Forum Non Conveniens and Choice of Law in Tort & Equity in the Singapore Court of Appeal

In *Rickshaw Investments Ltd and Another v Nicolai Baron von Uexkull* [2006] SGCA 39 (handed down on 3rd November 2006), there was an appeal against the first-instance decision that the appellant's (Rickshaw Investments Ltd) action against the respondent (Nicolai Baron von Uexkull) be stayed on the ground of *forum non conveniens*. The appellants had hired the respondent in 2001 to sell dynasty artefacts from the "Tang Cargo". The employment contract was subject to German law and the competence of the German courts. When the appellant terminated the contract in 2004, the respondent commenced proceedings in Germany against the first appellant on the basis of a claim in contract.

The appellants, meanwhile, commenced an action against the respondent in Singapore on 10 June 2005. The appellants stated four causes of action, as follows:

- conversion of 25 pieces of the Tang Cargo by the respondent;
- breach of the respondent's equitable duty of confidentiality towards the appellants;
- breach of the respondent's fiduciary duties as agent of the appellants; and
- deceit arising from the respondent's misrepresentations.

In deciding whether or not the appellant's claim in Singapore should be stayed on the ground of *forum non conveniens*, the Singapore Court of Appeal looked to the classic test given by the House of Lords in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460, stage one of which is that:

> *a stay will only be granted on the ground of forum non conveniens where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interest of all the parties and the ends of justice*

In order to determine whether Singapore was the appropriate forum for the present proceedings, the court stated the relevant factors for consideration were the **general connecting factors**; the **jurisdiction in which the tort occurred**; **choice of law**, ie, whether the choice of law clause in the contract was exclusive, and if not, which law should be applied to the claims in tort and equity; and the **effect of the concurrent proceedings in Germany**.

The court found that, under the *general connecting factors*, Singapore was the appropriate forum to hear the substantive dispute, as the location of the key witnesses was Singapore, and the respondent was a permanent resident of Singapore and resided in Singapore at the time the alleged tortious acts and equitable breaches took place.

In deciding *whether the natural and most appropriate forum is that in which the tort occurred*, the court placed considerable reliance on *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 2 Lloyd's Rep 91 and *Berezovsky v Michaels* [2000] 1 WLR 1004, which held that, inter alia, "…if the substance of an alleged tort is committed within a certain jurisdiction, it is not easy to imagine what other facts could displace the conclusion that the Courts of that jurisdiction are the natural forum" (per Goff LJ in the Alberforth at 96). In agreeing with that general principle, the court held that

> *we must emphasise that the result that is arrived at through the application of the Albaforth principle is only the prima facie position and/or a weighty factor pointing in favour of that jurisdiction. Applying this to the present case, the fact that the respondent's alleged torts were committed in Singapore does point towards Singapore as being the natural forum to hear the dispute, but this is only one of the factors to be taken into account in the overall analysis, albeit a significant one.*

In the *choice of law* analysis (looked at on the basis that where a dispute is governed by a foreign *lex causae*, the forum would be less adept in applying this law than the courts of the jurisdiction from which the lex causae originates), a key issue was whether the appellant's choice to sue in tort was tantamount to an avoidance of the governing law provision in the contract of employment. The court held that, absent bad faith on the part of the appellants,

> *…we see no reason why they should be denied the freedom of choice to frame*

> *their causes of action in the way they have. This has in fact been made clear in the case law. It is, for example, established law that the mere presence of a contractual relationship does not in itself preclude the existence of an independent duty of care in tort: Henderson v Merrett Syndicates Ltd [1995] 2 AC 145 as well as the decision of this court in The Jian He [2000] 1 SLR 8 at [26]….In other words, although the allegedly tortious acts were committed in the course of the respondent's employment in fact, the acts had a separate legal existence from his contractual obligations and breaches thereof.*

The claims in *conversion*, the other for *fraudulent misrepresentation or deceit* were claims in **tort**, and so the **double actionability rule** applied, subject to the double flexibility exception (see Briggs (1995) 111 LQR 18 at 21); i.e. the decision in *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 meant that the tort might nevertheless be actionable even though it was not actionable under the *lex fori* or the *lex loci delicti*, and even heralded the possibility that the *lex causae* of a tort could be the law of a *third* jurisdiction (other than the *lex fori* or the *lex loci delicti*), which has the most significant relationship with the occurrence and with the parties. The court held that it might, in certain exceptional circumstances, be possible for a law other than Singapore law to apply, even in the case of a local tort (i.e. a tort committed in Singapore). That said, the claim in conversion was held to be governed by the *lex fori* – Singapore law, as that was also the lex loci delicti.The Red Sea exception did not apply, as most of the connecting factors (as discussed above) pointed to Singapore. The claim for fraudulent misrepresentation or deceit likewise fell wholly within Singaporean law under the double actionability rule.

The claims in *breach of confidence*, and *breach of fiduciary duties*, were claims in **equity**. In identifying the choice of law principles, the court relied heavily on T M Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004). The court decided that:

> *We would, however, accept the more limited proposition to the effect that where equitable duties (here, in relation to both breach of fiduciary duty and breach of confidence) arise from a factual matrix where the legal foundation is premised on an independent established category such as contract or tort, the appropriate principle in so far as the choice of law is concerned ought to be centred on the established category concerned.*

On that basis, as the allegations of breach of fiduciary duty as well as breach of confidence arose from the contract of employment itself, German law (as the governing law of the contract) should govern the claims in equity.

The court therefore concluded that, as a whole, the connecting factors clearly pointed to Singapore as being the appropriate forum for the hearing of the substantive issues concerned. On that basis, the appellants' action in the Singapore courts against the respondent ought **not** to be stayed.

> *It is also clear that Singapore is the most natural and appropriate forum to hear the claims in tort. The issue of choice of law appears, as we have noted, to be neutral and, although there is a risk of conflicting decisions by the Singapore and German courts, this factor does not weigh decisively in the respondent's favour, having regard to the other factors.*