WONG PARTNERSHIP

LAW WATCH

JUNE 2022

In Brief

WONG PARTNERSHIP

DEALS

WONGPARTNERSHIP LLP ACTS IN…
Proposed combination of Keppel O&M with Sembcorp Marine

WongPartnership is acting for Keppel Corporation in the proposed combination of their Offshore & Marine ("**Keppel O&M**") unit with Sembcorp Marine and transfer of legacy rig assets, associated receivables and associated intercompany loans to Kyanite Investment Holdings ("**Kyanite**"), a wholly-owned indirect subsidiary of Temasek Holdings Pte Ltd. This deal would allow Keppel Corporation to realise approximately S$9,424.2 million in value over time.

This was a cross-border deal with highly bespoke commercial terms and a very compressed timeline in which to negotiate and close. Lawyers and the respective commercial parties had to be nimble and flexible to address concerns, limitations and commercial requirements on both sides to take the deal across the line with a mutually satisfactory outcome. The parties had to consider how the transactions between Keppel Corporation and each of Kyanite and Sembcorp Marine interacted with each other and how issues should be dealt with without compromising any party's position.

Keppel Corporation provides solutions for sustainable urbanisation, focusing on four key areas comprising energy and environment, urban development, connectivity and asset management. With sustainability at the core of their strategy, they harness the strengths and expertise of their business units to develop, operate and maintain real assets, which provide diverse solutions that are beneficial to the planet, people and the company. Keppel O&M provides total solutions to the offshore, marine and energy industries, while Sembcorp Marine provides innovative engineering solutions to global offshore, marine and energy industries.

Partners involved in the transaction were Ng Wai King and Low Kah Keong from the Mergers & Acquisitions Practice; Hui Choon Yuen from the Debt Capital Markets Practice; Chan Jia Hui from the Antitrust & Competition Practice; Lam Chung Nian from the Intellectual Property, Technology & Data Practice; Tan Teck Howe and Serene Soh from the Corporate Real Estate Practice; and Tian Sion Yoong from the Financial Services Regulatory / Derivatives & Structured Products Practices.

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Other recent matters that WongPartnership was involved in were:

DESCRIPTION	PRACTICE AREAS
Acted in Keppel Infrastructure Trust's proposed issuance of S$250 million notes with an interest rate of 4.11 per cent annum due 2027 under its S$2 billion multicurrency debt issuance programme, with CIMB Bank Berhad (CIMB Bank), DBS Bank Ltd. (DBS Bank), The Hongkong & Shanghai Banking Corporation Limited (HSBC Bank), and United Overseas Bank Limited (UOB Bank) as the joint lead managers.	Debt Capital Markets
Acting in the US$300 million Series D investment round by Biofourmis, a virtual care and digital medicine company, led by growth equity firm General Atlantic. The funding round increases Biofourmis' valuation to US$1.3 billion, surpassing unicorn status. With this investment, Biofourmis plans to scale up its virtual care offerings.	WP Grow: Start-up / Venture Capital
Acted in the sale by Asia Pacific Realty Holdings Ltd. (an entity held by funds managed by Northstar Advisors Pte. Ltd. and certain key executives of APAC Realty Limited) of its 59.8% stake in APAC Realty Limited to NHPEA Ace Realty Company Limited (a wholly-owned subsidiary of a private equity fund managed by Morgan Stanley Private Equity Asia) ("**MSPEA**") for approximately S$129.5 million and MSPEA's unconditional mandatory general offer for APAC Realty Limited.	Corporate/Mergers & Acquisitions
Acting in the S$860 million syndicated sustainability-linked loan financing relating to the acquisition of a remaining stake interest in Jem mall by Lendlease Global Commercial REIT ("**Lendlease REIT**"). Citibank, DBS and OCBC are the mandated lead arrangers and also the sustainability coordinators. The unsecured sustainability-linked loan financing is the largest among Asia-Pacific REITs to date. Also acted in the issuance by Lendlease REIT of S$200 million perpetual securities with an initial rate of 5.25 per cent per annum for the first three years. Net proceeds from this round of issuance will be used to finance potential acquisition and investment opportunities, including the proposed acquisition of the remaining interests in Jem mall.	Banking and Finance Debt Capital Markets
Acting in the acquisition by Chip Eng Seng and Haiyi Group of a minority interest in 8 Shenton Way (AXA Tower). The project will add to the pipeline of Chip Eng Seng's property development projects in Singapore and will enable the company to mitigate its financial and	Corporate/Mergers & Acquisitions Corporate Real Estate

DESCRIPTION	PRACTICE AREAS
execution risks through participating in a large-scale redevelopment project with other partners.	
Acting in the sale by Olam Holdings Pte. Ltd. of a 35.4 per cent stake in Olam Agri Holdings to SALIC International Investment Company ("**SALIC**") for US$1.24 billion. The proposed sale to and resulting partnership with SALIC will unlock value for shareholders of Olam and catalyse Olam Agri's access to new markets.	Corporate/Mergers & Acquisition Corporate Governance & Compliance Antitrust & Competition
Acting in the acquisition by CapitaLand Integrated Commercial Trust ("**CICT**") and CapitaLand Open End Real Estate Fund ("**COREF**") of a Grade-A office building at 79 Robinson Road for S$1.3 billion. The purchase was done by CICT and COREF acquiring 70 per cent and 30 per cent respectively of the shares of the property holding company Southernwood Property Pte. Ltd.	Corporate Real Estate Energy, Projects and Construction Corporate/Mergers & Acquisitions
Acted in the voluntary unconditional cash offer by NewMedCo for the shares of Catalist-listed healthcare provider, Singapore O&G, at S$0.295 per share. NewMedCo is a consortium comprising a vehicle led by Dymon Asia Private Equity and Singapore O&G's executive chairman Beh Suan Tiong, its executive director Heng Tung Lan and three other specialist medical practitioners employed by the group.	Corporate/Mergers & Acquisitions
Acted in the sale by a global investment company of its entire 12 per cent stake in Sunseap, part of a total 91 per cent stake in Sunseap that was sold to EDP Renewables for S$1.1 billion.	Corporate/Mergers & Acquisitions
Acted as Singapore counsel in the sale of Mobileum Inc by Audax Private Equity to H.I.G. Technology Partners.	Corporate/Mergers & Acquisitions Intellectual Property, Technology & Data Financial Services Regulatory

ARBITRATION

Singapore Court of Appeal Clarifies When Arbitral Award May Bind and Be Enforced Against Entity Not Named In Award

Authored by Partners Wendy Lin, Goh Wei Wei and Senior Associate Ling Jia Yu

Can an arbitral award be enforced by or against an entity which is not named in it? In *National Oilwell Varco Norway AS v Keppel FELS Ltd* [2022] SGCA 24, the Singapore Court of Appeal held that the answer is a qualified yes, permitting a Norwegian company to enforce an award ostensibly made in the name of a *different* Norwegian company which had been dissolved prior to the arbitration.

According to the Court of Appeal, its holding does not contravene the bedrock principles of minimal curial intervention and mechanical enforcement which permit the court to enforce an arbitral award only in accordance with its terms (see: Section 19 of the International Arbitration Act 1994). This is because the two companies were, for all intents and purposes, regarded by Norwegian company law as the same legal person.

While this decision reinforces the Singapore courts' pro-enforcement, pragmatic approach, it does not detract from the following:

- Parties should ensure that they obtain a clear and unambiguous award in which all parties to the arbitration are properly named and identified. Where possible, parties should deal with any ambiguities or deficiencies in the award before the arbitral tribunal, rather than the court at the enforcement stage.
- Before commencing arbitration, parties should conduct proper checks to identify and verify the identities and status of potential counterparties, especially in complex multi-party or long-term disputes or where complex corporate structures or agents / principals are involved.
- The same applies in the course of an arbitration, where any counterparty undergoes corporate changes, or the underlying contract becomes the subject of a novation or assignment. Parties should review the effects on the contract and the pending arbitration.
- Parties who may wish to engage in procedural tactics to hedge against an adverse result in the arbitration should seek legal advice and consider the effects on the arbitration and enforcement.

Our firm's Wendy Lin, Goh Wei Wei and Ling Jia Yu acted for Keppel FELS Limited ("KFELS") before both the General Division of the Singapore High Court ("High Court") and the Court of Appeal.

This update takes a look at the Court of Appeal's decision.

Background

KFELS of Singapore and Hydralift AS ("**Hydralift**") of Norway entered into a manufacturing contract in 1996. As is common, disputes soon arose. As is not, the disputants attempted to amicably resolve their disputes for the better part of a decade, before arbitration was commenced by KFELS in 2007. By then (in 2004), Hydralift was no longer a live entity, having undergone corporate restructuring processes under the Norwegian Private Limited Liability Companies Act ("**Norwegian Mergers**"). The resultant company – National Oilwell Varco Norway AS ("**NOV Norway**") – bore a different company registration number.

Throughout the arbitration (which spanned an extraordinary 12 years), NOV Norway not only concealed the Norwegian Mergers and Hydralift's dissolution from KFELS, KFELS' former solicitors acting in the arbitration and the Arbitral Tribunal, but also impersonated Hydralift (the Court of Appeal agreed with the High Court that NOV Norway's "*errant conduct*" in the arbitration was "*altogether inexplicable and unsatisfactory*"). As a result, all the parties' pleadings, evidence and submissions in the arbitration referred to and described Hydralift as the respondent. The Arbitral Tribunal issued its award dismissing KFELS' claim and allowing the counterclaim in favour of Hydralift. NOV Norway then surfaced, seeking to enforce the award against KFELS.

Before the High Court ([2021] SGHC 124), KFELS argued that:

(a) First, Hydralift and NOV Norway were in fact two different entities. Seeing as on the face of its award, the Arbitral Tribunal intended to render the award in favour of Hydralift and not NOV Norway (who was referred to only as Hydralift's parent company), the mechanical approach precluded the High Court from enforcing the award in favour of NOV Norway.

(b) Second, the naming of Hydralift as the respondent in the arbitration was not a misnomer. Both parties objectively intended Hydralift's name to refer only to Hydralift and not to NOV Norway. Thus, the arbitration and the award made in favour of a non-existent entity were nullities. In any event, a misnomer must be corrected within the arbitration (which was undisputedly not done).

(c) Third, NOV Norway was estopped from denying that it was Hydralift which was a party to the award, given its aforementioned "*errant conduct*".

The High Court agreed with KFELS' arguments in a rare decision denying enforcement of the award. On appeal, the Court of Appeal took a different view of the Norwegian law evidence, focusing instead on the *substantive* effect of the Norwegian Mergers, and giving weight to its finding that the legal personality of Hydralift continued in NOV Norway. This divergence was the crux of the Court of Appeal's decision.

The Court of Appeal further confirmed that typical boilerplate "anti-assignment" clauses / prohibitions on transfer will not ordinarily prevent the transmission of rights by operation of law.

The Court of Appeal's Decision: Substance over form

This decision clarifies one of the limited circumstances in which arbitral awards can be enforced by or against parties not named therein.

The test framed by the Court of Appeal is: whether the name stated in the award, seen objectively against the relevant factual and legal background, is nothing more than the incorrect name of the legal person the award is in fact and in law to be enforced in favour of or against? The test is an objective one, unencumbered by the counterparty's and/or the tribunal's state of knowledge. Critically, the test disregards any motivations for perpetuating the erroneous state of affairs, such as a party hedging to defeat enforcement of a potential adverse award down the line.

Where all that has happened is a failure to reflect a change of name within the arbitration, this test would appear to be easily satisfied. Where the arbitration record has not kept pace with corporate changes, however, the issue is thornier – the court will then have to construe the legislation underpinning the corporate changes and determine whether its effect was to extend the legal identity of the old entity to the new (or more colloquially, whether the new entity "*stepped into the shoes of the old*").

In the present case, the Court of Appeal considered the following factors germane:

(a) Norwegian legislative materials emphasised the continuation of the business of the assigning company (Hydralift) and "*the assigning company is considered to be carried on in the assignee company*".

(b) In legal proceedings where the claimant had been dissolved following a merger, Norwegian law recognises that the claimant's name could be *rectified* (as opposed to the claimant being *substituted*) by the assignee's name.

(c) The assigning company's assets, rights, liabilities and obligations are transferred wholesale by operation of Norwegian law as a result of the merger, subject to contractual prohibitions on transfers.

Our Comments

The Court of Appeal was mindful of the "*potential devastating effect*" of refusing enforcement and defeating a 12-year arbitration which did not suffer from any procedural or jurisdictional defects (although one could argue that the onus was on the parties to identify themselves correctly before the Arbitral Tribunal and to allow all issues relating to the disputants' identities to be canvassed before the Arbitral Tribunal instead).

Pertinently, it appears that the Court of Appeal would likely have *denied* enforcement if it had instead found that the legal personality of Hydralift did *not* merge into that of NOV Norway. It remains to be seen how the Court of Appeal will treat corporate restructuring legislation which, despite effecting a wholesale transfer of one company's rights and obligations to another, does *not* entail a concomitant transfer of legal personality.

An award or arbitration which "incorrectly" names a party further runs the risk of being challenged in jurisdictions outside of Singapore; in the present case, Norwegian law evidence was adduced which indicated that KFELS would face difficulties enforcing a favourable award in Norway against NOV Norway. English authorities also suggest a different test for identifying a misnomer and that even in a case of a misnomer, the arbitration commenced by or against a non-existent entity needs to be corrected in the arbitration itself which remains a nullity unless and until it is corrected.

It is noteworthy that the Court of Appeal deemed it appropriate that NOV Norway bear its own costs for the enforcement proceedings spanning almost two years in light of its errant conduct.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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TRUSTS

Singapore Appellate Division Signals That Monetary Contributions Towards Payment of Stamp Duty For Purchase of Property Should Be Factored Into Determining Beneficial Shares Under Resulting Trust Analysis

The Appellate Division of the Singapore High Court ("**Appellate Division**") has, in *obiter* comments, indicated that it is "at least arguable" that monetary contributions towards the payment of stamp duty for the purchase of a property should be taken into account in determining the parties' respective beneficial shares in that property under a resulting trust: *Tay Yak Ping and another v Tay Nguang Kee Serene* [2022] SGHC(A) 22.

Our Comments

In making these comments, the Appellate Division bore in mind the classic formulation of purchase money resulting trusts in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669 ("***Westdeutsche***") at 708 as relating to the money paid *for the purchase of the property*. The Appellate Division explained that this would be broad enough to encompass stamp duty payable on the purchase, instead of being limited to the purchase price only.

The Appellate Division also found persuasive McLelland J's reasoning in the Supreme Court of New South Wales' decision in *Currie v Hamilton* [1984] 1 NSWLR 687 ("***Currie v Hamilton***") that what is significant is the *cost to the purchasers* rather than the benefit to the vendor. It commented that this reasoning made sense given that: (a) the resulting trust analysis focuses on the apportionment of beneficial interest in a property between those claiming an interest *inter se*, and not *vis-à-vis* the vendors of the property; and (b) it is often fortuitous whether the money of one person or another is used to pay the purchase price or stamp duty.

Finally, the Appellate Division highlighted the practical importance of this issue bearing in mind the stamp duty regime in Singapore.

While the Appellate Division noted that there were other types of ancillary costs of purchasing a property (such as solicitors' fees and agents' fees), the Appellate Division did not set out specific views on whether each of these other types of ancillary costs should be considered for the purposes of a resulting trust analysis.

This update takes a closer look at the Appellate Division's comments.

Background

In 2006, an apartment at 24 River Valley Close ("**Pacific Mansion Apartment**") was purchased for $670,000 and registered in the joint names of the first and second appellants who were son and father respectively.

96.07% of the purchase price of the Pacific Mansion Apartment was paid using the sale proceeds of another property ("**Valley Apartment**"). The remaining 3.93% of the purchase price was paid using funds in the first appellant's Central Provident Fund account.

Using funds in his Central Provident Fund account, the first appellant also made a further monetary contribution of $17,700 towards payment of the stamp duty for the purchase of the Pacific Mansion Apartment ("**$17,700 Ancillary Costs**").

Following the sale of the Pacific Mansion Apartment in 2018 and the first appellant's attempts to use part of the sale proceeds to purchase a new private residential property as joint tenants with the second appellant, the respondent (the sister and daughter of the first and second appellants respectively) commenced legal proceedings, claiming that the appellants held the sale proceeds from the Pacific Mansion Apartment on a resulting trust for her.

The High Court Judge found, among other things, that:

- The Valley Apartment (and its sale proceeds) were held by the appellants on resulting trust for the respondent because the proceeds of a business solely owned by the respondent ("**Serene Leather**") had been used to purchase the Valley Apartment, and there was never an intention by the respondent to gift the Valley Apartment or its sale proceeds to the appellants. Applying *Chan Yuen Lan v See Fong Mun* [2014] 3 SLR 1048, the presumption of resulting trust was therefore not displaced.

- As the sale proceeds of the Valley Apartment (which were beneficially owned by the respondent) had been used to pay for 96.07% of the purchase price of the Pacific Mansion Apartment, 96.07% of the subsequent sale proceeds from the Pacific Mansion Apartment were held by the appellants on resulting trust for the respondent.

The High Court Judge declined to treat the $17,700 Ancillary Costs paid by the first appellant as a contribution towards the purchase price of the Pacific Mansion Apartment, but ordered the respondent to return the sum of $23,299.65 to the first appellant, comprising 96.07% of $17,700 plus accrued interest of $6,552.78 on that amount.

The appellants appealed to the Appellate Division, principally against the High Court Judge's finding that 96.07% of the sale proceeds from the Pacific Mansion Apartment were held by the appellants on resulting trust for the respondent.

The Appellate Division's Decision

The parties' cases on appeal were largely factual in nature and centred around the questions of whether: (a) the Valley Apartment was indeed purchased using the proceeds of Serene Leather, and (b) whether Serene Leather was indeed solely owed by the respondent. The Appellate Division found no basis to disturb the findings made below, and affirmed the High Court Judge's finding that the respondent was the beneficial owner of 96.07% of the sale proceeds of the Pacific Mansion Apartment, which sum was held by the appellants on a resulting trust for the respondent.

Whether monetary contributions towards ancillary costs of purchasing property (such as stamp duty) should be taken into account in determining beneficial shares in the property under a resulting trust analysis

While the High Court Judge's treatment of the $17,700 Ancillary Costs was not addressed or challenged by either party before the Appellate Division (the appellants in fact confirmed that they did not wish to contend that the payment of the $17,700 Ancillary Costs entitled the first appellant to a larger equitable interest in the Pacific Mansion Apartment), the Appellate Division cautioned against "*uncritically adopting*" the High Court Judge's approach to the "*interesting, and as yet unresolved, question of law*" of whether monetary contributions towards the ancillary costs of purchasing a property (such as stamp duty, solicitors' fees and agents' fees) should be taken into account in determining the parties' respective beneficial shares in that property under a resulting trust, and took the opportunity to offer its own observations.

The Appellate Division noted that the High Court Judge's treatment of the $17,700 Ancillary Costs was consonant with the English Court of Appeal's decision in *Curley v Parkes* [2004] EWCA Civ 1515, where it was held that the payment of solicitors' fees and expenses "*was of no part of the purchase price*" for the purposes of a resulting trust, but noted that *Curley v Parkes* "*does not appear to have been consistently followed, even by the English courts*".

Following a review of English, Australian and Hong Kong case law, the Appellate Division observed that it is "*at least arguable*" that monetary contributions towards *stamp duty* should be included by the court in determining the parties' respective beneficial shares under a resulting trust. The Appellate Division noted that:

- The classic formulation of purchase money resulting trusts in *Westdeutsche* at 708, which refers to a presumption of resulting trust arising where one party "*pays (wholly or in part)* ***for the purchase of property*** *which is vested either in [the other party] alone or in the joint names of [both parties]*", is not limited to the *purchase price* of the property, but is instead broad enough to encompass *stamp duty* payable on the purchase of the property in question.

- The Appellate Division drew particular support from McLelland J's reasoning in the Supreme Court of New South Wales' decision in *Currie v Hamilton* that "*[s]ince* ***what is significant [in a purchase money resulting trust analysis] is the cost to the purchasers rather than the benefit to the vendor*** *[which is limited to the purchase price], [there was] no reason to doubt that it is the aggregate cost rather than the mere purchase price that should form the basis of the calculation*". This was recently reaffirmed in *Cong v Shen (No 3)* [2021] NSWSC 947 at

[1704] ("***Cong v Shen (No 3)***"), where Ward CJ also noted that "*[i]n identifying the purchase moneys,* ***a "broader concept" is to be applied than simply the stipulated consideration for the purchase [such that] [r]egard may be had to the incidental costs of the purchase****, such as legal expenses, stamp duty and registration*".

- In the Appellate Division's view, the approach in *Currie v Hamilton* and *Cong v Shen (No 3)* "*made sense*" as: (a) the focus of the resulting trust analysis is on the proper apportionment of the beneficial interest in a property between those claiming to have acquired an interest in that property *inter se*, and not on the apportionment of any interest as between those parties and the vendors of the property; and (b) it is often fortuitous whether the money of one person or another is used to pay the purchase price or the stamp duty, or even the legal expenses.

- The Appellate Division however did not go as far as the New South Wales courts to treat ancillary costs *other than stamp duty* as part of the purchase costs to be considered for purposes of a resulting trust analysis. The Appellate Division noted different approaches taken by the courts in the New South Wales on the types of ancillary costs which should be considered for purposes of a resulting trust analysis, and stated (at [68] of the decision) that its *obiter* comments *vis-à-vis* the treatment of contributions towards payment of *stamp duty* was regardless of "*whether or not one agrees with the distinction drawn by the Supreme Court of Victoria in Sivritas*". In *Sivritas v Sivritas* [2008] VSC 374, the Supreme Court of Victoria noted (in *obiter*) that "*only costs necessarily incurred prior to and as a condition of obtaining registration of the interest which is to be held on trust should be included in the purchase price*" and "*[o]n this basis, stamp duty and registration fees would be included but legal fees and bank fees would not be*". The treatment of such *other* ancillary costs under Singapore law thus remains to be addressed in future cases.

Closing Observations

The Appellate Division's treatment of monetary contributions towards the payment of stamp duty for the purchase of a property is practical and properly sensitive to the Singapore context (it expressly bore in mind "*the stamp duty regime in Singapore*" at [68] of its decision), where stamp duties form a not unsubstantial portion of property purchase costs (especially for purchases by non-citizens or purchases of second and subsequent properties by citizens). For example, in an effort to cool the property market in December 2021, the Additional Buyer Stamp Duty rate for the purchase of second residential properties by citizens was increased to 17% (i.e., $340,000 for a $2 million property), and that for the purchase of third and subsequent residential properties by Singapore citizens was increased to 25% (i.e., $0.5 million for a $2 million property). The availability of funds to meet such purchase requirements can clearly "make or break" purchase transactions, and it would be artificial for the courts not to take such contributions into account when undertaking a resulting trust analysis to determine respective beneficial shares in the property.

As mentioned, it remains to be seen whether the same tentative approach would also apply to other ancillary costs such as legal and bank fees. Insofar as a distinction may be drawn between the treatment of such costs and stamp duties in the future, parties contributing towards the payment of stamp duties should make the nature of their contribution clear.

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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CIVIL PROCEDURE

Applicability of Foreign Law *Per Se* Insufficient Cause for Leave to Defend in Summary Judgment Proceedings

Trite is the common law principle that foreign law must be pleaded and proven as a fact (save where provided otherwise).[1] It was once also thought that the applicability of foreign law to a contract would, by itself, provide sufficient cause for leave to defend to be granted in summary judgment proceedings; the recent decision of the General Division of the Singapore High Court ("**High Court**") in *ING Bank NV, Singapore Branch v The Demise Charterer of the Ship or Vessel "Navig8 Ametrine"* [2022] SGHCR 5 ("***The Navig8 Ametrine***") has, however, cast considerable doubt upon this proposition.

Our Comments

The decision in *The Navig8 Ametrine* belies an inherent tension at the heart of the common law: questions of domestic law are adjudicated upon the basis of submissions, while questions of foreign law (save as provided otherwise) are determined on the basis of pleading and proof. It is not surprising that *The Navig8 Ametrine* has taken a robust approach in determining the applicability and contents of foreign law, given the prevailing trends — sources of foreign law are, more than ever, readily accessible online, the practice of law is becoming increasingly internationalised and frequently involves cross-border disputes,[2] and disparate legal systems are increasingly converging.[3]

Nonetheless, it is undoubtedly germane that *The Navig8 Ametrine* dealt with questions of the applicability and contents of English law. It cannot be gainsaid that English and Singapore law, both being common law systems of law, are similar, and both the English and Singapore courts have cited decisions by the other in deciding questions of their respective laws. Time will tell whether a Singapore court will be as robust in granting summary judgment where questions of the applicability and contents of civil law systems arise.

Background

The plaintiff brought an action against the defendant, the demise charterer of the vessel "Navig8 Ametrine" ("**Vessel**"), for misdelivery of light naphtha ("**Cargo**") shipped upon the Vessel and delivered to Hin Leong Trading (Pte) Ltd ("**HLT**") without presentation of the bills of lading.

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1 For instance, the Singapore International Commercial Court may determine issues of foreign law on the basis of submissions, as per O 16 r 8 of the Singapore International Commercial Court Rules 2021.

2 As can be seen in, for instance, the increase in the caseloads of major arbitral institutions that deal with international arbitration.

3 See *e.g.,* Sundaresh Menon CJ, "Transnational Commercial Law: Realities, Challenges and a Call for Meaningful Convergence" [2013] 2 SJLS 231

The plaintiff, the Singapore branch of a bank, carried on the business of trade financing, and had granted credit facilities of up to US$140 million to HLT.

Aeturnum Energy International Pte Ltd ("**AEI**") had sold light naphtha under separate contracts to Total Trading Asia Pte Ltd ("**Totsa**") and HLT. AEI presented an invoice for the value of the Cargo to the plaintiff, which the plaintiff paid under a letter of credit. The plaintiff received the bills of lading thereafter, but mistakenly endorsed the same to Totsa: the plaintiff intended to endorse a different set of bills of lading to Totsa for the cargo that was to be delivered to Totsa.

The plaintiff sought summary judgment for the invoice value of the Cargo, or alternatively, for interlocutory judgment to be entered against the defendant with damages to be assessed.

The High Court's Decision

The High Court granted the plaintiff's alternative prayer for interlocutory judgment with damages to be assessed, having found that the plaintiff had made out a *prima facie* case, in that the Cargo was discharged and delivered without presentation of the bills of lading.

The defendant raised several purportedly triable issues, of which two were alleged to be governed by English law: first, whether the plaintiff had authorised HLT to take delivery of, or ratified HLT having taken delivery of the Cargo without presentation of the bills of lading ("**Authority Issue**"); and second, whether the plaintiff was entitled to damages quantified as the invoice value of the Cargo ("**Quantum Issue**").

The parties tendered purportedly differing expert opinions on English law in relation to the two issues. The defendant, in particular, submitted that, if foreign law applies to the contract being considered, that alone provides sufficient cause for leave to defend to be granted — on the authority of *Singapore Civil Procedure 2021* (Cavinder Bull SC gen ed) (Sweet & Maxwell, 2021), which in turn cited the decision of the Malaysia High Court in *Lin Securities (Pte) Ltd v Noone & Co Sdn Bhd* [1989] 1 MLJ 321 ("***Lin Securities***").

The High Court declined to adopt the proposition that the applicability of foreign law to a contract — without more — is in and of itself sufficient cause for leave to defend. It had "*serious reservations about so stark a proposition*" for the following reasons:

(a) First, *Lin Securities* was distinguished as being a case where one difficult question was whether foreign law applied, and if foreign law did apply, various other issues would then have to be decided, rendering the summary judgment process inappropriate.

(b) Second, the later High Court decision of *PMA Credit Opportunities Fund and others v Tantono Tiny* [2011] SGHC 89 considered the proposition but only stated that a court is reluctant to try an issue of foreign law on the basis of affidavit evidence.

(c) Third, the court adopts a robust approach when considering summary judgment applications.

The High Court ultimately held that "*the court should not be too quick to grant leave to defend simply because the applicability of foreign law is in question, or because there are differing opinions advanced by foreign law experts*".

The High Court found that the Authority Issue was governed by Singapore law, in which case any purported differences in the expert opinions of the parties would not give rise to any triable issue. But, even if English law were to apply, the High Court took the view that the differing expert opinions either had no material impact on the outcome of the present case, or differed only as to the possible legal conclusions that may be reached and not to the content of English law.

With respect to the Quantum Issue, the High Court likewise found that the expert opinions differed only as to the possible legal conclusions that may be reached and not to the content of English law.

Ultimately, and on the facts of the case, the High Court found that there were no triable issues in relation to the Authority Issue, but that there were triable issues in relation to the Quantum Issue (with both parties' expert opinions being in accord on the applicable principles of law).

If you would like information or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or the following Partner:

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LEGAL HIGHLIGHTS

JUNE 2022	
3 June 2022	**Information Papers on Environmental Risk Management** The MAS' Guidelines on Environmental Risk Management ("**ERM Guidelines**"), which are applicable to various classes of financial institutions ("**FIs**") in Singapore such as banks, asset managers and insurers, came into force on 1 June 2022. This follows an 18-month transition period since the issuance of the ERM Guidelines back in December 2020. In this connection, the MAS also published a set of information papers on environmental risk management for banks, insurers and asset managers to provide an overview of the progress made in implementing the ERM Guidelines. These information papers are based on a thematic review conducted by the MAS on the various classes of FIs, and highlight emerging and good practices by these FIs to bolster their resilience to environmental risks, as well as identify areas where further work is needed. The MAS thus expects FIs to refer to the industry practices shared in these information papers, with particular attention paid to areas where further work is required. **Related information**: Information Papers on Environmental Risk Management **Contact our Partners**: Elaine Chan | Rosabel Ng | Chan Jia Hui | Tian Sion Yoong
APRIL 2022	
25 April 2022	**Revised Notices on Misconduct Reporting Requirements under the Financial Advisers Act, Insurance Act and Securities and Futures Act** The MAS has issued a consultation paper on 19 April 2022 ("**Consultation Paper**") on proposed amendments to the various MAS notices which impose misconduct reporting requirements on financial institutions ("**FIs**") regulated under the Financial Advisers Act 2001, the Insurance Act 1966 ("**IA**"), and the Securities and Futures Act 2001 ("**SFA**"). The proposed amendments outlined in the Consultation Paper include: (i) expanding the scope of the various misconduct reporting notices to apply to additional types of FIs, i.e., accident and health insurance intermediaries under the IA, registered fund management companies under the SFA;

	(ii) changes to the categories of reportable misconduct and reporting timelines; (iii) requiring FIs to submit internal investigation / police reports (where applicable) to the MAS as part of the misconduct report to the MAS; and (iv) requiring FIs to provide their representatives with a copy of the misconduct report filed with the MAS within certain specified timelines. **Related information**: Consultation Paper on the Revised Notices on Misconduct Reporting Requirements under the Financial Advisers Act, Insurance Act and Securities and Futures Act **Contact our Partners**: Joy Tan | Elaine Chan | Chan Jia Hui | Tian Sion Yoong

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16 June 2022	LegisWatch: Singapore Permits Conditional Fee Agreements Between Lawyers and Clients
13 May 2022	LegisWatch: Secondary Listings on the Singapore Exchange (SGX)
22 April 2022	Special Update: Non-Performing Corporate Loan Toolkit for Banks
20 April 2022	Special Update: Data Protection Quarterly Updates (January - March 2022)
14 April 2022	CaseWatch: Foreign States Have Additional Time To Apply To Set Aside Orders For Leave to Enforce Arbitral Awards, Singapore High Court Rules
13 April 2022	CaseWatch: Singapore High Court Sounds Caution Against Citing COVID-19 Pandemic to Avoid Testimony in Person at Trial

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5 May 2022	The Legal 500: Insurance & Reinsurance Country Comparative Guide 2022 (Singapore)	Hui Choon Yuen

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