THE EFFECTIVE REACH OF CHOICE OF LAW AGREEMENTS

Two fundamental principles relating to party autonomy developed in the recent history of the conflict of laws. Despite initial reservations, the law today takes for granted that the parties' agreement is nearly conclusive in respect of both their choice of litigation forum and their choice of the law governing the contractual relationship. Meanwhile, the law of obligations – in tort, restitution and equity – has grown apace; disputes between contracting parties today are rarely confined to pure contractual issues. Can contracting parties choose the law to govern non-contractual disputes in cross-border litigation? In the absence of such choice, to what extent can or should the choice of law in contract be relevant to selection of the law applicable to non-contractual obligations in their disputes? It is also important to distinguish between these two situations if different legal consequences follow. This article addresses these issues, with specific reference to Singapore law.

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I. Introduction

A. Choice of court agreements

1 One of the earliest modern Singapore cases on the conflict of laws to capture the attention of foreign writers was a judgment of Yong Pung How J (as he then was) in 1990. The plaintiff had started an action in Singapore, but the defendant pointed to a clause in their contract stating that they had agreed to the exclusive jurisdiction of the Japanese court. The action was stayed; Yong J said: "contracts freely entered into must be upheld and given full effect unless their enforcement would be

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unreasonable and unjust". This was *The Asian Plutus*,[2] and it was cited in a note in the Law Quarterly Review by Adrian Briggs, now Professor of Private International Law at the University of Oxford, for making so clear a principle that had been lost sight of by the English courts.[3]

2 There have been reported cases of the English court giving effect to the litigants' choice of a foreign court by stay of proceedings from the end of the 18th century.[4] There was no question that the parties have no power to exclude the jurisdiction of the court of law, but the court could refuse to exercise its jurisdiction to hear the case. There was some debate about the jurisprudential basis for staying such proceedings,[5] but by the middle of the 20th century it was orthodoxy that the action was stayed in order to give effect to the parties' agreement.[6] The common law, in England and Singapore, has waxed and waned in the extent to which they have given effect to such agreements.[7] As this article has more to do with party autonomy in choice of law agreements than in choice of court agreements, it suffices to say that today both English[8] and Singapore[9] law recognise that a contractual exclusive choice of court agreement will be given effect to unless strong cause amounting to exceptional circumstances can be demonstrated otherwise. Similarly, if foreign proceedings are commenced or continued in breach of an exclusive choice of forum court agreement, the court of the forum would readily grant an anti-suit injunction unless strong cause is shown otherwise.[10] On a broader note, the role of party autonomy in choice of court agreements is clearly recognised in a recent international

2 [1990] SLR 543 at 547.

3 A Briggs, "Jurisdiction Clauses and Judicial Attitudes" (1993) 109 LQR 382 at 385.

4 See, for example, *Gienar v Meyer* (1796) 2 H Bl 603 at 608, 126 ER 728 at 731.

5 Including whether they could be treated as arbitration clauses under arbitration legislation: See M Pryles, "Comparative Aspects of Prorogation and Arbitration Agreements" (1976) 25 ICLQ 543 at 556–557.

6 *Racecourse Betting Control Board v Secretary for Air* [1944] 1 Ch 114 (CA) at 126; *The Fehmarn* [1958] 1 WLR 159 (CA) at 161–162.

7 See E Peel, "Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws" [1998] LMCLQ 182; K S Toh, "Stay of Actions Based on Exclusive Jurisdiction Clauses under English and Singapore Law [1991] SJLS 103 and 410. See also, Y L Tan, "Choice of Court Agreement: From a Viewpoint of Anglo-Commonwealth Law" in *Evolution of Party Autonomy in International Civil Disputes* (A Saito ed), (Singapore: Lexisnexis, 2005) at p 41; T M Yeo, "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306.

8 Where the matter is still governed by the common law.

9 See, for example, *The Hyundai Fortune* [2004] 4 SLR 548 (CA).

10 See, for example, *Donohue v Armco Inc* [2002] 1 All ER 749, [2001] UKHL 64 at [24] and [53]; *Regalindo Resources Pte Ltd v Seatrek Trans Pte Ltd* [2008] SGHC 74 at [11].

instrument: the Hague Convention on Choice of Court Agreements of 2005.[11]

B. Choice of law agreements

3 The history of choice of law in contract has been marked by the gradual progress of the recognition of party autonomy.[12] Even though the earliest reported cases on choice of law for contracts looked to the law of the place where the contract was made as the proper law of the agreement,[13] it was recognised by the middle of the 18th century that the contract was exceptionally governed by the law intended by the contracting parties.[14] By the middle of the 19th century, the law of the place of contracting had been re-interpreted as being the presumed choice of law of the contracting parties;[15] and it became uncontroversial for the English court to look to the law expressly or impliedly intended by the contracting parties to govern their relationship.[16] By the 1930s, it was well settled that a contract was governed by the law intended by the parties to apply to the contract.[17] *Vita Food Products Inc v Unus Shipping Co Ltd* ("*Vita Food*") remains today the leading Commonwealth authority:[18] a contract is governed by the law chosen by the parties, unless the choice is not *bona fide* or legal, and there is no reason to avoid the choice on public policy grounds. There had been some wavering on the conclusive effect of the parties' express choice of law in the middle of the 20th century,[19] one view being that the chosen law was merely an indication of the law with the closest and most real objective connections with the contract. That view soon petered out, and the proposition in *Vita Food* on the effect of party choice of law became regarded as unchallengeable.[20] In the absence of choice, the contract

11 http://www.hcch.net/index_en.php?act=conventions.text&cid=98 (accessed on 11 August 2008). Singapore is not a signatory to the instrument, but the principles in the instrument are broadly similar to those applied in the common law.

12 An important study of the modern law is found in P Nygh, *Autonomy in International Contracts* (Oxford: OUP, 1999).

13 See, for example, *Ranelaugh v Champante* (1700) 2 Vern 395 at 395, 23 ER 855 at 855; *Dungannon v Hackett* (1702) Eq Ca Abr 289 at 289, 21 ER 1007 at 1007. See, generally, A N Sack, "Conflict of Laws in the History of the English Law" in *Law: A Century of Progress, 1835-1935* (A Reppy ed) (NY: NYUP, 1937) at pp 386–389.

14 *Robinson v Bland* (1760) 2 Burr 1077 at 1078, 97 ER 717 at 718.

15 *Peninsular and Oriental Steam Navigation Co v Shand* (1865) 3 Moo NS 272 (PC, Mauritius) at 290–291, 16 ER 103 at 110.

16 *Lloyd v Guibert* (1865) LR 1 QB 115 (Ex Ch) at 121.

17 *R v International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] AC 500 at 530.

18 [1939] AC 277 (PC, Nova Scotia) at 289–290.

19 *Boissevain v Weil* [1949] 1 KB 482 (CA) at 491 (Denning LJ); *Re Helbert Wagg & Co Ltd* [1956] Ch 323 at 341 (Upjohn J); *The Fehmarn* [1958] 1 WLR 159 at 162 (Lord Denning).

20 For a strong modern reaffirmation of the effect of the choice of the parties, see *The Komninos S* [1991] 1 Lloyd's Rep 370 (CA) at 373.

would be governed by the law with the closest and most real connection with the transaction and the parties.

4 The leading Singapore case is *Peh Teck Quee v Bayerische Landesbank Girozentrale*,[21] where the Court of Appeal affirmed the *Vita Food* principle that the express choice of law of the parties will be virtually conclusive unless it is not *bona fide* or legal. The limitations to party autonomy are narrowly circumscribed. It will be very difficult to demonstrate a case of absence of *bona fides* outside the situation where the sole purpose of the contractual choice of law was to avoid the application of the law otherwise applicable to the contract.[22] Of course, the application of the foreign law chosen by the parties will be denied if the application of that law will be contrary to the fundamental public policy of the forum.[23]

C. Rise of non-contractual liabilities

5 These developments in choice of court agreements and choice of law clauses in the litigation context emphasise the significant role of party autonomy in cross-border dispute resolution.[24] This should mean that commercial parties have significant leeway to plan their transactions in accordance with a single chosen system of law.

6 However, another key line of development lies within the realms of domestic law. Tort law, especially in the law of negligence[25] and in

21 [2000] 1 SLR 148 (CA) at [12]. A recent restatement of the applicable principles is found in *Pacific Recreation Pte Ltd v S Y Technology Inc* [2008] 2 SLR 491 (CA) at [35]–[37]. Other cases affirming party autonomy in choice of law for contracts include *Las Vegas Hilton Corp t/a Las Vegas Hilton v Khoo Teng Hock Sunny* [1997] 1 SLR 341 (CA) at [37]–[38]; *Overseas Union Insurance Ltd v Turegum Insurance Co* [2001] 3 SLR 330 at [82]; *Pacific Electric Wire & Cable Co Ltd v Neptune Orient Lines Ltd (Toko Kajun Kaisha Ltd, third party and Prima Shipping Sdn Bhd, fourth party)* [1993] 3 SLR 60.

22 *Peh Teck Quee v Bayerische Landesbank Girozentrale* [2000] 1 SLR 148 (CA) at [17].

23 *Peh Teck Quee v Bayerische Landesbank Girozentrale* [2000] 1 SLR 148 (CA) at [12]; *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 (PC, Nova Scotia) at 290. The approach of the Singapore Court of Appeal made it clear that the public policy objection mentioned in the *Vita Food* case is the general exclusion of the application of foreign law that results in the contravention of the fundamental public policy of the forum.

24 Developments in international commercial arbitration strongly underscore the trend in favour of party autonomy as well. This topic is outside the scope of this article.

25 Compare the genesis in *Donoghue v Stevenson* [1932] AC 562 with the Singapore Court of Appeal's approach in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 (CA).

relation to the recovery of economic loss,[26] developed exponentially within the last century. The law of restitution or unjust enrichment, a topic which had struggled for a long time for an existence independent from the historical maze of quasi-contract, was eventually recognised by the House of Lords as an independent source of obligations in 1991,[27] a development swiftly confirmed in Singapore in 1995.[28] Equitable obligations, once mired within the law of trusts, began to emerge in the 1970s as a vital source of liability in commercial litigation.[29] Disputes between contracting parties today almost invariably involve more than just contractual liability. Very often, one party does not merely aver the other has breached the contract. Additional allegations will often involve breaches of tortious duties, liabilities for unjust enrichment, breaches of fiduciary duties, confidentiality duties, equitable duties of skill and care, and liabilities as constructive trustees.[30]

7 As a result, litigants will often have to deal with choice of law rules for torts, restitution and equitable obligations as well. The choice of law rules for these areas are less developed than for contracts, and unlike the case of contracts, there is no direct reference to the choice of the parties. This article does not deal with property issues; the interaction between party autonomy and rights of third parties is a complex topic outside its scope.[31] Similarly, matrimonial agreements require special consideration and fall outside the scope of this article as well.[32]

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26 Compare the genesis in *Hedley Byrne & Co Ltd v Heller & Partners* [1964] AC 465 with the Singapore Court of Appeal's approach in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR 100 (CA).

27 *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548.

28 *Seagate Technology Pte Ltd v Goh Han Kim* [1995] 2 SLR 17 (CA).

29 See, for example, *Carl Zeiss Stiftung v Herbert Smith & Co (No 2)* [1969] 2 Ch 276; *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373; *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250 (CA); *Belmont Finance Corporation Ltd v Williams Furniture Ltd (No 2)* [1980] 1 All ER 393 (CA); *Re Montagu's Settlement Trusts* [1987] 2 WLR 1192.

30 See, for example, *Base Metal Trading Ltd v Shamurin* [2002] CLC 322 where the same acts of the defendant were the basis of the claims for breach of contract, tort, and breach of equitable duty of care. In *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 (CA), a series of acts and omissions occurring in the course of the performance of the contract formed the basis of claims in tort and equity. In this and in *Base Metal Trading Ltd v Shamurin* [2005] EWCA Civ 1316, [2005] 1 WLR 1157, the contractual claim was not pursued, probably for strategic choice of law reasons.

31 *Cf The ASL Power* [2003] 1 SLR 545 and see the commentary in Y L Tan & F Xavier, "The Conflict of Laws in Singapore 2001–2005" in *Developments in Singapore Law 2001–2005* (K S Teo ed) (Singapore: SAL, 2006) ch 7 at [141]–[146].

32 However, it is noteworthy that two recent cases in Singapore highlighted the significance of party autonomy in this area. In *TQ v TR* [2007] 3 SLR 719, a pre-nuptial agreement was given effect to in accordance with its governing law. An appeal was dismissed by the Court of Appeal. In *Murakami Takako v Wiryadi Louise Maria* [2008] 3 SLR 198, the High Court gave effect to the parties' choice of

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8 The result of the concurrent existence of different juridical obligations is the potential fragmentation of the legal dispute: different domestic laws potentially apply to different obligations arising out of a single legal relationship, sometimes the same (but concurrent) obligation can be governed by different laws depending on whether it is characterised as contract, tort, restitution, or even equity, or one or more of the above.

II. Outline

9 To address this problem of potential fragmentation, this article proposes to consider three questions:

(a) Where the contracting parties *have not chosen* a law to govern non-contractual obligations arising out of or relating to their contractual relationship, does the law of the contractual relationship have any effect on the choice of law to govern these non-contractual obligations?

(b) Where the contracting parties *have chosen* a law to govern non-contractual obligations arising out of or relating to their contractual relationship, should effect be given to the choice?

(c) If there is indeed a legal distinction between the two situations, how is situation (a) to be distinguished from situation (b)?

III. Relevance of underlying contractual relationship to choice of law for non-contractual obligations

10 This article focuses on three main categories of non-contractual obligations that are likely to arise in commercial disputes: torts, restitution and equity.

A. Tortious obligations

11 There is significant divergence in the choice of law rules for torts even within the Commonwealth. Singapore follows closely the original common law position: a tort will be actionable in the Singapore courts if it is actionable as a tort by the law of the forum and civil liability in respect of the same claim can be established by the law of the

matrimonial property regime, even in respect of immovable property, at least where no third party rights were involved.

place of the tort, subject to a flexible exception.[33] A Singapore innovation is that, unlike the English common law where English law invariably applies to torts committed in England,[34] under Singapore law the same choice of law rule applies whether the tort is committed in or out of Singapore.[35] England itself moved away from the common law position in 1995, adopting instead a statutory position of the general rule of the place where the significant events constituting the tort happened, subject to a flexible exception.[36] Courts in Australia[37] and Canada[38] have effected common law reforms in the exclusive application of the law of the place of the tort and subject to very limited public policy exceptions.

12 In theory, under the double actionability with flexible exception approach which applies in Singapore, it is possible for the court to apply the law of the underlying contractual relationship to govern the tort. However, there is no known common law case in the Commonwealth where the court has explicitly adopted this approach.[39] In the US where the courts take a more open ended approach to choice of law for torts, it is not unusual for a court to consider the law of the contractual relationship as a relevant connection, sometimes an important one.[40] A significant change of attitude can be traced in English law. In the 1980s, it was the norm to apply the torts choice of law and to regard the law of the underlying contract as generally irrelevant unless it raised an issue of a contractual defence to the tort.[41] In the new millennium, however, the

33 See *Parno v SC Marine Pte Ltd* [1999] 4 SLR 579 (CA) and *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 (CA), following *Boys v Chaplin* [1971] AC 356 and *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190 (PC, Hong Kong). This approach still prevails in New Zealand: *The Seven Pioneer* [2001] 2 Lloyd's Rep 57. *Cf* W Tong, "Singapore Private International Law on Torts: Inappropriate for Modern Times?" [2007] SJLS 405.

34 *Metall und Rohstoff AG v Donaldson Lufkin Jenrette Inc* [1990] 1 QB 391 (CA).

35 *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 (CA).

36 Private International Law (Miscellaneous Provisions) Act 1995 (c 42) (the common law still applied to claims in defamation, though).

37 *Regie National des Usines Renault SA v Zhang* (2002) 210 CLR 491, [2002] HCA 10.

38 *Tolofsen v Jensen* [1994] 3 SCR 1022.

39 The result of *Johnson v Coventry Churchill International Ltd* [1992] 3 All ER 14 could be explained on this basis though the actual reasoning was based on the closeness of the overall connections of the case with England, of which the contractual relationship between the parties was one.

40 Restatement (Second) on the Conflict of Laws (American Law Institute, 1971) §145. See, for example, *Godbey v Frank E Basil* Inc 603 F Supp 775 (USDC, DC, 1985) at 777; *Jackson v Miller-Davis Co* 358 NE 2d 328 (Ill App, 1976) at 331; *Cribb v Augustin* 696 A 2d 285 (RI, 1997) at 288. However, no general inference can be drawn from the multitude of authorities as to any specific significance of the law governing an underlying contractual relationship to tortious claims arising between the parties, as the search for the proper law is an open-ended exercise.

41 *Coupland v Arabian Gulf Petroleum Co* [1983] 2 All ER 434 (CA) at 446–447. See, for example, *Sayers v International Drilling Co NV* [1971] 1 WLR 1176 (CA)

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attitude is discernibly different. Applying the statutory regime (which like the common law makes no explicit reference to any contractual relationship between the parties), the English court has given considerable weight to the underlying contractual relationship of the parties in applying the exception.[42] From January 2009 when the Rome II Regulation[43] takes effect in the EU, the choice of law rule for torts under English law will be based on the law of the place of injury[44] subject to a flexible exception; and in respect of the exception, the court is expressly directed to consider the underlying contractual relationship between the parties where it exists.[45]

13 In two Singapore Court of Appeal cases where one contracting party had sued another in respect of torts committed in the course of performance of the contract, double actionability was applied without reference to the underlying contractual relationship between the parties.[46] However, in both cases, the argument that the exception should be applied because of underlying contractual relationship did not appear to have been pressed.[47] The double actionability rule for torts has been developed out of the paradigm of a wrong between strangers,

(validity and effect of exemption clause to tort claim tested by proper law of the contract).

42 *Morin v Bonhams & Brooks Ltd* [2003] EWCA Civ 1802 at [23], [2004] 1 All ER Com 880; *Trafigura Beheer BV v Kookmin Bank Co* [2006] EWHC 1450 (Comm) especially at [112]–[113], [2006] 2 Lloyd's Rep 455. This attitude was all the more striking in view of academic opinion that it may not be accommodated by the wording of the legislation which refers to connections with "country" rather than "system of law": A Briggs, "On drafting agreements on choice of law" [2003] LMCLQ 389 at 394; but see *Morin v Bonhams & Brooks Ltd* at [23]. See further, A Briggs, "The further consequences of choice of law" (2007) 123 LQR 18. See also *Glencore International AG v Metro Trading International Inc* [2001] 1 Lloyd's Rep 284 at [37] where it was the common ground of counsel that the tortious claims arising from the contractual relationship were exceptionally governed by the law of the underlying contractual relationship under s 12 of the 1995 Act.

43 Regulation (EC) No 864/2007 of 11 July 2007, OJ L199/40, coming into force on 11 January 2009. This instrument will (with limited exceptions) unify the choice of law rules for courts in the EU in respect of non-contractual obligations arising in civil and commercial matters. It is an "open" regulation in the sense that it will apply even if the parties or facts have no connection with the EU, so long as a court within the EU is legally exercising jurisdiction over the issue.

44 Article 4(1).

45 Article 4(3).

46 *Parno v SC Marine Pte Ltd* [1999] 4 SLR 579 (CA); *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 (CA).

47 See *Parno v SC Marine Pte Ltd* [1999] 4 SLR 579 (CA) where the main issue was the territorial scope of a piece of Singapore legislation; *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 (CA), especially at [68]–[72]. See, however, *The Rainbow Joy* [2005] 3 SLR 719 (CA), discussed below.

typically the road accident.[48] Although the Singapore Court of Appeal more recently appeared to have set a very high threshold for the application of the flexible exception, this was done in the interest of promoting certainty.[49] However, in the case of a tort which arises out of the performance of a contract, it probably leads to greater certainty for the contracting parties that the court should look to the law of the underlying contract than for the court to apply the general rule of double actionability. Thus, the relative weight to be given to the parties' underlying contractual relationship in determining whether the flexible exception to the double actionability rule should be invoked remains an open question in Singapore law.

B. Restitutionary obligations

14 The choice of law rule for restitution remains uncertain, but is generally accepted to be the proper law of the restitutionary obligation. One important sub-rule that has been accepted in Singapore is that where the obligation arises in connection with a contract, the proper law of the obligation is the proper law of the contract.[50] On the face of it, this rule will capture most restitutionary claims between contracting parties. Some doubts have been expressed whether the proper law of the contract can be relevant if the restitutionary obligation arises out of an ineffective contract,[51] but the better view is that the concept of the proper law of the contract is distinct from the validity of the contract, and the application of the proper law gives effect to the reasonable expectations of the parties,[52] unless, of course, the choice of law clause is itself impeached for fraud or duress or other reasons.[53]

15 However, a somewhat restrictive reading was taken by the Singapore Court of Appeal in *Thahir v Pertamina*, where on one reading the court held that a claim for the account of bribes by a principal

48 *Boys v Chaplin* [1971] AC 356 (road accident); *The Halley* (1868) LR 2 PC 193 (collision between ships); *Phillips v Eyre* (1870) LR 6 QB 1 (Exc Ch) (assault and false imprisonment).

49 *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 (CA).

50 *Dicey, Morris & Collins: The Conflict of Laws* (L Collins gen ed) (London: Thomson, 14th Ed, 2006) Rule 230(2)(a). Its earlier incarnation in the 12th Ed, 1993, in the same terminology, was accepted in *Kartika Rathna Thahir v PT Pertambangan Minyak dan Gas Bumi Negara (Pertamina)* [1994] 3 SLR 257 (CA) at 270 *et seq*. See also *Dresdner Kleinwort Ltd v CIMB Bank Bhd* [2008] SGHC 59 at [88]–[93].

51 *Baring Bros & Co Ltd v Cunninghame DC* [1997] CLC 108 (Scot Ct Sess).

52 See A Chong, "Choice of Law for Void Contracts and Their Restitutionary Aftermath: The Putative Governing Law of the Contract", in *Re-Examining Contract and Unjust Enrichment: Anglo-Canadian Perspectives* (P Giliker ed) (Leiden: Martnus Nijhoff, 2007) ch 9.

53 Some of these issues were addressed in *Dresdner Kleinwort Ltd v CIMB Bank* [2008] SGHC 59, especially at [95].

against an agent was not connected to a contract because the obligation was imposed by equity outside of contract law.[54] It is suggested that the better reading of the case is that it had everything to do with property and nothing to do with contract at all. The defendant was alleged to have received the proceeds of bribes taken by General Thahir in breach of fiduciary duty owed to the plaintiff. General Thahir was alleged to have brought the tainted money into Singapore and given the money to the defendant in Singapore. The real issue was who owned the property in the chose in action against a bank operating in Singapore; an issue clearly governed by Singapore law either as the *lex situs* or the proper law of the chose in action.[55]

C. Equitable obligations

16 The applicability of choice of law rules for equitable obligations was almost a non-existent subject[56] until very recently.[57] Some jurisdictions may hold to the ancient view that once the equitable jurisdiction of the court is invoked, there is no choice of law question at all; the law of the forum governs all questions of equity.[58] The Singapore Court of Appeal made a very important contribution to Commonwealth jurisprudence recently in holding that equitable obligations arising out of a legal relationship established by contract are governed by the law of the underlying contract.[59] In the author's view, this is going to be the trend in many common law jurisdictions.[60]

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54 [1994] 3 SLR 257 (CA) at 271–272.

55 See T M Yeo, *Choice of Law for Equitable Doctrines* (Oxford: OUP, 2004) at paras [7.68]–[7.69]; T M Yeo, "Restitution" (2007) 8 SAL Ann Rev 364 at [20.80]–[20.81].

56 Literature was sparse. See R W White, "Equitable Obligations in Private International Law: The Choice of Law" (1986) 11 Sydney L Rev 92; L Barnard, "Choice of Law in Equitable Wrongs – A Comparative Analysis" [1992] CLJ 474.

57 See, generally, T M Yeo, *Choice of Law for Equitable Doctrines* (Oxford: OUP 2004); T M Yeo, "Choice of Law for Equity" and R Stevens, "Choice of Law for Equity: A Reply" in *Equity in Commercial Law* (S Degeling & J Edelman eds) (Sydney: Thomson, 2005); T M Yeo, "Choice of Law for Director's Equitable Duty of Care and Concurrence" [2005] LMCLQ 144; A Chong, "The Common Law Choice of Law Rules for Resulting and Constructive Trusts" (2005) 54 ICLQ 855.

58 *National Commercial Bank v Wimborne National Commercial Bank v Wimborne* (1978) 5 BPR 11,958 at 11,982; *Paramasivam v Flynn* (1998) 160 ALR 203 (FCA), especially at 215–216.

59 *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 (CA).

60 See also *A-G for England and Wales v R* [2003] 2 NZLR 91 (CA) at 103 (affirmed without reference to the choice of law point in *R v A-G for England and Wales* [2003] UKPC 22); *Base Metal Trading Ltd v Shamurin* [2003] EWHC Comm 2419 at [43]–[44], affirmed without reference to this point in [2005] EWCA Civ 1316, [2005] 1 WLR 1157 but the Court of Appeal's approach was premised on the application of choice of law rules to equitable obligations.

IV. Parties' choice of law to govern non-contractual obligations

17 On the whole, it would seem that under Singapore private international law party autonomy plays a significant role for equitable and restitutionary obligations, and potentially (though not clearly) so for tortious obligations as well, in the background of the respective choice of law rules. One reason for this difference is that the common law torts choice of law rules were developed the earliest, at a time when torts and crimes were still seen to be closely connected,[61] when the theory of territorial vesting of rights still held sway, and the typical tort was the collision at sea[62] or on the road.[63] In contrast, choice of law rules for restitutionary[64] and equitable obligations[65] are of far more recent vintage, and formulated on the modern theory of justice between the parties.

18 The next question is whether the parties' agreement[66] has a larger role to play in the foreground. This step is perhaps most significant for tort claims where the subsidiary role for party autonomy may be the least secure. We have seen that parties' choice of law is almost conclusive in giving effect to the selection of the law to govern contractual obligations, and this law has an effect on application of the choice of law rules for non-contractual obligations. Should the party autonomy be taken a step further, and effect given to parties' choice of a law to govern non-contractual obligations connected to their contractual relationship?

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61 O Kahn-Freund, "Delictual Liability and Conflict of Laws" (1968) 124 II *Recueil des cours* 1 at 24.

62 *The Halley* (1868) LR 2 PC 193.

63 *Boys v Chaplin* [1971] AC 356.

64 "Restitution" as a choice of law topic was first introduced in the 6th edition of *Dicey: The Conflict of Laws* (J H C Morris gen ed) (London: Stevens, 6th Ed, 1949), and in P M North & J J Fawcett, *Cheshire and North's Private International Law* (Oxford: OUP, 13th Ed, 1999) only in the 13th edition in 1999.

65 The rules are still in the process of judicial formulation. See, generally, T M Yeo, *Choice of Law for Equitable Doctrines* (Oxford: OUP, 2004).

66 The thesis advanced in this article is based on a *choice of law* made by the parties (either express or implied). Not all arguments considered here apply or apply with equal force to the objective choice of law that governs the contract in the absence of parties' choice. Nor do the observations of the Singapore authorities considered below (Section C) go beyond supporting the case for giving effect to the choice of the contracting parties. In the context of the objective proper law, there is an argument from the economic analysis of law that the law governing the pre-existing contractual relationship should also govern the issue of tortious liability for losses arising from a contractual exchange entered in a market situation because the same policy objectives apply to both contractual and tortious liabilities: M J Whincop & M Keyes, "The Market Tort in Private International law" (1999) 19 NJILB 215 and M J Whincop & M Keyes, *Policy and Pragmatism in the Conflict of Laws* (Aldershot: Asghgate/Dartmouth, 2001) ch 5.

A. The case for

19 Five arguments may be made in favour of an affirmative answer.

20 The first argument proceeds from the law of contract. Where the parties have made a contractual choice of a law to govern non-contractual obligations arising from their contractual relationship, it is difficult from a commercial point of view to see why their agreement should not generally be upheld.[67] The common law tendency to hold parties to their contractual choice of court agreement extends to all disputes falling within the scope of the agreement and not merely contractual disputes. From a contractual perspective, it is just a matter of the common law enforcing the parties' agreement.[68] The strict enforcement of commercial agreements is one of the pillars of the common law which makes it attractive as the law of choice for commercial transactions (and the court applying that law as the choice of litigation forum).

21 The second argument is that of certainty and cost-avoidance.[69] There are three aspects. First, it enables contracting parties to plan their transactions and conduct with reference to a single legal system. Secondly, it reduces the cost of dispute resolution in having all connected disputes resolved by a single system of law. Thirdly, it increases the probability of amicable settlements of disputes, if the disputants only need to bargain with reference to a single system of law which they had chosen in the first place.

22 The third argument is to align as far as possible the position in litigation with that in arbitration. In international arbitration, parties are allowed by statute to choose a law to govern non-contractual disputes.[70] There is both a theoretical and a practical perspective to this argument. The theoretical perspective is that whether one is looking at arbitration or litigation, the contract remains the same: the parties have

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67 See main text to n 1.

68 There is a choice of law issue here: the agreement must create enforceable rights under the proper law of the contract.

69 For a more detailed analysis, from the perspective of the economic analysis of law, of the "efficiency" of using the choice of law in the underlying contractual relationship to govern torts arising out of a market transaction, see M J Whincop & M Keyes, "The Market Tort in Private International law" (1999) 19 NJILB 215 and M J Whincop & M Keyes, *Policy and Pragmatism in the Conflict of Laws* (Aldershot: Asghgate/Dartmouth, 2001) ch 5.

70 Article 28 of the UNCITRAL Model Law on International Commercial Arbitration states: "The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute …". See the International Arbitration Act (Cap 143A, 2002 Rev Ed) First Schedule.

made an agreement on the law to apply to their disputes.[71] If the terms are certain enough, they should be upheld.[72] The practical perspective is that it cannot be certain whether a dispute will end up in an arbitration tribunal or a court. Parties who had originally agreed to an arbitration clause may change their mind, or one of them may have taken a step in legal proceedings, such that the case ends up in a court of law. Parties who had originally agreed to a choice of court clause may mutually consent to arbitration instead after a dispute has arisen. Parties may put fall-back clauses in their contracts: arbitration in some situations, courts of law in other situations (*eg*, where the parties cannot agree as to the choice of arbitrators). To have a choice of law clause that is effective in one dispute resolution forum but not in another can only be a source of confusion.

23 The fourth argument is to respond to the demands of global competition. Globalisation of commerce has led to the phenomenon of contracting parties being able to select systems of law by reference to which they wish to transact their business. Globalisation of legal services in turn led to the parallel phenomenon of the commoditisation of legal systems: the packaging of legal systems as a product to sell to commercial parties. Legal systems which aim to be hubs for international commercial disputes sell their services as a dispute resolution centre. Singapore's own efforts in this direction can be seen clearly in the Promotion of Singapore Law project.[73] How attractive this product is depends on what it can offer to commercial parties. A legal system which offers not only a space for one-stop dispute resolution but also a means for greater certainty in their dispute resolution outcomes is, all things being equal, a more attractive venue than one which does not.[74] When the Rome II Regulation takes effect in the EU in early 2009,

71 There are limitations to this comparison. This article does not go so far as to argue that the court should be able to do everything that an arbitration tribunal can. For example, while the arbitration tribunal may, by the parties' consent, be conferred the power to decide cases *ex aequo et bono*, courts of law are generally not so empowered and must decide by reference to localised systems of law: see *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch) at [2] for the common law position. See also *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 19, [2004] 1 WLR 1784 and *Halpern v Halpern* [2007] EWCA Civ 291, [2008] 1 QB 105 (Rome Convention). The position appears to be similar in the US under the *Restatement (Second) on the Conflict of Laws* (American Law Institute, 1971): see S C Symeonides, "Contracts Subject to Non-State Norms" (2006) 54 Am J Comp L 209 at 215–216.

72 This is another reason why the choice of *lex mercatoria* may not be enforceable in a common law court.

73 See http://www.singaporelaw.org (accessed on 11 August 2008).

74 In addition, the ability to resolve disputes involving non-contractual liabilities according to the contractually chosen law of the parties may be a legitimate juridical advantage of suing in the forum, and thus a factor against staying of proceedings even though there may be a clearly more appropriate forum elsewhere (if the competing foreign court lacks this ability). See the analogous point in the

(*cont'd on the next page*)

courts of the Member States (including, of course, England and Wales) will allow, with certain limitations, commercial parties to choose the governing law in advance for non-contractual obligations in civil and commercial matters.[75] The position in the US is more complex: since choice of law is a state and not a federal matter, every state's choice of law position is potentially different. Suffice to say that within the US, courts have shown some inclination to give effect to contractual choice of governing law for non-contractual obligations in the absence of countervailing constitutional and public policy considerations. This has been evident in at least several states, including California[76] and New York.[77]

24 The fifth argument is that such a development will be an incremental and not a radical change in the common law. There is a procedural and a substantive aspect to this argument. Procedurally, it is already possible for contracting parties to select a common law court as the exclusive forum for adjudication of their disputes (in relation to both contractual and non-contractual obligations) and to agree not to plead any foreign law in the process. There is generally no reason of public policy why an agreement not to plead foreign law should not be upheld.[78] On the substantive side, as discussed above, within the existing choice of law rules for torts, restitution and equity, there are already mechanisms for giving effect to the law governing the underlying contractual relationship of the parties. It is admittedly not a small step, but it is suggested that it is nevertheless incremental in building upon the principle of party autonomy that is already latent in the existing rules and an application of the basic principles of contract law.

B. The case against

25 As against this, five arguments may be made against such a development.

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case of contractual obligations: *Banco Atlantico SA v the British Bank of the Middle East* [1990] 2 Lloyd's Rep 504 (CA); *The Magnum* [1989] 1 Lloyd's Rep 47 (CA).

75 Article 14(1)(b).

76 *Nedlloyd Lines BV v San Mateo* 834 P 2d 1148, 11 Cal Rptr 2d 330 (Cal SC, 1992).

77 *Maltz v Union Carbide Chemicals & Plastics Co* 992 F Supp 286 (SDNY, 1998). For discussions of other authorities, see S C Symeonides, "Choice of Law in the American Courts in 1994: A View 'From the Trenches'" (1995) 43 Am J Comp L 1 at 63–64; "Choice of Law in the American Courts in 1995: A Year in Review" (1996) 44 Am J Comp L 181 at 224; *American Private International Law* (Alphen aan den Rijn: Kluwer, 2008) at §§459–463.

78 There may be exceptional cases of foreign illegality where the court may take judicial notice of a notorious foreign law.

26 First, it may be argued that to allow parties to choose a law is to endow them with the capacity of legislators.[79] This argument may be dealt with briefly. This was the original objection to giving effect to parties' choice of law for contractual obligations. The fallacy in the argument is that it is ultimately the law of the forum which gives legal effect to the consequences of the agreement of the parties.[80]

27 Secondly, there is the argument that giving effect to parties' choice of law for non-contractual obligations neglects the regulatory functions of the law. According to this argument, the degree of private ordering which such a proposed system allows will undermine the regulatory interests of States.[81] In response, it may be said that there is no bright-line distinction between facilitative and regulatory functions of the law, and, in any event, they do not translate into contract law and non-contract law. It is all a matter of degree and perspective. There is no doubt that torts grew out of criminal law, but much of tort law today can be seen as rules of risk allocation which could be subject to modification by the parties (*eg*, by exclusion and limitation clauses or duty modifying clauses). Equity developed from the need to regulate the conscience of humankind, but many of its rules today are also subject to consensual modification, including the stronghold of the fiduciary institution. From one perspective, the whole of contract law is regulatory; it functions to ensure that people keep their promises. Historically, a large part of contract law actually grew out of the law of torts.[82] There is no doubt that there are certain aspects of contract law which are on any view regulatory, but which we do not see any problem with giving effect to party autonomy. Prime examples are where issues of illegality and enforceability of exemption and penalty clauses are governed by the law chosen by contracting parties.

28 There are safeguards. It may be said that the common law choice of law process (at least outside the US) is concerned only with the

79 See, for example, J Beale, "What Law Governs the Validity of a Contract?" (1909) 23 Harv LR 23.

80 W W Cook, *Logical and Legal Bases of the Conflict of Laws* (London: OUP, 1942) ch 15.

81 H Muir Watt, "Reshaping Private International Law in a Changing World", http://www.conflictoflaws.net/2008/guest-editorials/guest-editorial-muir-watt-on-reshaping-private-international-law-in-a-changing-world/ (accessed on 11 August 2008). See, more generally, R Wai, "Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization" (2002) 40 Colum J Trans L 209.

82 There was a time when the action in debt and the action in detinue were indistinguishable: S F C Milsom, *Historical Foundations of the Common Law* (London: Butterworths, 2nd Ed, 1981) at p 262. The mainstay of contractual actions, the action for damages for breach of contract, grew out of a type of trespass action: Milsom at p 316.

question of private justice between the litigants.[83] Absent statutory direction,[84] the only regulatory interests that the common law gives effect to are those of its home country, and this is expressed in terms of *bona fide* choice of law, mandatory rules and fundamental public policy of the forum.[85] A choice of law which is deliberately and solely evasive runs against the rationale for allowing choice of law in the first place and will not be given effect to.[86] The application of a foreign law which denies liability altogether for fraud will be against the fundamental public policy of the forum.[87] The forum may apply the Unfair Contract Terms Act[88] or the Consumer Protection (Fair Trading) Act[89] in cases falling within their ambit where directed by the legislation to do so in spite of the foreign elements in the case.

29 The characteristic feature of common law conflict of laws is that the court behaves as a responsible global citizen, but it does not act like an international policeman.[90] The court's primary role in choice of law is, subject to the fundamental law and policies and rules of procedure of the forum State, to give effect to principles of private justice between the litigants, and at the same time act with self-restraint bearing in mind considerations of international comity. Any country with a strong regulatory interest in an issue will provide for its own rules of jurisdiction and choice of law to protect its own interests. The court of the forum should respect that foreign court accordingly as a court of competent jurisdiction (and any judgment coming out of that in accordance with the forum's principles of recognition of foreign

83 *Dicey, Morris and Collins: The Conflict of Laws* (L Collins gen ed) (London: Thomson, 14th Ed, 2006) at [1-005]; P M North & J J Fawcett, *Cheshire and North's Private International Law* (Oxford: OUP, 13th Ed, 1999) at p 32; P Nygh, *Autonomy in International Contracts* (Oxford: OUP, 1999) at p 13.

84 The common law courts will only take statutory direction emanating from its own home country.

85 And to an increasingly lesser extent in the modern law, rules of procedure of the forum.

86 *Peh Teck Quee v Bayerische Landesbank Girozentrale* [2000] 1 SLR 148 (CA) at [17]. The case concerned the potential evasion of *contract* mandatory rules. But if the common law extends the effective scope of the choice of law clause to non-contractual issues, then it follows that the evasion of non-contract mandatory rules may also amount to non-*bona fide* choice. Whether in such a case severance of the choice of law clause may be possible to preserve its application to contractual issues if there has been no evasion of contract mandatory rules is beyond the scope of this article.

87 In domestic law, contractual exclusion of liability for (actual) fraud is against public policy: *Armitage v Nurse* [1998] Ch 241 (CA). There is little doubt that this is fundamental public policy of the forum.

88 Unfair Contract Terms Act (Cap 396, 1994 Rev Ed). A choice of law clause, like a choice of court clause, may be subject to regulation under this statute where the case falls within its territorial scope and subject matter.

89 Consumer Protection (Fair Trading) Act (Cap 52A, 2004 Rev Ed).

90 See *Airbus Industrie GIE v Patel* [1999] 1 AC 119 at 131; *People's Insurance Co Ltd v Akai Pty Ltd* [1998] 1 SLR 206 at [12].

judgments), but in determining the merits of a dispute before it, the court is entitled to act according to its own conception of conflicts justice, which is essentially private justice. This is how it is with the principles of natural forum and anti-suit injunctions; it should be the same with choice of law.

30 Thirdly, it may be argued that the analogy between arbitration and litigation does not hold true because arbitration is a private process that stems from the consent of the parties, while courts are required to uphold the law in the public interest. Thus, courts should have no, or at least only a minimal, function in the upholding of this type of private ordering between contracting parties. However, given the degree of support that the legal system provides the arbitration process and the enforcement of arbitral awards, there appears to be a high level of endorsement of private ordering. Of course, there are limitations based on the concepts of arbitrability and public policy. There are corresponding safeguards within private international law as well.

31 Fourthly, there are valid concerns about potential inequality of bargaining power between contracting parties. This is already an existing general concern for choice of law for contractual obligations. The Rome II Regulation in the EU contains specific protective rules for consumers and employees.[91] Consumer and labour protection laws are prominent features of the legal landscape in the EU.[92] On the other hand, common law safeguards are to be found in the concepts of *bona fide* choice, fundamental public policy and mandatory rules of the forum.

32 Fifthly, it may be argued that there are no authorities in support of such a development. One may, however, take notice of developments

91 Professor Symeonides has criticised the Rome II Regulation for giving as much effect to pre-tort agreements as it does to post-tort agreements. In his view, pre-tort agreements should be disallowed or at least closely policed. See S C Symeonides, "Rome II and Tort Conflicts: A Missed Opportunity" (2008) 56 Am J Comp L 173 at 215–216. However, the distinction between pre- and post-event choice of law has arguably been exaggerated, and no such distinction is drawn for contract choice of law under the Rome Convention (and the Rome I Regulation intended to replace it) and for choice of court agreements under the Brussels I Regulation. To the extent that higher information disparities may exist before the event and this could engender greater vulnerability to exploitation, the author has no doubt that the common law can and will be sensitive to this distinction. For a discussion of these issues in the context of choice of law rules for restitutionary claims in the Rome II Regulation, see A Chong, "Choice of Law for Unjust Enrichment/Restitution and the Rome II Regulation" (ICLQ, forthcoming).

92 However, it has been argued that there is no reason why employees and consumers should be denied the opportunity of relying on a prior choice of law agreement: Th M de Boer, "Party Autonomy and Its Limitations in the Rome II Regulation" (2007) 9 YPIL 19 at 27–28.

in Europe and the US discussed above. In 1999, an academic suggestion had been made that the court could refer to the choice of the contracting parties to govern fiduciary duties arising from their contractual relationship.[93] Professor Adrian Briggs, in March 2008, published in the *Oxford Private International Law Series* a book entitled *Agreements on Jurisdiction and Choice of Law*,[94] where he advocates an approach that looks bold and sweeping at the level of insight but is simply an application of existing doctrines of contract law and private international law at the level of legal principles. His main argument, which goes beyond the scope of this article, is that the choice of law clause is a contractually stipulated means of dispute resolution like the choice of jurisdiction agreement and should be given contractual effect as such. More pertinently for Singapore law, there are indeed authorities that support such an approach.

C. Singapore case law

33 *The Rainbow Joy*[95] was a straightforward case of *forum non conveniens* from the Singapore Court of Appeal. The plaintiff was a Filipino employee engaged by a Panamanian company under a contract governed by Filipino law to work on board a ship flying the flag of Hong Kong. The plaintiff was injured while working on the ship when the ship was on the high seas. The plaintiff wanted to sue in the Singapore court for breach of contract as well as tort. Both claims were stayed. It is the court's treatment of the tort claim that is of interest. After referring to the law of the flag as the *prima facie* applicable law, the court stated, albeit rather briefly: "However, where in the contract of employment the parties have specified the governing law, the contract term should prevail."[96] That appears to be a clear statement that effect should be given to a contractual choice of law clause for tortious obligations.[97]

34 *Rickshaw Investments Ltd v Nicolai Baron von Uexkull*[98] was another *forum non conveniens* case of the Singapore Court of Appeal.

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93 T M Yeo, "Choice of Law for Fiduciary Duties" (1999) 115 LQR 571 at 574. This technique is, however, unnecessary if the fiduciary obligation is *characterised* as raising a *contractual* issue for choice of law purpose: T M Yeo, *Choice of Law for Equitable Doctrines* (Oxford: OUP, 2004) at paras [7.24]–[7.73].

94 A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford: OUP, 2008). See also A Briggs, "On Drafting Agreements on Choice of Law" [2003] LMCLQ 389.

95 [2005] 3 SLR 719 (CA), noted in "Natural Forum and the Elusive Significance of the Jurisdiction Agreements" [2005] SJLS 448.

96 [2005] 3 SLR 719 at [31].

97 The weight of this authority is, however, somewhat undermined by the absence of discussion of the substantive issues above.

98 [2007] 1 SLR 377 (CA); A Briggs, "A Map or a Maze: Jurisdiction and Choice of Law in the Court of Appeal" (2007) 11 SYBIL (forthcoming); T M Yeo, "The Effect of Contract on the Law Governing Claims in Torts and Equity" (2007) 9 YPIL 459.

The defendant had been employed by the plaintiff in a contract governed by German law to broker the sale of Tang dynasty relics. The defendant sued the plaintiff in Germany for his commission as well as for damages for wrongful termination of the employment contract. The plaintiff alleged that while performing the contract the defendant had disclosed confidential information to potential buyers in Singapore, lied to the plaintiff about the events occurring in Singapore, and failed to return certain samples of the relics to the plaintiff. The plaintiff sued in Singapore for deceit and conversion of goods (torts) and for breach of fiduciary duty and duty of confidentiality (equity). This was a complex judgment dealing with many difficult issues of law. For the purpose of this article, the most significant paragraph is this:

> 15 Under Stage One [*of the* forum non conveniens *test in The Spiliada*[99]], we considered the following factors in order to determine if Singapore is the appropriate forum for the present proceedings:
>
> (a) general connecting factors;
>
> (b) the jurisdiction in which the tort occurred;
>
> (c) *choice of law, ie, whether the choice of law clause in the contract was exclusive, and if not, which law should be applied to the claims in tort and equity*; and
>
> (d) the effect of the concurrent proceedings in Germany.
>
> [emphasis added]

35 This passage introduced into the common law the concept of an *exclusive choice of law clause*. This concept is explained in a subsequent paragraph.[100] It appeared to have been argued by one side and conceded by the other that the choice of law clause was only intended to apply to contractual obligations arising out of the employment contract. Thus, the clause was not exclusive in the sense that it was not intended to apply to non-contractual obligations to the *exclusion of the common law choice of law rules*. The significance of the highlighted statement from the Court of Appeal judgment lies in the two-part query. The second part, the application of the traditional choice of law rules to the non-contractual obligations, is triggered only if the parties had not intended the chosen law to govern these obligations.

36 The statement might have been regarded as a one-off response to the specific arguments of counsel in the case, except that it appears to have now entered mainstream Singapore jurisprudence. The formula was restated by the Court of Appeal in *Good Earth Agricultural Co Ltd v*

99 [1987] AC 460.
100 [2007] 1 SLR 377 at [44].

Novus International Pte Ltd,[101] another *forum non conveniens* case, where the substantive dispute involved breach of contract and breach of fiduciary duties. One of the main factors to be considered in the first stage of the *forum non conveniens* test was "the choice of law (whether the choice of law in the contract was exclusive and if not, which law should be applied in the claims)".[102] On the facts, there was no contractual choice of law.

37 Although the issue has not been fully ventilated, this trilogy of Singapore Court of Appeal cases sends a strong signal that, in all likelihood, effect will be given to a contractual choice of law to govern non-contractual obligations arising from the contractual relationship between the parties, though it is probably subject to certain limitations. These limitations may be summarised as follows: There must have been a valid choice of law agreement. The parties' choice of law must be *bona fide* and legal. The effect of the application of foreign law must not contravene the fundamental public policy of the forum. International mandatory rules of the domestic law of the forum may apply in any event. It may also be that some obligations may be excluded from the scope of party autonomy. This last category of limitations is presented tentatively and its scope requires further and fuller consideration. One example may be obligations arising from an office created by law, *eg*, duties owed by a director to a company; but even so the forum may permit contractual choice of law if it is permitted by the applicable law, *ie*, the *lex incorporationis*.[103] Another may be intellectual property torts based on infringements of strictly territorial rights. It is suggested that, on the whole, this will be a development which will support Singapore's vision of developing itself as a hub for cross-border litigation and other methods of dispute resolution.

V. Scope of the choice of law clause

38 The third issue, if the answer to the second question is indeed in the affirmative, relates to the difference between the two categories of cases: when is a choice of law clause *exclusive* in the sense intended by the Singapore Court of Appeal, *ie*, it applies to non-contractual obligations as well?

39 In principle, this is a question of construction of the choice of law clause, an issue governed by the proper law of the contract. Where the common law is concerned, the trend in the construction of

101 [2008] 2 SLR 711.

102 [2008] 2 SLR 711 at [10].

103 See *Base Metal Trading Ltd v Shamurin* [2005] EWCA Civ 1316, [2005] 1 WLR 1157 at [69] and [77]; T M Yeo, "Choice of Law for Director's Equitable Duty of Care and Concurrence" [2005] LMCLQ 144 at 151.

commercial agreements has been to move away from technicalities of language to a stronger focus on contextual meanings in view of the substantive objective intentions of the contracting parties.[104] In this specific context, the words of Baxter J in the Supreme Court of California are instructive. He was considering the question whether a choice of law clause in a commercial contract also applied to claims in torts and breaches of fiduciary duties:[105]

> When two sophisticated, commercial entities agree to a choice-of-law clause … the most reasonable interpretation of their actions is that they intended for the clause to apply to all causes of action arising from or related to their contract …
>
> …
>
> When a rational businessperson enters into an agreement establishing a transaction or relationship and provides that disputes arising from the agreement shall be governed by the law of an identified jurisdiction, the logical conclusion is that he or she intended that law to apply to all disputes arising out of the transaction or relationship. We seriously doubt that any rational businessperson, attempting to provide by contract for an efficient and businesslike resolution of possible future disputes, would intend that the laws of multiple jurisdictions would apply to a single controversy having its origin in a single, contract-based relationship. Nor do we believe such a person would reasonably desire a protracted litigation battle concerning only the threshold question of what law was to be applied to which asserted claims or issues. Indeed, the manifest purpose of a choice-of-law clause is precisely to avoid such a battle.

40 In the specific context of cross-border dispute resolution, the most significant recent Commonwealth case on the interpretation of contracts is probably the House of Lords decision in *Premium Nafta Products Ltd v Fili Shipping Co Ltd*.[106] In a development much welcomed in commercial circles in the Commonwealth, the House of Lords held

104 See *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] SGCA 27. The leading English case is *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, [1997] UKHL 28, especially at 912–913.

105 *Nedlloyd Lines BV v San Mateo* 834 P 2d 1148, at 1153-1154, 11 Cal Rptr 2d 330 at 335–336 (Cal SC, 1992) (referring to claims in tort and breaches of fiduciary duties). More recent US authorities on the interpretation of the scope of contractual choice of law clauses beyond contractual issues are noted in S C Symeonides, "Choice of Law in the American Courts in 2004: Eighteenth Annual Survey" 92004) 52 Am J Comp L 919 at 972–973; "Choice Of Law in the American Courts in 2005: Nineteenth Annual Survey" (2005) 53 Am J Comp L 559 at 630–631.

106 [2007] UKHL 40, [2007] 4 All ER 951, [2007] Bus LR 1719 (appeal from *Fiona Trust and Holding Corp v Privalov* [2007] EWCA Civ 20); A Briggs, "Construction of an arbitration agreement: deconstruction of an arbitration clause" [2008] LMCLQ 1.

that a pragmatic and commonsensical approach shorn of linguistic technicalities should be taken to the interpretation of arbitration clauses, particularly to the question what disputes fall within the clause; commercial parties are generally presumed to intend a one-stop dispute resolution solution. What is of particular significance to this article is that Lord Hope of Craighead saw the same principles to be applicable to the interpretation of a *choice of law clause*.[107] The theme of the speeches in the case was giving effect to the reasonable expectations of commercial parties.

41 This theme is a familiar one in Singapore law. In *Tribune Investment Trust Inc v Soosan Trading Co Ltd*, Yong Pung How CJ in the Court of Appeal had reminded us that "the function of the court is to try as far as practical experience allows, to ensure that the reasonable expectations of honest men are not disappointed".[108] This is a fundamental principle that undergirds the common law which the Court of Appeal more recently saw fit to invoke again in *Jet Holding Ltd v Cooper Cameron (Singapore) Pte Ltd*.[109]

VI. Conclusion

42 In summary:

(a) The party autonomy which underlies the law relating to choice of court and choice of law clauses in contracts much valued by commercial parties may be outflanked by the rising significance of non-contractual obligations in disputes between contracting parties.

(b) The common law choice of law rules for obligations in restitution and equity give considerable weight to the relevance of any underlying contractual relationship between the parties, and the same is potentially (but less clearly) so for torts choice of law rules.

(c) It is possible for the common law to take a further incremental step to give effect to the parties' contractual choice of law to govern non-contractual obligations, subject to certain limitations (the choice must a valid one that is *bona fide* and legal, forum mandatory rules and fundamental public policies may be overriding, and some types non-contractual obligations may not be subject to parties' choice of law), and indications are that the step may already have been taken in Singapore law.

107 [2007] UKHL 40, [2007] 4 All ER 951, [2007] Bus LR 1719 at [27].

108 [2000] 3 SLR 405 (CA) at [40]. See also Lord Steyn, "Contract Law: Fulfilling the Reasonable Expectations of Honest Men" (1997) 113 LQR 433.

109 [2006] 3 SLR 769 (CA) at [111].

(d) Insofar as the last step is taken, the principles governing the interpretation of the choice of law agreement (assuming the common law applies as the governing law) should be no different from those governing the interpretation of choice of court and arbitration clauses, *ie*, generally in accordance with the reasonable expectations of commercial people.

43 The common law conflict of laws may be on the cusp of a development that is significant (albeit incremental), and the Singapore courts may well be on the cutting edge of this development.
