CIMB Bank Bhd v Dresdner Kleinwort Ltd
[2008] SGCA 36

Case Number : CA 35/2008

Decision Date : 08 August 2008

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA

Counsel Name(s) : Alvin Yeo SC, Nish Shetty, Tan Hsiang Yue and Aw Wen Ni (Wong Partnership LLP) for the appellant; Hri Kumar SC, Tan Siu Lin and Bhavish Advani (Drew & Napier LLC) for the respondent

Parties : CIMB Bank Bhd — Dresdner Kleinwort Ltd

Conflict of Laws – Choice of jurisdiction – Relevant factors at stage one of Spiliada test – Whether third-party action should be tried together with main action – Whether third-party action integral and inseparable part of main action

Conflict of Laws – Choice of law – Contract – Restitution – Whether choice of law clause in void or non-existent contract should apply to consequential restitutionary claim – Distinguishing between contracts parties intended to enter into but subsequently became ineffective or void due to contractual failure, and void contracts where there was no meeting of the minds to enter into that particular contract

Contract – Effect of fraud on existence of contact – Common ground that no contract between parties under which payment could have been made by purchaser to seller – Whether choice of law clause in non-existent contract should apply to purchaser's claim to recover payment

8 August 2008

Chao Hick Tin JA (delivering the grounds of decision of the court):

1 This was an appeal by the defendant appellant, CIMB Bank Berhad ("CIMB"), against a decision of the High Court refusing its application for a permanent stay of an action ("the present action") instituted by the plaintiff respondent, Dresdner Kleinwort Limited ("Dresdner"), for the recovery of US$8,199,869.50 ("the Funds") in relation to the purported sale and purchase of eight promissory notes ("the Notes"), on the ground of *forum non conveniens.* Instead, the High Court granted Dresdner's application that the action be temporarily stayed, pending the outcome of certain foreign proceedings in Germany where Dresdner is being sued by other parties also in connection with the Notes. We heard the appeal and, not being persuaded that the High Court judge ("the Judge") was wrong in the exercise of his discretion or had misapplied the relevant principles, dismissed it. We now give our reasons.

Background

2 Dresdner is a foreign company with a registered office in England offering banking services, including the discounting of promissory notes. Its London branch ("Dresdner London") was the office that dealt with the purported transaction involving the Notes. CIMB is a Malaysian bank with branches in various places, including London and Singapore.

3 On 6 May 2002, pursuant to a written agreement, Dresdner sought to purchase from CIMB the Notes,[note: 1] which had a nominal value of US$10m, for the amount of the Funds. The Notes, with a maturity date of 3 February 2004, were issued on 1 February 2002 by Innaria Sdn Bhd, Kota

Kinabalu, Sabah, Malaysia ("Innaria") to the order of V V Enterprise, Luyang, Sabah, Malaysia ("V V Enterprise"), and payable at Maybank Bhd, Kota Kinabalu, Sabah, Malaysia. The Notes bore signatures that appeared to be those of two directors of Innaria, namely, Lye Kok Keng alias Harry ("Lye") and Mohamed Zulfikar bin Muzaffar ("Zulfikar"). The Notes on their face also bore the guarantee of the Public Works Department of Sabah, Malaysia, with the alleged signatures of John Baptist Badai ("Badai") and Lontou Ujum ("Ujum") against the signed stamp of a "Commissioner for Oaths". The Notes were accompanied by a confirmation letter from Innaria stating that the Notes "relate to the financing of the import and installation of pipes under contract number JKR.JLN (S) 600 – 1/5/6 Klt.16/144".[note: 2]As with the Notes, this confirmation letter bore the signatures of Lye and Zulfikar of Innaria and those of Badai and Ujum of the Public Works Department of Sabah. The agreement between CIMB and Dresdner was signed on behalf of CIMB by one George Chau, the sales officer of the Inanam branch of CIMB ("CIMB Inanam").[note: 3]

4 Subsequently, on 5 June 2002, payment for the transaction was effected by Dresdner, through its correspondent bank, the Bank of New York, to the Singapore branch of CIMB ("CIMB Singapore") by SWIFT. In the SWIFT communication there was an express instruction that the Funds be credited to CIMB Inanam as the beneficial customer. The next day, CIMB Singapore transferred the Funds over to Hongkong and Shanghai Banking Corporation, Hong Kong ("HSBC Hong Kong") in favour of New Speed Technologies Ltd, pursuant to what appeared to be instructions issued by George Chau and Ahmad Bin HJ Khamis of CIMB Inanam for the attention of Paul Ma, the assistant general manager of CIMB Singapore.[note: 4] That notification stated that CIMB Inanam had received such instructions from V V Enterprise. Before the Funds were remitted to Hong Kong, the general manager of CIMB Singapore, Raja Sulong Razak ("Razak"), confirmed with CIMB Inanam that the transfer should proceed.[note: 5] Upon payment, Dresdner London obtained the Notes from the London branch of CIMB ("CIMB London") and endorsed them over to DF Deutsche Forfait AG ("DF"). It also warranted to DF as to the legal existence of the Notes and the avals contained therein. Subsequently, DF resold the Notes to Siemens Financial Services GmbH ("SFS") and similarly assigned the warranty over to SFS.

5 We pause here to mention that this series of transactions involving the Notes were brokered by an English company, Bon Pour Aval Limited ("BPAL"). Eventually, the Notes were dishonoured upon presentation.

6 On 9 November 2005, SFS sued Dresdner in Munich, Germany, on the warranty and on 18 August 2006 obtained a German judgment. Dresdner has filed an appeal against that decision and the determination of that appeal is now pending before the Superior Regional Court of Munich. We should hasten to add that there are further levels of appeal beyond the Superior Regional Court. The entire judicial process before the German courts is not likely to conclude before the end of 2009.[note: 6]

7 As stated earlier, the written agreement was executed on behalf of CIMB by George Chau. CIMB alleged that the agreement could not bind CIMB, and thus it was of no validity, because George Chau, acting alone, had no authority to execute the agreement. Moreover, the limit of George Chau's authority was expressly communicated to Dresdner by way of a fax dated 21 May 2002 from Ms Andrea Francis ("Ms Francis"), a trade finance officer of CIMB London, to Ms Amanda Callaghan ("Ms Callaghan") of Dresdner London, which stated that two authorised signatories were required for the endorsement of promissory notes that exceeded US$10,000.[note: 7] Here we should explain that earlier, on 15 May 2002, Yussof Bin Momin ("Momin"), a customer officer of CIMB Inanam, faxed a message to Ms Callaghan confirming that George Chau was authorised to sign on behalf of CIMB and that his sole signature was sufficient and legally binding on CIMB in relation to the Notes.[note: 8] On 20 May 2002, Ms Callaghan wrote to Ms Francis seeking confirmation that Momin had authority to

act on behalf of CIMB and to issue the fax of 15 May 2002. On 21 May 2002, the Head of Customer Service of CIMB Inanam, Ms Linda Sia Henry Sum ("Ms Sum"), and Momin jointly faxed a message to CIMB London and copied it to Ms Callaghan, confirming that one signatory was sufficient for the transaction of the Notes and that George Chau was so authorised. Again Ms Callaghan immediately sought confirmation of this 21 May 2002 fax from Ms Francis. Later, on the same day, CIMB Inanam sent a fax to CIMB London for the attention of Ms Francis asking her to confirm to Ms Callaghan that Momin and Ms Sum were legal and authorised signatories of CIMB Inanam. This led to Ms Francis' fax of the same day stating that George Chau's sole signature was valid only for transactions up to US$10,000 and two signatories were required for transactions beyond that limit.[note: 9] On 23 May 2002, Ms Mastulu Nurdin ("Ms Nurdin"), the Operations Manager of CIMB London, asked CIMB's headquarters in Kuala Lumpur, Malaysia ("CIMB KL") to verify the transaction for security purposes.[note: 10] Of course, this latter note was not communicated to Dresdner.

8 After the Notes were dishonoured, an internal investigation was carried out by CIMB which came to the conclusion that "the Project was non-existent, the supporting documents to validate the issuance of the Notes were fictitious and the Notes were issued in furtherance of a fraud".[note: 11]

9 In the statement of claim in the present action, Dresdner averred that the agreement with CIMB relating to the purchase and sale of the Notes was valid. This was also Dresdner's position in the German proceedings. Further, Dresdner pleaded in the alternative that if the agreement were in fact not valid and binding, it was entitled to reclaim the money from CIMB on the ground that the money was paid under a mistake of fact and that, consequently, CIMB had been unjustly enriched. A second alternative basis of Dresdner's claim was that the payment was made pursuant to a consideration which had totally failed.

10 We now explain why Dresdner had applied for a temporary stay of the present action. In view of the pending German proceedings, Dresdner took the position that if it could successfully resist the claim by SFS, then it, having suffered no loss, would not have to continue with its claim against CIMB. Indeed the institution of the present action in Singapore against CIMB was entirely precautionary as otherwise limitation would have set in on 6 June 2008.

11 In response to Dresdner's application for a temporary stay, CIMB applied to have the present action permanently stayed on the ground of *forum non conveniens*, asserting that England was the more appropriate forum to adjudicate on the dispute between them because much of the negotiations relating to the purported sale and purchase of the Notes were conducted by staff of the London offices of the two parties. The defence of CIMB, as disclosed in its affidavits filed in support of its stay application, was that the "agreement" signed by George Chau was not valid or binding. It also alleged that it had changed its position in good faith, *ie*, it had, in good faith, remitted the Funds received from Dresdner to HSBC Hong Kong.

Decisions below

12 Before the assistant registrar it was decided that Dresdner's application for a temporary stay should be heard prior to CIMB's application. Having ruled in that manner, the assistant registrar granted Dresdner's application and did not proceed to hear CIMB's application. On appeal, the Judge decided that both applications should be heard together. At the hearing before the Judge, in order to ensure that Dresdner would not subsequently revive the validity of the agreement as an issue, Dresdner gave an undertaking ("the Undertaking") that, for the purposes of this action, it would not take the position that the agreement was valid (see the Judge's grounds of decision ("the GD") in *Dresdner Kleinwort Ltd v CIMB Bank Bhd* [2008] SGHC 59 at [136]–[140]). The effect of the Undertaking was that Dresdner agreed with CIMB that George Chau had entered into the agreement

without authority and that there was no such agreement.

13 Accordingly, the Judge dismissed CIMB's application for a permanent stay and varied the temporary stay granted by the assistant registrar in that CIMB was granted liberty to take all essential steps for it to commence any intended third-party proceedings.

Factors taken into account by the Judge

14 In considering the question of whether England was the more appropriate forum to adjudicate on the present action, the Judge examined the following factors which CIMB averred connected the present action with England:

(a) whether the agreement was valid and enforceable;

(b) the potential witnesses which both parties were likely to call in relation to the claim for unjust enrichment;

(c) whether Dresdner London made the payment as a result of a mistake; and

(d) the change of position of CIMB upon receipt of the payment and the involvement of its Singapore branch.

15 CIMB also underscored the fact that the London offices of both Dresdner and CIMB were more closely involved with the transaction than its Singapore office which merely received the payment and transferred it out to HSBC Hong Kong.

16 The Judge also considered the following issues or factors which, as alleged by Dresdner, connected the present action with Singapore:

(a) whether there was a failure of consideration for the payment of the Funds if the agreement was not valid;

(b) whether, in making the payment, Dresdner laboured under a mistake that the agreement was valid and binding;

(c) whether CIMB changed its position after receiving the payment;

(d) whether, in changing its position, CIMB acted in good faith;

(e) the question of unjust enrichment and the proper law of the restitutionary obligations; and

(f) the question of third-party actions which CIMB intended to institute against HSBC Hong Kong and BPAL.

It would be apparent that some of these factors raised by Dresdner overlapped with those raised by CIMB.

17 In relation to factors (a), (b) and (c) (at [14] above), the Judge recognised that, in view of the fact that the negotiations leading to the purported agreement as well as the verification of the Notes and authorised signatories were carried out mainly by employees of both parties in London, the witnesses involved would be in London and so would the relevant documents. Thus these factors

favoured London. However, the Judge also commented that as the potential witnesses of CIMB were still in its employment, there should not be too much difficulty in getting them to come over to Singapore to testify. Moreover, the relevant documents were also small in number.

18 As for factor (d) (at [14] above), the Judge noted that the Funds were received by CIMB Singapore which remitted them to HSBC Hong Kong in contravention of the express instructions contained in the SWIFT message (see [4] above). As regards CIMB's contentions that the broker, BPAL, could also have played a role in the remittance of the Funds to Hong Kong, that CIMB intended to take out third-party proceedings against BPAL and that consequently BPAL directors and staff, who were located in London, would be necessary witnesses, the Judge observed that in the light of the fact that there was reciprocal enforcement of judgments between Singapore and the United Kingdom, CIMB could bring third-party proceedings here against BPAL and he could not imagine that BPAL would ignore the third-party action so taken out here.

19 On factor (a) (at [16] above), the Judge was of the view that that was primarily a question of law. As for factor (b) (at [16] above), he observed that only Ms Francis and George Chau of CIMB communicated with Ms Callaghan of Dresdner London in relation to the payment. Therefore, only these three persons would really be able to shed any light on the issue of payment. Ms Francis was still in the employment of CIMB so there should be no difficulty in getting her to come over to Singapore to testify; it was only a matter of some expense which was well within the means of CIMB. In his view, this was not a significant factor. George Chau had left CIMB's employment and his whereabouts were not known. The Judge rejected CIMB's argument that it would not be able to call the people from BPAL to be witnesses unless the trial was in London because, in his opinion, it was "wholly unrealistic" for CIMB to expect that the employees of BPAL would testify on its behalf given that it intended to take third-party action against BPAL (see the GD at [68]).

20 On factors (c) and (d) (at [16] above), the Judge stated that the event of CIMB's change of position upon receiving the Funds occurred in Singapore. But he also noted that what took place at CIMB Inanam was also material as it was that branch which purportedly gave the instructions to the Singapore branch to transfer the payment to Hong Kong in favour of another party, New Speed Technologies Ltd. As for the question of good faith in the remittance of the Funds from CIMB Singapore to Hong Kong, the evidence on that would depend on those same witnesses. If there was anyone who aided George Chau in the scam, it would likely be someone at CIMB Singapore. Two crucial witnesses of CIMB in this regard would be George Chau and Paul Ma, both of whom had ceased to be in the employment of CIMB and whose whereabouts were unknown. But the last-known address of Paul Ma was in Singapore and that of George Chau was in Malaysia. The Judge observed that, in any event, the relevant evidence in this connection was to be found in Singapore and Malaysia, not England.

21 At this juncture, we would refer to the remarks of the Judge on the general question of the location of the witnesses (at [82] of the GD):

> [Dresdner] took pains during the hearing to impress upon me that it will facilitate the attendance of its London witnesses before the Singapore court, if the permanent stay application is not granted. Similarly, [CIMB] informed me that it will facilitate the attendance of its Singapore and Malaysian witnesses before the English court, if the action were stayed. As some of these potential witnesses are located in England and others in Singapore and Malaysia, I will not regard the convenience and cost factor to be weighing distinctly in favour either of Singapore or England for the trial. It is a fairly neutral factor in my judgment.

22 As for factor (e) (at [16] above), in view of the position taken by Dresdner as evidenced by

the Undertaking (see [12] above), the Judge came to the conclusion that there was, in truth, no contract in existence between the parties. This was not a case of a failed contract, *ie*, it was not a case where the parties had entered into a contractual relationship which failed. Effectively, it was a case of George Chau having perpetrated a fraud on both CIMB and Dresdner. In the circumstances, the Judge held that there was no prior relationship to which reference might be made or which might contribute to the identification of the proper law of the obligation to make restitution. The choice of law stated in the purported contract could not be relevant to the determination of the proper law that should govern the restoration of the alleged unjust enrichment. The obligation to make restitution would be governed by the law of the country with which the obligation to make restitution had the closest and most real connection. On this test, and taking into account all the circumstances of the case, the Judge concluded that the place with the closest and most real connection with the obligation to restore the benefit of the alleged enrichment was Singapore and not England.

23 Turning to factor (f) (at [16] above), the evidence suggested that CIMB was likely to make claims against HSBC Hong Kong and BPAL. On the claim against HSBC Hong Kong, the Judge noted that the governing law was likely to be Hong Kong or Singapore. It would certainly have nothing to do with England. As for the claim against BPAL, that claim would be either for negligence or breach of duty in respect of BPAL's failure to conduct due diligence on Innaria and the underlying project for which the Notes were issued, or for conspiracy, or both. Thus, the claim which CIMB was likely to bring against BPAL would be quite different, and indeed very wide-ranging, from the rather straightforward claim of unjust enrichment which Dresdner was making against CIMB. To link CIMB's claim against BPAL with the present action by Dresdner against CIMB would unnecessarily prolong the trial of the present action. The Judge accepted that if the nature of the third-party proceedings were to fall within the scope of O 16 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), it was generally convenient that all the proceedings should be tried in the same forum. However, without knowing the full facts of the third-party claim and the likely responses of BPAL, the Judge was inclined to the view, in a tentative way, that it was probably more appropriate to try the claim in England after the Singapore action had been disposed of. Therefore, the Judge gave very little weight to the third-party claim which CIMB would be making against BPAL.

24 In the result, the Judge concluded that CIMB had not shown that London was the more appropriate forum to adjudicate on the present unjust enrichment claim by Dresdner against CIMB because (see the GD at [143]):

(a) CIMB's unjust enrichment occurred in Singapore;

(b) Dresdner's causes of action principally for restitution, payment under a mistake and for money had and received arose in Singapore;

(c) CIMB's alleged change of position occurred in Singapore;

(d) CIMB's state of mind, if and when it changed its position would, *inter alia*, be that of its employees in its Singapore branch. In any event, witnesses who were still employees of CIMB or Dresdner would be readily made available at the trial by the parties themselves wherever that trial was held;

(e) for witnesses who were not employees, Paul Ma (if he could be found) was likely to be in Singapore, while George Chau (if he could be found) was likely to be in Malaysia;

(f) the documents relating to CIMB's alleged change of position were mainly in Singapore;

(g) the governing law of Dresdner's action in restitution was Singapore law;

(h) it was undisputed that the Singapore courts had jurisdiction over Dresdner's present action; and

(i) it was undisputed that CIMB had a presence in Singapore and carried on business in Singapore.

General principles governing *forum non conveniens*

25 The *locus classicus* on the question of when a stay would be granted on the basis of *forum non conveniens* is *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*"), a decision of the House of Lords where Lord Goff of Chieveley, in delivering the leading judgment, laid down certain guiding principles (at 476–478) for determining the question of *forum non conveniens* ("the *Spiliada* test"). Those principles have been adopted by this court in several cases such as *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776, *Eng Liat Kiang v Eng Bak Hern* [1995] 3 SLR 97, *PT Hutan Domas Raya v Yue Xiu Enterprises* (*Holdings*) *Limited* [2001] 2 SLR 49 and *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 ("*Rickshaw Investments*").

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

Application of the *Spiliada* test to this appeal

Relevant factors at stage one of the Spiliada test

27 As in the court below, CIMB argued that the present action had the closest connection with England as the negotiations for the sale and purchase of the Notes were carried out by the staff of both parties from their London offices and thus the relevant witnesses would all be there. On the other hand, Dresdner contended that, as its claim was only for unjust enrichment, Singapore was the natural forum for the action and that CIMB had not established that England was the more appropriate forum for the action. Three main factors were canvassed before us by the parties:

(a) the applicable law in relation to Dresdner's claim for unjust enrichment;

(b) the country where the witnesses of the parties and the relevant documents were

located; and

(c) third-party actions which CIMB intended to institute and whether they should be tried together with the present action.

28 We should, in this regard, add that CIMB also made the allegation that Dresdner did not make a mistake when it remitted the Funds to CIMB Singapore and sought to rely on the fact that Dresdner London was informed on 21 May 2002 that any transactions beyond the value of US$10,000 would require two signatories (see [7] above). To our mind, to suggest that Dresdner made the payment knowing full well and being conscious that the agreement to effect the transaction was invalid, or of no effect, was simply absurd. Someone in Dresdner obviously bungled, having overlooked the notification received from CIMB London. However, an oversight is no less a mistake. There was no suggestion by CIMB that any employee in Dresdner was acting in cahoots with George Chau. In our opinion, this was a non-issue. It seemed to us that this point was made to enable CIMB to assert that employees of both Dresdner London and CIMB London would be required to be called as witnesses with the hope that this, in turn, could tilt the balance in the consideration of the factors germane to the *forum non conveniens* issue.

Issue of applicable law

29 The basic rule is that a contract is governed by the law chosen by the parties: see *James Miller & Partners Ltd v Whitworth Street Estates* (*Manchester*) *Ltd* [1970] AC 583 at 603 *per* Lord Reid, and Rule 203(1) in *Dicey, Morris and Collins on The Conflict of Laws* (Sweet & Maxwell, 14th Ed, 2006) ("*Dicey, Morris and Collins*") at para 32R1061. In relation to the present matter, it could not be disputed that Dresdner had sought to enter into a contract with CIMB to purchase the Notes and in that "agreement" there was a provision, cl 6.5, expressly stating that the applicable law would be the law of England and that the parties would submit to the non-exclusive jurisdiction of the English courts. However, the claim, that the "agreement" was not valid and binding on CIMB because the person who allegedly entered into the "agreement" on behalf of CIMB had no authority to do so, put a different complexion to this question. In fact, CIMB also highlighted the fact that after the signing of the "agreement", it had notified Dresdner that any transaction above the sum of US$10,000 would require two signatories. Be that as it may, with Dresdner eventually accepting (in the Undertaking) CIMB's assertion that George Chau had no authority to enter into the "agreement", the effect would be that there was no contract between the parties under which the payment could have been made by Dresdner. Thus, the question which confronted this court was whether the applicable law clause in the void or non-existent "agreement" could conceivably apply to the present claim by Dresdner against CIMB for the return of the Funds.

30 In our opinion, a distinction ought to be drawn between a case where the parties are agreed that there is no agreement at all, and a case where the parties are in dispute as to the existence or validity of the agreement (*eg*, due to fraud or misrepresentation). It is settled principle that, in the latter situation, the dispute as to the existence or the validity of the contract would be construed in accordance with the law that governs that contract as if the contract were valid: see *The Parouth* [1982] 2 Lloyd's Rep 351 at 353 *per* Ackner LJ, and Rules 203 and 206 of *Dicey, Morris and Collins* (at paras 32R1061 and 32R1154 respectively). Such a rule makes good practical sense because otherwise it would mean that a mere allegation on the part of the defendant that there was fraud would suffice to neutralise the effect of the jurisdiction or choice of law clause in the agreement. In *Ash v Corporation of Lloyd's* (1992) 9 OR (3d) 755 ("*Ash*"), Carthy JA said (at 758):

> The plaintiffs argue that the exclusive jurisdiction clauses should be ignored because if there has been fraud in the circumstances surrounding the procurement of the contracts then the

contracts are void *ab initio* and the clauses relating to forum are of no effect. I agree with McKeown J., and with the authorities he cites, to the effect that an allegation that a contract is void *ab initio* does not make it so until a final judgment of the court. If the plaintiffs can commence an action with an allegation of fraud which would void the contract and thus vitiate a choice of jurisdiction clause from the outset, then they may succeed on the merits while enjoying their own choice of jurisdiction or fail on the merits while depriving the defendant of the contracted choice. These clauses are too important in international commerce to permit that anomalous result to flow.

(1) Rule 230 of Dicey, Morris and Collins

31 *Dicey, Morris and Collins* states in Rule 230 as follows (at para 34R1001):

> (1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.
>
> (2) The proper law of the obligation is (*semble*) determined as follows:
>
> > (a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;
> >
> > (b) If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (*lex situs*);
> >
> > (c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs.

In stating the principles in the three clauses of Rule 230(2), *Dicey, Morris and Collins* seems to have applied the "most closely connected" test. The issue that concerned us was whether Dresdner's present claim against CIMB came under cl 2(a) or 2(c) of Rule 230. This, in turn, depended upon whether the alleged obligation to refund the payment arose "in connection with a contract". It was common ground that cl 2(b) was inapplicable.

32 Dresdner, which asserted that cl 2(c) should apply, submitted [note: 12] that cl 2(a) was meant to apply only to cases where the obligation to restore arose in connection with a contract which both parties intended to and did knowingly enter into and which became ineffective for some other reason(s). Such cases should be distinguished from cases, such as the present, where the very existence of the contract was denied by both parties, implying that there was never a meeting of minds in the first place. On the other hand, CIMB sought to argue [note: 13] that there was nevertheless an agreement:

> Under the doctrine of apparent authority, the principal may be bound to third parties because the agent appeared to have authority. Further, the presence of fraud and lack of authority on the part of the employee of one party does not *per se* mean that no agreement exists between the parties …
>
> … At the very least, from Dresdner's perspective, there was a relationship (with CIMB) which was intended to be entered into …

33 The use in cl (2)(a) of the expression "in connection with a contract" has been the subject of some comment as being too "broad and vague" (see George Panagopoulos, *Restitution in Private*

International Law (Hart Publishing, 2000) at p 47). The same author stated (*id* at pp 47–48):

> This could refer to restitutionary claims, where the enrichment, in relation to which restitution is claimed, was provided pursuant to an actual or purported contract which is ineffective. Alternatively, it may refer to situations where there is, or was, an underlying contractual relationship between the parties. Furthermore, the word "contract" in this context could mean a wide variety of things. It could refer to an existing contract, a previously valid contract which has been discharged or avoided, or it could even include purported contracts which were never effective.

Indeed, extensive debate has occurred as to whether it is logically justifiable to use the law of a failed "contract" to determine the restitutionary consequences of its failure. If a contract is void, how can it have a governing law and how can one justify extending the ambit of that governing law to an unjust enrichment claim? One answer is that perhaps it is convenient and pragmatic to adopt that rule and, arguably, such an approach was probably in line with the expectation of the parties. This approach seems to be premised on the assumption that the choice of law clause can be regarded as separable from the contract itself. If the law applicable to a contract determines that it is void, it is not obviously desirable, or commercially sensible, for a different law then to be applied to determine the restitutionary consequences of this voidness (see discussion in Jonathan Harris, "Does Choice of Law Make Any Sense?" (2004) 57 CLP 305 at 327).

34 In the commentary on cl 2(a), *Dicey, Morris and Collins* gives the following illustrations as to the sort of situations to which the clause applies (at paras 34‖020 and 34‖021):

> Although the obligation to restore an unjust benefit does not arise *from* a contract, it may, and very frequently does, arise in connection with a contract. This is the case where a party seeks to recover money paid pursuant to an *ineffective* contract, e.g. by reason of a failure of consideration or as a repayment of money paid under an illegal contract or where he claims a *quantum meruit* for work done or services rendered under a contract which turned out to be void. …
>
> … [T]he choice of law rule for dealing with the consequences of a contract being void, or being avoided, or being discharged for frustration, will be the law which governed the real or supposed contract and pursuant to which the avoidance or discharge was brought about. It will, therefore, be *generally* unnecessary to decide whether the claim for an order to settle the rights of the parties in the aftermath of a failed contract is to be characterised for choice of law purposes as a contractual or a restitutionary matter.
>
> [emphasis added]

35 Equally pertinent is para 34‖028 of *Dicey, Morris and Collins* where it is stated that cl 2(a) is meant to apply where there is contractual failure:

> [C]lause 2(a) seeks only to assist in the identification of the proper law of the restitutionary obligation in circumstances of contractual failure; it does not state an inflexible rule which must be applied without exception to every case connected to a contract.

36 *Dicey, Morris and Collins* gives the following rationale at para 34‖023 as to why the law which governs the validity of a contract should also *generally* regulate the consequential restitutionary obligations:

> There are … rational and practical reasons why the law which governs the validity of the contract should *generally* regulate the consequential restitutionary obligations if, under that law, the contract is found to be ineffective, and that there may be many cases in which it is appropriate to apply the law which was expressly chosen by the parties. If the parties have expressly chosen the law to govern the contract, it is realistic to suppose that, had they given the matter any thought, they will have expected this law also to deal with the remedial consequences if the contract is ineffective or has failed. [emphasis added]

37 We will, at this juncture, examine some of the cases upon which *Dicey, Morris and Collins* relied to state the principles in cl 2(a) and to make the commentary quoted at [34] above. In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour, Limited* [1943] AC 32, where a contract between an English company and a Polish company to sell and deliver goods in Poland was frustrated by the German occupation of Poland, the House of Lords held that the part payment made in advance could be recovered by way of restitution or quasi-contract. It is important to note that, in this case, the parties did not dispute that English law was the proper law to apply in relation to the claim for a refund of the part payment. Furthermore, what we would underscore about the case is that there was a contract, a meeting of the minds, between the parties. Payment was made thereunder. The contract was frustrated because of the war.

38 Similarly, in *Etler v Kertesz* (1960) 26 DLR (2d) 209, there was a claim for the refund of a payment made under a contract governed by Austrian law but the contract was illegal by that law. The Ontario Court of Appeal held that the claim would be subject to Austrian law. Again, we would emphasise that there was a meeting of the minds as far as the contract was concerned. There was an intention on the part of both parties in *Etler v Kertesz* to enter into the contract.

39 In contrast, in *Arab Monetary Fund v Hashim* [1993] 1 Lloyd's Rep 543 ("*Hashim*"), an employer brought a claim to recover sums of money received by an employee as bribes. While Evans J (at 566) decided that cl 2(a) applied, he based this conclusion on "wider grounds" such as where the employee was based and the location of the employer's headquarters. However, this case does not stand for the proposition that where there is no meeting of the minds to enter into a contract, cl 2(a) ought to apply nonetheless to the restitutionary obligation (see also [59] below). In this regard, it may be noted that in *Kartika Ratna Thahir v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR 257 ("*Thahir*"), this court was of the view that a claim for the recovery of bribes came within cl (2)(c) rather than cl (2)(a).

40 While it is true that in *Hashim* and in *Thahir* the bribes were not paid pursuant to the respective contracts of employment, and indeed it cannot be argued that such payments were contemplated under the employment contracts, it cannot be denied that it was the existence of the employment contracts that provided the opportunity for the offer and receipt of the bribes. Thus there was this special link between the payment of the bribes and the bribe recipients' employment. That, notwithstanding, the court in *Hashim* took into account factors that, in our view, were also relevant under cl 2(c), while this court held, unequivocally, in *Thahir* that cl 2(c) applied (see [39] above).

41 It seems to us that whether it is a case of an "ineffective contact" or a case of "contractual failure", both situations presuppose that the parties *had intended* to enter into the contract but that, due to other circumstances or reasons, the contract had become void or ineffective or a contractual failure had arisen. Clearly, in such situations, the parties intended to enter into the contract, including the choice of law clause. Thus it would be logical to apply that same law to consequential restitutionary obligations following either the contract becoming ineffective or a contractual failure. The rationale for this is apparent from the following passage of Lord Denning MR in *Mackender v*

Feldia AG [1967] 2 QB 590 ("*Mackender*") at 598:

> I can well see that if the issue was whether there ever had been any contract at all, as, for instance, if there was a plea of non est factum, then the foreign jurisdiction clause might not apply at all. But here there was a contract, and when it was made, it contained the foreign jurisdiction clause. Even if there was non-disclosure, nevertheless non-disclosure does not automatically avoid the contract. It only makes it voidable. It gives the insurers a right to elect. They can either avoid the contract or affirm it. If they avoid it, it is avoided in this sense, that the insurers are no longer bound by it. They can repudiate the contract or refuse to pay on it. But things already done are not undone. The contract is not avoided from the beginning but only from the moment of avoidance. In particular, the foreign jurisdiction clause is not abrogated. A dispute as to non-disclosure is "a dispute arising under" the policy and remains within the clause: just as does a dispute as to whether one side or the other was entitled to repudiate the contract: see *Heyman* v. *Darwins Ltd* [[1942] AC 356].
>
> It seems to me that [counsel for the underwriters'] argument (to the effect that non-disclosure strikes out the whole contract) is not well founded. The foreign jurisdiction clause is a positive agreement by the underwriters that the policy is governed exclusively by Belgian law. Any dispute under it is to be exclusively subject to Belgian jurisdiction. That clause still stands and is a strong ground why discretion should be exercised against leave to serve out of the jurisdiction.

42 In the same case, Diplock LJ explained (at 603–604) why when it is said that a contract has become void it does not mean that there was no contract at all:

> The fallacy in the argument to the contrary is that when what is said to be a "voidable" contract is said to be "avoided," that does not mean that the contract never existed but that it ceases to exist from the moment of avoidance, and that upon its ceasing there may then arise consequential rights in respect of things done in performance of it while it did exist which may have the effect of undoing those things as far as practicable. It is sometimes sought to assimilate the concept of avoidance of a voidable contract to the concept of *non est factum* which prevents a contract from ever coming into existence at all. It is argued that innocent misrepresentation or, in the case of contracts of insurance, non-disclosure of material facts vitiates consent and makes the apparent consent of the party misled, no consent at all. But this is specious. What is really meant is that the party did in fact consent but would not have done so if he had then known then what he knows now.

43 However, in the present action for restitution by Dresdner, both parties were in agreement that there was no contract under which the payment was made. It would be noted that, at [32] above, we have quoted CIMB's submission which we repeat:

> At the very least, from Dresdner's perspective, there was a relationship (with CIMB) which was intended to be entered into …

Obviously CIMB saw the difficulties of its own argument because there could be a contract only if there were two parties, yet CIMB could only say that as far as Dresdner was concerned there was an intention to enter into the contract. It could not say that CIMB intended to enter into the contract. This is the bind which CIMB could not get away from. How could it be said that there was an agreement when its position was that George Chau was not authorised, and that there was no contract? The entire situation smacked of CIMB wanting to have its cake and eat it too. CIMB was taking wholly inconsistent positions.

(2) Exception to the rule

44 As stated (at [31] above), the rule is that where a contract becomes ineffective or fails, the law that would govern the consequential claims arising therefrom would be the law of that contract. We now turn to an apparent exception to the rule where the invalidity of the contract is founded on duress or fraud. *Dicey, Morris and Collins* states at para 34[024]:

> [I]t does not follow that the law which governed the contract should invariably govern the claim for restitution. First, in a case in which the invalidity of the contract is founded on duress or on fraud, and it is alleged that the duress meant that the express choice of law was itself liable to be set aside, it will be inappropriate to apply the expressly chosen law, even if this is the law which determined the validity or invalidity of the contract.

45 Prof Harris also recognised duress or fraud as a possible exception when he stated in his article ([33] *supra* at 326):

> [W]here a contract is void on the grounds of mistake, the mistake may relate to the subject matter of the contract; but the choice of law clause may not have been the subject of a mistake at all. If so, then it may legitimately be used in respect of a claim in restitution arising from the mistake. However, if the contract is set aside as the product of duress, it may be that the choice of law clause itself was also a product of duress. If that is the case, then there should be no question of the law specified by the clause being used in respect of any restitutionary claim.

Prof Harris also wrote (*id* at 327):

> [T]he question will arise whether the factor which led to the invalidity of the contract itself also 'infects' and invalidates the choice of law clause. If it does 'infect' the clause, then the clause cannot logically survive. But if it does not, then the clause, logically separable from the contract and not rendered invalid, therefore still stands. If so, it may logically be used to determine a claim in restitution arising out of the contract.

46 It would be seen that the fact that a contract is void due to duress or fraud does not necessarily mean that everything in the contract will be thrown out of the window. This is because fraud or duress can take many forms. For example, fraud could give rise to the plea of *non est factum* in which case everything in the contract must be discarded because the victim was defrauded into thinking that the document he executed was of a wholly different nature. As there was no intention on the part of the victim to enter into any contract, it is difficult to visualise why any terms therein should still apply to restitutionary issues. On the other hand, fraud can relate purely to the condition of the subject matter of the contract, *ie*, a case of fraudulent misrepresentation. In this scenario, it is clear that the victim intended to enter into the contract, including the choice of law clause. The fact that the victim could have the contract declared void on the ground of fraud does not mean that the victim did not intend to enter into the contract or that there was no contract. In this situation, it is probably reasonable and logical to apply the choice of law clause to any restitutionary issues that may arise between the parties. Indeed, if the parties had thought about it at the time of the contract, they would likely have agreed to the choice of law. The same will be the position where duress is concerned, depending on whether the effect of the duress goes to the root of the consent, *eg*, when a person was being forced or coerced into signing an "agreement" when he never intended to. Where (in the admittedly rare case) it can be demonstrated, on the facts, that the fraud or duress directly impacted the decision of the victim to agree to the choice of law clause itself, then obviously we would think that that clause would also have no legal effect.

47 We would hasten to add that a contract may be void for other reasons too. One example would be the case where there was a common and fundamental mistake as to the subject matter of the contract. In such a situation, it does not mean that the parties did not intend to enter into the contract or that there was never any contract between them. A contract rendered invalid or void for such a reason need not necessarily impugn the express choice of law clause and there is some rationale for contending that such a choice of law should still govern the consequential restitutionary claims. As *Dicey, Morris and Collins* commented at para 34-024:

> [I]f the contract is void on account of a common and fundamental mistake as to the subject matter of the contract, there may be no objection to giving effect to an express choice of law: the parties may have been clear in their intention that Ruritanian law should govern the contract and any consequences of its invalidity, even though they were mistaken as to the existence of the subject matter of the contract.

48 The Judge ventured to suggest (at [93] of the GD) that the following three situations fall within cl (2)(c):

> (a) where the signature to an alleged contract is forged and the party purported to be a signatory to the contract does not even know the forged contract exists until perhaps after the forgery of that party's signature is discovered;
>
> (b) where an employee, on a frolic of his own, enters into an alleged contract on behalf of his employer when clearly the employee has no real or apparent authority to do so; and
>
> (c) where the defence of *non est factum* to a claim under an alleged contract is made out.

We agree. In the three situations it is clear that the victim or the employer never intended to enter into the contract. In line with what is stated at [46] above, the choice of law clause in the "contract" should not *ipso facto* be treated as applicable to consequential restitutionary issues.

49 Therefore a contract being void as such does not assist us in determining whether the choice of law clause in the contract has still a role to play in consequential restitutionary issues. This is because a contract could be void for a variety of reasons or circumstances. There is a need to examine the factual circumstances of each case to see the cause for the contract being void. If the contract is declared void because there was, in the full sense of the word, no meeting of the minds to enter into that particular contract, *eg*, where the defence of *non est factum* is applicable, then we cannot see any reason or logic to give effect to any of the clauses therein. A restitutionary claim arising from such a void contract is really a claim independent and outside the contract because there is no contract to speak of in the first place. Thus in the passage of *Dicey, Morris and Collins* which we have quoted at [36] above, the word "generally" is used.

50 Even if we were to look at the question from a slightly different angle by using the "infection" test suggested by Prof Harris (see [45] above) to determine whether a choice of law clause could still survive and apply to a consequential restitutionary claim if the "contact" is void, the answer would still be the same. If a "contract" is void because there was no meeting of the minds to enter into the agreement at all, and in effect there was no contract, it is extremely hard to imagine why the lack of consent should only "infect" the other clauses but not the choice of law clause. We cannot see any rationale for saving the choice of law clause in such circumstances. To do that will be an unwarranted exercise in mental gymnastics or creative thinking. In such circumstances, the true position will be that there is no prior relation between the parties to which reference may be made or which may contribute to the identification of the proper law of the obligation to make the restitution.

51 In this regard, it is of interest to note that *Dicey, Morris and Collins*' commentary on cl 2(c) at para 34-030 alluded to another category of mistakes, *viz*, mistakes of fact, to which cl 2(c) would apply:

> Where money is paid to, or a benefit is conferred upon, another person with whom *no prior contract, or supposed contract, exists*, and it is alleged that the money or the value of the benefit is recoverable, e.g. because of a mistake of fact, the enrichment is likely to be most closely connected with the country in which it occurred, and the obligation to restore it to be governed by the law of that country. [emphasis added]

It seems to us that, in the light of the commentaries made in paras 34-020, 34-021 and 34-028 of the same textbook (quoted at [34] and [35] above), this reference to "supposed contract" at para 34-030 must be read to mean a contract which the parties intended to enter into but due to one reason or another has been held to be void or has become ineffective or has failed.

52 In this context, a somewhat controversial case is *Baring Brothers & Co Ltd v Cunninghame District Council* [1997] CLC 108 ("*Baring Brothers*") where it was agreed that the contract in question – a forward rate agreement entered into between the plaintiff banks and the defendant district council – was *ultra vires* the defendant. Lord Penrose held that the consequential restitutionary issues arising under a void contract were to be separately characterised and governed by a separate choice of law rule. This flowed from the fact that a claim was made in restitution because there was no contract and a claim could not be made under contract. The Court of Session held that the choice of law relating to the restitutionary issues was to be determined on the basis of which law the critical facts relating to the claim in restitution had their closest and most real connection with. Lord Penrose said (at 123):

> The restitutionary remedy is available only because there is no contract, and there was no contractual obligation at the date of the transfer of assets. *The proper law of the contract has exhausted its purpose* in dictating that conclusion, and it is not attractive to proceed then to give direct effect to a term of the contract, where there is an express choice of law ... when the contract has ceased to have any validity as between the parties. [emphasis added]

5 3 *Baring Brothers* has received academic criticism because it failed to differentiate between restitutionary claims which did not arise out of any contract and those which arose out of contracts which the parties intended to enter into but subsequently became void for one reason or another. We agree with Prof Yeo's observations in T M Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004) at para 9.22 that "[w]here a contract is avoided *ab initio*, legally it does not mean that the contract never existed; it means that the parties are treated as if the contract never existed" (see also the views of Lord Denning MR and Diplock LJ in *Mackender* ([41] *supra*) quoted at [41] and [42] above). Prof Yeo made five points against *Baring Brothers*, of which his third and fourth points, in our opinion, confirm that the criticism of *Baring Brothers* need not concern us in the instant appeal where there is no "underlying contract" to speak of (at para 9.22):

> Thirdly, to use the applicable law of the contract to govern the restitutionary obligation is not to equate restitutionary claims with contractual claims; the recourse to *the law of the underlying contract* reflects a policy choice to apply a single law to closely connected issues. Fourthly, in practice, the application of the proper law of the contract will meet *the reasonable expectations of the parties*. [emphasis added]

(3) Our decision on the applicable law

54 Reverting to the present case, the "agreement" is void because of the fraud of George Chau, a fraud which he perpetrated against both Dresdner and CIMB. Both Dresdner and CIMB agreed that there was no contract between them because George Chau went on a fraudulent frolic of his own. Even taking the "infection" approach advocated by Prof Harris (see [45] above), this fraud must infect the entire "agreement". The "agreement", including the choice of law clause, could not have bound CIMB (if CIMB, contrary to its stand here, was minded to take that position). If the choice of law clause in the void contract could not apply to CIMB, the same should be the position *vis-à-vis* Dresdner. It would be contrary to all principles to suggest that the clause could be effective only against one party and not the other. Accordingly, we found the following argument of Dresdner (at paras 85 and 86 of the respondent's case) both germane and persuasive and here we quote:

> CIMB cannot have its cake and eat it too. Here, it is CIMB who has alleged fraud on the part of its own employee. It is CIMB who is disavowing the Agreement. It cannot at the same time also insist on relying on the express choice of law therein.
>
> The position can be simply tested in a different way. Assuming the choice of law clause is unfavourable to CIMB, would it be fair that it can be used against CIMB? Obviously not, as CIMB had never agreed to, or even seen, the terms of the Agreement, and both parties accept that the Agreement is invalid. If that is the case, CIMB cannot likewise take advantage of the choice of law clause in the Agreement.

55 We would reiterate that this was not a case where fraud was alleged by one party but disputed by the other party. In such an event, as stated at [30] above, the mere allegation of fraud is not in itself sufficient to impugn the choice of law clause in the contract (see *Industrial & Commercial Bank Ltd v Banco Ambrosiano Veneto SPA* [2000] SGHC 188, and *Ash* ([30] *supra*)). Neither was it a case where the parties intended to enter into the contract and the fraud related only to the subject matter of the contract (see [46] above).

56 Even moving away from treating the present case as one involving fraud and, instead, treating it as purely one where there was no meeting of the minds between the parties to enter into the contract, the answer to the question of choice of law for the unjust enrichment claim should still be the same. If there was no contract between the parties, as alleged by CIMB and accepted by Dresdner, what basis is there to say that the choice of law clause in the non-existent contract should still have some lingering effect so as to apply to the restitutionary claim? We would reiterate that here we were not concerned with a contract which the parties intended to enter into but which subsequently failed or became ineffective.

57 Accordingly, we held that the present action for unjust enrichment did not come within cl 2(a) but came within cl 2(c) of *Dicey, Morris and Collins*' Rule 230 (see [31] above).

(4) Real and closest connection

58 We will next examine which country Dresdner's present claim for unjust enrichment is most closely connected with. At this juncture, it may be opportune to remind ourselves of the rationale behind cl 2(c) and here we would quote *Dicey, Morris and Collins* at para 34-030:

> [I]n the absence of a prior relationship between the parties to which reference may be made, or which may contribute to the identification of the proper law of the obligation to make restitution, the law of the place where the enrichment occurred may be expected to be that which has the best claim to be applied to any obligation to restore.

59 Naturally, in view of the diverse situations in which a restitutionary claim may arise, the place of enrichment may not always be the place with which the claim has the closest connection. *Dicey, Morris and Collins* at para 34|031 gives the example of a case where there is a "pre-existing relationship between the parties which, though not contractual, may justify giving weight to the law which governed that relationship in the search for the law with which the obligation to make restitution has its closest connection". A case where such an exception was applied was *Hashim* ([39] *supra*) which concerned the recovery of a bribe received by an employee in Switzerland. On appeal, the Court of Appeal, in *Arab Monetary Fund v Hashim* [1996] 1 Lloyd's Rep 589 at 597 (*per* Saville LJ), held that the applicable law to govern the recovery of the bribe was that of Abu Dhabi, as it was in Abu Dhabi that the relationship of employer and employee was created, and it was also there that the building contract was awarded to the briber as a result of the dishonest abuse of the briber's and the bribe recipient's (*ie*, the employee's) relationship with the third party concerned (*ie*, the employer). In the circumstances, the court did not regard as significant the fact that the bribe was paid in Switzerland.

60 Singapore was the location at which CIMB was unjustly enriched. Singapore was also the place where CIMB allegedly "changed its position in good faith" by remitting the money to HSBC Hong Kong. As far as the present action is concerned, these are basically the only two key issues which the court has to address and nothing else. Witnesses and documents relevant to these two key issues are in the main to be found here. As mentioned before, while Paul Ma's present whereabouts are not known, his last-known place of residence was Singapore. Razak is not presently in Singapore but in Johor which is certainly more proximate to Singapore than England. As for George Chau, whose present whereabouts are not known, indications are that he is a Malaysian and likely to be resident in Malaysia, and the comment on Razak is equally applicable to George Chau's position.

(5) Alternative argument on the applicable law

61 We would finally refer to one further argument put forward by Dresdner, which we thought had some merits. It was that even if English law were to be the applicable law, little weight should be given to this factor. For this argument, Dresdner relied on para 12|029 of *Dicey, Morris and Collins* which states:

> If the legal issues are straightforward, or if the competing fora have domestic laws which are substantially similar, the identity of the governing law will be a factor of rather little significance.

This statement of principle was accepted by David Steel J in *Marconi Communications International Ltd v PT Pan Indonesia Bank Ltd TBK* [2004] 1 Lloyd's Rep 594 (at [36]) and *Navigators Insurance Co Ltd v Atlantic Methanol Production Co LLC* [2004] Lloyd's Rep IR 418 at [48].

62 Reliance was also placed by Dresdner on *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1975-1977] SLR 258 where this court, in relation to a contract governed by Indonesian law, said (at 264, [36]):

> There is no evidence before this court that Indonesian law differs from our law in any significant respect concerning matters relating to this claim or that there is likely to be any serious dispute on the application of Indonesian law to the issues in this case. Besides there is no material to show that a Singapore court would have any difficulty in applying Indonesian law should the need arise. There may be cases where complicated issues of law are likely to arise when the application of the law by a foreign court may not be desirable and at best avoided but there is no material before us to infer that this is one such case. That being so we would attach little weight to this factor.

63 The reason why, in the consideration of the question of *forum non conveniens*, the issue of applicable law is a relevant factor is because where a dispute is governed by a foreign law, the forum will be less adept in applying that law than the courts of the country of that law, and there could be savings in time and resources in litigating the dispute in the forum of the applicable law. However, such advantages will not be obtained in the instant case because Singapore law on unjust enrichment is similar, if not identical, to that prevailing in England. Singapore courts would be able to apply English law without the aid of foreign experts. On this basis, the applicable law factor, even if it were English law, would not be a factor of much significance.

Witnesses

64 We now turn to consider the other factors which are relevant to the consideration of *forum non conveniens*. We will first consider the factor relating to witnesses. CIMB contended that most of the witnesses they intended to call to testify were located in England. They listed the following main witnesses who were located in London:

(a) Ms Francis, the person at CIMB London who liaised with Ms Callaghan of Dresdner London on the purported transaction;

(b) Ms Nurdin, the Operations Manager of CIMB London, who communicated with Ms Raihan Kamaruddin of CIMB KL in relation to Dresdner's request to verify the Notes signed by George Chau; and

(c) Aziz Mohd Jaafar, the immediate superior of Ms Francis.

Furthermore, CIMB strongly contended that the employees of BPAL, whom they intended to call to testify as to their roles in the transaction, were also located in London.

65 As for the employees of CIMB Singapore who had dealings with the matter, CIMB highlighted that only one was still in Singapore; two others who played more important roles were no longer here. Of the latter, one was Paul Ma, who received the instructions from CIMB Inanam to transfer the Funds received from Dresdner to HSBC Hong Kong. Paul Ma is no longer in the employment of CIMB and his whereabouts are unknown. The other was Razak, who contacted CIMB Inanam to obtain confirmation of the instruction to remit the Funds to HSBC Hong Kong. Razak is still in the employment of CIMB but stationed in a branch in Johor, Malaysia.

66 In addition, CIMB made the point that even the witnesses of Dresdner who were involved in the transaction were mainly in London. Besides Ms Callaghan, the two gentlemen who signed the agreement for Dresdner, Steven Loughe and Steve Hagopian, were both located there. One other person, a Shaun Little ("Little") of Dresdner London who communicated with BPAL, was also in London.

67 The first thing we would underscore is that since it was common ground that there was in fact no agreement in existence between Dresdner and CIMB, all the evidence relating to the making of that agreement was no longer relevant or in issue. All that remained was for Dresdner to explain why the payment was made even though Dresdner was informed (after the agreement was signed by George Chau) that two signatories were required for transactions above US$10,000. On this aspect, only the evidence of Ms Callaghan and Little, who were involved in concluding the "agreement" and effecting the payment, would be material and relevant. Dresdner had indicated that there would be no problem in securing the attendance of these two persons for trial in Singapore. We did not think that any CIMB officer would really be able to add anything on that. If at all anyone from CIMB could help,

it would be George Chau and, perhaps, Ms Francis, the latter being the person who liaised with Ms Callaghan of Dresdner London on the agreement. But we think the relevance of Ms Francis's evidence on this point would, at best, be minimal. In any case, Ms Francis is still in the employment of CIMB, so there should be no problem in CIMB arranging for her to testify anywhere.

68 The evidence relating to the steps taken by CIMB Singapore after the receipt of the Funds from Dresdner would be available in Singapore. The staff of CIMB Singapore would be able to testify on that, particularly Paul Ma and Razak. Paul Ma has to explain why he did not act in accordance with the instructions in the SWIFT message and how these instructions were reconciled with the memorandum from CIMB Inanam to re-transfer the Funds to Hong Kong,[note: 14] which led him to write a handwritten note to Razak as follows:[note: 15]

> Remitter VV Enterprise was supposed to send funds to HK but came to us instead. Inanam Br[anch] agreed we charge nominal for retransfer to HK. Your approval pls.

69 As mentioned before, the last-known place of residence of Paul Ma was Singapore and that of Razak, Johor. The staff of CIMB Singapore whom Paul Ma instructed to transfer the Funds to HSBC Hong Kong was one Ms Roshida, who is in Singapore. This part of the events, which is at the heart of the present action by Dresdner against CIMB, has nothing to do with England. In considering the location of witnesses as a factor, the court must bear in mind the issues in the action. Only witnesses whose evidence is potentially material and relevant to the issues in the action should be reckoned. The witnesses whom CIMB identified, and who are in England, would not be able to help in relation to the material issues of the action. Moreover, location of witnesses is only really significant in relation to third-party witnesses who are not in the employ of the party as it could give rise to issues of compellability (see *Rickshaw Investments* ([25] *supra*) at [19]). Thus this factor as to the location of witnesses required to prove or defend the claim for restitution, points more to Singapore as being the more natural forum to hear the substantive dispute. We repeat, Paul Ma, Razak and George Chau are key witnesses and they have nothing to do with England. Paul Ma is presumably in Singapore. George Chau is probably in Sabah, Malaysia. Razak is in Johor. Plainly, it would be more convenient, and less expensive, for witnesses to travel from Malaysia to Singapore. We are conscious that in this technologically advanced age, the convenience of witnesses who may be located in a different jurisdiction should also be considered against the easy availability of video conferencing (see *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR 381 at [26] and [27]). Thus the question of the compellability of the witnesses assumes greater importance and, on this score, bearing in mind the issues raised in the present action, we were inclined to hold that it favoured a trial in Singapore.

Third party claims

70 We accept the proposition that a multiplicity of *closely* related proceedings continuing simultaneously before different courts in different jurisdictions is obviously undesirable. In this regard, we would underscore the word "closely". Order 16 r (1) of the Rules of Court reads as follows:

> Where in any action a defendant who has entered an appearance —
>
> (*a*) claims against a person not already a party to the action any contribution or indemnity;
>
> (*b*) claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or

(*c*) requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action,

then … the defendant may issue a notice … (referred to in this Order as a third party notice), containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined.

71 In this appeal, CIMB contended that the Judge erred in construing this rule too narrowly and relied on *Myers v N & J Sherick Ltd* [1974] 1 WLR 31 ("*Myers*") where Goff J said at 35:

[A]lthough similarity of the facts is an important element, it is not necessarily decisive, and the fact that the third party claim is designed to determine who should ultimately bear the loss is also very important.

It seemed to us that this comment of Goff J should be viewed in the context of the factual matrix of that case. In *Myers*, the plaintiff purchaser sued the defendant vendors for misrepresentation and breach of the implied covenants for title in a registered property transferred to him on the ground that he was not given notice of the variation of a sub-lease which gave only the sub-lessee the right to determine the sub-lease. The defendants served a third-party notice on their solicitors. It would be apparent that the main action and the third-party claim were inextricably linked. If the defendants were held liable to the plaintiff, the defendants would be entitled to claim indemnity or contribution from the third party who was the firm of solicitors acting for the defendants in the transaction. The duty of the third party to the defendants essentially mirrored the duty of the defendants to the plaintiff. Goff J held that even if he were wrong in his view that there was sufficient similarity to bring the case within O 16 r 1(1)(*b*) of the Rules of the Supreme Court (SI 1965 No 1776) (UK), it could still fall within r 1(1)(*c*) (both sub-clauses of O 16 were *in pari materia* with the corresponding sub-clauses in the Rules of Court (at [70] above)).

72 Dresdner's claim against CIMB is for restitution on the ground of unjust enrichment. However, from the affidavits filed by CIMB it was clear that its third-party claim against BPAL would be for negligence or failure to exercise due diligence and/or for conspiracy to defraud. The issues in the present action by Dresdner and in the potential third-party claim by CIMB against BPAL would be very different and so would the evidence required to substantiate those claims. Nothing can better illustrate the differences between the two claims than to quote *in extenso* what CIMB alleged in its affidavit against BPAL:[note: 16]

(a) BPAL London was the arranger of the transaction and took for itself a large fee (approximately US$695,000) yet appears to have carried out almost no due diligence. BPAL failed to investigate Innaria and the underlying Innaria contract and failed to identify that the underlying transaction was completely fictitious. CIMB will say that this was clearly negligent, and further that BPAL's failure to investigate the transaction properly was so striking that it can be inferred that BPAL must have acted recklessly (i.e. it failed to ask obvious questions about the transaction for fear that it might find out the truth – that the transaction was a fraud)[.]

(b) BPAL knew that none of the other parties to the transaction was in a position to carry out due diligence – CIMB charged no fee for their part and [Dresdner] charged only $21,000. They therefore must have known that the other parties to the transaction were relying on them to carry out the necessary checks. This emphasises BPAL's negligence (or recklessness) in

relation to … whether the transaction was genuine.

(c) There were irregularities in relation to various documents connected with the transaction which a reasonable person in the position of BPAL would have investigated further. For example, an approval letter dated 14 March 2002 purportedly from Malaysia's Central Bank was sent to Innaria in English and then a later letter from Malaysia's Central Bank dated 10 May 2002 was in Bahasa Malaysia and needed to be translated into English. Again, CIMB will say that BPAL's failure to properly investigate this and other irregularities is evidence of negligence and recklessness as to the genuineness of the transaction on the part of BPAL.

(d) BPAL also co-ordinated the actions of George Chau, the employee of CIMB who was found by an internal investigation to have acted fraudulently in endorsing the notes without authority. They must have known that he was acting without authority, or failed to enquire, which would be evidence of negligence and recklessness.

(e) Innaria [was] a dormant company without its own premises at the time of issuing the Notes. BPAL failed to investigate Innaria's financial position and ability to meet its financial obligations under the Notes or was willfully blind to evidence which showed Innaria's true financial position. Had BPAL properly investigated Innaria's financial position, it would have been obvious that Innaria was not in a position to make payment under the Notes and that Innaria's claims to be [a] sub-contractor in a US$200 million government project were false. Again, an honest and careful party in BPAL's position would have asked questions.

(f) The Notes with which this dispute is concerned are not the only ones arranged by BPAL. They also arranged other fraudulent schemes including a second tranche of Innaria promissory notes for US$15m (that were never paid because the fraud was identified by CIMB), and notes for other Malaysian entities (named Safire and Citra Pedoman) that were later found to be fraudulent. It is difficult to believe that BPAL can have arranged all of these transactions without knowing that they involved frauds.

73 What we see here are two very distinct claims which are based on very different allegations of fact with nothing in common except that they each involved the Notes. Our case here is unlike that in *Myers* ([71] *supra*). It is also different from *Firststate Pte Ltd v Raviland Pte Ltd* [1995] 1 SLR 589 ("*Firststate*") which was cited by CIMB and we need only quote from the appellant's case to show that there is no parallel between *Firststate* and the present action against CIMB:[note: 17]

The case of *Firststate* … involves the [defendant] alleging fraud in [its] counterclaim against the plaintiff. The [defendant] also claimed against proposed third parties (individuals who were corporate officers of the plaintiff) in using the plaintiff company as a vehicle for fraud.

74 It would be noted that in *Firststate* the defendant alleged fraud against both the plaintiff and the proposed third parties, the latter being the officers of the plaintiff. Clearly the main action and the proposed third party action were inextricably linked and the defendant was relying on very much the same facts in both the proceedings. This would not be the situation in the present case.

75 Another case relied upon by CIMB was *Baring Futures (Singapore) Pte Ltd v Deloitte & Touche* [1997] 3 SLR 312 ("*Baring Futures*"). In that case, Barings plc, an English company, and Barings Securities Ltd ("BSL"), an indirect subsidiary of Barings plc, commenced an action in the English High Court against five defendants for negligence or breach of contract in the audit and reporting of the accounts of Barings Futures (Singapore) ("BFS"), a Singapore company that was an

indirect subsidiary of BSL. BFS's auditors during the material time were Deloitte & Touche Singapore ("D&T") and Coopers & Lybrand Singapore ("C&L"). Among the five defendants in the English action were representative defendants of D&T and representative defendants of C&L. One month later, the liquidators of BFS commenced an action in Singapore against D&T and C&L. D&T applied to stay the Singapore action on the ground that London was the *forum conveniens* to hear BFS's claim. D&T indicated that it would join BFS as a third party in the English action for the purposes of, *inter alia*, contribution and to ensure that BFS, D&T and the plaintiffs in the English action would be bound by the same decision. If its application for a stay of the Singapore action failed, D&T would join Barings plc, BSL and Coopers & Lybrand London as proper and necessary parties to the action commenced by BFS in Singapore.

76 In granting a stay in *Baring Futures*, Lai Kew Chai J recognised that the two actions raised many common factual questions and added (at [2]):

> [O]nly by bringing all the principal players together before one forum for adjudication could the responsibility be justly, sensibly and more efficiently ascertained and distributed between those concerned … This approach would avoid the potential disaster of inconsistent verdicts which could be given if similar disputes with overlapping facts involving the same or different parties were litigated before two courts in two different jurisdictions …

77 Again, it would be seen that *Baring Futures* was quite a different sort of a case because there, very much the same facts were germane for both the main action and the third party proceedings. However, the issues in the present action in Singapore would not be similar to those which would be raised in the contemplated third-party action by CIMB against BPAL. There is no danger of there being "two sets of litigation involving substantially the same parties over substantially the same underlying transactions" as was the case in *Baring Futures* (at [25]).

78 A third case relied upon by CIMB was *IPCO International Construction Ltd v S T Kay & Co* [1998] SGHC 198 ("*IPCO*") but this case could hardly be of assistance to CIMB because the circumstances in *IPCO* were again quite distinct. There, when the Singapore action was commenced by the plaintiff, proceedings had already been commenced in the Philippines by the third party, a company incorporated in the Philippines, against the Singapore defendant and where the defendant had also joined the plaintiff as a third party. The defendant and the third party then separately applied to stay the Singapore action in the light of the existing action in the Philippines. Their applications were granted and the court noted that the main dispute in the case was really between the plaintiff and the third party, and that the defendant was caught in the middle. The following passages of the High Court in *IPCO* (at [36] and [41]), which were quoted by CIMB, deserve to be considered carefully:

> In my judgment, one had to consider the entire circumstances of the case and the nature of the proceedings. In this case, the matters involving the third party and the plaintiffs were inextricably linked with the dispute between the [plaintiff] and the [defendant] …
>
> …
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> … In my judgment, the entire proceedings involving all three parties should properly be before the same Court. I regarded the third party proceedings as an integral and inseparable part of the main action. The defendants in the third party proceedings were not claiming for any contribution or indemnity from the third party. Therefore, it would not be right to stay the third party proceedings in favour of the Philippines proceedings but allow the action between the [plaintiff] and the [defendant] to be tried in Singapore. Multiplicity of closely related proceedings continuing

simultaneously before different courts in different jurisdictions was obviously undesirable. Concurrent litigation involving the same parties and the same issues leads to unnecessary expense and inconvenience to the parties, quite apart from the very real risk of conflicting decisions being handed down.

79 We would also add that even if Dresdner were to succeed against CIMB for unjust enrichment, it would not follow that CIMB would succeed against BPAL. CIMB has to prove negligence or breach of duty or conspiracy on the part of BPAL. There will be no question of "inconsistent" judgments arising. If CIMB's third-party claim were to be heard together with the present action, it would only prolong the trial and much of it would have nothing to do with Dresdner; it would be making Dresdner sit through the hearing of issues which do not concern it. A joint hearing would cause hardship to Dresdner with the net result that it would only add to costs and prolong the time that Dresdner would need to spend on the case. Here it would be useful for us to refer to *Chatsworth Investments Ltd v Amoco* (*UK*) *Ltd* [1968] Ch 665 where Cross J made these comments (at 676) and whose decision, including his views on this point, was upheld on appeal:

> Finally, looking at this case from the broader standpoint of the exercise of discretion, I think that, even if contrary to my opinion it falls within the wording of Ord. 16, r. 1(1)(*b*), it would not be right to allow the question of the enforceability of the later agreement to be tried in the same action as the question of the enforceability of the earlier agreement. To do so would be a hardship both to the plaintiffs and to the third parties, since it might add considerably to the costs and the time spent, and there would not, as far as I can see, be any compensating advantage. The third parties know nothing of the circumstances in which the earlier agreement was entered into, and if they did give the undertaking to which I have referred, that is all that the defendants can reasonably require.

80 CIMB made the bare assertion at para 156 of the appellant's case that its conspiracy and contribution claims (based on negligence and/or breach of duty) against BPAL raised issues which related to the circumstances involving the mistaken payment and its defence of change of position. CIMB did not show the basis for such an assertion. No sufficient explanation was given as to the link between the present action and the third-party claim against BPAL. None of the allegations which CIMB made against BPAL (quoted at [72] above) indicate any such linkage. CIMB also made the point that in relation to the Notes, Dresdner was BPAL's "closing Bank". However, CIMB did not explain what "closing bank" meant or entailed. It also did not explain why, just because Dresdner was the "closing bank" of BPAL, that provided the link to the present action by Dresdner. It seemed to us that all these allegations of supposed links were made so that Dresdner's claim for unjust enrichment would appear more complex than it really is. There was just a lot of smoke generated and nothing else.

81 In any event, no action has yet been commenced anywhere by CIMB against BPAL. As regards the third-party claim by CIMB against HSBC Hong Kong, no particulars as to the basis of claim have yet been disclosed. It is of interest to note that whereas CIMB emphasised its third-party claim against BPAL in seeking to establish that England was the more appropriate forum, it said very little as regards its third-party claim against HSBC Hong Kong, presumably because the claim against HSBC Hong Kong had no connection whatsoever with England.

83 We must emphasise, and this seemed to have been overlooked by CIMB, that the real test to determine whether a third-party action should be heard together with the main action is not that of connection alone but whether they are inextricably linked and the third-party action is an integral and inseparable part of the main action. This has not been shown to be the case here.

84 Another point raised by CIMB is that if the trial of the action by Dresdner were to be held in

Singapore, CIMB would not be able to compel BPAL's employees to testify here. First, we could not see what relevant evidence BPAL's employees could give in relation to the present action for unjust enrichment. Second, as we perceived it, with a third-party action hanging over the head of BPAL, we, like the Judge, did not think it realistic for CIMB to expect coloperation from BPAL. And if, in fact, BPAL was prepared to coloperate, there should be no difficulties in either getting those employees of BPAL to come to Singapore to be witnesses or obtaining their evidence through video link, if at all they had anything to say on the material issues.

Exercise of discretion

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

86 At the end of the day, weighing the various connecting factors is not a numbers game. We would point out that it is the legal significance of those factors in order to achieve the ends of justice which would be decisive. In our opinion, all that had occurred between the two London offices of Dresdner and CIMB were not in issue in the present action. The matters that are at the heart of the unjust enrichment claim all occurred in Singapore and it is Singapore which has the most and closest connection with the claim.

87 In the light of the foregoing, we did not think that CIMB had demonstrated that England was clearly the more appropriate forum to hear the present action brought against it by Dresdner. At best, even taking the position that English law is the applicable law for the restitution claim, we did not think, given the cause of action, that the relevant factors clearly point to England being the more appropriate forum to hear the dispute between the parties.

Stage two of the Spiliada test

88 In case we were wrong in the determination of stage one of the *Spiliada* test, we come next to stage two of the *Spiliada* test (see [26] above). Dresdner argued that it would be severely prejudiced if its action were not heard in Singapore because it would be deprived of the opportunity to subpoena essential witnesses who would be required to demolish CIMB's defence of change of position in good faith. Here, quite clearly, Dresdner had in mind witnesses such as Paul Ma, Razak and Ms Roshida.

89 The crucial question is, how does this weigh against CIMB's contention that if the main action were to be held here, it would not be able to subpoena BPAL's employees, who were in London, as well as its London employees who had left its employment, to testify? In any event, as stated in [83] above, and bearing in mind the third-party proceeding hanging over the head of BPAL, it would not be likely that BPAL's employees would coloperate. If BPAL did not wish to coloperate, it would be foolhardy for CIMB to call BPAL's employees to testify. If, on the other hand, BPAL were prepared to coloperate, then the question of the compellability of BPAL's employees would become academic.

90 As submitted by Dresdner, the facts and issues in CIMB's claim against BPAL in negligence and conspiracy would be very different from those needed to prove the claim in the present action. There would be no common factual questions and no inextricable link between the present action and the third-party claim by CIMB against BPAL. The Judge thought that the appropriate forum to hear

the action by CIMB against BPAL was probably England (at [127] of the GD). We agree, but ultimately in the present action, whether or not Dresdner would be able to succeed in its claim against CIMB would in fact depend on whether Dresdner could show bad faith when CIMB Singapore transferred the Funds to HSBC Hong Kong. For this critical question, the evidence would be here in Singapore. Thus, even if it were shown that the present action and the proposed CIMB's third-party claim against BPAL are intricately linked (which we do not think is the case), and that, contrary to what we hold, England is the more appropriate forum to hear the action, we were, for the aforesaid reasons, of the opinion that justice required that the action be nevertheless heard in Singapore.

Conclusion

91 Accordingly, we affirmed the Judge's decision that the present action would be temporarily stayed pending the completion of the German proceedings. In the meantime, CIMB could proceed with its intended third-party actions. In the result, CIMB's appeal was dismissed with costs with the usual consequential orders.

[note: 1]Appellant's Core Bundle vol II at pp 97–110.

[note: 2]Appellant's Core Bundle vol II at pp 106–108.

[note: 3]Appellant's Core Bundle vol II at pp 94–95.

[note: 4]Appellant's Core Bundle vol II at pp 172.

[note: 5]Datin Norhayati Hashim's 3rd affidavit filed on 10 December 2007 at para 24(b), Appellant's Core Bundle vol II at p 165.

[note: 6]Simon Jonathan Leifer's affidavit filed on 26 October 2007 at para 19, Appellant's Core Bundle vol II at p 247.

[note: 7]Appellant's Core Bundle vol II at p 127.

[note: 8]Appellant's Core Bundle vol II at p 122.

[note: 9]Appellant's Core Bundle vol II at p 127.

[note: 10]Appellant's Core Bundle vol II at p 129.

[note: 11]Datin Norhayati Hashim's 1st affidavit filed on 9 November 2002 at para 16, Appellant's Core Bundle vol II at p 76.

[note: 12]At para 57 of the respondent's case.

[note: 13]At paras 71 and 73 of the appellant's case.

[note: 14]Appellant's Core Bundle vol. II at p 134.

[note: 15]Appellant's Core Bundle vol. II at p 131.

[note: 16]Datin Norhayati Hashim's 2nd affidavit filed on 26 November 2007 at para 20, Appellant's

Core Bundle vol II at pp 149–250.

[note: 17]At para 160 of the appellant's case.