IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 107

Civil Appeal No 31 of 2020

Between

Recovery Vehicle 1 Pte Ltd

… *Appellant*

And

Industries Chimiques Du Senegal

… *Respondent*

Civil Appeal No 32 of 2020

Between

Industries Chimiques Du Senegal

… *Appellant*

And

Recovery Vehicle 1 Pte Ltd

… *Respondent*

Summons No 84 of 2020

Between

Recovery Vehicle 1 Pte Ltd

… *Appellant*

And

Industries Chimiques Du
Senegal

… *Respondent*

In the matter of Suit No 724 of 2018 (Registrar's Appeal No 179 of 2019)

Between

Recovery Vehicle 1 Pte Ltd

… *Plaintiff*

And

Industries Chimiques Du
Senegal

… *Defendant*

JUDGMENT

[Civil Procedure] — [Service] — [Service of writ out of jurisdiction]
[Conflict of Laws] — [Natural Forum]

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Recovery Vehicle 1 Pte Ltd
v
Industries Chimiques Du Senegal and another appeal and another matter

[2020] SGCA 107

Court of Appeal — Civil Appeal No 31 of 2020, Civil Appeal No 32 of 2020 and Summons No 86 of 2020
Sundaresh Menon CJ, Steven Chong JA and Belinda Ang Saw Ean J
9 September 2020

29 October 2020 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 These appeals arose from an application to, *inter alia*, set aside the service of a writ outside of jurisdiction. There was no controversy as to the requirements which a plaintiff has to satisfy to obtain leave for service outside of jurisdiction. Neither was there any dispute that the burden to satisfy each of the requirements rested with such a plaintiff.

2 In determining whether the burden for each of the requirement is satisfied, the court typically undertakes an analysis of each discrete requirement. However, it should not be overlooked that the analysis of any one of the requirements may have consequential impact on the other requirements.

3 Unfortunately, this was precisely what occurred in the court below. In determining whether Singapore was the *forum conveniens* for the resolution of the dispute, it was essential to examine whether there was any available competing jurisdiction. The High Judge below ("the Judge"), for the purposes of the *forum non conveniens* analysis, found that the claim was time-barred in the other competing jurisdiction, Senegal. The Judge went on rightly to find that as the plaintiff had not acted reasonably in failing to issue a protective writ in Senegal, it could not rely on the unavailability of Senegal to tilt the balance in favour of Singapore as the *forum conveniens*. However, the court below should have been mindful that the effect of a finding of time bar has a significant impact on the sufficiency of merits requirement for the purposes of obtaining leave for service outside of jurisdiction. After all, by definition, a time-barred claim would have no merit and consequently, such a finding would in itself establish that there was no sufficient degree of merit which would defeat any leave application for service outside of jurisdiction.

4 Similarly, when a party accepts a fact in aid of a specific legal argument, it may unwittingly cause consequential impact on other legal arguments. In this case, in its quest to establish that Senegal was not an available forum, it was conceded that the claims were time-barred in Senegal. However, that *factual* concession was made in tandem with the argument that the governing law was Singapore law notwithstanding the opposing party's contention that it was Senegalese law. The Judge found that Senegalese law was the governing law. Such a finding gave rise to unintended consequences because under Senegalese law, the claims were time-barred. Under such circumstances, is it open to such party to resile from its *factual* concession on the basis that the concession was made in aid of a different legal argument? As explained below, this would not

be permissible as it would constitute an abuse of process. In any event, the evidence before the court was consistent with the factual concession.

5 This judgment will serve to remind litigants and their legal advisors of the risks in adopting a pigeon-holed view when examining each of the legal requirements for service outside of jurisdiction. Quite often, the analysis is not static but dynamic in nature requiring parties to connect the dots after the analysis to consider and understand the ramifications *prior* to settling their legal submissions. An omission or failure to do so may give rise to unanticipated adverse consequences.

Facts

6 The appellant in Civil Appeal No 31 of 2020 ("CA 31"), Recovery Vehicle 1 Pte Ltd ("RV1"), is a Singapore company in the business of recovering stressed debts, and has been assigned the debts purportedly owed by Industries Chimiques Du Senegal ("ICS") to Affert Resources Pte Ltd ("Affert"). ICS is the appellant in Civil Appeal No 32 of 2020 ("CA 32").

7 Affert is a Singapore company which business includes the manufacturing and trading of fertilisers and mineral ores, as well as the charter of ships and barges. Its directors are Mr Syam Kumar Ampajalam ("Mr Syam") and Ms Vandana Hanumanth Rao Bhounsle ("Ms Vandana"). Mr Syam was the sole shareholder of Affert. Ms Vandana is from the corporate secretarial firm of Crystalbiz Pte Limited and was not involved in the running of Affert. She was based in Singapore.

8 It is common ground that Affert was controlled by the Archean Group, which is a conglomerate managed from India by the Pendurthi family. Affert's only active director, Mr Syam, was primarily based in Hong Kong during his

conduct of Affert's business. Both parties agreed that Affert had no active employees in Singapore.

9 ICS is a Senegal-incorporated company which business includes the production and export of phosphate fertiliser products. ICS was also related to the Archean Group in that 66% of its shares were owned by Senfer Africa Ltd ("Senfer"), which was controlled by the Archean Group. The remaining shares in ICS were held by the State of Senegal, the Government of India and the Indian Farmers Fertilisers Cooperative Ltd.

The Sulphur Contracts

10 The crux of this dispute concerns six contracts made between Affert and ICS from 11 May 2012 to 10 June 2013 for the purchase of sulphur. We refer to these as the "Sulphur Contracts". It is undisputed that the Sulphur Contracts were not written. The key details of the Sulphur Contracts may be found in six invoices dated from 11 May 2012 to 10 June 2013 ("the Six Invoices"). We briefly recount the material information as stated in the Six Invoices.

(a) **An invoice dated 11 May 2012 for US$1,573,000 issued by Affert to ICS for the delivery of Sulphur from Canada to Senegal ("the MV Xenia Shipment")**: In respect of this invoice, RV1 claims the sum of US$962,000, after taking into account a part payment made by ICS to Affert's bank account in Hong Kong on 12 June 2012. Payment for this shipment was to be made within 90 days of the Bill of Lading ("BL") date (*ie,* by 19 July 2012). The shipper was listed as Primary Resources, Inc ("Primary Resources"). The BL was endorsed in blank by the Bank of India (Singapore Branch).

(b) **An invoice dated 6 August 2012 for US$5,800,837 issued by Affert to ICS for the delivery of sulphur from the United Arab Emirates ("the UAE") to Senegal ("the Transfert Shipment")**: In respect of this invoice, RV1 claims the sum of US$1,120,837, after deducting part payments that ICS made in Hong Kong on 7 December 2012, 20 February 2013, 15 April 2013 and 9 January 2014 although payment was to be made within 60 days from the BL date (*ie,* by 27 September 2012). Affert purchased this shipment from Transfert FZCO ("Transfert") for US$5,674,313.09. Affert, however, did not make any payment to Transfert. This subsequently led to a dispute between Transfert and Affert, with Transfert commencing Suit No 1072 of 2014 against Affert on 9 October 2014. On 30 March 2015, Transfert filed a Notice of Discontinuance after payment was made to Transfert.

(c) **An invoice dated 27 September 2012 for US$6,475,350 issued by Affert to ICS for the delivery of Sulphur from Poland to Senegal ("the Solvadis Shipment")**: RV1 claims the full price of US$6,475,350. Payment was to be made at sight of the cargo. Affert's Ledger Account for the period from 1 January 2012 to 31 December 2012 indicated that Solvadis Commodity Chemicals Gmbh ("Solvadis") had charged Affert US$5,761,740 for this shipment. Presumably, Affert intended to make the difference of US$713,610 as profit by on-selling the sulphur to ICS.

(d) **An invoice dated 7 March 2013 for US$6,012,500 issued by Affert to ICS for the delivery of sulphur from Ukraine to Senegal ("the MV Amanda C Shipment")**: RV1 claims the full price of US$6,012,500. Payment was to be made at sight of the cargo. The shipper named in the BL was Tengizchevroil International (Bermuda)

Limited, a Bermuda company. The consignee was named as the Bank of India (Singapore Branch), and the notify party was ICS.

(e) **An invoice dated 7 May 2013 for US$1,247,077.60 issued by Affert to ICS for the delivery of sulphur from Canada to Senegal ("the MV Beauforte Shipment")**: RV1 claims the full price of US$1,247,077.60. Payment was to be made within 60 days from the BL date (*ie,* by 5 July 2013). This shipment was purchased by Affert from the Mineral Trade Group based in Dubai. The shipper named in the BL was Primary Resources and the notify party was ICS. The BL was endorsed in blank by Mashreqbank, Dubai.

(f) **An invoice dated 10 June 2013 for US$1,189,500 issued by Affert to ICS for the delivery of sulphur from Spain to Senegal ("the MV Lena Shipment")**: RV1 claims the full price of US$1,189,500. Payment was to be made within 60 days from the BL date by 29 June 2013. According to RV1, Affert purchased this shipment from Mineral Trade Group. The named shipper was Primary Resources and the notify party was ICS. The BL was endorsed in blank by Mashreqbank, Dubai.

11 In total, RV1 claims the sum of US$17,007,263.60 from ICS ("the ICS Debt").

12 Apart from the issue of payment, there was also a dispute between ICS and Affert concerning the quality of the Solvadis Shipment. According to ICS, it informed Affert in 2012 and 2013 that the sub-standard quality of the Solvadis Shipment sulphur had led to the closure of one its plants. Affert had, in a letter to the Inland Revenue Authority dated on 14 June 2016, recorded the sum of US$6,475,350 (the sum due pursuant to the Solvadis Shipment) as a "doubtful

debt" for the 2014 Year of Assessment. RV1's representative, Mr Damian John Prentice ("Mr Prentice") exhibited in his affidavit certain answers provided by Ms Vandana in Examination of Judgment Debtor proceedings commenced by Solvadis against Affert. There, Ms Vandana stated that Affert had not pursued ICS for the Solvadis Shipment as it did not have the funds to "fight" ICS and that it did not wish to provoke a counter-claim by ICS for damage to ICS's plant, which purportedly came up to US$22.4 million.

Acquisition of ICS and Waiver of the ICS Debt

13 In the proceedings before the Judge, a key aspect of ICS's defence against RV1's claim under the Sulphur Contracts was that Affert had *waived* the ICS Debt ("the Waiver Defence"). According to ICS, Affert had agreed in or around October 2014 to waive the ICS Debt as part of an acquisition of Senfer's stake in ICS ("the Acquisition") by Indorama Holdings B.V. ("Indorama").

14 The Acquisition was to proceed in the following manner. First, Indorama would inject the sum of US$50 million to various other entities in the Archean Group and its creditors. In exchange, Indorama would receive 66% of the shareholdings in ICS. As part of the Acquisition, Affert would unconditionally waive and forego all of its past claims against ICS, including the ICS Debt.

15 ICS relies on a number of documents to prove the Waiver Defence. We refer to the first category of documents as "the Acquisition Documents", which consist of the following:

(a) **The Share Transfer Agreement**: This was executed in Senegal by Senfer and Indorama. Under this agreement, Indorama paid

US$11 million for Senfer's ICS's shares. This agreement is stated to be governed by the Organisation for the Harmonization of Business Law in Africa Act ("OHADA Act") and the disputes thereunder are to be submitted to the Regional Court of Dakar, Senegal.

(b) **An Assumption of Debt Agreement ("ADA")**: Indorama paid US$30 million to Senfer's creditor banks under this agreement. The ADA is governed by English law.

(c) **A Side Letter to the ADA**: In this letter, it is stated that "Indorama shall cause [ICS] to pay to Senfer's bank account or to its order" US$9 million as full and final settlement of all of ICS's related-party outstandings as at 30 June 2014 "provided all the relevant related parties send the required confirmations to this effect to [ICS]".

16 We refer to the second category of documents which ICS relies on as "the Waiver Documents". These consist of the following:

(a) An email sent by Mr Syam to Mr Munish Jindal ("Mr Jindal"), a representative of Indorama and possibly a representative of ICS, on 1 October 2014 stating that "[a]s per the overall understanding on takeover of ICS by Indorama, we, hereby, *agree to consider the dues of ICS to us as part of the overall consideration for the transaction*" [emphasis added] ("the 1 October 2014 email").

(b) An email sent by Mr Jindal to Mr Syam on 3 October 2014 stating "[w]e acknowledge receipt of your confirmation that the dues of ICS to [Affert] are *part of the settlement reached between Archean Group and Indorama and part of the overall consideration for the acquisition of Archean's shares in ICS by Indorama; therefore it is*

> *mutually agreed that the dues to Affert are no longer payable*." [emphasis added] ("the 3 October 2014 email").
>
> (c) An email sent by Mr Jindal to Mr Anil Jain on 6 October 2014 forwarding the 1 October 2014 email and the 3 October 2014 email ("the 6 October 2014 email").
>
> (d) A letter sent by Mr Syam to Mr Jindal on 7 October 2014, stating: "[a]s per the books of Accounts of ICS USD 17,277,886 is due to [Affert] as on 17th September 2014. We confirm that we will not claim this amount as per our understanding. We hereby confirm that we will not in future dispute or make any claim on ICS or its subsidiaries for any sort of dues to [Affert]" ("the 7 October 2014 letter").

17 Affert's purported Waiver of the ICS Debt was also referred in a Deed of Termination ("DOT") dated 24 March 2015, which was signed by Affert, ICS and Transfert. The DOT mainly concerned the issue of payment for the Transfert Shipment. Recital B of the DOT provided that "[Affert] further confirmed in [the 7 October 2014 letter] to ICS that *they have no further claim on ICS for any amounts whatsoever*" [emphasis added]. On 25 February 2015, Ms Vandana and Affert's company secretary, Mr Hanumanth Rao Bhounsle, signed a board resolution authorising Mr Syam to sign the DOT on behalf of Affert.

18 It is RV1's position that Affert had not waived the ICS Debt and that the Waiver is a sham in that it is devoid of consideration and/or should be set aside as an undervalued transaction. In support of this, Mr Prentice made several allegations, including the claim that ICS had surreptitiously entered into an

agreement with Affert's former directors who acted with the knowledge that they were in breach of their fiduciary duties.

Singapore proceedings

19 On 8 February 2017, Affert was placed in creditor's voluntary winding-up and appointed Foo Kon Tan LLP ("FKT") as its liquidators. On 7 June 2017, FKT sent ICS a letter demanding payment of the ICS Debt. ICS's Senegalese lawyers responded on 3 July 2017 stating that "[a]ll amounts then due from ICS to Affert were settled as part of the acquisition of ICS from [the Archean Group] by [Indorama] in 2014" whilst also denying that it owed any sum to Affert. In that same letter, ICS's Senegalese lawyers attached, amongst other things, the 7 October 2014 Letter and the DOT. That letter, however, was only received by FKT on 24 July 2017.

20 On 18 September 2017, Affert was compulsorily wound up by Solvadis in Companies Winding Up No 17 of 2017 ("CWU No 17"). Affert's current liquidators are AAG Corporate Advisory Pte Ltd ("the Liquidators"). On 26 September 2017, the Liquidators also sent a letter of demand to ICS to recover the ICS Debt.

21 On 18 July 2018, the Liquidators filed a writ of summons with an endorsement of claim, seeking the repayment of the sums due under the Sulphur Contracts. On 17 September 2018, Affert (through its Liquidators) assigned to RV1, pursuant to a document entitled "Deed of Assignment of Receivable", the ICS Debt with effect from 29 August 2018. On 4 October 2018, RV1 filed an amended writ of summons ("the Amended Writ") substituting RV1 in place of the Liquidators as the plaintiff in the present suit.

22 On 9 October 2018, RV1 filed an *ex parte* application in Summons No 4699 of 2018 for leave to serve the Amended Writ on ICS in Senegal. RV1 did not inform the court of the Waiver Defence at this stage. On 10 October 2018, ICS's Senegalese lawyers sent a letter to RV1 enclosing the following: (a) a letter it had sent to FKT dated 3 July 2017 (in which it stated that the ICS Debt had been settled as part of the acquisition of ICS by Indorama); (b) the 1 October 2014 email; (c) the 7 October 2014 letter; and (d) the DOT ("the 10 October 2018 Letter"). In the letter, ICS's Senegalese lawyers also stated that "all amounts due from ICS to Affert have been settled *as part of the acquisition of ICS from the Archean Group* by [Indorama] in 2014 and therefore, there is nothing due and payable from ICS" [emphasis added].

23 On 11 October 2018, leave was granted to RV1 to serve the Amended Writ out of jurisdiction ("the Leave Order"). On 22 January 2019, ICS took out Summons No 383 of 2019 to set aside RV1's Amended Writ and/or the Leave Order. After hearing the parties' submissions, the Assistant Registrar granted the following orders:

(a) the Amended Writ and/or service of the Amended Writ on ICS in Senegal be set aside; and

(b) the costs of the application be paid by RV1 to ICS.

24 It was later clarified that the Assistant Registrar did not set aside the Amended Writ, but had only set aside the Leave Order.

25 In a letter to RV1's lawyers on 7 February 2019, the Liquidators claimed that it was only around 31 October 2018 that they first knew of the existence of FKT's 7 June 2017 Letter, ICS's 3 July 2017 Letter, as well as the various other correspondence pertaining to the Waiver and the DOT.

26 In the minute sheet detailing his decision, the Assistant Registrar stated that RV1 ought to have brought the existence of the Waiver to the court's attention in the light of the notice given to it in October 2018. He noted that FKT was privy to the information and there was therefore sufficient ground to set aside the Amended Writ and/or the service of the Amended Writ. The main reason for setting aside the Amended Writ and/or the service of the Amended Writ was premised on RV1's purported failure to comply with its duty of full and frank disclosure in the *ex parte* application.

27 On 24 April 2019, the Liquidators filed an application in Originating Summons No 544 of 2019 ("OS 544") to set aside the Waiver of the ICS Debt on the basis that it was a transaction at an undervalue under s 329 read with s 98 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) and is therefore void and unenforceable. The summons was served on ICS in Senegal on 7 June 2019. On 11 October 2019, OS 544 was stayed pending the determination of these proceedings. The Liquidators have filed an appeal against the decision to stay OS 544.

Dakar proceedings

28 Amidst the Singapore proceedings, ICS commenced proceedings against RV1 in Senegal ("the Dakar proceedings").

29 On 19 December 2018, ICS applied by summons to the Dakar Commercial Court in Senegal for a "Declaration to Extinguish Debt" on the basis of the Waiver Defence as evidenced by the 7 October 2014 Letter. Whilst ICS claimed to have satisfied the procedural requirements for service of the summons in the Dakar proceedings, it was not disputed that neither Affert, the Liquidators nor RV1 were notified of the summons and they came to know of

the Dakar proceedings only *after* ICS had obtained a default judgment and served the default judgment on Affert and the Liquidators.

30 Two hearings took place in Dakar, Senegal on 31 December 2018 and 16 January 2019 and on 23 January 2019, the Dakar Commercial Court gave default judgment in favour of ICS, holding that Affert's 7 October 2014 Letter constituted a unilateral act of debt relief, was valid under Senegalese law, and that Affert had waived the ICS Debt. The finalised default judgment was released on 19 February 2019 ("the Dakar Judgment").

The decision below

31 On 21 June 2019, RV1 appealed against the Assistant Registrar's decision in Registrar's Appeal No 179 of 2019. The Judge allowed the appeal and held that RV1 satisfied the jurisdictional gateway under O 11 r 1(*e*) of the Rules of Court (Cap 322, R5, 2014 Rev Ed) ("Rules of Court") and that Singapore was the *forum conveniens*. The Judge also exercised her discretion not to set aside the Leave Order despite a finding that RV1 had breached its continuous duty to make full and frank disclosure in not informing the court of the Waiver Defence. This decision is reported in *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal* [2019] SGHC 289 ("the Judgment").

32 The Judge first considered whether RV1 had complied with the duty of full and frank disclosure after it had obtained the Leave Order.

33 The Judge found that RV1 *did not know* about the Waiver documents and the DOT when it filed the Amended Writ on 4 October 2018 or when the Leave Order was granted on 11 October 2018. Although FKT knew of the Waiver Documents and the DOT in July 2017, there was no evidence that FKT had informed the Liquidators or RV1 about these documents. The Liquidators

only knew on or around 31 October 2018 of FKT's 7 June 2017 Letter, ICS's 3 July 2017 Letter, and the correspondence relating to the settlement in October 2014 and the DOT (Judgment at [23]). The Judge nonetheless found that RV1 had breached the continuing duty to give full and frank disclosure *after* it had obtained the Leave Order but before the Amended Writ was served out of jurisdiction on ICS. The Judge noted that RV1 had not provided an explanation for its failure to inform the court of the Waiver Defence. Nevertheless, the Judge exercised her discretion not to set aside the Leave Order on account of this breach of duty as she found that RV1's claim had a sufficient degree of merit and that Singapore was the *forum conveniens* (Judgment at [24]–[26] and [87]).

Order 11 rule 1(d)(*iii*)

34 The Judge found that the jurisdictional gateway under O 11 r 1(*d*)(iii) was not satisfied.

35 Order 11 r 1(*d*)(iii) reads as follows:

> **Cases in which service out of Singapore is permissible (O.11, r.1)**
>
> 1. Provided that the originating process does not contain any claim mentioned in Order 70, Rule 3(1), service of an originating process out of Singapore is permissible with the leave of the Court if in the action –
>
> …
>
> (*d*) the claim is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which –
>
> …
>
> (iii) is by its terms, or by implication, governed by the law of Singapore;

36 The Judge rejected RV1's contention that the Sulphur Contracts were governed by Singapore law and found that they were instead governed by Senegalese law, applying the three-stage test in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*"). Under the three-stage test for determining the governing law of a contract, the first stage requires the court to determine if there was an express choice of governing law. If not, the second stage asks whether an intention of the parties to choose a governing law can be inferred. If the court is faced with a multiplicity of factors, with each factor pointing to a different governing law, then the proper approach would be to move on to the third stage, which was to determine the law with the closest and most real connection with the contract (*Pacific Recreation* at [36], [37] and [47]). The Judge found that there was insufficient evidence to show that the parties had intended for Singapore law to govern the Sulphur Contracts, and that Senegalese law had the "closest and most real connection" to the Sulphur Contracts (under the third stage of *Pacific Recreation*) for the following reasons (Judgment at [37]):

(a) The pre-contractual negotiations leading up to the formation of the Sulphur Contracts were between representatives of ICS (in Senegal) and the Archean Group (in India). RV1 did not show how Affert (a Singapore entity) was involved in the negotiations.

(b) The place of discharge of the cargoes was Senegal and all the cargoes were in fact delivered to Senegal.

(c) All the part payments were paid by ICS to Affert's bank account in Hong Kong.

(d) The invoices issued by Affert in Singapore were not determinative as they were issued after the Sulphur Contracts had been formed.

37 This finding by the Judge led to RV1's appeal in CA 31.

***Order 11 rule 1(*e**)**

38 The Judge instead found that RV1 had satisfied the jurisdictional gateway under O 11 r 1(*e*) which provides as follows:

> **Cases in which service out of Singapore is permissible (O.11, r.1)**
>
> 1. Provided that the originating process does not contain any claim mentioned in Order 70, Rule 3(1), service of an originating process out of Singapore is permissible with the leave of the Court if in the action –
>
> …
>
> (*e*) the claim is brought in respect of a breach committed in Singapore of a contract made in or out of Singapore and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of Singapore that rendered impossible the performance of so much of the contract as ought to have been performed in Singapore; …

39 Despite the absence of an express clause stipulating the place of payment under the Sulphur Contracts, the Judge held that the applicable rule was that the debtor (*ie*, ICS) must seek out the creditor (*ie*, Affert) at the creditor's place of business and pay him there (Judgment at [41]). According to the Judge, Affert, being a Singapore entity, had its place of business in Singapore, and therefore had a right to be paid in Singapore (Judgment at [43]). Despite the fact that Affert may have agreed to accept partial payments in Hong Kong, the Judge deemed this insufficient to show that Affert had agreed to accept all future payments under the Sulphur Contracts in Hong Kong. The Judge therefore

found that RV1 had demonstrated a good arguable case that its claim was "in respect of a breach committed in Singapore" (Judgment at [48]).

40 The Judge also considered the merits of the Waiver Defence, and found that the Waiver was not legally valid as it was not adequately supported by consideration. The Judge further noted that there was force in the assertion that the Waiver was a sham (Judgment at [52]–[53]).

Forum non conveniens analysis

41 The Judge found that Singapore was the *forum conveniens* to try the dispute. Her main basis was that Singapore law governed the Waiver, and that the Waiver Defence was ICS's primary defence to RV1's claim for the ICS Debt. Apart from this, the Judge also considered the following factors in her determination that Singapore was the *forum conveniens* to try the dispute:

(a) The Liquidators had applied in OS 544 to set aside the Waiver as a transaction at an undervalue, as well as in Senegal to set aside the Dakar Judgment. OS 544 is governed by Singapore law. As the effect of the Waiver was a crucial issue, especially in the light of RV1's claim that the Waiver was a sham transaction, the Singapore court's decision in OS 544 would have a material bearing on ICS's defence in the Suit (Judgment at [68]).

(b) The place of the breach of the Sulphur Contracts would be a connecting factor that tilts the balance in favour of Singapore as the *forum conveniens*. However, it was not as strong a factor as the Liquidator's proceedings in OS 544 (Judgment at [69]).

42 The Judge did not regard the Dakar Judgment as a significantly weighty factor. This was because it had been obtained in default of appearance and was not at such an advanced stage so as to tilt the balance in favour of Senegal. The Judge also found the following factors to be of neutral weight: (a) the parties' place of incorporation; (b) the place of the transaction and the place of performance of the Sulphur Contracts; (c) the location of the witnesses and their compellability; (d) the language of the documents; (e) the availability of transfer to the Singapore International Commercial Court; (f) the contents of the Acquisition Documents; and (g) the existence of a time bar in relation to RV1's claim under the Sulphur Contracts.

43 As a substantial part of ICS's case in CA 32 concerns the establishment of the time bar defence under Senegalese law, it is useful to recount the Judge's findings in relation to the time bar, which were made in the context of addressing the parties' submissions on *forum non conveniens*. The Judge noted that on the evidence of either of the two parties' experts (Mr Mouhamed Kebe ("Mr Kebe") and Mr Khaled Abou El Houda ("Mr Houda")), RV1's claim would be time-barred in Senegal. However, in order for RV1 to rely on the time bar as a factor in the *forum non conveniens* analysis, the Judge required RV1 to show that it had not acted unreasonably in failing to commence proceedings within time in the alternative forum (*ie*, Senegal) by issuing a protective writ. Having regard to the evidence, in particular the fact that both FKT and the Liquidators had sent letters of demand to ICS prior to the commencement of the suit but had chosen not to issue a protective writ, and had chosen to do so without reasonable explanation, the Judge found that RV1 could not rely on the unavailability of Senegal as the alternative forum to tilt the balance to Singapore as the *forum conveniens* (Judgment at [82]–[85]). Nonetheless, given that Singapore law governed the issue of Waiver, and as the Liquidators had applied

to set aside the Waiver in Singapore, the Judge held that in the round, Singapore was the proper forum for the trial of the dispute (Judgment at [86]). The Judge's findings against ICS led to ICS's appeal in CA 32.

Parties' submissions

RV1's case in CA 31 and Summons No 84 of 2020

44 RV1 appeals against the Judge's decision that the Sulphur Contracts are governed by Senegalese law, submitting that they are instead governed by Singapore law. On this basis, RV1 argues that it has satisfied the jurisdictional gateway under O 11 r 1(*d*)(iii). RV1's main argument is that the Sulphur Contracts are costs and freight ("CFR") contracts, which consist of certain core contractual obligations, and that the *contemplated* place of performance of these obligations under the Sulphur Contracts was Singapore. In this respect, RV1 submits that the *contemplated* (as distinct from actual) place of performance of these obligations under the Sulphur Contracts is a very significant factor in the assessment of the third stage in *Pacific Recreation* ([36] *supra*).

45 RV1 also points to two errors made by the Judge. First, the Judge should not have emphasised the actual place of physical delivery of the cargoes (*ie*, Senegal), as a CFR seller such as Affert was not under any contractual duty to ensure the actual physical delivery of the cargo. Relatedly, RV1 contends that the *sole* factor pointing to Senegal as the governing law is the place of delivery of the cargoes. As the actual place of physical delivery should not be taken into account, the court should therefore find that Singapore law governs the Sulphur Contracts.

46 RV1 also seeks leave to adduce fresh evidence on appeal in Summons No 84 of 2020 ("SUM 84"), including the fourth affidavit of Mr Kebe, which

consists of, *inter alia*, his opinion on the applicable limitation period for RV1's claim and whether any exceptions apply to the limitation period under Senegalese law.

ICS's case in CA 32

47 ICS appeals against the Judge's decision to grant leave to RV1 to serve the Amended Writ out of jurisdiction.

(a) First, ICS claims that RV1 has failed to make out a good arguable case under O 11 r 1(*e*) because RV1's claim under the Sulphur Contracts is not brought "in respect of a breach of contract in Singapore".

(b) Second, RV1's claim lacks sufficient merit as it is time-barred under Senegalese law. This was a concession made by RV1 in the hearing before the Judge.

(c) Third, Singapore is not the *forum conveniens* to try the dispute.

(d) Fourth, RV1 has failed to comply with its duty to make full and frank disclosure of the Waiver defence. The court should therefore exercise its discretion to refuse the service of the Amended Writ.

Issues before this court

48 The following issues arise in these appeals:

(a) Whether the Sulphur Contracts are governed by Singapore law or Senegalese law.

(b) Whether RV1 has established a good arguable case that its claim is brought "in respect of a breach in Singapore" for the purpose of O 11 r 1(*e*).

(c) Whether RV1's claim is time-barred under Senegalese law such that it lacks sufficient merit to satisfy the requirements for the Leave Order.

(d) Whether Singapore is the *forum conveniens* to try the dispute.

(e) Whether RV1 had breached its duty of full and frank disclosure by omitting to mention the Waiver Defence such that the Leave Order ought not to have been granted.

Analysis

49 Before we properly embark on the analysis of the issues, we note that it was *ICS* that brought the application to set aside the Amended Writ and the Leave Order. The Assistant Registrar, however, only granted an order to set aside the Leave Order following his clarification (see [24] above). In any event, the Judge, in her Judgment, dealt solely with the requirements for leave for service out of jurisdiction and the Assistant Registrar's decision to set aside the Leave Order. Both parties' submissions in these appeals also concern only the requirements for service out of jurisdiction (as opposed to the requirements for setting aside the writ) and we shall deal with the issues arising accordingly.

50 Despite the fact that it is ICS which is seeking to set aside the Leave Order, it is plain that the burden ultimately rests on RV1 as the plaintiff to satisfy the following three requirements for service out of jurisdiction (*Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [26];

Oro Negro Drilling Pte Ltd and others v Integradora de Servicios Petroleros Oro Negro SAPI de CV and others and another appeal (Jesus Angel Guerra Mendez, non-party) [2020] 1 SLR 226 at [54]; *MAN Diesel & Turbo SE and another v IM Skaugen SE and another* [2020] 1 SLR 327 ("*MAN Diesel*") at [27]):

(a) the claim must come within one of the jurisdictional gateways in O 11 r 1 ("the jurisdictional requirement");

(b) the claim must have a sufficient degree of merit ("the merits requirement"); and

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

51 The court must bear in mind that a finding on the jurisdictional requirement may inevitably have an impact on the merits requirement. In other words, even if the court finds that the jurisdictional requirement (*eg*, O 11 r 1(*d*)(iii)) is not satisfied, and that the relevant contract is governed by a foreign law, this may still have a consequential impact on the merits requirement under another jurisdictional gateway. Similarly, the findings made by the court in the context of the *forum non conveniens* requirement may also have a bearing on the merits requirement. Ultimately, the court should not examine the three requirements in isolation, but must also proceed to examine whether its findings in relation to one requirement are consistent with its findings in relation to the other requirements for service outside of jurisdiction.

Issue 1: Whether the Sulphur Contracts are governed by Singapore law or Senegalese law

52 We first examine RV1's contention that the Sulphur Contracts are governed by Singapore law such as to satisfy O 11 r 1(*d*)(iii). There is no dispute that the Sulphur Contracts do not contain an express governing law clause in favour of either Singapore or Senegalese law. The Judge was thus correct in analysing the issue with reference to the second and third stages of *Pacific Recreation* ([36] *supra*)).

53 In aid of its submission that the Sulphur Contracts are governed by Singapore law, RV1 relies on the nature of the Sulphur Contracts being CFR contracts whose core obligations are contemplated to be performed in Singapore. On the strength of this submission, RV1 argues that the court ought to disregard the fact that all the cargoes were shipped to Senegal as the duty to *actually* deliver the cargoes is not one of the obligations of a CFR seller. In other words, more weight should be attached to the *contemplated* place of performance as opposed to the *actual* place of performance of the obligations under a CFR contract. To that end, RV1 submits that the court should focus on the core obligations of CFR contracts which are: (a) to make out an invoice of the goods sold; (b) to ship at the port of shipment goods of the description contained in the contract; (c) to procure a contract of affreightment under which the goods will be delivered; and (d) with all reasonable despatch, send the shipping documents to the buyer. However, notwithstanding the fact that a CFR (or Cost, Insurance and Freight ("CIF")) seller does not have a duty to ensure the actual delivery of the goods at the port of destination, a CFR (or CIF) contract remains a contract for the *sale of goods*. At para 19-008 of *Benjamin's Sale of Goods* (Michael G Bridge ed) (Sweet & Maxwell, 10th Ed, 2018) ("*Sale of Goods*"), it is stated that:

> *The prevailing view is that a [CIF] contract is not a sale of documents but a sale of goods or a contract for the sale of goods to be performed by delivery of documents, or "a contract for the sale of documents representing goods" (and not merely rights of action).* It has been said that the difference between the two views "is one of phrase only" but there may be cases in which it cannot be dismissed so lightly. Thus if the agreed destination of the goods becomes, after the making of the contract, enemy territory, the contract may be discharged by supervening illegality even though the documents were to be tendered in England. Again, where a seller fails to ship goods of the contract description, this, and not his consequent inability to tender documents, is the "substantial breach", so that if he fails abroad to ship goods under a contract providing for shipment of the goods to, or tender of documents in, this country the "substantial breach" does not take place in this country. Similarly, if no goods have been shipped but the seller nevertheless tenders documents good on their face, he is in breach even though those documents may give the buyer a right of action against the carrier. The seller is similarly in breach if, having shipped goods to the [CIF] destination, he then interferes with the performance of the contract of carriage, e.g. by ordering the ship to carry them to a place other than that destination; or by ordering her to leave that destination without having delivered the goods to the buyer; or by simply ordering her (in purported exercise of an unjustified lien) not to make such delivery. In all these cases, the seller, as well as the carrier, is in breach; for a [CIF] contract "contemplates that the [buyer] is to get physical possession of the goods through the contract of carriage that it is the seller's duty to arrange". … All of these rules suggest that the [CIF] transaction is, in essence, a *sale of goods*; and the same view is perhaps also supported by the rule that a [CIF] contract for the sale of specific goods is void if at the time of the contract the goods had perished, even though there was in existence at that time a set of shipping documents including a valid policy of insurance on the goods. [emphasis added in italics]

54 In our judgment, RV1's submissions on this point are misconceived as they are not supported by the authorities it relies on. Before examining the authorities, it is important to understand the nature of a CFR contract and how it is different from other types of contract for the sale of goods such as CIF and Free on Board ("FOB") contracts. At its core, CFR, CIF and FOB contracts are contracts for the sale of goods and their main difference lies in the allocation of

obligations/expenses and the passing of risks in relation to the *shipment* of the goods. For instance, as regards the significance of the difference between a FOB and CIF contract, it has been stated in the *Sale of Goods* at para 20-012 that:

> **Effects of distinction between [FOB] and [CIF] contracts**
>
> The distinction between these two types of contracts is important in determining the *method of calculating the price, the passing of property and risk, and the methods in which the parties can perform their obligations under the contract.* [emphasis added in italics]

55 The key difference between a CIF and CFR contract is that for a CIF contract, there is an additional obligation on the part of the seller to arrange and pay for insurance and such expenses are reflected in the CIF price. In the case of FOB contracts, the main difference lies in the fact that the seller's *shipment* obligation is limited to arranging and paying for the costs of loading the goods on the nominated vessel and it is the buyer who would arrange and pay for the freight and insurance. In terms of risk, in a normal CIF contract, the risk of loss of the goods generally passes to the buyer on or from shipment of the goods (*Sale of Goods* at para 19-006). The risk under a FOB contract similarly passes on shipment, but the seller will be held responsible for any subsequent loss of, or damage to, the goods which is due to his breach of contract (*Sale of Goods* at para 20-021).

56 In an effort to demonstrate that the Judge had erred in attaching weight to the fact that the goods were discharged in Senegal, RV1 relies principally on the New South Wales Supreme Court 's decision in *Mendelson-Zeller Co Inc v T&C Providores Pty Ltd* [1981] 1 NSWLR 366 ("*Mendelson*") to support its contention that the court should disregard the actual place of delivery in a CFR contract, and points to the observation by the court that "the fact that delivery

was made in Sydney was not an essential incident of the contract between the parties".

57 In *Mendelson*, the plaintiff was incorporated in the State of California in the United States and the defendant in New South Wales, Australia. The dispute concerned four shipments of fruits from California to New South Wales, Australia, with the seller claiming that it was owed sums of money under four different C&F contracts (which are the same as CFR contracts). Before proceeding to the trial, the court deemed it expedient to first examine the country with which the contracts had their closest and most real connection in order to determine their governing law (*Mendelson* at 368).

58 In our view, far from establishing any kind of rule that the court must disregard the actual place of delivery in certain categories of contracts, the court in *Mendelsohn* was plainly alive to the principle that the weight to be given to various factors would vary according to the precise facts of each case (*Mendelson* at 369). The court noted that these factors included, *inter alia*, the place of contracting, the place of performance, the place of residence or business of the parties as well as the nature and subject matter of the contract (citing *Re United Railways of the Havana & Regla Warehouses Ltd* [1960] 1 Ch 52 at 91). In *Mendelson*, the buyer submitted that the four contracts were governed by New South Wales law as the shipping documents had been sent to Sydney, the shipped goods were to be ultimately sold in Australia for consumption and that the place of delivery of the goods was Australia. The court, however, considered various countervailing factors and found that the contracts had a much closer connection with the State of California. In this regard, the court stated as follows (*Mendelson* at 371):

> ***In each case it must be a question of evaluating the competing considerations, in an effort to determine what***

> ***should be the proper law of the contract.*** *In the instant case, in my view the contract has much the closer connection with the State of California. The obligations of the shipper, except for the presentation of the documents, all took place in California. Payment was made in California; the currency of the United States was employed as the currency of the contract; the goods were United States goods; there is room for the view that the property in the goods passed in the United States. The fact that delivery was made in Sydney was not an essential incident of the contract between the parties.* [emphasis added in bold and italics]

59 It is clear from the above passage that the court's observation that "[t]he fact that delivery was made in Sydney was not an essential incident of the contract" was a fact-sensitive determination that was not tied to the fact that the four contracts were C&F contracts. The fact that delivery was made in Sydney was ultimately outweighed by the various other considerations referred to, including the fact that *all* of the shipper's obligations, save for the presentation of the shipping documents, had taken place in the State of California.

60 As regards it's submission that the court should attach weight to the *contemplated place* of performance as opposed the *actual place* of performance of the contractual obligations, RV1 relies on *Habib Bank Ltd v Central Bank of Sudan (formerly known as Bank of Sudan*) [2007] 1 WLR 470 ("*Habib Bank*"). In that case, Habib Bank sought to satisfy Civil Procedure Rules 1998 (No 3132) (UK) ("CPR") r 6.20(5)(*c*) by showing that its contracts with the Central Bank of Sudan ("CBS") were governed by English law. The contracts were two confirmed letters of credit. Habib Bank (as the confirming bank for reimbursement) was claiming against CBS (as the issuing bank) under the two letters of credit. The two letters of credit contained undertakings by the CBS to make payment. At [43] and [44] of the judgment, Field J held as follows:

> 43 The contracts sued on (the undertakings to honour [Habib Bank's] claim for principal and interest provided all terms and conditions were complied with) predate the coming

> into force of the Contracts (Applicable Law) Act 1990. The proper law of the contracts must therefore be established by reference to common law principles. There was no express choice of law. The governing law is therefore that of the country with which the contract has its closest and most real connection. In fact the position is essentially the same under the 1990 Act.
>
> 44 *Whether the contract was a unilateral or bilateral contract, the contemplated performance by [Habib Bank] was notification and confirmation of the letters of credit, inspection of the documents presented and negotiation of the documents.* All of these steps involved action to be taken in England and I am in no doubt that England is the country with the closest and most real connection to the contracts. I am fortified in this conclusion by the decision in *Bank of Baroda v Vysya Bank Ltd* [1994] 2 Lloyd's Rep 87 where Mance J held that English law was the governing law under the 1990 Act of the contract between an Indian issuing bank and an Indian confirming bank where the addition and honouring of the confirmation were all to be performed in London by the confirming bank's London branch office. [emphasis added in italics]

61 RV1's reliance of the choice of "contemplated performance" in *Habib Bank* is however misplaced. Without a proper understanding of the context under which words/phrases in a judgment are used, there is a risk or tendency to cite or quote a passage out of context. This was precisely the case with RV1's reliance on the reference to "contemplated performance" in *Habib Bank*. In that case, it should be borne in mind that the contracts were letters of credit and not contracts for the sale of goods. The parties under a letter of credit are only concerned with documents, in particular, whether the tendered documents are in strict compliance with its terms. Such contracts do not involve the performance of obligations which would typically concern contracts for the sale of goods. Therefore, it seems to us that in referring to "contemplated performance", the court in *Habib Bank* was neither seeking nor intending to make any distinction between the contemplated place and actual place of performance. There is nothing in *Habib Bank* to suggest that the *contemplated place* of performance was different from the *actual place* of performance to

begin with. In short, nothing had turned on the mere reference to the *contemplated place* of performance in *Habib Bank*. It is plainly erroneous for RV1 to suggest otherwise.

62 In our view, the correct approach towards determining the governing law of CFR contracts should be no different from determining the governing law of any other type of contract. In this respect, we endorse the general position referred to by the authors in *Sale of Goods* at para 26-012:

> *In general, the proper law of a [CIF] contract had to be identified in accordance with the general rules regarding ascertainment of the proper law, without any special rules or factors being applicable merely by virtue of its being a [CIF] contract.* However, there was slender judicial authority, and some academic authority, to the effect that where the parties carried on business in different countries, the law of the country of shipment of the goods should prima facie be the proper law. The view was, however, open to the objection that a [CIF] seller may prima facie have the right to tender documents in respect of goods sold afloat. In any event, the principal duties of a [CIF] seller, unlike those of a [FOB] seller, are not clearly concentrated upon the country of shipment. The contract is quite likely to require performance of his duty to tender appropriate documents (a duty of prime importance) in the buyer's country, or elsewhere outside the country of shipment. The most that might be said is that in a situation where the seller has no right to tender goods afloat (e.g. where he is bound to manufacture and ship the goods [CIF] in a specified country) there could be a strong pointer towards that country's law as the proper law. [emphasis added in italics]

63 This approach would be consistent with existing case law, in particular, this court's decision in *Pacific Recreation* ([36] *supra*). In *Pacific Recreation*, we stated at [48] that the aim of the third stage of the test was not to divine any "intent" of the parties, but was instead a pragmatic exercise in which various factors would be taken into account:

> It is worth emphasising that the aim of the third stage is not to divine any "intent" of the parties, but to consider, on balance, *which law has the most connection with the contract in question*

> *and the circumstances surrounding the inception of that contract.* It is a pragmatic exercise acknowledging that parties do not always have a governing law in mind when they enter into contracts. *Equal weight ought to be placed on all factors, even those which would not, under the second stage, have been strongly inferential of any intention as to the governing law.* [emphasis added in italics]

64 In any event, it is clear that RV1 did not in fact adduce any evidence that the contemplated place of performance of the obligations under the Sulphur Contracts was in Singapore. What RV1 purported to do was to rely primarily on the incorporation of Affert in Singapore *to invite the court to draw the inference that the contemplated place of these obligations must have been in Singapore*. This is made clear when we examine each of the four core obligations referred to by RV1 in turn:

(a) **Obligation to make out the invoices:** RV1 argues that that it can be inferred that the Six Invoices were issued in Singapore as they all bore Affert's Singapore address and that this showed that the actual place from which Affert issued the Six Invoices was Singapore. From this, RV1 contends that it may be inferred from that the *contemplated* place of performance under the Sulphur Contracts was also Singapore. However, Affert is a Singapore-incorporated entity with a Singapore-registered address. Further, Mr Syam, Affert's main director, was based in Hong Kong and Affert had no active employees in Singapore. It seems to us that irrespective of the country where the Six Invoices were issued, Affert's Singapore address would still have been stated on the Six Invoices.

(b) **Obligation to ship at the port of shipment**: RV1 claims that because Affert was not a manufacturer of sulphur, but was only an intermediate seller (which ICS does not seriously dispute), Affert must

have performed this obligation from its place of business, *ie*, Singapore, as the goods must have already been afloat at the time the Sulphur Contracts were entered into. RV1 further points to the fact that the BL for the MV Xenia Shipment was endorsed in blank by the Bank of India (Singapore Branch) and Primary Resource's own invoice dated 20 April 2012 was addressed to Affert's Singapore address. As we have mentioned above, there was insufficient evidence that Affert actually carried out any business from Singapore, given the absence of any active employees or directors in Singapore. The fact that the bank had endorsed the BL in Singapore, as well as Primary Resource's invoice, does not in our view demonstrate that Affert had actually procured the shipment of goods from Singapore. There was thus no evidence that Affert had performed this obligation in Singapore or that the contemplated place of performance of this obligation was in Singapore.

(c) **Obligation to procure a contract of affreightment:** RV1 argues that given Affert's position as the intermediate seller of the goods, it also had to procure the contracts of affreightment in or out of Singapore from which it carried out its business. This argument suffers from the same flaw in that it assumes that because Affert is a Singapore incorporated company, it must have conducted its business in Singapore. There is, however, no evidence that Affert had actually procured the contracts of affreightment in or out of Singapore.

(d) **Obligation to tender the shipment documents:** There is nothing to show that the parties had actually tendered, or contemplated to tender the shipping documents out of Singapore. We note that the various BLs were issued in different countries in Dubai, Canada, Poland and Spain. They therefore do not necessarily point to Singapore as the

contemplated place where the tender of the shipping documents was to take place.

65 In sum, RV1 has not adduced any evidence as to the actual or contemplated place of performance of these obligations. This may well be due to RV1's position as the *assignee* of the ICS Debt which somewhat hindered its ability to obtain direct evidence from the individuals who were involved in the actual performance of those obligations. However, this does not change the position that RV1 cannot stand in a better position than the assignor, Affert. In this court's decision in *MAN Diesel* ([50] *supra*), we made it clear at [66] that "the mere act of assigning a claim, in and of itself, cannot possibly convert a claim which does not satisfy the jurisdictional requirement in O 11 r 1 into an otherwise valid claim". We further observed that if this were done, "parties would effectively be allowed to circumvent O 11 r 1 by assigning their alleged claims (which are otherwise outside the scope of O 11 r 1) to a party whose *own claim* is able to satisfy one or more of the jurisdictional gateways under O 11 r 1". Similarly, the court cannot grant RV1 greater latitude in terms of the assessment of the evidence under this jurisdictional gateway (*ie*, O 11 r 1(d)(*iii*)) on account of RV1's status as an *assignee*.

66 Ultimately, the court cannot speculate on where the contemplated or actual place of performance of the obligations was in the absence of any evidence. This evidence would have been in the possession of Affert's director, Mr Syam, but he was not called to give evidence. While there might have been valid reasons for RV1's failure to obtain that evidence, such as the inability of RV1 to contact Mr Syam, any such difficulty cannot be used by RV1 to somehow lessen its burden of proof. In short, there is no free pass to dispense with proof on account of difficulties in obtaining evidence by reason of RV1's status as an assignee.

67 Having dealt with RV1's submissions, we now turn to consider which system of law bears the closest and most real connection with the Sulphur Contracts. We are broadly in agreement with the Judge's analysis of this issue and her determination that Senegalese law governs the Sulphur Contracts.

68 A factor of some significance, in our view, is the common commercial purpose underpinning all the Sulphur Contracts. In this respect, it is imperative to note that the Sulphur Contracts were not mere trading contracts. Instead, Affert had entered into the Sulphur Contracts for ICS to use the sulphur for manufacturing fertiliser in Senegal. Another common thread running through the Sulphur Contracts is that *all the cargoes were eventually shipped to Senegal* even though they may have been sourced and shipped from different countries – Canada, the UAE, Poland, Ukraine, and Spain. Counsel for RV1, Mr Dominic Chan, appears to have accepted that there was no evidence that the BLs had been endorsed in Singapore or that they had been given to Affert in Singapore to be transmitted to ICS in Senegal (Judgment at [34]).

69 The negotiations preceding the formation of the Sulphur Contracts also reveal more connection to Senegal than to Singapore. According to the Chief Executive Officer of ICS, Mr Alassane Diallo ("Mr Diallo"), he and his team based in Senegal communicated directly with Mr Ranjit Pendurthi ("Mr Pendurthi") of the Archean Group, who was based in India at the material time, on the sale of the cargoes under the Sulphur Contracts. Mr Diallo also testified that Affert was not directly involved in these negotiations. In separate proceedings involving Solvadis and Affert, Solvadis' Managing Director, Mr Andreas Weimann, affirmed on affidavit that it was the Archean Group which was the effective owners and controllers of Affert. By way of contrast, RV1 did not advance any positive case as to where the negotiations actually took place, but simply denied that they had taken place in Senegal. On balance,

therefore, it appears that the negotiations took place at least partly out of Senegal, while there is no evidence of any negotiations having taken place in Singapore.

70 RV1 also urges the court to consider the impact of the Waiver Documents, the Settlement Agreement and the DOT in determining the governing law of the Sulphur Contracts. These documents, however, were only issued *after* the formation of the Sulphur Contracts and do not, in our view, shed any light on the governing law of the Sulphur Contracts.

71 Finally, RV1 submits that should this court find that the Sulphur Contracts are governed by Senegalese law, this finding should only be expressed as "provisional". There is plainly no basis for the court to make only a provisional determination of this issue, especially as it was *RV1* that raised the issue of the governing law of the Sulphur Contracts in the context of satisfying the jurisdictional requirement under O 11 r 1(*d*)(iii). Any finding by this court on this issue must cut both ways. It would be incongruous for RV1 to suggest that if we were to find Singapore law to be the governing law thereby satisfying the jurisdictional gateway under O 11 r 1(*d*)(iii), such a finding should likewise be "provisional". A jurisdictional gateway cannot be satisfied on a "provisional" basis.

Issue 2: Whether RV1's claim is brought in respect of a breach committed in Singapore such as to satisfy O 11 r 1(*e*)

72 In order for RV1 to satisfy the jurisdictional gateway under O 11 r 1(*e*), it must show that its claim is "brought in respect of a breach *committed in Singapore* of a contract made in or out of Singapore" [emphasis added]. It follows that for RV1 to establish that the claim is brought in respect of a breach committed in Singapore, there must be an antecedent contractual obligation

under the Sulphur Contracts that must be performed *in Singapore*. In this case, the specific contractual obligation concerns the issue of payment, namely whether ICS is required to make payment of the ICS Debt in Singapore.

73 Respectfully, we disagree with the Judge's finding at [43] of the Judgment requiring *ICS* to show that the payment obligation was to be discharged in Hong Kong. While the defendant (here, ICS) may contend that the obligation to make payment lies elsewhere than in Singapore, this does not detract from the overall burden that rests on the plaintiff (here, RV1) to show that there was a breach of a contract committed in Singapore. In order for the plaintiff to discharge this burden, it must first establish the existence of a contractual obligation that was to be performed only in Singapore.

74 ICS submits that RV1 has failed to discharge the burden of proving that it ought to, pursuant to the Sulphur Contracts, make payment in Singapore. ICS points to the fact that past payments by ICS were made to Affert's bank account in Hong Kong, as well as the fact that Affert's key director, Mr Syam, was domiciled in Hong Kong. ICS also asserts that there is no evidence of any payment ever having been made by ICS to Affert in Singapore. In the circumstances, there was no contractual obligation on ICS to make payments to Affert under the Sulphur Contracts only in Singapore.

75 In our judgment, the established authorities bear out the proposition that in order for RV1 to satisfy the jurisdictional gateway under O 11 r 1(*e*), it must show that Singapore is the *only* place from which performance of the obligation is required under the contract.

76 In the English Court of Appeal decision in *Bell & Co v Antwerp, London and Brazil Line* [1891] 1 QB 103 ("*Bell & Co*"), the shipowners in England

sought an order to serve its writ out of jurisdiction on a foreign company which had chartered its ship. The proposed action was based on certain stipulations in the charterparty between the English shipowner and the foreign charterer, under which the charterer had agreed to indemnify the shipowner for any expense with regard to lighterage and demurrage. The issue before the English Court of Appeal was whether the contract "ought to be performed within the jurisdiction", so that leave could be granted for service out of jurisdiction under O 11 r 1(*e*) of the English Rules of Court. In this regard, Lord Esher MR held that "[u]nless the Court can see that by the terms of the contract it is to be performed within the jurisdiction, it is not entitled to make the order for service abroad" (at 107–108). As the contract in that case did not specify a place for payment, the charterer was bound to pay the shipowners on demand (at 107), and they could therefore be bound to make payment under the contract "out of jurisdiction if required by the shipowners to do so". Under such circumstances, Lord Esher MR declined to grant leave, holding at 108 that:

> … If the charterers were bound to perform [the contract] out of the jurisdiction if required by the shipowners to do so, how can it be said to be a contract which, according to its terms, ought to be performed within the jurisdiction? *Where* ***a contract is one which may be performed in or out of the jurisdiction****, as the case may be,* ***I do not see how it can be a contract which, according to its terms, ought to be performed within any more than without the jurisdiction****.* [emphasis added]

77 In *Cuban Atlantic Sugar Sales Corporation v Compania De Vapores San Elefterio Limitada* [1960] 1 QB 187 ("*Cuban Atlantic*"), the English Court of Appeal found (at 193–195) that the contract could be performed in the United Kingdom or elsewhere, that until the nomination of a port had been made, it could not be said that there was a contract to be performed within the United Kingdom, and that there was no breach within the United Kingdom because the time for nomination never arrived.

78 More recently, in the English Court of Appeal decision in *Daad Sharab v HRH Prince Al-Waleed Bin Talal Bin Abdal-Aziz Al-Saud* [2009] EWCA Civ 353 ("*Sharab v HRH Prince*"), the claimant claimed commission payable by the defendant for her services in relation to the sale of an aircraft by a Saudi Arabian prince ("the Prince") to Colonel Gaddafi, then President of Libya. The Prince applied for an order under CPR Part 11 declaring that the court had no jurisdiction to hear the claim. The Deputy Judge of the High Court dismissed the application, deciding, amongst other things, that the claimant's claim fell within CPR r 6.20(6), *ie*, that a breach of contract had been committed within the jurisdiction. The English Court of Appeal disagreed with the Deputy Judge as there was insufficient evidence to establish a good arguable case that London was agreed as the place of payment. Significantly (for the present purposes), the court, referring to *Cuban Atlantic*, noted that counsel had correctly pointed out that in order for the jurisdictional gateway to be satisfied, England "must be the *only* place where performance is required by the contract" [emphasis added] (at [39]).

79 The only seemingly contrary authority referred to us was the Hong Kong Court of Appeal decision in *Komaia Deccof and Co SA and others v Perusahaan Pertambangan Minyik Dan Gas Bumi Negara* [1982] HKCA 253 ("*Komaia Deccof*"). In that case, the plaintiffs, Liberia-incorporated companies whose business was in Hong Kong, sued the defendant. The issue was whether the plaintiffs could make out a good arguable case under the Hong Kong equivalent of O 11 r 1(*e*), namely, whether the breach of each relevant contract had been committed within Hong Kong. The court considered two questions to be relevant. First, whether the plaintiffs had a good arguable case for contending that their activities *vis-à-vis* the defendant were conducted from Hong Kong. Second, whether the plaintiffs had a good arguable case that the defendant's

obligation under the relevant contracts was to pay at the place from which the plaintiffs' activities were conducted (*ie*, Hong Kong). The court found that the evidence pointed "all one way" and that the plaintiffs had actually conducted business from Hong Kong. To answer the second question, the court deemed the correct approach to be as follows (at [9], [12] and [15]):

> (a) First, enquire whether the parties had expressly agreed a place of performance.
>
> (b) Second, investigate whether the parties had impliedly agreed such a place.
>
> (c) Third, where stages one and two produce no result, apply a rule of law that the debtor had to pay the creditor at the creditor's place of business. Where the creditor had two places of business, the relevant place of business is that from which he has dealt with the defendant in relation to the transaction in question.

80 On the difference between the second stage and the third stage, the court stated as follows at [12]:

> ... On the authorities which have been put before us it seems to us clear that the proper inquiry, (if necessary) proceeds through three stages and not two, and that there is a material difference between stage 2 and stage 3. At stage 2 the court is looking for the parties' real but unexpressed intentions: at stage 3 it is filling the vacuum which the parties have left by applying a rule of law. The approach seems to us to be supported by all the textbooks, see Chitty on Contract, 24th Edition, Vol. 1, paragraph 1297; Benjamin on Sale of Goods, 2nd Edition, paragraph 705; and 9 Halsbury's Laws (4th edition), paragraph 487. *It seems to us most clearly to emerge from the Court of Appeal decision in [The Eider (1893) Probate 119)], where Lord Esher MR at p 131, and Bowen LJ at p 136, both founded on a "general rule"; whereas Lindley LJ founded upon "those principles of law by which lawyers are guided".* To us, this means that at stage 3 the court is not concerned with actual

> but with imputed intentions and that is the fundamental difference between the two stages. [emphasis added in italics]

81 RV1's case rests primarily on the rule extracted from *The Eider* [1893] Probate 119 ("*The Eider*"), *viz*, there is a general rule of law in which the debtor must pay the creditor at the debtor's place of business and that this is a general principle of law to be applied where there is no express or implied term under the contract stating the place from which payment must be made. In *The Eider*, Lord Esher MR stated as follows (at 131):

> … There is no place specified in the contract for the payment. *What, then, is the ordinary rule?* That the debtor must follow his creditor, and must pay where his creditor is. *If this were a contract made in England, by two people who were at the time in England, and payment was to be made in England, nevertheless, if the creditor went abroad and was abroad at the time payment was to be made, the debtor need not go after his creditor to pay him abroad; he may wait till his creditor comes back to England.* The case of *Fessard v Mugnier* [(1865) 144 ER 453] shews that absence of the creditor from England affords an excuse for the want of tender or payment by the debtor where the creditor has gone abroad after the making of the contract, *but nevertheless the proper place of payment is determined by the rule that the debtor must follow the creditor, and if he makes a bargain with a person who is abroad at the time when the contract is made, which is the case here – and what makes this case stronger is, that it is made by a foreigner who is abroad, with a foreigner who is also abroad – the place of payment according to the contract follows the general rule, and is to be made where the creditor is.* [emphasis added in italics]

82 The rule that the debtor must seek out the creditor in the absence of an express or implied term is also mentioned in *Dicey, Morris and Collins on The Conflict of Laws* (Sweet & Maxwell, 15th Ed, 2012) at para 11-197:

> The contract need not contain an express term providing for performance in England. It is enough if the court can gather that this was the intention of the parties by construing the contract in the light of the surrounding circumstances, including the course of dealing between the parties. In most of the reported cases, the breach complained of was the failure to pay money, the matter in which it is especially difficult to

> determine the place of performance in the absence of an express term in the contract. "The general rule is that where no place of payment is specified, either expressly or by implication, the debtor must seek out his creditor" [referring to *The Eider*]. ***But this is only a general rule*** and, as stated, it only applies where no place of payment is expressed or *implied* in the contract. It certainly does not mean that a creditor can confer jurisdiction on the English court merely by taking up his residence in England after the making of the contract. [emphasis added in bold]

83 The rule in *The Eider* appears be an established feature of English law. It has been referred to by the English Court of Appeal in *Sharab v HRH Prince* ([78] *supra*) at [38] and several decisions by the English High Court (see *eg*, *Commercial Marine Piling Limited v Pierse Contracting Limited* [2009] EWHC 2241 at [38] and *Zebrarise Ltd and another v de Nieffe* [2005] 2 All ER (Comm) 816 at [30], where Judge Havelock-Allan described it as an "well established" general rule).

84 In any event, in our judgment, the "general rule" would clearly have no place in a situation where there is a history of past payments by the debtor to the creditor in respect of the transaction in question in a jurisdiction other than the place of business of the creditor.

85 It is also important to appreciate the true scope of the rule in *The Eider*. It does not establish the proposition that the debtor must seek out the creditor at the creditor's place of incorporation but instead, the place from which the creditor performs his business. This point is amply illustrated by the facts in *Komaia Deccof* ([79] *supra*). In that case, the plaintiffs were Liberian-incorporated companies but had their place of business in Hong Kong. The court thus applied the rule in *The Eider* to find that the plaintiffs were entitled to be paid in Hong Kong, as Hong Kong was their place of business. In fact, none of

the parties had suggested that the payment could only be validly made in Liberia, the place where the plaintiffs were incorporated.

86 Having set out the applicable principles, we turn to the question of whether RV1 had shown a good arguable case that ICS had breached a contractual obligation to make payment in Singapore.

87 It is common ground that there is no express clause under the Sulphur Contracts providing where payment is to be made. In our view, the most material fact is that part payments were made by ICS to Affert's Hong Kong bank account on multiple occasions (12 June 2012, 7 December 2012, 20 February 2013, 15 April 2013, and 9 January 2014) in respect of both the MV Xenia Shipment and the Transfert Shipment. This history of part payment by ICS to RV1 in Hong Kong, despite the existence of four live bank accounts in Singapore (with the Bank of India, OCBC Bank and Standard Chartered Bank) strongly militate against the application of the "general rule" in *The Eider*.

88 In any case, the rule in *The Eider* does not assist RV1. As mentioned at [85] above, the rule in *The Eider* requires the debtor to make payment at the creditor's *place of business,* does not apply to assist RV1. The rule does *not* require payment by the debtor at the creditor's place of incorporation where the creditor performs his business elsewhere than in the place of incorporation. It is undisputed that Affert's main director, Mr Syam, was based in Hong Kong, and that Affert had no active employees in Singapore. Apart from the fact that Affert was incorporated in Singapore, there is simply no evidence that Affert had carried out any business in Singapore.

89 The very fact that the payments were made and accepted in Hong Kong must mean either that (a) there was a waiver by Affert to have the payment made in Singapore; or (b) that it was legally permissible to make the payment either in Hong Kong or in Singapore. As no evidence was adduced by RV1 to suggest that there was a waiver, the more natural inference is that it was not an exclusive obligation to pay in Singapore and *only* in Singapore.

90 Given the above, we find that RV1 has not shown a good arguable case that its claim was brought in respect of a breach committed in Singapore under O 11 r 1(*e*).

Issue 3: Whether RV1's claim is time-barred under Senegalese law such that it cannot satisfy the merits requirements for service out of jurisdiction

91 As we have explained above, the court's finding on the governing law of a contract may have an effect on the merits of a plaintiff's claim.

92 In this case, the court's finding that the governing law of the Sulphur Contracts will inevitably have an impact on the analysis of the merits of RV1's claim, given ICS's primary defence in these appeals is that RV1's claim is time-barred under Senegalese law.

The Judge's findings on the time bar and RV1's submissions below

93 We start our analysis by recalling how the issue of the time bar was dealt with by the Judge below as well as the submissions made by RV1 before the Judge. It is useful to examine the first affidavit filed by RV1's expert on Senegalese law, Mr Kebe, which detailed his opinion on the applicable time bar under Senegalese law. Mr Kebe stated, in response to the question on the applicable limitation or prescription period, that this could be either five or two

years, and that in order to stop the running of the limitation period, RV1 would have had to either (a) initiate a claim before the court; (b) make a formal request for payment of debt; or (c) have a signed note or acknowledgement of debt in favour of the creditor. Mr Kebe further stated that it was possible that the limitation period for enforcing the ICS Debt had expired under Senegalese law.

94 Although RV1's primary position before the Judge was that the Sulphur Contracts were governed by Singapore law and not Senegalese law, it nonetheless advanced a positive case that its claim under the Sulphur Contracts was time-barred under Senegalese law (albeit in the context of its submissions that Singapore was the *forum conveniens* to try the dispute). In its submissions, it stated that:

> 15. Natural Forum: Eight, apart from the above factors pointing to Singapore as clearly the more appropriate forum for the resolution of this dispute (e.g. non-payment in Singapore, governing law being Singapore law, the case involves a Singapore company wound up in Singapore with a liquidator based in Singapore and seeking to set aside the undervalue transaction using Singapore statutes, the application of the Model Law, etc), here are some further factors in support of the same:
>
> > (1) Unavailability of Senegal as a Forum*:* The time-bar to sue under the Invoices in Senegal, whether 2 years or 5 years, has expired. Applying [*MAN Diesel*], the unavailability of Senegal as a forum must be given significant weight in determining which is the appropriate forum. In the circumstances, only Singapore remains as the appropriate forum.
>
> …

95 Most significantly, RV1 expressly conceded to the Judge that irrespective of whether the limitation period was two years or five years (under Senegalese law), it would have already set in. The relevant portion of the transcript reads as follows:

C[our]t:	On the basis of both [Mr Kebe's] and [Mr Houda's] affidavits, the time bar would seem to have set in at 2 years or 5 years, correct?
[ICS and RV1]:	***Agree***.
C[our]t:	Whether it is 2 years or 5 years, the time bar would have set in, today?
[ICS and RV1]:	***Agree***.

[emphasis added in bold and italics]

96 Thus, at the time of hearing before the Judge, RV1 had accepted that the claim was time-barred under Senegalese law. This was, in our view, an entirely reasonable position for RV1 to have taken in the light of the evidence provided by RV1's own expert, Mr Kebe, in his first affidavit. Having regard to RV1's concession, the Judge made a *factual* finding that RV1's claim under the Sulphur Contracts was time-barred under Senegalese law (Judgment at [82]).

97 However, this factual finding was not taken into account by the Judge in the assessment of the merits requirement. Instead, this finding was only considered in the context of assessing the availability of Senegal as an alternative forum in the *forum non conveniens* analysis. In this regard, the Judge referred to the proposition in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [141] that in order for RV1 to rely on the time-bar factor for the purposes of *forum non conveniens*, it must show that it did not act unreasonably in failing to commence proceedings within time in the alternative forum, such as by issuing a protective writ (Judgment at [82]). Having regard to the conduct of FKT, the Liquidators and RV1 itself, the Judge found that it had not been shown that they had acted reasonably in failing to commence a claim (Judgment at [83] and [84]). Thus, the Judge found that RV1 could not rely on the unavailability of Senegal (as the alternative

forum to pursue the dispute) to tilt the balance to Singapore as the *forum conveniens* (Judgment at [85]).

98 On appeal, RV1 submits that the time bar under Senegalese law no longer applies. In this respect, RV1 seeks to admit Mr Kebe's fourth affidavit in SUM 84, which consists of Mr Kebe's revised position on the applicable limitation period under Senegalese law. In substance, Mr Kebe now claims that the applicable limitation period no longer applies as there are various exceptions to that limitation period. The question which arises here is whether RV1 can resile from its factual concession before the Judge even though that concession was made in aid of its submission that Singapore was the *forum conveniens* to try the dispute, and to adopt, on appeal, a completely opposing position in the context of its submissions on the merits requirement.

Approbation and reprobation

99 In our judgment, RV1's stark shift in positions in respect of the limitation period engages both the doctrine of approbation and reprobation and the doctrine of abuse of process which we will deal with in turn.

100 RV1 had, before the Judge, accepted that its claim was barred under Senegalese law, as a matter of *fact* based on its own expert evidence, in aid of its submission that Senegal was an unavailable forum. It now seeks to advance a completely different position, namely, that its claim is *no longer* time-barred under Senegalese law, in order to refute ICS's submission that its claim lacks sufficient merit for the purposes of obtaining the Leave Order. In *BWG v BWF* [2020] 1 SLR 1296, this court summarised the scope of the doctrine of approbation and reprobation at [102]–[118]. In essence, the doctrine bars a person, having a choice between two inconsistent courses of conduct and having

chosen one, from resiling from that position having taken some benefit from that chosen course. In *Lipkin International Ltd v Swiber Holdings Ltd and another* [2015] 5 SLR 962 ("*Swiber*") at [61], the High Court explained that there was also a "wider dimension to the doctrine which discourages the adoption of 'inconsistent attitudes' and warns that stark shifts in positions from previous proceedings would be viewed 'with some circumspection and scepticism'".

101 Given that the Judge below *did not accept* RV1's submission that the claim being time-barred made Senegal an unavailable forum such as to tilt the balance towards Singapore, we do not think that the doctrine of approbation and reprobation strictly applies, particularly as RV1 did not receive any benefit as a result of its earlier position on the time bar. If RV1 had successfully convinced the Judge that Senegal was an unavailable forum by reason of the time bar in aid of its submission that Singapore was the *forum conveniens*, we would have had no hesitation in holding that RV1's conduct constituted approbation and reprobation.

102 Nonetheless, RV1's starkly contradictory position in this appeal is highly unsatisfactory and attracts the criticism raised in *Swiber* that such changes of position would attract the circumspection and scepticism of the court. The fact that RV1's concession on the time bar was made in the context of its submissions on *forum non conveniens* does not, in our view, alter the analysis or excuse its change of position.

Abuse of process

103 We now consider whether RV1's change of position on the time bar issue offends the doctrine of abuse of process.

104 In our recent decision in *JWR Pte Ltd v Edmond Pereira Law Corp and another* [2020] SGCA 68 ("*Edmond Pereira*"), the appellant abandoned its case at trial and relied on a single new allegation of negligence which was not raised at all during the trial. The appellant then applied by way of summons under O 57 r 9A(4)(*b*) of the Rules of Court to raise this new point on appeal and to amend its Statement of Claim. This court found that there was an "abuse of the appeal process" as the court would not be considering whether the High Court judge was wrong in arriving at the conclusions but would effectively be conducting a second trial (*Edmond Pereira* at [32]).

105 In another recent decision of this court, *Zyfas Medical Co (Sued as a firm) v Millennium Pharmaceuticals, Inc* [2020] SGCA 84 ("*Millennium Pharmaceuticals*"), Zyfas sought to advance a legal submission which it had expressly *conceded* during the hearing before the High Court. Millennium had, in the High Court, sought a declaration that Zyfas' declaration under the Health Products (Therapeutic Products) Regulations 2016 (S 329/2016) ("the TPR") contained a statement that was false or misleading in a material particular or omitted to disclose a matter that was material to the application for the registration of a therapeutic product. In the High Court, Zyfas expressly conceded that process patents were patents in force that had to be declared under reg 23(2)(*a*) of the TPR.

106 On appeal, Zyfas performed a *volte face*, and contended that process patents did not fall within the scope of reg 23(2)(*a*). This court found Zyfas' change in position to be highly unsatisfactory as that concession had been made after consideration by Zyfas' counsel below. The court also suggested that Zyfas' retraction of its earlier position on appeal arose from a reworking and rethinking of its litigation strategy. Accordingly, Zyfas' conduct fell within the scope of criticisms in *Edmond Pereira* and would have amounted to an abuse

of the appeal process (*Millennium Pharmaceuticals* at [31]–[32]). However, given that there were certain special features in the case, namely, the need to clarify an important question of law, the court proceeded to consider the question of whether process patents were covered under reg 23(2)(*a*) of the TPR.

107 Unlike Zyfas in *Millennium Pharmaceuticals*, RV1 did not make a concession on a purely legal point. Instead, it had conceded, as a matter of *fact*, based on its own expert's evidence, that its claim under the Sulphur Contracts was time-barred under Senegalese law in aid of its argument that Singapore was the *forum conveniens* to try the dispute. This was a carefully considered position adopted by RV1, as evidenced by various correspondence. RV1's own expert, Mr Kebe, provided evidence that it was possible that RV1's claim was time-barred in the hearing below. Further, RV1's current solicitors (albeit acting on behalf of Solvadis at the time) had, on or around 30 November 2017, written to the Liquidator's solicitors highlighting the potential issue of the time bar ("the 30 November 2017 letter"). In this letter, the solicitors expressly acknowledged the potential difficulty of the time bar and stated that:

> [t]he limitation of Affert's causes of action against ICS would have tremendous consequences for Affert and their creditors. In respect of the 3rd invoice alone, this is the largest invoice by Affert to ICS amounting to a huge sum of US$6,475,350 (which is about 38% of the total sums owed by ICS to Affert), and any time bar would greatly prejudice and deprive Affert's creditors from having the debts owed to them from being significantly reduced. It is therefore pertinent that any action against ICS is commenced as soon as possible and before 25 January 2018 (if the action is to be commenced in Senegal under Senegalese law) so as to preserve Affert's claim.

108 Further, RV1's awareness of the time bar under Senegalese law can also be seen in an email by Mr Prentice to Mr Abuthathir s/o Abdul Gafoor ("Mr Gafoor") sent on 6 December 2017 ("the 6 December 2017 email"), in

response to an email by Affert's Liquidators highlighting concerns in relation to the time bar under Senegalese law:

> We are aware of the prescription period in Senegal – which is 2 years for contractual disputes and five years for other claims. In Hong Kong the limitation period is six years. Cyprus has a limitation period of six years for contract, and ten years for other claims. Jersey has a ten year limitation for contract and it varies for claims but that period is generally shorter.
>
> …
>
> As you are no doubt aware, it is for the debtor to argue limitations as a defence to Affert's claim for payment. Clearly the period for a contractual dispute in Senegal has already passed for all of the unpaid invoices, which means that Affert will need to counter the debtor's defence by the exceptions to the limitation period – such as conspiracy, or lack of good faith. *Regardless this approach still means that specific invoices are uncollectable unless it can be shown the event triggering the limitation period was some time after the contractual default or that the claim is subject to [a] law other than Senegal. …*
>
> Limitation periods will not affect litigation in relation to Affert. *If we cannot recover Affert's receivables from its debtors, the amount available to offset the loss caused by the directors and shadow directors will be reduced, increasing the damages we will be seeking from the directors, shadow directors, and the beneficiaries of any wrong doing.*
>
> …
>
> *Our recovery sharing offer for the receivables explicitly considered our chances of overcoming debtor's limitations defence as at 21 November 2017. Obviously delays will impact the strategies utilised to make a recovery – as well as the cost and time, and probabilities of success. Our offer still stands, but we reserve the right to revise the terms of the recovery sharing agreement…*
>
> [emphasis added in italics]

109 Mr Gafoor was one of Affert's court appointed liquidators and had filed an affidavit in CWU No 17 seeking a declaration to approve the terms of the "Assignment of (Receivables and Causes of Action) Agreement" dated

27 March 2018 ("the Assignment Agreement") between Affert and RV1. In Mr Gafoor's affidavit, it was stated that:

> … the Liquidators understand that there are various time bar (limitation period) issues in relation to the Assigned Property. As such, even if there were other proposals by third party litigation funders to consider (of which there were none when the [Assignment Agreement] was executed by the Liquidators), there were commercial considerations that meant that the Liquidators would have to quickly select one.
>
> (a) The said time bar (limitation period) issues have been set out in the following correspondence:
>
> (i) [the 30 November 2017 letter].
>
> (ii) [the 6 December 2017 email].
>
> (iii) A letter dated 11 April 2018 from Oxford [Investments Limited Partnership] [*ie*, a related party to RV1]
>
> …

110 Relying on the evidence of Mr Kebe, RV1's counsel rightly conceded that the time bar would have already set in, whether the limitation period was two years or five years. While RV1 might not have appreciated that this concession would have a consequential impact on the merits requirement, this does not change the analysis. A factual concession remains a factual concession irrespective of the nature of the legal argument under which it was made. Ultimately, in seeking to resile from the concession that the claim was time-barred and submitting that the time bar no longer applied, this court would no longer be considering whether the High Court judge was wrong in arriving at the conclusions but would effectively be conducting a fresh examination of the merits (in this case, the issue of the time bar) (*Edmond Pereira* at [32]).

111 In the circumstances, we find that it is an abuse of process of the court for RV1 to now contend on appeal that the time bar under Senegalese law no longer applies. The fact that this is an appeal from an interlocutory application

does not affect the application of the doctrine of abuse of process. In this respect, we align ourselves with the views of Buckley LJ in *Bryanston Finance Ltd v De Vries (No. 2)* [1976] 1 Ch 63 at 77:

> … Mr Bateson says that this concession was made for the purposes of the hearing before the judge only and should not bind him in this court. This is not, in my opinion, a tenable position. On an interlocutory application party can, of course, make a concession limited to the purposes of that application. This is often done where a party does not wish at an interlocutory stage to incur the expense and delay that might attend the investigation of some disputed issue. *But such a concession must, I think, be made for the purposes of that application in its entirety. If the interlocutory order be appealed, the party having made the concession below cannot resile from it in the appellate court, at any rate without the leave of the court.* ***The primary function of the appellate court is to decide whether the judge at first instance has reached the right conclusion on the material before him. This material must include any concession made before him. If the appellate court were to be satisfied that the concession was made as the result of some misunderstanding or for some other reason justice required that the party should be allowed to withdraw it, [i]t might allow the withdrawal of the concession. Otherwise the concession must hold.*** [emphasis added in bold and italics]

112 For completeness, we should add that we would not have accepted RV1's new submission on the time bar issue. For this, we turn to deal with the admissibility of Mr Kebe's fourth affidavit on appeal, which detailed RV1's revised position on the time bar issue.

113 In an appeal from an interlocutory application, the requirements in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") – non-availability, relevance and credibility – do not have to be applied in an unattenuated manner, but the court may remain guided by the three requirements: *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 ("*AnAn Group*") at [57].

114 In our judgment, the credibility of Mr Kebe's fourth affidavit is wholly lacking. Mr Kebe is RV1's Senegalese lawyer. This was confirmed by both parties during the hearing of the appeal. In this vein, we find that Mr Kebe was not an independent expert. It appears likely that Mr Kebe must have revised his position on the issue of the time bar under Senegalese law when it became clear that the time bar would result in a failure to satisfy the merits requirement for the purposes of the Leave Order.

115 Further, it is established law that in evaluating expert evidence, regard must be had to content credibility, evidence of partiality, coherence and the evidence in the context of established facts (*Sakthivel Punithavathi v Public Prosecutor* [2007] 2 SLR(R) 983 at [76]).

116 In this respect, we find Mr Kebe's evidence on the time bar (in the fourth affidavit) to be unsupported and incoherent. In response to the question as to whether ICS had made an admission or acknowledgment of the ICS Debt such that the limitation period was extended, Mr Kebe simply stated that "… [the] legal claim constituted by the summons filed at the clerk's office of the Commercial Court amount to an admission or acknowledgment of the ICS Debt under Senegalese law and is sufficient to extend the limitation period" (the summons is a reference to the summons for the declaration of the extinguishing of the ICS Debt). Mr Kebe provides no reasoning or any explanation for his opinion on why or how the summons constitutes an admission or acknowledgment of the ICS Debt under Senegalese law.

117 Furthermore, Mr Kebe's opinion on this point is irrational on its face, as the summons filed by ICS was for the *very purpose of establishing that no such debt was owed*. It is difficult to appreciate how that summons could conceivably

be construed as an admission or acknowledgment of the ICS Debt when it was filed to achieve the direct opposite result.

118 Mr Kebe further opined that subsequent acknowledgment of the claim for the ICS Debt without the raising of the issue of the limitation period shall constitute a "tacit waiver" such as to restart a new limitation period. Again, Mr Kebe did not explain how he had arrived at this view. Finally, Mr Kebe stated that the limitation period for filing an action under Senegalese law only runs from the date that ICS informed Affert on 3 July 2017 that it no longer owed Affert the ICS Debt. Once more, there is no explanation as to why Mr Kebe had departed from his earlier position that the limitation period began to run from the time at which payment was to be made under the Sulphur Contracts.

119 Accordingly, we refuse to admit Mr Kebe's fourth affidavit. We also refuse to admit the remaining evidence which RV1 seeks to admit in SUM 84 as we are satisfied that the evidence was available at the time of the hearing before the Judge. This leaves us with the evidence of Mr Kebe and Mr Houda, as was presented before the Judge below. The Judge did not make a positive finding on whether the applicable time bar under Senegalese law was two years or five years, but noted that the claim would have been barred in either case.

120 During the hearing of these appeals, counsel for ICS, Mr Cavinder Bull SC ("Mr Bull"), agreed that the claim would be barred whether the limitation period was two years or five years (see the table below), but urged the court to make a finding that it was two years. We decline to do so as the determination of the precise applicable time bar under Senegalese law would have no bearing on the outcome of the issues arising in these appeals. It would be more appropriate for the relevant court in Senegal (if filed by RV1) to make

the pronouncement given our decision that Senegal is the *forum conveniens* (see below at [150]). The following table sets out the various expiry dates for the limitation period (whether two years or five years) in respect of RV1's claim under the Sulphur Contracts:

Invoice for	**Invoice Date**	**BL date**	**Last date for payment**	**Expiry of Limitation Period (Two years)**	**Expiry of Limitation Period (Five years)**
MV Xenia Shipment	11 May 2012	20 April 2012	19 July 2012	**19 July 2014**	**19 July 2017**
Transfert Shipment	6 August 2012	29 July 2012	27 September 2012	**27 September 2014**	**27 September 2017**
Solvadis Shipment	27 September 2012	6 September 2012	4 October 2012	**4 October 2014**	**4 October 2017**
MV Amanda C Shipment	7 March 2013	6 March 2013	29 March 2013	**29 March 2015**	**29 March 2018**
MV Beauforte Shipment	7 May 2013	5 May 2013	5 July 2013	**5 July 2015**	**5 July 2018**
MV Lena Shipment	10 June 2013	29 May 2013	29 Jul 2013	**29 Jul 2015**	**29 Jul 2018**

Whether RV1 can avail itself of the undue hardship exception under the Foreign Limitation Periods Act

121 Notwithstanding its position on the applicable time bar under Senegalese law, RV1 submits that it would not apply because of the "undue hardship" exception under s 3(1) read with ss 4(1) and 4(2) of the Foreign Limitation Periods Act (Cap 111A, 2013 Rev Ed) ("Foreign Limitation Periods Act"). The relevant provisions read as follows:

> **Application of foreign limitation law**
>
> **3.** – (1) Subject to the following provisions of this Act, where in any action or proceedings in a court in Singapore the law of any other country falls (in accordance with the rules of private international law applicable by any such court) to be applied in the determination of any matter –
>
> (*a*) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and
>
> (*b*) the law of Singapore relating to limitation shall not so apply.
>
> …
>
> **Exceptions**
>
> **4.** – (1) In any case in which the application of section 3 would to any extent conflict with public policy, that section shall not apply to the extent that its application would so conflict.
>
> (2) The application of section 3 in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings.
>
> …

122 Although there is no reported decision in Singapore on the "undue hardship" exception under s 4(2) of the Foreign Limitation Periods Act, both parties were broadly in agreement on the applicable principles, which they drew from various English decisions. They did, however, emphasise different factors as well as the weight to be accorded to these factors.

123 We begin our analysis by endorsing the meaning of "undue hardship" as ascribed by Lord Denning MR in *Liberian Shipping Corporation "Pegasus" v A King & Sons Ltd* [1967] 2 QB 86 at 98: "'undue' … simply means excessive. It means greater hardship than the circumstances warrant. Even though a claimant has been at fault himself, it is an undue hardship on him if the consequences are out of proportion to his fault". This formulation was also

referred to by Longmore LJ in the English Court of Appeal decision in *Bank St Petersburg OJSC and another v Arkhangelsky and another* [2014] EWCA 593 ("*Arkhangelsky*") in the context of s 2(2) of the Foreign Limitations Periods Act 1984 (UK) ("UK Foreign Limitation Periods Act") (*Arkhangelsky* at [20]) and the decision of the English High Court in *Alseran and others v Ministry of Defence* [2017] EWHC 3289 (QB) at [821].

124 We refer to the following English decisions in our analysis of undue hardship under s 4(2) of the Foreign Limitation Periods Act.

125 In the English Court of Appeal decision in *Harley and others v Smith and another* [2010] EWCA Civ 78 ("*Harley v Smith*"), several employees brought claims for personal injury against their employer and their co-employee ("the defendants") before an English court. The defendants argued that the proper law governing the claim was Saudi law and that the claim was time-barred under Saudi law, relying on Article 222 of the Labour Law in Saudi Arabia. The judge below proceeded to find that whilst the 12-month limitation period under the Labour Law did apply, that period ran from the end of the "work relations" between the employer and employee, and accordingly, the claims were not time-barred. In any event, however, the judge found that the "undue hardship" threshold would have been crossed under the UK Foreign Limitations Periods Act, so that the 12-month limitation period "should be disapplied".

126 The English Court of Appeal held that the judge had wrongly exercised his discretion to hold that there was "undue hardship" (*Harley v Smith* at [51]). In this respect, the court disagreed with the judge below that the failure of the claimants' lawyers to appreciate the true limitation period under Saudi law was a relevant factor in determining whether there was "undue hardship". The true

question is "not whether undue hardship is caused by wrong advice; but whether *it is caused by the application of the foreign limitation period*" [emphasis added]. Even if the legal position *vis-à-vis* the Saudi law was uncertain, this would have "*made it necessary to bring proceedings sooner rather than later in order to avoid the risk, to which the uncertainty gives rise, of being out of time*: the uncertainty does not add to the hardship (if any) caused by the need to bring the proceedings within twelve months" (*Harley v Smith* at [53]–[54]) [emphasis added].

127 In *Arkhangelsky*, the defendants appealed against an order disapplying the three-year Russian limitation period by reason of the UK Foreign Limitation Periods Act. Longmore LJ agreed with the judge below that the limitation period would cause undue hardship to the claimants as: (a) the claimants had been exiled from Russia; (b) the parties had agreed that the English Court would have exclusive jurisdiction to determine their dispute; (c) the claimants had been "out-gunned and out-lawyered" by the defendants; (d) the claimants had instituted proceedings within time, but were unable to timeously effect service out of jurisdiction on the defendants in Russia due to their impecuniosity; and (e) the claimants had reasonably expected that the defendants' English lawyers would accept service, but were confronted with the defendants' uncooperative and "hardball" tactics, in determining that there was "undue hardship". The judge below also referred to various authorities in his analysis, including *Harley v Smith* (*Arkhangelsky* at [19]) and found that where the relevant impecuniosity of the claimant hindered due service and the limitation period expires during the period allowed for service, the undue hardship provision could be invoked to disapply the foreign limitation period (*Arkhangelsky* at [22]). In this regard, Longmore LJ concluded that the court has to look at all the circumstances in order to decide whether the application of the foreign limitation period will

cause undue hardship and impecuniosity was highly relevant to that question (*Arkhangelsky* at [24] and [25]). RV1 relies on *Arkhangelsky* by way of analogy and suggests that RV1, like the claimants in *Arkhangelsky*, did not have a reasonable opportunity to pursue the claim against ICS even though it had acted with reasonable diligence.

128 In *Arab Monetary Fund v Hashim and others* [1996] 1 Lloyd's Rep 589 ("*Arab Monetary Fund*"), the claimant's claims in tort fell outside the foreign limitation period, and the claimant sought to rely on the undue hardship exception in the UK Foreign Limitation Periods Act. Saville LJ found that the application of the three-year limitation period under the foreign law could not be said to have caused undue hardship. This was because the claimant was by August 1988 (within the relevant limitation period) already in possession of all the material it needed to launch the proceedings, but chose not to do so until the following April (outside of the relevant limitation period). The judge also noted that the claimant had admitted that it was fully aware of the relevant provisions of both English and the foreign (Abu Dhabi) law at all material times. The decision in *Arab Monetary Fund* therefore suggests that knowledge of the foreign limitation period within the applicable limitation period militates against a finding of undue hardship.

129 In our judgment, in assessing whether the application of the foreign limitation period would cause undue hardship, the court must take into account all the relevant facts and circumstances of the case. Some of the relevant factors that the court may take into account include the following:

(a) The objective reasonableness of the time bar under foreign law, although the mere fact that the foreign time bar is shorter than the

equivalent time bar under Singapore law would not in and of itself justify a finding of undue hardship.

(b) The legal and factual complexity of the claim in the context of the applicable foreign time bar.

(c) Whether the plaintiff had, on the particular facts of the case, a reasonable justification for allowing the applicable foreign time bar to set in.

130 Having set out the relevant principles, we now turn to consider whether the application of the Senegalese time bar has caused undue hardship within the meaning of s 4(2) of the Foreign Limitation Periods Act in the circumstances of the present case.

131 RV1's primary contention is that because Affert is a "person who … might be made a party to the action or proceedings" under s 4(2) of the Foreign Limitation Periods Act, it must also be considered whether *Affert* would suffer from "undue hardship". In this respect, RV1 submits that Affert was not in a position to collect the ICS Debt as it was controlled by directors who had no intention to collect that debt. This was compounded by the fact that Affert had waived the ICS Debt in exchange for nothing. No redress could therefore have been attained until Affert's company directors were removed and eventually replaced by *bona fide* directors. The earliest time this could have been done was 29 August 2018.

132 We first consider whether undue hardship was caused to RV1 before turning to Affert.

133 As Mr Bull submitted during the hearing before us, it is crucial to bear in mind that the undue hardship contemplated under s 4(2) of the Foreign Limitation Periods Act must be caused *by the application of the limitation period* under Senegalese law (*Harley v Smith* at [53]).

134 In this case, any hardship suffered by RV1 arose from its considered commercial decision to obtain the assignment of the ICS Debt knowing full well that the claim might already be time-barred. In this regard, it bears repeating that the assignment of the ICS Debt took effect from 29 August 2018 (see [21] above). By then, the claim was already time-barred whether the limitation period was two years or five years (see the above table at [120]). Furthermore, Mr Prentice of RV1, in the 6 December 2017 email (*ie*, ***before*** the assignment took effect on 29 August 2018) clearly demonstrated an awareness of the limitation period under Senegal law, stating that RV1 would not be able to collect on the invoices "unless it can be shown the event triggering the limitation period was some time after the contractual default or that the claim is subject to [a] law other than Senegal". It is also highly telling that Mr Prentice acknowledged that the "[the] recovery sharing offer for the receivables *explicitly considered [the] chances of overcoming [the] debtor's limitations defence as at 21 November 2017*" [emphasis added] (see above at [108]). Finally, it should be noted that RV1 did not disclose the Assignment Agreement on the basis that such information was confidential, irrelevant or privileged. Important terms of the Assignment Agreement, however, appear to have been disclosed by Mr Gafoor in his affidavit in CWU No 17. Clauses 3.12 and 3.1.3 of the Assignment Agreement stated as follows:

> 3.1.2 The Initial Purchase Price payable by [RV1] to the Assignor for the Assigned Property shall be $50,000 Singapore dollars … and shall be payable to the Assignor's Account.
>
> 3.1.3. In addition to the Initial Purchase Price, [RV1] shall pay a Deferred Purchase Price to the Assignor being such amount equal to 40% (forty percent) of the first US$10 million … of Net Proceeds and 50% … of Net Proceeds in excess of US$10 million.

135 The above clauses reveal that RV1 had obtained the assignment of the ICS Debt at a substantial discount, presumably after taking into account the likelihood that the claim might be time-barred under Senegalese law.

136 In the circumstances, the only inference to be drawn is that RV1 must have obtained the assignment from the Liquidators with the full knowledge that the claim against ICS might be time-barred under Senegalese law.

137 It seems to us that it is objectionable in principle that a party like RV1, as an assignee of a debt, should be permitted to revive a time-barred claim simply by pointing to the alleged *mala fides* of the assignor's former directors in failing to commence the proceedings within the applicable limitation period, with the knowledge that the claim was already time-barred. As in *Arab Monetary Fund* ([128] *supra*), any knowledge of the applicability of a foreign time bar would militate against any finding of undue hardship. In this case, both RV1 and Affert (through its Liquidators) possessed that knowledge (at the latest, by 30 November 2017 in the case of Affert and by 21 November 2017 in the case of RV1). This precludes any finding of undue hardship. And even if there was any uncertainty as to the applicability of the Senegalese time bar, that would have "*made it necessary to bring proceedings sooner rather than later* in order to avoid the risk, to which the uncertainty gives rise, of being out of time" [emphasis added] (*Harley v Smith* ([125] *supra*) at [53]).

138 RV1's reliance on *Arkhangelsky* ([123] *supra*) is also misconceived. There is no suggestion that ICS displayed "hardball" tactics similar to the defendants in *Arkhangelsky* or that RV1 suffered from impecuniosity which hindered its ability to file the claim within the limitation period under Senegalese law.

139 As for the undue hardship caused to *Affert*, the truth is that Affert never contemplated commencing proceedings against ICS for the ICS Debt either in Singapore or Senegal. In other words, the alleged undue hardship caused to Affert had nothing to do with the application of the time bar under Senegalese law, but arose from the omissions of Affert's former directors in commencing *any* proceedings against ICS. If there was misconduct on the part of Affert's directors arising from the Waiver Defence, that is a matter for the Liquidators to consider. Relatedly, we note that the Liquidators have already commenced proceedings in OS 544 to set aside the Waiver. It is therefore not open for RV1 to contend on behalf of Affert that undue hardship has been caused to Affert from the application of the Senegalese time bar given that the claim has been assigned to RV1.

140 We should state that it was, in any event, wrong for RV1 to contend that the earliest time that proceedings could have commenced against ICS was 29 August 2018. FKT was appointed as Affert's liquidators on 8 February 2017 before they were replaced by the Liquidators. Either FKT or the Liquidators could have commenced proceedings against ICS within a reasonable time after their appointment.

141 In the circumstances, RV1 cannot find assistance under s 4(2) of the Foreign Limitation Periods Act to be relieved of the Senegalese time bar defence.

Relevance of the Waiver Defence

142 In the hearing before the Judge, ICS's primary defence was that Affert had agreed in 2014 to waive the ICS Debt as part of the Acquisition of 66% of the shares in ICS by Indorama. At that same hearing, RV1 argued that the Waiver was invalid because it was a sham or that it lacked sufficient consideration. Separately, the Liquidators filed OS 544 to set aside the Waiver of the ICS Debt on the basis that it was a transaction at an undervalue.

143 During the hearing of the appeal, Mr Bull pointed out that even if the Waiver was set aside in OS 544 and therefore unenforceable, RV1 would still not be able to revive its claim for the ICS Debt as it would be time-barred under Senegalese law. We agree with this submission. Given our findings above that the claim is in fact time-barred under Senegalese law, it is unnecessary for us to deal with the merits of the Waiver defence as RV1 would not be able to satisfy the merits requirement for the Leave Order. Any examination of the merits of the Waiver defence would inevitably engage the same issues of fact and law which are before the court in OS 544. As such, it would be inappropriate for us to examine the merits of the Waiver defence and we decline to do so at this stage.

Issue 4: Whether Singapore is the *forum conveniens*

144 Finally, we turn to consider the issue of whether Singapore or Senegal is the *forum conveniens*. The burden rests on RV1 to show that Singapore is the *forum conveniens*.

145 ICS submits that the Judge was wrong to find that Singapore was the *forum conveniens* for the following reasons:

(a) The Judge had proceeded on the basis that the Waiver was the crux of ICS's defence, but ICS's primary defence in this appeal is that RV1's claim is time-barred. In the circumstances, the governing law of the Sulphur Contracts (*ie*, Senegalese law) assumes paramount importance in determining the *forum conveniens*. Thus, the Judge incorrectly thought that the ICS Debt would have been due but for the Waiver defence and thus gave the governing law of the Sulphur Contracts no weight.

(b) The breach of the Sulphur Contracts did not occur in Singapore.

(c) The fact that the Liquidators have filed OS 544 does not shift the proper forum to Singapore. If the claim in the present suit is time-barred, RV1's claim in this suit will fail even if the Waiver is set aside in OS 544. In any event, RV1 and Affert had belatedly and deliberately commenced OS 544 to bolster their case that Singapore is the more appropriate forum.

(d) It is more likely that the key witnesses will testify in Senegal. Most of the relevant matters in dispute occurred in Senegal and not Singapore.

146 In the light of our findings on the time-bar issue under Senegalese law, we agree with ICS that the governing law of the Waiver is no longer a significant factor in the *forum non conveniens* analysis. Regardless of whether ICS can succeed in establishing the Waiver Defence, RV1 would not be able to satisfy the merits requirement since its claim is already time-barred under Senegalese law.

147 Similarly, the Liquidators' application in OS 544 is not a weighty factor as, regardless of the merits of the Waiver, RV1's claim would be time-barred under Senegalese law in any event. Therefore, even if this court were to find that the Waiver is a transaction at an undervalue, RV1 would still not succeed in proving its claim. Thus, the governing law of the Sulphur Contracts is the most important factor in the *forum non conveniens* analysis as it determines the applicable limitation period and consequently the viability of the claim for the ICS Debt.

148 The other factor which the Judge deemed important in determining that Singapore was the *forum conveniens* was that Singapore was the place of the breach of the Sulphur Contracts. This can no longer stand in the light of our finding that ICS does not have a contractual obligation under the Sulphur Contracts to make payment to Affert (and consequently, RV1) in Singapore.

149 We do, however, agree with the Judge's analysis (Judgment at [76]–[81]) and that the parties' place of incorporation, place of the transaction and place of performance of the Sulphur Contracts, location of the witnesses and their compellability, language of the various documents, and the contents of the Acquisition Documents, are of neutral weight in the *forum non conveniens* analysis.

150 On balance, we are of the view that the factors tilt towards Senegal as the *forum conveniens*.

Issue 5: Whether RV1 breached the continuous duty to make full and frank disclosure by omitting to mention the Waiver Defence

151 For the reasons stated by the Judge (Judgment at [21]–[26]), we agree that RV1 only knew of the Waiver Defence after it had filed the Amended Writ

and after the Leave Order was granted on 11 October 2018. We also agree that RV1 was in breach of its continuous duty to give full and frank disclosure after it had obtained the Leave Order but before the Amended Writ was served on ICS in Senegal. Nonetheless, we are satisfied that the Judge had exercised her discretion correctly and do not disturb her decision not to set aside the Leave Order on account of that breach.

Conclusion

152 In the circumstances, we disallow RV1's application in SUM 84 to adduce fresh evidence as we are satisfied that the evidence could have been adduced in the hearing before the Judge.

153 We dismiss RV1's appeal in CA 31 and find that the Sulphur Contracts are governed by Senegalese law. We allow ICS's appeal in CA 32 on the basis that RV1 failed to satisfy the jurisdictional requirement under O 11 r 1(*e*) to a good arguable standard, and that it could not satisfy the merits requirement as its claims are time-barred under Senegalese law. We also find that RV1's conduct on appeal, in contending that the Sulphur Contracts were no longer time-barred under Senegalese law, to be an abuse of the appeal process. Finally, we are of the view that Senegal is the *forum conveniens* to try the dispute.

154 Taking into account the parties' respective cost schedules, we order RV1 to pay ICS the costs of both appeals and the application for leave to adduce further evidence, fixed at $60,000 inclusive of disbursements. In quantifying the aggregate costs, we acknowledge that the time bar point was not pursued by ICS below to set aside the Leave Order though in fairness, we should add that the argument became clearer as a result of the Judge's finding together with RV1's

concession on the time bar under Senegalese law. The costs orders below shall be reversed in favour of ICS. The usual consequential orders will apply.

Sundaresh Menon Chief Justice	Steven Chong Judge of Appeal	Belinda Ang Saw Ean Judge

Chan Wai Kit Darren Dominic and Ng Yi Ming Daniel (Characterist LLC) for the appellant in Civil Appeal No 31 of 2020 and the respondent in Civil Appeal No 32 of 2020;
Bull Cavinder SC, Kong Man Er and Tan Sih Si (Drew & Napier LLC) for the appellant in Civil Appeal No 32 and the respondent in Civil Appeal No 31 of 2020.