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# Governing Law of Transaction in the Context of a Ponzi Scheme

*Tamar Perry and another v  
Jacques Henri Georges  
Esculier and another [2023]  
SGCA(I) 2*

8 March 2023

LEGAL  
UPDATE

# In this Update

The recent decision of *Tamar Perry and another v Jacques Henri Georges Esculier and another* [2023] SGCA(I) 2 concerned a Ponzi scheme. In this decision, the Court of Appeal held that even though the company to which the Appellants had transferred moneys was not a party to certain agreements, Swiss law (which was the express choice of law of the agreements in question) was the governing law for the transfers. This was because the Appellants' transfers of moneys were made pursuant to the agreements.

Our update discusses this decision.

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## INTRODUCTION

The recent decision of *Tamar Perry and another v Jacques Henri Georges Esculier and another* [2023] SGCA(I) 2 concerned a Ponzi scheme. In this decision, the Court of Appeal held that even though the company to which the Appellants had transferred moneys was not a party to certain agreements, Swiss law (which was the express choice of law of the agreements in question) was the governing law for the transfers. This was because the Appellants' transfers of moneys were made pursuant to the agreements.

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## BACKGROUND

The Appellants and the Respondents were unsuspecting victims of a Ponzi scheme administered by a group of companies (collectively, "**Lexinta Group**"). From April 2016 to August 2017, the Appellants transferred funds to the HK bank account of one of the companies in the Lexinta Group named Lexinta Group Limited ("**LGL**"), for investment. The Respondents were earlier investors and had first transferred funds to the Lexinta Group in April 2014. The Respondents subsequently decided to realise their investments and received a total sum of approximately US\$10 million from LGL between August 2016 and February 2017 ("**Disputed Moneys**"). The Disputed Moneys were paid into the Respondents' account with DBS in Singapore.

LGL was not a party to the asset management agreements ("**AMAs**") under which the Appellants and the Respondents made their investments. In the AMAs, the "Lexinta Group" was named as the "Asset Manager" and counterparty to the AMAs. Three companies were defined in the AMAs as constituting the Lexinta Group. LGL was not one of these companies.

Faced with competing claims to the Disputed Moneys by the Appellants and the Respondents, DBS commenced interpleader proceedings in the Singapore High Court. The competing claims were ordered to be determined in separate proceedings between the Appellants and the Respondents.

In the proceedings, the Appellants claimed that the Disputed Moneys were not the Respondents' return on their investment and that the Lexinta Group had been operating a Ponzi scheme before the Respondents' first investment in April 2014. The Appellants also argued that since LGL was not a party to the AMAs, LGL held the funds on trust for the Appellants pursuant to Hong Kong law, being the law of the place of incorporation of LGL. The Appellants also argued that the Respondents had notice of the Appellants' claim to the Disputed Moneys when they received the Disputed Moneys from LGL and therefore held the same on trust for the Appellants as well. In response, the Respondents contended that the transfers were

governed by Swiss law because the AMAs contained an express choice of Swiss Law and that the Appellants' claim should fail because Swiss law did not recognise the concept of a trust.

The High Court Judge dismissed the Appellants' claim in trust, finding that LGL was an implied party to the AMAs. The Appellants appealed.

## THE COURT OF APPEAL'S DECISION

The Court of Appeal dismissed the appeal.

The issue before the Court was whether the Appellants' transfers to LGL were made pursuant to the AMAs. The Court held that this was the case because the Appellants' transfers were clearly made for the purpose of the investment under the AMAs.

### KEYPOINT

*As the transfers were made pursuant to the AMAs, Swiss law applied as the express choice of law of the AMAs.*

The Court also held that in any event, neither Singapore law as the *lex situs* of the Disputed Moneys nor Hong Kong law as the law of the place of LGL's incorporation could apply as the governing law.

### KEYPOINT

*The Court held that the quality of the AMAs as the very reason for the investments outweighed the quality of the other connecting factors with either Singapore law or Hong Kong law.*

Having found that Swiss law was the law governing the transfers, the Court held that the Appellants' claim could not succeed because under Swiss law, whether there was a Ponzi scheme or not was irrelevant and the issue was whether the Respondents had acted in bad faith. On this issue, the Court noted that it was never alleged that the Respondents had acted in bad faith or were complicit in the Ponzi scheme.

The Court also held *inter alia* that any claim in trust by the Appellants against the Respondents would have failed because Swiss law did not recognise the concept of a trust. Finally, the Court also held that payment by LGL to the Respondents discharged the Lexinta Group's obligations to the Respondents under the relevant AMA.

Accordingly, the appeal was dismissed.

## **COMMENTARY**

The Court of Appeal's decision provides welcome clarity on the applicable choice of law in situations where a transfer of funds is performed pursuant to a contractual obligation but is *not* transferred to a party to the contract but to a third party instead. In that situation, a party will need to carefully consider: (a) the purpose of the transfer; and (b) whether the transfer would have taken place in the absence of the contract. If the transfer in question was made for the purpose of investment under the contract and would not have taken place in the absence of the contract, a Court is likely to find that the governing law of the transfer will be the same as the governing law of the contract, regardless of the fact that the *lex situs* of the transferred funds and/or the law of the place of incorporation of the third party are different from the governing law of the contract.

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