Bunge SA and another *v* Indian Bank
[2015] SGHC 330

Case Number : Suit No 848 of 2012 (Registrar's Appeal No 269 of 2013)

Decision Date : 30 December 2015

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Kwek Choon Lin Winston, Joseph Tang and Istyana Putri Ibrahim (Rajah and Tann Singapore LLP) for the plaintiffs; Tan Teng Muan and Loh Li Qin (Mallal & Namazie) for the defendant.

Parties : Bunge SA — Grains and Industrial Products Trading Pte Ltd — Indian Bank

Conflict of laws – Choice of jurisdiction – Natural forum

30 December 2015

Belinda Ang Saw Ean J:

Introduction

1 The first plaintiff, Bunge SA, a company incorporated in Switzerland, and the second plaintiff, Grains and Industrial Products Trading Pte Ltd, a Singapore company (collectively, "the plaintiffs"), are part of the Bunge group of companies. The defendant, Indian Bank, has its headquarters in Chennai with branches all over India and abroad such as in Mumbai and Singapore.

2 The plaintiffs sued the defendant in Singapore *vide* Suit No 848 of 2012 ("the Singapore proceedings") for money had and received in respect of a sum of US$9.74m and damages for failure to issue a letter of credit in favour of the first plaintiff in breach of its undertaking to do so upon receipt of US$9.74m. The fund transfer and undertaking were supposedly integral parts of a structured finance transaction whereby the plaintiffs would provide working capital to an Indian company, Varun Industries Limited ("Varun"), through the use of back-to-back sale contracts. If the requisite letter of credit was not issued, the remittance, and in this case, the sum of US$9.74m, was to be returned to the plaintiffs. Whilst the physical remittance of US$9.74m is not disputed, the defendant's defence is that there is no basis for the claim against the defendant as the remittance was to the account holder, Varun. In other words, the remittance in question was unconnected with any legal obligation on its part to issue a letter of credit in favour of the first plaintiff.

3 The defendant's application to stay the Singapore proceedings on ground of *forum non conveniens* was advanced on the footing that the court should not exercise jurisdiction over a case such as this where the factors connecting the issues and facts to Singapore were casual at best; the more appropriate forum was clearly India. The Writ of Summons filed in the Singapore proceedings was served on the defendant at its branch office in Singapore solely to found jurisdiction. The operations of the Singapore branch was not involved in the subject matter of the Singapore proceedings, and the complaint pertained to Varun's account at the defendant's Mumbai branch.

4 So far as *forum non conveniens* is concerned, the court will examine and evaluate the connecting factors to Singapore in deciding whether Singapore is the more appropriate forum for the issues in the action, as opposed to the fact that the defendant was served in this country at its

Singapore branch office. As to whether the court should retain jurisdiction, the main objection to India advanced by the plaintiffs is that they are likely to face delay in the Indian legal system if they are compelled to initiate proceedings against the defendant in India.

5 The Assistant Registrar stayed the Singapore proceedings on 25 July 2013 in favour of India as the more appropriate forum. The plaintiffs appealed the Assistant Registrar's decision *vide* Registrar's Appeal No 269 of 2013 ("RA 269").

6 On 14 May 2015, I dismissed the plaintiffs' appeal in RA 269. As regards the defendant's undertaking to cooperate with the plaintiffs for the expeditious prosecution of this action by summary procedure in India, I granted time to the parties to consult their lawyers in India with a view to spelling out in greater detail the extent of the undertaking required to cover proceedings to be instituted in India. The parties took several months to finalise the terms of the defendant's undertaking. Be that as it may, the terms of the undertaking were eventually recorded on 12 October 2015 as part of the Order staying the Singapore proceedings.

7 I should mention for completeness that the plaintiffs filed a Notice of Appeal against my decision to grant a stay on 9 June 2015 *vide* Civil appeal No 122 of 2015 ("CA 122/2015"). Initially, the plaintiffs intimated that they would withdraw CA 122/2015 to file a fresh Notice of Appeal after finalisation of the terms of the defendant's undertaking. As it transpired, the plaintiffs instead amended CA 122/2015 on 9 November 2015 after the terms of the defendant's undertaking were finalised.

8 The reasons for dismissing RA 269 are set out in this written Grounds of Decision.

Order 12 r 7(2) of the Rules of Court

9 Procedurally, the stay application was filed late contrary to O 12 r 7(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the 2006 ROC"). The defendant filed its Defence before taking out the stay application on 8 April 2013. Not only were pleadings filed, the parties amended their pleadings after the Assistant Registrar stayed the Singapore proceedings. Besides amendments to pleadings, further affidavits were filed for the purposes of RA 269 so much so that RA 269 was ready for hearing only in 2015.

10 O 12 r 7(2) of the 2006 ROC provides as follows:

> A defendant who wishes to contend that the Court should not assume jurisdiction over the action on the ground that Singapore is not the proper forum for the dispute shall enter an appearance and, within the time limited for serving a defence, apply to Court for an order staying the proceedings.

11 The chronology of events leading up to the filing of the stay application is as follows:

(a) The Statement of Claim was filed and served on 2 November 2012.

(b) The Defence was filed and served on 20 December 2012.

(c) The Reply was filed and served on 18 February 2013.

(d) At a Pre-Trial Conference ("PTC") on 21 February 2013, counsel for the defendant, Mr Tan Teng Muan ("Mr Tan"), informed the Senior Assistant Registrar ("the PTC Registrar") that as the

defendant had just been served with the Reply, he was not able to take instructions due to an on-going labour strike in India and sought an adjournment of two weeks. At the same PTC, counsel for the plaintiffs, Mr Joseph Tang ("Mr Tang") informed the PTC Registrar of his instructions to apply for summary judgment.

(e) At a subsequent PTC held on 7 March 2013, Mr Tan confirmed his instructions to apply for a stay of the Singapore proceedings. The PTC Registrar duly directed the defendant to file its stay application by 28 March 2013, and that the plaintiffs' application for summary judgment would be held in abeyance pending the outcome of the defendant's stay application.

(f) The stay application was filed and it was served on 8 April 2013. On 25 July 2013, the application came up for hearing and the Assistant Registrar allowed the defendant's application for a stay. Two weeks later, the plaintiffs filed this appeal against the Assistant Registrar's order.

12 Notably, the defendant did not apply for extension of time to file the stay application. At the same time, the plaintiffs did not oppose the direction given on 7 March 2013. Neither did the plaintiffs raise any objection to the late filing of the stay application at the hearing of the stay application before the Assistant Registrar. Above all, it is not known what considerations the PTC Registrar took into account in the exercise of his discretion to allow the stay application to be filed out of time.

13 Be that as it may, this court has and will use its wide discretion to deal with procedural irregularity under O 2 r 1(2) to put matters right so as to give effect to the overriding purpose of the jurisdiction to stay proceedings on the ground of *forum non conveniens*, which is to ensure that the claim is tried in the most appropriate forum. It seems to me that the procedural timeline in O 12 r 7(2) was overlooked at the second PTC held on 7 March 2013. The direction to file the stay application by 28 March 2013 was given without any inkling that the effect of this was that the stay application would be filed out of time. Mr Tang acknowledged this since the issue of non-compliance with O 12 r 7(2) was not raised by the plaintiffs when Mr Tan communicated his instructions to apply for a stay of the action on 7 March 2013, or during the hearing before the Assistant Registrar, or at all. A late objection was only made after I queried parties on the potential procedural irregularity.

14 The oversight explained in [12]–[13] above did not prejudice the plaintiffs. As Mr Tan explained, there was no need for the defendant to apply for an extension of time to file the stay application given the PTC Registrar's direction for the stay application to be filed by 28 March 2013. As stated, even after the stay application was filed, the plaintiffs never opposed the stay application on the ground that it was made too late. The parties simply proceeded to argue the stay application on its merits.

15 As regards the defendant's pleadings, Mr Tan clarified that he was not aware of the *forum non conveniens* issue until the plaintiffs served its Reply. The defendant explained that the application for a stay came belatedly as the plaintiffs had only pleaded the relevant factual matrix in their Reply. Further instructions were taken which led to Mr Tan forming the view that the appropriate forum was India and not Singapore. The filing of the Defence should not amount to a waiver of the defendant's right to apply for a stay on the ground of *forum non conveniens*.

16 The Court of Appeal held in *Chan Chin Cheung v Chan Fatt Cheung and others* [2010] 1 SLR 1192 ("*Chan Chin Cheung*") at [22] and *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 at [16]–[17] that the filing of a defence without more does not disentitle or prevent a defendant from applying for a stay of the action in Singapore. The circumstances under which the pleadings were filed are relevant to the application of this particular proposition enunciated by the Court of Appeal. I accepted Mr Tan's explanation that it was after the plaintiffs filed and served the Reply that

the defendant realised that the factual matters in dispute were directly connected to the operations of the defendant's Mumbai branch. That meant that the grounds justifying an application for a stay did not emerge until sometime after the Defence was filed and served (see *Chan Chin Cheung* at [24]). From that point, there is reason to suppose that the court would be willing to extend time to allow the stay application to be made. Besides, no apparent prejudice would have been occasioned by the late application. Having regard to the chronology, I agreed with the defendant that had the procedural breach caused any prejudice to the plaintiffs that could have been remedied by an appropriate costs order. Above all, at no point during the hearing of RA 269 did the plaintiffs complain of prejudice.

The Singapore proceedings

The plaintiffs' case

17 The plaintiffs as financiers provided Varun with working capital through a series of back-to-back contracts. The relevant contracts were all dated 27 February 2012 and they were entered into between the plaintiffs, Varun, and a fourth company known as White Impex General Trading LLC ("White Impex"). The contractual chain is as follows:

(a) The first plaintiff sold a cargo of 33,007.861 mt of "US SOYABEAN MEAL" for a sum of US$14,989,859.92 to Varun on terms that Varun was to make payment by way of a letter of credit in the same amount, payable on 180 days from the date of the letter of credit. The documents required to be presented for payment under the letter of credit included, *inter alia*, one photocopy of the ocean bill(s) of lading, instead of the original bill(s) of lading.

(b) Varun sold the same cargo to White Impex for a total price of US$15,589,612.75 pursuant to Sale Contract No. VARUN/KCR/12/S002. The terms of the sale contract provided that White Impex was to pay Varun the contract price within 180 days from the letter of credit issued by Varun.

(c) White Impex then sold the same cargo to the second plaintiff for a sum of US$14,610,269.51. Under this contract, the second plaintiff was to pay White Impex the full amount of the contract price at sight.

For ease of reference, this contractual chain shall be referred to as "the A002 Transactions".

18 The defendant was appointed by Varun as the issuing bank for the letter of credit. According to the plaintiffs, the defendant was obliged to honour the letter of credit upon presentation of a photocopy of the bill(s) of lading. The documents to be presented for payment under the letter of credit were to be accepted by the defendant regardless of any and all discrepancies. To secure the value of the letter of credit to be issued, the defendant required a cash deposit for the approximate value of the letter of credit. It was envisaged that the cash deposit would be provided by the plaintiffs.

19 To avoid the situation where no letter of credit was issued after payment of the cash deposit to the defendant, the plaintiffs required the defendant to give an undertaking that it would issue the letter of credit within the stipulated time, failing which the said deposit would be refunded to the plaintiffs.

20 Mr Tang said that the structured finance transaction in the Singapore proceedings was similar to the structured financing transaction described in *Raiffeisen Zentralbank Osterreich AG v Archer*

Daniels Midland Co and others [2007] 1 SLR(R) 196. According to Mr Tang, the letter of credit to be issued constituted security for the plaintiffs' provision of working capital to Varun. Unfortunately, Mr Tang was not able to explain how Varun would have obtained working capital through the sale transactions if the deposit to be paid by the plaintiffs to the defendant was the security for the letter of credit to be issued. Even though the plaintiffs were not privy to the arrangement between Varun and the defendant, Mr Tang suggested that with the receipt of the deposit from the plaintiffs, the defendant might provide Varun with hedging facilities or extend working capital. At the end of the hearing, it was still unclear how Varun obtained working capital from the plaintiffs through the various contracts described above. Fortunately, the precise effect of the transactions was not material to the defendant's present application for a stay since the remittance of US$9.74m was not disputed.

21 It is common ground that on 1 March 2012 the defendant sent the following Society for Worldwide Interbank Financial Transmission ("SWIFT") message to Credit Suisse AG, the plaintiffs' bank (hereinafter referred to as the "March SWIFT message"): [note: 1]

F20: Transaction Reference Number

B027VARUN/BUNGI

F79: Narrative

Letter of Credit issued/to be issued by us in favour of Bunge S.A. upon our receipt of the sum of USD 14610000.00 into Varun Industries Limited's account with us under … Advance Contract No. VARUN/KCR/12/A 001 between Varun Industries Limited and White Impex General Trading LLC, we irrevocably and unconditionally undertake that we shall issue a letter of credit for USD 14989859.92 in the format attached as Annex A hereto, subject to such amendment, modification as may be required by VARUN INDUSTRIES LIMITED AND/OR the beneficiary of such letter of credit.

IF FOR WHATEVER REASON WE DO NOT ISSUE THE LC IN FIVE WORKING DAYS FROM THE DATE OF RECEIPT OF THE FORESAID AMOUNT OF USD 14610000.00, WE SHALL REFUND TO YOU AN AMOUNT OF USD 14610000.00 AS PER YOUR BANKING DETAILS.

REGARDS

INDIAN BANK

MUMBAI FORT, FX DEPT

22 The plaintiffs maintained that the reference to "Advance Contract No. VARUN/KCR/12/A 001" ("Advance Contract No. A001") in the March SWIFT message was a typographical error which the defendant knew or ought to have known of and that the reference should have been to "Advance Contract No. VARUN/KCR/12/A 002" ("Advance Contract No. A002") instead. The plaintiffs' pleaded case is that on or about 1 March 2012, the first and/or second plaintiff had informed the defendant of the error and sought the following amendments:

(a) to correct the reference from Advance Contract No. A001 to Advance Contract No. A002; and

(b) to amend the value of the letter of credit to be issued from US$14,989,859.92 to US$9,993,239.64 and correspondingly amend the deposit of US$14,610,000 to be received to

US$9,740,000 instead.

23 According to the plaintiffs, the amendments were required as the defendant could not issue a letter of credit for the value of US$14,989,859.92 because under the credit line between Varun and the defendant, Varun was only entitled to apply for a letter of credit of a maximum of US$10m.

24 Thereafter, on or about 2 March 2012, the second plaintiff, through JP Morgan Chase Bank NA, remitted a sum of US$9.74m to the defendant, providing Varun as the beneficiary of the remittance. The remittance information read: [note: 2]

F50K: Ordering Customer – Name & Address

…

GRAINS AND INDUSTRIAL PRODUCTS TRADING PTE LTD

…

F59: Beneficiary Customer – Name & Addr

…

VARUN INDUSTRIES LIMITED

…

F70: Remittance Information

PARTIAL PYMT 030 WHITE IMPEX UNDER INV OSN/RE/004/2012 DD 2702.12 AGSTADV CTR NO VARUN/KCR/12/A002 DD 27..02.12 BTW WHITE IMPEX AND VARUN

25 As it turned out, no letter of credit was issued and the sum of US$9.74m which the second plaintiff had remitted was not refunded.

26 To support the plaintiffs' claim that the defendant must have or ought to have known of the typographical error in the March SWIFT message, and that it should have instead related to Advance Contract No. A002, the plaintiffs referred to an earlier structured finance transaction that involved the same entities ("the previous structured finance transaction"). The relevant contracts for the previous structured finance transaction were dated 6 February 2012 and involved these back-to-back contracts:

(a) A contract between the second plaintiff and Varun where the second plaintiff agreed to sell a cargo of 16,853.427 mt of "US NO 2 OF BETTER YELLOW SOYBEANS" for a price of US$9,993,239.54. Pursuant to the terms of this contract, Varun was to make payment by way of a letter of credit in such amount, payable on 180 days from the date of the letter of credit.

(b) Varun then sold the same cargo to White Impex by way of Sale Contract No. VARUN/KCR/12/S001 for the sum of US$10,393,002.83.

(c) Finally, White Impex sold the same cargo to the first plaintiff for US$9,740,101.07. Under the terms of this contract, the first plaintiff was to pay White Impex the full amount of contract

price at sight.

For ease of reference, the above contractual chain shall be referred to hereinafter as "the A001 Transactions".

27 In relation to the A001 Transactions, the defendant was also the issuing bank appointed by Varun for the issuance of the letter of credit to the second plaintiff. The defendant had duly issued the letter of credit for the previous structured finance transaction in the second plaintiff's favour on 24 February 2012. This letter of credit was in respect of Advance Contract No. A001.

The defendant's case

28 The despatch of the March SWIFT message was admitted but the defendant disagreed that this message constituted or amounted to the giving of an undertaking to the plaintiffs. The March SWIFT message was sent to Credit Suisse AG based on written instructions from Varun dated 29 February 2012 that specifically referred to Advance Contract No. A001.

29 According to the defendant, neither the plaintiffs nor Varun instructed the defendant to amend the reference in the March SWIFT message from Advance Contract No. A001 to Advance Contract No. A002. The defendant also asserted that it did not know of the contractual chain pertaining to the A002 Transactions until it received the letter of demand from the plaintiffs' solicitors.

30 As for the second plaintiff's remittance of US$9.74m, the defendant's case is that this was received by Varun unconditionally (*ie*, not as the alleged deposit). In this regard, the defendant produced correspondence from Varun dated 2 March 2012 wherein Varun informed the defendant that the remittance of US$9.74m was "advance payment … from [its] overseas buyers" and instructed the defendant to credit the sum to its account with the defendant [note: 3], which the defendant did as it was obliged to act on Varun's written mandate.

31 Even if the terms of the March SWIFT message constituted an undertaking, the defendant's position was that the conditions stipulated in the March SWIFT message would have to be strictly met before the defendant's obligations thereunder would arise. No refund of the money or issuance of any letter of credit was necessary as the terms of the March SWIFT message was not strictly complied with.

32 The defendant made two other points. The first point is that Indian law is the governing law in respect of the plaintiffs' claims for breach of the alleged undertaking and for return of money had and received. The second point is that Varun is a proper and necessary party to the plaintiffs' claim for the recovery of US$9.74m.

The relevant principles on *forum non conveniens*

33 The leading authority 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*"). It is clearly established that the "*Spiliada* principles", as they are known, are applicable to determining the question of *forum non conveniens* in Singapore (see the Court of Appeal decisions of *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*"), *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 ("*CIMB Bank*") and *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*")).

34 The *Spiliada* principles encompass a two-stage process. At stage one of the *Spiliada* test, the

burden rests on the defendant to show that there is another available forum that is clearly or distinctly more appropriate than Singapore. At this stage, the court will have regard to the general connecting factors, the governing law of the claims and the places where the respective parties carry out business. The natural forum is the forum with which the proceedings have the most real and substantial connection. In other words, the natural forum is the forum in which the dispute can be adjudicated most cost-effectively (Richard Fentiman, *International Commercial Litigation* (Oxford University Press, 2nd Ed, 2015) at para 13.11).

35 If the court is of the view that *prima facie* there is some other available forum that is clearly or distinctly more appropriate, it will ordinarily grant a stay unless the plaintiff can prove that there are special circumstances by reason of justice which require that a stay should nonetheless not be granted. In exercising its discretion, the court will also have regard to whether the defendant, in applying for a stay, genuinely desires a trial in the foreign country, or is only seeking procedural advantages, and whether the plaintiff would be prejudiced by having to sue in a foreign court (see *The Eleftheria* [1969] 1 Lloyd's Rep 237 at 242). Where it is alleged that the plaintiff will not obtain justice in the foreign jurisdiction, cogent evidence must be led to establish this (see *Spiliada* at 478). Cogent evidence is required because of the principles of international comity, which requires the court to take extreme precautions before deciding that there is a real risk that justice will not be done in the foreign jurisdiction, which is the *prima facie* natural forum.

Stage 1 of the *Spiliada* test

General connecting factors and availability of documentary evidence and witnesses

36 The defendant's reasons in support of the stay application, broadly speaking, were that the relevant witnesses and documents are located in India, specifically at the defendant's Fort Road, Mumbai branch, the law governing the plaintiffs' claims is Indian law, and that Varun, which was a proper party to the action, is an Indian company headquartered in Mumbai. The defendant had also voluntarily undertaken to comply with the procedural timelines in India and cooperate with the plaintiffs to prosecute the action expeditiously in India.

37 The only connections that Singapore had to the plaintiffs' claim were that the second plaintiff was incorporated in Singapore, the second plaintiff remitted the deposit of US$9.74m to the defendant as banker for Varun (see [24] above), and that the defendant had a Singapore branch. The receipt of the remittance was not disputed by the defendant. The second plaintiff's Singaporean identity was inconsequential to the dispute between the parties. Neither did the operations of the defendant's Singapore branch play a role in any of the transactions giving rise to the dispute. It is thus not surprising that the thrust of the plaintiffs' argument was not that Singapore was the clearly more appropriate forum *vis-à-vis* India, but that the defendant could not show that India was the clearly more appropriate forum. The plaintiffs took the position that English law governed both the contractual and restitutionary claims, while the defendant was of the view that Indian law would apply.

38 It is not disputed that the relevant transactions, such as the issuance of the March SWIFT message, and the receipt of the sum of US$9.74m occurred in Mumbai. It is also not disputed that the relevant documents concerning these transactions are held by the defendant's Mumbai branch.

39 The disputes of fact in the Singapore proceedings are centred on the issuance of the March SWIFT message and Varun's instructions thereto, the alleged typographical error in the March SWIFT message, and the relationship between Varun and the defendant that affected the defendant's knowledge concerning what should have been stated in the March SWIFT message or the

circumstances surrounding the defendant's receipt of US$9.74m. Having regard to these disputes of fact, the material witnesses would be the employees of the defendant's Mumbai branch and officers from Varun. The defendant's witnesses are located in India which is a factor that favours India as the natural forum of this dispute.

40 Whilst the location of witnesses and documentary evidence may arguably be viewed as a neutral factor especially if the material witnesses are employees of the parties who would have no difficulty travelling to either country as witnesses of fact, the involvement of Varun in this dispute placed a different complexion on the matter and tipped the scale in favour of India as the more appropriate forum. With Varun in the picture the dispute would take a different dimension in terms of the nature of the plaintiffs' claims and the relevant factual and legal disputes that would arise in a trial. As the Court of Appeal put it in *Rickshaw Investments* at [19]:

> … [T]he importance of the location and the compellability of the witnesses depends on whether the main disputes revolve around questions of fact. If they do and, for example, the judge's assessment of a witness's credibility is crucial, then the location of the witnesses takes on greater significance because there would be savings of time and resources if the trial is held in the forum in which the witnesses reside and where they are *clearly* compellable to testify. [emphasis added]

41 I now turn to discuss Varun and its relevance to the proceedings.

Varun

42 Varun, a company incorporated in India and headquartered in Mumbai, is a central figure in the factual matrix giving rise to the dispute. As explained, the officers from Varun who were involved in authorising and communicating with the plaintiffs and the defendant about the respective transactions giving rise to the dispute are material witnesses of fact.

43 There is merit in the defendant's contention that Varun is a necessary and proper party and that it should be joined as a party since its presence in the proceedings would ensure that all the matters in dispute could be adjudicated on effectively before the same judge thereby avoiding a multiplicity of proceedings and the likelihood of inconsistent decisions. The defendant had, at all material times, acted on Varun's instructions. Specifically, the content of the March SWIFT message was supposedly based on instructions from Varun. The crediting of the remittance to Varun's account as opposed to retaining it as the alleged cash deposit for the approximate value of the letter of credit was also based on Varun's instruction (see [30] above). On both counts there is on the defendant's case no basis for the claim in relation to the remittance.

44 The same contention that the wrong party had been sued is made in respect of the plaintiffs' claim for restitution of US$9.74m. As noted from the remittance information set out at [24], the remittance was clearly for Varun's benefit. The present dispute concerned Varun's account with the defendant and although a customer's account with a bank normally involves a debtor-creditor relationship, when money is paid to a bank for a defined purpose as alleged here, a *Quistclose* trust would arguably come into existence in India (see *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] 1 AC 567). Lord Millett summarised the *Quistclose* principles in *Twinsectra Ltd v Yardley* [2002] AC 164 at [68] and his Lordship at [69] said:

> When the money is advanced the lender acquires a right, enforceable in equity, to see that it is applied to the stated purpose, or more accurately to prevent its application for any other purpose. This prevents the borrower from obtaining any beneficial interest in the money, at least

while the designated purpose is still capable of being carried out. Once the purpose has been carried out, the lender has his normal remedy in debt. If for any reason the purpose cannot be carried out, the question arises whether the money falls within the general fund of the borrower's assets, in which case it passes to his trustee-in-bankruptcy in the event of his insolvency and the lender is merely a loan creditor; or whether it is held on a resulting trust for the lender. This depends on the intention of the parties collected from the terms of the arrangement and the circumstance of the case.

45 Varun's version of the facts is crucial. For now, the defendant's case is that Varun instructed it to credit the remittance to Varun's account (see [30] above). Whether Varun was free to apply the remittance for any other purpose depended on the intention of the parties collected from the terms of the arrangement and the circumstances of the case. If, as the plaintiffs argued, the remittance was for a purpose that failed, the question is whether the money was held by Varun on a resulting trust for the plaintiffs as opposed to its current claim as framed against the defendant for money had and received.

46 That Varun played a significant part in the dispute is made plain by a letter sent by the first plaintiff to Varun in April 2012 where the first plaintiff pointed to Varun's failure to issue a letter of credit for "Sale and Purchase Contract BSAI S12-1231A-8298 dated 27 February 2012" and demanded that Varun took immediate steps to pay the first plaintiff a sum of US$9.74m. [note: 4] This demand needs to be explained when examining the question whether or not a *Quistclose* trust had been created in India.

47 Varun's officers who are located outside of Singapore are not compellable in Singapore (see O 38 r 18(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed)). The defendant's Indian law expert, Ms Rathina Maravarman ("Ms Maravarman"), did not deal with the question of whether Varun's officers are compellable in India. This was not fatal to the defendant's stay application. In *JIO Minerals*, although the parties did not adduce expert evidence on whether Indonesian witnesses were compellable to testify in Indonesia, the Court of Appeal held that Indonesian witnesses were *more likely* to testify if the dispute were heard in Indonesia. This was one of the factors in *JIO Minerals* that pointed to Indonesia, rather than Singapore, as being the natural forum. While it would have been preferable for the defendant to lead evidence establishing the location of the material witnesses from Varun, and the compellability of such witnesses in the Bombay High Court, following the approach in *JIO Minerals* and given that Varun is an Indian company subject to the Indian court's jurisdiction, Varun's officers are more likely to testify if the dispute is heard in India.

48 Finally, Mr Tan had, at the hearing, informed the court that Varun was due to be wound up in India. This development added a further layer of complexity to the Singapore proceedings. In the event of a winding up order, the Indian courts would have jurisdiction to deal with the issue of joinder of an Indian company in liquidation under Indian insolvency law.

The governing law

General principles

49 Another relevant factor under stage one of the *Spiliada* test is the governing law of the plaintiffs' claims. It is without doubt that a court deciding on the proper law of the claims for restitution and breach of undertaking must apply Singapore conflict of law rules. In a stay application which is made at an interlocutory stage with only the pleadings and minimal affidavit evidence as background, it is appropriate for the court at this stage to form a *provisional* view of the governing law (*Yeoh Poh San and another v Won Siok Wan* [2002] SGHC 196 at [15]; *Banco Atlantico SA v The*

British Bank of the Middle East [1990] 2 Lloyd's Law Rep 504 at 507; *Seashell Shipping Corporation v Mutualidad de Seguros del Instituto Nacional de Industria* [1989] 1 Lloyd's Law Rep 47 at 51). Strict proof of the relevant foreign law is not necessary and the court is able to take notice that the laws of other jurisdictions are likely to be different (see *JIO Minerals* at [96]; *Rickshaw Investment* at [43]). If the identity of the applicable law cannot be ascertained even on a provisional basis on the pleaded case and the interlocutory evidence adduced, the court may treat the issue of the applicable law as a neutral factor in the first stage of the *Spiliada* test, leaving the matter to be settled at trial on the merits of the case (see *Halsbury's Laws of Singapore*, Vol 6(2), 2013 reissue (LexisNexis, 2013) at para 75.093).

The claim for breach of the alleged undertaking contained in the March SWIFT message

50 The parties accepted that the choice of law analysis that was relevant to the plaintiffs' claim for breach of the alleged undertaking were the choice of law rules for contractual claims as stated in *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") and it is common ground that no express or implied choice of law can be found or inferred. It was agreed that the proper law of the obligation is thus the law that has the closest and most real connection with the defendant's alleged undertaking in the March SWIFT message.

51 The plaintiffs submitted that as the March SWIFT message was sent in the context of the overarching structured finance transaction, and specifically was an undertaking that flowed from Varun's obligations under its contract dated 27 February 2012 with the first plaintiff (see [17(a)] above) which was governed by English law, the plaintiffs submitted that English law governed their claims against the defendant for breach of the undertaking. In contrast, the defendant's view is that the laws of India have the closest and most real connection because:

(a) The March SWIFT message was issued by the defendant's Mumbai branch.

(b) The performance of the terms of the March SWIFT message was to be effected in India.

52 Before the court is able to determine the proper law of the alleged undertaking in the March SWIFT message, the court must first decide on the factual issue of whether or not the March SWIFT message constituted an undertaking as alleged. Applying the approach in *Pacific Recreation*, the law that has the closest and most real connection to the March SWIFT message is *prima facie* Indian law for the two reasons stated by the defendant at [51] above. Hence, the question of whether the March SWIFT message constituted an undertaking in the first place is *prima facie* governed by Indian law. Assuming then that the March SWIFT message amounted to an undertaking under Indian law, the proper law of the undertaking and the defendant's obligations thereunder would have to be decided as a matter of Indian law.

The claim for money had and received

53 It is now settled law that a claim for money had and received is a restitutionary claim. It has been held in *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [125] that "the underlying basis for money had and received is now embraced under the rubric of unjust enrichment" [emphasis in original omitted].

54 The approach in Singapore to determining the proper law of a restitutionary obligation has been comprehensively stated in *CIMB Bank* at [31]. In short, the proper law of a restitutionary obligation is generally identified as follows:

(a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract. However, this is not an inflexible rule that must be applied without exception to every case connected to a contract; the rule seeks to assist in the identification of the proper law of the restitutionary obligation in circumstances of contractual failure (for *eg*, where the contract is void or ineffective) or where the contract was procured by fraud or duress which did not directly impact the choice of law clause in the contract (see *CIMB Bank* at [35], [41] and [46]).

(b) If the obligation arises in connection with a transaction concerning an immoveable, its proper law is the law of the country where the immovable is situated.

(c) If the obligation arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.

The underlying basis of the above rules appears to be to identify the law that has the closest and most real connection to the restitutionary obligation (see also the Court of Appeal's observations in *CIMB Bank* at [31]).

55 The plaintiffs' position is that the choice of law analysis for their claim in restitution would follow from the choice of law analysis concerning the claim for breach of undertaking as the claim for restitution is consequential on the defendant's breach of the undertaking by failing to issue the letter of credit or refund the remitted sum of US$9.74m. This was not a view shared by the defendant, who did not accept that it had given an undertaking, much less breached it. In any case, the defendant submitted that the governing law of the plaintiffs' claim for money had and received was Indian law because:

(a) The sum of US$9.74m was remitted to Varun's account at the defendant's Mumbai branch, *ie*, India was the place where the defendant was allegedly unjustly enriched.

(b) India was the place where the defendant received the sum of US$9.74m and acted upon instructions of Varun to credit its account with the stated amount (*ie*, India was the place where the defendant changed its position).

56 Although the plaintiffs pleaded that the money was paid to the defendant pursuant to the alleged undertaking given in the March SWIFT message, the uncontroverted fact is that the remittance information showed that Varun was the "Beneficiary Customer" of the remittance (see [24] above). Furthermore, the March SWIFT message referred to a different amount of US$14.61m. The plaintiffs thus did not fall within the terms of the March SWIFT message on its face. It was also important to note that the plaintiffs' claim for money had and received was not necessarily dependent on the defendant's alleged breach of the March SWIFT message. The applicable test is this: what law is most closely connected to the restitutionary obligation? In my judgment, as the alleged enrichment and the alleged change of position both took place in India, the *prima facie* proper law of the plaintiffs' claim for money had and received is Indian law.

57 There is also the *Quistclose* trust point discussed in [44]–[45] above. If, as the plaintiffs argued, the remittance was for a purpose that failed, the question is whether under Indian law the money was held by Varun on a resulting trust for the plaintiffs as opposed to a distinct claim against the defendant for money had and received.

Conclusion on stage 1 of the Spiliada test

58 Cumulatively, the connecting factors analysed above point to India as the clearly and distinctly more appropriate forum.

Stage 2 of the *Spiliada* test

Delay

59 As stated, the main objection to India advanced by the plaintiffs is that there are likely to be lengthy delays in India if legal proceedings are commenced there. It is worth nothing that cogent evidence is necessary to establish the presence of substantial delays in the Indian system (see *Konamaneni and others v Rolls Royce Industrial Power (India) Ltd and others* [2002] 1 WLR 1269 at [177]). Anecdotal evidence would not suffice.

60 The plaintiff's expert witness, Mr Pratap Prashant ("Mr Prashant"), a Senior Advocate of the Bombay High Court, said it might take up to ten years to get to trial in the Bombay High Court. The defendant's expert witness, Ms Maravarman, a Senior Advocate of the High Court of Chennai and Bombay, did not dispute that delays were experienced in the Indian legal system in the past but she highlighted efforts made in recent years to reduce the backlog of cases. She stated that in her experience, actions could be tried in India within three to six years of their commencement.

61 Mr Prashant talked about the pendency of suits in the Bombay High Court. He opined that:

(a) A suit filed in the Bombay High Court is likely to take not less than ten years to reach trial.

(b) There are suits which were commenced in the 1990s that are still pending before the court.

(c) The Indian courts are liberal in granting adjournments, and also have a limited number of judges to hear the cases.

(d) If the matter is appealed the appeal may take a further period of five to nine years to be resolved.

(e) Procedure for summary judgment is available, and the present position is that an application for summary judgment could take up to a year to be heard. If the timelines under the Indian Code of Civil Procedure are strictly adhered to, summary procedure may be concluded within three to six months.

To support his opinion, Mr Prashant exhibited five hearing lists of the Bombay dated between October and December 2014, which he said indicated that there were suits which were filed prior to 2000 which were still at a pre-trial stage.

62 Ms Maravarman disagreed with Mr Prashant's opinion that a regular suit in the Bombay High Court would take ten years to go to trial. She cited the push by the Indian courts to improve their case management capabilities and identified a number of reforms that the Indian Government had rolled out, such as amendments to existing laws designed to reduce the pendency of cases in the Bombay High Court. In her view, the hearing lists exhibited by Mr Prashant were not representative or reflective of the state of the Indian court system. I did not place weight on Ms Maravarman's reference to an extract from a World Bank report on the efficiency of the Bombay City Civil Court in contractual disputes as the information contained in the website screenshot exhibited was unclear and devoid of context. Moving on to summary proceedings, Ms Maravarman's view was that strict

compliance with the Indian Code of Civil Procedure would allow summary determination of the suit within three to six months. If, however, the Indian court finds that triable defences exist, the summary proceedings would be converted to a regular suit.

63 In *The "Vishva Apurva"* [1992] 1 SLR(R) 912 ("*The Vishva Apurva*"), the Court of Appeal was not satisfied that the evidence adduced of delay was cogent enough to refuse a stay of proceedings in Singapore. The remarks made by the Court of Appeal in *The Vishva Apurva* at [42]–[43] are directly on point:

> 42 In our view, this delay appeared to be the most weighty factor in this case. Indeed, it would appear to be the only factor which could be said to favour a trial in Singapore if the evidence adduced by the respondents as to the magnitude of the delay was conclusive. However, it was not. There was a conflict of evidence as to how long the court in Bombay would have taken to hear the respondents' actions in India. The respondents claimed that it would take at least ten years on the basis of the crowded court calendar. The appellants claimed that the statistical evidence produced by the respondents was irrelevant as it related to cases filed under the court's ordinary original civil jurisdiction, that the court in Bombay had given a direction that the limitation action be heard and determined as an expedited admiralty suit, that it would be shorter than four years and that such a period of time was neither unreasonable nor could it constitute an exceptional circumstance. …
>
> 43 Having regard to the conflicting evidence before the court, we did not think that the respondents had made out a sufficiently cogent case on the evidence that there was excessive delay. Nor were we satisfied that this ought to be a decisive factor in this case. In *The Vishva Ajay* … Sheen J held that delay in the magnitude of six to ten years was a denial of justice. That statement was made in a *forum non conveniens* case. In an exclusive jurisdiction clause case, different considerations must apply. One of them is that the court should give effect to what the parties had bargained for.

64 In the instant case, the evidence shows that at least in proceedings for summary judgment it cannot be seriously argued that substantial justice cannot be done in India. Notably, both experts are in broad agreement that there is a "fast track" available in the form of summary procedure. While Ms Maravarman opined that an application for summary judgment under Order 37 of the Indian Code of Civil Procedure 1908 would be concluded in three to six months, Mr Prashant's opinion that an application for summary judgment could take up to one year to be heard. A reasonable reading of the evidence is that it would not take more than one year to obtain summary judgment. This estimate of one year to obtain summary judgment could not be characterised as excessive delay. As observed earlier, the plaintiffs were seeking, in the Singapore proceedings, to apply for summary judgment. If the same course of action were adopted in India, which I have found to be the natural forum, the plaintiffs' concerns of delays would no longer carry much weight.

65 Moving away from summary judgment, Mr Prashant's evidence did not go beyond generalised, anecdotal material and did not approach the required high level of cogency. Finally, the defendant gave an undertaking to cooperate in a manner that would expedite litigation in Mumbai. This undertaking serves to mitigate the issue of delay. By the undertaking, the parties had agreed to fix the action for trial in the Indian courts as soon as was practicable, and if possible, within a year from the plaintiffs' commencement of the action in India. With all these in mind, it could not be said that justice could not be done in the Indian courts, which is the appropriate forum for the resolution of this dispute.

Conclusion

66 For the reasons stated, I granted a stay of the Singapore proceedings on the terms of the consent undertaking given by the defendant. Costs of the appeal were fixed at $9,000 inclusive of disbursements.

[note: 1] 1st affidavit of Yog Raj Bajaj ("Yog"), page 9.

[note: 2] 1st affidavit of Yog, page 10.

[note: 3] 1st affidavit of Yog, page 11.

[note: 4] 2nd Affidavit of Mr Yog, page 13.