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

[2021] SGHC 245

Suit No 832 of 2020 (Summonses Nos 4431 of 2020 and 1899 of 2021)

Between

Sinopec International
(Singapore) Pte Ltd

… *Plaintiff*

And

Bank of Communications
Co Ltd

… *Defendant*

JUDGMENT

[Conflict of Laws] — [Jurisdiction]
[Conflict of Laws] — [Natural forum]
[Civil Procedure] — [Jurisdiction] — [Inherent]

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Sinopec International (Singapore) Pte Ltd
v
Bank of Communications Co Ltd

[2021] SGHC 245

General Division of the High Court — Suit No 832 of 2020 (Summonses Nos 4431 of 2020 and 1899 of 2021)
Ang Cheng Hock J
13 July, 5 August 2021

28 October 2021 Judgment reserved.

Ang Cheng Hock J:

1 In this case, the plaintiff, a Singapore company, which is a beneficiary under several letters of credit, has brought proceedings against the defendant bank, which issued those letters of credit. The plaintiff was not paid even though it had apparently presented compliant documents. The defendant refused to make payment because it claims that there was fraud in the documents presented, in that certain bills of lading were no longer documents of title, but worthless pieces of paper. The applications before me do not concern the merits of the claim and defence. They are limited to the questions as to whether the court has jurisdiction over the defendant because it contends that it has not been properly served with the writ, and also whether, if there was proper service, the court should exercise its jurisdiction because it is claimed by the defendant that there is a more appropriate forum than Singapore, and also because there are foreign court proceedings and foreign criminal investigations, which the

defendant says will have a bearing on the determination of the issues in this action.

The parties

2 The plaintiff, Sinopec International (Singapore) Pte Ltd ("Sinopec SG"), is a Singapore-incorporated company in the business of trading oil, refined petroleum and petrochemical products.[1] It is a wholly owned subsidiary of Sinopec Japan Co Ltd, which is in turn 99% owned by China Petrochemical International Co Ltd ("Sinopec Intl"). Sinopec Intl is a wholly owned subsidiary of China Petroleum & Chemical Corporation ("Sinopec Corp"). Sinopec Corp is the parent organisation of various subsidiaries within the "Sinopec Group" which similarly engage in the international trade of petrochemical products. These subsidiaries include Sinopec Chemical Commercial Holding Company Ltd, Jiangsu Company ("Sinopec Jiangsu"),[2] China Jinshan Associated Trading Corporation ("China Jinshan")[3] and Shanghai Jinshan Associated Trading Corporation ("Shanghai Jinshan").[4]

3 The defendant is the Bank of Communications Co Ltd ("BComm"), an international bank, with its head office in the People's Republic of China ("PRC").[5] It was BComm's branch in Tokyo, Japan ("BComm Tokyo"), which issued the letters of credit that are the subject of this action. BComm also has a branch in Singapore ("BComm SG").

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1 1st Affidavit of Zhao Yi ("Zhao's 1st Affidavit") at para 10.

2 Zhao's 1st Affidavit at para 50.

3 3rd Affidavit of Zhao Yi ("Zhao's 3rd Affidavit") at para 8.

4 Zhao's 1st Affidavit at para 44.

5 1st Affidavit of Chen Xiao Lu ("Chen's 1st Affidavit") at p 58; 1st Affidavit of Chew Koon Peng ("Chew's 1st Affidavit") at p 16.

Background facts

The LCs

4 Sinopec SG is the beneficiary of four letters of credit issued by BComm Tokyo ("the LCs"). Shanghai International Holding Co Ltd ("SIH") had applied for the LCs to meet its payment obligations under four contracts entered into on or around 11 July 2019 for the purchase of Paraxylene ("the Cargo") from Sinopec SG ("the Sale Contracts").[6] SIH apparently intended to on-sell the Cargo to Hong Kong Zhong Tuo Industry Ltd ("HKZT") under four sales contracts ("the Downstream Contracts").[7]

5 The LCs incorporated *The Uniform Customs and Practice for Documentary Credits 600* ("UCP 600"). The terms of the LCs were first communicated by BComm's Hong Kong branch (as the first advising bank) to Westpac Banking Corporation ("Westpac")'s Hong Kong branch ("Westpac HK"), and then by Westpac HK (as the second advising bank) to Sinopec SG.[8] The LCs contained, in particular, the following terms:[9]

(a) it was available at any bank by negotiation;

(b) BComm was to honour the LCs by paying on drafts drawn upon it at 90 days after sight; and

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6 Zhao's 1st Affidavit at para 41; Chen's 1st Affidavit at para 17.

7 Chen's 1st Affidavit at para 18; 1st Affidavit of Liu Min ("Liu's 1st Affidavit") at para 12.

8 Zhao's 1st Affidavit at para 21.

9 Zhao's 1st Affidavit at paras 38–40 and pp 95–110.

(c) "shipment and documents effected prior to [the LCs'] issuance date is acceptable" ("the Additional Condition").[10]

The Presentation

6 To obtain payment under the LCs, which were available at any bank by negotiation, Sinopec SG could approach any bank of its choice to purchase its documents and a draft drawn by Sinopec SG on BComm under the LCs. If that bank agreed to negotiate the LCs, Sinopec SG would then be entitled to a discounted amount of the sum secured by the LCs, with the discount representing the interest and fees incurred by that bank in making payment under the LCs ahead of their due date (see Art. 2 of the UCP 600; *Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] 3 SLR 1308 ("*Grains*") at [8]; Ali Malek and David Quest, *Jack: Documentary Credits* (Tottel Publishing, 4th Ed, 2009) ("*Jack*") at 2.19).

7 On 17 and 18 July 2019, Sinopec SG presented the required documents under the LCs at Westpac HK ("the Presentation").[11] Westpac HK then transmitted the documents to BComm Tokyo.[12] Accompanying those documents were Presentation Schedules (which appear to have been filled up by Sinopec SG) under which the field "Negotiate under Documentary Credit" in each was ticked, as well as drafts drawn under the LCs for the corresponding invoice value of each of the Sale Contracts to be paid to the order of Westpac 90 days after sight.[13]

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10 Zhao's 1st Affidavit at paras 38–40.

11 Zhao's 1st Affidavit at paras 23 and 77.

12 Zhao's 1st Affidavit at para 77.

13 Zhao's 1st Affidavit at pp 324–326, 345–347, 366–368 and 387–389.

8 By presenting the documents at Westpac HK, Sinopec SG wanted Westpac to negotiate the LCs. However, it would appear that Westpac withheld its decision on whether to do so, at least until after BComm had determined that the presented documents were compliant. As it turned out, Westpac did not negotiate the LCs, presumably because BComm Tokyo subsequently rejected the documents as being non-compliant (see [12] below). In these circumstances, Westpac HK only acted as a "collecting bank" in transmitting and presenting the documents to BComm Tokyo on Sinopec SG's behalf and as Sinopec SG's agent (see *Jack* at para 7.2).[14]

9 Notwithstanding that the documents were transmitted by Westpac HK to BComm Tokyo, and it was at BComm Tokyo where the documents were examined and found to be discrepant, the place where the documents were presented under the LCs would still be Westpac HK, *ie*, Hong Kong. This is so, for two reasons:

(a) Art. 6(d)(ii) of the UCP 600 provides that the place for presentation of documents under a letter of credit is the bank at which the credit is available. In this case, since the LCs were available at any bank by negotiation, Sinopec SG would have been authorised by the terms of the credit to present documents at any bank of its choice (see *Grains* at [50]), in addition to the issuing bank (see Art. 6(d)(ii) of the UCP 600). The place of presentation would therefore be any bank where Sinopec SG chose to present its documents, in this case, Westpac HK.

(b) The liability of the issuing bank under Art. 7(a) of the UCP 600 is engaged as long as the beneficiary makes a valid and complying

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14 Defendant's Written Submissions dated 9 Jul 2021 ("DWS") at para 74.4.

presentation to a bank at which the credit is available, irrespective of whether that bank has agreed to honour or negotiate a complying presentation (*Grains* at [54]–[55(a)]). It is also the presentation at that bank that is the point of reference for determining the time at which the presentation of documents under the credit was made (*Grains* at [51]). In this case, if the documents presented were compliant, it would have been the Presentation at Westpac HK (and not any subsequent receipt of documents by BComm Tokyo) that would have rendered BComm liable under the LCs. It is therefore immaterial that Westpac did not negotiate the LCs and that did not make Westpac HK any less the place of presentation of documents under the LCs.

10 Returning to the documents presented by Sinopec SG, they included, *inter alia*, four bills of lading ("the BLs"):

(a) BL no SJ01PXOMAN03 dated 28 April 2019 for 4790.519 MT of Paraxylene shipped on board the *Southern Jaguar* ("BL 1"). [15]

(b) BL no SJS190429KVT dated 29 April 2019 for 4761.279 MT of Paraxylene shipped on board the *Korea Victory* ("BL 2").[16]

(c) BL nos. 1 and 2, each dated 27 May 2019 and for 5250 MT of Paraxylene shipped on board the *Fairchem Forte* ("BLs 3 and 4").[17]

11 The BLs were "blank" bills and it was simply indicated "to order" in the consignee section. BLs 1 and 2 identified one Hangzhou Huasu Industrial Co

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15 Zhao's 1st Affidavit at pp 203–205.

16 Zhao's 1st Affidavit at pp 214–216.

17 Zhao's 1st Affidavit at pp 207–212.

Ltd ("HZHS") as the notify party. BLs 3 and 4 identified HKZT as the notify party. It has not been disputed that HZHS and HKZT are related entities. The key shareholder and executive managing director of HZHS, Chen Zeng Chun, is also the sole director of HKZT.[18] Where appropriate, HKZT and HZHS will be collectively referred to as the "Zhong Tuo Group" or the "Zhong Tuo Group entities".

BComm Tokyo's refusal to honour

12 On 25 and 26 July 2019, BComm's Hong Kong branch informed Sinopec SG (via Westpac HK) that the Presentation was rejected because of "[bill of lading] suspected fraud",[19] which it further elaborated on in the following terms: the shipped-on-board date on the BLs was too far from the issuance date of the LCs; and the respective vessels carrying the Cargo had arrived at the respective discharge ports on various dates in May and June 2019 ("the Notices of Rejection").[20] In these proceedings, it is common ground that the Cargo on board the *Southern Jaguar* and *Korea Victory* had been discharged to HZHS in May 2019, while the Cargo on board the *Fairchem Forte* had been discharged to HKZT in June 2019 ("the Discharge").[21] The Discharge had taken place against letters of indemnity ("the LOIs") issued by Sinopec SG (for the shipment on board the *Southern Jaguar* and *Fairchem Forte*) and Shanghai Jinshan (for the shipment on board the *Korea Victory*).[22]

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18 2nd Affidavit of Chen Xiao Lu ("Chen's 2nd Affidavit") at para 31.

19 Zhao's 1st Affidavit at para 80.

20 Zhao's 1st Affidavit at para 80.

21 Zhao's 1st Affidavit at paras 49, 51 and 65; Chen's 1st Affidavit at para 26.2; Liu's 1st Affidavit at paras 24.5–24.6.

22 Zhao's 1st Affidavit at para 65; 4th Affidavit of Chen Xiao Lu ("Chen's 4th Affidavit") at para 26.1.

13 From 26 to 29 July 2019, Sinopec SG responded by disagreeing with the Notices of Rejection, and cited the Additional Condition.[23] However, BComm Tokyo was unmoved. On 2 August 2019, BComm's Hong Kong branch replied by stating that BComm could not accept forged documents, and that it learnt from its investigations that the actual goods to which the BLs related (*ie*, the Cargo) had already been discharged.[24]

14 In affidavits filed for the present proceedings, BComm provided a fuller account of the circumstances that led to BComm Tokyo's issuance of the Notices of Rejection. BComm says that, on 23 July 2019, at a meeting of both sides' representatives, it had been informed by SIH that: (a) there had been media reports emerging on 12 July 2019 that the Zhong Tuo Group was in financial difficulties due to trading losses,[25] and so SIH became concerned that HKZT would be unable to pay for the Cargo under the Downstream Contracts;[26] and (b) SIH had been unable to locate the Cargo even though it had not issued any instructions for the release of the Cargo, and so it suspected fraud relating to the Sale Contracts.[27] SIH therefore filed a police report on or around 20 July 2019 with the Shanghai Public Security Bureau ("Shanghai PSB") ("the SIH Report").[28]

15 Thereafter, BComm Tokyo took steps to investigate the allegations made by SIH. It reviewed the documents presented by Sinopec SG for payment

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23 Zhao's 1st Affidavit at para 82.

24 Chen's 1st Affidavit at para 29; Zhao's 1st Affidavit at para 83.

25 Chen's 1st Affidavit at para 20; Liu's 1st Affidavit at para 16.

26 Chen's 1st Affidavit at paras 20–21.3; Liu's 1st Affidavit at para 16.

27 Chen's 1st Affidavit at paras 21.4–22 and 25; Liu's 1st Affidavit at para 17.

28 Liu's 1st Affidavit at para 18.

(in particular, the BLs) and noted that the respective vessels carrying the Cargo had arrived at the respective ports of discharge prior to the date of the Sale Contracts, and did not subsequently revisit those ports of discharge.[29] From these investigations, BComm Tokyo concluded that the Cargo had already been discharged, and was of the view that the BLs were being re-used by Sinopec SG to collect payment under the LCs. This confirmed what it had been told of by SIH, and therefore BComm Tokyo determined that it was entitled to refuse payment under the LCs.[30]

Subsequent developments

The PRC Criminal Investigations

16 According to BComm, pursuant to the SIH Report, the Shanghai PSB commenced criminal investigations into the alleged fraud relating to the LCs and the Sale Contracts ("the PRC Criminal Investigations").[31] The PRC Criminal Investigations also concern three other letters of credit in respect of other contracts for the sale and purchase of Paraxylene between Sinopec SG and SIH (in addition to the Sale Contracts), two of which were issued by the Bank of China's Tokyo branch ("BOC Tokyo").[32] According to BComm, findings from these investigations may result in criminal proceedings before criminal courts in the PRC ("the PRC Criminal Proceedings").[33]

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29 Chen's 1st Affidavit at para 26.

30 Chen's 1st Affidavit at paras 26–27.

31 Liu's 1st Affidavit at para 21.

32 Liu's 1st Affidavit at paras 13–14 and 20.

33 Chen's 1st Affidavit at para 59.

Letter of demand

17 On 28 August 2019, Sinopec SG issued a letter of demand (via its Japanese solicitors) to BComm's Tokyo branch, demanding that BComm honour its payment obligations under the LCs, and threatening legal proceedings if payment was not forthcoming.[34]

The Suit

18 On 2 September 2020, Sinopec SG commenced Suit No 832 of 2020 ("the Suit") against BComm.[35] The writ of summons was served at the office of BComm SG on 4 September 2020 ("the Writ").[36] BComm entered an appearance on 14 September 2020.[37]

19 On 12 October 2020, BComm filed Summons No 4431 of 2020 ("SUM 4431") for, *inter alia*, (a) a declaration that the Singapore courts have no jurisdiction over BComm ("the Declaration Application"); (b) a stay of the Suit on ground of *forum non conveniens* ("the Stay Application"); and (c) in the alternative, a case management stay of the Suit until the conclusion of the PRC Criminal Proceedings ("the CMS Application").[38]

The Rehabilitation Proceedings by SIH

20 On 19 September 2019, SIH obtained approval from the Tokyo District Court to commence proceedings to rehabilitate its business by proposing an

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34 Chen's 1st Affidavit at para 52.

35 Zhao's 1st Affidavit at para 30.

36 Zhao's 1st Affidavit at para 31.

37 Zhao's 1st Affidavit at para 32.

38 Zhao's 3rd Affidavit at para 3.

agreement or arrangement with its creditors, in a process that appears somewhat similar to a scheme of arrangement under Singapore law. This proposed agreement or arrangement is subject to the approval of SIH's creditors, whose proofs of claim are accepted by SIH ("the Rehabilitation Proceedings").[39] While not explicitly stated, it appears quite clear from the affidavits that the Rehabilitation Proceedings are a form of insolvency proceedings under Japanese Law, and that SIH is now insolvent.[40]

The PRC Civil Proceedings

21 On 1 December 2020, BComm submitted a civil complaint to the Shanghai Financial Courts ("the Shanghai Court") against Sinopec SG and China Jinshan ("the PRC Civil Proceedings"). Oddly, both BComm and BComm Tokyo are named as separate plaintiffs in those proceedings ("the PRC Plaintiffs"),[41] even though they are the same legal entity, *ie*, BComm (see [50] below). SIH is also named by the PRC Plaintiffs as a third party to the PRC Civil Proceedings, but it does not appear that the PRC Plaintiffs are pursuing any causes of action or seeking any relief against it.[42] It is common ground that the commencement date of the PRC Civil Proceedings is the date on which it was docketed by the PRC Courts, *ie*, 1 December 2020.[43]

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39 Chen's 1st Affidavit at para 39.

40 Chen's 1st Affidavit at paras 39–43.

41 3rd Affidavit of Chen Xiao Lu ("Chen's 3rd Affidavit") at p 24; 2nd Affidavit of Zhang Lili ("Zhang's 2nd Affidavit") at p 19.

42 Chen's 3rd Affidavit at para 19.

43 Chen's 3rd Affidavit at para 11; DWS at paras 35.2–35.3; Plaintiff's Written Submissions (Jurisdictional Challenge and Stay of Proceedings) dated 9 Jul 2021 ("PWS") at para 128.

22 In those proceedings, the PRC Plaintiffs seek, *inter alia*, an order to restrain BComm Tokyo from paying the sum under the LCs and an order for Sinopec SG and China Jinshan to be jointly liable for losses suffered by the PRC Plaintiffs arising from alleged fraud relating to the LCs.[44]

23 By 7 January 2021, court papers for the PRC Civil Proceedings were served on China Jinshan and SIH.[45] To date, Sinopec SG has not agreed to accept service of the PRC Civil Proceedings. Nonetheless, BComm takes the position that Sinopec SG would have become aware of those proceedings when the court papers were served on China Jinshan.[46] Sinopec SG maintains that it had only been made aware of the PRC Civil Proceedings through BComm's Singapore solicitors through an email on 8 April 2021.[47]

24 On 12 January 2021, the PRC Plaintiffs applied to the Shanghai Court for it to initiate a process to investigate and collect evidence arising from the PRC Criminal Investigations for use in the PRC Civil Proceedings ("the PRC Investigation Order").[48] The PRC Investigation Order was granted on 23 March 2021.[49] According to BComm's PRC law expert, under the PRC Investigation Order, it is the Shanghai Court that is responsible for obtaining evidence, and

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44 Chen's 3rd Affidavit at para 9.

45 Chen's 3rd Affidavit at para 12.

46 Notes of Arguments, 13 Jul, p 6 lines 17–19; Chen's 3rd Affidavit at paras 16–17; 5th Affidavit of Chen Xiao Lu ("Chen's 5th Affidavit") at para 12; 4th Affidavit of Liu Min ("Liu's 4th Affidavit") at para 11.4.

47 Zhao's 3rd Affidavit at para 20.

48 Chen's 3rd Affidavit at para 13 and pp 42–43.

49 Zhao's 3rd Affidavit at para 13.

there is no fixed timeline for this process.[50] As at the time of the hearing before me, it is common ground that no evidence had yet been collected pursuant to the PRC Investigation Order.

25 According to a summons issued by the Shanghai Court to BComm on 16 March 2021, the trial of the PRC Civil Proceedings is fixed on 21 December 2021.[51] Given that it has not been served with the court papers, Sinopec SG takes the position that the trial of the PRC Civil Proceedings clearly cannot proceed on 21 December 2021. It is supported by the opinion of its PRC law expert, who says that the trial date is merely tentative, and will be postponed until effective service of court papers has been achieved.[52] On the other hand, BComm's PRC law expert says that such a characterisation of the trial date is incorrect, as it would only have been fixed by the Shanghai Court after taking into account the time required for effective service of court papers on Sinopec SG.[53] Counsel for Sinopec SG informed me at the hearing that his client had still not been served with any papers relating to the PRC Civil Proceedings.[54]

26 Although the PRC Civil Proceedings were commenced on 1 December 2020, the earliest time at which the PRC Civil Proceedings were made known to the Singapore courts was on 16 April 2021 when Sinopec SG's solicitors wrote a letter to the Supreme Court requesting for an urgent pre-trial conference

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50 Liu's 4th Affidavit at paras 17–18; Song Xixiang's Expert Opinion dated 1 Jul 2021 in 3rd Affidavit of Song Xixiang ("Song XX's 3rd Report") at paras 18–19.

51 4th Affidavit of Zhao Yi ("Zhao's 4th Affidavit") at para 8(f); Chen's 3rd Affidavit at para 14.

52 Song Lianbin's Expert Opinion dated 17 Jun 2021 in 3rd Affidavit of Song Lianbin ("Song LB's 2nd Report") at paras 37–39.

53 Song XX's 3rd Report at para 14.

54 Notes of Arguments, 5 Aug, p 4 lines 25–27.

after BComm had requested Sinopec SG to consent to an amendment of SUM 4431 to take into account the PRC Civil Proceedings in relation to the CMS Application.[55] Sinopec SG did not consent and, on 23 April 2021, BComm filed Summons No 1899 of 2021 ("SUM 1899") for leave to amend its prayers for the CMS Application ("the Amendment Application").

BComm's allegations of fraud and Sinopec SG's claims of "credit facilitation"

27 In affidavits filed for the present proceedings, BComm elaborated on the allegations of fraud which it relied on in refusing to make payment under the LCs. These allegations rest largely on what it had been informed of by officers of the Shanghai PSB at a meeting on 24 September 2019 ("the 24 Sep Meeting").[56] BComm's account of that meeting is that the officers said that the Cargo (to which the BLs and the Sale Contracts relate) had been the subject of previous contracts of sale between Sinopec SG and entities within the Zhong Tuo Group ("the Alleged Prior Contracts").[57] The Cargo had also been discharged to the respective Zhong Tuo Group entities in May and June 2019 pursuant to Sinopec SG's performance of its obligations as seller under the Alleged Prior Contracts.[58]

28 However, by July 2019, it became clear that the Zhong Tuo Group had fallen into financial difficulty, and that Sinopec SG would not be able to recover any payment for the Cargo from the Zhong Tuo Group.[59] Accordingly, Sinopec

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55 Zhao's 3rd Affidavit at paras 20–23.

56 Liu's 1st Affidavit at paras 21–23.

57 Liu's 1st Affidavit at paras 24.5–24.7 and pp 28–29; Liu's 4th Affidavit at para 20.

58 Liu's 1st Affidavit at paras 24.5–24.6.

59 Liu's 1st Affidavit at para 24.7.

SG decided to alter the documentation for the Alleged Prior Contracts into a sequence of deals involving Sinopec SG, SIH and HKZT, where Sinopec SG and SIH entered into the Sale Contracts, while SIH entered into the Downstream Contracts with HKZT.[60]

29 The alleged fraud therefore stemmed from how the Sale Contracts had been contrived by Sinopec SG as a means of obtaining payment (by way of letters of credit) for the Cargo that Sinopec SG had already sold and released to the Zhong Tuo Group entities under the Alleged Prior Contracts, and which it no longer had title to.[61] According to BComm, Sinopec SG was seeking to sell the Cargo and obtain payment for it *twice* – first from the Zhong Tuo Group entities, and when it failed to do so, from BComm (as an issuer of the LCs on the application of SIH).[62] Apparently, the officers of the Shanghai PSB had also stated at the 24 Sep Meeting that they had advised Sinopec SG not to take legal action against BComm to claim compensation under the LCs.[63]

30 Sinopec SG disputes BComm's allegations of fraud. It provides a very different characterisation of the Sale Contracts. It explains that it had first purchased the Cargo from suppliers ("the Supply Contracts") on behalf of Shanghai Jinshan.[64] In doing so, Sinopec SG was only acting as a "credit facilitator" on behalf of Shanghai Jinshan, given that Shanghai Jinshan did not

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60 Liu's 1st Affidavit at para 24.8.

61 Liu's 1st Affidavit at paras 24.5–24.6 and 25; Chen's 4th Affidavit at paras 12.3 and 16.

62 Chen's 4th Affidavit at paras 11–12 and 16–18; Liu's 4th Affidavit at para 20.1.

63 Liu's 1st Affidavit at para 26.

64 Zhao's 1st Affidavit at paras 44–45.

have banking facilities that allowed it to apply for letters of credit, which were the prescribed mode of payment under the Supply Contracts.[65]

31 There were four of these Supply Contracts:[66] one was dated 25 March 2019 (for the shipment on board the *Southern Jaguar* originating from Oman),[67] another was dated 19 April 2019 (for the shipment on board the *Korea Victory* originating from South Korea),[68] and the remaining two were dated 21 May 2019 (for each of the two shipments on board the *Fairchem Forte* originating from Georgia, USA).[69] The Cargo was in turn to be sold to Sinopec Jiangsu pursuant to "Export Contracts" entered into between Sinopec SG and Sinopec Jiangsu.[70] While the Export Contracts have been formalised in writing, they were never signed due to an administrative oversight.[71] In its affidavits, Sinopec SG exhibited four of these Export Contracts, which it appears (given the country of origin of the Paraxylene specified in each of these contracts) correspond to each of the Supply Contracts. According to the dates on these Export Contracts, it appears that, save for one of them, they were all formalised shortly after the corresponding Supply Contract was entered into.[72]

32 According to Sinopec SG, the LOIs (against which the Discharge took place) had been issued "on the instructions of Sinopec Jiangsu … [as] the buyer

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65 Zhao's 1st Affidavit at para 47.

66 Zhao's 1st Affidavit at paras 46–47.

67 Zhao's 1st Affidavit at pp 175–180.

68 Zhao's 1st Affidavit at pp 191–192.

69 Zhao's 1st Affidavit at pp 184–187.

70 Zhao's 1st Affidavit at para 50.

71 Zhao's 1st Affidavit at para 50.

72 Zhao's 1st Affidavit at pp 218–253.

of [the Cargo] under the Export Contracts".[73] These LOIs were dated 30 April 2019 (in respect of the shipment on board the *Korea Victory*),[74] 14 May 2019 (in respect of the shipment on board the *Southern Jaguar*),[75] and 27 May 2019 (in respect of the shipments on board the *Fairchem Forte*).[76] While not stated in explicit terms, this can only mean that the Discharge had taken place on the instructions of Sinopec Jiangsu at around the relevant times when the respective LOIs were issued.

33 Some two months after the Export Contracts had been entered into, Sinopec Jiangsu informed Sinopec SG that the Export Contracts were to be "novated" to the end receivers of the Cargo, HKZT and HZHS, *ie*, the Zhong Tuo Group entities (see [12] above).[77] According to the dates of the email correspondence apparently recording these instructions from Sinopec Jiangsu, the novation would have taken place on or around 27 June 2019.[78] I should add that it is not possible to pinpoint the precise date on which the novation took place and the terms on which it occurred because Sinopec SG has thus far not disclosed all the documents in relation to the novation.

34 A "novation" refers to the process by which the contract between the original contracting parties is discharged through mutual consent and substituted with a new contract between the same parties to the original contract or between different parties (*Fairview Developments Pte Ltd v Ong & Ong Pte*

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73 Zhao's 1st Affidavit at para 65.

74 Zhao's 1st Affidavit at pp 309–310.

75 Zhao's 1st Affidavit at pp 303–304.

76 Zhao's 1st Affidavit at pp 305–308.

77 Zhao's 1st Affidavit at para 51.

78 Zhao's 1st Affidavit at pp 255–258.

Ltd and another appeal [2014] 2 SLR 318 at [46]). As such, the expected result of the novation in this case would have been the replacement of Sinopec Jiangsu by the respective Zhong Tuo Group entities as a party to each of the novated Export Contracts. However, it appears that never happened because SIH entered the picture to act as a credit facilitator for the Zhong Tuo Group entities, which had to make payment for the Cargo, but which did not have access to banking facilities that allowed them to apply for letters of credit to do so. Under this arrangement, SIH was to apply for letters of credit (*ie*, the LCs) in favour of Sinopec SG to enable the Zhong Tuo Group entities to make payment for the Cargo[79] and thereby take on the credit risk of the Zhong Tuo Group entities.

35 According to Sinopec SG, the Sale Contracts were executed for this very purpose.[80] Sinopec SG also states that it had only been aware that SIH was acting as a credit facilitator and expected that SIH would directly or indirectly receive payment from the Zhong Tuo Group for performing this role, and then use such funds to reimburse BComm Tokyo, which issued the LCs.[81] It will therefore appear that, at the time when the Sale Contracts were entered into, Sinopec SG was not aware of any precise arrangements relating to the Cargo between SIH and the Zhong Tuo Group, such as the Downstream Contracts.

36 Therefore, the effect of the novation was the interposition of a set of back-to-back contracts: the Sale Contracts between Sinopec SG and SIH, and some other contractual arrangement between SIH and the Zhong Tuo Group, the precise details of which Sinopec SG was not aware of but under which it

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79 Zhao's 1st Affidavit at paras 51–52.

80 Zhao's 1st Affidavit at para 53.

81 Zhao's 1st Affidavit at para 60.

expected SIH to obtain reimbursement for acting as a credit facilitator. Hence, Sinopec SG's position is that it has never been a party to any contract relating to the Cargo with the Zhong Tuo Group.[82] Prior to the novation, the only such contract to which it had been a party were the Export Contracts with Sinopec Jiangsu. Following the novation, Sinopec SG was a party to the Sale Contracts with SIH.

37 Sinopec SG says that SIH (by virtue of its role as a "credit facilitator") would have known, at the time of entering into the Sale Contracts, that the Cargo had already been discharged in May and June 2019.[83] In particular, it says cl 11 of the Sale Contracts, which specified the delivery dates as "ANY [APRIL 2019] ARRIVAL", would have made that clear.[84] Otherwise, SIH would not have requested that the LCs contain the Additional Condition.[85] Sinopec SG also says that, in light of SIH's request for the Additional Condition, and the fact that BComm Tokyo had been provided with copies of the Sale Contracts by SIH when it applied for the LCs,[86] and so would have had sight of cl 11, BComm would also have known, or ought to have known, that the Cargo had already been discharged at the time when it agreed to issue the LCs.[87]

38 Responding to that contention, BComm says that SIH had been in the dark as to the whereabouts of the Cargo from the time when it applied for the

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82 Zhao's 1st Affidavit at para 62; Zhao's 4th Affidavit at para 20.

83 Zhao's 1st Affidavit at paras 56 and 66.

84 Zhao's 1st Affidavit at para 66.

85 Zhao's 1st Affidavit at para 67.

86 Zhao's 1st Affidavit at para 57.

87 Zhao's 1st Affidavit at paras 56–58.

LCs with BComm Tokyo.[88] BComm also denies that it knew or ought to have known that the Cargo had been discharged,[89] presumably from the time when the LCs were issued, since BComm's knowledge would have been limited to whatever the applicant for the LCs (SIH) provided BComm Tokyo with. Also, BComm says that cl 11 of the Sale Contracts cannot impute SIH with the knowledge that the Cargo had already been discharged to HKZT or HZHS.[90] Further, BComm also says that the inclusion of the Additional Condition as a term of the LCs only shows that BComm Tokyo could accept bills of lading issued prior to the issuance date of the LCs, but it cannot impute BComm with the knowledge that the Cargo had already been discharged prior to the issuance of the LCs.[91]

39 BComm also refers to a letter provided by SIH to BComm Tokyo dated 26 May 2021 ("the SIH 26 May Letter"), in which SIH claimed that it did not know, at the time of entering into the Sale Contracts, that: (a) Sinopec SG and HKZT had previously entered into separate sale contracts relating to the Cargo; and (b) the Cargo under the Sale Contracts had been discharged in May and June 2019.[92] Sinopec SG disputes the authenticity of the SIH 26 May Letter,[93] but also claims its contents showed that SIH knew that it was acting as a credit facilitator.[94]

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88 3rd Affidavit of Liu Min ("Liu's 3rd Affidavit") at para 19, Chen's 4th Affidavit at paras 33–34.

89 Chen's 4th Affidavit at para 37.

90 Chen's 4th Affidavit at para 33.

91 Chen's 4th Affidavit at para 36.

92 Liu's 3rd Affidavit at para 21, Chen's 4th Affidavit at para 24.

93 Zhao's 4th Affidavit at para 23.

94 Zhao's 4th Affidavit at para 30.

40 From the parties' respective cases, it appears to me that BComm and Sinopec SG are in contention over two main issues. First, what were the Sale Contracts for? BComm says that the contracts involved the physical sale and purchase of the Cargo, and that SIH was not acting as a "credit facilitator" as Sinopec SG claims.[95] On the other hand, Sinopec SG maintains that the Sale Contracts had been interposed in the chain transaction for the Cargo (beginning with the purchase of the Cargo under the Supply Contracts, the subsequent sale to Sinopec Jiangsu, and then the eventual novation involving SIH and the Zhong Tuo Group entities) to facilitate payment by the Zhong Tuo Group, and so the Sale Contracts *per se* were not meant to involve any actual dealings in goods.

41 Second, were Sinopec SG and the respective Zhong Tuo Group entities in any contractual relationship relating to the Cargo at the time of the Discharge? Sinopec SG says they were not – the Zhong Tuo Group entities and itself only become parties to the *separate* back-to-back contracts with SIH in July 2019, after the Discharge had already taken place in May and June 2019. BComm alleges that Sinopec SG and the respective Zhong Tuo Group entities were in such a contractual relationship, and in particular, they had already entered into the Alleged Prior Contracts by then.

SUM 4431 and SUM 1899

42 BComm makes four applications in SUM 4431 and SUM 1899: (a) the Declaration Application; (b) the Stay Application; (c) the Amendment Application; and (d) the CMS Application.

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95 Chen's 4th Affidavit at paras 19–20; Liu's 4th Affidavit at para 24.

43 For the Declaration Application, BComm argues that there has been no proper service of originating process as the Writ had only been served on BComm SG. BComm argues that, for the purposes of the dispute over the LCs, BComm Tokyo, as the branch which issued the LCs, should be regarded as a distinct legal entity, and since there has been no proper service on BComm Tokyo, the Singapore courts have no jurisdiction over BComm. In reply, Sinopec SG argues that service of the Writ on BComm SG constitutes effective service on BComm, and is sufficient to found jurisdiction over it, even though it had been BComm Tokyo which issued the LCs.

44 For the Stay Application, BComm argues that the various connecting factors – identified by reference to the governing law of the LCs, the witnesses and documentary evidence which it says is necessary to establish its fraud defence to Sinopec SG's claim in the Suit and the PRC Civil Proceedings overlapping with the Suit – all point toward jurisdictions other than Singapore, specifically, the PRC, Hong Kong and/or Japan (collectively, the "Alternative Fora"), as the more appropriate forum, and so the Suit should be stayed on grounds of *forum non conveniens*.

45 On the other hand, Sinopec SG argues that little if no weight should be placed on these purported connections. First, the witnesses which BComm has identified as necessary for its defence do not appear relevant, and there is no evidence as to where they are located, and whether they are unwilling to testify in Singapore. Second, it identifies the governing law of the LCs as Singapore law. But it says, even if it is Hong Kong law, as argued by BComm, that would not be a significant factor in favour of Hong Kong as the more appropriate forum, since both Singapore and Hong Kong law are similar in respect of the fraud defence to a claim under letters of credit. Third, it argues that no weight

should be given to the PRC Civil Proceedings in the *forum non conveniens* analysis as they were commenced for strategic reasons by BComm, well after the Suit was started in Singapore. In the alternative, a stay should nevertheless be refused even if a more appropriate forum than Singapore can be identified because Sinopec SG will be deprived of a legitimate juridical advantage if the dispute were tried in the PRC, given the fact that the Shanghai Court will only apply PRC law, and the scope of the fraud defence under PRC law is broader as compared to Singapore law. It also points to substantial prejudice arising from delay and procedural differences if the dispute were tried in the PRC as reasons for refusing a stay.

46 For the Amendment Application, BComm argues that its prayer for the CMS Application should be amended to take into account the PRC Civil Proceedings as it will allow the real controversy between parties to be determined. Sinopec SG opposes the Amendment Application on grounds that the PRC Civil Proceedings had been commenced for strategic reasons, and also because of how late in time the application was made.

47 In the event that I am minded to grant the Amendment Application, BComm argues that the CMS Application should be allowed so that it can adduce all relevant evidence it requires for its fraud defence on the basis of findings from the PRC Criminal Proceedings and the PRC Civil Proceedings; and the Singapore courts can also have the benefit of those findings to avoid traversing the very same grounds. Sinopec SG argues that the CMS Application should not be granted because the PRC Criminal Proceedings do not appear relevant to the issues in dispute in the Suit, and also because doing so would render the Singapore proceedings otiose and result in a substantial delay in the resolution of the dispute.

Issues to be determined

48 There are four main issues to be determined:

(a) whether there has been effective service on BComm to found the jurisdiction of the Singapore courts over it;

(b) whether the Suit should be stayed on grounds of *forum non conveniens*;

(c) whether the Amendment Application should be allowed; and

(d) whether the CMS Application (either in its original form, or in the form of the amended prayers) should be allowed.

Issue 1: Whether there was proper service to found the jurisdiction of the Singapore courts?

49 At common law, all branches of a bank are regarded as emanations of that one bank, and so the head office of a bank and its various branches are regarded as a single legal entity (*Benjamin's Sale of Goods* (Michael Bridge gen ed) (Sweet & Maxwell, 10th Ed, 2017) ("*Benjamin*") at para 23-026; E P Ellinger, Eva Lomnicka and C V M Hare, *Ellinger's Modern Banking Law* (Oxford University Press, 5th Ed, 2011) at p 711). There are, however, exceptions to this general rule and a bank and its branches located overseas have been treated as separate entities in some situations (see, *eg*, Johanna Vroegop, "The status of bank branches" (1990) 5 JBL 445 at 446; *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 WLR 1233 at 1241).

50 In this case, there is no dispute that both BComm SG and BComm Tokyo are part of the same legal entity, BComm.[96] As such, the defendant in the Suit is simply BComm, even though it had been BComm Tokyo which issued the LCs. BComm is a foreign company registered under s 368(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act").[97] Section 376(*a*) of the Companies Act provides that service on a registered foreign company will be effective if it is addressed to the foreign company and left at or sent by post to its registered office in Singapore. As such, service on BComm SG, which is the registered office of BComm in Singapore,[98] will constitute effective service on BComm. According to the Memorandum of Service, the Writ (which had been addressed to BComm) had been left at the office of BComm SG.[99] By virtue of that, there has been effective service on BComm, and the jurisdiction of the court over BComm for the purposes of the Suit has been properly established pursuant to s 16(1)(*a*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("the SCJA"), notwithstanding that it had been BComm's Tokyo branch that issued the LCs.[100]

51 At the hearing before me and in written submissions, counsel for BComm argued that the Writ must be served on BComm's Tokyo branch for the Singapore courts to be seised of jurisdiction.[101] He argues that, for the purposes of the contract under the LCs between BComm and Sinopec SG, BComm's Tokyo branch is to be regarded as a distinct legal entity that is

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96 Notes of Arguments, 13 Jul, p 2 lines 17–19, p 7 lines 26–27.

97 Zhao's 1st Affidavit at para 34.

98 Zhao's 1st Affidavit at para 31; Chen's 1st Affidavit at para 9.

99 Zhao's 1st Affidavit at p 83.

100 PWS at paras 50 and 56.

101 DWS at paras 19–20.

separate from BComm's other branches. That is because the contract under the LCs incorporates Art. 3 of the UCP 600, which provides that "[b]ranches of a bank in different countries are considered to be separate banks".[102]

52 In support of this argument, BComm relies on the decision of the UK Supreme Court in *Taurus Petroleum Ltd v State Oil Marketing Co of the Ministry of Oil, Republic of Iraq* [2018] AC 690 ("*Taurus Petroleum*"). In that case, the court had to identify the *situs* of a debt due under a letter of credit that was issued by the London branch of a French bank ("Credit Agricole") to determine if it had the requisite jurisdiction to make an attachment order in respect of that debt. The court accepted that it followed from Art. 3 of the UCP 600 that, for the purposes of the letter of credit, the London branch of Credit Agricole was to be treated as a separate bank from Credit Agricole's French headquarters, and accordingly, the place where the debt under the letter of credit was recoverable, and the *situs* of that debt, was England (at [31]).

53 In my judgment, BComm and BComm Tokyo are to be regarded as a single legal entity for the purposes of service of process under our procedural rules. Art. 3 of the UCP 600, which parties have contracted to apply to the contract under the LCs, does not have the effect of altering the rules as to service of process so that originating process in respect of any dispute arising from a letter of credit must be specifically served on the bank branch that issued the credit. The purpose of Art. 3 is to allow branches of the same bank to be treated as separate banks so that they can each perform the respective functions required of the different banks involved in a letter of credit transaction as set out in Art. 2 of the UCP 600, notwithstanding that these branches will be regarded at

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102 Notes of Arguments, 13 Jul p 2 lines 13–17.

general law as parts of a single legal entity (see James Byrne *et al*, *UCP600: An Analytical Commentary* (Institute of International Banking Law & Practice, 2001) ("*Byrne*") at pp 240–241; *Benjamin* ([49] above) at para 23-026). As the following extract from *Byrne* suggests, how bank branches are to be treated for the purposes of service of process in a particular jurisdiction is a question outside of the UCP 600 (at p 243):

> If the 'branch' [of a bank] in another country … was nominated in the [letter of credit] to advise the [letter of credit], its role would be that of an advisor. Whether the home office [of that bank] could be brought into court in that jurisdiction [or] was subject to its law … are all questions beyond the scope of UCP 600 and are answered under the relevant legal regimes.

54 While the court in *Taurus Petroleum* found that a bank branch which issued a letter of credit constitutes a separate entity, I find that case distinguishable as it involved a different context from the present case. In *Taurus Petroleum*, the court was concerned with identifying the *situs* of the debt under the said letter of credit. To do so, the court had to consider where that debt was recoverable. It will appear that the court only applied Art. 3 and found the London branch of Credit Agricole to be a "separate bank" from its French headquarters because it had been of the view that the debt due under that letter of credit was only recoverable at the London branch, where the applicant for the letter of credit had maintained its accounts with Credit Agricole (see *Taurus Petroleum* at [31]). The court therefore applied Art. 3 and regarded bank branches as separate entities *only* for the limited purpose of identifying the *situs* of a debt due under a letter of credit. I do not read *Taurus Petroleum* as laying down a statement of general principle that bank branches involved in a letter of credit of transaction were to be regarded as separate entities for all purposes by virtue of Art. 3.

55 Since BComm and BComm Tokyo are one and the same legal entity, I find that the effective service of the Writ on BComm, by service on BComm SG, suffices to establish the court's jurisdiction over BComm as the defendant in the Suit. I therefore dismiss the Declaration Application.

56 In coming to this conclusion, I note that the same result was reached by the Hong Kong Court of First Instance in *LG Electronics Hong Kong Ltd v Bank of Taiwan* [2001] HKEC 2098, which involved somewhat similar facts. In that case, the plaintiff was a beneficiary under a letter of credit issued by the Panchiao, Taiwan, branch of the Bank of Taiwan ("BOT"). After the plaintiff's presentation of documents was rejected, it commenced proceedings against BOT in Hong Kong to recover payment. The writ of summons simply identified BOT as the defendant, and provided the address of its place of business in Hong Kong at which service may be effected (at [3] and [21]). The court accepted that there had been effective service of originating process on BOT by virtue of service on BOT's place of business in Hong Kong (at [14] and [17]). BOT had argued that the defendant in the writ was BOT's Hong Kong branch, which was in turn a separate legal entity from BOT's Panchiao branch. As such, BOT contended that the court had no jurisdiction because BOT's Panchiao branch, which issued the credit, had not been named in the writ. Like BComm in this case, BOT also relied on Art. 2 of *The Uniform Customs and Practice for Documentary Credits 500* ("UCP 500"), which provided, in similar terms to Art. 3 of the UCP 600, that branches of a bank in different countries are considered separate banks.

57 The court rejected BOT's arguments – in particular, the argument that Art. 2 of the UCP 500 had the effect of rendering BOT's Panchiao branch a separate legal entity (at [19] and [23]). It held that the defendant identified in

the writ was simply BOT, and not BOT's Hong Kong branch (at [21]). Bank branches were only to be treated as separate entities in their dealings with each other and other banks in a letter of credit transaction, but not for other purposes. Hence, there was no need to identify BOT's Panchiao branch as a defendant in the writ, because BOT Panchiao and BOT were simply one and the same entity (at [22]). Since BOT was a registered foreign company under the Hong Kong Companies Ordinance (Cap 32) ("the Ordinance") (at [3]), service of process on BOT's place of business in Hong Kong constituted effective service on BOT pursuant to provisions in the Ordinance that were similar in terms to s 376(*a*) of the Companies Act (at [21] and [23]). Accordingly, the court's jurisdiction over BOT was properly founded.

Issue 2: Whether the Suit should be stayed on grounds of *forum non conveniens*

58 The Court of Appeal in *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw*") at [12] endorsed the test articulated by the UK House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") as governing an application for a stay of proceedings on grounds of *forum non conveniens*.

59 The *Spiliada* test comprises two stages. The first stage of the test considers whether there is some other available forum which is more appropriate for the case to be tried, and if the court concludes that there is a more appropriate forum, a stay will ordinarily be granted ("Stage One"), unless the court finds at the second stage of the test that there are circumstances by reason of which justice requires that a stay should nonetheless not be granted ("Stage Two") (*Rickshaw* at [14]; *Ivanishvili, Bidzina and others v Credit Suisse Trust Ltd* [2020] 2 SLR 638 ("*Ivanishvili*") at [81]).

60 At Stage One, the legal burden is on the applicant for the stay to show that there is another forum which is "clearly or distinctly more appropriate" than Singapore (*Ivanishvili* at [82]). At this stage, the court considers the connecting factors that link the dispute with the competing jurisdictions, which include (*Ivanishvili* at [82]; *Rappo, Tania v Accent Delight International Ltd and another and another appeal* [2017] 2 SLR 265 ("*Rappo*") at [71]):

(a) the personal connections of the parties and the witnesses;

(b) the connections to relevant events and transactions;

(c) the applicable law to the dispute;

(d) the existence of proceedings elsewhere (*lis alibi pendens*); and

(e) the "shape of the litigation", *viz*, the manner in which the claim and the defence have been pleaded.

61 However, to successfully obtain a stay, it is not enough for the applicant to merely show that Singapore is *not* the natural forum (*JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*") at [53]), *eg*, by relying on a host of connecting factors pointing away from Singapore but which are dispersed amongst several jurisdictions and hence incapable of pointing towards any particular jurisdiction as the more appropriate forum (see *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 ("*Siemens AG*") at [4]). This is because Singapore can only be *forum non conveniens* if the connecting factors pointing away from Singapore identify a distinctly more appropriate forum than Singapore, and not merely if those connections outweigh those which point to Singapore (*Siemens AG* at [4]).

62 When engaging in the inquiry under Stage One, the court can and should attribute differing weight to each connecting factor depending on the particular nature of the dispute (*Rickshaw* ([58] above) at [23]), and more weight can be ascribed to those connecting factors corresponding to incidences that are likely to be material to the fair determination of the dispute (*Rappo* at [71]; *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 ("*Salgaocar*") at [54]). Since the search is for connections that have the most relevant and substantial associations with the dispute, it is the quality of the connecting factors (rather than the mere quantity of factors) that is crucial in this analysis (*Rappo* at [70]). In this vein, the court will also weigh the connecting factors with reference to the likely issues, and connections which have little or no bearing on the adjudication of the issues in dispute between the parties will generally carry little weight (*JIO Minerals* at [41]; *Perwira Habib Bank Malaysia Bhd v Soon Peng Yam and others* [1994] 3 SLR(R) 768 at [21]; *Yeoh Poh San and another v Won Siok Wan* [2002] SGHC 196 at [18]).

63 At Stage Two, in considering whether a stay should be refused, the main consideration is whether substantial justice can be obtained in the foreign *prima facie* natural forum, and the plaintiff must establish with cogent evidence that it will be denied substantial justice if the case is not heard in the forum (*JIO Minerals* at [43]). The fact that the plaintiff would be deprived of a legitimate juridical or personal advantage if it were not allowed to proceed in Singapore will not by itself amount to a denial of substantial justice (*Rappo* at [109]). The court will also proceed cautiously before pronouncing that a litigant will experience a deprivation of substantial justice if it is left to seek recourse in an available and appropriate foreign forum, especially if the foreign forum operates a well-established and well-recognised system of justice (*Rappo* at [110]).

Stage One

64 BComm identifies four broad connecting factors which it says point towards the Alternative Fora (in particular, the PRC) as the more appropriate forum: the governing law of the contract between BComm and Sinopec SG under the LCs, the personal connections of the witnesses (raising issues of witness availability and compellability), the location where documentary evidence is available, and the risk of overlapping proceedings (arising by virtue of the PRC Civil Proceedings). I will consider these factors in turn.

Governing law

65 The governing law of the dispute is a connecting factor that points to the courts of the jurisdiction from which that system of law originates as the more appropriate forum because there will clearly be savings in time and resources if a court applies the laws of its own jurisdiction to the substantive dispute (*Rickshaw* ([58] above) at [42]).

66 The LCs do not contain a provision for governing law. It is common ground between the parties that the governing law of the LCs is *not* PRC law. BComm contends the governing law of the LCs must be Hong Kong law,[103] while Sinopec SG contends that the governing law of the LCs is Singapore law, or in the alternative, Hong Kong law.[104]

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103 Notes of Argument, 13 Jul, p 5 lines 27–28.

104 Notes of Argument, 13 Jul, p 8 line 10, p 10 line 6–8; PWS at para 102.

(1) Determining the governing law of letters of credit

67 In the absence of an express choice of governing law in the LCs, the system of law with which the contract between the issuing bank and the beneficiary under the letter of credit is most closely connected is the law of the place where the documents necessary to procure payment to the beneficiary are to be presented and checked, and where payment to the beneficiary is to be made against those documents (*Sinotani Pacific Pte Ltd v Agricultural Bank of China* [1999] 2 SLR(R) 970 ("*Sinotani*") at [19] and [23]; *Marconi Communications v PT Pan Indonesia Bank* [2007] 2 Lloyd's Rep 72 ("*Marconi*") at [43] and [63]).

68 In *Sinotani*, the letter of credit was a straight credit issued by a Chinese bank ("ABC") but it provided that documents may be presented at the Singapore branch of a Canadian bank ("RBC") for the purposes of drawing on the credit. It was argued that the contract between ABC and the beneficiary was governed by Singapore law as the place of presentation of documents and place of payment was Singapore. The Court of Appeal rejected that argument. First, documents were presented in Singapore only for the purpose of forwarding to ABC's branch in Dalian, the PRC, as RBC neither had the authority to pay the beneficiary nor bind ABC by virtue of its acceptance of presented documents in Singapore, and so any presentation and acceptance of documents only took place in the PRC (at [26]). Second, the letter of credit had also provided for payment to be made from ABC's branch in Dalian (at [27]). The court therefore found that it was PRC law with which the contract under the letter of credit had the closest and most real connection.

69 *Marconi* concerned a letter of credit issued by an Indonesian bank ("Hastin Bank") that was advised to the beneficiary by an English bank ("SCB

London") (at [10]). Another Indonesian bank ("Panin Bank") acted as a confirming bank (at [11]). While the credit did not expressly state so, the English Court of Appeal found that it was a credit available by negotiation, and that Hastin Bank, Panin Bank and the beneficiary had all contemplated that the credit was to be operated in favour of the beneficiary through SCB London as the negotiating bank (at [21]). As things transpired, SCB London did not act as a negotiating bank, but merely a collecting bank in checking and forwarding the documents presented by the beneficiary to Panin Bank (at [12] and [54]). Both Hastin Bank and Panin Bank rejected the documents as a non-compliant presentation (at [13]). Hastin Bank subsequently became insolvent, and the beneficiary commenced proceedings against Panin Bank in the English courts. An issue arose as to the governing law of the contract between the beneficiary and Panin Bank (as confirming bank) under the letter of credit.

70 The English Court of Appeal found that it was English law with which the contract between Panin Bank and the beneficiary had the closest connection because, since the credit was available by negotiation at SCB London, the contemplated place for presentation of documents and payment was England (at [64]–[66]). The English Court of Appeal also endorsed the reasoning of the trial judge that it did not matter that SCB London did not actually act as a negotiating bank because it was the *availability* of SCB London as a negotiating bank that gave rise to the closeness of connection with England (at [54]). In this vein, the court added that the proper approach in identifying the governing law of the contract under the letter of credit is to look at how the contract was intended by its terms to operate at the time it was made, rather than to look at what in fact occurred (at [55]).

(2) The governing law of the LCs

71 In this case, Field 41D of the LCs provided that they were "available with *any* bank by negotiation" [emphasis added]. Sinopec SG could therefore choose to present its documents and obtain payment at any bank of its choice, which would have been authorised by the terms of the LCs to give value for drafts drawn by Sinopec SG on BComm against compliant documents. In the event, Westpac HK acted as the advising bank and communicated the terms of the LCs to Sinopec SG. Sinopec SG also made the Presentation at Westpac HK, which then transmitted the documents on to BComm Tokyo (see [6] above).

72 Sinopec SG argues that the fact that the LCs were available with any bank by negotiation meant that Singapore law is the governing law of the LCs, because it could have gone to any bank in Singapore to negotiate the LCs.[105] However, BComm argues that this ignores the fact that Sinopec SG had made the Presentation at Westpac HK, and consequently, its likely expectation was that it would be paid through Westpac HK had the Presentation been deemed compliant. As such, according to BComm, the place where Sinopec SG was to be paid, and the place where documents were to be presented, and checked before such payment was made, was Hong Kong.

73 In the case of a freely negotiable credit, since the beneficiary is free to present documents and obtain payment at any bank of its choice, the place of actual presentation of documents and payment is at the beneficiary's choosing. However, that cannot mean that the place, and the corresponding system of law, with which the contract under the letter of credit has its closest connection will depend on *where* the beneficiary eventually decides to negotiate its documents.

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105 Notes of Arguments, 13 Jul, p 10 lines 7–9.

Contracts are incapable of existing in a legal vacuum and are made by reference to some system of law which defines the obligations assumed by the parties and prescribes remedies enforceable in a court of justice for failure to perform any of these obligations (*Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] 1 AC 50 at 65). The contract between the issuing bank and a beneficiary under a letter of credit is formed and the issuing bank becomes irrevocably bound to honour the credit when the credit is communicated to the beneficiary (*Sinotani* ([67] above) at [24]; *Jack* ([6] above) at para 5.3). The place and the corresponding system of law that is most closely connected must therefore also be determined at that time, and not subsequently when the beneficiary presents documents pursuant to the terms of the credit. For example, in *Marconi* ([67] above), it did not matter that SCB London did not eventually negotiate the credit and merely acted as a collecting bank – given the designation of SCB London under the terms of the credit as the negotiating bank, it had been in the *anticipation* of the parties at the time when the contract was made that the beneficiary would present documents to, and be paid by, SCB London in England, and that sufficed to render English law most closely connected to the credit (at [55] and [66]).

74 In my judgment, in the case of a freely negotiable credit (like the LCs) where the beneficiary may present documents and obtain payment at any bank of its choice, the system of law with which the contract between the issuing bank and the beneficiary has its closest connection is that of the place where parties had *contemplated* that documents would be presented and payment made, at the time when the terms of the letter of credit were communicated to the beneficiary.

75 In this case, Sinopec SG is a Singapore-incorporated company and conducts business operations out of Singapore.[106] The commercial purpose of a letter of credit is to provide the beneficiary with the right to receive payment against compliant documents in a particular country, usually that in which it carries on business (*Marconi* at [62]). Therefore, the ordinary expectation of parties at the time when the terms of the LCs were communicated to Sinopec SG was that Sinopec SG would have negotiated documents and sought to obtain payment in Singapore, the place at which it carries on business. It would have been in the contemplation of the parties at the material time that the place of presentation of documents and payment under the LCs was Singapore. I am therefore inclined to the view that Singapore law is the governing law of the contract between Sinopec SG and BComm under the LCs.

76 The fact that the terms of the LCs had been communicated by Westpac HK to Sinopec SG is not inconsistent with the view that I have expressed earlier. An advising bank which communicates the terms of a letter of credit to the beneficiary does not undertake any obligation to the beneficiary unless it adds its confirmation to the credit (see Art. 9(a) of the UCP 600). It does not appear that Westpac HK, which acted as the advising bank, had added its confirmation to the LCs, nor does it appear that Westpac HK had been invited by BComm to do so. In my view, the circumstances in which the LCs had been communicated therefore do not necessarily convey the impression that Hong Kong had been contemplated by parties as the place for presentation of the documents or for payment. In any event, for the purposes of the Stay Application, I do not have to come to a firm conclusion at this stage of the proceedings as to what the governing law of the LCs are. It suffices to state that I am not persuaded that

106 Zhao's 1st Affidavit at para 14.

Hong Kong had been in parties' contemplation at the time the contract under the LCs was formed as the place where documents were to be presented, and where payment was to be made, and so Hong Kong law is unlikely to be the governing law.

77 Given my tentative view that the governing law of the contract between BComm and Sinopec SG is Singapore law, this connecting factor does not identify an alternate jurisdiction for the purposes of Stage One. However, even if the governing law were Hong Kong law and so identifies Hong Kong as an alternate jurisdiction, this does not change the overall result in so far as this connecting factor is concerned under Stage One. This is because both parties are in agreement that, whether it is Hong Kong law or Singapore law that is the governing law, there is no substantive difference in the legal principles that will apply to the dispute at hand. In any event, there is no evidence placed before me as to how Hong Kong law would differ from Singapore law in so far as the fraud defence to a claim under letters of credit is concerned. This is unsurprising given that both Singapore and Hong Kong are leading centres of business and commerce, and they also share a similar common law legal tradition.

78 This has some consequences as to the weight to be attributed to the governing law as a connecting factor, even if the governing law of the LCs were Hong Kong law. The governing law of a transaction is regarded as a relevant connecting factor in a dispute governed by foreign law because the foreign forum will be more adept at applying its own laws than a court of another system of law, and so litigation in that foreign forum produces cost and resource savings (*CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 ("*CIMB*") at [63]). In this case, given the absence of any evidence to the contrary, I can proceed on the basis that Hong Kong law is no different from Singapore law as

to the relevant legal principles that would apply (see *The "Chem Orchid*" [2015] 2 SLR 1020 at [159]). That being so, I can only conclude that the Singapore courts would not face any difficulty in applying Hong Kong law to resolve the dispute between the parties. Litigating the dispute in Hong Kong will therefore not produce any cost or resource savings and the reasons ordinarily justifying the treatment of governing law as a connecting factor do not apply.

79 Furthermore, as will be explained in more detail in the course of this judgment, given the nature of the defence which BComm says it intends to rely on in refusing to honour the LCs, it does not appear to me that the present case would raise any novel issues of law about the fraud defence to a claim under letters of credit. In situations like these, little weight is usually given to the governing law as a connecting factor, as the following extract from *Dicey, Morris and Collins on The Conflict of Laws* (Sweet & Maxwell, 14th Ed, 2006), approved by the Court of Appeal in *CIMB* at [61], explains:

> If the legal issues are straightforward, or if the competing fora have domestic laws which are substantially similar, the identity of the governing law will be a factor of rather little significance.

80 Therefore, even if the governing law of the LCs were Hong Kong law and so constitute a connecting factor in favour of Hong Kong, I find that little to no weight may be accorded to that factor at Stage One.

Personal connections of the witnesses

81 Connections relating to witnesses encompass two distinct factors: (a) the convenience in having the case decided in the forum where the witnesses are ordinarily resident (*ie*, the locations of the witnesses); and (b) the compellability of those witnesses (*JIO Minerals* ([61] above) at [63]). Where the main disputes in the action revolve around questions of fact, these factors take on greater

significance because there would be savings of time and resources if the trial is held in the forum in which witnesses reside and where they are clearly compellable to testify (*Rickshaw* ([58] above) at [19]).

82 To appreciate the significance of this connecting factor, the court must consider what evidence would likely be needed in relation to the claims made in the action before the forum (*Ivanishvili* ([59] above) at [85]). The court will focus on the issues that are in dispute, and what evidence is needed in respect of those issues. In this regard, the focus is not on the evidence the plaintiff requires to establish its allegations, but on the potential prejudice to the defendant in running its defence if evidence from particular witnesses is unavailable (*Ivanishvili* at [86]).

83 A defendant who argues that the presence of witnesses in a foreign jurisdiction renders it the more appropriate forum should at least show that the evidence from those foreign witnesses is *arguably* relevant to its defence – it is not permitted to simply assert, without substantiation, that it requires foreign witnesses (*JIO Minerals* at [67]). However, it is also not required to demonstrate exactly how the testimony of those witnesses will be used and whether it is material to its defence because the court should not, at this interlocutory stage, predetermine the witnesses that the parties should call (*JIO Minerals* at [66]).

84 The physical locations of witnesses are generally of less significance in present times given the ease of travel and the option of giving evidence from a foreign jurisdiction by video-link. Indeed, given the ongoing COVID-19 pandemic, which will result in witnesses increasingly having to give evidence by video-link due to travel and other restrictions, their place of residence or

physical locations will generally be less important (*Bunge SA and another v Shrikant Bhasi and other appeals* [2020] 2 SLR 1223 ("*Bunge*") at [50]).

85 However, since a Singapore court cannot compel a foreign witness to testify physically in a Singapore court or via video-link (see O 38 r 18(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the Rules of Court")), the compellability of a foreign witness remains relevant, and it is a factor that points towards the jurisdiction in which that witness ordinarily resides as the more appropriate forum (*JIO Minerals* ([61] above) at [71]). The compellability of a witness to testify if the dispute was heard in the foreign jurisdiction in which he resides is a matter of foreign law and can be addressed by way of expert evidence (see *JIO Minerals* at [72]–[73]). Nevertheless, the absence of evidence of such foreign law should not be seen as reducing the weight associated to this connecting factor in an appropriate case because it remains the case that a foreign witness is more likely to testify if the dispute were heard in the foreign court where that witness is resident, than if it were heard in Singapore (see *JIO Minerals* at [74]).

86 Since the attendance of witnesses related to the parties can usually be secured even if they are not compellable to testify, the issue of compellability of witnesses should be focused on third-party witnesses over whom the parties to the dispute have no control and whom the parties may not be able to persuade to give evidence voluntarily in the absence of their compellability (*Salgaocar* ([62] above) at [73]; *Ivanishvili* ([59] above) at [84]).

87 There is, in general, no disagreement between the parties as to the legal principles set out above in relation to the personal connections of the witnesses. There is, however, one significant point of contention relating to the

compellability of witnesses. That is whether the defendant seeking a stay of proceedings must *first show that a witness is unwilling to testify in Singapore* before the compellability of that witness can be a relevant consideration for the purposes of identifying a connecting factor for Stage One. Sinopec SG argues that there is such a requirement. It relies on *Bunge* ([84] above), where the Court of Appeal had stated: "the issue of compellability only arises if there is some indication that the relevant witness is unwilling to testify" (at [50]). BComm submits that there is no such requirement.

88 First, my review of the case law in Singapore prior to *Bunge* shows that compellability only becomes irrelevant when there is evidence that a witness, ordinarily residing in a foreign jurisdiction, is willing to come forward and testify in Singapore. In the absence of such evidence, a witness will not be taken to be willing to testify outside of his jurisdiction of residence, and so the compellability of a witness ordinarily points towards the jurisdiction in which he resides as the more appropriate forum.

89 In *JIO Minerals* ([61] above), the Court of Appeal found that the fact that particular witnesses were compellable only in Indonesia but not Singapore pointed to Indonesia as the natural forum. The court accepted that the compellability of the Indonesian witnesses was in issue and presented a relevant connecting factor even though it does not appear that there had been any suggestion that those witnesses were *unwilling* to testify in Singapore. It appeared to be sufficient that those witnesses were located *outside* of Singapore and in Indonesia, even if there had been no evidence that they were unwilling to come forward to testify in Singapore – in fact, the court had found that those witnesses were *more likely* to testify in Indonesia, even if they were not strictly compellable under Indonesian law (at [71]–[74]). Similarly, in *Ivanishvili* ([59]

above), the Court of Appeal explained that, where there is a high likelihood of there being relevant witnesses who are non-compellable in Singapore, that would in principle be a factor pointing away from Singapore as the appropriate forum, *even if such witnesses have not actually been identified* (at [94]). If the relevant witnesses have not been identified, then *a fortiori* it could not have been possible for the defendant seeking a stay of proceedings to show that these witnesses are unwilling to testify in Singapore. Therefore, emphasis was placed by the court on the compellability of a witness to testify in Singapore, and not the unwillingness of a witness to testify in Singapore.

90 Therefore, the approach taken by our courts is that it will ordinarily proceed on the basis that compellability *is in issue*, unless shown otherwise by evidence of the *willingness* of a foreign witness to testify in Singapore. However, the approach advocated by Sinopec SG proceeds on the opposite premise – that compellability is *not in issue*, unless shown otherwise by evidence of the *unwillingness* of a foreign witness to testify in Singapore.

91 Second, I think that there may be practical difficulties if a defendant seeking a stay of proceedings is required to demonstrate, at an early stage of the proceedings, that the witnesses which it intends to call are unwilling to testify in Singapore. A defendant is not required to establish the materiality of any of its potential witnesses at this stage; it suffices that these witnesses are at least arguably relevant to its defence (see [83] above). As such, there is usually no certainty that any such witnesses will be called for the trial. I think it may be too much to expect of a defendant if it is required to obtain some confirmation from each and every such potential witness, who may be dispersed across different jurisdictions, stating that they are unwilling to come forward and

testify in Singapore, at a time when its defence has not even been filed and all the disputed issues may not even be clear.

92 Third, the observations of the Court of Appeal in *Bunge* ([84] above) must be seen in the context of the particular facts in that case. In that case, the High Court had dismissed an application by the defendant for a stay of the Singapore proceedings in favour of India: see *Grains and Industrial Products Trading Pte Ltd and another v State Bank of India and others* [2019] SGHC 292 ("*Grains*") at [195]–[207]. On appeal, the defendant argued that the dispute had strong connections to India (which pointed to India as being the more appropriate forum) because, *inter alia*, some critical witnesses who were resident in India were not compellable as far as the Singapore proceedings were concerned (at [46]). These witnesses included one Ms Jadhav, who was an employee in the second plaintiff's group of companies.

93 It was the defendant's own case that Ms Jadhav would *more likely* testify if the claim were heard in India (at [50]). In my view, it was implicit in this argument that Ms Jadhav would, at the very least, have been *willing* to testify in Singapore, although *less likely* than if proceedings were in India. Where a witness is willing to testify in Singapore, then the issue of compellability becomes irrelevant (see [88]–[90] above). Hence, the Court of Appeal did not have to deal with any issue of compellability of Ms Jadhav given that it appeared that she was willing to testify for the Singapore proceedings. That explains the Court of Appeal's comment (as set out at [87] above) about no issue of compellability arising because there was no evidence of the witness being unwilling to testify. Further, given that Ms Jadhav was in the employ of the second plaintiff's group of companies and that her testimony was directly relevant to a key issue of fact (see *Grains* at [48]–[54] and [200]), it would be

most unlikely that the second plaintiff would not procure her as a witness to the proceedings in Singapore, given that, otherwise, adverse inferences might be drawn. Notably, the Court of Appeal in *Bunge* also added that "considerations of witness … compellability must be specific to both the prevailing external situation and a party's own case" (at [50]). In my view, this is a recognition that the relevance of the issue of witness compellability differs from one case to another. As such, I do not think that the Court of Appeal intended to lay down a universal requirement that a defendant must first show that particular witnesses are unwilling to testify *before* their compellability can be said to be an issue for the purposes of Stage One of the *Spiliada* test.

94 With these legal considerations out of the way, I move now to consider the issues in dispute, the arguably relevant witnesses in relation to those issues, and their personal connections.

(1) BComm's defence to non-payment under the LCs

95 I begin by considering the nature of BComm's defence to the claim under the LCs. In the Suit, Sinopec SG claims in its capacity as a beneficiary of the LCs against BComm as an issuer of the letter of credit. The autonomous nature of documentary credits means that the bank's payment obligation under the letter of credit is treated as being independent of the underlying transaction in respect of which the credit was issued, as well as the performance of that transaction. However, BComm's payment obligation under the LCs is not absolute and it may avail itself of a defence to Sinopec SG's claim on the basis of recognised exceptions to the autonomous nature of letters of credit.

96 The scope of such defences will differ depending on the system of law which governs the LCs (which, as I noted earlier, contain no provision for

governing law: at [5]). Under Singapore law (as well as English law), one established exception to the autonomy principle that justifies a bank's refusal to honour a letter of credit is where the beneficiary, for the purpose of drawing on the credit, fraudulently presents to the bank documents that contain, expressly or by implication, material representations of fact that, to his knowledge, are untrue (*United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 ("*United City Merchants*") at 183). An allegation that there had been fraud in the underlying sale contracts in respect of which the letter of credit had been issued does not justify the issuing bank's refusal to honour its payment obligations (see, *eg*, *Brody, White and Co Inc v Chemet Handel Trading (S) Pte Ltd* [1992] 3 SLR(R) 146 at [22]); the scope of the fraud exception is limited to fraud *in the presentation of documents* under the credit and *not* that in the underlying transaction itself.

97 Given the narrow compass of the fraud exception, BComm recognises that it will not suffice to only contend that the Cargo had been the subject of the Alleged Prior Contracts, or that Sinopec SG was seeking to re-sell to SIH under the Sale Contracts goods that it had previously sold to the Zhong Tuo Group entities under the Alleged Prior Contracts. That can only show fraud in the Sale Contracts and no more than that.

98 Instead, BComm has maintained that its defence to the claim under the LCs falls squarely within the scope of the fraud exception as set out in *United City Merchants* because there has been fraud in the presentation of the documents for payment under the LCs. It argues, relying on *The Yue You 902 and another matter* [2020] 3 SLR 573 ("*The Yue You*"), that the Discharge had rendered the BLs "spent" because the Cargo had been released to persons entitled to delivery under the bills of lading. According to counsel for BComm,

that had been the case here because, pursuant to the Discharge, the Cargo had been released to the Zhong Tuo Group entities, which had been entitled to take delivery of the Cargo under the Alleged Prior Contracts.

99 BComm also argues that, while the Discharge had only taken place against the LOIs (and not presentation of the BLs), that would nonetheless have rendered the BLs spent.[107] In *The Yue You*, the court accepted that a bill of lading will only become "spent" if cargo was delivered to a person *entitled* to delivery under the bill (at [65] and [74]). Without deciding the issue, the court expressed preference for the view that a bill of lading would also become spent even if delivery to a person entitled to delivery of the cargo had only taken place against a letter of indemnity without surrender of the bill of lading, because whether a bill becomes spent depends on whether delivery had been made to the right person (at [69]).

100 According to BComm, the fact that the BLs as presented were already spent meant that, despite their apparent conformity with the terms of the LCs, they were no longer effective documents of title. A bill of lading functions as a document of title enabling the consignee to take delivery of the goods or dispose of them by transfer of the bill of lading (see *The Star Quest and other matters* [2016] 3 SLR 1280 at [17]). It therefore carries with it the implied representation that it is an effective document of title. In the present case, given that the BLs were already spent, this representation was untrue.

101 Further, that the BLs were spent was something which Sinopec SG would have known about. This is because Sinopec SG knew that the Cargo had

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107 DWS at paras 53.3–53.4.

been the subject of the Alleged Prior Contracts between itself and the respective Zhong Tuo Group entities, that the Zhong Tuo Group entities were entitled to delivery of the Cargo under those contracts, and that the Discharge to them had taken place pursuant to those contracts.

102 BComm thus argues that Sinopec SG, by presenting the spent BLs, was knowingly making a misrepresentation to BComm that the BLs were effective documents of title to the Cargo. As such, there was fraud in the presentation of documents that fell within the scope of the fraud exception to the autonomy principle.[108] BComm relies on the following extract from *United City Merchants* ([96] above) in support of this argument (at 187E):

> … if [the beneficiary] presented documents with knowledge that this apparent conformity with the terms and conditions of the credit was due to the fact that the documents told a lie, the seller/beneficiary would himself be a party to the misrepresentation made to the confirming bank by the lie in the documents and the case would come within the fraud exception.

103 I have set out BComm's arguments above so that I can proceed to then consider the witnesses it will require to make out its defence of fraud. I have refrained from expressing any view on the merits of its arguments since the court is not required to express a view on whether there is a viable defence to the claim as part of the *forum non conveniens* analysis (see, *eg*, *The Rainbow Joy* [2005] 3 SLR(R) 719 at [27]).

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108 Defendant's Supplemental Submissions dated 3 Aug 2021 ("DSS") at para 10.

(2) Is the testimony of the required witnesses arguably relevant to BComm's fraud defence?

104 BComm's fraud defence turns on the legal effect of the BLs at the time of the Presentation – they must have been spent at that time so that the Presentation would have entailed Sinopec SG making a misrepresentation to BComm. To establish that the BLs were spent, BComm must show that the Zhong Tuo Group entities had been entitled to delivery of the Cargo under the BLs at the time of the Discharge. Although the BLs have identified the respective Zhong Tuo Group entities as the "notify party", that *per se* did not mean that they were entitled to receive the Cargo (see also Richard Aikens, Richard Lord and Michael Bools, *Bills of Lading* (Informa, 2nd Ed, 2015) at para 3.124, which explains that the notify party is neither a party to the contract of carriage nor a person entitled to possession of the goods). To succeed in its defence, BComm must therefore prove that the Alleged Prior Contracts exist so that the Zhong Tuo Group entities would have been contractually entitled to delivery of the Cargo. For this, it will require evidence as to whether there had been any pre-existing contractual relationship between Sinopec SG and the respective Zhong Tuo Group entities relating to the Cargo at the time of the Discharge.

105 I now turn to each of the different witnesses, categorised by the organisation to which they belong, and consider if it is likely that the facts within their personal knowledge, and the testimony which they can give, are arguably relevant in relation to the issue of whether the Alleged Prior Contracts exist.[109]

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109 DWS at para 55.

Entity which the witness belongs to	Witness	Role
SIH ("the SIH Witnesses")	Feng Jun	Chairman
	Mao Jian Yi	President
	Meng Yin Fa	Former General Manager
	Yuan Jing Qing	Deputy Department Head, Finance
Shanghai International Corporation ("SIC"), a wholly-owned subsidiary of SIH[110] ("the SIC Witnesses")	Li Xiang Yang	General Manager
	Chen Xin Yan	Employee
China Jinshan ("the China Jinshan Witnesses")	Xia Sen	Vice General Manager
	Sun Zhen Guo	Deputy Manager
Zhong Tuo Group ("the Zhong Tuo Group Witnesses")	Lv Qing Qing	Business Manager at HKZT
	Chen Zeng Chun	Director at HKZT and Executive Managing Director at HZHS
Shanghai Jinshan (*cf* [130] below)	Peng Xiang	Employee
Shanghai PSB ("the Shanghai PSB Witnesses")	Captain Zhou Hai Feng	Captain of the First Team of the Shanghai PSB's Economic Crime

110 Liu's 1st Affidavit at para 24.3; Chen's 1st Affidavit at para 18.

Entity which the witness belongs to	Witness	Role
		Investigation Department.[111]
	Captain Xu Qin	Vice-Captain of the First Brigade of the First Team of the Shanghai PSB's Economic Crime Investigation Department.[112]
Bank of China, Tokyo Branch ("the BOC Tokyo Witnesses")	Dai Ying	Former General Manager
	Lu Qiang	Department Head for Trade and Services
	Yun Yi	Vice President
BComm ("the BComm Witnesses")	Xin Hongqi	Employees from BComm Tokyo who have attended the 24 Sep Meeting with the Shanghai PSB.[113]
	Yao Yi Fan	
	Peng Yun	
	He Yiying	
	Liu Jun	
Sinopec Jiangsu ("the Sinopec Jiangsu Witnesses")	Yu Miao	Deputy Director
	Mei Hailiang	Deputy General Manager
Sinopec Chemical Sales (Shanghai) Co Ltd	Chang Jian Hua	Business Department Manager

111 Liu's 1st Affidavit at para 22.1.

112 Liu's 1st Affidavit at para 22.2.

113 Liu's 1st Affidavit at para 22.

(A) THE SIH WITNESSES

106 I accept that the SIH Witnesses can testify on the precise role which SIH has played by entering into the Sale Contracts, which is also a point in dispute between the parties (see [40] above). These witnesses can testify as to whether SIH had agreed to act as a credit facilitator when it entered into the Sale Contracts, and thus had taken on the credit risk of the Zhong Tuo Group entities.[114] However, it is unclear to me how such evidence will be relevant in establishing BComm's fraud defence.

107 First, as a matter of principle, whether BComm may avail itself of any defences to non-payment under the LCs must be independent of the reason why SIH had entered into the Sale Contracts. Whether SIH had agreed to act as a credit facilitator would arguably be relevant to the question of whether it had a claim against Sinopec SG for not having good title to the goods that it purportedly sold under the Sale Contracts. However, because of the autonomous nature of letters of credit, disputes between buyer and seller arising from the underlying sales contract cannot affect the issuing bank's separate payment obligation in the corresponding letter of credit.

108 Second, what appears critical to BComm's fraud defence is whether the BLs were spent and had ceased to be effective documents of title at the time of the Presentation. That is dependent on whether there had been any contractual relationship between Sinopec SG and the respective Zhong Tuo Group entities relating to the Cargo at the time of the Discharge, and pursuant to which the Discharge might have taken place. Since SIH is neither a party to the Alleged Prior Contracts, nor does it appear to have been involved in any dealings relating

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114 Chen's 4th Affidavit at para 46.3.

to the Cargo prior to the date of the Sale Contracts, the SIH Witnesses cannot shed light on whether the Alleged Prior Contracts exist. They can only testify as to SIH's own dealings with Sinopec SG, and whether they believed that Sinopec SG had good title to the Cargo sold under the Sale Contracts.

109 Quite apart from the relevance of their evidence to the critical issue in dispute, BComm faces another serious problem in showing the personal connections of the SIH Witnesses to any particular jurisdiction. Despite the claimed importance of the SIH Witnesses to its defence, BComm has not put forward in its affidavits any evidence to suggest where these witnesses are located.[115] Indeed, at the hearing before me, BComm's counsel argued that, while there is no evidence before the court as to the locations of these witnesses, they were probably either *in Japan or the PRC* because they are PRC nationals, and SIH is a Japanese-incorporated company.[116]

110 Counsel for Sinopec SG argues that since these employees work for a Japanese company, the more natural inference is that they are presently in Japan. However, this is met with the response by opposing counsel that, regardless of where the SIH Witnesses are actually located, they are effectively compellable to testify in the PRC because PRC nationals are unlikely to defy any order by the courts of their home country to give witness testimony.[117] I am sceptical of the factual premise of this submission by BComm's counsel. I find it rather speculative. But, even if it were correct, it did not mean that the SIH Witnesses are compellable to testify in the PRC, if they are presently resident outside of

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115 Liu's 4th Affidavit at para 38; Chen's 4th Affidavit at para 46.3; Zhao's 4th Affidavit at para 43.

116 Notes of Argument, 13 Jul, p 4 lines 21–23.

117 DWS at para 58.2.2; Liu's 4th Affidavit at para 38.1.

the PRC. It only means that they are *willing* to do so if any legal proceedings were to take place in the PRC. In the absence of clear evidence as to where the SIH Witnesses are exactly located, I find that the compellability of these witnesses cannot present a connecting factor in favour of any particular jurisdiction for the purposes of Stage One.

111 I also observe that BComm's arguments (in respect of the alleged connecting factors presented by the SIH Witnesses) appear to suggest that it did not matter, for the purposes of the analysis at Stage One, whether the SIH Witnesses were located in Japan or PRC, so long as they were located outside of Singapore, as that would point towards either Japan and/or the PRC as the more appropriate forum than Singapore to try the dispute. That approach raises difficulties. Under Stage One, BComm must identify a jurisdiction that is a distinctly more appropriate forum than Singapore, *ie*, the connections pointing toward that *particular* jurisdiction must overwhelm those that point towards Singapore (see [61] above). The fact that BComm is unable to point to the particular jurisdiction in which the SIH Witnesses are located means that it is unable to identify the jurisdiction in which these witnesses are compellable to testify and which connections may overwhelm those in favour of Singapore, and so it has failed to identify any jurisdiction as the more appropriate forum.

(B) THE SIC WITNESSES

112 The evidence which BComm says each of the SIC Witnesses may provide differ, and so I will consider them separately.

113 BComm submits that Chen Xin Yan can give evidence of the attempts which SIH made to locate the Cargo after it learnt of HKZT's financial

difficulties.[118] I am not persuaded that this would be relevant to the question of whether the BLs were already spent at the time of the Discharge. Whether the BLs were spent in this case does not depend on the location of the Cargo at the time of the Presentation, but on the terms pursuant to which the Discharge had taken place. Any attempts by SIH to locate the Cargo will not shed light on whether the Alleged Prior Contracts exist. Moreover, the location of the Cargo at the time of the Presentation is not in dispute, and it is common ground between parties that the Cargo had already been released into the custody of the Zhong Tuo Group entities by then.

114 In any event, BComm has not specified where Chen Xin Yan is presently located and in which jurisdiction will she be compellable to testify. As such, even if her evidence were relevant, her compellability does not constitute a connecting factor capable of identifying a more appropriate forum than Singapore.

115 Li Xiang Yang was the contact person for each of the Downstream Contracts which were entered into between SIH and HKZT.[119] According to BComm, he would be able to testify as to the arrangements between SIH and HKZT and provide relevant evidence on the role which SIH had played by entering into the Sale Contracts. However, whether SIH entered into the Sale Contracts as a credit facilitator is not relevant to BComm's fraud defence. That can only be relevant for the purposes of determining if SIH had been defrauded by Sinopec SG under the Sale Contracts (see [107] above). As such, while Sinopec SG and BComm appear to be in agreement that Li Xiang Yang is

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118 Chen's 1st Affidavit at para 30.2; Chen's 4th Affidavit at para 46.5.

119 Chen's 1st Affidavit at para 18; Chen's 4th Affidavit at para 46.4.

presently detained in the PRC due to the PRC Criminal Investigations,[120] so that it is not in dispute that he is located in the PRC, I am not persuaded that his evidence is relevant to BComm's fraud defence.

116 Finally, I should add that, BComm also says that Li Xiang Yang is a relevant witness because, given that he has been detained as a subject in the PRC Criminal Investigations,[121] he would likely have knowledge of the alleged fraud.[122] I reject that. It is rather speculative to say that Li Xiang Yang's evidence is relevant simply because he has come under investigation, when it is not at all clear what he had come under investigation for, and whether that is in fact related to BComm's allegations of fraud and the conduct of Sinopec SG which it complains of (bearing in mind that Li Xiang Yang is not an officer of any of the Sinopec Group entities). Moreover, the relevance of the PRC Criminal Investigations to BComm's fraud defence is also uncertain (see [159] below).

(C) THE CHINA JINSHAN WITNESSES

117 Both of the China Jinshan Witnesses, Xia Sen and Sun Zhen Guo, are subjects of the PRC Criminal Investigations.[123] Sinopec SG and BComm also appear to be in agreement that both of them are presently detained in the PRC in connection with the investigations.[124]

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120 Chen's 4th Affidavit at para 46.4; Liu's 4th Affidavit at para 33; Zhao's 4th Affidavit at para 37.

121 Liu's 4th Affidavit at para 33; Zhao's 4th Affidavit at para 37.

122 Chen's 4th Affidavit at para 46.4; DWS Tab F at para 4.1.4.

123 Liu's 1st Affidavit at paras 29.2–29.3 and pp 31–32; Chen's 4th Affidavit at para 46.14.

124 Liu's 4th Affidavit at para 33; Zhao's 4th Affidavit at para 37.

118 BComm has not attempted to explain how Sun Zhen Guo is a relevant witness for its fraud defence, apart from the fact that he is a subject of the PRC Criminal Investigations. The fact of his detention is not a sufficient basis to show the relevance of his evidence. First, BComm has not explained in its affidavits clearly what are the offences for which Sun Zhen Guo is being investigated.[125] There is, however, an unsubstantiated allegation that Sun Zhen Guo is under investigation for fraud relating to the Sale Contracts.[126] However, that is hardly enough, and it remains unclear to me what relevant evidence Sun Zhen Guo can give especially since China Jinshan does not appear to feature directly in the chain transaction involving the Cargo.

119 Second, the PRC Criminal Investigations also appear to cover three other letter of credit transactions other than the LCs issued by BComm (see [16] above). As such, it may well be the case that Sun Zhen Guo was only involved in the transactions relating to those other letters of credit, and not those that are the subject of the Suit. The onus is on BComm to adduce some evidence to show that Sun Zhen Guo had been involved in the transactions relating to the LCs, but it has not done so.

120 One of BComm's early affidavits states that Sun Zhen Guo had been copied in the email in which the LOI for the release of the shipment of the Cargo on board the *Korea Victory* had been sent by Peng Xiang to the shipper (see also [130] below).[127] I do not consider that alone will make him an arguably relevant witness. Being copied in the email as such can only show that Sun Zhen Guo

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125 Liu's 1st Affidavit at para 29.3; Chen 1st Affidavit at para 47.3.

126 Chen's 4th Affidavit at para 46.14.

127 Chen's 2nd Affidavit at para 21.1.

knew of the LOI's *existence*, but that did not mean that he knew *why* the LOI had been issued – such as if there had been some contractual relationship between Sinopec SG and the respective Zhong Tuo Group entities so that it was necessary to facilitate the release of the Cargo to them. It is the latter, and not the former, which is relevant to BComm's fraud defence. Moreover, it was Shanghai Jinshan, and not China Jinshan (where Sun Zhen Guo works) which issued the said LOI.

121 I also find that BComm has not shown that Xia Sen is a relevant witness. For him, BComm largely relies on what it had been informed by the Shanghai PSB officers at the 24 Sep Meeting in relation to the progress of the PRC Criminal Investigations. At that meeting, those officers purportedly identified Xia Sen as "the mastermind behind the case", and also added that Xia Sen had given direct instructions for the release of "two … lots of goods" to the Zhong Tuo Group.[128]

122 However, in none of the affidavits filed did BComm provide further elaboration on what it meant by Xia Sen being a "mastermind behind the case". Was he a mastermind in the sense that he had come up with the idea of contriving the Sale Contracts as a means for Sinopec SG to obtain payment for the Cargo which Sinopec SG had become unable to recover from the Zhong Tuo Group entities by July 2019? If so, this appears to contradict BComm's own evidence that it was *Sinopec SG* which decided to alter the documentation for the Alleged Prior Contracts between itself and the respective Zhong Tuo Group entities into a sequence of deals involving Sinopec SG, SIH and HKZT, thereby giving rise, *inter alia*, to the Sale Contracts between Sinopec SG and SIH (see

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128 Liu's 1st Affidavit at para 24.2 and 24.6; Chen's 4th Affidavit at para 46.13.

[28] above).[129] Moreover, it has not been suggested that, in doing what BComm alleges it did, Sinopec SG had acted on the instructions of Xia Sen.

123 There has also been no evidence in these proceedings that Sinopec SG would have acted on the instructions of China Jinshan at any point in time for the chain transaction. To claim that Xia Sen was a "mastermind" is simply ambiguous and it is for BComm, in discharging its legal burden under Stage One, to at least show that he would have been privy to the alleged contractual arrangements between Sinopec SG and the respective Zhong Tuo Group entities at the time of the Discharge before his evidence can be considered to be arguably relevant on the issue of whether the Alleged Prior Contracts exist.

124 Similarly, in none of the affidavits filed did BComm elaborate on which were the "two … lots of goods" that Xia Sen had given direct instructions for release to the Zhong Tuo Group. Since the PRC Criminal Investigations apparently concern seven letters of credit (out of which four were the LCs), the "two … lots of goods" referred to here may possibly have been part of the Cargo, but there was also a distinct possibility that they were not. Again, it was for BComm, in discharging its legal burden under Stage One, to at least show that Xia Sen had been involved in relation to the Cargo and the Discharge before his evidence may be arguably relevant on the issue of whether the Alleged Prior Contracts exist.

125 BComm also claims that Xia Sen is a relevant witness because he had given Sinopec SG the instructions that SIH would purportedly be acting as a

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[129] Liu's 1st Affidavit at para 24.8.

credit facilitator for the Zhong Tuo Group.[130] I am not satisfied that that makes him a relevant witness. The fact that Xia Sen gave instructions about SIH acting as a credit facilitator goes towards the issue of what were the Sale Contracts for, and the reasons for which SIH had entered into the Sale Contracts. However, as I have stated earlier, that issue is not relevant to BComm's fraud defence (see [107] above). Moreover, since China Jinshan does not appear to have been involved in the chain transaction as described by Sinopec SG, the fact that Xia Sen had given such instructions cannot *per se* be reflective of any possible contractual arrangements that may have been made between Sinopec SG and the recipient of the Cargo. Indeed, Xia Sen could also have given such instructions for a multitude of reasons – for example, by virtue of the Zhong Tuo Group entities being the end receivers of the Cargo under separate arrangements entered into *after* the Discharge. It was for BComm to show that he likely gave such instructions because he had been privy to the contractual arrangements between Sinopec SG and the respective Zhong Tuo Group entities *at the time of the Discharge* before his evidence may be arguably relevant on the issue of whether the Alleged Prior Contracts exist.

(D) THE ZHONG TUO GROUP WITNESSES

126 I am not satisfied that Lv Qing Qing is able to provide relevant evidence for BComm's fraud defence. According to BComm, the relevance of Lv Qing Qing's evidence lies in the fact that she had confirmed with SIH in July 2019 that the Cargo had indeed been released to the respective Zhong Tuo Group entities in May and June 2019.[131] However, that the Discharge had taken place

130 Chen's 4th Affidavit at para 46.13.

131 Chen's 1st Affidavit at para 30.1.

is not disputed by Sinopec SG.[132] Moreover, the fact of the Discharge is not relevant for the purposes of BComm's fraud defence – that it took place does not *per se* render the BLs spent; it is the circumstances in which it took place that is critical, and in particular, whether it was done pursuant to a contract between Sinopec SG and the respective Zhong Tuo Group entities relating to the Cargo. It has not been suggested by BComm that Lv Qing Qing is able to testify as to the existence of such a contract and its terms.

127 On the other hand, I am satisfied that Chen Zeng Chun will be able to provide relevant evidence for BComm's fraud defence. As the sole director of HKZT and the executive managing director of HZHS (see [11] above), I accept that Chen Zeng Chun would be privy to the affairs of the Zhong Tuo Group entities, and can therefore testify on whether those entities receiving the Cargo in May and June 2019 had a direct contractual relationship *then* with Sinopec SG relating to the Cargo, and if not, what had been the basis for its receipt of the Cargo.[133] Such evidence can immediately shed light on the circumstances in which the Discharge had taken place, and whether it had taken place pursuant to the Alleged Prior Contracts between Sinopec SG and the respective Zhong Tuo Group entities so that the latter had been *entitled* to receive the Cargo when the Discharge took place, and thereby rendering the BLs spent, which is the critical fact necessary to make out BComm's fraud defence.

128 However, there has been no evidence provided by BComm as to where Chen Zeng Chun is presently located and thus the jurisdiction in which he is compellable to testify. BComm only points to the *possibility* that he may be

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132 Zhao's 1st Affidavit at paras 49, 56 and 58.

133 Chen's 4th Affidavit at para 46.8; see also DWS Tab F at para 6.

located in Hong Kong, where the Zhong Tuo Group is based.[134] In my judgment, it would be speculative to conclude, from that possibility alone, that Chen Zeng Chun would necessarily be compellable to testify in Hong Kong. I therefore do not find that the compellability of Chen Zeng Chun as a witness presents a connecting factor in favour of any jurisdiction outside of Singapore for the purposes of Stage One.

129 I should also add that BComm has made a submission, in general terms, that Hong Kong is a more appropriate forum because it will require evidence from "employees and/or officers" of the Zhong Tuo Group on the abovementioned matters.[135] In my judgment, that is not sufficient to establish that the personal connections of such witnesses present a connecting factor in favour of Hong Kong as a more appropriate forum for the purposes of Stage One. While there is no requirement that potential witnesses must be precisely identified for the purposes of identifying personal connections at Stage One (see *Man Diesel & Turbo SE and another v IM Skaugen SE and another* [2020] 1 SLR 327 at [148]; *Ivanishvili* ([59] above) at [94]), at the very least, it must be specified where these potential witnesses are likely to be located before their compellability can present a connecting factor in favour of that jurisdiction. This is especially the case here since, on BComm's evidence, the Zhong Tuo Group comprises entities established in both the PRC *and* in Hong Kong, and any such "employees and/or officers" may well be located in either jurisdiction at any one time.

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134 Liu's 4th Affidavit at para 39.

135 Chen's 4th Affidavit at para 46.8; Liu's 4th Affidavit at para 39.

(E) PENG XIANG

130 Peng Xiang had signed on the LOI issued by Shanghai Jinshan for the discharge of the shipment of the Cargo on board the *Korea Victory* (see [12] above). BComm says that the evidence of Peng Xiang is relevant because he can testify as to the basis on which Shanghai Jinshan had issued an LOI in respect of goods belonging to Sinopec SG, such as the instructions that had been given to Shanghai Jinshan for the issuance of the LOI, and the arrangements between Shanghai Jinshan and Sinopec SG that entitled the former to issue the LOI.[136] I note that two of BComm's earlier affidavits had identified Peng Xiang as an employee of China Jinshan,[137] but it appears to have subsequently taken the position that Peng Xiang is an employee of Shanghai Jinshan.[138] In written submissions, BComm again states that Peng Xiang is an employee of China Jinshan.[139] I would add that this apparent discrepancy is immaterial since it is the fact of Peng Xiang executing the LOI on behalf of Shanghai Jinshan (which issued the LOI) rather than the entity where Peng Xiang works at that is material.

131 I am satisfied that BComm has shown that Peng Xiang is able to provide arguably relevant evidence for BComm's fraud defence. The fact that Peng Xiang could sign on the LOI suggests that he would be in a position to testify as to the basis on which the Cargo had been released into the custody of the Zhong Tuo Group entities in May and June 2019. He may be able to explain

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136 Chen's 2nd Affidavit at para 21.1; Chen's 4th Affidavit at para 46.9; DWS Tab F at para 12.

137 Chen's 1st Affidavit at para 30.1; Chen's 2nd Affidavit at para 21.1 and 33.1.

138 Chen's 4th Affidavit at para 46.9.

139 DWS at para 55.3.

whether there was then a contractual relationship between Sinopec SG and the respective Zhong Tuo Group entities that justified him in doing so, *ie*, whether the Alleged Prior Contracts exist.

132 However, the evidence provided by both parties as to where Peng Xiang is located is contradictory. According to Sinopec SG, Peng Xiang has also come under investigation by the PRC authorities.[140] However, it is unclear if these investigations are, or are related to, the PRC Criminal Investigations – the exhibits to Sinopec SG's affidavits describe the investigations involving Peng Xiang as a "bribery case of non-state functionaries".[141] It is also unclear if Peng Xiang has been detained in the PRC as a result of these investigations. On the other hand, it does not appear to be BComm's position that Peng Xiang has come under investigation and is presently detained in the PRC.[142] Peng Xiang has also not been identified as one of the nine persons who BComm says are subjects of the PRC Criminal Investigations.[143]

133 In these circumstances, since the legal burden for the purposes of Stage One is on BComm, I find that BComm has not shown where Peng Xiang is presently located and in which jurisdiction he is compellable to testify. Again, I would reiterate that it would be speculative to conclude from the fact that Shanghai Jinshan (and/or China Jinshan) has operations within the PRC that Peng Xiang must *also* be based in the PRC and so he would necessarily be

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140 Zhao's 1st Affidavit at p 425; Zhao's 4th Affidavit at para 37.

141 Zhao's 1st Affidavit at p 425; 1st Affidavit of Corrine Lam ("Lam's 1st Affidavit") at p 61.

142 Chen's 4th Affidavit at para 46.9 and 46.14.

143 Notes of Arguments, 13 Jul, p 6 lines 5–7; Defendant's Core Bundle ("DCB") at pp Z147–Z148; Liu's 1st Affidavit at para 29.3 and pp 31–32; Chen's 1st Affidavit at para 47 and pp 305–306.

compellable to testify in the PRC. I therefore do not find that the compellability of Peng Xiang presents a connecting factor in favour of any jurisdiction outside of Singapore for the purposes of Stage One.

(F) THE SHANGHAI PSB WITNESSES

134 In so far as the Shanghai PSB Witnesses are concerned, it is important to note that, even if the Alleged Prior Contracts exist, these witnesses do not have any direct or personal knowledge about them. They would have gained their knowledge through the process of the PRC Criminal Investigations. As such, I do not consider *their* evidence to be directly relevant to the question of whether BComm can establish its fraud defence. Indeed, this much appears to have been accepted by counsel for BComm at the hearing before me, where he emphasised the necessity to call the SIH Witnesses, the SIC Witnesses and the Zhong Tuo Group Witnesses to make out its fraud defence, but made no mention of the Shanghai PSB Witnesses on this point.[144]

135 Even if one were to assume that the PRC Criminal Investigations indeed cover matters which are relevant to BComm's fraud defence (a point which I will return to later at [159] below), in so far as the Shanghai PSB Witnesses may testify on evidence obtained in the course of those investigations, such as "any admissions or confessions made by [Sinopec SG's] employees",[145] I am still not prepared to accept that the personal connections of the Shanghai PSB witnesses give rise to a connecting factor in favour of the PRC for the purposes of Stage One.

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144 Notes of Arguments, 5 Aug, p 7 lines 24–28.

145 Notes of Arguments, 13 Jul, p 5 lines 2–4.

136 Both parties' PRC law experts are in agreement that any evidence obtained in the course of the PRC Criminal Investigations cannot be used for any proceedings outside the PRC. This is because documents uncovered in the course of criminal investigations are considered "state secrets" under the PRC State Secrets Law, and a party who discloses such documents in a foreign proceeding without prior authorisation will violate Art. 9(6) of the PRC State Secrets Law and expose himself to criminal sanctions.[146] Although BComm's expert does go further to say that such documents will no longer constitute "state secrets" once they have been disclosed in a public hearing and/or judgment of the criminal courts in the PRC,[147] that does not materially change the position because it still means that any findings emerging from the PRC Criminal Investigations can only be used within the PRC until such time when the PRC Criminal Proceedings have taken place or concluded.

137 This means that any evidence of the Shanghai PSB Witnesses relating to matters relevant to BComm's fraud defence can only be given for proceedings within the PRC. The evidence of the Shanghai PSB Witnesses therefore does not create any personal connections for the purposes of Stage One because the relevant issue in relation to their evidence is *where* such evidence is available, rather than *from whom* such evidence can be obtained. For such evidence, the question is whether the PRC will be a more appropriate forum by virtue of it being available within the PRC and not in other jurisdictions, which is a point I will turn to later at [157] below.

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146 Song Lianbin's Expert Opinion dated 3 Mar 2021 in 1st Affidavit of Song Lianbin ("Song LB's 1st Report") at paras 52–54. Song Xixiang's Expert Opinion dated 9 Dec 2020 in 1st Affidavit of Song Xixiang ("Song XX's 1st Report") at para 21.

147 Song XX's 1st Report at para 21.3.

(G) THE BOC TOKYO WITNESSES

138 According to Sinopec SG, BOC Tokyo had issued two letters of credit in relation to contracts for the sale and purchase of Paraxylene between Sinopec SG and SIH that were similar to, and were entered into at around the same time as the Sale Contracts and which are also the subject of the PRC Criminal Investigations (see [16] above).[148] BOC Tokyo also refused to make payment under those letters of credit.[149] According to BComm, the reasons for BOC Tokyo's refusal to honour those letters of credit would be relevant evidence because it takes the view that the fraud relating to those contracts are similar to that which it alleges of the Sale Contracts.[150]

139 I do not accept that the evidence of the BOC Tokyo Witnesses is relevant for BComm's fraud defence. Out of all the sale contracts that were financed by letters of credit which are the subject of the PRC Criminal Investigations, BOC Tokyo would presumably only have an interest in, and be familiar with, those sale contracts which it had financed. I do not think that one can assume that the BOC Tokyo Witnesses are in a position to testify about the Sale Contracts, and even less so in relation to any contractual arrangements between Sinopec SG and the respective Zhong Tuo Group entities in relation to the goods under the Sale Contracts (*ie*, the Cargo) that existed prior to the Discharge.

140 For completeness, I would also add that it has not been stated in BComm's affidavits where the BOC Tokyo Witnesses are located. Presumably, they are in Japan. As such, even if their evidence were relevant for BComm's

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148 Liu's 1st Affidavit at paras 20 and 24.1; Chen's 1st Affidavit at para 32.

149 Liu's 1st Affidavit at paras 13–14; Chen's 1st Affidavit at para 31.

150 Chen's 4th Affidavit at para 46.7.

fraud defence, it is to Japan, and not the PRC, that their evidence presents a connecting factor.

(H) THE BCOMM WITNESSES

141 As BComm accepts, the issue of compellability of witnesses (and the corresponding connecting factors which it may give rise to) should focus on third party witnesses not in its employ and who might not be persuaded to give evidence voluntarily in the absence of their compellability (see [86] above).[151] For that reason, the compellability of the BComm Witnesses is not a relevant consideration in assessing the personal connections of witnesses for the purposes of Stage One.

(I) THE SINOPEC JIANGSU WITNESSES

142 Both of the Sinopec Jiangsu Witnesses, Yu Miao and Mei Hailiang, are subjects of the PRC Criminal Investigations.[152] Sinopec SG and BComm also appear to be in agreement that both of them are presently detained in the PRC in connection with the investigations.[153] BComm contends that, since Sinopec Jiangsu was the original counterparty to the Export Contracts that Sinopec SG claims were subsequently novated to the Zhong Tuo Group entities (which gave rise to back-to-back contracts between Sinopec SG and SIH, and between SIH and the Zhong Tuo Group), these witnesses can provide relevant evidence on whether any contract relating to the Cargo existed between Sinopec SG and the respective Zhong Tuo Group entities, and if so, what its terms were.[154]

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151 DWS at para 47.2.

152 Liu's 1st Affidavit at para 29.3 and pp 31–32; Chen's 4th Affidavit at para 46.14.

153 Liu's 4th Affidavit at para 33; Zhao's 4th Affidavit at para 37.

154 Chen's 4th Affidavit at para 46.11.

143 On Sinopec SG's case, it appears that it had been Sinopec Jiangsu which gave instructions for the release of the Cargo to the Zhong Tuo Group entities in May and June 2019, and that Sinopec Jiangsu had done so in its capacity as a buyer of the Cargo from Sinopec SG (see [32] above). Therefore, according to Sinopec SG, it was that – and not some other contractual relationship between Sinopec SG and the respective Zhong Tuo Group entities relating to the Cargo – which justified Sinopec SG releasing the Cargo then. Given this, I would expect that the Sinopec Jiangsu Witnesses would therefore be able to testify as to whether that had actually been the case, since this contention is being challenged by BComm. If no such arrangement had been in place, the evidence of these witnesses may shed light on the actual basis on which Sinopec SG had released the Cargo to the Zhong Tuo Group entities in May and June 2019. I therefore accept that the testimony of the Sinopec Jiangsu Witnesses is arguably relevant to the issue of whether the Alleged Prior Contracts exist.

144 Since the Sinopec Jiangsu Witnesses are located within the PRC by reason of their detention and so can only testify in the PRC, their personal connections will present a connecting factor in favour of the PRC for the purposes of Stage One.

(J) CHANG JIAN HUA

145 Similar to the case for Sun Zhen Guo, BComm has not explained how Chang Jian Hua (who is not an officer of any of the Sinopec Group entities involved in the chain transaction) is a relevant witness for its fraud defence. The only basis on which he is said to be relevant is that he is also a subject of the PRC Criminal Investigations,[155] which as I have considered above, does not *ipso*

[155] Liu's 1st Affidavit at para 29.3.

facto mean that he will be able to provide relevant evidence relating to the real issues in dispute between the parties to the Suit (see [118]–[119] above).

(3) Are witnesses located within the PRC nevertheless compellable under PRC law to testify in civil proceedings in Singapore?

146 As an alternative argument, Sinopec SG also submits that, even if any connecting factor arises in favour of the PRC as a result of arguably relevant witnesses being located in the PRC, that factor should be given little or no weight at Stage One because those witnesses are compellable *as a matter of PRC law to testify in aid of civil proceedings in Singapore*. As I explain below, I find that there is no evidence that witnesses within the PRC are compellable under PRC law to testify in civil proceedings in Singapore. While there are mechanisms that facilitate their testimony, that is altogether different from saying that such witnesses, who ultimately will only be required to testify if and when a request for judicial assistance made by the Singapore courts is acceded to by the relevant PRC authorities, are compellable as a matter of PRC law.

(A) SINOPEC SG'S PRC LAW EVIDENCE

147 Sinopec SG relies on the opinion of its PRC law expert Professor Song Lianbin ("Prof SL"). Prof SL says that there are international law mechanisms facilitating the giving of evidence by PRC witnesses for the purposes of civil proceedings in Singapore. Since these mechanisms contemplate the application of PRC law and any compulsory measures prescribed thereunder, it follows that witnesses within the PRC are also compellable to testify in civil proceedings in Singapore as a matter of PRC law.

148 The two international law mechanisms which Prof SL refers to are (a) the Treaty on Judicial Assistance in Civil and Commercial Matters between the

People's Republic of China and the Republic of Singapore ("the Treaty on Judicial Assistance"); and (b) the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("the Hague Convention"), to which both Singapore and the PRC are signatories.[156] According to Prof SL, under both the Treaty on Judicial Assistance and the Hague Convention, a witness within the PRC can testify in civil proceedings in Singapore pursuant to a request for judicial assistance for the taking of evidence made by the Supreme Court of Singapore to the PRC Ministry of Justice ("PRC MOJ").[157]

149 It appears that both mechanisms contemplate the application of PRC law in any response by the PRC MOJ to requests for judicial assistance. Art. 14 of the Treaty on Judicial Assistance provides that "[t]he laws of the requested party shall be applied in the taking of evidence and when necessary, the appropriate compulsory measures prescribed under its laws may be invoked".[158] Art. 9 of the Hague Convention provides that a "judicial authority which executes a [request to obtain evidence] shall apply its own law as to the methods and procedures to be followed".[159] Art. 10 of the same provides that "the requested authority [in executing a request to obtain evidence] shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law".[160] I shall refer to these articles collectively as the "Treaty and Convention Articles".

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156 Song LB's 1st Report at para 16.

157 Song LB's 1st Report at paras 18 and 22.

158 Song LB's 1st Report at Annex 4.

159 Song LB's 1st Report at Annex 5.

160 Song LB's 1st Report at Annex 5.

150 Sinopec SG argues that the effect of the Treaty and Convention Articles is that compulsory measures available under PRC law to compel the attendance of witnesses and production of evidence for the purposes of domestic proceedings may *also* be invoked to compel witnesses in the PRC to give evidence and produce evidence in aid of civil proceedings in Singapore. In this vein, Sinopec SG has brought two such provisions in the PRC Civil Procedure Law ("the PRC CPL") to my attention:

(a) Art. 72 of the PRC CPL, which states that "all … individuals who have information about the case are obliged to testify in court".[161] Read together with the Treaty and Convention Articles, Prof SL is of the view that, *if the PRC MOJ agrees to render judicial assistance*, witnesses within the PRC, who are already compellable for the purposes of domestic civil proceedings, will also be compellable to give evidence in aid of civil proceedings in Singapore.[162]

(b) Art. 73(4) of the PRC CPL, which provides that a witness may testify by alternative means such as written testimony, audio-visual transmission techniques or audio-visual materials, if he is "unable to be present in court due to any other proper reason".[163] According to Prof SL, the effect of Art. 73(4) is that, under PRC law, persons in detention will also be required to testify for the purposes of domestic proceedings if required by the PRC courts to do so, and they may testify by such alternative means specified in Art. 73.[164] Read together with the Treaty

161 Lam's 1st Affidavit at p 84.

162 Song LB's 1st Report at para 23.

163 Lam's 1st Affidavit at p 85.

164 Song LB's 1st Report at para 28.

and Convention Articles, Prof SL's view is that, if the PRC courts agree to render judicial assistance in aid of civil proceedings in Singapore, a person in detention in the PRC will also be required to testify in those proceedings by such alternative means.[165] This is relevant in so far as BComm requires the testimony of the Sinopec Jiangsu Witnesses (see [144] above), who appear to have been detained by the PRC authorities, and whose evidence I have found to be arguably relevant to BComm's fraud defence.

151 Finally, Prof SL also points to the following provisions of the PRC CPL, which he says shows that the testimony of witnesses located within the PRC can be provided through audio-visual, video-link or tele-communication methods for the purposes of civil proceedings in Singapore if the Singapore court requests for judicial assistance from the PRC MOJ:

(a) Art. 276 of the PRC CPL, which provides that the PRC Courts and a foreign court may, "pursuant to the international treaty concluded or participated by [the PRC] or in accordance with the principle of reciprocity … request each other to carry out service of documents on behalf, investigation and collection of evidence and any other litigation acts".[166]

(b) Art. 277 of the PRC CPL, which provides that a "[r]equest for and provision of judicial assistance shall be carried out via the channels

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165 Song LB's 1st Report at para 28.

166 Song LB's 1st Report at para 20.

stipulated in the international treaty concluded or participated by [the PRC]".[167]

(c) Art. 279 of the PRC CPL, which further provides that in executing requests for judicial assistance in aid of foreign proceedings, any specific mode for taking evidence requested by the foreign court of the PRC courts may also be acceptable unless it violates PRC laws.[168]

(B) BCOMM'S PRC LAW EVIDENCE

152 BComm's PRC law expert, Professor Song Xixiang ("Prof SX"), accepts that the mechanisms under the Treaty on Judicial Assistance and the Hague Convention exist.[169] Prof SX also does not disagree that these mechanisms contemplate the application of domestic law and compulsory measures prescribed thereunder (see [149] above).[170] Where he fundamentally differs from Prof SL is that he takes the view that these mechanisms mean little because, since there is no PRC law providing for the compulsion of witnesses within the PRC to testify in foreign civil proceedings,[171] whether a witness is in fact required to testify in aid of civil proceedings in Singapore is ultimately dependent on whether the PRC authorities agree to render judicial assistance to the Singapore courts.[172] In this case, Prof SX is of the view that the PRC authorities are unlikely to accede to a request for judicial assistance because the

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167 Song LB's 1st Report at para 20.

168 Song LB's 1st Report at para 21.

169 Song XX's 1st Report at para 22.2, 22.8.

170 Song XX's 1st Report at paras 26.1–26.3.

171 Song XX's 1st Report at para 22.1.

172 Song XX's 1st Report at para 26; Song Xixiang's Expert Opinion dated 27 May 2021 in 2nd Affidavit of Song Xixiang ("Song XX's 2nd Report") at para 13.

required witness testimony concerns matters covered by the PRC Criminal Investigations, and the rendering of judicial assistance is likely to violate the PRC State Secrets Law (which forbids the disclosure of information relating to such investigations), and prejudice the PRC's sovereignty and security.[173]

153 Prof SX is also of the view that any requests for judicial assistance under either of the two mechanisms are likely to be rejected *in any event*.[174] As I explain below, I am rather doubtful as to the correctness of this conclusion.

(a) In respect of requests made pursuant to the Treaty on Judicial Assistance, Prof SX says that the PRC courts are unlikely to render any assistance because the scope of judicial assistance that can be rendered under the Treaty on Judicial Assistance is limited and does not cover compelling witnesses within the PRC to give testimony *in aid of civil proceedings in Singapore*.[175] However, Prof SX did not refer to any provision in the Treaty on Judicial Assistance or the PRC CPL in support of his view. From my review, I could not find any provisions within the Treaty on Judicial Assistance suggesting that the scope of judicial assistance is circumscribed in the manner as suggested by Prof SX.

(b) In respect of requests made pursuant to the Hague Convention, Prof SX opines that the PRC courts are likely to reject any application made to compel PRC witnesses to give testimony in aid of foreign civil proceedings because such judicial assistance would be "incompatible with [PRC law] or is impossible of performance by reason of its internal

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173 Song XX's 2nd Report at para 15.1.

174 Song XX's 1st Report at para 27.

175 Song XX's 1st Report at paras 22.9 and 22.10.

practice and procedure or by reason of practical difficulties".[176] The reasons he gives for coming to this conclusion are that the PRC Courts have never rendered such judicial assistance in foreign civil proceedings, and that the PRC courts are reluctant to use technology like video-conferencing to collect evidence or witness testimony.[177] I noted that Prof SX did not refer to any official records or statistics in support of this view. I had some doubt whether Prof SX's conclusion is correct given that there is no evidence before me that the use of technology such as video-conferencing is incompatible with PRC law. That is especially since Prof SX himself agreed that the PRC courts have provided judicial assistance for foreign criminal proceedings by compelling witnesses in the PRC to testify by video-link in such proceedings.[178] That fact alone would make it clear that such a mode of testimony is not incompatible with PRC law.

154 As mentioned earlier, Prof SX takes the view that, as a matter of PRC law, witnesses within the PRC are not compellable to give evidence in aid of foreign civil proceedings (see [152] above). Prof SX also does not disagree with Prof SL that the international law mechanisms for judicial assistance which the latter had alluded to contemplate the application of compulsory measures prescribed under PRC law for evidence taking in foreign civil proceedings (see [149] above). However, Prof SX contends that these compulsory measures are far more limited in scope than what Prof SL suggests (see [150] above) and so,

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176 Song XX's 1st Report at para 22.6.

177 Song XX's 1st Report at para 22.5.

178 Song XX's 1st Report at para 22.5.

even if they were applicable to foreign civil proceedings, they will not be effective in this case.

(a) For instance, Prof SX says that the PRC CPL does not even provide for any measures to compel individual witnesses (save for defendants) to testify in civil proceedings within the PRC.[179] According to him, individual witnesses are only compellable to testify within the PRC for the purposes of *criminal proceedings*.[180] I had some doubt as to whether this view was correct given that Prof SX had himself stated, in an earlier expert report, that "a Chinese court can, either on its own initiative or at a party's request, compel a person in the PRC to appear and give witness testimony in *civil proceedings* before a Chinese court" [emphasis added].[181] The literal words of Art. 72 of the PRC CPL (see [150(a)] above) also do not appear to be as restrictive as Prof SX suggests it is.

(b) Prof SX also disagrees that Art. 73(4) has the effect of requiring persons in detention within the PRC to testify in aid of foreign civil proceedings by way of video-link even if the PRC authorities agree to provide judicial assistance. He says this follows from his opinion (which I have rejected at [154(a)] above) that there is no provision of PRC law that allows the PRC courts to compel the attendance of individual witnesses who are not defendants (including persons in detention) to testify in both domestic and foreign civil proceedings.[182]

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179 Song XX's 2nd Report at para 12.1.

180 Song XX's 2nd Report at para 12.1.

181 Song XX's 1st Report at para 17.

182 Song XX's 2nd Report at paras 11.1–11.2.

Additionally, Prof SX disagrees that Art. 73(4) of the PRC CPL has the effect of requiring persons in detention to testify in domestic civil proceedings (*cf* Prof SL's opinion at [150(b)] above) because the ambit of "any other proper reason" that results in a witness being unable to be physically present in court and which triggers the operation of Art. 73(4) is unclear.[183] While not saying so explicitly, Prof SX appears to suggest that it is uncertain if "any other proper reason" includes a situation where a person is unable to be present as a result of detention. He also notes that there has been no official report from the PRC authorities which shows that persons in detention within the PRC have testified via video-link for domestic civil proceedings pursuant to Art. 73(4).[184] In any event, he says, Art. 73(4) would not apply in the context of judicial assistance and witnesses testifying in foreign civil proceedings via video-link.[185]

(C) ANALYSIS

155 I do not find that there are any provisions within PRC law which provide that witnesses within the PRC (whether in detention or not) are compellable to testify in aid of civil proceedings in a foreign jurisdiction. While I accept that Art. 72 of the PRC CPL renders a witness within the PRC compellable to testify in aid of civil proceedings within the PRC, and that Art. 73(4) of the PRC CPL provides for alternative mechanisms through which such a compellable witness may testify, if he is not able to testify physically in court, there is nothing on the

183 Song XX's 2nd Report at paras 10–10.1.

184 Song XX's 2nd Report at para 10.2.

185 Song XX's 2nd Report at paras 9.2 and 10.1.

face of these provisions indicating that they are capable of application in the context of foreign civil proceedings outside of the PRC.

156 Even if the Treaty on Judicial Assistance and the Hague Convention contemplate the application of domestic law and compulsory measures thereunder to witnesses within the PRC required for the purposes of civil proceedings in Singapore (by virtue of the Treaty and Convention Articles), in my view, that is altogether different from saying that such witnesses are compellable for the purposes of civil proceedings in Singapore *as a matter of PRC law*. While the Treaty on Judicial Assistance and the Hague Convention provide for the mechanisms by which witnesses within the PRC may testify in civil proceedings in Singapore, it only requires them to testify, pursuant to compulsion prescribed under PRC law, *if and when* the relevant PRC authorities accede to a request for judicial assistance by the Singapore courts. As such, these mechanisms are facilitative rather than mandatory in nature. Indeed, both parties' experts also appear to be in common ground on this point (see [148] and [152] above). Where the request is not acceded to, then the witness cannot be compelled to testify, notwithstanding the Treaty and Convention Articles and any compulsory measures existing under the PRC CPL. Accordingly, I do not accept Sinopec SG's submission that connecting factors in favour of the PRC arising from witnesses, compellable in or available within the PRC, should be given no weight for the purposes of Stage One.

Availability of evidence

157 BComm says that any documentary evidence obtained in the course of the PRC Criminal Investigations will be relevant evidence for the purposes of establishing its fraud defence. As stated earlier, it is common ground that any such materials are only available for use in civil proceedings *within the PRC*,

but not for proceedings elsewhere (see [136] above). BComm has therefore relied on the availability of documentary evidence within the PRC as a connecting factor in favour of the PRC for the purposes of Stage One.

158 However, the scope of the PRC Criminal Investigations, and the relevance of any documentary evidence likely to be obtained thereunder, is manifestly unclear. Save for a set of contemporaneous minutes of the 24 Sep Meeting (the contents of which has been disputed by Sinopec SG),[186] which essentially recite the facts which BComm has relied on in its allegations of fraud against Sinopec SG (see [27]–[29] above), nothing further has been said in the affidavits about the PRC Criminal Investigations – in particular, as to what those investigations cover, what possible charges may be brought and against whom, and how any findings are likely to be relevant to the conduct of Sinopec SG which BComm complains of in its fraud defence. BComm explains that it is unable to provide further evidence about the relevance of the PRC Criminal Investigations because it is precluded by the PRC State Secrets Law from disclosing further evidence relating to those investigations.[187] That claim is unmeritorious. Merely stating what those investigations *cover* (as opposed to the findings made or evidence uncovered in the course of those investigations) cannot entail a violation of the PRC State Secrets Law since it is public knowledge that those investigations are underway.[188] Furthermore, BComm need only posit an explanation for why the PRC Criminal Investigations are *relevant* to the conduct of Sinopec SG which it complains of. BComm should be able to do so on the basis of presently available evidence which it had

186 Zhao's 1st Affidavit at para 96.

187 Liu's 4th Affidavit at para 37.2.

188 Liu's 1st Affidavit at para 29.3 and pp 31–32.

considered in determining that it is entitled to rely on the fraud defence, without actually requiring evidence uncovered in the course of those investigations. Finally, I will also add that it is insufficient for BComm to say that the PRC Criminal Investigations must be relevant because they followed from the SIH Report.[189] As stated earlier, even if there had been fraud and possibly criminal conduct in relation to the Sale Contracts vis-à-vis SIH, that would not assist BComm in the fraud defence unless it specifically relates to the Presentation by Sinopec SG under the LCs (see [97] above).

159 On the available evidence (*viz*, the minutes of the 24 Sep Meeting), the relevance of the PRC Criminal Investigations is also unclear. It is BComm's case that it was Sinopec SG who altered the contractual documentation relating to the Alleged Prior Contracts in contriving the Sale Contracts as a means for obtaining payment for goods already sold (see [28] above). Yet, the minutes identify Xia Sen as the "mastermind" of the alleged fraud – when he is neither an employee nor an officer of Sinopec SG, and when it has not been suggested by BComm that Sinopec SG was acting under his instructions (see [122]–[123] above). It is also notable that, of the nine individuals which BComm identifies as having been detained as subjects of the PRC Criminal Investigations, none of them are officers and/or employees of Sinopec SG.[190] While both Li Zhifeng (Sinopec SG's General Manager) and Zhao Yi (head of Sinopec SG's Operations Department) have attended at the Shanghai PSB and provided statements to the Shanghai PSB on two occasions in July and August 2019,[191] there is no evidence before me that they had done so as subjects of investigation,

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189 Liu's 4th Affidavit at para 34.

190 Notes of Arguments, 13 Jul, p 6 lines 5–7; DCB at pp Z147–Z148; Chen's 1st Affidavit at para 47 and pp 305–306; Liu's 1st Affidavit at pp 31–32.

191 Liu's 1st Affidavit at para 25.

and they were released without detention on both occasions.[192] Although Li Zhifeng subsequently came under investigation in the PRC in November 2020,[193] that appears to have been related to his potential violations of disciplinary standards arising from his alleged negligence in executing his duties as an officer of Sinopec SG.[194] It has not been suggested by BComm that those investigations are related to the PRC Criminal Investigations. BComm's PRC criminal law expert, Professor Wu Yunfeng, only says that Li Zhifeng would have come under such investigations because he is also suspected of having committed crimes in the PRC in addition to disciplinary violations,[195] but there is no suggestion that these "crimes" pertain to those which are the subject of the PRC Criminal Investigations.

160 In these circumstances, I find it speculative for BComm to submit that the PRC Criminal Investigations will yield evidence that is relevant to the conduct of Sinopec SG which BComm complains of, and so constitute a source of relevant evidence for BComm's fraud defence. In my judgment, BComm has failed to discharge its legal burden to demonstrate why the availability of evidence arising from the PRC Criminal Investigations should constitute a connecting factor in favour of the PRC for the purposes of Stage One.

161 In any event, I find that the availability of documentary evidence within the PRC does not constitute a connecting factor in favour of the PRC for the

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192 Zhao's 1st Affidavit at paras 92–96 and 97–99; 2nd Affidavit of Zhao Yi ("Zhao's 2nd Affidavit") at para 9.

193 Chen's 4th Affidavit at para 42.1; Liu's 4th Affidavit at paras 15.1–15.2.

194 Zhao's 4th Affidavit at paras 15–16.

195 Wu Yunfeng's Expert Opinion dated 1 Jul 2021 in 3rd Affidavit of Wu Yunfeng ("Wu's 3rd Report") at para 11; Liu's 4th Affidavit at paras 15.3–15.5.

purposes of Stage One. It is not clear to me why documentary evidence relating to the Alleged Prior Contracts, which may possibly be gathered in the course of the PRC Criminal Investigations, will be more comprehensive or complete than those which are in the possession of Sinopec SG (which is said to be a party to the Alleged Prior Contracts). It was also not explained to me why such documentary evidence cannot be obtained from Sinopec SG through the usual discovery process in the Suit. All that BComm can complain of is that any such documentary evidence that may be obtained in the course of the PRC Criminal Investigations might constitute an *alternative* source of the relevant documentary evidence. It is therefore not the case that documentary evidence relating to the Alleged Prior Contracts can *only* be easily obtained if proceedings take place within the PRC, which must be the case if the location of such evidence is to present a connecting factor for the purposes of Stage One (see *Ivanishvili* ([59] above) at [98]).

162 Even if any of those documents in the possession, custody or power of Sinopec SG are located in the PRC, that should not matter so long as the original documents can be sent to Singapore. Copies of such documents can also be sent easily to Singapore though electronic means. As the Court of Appeal has stated in *John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428 at [40], the location of documentary evidence generally does not present a weighty connecting factor for the purposes of Stage One as it is easily transportable between jurisdictions in this digital age (see also *Ivanishvili* at [98]). Moreover, since most communications nowadays are made via electronic means (which also appears to be the case for the present dispute), the transportability of documents evidencing such communications from the PRC or any other jurisdiction to Singapore should not pose any real problems.

163 I can accept that, if the relevant documents are no longer in the possession of the parties and presently in the hands of the authorities responsible for the conduct of the PRC Criminal Investigations, then the issue of the location of the key documents might be a relevant connecting factor because such documents can only be easily obtained in proceedings in the PRC (from the relevant investigative authorities) but not Singapore (see *Ivanishvili* at [98]). However, there has been no allegation by BComm that Sinopec SG is not in possession of the relevant documents any longer because they have been seized, or that Sinopec SG would not even have copies of such documents. In the event, any such allegation would probably not stand up to scrutiny because, given the prevalence of electronic communications and documents, the court must proceed on the basis that copies of such communications and documents would have been stored electronically, *eg*, in the email servers of the company, and thus remain accessible.

Overlapping PRC proceedings

164 Where the forum defendant commences proceedings against the forum plaintiff in a foreign jurisdiction, the fact of such parallel or overlapping foreign proceedings is accorded legal significance by reference to the doctrine of *forum non conveniens* (*Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd and another appeal* [2013] 4 SLR 1097 ("*Virsagi*") at [28]–[29]) and it features as one of the factors in determining if it is appropriate for a Singapore court to hear the dispute, or if there is a more appropriate forum elsewhere (*Virsagi* at [38]).

165 Where relevant, the weight to be accorded to this connecting factor will depend on the circumstances, including the degree to which the respective proceedings have advanced, and the degree of overlap of issues and the parties

(*Virsagi* at [39]). It is sufficient that the proceedings in the forum are related to, or parallel to the foreign proceedings. There is no requirement for a strict *lis alibi pendens*, *ie*, that the action in the foreign country must be between the same parties and involve the same or similar issues, in order for such proceedings to weigh into the analysis of appropriateness (*Virsagi* at [40]).

166 However, it is also important to note that little or no weight will be accorded to this factor if the foreign proceedings have been commenced for strategic reasons to demonstrate the existence of a competing jurisdiction and bolster the case of a clearly more appropriate forum elsewhere (*Virsagi* at [39]; *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR(R) 381 ("*Pinder*") at [33]; *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd and another and another appeal* [2017] 2 SLR 814 ("*Trisuryo*") at [63]).

167 In this case, it is not in dispute that there is an overlap in parties in the Suit and the PRC Civil Proceedings – the latter had been commenced by BComm (as one of the PRC Plaintiffs) seeking reliefs against Sinopec SG and China Jinshan. It is also clear, from the reliefs sought, that there is an overlap of issues in both proceedings. In the PRC Civil Proceedings, the PRC Plaintiffs seek:[196]

> 1. An order to restrain [BComm Tokyo] from making payment of the amounts [under the LCs];
>
> 2. An order for [Sinopec SG] and [China Jinshan] to be jointly liable for the loss suffered by [BComm] and [BComm Tokyo] as a result of their fraud and collusion …
>
> 3. Orders for [BComm] and [BComm Tokyo] to be jointly liable for the costs of [the PRC Civil Proceedings].

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196 Chen's 3rd Affidavit at p 25; Zhang's 2nd Affidavit at p 20.

168 At its heart, the PRC Civil Proceedings seek a declaration that BComm is not liable to Sinopec SG under the LCs. Put bluntly, BComm is seeking a negative declaration or a converse of the reliefs which Sinopec SG is praying for against BComm in the Suit. As the court in *Mizuho Corporate Bank Ltd v Cho Hung Bank* [2004] 4 SLR(R) 67 observed, claims for negative declarations should be viewed with great caution in situations involving conflicts of jurisdictions as it is a sign of an improper attempt by parties at forum shopping in apprehension of proceedings that might be commenced against them (at [13]). In our case, what makes things worse is that the PRC Civil Proceedings were commenced on 1 December 2020, almost three months *after* the Suit had been started by Sinopec SG.

169 These circumstances inevitably lend themselves to the impression that the PRC Civil Proceedings were commenced for strategic reasons for the purposes of demonstrating a competing jurisdiction. Notably, this also appears to be BComm's own position – it says that the PRC Civil Proceedings were merely a *response* to Sinopec SG ignoring the admonition of the Shanghai PSB that it should not make any claim against BComm for payment due under the LCs until the conclusion of the PRC Criminal Investigations (see also [29] above).[197] It is immaterial whether Sinopec SG had indeed been so advised – the characterisation of overlapping proceedings (whether they were commenced for strategic reasons) is dependent on the reasons for which they have been commenced by the plaintiff and not what the corresponding defendant (in this case, Sinopec SG) had been advised not to do. In my judgment, therefore, the PRC Civil Proceedings should be accorded no weight in the *forum non conveniens* analysis.

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[197] Notes of Arguments, 13 Jul, p 6 lines 12–13.

170 In *Trisuyo* ([166] above), the defendants in proceedings before the Singapore courts commenced proceedings against the Singapore plaintiffs and other parties in the Indonesian courts, within one to two months after the Singapore proceedings were filed. The Court of Appeal held that the Indonesian actions were to be accorded no weight in the *forum non conveniens* analysis, because they had been commenced by the defendants *themselves* after the Singapore actions started, and sought what was essentially the converse of what the plaintiffs in the Singapore proceedings were seeking. The Court of Appeal was of the view that this was nothing more than an attempt to "manufacture a set of concurrent proceedings" (at [67]).

171 Similarly, in *Pinder* ([166] above), the appellant, who was the executor of the last will of the testator and had been granted probate by the Singapore courts, filed proceedings in Singapore seeking a determination of whether the testator died domiciled in Singapore. The respondent opposed those proceedings and commenced proceedings in the English courts for a declaration that the testator was domiciled in England and Wales *after* originating process of the Singapore proceedings had been served on her (at [33]). In the High Court, VK Rajah J (as he then was) accorded the English proceedings no weight as it was plain that it had been commenced for the sole purpose of demonstrating a competing jurisdiction elsewhere (at [34]).

172 For completeness, I would add that, given my earlier conclusion that it is speculative to assert that the PRC Criminal Investigations will yield relevant evidence for BComm's fraud defence (see [160] above), the potential availability of evidence from the PRC Criminal Investigations for use in the PRC Civil Proceedings by virtue of the PRC Investigation Order (see [24]

above) does not alter my conclusion on the irrelevance of the PRC Civil Proceedings in the *forum non conveniens* analysis.

Conclusion on Stage One

173 On a consideration of all the relevant connecting factors, I am not satisfied that BComm has shown that any of the Alternative Fora is a distinctly "more appropriate forum" than Singapore.

174 BComm says that this is a "China-centric" dispute and therefore the PRC is a more appropriate forum than Singapore. I do not agree. In relation to the letters of credit, it must be borne in mind that the applicant for the letters of credit is a Japanese-incorporated company (SIH), the issuing bank is the Tokyo branch of an international bank (BComm), and the beneficiary is a Singapore-incorporated company (Sinopec SG). Not only that, my examination of the relevant connecting factors concerning the actual dispute between Sinopec SG and BComm (which, by reason of the autonomy principle, is quite separate from any dispute under the Sale Contracts) shows that the connections with the PRC are actually few and far between.

175 To recapitulate, of the plethora of witnesses which BComm says it intends to call in support of its fraud defence, the only witnesses whose evidence is arguably relevant to the real issues in contention, and who BComm has shown to be located within the PRC, and therefore present a relevant connecting factor to the PRC, are the Sinopec Jiangsu Witnesses.

176 As I have already indicated, the Sinopec Jiangsu Witnesses will be able to provide relevant evidence as to the basis on which Sinopec SG was instructed to discharge the Cargo to the Zhong Tuo Group entities, and such evidence may

shed light on whether it existed at that time a direct contractual relationship between Sinopec SG and the respective Zhong Tuo Group entities relating to the Cargo. However, such evidence can also be obtained from Sinopec SG in the Suit through the process of discovery, interrogatories, and eventually cross-examination. As such, I would not regard this connecting factor to the PRC as carrying that much weight.

177 For completeness, there are no relevant connections at Stage One which point to Japan. BComm has put forth the *possibility* that the SIH Witnesses are located in Japan, but as I have said, that is not sufficient to identify the jurisdiction in which those witnesses are located and compellable to testify for the purpose of establishing personal connections at Stage One. In any event, as already explained, I also do not find that the evidence of the SIH Witnesses is arguably relevant for the purposes of BComm's fraud defence, and so their personal connections (if any) will not be relevant for the purposes of Stage One. It follows that BComm has not shown that Japan is a distinctly more appropriate forum than Singapore.

178 As for Hong Kong, the only relevant connection at Stage One which points to that jurisdiction is the fact that the LCs might *arguably* be governed by Hong Kong law, although the more likely position, as I have already explained at [75] above, is that the LCs are governed by Singapore law. However, since no evidence has been placed before me to show that Hong Kong law on the fraud exception to the autonomy principle is any different from Singapore law, this governing law factor is given little or no weight at Stage One.

179 Further, while BComm has submitted that Chen Zeng Chun, an officer of the Zhong Tuo Group, can provide evidence on the Alleged Prior Contracts between Sinopec SG and the respective Zhong Tuo Group entities, BComm has not shown that he is presently resident in Hong Kong. I therefore find that BComm has not shown that Hong Kong is a distinctly more appropriate forum than Singapore.

180 BComm's case, taken at its highest, may suggest that there are only a few connections between the dispute and Singapore. However, the fact that the connections between the dispute and Singapore are weak does not *ipso facto* establish that Singapore is *forum non conveniens*. It bears reiteration that BComm must show that a distinctly more appropriate forum exists elsewhere, and it cannot discharge its burden under Stage One by merely showing that Singapore is not the natural forum (see [61] above).

181 After a consideration of all the relevant connecting factors, I find that BComm has not discharged its legal burden under Stage One and no stay of proceedings can be granted. Given my conclusion on Stage One, it is not necessary for me to proceed further and consider Stage Two of the *Spiliada* test.

182 I thus express no opinion on Stage Two, even though I acknowledge that counsel for Sinopec SG did make a rather interesting argument that Sinopec SG would suffer a juridical disadvantage, and consequently be denied substantial justice, if it were forced to litigate the dispute with BComm in the PRC. This is because it is common ground that the Shanghai Court would apply PRC law to determine if Sinopec SG would be entitled to claim payment under the LCs, and it appears that PRC law provides a more generous fraud defence against

claims under letters of credit as compared to the common law.[198] In other words, it would be easier, as a matter of law, for BComm to resist Sinopec SG's claim for payment, in proceedings in the courts of the PRC. However, as this point on PRC law was not dealt with comprehensively by both parties' PRC law experts, and since I have already found against BComm on Stage One of the *Spiliada* test, I will refrain from expressing any view on the merits of this argument.

Issue 3: Should SUM 1899 be allowed?

183 O 20 r 8(1) of the Rules of Court confers upon the court a general power to allow amendments to be made to any document in the proceedings on the application of any party to the proceedings. It states:

> For the purpose of determining the real question in controversy between the parties to any proceedings, or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either of its own motion or on the application of any party to the proceedings order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

184 It is trite that the guiding principle is that such amendments should be allowed if they would enable "the real question and/or issue in controversy between the parties" to be determined (see *Review Publishing Co Ltd and another v Lee Hsien Loong and another appeal* [2010] 1 SLR 52 ("*Review Publishing*") at [113]) and serve the ends of justice (*Wright Norman v Oversea-Chinese Banking Corp Ltd* [1993] 3 SLR(R) 640 at [23]). An amendment can also be allowed "at any stage of the proceedings" (see *Review Publishing* at

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198 Notes of Arguments, 5 Aug, p 5 lines 15–27; Wu Yunfeng's Expert Opinion dated 27 May 2021 in 2nd Affidavit of Wu Yunfeng ("Wu's 2nd Report") at para 29.4.1.

[112]). All the relevant circumstances of the case should be considered in deciding whether or not to allow an amendment, and delay in bringing the application for leave to amend *per se* does not constitute prejudice to the other party (see *Review Publishing* at [114]).

185 In my judgment, SUM 1899 should be allowed and I grant BComm leave to amend its prayers for the CMS Application to take into account the PRC Civil Proceedings. My earlier finding that those proceedings were likely commenced by BComm for strategic reasons only meant that the PRC Civil Proceedings were to be accorded no weight under Stage One of the *forum non conveniens* analysis. It did not mean that it is of no relevance in the court's determination of whether there should be a limited stay of the Suit pending the conclusion of *all* the developments in the PRC which BComm says are relevant to the dispute between the parties. Since these developments have now widened to include the PRC Civil Proceedings, allowing the amendment to take into account those proceedings for the purposes of the CMS Application will enable the real question in controversy between the parties to be determined, and serve the ends of justice.

186 I accept counsel for Sinopec SG's point that there had been significant delay in the bringing of SUM 1899. It was filed only on 23 April 2021, more than four months after the PRC Civil Proceedings were commenced on 1 December 2020. However, that delay did not result in any irremediable prejudice to Sinopec SG, since the adjournment of the hearing date for SUM 4431 (after SUM 1899 was brought) meant that Sinopec SG was given time to consider BComm's position on the PRC Civil Proceedings in advance of the hearing of SUM 4431. As such, save for wasted costs, Sinopec SG was ultimately not placed in any worse position than it would have been had the

prayers for the CMS Application been amended at an earlier time (see also, *Singapore Civil Procedure Vol I* (Cavinder Bull SC gen ed) (Sweet & Maxwell, 2021) at para 20/8/13).

Issue 4: Whether a case management stay of the Suit in terms of the amended prayer should be granted?

187 The court may grant a limited stay of the Singapore proceedings pending the conclusion of proceedings elsewhere either by an exercise of its powers under s 18(2) of the SCJA read with para 9 of the First Schedule of the same statute, or pursuant to its inherent jurisdiction (*BNP Paribas Wealth Management v Jacob Agam and another* [2017] 3 SLR 27 ("*Agam*") at [32]). The grant of a limited stay of proceedings is a discretionary exercise of the court's case management powers and does not require the application of the principles of *forum non conveniens* (*Chan Chin Cheung v Chan Fatt Cheung and others* [2010] 1 SLR 1192 at [47]). This discretion is available when there is a multiplicity of proceedings, and the court is entitled to consider all the circumstances of the case in exercising its discretion, with a view towards ensuring the efficient and fair resolution of the dispute as a whole (*Agam* at [35]). A non-exhaustive list of factors which the court may consider has been identified in case law as follows (see *Agam* at [34]):

(a) which proceeding was commenced first;

(b) whether the termination of one proceeding is likely to have a material effect on the other;

(c) the public interest;

(d) the undesirability of two courts competing to see which of them determines common facts first;

(e) consideration of circumstances relating to witnesses;

(f) whether work done on pleadings, particulars, discovery, interrogatories and preparation might be wasted;

(g) the undesirability of substantial waste of time and effort if it becomes a common practice to bring actions in two courts involving substantially the same issues;

(h) how far advanced the proceedings are in each court;

(i) the law should strive against permitting multiplicity of proceedings in relation to similar issues; and

(j) generally balancing the advantages and disadvantages to each party.

188 BComm argues that a limited stay should be granted until after the conclusion of the PRC Criminal Proceedings so that a Singapore court hearing the Suit can have the benefit of findings arising from those proceedings, and so avoid having to traverse those same grounds and the consequent waste of work.

189 I am unable to agree. As I have explained earlier, the relevance of the PRC Criminal Investigations to BComm's fraud defence has not been established. As such, I am not satisfied that any findings arising from the PRC Criminal Proceedings (as a culmination of the PRC Criminal Investigations) will be of assistance to a Singapore court in the Suit. More importantly, in

determining if BComm's fraud defence is made out as a matter of Singapore law, the issue which a Singapore court must determine is whether Sinopec SG had acted fraudulently in seeking to obtain payment under the LCs. Yet, none of Sinopec SG's officers and/or employees are subjects of the PRC Criminal Investigations; neither has BComm suggested that those investigations or proceedings would cover the conduct of Sinopec SG (see [158]–[159] above). In the absence of a clear and direct association between the PRC Criminal Investigations and Sinopec SG, it is not apparent to me why findings from the PRC Criminal Proceedings will pertain to the conduct of Sinopec SG and whether it had acted fraudulently in seeking to obtain payment under the LCs.

190 In any event, even if the PRC Criminal Investigations were relevant, any findings from the PRC Criminal Proceedings cannot constitute relevant evidence for the purposes of the Suit. Any such finding would merely be an expression of an opinion by the investigators and/or the relevant finders of fact in the PRC Criminal Proceedings, and these would not constitute primary evidence of the issues in dispute in the Suit. Instead, what is relevant will be the underlying evidence relied upon by the investigators and/or finders of fact in arriving at their respective conclusions. I do not see why such evidence will not be available to a Singapore court through the usual course of discovery, interrogatories and cross-examination of witnesses here. With such direct evidence of the parties in the form of witness testimony, evidence of their communications and other documentary evidence, a Singapore court will be equally well placed to come to its own findings on the issues in dispute. Therefore, BComm has not satisfied the court that it should exercise its case management powers to grant a limited stay pending the conclusion of the PRC Criminal Proceedings.

191 As for the PRC Civil Proceedings, I find that the CMS Application for a limited stay on the ground of those proceedings is motivated by the extraneous purpose of stifling the Suit. As I have already noted, the relief sought in the PRC Civil Proceedings is in the nature of a negative declaration of the very reliefs which Sinopec SG seeks in the Suit. There is a complete overlap between both sets of proceedings (see [168] above). This means that, if the Suit is stayed pending the determination of the PRC Civil Proceedings, it would effectively be rendered otiose once the PRC Civil Proceedings are concluded. Both parties would likely be barred by the principles of *res judicata* and/or issue estoppel from proceeding with the Suit in Singapore. In other words, the probable consequence of granting the limited stay sought by BComm is that it will in substance be a permanent one (see *Agam* at [50]).

192 It is of some significance that, if a limited stay pending the conclusion of the PRC Civil Proceedings were granted, it would result in BComm obtaining the very outcome that it had sought, but failed to obtain, in the Stay Application. Sinopec SG's right to proceed in the Singapore courts would be practically extinguished even though BComm has not shown that there is a distinctly more appropriate forum than Singapore. A case management stay is a mechanism meant to *preserve* the plaintiff's right to prosecute its claim in Singapore, while minimising the risk of conflicting decisions by allowing the Singapore court to have the benefit of the findings of the foreign court (*Agam* at [51]). The realities associated with the present case are such that the grant of a case management stay would not be appropriate.

193 I therefore find no reason for the court to exercise its case management powers to grant a limited stay pending the conclusion of the PRC Civil

Proceedings. I am not persuaded that doing so would be conducive for the fair and efficient resolution of the dispute between the parties.

Conclusion

194 In light of the foregoing reasons, I dismissed the Declaration Application and the Stay Application. While I granted the Amendment Application so that the CMS Application took into account both the PRC Criminal Proceedings and the PRC Civil Proceedings, I dismissed the CMS Application on its merits.

195 I will deal separately with the issue of costs.

Ang Cheng Hock
Judge of the High Court

Toh Kian Sing SC, Lin Yong'en Nathanael, Wu Junneng and Marcus Chiang Mun Leong (Rajah & Tann Singapore LLP) for the plaintiff;
Khoo Boo Teck Randolph, Liu Chenghan Aloysius and Chan Jian Da (Drew & Napier LLC) for the defendant.