COURT OF APPEAL FILE NO. CA43295

COURT OF APPEAL

ON APPEAL FROM the order of Madam Justice Gerow of the Supreme Court of British Columbia pronounced on the 9th day of November, 2015.

BETWEEN:

Adolfo Agustín García, Luis Fernando García Monroy, Erick Fernando Castillo Pérez, Artemio Humberto Castillo Herrera, Wilmer Francisco Pérez Martínez, Noé Aguilar Castillo, and Misael Eberto Martínez Sasvin

APPELLANTS

(Plaintiffs)

AND:

Tahoe Resources Inc.

RESPONDENT

(Defendant)

RESPONDENT'S FACTUM

Adolfo Agustín García, Luis Fernando García Monroy, Erick Fernando Castillo Pérez, Artemio Humberto, Castillo Herrera, Wilmer Francisco Pérez Martínez, Noé Aguilar Castillo, and Misael Eberto Martínez Sasvin

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CHRONOLOGY

Date	Event
September 2012	A series of protests, some violent, begin near the Escobal mine in Guatemala. The mine is owned by MSR, a Guatemalan company that is an indirect subsidiary of the Respondent.
January 2013	Armed individuals ambush MSR security contractors in Guatemala, killing two security guards and injuring seven others.
April 27, 2013	The Appellants allege injuries suffered outside of the Escobal mine in Guatemala due to MSR's security contractors.
May 2013	The Appellants participate in Guatemalan criminal proceedings against MSR's security manager, Mr. Rotondo.
June 2013	Six of the Appellants obtain leave to bring civil damages claims against Mr. Rotondo within the criminal proceedings
June 18, 2014	The Appellants file a notice of civil claim in British Columbia
July 9, 2014	The Respondent files its jurisdictional response
November 9, 2015	The chambers judge grants a stay of proceedings

OPENING STATEMENT

The fundamental issue on this appeal is whether the principle of comity is discarded when there are allegations that the judges of a foreign country will not provide a fair trial.

In light of the principle of comity, the chambers judge proceeded with extreme caution in evaluating the Appellants' allegations that judges in Guatemala would not grant them a fair trial. The Appellants argue that her emphasis on comity is "misplaced in the circumstances of this case". If accepted, their abandonment of the principle of comity would seriously undermine the international legal order.

The Appellants wish to have the British Columbia courts adjudicate claims:

- belonging to residents of Guatemala;
- based on injuries suffered in Guatemala;
- arising from events occurring in Guatemala;
- involving the alleged actions or omissions of Guatemalan or American residents;
- to be determined in accordance with Guatemalan law; and
- related to ongoing legal proceedings in Guatemala.

Given that these factors overwhelmingly favour declining jurisdiction in favour of Guatemala, the chambers judge properly found that the Respondent had discharged its burden of identifying a **clearly** more appropriate forum.

The Appellants' remaining allegations against the Guatemalan legal system are based on a parochial attitude towards countries that follow the civil law procedural tradition. The differences between the fact finding procedures used in Guatemala and those in British Columbia are not materially disadvantageous to the Appellants in the circumstances of this case. These differences are deserving of respect and should not be treated as signs of inferiority. The chambers judge properly concluded that the Appellants bore the burden of proving their serious allegations and that their evidence came nowhere near meeting the necessary standard of proof to justify a refusal to decline jurisdiction. For these reasons, this appeal should be dismissed.

PART 1 - STATEMENT OF FACTS

A. The Appellants And Key Witnesses Reside In Guatemala

1. The Appellants are all residents of Guatemala. None speak English.

Appeal Record ("AR"), Reasons for Judgment of the Honourable Madam Justice Gerow ("Reasons") at para. 6

2. The Appellants allege they were injured by security guards while they were protesting outside of the Escobal mine in Guatemala on April 27, 2013. The mine is owned by a Guatemalan company, Minera San Rafael S.A. ("**MSR**"). The Respondent, Tahoe Resources Inc. ("**Tahoe**"), is the indirect parent company of MSR.

AR, Reasons at paras. 1, 13

3. At the material time, Don Gray was the general manager of MSR and resided in Guatemala. In his role with MSR, Mr. Gray had responsibility for all matters relating to the operation of the Escobal mine, including security and community relations.

AR, Reasons at para. 16

4. In April 2013, MSR had 693 employees who were residents of Guatemala. The contracts between MSR and its employees are in Spanish. There were also 28 expatriates who provided management services to MSR in what is known under Guatemalan law as a *Contrato*.

AR, Reasons at para. 17

5. Alberto Rotondo Dall'Orso ("**Mr. Rotondo**") was a partner in the *Contrato* and served as MSR's security manager. MSR also engaged external Guatemalan security firms. All contracts between MSR and its security providers were made in Guatemala and are in Spanish.

AR, Reasons at paras. 7, 18

6. Tahoe is a corporation incorporated and registered in British Columbia, but its business headquarters are in Reno, Nevada.

AR, Reasons at para. 10

7. During the relevant period, Tahoe had no officers or employees in British Columbia. All of Tahoe's officers were employed by Tahoe Resources USA Inc. ("**Tahoe USA**"), a Nevada corporation.

AR, Reasons at para. 15

8. During April 2013, Mr. Rotondo reported to Mr. Gray in Guatemala. Mr. Gray in turn reported to Tahoe's Chief Operating Officer in Reno, Nevada.

AR, Reasons at para. 20

9. During the relevant period, only three Tahoe directors resided in British Columbia and two others resided in Ontario. The remaining three directors resided in Reno, Nevada. Therefore, during the relevant period, the majority of Tahoe's directors were resident outside of British Columbia, the majority of the non-British Columbia directors being in Nevada.

AR, Reasons at para. 14

Joint Appeal Book ("JAB") at pp. 107-108 (Vol. 1, Tab 3, Gray #1 at para. 9)

10. The chambers judge found that (absent a stay of proceedings) most, if not all, of the witnesses in this case will have to travel to Vancouver from Guatemala or Reno, and many will only speak Spanish. Obtaining and translating evidence will be a significant challenge. This will be inconvenient and will undoubtedly lengthen the trial considerably. The Appellants have not challenged this finding.

AR, Reasons at para. 47

B. The Claim Arises From Events Occurring In Guatemala

11. Beginning in September 2012, there were a series of protests, some violent, near the Escobal mine. In one incident, in January 2013, armed individuals ambushed MSR security contractors, killing two security guards and injuring seven others.

AR, Reasons at para. 33

JAB at p. 122 (Vol. 1, Tab 3, Gray #1 at paras. 64-67)

12. The incident giving rise to the Appellants' claim occurred in Guatemala on April 27, 2013 when protestors impeded traffic near the Escobal mine and an altercation between the protestors and security personnel ensued.

JAB at pp. 122-123 (Vol. 1, Tab 3, Gray #1 at paras. 68-70)

13. The Appellants' claims against Tahoe are based almost entirely on actions or omissions that allegedly occurred in Guatemala. Most of the evidence regarding those allegations would be located in Guatemala and would be in Spanish. This includes:

a. evidence of prior violent protests and other events necessary to establish the proper context;

b. evidence regarding the incident itself (as illustrated by the Appellants' extensive reliance in their factum on Spanish communications in which the Plaintiffs say Mr. Rotondo participated);

c. evidence of security protocols and communications between MSR and its security providers relating to the allegations of express or implied authority granted to Mr. Rotondo and Guatemalan security personnel;

d. evidence regarding the allegations of vicarious liability for the actions of Mr. Rotondo and security personnel, which would involve Spanish language contracts made in Guatemala and governed by Guatemalan law; and

e. evidence regarding the allegations of failure to perform background checks and inadequate monitoring of security guards.

AR, Reasons at paras. 28, 43-47, 67, 79, 99

JAB at pp. 111, 119-123 (Vol. 1, Tab 3, Gray #1 at paras. 22-23, 54-63, 65-70)

JAB at pp. 231-255 (Vol. 1, Tab 4, Barany #1-B)

14. The Appellants seek damages for the injuries that they allegedly suffered in Guatemala. They allege that their treatment for these injuries occurred in Guatemala and their loss of income and earning capacity would depend on business and labour

market conditions in Guatemala. All of the records needed to assess claims for general damages, loss of past and future income, loss of opportunity, and past and future care are in Guatemala and most, if not all, are in Spanish.

AR, Reasons at para. 44

15. Despite their assertion that their claim is "centered" on Canada, the Appellants did not plead any specific negligent act or omission by Tahoe's Board of Directors that might have occurred in Vancouver. At most, they refer to the fact that the Tahoe Board adopted Corporate Social Responsibility policies - an action which is hardly wrongful. The chambers judge properly found that the evidence regarding the direct claims against Tahoe showed that any alleged breaches would have occurred in Guatemala, and perhaps Nevada.

AR, Reasons at para. 67

C. The Appellants Brought Claims for Damages In Guatemala

16. Following the incident, Mr. Rotondo was charged with assault and other offences by Guatemalan authorities. All of the Appellants appeared in the Guatemalan criminal proceedings against Mr. Rotondo starting in May 2013.

AR, Reasons at paras. 25-26

17. In June 2013, six of the Appellants succeeded in being added as plaintiffs in the Guatemalan criminal proceeding against Mr. Rotondo and sought damages for the alleged wrongdoing.

AR, Reasons at para. 26

18. The Appellants have had the benefit of free legal assistance to support their damages claim in the criminal proceedings. Their Guatemalan counsel has a right to all evidence filed in the criminal proceedings. The Appellants can also add as parties to their compensation claim any other persons potentially responsible for the actions of the accused.

AR, Reasons at paras. 28, 66, 70

19. Despite their accusations against the Guatemalan judiciary, the Appellants have had a series of favourable rulings from the Guatemalan courts in the proceedings against Mr. Rotondo. Amongst other matters, the Guatemalan courts:

a. accepted the applications of six of the seven Appellants to be granted standing as plaintiffs within the criminal proceedings;

b. ordered Mr. Rotondo to stand trial on a number of charges; and

c. sustained the Appellants' objections to the initial judge who had been appointed to adjudicate the criminal proceedings.

JAB at pp. 962-1002 (Vol. 3, Tab 13, Quesada #1-B), translated by

JAB at pp. 1082-1083, 1101-1106, 1124 (Vol. 3, Tab 15, Campos #1-B)

JAB at pp. 917-918 (Vol. 3, Tab 15, Toledo #2 at paras. 8-11)

20. There is an extensive record in the Guatemalan proceedings against Mr. Rotondo that includes details of the authorities' investigations (such as the wiretap evidence cited extensively by the Appellants) and medical reports regarding the Appellants' injuries. This existing record, all of which is in Spanish, would overlap substantially with the trial record that would be developed in any civil claim in British Columbia.

JAB at pp. 21-24 (Vol. 1, Tab 1, Chavez #1-C)

JAB at pp. 98-99 (Vol. 1, Tab 2, Toledo #1 at paras. 3-7)

JAB at pp. 916-918 (Vol. 3, Tab 15, Toledo #2 at paras. 3-13)

JAB at p. 851 (Vol. 3, Tab 7, Chumil #1 at para. 3)

JAB at pp. 976, 981-986 (Vol. 3, Tab 13, Quesada #1-B), translated by

JAB at pp. 1096, 1101-1106 (Vol. 3, Tab 15, Campos #1-B)

JAB at pp. 905-907 (Vol. 3, Tab 9, Melgar #1-C), translated by

JAB at pp. 817-818 (Vol. 3, Tab 6, Barany #2-A)

D. Guatemalan Law Provides Comparable Remedies

21. In addition to their claim for compensation in the criminal proceedings, the Appellants could also have filed a civil suit in Guatemala for damages. Guatemala has a Civil Code that allows plaintiffs to bring claims based on vicarious liability, direct battery and negligence. The recoverable damages under the Civil Code include moral (akin to punitive) damages and damages for psychological harm.

AR, Reasons at paras. 28, 68

22. The chambers judge carefully reviewed the evidence regarding Guatemalan civil law and the possibility of bringing such claims against Tahoe, MSR's indirect parent. She noted that the issue of the corporate veil does not factor into the direct negligence claim or the direct battery claim under Guatemalan law. The chambers judge acknowledged that British Columbia law appears less restrictive with respect to claims based on agency and she weighed that evidence against other factors in the exercise of her discretion.

AR, Reasons at paras. 96-97

23. The chambers judge also reviewed the evidence of Tahoe's expert outlining the procedures for obtaining and submitting evidence in civil cases, including obtaining declarations of material witnesses and conducting depositions. She took note of the evidence of the Appellants' experts regarding certain challenges in collecting evidence, but found that Guatemalan procedures resemble those used in other civil law jurisdictions and that those procedures are available to the Appellants.

AR, Reasons at para. 100

24. Paragraph 38 of the Appellants' factum provides an incomplete and misleading summary of the expert evidence relating to Guatemalan procedural law. When the expert evidence is read as a whole, the chambers judge's factual findings are amply supported by it and the weight that she placed on various factors was a proper exercise of her discretion. In particular:

a. pleadings: The Appellants complain that the document initiating a civil proceeding in Guatemala must identify the evidence that the plaintiff relies upon. However, a plaintiff is not limited to proving its case based solely on the evidence identified with its initiating complaint. Instead, a plaintiff can file additional documents and give oral testimony as the case progresses and further evidence is obtained. The Appellants are therefore misstating a simple disclosure obligation that applies to the initiating pleading. That disclosure obligation in no way restricts their ability to gather and file further evidence as the case progresses.

JAB at pp. 15-18 (Vol. 1, Tab 1, Chavez #1-C)

b. discovery: The Appellants note that "discovery" is not contemplated in Guatemala. However, a party may obtain court orders requiring the other party to disclose documents in its possession or requiring that witnesses provide testimony. The chambers judge's reference to the existence of "discovery procedures prior to a hearing", read in the context of the expert evidence, simply refers to the process by which one party can obtain evidence that is in the other party's possession. The chambers judge did not find that there were no differences between Guatemala and British Columbia with respect to discovery, only that there was no proof of any prejudice to the Appellants arising from Guatemala's civil law procedural tradition.

AR, Reasons at paras. 28, 70, 100
JAB at pp. 15-18 (Vol. 1, Tab 1, Chavez #1-C)
JAB at pp. 935-937 (Vol. 3, Tab 12, Chavez #2-B)

c. document production: Contradicting their argument that there is no "discovery", the Appellants note that they may make document disclosure requests to a defendant in a Guatemalan proceeding. They complain that these disclosure requests must identify the documents requested, but they have not proven that they cannot comply with such a routine procedural requirement of civil law systems. The Appellants would only need to identify requested documents in general terms and the court will draw an adverse inference from a refusal to produce relevant documents in the defendant's possession. As the chambers judge found, the Appellants have been armed with extensive evidence regarding the incident of April

27, 2013 from the criminal proceedings. They also have filed evidence regarding Tahoe's internal policies from its public disclosures. The Appellants have not explained why they cannot use this evidence to identify in general terms any additional relevant documents in Tahoe's possession that would be disclosed in a Guatemalan civil proceeding.

AR, Reasons at para. 70
JAB at pp. 15-18 (Vol. 1, Tab 1, Chavez #1-C)
JAB at pp. 935-937 (Vol. 3, Tab 12, Chavez #2-B)

d. *forum non conveniens*: The Appellants allege that Guatemalan law does not recognize the doctrine of *forum non conveniens*. This is completely irrelevant as the Appellants would be plaintiffs in Guatemala and would not be invoking this doctrine. Where a foreign court stays a case due to *forum non conveniens* and refers the case back to Guatemala, the Guatemalan court must accept jurisdiction.

JAB at pp. 24-27 (Vol. 1, Tab 1, Chavez #1-C)

e. transfer of a case: The Appellants note that this case would not be "transferred" to a Guatemalan court, but would instead be restarted as a new action. This is an irrelevant technicality. The Appellants are free to file a new civil case against Tahoe even if they do not choose to join it to the ongoing criminal compensation case.

JAB at pp. 25-26 (Vol. 1, Tab 1, Chavez #1-C)

f. limitation periods: Limitations defences can be waived expressly or implicitly by a defendant. If any limitations issue has arisen, this is solely due to the Appellants' calculated decision to avoid initiating a claim in Guatemala.

JAB at p. 20 (Vol. 1, Tab 1, Chavez #1-C)

g. frequency of tort actions: There are few subsidiaries of foreign companies in Guatemala and therefore it is not reasonable to expect an abundance of tort claims against foreign companies. However, civil damages claims against local companies are common and routine. A civil claim against either Tahoe or MSR would not be unusual.

JAB at p. 935 (Vol. 3, Tab 12, Chavez #2-B)

25. Finally, the Appellants refer to the lack of response to subpoenas that were issued in Guatemala requiring Tahoe representatives to attend to testify in a criminal proceeding in Guatemala involving a separate and unrelated incident (the "**Morales Case**"). In Guatemala, the proper procedure for obtaining evidence from non-party witnesses outside of the jurisdiction is to use letters rogatory rather than to serve a subpoena. The same is true in British Columbia. For unknown reasons, the proper process was not used in the Morales Case.

AR, Reasons at paras. 103, 104

26. After the hearing, the Appellants made an application seeking to submit such evidence from the Morales Case. It should be noted that the chambers judge made no express finding that would suggest she admitted such evidence. She clearly did not rely on this evidence and found that there was sufficient evidence at the hearing relating to the obtaining of evidence from foreign witnesses in proceedings in Guatemala. The Respondent had objected to the introduction of this new evidence on the grounds that it was not relevant and it would appear that the chambers judge agreed with the Respondent's objection.

AR, Reasons at paras. 101 - 103

E. No Cogent Evidence Of Bias Or Corruption Relating To The Present Case

27. The chambers judge carefully reviewed and considered the evidence of the Appellants' experts regarding the Guatemalan judiciary's ability to grant a fair trial. She found that the Appellants' experts refer to instances of corruption or bias in the context of criminal prosecutions against state officials or organized crime syndicates, not cases involving claims of personal injuries such as this one.

AR, Reasons at para. 65

28. Even in the criminal context, the Appellants conceded that some very significant convictions have been secured and that many lawyers and judges strive for justice and the rule of law. At no point did the Appellants even make any allegation of a risk of improper influence by Tahoe or MSR.

AR, Reasons at para. 39

29. The chambers judge accepted that there were imperfections in the Guatemalan justice system, but noted that even the Appellants' experts identified significant judicial reforms since the early 2000s (which would counter the earlier examples that they relied upon). As a result, the chambers judge found that the Guatemalan justice system "functions in a meaningful way" that allows the Appellants to pursue their rights and remedies with the benefit of legal assistance.

AR, Reasons at para. 66

30. The Appellants' sole fact witness, Mr. Garcia, testified that the Appellants have an effective lawyer in Guatemala who has had success in the Guatemalan courts. The Appellants' Guatemalan lawyers have repeatedly and publicly proclaimed their successes before the Guatemalan courts in proceedings against various parties (including MSR).

JAB at p. 1294 (Vol. 4, Tab 21, Jolliffe #1-B, lines 7-47)

31. Only Tahoe filed evidence from an expert witness with substantial and current knowledge of the Guatemalan civil justice system. Tahoe's expert, Francisco Chavez, opined that the Appellants could be assured a fair and impartial proceeding against Tahoe or any other defendant in the Guatemalan courts. He was not cross-examined on this statement.

JAB at p. 924 (Vol. 3, Tab 12, Chavez #2-B)

32. Carol Zardetto was the only witness offered by the Appellants who possessed any experience relating to the Guatemalan civil justice system. Ms. Zardetto practiced as a litigator between 1984 and 1996. From 1996 to 2006, she worked on various projects, including writing a novel and a children's book. Since returning to practice in 2006, she had been counsel in less than 10 cases. On cross-examination, she admitted that she has had very limited dealings with Guatemalan court officers and judges in recent years. She also admitted that she had not done any work on anti-corruption matters in the past 10 years and that her current knowledge of such matters was limited to what any "interested citizen" of Guatemala might know.

JAB at pp. 1221-1222 (Vol. 4, Tab 20, Ardón #1 at para. 9)

JAB at pp. 1214-1215 (Vol. 4, Tab 18, Reyes #1 at para. 3)

JAB at pp. 1218-1219 (Vol. 4, Tab 19, Ponce #1 at paras. 4-5)

JAB at p. 1237 at lines 2-37, p. 1238 at lines 1-41, p. 1246 at lines 15-23, p. 1247 at lines 20-24 and 31-34 (Vol. 4, Tab 21, Jolliffe #1-A)

33. The Appellants rely heavily on the evidence of Ms. Myrtle Postema (a lawyer with the Due Process of Law Foundation, a Washington-based NGO) and Mr. Mynor Melgar (a former Guatemalan prosecutor). Both opinions cite alleged difficulties in high profile criminal prosecutions of state officials or organized crime syndicates. Ms. Postema does not even attempt to make any link between those exceptional prosecutions and the routine personal injury case before this Court. Mr. Melgar's attempt to draw such a link is based on nothing but speculation and conjecture. He claims that the interests of government officials in maintaining revenues and attracting foreign investment create a risk of an unfair trial - but there is absolutely no evidence that state revenues or foreign investment would be affected in any way by the Appellants' damages claim.

JAB at pp. 912-915 (Vol. 4, Tab 19, Postema #1-A)

JAB at pp. 904-905 (Vol. 3, Tab 9, Melgar #1-C), translated by

JAB at pp. 815-817 (Vol. 3, Tab 6, Barany #2-A)

34. The Appellants rely on Ms. Postema's report to question the independence of the Guatemalan judiciary in even a personal injury case between private parties. In doing so, they ignore the evidence before the chambers judge of the mechanisms to ensure the constitutionally guaranteed independence of the Guatemalan judiciary.

JAB at pp. 929-931 (Vol. 3, Tab 12, Chavez #2-B)

35. For example, the Guatemalan Supreme Court, rather than the executive, appoints judges of first instance and renews their terms. While appellate judges or "magistrates" are initially elected by Congress, these elections are from lists prepared by a

commission of law school deans. Judicial discipline proceedings are decided by an independent board of judges appointed by the Guatemalan Supreme Court.

JAB at pp. 929-931 (Vol. 3, Tab 12, Chavez #2-B)

36. Since 2007, a UN-appointed commission, the Comisión Internacional contra la Impunidad en Guatemala (the "**CICIG**") has also investigated allegations against judges accused of favouring state officials facing charges of human rights abuses. Some of the CICIG's investigations proved to be successful and have improved the Guatemalan justice system, but the Guatemalan Supreme Court found that other allegations by this commission were unsupported by the evidence.

JAB at pp. 929-931 (Vol. 3, Tab 12, Chavez #2-B)

37. In paragraph 53 of their factum, the Appellants cite the CICIG's complaints about unjustified delays in some prosecutions due to the abuse of judicial remedies. However, these judicial remedies are constitutional guarantees for the rights of the accused. The existence of delays due to constitutional rights for those charged with serious crimes hardly demonstrates that the Guatemalan justice system cannot deal with civil cases in a timely manner.

JAB at pp. 929-931 (Vol. 3, Tab 12, Chavez #2-B)

PART 2 - ISSUES ON APPEAL

38. The chambers judge did not err by exercising her discretion to decline jurisdiction. In particular, the chambers judge:

a. considered and applied the correct legal principles regarding whether Guatemala was clearly the more appropriate forum;

b. considered and applied the correct legal principles in evaluating the allegations against the Guatemalan judiciary; and

c. considered and weighed each of the relevant factors under s.11(2) of the of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 (the "**CJPTA**").

PART 3 - ARGUMENT

A. The Standard Of Review

39. The chambers judge's determinations regarding Guatemalan law, the Guatemalan legal system and the Guatemalan judiciary are findings of fact. Findings of fact are reviewable on a standard of palpable and overriding error, even when those findings are made on a paper record.

Housen v. Nikolaisen, 2002 SCC 33 at para. 10

Old North State Brewing Co. v. Newlands Services Inc. (1998), 58 B.C.L.R. (3d) 144 (CA) at para. 39

40. In *Canada (Attorney General) v. Bedford*, the Supreme Court reiterated that "social and legislative facts" are subject to the usual standard of review. Adopting a less deferential standard would require appellate judges to duplicate the work of the first instance judge.

Canada (Attorney General) v. Bedford, 2013 SCC 72 at paras. 55-56

41. The chambers judge's exercise of discretion is entitled to deference absent an error of law or a "clear and serious" error in the determination of relevant facts. The Appellants cannot ask this Court to re-weigh factors that were considered at first instance.

Club Resorts Ltd. v. Van Breda, 2012 SCC 17 at para. 112

B. Fairness And Efficiency Favour Guatemala

42. In this case, the initial assumption of jurisdiction by the British Columbia court is on a low threshold, namely the mere presence of the defendant's registered corporate office in British Columbia. The doctrine of *forum non conveniens* plays an important role in these circumstances by identifying a more appropriate forum for the disposition of the litigation and thus ensuring both fairness to the parties and an efficient dispute resolution process.

Van Breda at para. 109

43. The chambers judge correctly noted that Tahoe bore the burden of establishing an alternate forum that is "clearly more appropriate". She found that Tahoe had discharged this burden by establishing that Guatemala was the clearly more appropriate forum.

AR, Reasons at paras. 31, 33-34, 106

44. The chambers judge properly recognized that the comparison required by the *forum non conveniens* analysis is not one between the abstract features of two different legal *systems*. Instead, the comparison is between the specific characteristics of two different *venues* for the resolution of a given dispute. Thus, the issue is not whether the Guatemalan judicial system is fairer or more efficient than the Canadian system but whether Guatemala is a more appropriate forum than British Columbia for a fair and efficient resolution of this particular dispute.

AR, Reasons at para. 64

45. In exercising her discretion, the chambers judge began by considering the non-exhaustive list of factors itemized in s.11(2) of the CJPTA, as well as additional factors identified by the Supreme Court of Canada. She found that these factors overwhelmingly favoured Guatemala.

AR, Reasons at para. 32

CJPTA, s.11(2)

Spar Aerospace Ltd. v. American Mobile Satellite Corp., 2002 SCC 78 at paras. 80-82

46. In particular, the chambers judge found that:

a. comparative convenience and expense for the parties and for their witnesses: Guatemala is where all the Appellants reside, where they suffered their injuries and where the records to assess their damages are located. Their testimony and documents would be in Spanish. The same would be true of MSR's witnesses and documents. Meanwhile, Tahoe's witnesses and records would mostly be located in Nevada rather than British Columbia;

AR, Reasons at paras. 44-47

b. law to be applied: Guatemala is where most of the pleaded torts occurred and the factor of which law would be applied favours Guatemala as the appropriate forum;

AR, Reasons at paras. 77-80

c. desirability of avoiding multiplicity of legal proceedings and conflicting decisions: Six of the seven Appellants are seeking damages from Mr. Rotondo in the criminal proceedings in Guatemala while also seeking damages against Tahoe in British Columbia for the same injuries arising out of the same incident;

AR, Reasons at paras. 81-82

d. enforcement of an eventual judgment: This is a non-issue as Canadian courts would recognize a Guatemalan judgment subject to only the narrow defences in *Beals v. Saldanha*, 2003 SCC 72; and

AR, Reasons at para. 83

e. fair and efficient working of the Canadian legal system as a whole: Neither substantive nor procedural Guatemalan law creates a material juridical disadvantage to the Appellants. Even if some aspects of the law of agency are more favourable in British Columbia, the Appellants' case of direct negligence under our law rests on proving a "novel" duty of care. Guatemala's procedural law resembles that of other civil law jurisdictions and the Appellants have already obtained key evidence through the criminal proceedings.

AR, Reasons at paras. 89-90, 99-100

C. The Importance Of Comity In Considering Any Juridical Disadvantage

47. In considering the issues of convenience and juridical advantage, the chambers judge also took into account the Appellants' allegations that they cannot be assured a fair and impartial trial in Guatemala. In light of the principle of comity, she proceeded cautiously in evaluating the allegations against the Guatemalan judiciary. Contrary to the Appellants' arguments, her reference to the role of comity in this analysis was entirely appropriate.

AR, Reasons at paras. 48-73, 105

48. The entire modern conflicts of law system rests on the principle of comity. Since at least *Morguard*, the Supreme Court has repeatedly emphasized the need for an attitude of respect for and deference to other states. Comity, in turn, requires order. Considerations of fairness cannot be divorced from the requirements of predictability and stability which assure order in private international law.

Van Breda at para. 74

Morguard Investments Ltd. v. De Savoye (1990), [1990] 3 S.C.R. 1077 at 1095, 1990 CarswellBC 283 at paras. 28-29

49. In *Van Breda*, the Supreme Court warned against undue emphasis on a loss of juridical advantage in the *forum non conveniens* analysis, noting that "comity and an attitude of respect for the courts and legal systems of other countries, many of which have the same basic values as us, may be in order" and that a Canadian court must "refrain from leaning too instinctively in favour of its own jurisdiction".

Van Breda, para. 112

50. Similarly, in *Black v. Breeden*, the Supreme Court held that "a focus on juridical advantage may put too strong an emphasis on issues that may reflect only differences in legal tradition which are deserving of respect, or courts may be drawn too instinctively to view disadvantage as a sign of inferiority and favour their home jurisdiction."

Breeden v. Black, 2012 SCC 19 at para. 26

51. Canadian courts have consistently expressed an attitude of comity and respect towards courts in the developing world or those that follow the civil law tradition of evidence gathering. For example, they have declined jurisdiction in favour of courts in jurisdictions such as Grenada, Mexico, Nicaragua, Romania, Jamaica and Trinidad & Tobago.

Lemmex v. Bernard (2002), 60 O.R. (3d) 54 (CA)

Genco Resources Ltd. v. MacInnis, 2010 BCSC 1342

Follwell v. Holmes, [2006] O.J. No. 4387 (SC)

Prichici v. Prichici, [2005] O.J. No. 1979 (SC)

Wilson v. RIU, 2012 ONSC 6840

Persaud v. Trinidad & Tobago National Petroleum Marketing Co., [1997] O.J. No. 161 (SC Gen. Div.)

Nicholas v. Nicholas, [1995] O.J. No. 28 at paras. 26-30, aff'd 139 D.L.R. (4th) 652 (ONCA)

D. Allegations of Bias and Corruption Require "Cogent Evidence", Not Anecdotes

i. English Courts Are "Extremely Cautious" In Examining Bias Or Corruption

52. The Appellants rely on English jurisprudence to argue that their allegations against the Guatemalan judiciary should outweigh all of the factors outlined in the CJPTA and the Supreme Court's jurisprudence. In fact, English law does not assist the Appellants in any way.

53. The judgment of the House of Lords in *Spiliada Maritime Corp. v. Consulex Ltd.* was the building block for the Supreme Court of Canada's *forum non conveniens* jurisprudence. In that case, the House of Lords held that, while evidence of a likely denial of justice may be considered to rebut a finding that an alternate forum is prima facie more convenient, this approach requires that:

a. the burden of proof shifts back to the plaintiff; and

b. there is "cogent evidence" that the plaintiff will not obtain justice in the foreign courts.

Van Breda, para. 104

Spiliada Maritime Corp. v. Cansulex Ltd. (1986), [1987] A.C. 460 (U.K. H.L.) at 478

54. In particular, after reviewing the factors to be considered on a defendant's request for a stay, the House of Lords held that:

> If however the court concludes at this stage 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 not be granted. In this enquiry, the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. *One such factor can be the fact, if established objectively*

> *by cogent evidence, that the plaintiff will not obtain justice in the foreign jurisdiction. …on this enquiry, the burden of proof shifts to the plaintiff.* [emphasis added]
>
> *Spiliada* at 478

55. The House of Lords' decision in *Connelly* adopted the same approach of shifting the burden to the plaintiff (i.e., requiring the plaintiff to "take the forum as he finds it") unless the plaintiff could demonstrate that "substantial justice cannot be done" in that jurisdiction. The plaintiff in that case discharged his burden by showing that he could not obtain counsel in the foreign jurisdiction (Namibia). Similarly, in *Katanga Mining*, the plaintiff discharged its burden by showing the lack of a functioning justice system in the alternate forum (Democratic Republic of Congo). The Appellants now acknowledge that such factors do not apply in their case as they have access to counsel in a functioning judicial system.

> *Connelly v. RTZ Corporation Plc and Others*, [1998] A.C. 854, [1997] UKHL 30 at para. 27
>
> *889457 Alberta Inc v Katanga Mining Ltd.*, [2008] EWHC 2679 (Comm), [2009] 1 B.C.L.C. 189

56. The Appellants relied on *Spiliada*, *Connelly* and *Katanga Mining* before the chambers judge and therefore she considered and distinguished those cases. On this appeal, the Appellants have changed their position. They now claim that the *Spiliada/Connelly* test, requiring cogent evidence that they will not obtain justice, is wrong. Instead, citing *AK Investment CJSC v. Kyrgyz Mobil Tel*, they claim that they merely need to show a "real risk of an unfair process". This is an extreme oversimplification of that decision and the subsequent English jurisprudence.

> AR, Reasons at para. 58
>
> *AK Investment CJSC v. Kyrgyz Mobil Tel Ltd*, [2011] UKPC 7, [2012] 1 W.L.R. 1804

57. In *AK Investment*, the Judicial Committee of the Privy Council examined in detail the manner in which the plaintiffs had been treated in prior decisions of the Kyrgyz courts. After a careful review of those decisions, the Privy Council held that "there was substantial evidence of *specific* irregularities, breach of principles of natural justice and

irrational conclusions to justify a conclusion that there was considerably more than a risk of injustice" [emphasis added]. As a result, the Privy Council concluded that "if there is no trial in the Isle of Man, there will be no trial anywhere".

AK Investment at paras. 143, 151

58. In *AK Investment*, the Privy Council accepted that the burden of providing "cogent evidence" of a denial of justice could be discharged with proof of a "real risk that justice will not be obtained" rather than proof that such an outcome was more likely than not. It also agreed that evidence of corruption in other cases was *admissible*. However, the Privy Council did not hold that evidence of corruption or bias in unrelated cases was *sufficient* to prove the real risk to the plaintiffs.

AK Investment at paras. 92-94, 108

59. The Appellants attack the chambers judge's statement that, for reasons of comity, Canadian courts should "proceed extremely cautiously in finding that a foreign court is incapable of providing justice to its own citizens". However, that statement is essentially the same as Lord Collins' speech in *AK Investment*:

> Comity requires that the court be extremely cautious before deciding that there is a risk that justice will not be done in the foreign country by the foreign court, and that is why cogent evidence is required.

AR, Reasons at para. 105

AK Investment at para. 97

60. The Privy Council did not consider generalised evidence of corruption in the Kyrgyz courts as the plaintiffs had demonstrated that they themselves had already suffered mistreatment in prior decisions. By contrast, in this case, the Appellants have had a series of favourable rulings in the Guatemalan criminal proceedings and their Guatemalan counsel have proclaimed their track record of success against MSR and other defendants.

JAB at p. 1294 (Vol. 4, Tab 21, Jolliffe #1-B at lines 7-47)

61. The English courts' subsequent treatment of generalised accusations of corruption or lack of independence demonstrates that the "cogent evidence of a real risk" standard

is a high bar. Reports of injustices in criminal cases carry little weight in deciding civil disputes and general observations from international bodies are unpersuasive. This can be seen in cases dealing with the following jurisdictions:

a. Ukraine: In *Ferrexpo*, the plaintiffs submitted the report of a Ukrainian law professor who cited statistics on human rights abuses, unrelated rulings by the European Court of Human Rights and reports by international NGOs on the pervasiveness of corruption. The High Court held that such expert evidence failed to meet the "cogent evidence" test.

> *Ferrexpo AG v. Gilson Investments Ltd.*, [2012] EWHC 721 (Comm), [2012] 1 C.L.C. 645

b. Russia: In *Erste Group Bank*, the High Court observed that "many of the high profile cases which are considered by the experts to be ones where influence was brought to bear are criminal cases or cases which are before courts of general jurisdiction, not the *arbitrazh* [commercial] courts." The evidence regarding those *arbitrazh* courts was different and showed recent improvements in transparency, so that the "cogent evidence" test was not met.

> *Erste Group Bank AG (London) v. JSC (VMZ Red October),* [2013] EWHC 2926 (Comm), 2013 WL 5336017

c. Ethiopia: In *Mengiste*, the High Court held that the plaintiffs' evidence of injustices in criminal cases did not pertain to civil cases such as the one under consideration.

> *Mengiste v. Endowment Fund for the Rehabilitation of Tigray*, [2013] EWHC 599 (Ch), 2013 WL 617798

d. Tanzania: In *Standard Chartered Bank*, the plaintiffs filed reports of corruption from Transparency International and the US State Department. The High Court held that "generalised reports of corruption of this kind, which are no doubt produced in relation to many countries and which in any event seem to be directed at the lower echelons of the judiciary are not cogent evidence of a real risk of [the plaintiff] being unable to obtain a fair trial in Tanzania".

Standard Chartered Bank (Hong Kong) Ltd & Anor v. Independent Power Tanzania Ltd., [2015] EWHC 1640 (Comm), 2015 WL 3479997

ii. US Courts Reject Generalised, Anecdotal Evidence

62. In *AK Investment*, the Privy Council reviewed the leading US authorities that examined the standard of justice in the foreign courts. It noted that, in those cases, comity considerations also required that the US court not pass judgment on the foreign court without adequate evidence. It observed that such evidence "must go beyond generalised, anecdotal material."

AK Investment, para. 102

Carijano v. Occidental Petroleum Corp., 643 F.3d 1216 (9th Cir. 2011), superseding *Cariajano v. Occidental Petroleum Corp.*, 626 F.3d 1137 (9th Cir. 2010)

Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163 at 1179 (9th Cir. 2006)

Stroitelstvo Bulgaria Ltd v. Bulgarian-American Enterprise Fund, 589 F.3d 417 (7th Cir. 2009)

Rasoulzadeh v. Associated Press, 574 F.Supp. 854 (S.D.N.Y. 1983), aff'd 767 F.2d 908 (2d Cir. 1985 unpublished)

Osorio v. Dole Food Co., 665 F.Supp.2d 1307 (S.D. Fla. 2009), aff'd 635 F.3d 1277 (11th Cir. 2011).

63. US cases dealing with challenges to Guatemala's judicial system illustrate the stringent legal standards that will be applied to evaluate accusations of lack of impartiality. Thus, in the *Palacios* case, the Court held that:

> As a threshold matter, "considerations of comity preclude a court from adversely judging the quality of a foreign justice system absent a showing of inadequate procedural safeguards." [...] ("We have been reluctant to find foreign courts 'corrupt' or 'biased.'"); [...]
>
> To establish the inadequacy of a proposed alternative forum, "something more than bald assertion is required." [...] Plaintiffs supply the "something more" in the form of various news articles on corruption and violent crime.... Despite the provocative headlines, however, these incidents differ in kind from the systemic

> judicial breakdowns that have prompted other courts to question forum adequacy.[...]. ...For that reason, the Court declines to brand the judicial system of Guatemala procedurally deficient or politically corrupt. [internal citations omitted]
>
> *Palacios. v. The Coca-Cola Company,* 757 F. Supp.2d 347 (S.D.N.Y. 2010) at 358-360

64. Two critical factors weighed by US courts are: i) the absence of any evidence implicating the defendant in any judicial misconduct; and ii) the plaintiff's decision to commence related proceedings in the alternate forum. In the *Polanco* decision, the US court emphasized that there was no evidence that the defendant or its Guatemalan subsidiary "would use their considerable resources in an attempt to 'buy' the Guatemalan courts". Meanwhile, in *Lisa S.A.*, the US court emphasized that the plaintiff's decision to file lawsuits in Guatemala demonstrated a confidence in the judicial system that contradicted its expert evidence of generalised instances of corruption.

> *Polanco v. H.B. Fuller*, 941 F.Supp. 1512 (D. Minn. 1996)
>
> *Lisa S.A. v. Gutierrez Mayorga*, 240 Fed.Appx. 822 (11th Cir. 2007)

iii. Canadian Courts Are Also Extremely Cautious

65. Canadian courts have consistently refused to accept generalised allegations of corruption or bias as being sufficient grounds for a refusal to decline jurisdiction. They have only done so where there is specific evidence that the defendant may exercise undue influence over the judiciary in the foreign jurisdiction.

66. In *Recherches internationales Québec*, the Quebec Superior Court stayed a proposed class action in favour of the courts of Guyana. It found that the opinion of an expert on international human rights was not sufficient for the plaintiffs to meet the burden of "conclusive and objective evidence" demonstrating that Guyana is an inadequate forum, especially where the opinion was contradicted by evidence of practicing barristers and retired judges from the jurisdiction.

Recherches internationales Québec v. Cambior inc., 1998 CarswellQue 4511, 1998 CanLII 9780 (CS) at para. 88

67. In *Kornhaber*, the Ontario Superior Court took judicial notice of the fact that China is not a Western democratic country. However, it held that this "is not sufficient for this court to conclude that the plaintiffs could not obtain justice in China in respect to this claim."

Kornhaber v. Starwood Hotels and Restaurants Worldwide, Inc., 2014 ONSC 6182 at para. 17

68. The only relevant Canadian case cited by the Appellants, *Norex Petroleum Limited v. Chubb Insurance Company of Canada* is distinguishable because it involved concrete and specific evidence of whether the foreign courts could provide justice given the risks created by the defendant's past conduct before those courts.

69. In *Norex,* the plaintiff was suing a Russian company controlled by one of Russia's most powerful oligarchs. The expert evidence noted that, in addition to the general level of corruption in Russia, the conduct of this oligarch in other cases demonstrated a substantial risk that the defendant would choose to exercise influence over the judiciary. Based on this evidence, the Alberta Court of Queen's Bench found a real risk that Norex could be unable to obtain justice.

Norex Petroleum Limited v. Chubb Insurance Company of Canada, 2008 ABQB 442 at paras. 16, 116

70. The *Norex* decision is noteworthy for what the Alberta Court did *not* do. The Court did not look at the general human rights record of Russia, the impunity of government officials accused of political crimes, the risk of political influence in cases involving the state or the difficulties in prosecuting organized crime.

71. While the Appellants also cite *Sistem*, that decision did not address the issue before this Court. In *Sistem*, an international arbitral tribunal had found that the Kyrgyz Republic was responsible for Kyrgyz court decisions that effectively expropriated the applicant's investments. Sistem then sought to enforce that arbitral award against shares in Ontario

held by the Republic. The Ontario Superior Court found that Ontario was the preferable forum because the litigation related to shares located in that province. Hence, it declined to make any specific finding about whether the case "could be suitably tried in the Republic's courts". In very brief *obiter* comments, the Ontario Court simply noted that the evidence regarding the Kyrgyz judiciary did not show that the Republic was a clearly more appropriate forum.

Sistem Mühendislik Insaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic, 2012 ONSC 4351 at paras. 61-71

72. In exercising her discretion, the chambers judge properly put the burden of proof on the Appellants to demonstrate that their allegations against the Guatemalan judiciary should negate the ordinary *forum non conveniens* analysis. She then considered and distinguished each of the examples offered by the Appellants of instances establishing either "cogent evidence of a real risk" or evidence of a likelihood that substantial justice would not be done in Guatemala. In doing so, she exercised the necessary level of caution as emphasized by the Privy Council in the *AK Investment* case relied upon by the Appellants.

AR, Reasons at paras., 36, 63-73, 79-80, 82, 83, 99-100, 103-105.

73. Much of the Appellants' attack on the chambers judge's reasons focuses on her use of the *Connelly* dictum that "the plaintiff must take the forum as he finds it even if it is in certain respects less advantageous to him". However, the chambers judge emphasized that this rebuttable presumption only arises after the defendant establishes that the *forum non conveniens* factors set out in the CJPTA and the Supreme Court's jurisprudence point to a clearly more appropriate forum.

AR, Reasons at para. 64

74. This reversal of the burden of proof flows from the *Spiliada* decision that was adopted by the Supreme Court in *Amchem*. This reverse onus was applied by all subsequent Canadian, English and US cases. The reversal of the onus is necessary in light of the extreme caution required when a court departs from the fundamental principle of comity that is the foundation for modern conflicts of law.

Amchem Products Incorporated v. British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897

75. The chambers judge considered cases where the plaintiff discharged his burden of proof by showing that he could not obtain justice (e.g., due to a breakdown of the judicial system or lack of legal representation) as well as cases where the plaintiff discharged his burden by showing a real risk of a denial of justice in the specific circumstances of the case (e.g., the defendant's past conduct in the *Norex* case). She found neither set of circumstances was present on the facts of this case.

AR, Reasons at paras. 51-53, 55

76. In any event, nothing in this case turns on the precise wording of the plaintiff's burden of proving the likelihood of a denial of justice. The Appellants' evidence of problems in the Guatemalan judiciary is generalised and anecdotal. It is based on inherently difficult and complex criminal prosecutions of high ranking state officials or of organized crime syndicates. The delays and difficulties in such cases shed no light on how a civil dispute will be handled. Furthermore, the Appellants fail to address the expert evidence regarding the measures adopted to implement the constitutionally guaranteed independence of the Guatemalan judiciary, such as the appointment of judges by the Supreme Court and the selection of magistrates by Congress from a shortlist provided by an independent commission comprised of law school deans, representatives of the Bar Association, and representatives of the judges and magistrates. Finally, the Appellants' expert evidence contradicts their own actions in choosing to seek compensation within the Guatemalan judicial system.

JAB at p. 929 (Vol. 3, Tab 12, Chavez #2-B)

77. The refusal to decline jurisdiction in these circumstances would drastically undermine the principle of international comity that supports a fair and orderly international legal system. It would unfairly tar the reputation of the entire Guatemalan judiciary and of most countries with the civil law tradition. Such a lack of respect for another country's judiciary will create a risk that other countries treat the Canadian judicial system with similar disregard.

E. All Remaining Factors Point To Guatemala

78. The Appellants make a weak effort to re-litigate the chambers judge's findings that:

a. Guatemalan procedural law is adequate;

b. Guatemalan law applies to their claim; and

c. a Guatemalan judgment will be readily enforceable.

i. No Juridical Disadvantage From Guatemalan Procedural Law

79. The Appellants' description of Guatemalan procedural law treats immaterial differences between the civil law and common law traditions as signs of the inferiority of the Guatemalan legal system. This is precisely the type of error that the Supreme Court warned against in *Breeden v. Black*.

Breeden at para. 26

80. In Guatemala, a party can obtain disclosure of another party's documents in several stages:

a. First, before the lawsuit is even commenced, the plaintiff may obtain some disclosure of evidence, such as witness declarations and accounting books review.

b. Second, at the pleadings stage, a party must disclose the evidence that it relies on in support of its pleadings. This is a minor burden to a plaintiff when the claim is initiated, but it also provides a plaintiff with the benefit of prompt disclosure of the documents relied upon by the defendant in support of its pleading. The plaintiff therefore knows the case that it must meet at an early stage.

c. Third, as the Appellants acknowledge, a plaintiff may then request the production of relevant documents in the defendant's possession. Only the general content of these documents needs to be described with the request. If the defendant refuses to produce the requested documents, the judge may consider the plaintiff's description to be accurate. This creates a powerful incentive to disclose relevant documents in a

party's possession, such as the internal security policies of Tahoe/MSR or internal communications with security providers.

d. Fourth, a plaintiff may obtain an order requiring production of documents (including electronic documents) and the provision of testimony to the judge. Such testimony becomes part of the record of the case, hence, it is not technically "discovery". However, like discovery procedures, such orders allow the plaintiff to obtain evidence from witnesses employed by the other party.

JAB at pp. 21-24 (Vol. 1, Tab 1, Chavez #1-C)
JAB at pp. 935-937 (Vol. 3, Tab 12, Chavez #2-B)

81. On the Appellants' own evidence, a letter of request from the Guatemalan court only becomes relevant where the plaintiff is seeking to obtain evidence from the prospective defendant *before* commencing the case or seeking evidence from a non-party outside of the jurisdiction. There is no reason to obtain a letter of request before the case is started as the Appellants have sufficient evidence to draft their initial pleading (as demonstrated by the lengthy record on this appeal). If a letter of request were necessary, there is no evidence to suggest that obtaining one would be particularly burdensome.

JAB at pp. 1148-1149 (Vol. 3, Tab 16, Zardetto #1-C)

82. The Appellants complain that third parties, such as a Guatemalan security provider (Grupo Golan), may fail to comply with Guatemalan court orders to produce evidence. As such a failure could lead to the third parties' liability to the Appellants, the Appellants' complaint is speculative. However, assuming that such non-compliance occurred, this problem would not be solved by a hearing in British Columbia. If evidence from Grupo Golan is needed, the British Columbia Supreme Court would need to issue a letter of request to the Guatemalan courts and the Appellants would need to enforce that letter of request in Guatemala. This would involve considerably more expense than if the case were being heard in Guatemala, but would not provide the Appellants with any additional benefit. The British Columbia courts do not have jurisdiction over non-party witnesses in Guatemala - only the Guatemalan courts do.

ii. Guatemalan Law Applies

83. The Appellants' challenge to the chambers judge's finding that their claim is not "centred" on British Columbia confuses the question of whether a direct claim can be made against Tahoe under our law with the question of what law applies to that claim.

84. The Appellants rely on the *Lubbe* decision of the House of Lords to argue that the case is "centred" in British Columbia. That case did not address the applicable law, but rather referred to the fact that the parent company's records were located in England. By contrast, Tahoe's witnesses and records are not in the plaintiff's chosen jurisdiction. The parent company's witnesses and records are in Nevada and, therefore, this factor does not favour the Appellants. The more important witnesses and records, based on the allegations of a failure to conduct background checks and supervise security guards, are at MSR, Tahoe's Guatemalan subsidiary.

> *Lubbe v. Cape Plc.*, [2000] UKHL 41 at para. 20, [2000] 4 All ER 268
>
> AR, Reasons at para. 67

85. Guatemalan law would continue to apply even if the case was heard in British Columbia. While the Appellants allege that the chambers judge's finding on that issue was premature, she was required to consider the applicable law under s.11(2) of the CJPTA. In *Douez*, this Court held that consideration of the applicable law did not require a definitive conclusion on that issue. However, there is no reason to avoid making such a conclusion where the issue of the applicable law is relatively straightforward.

> CJPTA, s. 11(2)
>
> *Douez v. Facebook, Inc.,* 2015 BCCA 279 at para. 83

86. In this case, the alleged injury occurred in Guatemala and related to an assault that is alleged to have occurred in Guatemala. Any vicarious liability for such assault is governed by Guatemalan law. The alleged failure to carry out background checks or supervise the security guards also occurred in Guatemala and (perhaps partly) in Nevada. The place of the tort must therefore be Guatemala and, hence, Guatemalan law applies.

Tolofson v. Jensen, [1994] 3 S.C.R. 1022 at 1049-1051, 1994 CarswellBC 1 at paras. 43-44

iii. A Guatemalan Judgment Is Enforceable

87. Finally, the Appellants cite the *Chevron* case to suggest that there may be difficulties in enforcing a Guatemalan judgment. The issue in *Chevron* was whether a Canadian court has jurisdiction to enforce a foreign judgment where the defendant has no presence in Canada. The Supreme Court ruled that it does have such jurisdiction. This case has no relevance here as Tahoe does not contest jurisdiction *simpliciter*. Furthermore, the Supreme Court's holding demonstrates the ease of enforcing foreign judgments in Canada.

Chevron Corp. v. Yaiguaje, 2015 SCC 42

PART 4 - NATURE OF ORDER SOUGHT

88. For the reasons above, the Respondent seeks an Order dismissing the appeal with costs.

89. All of which is respectfully submitted.

Dated at the City of Vancouver, Province of British Columbia, May 30, 2016.

Peter J. Reardon
Counsel for the Respondent

APPENDIX: ENACTMENTS

COURT JURISDICTION AND PROCEEDINGS TRANSFER ACT

Discretion as to the exercise of territorial competence

11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,

(b) the law to be applied to issues in the proceeding,

(c) the desirability of avoiding multiplicity of legal proceedings,

(d) the desirability of avoiding conflicting decisions in different courts,

(e) the enforcement of an eventual judgment, and

(f) the fair and efficient working of the Canadian legal system as a whole.

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