11th Yong Pung How Professorship of Law Lecture

Scope and Limits of Party Autonomy under the Hague Convention on Choice of Court Agreements

Abstract: The *Hague Convention on Choice of Court Agreements*, now part of Singapore law, aims to give effect to party autonomy in the choice of litigation fora. This paper will address the scope and limits of this party autonomy. It will address the situations where party autonomy itself is being challenged, for example, through lack of consent or capacity. It will also consider how the concept of party autonomy under the Convention relates to its counterpart under the common law.

I. Introduction

1. I am greatly honoured to deliver the 11th Yong Pung How Professorship of Law Lecture. My chair and this lecture series have been sponsored by a generous endowment from the Yong Shook Lin Trust, facilitated by Mr Yong Pung How. Mr Yong had provided tremendous assistance to SMU from the inception of the SMU School of Law. He had helped to recruit faculty to kickstart the School, and served with distinction as the Chairman of its first Advisory Board and subsequently as Chancellor of the University. He continues to support the School to this day.

2. As the Chief Justice of Singapore from 1990 to 2006, Mr Yong had uplifted the administration of justice in Singapore to first-class world standards. This laid the important foundations for the development of Singapore jurisprudence and the globalisation of Singapore legal services. Singapore is taking a multi-pronged approach in developing itself as a commercial dispute resolution hub for Asia and the world, by offering a one-stop service centre for litigation, arbitration and mediation. On the litigation front, two key developments in Singapore have been the establishment of the Singapore International Commercial Court (SICC) in 2015 and the adoption of the Hague Convention on Choice of Court Agreements ("Hague Convention") into law in 2016.

II. Party Autonomy and the Hague Convention on Choice of Court Agreements

3. This paper will focus on the concept, operation and limits of party autonomy under the Hague Convention in comparison with and in relation to the common law. The Hague Convention has

three principal features: (1) the exclusively chosen court of a Contracting State shall hear a dispute within the choice of court clause unless the clause is null and void;[1] (2) a non-chosen court of a Contracting State should not take jurisdiction unless the exclusive choice of court clause is null and void; a party lacked capacity; the exclusively chosen court has declined to take jurisdiction; enforcement of the clause would be manifestly incompatible with forum public policy; or the agreement cannot be performed for exceptional reasons outside the control of the parties;[2] and (3) the judgment of a chosen court of a Contracting State shall be recognised and enforced in another Contracting State subject to limited defences defined in the Convention.[3] It is also possible for Contracting States to declare that it will apply the Convention to non-exclusive choice of court agreements,[4] but no state has done so thus far.

4. At this broad level of generality, the concept of party autonomy in the Convention resonates strongly with the common law. As Chief Justice Yong said of Singapore law on choice of court agreements: "contracts freely entered into must be upheld and given full effect unless their enforcement would be unreasonable and unjust".[5] I am not aware of any case where a Singapore court has declined to take jurisdiction when it is the exclusively chosen court, though it is within its discretion to do so.[6] When contracting parties have chosen a foreign court exclusively, then a party would be bound by the agreed clause unless it can show exceptional circumstances amounting to strong cause to the contrary.[7] Nevertheless, there are important differences of detail between the Convention and the common law. Under the Hague Convention, the chosen court has no discretion to stay proceedings if the choice of court clause is valid, and the discretion of a non-chosen court to ignore a valid choice of court clause is crafted in narrower terms than the common law test of strong cause.
5. On the third feature, until recently the link between party autonomy and the enforcement of judgments has not been the subject of much attention.[8] In the common law world, it is well

[1] Article 5(1), Hague Convention.
[2] Article 6, Hague Convention. There is no room for the direct application of international mandatory rules of the forum under the Hague Convention; but they can operate indirectly as public policy of the forum.
[3] Article 8, Hague Convention.
[4] Article 22, Hague Convention.
[5] *The Asian Plutus* [1990] 1 SLR(R) 504 at [9]. See also *The Vishva Apurva* [1992] 1 SLR(R) 912 at [18]-[19].
[6] *Cf Donohue v Armco Inc* [2001] UKHL 64, [2002] 1 All ER 749.
[7] *The Asian Plutus* [1990] 1 SLR(R) 504 at [15]. See also *The Vishva Apurva* [1992] 1 SLR(R) 912 at [13], [16] and [22].
[8] A Briggs, "Distinctive aspects of the conflict of laws in common law systems: Autonomy and agreement in the conflict of laws" (2005) 57 同志社法学 21 at 23-25 had this to say about the enforcement of foreign judgments based on the parties' agreement on the foreign court of origin: "The fact that English judges do not always say this does not mean that they are not thinking it. The fact that English academic writers have been slow to grasp the fundamental importance of this broad principle does not mean that the principle is not there." See also A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford: Oxford University Press, 2008) at [9.21]-[9.27]

established that a judgment from a foreign court that has been chosen by contracting parties will meet the standard of international jurisdiction for the purpose of recognition and enforcement of foreign judgments in the forum. The doctrine of international jurisdiction looks to the connection between the party sought to be bound by the foreign judgment and the proceedings in the foreign court. Presence[9] is an established ground of international jurisdiction because of the deeply entrenched principle of territorial sovereignty: a party who was present in a foreign territory at the time of the commencement of the foreign proceedings is bound to obey the judgment of the court of that foreign sovereign. Voluntary submission to foreign proceedings amounts to acknowledgement and acceptance of the jurisdiction of the foreign court over the party, and the common law court considers a party who has so conducted himself to be bound to obey the foreign judgment. It was a logical step to apply this principle to an agreement to submit to the jurisdiction of the foreign court. However, it is the element of submission inherent in the agreement, rather than party autonomy itself, that has traditionally been emphasised as the basis of the international jurisdiction in the common law. In contrast, in many civil law countries, the recognition and enforcement of foreign judgments is a matter of treaty and reciprocity; party autonomy in itself is irrelevant. Party autonomy came into prominence in European law only after the Brussels Convention in 1968.[10]

6. This may be contrasted with the development of international commercial arbitration, where party autonomy has played a much more significant role. This is primarily because the jurisdiction of an arbitration tribunal depends on the agreement of the parties, and the agreement of the parties was also the common law basis for the enforcement of foreign arbitration awards, before statutory frameworks and international conventions overtook the nascent common law enforcement mechanism.

7. Today, we are witnessing a convergence in way party autonomy plays out under the two regimes. The creation of specialised international commercial courts[11] as a service industry is

[9] Presence to the exclusion of residence appears to be the English common law position today (*Rubin v Eurofinance SA* [2013] 1 AC 236 at [7]-[8]), but residence remains a ground under the UK and Singapore reciprocal enforcement statutes and probably Singapore common law (*RMS Veerappa Chitty v MPL Mootappa Chitty* (1894) 2 SSLR 12) as well.

[10] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968.

[11] The London Commercial Court is an international commercial in all but name. Similar commercial courts or divisions have sprung up in Europe, including in France and the Netherlands, and Germany and Brussels have similar plans (http://conflictoflaws.net/2018/the-domino-effect-of-international-commercial-courts-in-europe-whos-next/, accessed on 15 May 2018). China has announced that it will establish three international commercial courts (https://www.straitstimes.com/asia/east-asia/chinas-courts-for-bri-disputes-a-logical-step, accessed on 14 May 2018). There is interest in Australia as well: The Honourable Chief Justice Marilyn Warren AC and The Honourable Justice Clyde Croft, "An International Commercial Court for Australia: Looking Beyond the New

one such manifestation. The SICC has certain features which are inspired by the arbitration regime, for example, the confidentiality in certain cases, special rules of evidence, and the use of an international panel. The convergence goes deeper than institutional features. For example, under the common law, it is implied into an arbitration agreement that the parties also promise to abide by the award and to perform the award.[12] This has not been the case for choice of court agreements, but Section 18F of the Supreme Court of Judicature Act,[13] where it applies as the law governing the choice of court agreement, replicates that effect for a judgment when parties have consented to resolve a dispute in the SICC. Another manifestation is the Hague Convention, which endeavours to match the success of the New York Convention by putting court judgments arising from parties' agreement on a similar footing as arbitration awards.

8. The Hague Convention is slowly but surely gaining momentum. It came into effect on 1 October 2015 for the EU (except Denmark) and Mexico. It became law in Singapore on 1 October 2016. Other signatories – United States of America, Ukraine, Montenegro, and the People's Republic of China[14] – have not yet taken the necessary steps to enact the Convention into law. Although Canada has not ratified the Convention, the province of Ontario has already enacted legislation in anticipation.[15] The Joint Standing Committee on Treaties of the Australian Parliament recommended accession to the Convention in November 2016.[16] Before China had even signed the Convention, a court in Shanghai had taken guidance from the Convention in deciding to stay proceedings in favour of the Taiwanese court selected by the parties, by applying a presumption of exclusivity to the choice of court clause before it.[17] The Convention applies in the UK by virtue of its EU membership. Although the legal consequences of BREXIT remain murky, the UK Government has explicitly declared its intention to continue applying Hague Conventions to which it is already a party.[18]

York Convention", https://www.monash.edu/__data/assets/pdf_file/0009/467658/Com-CPD-April-2016-Paper.pdf, accessed on 14 May 2018).

[12] *Breme Oeltransport GmbH v Drewry* [1933] 1 KB 753 at 760; *Associate Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 WLR 1041) (PC Bermuda).

[13] Cap 322, 2007 Rev Ed.

[14] The Mainland has to decide whether to extend the effect of the Convention to Hong Kong SAR and Macau SAR.

[15] International Choice of Court Agreements Act 2017.

[16] Parliament of the Commonwealth of Australia, Report 166, at [3.21], available at: http://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024013/toc_pdf/Report166.pdf;fileType=application%2Fpdf, accessed on 9 May 2018.

[17] See http://conflictoflaws.net/2017/chinese-courts-made-decision-taking-into-account-of-the-hague-choice-of-court-convention/, accessed on 9 May 2018.

[18] HM Government, "Providing a Cross-Border Civil Judicial Cooperation Framework: a Future Partnership Paper", available at:

III. Scope of Party Autonomy under the Hague Convention

9. The Hague Convention applies to civil and commercial matters, subject to any subject matter exclusions under the Convention. Whether the Hague Convention applies in any particular case depends on whether there is a relevant exclusive choice of court agreement. The notion of party autonomy that has defined the scope of this Convention is slightly different from the common law.

A. Exclusion of Consumer and Employment Contracts

10. The Hague Convention does not apply to consumer or employment contracts.[19] These are areas where there are strong arguments for limiting the scope of party autonomy because of concerns with information asymmetry and inequality of bargaining power. In contrast, common law rules do not have inherent divisions to deal with consumer or employment contracts separately. Common law rules must be flexible enough to deal with all types of situations including these, whereas the Hague Convention, having excluded these subject matters, can in theory afford to give greater effect to party autonomy.[20] It is notable that the Hague Principles on the Choice of Law in International Commercial Contracts excludes consumer contracts, employment contracts *and* non-commercial contracts generally, and it pushes party autonomy even further.

B. An "International" Contract

11. The Hague Convention only applies to a situation which is "international".[21] This is defined in a negative way to exclude only transactions which are localised in a Contracting State. A transaction is localised if all the parties reside in the same Contracting State and the relationship of the parties and all the elements to the dispute apart from the choice of court agreement are connected only with that Contracting State. This places a restriction on party autonomy where the local interests of the Contracting State should prevail in what is essentially a domestic case. However, this protection is not extended to non-Contracting States. In contrast, the common law does not recognise such a restriction as a matter of the validity of a choice of court clause, though the connections may be relevant in considering the strong cause test. This is not a mere academic distinction. For example, if the parties and all elements of a contract are connected

---

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf, at [21]-[22], accessed on 9 May 2018.

[19] Article 2(1), Hague Convention.

[20] See para [4 above.]

[21] Article 1(2), Hague Convention.

solely with a foreign Contracting State, but the parties choose the SICC as a neutral exclusive forum for dispute resolution, this case may be "international" under the Singapore Rules of Court entitling the SICC to take jurisdiction, but it will not be a Hague Convention case.

C. Meaning of "Exclusive" Choice of Court

12. The Hague Convention only applies to an "exclusive" choice of court agreement. Other types of choice court agreements may still be valid and enforceable, but they are not protected by the Convention. The Hague Convention defines an exclusive choice of court agreement as:[22]

> an agreement concluded by two or more parties that … designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts.

13. It is clear that whether a clause is "exclusive" for the purpose of the Hague Convention must be determined by reference to the text and intent of the Convention. However, one must first ascertain the meaning of the choice of court clause before it can be tested against the frame of reference in the Convention. With the exception of the presumption of exclusivity, the Hague Convention is silent on which law applies to the construction of the choice of court clause. To be consistent with the structure and tenor of the Convention, which appears to direct the application of the private international law of the chosen court to questions of the existence and validity of the choice of court clause, the interpretation of the clause should be approached in the same way, giving primacy to the approach of the chosen court.

14. There appears to be a cultural divide between the common law perspective of the choice of court agreement as a contractual agreement and the civilian perspective of the agreement as a procedural device. The chosen court may consider the clause to be contractual which raises an issue of substance thus requiring the application of choice of law rules, or the chosen court may apply its own law if regards the choice of court clause to raise an issue of procedure only. This division also manifests itself in the context the meaning of an "exclusive" choice of court agreement.

i. <u>Deemed "Exclusive"</u>

[22] Article 3(a), Hague Convention.

15. The Hague Convention deems a choice of court agreement to be exclusive unless parties have expressly provided otherwise.[23] This is a Convention rule which overrides any national law. In comparison, generally the common law avoids the use of presumptions in contractual interpretation, preferring to investigate the facts of each case to determine the objective meaning of the choice of court clause. The presumption clearly makes greater sense from the perspective of procedural efficiency than from contractual party autonomy.[24] The practical significance lies in the importance of clear drafting of choice of court clauses.

ii. Asymmetric Choice of Court Agreements

16. The second area where this cultural divide may be seen is in the approach to asymmetric choice of court clauses. These clauses are frequently found in finance and banking contracts that are drafted in common law style. A typical asymmetric choice of court clause would be something like this:

> In respect of any disputes arising from or in connection with this contract, **B** may sue **A** only in Singapore, but **A** may sue **B** [whether concurrently or otherwise] anywhere in the world.

17. The common law's contractual approach means that choice of court clause will be given effect to as "exclusive" against the party (**B**) who is contractually bound not to sue anywhere else, even if the other contracting party (**A**) who is suing in Singapore has the right to sue elsewhere even concurrently. Asymmetric clauses are enforced in common law systems on the same principle as bilateral clauses, ie, the party who is resisting the choice of court agreement needs to establish exceptional circumstances amounting to strong cause why he should not be held to the jurisdictional bargain.

18. On this issue, the Hague Convention appears to take a narrower view of the scope of party autonomy than the common law. Although the definition does not expressly do so, the Explanatory Report[25] to the Convention in three places explicitly excludes asymmetric choice

[23] Article 3(b).
[24] The Hague Convention has, however, probably inspired a trend to employ presumptions in the Singapore Rules of Court to broaden the jurisdiction of the Singapore courts.
[25] In other areas, an Explanatory Report has been said to be "available as an aid to construction as part of the '*travaux preparatoires*'" (*R v Secretary of State for the Home Department, ex parte Read* [1989] AC 1014 at 1052) and may have "great persuasive value in the process of interpretation" (*R v Secretary of State for he Home Department ex parte Mullen* [2005] 1 AC 1 at [48]).

of court agreements from the scope of the Convention.[26] However, this view has been challenged. The English High Court decision in *Commerzbank AG v Liquimar Tankers Management Inc*[27] (though not a Hague Convention case) probably contains the very first judicial consideration of the meaning of the text of the Hague Convention by the court of a Contracting State. In this case, Cranston J held that an asymmetric choice of court clause (in the pattern illustrated above in paragraph [16]) above was an exclusive jurisdiction clause for the purpose of the Brussels I Regulation in the European Union (EU), and opined (in *obiter*) that, notwithstanding the Explanatory Report: "There are good arguments in my view that the words of the definition of exclusive jurisdiction clauses in article 3(a) of the Hague Convention cover asymmetric jurisdiction clauses."[28] This comment was significant because there was no definition of "exclusive" under the Brussels I Regulation, and the judge was specifically addressing his mind to the definition under the Hague Convention. The primary arguments in favour appeared to be the upholding of party autonomy and the promotion of certainty in upholding jurisdictional bargains. With typical common law ingenuity, Cranston J appeared to have turned the Explanatory Report on its head. The reasoning is not explicit, but it appears to proceed in this way: if the intention to exclude asymmetric clauses had to be mentioned in the Explanatory Report, then that confirms the main text did not on their terms exclude them, and if the main text was not amended to clarify when it was clear that it could cover asymmetric clauses, then the intention was to cover asymmetric clauses.[29] It may be doubted, however, if such an approach is appropriate for the interpretation of an international instrument.

19. The Explanatory Report explains the exclusion of asymmetric choice of court agreements in somewhat technical terms. It states that the Diplomatic Session had agreed that for a clause to be within the scope of the Hague Convention, "the agreement must be exclusive irrespective of the party bringing the proceedings".[30]

20. Just as there are many variations of non-exclusive choice of court agreements,[31] there can also be different types of asymmetric clauses. A good illustration can be found in the arbitration

[26] T Hartley and M Dagauchi, *Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report* ("*Explanatory Report*"), at [32], [105] and [249].
[27] [2017] 1 WLR 3497.
[28] Ibid, at [74].
[29] Ibid, at [36]-[39].
[30] *Explanatory Report*, at [106] and [249].
[31] A Briggs, "The subtle variety of jurisdiction agreements" [2012] LMCLQ 364; TM Yeo, "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306.

context in the Singapore case of *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd*.[32] The plaintiff commenced proceedings in court even though there was a clause in the parties' agreement which gave the plaintiff (but not the defendant) the right to elect for arbitration. The defendant's application to stay the proceedings on the basis of the existence of an arbitration agreement in the parties' contract failed before the Registry, the High Court, and the Court of Appeal, for somewhat different reasons. The Court of Appeal held that there was a valid arbitration agreement in the circumstances, notwithstanding the lack of mutuality in the sense that only one party had the power to elect for arbitration. The Court of Appeal held further that since the election was exercised in favour of litigation, there was no relevant dispute falling within the arbitration agreement.

21. There is no doubt that there was mutuality in the agreement itself. There was clearly also mutuality at another level. If the election had been made for arbitration, then there would have been a mutually binding agreement to arbitrate to the exclusion of litigation. The result of such a unilateral election would have been that both parties become mutually bound to arbitrate, and either could be stopped from litigating in the absence of waiver of the arbitration agreement. The asymmetry lies only in the power of election.

22. This is conceptually different from the clause before Cranston J in the *Commerzbank* case, where the contract imposed an obligation on the guarantor to accept the exclusive jurisdiction of the English court, but gave the bank the right to sue the guarantor anywhere, whether concurrently or not. The guarantor started proceedings against the bank in a Greek court. Under the EU principle of *lis pendens*, ordinarily the court first seised will hear the case and no other EU court should take jurisdiction. The bank then sued the guarantor in the English court in reliance on the jurisdiction agreement. Under the (recast) Brussels I Regulation, a court taking jurisdiction based on an exclusive jurisdiction agreement takes precedence over the court first seised. The practical consequence of commencing proceedings in the English court is that the bank is then bound by the *lis pendens* rule from starting concurrent actions elsewhere in the European Union. From the internal viewpoint of the Regulation it has the effect of electing for a mutually binding jurisdiction agreement. However, the bank remains contractually at liberty to sue the guarantor in a state outside the EU which is not bound by the *lis pendens* rules of the

[32] [2017] 2 SLR 362.

EU.[33] Be that as it may, the point remains that at the time the bank commenced proceedings against the guarantor in the English court, only the guarantor was under an obligation to litigate there. It is hard to see this type of clause as being "exclusive irrespective of the party bringing the proceedings" as indicated in the Explanatory Report.

23. Recent surveys of similar unilateral option clauses in the context of arbitration reveal wildly inconsistent approaches across different countries.[34] Common law countries tended to uphold the clause on the basis of party autonomy, at least for commercial transactions, while some civil law countries have found objection to them as violating equality of procedural rights or being unfair. The approach to unilateral choice of court agreements is likely to attract similar divergence of opinion globally. However, one should be mindful of the conceptual difference in the nature of arbitration and choice of court agreements. While a non-exclusive choice of court agreement is sensible and in fact commonly upheld as such (outside the Hague Convention), there is no meaningful sense in a non-exclusive arbitration agreement. An arbitration agreement should require both parties to arbitrate to the exclusion of litigation, even if the recourse to arbitration is to be triggered by a unilateral exercise of an option. But in a choice of court context, there may be a unilateral trigger of a condition that binds only one party to litigate exclusively in a particular court.

24. It is strongly arguable that the asymmetric clause illustrated in paragraph [16] above is not an exclusive jurisdiction clause under the Hague Convention, notwithstanding the *Commerzbank* case.[35] What might have stronger chance of qualifying as an exclusive jurisdiction clause is something like this:

> In respect of any dispute arising from or in connection with this contract, if **A** sues **B** in the court of **X**, the court of **X** shall have (exclusive)[36] jurisdiction, and if **B** sues **A** in the court of **Y**, the court of **Y** shall have (exclusive) jurisdiction.

---

[33] This not only demonstrates the non-mutuality of exclusive recourse, but also amounts to express provision to the contrary that prevents the bank's agreement to English jurisdiction to be deemed exclusive under the Hague Convention (on the hypothetical assumption that the Convention is applicable).

[34] D Draguiev, "Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability", (2014) 31 Journal of International Arbitration 19; Clifford Chance, "Unilateral Option Clauses – 2017 Survey", available at: https://www.cliffordchance.com/briefings/2017/01/unilateral_optionclauses-2017survey.html, accessed on 9 May 2018.

[35] The *Explanatory Report* actually gives a clause of this structure as a typical example of an asymmetric choice of court clause (at[105]), though it was not specifically included in the (non-exhaustive) list of examples of non-exclusive choice of court agreements (at [109]).

[36] Whether this clause falls within the scope of the Hague Convention does not depend on the appearance of the word "exclusive": if it is within scope, it will be deemed exclusive.

In this case, there is mutuality in the exclusivity of recourse to the chosen court, and equality in the power of election. The chosen court has exclusive jurisdiction irrespective of which party is bringing the proceedings; it is just that the identity of the chosen court depends on which party first takes action. While this type of clause has been found to be within the scope of the Brussels I Regulation,[37] the Explanatory Report gives this as an example of a non-exclusive choice of court agreement.[38]

25. An asymmetric version would have the structure of a floating choice of court clause enforceable at common law if drafted with sufficient clarity:[39]

> In respect of any dispute arising from or in connection with this contract, **A** may select the court of **X** or **Y** as the (exclusive) forum for resolution, and neither party shall commence any legal proceedings against the other until such selection has been made.

Here, there is mutuality in the exclusivity of recourse to the chosen court, but inequality in the power of selection. This structure is similar to the unilateral arbitration clause in the *Wilson Taylor* case. If the previous example is not exclusive under the Hague Convention, it is hard to see how this can be, even if there is French authority[40] that it is exclusive under the Brussels I Regulation. But if *Commerzbank* clause is exclusive under the Hague Convention, then it is hard to see how this is not exclusive. Further, even if a Singapore court takes jurisdiction on the basis of the Hague Convention, there is no assurance that a foreign Contracting State which is requested to enforce the resulting Singapore judgment will acknowledge this as a Convention case. The consequences of such clauses among Contracting States may well be "asymmetric".

26. Moreover, even if this is considered exclusive, there may come a point where the notion of exclusivity may be stretched beyond recognition:

> In respect of any dispute arising from or in connection with this contract, **A** may select the court of any Contracting State to the Hague Convention on Choice of Court Agreements as the (exclusive) forum for resolution, and neither party shall commence any legal proceedings against the other until such selection has been made.

---

[37] See *Meeth v Glacetal Sarl* (Case C-23/78) EU:C:1978:198; [1978] ECR 2133, ECJ.
[38] *Explanatory Report*, at [109], fourth example: "Proceedings against A may be brought exclusively at A's residence in State A; proceedings against B may be brought exclusively at B's residence in State B."
[39] *The Star Texas* [1993] 2 Lloyd's Rep 44; *Sonatrach Petroleum Corp (BCI) v Ferrell International Ltd*, 4 October 2001 (QB).
[40] *Apple Sales International v eBizcuss*: Cass. 1ere Civ, 7 October 2015, 14-16.898.

The technical analysis is the same as above, but the practical and substantive effect of this clause is that **A** may sue **B** anywhere that counts under the Hague Convention, while **B** may only sue **A** in the forum chosen by **A**. It is doubtful on any view whether this can be regarded in substance as a case where the chosen forum is exclusive irrespective of the party bringing the suit. Furthermore, one important objective of the Hague Convention is to create certainty of adjudicatory forum, and a provision like this does not advance the goal at all, and may well fail for that reason.[41]

IV. Independent Agreement

27. The Hague Convention states that "an exclusive choice of court agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract."[42] It goes on to say that the validity of the choice of the court agreement cannot be contested solely on the ground that the contract is invalid.[43] This insulates and protect the party autonomy in the choice of court agreement from challenges to the substantive contract. It does not, however, provide a blanket immunity against all possible challenges to the validity of the substantive contract.

28. While Singapore common law has not gone as far as to separate the choice of court clause as an independent contract, it is nevertheless clear that generally a challenge to the existence or validity of the main contract is a dispute that should be subject to the choice of court clause.[44] In every case the question is whether the challenge to the contract is of a nature that infected the choice of court clause as well, eg, where there was a misrepresentation specifically about the choice of court clause.[45] This is the principle of severability or separability (often used interchangeably).[46]

---

[41] Whether a choice of court clause is "exclusive" and whether it is valid are two different questions. The first question is governed by the Hague Convention. The second is governed by the private international law of the chosen court. Uncertainty may be a relevant factor at both levels.
[42] Article 3(d), Hague Convention.
[43] Article 3(d), Hague Convention.
[44] *PT Selecta Bestama v Sin Huat Huat Marine Transportation Pte Ltd* [2016] 1 SLR 729 at [29]; *Mackender v Feldia AG* [1967] 2 QB 590 at 598.
[45] *PT Selecta Bestama v Sin Huat Huat Marine Transportation Pte Ltd* [2016] 1 SLR 729 at [37]-[43].
[46] Whether severability or separability is a doctrine of private international law of a doctrine of domestic law (and thus subject to choice of law rules) is an academic question in this context because it is mandated by the Hague Convention.

29. The common law approach to this separability principle as applied to arbitration agreements and extended to choice of court agreements[47] was explained by Steven Chong J (as he then was):[48]

> … the doctrine of separability serves to give effect to the parties' expectation that their arbitration clause – embodying their chosen method of dispute resolution – remains effective even if the main contract is alleged or found to be invalid. It does not mean that the arbitration clause forms a distinct agreement from the time the main contract is formed.

30. The court emphasised that Article 16 of the UNCITRAL Model Law on International Commercial Arbitration Model Law which states that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract" was only for the purpose of testing the existence and validity of the arbitration agreement apart from the main contract. For this reason, the court concluded that the arbitration agreement was governed by the law that governed the main contract, rather than the law of the arbitral seat. A similar approach is taken under the common law for choice of court agreements. The law governing a choice of court agreement is usually the law of the main contract notwithstanding that the choice of court clause may be severable from the main contract, unless the parties have expressly chosen a different law to govern the clause.

31. It is arguable that the separability principle in the Hague Convention goes farther than the common law. The mandate in the Hague Convention to treat the choice of court agreement as independent is not qualified in the way described above.[49] The Convention carves the choice of court agreement out of the main contract for many purposes beyond the situation when the main contract is challenged. The validity of the choice of court clause irrespective of the main contract follows from the independent agreement, not the other way around. This has potential implications for the determination of the proper law of the choice of court agreement. If there is an express choice of law specifically addressed to the choice of court agreement, that will settle the matter. If not, the query is whether there is an inferred choice of law. If the focus is solely on the choice of court agreement, then there is a very strong inference that the contracting parties had intended the law of the state of the chosen court to govern. This, however, needs to

[47] Industrial & Commercial Bank Ltd v Banco Ambrosiano Veneto SPA [2000] SGHC 188.
[48] *BCY v BCZ* [2017] 3 SLR 357 at [60].
[49] Article 3(d), Hague Convention. See also the *Explanatory Report*, at [115].

be counterbalanced against the argument that the parties had intended the governing law of the substantive contract to apply also to the closely related dispute resolution contract. Presently, it is unlikely that contracting parties negotiate on the basis that the choice of court clause is actually a separate contract, but it is questionable whether this attitude is sustainable when dealing with a Hague Convention choice of court clause. But the balance of significance may shift in the future as dispute resolution agreements grow in importance for international commercial transactions.

32. If no inference can be drawn, or practically speaking, if the court thinks that it would be a fruitless and artificial exercise to search for an inferred intention because the parties had failed to address their minds to the question, then the objective proper law will apply.[50] Given that realistically most negotiating parties do not give thought to the law governing the choice of court clause, it is possible that the objective proper law may be triggered more often in Hague Convention cases.

33. At this stage, the common law court looks for the law with the closest and most real connection with the contract. If the focus is on an independent choice of court agreement alone, then there is unlikely to be doubt that the contract will have the closest connection with the law of the state of the chosen court. But the objective proper law test is not necessarily confined to the connections of the contract itself. The court considers "which law has the most connection with the contract in question and the circumstances surrounding the inception of that contract".[51] As Singleton LJ said in a passage that has been approved by the Singapore Court of Appeal:[52]

> [O]ne must look at all the circumstances and seek to find what just and reasonable persons ought to have intended if they had thought about the matter at the time when they made the contract. If they had thought that they were likely to have a dispute, I hope that it may be said that just and reasonable persons would like the dispute determined in the most convenient way and in accordance with business efficacy.

34. Bearing in mind that the search is for the objective proper law of an independent choice of court agreement, one would have thought that any dispute about the choice of law clause would

[50] *Pacific Recreation Pte Ltd v S y Technology Inc* [2008] 2 SLR(R) 491 at [49].
[51] *Pacific Recreation Pte Ltd v S y Technology Inc* [2008] 2 SLR(R) 491 at [48].
[52] *The Assunzione* [1954] P 150 at 179, cited with approval in *Pacific Recreation Pte Ltd v S y Technology Inc* [2008] 2 SLR(R) 491 at [49]. See also *Las Vegas Hilton Corp v Khoo Teng Hock Sunny* [1996] 2 SLR(R) 589 at [42].

be most conveniently and efficaciously be determined according to the law that would be applied by the chosen court, especially given the structure and intent of the Hague Convention which directs nearly all relevant questions relating to the choice of court agreement to this law. Applying a different law will create another layer of complexity.

V. Substantive Validity of the Choice of Court Clause

35. The Hague Convention addresses the issue of substantive validity of the choice of court agreement in three places. First, the chosen court of a Contracting State may decline jurisdiction if the agreement is null and void under the law of the Contracting State.[53] Second, a non-chosen court may take jurisdiction if the choice of court agreement is null and void under the law of the State of the chosen court.[54] Third, a judgment rendered by the chosen court of a Contracting State may be refused recognition or enforcement in another Contracting State if the requested court considers that the choice of court agreement was null and void under the law of the State of the chosen court unless the chosen court had determined that the agreement was valid.[55] These provisions severally and cumulatively direct that the substantive validity of the choice of court agreement is to be determined by the law of the State of the chosen court. Although the Hague Convention is not explicit on this issue, the Explanatory Report is clear that this means the private international law of the chosen court.[56] This appears correct in principle and policy because the rationale is that it is for the chosen court to decide whether the agreement is valid, and the chosen court would in practice decide the question in accordance with its private international law. This approach creates uniformity of outcome.

36. On the other hand, there is general resistance to renvoi under the common law.[57] The common law contractual analysis (ie, parties are unlikely to want the private international law of the proper to apply) may be contrasted with the stronger procedural flavour under the Hague Convention. If the chosen court is a common law court, the substantive validity of a choice of court agreement will be tested by the proper law of the choice of court agreement. Some civil law countries may not see a choice of law issue at all, the validity choice of court clause being a question of their own procedure. From a practical perspective, one way of reducing

[53] Article 5, Hague Convention.
[54] Article 6(a), Hague Convention.
[55] Article 9, Hague Convention.
[56] *Explanatory Report*, at [3], [4], [5], [125], and [149],
[57] *Ong Ghee Soon Kevin v Ho Yong Chong* [2017] 3 SLR 711 at [103]-[106].

complexity is for parties to choose expressly the domestic law of the state of the chosen court to govern the choice of court clause.[58]

37. The approach of the Hague Convention to foreign judgments in respect of this issue also manifests a different approach to party autonomy from the common law. Under the common law, whether there is a valid agreement to submit to the foreign jurisdiction for the purpose of establishing international jurisdiction is determined by the law of the forum, in accordance with its own choice of law rules for contracts. This threshold needs to be crossed before the foreign judgment has any effect in the forum. In contrast, under the Hague Convention, a ruling by the purportedly chosen court that the choice of court clause is substantively valid cannot be questioned by the Contracting State being requested to recognise or enforce that judgment. The judgment must be recognised or enforced even if the requested state takes a different view on the validity of the choice of court clause. While the common law focuses on the validity of the contractual agreement, the Hague Convention places greater weight on the decision of the purportedly chosen court.

VI. Capacity to Agree to Choice of Court

38. Lack of capacity is a natural limitation to party autonomy. Capacity rules usually arises from some protective policy of the state. For there to be a valid agreement, the parties must have the legal capacity to conclude the agreement. Unfortunately, capacity is not the subject of clear and direct rules under the Hague Convention. Capacity of corporations is not excluded from the Convention. English common law requires corporate capacity to exist under both the law of incorporation as well as the proper law of the contract. The status and capacity of natural persons are outside the subject matter scope of the Convention.[59] This exclusion is common in international instruments on private international law, because of an unbridgeable gap between common law and civil law countries.[60] Civil law countries generally consider capacity to contract as an issue of personal status, usually governed by the law of nationality, sometimes habitual residence in more recent codes, and sometimes subject to an exception where the contract is made in the forum. The modern tendency of the common law is to view capacity to

[58] Particular care should be exercised in a floating choice of court clause (to the extent that it is within the scope of the Hague Convention). To avoid a situation of an impermissible floating proper law, a proper law should be designated at the outset, though subject to change with the court selection.
[59] Article 2(2)(a), Hague Convention.
[60] The *Hague Principles on Choice of Law for International Commercial Contracts* (2015) excludes capacity from its scope.

contract (outside the family and succession law contexts) as an issue of substantive validity of the contract, with strong academic support for the alternative validation by the proper law of the contract or the law of the person's domicil. Whether this leads to the subjective or objective proper law of the contract is a matter of some controversy.

39. The exclusion of capacity in the Hague Convention only applies to the substantive subject matter of the dispute, not the choice of court agreement itself. Capacity to conclude a choice of court agreement is addressed within the Hague Convention in three places. First, the choice of court agreement may be challenged in the chosen court on the basis that it is null and void under the law of that State. This can include an inquiry as to whether the parties lacked capacity. As an issue of substantive validity, "law" refers to private international law. Second, a non-chosen court of a Contracting State may take jurisdiction if the agreement is null and void (including for incapacity) under the law of the chosen court[61] or if a party lacked capacity to conclude the agreement under its own private international law.[62] Third, a requested Contracting State may refuse to recognise or enforce a judgment of a chosen court of another Contracting State if a party lacked the capacity to conclude the agreement under the law of the requested State,[63] irrespective of any conclusion on this made by the chosen court.[64] The party resisting judgment may also raise incapacity under the private international law of the chosen court (as part of the inquiry whether the clause was null and void) unless the chosen court had determined that there was capacity.[65]

40. A party resisting a choice of court agreement can argue not only its own incapacity but also the incapacity of the party seeking the enforcement of the agreement. For example, a party asking a non-chosen court to take jurisdiction may argue: (1) its own incapacity under the court's private international law; (2) its own incapacity under the chosen court's private international law; (3) the other party's incapacity under the court's private international law; and (4) the other party's incapacity under the chosen court's private international law.

41. The treatment of capacity to conclude a choice a court agreement in the Hague Convention creates a potential trap for parties planning cross-border transactions. In theory, one must be mindful of the capacity choice of law rules of the State of the chosen court, the choice of law

[61] Article 6(a), Hague Convention.
[62] Article 6(b), Hague Convention.
[63] Article 9(b), Hague Convention.
[64] Compare with Article 9(a), Hague Convention.
[65] Article 9(a), Hague Convention.

rules in other states where proceedings may likely be commenced in defiance of the choice of court agreement, as well as the choice of law rules of potential States where enforcement may be sought – in other words, possibly the whole world. In its defence, the Hague Convention position is only slightly more complicated than the common law position, introducing the additional consideration of capacity choice of law rules of the chosen court.

42. One clear practical implication is the increased importance of ascertaining the choice of law rules of the chosen court to the issue of capacity to enter into a choice of court agreement under the Hague Convention. This means that a country that aspires to be a litigation hub should have clear private international law rules on capacity to contract. The common law has not fared well as far as natural persons are concerned. As far as Singapore is concerned, the only local reported cases that I am aware of are from the Straits Settlements,[66] the combined effect of which is probably that an incapacity defence can only succeed if the party lacked capacity by both the law of the domicil as well as the law of the place of contracting. This rule probably made a lot of sense in the conditions of the nineteenth century but may not be fit for purpose for modern complex cross-border commercial transactions. Whatever the modern choice of law rule turns out to be, in order to minimise the potential effects of foreign incapacity rules, it may be useful to consider whether Singapore should adopt[67] an additional layer of validation similar to the one found in the Rome I Regulation, which provides that where the parties concluded the contract in one country, a natural person cannot rely on the incapacity rules of any other country unless the other party knew or ought to have known about the incapacity.[68]

VII. Existence of the Choice of Court Agreement

43. The Hague Convention does not explicitly address the issue of the existence of the choice of court agreement. A "void" contract is not always synonymous with the absence of a contract. According to the Explanatory Report,[69] the existence of the agreement should be ascertained according to the private international law of the chosen court. This is explicable as a matter of policy: uniformity will be promoted if the private international law of the chosen court determines as many issues relating to the choice of court agreement as possible. The

[66] *Schmidt v Spahn* (1863) Leic 229 and *Chulas and Kachee v Kolson binte Seydoo Malim* (1867) Leic 462.
[67] The Law Reform Sub-Committee, Singapore Academy of Law, *Report on Reform of the Law Concerning Choice of Law in Contract* (2003), at [52]-[55], recommended that no legislative reform was necessary for capacity because the real uncertainties were with the capacity of natural persons, which was not a common problem before the Singapore courts, and the matter should be left to the common law to develop.
[68] Article 13, Rome I Regulation.
[69] *Explanatory Report*, at [94].

Explanatory Report also says that the Convention permits the *lex fori* to reject foreign law if the "basic factual requirements" of consent do not exist by "any normal standards".[70] The example given is the rejection of a foreign rule that silence can constitute the acceptance of an offer. This is not intended to permit the *lex fori* to apply its domestic law, or even private international law, generally to the question of existence of the agreement.[71] It is intended to be an exception. It does create some uncertainty, however, as to what are normal standards of factual consent. This is left to individual Contracting States to decide, with a hope for uniform interpretation.[72]

44. Under the common law, which would apply if the chosen court is a Singapore court, a characterisation issue arises: does the existence of a choice of court clause raise an issue of incorporation of term or of formation of contract? Common law cases have not always taken a consistent approach to this question. In principle, this depends on whether the jurisdiction agreement is part of the main contract, or is an independent contract. If it is part of the main contract, and the existence of the main contract is not challenged, then in principle the question should be characterised as incorporation of terms and determined according to the proper law of the main contract. If it is an independent contract, then it clearly raises an issue of formation of contract. If we accept that the choice of court agreement is an independent contract for choice of law purposes under the Hague Convention, then whether a choice of court agreement exists or not always raises an issue of formation and not incorporation.

45. Under the common law, the issue of formation of contract is sometimes seen as one that needs to be answered before any choice of law question can arise, and therefore answered by the *lex fori*.[73] However, the approach that has found favour in English[74] and Singapore[75] courts is that existence and validity of a contract raise the same choice of law question, to be answered by the proper law of the putative contract, ie, the law that will govern the agreement if the agreement exists and is valid.

---

[70] *Explanatory Report*, at [95].
[71] To do so would contradict the *Explanatory Report* at [94]. See, however, However, R Brand and P Herrup, *The 2005 Hague Convention on Choice of Court Agreements: Commentary and Documents* (New York: Cambridge University Press, 2008), at 20, posit that the existence of consent to establish the existence of the contract is determined by the *lex fori*.
[72] Article 23, Hague Convention.
[73] See, eg, *Oceanic Sun Line Inc v Fay* (1988) 165 CLR 197 at 225 and 261; *Mackender v Feldia AG* [1967] 2 QB 590 at 602-603.
[74] *The Parouth* [1982] 2 Lloy'd Rep 351 (CA); *The Atlantic Emperor* [1989] 1 Lloyd's Rep 548 (CA).
[75] *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [30]; *PT First Media TBK v Astro Nusantara International BV* [2014] 1 SLR 372 at [157]-[158].

46. Conceptually, the application of the proper law of the putative agreement involves a circular argument because it assumes the very thing that it is testing for. The justifications are pragmatic. One concern is that that the application of any other law may make it too easy for a party to wriggle out of a jurisdiction clause.[76] It may also be assumed that rational parties would conduct their negotiation by reference to that law. Anecdotal evidence suggests that in reality, choice of court clauses tend to be "midnight clauses" hastily thrown in order not to postpone the cocktail party to celebrate the conclusion of an agreement. But perhaps there is nothing wrong with a legal rule that proceeds on the basis of what people ought to be doing, rather than what they actually do. It is also the preferred approach of other international instruments, for example the Rome I Regulation in the EU,[77] and the recent Hague Principles on Choice of Law in International Commercial Contracts.[78] Both of these choice of law instruments explicitly carve out an exception where if it will be unreasonable in the circumstances to apply the general rule to determine a particular party's consent to an agreement, the law of that party's residence may apply instead. The Hague Convention did not follow these examples in making an exception explicit and structured, probably because it does not regard the choice of court agreement as necessarily raising a contractual choice of law issue since a choice of court agreement may be a procedural mechanism only in some jurisdictions. It is within the grasp of the common law to develop a similar exception too.

47. Under the common law, the subjective proper law of the putative contract approach is in any event unworkable if there is more than one choice of law clause (eg, where it is in contention which one of two possible choice of law clauses was part of the final agreement). In this case the English courts have skipped over the objective putative proper law and reverted to the *lex fori*.[79] Further, a choice of court clause will be ignored where it is very clear to the Singapore court that the party resisting the choice of court clause has not consented to the clause.[80] It is not clear, however, whether the court at this stage tests consent by reference to the proper law of choice of court agreement, or the domestic law of the forum, or some kind of factual minimum threshold similar to the "basic factual requirements" of consent under the Hague Convention.

---

[76] *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [30].
[77] Article 10(2) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council (17 June 2008) (law applicable to contractual obligations) (Rome I).
[78] Article 6(2).
[79] *The Heidberg* [1994] 2 Lloyd's Rep 351; *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2006] 2 Lloyd's Rep 475 (CA).
[80] *PT Selecta Bestama v Sin Huat Huat Marine Transportation Pte Ltd* [2016] 1 SLR 729 at [40]-[41].

48. The Hague Convention provides no answer if there are competing exclusive choice of court clauses.[81] The law of the chosen court has to apply in the first instance, but a stalemate is reached if the existence of each competing clause is confirmed under the law of the respective chosen Contracting States. In some cases, the stalemate may be broken by the application of the "basic factual requirements of consent" test, but it may be that the different tests applied by the two competing courts both meet the standard: for example, the postal acceptance rule may be applied in one jurisdiction but rejected in the other – neither approach is obviously wrong. Conflicting jurisdictions and judgments will not necessarily be a thing of the past even after the Hague Convention, but hopefully such incidents will be reduced.

VIII. Conclusion

49. There is a clear global trend pushing party autonomy to the fore in cross-border commercial dispute resolution. The success of the New York Convention for arbitration, and momentum that is gaining for the Hague Convention for litigation, and the recent conclusion of conclusion of negotiations in UNCITRAL on a Convention and Model Law on the enforcement of settlement agreements reached through international commercial conciliation or mediation, are clear signals of this trend.

50. However, party autonomy means different things in different jurisdictions. Party autonomy drives international trade, but it is not an unqualified good and parties' private interests must be balanced against public interests in the administration of justice. The Hague Convention represents a multilateral compromise in the litigation sphere. There will be differences between the Convention position and national law.

51. As the Hague Convention leaves consumer and employment contracts out of scope, one is not surprised to find that it gives a stronger effect to a valid exclusive choice of court agreement than the common law. The Convention provides for considerably fewer grounds than the common law to allow a contracting party to resist a valid exclusive choice of court agreement.

52. However, there remains fundamental differences of view about nature of a choice of court agreement. The Hague Convention had to find common ground between the prevailing

[81] The Hague Principles on Choice of Law for International Commercial Contracts provide a partial solution for battle of form situations for choice of law clauses. The Hague Principles exclude choice of court agreements from its scope. Nothing, however, prevents a court from drawing inspiration from the Hague Principles to deal with some cases of battle of choice of court agreements, should it desire to do so.

common law view of the choice of court clause as a contractual agreement and the predominant civilian view of it as a procedural device. This has resulted in a narrower scope of party autonomy in the Convention than under the common law. The requirement for an "international" contract is an example. A more prominent and contentious example is the uncertain place of asymmetric choice of court clauses under the Convention. The procedural perspective has also led to considerable focus on the law that will be applied by the chosen court for various issues, including the existence and validity of the choice of court agreement, taking priority over the common law concept of the proper law of the contract. Many issues at the limits of party autonomy will require judicial attention, and different views could emerge from different countries, notwithstanding that the Convention calls for uniform interpretation.[82] As an early adopter of the Convention and especially with the establishment of the SICC, Singapore has a real opportunity to participate in the development of the global jurisprudence.

YEO Tiong Min
Yong Pung How Chair Professor of Law
School of Law
Singapore Management University

16 May 2018

[82] Article 23, Hague Convention.