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

[2021] SGHC 257

Suit No 951 of 2020 (Summons No 665 of 2021)

Between

6DM (S) Pte. Ltd.

… *Plaintiff*

And

(1) AE Brands Korea Ltd
(2) Asahi Beer Asia Ltd
(3) Asahi Premium Brands Ltd
(4) Federico Bogna

… *Defendants*

Originating Summons No 138 of 2021

Between

6DM (S) Pte. Ltd.

… *Plaintiff*

And

(1) AE Brands Korea Ltd
(2) Asahi Beer Asia Ltd
(3) Asahi Premium Brands Ltd
(4) Asahi Brands Germany GmBH (formerly known as Asahi Brands Europe a.s.)

… *Defendants*

JUDGMENT

[Civil Procedure] — [Jurisdiction] — [Submission]
[Civil Procedure] — [Stay of proceedings]
[Conflict of Laws] — [Choice of jurisdiction] — [Exclusive]

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6DM (S) Pte Ltd
v
AE Brands Korea Ltd and others and another matter

[2021] SGHC 257

General Division of the High Court — Suit No 951 of 2020 (Summons No 665 of 2021) and Originating Summons No 138 of 2021
Mavis Chionh Sze Chyi J
29 April, 27 May, 13 September 2021

16 November 2021 Judgment reserved.

Mavis Chionh Sze Chyi J:

1 The plaintiff, 6DM (S) Pte. Ltd. ("6DM"), commenced Suit No 951 of 2020 ("Suit 951"), alleging that the defendants had made fraudulent misrepresentations, engaged in a lawful and/or unlawful means conspiracy, breached an implied agreement and/or a collateral contract and/or were liable for unjust enrichment. 6DM previously distributed the first three defendants' beer products pursuant to three distribution agreements. The nub of 6DM's case is that the defendants acted in concert to induce 6DM to invest in promoting, marketing and distributing more of the defendants' beer products by representing that the first three defendants would acquire shares in 6DM and/or partner with 6DM to set up a joint venture company to distribute the said products in Singapore ("the Arrangement").[1] Pursuant to these representations,

[1] Statement of Claim dated 2 October 2020 ("SOC") at paras 22 and 27.

the defendants allegedly assured 6DM that any debts owed by 6DM to the first three defendants under the distribution agreements need only be paid when the Arrangement was finalised.[2] Instead of finalising the Arrangement with 6DM, the first three defendants terminated the distribution agreements in early July 2020 and demanded that 6DM pay the debts owed.[3]

2 The first three defendants in Suit 951 are, respectively, AE Brands Korea Ltd ("AEBK"), Asahi Beer Asia Ltd ("ABA") and Asahi Premium Brands Ltd ("APB"). I will refer to them collectively as "the Asahi Entities" in this judgement. In Summons No 665 of 2021 ("SUM 665"), the Asahi Entities mount various jurisdictional challenges in respect of 6DM's claim in Suit 951. They seek, *inter alia*, (a) an order discharging and/or setting aside the order granting 6DM leave to serve the writ out of jurisdiction ("the Leave Order"); (b) a declaration that the writ has not been duly served on them; (c) an order setting aside service of the writ; (d) further and/or in the alternative, an order that Suit 951 be dismissed or stayed pursuant to section 12 of the Choice of Court Agreements Act 2016 (Cap 39A, 2017 Rev Ed) (the "CCAA"); (e) further and/or in the alternative, an order that Suit 951 be stayed pursuant to O 12 r 7(2) of the Rules of Court (2014 Rev Ed) ("ROC") and paragraph 9 of the First Schedule of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA").

3 On 15 February 2021, 6DM filed an application, Originating Summons No 138 of 2021 ("OS 138"), seeking the grant of an injunction against the defendants to restrain the Asahi Entities and a fourth entity Asahi Brands Germany GMBH ("ABGG", formerly known as Asahi Brands Europe A.S. or

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2 SOC at para 27.

3 SOC at paras 44–45.

"ABE") from commencing winding-up proceedings against the plaintiff on the basis of a statutory demand dated 22 January 2021 (the "Statutory Demand"). Based on the Statutory Demand, the Asahi Entities and ABGG were owed sums totalling more than USD 790,000.00 and EUR 570,000.00.[4]

4 Where an applicant seeks to set aside the order for service of an originating process out of jurisdiction, or alternatively, to stay proceedings on improper forum grounds, the stay prayer is usually pursued only as a fall-back to the setting-aside prayer, *ie* it is sought without prejudice to the setting-aside prayer and is sought only if the setting-aside prayer fails. In such cases, the usual procedure is for the court to deal with the setting-aside prayer first, before addressing the stay prayer. This is because a prayer seeking the setting-aside of the order for service out of jurisdiction essentially disputes the existence of the Singapore courts' jurisdiction; whereas a prayer for stay on improper forum grounds is generally sought only in respect of proceedings over which the court has jurisdiction and is a challenge to the exercise by the court of that jurisdiction rather than a challenge to the existence of the jurisdiction: see the judgment of the Court of Appeal (the "CA") in *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [26]–[27], [32]–[33], [56] and [58].

5 In the present case, in addition to a prayer for setting-aside of the Leave Order and a fall-back prayer for stay of the Suit 951 proceedings on improper forum grounds, there is a prayer for the dismissal or stay of Suit 951 pursuant to section 12 of the CCAA. I propose to deal with this prayer for the dismissal or stay of Suit 951 pursuant to section 12 of the CCAA first. This is because it is not disputed that if I accept the Asahi Entities' argument that the exclusive jurisdiction clauses ("EJCs") in their distribution agreements with 6DM are in

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[4] Core Bundle of Documents dated 22 April 2021 ("CB") at pp 492–499.

favour of the courts of England and Wales, then section 12(1) of the CCAA *mandates* that I dismiss or stay Suit 951, unless one of the five exceptions provided in section 12(1) applies. *This is the case regardless of whether the Singapore courts would otherwise have jurisdiction under Singapore law* – including any written law providing that the Singapore courts have jurisdiction over a foreign defendant validly served out of jurisdiction with an originating process.

6 I will deal first with the prayer in SUM 665 for dismissal or stay of the Suit 951 proceedings before addressing the prayers for setting-aside of the Leave Order and alternatively, for a stay pursuant to O 12 r 7(2) of the ROC and paragraph 9 of the First Schedule of the SCJA. I will then deal with 6DM's application in OS 138 for an injunction against the institution of winding-up proceedings.

Facts

The parties

7 I start by summarising the key background facts. 6DM is a Singapore incorporated company, in the business of (*inter alia*) the wholesale of liquor, soft drinks and beverages.[5] Its sole director and shareholder is Sim Yew Meng Adrian ("Adrian Sim"). The first, second and third defendants in Suit 951 and OS 138 (AEBK, ABA and APB – collectively "the Asahi Entities") are incorporated in South Korea, Hong Kong and the United Kingdom ("UK") respectively.[6] The Asahi Entities are part of a group of companies which has been referred to in affidavit evidence as "the Asahi Group". Within the Asahi

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5 CB at pp 658–661.

6 SOC at paras 3–5.

Group, ABA and APB are subsidiaries of Asahi International Ltd ("AIL"), whereas AEBK is wholly owned by another parent company within the Asahi Group.[7] The fourth defendant in OS 138, ABGG (formerly known as ABE), is a private company under German law.[8] The fourth defendant in Suit 951 is an individual named Federico Bogna ("Bogna"). He is the Regional Markets Development Manager Asia Pacific at ABA and was at all material times the main point of contact between 6DM and the Asahi Entities.[9]

The distribution agreements

8 According to 6DM, it started distributing Peroni Nastro Azzuro ("Peroni") brand products in Singapore in 2013[10] pursuant to an exclusive distribution agreement dated 8 March 2013 with SABMiller Brands Europe a.s. ("SABMiller") (the "2013 Distribution Agreement").[11] The 2013 Distribution Agreement contains the following clause on governing law and jurisdiction:[12]

> 22.1 This Agreement is governed by the laws of England and Wales.
>
> 22.2 Each party irrevocably agrees that the courts of England and Wales have exclusive jurisdiction to settle any dispute or matter arising under or in connection with this Agreement, including a dispute regarding the existence, validity or termination of this Agreement or the consequences of its nullity. For the purposes of this clause, the parties acknowledge that the Supplier is a member of an English group of companies, the parent company of which is SABMiller plc.

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7 (Suit 951) Affidavit of Yusuke Naritsuka dated 10 February 2021 ("YN1") at para 1.

8 (OS 138) Affidavit of Yusuke Naritsuka dated 3 March 2021 ("YN2") at para 9.

9 (Suit 951) Affidavit of Federico Bogna dated 24 March 2021 at paras 1 and 6.

10 SOC at paras 7 and 8.

11 CB at pp 52–87.

12 CB at p 74.

9 On 1 April 2016, 6DM and SABMiller entered into an exclusive distribution agreement (the "AEBK Agreement"),[13] to renew their existing distribution agreement.[14] On 31 July 2017, SABMiller was acquired by the Asahi Group, and SABMiller changed its name to ABE.[15] On 1 January 2018, AEBK took over the business from ABE and assumed all of ABE's rights, benefits, obligations and liabilities under the AEBK Agreement.[16] In the AEBK Agreement, the clause for governing law and jurisdiction is as follows:[17]

> 22.1 This Agreement is governed by the English law.
>
> 22.2 Each party irrevocably agrees that the local courts have exclusive jurisdiction to settle any dispute or matter arising under or in connection with this Agreement, including a dispute regarding the existence, validity or termination of this Agreement or the consequences of its nullity.

10 On 15 March 2017, 6DM and Asahi Europe Ltd ("AEL") entered into a third party distribution agreement; and subsequently, on 1 April 2017, APB assumed all of AEL's rights, benefits, obligations and liabilities under the agreement (the "APB Agreement").[18] The APB Agreement contains the following clause on governing law and jurisdiction:[19]

> 22.1 This Agreement is governed by the laws of England and Wales.
>
> 22.2 Each party irrevocably agrees that the courts of England and Wales have exclusive jurisdiction to settle any dispute or matter arising under or in connection with this Agreement,

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13 CB at pp 88–123.

14 SOC at para 9.

15 YN1 at para 10.

16 YN1 at para 10.

17 CB at p 108.

18 CB at pp 124–153; YN1 at para 10.

19 CB at p 146.

> including a dispute regarding the existence, validity or termination of this Agreement or the consequences of its nullity.

11 On 1 February 2020, 6DM and ABA entered into a third party distribution agreement (the "ABA Agreement").[20] The ABA Agreement contained the following clause on governing law and jurisdiction:[21]

> 22.1 This Agreement is governed by the laws of England and Wales.
>
> 22.2 Each party irrevocably agrees that the courts of England and Wales have exclusive jurisdiction to settle any dispute or matter arising under or in connection with this Agreement, including a dispute regarding the existence, validity or termination of this Agreement or the consequences of its nullity.

12 I will refer to the AEBK Agreement, the APB Agreement and the ABA Agreement as the "distribution agreements"; and to clause 22.2 in each of the agreements as the "exclusive jurisdiction clause" (the "EJC").

Termination of the AEBK, APB and ABA Agreements

13 Between 6 and 7 July 2020, the Asahi Entities terminated the AEBK Agreement,[22] the APB Agreement[23] and the ABA Agreement[24] on the basis that 6DM had neglected and/or failed to make full payment on invoices under the distribution agreements dating back to 2017. According to 6DM, the termination of these agreements was (*inter alia*) contrary to the representations made by the Asahi Entities,[25] *ie*, that debts owed by 6DM to the Asahi Entities

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20 CB at pp 157–189; SOC at para 13; YN1 at para 10.

21 CB at p 178.

22 CB at pp 462–464.

23 CB at pp 467–469.

24 CB at pp 465–466.

25 SOC at para 46.

need only be paid when the Arrangement was finalised,[26] and/or in breach of the implied agreement and/or collateral contract between the Asahi Entities and itself.[27]

14 On 2 October 2020, 6DM commenced Suit 951 for the loss and damage allegedly caused by the Asahi Entities' and Bogna's various breaches. On 4 December 2020, 6DM was granted leave to serve the writ out of jurisdiction on the defendants. The Asahi Entities issued the Statutory Demand to 6DM on 22 January 2021. On 10 February 2021, the Asahi Entities filed SUM 665 in Suit 951. 6DM commenced OS 138 on 15 February 2021 to injunct the Asahi Entities and ABGG from commencing winding-up proceedings against 6DM on the basis of the Statutory Demand (see [3] above).

The parties' cases

15 6DM's position on whether the dispute in Suit 951 is one "arising under or in connection with" the distribution agreements has shifted more than once in the course of the proceedings before me. In its written submissions of 20 May 2021, 6DM argued that the dispute in Suit 951 fell outside the scope of the distribution agreements and that the EJCs in these agreements were therefore irrelevant to the dispute.[28] However, in its further submissions of 3 June 2021, 6DM stated that it would no longer pursue this argument.[29] In the light of this express concession, it was surprising that in its final submissions on 13 September 2021, 6DM again reprised the argument that the dispute in Suit 951

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26 SOC at para 27.

27 SOC at paras 60 and 62.

28 6DM's Written Submissions dated 20 May 2021 ("PWS2") at paras 134, 139.

29 6DM's Written Submissions dated 3 June 2021 ("PWS3") at para 20.

did not arise under or in connection with the distribution agreements.[30] 6DM did not explain in its submissions of 13 September 2021 the reasons for this *volte-face*. I will approach its case in SUM 665 on the basis that it *is* alleging that the present dispute falls outside the scope of the distribution agreements and that the EJCs in these agreements are irrelevant to the dispute.

16 Even if the present dispute is found to arise under or in connection with the distribution agreements, 6DM argues that:

(a) The EJC in the AEBK Agreement which refers to "local courts" is a reference to the "Singapore courts" and is therefore an EJC in favour of the Singapore courts.[31] 6DM argues that this means sections 11(1) and 11(2) of the CCAA apply; and that properly construed, these provisions require the Singapore courts to exercise jurisdiction over the entirety of the present dispute, notwithstanding the EJCs in the APB and ABA Agreements which are expressly in favour of the courts of England and Wales.[32] Indeed, according to 6DM, the EJC in the AEBK Agreement should be enforced "at the expense of" the EJCs in the APB and the ABA Agreements. 6DM claims that to do otherwise would be "[t]o split up this dispute for different courts to hear, and risk inconsistent findings of fact" which "would constitute manifest injustice and/or would be manifestly contrary to the public policy of Singapore, within the meaning of the CCAA".[33]

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30 6DM's Written Submissions dated 13 September 2021 ("PWS4") at paras 8, 11(c).

31 PWS2 at para 141.

32 PWS2 at paras 150–151.

33 PWS2 at para 165.

(b) 6DM further argues that even if I were to find that the reference to "local courts" in clause 22.2 of the AEBK Agreement is a reference to the "courts of England and Wales", I should nevertheless decline to stay or dismiss Suit 951. Again, this is because (according to 6DM) a stay or a dismissal of Suit 951 would result in a multiplicity of proceedings and/or constitute a breach of natural justice: "there would be no certainty that 6DM would be able to join [Federico Bogna], or that the courts of England and Wales would assume jurisdiction over [Federico Bogna]".[34]

(c) If all else fails, I should decline to stay or dismiss Suit 951 on the basis that the Asahi Entities have submitted to the Singapore courts' jurisdiction when they issued the Statutory Demand under Singapore law and sought recourse in the Singapore courts.[35]

(d) As for OS 138, 6DM contends that there are triable issues warranting the grant of an injunction against the commencement of winding-up proceedings by the Asahi Entities.[36]

17 As for the Asahi Entities, they argue that:

(a) Their service of the Statutory Demand[37] and/or their invitation to the Singapore courts to make a finding whether any triable issues exist

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34 PWS3 at paras 19, 31(a) and 31(c).

35 PWS3 at paras 34–35.

36 PWS2 at para 184.

37 Asahi Entities' Written Submissions dated 22 April 2021 ("DWS1") at paras 154–155.

in OS 138 and/or Suit 951[38] do not constitute a submission to the jurisdiction of the Singapore courts.

(b) In any event, according to the Asahi Entities, the dispute in Suit 951 clearly arises under or in connection with the three distribution agreements. This means that the EJCs in all three distribution agreements are engaged; and it is the Asahi Entities' case that all three EJCs are in favour of the courts of England and Wales. Section 12(1) of the CCAA therefore applies to the EJCs in question; and 6DM has not shown that giving effect to the EJCs would lead to manifest injustice or would be manifestly contrary to the public policy of Singapore within the meaning of section 12(1)(*c*) of the CCAA.[39] The Asahi Entities contend that in the circumstances, I am required by section 12(1) to dismiss or stay Suit 951 in favour of the courts of England and Wales.

(c) As for OS 138, the Asahi Entities say that there are no triable issues to justify the injunction sought by 6DM; and that in any event, I should exercise my discretion to refuse the injunction sought because 6DM has not come to the court with clean hands.[40]

Parties' further submissions on full and frank disclosure

18 In addition to the above, an issue arose in SUM 665 as to whether 6DM had breached its duty of full and frank disclosure in the course of its *ex parte* application for leave to serve the writ out of jurisdiction in HC/SUM 5295/2020

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38 Asahi Entities' Written Submissions dated 28 April 2021 ("DWS2") at paras 9–11.

39 DWS2 at paras 12, 15; Asahi Entities' Written Submissions dated 20 May 2021 ("DWS3") at para 26.

40 DWS1 at paras 5–6.

("SUM 5295"). The supporting affidavit of 3 December 2020 – filed by Adrian Sim (the "3 December 2020 Affidavit") – stated at [42]:

> In the interests of full disclosure, under each of the Agreements, there are exclusive jurisdiction clauses providing that the Agreements are governed by English law: see paragraph 22.2 of the AEBK Agreement, the APB Agreement and the ABA Agreement (collectively exhibited at SYM-1). Nevertheless, I am advised that 6DM's claims do not arise under or are in connection with the Agreements, and the exclusive jurisdiction clauses are thus irrelevant to the present Suit.

19 Copies of the three distribution agreements were included as exhibits in the 3 December 2020 Affidavit. However, the 3 December 2020 Affidavit did not reproduce the three EJCs – or clause 22 – in the text of the affidavit. Nor was it stated anywhere in the affidavit that the EJCs were either in favour of "the courts of England and Wales" or "the local courts". No written submissions were filed in respect of SUM 5295, nor did counsel attend before the Assistant Registrar who granted the Leave Order.

20 In their original submissions, neither side addressed the issue of whether 6DM had complied with its duty to make full and frank disclosure of all material facts in its *ex parte* application for the Leave Order. I asked parties to address me on whether 6DM's omission to address expressly the existence and effect of the EJC in each of the distribution agreements amounted to a breach of its duty to make full and frank disclosure of all material facts in SUM 5295; further, in the event there was a breach, what the effect of such breach might be on the Asahi Entities' application in SUM 665.

The issues in contention

21 Having regard to the case put forward by 6DM and by the Asahi Entities respectively, the following issues arise for my determination:

(a) In SUM 665:

(i) Whether the dispute in Suit 951 arises under or in connection with the distribution agreements;

(ii) Whether the EJC in the AEBK Agreement is in favour of the Singapore courts or the courts of England and Wales. *Inter alia*, this raises the question of whether the standard of a "good arguable case" – which is the standard of review at common law for a stay of proceedings based on an EJC – also applies to applications for a stay or dismissal of proceedings pursuant to section 12(1) of the CCAA;

(iii) If the EJC in the AEBK Agreement is found to be in favour of the courts of England and Wales (*ie* similar to the EJCs in the APB and the ABA Agreements), whether 6DM is able to show that giving effect to the EJCs in the distribution agreements would lead to manifest injustice or would be manifestly contrary to the public policy of Singapore within the meaning of section 12(1)(*c*) of the CCAA;

(iv) Conversely, if the EJC in the AEBK Agreement is found to be in favour of the Singapore courts, whether sections 11(1) and 11(2) of the CCAA apply in such a way that this EJC should be enforced "at the expense" of the EJCs in the APB and the ABA Agreements;

(v) Whether the Asahi Entities had submitted to the Singapore court's jurisdiction by reason of their service of the Statutory Demand and/or their conduct in OS 138 and/or in Suit 951;

(vi) Whether 6DM had breached its duty to make full and frank disclosure when seeking leave to serve the writ out of jurisdiction in SUM 5295;

(b) In OS 138:

(i) Whether 6DM has raised triable issues in OS 138, *ie*, that there exists a substantial and *bona fide* dispute, whether in relation to a cross-claim or disputed debt, warranting the grant of an injunction restraining the Asahi Entities from commencing winding-up proceedings.

SUM 665

The applicable legal principles under section 12 of the CCAA

22 Turning to SUM 665 and the Asahi Entities' prayer for a stay of dismissal of the Suit 951 proceedings pursuant to section 12 of the CCAA, I consider first the legal principles governing such an application.

23 At common law, where an application is made to stay proceedings on the basis that the dispute is subject to an EJC in favour of a foreign jurisdiction, the court will engage in a two-stage analysis to determine if a stay ought to be granted. At the first stage, the party seeking to rely on the EJC bears the burden of showing a "good arguable case" that an EJC exists and governs the dispute in question: *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 ("*Vinmar*") at [45]; *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2020 Reissue) ("*Halsbury's*") at para 75.112. To establish a "good arguable case" that a jurisdiction agreement governs the dispute in an EJC application, the applicant must have the better of the argument, on the evidence before the court, that the agreement exists and applies to the dispute.

This formulation reflects that the threshold is more than a mere *prima facie* case, but is different from the standard of a balance of probabilities given the limits inherent in the stage at which the application is being heard. In determining whether the applicant has established a good arguable case, the court may grapple with questions of law but should not delve into contested factual issues: *Vinmar* at [45] and [46]. As for the second stage of the analysis, this requires the party in breach of the EJC to demonstrate "strong cause amounting to exceptional circumstances" why he should not be held to the jurisdiction agreement: *Vinmar* at [112]; *Halsbury's* at para 75.121.

24 The question then is whether the common law test as set out above should apply to applications under section 12 of the CCAA. I reproduce below section 12 of the CCAA:

> **Where Singapore court is not chosen court**
>
> **12.—**(1) Despite any other written law or rule of law, if an exclusive choice of court agreement does not designate any Singapore court as a chosen court, a Singapore court must stay or dismiss any case or proceeding to which the agreement applies, unless the Singapore court determines that —
>
> (*a*) the agreement is null and void under the law of the State of the chosen court;
>
> (*b*) a party to the agreement lacked the capacity, under the law of Singapore, to enter into or conclude the agreement;
>
> (*c*) giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of Singapore;
>
> (*d*) the agreement cannot reasonably be performed for exceptional reasons beyond the control of the parties to the agreement; or
>
> (*e*) the chosen court has decided not to hear the case or proceeding.
>
> (2) This section does not affect the ability of a Singapore court to stay or dismiss the case or proceeding on other grounds.

Adopting the "good arguable case" standard

25 Following from the manner in which section 12 of the CCAA is formulated, it would appear applications under section 12(1) for a stay or dismissal of proceedings fall to be considered in two stages. First, the court has to consider whether there exists an exclusive choice of court agreement (which, for ease of reference, I will also refer to as an "EJC") which does not designate Singapore as a chosen court and which applies to the case or proceeding in which the section 12(1) application is made. This is the first stage of the analysis. If the court is satisfied that there is such an EJC before it, it *must* stay or dismiss the case or proceeding, unless it is shown that one of the five exceptions set out in section 12(1) applies. This is the second stage of the analysis.

26 I asked both parties for submissions on whether the "good arguable case" standard at the first stage of the *Vinmar* test should apply to the first stage of the analysis for applications under section 12(1) of the CCAA. A possible alternative approach to *Vinmar* is the approach taken by our courts in the context of arbitration, whereby a court hearing a stay application should grant a stay in favour of arbitration if the applicant is able to establish a *prima facie* case (*per* the Court of Appeal ("CA") in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*") at [63]) that:

> (a) there is a valid arbitration agreement between the parties to the court proceedings;
>
> (b) the dispute in the court proceedings (or any part thereof) falls within the scope of the arbitration agreement; and
>
> (c) the arbitration agreement is not null and void, inoperative or incapable of being performed.

On the *Tomolugen* approach, once this burden has been discharged by the party applying for a stay, the court should grant a stay and defer the actual determination of the arbitral tribunal's jurisdiction to the tribunal itself (at [64]).

27 In considering the standard of review to be applied in the context of section 12 of the CCAA, it should be remembered that section 12 was based on Art 6 of the 2005 Convention on Choice of Court Agreements (the "Hague Convention"); and in interpreting the various provisions of the Hague Convention, a highly relevant and useful source of reference is the *Explanatory Report on the 2005 Hague Choice of Court Agreements Convention (2013)* published by the Hague Conference on Private International Law ("the Hartley/Dogauchi Report").

28 On the question of the standard of review to be adopted in determining whether there is an EJC which applies to the proceedings before the court seised and which does not designate the court seised as the chosen court, the Hartley/Dogauchi Report is inconclusive as to the appropriate approach. Para 144 of the Hartley/Dogauchi Report describes the obligations of a court not chosen under Art 6 of the Hague Convention as such:

> Article 6 requires the court to suspend or dismiss "proceedings to which an exclusive choice of court agreement applies". To determine whether the proceedings are subject to such an agreement, the court must interpret it. Under Article 3 a) of the Convention, the agreement applies to disputes "which have arisen or may arise in connection with a particular legal relationship". *In interpreting the agreement, the court must decide what that relationship is, and which disputes the agreement applies to.* It must decide, for example, whether a choice of court clause in a loan agreement applies to a tort action by the borrower against the lender for enforcing the agreement in an allegedly abusive manner.
>
> [emphasis added]

29 While para 144 of the Hartley/Dogauchi Report makes it clear that the court seised (but not chosen) is responsible for deciding whether an EJC exists and whether it governs the dispute in question, it does not indicate the standard of review to be adopted by the court in coming to its decision. The parties have also been unable to locate any authorities that address this issue. Accordingly, I rely on first principles in considering the appropriate approach in the context of section 12(1) of the CCAA.

30 In *Tomolugen*, one of the key reasons for the adoption of the *prima facie* approach was the *kompetenz-kompetenz* principle found in Art 16 of the UNCITRAL Model Law on International Commercial Arbitration (at [26] and [67]). The CA in *Tomolugen* was of the view that allowing (and, indeed, obliging) the court seised of jurisdiction to make a full determination on the existence and scope of the arbitration clause would deprive the putative arbitral tribunal of its *kompetenz-komptenz* (at [67]). Instead, the CA held that "the arbitral tribunal is to be the first arbiter of its own jurisdiction, *with the court having the final say*" [emphasis added] (at [66]). Thus, while the arbitral tribunal will determine the existence and scope of its own jurisdiction, its determination will "nonetheless remain subject to overriding court supervision in the form of an appeal under s 10(3) of the [International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA")] against the arbitral tribunal's jurisdictional ruling" (at [64]).

31 Quite apart from the fact that there is no equivalent principle of *kompetenz-kompetenz* in the context of EJCs, there is also no equivalent appeal process. It is simply not possible in the context of EJCs to say that the chosen court – defined in section 2(1) of the CCAA as "a court, of a Contracting State, designated in an exclusive choice of court agreement" – is to be the first arbiter of its own jurisdiction and for the court seised (but not chosen) to have the final

say. Once a court seised decides to stay or dismiss the proceedings on the grounds of section 12 of the CCAA, the chosen court's determination of its jurisdiction cannot be appealed by way of recourse to the court seised.

32 In addition to the above considerations, it should be remembered that the initial question of whether an EJC exists and if so, which jurisdiction it favours, not only determines whether the CCAA is applicable in the first place, but also determines whether section 11 of the CCAA (where the EJC is in favour of a Singapore court), or section 12 of the CCAA (where the EJC is in favour of another court, not a Singapore court), applies. As the CA in *Vinmar* explained (at [44]), "[i]n an EJC Application, the context is that the applicant is inviting the court not to exercise its otherwise valid jurisdiction over the dispute. In the circumstances, a relatively robust test is apposite, albeit it must require less than the test of a balance of probabilities given the interlocutory nature of the application."

33 I add that in the first stage of a stay application under section 12(1) of the CCAA, the issue to be considered by the court is similar to the issue to be considered under the common law in the first stage of an application for a stay based on an EJC. It makes sense, therefore, that a similar approach is applied in both instances. In this connection, I note that in the context of recognition of foreign judgments, the CA in *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* [2021] 1 SLR 1102 has held that "[w]here the defences to the recognition of foreign judgments are concerned … it is in principle desirable that there be broad convergence in the defences available under the common law and under statutes such as the CCAA and the REFJA"; and this is "especially so in respect of the CCAA, which gives effect to the [Hague Convention]" (at [37]).

34 For the above reasons, I find that in the context of section 12(1) of the CCAA, a relatively robust approach is appropriate at the first stage of the analysis when determining whether an EJC exists and whether it governs the dispute in question. I therefore adopt the same approach as that set out in *Vinmar*. This means that the party applying under section 12(1) for a stay or dismissal of the case of proceedings has to show a "good arguable case" that an EJC exists and governs the dispute in question.

Displacing the common law test of "strong cause"

35 At common law, once the party seeking to rely on a purported EJC establishes a good arguable case that the EJC exists and governs the dispute in question, the onus at the second stage of the analysis shifts to the party in breach of the EJC to show "strong cause amounting to exceptional circumstances" why he should not be held to the jurisdiction agreement. Under the CCAA, however, the test applicable at this stage to applications for a stay or dismissal of proceedings under section 12(1) is a different one. In the Explanatory Statement in the Choice of Court Agreements Bill (Bill No. 14/2016) (the "Bill"), it was stated that:

> Clause 12 provides that if an [exclusive choice of court agreement] does not designate any Singapore court as a chosen court, a Singapore court must stay or dismiss the case or proceeding to which the agreement applies, unless the Singapore court determines that any of certain circumstances mentioned in that clause applies. However, that clause does not affect the ability of a Singapore court to stay or dismiss the case or proceeding on other grounds.

36 From the wording of section 12 of the CCAA as well as the Explanatory Statement, it is clear that where an EJC does not designate any Singapore court as a chosen court, a Singapore court *must* stay or dismiss the case or proceeding to which the agreement applies, *unless* one of the five exceptions stipulated in

section 12(1) of the CCAA applies. Section 12(2) of the CCAA provides that this does not affect the ability of a Singapore court to stay or dismiss the case or proceeding on other grounds. Reading both subsections together, while a Singapore court may choose to stay or dismiss the case or proceeding on other grounds, the grounds on which it may choose *not* to stay or dismiss the case or proceeding are closed, *ie*, limited to the five exceptions set out in section 12(1). I note as well that like section 6(2) of the IAA (and unlike section 6(2) of the Arbitration Act (Cap 10, 2002 Rev Ed)), section 12 of the CCAA is framed in mandatory terms: the court has no discretion to refuse a stay if an applicable EJC does not designate any Singapore court as a chosen court and if none of the five stated exceptions in section 12(1) applies.

37 The above conclusion is supported by Art 6 of the Hague Convention, on which section 12 of the CCAA was based. In the commentary on Art 6 at para 141 of the Hartley/Dogauchi Report, it is stated that:

> Article 6 is the second "key provision" of the Convention. Like other provisions, it applies only if the choice of court agreement is exclusive and only if the chosen court is in a Contracting State. It is addressed to courts in Contracting States other than that of the chosen court, and requires them (*except in certain specified circumstances*) not to hear the case, *i.e.* to suspend or dismiss the proceedings, *even if they have jurisdiction under their national law*. This obligation is essential if the exclusive character of the choice of court agreement is to be respected.
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> [emphasis added]

38 The effect of section 12 of the CCAA is thus to override "any other written law or rule of law" in Singapore that might, in the absence of the EJC, permit the court to exercise jurisdiction over a case or proceeding to which the EJC applies. In other words, for the purpose of an application under section 12(1) of the CCAA, it does not suffice for the party resisting a stay of the Singapore proceedings to show that there is "strong cause" to refuse a stay – or

that the applicant had submitted to the jurisdiction of the Singapore courts pursuant to section 16(1)(*b*) of the SCJA – if he cannot bring himself within one of the five exceptions specified in section 12(1). Paras 145–146 of the Hartley/Dogauchi Report put the position beyond doubt:

> 145 If the proceedings are covered by an exclusive choice of court agreement, the court must either suspend or dismiss them, unless one of the exceptions applies.
>
> 146 **Five exceptions.** Article 6 lays down five exceptions to the rule that the proceedings must be suspended or dismissed. Where one of the exceptions applies, the prohibition against hearing the case is lifted. The Convention does not then prevent the court from exercising such jurisdiction as it may have under its own law. Article 6 does not, however, create a Convention-based ground of jurisdiction, nor does it *require* the court seised to exercise any jurisdiction that exists under its law: the law of the court seised determines whether or not it has jurisdiction and whether or not it can exercise that jurisdiction.
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> [emphasis in original]

39 In sum: in an application for dismissal or stay of proceedings pursuant to section 12(1) of the CCAA, it is for the party seeking to rely on the purported EJC to show a "good arguable case" that an EJC exists and governs the dispute in question. Once the applicant has done so, the Singapore court is *required* (except in the circumstances specified in section 12(1)) *not* to hear the case, *ie*, to stay or dismiss the proceedings – even if it has jurisdiction under national law.

Whether the EJC in the AEBK Agreement is in favour of the Singapore courts or the courts of England and Wales

40 On the issue of whether the EJC in the AEBK Agreement favours the Singapore courts or the English courts, 6DM's position has also shifted significantly in the course of these proceedings. Paragraph 136 of 6DM's 1st Written Submissions dated 22 April 2021 stated in no uncertain terms that

"6DM does not dispute that the Agreements are governed by English law and contain exclusive jurisdiction clauses in favour of the English courts (Clause 22 in each of the Agreements)".[41] However, at the oral hearing on 29 April 2021 and in its further written submissions, counsel for 6DM argued that although the contracting parties for the AEBK Agreement had nominated English law as the governing law, the EJC in the AEBK Agreement was an EJC in favour of the Singapore courts because the reference in that EJC to "local courts" was actually a reference to "Singapore courts".[42] 6DM argued that since the parties to the AEBK Agreement had used the expression "English law" in clause 22.1 of the agreement, they could and would simply have used the expression "the courts of England and Wales" in clause 22.2 had they truly intended to refer to the English courts – and since they did not, they must be taken to have intended to refer to a court other than the English courts.[43] In arguing that the words "local courts" in clause 22.2 must mean the Singapore courts, 6DM pointed to clause 9.3 of the AEBK Agreement in which the expression "Local Regulations" was used. In clause 9.3, "Local Regulations" is defined as "all laws and regulations affecting the distribution of the Products in the Territory"; and "Territory" in turn is defined in clause 1.1 as "Singapore Domestic".[44] In other words, since the words "Local Regulations" in clause 9.3 refer to laws and regulations affecting the distribution of the products in Singapore, the words "local courts" in clause 22.2 must refer to the courts of Singapore.

41 On the other hand, the Asahi Entities argued that the words "local courts" in clause 22.2 of the AEBK Agreement should be construed with

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41 6DM's Written Submissions dated 22 April 2021 ("PWS1") at para 136.

42 PWS2 at para 141.

43 PWS2 at para 146.

44 PWS2 at para 144.

reference to clause 22.1, which provided for the AEBK Agreement to be governed by English law. According to the Asahi Entities, this strongly suggested that the parties always intended for the English courts to adjudicate any disputes arising under or in connection with the AEBK Agreement.[45] The Asahi Entities also argued that 6DM's attempt to rely on clause 9.3 in the construction of the words "local courts" in clause 22.2 was "an afterthought" without any merit.[46]

42 For the purposes of interpreting the EJC in clause 22.2 of the AEBK Agreement, "[t]he law which governs the contract will also generally govern the jurisdiction agreement" (*per* the CA in *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 (*Shanghai Turbo*") at [54]). As seen above, clause 22.1 provides that English law is the governing law. Applying the principles of contractual interpretation established in English law, I note firstly that "the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant"; and in this connection, the relevant reasonable person is one who has "all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract": *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 ("*Investors Compensation Scheme*") at p 912H; *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 ("*Rainy Sky*") at [14]; *Hin-Pro International Logistics Ltd v Compania Sud Americana de Vapores SA* [2015] EWCA Civ 401 ("*Hin-Pro*") at [57].

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45 DWS3 at paras 37, 39.

46 DWS3 at para 27.

43 While English law excludes from the admissible background the parties' previous negotiations and their declarations of subjective intent, it includes *prior* contracts between the parties: per the English Court of Appeal (Civil Division) in *HIH Casualty & General Insurance Ltd v New Hampshire Insurance Co* [2001] EWCA Civ 735 ("*HIH Insurance*") (at [81] to [84]). In *KPMG LLP v Network Rail Infrastructure Limited* [2007] EWCA Civ 363 ("*KPMG LLP*"), the English Court of Appeal ("English CA") had to interpret a lease dated 11 July 1985 ("the 1985 lease") which followed generally the form of a draft lease attached to an agreement dated 13 December 1974 ("the 1974 Agreement"). The English CA held that in interpreting the 1985 lease, "the 1974 [A]greement, including the form and content of the draft lease attached to it, was an important part of the background and is a permissible aid in the construction of the lease in its final form". It concluded that "something ha[d] gone wrong" with the drafting of the 1985 lease, and that the proposed interpretation based on the 1974 Agreement was "a better reflection of the parties' intentions".

44 Applying the above principles to the present case, I find firstly that 6DM's attempt to rely on clause 9.3 as an aid to the interpretation of clause 22.2 is tenuous at best. The term "Local Regulations" is expressly and clearly defined in clause 9.3 itself as the "laws and regulations affecting the distribution of the Products in the Territory" (*ie*, in Singapore); whereas in clause 22.2, there is no similar definition of the term "local courts".

45 I find, on the other hand, that the background to the AEBK Agreement – specifically, the 2013 DA between 6DM and SABMiller – provides a helpful guide to the parties' intention *vis-à-vis* clause 22.2 of the AEBK Agreement. The 2013 DA is inevitably part of the factual matrix of the AEBK Agreement. 6DM does not dispute that the AEBK Agreement was a renewal of the 2013 DA

between 6DM and SABMiller: indeed, it is pleaded as such in 6DM's statement of claim.[47] It is not disputed that these agreements were based on SABMiller's standard form template.[48] When the AEBK Agreement was entered into on 1 April 2016, the parties to the said agreement were still 6DM and SABMiller[49]: it was only subsequent to 1 April 2016 that SABMiller changed its name to ABE (in July 2017), and that ABE's rights and obligations under the AEBK Agreement were assumed by AEBK (on 1 January 2018). 6DM also does not dispute that the 2013 DA contained an EJC in favour of "the courts of England and Wales".[50] While 6DM has argued that the use of the words "local courts" in clause 22.2 in the AEBK Agreement suggests "the parties made the conscious decision to confer exclusive jurisdiction on a court other than the courts of England and Wales",[51] this suggestion of a "conscious decision" is not borne out by the affidavit evidence – which includes the multiple affidavits of 6DM's Adrian Sim. On the contrary, given that the parties agree the AEBK Agreement was an agreement to "renew [the] existing distribution arrangement [between 6DM and SABMiller]"[52], it does not appear to me to make any commercial sense for the parties to have "consciously decided" – in relation to the choice of court in clause 22.2 – to switch to a court other than the courts of England and Wales.

46 This is all the more so when one considers that the AEBK Agreement continued to adopt English law as the governing law, and that these agreements

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47 SOC at paras 8–9; PWS2 at para 145; DWS3 at para 35.

48 YN1 at paras 16–17.

49 CB at p 88.

50 CB at p 74; PWS2 at para 145.

51 PWS2 at para 145.

52 SOC at para 9.

were based on SABMiller's standard form template.[53] On the one hand, the English courts have held that England is the best forum for the application of its own law: see for example the judgment of the English CA in *Hin-Pro* at [66]. On the other hand, the number of courts that might have jurisdiction over a dispute is at least as large as the range of countries in which the relevant beer products might be distributed. Some countries are likely not to apply English law despite clause 22.1; some might apply it in an idiosyncratic manner: SABMiller could not have predicted with any certainty how the courts in each country where its products were distributed would respond. In the circumstances, it made no commercial sense for it to have consciously decided on 1 April 2016 to switch the choice of court in clause 22.2 to a court other than the courts of England and Wales.

47 For the reasons set out above at [40] to [46], I accept that the Asahi Entities have made out a good arguable case that the EJC in clause 22.2 of the AEBK Agreement is an EJC in favour of the courts of England and Wales.

Whether the dispute in Suit 951 arises under or in connection with the distribution agreements

48 6DM's next argument is that even if the EJC in the AEBK Agreement is found to be in favour of the courts of England and Wales, section 12(1) of the CCAA is nevertheless not engaged because the dispute in Suit 951 does not arise under or in connection with the distribution agreements, and is therefore not a case or proceeding to which the distribution agreements apply. As I noted earlier, this argument is one which 6DM first advanced in its submissions of 20 May 2021 and then expressly abandoned in its submissions of 13 June 2021 – only to reprise in its final submissions of 13 September 2021. In gist, 6DM

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[53] YN1 at paras 16–17.

argues that the dispute in Suit 951 falls outside the scope of the distribution agreements because "[n]one of 6DM's causes of action involve the enforcement of any contractual term in the Agreements".[54] In particular, 6DM argues that its claims in fraudulent misrepresentation and conspiracy should not be governed by the EJCs in the distribution agreements, citing the High Court's judgment in *Ong Ghee Soon Kevin v Ho Yong Chong* [2016] SGHC 277 ("*Ong Ghee Soon Kevin*"). Specifically, 6DM contended that the High Court in *Ong Ghee Soon Kevin* had "remarked that there is 'scant authority' on whether Singapore private international law rules would give effect to contractual choice of law clauses for tort claims".[55]

49 With respect, in citing *Ong Ghee Soon Kevin*, 6DM has selectively quoted one line from the High Court's judgment without referencing the context in which that line appeared or, for that matter, the rest of the judgment and/or the actual outcome in that case. In *Ong Ghee Soon Kevin*, the dispute was between the customer of a bank (the plaintiff) and the bank's designated officer (the defendant) who had liaised with the plaintiff. The plaintiff claimed that the defendant had induced him to purchase certain shares by making certain representations. The defendant sought, *inter alia*, to rely on the choice of law clause in the general conditions of the bank's contract with the plaintiff, which provided that relations between the bank and its customers were subject to Swiss law, and asserted that under Swiss law, the plaintiff's claim against him was not actionable. The interpretation of the choice of law clause was governed by Swiss law as the proper law of the contract between the bank and the plaintiff; whereas the question of whether a contractual choice of law clause for torts would be given effect in Singapore courts depended on Singapore private international

54 PWS2 at para 134.

55 PWS2 at para 135.

law rules. It was in dealing with the defendant's attempt to rely on the choice of law clause that the High Court remarked that there was "scant authority" on whether Singapore private international law rules would give effect to contractual choice of law clauses for tort claims. What 6DM has failed to point out in its written submissions, however, is that the High Court went on to note the existence of academic commentary which supported the view that "when the relationship between the parties is primarily contractual, causes of action relating to the contract should also be governed by the proper law of the contract". The High Court also noted that in *Rickshaw Investments and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377, the CA had held that the appellants' equitable claims centering around allegations of breach of fiduciary duty as well as breach of confidence arose from a legal relationship established by an employment contract and were hence governed by the law of the underlying contract (German law); and that in *Thahir Kartika Ratna v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR(R) 312, the CA had referred to the rule that where a restitutionary obligation arises in connection with a contract, the proper law of the restitutionary obligation is the proper law of the contract. On the facts of *Ong Ghee Soon Kevin* itself, the High Court found that the choice of law clause in the bank's general conditions was drafted widely enough to encompass tortious obligations, but it also held that in any event, the defendant – being a third party to the bank's contract with its customer – could not rely on and take the benefit of the choice of law clause. It cautioned, therefore, that the views it had stated on the application of Singapore private international law rules to contractual choice of law clauses for torts were "provisional" (at [107]–[111]).

50 Having selectively cited one line from the High Court's judgment in *Ong Ghee Soon Kevin*, 6DM has also regrettably failed to explain how the judgment

supports its argument that the EJCs in the distribution agreements are irrelevant to Suit 951 because the dispute in Suit 951 falls outside the scope of the distribution agreements. With respect, 6DM has also failed to address other relevant authorities.

51 In *Fiona Trust & Holding Corporation and others v Privalov and others* [2007] UKHL 40 ("*Fiona Trust*"), the House of Lords held that in interpreting an arbitration clause, it is presumed that parties are rational businessmen and would thus have intended any claims (including non-contractual claims) which arise out of the relationship between them to be decided by the same tribunal. An arbitration clause will be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction (see *Fiona Trust* at [13]).

52 *Fiona Trust* was cited by our CA in *Tomolugen*. In *Tomolugen*, the plaintiff, Silica Investors, and the second defendant, Lionsgate, had entered into a Share Sale Agreement whereby the plaintiff acquired from the second defendant certain shares in a company named AMRG. Silica Investors subsequently commenced a minority oppression suit against several defendants, including Lionsgate and AMRG. The CA had to consider whether part of the proceedings fell within the scope of the arbitration clause in the Share Sale Agreement, which provided that "any dispute arising out of or in connection with this Agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in Singapore". The CA held that in determining whether the disputed matters fell within the scope of the arbitration clause, the "court does not adopt a technical approach", but – *per* the House of Lords' stated approach in *Fiona Trust* – construes the clause based on the presumed intentions of the parties as rational commercial parties. As the CA put it (at [125]), "[w]hen ascertaining whether a

given matter is covered by an arbitration clause, the court must consider the underlying basis and true nature of the issue or claim, and is not limited solely to the manner in which it is pleaded".

53 Applying the above principles, the CA found that one of the disputed matters, which concerned the allegedly improper issuance of AMRG shares, could not fairly be said to arise out of or in connection with the Share Sale Agreement because the central issue therein was whether any commercial justification existed for the issuance of the shares: this was an issue which depended on whether certain liabilities had been discharged by AMRG prior to the conclusion of the Share Sale Agreement and was wholly unaffected by the Share Sale Agreement itself (*Tomolugen* at [134]). On the other hand, the other disputed matter, which concerned Silica Investors' claim regarding its alleged exclusion from participation in AMRG's management, was held to be a matter falling squarely within the ambit of the arbitration clause in the Share Sale Agreement, as Silica Investors' only basis for asserting that there was an understanding of a legitimate expectation that it would participate in AMRG's management was the Share Sale Agreement (*Tomolugen* at [136]). In other words, although Silica Investors' claim regarding exclusion from management participation was pleaded as part of a minority oppression action, it was found to be a "dispute arising out of or in connection with the [Share Sale] Agreement".

54 In the present case, it is not disputed that the relationship between 6DM and the Asahi Entities is a contractual one, based on the distribution agreements entered into between them. 6DM's various causes of action against the Asahi Entities in Suit 951 are pleaded as follows. First, 6DM claims that the Asahi Entities made various fraudulent misrepresentations (through Bogna and one Mr Choo Kinyi) to it: 6DM claims that it entered into the distribution

agreements with the Asahi Entities in reliance on these misrepresentations and that it continued to promote, market and distribute the Asahi Entities' products pursuant to these distribution agreements despite incurring substantial losses. In this connection, 6DM also makes claims of unlawful and/or lawful means conspiracy, alleging that the Asahi Entities and Bogna were party to a conspiracy to make the alleged misrepresentations and subsequently to terminate the distribution agreements. Further or in the alternative, 6DM claims the existence of an implied agreement and/or a collateral contract: whereas the Asahi Entities say the terms of the distribution agreements entitle them to terminate the DAs, 6DM asserts that the Asahi Entities had – pursuant to the alleged implied agreement or collateral contract – agreed not to enforce their rights under the distribution agreements. Finally, 6DM claims that the Asahi Entities are "liable in unjust enrichment": according to 6DM, it has incurred losses in marketing and distributing the various products under the distribution agreements, while the Asahi Entities have on the other hand "enjoyed the fruit" of 6DM's efforts and investment in the said products, and thereby enriched themselves.

55 6DM's claims against the Asahi Entities plainly require determination of questions relating to the circumstances in which the distribution agreements were concluded, the respective parties' rights and obligations under the distribution agreements, and whether the express terms of the distribution agreements are exhaustive of their rights and obligations. Applying the principles articulated in *Fiona Trust* and *Tomolugen*, I am unable to accept 6DM's argument that the dispute in Suit 951 does not arise under or in connection with the distribution agreements. Indeed, with respect, having regard to its assertion that the Asahi Entities are precluded from exercising their contractual right to terminate the distribution agreements, *inter alia*, because of

an implied agreement and/or a collateral contract, it seems to me disingenuous of 6DM to say that none of its causes of action in Suit 951 concern the enforcement of any terms of the distribution agreements.

56 Finally, I note that in its submissions of 13 September 2021, 6DM has argued that the EJCs in the distribution agreements do not apply to Suit 951 because one of the parties to Suit 951 – Bogna – was not a party to the distribution agreements and is not bound by the EJCs in these agreements.[56] This argument is also without merit. While it is true that Bogna is not bound by the EJCs in these distribution agreements, the EJCs are still binding as between 6DM and the Asahi Entities – and any case or proceeding which 6DM brings against the Asahi Entities, to which the EJCs apply, must be stayed or dismissed vis-à-vis the Asahi Entities, unless the court determines that one of the exceptions in section 12(1) of the CCAA applies. In fact, para 143 of the Hartley/Dogauchi Report expressly considered how the Hague Convention would work in multi-party cases; and from the example given, it is clear that notwithstanding the presence of a third party who is not bound by the EJC, the EJC will nevertheless be binding as between the parties to it, and a court will be required to suspend or dismiss any proceedings between those parties:

> The following example illustrates how the Convention can work in multi-party cases. Assume that A, who is resident in Germany, sells goods to B, who is resident in Quebec (Canada). The contract contains a choice of court clause in favour of the courts of Germany. The goods are delivered in Quebec, and B sells them to C, who is also resident in Quebec. The contract between B and C contains no choice of court clause. If C claims that the goods are defective, he can sue B in Quebec. He could also sue A (in tort) in Quebec (if the courts of Quebec have jurisdiction under their law), since the choice of court agreement would not be binding between A and C. *However, if C sues only B in Quebec, and B then wishes to join A as a third party, B will be unable to do so: the choice of court agreement is*

[56] PWS3 at para 33(a).

> *binding between A and B. Under Article 6 of the Convention, the court in Quebec will be required to suspend or dismiss any proceedings that B brings against A.* The Convention would thus override domestic law provisions that might, in the absence of the Convention, allow joinder of A in Quebec or permit the court to exercise jurisdiction over the claim against A.
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> [emphasis added]

57 Having regard to the reasons set out at [40] to [56], I am satisfied that there is a good arguable case that the EJCs in the three distribution agreements apply to Suit 951. As I have found that the EJC in the AEBK Agreement is in favour of the English courts and as the EJCs in the APB and the ABA Agreements are also in favour of the English courts, section 12(1) of the CCAA is engaged. This means that I must dismiss or stay the proceedings in Suit 951, unless I determine that one of the five stated exceptions in section 12(1) applies.

Whether giving effect to the EJCs would result in manifest injustice or would be manifestly contrary to the public policy of Singapore

58 6DM invokes section 12(1)(*c*) of the CCAA: it contends that giving effect to the EJCs will "lead to a manifest injustice" or will be "manifestly contrary to the public policy of Singapore". In invoking section 12(1)(*c*), 6DM relies in the main on the argument that the grant of a stay or dismissal of Suit 951 *vis-à-vis* the Asahi Entities will lead to multiple sets of proceedings in more than one jurisdiction and thus the fragmentation of the dispute.

59 At common law, where the grant of a stay would lead to the "fragmentation of a dispute across multiple jurisdictions" because the dispute involves multiple parties, some of whom are not parties to the jurisdiction agreement, "the risk of duplicative proceedings, inconsistent findings and incentivising a rush to judgment may well establish strong cause to refuse a stay": *per* the CA in *Vinmar* (at [139]).

60 However, in an application for a stay or dismissal of proceedings pursuant to section 12(1) of the CCAA, the test is very different. As seen above, 6DM has to establish that the alleged risk of multiplicity of proceedings will "lead to a manifest injustice" or will be "manifestly contrary to the public policy of Singapore" within the meaning of section 12(1)(*c*); and the threshold for establishing either limb of this exception is a high one. This is made abundantly clear in the Hartley-Dogauchi Report in the commentary on the third exception to Article 6 of the Hague Convention (on which section 12(1)(*c*) was based) (at paras 151 to 153):

> **The third exception (first limb): manifest injustice.** … The phrase "manifest injustice" could cover the exceptional case where one of the parties would not get a fair trial in the foreign State, perhaps because of bias or corruption, or where there were other reasons specific to that party that would preclude him or her from bringing or defending proceedings in the chosen court. It might also relate to the particular circumstances in which the agreement was concluded – for example, if it was the result of fraud. The standard is intended to be high: the provision does not permit a court to disregard a choice of court agreement simply because it would not be binding under domestic law.
>
> **The third exception (second limb): public policy.** The phrase "manifestly contrary to the public policy of the State of the court seised" is intended to set a high threshold. It refers to basic norms or principles of that State; it does not permit the court seised to hear the case simply because the chosen court might violate, in some technical way, a mandatory rule of the State of the court seised. As in the case of manifest injustice, the standard is intended to be high: the provision does not permit a court to disregard a choice of court agreement simply because it would not be binding under domestic law.

61 Commenting on Article 6 of the Hague Convention and the exceptions to it, the authors of *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (Ronald A. Brand & Paul Herrup, Cambridge University Press, 2008) had the following observations (at pp 91–93):

> The language of this exception involves the application of three concepts: (1) giving effect to the agreement; (2) would lead to manifest injustice; and (3) would be manifestly contrary to the public policy of the State of the court seised. These phrases, individually and cumulatively, are best viewed as traffic signals cautioning the court seised that it may proceed with the case under this exception only in unusual circumstances, and with the greatest circumspection.
>
> ***…"Would lead to or be" means that a manifest injustice or a violation of public policy is highly probable in the particular case if the court seised suspends or dismisses the proceedings. This exception should not be invoked on the speculative possibility that something undesirable might happen if the choice of court agreement if honoured. A threshold level of reasonable certainty that an unacceptable result "would" result is required.***
>
> "Manifest injustice" and "manifestly contrary to the public policy of the State of the court seised" are critical concepts in private international law, and were the subject of extended discussion in the negotiations. They are separate concepts, although there may be circumstances in which they overlap…
>
> ***…"Manifest/manifestly" has been used in a number of Hague conventions on private international law, and should be given the sense of the term as used in Hague practice. That sense has two aspects: the injustice or violation of public policy must be (1) clear, and (2) extremely serious. …***
>
> "Manifest injustice" is intended to underscore the caution with which this exception should be invoked. The result must be incontrovertibly unjust from the perspective of the law and policy of the state of the court seised. The result of failure to exercise jurisdiction also must be a serious injustice as well. *Mere inconvenience* is not a ground for refusal to suspend or dismiss under the general rule of Article 6. In other words, the issue is not whether giving effect to a choice of court agreement leads to injustice as a matter of national law; whether the injustice is "manifest" is a matter to be interpreted in light of the traditional force given to the term in Hague Conventions.
>
> "Manifestly contrary to the public policy of the State of the court seised" requires additional, extended scrutiny. Even more than "injustice", the concept of "public policy" is a major topic of both private international law and public law. It plays a basic role in this Convention, as both a ground for exercising of alternative jurisdiction under Article 6(c), and a ground for refusing recognition and enforcement of a judgement under Article 9(e).

> For private international law purposes, public policy means legal policy, and does not implicate political policy of a state at a given point in time. ***As with the term manifest injustice in the same provision, whether a failure to give effect to a choice of court agreement would be contrary to public policy is a determination to be made on the basis of the law of the state of the court seised. The issue of whether the inconsistency is "manifestly" contrary to that public policy is interpreted in light of the traditional force given to the term in Hague Conventions. Thus, "manifestly contrary" means that the violation of public policy which would result from the decision in the particular case to give effect to the choice of court agreement is not an arguable violation, but must be one which is definitely recogni[s]able as such.*** **In the context of purely private litigation, a mere violation of local rules of convenience is not a violation of public policy. The violation must be of rules or policies that reflect basic choices of public order of the state of the court seised.**
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> [emphasis in original in italics; emphasis added in bold italics]

62 In *Motacus Constructions Limited v Paolo Castelli SPA* [2021] EWHC 356 ("*Motacus*"), the claimant – who had been retained by the defendant to supply and install plasterboard and other works relating to the defendant's fitting-out project – applied in the English High Court for summary judgment to enforce the decision of an adjudicator which had made an award in the claimant's favour against the defendant. The defendant's sole defence to the summary judgment application was that it had been brought in breach of a clause in the construction contract which conferred exclusive jurisdiction on the courts of Paris, France: according to the defendant, this meant that the English High Court did not have jurisdiction to determine the summary judgment application. The Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act") of the United Kingdom ("UK") governs the jurisdiction of the English courts where there is a dispute over which national court should entertain jurisdiction over a case. Following its amendment by the Private International Law (Implementation of Agreements) Act 2020 ("the 2020 Act"), such jurisdictional questions are now determined by the Hague Convention: section 1(2) of the

2020 Act inserted a new section 3D in the 1982 Act by which the Hague Convention has the force of law in the United Kingdom.

63 In *Motacus*, the claimant argued that notwithstanding the EJC in favour of the courts of Paris, the English High Court should accept jurisdiction and enforce the adjudicator's decision in the light of the provisions in either Article 6(c) or Article 7 of the Hague Convention. The claimant argued that it would be manifestly contrary to the public policy enshrined in the Housing Grants, Construction and Regeneration Act 1996 ("the 1996 Act") to refuse to enforce an otherwise enforceable adjudicator's decision. In gist, the claimant's argument was that the UK Parliament had introduced in the 1996 Act a short-form process of adjudication producing binding and readily enforceable decisions in order to address cash flow problems in the construction industry and the shortcomings of the traditional litigation process in serving the needs of the construction industry. To refuse to enforce the adjudicator's decision would – according to the claimant – be "manifestly contrary to the public policy" of ensuring speedy enforcement of adjudicators' decisions. Alternatively, it would be "manifestly unjust".

64 The claimant's attempt to invoke Article 6(c) of the Hague Convention was rejected by the court. Noting that the claimant bore the burden of persuading the court that one or other (or both) of the two limbs of that particular exception was engaged, the court held that a *high threshold* was required for this exception to be engaged – and that the claimant had not met this threshold. In so holding, the court stated (at [54]) that it accepted the defendant's submissions. These included the submission – citing *Dicey, Morris & Collins on the Conflict of Laws*, 15th Ed - that the public policy exception "is to operate only in *exceptional circumstances*" [emphasis added] (at [41]):

> … Before it may find recognition contrary to public policy, the court addressed must conclude that recognition would conflict, to an unacceptable degree, with the legal order in the State of recognition because it would infringe a fundamental principle, or would involve a manifest breach of a rule of law which is regarded as fundamental within that legal order.

65 On the evidence before it, the court in *Motacus* held that if Parliament considered "that the cashflow problems affecting the construction industry, and the consequent need to address this problem by way of a speedy mechanism for settling disputes in construction contracts on a provisional, and interim, basis, warrant a derogation from the binding character accorded to an exclusive jurisdiction clause in favour of a foreign court so as to enable an adjudicator's decision to be enforced in the English and Welsh (or Scottish) courts, then it will need to make a declaration in respect of construction contracts under and in accordance with art. 21 of the 2005 Hague Convention". The claimant had not shown that it would be contrary to public policy or unjust (let alone manifestly so) to require the claimant to enforce its adjudication award in the courts of Paris; and there was "no good reason why the parties should not be held to the bargain that they freely made when they incorporated clause 19 [the EJC] into their construction contract" (at [54]).

66 I add as an aside that ultimately, the court in *Motacus* decided to deal with the summary judgment application on the basis of the separate and distinct provisions of Article 7, which excludes "interim measures of protection" from the purview of the Hague Convention. In the court's view, the concept of an interim measure of protection extended to an adjudicator's decision: the reality of a summary judgment application brought to enforce an adjudicator's decision "is that the court is being invited to grant an interim, rather than a final and conclusive, remedy" (at [57]). For our present purposes, however, Article 7 of the Hague Convention has no application: the English High Court's judgment

in *Motacus* is relevant mainly for affirming that a party who seeks to invoke one of the exceptions to Article 6 must exceed a high threshold and demonstrate exceptional circumstances before the exception is engaged.

67 In the present case, 6DM's submission on the risk of fragmentation of the dispute is premised on the purported lack of "certainty that 6DM would be able to join [Federico Bogna]" or that "the courts of England and Wales would assume jurisdiction over [Federico Bogna]" if the matter were to proceed to be heard in the courts of England and Wales.[57] Insofar as 6DM seeks to rely on the public policy limb in section 12(1)(*c*) (as well as the "manifestly unfair" limb), 6DM has not articulated any coherent formation of the specific "public policy" that would be "manifestly" contravened in the above scenario. In any event, as the Asahi Entities have pointed out, this argument about fragmentation of the dispute is "purely speculative"[58]: 6DM has not put forward any expert evidence on English law in this respect, and/or on how the courts of England and Wales would exercise their jurisdiction.[59] In its written submissions, 6DM claims that if it "tries to sue AEBK and [Federico Bogna] in England instead of Singapore, the English courts *may well decline* to establish jurisdiction over AEBK and/or [Federico Bogna] in the absence of any jurisdiction agreement" [emphasis added].[60] 6DM's general and somewhat sweeping statements are unhelpful, particularly when it has not shown that the presence of a jurisdiction agreement is necessary in order for the courts of England and Wales to establish jurisdiction over AEBK and/or Federico Bogna. In any event, 6DM's submission that the English courts "*may well decline* to establish jurisdiction

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57 PWS3 at para 19.

58 Asahi Entities' Written Submissions dated 10 June 2021 ("DWS4") at para 6.

59 DWS2 at para 22.

60 PWS2 at para 161(c).

over AEBK and/or [Federico Bogna]" [emphasis added] is couched in very tentative terms and fails to exceed the high threshold required. At best, it raises a speculative possibility that something undesirable *might* happen if the EJCs in the distribution agreements are honoured – which is entirely inadequate to make out the exception in section 12(1)(*c*) of the CCAA.

68 The mere fact that 6DM has commenced proceedings against Federico Bogna in Singapore does not alter the above conclusions. Proceedings against Federico Bogna are still at a preliminary stage: Bogna entered his appearance on 28 April 2021,[61] and it does not appear any substantive steps have been taken by or against him since. Moreover, even assuming for the sake of argument that Bogna cannot for some reason be joined as a party to proceedings against the Asahi Entities in the English courts, it is in principle possible for the risk of parallel proceedings and inconsistent findings to be mitigated *via* a limited stay of the Singapore proceedings against Bogna pending the resolution of the English proceedings. There is ample authority for the proposition that a Singapore court may grant such a limited stay in the discretionary exercise of its case management powers: see for example the High Court's judgment in *Yap Shirley Kathreyn v Tan Peng Quee* [2011] SGHC 5 at [7], cited by the High Court in *Ram Parshotam Mittal v Portcullis Trustnet (Singapore) Pte Ltd and others* [2014] 3 SLR 1337 at [58], which was in turn cited by the Singapore International Commercial Court in *BNP Paribas Wealth Management v Jacob Agam and another* [2017] 3 SLR 27 at [34]. I stress that in pointing out the existence of such a discretion on the part of the Singapore courts, I make no judgment on how such discretion might be exercised in the event of any application in the present proceedings *vis-à-vis* Bogna. The point I am making

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61 PWS2 at pp 117–118, para 17(b).

is simply that 6DM is mistaken when it claims that a stay of the Singapore proceedings *vis-à-vis* the Asahi Entities will leave the Singapore courts and parties helpless in the face of confusing parallel proceedings and potentially inconsistent findings.

69 For the reasons set out at [58] to [68], I find that 6DM has not satisfied me that the exception in section 12(1)(*c*) of the CCAA – or for that matter, any exception under section 12(1) – applies.

The Asahi Entities' alleged submission to jurisdiction

70 I address next 6DM's argument that even if they fail on the issues relating to the EJCs and section 12(1) of the CCAA, the court should nevertheless decline to stay or dismiss Suit 951 because the Asahi Entities have submitted to the jurisdiction of the Singapore courts pursuant to section 16(1)(*b*) of the SCJA.[62]

71 6DM claims that the Asahi Entities have, by virtue of the Statutory Demand they served on 6DM, voluntarily submitted to the jurisdiction of the Singapore courts in connection with the matters raised in Suit 951. According to 6DM, the service of the Statutory Demand evinced a clear intention on the Asahi Entities' part to commence proceedings against 6DM in the Singapore courts.[63] The issues in OS 138, including the matters raised in the Statutory Demand, are "inextricably linked" to the issues in Suit 951.[64] It is untenable for the Asahi Entities to separate SUM 665 from the Statutory Demand such that the former is subject to the jurisdiction of the courts of England and Wales while

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62 PWS2 at para 11.

63 PWS1 at para 96(b).

64 PWS1 at para 96(d).

proceedings related to the latter are subject to the jurisdiction of the Singapore courts.[65] In the alternative, 6DM says that the Asahi Entities have invited the Singapore courts to make substantive findings of fact in relation to the matters raised in Suit 951 and have thus submitted to the jurisdiction of the Singapore courts in Suit 951, since they are participating in the procedure for resolution of the merits of the case.[66]

72 The Asahi Entities disagree. They contend that they have simply filed the Statutory Demand on the basis of undisputed contractual debts, which is one step removed from the commencement of formal winding up proceedings against 6DM.[67] 6DM cannot raise any triable issues in this regard, and there is no "dispute" for which a submission can be made to the jurisdiction of the Singapore courts.[68] Lastly, the winding-up jurisdiction of the court is not concerned with determining the merits of the parties' disputes, and the Asahi Entities have filed affidavits only to prove to the court that there are no triable issues in OS 138 or Suit 951 and to demonstrate that there is no "dispute" in respect of which the Singapore courts have jurisdiction. According to the Asahi Entities, there is nothing in their submissions or affidavits which require the court to make substantive findings of fact.[69]

73 The applicable legal principles with regard to submission to jurisdiction are largely undisputed. Both parties referred to the CA judgment in *Shanghai Turbo*. Whether a defendant's conduct amounts to a submission to jurisdiction

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65 PWS2 at para 20.

66 PWS1 at para 104.

67 DWS2 at para 7.

68 DWS2 at para 8.

69 DWS2 at paras 10–11.

is a question of fact in each case (at [32]). The question is whether the defendant's conduct demonstrates an unequivocal, clear and consistent intention to submit to the jurisdiction of the court (at [37]). The CA noted that "if a party's conduct clearly and unequivocally signifies a submission to jurisdiction, we doubt whether it can necessarily be salvaged by a mere reservation. Even the filing of a jurisdictional challenge (in the service context) or a stay application (in the arbitral and *forum non conveniens* contexts) may not suffice if the challenge is fundamentally inconsistent with the nature of the defendant's acts" (at [38]).

74 In *Shanghai Turbo*, the CA found that the respondent's participation in Summons No 1173 of 2018 ("SUM 1173") – which was an application filed by two non-parties in the suit – despite his not being compelled to respond to or otherwise participate in it, "amounted to an invocation of the court's jurisdiction and an implied acceptance that the court had jurisdiction" to try the suit (at [33]). The respondent had taken it upon himself to argue and to support the non-parties' application by filing written submissions, having his counsel make extensive oral arguments in support of SUM 1173, and filing an affidavit in support of SUM 1173 (at [30]).

75 Other cases have held that a party's submission to jurisdiction is evinced by its filing of a defence (*Reputation Administration Service Pte Ltd v Spamhaus Technology Ltd* [2021] 2 SLR 342 (*"Spamhaus"*) at [22(a)]), a failure to file a prompt jurisdictional challenge/stay application and lack of protest against the court assuming jurisdiction over the parties (*Spamhaus* at [25], [27]; *Allenger, Shiona (trustee-in-bankruptcy of the estate of Pelletier, Richard Paul Joseph) v Pelletier, Olga and another* [2020] SGHC 279 (*"Allenger"*) at [97], [108]), and filing or contesting applications in the suit, *eg* contesting a summary judgment application and filing a striking out application

(*Spamhaus* at [22(b)–(c)] and [24]; *Allenger* at [109]–[113]). Submission is established where a party has taken a clear and unequivocal step that is incompatible with the position that the Singapore court does not have jurisdiction (*Spamhaus* at [20]–[21]).

76 In the present case, after 6DM commenced Suit 951 on 2 October 2020 and was granted leave to serve the writ out of jurisdiction on 4 December 2020, the Asahi Entities issued the Statutory Demand to 6DM on 22 January 2021 and filed SUM 665 in Suit 951 on 10 February 2021. I first address, therefore, the question of whether these steps, either on their own or taken together, demonstrate a clear and unequivocal intention on the part of the Asahi Entities to have the dispute determined by the Singapore courts, or are incompatible with the position that the Singapore court does not have jurisdiction.

Issuance of the Statutory Demand

77 I first consider the issuance of the Statutory Demand. 6DM cites *Manharlal Trikamdas Mody v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 (*"Manharlal"*), where the High Court held that formal submission of a proof of debt by a foreign creditor is sufficient basis to allow the supervising court to make orders against that foreign creditor (*Manharlal* at [123]).[70] In *Manharlal*, the defendant, which was a judgment creditor of one of the plaintiffs, had commenced execution proceedings against a property in India. The plaintiffs sought to restrain the defendant from continuing with the legal proceedings in India against the plaintiffs and the Official Assignee, and sought leave to serve the originating summons (the "OS") on the defendant out of jurisdiction. The defendant applied to set aside the OS and the order granting

[70] PWS2 at para 43.

leave to serve out of jurisdiction. George Wei JC (as he then was) allowed the defendant's application (*Manharlal* at [2]).

78 With respect, 6DM has not explained how the decision in *Manharlal* supports its position in the present case. In *Manharlal*, Wei JC opined – after a detailed review of certain English authorities – that the formal submission of a proof of debt by a foreign creditor was sufficient basis to allow the court supervising the insolvency administration to make orders against that foreign creditor (at [122]–[123]). In other words, formal submission of a debt to the insolvency administration will generally be adequate to support a conclusion that *the court supervising the administration* thereafter has jurisdiction to make orders *in matters connected with the administration* against the creditor who has proved the debt (at [122]). This is in substance an entirely different situation from what we have in the present case, where 6DM is claiming that the Asahi Entities' issuance of a Statutory Demand amounts to a submission to the jurisdiction of the Singapore courts *in connection with the matters raised in Suit 951*. It should moreover be noted that in *Manharlal*, Wei JC held that the issue of whether the defendant could be regarded as having submitted to the jurisdiction of the court when it filed its proof of debt with the Official Assignee was "largely inconsequential" because "Singapore [was] not, in any event, the appropriate forum, and jurisdiction should be declined on the basis of *forum non conveniens*" (*Manharlal* at [123]).

79 Next, I note that in *Spamhaus*, *Shanghai Turbo* and *Allenger* (see [74]–[75] above), the parties in those cases were found to have submitted to the jurisdiction of the Singapore courts because they had, *inter alia*, filed or contested applications *in the suit itself*. Again, that is very different from the position in the present case. The Statutory Demand is not an application made in Suit 951 and is therefore not a "step" within Suit 951 – even if the debts

claimed under the Statutory Demand may arise out of the distribution agreements under consideration in Suit 951.

80 Elsewhere, the High Court has also held that a party's filing of an originating summons to seek recognition of the appointment of foreign receivers did *not* constitute a submission to jurisdiction. The court held that, unlike the filing of a counterclaim or defence, an application for the recognition of the appointment of foreign receivers was not premised on the Singapore courts having jurisdiction over a dispute concerning whether the receivers had breached any duties owed (*Lakshmi Anil Salgaocar v Hadley James Chilton and others* [2018] 5 SLR 725 at [39]). Similarly, in the present case, the issuance of the Statutory Demand is not premised on the Singapore courts *having jurisdiction over the dispute in Suit 951*. It cannot be said to be a submission to the jurisdiction of the Singapore courts to determine Suit 951.

81 Lastly, the Statutory Demand contains a reservation stating that nothing in the Statutory Demand "shall constitute a submission to the Singapore courts of any dispute arising under or in connection with [the three distribution agreements]".[71] I note that the CA has said in *Shanghai Turbo* (at [38]) that if a party's conduct clearly and unequivocally signifies a submission to jurisdiction, the court doubted whether that could necessarily be salvaged by a mere reservation. In this case, however, I have earlier found that the Asahi Entities' issuance of the Statutory Demand does *not* clearly and unequivocally signify a submission to the jurisdiction of the Singapore courts to determine Suit 951. In the circumstances, the reservation in the Statutory Demand supports my finding that the Asahi Entities did not intend to submit to the jurisdiction of the Singapore court.

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[71] CB at p 495.

82 For completeness, I add that I reject 6DM's submission that the Asahi Entities are asking the Singapore court to make "substantive findings of fact" in relation to the matters raised in Suit 951 and have "delved into the substantive merits of the case in Suit 951".[72] First, I agree with the Asahi Entities that the winding-up jurisdiction of the court does not involve determination of the merits of the parties' disputes.[73] A debtor-company need only raise triable issues in order to obtain a stay or dismissal of the winding-up application. To raise such triable issues, the debtor can show that there exists a substantial and *bona fide* dispute, whether in relation to a cross-claim or a disputed debt (see *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [23] and [25], cited by the court in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2020] 1 SLR 1158 ("*AnAn Group*") at [25]). The applicable standard is no more than that for resisting a summary judgment application (*Pacific Recreation* at [23]). A finding that there are triable issues, *ie* that there is a substantial and *bona fide* dispute that ought to be heard in the proper forum rather than in a winding-up application, is not a substantive finding of fact on the merits of the dispute in Suit 951 itself.

83 Further, I do not think the Asahi Entities "must have contemplated" that the Singapore courts would make findings on the substantive merits of their claims at some point in the future, as 6DM argues.[74] The Asahi Entities' position is that the debts cited in the Statutory Demand are undisputed debts. Their case is that there are no triable issues, and thus nothing for the Singapore courts to make findings on at "some point in the future". 6DM also submits that the Asahi

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72 PWS2 at paras 49–51.

73 DWS2 at para 10.

74 PWS2 at para 51(a).

Entities ought to have first sued 6DM on their claims in another jurisdiction, obtained judgment against 6DM and subsequently enforced the judgment against 6DM in Singapore.[75] I understand 6DM to be saying that in order to avoid the risk of being viewed as submitting to the jurisdiction of the Singapore court in Suit 951, the Asahi Entities ought to have obtained a judgment against 6DM in another jurisdiction and enforced this judgment against 6DM in Singapore instead. However, just because the Asahi Entities *could* have taken alternative courses of legal action does not mean that their issuance of the Statutory Demand entails a submission to the jurisdiction of the Singapore courts in respect of Suit 951.

Filing of SUM 665

84 I next consider whether the Asahi Entities' filing of SUM 665 in Suit 951 amounted to a submission to the jurisdiction of the Singapore courts in connection with the matters raised in Suit 951.

85 In *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 (*"Zoom Communications"*), the CA held (at [32]):

> … Where a foreign defendant puts forward an application for a stay of proceedings on improper forum grounds as a fall-back to an application for an overseas service leave order to be set aside, it would generally *not* be appropriate to infer that he has submitted to the jurisdiction of the local court. This is so for the simple reason that the question of whether the local court has jurisdiction over the foreign defendant (which is the question to be decided *vis-à-vis* his setting-aside application) is logically anterior to the question of whether such jurisdiction, if it exists, should be exercised (which is the question to be decided *vis-à-vis* the foreign defendant's stay application).
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> [emphasis in original]

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75 PWS2 at para 51(b).

86 In my view, the filing of SUM 665 cannot be said to be a submission to jurisdiction. The defendants have, *via* SUM 665, disputed the existence of the Singapore court's jurisdiction on the basis that the EJCs in all three distribution agreements favour the English courts and that section 12(1) of the CCAA mandates a stay or dismissal of proceedings; alternatively, on the basis that the Leave Order and the subsequent service of the writ on them should be set aside. The prayer for a stay or dismissal of proceedings on improper forum grounds is really a "fall-back". As such, I do not find the Asahi Entities to have engaged in conduct that constitutes a waiver of their objection to the existence of the Singapore court's jurisdiction (*Zoom Communications* at [59]).

87 Since I am not persuaded that either the issuance of the Statutory Demand or the filing of SUM 665 constitutes a submission to jurisdiction, I am not persuaded that these two steps viewed together constitute a submission to jurisdiction. I therefore reject 6DM's contention that the Asahi Entities have submitted to the jurisdiction of the Singapore courts in connection with the matters raised in Suit 951.

Stay or dismissal under section 12(1) of the CCAA

88 However, even if the foregoing analysis is wrong and even assuming the Asahi Entities' issuance of the Statutory Demand and/or the filing of SUM 665 *is* a submission to the jurisdiction of the Singapore courts pursuant to section 16(1)(*b*) of the SCJA, 6DM has not explained why or how the purported submission to jurisdiction should result in the refusal of a stay or dismissal of Suit 951 under section 12 of the CCAA. So long as there is an EJC that does not designate Singapore as the chosen court, section 12(1) of the CCAA requires that the Singapore court stay or dismiss any case. As I observed earlier at [36], the grounds on which the Singapore court may decide *not* to stay or dismiss the

case or proceeding are confined to the five exceptions specified in section 12(1)(*a*) to (*e*). Para 141 of the Hartley/Dogauchi Report (see [37] above) also makes it clear that Article 6 of the Hague Convention – on which our section 12(1) was based – requires courts in contracting States (other than the chosen court) *not* to hear the case, *ie* to suspend or dismiss the proceedings, even if they have jurisdiction under their national law. As the authors of the Hartley/Dogauchi Report put it, this obligation is "essential if the exclusive character of the choice of court agreement is to be respected". Accordingly, even if a Singapore court has jurisdiction over the dispute in Suit 951 by virtue of section 16(1)(*b*) of the SCJA, it must stay or dismiss the proceedings unless 6DM can make out one of the exceptions in section 12(1).

89 I add that I do not accept the argument that granting a stay of Suit 951 in such circumstances (*ie*, where the Asahi Entities have submitted to the jurisdiction of the Singapore courts) would lead to manifest injustice or would be manifestly contrary to the public policy of Singapore within the meaning of section 12(1)(*c*) of the CCAA. Insofar as 6DM's argument is premised on the proposition that it is prejudiced because it has already commenced proceedings in Singapore, I find that any prejudice which has resulted in this regard is due to its own conduct in commencing Suit 951 in Singapore in breach of the EJCs in favour of the English courts. Moreover, as noted earlier (see [60**Error! Reference source not found.**] above), the threshold to be met for establishing either limb of the exception under section 12(1)(*c*) is very high. On the basis of the affidavit evidence adduced and the arguments advanced, 6DM's case falls far short of meeting this threshold.

90 From my reasoning and conclusions as set out above (at [22]–[89]), it follows that I must either stay or dismiss the Suit 951 proceedings *vis-à-vis* the Asahi Entities, pursuant to section 12 of the CCAA.

91 The next question is whether I should order a dismissal or a stay of Suit 951. Section 12 of the CCAA does not provide any specific guidelines for when a stay is to be preferred over a dismissal or *vice versa*. Nor have any relevant authorities been cited to me by either side. Reasoning from first principles, it appears to me a stay would make sense in cases where part of the dispute between the parties falls outside the scope of their EJC: in such cases, it would make sense to stay that part of the dispute which falls within the scope of the EJC while allowing the remainder of the dispute to proceed in the Singapore proceedings. However, in cases where the entirety of the dispute falls within the EJC, there does not appear to me to be any principled reason to stay the Singapore proceedings instead of dismissing the proceedings. I add that I am aware 6DM claims to be concerned about whether the English courts will assume jurisdiction over AEBK.[76] However, there has been no evidence adduced (*eg* opinion evidence from an expert on English law) to suggest that 6DM's concerns are anything more than conjecture.

92 Having regard to the reasoning set out above and given my finding that the dispute in Suit 951 falls within the EJCs between 6DM and the Asahi Entities, I am of the view that the Suit 951 proceedings should be dismissed as against the Asahi Entities.

Miscellaneous arguments

On section 11(2) of the CCAA

93 In finding that the Asahi Entities should be granted their prayer for a dismissal of the Suit 951 proceedings pursuant to section 12(1) of the CCAA, I also considered the following arguments put forward by the parties. The first

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[76] PWS2 at para 161(c).

concerns an argument put forward by 6DM on the application of sections 11(1) and 11(2) of the CCAA. For ease of reference, I set out below these two provisions:

> **Jurisdiction of Singapore chosen court**
>
> **11.**—(1) A Singapore court, designated in an exclusive choice of court agreement for the purposes of deciding a dispute, has jurisdiction to decide the dispute, unless the agreement is null and void under the law of Singapore.
>
> (2) A Singapore court that has jurisdiction under subsection (1) cannot decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.

94 According to 6DM, if the EJC in clause 22.2 of the AEBK Agreement is understood to be in favour of the Singapore courts, then this EJC "should be enforced at the expense of the EJCs in the APB and ABA Agreements".[77] 6DM argues that this is because once a Singapore court is found to have jurisdiction under section 11(1) of the CCAA (*ie* by virtue of being the court designated by an exclusive choice of court agreement for the purposes of deciding a dispute), then section 11(2) also kicks in. Section 11(2) provides that such a Singapore court "cannot decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State". What section 11(2) means (according to 6DM) is that in the present case, even though the other two distribution agreements contain EJCs in favour of the English courts, the existence of an EJC in favour of the Singapore courts in the AEBK Agreement precludes a Singapore court from declining jurisdiction in favour of the English courts.[78]

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77 PWS2 at para 151.

78 PWS2 at paras 153, 155.

95 With respect, 6DM's argument is misconceived. Section 11(2) of the CCAA is not applicable in the present case even if the EJC in the AEBK Agreement is found to be in favour of the Singapore courts. By the very words used in the provision, section 11(2) clearly concerns situations where a Singapore court may consider "that the dispute *should* be decided in a court of another State" [emphasis added]; in other words, where the Singapore court is faced with arguments of improper forum. Section 11(2) cannot be the basis for a Singapore court ignoring the EJCs in the APB and the ABA Agreements: 6DM itself concedes that these two EJCs attract the operation of section 12(1), and section 12(1) is framed in mandatory terms ("*must* stay or dismiss any case or proceeding").

96 That section 11(2) was never intended to apply in a situation where section 12(1) is engaged becomes clear beyond doubt when one examines the commentary in the Hartley-Dogauchi Report on Article 5(2) (the article in the Hague Convention on which section 11(2) of the CCAA was based). Paras 131 to 134 of the Hartley-Dogauchi Report expressly state that for the purposes of Article 5(2), there "are two legal doctrines on the basis of which a court might consider that the dispute should be decided in a court of another State": the first is the doctrine of *forum non conveniens*, the other is the doctrine of *lis pendens*. 6DM has not demonstrated that the situation it finds itself in is a case either of *forum non conveniens* or of *lis pendens*.

97 For the reasons given above, I find no merit in 6DM's argument about section 11(2) of the CCAA: it certainly provides no basis on which to say that the EJC in the AEBK Agreement should – if found to be in favour of the Singapore courts – be enforced "at the expense of the EJCs in the APB and ABA Agreements".

98 I note, moreover, that the Asahi Entities have submitted that even if I were to find that clause 22.2 of the AEBK Agreement provides for the exclusive jurisdiction of the Singapore courts, a Singapore court will not be bound to exercise its jurisdiction under section 11 of the CCAA because the AEBK Agreement was entered into on 1 April 2016 – and pursuant to section 24(1), the CCAA does not apply to an exclusive choice of court agreement that designates a *Singapore* court as a chosen court if such agreement was concluded *before 1 October 2016*.[79] For ease of reference, I set out below the provisions of section 24(1) as well as section 24(2):

> **Saving and transitional provisions**
>
> **24.**—(1) This Act does not apply to an exclusive choice of court agreement that designates a Singapore court as a chosen court, if the agreement is concluded before 1 October 2016.
>
> (2) This Act does not apply to an exclusive choice of court agreement that designates a court of another Contracting State as a chosen court, if the agreement is concluded before the Convention enters into force in that Contracting State.

99 I note that on the face of it, the AEBK Agreement was concluded on 1 April 2016.[80] I also note that clause 12.1 of the AEBK Agreement states[81]:

> …[u]nless either party provides notice to the other at least 6 months prior to the end of the Term (i.e. by 30th of November each year), the Agreement will automatically renew for a further period of 12 months.

100 6DM has argued, however, that the AEBK Agreement was in reality concluded after 1 October 2016. 6DM does not dispute that it entered into the exclusive distribution agreement with SABMiller on 1 April 2016; that 6DM changed its name to ABE on 31 July 2017 following its acquisition by the Asahi

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79 DWS4 at para 8; CB at p 88.

80 CB at p 88.

81 CB at p 104.

Group; and that ABE's rights, benefits, obligations and liabilities under the exclusive distribution agreement with 6DM were subsequently taken over by AEBK. On the face of it, the same distribution agreement with the same terms – periodically renewed pursuant to clause 12.1 – has subsisted between the parties since 1 April 2016. It is this same agreement that has been referred to as the "AEBK Agreement" in the course of the hearing and in this judgment. What 6DM is saying, however, is that a *new* AEBK Agreement was notionally entered into upon the occasion of each renewal. This is because, according to 6DM, the word "renew" in clause 12.1 means the "re-creation" of a legal relationship, or the replacement of an old contract with a new contract. Further, the clause says that "the Agreement will automatically renew" instead of merely saying that the "duration of the agreement" would be renewed. According to 6DM, therefore, when the Term of the AEBK Agreement concluded on 31 May 2017 (pursuant to clause 1.1 of the AEBK Agreement), the renewal of the agreement meant that a *new* agreement was concluded on 1 June 2017 (*ie* after 1 October 2016).[82]

101 With respect, 6DM's argument is without any merit. 6DM has been unable to produce any authorities which bear out its somewhat startling proposition. If anything, as the Asahi Entities have pointed out, the authorities are against 6DM. I refer for example to the CA's decision in *Parfums Rochas SA and others v Davidson Singapore Pte Ltd and another* [2000] 1 SLR(R) 397 (*"Parfums"*). In *Parfums*, it was a term of the distribution agreement between the parties that the duration of the distribution agreement would be for an initial period of three years, with an "automatic renewal" for two years. The CA agreed with the trial judge that this meant the distribution agreement was for a period

[82] PWS3 at para 24.

of five years: clearly, neither the CA nor the trial judge viewed this as a three-year contract followed by a *new* two-year contract (at [39]–[40]).

102 In *Pacific Autocom Enterprise Pte Ltd v Chia Wah Siang* [2004] 3 SLR(R) 73 (*"Autocom"*), the parties had entered into an indemnity agreement in which it was stated that the agreement "shall automatically be renewed" after 18 months, for "similar duration", unless terminated, varied or extended by both parties. The High Court held that this clause had the effect of "extending the initial duration [of the agreement] without the need for any further agreement or action by either party", such that "the agreement was for a duration of 36 months" (*Autocom* at [33]).

103 Having regard to the above authorities, I reject 6DM's argument that an automatic renewal of the AEBK Agreement pursuant to clause 12.1 must mean a "re-conclusion" of a fresh agreement for the purposes of the CCAA. Such a renewal merely has the practical effect of extending the original agreement on the same terms. It follows that I reject 6DM's argument that the AEBK Agreement was concluded after 1 October 2016. Instead, I accept the Asahi Entities' argument that, even assuming that clause 22.2 of the AEBK Agreement is an EJC in favour of the Singapore courts, a Singapore court will not be bound to exercise its jurisdiction under section 11(1), in light of the provision in section 24(1) that the CCAA does not apply to such an EJC.

On section 24(2) of the CCAA

104 In the interests of completeness, having found that the EJCs in all three distribution agreements are in favour of the English courts, I should make it clear that I find section 24(2) of the CCAA is also not engaged in this case. Under section 24(2), the CCAA will not apply to an exclusive choice of court

agreement that designates a court of another Contracting State as a chosen court if that agreement was concluded before the Hague Convention entered into force in that Contracting State. In the present case, I find that section 24(2) has no application because all three EJCs were concluded *after* the date when the Hague Convention entered into force in the UK, *ie* the CCAA does apply to all three EJCs.

105 The Hague Convention entered into force for both the European Union ("EU") and the UK on 1 October 2015, while the UK was still a member of the EU (Council Decision of 4 December 2014 on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements, EU Council Decision 2014/887/EU, 2014 OJ L 353/5). The UK has since withdrawn from the EU, and the EU Commission has expressed the view that the Hague Convention will apply between the EU and the UK to exclusive choice of court agreements concluded *after* the Hague Convention enters into force in the UK as party in its own right to the Hague Convention (EU Commission Notice to Stakeholders, Withdrawal of the United Kingdom and EU rules in the field of Civil Justice and Private International La*w*, 27 August 2020, para 3.3). However, this statement by the EU Commission appears to have been made in the context of its consideration as to whether proceedings instituted based on an exclusive choice of court agreement in the courts of the UK after the end of the transition period should still benefit from EU rules on recognition and enforcement in EU Member States. I do not think it impacts the present case. Further, Schedule 5, paragraph 7 of the 2020 Act (which I mentioned above at [62]) expressly provides that for the purposes of Article 16 of the Hague Convention, "the date on which the 2005 Hague Convention entered into force for the United Kingdom is 1 October 2015, and accordingly references in the Convention to a Contracting State are to be read as including,

without interruption from that date, the United Kingdom". I therefore find that the Hague Convention entered into force in the UK on 1 October 2015. The AEBK Agreement was concluded after this date – on 1 April 2016. The APB Agreement and ABA Agreement were likewise concluded after 1 October 2015 – on 15 March 2017 and 1 February 2020 respectively. As all three EJCs were concluded after the date when the Hague Convention entered into force in the UK, section 24(2) of the CCAA has no application. In other words, there is no question that the CCAA is engaged, and that section 12(1) applies in respect of all three EJCs.

106 Having found in favour of the Asahi Entities on their prayer for a dismissal of the Suit 951 proceedings pursuant to section 12(1) of the CCAA, there is strictly no necessity for me to deal with the remaining prayers. However, I wish to make it clear that even if I am wrong in my conclusions about the interpretation of clause 22.2 of the AEBK Agreement and the application of section 12(1), I would in any event have granted the prayer for the setting aside of the Leave Order and the service out of jurisdiction effected on the Asahi Entities. In the interests of completeness, I explain below why this is so. In the next section of this judgment, I will deal with the Asahi Entities' submission that the Leave Order and the service effected on them should be set aside due to 6DM's failure to make full and frank disclosure of all material facts in its *ex parte* application for leave to serve the writ out of jurisdiction, and/or 6DM's failure to show that Singapore is the proper forum for the trial of the dispute.

Whether 6DM breached its duty to make full and frank disclosure

107 I address first the issue of 6DM's duty to make full and frank disclosure. As I noted earlier, the 3 December 2020 Affidavit filed by 6DM in support of SUM 5295 did not reproduce in the text of the affidavit the EJCs in the three

distribution agreements, nor did it address the effect of the governing law clause and EJC in each agreement. The parties filed further submissions on 13 September 2021 to address my queries at [19] above.

108 6DM asserts that it has made full and frank disclosure of all material facts in paragraph 42 of the 3 December 2020 Affidavit. This is what paragraph 42 says:

> In the interests of full disclosure, under each of the Agreements, there are exclusive jurisdiction clauses providing that the Agreements are governed by English law: see paragraph 22.2 of the AEBK Agreement, the APB Agreement and the ABA Agreement (collectively exhibited at SYM-1). Nevertheless, I am advised that 6DM's claims do not arise under or are in connection with the Agreements, and the exclusive jurisdiction clauses are thus irrelevant to the present Suit.

109 According to 6DM, based on the CA's decision in *Shanghai Turbo* at [107], it was sufficient that the relevant EJCs were highlighted "in the interests of full disclosure" and could be found among the exhibits of the 3 December 2020 Affidavit; it would have been "clear" that the EJCs referred to English law and the jurisdictions of both Singapore, and England and Wales; and there was no need for 6DM to draw attention to counter-arguments which the Asahi Entities might raise in a challenge to jurisdiction.[83] Further, so 6DM argues, even if it has breached its duty to make full and frank disclosure, the Leave Order should not be set aside because, *inter alia*, as in *Zoom Communications* at [69], the undisclosed facts do not displace the fact that the connecting factors point to Singapore as the proper forum for Suit 951 to be heard.[84]

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83 PWS4 at para 11.

84 PWS4 at para 17(a).

110 The Asahi Entities contend, on the other hand, that 6DM has breached its duty to make full and frank disclosure of all material facts in SUM 5295; and such breach constitutes sufficient basis in itself for setting aside the Leave Order and the subsequent service out of jurisdiction.[85] 6DM had merely mentioned the EJCs in one inconspicuous paragraph in a 234-page affidavit, and even worse, had confounded matters by stating solely that these were EJCs providing for the distribution agreements to be "governed by English law", without disclosing that the EJCs stipulated the exclusive jurisdiction of the courts of England and Wales.[86] 6DM's assertion that the EJCs were irrelevant to Suit 951 was incorrect, as 6DM's claims against the Asahi Entities clearly arose under or in connection with the distribution agreements;[87] and contrary to the duty of full and frank disclosure imposed on it, 6DM had failed to raise in the 3 December 2020 Affidavit any facts or potential arguments that were prejudicial to its application, including (*inter alia* and in particular) the applicability of the CCAA.[88]

111 Having considered the parties' arguments, I agree with the Asahi Entities' submission that 6DM has breached its duty of full and frank disclosure in SUM 5295 and that this is a ground for the court to set aside the Leave Order and the subsequent service.

112 First, I find that paragraph 42 of the 3 December 2020 Affidavit is *not* sufficient for compliance with 6DM's duty of full and frank disclosure. Paragraph 42 merely states that there are EJCs "providing that the Agreements

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85 Asahi Entities' Written Submissions dated 13 September 2021 ("DWS5") at para 2.

86 DWS5 at para 15.

87 DWS5 at para 16.

88 DWS5 at para 17.

are governed by English law". Paragraph 42 does not state that these EJCs are either in favour of "the courts of England and Wales" or the "local courts". The statement therefore conflates and confuses the issue of the exclusive jurisdiction agreement and that of the governing law clause. I agree with the Asahi Entities that the disclosure in paragraph 42 is "ambiguous at best, and misleading at worst". In the words of the CA in *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 ("*The Vasiliy Golovnin*") (at [91]), "mere disclosure of material facts without more or devoid of the proper context is in itself plainly insufficient to constitute full and frank disclosure".

113 In my view, 6DM ought to have reproduced the relevant EJC for each distribution agreement *in full* at paragraph 42 of its 3 December 2020 Affidavit, *and* it should have explained why it said the disputes in Suit 951 did not "arise under" or "in connection" with these agreements (see [19] above).

114 6DM should also have gone further to explain what the effect of the three EJCs would be in the event the court was of the view that the dispute in Suit 951 did in fact arise under or in connection with the distribution agreements; and in particular, it should have explained why the EJCs should not be considered to be in favour of the English courts (in the case of the AEBK Agreement) or why they should not be enforced (in the case of the APB and the ABA Agreements). Again, in the words of the CA in *The Vasiliy Golovnin*, in considering an applicant's duty of full and frank disclosure (at [91]), we are "concerned with how the material facts can best be presented to the court so as to ensure that the court receives the most complete and undistorted picture of the material facts, sufficient for its purpose of making an informed and fair decision on the outcome of the application, such that the threshold of full and frank disclosure can be meaningfully said to be crossed". The CA also said (at [94]):

> … [A]ll material facts should be fairly stated in the affidavit, and it is not open to a plaintiff to say that it has fulfilled its duty to make full and frank disclosure because the relevant facts can be distilled somewhat from somewhere in the voluminous exhibits filed. In short … the applicant must "identify the crucial points for and against the application, *and not rely on general statements and the mere exhibiting of numerous documents*" …
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> [Court of Appeal's emphasis in *The Vasiliy Golovnin* in italics]

115 I find it highly regrettable that in 6DM's affidavit in support of its *ex parte* leave application, it has said virtually nothing about the "crucial points … against the application", and in briefly alluding to the existence of the EJCs, has glossed over the contents of these EJCs. I add that the fact that 6DM may have been "advised" by its lawyers that the dispute in Suit 951 did not arise "under" or "in connection with" the distribution agreements is neither here nor there: materiality is to be decided by the court and not by the applicant or its legal advisors: *Bahtera Offshore (M) Sdn Bhd v Sim Kok Beng and another* [2009] 4 SLR(R) 365 ("*Bahtera*") at [21]. I have made it clear, in any event, that I reject the argument that the dispute in Suit 951 falls outside the scope of the distribution agreements: see [48] to [57] above.

116 I note that 6DM tried to distinguish *The Vasiliy Golovnin* by referencing the CA's comment in *Shanghai Turbo* that facts "that satisfy the test of materiality in an application for an arrest of a vessel or an injunction may not necessarily be material for an application for leave to serve out of jurisdiction" (at [106]). According to 6DM, the CA's approach in *Shanghai Turbo* is based on the "qualitative difference" between ship arrests, which are "major applications with far reaching consequences", and applications for leave to serve out of jurisdiction, which only involve the defendant.[89]

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89 PWS4 at paras 5–6.

117 I am not persuaded by this argument. While the CA in *Shanghai Turbo* said that *facts* that satisfy the test of materiality in an arrest application or an injunction application may not necessarily satisfy the same test of materiality in an application for leave to serve out of jurisdiction, it did not say that the *test* for materiality differed between these applications. Indeed, in *The Vasiliy Golovnin*, the CA made it clear that the "test of materiality for an arrest application is also the same as that required in other *ex parte* civil remedies" (at [85]). The test of materiality, which is an objective test, is whether the facts in question are matters that the court would likely take into consideration in making its decision (*Zoom Communications* at [68]). In my view, the full provisions of the EJCs and the applicability of the CCAA were matters that would likely have been taken into consideration by the Assistant Registrar deciding SUM 5295. I would go so far as to say they would have been an important factor in the court's consideration of whether to grant leave to serve the writ out of jurisdiction.

118 6DM has also sought to justify its conduct by arguing that the Asahi Entities did not initially point out the non-disclosure of the full contents of the EJCs, nor did they initially raise any objections, until I asked parties to address me on the issue.[90] Insofar as 6DM appears to be saying the Asahi Entities' initial lack of protestations somehow excuses any non-disclosure, the argument is without merit. 6DM's duty of full and frank disclosure in applying *ex parte* for the Leave Order is "a duty that is owed to the Court and is driven by the need for the Court to satisfy itself that the case is a *proper* one for service out of jurisdiction" [emphasis in original]: *per* the CA in *Tecnomar & Associates Pte Ltd v SBM Offshore NV* [2021] SGCA 36 at [12]. Whether 6DM has satisfied

90 PWS4 at para 17(d).

its duty of full and frank disclosure does not depend on whether the Asahi Entities were quick to point out any material non-disclosure when they first applied to set aside the Leave Order; nor is any material non-disclosure excused by the initial lack of protestations from the Asahi Entities.

119 6DM further argues that even if I find that it has breached its duty of full and frank disclosure, it does not necessarily follow that the Leave Order and the service out of jurisdiction should be set aside. In principle, it is true that even where the court finds that the applicant in an *ex parte* application has not made full and frank disclosure, it does not necessarily follow that the court must discharge the *ex parte* order; there is discretion in the matter: see *Bahtera* at [25]. Whether or not the court would exercise its discretion depends on factors such as the particular relief sought, how serious the material non-disclosure is, or how important the undisclosed facts are, and the overall merits of the plaintiff's case. Where the information suppressed is sufficiently material, the court will then have to consider whether the material non-disclosure was inadvertent or innocent (in the sense that the applicant did not know that fact, had forgotten its existence, or failed to perceive its relevance), or whether it was deliberate and intended to mislead the court into granting the *ex parte* order: *Bahtera* at [26]–[27].

120 In the present case, 6DM obviously intended to serve the Suit 951 writ on foreign defendants and thereby to establish the jurisdiction of the Singapore courts to try the dispute in Suit 951. I have earlier also explained why it would have been obvious that the dispute in Suit 951 arose under or in connection with the distribution agreements (see [48]–[57] above). In my view, given the circumstances, it would have been plain to 6DM that the existence of the EJCs in the distribution agreements, the full contents of these EJCs, and the applicability of section 12 of the CCAA were factors that would carry

substantial weight in the court's consideration of whether to grant the Leave Order. I am unable, moreover, to accept that 6DM's failure to address these matters in its 3 December 2020 Affidavit was inadvertent or innocent. What 6DM did was to leave out from paragraph 42 of its affidavit any mention of the most important parts of the EJCs. As seen earlier, in paragraph 42, 6DM expressly referenced the first limb of clause 22 of the distribution agreements by mentioning that the EJCs provided for English law as the governing law – but it made no mention of the second limb of clause 22 which actually encapsulated the exclusive jurisdiction agreement. I cannot see how this silence on 6DM's part can have been anything but selective, deliberate, and ultimately, misleading. With respect, 6DM's present argument that it merely omitted to touch on the "effects" of the EJCs appears to me to be a cynical attempt at wordplay.

Whether Singapore is the proper forum

121 Even assuming, however, that 6DM's breach of its duty of full and frank disclosure was merely inadvertent, I would nevertheless have set aside the Leave Order on the basis that 6DM has failed to show Singapore is the proper forum for the trial of the dispute (see *Zoom Communications* at [66] and [69]). This was the Asahi Entities' other key argument in relation to their alternative prayer for the setting-aside of the Leave Order. For its part, 6DM maintains that the non-disclosures do not displace the fact that the connecting factors point to Singapore as the proper forum for the hearing of Suit 951.

122 In *Zoom Communications*, the respondent was granted leave to serve out of jurisdiction (the "Leave Order") but failed to disclose that it was disputed whether the choice of forum clause in favour of the Singapore courts within the Standard Terms and Conditions applied to the relevant Hire Agreements

between the parties, and that there were ongoing proceedings in India which allegedly related to the Singapore action (at [67]–[68]). While the CA found that the respondent had failed to make full and frank disclosure, it held that those facts were not so material as to warrant setting aside the Leave Order because it was satisfied that the connecting factors pointed to Singapore as the proper forum for the trial of the dispute (at [69], [82]). In gist, the CA found that while most of the connecting factors in the case were evenly balanced, the breach of the Hire Agreements had occurred in Singapore, and this connecting factor tilted the balance towards Singapore as the proper forum for the trial of the dispute (at [86]).

123 In the present case, 6DM cites various matters which it says constitute connecting factors pointing to Singapore as the proper forum to try the dispute in Suit 951.[91]

124 First, 6DM has pointed to the fact that it is incorporated in Singapore. However, the Asahi Entities are incorporated in South Korea (AEBK), Hong Kong (ABA) and the UK (APB).

125 Second, 6DM submits that while the Asahi Entities are not based in Singapore, they distribute products in Singapore, and any Singapore judgment obtained by 6DM against the Asahi Entities need not be enforced outside Singapore.[92] However, as the Asahi Entities have pointed out, insofar as 6DM has argued that it can garnish account receivables from the Asahi Entities' Singapore distributors or apply for seizure and sale of stocks belonging to the

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91 PWS4 at para 17(a).

92 PWS2 at para 174(g).

Asahi Entities warehoused in Singapore, the same can be said of any country where the Asahi Entities distribute alcoholic products.[93]

126 Third, 6DM claims that the three most crucial witnesses in this case are Bogna, Choo Kinyi and Adrian Sim; and that of these three, two (Choo and Sim) are located in Singapore and compellable in Singapore. However, the Asahi Entities have gone on affidavit to assert that Choo is relocating permanently to Hong Kong (where Bogna is also based);[94] and indeed, Choo appears to have already been staying in Hong Kong at the time he filed his affidavits for these proceedings. The Asahi Entities also have another witness of some importance, *ie* finance director Yusune Naritsuka, who has so far given affidavit evidence on (*inter alia*) 6DM's debt position *vis-à-vis* the Asahi Entities, and who is based in Japan.

127 Fourth, 6DM argues that its relationship with the Asahi Entities revolved around 6DM's distribution of beer products in Singapore; and that a key aspect of the alleged Arrangement involved the Asahi Entities acquiring shares in 6DM and/or partnering with 6DM to co-own a company for the distribution of Peroni products in Singapore. However, this does not actually explain why Singapore is the proper forum for the trial of the present dispute. Instead, these factors seem really to be part of the next argument advanced by 6DM, which is that the breaches committed against it occurred in Singapore because the representations made by Bogna on behalf of the Asahi Entities were made at meetings in Singapore and caused it damage in Singapore.

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93 DWS1 at para 150.

94 DWS1 at para 151; (OS 138) Affidavit of Choo Kin Yi dated 3 March 2021 at para 3.

128 It should be pointed out at the outset that in saying the representations were made by Bogna at meetings in Singapore, 6DM is not presenting the full picture of the parties' dealings. The reality is that a substantial part of the parties' communications were documented by way of Whatsapp messages and emails.[95]

129 More importantly, insofar as 6DM seeks to rely on the CA's finding in *Zoom Communications* that the fact that the breach of the parties' Hire Agreements had occurred in Singapore tilted the balance towards Singapore as the proper forum for trial, the CA's remarks must be understood in the context of the specific facts in *Zoom Communications*. As noted earlier, most of the connecting factors in that case were evenly balanced: some pointed to Singapore as the proper forum, others to India; and the trial judge concluded that India "might be the slightly more appropriate jurisdiction", though "not clearly or distinctly so" (at [84]). The CA also found that it was uncertain whether Singapore law or Indian law was the governing law of the Hire Agreements (at [85]). It was against this backdrop of evenly balanced connecting factors and uncertainty as to the governing law that the CA found the place of breach of the agreements to be a factor tilting the balance towards Singapore. Further, it should be noted that the appellant in *Zoom Communications* did not deny owing the sums claimed by the respondent in the Singapore action (at [90]), nor did it deny that the sums claimed in the Singapore action were to have been paid to the respondent in Singapore.

130 In contrast, in the present case, leaving aside the place of alleged breaches complained of by 6DM, there are no connecting factors pointing to

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95 (Suit 951) Affidavit of Adrian Sim dated 3 December 2020, Exhibit SYM-2 (at pp 133–179); YN1, Exhibit YN-2 (at pp 145–703).

Singapore as the proper forum. Moreover, unlike in *Zoom Communications*, the governing law of the dispute in this case is clearly English law (*per* clause 22.1 of the distribution agreements) and not Singapore law – though to be fair, I should add that I give the factor of the governing law less weight in this case as it appears most of the key issues in contention are factual in nature (for example, whether certain representations were made on the Asahi Entities' behalf to 6DM by Bogna, whether Bogna had authority to make "[h]igh level commercial decisions" on the Asahi Entities' behalf,[96] and whether 6DM knew of Bogna's authority or lack thereof): see *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 ("*Lakshmi Anil Salgaocar*") at [56].

131 As to the factor of the place of alleged breaches, the Asahi Entities dispute any representations having been made to 6DM about their taking up equity in – or entering into a joint venture with – the latter; much less, any concluded Arrangement for them to do so.[97] The Asahi Entities' position is thus very different from that of the appellant in *Zoom Communications*, who did not dispute owing the sums claimed by the respondent in the Singapore action and who admitted that it should have paid the respondent these sums in Singapore. In this connection, I had regard to the case of *Lakshmi Anil Salgaocar*. In that case, the appellant as administrator of one Mr Anil's estate had sued the respondent for a declaration that he held certain assets (shares in Special Purpose Vehicles or "SPVs") on trust for the estate, following which the respondent commenced proceedings in the British Virgin Islands ("BVI") for a declaration that he was the rightful owner of the share in the parent company ("MDWL") of the SPVs. The respondent successfully resisted the appellant's application to the BVI High Court to stay his BVI suit. Subsequently, the CA in

96 DWS1 at para 66.

97 DWS1 at paras 49, 50.

Singapore granted the appellant's application for an anti-suit injunction to restrain the respondent from proceeding in the BVI suit. In so doing, the CA noted that in refusing a stay of the BVI suit, the BVI High Court had found that the place of the breach was a relevant connecting factor pointing to the BVI as the natural forum for the dispute. The breach referred to by the BVI High Court was the "breach in failing to rectify the register of the [parent company MDWL]". As the CA noted, "[h]owever, given that this factor assume[d] that the respondent's claim [was] made out", the CA was of the view that "limited weight should be placed on it" (*Lakshmi Anil Salgaocar* at [85]). Given the Asahi Entities' strenuous denial of 6DM's claims in this case, I think the same reasoning should apply.

132 Lastly, in arguing that the connecting factors point to Singapore as the proper forum for the trial of the present dispute, 6DM appears to have ignored the fact that even if clause 22.2 of the AEBK Agreement refers to the Singapore courts, the corresponding clauses in the APB and the ABA Agreements expressly stipulate the exclusive jurisdiction of the courts of England and Wales. Even leaving aside for the moment the applicability of section 12(1) of the CCAA, the existence of these EJCs must surely be a factor pointing away from Singapore as the proper forum.

133 For the reasons given above at [121] to [132], I do not agree with 6DM that "taken as a whole", the connecting factors point to Singapore as the proper forum for the trial of the present dispute.

134 Having already found in favour of the Asahi Entities' prayer for the dismissal of the Suit 951 proceedings pursuant to section 12(1) of the CCAA, I do not find it necessary to make any orders for the setting-aside of the Leave Order and the service out of jurisdiction. However, if I am wrong on the issues

relating to the EJCs and the application of section 12(1), I make it clear that I would in any event have set aside the Leave Order and the service on the Asahi Entities, for the reasons set out at [107] to [133] above.

OS 138

Whether 6DM has raised triable issues

135 I turn now to OS 138, which is 6DM's application for an injunction to restrain the Asahi Entities and the fourth defendant ABGG from commencing winding-up proceedings against it on the basis of the Statutory Demand dated 22 January 2021.

136 It is well established that where "the company disputes the debt claimed by the creditor … the court will restrain a creditor from filing a petition to wind up the company, or if the petition has been filed, to stay or dismiss it on the ground that the *locus standi* of the petitioner as a creditor is in question, and it is an abuse of process of the court for the petitioner to try to enforce a disputed debt in this way" (see *Metalform Asia Pte Ltd v Holland Leedon Pte Ltd* [2007] 2 SLR(R) 268 ("*Metalform*") at [62]).

137 In *Metalform* at [77], the CA held that "[t]he company does not have to show that the winding-up petition is bound to fail, but that there is a likelihood that it may fail or that it is unlikely that a winding-up order would be made. Furthermore, in such a case, where the court is unable to say that there is no prospect of success without oral evidence or cross-examination, the court will grant the injunction". In *Pacific Recreation* at [23], the CA held that the standard of review required in order to obtain a stay or dismissal of the winding-up application "was no more than that for resisting a summary judgment application, *ie*, the debtor-company need only raise triable issues". To raise such

triable issues, the company can show that there exists a substantial and *bona fide* dispute, whether in relation to a cross-claim or disputed debt: see *AnAn Group* at [25]. It is settled that the "unlikely to succeed" standard referred to in *Metalform* is the same as the "triable issue" standard set out in *Pacific Recreation*: see *AnAn Group* at [27].

138 In its recent decision in *AnAn Group*, the CA held (at [56]) that when a court is faced with either a disputed debt or a cross-claim that is subject to an arbitration agreement, the *prima facie* standard (rather than the triable issue standard) should apply, such that "the winding-up proceedings will be stayed or dismissed as long as (a) there is a valid arbitration agreement between the parties; and (b) the dispute falls within the scope of the arbitration agreement, provided that the dispute is not being raised by the debtor in abuse of the court's process". An argument could be made that when a court is faced with a disputed debt or a cross-claim that is subject to an exclusive choice of court agreement (as defined in the CCAA), either the *prima facie* standard or the "good arguable case" standard (rather than the triable issue standard) should apply to the winding-up proceedings. However, as both sides did not make any submissions on this point and both proceeded on the basis that the triable issue standard governs the dispute in OS 138, the analysis which follows will be based on the triable issue standard. In any event, even on the higher triable issue standard, I am satisfied (for the reasons that follow) that the injunction sought by 6DM should be granted.

139 6DM argues that the debts claimed in the Statutory Demand are disputed as "the Asahi Entities had represented to 6DM that they would not enforce their rights to demand 6DM's outstanding payments, and had consistently conducted

themselves as such".[98] The disputed issues which ought to be ventilated at trial include:

> (a) whether the Arrangement was at a high level and purely exploratory (as alleged by the Asahi Entities) or whether negotiations had progressed to such an advanced stage that there was even an implied agreement that the Asahi Entities would not enforce their rights to recover the outstanding invoices from 6DM in the short term (as alleged by 6DM);[99] and
>
> (b) whether Bogna had the requisite authority to make representations on behalf of the Asahi Entities "in respect of potential joint ventures or takeovers to be transacted by the Asahi Group".[100]

140 I am satisfied that the areas of dispute highlighted by 6DM raise triable issues. First, I note that the Asahi Entities are not contending that there were no discussions at all in relation to a potential joint venture with 6DM.[101] In fact, there is evidence of correspondence between representatives of the Asahi Entities and Adrian Sim on the idea of a potential joint venture.[102] At the same time, I note that 6DM has submitted that the evidence of "aged accounts" dating back to 2017, as well as the lack of any formal demand by the Asahi Entities for repayment of 6DM's debts until in 2021, are consistent with the fact that the Asahi Entities had represented they would not enforce their rights to recover the

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98 PWS2 at para 185.

99 SOC at paras 59–60.

100 PWS2 at para 187.

101 DWS1 at para 50.

102 See for *eg*, CB at pp 228–229.

outstanding debts until certain conditions were met.[103] This appears at the very least to raise triable issues as to whether certain representations were made giving rise to an implied agreement or a collateral contract between the parties – and is clearly a dispute that ought to be resolved by a trial in the proper forum, rather than on a winding-up application.

141 Secondly, insofar as the Asahi Entities contend that the representations (even if they were made) were made without any authority on the part of their representatives,[104] this also appears to raise triable issues. This is particularly so given that the Asahi Entities do not dispute that Bogna was its key contact person in liaising and communicating with 6DM.[105] Notably, the Asahi Entities refer to various instances of correspondence to establish 6DM's knowledge of the lack of authority on Bogna's part; whereas 6DM – not surprisingly – denies having possessed any such knowledge.[106]

142 I am therefore satisfied that there are triable issues warranting the grant of an injunction against the four defendants in OS 138, to restrain them from commencing winding-up proceedings against 6DM.

143 To round off the inquiry, I address the following other arguments advanced by the OS 138 defendants. First, the defendants rely on the decision of Tan Siong Thye J in *RCMA Asia Pte Ltd v Sun Electric Power Pte Ltd (Energy Market Authority of Singapore, non-party)* [2020] SGHC 205 ("*RCMA Asia (HC)*") (the appeal against Tan J's decision has been dismissed by the CA)

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103 PWS2 at para 186(a).

104 DWS1 at para 54.

105 CB at p 205; YN1 at para 13.

106 DWS1 at para 55; PWS1 at paras 121–127.

for the proposition that even if there were a substantial and *bona fide* dispute regarding a debt, "exceptional circumstances" may nevertheless justify a winding-up (at [81]).[107]

144 In *RCMA Asia (HC)*, Tan J was satisfied that the defendant company ("SEPPL") was "clearly insolvent" and in "dire financial circumstances", whether from the perspective of the cash flow test or the balance sheet test (at [88]). He also found that minimal prejudice would be caused to SEPPL by the making of a winding-up order, as SEPPL itself had previously applied for judicial management and interim judicial management on the basis that it was insolvent and unable to pay its debts (at [89]). Furthermore, Tan J found that there was clear evidence that SEPPL's sole director had made multiple withdrawals of large sums from the company's bank account; that these withdrawals led to the diminishing of the funds in the account (70% of which belonged to the plaintiff); and that these withdrawals were made in "blatant disregard" of an injunction which had been granted to restrain SEPPL, its directors, employees and/or agents from dealing with the said funds (at [65]). In Tan J's view, there was a "serious risk" that if the winding-up application was disallowed and the plaintiff was forced to continue with its suit against SEPPL, it would be left with no recovery even if it won the suit (at [90]). It was in these circumstances that Tan J held there were "exceptional circumstances" justifying a winding-up order against SEPPL, even if there was a substantial and *bona fide* dispute relating to its debt (at [92]).

145 In the present case, the OS 138 defendants point to evidence of 6DM's tardiness in making payment to third-party service providers[108] as proof of

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107 DWS1 at para 173(a).

108 CB at pp 363–372.

6DM's consistent "disregard towards its payment obligations to its creditors".[109] In this regard, I note that the defendants are not alleging that these third-party service providers were not paid, but rather that they were not paid in a timely manner.[110] The defendants also complain that 6DM "has, to date, failed, refused and/or neglected to make payment to the Asahi Entities in respect of the various debts it owes under the Distribution Agreements".[111] In addition, they point to a charge which DBS Bank Ltd lodged on or about 18 February 2021 in respect of deposits held by 6DM at DBS Bank Ltd.[112] It is alleged that the charge demonstrates that DBS Bank Ltd "was concerned it may not be paid by 6DM" and as such, "6DM is likely balance sheet insolvent". In the circumstances, "there is a serious risk that the interests of 6DM's creditors would be prejudiced" and "it would be best if the Court were to appoint a liquidator to take charge of 6DM's affairs and investigate these suspicious activities".[113]

146 Based on the above evidence, I do not find that the OS 138 defendants have shown any "exceptional circumstances" which would justify 6DM being wound up despite having demonstrated a substantial and *bona fide* dispute regarding the alleged debt. Unlike in *RCMA Asia (HC)* (at [88]), putting aside 6DM's disputed debts to the Asahi Entities, the defendants have not been able to demonstrate any legitimate concerns about the solvency of 6DM as a going concern (in this regard, see also the CA decision of *BWG v BWF* [2020] 1 SLR 1296 at [131]). I am not aware of any other pending winding-up applications or

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109 DWS1 at para 169.

110 DWS1 at para 170; (Suit 951) Affidavit of Federico Bogna dated 24 March 2021 at paras 24–27.

111 DWS1 at para 177(a).

112 CB at pp 763–765; DWS1 at para 86.

113 DWS1 at para 177.

claims against 6DM which would indicate otherwise. In this regard, although the Asahi Entities exhibited cause book searches purportedly indicating "6DM's routine practice of using Singapore Court proceedings to evade its contractual commitments", I note that the originating processes in question were commenced by 6DM (rather than being commenced against it).[114] Without more, I do not find that these cause book searches demonstrate legitimate concerns about the solvency of 6DM. Likewise, I find the evidence of 6DM's alleged tardiness in paying third-party service providers, as well as the evidence of the charge lodged over its deposits held at DBS Bank Ltd, to be insufficient to establish legitimate concerns about the solvency of 6DM.

147 Next, the OS 138 defendants also argue that an injunction ought not to be granted in this case because 6DM did not come before the court with clean hands.[115] In support of this argument, the defendants point to evidence of Adrian Sim having set up a new company in Singapore called East Asia Beverages Pte Ltd ("EAB"). Sim is currently a director of EAB and holds 50% of its shares.[116] EAB was incorporated on 19 August 2020, which was about a month and a half after the Asahi Entities' termination of the distribution agreements in early July 2020. Based on screenshots of the beer brands exhibited on the websites of 6DM and EAB, the Asahi Entities claim that it is "worrying" that brand portfolios "which previously belonged to 6DM have now been transferred to EAB".[117] Taking these factors together, the defendants say that the incorporation of EAB constituted "an attempt by [Sim] to divert 6DM's businesses and/or dissipate 6DM's assets and to put them out of reach of 6DM's

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114 YN2 at para 100; see Exhibit YN-3, at pp 879–908.

115 DWS1 at para 161.

116 CB at pp 647–650; DWS1 at para 164.

117 CB at pp 766-767; DWS1 at paras 165(c) and 166.

creditors (including the Asahi Entities), in breach of his fiduciary duties as a director".[118]

148 I do not find the above argument persuasive. In order for such an argument to be made out, the conduct relied on by the defendants "must stem from the facts relied upon to invoke the court's conscience": in other words, the conduct complained of must have an immediate and necessary relation to the equity sued for, and it must be "a depravity in the legal as well as moral sense" (*per* the CA in *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and others and another appeal* [2012] 1 SLR 32 at [92]). In this regard, the only evidence the OS 138 defendants have really pointed to is the evidence regarding the incorporation of EAB and the alleged transfer of beer brands from 6DM's portfolio to EAB's. In response to this, Adrian Sim has asserted that there were legitimate commercial reasons for the incorporation of EAB: according to Sim's affidavit evidence, EAB "acquires and creates brands (i.e. it owns a few of its brands), while 6DM's focus is on beer distribution. In this regard, EAB has acquired a 40% stake in the well-known Crossroads Brewing Company (Singapore), and has the option to acquire a further 10%".[119] It is not disputed that whereas Sim is the sole shareholder of 6DM, EAB is a partnership between him and a few other business partners. As for the timing of the incorporation of EAB, I do not find it particularly sinister that EAB was set up slightly over a month after the Asahi Entities' termination of the distribution agreements. From Sim's perspective, the Asahi Entities' termination of the distribution agreements would likely have been disappointing for 6DM in business terms; and it is perhaps not that surprising that he should have looked for other business opportunities shortly after the termination.

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118 DWS1 at para 166.

119 (OS 138) Affidavit of Adrian Sim dated 1 April 2021 at para 86(b).

149 On the evidence produced, therefore, the OS 138 defendants' allegations concerning 6DM's purported insolvency and inequitable conduct appear to be based on rather flimsy evidence. Having earlier found that there is a substantial and *bona fide* dispute in relation to the debt allegedly owed to the Asahi Entities (see [135]-[142] above), I find that the OS 138 defendants have not satisfied me of any grounds for refusing the injunction sought by 6DM.

Conclusion

150 To sum up: for the reasons I have given, in respect of SUM 665, I dismiss the Suit 951 proceedings *vis-à-vis* the Asahi Entities, pursuant to section 12(1) of the CCAA. At the same time, in respect of OS 138, I grant an injunction to restrain the OS 138 defendants from commencing winding-up proceedings against 6DM based on the Statutory Demand dated 22 January 2021.

151 As the Asahi Entities have succeeded in SUM 665 on their application for the dismissal of Suit 951 pursuant to section 12(1) of the CCAA, while 6DM has succeeded in OS 138 in its application for an injunction against winding-up, I am inclined to order that each party in the two matters should bear its own costs. However, I will hear oral submissions from the parties on the issue of costs before I make any order as to costs.

Mavis Chionh Sze Chyi
Judge of the High Court

Tan Gim Hai Adrian, Yeoh Jean Ann, Kim Shi Yin, Feng Chong We, Kwoh Ji Wei and Wong Ling Yun (TSMP Law Corporation) for the plaintiff;
Siew Guo Wei (Shao Guowei), Joseph Lim Weisheng and Foo Zhi Wei (Tan Kok Quan Partnership) for the first to third defendants in HC/S 951/2020 and the defendants in HC/OS 138/2021.
