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IM Skaugen SE v MAN Diesel & Turbo SE [2018] SGHC 123

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by ADELINE CHONG *on* AUGUST 15, 2018

In *IM Skaugen SE v MAN Diesel & Turbo SE* [2018] SGHC 123, the Singapore High Court had the occasion to discuss and resolve various meaty private international law issues. The facts concerned the alleged negligent or fraudulent misrepresentation by the defendants on the fuel consumption of a specific model of engine that was sold and installed into ships owned by the plaintiffs. The issue before the court was whether the Singapore courts had jurisdiction over the misrepresentation claim. The defendants were German and Norwegian incorporated companies so the plaintiffs applied for leave to serve the writ out of Singapore. This entailed fulfilling a 3 stage process, following English common law rules: (1) a good arguable case that the case falls within one of the heads set out in the Rules of Court, Order 11, (2) a serious issue to be tried on the merits, and (3) Singapore is *forum conveniens* on applying the test set out in *The Spiliada* [1987] AC 460. Stages (1) and (3) were at issue in the case. The judgment, by Coomaraswamy J, merits close reading. The main private international law issues can be summarised as follows:

(a) Choice of law is relevant when assessing the heads of Order 11 of the Rules of Court.

The plaintiffs had relied on Order 11 rule 1(f) and rule 1(p). Rule 1(f) deals with tortious claims and the court proceeded by ascertaining where the tort was committed. According to the court, this question was to be answered by the *lex fori*. If the tort was committed abroad, the court held that choice of law for tort then came into play: the court must then determine if the tort satisfied Singapore's tort choice of law rule, ie the double actionability rule. It should be noted that the Court of Appeal in *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377 had held that the double actionability rule will apply even in relation to local torts (as the flexible exception may displace Singapore law to point to the law of a third jurisdiction). The double actionability rule thus remains relevant when assessing Order rule 1(f) whether the tort is committed abroad or in Singapore.

(b) 'damage' for the purposes of Order 11 rule 1(f)(*ii*) is not limited to direct damage. Order 11 rule 1(f)(*ii*) is in these terms: 'the claim is wholly or partly founded on, or is for the recovery of damages in respect of, damage suffered in Singapore caused by a tortious act or omission wherever occurring.' The court held that 'damage' for the purposes of rule 1(f)(*ii*) included the increased fuel expenditure and reduction in capital value of the ships due to the fuel inefficient engines suffered not just by the original owners of the ships at the time of the misrepresentation, but also the subsequent purchasers of the ships. On the facts, the court held that the damage suffered by the subsequent purchasers arose directly from the misrepresentation as the misrepresentation was also intended to be relied upon by them. Further, the court held that, even if that had not been the case, direct damage is not required under rule 1(f)(*ii*). The difference in wording between Order 11 rule 1(f) and the UK CPR equivalent (CPR PD6B para 3.1(9)) makes the decision on this point less

controversial than the reasoning in *Four Seasons v Brownlie* [2017] UKSC 80, [2018] 1 WLR 192.

(c) The test used to ascertain whether 'the claim is founded on a cause of action arising in Singapore' for the purposes of Order 11 rule 1(p) differs from the substance test which applies to determine the *loci delicti* in a multi-jurisdictional tort situation for the purposes of the double actionability rule.

The former test derives from *Distillers Co (Biochemicals) Ltd v Thompson* [1971] AC 458. The court observed that the *Distiller's* test is more plaintiff-centric compared to the substance test used for the purposes of the double actionability rule because Order 11 rule 1(p) 'requires the court to view the facts of the case through the cause of action which the plaintiff has sought to invoke.' Whereas, the latter test is 'the more general and more factual question "where in substance did *the tort take place*."' (para [166], emphasis in original). This point will likely be revisited by the Court of Appeal, not least because it had, as the court itself acknowledged, cited the *Distillers* test as authority for the substance test in *JIO Minerals FZC v Mineral Enterprises* [2011] 1 SLR 391.

(d) Whether Singapore is *forum conveniens* for the purposes of a setting aside application and whether Singapore is *forum non conveniens* for the purposes of a stay application should be assessed with reference to current facts.

Norway and Germany were potential alternative fora for the action. After leave had been given to serve out of jurisdiction in the *ex parte* hearing, the plaintiffs commenced proceedings in Norway as a protective measure. No proceedings were commenced in Germany. This meant that, under the Lugano Convention, the Norwegian courts had priority over the German courts. The court treated this as indicating that the courts of Germany ceased to be an available forum to the parties. This was significant, given that the court had earlier held that the *loci delicti* was Germany. The defendants argued that the commencement of Norwegian proceedings was to be ignored and the application to set aside service out of jurisdiction was to be assessed solely with reference to the facts which existed at the time when leave to serve out of jurisdiction was granted. The effect of the defendants' argument would be that the setting aside application would be determined on the basis that Germany was an available forum, while their alternative prayer for a stay would be determined on the basis that Germany was an unavailable forum. The potential for wastage in time and costs is clear on this argument and the court rightly took a common sense and practical approach on this issue.

(e) The possibility of a transfer of the case from the Singapore High Court (excluding the SICC) to the Singapore International Commercial Court (SICC) is a relevant factor in the *Spiliada* analysis.

This had previously been confirmed by the Court of Appeal in *Rappo, Tania v Accent Delight International Ltd* [2017] 2 SLR 265. The SICC is a division of the Singapore High Court which specialises in international commercial litigation. Its rules allow for a question of foreign law to be determined on the basis of submissions instead of proof. Further, the bench includes International Judges from not only common law but also civil law jurisdictions. The court held that the specific features of the SICC and the possibility of the transfer of the case to the SICC weighed in favour of Singapore being *forum conveniens* compared to Norway and Germany.

(f) In a setting-aside application, where the plaintiffs have succeeded in showing that Singapore is the *prima facie* natural forum in the first stage of the *Spiliada* test, the burden of proof shifts to the defendants to show why they would suffer substantial injustice if the action were to proceed in Singapore.

In an Order 11 case, the second stage of the *Spiliada* test usually operates to give the plaintiffs a second bite of the cherry should they fail to establish Singapore is the natural forum under the first stage of the test. The plaintiffs are allowed to put forward reasons why they would suffer substantial injustice if trial takes place in the natural forum abroad. Very interestingly, the court held that where, as on the facts of the case, the plaintiff had already satisfied the burden of showing that Singapore is the natural forum under the first stage of the *Spiliada* test, the burden then shifts to the defendants to show why they would suffer substantial injustice if trial took place in Singapore.
The case is on appeal to the Court of Appeal. Its judgment is eagerly anticipated.