach would be occasioned (see *Sun Travels* at [68] and [81]–[83]), the only question we had to answer was whether the pursuit of the DIMA Claim in the Hong Kong Proceedings violated the MTDR Clause in the DIMA. We answered this in the affirmative.

40 It was clear to us that the answer to the question at [39] above turned on a proper understanding of how the *Vandepitte* procedure operated – or, in other words, what the invocation of the *Vandepitte* procedure did and did not do. The effect of the *Vandepitte* procedure is to act as a procedural short-cut, truncating the beneficiary's quest for relief by coalescing two distinct causes of action into one process – first, a beneficiary's breach of trust action against a trustee who, in default of duty, refuses to exercise a right to sue which the trustee alone holds the legal title to, and secondly, the trustee's action against the wrongdoing third party. However, the *Vandepitte* procedure is "a rule of procedure, and not a rule of substance" and "does not affect the substantive rights of the parties" (see *The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR) v Westacre Investments Inc and other appeals* [2016] 5 SLR 372 at [116]–[118]).

41 In order to invoke the *Vandepitte* procedure, it must be shown that the trustee held the rights exigible against the third party on trust for the beneficiary. Where it is shown that the trustee refuses to exercise that right to sue the third party, the beneficiary may enforce that right against the third party, but "in the name of the trustee … joining the trustee as a defendant" (see *Vandepitte* at 79

(*per* Lord Wright)). As Lord Hanworth MR explained in *Harmer* at 82–83, "in general, when a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made a party to the action".

42 The purpose of joining the trustee to the action is to confer on the court the necessary *in personam* jurisdiction over the trustee's legal title to sue. The beneficiary holds no right to sue the third party directly. In the absence of such joinder, the court has no power to try the substance of the underlying cause of action and award relief against the third party. Therefore, while the beneficiary may be directing the course of the litigation in practice, in theory, the cause of action *remains the trustee's alone*, and it is *still the trustee* who is suing the third party – whether voluntarily or under the compulsion of court. As Lord Collins of Mapesbury JSC put it in *Roberts v Gill & Co and another* [2011] 1 AC 240 ("*Roberts*") at [62]: "[t]he purpose of joinder has been said to ensure that they [the trustees] are bound by any judgment and to avoid the risk of multiplicity of actions … [b]ut joinder also has a substantive basis, since the beneficiary has no personal right to sue, and is suing on behalf of the estate, or more accurately, the trustee".

43 Accordingly, in *Harmer* (at 88), Lawrence LJ reasoned that:

> Whenever a party under a contract, at the date when he enters into it is (or thereafter constitutes himself) a trustee for a third party that party has a right conferred upon him by way of property to sue on the contract whether the contract be under seal or not and can, according to well settled principles, enforce that right in equity, joining the trustee as a defendant to the action. The right of a beneficiary in such a case as the present, however, is to *enforce the agreement according to its tenor, that is to say in favour of the defendant Armstrong, and not in favour of the plaintiff beneficiaries*. …
>
> [emphasis added]

44 In a similar vein, in *Barbados Trust* at [29], Waller LJ explained that the *Vandepitte* procedure was meant "to enable a beneficiary under a trust to obtain what he is beneficially entitled to in a situation in which the trustee will not sue – will not sue for *what the trustee is legally entitled to* but which if he succeeds he must hold for the beneficiary" [emphasis added]. He further remarked that "the court would not allow the procedure to be misused to obtain rights that the beneficiary is not otherwise entitled to", which he contrasted against a scenario where "the beneficiary has an unanswerable right under a trust *and the trustee has an unanswerable claim*" [emphasis added]. On the conceptual origins of the *Vandepitte* procedure and the need for joinder of the trustee, Rix LJ's reasoning (at [101]–[102]) was *ad idem* with that of Waller LJ, namely:

> … the [*Vandepitte*] procedure is necessary to get the legal claim before the court, through the party who owned it. If such a party was not a claimant, then he must perforce be made a defendant. In either event, the legal claim was brought before the court, and, having been adjudicated on, was dealt with. Or to put the matter another way, if the trustee does not come to court himself as a claimant to protect the equitable rights of the beneficiary, he can be compelled to do so by means of the [*Vandepitte* procedure] …
>
> I would therefore consider that the effect of the *Vandepitte* procedure is that, although the trustee is nominally a defendant, his real role as a party is to ensure that, through his presence, his *legal right can be properly before the court for adjudication, just as though he was, as he should be if he is indeed a trustee for the claimant, a claimant himself*. …
>
> [emphasis added]

45 Accordingly, the underlying claim against a wrongdoing third party remains the trustee's as it is for breach(es) of *the trustee's* legal rights. The beneficiary *de facto* enforces that right through the beneficiary's action against the trustee. As such, the success or failure of the underlying cause of action does not turn on whether the claim is brought by the trustee or the beneficiary in the name of the trustee by reason of the trustee's wrongful failure or refusal to do

so. Where a beneficiary invokes the procedural short-cut in *Vandepitte*, it remains as if it were the trustee himself suing the wrongdoer, and the trustee's substantive cause of action remains the same in its contents.

46 Once the basis of the *Vandepitte* procedure is properly appreciated, the response to the argument that Techteryx could not violate the MTDR Clause because it is not a party to the DIMA becomes obvious – while Techteryx could not, FDT could, and it is *FDT's rights* which were being enforced by Techteryx in the DIMA Claim, not Techteryx's. Consequently, if FDT was precluded by the terms of the DIMA from maintaining a cause of action on the DIMA against Finaport in the circumstances, Techteryx must also be precluded from enforcing FDT's rights against Finaport upon the same facts. It was no answer that Techteryx owed no obligations to Finaport under the DIMA. By invoking the *Vandepitte* procedure, Techteryx sought to utilise the Hong Kong Court of First Instance's *in personam* jurisdiction over FDT's rights under the DIMA to compel FDT to sue Finaport in breach of FDT's obligations under the MTDR Clause. To put it simply, Techteryx sought to procure a breach of the DIMA by FDT against Finaport. It followed that the court's equitable jurisdiction to restrain a breach of contract affirmed in *Sun Travels* at [67]–[68] was engaged. It was engaged to prevent Finaport's contractual rights from being violated, and it was directed at the party responsible for procuring that breach in FDT's name: Techteryx.

47 For this reason, we were, with respect, unable to agree with the Judge's reasoning that the *Vandepitte* procedure operated to confer upon the beneficiary procedural advantages provided no substantive advantages are conferred (see at [18(b)(ii)] above). The *only* procedural advantage conferred on the beneficiary is the eclipsing of the beneficiary's action against the trustee to compel them to sue the third party into the trial of the merits of the trustee's cause of action

against the third party. However, the contents of the trustee's underlying cause of action do not change, irrespective of whether aspects of that underlying claim are deemed procedural or substantive. Indeed, this distinction itself was fraught with difficulty, as evidenced by the Judge's view (see at [18(b)(iv)] above) – supported by Techteryx on appeal (see at [35] above) – that arbitration clauses and exclusive jurisdiction clauses amounted to substantive barriers that could not be circumvented by the *Vandepitte* procedure, whereas the MTDR Clause was only a procedural barrier which could. With respect, we could see no principled basis to sustain such a differentiation. In either case, the trustee's underlying claim was barred by virtue of a provision in an agreement which precluded the trustee's claim from being prosecuted in the circumstances. The *Vandepitte* procedure could not have the effect of altering the contents of a contract and the limitations it imposed upon the trustee's right to sue, whether enforced by the trustee directly or by a beneficiary compelling the trustee to sue in the trustee's own name.

48 For similar reasons, we also rejected the analogy that Finaport drew with the "derived rights" cases at [31] above, concerning assignees or subrogees to a claim being bound by the effects of an arbitration or exclusive jurisdiction clause in a contract to which it was a non-party. We agreed with Techteryx that the present case was disanalogous for the simple reason that there was no transfer of FDT's title to sue; the legal right to sue remained *solely* with FDT alone and never passed to Techteryx. Indeed, the absence of a transfer of FDT's title to sue under the DIMA was precisely why the *Vandepitte* procedure was needed to join the trustee to the proceedings and confer upon the court the requisite personal jurisdiction over the claim that was held in the person of the trustee alone. However, we departed from Techteryx on the implications of this difference. In the "derived rights" cases, the question that the court must grapple

with is whether a burden in the original contract accompanied the transfer of the right from a predecessor to a successor in title. If an assignee may nevertheless remain bound by the effects of a procedural burden in such circumstances (see, *eg*, *Schiffahrtsgesellschaft Detlev Von Appen GmbH v Voest Alpine Intertrading GmbH, The Jay Bola* [1997] 2 Lloyd's Rep 279), *a fortiori*, it must be the case that, if FDT alone held the title to sue under the DIMA, it could not be exercised independently of the procedural limitations in the DIMA which bound FDT *qua* contracting party. Techteryx *qua* beneficiary had no power under the *Vandepitte* procedure to sue in FDT's name and pursue a claim that FDT itself had no power to institute in the same circumstances.

49 As for the arguments as to the impracticability of Techteryx complying with the MTDR Clause (see at [18(b)(iii)] and [36] above), the response was twofold. First, Finaport indicated on the record their amenability to negotiating and mediating with Techteryx, provided Techteryx's standing as a beneficiary – and, by extension, their right to compel the exercise of relevant rights to issue a notice for a meeting or to make a referral of a dispute to SMC mediation by their putative trustee, FDT – was properly determined (see at [33] above). That was only fair. It would not be reasonable to expect Finaport to negotiate or mediate with Techteryx if there were lingering doubts as to Techteryx's right *qua* beneficiary to compel enforcement of the relevant rights by FDT *qua* trustee conferred on FDT by Finaport pursuant to a contract to which Techteryx was otherwise a mere stranger.

50 Secondly, and more fundamentally, a beneficiary is not entitled *by right* to the benefits of the *Vandepitte* procedure, which exists to provide procedural convenience to beneficiaries in certain special circumstances (see *Joseph Hayim Hayim and another v Citibank NA and another* [1987] AC 730 at 748 (*per* Lord Templeman); see also *Roberts* at [45]–[46] (*per* Lord Collins of Mapesbury

JSC) and [108]–[110] and [112] (*per* Lord Walker of Gestingthorpe JSC)). It was therefore no answer to say that requiring Techteryx to establish its status as a beneficiary of FDT would render its enjoyment of the *Vandepitte* procedure inefficacious. *Even if* that was so, it would be a consequence of the contractual bargain struck between the contracting parties. The contracting parties chose to impose pre-conditions to the enforcement of the choses in action in or arising as a result of the DIMA. Techteryx, as a third party seeking to exercise those choses in action, could hardly complain about an inability to pick and choose which parts of the contracting parties' bargain suited its purposes whilst eschewing any conditions therein it found inconvenient. Nothing in the *Vandepitte* procedure or its possible status as a beneficiary entitled it to rewrite FDT's and Finaport's contractual bargain.

51 As Lightman J expressed in *Don King* at 321, "[a] beneficiary cannot be allowed to abrogate the fullest protection that the parties to the contract have secured for themselves under the terms of the contract from intrusion into their contractual relations by third parties". Techteryx must therefore satisfy whatever legal hurdles must be cleared in order to avail itself of FDT's choses in action constituted by the DIMA. *If* that required Techteryx to establish its status as a beneficiary before the DIMA Claim might be pursued, that was only the logical outcome of upholding the contractual freedom of FDT and Finaport to strike their own autonomous bargain in the DIMA without a beneficiary being empowered to sidestep the terms of their chosen dispute-settlement mechanism.

52 That left us only to frame the terms of the contractual ASI. It was clear to us that the prayer in Finaport's ASI Application, *viz*, that "[a]n injunction be granted restraining [Techteryx] from pursuing, continuing and/or proceeding with [the Hong Kong Proceedings] … before the … Hong Kong Special Administrative Region Court of First Instance … as against [Finaport]", could

not be granted. That was for two reasons. First, an ASI framed in such terms would have had the effect of injuncting the Hong Kong Proceedings in their entirety against Finaport, *including* the newly added Fraud Claims, over which our appellate jurisdiction was not properly seised (see at [22] above). Second, in a usual case of a contractual ASI, granted "[i]n cases involving an arbitration agreement or an exclusive jurisdiction clause" (see *Sun Travels* at [68]), the institution or continuation of the foreign proceedings before the relevant court is a *per se* violation of that contractual undertaking. In the case of an MTDR Clause, however, it is not a *per se* breach for the DIMA Claim to be filed before the Hong Kong Court of First Instance – the MTDR Clause renders the claim premature and inadmissible *at this stage*, as opposed to totally depriving the Hong Kong Court of First Instance of jurisdiction altogether. As a result, Finaport was not entitled to a contractual ASI that injuncted the DIMA Claim *in all circumstances*, but only in so far as the pre-requisites in the MTDR Clause were unsatisfied.

53 Consequently, we rendered a narrower, modified version of Finaport's prayer in their ASI Application, in the following terms:

> An injunction is granted restraining the Respondent from commencing, pursuing and/or continuing any proceeding against the Applicant arising out of or in connection with a dispute under the Discretionary Investment Management Agreement dated 18 March 2021 between the Applicant and First Digital Trust Limited prior to the satisfaction of the pre-conditions to litigation stipulated in cl 24.3 of that agreement. There shall be liberty to apply.

54 It followed that we allowed the Appeal only in part. We took that into account in ascertaining the "event" of the ASI Application and the Appeal, and so calibrated the quantum of costs that we fixed in Finaport's favour in that light (see at [68] below). We proceed to briefly canvass our grounds for refusing Finaport's prayer for a *non*-contractual ASI, which was not rendered moot by

the above. That is because, *if* Finaport were entitled to a non-contractual ASI, they would, in *that* event, have been entitled to have the DIMA Claim injuncted *in toto*, as opposed to the conditional ASI stipulated at [53] above; but, we were not persuaded that a non-contractual ASI was warranted in the circumstances.

Issue 2: Non-Contractual ASI

The parties' positions

Finaport's submissions

55 Finaport relied on two factors to argue that the DIMA Claim should be injuncted on a non-contractual basis – first, that Singapore was the natural forum of the dispute, and second, that Techteryx's claims were vexatious or oppressive to it. Finaport argued that the "dispute" ought to be analysed as the bilateral DIMA Claim between Finaport and Techteryx (in FDT's name), the natural forum for which must be Singapore, in light of such factors as *inter alia* the DIMA being governed by Singapore law and the clause in the DIMA submitting to the non-exclusive jurisdiction of the Singaporean courts.

56 Finaport's submissions on vexation or oppression rested on the premise that the DIMA Claim was doomed to failure for a litany of reasons, including that Techteryx was said to be unable to discharge its burden of proving its legal standing to institute the DIMA Claim under the *Vandepitte* procedure, that the DIMA Claim was subject to the concessions made by FDT in its pleadings, which rendered the DIMA Claim unmeritorious on the facts, that Techteryx allegedly conducted itself in bad faith in the Hong Kong Proceedings, and various other pieces of documentary evidence, highlighted in oral submissions, which supposedly rendered Techteryx's allegations unsustainable on the facts.

For these reasons, Finaport urged us to injunct Techteryx's claims against it as they were bound to fail, and therefore, vexatious and oppressive to Finaport.

Techteryx's submissions

57 On the natural forum of the dispute, Techteryx largely adopted the view of the Judge at [18(a)(i)] above, *viz*, that the "dispute" should be analysed in the round, and the DIMA Claim formed part of the wider factual matrix of the Breach of Trust Claim between Techteryx, on the one hand, and FDT, ACFF, and Aria DMCC, on the other. The natural forum of that wider dispute must be Hong Kong, given that FDT's relationship with Techteryx was governed by the Custodianship Agreements, which contained jurisdiction clauses (of which at least two were exclusive) that selected the Hong Kong courts, and Finaport's alleged breaches in relation to FDT's management of the USD reserves were all factually intertwined with the question of FDT's alleged breaches of duty in relation to Techteryx.

58 As for whether its claims were vexatious or oppressive towards Finaport, Techteryx argued that a high bar was required for the court to infer that a foreign proceeding was bound to fail from the outset, or that it was being carried on in bad faith. Techteryx submitted that Finaport failed to satisfy that threshold in respect of *inter alia* any of the factors highlighted at [56] above.

Our decision: There were no grounds for the grant of a non-contractual ASI to restrain in toto Techteryx's continuation of the DIMA Claim in the Hong Kong Proceedings against Finaport

59 The starting point for our analysis was the factors that influenced the grant or refusal of a non-contractual ASI, as set out by the Court of Appeal in *John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428 ("*Kirkham*") at [28] and *Lakshmi Anil Salgaocar v Jhaveri Darsan*

Jitendra [2019] 2 SLR 372 ("*Lakshmi*") at [50(a)]–[50(d)]. Of those, the only two that were in issue here were the "natural forum for resolution of the dispute between the parties" and the "alleged vexation or oppression to the plaintiffs if the foreign proceedings [were] to continue".

60 It was obvious that there was little merit in Finaport's suggestion that the Hong Kong Proceedings were vexatious or oppressive. Thus, it was not, strictly speaking, necessary for us to consider the natural forum of the dispute, given that it was trite that Singapore being the natural forum was not *ipso facto* sufficient for an ASI to be granted to restrain the continuation of foreign proceedings (see *Kirkham* at [45]). It would be inconsistent with comity for a Singapore court to restrain proceedings before the foreign court simply because Singapore was the more appropriate forum to adjudicate the dispute (see *Société Nationale Industrielle Aerospatiale v Lee Kui Jak and another* [1987] AC 871 at 895–896 (*per* Lord Goff of Chieveley)). Hence, more is generally required than that to demonstrate that an ASI is *required* to serve the "ends of justice" (see *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 ("*Koh Kay Yew*") at [14], relying upon *Bank of America National Trust and Savings Association v Djoni Widjaja* [1994] 2 SLR(R) 898 ("*Bank of America*") at [11]).

61 We take this opportunity to reiterate that a finding that the foreign legal proceeding is vexatious or oppressive requires more than merely showing that an ASI applicant was able to make a cogent case that the ASI respondent's claims might ultimately fail before the foreign court, or that that was a likely or probable outcome. A determination of vexation and oppression or otherwise remained an evaluative exercise, in which the court considers the factual matrix as a whole, and decides whether the factors raised – *eg*, that "the foreign proceedings were instituted in bad faith or for no good reason, are bound to fail, will cause extreme inconvenience … amount to an unlawful attack on the

plaintiff's legal rights … or are duplicative of Singapore proceedings" (see *VEW v VEV* [2022] 2 SLR 380 ("*VEW v VEV*") at [44]) – necessarily compelled the inference that the ASI respondent carried on those proceedings for something other than a legitimate juridical purpose (see, *eg*, *Lakshmi* at [89]–[97]; *cf*, *VEW v VEV* at [96]–[106]), to suffice to invoke the court's jurisdiction to grant an ASI to serve the ends of justice, one which "should be exercised sparingly and only in exceptional cases" owing to its implications on comity (see *VEW v VEV* at [46]).

62 None of the facts raised by Finaport compelled that inference. Put at the *very highest*, Finaport's arguments went only towards showing that Techteryx's claims against Finaport might ultimately fail on the merits. They certainly did not cross the high threshold needed to demonstrate that the Hong Kong Proceedings were so patently and obviously unsustainable that we should find that Techteryx was carrying it on for no good reason, and an ASI was required to serve the ends of justice (see *Koh Kay Yew* at [14] and [27]).

63 We need not exhaustively canvass every factor highlighted by Finaport to show that this high threshold was not cleared. To cite just two examples raised in its oral submissions, Finaport's counsel pointed to email correspondence between *inter alia* representatives of FDT and Techteryx, exchanged in January to March 2021, that were said to support the inference that Techteryx knew throughout the pre-contractual negotiations that it would be a mere stranger to the DIMA, with Finaport owing obligations *only* to FDT and not Techteryx. In particular, much time was spent on the contents of an email sent by Mr Can Sun to Mr Vincent Chok on 3 February 2021 (the "Can Email") which, it was argued, constituted an acknowledgement by Techteryx, in relation to the DIMA, that: "[i]t looks like Finaport's client is [FDT]. As such, Finaport's obligations run to [FDT] and not Techteryx directly". Finaport tried to paint this as the nail

in the coffin in Techteryx's case that it was a beneficiary entitled to enforce FDT's contractual rights under the DIMA in FDT's name; however, we did not share Finaport's view on the effect of the email correspondence.

64 The emails were equivocal at best. Specifically, they were silent on whether FDT held the contractual rights in the DIMA on a bare trust for Techteryx (*per Lloyd's v Harper* (1880) 16 ChD 290 at 315–317 and *Les Affréteurs Réunis Société Anonyme v Leopold Walford (London), Ltd* [1919] AC 801 at 806–809 (*per* Lord Birkenhead LC)). While the contents of these emails might be said to militate in favour of the view that FDT contracted for its own benefit in the DIMA and not to confer any equitable rights on Techteryx, we note that this outcome was not spelt out in the Custodianship Agreements. Although those contracts pre-dated the DIMA, nevertheless, it struck us as odd that, if that was the intended outcome all along, FDT did not ensure that the Custodianship Agreements did not specifically provide for it. We also found it odd that this would have been the intention of both FDT and Techteryx, given that the transactions resulting in the escrow accounts being vested in FDT's name were initiated and driven by Techteryx. It was notable, in this regard, that FDT's business was, as noted earlier at [5], the provision of escrow services, and the agreements between Techteryx and FDT were described as "Client Agreement", "Custody Agreement", and "Escrow Services Agreement". There was also nothing in the Deed of Amendment of the Escrow Services Agreement of 16 September 2022 (the "Deed of Amendment") that would indicate that such an arrangement had been envisaged by Techteryx and FDT at the time in relation to the latter concluding the DIMA with Finaport. It is significant in this regard that the Deed of Amendment was entered into some 19 months after the Can Email, and therefore presented the opportunity to make clear that the

relationship between FDT and Techteryx was not that of trustee and beneficiary respectively, if that indeed was the case.

65 It was therefore entirely possible to construe the emails as evincing an understanding that Techteryx would not acquire any *legal rights* from the DIMA, but that the DIMA was contracted by FDT in its capacity as trustee to Techteryx, holding the choses in action under the DIMA on a bare trust for Techteryx, with Techteryx remaining a non-party all the while. Ultimately, the issue of the *ius standi* of Techteryx *qua* beneficiary to invoke the *Vandepitte* procedure *vis-à-vis* the DIMA Claim would turn on questions of mixed fact and law, including the wording of the DIMA, the circumstances of its conclusion, and how FDT's execution of the DIMA was interrelated with the broader factual matrix as to the Custodianship Agreements, FDT's custody of the USD reserves, and FDT's trustee-beneficiary relationship (if any) with Techteryx, to determine if FDT, as "a party to a contract [did] constitute [itself] a trustee for a third party of a right under the contract and thus confer[red] such rights enforceable in equity on the third party [Techteryx]" (*per Vandepitte* at 79). These are matters to be determined by the Hong Kong courts applying principally Hong Kong law. FDT's intention to constitute a trust must be affirmatively proved by Techteryx in order to pursue the DIMA Claim in FDT's name (*per Vandepitte* at 79–80), but Finaport's arguments fell short of showing that Techteryx was bound to fail in proving that intent.

66 Likewise, we reached the same conclusion regarding Finaport's claims, which were raised in the Hong Kong Proceedings, that the DIMA Claim was meritless because Techteryx's authorised signatory, Mr Christian Alexander Boehnke de Lorraine-Elbeuf (alias Alex de Lorraine) ("Mr de Lorraine"), had authorised the impugned remittances to Aria DMCC, as asserted to be ratified in a subsequent board resolution. Similar to Finaport's submissions on the

3 February 2021 email at [63] above, at most, these were arguments that could be made against Techteryx's claims in the Hong Kong Proceedings, but their success or failure would ultimately still depend on the court's assessment of the *entirety* of the evidentiary record. As we highlighted to Finaport at the hearing, Mr de Lorraine was added to the Hong Kong Proceedings as the sixth defendant (see at [20] above), and was pleaded to have been party to the defendants' alleged frauds and conspiracy perpetrated against Techteryx. Techteryx also pleaded that Mr de Lorraine acted in breach of his fiduciary duties to Techteryx, as their "authorised representative", and his alleged breaches were said to include his authorising the impugned remittances to Aria DMCC. As such, whether Mr de Lorraine's authorisation and the board resolution of Techteryx ratifying Mr de Lorraine's actions (as pleaded by FDT in its defence on the merits) operated to defeat Techteryx's claims would turn on questions of mixed fact and law which we were not in any position to prejudge. It certainly could not be said, at this juncture, that Techteryx's claims were doomed to fail on this basis.

67 For these reasons, we found that Finaport's arguments as to vexation or oppression held no merit. Accordingly, it was not necessary for us to consider the question of the natural forum of the dispute (see at [60] above), and we express no view on this issue.

Conclusion

68 For all the foregoing reasons, we allowed the Appeal in part and granted a contractual ASI restraining the continuation of the DIMA Claim in the Hong Kong Proceedings prior to the satisfaction of the pre-conditions to litigation as set out in the MTDR Clause of the DIMA. We did not allow Finaport's prayer for the Hong Kong Proceedings to be injuncted *in toto*. We awarded costs of the

Appeal to Finaport, with the quantum fixed at $30,000 (all-in). We allowed the Further Evidence Summons by consent, with the parties bearing their own costs. We vacated the Judge's costs order on the ASI Application below, and we substituted an award of costs fixed at $5,000 (inclusive of disbursements) in Finaport's favour. The usual consequential orders applied.

Kannan Ramesh
Judge of the Appellate Division

See Kee Oon
Judge of the Appellate Division

Hri Kumar Nair
Judge of the High Court

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