

THE FUTURE OF PRIVATE INTERNATIONAL LAW IN SINGAPORE

Hot on the heels of its success in international commercial arbitration, Singapore is positioning itself to be an international hub for international commercial litigation. Until such time if and when harmonisation of commercial laws and litigation procedures become reality, private international law will continue to play a critical role in the conduct and outcome of cross-border litigation. This lecture will address some of the key issues and challenges in the private international law of Singapore in the context of international commercial litigation, including the effects and limits of party autonomy.

Introduction

1. This is the seventh public lecture in Yong Pung How Professorship of Law Lecture series. The chair and this public lecture series have been made possible by a generous endowed gift from the Yong Loo Lin Trust, for which the University and the School are extremely grateful. Mr Yong Pung How played a key role in the setting up the School of Law at the Singapore Management University in 2007, and served as Chairman of its first Advisory Board. He continues to support the University as Chancellor. Before he joined SMU, Mr Yong had played a critical role in building the foundations of the modern Singapore legal system. As Chief Justice, he had instituted radical reforms to the legal system which propelled Singapore into the international limelight for its administration of justice. He was awarded the Order of Temasek (First Class) in 1999 for building a world-class judiciary. His successors have built upon this, moving the legal system to the next level.
2. The current national plan is to drive Singapore to be a dispute resolution hub for international commercial parties. This is a multi-pronged strategy which includes mediation, arbitration and litigation, as well as the promotion of the use of Singapore law. Another thrust of the strategy is to be engaged in the global conversation on the convergence of commercial laws.¹ My lecture is on the future of Singapore private international law. There is a negative correlation between harmonisation and private international law. Private international law assumes and thrives on differences between national laws, while harmonisation seeks to minimise or even to eradicate

¹ See, eg, Sundaresh Menon CJ, “The Somewhat Uncommon Law of Commerce” (2014) 26 SAcLJ 23; See also “Asean Integration through Law” (Keynote speech at *The ASEAN Way in a Comparative Context: Plenary on the Rule of Law in the ASEAN Community*, 25 August 2013), available at: <http://app.supremecourt.gov.sg/data/doc/ManagePage/4943/ASEAN%20Integration%20Through%20Law%20Project%20Keynote.pdf>. SMU will be contributing to these efforts through its proposed Centre for Cross-Border Commercial Law in Asia (CEBLA).

such differences. However, harmonisation of laws, especially outside of unitary political regimes like the European Union, will be a tortuous and sometimes torturous process. Until we get there, private international law will continue to play a critical role in cross-border disputes. For this lecture, I will focus on international commercial litigation, in particular on a few key areas which has or should come under scrutiny as a result of the ambition to be an international commercial litigation hub. Because of the constraints of time, I will focus on the question of jurisdiction, but I will also say a little about choice of law.

Jurisdiction

3. From the practical perspective, the issues in the context of jurisdiction are informed by three key concepts: (a) connected jurisdiction; (b) consensual jurisdiction; and (c) competing jurisdictions.²

Connected Jurisdiction

4. This describes the basic premise of the jurisdictional rules for cross-border cases: there should be sufficient connection between the parties, the facts or the subject matter in the dispute with Singapore before the Singapore courts should assert legal authority to determine the dispute. The earliest common law basis of adjudicatory jurisdiction which still exists today is if a person is present in Singapore, the Singapore court will have jurisdiction over him, no matter that the presence was merely transient.³ Generally, this basis of jurisdiction in the common law world has not been under serious challenge.⁴ This is because of development of the doctrine of natural forum or *forum non conveniens*, where the proceedings may be stayed if there is an available forum in another country that is clearly and distinctly more appropriate to hear the case. I will return to the natural forum doctrine later, but for now I want to emphasise that transient presence as a ground of jurisdiction is extremely broad and is likely to fail any substantive test based on connections, and it may not have survived to this day if not for the counter-balance brought about by the doctrine of natural forum.

² Jonathan Hill, "Jurisdiction in Civil and Commercial Matters: Is there a Third Way?" [2001] Current Legal Problems 439 at 457-459.

³ There may be an exception if there has been abuse of process, eg, if the plaintiff had deceived the defendant into stepping into Singapore solely for the purpose of service.

⁴ Except in England, where it has been restricted under the Brussels I Regulation, and there are further proposals to unify all national laws on jurisdiction in the European Union.

5. Presence as a basis of jurisdiction in the common law developed not as a product of considerations of connection, but from the simple theory of sovereignty and territoriality.⁵ If the defendant is inside the territory of the sovereign, he becomes subject to the command of the sovereign. Statutory law extended the jurisdiction of the court beyond presence.⁶ Today, under Order 11 of the Rules of Court, there is a wide miscellany of grounds, based on the connections between the defendant, the facts, and the subject matter of the dispute, with Singapore, which can justify service of process out of jurisdiction. Key principles which have underpinned the entire process of service out has come under recent challenge in England, and the question is whether Singapore should follow suit. Service out of jurisdiction requires the leave of the court, and the judicial attitude to the granting of leave has traditionally been one of caution. Thus, service out of jurisdiction has commonly been described as “exorbitant”. It is frequently said that the case must fall within the “letter and spirit” of the relevant rule,⁷ and that any doubt in the case ought to be resolved in favour of the defendant.
6. The trend in England to liberalise the approach to extra-territorial jurisdiction⁸ started a few years ago,⁹ and culminated in the UK Supreme Court decision in *Abela v Baadarani*.¹⁰ The facts were not very exceptional. Leave had been granted for service out jurisdiction on a Lebanese resident, on the basis of a contract connected to the English jurisdiction. After many attempts to serve the writ through various means and channels in Lebanon failed, the claimant asked the English court to treat the delivery of the documents to the defendant’s lawyers who were acting for the defendant in a different matter (and who had refused to accept service) as good service. The High Court decided for the claimant. However, the Court of Appeal reversed the decision on the basis that it would be too exorbitant to do that in respect of service overseas. The Supreme Court reversed the Court of Appeal, and deemed the service good.
7. This exercise involves using a local procedural rule designed to cure irregularities effectively to extend the extraterritorial jurisdiction of the court. But the UK Supreme Court decision, which caused quite a stir in the UK, should come as no surprise to Singaporeans. In *ITC Global Holdings Pte Ltd (in liquidation) v ITC Ltd*,¹¹ the Singapore High Court had exercised Order 2 discretion to cure an irregularity of service overseas, in similar circumstances, where the

⁵ The doctrine still holds sway today: *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 at [7].

⁶ And submission (see below at para [12]).

⁷ See, eg, *Consistel Pte Ltd v Farooq Nasir* [2009] 3 SLR(R) 665 at [34].

⁸ In cases not caught by the jurisdictional rules of the European regime.

⁹ Andrew Dickinson, “Restrained no more? Service out of jurisdiction in the 21st century” [2010] LMCLQ 1.

¹⁰ [2013] UKSC 44, [2013] 1 WLR 2304.

¹¹ [2011] SGHC 150.

defendants were seen to be evading service and it was clear that they had notice of the proceedings.¹² The most important reason given by the High Court was an observation of the Singapore Court of Appeal in *Fortune Hong Kong Trading Ltd v Cosco Feoso (Singapore) Pte Ltd*¹³ to the effect that because the modern form of the writ has lost its character as a sovereign command and is essentially a notification to the defendant of the commencement of proceedings, “it can hardly be contended that the service of our writ abroad would interfere with or encroach upon the sovereignty of the country in which the writ is served”.¹⁴ This extraterritorial effect of Order 2 was affirmed just last week by the Court of Appeal in *Burgundy Global Exploration Corp v Transocean International Ventures Ltd*,¹⁵ where it was held that Order 2 empowered the court to grant leave retrospectively for service out of jurisdiction.

8. This modern sentiment was taken to its logical conclusion by Lord Sumption JSC in *Abela*, where he observed: “It should no longer be necessary to resort to the kind of muscular presumptions against service out which are implicit in adjectives like “exorbitant”.”¹⁶ In recent times, the Court of Appeal of England and Wales have clearly been taking less restrictive interpretations of the grounds for service out jurisdiction. For example, for service out of jurisdiction based on a contractual claim, whereas older English authorities required a contract between the claimant and the party sought to be served, the latest authorities only require that the contract be a relevant one in the litigation.¹⁷ It may well be that the overhaul of the procedural regime and the different wording in the Civil Procedure Rules had emboldened the English judges to take a more liberal approach. But at least in the context of service out of jurisdiction, the avowed purpose of the new rules was to “simplify”, and not radically to alter, the regime.¹⁸ The trend is more likely due to the growing acceptance of cross-border litigation as a normal by-product of globalisation, and of course, the recognition that London is a favoured venue for international commercial litigation.

¹² The claimant may seek permission of the court to effect substituted service under Order 62 Rule 5 read with Order 11 Rule 3(1). In *Abela* and *ITC Global*, the claimant were seeking retrospective validation of a mode of service.

¹³ [2000] 1 SLR(R) 962.

¹⁴ *Ibid* at [30]; above note 11 at [41].

¹⁵ [2014] SGCA 24 at [110]

¹⁶ Above note 10 at [53]. See also Lord Clarke JSC at [45].

¹⁷ Andrew Dickinson, “Restrained no more? Service out of jurisdiction in the 21st century” [2010] LMCLQ 1; Andrew Dickinson, “Service out of Jurisdiction in Contract Cases: Straightening out the Deck Chairs” [2012] LMCLQ 181.

¹⁸ Andrew Dickinson, “Restrained no more? Service out of jurisdiction in the 21st century” [2010] LMCLQ 1 at 5.

9. It should be noted that the continued existence of presence as a ground of jurisdiction, as well as this broadening of jurisdictional bases for service out of jurisdiction, occur in the context of the countervailing doctrine of natural forum. In our law, existence (grounds for taking jurisdiction) and exercise of jurisdiction (the natural forum doctrine) are two distinct concepts and two discrete steps in jurisdictional analysis, and we conflate them at our peril. However, that does not mean that the two are unrelated. The wider the grounds of jurisdiction, the more imperative it is to have a broad discretion in the exercise of jurisdiction. Conversely, civil law countries generally dispense with the question of exercise of jurisdiction because they have narrowly defined grounds for taking jurisdiction.
10. Where should Singapore go in this respect? There is a case for taking a more liberal approach, provided that we retain the natural forum doctrine in its broad version today. This does not call for radical changes to the meaning of the grounds of Order 11, but a more subtle change in the approach towards the interpretation of these grounds. The statutory language and the underlying rationale of sufficiency of connections with Singapore must be at the forefront of analysis, because it remains a big step to require a foreigner who has not consented to the jurisdiction of the Singapore court to answer to it.

Consensual Jurisdiction

11. Consent is a sufficient basis for taking jurisdiction. In principle, no further connections should be necessary. There are two aspects to this concept: submission by conduct and submission by agreement.
12. Submission by conduct generally occurs in the context of litigation. At some point, a defendant who is resisting jurisdiction may do something which crosses the line and which amounts to an unequivocal acceptance of the jurisdiction of the court in respect of the claim. There is much in the writings on civil procedure on when this line is crossed. Subject to the Rules of Court, this is a highly factual inquiry. In the context of service out of jurisdiction, it is clear that, an argument to stay proceedings without more, would amount to submission because one cannot ask the court not to exercise its jurisdiction without accepting that the court already has jurisdiction. A more difficult question arises when the stay argument is made in the alternative, and that is the subject of the decision of the High Court in *Broadcast Solutions Pte Ltd v Zoom Communications Ltd*,¹⁹ that an application to stay as an alternative to an application to set aside

¹⁹ [2014] 1 SLR 1324.

service of process out of jurisdiction amounted to submission, at any rate where the defendant had actually embarked on the stay arguments. As an appeal from this decision is currently under consideration by the Court of Appeal, I will refrain from commenting on the case. I will just refer to a remark in the “Conflict of Laws” volume of *Halsbury’s Law’s Singapore* that as a practical matter, once the time for applying for stay of proceedings had been delimited to the same period as the time for setting aside the service of process, there was no real advantage in pursuing stay proceedings on the basis of *forum non conveniens*.²⁰ The same doctrine of natural forum will be considered on the same facts, and in fact the defendant will lose the advantage. In proceedings to set aside, the plaintiff maintains the legal burden of showing the appropriateness of the Singapore forum; while in a stay application the defendant bears the legal burden of showing that the clearly more appropriate forum lies elsewhere. I have never understood why it is common practice in Singapore to apply for stay of proceedings in a service out of jurisdiction case.²¹

13. Agreements to submit to the jurisdiction of the Singapore courts raises no difficulty in respect of the grounds for taking jurisdiction (ie, the existence of jurisdiction).²² The issues arise in the context of the exercise of jurisdiction. It is clear that an exclusive choice of court agreement will be given effect to unless it is unreasonable to hold the parties to the bargain.²³ This is encapsulated in the formula that the applicant must show exceptional circumstances amounting to strong cause why he should not be held to his contract.²⁴ The test is not *forum conveniens* or *forum non conveniens*, but strong cause.
14. A non-exclusive choice of court clause is equally an agreement to submit to the jurisdiction of the chosen court. The real difficulty lies in the varieties of choice of court agreements in the marketplace,²⁵ and the sometimes inconsistent effects given to them. A non-exclusive choice of court clause in itself is a factor to be considered in the natural forum exercise,²⁶ but the

²⁰ “Conflict of Laws”, Vol 6(2), *Halsbury’s Laws of Singapore* (Singapore: LexisNexis, 2009), at para [75.104].

²¹ Except if the stay is for reasons other than *forum non conveniens*, or on *forum non conveniens* grounds but on the exceptional basis that factual circumstances have changed substantially to justify a fresh application.

²² For service out of jurisdiction, see: Rules of Court, Order 11, Rule 1(d)(iv) and Rule 1(r).

²³ *The Asian Plutus* [1990] 1 SLR(R) 504 at [9].

²⁴ *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1977-1978] SLR(R) 112 at [11].

²⁵ Adrian Briggs, “The subtle variety of jurisdiction agreements” [2012] LMCLQ 364; Yeo Tiong Min, “The Contractual Basis of the Enforcement of Exclusive and Non-exclusive Choice of Court Agreements” (2005) 17 SAclJ 306.

²⁶ *Orchard Capital I Ltd v Ravindra Kumar Jhunjunwala* [2012] 2 SLR 519. Because the *forum non conveniens* analysis is not based on contractual promises, it is arguable that a jurisdiction clause could be a relevant factor in respect of non-contracting parties provided they are sufficiently connected to the transaction: *Global Partners Fund Ltd v Babcock & Brown* [2010] NSWLR 196. *cf* *VTB Capital plc v Nutritek International Corp* [2013]

significance of the clause can go beyond that if the parties have agreed to something more than just to accept the existence of the jurisdiction of a court over the claim. Thus, non-exclusive choice of court clauses have been subject sometimes to the same test as that for exclusive choice of court clauses, sometimes to the simple *forum non conveniens* test, and sometimes to something in between. The practical solution lies in the drafting of the choice of court clause, because at the end of the day the question is what the parties have agreed to.

15. Jurisdiction by agreement looks set to be simplified, but at the same time complicated, by the Hague Convention on Choice of Court Agreements 2005²⁷ if and when Singapore adopts it and it becomes law. Although it is not necessarily a foregone conclusion at this point, adoption appears to be on the cards as part of the larger scheme to promote Singapore as a venue for international commercial litigation. The Convention aims to do for litigation what the New York Convention has done for arbitration. It is a closed Convention in the sense that it only applies to exclusive choice of court agreements stipulating the court of a Contracting State, and to consequential judgments from the chosen courts of Contracting States. The Convention Scheme is very similar to the common law position: the chosen court should hear the case, and non-chosen courts should not; and a resulting judgment of the chosen court of a Contracting will be enforceable in all other Contracting States. However, the Convention does not apply to all contracts. For example, consumer contracts, employment contracts, and carriage of goods contracts are excluded from its scope. The Convention has a more limited meaning of “exclusive” than in the common law. For example, it does not include a unilateral exclusive choice of court agreement (where the clause binds one party but not the other to sue the chosen court). Significantly, there is a rebuttable presumption of exclusivity in the Convention, and this would be a very important consideration in the drafting of contracts. The Convention also differs from the common law in a few other key aspects. The chosen court as well as the non-chosen courts have even less flexibility than in the common law to decide not to give effect to the parties’ contractual choice of court. The validity of the choice of court clause is tested by the proper law of the agreement under the common law but under the Convention it is tested by the law which will be applied by the chosen court to answer the question.

UKSC 5, [2013] 2 WLR 398; Adeline Chong, “The ‘party scope’ of exclusive jurisdiction clauses” [2011] LMCLQ 470.

²⁷ (2005) 44 International Legal Materials 1294. Full text can be found at: http://www.hcch.net/index_en.php?act=conventions.text&cid=98. An outline can be found at: <http://www.hcch.net/upload/outline37e.pdf>. See also *Report of the Law Reform Committee of the Singapore Academy of Law on The Hague Convention on Choice of Court Agreements 2005* (Singapore: SAL, 2013), available at: <http://www.sal.org.sg/digitalibrary/Lists/Law%20Reform%20Reports/DispForm.aspx?ID=37>.

16. The simplification will lie in the presumption of exclusivity, the greater certainty in the enforcement of the choice of court clauses, and the mobility of the resulting judgments within the Contracting States. The complication will lie in the fact that the Convention will co-exist with the common law, so that there will be two concurrent regimes for the enforcement of choice of court agreements.
17. Jurisdiction by consent, specifically by agreement, is a narrowly defined basis of jurisdiction, and it gives effect to the principle of party autonomy which is highly valued in the common law and indeed in most legal systems. The discretion in such cases is rightly more narrowly circumscribed than in the case of jurisdiction by connection.²⁸ The even narrower discretion in the Hague Convention on Choice of Court Agreements 2005 is justifiable on the basis of reciprocity of treatment within the Convention regime.
18. One question that has arisen is whether the proposed Singapore International Commercial Court (SICC) should apply the common law standard or something closer to the Convention standard in respect of non-Convention cases in the enforcement of choice of court agreements.²⁹ In truth, the common law formula of “exceptional circumstances amounting to strong cause” has malleable content and is capable of internal calibration at different levels; and the Singapore courts have indeed applied different standards at different times. For exclusive choice of foreign court clauses, Singapore cases in the early 1990’s pitched the standard very high, with strong language that the plaintiff be “deprived of his day in court” in the chosen jurisdiction before the Singapore court would exercise its own jurisdiction;³⁰ one court gave as examples of strong cause the paralysis of the foreign legal system or the breakdown of law and order.³¹ Subsequently, however, the courts took a less restrictive approach to allow more claims to proceed in Singapore in breach of contract.³² Conversely, there is no known case where a Singapore court has refused to exercise jurisdiction in the face

²⁸ See Yeo Tiong Min, “Natural Forum and the Elusive Significance of Jurisdiction Agreements” [2005] SJLS 448.

²⁹ *The Report of the Singapore International Commercial Court Committee* (2013), at para [27], alludes to the different standards without making any specific suggestions or recommendations.

³⁰ *The “Vishva Apurva”* [1991] 1 SLR(R) 912 at [46].

³¹ *The Humulesti* [1991] SGHC 161.

³² *The Eastern Trust* [1994] 2 SLR(R) 911; *The Jian He* [1999] 3 SLR(R) 432; *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR(R) 6; *The Hyundai Fortune* [2004] 4 SLR(R) 548.

of an exclusive choice of Singapore court clause; practically it will very difficult to show that trial in Singapore would deny the defendant substantial justice.³³

Competing Jurisdictions

19. A cross-border transaction by definition has connections with more than one jurisdiction, and it is likely that more than one country will have legitimate claims to hear any dispute arising from it. If and when the Hague Convention on Choice of Court Agreements 2005 takes effect and a case falls under it, the problem of competing jurisdictions will of course be sorted out under the Convention. Apart from treaties and conventions, the common law adopts an ad hoc approach to deal with competition of jurisdictions. It has done so for nearly thirty years using the doctrine of natural forum. Singapore, like many other common law countries, follows the “most appropriate forum” test developed in the House of Lords in *The Spiliada* in 1986.³⁴ The fundamental principle is that a trial should take place in the country which is best suited to try the case in the interests of the parties and for the ends of justice. In practical terms it means that a Singapore court would exercise its jurisdiction to hear a case only if it is most appropriate forum, unless there are reasons of justice otherwise. There is a difference in the burden of proof: a defendant served within the jurisdiction³⁵ has the legal burden of showing that there is an available and clearly and distinctly more appropriate forum elsewhere. In the case of service out of jurisdiction,³⁶ the plaintiff had the legal burden to show that Singapore is the most appropriate forum. But the same principles of natural forum apply.³⁷

20. This is of course not the only way of dealing with competition of jurisdictions. Prior to *The Spiliada*, the focus of the common law was on abuse of process: an action would be stayed if the plaintiff had acted in a vexatious and oppressive manner towards the defendant such as to amount to an abuse of process. This approach is forum-centric in the sense that actions commenced are presumed to belong to the forum unless the plaintiff is guilty of abusive conduct. The “most appropriate forum” test, on the other hand, focuses on the question of which

³³ *The Herceg Novi* [1998] SGHC 303; *Evergreen International SA v Volkswagen Group Singapore Pte Ltd* [2004] 2 SLR(R) 457 at [62].

³⁴ [1987] AC 460. See *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR(R) 345.

³⁵ In such cases, the power to stay is derived from the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed), s 18(1) and Schedule 1, para 9.

³⁶ In such cases, whether Singapore is the most appropriate forum is key consideration in determining whether the case is a “proper one” for leave to be granted under Rules of Court, Order 11 Rule 2(2) for service out of jurisdiction.

³⁷ *The Spiliada* [1987] AC 460 at 478-482. *Oriental Insurance Co Ltd v Bhavani Stores Ltd* [1997] 3 SLR(R) 363.

country's court is best placed to hear the case in the interests of the parties and for the ends of justice.

21. The European approach to jurisdiction is similar to the abuse of process approach, but the rationale is different. Generally, civil law systems do not apply the doctrine of natural forum. But the idea of the “most appropriate forum” is very much a part of the fabric of the European jurisdictional regime, except that the concept is encapsulated within the jurisdictional rules. So they have narrowly defined bases of jurisdiction based on consent or connections. The grounds for jurisdiction are generally interpreted to give effect to these underlying principles. Another key difference between the European regime and the common law is the way competing jurisdictions are handled. In the European Union, where there are strict and binding rules on the allocation of jurisdiction in cross-border disputes, the general rule is that the first court to be seised of the proceedings will hear the case. This is their *lis alibi pendens* rule. Certainty and predictability are the core values protected by the European rule. On the other hand, the existence of parallel proceedings is merely part of the factual matrix to the common law court in determining jurisdiction questions.³⁸ Since certainty cannot be achieved because there is no overarching regime to determine how other courts will behave, the common law focuses instead on questions of efficiency and equity in individual cases. Thus, while one can learn much from the European experience in dealing with problems of competing jurisdictions, but one also needs to bear in mind the contextual differences.
22. Within the Commonwealth there is an important variation of the natural forum doctrine. This is the Australian “clearly inappropriate forum” test; an action commenced in Australia will be stayed only if the Australian court is demonstrated to be a “clearly inappropriate forum.”³⁹ At a philosophical level, it reflects a difference of view whether the plaintiff's right of access to justice should be viewed from the perspective of the court of the forum or from the perspective of plurality of potential fora. Australia's main objection to the “most appropriate forum” test was that it required the courts to make value judgments about other legal systems. The

³⁸ Parallel proceedings may raise considerations of forum management or *forum non conveniens* (or both), and different policy considerations apply: *Virsaqi Management (S) Pte Ltd v Welltech Construction Pte Ltd* [2013] 4 SLR 1097.

³⁹ For criticism, eg, A Briggs, “Wider still and wider: the bounds of Australian exorbitant jurisdiction” [1988] LMCLQ 216; A Briggs, “*Forum Non Conveniens* in Australia” (1989) 105 LQR 200; R Garnett, “Stay of Proceedings in Australia: a ‘Clearly Inappropriate’ Test?” (1999) 23 Melb UL Rev 30; M Davies, AS Bell and PLG Brereton, *Nygh's Conflict of Laws in Australia* (Sydney: LexisNexis, 8th ed, 2010) at pp 171-172); R Mortensen, R Garnett and M Keyes, *Private International Law in Australia* (Sydney: LexisNexis, 2nd ed, 2011) at pp 107-109; M Pryles, “Judicial Darkness on the Oceanic Sun” (1988) 62 ALJ 774; M Pryles, “Internationalism in Australian Private International Law” (1989-1990) 12 Syd L Rev 96 at 131.

Australian approach comes close to the abuse of process formula because it seems that (a) the test is whether the plaintiff was acting in a vexatious or oppressive manner; and (b) the appropriateness of courts in other countries is not part of the test. It is not the same as the abuse of process test because “vexatious” and “oppressive” are to be read more broadly. The Australian cases consider substantially the same factors as under the “most appropriate forum” test, except that they are examined with reference to the question of the inappropriateness of the home forum only. Thus, it has been said that the difference between the most appropriate forum formula and the clearly inappropriate forum formula may not be so substantial,⁴⁰ and it is likely only in marginal cases that different results would be reached. That is correct in theory, but it is a fact that few cases in Australia have been stayed under the “clearly inappropriate forum” test. Ultimately, because of the discretion inherent in the process, judicial attitudes play a dominant role whichever formula is adopted. It has been observed that the “clearly inappropriate forum” test had been developed on the back of personal injury claims.⁴¹ On the other hand, the “most appropriate forum” test was charted by the English courts on the waves of international commercial litigation. In the one leading Australian decision that arose in a commercial context, a stay was granted.⁴²

23. There is a notable exception in Australian law where the competing forum is New Zealand. Under the Trans-Tasman Proceedings Act 2010,⁴³ the Australian court may stay proceedings if the New Zealand court is the “more appropriate forum”. The statutory language is inconsistent with the “clearly inappropriate forum” test in Australian common law and appears to be based on the “most appropriate forum” test.
24. Farther afield, the natural forum doctrine in the United States is superficially similar to the doctrine applied in Anglo-Singapore law. One key difference is that while Anglo-Singapore law is concerned only with private interests, the US doctrine takes into consideration state interests. This is a fundamental difference in the private international law of the United States and that of other common law countries, including Singapore’s.⁴⁴ Another difference is that

⁴⁰ Peter Brereton, “*Forum Non Conveniens* in Australia: A Case Note on *Voth v Manildra Flour Mills*” (1991) 40 ICLQ 895 at 897–898; *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [33].

⁴¹ Andrew Bell, “The Future of Australian Private International Law in Australia” (2012) 19 AILJ 11. See *Oceanic Sun Line Special Shipping Company Inc v Fay* (1987) 165 CLR 197; *Regie Nationale des Usines Renault SA v Zhang* [2002] HCA 10, (2002) 210 CLR 491, *Puttick v Tennant Limited* [2008] HCA 54, (2008) 238 CLR 265.

⁴² *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538.

⁴³ Section 19.

⁴⁴ This was highlighted in the context of choice of law rules in *The Republic of Philippines v Maler Foundation* [2014] 1 SLR 1389 at [62].

the US approach has an explicit bias against foreign plaintiffs; it is in itself a strong factor indicating that the plaintiff has chosen an inconvenient forum.⁴⁵ The imperatives for this approach lie in the prevention of forum shopping as well as the conservation of judicial resources for the benefit of local cases. On the other hand, the residence of the parties is only one of the factors taken into consideration under the Singapore version of the doctrine.

25. The natural forum doctrine, and in particular the “most appropriate forum” test, has come under attack from many quarters. The most recent and relevant challenge comes from the *Report of the Committee on the Singapore International Commercial Court* which questioned whether it remained “modern and relevant”.⁴⁶ The point is not elaborated, and so I turn now to consider the main arguments for and against the doctrine, in the context of the possible approaches to jurisdiction.
26. There is a spectrum of jurisdictional approaches⁴⁷ that could be adopted to deal with competing jurisdictions. For present purposes, the key points in the spectrum may be laid out as follow:
 - a. Jurisdiction must be exercised unless there has been abuse of process in the form of vexatious and oppressive conduct by the plaintiff (the abuse of process approach).
 - b. No *forum non conveniens*: jurisdiction once assumed must be exercised (the EU approach).
 - c. Jurisdiction should be exercised unless the forum is a clearly inappropriate one (the “clearly inappropriate forum” test).
 - d. Jurisdiction should be exercised unless the most appropriate forum is elsewhere (the “most appropriate forum” test).
27. On the abuse of process model, having wide jurisdictional rules like we currently do but without a broad natural forum doctrine, qualified by a narrow discretion based on wrongful conduct, is likely to lead to the exercise of jurisdiction in cases with tenuous connections. This is likely to have negative effects: (a) a reputational risk of arrogance; (b) the risk of anti-suit

⁴⁵ *Piper Aircraft Co v Reyno* 454 US 235 (1981).

⁴⁶ *The Report of the Singapore International Commercial Court Committee* (2013), at para [27].

⁴⁷ Other techniques include the use of anti-suit injunctions to prevent parties from starting or continuing with foreign proceedings, anti-enforcement injunctions to prevent the enforcement of resulting foreign judgments, damages for breach of jurisdiction agreements, creation of estoppel from a local judgment, and clawback legislation to reverse the effects of foreign judgments. These topics are beyond the scope of this paper.

injunctions being issued from foreign courts; (c) the risk of non-enforceability of Singapore judgments, including the issue of anti-enforcement injunctions by foreign courts; (d) the risk of duplicative proceedings and inconsistent judgments.

28. The EU approach in the first model is premised on a rigid set of jurisdictional allocation rules binding on member states. The plaintiff should sue in the defendant's home country subject to narrowly construed exceptions. There is no scope for the application for *forum non conveniens*. This model makes sense in view of the narrowly defined jurisdictional rules. This model works less well outside of a treaty regime, because of the lack of mutuality. Moreover, practically, having a narrow jurisdictional basis may not be entirely conducive to attracting international commercial litigation.

29. Assuming that some doctrine of *forum non conveniens* is needed, the real contest is between the "most appropriate forum" test and the "clearly inappropriate forum" test. The main arguments in favour of the "most appropriate forum" test are that:

- a. It recognises, as a matter of international comity, that foreign courts may have legitimate claims to try the case and have the competence to do so.⁴⁸ However, unlike the EU regime, it does not espouse the specific ideal that every dispute has a "seat" or "centre or gravity" in a country which is best placed to try the case. The natural forum is a relative concept in the common law.⁴⁹ Within the constraints of practical justice, the case should be tried in what can be demonstrated to be a clearly more appropriate forum. The practical benefits lie in the avoidance of duplication of trials and the potential conflict of judgments. On the other hand, the "clearly inappropriate forum" test is only concerned with the question whether the case has adequate connections with the forum for it to hear the case. This can actually have surprising consequences where the forum may exercise jurisdiction under the "most appropriate forum" test but not under the "clearly inappropriate forum" test, in cases where (a) there are no connections with the forum, there is also no available forum abroad; (b) there are no connections with the forum, and the foreign connections are with countries that the parties have no interest in litigating in.

⁴⁸ *Eng Liat Kiang v Eng Bak Hern* [1995] 2 SLR(R) 851 at [19]-[25]; *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [50]-[52]. See also *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494 at [14]-[19].

⁴⁹ *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [53].

- b. The “most appropriate forum” test takes a more even-handed approach to the interests of plaintiffs and defendants than the “clearly inappropriate forum” test. The “clearly inappropriate forum” test strongly favours the party who starts the proceedings in the forum. In common law systems, this may be the party who is seeking to vindicate a claim, or it could be a defensive move for a declaration of non-liability. On the other hand, in the “most appropriate forum” test the fundamental consideration is that the court should act in the interests of *all* the parties and for the ends of justice. There is already an inherent forum-bias in the way the “most appropriate forum” test works out in practice. First, the defendant bears the burden of demonstrating that there is an available and clearly⁵⁰ more appropriate forum elsewhere.⁵¹ Secondly, there have been many cases where the plaintiff is able to sue in the forum although the prima facie most appropriate forum is elsewhere by demonstrating that he is unable to obtain substantial justice in that foreign court; but no case where a defendant has succeeded in convincing the prima facie most appropriate forum not to exercise jurisdiction because he cannot obtain substantial justice in the forum.
- c. The “most appropriate forum test” was explicitly designed to discourage forum shopping. Forum shopping tends to be used in a pejorative sense. In this globalised world, the existence of choices of legal system to commence proceedings is an inescapable fact. It may be difficult to draw a clear line between a legitimate choice of forum from an illegitimate one.⁵² The “most appropriate forum” test attempts this exercise by a careful examination of all relevant circumstances to ensure that the choice made does not unduly prejudice the other party. On the other hand, the “clearly inappropriate forum” test taken together with the wide bases of jurisdiction under Australian law makes it difficult to displace the choice of the Australian forum.
- d. The “most appropriate forum” test is a better-calibrated tool to prevent a saturation of foreign parties and foreign claims into the legal process at the expense of domestic cases.

⁵⁰ The word “clearly” in this context is not merely a reference to the quality of the evidence, but to a substantive difference in the appropriateness of competing fora: *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [2008] 3 SLR(R) 121 at [22].

⁵¹ This is the legal burden in the case of service within jurisdiction. In the case of service outside jurisdiction, the plaintiff bears the legal burden of showing that Singapore is an appropriate forum (*Siemens AG v Holdrich Investments Ltd* [2010] 3 SLR 1007) and not the clearly most appropriate forum (otherwise there may be a jurisdictional limbo if the competing forum is equally appropriate), and the defendant will therefore carry the evidential burden of showing that there is another available forum that is clearly and distinctly more appropriate.

⁵² See F Ferrari, “Forum Shopping in the International Commercial Arbitration Context: Setting the Stage”, in F Ferrari (ed), *Forum Shopping in the International Commercial Arbitration Context* (Munich: Sellier, 2013).

Of course, this assumes that the influx of foreign cases is a problem. The thinking behind the proposed Singapore International Commercial Court is clearly to encourage more foreign cases. But it should be borne in mind that the natural forum doctrine applies beyond commercial cases, where the influx of unconnected foreign cases may not bring as much economic benefits to Singapore.

- e. To the extent that *forum non conveniens* continues to play a role as a proxy for choice of law, the “most appropriate forum” test can be more sensitive to the requirements of justice. Historically, before choice of law rules were developed the English court used to stay proceedings in cases where the judges did not think the application of English law was suitable. This is no longer of concern where choice of law rules have developed. But there are still some areas where choice of law remains undeveloped, eg, in divorce and maintenance within the matrimonial jurisdiction. In these areas *forum non conveniens* plays an important role in limiting the territorial reach of Singapore law.⁵³ The amendments to the Women’s Charter⁵⁴ in 2011⁵⁵ to extend the court’s ancillary jurisdiction to cases where a foreign divorce decree has been obtained is an acknowledgement that sometimes it is better that the Singapore court plays an ancillary role in deference to a foreign court which is the more appropriate forum to deal with the main issue of divorce.
- f. The broad discretion in the doctrine gives the courts tremendous flexibility to deal with individual cases. Singapore courts which are well known for their highly pragmatic and common-sense approach have been applying the “most appropriate forum” test for more than two decades. The Court of Appeal has twice considered but rejected “clearly inappropriate forum” test.⁵⁶

30. The main arguments⁵⁷ against the “most appropriate forum” test are:

⁵³ For divorce, see: *Low Wing Hong Alvin v Kelso Sharon Leigh* [1999] 3 SLR(R) 993; For maintenance, see *BDA v BDB* [2013] 1 SLR 607.

⁵⁴ Cap 353, 2009 Rev Ed.

⁵⁵ Women’s Charter (Amendment) Act 2011 (No 2 of 2011).

⁵⁶ *Eng Liat Kiang v Eng Bak Hern* [1995] 2 SLR(R) 851 at [19]-[25]; *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [50]-[52]. See also *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494 at [14]-[19].

⁵⁷ For a recent survey, see M Petshe, “A Critique of the Doctrine of *Forum Non Conveniens*” (2012) 24 Fla J Intl L 545.

- a. The *forum non conveniens* doctrine is on the decline in English law. However, the decline is due to the Europeanization of jurisdiction rules, and not because of dissatisfaction with the doctrine in the common law. Insofar as the common law rules of jurisdiction still apply within the interstices of the European regime, the *forum non conveniens* doctrine remains a highly relevant aspect of it. It may be noted that *forum non conveniens* doctrine is thriving in other common law jurisdictions as well.⁵⁸ Indeed, Canada has taken steps to codify the “most appropriate forum” test.⁵⁹
- b. The “most appropriate forum” test goes against international comity because it involves the court’s evaluation of foreign legal systems. This was the main reason provided by the Australian court for preferring the “clearly inappropriate forum” approach.⁶⁰ There is force in this criticism, particularly in the light of a recent Privy Council decision that the court in the *forum non conveniens* exercise may conclude that a plaintiff would be deprived of justice in a foreign court for reasons of systematic corruption, incompetence or lack of independence of that foreign court.⁶¹ If it is accepted that international comity requires the court to consider the question whether the case should sometimes be tried in a foreign court as a matter of international comity,⁶² then it is a necessary evil that sometimes the court will withhold that international comity where it is justified by the circumstances. The requirement of cogent evidence⁶³ provides a rational basis for drawing the line.
- c. The doctrine deprives the plaintiff of justice. This argument arises commonly in the context of personal injuries claims against multinational corporations, and it has been argued that the “most appropriate forum” doctrine denies the plaintiffs the application of the standard of duty of care under the corporation’s home country’s laws, which are usually higher than the standard in the place where injuries occur.⁶⁴ This line of

⁵⁸ See, *Airbus v Patel* [1999] 2 AC 119 at 141 (Lord Goff of Chieveley): “The principle is now so widespread that it may come to be accepted throughout the common law world; indeed, since it is founded upon the exercise of self restraint by independent jurisdictions, it can be regarded as one of the most civilised of legal principles.”

⁵⁹ Stephen Pitel, “The Canadian Codification of *forum non conveniens*” (2011) 7 JPIL 251.

⁶⁰ See also Adrian Briggs, “The Principle of Comity in Private International Law” (2012) 354 *Recueil des Cours* 65 at [122]-[125].

⁶¹ *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7, [2012] 1 WLR 1804 at [101].

⁶² As the Singapore courts do: *Eng Liat Kiang v Eng Bak Hern* [1995] 2 SLR(R) 851 at [19]-[25]; *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [50]-[52]. See also *Q & M Enterprises Sdn Bhd v Poh Kiat* [2005] 4 SLR(R) 494 at [14]-19].

⁶³ Above, note 61, at [101]: “considerations of international comity will militate against any such finding in the absence of cogent evidence” (Lord Collins of Mapesbury JSC).

⁶⁴ See, eg, P Prince, “Bhopal, Bougainville and OK Tedi: Why Australia’s *Forum Non Conveniens* Approach is Better” (1998) 47 ICLQ 573.

argument has two faulty premises. The first is that the standards of the forum should be applicable in the first place. The second, assuming the first premise, is that the forum will not apply the law of another country as a matter of choice of law. Further, this line of argument downplays the interests of the defendant. If there is any particular classes of plaintiffs which deserve special protection, legislation will arguably be able to provide a more targeted solution. In comparison, the “most appropriate forum” requires that the interests of both the plaintiff and the defendant be considered.

- d. Forum shopping is either neutral or even a good thing.⁶⁵ Choice of forum to commence proceedings is in itself neutral. Forum-shopping has a slippery meaning,⁶⁶ and often it is a label attached after the conclusion is reached that the case should not be heard in the forum. Ultimately, the question is whether the plaintiff is taking undue advantage of the availability of the forum in his action against the defendant. All things being equal, the “clearly inappropriate forum” test allows greater scope for forum-shopping than the “most appropriate forum” test.
- e. The uncertainty and consequential litigation costs involved. There is judicial discretion embodied in both the “most appropriate forum” test as well as the “clearly inappropriate forum” test. The lower threshold in the latter does render it more predictable, even if it means that the defendant mostly loses the jurisdiction battle. The doctrine of natural forum in any form has been subject to the general criticism that it creates a new level of litigation about where to litigate, and the question can take up significant resources for resolution. However, it is notable that tremendous resources have also been spent on litigation on where to litigate within the European regime even though it has no doctrine of natural forum.⁶⁷
- f. The abuse of the doctrine in enforcement proceedings. In the United States at least, the doctrine of *forum non conveniens* has been used as a defence to the enforcement of a foreign arbitral award under the New York Convention,⁶⁸ and it is potentially applicable

⁶⁵ See, eg, FK Juenger, “What’s Wrong with Forum Shopping?” (1994) 16 Syd L Rev 5; BR Opeskin, “The Price of Forum Shopping: A Reply to Professor Juenger” (1994) 16 Syd L Rev 14; FK Juenger, “Forum Shopping: A Rejoinder” (1994) 16 Syd L Rev 28.

⁶⁶ See note 52 above.

⁶⁷ *Research in Motion UK Ltd v Visto Corp* [2008] EWCA Civ 153, [2008] Bus LR D141 at [3] (in the context of Brussels I Regulation): “Too often one finds parties litigating as much about where and when disputes should be heard and decided as about the real underlying dispute”.

⁶⁸ *Figueiredo Ferraz E Engenharia de Projeto Ltda v Republic of Peru* 665 F 3d 384 (CA2NY, 2011).

to a claim to enforce a foreign judgments as well, even an action under the Hague Convention on Choice of Court Agreements.⁶⁹ However, this type of challenge is not likely to happen under Singapore law for three reasons. First, the foreign judgment gives rise to an independent obligation, and the enforcement action is only concerned with that obligation. Thus, an alleged set-off against the underlying debt is not a good defence to the enforcement of the foreign judgment.⁷⁰ As far as the enforcement of that obligation is concerned, it is hard to see any *forum non conveniens* objection arising so long as there are assets available in the forum. Secondly, the US courts consider the question of which state has the greater interest in the enforcement proceedings; this is not a relevant consideration in the Commonwealth version of *forum non conveniens*. Thirdly, I think that the Singapore courts are likely to take a more pro-enforcement approach than the US courts, and especially in respect of enforcement under a Convention.

- g. Choice of law rules can deal with problems of forum shopping. This is true to some extent.⁷¹ There will be little incentive for a plaintiff to be choosy if the different courts will apply the same law. However, in private international law, “procedure” is always a question for the law of the forum, and this is often a key factor in cross-border litigation strategy. For example, jury awards and liberal discovery attract much litigation to the United States. Most developed countries have been moving towards a more restrictive meaning of “procedure” for the purpose of choice of law. Singapore law still follows the traditional common law approach which takes a broad view of “procedure”,⁷² but it is in a state of flux.⁷³ Moreover, there are still some areas where no choice of law is applied; hence, jurisdictional techniques will play a crucial role in matrimonial⁷⁴ and insolvency⁷⁵ contexts.

31. My own view is that the “most appropriate forum” test is a robust and flexible one, and is the more appropriate jurisdictional test for Singapore. If the concern is that the test will take

⁶⁹ Ronald Brand, “Challenges to *Forum Non Conveniens*” (2012-2013) 45 NYU J Int’l L & Pol 1003 at 1028-1030.

⁷⁰ *Bellaza Club Japan Co Ltd v Matsumura Akihiko* [2010] 3 SLR 342.

⁷¹ Historically, one important reason for applying the *lex loci delicti* in choice of law for torts was to prevent forum shopping, especially when the *lex fori* was applicable.

⁷² *Star City Pty Ltd (fka Sydney Harbour Casino Pty Ltd) v Tan Hong Woon* [2002] 1 SLR(R) 306 at [12]; *Dynasty Line Ltd (in liquidation) v Sukanto Sia* [2014] SGCA 21 at [51].

⁷³ *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367.

⁷⁴ Above, para .

⁷⁵ *Beluga Chartering GmbH (in liquidation) v Beluga Projects (Singapore) Pte Ltd* [2014] SGCA 14.

desirable cases away from the Singapore courts, I do not think that this is a necessary consequence. In a recent study of English common law on the subject, Professor Hartley observed:⁷⁶

This survey shows that common-law judges make a strenuous effort to ensure that the case is decided in the most suitable court. This necessarily involves a subjective factor, which produces uncertainty. If they are to be criticized, however, it is probably because they do not stay or dismiss proceedings often enough, rather than because they deprive the claimant of his rightful forum.

32. There are practical ways to mitigate the uncertainty. The parties can agree to a choice of forum; this will move the question from connected to consensual jurisdiction. There are also more sophisticated ways, in the form of contractual waiver of objections based on *forum non conveniens*.

Choice of Law and Party Autonomy

33. In my inaugural lecture in 2008, I had raised the issue of party autonomy in the choice of law rules of Singapore and argued that although the law gives nearly unrestrained effect to the choice of the parties in relation to contractual issues, more effect could be given to party autonomy in relation to non-contractual issues that arise in connection with the contractual transaction.⁷⁷ I had pointed out that commercial parties could specify the applicable law for non-contractual issues under the European regime⁷⁸ as well as in the context of international commercial arbitration. This issue appears to have gained greater significance with the efforts to attract international commercial litigation to the Singapore courts. Unfortunately, I have to report that there has been no further judicial development in Singapore on this topic since then.⁷⁹ In the meantime, the state of Oregon became the first common law jurisdiction to enact legislation specifically to allow for parties to select the governing law for non-contractual

⁷⁶ Trevor C. Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law* (Cambridge: CUP 2009) p 235, §4. See also JJ Fawcett and JM Carruthers (eds), *Cheshire, North and Fawcett: Private International Law* (Oxford: OUP, 14th ed, 2008) at 439.

⁷⁷ Yeo Tiong Min, “The Effective Reach of Choice of Law Agreements” (2008) 20 SAclJ 723.

⁷⁸ Except for intellectual property and competition torts. For arguments that party autonomy should extend even to the tort of infringement of intellectual property, see Rita Matulionytė, “Calling for Party Autonomy in Intellectual Property Infringement Cases” (2013) 9 JPIL 77.

⁷⁹ Extra-judicially, the following comment by Judge of Appeal Justice VK Rajah is significant: “A strong argument can be made that, when the relationship between the parties is primarily contractual, causes of action relating to the contract should also be governed by the proper law of the contract.” VK Rajah, “Judicial Dynamism in International Trade in Hong Kong and Singapore – An Indivisible Link” (2010) 40 HKLJ 815 at 822

obligations, but confined it to choices made after the event.⁸⁰ This is in contrast to the European position which allows commercial parties in a freely-negotiated contract to choose a law to govern non-contractual obligations. It may well be that legislation is a more appropriate channel for reform in this area.

34. Oregon has also been innovative in another aspect of private international law. It was the first jurisdiction to enact legislation to permit contracting parties to choose rules which do not belong to any national legal system, for eg, the UNIDROIT Principles of International Commercial Contracts.⁸¹ The only English common law authority on the question had decided that contracting parties must choose the law of a country's legal system.⁸² The same position applies under the European regime,⁸³ and under the *Restatement (Second) on the Conflict of Laws* in the United States.⁸⁴ Nothing, however, prevents the parties from incorporating such rules into their contract as terms subject to the test of certainty of terms under the governing law. There has been recent renewed interest in the subject partly because the development of the Principles of European Contract Law.⁸⁵ Closer home, there are efforts to develop Asian Principles of Contract Law.⁸⁶ The common law resistance to choice of non-state rules is attributable to historical reasons. First, transnational law is a new phenomenon that did not exist during the developmental stage of choice of law rules. Secondly, the vested rights theory led to the logic a contract can only exist by reference to the law of a national legal system which will govern the rights and liabilities of the parties. Modern conflicts theory has moved away from vested rights. The modern reference to the governing law is for the purpose of determining the rights and liabilities between the contracting parties. In principle, it should be possible for contracting parties to choose a non-national set of rules, subject to two conditions. First, the rules must be ascertainable and definite enough to provide justiciable standards for the court to

⁸⁰ An Act on Choice-of-Law for Torts and other Contractual Claims (Or Rev State §31.850-§31.890, 2009); Symeon Symeonides, "Oregon's New Choice of Law Codification for Tort Conflicts: An Exegesis" (2009) 88 Or Law Rev 963.53

⁸¹ Symeon Symeonides, "Oregon's Choice-of-Law Codification for Contract Conflicts: An Exegesis" (2007-2008) Willamette L Rev 205 at 228.

⁸² *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch) at [2]. It is however, not uncommon for such selections to be given effect to in international arbitration tribunals, which generally do not regard themselves as being bound by the national choice of law rules.

⁸³ *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 19, [2004] 1 WLR 1784 and *Halpern v Halpern* [2007] EWCA Civ 291, [2008] 1 QB 105. These cases were on the Rome Convention on the Law Applicable to Contractual Obligations, but the position under the Rome I Regulation on the Law Applicable to Contractual Obligations is the same.

⁸⁴ See Symeon Symeonides, "Contracts Subject to Non-State Norms" (2006) 54 Am J Comp L 209 at 215–216.

⁸⁵ See http://frontpage.cbs.dk/law/commission_on_european_contract_law/.

⁸⁶ Shiyuan Han, "Principles of Asian Contract Law: An Endeavor of Regional Harmonization of Contract Law in East Asia" (2013) 58 Villanova L Rev 589.

apply;⁸⁷ and secondly, there must be some gap-filling system because non-national laws are not likely to govern all aspects of the transaction.

35. This is the subject of an ongoing project by the Hague Conference on Private International Law, the proposed Hague Convention on Choice of Law in International Contracts.⁸⁸ The current draft allows contracting parties to choose a non-national legal system to govern their contract, provided these rules are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules.⁸⁹ The parties may also choose a law to govern residual issues. The draft Convention does not say what happens when the parties do not, but presumably these issues would be governed by the law that the forum would apply to the contract in the absence of choice by the parties. The draft Convention has not (yet) addressed the applicable law in such cases. In its present form, however, the draft Convention contains an important qualification: it permits the choice of a non-national legal system only to the extent that it is allowed by the law of the Contracting State forum. In other words, signing up to the Convention in its current form will not change the common law position. However, the draft Convention is still in its early stages, and if and when Singapore joins the Hague Conference, it will have some say on its final design.

Conclusion

36. Private international law in Singapore looks set to gain further significance in the future, especially with the proposed Singapore International Commercial Court. Harmonisation, if and when it occurs will reduce the incidence of recourse to rules of private international law, but harmonisation will take a long time to materialise, and it will not usually be comprehensive.⁹⁰ So private international law as a subject is unlikely to be eliminated. Indeed, a key strategy in harmonisation exercises is to start with the harmonisation of private international law (including international civil procedure) as the first step towards greater cross-border co-operation, before the harmonisation of substantive national laws. In this respect, it is notable that Singapore recently adopted the Hague Convention on the Civil Aspects of International

⁸⁷ Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford: OUP, 2008), at [10.06] and [10.12].

⁸⁸ See http://www.hcch.net/index_en.php?act=text.display&tid=49.

⁸⁹ Article 3. See Draft Commentary on the Draft Hague Principles on Choice of Law in International Contracts (2013), http://www.hcch.net/upload/wop/princ_com.pdf.

⁹⁰ Eg, the United Nations Convention on the International Sale of Goods (Vienna Convention) expressly preserves the application of private international law to fill gaps. Sale of Goods (United Nations Convention) Act, Cap 283A, 2013 Rev Ed.

Child Abduction, and under serious consideration are the Hague Convention on Choice of Court Agreements as well the UNCITRAL Model Law on Cross-Border Insolvency.

37. For the immediate future at least, national solutions to cross-border problems will still predominate. The proposed Singapore International Commercial Court raises a new set of questions for Singapore law, but it is premature to answer them at this stage. Will private international law develop differently in that Court?⁹¹ Will there be two systems of private international law in Singapore as a result? These are questions that must be addressed another day.

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⁹¹ Just as private international law has developed differently from the litigation context in international commercial arbitration. At the very least, proof of foreign law is likely to take on a different complexion in the proposed Singapore International Commercial Court, with the proposed changes to the Evidence Act to allow judges to dispense with the concept of proof of foreign law as a fact.