**IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE**

**[2019] SGCA 74**

Civil Appeal No 194 of 2018

Between

(1) Oro Negro Drilling Pte Ltd
(2) Oro Negro Decus Pte Ltd
(3) Oro Negro Fortius Pte Ltd
(4) Oro Negro Impetus Pte Ltd
(5) Oro Negro Laurus Pte Ltd
(6) Oro Negro Primus Pte Ltd

… *Appellants*

And

(1) Integradora de Servicios Petroleros Oro Negro SAPI de CV
(2) Alonso Del Val Echeverria
(3) Gonzalo Gil White

… *Respondents*

Civil Appeal No 105 of 2019

Between

(1) Oro Negro Impetus Pte Ltd
(2) Oro Negro Laurus Pte Ltd
(3) Oro Negro Fortius Pte Ltd
(4) Oro Negro Decus Pte Ltd
(5) Oro Negro Primus Pte Ltd
(6) Oro Negro Drilling Pte Ltd

… *Appellants*

And

(1) Integradora de Servicios Petroleros Oro Negro SAPI de CV
(2) Alonso Del Val Echeverria
(3) Gonzalo Gil White

… *Respondents*

And

Jesus Angel Guerra Mendez

… *Non-party*

In the matter of High Court Originating Summons 126 of 2018

Between

(1) Oro Negro Drilling Pte Ltd
(2) Oro Negro Decus Pte Ltd
(3) Oro Negro Fortius Pte Ltd
(4) Oro Negro Impetus Pte Ltd
(5) Oro Negro Laurus Pte Ltd
(6) Oro Negro Primus Pte Ltd

… *Plaintiffs*

And

(1) Integradora de Servicios Petroleros Oro Negro SAPI de CV
(2) Alonso Del Val Echeverria
(3) Gonzalo Gil White

… *Defendants*

# GROUNDS OF DECISION

[Conflict of Laws] — [Natural Forum] — [Corporate governance and internal management of Singapore-incorporated companies]

[Companies] — [Directors] — [Terms of appointment] — [Incorporation of company's constitution into director's contract of service]

[Civil Procedure] — [Injunctions] — [Prohibitory injunction to restrain breach of negative covenant]

[Civil Procedure] — [Parties] — [Joinder]

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# Oro Negro Drilling Pte Ltd and others
# v
# Integradora de Servicios Petroleros Oro Negro SAPI de CV and others and another appeal
# (Jesus Angel Guerra Mendez, non-party)

**[2019] SGCA 74**

Court of Appeal — Civil Appeals No 194 of 2018 and 105 of 2019
Steven Chong JA and Belinda Ang Saw Ean J
9 September 2019, 12 September 2019

27 November 2019

**Steven Chong JA (delivering the grounds of decision of the court):**

1 The pursuit of foreign proceedings can, in limited circumstances, be restrained by different *types* of injunctive relief. However, not all injunctions which have the *effect* of restraining the pursuit of or participation in foreign proceedings can be classified as anti-suit injunctions. The difference in classification is not just a matter of form but a distinction which carries crucial significance. A proper classification of the precise nature of the injunction bears on the correct appreciation of the issues before the court which in turn impacts on the correct application of the governing legal principles. The converse is equally true.

2 In the court below, the converse in fact occurred. The High Court Judge ("the Judge"), was persuaded by the respondents to examine the *ex parte* interim

injunctions on the basis that they were in substance anti-suit injunctions to restrain the commencement and continuation of insolvency proceedings ("the *concurso* proceedings") purportedly commenced on behalf of the appellants, all Singapore incorporated companies, before the insolvency court in Mexico. However, in truth, the *ex parte* interim injunctions were not obtained to restrain the *concurso* proceedings *per se* but to enforce a negative covenant in the appellants' constitutions. Each of the appellants' constitutions expressly provided that its directors were not to carry into effect any petition to initiate *concurso* proceedings unless this was *approved* by an independent director. It was common ground that no such approval was procured. In fact, the independent director was not even notified of the resolution prior to the commencement of the *concurso* proceedings. Under these circumstances, the injunctions sought by the appellants were to restrain the respondents from purporting to represent them in the *concurso* proceedings in light of the breach of this negative covenant. As such, comity considerations which typically take centre stage in deciding whether to grant an anti-suit injunction were strictly not engaged.

3 Once the precise nature of the relief was properly identified, it became self-evident that the crucial issue was whether the appellants had a good arguable case against the respondents as regards the breach of the negative covenant. In that respect, the importance of Singapore law to determine the capacity of and issues relating to the internal governance of the appellants, as Singapore incorporated companies, to commence the *concurso* proceedings would have been apparent for the purposes of determining whether service outside jurisdiction should have been granted and in particular, whether Singapore was clearly the most appropriate forum to hear the dispute. As the Judge did not attach sufficient weight to the importance of Singapore law in

determining the key issue in the action and Singapore as the appellants' place of incorporation, the Judge had misdirected herself. She found that the appellants' reliance on their being Singapore incorporated companies and the application of Singapore law for the purposes of Originating Summons No 126 of 2018 ("OS 126") were "contrived", "an afterthought" and "tactical" when in fact, it was as a matter of law and right.

4 These appeals concerned the Judge's decision in *Oro Negro Drilling Pte Ltd and others v Integradora de Servicios Petroleros Oro Negro, SAPI de CV and others* [2019] SGHC 35 ("the GD") to set aside: (a) an order granting the appellants leave to serve OS 126 out of Singapore ("the Overseas Service Order"); and (b) *ex parte* interim injunctions granted in the appellants' favour against the first to third respondents ("the Interim Injunctions"). After hearing the parties on 9 September 2019, we allowed Civil Appeals No 194 of 2018 and 105 of 2019 ("the appeals") on 12 September 2019 with brief oral grounds. We now elaborate on the grounds for our decision.

## Facts

5 The appellants were a group of Singapore-incorporated companies which comprised of:

(a) Oro Negro Drilling Pte Ltd ("Oro Negro")

(b) Oro Negro Primus Pte Ltd ("Primus")

(c) Oro Negro Laurus Pte Ltd ("Laurus")

(d) Oro Negro Fortius Pte Ltd ("Fortius")

(e) Oro Negro Decus Pte Ltd ("Decus")

(f) Oro Negro Impetus Pte Ltd ("Impetus")

6 Oro Negro was the holding company and sole shareholder of all the other appellants. It was in turn solely owned by the first respondent, Integradora de Servicios Petroleros Oro Negro, SAPI de CV ("Integradora"). Oro Negro had no business activities of its own and had no employees. It paid its taxes in Mexico and its sole purpose was to serve as a holding company for the second to sixth appellants, and to receive funds from those companies.[1] Each of the other appellants owned an offshore jack-up drilling rig named after their respective owners ("the Rigs"). For this reason, we shall refer to these other appellants collectively as "the Rig Owners". The Rigs were deployed in Mexican waters.[2]

7 Integradora was a Mexican-incorporated company that was in the business of providing integrated and diversified oilfield services.[3] All of Integradora's operations were located in Mexico, and its *sole* client was the Mexican state-owned petroleum company, Petroleos Mexicanos ("Pemex").[4] Integradora provided its services to Pemex through Perforadora Oro Negro S de RL de CV ("Perforadora"), a Mexican-incorporated entity which was 99.25% owned by Integradora.

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1 1st affidavit of Alonso Del Val Echeverria dated 30 May 2018 at para 17; GD at [15].

2 1st affidavit of Alonso Del Val Echeverria dated 30 May 2018 at para 12.

3 1st affidavit of Alonso Del Val Echeverria dated 30 May 2018 at para 11.

4 1st affidavit of Alonso Del Val Echeverria dated 30 May 2018 at para 12.

8 Perforadora was the bareboat charterer of the Rigs. It in turn sub-chartered the Rigs ("the Pemex Charters") to Pemex's subsidiaries.[5] Pursuant to a Mexican law-governed trust agreement which was also subject to the Mexican court's exclusive jurisdiction ("the Mexican Trust"),[6] income from the Pemex Charters were paid to Perforadora through trust accounts with a Mexican subsidiary of Deutsche Bank ("DB Mexico"). After receiving its income from the Pemex Charters, Perforadora would deduct its operating expenses and overheads before distributing the balance to the Rig Owners. The Rig Owners would then deduct their respective charter fees before transferring the balance to Oro Negro.[7]

9 The second and third respondents, Mr Alonso Del Val Echeverria ("Mr Alonso") and Mr Gonzalo Gil White ("Mr Gonzalo") (collectively, "the former directors") were directors of the appellants at the material time. They were eventually removed from office in September 2017, though we note for the moment that they have challenged the validity of their removal under Mexican law. We shall elaborate on this and the circumstances surrounding their removal subsequently. At the time they were directors of the appellants, Mr Gonzalo was a director of Integradora while Mr Alonso was authorised to execute important documents on Integradora's behalf.[8]

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5 1st affidavit of Alonso Del Val Echeverria dated 30 May 2018 at para 12.

6 GD at [19].

7 GD at [19].

8 1st affidavit of Alonso Del Val Echeverria dated 30 May 2018 at para 1; 1st affidavit of Noel Blair Hunter Cochrane at pp 120–122; Share Charge between Integradora and NT, ACB Vol 2(B) at pp 91, 121.

10 For convenience, we shall henceforth refer to Integradora, Mr Alonso and Mr Gonzalo, the three respondents herein, collectively as "IAG".

11 The non-party in this appeal was Mr Jesus Angel Guerra Mendez ("Mr Mendez"), a lawyer in Guerra Gonzalez y Asociados SC ("Guerra"), a Mexican law firm. He (and IAG) claimed that the appellants had appointed him and other lawyers in his firm as their attorneys pursuant to powers of attorney ("POAs") granted by the appellants on or around 31 August 2017.[9] It suffices for the moment to note that the appellants challenged his appointment and authority to act on their behalf. Mr Mendez became a non-party to this appeal as he had filed an application to vary the Interim Injunctions that the Judge had initially granted (see below at [38]).

## Background to the dispute

### *The financing of the Rigs*

12 The Rigs' purchase and operation was financed, *inter alia*, by bonds worth approximately US$940m ("the Bonds") issued by Oro Negro to various bondholders pursuant to an agreement dated 24 January 2014 ("the Bond Agreement") between Oro Negro and Nordic Trustee ASA ("NT"), a Norwegian company that acted as the bond trustee on the bondholders' behalf.[10] The Bond Agreement was governed by Norwegian Law. Although it was subsequently amended and re-stated,[11] none of the amendments were material

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9 1st affidavit of Jesus Guerra Angel Mendez dated 27 June 2018 at para 11.

10 ACB Vol 2(B) at pp 10–91.

11 ACB Vol 2(B) at p 12.

for the purposes of these appeals. We only need to highlight the following clauses of the Bond Agreement.

13 First, cl 13.5(a) of the Bond Agreement required Oro Negro to procure the amendment of the appellants' constitutions to provide: (a) NT with a right to appoint an independent director to each of the appellants' board of directors; and (b) the independent director with a veto over any attempt by the appellants to place themselves in any insolvency-related proceedings. It also provided that the appellants were not to amend their constitutions in a manner contrary to these two requirements.[12]

14 Second, and significantly, cl 13.5(g) of the Bond Agreement also provided, *inter alia*, that Oro Negro was not to change its place of incorporation.

15 Finally, cl 15.1(g) ("the EOD Clause") gave NT the right to declare the Bonds to be in default if the appellants, Integradora, or Perforadora took any steps to liquidate themselves or place themselves in insolvency-related proceedings.[13]

16 As part of the financing arrangement, fixed charges over the appellants' shares were also granted in favour of NT through deeds between Integradora and NT and Oro Negro and NT ("the Share Charges").[14] The Share Charges were governed by Singapore law and were subject to the Singapore court's

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12 ACB Vol 2(B) at pp 61–62.

13 ACB Vol 2(B) at pp 71–74.

14 ACB Vol 2(B) at pp 92–124.

exclusive jurisdiction.[15] For present purposes, it would suffice to highlight that cl 4.7 of the Share Charges provided that: (a) the chargors shall comply with cl 13.5(a) of the Bond Agreement (see above at [13]) as though it were set out expressly in the Share Charges; and (b) that they would procure the independent director's appointment upon receiving a written notice from NT to that effect.[16]

***The amendments to the appellants' constitutions***

17 A raft of amendments to the appellants' constitutions were passed in April 2016. However, only one amendment was material for these appeals.

18 Pursuant to cl 13.5(a) of the Bond Agreement and cl 4.7 of the Share Charges (see above at [13] and [16]), the appellants' constitutions were amended to include provisions for the appointment of an independent director and provisions which granted the independent director a veto in respect of certain decisions.[17] Most importantly for present purposes is the addition of the following provision to all of the appellants' constitutions:[18]

> 115A. Notwithstanding any other Article, unless:
>
> (i) approved by the Company in General meeting and
>
> (ii) if an Independent Director has been appointed in accordance with Article 88A, *the Independent Director (whose vote is necessary) has voted in approval, the Directors shall not carry into effect any of the following*:
>
> (a) the voluntary cessation of business, dissolution and liquidation of, or any filing for bankruptcy

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15 ACB Vol 2(B) at p 112.

16 ACB Vol 2(B) at p 98.

17 ACB Vol 2(A) at p 132, 138, 145, 149, 153 and 157.

18 ACB Vol 2(A) at pp 135–136; 142–143; 146–147; 150–151; 154–155; 158–159.

or concurso mercantile or judicial restructuring by or of the Company;

(b) any merger, spin-off, transfer, sale, consolidation or corporate restructuring of the Company; and

(c) any petition in respect of, the commencement or agreement by the Company to become a debtor under any bankruptcy, insolvency or similar filing, case or proceeding, including without limitation, any filing, case or proceeding seeking liquidation, winding up, reorganisation, arrangement, adjustment, protection, scheme of arrangement, judicial management, relief, composition or a general assignment under any law in any jurisdiction including the filing of a voluntary or a pre-packaged Concurso filing under the provisions of the Mexican Ley de Concursos Mercantiles.

(each, an "Insolvency Matter")

Notwithstanding any other Article, the Independent Director shall only be entitled to the following:

(a) receive notice of any meeting at which an Insolvency Matter is reasonably anticipated to be considered, not less than forty-eight hours prior to such meeting;

(b) attend any meeting at which an Insolvency Matter is reasonably anticipated to be considered;

(c) vote on or approve an Insolvency Matter;

(d) receive board materials in connection with any meeting at which there is to be a vote on or approval in respect of an Insolvency Matter; and

(e) access and receive all information (including books and records of the Company) as the Independent Director may consider reasonably necessary (i) to evaluate any matter relating to an Insolvency Matter, (ii) otherwise to discharge his/her duties (including any fiduciary duties) under applicable law.

[emphasis added]

Although these provisions were numbered differently in the appellants' constitutions, we shall adopt the numbering used in Oro Negro's constitution and simply refer to all the provisions as "Art 115A" for convenience.

19 Mr Noel Blair Hunter Cochrane Jr was duly appointed as the appellants' independent director ("the Independent Director") in September 2016, on NT's directions.[19]

***Perforadora entered rough seas with the Pemex Charters***

20 In 2015 and 2016, Pemex insisted on temporary amendments to the duration and hire rate of the Pemex Charters, which in turn caused a fall in the Rig Owners' revenue. In 2017, Pemex insisted on a number of further, and permanent, amendments to the Pemex Charters ("the Proposed Pemex Amendments") and threatened to terminate the Pemex Charters if Perforadora did not agree to them. Additionally, Pemex also refused to allow Perforadora to invoice them for services already rendered.[20] The specifics of the Proposed Pemex Amendments are immaterial for present purposes, save that IAG expected them to cause an approximately 70% fall in Perforadora's revenue. They further contended that this would have in turn caused Oro Negro to eventually default on its repayment obligations to the bondholders as well as caused the Rig Owners to become insolvent.[21]

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19 ACB Vol 2(A) at pp 218–220; 1st affidavit of Noel Blair Hunter Cochrane Jr dated 25 January 2018 at para 18.

20 1st affidavit of Alonso Del Val Echeverria dated 30 May 2018 at para 33.

21 1st affidavit of Alonso Del Val Echeverria dated 30 May 2018 at paras 36–38.

21 On 11 August 2017, an *ad hoc* group of bondholders of Oro Negro ("the *ad hoc* group") expressed support for the Proposed Pemex Amendments and made proposals for amendments to the bond documents to facilitate the implementation of the same.[22] IAG contended that the *ad hoc* group's proposal was commercially unrealistic. They also suggested that the *ad hoc* group was trying to engineer a situation where Oro Negro would end up defaulting on its obligations under the Bond Agreement because a leading member of the *ad hoc* group was closely related to Integradora's main competitor, a company called Seamex, which had also leased rigs to Pemex.[23]

***POAs purportedly granted to Guerra by Mr Alonso and Mr Gonzalo***

22 Pemex subsequently refused to implement the Proposed Pemex Amendments, even though it had proposed them. This led Integradora to believe that Pemex was going to unilaterally terminate the Pemex Charters.[24] On or around 31 August 2017, Mr Alonso and Mr Gonzalo granted POAs to lawyers from Guerra, including Mr Mendez, on the appellants' behalf ("the Guerra POAs"). The Guerra POAs purportedly granted the Guerra lawyers wide-ranging powers, including general powers of attorney for "litigations and collections" which included, but was not limited to, the filing and dismissal of "all kinds of proceedings".[25] It was undisputed that the Guerra POAs were executed without the Independent Director's knowledge and approval.

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22 1st affidavit of Alonso Del Val Echeverria dated 30 May 2018 at paras 39–40.

23 1st affidavit of Alonso Del Val Echeverria dated 30 May 2018 at paras 41–52.

24 1st affidavit of Alonso Del Val Echeverria dated 30 May 2018 at paras 53–54.

25 ACB Vol 2(A) at pp 247–258.

***The events of default and their aftermath***

*Perforadora filed a petition to place itself into* concurso *proceedings*

23 On 11 September 2017, Perforadora voluntarily filed a *concurso* petition in the Mexican court ("the Perforadora *Concurso* Petition").[26] A *concurso* was essentially a court-sanctioned debt restructuring process for insolvent companies, governed by a Mexican statute called the *Ley de Concursos Mercantiles* ("the LCM").[27] Broadly speaking, such proceedings consisted of the following stages:

(a) First, the application stage, which would commence upon the filing *and* admission of a *concurso* petition, where the court will appoint an "examiner" who will verify whether the company was in fact insolvent. If it was, then the court will declare the insolvent company to be in *concurso*, and the court's judgment to this effect will be published to notify creditors of the beginning of the *concurso* proceedings.[28]

(b) At the second stage, the court would appoint a "*conciliador*" whose role is to serve as a mediator between the petitioner and its creditors and to propose a plan for the insolvent company's reorganisation. The *conciliador* would also be conferred with limited management powers over the insolvent company though he or she may

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26 1st affidavit of Noel Blair Hunter Cochrane dated 25 January 2018 at para 19.

27 1st affidavit of Vicente Banuelos Rizo dated 25 January 2018 at para 9.

28 1st affidavit of Vicente Banuelos Rizo dated 25 January 2018 at para 11.

also apply to the court to take over as the full manager of the insolvent company's business.[29]

(c) At the last and final stage, the insolvent company would be declared "bankrupt" if: (i) the insolvent company sought such a declaration; (ii) there was no agreement between the creditors and the insolvent company for the restructuring of its debts; or (iii) the *conciliador* sought such a declaration. If the insolvent company were declared bankrupt, a liquidator will be appointed to realise the insolvent company's assets for its creditors' benefit, and various other consequences will also follow.[30]

*Guerra filed* concurso *petitions on the appellants' behalf*

24 On 20 September 2017, Integradora (as the sole shareholder of Oro Negro) passed a shareholder's resolution which purported to, *inter alia*:[31]

(a) approve the engagement of Guerra as Oro Negro's lawyers for the purposes of filing a *concurso* petition on Oro Negro's behalf; and

(b) grant powers of attorney to various lawyers from Guerra to, *inter alia*, "seek or desist any kind of proceedings" on Oro Negro's behalf.

25 In turn, Oro Negro (as the Rig Owners' sole shareholder), also passed various shareholder's resolutions to the same effect.[32] For convenience, we shall

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29 1st affidavit of Vicente Banuelos Rizo dated 25 January 2018 at para 12.

30 1st affidavit of Vicente Banuelos Rizo dated 25 January 2018 at para 13.

31 ACB Vol 2(A) at pp 221–227.

32 ACB Vol 2(A) at pp 228–246.

refer to all of these shareholder's resolutions as "the September 2017 resolutions". Mr Alonso signed all of the September 2017 resolutions on Integradora and Oro Negro's behalf.[33]

26 The Perforadora *Concurso* Petition only came to NT's attention on 19 September 2017.[34] NT then declared an "Event of Default" pursuant to cl 15.1(g)(i) (see above at [15]) of the Bond Agreement on 25 September 2017.[35] Thereafter, in exercise of its rights under the Bond Agreement and the Share Charges, NT:

(a) Replaced all the appellants' existing directors, including Mr Alonso and Mr Gonzalo, save for the Independent Director, with Mr Roger Arnold Hancock ("Mr Hancock") and Mr Roger Alan Bartlett ("Mr Bartlett") (collectively, "the new directors") on 25 September 2017. This was carried out pursuant to: (i) pre-executed resignation letters signed by the former directors; and (ii) resolutions authorising the appointment of persons nominated by NT as the appellants' new directors.[36]

(b) Perfected its security over the Oro Negro shares held by Intregradora and transferred these shares to its nominee, OND Pte Ltd ("OND") on 4 October 2017.[37] OND thus replaced Integradora as the controller of Oro Negro.

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33 ACB Vol 2(A) at pp 228–246.

34 1st affidavit of Noel Blair Hunter Cochrane dated 25 January 2018 at para 25.

35 1st affidavit of Noel Blair Hunter Cochrane dated 25 January 2018 at para 21.

36 1st affidavit of Noel Blair Hunter Cochrane dated 25 January 2018 at para 22–24.

37 1st affidavit of Noel Blair Hunter Cochrane dated 25 January 2018 at paras 22–23.

27 On 29 September 2017, Guerra filed a *concurso* petition on the appellants' behalf in the Mexican court ("the Oro Negro *Concurso* Petition"). It was undisputed that it did this without the Independent Director's knowledge or approval.[38] Concurrently, Guerra also filed a *concurso* petition on Integradora's behalf ("the Integradora *Concurso* Petition").[39] In a deposition made in related insolvency proceedings in the United States (which have since been stayed) (GD at [43]), Mr Alonso confirmed that he had reviewed the Oro Negro and Integradora *Concurso* Petitions before they were filed.[40]

28 The appellants only learnt of the Oro Negro *Concurso* Petition on 6 October 2017.[41] On 9 October 2017, the new directors passed board resolutions purporting to rescind any POAs that had been granted on their behalf to any persons.[42] IAG were informed of these resolutions on 23 October 2017.[43] For completeness, we note that Pemex terminated the Pemex Charters on 3 October 2017.[44]

***Proceedings in the Mexican courts***

29 On 17 October 2017, Cervantes Sainz, SC ("CS"), a Mexican law firm that was instructed by the new directors, filed a "brief" to notify the Mexican

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38 1st affidavit of Noel Blair Hunter Cochrane dated 25 January 2018 at paras 26 and 30.

39 1st affidavit of Jesus Angel Guerra Mendez dated 27 June 2018 at para 14 and 51.

40 1st affidavit of Roger Arnold Hancock dated 26 July 2018 at paras 72–73.

41 1st affidavit of Noel Blair Hunter Cochrane dated 25 January 2018 at para 28.

42 1st affidavit of Jesus Angel Guerra Mendez dated 27 June 2018 at para 28.

43 1st affidavit of Noel Blair Hunter Cochrane dated 25 January 2018 at paras 32 and 34.

44 1st affidavit of Alonso Del Val Echeverria dated 30 May 2018 at para 63.

court that there had been a change to the appellants' corporate structures.[45] This was followed by a motion that CS filed on or around 18 October 2017 ("the withdrawal motion"), seeking orders that:[46]

(a) CS were the appellants' authorised legal representatives;

(b) Guerra were not the appellants' authorised legal representatives and that their powers to appear on behalf of the appellants had, in any case, been revoked; and

(c) the Oro Negro *Concurso* Petition be withdrawn.

The withdrawal motion was admitted by the Mexican court on 20 October 2017. However, Guerra subsequently filed a motion seeking the revocation of that order sometime between 25 and 27 October 2017.[47]

30 On 25 October 2017, Guerra filed, purportedly on behalf of Integradora and the appellants, an "inefficiency and punitive damages claim" against NT, OND, and the new directors ("the inefficiency motion"), seeking the following orders:[48]

(a) a declaration that the Event of Default declaration by NT, its removal of Mr Alonso and Mr Gonzalo as the appellants' directors and

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45 1st affidavit of Jesus Angel Guerra Mendez dated 27 June 2018 at para 55.

46 1st affidavit of Noel Blair Hunter Cochrane dated 25 January 2018 at para 37.1; 1st affidavit of Jesus Angel Guerra Mendez dated 27 June 2018 at para 57.

47 1st affidavit of Noel Blair Hunter Cochrane dated 25 January 2018 at para 37.1; 1st affidavit of Jesus Angel Guerra Mendez dated 27 June 2018 at para 59.

48 1st affidavit of Noel Blair Hunter Cochrane dated 25 January 2018 at para 37.3; 1st affidavit of Alonso Del Val Echeverria dated 30 May 2018 at para 72.

the appointment of the new directors in their place, the transfer of Oro Negro's shares to OND, and the 9 October 2017 resolutions purporting to revoke the Guerra POAs were illegal, ineffective, and have no effect pursuant to Art 87 of the LCM; and

(b) punitive damages amounting to approximately US$916m, being the unpaid principal on the Bonds.

According to IAG, Mr Mendez made the decision to file the inefficiency motion independently.[49] The Mexican Court admitted the inefficiency motion on 31 October 2017,[50] but this order was revoked on 20 March 2018 following a motion filed by CS in November 2017.[51] In response, Guerra filed an *amparo* (constitutional) appeal against the 20 March 2018 decision to revoke the admission of the inefficiency motion ("the inefficiency *amparo*"). The inefficiency *amparo* was pending disposal when we heard these appeals.[52]

31 On 6 November 2017, CS filed a motion for the dismissal of the Oro Negro *Concurso* Petition on the basis that the petition was filed in breach of the appellants' constitutions.[53] On 27 November 2017, CS filed a motion for a declaration that Guerra did not have legal standing to file the Oro Negro *Concurso* Petition ("the lack of standing motion").[54] The lack of standing

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49 1st affidavit of Alonso Del Val Echeverria dated 30 May 2018 at para 74.

50 1st affidavit of Jesus Angel Guerra Mendez dated 27 June 2018 at para 63.

51 1st affidavit of Jesus Angel Guerra Mendez dated 27 June 2018 at paras 67 and 71.

52 1st affidavit of Jesus Angel Guerra Mendez dated 27 June 2018 at para 72.

53 1st affidavit of Jesus Angel Guerra Mendez dated 27 June 2018 at para 73.

54 1st affidavit of Jesus Angel Guerra Mendez dated 27 June 2018 at para 76.

motion was admitted by the Mexican court on 1 December 2017, but Guerra filed a motion seeking a revocation of this order on 8 December 2017.[55]

32 On 2 May 2018, the Mexican court held that: (a) the Guerra POAs were not proven to have been validly revoked and would be treated as having been validly granted until proven otherwise;[56] (b) the withdrawal of the Oro Negro *Concurso* Petition would not be allowed as Guerra were presumed to have filed the petition with valid authority and in good faith;[57] and (c) the Oro Negro *Concurso* Petition was dismissed as it was submitted without the Independent Director's approval and was therefore in breach of the appellants' constitutions ("the 2 May 2018 decision").[58]

33 Guerra filed a motion for the court to reconsider the 2 May 2018 decision, but that motion was dismissed on 18 June 2018. It subsequently filed an *amparo* (constitutional) appeal against the court's decision not to reconsider the 2 May 2018 decision ("the dismissal *amparo*"). On 19 September 2018, the *Amparo* Court overruled the 2 May 2018 decision and directed the *Concurso* Court to reconsider the admission of the Oro Negro *Concurso* Petition as well as the question of whether compliance with Art 115A should be excused on the basis that the Independent Director was in a position of conflict.[59]

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55 1st affidavit of Jesus Angel Guerra Mendez dated 27 June 2018 at paras 78–81.

56 1st affidavit of Jesus Angel Guerra Mendez dated 27 June 2018 at pp 349–351.

57 1st affidavit of Jesus Angel Guerra Mendez dated 27 June 2018 at pp 355–357.

58 1st affidavit of Jesus Angel Guerra Mendez dated 27 June 2018 at pp 383–385.

59 Affidavit of Gonzalo Gil White dated 28 August 2019 at para 12; Affidavit of Roger Arnold Hancock dated 17 August 2019 at para 16.1.

34 For completeness, we noted that the Rig Owners had commenced actions against Perforadora in the United States courts seeking the return of the rigs following the alleged termination of the Pemex Charters, while Mr Alonso had commenced voluntary bankruptcy proceedings in the United States on behalf of Perforadora and Integradora. These proceedings had been stayed pending the disposal of the proceedings in Mexico (GD at [44]–[45], though they were immaterial for the purposes of these appeals.[60]

***The Singapore proceedings***

35 On 26 January 2018, the appellants filed OS 126 in the Singapore High Court, seeking declarations that:

> (a) the shareholder resolutions that Integradora passed which purported to authorise members of Guerra to seek a *concurso* petition on the appellants' behalf was *ultra vires* and/or incapable of enabling the appellants to seek any *concurso* or any other insolvency matter without the Independent Director's approval;
>
> (b) IAG had no authority to cause and shall not cause the appellants to commence, continue and/or maintain any *concurso* petition or any other legal action purportedly on the appellants' behalf whether in Mexico or elsewhere; and
>
> (c) IAG had no authority to act for any of the appellants and/or shall not act for any of the appellants and/or deal with the appellants' assets including, but not limited to, the Rigs.

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60 2nd affidavit of Alonso Del Val Echeverria dated 21 August 2018 at paras 41–42.

36 In OS 126, the appellants also sought permanent injunctions to:

(a) restrain IAG and their servants and/or agents from relying and/or continuing to rely on the September 2017 resolutions to cause the appellants to commence, continue, and/or maintain any *concurso* petition or insolvency action and/or any other legal action purportedly on the appellants' behalf, whether in Mexico or elsewhere;[61] and

(b) restrain IAG and their servants and/or agents from commencing, continuing and/or maintaining any *concurso* petition or insolvency action and/or any other legal action purportedly on the appellants' behalf, whether in Mexico or elsewhere.

37 Simultaneously, the appellants also filed HC/Summons No 482 of 2018, where they sought and obtained *ex parte* (GD at [1]):[62]

(a) the Interim Injunctions against IAG which mirrored the injunctions prayed for in OS 126 (see above at [36]); and

(b) the court's leave to serve OS 126 on IAG in Mexico (as well as the necessary extension of time for service).

38 IAG subsequently applied, *via* HC/Summons No 2473 of 2018 to set aside the Interim Injunctions and the Overseas Service Order ("the setting aside application"). Thereafter, Mr Mendez filed an application *via* HC/Summons No 2960 of 2018 ("the variation application") for:

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61 OS 126/2018, Annex A.

62 Minute Sheet dated 30 January 2018.

(a) a declaration that Guerra and its lawyers were not bound by the Interim Injunctions;

(b) alternatively, a variation of the Interim Injunctions to expressly state that they were not binding on persons outside of Singapore if they have not been declared to be enforceable by the courts of foreign countries unless: (i) the person was an officer or agent of IAG; or (ii) the person was subject to the Singapore court's jurisdiction, had received written notice of the order, and was in a position to prevent acts or omissions outside Singapore that constituted a breach of the Interim Injunctions.

(c) alternatively, a variation of the Interim Injunctions to clarify that they did not prohibit any third party from complying with what that third party "reasonably believe[d] to be its obligations, contractual, statutory, professionally or otherwise, under the laws and obligations of Mexico, or under the proper law of the [Guerra POAs]".

39 Having heard the parties' submissions, , the Judge set aside the Overseas Service Order as well as the Interim Injunctions and made no orders on the variation application save to award Mr Mendez his costs for that application (GD at [4]).

**The decision below**

40 In essence, the Judge held that the Overseas Service Order and the Interim Injunctions should be set aside because she found that Singapore was not the appropriate forum for resolving the disputes raised in OS 126 as those disputes had little or nothing to do with Singapore or Singapore law. In this

regard, she found that the appellants' incorporation in Singapore was "totally fortuitous" and therefore the appellants' reliance on this factor was unpersuasive (GD at [126]–[127]).

41 The Judge also found that the appellants had acted in bad faith as they were attempting to use the Singapore court's process to "muzzle" IAG in the Mexican proceedings by obtaining an anti-suit injunction against them (GD at [119], [121] and [133]).

42 In her view, IAG had not acted in breach of Art 115A as: (a) Integradora was not restricted from passing resolutions authorising the commencement of *concurso* proceedings on the appellants' behalf; and (b) Mr Alonso and Mr Gonzalo were directors, and not members of the appellants and were therefore not contractually bound to observe their constitutions (GD at [112], [147]).

43 In addition, the Judge found that the Interim Injunctions should be set aside on the basis of comity since there were ongoing Mexican proceedings, as well as proceedings in the United States that had been stayed pending the disposal of the Mexican proceedings (GD at [139]).

44 Finally, the Judge found that the appellants had failed to make full and frank disclosure of material facts (GD at [117]–[118], [120]–[123], [138]).

## The parties' cases

### *The appellants' case*

45 The appellants submitted that the Judge's decision was based on the erroneous conclusion that Singapore was not the appropriate forum to determine

the dispute in OS 126. They contended that Singapore was clearly the more appropriate forum to determine the issues raised therein because the governing law of their claims was Singapore law, and that the appellants were incorporated in Singapore precisely "to take advantage of Singapore law, corporate structure and governance".[63] They also disagreed with her finding that they had failed to make full and frank disclosure.

46 In the event that the Overseas Service Order was restored, the appellants submitted that this court should also restore the Interim Injunctions because it was clear that IAG had breached Art 115A, which was a negative covenant.[64] In any case, the balance of convenience lay in their favour as they would have been irreparably prejudiced if they were wound up by the Mexican court while IAG would suffer no corresponding material prejudice.[65]

47 Should the appeal be allowed, the appellants submitted that Mr Mendez should be added as a defendant in OS 126 since his participation in OS 126 was required for the fair and proper disposal of the issues raised therein.[66]

***The respondents' case***

48 IAG submitted that the Judge was correct to set aside the Overseas Service Order because the appellants had failed to discharge their burden of showing that Singapore was the more appropriate forum to determine the issues raised in OS 126. Instead, they contended that Mexico was the most appropriate

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63 Appellants' Case at paras 102–108.

64 Appellants' Case at paras 147.

65 Appellants' Case at paras 173–183.

66 Appellants' Case at paras 122–139.

forum for resolving those issues.[67] Additionally, IAG also submitted that the Judge was right to have found that the appellants had failed to make full and frank disclosure.[68]

49 They also contended that the Interim Injunctions interfered with the administration of justice in Mexico by shutting IAG out of the *concurso* proceedings, which would result in the appellants succeeding by default.[69] Additionally, they submitted that the balance of convenience lay in favour of discharging the Interim Injunctions as IAG would be prejudiced by losing an opportunity to regain control of the appellants. In contrast, the appellants would suffer no prejudice as could be seen from the fact that they did not rush to Singapore immediately after learning about the Oro Negro *Concurso* Petition and were content to participate in the Mexican proceedings for a period of time.[70]

***Mr Mendez's case***

50 Mr Mendez submitted that he was not bound by the Interim Injunctions since he was neither the servant nor agent of IAG. He contended that this question should be determined by Mexican law, and that under Mexican law he was not considered to be IAG's servant or agent.[71] Nevertheless, Mr Mendez also submitted that the Interim Injunctions should be varied as they may otherwise have the effect of preventing him from carrying out his professional

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67 IAG's Case at paras 149–186.

68 IAG's Case at paras 78–103.

69 IAG's Case at paras 63–75.

70 IAG's Case at paras 130–145.

71 Mendez's Case at paras 45–68.

duties under Mexican law.[72] In his view, the proposed variations were akin to those frequently made in respect of third parties in the context of *Mareva* injunctions.[73]

51 Mr Mendez also submitted that he should not be added as a defendant in OS 126 since his participation was not required for its fair and proper disposal as he had no involvement whatsoever in respect of the appellants' claims against IAG.[74] Finally, Mr Mendez contended that he had not voluntarily submitted to the Singapore court's jurisdiction since the variation application was merely defensive and did not amount to an invocation of the court's jurisdiction.[75]

**The issues to be determined**

52 Against this backdrop, the following substantive issues arose for determination in these appeals:

(a) Whether the Judge erred in setting aside the Overseas Service Order.

(b) Whether the Judge erred in discharging the Interim Injunctions.

(c) Whether Mr Mendez should have been added as a third defendant in OS 126.

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72 Mendez's Case at paras 69–84.

73 Mendez's Case at paras 85–89.

74 Mendez's Case at paras 90–98.

75 Mendez's Case at paras 99–106.

(d) Whether this court should have allowed Mr Mendez's variation application.

**Issue 1: Whether the Judge erred in setting aside the Overseas Service Order**

53 We shall first deal with the issue of whether the Judge had correctly set aside the Overseas Service Order since all other questions would be rendered moot if this court agreed with that decision.

54 It is well-established that a plaintiff had to satisfy the following requirements in order to obtain the court's leave to serve originating processes out of Singapore (*Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications*") at [26]):

(a) First, the plaintiff must have a good arguable case that its claim falls within one of the "jurisdictional gateways" under O 11 r 1 of the Rules of Court (Cap 322, R 5, 2014 Ed) (the "ROC"). For convenience, we shall henceforth refer to this requirement as the "good arguable case requirement".

(b) Second, there must be a sufficient degree of merit to the plaintiff's claim, and in doing so it must show that there is a serious question to be tried. This requirement was unnecessary though, if the plaintiff was relying on a jurisdictional gateway that already required the court to examine the merits of its claim under the good arguable case requirement (*Bradley Lomas Electrolok Ltd and another v Colt Ventilation East Asia Pte Ltd and others* [1999] 3 SLR(R) 1156 at [18]–[20]).

(c) Third, Singapore must *clearly* be the more appropriate forum for the trial or determination of the action (the "appropriate forum requirement").

The plaintiff must provide full and frank disclosure of all material facts when applying for leave, and a failure to do so may be a sufficient basis to set aside an order granting leave for service out (*Zoom Communications* at [68]–[69]).

***Sub-issue 1(A) – The good arguable case requirement***

55 Before the Judge below, IAG only contended that the Overseas Service Order should be set aside as: (a) the appellants had not satisfied the appropriate forum requirement; and (b) the appellants had failed to make full and frank disclosure.[76] They did not expressly contend that the appellants had failed to satisfy the good arguable case requirement. In the course of their submissions on the Interim Injunctions, however, IAG also submitted that: (a) none of them were contractually bound by the prohibitive provisions in the appellants' constitutions; and (b) neither Mr Alonso nor Mr Gonzalo had breached their directors' duties to the appellants. As such, we found it necessary to address the good arguable case requirement.

*The appellants had a good arguable case against Mr Alonso and Mr Gonzalo for breach of the appellants' constitutions*

(1) The former directors were bound to comply with Art 115A

56 Although the appellants accepted that the former directors were not parties to the appellants' constitutions, they submitted that this court should

[76] IAG's submissions in Sum 2473/2018 at paras 105–181.

nonetheless find the existence of a collateral contract between them and the former directors that incorporates the appellants' constitutions. This was because individuals who have accepted appointment as directors should be taken to have agreed to serve the company on the terms contained in the constitution.[77] They relied on the English High Court's decision in In *re Anglo-Austrian Printing and Publishing Union (Isaacs' Case)* [1892] 2 Ch 158 ("*Isaacs' Case*"); the Malaysian High Court's decision in *Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & others v Perdana Petroleum Bhd (formerly known as Petra Perdana Bhd)* [2013] 8 MLJ 280 ("*Tengku Dato' Ibrahim*"); and this court's decision in *Chee Kheong Mah Chaly and others v Liquidators of Baring Futures (Singapore) Pte Ltd* [2003] 2 SLR(R) 571 ("*Chaly Chee*").

57 IAG, on the other hand, submitted that Mr Alonso and Mr Gonzalo were not parties to any agreement which imposed a contractual obligation on them to observe the appellants' constitutions. They relied on the principle that a company's constitution was merely a contract between a company and its shareholders, and its shareholders *inter se*. Although they recognised that a company's constitutional provisions could be incorporated into an agreement between a non-member director and a company, they submitted that a director's consent to being appointed *per se* was insufficient for such purposes.[78]

58 In our view, the central question on this issue was whether the former directors' acceptance of their appointments as the appellants' directors was sufficient to cause them to be bound by the appellants' constitutional provisions.

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77 Appellants' Case at para 71(b).

78 IAG's Case at paras 113–115.

59 Both parties agreed that Singapore law was the applicable law for the resolution of this issue. In any case, it was well-established that issues relating to the duties owed by an officer to a company was to be determined by the law of the company's place of incorporation, or the *lex incorporationis* (*Base Metal Trading Ltd v Shamurin* [2005] 1 WLR 1157 ("*Base Metal*") *per* Tuckey LJ at [56], *per* Arden LJ at [69]; *Focus Energy Ltd v Aye Aye Soe* [2009] 1 SLR(R) 1086 ("*Focus Energy*") at [31]–[33]; Adrian Briggs, *Private International Law in English Courts* (Oxford University Press, 1st Ed, 2014) at para 10.22).

60 We were satisfied that the appellants had a good arguable case that the former directors were bound to observe the appellants' constitutions. In our view, the former directors' consent to being appointed as the appellants' directors on the facts of this case, gave rise to an agreement that they would serve the appellants based on the terms of their constitutions.

61 As Lord Esher MR observed in *Swabey v Port Darwin Gold Mining Co* (1889) 1 Megone 385 ("*Swabey*") at 387, "[t]he articles [of a company] do not themselves form a contract, but from them you get the terms upon which the directors are serving". That case involved a dispute between a director and his company over the director's fees. The plaintiff director had been appointed as a director of the defendant company at a time when the company's articles contained a provision which provided that its directors were to be paid a particular annual sum. After the plaintiff's appointment, however, a special resolution was passed to amend that provision in such a way as to reduce its directors' fees. The special resolution also purported to apply this amendment retroactively from a date prior to the plaintiff's appointment. The plaintiff resigned his directorship and sued for three months' worth of his outstanding fees based on the pre-amendment rate.

62 The claim was dismissed at first instance but was allowed on appeal. The English Court of Appeal's leading judgment was delivered by Lord Halsbury LC, who held that although the articles *per se* did not constitute a contract between the company and the plaintiff director, a person who accepts an appointment as a director with notice of the company's articles would be taken to have entered into a contract with the company to serve on the terms of its articles (at 386). Lord Halsbury LC further held that a director in this position would also be taken to have agreed that it is possible for the company to alter the director's terms of service, in which case the director would have the option to continue serving based on the new terms or resigning. Those terms, however, could only be altered prospectively, and the director in that case was therefore entitled to his fees based on the old rate up to the point the articles were altered. Lord Esher MR concurred with this analysis and delivered a short concurring judgment in which he made the observation cited above at [61].

63 We noted that *Swabey* concerned a situation where the director was seeking to enforce his rights under the articles against the company, whereas here, it was the appellants that were seeking to enforce the articles against the former directors. In our view, the contractual effect of the company's articles vis-à-vis its directors should work both ways.

64 In *Isaacs' Case*, the company's articles provided that its first director would be deemed to have agreed to subscribe to qualification shares from the company and that the shares would be allotted to him if he failed to acquire them within a month of his appointment. Sir Henry Isaacs was eventually appointed as its first director. He had signed a copy of the company's constitution at the time of his appointment and also attended various board meetings but never acquired the requisite qualification shares. When the

company was wound up, Sir Henry applied for his name to be struck off its list of contributories. His application was refused and the court held that Sir Henry was liable to be placed on the list of contributories as he was bound by the company's articles to acquire the qualification shares. Citing Lord Esher MR's judgment in *Swabey*, Stirling J observed that (at 164):

> … **[W]here a man has accepted the office of director, and acted as such, there ought to be inferred an agreement between him and the company, on his part that he will serve the company on the terms as to qualification and otherwise contained in the articles of association**, and on the part of the company that he shall receive the remuneration, and all the benefits which the articles provide for directors. To use the language of the present Master of the Rolls in *Swabey v Port Darwin Gold Mining Company*, "the articles do not themselves form a contract, but from them you get the terms upon which the directors are serving. [emphasis added]

65 Stirling J's decision was upheld on appeal and was subsequently cited with approval in *In re T N Farrer Ltd* [1937] 1 Ch 352 (at 358) and *Molineaux v The London, Birmingham and Manchester Insurance Company, Limited* [1902] 2 KB 589 (at 596).

66 We now turn to this court's decision in *Chaly Chee*. That case concerned the question of whether provisions in a company's constitution had been incorporated into a contract of appointment between a company and its former auditors, who we shall refer to as D&T. D&T's appointment originated from a relatively short letter of offer from the company with no written terms of appointment. The letter, however, referred to and enclosed, *inter alia*, the company's memorandum and articles of association (at [9]). D&T accepted the appointment and eventually served as the company's auditors during a period in which a rogue trader's activities caused the company to suffer significant losses. The company was subsequently placed in liquidation and the liquidators

sued D&T for negligence. D&T eventually took out a motion in the Singapore court seeking a determination that it was entitled to costs on an indemnity basis if the liquidator was unsuccessful in the negligence claim against it. It based this application on a provision in the company's articles which it alleged had been incorporated into its contract of appointment (at [6]). The High Court found that the company's articles had not been incorporated into D&T's contract of appointment. However, that decision was reversed on appeal and in doing so, this court held that the question of whether the provisions in a company's articles had been incorporated into a contract of appointment was ultimately to be inferred from all the circumstances (at [24]). On this basis, this court observed that D&T could only have been appointed on the footing of the company's articles since there were no written terms of appointment other than what was set out in the company's articles, a copy of which was enclosed with the company's letter of offer (at [22]). Additionally, it also observed that the company's articles did provide for the appointment and duties of, *inter alia*, directors and auditors (at [24]). Thus, this brought the case within the principle laid down by Warrington LJ in *In re City Equitable Fire Insurance Company Limited* [1925] Ch 407 at 521 (cited in *Chaly Chee* at [16]):

> [Where] auditors are engaged without any special terms of engagement … then if the articles contain provisions relating to the performance by them of their duties and to the obligations imposed upon them by the acceptance of the office, I think it is quite plain that the articles must be taken to express the terms upon which the auditors accept their position. Of course, if the terms of their employment are expressed in a separate document, then that document must be taken to define the conditions of their engagement, and it would not be proper to assume any implied terms either from the provisions of the articles or elsewhere.

67 For completeness, we should add that this court in *Chaly Chee* at [18] and [24] also observed, albeit in *obiter dicta*, that incorporation of the

company's articles into D&T's contract of appointment might still have been possible even if their appointment contract had contained more express terms than what was stated in D&T's letter of acceptance.

68 In *Tengku Dato' Ibrahim*, a company's former directors sought a declaration that the company was liable to indemnify them for their costs in defending an action by a minority shareholder against them for breach of their directors' duties. Those former directors based this application on a provision in the company's articles which, they contended, had been incorporated into their contract of service with the company. Mohamad Ariff J found that the articles had indeed been incorporated into their contract of service even though at least one of them had a written contract with the company though that contract made no reference to the company's articles (at [22]). In so finding, he held (at [27]):

> … The issue is to what extent the terms of the articles of association can be imported or incorporated into this contractual relationship? The cases suggest the incorporation depends on whether the director's appointment is done 'on the footing of the articles'. In this connection again, a healthy dose of commercial reality will assist in understanding and formulating a rational basis for the law. I am tempted to ask: in these days of sophisticated corporate affairs and detailed company law provisions, how else can directors be appointed to the board except on 'the footing of the articles'? It is an obvious necessary pre condition for a valid board appointment. In this sense, the view that 'it takes very little' to incorporate the articles into the director's contract can be more readily and realistically understood. …

69 We agreed with these principles and found that on the evidence before us, there was a good arguable case that Mr Alonso and Mr Gonzalo had agreed to serve as the appellants' directors on the footing of the appellants' constitutions.

70 As this court observed in *Chaly Chee* (at [18]), it would be sensible for the court to infer that the parties intended to contract "on the footing of the articles" (or constitution) if there was no written or express terms of appointment. If relatively little would be required to incorporate a company's constitution into a contract of appointment between a company and its auditor (see *Chaly Chee* at [22]), even less should be required where directors were concerned. This was especially so when the constitutions in question contained provisions relating to the appointment, duties, and powers of the company's directors. In such circumstances, the only reasonable inference that the court could draw was that Mr Alonso and Mr Gonzalo must have agreed with the appellants that their terms of service were to include the appellants' constitutions. It did not matter that there was no evidence as to whether Mr Alonso and Mr Gonzalo were familiar with the appellants' constitutional provisions at the time of their appointment. In our view, it would be extraordinary for directors to claim that they were not familiar with constitution of a company that they have agreed to serve. All directors were expected to conduct and manage the company's affairs in accordance with the powers granted to them by the company's constitution (*In re John Fulton & Co Ltd* [1931] Ch 35 at 55) and to "follow the appropriate procedures in the company's constitution" (*Clark v Cutland* [2004] 1 WLR 783 *per* Arden LJ at [21]).

71 It also made no difference that Art 115A was inserted after the former directors were appointed since directors are taken to agree to abide by the company's constitution as it stood from time to time. As Lord Halsbury LC held in *Swabey*, a director who served on the footing of the company's articles has "as one of the stipulations of [his] contract, that it shall be possible for [the company] to alter the terms upon which he is to serve, in which case he would have the option of continuing to serve" (at 386). Thus, the fact that Mr Alonso

and Mr Gonzalo had continued serving as the appellants' directors *after* Art 115A was inserted into the appellants' constitutions meant that they must be taken to have agreed to serve on the terms of the amended constitutions. Both of them clearly knew about the insertion of Art 115A. Mr Alonso had signed all but one of the shareholder's special resolutions on behalf of Integradora and Oro Negro respectively which amended the appellants' constitutions to include Art 115A.[79] Mr Gonzalo signed the Bond Agreement and original Share Charges on behalf of Integradora pursuant to which Art 115A was inserted into the appellants' constitutions.[80]

(2) The former directors had breached their obligations under Art 115A

72 As was clear from a plain reading of Art 115A (see above at [18]), the appellants' directors were prohibited from carrying into effect the filing of any petition to place the appellants in *concurso* unless two mandatory requirements were satisfied: (a) first, their shareholders had to approve of such a measure at a general meeting; and (b) the independent director had to separately approve of such a measure, if such an independent director had been appointed. It was clear to us that this provision was meant to safeguard the bondholders' interests by making sure that the appellants would not cease operations and commence liquidation without the approval of an independent director nominated by the bond trustee. This was an important safeguard, given that Integradora was Oro Negro's sole shareholder and that two of the appellants' directors were office holders of Integradora.

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79 See [25] above.

80 ACB 2(B) at p 1099, 1213.

73 We were satisfied that there was a good arguable case that Mr Alonso and Mr Gonzalo had breached Art 115A by granting the wide-ranging POAs to Guerra without the Independent Director's approval. At the outset, we noted that IAG did not dispute that the filing of the Oro Negro *Concurso* Petition would be in breach of Art 115A, in the event we held that the former directors were bound by it. Instead, their main defence was that: (a) the former directors were not the parties that carried the Oro Negro *Concurso* Petition into effect; and (b) the former directors were in any case entitled to bypass Art 115A's requirements as the Independent Director was in a position of conflict.[81] We were not persuaded by either of these submissions.

74 First, there was a good arguable case that the former directors directly facilitated the filing of the Oro Negro *Concurso* Petition without the Independent Director's approval. Article 115A provided that the appellants' directors shall not "carry into effect" the filing of any petition to place the appellants in *concurso*, unless its two requirements had been met (see above at [72]). The term "carry into effect" would, in our view, encompass situations where the acts of the directors had directly facilitated the commencement of any insolvency matter listed in Art 115A(a) to (c), which included a petition to place the appellants in *concurso*.[82] In this case, the filing of the Oro Negro *Concurso* Petition was achieved through the Guerra POAs granted by the former directors. In our view, the former directors could not have granted powers to Guerra which they themselves could not have validly exercised. In fact, this would be consistent with Art 116(B) which provided that "[d]irectors may from time to

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81 IAG's Case at paras 116–117.

82 ACB 2(A) at p 907.

time … by power of attorney under the Seal appoint any company, firm or person or any fluctuating body of persons whether nominated directly or indirectly by the Directors to be the attorney or attorneys of the Company for such purposes and with such powers, authorities and discretions **(***not exceeding those vested in or exercisable by the Directors under these Articles*)" [emphasis added].[83] To hold otherwise would mean that the former directors could essentially bypass the Art 115A safeguards by granting wide powers of attorney to non-directors. This was simply untenable.

75 In any case, we were also of the view that there was a good arguable case that the Guerra POAs had been granted by the former directors with the intention of bypassing the safeguards in Art 115A. As mentioned above, Guerra was granted more powers than that available to the former directors at the material time despite the former directors' knowledge of Art 115A's requirements. Further, the Guerra POAs were granted shortly after negotiations between Integradora and the *ad hoc* group broke down.[84] The practical effect of the Guerra POAs was to enable IAG to pre-empt any attempt by NT to obtain total control of the Oro Negro Group after the Perforadora *Concurso* Petition was filed. IAG would have known that NT was likely to declare an event of default under the Bond Agreement and to thereafter replace the former directors with their own board appointees. The granting of the POAs would thus have enabled IAG to retain some control of or influence over the appellants' affairs through Guerra. The fact that Mr Alonso was in fact involved with the preparation of the Oro Negro *Concurso* Petition before it was filed by Guerra

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83 ACB 2(A) at p 67.

84 Alonso's affidavit dated 16 May 2018 at paras 48–52, 54–55.

supported such an inference (see above at [27]). Mr Alonso's participation in the preparation of the Oro Negro *Concurso* Petition *despite* his knowledge that it was going to be filed without the Independent Director's approval indicated that that was his intention all along. These facts, when taken together, provided a reasonable basis for this court to infer that the Guerra POAs were granted in order to bypass the requirements of Art 115A.

76 We were also not persuaded by IAG's submission that Mr Alonso and Mr Gonzalo were entitled to bypass Art 115A because the Independent Director would have voted in a capricious manner anyway on account of a conflict of interest. The fact remained that the Independent Director had to approve of any *concurso* petition filed on the appellants' behalf. This was a *mandatory* requirement under Art 115A. We were not aware of any provision in the appellants' constitution or any legal principle that entitled the former directors to bypass mandatory requirements in the companies' constitutions even in such circumstances. We also noted that Mr Alonso did not state on affidavit that the former directors acted on this consideration when they granted the Guerra POAs. Instead, this point only emerged in their submissions.[85] Finally, and in any case, IAG's contention that the Independent Director would have acted in a capricious manner was speculative at best.

*The appellants had a good arguable case against Integradora for inducing breach of contract and unlawful means conspiracy, but not for breaching Art 115A*

77 We turn now to Integradora. We agreed with the Judge and IAG that Art 115A was, strictly speaking, a provision that only prohibited the appellants'

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85 IAG's Case at paras 108–109.

directors from carrying into effect any petition to place the appellants in *concurso* without the Independent Director's approval. As such, it did not apply to prohibit Integradora, as a shareholder of Oro Negro, from voting in favour of the September 2017 Resolutions authorising the filing of the Oro Negro *Concurso* Petition.

78 However, we were of the view that the appellants had raised good arguable cases against Integradora for unlawful means conspiracy and for inducing the breach of Art 115A. Indeed, IAG did not contend that the appellants had no good arguable case against Integradora for these two causes of action. As we mentioned above at [55], their only contention in this regard was that Singapore was *forum non conveniens*. In any case, we were satisfied that the evidence before us disclosed a good arguable case against Integradora for unlawful means conspiracy against the appellants and for inducing a breach of the appellants' constitutions. In this regard, it was relevant to note that all but one of the September 2017 resolutions to appoint Guerra to file *concurso* proceedings on the appellants' behalf was signed by Mr Alonso on Integradora's behalf just nine days before the filing of the Oro Negro *Concurso* Petition (see above at [24]–[25]). It appeared, therefore, that Integradora's plan at that point was for Guerra to proceed with the filing of the Oro Negro *Concurso* Petition on the appellants' behalf *without* the Independent Director's approval.

***The appropriate forum requirement***

79 We now turn to the appropriate forum requirement. The Judge held that OS 126 had nothing or little to do with Singapore or Singapore law. Although counsel for IAG accepted at the hearing before us that the main issue in OS 126 was governed by Singapore law, he contended that Singapore was nevertheless

*forum non conveniens* given the nature and extent of the insolvency proceedings in Mexico.

*The applicable legal principles*

80 The applicable legal principles for determining whether Singapore was the more appropriate forum for the purposes of service out were well-established, and could be summarised as follows:

(a) The question whether Singapore was the more appropriate forum for the action only arises for determination if the court was first satisfied that there was at least another available forum (Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 1st Ed, 2010) ("*Fentiman*") at para 12.63). As this court observed in *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 ("*Siemens AG*") at [4], Singapore could only be *forum non conveniens* if there was a *more appropriate* forum other than Singapore. Here, the other *available* forum was Mexico.

(b) The appellants (as the plaintiffs in OS 126) bore the burden of demonstrating that Singapore was, on balance, the *more appropriate* forum to decide on the issues raised in OS 126. In this regard, it was strictly irrelevant whether Singapore was the more appropriate forum "by a hair or by a mile" (*Siemens AG* at [8]).

(c) The inquiry for determining whether Singapore was the more appropriate forum in the context of service out applications was the same as that undertaken at the *first* stage of the *Spiliada* test (*Zoom Communications* at [70]). Consequently, Singapore would be the more appropriate forum if it had the most real and substantial connection with

the disputes raised (*JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*") at [38]). The court would weigh the connecting factors that had the most relevant and substantial associations with the dispute rather than undertake a mechanical application of established connecting factors. It would also be primarily concerned with the *quality* of the connecting factors rather than the quantity of factors on each side of the scale (*JIO Minerals* at [41]; *Rappo, Tania v Accent Delight International Ltd and another and another appeal* [2017] 2 SLR 265 at [70], *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 ("*Lakshmi Anil Salgaocar*") at [54]).

(d) In the event that Singapore was not the more appropriate forum, it was an open question whether the second stage of the *Spiliada* test was applicable in the context of leave applications for service outside jurisdiction (*ie*, whether the Singapore court can nevertheless grant leave for service out if the plaintiff can show that substantial justice cannot be done in the otherwise appropriate foreign forum). There appeared to be authorities pointing both ways (see *Lewis v King* [2005] ILPr 16; *Metall und Rohstoff GmbH v Donalson Lufkin & Kenrette* [1990] 1 QB 391 at 488 which considered the second stage of the *Spiliada* enquiry; *cf*, *Konamaneni and others v Rolls Royce Industrial Power (India) Ltd and others* [2002] 1 WLR 1269 ("*Konamaneni*") at [175]–[176]; *Fentiman* at 12.27–12.28 which suggest that the plaintiff has no cause to complain that it would be a denial of justice to refuse permission to serve out). However, given our determination that Singapore was clearly the more appropriate forum in this case, and since this point was not argued before us, it was not necessary for us to express any views on it.

81 Although the facts may have appeared complicated and complex, the main issue raised in OS 126 was whether, as a matter of Singapore law, the Oro Negro *Concurso* Petition was filed in breach of Art 115A. For choice of law purposes, this was an issue concerning the appellants' corporate governance and internal management. Additionally, we also found it significant that the key dispute was legal in nature since the material facts were not disputed. Seen in this light, it became clear to us that Singapore was the more appropriate forum for the determination of OS 126 and that the Judge had erred in holding otherwise.

*Singapore was* prima facie *the more appropriate forum as OS 126 involved claims concerning the appellants' corporate governance and internal management*

82 The Judge did not attach sufficient weight to the fact that Singapore was the appellants' place of incorporation and that the Bond Agreement expressly stipulated that it should *remain* as such. In our view, a company's place of incorporation was, *prima facie*, the more appropriate forum in cases concerning its corporate governance or internal management, and that factor was to be given considerable weight in the analysis of the appropriate forum requirement.

83 As Lawrence Collins J held at [55] of *Konamaneni*:

> … **the courts of the place of incorporation are very likely indeed to be the appropriate forum**, but not so overwhelmingly that they will necessarily be the exclusive forum. … questions of internal management are governed by the law of the place of incorporation, and that **the courts of that place are best suited to give decisions on the control and extent of the powers of the management**. [emphasis added]

84 Before us, there was no suggestion that the appellants were not properly incorporated in Singapore, or that their incorporation in Singapore was in pursuit of any illegal or improper purposes. As the appellants' place of incorporation, Singapore was *prima facie* the more appropriate forum for determining disputes relating to their governance or internal management and the Judge had erred in failing to recognise this. Additionally, Integradora had expressly agreed that the appellants were to maintain their place of incorporation in Singapore pursuant to cl 13.5(g) of the Bond Agreement (see above at [14]). Consequently, and contrary to the Judge's holdings (GD at [122] and [126]), the fact that Singapore was the appellants' place of incorporation was not fortuitous and the appellants' links to Singapore were not contrived. The appellants were therefore entitled to commence OS 126 in Singapore.

*The nature and extent of the Oro Negro* Concurso *Proceedings in Mexico*

85 Further, we found that the Judge erred in placing substantial weight on the nature and extent of the Mexican proceedings. In our view, these proceedings were, strictly speaking, irrelevant for the purposes of determining the appropriate forum for the determination of OS 126. This was because they related to matters that were incidental to and arising from the *concurso* proceedings that were purportedly filed in breach of the appellants' constitutions. If the *concurso* proceedings were indeed commenced in breach of the appellants' constitutions, it followed that all the other consequential applications purportedly commenced on the appellants' behalf in Mexico by Guerra would have been infected by that same breach. As such, the nature and extent of the Mexican proceedings did not change the outcome of our appropriate forum analysis.

86 We also disagreed with IAG's submission that the appellants' argument before the Mexican court that: (a) Guerra had no authority to act on their behalf and (b) the Oro Negro *Concurso* Petition had been filed in breach of Art 115A necessarily indicated an acceptance by them that Mexico was the more appropriate forum for resolving the issues raised in OS 126.[86] IAG accepted at the hearing before us that the appellants' actions in the Mexican proceedings were entirely reactive in nature. In our view, it was reasonable for the new directors to have attempted to put a quick end to the Mexican proceedings after gaining control of the appellants. Although OS 126 was not commenced immediately after the appellants learnt about the Oro Negro *Concurso* Petition, we did not think that this delay was inordinate or of such length as to render Singapore *forum non conveniens*. Additionally, this delay did not result in any final determination of the substantive issues raised in OS 126 by the Mexican courts.

*Governing law of the issues in OS 126*

87 Finally, the fact that that the main issue in OS 126 (*ie*, whether the Oro Negro *Concurso* Petition was filed in breach of Art 115A) was governed by Singapore law pointed in favour of Singapore as the more appropriate forum.

88 As mentioned above at [81] the main issue in OS 126 concerned the appellants' corporate governance and internal management. It was well established that such issues were governed by the *lex incorporationis* (see, *Dicey, Morris & Collins on The Conflict of Laws* vol 1 (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 15th Ed, 2012) ("*Dicey, Morris &*

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[86] IAG's Case at paras 150–153.

*Collins*")at para 30–028; *Base Metal per* Tuckey LJ at [56] and Arden LJ at [67]–[69]; *Konamaneni* at [55]; *Focus Energy* (at [31]–[33] and [36])).

89 In *Lakshmi Anil Salgaocar* (at [56]–[57]), this court observed that the weight to be accorded to the governing law of a dispute would ultimately depend on the nature of the dispute (citing *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis Singapore, 2016) at para 75.093 and *Dicey, Morris & Collins* at para 12-034)). Here, the central issue of OS 126 concerned the internal governance and management of Singapore incorporated companies, an issue uniquely governed by Singapore law.

*Mexico was the place of alleged torts*

90 The starting presumption in relation to tortious claims was that the place where the tort occurred was *prima facie* the natural forum for determining that tortious claim, though this was only one of the factors in the overall *forum conveniens* analysis (*Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [37]–[40]; *JIO Minerals* at [106]). In this case, it was clear that the unlawful means conspiracy and inducement of breach of contract claims which were alleged against IAG occurred in Mexico. Hence, Mexico would, *prima facie*, be the more appropriate forum for determining the appellants' tortious claims against Integradora.

91 However, that presumption was displaced here because the underlying acts that allegedly attracted tortious liability arose from the breaches of the appellants' constitutions. The alleged unlawful means that the appellants asserted was the breach of their constitutions, while the contracts that were allegedly breached were also their constitutions. The tortious claims were therefore *parasitic* on the non-tortious claims. In such circumstances, it would

have been incongruous to have held that these two inextricably linked issues should be determined in two different fora.

*Other factors*

92 For completeness, we also found the following factors irrelevant or neutral in our analysis of the appropriate forum requirement.

(a) While IAG was correct that most of the witnesses were likely to be located in Mexico,[87] we gave this factor relatively little weight since the determination of OS 126 was not likely to require witness testimonies. After all, it was common ground that the approval of the Independent Director was not procured.

(b) The fact that the appellants had brought criminal complaints against the former directors was strictly irrelevant for the purposes of OS 126. The criminal proceedings involved questions on whether any Mexican penal laws had been violated, whereas OS 126 involved questions relating to the corporate governance of the appellants under Singapore law. While there might have been some overlap in the factual issues involved, we were not convinced that the extent of overlap was likely to be significant.

(c) The appellants' commencement of civil proceedings against DB Mexico and Perforadora in Mexico was also irrelevant because those proceedings neither concerned IAG's capacity to represent the appellants nor their conduct in procuring the Guerra POAs. Instead,

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87 IAG's Case at paras 172–76.

> those civil proceedings related to the provision of information by DB Mexico as well as Perforadora, and were brought pursuant to the Mexican Trust which was expressly stated to be governed by Mexican law and subject to the exclusive jurisdiction of the Mexican courts.[88]

93 In the circumstances, we did not find any persuasive reason to displace the starting point that Singapore was the more appropriate forum to determine the issues raised in OS 126.

*The unnecessary expert affidavits*

94 Before turning to the next section, we noted that multiple expert affidavits were filed in the court below by the appellants, IAG, and Mr Mendez on issues relating to Mexican law. At [79]–[98] of the GD, the Judge set out a fairly lengthy summary of how these affidavits came to be filed and the purposes for which they were filed. We do not propose to repeat that summary here, save to observe that most of the experts' evidence related to *procedural* issues under Mexican law. Eventually, it became clear that none of these experts' evidence were material for the determination of the issues raised in these appeals or the setting aside application from which they arose. Indeed, save for the applicability of Art 87 of the LCM, the Judge did not refer to any of the experts' evidence in her GD, nor did we derive any assistance from their evidence in reaching our conclusions. Additionally, the parties' reliance on their experts' evidence had evaporated by the time these appeals came before us and none of them placed much reliance on the experts' evidence. While it may have been useful for the parties to provide some brief *factual* explanation of the various

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88 4th affidavit of Vincente Banuelos Rizo at para 21; GD at [19].

proceedings in Mexico, there was no need for them to have adduced expert evidence on Mexican law. This unnecessary filing of expert evidence, in our view, led to significant wasted costs and should be discouraged. We would therefore like to take this opportunity to remind counsel not to rush into filing expert evidence without first addressing their mind to the relevance *and* materiality of expert evidence on foreign law to the issues at hand.

***The full and frank disclosure requirement***

95 Finally, we turn to address the question of full and frank disclosure. It was well-established that the duty to make full and frank disclosure in the context of interlocutory applications did not "require the plaintiff to disclose every relevant document, as it must on discovery" (*The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 at [88]). Instead, a plaintiff only bore the burden of disclosing facts that were *material*, *ie*, facts that the court should take into consideration in making an informed decision on the *issues* before it (*The "Vasily Golovnin"* at [86]–[87]). The question of whether full and frank disclosure had been made obviously depended on the issues raised in each case.

96 The Judge was of the view that the appellants had failed to disclose the following facts:

> (a) The potential applicability of Art 87 of the LCM, as well as a December 2017 ruling by the Mexican court that a provision in the Pemex charters that was similar to the EOD Clause in the Bond Agreement was invalid for contravening Art 87 (GD at [92], [116]–[118]), as it would have indicated that all of NT's actions taken pursuant to the EOD Clause under the Bond Agreement would have been invalid,

including the appellants' commencement of OS 126 by the new directors (GD at [117]–[118]).

(b) The fact that the Rig Owners had filed criminal complaints and lawsuits in Mexico in April 2018 against Mr Alonso and three lawyers from Guerra, as well as suits against DB Mexico and Perforadora between June to July 2018 (GD at [120]).

(c) The fact that the appellants were incorporated in Singapore pursuant to the requirement of lenders who had underwritten the purchase of two of the rigs owned by the appellants, whose loans have since been paid off (GD at [122]).

(d) The fact that the appellants' bank accounts in Singapore were closed before OS 126 was filed, contrary to the appellants' claim that they maintained bank accounts in Singapore (GD at [123]).

97 In our view, the Judge had erred in finding that this amounted to a lack of full and frank disclosure as none of these facts were material to the issues before the court:

(a) Article 87 was not relevant for the purposes of determining whether Art 115A had been breached in this case. Art 87 was only relevant for the purposes of determining whether, under *Mexican* law the bondholders were entitled to treat the commencement of Perforadora's *concurso* petition as an event of default under the Bond Agreement and it could not cure any breach of Art 115A. There was also no suggestion that the Singapore court was required to apply Mexican law and find that Art 87 invalidated the EOD Clause in the Bond

Agreement. In any event, this point became moot because the *concurso* court in Mexico had since decided on 11 October 2018 that it did not have the authority to rule on the applicability of Art 87 to the Bond Agreement as the latter was subject to Norwegian law and the Norwegian courts' exclusive jurisdiction.

(b) The criminal complaints and separate civil proceedings concerned entirely different issues and parties. They also did not have any material bearing on the main issue raised in OS 126 for the reasons we have explained above at [92(b)]–[92(c)].

(c) It was immaterial whether the appellants had bank accounts or business activities in Singapore or that their incorporation in Singapore was required by a separate group of former-lenders. It was an undeniable fact that the appellants remained Singapore-incorporated companies and were therefore governed by Singapore law. Additionally, we noted that the appellants did not rely on the presence of bank accounts to establish that Singapore was *forum conveniens* at the *ex parte* hearing. Instead, this fact was only raised in response to IAG's allegation that the applicants did not do any business in Singapore.[89]

98 For the above reasons, we held that the Judge was wrong to have set aside the Overseas Service Order and we therefore ordered its reinstatement.

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89 Notes of Argument dated 13 September 2018, p 8 at lines 27–31.

**Issue 2: Whether the Judge erred in setting aside the Interim Injunctions**

***Whether the Interim Injunctions were anti-suit injunctions***

99 As mentioned above, we disagreed with the Judge's (and IAG's) characterisation of the Interim Injunctions as anti-suit injunctions. Steven Gee QC, in *Commercial Injunctions* (Sweet & Maxwell, 6th Ed, 2016) defined an anti-suit injunction as "an injunction against a person enjoining him from commencing or continuing with proceedings in a court or tribunal abroad" (at para 14-001). In a similar vein, Thomas Raphael described an anti-suit injunction as "an order of the court requiring the injunction defendant not to commence, or cease to pursue, or not to advance particular claims within or to take steps to terminate or suspend, court or arbitration proceedings in a foreign country, or court proceedings elsewhere in England" (*The Anti-Suit Injunction* (Oxford University Press, 2008) at para 1.08).

100 The Interim Injunctions in this case did not specifically restrain IAG from commencing or continuing any proceedings against the appellants. They did not stop IAG from pursuing any personal claims that they may have had against the appellants in their own names. Instead, all that the Interim Injunctions did was to restrain IAG from purporting to act on the appellants' behalf because the Oro Negro *Concurso* Petition was plainly filed in direct contravention of Art 115A. If the Interim Injunctions had the practical effect of putting an end to the *concurso* proceedings, that would only have been a result of IAG having no causes of action in their own names against the appellants. As such, considerations of comity were not engaged and we were not persuaded that the Interim Injunctions would have the effect of interfering with justice in Mexico.

***Whether Art 115A was a negative covenant and whether it was breached***

101 In *RGA Holdings International Inc v Loh Choon Phing Robin and another* [2017] 2 SLR 997 ("*RGA Holdings*"), this court held that an interim prohibitory injunction would readily be granted where a defendant was about to breach, or had already breached, a negative covenant and that the balance of convenience test did not apply in such cases (at [32]–[33] and [47]). A negative covenant is a promise not do so something or to abstain from acting in a particular manner (Tham Chee Ho, "Non-compensatory Remedies" in *The Law of Contract in Singapore* (Andrew Phang Boon Leong gen ed) (Academy Publishing, 2012) at paras 23.155 and 23.159). Art 115A was clearly a negative covenant since it required the appellants' directors to abstain from "carry[ing] into effect" any petition to place the appellants in *concurso* or any "Insolvency Matter[s]" under Art 115(a) to (c) without the Independent Director's approval. Before us, IAG did not contend that Art 115A was not a negative covenant should the former directors be found to be bound by it.

102 As we have held at [73]–[76] above, there was a good arguable case that the former directors had breached Art 115A by granting the Guerra POAs. Based on the principle in *RGA Holdings*, the Interim Injunctions should have been maintained to restrain the former directors from continuing to breach this negative covenant, absent any hardship or special circumstances over and above compliance with the contract (*RGA Holdings* at [32]–[33] and [48]). The former directors did not show any hardship or special circumstances that militated against granting the Interim Injunctions.

103 Although Integradora was not directly bound by Art 115A, we were of the view that the balance of convenience test was equally inapplicable in relation to the appellants' tortious claims against it. After all, the tortious claims

were *premised* on the breach of the *same* negative covenant. In our judgment, the court should be equally ready to grant a prohibitory injunction to restrain that third party where there was a good arguable case that the breach of a negative covenant was *procured* by that third party. It would have been incongruous for us to have adopted a different standard *vis-à-vis* Integradora when the claims against it involved the *same* breaches of the *same* negative covenant and which resulted in the *same* consequences, albeit it was not the direct party that had acted in breach. We were also not persuaded that there were any hardship or special circumstances that militated against the granting of the Interim Injunctions to restrain Integradora's procurement of the breach of Art 115A.

104 Even if the balance of convenience test were applicable, we would have found that the balance lay in favour of preserving the Interim Injunctions:

(a) The appellants would have suffered substantial and irreparable harm if IAG were allowed to continue purporting to act on the appellants' behalf. IAG did not dispute that the practical effect of the Interim Injunctions, if granted, would be to put a stop to the *concurso* proceedings. Indeed, they placed significant emphasis on this fact in contending that the balance of convenience lay against the granting of the Interim Injunctions.[90] If so, the converse must be true, *ie*, that the *concurso* proceedings were likely to continue and could proceed to more advanced stages if the Interim Injunctions were discharged. As mentioned above at [23], the appellants could have lost management control to a *conciliador* if the proceedings should proceed to the second

90 IAG's case at paras 130–131.

stage, and they may even have been forced into liquidation if the matter proceeded to the third stage. This would certainly have caused irreparable harm to the appellants that could not be compensated by any order for costs.

(b) We were unpersuaded that IAG would have suffered any irreparable prejudice if the Interim Injunctions were granted. We did not think that the loss of any opportunity by IAG to "regain ownership and control" of the appellants under a *concurso* framework was in any way prejudicial to IAG.[91] This was because they had no right to do so in the first place since ownership of the appellants was properly transferred to NT, who exercised its right to remove the former directors and appoint new ones. We were also not persuaded that IAG would necessarily be deprived of a chance to challenge the validity of the EOD Clause and the actions taken pursuant to that clause. As mentioned above at [100], they were perfectly entitled to do so in the Mexican courts if they had causes of action in their own right against the appellants. What they could not be allowed to do was to mount such a challenge by purporting to act on the appellants' behalf when they had no such authority to begin with. In other words, they could not legitimately ask this court to refrain from granting an injunction in order to allow them to take advantage of an opportunity that only arose as a consequence of their own wrongs.

(c) We were also of the view that relatively little weight ought to have been placed on the slight delay by the appellants in commencing OS 126 for the same reasons expressed above at [86].

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91 IAG's Case at para 130.

105 For these reasons, we were of the view that the Judge had erred in setting aside the Interim Injunctions and we therefore ordered that they be restored.

**Issue 3: Whether Mr Mendez should have been added as a defendant to OS 126**

106 The Judge made no order on Mr Mendez's variation application in light of her order that the Overseas Service Order be set aside and the Interim Injunctions discharged. The appellants sought to persuade us to add Mr Mendez as a defendant in OS 126 in the event that the appeals were allowed. Their case was that Mr Mendez's participation was necessary for the purposes of enforcing any order in the event that they succeeded in OS 126. They relied on the English High Court's decision in *T.S.B Bank International v Chabra and another* [1992] 1 WLR 231 ("*Chabra*") to contend that a person against whom no cause of action was being asserted can be added as a defendant in anticipation of eventual enforcement proceedings against that party.

107 Pursuant to O 15 r 6(2)(*b*) of the ROC, the court could, even on its own motion, join the following persons as defendants:

> (i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in the cause or matter may be effectually and completely determined and adjudicated upon;
>
> (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

108 However, we declined to make any such order.

109 At the outset, we noted that there was no formal application to this effect before us or in the court below (see GD at [100]). Instead, the appellants sought to advance such an application by way of submissions in these appeals and before the Judge and we were content to dismiss this application on this basis alone.

110 In any case, we were not persuaded that Mr Mendez fell within either limb of O 15 r 6(2)(*b*). In particular, we did not think that *Chabra* stood for the broad proposition that the appellants sought to advance. In *Chabra*, the English High Court made an order on its own motion for the joinder of a company on the basis that there was a good arguable case that the company was holding assets that were beneficially the property of the first defendant and therefore available to satisfy the plaintiff's claims against the first defendant if successful. This was despite the fact that the plaintiff had no substantive cause of action against the company at the time of the application. The principal basis for Mummery J's (as he then was) decision to join the company was expressed as follows (at 238F–G):

> In brief, in the light of the plaintiff's evidence and the absence of any detailed evidence on the part of the defendants, I am of the view that there is a good arguable case that there are assets, apparently vested in the company, which may be beneficially the property of [the first defendant] and therefore available to satisfy the plaintiff's claims against him if established at trial. I am also of the view that it is arguable that the company was, in fact, at relevant times the alter ego of [the first defendant] and that its assets, or at least some of its assets, may be available to meet the plaintiff's claims against him if established. … In my view, the company is a proper party to these proceedings, even though there is no cause of action against it on the guarantee.

111 *Chabra* was cited with approval by this court in *Teo Siew Har v Lee Kuan Yew* [1999] 3 SLR(R) 410 ("*Teo Siew Har*"). That case concerned, *inter*

*alia*, an appeal against the Singapore High Court's decision to: (a) join the defendant's wife as a defendant to a defamation claim against her husband on the basis that the wife held some of her assets as a nominee for the defendant husband; and (b) grant a *Mareva* injunction against the wife. In dismissing the appeal against these two orders, and having made reference to the English Court of Appeal's decision in *SCF Finance Co Ltd v Masri* [1985] 1 WLR 876 and *Chabra*, this court observed that (at [19]):

> On these authorities and in the light of the provisions in O 15 r 6(2)(*b*)(ii), it seems to us clear that a third party against whom a plaintiff has no cause of action may be joined as a defendant, and a *Mareva* injunction issued against him, *if a good arguable case can be shown that the third party is holding assets belonging to the defendant*. Accordingly, based on the evidence before the court in this case, we hold that it was in order to add the appellant as the second defendant to the action. [emphasis added]

112 In our view, *Chabra* stood for the narrower principle that a third party against whom no cause of action is being asserted can be added as a defendant where there is good reason to suppose that the *assets* held by that third party are, in truth, the assets of the defendant against whom a cause of action is being asserted. The anticipated eventual enforcement must have been against assets rather than against persons for breaching a court order. We did not accept that the principle in *Chabra* could be extended to *any* situation in which eventual enforcement against a third party was contemplated.

113 In *Chabra* and *Teo Siew Har*, the third parties were joined because it was found to be arguable that they held assets belonging to the defendant and in that sense, "there may exist a question or issue arising out of or relating to or *connected with any relief or remedy claimed in the cause or matter* which in the opinion of the Court it would be just and convenient to determine as between

him and that party as well as between the parties to the cause or matter". [emphasis added]. In this case, however, there was no dispute that the terms of the Interim Injunctions extended to IAG's servants and agents. Neither was there any question of Mr Mendez holding any disputed assets belonging to IAG. The dispute was simply whether Mr Mendez was IAG's servant or agent for the purposes of the Interim Injunctions. If the appellants were eventually successful in OS 126 and Mr Mendez should breach any orders of court made therefrom, the appellants would be entitled to take out enforcement proceedings against Mr Mendez even without his participation as a party in OS 126, *provided* he is found to be a servant or agent of IAG. Indeed, the appellants have taken the position that Mr Mendez was already bound by the Interim Injunctions by virtue of him being the servant or agent of IAG under the express terms of the Interim Injunctions.[92] That being the case, the addition of Mr Mendez as a defendant in OS 126 would have changed nothing. Additionally, the fact that Mr Mendez had actively participated in the proceedings below cannot, in and of itself, satisfy the requirements under O 15 r 6(2)(*b*). It appeared that his participation in the proceedings below was not seriously resisted even though the status of his participation was not properly explained. The proper response to this unsatisfactory state of affairs was to prevent Mr Mendez from further participating in these proceedings unless he applied to add himself as a party at which time, the court will consider the propriety of his application. For this reason, it was also strictly incorrect for Mr Mendez to have been described as the "fourth respondent" for these appeals.[93]

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92 Appellants' Case at para 134.

93 See for *eg*, the cover page of the Appellants' Case.

114 In the circumstances, we declined to make any order to add Mr Mendez as a defendant to OS 126. Our comments in this regard were intended to guide his future participation in OS 126 should he be minded to continue doing so.

**Issue 4: Whether this Court should grant Mr Mendez's variation application?**

115 We now turn to our reasons for dismissing Mr Mendez's variation application. The variations sought by Mr Mendez were essentially clarifications that he was not bound by the Interim Injunctions. Specifically, Mr Mendez claimed that he was not a servant or agent of IAG under Mexican law. However, the question whether Mr Mendez was a servant or agent for the purposes of the Interim Injunctions was intrinsically an issue governed by Singapore law. Mr Mendez should have sought legal advice on whether he was bound by them under Singapore law, and it was not this court's role to clarify the position for him especially since he had already taken the position that he was not bound by the Interim Injunctions. For that reason, we dismissed his application.

**Conclusion**

116 For the reasons given above, we allowed the appeals but made no orders on the appellants' oral application to add Mr Mendez as a defendant in OS 126. We also dismissed Mr Mendez's variation application. Consequently, we reversed the Judge's costs orders below, and awarded the costs of these appeals to the appellants which we fixed at $70,000 plus reasonable disbursements to be agreed if not taxed, and such costs were inclusive of the costs of the leave application in CA/OS 41 of 2018. Mr Mendez was ordered to pay the appellants' costs of the appeals fixed at $15,000 as well as reasonable disbursements to be agreed if not taxed.

Steven Chong
Judge of Appeal

Belinda Ang Saw Ean
Judge

Toby Landau QC and Calvin Liang (Instructed Counsel) (Essex Court Chambers Duxton (Singapore Group Practice)), Ajaib Haridass, Mohammed Haireez bin Mohameed Jufferie, Ragini d/o Parasuram and C Sivah (Haridass Ho & Partners) for the appellants;
Cavinder Bull SC, Christopher Chong, Rajaram Vikram Raja, Lua Jie Ying Kelly and Sam Yi Ting (Drew & Napier LLC) for the respondents;
Thio Shen Yi SC and Md Noor E Adnaan (TSMP Law Corporation) for the non-party.

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