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THE EFFECT OF CHOICE OF COURT AGREEMENTS ON THIRD PARTIES

The effect of choice of court agreements on the exercise of jurisdiction of the Singapore court between contracting parties at common law has received clarification in Singapore law in recent years. The position is also clear under SICC Rules and the Choice of Court Agreements Act. The effect on third parties is less clear.
In this article, the effect of choice of court agreements on the position of third parties under the legal regimes above will be considered, from the perspective of both conflict of laws and the Contracts (Rights of Third Parties) Act in domestic Singapore law.
This article has been adapted from a 2022 lecture delivered by Dr Yeo Tiong Min, SC (*honoris causa*), Yong Pung How Chair Professor of Law, Yong Pung How School of Law, Singapore Management University, as part of the Yong Pung How Professorship of Law Lecture series.[*]

I. The importance of choice of court agreements

1 One key theme in the judgments of Chief Justice Yong Pung How was the importance of party autonomy, particularly in the context of upholding the bargain of commercial contracting parties in their choice of dispute resolution forum.[1] This principle continues to resound vibrantly in Singapore law today.[2] The law on the enforcement of choice of court agreements has grown very sophisticated. Today, there are three overlapping legal regimes for the enforcement of choice of court agreements in Singapore.

[*] The lecture was delivered on 25 May, 2022. The Yong Pung How Professorship of Law Lecture series has been made possible through a generous endowed gift from the Yong Shook Lin Trust, in honour of Dr Yong Pung How. Dr Yong had made tremendous contributions to Singapore in building up key institutions in the financial and legal industries, including the Government Investment Corporation and of course the Supreme Court, over which he presided as Chief Justice. Under his watch, he instituted substantial foundational reforms that enabled the courts to gain worldwide recognition. After retiring as Chief Justice, he played a significant role in the formative years of the School of Law at the Singapore Management University and was also the Chancellor of the University. The School of Law was renamed the Yong Pung How School of Law in 2021 to honour his contributions to the School, SMU, and Singapore.

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

[2] *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 (CA).

2 The most important one is the Hague Convention on Choice of Court Agreements ("**Convention**"),[3] given effect under the Choice of Court Agreements Act 2016 ("**CCAA**"). Of growing importance is the Singapore International Commercial Court ("**SICC**") regime, a litigation model with some arbitration characteristics. The common law remains significant in the residue of cases, although its significance may, with time, be diminished by the Convention and the SICC. Powerful effect is given to choice of court agreements under all three regimes.

3 The Convention is based on the fundamental principle that parties who have agreed to an exclusive choice of court agreement in civil and commercial matters in an international case should abide by it. The fundament principle is implemented in three steps: (**a**) the exclusively chosen court of a Contracting State will hear the case unless the clause is null and void; (**b**) non-chosen courts of Contracting States will not hear the case unless specified exceptional circumstances exist; and (**c**) the resulting judgment on the merits from the exclusively chosen court of a Contracting State will be recognised and enforced in all other Contracting States subject to limited specified defences.[4]

4 The primary jurisdiction[5] of the SICC is based on the arbitration model: where parties have agreed to submit to the jurisdiction of the SICC, whether exclusively or not, in an international and commercial case and no prerogative orders are sought as relief,[6] then the SICC will hear the case unless it will be contrary to its international and commercial character to do so, or there has been some abuse of process.[7] As between parties to an agreement submitting to the jurisdiction of the SICC, there is no room for common law assessment of the exercise of jurisdiction based on *forum conveniens* or even the strong cause test.[8] Moving forward, many SICC cases will also be Convention cases.

[3] The Hague Convention of 30 June 2005 on Choice of Court Agreements (https://www.hcch.net/en/instruments/conventions/full-text/?cid=98) ("**Convention**").
[4] Convention Arts 5, 6, 8, and 9.
[5] The SICC also has jurisdiction in specified commercial cases, in cases transferred from the General Division, and jurisdiction over third parties.
[6] Supreme Court of Judicature Act 1969 s 18D; Singapore International Commercial Court Rules 2021 ("**SICC Rules 2021**") O 2 r 1(1).
[7] SICC Rules 2021 O 2 r 3(2).
[8] SICC Rules 2021 O 2 r 3.

5 The general principle in the common law is that the court will apply the principle of *forum conveniens* (*The Spiliada*[9] principles) to determine whether it will exercise jurisdiction.[10] However, when contracting parties have agreed to an exclusive choice of court agreement, the agreement will be given full effect unless its enforcement will be unreasonable and unjust.[11] The merits of the case are irrelevant, and the party seeking to breach the agreement must demonstrate exceptional circumstances amounting to strong cause why the bargain should not be upheld.[12] The bar is set very high, and generally it will need to be shown that trial in the contractual forum is the result of an abuse of process or will lead to denial of justice.[13] The same contractual basis has been extended to non-exclusive choice of court agreements.[14] Thus, where the non-exclusive choice of court agreement is governed by Singapore law and is found in a contract that has been freely negotiated between the parties, unless indicated otherwise, the parties are taken to have promised not to object to the exercise of jurisdiction by the chosen court. Thus, in the case of a non-exclusive choice of Singapore court agreement, the defendant who objects to the exercise of jurisdiction by the Singapore court is in breach of contract and will need to demonstrate strong cause to convince the court not to exercise jurisdiction.[15]

6 Further, choice of court agreements can have important downstream effects when it comes to recognition and enforcement of judgments. There are four legal regimes that potentially apply to the recognition and enforcement of foreign judgments in Singapore: the Convention; the Reciprocal Enforcement of Commonwealth Judgments Act 1921;[16] the Reciprocal Enforcement of Foreign Judgments Act

[9] *Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada*) [1987] AC 460.
[10] *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 (CA).
[11] *The "Asian Plutus"* [1990] 1 SLR(R) 504 at [9].
[12] *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [112]–[113].
[13] *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 at [128].
[14] *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 at [94]–[96].
[15] *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 (CA). See also Yeo Tiong Min, "The Choice of Court Agreement: Perils of the Midnight Clause" Yong Pung How Professorship of Law Lecture (2019) (https://ccla.smu.edu.sg/sites/cebcla.smu.edu.sg/files/Paper2019.pdf).
[16] This has been repealed (Reciprocal Enforcement of Commonwealth Judgments (Repeal) Act 2019 (No 25 of 2019)). The repeal became effective from 1 March 2023, after the affected foreign countries were substantially transferred to the revised Reciprocal Enforcement of Foreign Judgments Act on the same or revised terms. [See, *eg*, Reciprocal

1959;[17] and the common law. Rising above the specific rules in each regime, there is one clear theme that runs across all four regimes: a party's agreement to the jurisdiction of the foreign court is a basis for the recognition and enforcement of its judgment against that party.[18]

II. Indirect effect on third parties

7 The focus of this article is on the effect of choice of court agreements on third parties, but it is important to appreciate the legal effect on contracting parties in the background. One important trend in international commercial litigation is the involvement of third parties. Questions will abound on the effect of choice of court agreements to which they are not privy.

8 Sometimes, a contracting party may take direct enforcement action. This calls for a relatively straightforward analysis of the relationship between the contracting parties, and generally no complex choice of law issues are involved. The complexity will lie in the interpretation of the scope of the choice of court agreement and the extent to which it includes disputes with third parties; that is a question of construction governed by the proper law of the choice of court agreement. It is not uncommon for choice of court agreements to include proceedings against third parties, and there can be good commercial reasons for this. For example, when relationships sour between contracting parties, litigation is often commenced not just against the counter party, but also directors, employees, related companies, and related parties. At least where the choice of court agreement is governed by the common law, it may be possible for the contracting party to intervene in proceedings against the third party to enforce a contractual

Enforcement of Commonwealth Judgments (Repeal) Act 2019 (Commencement) Notification 2023 (S89/2023); Reciprocal Enforcement of Commonwealth Judgments (Revocation) Notification 2023 (S104/2023); Reciprocal Enforcement of Foreign Judgments (United Kingdom and the Commonwealth) Order 2023 (S90/2023).] The statute remains applicable to judgments within its scope given before the date of repeal.

[17] This was substantially amended in 2019 (Reciprocal Enforcement of Foreign Judgments (Amendment) Act 2019 (No 25 of 2019) with the intention to replace both its previous version as well as the repealed Reciprocal Enforcement of Commonwealth Judgments Act.

[18] The question whether reciprocity is a necessary condition at common law for a foreign judgment can be recognised and enforced in Singapore was left open in *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* [2021] 1 SLR 1102 (CA). See Yeo Tiong Min, "The Changing Global Landscape for Foreign Judgments", Yong Pung How Professorship of Law 2021 (https://site.smu.edu.sg/sites/site.smu.edu.sg/files/smu_cebcla/YPH%20Lecture%202021%20Paper.pdf).

right, provided the intervenor has a legitimate interest for doing so.[19] So, where *A* has contractually promised *B* not to sue *C* anywhere except in the London court (*ie*, exclusive choice of the London court), and *A* sues *C* in the Singapore court, *B* may be able to intervene to put *A* to show strong cause to justify its breach of contract, at least where *B* would suffer some detriment from the proceedings against *C* in Singapore in breach of contract.[20]

9 It is doubtful that such intervention by a contracting party can be done on the basis of the Convention. Since there is an exclusive choice of court of a Contracting State, any dispute between *A* and *B* within the choice of court clause will clearly be caught by the Convention. However, without more, the Convention has no effect on *A*'s proceedings against *C* because *C* is not party to the choice of court agreement. *C* has no right to enforce the contract and is not bound by the contract. Neither *B* nor *C* can invoke the Convention and will be left to common law remedies.

10 Nonetheless, without considering any direct legal relationship between the third party and the promisor, the existence of a choice of court agreement in a contract in a related transaction may have some legal significance *vis-à-vis* third parties. In determining whether Singapore is *forum conveniens*, the court will look at all circumstances of the case, including the overall shape of the litigation, and this can include related litigation involving other parties subject to a choice of court agreement.[21]

III. Direct effect on third parties

11 Third parties may succeed to a contracting party's rights, liabilities, or both. There are two questions of substantive law that arise in every case:

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[19] *Donohue v Armco* [2002] 1 All ER 749 at [60]; *Winnetka Trading Corp v Julius Baer International Ltd* [2008] EWHC 3246 at [29]. *Global Partners Fund Limited v Babcock & Brown Ltd* [2010] NSWCA 196 at [73]; *Royal Caribbean Cruises Ltd v Browitt* [2021] FCA 653 at [111]. See also *TMT Co Ltd v The Royal Bank of Scotland plc* [2018] 3 SLR 70 at [55] and [94].

[20] In the converse case of proceedings in a foreign jurisdiction against a third party in breach of an exclusive choice of forum court agreement, the contracting party may seek an anti-suit injunction to prevent the breach of contract: *Gate Gourmet Korea, Co Ltd v Asiana Airlines, Inc* [2023] SGHC(I) 23 at [50].

[21] *TMT Co Ltd v The Royal Bank of Scotland plc (trading as RBS Greenwich Futures)* [2018] 3 SLR 70.

(a) Can a third party ***enforce*** a choice of court agreement in a contract?

(b) Is a third party ***bound*** by a choice of court agreement in a contract?

12 These two questions highlight the typical analysis of the nature of any obligation. Every obligation involves one party who has the right to enforce the obligation, and another party who is bound to perform the obligation. In the context of contract law discourse, they are often described in the language of benefit and burden respectively. The choice of law analysis would ask the questions:

(a) Which system of law governs the question whether a third party takes the benefit of the choice of court agreement?

(b) Which system of law governs the question whether a third party has the burden of the choice of court agreement?

13 Looking first at the common law regime, which for our purposes will also apply to the SICC regime where not inconsistent with the statutory regime (which does not specifically deal with the direct effect of the jurisdiction agreement on third parties), the starting point in private international law analysis is the characterisation of the issue. It is important to note that whether a third party is bound or can take the benefit of a contract term is not a singular legal problem. There are many possible legal rationales depending on the facts in each case. Characterisation of the issue for choice of law purposes will depend on the specific legal doctrine invoked to justify the legal effect of the contract term on a third party. The following list is non-exhaustive.

14 The starting point will be the contract itself. Does the third party have any right or liability as a matter of contract law? The relevant legal doctrine is privity of contract. This is clearly a contractual issue governed by the proper law of the contract. In common law systems, the rule is very clear: a contract creates no rights for, and imposes no liabilities on, third parties. Sometimes a direct contractual relationship is found between the third party and the promisor by way of a collateral contract. The most famous example can be found in shipping cases in the form of a *Himalaya* clause that functions additionally as an offer of

a collateral contract on specified terms that can be accepted by a third party.[22] The interpretation of the *Himalaya* clause is governed by the proper law of the contract. The common law appears to take a restrictive interpretation of whether the *Himalaya* clause includes a choice of court agreement,[23] but ultimately it is a question of construction of the clause in each case depending on the text and context. Whether a collateral contract is formed will be governed by the putative proper law of the collateral contract,[24] which will probably be the same law as the law governing the main contract containing the *Himalaya* clause, but not necessarily so.

15 One important development in some common law countries is the statutory intervention to create a broad general exception to the common law privity[25] doctrine. In Singapore, it appears as the Contracts (Rights of Third Parties Act) 2001 ("**CRTPA**"), based closely on the Contracts (Rights of Third Parties) Act 1999 ("**UK 1999 Act**") of the UK.[26] Similar legislation applies in Hong Kong SAR[27] and New Zealand.[28] Since the question of the scope of the doctrine of privity raises a contract question governed by the proper law of the contract, in principle whether the statutory exception applies is also a question governed by the proper law of the contract.[29] Under Singapore private

[22] *New Zealand Shipping Co Ltd v AM Satterthwaite & Co Ltd (The Eurymedon)* [1975] 1 AC 154 (PC, NZ) (where the relevant contract term was an exclusion of liability clause).
[23] *The Makhutai* [1996] AC 659 (PC, HK).
[24] See *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 (CA), deciding that in determining whether a contract has been formed, the court should first assume that the impugned contract has been formed, before determining its proper law on that basis in order to determine whether it has in fact been formed (see [63]–[72]).
[25] The Australian High Court has recently reaffirmed the doctrine of privity in its common law: *Hobart International Airport Pty Ltd v Clarence City Council* [2022] HCA 5, with a narrow exception for insurance contracts (*Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* [1988] HCA 44).
[26] Contracts (Rights of Third Parties) Act 1999 (c 31) (UK) ("**UK 1999 Act**"). The statute does not apply to Scotland. The relevant legislation in Scotland is the Contract (Third Party Rights) (Scotland) Act 2017.
[27] Contracts (Rights of Third Parties) Ordinance (Cap 623) (HK).
[28] Contracts and Commercial Law Act 2017 (2017 No 5) (NZ) Part 2(1), superseding the Contracts (Privity) Act 1982.
[29] *Swiss Singapore Overseas Enterprises Pte Ltd v Navalmar UK Ltd* [2003] 1 SLR(R) 587 at [19]; *Starlight Shipping Co v Tai Ping Insurance Co Ltd (Hubei Branch)* [2007] EWHC 1893 (Comm), [2008] 1 Lloyd's Rep 230. It has been argued that the statutory intervention actually expresses the law of trusts: Tham Chee Ho, "Trusts, not Contract: Restoring Trust in the Contracts (Rights of Third Parties) Act" (2005) 21 JCL 107. *Contra* Brian Coote, "Contract not Trust: Questions About the Contracts (Rights of Third Parties) Act from Another Perspective" (2006) 22 JCL 72. See also, Andrew Phang *et al*., *The Law of Contract in Singapore* (Academy Publishing, 2012) at para 15.132, footnote 249. Even if

international law, a choice of court agreement that appears in a contract is governed by the proper law of the main contract unless the parties have indicated otherwise.[30] The second part of this article will focus on the operation of the CRTPA when Singapore law governs the choice of court agreement.

16 There are, however, many other ways for third parties to be affected by a term in contract. A third party can become a contracting party through party substitution in a novation of the contract.[31] Assignment is a common way for third parties to be able to assert contractual rights. Assignments can occur through voluntary acts,[32] but they may also be involuntary (*eg*, a court order).[33] Subrogation occurs when as a matter of law one party can enforce the contractual rights of another.[34] The law of bailment can subject a third party to the benefit or burden of a contract.[35] Agency[36] is another way to circumvent privity. A

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the domestic statute is derived from trusts law, it is submitted that having regard to its *function*, it should still be characterised as contractual for choice of law purposes.

[30] *Shanghai Turbo Enterprise Ltd v Liu Ming* [2019] 1 SLR 779 (CA) at [54]. This appears to be the case even if the main contract is governed by an objective proper law in the absence of any express or implied choice of law by the contracting parties (*ibid*, at [50]). There is a respectable argument that the choice of court agreement may have its own objective proper law in such a case by analogy with arbitration agreements (*Enka Insaat v Sanayi AS v OOO "Insurance Company Chubb"* [2020] 1 WLR 4117 (UKSC)), especially where the case arises under the Convention which mandates treating the choice of court agreement as independent of the main contract (Convention Art 3(d); Choice of Court Agreements Act 2016 ("**CCAA**") s 5(*a*)).

[31] Voluntary novation raises fairly straightforward issues of choice of law in the discharge of one contract and the formation of another (between different parties). Complications can arise when the party substitution is statutory, *eg*, in the shipping context: see Toh Kian Sing, "Conflict of Laws implications of the Carriage of Goods by Sea Act 1992" [1994] LMCLQ 280.

[32] The relationship between the assignee (third party) and the promisor will be governed by the proper law of the assigned contractual right: *Hang Lung Bank Ltd v Datuk Tan Kim Chua* [1985-1986] SLR(R) 1015. See also Art 14(2) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJL 177.

[33] For some of the difficulties in the choice of law analysis of involuntary assignments, see *Republic of the Philippines v Maler Foundation* [2014] 1 SLR 1289 (CA).

[34] The choice of law analysis in common law is unclear, but it is likely to be similar to that in Rome I, Art 14(2), *ie*, the relationship between the party subrogating to the contractual right (third party) and the promisor will be the law applicable to the contractual right that is the subject of the subrogation.

[35] Choice of law for bailment is an under-investigated topic in the common law. It has been said to be the "proper law of the bailment" (*Kahler v Midland Bank Ld* [1950] AC 24 at 35-36 (Lord Normand), but it is arguable that it may be that for choice of law purposes a bailment relationship can raise issues of contract, tort or property depending on the dispute and the facts.

[36] Agency choice of law can be complex because it is a generalised concept in the common law but not in the civil law. Many agency relationships, however, can be analysed with contractual lenses for choice of law purposes.

contracting party's right held on trust for a third party will enable the third party to enforce the right.[37] The law of universal succession may be relevant when the question is which corporation is the real party to the contract.[38] The law on the lifting of the corporate veil[39] can be in issue if the claimant is arguing that a director is the real contracting party to a contract made with the company. The law of estoppel[40] may be invoked as well,[41] for this purpose including the law relating to inconsistent assertions: for example, a third party alleging that it is a contracting party may be estopped from denying the effect of any choice of court agreement in the contract. Direct action statutes may also be relevant, *eg*, where a third party who is injured by an insured party may be allowed to sue the insurer directly.

17 It will take several books to deal with the choice of law problems that can arise from these issues, and I do not propose to deal with them in this article. The point is that third party rights and liabilities do not raise a single legal issue whether in domestic law or choice of law; instead, a multiplex of legal issues could be engaged. In a number of these situations, the connecting factor will point to the law governing the choice of court agreement, which highlights the significance of that law. But it is not the universal choice of law solution.

18 What is not within the categories of common law doctrines is a purportedly new doctrine of "quasi-contract" that appears to be developing in the law of anti-suit injunctions. These involve a variety of situations where one party seeks to injunct another party from overseas proceedings by relying on a contract when there is no privity between

[37] Whether the trust is formed probably depends on the putative proper law of the trust: *The Republic of the Philippines v Maler Foundation* [2014] 1 SLR 1389 (CA) at [201]. In *Baker, Michael A v BCS Business Consulting Services Pte Ltd* [2020] 4 SLR 85 the finding of a *prima facie* trust under the *lex fori* appeared to be in the course of addressing the defendant's submission that there was no case to be answered and not part of the court's choice of law analysis. The application of the *lex fori* in this context would go against the spirit of *Lew, Solomon v Kaikhushru Shiavax Nargolwala* [2021] 2 SLR 1 (CA).

[38] This is an issue that will be governed by the law of incorporation: *BNP Paribas Wealth Management v Jacob Agam* [2017] 4 SLR 14 at [37]; *JX Holdings Inc v Singapore Airlines Ltd* [2018] 5 SLR 988. Complications will arise when a restructuring occurs across different jurisdictions.

[39] Choice of law for lifting the corporate veil is another under-investigated issue in the common law. For a sampling of the issues, see Tham Chee Ho, "Piercing the corporate veil: searching for appropriate choice of law rules" [2007] LMCLQ 22.

[40] *Wittman v Blackbaud Inc* 2021 BCSC 2025 at [26].

[41] Some estoppels are substantive and subject to the choice of law analysis: *First Laser Ltd v Fujian Enterprises (Holding) Co Ltd* (2012) 15 HKCFAR 569.

the parties. The cases are discussed in detail in a recent extra-judicial paper by Justice Belinda Ang.[42] While the label is a useful descriptive term to describe factual scenarios where litigation between two parties is connected with a contract to which only one of the parties is privy, and the cases illustrate the complexity of the law on anti-suit injunctions, it is important to maintain a clear distinction between the enforcement of a contractual right and other justifications for granting an anti-suit injunction. If an injunction is sought to enforce a contractual right, then the right to enforce a contractual right must be clearly established according to legal principle.[43] As the Court of Appeal has demonstrated recently in the context of the law of unjust enrichment, a quasi-contract simply means that there is no contractual right.[44]

IV. Hague Convention on Choice of Court Agreements and third parties

19 The fundamental rationale of the Convention is to enforce exclusive choice of court agreements. The Convention applies to "an agreement concluded by two or more parties" that meets the requirements of the Convention.[45] In the CCAA, the test is "an agreement between 2 or more parties"[46] that meets the requirements of the statute. These requirements are essentially the formal one of accessibility of the choice of court agreement and the substantive one of the exclusive nature of the agreement. If *A* wants to enforce a choice of court agreement against *B*, there must of course be an "agreement" between *A* and *B* for the purpose of the Convention. The starting point is that "agreement" is not defined in the Convention or the CCAA, but it has an autonomous meaning, *ie*, its meaning is determined by the Convention rather than national law.[47] Consent is essential to the

[42] Justice Belinda Ang Saw Ean, Anti-Suit Injunctions in Maritime Disputes: A Trend that Threatens to be Out of Control? *Working Paper 21/03* (NUS Centre of Maritime Law, December 2021) (https://law.nus.edu.sg/wp-content/uploads/2021/12/CML-WPS-2103.pdf). See also Paul Myburgh, "Non-parties, forum agreements and expanding anti-suit injunctions" [2020] LMCLQ 345.
[43] *Clearlake Shipping Pte Ltd v Xiang Da Marine Pte Ltd* [2019] EWHC 2284 (Comm) at [23].
[44] *Esben Finance Ltd v Neil Wong Hou-Lianq* [2022] SGCA(I) 1.
[45] Convention Art 3(a).
[46] CCAA s 3(1).
[47] The existence of the agreement is normally decided by the law of the state of the chosen court, including its choice of law rules, but it may also be affected by capacity rules of other legal systems: Convention Arts 5(1), 6(a), 6(b), 9(a) and 9(b); Trevor Hartley & Masato Dogauchi, Hague Conference on Private International Law, *Convention of 30 June*

concept of an agreement, and likewise consent has an autonomous meaning under the Convention.[48] There is a qualified reference to the private international law of the chosen court (*lex fori prorogati*); this law normally governs the existence and validity of the agreement. Thus, whether the clause is null and void is determined according to the private international law of the chosen court.[49] However, the court of the forum can independently decide that the Convention does not apply due to the absence of the basic factual requirements of consent.[50]

20 There is no express treatment of third parties in the Convention (or the CCAA). The Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report ("**Explanatory Report**") states:[51]

> Provided the original parties consent to the choice of court agreement, the agreement may bind third parties who did not express consent to it, if their standing to bring the proceedings depends on their taking over the rights and obligations of one of the original parties. Whether this is the case will depend on national law.

21 This statement is ambiguous. On one view, the question of third party benefits and burdens lies entirely outside the Convention, so that it will be addressed by the *lex fori* (the law of the forum as the law of the court addressed). On the other hand, since the Convention is based on an autonomous concept of agreement, and consent is the key ingredient of this agreement, then the Convention should apply only when there is such autonomous consent between the litigants. On this view, the Convention applies, but it delegates the question to a national law that is not specified and thus to be somehow divined from the text of the Convention. The most obvious candidates for the national law would be the law of the chosen court (*lex fori prorogati*), in line with the general position that the chosen court's perspective on the existence and validity

2005 on Choice of Court Agreements: Explanatory Report ("**Explanatory Report**") at para 94.

[48] TC Hartley, *Choice of Court Agreements under the European and International Instruments* (OUP, 2013) at §1.3.12.

[49] Convention Art 5(1), Art 6(a), Art 9(a); CCAA, s 11(1), s 12(1)(a), s 15(1)(a).

[50] Explanatory Report (note 47 above) at para 95. In the case of judgments, this may be qualified by the binding effect of a non-default judgment of a foreign Contracting State on findings of jurisdictional facts (*ie*, facts constituting the basis of the jurisdiction of the court under the Convention), which can include facts constituting the consent to the choice of court agreement: Convention Art 8(2); CCAA s 13(3)(*b*).

[51] Explanatory Report at para 97 (see also para 142 in the same report).

of the clause should be adopted by all other Contracting States, or the *lex fori*, or the *lex causae* (the law governing the choice of court agreement). As the test of consent remains autonomous on this view, the application of national law would be subject to the overriding effect in the Convention for the fundamental requirements of consent.

22 It is suggested that the first view is, on balance, the better one, for the following reasons. First, uniform interpretation of autonomous language is difficult to sustain in international instruments without an overarching authority that can give authoritative rulings on interpretation, as in the case of the European Court of Justice for European instruments. All that the Convention can do is to encourage the interpretation of Convention rules with regard to their international character and the need to promote uniformity in application.[52] It is especially difficult to implement an autonomous meaning when there is no definition of it. So, while what is an "exclusive choice of court" has an autonomous meaning under the Convention, there is also a definition of it. While there is no definition of "consent" as an autonomous concept, at least the Explanatory Report has clarified it to mean at minimum the basic factual requirements of consent between the contracting parties. Stretching the autonomous idea of "consent" to third party situations will create too much uncertainty in the interpretation of the Convention.

23 Second, the Explanatory Report itself suggests that the only consent that is relevant for ascertaining an "agreement" for the purpose of applying the Convention is that between the original contracting parties.[53]

24 Third, there is support in the preparatory materials (*travaux préparatoires*) referred to in the Explanatory Report.[54] In the minutes of one of the Special Commission meetings, the Chair stated in response to queries that he understood the effect of the proposed Convention was that the conditions under which a third party can enforce a choice of court obligation by way of transfer is not regulated in the Convention,[55] and there was no further discussion on the point.

[52] Convention Art 23.
[53] See para 20 above.
[54] Explanatory Report itself (note 47 above) at para 97.
[55] Permanent Bureau of the Conference, *Proceedings of the Twentieth Session 14 to 30 June 2005* (Antwerp: Intersentia, 2010) at 570 (Minutes No 2 of the Commission II). Explanatory Report itself at para 97.

25 Fourth, if the intention of the Convention is to create an autonomous meaning of "consent" for third parties, then there is also a reference to a national law as indicated in the Explanatory Report. On this basis, it is peculiar that no mention is made of the identity of the national law. In contrast, the Explanatory Report generally makes explicit references to the law (including the private international law) of the chosen court when that is the intention. If the reference is to the *lex fori*, then it is hardly possible that the forum will find that the law it will apply will be against the fundamental principles of consent, and the result will not be different from excluding the issue from the scope of the Convention. Further, it is unlikely that the Explanatory Report is addressing the national law of the *lex causae*, because in the general scheme of the Convention, that law is only relevant when referred to by the private international law of the chosen court through *renvoi*.

26 It is a legitimate question to ask why the autonomous test for consent in the agreement under the Convention for direct contracting parties should not also apply to third parties.[56] However logical this may sound, the evidence points to the intention by the negotiators to exclude the issue from the scope of the Convention. There is some attraction to the argument that since the private international law of the chosen court governs matters relating to the existence and validity of the choice of court agreement,[57] it should also govern the question of when third parties can be bound by or take the benefit of the agreement. However, the circumstances under which a third party may do so are myriad in their doctrinal bases, and it would take stronger evidence than mere silence in the text to demonstrate that the negotiators were content to adopt the solution of the chosen court on this issue.

27 If the issue of third party rights and obligations in a choice of court agreement is outside the scope of the Convention, then a decision by the chosen court on the question is not a Convention judgment and cannot be recognised under the Convention. In any event, it is not going to be a judgment on the merits[58] for the purpose of the Convention, since the decision addresses the question of jurisdiction for the purpose of the Convention rather than the merits of the dispute. However, a decision on

[56] This is the position under the Brussels I Regulation in the European Union.
[57] Explanatory Report (note 47 above) at paras 3, 4, 5 and 94.
[58] Convention Art 4(1); CCAA s 2(1).

the point may create an issue estoppel under the common law,[59] if the common law rules on transnational issue estoppel[60] are satisfied. However, if the exclusively chosen court takes jurisdiction on the basis that the choice of court agreement is binding between a contracting party and a third party and then proceeds to rule on the merits, then whether the judgment on the merits will be recognised or enforced as a Convention judgment will depend on whether the private international law of the requested court recognises that there is an effective choice of court agreement between the contracting party and the third party.[61]

28 On the basis that the issue is not governed by the Convention and is left to the *lex fori*, then in Singapore, the common law private international law will apply in all cases involving third parties. The next part of the article will focus on the applicability of the CRTPA on the basis that the choice of court agreement is governed by Singapore law.

V. The Contracts (Rights of Third Parties) Act 2001

29 The starting point in Singapore contract law is the common law doctrine of privity. Contracting parties cannot confer rights or impose liabilities on third parties. However, the CRTPA creates a broad statutory exception to the privity doctrine. Two fundamental questions arise where a jurisdiction agreement is concerned: (**a**) Can a third party be <u>bound</u> by a jurisdiction agreement under the CRTPA? (**b**) Can a third party <u>enforce</u> a jurisdiction agreement under the CRTPA?

30 The operational provision of the CRTPA is section 2:

> **Right of third party to enforce contractual term**
> **2.** — (1) Subject to the provisions of this Act, a person who is not a party to a contract (referred to in this Act

[59] *Lakshmi Anil Salgaocar v Jhaveri Darson Jitendra* [2019] 2 SLR 372 (CA) at [101], following *Desert Sun Loan Corp v Hill* [1996] 2 All ER 847 (CA).
[60] See generally *Merck Sharp & Dohme Corp (formerly known as Merck & Co, Inc) v Merck KGaA (formerly known as E Merck)* [2021] 1 SLR 1102 (CA) on the operation of issue estoppel from foreign judgments in Singapore law. It is beyond the scope of this article to consider whether there is a "primacy principle" in favour of the country of the chosen court corresponding to the proposed favourable treatment of the seat of arbitration in *The Republic of India v Deutsche Telekom AG* [2024] 1 SLR 56 (CA).
[61] It does not qualify as a "foreign judgment" if the exclusive choice of court clause is not one to which the creditor and the judgment debtor had agreed: Convention Art 3, Art 8(1); CCAA s 2(1) (definitions of "chosen court" and "foreign judgment"), s 3(1) (definition of "exclusive choice of court agreement"), s 13(1).

> as a third party) may, in his own right, enforce a term of the contract if —
>
> (*a*) the contract express provides that he may; or
>
> (*b*) subject to subsection (2), the term purports to confer a benefit on him.
>
> (2) Subsection (1)(*b*) shall not apply if, on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by the third party.
>
> (3) The third party shall be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.
>
> (4) This section shall not confer a right on a third party to enforce a term of a contract otherwise than subject to an in accordance with any other relevant terms of the contract.

31 Put simply, contracting parties can expressly[62] or impliedly[63] confer on an expressly identified third party[64] a right to enforce a contract term, subject to and in accordance with the other terms of the contract.[65] A jurisdiction clause has full contractual force as a term in the contract.[66] On the face of it, it would appear to be straightforward to apply the CRTPA to jurisdiction clauses. However, the reality is otherwise.

A. Whether third party can be bound

32 The first question, whether a third party can be bound by a jurisdiction clause in the contract, receives a simple and uncontroversial answer: **yes**. This may sound strange because the starting point is that

[62] Contract (Right of Third Parties) Act 2001 ("**CRTPA**") s 2(1)(*a*).
[63] CRTPA s 2(1)(*b*) read with s 2(2). A presumption of such intention is raised when the term purports to confer a benefit on the third party, and the party relying on s 2(2) needs to rebut the presumption by showing that on the proper construction of the contract, the contracting parties had no such intention: *CLAAS Medical Centre Pte Ltd v Ng Boon Ching* [2010] 2 SLR 386 (CA) at [37].
[64] CRTPA s 2(3).
[65] CRTPA s 2(4).
[66] *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271 (CA) at [2].

the intention behind the CRTPA is to allow contracting parties to confer a benefit – the right to enforce a contract term[67] – and not to impose a burden on the third party. However, the CRTPA, section 2(4) very clearly codifies the fundamental principle in the common law of conditional benefit. Thus, "if a party, X, acquires rights arising under a contract between A and B, X can only enforce those rights consistently with the terms of that contract".[68] When a benefit is conditional, the third party cannot accept the benefit without also consenting to the burden of the condition. When a third party (*T*) sues a promisor (*P*) on a substantive term in the contract, *T* will be bound by any jurisdiction clause in the contract that is a condition to the enforcement of that term.

B. Whether third party can enforce

33 The second question, whether a third party can enforce a jurisdiction agreement under the CRTPA, ironically receives a more controversial answer, given that the purpose of the legislation is to allow contracting parties to enable third parties to enforce contract terms.

34 There are two typical situations where this issue can arise. In the first (Situation 1), *T* is suing *P* on a substantive term in the contract, and wants to enforce the jurisdiction clause in the contract that is the condition of the enforcement of that substantive term against *P*. In this situation, the conditional benefit analysis in section 2(4) will impose the ***burden*** of the jurisdiction clause on *T*. It says nothing about the ***benefit*** of the clause.[69] Whether *T* has a right to enforce the jurisdiction clause will depend on the general operation of section 2(1):[70] whether the contracting parties intended the third party to be able to enforce the clause.

35 In the second (Situation 2), *T* is being sued by *P* on a claim (in contract, tort, equity etc) that falls within the scope of the jurisdiction clause in the contract, and *T* wants to enforce the jurisdiction clause

[67] *Singapore Parliamentary Debates, Official Report* (5 October 2001) vol 73 at col 2186 (Prof S Jayakumar, Minister for Law).
[68] *Aspen Underwriting Ltd v Credit Europe Bank NV* [2019] 1 Lloyd's Rep 221 (EWCA) at [57], approved of in [2020] 1 Lloyd's Rep 520 (UKSC) at [26]–[27].
[69] *Hurley Palmer Flatt Ltd v Barclays Bank plc* [2015] Bus LR 106 at [32] and [40]–[41].
[70] Section 9(1) of the CRTPA additionally gives the third party the right to enforce an arbitration clause when it appears as a condition to the enforcement of a substantive right. This is not possible from s 2(4) itself: *Hurley Palmer Flatt Ltd v Barclays Bank plc* [2015] Bus LR 106 at [32] and [40]–[41].

against *P*. In this situation, the conditional benefit analysis has no role to play at all, because *T* is not suing on any substantive term in the contract. *T* just wants to enforce the jurisdiction clause. Section 2(4) is irrelevant, and whether *T* can enforce the jurisdiction clause depends on section 2(1). Thus, in both situations, although the factual scenarios are different, the same legal question arises: Can *T* enforce the jurisdiction clause in the contract based on the CRTPA, section 2(1)?

36 The answer is unfortunately quite equivocal. The Court of Appeal in *VKC v VJZ*[71] gave a qualified answer in the negative. This case involved Situation 2. Beneficiaries of a deceased's estate who were disputing the distribution of the estate concluded a settlement agreement governed by Singapore law which contained an exclusive choice of Singapore court agreement. Some of the beneficiaries – who were contracting parties – sued the administrators of the estate (who were not contracting parties) in tort in Indonesia. The administrators then sought protection from the Singapore court in the form of an anti-suit injunction.

37 The High Court[72] decided that, as a matter of construction of the contract, the suit against the administrators fell within the scope of the jurisdiction clause, that the administrators were expressly identified in the contract,[73] and that the contracting parties had impliedly intended that the administrators should have the legal right to enforce the jurisdiction clause.[74] Hence, the court held that the administrators as third parties were entitled to enforce the jurisdiction clause against the promisors, and could obtain the remedy of an anti-suit injunction to restrain the breach of the clause.[75]

38 The Court of Appeal reversed the holding of the High Court on this point, without comment on the correctness of the High Court's interpretation of the contract.[76] The Court of Appeal held that the third parties could not enforce the jurisdiction clause because Parliament did not intend section 2(1)(*b*) of the CRTPA to confer rights on a third party

[71] [2021] 2 SLR 753 (CA).
[72] *VJZ v VKB* [2020] SGHCF 11 at [27]–[51] and [53]–[61].
[73] CRTPA s 2(3).
[74] CRTPA s 2(1)(*b*) and s 2(2).
[75] *VJZ and another v VKB and others* [2020] SGHCF 11 at [90].
[76] The approach of the English courts to the interpretation of contractual intention to confer rights on third parties has been criticised as being too liberal: Paul S Davies, "Excluding the Contracts (Rights of Third Parties) Act 1999" (2021) 137 LQR 101. This raises a separate legal issue of contractual interpretation, which was not addressed in *VKC v VJZ*.

to enforce jurisdiction agreements, but a third party may be able to enforce such a clause under s 2(1)(*a*) or 2(3).[77] The ruling that 2(1)(*b*) does not apply to jurisdiction agreements is clearly a *ratio* of the decision, but the observations on the possible use of s 2(1)(*a*) or s 2(3) were clearly *obiter*. In the event, the Court of Appeal allowed the anti-suit injunction to stand on the alternative basis that the foreign proceedings were vexatious and oppressive.[78]

39 It is useful to bear in mind the relationship between ss 2(1)(*b*), 2(1)(*a*), and 2(3) of the CRTPA. First, s 2(3) is not an operative provision. It imposes a requirement of express identification of the third party in the contract as a condition of applying s 2(1) (both 2(1)(*a*) and 2(1)(*b*)). It cannot confer any right by itself. So, the *obiter* reference to s 2(3) will provide cold comfort to third parties.

40 Moreover, s 2(1)(*a*) and s 2(1)(*b*) (the latter to be read with s 2(2)) is a composite package for determining whether the contracting parties intended (*ie*, either expressly or impliedly) to confer on a third party a right to sue on a contract term. There is nothing in the CRTPA or any legislative materials to suggest that Parliament had intended different subject matter scope for express and implied contractual intentions. This would have run against the fundamental principle in contract law that the legal force and effect of contractual intention does not depend on whether it is express, inferred, or implied. Thus, without more,[79] if jurisdiction clauses fall outside the subject matter scope of implied intention, then it cannot be within the scope of express intention, and the third party cannot also rely on s 2(1)(*a*). *Prima facie*, the *ratio* is inconsistent with the *obiter*.

41 The reasoning of the court calls for closer scrutiny. The court gave detailed reasons for its conclusion. First, the court applied the

[77] *VKC v VJZ* [2021] 2 SLR 753 (CA) at [54].
[78] *VKC v VJZ* [2021] 2 SLR 753 (CA) at [35]–[52].
[79] Of course, Parliament can so differentiate if it thinks it is correct as a matter of policy. When the Irish Law Commission recommended differentiating between implied and express benefits giving rise to an inference of contractual intention, the language of the draft bill was very clear on this differentiation: Law Reform Commission, *Privity of Contract and Third Party Rights* (LRC 88 - 2008) (http://www.lawreform.ie/_fileupload/Reports/Report%20Privity.pdf). It has not been implemented to date. The proposed distinction between express and implied benefits has been criticised as arbitrary: Kevin T Sullivan, "Privity of Contract: The Potential Impact of the Law Reform Commission Recommendations on Irish Contract Law" [2010] *Judicial Studies Institute Journal* 110 at 112.

maxim *expressio unius est exclusio alterius* – the mention of one thing implies the exclusion of another. It is beyond doubt that the CRTPA deals explicitly with arbitration clauses but is silent on jurisdiction agreements. The court was persuaded by this silence that Parliament intended jurisdiction agreements to be outside the scope of the statute.[80] Second, the court considered the legislative history of the UK 1999 Act, upon which the Singapore statute was closed based, and was persuaded that the UK Parliament had followed the recommendation of the Law Commission to exclude jurisdiction agreements from the scope of the legislation, since the statute expressly dealt with arbitration agreements but remained silent on jurisdiction agreements.[81] The Law Commission had recommended the exclusion of jurisdiction and arbitration agreements, and in the view of the court, the UK Parliament had followed the recommendation in respect of jurisdiction agreements but not in respect of arbitration agreements. Third, the court was also persuaded that its reading of the intention of the UK Parliament was correct from the fact that the Hong Kong SAR legislation, which is also based on the UK 1999 Act, explicitly addresses both arbitration and jurisdiction agreements.[82] The Hong Kong Law Reform Commission Report leading to the legislation had considered the position in both the UK and Singapore and recommended the inclusion of jurisdiction agreements within scope of the statute. Fourth, the court considered that a right to enforce a jurisdiction agreement is a *procedural* right, and decided that the CRTPA, section 2(1)(*b*) applied only to substantive rights (*ie*, the enforcement of a substantive term).[83]

42 Thus, the Court of Appeal in *VKC v VJZ* has made a clear ruling that jurisdiction agreements fall outside the purview of the CRTPA, s 2(1)(*b*). Bearing in mind the binding nature of this ruling under Singapore law, I would respectfully propose the following counter points, which were not referred to the Court of Appeal judgment, for further consideration.

[80] *VKC v VJZ* [2021] 2 SLR 753 (CA) at [59].
[81] *VKC v VJZ* [2021] 2 SLR 753 (CA) at [66]–[79].
[82] *VKC v VJZ* [2021] 2 SLR 753 (CA) at [71].
[83] *VKC v VJZ* [2021] 2 SLR 753 (CA) at [60].

(1) Expressio unius est exclusio alterius

43 First, on the *expressio unius est exclusio alterius* reasoning, it is suggested that there is a more deafening silence than the lack of mention of jurisdiction agreements in the statute. Section 7 of the CRTPA contains an express list of agreements excluded from the scope of the statute, but it is silent on jurisdiction agreements.[84] This silence is all the more telling because the original proposed draft bill attached to the UK Law Commission Report expressly excluded jurisdiction and arbitration agreements.[85]

(2) Legislative history of the UK Statute

44 The silence point is closely related to the legislative history point. The Court of Appeal inferred that the UK Parliament had *partially* followed the recommendation of the Law Commission to exclude jurisdiction and arbitration agreements, in dealing expressly with arbitration agreements while remaining silent on jurisdiction agreements.[86] The UK 1999 Act started life as a Bill introduced in the House of Lords. The judgment of the Court of Appeal did not refer to the portion of the debate in the House of Lords at an early stage of the Second Reading when Lord Wilberforce queried the disparity between the draft bill of the Law Commission and the Bill as introduced to the House of Lords – the omission of the express exclusion of jurisdiction and arbitration clauses.[87] The Lord Chancellor responded that the Law Commission had changed its mind after the publication of its Report, and the entire debate thereafter proceeded on the basis of the revised view of the Law Commission that "there was clearly no good reasons to exclude these clauses from the operation of the reform".[88]

45 One concern of the Law Commission was that dispute resolution clauses should be mutually binding in nature, while the intention of the reform was to create benefits and not to impose

[84] Corresponding to the UK 1999 Act s 6.
[85] Law Commission, *Privity of Contract: Contracts for the Benefit of Third Parties* (LC No 242, 1996) at p 180 (clauses 6(2(d) and (e)).
[86] *VKC v VJZ* [2021] 2 SLR 753 (CA) at [66]–[70].
[87]United Kingdom, House of Lords, *Hansard Debate* (11 Jan 1999) vol 596 at col 27–28; Robert Merkin (ed), *Privity of Contract* (LLP, 2000), Appendix at 469.
[88] United Kingdom, House of Lords, *Hansard Debate* (11 Jan 1999) vol 596 col 32–33, and 27 May 1999 at col 105; Robert Merkin (ed), *Privity of Contract* (Routledge, 2000), Appendix at 473 and 494.

burdens.[89] In Situation 1, the reasonable interpretation in practically all cases is that contracting parties intended the third party to be able to enforce the jurisdiction agreement.[90] In conjunction with the conditional benefit analysis, mutuality will be achieved in practically all cases. However, there can be no mutuality in Situation 2 where the conditional benefit analysis would not work to impose a burden on the third party. It is not clear why the Law Commission was so concerned about the unilateral operation of jurisdiction clauses since unilateral jurisdiction (and arbitration) clauses are routinely enforced in English law[91] (and Singapore law[92]). It is important to appreciate the distinction between the unilateral invocation of the dispute resolution clause, and the application of the rules of the chosen dispute resolution regime.[93] The former is quite normal in contractual relationships in the common law. The latter can be a real problem when the dispute resolution regime is structured around party autonomy, and it was dealt with by Parliament for arbitration agreements.[94]

46 The larger concern of the Law Commission was a practical one that a jurisdictional limbo could result when the third party can successfully seek a stay of proceedings to enforce an arbitration agreement only to have the promisor left with no remedy because it cannot enforce the arbitration clause against the third party. This concern was assuaged by the argument that as a matter of practical justice, the English court would not stay proceedings unless the third party would

[89] *VKC v VJZ* [2021] 2 SLR 753 (CA) at [66].
[90] Andrew Burrows, "Reforming privity of contract: Law Commission Report No. 242" [1996] LMCLQ 467 at 481.
[91] See, *eg*, *NB Three Shipping v Harebell Shipping Ltd* [2004] EWHC 2001 (Comm); *Law Debenture Trust Corp v Elektrim Finance BV* [2005] EWHC 1412 (Ch); *Mauritius Commercial Bank v Hestia Holdings Limited* [2013] EWHC 1328 (Comm); *Ourspace Ventures Limited v Halliwell* [2019] EWHC 3475 (Ch); *Etihad Airways PJSC v Flöther* [2020] EWCA Civ 1707.
[92] See, *eg*, *Wilson Taylor Asia Pte Ltd v Dyna-Jet Pte Ltd* [2017] 2 SLR 362 (CA); *Astrata (Singapore) Pte Ltd v Portcullis Escrow Pte Ltd* [2011] 3 SLR 386; *Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp* [2010] 2 SLR 821; *UBS AG v Telesto Investments Ltd* [2011] 4 SLR 503; *Bambang Sutrisno v Bali International Finance Ltd* [1999] 2 SLR(R) 632 (CA); *Frans Bambang Siswanto v Coutts & Co AG* [1996] SGHC 250.
[93] Thus, without a bilateral agreement to go to arbitration, arbitration proceedings cannot be initiated: *Cheung Teck Cheong Richard v LVND Investments Pte Ltd* [2021] 2 SLR 890 (CA).
[94] CRTPA s 9.

undertake to abide by the arbitration clause.[95] Moreover, this concern does not arise for jurisdiction agreements because the contracting party can always commence proceedings in the contractual forum.

47 Another significant material that was not addressed by the Court of Appeal is paragraph 32 of the Explanatory Notes to the UK 1999 Act[96] (although the court did refer to other paragraphs of the document). This paragraph refers to the Brussels Convention:

> The question of whether a third party given a procedural right to enforce a jurisdiction agreement under section 1 of this Act falls within Article 17, or whether a third party with a substantive right under section 1, subject to a jurisdiction clause, is "bound" by that clause under Article 17 (applying a conditional benefit analysis) is a matter for the European Court of Justice.

48 There are two reasons why this paragraph makes sense only if the UK 1999 Act, section 1 (equivalent to the CRTPA, section 2) applies to allow third parties to enforce jurisdiction agreements. First the language refers to cases where the third party is given a right to enforce a jurisdiction agreement (and it includes both Situation 1 and Situation 2). Second, it carefully carves out the UK's own sphere of legislative competence in respect of Article 17 of the Brussels Convention. Article 17 regulated the enforcement of jurisdiction agreements within the European Union using an autonomous notion of consent subject to references to national law on some issues. The purpose of this paragraph is to clarify that the UK Parliament is acting within its own legislative competence in making national law, and not usurping the powers of the European Parliament. If the right of a third party to enforce jurisdiction agreements lies outside the scope of the UK 1999 Act, then there would have been no need to be concerned about Article 17. This is a carefully

[95] United Kingdom, House of Lords, *Hansard Debate* (11 Jan 1999) vol 596 at col 32–33; Robert Merkin (ed), *Privity of Contract* (LLP, 2000), Appendix at 473. CRTPA s 9(2) (UK 1999 Act s 8(2)) deals with the situation more decisively by allowing the promisor to enforce the arbitration clause against the third party when the third party chooses to rely on it.
[96] Lord Chancellor's Department, *Contracts (Rights of Third Parties) Act 1999 Explanatory Notes* (HMSO, 1999).

crafted statement with tremendous significance on the balance of legislative power between the EU and the UK and is not one made lightly.

49 Moreover, there is a simple explanation why the UK 1999 Act (and the CRTPA) expressly deals with arbitration agreements but does not mention jurisdiction agreements. There was a clear need to accommodate the language of the arbitration legislation which is structured around the "party to the agreement", since both the UK 1999 Act and the CRTPA make it clear that the third party, though able to enforce a contract term, is not for that reason to be treated as a party to the contract.[97] There was no such need at that time to mention jurisdiction agreements because there was no legislative framework for the enforcement of jurisdiction agreement (outside the EU framework). Jurisdiction agreements could be treated like any other contract term.

50 Finally, English courts have proceeded on the basis that the UK 1999 Act applies to allow contracting parties to confer on third parties the right to enforce jurisdiction agreements, without differentiation between Situation 1 and Situation 2, or between express and implied contractual intention.[98]

(3) The Hong Kong SAR position

51 The Court of Appeal in *VKC v VJZ* also relied on the express reference to jurisdiction agreements in the Hong Kong legislation[99] as

[97] CRTPA s 8(4); UK 1999 Act s 7(4); *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2004] 1 Lloyd's Rep 38 at [33]; Lord Chancellor's Department, *Contracts (Rights of Third Parties) Act 1999 Explanatory Notes* (HMSO, 1999), para 33; United Kingdom, Huse of Lords, *Hansard Debate*,(27 May 1999) vol 601 at col 1058–1059; Robert Merkin (ed), *Privity of Contract* (LLP, 2000), Appendix at 494–495; Andrew Burrows, "Reforming privity of contract: Law Commission Report No. 242" [1996] LMCLQ 467 at 481.

[98] *Starlight Shipping Co v Allianz Marine & Aviation Versicherung AG* [2014] 2 Lloyd's Rep 579 at [83]–[89] (a case on the corresponding provision to the Singapore CRTPA s 2(1)(*b*)). In *Petrologic Capital SA v Banque Cantonale de Genève* [2012] EWHC 453 (Comm), and *Team Y&R Holdings Ltd v Ghossoub* [2017] EWHC 2401 (Comm), the English High Court also proceeded on the basis that it was possible to allow a third party to enforce a jurisdiction agreement under the UK 1999 Act, but found on the facts that the clause in the relevant contract did not purport to confer a benefit on the third party. See also Andrew Burrows, "The Contracts (Rights of Third Parties) Act 1999 and its implications for commercial contracts" [2000] LMCLQ 540 at 552, footnote 28; Neil Andrews, "Strangers to Justice no Longer: The Reversal of the Privity Rule under the Contracts (Rights of Third Parties) Act 1999" [2001] CLJ 353 at 374–375; Robert Merkin, "The Right of a Third Party to Enforce a Contract Term" in Robert Merkin (ed), *Privity of Contract* (Routledge, 2000) at 5.123–5.124; Adrian Briggs, *Civil Jurisdiction and Judgments* (Routledge, 7th ed, 2021) at para 23.11.

[99] Contracts (Rights of Third Parties) Ordinance (Cap 623) (HK) s 13.

affirmation of its reading of the intention behind the UK 1999 Act.[100] It is however, suggested that the Hong Kong legislation is at best ambiguous. The relevant provision is as follows:

> **13. Exclusive jurisdiction clause**
> (1) This section applies if a contract contains—
> (*a*) a term enforceable by a third party under section 4; and
> (*b*) an exclusive jurisdiction clause.
> (2) The third party is bound by the exclusive jurisdiction clause as regards a dispute between the third party and the promisor relating to the enforcement of the term by the third party.
> (3) This section does not apply if, on a proper construction of the contract, the third party is not intended to be so bound.
> (4) In this section—
> exclusive jurisdiction clause (專有司法管轄權條款) means a clause requiring that a dispute relating to the term enforceable by the third party under section 4 be resolved only in a particular jurisdiction.

52 While the legislation makes express mention of jurisdiction agreements, it only refers to the ***burden*** of the jurisdiction clause when the third party is enforcing a substantive term subject to a jurisdiction agreement,[101] which is uncontroversial under the CRTPA, section 2(4).[102] It is silent on whether and when the third party can ***enforce*** an exclusive jurisdiction agreement, even though its Law Commission had

[100] *VKC v VJZ* [2021] 2 SLR 753 (CA) at [71].
[101] The provision adopts a definition of exclusive jurisdiction agreement that is narrower than the common law conception. It is also not clear why non-exclusive jurisdiction agreements were omitted from scope. These can have powerful in the common law: *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] 1 SLR 779 (CA).
[102] The Hong Kong SAR provision goes beyond the CRTPA position in creating a rebuttable presumption that the contracting parties intended jurisdiction agreement to be a condition of the enforcement of the substantive term. In the CRTPA, s 2(4) requires the construction of the contract to determine whether the jurisdiction agreement is a condition to the enforcement of the term in question. The condition may not be invoked if the third party is merely asserting a right without suing on the right: *Aspen Underwriting Ltd v Credit Europe Bank NV* [2019] 1 Lloyd's Rep 221 at [57].

recommended that a third party should be able to do so.[103] Thus under the Hong Kong legislation, it appears that whether the third party can enforce a jurisdiction agreement will depend on the general operative provision in the statute[104] (the equivalent of the CRTPA, section 2). Thus, the Hong Kong SAR position provides no useful guide on statutory interpretation of the UK 1999 Act on the issue of enforcement of a jurisdiction agreement by a third party. On the contrary, if the Hong Kong SAR legislature is taken to have followed the recommendation of its Law Commission, then the general operative provision does apply to allow contracting parties to confer on a third party a right to sue on jurisdiction agreements.

(4) Substantive versus procedural rights

53 The fourth point in support of the *VKC v VJZ* position is that the CRTPA section 2(1)(*b*) only applies to the enforcement of a substantive term, and it does not apply to the enforcement of a procedural right in a jurisdiction clause.[105] If this this correct, then section 2(1)(*a*) also cannot apply to a procedural right, because "the term" referenced in section 2(1)(*b*) is the same "term" in the chapeau of section 2(1) which applies to both 2(1)(*a*) and 2(1)(*b*). This means that the statute simply cannot confer any procedural right on a third party, whether through express or implied intention.

54 Moreover, a right to enforce an arbitration agreement is equally a procedural right. The CRTPA, section 9 provides:

> **Arbitration provisions**
> **9.**—(1) Where —
> (*a*) a right under section 2 to enforce a term (referred to in this section as the substantive term) is subject to a term providing for the submission of disputes to arbitration

[103] The Law Reform Commission of Hong Kong, *The Law Reform Commission of Hong Kong Report: Privity of Contract* (2005) at pp 92-93 (http://www.hkreform.gov.hk). The substantive discussion in the report on this issue is unfortunately not helpful as it does not clearly distinguish between the burden and the benefit of the jurisdiction clause.
[104] Contracts (Rights of Third Parties) Ordinance (Cap 623) (HK) s 4.
[105] *VKC v VJZ* [2021] 2 SLR 753 (CA) at [60]–65]. This also appears to be inconsistent with para 32 of the Explanatory Notes discussed in paras 47–48 above.

> (referred to in this section as the arbitration agreement); and
>
> (*b*) the arbitration agreement is an agreement in writing for the purposes of the Arbitration Act 2001 or Part 2 of the International Arbitration Act 1994,
>
> the third party shall be treated for the purposes of the Arbitration Act 2001 or the International Arbitration Act 1994, as the case may be, as a party to the arbitration agreement as regards disputes between himself and the promisor relating to the enforcement of the substantive term by the third party.
>
> (2) Where —
>
> (*a*) a third party has a right under section 2 to enforce a term providing for one or more descriptions of dispute between the third party and the promisor to be submitted to arbitration (called in this section the arbitration agreement);
>
> (*b*) the arbitration agreement is an agreement in writing for the purposes of the Arbitration Act 2001 or Part 2 of the International Arbitration Act 1994; and
>
> (*c*) the third party does not fall to be treated under subsection (1) as a party to the arbitration agreement,
>
> the third party is, if the third party exercises the right, treated for the purposes of the Arbitration Act 2001 or the International Arbitration Act 1994 (as the case may be) as a party to the arbitration agreement in relation to the matter with respect to which the right is exercised, and treated as having been so immediately before the exercise of the right.

55 Section 9(1) deals with the arbitration analogue of Situation 1. It provides that the third party enforcing a substantive term that is subject to an arbitration clause in accordance with section 2 is bound by and entitled to enforce that clause as a party to the arbitration agreement.

Section 9(2) deals with the analogous Situation 2 case. The third party can invoke the arbitration framework as a party to the arbitration agreement when enforcing a procedural right to arbitration in accordance with section 2.

56 Section 9(2) applies only when the third party has a right to enforce the procedural right to arbitration under section 2.[106] If the whole of section 2 does not apply to procedural rights because as argued above there is no difference between sections 2(1)(*a*) and 2(1)(*b*) as to the meaning of the "term" to which it applies, then section 9(2) will never be invoked and is a dead letter. If only section 2(1)(*b*) does not apply to procedural rights, then section 9(2) will never be invoked based on implied contractual intentions. But English case law supports the application of the equivalent of section 9(2), even for implied intentions under the equivalent of section 2(1)(*b*).[107]

57 The facts of *VKC v VJZ* fall within Situation 2, where the third party is seeking to enforce a jurisdiction clause directly. There is an oblique suggestion in the case that the third party may be able to enforce a jurisdiction agreement in Situation 1 when the third party is suing the promisor on a substantive term in the contract, even based on an implied intention under s 2(1)(*b*).[108] Thus it is arguable that the ruling in *VKC v VJZ* only applies in Situation 2. However, if the premise is that Parliament intended jurisdiction agreements to be outside the scope of the statute, then it should make no difference whether it is a Situation 1 or 2. In both cases, the third party can enforce a term in a contract only if the same provision in the statute (CRTPA, s 2) says so.

VI. Conclusion

58 *VKC v VJZ* is an important case on the interpretation of the CRTPA that has potentially wide-ranging implications. While there are arguments that were not considered in the judgment that the CRTPA allows contracting parties to confer, whether expressly or impliedly, a right on a third party to enforce a jurisdiction clause in the contract, it remains a binding decision on the scope of the CRTPA. *VKC v VJZ* is a

[106] *VKC v VJZ* [2021] 2 SLR 753 (CA) at [64]; *Hurley Palmer Flatt Ltd v Barclays Bank plc* [2015] Bus LR 106.
[107] See, *eg*, *Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP* [2013] 1 WLR 3566; *Sodzawiczny v Ruhan* [2018] Bus LR 2419.
[108] *VKC v VJZ* [2021] 2 SLR 753 (CA) at [65].

case on Singapore contract law. If a contract is governed by Singapore law and the jurisdiction agreement is not governed by a different law, contracting parties cannot impliedly confer on a third party a right to enforce a jurisdiction agreement at least in a Situation 2 case. It is arguable that the consequences of this restrictive reading of the CRTPA in *VKC v VJZ* has little practical impact for the following reasons: (**a**) In practice, most contracts exclude the application of the CRTPA anyway; (**b**) other common law techniques may be available to circumvent privity; (**c**) the promisee as a contracting party may be able to intervene to protect third parties in suits involving third parties; and (**d**) contracting parties are free to choose a different law to govern the jurisdiction agreement.

59 On the other hand, the boundaries of the ruling in *VKC v VJZ* are somewhat hazy. While the case itself suggested that contracting parties may expressly or impliedly confer a third party right to enforce a jurisdiction clause in Situation 1 where the third party is suing on a substantive term, and that contracting parties may also do so expressly though not impliedly in Situation 2, it is difficult to reconcile these observations with the premises underlying the ruling itself. The uncertainty in the scope of the ruling in *VKC v VJZ* is not conducive to transaction planning, and may drive commercial contracting parties away from using Singapore law.

60 One further implication of the decision is the asymmetry that results when the third party is bound but is unable to enforce a jurisdiction agreement. In a Situation 2 case, the asymmetry is a given because the conditional benefit analysis cannot apply to impose any burden on the third party. In Situation 1, T will be bound by a jurisdiction agreement but may not be able to enforce it. Practically, this means that if there is an exclusive choice of Singapore court clause and T sues in a Singapore court, P is not in breach of contract when P seeks a stay of proceedings on *forum non conveniens* principle; P is not put to strong cause. If the choice of Singapore court clause includes the SICC, but T is bound by but cannot enforce the clause, it is a long stretch to say that there is an agreement between the parties to submit to the jurisdiction of the SICC. This asymmetry is also likely to knock the clause out of scope of the Convention.[109]

[109] Yeo Tiong Min, "Scope and Limits of Party Autonomy under the Hague Convention on Choice of Court Agreements", Yong Pung How Professorship of Law Lecture (2018)

61 On the level of legal policy, if we want to encourage disputes involving connected third parties to be resolved within the same jurisdiction agreement in a contract, then we should allow contracting parties the facility in our domestic law. We clearly do have that policy for arbitration agreements, and it is difficult to see why a different policy should apply for jurisdiction agreements.

62 For these reasons, serious thought should be given whether there should be legislative reform. One way or another, it should be clarified whether and to what extent the CRTPA allows contracting parties to confer on third parties the right to enforce jurisdiction agreements. Legislative reform may also be beneficial because it may be appropriate to consider two other related matters: whether jurisdiction clauses should be mutualised in the way arbitration clauses have been under the CRTPA, s 9 for both Situation 1 and Situation 2. This may go some way to address the issues of the scope of the SICC and Convention jurisdiction; these issues did not exist at the time the legislation was enacted. If legislative reform is undertaken, it will also be opportune to consider whether special provisions are needed to deal with other types of dispute resolution clauses, *eg*, for mediation and adjudication.[110]

at paras 11–26 (https://ccla.smu.edu.sg/sites/cebcla.smu.edu.sg/files/Paper2018.pdf). See also *Etihad Airways PJSC v Flother* [2020] EWCA Civ 1707 at [85]–[86].

[110] See, *eg*, *Hurley Palmer Flatt Ltd v Barclays Bank plc* [2015] Bus LR 106 at [43].