

A photograph of two mountaineers in winter gear climbing a steep, snow-covered mountain slope. The sun is low in the sky, creating long shadows and a hazy atmosphere. The image is split vertically, with the left side showing the mountain and the right side being a dark blue gradient.

 DREW & NAPIER

Abuse Of Process For A Party To Resile From Prior Factual Concession

*Recovery Vehicle 1 Pte Ltd v
Industries Chimiques Du
Senegal and another appeal
and another matter [2020]
SGCA 107*

3 November 2020

**LEGAL
UPDATE**

In this Update

The Court of Appeal recently held that it was an abuse of process for a party to resile, on appeal, from its concession before the High Court that its claim was time-barred in Senegal.

Cavinder Bull SC, Director Kong Man Er and Associates Tan Sih Si and Melody Lau successfully represented Industries Chimiques Du Senegal in this appeal.

03
INTRODUCTION

03
BACKGROUND

03
THE HIGH COURT'S
DECISION

04
THE COURT OF APPEAL'S
DECISION

07
COMMENTARY

INTRODUCTION

In the recent decision of *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal and another appeal and another matter* [2020] SGCA 107, the Court of Appeal allowed the appeal by Industries Chimiques Du Senegal (“**ICS**”) and set aside the order permitting service of a writ on ICS out of jurisdiction, in Senegal.

The Court of Appeal accepted ICS’s submissions that Recovery Vehicle 1 Pte Ltd (“**RV1**”)’s claim was governed by Senegalese law and that RV1’s claim could not satisfy the merits requirement for service of the writ out of jurisdiction as its claim was time-barred under Senegalese law.

The Court of Appeal held that it was an abuse of process for RV1 to contend on appeal that its claim was not time-barred in Senegal given that RV1 had, in the proceedings below, in its quest to establish that Senegal was not an available forum and in tandem with its argument that its claim was governed by Singapore law, conceded that its claim was time-barred in Senegal.

Cavinder Bull SC, Director Kong Man Er and Associates Tan Sih Si and Melody Lau successfully represented ICS in this appeal.

BACKGROUND

Affert Resources Pte Ltd (“**Affert**”) and ICS entered into six contracts for the sale of sulphur by Affert to ICS. RV1, a company in the business of recovering stressed debts, was later assigned the debt purportedly owed by ICS to Affert.

In High Court Suit No. 724 of 2018 (“**Suit 724**”), RV1 claimed an amount of over USD17m from ICS.

On 11 October 2018, RV1 obtained leave to serve the writ in Suit 724 out of jurisdiction, on ICS in Senegal (“**Leave Order**”). ICS applied to set aside, *inter alia*, the Leave Order. The Assistant Registrar set aside the Leave Order.

THE HIGH COURT’S DECISION

The High Court allowed RV1’s appeal against the Assistant Registrar’s decision.

The High Court found that RV1’s claim was governed by Senegalese law and that the jurisdictional gateway under O11 r1(d)(iii) of the Rules of Court was not satisfied.

However, the High Court held that RV1 had satisfied the jurisdictional gateway under O11 r1(e) of the Rules of Court. The High Court held that: (a) RV1's claim was brought in respect of a breach of contract committed in Singapore; and (b) Singapore was the *forum conveniens* to try the dispute.

THE COURT OF APPEAL'S DECISION

RV1 appealed against the High Court's decision that RV1's claim was governed by Senegalese law. ICS appealed against the High Court's decision to grant leave to RV1 to serve the writ out of jurisdiction. On appeal, RV1 also sought to adduce further evidence to demonstrate that its claim was not time-barred under Senegalese law.

The Court of Appeal held that the burden rests on the plaintiff (RV1, in this case) to satisfy the following requirements for service out of jurisdiction:

- (a) the claim must come within one of the jurisdictional gateways in O11 r1 of the Rules of Court ("**jurisdictional requirement**");
- (b) the claim must have a sufficient degree of merit ("**merits requirement**"); and
- (c) Singapore must be the more appropriate forum for the trial or determination of the action ("**forum non conveniens requirement**").

The Court of Appeal noted that a finding on the jurisdictional requirement and/or the *forum non conveniens* argument may inevitably have an impact on the merits requirement. The three requirements should not be examined in isolation.

The Court of Appeal dismissed RV1's appeal against the High Court's finding that RV1 had not satisfied the jurisdictional gateway under O11 r1(d)(iii). The Court of Appeal agreed with ICS's submissions that the contracts underlying RV1's claim were governed by Senegalese law, considering that: (a) the common commercial purpose underpinning all the contracts was for the sulphur cargoes to be shipped to Senegal; and (b) the negotiations preceding the formation of the contracts revealed more connection to Senegal than to Singapore.

The Court of Appeal also held that RV1 had not satisfied the jurisdictional gateway under O11 r1(e). The Court of Appeal held that to satisfy O11 r1(e), RV1 must show that its claim was "brought in respect of a breach committed in Singapore of a contract made in or out of Singapore" (emphasis in original). The overall burden was on the plaintiff (i.e. RV1) to show that there was a breach of a contract committed in Singapore and the plaintiff must first establish the existence of a contractual obligation that was to be performed only in Singapore. RV1 had to show that Singapore was the *only* place from which performance of the obligation was required under the contract.

RV1 was not able to show that Singapore was the only place from which ICS could make payment under the contracts. RV1 could not rely on a “general rule” that a debtor must pay the creditor at the creditor’s place of business as: (a) there was a history of multiple past payments by ICS to RV1 in Hong Kong; and (b) whilst Affert was incorporated in Singapore, there was no evidence that Affert carried out any business in Singapore.

KEYPOINT

In order to satisfy the jurisdictional gateway under O 11 r 1(e), the plaintiff must first establish the existence of a contractual obligation that was to be performed only in Singapore. The Plaintiff must show that Singapore is the only place from which performance of the obligation is required under the contract.

The Court of Appeal held that its finding on the governing law of the contracts inevitably had an impact on the analysis of the merits of RV1’s claim given that ICS’s primary defence in the appeals was that RV1’s claim was time-barred under Senegalese law.

The Court of Appeal noted that, at the hearing before the High Court, RV1 had accepted that its claim under the contracts was time-barred under Senegalese law, albeit in aid of RV1’s submission that Senegal was an unavailable forum and that Singapore was the *forum conveniens* to try the dispute. The Court of Appeal examined whether RV1 could adopt, on appeal, a completely opposing position on the Senegalese time-bar issue in the context of RV1’s submissions on the merits requirement for service out of jurisdiction. The Court of Appeal held that:

- (a) The doctrine of approbation and reprobation did not strictly apply here as RV1 was unsuccessful in persuading the High Court that the claim being time-barred made Senegal an unavailable forum such as to tilt the balance towards Singapore and RV1 had therefore not received any benefit as a result of its earlier position on the time bar. Nonetheless, RV1’s starkly contradictory position on the time-bar issue on appeal was highly unsatisfactory and would attract the circumspection and scepticism of the Court.
- (b) RV1’s change of position on the time bar issue offended the doctrine of abuse of process. It was an abuse of process of the Court for RV1 to contend on appeal that the time bar under Senegalese law no longer applied.

KEYPOINT

It was an abuse of process for RV1 to contend on appeal that the time bar under Senegalese law no longer applied as it had earlier advanced a positive case before the High Court that its claim under the sulphur contracts was time-barred.

RV1 also submitted that the applicable time bar under Senegalese law would not apply because of the “undue hardship” exception under section 4(2) of the Foreign Limitation Periods Act (Cap 111A, 2013 Rev Ed). RV1 argued that Affert was not in a position to collect the debt as it was controlled by directors who had no intention to collect the debt.

The Court of Appeal noted that there had not been any reported decision in Singapore on the “undue hardship” exception under section 4(2) of the Foreign Limitation Periods Act. The Court of Appeal therefore examined a number of English authorities. The Court of Appeal held that, in assessing whether the application of the foreign limitation period would cause undue hardship, the Court must take into account all the relevant facts and circumstances of the case. Some of the relevant factors include the following:

- (a) The objective reasonableness of the time bar under foreign law although the mere fact that the foreign time bar is shorter than the equivalent time bar under Singapore law would not in and of itself justify a finding of undue hardship.
- (b) The legal and factual complexity of the claim in the context of the applicable foreign time bar.
- (c) Whether the plaintiff had, on the particular facts of the case, a reasonable justification for allowing the applicable foreign time bar to set in.

The Court of Appeal held that undue hardship contemplated under section 4(2) of the Foreign Limitation Periods Act must be caused *by the application of the limitation period* under Senegalese law. In the present case the Court of Appeal found that any undue hardship did not arise from the application of the Senegalese time bar: (a) any undue hardship suffered by RV1 arose from its considered commercial decision to obtain the assignment of the debt knowing full well that the claim might already be time-barred; and (b) any undue hardship caused to Affert arose from the omissions of Affert’s former directors in commencing any proceedings against ICS. If there was misconduct on the part of Affert’s directors, that was a matter for Affert’s liquidators to consider.

In the circumstances, the Court of Appeal found that RV1 could not find assistance under section 4(2) of the Foreign Limitation Periods Act to be relieved of ICS’s Senegalese time bar defence.

KEYPOINT

Undue hardship contemplated under section 4(2) of the Foreign Limitation Periods Act must be caused by the application of the foreign limitation period.

On balance, the Court of Appeal found that the factors in the case tilted towards Senegal as the *forum conveniens*.

In the circumstances, the Court of Appeal disallowed RV1's application to adduce fresh evidence on the Senegalese time-bar issue, dismissed RV1's appeal and found that the contracts were governed by Senegalese law, and allowed ICS's appeal on the basis that: (a) RV1 failed to satisfy the jurisdictional requirement under O11 r1(e) to a good arguable standard; (b) RV1 could not satisfy the merits requirement for service out of jurisdiction as its claims are time-barred under Senegalese law; (c) RV1's conduct on appeal in contending that the contracts were no longer-time-barred under Senegalese law was an abuse of the appeal process; and (d) Senegal was the *forum conveniens* to try the dispute.

COMMENTARY

The Court of Appeal has made it clear in this Judgment that it is not open to a party to resile from its factual concession made in proceedings below on the basis that the concession was made in aid of a different legal argument. RV1 had made a factual concession that its claim was time-barred in Senegal in tandem with its argument that its claim was governed by Singapore law and in aid of its argument that Senegal is not the *forum conveniens*. When RV1 failed to persuade the High Court that its claim was governed by Singapore law, it was an abuse of the appeal process for RV1 to seek to adduce further evidence on appeal to argue that its claim was no longer time-barred in Senegal.

As the Court of Appeal noted, this Judgment will serve to remind litigants and their legal advisors of the risks in adopting a pigeon-holed view when examining each of the legal requirements for service outside of jurisdiction. The analysis is dynamic in nature and requires parties to connect the dots after the analysis to consider and understand the ramifications prior to settling their legal submissions. When a party accepts a fact in aid of a specific legal argument, it may unwittingly cause consequential impact on other legal arguments and it would be too late, on appeal, for that party to do an about-turn on its factual concession.

The content of this article does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances. Copyright in this publication is owned by Drew & Napier LLC. This publication may not be reproduced or transmitted in any form or by any means, in whole or in part, without prior written approval.

If you have any questions or
comments on this article, please
contact:



Cavinder Bull, SC
Chief Executive Officer

T: +65 6531 2416

E: cavinder.bull@drewnapier.com



Kong Man Er
Director, Dispute Resolution

T: +65 6531 2224

E: maner.kong@drewnapier.com

Drew & Napier LLC
10 Collyer Quay
#10-01 Ocean Financial Centre
Singapore 049315

www.drewnapier.com

T : +65 6535 0733

T : +65 9726 0573 (After Hours)

F : +65 6535 4906

 **DREW & NAPIER**