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Singapore Court of Appeal Affirms Party Autonomy in Choice of Court Agreements

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Professor Yeo Tiong Min, SC (honoris causa), Yong Pung How Professor of Law at Singapore Management University, has kindly provided the following report:

"The Singapore Court of Appeal has recently affirmed the significance of giving effect to party autonomy in the enforcement of choice of court agreements under the common law in three important decisions handed down in quick succession, on different aspects of the matter: the legal effect of exclusive choice of court agreements, the interpretation and effect of non-exclusive choice of court agreements, and the effect of exclusive choice of court agreements on anti-suit injunctions.

In *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] SGCA 65, proceedings were commenced in Singapore in respect of an alleged breach of a commercial sale contract containing an exclusive choice of English court agreement. The agreement was dated before the Hague Convention on Choice of Court Agreements took effect in English law, so the Convention was not engaged. Like many other common law countries, the Singapore courts would give effect to the agreement unless strong cause can be demonstrated by the party seeking to breach the agreement. A complication arose because there had been four previous decisions of the Court of Appeal in the shipping context where proceedings had been allowed to continue in Singapore in the face of an exclusive choice of foreign court agreement because the court had found that the defence was devoid of merits. The claimant's argument that based on these decisions the Singapore court should hear the case because there was no valid defence to its claim succeeded before the High Court.

Sitting as a coram of five on the basis of the significance of the issue, the Court of Appeal unanimously reversed the decision. It decided that the merits of the case were not a relevant consideration at the stage where the court was determining whether to exercise its jurisdiction, and departed from its previous decisions to the extent that they stood to the contrary. While affirming the continuing validity of the strong cause test, the court placed considerable emphasis on the element of contractual enforcement. Thus, factors that were reasonably foreseeable at the time of contracting would generally carry little or no weight. In particular, the court recast one of the traditional factors in the strong cause test, "whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages", as an inquiry into whether the party seeking to enforce the choice of court agreement was acting abusively in the context of cross-border litigation. In the view of the court, the genuine desire for trial in the contractual forum has been adequately expressed in the choice of court agreement itself, and it is legitimate to seek the procedural advantages in the contractual forum. The court considered that strong cause would generally need to be established by either proof that the party seeking trial in the contractual forum was acting in an abusive manner (which is said to be a very high threshold), or that the party evading the contractual forum will be denied justice in that forum (ignoring the foreseeable factors), for example if war had broken out in that jurisdiction.

The court left open the question whether the same approach would be taken if the choice of court agreement had not been freely negotiated, taking cognisance of situations, especially in the shipping context, where contracting parties may find themselves bound by clauses the contents of which they have had no prior notice. The court expressed the tentative view that as a matter of consistency, the same approach should be adopted.

In *Shanghai Turbo Enterprises Ltd v Liu Ming* [2019] SGCA 11, the Court of Appeal was faced with an unusual clause: "This Agreement shall be governed by the laws of Singapore/or People's Republic of China and each of the parties hereto submits to the non-exclusive jurisdiction of the Courts of Singapore/or People's Republic of China." The High Court found the choice of law agreement to be meaningless as a purported floating choice of law, and that the choice of court agreement was invalid as it could not be severed from the choice of law agreement. The court then applied the natural forum test and declined to exercise jurisdiction on the basis that China was the clearly more appropriate forum for the dispute. On appeal,

the Court of Appeal agreed with the finding that the choice of law agreement was invalid, but held that the choice of court agreement could be severed from the choice of law agreement.

In a prior decision, the Court of Appeal in *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] SGCA 16, had considered a non-exclusive choice of court clause to be relevant at the very least as a factor in the natural forum test, and that the weight to be accorded to the factor depended on the circumstances of each case. It also considered that there was another possible approach to such clauses based on contractual enforcement principles, which it did not fully endorse as the parties had not raised arguments based on contractual intentions.

In *Shanghai Turbo*, the Court of Appeal had to face this issue squarely, and affirmed that if there is a contractual promise in the non-exclusive choice of court clause, the party seeking to breach the agreement had to demonstrate strong cause why it should be allowed to do so. The court went on to hold that, generally, where Singapore contract law is applicable, the "most commercially sensible and reasonable" construction of an agreement to submit, albeit non-exclusively, to a court is that the parties have agreed not to object to the exercise of jurisdiction by the chosen court. This inference does not depend on there being an independent basis for the chosen court to assume jurisdiction (eg, by way of choice of law agreement), or on the number of courts named in the clause. Conversely, there is generally no inference that the parties have agreed that the chosen court is the most appropriate forum to hear the case.

Thus, practically, where there is a non-exclusive choice of Singapore court clause, in general the Singapore will hear the case unless strong cause (the same test elucidated in *Vinmar*) is demonstrated by the party objecting to the exercise of jurisdiction by the Singapore court, but where there is a non-exclusive choice of foreign court clause, this is merely a factor in the natural forum test, as the party seeking trial in Singapore is not in breach of any agreement. On the facts, the court held that jurisdiction should be exercised because the defendant could not demonstrate strong cause.

It is to be noted these are canons of construction under Singapore law. Under Singapore private international law, the choice of court agreement is governed by the law that governs the main contract unless the parties have indicated otherwise. However, Singapore law will apply in default of proof of foreign law. Moreover, canons of construction may be displaced by evidence of contrary intention. The court left open the question – expressing no tentative view – whether the same approach would be taken for contracts which are not freely negotiated. However, as this is a question of interpretation, the context of negotiation could be a relevant indication of the true meaning of contractual terms.

The third case is on arbitration, but the Court of Appeal also made comments relevant to choice of court agreements. In *Sun Travels & Tours Pvt Ltd v Hilton International (Maldives) Pvt Ltd* [2019] SGCA 10, an injunction was sought to prevent reliance on a foreign judgment obtained in proceedings commenced in breach of an arbitration agreement. The court correctly identified the remedy sought as an anti-enforcement injunction, but nevertheless also discussed the anti-suit injunction because the case was argued on the basis that the injunction sought followed from an entitlement to an anti-suit injunction. The court clarified that an anti-suit injunction would generally be granted to enforce a choice of court agreement unless strong cause is demonstrated why it should be denied, and that there is no need to demonstrate vexatious or oppressive conduct independently. Thus, the law in this area is the mirror image of *Vinmar*. This case is particularly significant for Singapore because statements in the previous Court of Appeal decision in *John Reginald Stott Kirkham v Trane US Inc* [2009] SGCA 32 could be read as suggesting that the breach of contract is merely one factor to consider in determining whether the conduct of foreign proceedings abroad was vexatious.

These common law developments are highly significant in bringing greater consistency with developments elsewhere where party autonomy has come to assume tremendous significance. One is the Hague Convention on Choice of Court Agreements which took effect in Singapore law on 1 October 2016. Two critical aspects of this Convention are that a choice of the court of a Contracting State is deemed to be exclusive unless there are express provisions to the contrary, and that the chosen court should assume jurisdiction unless the choice of court clause is invalid. The second is the Singapore International Commercial Court (SICC) established in 2015. Where there is a choice (whether exclusive or not) of SICC clause, the SICC will assume jurisdiction unless the case is not an appropriate one having regard to the court's character as an international commercial court. In addition, under the Rules of Court, a choice of the Singapore High Court made on or after 1 October

2016 is presumed to include the SICC unless expressly indicated otherwise. In both situations, the common law is not relevant, and to that extent, the practical effects of *Vinmar* and *Shanghai Turbo* will be limited. However, the extent to which anti-suit injunctions will be consistent with the Hague Convention on Choice of Court Agreements remains an open question, and it is certainly an area for watch for further developments."

A more detailed discussion of the cases mentioned above can be found at: https://cebcla.smu.edu.sg/sites/cebcla.smu.edu.sg/files/Paper2019.pdf