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[Abstract]

The key to understanding the role of party autonomy in the rules of international civil litigation in Singapore is to see it from the eyes of the judges of the common law system. For the most part, the concern, both historically and in modern times, is with upholding the agreement of the parties. There is thus a strong contractual flavour (in both the domestic and choice of law sense) in the analysis of the principles that regulate the effect of party autonomy on the conduct of international civil litigation, a theme that runs on to some extent even to questions of the recognition and enforceability of foreign judgments. In more recent times, other considerations have become more prominent: issues of public policy, comity, justice and fairness to the parties, and the public interest, but the primary driving force is still the contractual analysis. This has implications for the development of internal law relating to international civil litigation, as well as harmonisation of such rules with the rules of other countries.

1 INTRODUCTION

1.1 Objective of Paper

[1] The objective of this paper is to review the role that party autonomy plays in the international civil litigation under Singapore law, and the underlying tensions between the principle of party autonomy and wider jurisdictional considerations relating to the public interest in the selection of venue for litigation as well as considerations of international comity. The tensions are particularly troublesome because of the strong contractual flavour that underlies much of this law.

1.2 Organisation of Paper

[2] This paper first sets out the position under Singapore law relating to jurisdiction over persons in international civil disputes (Section 2). The role that jurisdiction agreements play in this scheme of international civil jurisdiction is next discussed (Section 3). Because the contractual analysis of jurisdictional agreements is so important in common law systems, the Singapore position on the choice of law for contracts is set out very briefly. The emphasis on party autonomy in contract choice of law is seen to be carried through to the analysis of the effect of jurisdiction agreements, and it will be shown that the way the Singapore courts presently deal with the effect of jurisdictional agreements on cross-border disputes has been coloured by the historical approach of the common law courts to the enforcement of contracts, though tempered by a judicial discretion based on wider policy considerations (Section 4). The two most important jurisdictional techniques, stay of proceedings (Section 5), and the anti-suit injunction (Section 6), are next reviewed. Public policy and mandatory rules, which are important qualifications to any system of private international law, although not of great practical significance in this context, are discussed briefly in Section 7. The application of contract choice of law principles to determine important issues relating to the validity and interpretation of jurisdiction agreement is discussed next (Section 8), before the paper moves on to explain the author's view on what is perhaps the difficult and confused area in the common law relating to jurisdiction agreements: the relationship between the jurisdiction clause and breach of agreement and its impact on the meaning of an "exclusive" jurisdiction clause (Section 9). The role of party autonomy in the recognition and enforcement of foreign

judgments is considered (Section 10). Finally, the conclusion in Section 11 reviews how the key aspects of the tension between party autonomy and wider jurisdictional considerations may create difficulties in any international efforts at harmonisation of rules relating to the enforcement of jurisdictional agreements.

[3] Although this paper discusses the law of Singapore, it will make frequent references to English authorities, either for comparison or for guidance where the position in Singapore is unclear. The Singapore legal system is based on the English system, and English law was received into Singapore in 1826, subject to modifications to suit local conditions. Up to 1993, English law was applied in many commercial cases except where was specific legislation in Singapore. Although the Singapore courts today are not bound by English cases, very often they find such decisions to be of highly persuasive authority.

2 INTERNATIONAL JURISDICTION

[4] Personal jurisdiction over a defendant in international civil cases[1] depends on the service of process on the defendant. This may occur in two ways. Traditionally, following the common law rules,[2] the court may assume jurisdiction over the defendant if the defendant can be served with process while present within the territories of Singapore, or if the defendant has submitted to the jurisdiction of the court of Singapore. Submission normally occurs during the conduct of the legal proceedings and involves an action by the defendant that irrevocably indicates that the defendant has accepted the jurisdiction of the court to determine the merits of the case. This existence of this jurisdiction is as of right; the court has no discretion on this matter. However, the defendant may mount a separate challenge against the exercise of the jurisdiction, on the basis that there is another forum outside Singapore that is clearly and distinctly the more appropriate forum as a mater of convenience, and that there are no reasons of justice why the case should nevertheless be heard in the Singapore court, that is, the plaintiff will not be deprived of substantial justice if the trial takes place abroad.

[5] Discretionary jurisdiction is conferred by statute.[3] Under the Rules of Court,[4] the court may grant leave for service of process out of jurisdiction.[5] These grounds are generally based on a link between the forum and one of the following: the defendant, the subject matter of the dispute, or the cause of action. Before leave is granted, the court must decide that there is a good arguable case that the case falls within one of the limbs providing for service of process out of jurisdiction, that there is a serious issue to be tried on the merits, and that it is a proper case for leave to be granted. The most important consideration for the proper case is that the Singapore court should be shown to be the most appropriate forum to adjudicate the dispute. The application for service out of jurisdiction is made in the first instance by the plaintiff alone (*ex parte* application). After the service of process has been completed on the overseas defendant, the defendant may apply to set aside the service. The most important reasons to support an application for setting aside the service are that the ground for service out of jurisdiction has not been satisfied, or that the Singapore court is not the most appropriate forum to determine the merits of the case.

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1 Left out of account are cases invoking the matrimonial jurisdiction, insolvency jurisdiction, jurisdiction to administer deceased estates, and admiralty *in rem* jurisdiction.

2 Now endorsed by statute: Supreme Court of Jurisdiction Act (Chapter 322, 1999 Revised Edition), section 16(1)(a)(i) and 16(1)(b).

3 Supreme Court of Judicature Act (Chapter 322, 1999 Revised Edition), section 16(1)(ii).

4 Chapter 322, Rule 5.

5 Order 11, Rules of Court.

[6] In summary, putting aside procedural complications, the personal jurisdiction of the Singapore court in international civil litigation proceeds in two stages. The first is the existence of the *nexus* for the jurisdiction. This is supplied under the common law by the territorial presence or the submission of the defendant, and expanded by statute to numerous grounds connecting the defendant or action to the forum. The second stage is the *exercise* of the jurisdiction. Here, where there is no breach of jurisdiction agreement involved, the question is whether the Singapore court is the most appropriate forum to determine the dispute, and if not whether there are nevertheless reasons of justice why the case should be heard in Singapore. This is doctrine is commonly referred to as the natural forum doctrine, or the doctrine of *forum conveniens*[6] or *forum non conveniens*.[7] The doctrine of natural forum aims to channel the trial to the forum which is best placed to determine the dispute in the interests of the parties and the ends of justice.[8] It involves balancing considerations of the private interests of the parties (especially expense and inconvenience), wider considerations in the public interest (for example, the inconvenience to witnesses, wastage of resources, the risk of inconsistent judgments from different jurisdictions, and justice in the broadest sense) as well as considerations of international comity (respect for the jurisdiction of the courts of other countries).

3 JURISDICTION AGREEMENTS

[7] A jurisdiction agreement usually performs two functions. The first function is the selection of a forum or the prorogation of jurisdiction: it supplies a jurisdictional basis for the chosen court to hear the case. The second function is de-selection of a forum or the derogation from jurisdiction: it supplies a reason for the forum not to hear the case. Usually a jurisdiction agreement will perform each function in respect of different jurisdictions. "Jurisdiction agreement" is used in this paper in a broad sense to mean any agreement between the parties that has either or both of these functions.

[8] The most common jurisdiction agreement to appear in international civil litigation is the choice of court(s) clause. This will form the focus of this paper. Before that, however, a brief reference will be made to two other types of jurisdiction agreements which are of increasing significance to international civil litigation.

3.1 Arbitration

[9] The arbitration agreement has attracted a large body of jurisprudence of its own, and will only be commented on briefly in this paper. An arbitration agreement is a jurisdiction agreement in the derogation sense, to the extent that the contracting parties have agreed *not* to have their dispute heard in a court of law. The effect of arbitration agreements in Singapore is very strong, and demonstrates the respect that Singapore law bears for party autonomy in the arbitration context. In domestic arbitrations, the court has discretion to stay any proceedings commenced in breach of an arbitration agreement.[9] In international arbitrations, stay of court proceedings commenced in breach of the arbitration agreement is mandatory.[10] In addition, the Singapore court may also issue an injunction to restrain a party from acting in a foreign country in breach of an arbitration agreement.[11] There may

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[6] When the question is whether the court should allow service of process out of jurisdiction because it is the natural forum.

[7] Where the question is whether the court should stay proceedings commenced by service within the jurisdiction because it is not the natural forum.

[8] *The Spiliada* [1987] AC 460; adopted in Singapore in *Brinkerhoff Maritime Drilling Corp and Another v PT Airfast Services Indonesia* [1992] 2 SLR 776, [1992] SGCA 45.

[9] Arbitration Act (Chapter 10, 1985 Revised Edition), section 7.

[10] International Arbitration Act (Chapter 143A, 1995 Revised Edition), section 6.

[11] *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603, [2002] SGHC 104.

also be a claim for damages for the breach of an arbitration agreement.[12] Foreign arbitration awards may be enforced in Singapore either under common law,[13] or registered to be enforced in accordance with the New York Convention Recognition and Enforcement of Foreign Arbitral Awards 1958 where applicable.[14]

3.2 Negotiation or Mediation

[10] Of increasing significance today is the mediation clause, which will also be mentioned only briefly in this paper. This is an agreement between the parties that in the event of a dispute they should refrain from commencing proceedings in court (or even commencing arbitration) until they have attempted to resolve their differences between themselves, either by negotiation between themselves, or with the aid of a mediator or mediation institution. Like the arbitration agreement, it is a jurisdiction clause in the derogation sense. The enforceability of such clauses in domestic law differs from jurisdiction to jurisdiction, and the enforceability of such clauses under Singapore law is in doubt,[15] though it has yet to be seriously argued before the courts. Much may depend on how the clause is drafted to address the greatest judicial concern: the uncertainty and lack of standards to judge whether and when the clause has been breached. In the cross-border context, the most important questions relate to which aspects of the mediation agreement are subject to the proper law governing the agreement, and which aspects of it are governed by the law of the forum as a matter of procedure.

3.3 Choice of Court

[11] The classic jurisdiction agreement is the choice of court agreement. Two traditional distinctions are usually drawn in the law relating to jurisdiction agreements. First, a distinction is drawn between non-exclusive and exclusive jurisdiction agreements. Generally, non-exclusive jurisdiction agreements serve only a prorogation function. Exclusive jurisdiction agreements serve not only a prorogation function in respect of the court of the chosen forum, but also a derogation function in respect of the courts of other fora excluded by the agreement.

[12] Prorogation of jurisdiction operates under the law of Singapore in two ways: first, a plaintiff can serve process in Singapore on an overseas defendant who has submitted to the jurisdiction of the Singapore court by agreement, in accordance with the agreed mode of service (jurisdiction as of right); secondly, if no mode of service has been agreed, or the agreed mode entails the service of process out of the country, leave of court may be obtained for the service out of Singapore (discretionary jurisdiction).

[13] Secondly, a distinction is drawn between issues of substance, which are governed by the law governing the jurisdiction agreement, and matters of procedure governed by the law of the forum. The former includes questions of the existence, validity and interpretation of the agreement. The latter governs the effect of the agreement on the question of the prorogation or derogation of jurisdiction on the question whether the court of the forum will adjudicate the case, and if so, on what terms.

[14] An important *leitmotif* in the law of international civil litigation applying in Singapore is the contractual flavour of the analysis of jurisdiction agreements. Because the jurisdiction agreement will be given effect to, if at all, by the forum as a contract, this involves an

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12 *Mantovani v Carapelli SpA* [1978] 2 Lloyd's Rep 63, 73, [1980] 1 Lloyd's Rep 375 (CA) 383.

13 A theoretical possibility, but the author knows of no instance where this has occurred in Singapore.

14 International Arbitration Act (Chapter 143A, 1995 Revised Edition), Part 3.

15 *United Artists Singapore Theatres Pte Ltd v Parkway Properties Pte Ltd* [2003] 1 SLR 791 at [214], [2002] SGHC 185; *Grossner Jens v Raffles Holdings Ltd* [2004] 1 SLR 202, at [43], [2003] SGHC 290.

analysis of the choice of law in contract on the one hand, and contractual remedies of the forum on the other.

4 CHOICE OF COURT AGREEMENTS

[15] Substantive questions of the existence of a jurisdiction agreement, whether it has been incorporated into a contract, whether the agreement covers the dispute in question, and whether the agreement is intended to have prorogation or derogation effects, are seen to be questions of substantive contract law. These questions are therefore subject to choice of law rules for contract. Significantly, the jurisdiction agreement is analysed in choice of law terms as any other term in the contract would be. The tendency in the common law is not to separate the jurisdiction agreement from the substantive agreement for the purpose of choice of law analysis. This means that no special consideration has been given to the law of the country whose court has been chosen to determine the dispute, even in the case of an exclusive choice of court agreement. No reported case in Singapore has found the jurisdiction clause to be governed by a law different from that governing the contract.

4.1 Party Autonomy in Contract Choice of Law

[16] Singapore law follows the general pattern of Commonwealth law in the choice of law analysis of contracts. The court follows a three-stage approach in determining the proper law of the contract: (1) the express choice of the parties would be given effect to provided it is legal and made in good faith, and it is not against public policy; (2) if there is no express choice, the court will attempt to infer the intention of the parties from the surrounding circumstances; and (3) if no express or inferred intention can be discerned from the contract and its surrounding circumstances, the proper law of the contract is the law with the closest and most real connection with the parties and the transaction. This hierarchical approach attempts to give effect to the intention of the parties (a subjective proper law), and it is only when this intention cannot be found that the court undertakes an objective determination of the proper law of the contract (an objective proper law).

[17] The classic authority for giving effect to party autonomy is the Privy Council (Canada) case in *Vita Food Products Inc v Unus Shipping Co Ltd*,[16] where Lord Wright stated that the express choice of law by the parties would be regarded as conclusive, even if the law chosen by the parties is not connected to the parties or the transaction, provided the choice of the parties is made in good faith and legal, and there is no basis for avoiding the choice on the grounds of public policy.

[18] Although there has been some doubt about the meaning of the qualification to the express choice of the party, it has hardly ever been applied in practice. The only known case is where a court in Queensland refused to give effect to the parties' choice of Hong Kong law on the basis that it would evade the statutory policy of the forum's own protective statutory regulations applicable to activities occurring in the forum.[17] On appeal, the case was considered to be simply one of an application of the mandatory rules of the forum; there was no need to consider the qualifications to choice of law.[18] It was also unclear how the parties' selection of a law to govern their agreement in itself can be contrary to the public policy of the forum. The Singapore Court of Appeal has clarified these qualifications. In *Peh Teck Quee v Bayerische Landesbank Girozentrale*,[19] the court took a restrictive approach to the qualifications. First it considered the public policy

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16 [1939] AC 277, 290.

17 *Golden Acres Ltd v Queensland Estates Pty Ltd* [1969] Qd R 378.

18 *Golden Acres Ltd* v *Queensland Estates Pty Ltd* (1970) 123 CLR 418.

19 [2000] 1 SLR 148 (CA).

qualification to refer to the contract and its enforcement, rather than the selection of the proper law itself. So it may be against the public policy of the forum to give effect to the contract in accordance with the law chosen by the parties if it would be against the fundamental public policy of the forum to do so. Thus stated, it is a simple articulation of the general public policy exception in the choice of law process, and nothing specifically to do with the selection of the proper law by the parties. There is effectively no distinct public policy exception to the parties' choice of the proper law.

[19] More importantly, the court considered the meaning of "good faith" in this context. This is significant, because "good faith" has no special meaning in the common law of Singapore; it is not a broad legal standard that is applied by the courts, unlike the case of some civil law countries. The court considered that the parties' selection of the proper law would be considered to be not done in good faith if it is done with the sole motive to evade laws which would otherwise be applicable to the contract. Although there are some conceptual difficulties with this approach,[20] practically the effect is that the exception is an extremely narrow one, for it would be very difficult to find a case where the *sole* purpose of the selection of a proper law is the evasion of other laws. In practice, it will be very easy to find some positive reason why the parties chose a particular law to govern the contract. Effectively, this evasive intent appears to be the only exception[21] recognised under Singapore private international law principles to the express[22] choice of the parties. Because of the narrow interpretation of this exception, Singapore law can be seen to give prominence to party autonomy in the choice of law analysis of contracts.

[20] Where no express choice is made, there is still a theoretical distinction between the two further stages for the determination of the proper law: one is a search for the parties' intention, the other a search for objective connecting factors. However, courts in Singapore tend to take a pragmatic approach. Where it is not obvious that the parties have made an implied choice, the tendency is for the courts to conclude that there has been no subjective choice by the parties,[23] and to proceed to the third step to determine the objective proper law of the contract by the connections of the case.

4.2 Contractual Remedies of the Forum

[21] The contractual theme in the enforcement of jurisdiction clauses manifests itself in the remedies available for breaches of jurisdiction agreements. In legal systems based on the common law, the most important of the remedies for the prevention of breaches of agreement is the injunction. This is an equitable remedy that originated in the court of chancery dating back to the days when common law and equity were administered in different courts of law. Contractual rights were ordinarily enforced in the common law courts by way of actions for the recovery of promised payments or damages for breach

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[20] It is not clear whether the evasion of *any* foreign law of the (presumably) otherwise objective proper law would trigger this exception, or whether the exception is triggered only upon the evasion of *mandatory* foreign rules. The latter interpretation in turn raises the difficult question of principle of the effect that the Singapore forum should give to *foreign* mandatory rules, a concept that is quite alien to the common law.

[21] See [2000] 1 SLR 148 at [17].

[22] In principle, these qualifications to express choice apply to the inferred choice under the second step of the analysis, since it is just an extension of express choice, although there have been no case authorities on this point.

[23] The English courts sometimes take pains to try to discern the inferred intention of the parties, but even so, there is much room for disagreement as to whether a decision is arrived at by finding the intentions of the parties or by the objective connections of the case: *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50. The Singapore approach has the advantage of saving the parties time and cost. Compare the position in Europe under the Rome Convention on the Law Applicable to Contractual Obligations, Article 3(1), where the court is directed to proceed to look at objective connections once the parties' subjective choice cannot be demonstrated with "reasonable certainty".

of contract. Monetary awards were the normal remedies from the common law courts. Occasionally, the innocent party would resort to the equitable jurisdiction to have the contract specifically performed, or more commonly outside the context of land transactions, to ask for an injunction to restrain a breach of contract. Although the injunction is a discretionary remedy like the specific performance, and given only common law damages would be inadequate, it is more readily granted by the courts.[24] The injunction when issued was directed at the respondent (the party threatening to breach the contract), and ordered the respondent not to proceed with his common law rights under the contract. This was called the common injunction.

[22] When the administration of common law and equity were merged into a single court,[25] it became impossible for equity division of the court to order someone not to resort to the common law division of the same court.[26] Instead, in cases where principles required that a common injunction would have issued before the merger of the courts, the court would be asked to ***stay*** the proceedings instead.[27] This is the principle underlying cases, not governed by statute,[28] where the court would ordinarily stay an action commenced in breach of a jurisdiction agreement. In ***Racecourse Betting Control Board v Secretary for Air***, MacKinnon LJ explained that in such cases:[29]

> that power and duty arose under a wider general principle, namely, that the court makes people abide by their contracts, and, therefore, will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined.

What could no longer be restrained due to changes in the court structure would now be achieved by the technique of stay of proceedings. This remedy is tempered by the discretion of the court, a discretion which has developed a fair degree of sophistication to balance the respect for party autonomy on one hand, and procedural aspects of justice in international civil litigation on the other.

[23] This short historical excursus is intended to show the link between the stay of proceedings in cases of breach of jurisdiction agreement, and another important remedy available in the same context, the anti-suit injunction. While the court is now prohibited from restraining parties from seeking justice from itself, it is not so constrained (except by considerations of comity) to restrain parties from resorting to courts of other jurisdictions. The common injunction, intended to protect contractual rights, is the historical source of the two most important remedies for breaches of jurisdiction agreements. Modern English authorities have also observed that in cases of breach of jurisdiction agreements, the same test applies to applications for stay of proceedings and the anti-suit injunction, since they both serve the function of upholding the parties' agreement.[30]

[24] A third remedy for the breach of contract, monetary damages, is just starting to show itself as a potential remedy for breaches of jurisdiction clauses. A recent English Court of Appeal decision has allowed a claim for wasted costs incurred in staying proceedings

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24 ***Doherty v Allman*** (1878) LR 3 App Cas 709, 719-720.

25 In England: Supreme Court of Judicature Act 1873. In Singapore: Courts Ordinance 1878, section 10.

26 Civil Law Act (Chapter 43, 1999 Revised Edition), section 3(e).

27 Civil Law Act (Chapter 43, 1999 Revised Edition), section 3(f).

28 Eg, the International Arbitration Act (Cap 143A, 1994 Revised Edition).

29 [1944] Ch 114 (CA) 126. See also ***The Fehrmarn*** [1958] 1 WLR 159 (CA) 163, 164.

30 ***Donohue v Armco Inc*** [2002] 1 Lloyd's Rep 425, [2001] UKHL 64; ***Ultisol Transport Contractors Ltd v Bouygues Offshore SA*** [1996] 2 Lloyd's Rep 140, 149; ***Akai Pty Ltd v People's Insurance Co Ltd*** [1998] 1 Lloyd's Rep 90, 105.

commenced in a foreign jurisdiction in breach of a jurisdiction agreement,[31] and the House of Lords has made observations that it may be possible to obtain substantial damages for the breach of jurisdiction clauses.[32] These developments will certainly be considered by the Singapore courts if an appropriate occasion arises, but at this point it is too early to tell whether the Singapore courts will follow the English developments, and to what extent. Certainly, if the courts continue to look at jurisdiction agreements through the analytical lenses of contract law, it is difficult to see why damages should not be an available remedy for breaches of contract; it might give the court more flexibility if they should decide not to use the specific remedies of stay or anti-suit injunctions. But there is another school of thought, which has not permeated to the judiciary, that the jurisdiction agreement is not like any other term of the contract; it is merely an expression (non-contractual) of the parties' intention to the court of their choice of venue for trial.

5 STAY OF PROCEEDINGS

[25] Where an application is made to stay proceedings commenced in Singapore in breach of an exclusive foreign jurisdiction clause,[33] the courts would ordinarily stay the proceedings to give effect to the agreement of the parties, unless the party commencing the action in breach of contract can show exceptional circumstances amounting to strong cause why in the circumstances substantial justice cannot be obtained in the foreign court.[34] The law in Singapore is set out by the Court of Appeal in *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd*:[35]

> Where a plaintiff sues in Singapore in breach of an agreement to submit their disputes to a foreign court, and the defendant applies to a stay, the Singapore Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. The court in exercising its discretion should grant the stay and give effect to the agreement between the parties unless strong cause is shown by the plaintiff for not doing so, To put it in other words the plaintiff must show exceptional circumstances amounting to strong cause for him to succeed in resisting an application for a stay by the defendant. In exercising its discretion the court should take into account all the circumstances of the particular case. In particular, the court may have regard to the following matters, where they arise: -
>
> (a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts.
>
> (b) Whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects.
>
> (c) With what country either party is connected and, if so, how closely.

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[31] *Union Discount Co Ltd v Zoller* [2002] 1 WLR 1517, [2001] EWCA Civ 1755.

[32] *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425, [2001] UKHL 64.

[33] In respect of arbitration agreements not falling within the International Arbitration Act, where the court has a discretion to stay proceedings, the party commencing proceedings in breach of agreement has to show "sufficient reason" why the court should not stay the action to give effect to the agreement: *SA Shee & Co (Pte) Ltd v Kaki Bukit Industrial Park Pte Ltd* [2000] 2 SLR 12 at [39], [2000] SGCA 7.

[34] The same principles generally apply where the plaintiff is seeking leave from the court for service of process out of the jurisdiction; the only difference lies in the burden of proof.

[35] [1975–1977] SLR 258, [1977] 2 MLJ 181. The test is adopted from the English case of *The El Amria* [1981] 2 Lloyd's Rep 119.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) whether the plaintiffs would be prejudiced by having e in the foreign court because they would:

(i) be deprived of security for their claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable here; or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

[26] This is different from the natural forum test where no breach of agreement is involved. Although the factors that the courts consider are similar in both contexts, the standard applied is different. It is generally harder to convince the court that it should stay proceedings commenced in breach of a jurisdiction clause than it is to convince the court to stay proceedings because there is a more appropriate forum elsewhere.

[27] There has been some shift in the thinking of the court in terms of the threshold required for showing strong cause. The protection of party autonomy reached a high water mark in the early 1990's, when it appeared that the courts would require a very high standard for strong cause to justify the breach of contract. Thus, in ***The Asian Plutus***,[36] the Singapore High Court stayed an action commenced in Singapore in breach of an exclusive foreign jurisdiction clause, with the comment – emphasising once again the strong contractual theme – that the parties ought to be held to their bargain since there is a presumption that the parties knew what they were doing. In ***The Humulesti***,[37] the Singapore High Court suggested that in order to show strong cause one had to look at very serious factors like paralysis of the court system, breakdown of law and order, unavailability of legal representation, unavailability of translation or interpretation services, or fundamental change in legal system, in the chosen country. In ***The Vishva Apurva***,[38] the Singapore Court of Appeal suggested that the strong cause needed was something equivalent to such grave difficulty and inconvenience of trial in the chosen foreign court that staying the proceedings in the forum would amount to denying the plaintiff "his day in court"; apart from that, the parties should be held to their bargain.

[28] Soon after, this very strict approach was tempered in ***The Eastern Trust***,[39] where the Singapore High Court emphasised that the degree of strong cause required in each case depends on the circumstances of the case. Important factors to take into account to determine the strength of exceptional circumstances include the nature of the agreement itself (the degree to which the jurisdiction clause represents the genuine agreement[40] of the parties), the degree of surprise on the party held bound to the jurisdiction clause, and the strength of the connections of the case to the chosen forum. This sliding scale approach has since been taken to represent the law in Singapore.[41] There were probably two reasons for this shift. The first is the recognition that there needs to be a more moderate approach in balancing private party interests of the contracting parties with the

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36 [1990] SLR 543, 546-548, [1990] SGHC 119.

37 [1991] SGHC 161.

38 [1992] 2 SLR 175, [1992] SGCA 32.

39 [1994] 2 SLR 526, [1994] SGHC 148.

40 This is particularly important in the carriage of goods context where parties may not know the terms of the contract to which they become parties by operation of statutory law.

41 See, eg, ***Bambang Sutrisno v Bali International Finance Ltd*** [1999] 3 SLR 140 at [8], [1999] SGCA 92; ***Baiduri Bank Bhd v Dong Sui Hung*** [2000] 4 SLR 212 at [16], [2000] SGHC 118; ***The Hyundai Fortune*** [2004] 2 SLR 213 at [8], [2004] SGHC 45.

public procedural interests in the selection of the appropriate forum to adjudicate the parties' dispute. A second reason may be a practical one: anecdotal evidence indicates that the courts of Singapore deal with more cases involving exclusive foreign jurisdiction clauses than cases involving exclusive forum jurisdiction clauses, and the contractual emphasis may work against the development of a commercial court experienced in the handling of international commercial disputes.

[29] At the discretionary stage, the Singapore Court of Appeal has recently decided that it would also consider factors of convenience which were foreseeable by the contracting parties at the time they entered into the contract, although it said that little weight will be accorded to such factors. [42] This is unlike the trend in the English courts to disregard such factors altogether.[43] It should be noted that although little weight is accorded to such factors, the effect may be cumulative: a large number of small factors may add up to exceptional circumstances even if no single factor is by itself sufficient.[44] This consideration of foreseeable factors appears to be another shift from the previous thinking, where the Singapore High Court had placed emphasis on the fact that the parties should be presumed to know that they were doing when they selected an exclusive contractual forum for their disputes.[45] On this analysis, the only foreseeable factors that the courts should take into consideration at all are those that are those that go to questions of public interest rather than the private interests of the parties, for example, where very serious defects of procedure of the chosen forum may deny the plaintiff substantial justice.[46] On this issue, it is not clear what has accounted for this shift.

[30] A dominant concern of the Singapore courts in recent times has been the use of the exclusive jurisdiction clause by the defendant as a delaying strategy when there is no real defence to the plaintiffs' claim. This has been evident in a number of cases where the courts have placed considerable weight on the fact that on the view of the court there was no genuine dispute to be tried since the liability of the defendants was very clear, so that the defendants is seen to be trying to channel the litigation to another jurisdiction either to delay proceedings or to take advantage of laws which may not be so clear to gain a procedural advantage.[47] Two fundamental issues have not been considered by the courts. First, should the court, which in the case an exclusive foreign jurisdiction clause is one in which the parties did not wish to have their dispute heard, actually make that assessment, or should it be left to what is after all the court chosen by the parties to resolve their dispute? Secondly, if the court is to make this assessment, should it assess the absence of a real dispute from the perspective of its own laws or even choice of law rules, or from the perspective of the domestic and private international law of the chosen court?

[31] Conversely if an action is commenced in Singapore pursuant to an exclusive forum jurisdiction clause, it will be nearly impossible to convince the court that justice requires

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42 *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR 6 at [38]-[40], [2003] SGCA 43.

43 *The El Amria* [1981] 2 Lloyd's Rep 119, 129; *The Nile Rhapsody* [1992] 2 Lloyd's Rep 399, 414; *British Aerospace Plc v Dee Howard & Co* [1993] 1 Lloyd's Rep 368, 376.

44 *The Hyundai Fortune* [2004] 2 SLR 213, [2004] SGHC 45.

45 *The Asian Plutus* [1990] SLR 543, 548, [1990] SGHC 119.

46 *The Asian Plutus* [1990] SLR 543, 551, [1990] SGHC 119.

47 *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR 6, [2003] SGCA 43 (CA); *The Hung Vuong-2* [2001] 3 SLR 146, [2000] SGCA 25 (CA); *The Jian He* [2000] 1 SLR 8, [1999] SGCA 71 (CA); *The Kapitan Mezentsev* [1995] 3 SLR 55, [1995] SGHC 91.

that the case should be heard elsewhere. In *The Herceg Novi*,[48] Selvam J said in the Singapore High Court:

> I am not aware of a decision anywhere whereby a court has stayed an action legitimately brought before it on the ground that there is something wanting in its system of justice and that better justice will be done in another jurisdiction. For my part it would be wrong in principle to do so because I cannot accept that the law of Singapore is unjust to either party.

[32] However, a stay of proceedings is still theoretically possible on appropriate facts.[49] For example, if there is no significant connection between the facts or the parties and the forum, and especially if the selection of the forum is not seen as one representing the true intentions of the parties,[50] then it may be possible to convince the court to stay the action on the basis that it would be much more convenient for the trial to be held abroad.

6 THE ANTI-SUIT INJUNCTION

[33] The anti-suit injunction[51] is an order of the court restraining a person from commencing or continuing proceedings in a foreign country. The order is directed at the person, and not the foreign court. Even so, the anti-suit injunction is recognised to be invasive, and as a matter of international comity, great caution is generally exercised before it will be granted. So as a general rule, in the absence of a jurisdiction agreement, an anti-suit injunction will only be granted if the forum is the natural forum for the substantive dispute on the merits, and the conduct of the party in commencing or continuing foreign proceedings is vexatious or oppressive. Moreover, the remedy is a discretionary one, and the courts are generally mindful of considerations of international comity in deciding whether to grant the injunction. It is not enough to show that Singapore is the natural forum to persuade the court to do so.

[34] However, international comity plays a reduced role when the anti-suit injunction is sought to restrain a party from breaching a jurisdiction or arbitration clause.[52] In such cases, the presumption is reversed. The remedy is still discretionary, of course, but strong cause has to be shown why the breach of contract should not be restrained by injunction. As Millett LJ said in the English Court of Appeal in *The Angelic Grace*:[53]

> … in my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them.
>
> …
>
> The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary

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[48] *The Herceg Novi* [1998] SGHC 303. See also: *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2003] SGHC 142 at [62]. This was a case of natural and not agreed forum, but the reasoning applies to cases of jurisdiction agreements with even greater force.

[49] Compare the English approach denying the existence of a discretion to stay at all when there is an exclusive forum jurisdiction clause: *S & W Berisford plc v New Hampshire Insurance Co* [1990] 2 QB 631, 638.

[50] See *The Eastern Trust* [1994] 2 SLR 526, [1994] SGHC 148.

[51] It has generally been assumed that damages for the breach of a jurisdiction clause will be inadequate. This assumption may be challenged to the extent that substantial damages may become available: see paragraph [24].

[52] The anti-suit injunction has yet to be applied to the breach of a mediation clause, although it is theoretically available since the underlying basis is the same: a contractual derogation agreement.

[53] *Aggeliki Charis Compania Maritima SA v Pagnan SpA, The Angelic Grace* [1995] 1 Lloyd's Rep 87 (CA) 96.

and is not exercised as a matter of course, but good reason needs to be shown why it should not be exercised in any given case.

[35] This approach has been followed in Singapore.[54] The only practical limitation appears to be that as a matter of international comity, the court would only act if it is the chosen forum. Where it is not the chosen forum, it would leave the parties to their remedies at the chosen forum. Thus, in one case, the Australian court had, based on its own mandatory rules, assumed jurisdiction to determine a dispute even though the contract in question contained an exclusive foreign jurisdiction clause in favour of the courts of London. The aggrieved party sought an anti-suit injunction from the Singapore court. The court refused to act, stating that "the Singapore court should not assume the role of an international busybody".[55]

[36] It has been recognised in English law that an exclusive jurisdiction agreement gives rise to the same issue whether the agreement should be upheld, whether the question before the court is one of stay of proceedings in the forum, or the grant of an anti-suit injunction to restrain foreign proceedings, subject to different considerations of international comity.[56] Although there have been statements in English case law as to how the English court, in issuing anti-suit injunctions, is doing the foreign courts a favour by keeping wasteful litigation out of their courts,[57] the more common attitude today is that the anti-suit injunction calls for much great caution because of its indirect interference with the proceedings in other countries.[58] Although the Singapore court has not expressed any view on the question of comity in the context of anti-suit injunctions to prevent breaches of contract, this is likely to represent Singapore law.

[37] The anti-suit injunction has been recognised to be a particularly subversive instrument in a system of harmonised jurisdictional rules. The European Court of Justice has recently ruled that the use of the anti-suit injunction in the context of the Brussels Regulation I is not compatible with the scheme of division of jurisdiction under the Regulation.[59] This ruling also applies to cases where the English court is attempting to enforce what appears in its own view as an exclusive English jurisdiction clause, because where proceedings have commenced in such cases in another country within the Brussels jurisdiction scheme, the English court not being the first court seised of the proceedings is not entitled to challenge the jurisdiction of the court first seised.[60]

[38] The Singapore court suffers no such constraint at present, and, like the English court in respect of a jurisdictional conflict not falling within the Brussels jurisdiction scheme, it is likely to be business as usual as far as anti-suit injunctions are concerned.[61] This means if

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[54] *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603, [2002] SGHC 104 (a case on breach of arbitration agreement, but the principles are the same).

[55] *People's Insurance Co Ltd v Akai Pty Ltd* [1998] 1 SLR 206; [1997] SGHC 165.

[56] *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425, [2001] UKHL 64.

[57] See, eg, *Amoco v TGTL* 26 June 1996 (QBD).

[58] The German court reacted with great indignation to an English anti-suit injunction: *Re Enforcement of an English Injunction* [1997] ILPr 320, a reaction that appeared to come as something of a surprise to the English courts: *Phillip Alexander Securities and Futures Ltd v Bamberger* [1997] ILPr 73 at [48]. On the other hand, the English court reacted with similar indignation to a New York injunction: *General Star Indemnity Ltd v Stirling Cooke Browne Reinsurance Brokers Ltd* [2003] ILPr 19, [2003] EWHC Comm 3. The House of Lords acknowledged the indirect interference with the procedure of foreign courts in *Turner v Grovit* [2002] 1 WLR 107 at [22]-[29], [2001] UKHL 65.

[59] *Turner v Grovit Case* C-159/02 (27 April 2004).

[60] *Erich Gasser GmbH v MISAT Srl* Case C116/02 [2004] 1 Lloyd's Rep 222.

[61] The author is not aware of any reported case in Singapore where an anti-suit injunction has been granted to restrain the breach of an exclusive choice of forum court agreement. This could be partly due to the fact that there are not many international contracts containing an exclusive choice of Singapore court

a Singapore court disagrees with a foreign court's interpretation of a jurisdiction agreement, or disagrees with the assumption of jurisdiction by a foreign court in spite of an exclusive choice of Singapore court clause, it may be prepared to issue an anti-suit injunction unless strong cause or other considerations of international comity are shown why the injunction should not be granted. The mere fact that another court has assumed jurisdiction is not a consideration of international comity.

[39] Proceedings for anti-suit injunctions can themselves be the subject of anti-suit injunctions. This is an anti-anti-suit injunction. This could itself be subject to an anti-anti-anti-suit injunction. The significance of this procedural strategy in the context of restraining breaches of jurisdictional agreement lies in the scope of the jurisdiction clause. In the case mentioned above in paragraph [35], could the anti-suit injunction proceedings brought in Singapore be regarded as a breach of the exclusive jurisdiction clause submitting all disputes to London, and therefore a proper subject for an anti-anti-suit injunction from the English court? This is a question of the construction of the jurisdiction clause. In principle, at least under the common law, it appears to be open to the parties to stipulate an exclusive forum for such remedies.[62] Practically, however, this is not likely to be an issue so long as the court takes the view that the parties should go to the chosen forum for this kind of remedy.

7 PUBLIC POLICY AND MANDATORY RULES

[40] A foreign exclusive jurisdiction clause may not be given effect to if to do so will contravene some international mandatory rule of the forum or some fundamental public policy of the forum. For example, the Singapore court has refused to give effect to a foreign exclusive jurisdiction clause where to do so would lead to the foreign court applying a limitation to the plaintiff's claim that is lower than that provided for under its mandatory statute giving effect to an international convention.[63] In such cases, it does not matter what the law governing the jurisdiction agreement is. The law of the forum applies as mandatory law.

[41] Another example of a mandatory rule is found in the Unfair Contract Terms Act.[64] An exclusive foreign jurisdiction agreement may contravene the statute if it seen to impose too restrictive or onerous conditions on the enforcement of the terms of the contract.[65] The protective statutory provisions has mandatory effect even if the jurisdiction agreement is expressly governed by a foreign law, if choice of law clause was imposed primarily for the purpose of evading the operation of the statute, or if one of the contracting parties had acted as a consumer and the essential steps necessary for the making of the contract were taken by him or his agents in Singapore.[66] However this provision can apply only to choice of court agreements, and does not apply to arbitration agreements.[67] Given the level of sophistication and high costs of arbitration in modern times, it is not so clear that this distinction is really justified. A Singapore consumer

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clause, and partly due to the fact that such cases may go unreported because there is little to argue against the issue of such injunctions.

62 See *Sabah Shipyard (Pakistan) Ltd v The Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571, [2002] EWCA Civ 1643 where it was held that claims for anti-suit injunctions fell within the jurisdiction clause.

63 *The Epar* [1984-1985] SLR 409, [1984] SGHC 16, giving effect to the Carriage of Goods by Sea Act 1972. Doubts were cast on the mandatory nature of the relevant statutory provision in *Pacific Electric Wire & Cable Co Ltd v Neptune Orient Lines Ltd* [1993] 3 SLR 60, [1993] SGHC 122 but the mandatory language was subsequently reinforced by Parliament. See now the Carriage of Goods by Sea Act (Chapter 33, 1998 Revised Edition), section 3(1).

64 Chapter 396, 1994 Revised Edition.

65 Section 13.

66 Section 27(2).

67 Section 13(2).

entering into an internet transaction with a European company is not likely to find greater comfort in an obligation to submit a dispute to arbitration in Paris, than in an obligation to submit the dispute exclusively to the courts of London.

8 EXISTENCE AND VALIDITY OF THE JURISDICTION CLAUSE

8.1 A Contract Question

[42] The question that is usually framed is not whether there is a valid jurisdiction agreement between the parties, but whether the contract between the parties contains a jurisdiction clause. The jurisdiction agreement is generally seen as a *term* in the substantive contract between the parties. It is still seen as something which is an adjunct to the main contract. Questions of its existence and validity are often, though not invariably, tied to the issues of the existence and validity of the main contract.

8.2 Validity and Separability

[43] Just as the arbitration agreement is treated as separable from the main contract,[68] so is the jurisdiction agreement.[69] Where the allegation is that the contract has been avoided *ab initio*, for example, because of fraud or misrepresentation, or that the contract is unenforceable because of an illegality, it is clear that the court will view the question whether the contract is avoided or unenforceable as an issue that falls within the jurisdiction clause itself. This is the doctrine of separability, founded on the "policy of the law [that] it is so desirable that the agreement as to how a dispute should be resolved should be preserved that it should remain enforceable and effective even if the … contract is voidable".[70] Another policy reason for the separability doctrine is the minimisation of substantive disputes at the jurisdictional stage.[71]

[44] However, these policy reasons do not apply if the jurisdiction clause was the direct object of a fraud. Then, even though generally fraud renders the agreement voidable only,[72] if the allegations of fraud in respect of the jurisdiction agreement are not challenged or made out to a satisfactory[73] standard, the court will not give effect to the jurisdiction agreement.[74]

[45] Moreover, this doctrine does not insulate the jurisdiction clause from the argument that it does not exist because there was no agreement at all.[75] Difficult choice of law questions can arise in this respect, as the common law choice of law rules for the existence of an

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[68] See, eg, Article 16(1), UNCITRAL Model Law on International Commercial Arbitration, First Schedule, International Arbitration Act (Chapter 143A, 1995 Revised Edition).

[69] *Industrial & Commercial Bank Ltd v Banco Ambrosiano Veneto SPA* [2000] SGHC 188. This position is prevalent in the Commonwealth: *Mackender v Feldia AG* [1967] 2 QB 590; *Ash v Corporation of Lloyds* [1992] 9 OR (3d) 755; *FAI General Insurance Co Ltd v Ocean Marine Mutual P & I Assoc Ltd* [1998] Lloyd's Rep IR 24 (NSW).

[70] *IFR Ltd v Federal Trade SPA* 19 September 2001 (QBD).

[71] *Industrial & Commercial Bank Ltd v Banco Ambrosiano Veneto SPA* [2000] SGHC 188.

[72] The effect of fraud on the agreement is an issue governed by the proper law of the agreement.

[73] It is not clear what this standard is. Leading textbooks suggest that at the jurisdictional stage it is enough to show a good arguable case that there is a valid jurisdiction clause according to the proper law of the agreement. It could be argued that the normal standard of proof for civil litigation, the balance of probabilities, should be used since the jurisdiction agreement is a contractual agreement like any other. The policy justification for the lower standard of proof may be to avoid going into the merits of the substantive disputes at the jurisdictional stage. In this case, the procedural considerations outweigh the contractual ones.

[74] See *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] 1 Lloyd's Rep 784, which is likely to be highly persuasive in Singapore law.

[75] For example, where the jurisdiction agreement was forged: *Crescent Oil and Shipping Services Ltd v Banco Nacional De Angola* 28 May 1999 (QBD).

agreement is unclear, with the main contenders being the law of the forum[76] and the proper law of the putative agreement.[77] Although it is theoretically possible for the jurisdiction agreement to attract its own choice of law rule apart from the law governing the substantive agreement (*depeçage*), there is no case in the common law of Singapore or England[78] that has taken that position. Thus, the law governing the jurisdiction agreement, for all practical purposes, is the law governing the contract. The view that the jurisdiction agreement is merely a term of the larger contract is quite entrenched. The jurisdiction clause is itself therefore taken as a very strong indication of the selection of the proper law of the contract,[79] or as a very relevant connection to determine the objective proper law.[80]

8.3 Formalities

[46] There are no specific formalities for a choice of court agreement. Whether there are any relevant formalities to be complied with is an issue of formalities in the choice of law for contracts. Under Singapore law, formalities are satisfied if the formal requirements of either the proper law of the contract or the law of the place where the contract was formed are satisfied.[81] Thus, generally, a jurisdiction agreement can be informal. It can be an implied term of a contract. It can even be oral.[82]

8.4 Certainty

[47] The issue whether a jurisdiction agreement is certain enough to be enforced is a substantive question of contract law, to be determined by the proper law of the jurisdiction agreement, which is often the proper law of the contract. Where the common law is applicable as the proper law, it is permissible to have "floating" jurisdiction clauses: the venue need not be fixed at the time of the contract. The parties can agree that the exclusive forum be determined at a later date either by objective events or even at the option of one of the parties.[83]

9 INTERPRETATION OF THE JURISDICTION AGREEMENT

[48] There are no special rules for the interpretation of jurisdiction clause. It is a term of a contract, and therefore its interpretation is governed by the law governing the contract.[84] There are two important aspects of the interpretation of the jurisdiction clause. The first is whether the dispute falls within the jurisdiction agreement. The second is whether there has been any breach of the jurisdiction clause. If the dispute does not fall within the jurisdiction clause, then the clause is irrelevant. If the dispute falls within the clause and there has been a breach of the agreement, then the court requires the party breaching the contract to justify with strong cause or exceptional circumstances why that party should not be held to the bargain. If the dispute falls within the jurisdiction clause, but there has been no breach of contract, then natural forum principles apply, and a separate question arises whether the jurisdiction clause has any effect in the court's assessment of where the natural forum lies.

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76 *Mackender v Feldia AG* [1967] 2 QB 590; *Oceanic Sun Line Special Shipping Company Inc v Fay* (1988) 165 CLR 197 (High Court of Australia).

77 *The Parouth* [1982] 2 Lloyd's Rep 351 (CA); *The Atlantic Emperor* [1989] 1 Lloyd's Rep 548 (CA).

78 Under English statutory law, the jurisdiction clause is subject to common law choice of law rules (subject to the Brussels Regulation I where it applies) while the rest of the contract is subject to the choice of law rules of the Rome Convention.

79 *The Komninos S* [1990] 1 Lloyd's Rep 541 (CA).

80 *Las Vegas Hilton Corporation t/a Las Vegas Hilton v Khoo Teng Hock Sunny* [1997] 1 SLR 341 at [39].

81 *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* [1996] SGHC 285

82 See, for example, *The Nile Rhapsody* [1994] 1 Lloyd's Rep 382.

83 *The Star Texas* [1993] 2 Lloyd's Rep 445; *The Maldive Importer* [1982-1983] SLR 510, [1983] SGHC 22.

84 Or the law governing the interpretation of the contract, if the parties choose it separately.

9.1 The Scope of the Jurisdiction Agreement

[49] Whether there is a dispute that falls within the scope of the jurisdiction agreement is a question of construction of the agreement in accordance with the law governing the issue of interpretation of the agreement, normally the proper law of the agreement.[85] Normally, foreign law is not proven at this stage, and by default the Singapore court will apply Singapore law instead. The interpretation of a jurisdiction clause can be the subject of estoppel by a foreign judgment even if the foreign court had only decided a question jurisdiction, if that judgment is binding on the parties under the conflict of laws rules of Singapore.[86]

[50] Consistently with what they perceive to be the reasonable expectations of commercial parties, the Singapore courts take a broad view of "claims" or "disputes" which fall within the jurisdiction clause. As the Court of Appeal recently held: "A claim which is not met becomes a dispute which would require determination".[87] Thus, the question whether the absence of any arguable defence renders it a case where there is no "dispute" is not generally treated as an issue of the scope of the jurisdiction clause, but an issue of whether how the court should exercise its discretion.[88] Whether the jurisdiction clause includes disputes which are non-contractual is also a question of construction. Similarly, the courts take a robust approach, and it is not difficult to persuade the court to decide that the parties had intended to include non-contractual disputes related to their contract.[89]

[51] The wording of the jurisdiction clause is by itself not conclusive whether it is exclusive or non-exclusive. Whether a jurisdiction clause is exclusive or not depends on the intentions of the parties as interpreted by the court, and not on whether the term "exclusive" is used in the clause.[90] There is no presumption in Singapore law[91] either way whether a jurisdiction clause has been intended by the contracting parties to be exclusive or otherwise.

9.2 Breach of Jurisdiction Agreement

9.2.1 Exclusive and Non-Exclusive Choice of Court Agreement

[52] The Singapore courts have generally been quite clear in distinguishing between exclusive and non-exclusive jurisdiction clauses. There has, however, been considerable confusion when it comes to linking the issue with whether there has been a breach of contract. The difficulty arises principally in the context of what appears on the face of the agreement to be a non-exclusive jurisdiction agreement, and it may arise because of a desire of the court to hold the trial in the non-exclusively chosen court, which often happens in the case where the chosen court is that of the forum.

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85 *The Jian He* [2000] 1 SLR 8 at [16], [1999] SGCA 71 (CA); *Baiduri Bank Bhd v Dong Sui Hung* [2000] 4 SLR 212, [2000] SGHC 118.

86 *Baiduri Bank Bhd v Dong Sui Hung* [2000] 4 SLR 212, [2000] SGHC 118.

87 *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR 6 at [32], [2003] SGCA 43.

88 See paragraph [29] above.

89 *The Jian He* [2000] 1 SLR 8, [1999] SGCA 71 (CA).

90 *Frans Bambang Siswanto v Coutts & Co AG* [1996] SGHC 250; *Malayan Banking Bhd v Measurex Engineering Pte Ltd* [2001] SGHC 5.

91 If there is a presumption in a foreign law which governs the jurisdiction agreement, then that presumption is likely to be applied as a substantive rule of law. It is arguable that such a presumption is procedural, for example, if the foreign law views jurisdiction clauses as purely procedural devices, but it is suggested that the forum's characterisation of the issue of the construction of a contractual as substantive should prevail. See *PT Bank Bali v Santosa Widjaja* [1997] SGHC 142, where the "procedural" law of the Indonesian proper law was referred to in order to interpret whether a term was an exclusive jurisdiction clause.

[53] Where it is found that both parties have agreed that a single forum is their chosen exclusive forum, and their dispute falls within the clause, the issues are very clear. Both parties have agreed that no other court shall hear the case, and any proceedings by either party in any court other than the chosen court will constitute a breach of contract, which will require the party initiating such action to show strong cause before the Singapore court why the agreement should not be adhered to.

[54] It is also fairly straightforward where the jurisdiction clause is clearly semi-exclusive. There are many varieties of the semi-exclusive jurisdiction clause. A typical clause would give one party a choice of fora in which to sue the other party, but the other party is bound by that choice. The clause is non-exclusive with respect to the first party, but exclusive with respect to the other party. Quite often, the clause would also require the other party to sue the first party only in a selected forum, which then reinforces the semi-exclusive nature of the jurisdiction agreement.

[55] However, beyond these clear cases, when it comes to deciding whether a jurisdiction agreement has been breached, the distinction between exclusive and non-exclusive becomes less helpful. This is because the common law courts have developed a number of techniques to deal with non-exclusive choice of court clauses, and these techniques have not been very clearly explained in the cases. Three strands of reasoning can be discerned.

9.2.2 Agreement to Waive Objection

[56] Of increasing importance is the use of the waiver of objection clause with a non-exclusive jurisdiction clause. Here, one or both parties agree to waive any objections to a chosen forum exercising jurisdiction. This kind of clause is often coupled with the non-exclusive choice of jurisdictions by one contracting party, and the other party agrees not to object to the jurisdiction of any court chosen by the first party. While this kind of agreement does not fit into the traditional mould of a jurisdiction agreement, it is suggested that it is no less potentially an exclusive or semi-exclusive jurisdiction agreement. It can perform the same derogation function as the traditional exclusive jurisdiction clause.

[57] There are two versions of this waiver of objection agreement. First, agreement could be construed as one not to object to the chosen court exercising its jurisdiction. Secondly, it could be construed as an agreement not to object to any argument that the chosen forum is the most appropriate forum to hear the case. The first is more specific; the promise only relates to proceedings before the chosen court. This will be referred to as the narrow waiver of objection clause. The second is the same argument at a more general level of abstraction, not being tied to any particular forum. The second version will be referred to as the wide waiver of objection clause. The distinction, however, is an important one.

[58] If there is a non-exclusive Singapore jurisdiction clause, and one party has agreed not to object to the chosen court's exercise of its jurisdiction (the narrow waiver of objection clause), and proceedings are commenced in Singapore, that party, in asking the court to stay proceedings because the court of another country is the more appropriate forum, is acting in breach of contract, and is expected to show strong cause why the agreement should not be upheld (ie, why he should refrain from objecting to the court exercising jurisdiction).[92] However, if the non-exclusive jurisdiction clause is a foreign one coupled with the narrow waiver of objection clause, then if proceedings are commenced in

[92] *Bambang Sutrisno v Bali International Finance Ltd* [1999] 3 SLR 140, [1999] SGCA 92.

Singapore, then the party who has agreed to the waiver and who commenced action in Singapore is not acting in breach of contract. He has only promised not to object to the foreign court exercising jurisdiction; his promise has nothing to do with what arguments he can raise in the Singapore forum. The party who wants to stay the action so that the chosen forum can hear the case cannot therefore put the party who commenced the action in Singapore to proof of strong cause why the action should continue in Singapore. Thus the narrow waiver of objection clause has the same effect as an exclusive jurisdiction clause, but only from the perspective of the chosen court.

[59] If the wide waiver of objection clause is used, however, then it operates as an exclusive jurisdiction clause in both cases. In the first situation, the party asking the chosen court to stay is acting in breach of contract because he has agreed not to argue that any other court is the more appropriate forum to hear the case. In the second situation, the party who wants the Singapore court to hear the case is acting in breach of contract because he has agreed not to argue that any court other than the chosen is the most appropriate forum. Thus, in both cases, the party in breach has to argue to the standard of a strong cause why he should be allowed to breach the agreement.

[60] In both cases, the breach of agreement does not lie in the commencement of the proceedings, but in raising the objections based on the appropriateness of the forum. But this has to be understood in the context of the concept of jurisdiction in common law countries like Singapore. Jurisdiction is a two-pronged concept. The two parts are the nexus forming the basis of the existence of the jurisdiction, and the exercise of the jurisdiction on principles of natural forum. While the traditional jurisdiction clause attacks the first prong (commencement of proceedings to invoke the jurisdiction of the court), this new waiver of objection clause attacks the second (whether the jurisdiction having been invoked should be exercised). The latter is a relatively new phenomenon. But this is because the concept of the exercise of jurisdiction as a significant aspect of the concept of jurisdiction in the common law is less than twenty years old.[93] We should not blinded by the technique used by the parties. Whether the agreement relates to the commencement or the exercise of the jurisdiction, in both cases, so long as the element of derogation is clear, it should be seen as the selection of an exclusive (or semi-exclusive[94]) forum to determine a dispute.[95] However, to avoid confusion, this paper will continue to use the term "non-exclusive" and "exclusive" in the traditional senses.

[61] If the waiver of objection is clearly spelt out, then it ought to be given effect to, even if it means practically giving effect to an exclusive or semi-exclusive jurisdiction clause. However, in many cases, such agreements are implied. In England, the prevailing judicial view (though not yet tested by the House of Lords) is that the narrow waiver of objection clause is necessarily implied into every non-exclusive jurisdiction clause,[96] at

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[93] *The Spiliada* [1987] AC 460; adopted in Singapore in *Brinkerhoff Maritime Drilling Corp and Another v PT Airfast Services Indonesia* [1992] 2 SLR 776, [1992] SGCA 45.

[94] It may be exclusive only insofar as the party who is sued in the (chosen) court is concerned.

[95] In a different context, English law has recognised the need to see common law jurisdiction as a composite of existence and exercise of jurisdiction. Thus, asking a court not to exercise its jurisdiction is no longer regarded as submission to the jurisdiction of the court to determine the merits of the case, even though such an application invariably involves acceptance of the existence of the jurisdiction to determine merits: Civil Jurisdiction and Judgments Act 1982 (UK), section 33. Singapore law has come close to making the same move judicially, though it has not actually done so: *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603, [2002] SGHC 104.

[96] *British Aerospace Plc v Dee Howard & Co* [1993] 1 Lloyd's Rep 368; *Commercial Bank of the Near East plc v A B C and D* [1989] 2 Lloyd's Rep 319; *Amoco v TGTL* 26 June 1996; *Mercury Communications Ltd v Communication Telesystems International* [1999] 2 All ER Comm 33; *Burrows v Jamaica Private Power Co Ltd* [2001]

least where the jurisdiction agreement is governed by English law.[97] This has the effect of turning all non-exclusive jurisdiction agreements (governed by English law by the choice of the parties or by default because no foreign law is proven) into exclusive jurisdiction clauses when proceedings are commenced in the chosen court, but not when commenced in another jurisdiction.[98] It has the practical result that a non-exclusive choice of forum court agreement has a much more powerful effect than a non-exclusive choice of foreign court agreement in the court of the forum; thus encouraging parties to go to chosen court to enforce the jurisdiction agreement. There is some evidence that Singapore courts are following the same line of reasoning,[99] but the evidence is not conclusive.[100]

[62] Thus, on the present state of the authorities, it is not clear when a waiver of objection agreement will be implied if it is not express. Nor is it clear, if such an inference is drawn, whether it will be the narrow or wide version. There is little guidance from the courts.

9.2.3 Agreement as to Appropriate Forum

[63] The Singapore court is likely to infer from the non-exclusive choice of court clause that the parties had thought (but not in any contractual sense) that the chosen forum is an appropriate one to resolve their disputes. On this view, the clause is merely a factor to be weighed when the court determines where the natural forum for the dispute lies.[101] On the other hand, the court may go further.

[64] A non-exclusive choice of court clause may be said to represent an agreement between the parties that the chosen court is an appropriate forum, or the most appropriate forum, to adjudicate the disputes arising within the jurisdiction clause.[102] If the agreement has any promissory content at all, then it must mean that there is an undertaking not to argue otherwise. The former inference does not have much significance for courts like those in Singapore which determines the question of natural forum not by reference to whether it is an inappropriate forum,[103] but whether it is not the clearly more appropriate forum. In the case of the latter inference, it should follow that it would be a breach of contract to argue that any other forum is the more appropriate one to hear the parties' dispute. This means that the promissory content would be the same as the wide waiver of objection clause discussed in the previous section.

[65] Theoretically, whether any such agreement is to be implied from the non-exclusive choice of court clause, and whether such inferred agreement has any promissory content, and if so, what content, are all issues governed by the proper law of the jurisdiction

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EWHC Comm 488; *JP Morgan Securities Asia Private Ltd v Malaysian Newsprint Industries Sdn Bhd* [2001] 2 Lloyd's Rep 41.

97 This must be so since the interpretation of the jurisdiction agreement is subject to its proper law.

98 *Amoco v TGTL* 26 June 1996 (QBD).

99 *Baiduri Bank Bhd v Dong Sui Hung* [2000] 4 SLR 212, [2000] SGHC 118; *Societe Generale v Tai Kee Sing* [2003] SGHC 139.

100 See the cases in the following footnote, where no such inference had been drawn.

101 *Industrial & Commercial Bank Ltd v Banco Ambrosiano Veneto SPA* [2000] SGHC 188; *Datuk Hamzah bin Mohd Noor v Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj* [2001] 4 SLR 396, [2001] SGHC 281; *Yugiantoro v Budiono Wododo* [2002] 2 SLR 275, [2001] SGHC 349; *Malayan Banking Berhad v Measurex Engineering Pte Ltd* [2001] SGHC 5.

102 Not surprisingly, this inference is not usually drawn in cases where several jurisdictions are specified as possible venues for litigation: *Baiduri Bank Bhd v Dong Sui Hung* [2000] 4 SLR 212, [2000] SGHC 118.

103 Compare the Australian approach based on the clearly inappropriate forum (*Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538), where an agreement as that a forum is appropriate will have greater impact on the test for the exercise of jurisdiction.

agreement. It would be helpful if the intentions of the parties are clearly spelt out, but unfortunately, in practically all cases it is up to the courts to draw their own inferences. Unfortunately, the cases reveal more conclusions than explanations, and sometimes even the conclusions are not very clear.

[66] In *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd*,[104] the Singapore High Court inferred from a non-exclusive choice of foreign (Indonesian) court clause that the parties had agreed that it was an appropriate forum, and it was held that the plaintiffs should not be heard to argue that Indonesia was not an appropriate forum. But the party seeking to have the case heard in Singapore was not put to argue on the basis of strong cause why the action should continue. If the agreement, though promissory, only related to *an* appropriate forum, it would not be a breach of contract for the plaintiffs to argue that Singapore was the *more* appropriate forum. Thus, it was not surprising that the court considered that the jurisdiction clause was only one of the factors going to the question of appropriateness in determine the natural forum for the dispute; it had no further effect. No case in Singapore has gone so far to infer from the non-exclusive selection of a court that they have agreed that it is the most appropriate forum so that it would be a breach of contract to argue that any other court than the chosen one is the more appropriate forum.[105] A number of cases in Singapore have considered that a non-exclusive forum jurisdiction clause has no other effect other than as a factor to be weighed in the determination of the natural forum.[106] Thus, under Singapore law, the non-exclusive selection of court clearly has some weight in the determination of the natural forum, but on a contractual analysis, the strongest inference drawn so far[107] from a non-exclusive choice of court clause is an agreement that it is an appropriate forum. This, as suggested above, has little significance in view of the version of the natural forum test adopted in Singapore.

[67] If the inference is drawn that the parties have agreed that the non-exclusively chosen court is the most appropriate forum, then the contractual analysis should follow logically, and the parties should be allowed to argue that a non-chosen forum is more appropriate based only upon exceptional circumstances amounting to strong cause. To say that the parties have agreed to the chosen forum being the most suitable forum, and therefore agreed not to object to the assumption of the jurisdiction by the chosen court (the narrow waiver of objection agreement), as the English cases have done,[108] seems to be drawing the line somewhat narrowly and artificially. There does not appear to be any good reason in principle why non-exclusive foreign jurisdiction clauses should be treated differently from non-exclusive forum jurisdiction clauses.[109]

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[104] [1996] SGHC 285. Approved of in *Bambang Sutrisno v Bali International Finance Ltd* [1999] 3 SLR 140, [1999] SGCA 92.

[105] Arguably, some English cases have taken that step, at least in respect of a choice of forum court clause: *S & W Berisford plc v New Hampshire Insurance Co* [1990] 2 QB 631, 638; *Cannon Screen Entertainment Ltd v Handmade Films (Distributors) Ltd* 11 July 1989; *British Aerospace Plc v Dee Howard & Co* [1993] 1 Lloyd's Rep 368; *Amoco v TGTL* 26 June 1996 (QBD).

[106] *Industrial & Commercial Bank Ltd v Banco Ambrosiano Veneto SPA* [2000] SGHC 188; *Datuk Hamzah bin Mohd Noor v Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj* [2001] 4 SLR 396, [2001] SGHC 281; *Yugiantoro v Budiono Wododo* [2002] 2 SLR 275, [2001] SGHC 349; *Malayan Banking Berhad v Measurex Engineering Pte Ltd* [2001] SGHC 5.

[107] Not counting the inference of the narrow waiver of objection agreement: see paragraph [61] above.

[108] See especially *British Aerospace Plc v Dee Howard & Co* [1993] 1 Lloyd's Rep 368 and *Amoco v TGTL* 26 June 1996 (QBD).

[109] *The Chapparal* [1968] 2 Lloyd's Rep 158 (CA) 164; *Burrows v Jamaica Private Power Co Ltd* [2001] EWHC Comm 488.

9.2.4 Right to Sue

[68] A non-exclusive choice of court agreement clearly confers a right on the contracting parties to have the dispute heard in the chosen forum. This is the prorogation effect of the agreement. There has been a tendency in the English law to see in this right to sue also a right not to be sued elsewhere:[110] an implied derogation. Thus, the fact that the parties had submitted themselves to the chosen court, or had contractually bargained for their disputes to be heard in that chosen court, implies that there is a right to have the dispute resolved *only* in that forum. Any action brought in another jurisdiction is seen to derogate from the right to sue in the chosen forum.[111] This line of reasoning has also surfaced in Singapore authorities.[112]

[69] In common law systems, there is a distinction between a right to commence proceedings (which depends on the existence of jurisdiction) and the right to have a dispute eventually resolved by the courts (which depends on the court exercising its jurisdiction). If parties agree to have their disputes resolved in a particular court (as supposed to merely submitting themselves to the jurisdiction of the court), it may be a legitimate inference on appropriate facts that the parties had intended that no other court should adjudicate the case. In such a case it is clearly an exclusive jurisdiction clause.[113]

[70] However, if no such inference is drawn, and the conclusion is that it is a non-exclusive choice of court agreement, then it is difficult to see why it should necessarily follow from the agreement that the parties should not object to the exercise of jurisdiction by the chosen court. It is the corollary of a non-exclusive jurisdiction agreement that the parties have reserved the right to have the dispute resolved in another jurisdiction. In other words, while the right to sue in the chosen court has been conferred by the contract, whether or not there is a further right to have the dispute resolved *only* in that chosen court raises the question whether the parties have either agreed not to commence action elsewhere, or agreed to waive any objections on the grounds that there is a clearly more appropriate forum elsewhere. There is indeed a breach of a prorogation agreement if one of the parties takes out an anti-suit injunction to restrain the other party from commencing action in the chosen forum; this is clearly in breach of the right to sue in the chosen court.[114] But a party, in asking the chosen court not to exercise its jurisdiction, does not breach a prorogation agreement. The question is whether there is any further agreement that can be inferred or implied from the choice of court agreement. And if there is indeed a further agreement not to object to the appropriateness of the chosen court, then it raises the question why the agreement is not simply treated as an exclusive choice of court agreement. Unfortunately, the courts offer little by way of explanation

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[110] *The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Ltd v Gann* [1992] 2 Lloyd's Rep 528; *Gulf Bank KSC v Mitsubishi Heavy Industries Ltd* [1994] 1 Lloyd's Rep 323; *Cannon Screen Entertainment Ltd v Handmade Films (Distributors) Ltd* [1989] BCLC 660; *S & W Berisford plc v New Hampshire Insurance Co* [1990] 2 QB 631; *British Aerospace Plc v Dee Howard & Co* [1993] 1 Lloyd's Rep 368; *Commercial Bank of the Near East plc v A B C and D* [1989] 2 Lloyd's Rep 319; *Amoco v TGTL* 26 June 1996; *Import Export Metro Ltd and Another v Compania Sud Americana de Vapores SA* [2003] 1 Lloyd's Rep 405, [2003] EWHC 11; *JP Morgan Securities Asia Private Ltd v Malaysian Newsprint Industries Sdn Bhd* [2001] 2 Lloyd's Rep 41.

[111] This implication was made explicitly in *Sabah Shipyard (Pakistan) Ltd v The Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571, [2002] EWCA Civ 1643.

[112] *Asia-Pacific Ventures II Ltd and Others v PT Intimutiara Gasindo* [2002] 3 SLR 326, [2001] SGHC 144; *Bayerische Landesbank Girozentrale v Kong Kok Keong* [2002] 4 SLR 283, [2002] SGHC 51.

[113] *British Aerospace Plc v Dee Howard & Co* [1993] 1 Lloyd's Rep 368, 375.

[114] *Sabah Shipyard (Pakistan) Ltd v The Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571, [2002] EWCA Civ 1643.

except the need to uphold the parties' contractual bargain. But the under-investigated question is: what is the content of the bargain?

10 EFFECT OF PARTY AUTONOMY ON FOREIGN JUDGMENTS

[71] Foreign judgments may be recognised or enforced, subject to defences, under the private international law of Singapore. Foreign judgments may be recognised for the purpose of raising an estoppel on the cause of action or specific issues between the parties. Foreign judgments for specific or ascertainable sums of money may be enforced against the judgment debtor in Singapore. Without going into the details of the recognition and enforcement regimes in Singapore, there is a general requirement that the foreign court has "international jurisdiction" over the party against whom the foreign judgment is sought to be recognised or enforced. Generally, this means that the person must be, at the time of the commencement of the foreign proceedings, physically present, resident, or has submitted to the jurisdiction of the foreign court. The submission to the foreign court may be by the conduct of the party during the judicial proceedings indicating without doubt that he had accepted the jurisdiction of the court to determine the merits of the case.

10.1 Prorogation of Jurisdiction

[72] More importantly for this paper, the submission may also take the form of a jurisdiction agreement. The jurisdiction agreement here plays a pure prorogation role, but in a different sense. The question is whether the party has submitted to the jurisdiction of the foreign court under the rules of Singapore private international law, not under the rules of foreign procedure, although reference may be made to the foreign procedure to understand whether there has been submission under Singapore law. Thus, under the law of Singapore, even if the defendant did not appear to contest the proceedings in the foreign court (and therefore cannot be said to have submitted to the jurisdiction of the foreign court), the fact that he has agreed to submit to the jurisdiction is considered a good enough reason to recognise or enforce the foreign judgment against him.[115] Moreover, because only the prorogation effect of the jurisdiction agreement is in question in this context, the law draws no distinction between exclusive and non-exclusive choice of court agreements.

[73] Why is an agreement to submit to the jurisdiction of the foreign court a sound basis of international jurisdiction? It is very difficult to answer this question, when the theoretical basis for the enforcement of foreign judgments in common law systems like Singapore is unclear. The prevalent thinking is that a foreign judgment is enforced in the court of the forum because of the "obligation theory": the foreign judgment gives rise to an obligation to obey the judgment when the rules of international jurisdiction are satisfied.[116] One only has to state the argument to see that it is circular: why does the obligation arise in the first place? Whatever the substantive justification, the obligation theory was a convenient explanation from the point of view of the history of the procedure of enforcement actions. To allow foreign judgments to be enforced by action, early common law judges were constrained by technical rules of procedure to select a writ under which the plaintiff may proceed in the local courts, and the writ that came to hand was the quasi-contractual writ of *indebitatus assumpsit* which alleged that the

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[115] See, eg, *Burswood Nominees Ltd (formerly Burswood Nominees Pty Ltd) v Liao Eng Kiat* [2004] 2 SLR 436, [2004] SGHC 64.

[116] *Williams v Jones* (1845) 13 M & W 628, 633. The Singapore Court of Appeal in *Hong Pian Tee v Les Placements Germain Gauthier Inc* [2001] 3 SLR 418, [2002] SGCA 18 alluded to this explanation without committing to it. It did not, however, provide any alternative explanation.

defendant had come under an obligation to the plaintiff for a sum of money because of an implied promise[117] to pay.[118]

[74] One possible substantive argument is that the party, having agreed to accept the jurisdiction of the court, cannot be heard to complain that he did not actually do so, and breached the agreement in not doing so. Thus, an agreement to submit is treated as if it were actual submission.[119] This begs the question why the agreement is invariably irrevocable. After all, in the context of the enforcing court's own rules on the exercise of jurisdiction, breaches of jurisdiction agreements may be sanctioned if there is strong cause to do so. Another possible substantive argument is that the contracting parties, having agreed to have the dispute resolved in a chosen forum (whether exclusive or not), have impliedly agreed to the enforcement of the judgment from that court in any other jurisdiction. This argument appears to go too far, because the enforcement of foreign judgments is by way of a separate action,[120] not by way of the enforcement of an agreement.

[75] The prorogation agreement as a basis for the recognition and enforcement of foreign judgments has seldom been questioned in the common law world; after all, this kind of agreement in favour of the court of the forum is a basis for the existence of jurisdiction of the court as of right provided service can be made within the territorial jurisdiction of the court. This, of course, begs the question why the agreement to submit is a basis of territorial jurisdiction. The answer may well be a pragmatic one. The line has to be drawn somewhere and, as a matter of policy, accepting that an agreement to submit is both a basis for domestic territorial competence as well as a ground of international jurisdiction accords respect to the principle of party autonomy. Analogising from the contractual analysis, if strong cause exists for not submitting to the chosen jurisdiction, the justification will have to be found elsewhere, but the law on the recognition and enforcement of foreign judgments does not pay any attention to the issue of strong cause at all. It is more likely the case that the role of party autonomy in such cases is only a limited one. It is a factor that the law takes into account in setting out the rules on when effect is to be given to foreign judgments, and these rules may depend on complex policy considerations, but it is not the case that the law is attempting to enforce the agreements as such.

10.2 Derogation of Jurisdiction

[76] The derogation aspect of the jurisdiction agreement comes to the forefront in the scenario where the foreign court has assumed jurisdiction even though there is, at least in the eyes of the court of the forum, a breach of a jurisdiction clause in the commencement or continuation of proceedings in the foreign court. In the light of the discussion in Section 9 above, it should be noted that cases of derogation can occur even if the jurisdiction agreement in question is not a traditional exclusive jurisdiction clause.

[77] What is the effect of a breach of a jurisdiction clause in commencing or continuing with the foreign proceedings on the recognition or enforcement of the resulting foreign

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[117] The implication to pay arose as a matter of law based on proven facts, and cannot be traversed by the denial of such a promise having been made.

[118] This accident of historical procedure has another curious consequence: the prevalent assumption that only foreign judgments for sums of money can be enforceable.

[119] This assumes that actual submission is a sound basis of international jurisdiction, a point which is beyond the scope of this paper.

[120] Or by registration where allowed or required by law.

judgment? The present law in Singapore is mostly unclear.[121] There are three possible approaches.

10.2.1 Public Policy

[78] First, it could be argued that a foreign judgment obtained in breach of a jurisdiction agreement should not be recognised or enforced because it would be against public policy to do so. Public policy is an established defence to the recognition or enforcement of a foreign judgment. However, it is difficult to see how a breach of contract deserves protection as fundamental public policy of the forum in the private international law sense, even if party autonomy is an important principle in the context of international civil litigation.

[79] It is different if the enforcing court had previously issued an anti-suit injunction to restrain the plaintiff in the foreign proceedings from commencing or continuing with those proceedings that led to the foreign judgment, and the injunction was wilfully ignored. In such a case, there is an issue of contempt of court orders, and it is likely and justifiable that the party in contempt of an order the enforcing court should not be able to use the court's procedures and resources to recognise or enforce the foreign judgment.[122] However, it has also been argued that so long as the party resisting the recognition or enforcement proceedings could show that it would have been entitled to obtain an anti-suit injunction from the recognising or enforcing court had he applied for one, that foreign judgment should not be recognised or enforced. But, it is suggested that there is a long distance between having a court order, and hypothetically having been able to get the court order. The former raises questions of abuse of processes of the court. The latter merely confirms that there is a contractual right to be protected. Thus, it is suggested that the public policy argument does not work.

10.2.2 Contract

[80] Secondly, it could be argued that the foreign judgment should not be enforceable as a matter of contract. The position in the United Kingdom suggests this rationale. Under the Civil Jurisdiction and Judgments Act 1982 (UK), section 32, foreign judgments obtained in breach of a jurisdiction agreement are not enforceable. Consistent with the contractual view, the defence does not apply if the agreement was illegal, void or unenforceable,[123] and the court is directed to discover for itself under its own choice of law rules whether there has been a breach of contract.[124] This could be seen a case of protecting substantive contractual rights.

[81] However, there are three reasons why the United Kingdom position is not entirely consistent with this view. There are two qualifications to the breach of contract defence. One is where the party against whom the proceedings had been brought had agreed to

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[121] Such a defence appears in one of the statutory registration regime: Reciprocal Enforcement of Foreign Judgments Act (Chapter 265, 1985 Edition), section 5(3)(b) (Hong Kong is the only jurisdiction to which this legislation applies), but not in the other one: Reciprocal Enforcement of Commonwealth Judgments Act (Chapter 264, 1985 Edition). There are no common law authorities.

[122] *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603, [2002] SGHC 104.

[123] Since this is an issue governed by the English forum's choice of law rules, presumably the doctrine of separability would apply to insulate the validity of the jurisdiction clause except where the clause is directly impinged, but the point is not very clear.

[124] The English court cannot be bound by an interlocutory decision of the foreign court on the issue of interpretation of the jurisdiction clause. It is not clear whether the parties could be bound by the interlocutory decision of a different foreign court on the question of interpretation. Compare this to the common law position: *Baiduri Bank Bhd v Dong Sui Hung* [2000] 4 SLR 212, [2000] SGHC 118.

the bringing of those proceedings. This is uncontroversial. It amounts to either a variation of the agreement or a waiver of the breach. The second is where the party had submitted to the jurisdiction of the foreign court. But the submission to the jurisdiction of the foreign court does not necessarily amount to waiver of the jurisdiction agreement. The jurisdiction agreement is a matter between the two contracting parties. Submission is a relationship between the party submitting and the court to which jurisdiction that party is submitting. There is no necessary correlation between accepting that a court of law has the jurisdiction to determine the dispute, and the waiver of a term of an agreement with the other contracting party. So the second qualification is difficult to reconcile with the rationale of protection of contractual rights.

[82] The second reason why the United Kingdom position is not entirely consistent with the rationale of protection of contractual rights is that it is difficult to see justification for such a general defence of breach of contract. Under English law, normal remedies for breach of contract are damages, specific performance or injunction. The specific performance and injunction orders are not appropriate orders since the breach is a *fait accompli*. The only possible justification is that the defendant should be deprived of the profits of the breach of contract. There are three problems with this analysis. First, insofar as this is an issue governed by the law of the jurisdiction agreement, the statute assumes that the remedy is available under that the proper law. Secondly, assuming the issue is governed by the law of the forum,[125] this remedy was only recognised in 2001.[126] Thirdly, on the same assumption, under English contract law, this benefit-stripping remedy is only available in highly exceptional circumstances, whereas the English legislation assumes that it is the norm, even if there is strong cause for the party to proceed in the foreign jurisdiction in spite of the jurisdiction agreement.

[83] A third reason is that the exception in respect of the party bringing the foreign proceedings not being at fault in not being able to perform the jurisdiction agreement is not necessarily a defence to a breach of contract. These reasons suggest that the legislation deals with issues beyond the protection of contractual rights.

[84] There is some support in the common law for a contractual analysis. In ***Ellerman Lines Ltd v Read***,[127] the applicant succeeded in obtaining a world-wide injunction to restrain the respondent from enforcing a judgment which the respondent had procured by breaching a jurisdiction agreement and by practising a fraud on the foreign court. Although the English Court of Appeal rested its decision on fraud, Atkin LJ's observations appear to go further:

> If the English Court finds that a person subject to its jurisdiction has committed a breach of covenant, or has acted in breach of some fiduciary duty or has in any way violated the principles of equity and conscience, and that it would be inequitable on his part to seek to enforce a judgment obtained in breach of such obligations it will restrain him, not by issuing an edict to the foreign Court, but by saying that he is in conscience bound not to enforce that judgment.[128]

[85] It may appear from this passage that mere breach of jurisdiction agreement is an *alternative* ground to fraud for the court to restrain the party from enforcing the judgment. However, on a contractual analysis, it is not clear why a breach of agreement in the

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[125] This assumption is questionable especially in the context of the Rome Convention on the Law Applicable to Contractual Obligations applicable in English law.

[126] *Attorney-General v Blake* [2001] 1 AC 268.

[127] [1928] 2 KB 144 (CA).

[128] [1928] 2 KB 144 (CA) 155.

commencement or continuation of the foreign proceedings would justify restraining the enforcement of the judgment, unless the court is enforcing a primary right based on an implied agreement not to enforce any judgment obtained from any other court, or enforcing a secondary right to deprive the party in breach from the profits of the breach.

[86] It is suggested that under the common law, the contractual analysis really only works in two limited situations. First, if indeed there is an express or implied agreement not to enforce any judgment obtained from any court other than the chosen court, then in principle it should follow that a stay could be granted in respect of proceedings in the Singapore court to enforce a judgment from that court, and that an application for the foreign judgment to be recognised could be struck out. It may also be possible to obtain an anti-suit injunction to restrain the party in breach from enforcing the judgment in any other jurisdiction, subject to considerations of international comity in the discretion of the court. Secondly, if the jurisdiction agreement is governed by English law or some other law with similar content, then the Singapore court may, if it regards the circumstances to be exceptional enough to justify it, refuse to recognise or enforce the judgment on the basis that to do so would allow party in breach to profit from the breach of contract, probably by staying the proceedings or striking out an application.

10.2.3 Defence Based on the Policy of Protecting Party Autonomy

[87] Thus, it is suggested that the defence in the United Kingdom legislation is based neither on the fundamental public policy of the forum nor on the protection of contractual rights as such. It therefore represents a distinct defence based on a policy decision not to recognise or enforce foreign judgments obtained in breach of jurisdiction agreements.

[88] If this is right, then there is no common law defence to the recognition or enforcement of a foreign judgment because it was obtained in breach of a jurisdiction clause. Indeed, it can be difficult to justify such a defence from the perspective of international comity. The Singapore courts, like the English courts, regularly exercise its jurisdiction to hear cases when there is a breach of a jurisdiction agreement, when the courts are satisfied that there are strong reasons why the case should continue in the forum in spite of the breach of agreement,[129] or sometimes for reasons of fundamental public policy or mandatory laws.[130] It is possible to design a breach of jurisdiction agreement defence that will accord respect to the assumption or exercise of jurisdiction by the foreign courts in similar cases, but this may lead to uncertainty in the law.

[89] It is true that there is a strong policy reason to uphold the agreement of the parties and to prevent any breach of it. But this has to be balanced against considerations of international comity. In the context of the international jurisdiction of the court of the forum (stay of proceedings and the anti-suit injunction), it has been seen that the contractual analysis is tempered by considerations of international comity and the public interest in respect of the venue for litigation. Cases where the recognition or enforcement of the foreign judgment is itself a breach of agreement, or where a benefit-stripping or analogous remedy may be available under the relevant applicable law require separate consideration: the contractual analysis is justified in those cases, but also subject to international comity in respect of leaving foreign courts to deal as they will with such

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[129] Examples in Singapore include: ***The Eastern Trust*** [1994] 2 SLR 526, [1994] SGHC 148; ***The Jian He*** [2000] 1 SLR 8, [1999] SGCA 71 (CA); ***The Hung Vuong-2*** [2001] 3 SLR 146, [2000] SGCA 25 (CA); ***Golden Shore Transportation Pte Ltd v UCO Bank*** [2004] 1 SLR 6, [2003] SGCA 43 (CA).

[130] ***The Epar*** [1984-1985] SLR 409, [1984] SGHC 16.

breaches. For cases of naked beach of jurisdiction agreements, it is not a necessary contractual consequence that the foreign judgment should not be recognised or enforced.

[90] It is thus suggested that under the common law of Singapore, there is no general defence to the recognition or enforcement of a foreign judgment because the judgment was obtained by a breach of jurisdiction agreement, but there may be limited and specific contractual defences. It is a different question whether there ought to be such a defence to be enacted by statute. The protection of party autonomy is only a factor that has to be weighed among many others in deciding this question. A defence like the English statutory one does serve a very practical purpose: it has a channelling effect for disputes governed by exclusive and non-exclusive English jurisdiction clauses, ensuring that the English commercial courts are kept busy. In addition, if the concept of damages for the breach of jurisdiction clauses is developed further,[131] the outcome from applying a defence may be economically more efficient than allowing enforcement and a counterclaim for damages. But the consideration of this option is beyond the scope of this paper.

11 CONCLUSION

[91] It can be seen from the discussion above that party autonomy runs as a very strong theme in international civil litigation under the law of Singapore. There is a strong contractual undercurrent underpinning the analysis of the content and effect of jurisdiction agreements in the common law. The real question in most litigation today is not whether the jurisdiction agreement is exclusive or non-exclusive. The real question is whether one of the parties is acting in breach of contract in adopting a particular jurisdictional strategy. In this context, there is a serious need for more precise analysis of the scope and extent of the parties' agreement, and for recognition that jurisdiction agreements may deal not merely with the existence but also the exercise of jurisdiction. Until both steps are taken, the law relating to jurisdiction agreements will continue to be mired in confusion. One possible step that could be taken to reduce some of the uncertainty is to use presumptions[132] in the kinds of inferences to be drawn from jurisdiction agreements.

[92] At the same time, the procedural aspects of jurisdiction agreements are very important as well. Kahn-Freund has pointed out that jurisdiction agreements have

> an intended and necessary procedural effect, the effect intended and calculated to produce action or inaction on the part of a public authority. Hence the principles governing the choice of the law applicable to the operation of contracts cannot without considerable modification be applied to jurisdiction agreements. [133]

This advice has been heeded in common law systems to the extent that the effect of a jurisdiction agreement on the question of jurisdiction is always a procedural question. However, it has been seen that even the procedural question has been much influenced by the contractual analysis. The question is whether too much emphasis continues to be placed on the contractual aspects of the jurisdiction agreement. A contrast can be seen between the balance struck by the common law in the two contexts of the assumption of jurisdiction within the forum on one hand, and the recognition and enforcement of foreign judgments on the other, and it has also been seen how the English law has

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[131] See paragraph [24] above.

[132] It will not work if a foreign proper law governs the jurisdiction agreement, but in most cases, foreign law is not argued at the interlocutory stage.

[133] O Kahn-Freund, "Jurisdiction Clauses: Some Reflections" (1977) 26 ICLQ 825, 834.

shifted the common law balance in favour of the contractual emphasis in the latter context.

[93] The effect given to party autonomy accorded by the common law systems, including that of Singapore, in some aspects probably exceeds that given in some non-common law countries. From the point of view of harmonisation with the jurisdiction rules of other countries, particularly in the context of the proposed Draft Hague Convention on Exclusive Choice of Court Agreements, several difficulties are likely to stand in the way, and will require further and careful study.

[94] First, a significant consequence of the common law's contractual emphasis is that the parties' choice of law governs jurisdiction agreements. If one starts from a procedural perspective, it may be that the law of the chosen court provides the more suitable governing law. There are arguments both ways whether a more contractual or procedural perspective should be adopted.

[95] Secondly, the common law's fuzzy distinction between exclusive and non-exclusive jurisdiction agreements is likely to cause difficulty in the understanding of what is an exclusive jurisdiction agreement. There is a tension between approaching the problem from a contractual perspective on what amounts to a breach of contract, and from a more procedural perspective of forum selection. Greater understanding of the "exclusive" nature jurisdiction agreements in common law systems needs to be promoted. This involves the understanding that the common law conception of jurisdiction is a composite of the existence and the exercise of jurisdiction on the one hand, and careful interpretation of what the parties have actually agreed to on the other.

[96] Thirdly, the anti-suit injunction granted in aid of contractual rights (that is, contractual rights from the perspective of the forum issuing the injunction), including rights arising from jurisdiction agreements, is likely to subvert any scheme based on a different basis for forum selection.

[97] Fourthly, the common law may also present obstacles from the procedural perspective. The Singapore courts are used to channelling a dispute to a non-contractual forum where the courts are of the view that there are strong reasons to do so, thus sanctioning a breach of jurisdiction agreement. This view, based on what is now a deep-rooted notion of a natural forum to resolve a dispute (that is sometimes displaced by the parties' agreement), will be a difficult one to shake.

[98] Fifthly, a related concern is the potential abuse of the jurisdiction agreement by a contracting party as a delaying or obfuscating tactic. However, assuming it is a legitimate concern, it may arguably be dealt with to some extent by resorting to, and perhaps expanding, the court's inherent powers to prevent abuse of process. The abuse of local process is arguably the making of an application that would result in the plaintiff being unreasonably put to spend extra time and resources with no difference in the eventual result.[134] Another possible response to the common law concern is that it should not be a concern at all.[135] It may be that it is the plaintiff's own fault in commencing the proceedings in the forum in breach of agreement, and allowing the plaintiff to carry on

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[134] It cannot be based on the wastage of resources of the foreign court. The Singapore court has no concern with the abuse of *foreign* processes: ***R v Commissioner of Police of the Metropolis, ex p Bennett*** [1995] QB 313 (CA); ***CSR Ltd v Cigna Insurance Australia Ltd*** (1997) 189 CLR 345.

[135] Compare the attitude to international arbitration agreements, where the existence of a dispute in the broad sense of a claim not being met would entail compulsory stay of proceedings, even if the court thinks it is a case for summary judgment because there are no triable issues: ***Coop International Pte Ltd v Ebel SA*** [1998] 3 SLR 670 at [99], [1998] SGHC 425.

with the proceedings would encourage forum shopping (where, for example, the forum can give better remedies or would apply more favourable laws) in the face of exclusive jurisdiction agreements.

[99] Sixthly, there may be pragmatic considerations too. An international scheme that enforces contractual forum selection strictly and rigidly will favour the jurisdictions of more developed countries which are the favourite choices of commercial parties. Common law countries which do not belong to that elite league may find the scheme less acceptable than the current system which allows them greater flexibility.

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