Eighth Yong Pung How Professorship of Law Lecture 2015

Staying Relevant: Exercise of Jurisdiction in the Age of the SICC

The launch of the Singapore International Commercial Court in January 2015 has brought changes to jurisdictional rules of the Singapore courts. This lecture will consider how common law rules on discretionary exercise of jurisdiction – stay of proceedings for service within jurisdiction and leave where applicable for service out of jurisdiction – have been modified by the new Order 110 of the Rules of Court, and how the common law rules may evolve further in the future.

"*I can't count the reasons I should stay*
One by one they all just fade away"[1]

Introduction

1. This lecture marks the eighth year since the foundation of this lecture series as well as the chair which I have the honour to hold. Both were made possible by a generous donation from the Yong Shook Lin Trust, in honour of Mr Yong Pung How. Mr Yong has been closely associated with SMU, having given tremendous support to the School of Law since its inception in 2007. He chaired the inaugural Advisory Board of the School. He has served as Chancellor of this University since 2010. He continues to give generously to the School of Law. Previously, Mr Yong had served as the second Chief Justice of independent Singapore from 1990 to 2006. During that period, he was instrumental in instituting major reforms to modernise the legal system in Singapore and raising it to world class standards. Mr Yong had laid the foundations to enable his successor, Chief Justice Chan Sek Keong, to consolidate substantive Singapore jurisprudence. In turn, Chief Justice Chan's successor, Chief Justice Sundaresh Menon, looks set to bring the

[1] From the song "At Least it was Here" by *The 88*, from their (soundtrack) Album "Community" (2010), with apologies for taking it out of context.

Singapore legal system to even greater heights. The launch of the Singapore International Commercial Court (SICC) marks a major turning point as Singapore moves into a new age of globalisation of legal services.[2]

2. In this lecture I propose to consider the rules on the existence and especially the exercise of jurisdiction in the SICC, with a focus on international jurisdiction, and how it relates to, or is affected by, or may affect the pre-existing structure of common law discretionary jurisdiction. I will also consider how the Hague Convention on Choice of Court Agreements will affect the existing scheme for international jurisdiction. For the purpose of this lecture, I will focus on *in personam* civil jurisdiction, as the SICC is concerned only with this.

Existence and Exercise of Jurisdiction of the Singapore High Court – An Overview

3. The jurisdiction of the Singapore High Court is founded on statute, the Supreme Court of Judicature Act (SCJA),[3] read with its subsidiary legislation, the Rules of Court,[4] and supplemented by the common law where not inconsistent with legislation. The High Court has *in personam* civil jurisdiction if the defendant is present to be served with originating process in Singapore, or is served outside Singapore with the leave of court.[5] The Singapore High Court also has jurisdiction if the defendant has submitted to its jurisdiction.[6] These rules apply to both domestic and cross-border cases, but I will focus on their application to cross-border cases. For the purpose of this lecture, I refer to this as international jurisdiction.

[2] Set to make history as the first case to be heard in the SICC (transferred from the High Court) is *BCBC Singapore Pte Ltd v PT Bayan Resources TBK*, SIC/S 1/2015.
[3] Cap 322 (2007 Rev Ed), as amended by the Supreme Court of Judicature (Amendment) Act (Act 42 of 2014) with effect from 1 January 2015.
[4] Cap 322, R 5, as amended by Rules of Court (Amendment No. 6) Rules 2014 (S 850/2014) with effect from 1 January 2015.
[5] Section 16(1)(a), SCJA.
[6] Section 16(1)(b), SCJA.

4. If jurisdiction has been obtained as of right, the defendant may apply to stay proceedings on the basis that the case ought to be heard in a foreign country. Leave of court for service of process out of jurisdiction is discretionary, and will not be granted if the court can be persuaded that the case ought to be heard elsewhere. The principles governing the exercise of jurisdiction in both contexts are the same, though there are operational differences due to the different procedural contexts. The applicable principles depend on whether there is a choice of court agreement.

5. If there is an exclusive choice of court agreement, the agreement will be given effect to unless it would be unreasonable to do so.[7] The party seeking to breach the agreement needs to show exceptional circumstances amounting to strong cause why he should not be held to the agreement. Considerations of expense and convenience take a back seat. The same principle applies whether the choice is of a Singapore or a foreign court.

6. If there is no choice of court agreement, then the principles of natural forum apply. The general principle, commonly known as the *Spiliada* principle, is that the case ought to be tried in the most appropriate forum, in the interests of the parties and the ends of justice.[8] Where jurisdiction is obtained as of right, the defendant needs to show that there is an available and clearly more appropriate forum elsewhere. Expense and convenience are the primary considerations at this stage. If he cannot do so, normally the Singapore court will hear the case. If he can, then the court would stay proceedings unless the plaintiff can show that, after taking into account all the circumstances of the case, the plaintiff would be deprived of substantial justice if the case is not heard in Singapore. In the case of service out of jurisdiction, the plaintiff needs to show that Singapore is the most appropriate

[7] *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd* [1977-1978] SLR 112; The *Asian Plutus* [1990] 2 SLR(R) 504 at [9].
[8] *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

forum to hear the case.[9] If the plaintiff cannot convince the Singapore court that it is clearly more appropriate than alternatives raised by the defendant, he may still convince the court to grant leave if he can show that he will be deprived of substantial justice if the case is not heard in Singapore.

7. It is notable that the Singapore Court of Appeal has twice affirmed the common law "most appropriate forum" test[10] and not followed the alternative test of "clearly inappropriate forum" test adopted by the courts in Australia.[11] In the latter approach, the focus is not on which forum is more appropriate than the other, but on whether the local forum is clearly unsuitable to hear the case. Although conceptually a different approach, the court nevertheless takes foreign connections into considerations, and it is thought that the cases where the two tests would produce different results are probably marginal.[12] The Singapore courts have preferred the "most appropriate forum" test as being more aligned with considerations of international comity.

8. In recent years, a considerable body of case law has developed in respect of non-exclusive choice of court clauses. All choice of court agreements, whether exclusive or non-exclusive, contain a *prorogation* element: a submission to the jurisdiction of the chosen court. In most countries this provides s a sufficient nexus for the chosen court to take jurisdiction. The key differentiating factor for the exclusive choice of court agreement is the element of *derogation*: the parties have promised not to sue anywhere else but in the chosen court. This promise not to sue elsewhere is the basis of modern common law authorities in the enforcement of exclusive choice of court agreements – the governing principle is

[9] *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007.
[10] Bearing in mind the relativity of the concept. The search is in practice for a clearly more appropriate, rather than *the* most appropriate forum: *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [53].
[11] *Eng Liat Kiang v Eng Bak Hern* [1995] 2 SLR(R) 851; *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391.
[12] In practice, the "clearly inappropriate forum" test has led to many refusals to stay proceedings in Australia, but mostly in in personal injury claims: M Davies, AS Bell, & PLG Brereton, *Nygh's Conflict of Laws in Australia* (Sydney: Lexisnexis, 8th ed, 2010) at [8.27].

to hold the parties to their bargain unless it would be unjust or unreasonable to do so. There is no such promise in the case of the non-exclusive choice of court agreement. Non-exclusive choice of court clauses can raise complex issues which I have discussed elsewhere.[13] For present purposes, it is sufficient to point out that the agreement is at least a relevant factor to be taken into consideration in the considering the *Spiliada* principles; and that in some cases, the non-exclusive choice of court agreement may contain promises by the contracting parties to waive objections to the court's exercise of its international jurisdiction.

9. In summary, principles governing the exercise of jurisdiction in the common law fall into two broad categories: the enforcement of a bargain in respect of exclusive choice of court agreement; and the balancing of multiple factors in the determination of the most appropriate forum. Non-exclusive choice of court agreements can in some circumstances modify the operation of the *Spiliada* principles in the latter category.

Jurisdiction of the SICC

10. The jurisdiction of the SICC follows the common law concepts of existence and exercise of jurisdiction. Whether the court has jurisdiction, and whether it will assume jurisdiction are two separate legal issues.

Existence of Jurisdiction

11. The SICC was established as a division of the Singapore High Court. Following the terminology of Order 110 of the Rules of Court, I shall hereafter refer to the "High Court" to mean the rest of the High Court other than the SICC. The jurisdiction of the SICC is defined in section 18D SCJA. Its jurisdiction is circumscribed by three cumulative parameters:

    (a) the action is international and commercial in nature;

[13] "The Contractual Basis of the Enforcement of Exclusive and Non-Exclusive Choice of Court Agreements" (2005) 17 SAcLJ 306. See also *Orchard Capital Ltd v Ravindra Kuma Jhunjhunwala* [2012] 2 SLR 519.

(b) the action is one that the High Court may hear and try in its original jurisdiction;
(c) the action satisfies such other conditions as the Rules of Court may prescribe.

12. The reference to the High Court's jurisdiction is significant. The SICC cannot have a larger base of jurisdiction than the High Court. Practically, this means that the SICC will be constrained in the same way that the High Court would be. For example, the limitation that the court will not adjudicate a case that involves title or possessory rights to foreign immovable property is a subject matter limitation[14] that will apply equally to the SICC, and the parties cannot overcome this limitation by their consent. Similarly, the SICC may, like the High Court, lack jurisdiction to deal with certain types of questions that are regarded as non-justiciable in a court of law.[15]

13. The SCJA does not define "international" or "commercial". This is left to Order 110 of the Rules of Court. "International" is defined in Order 110, Rule 1(2)(a). Unless otherwise required by the context, a claim is international if:

(i) the parties to the claim have, by a written jurisdiction agreement, agreed to submit the claim for resolution by the Court and, at the time the agreement was concluded, the parties have their places of business in different States;
(ii) none of the parties to the claim have their places of business in Singapore;
(iii) one of the following places is situated outside any State in which any of the parties have their places of business: (A) any place where a substantial part of the obligations of the commercial relationship between the parties is to be performed; (B) the place with which the subject-matter of the dispute is most closely connected; or

[14] *Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria* [2009] 1 SLR 508 at [8].
[15] *Buttes Gas and Oil Co v Hammer* [1982] AC 888. See however L Collins, "Foreign Relations and the Conflict of Laws" (1995-1996) KCLJ 20; L Collins, "Foreign Relations and the Judiciary", (2002) 51 ICLQ 485. Anglo-Australian law have in more recent times applied a more circumscribed approach to limit the scope of the doctrine: C Sim, "Non-Justiciability in Australian Private International Law: A Lack of 'Judicial Restraint'?" (2009) 10 Melb J Intl Law 9; R Garnett, "Foreign States in Australian Courts", (2005) 29 Mel U L Rev 704.

(iv) the parties to the claim have expressly agreed that the subject-matter of the claim relates to more than one State;

14. The first three are fairly straightforward tests based on factual connections. The fourth raises the question whether a case can be made "international" merely by the subjective intentions of the contracting parties, or whether the court must look at the underlying facts to determine if their agreement has some factual foundation. Bearing in mind that section 18D SCJA must also be satisfied, this also requires analysis of the meaning of "international" under the parent statute. In favour of the objective approach, it may be argued that if Parliament had intended contracting parties to have the power to "internationalise" an otherwise domestic transaction, it is odd that it had not given them the converse power to "domesticate" an otherwise "international" case.

15. "Commercial" is broadly defined in Order 110, Rule 1(2)(b):

> "a claim is commercial in nature if the subject-matter of the claim arises from a relationship of a commercial nature, whether contractual or not, including (but not limited to) any of the following transactions:
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> (i) any trade transaction for the supply or exchange of goods or services;
> (ii) a distribution agreement;
> (iii) commercial representation or agency;
> (iv) factoring or leasing;
> (v) construction works;
> (vi) consulting, engineering or licensing;
> (vii) investment, financing, banking or insurance;
> (viii) an exploitation agreement or a concession;
> (ix) a joint venture or any other form of industrial or business co-operation;
> (x) a merger of companies or an acquisition of one or more companies;
> (xi) the carriage of goods or passengers by air, sea, rail or road;"

16. The definition itself is circular, referring to a "relationship of a commercial nature", but the enumerated transactions suggest a very broad canvas. Old cases on the meaning of "mercantile" law for the purpose of the infamous but now repealed section 5 of the Civil Law Act which had provided for the continuing

reception of English law in mercantile matters are not likely to be very helpful. It is more sensible to start with the words of Order 110 (and section 18D SCJA) as a matter of modern statutory interpretation.

17. No mention is made whether the parties may agree that their relationship is commercial or not. Presumably the test is entirely objective.

18. Apart from the action being international and commercial in nature,[16] the Rules also require that the parties have submitted to the jurisdiction of the SICC under a written jurisdiction agreement[17] (whether exclusive or non-exclusive[18]). Additionally, jurisdiction can also be obtained if a case is transferred to the SICC by the High Court. In both cases, jurisdiction may be obtained by joinder over third parties who have not consented to the jurisdiction of the SICC.[19] It has been assumed that the third party claim need not be of an international and commercial character;[20] certainly the Order 110 does not impose that requirement. However, SCJA, section 18D(a) clearly limits the SICC's subject matter jurisdiction to trying international and commercial actions.[21]

19. Judicial review matters are generally excluded from its jurisdiction.[22]

20. A "written" jurisdiction agreement can be entered into orally or by conduct, so long as the content is recorded in a way that is accessible so as to be useable for subsequent reference.[23] Model clauses are available from the SICC website.[24] An agreement to submit to the jurisdiction of the High Court will not by itself

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[16] Order 110, Rule 7(1)(a). This is ascertained at the time the originating process is first filed.
[17] Order 110, Rule 7(1)(b).
[18] Order 110, Rule 1(1).
[19] Except that a State or Sovereign of a State must consent under a written jurisdiction agreement: Order 110, Rule 9(2).
[20] Note 1 (Jurisdiction), para [7] of the *Singapore International Commercial Court User Guides* (http://www.sicc.gov.sg/documents/docs/SICC_User_Guide_1.pdf).
[21] On the other hand, jurisdiction in contempt proceedings (Order 110, Rule 7(2)(b)) is incidental and necessary to the court's powers of enforcement of its judgments or orders given in respect of actions within its subject matter jurisdiction.
[22] Order 110, Rule 7(1)(c); Rule 9(1)(b)(i); Rule 12(4)(a)(i).
[23] All this requires is that the contents are recorded in any form so long as the information is accessible so to be useable for subsequent reference: Order 110, Rule 1(2)(e).
[24] http://www.sicc.gov.sg/documents/docs/SICC_Model_Clauses.pdf.

constitute an agreement to submit to the jurisdiction of the SICC,[25] and vice versa.[26]

21. Section 18F of the SCJA provides:

> (1) Subject to subsection (2), the parties to an agreement to submit to the jurisdiction of the Singapore International Commercial Court shall be considered to have agreed
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> (a) to submit to the exclusive jurisdiction of the Singapore International Commercial Court;
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> (b) to carry out any judgment or order of the Singapore International Commercial Court without undue delay; and
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> (c) to waive any recourse to any court or tribunal outside Singapore against any judgment or order of the Singapore International Commercial Court, and against the enforcement of such judgment or order, insofar as such recourse can validly be waived.
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> (2) Subsection (1)(a), (b) and (c) applies only if there is no express provision to the contrary in the agreement.

22. The primary effect of this section is to create a rebuttable presumption that a choice of the SICC is an exclusive choice. However, does this section apply if the choice of court agreement is governed by foreign law? Generally speaking, although a choice of court agreement may be regarded as a distinct agreement from the main contract and having its own governing law, the common law approach has to been to assume that the parties intended the law governing the main contract to govern the choice of court clause.[27] Thus, if the main contract is governed by French law and the parties are silent as to the law governing the choice of court clause, the choice of court clause would be governed by French law. Whether section 18F applies to a contract governed by foreign law is a matter

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[25] Order 110, Rule 1(2)(c).

[26] Order 110, Rule 1(2)(d).

[27] *Orchard Capital I Ltd v Ravindra Kumar Jhunjhunwala* [2012] 2 SLR 519; *Abdul Rashid bin Abdul Manaf v Hii Yii Ann* [2014] SGHC 194. *Firstlink Investments Corp Ltd v GT Payment Pte Ltd* [2014] SGHCR 12 decided that an arbitration agreement is governed by the law of the seat of the arbitration, rather than the law of the main contract, in the absence of choice of law. The applicability of this line of reasoning to choice of court clauses has not been tested in the common law. Under the Hague Convention on Choice of Court Agreements 2005, the validity of the choice of court agreement is governed by the law applied by the chosen court (including its private international law).

of statutory interpretation.[28] There is a general presumption against extraterritoriality[29] but it may be easily rebuttable in this instance as the provision is intended to deal with international cases. On the other hand, it is arguably incongruous to apply a provision as a forum mandatory rule in an area where party autonomy plays such a significant role. In any event, even if section 18F is characterised as a forum mandatory rule, at least if there is an express choice of law clause in the agreement, it is strongly arguable that this is an express provision to the contrary under section 18F(2), since the parties have indicated that they do not want Singapore law to apply.

23. Leave of court is not required in the case of service out of jurisdiction on a party to a written choice of SICC agreement.[30] This makes it more convenient to commence proceedings in the SICC, but perhaps only marginally so because it is generally not difficult to obtain leave if there is a choice of Singapore court clause. Parties who choose the High Court can always stipulate a mode of service in their contract and leave will not be required for service within Singapore,[31] though leave is still required if the service is out of jurisdiction.[32] This facility is also available for choice of SICC clauses,[33] except that leave of court will not be necessary even for a contractually stipulated mode of service outside Singapore.[34]

24. The dispensation of the leave requirement has another important consequence. In the normal service out of jurisdiction case, the plaintiff carries the burden of convincing the Singapore court to exercise its international jurisdiction. Jurisdiction of the SICC over a defendant who has agreed in writing to submit to its jurisdiction is established as of right, whether he is served in or out of

[28] *JIO Minerals FZC v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [98]-[100].
[29] *Ibid*; *Beluga Chartering GmBH (in liquidation) v Beluga Projects (Singapore) Pte Ltd* [2014] 2 SLR 815 at [48].
[30] Order 110, Rule 6(2).
[31] Order 10, Rule 3(1).
[32] Order 10, Rule 3(2). Generally, it will not be difficult to obtain leave in such cases.
[33] The Rules of Court apply to the SICC where not inconsistent with Order 110 (Order 110, Rule 3).
[34] Order 10, Rule 3(2) requiring leave for service out of jurisdiction is inconsistent with Order 110, Rule 6(2).

Singapore. The defendant bears the burden of persuading the court not to exercise its jurisdiction, unless the court decides to decline jurisdiction on its own motion.

Exercise of Jurisdiction in the SICC

25. The SICC may determine whether it has jurisdiction or whether it should decline to assume jurisdiction either on its motion at any time so long as it has heard the parties on the issue[35] or on the application by a party within a limited time.[36] If the SICC decides that it has no jurisdiction or that it will decline to assume jurisdiction, then it must transfer proceedings to the High Court if: (a) it considers that the High Court has and will assume jurisdiction; and (b) all parties consent to the transfer.[37] Otherwise, the SICC may dismiss or stay the proceedings or make any other order as it sees fit.[38] Presumably this includes a power to order a transfer to the High Court even if the parties have not consented.

26. Assuming that the jurisdictional grounds are satisfied, challenges to the SICC's exercise of jurisdiction could be premised on two possible conceptual bases: (1) that the case should not be heard in Singapore at all; or (2) the case should be heard in the Singapore High Court instead. They call for distinctly different considerations. The contest of jurisdiction between the SICC and foreign courts raise private international law considerations of international allocation of jurisdiction. The common law dealt with this problem with the principle of "strong cause" in the case of an exclusive choice of court clause, and the *Spiliada* principle in other cases. The choice of jurisdiction between the SICC and the High Court does not raise questions of private international law; it raises an issue of internal allocation of jurisdiction between divisions of the same domestic court, usually resolved by reference to the subject matter of the dispute. Unfortunately, it is not always easy to disentangle these two strands.

[35] Order 110, Rule 10(1)(a)
[36] Order 110, Rule 10(1)(b) and Rule 11.
[37] Order 110, Rule 10(3)(a).
[38] Order 110, Rule 10(3)(b).

Cases Commenced in the SICC

27. The principles on the exercise of jurisdiction by the SICC are set out in Order 110, Rule 8:

> (1) Subject to paragraph (2), the Court may decline to assume jurisdiction in an action under Rule 7(1) if it is not appropriate for the action to be heard in the Court.
> (2) The Court must not decline to assume jurisdiction in an action solely on the ground that the dispute between the parties is connected to a jurisdiction other than Singapore, if there is a written jurisdiction agreement between the parties.
> (3) In exercising its discretion under paragraph (1), the Court shall have regard to its international and commercial character.

28. These provisions only apply to actions commenced in the SICC,[39] ie, where there is an exclusive or non-exclusive choice of SICC agreement.

29. Rule 8(1) clearly deals with the issue of internal allocation of jurisdiction between the SICC and the High Court. The language is consistent with the *Report of the Singapore International Commercial Court Committee* which advocated the transfer of cases to the High Court where the action is "clearly inappropriate" to be heard in the SICC.[40] Only cases of an international and commercial nature fall within its jurisdiction in the first place. However, even within this category, some cases may be rooted in a non-commercial context or raise public policy issues of a very local nature, such that they are not appropriate for the SICC. For example, a dispute on the ownership of shares in a listed company is on the surface a highly commercial one, but it may have arisen from an agreement on the division of matrimonial assets. A commercial dispute may turn on a question of the constitutional validity of a local statute.

30. Rule 8(1) also states a test for international jurisdiction. There is no need to be subject to Rule 8(2) – which clearly deals with international jurisdiction – if it is

[39] Under Order 110, Rule 7(1).
[40] https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Annex_A_-_SICC_Committee_Report.pdf, at para [28].

not concerned with international jurisdiction. The question is whether it is the *exclusive* test for international jurisdiction, since it does expressly say that the SICC may decline jurisdiction only under that test. For example, may the SICC also decline jurisdiction if there is a clearly more appropriate forum abroad, or if there is strong cause not to hold the parties to their choice of court agreement?

31. Does Rule 8(2) override common law principles for stay of proceedings? Read literally, it does not. At common law, the court never stays proceedings *solely* on the ground that the dispute is connected to a foreign jurisdiction. In the case of an exclusive choice of forum agreement, if a stay is granted it is because it would be unreasonable or unjust to enforce the agreement; the connection of the dispute to a foreign jurisdiction is clearly inadequate as a ground for staying proceedings. Applying *Spiliada*, proceedings are stayed when the court is convinced that dispute is clearly more closely connected to a foreign jurisdiction *and* the stay does not cause injustice to the plaintiff.

32. However, this reading will denude the rule of any real effect. The fact that fresh rules are being drafted on international jurisdiction indicates an intention to depart from the pre-existing law. The business model in arbitration that the SICC follows suggests that grounds for declining jurisdiction are intended to be narrow, and this is also the gist of the recommendation in the *Report of the Singapore International Commercial Court Committee*.[41] A purposive interpretation would suggest that Rule 8(1) sets out a single test for international jurisdiction, to the exclusion of the common law tests. Thus, jurisdiction may be declined *if and only if* the case is not appropriate to be heard in the SICC. Rule 8(2) restricts Rule 8(1) by limiting the SICC's reference to foreign connections in the exercise of its discretion. At first blush, Rule 8(1) looks conceptually similar to the Australian "clearly inappropriate forum test" that was previously rejected in Singapore.[42]

[41] *Ibid*, at paras [26]-[27].
[42] See note 11 above.

However, to the extent that Rule 8(2) is read to exclude the most appropriate forum test because of its reliance on foreign connections, it is hard to see how the "clearly inappropriate forum" test, which also analyses foreign connections closely, has survived the Rule. The difference between the two tests is whether one is looking to see whether the foreign connections indicate that there is a clearly more appropriate forum elsewhere, or they make the forum a clearly inappropriate one. Thus, it would be dangerous to assume that Rule 8(1) encapsulates the Australian test of "clearly inappropriate forum".[43]

33. The meaning of Rule 8(1) and 8(2) will need to be worked out from the ground as cases come for decision. Rule 8(2) does not strictly rule out taking foreign connections into account, provided they are not the sole basis of the decision. Considerations that could cause it to be inappropriate for a case to be heard in Singapore may include: where the dispute involves the validity of entries in foreign registration systems,[44] or where third party rights are affected in a way that cannot readily be addressed by joinder procedures, or where there is a very high risk of conflicting judgments especially in the case of a non-exclusive choice of court agreement.

34. Rule 8(3) is significant as well. The SICC is directed to have regard to its international and commercial character when deciding whether to exercise jurisdiction. As every case is international and commercial (as a jurisdictional fact), it can only be the starting point that the case is an appropriate one to be heard.

Exclusive and Non-Exclusive Choice of the SICC

35. In the exercise of international jurisdiction of the SICC, the same test applies for both exclusive and non-exclusive choice of SICC agreement. It may be that with

[43] See also Note 1 (Jurisdiction), para [4] of the *Singapore International Commercial Court User Guides* (http://www.sicc.gov.sg/documents/docs/SICC_User_Guide_1.pdf) suggesting that foreign connections may not be taken into account at all.
[44] Assuming that there is subject matter jurisdiction in the first place.

the presumption of exclusivity in SCJA section 18F, cases of non-exclusive choice will become marginal. A high threshold for declining jurisdiction is clearly justified in the case of an exclusive jurisdiction clause, to respect the agreement of the parties.

36. In a non-exclusive jurisdiction agreement, the parties have not agreed that proceedings cannot be commenced elsewhere, and in some cases may actually have expressly provided that they can sue elsewhere. The thinking behind the SICC approach may be found in the *Report of the Singapore International Commercial Court Committee*, which suggested following the approaches in Hague Convention on Choice of Court Agreements and arbitration cases.[45] The presumption of exclusivity was borrowed from the Hague Convention. An arbitration agreement necessarily implies a promise not to sue in any court of law, so it is analogous to an exclusive rather than a non-exclusive choice of court agreement. Nevertheless, no injustice is caused since the SICC is a specialist court and parties choosing the SICC ought to be aware of the consequences of their choice. It could even be argued, in some cases at least, that as a matter of construction the parties had in the circumstances promised not to object to the exercise of jurisdiction by the SICC.

37. The distinction between exclusive and non-exclusive choice of the SICC remains important in other respects. In the case of an exclusive choice of SICC agreement, the jurisdiction of the SICC may be reinforced by an anti-suit injunction to restrain a breach of contract if proceedings are commenced in a foreign court. Order 110 does not apply to anti-suit injunctions so the common law continues to apply. In the absence of a breach of contract, the anti-suit injunction will be granted on very restrictive grounds.[46] Generally it should not be as difficult to obtain an anti-injunction to restrain a breach of contract because international

[45] Note 40 above, at para [27].

[46] It must be demonstrated that the forum is the natural forum, and the action in commencement or continuation of foreign proceedings amounts to vexatious, oppressive, or unconscionable behaviour.

comity plays a reduced role where the objective of the injunction is to enforce a contractual bargain. Additionally, damages for breach of contract could be available as a remedy if actions are commenced in foreign courts in breach of the clause. Finally, one could run the argument that a foreign judgment obtained in breach of a jurisdiction agreement should not be recognised.[47] The difference can also be important from the perspective of a foreign court if proceedings are commenced there. As general rule, a foreign court is considerably more likely to stay its own proceedings in favour the SICC if the choice is exclusive rather than non-exclusive.

Transfer of Cases from High Court to SICC

38. The High Court may transfer a pending case to the SICC when either all the parties have consented to the transfer or the High Court so decides after hearing the parties,[48] and if and only if it considers that:[49]

    (a) the claims are of an "international and commercial nature";
    (b) the SICC will assume jurisdiction in the case; and
    (c) it is more appropriate for the SICC to hear the case.

39. The first requirement is self-explanatory as it refers to jurisdictional facts for the SICC. The second requires the High Court to consider whether the SICC will assume jurisdiction, and by logical extension, whether the SICC would decline to assume jurisdiction.[50] The third requirement makes it clear that it is not relevant that it is appropriate for the High Court to hear the case so long as it is *more appropriate* for the SICC to hear the case. This address the comparative

[47] This is so in respect of a Hong Kong SAR judgment sought to be registered under the Reciprocal Enforcement of Foreign Judgments Act (Cap 265, 2001 Rev Ed) (s 5(3)(b)). The position under the Reciprocal Enforcement of Commonwealth Judgments Act, Cap 264 (1985 Rev Ed) and in the common law is less clear.

[48] A contractual exclusion of the SICC can at best be taken into consideration by the High Court and will not be determinative. No question of using "strong cause" to justify breach arise when both parties are resisting the transfer, and in any event, the "strong cause" test is not relevant because the only issue is internal allocation of jurisdiction between divisions of a single court.

[49] Order 110, Rule 12(4).

[50] The SICC may decline to assume jurisdiction at any time on its own motion (Order 110, Rule 10(1)(a)), so that it is not a valid objection that the usual period for parties to raise jurisdictional challenge (Order 12, Rule 7 and Order 110, Rule 11) has passed.

appropriateness between the SICC and the High Court, and raises the issue of internal allocation of jurisdiction.

40. Does the test that the "SICC will assume jurisdiction"[51] require the High Court to consider whether the SICC would assume jurisdiction on both subject matter appropriateness as well as international jurisdiction appropriateness? Ordinarily, a transfer from the High Court to the SICC would raise only issues of internal allocation of jurisdiction. But since the High Court can initiate the transfer at any time, it is possible that international jurisdiction is still a live issue at the time transfer is being considered. This could happen if the High Court is considering whether to stay proceedings in favour of a foreign court, or to hear the case Singapore and possibly transfer the case to the SICC. Given the interconnectedness of the issues, this would not be an unreasonable course of action. In this scenario, should the High Court apply its own international jurisdiction standards, or the international jurisdiction standards of the SICC? There is no provision for the SICC to decline jurisdiction in a transfer case. It could be argued that (a) the common law applies by default; or (b) the SICC would apply Rule 8 by analogy;[52] or (c) there is no power for declining jurisdiction in a transfer case, on the argument of *expressio unius est exclusio alterius*. The third view is reinforced by the provisions that in transfer cases, the receiving court will not reconsider whether it has or will assume jurisdiction.[53]

41. The issue of international jurisdiction should as a matter of principle be determined by the High Court according to its own rules of international jurisdiction as it is the court seised of the action. It should decides that question before deciding the case should be transferred to the SICC, even if one decision should follow immediately after the other. Logically, the question of international

[51] Order 110, Rule 12(4)(a)(ii)
[52] Rule 8(2) is confined to cases with a written jurisdiction agreement, suggesting that Rule 8(1) may not be so confined.
[53] Order 110, Rule 12(5)(a).

jurisdiction precedes the issue of internal allocation of jurisdiction. The balance of principle, policy, and international comity that underlies the common law test of strong cause to uphold bargains and the interests of the parties and the ends of justice in the *Spiliada* test continues to be relevant at this stage. In other words, transfer to the SICC should not engage SICC's rules of international jurisdiction.

Transfer of Cases from SICC to High Court

42. The Rules provide for cases to be transferred from the SICC to the High Court in two situations. First, if the SICC decides that it has no jurisdiction or declines to assume jurisdiction, it must transfer the case to the High Court if it considers that the High Court has and will assume jurisdiction and all the parties consent to the transfer. Secondly, the SICC may order a transfer if the SICC considers that the High Court has and will assume jurisdiction and that it is more appropriate for the case to be heard in the High Court, upon the application of one party with the consent of all parties. In both cases, the SICC is required to consider whether the High Court will assume jurisdiction, and this in theory includes whether the High Court will decline to assume jurisdiction.

43. Transfers from the SICC to the High Court with consent of all parties[54] do not however raise live international jurisdiction issues since the parties would have impliedly agreed to the High Court exercising jurisdiction. In such cases, the High Court cannot reconsider jurisdiction.[55] If the SICC orders the transfer of a case to the High Court after declining jurisdiction without the consent of all parties,[56] then High Court is not precluded from considering international jurisdiction afresh. This is analogous to a fresh action before the High Court and should be treated as such for the purpose of determining the exercise of its international jurisdiction.

[54] Order 110, Rule 10(3)(a) and Rule 12(1)(3).
[55] Order 110, Rule 10(4) and Rule 12(5).
[56] Order 110, Rule 10(3)(b).

Third Parties

44. Third parties not bound by the jurisdiction clause may be joined to the proceedings before the SICC under Rule 9. There are two aspects of joinder: the substantive reasons for joining the third party, and international jurisdiction over the third party. I will focus on the latter issue. Under the common law, in joinder proceedings, a third party may challenge the exercise of jurisdiction on the basis that the dispute in relation to the third party should not be heard in Singapore. If he was served within jurisdiction, he could apply for stay of proceedings on grounds of *forum non conveniens*. If served out of jurisdiction, he could challenge the leave of court on the basis that Singapore was not *forum conveniens*.[57] If the dispute in relation to the third party is subject to an exclusive choice of court (whether forum or foreign) agreement, then the applicable test would be "strong cause".[58]

45. Leave of court will be required for service of process out of Singapore on a third party who has not consented to the jurisdiction of the SICC under a written jurisdiction agreement.[59] This effected through Order 11,[60] which requires a "proper"[61] case to be demonstrated, and "proper" case includes showing that Singapore is *forum conveniens*, or in the case of an exclusive choice of foreign court agreement, "strong cause".[62] However, Order 11 must be read subject to Order 110,[63] and Order 110, Rule 9 sets out a different test for international jurisdiction, ie, that it is "appropriate" for the SICC to assume jurisdiction over the third party,[64] even if the dispute in relation to the third party is subject to an

[57] See, eg, *Kishinchand Tiloomal Bhojwani v Sunil Kishinchand Bhojwani* [1997] 1 SLR(R) 518; *The Baltic Flame* [2001] 2 Lloyd's Rep 203 (CA).
[58] See, eg, *Donohue v Armco* [2002] 1 All ER 749, [2001] UKHL 64.
[59] Order 110, Rule 6(2) does not dispense with the leave requirement for service out of jurisdiction in such a case.
[60] Many grounds are potentially available under Order 11, Rule 1, but in the absence of any other connection the third party may be served under Rule 1(c) on the basis that he is a "necessary or proper party" to an action already brought within the jurisdiction of the court.
[61] Order 11, Rule 2(2).
[62] Service out of jurisdiction is used as a more obvious illustration. The same issues apply to service on the third party within jurisdiction.
[63] Order 110, Rule 3.
[64] Order 110, Rule 9(1)(b)(ii). The substantive considerations for joining are addressed in Order 110, Rule 9(1)(a).

exclusive choice of foreign court agreement. The threshold is that Singapore is an appropriate forum, ie, not that it is a more appropriate forum, not that there is strong cause to exercise jurisdiction in the face of an exclusive choice of foreign court agreement.[65] In this context, the court can take foreign connections into account.[66] Even if the third party claim need not be international and commercial,[67] it obviously has to be sufficiently connected with the main action which is necessarily international and commercial to justify a joinder. Rule 9(3) directing the court to have regard to its international and commercial character thus signals a lean towards assuming jurisdiction. There is some resemblance to the Australian "clearly inappropriate forum" test, but one should not be too quick to assume that it is an endorsement of this common law approach. On the whole, it appears to be easier to establish international jurisdiction over third parties in joinder proceedings in the SICC than in the High Court.[68] Nevertheless, considerable difficulties remain in enforcing judgments against third parties in other countries.[69]

The Future of the Common Law

46. Cross-border cases will come to Singapore in two streams. One to the SICC when it has been chosen pursuant to a written jurisdiction agreement, and another to the High Court where there is no such agreement. By default, the High Court continues to apply common law principles in the exercise of its jurisdiction. The "strong cause" test applies to exclusive choice of court cases, *Spiliada* principles

[65] Unlike 8(2) which is framed in the negative (court may decline jurisdiction if it is not the appropriate forum), Rule 9((1)(b)(ii) is phrased in the positive (court to assume jurisdiction if the claims are appropriate to be heard), thus indicating that the legal burden is on the party seeking the joinder, whether the service is within or outside the jurisdiction.

[66] There is no equivalent of Rule 8(2) in Rule 9.

[67] See main text to note 20 above, *et seq*.

[68] It is unlikely that the observation (*Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services Ltd* [1983] 1 Ch 258 at 268, cited with approval in *Kinshinchand Tiloomal Bhojwani v Sunil Kishinchand Bhojwani* [1997] 1 SLR(R) 518 at [13]) that the court "should be exceedingly careful" when allowing service abroad to join a third party to forum proceedings will apply with the same force here.

[69] It will not be enforceable against the third party in another Contracting State under the Hague Convention on Choice of Court Agreements 2005 if the third party had not consented to the choice of court agreement. If the third party had submitted to the jurisdiction (eg, by entering into the merits of the dispute), it may be enforceable in many common law countries at least.

to cases where there is no jurisdiction agreement, and in the case of non-exclusive choice of court clauses, *Spiliada* principles potentially modified by what the parties have agreed to.

47. Where does the common law go from here? To what extent should common law principles be affected by the establishment of the SICC? One extreme view may be that it should be business as usual, with any question of transfer coming up purely as an issue of internal allocation of jurisdiction. The High Court would consider the question of exercise of international jurisdiction *without reference to the existence of the SICC at all*. I do not think this is a plausible view. The common law requires all factors to be taken into consideration, and this must include the possibility of transfer to the SICC. For example, factors relating to the expense and convenience of applying foreign law must be considered in the light of the possibility of the case being heard by International Judges in the SICC.

48. At the opposite extreme, one could take the view that since we now have an International Commercial Court, all cross-border commercial cases could be tried either in the High Court or the SICC. Instead of staying proceedings to allow for adjudication abroad, they should all be heard in Singapore, just internally allocated either to the High Court or the SICC. I do not think this is a defensible view. In the case of an exclusive choice of foreign court agreement, the contractual basis for enforcement of the bargain remains valid; this is consistent with the emphasis on party autonomy inherent in the structure of the SICC. In this respect, the common law is part of a larger picture of the dominant role of party autonomy in international dispute resolution systems around the world. The common law principle of giving effect to the interests of the parties and the ends of justice continues to remain relevant and applicable absent a choice of SICC clause.

49. A myriad of possible positions could be taken on a spectrum in between. One possibility is that the common law in Singapore could follow the "not appropriate"

forum test applied in the SICC. In the case of exclusive choice of court agreements, I think that that the established common law "strong cause" test reflects a considered balance between the enforcement of agreements and procedural considerations. Where there is no exclusive choice of court agreement, I have argued in my 2014 lecture in favour of the Singapore Court of Appeal's endorsement of the "most appropriate forum" test in preference to the Australian "clearly inappropriate forum" test.[70] The fundamental precept of trial in the most appropriate forum in the interests of the parties and for the ends of justice remains relevant.

50. There is no conceptual difficulty in the High Court and the SICC applying different tests for exercising jurisdiction. The SICC is a specialist court with narrow grounds for taking jurisdiction, and parties in choosing the SICC would have given particular consideration to its specific rules for taking jurisdiction. On the other hand, the High Court is a court of general civil jurisdiction and has very broad grounds for taking jurisdiction, so its rules on the exercise of jurisdiction must be flexible enough to take into account all circumstances of the case, in particular, considerations of international comity. International comity can take a back seat in the case of the SICC when it is giving effect to party autonomy.

51. Courts of law can be seen as performing two overlapping roles in international commercial litigation: the public adjudicatory function and the provision of a commercial dispute resolution service.[71] While the High Court predominantly services the public function, the SICC has a strong flavour of commercial service provision. Tighter rules of jurisdiction are justified where the parties have clearly chosen the SICC, so as to focus its resources on the merits of the dispute and not be distracted by satellite litigation on where to litigate. Concerns about forum-shopping are absent or minimal in the context of the SICC's consensual

[70] http://law.smu.edu.sg/YPH/2014?itemid=3106.
[71] M Keyes, *Jurisdiction in International Litigation* (Sydney: Federation Press, 2005), at 22-26.

jurisdiction. Where the public adjudicatory role is dominant, the question must be asked why the plaintiff's choice of forum should be preferred to the defendant's. [72] This tension is felt most strongly in the case of SICC's international jurisdiction over a third party who has not consented to its jurisdiction. In complex international litigation, there may even be a foreign exclusive choice of court clause that applies to the dispute in relation to the third party. The litigation convenience of parties who have selected the SICC as dispute resolution service provider must be balanced against the interests of non-consenting third parties, the considerations of international comity, and party autonomy where applicable, within the test of "appropriate" forum under Rule 9.

Effect of Hague Convention on Choice of Court Agreements 2005

52. Singapore signed the Hague Convention on Choice of Court Agreements on 25 March 2015.[73] Three things must happen before the Convention has force of law in Singapore. First, the Convention must enter into force internationally. This is anticipated to occur before the end of 2015.[74] Secondly, Singapore must ratify the Convention. Signing only expresses an intention in principle to apply the Convention. Ratification creates an international obligation to apply it. Thirdly, domestic legislation needs to be enacted to give the Convention force of law in Singapore.

53. When the Convention becomes law in Singapore, it will apply to exclusive choice of court clauses within its scope, whether the cases come before the SICC, the High Court, or the State Courts. The objective of the Convention is to promote international trade by enhancing certainty for choice of court agreements in terms of allocation of jurisdiction and the enforcement of resulting judgments, It aims

[72] A Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford: OUP, 2003).
[73] http://www.hcch.net/index_en.php?act=conventions.status&cid=98.
[74] The Convention enters into force three months after the deposit of the second instrument of ratification, acceptance, approval or accession. The EU is anticipated to deposit its instrument of approval in June 2015.

to replicate for international litigation what the New York Convention has achieved for international arbitration. The effect of the Convention on Singapore law is discussed in a Law Reform Report of the Singapore Academy of Law.[75] In summary, the Convention deals only with exclusive choice of a court of a Contracting State in civil and commercial matters. It provides that a choice of a court clause is deemed exclusive unless parties expressly provides otherwise.[76] Not every Convention case will be an SICC case, and not every SICC case will be a Convention case. A choice of court agreement may be exclusive under the common law but not under the Convention. The Convention has a wider definition of "international", basically excluding only cases where the parties are resident in the same Contracting State and the relationship of the parties and all the other elements relevant to the dispute (apart from the location of the chosen court) are connected only with that State.[77] The Convention goes beyond the jurisdictional reach of the SICC in covering *civil but non-commercial* matters, but is narrower than the SICC jurisdiction in the exclusion of certain contracts which clearly come within SICC's jurisdiction, eg, contracts for the carriage of goods and passengers.[78] Further, the Convention will not apply to a non-exclusive choice of the SICC clause;[79] this highlights the continuing significance of the differences between exclusive and non-exclusive choice of court clauses.

54. Where the Convention applies, it imposes an obligation on the chosen court of a Contracting State to hear the case unless the choice of court agreement is

[75] *Report of the Law Reform Committee on the Hague Convention on Choice of Court Agreements 2005*, http://www.sal.org.sg/digitallibrary/Lists/Law%20Reform%20Reports/DispForm.aspx?ID=37. See also See also TM Yeo, "Hague Convention on Choice of Court Agreements 2005: A Singapore Perspective", (2015) 114 J Intl L & Dip (forthcoming).
[76] Article 3(b). The Convention does not expressly say what law governs this question, but the prevailing academic view is that it is governed by the law determined by the private international law of the chosen court.
[77] Article 1(2).
[78] Article 2(2)(f). Compare Order 110, Rule 1(2)(b).
[79] A judgment from a Contracting State taking jurisdiction based on a *non-exclusive* choice of court agreement may be enforceable in another Contracting State if both have a declaration under Article 22(1). Singapore has not made a declaration.

invalid.[80] In this respect, the common law "strong cause" test and the "not appropriate" forum test of the SICC (for parties to jurisdiction agreement) and "appropriate" forum test (for joinder[81]) clearly do not meet the standard of the Convention, and the law will need to change accordingly.[82] The Convention imposes an obligation on a non-chosen court to decline jurisdiction unless the agreement is invalid, or the chosen court has declined jurisdiction, or enumerated exceptional circumstances can be shown.[83] Although framed in similar language, the "strong cause" test in the common law may not meet the standard of the Convention, and may also need to be adjusted to satisfy the Convention. Similarly, the inappropriate forum test in the SICC will require adjustment to comply with the Convention in an applicable case.

55. A resulting judgment from a Contracting State will be enforceable in another Contracting State, subject to limited defences.[84] Practically, this is the key selling point of the Convention.

56. The Convention does not affect the internal allocation of jurisdiction within a political unit.[85] Thus, if an action on a dispute subject to an exclusive choice of the Singapore court (inclusive of all its divisions) clause is commenced in the High Court, it can be transferred to the SICC (even when parties protest) without contravention of the Convention.[86] However, if the parties have chosen one division to the exclusion of others,[87] a transfer from the chosen division to another may have serious consequences under the Convention. First, the chosen court has

[80] Article 5. The validity of the choice of court clause will be tested by the law applied by the chosen court, ie, the law determined to be applicable by the private international law of Singapore (Article 5(1)).
[81] T Hartley & M Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report* (HCCH Publications, 2005), available at: http://www.hcch.net/index_en.php?act=publications.details&pid=3959&dtid=3, at paras 143-145.
[82] Realistically, however, there is no practical consequence except reputational risk if Singapore does not comply.
[83] Article 6.
[84] Article 8.
[85] Article 5(3)(b).
[86] Article 5(3)(b). The Convention only requires that "due consideration" should be should be given to the choice of the parties. This is also the effect of Order 110, Rule 12(4)(b)(2).
[87] Order 110, Rule 2(c) and (d) must be borne in mind in this context.

declined jurisdiction, so the courts of other Contracting States will no longer be bound to respect the choice of court clause under the Convention.[88] Consent by the parties[89] may be argued to amount to a modification to their choice of court agreement under the Convention, but in practice it may be prudent to document any such modification specifically. Secondly, although the Singapore judgment will still be a Convention judgment, a foreign Contracting State has a discretion not to recognise the Singapore judgment where a discretionary transfer has been made against the timely objection of the party resisting the recognition.[90]

Conclusions

57. Where there is an exclusive choice of court agreement,[91] there is substantial convergence in the approaches of the common law, the SICC rules, and the upcoming Hague Convention on Choice of Court Agreements, although the tests are expressed in different terminology.

58. In the case of an exclusive choice of Singapore court clause, the Convention will only allow the court to decline jurisdiction if the clause is null and void. The SICC will only decline jurisdiction if it is not the appropriate forum, and it cannot decide solely on grounds of foreign connections. The common law will only stay proceedings if there are exceptional circumstances amounting to strong cause showing that it would be unreasonable or unjust to hold the parties to their bargain. All three focus on the enforcement of the parties' agreement. This reflects the deep respect for party autonomy that underlies much of the jurisprudence on

[88] Article 6(e). See also, T Hartley & M Dogauchi, *Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report* (HCCH Publications, 2005), available at: http://www.hcch.net/index_en.php?act=publications.details&pid=3959&dtid=3, at para 158. The foreign court may still apply its own (non-Convention) rules relating to *lis pendens*.

[89] Lack of Parties' consent does not prevent he High Court from transferring a case to the SICC (Order 110, Rule 12(4)(b)(2)). Where the SICC has decided that it has no jurisdiction or has declined to assume jurisdiction, and the parties do not consent to a transfer to the High Court, the SICC has the power to "make any order as it sees fit" (Order 110, Rule 10(3)(b)) which presumably includes a transfer order.

[90] Article 8(5).

[91] Bearing in mind that an exclusive choice of court agreement has a narrower meaning in the Convention.

dispute resolution today. Nevertheless, the three tests could lead to different results in marginal cases.

59. In the case of an exclusive choice of foreign court clause, the common law applies the strong cause test also. The Convention will prevail if the foreign court is in a Contracting State, and the Singapore court will have very limited grounds for assuming jurisdiction, probably narrower grounds than permitted by the common law. The SICC has no jurisdictional basis at all.[92]

60. There is greater disparity when it comes to non-exclusive choice of court agreements. The Convention will not apply.[93] While the common law takes a sophisticated approach depending on the content of the agreement, the SICC treats the clause as equivalent to an exclusive choice of court agreement for the purpose of the exercise of its international jurisdiction. The arbitration agreement provides not a legal analogy[94] but a business model. It is presumed that parties who choose the SICC do not want to sue elsewhere; and even if they do they are treated as if they do not. This is conceptually problematic, but practically no injustice is caused as the choice of SICC as a specialist court is unlikely to have been made without due regard to the legal consequences of the choice. Commercial parties are deemed to choose with their eyes open.

61. Where there is no jurisdiction agreement, the Convention clearly will not apply. The SICC has no jurisdiction except where a case is transferred to it or where there is a joinder of third parties. The High Court would have decided international jurisdiction under common law principles before deciding to transfer a case to the SICC. In joinder cases, I have pointed out that there is now a fissure between the common law and the SICC rules on international jurisdiction. While the common law applies either the *Spiliada* principles or the

[92] Such a case could however be transferred from the High Court to the SICC, if the High Court does not stay proceedings because strong cause had been shown.
[93] Apart from note 79.
[94] See main text following note 45.

strong cause test depending on whether there is an exclusive choice of court agreement applying to the claim in relation to the third party, the SICC applies a single test whether it is an appropriate forum. Whether this test will take the lead from the Australian authorities on "clearly inappropriate forum" remains to be seen.

62. There used to be only two tests for international jurisdiction in the common law.[95] Once the Convention comes into force in Singapore, depending on the context, the exercise of international jurisdiction could be subjected to four different tests for exclusive choice of court clauses,[96] two different tests for non-exclusive choice of court cases,[97] and five different tests for joining third parties.[98] Litigators need to tread carefully, and contract draftsmen should be heedful of these consequences. While it may be argued that simplification is in order, one needs to be mindful of the extent to which the reasons driving these different tests remain valid within their own spheres of operation. The law is sophisticated because international litigation is complex.

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[95] Natural forum and "strong cause".
[96] Two in the Convention for choice of forum and foreign court respectively, Rule 8(1) and 8(2) in the SICC, and the "strong cause" test in the common law.
[97] *Spiliada* as modified by any discerned agreement in the common law, and Rule 8(1) and 8(2) in the SICC. A non-exclusive choice of foreign court agreement does not provide a basis for the SICC to assume jurisdiction, but it may co-exist with a non-exclusive choice of SICC agreement.
[98] *Spiliada* and "strong cause" tests in the common law, and Rule 9(1)(b)(ii) in the SICC, and two tests in the Convention for choice of forum and foreign court respectively.