IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2017] SGCA 27

Civil Appeal No 110 of 2016

Between

TANIA RAPPO

… *Appellant*

And

(1) ACCENT DELIGHT INTERNATIONAL LTD
(2) XITRANS FINANCE LTD

… *Respondents*

Civil Appeal No 113 of 2016

Between

(1) YVES CHARLES EDGAR BOUVIER
(2) MEI INVEST LIMITED

… *Appellants*

And

(1) ACCENT DELIGHT INTERNATIONAL LTD
(2) XITRANS FINANCE LTD

… *Respondents*

Civil Appeal No 110 of 2016 (Summonses Nos 96 of 2016 and 19 of 2017)

Between

TANIA RAPPO

… *Applicant*

And

(1) ACCENT DELIGHT INTERNATIONAL LTD
(2) XITRANS FINANCE LTD

… *Respondents*

Civil Appeal No 113 of 2016 (Summons No 97 of 2016)

Between

(1) YVES CHARLES EDGAR BOUVIER
(2) MEI INVEST LIMITED

… *Applicants*

And

(1) ACCENT DELIGHT INTERNATIONAL LTD
(2) XITRANS FINANCE LTD

… *Respondents*

In the matter of Suit No 236 of 2015

Between

(1) ACCENT DELIGHT INTERNATIONAL LTD
(2) XITRANS FINANCE LTD

… *Plaintiffs*

And

(1) YVES CHARLES EDGAR BOUVIER
(2) MEI INVEST LIMITED
(3) TANIA RAPPO

… *Defendants*

JUDGMENT

[Conflict of Laws] – [Natural forum] – [Stay of proceedings]

Rappo, Tania
v
Accent Delight International Ltd and another and another appeal

[2017] SGCA 27

Court of Appeal — Civil Appeals Nos 110 and 113 of 2016; Summonses Nos 96 and 97 of 2016 and 19 of 2017
Sundaresh Menon CJ, Chao Hick Tin JA and Andrew Phang Boon Leong JA
1 March 2017

18 April 2017 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Overview

1 These are two appeals against the decision of a High Court judge ("the Judge") dismissing the appellants' respective applications for a stay of proceedings in Singapore. The appellants have two principal grounds for seeking a stay: first, that Switzerland and/or Monaco are more appropriate fora than Singapore for the determination of the substantive dispute between the parties; and second, that proceedings currently ongoing in Monaco are *lis alibi pendens*.

2 The substantive dispute centres on the relationship between a well-known Russian businessman and the owner of an international art storage and delivery company. For slightly over a decade, the relationship between the

parties was amicable, and it yielded, for the Russian businessman, ownership of an art collection of considerable cultural and historical importance. However, the breakdown of their relationship swiftly led to the commencement of criminal and civil proceedings in Monaco as well as civil proceedings in Singapore, and it is the last of these which the appellants have sought to stay. The Judge dismissed the stay applications, subject to the condition that the respondents discontinue their civil claims in the Monegasque proceedings. The appellants now appeal against that dismissal.

3 A number of issues of note within the conflict of laws were raised in these appeals. Broadly speaking, they concern the proper relationship between the doctrines of forum election and *forum non conveniens*, the nature of the factors that are relevant for the court's consideration in determining whether another forum is clearly or distinctly more appropriate than Singapore for the determination of the substantive dispute, as well as whether the unavailability of a desired remedy in a foreign forum provides proper grounds for an argument that substantial justice will not be served if the dispute is heard there. A novel issue was raised as to whether the possibility of a transfer of a case to the Singapore International Commercial Court ("the SICC") is a relevant consideration in determining whether Singapore is an appropriate forum. Having considered these issues and the parties' respective cases, we allow both appeals and order that the proceedings in Singapore be stayed forthwith. We now explain the reasons for our decision.

The facts

The parties

4 Mr Yves Charles Edgar Bouvier is a self-described entrepreneur and businessman in the international art scene. Through his Swiss holding

company, Euroasia Investment SA, he is the main shareholder in the Natural Le Coultre companies in Geneva, which specialise in the storage, packing and shipping of artworks. In Geneva, Natural Le Coultre operates from the Geneva Freeport, a facility in which artworks are stored, showcased and also bought and sold in a tax-free setting. Mr Bouvier is credited with setting up Freeports, similar to that in Geneva, in Singapore and Luxembourg. Mr Bouvier is a Swiss national and has been a Singapore permanent resident since 2009. Before moving to Singapore in 2009, Mr Bouvier resided in Geneva.

5 Through his business in the Freeports, Mr Bouvier has built up a network of connections with international auction houses, curators, galleries, art dealers and private collectors. Using this network, he has facilitated (to use a neutral term to describe the nature of the arrangements) the private sale and purchase of valuable art pieces. As Mr Bouvier explains, this is a business that is couched in secrecy. The players are often very high net worth individuals who see art as a "smart commodity" for investment, and who prefer the low visibility of private transactions to the profile and publicity of public auctions. Mr Bouvier identifies interested buyers and willing sellers, and plays a key role in the transactions that follow. We deliberately refrain from characterising that role because in the context of the present proceedings, that is one of the central matters in dispute.

6 MEI Invest Limited ("MEI Invest") is a company incorporated in Hong Kong. Mr Bouvier controls MEI Invest and uses it for his business purposes. Mr Bouvier and MEI Invest are the appellants in Civil Appeal No 113 of 2016 ("CA 113/2016").

7 Ms Tania Rappo is a Swiss national currently resident in Monaco. Ms Rappo played a key role in the genesis of the relationship between the two

main actors in the dispute. She is the sole appellant in Civil Appeal No 110 of 2016 ("CA 110/2016"). We will refer to Mr Bouvier, MEI Invest and Ms Rappo collectively as "the Appellants".

8 Mr Dmitry Rybolovlev is a Russian magnate who was, until 2010, the chairman of the Board of the Uralkali group in Russia. He is currently domiciled in Monaco with his daughter, Ms Ekaterina Rybolovleva ("Ekaterina"). Prior to his move to Monaco in 2011, Mr Rybolovlev resided in Geneva with his wife, Ms Elena Rybolovleva ("Elena").

9 Accent Delight International Ltd ("Accent") and Xitrans Finance Ltd ("Xitrans") are companies incorporated in the British Virgin Islands. They are held by the Rybolovlev family trusts, which are governed by Cypriot law. Ekaterina is one of the beneficiaries of those trusts. Prior to the establishment of the Rybolovlev family trusts in 2005, Xitrans was held directly by Mr Rybolovlev. Accent was incorporated in 2010 and has since been held by those same trusts. Accent and Xitrans are the respondents in both CA 110/2016 and CA 113/2016, and we will refer to them collectively as "the Respondents".

Ms Rappo's relationship with the Rybolovlevs

10 The precise year in which Ms Rappo first came to know the Rybolovlevs – whether in 1995 or in 2000 – is contested. The closeness of the relationship between Ms Rappo and Mr Rybolovlev, and the extent to which she had his ear are also matters in dispute. It is not controversial, however, that their first meeting was in Geneva, and that Ms Rappo and Elena struck up a close friendship. Ms Rappo was even the godmother of one of the Rybolovlev children, Anna, who was born in 2001.

11 Sometime in 2002 or 2003, Mr Rybolovlev informed Ms Rappo of his desire to create a private art collection, and asked her to introduce him to individuals who could assist him in this endeavour. One of the artworks that Mr Rybolovlev was interested in purchasing at the time was a painting by Marc Chagall. Ms Rappo was able to put Mr Rybolovlev in touch with the owners of the Chagall painting. As Ms Rappo recounts, she, Mr Rybolovlev and Elena visited Natural Le Coultre at the Geneva Freeport to collect the painting. That was when they first met Mr Bouvier.

12 According to Mr Bouvier, when he met Ms Rappo at Natural Le Coultre, he obtained the impression that she enjoyed a good relationship with Mr Rybolovlev and Elena. Mr Bouvier then contacted Ms Rappo with a request that he be introduced to Mr Rybolovlev. Ms Rappo agreed to arrange this. The nature and terms of the dealings between Mr Bouvier and Ms Rappo are the subject of disagreement between the parties, and, indeed, these matters are at the core of the Respondents' claims against Ms Rappo. In essence, Ms Rappo claims that she was paid a "finder's fee" by Mr Bouvier for introducing business to him. Ms Rappo never volunteered this information to Mr Rybolovlev because she believed that this was a private commercial arrangement between her and Mr Bouvier. The Respondents, however, take the view that these "fees" – which, according to them, amount to millions of Euros – were part of the unauthorised profits which Mr Bouvier obtained by deceiving Mr Rybolovlev. We will elaborate on the Respondents' claims later.

The dealings between Mr Bouvier and Mr Rybolovlev

13 It is undisputed that in or around 2002 or 2003, Ms Rappo formally introduced Mr Bouvier to Mr Rybolovlev in Geneva. According to Mr Bouvier, Mr Rybolovlev spoke of his interest in creating an art collection,

and asked Mr Bouvier to let him know if there were exceptional artworks that he could acquire. Thus began over a decade of dealings between the two, during which Mr Rybolovlev came to amass an art collection of much significance. The collection includes masterpieces by artists of the highest renown such as Vincent van Gogh, Pablo Picasso, Henri Matisse, Claude Monet and Leonardo da Vinci.

14 Acting as the primary intermediary between Mr Rybolovlev and Mr Bouvier was Mr Mikhail Sazonov, a Swiss national who resides in Switzerland. Mr Sazonov has been working for the Rybolovlev family trusts since 2005, and until sometime in 2009, he was the sole director of Xitrans. Mr Sazonov describes himself as the Respondents' main representative in their business dealings with Mr Bouvier and MEI Invest. He was introduced to Mr Bouvier by Mr Rybolovlev sometime in or around 2003, and thereafter became Mr Rybolovlev's primary intermediary, evidently because Mr Rybolovlev spoke only Russian and a little English, whereas Mr Sazonov and Mr Bouvier were both conversant in French and English.

15 The parties disagree on the level of control and involvement that Mr Rybolovlev had in relation to the selection of artworks to acquire, as well as the nature and terms of the arrangements between Mr Bouvier and Mr Rybolovlev. These are central issues in the suit commenced by the Respondents against Mr Bouvier, with each party advancing a different characterisation of their relationship.

16 Mr Bouvier states that Mr Rybolovlev had, from the beginning, a clear idea of what art pieces he liked and wished to acquire, and that Mr Rybolovlev himself eventually became knowledgeable about the art market by visiting art museums, frequenting art fairs and receiving various catalogues and listings. If

Mr Rybolovlev expressed interest in a particular artwork, Mr Bouvier or his companies would locate the piece and acquire it from the owner. Mr Rybolovlev, acting through one of the Respondents, would then purchase the artwork from Mr Bouvier. Mr Bouvier takes the position that once he had acquired an artwork, he was at liberty to "on-sell" it to Mr Rybolovlev at a profit. The price at which he decided to "on-sell" the artwork to Mr Rybolovlev in each case was a function of how much he had paid to acquire the piece, including any broker fees he had had to pay, added to a profit margin based on what he considered to be the value of the piece. What this meant, in essence, was that the prices which he charged Mr Rybolovlev were largely dependent on what the latter was prepared to pay. To Mr Bouvier, this was the "value" of this type of artworks. The transactions, Mr Bouvier suggests, were all conducted on a "willing buyer-willing seller basis".

17 According to Mr Sazonov, however, Mr Bouvier's proposal to Mr Rybolovlev was that he would act as an agent for the Respondents to source and acquire artworks. Mr Bouvier could assist Mr Rybolovlev to acquire valuable artworks discreetly and at a more favourable pricing, given his expert knowledge and direct access to the owners of such artworks through Natural Le Coultre. According to Mr Sazonov, it was Mr Bouvier who would first inform him or Mr Rybolovlev of the opportunity to acquire a particular artwork. Mr Bouvier would also provide advice on the approximate value of the work and the price at which it could be obtained. Mr Rybolovlev or Mr Sazonov would then give instructions to Mr Bouvier on the price and payment terms that were acceptable to them, and Mr Bouvier would negotiate the terms of the acquisition with the owner. What Mr Bouvier was entitled to for his services was generally only a commission calculated at 2% of the

transaction price of each artwork. In rebuttal, Mr Bouvier explains that the payment of 2% of the sale price was not a commission, but rather, a fee charged for administrative services and other costs incurred in relation to the purchase of the artwork, such as the costs of transportation, shipping insurance and restoration.

18 It is undisputed that written sale and purchase agreements were entered into only in relation to the first four transactions, the first of which was dated 26 July 2003 and the last of which was dated 16 October 2006. The sellers under the first three agreements were, respectively, Arrow Fine Art LLC, The Eagle Overseas Co Ltd and Kinsride Finance Ltd, which were all companies in which Mr Bouvier was a shareholder. The seller under the fourth agreement was MEI Invest. The purchaser under all four written agreements was Xitrans. All four agreements contained clauses stating that Swiss law was to govern the agreements, and that any disputes related to the agreements were to be subject to the exclusive jurisdiction of the courts of the Republic and Canton of Geneva.

19 Thereafter, the parties dispensed with the need for formal written agreements and transacted only on the basis of invoices. Mr Bouvier claims that the invoices were meant to be a simplified version of the four written agreements, and that accordingly, the parties intended the terms stated in those agreements – including the choice of law and exclusive jurisdiction clauses – likewise to apply to the subsequent transactions that were recorded only by invoices. Mr Sazonov states that the reason why invoices rather than full written agreements came to be used was that Mr Bouvier had explained that it was the usual practice in the art world to only issue invoices. Both parties rely, in support of their respective positions, on an email dated 4 October 2006 from Mr Bouvier to Mr Sazonov in which Mr Bouvier wrote, in relation to a

transaction for a painting by Picasso, that "if the payment [is] made all at once, the contract is very simplified and becomes an invoice with one payment date". The vast majority of the invoices were issued either by Mr Bouvier or by MEI Invest, and directed payment to be made into Swiss bank accounts.

The events between 2009 and 2014

20 In 2009, Mr Bouvier moved to Singapore from Geneva. He has been a Singapore permanent resident since then.

21 The parties do not dispute that from 2009 onwards, most of the artworks that Mr Rybolovlev purchased (through the Respondents) were shipped from Geneva to Singapore, and any artworks purchased thereafter likewise ended up in Singapore. What the parties dispute is whether the artworks were delivered to Accent and/or Xitrans in Geneva, and only thereafter shipped to Singapore following such delivery. This is Mr Bouvier's characterisation of the delivery arrangements. Mr Sazonov, on the other hand, claims that delivery to and storage at the Singapore Freeport was an integral part of completing the transactions.

22 In any event, it is undisputed that from 2009 onwards, there was a change in the ultimate location of the artworks purchased by Mr Rybolovlev from Geneva to Singapore, and this can be traced to two main developments. First, sometime in October or November 2008, Mr Rybolovlev faced possible seizures of his properties in Switzerland by Russia following investigations by the Russian government into an ecological disaster that had occurred in Russia. Second, in 2008, Elena commenced divorce proceedings against Mr Rybolovlev in Switzerland. As part of those proceedings, she sought disclosure and seizure orders in respect of property belonging to

Mr Rybolovlev. At the hearing before us, counsel for the parties agreed that these circumstances provided the impetus for Mr Rybolovlev's decision to have the artworks routed to Singapore from 2009 onwards in an attempt to insulate them from possible seizure or division orders.

23 In 2011, Mr Rybolovlev moved to Monaco, where he now resides. It is, according to Mr Bouvier, a well-known fact that Mr Rybolovlev is a prominent and influential figure in Monaco given his wealth and his ownership of the AS Monaco Football Club.

The breakdown of the relationship between Mr Rybolovlev and Mr Bouvier

24 Sometime towards the end of 2014, the relationship between Mr Rybolovlev and Mr Bouvier quickly deteriorated. The cause of the falling-out between the two parties is disputed.

25 Mr Bouvier claims that Mr Rybolovlev was experiencing financial difficulties in 2014, partly as a result of an order by a Swiss court that he was to pay US$4.5bn to Elena as part of their divorce settlement. Due to these financial problems, Mr Rybolovlev (through Accent) was unwilling or unable to make full payment of €140m to MEI Invest for a painting by Mark Rothko, *No 6, Violet, vert et rouge* ("the Rothko painting"). Not having received the full purchase price, Mr Bouvier did not hand over possession of the Rothko painting to either Accent or Mr Rybolovlev. Mr Bouvier suggests that this led to the breakdown of his relationship with Mr Rybolovlev.

26 Mr Rybolovlev's account of the events, as relayed by Mr Sazonov, is markedly different. According to this account, Mr Rybolovlev met Mr Sanford Heller, an art adviser, on 31 December 2014 and learned that the seller of one of the paintings that he had purchased (*Nu couché au cousin bleu* by Amedeo

Modigliani ("the Modigliani painting")) had received a total of US$93.5m by way of sale proceeds. Accent, however, had paid Mr Bouvier a purchase price of US$118m for the same work. The Respondents instructed their Swiss counsel to approach Mr Heller to obtain written confirmation that the sale proceeds received by the seller, Mr Steven Cohen, had indeed amounted to US$93.5m. They also sought copies of the agreements between Mr Cohen and his broker. This material was provided to the Respondents as requested.

27 Separately, Mr Rybolovlev learned from an article published in *The New York Times* on 3 March 2014 that another painting which he had purchased, *Le Christ comme Salvator Mundi* by Leonardo da Vinci ("the da Vinci painting"), had been sold for between US$75m and US$80m. However, Accent had acquired that painting for US$127.5m through Mr Bouvier's services. According to Mr Rybolovlev, all these events led him to believe that Mr Bouvier had dishonestly inflated the sale prices of a number, or possibly all, of the artworks purchased so as to keep for himself, in addition to the commission that he charged, the difference between the sale prices that he represented to the Respondents and the actual prices that he had paid for those works.

The criminal complaint against Mr Bouvier in Monaco

28 On 9 January 2015, Ms Tetiana Bersheda, Swiss counsel for the Respondents, made a criminal complaint by way of letter to the General Prosecutor of the Principality of Monaco. The complaint was made against "Mr. Yves Bouvier and any participant". In essence, it alleged that Mr Bouvier had acted fraudulently by keeping for himself a portion of the sale prices paid by Mr Rybolovlev. Ms Bersheda referred to Mr Rybolovlev's discoveries in respect of the Modigliani painting and the da Vinci painting as described at

[26]–[27] above, and further alleged that there were "well-founded fears" that Mr Bouvier had secretly withheld sums in relation to the other artwork transactions as well. She sought the opening of an inquiry by the Monegasque authorities. At the end of her letter, Ms Bersheda stated as follows:

> Accent Delight International Ltd and Xitrans Finance Ltd declare **that they wish to institute civil proceedings as claimants.** [emphasis in bold in original]

29 The next day, the Public Prosecutor of Monaco sent a request to the President of the Tribunal de Première Instance to designate an Investigating Judge to take charge of the investigations into the complaint. On the same day, Mr Loïc Malbrancke was appointed as the Investigating Judge.

30 On 25 February 2015, Mr Bouvier went to Mr Rybolovlev's residence in Monaco at the latter's request, purportedly to discuss payment terms for the outstanding balance due on the Rothko painting (as Mr Bouvier recounts). Upon his arrival, Mr Bouvier was arrested by the Monegasque police, who had been waiting for him. Ms Rappo was likewise arrested on the same day.

31 On 27 February 2015, Ms Bersheda wrote to Mr Malbrancke informing him that the Respondents and Ekaterina wished to join the proceedings against Mr Bouvier and Ms Rappo as civil parties.

32 A day later, Mr Bouvier and Ms Rappo appeared before Mr Malbrancke and were both made "*inculpé*" under Monegasque law. The Respondents have furnished the English translation of the "Minutes of First Appearance" that were recorded by Mr Malbrancke on that occasion. In respect of Mr Bouvier, they state that he was:

> … charged, pursuant to the initial indictment of 24 February 2015, which we made known to him, with the following counts:

> – FRAUDULENT ACTS committed during 2013 and 2014 to the detriment of Accent Delight International Ltd and Ekaterina Rybolovleva, beneficiary of the Domus Trust, (in relation to transactions concerning pictures by Da Vinci, Gaugin [*sic*] and Rothko)
>
> …
>
> – COMPLICITY IN MONEY LAUNDERING in Monaco during the period from 2006 to 24 February 2015 (transfers from the account or accounts of his company Mei Invest Ltd to Monegasque accounts held, directly or indirectly, by Tania Rappo, who thus acquired, held or used funds constituting the proceeds of fraudulent acts committed to the detriment of Xitrans Finance Ltd and Accent Delight International Ltd and Ekaterina Rybolovleva, beneficiary of the Domus Trust[])]
>
> …

With regard to Ms Rappo, the Minutes of First Appearance state that she was:

> … charged, pursuant to the introductory indictment of 24 February 2015, of which I inform her, on the count of:
>
> – MONEY LAUNDERING in Monaco during 2006 until 24 February 2015 (acquiring, holding, or using funds transferred by MEI INVEST LTD from Yves Bouvier to the Monocan [*sic*] accounts she directly or indirectly holds, representing the proceeds from swindles committed to the detriment of the companies "XITRANS FINANCE LTD" and "ACCENT DELIGHT INTERNATIONAL LTD" and Ekaterina Rybolovleva, beneficiary of "THE DOMUS TRUST") …

33 We note that there are disputes between the parties on the proper translation of the Minutes of First Appearance, specifically in relation to the translation of the French word "*inculpé*" as "charged" and what the status of "*inculpé*" entails as a matter of Monegasque law, but for present purposes, it is unnecessary for us to delve into the issue. We quote the English translation of the Minutes of First Appearance provided by the Respondents only for the purpose of convenience and without making any finding on the proper translation and meaning of "*inculpé*".

The commencement of proceedings in Singapore

34 On 12 March 2015, the Respondents commenced Suit No 236 of 2015 ("Suit 236/2015") in Singapore against the Appellants. They claimed that Mr Bouvier had breached the fiduciary duties which he owed to them as their agent, and had also committed fraudulent misrepresentation and the tort of deceit. It was further alleged that MEI Invest and Ms Rappo were liable for dishonest assistance and/or knowing receipt, and in addition, that all the Appellants had conspired to wrongfully cause loss to the Respondents. On that same day, the Respondents applied *ex parte* for Mareva injunctions and ancillary disclosure orders against the Appellants. The Judge granted the orders sought. On 19 March 2015, the Appellants applied unsuccessfully to the Judge to set aside those orders.

35 On 15 April 2015, Mr Bouvier and MEI Invest filed Summons No 1763 of 2015 seeking a stay of the proceedings in Singapore on two grounds: first, that there was a *lis alibi pendens* in Monaco; and second, that Switzerland rather than Singapore was the appropriate forum for the determination of the Respondents' claims. Ms Rappo made a similar application in Summons No 1900 of 2015 on 22 April 2015. Her argument was that Switzerland and Monaco were both more appropriate fora than Singapore.

36 Separately, on 20 April 2015, the Appellants filed notices of appeal against the Judge's decision to dismiss their setting-aside applications in respect of the Mareva injunctions and the disclosure orders. In July and August 2015, we heard and allowed the appeals, discharging the injunctions and orders made by the Judge. Our decision is reported in *Bouvier, Yves*

Charles Edgar and another v Accent Delight International Ltd and another and another appeal [2015] 5 SLR 558.

The Judge's decision on the stay applications

37 The Judge heard the Appellants' stay applications following our decision on the aforesaid appeals. On 17 March 2016, she dismissed both applications (see *Accent Delight International Ltd and another v Bouvier, Yves Charles Edgar and others* [2016] 2 SLR 841 ("the Judgment")). However, she also held that "[a]s a condition of a stay not being granted", the Respondents as well as Ekaterina were "required to discontinue their civil proceedings in Monaco" (at [117(c)]).

38 In explaining the reasons for her decision, the Judge first held that it was unnecessary for her to determine whether the proceedings in Monaco were *lis alibi pendens* and, as a consequence, whether the Respondents should be put to forum election. This was because during the hearing, counsel for the Respondents had informed her that the Respondents "would be prepared to discontinue their Monaco civil proceedings against [Mr Bouvier and Ms Rappo] if the court ruled in their favour" (see the Judgment at [73]). This, in the Judge's view, rendered the question of *lis alibi pendens* academic. Second, the Judge held that the Appellants had failed to show that Switzerland was a more appropriate forum than Singapore for the determination of the parties' dispute. She also rejected Ms Rappo's alternative argument that Monaco was a more appropriate forum because she took the view that the claims against Mr Bouvier and MEI Invest should be heard together with the claims against Ms Rappo.

39 The Judge disagreed with the Appellants' position that the dispute between the parties was not suitable for transfer to the SICC, finding that such a transfer would offer "all the advantages and none of the disadvantages … that were raised in [the parties'] submissions" (see the Judgment at [116]). The Judge also ordered that in the event that the parties failed to agree on such a transfer, the Appellants were to be given another opportunity to present full arguments to her as to why the matter should not be transferred to the SICC pursuant to the court's power of transfer under O 110 r 12(4)(*b*)(ii) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules of Court").

The parties' respective cases on appeal

The Appellants' position

40 Mr Bouvier and MEI Invest submit that the Judge erred in refusing to grant a stay of the proceedings in Singapore. They contend that the Respondents should have been put to forum election because the Monegasque proceedings are *lis alibi pendens*. According to them, by joining the criminal proceedings in Monaco as civil parties, the Respondents are in the position of having commenced a civil suit against Mr Bouvier and Ms Rappo under Monegasque law. Further, despite the confirmation by the Respondents' counsel that the Respondents would not pursue claims in Monaco and the Judge's imposition of the condition (see [37] above) that they were to "discontinue their civil proceedings in Monaco", the Respondents have in fact continued to participate actively in those proceedings in breach of the condition. The latter is a common point taken by the Appellants in both appeals. In this regard, the Appellants have filed three applications for leave to admit further evidence on appeal (Summonses Nos 96 of 2016 and 19 of 2017 on the part of Ms Rappo, and Summons No 97 of 2016 on the part of Mr Bouvier and MEI Invest), seeking to demonstrate primarily that the

Respondents have not complied with the Judge's condition, but have instead continued to exercise their rights as civil parties in the Monegasque proceedings.

41 Mr Bouvier and MEI Invest further submit that Switzerland is a more appropriate forum than Singapore for the trial of the Respondents' claims as Swiss law governs these claims, and various significant connecting factors similarly point to Switzerland as the natural forum. In addition, they submit that the Judge erred in deciding that she could take into account the possibility of a transfer of Suit 236/2015 to the SICC in reaching her decision on *forum non conveniens*.

42 Ms Rappo's submissions on appeal parallel to a significant extent those advanced by Mr Bouvier and MEI Invest, particularly in relation to her arguments that the Monegasque proceedings are *lis alibi pendens*, that the Respondents have not complied with the condition imposed by the Judge and that Switzerland is a more appropriate forum. The primary difference between the submissions is Ms Rappo's alternative argument that *Monaco* is also a clearly more appropriate forum. In support of this argument, she points to the fact that proceedings have already been commenced in Monaco and that Monaco bears a number of connections to the Respondents' claims.

The Respondents' position

43 The Respondents seek to defend the Judge's dismissal of the Appellants' stay applications. According to them, the Monegasque proceedings cannot be considered *lis alibi pendens* because they are nothing more than a "criminal investigation". In any event, there is no identity between those proceedings and the proceedings in Singapore in relation to either the

parties involved or the causes of action. The Respondents also take the position that they have not breached the condition imposed by the Judge. In this regard, they point to two letters that they have sent to Mr Morgan Raymond, the current Investigating Judge, informing him that they will not be making claims for damages in the proceedings in Monaco.

44 Further, the Respondents suggest that the Appellants are not entitled, as a matter of law, to rely on both the doctrines of forum election and *forum non conveniens* as the two doctrines represent "alternative" and not "cumulative" remedies. They also contend that Singapore, rather than Switzerland or Monaco, is the natural forum, and that substantial injustice would be caused if the proceedings here were to be stayed. Their final point is that the Judge had not in fact taken the possibility of a transfer of Suit 236/2015 to the SICC into account in coming to her decision – but even if she had, she had not erred in doing so.

The issues for determination

45 In our judgment, there are four key issues before this court. The first concerns the Appellants' allegation that the Respondents have breached the condition imposed by the Judge, and that for this reason alone, a stay of the Singapore proceedings ought to be ordered. Closely tied to this issue are the Appellants' applications for leave to admit further evidence, the primary purpose of which is to demonstrate that the Respondents have continued to participate actively in the Monegasque proceedings as civil parties.

46 The second concerns the question of whether it is permissible for the Appellants to run cumulatively the arguments that the Respondents should be put to forum election and that Singapore is *forum non conveniens*. As

mentioned at [44] above, the Respondents take the position that the Appellants are not entitled to run both arguments at the same time, and that permitting them to do so would in fact result in prejudice to the Respondents.

47 Third, we will consider whether – as the Appellants contend – Switzerland and/or Monaco are more appropriate fora than Singapore for the determination of the substantive dispute between the parties, and if so, whether there are any reasons of justice that would nevertheless militate against a stay of the proceedings in Singapore. Apart from the general connecting factors between the dispute and these fora, including the issue of the governing law, three discrete issues were raised by the parties in this regard: first, whether Switzerland is an available forum (which the Respondents deny); second, whether the possibility of a transfer of the dispute to the SICC is a relevant factor in determining whether Singapore is a more appropriate forum; and third, whether the fact that Switzerland, as a civil law jurisdiction, does not offer the remedies of constructive trusts and tracing provides a proper ground for finding that substantial injustice would be caused were the proceedings in Singapore to be stayed.

48 The fourth and final issue is whether the proceedings in Monaco are *lis alibi pendens*, such that the Respondents should be put to forum election. As we will explain, it is our view that no determination need be made on this issue in these appeals. We will therefore deal only briefly with this issue.

49 We will address each of these issues in turn.

Whether the Respondents have breached the Judge's condition

50 The genesis of this issue – which engendered a flow of letters not only between the parties themselves, but also between the Respondents'

Monegasque counsel and the Investigating Judge of the proceedings in Monaco – was a statement made by counsel for the Respondents at the hearing of the Appellants' stay applications. Mr Yeo Khirn Hai Alvin SC, who represented the Respondents at that stage of the proceedings, informed the Judge that "If matter [*sic*] not stayed, I can confirm we will not pursue our civil claims for damages in the criminal proceedings."

51 As described above, the Judge understood this to be confirmation by the Respondents that they "would be prepared to discontinue their Monaco civil proceedings against [Mr Bouvier and Ms Rappo] if the court ruled in their favour, thereby rendering it unnecessary for the court to rule on the issue of *lis alibi pendens*" (see the Judgment at [73]). The Judge incorporated this undertaking into her order as a condition for her dismissal of the stay applications. It was phrased as a requirement that the Respondents (as well as Ekaterina) "discontinue their civil proceedings in Monaco" (see the Judgment at [117(c)]).

52 The Appellants argue that the Respondents have neither kept their word nor complied with the condition imposed by the Judge, and that a stay should accordingly be granted. They seek to admit further evidence to buttress their submissions in this regard. The most significant of this proposed new material consists of letters sent by Ms Géraldine Gazo, Monegasque counsel for the Respondents and Ekaterina, to Mr Raymond, the current Investigating Judge, in May and August 2016. In these letters, Ms Gazo sought updates from Mr Raymond on the Respondents' earlier requests to him to seek mutual assistance from the authorities in the US, Switzerland and Hong Kong in relation to matters such as the investigations into the da Vinci painting, the freezing of assets owned by Mr Bouvier and the retrieval of Mr Bouvier's bank statements. Ms Gazo also requested confirmation from Mr Raymond

regarding the Respondents' and Ekaterina's status as civil parties in the Monegasque proceedings. Mr Raymond provided the confirmation sought and informed Ms Gazo that as their counsel, it was "perfectly permissible for [her] to contribute to the establishment of the truth in the investigation being conducted against [Mr Bouvier and Ms Rappo]". The Appellants argue that this material shows that the Respondents have resiled from the undertaking given to the Judge and demonstrates their intent to continue participating in both the Monegasque and the Singapore proceedings.

53 In rebuttal, the Respondents likewise refer to letters sent by Ms Gazo to Mr Raymond. The two letters which the Respondents rely on form part of the Record of Appeal and therefore are already in evidence before us. The first is a letter dated 31 March 2016, in which Ms Gazo informed Mr Raymond of the Judge's decision to dismiss the Appellants' stay applications and provided confirmation to him that neither the Respondents nor Ekaterina had filed a civil suit or made any civil claims in Monaco. The second is a letter dated 15 April 2016, which states as follows:

> Further to my letter dated 31 March 2016, and purely for the avoidance of any doubt, Xitrans Finance Ltd, Accent Delight International Limited and Ms Ekaterina Rybolovleva hereby confirm that they will not proceed with and/or make and/or lodge any civil claim or petition for indemnification of financial losses suffered against Mr Yves Bouvier and Ms Tania Rappo in the captioned proceedings or in any other proceedings in Monaco.

54 Crucially, the Respondents also refer to certain remarks made by the Judge during the hearing on 4 May 2016 of the Appellants' applications for leave to appeal against the dismissal of their stay applications. In essence, the Judge expressed her view that Ms Gazo's letter of 31 March 2016 was insufficient to constitute compliance with the condition which she had imposed, but that Ms Gazo's letter of 15 April 2016 had the required effect.

The Judge further explained that her intention in imposing the condition was really to prevent the Respondents from obtaining damages in the Monegasque proceedings, and did not extend so far as to require the Respondents to withdraw altogether from those proceedings.

55 The Appellants disagree with the Judge's view that Ms Gazo's letter of 15 April 2016 satisfied the condition, and point to a letter dated 22 April 2016 from Mr Raymond to Ms Gazo informing her of his opinion that neither of the letters mentioned at [53] above satisfied the undertaking given by the Respondents to the Judge since, as a matter of Monegasque law, such an undertaking could only be effected by "discontinuance" under Art 79 of the Monegasque Code of Criminal Procedure.

56 In our judgment, it is difficult to accept the Appellants' contention that the condition imposed by the Judge meant something other than what the Judge herself thought it to mean. She explained during the leave to appeal hearing that her understanding of the Respondents' undertaking before her and the purpose behind her imposition of the condition were one and the same – that the Respondents would be barred from seeking damages in Monaco. On this footing, she reasoned that the Respondents had complied, in substance if not also in form, with the condition by giving the relevant confirmation to the Investigating Judge through Ms Gazo's letter of 15 April 2016 that they would not "lodge any civil claim or petition for indemnification of financial losses suffered against Mr Yves Bouvier and Ms Tania Rappo" in Monaco. Since the condition emanated from the Judge, it seems to us that she would be in the best position to decide whether the Respondents were in compliance with that condition. Indeed, we think she would be better placed than we are or, with respect, than the Monegasque Investigating Judge is to reach such a determination. She was evidently satisfied that the Respondents had complied

with the condition. In the circumstances, we fail to see how it can be said that the condition has not in fact been met.

57 We might well take the view that such a limited condition would not adequately address the concerns that led to its being imposed in the first place. In this regard, we note that one of the reasons why the concurrent pursuit of a *lis alibi pendens* is generally considered objectionable is that it is vexatious and oppressive for the defendant, who would then have to defend itself in two different jurisdictions, with the attendant duplication of costs, time and stress: see *Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd* [2013] 4 SLR 1097 ("*Virsagi*") at [42]; and *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2016) ("*Halsbury's*") at para 75.108. But, the questions of whether the Monegasque proceedings are *lis alibi pendens*, and whether the undertaking given by the Respondents and the condition imposed by the Judge are sufficient measures to ameliorate the potential hardship for Mr Bouvier and Ms Rappo are separate inquiries that are conceptually distinct from the question of whether the Respondents have failed to satisfy the condition imposed by the Judge. Our answers to those inquiries might conceivably result in our imposing a fresh condition were we to find such a measure necessary in the circumstances. However, we reiterate that even if we were to arrive at that conclusion, it would not mean that the Respondents have acted in breach of the more limited condition that the Judge evidently thought she *had* imposed. That is the only question which we consider at this juncture, and we answer it in the negative in the light of the Judge's view that Ms Gazo's letter of 15 April 2016 satisfied the condition entirely.

58 In the premises, we make no order on the Appellants' applications for leave to adduce further evidence. However, if we had found it necessary to do so, we would have been inclined to allow the applications. The evidence in

question was entirely within the knowledge of the Respondents, Mr Rybolovlev and his associates. Save for one exhibit in Summons No 96 of 2016, which Ms Rappo claims was only made available to her in April 2016 (that is, after the Judge's decision had been given on 17 March 2016), all the remaining evidence that is sought to be admitted arose from events following the Judge's decision. In the circumstances, we fail to see how the Respondents would or could have been prejudiced had we admitted the evidence, in the event we thought it relevant.

Whether the Appellants can rely on the doctrines of forum election and *forum non conveniens* cumulatively

59 The Respondents take the position that the Monegasque proceedings are not *lis alibi pendens*, and that Singapore cannot be considered a less appropriate forum than Switzerland and/or Monaco for the determination of the substantive dispute between the parties. But, as a preliminary matter, they argue that it is not open to the Appellants to rely on the doctrines of forum election and *forum non conveniens* cumulatively. In support of this argument, the Respondents cite our decisions in *Yusen Air & Sea Service (S) Pte Ltd v KLM Royal Dutch Airlines* [1999] 2 SLR(R) 955 ("*Yusen*") and *Virsagi*.

60 According to the Respondents, the doctrines of forum election and *forum non conveniens* offer "alternative" and not "cumulative" remedies. They afford a defendant two different ways of achieving the same objective of ensuring that it is not sued in two or more jurisdictions on the same matter. A defendant can take the "passive" approach of compelling the plaintiff to elect whether to pursue the proceedings in Singapore or those in the foreign jurisdiction. Alternatively, it can take a more "pro-active" stance by doing one of two things. If it desires that the matter be heard abroad, it can apply for a stay of the proceedings in Singapore on the ground that Singapore is *forum*

non conveniens. If, on the other hand, it wishes the matter to be decided in Singapore, it can seek an anti-suit injunction to restrain the plaintiff from prosecuting the foreign suit. What the defendant cannot do – according to the Respondents – is to rely on the doctrines of forum election and *forum non conveniens* cumulatively as they are *alternative* remedies that are available to the defendant depending on whether it wishes to take a "passive" or a "pro-active" stance.

61 The Respondents further suggest that allowing the Appellants to rely on these doctrines cumulatively would lead to "anomalous situations". By way of an example, they submit that assuming there are ongoing parallel proceedings in Singapore and England, the defendant could first compel the plaintiff to make an election between the actions in Singapore and in England. If the plaintiff elects to pursue the Singapore action and terminate the English proceedings, the defendant might then argue in the Singapore court that England, rather than Singapore, is the appropriate forum, in which case, the plaintiff would be placed in a difficult situation as it would already have put an end to the English action. Such an approach, so the Respondents argue, would be "unjust and would allow a defendant to 'trick' the other side".

62 We do not think the cases cited by the Respondents lend any support to their argument so long as the scenario before the court is not one where the defendant, having made a representation, seeks to resile from that representation after the plaintiff has relied on it. Leaving this sort of exceptional case to one side, it appears to us that *Virsagi* is clear authority to the contrary for the Respondents' contention in this regard.

63 In *Virsagi*, Andrew Phang Boon Leong JA explained (at [32]) that when a court directs a plaintiff to elect between forums, the court is "*not*

deciding on the appropriateness of the court" [emphasis in original], but is instead "merely managing its own process". The reason why a plaintiff should be compelled to elect between forums is to prevent the risk of conflicting findings by different courts and to thwart the plaintiff's abuse of judicial systems here and abroad. In contrast, when a court applies the doctrine of *forum non conveniens*, it is deciding the appropriateness of exercising its jurisdiction over the dispute. Phang JA further observed (at [33]) that in *Yusen*, M Karthigesu JA was "at pains to point out that the doctrine of *forum non conveniens* is not superseded by the doctrine of forum election in common plaintiff cases [that is, cases where the same plaintiff has commenced proceedings both in Singapore and abroad]". Phang JA then held as follows:

> 34 Indeed, it seems to us that *the doctrine of forum election in common plaintiff situations of* lis alibi pendens *and the doctrine of* forum non conveniens *do not overlap in any way on a conceptual level.* The two principles can – and do – operate alongside each other, although, practically speaking, it is perhaps inevitable that the two doctrines will interface with one another given that they both concern questions of jurisdiction in private international law. To that end, we highlight certain scenarios of such interaction between these doctrines.
>
> 35 When the plaintiff is put to an election, and he then elects to continue his claim in Singapore, the court will enjoin the plaintiff to stop all other foreign proceedings by way of an injunction. At this juncture, the defendant may be happy for the dispute to be heard in Singapore, and nothing more needs to be done. However, *where the defendant does not want proceedings to continue in Singapore, it is open to it to rely on the doctrine of* forum non conveniens *to argue that the overseas forum is clearly or distinctly the more appropriate forum for the dispute to be heard, and therefore to have the Singapore proceedings stayed.* This is clear from the observations of Karthigesu JA in *Yusen* … (see above at [33]).
>
> 36 On the other hand, if the plaintiff elects to pursue its claim in the overseas forum (instead of in Singapore) but the defendant wants the proceedings to continue in Singapore, the latter *may seek an anti-suit injunction from the Singapore courts to prevent the plaintiff from carrying on with the foreign*

> *proceedings. The plaintiff's election does not,* ipso facto*, preclude the granting of such an injunction. …*
>
> 37 It should therefore be clear that *the doctrine of forum election, as a mechanism of case management, is never finally dispositive of where the dispute will be heard unless the defendant has no objections to the plaintiff's election.*
>
> [emphasis in original omitted; emphasis added in italics]

64 Accordingly, it is open to the defendant, *after* the plaintiff has been put to an election and decides to proceed only in Singapore, to submit that the action in Singapore should be stayed on the basis that the overseas forum is clearly or distinctly the more appropriate forum. Conversely, if the plaintiff chooses, after having been put to an election, to proceed abroad, it is permissible for the defendant to apply for an anti-suit injunction to restrain the plaintiff from pursuing the foreign action – on the basis, for instance, that Singapore is the natural forum and that the plaintiff's pursuit of the foreign proceedings would be vexatious or oppressive (following the approach in *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 2 SLR(R) 148 at [18]–[19]).

65 There is no issue of unfairness to the plaintiff in either of these scenarios because the doctrines of forum election and *forum non conveniens* have different conceptual bases. A plaintiff who has commenced parallel proceedings in respect of the same dispute is put to an election because it is oppressive for the defendant to have to defend itself in two different jurisdictions, and also because there is a real risk of inconsistent findings by the courts in each of those jurisdictions. A court that stays proceedings before it on the basis that the jurisdiction is *forum non conveniens* does so because the case may be tried more suitably in the interests of all the parties and the ends of justice in another more appropriate forum (see *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR(R) 345 ("*Brinkerhoff*") at [35(a)]). Just as a plaintiff is not entitled to try its luck in

two different fora, so it is not entitled to proceed in a forum that is less well-suited for the determination of the dispute.

66 We take this opportunity, however, to make an observation about the *order* in which a court ought sensibly to decide cumulative jurisdictional objections based on the doctrines of forum election and *forum non conveniens*, such as those advanced by the Appellants. In our judgment, *Virsagi* should not be understood as authority that a court ought, in all cases, to put the plaintiff to forum election *before* deciding whether Singapore is *forum non conveniens*. The court in *Virsagi* simply made the point (at [35]–[36], as quoted at [63] above) that a defendant is entitled to argue, even after the plaintiff has elected to proceed either in Singapore or elsewhere, that it should be granted a stay on *forum non conveniens* grounds or an anti-suit injunction, as the case may be. Nothing in *Virsagi* pronounces on the *sequence* in which a court ought to decide cumulative arguments advanced before it that: (a) the plaintiff should be put to forum election; and (b) if the plaintiff decides to proceed in Singapore, any proceedings here should be stayed in favour of a foreign forum.

67 However, we think it would be prudent, as a matter of general practice, for a court in such a situation to first decide whether Singapore is *forum non conveniens*. If it considers that Singapore is not the appropriate forum, it should order a stay and that would be the end of the matter; there would be no need in such circumstances to embark on a further inquiry as to whether the foreign proceedings are *lis alibi pendens*. It is only if the court finds that the alternative forum is not clearly or distinctly more appropriate than Singapore for the determination of the dispute that it would then have to put the plaintiff to an election between forums. This approach would not only be resource-saving, but also more consonant with logic and principle in that there is simply

no need to put the plaintiff to an election if Singapore turns out not to be an appropriate forum for the hearing of the matter in the first place. Accordingly, this is the approach which we adopt in the present appeals.

Whether Switzerland and/or Monaco are more appropriate fora than Singapore for the determination of the dispute

68 We turn now to the first of the Appellants' two main grounds for seeking a stay. This centres on the question of whether, as the Appellants argue, Singapore is *forum non conveniens*, such that the proceedings here should be stayed. The answer to this turns on the application of the principles laid out in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"), which were approved and applied by this court in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*"). There are two stages to the *Spiliada* test. As described in *Rickshaw Investments* at [14], the court will first determine whether, *prima facie*, there is some other available forum that is more appropriate for the case to be tried. If the court concludes that there is *prima facie* a more appropriate alternative forum, the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nonetheless not be granted.

Appropriate and available alternative fora

69 In the present appeals, at the first stage of the *Spiliada* analysis, the legal burden lies on the Appellants to demonstrate that Switzerland and/or Monaco are "clearly or distinctly more appropriate" fora than Singapore for the trial of the substantive dispute between the parties (see *Spiliada* at 477). Whether this is indeed the case turns on a consideration of the factors that connect the dispute with the competing jurisdictions.

70 We think it is appropriate here to emphasise that it is the *quality* of the connecting factors that is crucial in this analysis, rather than the quantity of factors on each side of the scale. Parties in modern commercial litigation are often well connected, with relational and business ties to many different jurisdictions. The task of the court in this context is not to draw up a balance sheet of tenuous or insubstantial points of contact with different fora in the expectation that the jurisdiction with the largest number on its side prevails at the close of the analysis. Rather, the search is for those incidences (or connections) that have the *most relevant and substantial associations* with the dispute.

71 We identified five such incidences in *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*") at [42] (citing with approval *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2009) at paras 75.091–75.095): first, the personal connections of the parties and the witnesses; second, the connections to relevant events and transactions; third, the applicable law to the dispute; fourth, the existence of proceedings elsewhere (that is, *lis alibi pendens*); and fifth, the "shape of the litigation", which is shorthand for the manner in which the claim and the defence have been pleaded. While this provides a useful list of potentially relevant indicators for the court's consideration, we think that a mechanistic application of this framework will be of little utility and may in fact be misleading in certain cases. For instance, in disputes involving well-heeled parties who have a high degree of mobility, such as the present dispute, the current domicile of the parties may be of little legal significance, depending on the circumstances of the case. The court should always be astute to determine those incidences that are likely to be material to the fair determination of the

dispute, and to ascribe greater weight to those incidences over others, as the case may require.

72 Ultimately, the lodestar for a court tasked with identifying the natural forum is whether any of the connections point towards a jurisdiction in which the case may be "tried more suitably for the interests of all the parties and for the ends of justice", to use the words of Lord Goff of Chieveley in *Spiliada* at 476. This lies at the heart of the *forum non conveniens* analysis, and we can do no better than to reiterate the elegant summation of principle by Lord Sumner in *La Société du Gaz de Paris v La Société Anonyme de Navigation "Les Armateurs Français"* (1926) Sess Cas (HL) 13 at 22:

> … [O]ne cannot think of convenience apart from the convenience of the pursuer or the defender or the court, and the convenience of all these three, as the cases show, is of little, if any, importance. If you read it as 'more convenient, that is to say, preferable, for securing the ends of justice,' I think the true meaning of the doctrine is arrived at. *The object, under the words 'forum non conveniens' is to find that forum which is the more suitable for the ends of justice, and is preferable because pursuit of the litigation in that forum is more likely to secure those ends*. [emphasis added]

73 We now apply this approach to the facts before us.

Connecting factors

(1) The governing law

74 In our judgment, the most significant connecting factor in the present appeals is the governing law of the relationship between Mr Bouvier and the Respondents, which are in substance controlled by Mr Rybolovlev. The governing law is significant in this case not only because it is a relevant consideration as stated in *JIO Minerals*, but also because it arises explicitly as an incident of this case (due to the choice of law clauses that were included in

the four written agreements mentioned at [18] above, as we will explain below); and it will also be determinative of the Respondents' objection, at the second stage of the *Spiliada* analysis, that a stay of the Singapore proceedings will cause them to suffer substantial injustice because the Swiss courts will not offer them the equitable remedies of constructive trusts and tracing under Swiss law. For these reasons, we have taken the view that the applicable law to the dispute is the central consideration in this case.

75 As we have mentioned, the substantive dispute between the parties centres on the precise nature of the relationship between Mr Bouvier and the Respondents, through which Mr Rybolovlev acted. The critical issue is whether Mr Bouvier was engaged as an agent of the Respondents/Mr Rybolovlev, or whether he was an independent seller of artworks to them, with the parties dealing with one another as principals. The success or failure of the Respondents' claim that Mr Bouvier breached fiduciary duties owed to them as their agent essentially hinges on the answer to this question. Equally, the Respondents' claims against MEI Invest and Ms Rappo for dishonest assistance and/or knowing receipt in relation to Mr Bouvier's breach of fiduciary duties will fall away if this question is answered in Mr Bouvier's favour.

76 In *Rickshaw Investments*, we agreed (at [80]) with the view of Prof Yeo Tiong Min in *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004) that in determining the applicable law to claims in equity, it is important to ascertain the foundational sources from which the relevant equitable rights and remedies arise. These would include, amongst others, established categories of law such as contract and tort. While we decided that we would not go so far as to endorse the proposition that equitable concepts and doctrines would always be dependent on other

established categories of law, we accepted a more limited proposition which we stated as follows (at [81]):

> … [W]here equitable duties (here, in relation to both breach of fiduciary duty and breach of confidence) arise from a factual matrix where the legal foundation is premised on an independent established category such as contract or tort, the appropriate principle in so far as the choice of law is concerned ought to be centred on the established category concerned. …

77 In the present case, there is no dispute that the duties which Mr Bouvier owed to the Respondents, whatever they might be, arose out of the relationship between Mr Bouvier and Mr Rybolovlev, who (as we mentioned earlier) controlled and acted through the Respondents at the material time. That relationship originated in the understanding reached between Mr Bouvier and Mr Rybolovlev when they were formally introduced to each other in Geneva sometime in 2002 or 2003 (see [13] above). That was when they orally agreed that Mr Bouvier would assist Mr Rybolovlev to procure a collection of valuable artworks. We therefore consider that the "legal foundation" (to use the words we used in *Rickshaw Investments*) of the Respondents' present claim for breach of fiduciary duties is essentially *contractual*.

78 At the time of the aforesaid oral agreement between Mr Rybolovlev and Mr Bouvier, both men were based in Switzerland. Following that conversation, Mr Bouvier first met Mr Rybolovlev's agent, Mr Sazonov, also in Switzerland in 2003 (see [14] above). We have explained that Mr Sazonov then became the primary representative of the Respondents and Mr Rybolovlev in their dealings with Mr Bouvier and MEI Invest owing to the language barrier between Mr Rybolovlev and Mr Bouvier. Crucially, what followed shortly after the oral agreement between Mr Rybolovlev and

Mr Bouvier was the execution of four written agreements that governed the Respondents' purchase of specific artworks. Those written agreements were entered into by Xitrans as the purchaser in each of the agreements, and by various companies in which Mr Bouvier was a shareholder or which he otherwise controlled as the sellers (see [18] above). Indeed, one of the sellers was MEI Invest itself. Each agreement contained an express choice of Swiss law and also provided for the exclusive jurisdiction of the Swiss courts.

79 After the initial four purchases, the parties simply transacted on the basis of invoices (see [19] above). There were no more written agreements even though the transactions continued over the next decade and more. During the hearing before us, Mr Davinder Singh SC submitted on behalf of the Respondents that each transaction was a separate one. However, he accepted that the terms of the transactions were not spelt out each time; instead, the parties transacted on the basis of the course of dealing that had been established between them. In our judgment, seen in context, it seems likely that this course of dealing was on the same basis as that reflected in the four written agreements. There was certainly nothing to suggest that when the parties switched to transacting on the basis of the invoices, they consciously decided to change the basis of their dealings. Mr Edwin Tong SC, on behalf of Mr Bouvier and MEI Invest, further argued that the relationship between Mr Bouvier and Mr Rybolovlev at the time they entered into their oral agreement had no, or virtually no, connection to Singapore. There is also no reason to think that some law other than Swiss law applied to the relationship during that period. According to the Appellants, the invoices were effectively meant to be a simplified version of the four written agreements, and the parties intended to deal with each other on the same or similar terms as those set out in the written agreements – including applying Swiss law to their dealings.

80 In our judgment, for the purposes of determining the governing law of the parties' relationship, the relevant course of dealing is that which began *at the outset of the dealings between Mr Bouvier and Mr Rybolovlev/the Respondents*. That was when Mr Rybolovlev and, subsequently, the Respondents entered into the oral and written agreements mentioned at [77]–[78] above. The parties later entered into yet further transactions on the basis of invoices only. We pause to note the established approach to determining the governing law of a contract, as explained in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [82] (citing *Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] 2 SLR(R) 285). First, the court will examine the contract itself to determine whether it states expressly what the governing law is. In the absence of an express statement, the court considers whether the intention of the parties as to the governing law can be inferred from the circumstances. If that cannot be done, the court then identifies the system of law with which the contract has its closest and most real connection: in essence, this is an objective analysis undertaken from the perspective of a reasonable person in the position of the parties at the time of the contract.

81 Adopting this approach, we are satisfied that the course of dealing that Mr Singh referred to points to Swiss law as the law governing the parties' relationship. Express provision was made for Swiss law (as well as exclusive Swiss jurisdiction) in the written agreements governing the first four contracts. The Respondents argue that these four written agreements are irrelevant for the purposes of determining the governing law of their claims because their claims concern Mr Bouvier's breaches of fiduciary duties as their agent and are not founded on any alleged breaches of these agreements. We find this argument implausible because, as we have already observed, the question of

whether there was in fact an agency arrangement between Mr Bouvier and the Respondents is likely to turn on the nature of the understanding between Mr Bouvier and Mr Rybolovlev (who controlled and acted through the Respondents) at the time the four written agreements were entered into. It is not clear to us how these written agreements and the contracts they reflect can be separated from the alleged agency arrangement. Either Mr Bouvier was acting as Mr Rybolovlev's/the Respondents' agent when he procured the artworks in question, or he was acting as a principal in his own right. That question will depend, at the outset of the relationship between Mr Bouvier and Mr Rybolovlev/the Respondents, at least in part on the four written agreements, even though the Respondents contend that there was also a separate oral understanding as to the true nature of that relationship. And even if we accept that there is no express choice of law provision in the alleged agency agreement between Mr Bouvier and the Respondents, we think it highly unlikely that the parties would have intended Swiss law to govern the four written agreements and some other law to govern the alleged agency agreement. There is simply no evidence to support the Respondents' suggestion that the parties intended two different sets of laws to apply to the written agreements on the one hand and the alleged agency agreement on the other, nor can we conceive of any reason why the parties might have desired this. Certainly, the Respondents have not proposed any reason for such a divergence. The most plausible inference, in our view, is that the parties intended that the governing law in respect of their relationship as a whole should be one and the same, and, as we have observed, the express choice of law clauses in the four written agreements point inexorably to Swiss law as the governing law.

82 Even if we are wrong on this and the governing law of the contract between the parties falls to be considered under the third stage of the *Pacific Recreation* analysis (namely, the ascertainment of the system of law with which the contract has its closest and most real connection), we again think that this would point to Swiss law as the governing law. At the time the oral agreement between Mr Bouvier and Mr Rybolovlev was entered into, both men resided in Geneva. The place of contract formation, where Mr Rybolovlev and Mr Bouvier orally agreed on the arrangements between them, was also Geneva. The Respondents – companies controlled by Mr Rybolovlev – and various companies controlled by Mr Bouvier, including MEI Invest, then entered into written contracts expressly governed by Swiss law with exclusive jurisdiction clauses in favour of the Swiss courts. The vast majority of the invoices issued required payment to be made into Swiss bank accounts (see [19] above). In our view, the tenor, form and substance of the parties' dealings were intimately tied up with Switzerland and Swiss law. Indeed, we see no substantial connections between those dealings and any other jurisdiction, be it Singapore or otherwise.

83 Mr Singh, however, had one more arrow in his quiver. He contended that sometime in 2008 or 2009, the parties intended to and did change material aspects of their relationship. As he put it, Mr Rybolovlev shifted the "centre of gravity" of his endeavour to build his art collection to Singapore. At about that time, Mr Bouvier too moved to Singapore. We have described the relevant facts at [20]–[22] above.

84 We accept that there were important changes in the practices of the parties towards the end of 2008, when Mr Rybolovlev took steps to immunise or protect his assets from potential third-party claims (see [22] above). It is undisputed, and we therefore also accept, that the motivation for the changes

on Mr Rybolovlev's part was because he wanted to shield his assets, including the artworks, from the Russian authorities, whom he feared might attempt to appropriate his assets, and also from Elena, with whom he was embroiled in divorce proceedings.

85 In our view, however, those events do not have the legal significance that Mr Singh contends. Those events were all concerned with the relationship between Mr Rybolovlev and *third parties*, and not between Mr Rybolovlev and *Mr Bouvier*. As we have explained, we accept that the purpose of the relocation of the assets, from Mr Rybolovlev's perspective, was to attempt to place those assets out of the reach of potential third-party claims by bringing them out of Switzerland. But the key question is whether the intention of Mr Rybolovlev to protect his assets from *third parties* leads properly to the conclusion that the *present parties* also therefore contemplated a change in the nature of their relationship, specifically that between Mr Rybolovlev and Mr Bouvier. We do not find that the latter proposition flows from the former, either as a matter of logic or on the evidence. There is no basis for the court to objectively conclude that owing to Mr Rybolovlev's particular reasons for wanting to protect his assets from third parties, the legal character of his dealings (via the Respondents) with Mr Bouvier were affected and came under the influence of a different body of law. Nor is there any suggestion of any separate and distinct agreements to this effect. Put another way, there was undoubtedly an intention on the part of the parties to change the *locus* of the artworks in question towards the end of 2008, but this does not entail the conclusion that the parties also intended to change the *governing law* of their relationship. In our judgment, the course of dealing that underlay all the transactions in question remained rooted in what had transpired in the years between sometime in 2002 or 2003 (when Mr Bouvier and Mr Rybolovlev

entered into their oral agreement) and late 2008. The Respondents have not persuaded us that anything that occurred thereafter operated to change this.

86 The other factors that Mr Singh relied on in his submissions are also insufficient, either on their own or when taken together, to establish that the parties intended to change the governing law of their relationship. We do not think the fact that Mr Bouvier changed his domicile to Singapore is of any real significance; the same applies to the matters pertaining to his email address and the place of registration of his mobile phone. We note that the Judge herself questioned the materiality of the fact that Mr Bouvier maintained an email address with a Singapore domain and exchanged emails with Mr Sazonov therefrom, and that Mr Bouvier had a Singapore-registered mobile phone (see the Judgment at [90]). We agree. These are not connecting factors that constitute relevant and substantial associations with the parties' dispute, and they do not possess the requisite quality to be of legal significance in the *forum non conveniens* analysis. Mr Singh also pointed out during the hearing that apart from two invoices both dated 19 November 2010, the remaining invoices issued in respect of the artwork transactions did not state that the services in question were rendered *outside* Singapore, and urged us to draw the inference that those services must therefore have been rendered *within* Singapore. We do not think that the absence of express language that the services were rendered outside Singapore provides a sufficient basis for us to draw that inference.

87 Mr Singh further submitted that the core duty of Mr Bouvier was to negotiate, on behalf of the Respondents, the lowest possible purchase price and the most favourable payment terms for the artworks, and that this duty was performed by Mr Bouvier substantially in Singapore because this was not denied by Mr Bouvier in his evidence. We do not think there is force in this

submission. It rests on a premature conclusion on the nature of the relationship between Mr Bouvier and Mr Rybolovlev/the Respondents. It assumes that Mr Bouvier was engaged by Mr Rybolovlev/the Respondents to negotiate the prices of the artworks for them *as their agent*, and was not (as the Appellants argue) an independent seller of the artworks. On Mr Bouvier's case, he was never engaged to negotiate on Mr Rybolovlev's/the Respondents' behalf; this was simply not something that he had contracted to do. It is therefore unsurprising and, ultimately, not probative that he did not specifically rebut this in his evidence.

88 To conclude, we find that there is nothing in the evidence on the events that occurred from late 2008 onwards that would displace or alter the nature of the parties' relationship as it was constituted sometime in 2002 or 2003, when Mr Bouvier and Mr Rybolovlev entered into their oral agreement. Switzerland is the jurisdiction that has the closest connection to the parties' relationship, and therefore, it is likely that that relationship is governed by Swiss law.

(2) The witnesses' personal connections

89 We have explained our view (at [74] above) that in the present appeals, the governing law of the parties' relationship is the weightiest and most compelling factor in the analysis of whether it is more appropriate for the parties' dispute to be heard in a jurisdiction other than Singapore. We will, however, briefly comment on the personal connections of the witnesses to the dispute, which, in our view, similarly point towards Switzerland as the forum with the closest and most real connection with the dispute.

90 First, we note that Mr Sazonov is a Swiss national who resided in Geneva at the material time and continues to reside there. It is indisputable

that Mr Sazonov will be a key witness at the trial, given that he was the primary representative of the Respondents and Mr Rybolovlev in their dealings with Mr Bouvier and MEI Invest. Second, according to Mr Bouvier, Elena, who is believed to reside in Switzerland, "should be able to give evidence on the content of the discussions between Mr Rybolovlev, Mr Sazonov and [Mr Bouvier himself]". In this regard, we note that Mr Rybolovlev himself has given evidence that Elena acted as a translator for some of the artwork transactions, and also assisted in dealing with intermediaries and vendors of artworks that he considered purchasing. It was also Mr Rybolovlev's practice after June 2005 to communicate his purchasing decisions either to Elena, who would then convey the decision to the vendor or the vendor's agent, or to Mr Sazonov, who would make the necessary arrangements. Third, Ms Bersheda, the Respondents' Swiss counsel and a partner at a Swiss law firm, will (in Mr Bouvier's submission) likewise be able to testify on the content of the discussions between him, Mr Rybolovlev, Mr Sazonov and Ms Bersheda herself as she was present at some of the meetings between the parties in Geneva. In this regard, we note that the Judge expressed the view (at [98] of the Judgment) that apart from Mr Sazonov, there would be no need for any of the staff employed in Geneva by the Respondents, Mr Rybolovlev or Mr Bouvier to be called as witnesses at the trial. With respect, we consider that this view is premature and is, in any event, much too broadly stated. In the context of a stay application where the dispute concerns events spanning more than a decade and will likely require careful factual investigation, we do not think it is appropriate to form a view, based purely on the affidavit evidence in the stay application, that the evidence of a given witness is likely to be irrelevant, particularly when one of the parties has taken a firm position that that witness was present at and participated in key events.

91 Taking a step back, we also consider it telling that *none* of the witnesses mentioned in the preceding paragraph have any relevant connections to Singapore at all. It reflects just how far removed the parties, the witnesses and the critical events in the present case are from this jurisdiction.

The availability of Switzerland as an alternative forum

(1) The Swiss Federal Act on Private International Law

92 Another tenet of the Respondents' case as to why the proceedings in Singapore should not be stayed is that the Swiss courts are not an available forum because under the Swiss Federal Act on Private International Law ("the PILA"), they do not have jurisdiction over the parties' dispute. A series of opinions on this point were exchanged between the parties' Swiss law experts, Mr Marc Abby Joory for the Respondents and Prof Corinne Widmer Lüchinger for Mr Bouvier and MEI Invest.

93 In essence, the disagreement between the experts boils down to the proper understanding of Arts 5(3) and 6 of the PILA. Article 6 of the PILA reads:

> In matters involving an economic interest, a court shall have jurisdiction if the defendant proceeds on the merits without reservation, unless such court denies jurisdiction to the extent permitted by Article 5, paragraph 3.

Article 5(3) states as follows:

> 3. The chosen court may not deny jurisdiction:
>
> (a) if a party is domiciled or has its habitual residence or a place of business in the canton where the chosen court sits; or
>
> (b) if, pursuant to [the PILA], Swiss law is applicable to the dispute.

94 In this regard, the Appellants refer to written undertakings that they furnished to the Respondents on, respectively, 3 July 2015 (on the part of Mr Bouvier and MEI Invest) and 27 August 2015 (on the part of Ms Rappo). In summary, these written undertakings state that the Appellants recognise and accept the jurisdiction of the civil courts of Geneva, Switzerland, in respect of any dispute in connection with the sale of artworks to Xitrans and/or any related transactions. Prof Lüchinger's opinion is that if the Appellants accept the jurisdiction of the Swiss courts, this will confer jurisdiction under Art 6 of the PILA. Given her view that Swiss law governs the Respondents' claims, she opines that the Swiss courts will not be able to deny jurisdiction (assuming they might otherwise be minded to do so) by reason of Art 5(3)(b) of the PILA.

95 Mr Joory, on the other hand, advances a different understanding of the relevant provisions of the PILA. According to him, Art 6 "should be considered an exception to a Swiss court's lack of jurisdiction", and applies "only when the plaintiff has filed its claim with an incompetent Court, which would in principle deny its competence but accept the case based on the defendant's lack of reservation on the question of jurisdiction". As we understand it, Mr Joory's view is that because the Respondents (the plaintiffs in Suit 236/2015) have filed their claims in Singapore rather than Switzerland, "there is no mutual intent to choose Switzerland as a forum". He also suggests that Arts 5(3)(a) and 5(3)(b) should be read conjunctively rather than disjunctively, *ie*, a Swiss court may deny jurisdiction except where a party is domiciled or has its habitual residence or place of business in the canton where the chosen court sits, *and* Swiss law applies to the dispute.

96 We respectfully disagree with Mr Joory's reading of Arts 5(3) and 6. As Prof Lüchinger points out, Mr Joory's understanding of Art 6 as an

exception to a Swiss court's lack of jurisdiction is simply not supported by the language of that provision. Article 6 confers jurisdiction on a Swiss court *at first instance*. It is not phrased in the language of an exception that would only apply in circumstances where a Swiss court would otherwise lack jurisdiction. We also agree with Prof Lüchinger that Mr Joory's reading of Arts 5(3)(a) and 5(3)(b) as imposing conjunctive rather than disjunctive conditions does not square with the language of these provisions, which expressly state that a Swiss court cannot deny jurisdiction if either Art 5(3)(a) "or" Art 5(3)(b) applies. In the circumstances, we reject the Respondents' submission that under the PILA, the Swiss courts will not have jurisdiction over the parties' dispute. On the contrary, we are satisfied that the written undertakings provided by each of the Appellants will provide the Swiss courts with a firm footing on which to assume jurisdiction. We are also of the view that the language of the undertakings is broad enough to encompass the claims that the Respondents wish to bring against the Appellants.

(2) Further undertakings given by the Appellants

97 During the hearing of these appeals, in response to a suggestion by Mr Singh that the written undertakings proffered by the Appellants were not wide enough and that further challenges to the jurisdiction of the Swiss courts could be expected, Mr Tong, on behalf of Mr Bouvier and MEI Invest, and Mr Kenneth Michael Tan SC, on behalf of Ms Rappo, clarified and confirmed *to us* that the Appellants' written undertakings were intended to be expressed in the "widest possible sense", and, specifically, that the Appellants would submit to the Swiss courts' determination on the merits of any claims that the Respondents might bring against them in Switzerland in respect of the matters set out in Suit 236/2015. In response to these further clarifications or undertakings, Mr Singh referred us to footnote 145 to para 12-032 (on p 554)

of *Dicey, Morris & Collins on The Conflict of Laws* vol 1 (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 15th Ed, 2012) ("*Dicey*"), but without fleshing out his argument.

98 The relevant portion of para 12-032 of *Dicey* explains that a foreign court will be considered to be "available" to a plaintiff even if this comes about only as a result of the defendant's voluntary submission to the jurisdiction of the foreign court. It follows from this that "an undertaking by the defendant to submit to the jurisdiction of a foreign court can make the foreign court available even though it would not have been so without his undertaking". The footnote that Mr Singh referred to is appended to the end of the statement just quoted, and the relevant portion reads, "By contrast, if the undertaking to submit is given only during the appeal, it will be irrelevant and disregarded, as the appeal lies against the order of the judge at the time he made it: *Sharab v Al-Saud* [2009] EWCA Civ 353, [2009] 2 Lloyd's Rep. 160 [("*Sharab*")]". Although Mr Singh did not develop his argument, we will nevertheless consider what import, if any, *Sharab* has for our decision.

99 In *Sharab*, the plaintiff commenced an action in the English courts against a Saudi Arabian prince for commission that the latter allegedly owed to her for her services in negotiating the sale of certain aircraft to President Gaddafi of Libya. The plaintiff sought permission from a deputy judge to serve process on the prince outside the jurisdiction. The prince resisted the application on the basis that the matter should be heard in Libya, but did not indicate to the deputy judge that he would voluntarily submit to the jurisdiction of the Libyan courts in the event that the plaintiff brought her claim there (see *Sharab* at [24(ii)]). The deputy judge granted the plaintiff's application, and the prince then appealed. At the conclusion of the hearing of the appeal, it remained the case that no undertaking to submit to Libyan

jurisdiction had been given by the prince. It was only after the hearing that the prince's counsel informed the English Court of Appeal that the prince wished to give an undertaking to the court that he would submit to the jurisdiction of the Libyan courts (see *Sharab* at [45]). The English Court of Appeal unanimously held at [52] that it would not accept an undertaking given at such a late stage. It noted that the prince had had the "clearest of opportunities" to give such an undertaking to the deputy judge, but had made a "considered decision" not to do so – a position which he had adhered to until the close of the hearing of the appeal. The prince should not be permitted "to reverse, so late in the day, a tactical position deliberately adopted for the purposes of the proceedings below and the appeal". If the court were to accept the undertaking proffered by the prince at that stage of the proceedings, it would produce a situation materially different from that considered by the deputy judge and would alter the character of the case sufficiently so as to make it necessary for fresh arguments to be made at a further hearing. The English Court of Appeal therefore rejected the undertaking and also dismissed the appeal.

100 If Mr Singh's argument is that *Sharab* stands for the proposition that an undertaking by a defendant to submit to the jurisdiction of a foreign court cannot be given on appeal, we disagree. Indeed, in so far as footnote 145 to para 12-032 of *Dicey* suggests that *Sharab* is authority for such a proposition, we reject it. We note that the English Court of Appeal in *Sharab* expressly considered (at [52(iii)]) that it had the discretion to decide whether to receive fresh evidence or to permit a party to rely on a matter not contained in the notice of appeal, and found that "the discretion should apply to the acceptance of an undertaking in much the same way as to the admission of fresh evidence properly so called". On the facts of the case, it decided that it was inappropriate to accept the prince's belated undertaking given the lateness of

the manoeuvre. *Sharab* therefore simply does not support such a broad proposition of law. We also find, in any case, that the circumstances in *Sharab* are significantly different from those in the present case, where the Appellants have consistently maintained since July 2015 – even before the hearing of their stay applications by the Judge – that they will submit to the jurisdiction of the Swiss courts. This should be juxtaposed with the abrupt about-face of the prince in *Sharab*. The further undertakings that Mr Tong and Mr Tan provided to this court on behalf of the Appellants are, in our view, completely consistent with and, indeed, merely a reaffirmation of the Appellants' earlier written undertakings to the Respondents. We therefore reject Mr Singh's reliance on *Sharab*.

101 Mr Singh also expressed the concern that if, for some reason, the Swiss courts decided not to assume jurisdiction were the proceedings in Singapore to be stayed, the Respondents would effectively be shut out from seeking any remedies for the wrongs which they have allegedly suffered. We do not agree. We have explained our view that the Swiss courts would have jurisdiction under the PILA, given the undertakings from the Appellants to submit to adjudication there. Apart from this, we also explained to the parties at the hearing that if the Swiss courts were to decide, upon a commencement of an action by the Respondents there, that they do not have jurisdiction, it will be open to the Respondents to return to the Singapore courts to seek an order lifting the stay so that they might continue to pursue their action here. After all, as noted at [68] above, at the first stage of the *Spiliada* framework, the court is engaged in only a *prima facie* determination of whether there is some other available forum that is more appropriate for the trial of the case. Since a court which grants a stay remains seised of the proceedings and may in principle lift the stay at a later date (see our recent *ex tempore* judgment in

Rotary Engineering Ltd and others v Kioumji & Eslim Law Firm and another and another appeal and other matters [2017] SGCA 24 (at [24]), if the premise on which it decides to grant a stay should turn out to be mistaken or unduly optimistic, we see no reason why the stay cannot, in such "exceptional circumstances which strike at the very basis on which the stay was granted", be revisited (at [25]).

102 We hasten to add that the Swiss courts should be given an opportunity to make a full and final determination that they indeed do not have jurisdiction over the parties' dispute before the Respondents can again seek to trigger the exercise of the Singapore courts' jurisdiction. In addition, any such application by the Respondents would, as a matter of fairness, be subject to any arguments made by the Appellants at a further hearing, including an argument that some other forum is more appropriate than Singapore for the determination of the parties' dispute.

103 In our judgment, there is accordingly no real or effective threat to the Respondents' ability to obtain the due remedies for the wrongs which they allege they have suffered.

Monaco as an alternative forum

104 In the light of our decision that Switzerland is clearly or distinctly a more appropriate forum than Singapore for the determination of the parties' dispute and that the proceedings here should be stayed on that basis, we do not consider it necessary to decide whether Monaco is also an available and alternative forum. We will only make two brief points on the matter.

105 First, inasmuch as the Respondents have initiated criminal proceedings in Monaco and remain joined in those proceedings as civil parties, it does not

seem to us to be open to the Respondents to say that Monaco is not an appropriate alternative forum. Indeed, as Mr Tan, on behalf of Ms Rappo, observed, the Monegasque proceedings are essentially concerned with the same central question as that in Suit 236/2015, which is the nature of the relationship and dealings between Mr Rybolovlev/the Respondents and Mr Bouvier.

106 Second, we think there is much merit in the Judge's opinion that the Respondents' claims against Mr Bouvier and MEI Invest on the one hand, and against Ms Rappo on the other should be heard together (see the Judgment at [109]). Given that the Respondents' claims against all the Appellants arise from the same factual matrix and involve a determination of the same central issues, it appears to us that there will be undesirable duplication of costs and resources, as well as a real risk of inconsistent findings were the claims against the Appellants to be heard separately in different jurisdictions.

Reasons of justice against a stay

107 Turning to the second stage of the test in *Spiliada*, the inquiry at this stage is whether there are "circumstances by reason of justice why [the court] should exercise its jurisdiction even if it is not the *prima facie* natural forum" (see *Halsbury's* at para 75.096). The Respondents' key contention in this regard is that if the matter were heard in Switzerland, they would be deprived of "legitimate juridical advantages" because Swiss law does not provide the remedies of constructive trusts and tracing; any award would only sound in damages. Prof Lüchinger and Mr Joory agree that these remedies are not available in the Swiss courts.

108 We do not think that the Respondents, if they were allowed to proceed in Singapore, would enjoy any juridical advantage here which would be unavailable to them in Switzerland (or, for that matter, Monaco). Given our determination that Swiss law applies to the parties' dispute, the Respondents would not be able to obtain the remedies of constructive trusts and tracing even if the dispute were heard in Singapore and the Respondents succeeded in their claims here. Consequently, the Respondents' argument on this point is unfounded.

109 More fundamentally, we consider that the Respondents' argument – that a stay should be refused because they would otherwise be unable to obtain a particular type of remedy that is available here but not in a foreign court – is questionable in principle. The fact that a plaintiff would have a "legitimate juridical advantage" if it is allowed to proceed in Singapore is not a decisive factor (see *Brinkerhoff* at [35(f)]). Prof Yeo Tiong Min states in *Halsbury's* (at para 75.097) that "differences in procedure and remedies will generally be irrelevant, and not having the benefit of the procedures or remedies of the forum will not by itself amount to denial of substantial justice".

110 In our view, this is reflective of the general policy that a court must proceed cautiously before it pronounces that a litigant will experience a deprivation of substantial justice if it is left to seek recourse in an available and appropriate foreign forum. This is particularly so where the foreign forum operates a well-established and well-recognised system of justice. Indeed, it is well established that a court will be very slow to pass judgment on the quality of justice obtainable in a foreign court (see *Good Earth Agricultural Co Ltd v Novus International Pte Ltd* [2008] 2 SLR(R) 711 at [27]). In *Civil Jurisdiction and Judgments* (Informa Law, 6th Ed, 2015), Prof Adrian Briggs remarked (at para 4.31) that "[o]n the basis of the decision in *Spiliada*, the

broad question appears to be whether the foreign court would be able to try the dispute between the parties in a manner which is *procedurally and substantively fair*" [emphasis added]. We accept this as a correct statement of principle.

111 In *Spiliada* (at 482–483), Lord Goff provided examples of certain advantages that a plaintiff might derive from invoking English jurisdiction, and considered whether they provided proper grounds for a complaint by a plaintiff that injustice would be done were it compelled to proceed in an available appropriate forum that did not offer those advantages. Two of these examples were damages awarded on a higher scale, as well as the power of the English courts to award interest. Lord Goff took the view (at 483) that the English courts should not be deterred from granting a stay of proceedings simply because the plaintiff would be deprived of such advantages. It is true that Lord Goff was considering differences in the *quantum* of damages and not the *type* of remedies (although it is arguable that an award of interest goes beyond a matter of quantum), but the type of remedies that are likely to be available is, in the final analysis, a function of the law that governs the relevant relationship rather than a deficit in the relevant jurisdiction.

112 In the circumstances, we have no hesitation in rejecting the Respondents' submission that they will be deprived of substantial justice if they are left to seek recourse in the Swiss courts.

The relevance of the SICC in determining whether Singapore is forum non conveniens

113 One of the matters that received a considerable amount of attention in the parties' written submissions was whether the Judge took into account the possibility of a transfer of Suit 236/2015 to the SICC in determining whether

Singapore was *forum non conveniens*, and if so, whether she was correct as a matter of principle to take that possibility into account.

114 In summary, the Judge expressed the view (at [111] of the Judgment) that "the perceived advantages (to the [Appellants]) or disadvantages (to the [Respondents]) of Switzerland being the forum will be levelled out if this Suit remains in Singapore but is transferred to the SICC". After setting out the parties' respective positions on the issue, the Judge explained (at [116]) that she disagreed with the Appellants' submission that Suit 236/2015 should not be so transferred, and took the view that such a transfer "offer[ed] all the advantages and none of the disadvantages to the [Respondents] or the [Appellants] that were raised in their submissions". She further urged the parties to reconsider the matter and to agree to a transfer of the suit. At the end of the Judgment, after ordering the dismissal of the stay applications, the Judge further held that should the parties fail to agree on a transfer of the suit to the SICC, the Appellants would be given another opportunity to present full arguments to her as to why there should not be such a transfer.

115 The Appellants argue that the Judge took the possibility of a transfer of the parties' dispute to the SICC into account in deciding whether the stay applications should be rejected, and that she should not have done so. In response, the Respondents rely on the explanation given by the Judge at a hearing on the transfer of the matter to the SICC that she "did not take [the possibility of a transfer] into consideration in deciding the two applications for *forum non conveniens*"; all she intended to say was simply that a transfer to the SICC might alleviate the concerns that the Appellants had were the matter not to be stayed. According to the Judge, this was why she held that the Appellants should be given another opportunity to present full arguments to her as to why Suit 236/2015 should not be transferred to the SICC if the

parties failed to agree on such a transfer. The Respondents also submit that the Judge was, in any event, entitled to take the possibility of a transfer into account.

116 Given the Judge's clarification – phrased in no uncertain terms – that she did not take the possibility of a transfer of Suit 236/2015 to the SICC into account in deciding to dismiss the stay applications, we see no basis to reach a contrary finding. The Appellants' contention in this regard is therefore rejected. In any event, we consider that the Judge was entitled as a matter of principle to take the possibility of a transfer into account in determining whether Singapore was *forum non conveniens*. The presence of the SICC and its capabilities are potentially relevant to the analysis. We will explain our view.

117 In support of their respective positions, the parties have each referred to a speech given by Prof Yeo at the Eighth Yong Pung How Professorship of Law Lecture 2015 titled "Staying Relevant: Exercise of Jurisdiction in the Age of the SICC". In this speech, Prof Yeo commented on the procedure for the transfer of cases from the Singapore High Court to the SICC under O 110 r 12(4) of the Rules of Court. Under O 110 r 12(4)(*a*), such a transfer may occur where the High Court considers that the following requirements ("the Transfer Requirements") are satisfied: first, the claims are of "an international and commercial nature"; second, the parties do not seek any relief in the form of, or connected with, a prerogative order; and third, the High Court deems it more appropriate for the case to be heard in the SICC. We note that Prof Yeo's speech, which was delivered on 13 May 2015, was not based on the current version of O 110 r 12(4). On 1 January 2016, the Rules of Court (Amendment No 3) Rules 2015 (S 756/2015) came into operation, and one of its effects was the deletion of what was originally O 110 r 12(4)(*a*)(ii) of the Rules of Court,

which required that the High Court consider, as an additional requirement for a transfer, that the SICC would assume jurisdiction in the case. This requirement has now been removed. Only the Transfer Requirements that we have just described now apply.

118 Prof Yeo opined at para 41 of his speech that the Singapore High Court should, as a matter of logical sequence, determine whether it has "international jurisdiction" according to its own rules of international jurisdiction before deciding whether the case should be transferred to the SICC. He described the latter question as an issue involving the "internal allocation of jurisdiction". Prof Yeo took the view that "[t]he balance of principle, policy, and international comity that underlies the common law test of strong cause to uphold bargains and the interests of the parties and the ends of justice in the *Spiliada* test continues to be relevant at this stage. In other words, transfer to the SICC should not engage [the] SICC's rules of international jurisdiction".

119 We do not understand Prof Yeo to be saying that the Singapore High Court should not take the possibility of a transfer of a matter to the SICC into consideration when determining whether the High Court has "international jurisdiction". What Prof Yeo seems to us to be contending is that when the High Court comes to consider the *second* question in the sequence mentioned at [118] above (namely, whether the case should be transferred to the SICC), the "SICC's rules of international jurisdiction" are not relevant. Put another way, when the High Court decides whether to transfer a case to the SICC under O 110 r 12(4), questions of private international law are no longer relevant – all that the High Court needs to consider are the Transfer Requirements, namely: (a) whether the claims are "international and commercial" in nature (what Prof Yeo terms "subject matter appropriateness"); (b) whether the relief sought is in the form of or connected

with a prerogative order; and (c) whether it is more appropriate for the SICC rather than the High Court to hear the matter. These are matters concerning purely the internal allocation of jurisdiction and do not raise issues of private international law (or "rules of international jurisdiction").

120 Indeed, our reading of Prof Yeo's speech is confirmed when we turn to his subsequent analysis:

> 47. Where does the common law go from here? To what extent should common law principles be affected by the establishment of the SICC? One extreme view may be that it should be business as usual, with any question of transfer coming up purely as an issue of internal allocation of jurisdiction. The High Court would consider the question of exercise of international jurisdiction without reference to the existence of the SICC at all. *I do not think this is a plausible view. The common law requires all factors to be taken into consideration, and this must include the possibility of transfer to the SICC. For example, factors relating to the expense and convenience of applying foreign law must be considered in the light of the possibility of the case being heard by International Judges in the SICC.*
>
> 48. At the opposite extreme, one could take the view that since we now have an International Commercial Court, all cross-border commercial cases could be tried either in the High Court or the SICC. Instead of staying proceedings to allow for adjudication abroad, they should all be heard in Singapore, just internally allocated either to the High Court or the SICC. I do not think this is a defensible view. In the case of an exclusive choice of foreign court agreement, the contractual basis for enforcement of the bargain remains valid; this is consistent with the emphasis on party autonomy inherent in the structure of the SICC. In this respect, the common law is part of a larger picture of the dominant role of party autonomy in international dispute resolution systems around the world. The common law principle of giving effect to the interests of the parties and the ends of justice continues to remain relevant and applicable absent a choice of SICC clause.
>
> [emphasis added]

121 It is clear from the emphasised portion of the above extract that Prof Yeo regards the possibility of transferring a case to the SICC as a potentially relevant consideration for the Singapore High Court in determining whether it should exercise international jurisdiction. This is because in determining whether a particular forum is *forum non conveniens*, the court is required to take *all factors into consideration*, and this must include the possibility of a transfer to the SICC.

122 We think that this is undoubtedly correct. The reason is that the inquiry under *Spiliada* is a broad one – it requires the court to identify the forum in which the case may be tried more suitably in the interests of the parties and the ends of justice. It would be wrong in principle for the court to shut its eyes to a plainly relevant consideration. The capabilities of the SICC *are* such a consideration. For example, under O 110 r 25 of the Rules of Court, the SICC may, on the application of a party, order that any question of foreign law be determined on the basis of submissions instead of proof. This would obviate the need (and correlative expense) for experts to give evidence on foreign law. More fundamentally – leaving aside issues of cost – the reason why the applicable law to a dispute is considered a relevant connection under *Spiliada* is that a court which is called on to apply its own law is better equipped to do so and less likely to err in its application (see *Halsbury's* at para 75.093). Thus, the fact that a law other than Singapore law applies to the dispute at hand should carry less weight in the *forum non conveniens* analysis if the Singapore courts, through their International Judges in the SICC, are familiar with and adept at applying that foreign law.

123 The thrust of the Appellants' submissions is that the presence of the SICC should not provide a reason for all cross-border cases to be tried in Singapore. They refer to Prof Yeo's view at para 48 of his speech (quoted at

[120] above) that allowing all cross-border commercial cases to be tried in Singapore is not defensible. We agree that an unprincipled jurisdictional grab resulting in the Singapore courts' refusal to grant a stay in *all* cross-border commercial cases would be wrong. But, we consider this to be a most unlikely scenario given that the qualities and capabilities of the SICC are but *one* factor, albeit an often important one, within the broader *forum non conveniens* analysis. All the factors that are normally considered within such an analysis – personal connections, connections to events and transactions, and so on – remain as relevant and significant as before. Thus, the presence of the SICC and the possibility of a transfer of the case to it may well not be determinative. In this regard, we note that in the Report of the SICC Committee (November 2013), the SICC Committee expressed the view that there is "a question of whether the traditional *Spiliada* test which is applicable under Singapore law remains modern and relevant to the SICC" (at para 27). We think that *Spiliada* undoubtedly remains relevant. The *Spiliada* test must be retained because it is founded on the still-prevailing idea that a dispute should be tried in a forum that is "more suitabl[e] for the interest[s] of all the parties and the ends of justice" (see *Brinkerhoff* at [35(a)]).

124 We emphasise that the possibility of a transfer to the SICC should not be considered by plaintiffs as a free pass to elude all jurisdictional objections to the adjudication of a dispute in Singapore. Like all arguments on *forum non conveniens*, a submission that the possibility of a transfer to the SICC weighs in favour of an exercise of jurisdiction by the Singapore courts must be grounded in specificity of argument and proof by evidence. A plaintiff must articulate the particular quality or feature of the SICC that would make it more appropriate for the dispute to be heard in Singapore by the SICC, as well as prove that the dispute is of a nature that lends itself to the SICC's capabilities.

It is also relevant for the court to consider whether the Transfer Requirements are likely to be satisfied. If, for example, the plaintiff fails even to show a *prima facie* case that the dispute is of an "international and commercial" nature, we do not think its reliance on the possibility of a transfer to the SICC should be given any weight whatsoever. The court does not, however, need to make a conclusive determination at this stage of the analysis on the susceptibility of the dispute to a transfer. Just as it is sufficient for the court at this stage to form a *prima facie* view of the governing law of the dispute (see *Yeoh Poh San and another v Won Siok Wan* [2002] SGHC 196 at [15]), so it suffices for it to make a *prima facie* determination as to whether a transfer to the SICC should succeed.

Whether the proceedings in Monaco are *lis alibi pendens*

125 Given our finding that Singapore is *forum non conveniens*, it is unnecessary for us to determine whether the proceedings in Monaco are *lis alibi pendens*. If the Respondents were to commence an action against the Appellants in Switzerland, this might perhaps be a relevant consideration for the Swiss courts. We will therefore say no more about the matter. But, we should make it clear that if the Appellants were to contend before the Swiss courts that the proceedings in Monaco are *lis alibi pendens*, we would not regard this as being inconsistent with the undertakings given to us by Mr Tong and Mr Tan, on behalf of the Appellants, that the Appellants will submit to the determination on the merits of the Respondents' claims against them in Switzerland.

126 We say this simply because even if we had ruled against the Appellants on the question of *forum non conveniens*, it would have remained open to them to take the point that the Respondents should not be allowed to proceed

here on the grounds that the Monegasque proceedings are *lis alibi pendens*. The issue is not whether they would succeed on this point, but simply that they would legitimately be able to raise it. In the light of our decision on *forum non conveniens*, it is now for the Respondents to choose their forum.

Conclusion

127 For these reasons, we allow both appeals and grant the stay of proceedings sought by the Appellants. Given the basis of our decision, it will now be evident why we do not think it necessary to make any order on the Appellants' applications for leave to introduce further evidence since the further evidence in question pertains in part to their arguments on *lis alibi pendens*, which issue we need not decide.

128 We will hear the parties on costs and any other issues. Written submissions, limited to six pages for each party, are to be filed within seven days of the date of this judgment setting out the parties' respective positions on costs and any other issues.

Sundaresh Menon	Chao Hick Tin	Andrew Phang Boon Leong
Chief Justice	Judge of Appeal	Judge of Appeal

Kenneth Michael Tan SC (instructed), Paul Seah, Calvin Liang, Eugene Low, Kristy Teo, Rachel Chin and Amanda Lee (Tan Kok Quan Partnership) for the appellant in Civil Appeal No 110 of 2016;
Edwin Tong SC, Kristy Tan, Peh Aik Hin, Leong Yi-Ming and Han Jiajun (Allen & Gledhill LLP) for the appellants in Civil Appeal No 113 of 2016;
Davinder Singh SC, Jaikanth Shankar, Pardeep Singh Khosa, Chan

Yong Wei, Lea Woon Yee and John Lo (Drew & Napier LLC) for the respondents in Civil Appeals Nos 110 and 113 of 2016.
