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PRIVATE INTERNATIONAL LAW IN THE SINGAPORE COURTS

by JOEL LEE*

In this second annual survey of conflict of laws cases in the Singapore Year Book of International Law, eight cases[1] will be considered.[2] In addition, there will be a legislation note at the end.[3] Before looking at these cases, it is useful to make three preliminary comments. First, generally, only cases from the High Court and Court of Appeal will be considered. In exceptional situations, cases from the Subordinate Courts will be considered. In this year's survey, one case from the District Court is considered. Secondly, conflict of laws cases often relate to other areas of law. In these situations, this survey will only consider those parts of the case that relate to conflict of laws. Finally, 2 cases occurring in the first quarter of 2004, *Kaki Bukit Industries Park Pte Ltd v Ng Man Heng and Others*[4] and *The* "*Hyundai Fortune*"[5] have already been considered in the previous year's survey.

I. FOREIGN CUSTODY ORDER, RECOGNITION, RES JUDICATA AND STAY: *AB v AC AND ANOTHER APPLICATION*[6]

This case involved various cross applications by a Singaporean mother and a Norwegian father with respect to their child. Joint custody of the child was obtained by way of a consent order in the Norwegian courts in early 2002. The couple divorced later that year. In early 2003, in contravention of the consent order, the mother brought the child to Singapore. She has since refused to return the child to Norway and applied for the custody and maintenance of the child in Singapore. The father applied for, *inter alia*, a stay of the applicant mother's proceedings on the grounds of *forum non conveniens* and *res judicata*.

On the application for a stay on the grounds of *forum non conveniens*, the court applied the usual principles from *The Spiliada*[7] and concluded that there was a preponderance of connecting factors pointing to Norway. The proceedings could therefore be stayed on this ground.

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1 Many of these cases have also been considered in the "Conflict of Laws"—Annual Review of Singapore Cases 2004 (Singapore Academy of Law, Singapore, 2005).

2 This year's survey covers the period from April 2004 to December 2004. This is an interim situation and surveys in subsequent years will cover the cases for the full previous calendar year.

3 While this survey focuses on cases in the Singapore Court, from time to time, it will cover legislation pertinent to Private International Law.

4 [2004] SGHC 60. See "Private International Law in the Singapore Courts" (2004) 8 S.Y.B.I.L. 238.

5 [2004] 2 SLR 213; [2004] SGHC 45. See "Private International Law in the Singapore Courts", *ibid.*, at 240-241. The decision from this case's appeal will be considered in this survey. See text accompanying note 39.

6 [2004] SGDC 6 (District Court: FS Hong DJ).

7 [1987] AC 460.

On the application for a stay based on *res judicata*, Hong DJ concluded that it was unclear if a custody order could be said to be final and conclusive for the purposes of recognition and enforcement. Interestingly, the court went on to, *in effect*, recognise that order on the basis that it was made by the court of the child's habitual residence. In doing so, the court was strongly influenced by the provisions of the *Hague Convention on Civil Aspects of International Child Abduction*.[8] This move, while arguably correct from the perspective of policy,[9] is unusual from a legal standpoint as Singapore is not yet a signatory to that convention.

As such, the court granted the father custody to return the child to the jurisdiction of the Norwegian court.

II. Multiplicity of Proceedings, Forum Non Conveniens and Lis Alibi Pendens: *Ang Ming Chuang v Singapore Airlines Ltd (Civil Aeronautics Administration, Third Party)*[10]

This case arose out of the unfortunate accident involving Singapore Airlines flight SQ006 at Chiang Kai-Shek International Airport in Taiwan. In response to an action commenced by the plaintiff, the defendant Singapore Airlines joined the Civil Aeronautics Administration (CAA) as a third party in the action seeking indemnity or contribution. The defendants subsequently commenced an action in Taiwan against CAA in respect of the same accident claiming a wider scope of relief than its Singapore action. CAA applied to stay the Singapore action on the grounds of multiplicity of proceedings and *forum non conveniens*.

On the ground of multiplicity of proceedings, Woo J opined that where it is shown that there is duplicity of proceedings commenced by the same plaintiff against the defendant in different jurisdictions, the plaintiff can be compelled to make an election as to which set of proceedings it wishes to pursue unless it can show "very unusual circumstances".[11]

On the facts, duplicity of proceedings was established by CAA and the court held that Singapore Airlines did not show that "very unusual circumstances" existed. Ordinarily, this would mean that Singapore Airlines would be put to an election. However, the court opined that on the facts, because the second action in Taiwan was claiming a wider scope of relief than that in the Singapore action, Singapore Airlines could be taken to have elected to proceed with the action in Taiwan. As such, the court concluded that it was no longer necessary to put Singapore Airlines to an election and that the action in Singapore should be dismissed or stayed on the ground of *lis alibi pendens*.

This appears to be contrary to statements in *Yusen Air* where the court had opined that, although election by conduct was possible, the mere commencement of one set of proceedings did not *per se* amount to an election to proceed in that jurisdiction and that an election needed to be made by the appropriate party in court.

Although Singapore Airline's counsel had maintained throughout the proceedings that no election had been made, Woo J's approach indicates that the conduct of parties prior to the present proceedings could amount to an election, as it seemed to in this case. This is unusual as it is difficult to understand why a party should be held to have made an election prior to proceedings simply on the basis that the subsequent action happened to encompass a wider scope of relief than that in the initial action.

[8] Adopted by the Fourteenth Session of the Hague Conference on Private International Law on 25 October 1980 and entered into force on 1 December 1983. The text of this Convention is available at Hague Conference on Private International Law, online: <http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=24>.

[9] For a consideration of the attendant policy considerations in this case, see Ong D, "Family Law" (2005) 4 SAL Ann Rev (forthcoming).

[10] [2005] 1 SLR 409; [2004] SGHC 263 (High Court: BL Woo J).

[11] Taking the position in *Yusen Air & Sea Service (S) Pte Ltd v KLM Royal Dutch Airlines* [1999] 4 SLR 21.

It is suggested that election by conduct prior to proceedings should involve more than this, perhaps with some form of representation of that party's intention to definitively proceed in a particular jurisdiction.

On the ground of *forum non conveniens*, the court stated the principles enunciated in *The Spiliada* and considered the various factors involved and concluded that Taiwan was the more appropriate forum.

As part of the process of considering the connecting factors in stage 1, the court looked at the governing law as one of the factors. This also pointed to Taiwan but it is interesting to note that Woo J delivered a fairly lengthy exposition on the history, critiques and alternative approaches to the double actionability rule in tort choice of law. Woo J concluded that although the double actionability rule was the general rule in Singapore for international torts, if he were not bound by the doctrine of precedent, he would reform the law in favour of the *lex loci delicti* as a general rule for international torts.[12] Perhaps this is something that may be addressed by the Court of Appeal in a future case or by legislative reform.

In stage 2 of the test in the *The Spiliada*, counsel for Singapore Airlines expressed the concern[13] that justice may not be obtained in Taiwan because CAA was linked to the Taiwanese government. This was dismissed by the court.

The third party, CAA's application for stay was granted.

III. Statutory Interpretation, Meaning of Wagering Contract, Registrability of Foreign Judgment Relating to Foreign Wagering Contract, Public Policy Considerations: *Burswood Nominees Ltd (Formerly Burswood Nominees Pty Ltd) v Liao Eng Kiat*;[14] *and Liao Eng Kiat v Burswood Nominees Ltd*[15]

The defendant had used the plaintiff casino's cheque cashing facility to issue a personal cheque to the casino in exchange for a voucher which was then exchanged for gambling chips. The cheque was dishonoured on presentation and the plaintiff sued in the District Court of Western Australia and obtained a default judgment. This judgment was deemed by section 146 of the *Supreme Court Act* 1935 (Western Australia) to be a judgment of the Supreme Court of Western Australia and was subsequently registered in the Singapore High Court under the *Reciprocal Enforcement of Commonwealth Judgments Act* (RECJA).[16] The defendant applied to set aside the registration. This was dismissed before the Assistant Registrar.

On appeal to the High Court, Lai J classified the transaction in question as a loan which in her opinion fell outside the prohibition of the *Civil Law Act*. Therefore, the registration of the foreign judgment did not offend public policy and the appeal was dismissed. The defendant appealed to the Court of Appeal.

The Court of Appeal adopted a different line of reasoning from the High Court. The court first noted that while the facts in the present case involved a similar credit facility arrangement as the one in *Star City Pty Ltd v Tan Hong Woon*,[17] it differed in that the plaintiff casino had already obtained judgment in the Australian courts and was only seeking registration of that judgment in Singapore.

On the issue of the nature of the transaction, the court disagreed with the conclusion of the High Court and opined that the transaction in question was for money won upon a

[12] See *supra* note 10, paras 30-52.
[13] From the judgment, it does not seem that an actual submission was made, only an innuendo.
[14] [2004] 4 SLR 690; [2004] SGCA 45 (Court of Appeal: PH Yong CJ, HT Chao JA, SE Ang J).
[15] [2004] 2 SLR 436; [2004] SGHC 64 (High Court: SC Lai J).
[16] Cap 264, 1985 Rev Ed.
[17] [2002] 2 SLR 22.

wager.[18] As such, had the plaintiff sought to claim on the transaction in Singapore in the first instance, recovery would have been precluded by section 5(2) of the *Civil Law Act*. The question was whether registration of the Australian judgment was precluded by the public policy considerations under section 3(2)(f) of the RECJA.

The court first observed that a high standard of public policy must be met before foreign courts will refuse to enforce a foreign judgment. Therefore, a distinction was drawn between the operation of public policy in domestic law and in the conflict of laws. The court concluded that the domestic public policy concerns regarding the enforcement of gambling debts did not extend to the public policy concerns of the international community. It also acknowledged that gambling, *per se*, was not contrary to the public interest in Singapore and that Singapore's societal attitudes towards gambling were evolving. As such, registration of the Australian judgment did not offend any international public policy considerations and was allowed.

This decision is hard to reconcile with the wording of section 3(2)(f) of the RECJA.[19] While the writer agrees in principle with the distinction drawn by the court between the operation of public policy in domestic law and in the conflict of laws, it is difficult to see how the distinction drawn by the court between domestic and international public policy assists. Had the cause of action been brought in a Singapore court in the first instance, recovery would have been precluded by reason of domestic public policy. The "public policy" referred to in section 3(2)(f) must refer to the same public policy, *i.e.*, domestic public policy, that will preclude the cause of action from being entertained by the registering court. Therefore, registration should have been denied.

As an aside, had the defendant sought to argue that registration of the foreign judgment would not have been "just and convenient" for reasons of public policy under section 3(1) of the RECJA, the distinction drawn by the court would then assist here.

Having said this, the writer agrees that the outcome of the case in that the judgment of a foreign court relating to a wagering claim should be registrable is right as a matter of policy. In light of the evolving social attitudes towards gambling in Singapore, perhaps it is time for the legislature to relook at the provisions relating to gambling.

IV. Recognition of Singapore Judgment in Foreign Court, Whether Sufficient Reason to Proceed in High Court: *Cheong Ghim Fah and Another v Murugian s/o Rangasamy (No 2)*[20]

While this case does not directly raise an issue relating to conflict of laws, it will be discussed here because there are statements relating to whether a Singapore judgement may eventually be recognised and enforced in a foreign jurisdiction.

This application arose from *Cheong Ghim Fah and another v Murugian s/o Rangasamy*[21] where the defendant was assigned 85% of the liability for the death of a jogger. The damages awarded fell within the pecuniary limit of the District Court and the Assistant Registrar ruled that costs should be taxed on the District Court scale. The plaintiff applied to have costs taxed on the High Court scale.

The court considered that the general rule in awarding costs is that it is made for the purpose of compensating the successful party for the legal costs it has incurred and not to punish the unsuccessful party. There is also the interest in having cases heard at the

[18] This transaction was substantially similar to the one in *Star City* which in that case was characterised as money won upon a wager.

[19] This provides that "No judgment shall be ordered to be registered under this section if … the judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court".

[20] [2004] 3 SLR 193; [2004] SGHC 125 (High Court: VK Rajah JC).

[21] [2004] 1 SLR 628.

appropriate level of forum. As such, a party that incorrectly commences proceedings in the High Court should not be entitled to recover costs that have been unreasonably incurred. In such a case, costs should be assessed and awarded on the Subordinate Courts scale.

In some cases, where there was "sufficient reason" within the meaning of section 39 of the *Subordinate Courts Act*[22] to initiate proceedings in the High Court, then costs could be taxed on the High Court scale. Whether "sufficient reason" exists will depend upon the facts of each case.

In this case, the court found that "sufficient reason" did exist for two reasons. The first, and this is unrelated to the conflict of laws, was that counsel had reasonably expected that the damages recoverable would exceed the pecuniary limit of the District Courts.

The second reason, and relevant for the purposes of this survey, is that "sufficient reason" to commence proceedings in the High Court may exist if by commencing proceedings in the Subordinate Court, it would not be possible to enforce that judgment in another jurisdiction. It is important to note, however, that not only must the judgment of the Subordinate Courts not be recognised in the jurisdiction in which enforcement is sought but that the *sole* means of enforcing the judgment must lie in that jurisdiction.[23]

Therefore, where proceedings are commenced in the High Court *only* because of a desire to enforce the judgment in another jurisdiction, costs would continue to be taxed at the Subordinate Court scale.[24]

It is useful to point out that this case dealt with the question of registering a Singapore judgment in Malaysia[25] and that it is also possible to enforce a subordinate court judgment by common law action in Malaysia. Therefore, the statements in this case must be restricted to situations where a plaintiff wishes to transfer proceedings to the High Court *in order to seek eventual registration in another jurisdiction*. In other words, the rule in this case is narrower than it might have initially appeared. Otherwise, there could never be "sufficient reason" for proceedings to be transferred to the High Court as long as a subordinate court judgment is enforceable by common law action in that jurisdiction.

In this case, the plaintiff's application was granted and costs were taxed on the High Court scale.

V. *Forum Non Conveniens*, Burden of Proof and the Significance of Risk to Personal Safety: *Herbst Ehud v Sampoerna Putera and Another*[26]

The Sampoerna group of companies, of which the first defendant had a controlling interest, engaged the plaintiff, an Israeli, as a consultant. Pursuant to a business plan, the plaintiff, first defendant and a third party were to participate in a joint venture. Pursuant to the aims of this joint venture, two Indonesian companies held by Mauritian offshore companies were established. The second defendant, represented as agent of the first defendant, held the shares of these companies in trust for the parties' respective nominee companies.

The plaintiff made a capital contribution of US$250,000 at the repeated requests of the second defendant even though the joint venture agreement was still being negotiated and

[22] Cap 321, 1999 Rev Ed.

[23] Rajah JC referred to *Sunlink Engineering Pte Ltd* v *Koru Bena Sdn Bhd* [2003] 2 SLR 452 where Tan J transferred proceedings to the Subordinate Court and observed that the need to meet another country's legislation on reciprocal enforcement of foreign judgments did not, without more, confer on a plaintiff the right to be heard in the High Court. In that case, the foreign defendant had a presence and assets in Singapore and there was little question of the plaintiff being able to enforce a judgment of the Subordinate Court in Singapore.

[24] One wonders if "sufficient reason" would be established if it were reasonably foreseeable that the entire judgment amount of the Subordinate Court could not be satisfied by the defendant's assets in Singapore and that the plaintiff would have to seek enforcement of the remainder in another jurisdiction?

[25] Under the Malaysian Reciprocal Enforcement of Judgments Act 1958.

[26] [2005] 1 SLR 82; [2004] SGHC 236 (High Court: YK Tay J).

had not been signed. This remittance was made on the condition that the whole amount would be refunded on demand if the joint venture agreement was not concluded. There was also an implied warranty that the second defendant had been authorised to enter into the refund agreement.

The plaintiff's employment was terminated a year later and he demanded his refund. He was asked by the second defendant to withhold his demand and in consideration, the second defendant undertook that if the first defendant refused to refund the said amount to the plaintiff, he would do so himself. Subsequently, the second defendant informed the plaintiff that he was not entitled to a refund. The second defendant also sold the shares in the Indonesian companies without the plaintiff's knowledge or consent.

The plaintiff commenced proceedings against the first defendant for the refund of the remittance pursuant to the refund agreement made by the second defendant as agent on behalf of the first defendant. The plaintiff also claimed in the alternative against the second defendant for the sum of the remittance as damages for breach of warranty of authority or pursuant to the undertaking made by the second defendant to refund the remittance upon the first defendant's refusal to do so. The plaintiff also claimed an account of the sale of the shares and payment of any sum payable to him upon such sale and/or damages for breach of trust.

The defendants applied for a stay of proceedings on the grounds that Indonesia was the more appropriate forum. The application first came before the Assistant Registrar, who ordered a stay. The plaintiff appealed.

Tay J first stated that a stay would be granted when a defendant has shown that there was a more appropriate forum for the trial. Where a defendant meets this burden, then a stay will be granted unless a plaintiff can show there are circumstances by reason of which justice requires that a stay should nevertheless be refused.[27]

To support their application, the defendants submitted that if, in the balancing process, the balance was to remain at the mid-point and tilts to neither side, the action must generally follow the defendant.[28] Tay J opined that if the balance did not tilt to the forum preferred by the defendant, then the defendant's burden had not been discharged and the proceedings would not be stayed. In this case, Tay J found that the defendants had not met their burden. This was sufficient to dispose of the appeal.

However, Tay J went to comment on the plaintiff's argument that even if the defendants had discharged their burden, a stay of proceedings should nevertheless not be granted because of the risk to his personal safety there. The plaintiff relied on a travel advisory issued by Israel's Counter Terrorism Bureau recommending "that all Israeli citizens avoid any visit/stay in Indonesia" because of "a concrete terror threat" posed to such citizens. On this, he opined that it would not have been unreasonable for a citizen of any country to decide to abide by a travel advisory issued by the government of his country regarding any place in this world. This is a clear pronouncement that concern for one's personal safety, presumably based on reasonable grounds, is sufficient to satisfy the requirements of justice in stage 2 of the test in *The Spiliada*.[29]

The defendants' appeal was dismissed.

[27] Adopting the approach of the Court of Appeal in *Eng Liat Kiang v Eng Bak Hern* [1995] 3 SLR 97 and followed in *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1998] 1 SLR 253.

[28] The defendants relied upon the proposition from *Praptono Honggopati Tjitrohupojo* v *His Royal Highness Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj* [2002] 4 SLR 667.

[29] In *Askin* v *ABSA Bank Limited* (The Times 23 February 1999), the plaintiff argued that Africa was not an available forum because, *inter alia*, he feared assassination. The court there dismissed this argument on the basis that on the evidence, there was no strong indication that the plaintiff's concerns about assassination were founded. Tay J's dicta indicates that reliance on a governmental travel advisory would be sufficient.

VI. Relevant Factors in *Forum Non Conveniens* and Effect of Negative Declarations: *Mizuho Corporate Bank Ltd v Cho Hung Bank*[30]

The defendant issued a letter of credit for the purchase of a cargo of gas oil and the plaintiff was the confirming bank. When the plaintiff sought to obtain payment from the defendant by despatching documents required by the letter of credit, the defendant rejected the documents citing various discrepancies.

The defendant applied in South Korea for a declaration that it was not liable under the letter of credit. The plaintiff commenced proceedings in Singapore and the defendant applied for a stay of proceedings. The Assistant Registrar dismissed this application and the defendant appealed.

The court began by reviewing the principles that applied and concluded that most of the factors pointed to Singapore and that the defendant had not discharged its burden of showing that South Korea was the more appropriate forum.

The court also noted that the defendant's application in South Korea was for a negative declaration, i.e., a declaration that it was not liable. The court opined that such negative declarations must be viewed with great caution since they lent themselves to improper attempts at forum shopping.[31] This is a clear articulation of the attitude of the Singapore courts to negative declarations.

It is important to note that the attitude of the English courts towards negative declarations has changed since *The Volvox Hollandia*. In *Messier Dowty Ltd* v. *Sebena SA*,[32] the English Court of Appeal considered the arguments surrounding negative declarations and opined that there was no reason why such declarations should *per se* be considered adversely. In each case, the court should consider whether the negative declaration was useful to achieve the aims of justice.

The appeal was dismissed.

VII. Jurisdiction and Service on Foreign Companies: *Tao Commodity Trader Inc v Fortis Bank (Nederland) N.V.*[33]

The defendant, a Dutch bank incorporated in the Netherlands, was registered as a "foreign company" in Singapore under Part XI, Division 2 of the *Companies Act*.[34] In compliance with section 368(1)(e) of the *Companies Act*, two employees, one of which was the Deputy General Manager Gijsbert Schot ("Schot"), were named as agents who were authorised to accept service of process on behalf of the defendants.

Subsequently, the defendants sold and transferred their business operations in Singapore to their parent company. As part of these arrangements, Schot was employed by the parent company and the Singapore branch ceased to carry on or have a place of business in Singapore. A notice of cessation of business was lodged with the Registrar, duly acknowledged and the defendants' name was, as a matter of course, removed from the register. A notice of cessation of agency however was not lodged.

[30] [2004] 4 SLR 67; [2004] SGHC 159 (High Court: LM Tan J).
[31] Adopting the views expressed in *The Volvox Hollandia* [1988] 2 Lloyd's Rep 361 and *Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 Lloyd's Rep 588.
[32] [2001] 1 All E.R. 275.
[33] [2004] SGHC 30 (High Court (Registry): LR Tan AR).
[34] Cap. 50, 1999 Rev Ed.

Sometime after these events, the plaintiff sought to serve a writ on the defendant by serving Schot at his residence in accordance with section 376(b) of the *Companies Act*.[35] The defendants applied to set aside service of the writ.

Counsel for the defendant argued that service was not valid because at the time of the service, the defendant was no longer registered as a foreign company and had ceased to carry on business in Singapore. Counsel for the plaintiff argued that the status of the defendant's agents to accept service was independent of whether the defendants was registered or was carrying on business.

The court first opined that the application before it depended upon whether jurisdiction over the defendants existed based on the governing statutory regimes of section 16 of the *Supreme Court of Judicature Act*[36] (SCJA) and Part XI, Division 2 of the Companies Act.

The court went on to consider various case and academic authorities and concluded that section 16 of the SCJA envisioned a statutory regime of *in personam* jurisdiction that mirrored that of the common law. Since at common law, a company cannot be served if it had ceased to carry on business, then it must follow that once the defendant ceased to be registered under the Companies Act and had ceased to carry on business in Singapore, any purported service on the defendants would not be valid.[37] The court therefore drew a clear distinction between the nexus of jurisdiction and service. The ability to serve does not of itself create the basis of jurisdiction.[38]

Therefore, the defendants' application was granted and service set aside.

VIII. Exclusive Jurisdiction Agreement, Basis of Appeal in Exercise of Court's Discretion, Weighing of Factors to Strong Cause and the Effect of a Time Bar: The *"Hyundai Fortune"*[39]

As mentioned earlier, the High Court decision was considered in the previous year's survey. For convenience, the facts of the case and the findings of the High Court will be reproduced here.

The plaintiff shipped from China to Singapore a consignment of melons on board the "Hyundai Fortune". On arrival in Singapore, the consignment was found to be badly damaged. Surveyors were appointed by the parties and after reports had been made, the plaintiff wrote to the defendants, owners of the "Hyundai Fortune", making a claim. There was no response from the defendants for almost a year despite several reminders.

The plaintiff sued the defendants, owners of the "Hyundai Fortune", for the damaged goods. The contract of carriage contained an exclusive jurisdiction clause in favour of Korea where the action was time-barred. The defendants applied for a stay and at first instance, the application was granted. The plaintiff appealed.

The High Court held that there was no real question of liability to be tried in the contractually agreed forum. The court concluded that the plaintiff had shown strong cause and the appeal was allowed. The defendants appealed.

The Court of Appeal stated clearly that in an appeal from an exercise of a court's discretion, it should not interfere in the exercise of that discretion unless it can be shown that the judge exercising the discretion had wrongly applied the law, or had wrongly appreciated the facts, or that the decision was plainly wrong.

[35] It is not clear from the judgment what the cause of action was.

[36] Cap. 322, 1999 Rev Ed.

[37] In doing so, the court went against a line of English case authorities and academic opinion that a de-registered company could nonetheless still be served under the relevant section of the *Companies Act*.

[38] Of course, in relation to a person, as presence is one basis upon which *in personam* jurisdiction is established, ability to serve personally also establishes the existence of jurisdiction. See *Maharanee of Baroda* v *Wildenstein* [1972] 2 QB 283.

[39] [2004] 4 SLR 548; [2004] SGCA 41 (Court of Appeal: HT Chao JA and LM Tan J).

On the facts, the court concluded that the learned High Court judge had not erred in any of these ways. Further, on the weighing of the factors, the court opined that the weight to be given to each of the relevant factors is not something that can be precisely defined and factors must be weighed cumulatively to see if they amounted to strong cause. However, in this weighing process, it is important that foreseeable factors, which were within contemplation of the contract, should not be accorded the same weight as the unforeseeable factors.

The court considered it significant that the defendants had ignored the plaintiff's claim for over a year and were unable to identify their defences in its affidavits. This was taken to indicate that the defendants did not really have a defence and that they were waiting for the limitation period to lapse in order to seek a procedural advantage. In other words, the court inferred the defendants did not seriously want a trial in the contractual forum.

Finally, the court considered the question of whether the plaintiff had acted reasonably in not instituting a protective writ in Korea before the limitation period had passed. The High Court had decided that even though the plaintiff had failed to provide a satisfactory explanation for failing to protect time, they could rely on other factors to show strong cause. On the other hand, the Court of Appeal felt it significant that because the defendants had not acknowledged or responded to the plaintiff's claim, it was reasonable for the plaintiff to have assumed that the defendants had no real answer to the claim and was merely stonewalling. As such, it was reasonable for the plaintiff not to have taken out a protective writ in Korea.

The defendants' appeal was dismissed.

IX. Capacity to Dispose of Property on Trust: Trustees (Amendment) Act 2004[40]

On 15 December 2004, the *Trustees (Amendment) Act* 2004 came into operation. The explanatory statement states that the purpose of the amendment is to "facilitate and promote wealth management in Singapore".[41] It, *inter alia*, inserted Section 90 which dealt in large part with the question of capacity of a settlor to dispose of property *inter vivos* on trust.

At common law, there is no unanimity as to which law determines capacity to create a trust of moveables. One view is that capacity is determined in accordance with the proper law of the trust.[42] Another view is that capacity is determined by the law of the domicile.[43]

Section 90(1) deems a settlor to have capacity if she or he had capacity under the law of Singapore, the law of his/her domicile or nationality, or the proper law of the transfer.[44] This rule does not entirely replace the common law position as Section 90(3) provides two conditions for the applicability of the rule.

First, at the time of creating the trust or transferring the property to be held on trust, the settlor or transferor must not have been a citizen or domiciliary of Singapore. Put another way, Section 90(1) deals with the question of capacity only of a settlor who is neither a Singaporean nor a Singaporean domiciliary.[45]

Secondly, the rule in Section 90(1) applies if the trust is expressedly governed by Singapore law and the trustees are resident in Singapore. This means that Section 90(1) will not apply in a case where there has not been an express choice of law even though the governing law of the trust was Singapore law through the determination of implied choice or objective proper law.

[40] No. 45 of 2004.

[41] Presumably, by providing for greater certainty for the validity of trusts, this will attract and encourage off shore trusts to Singapore.

[42] See *Dicey & Morris on the Conflict of Laws–Eleventh Edition* (London: Sweet & Maxwell, 1990) at 1017.

[43] *AG* v *Bellilos* [1928] 1 KB 798 at 826-827.

[44] Trustees Act (Cap 337, 1999 Rev Ed).

[45] Section 90(3)(a).

Three further points can be made about Section 90(1). First, the rule will apply even if there are rules relating to inheritance or succession which might ordinarily affect the validity of the trust.[46]

Secondly, the wording of Section 90(1) envisions the dual possibilities of creating a trust over moveables and immoveables, or of transferring moveable property to be held on trust. With respect to immoveables, the common law rule is that capacity is governed by the *lex situs*. The rule in Section 90(1) does not include the *lex situs* as one of the alternative systems of law. This could lead to a situation where the settlor of immoveable property outside Singapore may have capacity according to Section 90(1) but not according to the *lex situs* or vice versa.

Finally, Section 90(4) proves that any reference to "law" in the systems mentioned in Section 90(1) refers to the domestic rules of that system and excludes any choice of law rules. Put another way, the doctrine of *renvoi* is excluded.

Section 90(5) seems a bit out of place as it does not seem to have anything to do with the rules contained in subsections (1) to (4). It provides that a trust is not prevented from being completely constituted even though a settlor has reserved powers of investment or asset management. It is not clear, however, if section 90(5) is intended to state a rule relating to domestic trusts law or is a rule intended to apply to all trusts whatever their governing law. It is possible that section 90(5) was intended to apply to trusts covered by Section 90(1) therefore making it a rule relating to domestic trusts law. However, the words of the statute do not state this and it will fall to the courts to interpret this provision at some future point.

[46] Section 90(2).