JIO Minerals FZC and others *v* Mineral Enterprises Ltd [2010] SGCA 41

Case Number	: Civil Appeal No 72 of 2010
Decision Date	: 11 November 2010
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Cavinder Bull SC, Gerui Lim, Adam Maniam (Drew & Napier LLC) for the appellants; Gan Kam Yuin (Bih Li & Lee) for the respondent.
Parties	: JIO Minerals FZC and others — Mineral Enterprises Ltd

Conflict of Laws – Natural Forum

Conflict of Laws – Choice of Law – Contract

Conflict of Laws – Choice of Law – Tort

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2010] SGHC 109.]

11 November 2010

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

Introduction and facts

1 This was an appeal against the decision of the High Court judge ("the Judge") who had refused to grant the defendants a stay of the action brought against them by the plaintiff (see *Mineral Enterprises Ltd v JIO Minerals FZC and others* [2010] SGHC 109).

2 Dissatisfied with the decision of the Judge, the defendants appealed. After hearing counsel, we allowed the appeal. We now give the detailed grounds for our decision.

The Parties

3 Mineral Enterprises Ltd ("the Respondent") is the plaintiff. It is an Indian company with expertise in mining and marketing iron ore in India and internationally. The Respondent has projects in Indonesia which are coordinated by its Mining and Operations Manager, Joseph Cyriac ("Cyriac").

4 JIO Minerals FZC ("the First Appellant") is a company incorporated in the United Arab Emirates ("UAE") and was set up by Jimmy Singh ("the Second Appellant") and Raman Srinivasan ("the Third Appellant"). The First, Second and Third Appellants are the defendants and we will refer to them collectively as "the Appellants". The Second Appellant is the President and Director of an Indonesian company known as PT JIO Energi Resources ("PT JIO"). The Second Appellant is also a commercial licensee and manager of the First Appellant. PT JIO owns iron ore mining concessions in 12 hectares of land in Pelaihari, Kalimantan ("the Pelaihari Concession").

5 The Third Appellant is a commercial licensee of the First Appellant. Although it was suggested that the Third Appellant had control over PT JIO, together with the Second Appellant, the exact

nature of the Third Appellant's association with PT JIO was not addressed by the parties.

Initial Meetings in Indonesia

6 Cyriac met the Second and Third Appellants in Indonesia around August 2005. At this first meeting, Cyriac told the Second and Third Appellants that the Respondent was interested in mining iron ore in Indonesia. The Second and Third Appellants told Cyriac that a company that they controlled, PT JIO, had mining concessions in Pelaihari, Kalimantan.

7 Cyriac later visited the Pelaihari Concession. The outcome of this visit is disputed. The Appellants' version is that Cyriac assessed that the Pelaihari Concession contained approximately 300,000 to 500,000 tonnes of iron ore and that Cyriac communicated this assessment to the Respondent's directors. The Respondent's version was that Cyriac did not explore the Pelaihari Concession because the Appellants did not provide sufficient facilities and logistical arrangements for Cyriac to do so.

The Singapore Joint Venture

8 On 7 April 2006, the Respondent entered into a joint venture agreement ("the Singapore JVA") with JIO Corporation Pte Ltd ("JIO Singapore"), a Singapore company. The Second Appellant was the majority shareholder and a director of JIO Singapore.

9 The Singapore JVA provided for the incorporation of a joint venture company in Singapore. JIO Singapore was to procure marketing rights over at least 1 million tonnes of iron ore from Indonesia for the joint venture company. The Respondent and JIO Singapore were to have an equal number of shares in the joint venture company.

10 The Singapore JVA stipulated Singapore law as its governing law and included both a Singapore International Arbitration Centre arbitration clause and a forum selection clause for the Singapore courts.

11 After an amendment on 9 May 2006 to the Singapore JVA's payment provisions, the Singapore JVA was, however, not pursued further. The Respondent's director, H R Jain, deposed in his affidavit dated 18 January 2010 that the Singapore JVA was not pursued because of "the more advantageous income tax benefits" of forming the joint venture vehicle in the UAE instead.

12 JIO Singapore was struck off the register of companies in Singapore on 4 July 2008.

Visits to the Tanah Bumbu Concession

13 From February to August 2006, the Respondent's representatives visited a mining concession in Tanah Bumbu, Kalimantan (the "Tanah Bumbu Concession").

14 The Second Appellant deposed in his affidavit dated 23 November 2009 that two representatives of the local government in charge of the Tanah Bumbu Concession were aware of these visits by the Respondent's representatives.

The Exclusive Mining Agreement

15 On 2 August 2006, the UAE Government of Ajman issued a commercial license to the First Appellant. Shortly thereafter, on 7 August 2006, the First Appellant entered into an agreement with PT JIO. This agreement was termed an "Exclusive Irrevocable Exploration, Exploitation, Mining and

Marketing Agreement" ("the Exclusive Mining Agreement"). Under the Exclusive Mining Agreement, PT JIO appointed the First Appellant as "its sole and exclusive international agent with irrevocable rights of exploration, exploitation, mining and marketing of Iron Ore Concession [*sic*]". The Exclusive Mining Agreement did not define the term "Iron Ore Concession".

16 Under Article 5.1 of the Exclusive Mining Agreement, however, PT JIO represented that it had iron ore concessions with an estimated reserve of 1 million tonnes of "+65 Fe iron ore".

17 The Exclusive Mining Agreement selected the laws of Ajman, UAE, as its governing law. The Exclusive Mining Agreement provided for disputes in connection with it to be resolved "under the rules of the UAE International Arbitration [*sic*]".

18 On 7 September 2006, PT JIO sent the Respondent a copy of the Exclusive Mining Agreement via email. PT JIO sent the copy from Indonesia and the copy was received by the Respondent in India.

Meetings in Indonesia

19 The Respondent's representatives had meetings and negotiations with the Second and Third Appellants in Indonesia in or around August 2006. The outcome of the meetings is material to the dispute between the parties.

20 According to the Appellants, the Respondent and the Appellants had agreed that the Pelaihari Concession was to be used as a "pilot project". The Appellants further allege that the parties agreed that the Appellants would procure mining concessions with iron ore deposits of 1 million tonnes. In procuring these iron ore deposits, the Appellants were *not* to be limited to the Pelaihari Concession.

21 According to the Respondent, the outcome of the meetings was that the Respondent was to be given a first right of refusal for all other concessions that the Appellants held and that the Pelaihari Concession was to be the first project for the parties. The Respondent further alleged that the Appellants assured it at the meetings that they had control over the Tanah Bumbu Concession and could bring that concession within the scope of the joint venture that the parties intended to enter.

The Letter of Offer

22 On 7 September 2006, the First Appellant sent a letter of offer to the Respondent ("the Letter of Offer"). The Second Appellant signed the Letter of Offer.

23 The material terms of the Letter of Offer were as follows:

(a) The First Appellant offered the Respondent 50% shareholding in the First Appellant.

(b) The First Appellant represented that it "has a high grade iron ore reserve of 1 million tones [*sic*]".

24 The Letter of Offer was sent from Indonesia. The Respondent received the Letter of Offer in India.

Cyriac's Assessment of the Tanah Bumbu Concession

25 Cyriac visited the Tanah Bumbu Concession around the time when the First Appellant sent the

Letter of Offer to the Respondent. After the visit, Cyriac made a written report ("the Cyriac Report") that stated that the Tanah Bumbu Concession had approximately 5 to 6 million tonnes of iron ore deposits. The Cyriac Report was dated 14 September 2006.

26 The Appellants argued that the Respondent only accepted the Letter of Offer after it received the Cyriac Report. In contrast, the Respondent argued that it was not aware of the contents of the Cyriac Report before it accepted the Letter of Offer.

Payment of Consideration

27 The Respondent accepted the offer in the Letter of Offer by paying the requisite consideration ("the Investment Funds") to the bank accounts of the Second and Third Appellants in Singapore on 27 September 2006. We will refer to the resulting contract between the parties as the "Investment Agreement".

28 The Second and Third Appellants then transferred 30 and 20 shares, respectively, in the First Appellant to the Respondent.

The Respondent's drilling activities at the Pelaihari Concession

29 The Respondent started drilling at the Pelaihari Concession some time after the Investment Agreement was concluded. The exact date when the Respondent's drilling commenced and the extent of the Respondent's drilling activities are, however, disputed.

30 The Appellants alleged that the Respondent's drilling activities were insufficient for it to form a firm view on the amount of iron ore deposits in the Pelaihari Concession. The Appellants alleged that representatives of the local government in charge of the Pelaihari Concession witnessed the Respondent's drilling activities and would be able to give evidence on those activities.

Partial Repayment of the Investment Funds

31 The Appellants returned the Respondent a sum of US$699,000. The purpose of this repayment is disputed.

32 The Appellants argued that the sum was returned because they felt that they had no choice but to return the unutilised portion of the Investment Funds because the Respondent was not going to restart drilling. The Appellants further argued that they did not agree to return the balance of the Investment Funds.

33 The Respondent alleged that the Appellants returned that sum because they admitted that the Pelaihari Concession did not contain sufficient deposits. The Respondent also argued that the Appellants promised to return the balance of the Investment Funds.

The Claim

34 On 19 February 2009, the Respondent commenced proceedings against the Appellants in the Singapore High Court for, *inter alia*:

(a) a declaration that the Respondent had validly rescinded the Investment Agreement;

(b) the return of the balance of the Investment Funds (amounting to US$1,028,695);

(c) damages to be assessed; and

(d) further or alternatively, damages for fraudulent misrepresentation or misrepresentation under the Misrepresentation Act (Cap 390, 1994 Rev Ed) ("the Misrepresentation Act").

The decision below

35 The Judge allowed the Respondent's appeal from the Assistant Registrar's decision to stay the action on the ground of *forum non conveniens*.

36 The Judge's reasons for holding that Singapore was not *forum non conveniens* were as follows:

(a) The only legally significant geographical connections that the dispute had with Indonesia were: (i) the location of the concessions in Indonesia; and (ii) the Indonesian residency of the Second Appellant, who, in the Judge's opinion, was the "directing mind behind the corporate structures and documentation".

(b) The Appellants did not raise a compelling argument that the Investment Agreement was governed by Indonesian law. Rather, reasonable persons in the position of the parties would not have concluded that Indonesian law should govern the Investment Agreement, given that: (i) the Exclusive Mining Agreement was governed by UAE law; and (ii) the Singapore JVA was governed by Singapore law.

(c) The Appellants' arguments on the law governing the alternative tort claims did not present "insurmountable obstacles".

(d) The Appellants were not able to show that the evidence of two Indonesian witnesses who allegedly witnessed the extent of the Respondent's drilling operations would be material. The Appellants also failed to show whether these witnesses would be available or whether other witnesses would be able to provide the same evidence.

(e) On the whole, the Appellants had failed to demonstrate the presence of another more appropriate forum for the dispute.

The issue

37 The sole issue on appeal was whether the Respondent's action should be stayed on the ground of *forum non conveniens*. In particular, we were concerned with whether or not Indonesia was a clearly or distinctly more appropriate forum than Singapore for the hearing of the dispute between the parties.

The applicable legal principles

The approach in Spiliada

38 The general principles to be applied in the context of the present appeal are well-established and may be traced back to the seminal House of Lords decision of *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"). Indeed, the principles set out in *Spiliada* have been approved and applied a great many times by the Singapore courts. The applicable principles were recently summarised in the decision of this court in *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 ("*CIMB Bank*"), as follows (at [25]–[26]):

25 The *locus classicus* on the question of when a stay would be granted on the basis of *forum non conveniens* is *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"), a decision of the House of Lords where Lord Goff of Chieveley, in delivering the leading judgment, laid down certain guiding principles (at 476-478) for determining the question of *forum non conveniens* ("the *Spiliada* test"). Those principles have been adopted by this court in several cases such as *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR(R) 345, *Eng Liat Kiang v Eng Bak Hern* [1995] 2 SLR(R) 851, *PT Hutan Domas Raya v Yue Xiu Enterprises* (*Holdings*) *Ltd* [2001] 1 SLR(R) 104 and *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 ("*Rickshaw Investments*").

26 The gist of these principles is that, under the doctrine of *forum non conveniens*, a stay will only be granted where the court is satisfied that there is some other available and more appropriate forum for the trial of the action. The burden of establishing this rests on the defendant and it is not enough just to show that Singapore is not the natural or appropriate forum. The defendant must also establish that there is another available forum which is clearly or distinctly more appropriate than Singapore. The natural forum is one with which the action has the most real and substantial connection. In this regard, the factors which the court will take into consideration include not only factors affecting convenience or expense (such as the availability of witnesses) but also other factors such as the law governing the transaction and the places where the parties respectively reside or carry on business. If the court concludes, at this stage of the inquiry ("stage one of the *Spiliada* test"), that there is no other available forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. If, at this stage, it concludes that there is some other available forum which *prima facie* is clearly more appropriate for the trial of the action, it will ordinarily grant a stay, unless there are circumstances by reason of which justice requires that a stay should nevertheless be refused. In this connection, the court will consider all the circumstances of the case. For this second stage inquiry ("stage two of the *Spiliada* test"), the legal burden is on the plaintiff to establish the existence of those special circumstances.

39 We will, in fact, proceed to analyse the facts of the present appeal in accordance with the two stages enunciated in *Spiliada* and, consistent with the terminology adopted in *CIMB Bank*, will refer to each stage as "stage one of the *Spiliada* test" and "stage two of the *Spiliada* test", respectively.

40 It is worth noting that a decision on whether to grant a stay of proceedings is, ultimately, a discretionary one. The discretionary nature of the determination necessarily limits the role of an appellate court; as this court has observed in *CIMB Bank* (at [84]):

> It is clear that in determining whether or not to grant a stay of proceedings, the judge will be exercising a discretion. Such an exercise of discretion should not be interfered with by an appellate court unless the judge had misdirected himself on a matter of principle, or he had taken into account matters which he ought not to have taken into account or had failed to take into account matters which he ought to have taken into account, or his decision is plainly wrong (see *The Abidin Daver* [1984] AC 398 at 420 *per* Lord Brandon of Oakbrook).

Factors to consider under stage one of the Spiliada test

41 The courts will generally consider the relevant connecting factors at *stage one* of the *Spiliada* test. Although the list of factors is obviously not closed and much will depend upon the precise factual matrix concerned, Prof Yeo Tiong Min has furnished some helpful guidance, as follows (see *Halsbury's Laws of Singapore – Conflict of Laws* vol 6(2) (LexisNexis, 2009) ("*Halsbury's Laws of Singapore*") at para 75.090):

> General connecting factors are considered at this stage. These include the locations of the parties, relevant witnesses, facts, and evidence, and the applicable law to the issues in dispute. As the search is for the forum that is prima facie clearly more appropriate to try the case, it is important to see what the case is about, and connections which have no or little bearing on adjudication of the issues in dispute between the parties will carry little weight. While there is a natural emphasis on the minimisation of expense and inconvenience of trial at this stage, it should be borne in mind that the true test is appropriateness.
>
> At this stage, differences in legal systems are generally ignored. In general, five types of connections may conveniently be identified, but they are not exhaustive.

42 The learned author then proceeds to list the following "five types of connections" which he states (and as also observed in the preceding paragraph) "are not exhaustive" (and see generally the very helpful and perceptive account of these factors in *Halsbury's Laws of Singapore* at paras 75.091–75.095):

> (1) Personal Connections
>
> (2) Connections to Events and Transactions
>
> (3) Governing Law
>
> (4) Other Proceedings
>
> (5) Shape of the Litigation

Stage two of the Spiliada test

43 In so far as *stage two* of the *Spiliada* test is concerned, Prof Yeo observes as follows (see *Halsbury's Laws of Singapore* at para 75.096):

> In Stage Two, the court is primarily concerned with the question whether there are circumstances by reason of justice why it should exercise its jurisdiction even if it is not the prima facie natural forum. The ultimate question of where the case should be heard for the interests of the parties and the ends of justice must not be lost sight of. This part of the test requires all circumstances to be taken into consideration, including factors already taken into consideration in Stage One. The main consideration in Stage Two is whether substantial justice can be obtained in the foreign *prima facie* natural forum. The court of the forum needs to tread a fine balance between justice to the parties and international comity. In considering this question, the court will not pass judgment on the competence or independence of the judiciary of another country, all the more so of a friendly foreign country, and will assiduously avoid comparing the quality of justice obtainable under its own legal system and the foreign legal system. It is not true that the quality of foreign judiciary will never be questioned, but the court of the forum will take a very cautious approach. The mere fact that the plaintiff has a legitimate or juridical

advantage in proceedings in Singapore will not be decisive. The plaintiff must establish with cogent evidence that he will be denied substantial justice if the case is not heard in the forum.

44 The learned author then proceeds to consider a number of related issues under the following headings (and see generally (again) the very helpful and perceptive account in *Halsbury's Laws of Singapore* at paras 75.097–75.101):

(1) Denial of Substantial Justice

(2) Contractual Choice of Law

(3) Time Bar

(4) Negative Declarations

(5) Substantial Justice in the Forum

Australian approach not followed

45 Before proceeding to apply the principles just stated, it might be appropriate to emphasise, once again, that the approach adopted in the Singapore context may be *contrasted with* that adopted in the *Australian* context (consisting in what has been termed the "clearly inappropriate forum test", which is elaborated upon below). In so far as the present Australian approach is concerned, it may, in fact, be traced back to the seminal High Court of Australia decisions of *Oceanic Sun Line Special Shipping Co v Fay* (1988) 165 CLR 197 ("*Oceanic Sun*") and *Voth v Manildra Flour Mills Proprietary Limited* (1990) 171 CLR 538 ("*Voth*"). However, it should be noted that the Singapore courts *rejected* the Australian approach (in favour of the approach in *Spiliada*) fairly early on. In the Singapore Court of Appeal decision of *Eng Liat Kiang v Eng Bak Hern* [1995] 2 SLR(R) 851, for example, L P Thean JA, delivering the judgment of the court, observed thus (at [24]–[25]):

> 24 Counsel for the appellant sought to set out the basis for the *Spiliada* test and submitted that it was formulated at the time to prevent "forum shopping" when the parties had little or no connection with the forum in which the case was brought. On the strength of the Australian authorities counsel submitted that the test in *Oceanic Sun* and approved in *Voth* should apply and urged this court to depart from the principles enunciated in *Spiliada Maritime Corp v Cansulex Ltd*.
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> 25 On authority and on principle we cannot agree. *The Spiliada* has been considered and approved in *Brinkerhoff* and we can see no reason for departing from that authority. The underlying basis in this test is whether the local court is clearly an appropriate forum or not and whether there is another forum which is distinctly and clearly more appropriate. It has a more liberal approach which cut down local parochialism as regards judicial adjudication and attaches greater importance to consideration of international comity.

46 It is notable that, whilst it was decided first, *Oceanic Sun* was only a bare majority decision of 3 to 2 in so far as the general approach to be adopted was concerned (unlike the majority, both Wilson and Toohey JJ preferred the test in *Spiliada* and (not surprisingly) arrived at a different decision on the facts). However, the judgments of the majority also raised a number of uncertainties inasmuch as it could not be said that there was a clear majority (amongst the majority judges in *Oceanic Sun*) in favour of what is presently known as the "clearly inappropriate forum test" in the Australian context. Indeed, this last-mentioned test was clearly set out in the judgment by Deane J (at 247–248). However, only Gaudron J (albeit not Brennan J) agreed with Deane J in this particular regard (at 266).

47 The "clearly inappropriate forum test" was, however, clearly endorsed in *Voth* (with only one judge (Toohey J (who was also in the minority in *Oceanic Sun*)) being in the minority, the learned judge stating (at 590) that he was "impenitent in adhering to the view which Wilson J. and [he] expressed in *Oceanic Sun*"). Significantly, Brennan J, who adopted a narrower approach than "the clearly inappropriate forum test" in *Oceanic Sun* (see above at [45]), endorsed this particular test in *Voth*; as the learned judge put it (at 572):

> As I think it is more important that a test be authoritatively settled than that I adhere to the test I prefer, and as any such test is judge-made law, I add my acceptance of the test proposed by the majority. It is unnecessary to consider whether the performance of the institutional duty of enunciating the law authoritatively should prevail when Justices' individual views diverge on questions of the true construction of the Constitution or perhaps on questions of the true construction of a statute, for that is not the present case. I therefore join in the decision that the "clearly inappropriate" test be adopted for the determination of applications of the three classes mentioned.

However, although Brennan J agreed with the majority of the court in *Voth* as to the particular test to be applied, he did "respectfully dissent from the result of its application" (*id*). In contrast, Toohey J, who (as we have just seen) adopted the approach in *Spiliada* instead, nevertheless arrived at the *same* conclusion as the majority (who applied "the clearly inappropriate forum test" instead) – thus illustrating the following observation made by Mason CJ, Deane, Dawson and Gaudron JJ in their joint judgment in the same decision (at 558) (see also below at [54]):

> The "clearly inappropriate forum" test is similar to and, for that reason, is likely to yield the same result as the "more appropriate forum" test in the majority of cases. The difference between the two tests will be of critical significance only in those cases – probably rare – in which it is held that an available foreign tribunal is the natural or more appropriate forum but in which it cannot be said that the local tribunal is a clearly inappropriate one.

Reference may, in this regard, also be made to the following observations by Prof Yeo (see *Halsbury's Laws of Singapore* at para 75.083):

> A notable variation is found in Australian jurisprudence, where the courts have struck a different balance. The Australian court will refuse to exercise its jurisdiction only if it is demonstrated that it is a clearly inappropriate forum. In many cases, the result will be the same as the approach in *The Spiliada*, but there may be a marginal case where it may be demonstrated that there is a clearly more appropriate forum available elsewhere yet the forum is not a clearly inappropriate forum, in which case stay of proceedings would *prima facie* be granted under the *Spiliada* approach but denied under the Australian approach. The Singapore courts apply the *Spiliada* approach because it is thought to be more consistent with international comity.

48 *Voth* therefore marks the clear establishment of the "clearly inappropriate forum test" (see also Martin Davies, Andrew Bell and Paul Le Gay Bereton, *Nygh's Conflict of Laws in Australia* (LexisNexis, 8th ed, 2010) ("*Nygh's Conflict of Laws in Australia*") at paras 8.13–8.24).

49 And, in the decision of this court in *Murukami Takako (executrix of the estate of Takashi Murukami Suroso, deceased) v Wiryadi Louise Maria and others* [2009] 1 SLR(R) 508, the current Australian position was summarised thus (at [32]–[35]):

> 32 In so far as those of the disputed foreign properties situated in Australia ("the Australian properties") are concerned, the appellant also previously brought claims in the Supreme Court of New South Wales. Gzell J, in *Murakami v Wiryadi* [2006] NSWSC 1354 ("*Murakami*"), stayed those proceedings on the ground of *forum non conveniens*. The learned judge applied the Australian approach to *forum non conveniens* as set out in the Australian High Court decisions of *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 ("*Oceanic Sun Line*"), *Voth v Manildra Flour Mills Proprietary Limited* (1990) 171 CLR 538 ("*Voth*"), *Henry v Henry* (1996) 185 CLR 571 and *CSR Limited v Cigna Insurance Australia Limited* (1997) 189 CLR 345 to the effect that the court may stay or dismiss proceedings if, having regard to the circumstances of the case and the availability of the foreign tribunal, the forum is clearly inappropriate for the determination of the dispute (reference may similarly be made to the (also) Australian High Court decision of *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491).
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> 33 Although the test applied in the Australian context to the issue of *forum non conveniens* is quite different from that set out in *Spiliada* ([26] supra), there would (on most occasions) be no difference in the actual result arrived at by the court (see, for example, *Oceanic Sun Line* at 251-252 (*per* Deane J) and 265-266 (*per* Gaudron J), *Voth* at 558 (*per* Mason CJ and Deane, Dawson and Gaudron JJ), *Eng Liat Kiang* ([9] supra) at [23] and Peter Brereton, "*Forum Non Conveniens* in Australia: A Case Note on *Voth* v *Manildra Flour Mills*" (1991) 40 ICLQ 895 at 897-898; *cf*, however, *Civil Jurisdiction and Judgments* ([6] *supra*) at para 4.20 (reference may also be made to Richard Garnett, "Stay of Proceedings in Australia: A 'Clearly Inappropriate' Test?" (1999) 23 Melb Univ L Rev 30)). That having been said, it is important to guard against simply equating the two tests because (if nothing else) their respective points of emphasis are quite different (see, for example, *Voth* at 558 *per* Mason CJ and Deane, Dawson and Gaudron JJ; the learned judges, however, also observed that, in applying the test under Australian law, "the discussion by Lord Goff in *Spiliada* of relevant 'connecting factors' and 'a legitimate personal or juridical advantage' provide[d] valuable assistance" (*id* at 564-565) - observations which were also cited and applied by Gzell J in *Murakami* at ([39]).
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> 34 While we have previously rejected the Australian approach to *forum non conveniens* in favour of the test in *Spiliada*, which calls for a determination of whether there is another forum which is clearly or distinctly more appropriate than Singapore (see, for example, the decision of this court in *Eng Liat Kiang* at [26]), Gzell J's observations in *Murakami* ([32] supra) are nevertheless helpful. This is because the factors which the learned judge considered would apply with equal force in the context of the doctrine of *forum non conveniens* as set out in *Spiliada*. In particular, Gzell J noted that (see *Murakami* at [45]):
>
> > The connecting factors ... do not favour New South Wales against Indonesia. [The appellant] is not resident in New South Wales and [the first respondent] and [the fourth respondent] do not live in Australia. The events [which are] the subject of complaint are just as much centred in Indonesia where the non-disclosure of the New South Wales assets is alleged to have occurred as in New South Wales where the assets were acquired.

The learned judge also noted (*id* at [46]), just as we have (see [29] above), that the *lex causae* was Indonesian law. He further commented (at [47] of *Murakami*) that:

> If matters are to be determined in the New South Wales court expert evidence will be required. If the issues are to be determined in the Indonesian courts there is no need for experts.

Indeed, Gzell J was of the view (*id* at [52]) that "it [was] in the interests of the parties that a proper resolution of the issues be made in proceedings to be commenced in Indonesia".

35 The factors and the arguments considered by Gzell J in the preceding paragraph, although analysed in the context of the Australian approach to *forum non conveniens*, apply equally in the context of the approach of this court as embodied in *Spiliada* ([26] *supra*). Indeed, there is a considerable overlap between the factors and the arguments considered by Gzell J in *Murakami* and those discussed above in the context of the present proceedings. There is, in fact, good reason to believe that this is one instance where there would be no difference in result regardless of whether the Australian approach or the approach in *Spiliada* is adopted (see also above at [33]).

50 It should be noted that the decision of Gzell J in *Murakami v Wiryadi* [2006] NSWSC 1354 was in fact reversed on appeal in the decision of the New South Wales Court of Appeal decision of *Murakami v Wiryadi & Ors* [2010] NSWCA 7. However, the general principles as well as observations set out in the quotation in the preceding paragraph continue to represent the Australian approach towards the issue of *forum non conveniens*, notwithstanding the following observations by Kirby J in the High Court of Australia decision of *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 ("*Zhang*") (at 525):

> Like the Pilgrim I have not lost faith. One day *Voth* may be overruled and a principle of the common law may be established more appropriate to contemporary circumstances of global and regional disputes in which Australian courts, like those of every country, must now operate. But until overruled by this Court or replaced by valid legislation, *Voth* must be applied.

51 Indeed, a challenge mounted recently against the present Australian approach in the subsequent (also) High Court of Australia decision of *Puttick v Tenon* (2008) 238 CLR 265 was rejected, in no uncertain, terms by the majority. The challenge (which was mounted by the Respondent) was, in fact, framed by way of an invitation to the court to either overrule the "clearly inappropriate forum test" in *Voth or* to *restate* the test in *Voth* in a *modified* form by also permitting a stay when there was a more appropriate forum for the resolution of the dispute. The latter was, in effect, an invitation to introduce the *Spiliada* test *in addition to* the "clearly inappropriate forum test". Not surprisingly, perhaps, French CJ, Gummow, Hayne and Kiefel JJ *rejected* this invitation and reaffirmed the "clearly inappropriate forum test" in *Voth*. Heydon and Crennan JJ, however, whilst clearly of the view that *Voth* could not be overruled in that particular case, did (perhaps somewhat curiously) add thus (at [38]):

> *Voth's* case should simply be followed until the time comes, if it ever comes, for full argument to be developed about its correctness, and for an argument that it is wrong to be accepted.

The learned judges proceeded to give reasons as to why the test in *Voth* could not be challenged in that particular case. These included, first, that there was no "satisfactory forensic background against which to explore the correctness of *Voth's* case" (at [39]); that it was not satisfactorily explained in detail how the considerations relevant to overruling prior authorities (here, *Voth*) had

been satisfied (at [40]); that the written submissions advanced by the Respondent in relation to the correctness of *Voth* "were not developed in the detail which is desirable when a question of this important kind is presented" (at [41]); that "it was not demonstrated that even if the *Voth* test were overruled or modified, there would be any difference in the result of the appeal"; and that "[i]n the absence of that demonstration, any observations making a change to the *Voth* test would in one sense be dicta only", which was "not in general a satisfactory method of developing the law" (at [42]).

52 The observations of both Heydon and Crennan JJ are, on one reading at least, ambiguous although it might, on another reading, be open to the interpretation that they were at least open to the "clearly inappropriate forum test" in *Voth* being revisted on an appropriate occasion in the foreseeable future. Looked at in this light, the following observations by the authors of a leading Australian textbook may appear a little too strong (see *Nygh's Conflict of Laws in Australia* at para 8.24):

> [*Voth v Manildra Flour Mills Proprietary Limited* (1990) 171 CLR 538] has been part of Australian law for twenty years. In [*Puttick v Tenon Ltd* (2008) 250 ALR 482], a new generation of High Court justices, none of whom participated in *Voth*, showed no inclination to reconsider the 'clearly inappropriate forum' test. Despite all the academic lamentation and complaint, judicial reform of the *Voth* test appears to be past praying for. Without legislative change, the test is entrenched in Australian law and critics must just grin and bear it.

A final point – relativity of natural forum

53 A final point might be noted. Counsel for the Appellant, Mr Cavinder Bull, laid great emphasis upon the fact that there were, in effect, no substantive connecting factors in relation to *Singapore*. He argued that this was a relevant factor as stage one of the *Spiliada* test was *comparative* in nature. There is some force in this argument inasmuch as the defendant must, under the first limb of the test in the *Spiliada*, establish that there is *another* available forum which is clearly or distinctly more appropriate than Singapore. To *that* end, the number as well as quality of connecting factors in the *Singapore* context *is* relevant from a comparative (or relational) perspective. And, to the extent that there are *no* substantive connecting factors in relation to Singapore, that must surely weigh in favour of the defendant. However, as this court pointed out in *CIMB Bank* (at [26]; also reproduced above at [38]), "it is not enough just to show that Singapore is not the natural or appropriate forum" – which would, of course, be the situation if there were, in the case concerned, *no* substantive connecting factors in relation to *Singapore*. The defendant must, as we have already noted, go *further* and establish that there is *another* available forum which is *clearly or distinctly more appropriate than Singapore* (see also the decision of this court in *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 at [4] ("*Siemens AG*")). Hence, notwithstanding the fact that there might be few – or even *no* – substantive connecting factors in relation to *Singapore*, this does *not necessarily* mean that the defendant would have discharged the burden that is placed upon it under the first limb of the test in the *Spiliada*. This is, in fact, an excellent example of the more *general* principle that *every* perspective in a given legal test *must* be considered. Indeed, in so far as this particular issue is concerned, the following summary by Prof Yeo is particularly helpful (see *Halsbury's Laws of Singapore* (at para 75.089), appropriately entitled "Relativity of Natural Forum"):

> The principle of the natural forum does not seek to identify *the* most clearly appropriate forum in the absolute sense. The search is for *a* natural forum, not *the* natural forum. Four implications follow.
>
> Firstly, there may be cases where no forum can be said to be comparatively more appropriate

than any other. In such a case, stay will not be granted because it cannot be shown that there is another forum that is clearly more appropriate. Similarly, in a service out of jurisdiction case, it cannot be rebutted that Singapore is the proper forum to hear the case. The Singapore court will exercise its jurisdiction in such cases, even if it means multiplicity of proceedings.

Secondly, although the formulation in *The Spiliada* is that the defendant seeking a stay of proceedings must not only show that Singapore is not an appropriate forum, but that there is clearly another more appropriate forum elsewhere, it should be borne in mind that the inappropriateness of Singapore as a forum is relative to the existence of a clearly more appropriate forum elsewhere. It is not necessary to show that Singapore is a clearly inappropriate forum.

Thirdly, the defendant may show that two (or more) fora are clearly more appropriate than Singapore, without having to identify one of them specifically as *the* most appropriate forum.

Fourthly, if the parties have chosen not to have their dispute decided in the foreign forum with the strongest connections with the case, and this alternative forum is not put forward to the court for consideration, the court is still obliged to consider whether any other forum put forward by the defendant is a clearly more appropriate forum than Singapore. A more difficult situation arises where the defendant applies to stay Singapore proceedings on the basis that forum X is clearly more appropriate than Singapore, while the plaintiff presents evidence that forum Y is clearly more appropriate than either X or Singapore (but neither the plaintiff nor the defendant is interested in litigating in Y). In principle, this does not affect the proposition that the court should *prima facie* stay the proceedings when the defendant has demonstrated that there is a clearly more appropriate and available forum elsewhere.

[emphasis in original]

54 We should note – parenthetically – that, in *contrast* to the *Singapore* position, the *Australian* position (see above at [47]–[48]) tends, by its very nature, to be focused, instead, on (as Mason CJ, Deane, Dawson and Gaudron JJ put it in *Voth* (at 565)) "the inappropriateness of the local court and not the appropriateness or comparative appropriateness of the suggested foreign forum". And, in the same decision, the learned judges also observed, in a similar vein (at 558), that:

...the question which the ["clearly inappropriate forum"] test presents is slightly different [from the approach in *Spiliada*] in that it focuses on the advantages and disadvantages arising from a continuation of the proceedings in the selected forum rather than on the need to make a comparative judgment between the two forums.

Likewise, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ observed in *Zhang* (at 503) that "it should at once be noted that a court is not an inappropriate forum merely because another is more appropriate". However, we would think that, on a practical level at least, some comparative analysis is probably inevitable in most cases. Indeed, in *Voth*, Mason CJ, Deane, Dawson and Gaudron JJ observed (at 558) that:

[The focus on the inappropriateness of the local forum] is not to deny that considerations relating to the suitability of the alternative forum are relevant to the examination of the appropriateness or inappropriateness of the selected forum.

(See also *Voth* at 564–565 and [47] above).

55 Let us turn now to apply both the first limb as well as the second limb of the test in the *Spiliada* to the facts of the present appeal. Before proceeding to do so, it would be appropriate to review – in summary form – the main arguments proffered on behalf of both parties.

The parties' arguments

The Appellants' arguments

56 The Appellants argued that, as between Singapore and Indonesia, Indonesia was the more appropriate forum for hearing the dispute between the parties. The Appellants emphasised that the following connecting factors pointed towards Indonesia as the natural forum:

(a) Events relevant to the dispute occurred in Indonesia. For example, Indonesia was the place where Cyriac first met the Second and Third Appellants. Indonesia is also the location of the mining concessions that are the subject of the dispute.

(b) The parties have connections with Indonesia. The First Appellant is a UAE company but it has a registered office in Indonesia. Both the Second and Third Appellants are resident in Indonesia. The Respondent carries out projects in Indonesia and its representative, Cyriac, spends a significant amount of time there.

(c) The Appellants will have to rely on non-party witnesses who are resident in Indonesia ("the Indonesian Witnesses"). Some of these witnesses may have to be compelled to testify. In this regard, the Judge erred in predetermining the witnesses that the Appellants wished to call for the trial on the merits.

(d) Documentary evidence relevant to the dispute is presently located in Indonesia.

(e) In so far, at least, as the Respondent's alternative claim for misrepresentation in tort is concerned, the natural forum is Indonesia because that is the place where the tort occurred.

(f) The Respondent's claims are governed by Indonesian law. The claim for misrepresentation is governed by Indonesian law because Indonesian law is the *lex loci delicti*. Indonesian law is also the law governing the Investment Agreement because that is the law which has the closest and most real connection with the Investment Agreement. In relation to the governing law of the Investment Agreement, the Judge erred in suggesting that UAE law might govern the Investment Agreement even though neither party raised the applicability of UAE law in the hearing below.

(g) The Appellants sought leave to raise a new argument on the Respondent's claim under the Misrepresentation Act. The Appellants argued that the Respondent has no claim under the Misrepresentation Act because the Misrepresentation Act does not have extraterritorial effect, *ie*, that this Act does not apply to misrepresentations occurring outside the territory of Singapore.

57 On the whole, the Appellants submitted that, as between Singapore and Indonesia, Indonesia is the more appropriate forum for hearing the dispute. The Appellants further argued that, even if the Investment Agreement was governed by UAE law, the connecting factors were still overwhelmingly in favour of Indonesia. In any case, the Appellants urged us to only consider whether Singapore was a more appropriate forum than Indonesia since neither party was contending that the dispute should be heard in any forum apart from Singapore or Indonesia.

The Respondent's arguments

58 The Respondent submitted that the following connecting factors pointed towards Singapore as the more appropriate forum for hearing the dispute:

(a) The Appellants chose to receive the Investment Funds in Singapore.

(b) Both the Second and Third Appellants have connections with Singapore. The Second Appellant studied in Singapore. He also has a Singapore bank account and he previously owned an apartment in Singapore. The Second Appellant also previously held shares and directorships in Singapore companies. The Third Appellant also holds shares and directorships in Singapore companies. The Respondent also has connections with Singapore in the form of a wholly-owned subsidiary incorporated in Singapore.

(c) As for the location of witnesses, the dispute is in relation to the discussions between the Appellants and the Respondent. Therefore, the party witnesses (*ie*, the Second and Third Appellants and the Respondent's representatives) are the most relevant witnesses. In any case, the Appellants have not shown that adducing evidence via video-link would be unsuitable. Furthermore, the travel time between Indonesia and Singapore is not long and so the inconvenience occasioned by having the case heard in Singapore is not significant. As for the need to compel the witnesses, the Appellants have not adduced evidence on whether the witnesses are compellable in Indonesia.

(d) The location of documents should not be given any weight. The expense of transporting the documents to Singapore may be compensated with an appropriate costs order.

(e) Indonesian law is not the governing law of the Investment Agreement. Rather, the Investment Agreement is governed by Singapore law because the Singapore JVA was abandoned only because of the more advantageous tax benefits of using a UAE entity. The parties always intended for Singapore law to govern the Investment Agreement. Alternatively, the governing law is UAE law. As for the misrepresentation claim, the Judge did not err in considering that the application of Indonesian law was not an insurmountable obstacle. The Judge was merely ascribing the weight that he was giving to the governing law as a connecting factor. In any event, the Indonesian law issues for the tort claim are not complex.

(f) The place of the tort is indeed the *prima facie* natural forum for the misrepresentation claim. However, this is just one of the factors that the court should consider. Furthermore, this factor should be given less weight because Indonesian tort law has not been shown to be different from Singapore law.

(g) As for the Respondent's claim under the Misrepresentation Act, the Respondent took issue with the Appellants' raising of a new point that was not canvassed before the Judge. On the merits, the Respondent argued that the applicability of the Misrepresentation Act has no bearing on the *forum non conveniens* analysis because it is not a connecting factor.

(h) On balance, the connecting factors do not point clearly and distinctly away from Singapore to Indonesia. The connecting factors in favour of Indonesia should be given little weight.

Our decision

Introduction

59 It is perhaps important to state an obvious point right at the outset. Notwithstanding the

principles stated above, the *facts* of each case are of equal importance. Put simply, there is no mechanistic method that can be utilised in this – indeed, any – legal context. To adopt such an approach would be a sure recipe for legal disaster, producing (in the majority of cases at least) great injustice. Hence, a close attention to the factual matrix of the present appeal is imperative.

The Judge's discretion

60 As we noted earlier (at [40]), a decision to grant, or to refuse to grant, a stay of proceedings is discretionary. We were of the view that the appeal could not be allowed merely because we disagreed with the Judge's exercise of his discretion inasmuch as we might have arrived at a different conclusion on the facts. To reiterate, the guiding principles in this regard were, as this court stated in *CIMB Bank* (at [84] reproduced above at [40]), that:

> ...an exercise of discretion should not be interfered with by an appellate court unless the judge had misdirected himself on a matter of principle, or he had taken into account matters which he ought not to have taken into account or had failed to take into account matters which he ought to have taken into account, or his decision is plainly wrong.

In this regard, the Appellants' arguments suggested that the Judge might have misapplied certain principles. For example, the Appellants submitted that the Judge failed to correctly apply the *Albaforth* principle, which, as will be seen below (at [106]), is a principle that, in a dispute involving a tort, the place where the tort occurred is *prima facie* the natural forum. It was, therefore, necessary for us to apply the *Spiliada* test afresh to the facts in order to ascertain whether or not the Judge had misapplied the principles just stated. We pause to observe – parenthetically – that the relevant factors in the context of the facts of the present appeal fall (as we shall see) principally within the purview of the first three categories of connections identified by Prof Yeo (above at [42]).

Stage one of the Spiliada test

The residence and place of business of the parties

61 The First Appellant is a UAE corporation. However, it has a representative office in Jakarta. The First Appellant appears to have conducted most of its business from that office, as evidenced by the following facts: (i) it sent the Letter of Offer to the Respondent from Indonesia; (ii) it conducted its meeting of its board of directors to increase its share capital at the representative office; and (iiii) it sent the Respondent a copy of the Exclusive Mining Agreement from Indonesia.

62 As for the other parties, the Second and Third Appellants are resident in Indonesia. The Respondent is an Indian company with operations in Indonesia.

The availability of non-party witnesses

63 We were of the view that the parties were conflating two factors: (i) the *convenience* in having the case decided in the forum where the witnesses are ordinarily resident ("the Witness Convenience Factor"); and (ii) the *compellability* of those witnesses ("the Witness Compellability Factor"). We should analyse these factors separately because each may suggest that different forums are the natural forum. In addition, the Witness Compellability Factor could also be a relevant factor under the second stage of the *Spiliada* test, as was the argument of counsel in *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [91]–[92] ("*Rickshaw Investments*"). In this regard, we agreed with the following observations of Prof Yeo (*Halsbury's Laws of Singapore* at para 75.091):

> The connections of relevant witnesses can be important too. The physical locations of witnesses are generally of less significance today given the ease of travel and the possible use of information and communication technology. *A more important consideration is the compellability of the witnesses*. This has been considered as a Stage One factor although it involves a comparison of the procedures of different legal systems. *Arguably, it sits more naturally as a Stage Two factor* – a juridical advantage of trial in a particular forum. However, *the benefit of considering this as a Stage One factor is that compellability of the defendant's witnesses in the foreign court will be weighed in the equation as well*, whereas as a Stage Two factor, the defendant would have to prove that non-compellability in Singapore is a denial of substantial justice, a very difficult case to make out. This point, while illustrating the different objectives of the two stages, also demonstrates the need to take a holistic view. [emphasis added]

64 Given the differences between the two factors, we considered them separately.

(1) The Witness Convenience Factor

65 In so far as the Witness Convenience Factor was concerned, our view was that the Judge had, with respect, erred for two reasons in holding that the Appellants had not shown that the evidence of the Indonesian Witnesses is material.

66 First, as this court in *Good Earth Agricultural Co Ltd v Novus International Pte Ltd* [2008] 2 SLR(R) 711 has held (at [21]), the court hearing an application for a stay should not predetermine the witnesses that the parties should call. In fairness to the Judge, he did not hold that the evidence of the Indonesian Witnesses was not necessary for the Appellants' defence. Rather, the Judge indicated that *the Appellants had failed to demonstrate* that the evidence of the Indonesian Witnesses' would be material. However, we were of the view that the Judge had, in substance, predetermined that the Appellants did not need testimony from the Indonesian Witnesses to advance their defence.

67 Second, the Appellants have endeavoured to explain the reasons why they require the testimony of the Indonesian Witnesses. It would not be appropriate to require the Appellants to demonstrate *exactly* how they would use the testimony of the Indonesian Witnesses at this interlocutory stage. The Appellants have not yet prepared their Defence. We acknowledge, on the other hand, that a defendant applying for a stay should not be permitted to assert, without substantiation, that it requires foreign witnesses because that would make it easy for defendants to manufacture a connecting factor. Our view was that a defendant should at least show that evidence from foreign witnesses is at least arguably relevant to its defence. The Appellants have, in our view, met that threshold.

68 Since the Appellants require the testimony of the Indonesian Witnesses, it appears that this factor points to Indonesia as the natural forum. However, our analysis did not end there. It was necessary for us to consider whether (i) the possibility of obtaining evidence from the Indonesian Witnesses through video-link and (ii) the fact that Indonesia is relatively close to Singapore suggest that this factor should not be given substantial weight. Our view was that both considerations were persuasive and hence operated against the Appellants on this particular sub-issue.

69 With regard to the first consideration, this court has endorsed the views of the High Court in *Peters Rogers May v Pinder Lillian Gek Lian* [2006] 2 SLR(R) 381 (at [26]) on how the possibility of obtaining video-link evidence should impact the stage one analysis of the *Spiliada* test (see *Good Earth* at [21]). The Appellants have not explained why the evidence of the Indonesian Witnesses cannot be given via video-link.

70 As for the second consideration, we note that this court in *Chan Chin Cheung v Chan Fatt Cheung* [2010] 1 SLR(R) 1206 held (at [35]) that the availability of witnesses should not be a significant factor if the witnesses are from Malaysia because of the proximity of Singapore to Malaysia. This consideration applies with equal force to Indonesia, which (as the Respondent has argued) is also relatively near to Singapore.

(2) The Witness Compellability Factor

71 In so far as the Witness Compellability Factor is concerned, a Singapore court cannot compel a foreign witness to testify in a Singapore court (see Order 38, rule 18(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed)). Therefore, the fact that the Indonesian Witnesses cannot be compelled by a Singapore court to either testify in person in Singapore or to give evidence via video-link is a factor that points to Indonesia as being the natural forum. The Appellants have argued that the Indonesian Witnesses may need to be compelled to testify.

72 A countervailing consideration is, as the Respondent has argued, that the Appellants have not shown that the Indonesian Witnesses would be compellable in an Indonesian court if this dispute were heard in Indonesia. The Respondent cited the recent Singapore High Court decision of *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2010] SGHC 111 ("*Sun Jin Engineering*") in support of the argument that the Appellants should have led evidence on the compellability of the Indonesian Witnesses in the Indonesian courts. In *Sun Jin Engineering*, the court had the benefit of expert evidence on whether foreign witnesses were compellable in the alternative forum (the Maldives).

73 With respect, the Respondent has misunderstood this particular aspect of the decision in *Sun Jin Engineering*. The Appellants have correctly explained that in *Sun Jin Engineering*, the court considered that the expert evidence on whether witnesses were compellable in the Maldives was unclear. Notwithstanding this, the court considered that it was *more likely* that the Maldivian witnesses would testify if the case were heard in the Maldives (see *Sun Jin Engineering* at [40]).

74 We took a similar view in this appeal. Although it would have been preferable to have had expert evidence on whether the Indonesian Witnesses are compellable to testify in an Indonesian court, it is more likely that the Indonesian Witnesses would testify if the dispute were heard in an Indonesian court.

The governing law of the claims

75 As this court has observed (in *Rickshaw Investments* at [42]), the governing law of the claims raised by the parties is a significant factor in stage one of the *Spiliada* test.

(1) Characterising the issues

76 Before determining the governing law of the claims, it is necessary for us to characterise the issues raised by the claims. The first stage of any choice of law analysis is to characterise the issues that the parties have raised (see, for example, the English Court of Appeal decision of *Macmillan Inc v Bishopsgate Investments plc (No 3)* [1996] 1 WLR 387 at 407).

77 The Respondent has made claims (see also above at [34]) for the following: (i) a declaration that the contract was validly rescinded; (ii) restitution of the remainder of the Investment Funds; (iii) damages for misrepresentation in contract; (iv) damages for misrepresentation in tort; and (v) damages for misrepresentation under the Misrepresentation Act.

78 The first and the third claims are claims in contract. The second claim is a claim in restitution. However, the choice of law analysis for the restitutionary claim is the same as the choice of law analysis for the contract claims because the restitutionary claim is consequential on the failure of the Investment Agreement (see *CIMB Bank* at [41]). The fourth claim is a claim in tort and the fifth claim is a statutory claim.

(2) The governing law for the contractual and restitutionary claims

(a) The choice of law rule

79 It is well established that a three stage approach is applied to determine the governing law of a contract (see, for example, the decision of this court in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 ("*Pacific Recreation*") at [36]). At the first stage, the court considers if the contract expressly states its governing law ("the Express Law"). If the contract is silent, the court proceeds to the second stage and considers whether it can infer the governing law from the intentions of the parties ("the Implied Law"). If the court is unable to infer the parties' intentions, it moves to the third stage and determines the law which has the closest and most real connection with the contract ("the Objective Law").

(b) analysis

80 It is clear that there was no Express Law. We were of the view, however, that it is possible to determine the Implied Law. It is reasonable to infer that the parties intended that UAE law govern the Investment Agreement given the choice of that law in a closely related contract, *viz*, the Exclusive Mining Agreement. The Exclusive Mining Agreement was, in fact, sent to the Respondent. The Letter of Offer also refers to the Exclusive Mining Agreement three times. Furthermore, the Exclusive Mining Agreement was essential to the Investment Agreement. Without it, the First Appellant would have had nothing of value to offer the Respondent in exchange for its provision of expertise.

81 As the editors of the 11th Edition of *Dicey and Morris on the Conflict of Laws* (Stevens & Sons, 11th Ed, 1987) ("*Dicey and Morris (11th Ed)*") note, it is possible to infer that the parties intended that a contract be governed by the same law that governs a closely related contract (at 1185):

> … The legal or commercial connection between one contract and another may enable a court to say that the parties must be held implicitly to have submitted both contracts to the same law. …

The editors of the 11th Edition of *Chesire and North's Private International Law* (Butterworths, 11th Ed, 1987) make a similar assertion (at 459–460).

82 The editors of *Dicey and Morris (11th Ed)* cite a number of cases for this proposition, including the English Court of Appeal decision in *Re United Railways of Havana* [1960] Ch 52 ("*Re United Railways of Havana*"). *Re United Railways of Havana* involved two related contracts that were part of a transaction for an English railway company to obtain finance to purchase rolling stock. The English railway company incorporated a subsidiary in Pennsylvania and sold the rolling stock to that subsidiary. The subsidiary then leased the rolling stock to the English railway company ("the First Contract"). Under the terms of the First Contract, the English railway company was to pay rentals to the subsidiary. The subsidiary entered into a contemporaneous contract with a trust company ("the Second Contract"). Under the terms of the Second Contract, the subsidiary assigned its rights under the First Contract to the trust company. In effect, this arrangement meant that the English railway company would pay the rentals to the trust company which would in turn pay the rentals to holders of trust certificates.

83 One of the issues in *Re United Railways of Havana* was the governing law of the First Contract. Having held that the Second Contract was governed by *Pennsylvanian* law, the English Court of Appeal proceeded to hold that the First Contract was also governed by Pennsylvanian law because that was both the Implied Law and the Objective Law. The following portion of the court's judgment is instructive (*Re United Railways of Havana* at 94):

> It has been material to consider the agreement in this connection because it was held by the judge, and argued before us by counsel for the respondents, that *the proper law of the agreement and of the lease was intended to be the same*. *This is probably, though not, we think, inevitably, true*. In the words of the judge: "The lease is expressly recited in the agreement, and in the lease there is a recital of the intention immediately to assign the benefit of the lease to the trustee. *The two documents are essential parts of the same transaction*, namely, the Philadelphia Plan. In those circumstances one would expect that they would each have the same proper law, and I hold that they have." One certainly cannot ignore the fact that *each of the two documents constituted essential parts of one entire transaction and it would, we think, be unusual if the parties concerned in that transaction should desire one part to be governed by the law of Cuba (which is in many relevant respects totally different from American law) and the other part to be governed by the law of Pennsylvania*. [emphasis added]

It should be noted that *Re United Railways of Havana* proceeded on appeal to the House of Lords (see *In re United Railways of Havana and Regla Warehouses Ltd* [1961] AC 1007 ("*Re United Railways of Havana (HL)*")). On this particular point, the House of Lords considered that the Objective Law was Pennsylvanian law (see *Re United Railways of Havana (HL)* at 1068 (*per* Lord Denning) and 1081 (*per* Lord Morris)). The judgment at the House of Lords did not consider whether the Implied Law was Pennsylvanian law (and was, incidentally, one of the rare decisions that was overruled (pursuant to the House of Lords Practice Statement (Judicial Precedent) [1966] 1 WLR 1234) by the House of Lords in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 (albeit with Lord Simon of Glaisdale dissenting (on the issue as to whether or not the "breach date conversion" rule in *Re United Railways of Havana (HL)* ought to be departed from and be substituted with the rule that an English court was entitled to give judgment for a sum of money expressed in a foreign currency in the case of obligations of a money character to pay foreign currency under a contract, the proper law of which was that of a foreign country and when the money of account was that of that country or possibly some country other than the United Kingdom))).

84 We also considered decisions such as the English High Court decisions in *The Njegos* [1936] 1 P 90 ("*The Njegos*") and *The Adriatic* [1931] P 241 to be relevant because they consider that it is possible to infer that the parties concerned intended that a contract be governed by the same law as the governing law of a related contract. In *The Njegos*, for example, a bill of lading incorporated the terms of a charterparty. The charterparty contained an arbitration clause providing for arbitration in England. The parties agreed that the proper law of the charterparty was English law. The issue related to the governing law of the bills of lading. The court found that the bills of lading did not incorporate the arbitration clause and hence the governing law could not be inferred from the arbitration clause. However, the court nevertheless held that English law governed the bills of lading because the parties should be presumed to have intended that the bills of lading be governed by the same law as the law governing the charterparty (*The Njegos* at 107). It might also be noted that the Singapore High Court in *Las Vegas Hilton Corp (trading as Las Vegas Hilton) v Khoo Teng Hock Sunny* [1996] 2 SLR(R) 589 referred (at [39]) to *The Njegos* when discussing the circumstances in which an inference may be drawn in relation to the governing law of a contract.

85 Returning to the relevant facts of the present appeal, we considered that it was possible to infer that the parties intended that the Investment Agreement be governed by the same law that

governs the Exclusive Mining Agreement (UAE law) because of the close relation between the contracts. We did not consider it to be material that the Exclusive Mining Agreement and the Investment Agreement were not between the same parties. The related contracts in the decisions referred to above (at [83] and [84]) were also between different parties. The crucial point is that the two contracts in each of those decisions were so closely related that the parties could not reasonably be considered as having intended that different laws govern the related contracts.

86 This raises the issue as to whether the Judge was entitled to suggest that the applicable law was UAE law when the parties proceeded on the basis that the applicable law was either Singapore law or Indonesian law. The Appellants argued that the Judge should not have suggested that the applicable law was UAE law without inviting the parties to make submissions on the potential applicability of UAE law. The Appellants relied on the decision of this court in *Pacific Recreation* as support for this argument.

87 It is indeed true that the Judge should have allowed the parties to submit on the potential applicability of UAE law. However, it is open to us to reach a provisional view that the governing law of the Investment Agreement is UAE law because both parties had the opportunity to submit, in this appeal, on the potential applicability of UAE law – which opportunity they in fact availed themselves of.

(3) The governing law for the alternative tort claim

(a) The choice of law rule

88 The choice of law rule that Singapore courts apply for torts is the double actionability rule (see *Rickshaw Investments* at [53]). The double actionability rule provides that the tort must be actionable under both the *lex fori* and the *lex loci delicti*. Exceptionally, the double actionability rule may be displaced such that the tort may be actionable in Singapore even though it is not actionable under either the *lex loci delicti* or the *lex fori*. The exception may even be applied to provide that the law of a third country is the applicable law for the tort (see *Rickshaw Investments* at [56]).

(b) analysis

89 We have to first determine the place of the tort in order to ascertain the *lex loci delicti*. This posed some difficulty in the present appeal because the elements constituting the tort of misrepresentation did not occur in a single jurisdiction. The alleged misrepresentations were made in Indonesia. But at least some of the misrepresentations were received in India.

90 The test that is commonly applied for determining the place of the tort is that which looks at the events constituting the tort and asks where, in substance, the cause of action arose ("the Substance Test") (see, for example, the House of Lords decision of *Distillers Co. (Biochemicals) Ltd v Thompson* [1971] AC 458 at 468 and the English Court of Appeal decision of *Metal und Rohstoff AG v Donaldson Lufkin & Jenrette Inc & Anor* [1990] 1 QB 391 at 443). The Singapore courts have also applied the Substance Test (see, for example, the Singapore High Court decisions of *Wing Hak Man and another v Bio-Treat Technology Ltd and others* [2009] 1 SLR(R) 446 at [26] and *Focus Energy Ltd v Aye Aye Soe* [2009] 1 SLR(R) 1086 at [14]).

91 The English courts have crystallised the Substance Test into a more certain rule in cases of misrepresentations made in one jurisdiction and received in another jurisdiction. In the context of determining the place of tort for the purpose of leave to serve out of jurisdiction, the English Court of Appeal has held that the place of the tort is the place where the representation is "received and

acted upon" (see the English Court of Appeal decisions of *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The "Albaforth")* [1984] 2 Lloyd's Rep 91 at 92 ("*The Albaforth*") and *Diamond v Bank of London and Montreal* [1979] QB 333 at 345–346). A different approach, however, was taken in a case where the misrepresentation occurred in one jurisdiction to an *unspecified class* of persons and was received and relied upon in a second jurisdiction. The court found that the tort occurred in the first jurisdiction (see the English Court of Appeal decision of *Cordova Land Co v Victor Bros Inc* [1966] 1 WLR 793 at 801). Prof Yeo, in *Halsbury's Laws of Singapore*, concisely states the approach taken in these misrepresentation cases thus (at para 75.378):

> The tort of misrepresentation is generally committed in the country where the representation is *received and acted upon*, at least where the representation is directed specifically at the plaintiff, *unless the place is fortuitous in the circumstances*, or if the receipt and reliance occur in different countries. If the representation is made *at large*, then the tort may have occurred in the *place where the representation is made*. [emphasis added]

92 It should be noted, in passing, that the English courts *now* apply a *different* test for determining the place of the tort. For cases arising before the date when the Rome II Regulation came into force (11 January 2009), the test for the place of the tort is found in s 11(2) of the Private International Law (Miscellaneous Provisions) Act 1995 (c 42) (UK) ("the PILMPA") (which is, of course, not applicable in Singapore). That provision defines the place of the tort differently for personal injury cases (see s 11(2)(a) of the PILMPA), property damage cases (see s 11(2)(b) of the PILMPA) and all other cases (see s 11(2)(c) of the PILMPA). The present case would have come within the scope of s 11(2)(c) of the PILMPA, under which the place of the tort would be the place where "the most significant element or elements" of the events constituting the tort in question occurred (see *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 14th Ed, 2006) at para 35-088–35-089 ("*Dicey, Morris and Collins*")). For cases coming within the purview of the Rome II Regulation, there is no longer a need to consider the place of the tort because other connecting factors, such as the place where the damage occurs and the place of habitual residence, are utilised instead (see generally *Dicey, Morris and Collins on the Conflict of Laws*, Third Cumulative Supplement to the Fourteenth Edition at paras S35-194–S35-200).

93 We were of the view that the approach adopted by the English courts (as discussed above at [91]) has some merit. The Substance Test is itself rather broad and open-ended. There is, for example, room for debate as to whether the place where the representation was made is more significant than the place where the representation was received – and *vice versa*. More importantly, both would, theoretically at least, satisfy the Substance Test. It would therefore help to have more concrete rules, with appropriate exceptions, for particular torts. For misrepresentations, it is suggested that, if the representation was received and acted upon in a single jurisdiction, that place should be the place of the tort unless that place was fortuitous or if the receipt and reliance occur in different countries. The Substance Test (in its more general form and possible "incarnations") may nevertheless still be resorted to in cases not falling comfortably within this suggested (and more specific) rule. However, for reasons which we will elaborate upon in a moment, there is no need to rule definitively on this point in the present appeal. In particular, the circumstances are such that the suggested rule cannot (as we shall see) be applied.

94 As just mentioned, the present appeal is, in fact, a case that does not fit comfortably within the suggested rule. The actual misrepresentation was *received* in India because that was the place where the First Appellant sent the Letter of Offer and the Exclusive Mining Agreement. Both those documents contained a representation that the First Appellant had mining concessions with one million tonnes of iron ore. However, the Appellants contend that other representations were also made during meetings in Indonesia as to the mining concessions that the First Appellant could rely on to

make up a total of one million tonnes of iron ore. The representations were also *acted upon* in *two* jurisdictions. The Respondent acted on the representation by remitting funds from India. The Respondent also acted on the representation in Indonesia by conducting drilling works at the Pelaihari Concession. Accordingly, it is not possible to apply the suggested rule. Instead, we applied the general Substance Test.

95 Applying the general Substance Test, we were of the view that the place of the tort was Indonesia. Indonesia was the place where most of the negotiations took place. The Respondent also took steps in reliance of the representations in Indonesia. The only reason why the representations in the Letter of Offer and the Exclusive Mining Agreement were received in India was because the Respondent was based in India. Accordingly, we were of the view that the *lex loci delicti* is Indonesian law.

96 It remained for us to consider the Respondent's contention that Indonesian law has not been shown to be different from Singapore law. In this regard, we noted that strict proof of the differences between Indonesian and Singapore law was not necessary. As this court observed in *Rickshaw Investments*, we may take notice that the laws of other jurisdictions are likely to be different (at [43]):

> Choice of law questions raise a related issue regarding a party's evidential burden to plead foreign law. In *Goh Chok Tong v Tang Liang Hong* [1997] 1 SLR(R) 811, Lai Kew Chai J pointed pertinently to *the need for foreign law to be pleaded*, and held that if foreign law was not in fact pleaded, it would be presumed to be the same as the relevant position under Singapore law (see generally at [77]-[84], and especially at [79]): see also *Ertel Bieber and Company v Rio Tinto Company, Limited* [1918] AC 260 at 294-295. Where this evidentiary presumption can be invoked, the applicability of a foreign *lex causae* under choice of law rules may therefore be reduced in significance since the forum is unlikely to have difficulty applying a foreign law which is (assumed to be) identical to the *lex fori*. In this regard, however, a number of cases suggest that a court may, despite a party's failure to adduce proof of foreign law, have regard to the fact that the principles in the foreign jurisdiction concerned will, in all likelihood, differ from the *lex fori* in some respects (see, for example, the Singapore High Court decision of *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* [1996] SGHC 285 at [44] ("*PT Jaya*")). Hence, in the present case, the mere factum of a foreign *lex causae*, *ie*, German law, may be accorded due weight *despite* the respondent's failure to adduce evidence regarding the content of this law. [emphasis in original]

(4) The statutory claim

97 Contrary to the Respondent's submissions (see above at [58(g)]), whether the Misrepresentation Act potentially applies is a relevant consideration under stage one of the *Spiliada* test because it is relevant for this court to consider the law governing the claims raised by the Respondent. For example, if the scope of the Misrepresentation Act is such that it potentially applies to the present case, then that would be a factor against Indonesia being the natural forum because greater expense and inconvenience would result in having the application of a Singapore statute heard in an Indonesian court. This is *not* to state that we are determining the *substantive* issue as to whether the Respondent's claim under the Misrepresentation Act is sustainable on the facts, as we cannot, *ex hypothesi*, make this determination in the context of the present proceedings. Rather, we are determining whether the *scope* of the Misrepresentation Act is such that it *potentially* applies in the present case.

98 Before considering the scope of the Misrepresentation Act, we should elucidate the approach

that we took in our analysis. The Appellants approached the issue of the scope of the Misrepresentation Act from the perspective of the presumption against extraterritoriality. It is useful to clarify that there are in fact two aspects to this presumption in the conflict of laws context. Prof Yeo notes as follows (see *Halsbury's Laws of Singapore* at para 75.292):

> Where the conflictual scope of legislation is not spelt out, it has often been said that there is a presumption that legislation of the forum is intended only to have territorial effect. There are two overlapping aspects to this presumption. *Firstly*, as a matter of *private international law*, the presumption is that the statutory provision *only applies if the relevant connecting factor points to the law of the forum as the law governing the issue*. *Secondly*, *whatever the basis that the statute applies* (whether as forum mandatory law, or as the substantive law governing the issue by reason of the forum's choice of law rule, or as forum procedural law), it is presumably *only intended to affect activities occurring within the territory of the forum*, or to *activities abroad of nationals of the forum*. [emphasis added]

9 9 *Dicey, Morris and Collins* note that there are two approaches to determining the scope of a statute in the conflict of laws context. However, the editors do not consider the two approaches to be part of a common exercise of deriving parliamentary intention. The following remarks by the editors, in the context of a discussion on the scope of s 2 of the Marriage Act 1949 (c 76) (UK), are instructive (at para 1-040):

> A court, when confronted by a statute of its own law or of foreign law which is expressed in general terms like this, could use one of the two methods to determine its scope. The *first* is to *interpret the statute in the light of its purpose and background* so as to read into it the limitations which the legislature would have expressed if it had given thought to the matter. This is an artificial method, and perhaps a dangerous one, because *ex hypothesi* the legislature gave no thought to the matter – if it had done so it would have expressed the limitations. The *second method* is to *apply general principles derived from the conflict of laws* – i.e. *first characterise the question* as relating to capacity to marry [as noted above, this quotation is from a discussion on the scope of s 2 of the Marriage Act 1949 (c 76) (UK), which provides that "[a] marriage between persons either of whom is under the age of sixteen shall be void"], and then apply the relevant conflict rule to the question so characterised. [emphasis added]

100 Our view was that, conceptually, it is better to consider the two approaches as part of a common exercise of discerning parliamentary intention. If Parliament clearly intended for a statute to apply even where the choice of law rules suggest that Singapore law does not apply, the courts must not disregard Parliamentary intention and refuse to apply the statute. Parliament has the power to legislate extraterritorially (see the decision of this court in *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [37]). The choice of law rules are simply useful tools in ascertaining Parliamentary intention on the geographical scope of our laws.

101 On the first aspect of the presumption, the starting point is to characterise the issue that the Respondent has raised with its claim that the Appellants have induced it to enter into a contract through a misrepresentation. The competing characterisations are a tort and a contract characterisation. It is not necessary to reach a firm conclusion on the proper characterisation because, on either characterisation, the applicable law is not Singapore law. As considered above, the applicable law on a contract characterisation is UAE law (see above at [85]) and the applicable law based on a tort characterisation is Indonesian law (see above at [95]). Therefore, on the first aspect of the presumption, we may presume that Parliament did not intend that the Misrepresentation Act apply to the present case because Singapore law does not govern the issue that the Respondent has raised.

102 The second aspect of the presumption does not rely on choice of law rules. Parliament is *generally* presumed to have intended for its laws to only apply to activity in Singapore (see the decision of this court in *Parno v SC Marine Pte Ltd* [1999] 3 SLR(R) 377 at [38]–[39] ("*Parno*")). This presumption may be displaced by clear indication of Parliamentary intention that the statute concerned is intended to apply extraterritorially (see *Parno* at [39]). This intention need not be stated expressly (see *Parno* at [38]). As an illustration, the Singapore High Court recently held that the presumption against extraterritoriality was rebutted in the Traditional Chinese Medicine Practitioners Act (Cap 333A, 2001 Rev Ed) ("the Traditional Chinese Medicine Practitioners Act") on the basis that extraterritorial application of that statute would serve Parliamentary intention and would not cause any difficulty with international comity and enforcement of the statute (see *Huang Danmin v Traditional Chinese Medicine Practitioners Board* [2010] SGHC 152 at [36]–[38]).

103 Applying this general presumption, the Misrepresentation Act is presumed to apply only to misrepresentations within Singapore territory. Unlike, for example, s 37 of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) ("the Prevention of Corruption Act"), the Misrepresentation Act is silent as to its geographical scope. It is clear, therefore, that the Singapore Parliament has not *expressly* stipulated that it intended that the Misrepresentation Act apply extraterritorially. However, it seems that the intention underlying the Misrepresentation Act would be furthered if the Misrepresentation Act were applied to misrepresentations occurring outside Singapore territory but *only if* the applicable law of the relevant contract were Singapore law. The purpose of the Misrepresentation Act, which is based on the Misrepresentation Act 1967 (c 7) (UK), is well known and is concisely stated by the editors of *Chitty on Contracts* (30th Ed, Sweet & Maxwell, 2008) in the following manner (at para 6-001):

> … Prior to the enactment of the Misrepresentation Act 1967, the position broadly speaking was that a misrepresentation which induced a person to enter into a contract gave the representee the right to rescind the contract, subject to certain conditions, but *generally gave him no right to damages unless the misrepresentation had contractual force*. Since the coming into force of the Misrepresentation Act the representee *will always be able to claim damages for negligent misrepresentation* in circumstances in which he could have recovered damages had the misrepresentation been fraudulent. In addition the Act *gives the court a discretion to refuse to permit a representee to rescind a contract, but to award him damages in lieu of rescission*, if the misrepresentation is negligent or wholly innocent; but it leaves the representee with an absolute right to rescind where the misrepresentation is fraudulent. The Act of 1967 *does not, however, alter the rules as to what constitutes an effective misrepresentation* … [emphasis added]

104 It appears, therefore, that the purposes underlying the Misrepresentation Act are two-fold: (i) to supplement the remedies available to a representee under common law (more accurately, under the then common law as the seminal House of Lords decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 had been decided by the time the Misrepresentation Act had been enacted and had filled the then existing gap, albeit in different manner than that provided for pursuant to s 2(1) of the Misrepresentation Act (see, for example, *Cheshire, Fifoot and Furmston's Law of Contract – Second Singapore and Malaysian Edition* (Butterworths Asia, 1998) ("*Cheshire, Fifoot and Furmston*") at pp 468–471)); and (ii) to confer the courts with flexibility in remedial matters by allowing courts to award damages in lieu of rescission, which flexibility was not available under the common law (pursuant to s 2(2) of the Misrepresentation Act (see also *Cheshire, Fifoot and Furmston* at pp 482–484)). These purposes would not appear to be enhanced if the Misrepresentation Act were applicable to misrepresentations occurring outside Singapore territory in relation to contracts governed by foreign law. Unlike, for example, the Prevention of Corruption Act or the Traditional Chinese Medicine Practitioners Act, the Misrepresentation Act is not intended to regulate

conduct or protect classes of persons. The purposes of such conduct regulating and protective statutes would, perhaps, be advanced if they are applied without strict regard to territorial links. A statute that merely supplements existing common law remedies with respect to the *Singapore* common law of contract, without serving a conduct regulating or protective function, on the other hand, does not appear to require *general* extraterritorial application to have its purposes advanced. If, however, the relevant contract were governed by Singapore law (whether by express choice or otherwise), it would appear to be consistent with the purposes of the Misrepresentation Act to say that it applies even to misrepresentations occurring outside Singapore territory. In fact, we would suggest that it would be highly artificial if a choice of Singapore law in a contract only brings into operation Singapore *common law* for misrepresentations occurring outside Singapore territory without the supplementary or facilitative provisions of the Misrepresentation Act.

105 As we have held, the Investment Agreement might be governed by UAE law (see above at [85]). It follows, therefore, that the Misrepresentation Act does not apply because the misrepresentation occurred outside the territory of Singapore and the Investment Agreement was not governed by Singapore law. Therefore, the fact that the Respondent has raised a claim based on the Misrepresentation Act should not be a relevant factor in stage one of the *Spiliada* test.

Other connecting factors

(1) The place of the tort

106 As this court accepted in *Rickshaw* (at [39]), for tort claims, the place of the tort is *prima facie* the natural forum. This principle is derived from *The Albaforth* (at 96) and was accepted by the House of Lords in *Berezovsky v Michaels* [2000] 1 WLR 1004 (at 1014). However, as was observed in *Rickshaw* (at [40]), *The Albaforth* principle is only a *prima facie* position. As the Hong Kong Court of Appeal recently noted, the place of the tort may, in some cases, be fortuitous (see *The Peng Yan* [2009] 1 HKLRD 144 at [28], *per* Ma CJHC (with whom Cheung J agreed)):

> It is therefore important when applying *The Albaforth* principle in the context of *forum non conveniens* applications, to examine just how close a connection there really exists with any given *forum*. In some cases, the place of the commission of the tort may be decisive; in others, perhaps not weighty at all. The underlying principle to be firmly borne in mind is the basic test in *The Spiliada* and *The Adhiguna Meranti*. The place of the commission of the tort may in some cases be quite fortuitous and may provide no more than a convenient starting point or *prima facie* position. The court is required to look into more substantial factors in the application of the basic test. The present case involved a collision where, quite often, there is no obvious or natural forum: see *The Spiliada* at p.477C-D.

107 As we held earlier (see above at [95]), the place of the tort was Indonesia. Applying the *Albaforth* principle, Indonesia would, *prima facie*, be the natural forum, at least for the alternative tort claim. We were of the view that there was nothing on the facts of this case to displace the *prima facie* position. The place of the tort was not fortuitous. Indonesia was the place from which the misrepresentations were made. Indonesia was also the place where substantial acts in reliance of the misrepresentation took place: the Respondent conducted drilling at the Pelaihari Concession because of the Appellants' alleged misrepresentations. This is not to say that the *Albaforth* principle, whilst applicable in the context of the present proceedings, is decisive in the present appeal. We were aware that the Respondent's claim in tort was framed as an *alternative* cause of action.

(2) General connections with Singapore and the payment of the Investment Funds in Singapore

108 The Respondent placed considerable emphasis on certain general connections that the parties have or have had with Singapore. The Respondent also relied on the fact that the Investment Funds were paid into Singapore bank accounts.

109 We did not consider these connections to be relevant in stage one of the *Spiliada* test. The general connections to Singapore and the payment of the Investment Funds into Singapore bank accounts have no relevance to the claims that the Respondent has framed. Only connections that are relevant to the disputes should be considered in the *forum non conveniens* analysis (see, for example, the decision of this court in *The Rainbow Joy* [2005] 3 SLR(R) 719 at [52] and the English High Court decision of *Vetco Gray UK Ltd v FMC Technologies Inc*, [2007] EWHC 540 (Pat) at [26]). The underlying purpose of the *forum non conveniens* analysis is to determine whether there is a more appropriate forum, *viz*, one "in which the case may be tried more suitably for the interests of all the parties and the ends of justice" (see *Spiliada* at 476), and the core inquiry is to determine the place which has the "most real and substantial connection" with the case (see *Spiliada* at 478). This purpose and core inquiry will not be advanced by considering connecting factors that are not relevant to the dispute because those factors are not really and substantially connected with the case at hand.

Conclusion on stage one of the Spiliada *test*

110 On the whole, we were satisfied that Indonesia was clearly or distinctly a more appropriate forum than Singapore for the trial of the claims concerned. Indonesia is the place where all the parties have some connection that is relevant to the dispute. Although not a significant factor in so far as the proximity of Indonesia to Singapore and the possibility of obtaining evidence via video-link are concerned, we gave some weight to the fact that the Appellants intend to call witnesses based in Indonesia. The Appellants have also argued that they need to rely on Indonesian Witnesses who may have to be compelled, and the Appellants will more likely be able to compel these witnesses if the case was heard in Indonesia. In relation to the alternative claim in tort, it was relevant that Indonesian law was the *lex loci delicti* and that the place of the tort was Indonesia.

111 Although (as noted above) we considered that UAE law might govern the Investment Agreement, this was not a factor in favour of Singapore's candidacy as the natural forum. It should be recalled that the *forum non conveniens* analysis is a relative one (see above at [53]). The choice in the present proceedings was between Indonesia and Singapore. Between Indonesia and Singapore, it would not be logical for us to consider that Singapore was the natural forum simply because a third forum, the UAE, had a better or as strong a claim as Indonesia as the natural forum. In this regard, we found the English Court of Appeal decision of *Macsteel Commercial Holdings (Pty) Ltd & Anor v Thermasteel V (Canada) Inc & Anor* [1996] CLC 1403 ("*Macsteel*"), which the Appellants discussed at length in their Appellants' Case, to be a useful illustration (incidentally, *Macsteel* was recently considered by this court in *Siemens AG* (at [15])). *Macsteel* was a case where the dispute had links to Ontario and South Africa. The only link with England was that English law was expressed to be the governing law of the contract. On those facts, the court held that the action should be stayed even though both South Africa and Ontario had *equally* strong links with the dispute. The court considered it relevant that the parties were not arguing that the case should be heard in South Africa. The only comparison was between England and Ontario. As between England and Ontario, Ontario was the clearly more appropriate forum.

112 In fact, the Singapore High Court case adopted a similar approach to the English Court of Appeal in *Macsteel*. In *Lehman Brothers Special Financing Inc v Hartadi Angkosubroto* [1998] 3 SLR(R) 664, the court considered that the natural forum was either New York or Indonesia and not Singapore (at [35]). The High Court accordingly granted the stay.

113 Reference in this regard may also be made to the following views of Prof Yeo, which were also reproduced above (see above at [53]) (see *Halsbury's Laws of Singapore* at para 75.089):

> Fourthly, if the parties have chosen not to have their dispute decided in the foreign forum with the strongest connections with the case, and this alternative forum is not put forward to the court for consideration, the court is still obliged to consider whether any other forum put forward by the defendant is a clearly more appropriate forum than Singapore. A more difficult situation arises where the defendant applies to stay Singapore proceedings on the basis that forum X is clearly more appropriate than Singapore, while the plaintiff presents evidence that forum Y is clearly more appropriate than either X or Singapore (but neither the plaintiff nor the defendant is interested in litigating in Y). In principle, this does not affect the proposition that the court should *prima facie* stay the proceedings when the defendant has demonstrated that there is a clearly more appropriate and available forum elsewhere.

114 We were satisfied that, on a relative analysis, Indonesia was clearly a more appropriate forum than Singapore. Accordingly, stage one of the *Spiliada* analysis pointed firmly in favour of granting a stay of proceedings.

Stage two of the Spiliada test

115 It should be noted that no arguments were proffered with respect to this particular limb of the test in the *Spiliada*. This was not surprising, in our view, having regard to the relevant facts before us, and we therefore need say no more about this particular limb.

Conclusion

116 For the reasons set out above, it was clear that Indonesia was clearly and more distinctly the appropriate forum for the trial of the claims concerned. We therefore allowed the appeal with costs, and with the usual consequential orders.

117 We would also like to take this opportunity to commend both Mr Bull and Ms Gan for their clear arguments. In particular, neither sought to either exaggerate or even embellish their respective client's cases but simply presented their arguments to this court in as cogent and as persuasive a fashion as possible.