Third Yong Pung How Professorship of Law Lecture, 13 May 2010

Private International Law from the Equitable Jurisdiction: Imperialism, Universalism and Pluralism

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Introduction

1. One side-effect of globalization is increasing cross-border conflict arising from transactions between parties. Today, the courts have sophisticated tools to deal with such conflicts. The focus of this paper is the interrelation between the court's approach when dealing with problems in its equitable jurisdiction, and its approach when dealing with cross-border problems.

2. In 1994, the Singapore Court of Appeal (Yong Pung How CJ, Karthigesu and LP Thean JJA) delivered the judgment in *Thahir Kartika Ratna v PT Pertambanan Minyak dan Gas Bumi Negara (Pertamina)*,[1] which today remains a leading Commonwealth authority for choice of law for restitutionary claims.[2] It stirred great interest in both restitution and conflict of laws circles.

3. I was, however, more fascinated by a point that did not attract much attention at that time. Various claims had been made by an employer to reclaim bribes received by an employee and a subsequent recipient. Some were common law claims, others were equitable claims. In the High Court, Lai Kew Chai J stated that once the equitable jurisdiction of the court was invoked, the law of the forum applies to the claim. On the other hand, the Court of Appeal characterised the equitable claims as "restitution" and applied the choice of law rules in restitution to the claims. Both pointed to Singapore law, so nobody made much fuss about it. But which was the correct or better approach? I thought that it raised a question of principle that could have tremendous practical consequences. When an opportunity arose, I spent some time in Oxford researching the question.

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[1] [1994] 3 SLR(R) 312, [1994] 3 SLR 257 (CA). Noted in J Bird, "Bribes, Restitution and the Conflict of Laws" [1995] LMCLQ 198, and see also A Briggs, "Restitution Meets the Conflict of Laws" [1994] RLR 94. It was also a seminal case in the law of restitution in imposing a constructive trust on bribe monies, but in this respect it was somewhat eclipsed by *A-G for Hong Kong v Reid* [1994] 1 AC 324 (PC NZ).

[2] L Collins (gen ed), *Dicey, Morris and Collins: The Conflict of Laws* (London: Thomson, 14th ed, 2006) at [34-003]; P North and JJ Fawcett, *Cheshire and North's Private International Law* (London: Butterworths, 13th ed, 1999) at 687.

4. The conclusion, published in 2004,[3] was that generally the state of authorities in the Commonwealth was very unclear, there was little academic treatment of the subject,[4] and it was important to look at the matter from first principles in the light of the authorities.

Equity

5. Common law systems like Singapore derive their legal systems from the English system. A unique feature of the common law system is its duality: common law and equity. This dual system of judge-made law is the source of much puzzlement to civil lawyers as well as to lay persons, and indeed even to common lawyers. Sir George Jessel, Master of the Rolls who supervised the implementation of the merger of the English courts, was reputed to have said that "no one can be expected to understand equity until he is forty".[5] Today, with widespread university education in the law, it is not generally believed that understanding of equity is monopolised by those of middle-age and above.[6] Nevertheless it is a challenge. The system has been analogised to a mathematical system which contains blue numbers and red numbers, and where the colours have an important effect on calculations, and where there are complex rules on how the blue and red numbers may or may not be combined.[7]

6. Common law was the king's justice, or the law of the land, as applied by judges of the country. Equity was also the king's justice, but it represented a "higher" justice; it was a force to temper the common law when it became too harsh or too rigid. This idea of duality of justice dates back to Aristotle, and is not unknown in civil law system, but it finds a unique form of expression in common law countries. There are three unique features of equity that require emphasis. First, equity is seen as a distinct body of jurisprudence, and its methodology and principles are not always the same as those of the common law. Secondly, equity was historically

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[3] TM Yeo, *Choice of Law for Equitable Doctrines* (Oxford: OUP 2004).

[4] Among the few were: RW White, "Equitable Obligations in Private International Law: The Choice of Law" (1986) 11 Syd LR 92; L Barnard, "Choice of Law in Equitable Wrongs – A Comparative Analysis" [1992] CLJ 474. Much had been written about the private international law aspect of express trusts, but that is a different story.

[5] "We have the uncertain authority of Laski, repeating a story of Lord Maugham's, for Sir George Jessel's view that no one can be expected to understand equity until he is forty." Heydon, Gummow and Austin, *Cases and Materials on Equity* (1st ed, 1975), p(v); and Gummow, "Equity: Too Successful?"(2003) 77 ALJ 30 at 31.

[6] Heydon, Gummow and Austin, *Cases and Materials on Equity* (Sydney: Butterworths, 1st ed, 1975), p(v); and Gummow, "Equity: Too Successful?"(2003) 77 ALJ 30 at 31.

[7] J Getzler, "Patterns of Fusion", in P Birks (ed), *The Classification of Obligations* (P Birks ed) (Oxford: OUP, 1997), ch 7. See also S Worthington, *Equity* (Oxford: OUP, 2003) at 2-6.

administered from a separate court (the Court of Chancery) that was distinct from other courts. Indeed, it is impossible to define an "equitable" principle except by reference to the origin of the principle from this jurisdiction. These separate courts have merged for more than 140 years,[8] but the unified court continues to wear different hats; it applies common law rules in its common law jurisdiction, and principles of equity in its equitable jurisdiction. The merger was only of administration. Thirdly, while the objective of equity was to improve upon the common law, its technique was to subvert it.[9] The politics of the time prevented the equity courts from directly contradicting the common law courts; so the court acted on the person (thus: equity acts *in personam*), preventing him from asserting his common law rights. Of course, this created a conflict between the courts, and it was resolved in favour of equity,[10] a position that continues to prevail today.[11] Thus: if there is a conflict between common law and equity, equity prevails.

7. When there are two sets of rules which say different things about the same matter, it is necessary to have rules which determine which set of rules will apply in any given case. The two main principles in common law systems are deceptively simple: (1) the common law always applies; whether equity also applies depends on whether the equitable jurisdiction has been properly invoked; and (2) when there is a conflict, equity prevails. Academic debate rages on the extent to which there should continue to be two sets of rules. On one side are the "fusionists", who point out that the duality is an accident of history, and who argue that the common law system is mature enough to deal with problems with one set of rules rather than two. On the other side are the "separatists" who argue against the "fusion fallacy" – obtaining a legal result that that is not justifiable by reference to the distinct lines of jurisprudence in the common law and equitable jurisdictions when considered separately. Academics have nearly come to blows arguing this question. Courts, however, remain bound by doctrine and precedent to maintain the two separate jurisdictions.

Private International Law (Conflict of Laws)

8. Rules of private international law have been created by the courts to deal with cross-border disputes. There are three types of questions: (1) whether the court can assume and will exercise jurisdiction to determine a dispute between the parties, or

[8] In the UK: Supreme Court of Judicature Act 1873 and 1875; In Singapore: Courts Ordinance (No III of 1878) and Civil Law Ordinance (No IV of 1878), s 10.
[9] M Halliwell, *Equity and Good Conscience in a Contemporary Society* (London: Old Bailey, 1997) at 6.
[10] J Getzler, "Patterns of Fusion", in P Birks (ed), *The Classification of Obligations* (P Birks ed) (Oxford University Press, 1997) at 182-183.
[11] In Singapore: Civil Law Act (Cap 43, 1999 Rev Ed), s 4(13).

leave the matter to be resolved by the court of another country more closely connected with the dispute (jurisdiction); (2) if it is going to hear the case, which country's law the court will apply to determine the dispute (choice of law); and (3) the legal effect of a foreign judgment in Singapore (foreign judgments). This paper is concerned primarily with the second class of questions.

9. From very early times, English courts have recognised that it is not always the right thing to do apply English law to foreigners or to transactions occurring in foreign lands. Today, the common law has very sophisticated choice of law rules. It runs from the basic assumption that the application of the law of the forum does not always give the right answer in disputes involving foreign elements, and that "conflicts justice" requires the application of the rules of the legal system most closely connected with the dispute. In other words, it proceeds on the basis of pluralism and international comity. No one country's "justice" is necessarily better than another's.[12]

10. Choice of law is concerned with the question of which country's law is to apply to an issue in dispute. Dean Prosser once said of choice of law rules in particular:

> "The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorise about mysterious matters in a strange and incomprehensible jargon. The ordinary court, or lawyer, is quite lost when engulfed and entangled in it."[13]

11. We do not need to reach eighty before getting near to understanding. Choice of law is best understood as a methodology. The choice of law process can be understood in five steps: (1) characterisation of the issue in dispute; (2) identification of the connecting factor(s) associated with the category in question; (3) the identification of the applicable law in that legal system; (4) the application, if necessary, of rules of the forum rules which are mandatory in the international sense that they override the choice of law process; and (5) the rejection, if necessary, of foreign law if the consequence of its application is contrary to fundamental public policies of the forum. The first three steps acknowledge the pluralism of values in different legal systems. The last two recognise that there may be certain values which the court may regard as universal, or more commonly, as being so important to the moral, social or economic interests of the forum that foreign law to the contrary cannot be accepted.

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[12] In modern times, this same notion of international comity and pluralism has spawned much litigation about where to conduct litigation (natural forum).

[13] William L. Prosser, "*Interstate Publication*" (1953) 51 Mich L Rev 959 at 971.

12. The categories for choice of law are well-documented in textbooks on private international law. The key point to note is the objective of the characterisation; the categories serve no particular purpose other than to assist the court to identify the law most appropriate to apply to the dispute in question.[14] They are not defined by conceptual parameters, let alone domestic doctrines. Thus, we know that an agreement without consideration is not a contract as characterised under domestic common law. Nevertheless, it is a "contract" for choice of law purposes,[15] because agreements of this type serve the same function in the legal system as "contracts" in the domestic sense within the common law. In other words, the functions of the rules prevail over the labels attached to them.[16]

Choice of Law for Equity

13. Very sophisticated principles and rules have been developed to deal with choice of law problems. There is, however, a large gap when it comes to questions involving the potential application of the equitable principles of the forum (or of a foreign country). The question basically is: when a litigant is asking to invoke the equitable jurisdiction of the court, does the court apply choice of law at all? If so, does it apply a different set of rules from when the equitable jurisdiction is not invoked?

14. The seventeenth and eighteenth century had seen a flurry of activity in the English Chancery Court involving disputes between (mostly English) parties relating to foreign immovable property, mostly in the colonies.[17] There was (and is) a prohibition in the common law courts against the assumption of jurisdiction to hear disputes involving title to foreign lands.[18] Nevertheless, the English Chancery Court took jurisdiction in many of these cases, not contradicting the common law prohibition, but on the basis that it was acting on the conscience of the defendant. In almost all the cases, it applied English law. These decisions should be understood in context of the politics and economics of those times. In those days, the English courts generally had scant regard for foreign courts, especially those in their colonies. It was the height of the English empire, and English law was synonymous with universal justice and right. Economically, the resolution of these disputes in a fashion familiar to Englishmen was important to raise the level of confidence of the venture capitalists in those days, to aid in the expansion of the

[14] *Raiffeisen Zentrabank Osterreich AG v Five Start Trading LLC (The Mount I)* [2001] EWCA Civ 68, [2001] QB 825.
[15] *Re Bonacina* [1912] 2 Ch 394 (CA).
[16] See also *Goh Suan Hee v Teo Cher Teck* [2010] 1 SLR 367 (CA).
[17] The cases are legion. *Penn v Baltimore* (1750) 1 Ves Sen 444, 27 ER 1132 exemplifies.
[18] As restated in *British South Africa Co v Companhia de Moçambique* [1893] AC 602 (The *Moçambique* rule).

empire. This was the imperialist angle to the problem, and no more needs to be said about it.

15. These cases decreased in significance with the decline of the British Empire. Judicial systems in the colonies became more developed, and people encountered difficulties in enforcing judgments involving foreign land in the country where the land is situated. Its most important heritage is the principle for taking jurisdiction *in personam* in spite of the presence of foreign immovable property, which remains important today.[19]

16. The principles of equity were originally developed primarily for the protection of land, that being the most important repository of wealth in those days. With land disputes going local, principles of equity generally stayed out of private international law. Its significance for choice of law purposes resurfaced in the 1970's and 80's. This coincided with the phenomenal growth of equitable principles outside land law, and particularly into the commercial sphere: fiduciary duties; confidentiality duties; duties of skill and care; and duties owed by strangers to a trust or fiduciary duty. Increasingly, equitable principles were being called upon in litigation, including commercial litigation. This then spread to cross-border disputes. Today, it is commonplace for equitable principles to be invoked in cross-border disputes concerning commercial and non-commercial transactions.

17. How should the court approach the problem of choice of law for equitable doctrines? One extreme view is this:

    (1) Choice of law rules are rules of domestic law applied by the court to determine which system of law to apply to resolve the dispute;
    (2) The merger of courts only merged the administration; equitable jurisdiction remained distinct;
    (3) In the equitable jurisdiction, the court applied the law of the forum once it took jurisdiction, since it acted *in personam*;
    (4) Therefore the equitable principles of the forum must always apply; there is no choice of law question at all.

18. The New South Wales Supreme Court took the strongest position on this issue: once jurisdiction was taken over the defendant, all principles of equity of the

[19] See, eg, *Singh v Singh* [2006] WASC 182; *Singh v Singh* [2009] WASCA 53; *Murakami v Wiryadi* [2010] NSWSCA 7; R *Griggs Group Ltd v Evans* [2004] EWHC 1088 (Ch), [2005] Ch 153; *Murakami Takako v Wiryadi Louise Maria* [2009] 1 SLR(R) 508, [2009] 1 SLR 508 (CA). The enforcement of such judgments was discussed in the Second Yong Pung How Professorship of Law Lecture.

forum applied.[20] Reliance was placed on the cases involving jurisdiction in respect of foreign immovable property. The rationale was the universal values represented in the jurisprudence of equity. This proposition was affirmed in a number of cases in Australia.[21] Equitable principles reflected universal values which caused them to override not only the domestic common law, but foreign law as well.[22]

19. Another view, on the opposite end, is this:[23]

(1) Choice of law rules are rules of domestic law applied by the court to determine which system of law to apply to resolve the dispute;
(2) Applying choice of law in harmony with the common law is consistent with the precepts of equity and historically justified on the (albeit sparse) authorities;
(3) Choice of law rules need to be applied before it is decided whether the equitable jurisdiction is even relevant; there should therefore be a unitary approach to choice of law and choice of law rules, and categories should not be specific to the domestic division between law and equity;
(4) Equity is only relevant if it is part of the applicable law pointed to by the forum's choice of law rule: there must be choice of law.

20. The extreme view of the New South Wales Supreme Court has been rejected by the Singapore Court of Appeal in the important case of *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* (hereafter *Rickshaw*).[24] There, it rejected the universalism of equity; like the common law, the principles of equity must be subject to choice

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[20] "The Equity court has long taken the view that because it is a court of conscience and acts *in personam*, it has jurisdiction over persons within and subject to its jurisdiction to require them to act in accordance with the principles of equity administered by the court … The Equity Court determines according to its own law whether an equity exists, its nature and the remedy available….": *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958 at 11,982 (Holland J).

[21] "The origin of equity's jurisdiction must also be borne in mind. The Lord Chancellor, with responsibility for the immortal souls of the subjects of the English King, made orders that such subjects behave in accordance with what all right thinking people knew (*scio*) with (*con*) God what was right. There was no concern with the souls of mere foreigners. …Thus equity is very much a local field of law.": *OZ-US Film Productions Pty Ltd v Heath* [2000] NSWSC 967 (Young J). "It is in my view arguable that the true position is no more than that, once a defendant is amenable to the *in personam* jurisdiction of the Court, that Defendant is subject to the equitable principles of the *lex fori*.": *OZ-US Film Productions Pty Ltd v Heath* [2001] NSWSC 298 (McLaughlin M). "…[T]here is authority that Australian law will apply to both the substantive and procedural aspects of any proceeding here for fraud, alleging constructive trusts or seeking the remedy of tracing.": *Virgtel Ltd v Zabusky* [2006] QSC 66. See also Young, Croft and Smith, *On Equity* (Sydney: Law Book Co, 2009), at [2.470].

[22] *Kavalee v Burbridge* (1998) 43 NSWLR 422 (CA) at 438 (Mason P).

[23] See TM Yeo, *Choice of Law for Equitable Doctrines* (Oxford: OUP 2004); TM Yeo, "Choice of Law for Equity", in S Degeling and J Edelman, *Equity in Commercial Law* (Sydney: Thomson, 2005).

[24] [2007] 1 SLR(R) 377, [2007] 1 SLR 377 (CA). Noted in A Briggs, "A Map or a Maze:Jurisdiciton and Choice of Law in the Court of Appeal" (2007) 11 SYBIL 123; TM Yeo, "The Effect of Contract on the Law Governing Claims in Torts and Equity" (2007) 9 YPIL 459.

of law rules.[25] This was a matter of principle and international comity; it was recognition of the pluralism of values in different legal systems.

21. More recently, the Court of Appeal found it necessary to re-affirm the principle that jurisdiction and choice of law are two separate questions.[26] Just because the court assumes jurisdiction does not mean that it must apply its own domestic principles of equity.[27] That the courts may have done so historically as a primitive proxy for choice of law does not mean that it must do the same today. In any event, most of the old jurisdiction cases can be rationalised on modern choice of law bases as being the application of English law as the law governing the contract[28] or the law applicable to a wrong.

22. Pluralism may yet triumph over universalism within the stronghold of equity jurisprudence, Australia, especially New South Wales where there was a separate chancery bar until the 1970's. In *Paramasivam v Flynn*, the Federal Court of Australia, in a case involving a claim for damages for breach of fiduciary duty, (again relying on the jurisdiction cases) that the law of the forum must apply, considered that while choice of law may apply to fiduciary duties arising from contractual and corporate contexts, in other cases the principle was:[29]

> "the general application of the *lex fori*, subject, perhaps, to this: that where the circumstances giving rise to the asserted duty or the impugned conduct (or some of it) occurred outside the jurisdiction, the attitude of the law of the place where the circumstances arose or the conduct was undertaken is likely to be an important aspect of the factual circumstances by reference to which the Court determines whether a fiduciary relationship existed and, if so, the scope and content of the duties to which it gave rise."

23. That case was decided in 1998. It reflected universalism with some concession in exceptional cases to a discretionary form of pluralism. Much more recently

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[25] Insofar as rules of the forum (whether common law, equitable, or statutory) are regarded as universal and overriding, they may still apply as mandatory rules of an international nature or as fundamental public policy within the traditional conflict of laws methodology.

[26] *Murakami Takako v Wiryadi Louise Maria* [2009] 1 SLR(R) 508, [2009] 1 SLR 508 (CA).

[27] It disagreed (at [19]) with *R Griggs Group Ltd v Evans* [2004] EWHC 1088 (Ch), [2005] Ch 153 (at [110]) insofar as the suggested that the assumption of jurisdiction came with the choice of the law of the forum as the applicable law; but it may be that the court did not go further than suggesting that cases where the court assumed jurisdiction were those which involved "obligations" which happened to be governed by English law while those where the court refused jurisdiction involved questions of property law governed by foreign *lex situs* (at [111]-[113]).

[28] See *Murakami v Wiryadi* [2010] NSWCA 7 at [143].

[29] (1998) 90 FCR 489 at 503. See TM Yeo, "Choice of Law for Fiduciary Duties" (1999) 115 LQR 571.

(February 2010), in *Murakami v Wiryadi*,[30] Spigelman CJ, delivering the primary judgment[31] of the New South Wales Court of Appeal in a case where the plaintiff was seeking equitable remedies in respect of matrimonial property located in Australia of an Indonesian couple, took a slightly different approach. The court had, in addition to English and Australian authorities previously mentioned, the benefit of more recent academic writings,[32] and more significantly, the Singapore Court of Appeal decision in *Rickshaw*. Without actually deciding the question, it said:[33] "In determining a claim for an equitable interest under Australian law, this Court will have regard to, and *generally* enforce, a relevant foreign element in the dispute." (Emphasis added).

24. While the two cases dealt with different subject matter – fiduciary duties in *Paramasivm v Flynn* and matrimonial property in *Murakami v Wiryadi* – Spigelman CJ had proceeded on the basis that the approach in *Paramasivam v Flynn* was of general application. Subject to what the High Court of Australia may have to say about the matter, presently there appears to be a shift in thinking from relevant foreign law being applied in *exceptional* cases to relevant foreign law being applied *generally*.

25. This brings us to the second part of this paper: how should the court decide which foreign law to apply?

Choice of Law Methodology

26. It is one thing to say that there is choice of law for equitable doctrines. It is another how it is to be determined which law applies. Here, it has been difficult to get away from the idea of equity as a distinctive body of substantive domestic law even for the choice of law analysis, even though as a matter of principle, it can be seen that it is just that: a body of substantive domestic law. Bearing in mind that choice of law rules are ultimately rules of domestic law; it is still theoretically possible that choice of law rules that apply when the court is asked to invoke its equitable jurisdiction are different from choice of law rules that apply in its common law jurisdiction.

27. It is important to note that today, the bases of *in personam* jurisdiction, in the sense of the court having legal authority to determine a dispute in a way to bind the

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[30] [2010] NSWCA 7.
[31] MColl and Young JJA agreed.
[32] JD Heydon and MJ Leeming, *Jacobs' Law of Trusts* (Sydney: Butterworths, 7th ed, 2006) at [2821]; A Chong, "The Common Law Choice of Law Rules for Resulting and Constructive Trusts" (2005) 54 ICLQ 855; TM Yeo, *Choice of Law for Equitable Doctrines* (Oxford: OUP, 2004); TM Yeo, "Choice of Law for Equity", in S Degeling and J Edelman, *Equity in Commercial Law* (Sydney: Thomson, 2005).
[33] [2010] NSWCA 7 at [148].

parties, are common to both the common law and equitable jurisdiction; there is a single common basis of jurisdiction. It is also important to remind ourselves that the purpose of the choice of law rules is to determine which law will apply; before that is done, we do not know whether the equitable jurisdiction is going to be relevant. It is not helpful to say the equity acts *in personam* when it is still not clear whether equity should act at all. In other words, equitable jurisdiction is about the exercise of powers under domestic substantive law. On this view, the methodology for determining applicable law should be neutral to the common law/equity distinction. In other words, there should be a unitary approach to choice of law.

28. That is obviously not the case in Australia yet. The furthest it has gone, in *Murakami v Wiryadi*, is to give effect to foreign elements in a case; but it is still done outside the traditional choice of law process. The traditional process starts with characterisation, while its approach sidesteps it. Even so, the equitable choice of law rules applied[34] by the court basically referred to the existing category of contracts.[35] Equity followed the law in this case, but there is no clear indication whether or how equity will do so in other instances. So its equitable choice of law methodology remains uncertain.

29. The law in Singapore appears to be clearer, but still in a state of flux. In *Ricksham*, the Court of Appeal recognised that equitable principles are pervasive in the legal system and that they perform a variety of functions in diverse contexts. The court held that:

> "where equitable duties … arise from a factual matrix where the legal foundation is premised on an independent established category such as contract or tort, the appropriate principle in so far as the choice of law is concerned ought to be centred on the established category concerned."

30. Thus, as the case concerned allegations of breach of fiduciary and confidentiality duties arising from a contractual relationship, the court looked to the law applicable to the contract to govern the equitable claims. The approach is different from that of the New South Wales court in *Murakami v Wiryadi* because the Singapore court had proceeded on the basis that characterisation was a necessary step in the analysis. At the same time, it was concerned not to foreclose the

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[34] Or more accurately, invented by the court; since this is the first time the court was applying choice of law in this context.

[35] The court had found that there was an actual contract to be inferred from the conduct of the parties (at [122]). Presumably the court applied the *lex fori* to the question of formation of contract; but it is not clear whether it was applied *qua lex fori* or because the foreign proper law of the putative contract had not been proven.

possibility of new categories to deal with equitable doctrines. While not expressly characterising the claims in the case, the court had necessarily characterised them at least indirectly by following the choice of law rules of the underlying established categories. While it arguably retains the relevance of equity in the choice of law process, the "equitable" character of the approach is marginalised because it is dependent upon the same categories as traditional choice of law. In other words, subject to the creation of new categories in the conflict of laws, equity "follows the law"[36] in characterisation.

31. With respect, the concern of the court in *Rickshaw* to leave open the possibility that categories may require to be created to deal specifically with problems in equity – "equitable categories" [37] – within the choice of law process, appears to be exaggerated. Choice of law categories are based on the functions of the rules and institutions in question; they do not depend on the historical developments in domestic laws.[38] "Trusts" is no doubt a distinct category, but only because equity in this case managed to create a unique institution in the common law even in the functional sense, and there are functional equivalents from other legal systems that could fall within this category. On the other hand, it will be unnecessary and cumbersome for a claim for damages for breach of contract to be characterised as common law contracts and a defence of promissory estoppel to be characterised as equitable contracts. Of course, new choice of law categories may be recognised from time to time, but these should depend on the functions of the relevant rules rather than their historical origins.

32. Subject to the possible creation of new categories specific to equity (which has not occurred), the approach of the Singapore court therefore involves a unitary

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[36] See A Briggs, "Misappropriated and Misapplied Assets and the Conflict of Laws" in S Degeling and J Edelman, *Unjust Enrichment in Commercial Law* (Sydney: Law Book Co, 2008); TM Yeo, *Choice of Law for Equitable Doctrines* (Oxford: OUP, 2004) at [2.06].

[37] The creation of separate categories just to deal with equitable principles is rejected in L Collins (gen ed), *Dicey, Morris and Collins: The Conflict of Laws* (London: Thomson, 14th Ed, 2006) at [2.035] and [34.033]–[34.041], A Briggs, *The Conflict of Laws* (Oxford: OUP, 2nd ed, 2008) at 217, J Hill, *International Commercial Disputes in English Courts* (Oxford: Hart, 3rd ed, 2005) at [15.5.5]-[15.5.8] and WMV Clarkson and J Hill, *The Conflict of Laws* (Oxford: OUP, 3rd Ed, 2006) at 228 and 246–247. R Stevens, 'Choice of Law for Equity: Is It Possible?', in S Degeling and J Edelman, *Equity in Commercial Law* (Sydney: Thomson, 2005), considered its existence to be theoretically possible but left the question of its desirability open. PM North and JJ Fawcett, *Cheshire and North's Private International Law* (London: Butterworths, 13th Ed, 1999) at 1044 supported a category of "equitable wrongs", but the subsequent edition took a neutral stand: JJ Fawcett and M Carruthers, *Cheshire, North and Fawcett: Private International Law* (Oxford: OUP, 14th ed, 2008) at 769. The strongest support for an independent category of equitable wrongs comes from L Barnard, "Choice of Law in Equitable Wrongs: A Comparative Analysis" [1992] CLJ 474.

[38] *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1996] 1 WLR 387 (CA) at 407.

approach to choice of law. Equitable principles are relevant only, if at all, after the determination of the applicable domestic law to the issue.

33. Practically, insofar as *Rickshaw* supports an indirect characterization approach, it seems to have been bypassed by direct characterization in subsequent cases. In *Murakami Takako v Wiryadi Louse Maria*,[39] there were claims that various properties in different countries were held on a variety of trusts. This case centred on a jurisdiction dispute, but as far as choice of law was concerned, the court simply applied the established choice of law category of matrimonial property.[40] In *Focus Energy Ltd v Aye Aye Soe*,[41] which also centered on the question of jurisdiction, a choice of law issue arose in relation to claims by a company (incorporated in the British Virgin Islands and registered as a foreign company in Myanmar) against a former director for breach of fiduciary duty and misappropriation of funds. The High Court applied the *Rickshaw* approach and looked to the underlying legal category of constitution of companies. At the same time the court also characterized the claim directly within the same category.[42] Alternatively, the court also characterized the claim as falling within the category of restitution. In *Shanghai Electric Group Co Ltd v PT Merak Energi Indonesia*,[43] where an equitable remedy was sought to restrain the exercise of a contractual right, the court simply proceeded on a contract characterization. It might be said that the indirect reference was an unspoken step in these cases. But these cases illustrate that, barring the creation of equity-specific categories, there is no practical difference between direct and indirect characterization.

34. The approaches in recent times in a number of common law jurisdictions appear to be moving towards unitary characterisation approaches, even if they have not examined the theoretical basis for doing so as thoroughly as the Singapore Court of Appeal has done. Of note is the New Zealand case in *A-G of England and Wales v R*.[44] A claim that a contract be set aside for undue influence was simply held to raise an issue of contract for choice of law purposes. This approach has been stigmatised as a "fusion fallacy" transgression,[45] but the criticism appears to be directed at its reasoning (or lack thereof) rather than the approach itself. It was "fusion fallacy" because it simply considered there should not be any difference

[39] [2009] 1 SLR(R) 508, [2009] 1 SLR 508 (CA).
[40] [2009] 1 SLR(R) 508, [2009] 1 SLR 508 (CA) at [29].
[41] [2009] 1 SLR(R) 1086, [2009] 1 SLR 1086.
[42] Following *Base Metal Trading Ltd v Shamurin* [2004] EWCA Civ 1316, [2005] 1 All ER (Comm) 17.
[43] [2010] SGHC 2.
[44] [2002] 2 NZLR 91 (CA) at [28]-[30], affirmed in [2003] UKPC 22 without reference to the choice of law point.
[45] *Murakami v Wiryadi* [2010] NSWCA 7 at 136.

between common law and equity. It is not "fusion fallacy" if the differences are acknowledged, analysed, and found not to justify a difference of approach.

35. More recently, the British Columbia Supreme Court in *Minera Aquiline Argentina SA v IMA Exploration Inc*,[46] faced with a claim in respect of breach of confidence arising out of a contractual relationship, proceeded by characterising it as falling within the choice of law category of restitution[47] without any specific regard to the equitable origin of the claim as such.[48] In Hong Kong, Lord Hoffmann, sitting as a Non-Permanent Judge of the Court of Final Appeal in *Tripole Trading Ltd v Prosperfield Ventures Ltd*,[49] held that a claim that property received in China was the subject of a constructive trust simply raised a property issue governed by the *lex situs*. In *Base Metal Trading Ltd v Shamurin*,[50] the English Court of Appeal characterised a claim for damages for breach of a company director's equitable duty of skill and care as falling within the category of constitution of companies. In *Douglas v Hello! (No 3)*,[51] the English Court of Appeal characterised a claim to restrain a third party from breaching a duty of confidence as falling within the category of restitution. The case that gave the greatest consideration to the issue whether there was a separate category of equitable wrongs is *OJSC Oil Co Yugraneft v Abramovich*,[52] where Clark J, after reviewing the authorities, took the view that a claim that the defendant had dishonestly assisted in a breach of trust fell within the category of torts for choice of law purposes.[53] One could argue whether the right

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[46] 2006 BSCS 1102.

[47] Following a suggestion in L Collins (gen ed), *Dicey and Morris: The Conflict of Laws* (London: Sweet & Maxwell, 12th ed, 1993) at 1471.

[48] The decision was upheld by the British Columbia Court of Appeal: 2007 BCCA 319.

[49] (2006) 9 HKCFAR 1 at [86].

[50] [2004] EWCA Civ 1316, [2005] 1 All ER (Comm) 17; TM Yeo, "Choice of Law for Director's Equitable Duty of Care and Concurrence" [2005] LMCLQ 144.

[51] [2005] EWCA Civ 595, [2006] QB 125 at [96]-[102]. In the House of Lords, only Lord Hoffmann referred to the choice of law issue, where he affirmed the conclusions of the Court of Appeal on the point but without any indication of methodology: *OBG v Allan* [2008] 1 AC 1 at [126]. The proposition of the Court of Appeal that "the effect of shoehorning this type of claim in to the cause of action of breach of confidence means that it does not fall to be treated as a tort under English law" ([2005] EWCA Civ 595, [2006] QB 125 at [96]), however, commits the fallacy of using domestic characterization to control choice of law characterization. It would follow from this that an agreement without consideration cannot be treated as a contract for choice of law purposes, a conclusion which contradicts *Re Bonacina* [1912] 2 Ch 394 (CA) and much of the received wisdom in private international law; see particularly the caution of Auld LJ in *Macmillan Inc v Bishopsgate Investment Trust Plc (No 3)* [1996] 1 WLR 387 (CA) at 407: "classification of an issue and rule of law for this purpose, the underlying principle of which is to strive for comity between competing legal systems, should not be constrained by particular notions or distinctions of the domestic law of the *lex fori*, or that of the competing system of law, which may have no counterpart in the other's system."

[52] [2008] EWHC 2613 (Comm).

[53] The question was whether the Private International Law (Miscellaneous Provisions) Act 1995 (which reformed the choice of law rules for torts) applied, which in turned depended on whether the issue raised was, as a matter of characterization at common law, one of "tort".

categories were invoked in each of these cases, but in each, the court saw no need to create new categories just to deal with equitable issues. Of greater practical significance to the UK is the European choice of law regime for obligations: the Rome I Regulation on the Law Applicable to Contractual Obligations[54] and the Rome II Regulation on the Law Applicable to Non-Contractual Obligations,[55] together which cover almost the entire field of obligations today. The European Court of Justice, the final interpretative body for the Regulations, is very unlikely to take the view that an equitable obligation is neither contractual nor non-contractual and thereby fall outside the two Regulations.[56] I say very little about the law in the United States, where the choice of law methodology is very different and characterisation plays a minimal role: generally, equitable doctrines are not seen to raise any special choice of law issues at all.

36. The objection in principle to having separate choice of law rules (or separate choice of law categories) for equity is one of principle. Choice of law rules must determine the applicability of domestic systems of law, including (if any) its principles of equity. Having separate equitable choice of law rules puts the cart before the horse.

37. There are further difficulties in trying to apply a choice of law scheme which differentiates between equitable and non-equitable obligations or interests, whether at the level of approach, or at the level of choice of categories. The most problematic one is whether the court should characterise on the basis of the plaintiff's or the defendant's case. For example, the plaintiff may argue that its claim is based on an equitable principle according to the law argued by the plaintiff to be applicable (by reason of "equitable" choice of law rules or categories), while the defendant's case is that under the relevant applicable law (by reason of other choice of law rules or categories), the plaintiff's case does not depend on any equitable principle. The second is that some obligations have mixed origins. Examples include penalties in contract law, and the duty of disclosure in insurance contracts. If different choice of law rules or categories apply depending on whether one is raising an "equitable" or non-equitable issue, the question is simply

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[54] Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) of 17 June 2008, OJ L 177/6 (4 July 2008) with effect from 17 December 2009, superseding the Rome Convention on the Law Applicable to Contractual Obligations: Contracts (Applicable Law) Act 1990, c 36, Sch; OJ L266 (9 October 1980).

[55] Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) of 11 July 2007, OJ L199/40 (31 July 2007), with effect from 11 January 2009.

[56] A Rushworth and A Scott, "Rome II: Choice of Law for Non-Contractual Obligations" [2008] LMCLQ 274; A Dickinson, *The Rome II Regulation: The Law Applicable to Non Contractual Obligations* (Oxford: OUP, 2008) at [4.99]-[4.106]; A Briggs, *The Conflict of Laws* (Oxford:OUP, 2nd ed, 2008) at 207.

impossible to answer without some arbitrariness.[57] No jurisdiction applying the traditional methodology has found it necessary to create "equitable" categories yet.

38. Yet, at the same time, as a matter of doctrine, the equitable jurisdiction still exists separately.[58] But there is no reason why the same choice of law rules should not apply whether in the common law or equitable jurisdiction of the court. The first step towards this is to say, as the New South Wales Court of Appeal just did, that equity will follow the law. The second step is that already taken by the Singapore Court of Appeal, that equity will adopt the same choice of law methodology. The third step is disappearance of the significance of "equity" in the choice of law process. This comes with the recognition that while fresh categories may be created from time to time to deal with new problems, "equity" in choice of law merely raises many "old" problems within existing categories of choice of law (contracts, wrongs, restitution, property, succession, matrimonial property, etc). This is not fusion, but harmonisation, between common law and equity.

Conclusion

39. With increasing Europeanisation, English common law (including principles of equity) is becoming of decreasing significance to Singapore (and indeed to the UK itself), and Singapore needs to look progressively to other Commonwealth jurisdictions for guidance, and has indeed done so. At the same time, Singapore is poised to make important contributions to Commonwealth jurisprudence as well. Private international law is one (but not the only) area where Singapore has made its mark and continues to do so. *Rickshaw* follows *Thahir Kartika Ratna v PT Pertambanan Minyak dan Gas Bumi Negara (Pertamina)*,[59] as a Singapore case that has made others sit up. The leading Australian text on private international law urges the Australian courts to follow the *Rickshaw* decision as one that "contains perhaps the fullest theoretical consideration of the question of choice of law in respect of equitable obligations".[60] The New South Wales Court of Appeal[61] was clearly influenced by *Rickshaw* in its own decision to break away from older authorities denying any choice of law in equity. Arguably, the New South Wales decision has not gone as far as *Rickshaw* in adopting (either by direct characterisation or indirectly by equity "following the law") the traditional choice of law methodology, but its actual approach is at least consistent with the indirect characterisation

[57] Or, the development of another layer of rules: choice of choice of law rules.
[58] At least in most common law countries, including Singapore.
[59] [1994] 3 SLR(R) 312, [1994] 3 SLR 257 (CA).
[60] M Davies, AS Bell and PLG Brereton, *Nygh's Conflict of Laws in Australia* (Sydney: LexisNexis, 8th ed, 2010), at [21.2] and [21.17].
[61] *Murakami v Wiryadi* [2010] NSWCA 7.

interpretation of *Rickshaw*. But the common law develops continuously and incrementally, and the chapter is not closed yet. Even in Singapore and elsewhere, much work remains to be done in deciding how various equitable doctrines and principles are to be characterised. It is much harder work being a pluralist than a universalist, but it is all well worth the effort.

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