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Jurisdiction in relation to hostile trust litigation

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In *Ivanishvili, Bidzina v Credit Suisse Trust Ltd* [2020] SGCA 62, the Singapore Court of Appeal considered a number of issues: (1) whether a plaintiff could amend its Statement of Claim at the appellate stage to tilt the balance of connecting factors towards Singapore; (2) whether a clause in the trust deed identifying Singapore as the "forum of administration" of the trust was a jurisdiction clause, and if so; (3) whether the clause covered hostile litigation in relation to the trust; and depending on the answers to the previous questions, (4) whether the Singapore proceedings ought to be stayed.

The case concerned Mr Ivanishvili, the former Georgian prime minister, who was a French and Georgian dual national. Mr Ivanishvili had set up the Mandalay Trust which was domiciled in Singapore. The trustee of the Mandalay Trust was Credit Suisse Trust Ltd, a Singapore trust company ("the Trustee"). The trustee's asset management powers were delegated to the Geneva branch of Credit Suisse AG ("the Bank"). The Mandalay Trust suffered losses purportedly due to the actions of one the Bank's employees (Mr Lescaudron) who was the portfolio manager of the Mandalay Trust. Mr Lescaudron was convicted in Swiss criminal proceedings for various forms of misconduct in relation to the Mandalay Trust. At first instance, Mr Ivanishvili and his wife and children, who were the beneficiaries of the Mandalay Trust, sued both the Trustee and the Bank alleging, *inter alia*, breaches of duties of care and skill and misrepresentation. A stay was granted by the court below on the grounds that Switzerland was a more appropriate forum for the action. At the Court of Appeal, Mr Ivanishvili *et al* strategically chose to discontinue proceedings against the Bank to strengthen their argument that Singapore was the appropriate forum for trial of the action and sought to amend their Statement of Claim to this effect. This also entailed reformulating some of the claims against the Trustee to remove references to the Bank. This was allowed by the Court of Appeal on the basis that absent bad faith, the appellants had the freedom of choice to choose its cause of action and to sue the party it wishes to sue.

On the second issue, the relevant clause provided that:

"2. (a) This Declaration is established under the laws of the Republic of Singapore and subject to any change in the Proper Law duly made according to the powers and provisions hereinafter declared the Proper Law shall be the law of the said Republic of Singapore and the Courts of the Republic of Singapore shall be the forum for the administration hereof."

Clause 2(b) granted the Trustee the power to change the proper law and provided that if so, the courts of the jurisdiction of the new proper law would become the "forum for the administration" of the trust. Contrasting clause 2 with the equivalent clause in *Crociani v Crociani* (17 ITELR 624) where the relevant clauses referred to a *country* being the "forum for the administration", the Court of Appeal noted that the references to "forum for the administration" in clause 2 was tied up with a reference to the *courts*. It therefore held that clause 2(a) was a jurisdiction clause. As a point of interest, it should be noted that, generally speaking, it is immaterial whether a jurisdiction clause naming Singapore as a forum is exclusive or non-exclusive in nature after the Court of Appeal's decision in *Shanghai Turbo v Liu Ming* [2019] 1 SLR 779 (previously noted here); as Singapore is a named forum, the "strong cause" test would apply to cases falling within the scope of the jurisdiction clause.

The question which had to be considered next was whether clause 2(a) covered hostile litigation concerning breach of trust issues (such as in the present case) or was confined to litigation over administrative matters. On this, the Court engaged in an extensive review of case law in other off-shore trust jurisdictions. While tentatively observing that "there is no legal rule limiting the meaning of the phrase 'forum for [the] administration' to an administration action in the traditional sense"(at [75]), the Court ultimately followed the reasoning of the Privy Council in *Crociani* and other cases in its wake and held that that the phrase "is intended to refer to the court or jurisdiction which would settle questions arising in the day to day administration of the trust, and to denote the supervisory and authorising court for actions the trustee might need to take which were not specifically by the trust deed or where its terms were ambiguous"(at [76]). Such clauses did not cover hostile litigation between trustees and beneficiaries. The Court observed that: "The trust deed is not a contract between two parties with obligations on both sides – rather, it is a unilateral undertaking by the trustee, and in our view this difference must play a part when we consider whether the intention of the drafters was to impose a mandatory jurisdiction clause for the

resolution of contentious disputes regarding allegations of breach of trust"(at [78]). This suggests that the "strong cause" test, which has as its starting point the upholding of the parties' contractual bargain, is not appropriate in hostile litigation involving beneficiaries to a trust.

In any event, the Court's conclusion on the scope of clause 2(a) meant that whether a stay ought to be granted was to be determined under the *Spiliada* test on *forum non conveniens* rather than the "strong cause" test. On this point, the Court split. A majority of the Court (Menon CJ and Prakash JA), held that the balance of connecting factors pointed towards Singapore and allowed the appeal against the stay. The appellants argued that with the amended claim, the focus was on the Trustee's breaches of trust, all of which occurred in Singapore. The Court was unconvinced of the respondents' argument that most of the relevant witnesses, such as Mr Lescaudron, were located in Switzerland and not compellable to appear before the Singapore court. The location of witnesses was but a weak factor pointing in favour of Switzerland being *forum conveniens* relative to Singapore. The respondents had also argued that Swiss banking secrecy laws meant that disclosure of certain documents could only be ordered by the Swiss court but the Court gave little weight to this, holding that it was not clear that the Trustee could not obtain the requisite documents from the Bank itself. In contrast, the shape of litigation post the re-framing of the actions by the appellants meant that the trust relationship, rather than the banking relationship, was at the forefront of the claims. This pointed towards Singapore being the centre of gravity of the action. Further, Singapore law was the governing law of the Mandalay Trust and the rights of all parties under the Trust Deed: "There is no doubt that the Singapore courts are the most well-placed to decide issues of Singapore trust law, and the Swiss courts, operating in a civil law jurisdiction with no substantive doctrine of trusts, would be far less familiar with these issues"(at [110]). This comment may be to understate the competence of the Swiss courts in this regard, as internal Swiss trusts which are governed by a foreign law are not an uncommon wealth management tool in Switzerland. The Court was also not persuaded by the Trustee's argument that there was a risk of conflicting findings of fact due to related proceedings elsewhere, holding that this was not a "sufficiently real possibility" (at [114]). Thus, a majority of the Court held that, on an overall assessment of the connecting factors, Singapore would be the more appropriate forum vis-à-vis Switzerland.

There was a strong dissent by Chao SJ on the application of the *Spiliada* test. His Honour was of the view that whether the Trustee would be prejudiced by having to defend itself in Singapore formed the crux of the stay issue. In relation to this, His Honour observed that Mr Ivanishvili was a hands-on investor who corresponded directly with the Bank officers. The Trustee was not always copied into Mr Ivanishvili's instructions to the Bank. The alleged losses occurred in Switzerland and the acts and omissions of the Bank and its officers and the role of Mr Ivanishvili himself remained relevant in determining the Trustee's liability. In contrast, the Trustee played a passive role and the operative events in Singapore were merely secondary in nature (at [153]). This belied the appellants' insistence that the Bank's alleged wrongdoing was no longer relevant in the Singapore proceedings given the amended claim. His Honour was concerned about the respondents' ability to defend itself properly in Singapore given that the evidence and witnesses central to defending the claims were mainly located in Switzerland. Chao SJ was therefore of the view that the action had a greater connection with Switzerland than with Singapore "by a significant margin" (at [154]). His Honour went on to say that if he was wrong on stage one of the *Spiliada* test, stage two would also point towards Switzerland. On stage two, Chao SJ agreed with the High Court that the ends of justice would best be met by the Swiss court applying Singapore trust law. This is as the trustee's conduct may only be properly understood against the backdrop of Mr Ivanishvili's relationship with the Bank and the Bank's conduct in relation to its asset management duties (at [154]).

A pdf of the judgment can be downloaded here.