

IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 11

Civil Appeal No 87 of 2018

Between

SHANGHAI TURBO ENTERPRISES LTD

And

LIU MING

... Appellant

... Respondent

In the matter of Suit No 571 of 2017

Between

SHANGHAI TURBO ENTERPRISES LTD

And

LIU MING

... Plaintiff

... Defendant

FOUNDATIONS OF DECISION

[Conflict of Laws] — [Choice of jurisdiction] — [Non-exclusive]

[Conflict of Laws] — [Jurisdiction]

[Conflict of Laws] — [Natural forum]

[Civil Procedure] — [Jurisdiction] — [Submission]

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Shanghai Turbo Enterprises Ltd

v

Liu Ming

[2019] SGCA 11

Court of Appeal — Civil Appeal No 87 of 2018
Judith Prakash JA and Belinda Ang Saw Ean J
27 September 2018

13 February 2019

Judith Prakash JA (delivering the grounds of decision of the court):

Introduction

1 The dispute leading to this litigation was between a company listed on the Stock Exchange of Singapore, albeit incorporated elsewhere, and its former chief executive officer, a Chinese national. The dispute centres around the alleged breach of the service contract between the company and its former employee, but the issues that this court had to deal with concerned preliminary procedural matters relating to the validity of the order granting leave to serve the proceedings out of jurisdiction on the employee and the effect of a non-exclusive jurisdiction clause favouring Singapore on the strength of the case that the employee had to mount in order to displace the Singapore court's jurisdiction.

2 The appeal was brought by Shanghai Turbo Enterprises Ltd (“Shanghai Turbo”) against the decision of the High Court to set aside an order granting Shanghai Turbo leave to serve the writ out of jurisdiction on the respondent, Mr Liu Ming. The judge below (“the Judge”) set aside the order on two bases: first, Singapore was not the *forum conveniens* for trial of the suit; second, Shanghai Turbo had not made full and frank disclosure of the material facts in its *ex parte* application for leave to serve out of jurisdiction.

3 In addition to the matters which were canvassed before the Judge, we had to consider two arguments which were made for the first time on appeal. The first was that Mr Liu had by his conduct submitted to jurisdiction. The second was that the contract between the parties contained a non-exclusive jurisdiction clause which had the effect of requiring Mr Liu to show strong cause why the suit should not be tried in this jurisdiction, and strong cause had not been shown.

4 After hearing the parties’ arguments, we allowed the appeal and restored the order granting leave to serve out of jurisdiction. We now give the reasons for our decision.

Background facts

5 Shanghai Turbo is a company incorporated in the Cayman Islands and listed on the Singapore Stock Exchange (“the SGX”). It wholly owns a Hong Kong-incorporated entity, Best Success (Hong Kong) Ltd (“Best Success”). Best Success wholly owns Changzhou 3D Technological Complete Set Equipment Ltd (“CZ3D”), a company incorporated in China. The three companies together form a group (“the Group”), which is in the business of

precision engineering. CZ3D is the only income-generating entity of the Group and has a factory in Changzhou, Jiangsu, China.

6 Mr Liu is a Chinese citizen who resides in Changzhou. He owns 29.9998% of the shares in Shanghai Turbo. Another 39.19% of the shares is owned by a group comprising various Japanese companies. Mr Liu was the Executive Director of Shanghai Turbo from November 2005 to 15 April 2017, and its Chief Executive Officer from January 2010 to 15 April 2017. He was also a director of the three companies in the Group until 15 April 2017, when he was removed from office in all three companies, as well as other management positions in Best Success and CZ3D, allegedly because of the declining levels of profit under his management from 2014 to 2017. New boards of directors (and new management teams) then replaced the old boards (and old management teams) led by Mr Liu.

7 On 27 June 2017, Shanghai Turbo commenced Suit No 571 of 2017 (“the Suit”) in Singapore against Mr Liu for breaching an agreement entered into between them on 1 May 2016 in relation to Mr Liu’s appointment as Executive Director (“the Service Agreement”). The Service Agreement imposed certain obligations on Mr Liu in the event of termination, which he is alleged to have breached. The four alleged breaches are as follows.

(a) Clause 9(d)(ii) of the Service Agreement required Mr Liu, upon termination of his appointment, to deliver up to the board all documents, papers and property belonging to the Group which were in his possession or under his control. After 15 April 2017, however, Mr Liu refused and/or failed to deliver up the CZ3D factory to the new management. This state of affairs persisted until 20 September 2017.

(b) Clause 10(a)(i) of the Service Agreement required Mr Liu, for a period of 12 months from the termination of his appointment, not to solicit, interfere with or endeavour to entice away from the Group any person who to his knowledge was ever a client, customer or employee of, or in the habit of dealing with, the Group, save with Shanghai Turbo's prior written consent. Mr Liu (in conspiracy with another person) allegedly diverted CZ3D's business, an important client, and its employees to Changzhou Hengmiao Precise Machinery Limited ("Changzhou Hengmiao").

(c) Clause 10(b) of the Service Agreement required Mr Liu, upon termination of his appointment, not to disclose to any person, or himself use for any purpose, and to use his best endeavours to prevent the publication or disclosure of, information concerning the Group's business, accounts or finances or any of its clients' or customers' transactions or affairs, save with Shanghai Turbo's prior written consent. Mr Liu is alleged to have divulged confidential information concerning CZ3D's business and its client's affairs to other persons, and further instigated the latter to misuse the names of the Labour Union and CZ3D's employees to send a letter defamatory of the new management to the SGX.

(d) Clause 7(a) of the Service Agreement prohibited Mr Liu from revealing any of the trade secrets, secret confidential operations, processes, dealings or confidential information of the Group, or any information concerning the Group's organisation, business, finances, transactions or affairs, and from using any such information in any manner which might injure or cause loss to the Group. Mr Liu is alleged

to have breached this clause by committing the acts described in the preceding sub-para, as well as by giving CZ3D's employees incomplete, inaccurate and/or false information about the new management, instigating them to go on strike and to resist the new management's attempts to take possession of the factory.

8 Shanghai Turbo sought, as relief for these breaches, (a) an order for Mr Liu to deliver up all documents, papers and property belonging to the Group; (b) an account of all profits made by Mr Liu; and (c) damages, interest and costs.

9 As Mr Liu resides in China, Shanghai Turbo applied *ex parte* for leave to serve the writ of summons, the statement of claim and the service order itself out of jurisdiction on Mr Liu, citing O 11 rr 1(d)(iii), 1(d)(iv) and 1(r) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC"). In support of its application, Shanghai Turbo relied on cl 17 of the Service Agreement, which states:

Governing law

This Agreement shall be governed by the laws of Singapore/or People's Republic of China and each of the parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/or People's Republic of China.

10 The assistant registrar granted the application on 5 July 2017 and made an order in terms ("the Service Order"). On 13 March 2018, at which time service had not been effected pursuant to the Service Order despite being attempted, Mr Liu's solicitors informed Shanghai Turbo's solicitors that they had instructions to accept service on Mr Liu's behalf. On 14 March 2018, Mr Liu entered an appearance in the Suit.

11 On 20 March 2018, Mr Liu applied by way of Summons No 1345 of 2018 (“SUM 1345”) to set aside the Service Order. He also prayed that, consequentially, the following injunctions be set aside:

(a) a Mareva injunction obtained by Shanghai Turbo *ex parte* on 15 September 2017, which restrained Mr Liu from dealing with his assets in Singapore, including his stake in Shanghai Turbo, up to the aggregate value of \$30m (“the Mareva Injunction”); and

(b) an injunction obtained by Shanghai Turbo *ex parte* on 18 January 2018, restraining Mr Liu from exercising the voting and other rights attached to his shares in Shanghai Turbo, so as to stop him from replacing the new board and discontinuing and/or delaying the proceedings (“the Voting Injunction”).

12 When SUM 1345 was heard before the Judge, Shanghai Turbo conceded that cl 17 of the Service Agreement disclosed no valid express choice of law. It nevertheless maintained that service out of jurisdiction was permissible on the following grounds:

(a) Notwithstanding that cl 17 did not constitute a valid choice of law, objectively, Singapore law governed the Service Agreement. The claim was therefore brought in respect of a breach of a contract which “is by its terms, or by implication, governed by the law of Singapore” (O 11 r 1(d)(iii) of the ROC).

(b) Clause 17 constituted a submission to the jurisdiction of the Singapore courts. The claim was therefore brought in respect of a breach of a contract which “contains a term to the effect that that Court shall

have jurisdiction to hear and determine any action in respect of the contract” (O 11 r 1(d)(iv)).

(c) Clause 17 also meant that the claim was brought “in respect of matters in which the defendant has submitted or agreed to submit to the jurisdiction of the Court” (O 11 r 1(r)).

13 Mr Liu, on the other hand, contended that cl 17 was invalid and unenforceable in its entirety, and that Chinese law governed the Service Agreement. He also submitted that China, rather than Singapore, was a more appropriate venue for trial of the Suit, and that Singapore was therefore *forum non conveniens*.

The decision below

14 The Judge set aside the Service Order, the Mareva Injunction and the Voting Injunction on 14 May 2018. Her reasons are stated in *Shanghai Turbo Enterprises Ltd v Liu Ming* [2018] SGHC 172 (“the GD”). She applied the three requirements for valid service out of jurisdiction as set out in *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [26] (“*Zoom Communications*”), namely:

- (a) the plaintiff’s claim must come within one of the heads of claim in O 11 r 1 of the ROC;
- (b) the plaintiff’s claim must have a sufficient degree of merit; and
- (c) Singapore must be the proper forum for the trial of the action.

15 The second requirement was not in dispute so the Judge dealt only with the first and the third. As regards the first requirement, the Judge found, applying the test in *Pacific Recreation Pte Ltd v S Y Technology Inc and another appeal* [2008] 2 SLR(R) 491 (“*Pacific Recreation*”), that there was a good arguable case that Singapore law governed the Service Agreement. Although cl 17 provided that the Service Agreement was “governed by the laws of Singapore/or People’s Republic of China”, this was not valid, because the proper law of a contract had to be ascertainable at the time the contract came into existence and could not float in suspense (the GD at [31]–[32]). Nevertheless, having regard to various factors listed at [35] and [36] of the GD, the Judge considered that there was a good arguable case that the Service Agreement was governed by the law of Singapore, such that the claim fell within O 11 r 1(d)(iii) of the ROC (the GD at [37]–[39]). Though there were more connecting factors pointing towards Chinese law, a conclusive determination would require resolving disputes of fact (the GD at [39]).

16 However, cl 17 did not engage O 11 r 1(d)(iv) or O 11 r 1(r) of the ROC. Since the Judge did not make a conclusive finding as to the proper law of the Service Agreement, she considered the validity of cl 7 under both Singapore and Chinese law. As a matter of Singapore law, the first (invalid) part of cl 17 could not be severed from the second part (“each of the parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/or People’s Republic of China”). These two parts were “intimately linked” and were meant to be paired together: the non-exclusive jurisdiction of Singapore would be dependent on the choice of Singapore law, and the non-exclusive jurisdiction of China would be dependent on the choice of Chinese law (the GD at [45]–[46] and [50]). Even if the first part was severed, the word “or” in the second part of

the clause was to be read disjunctively rather than conjunctively, and did not mean that the parties had submitted to the jurisdiction of *both* the Singapore courts *and* the Chinese courts (the GD at [47]–[48]). However, cl 17 did not include a mechanism to choose between the Singapore and Chinese courts, reinforcing the Judge’s view that the two parts of cl 17 were not intended to operate independently (the GD at [50]). The Judge found that substantially the same result obtained under Chinese law, given the evidence by Mr Liu’s Chinese law expert that the second part of cl 17 was too vague to be enforceable (the GD at [52]). Since cl 17 would be invalid and unenforceable in entirety under both Singapore and Chinese law, O 11 rr 1(*d*)(iv) and 1(*r*) did not apply.

17 The Judge then went on to the third requirement of whether Singapore was the *forum conveniens*. She applied the test in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 (“*Spiliada*”). At the first stage of the *Spiliada* test, the Judge considered that China was the natural forum for the claim, having regard to various factors, particularly the location of the parties and CZ3D, the place of performance of the Service Agreement, the place where the breaches occurred, the location of the parties’ witnesses, the language of the documentary evidence, and related proceedings in China (the GD at [58]–[70]). As for the second stage of the *Spiliada* test, Shanghai Turbo argued that it would suffer substantial injustice if it was forced to bring the claim in China because (1) there was a real risk that Mr Liu would contrive to replace the board so as to discontinue the claim; and (2) it was in the public interest for the matter to be heard in Singapore as Shanghai Turbo had investors from Singapore and other countries, including Japan. The Judge found that there was insufficient evidence that Shanghai Turbo would be unable to obtain a suitable interim remedy in

China, and rejected the second argument as a thinly-veiled challenge to the competence of the Chinese courts (the GD at [78]–[79]).

18 The finding that Singapore was not the *forum conveniens* was sufficient to set aside the Service Order. The Judge, however, held additionally that Shanghai Turbo had not made full and frank disclosure of all material facts when applying *ex parte* for leave to serve out of jurisdiction. The supporting affidavit filed by Mr Chia Seng Hee (“Mr Chia”), an independent director and the non-executive chairman of Shanghai Turbo did not mention the issue of *forum conveniens* and did not raise the relevant facts to fulfil this requirement (the GD at [83] and [86]). The affidavit did not mention details concerning the alleged contractual breaches or the fact that key individuals were resident in China and CZ3D was incorporated in China (at [84]). The affidavit also did not grapple with the relevant arguments concerning O 11 r 1 of the ROC (at [85] and [86]).

19 The Judge therefore set aside the Service Order. There was no basis for the injunctions at [10] above to remain, and these were set aside as well (the GD at [87]). The Judge also dismissed Shanghai Turbo’s application to stay her orders pending the present appeal.

The parties’ cases on appeal

20 Shanghai Turbo’s case on appeal was essentially the same as it was before the Judge, save for the addition of two new arguments:

- (a) First, Shanghai Turbo contended that the second half of cl 17 is a valid non-exclusive jurisdiction clause, which has the effect of requiring Mr Liu to show strong cause why the matter should not be

tried in Singapore. In support of this contention, Shanghai Turbo relied principally on the Hong Kong Court of Appeal decision in *Noble Power Investments Ltd and another v Nissei Stomach Tokyo Co Ltd* [2008] HKCA 255 (“*Noble Power*”).

(b) Secondly, Shanghai Turbo submitted that by actively supporting an application filed by two non-parties in the Suit (Summons No 1173 of 2018, or “SUM 1173”), Mr Liu took a step in the proceedings and submitted to the jurisdiction of the Singapore courts.

21 Mr Liu adopted all the Judge’s conclusions save in respect of O 11 r 1(d)(iii) of the ROC. He argued that there were clear indicia that Chinese law, not Singapore law, bore the closest and most real connection to the Service Agreement. He further submitted that O 11 rr 1(d)(iv) and 1(r) were inapplicable because the second half of cl 17 could not be severed from the invalid first half, and in any event was too uncertain to be enforced. Mr Liu also submitted that *Noble Power* should not be followed in Singapore. Even if cl 17 constituted a valid submission to the non-exclusive jurisdiction of the Singapore and Chinese courts, it was only one factor to be considered in the *Spiliada* framework and did not require Mr Liu to show strong cause. Applying the *Spiliada* test, China was clearly the more appropriate forum.

22 Secondly, Mr Liu denied that his participation in SUM 1173 amounted to a submission to jurisdiction. In particular, he emphasised that he had expressly and repeatedly reserved his right to contest the jurisdiction of the Singapore courts.

The issues before this court

23 The issues which arose for our decision were as follows:

- (a) whether Mr Liu had submitted to the Singapore court's jurisdiction by his conduct relating to SUM 1173;
- (b) whether the Suit engaged any of the limbs in O 11 r 1 of the ROC;
- (c) whether cl 17 constituted an agreement to submit to the non-exclusive jurisdiction of the Singapore court, and if so, its effect;
- (d) whether, if strong cause was required to be shown, Mr Liu had shown it; and if not, whether Singapore was the *forum conveniens* on an application of the *Spiliada* test; and
- (e) whether Shanghai Turbo had failed to make full and frank disclosure in its *ex parte* application for leave to serve out of jurisdiction and, if so, whether the Service Order should be set aside on that basis.

24 Before we turn to the issues in the appeal, we first make an observation about the setting-aside application. Shanghai Turbo obtained the Service Order on 5 July 2017. On 13 March 2018, *before* service was effected pursuant to the Service Order, Mr Liu's solicitors informed Shanghai Turbo's solicitors that they had instructions to accept service (see [10] above). The writ of summons and statement of claim were accordingly served on Mr Liu at his solicitors' offices in Singapore on 14 March 2018. This meant that the originating process was served within jurisdiction pursuant to O 10 of the ROC, and not out of jurisdiction pursuant to the Service Order made under O 11. The Service Order

was therefore essentially redundant, and so was the application to set it aside. However, given that the parties did not raise this point before us, we went on to consider the appeal on its merits.

Submission to jurisdiction as a result of SUM 1173

25 We first address the question of whether Mr Liu’s participation in SUM 1173 constituted a submission to the jurisdiction of the Singapore court within the meaning of s 16(1)(b) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) (“the SCJA”).

26 Shanghai Turbo did not make this argument below and Mr Liu submitted that it ought not to be allowed to raise this argument for the first time on appeal. In deciding whether to grant a party leave to introduce on appeal new points not taken in the court below, the court will consider (a) the nature of the parties’ arguments below; (b) whether the court considered and provided any findings and reasoning in relation to this point; (c) whether further submissions, evidence, or findings would have been necessitated had the points been raised below; and (d) any prejudice that might result to the other party in the appeal (*Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76 at [38]). In *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179, the Court of Appeal permitted a new point to be argued because the issue was “one which this court [was] in just as advantageous a position as the court below to adjudicate upon” and “[n]o new evidence [was] required to be adduced” (at [63]). The principle applied here. There is no factual dispute concerning Mr Liu’s involvement in SUM 1173. Whether his acts amounted in law to a submission to jurisdiction was a question of law, which this court was as well-

placed to decide as the Judge below would have been. We therefore allowed Shanghai Turbo to make this argument.

27 By way of background, one Lin Chuanjun and one Zhang Ping (together “the Non-Parties”) – whom Shanghai Turbo alleged were acting in concert with Mr Liu – issued a requisition notice dated 4 January 2018 (“the Requisition Notice”) calling for an extraordinary general meeting of Shanghai Turbo. They wanted to pass resolutions to replace the incumbent board of Shanghai Turbo. On 9 January 2018, Shanghai Turbo filed applications seeking to (1) restrain the Non-Parties from *inter alia* holding any meeting in respect of the Requisition Notice, as well as any meeting intended to remove any of Shanghai Turbo’s directors or discontinuing the Suit (“SUM 155”); and (2) add the Non-Parties as parties to Shanghai Turbo’s application for that injunction (“SUM 156”). On 18 January 2018, Shanghai Turbo obtained the Voting Injunction. This provided that, until the adjourned hearing of SUM 155 or any further Order of Court:

- (a) the Non-Parties were restrained from holding any meeting in respect of the Requisition Notice;
- (b) both the Non-Parties and Mr Liu were restrained from requisitioning, convening, holding or allowing to be held any meeting, or doing any acts or things (including voting for or proposing resolutions at Shanghai Turbo’s meetings), that had or purported to have the effect of removing any of Shanghai Turbo’s directors or appointing any persons as directors; and
- (c) Mr Liu was restraining from voting for or proposing any resolutions at any meeting of Shanghai Turbo.

28 On 2 March 2018, before SUM 155 and SUM 156 were heard, Shanghai Turbo issued a Notice of Annual General Meeting (“AGM”) proposing a resolution to authorise a share issue. The AGM was to be held on 19 March 2018. The Non-Parties feared that Shanghai Turbo would use the share issue to dilute their shareholdings so as to prevent the Requisition Notice from being passed in the event that the court did not grant SUM 155 and/or SUM 166. They therefore filed SUM 1173 on 9 March 2018 to vary the Voting Injunction so as to include the following order:

Until the final conclusion of HC/SUM 155/2018 and HC/SUM 156/2018 in HC/S 571/2017, the Plaintiff, whether by themselves, or by their servant(s), agent(s), nominee(s) or otherwise, shall be restrained from doing anything, or causing anything to be done, which will or may directly or indirectly in any manner whatsoever affect the Requisition Notice dated 4 January 2018 given by Lin Chuanjun and Zhang Ping and/or prevent and/or reduce the chances of the resolutions proposed therein from being passed, including but not limited to:

- a) making any amendments to the Constitution of the Company;
- b) diluting the shareholding of any shareholder, including the issuance of new shares or securities (whether on a pro-rata or non-pro-rata basis) for any purpose whatsoever;
- c) acquiring of any asset(s) by the Company; and/or
- d) disposing of any asset(s) by the Company.

29 As can be seen from the terms of SUM 1173, the variation sought by the Non-Parties would have effectively discharged order 1 of the Voting Injunction, which restrained the Non-Parties from holding any meeting in respect of the Requisition Notice. It also ventured beyond the terms of the Voting Injunction by seeking to restrain Shanghai Turbo from doing *anything* which would,

directly or indirectly, reduce the chances of the resolutions proposed in the Requisition Notice being passed.

30 Although SUM 1173 was filed by the Non-Parties, Mr Liu took it upon himself to argue and support their application. First, he filed written submissions dated 14 March 2018 in support of SUM 1173, arguing that SUM 1173 was “necessary in order to prevent an abuse of process, prevent [Shanghai Turbo] from taking steps to unfairly prejudice [him], and to maintain the status quo of [Shanghai Turbo’s] shareholding”. At the hearing of SUM 1173 on 15 and 16 March 2018, counsel for Mr Liu, Mr Toh Kian Sing SC (“Mr Toh”), made extensive oral arguments in support of SUM 1173. Mr Toh even explained to the Judge that his client “did not put together an application, given limited time” – suggesting that Mr Liu had intended to file his *own* application to vary the Voting Injunction, but simply had not had the time to do so. Indeed, Mr Toh made an oral application at the hearing on 15 March to vary the Voting Injunction so as to enable Mr Liu to vote on resolutions tabled at Shanghai Turbo’s AGM. The next day, however, he informed the Judge that Mr Liu “[would] not ... pursue the oral application” should the Judge make an interim injunction restraining the issue of shares. Mr Toh also informed the court that Mr Liu was prepared to provide an undertaking as to damages in the event that the interim injunction sought by the Non-Parties was granted. On 22 March 2018, after filing his summons to set aside the Service Order, Mr Liu filed an affidavit in support of SUM 1173. In that affidavit he stated that his participation in SUM 1173 should not be taken as a submission to jurisdiction, because SUM 1173 was necessary to stop Shanghai Turbo from diluting his shareholding and to protect his interests and rights.

31 The Judge granted an interim injunction on 16 March 2018 restraining Shanghai Turbo from issuing new shares or securities pending the further hearing of SUM 1173 (“the Share Issue Injunction”), and also recorded Mr Liu’s undertaking as to damages. Mr Liu filed his setting aside application on 20 March 2018. The Share Issue Injunction was continued until 14 May 2018, when both it and Mr Liu’s undertaking were discharged as a result of the Judge’s setting aside of the Service Order.

32 Whether a defendant’s conduct amounts to a submission to jurisdiction is a question of fact in each case (*Zoom Communications* at [32]). Many of the authorities cited by the parties concerned the meaning of a “step in the proceedings” in the context of a stay in favour of arbitration, and we are content to accept for present purposes that substantially the same principles govern whether a defendant’s conduct amounts to a submission to jurisdiction where he contends that no such jurisdiction exists in the first place, subject to what we say at [44] below. The cases have identified various tests (see *Carona Holdings Pte Ltd and others v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 (“*Carona Holdings*”) at [55], [93] and [99]), (*Chong Long Hak Kee Construction Trading Co v IEC Global Pte Ltd* [2003] 4 SLR(R) 499 (“*Chong Long*”) at [9], and *L Capital Jones Ltd and another v Maniach Pte Ltd* [2017] 1 SLR 312 (“*L Capital Jones*”) at [77])). We do not think it necessary to set those tests out here.

33 We found that Mr Liu’s participation in SUM 1173 amounted to an invocation of the court’s jurisdiction and an implied acceptance that the court had jurisdiction to try the Suit. Mr Liu supported SUM 1173 even though he was not compelled to respond to or otherwise participate in it, since it was an

application by the Non-Parties against the plaintiff. Moreover, though SUM 1173 was in form an application to vary the Voting Injunction against Mr Liu and the Non-Parties, it was in substance an application for a new injunction against Shanghai Turbo. This was also how the Judge regarded it. On 15 March 2018, the first day SUM 1173 was heard, the Judge queried whether the Non-Parties were seeking to vary the Voting Injunction or to obtain interim injunction orders against Shanghai Turbo. Significantly, she also asked both the Non-Parties *and* Mr Liu whether they were prepared to give undertakings as to damages, which indicates how deeply Mr Liu was involved in advocating the merits of SUM 1173. Mr Liu was prepared to give such an undertaking, which the Judge duly recorded. The fact that Mr Liu continued to take an active role in supporting SUM 1173, even though he must have realised that the Judge regarded it as in substance an application for an interim injunction, suggests that he invoked the court's jurisdiction deliberately and knowingly. This diminishes the force of the express reservations which accompanied his conduct, which we return to below. Indeed, Mr Liu did not confine himself to supporting SUM 1173 but went on to make an oral application to vary the Voting Injunction at the hearing on 15 March, though the Judge's decision to order the Share Issue injunction against Shanghai Turbo made it unnecessary for him to pursue this application.

34 Mr Liu argued that his conduct did *not* amount to a submission to jurisdiction for the following reasons:

- (a) He expressly reserved his right to challenge the court's jurisdiction.

(b) His participation in SUM 1173 was necessary to defend himself against Shanghai Turbo’s attempt to dilute his shares. Mr Liu claims that he was “ham-strung” due to the Mareva Injunction, which meant he had no liquid assets to subscribe to the additional shares, and the Voting Injunction, which prevented him from voting against the share issue. Should his shares be diluted, he would have been “gravely prejudiced” in the event of “an escalating shareholders’ fight” with certain Japanese institutional shareholders, and would suffer commercial harm.

(c) The Share Issue Injunction was expressly ordered to last until 23 March 2018 or further Order of Court, not to the trial or final disposal of the Suit.

(d) Mr Liu filed his setting-aside application, SUM 1345, only five days after SUM 1173 was first heard.

We address these in turn.

35 First, we did not think Mr Liu’s express reservations as to his right to challenge the court’s jurisdiction could salvage conduct which was obviously meant to invoke the court’s jurisdiction. There were three such reservations:

(a) On 13 March 2018, when Mr Liu’s solicitors first notified Shanghai Turbo’s solicitors of their engagement, they wrote: “For the avoidance of doubt, [Mr Liu] hereby fully reserves his rights to dispute the jurisdiction of the Court and nothing herein shall be construed as a waiver of [Mr Liu’s] rights to do so.”

(b) Mr Liu’s written submissions for the hearing of SUM 1173, dated 14 March 2018, bore the following footnote:

The Defendant’s position in this Application is strictly without prejudice to his rights to challenge the jurisdiction of the Singapore court over him and/or to set aside the Interim Injunction, which rights are expressly reserved.

(c) Mr Liu’s affidavit filed on 22 March 2018 stated, “My participation in this Application [*ie*, SUM 1173] should not be taken as a submission to the jurisdiction of the Singapore courts.”

36 Mr Toh referred us to *Australian Timber Products Pte Ltd v Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd* [2005] 1 SLR(R) 168 at [22]–[23], which cites *Chong Long* for the proposition that “an act, which would otherwise be regarded as a step in the proceedings, will not be treated as such if the applicant has specifically stated that he intends to seek a stay or expressly reserves his right to do so”. In our view, however, those remarks did not lay down any blanket rule that no conduct would *ever* amount to a submission to jurisdiction if it was accompanied by a reservation of that party’s right to challenge jurisdiction. In *Corona Holdings* at [101], this Court warned that a party should be careful not to approbate and reprobate simultaneously. We agree with the following view expressed by the High Court in *WestLB AG v Philippine National Bank and others* [2007] 1 SLR(R) 967 at [41]:

I am not sure that an expressed reservation or intention to apply for a stay should be considered to be sufficient by itself for that purpose. If that party wants to apply for a stay of the proceedings, it should do so before, or at the same time as it takes a step in the proceedings. The effect of a step taken after or with a stay application would be considered with the application taken into account. The effect of a step taken

without a stay application can only be considered on its own. An expressed reservation or intention is not an application and cannot be accorded the same weight as an application. The party would secure its position better by filing an application for stay, and taking the step in the proceedings with the express reservation that the step is taken without prejudice to the stay application.

37 That does not mean that an express reservation of the right to apply to challenge the court’s jurisdiction will never be effective. The question of fact in every case is whether the defendant’s conduct demonstrates an unequivocal, clear and consistent intention to submit to the jurisdiction of the court (*Carona Holdings* at [99], referring to *Republic of the Philippines v Maler Foundation* [2008] 2 SLR(R) 857 (“*Maler*”). Where a party pursues a certain course of action that could possibly be construed as a submission to jurisdiction, that party may be able to show that his conduct should not be so construed by caveating that course of action with a reservation as to jurisdiction, or by simultaneously mounting a jurisdictional challenge or stay application (as the case may be). For example, the High Court found in *Chong Long* that a defendant who filed his defence and a stay application at the same time, *while* making clear in his defence that he did not intend to defend the claim in court, had not by his filing of the defence taken a “step in the proceedings” (at [5] and [11]) (though in that case the defendant was found to have submitted to jurisdiction by another act). Similarly, if the defendant’s prayer for a stay is framed as a fall-back to a prayer challenging the existence of the court’s jurisdiction, it will be understood that the stay application does *not* signify admission that the court has jurisdiction (see *Zoom Communications* at [45]). Likewise, an application for an extension of time to file a defence does not signify a submission to jurisdiction if it is taken only to safeguard the defendant’s legal position while his stay application is pending (see *Australian Timber* at [23], *Carona Holdings* at [26], [100] and

[101]). These examples illustrate the well-established principle that a submission to jurisdiction may be inferred if the course of action taken by the defendant is only necessary or useful on the assumption that he has waived, or has never entertained, any objection to such jurisdiction (*Zoom Communications* at [43] and [45]). Put another way, a party's conduct will only amount to a submission to jurisdiction where it "cannot be explained, except on the assumption that the party in question accepts that the court should be given jurisdiction" (*Global Multimedia International Ltd v Ara Media Services* [2007] 1 All ER (Comm) 1160 at [27], cited in *Carona Holdings* at [60]). If a defendant's conduct may be explained on some other basis which does not involve a submission to jurisdiction, it will not be interpreted as a submission thereto.

38 However, if a party's conduct clearly and unequivocally signifies a submission to jurisdiction, we doubt whether it can necessarily be salvaged by a mere reservation. Even the filing of a jurisdictional challenge (in the service context) or a stay application (in the arbitral and *forum non conveniens* contexts) may not suffice if the challenge is fundamentally inconsistent with the nature of the defendant's acts. In *Maler*, for example, the appellant had applied to stay proceedings in favour of arbitration, but its stay application included a specific prayer for certain funds to be released to it. The appellant indicated that it would proceed with that prayer even if the stay application succeeded. This suggested that the appellant had always intended to invoke the jurisdiction of the Singapore courts for the release of funds, and that that prayer was not merely a request for an order consequential to a stay order. The case was a "useful illustration of the point that a party applying for a stay should not blow hot and cold" (*Carona Holdings* at [99]). Unlike the three examples given at [37] above,

the appellant’s conduct could not be understood except as a submission to jurisdiction, notwithstanding its professed intention not to submit.

39 In this case, Mr Liu’s conduct unequivocally signified his acceptance and invocation of the court’s jurisdiction, and could not realistically be construed in any other way. It was not a “neutral procedural step” meant to safeguard his position in the event that his jurisdictional challenge was dismissed (*Carona Holdings* at [101]), nor was it a step taken to smother rather than advance the hearing on the merits (*Carona Holdings* at [93]). Repeated reservations as to his right to challenge the court’s jurisdiction did not change or clarify the nature of his conduct. Rather, those reservations were directly contradicted by his deliberate decision to seek interim relief from the Singapore court.

40 Secondly, we rejected Mr Liu’s argument that the steps he took did not constitute a submission to jurisdiction because he had to defend himself against Shanghai Turbo’s attempt to dilute his shares via the proposed share issue. Mr Liu’s argument was premised on a misinterpretation of the Voting Injunction, *ie*, that it prohibited him from voting *on* any resolution proposed at a meeting of Shanghai Turbo. This was the interpretation advanced by Mr Toh before us, and appears also to have been accepted by both the Judge and counsel for Shanghai Turbo. However, the Voting Injunction only restrained Mr Liu from “voting for or proposing resolutions” at Shanghai Turbo’s meeting. It did not restrain him from voting *against* resolutions proposed by other persons.

41 Even if Mr Liu genuinely believed that the Voting Injunction prevented him from voting against the share issue, we did not think this made his conduct any less a submission to jurisdiction. Mr Liu cited *International SOS Pte Ltd v*

Overton Mark Harold George [2001] 2 SLR(R) 777 (“*International SOS*”) for the principle that a step taken for the purpose of “parrying a blow from the plaintiff” does not amount to submission. In that case, the defendant opposed the plaintiffs’ application for an interim injunction which would have cost the defendant his job. Choo Han Teck J recognised that any step taken to challenge the opposite party’s action would *generally* be regarded as a step in the proceedings, but acknowledged an exception where the party had no alternative but to do so (at [6]). There was a dispute over the extent to which the defendant’s counsel had resisted the plaintiffs’ application, but even if he had argued against that application, such conduct was “essentially an act of self-defence to save his job and reputation”, which was not inconsistent with the defendant’s objection to jurisdiction (at [6]). Choo J cited *Roussel-Uclaf v GD Searle & Co Ltd* [1978] RPC 747 (“*Roussel-Uclaf*”) at 756 *per* Graham J:

On the whole, I think that the statute is contemplating some positive act by way of offence on the part of the defendant rather than merely parrying a blow by the plaintiff, particularly where the attack consists in asking for an interlocutory injunction.

42 That said, Choo J rightly cautioned that “the question whether any particular conduct constitutes such a step must be considered in the context and circumstances of the case” (at [5]), and expressly declined to adopt any rule that defensive steps could not amount to steps in the proceedings (at [6]). In this case, Mr Liu did not confine himself to opposing Shanghai Turbo’s application for an interim injunction (which was the case in *International SOS*, *Roussel-Uclaf* and *Obikoya and others v Silvernorth Ltd, Bergen Bank and others* (1983) 133 NLJ 805, which were cited by Mr Toh). His conduct was not merely defensive but amounted to an invocation of the court’s jurisdiction so as to obtain injunctive relief (see [33] above). There was no need for him to participate at all in SUM 1173, which was an application by the Non-Parties for

an interim injunction against Shanghai Turbo. If Mr Liu thought that the Singapore courts lacked jurisdiction to try the dispute, then the interim injunctions granted by the Judge up to that date (including the Voting Injunction) were *ultra vires* and Mr Liu could have applied to set them aside on that basis along with the Service Order. Mr Liu claimed that he had insufficient time to do so because he engaged his solicitors just before 13 March 2018, whereas SUM 1173 was filed on 9 March and scheduled to be heard on 15 March. However, if he had insufficient time to apprise his solicitors of the relevant circumstances, he could have applied to adjourn the hearing of SUM 1173 (and the AGM at which the share issue resolution was to be voted upon) pending the filing and disposal of a setting-aside application.

43 It is also worth noting Graham J's remarks in *Roussel-Uclaf* in full. *Roussel-Uclaf* concerned an application to stay the proceedings in favour of arbitration. After stating the principle cited at [41] above, Graham J continued (at 231 (right)):

Such a remedy [*ie*, an interlocutory injunction] against a defendant might well be necessary whether the action was ultimately stayed or not, in order to preserve, for example, the property the subject of the action in the meantime; and, as a practical matter, in such a case it would not be of importance whether the application to stay was made before, at the same time as, or after the application for an injunction.

44 A defendant who applies to stay proceedings in favour of arbitration does not deny the *existence* of the court's jurisdiction; he only seeks to dissuade the court from *exercising* such jurisdiction on the basis that the dispute should be arbitrated instead. Graham J's point was that it would not be inconsistent for a defendant to seek a stay *while at the same time* opposing the plaintiff's application for an injunction, provided the injunctive relief sought was

“necessary whether the action was ultimately stayed or not” (say, to preserve the property which was the subject-matter of the dispute). In other words, the grant of interlocutory relief does not necessarily advance the hearing of the matter in *court* as opposed to arbitration. It follows that a party does not necessarily contradict his prayer for a stay by opposing (or maybe even commencing) proceedings for interlocutory relief. But the position may be different where the defendant denies that the court has jurisdiction to begin with. Then he must be careful not to take any steps which would only be necessary or useful if the court actually possesses such jurisdiction. In this case, Mr Liu clearly invoked the court’s jurisdiction so as to obtain an injunction against the plaintiff (see [39]–[42] above).

45 Thirdly, the duration of the injunction sought by the Non-Parties did not affect our conclusion. Mr Liu cited *Esal (Commodities) Ltd v Mahendra Pujara* [1989] 2 Lloyd’s Rep 479 (“*Esal*”) and *SMAY Investments Ltd and another v Sachdev and others (Practice Note)* [2003] EWHC 474 (Ch) (“*SMAY Investments*”). In *Esal*, the defendant consented to an injunction being made against him in terms which clearly contemplated the trial of the action. Slade LJ remarked that the defendant’s consent to an order in that form “was only useful and appropriate if [his] objection [to jurisdiction] had been actually waived or if it had never been entertained at all” (at 483 col 2). But *Esal* is only one example of the type of conduct which might constitute a submission to jurisdiction. Whether the defendant has submitted must be answered with reference to the totality of his conduct in all the circumstances of the case.

46 In *SMAY Investments*, the plaintiffs obtained an *ex parte* freezing order against the first defendant. At the hearing for the continuance of that freezing order, the first defendant was represented by his counsel Mr Deacon. Mr Deacon

informed the court that the first defendant intended to contest the court's jurisdiction at the full *inter partes* hearing (at [43]). Mr Deacon also suggested that the freezing order should be discharged on the first defendant's undertaking not to dispose of or deal with his house without giving the plaintiffs' solicitors 14 days' written notice (at [35]). The court rejected that suggestion and extended the freezing order. The first defendant subsequently applied to stay the proceedings on the basis of *forum non conveniens*. The plaintiff countered that the first defendant had, by previously offering an undertaking, submitted to jurisdiction. Patten J rejected that contention because the undertaking was only to last until the full *inter partes* hearing. He held, citing *Esal*, that a party who attended before a judge to challenge an *ex parte* freezing order did not *ipso facto* waive his right to contest jurisdiction "unless as part of those proceedings he agree[d] to an order which in terms regulate[d] his position until, and therefore contemplate[d], the trial of the action" (at [44]). In our view, *SMAY Investments* was clearly distinguishable on its facts. The first defendant in that case did not invoke the court's jurisdiction. His purpose in offering an undertaking was to persuade the court to *discharge* the freezing order against him pending the hearing of his jurisdictional challenge. Mr Liu's conduct in the present case, by comparison, had nothing to do with attempting to discharge an injunction granted against him, but amounted to an invocation of the court's jurisdiction for the purpose of injuncting Shanghai Turbo. Additionally, as mentioned in [33] above this conduct took place in the course of Mr Liu's voluntary participation in a hearing to which, strictly speaking, he was not a party.

47 Fourth, the fact that Mr Liu filed SUM 1345 mere days after SUM 1173 was heard was neither here nor there since, in our view, Mr Liu had waived his right to bring SUM 1345 by that time.

48 For the foregoing reasons, we found that Mr Liu’s conduct in SUM 1173 amounted to a submission to jurisdiction within the meaning of s 16(1)(b) of the SCJA. Although this sufficed to give the court jurisdiction in the Suit, we go on to explain why this was, in our view, a proper case for service out of jurisdiction in any event.

Order 11 r 1 of the ROC

49 To prove that a claim falls within O 11 r 1 of the ROC, a plaintiff has to meet the standard of a good arguable case that one or more of the various conditions listed therein has been satisfied. This court recently held, in *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 (“*Vinmar*”), that a “good arguable case” required the applicant to have “the better of the argument”. This formulation “reflects that the threshold is more than a mere *prima facie* case, but is different from the standard of a balance of probabilities given the limits inherent in the stage at which the application is being heard” (*Vinmar* at [45]). In determining whether the applicant has established a good arguable case, the court may grapple with questions of law but should not delve into contested factual issues (*Vinmar* at [46]). In our view, there was a good arguable case that O 11 rr 1(d)(iii), 1(d)(iv) and 1(r) of the ROC were fulfilled.

Order 11 r 1(d)(iii) – whether the contract is governed by Singapore law

50 Neither party disputed the Judge’s finding that cl 17 disclosed no valid express choice of law, nor was it contended that the Service Agreement was null or invalid for that reason, and we therefore proceeded on that basis. The parties also did not take issue with the Judge’s decision to bypass the second stage of *Pacific Recreation*, bearing in mind that “the same factors as those considered

at the second stage would often have to be addressed” at the third stage anyway (*Pacific Recreation* at [47]). The parties’ dispute therefore centred on the third stage, *ie*, whether Singapore or Chinese law had the closest and most real connection with the Service Agreement. We considered that Singapore law bore the closest and most real connection to the Service Agreement, for the following reasons:

(a) The Service Agreement was entered into between Mr Liu and Shanghai Turbo rather than Best Success or CZ3D. Shanghai Turbo, not CZ3D, was to remunerate Mr Liu. This was peculiar, given that CZ3D was the only income-generating entity of the Group, which suggested that this commercial arrangement was entered into deliberately. Shanghai Turbo was listed on the SGX, had always held its AGMs in Singapore and was subject to SGX listing rules and Singapore laws. Its board was seated in Singapore. Resolutions, regulations and directions given to Mr Liu by Shanghai Turbo and/or its Board would also have had to comply with these rules and laws. Mr Liu was to “serve ... under the direction of the Board”. His duties included furthering the Group’s interests “[s]ubject to such instructions and directions as [might] from time to time be given to him by the board”, undertaking such duties and exercising such powers “as the Board [should] from time to time assign to or vest in him”, “comply[ing] with all resolutions, regulations and directions from time to time made o[r] given by the Company or the Board”, and performing such services “as the Board may from time to time reasonably require”.

(b) Mr Liu was paid an amount in Singapore dollars equivalent to RMB220,000 every four months, in addition to a basic salary in renminbi (“RMB”). Clause 5 of the Service Agreement stated:

During his appointment the Company shall pay to the Executive a basic salary at the rate of RMB360,000 per annum in China, payable by equal monthly instalments in arrears on the last working day of every month of RMB30,000. In addition, the Company shall pay to the Executive RMB220,000 every four months, payable in Singapore Dollars, at the prevailing exchange rates, in Singapore, in August, December and April of each year.

According to Shanghai Turbo, the payment of his basic salary in RMB was “merely an incidence” of Mr Liu being based in China, having been seconded to CZ3D.

(c) The Service Agreement expressly referred to Singapore statutes in two places. Clause 1 of the Agreement, titled “Interpretation”, defined various terms used in the Service Agreement, and cl 1(f) defined “related corporation” to “have the meaning assigned to it under Section 6 of the Companies Act (Chapter 50, 1994 Revised Edition, Singapore Statutes)”. Clause 16 was titled “Contracts (Rights of Third parties) Act (Cap 53B)” and stated, “The parties do not intent [*sic*] that any term of this Agreement shall be enforceable solely under or by virtue of Contracts (Rights of Third Parties) Act (Cap 53B) by any person who is not a party to this Agreement.” Mr Liu argued that cl 16 “[was] self-excluding in effect” and was therefore only relevant if Singapore law was the proper law of the Service Agreement. However, the fact remained that the parties clearly contemplated that the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed) might apply. No Chinese statutes were referred to in the Service Agreement.

51 Though other factors pointed in favour of Chinese law governing the Service Agreement, we did not think these gave Mr Liu the better of the argument. These were as follows:

(a) Mr Liu was resident in China at the material time and it was always contemplated that he would be stationed in China (the GD at [36(c)]). He was to perform his duties in China in relation to CZ3D, which is ordinarily a highly relevant connecting factor (the GD at [36(b)] and [37]). However, in our view, those factors made it all the more significant that the Service Agreement was entered into between Mr Liu and *Shanghai Turbo*, with Mr Liu then *seconded to CZ3D*, instead of between Mr Liu and CZ3D directly. The significance of this contractual arrangement counter-balanced the fact that Mr Liu would be working in China.

(b) Mr Liu further pointed out that he attended three out of four board meetings in China every year. However, the venue for board meetings can change easily; in fact the board presently meets in Singapore. The venue of the board's meetings is not as significant in our view as the fact that *Shanghai Turbo* was listed in Singapore, as a result of which the board was bound to comply with Singapore listing rules and laws.

(c) Mr Liu claimed that the Service Agreement was executed in China. However, this was disputed; Mr Chia deposed that *Shanghai Turbo* executed the Service Agreement in Singapore. It is not appropriate at this stage to delve into contested factual issues (*Vinmar* at [46]).

(d) Mr Liu’s basic salary was paid in RMB in China, and even the quarterly payments which were to be made in Singapore dollars in Singapore were denominated in RMB (the GD at [37]). We did not ascribe much weight to the fact that they were denominated in RMB; this may have been done for consistency and ease of comparison and understanding, since Mr Liu was himself Chinese. Of more significance were the *currency* and *place* in which the payments were to be made. That Mr Liu drew his basic salary in China in RMB was only natural, since he would be based in China – a factor we already considered above. But the fact that additional payments were made *in Singapore, in Singapore dollars*, notwithstanding that Mr Liu was stationed in China, was more unusual and must be given some significance as another connecting factor.

52 On the whole, we considered that Shanghai Turbo had the better argument. Our view is that even though Mr Liu was situated in China and performed his duties there, his *legal* responsibilities had to be discharged under the direction of the board, which was governed by Singapore listing rules and laws. Mr Liu was directly accountable to Shanghai Turbo, not CZ3D. The Service Agreement also provided for Mr Liu to receive additional remuneration in Singapore dollars in Singapore; gave primacy to the English version over the Chinese version; and contemplated the application of Singapore statutes.

Order 11 rr 1(d)(iv) and 1(r) – whether cl 17 constitutes a submission to jurisdiction

53 We also found that the Service Agreement meets O 11 r 1(d)(iv) (that it “contains a term to the effect that [the Singapore] Court shall have jurisdiction

to hear and determine any action in respect of the contract”) and O 11 r 1(r) (that “the claim is in respect of matters in which the defendant has submitted or agreed to submit to the jurisdiction of the Court”). This is because, by cl 17 of the Service Agreement, the parties submitted to the non-exclusive jurisdiction of the courts of *both* Singapore *and* the People’s Republic of China. To recapitulate, the clause states:

Governing law

This Agreement shall be governed by the laws of Singapore/or People’s Republic of China and each of the parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/or People’s Republic of China.

54 The law which governs the contract will also generally govern the jurisdiction agreement (*Dicey, Morris and Collins on the Conflict of Laws* (Lord Collins of Mapesbury gen ed) (Sweet & Maxwell, 15th Ed, 2012) (“*Dicey*”) at para 12–103). Given our view that there was a good arguable case that Singapore law governed the Service Agreement, we considered the effect of cl 17 under that law only. We did not think there was a need to determine cl 17 by reference to Chinese law. Only one party can have the better of the argument regarding which is the governing law. Once the court has formed a view on this, it should apply that view consistently to the remaining issues so far as it is relevant.

55 Turning to the effect of cl 17, the Judge accepted (and we agreed) that an invalid jurisdiction clause could *in principle* be severed from the contract. This was supported by the English cases cited below (see also *Briggs* at paras 3.37–3.41). Moreover, cl 14 of the Service Agreement expressly provided that, in case any provision was found to be “invalid, illegal or unenforceable”, such invalidity, illegality or unenforceability should not in any way affect or impair

the other provisions of the contract, and the contract “[should] be construed as if such invalid or illegal or unenforceable provision had never been contained”. We did not agree with the Judge, however, that the first part of cl 17 (the invalid choice of law) could not be severed from the second part (the choice of forum). The parties referred to three decisions of the English High Court, which we briefly summarise before turning to the present facts.

The three English decisions

56 The first case was *Dubai Electricity Co and others v Islamic Republic of Iran Shipping Lines (The “Iran Vojdan”)* [1985] 2 Lloyd’s Rep 380 (“*The Iran Vojdan*”). The clause in that case read:

The contract of carriage, the bill of lading and all disputes arising hereunder or in connection therewith ... shall ... in the option of the carrier ... be governed (i) either by Iranian law ... with exclusive jurisdiction of the courts in Teheran Iran; (ii) or by German law ... with exclusive jurisdiction of the Courts in Hamburg (German); (iii) or by English law ... with exclusive jurisdiction of the Courts in London (England).

57 The question facing Bingham J (as he then was) was whether this was a valid jurisdiction clause. The plaintiffs contended that German law applied to the determination of this question; the defendant contended that Iranian law applied. Bingham J first concluded that German law governed the contract as it had the closest and most real connection to the transaction (at 383 col 1), and that the clause would be invalid under German law because it was insufficiently legible (at 384 col 2). The same conclusion was reached even if Iranian law applied. Proceeding on the assumption that Iranian law was the same as English law, the clause was “bad insofar as it envisage[d] ... a floating proper law” (at 385 col 1). Importantly, Bingham J concluded that the choice of *jurisdiction*

could not be excised from the choice of *law* and given independent effect. He stated at 385 col 2:

It is ... the duty of the Court to give a sensible meaning so far as possible to what the parties have agreed and not readily to reject the text of an agreement between the parties as unintelligible. If the clause had confined itself to conferring three options for the choice of jurisdiction on the carrier alone that would seem to me a clause to which effect could properly and without difficulty be given. ... *I do not, however, construing this clause as a whole, think that the choice of jurisdiction can be excised from each of these sub-clauses and given independent effect if the choice of law falls. They are intimately connected with the choice of law options and are not expressed in the clause as separate options.* I think, as a matter of construction, that it is artificial and unreal to give effect to the ancillary provision while rejecting the main provision to which it is, as I think, parasitic. Accordingly, I reach the conclusion that this must be treated as a case in which there is no exclusive jurisdiction, applying the principles of English law on the assumption that that is the same as Iranian law. [emphasis added]

58 The second case was *The “Frank Pais”* [1986] 1 Lloyd’s Rep 529 (*“The Frank Pais”*). The bill of lading in that case provided:

Any dispute arising under this Bill of Lading shall be decided in the country where the Carrier has his principal place of business and the law of such country shall apply except as provided elsewhere herein. Notwithstanding the Carrier has the option to decide that the dispute may be determined by the Courts of any other country applying the Law in force therein.

59 The defendant carriers had their principal place of business in Cuba. Sheen J held that on the facts of the case, Cuban law undoubtedly governed the contract of carriage (at 530 col 2). In the absence of any evidence that the Cuban law differed from English law in any relevant respect, the question was whether the jurisdiction clause was valid under English law. Sheen J stated at 530–531:

[Counsel for the plaintiffs] submitted that the words “except as provided elsewhere herein” ... have the result that the two sentences hang together, and that the first sentence cannot

have an independent existence. He submitted that the second sentence is clearly invalid and that it infects the first sentence, with the result that the whole clause must be disregarded as being invalid. ... The Court will not re-write the contract for the parties. But if the last five words of the first sentence and the whole of the second sentence are deleted the effect is that an option, which the law will not recognize, is removed and there is preserved the agreement between the parties as to the country in which any dispute is to be decided.

60 Sheen J therefore excised the words “except as provided elsewhere herein” and the sentence after that, such that the clause provided straightforwardly for disputes to be decided “in the country where the Carrier has his principal place of business and the law of such country will apply”.

61 The third case was *Sonatrach Petroleum Corporation (BVI) v Ferrell International Limited* [2001] EWHC 481 (Comm) (“*Sonatrach*”). Sonatrach sub-chartered a vessel from Ferrell and a dispute subsequently arose. The sub-charter contained two law and jurisdiction clauses. The first, cl 46, provided:

This Charter shall be construed and the relations between the parties determined in accordance with the law of Japan. If any dispute arises concerning this Charter between the parties thereto, either of the parties shall submit the same to arbitration of The Japan Shipping Exchange, Inc, (Tokyo) ...

62 The second, cl 78, provided:

Law and Arbitration

Notwithstanding the provisions of clause 46 herein, in cases where the dispute may arise between Disponent owner (Ferrell) and Charterer (SPC), rather than with head owner, then such dispute shall be governed by [the following provision:]

This Charter shall be construed and the relations between the parties determined in accordance with the law of England. The High Court in London shall have exclusive jurisdiction over any dispute which may arise out of this Charter.

63 The effect of these clauses was – in the words of Colman J (as he then was) – that “only those disputes which [were] completely insulated from and [were] incapable of giving rise to issues in respect of the rights and obligations of the Head Owner ... under the Head Charter [were] to be subject to English law and jurisdiction”. Colman J found that the uncertainty inherent in cll 46 and 78 made these clauses unenforceable to the extent that they related to choice of *law*. However, this did not make them unenforceable in relation to choice of *forum*. Both the choice of law and forum were “expressed to be engaged by the incidence of a dispute having particular characteristics”. Although the choice of forum may have been intended to “match” the proper law, it was not “parasitic upon or ancillary to the choice of law”, but rather on the nature of the dispute. The two aspects (choice of law and forum) were therefore independent. *The Iran Vojdan* was distinguishable because the clause in that case “[made] the coming into effect of any of [the] jurisdiction options conditional upon or ancillary to the selection of the proper law”. In other words, “the jurisdiction agreement took effect only if and when the proper choice of proper law was made”; since the clause was unenforceable in relation to the parties’ choice of law, “the condition subject to which the jurisdiction clause operated, could not be satisfied”. The clauses in *Sonatrach*, by contrast, did not have that effect.

Clause 17 was severable

64 In our view, cl 17 was closer to the clauses in *The Frank Pais* and *Sonatrach* than that in *The Iran Vojdan*. Clause 17 of the Service Agreement related to both the choice of law and the choice of jurisdiction. But the two were not expressed to be interdependent, unlike the clause in *The Iran Vojdan*, where Iranian / German / English law was expressly paired with the Iranian / German / English courts respectively. This was a decisive factor in Bingham J’s

decision. Indeed, he intimated that he would have upheld the clause *if* the choice of law options and the choice of jurisdiction options had been “expressed in the clause as separate options”. Bingham J also said at 385 col 2 that it is “the duty of the Court to give a sensible meaning so far as possible to what the parties have agreed and not readily to reject the text of an agreement between the parties as unintelligible”. We agreed. It was possible to give cl 17 a sensible meaning by excising its first half (the words “This Agreement shall be governed by the laws of Singapore/or People’s Republic of China and”). Like the clause in *The Frank Pais*, the two parts of cl 17 did not “hang together”. They were connected only by the word “and”. The Judge thought this showed that the two parts of the clause were “intimately linked” (GD at [46]). We respectfully disagree. The word “and” was merely conjunctive; it did not convey any interdependence or contingency. Nothing in cl 17 made the choice of jurisdiction parasitic upon the choice of law such that the former must fall with the latter. The parties might well have subjectively intended to pair the jurisdiction with the governing law, such that Singapore courts would apply Singapore law while Chinese courts would apply Chinese law. But that was not apparent from the wording of the clause. As Colman J said of the clause in *Sonatrach*, “Although the applicability of a body of substantive law matching that of the selected forum is obviously a commercially and legally convenient objective, it is in this contract in no sense a pre-condition of forum selection.”

65 The Judge was also dissuaded from severing the first part of cl 17 because she had difficulty construing the second part in isolation (GD at [47]–[49]). This would read, “each of the parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/or People’s Republic of China”. Shanghai Turbo contended that this meant that the parties agreed to the non-

exclusive jurisdiction of the courts of *both* jurisdictions. This meant that “/or” was to be given a conjunctive rather than a disjunctive meaning. However, the Judge observed that the phrase “Singapore/or People’s Republic of China” appeared in both the first and second parts of cl 17, and ought to carry the same meaning in both parts. Since “/or” probably carried a disjunctive meaning in the first part of the clause, it likely also carried a disjunctive meaning in the second part. But if “/or” was read disjunctively to mean that the parties submitted to the non-exclusive jurisdiction of *either* the Singapore courts *or* the Chinese courts, how should the choice between them be made? The clause prescribed no mechanism to resolve this.

66 We did not agree that the second part of cl 17 was too ambiguous to be enforceable. There were two possible interpretations: (1) the parties submitted to the non-exclusive jurisdiction of *both* Singapore and China; or (2) the parties submitted to the non-exclusive jurisdiction of *either* Singapore or China. Our courts recognise the principle that a construction which entails that the contract and its performance are lawful and effective is to be preferred (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2003] 3 SLR(R) 1029 at [131], citing Gerard McMeel, *The Construction of Contracts: Interpretation, Implication, and Rectification* (Oxford University Press, 2007) at paras 1.124 to 1.133), though of course the meaning ascribed to the term must be one which the expressions used by the parties can reasonably bear. We also agreed with the principles stated in *The “Star Texas”* [1993] 2 Lloyd’s Rep 445 (“*The Star Texas*”) at 452 col 2 *per* Steyn LJ (albeit that he made those observations about an arbitration clause):

The fact that a multiplicity of possible meanings of a contractual provision are put forward, and that there are difficulties of interpretation, does not justify a conclusion that

the clause is meaningless. The Court must do its best to select, among the contending interpretations, the one that best matches the intention of the parties as expressed in the language they adopted. And, in a case where there are realistic alternative interpretations of [a] clause, the Court will always tend to favour the interpretation which gives a sensible and effective interpretation to the ... clause.

67 In our view, the second interpretation (*ie*, that the parties submitted to the non-exclusive jurisdiction of *either* the Singapore or Chinese courts) could be eliminated because, as the Judge said, there was no way of choosing between Singapore and China. If the parties only intended to submit to the non-exclusive jurisdiction of either China or Singapore, they could simply have specified which. It might perhaps be suggested that the choice was to be made by the claimant at the point of deciding which jurisdiction to bring its claim in. However, cl 17 did not expressly state that the choice between jurisdictions was to be made at one party's option (see *The Iran Vojdan* ([56] *supra*) and *The Star Texas* for counter-examples). Such an interpretation would also have the unfortunate effect of encouraging parties to litigate at the earliest sign of a dispute since the claimant would get to choose the jurisdiction. Moreover, cl 17 stated (in the present tense) that each of the parties "submits" to non-exclusive jurisdiction; not that they *would* submit to the non-exclusive jurisdiction of the forum where a claim was subsequently brought. Since it could not be known in advance where the claim will be brought, this could only mean that the parties submitted to the jurisdiction of *whichever* forum the claim was brought in, whether China or Singapore (*ie*, the first interpretation).

68 The main difficulty with the first interpretation was that the phrase "/or" normally carries a disjunctive meaning. However, it is clear from the Service Agreement as a whole that the parties were not very precise with their choice of words. They may have used "or" in cl 17 *not* because they intended to submit

to the non-exclusive jurisdiction of only China *or* Singapore, but because realistically the claim would be brought in one or the other jurisdiction. The word “or” may have been chosen to reflect this fact. But the parties probably intended their *submission* to extend to the non-exclusive jurisdiction of *both* fora. This made commercial sense because it accommodated the preferences of both parties: Mr Liu would probably favour China as a venue, while Shanghai Turbo – which was listed in Singapore and had a substantial Singapore presence – would probably favour Singapore as a venue. This explained why they would have submitted to the non-exclusive jurisdiction of both countries.

The effect of a submission to the non-exclusive jurisdiction of the Singapore courts

69 That brings us to the effect of a submission to non-exclusive jurisdiction via a non-exclusive jurisdiction clause. Shanghai Turbo submitted that, applying the Hong Kong Court of Appeal decision in *Noble Power*, Mr Liu must show strong cause why the matter should not be heard in Singapore. The test was not simply whether China was a more appropriate forum. But even applying the *Spiliada* test, Singapore was the more appropriate forum. Mr Liu, on the other hand, submitted that as a matter of Singapore law, the *Noble Power* approach did not displace the *Spiliada* test. Even if cl 17 constituted a valid submission to the non-exclusive jurisdiction of the Singapore and Chinese courts, it was only one factor to be considered in the *Spiliada* framework and did not require Mr Liu to show strong cause. Applying the *Spiliada* test, China was clearly the more appropriate forum.

Noble Power

70 We start by summarising the decision in *Noble Power* before explaining why we agree with it. The contract in that case was made between parties incorporated in the British Virgin Islands or Japan and a Japanese company which had no presence in Hong Kong. The contract was in English and was negotiated and signed in Hong Kong but the obligations thereunder were to be performed in Japan. It contained the following clause:

This Agreement shall be construed and governed in accordance with the laws of Hong Kong and the parties hereto submit to the non-exclusive jurisdiction of the courts of Hong Kong.

Nothing contained in this Clause shall limit the right of any party to take any suit, action or proceedings arising under this Agreement against the other parties in any other court of competent jurisdiction, nor shall the taking of any suit, action or proceedings arising under this Agreement in any one or more jurisdictions preclude the taking of any suit, action or proceedings arising under this Agreement in any other jurisdiction, whether concurrently or not, to the extent permitted by the law of that jurisdiction.

71 The plaintiffs commenced the claim in Hong Kong and obtained leave to serve the writ on the defendant in Japan. The defendant then applied to set aside the leave order on the basis of *forum non conveniens*. At first instance, the Recorder set the leave order aside on the basis that the jurisdiction clause was merely one factor to be weighed in the scales in determining whether Hong Kong was clearly and distinctly the appropriate forum. He found that on the facts, even if the jurisdiction clause were regarded as a “strong *prima facie* factor” in favour of Hong Kong, Japan was the more appropriate forum. The approach of the Recorder was the one Mr Liu wanted us to adopt.

72 The Hong Kong Court of Appeal allowed the plaintiffs’ appeal. It is worth pointing out that because leave had to be obtained to serve the defendant

out of the jurisdiction, the legal burden was on the plaintiffs to show that Hong Kong was clearly the appropriate forum for the trial of the action (at [22] of the judgment of Ma CJHC). The Court came to the conclusion that the type of non-exclusive clause in the contract enabled the plaintiffs to discharge this burden by simply referring to the non-exclusive jurisdiction clause.

73 The Court’s reasoning proceeded as follows. First, the Court observed that the “starting point” was “to arrive at the true construction of the relevant clause” (at [24]). Ma CJHC (with whom the other two judges agreed) stated that he saw no difference in principle between an exclusive jurisdiction clause and a non-exclusive jurisdiction clause to the extent that in both situations, the parties agreed that if they were sued in the named forum, they would submit to the jurisdiction of that forum (*Noble Power* at [29] and [37]). Ma CJHC therefore took the view (at [31]) that:

... Where proceedings are instituted in the named forum (to which the parties have agreed to submit), *the party who seeks a stay or otherwise to contest the jurisdiction or appropriateness of that forum, has a very heavy burden to discharge*, since that party has by definition agreed contractually to submit to the jurisdiction. In other words, he is seeking to avoid a forum to which he has, by contract, agreed to submit. ... [emphasis added]

74 The party seeking a stay, or seeking otherwise to contest the jurisdiction of the named forum, had to show “strong or overwhelming reasons or exceptional circumstances” in order to justify being “freed from their contractual bargain” (at [31], [36] and [40]). This was to be contrasted with the approach to stay applications based on *forum non conveniens*, where the test was whether there existed another clearly or distinctly more appropriate forum (at [38]). That approach was inappropriate where proceedings were instituted in the very forum to which the parties had agreed to submit (at [40]), in which case

the usual connecting factors relevant to a *forum non conveniens* analysis would be “much less powerful”.

75 By contrast, where proceedings were instituted in a forum *other than* the one identified in the non-exclusive jurisdiction clause, much would depend on the precise wording of the clause in question. If the other forum was one to which the parties had also agreed to submit in the event of being sued, the approach above would apply (at [32]). But if – as was more common – the other forum was one in which proceedings could be instituted without any obligation on the defendant actually to submit to that forum, the defendant was in a better position to contest the jurisdiction or appropriateness of that forum, since he would not be seeking to avoid a forum to which he had contractually agreed to submit. The existence of the non-exclusive jurisdiction clause would then carry far less weight (at [32] and [42]).

76 Applying these principles to the facts of *Noble Power*, the non-exclusive jurisdiction clause named the Hong Kong courts as the non-exclusive jurisdiction and the parties were required to submit thereto (at [48]). As Stone J stated in his concurring opinion at [77]:

... [T]he bargain as struck between these parties is that while neither of the parties to the contract are *bound* to sue in Hong Kong, given that this clause is non-exclusive, in a situation where in fact suit *is* commenced in Hong Kong, it is agreed that neither of the parties will dispute or challenge the other party’s choice of Hong Kong as the venue for resolving their dispute – in like manner as if this had been an exclusive jurisdiction clause, wherein contractually *both* parties would be bound to sue in Hong Kong. [emphasis in original]

77 The defendant therefore had to show strong cause why the case should not be heard in Hong Kong. It had failed to do so (at [49]).

Orchard Capital

78 We now turn to whether *Noble Power* represents the law in Singapore. Shanghai Turbo interprets the case of *Orchard Capital I Ltd v Ravindra Kumar Jhunjunwala* [2012] 2 SLR 519 as an endorsement of *Noble Power*, while Mr Liu interprets it as a rejection of the same.

79 It was quite clear to us that *Orchard Capital* did not expressly endorse the principles articulated in *Noble Power*. The defendant in *Orchard Capital* applied to stay proceedings on the basis of *forum non conveniens*, citing a non-exclusive jurisdiction clause by which the parties “submit[ted] to the non-exclusive jurisdiction of the courts of Hong Kong, SAR”. The court accepted Ma CHJC’s comments at [31]–[33] of *Noble Power* (see [72] and [75] above) as an explanation of “the general effect of non-exclusive jurisdiction clauses”, but noted that the procedural context in that case was different because *Orchard Capital* involved an application for stay rather than an application to set aside leave to serve out of jurisdiction (*Orchard Capital* at [16]). This was because the defendant had been served with the writ as of right within in Singapore and no leave to serve to serve out of the jurisdiction was required. Moreover, *Orchard Capital* only discussed *Noble Power* in the section summarising the appellant’s arguments, and barely referred to *Noble Power* in the substantive body of the decision. The discussion in *Orchard Capital* focused on Prof Yeo’s article, “The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements” (2005) 17 SAclJ 306 (“*Yeo*”). In summary, the court expressed the following views:

- (a) *Yeo* presented two central strands of analysis concerning non-exclusive jurisdiction clauses. The first was contractual in nature:

depending on the intention of the parties concerned, the clause could (taken at its highest) be given the effect of an exclusive jurisdiction clause, in which case the party seeking to sue in a jurisdiction other than the specified forum would have to show strong cause (at [24]). The second strand was general in nature: the clause would be simply one factor in ascertaining whether or not the action ought to be stayed pursuant to the *Spiliada* test. This second strand was not premised on the parties' contractual intention as such (at [25]).

(b) The Court did not “wholeheartedly [accept] the contractual approach”, which had certain difficulties (at [26]). These included: when there could be an agreement to waive objection to jurisdiction; the breadth of such waiver; whether it could be implied from a non-exclusive jurisdiction clause that the parties agreed that the jurisdiction stated in the clause was the most appropriate forum; and whether the contractual approach ought to be applied at an interlocutory stage, on affidavit evidence (at [26] and [27]). In any event, the first strand did not arise for decision in *Orchard Capital* because there was no evidence that the parties intended the clause to have a significant legal effect from a contractual perspective (at [27]–[28]).

(c) The parties' submissions focused on the second strand of analysis (at [26]). The fact that a court had been chosen by the parties (albeit non-exclusively) was relevant to the determination of the natural forum (at [30]). The precise weight attributable to this factor would depend on the facts and circumstances concerned (at [31]). On the facts of that case, the clause in question was *not* a strong indicator that Hong Kong was a clearly or distinctly more appropriate forum; it was at best

one factor for the court to consider in determining whether the action should be stayed (at [35]). The court dismissed the application for stay.

80 *Noble Power* engaged what *Orchard Capital* termed the first strand of analysis, *ie*, the contractual approach. The court in *Orchard Capital* expressly declined to decide whether that approach should apply in Singapore because it was not necessary to do so on the facts of the case (at [26]). We, however, had to take a position on the point.

The effect of cl 17

81 A jurisdiction clause must be interpreted according to the law which governs it, though its effect on the jurisdiction of the forum is a matter for the *lex fori* (*Dicey* at para 12–105; *Yeo* at paras 17 and 19). In this case, both were Singapore law.

82 We should first emphasise the need, when dealing with a non-exclusive jurisdiction clause, to scrutinise the particular terms of that clause (*UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503 (“*UBS v Telesto*”) at [119(a)]; *Yeo* at para 21). In that regard we agreed with the broad thesis in *Yeo*, which is that the consequences which follow from such a clause depend on the precise construction of that particular non-exclusive jurisdiction clause (*Yeo* at para 3). At minimum, a non-exclusive jurisdiction clause refers to “an agreement that the nominated court may be seised with jurisdiction by whichever party is claimant, but does not necessarily involve an immediate promise that no other court will be asked to exercise jurisdiction” (Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) (“*Briggs*”) at para 4.09). It was similarly observed in *Noble Power* at [24] that, though these

clauses may come in different forms, they generally possess two characteristics: (a) the non-exclusive jurisdiction clause identifies a specific forum to which the parties would be obliged to submit for the resolution of disputes between them; and (b) it will be clear that the parties are at liberty to institute proceedings in other jurisdictions, which may or may not be unidentified. But the precise obligations imposed by a non-exclusive jurisdiction clause may vary from case to case: “[e]verything depends on the precise content of the non-exclusive jurisdiction agreement” (*Briggs* at para 4.19; see also para 4.21).

83 The clause in *Noble Power* (“the parties hereto submit to the non-exclusive jurisdiction of the courts of Hong Kong”) possessed both characteristics identified above. Clause 17 was the same (“each of the parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/or People’s Republic of China”). While not all jurisdiction clauses are so straightforward, we are concerned in this judgment only with paradigmatic non-exclusive jurisdiction clauses of the sort in *Noble Power* and the present case. Thus, the analysis which we adopt here should not be applied unthinkingly to jurisdiction clauses which do not have the same legal effect.

84 In so far as cl 17 is concerned, we agreed with the construction advanced in *Noble Power*. The effect of a clause by which the parties “submit to the non-exclusive jurisdiction” of the courts of a particular forum is that while the plaintiff may sue in any jurisdiction, the plaintiff is promised the defendant’s submission if the claim is brought in the named jurisdiction. In our view, the meaning of the word “submit” in the context of cl 17 is that the parties consent to the *exercise* of jurisdiction by the courts of that forum and waive any objection thereto, thereby “reduc[ing] the risk of jurisdictional challenges if proceedings are brought” there (*Briggs* at para 4.15). This is equivalent, in

Prof Yeo’s vocabulary, to a “narrow waiver of objection”, though Prof Yeo has expressed disagreement with this view (see *Yeo* at paras 66, 71 and 77.) This seems to us to be the most commercially sensible and reasonable interpretation of cl 17 for the reasons given in *Briggs* at para 4.22:

If the parties agree that the courts of Ruritania are to have jurisdiction over the parties, and this is construed as being not exclusive ... what does it do? The immediate answer may be that it permits but does not oblige the claimant to bring proceedings before that court; but the claimant needs no permission from a defendant to do that: the court has jurisdiction or it does not according to its own law; but it is improbable that this is affected by whether the other party gives his permission. ... If all the clause does is confirm that either party may sue wherever it likes, it seems to be devoid of purpose or content. Some sort of obligation must be created or conveyed by the clause. If it is not an obligation on the claimant to sue in a particular court, it must impose an obligation on the defendant to defend in the named court if called on by the claimant (who has freedom to sue elsewhere) to do so. The ‘non-exclusive’ jurisdiction clause may oblige the defendant to a claim, which has been brought in the named court, to appear and to defend there.

85 It has been suggested that a non-exclusive jurisdiction clause will only have this effect where jurisdiction would exist apart from the clause anyway (say by virtue of the contract being made in the forum or the *lex fori* being the governing law of the contract). Only in that case, it is said, can it be inferred that the parties meant the non-exclusive jurisdiction clause to have some effect over and above conferring jurisdiction upon the named court (see, *eg*, Tan Seow Hon, “A New-Found Significance for non-Exclusive Jurisdiction Agreements” (2000) SJLS 298 at pp 303 and 307). However, we did not think this was a necessary condition to interpreting this type of clause in the way suggested. We doubt that the parties, at the time of contracting, would have imagined that the legal effect of their non-exclusive jurisdiction clause would depend on whether the courts of the named forum would be *otherwise* seised of

jurisdiction. They may not have been acquainted with the intricacies of the jurisdictional requirements in the named forum. The artificiality is compounded where the clause names more than one forum (as cl 17 does). In that case the parties probably did not expect the clause to have one effect in respect of one of the named fora but a different effect in respect of the other. There also exist non-exclusive jurisdiction clauses where the designated forum may not be known in advance (say because they give one party the option of where to sue). In that case the parties cannot have known whether jurisdiction existed independently of the non-exclusive jurisdiction clause. We think it would be more likely that the parties in such a case expected the clause to have the same legal effect regardless of which forum was named. To be precise, they probably intended to oblige the defendant to accept the exercise of jurisdiction by the courts of that forum, not merely to permit the claimant to commence proceedings there at the risk of having them stayed for reasons of convenience.

86 It follows that any challenge to the exercise of jurisdiction – for example an application to set aside a court order granting the *plaintiff* leave to serve out of jurisdiction, or to stay those proceedings in favour of proceedings elsewhere – amounts to an attempt to be released from the non-exclusive jurisdiction clause. This is so even if the *defendant* applies to stay the proceedings in favour of proceedings in another jurisdiction *also* stated in the clause (see [91] below). The defendant would have to show strong cause to justify such a result.

87 A non-exclusive jurisdiction clause ordinarily would *not* have the effect described in *Orchard Capital* at [24], namely, requiring a *plaintiff* to show strong cause if he seeks to sue in a jurisdiction other than that named in the clause. That is described in *Yeo* as the “wide waiver of objection” (*Yeo* at [71]). There is clear authority that an agreement to submit to the non-exclusive

jurisdiction of one forum does not entail an obligation to sue in that forum (*Bambang Sutrisno v Bali International Finance Ltd and others* [1999] 2 SLR(R) 632 (“*Bambang Sutrisno*”) at [11]; *UBS v Telesto* at [119(a)]; *Morgan Stanley Asia (Singapore) Pte (formerly known as Morgan Stanley Dean Witter Asia (Singapore) Pte) and others v Hong Leong Finance Ltd* [2013] 3 SLR 409 (“*Morgan Stanley*”) at [72]). It follows that there is no need to show strong cause to sue elsewhere instead. A non-exclusive jurisdiction clause “leaves open the possibility that there may be another appropriate jurisdiction” (*Morgan Stanley* at [65], citing *Deutsche Bank* at [64]). A non-exclusive jurisdiction clause only indicates that the parties thought that the forum named therein was an appropriate forum (see *UBS v Telesto* at [118]; *Bambang Sutrisno* at [11], citing *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* [1996] SGHC 285 (“*PT Jaya Putra*”) at [64]). However, that fact would not carry much significance given that the question of natural forum is determined not by reference to whether Singapore is an inappropriate forum, but whether there is a clearly more appropriate alternative (see *Yeo* at para 79; *PT Jaya Putra*, cited with approval in *Bambang Sutrisno* at [11]).

88 Therefore, much depends on whether in the case before the Singapore court, Singapore is the forum named in the non-exclusive jurisdiction clause:

- (a) If it is, then the *defendant* must show strong cause why he should not be bound to his contractual agreement to submit. It will be difficult for him to do so unless he can point to factors which were not foreseeable at the time of contracting; the usual connecting factors in the *Spiliada* analysis will generally not suffice (see [72]–[74] above and [96] below).

(b) If it is not, then the *defendant* may apply for a stay or to set aside service on the basis that Singapore is *forum non conveniens*. In that case the court will apply the *Spiliada* test, taking into account the usual connecting factors, including the clause itself. We agree with Prof Yeo’s view that the weight attributed to the non-exclusive jurisdiction clause would then depend on the circumstances of the case, for example whether the clause formed part of a closely negotiated contract or was a standard term in a contract of adhesion, and whether the forum stated in the clause was chosen for its neutrality (*Yeo* at paras 87–89 and 94).

89 We note that this approach is also supported by various English authorities, many of which were cited in *Noble Power*. We refer to only a few:

(a) In *S & W Berisford plc and another v New Hampshire Insurance Co* [1990] 3 WLR 688, the court was concerned with the words “this insurance is subject to English jurisdiction” in an insurance policy. Hobhouse J (as he then was) construed those words as a “contractual acknowledgement of the jurisdiction of the English courts and a contractual agreement to the invocation of that jurisdiction”, though it created no obligation to sue *only* in England (694F–H). Hobhouse J stated at 694H–695A:

If the contract says that the assured is entitled to sue the underwriter in the English courts, then it requires a strong case for the courts of this country to say that that right shall not be recognised and that he must sue elsewhere.

Hobhouse J also added that, in evaluating the appropriateness of the forum on a *Spiliada* analysis, the fact that the parties had agreed that the English courts would have non-exclusive jurisdiction “create[d] a strong

prima facie case that that jurisdiction [was] an appropriate one”, and was “in principle ... a jurisdiction to which neither party to the contract [could] object as inappropriate” (at 702B–D).

(b) In *British Aerospace plc v Dee Howard Co* [1993] 1 Lloyd’s Rep 368, the contract contained a clause stating that the parties “agree that the courts of law in England shall have jurisdiction to entertain any action in respect [of the contract]”. Waller J (as he then was) construed this as an exclusive jurisdiction clause. But even if it were a non-exclusive jurisdiction clause, particularly given the fact that it had been freely negotiated, Waller J thought it was not open to the defendant to object to jurisdiction on the basis of factors which would have been foreseeable at the time of contracting (at 376). A non-exclusive jurisdiction clause would entail an obligation not to object to the jurisdiction of the English court; the parties would have to “point to some factor which they could not have foreseen” in order to displace the bargain they had made (at 376 col 2).

(c) In *Mercury Communications Ltd and another v Communication Telesystems International* [1999] 2 All ER (Comm) 33 (“*Mercury Communications*”), the clause stated, “the parties hereby submit to the non-exclusive jurisdiction of the English Courts”. Moore-Bick J (as he then was) helpfully elucidated the reasons for the strong cause test at 40g–j:

Although a non-exclusive English jurisdiction clause leaves the parties free to bring proceedings elsewhere without thereby committing any breach of contract, it has generally been regarded as a powerful factor in favour of allowing proceedings brought in this country to continue. There are, it seems to me, two reasons why

that should be so. In the first place ... a clause of that kind involves a contract by each party to submit to the jurisdiction of the English courts if the other chooses to bring proceedings in this country. Although neither party binds itself to bring any action here, each of them does agree to submit to the jurisdiction if an action is brought against it. Secondly, as part and parcel of agreeing to submit to the jurisdiction each party must be taken to have recognised that this country would be an appropriate forum for the trial of the action.

Having referred to Waller J's view in *British Aerospace* that the party resisting jurisdiction should show some factor which was unforeseeable at the time of contracting, Moore-Bick J continued at 41f-g:

In principle I would respectfully agree with that approach. Although I think that the court is entitled to have regard to all the circumstances of the case, particular weight should in my view attach to the fact that the defendant has freely agreed as part of his bargain to submit to the jurisdiction. In principle he should be held to that bargain unless there are overwhelming reasons to the contrary. I would not go so far as to say that the court will never grant a stay unless circumstances have arisen which could not have been foreseen at the time the contract was made, but the cases in which it will do so are likely to be rare.

(d) *Ace Insurance SA-NV v Zurich Insurance Company and another* [2001] 1 All ER 802 (Comm), which was cited in *Noble Power* at [36], [40] and [62], is unlike most of the other English cases cited here in that it involved a stay of English proceedings in favour of the foreign jurisdiction named in the non-exclusive jurisdiction clause. The clause stated, "the Underwriters hereon, at the request of the Insured (or Reinsured) will submit to the Jurisdiction of a Court of competent jurisdiction within the United States". Upholding the stay, the Court of Appeal stated at [62]:

... If a party agrees to submit to the jurisdiction of the courts of a state, it does not easily lie in its mouth to complain that it is inconvenient to conduct its litigation there (ie to assert that the agreed forum is a *forum non conveniens*). ... As Waller J pointed out in *British Aerospace* ... it is necessary to point to some factor which could not have been foreseen in order to displace the bargain which has been agreed. In such a case that party must show some good reason or special cause why it should not be held to its agreement to submit to the agreed jurisdiction; and if it cannot do so, there seems no reason why the English court should entertain parallel proceedings here, with their attendant evils—duplication of expense and the danger of inconsistent decisions.

Importantly, the court did not go so far as to say that the plaintiff had breached the clause simply by commencing proceedings in England. As we explained at [87] above, we do not think that non-exclusive jurisdiction clauses have such an effect. But the plaintiff *was* obliged to submit to the jurisdiction of the US courts in the absence of special reasons otherwise, and given that Texan proceedings were already underway, there was no reason to entertain parallel proceedings in England.

(e) In *Antec International Limited v Biosafety USA Inc* [2006] All ER (D) 208 (“*Antec*”), the clause stated that “each party hereunder submits to the non-exclusive jurisdiction of the English Courts”. Gloster J (as she then was) stated three principles (cited with approval in *Qioptiq Ltd v Teledyne Scientific & Imaging LLC* [2011] EWHC 229 (Ch) at [38] and *Cuccolini SRL v Elcan Industries Inc* [2013] EWHC 2994 (“*Cuccolini*”) at [18] and [22]). First, the fact that the parties had “freely negotiated a contract providing for the non-exclusive jurisdiction of the English courts and English law, create[d] a strong prima facie case that

the English jurisdiction [was] the correct one”, and it was appropriate to approach the matter as though the English courts had jurisdiction as of right (at [7(i)]). Second, the general rule was that “parties [would] be held to their contractual choice of English jurisdiction unless there [were] overwhelming, or at least very strong, reasons for departing from this rule” (at [7(ii)]). Third, these reasons did not include factors of convenience which were foreseeable at the time of contracting (save in exceptional circumstances involving the interests of justice) and it was inappropriate “to embark upon a standard *Spiliada* balancing exercise” (at [7(iii)]). On the facts, the defendant had not shown “any strong or overwhelming reasons for not keeping the parties to their contractual choice of the English court as a forum for the resolution of their disputes” (at [6]).

90 We note that some of these cases suggest that a non-exclusive jurisdiction clause will only be approached in the way we described at [84] above if the contract was freely negotiated between the parties (see *Antec* at [7(i)] and *Mercury Communications* at 41*h–j*); Stone J appeared to accept this principle at [71] of *Noble Power*. The rationale behind this is that since the strong cause test is based on “the principle that the parties should be held to their agreement, it should be a relevant factor whether the jurisdiction clause reflects a genuine agreement between the parties” (Edwin Peel, “Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws” [1998] LMCLQ 182 at 220). The parties did not address us on this point. For present purposes, however, it suffices for us to observe that cl 17 was not a term in a standard form contract. For all intents and purposes the Service Agreement appeared to have been freely negotiated, and we had no difficulty construing

cl 17 as a waiver of objection to the exercise of jurisdiction by the Singapore courts. We decline to decide whether the same approach should be taken to a non-exclusive jurisdiction clause which was not freely negotiated.

91 Mr Liu attempted to distinguish *Noble Power* on the basis that it involved a no-exclusive jurisdiction clause with only one named forum, whereas cl 17 named *both* China and Singapore. But that was unconvincing because the *principle* in *Noble Power* – *ie*, that an agreement to submit to the non-exclusive jurisdiction of a particular forum prohibits either party from contesting the jurisdiction of that forum – applied with equal force to *each* of the jurisdictions to which the parties agreed to submit. An agreement to “submit to the non-exclusive jurisdiction” of the Singapore *and* Chinese courts would be breached by an application to set aside or stay proceedings in *either* jurisdiction.

92 The local cases cited to us by the parties (*Orchard Capital* aside) were not exactly on point, and had not considered the legal effect of a non-exclusive jurisdiction clause with the benefit of the most relevant authorities. We address them briefly here:

(a) Mr Liu cited *Econ Corp International Ltd v Ballast-Nedam International BV* [2003] 2 SLR(R) 15. The plaintiff in that case commenced proceedings in Singapore to decide whether the defendants were entitled to call on and receive moneys under a performance bond and two advance payment guarantees which were expressly “subject to the decision of the Courts of Singapore”. The plaintiff obtained leave to serve its originating summons out of jurisdiction on the defendant. The defendants applied to set aside the leave order; to stay the proceedings; or for a declaration that the High Court had no jurisdiction over them.

Lai Kew Chai J did not decide whether the quoted words amounted to an exclusive jurisdiction clause or a non-exclusive one, but in any event found that Singapore was “the more appropriate forum” because “Singapore law governed the three instruments and had submitted to the jurisdiction of the Singapore Courts in relation to any disputes arising out of those instruments” (at [17]).

(b) Mr Liu cited *Morgan Stanley* as a case which “specifically treated the non-exclusive jurisdiction clause as one of various factors in the *Spiliada* analysis”. This is hardly surprising, since that was how the party seeking to rely on the clause submitted that it ought to be treated (at [57]). But more importantly, in our view, this was the correct approach in that case. The plaintiff applied for an anti-suit injunction restraining the defendant from suing or continuing to prosecute proceedings outside Singapore in relation to certain credit-linked notes, and relied on a non-exclusive jurisdiction clause nominating Singapore as a “very strong indicator” that Singapore was the most appropriate forum to hear the case (at [39] and [56]). As we explained at [88(a)] above, if the plaintiff in *Morgan Stanley* had sued in Singapore, the defendant would be obliged to submit to the jurisdiction of the Singapore courts. However, not only were there *no* proceedings in Singapore, but the defendant had already commenced proceedings in New York against the plaintiff in respect of those notes (at [15], [43] and [54]). Given that the clause was not an exclusive jurisdiction clause, the plaintiff had no right to insist on being sued in Singapore. The strong cause test therefore did not apply. The non-exclusive jurisdiction clause was merely one factor to be weighed up in the *Spiliada* analysis to determine whether Singapore was the natural forum.

(c) Shanghai Turbo cited *Bambang Sutrisno* as Court of Appeal authority to the effect that strong cause must be shown before a party could act in breach of a non-exclusive jurisdiction clause. The clause in *Bambang Sutrisno*, however, contained an *express* waiver (on the part of the defendant indemnifier) of “any objection on the ground of venue or forum non conveniens or any similar grounds” (*Bambang Sutrisno* at [6]). Our decision therefore goes one step further than *Bambang Sutrisno* insofar as we have held that the words “submit to the non-exclusive jurisdiction of Singapore” entail a waiver of objection to the exercise of jurisdiction even in the absence of express words to that effect. We agree with *Bambang Sutrisno* that, where there is such an agreement between the parties, the court will usually refuse to stay the proceedings unless the defendant can “show exceptional circumstances amounting to strong cause” (at [9]). However, the remark in *Bambang Sutrisno* at [9] that “[i]n exercising its discretion the court should take into account all the circumstances of the particular case” must now be read in light of our holding that factors which were foreseeable at the time of contracting will usually carry little if any weight.

(d) Both parties cited *Abdul Rashid bin Abdul Manaf v Hii Yii Ann* [2014] 4 SLR 1042. There, the High Court held at [47] that “if a party were to argue that proceedings commenced in the [jurisdiction named in the non-exclusive jurisdiction clause] should be stayed in favour of another jurisdiction, that party is also not in breach of contract”. However, that case concerned a non-exclusive jurisdiction clause in favour of Queensland, Australia; Singapore was not the jurisdiction stated in the clause. In that context, the judge was right to hold that the plaintiff need not show strong cause for the matter to be heard in

Singapore. But as the judge suspected (see *Abdul Rashid* at [25] and [27]), the situation is different where proceedings are commenced in the contractual forum. That was the case in four of the English cases that had been cited to the High Court (see *Abdul Rashid* at [24]), as well as in *Noble Power* and here.

(e) In both *Asia-Pacific Ventures II Ltd and others v PT Intimutiara Gasindo and others* [2001] 2 SLR(R) 371 (“*Asia-Pacific Ventures*”) and *Bayerische Landesbank Girozentrale v Kong Kok Keong and another action* [2002] 1 SLR(R) 485 (“*Bayerische*”), which *Shanghai Turbo* cited, there was a non-exclusive jurisdiction clause in favour of Singapore. Based on the principles we have articulated, the High Court in both cases erred in treating the non-exclusive jurisdiction as merely one factor to weigh up in the *Spiliada* analysis (*Asia-Pacific Ventures* at [12] and [24]; *Bayerische* at [14]). That said, it was correctly observed in *Asia-Pacific Ventures* at [22], citing *Dicey and Morris on The Conflict of Laws* (13th Ed, 2000) at p 427, that the non-exclusive jurisdiction clause precluded either party from objecting to the exercise of the court’s jurisdiction on grounds which should have been foreseeable at the time of contracting.

93 Given that Mr Liu had agreed to submit to the exercise of the Singapore court’s jurisdiction, he had to show strong cause to justify setting aside the Service Order. We now turn to examine what “strong cause” means, and why we found that it was not established on the facts of the case.

Whether strong cause has been shown in this case

94 The meaning of “strong cause” in the context of a non-exclusive jurisdiction clause is the same as “strong cause” in the context of an exclusive jurisdiction clause, since the requirement of strong cause derives in both cases from the fact that the applicant seeks to renege on his contractual obligations. Essentially, the factors which are relevant to the test of strong cause in the context of an exclusive jurisdiction clause include (*Vinmar* at [71], citing *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1977–1978] SLR(R) 112 at [11]):

- (a) in what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts;
- (b) whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respect;
- (c) with what country either party is connected and, if so, how closely;
- (d) whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; and
- (e) whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:
 - (i) be deprived of security for their claim;
 - (ii) be unable to enforce any judgment obtained;
 - (iii) be faced with a time bar not applicable here; or

- (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

In applying factor (d) it should be borne in mind that it encapsulates the inquiry of whether the applicant is acting abusively in applying for a stay of proceedings (*Vinmar* at [130]).

95 These factors were formulated to apply to the situation where a *plaintiff* sues in Singapore in breach of an exclusive jurisdiction clause favouring a foreign court. They may therefore require some adaptation in order to be transposed into the non-exclusive jurisdiction clause context, where it is the *defendant* applying to set aside or stay proceedings in breach of a non-exclusive jurisdiction clause favouring *Singapore*. In that situation, the defendant will be able to engage factor (d) by showing that the *plaintiff*'s conduct constitutes an abuse, and factor (e) by showing that *the defendant* would be prejudiced by having to defend in Singapore. The court may also, in theory, countenance a breach of the clause in order to avoid a denial of justice (*Vinmar* at [129]–[134]).

96 Because the “strong cause” test reflects the philosophy that the court should generally give effect to the parties’ forum agreement, factors (a) and (c) (see [94] above) have little weight if they were foreseeable at the time when the parties made the jurisdiction agreement (*Vinmar* at [72] and [112], citing *Golden Shore Transportation Pte Ltd v UCO Bank and another appeal* [2004] 1 SLR(R) 6 at [38] and *The “Hyundai Fortune”* [2004] 4 SLR(R) 548 at [30]). For example, the parties must be deemed to have agreed to the jurisdiction of a court with knowledge of how it works and what it can or cannot do, and complaints about the procedure of that court will therefore rarely amount to strong cause (*The “Asian Plutus”* [1990] 1 SLR(R) 504 at [11] and [19], cited

with approval in *The “Vishva Apurva”* [1992] 1 SLR(R) 912 at [44]; see also *The “Eastern Trust”* [1994] 2 SLR(R) 511 at [18]–[19]).

97 We found that Mr Liu had not shown strong cause why the Suit should not be tried in Singapore. The factors which he cited, and which the Judge generally agreed with, were as follows:

(a) Mr Liu resided in China and CZ3D, which featured prominently in the claim, was incorporated in China (the GD at [58]). Although Shanghai Turbo was listed on the SGX, this had little to do with the contractual dispute (the GD at [59]).

(b) Mr Liu claimed that the Service Agreement was executed in China but, as we said at [51(c)] above, this was disputed.

(c) Mr Liu’s performance of his duties under the Service Agreement would by and large occur in China as a result of his secondment to CZ3D (the GD at [61]). His alleged breaches likewise occurred in China, had less to do with Shanghai Turbo than with CZ3D, and had nothing to do with Singapore (the GD at [62]).

(d) The witnesses to the trial were mostly based in China. Mr Liu identified seven witnesses, all of whom were in China. Mr Liu claimed they were not prepared to come to Singapore to testify. Though one witness was prepared to give evidence over video-link, the others were no longer in Mr Liu’s employ. Shanghai Turbo identified seven witnesses, four of whom were in China. Shanghai Turbo confirmed that these witnesses were employed by it or by CZ3D, and they were willing to come to Singapore to testify. The Judge also observed that the trial

might also require the evidence of other persons in China who were not presently listed as witnesses (the GD at [70]). Mr Liu further submitted that the Chinese police officers, who prepared a report in response to having been called to the CZ3D factory on 15 April 2017, should also be called as witnesses, and that it was “extremely unlikely that the local police officers would give evidence in Singapore”.

(e) Apart from the Service Agreement, the other relevant documents were likely to be in the Chinese language, including CZ3D’s business and accounts-related documents; documents relating to Beijing Full Dimension; and documents disclosing information to Changzhou Hengmiao (the GD at [72]). Mr Liu also suggested that the police report and other police records might be relevant.

(f) There were related proceedings in China, commenced by CZ3D on 1 August 2017 against Mr Liu and six of his witnesses in the torts of trespass and unlawful possession of the factory. This overlapped with Shanghai Turbo’s claim that Mr Liu breached the Service Agreement by refusing to surrender the factory. There was therefore a risk of inconsistent findings should the Suit be heard in Singapore (the GD at [73]–[74]).

98 In the circumstances of this case, these factors were insufficient to constitute strong cause. Some of them had little weight because they were known to or foreseeable by the parties at the time of contracting. Among these were Mr Liu’s residence in China and the place of contracting. Moreover, even though the precise nature of the dispute in the Suit would not have been known to the parties at the time of contracting, there was, according to Mr Liu, already

an understanding between the parties at that time that he would work and reside in China. In these circumstances it was only to be expected that any disputes which might arise under the Service Agreement would primarily concern events and persons in China. The parties nevertheless submitted such disputes to the non-exclusive jurisdiction of the Singapore courts. We therefore gave little weight to the fact that the breaches occurred in China. This also justified giving less weight to the location of witnesses than would be warranted if not for the presence of the non-exclusive jurisdiction clause.

99 As for the fact that relevant documents would be in the Chinese language, these could be translated. Moreover, as Shanghai Turbo said, it was unlikely that the documents would be voluminous; Mr Liu only listed eight key documents. The most important document was the Service Agreement, which was in both Chinese and English, with the English version being the authoritative one.

100 One factor which was not foreseeable by the parties at the time of contracting was the subsequent commencement of related proceedings in China. However, we did not think this amounted to strong cause. In assessing the weight to be attributed to this factor, the degree of overlap of issues and parties is a relevant consideration (*Virsagi Management (S) Pte Ltd v Welltech Construction Pte Ltd and another appeal* [2013] 4 SLR 1097 at [39]–[40], citing *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2009) at para 75.094). The Chinese proceedings related to only one of the four breaches alleged in the Suit (see [7] above) and CZ3D, rather than Shanghai Turbo, was a party. The Chinese proceedings concerned claims in tort whereas the Suit concerned alleged breaches of contract. The remedies sought in the two sets of proceedings

were different. The risk of inconsistent findings was, in our assessment, not so serious that it justified releasing Mr Liu from his obligation under cl 17.

101 On the other hand, there was a good arguable case that Singapore law governed the Service Agreement. Though some issues of fact were disputed in the Suit, the court would also have to decide whether the facts as found amounted to breaches of the Service Agreement. The interpretation of these provisions would engage substantive principles of contract law. In that regard, choice of law considerations could be a “significant factor in determining the appropriate forum” because it was generally true that the forum would be less adept in applying a foreign *lex causae* (*Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 at [42]; see also *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [42]). The courts of a civil law jurisdiction may also be expected to have greater difficulty in applying the law of a common law system (*Halsbury’s Laws of Singapore* vol 6(2) (LexisNexis, 2016 Reissue) at para 75.093).

102 Taking into account this and the other factors identified above, we found that Mr Liu had not shown strong cause justifying releasing him from his contractual bargain.

Full and frank disclosure

103 Finally, we do not think that the Service Order should be set aside on the basis that Shanghai Turbo failed to make full and frank disclosure of the material facts.

104 The Judge observed that the affidavit filed by Mr Chia in support of Shanghai Turbo’s *ex parte* application for leave to serve out of jurisdiction “did

not deal with the issue of whether Singapore is the *forum conveniens* at all, and did not draw attention to the relevant facts to fulfil this requirement” (GD at [83]). His affidavit did not, in the Judge’s view, canvass the factual background to the dispute in sufficient detail to illuminate the various connecting factors relevant to the issue of *forum conveniens*. It also “did not mention that the key individuals are resident in China, or that CZ3D was incorporated in China” (at [84]). As to whether the claim fell within O 11 r 1 of the ROC, the affidavit “did not identify the crucial points for and against its case” (at [86]). To support his case that the claim fell within O 11 rr 1(d)(iii), 1(d)(iv) and 1(r), Mr Chia deposed that the Service Agreement was “governed by Singapore law” and that the parties had agreed to the non-exclusive jurisdiction of the Singapore courts. He did not “specifically [highlight] that clause 17 also provided for Chinese governing law, and non-exclusive jurisdiction of the Chinese courts” (at [85]).

105 It is well-established that a plaintiff applying *ex parte* for leave to serve out of jurisdiction has a duty to make full and frank disclosure (*Manharlal Trikamdass Mody and another v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 at [79], citing *Transniko Pte Ltd v Communication Technology Sdn Bhd* [1995] 3 SLR(R) 941 at [11]–[12]). The test of materiality is “whether the facts in question are matters that the court would likely take into consideration in making its decision” (*Zoom Communications* at [68], citing *The Vasiliy Golovnin* [2008] 4 SLR(R) 994 (“*The Vasiliy Golovnin*”) at [86]). The applicant must “identify the crucial points for and against the application, and not rely on general statements and the mere exhibiting of numerous documents” (*The Vasiliy Golovnin* at [94]).

106 Thus, the question ultimately is whether the facts which are disclosed are “sufficient for [the] purpose of making an informed and fair decision on the

outcome of the application, such that the threshold of full and frank disclosure can be meaningfully said to be crossed” (*The Vasily Golovnin* at [91]). Facts that satisfy the test of materiality in an application for an arrest of a vessel or an injunction may not necessarily be material for an application for leave to serve out of jurisdiction. In the context of an application for leave to serve out of jurisdiction, an informed and fair decision can be arrived at without necessarily requiring an applicant to canvass the arguments against his own case as thoroughly as his opponent would if present. A balance must be struck between protecting the defendant from abuse and unduly impeding the plaintiff from serving proceedings (see also *The Vasily Golovnin* at [88], citing Steven Gee, *Commercial Injunctions* (Sweet & Maxwell, 5th Ed, 2004) at para 9.005).

107 In our view, the supporting affidavit filed by Mr Chia made adequate disclosure of the relevant facts. He identified the grounds under O 11 on which he relied. His affidavit reproduced cl 17 (and appended the Service Agreement) and it would have been clear to the reader that cl 17 referred to the law and jurisdiction of *both* Singapore and China. We did not think it was necessary for Mr Chia to specifically highlight this fact, as it was self-evident. Nor was it necessary for Mr Chia to compromise his own case for service out of jurisdiction by identifying and dwelling at length on the potential difficulties with the validity of cl 17. Having stated that he was “advised and verily believe[d]” that cl 17 had the effect of a submission to jurisdiction, there was no need for him to draw attention to counter-arguments which the defendant might later raise in a challenge to jurisdiction. As for the issue of *forum non conveniens*, it would have been clear from his affidavit at least that the CZ3D factory was situated in China and that the events in connection with his failure to deliver the factory up had likewise occurred in China. Finally, Mr Toh drew our attention to the fact

that the statement of claim had not been appended to Mr Chia's affidavit. While it is good practice to do so, there is nothing in the ROC which stipulates this as a requirement, and the court hearing the summons would still have been able to view the statement of claim. We therefore concluded that there had not been material non-disclosure.

Conclusion

108 For the foregoing reasons, we allowed the appeal with costs, set aside the orders made by the Judge below, and reinstated the Mareva Injunction and the Voting Injunction against Mr Liu.

Judith Prakash
Judge of Appeal

Belinda Ang Saw Ean
Judge

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