12th Yong Pung How Professorship of Law Lecture

The Choice of Court Agreement: Perils of the Midnight Clause

In the space of five months recently, the Singapore Court of Appeal released three seminal decisions relating to the enforcement of choice of court agreements in the common law regime: one recasting the "strong cause" test to justify a breach of an exclusive choice of court agreement in the context of the exercise of the court's jurisdiction; one on the interpretation and effect of non-exclusive choice of court agreements; and the third on the availability of injunctions to enforce choice of court agreements. This lecture will review the significance and implications of these developments for litigation and drafting in relation to cross-border transactions, against the backdrop of the common law as well as the Singapore International Commercial Court and the Hague Convention on Choice of Court Agreements, and highlight the perils of midnight choice of court clauses.

I. Introduction

1. It is with great honour that I deliver the Yong Pung How Professorship of Law Lecture today. This marks the twelfth year since the foundation of this Professorship and lecture series, from a generous endowment from the Yong Shook Lin Trust, in honour of Mr Yong Pung How. Mr Yong had been a visionary leader in the banking and finance industry before he was called upon to serve on the bench. As Chief Justice of Singapore from 1990 to 2006, he instituted reforms which brought the attention of the world to the Singapore Judiciary as a world class institution. He laid the solid foundation for successive Chief Justices to consolidate Singapore jurisprudence and to globalise its legal services. Mr Yong had provided tremendous assistance to the School of Law from its inception, helping to recruit faculty to get the School to a good start. He served with distinction as the inaugural Chairman of its Advisory Board, and subsequently as Chancellor of the University from 2010 to 2015. Mr Yong had been awarded the Distinguished Service Order (1989) and the Order of Temasek (First Class) (1999).

2. Party autonomy in the commercial conflict of laws has been a theme of quite a number of papers that I have delivered in this series. This is a reflection of the overall significance of this topic in practice. In this paper I focus on three leading cases from the Court of Appeal, which recently appeared in quick succession, on to the enforcement of choice of court agreements. My main message is that with increasing complexity in cross-border litigation and growing sophistication in the law relating to choice of court agreements, we need to stop the practice of

leaving these clauses to the last minute ("midnight clauses"[1]), and need to pay greater attention to the drafting of these clauses.

II. Background

3. For a Singapore court to hear a dispute, the jurisdiction of the court over the defendant must first be established. Singapore courts are creatures of statute, and the basis of their jurisdiction is statutory. Section 16 of the Supreme Court of Judicature Act[2] (SCJA) captures the historical notions of common law jurisdiction. The common law notion of *in personam* jurisdiction comprises the idea of a nexus or legal basis for taking jurisdiction, the notion of exercise of that jurisdiction, and the procedure of service so that the court is properly seised of jurisdiction.

4. Generally, service of process may be effected as of right on a defendant who is present in Singapore, or with the leave of court if the defendant is outside Singapore. Physical presence is the nexus for service in, and statutory grounds enumerated in Order 11 Rule 1 provide the nexus for service out. In both cases, the defendant may challenge the existence or exercise of jurisdiction. The forces of globalisation have made the venue for litigation a strategic issue. Some countries chose to deal with problems of competing jurisdictions with treaties, eg, the European Union. The common law adopted an ad hoc system to deal with the problem of forum shopping. The common law principle of natural forum, consolidated in the leading House of Lords decision of *The Spiliada* in 1986,[3] has since been followed in many Commonwealth countries[4] including Singapore,[5] as the test for determining exercise of jurisdiction. The basic principle is that, absent an exclusive jurisdiction agreement, a dispute should be heard in the forum that is most appropriately placed to hear the case in the interests of the parties and for the ends of justice. Specifically, the forum should not exercise jurisdiction if there is a clearly more appropriate forum elsewhere, unless it would cause substantial injustice if the case were to be heard in that forum.

5. As cross-border disputes grew more complex, and as lawyers developed greater consciousness of strategic choices of litigation venues, disputes on where to litigate became increasing more

[1] "'midnight clauses' … are typically included (or finalised) at the last minute": *BCY v BCZ* [2017] 3 SLR 357 at [61].
[2] Cap 322, 2007 Rev Ed.
[3] *The Spiliada* [1987] AC 460.
[4] With variations. The most notable one is perhaps Australia's version where the forum will decline jurisdiction only if it is a clearly inappropriate forum.
[5] *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR(R) 345 and many subsequent cases.

sophisticated and time-consuming. The bulk of international commercial litigation today is about where to litigate. One very important tool to mitigate venue risk is the choice of court agreement. However, in practice they tend to be underemphasized in the process of contract negotiation. As Thomas LJ observed in *Sebastian Holdings Inc v Deustche Bank AG*:[6] "Jurisdiction clauses are rarely the subject of detailed negotiation … in most transactions in the financial markets … *little attention seems to be paid to this element of risk management*" (emphasis added).

6. Choice of venue for litigation is a multidimensional decision. Factors to consider include trust and confidence in the system, its efficiency, its acceptability to counterparties, location of potential assets which could be the subject of execution, and the enforceability of the resulting judgment in other countries where assets may potentially move to. At perhaps a more fundamental level, the venue will determine the procedures and private international law that will be applied to determine the merits of the dispute. Contracting parties can manage many of these risks by an appropriate choice of court agreement. In a sense, the choice of court agreement is more fundamental than the choice of law agreement in terms of risk allocation, because the court of the venue will decide the effectiveness and scope of the choice of law agreement.

III. Three Legal Regimes for Choice of Court Agreements

7. There are currently three somewhat overlapping legal regimes in Singapore to consider when dealing with a choice of court agreement.

A. Hague Convention on Choice of Court Agreements ("Convention")

8. I had discussed the notion of party autonomy in detail in this context in a previous paper.[7] In summary, the Convention, given effect to under Singapore law with effect from 1 October 2016,[8] has three basic features:

    a. The court of a Contracting State which has been exclusively chosen by the parties should hear the case unless the choice of court clause is null and void;

[6] [2010] EWCA Civ 998, [2011] 2 All ER Comm 245, at [57]. A similar observation was made in respect of the arbitration clauses in *BCY v BCZ*, note 1 above, at [61].
[7] 11th Lecture, "Scope and Limits of Party Autonomy under the Hague Convention on Choice of Court Agreements", available at: https://cebcla.smu.edu.sg/sites/cebcla.smu.edu.sg/files/Paper2018.pdf.
[8] Choice of Court Agreements Act, Cap 39A, 2017 Rev Ed) ("CCAA").

b. A non-chosen court of a Contracting State should not hear the case unless the clause is null and void or exceptional circumstances enumerated in the Convention exist; and

c. A judgment from the chosen court would be recognised and enforced in other Contracting States.

9. A case falls within the Convention if there is an international civil or commercial dispute falling within the subject matter scope of the Convention, and within the scope of a written exclusive choice of court agreement selecting the court(s) of a Contracting State. Whether there is an exclusive choice of court agreement for the purpose of the Convention is determined as a Convention issue rather than as a matter of common law. Unlike the common law position, the existence, validity, and interpretation of a choice of court clause depend on the law, including the private international law, of the Contracting State of the chosen court. There is a requirement for writing, but it is easily satisfied with a retrievable record. Further, the Convention deems the choice of a court of a Contracting State to be exclusive unless there is express provision to the contrary. So the starting point is that a clause is exclusive unless the parties have expressly made it clear it is not intended to be exclusive. This is a rule of the Convention that applies whatever the proper law of the choice of court agreement may be. The Convention also requires the choice of court agreement to be treated as a separate agreement from the substantive contract.

10. A written choice of Singapore court clause entered into on or after 1 October 2016 will be presumed to be exclusive unless there is express contrary indication, and the Singapore court will hear the case unless, under Singapore private international law, the clause is null and void. There is no room to apply the common law notion of exercise of jurisdiction.

11. Conversely, a written choice of a court of a foreign Contracting State made after the Convention has entered into force in that State, will (in proceedings in Singapore commenced on or after 1 October 2016) trigger the potential application of the Convention. It will be presumed exclusive in the absence of express contrary provisions. The Singapore court will not hear the case unless one of the exceptions under the Convention is made out. At this stage, there is no room for applying the common law. If no exceptions can be invoked, the Singapore court will not hear the case. If an exception is made out, the Singapore court is not prohibited from taking jurisdiction. Whether it will actually hear the case will depend on its own private international

law; the common law could be relevant at this stage. Because the Convention exceptions are at least as strict as, if not more strict than, the common law test for exercising jurisdiction in this situation, it is unlikely that the common law test will lead to a different result.

B. Singapore International Commercial Court (SICC)

12. The SICC is a division of the Supreme Court of Singapore and its jurisdiction is based on the jurisdiction of the Singapore High Court. It has four types of jurisdiction:

    a. Jurisdiction based on the written agreement of the parties; in matters which are international and commercial and no prerogative orders are sought;

    b. Jurisdiction in international commercial arbitration matters;

    c. Jurisdiction in cases transferred from the High Court which are international and commercial, and which are appropriate to be heard in the SICC; and

    d. Jurisdiction over third parties joined to the proceedings.

13. This paper focuses on the first type of jurisdiction based on the written agreement of the parties. A few points are notable:

    a. The choice of SICC clause may be exclusive or non-exclusive;

    b. When proceedings are commenced in the SICC, the exercise of jurisdiction by the SICC is not subject to the common law rules on the exercise of jurisdiction, but on the statutory notion of whether the case is appropriate to be heard by the SICC, given its nature as an international and commercial court;

    c. The existence, validity, interpretation, and separability of the choice of SICC clause is governed by Singapore private international law (ie, the common law).

14. A choice of SICC clause made on or after 1 October 2016 is likely to be, but not necessarily, a Convention case. For example, there are subject matter exclusions under the Convention which do not apply to the jurisdiction of the SICC (eg, carriage of goods). Conversely, not all Convention cases will be SICC cases, eg, if parties select the Singapore High Court to the exclusion of the SICC.

15. There are statutory presumptions that may be applicable. The Convention presumption of exclusivity may be relevant here. Exclusivity under the Convention is defined with reference to Contracting States. This Convention rule applies whatever law governs the choice of court agreement. Thus, a choice of the Singapore High Court and/or the SICC to the exclusion of the courts of other countries will be exclusive for the purpose of the Convention, bearing in mind the presumption of exclusivity as well. Section 18F(1)(a) of the SCJA provides that a choice of the SICC is presumed to be exclusive unless the parties have expressly provided otherwise. Section 2(2) of the CCAA provides that a designation of the High Court in an exclusive choice of court agreement includes the SICC unless a contrary intention appears in the agreement. It is not clear whether these local provisions are forum mandatory rules, but given that party autonomy underlies much of the law in this area, it is more likely that they are substantive rules of Singapore contract law, and should apply only if Singapore law is the relevant domestic law governing the choice of court agreement. These presumptions may apply cumulatively.

16. Under the Rules of Court, a choice of the Singapore High Court made on or after 1 October 2016 will include the SICC unless a contrary intention appears in the agreement,[9] but the presumption that a choice of the Singapore High Court made before 1 October 2016 does not include the SICC may be rebutted by any admissible evidence.[10] There is a question whether these rules in the Rules of Court are substantive or procedural for the purpose of private international law. If procedural, then they apply whatever law governs the choice of court agreement. If substantive, then they apply only if the choice of court agreement is governed by Singapore law. Their appearance in a procedural code is not determinative. Given the modern trend to narrow the scope of the procedural characterisation,[11] they are likely to be substantive because they have a direct bearing on the question of the contractual intention of the parties. However, even if the choice of court agreement is governed by foreign law, foreign law is seldom invoked or pleaded at the jurisdiction stage, often leading to the application of Singapore law by default.

C. Common Law

17. The common law developed the natural forum doctrine to deal with competition of fora in the absence of an exclusive choice of court agreement. The common law traditionally distinguishes

[9] O 11 R 2(ca). This presumption overlaps with s 2(2) CCAA for Convention cases, but operates independently for non-Convention cases.
[10] O 11 R 2(c).
[11] *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367.

between an exclusive and non-exclusive choice of court agreements. All choice of courts agreement have a prorogation function, ie, they represent a common intention by the parties that the chosen court should have jurisdiction to hear the case. The distinctive feature of the exclusive choice of court agreement is a negative obligation imposed on one or both parties not to sue anywhere but in the chosen court in respect of disputes falling within scope of the clause. Whether a clause is exclusive or non-exclusive is a question of construction, governed by the proper law of the choice of court agreement. Under Singapore private international law, this is the law governing the main contract unless the parties have indicated otherwise. The existence, validity, interpretation, and separability of a choice of court agreement are substantive issues determined by the private international law of Singapore law as the law of the forum. This stands in contrast with the Convention where separability is a Convention issue, and existence, validity and interpretation are issues referred to the private international law of the chosen court. There is practical convergence when the Singapore court is the chosen court, but divergent answers may result if the chosen court is a foreign one. Under the common law, the effect of the choice of court agreement on the jurisdiction of the Singapore court is a question of procedure governed invariably by Singapore law.

18. It has been established clearly both in English and Singapore law, even before *The Spiliada* in 1986, that an exclusive choice of court agreement will be given effect to unless strong cause can be demonstrated by the party seeking to breach the agreement. As explained by Yong Pung How J (as he then was) in *The Asian Plutus*:[12] "The legal basis for these principles was the presumption that contracts freely entered into must be upheld and given full effect unless their enforcement would be unreasonable and unjust."

19. The meaning of strong cause was elucidated in *The Eleftheria*,[13] and adopted in Singapore law in *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd*:[14]

> (a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the Singapore and foreign courts.

[12] [1990] 1 SLR(R) 504 at [9].
[13] [1969] 1 Lloyd's Rep 237.
[14] [1977-1978] SLR(R) 112 at [11].

(b) Whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects.

(c) With what country either party is connected and, if so, how closely.

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

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

(i) be deprived of security for their claim;

(ii) be unable to enforce any judgment obtained;

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

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

20. While the meaning of "strong cause" has remained constant, the actual standard has varied over the years. Two features stood out about the law in Singapore. First, the High Court in *The Eastern Trust* held that strong cause can be a variable standard depending on whether the choice of court agreement was an essential term of a freely negotiated contract, and the strength of the connections of the case with the chosen forum.[15] Secondly, in the case of an exclusive choice of foreign court clause, the plaintiff may be able to demonstrate strong cause for the Singapore court to exercise its jurisdiction if there are no merits to the defence.[16]

21. It is in the context of this state of the common law that the first of the leading cases, *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd*[17] ("*Vinmar*"), was decided.

IV. *Vinmar*

22. There was a commercial sale contract containing an exclusive choice of English court clause prior to the date the Convention took effect in England, so the Convention was not engaged. There was a dispute whether the clause actually existed, but it suffices to say both the High

[15] [1994] 2 SLR(R) 511 at [16].
[16] *The Jian He* [1999] 3 SLR(R) 432; *The Hung Vuong-2* [2000] 2 SLR(R) 11; *The Hyundai Fortune* [2004] 4 SLR(R) 548; *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR(R) 6.
[17] [2018] 2 SLR 1271 at [11].

Court and Court of Appeal found the clause to exist to the appropriate standard of proof.[18] The plaintiff sued in Singapore, arguing that the Singapore court should exercise its jurisdiction despite the exclusive choice of English court clause because there were no merits to the defence. The High Court agreed with this submission. A five-judge coram of the Court of Appeal reversed the decision and stayed the Singapore proceedings.

23. Significantly, the judgment of the Court of Appeal began by noting the importance of exclusive choice of court agreements in contracts, and emphasised that full contractual effect should be given to them.[19] While upholding the strong cause test, the Court held that the merits of the case are not relevant in the assessment of strong cause, departing from a number of shipping cases[20] to the extent that they held otherwise. The Court gave two sets of reasons for taking this position.

24. The first related to principle, policy and legal coherence. First, the Court emphasised the need to give effect to party autonomy in their choice of court irrespective of the merits of the case. Parties do not choose a court only to win in it; they choose a court to win or lose in it. Second, exclusive choice of court agreements should be strictly enforced to create greater certainty and to reduce transaction costs in jurisdiction arguments. Third, to maintain coherence with the position of the common law on natural forum (where merits have been held to be irrelevant[21]). Fourth, to maintain coherence with the position of the law on anti-suit injunctions to enforce choice of court agreements, where lack of merits has not been considered relevant.

25. The Court then went on to consider two doctrinal arguments. First, it rejected the argument that a defendant had no genuine desire for trial if the defence lacked merits, on the basis that the desire for trial in the chosen court has been adequately expressed in the choice of court agreement. The Court also rejected the related argument that such a defendant would only be seeking procedural advantages in the contractual forum, on the basis that it is legitimate for the defendant to seek procedural advantages in the contractual forum. Second, it rejected the doctrinal argument that there was "no dispute" to trigger the choice of court agreement in the

[18] ie, a good arguable case in the jurisdictional context.
[19] Note 17 above, at [1]-[2].
[20] *The Jian He* [1999] 3 SLR(R) 432; *The Hung Vuong-2* [2000] 2 SLR(R) 11; *The Hyundai Fortune* [2004] 4 SLR 548; *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR(R) 6.
[21] *Q & M Enterprises Sdn Bhd v Poh Kiat* [20015] 4 SLR(R) 494; *The Rainbow Joy* [2005] 3 SLR(R) 719.

first place if the defence lacked merits, on the basis that there is a dispute even if one party is clearly wrong.

26. The Court considered that the lack of merits may be relevant to demonstrate a "no dispute" case in a limited situation where the defendant has admitted both liability and quantum of liability and is merely refusing to pay up.[22] On the other hand, it is arguable that as a matter of construction (depending on the governing law of the choice of court agreement), it makes commercial sense for parties to intend to include this type of case within the choice of court agreement. The Court had drawn the analogy from the arbitration context. It makes commercial sense for the parties to exclude this situation from the scope of an arbitration agreement, because it would make more sense for the innocent party to seek summary judgment from a court of law instead of going to arbitration. But a choice of court agreement already directs disputes towards a court of law where summary judgment may be readily obtained. Further, a choice of court agreement serves to create an agreement to submit which is recognised as a ground of international jurisdiction for the enforcement of foreign judgments in most common law countries. It seems odd that parties would intend to exclude from the clause the clearest possible case of a summary judgment with the potential for overseas enforcement. The Court also considered this situation as a potential case of abuse of process, which (in my view) rests on a more secure basis.

27. In endorsing the strong cause test and affirming the continuing relevance of the *Elelftheria* factors, the Court nevertheless emphasized the perspective of contract enforcement. Thus, factors reasonably foreseeable at the time of the contracting will carry little weight.[23] Very compelling reasons will be needed to show why the expiry of a time-bar in the chosen forum is not self-induced.[24] On the other hand, fragmentation of proceedings across different jurisdictions because of multiple parties some of whom are not parties to the choice of court agreement, was flagged as a potentially important factor for future consideration.[25]

28. The Court recast the factor of "Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages" into a test for whether the defendant had acted abusively in applying for stay of proceedings. The Court observed two particular problems with the language of the original formulation: that it suggested a search for a

[22] Note 17 above, at [131].
[23] Note 17 above, at [112].
[24] Note 17 above, at [141]
[25] Note 17 above, at [139]

subjective desire for trial, which is strictly irrelevant; and that it purports condemn a legitimate attempt to seek procedural advantages of the contractually chosen forum.

29. The Court also observed that, as a general rule, strong cause would need to be demonstrated either by abusive conduct (the threshold of which is "very high"), or by denial of justice (bearing in mind that many alleged deficiencies of the foreign system are probably reasonably foreseeable at the time of contracting). While these are not exhaustive grounds for establishing strong cause, they are important markers for the way the strong cause test should be approached henceforth. These markers would be the starting point, taking the *Eleftheria* factors into account in the process.

30. *Vinmar* sends a very strong signal on the policy of Singapore law to uphold party autonomy in dispute resolution clauses. This development is consistent with modern international trends giving effect to party autonomy in cross-border dispute resolution. Examples include the success of the international regime for international commercial arbitration, and the upcoming Singapore Convention on Mediation, and more specifically the Convention as well as trends in other common law countries. Significantly, in raising the strong cause standard, *Vinmar* aligns the common law position more closely with the position under the Convention. Indeed, this common law test will be superseded by the Convention insofar as chosen courts are courts of Contracting States (including Singapore). However, *Vinmar* will remain the relevant test for exclusive choice of courts of non-Contracting States.

31. One important point left open by the Court was the relevance of the degree of party autonomy. The court was mindful that in some areas like bills of lading, a party may find itself bound by an unseen choice of court agreement. The Court expressed the tentative view that the same principles should apply while reserving the question for future consideration. This means that the Court has not overruled the shipping cases considered in the judgment;[26] they have only departed from them insofar as they have been taken to stand for a general principle that lack of merits in the defence can be a reason not to give effect to an exclusive choice of foreign court agreement. The rationale for the tentative view was the basic proposition that a contract was a contract. It is indeed dangerous to go down the slippery slope to have different legal effects depending on the degree of consent.

[26] Note 20 above.

32. At the same time, the Court was mindful that the central principle of party autonomy that underlies the strong cause test may not strictly apply with the same force where the plaintiff had no say in the choice of court agreement.[27] One way of dealing with this problem is to accept that there are varying standards of strong cause in the law, depending on the connections of the case and the factual reality of the agreement.[28] It is doubtful whether this variability of standard has survived *Vinmar*. Arguably, setting variable standards not only creates uncertainty, but is hard to justify on the principle a contractual obligation is a contractual obligation. It may be possible to move forward without setting down a different approach or a different standard of strong cause, by focussing on the application of the strong cause test with sensitivity to the facts. The observation of the Court of Appeal in *Trisuryo Garuda Nusa Pte Ltd v SKP Pradiksi (North) Sdn Bhd* ("*Trisuyryo*") is pertinent:[29]

> We reiterate the observation in *The Hyundai Fortune* ([85] supra) that whether strong cause exists in any given case is a matter that must be carefully assessed according to the particular facts of the case, having regard to the relevant factors for consideration and attributing a suitable amount of weight to each of those factors. The assessment "cannot be the subject of rigid rules or classification".

33. Strong cause is ultimately a discretionary test, and the principles should be applied with sensitivity to different factual matrices. Merits would always be generally irrelevant as a matter of principle, but what factors are reasonably foreseeable and the weight to be accorded to them may differ depending on whether the contract is a negotiated one. On the other hand, it is harder to justify giving different weightage to factors depending on the strength of the connections to the chosen forum, since parties are entitled to, and often do, choose an unconnected "neutral" forum for very good commercial reasons. Sensitivity to factual context would also be important when it comes to consumer contracts,[30] even though there could be other forms of protection like forum mandatory rules.[31] Unlike the case of the Convention which does not apply to

[27] Note 17, at [137].
[28] *Cf The Eastern Trust*, note 15 above.
[29] [2017] 2 SLR 814 at [102].
[30] *Douez v Facebook Inc* [2017] 1 SCR 751 is a useful reminder that exclusive choice of court agreements can arise in the context of consumer litigation as well.
[31] Apart from contractual principles in relation to consent, mistake, duress, undue Influence (normally governed by the proper law of the contract), etc, a foreign exclusive jurisdiction agreement may in certain circumstances amount to an exclusion or limitation of liability even if the agreement is governed by foreign law (ss 13(1)(a), 27(2) of the Unfair Contract Terms Act, Cap 396, Rev Ed 1994), and a foreign exclusive jurisdiction clause as against a consumer may in some cases be construed as an illegal attempt to contract out of the Consumer Protection (Fair Trading) Act, Cap 52A, Rev Ed 2009 (section 13).

employment and consumer contracts, the common law test is of general application and it needs to be flexible enough to deal with all types of contracts.

34. It is interesting to note that not long before *Vinmar*, the Court of Appeal had allowed proceedings in Singapore to continue in spite of an exclusive choice of foreign court clause in *Trisuryo*.[32] The dispute centred on alleged agreements creating trusts to transfer shares in Indonesian companies. Holding that the dispute fell within the scope of exclusive choice of Indonesian court clauses in earlier agreements between the parties, the Court nevertheless found strong cause to exist because the plaintiff would be denied justice in the Indonesian court, which would not recognise the trusts which the Singapore court found to be governed by Singapore law. The Court stressed that it was an "exceptional" case because the nature of the plaintiff's claim would not be recognised by the chosen court. So this case cannot be used as a precedent if the plaintiff would lose in the chosen court because of time bar, or because its cause of action would not be made out, or if made out would be met with a defence, under the private international law of the chosen court. It also should not mean that generally equitable claims can bypass exclusive choice of foreign civil law courts, because in most cases their choice of law principles have some way of handling equitable claims. Nevertheless, one would have thought that the failure to persuade a civil law court to recognise a common law trust was a reasonably foreseeable consequence of choosing a civil law court. This case could alternatively be seen as exceptional on the basis that there were two conflicting party autonomies. On one hand, parties agreed that all disputes should be heard in in a civil law court. On the other hand, the parties (allegedly) agreed to create a legal structure that would not be recognised in the chosen court. On the facts, the decision gave priority to the party autonomy in creating the trust arrangement. It is arguable that the Court of Appeal would have reached the same conclusion in *Trisuryo* today, post-*Vinmar*.

V. Shanghai Turbo

35. *Shanghai Turbo Enterprises Ltd v Liu Ming*[33] followed very shortly from *Vinmar*. Like *Vinmar*, it developed the theme of party autonomy, but in the context of non-exclusive choice of court agreements. The choice of court clause was a somewhat unusual one entangled with the choice of law clause:

[32] Note 29 above.
[33] [2019] SGCA 11.

> This Agreement shall be governed by the laws of Singapore/or People's Republic of China and each of the parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/or People's Republic of China.

36. At first instance the choice of law clause was struck down as a floating choice of law clause, and the choice of court agreement could not survive as it could not be severed. The case was then dealt with on *Spiliada* principles and the court declined to exercise jurisdiction on the basis that China was the more appropriate forum. The Court of Appeal upheld the decision on the floating choice of law clause but found that the choice of court agreement could be severed and therefore survived. The Court found that the parties had agreed in the jurisdiction clause not to object to the exercise of jurisdiction by either of the chosen courts. The result was that the defendant in asking the Singapore court not to exercise its jurisdiction was in breach of contract and had to demonstrate strong cause why he should be allowed to do so. On the facts, strong cause was not shown, and the Singapore court would exercise its jurisdiction.

37. After *Shanghai Turbo*, Singapore law may be so summarised, at least in the context of freely negotiated agreements:[34] An agreement to submit to the non-exclusive jurisdiction of a court ordinarily indicates a promise not to object to the chosen court exercising its jurisdiction, but does not ordinarily indicate a promise not to object to the argument that the chosen court is the most appropriate forum. Thus, generally, if there is a non-exclusive choice of Singapore court agreement, the defendant must show strong cause why he should not be bound by his contractual agreement not to object to the exercise of jurisdiction by the Singapore court. If there is a non-exclusive choice of foreign court agreement, then the *Spiliada* test applies, and the weight to be accorded to the choice of court clause as a factor depends on all circumstances of the case, including whether the clause was negotiated and whether the forum was chosen for its neutrality.

38. The question of the legal effect of a non-exclusive choice of court agreement was last considered by the Court of Appeal in *Orchard Capital I Ltd v Ravindra Kuma Jhunjhunwala* ("*Orchard Capital*").[35] In that case, the Court accepted that a non-exclusive choice of court agreement is a factor in the *Spiliada* analysis, but did not commit itself to whether it was appropriate to apply contractual analysis to it. The contractual analysis stems from an article

[34] Ibid, at [88].
[35] [2012] 2 SLR 519.

published in the Singapore Academy of Law Journal in 2005.[36] That article had argued that the basis of the legal approach to both exclusive and non-exclusive choice of court agreements was or should be the same: the enforcement of the contractual promise in the clause. It followed that it was important to determine the content of the promise in the clause. In an exclusive choice of court clause, it is clear that the promise is not to sue anywhere else except in the chosen court. It was less clear whether a non-exclusive choice of court agreement had any promissory content, and if so, what that content was. But as a matter of legal principle, if there is a contractual promise, it should be enforced as such.[37] In the survey of primarily English and Singapore authorities at that time, it was pointed out that many cases had made assumptions about the contractual intentions of the parties, without explaining reasons for the inferences.

39. Two important consequences of the contractual analysis were indicated. First, there is no theoretical distinction between exclusive and non-exclusive jurisdiction clauses, only a difference of what promises have been made in the clause. It was fairly radical[38] when proposed, but other academics have also reached the same conclusion.[39] The second consequence is that non-exclusive choice of court agreements cannot be lumped into a single category; every clause needs to be construed on its own terms. This is a problem that features in every contract litigation. The article also expressed optimism that:

> The Singapore courts have acquired tremendous experience in the construction of contracts, especially commercial contracts. It should not be difficult for the courts to develop principles relating to the construction of non-exclusive jurisdiction agreements beyond the present state of uncertainty, once it is clear that this is what the courts are doing.

40. Where *Orchard Capital* had left the issue open, *Shanghai Turbo* has affirmed the contractual analysis of non-exclusive choice of court agreements. While mindful that each clause may be

[36] TM Yeo, "The Contractual Basis for the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306.
[37] See now, also, A Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP, 2008) at paras 4.09-4.25; A Briggs, "The subtle variety of jurisdiction agreements" [2012] LMCLQ 364 at 375-376; L Merrett, "Interpreting non-exclusive jurisdiction agreements" (2018) 14 JPIL 38.
[38] It was of some concern to the Court of Appeal in *Orchard Capital*, note 35 above, at [24] as being not entirely consistent with the language used in the case law.
[39] A Briggs, "The subtle variety of jurisdiction agreements" [2012] LMCLQ 364 at 376; L Merrett, "Interpreting non-exclusive jurisdiction agreements" (2018) 14 JPIL 38 at 44.

different, *Shanghai Turbo* also mitigated the uncertainty by adopting *canons of construction*, leading to the two general rules above. More specifically:

a. At minimum, parties have agreed that proceedings may be commenced in the chosen court;

b. The "most commercially sensible and reasonable" construction of a non-exclusive choice of court agreement is that parties have agreed not to object to the exercise of jurisdiction by the chosen court;

c. This inference does not depend on there being a basis for the chosen court to assume jurisdiction independent of the choice of court clause (eg, contract governed by Singapore law);

d. The inference does not depend on how many courts are named in the clause; and

e. Ordinarily, there is no inference that the parties have agreed that the chosen court is the most appropriate forum (ie, agreed not to object to the argument that the chosen court is the most appropriate forum).

41. If there is a breach of contract, then the strong cause test is triggered. It is the same test set out in *Vinmar*, for it is the same principle of contractual enforcement. So *Shanghai Turbo* is clearly aligned with the underlying philosophy of *Vinmar*, and may be seen as its logical extension, applying the same principle of enforcing a contractual agreement relating to jurisdiction. The "velcro" effect of a non-exclusive choice of Singapore court agreement may be seen as an alignment with Vinmar for exclusive choice of Singapore court agreements at common law, the position under the Convention, and the SICC.

42. Moving forward, the practical impact of *Shanghai Turbo* will in fact be minimised as far as choice of Singapore court is concerned. Much of the effect of *Shanghai Turbo* for simple choice of Singapore court agreements will eventually be superseded by the Convention. So long as the subject matter is civil and commercial and within scope of the Convention, the presumption of exclusivity will apply, and the Singapore court must take jurisdiction unless the clause is void. The clause in *Shanghai Turbo* itself will NOT, however, fall within the scope of the Convention, because the parties have not selected the court(s) of ONE Contracting State. But

if the *Shanghai Turbo* clause was made on or after 1 October 2016, the jurisdiction of the SICC may be triggered because the submission to the Singapore court will be presumed to include the SICC and there are no express words to contradict that. Once proceedings are commenced in the SICC, the test for exercise of jurisdiction is not natural forum or strong cause, but whether the case is appropriate for an international commercial court.

43. The *Shanghai Turbo* reasoning is about construction of terms, and this is an issue governed by the proper law of the choice of court agreement. The Court accepted that the proper law of the main contract also governed the choice of court agreement unless the parties had indicated otherwise. In this case, the contract was found to be governed by Singapore law. Different canons of construction may apply if the jurisdiction agreement is governed by foreign law. This is one of the potential complexities of the contractual analysis. However, this is mitigated by the principle that Singapore law applies by default if foreign law is not pleaded or proven.

44. The Court in this case was interpreting a specific clause in a particular contract. The Court reasoned that the most commercially sensible construction of an agreement "to submit" to the jurisdiction of a court is that parties have agreed to submit to the exercise of the jurisdiction of the court, ie, that they will not object to the exercise of jurisdiction by that court. This is not the only possible meaning of submission. For example, submission under section 16(2) of the SCJA means submission to the existence of the jurisdiction of the court, and not necessarily to its exercise; this is why a party who has submitted to the jurisdiction in that sense is not forbidden from disputing the exercise of jurisdiction of the court (as was the case with the *Shanghai Turbo* defendant). So the use of the word "submit" does not necessarily mean that the parties have agreed not to object to the exercise of the jurisdiction of the chosen court.[40] It is a question of construction, but *Shanghai Turbo* directs us to lean towards that particular construction, at least for freely negotiated contracts.

45. Conversely, the omission of the word "submit" from the clause does not mean that this particular canon of construction will not apply. The obligation to submit to the jurisdiction of the chosen court is regarded in the judgment as implicit in the very concept of a non-exclusive choice of court agreement[41] (though it begs the question what the party is agreeing to submit to).

[40] *Contra* Merrett, note 37 above, at 49.
[41] Note 33 above, at [82] and [84].

46. One question left open by the Court was whether its approach would apply to contracts that are not freely negotiated. The Court expressed no tentative view on the matter. While the Court of Appeal had opined tentatively in *Vinmar* that all contracts should be treated the same, it is important to note it was addressing the question about the legal effect of a contractual obligation. In *Shanghai Turbo*, the question is not whether the contractual term should have the same legal effect irrespective of the bargaining powers of the parties; instead it is a question of construction about the meaning of the term. It may not be realistic to make the same inference of "commercial sense" from a jurisdiction clause that has not been the subject of negotiation.[42]

47. While the Court in *Shanghai Turbo* dealt with two possible promises, accepting one (agreement not to object to chosen court exercising jurisdiction) and rejecting the other (agreement not to object to chosen court being the most appropriate forum) as a general rule, these do not exhaust the field of possible meanings that could be attributed to non-exclusive choice of court agreements.

48. For example, the possible intentions of the contracting parties on how to deal with parallel proceedings were not explored in *Shanghai Turbo* because there were no relevant parallel proceedings in that case. There were related proceedings in China but these were not disputes caught by the choice of court agreement. It may be that parties have intended that once proceedings are commenced in the chosen court, no parallel proceedings should occur anywhere else, ie, the choice effectively turns exclusive at that point.[43] If this approach were taken, *Shanghai Turbo* would arguably[44] have been decided the same way: strong cause would need to be shown why the Singapore court should not exercise jurisdiction once the proceedings were commenced. On the other hand, on this approach, if proceedings have already commenced in the Chinese court pursuant to the choice of court agreement, then the commencement of proceedings in Singapore could have been a breach of contract requiring strong cause justification for exercising jurisdiction. In the *Shanghai Turbo* judgment, the

[42] Indeed, even in negotiated contracts, the context, including availability of legal advice and the language of negotiations or drafts, can be important in construction of the terms: *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] SGCA 55; *Xia Zhengyan v Geng Changqing* [2015] 3 SLR 732.

[43] *Dicey, Morris & Collins: The Conflict of Laws* (Sweet * Maxwell, 15th ed, 2015) at 12-106-107; A Briggs, note 37 above, at paras 4.20-4.21; *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571 at [36] and [52].

[44] The fact that there were two chosen courts complicates matters somewhat. An additional intention would be required that the first seised court becomes exclusive, to the exclusion of the other.

situation where parallel proceedings had commenced in a foreign chosen court was briefly considered as an example of a *Spiliada* factor at work,[45] and it was regarded as a very strong factor to stay proceedings commenced in a non-chosen court. This seems to be a commercially sensible and reasonable outcome. Perhaps, it is not a big step to argue that it is commercially sensible and reasonable for contracting parties to intend that outcome.[46]

49. Further, in Singapore law, contractual meaning is sometimes not a question of construction but of implied terms. For example, there may be an implied term that the parties would not act in a way to impede the exercise of the contractual right to sue in the chosen court. An attempt to obtain an anti-suit injunction from another court to stop proceedings in the chosen court could then be a breach of this implied obligation, which could be subject to an application for an anti-anti-suit injunction.[47]

50. It is hard to criticise *Shanghai Turbo* as a matter of principle. If there is a contractual agreement, then the terms of that agreement must be discerned and enforced. *Shanghai Turbo* is the first appellate Commonwealth decision that has explicitly acknowledged the significance of contract enforcement in non-exclusive choice of court agreements, and it has provided the most detailed analysis from the contractual perspective by far. It is easier to criticise it on the basis that while *Vinmar* may have reduced the cost of disputing exclusive choice of court clauses, *Shanghai Turbo* had done the reverse by encouraging more litigation in respect of non-exclusive choice of court agreements. That criticism would, however, be out of place. The prior law was even more uncertain, and at least *Shanghai Turbo* has made it clear what the approach should be, and has provided canons of construction. Moreover, the effect of *Shanghai Turbo* on choice of Singapore court agreements will be minimised by the operation of the Convention and SICC rules as mentioned above.[48] There may indeed be more litigation with respect to non-exclusive choice of foreign court agreements.[49] If the concern is with the specific canons of construction in *Shanghai Turbo*, the simple response is to draft intentions clearly into choice of court agreements. If the concern is that parties may be taken by surprise for contracts already in existence, the answer is that the risk of such an inference being drawn has existed for many

[45] Note 33, at [89(d)].
[46] A Briggs, note 37 above, at para 4.20.
[47] R Fentiman, *International Commercial Litigation* (OUP ,2nd ed, 2015) at para 2.237.
[48] See para 41 above.
[49] The Convention may apply to a choice of a court in a foreign Contracting State.

years. In other words, the counter-measure is to ensure that choice of court agreements reflect clearly the intentions of the parties.

VI. Sun Travels

51. I deal more briefly with the third case, *Sun Travels & Tours Pvt Ltd v Hilton International Manage (Maldives) Pvt Ltd*[50] ("*Sun Travels*"). It is a case on commercial arbitration, but I highlight two aspects which are relevant to choice of court agreements. An injunction was sought to prevent the defendant from relying on a foreign judgment that had been obtained in proceedings commenced in breach of an arbitration agreement. The Court correctly identified the remedy sought to be an *anti-enforcement injunction*, but nevertheless discussed the antisuit injunction because the case was argued on the basis that the injunction sought followed from an entitlement to an antisuit injunction.

52. In the leading case of *Société Nationale Inustrielle Aerospatiale v Lee Kui Jak*,[51] the Privy Council laid down the basic requirements for an antisuit injunction. Generally, the forum must be satisfied that it is the natural forum and that the conduct of the party sought to be injuncted in commencing or continuing foreign proceedings was vexatious or oppressive. It also commended a strict and cautious approach for reasons of international comity because of the indirect interference with foreign proceedings.

53. The law in Singapore was restated in *John Reginald Stott Kirkham v Trane US Inc*[52] ("*Kirkham*") in terms of five elements to be considered:[53]

    a. Whether the defendant is amenable to the jurisdiction of the Singapore court;

    b. Whether Singapore is the natural forum for the resolution of the dispute between the parties;

    c. Whether the foreign proceedings would be vexatious or oppressive to the plaintiff if they are allowed to continue;

[50] [2019] SGCA 10.
[51] [1987] AC 871.
[52] [2009] 4 SLR(R) 428.
[53] Ibid, at [28]-[29].

d. Whether the anti-suit injunction would cause any injustice to the defendant by depriving the defendant of legitimate juridical advantages sought in the foreign proceedings; and

e. Whether the institution of foreign proceedings was or would be in breach of any agreement between the parties.

54. Unfortunately, this list has been the source of confusion especially to my students who try to read it as a statute.[54] This is a dangerous approach to the common law in general. *Sun Travels* clarified that a distinctly different approach is called for when an antisuit application is intended to enforce a contractual agreement. It made clear that the position here is the mirror image of *Vinmar*:[55] the injunction should *prima face* be granted to enforce the agreement unless strong cause can be shown otherwise. There is no requirement to demonstrate vexatious or oppressive conduct. International comity is of course still relevant, but the primary consideration is that the court is enforcing a contract. Thus, there was no need to be diffident about granting the injunction provided it is sought promptly and before foreign proceedings are too far advanced.

55. However, an anti-enforcement injunction calls for greater caution than even the anti-suit injunction because the indirect effect of the injunction is to prevent the enforcement of the judgment in the country of origin, and in other countries where enforcement may be sought. As a matter of international comity, it should be up to these countries whether or not to recognise or enforce the judgment. Thus, exceptional circumstances over and above the usual requirements for an antisuit injunction, are required to justify the anti-enforcement injunction.[56] Examples may be where the judgment had been procured by fraud or where the judgment debtor lacked knowledge and notice of the proceedings until the judgment had been delivered.[57] The court also emphasised the equitable nature of the injunction and the importance of the conduct of the party seeking the injunction, in particular the delay in seeking the injunction.

56. Because *Sun Travels* was decided in the arbitration context, the exposition on choice of court agreements was understandably sparse. For example, no reference was made to the natural forum element. This needs qualification. *Lee Kui Jak* was decided hot on the heels of *The Spiliada*, when the touchstone for hearing cross-border disputes was the natural forum. It has

[54] See also WYK Chng, "Breach of Agreement *versus* Vexatious, Oppressive and Unconscionable Conduct" (2015) 27 SAcLJ 340.
[55] Note 50 above, at [67]-[68].
[56] Note 50 above, at [99].
[57] Note 50, at [113].

since been clarified that the natural forum is a general rule, and a manifestation of a broader requirement rooted in international comity that the court has sufficient interest in, or connection with, the case to justify the indirect interference with foreign proceedings.[58] This has important practical consequences. So in the *Shanghai Turbo* type of case, jurisdiction is taken not on the basis of natural forum but on the failure to show strong cause why the court should not hear the case. This should be a sufficient interest or connection whether not it can be shown independently that Singapore is the natural forum. Similarly, when the SICC has jurisdiction on the basis of a non-exclusive submission, the sufficient interest or connection should be its basis for exercise of jurisdiction (ie, appropriateness having regard to its status as an international and commercial court), not whether Singapore is the natural forum.

57. In the context of enforcing an exclusive choice of court agreement, the question is whether sufficient interest or connection translates into a requirement that the Singapore is the chosen court. If it is the exclusively chosen court, it is indisputable that it has justification to consider granting an antisuit injunction to protect its own jurisdiction which is the result of party autonomy. It has been suggested that the Singapore court should not act if it is not the chosen court, because it should not assume the role of an international busybody.[59] It is arguable that this approach is too narrow, especially in the context of the Convention. For example, if there is a choice of a foreign court falling within the Convention, it is arguable that the Singapore court has sufficient interest to protect an international legal regime of which it is a part.[60] On the other hand, it is arguably inconsistent with the scheme of the Convention to interfere indirectly with proceedings in another Contracting State (whether or not Singapore is the chosen court), because it should up to that the court of that Contracting State to decide whether it can take jurisdiction as a non-chosen court in accordance with the Convention.[61]

58. Because the court proceeded on the common ground that the anti-enforcement injunction may be granted on the basis of an arbitration agreement notwithstanding that court proceedings in breach of the agreement had ended in judgment,[62] there was no discussion of whether and when an agreement to arbitrate also includes a promise not to enforce a judgment obtained in breach of the agreement. A similar question arises in relation to an exclusive choice of court agreement

[58] *Airbus Industrie GIE v Patel* [1999] 1 AC 119 at 138-139.
[59] *Peoples Insurance Co Ltd v Akai Pty Ltd* [1998] 1 SLR 206 at [12].
[60] This is arguably the justification for the antisuit injunction in the context of international commercial arbitration; it would be meaningless to enquire whether the forum is the natural forum for, or otherwise sufficiently connected with, the dispute.
[61] In contrast, the New York Convention does not deal with stay of proceedings in favour of arbitration.
[62] Note 50 above, at [88]-[89].

as well: have the parties also promised (whether as a matter of construction or implied terms) not to rely on any judgment obtained in breach of the agreement? This is a question for another day. Of course, nothing stops such promises from being expressly drafted into the contract.

59. On the basis that enforcement of the judgment would be a breach of agreement, the Court in *Sun Travels* focussed its attention on the effect of an anti-enforcement injunction in the foreign country delivering the judgment, and on other foreign countries where the judgment may be sought to be recognised. The court's attention was not directed to the effect of the judgment in Singapore because that was not put in issue. But it does raise the important question whether a judgment can be recognised or enforced in Singapore if it has been obtained in breach of an (arbitration or choice of court) agreement. It is an express defence under the Reciprocal Enforcement of Foreign Judgments Act,[63] but it is not clear whether it can be a defence under the Reciprocal Enforcement of Commonwealth Judgments Act[64] or the common law. This is also a question for another day.[65]

VII. Conclusion

60. Party autonomy is clearly gaining significance in dispute resolution. Choice of court agreements play a very important role in risk management in cross-border disputes. In this context, party autonomy in the common law has received emphatic endorsement from the Court of Appeal in three recent decisions: *Vinmar* raises the bar on the "strong cause" test for departing from an exclusive choice of court agreement; *Shanghai Turbo* highlights the significance of construing and enforcing the contractual promise in a non-exclusive choice of court agreement; and *Sun Travels* affirms the contract enforcement principle for anti-suit injunctions, and highlights its potential significance to anti-enforcement injunctions.

61. These common law developments are important, even though they will be substantially superseded by Convention and SICC rules. They are largely aligned with the position in the Convention and the SICC, and go in tandem with developments elsewhere in international arbitration and mediation. It is inevitable that there will be disputes about where disputes should

[63] Cap 265, 2001 Rev Ed, s 5(3)(b).
[64] Cap 264, 1985 Rev Ed.
[65] See "The Effective Reach of *in personam* reasoning in Private International Law", 2nd Yong Pung How Professorship of Law Lecture (2009) at paras 29-36, available at: https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=1004&context=yph_lect.

be resolved. To minimise transaction costs incurred in such disputes, it is important that parties' intentions in choice of court agreements should be clearly expressed as far as possible.

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