IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 218

Suit No 298 of 2015 (Summons No 4802 of 2015)

Between

(1) Kioumji & Eslim Law Firm
(2) Yahya Lutfi Khader

… *Plaintiffs*

And

(1) Rotary Engineering Limited
(2) Roger Chia Kim Piow
(3) Chia Kim Hung

… *Defendants*

GROUNDS OF DECISION

[Conflict of Laws] — [Natural forum] — [*Forum non conveniens*]
[Conflict of Laws] — [Choice of law] — [Tort] — [Conspiracy]
[Conflict of Laws] — [Choice of law] — [Contract]

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Kioumji & Eslim Law Firm and another
v
Rotary Engineering Ltd and others

[2016] SGHC 218

High Court — Suit No 298 of 2015 (Summons No 4802 of 2015)
Aedit Abdullah JC
19 February; 14 March 2016

7 October 2016 Judgment reserved.

Aedit Abdullah JC:

Introduction

1 The plaintiffs commenced the present suit in Singapore against the defendants, with causes of action in contract and the tort of conspiracy. The defendants applied to stay the proceedings here in favour of proceedings in the Kingdom of Saudi Arabia, on the ground of *forum non conveniens*. I dismissed the application. The Court of Appeal has since granted leave for the defendants to appeal against my decision refusing the stay.

2 The grounds of my decision refusing the stay are set out below. Quite unusually, in this case, it was a Singapore entity and two Singapore citizens who had argued in favour of a foreign forum, instead of Singapore, to resolve the dispute between them and the plaintiffs.

Background

3 None of the parties in the present suit were of Saudi Arabian nationality. The 1st Plaintiff, Kioumji & Eslim Law Firm ("KEL"), was a law firm based in the Kingdom of Bahrain. It was the legal advisor of the 2nd Plaintiff, Yahya Lutfi Khader ("Yahya"), a citizen of the United States of America who, at the time of the hearing before me, was residing in Lebanon. The 1st Defendant, Rotary Engineering Limited ("REL"), was a company incorporated in Singapore with expertise in the oil and gas, petroleum, petrochemical and pharmaceutical industries. It wholly owned two subsidiaries – Petrol Steel Company Ltd ("PSCL") and Rotary Arabia Co. Ltd ("RACL") – in Saudi Arabia. The 2nd Defendant, Roger Chia Kim Piow ("Roger"), was REL's founder, Chairman and Managing Director, whereas the 3rd Defendant, Chia Kim Hung ("Tommy"), assumed the role of Business Development Director of REL. Both Roger and Tommy were Singapore citizens. Roger was domiciled in Singapore but Tommy moved to Saudi Arabia in or around August 2014 to oversee REL's Saudi Arabian operations.

4 In or around 2009, PSCL and REL entered into an Engineering, Procurement and Construction ("EPC") contract ("EPC Contract") with Saudi Aramco Total Refining Petrochemical Company ("SATORP"), a Saudi Arabian company, for the design and construction of an integrated petroleum refinery and petrochemical complex in Saudi Arabia. PSCL and REL completed the works, but were not able to receive full payments from SATORP. A significant balance amount remained unclaimed from SATORP ("the SATORP Claim").

5 Yahya was introduced to Roger and Tommy in Saudi Arabia around August 2014 through one Captain Jazzar, Abdulrhman Al-Mutlaq and one

Mohamed Al-Mutlaq. Mohamed Al-Mutlaq was the Director-General of the Eastern Province Principality Office of Saudi Arabia, and Abdulrhman Al-Mutlaq was his son. At their first meeting, Roger and Tommy informed that they were looking for someone to assist them in the SATORP Claim, and Mohamed Al-Mutlaq recommended Yahya. At the same meeting, Roger and Tommy also informed Yahya that their local Saudi Arabia business partner in PSCL and RACL was withdrawing from the partnership, and that they considered Yahya as a suitable replacement who could assist REL in growing its business in Saudi Arabia through PSCL and RACL.

6 Subsequent to the meeting in August 2014, REL (represented by Tommy) and KEL (represented by Ziyad Kioumji who was a partner of KEL) signed a Proxy Agreement on 3 October 2014, which was back-dated to 16 September 2014. Under the Proxy Agreement, KEL was to negotiate and settle the dispute with SATORP in order to recover the SATORP claim. In return, REL agreed to pay to KEL professional fees which were agreed to be a percentage of the proceeds. Clause 12 of the Proxy Agreement provided that the Proxy Agreement shall be governed by the laws of the Kingdom of Saudi Arabia.

7 The parties were in dispute as to whether Yahya did substantial work in performance of the Proxy Agreement. They agreed that on or about September 2014, Yahya travelled to Singapore with one Ibrahim where they met Tommy, Roger, and other key personnel of REL who were involved in the EPC Contract. They also agreed that at that meeting, the REL personnel briefed Yahya and Ibrahim on the SATORP Claim, and that following the meeting, some 15 volumes of supporting documents in relation to the claim ("the claim documents") were compiled. But Yahya said that the claim documents were compiled under his precise instructions and that he had

conducted a comprehensive review of the documents during the meeting, whereas the defendants maintained that he neither reviewed the documents nor gave the REL personnel any directions or guidance on how the claim documents were to be arranged. It was the defendants' case that the REL personnel had compiled the claim documents on their own. Yahya also said that he had brought the 15 volumes of claim documents back to Saudi Arabia where he had consulted Ziyad Kioumji on how to make changes to them in order to present the SATORP Claim in a more persuasive manner, and had subsequently supervised the submission of the claim documents to SATORP on 19 October 2014. However, the defendants maintained that Yahya had overstated his role in the resolution of the SATORP Claim. Among other things, the defendants disagreed with Yahya that the bulk of the work to resolve the SATORP Claim was in preparing the claim documents. They said that Yahya's main obligation under the Proxy Agreement was to meet the SATORP representatives to present and negotiate the SATORP Claim, and Yahya did not fulfil this obligation. Yahya, on the other hand, claimed that the defendants had deliberately kept him out of the negotiations with the SATORP representatives. It was, however, common ground between the parties that SATORP did subsequently pay a substantial sum to PSCL/REL in settlement of the SATORP Claim, but that the plaintiffs were not paid any fees pursuant to the Proxy Agreement.

8 On 3 October 2014, while Yahya and Ibrahim were still in Singapore, they had another meeting with Tommy and Roger on a joint venture. Under the joint venture, Yahya and his team would form part of the management team in RACL where Yahya and Ibrahim would assume the positions of Chief Executive Officer and Chief Operating Officer respectively. Yahya and his team would expedite obtaining the necessary licenses and prequalification

approvals for RACL to undertake EPC projects in Saudi Arabia, while continuing work on recovering the outstanding SATORP Claim. REL, on its part, would inject the recovered SATORP Claim (less the plaintiffs' fees due under the Proxy Agreement) as capital into RACL. Yahya and his team were also to receive an equity share in RACL. The parties, however, disagreed on what the promised equity share to be given to Yahya was: Yahya asserted that during the 3 October 2014 meeting, the defendants had promised him an equity share in RACL of 49%, while the defendants contended that Yahya was to receive only a 40% share. This, Yahya argued, was an attempt by the defendants to rescind from the agreed terms of an oral Joint Venture Agreement ("JVA") that was formed at the 3 October 2014 meeting. Yahya also said that in reliance of the representations made by Roger and Tommy at the 3 October 2014 meeting, he and his team had started marketing the services and capabilities of REL, RACL and PSCL to third parties.

9 The plaintiffs further alleged that Tommy, together with Captain Jazzar, had demanded that Yahya give to them a cut of the professional fees due to the plaintiffs under the Proxy Agreement, and had threatened to terminate the JVA if he refused to do so. According to the plaintiffs, one Marwan and one Nabil had also approached Ziyad Kioumji at KEL's office where they demanded him to hand over the original signed Proxy Agreement and for KEL to declare that KEL and Yahya had failed to fulfil their obligations under the Proxy Agreement. When Ziyad Kioumji refused, REL and/or Tommy then offered, through a company Al-Jumeirah Contracting (which the plaintiffs said Nabil had told them was owned by him), to bribe KEL into complying with the demands. KEL did not accept the offer, and filed a complaint with the authorities in the Kingdom of Bahrain.

10 On 30 March 2015, the plaintiffs filed the present suit against the defendants, based on the following causes of action:

(a) Breach of the Proxy Agreement, through non-payment of professional fees due to the plaintiffs under the Proxy Agreement;

(b) Breach of the JVA, through failure to transfer 49% of the equity in RACL to the plaintiffs; and

(c) Conspiracy among REL, Roger and Tommy to injure the plaintiffs by unlawful means, by causing REL to wrongfully breach the Proxy Agreement and JVA.

11 In their defence, the defendants contended that they had entered into the Proxy Agreement under the influence of a misrepresentation or the operation of a unilateral mistake, as they had believed that they had been engaging the services of Ingress Partners ("Ingress") and not the plaintiffs in their own capacities. As for the JVA, the defendants said that they had intended to enter into the JVA with Abdulrhman Al-Mutlaq (Managing Director of Ingress) and/or Ingress but not Yahya, and that in any event, the discussions on the potential joint venture were in the preliminary stages and no agreement had yet been reached. The defendants further denied that they had ever conspired to breach the Proxy Agreement and/or the JVA with the intention of injuring Yahya.

12 On 30 September 2015, the defendants, by Summons No 4802 of 2015, applied to stay the proceedings on the ground of *forum non conveniens*, that the Kingdom of Saudi Arabia was the more appropriate forum than Singapore for the hearing of the dispute between the parties.

Defendant – Applicants' Case

13 The defendants contended that Saudi Arabia was clearly or distinctly the more appropriate forum to hear the dispute between the parties, as Saudi Arabia was the forum which had the most real and substantial connection to the disputed issues, for the following reasons:

(a) The governing law of the Proxy Agreement was the law of Saudi Arabia;

(b) There was no JVA, but even if there was, the governing law of the purported JVA was the law of Saudi Arabia;

(c) The place of performance of the Proxy Agreement and the purported JVA was Saudi Arabia;

(d) Events relevant to the dispute occurred in Saudi Arabia;

(e) Material non-party witnesses were resident in Saudi Arabia; and

(f) There were other related proceedings in Saudi Arabia against Yahya.

14 Further, it was the defendant's case that the plaintiffs would not be denied substantial justice if the disputes were heard in Saudi Arabia instead of in Singapore.

Plaintiff – Respondents' Case

15 The plaintiffs maintained that Saudi Arabia was not a more appropriate forum than Singapore to hear the dispute, for the following reasons:

(a) Notwithstanding that the Proxy Agreement was governed by the laws of Saudi Arabia, there was no agreement between the parties, whether verbal or written, to submit to the exclusive jurisdiction of Saudi Arabia to hear disputes arising from the Proxy Agreement;

(b) The parties' contractual obligations under both the Proxy Agreement and the JVA were and/or were to have been performed substantively in Singapore;

(c) Witnesses were not compellable to testify in Saudi Arabia and the defendants therefore had no advantage if the matter was heard in Saudi Arabia; and

(d) In relation to the supposedly related proceedings, the criminal complaint against Yahya for forgery was falsely lodged. As for the other alleged claims, these had been dismissed by the courts in Saudi Arabia.

16 In addition, the plaintiffs argued that if the court should grant a stay of the proceedings in Singapore, they would not be able to obtain justice if the dispute was heard instead in Saudi Arabia, for three reasons:

(a) Yahya would not be able to return to and enter Saudi Arabia;

(b) There was a real risk that the plaintiffs would not receive a fair trial in Saudi Arabia, and a real possibility that Yahya might face

trumped up charges against him and be unlawfully detained if and when he returned to Saudi Arabia; and

(c) If the dispute was to be governed by Saudi Arabia's procedural law, particularly the Islamic principles of evidence, there would be a denial of substantive justice accruing from the difference in weight accorded to evidence from Muslims and non-Muslims, and female and male witnesses.

Decision

17 I found that despite the best efforts of counsel for the defendants, the defendants had not made out their case that there was another forum, namely Saudi Arabia, that was clearly the more appropriate forum to hear the dispute between the parties.

18 In determining whether Singapore or Saudi Arabia was the more appropriate forum to hear the dispute, I did conclude that certain factors in the analysis were currently less determinative than they might have been in the past. The location of witnesses and evidence did not necessarily attract as much weight as in the past given the ready availability of communication facilities and information technology, as well as better connection between locations. Neither was an express choice of a foreign law necessarily a pointer to a foreign court as the natural forum; courts were now in a better position to hear expert opinion on foreign law and make determinations accordingly. It is easier now to adduce foreign law, and in some instances it is possible to even submit on foreign law. The loosening of the strictures in these areas will be examined in greater detail below.

19 Taking, firstly, the express choice of law in the Proxy Agreement, I did accept that choice of law was an important factor in the determination of the natural forum. However, it was not determinative, and could in appropriate circumstances be outweighed by other factors. In the present case, the Proxy Agreement had to be put alongside the other claims made by the Plaintiffs, which were based on a supposed JVA, as well as the tort of conspiracy. I was of the view that in respect of the allegations made under these two other claims, the applicable law was Singapore law – the JVA was more closely connected to Singapore, and the place of conspiracy, if it did occur, was Singapore. I would further note that there was nothing to show that these two claims were not *bona fide*, such as being manufactured simply to justify adjudication in Singapore.

20 In terms of the factual dispute, I accepted that a significant proportion of the material witnesses was likely to be in Singapore. While some Saudi Arabian witnesses would be material, particularly for the Proxy Agreement, it was not shown that they would not be willing to come to Singapore, or to give evidence by video-link. I did find that in respect of the allegations concerning the JVA and the conspiracy, it was more likely that the Singapore witnesses would play a greater role at trial. In the circumstances, I concluded that this factor of location of the witnesses was, at most, neutral.

21 Any documentary evidence was either likely to be in Singapore or could readily be brought before a Singapore court. In any case, I was not satisfied that this was the type of case where extremely voluminous documentary evidence rendered it necessary that proceedings be pursued where the documents were located.

22 The arguments put forward in respect of Stage One of the *Spiliada* Test were thus not shown to point clearly to Saudi Arabia as the natural forum to hear the dispute between the parties. It was not strictly necessary then for me to consider Stage Two of the *Spiliada* test. What I would note though was that the court would require cogent evidence of obstacles to justice in the other forum, before it would refuse to stay the proceedings in Singapore under Stage Two of the *Spiliada* test. I did not find that there were such obstacles here, in respect of allegations of possible targeting of Yahya by various persons in Saudi Arabia.

23 As for the concerns raised by the plaintiffs about the weight given under Saudi Arabian law to testimonies of non-Muslims and female witnesses, I noted that it was for each sovereign country to develop its own legal system in its own way. Parties, especially in commercial situations, who chose a particular governing law would be taken to have done so with knowledge of the requirements and rules of that system. There may be situations where such rules of evidence in a foreign forum may trigger a court to refuse to stay proceedings in Singapore under Stage Two of the *Spiliada* test, but in the present case, I was of the view that the concerns pointed out by the plaintiffs would not be operative on the specific facts: the testimony to be given by the plaintiffs' only female witness was not on a central point; and in respect of the contentious matters, both sides would have non-Muslim witnesses.

Analysis

Principles for Stay of Proceedings

24 The seminal case on the principles governing the grant of a stay of proceedings on the ground of *forum non conveniens* is *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"). In that case, which

has been adopted by the Singapore Court of Appeal on many occasions (see, *eg Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*") at [12] and *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 ("*CIMB Bank*") at [25]), the House of Lords set out the following two-stage inquiry for determining whether or not a stay of proceedings ought to be granted:

> (a) Whether, *prima facie*, there is some other available forum which is more appropriate for the case to be tried ("Stage One"); and
>
> (b) If there is another available forum which is more appropriate for the case to be tried, whether there are circumstances by reason of which justice requires that a stay should nonetheless not be granted ("Stage Two").

25 Under Stage One, the legal burden is upon the applicant seeking the stay to establish that there is another forum which is clearly or distinctly more appropriate than Singapore to hear the action. The natural forum is one with which the action has the most real and substantial connection: *CIMB Bank* at [26]. In this regard, the court considers various factors (see, *eg Rickshaw Investments* at [15] and *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*") at [41]–[42]), which may include:

> (a) General "connecting factors" such as residence of the parties and the location of the relevant witnesses or documents;
>
> (b) Choice of law clauses in contracts for contractual claims, and the applicable law for claims in torts, *ie* the governing law of the causes of action;
>
> (c) The jurisdiction in which the causes of action accrued; and

(d) The effect of concurrent proceedings in the alternative forum.

The weight to be accorded to a particular factor varies in different cases and the ultimate appraisal ought to reflect the exigencies dictated by the factual matrix: *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR(R) 381 ("*Peters Roger May*") at [20], cited with approval by the Court of Appeal in *Rickshaw Investments* at [15].

26 If the court is satisfied that, *prima facie*, there is another forum which is more appropriate for the case to be heard, then at Stage Two of the inquiry, the main consideration is whether substantial justice can be obtained if the case is indeed to be heard in that foreign *prima facie* natural forum. In considering this question, the court will not pass judgment on the competence or independence of the judiciary of another country, and will assiduously avoid comparing the quality of justice obtainable under its own legal system and the foreign legal system. While this is not to say that the quality of foreign judiciary will never be questioned, the court will take a very cautious approach, treading a fine balance between justice to the parties and international comity. The mere fact that the plaintiff has a legitimate or juridical advantage in proceedings in Singapore will not be decisive; the burden is upon him to establish with cogent evidence that he will be denied substantial injustice if the case is not heard in Singapore: *JIO Minerals* at [43].

27 In the present case, the parties did not seek to challenge the above principles but differed in the application of the law to the facts in relation to the various factors.

Residence and/or place of business of the parties

28 The plaintiffs urged the court to include the residence and place of business of the defendants in the analysis of connecting factors, on the basis that the jurisdiction of the Singapore courts is territorial, and that jurisdiction exists as a right over a defendant who is within Singapore. These are basic propositions of law, but which on the facts of this case, offered little assistance to the plaintiffs. It was not disputed that REL was a company incorporated in Singapore and listed on the Singapore Stock Exchange. It was also not disputed that both Roger and Tommy were Singaporeans, although at the time of the hearing, only Roger was residing in Singapore while Tommy said that he had relocated to Saudi Arabia since around August 2014. However, the court could not only consider the residence and/or place of business of the defendants but must also consider the same with respect to the plaintiffs. None of the plaintiffs in this case had personal connections with Singapore; Yahya was a citizen of the United States of America who at the time of the hearing was residing in Lebanon, whereas KEL was based in the Kingdom of Bahrain. Thus, I considered this factor of residence and/or place of business of the parties to be a neutral factor, as the circumstances concerning it did not point in one direction.

Choice of law in Proxy Agreement, governing law for purported JVA, and applicable law for cause of action in conspiracy

Choice of law clause in Proxy Agreement

29 The Proxy Agreement contained an express choice of law clause. Clause 12 of the Proxy Agreement stated as follows:

> **Governing Law**. The parties agree that this Agreement shall be governed by the laws of the Kingdom of Saudi Arabia.

The plaintiffs pointed out that a choice of law clause that favoured Saudi Arabian law did not necessarily mean that the parties had agreed to submit to the exclusive jurisdiction of the Saudi courts. This was true. Nevertheless, in considering the question of *forum non conveniens*, the issue of applicable law was a significant factor whether or not there was also an exclusive jurisdiction clause in the contract that was the subject of a contractual dispute. Where a dispute was governed by a foreign law, the courts of the country of that law would be best placed to apply its own law. That serves the interests of justice, and there would be savings both in terms of time and in resources if the dispute were to be litigated before the courts of that country instead of the forum where stay was sought: see *CIMB Bank* at [63]. That said, courts are now better able to hear and consider expert opinion on foreign law and determine accordingly. The ability to adduce or even submit on foreign law had become wider, particularly given the creation of such courts which permit foreign law practitioners to participate directly in proceedings. Hence, the presence of an express clause in the Proxy Agreement prescribing Saudi Arabian law as the governing law did not necessarily point to Saudi Arabia as being the natural forum to hear the dispute, but was only one of several factors that I had to consider in making the determination. Furthermore, apart from the Proxy Agreement, the dispute between the parties also involved causes of action arising from the JVA and the tort of conspiracy; the governing law for those causes of action must also be taken into consideration.

Governing law for the JVA

30 The defendants maintained that there was no valid JVA. But even if there was, there was never any discussion among the parties on the law that should govern the contract.

31 In the absence of any express contractual provision, the court will first try to infer the governing law of the contract from the intentions of the parties. However, if it is not possible to conclude that the parties had made an implied choice of the governing law, the court must then look for the law with which the contract had the closest and most real connection, based on objective grounds: see *JIO Minerals* at [79]. Some factors that the court would consider have been helpfully set out by the editors of *Chitty on Contracts* (Sweet & Maxwell, 32nd Ed, 2015) (at para 30-012), being: the place where the contract was made; the place where the contract had to be performed; the nature of the legal personality of the parties; the place of residence or business of the parties; the nature, subject-matter and standard terms of the contract; and whether the contract was closely linked to another contract containing an express choice of law clause. The weight to be attached to each of the various factors would vary from case to case.

32 In the present instance, I did not find, based on the facts presented by both sides, that the parties to the alleged JVA had made any implied choice of law. Looking at the objective circumstances, I was of the view that the alleged JVA had the closest and most real connection to Singapore law and not Saudi Arabian law. Without making any determination of whether a valid JVA had indeed been made between the parties – this was a matter to be determined during the trial proper – I found that assuming that such a valid contract was made, it was made in Singapore. The idea of the joint venture between the parties was first mooted in Saudi Arabia in August 2014 when Yahya was introduced to Roger and Tommy (see [5] above), and it may be that, accepting the defendants' contention, there were some further discussions on the terms of the joint venture in Saudi Arabia subsequent to the meeting on 3 October 2014. However, it remained undisputed that during the meeting on 3 October

2014, which took place in Singapore, the parties discussed and reached agreement on several major terms of the joint venture (see [8] above). Tommy conceded in his own affidavit that the main purpose of Yahya's and Ibrahim's visit to Singapore between 30 September and 3 October 2014 was to discuss the potential joint venture (although since Yahya was here, REL arranged for its key personnel to also brief him on the SATORP Claim), and such discussion did take place on 3 October 2014.

33 I accepted that the subject matter of the alleged JVA created a nexus between the contract and Saudi Arabian law. It was common ground that the idea of the joint venture came about because REL's local Saudi Arabia business partner in PSCL and RACL was withdrawing from the partnership, and REL had wanted to look for a suitable replacement who would be able to assist REL in growing its business in Saudi Arabia through PSCL and RACL (see [5] above). The parties also did not dispute the records of minutes of the 3 October 2014 meeting which stated that under the joint venture, Yahya and his team would form part of the management team in RACL where Yahya and Ibrahmi would assume the positions of Chief Executive Officer and Chief Operating Officer respectively, and that Yahya and his team would expedite obtaining the necessary licenses and prequalification approvals for RACL to undertake EPC projects in Saudi Arabia. The subject matter of the alleged JVA was therefore RACL, a company incorporated in Saudi Arabia and with business operations in Saudi Arabia. This, however, was but one factor which I had to consider in finding what the governing law for the alleged JVA was.

34 I found that the alleged JVA was to be performed partly in Singapore, and partly in Saudi Arabia. It was Yahya's own case that he had, in reliance of the JVA, met up with officers of Saudi Aramco in Saudi Arabia, where he introduced himself as the Chief Executive Officer of RACL before proceeding

to market to them the services and capabilities of REL and RACL, in an attempt to secure a project. Yahya's other obligation under the alleged JVA was to assume management duties in RACL and since RACL was a company incorporated in Saudi Arabia, the place of performance of this obligation was, *prima facie*, in Saudi Arabia as well. However, RACL was wholly owned by REL and it seemed clear to me, based on the undisputed facts, that it was managed from Singapore by REL. For instance, the communications and negotiations in relation to RACL's (as well as PSCL's) key matters, including that which took place on 3 October 2014, were conducted between Yahya and primarily Tommy, who was the Chief Executive Officer of REL. At that meeting, Tommy, as REL's representative, could make decisions on who was to be appointed onto the management team of RACL. In yet another instance, when PSCL was unable to recover the SATORP Claim, it was REL who had engaged Yahya to assist in recovering the claim. Pursuant to the Proxy Agreement, it was Tommy, acting *on behalf of REL*, who signed the authorisation letter appointing Yahya to *represent REL* in settlement negotiations with SATORP although the SATORP Claim was between SATORP and PSCL. There was nothing to suggest that PSCL was managed differently from RACL in so far as their relationship with their parent company REL was concerned; it was clear from the minutes of the meeting on 3 October 2014 that the parties chose RACL but not PSCL to be the subject of the joint venture simply because PSCL had a poorer reputation in Saudi Arabia and not because of any other strategic differences between the two subsidiaries. Given that RACL was managed from Singapore by REL, it was expected that in order for Yahya to perform his obligations under the alleged JVA to assume management duties for RACL, he would have to work closely with REL in Singapore. The other obligations under the alleged JVA were to be performed in Singapore. REL was supposed to transfer shares in RACL to

Yahya under the joint venture and since such shares were held by REL, which was based in Singapore, it was likely that the documents relating to the RACL shares would be located in Singapore as well. On balance, I concluded that, overall, the place of performance of the alleged JVA pointed to the contract having a closer connection to Singapore law than to Saudi Arabian law.

35 Finally, I rejected the defendants' contention that the alleged JVA was so closely connected to the Proxy Agreement that it would, as the Proxy Agreement was, also be governed by Saudi Arabian law. The Proxy Agreement was primarily focused on the recovery by PSCL of monies owing to it by SATORP, while the alleged JVA focused on the relationship between REL and Yahya as joint venture partners in RACL. In my view, the two agreements were separate and distinct.

36 Taking into account the objective circumstances, I concluded that the alleged JVA had the closest and most real connection to Singapore law, and that accordingly, it was governed by Singapore law and not Saudi Arabian law.

Governing law for the conspiracy claim

37 The plaintiffs had a claim in tort, that there was a conspiracy between REL, Roger and Tommy to injure them by unlawful means, by causing REL to wrongfully breach the Proxy Agreement and the JVA.

38 The place where a tort occurred is, *prima facie*, the natural forum for determining the claim: see *Rickshaw Investments* at [37]–[39]. To identify the place where the tort was committed, the court applies the "substance of the tort" test by examining the series of events constituting the elements of the tort to determine where, in substance, the cause of action arose. For the tort of

conspiracy, the key factors to consider are: the identity, importance and location of the conspirators; the locations where any agreements or combinations took place; the nature and places of the concerted acts or means; the location of the plaintiff; and the places where the plaintiff suffered losses: *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 at [53].

39 I was persuaded that the place of conspiracy, if it did occur, was Singapore. The said conspirators, according to the plaintiffs' case, were REL, Roger and Tommy. REL was a company incorporated in Singapore and it had its place of business in Singapore. Both Roger and Tommy were Singapore citizens. Roger was domiciled in Singapore. Although Tommy said that he had relocated to Saudi Arabia in August 2014, it appeared to me that he remained intimately involved in REL's businesses and probably visited Singapore not infrequently. For instance, he was here in Singapore during the 3 October 2014 meeting. In the circumstances, it was more likely than not that if there was a conspiracy between REL, Roger and Tommy, that conspiracy had taken place in Singapore.

40 Furthermore, the object of the alleged conspiracy was to cause REL to breach the Proxy Agreement and the JVA, and the acts (or rather omissions) that constituted the breach more likely took place in Singapore. The plaintiffs said that REL breached the Proxy Agreement because it failed to pay to the plaintiffs the professional fees that were due to them under the Proxy Agreement. Given that REL was a Singapore-incorporated company with its place of business in Singapore, it was more likely that REL was supposed to pay the professional fees from Singapore, using funds out of a Singapore account. The plaintiffs also claimed that REL breached the JVA when it failed

to transfer shares in RACL to Yahya. As I had observed at [34], the shares were held by REL and was more likely located in Singapore.

41 In view of the above, I concluded that the alleged conspiracy was most connected to Singapore and would be governed by Singapore law.

42 Given my finding that the JVA and the claim in the tort of conspiracy were governed by Singapore law, the weight to be given to the express clause in the Proxy Agreement favouring Saudi Arabian law in determining the natural forum for the present dispute must, accordingly, be reduced. If it were shown that the allegations about the breach of the JVA and the conspiracy claim were not made *bona fide*, but were only made to dilute the effect that the express choice of law clause in the Proxy Agreement had in the analysis, then the Singapore connection stemming from the governing law of the JVA and the conspiracy claim would be minimal in tipping the scales against the Saudi Arabian forum. There was, however, nothing of that sort in the present case.

Place of performance of the contracts

43 I had determined (at [34] above) that the JVA was to be performed partly in Singapore and partly in Saudi Arabia.

44 As for the Proxy Agreement, I accepted that a significant part of the contract was to be performed in Saudi Arabia. The purpose of the Proxy Agreement was to engage the services of the plaintiffs to negotiate and settle the dispute with SATORP on behalf of PSCL. SATORP was a Saudi Arabian company and PSCL was REL's subsidiary in Saudi Arabia. In his own affidavit, Yahya conceded that in trying to perform his obligations under the Proxy Agreement, it was in Saudi Arabia where he had consulted Ziyad on how to make changes to the claim documents so that the SATORP Claim

could be presented in a more persuasive and effective manner. He also said he had personally supervised the submission of the claim documents to SATORP at their offices in Saudi Arabia. Further, I accepted the defendants' submission that a large part of the work contemplated under the Proxy Agreement was not only the preparation and submission of the claim documents to SATORP, but also presentation of the claim documents to SATORP and negotiations with SATORP to persuade them on the merits of the claim. The defendants contended that it was always contemplated by the parties that negotiations for the amicable settlement of the SATORP Claim would take place in SATORP's offices in Saudi Arabia. The plaintiffs did not contradict this point. Given that SATORP had its office and place of business in Saudi Arabia, that the claim documents were, by Yahya's own admission, submitted to SATORP in Saudi Arabia, and that Yahya was resident in Saudi Arabia at the material time, there was no reason for me to disagree with the defendants that, more likely than not, the said presentation and negotiations were supposed to take place at SATORP's office in Saudi Arabia.

45 However, the work done by Yahya in Singapore in performance of the Proxy Agreement should not be understated. It was not disputed that on 30 September 2014, Yahya met key personnel of REL in Singapore, where they briefed him on the EPC Contract and the SATORP Claim. It was at that meeting that Yahya instructed the said REL personnel on the SATORP claim documents. In his affidavit, Tommy Chia conceded that once the claim documents were compiled, Yahya instructed the REL personnel to amend the claims to USD 238 million, and this advice was adopted by REL. The defendants made some allegations that, on hindsight, the advice by Yahya turned out to have been poorly made. However, the merits of Yahya's advice were irrelevant. What was significant was that Yahya had, in performance of

his obligations under the Proxy Agreement, rendered advice to REL in Singapore. Such performance of Yahya's obligations in Singapore was clearly contemplated by the defendants under the contract; according to Tommy's affidavit, the defendants had deliberately arranged for the REL personnel to meet Yahya when he was here in Singapore for the specific purpose of briefing him on the SATORP Claim. Presumably, they would have expected him to give instructions on the SATORP Claim as well, and this he did give and his advice was taken up by the defendants.

46 Further, Yahya said, and the defendants did not dispute, that when he returned to Saudi Arabia, he continued to engage REL personnel in Singapore via emails and telephone conversations, for them to make amendments and finalise the claim documents. It was not disputed that the REL personnel in Singapore were the ones who were deeply involved in performance of the EPC Contract out of which the SATORP Claim arose. Given the circumstances, performance of the Proxy Agreement by Yahya could, presumably, not have been possible without him working closely with the said REL personnel in Singapore. Hence, while Yahya might have performed some parts of his obligations under the Proxy Agreement when he was in Saudi Arabia, there were, nonetheless, some connection between his performance of the obligations and Singapore.

47 I therefore found that, like the JVA, the Proxy Agreement was to be performed partly in Singapore and partly in Saudi Arabia. In determining whether Singapore or Saudi Arabia was the natural forum to hear the present dispute, this factor of place of performance of the relevant contracts was, in the overall circumstances, a neutral factor.

Location of witnesses

48 With regard to the location of witnesses, there were two factors that needed to be considered:

(a) The convenience in having the case decided in the forum where the witnesses are ordinarily resident ("the Witness Convenience Factor"); and

(b) The compellability of those witnesses ("the Witness Compellability Factor").

49 As stated by the Court of Appeal in *JIO Minerals* (at [63]), out of the two factors set out above, the first factor has generally become of less significance today given the ease of travel and advancements in information and communication technology, including the possibility of obtaining evidence via video-link. I respectfully agreed with the following observations of Rajah J in *Peters Roger May* (at [26]):

> The easy and ready availability of video link nowadays warrants an altogether different, more measured and pragmatic re-assessment of the need for the physical presence of foreign witnesses in stay proceedings. Geographical proximity and physical convenience are no longer compelling factors nudging a decision on *forum non conveniens* towards the most "witness convenient" jurisdiction from the viewpoint of physical access. Historically, the availability and convenience of witnesses was a relevant factor as it had a bearing on the costs of preparing and/or presenting a case and, most crucially, in ensuring that all the relevant evidence was adduced before the adjudicating court. The advent of technology however has fortunately engendered affordable costs of video-linked evidence with unprecedented clarity and life-like verisimilitude, so that the importance of this last factor recedes very much into the background both in terms of relevance and importance. In other words, the availability and accessibility of video links coupled with its relative affordability have diminished the significance of the "physical convenience" of witnesses as a yardstick in assessing the

> appropriateness of a forum…As long as the court is satisfied that a witness is not being prompted, cross-examination can take place as readily and easily as in a courtroom…

The above passage by Rajah J has been cited with approval by the Court of Appeal on various occasions, including in *John Reginald Stott Kirkham and others v Trane US Inc and others* [2009] 4 SLR(R) 428 ("*John Reginald Stott Kirkham*") (at [39]).

50 In the present case, I accepted that a significant proportion of the material witnesses were likely to be in Singapore. The plaintiffs submitted that the key witnesses to the present suit included eight of REL's employees, who had met Yahya in Singapore during the September 2014 meeting, and who had worked with him on the preparation of the SATORP claim documents. They said that these eight REL personnel's evidence was necessary for them to prove that they had done work on the SATORP Claim pursuant to the Proxy Agreement. All eight REL personnel were resident in Singapore. Two of these eight REL personnel were also present at the 3 October 2014 meeting during which the joint venture was discussed, and the plaintiffs said they would be calling them to give evidence as to the contents of that meeting for the purposes of establishing the JVA. As for the alleged conspiracy, having decided that the place of the conspiracy was in Singapore (see [39] above), it was also more likely that witnesses located in Singapore would play a greater role at trial. The defendants also listed a number of potential witnesses that were resident in Saudi Arabia, who they said would testify on whether the defendants had indeed intended to enter into an agreement with Yahya or Ingress, and whether Yahya had done any work in relation to the Proxy Agreement. However, the defendants had not proved that the witnesses in Saudi Arabia were not willing to cooperate by travelling to Singapore. Further, even if they were not willing to travel, evidence could be taken via video-link.

No evidence was adduced that adducing evidence by video-link would, in this case, be in any way inconvenient, unsuitable, or prejudicial. On balance, therefore, the Witness Convenience Factor was, at best, a neutral factor in the circumstances of this case.

51 The more important consideration was the compellability of the witnesses. A Singapore court can compel a person resident in Singapore to testify at trial in Singapore, but it cannot do the same for a foreign witness to testify in a Singapore Court, whether in person or via video-link: see O 38 r 18(2) of the Rules of Court (Cap 332, R 5, 2014 Rev Ed). The defendants did not produce evidence that the witnesses in Saudi Arabia could be compelled to testify in a Saudi Arabian court. Conversely, the plaintiffs adduced as evidence the opinion of Saudi Arabian attorney Dr Anwar Bekhraji, who said that under the laws of Saudi Arabia, witnesses could not be compelled to give testimony to any authority there, including the Saudi Arabian courts. Nonetheless, even if witnesses located in Saudi Arabia could not be compelled to give testimony before the Saudi Arabian Court, I accepted that these witnesses may be *more likely* to testify if the case were heard in Saudi Arabia than in Singapore, and this was a factor to be taken into consideration in the current inquiry on which was the natural forum to hear the present dispute (see, *eg* JIO Minerals at [73]–[74]).

52 However, I was of the view that, overall, the Witness Compellability Factor was a neutral factor in this case, or may in fact be said to tilt slightly in favour of the plaintiffs' case. The plaintiffs said that they intended to call eight of REL's employees, who were all resident in Singapore, to testify (see [50] above). The defendants argued that the plaintiffs' contention that the location of these witnesses was relevant to determination of the natural forum of the present dispute was fundamentally flawed. Relying on the authority of *John*

Reginald Stott Kirkham, where the Court of Appeal held (at [38]) that the factor of location of witnesses was only significant in relation to third-party witnesses, the defendants contended that since all eight REL personnel identified as witnesses by the plaintiffs were employees of the defendant company, they were "party witnesses" and their location were not relevant in determining the forum most closely connected with the dispute. I was of the view that the defendants had read the decision in *John Reginald Stott Kirkham* out of context. In that case, what the Court was concerned with was that third-party witnesses who were "not in the employ of the parties...could give rise to issues of compellability", and that conversely, when a witness was in the employ of a party, that party would, presumably, have no difficulty in asking his own employee to testify, without the court having to compel that witness to do so. In the present case, the REL personnel that the plaintiffs wished to call as witnesses were not their own employees; rather, they were employees of the defendants. In the circumstances, it was not difficult to imagine that the said witnesses might be less than willing to testify as witnesses for the parties who were acting in opposition to their employers in the dispute, furthermore in a court away from home in Saudi Arabia. However, if the dispute was heard in Singapore, then the Singapore court would be able to compel them to testify.

Location of documentary evidence

53 The plaintiffs submitted that most of the documentary evidence relevant to the suit was in Singapore. Since the Proxy Agreement and the JVA were executed in Singapore, it was more likely that the defendants would have kept these documents in REL's head office in Singapore. Since the claim documents which were submitted to SATORP in relation to the SATORP Claim were prepared in Singapore as well, the material paper trail was most likely to be located in Singapore too.

54 I was, in the end, of the view that this was not a case where there would be extremely voluminous documentary evidence, such that location of the documents became a factor relevant to the inquiry of where the proceedings should be pursued. In any event, as observed by the Court of Appeal in *John Reginald Stott Kirkham* (at [40]), in this modern age, documentary evidence can be easily transportable between jurisdictions, such that the location of such evidence has become a consideration that can be dealt with by an appropriate order for costs and disbursements. I therefore gave little weight to this factor of location of documentary evidence in determining the natural forum for the present dispute.

55 I did not consider that there were any other factors on the facts of the present case that were material to the question of where the natural forum for the dispute was. In light of the above, I was of the view that the defendants had not discharged their burden of establishing that Saudi Arabia was clearly or distinctly a more appropriate forum than Singapore to hear the suit. The defendants' case therefore failed at Stage One of the *Spiliada* test, and the inquiry could have ended here. For completeness, however, I considered whether, assuming that the defendants had established that, *prima facie*, Saudi Arabia was the natural forum for the case to be tried, there were circumstances by reason of which justice required that a stay should nonetheless not be granted (*ie* Stage Two of the *Spiliada* test).

Whether there were circumstances by reason of which justice required that a stay should nonetheless not be granted

56 The plaintiffs referred to a number of points in favour of a stay not to be granted even if I found Saudi Arabia to be the more appropriate forum at Stage One of the *Spiliada* test. Essentially, the arguments concerned Yahya's alleged inability to enter Saudi Arabia, the risk of an unfair trial in Saudi

Arabia, as well as the disability or lack of capacity of non-Muslim and female witnesses under the law of Saudi Arabia.

57 The burden was upon the plaintiffs to establish that they would be denied substantial justice if the case was to be heard in Saudi Arabia. The threshold was not a low one, and I was of the view that it might take somewhat exceptional circumstances for a court to decide that it must refuse to grant a stay because of reasons of justice, after it had already established that, *prima facie*, there was another available forum which was more appropriate for the case to be tried. I was not, in the end, convinced that the factors cited by the plaintiffs would have operated to prevent a stay at Stage Two of the *Spiliada* test, if I had decided against them on the first limb of the test.

Yahya's alleged inability to enter Saudi Arabia

58 Yahya was a citizen of the United States of America. When he was President of the GCC Construction Company ("GCC"), he resided in Saudi Arabia. He was there on an "*iqama*", which allowed him long-term residency in Saudi Arabia and which permitted him to exit and re-enter the country. Yahya said that his "*iqama"* had not been renewed and that his re-entry visa expired when he was out of Saudi Arabia, and that as a result, he could not return to Saudi Arabia.

59 I was not convinced that there was sufficient evidence that Yahya could not have been able to re-enter Saudi Arabia. The defendants produced an opinion from Mr Badr Aljaafari, a Saudi Arabian lawyer, that non-Saudi nationals could apply for visas to visit the country for short periods. Even if Yahya was not able to renew his "*iqama"*, he had provided neither any

suggestion nor evidence that he could not have obtained a short term visa to enter Saudi Arabia.

60 Furthermore, it appeared that Yahya might not need to return to Saudi Arabia in order to gain access to the courts there. In his opinion, Mr Badr Aljaafari stated that under Saudi Arabian law, a litigant could access a Saudi Arabian court by authorising a lawyer or granting a power of attorney to an agent to act on his behalf. This was not rebutted by the plaintiffs.

Risk of unfair trial in Saudi Arabia

61 The plaintiffs submitted that the defendants were closely linked with Mohammed Al-Mutlaq. Mohammed Al-Mutlaq was the one who had first introduced Yahya to Tommy and Roger, and he was the Director-General of the Office of the Eastern Province HRH Prince Saud Bin Naif of Saudi Arabia ("the Prince's Office"). According to the plaintiffs, Mohammed Al-Mutlaq had "considerable influence in Saudi Arabia" by virtue of his position in the Prince's Office, and had "extensive power and authority over the police and interior intelligence detectives". The plaintiffs said that Mohammed Al-Mutlaq had directed the filing of various charges and complaints against Yahya in Saudi Arabia, to put pressure on him and to frustrate his legitimate claims against the defendants, and which would also cause him to be unlawfully detained without due process should Yahya return to Saudi Arabia. According to the plaintiffs, Yahya had been threatened on several occasions with imprisonment on false charges of forging the signature of Tommy. Another complaint had been filed by Yahya's ex-employer, GCC, against Yahya in Saudi Arabia, for alleged embezzlement of funds, and the plaintiffs said that GCC was linked to Mohammed Al-Mutlaq.

62 In support of their case, the plaintiffs cited the English Court of Appeal decision in *Deripaska v Cherney* [2009] EWCA Civ 849 ("*Deripaska*"). I did not find that case to be helpful to the plaintiffs. In *Deripaska*, the court found that the natural forum of a dispute was in Russia, but decided that there was cogent evidence showing that the plaintiff would not be able to pursue proceedings in Russia due to significant risks of him being assassinated and arrested on trumped up charges there, and that substantial justice may not be done. The court found (at [2] and [44]), as a matter of fact, that there were close links between the defendant in the dispute with the Russian state, that the subject of the dispute was one which was of strategic importance to the Russian state, and that there was therefore "a significant risk of improper government interference" if the plaintiff was to bring the claims in Russia. In the present case, however, although assertions were made that Mohammed Al-Mutlaq was an influential figure in Saudi Arabia with power over the police, the plaintiffs did not sufficiently establish that he might improperly interfere in proceedings before the Saudi Arabian courts, such that the plaintiffs would not be able to get a fair trial there.

63 With respect to the allegations of false charges, Tommy had stated in his affidavit that the complaint filed against Yahya for forgery was a mistake, and that he had already taken steps to withdraw the complaint. As for the complaint filed by GCC, it was the plaintiffs' own submission that that had already been dismissed by Saudi Arabia's Commercial Court on 26 November 2015. I further noted that Yahya had previously commenced actions in Saudi Arabia and no allegations were made that he was denied a fair trial then. The Dammam Labour Office had found for Yahya when he filed a claim against GCC for wrongful termination, and the Dewan Al Masala court likewise found for him when he brought an action against GCC for breach of an agreement.

The judgments were rendered between March and June 2015, after the disputes with REL had already arisen.

64 Given the above, I was not convinced that there was sufficient evidence to support the plaintiffs' allegation that they would not get a fair trial in Saudi Arabia.

Disability or lack of capacity of non-Muslim and female witnesses under the law of Saudi Arabia

65 According to the plaintiffs, in Saudi Arabia, a non-Muslim's testimony would not be admitted against a Muslim on the Islamic principle that only Muslims are credible. Further, under Islamic law, a female witness's testimony would be accorded only half the weight of the testimony of man's. Such rules of evidence, the plaintiffs said, would cause them substantial injustice. This was because Ziyad Kioumji, who was a representative of the 1st Plaintiff KEL and who would be a key witness in the proceedings, was a Catholic. The plaintiffs also intended to call as a witness one female, Mona Mohamed Eslim, who was a partner at KEL, and who had witnessed the scene set out in [9] above where Marwan and Nabil had allegedly approached Ziyad Kioumji at KEL's office and had demanded him to hand over the original signed Proxy Agreement.

66 The defendants did not dispute that under Saudi Arabian law, the testimonies of non-Muslims and females were given less weight. Experts appointed by both sides were also in agreement that non-Muslims and females may testify before a Saudi Arabian court, although Mr Ali Al-Shehri, a Saudi Arabian lawyer who was appointed by the plaintiffs to give his opinion, was of the view that instances where non-Muslims were allowed to testify were rare.

67 In *JIO Minerals* (at [43]), the Court of Appeal, citing Professor Yeo Tiong Min in *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2009) at para 75.096, stated as follows:

> …The main consideration in Stage Two is whether substantial justice can be obtained in the foreign *prima facie* natural forum. The court of the forum needs to tread a fine balance between justice to the parties and international comity. In considering this question, the court will not pass judgment on the competence or independence of the judiciary of another country, all the more so of a friendly foreign country, and will assiduously avoid comparing the quality of justice obtainable under its own legal system and the foreign legal system. It is not true that the quality of foreign judiciary will never be questioned, but the court of the forum will take a very cautious approach. The mere fact that the plaintiff has a legitimate or juridical advantage in proceedings in Singapore will not be decisive. The plaintiff must establish with cogent evidence that he will be denied substantial justice if the case is not heard in the forum.

68 The above passage recognised that it is for each sovereign country to develop its own legal system in its own way. International comity demands that a court should not readily pass judgment on the quality of justice obtainable under another system, based on its own benchmarks and notions of what is fair and just. Especially in commercial situations where parties have consciously chosen a particular law to govern the legal relations between them, they would be taken to have done so with knowledge of the requirements and rules of that legal system. Generally, the plaintiff would have to take the forum as he finds it, even if it is in certain respects less advantageous to him than he might have liked. This is not to say that there would never be situations where differences in the rules of evidence in a foreign forum would never trigger a court to refuse to stay proceedings in Singapore at Stage Two of the *Spiliada* test. But mere juridical advantages in proceedings in Singapore, or conversely juridical disadvantages in

proceedings in a foreign forum, would not suffice unless the plaintiffs would be deprived of substantial injustice.

69 On the facts of the present case, I was not convinced that the plaintiffs would be deprived of substantial injustice as a result of the rules under Saudi Arabian law with respect to the testimonies of non-Muslim and female witnesses. Both sides of the dispute would have non-Muslim witnesses. As for the female witness, Mona Mohamed Eslim, I did not consider that her testimony would be on a central point of the dispute.

Conclusion

70 For the reasons given above, I dismissed the defendants' application to stay the proceedings in Singapore, in favour of proceedings in the Kingdom of Saudi Arabia, on the ground of *forum non conveniens*.

Aedit Abdullah
Judicial Commissioner

N Sreenivasan, S.C., Valerie Ang and Tan Xin Ya (Straits Law Practice LLC) for the plaintiffs;
Vergis S Abraham & Asiyah Arif (Providence Law Asia LLC) for the defendants.