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PRIVATE INTERNATIONAL LAW IN THE SINGAPORE COURTS

by JOEL LEE*

In this fourth annual survey of conflict of laws cases in the Singapore Year Book of International Law, seven cases[1] will be considered. Before looking at these cases, it is useful to make two preliminary comments. First, generally, only cases from the High Court and Court of Appeal will be considered. However, where relevant, cases from the Subordinate Courts or the High Court registry will be included. Second, 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.

I. MAREVA INJUNCTIONS, IN SUPPORT OF FOREIGN ARBITRATION, POWERS OF COURT: *FRONT CARRIERS LTD V ATLANTIC & ORIENT SHIPPING CORP*[2]

A breach of a time charter led the plaintiff to commence arbitral proceedings in London. The plaintiff also applied in Singapore under the International Arbitration Act (Cap 143A, 2002 Rev Ed) "IAA" for a *Mareva* injunction. An application was made to set aside the *Mareva* injunction on the grounds that the High Court had no jurisdiction to order the *Mareva* injunction in support of foreign arbitral proceedings and that the plaintiff had not met the requirements for the grant of a *Mareva* injunction.

On the first ground, the court examined the provisions of the IAA, specifically section 12(7) and concluded that the court did indeed have jurisdiction to order a *Mareva* injunction in support of foreign arbitral proceedings. As an alternative, the court also opined that the Civil Law Act (Cap 43, 1999 Rev Ed) "CLA" also provided the court a similar power.

Having said that, the defendant succeeded in his application on that second ground i.e. that plaintiff did not meet the requirements of showing that there was a real risk of dissipation of the assets within the jurisdiction. As such, the *Mareva* injunction was discharged.

This case did not go on appeal. However, this case is of great interest as it appears to be diametrically opposed to the decision of Prakash J in the High Court decision of *Swift-Fortune Ltd* v *Magnifica Marine SA*.[3] This will be discussed later in this survey.[4] For the moment, it is sufficient to note that the Court of Appeal in Swift-Fortune,[5] seems to have rationalized the inconsistency.

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1 These cases have also been considered in the "Conflict of Laws" *Annual Review of Singapore Cases 2006* (Singapore Academy of Law, Singapore, 2007).

2 [2006] 3 Sing.L.R. 854; [2006] SGHC 127 (High Court: BSE Ang J).

3 [2006] 2 Sing.L.R. 323; [2006] SGHC 36 (High Court: J Prakash J).

4 See text accompanying note 29. By way of putting these 2 High Court decisions in chronological context, Prakash J's decision preceded Ang J's. In fact, Ang J had considered the earlier decision of Prakash J and explicitly disagreed with it.

5 [2007] 1 Sing.L.R. 629; [2006] SGCA 42 (Court of Appeal: SK Chan CJ, A BL Phang JA, YK Tay J).

As it stands, this case appears to stand for the following two propositions. First, that section 12(7) of the IAA allows for the court to issue injunctive relief in support of foreign arbitral proceedings.[6] Secondly, that section 4(10) of the CLA accords the court a similar power subject to the principles laid down in the case *Siskina v Distos Compania Naviera SA*.[7]

After the Court of Appeal's decision in *Swift-Fortune*, it remains to be seen whether the Singapore courts will extend Ang J's analysis of section 4(10) of the CLA to to support foreign court proceedings.[8] There is also some question as to whether the position established by *Front Carriers* will remain good law.

II. Stay of Proceedings, Forum Non Conveniens, Exclusive Jurisdiction Clause, Grounds for Refusing Stay: *Kuala Lumpur City Securities SDN BHD v Boston Asset Management Pte Ltd (Formerly known as Universal Network Education Pte Ltd) and Another*[9]

While somewhat convoluted, the relevant facts for our purposes are these. The first defendant is a company incorporated in Singapore functioning as an asset management agent and the second defendant was its Chief Executive Officer and one of its directors. The first defendant opened a trading account with the plaintiff, a Malaysian securities firm based in Kuala Lumpur. This trading account was guaranteed by the second defendant. The defendants incurred substantial trading losses due to market volatility and the plaintiff demanded payment of outstanding sums. Proceedings were commenced against the first defendant and when no appearance was entered, the plaintiff obtained a default judgment. The plaintiff also subsequently obtained a default judgment against the second defendant.

The applications by both defendants to set aside the default judgments, for stay of proceedings and for stay of execution on the judgments were dismissed by the Assistant Registrar. These were also dismissed on appeal to the High Court.

The first defendant had contended that under the doctrine of *forum non conveniens*, that Malaysia was the more appropriate forum for the plaintiff's claim. The court held that there was no need to even consider this point, since the first defendant had failed to discharge the burden of raising an arguable defence thereby allowing the court to set aside the default judgment. It is submitted that this position is correct as a stay application based on *forum non conveniens* would be, as a matter of principle appropriate before judgment had been obtained or in the case of a default judgment, if and after the judgment had been set aside.

The second defendant contended that the proceedings should be stayed on the basis of an exclusive jurisdiction clause in the guarantee in favour of the courts of Malaysia.

This application was also refused on the basis that there were good grounds for the proceedings in Singapore to continue.[10]

This is an unusual approach for the court to have taken. Lai J could have dismissed this application on the same basis as the first defendant's i.e. that the burden of raising an arguable defence had not been discharged. This position would have been justifiable since a stay application, whether based on *forum non conveniens* or a jurisdiction clause, is a jurisdictional matter. By using "good grounds" as a basis for allowing the proceedings in Singapore to continue, it is not clear if the court was seeking to provide an alternative approach to the "strong cause" test traditionally used by the courts in deciding whether to refuse a stay of proceedings despite the existence of an exclusive jurisdiction clause.

6 This position was not taken by the Court of Appeal in *Swift-Fortune* See text accompanying note 29.

7 [1979] AC 210.

8 This was a matter that was explicitly left open by *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and Another Appeal* [2005] 2 Sing.L.R. 568; [2005] SGHC 57, [2006] 1 Sing.L.R. 112; [2005] SGCA 47.

9 [2006] SGHC 99 (High Court: SC Lai J).

10 It is interesting to note that the court did not undertake a construction of the clause in question and seemed to accept without analysis that the jurisdiction clause was an exclusive one.

It is difficult to come to any kind of conclusion on this as this part of the judgement was brief and no authorities were cited. The court however seemed to attribute some significance to the fact that it had not been proved that Malaysian law did not materially differ from Singapore law. It is submitted that even if it had, this would not necessarily have constituted "strong cause". Perhaps this is an indication that an alternative approach was taken? It would be helpful for this to be clarified at some point in the future.

III. Foreign Maintenance Order, Registration, Reciprocal Enforcement of Commonwealth Judgments Act, Maintenance Orders (reciprocal Enforcement) Act: *Lee Pauline Bradnam v Lee Thien Terh George*[11]

The defendant, resident in Singapore, commenced divorce proceedings in Australia where the plaintiff lives with her children. As part of the ancillary matters, a Child Support Agreement was entered into and registered as an Order of Court in the Family Court of Australia in Melbourne. The reasons are not clear but the registration of this Child Support Agreement was declined by the child support agency. The defendant subsequently breached the Order of Court and the plaintiff sought to register the Order in Singapore under the Reciprocal Enforcement of Commonwealth Judgments Act (RECJA).

The court held that in order for a judgment to be registrable, it had to be final and conclusive and for a sum of money that was payable. A periodic maintenance order however did not meet this definition because first, it was characterised by having amounts due payable periodically and in the future and secondly, could be varied to take into account changing needs of the children or the financial situation of the parties. As the RECJA only allowed for the court to have control over the execution of the registered judgment the Singapore court would have no power of variation. Further, even if the order was varied by the originating court, there was no facility within the RECJA to then cancel or revoke the earlier registered order. The fit was therefore an uneasy one.

While some doubt can be cast on the persuasiveness of the first reason,[12] the second reason is far more persuasive. The court was also influenced by the existence of the Maintenance Orders (Reciprocal Enforcement) Act [MO(RE)A] which allows the court to vary and revoke foreign maintenance orders that are registered in Singapore. The court's conclusion must be correct when the MO(RE)A is contrasted with the provisions of the RECJA.

The court observed that since the child support agreement was not registrable with the Australian child support agency (although it is not entirely clear why this was so), the plaintiff could not register the maintenance order under the MO(RE)A and was left without a remedy.

IV. Probate Proceedings, Stay of Proceedings, Forum Non Conveniens, Factors, Choice of Law, Change of Domicile: *Peters Roger May v Pinder Lillian Gek Lian*[13]

This case revolved around a stay of proceedings application to determine the natural forum for determining the testator's domicile. The testator, who had settled in Singapore, became a citizen and despite traveling extensively over the years, invariably returned to Singapore. However, he passed away unexpectedly on one of his trips to England. The appellant

[11] [2006] SGHC 84 (High Court: ZK Yeong AR).

[12] The court did acknowledge that a maintenance order could be for a lump sum either payable immediately or over a period of time and seemed willing to entertain the idea that this type of maintenance order might be registrable. It is submitted that if a lump sum payable over time is acceptable, then smaller lump sums payable over time should be equally acceptable.

[13] [2006] 2 Sing.L.R. 381; [2006] SGHC 39 (High Court: VK Rajah J).

executor commenced probate proceedings and an order granting probate was made with the respondent widow's consent. He then applied pursuant to s 7 of the Probate and Administration Act (Cap 251, 2000 Rev Ed) for a determination whether a notation should be endorsed on the grant of probate that the testator died domiciled in Singapore. The respondent applied to stay these proceedings which succeeded before the assistant registrar. The executor appealed.

In determining the issue of *forum non conveniens*, the court made a number of clarifications in relation to applying the test from *Spiliada Maritime Corporation* v*Cansulex Ltd (The Spiliada)*.[14] First, the test required the court to balance competing interests and weigh the factors under consideration according to the requirements of each factual matrix.[15] Secondly, with the availability of video-conferencing facilities, the location of witnesses was no longer as important a connecting factor today. Thirdly, that stage 2 of the test in *The Spiliada* only operates when the court is minded to grant a stay and at that point, it would be the party who is opposing the stay (in this case the appellant executor) whose legitimate juridical advantage would be considered.[16]

It is interesting that the court considered it significant that as the respondent had consented to the grant of probate to the executor, she could not now contend that Singapore was not an appropriate forum. It is not clear why this is so. Acknowledging the forum's jurisdiction does not preclude one from contending that there is a clearly or distinctly more appropriate forum elsewhere.[17]

At the end of the day, the appeal was allowed. After making some observations regarding choice of law and domicile,[18] the court deliberately did not determine the issue of the testator's domicile and left it instead for the notation proceedings.

V. Stay of Proceedings, Forum Non Conveniens, Factors, Choice of Law, Actions in Tort and Equity: *Rickshaw Investments Ltd and Another v Nicolai Baron Von Uexkull*[19]

Under an initial oral employment arrangement, the second appellant hired the respondent, a German national and Singapore permanent resident, to market salvaged Tang dynasty artifacts. A written employment agreement, containing a choice of law and jurisdiction clauses pointing to Germany, subsequently replaced the oral arrangement. The second appellant's business was subsequently transferred to the first appellant who terminated the respondent's services. Proceedings were commenced in Germany by the respondent for salary and expenses and for a declaration that the termination was not effective. A consent judgment for a part of the sum was entered into and the German court deferred the hearing on the issue of termination to a later date. Proceedings in Singapore were commenced by the appellants nine months after the German proceedings began. The appellants sued for conversion, breach of confidentiality, breach of fiduciary duty and deceit. The respondent

[14] [1987] AC 460.

[15] This meant that the same factors may be accorded different weightage by the courts in different situations.

[16] This point was made in response to the respondent's submission that she would be deprived of a legitimate juridical advantage should the proceedings not be stayed.

[17] In fairness, this point was not conclusive. Perhaps the point being made by the court is not that the respondent cannot claim that there is a more appropriate forum elsewhere but that her evidential burden is simply a more onerous one to discharge.

[18] For the sake of completeness, these observations are: (1) a person obtains a domicile of origin on birth which prevails until a domicile of choice or dependence is obtained. (2) a person cannot have more than one domicile at any one time. (3) the person alleging a change in domicile bears the burden of proving the allegation and the burden required to prove a change of domicile of origin is higher than to prove a change of domicile of choice. (4) whether a domicile has been changed is determined according to the law of the forum.

[19] [2006] 2 Sing.L.R. 850; [2006] SGHC 70 (High Court: WB Li J), [2006] SGCA 39 (Court of Appeal: SK Chan CJ, A BL Phang JA).

applied for a stay of proceedings and succeeded at the High Court before Woo J. The matter was appealed.

At the Court of Appeal, the judgment primarily focused on the application for stay of proceedings based on *forum non conveniens*.[20] As part of that inquiry, the court made some significant statements about choice of law. Before looking at those statements, it is useful to make an observation here. As part of the inquiry at stage of 1 of the test from *The Spiliada*, the court considered a group of general connecting factors revolving around the jurisdictional connections of the parties involved and the location and compellability of relevant witnesses. The court indicated that the weightage to be accorded to the location and compellability of witnesses depends on whether the main disputes revolved around questions of fact. This means that the weighting of factors at stage 1 is not only relative within the same case but is also relative across cases. One should therefore look into the entire factual matrix to determine the weight that should be attributed to any proposed connecting factor.[21]

Another group of factors that the court took into account was the law that would govern the issues before the court. These choice of law considerations can be significant factors in the determination of the natural forum as it is generally more efficient and effective for a court to apply the law of its own jurisdiction to the substantive issues at hand.

The appellants had chosen to sue in tort and equity. As a preliminary point, since the acts complained of arose out of the employment contract, it was questioned whether the causes of action should be framed in contract and the proper law of the contract apply to the determination of the issues at hand. The court opined that, absent bad faith, the appellants could frame the cause of action in a way most advantageous to them. Further, the presence of a contractual relationship did not preclude the existence of other causes of action.

On choice of law considerations relating to tort, the court first stated the law in Singapore as accepted by *Parno v SC Marine Pte Ltd*[22] which was that the double actionability[23] applied with a flexible exception that allowed for the operation of a law other than the *lex fori* and *lex loci delicti*. The court then took a significant step and opined that even where it was a local tort i.e. a tort committed entirely in Singapore, in certain circumstances,[24] a flexible exception could apply. This is a significant departure from the traditional position that the *lex fori* applies in the case of a local tort.[25] Applying this analysis, the court concluded that there was no scope to apply the flexible exception in this case.[26]

[20] Even though the employment agreement had a jurisdiction clause in favour of the German courts, the High Court had held that this clause was not exclusive and the respondent had to proceed on the basis of *forum non conveniens*. Presumably, this is why there is no mention of this in the Court of Appeal's judgment. The High Court's approach in determining the nature of the jurisdiction clause can be critiqued but this was not brought to the attention of the Court of Appeal. See A Briggs "A Map or a Maze: Jurisdiction and Choice of Law in the Court of Appeal" (2007) 11 SYBIL 123 for an insightful discussion on this.

[21] While this makes some intuitive sense, this does not seem to sit well with the observations in *Peters Roger May* [2006] 2 Sing.L.R. 381; [2006] SGHC 39 (see text accompanying n 13) that the availability of video conferencing facilities meant that the location of witnesses was no longer as important a connecting factor today as it might have been in the past. While the possibility of video conferencing was argued by the respondent, this was not addressed by the Court of Appeal.

[22] [1999] 4 Sing.L.R. 579.

[23] This rule states that a tort had to be actionable by the *lex fori* and *lex loci delicti*.

[24] Where a tort happened by chance in Singapore and with no other connection to Singapore whatsoever.

[25] Technically, *Parno v SC Marine Pte Ltd* did not provide for the application of the law of a third country. Therefore, it could be said that *Rickshaw Investments* took 2 significant steps. The first was to allow for the application of the laws of a third country. The second was to allow for the flexible exception even when it was a local tort.

[26] Briggs applauds this step taken by the Court of Appeal but argues that since the torts in question arose out of the employment relationship from a contract that was governed by German law, the court should have used the flexible exception to apply the contractual choice of German law as the *lex causae*. See A Briggs "A Map or a Maze: Jurisdiction and Choice of Law in the Court of Appeal" (2007) 11 SYBIL 123 for a more detailed discussion on this.

On choice of law considerations relating to the actions in equity, the court opined[27] that one had to examine the nature of the equitable obligation in question, within its own factual matrix to determine the *lex causae*. This was because equitable obligations arise from different bases and the concept of equity was not a separate and distinct category in itself. Therefore, where an equitable obligation is premised on an established legal category like contract or tort, then the choice of law should be based on that respective established category.[28] Applying this approach, the court concluded that the equitable actions arose out of the employment agreement and as such, the appropriate choice of law rule to apply to these actions would be German law as the proper law of the contract.

At the end of the day, the appeal was allowed as the court opined that the burden of showing that there was a clearly more appropriate forum elsewhere had not been discharged.

VI. Mareva Injunctions, in Support of Foreign Arbitration, Powers of Court: *Swift-Fortune Ltd v Magnifica Marine SA*[29]

A memorandum of agreement for the sale of a vessel provided for any dispute to be referred to arbitration in London. On the day before completion, the plaintiff applied for and obtained a *Mareva* injunction to preserve assets pending arbitral proceedings in London. The defendant sought a discharge of the *Mareva* injunction and the court was faced with the question of whether a *Mareva* injunction could be ordered by the Singapore courts to support foreign arbitral proceedings. This was the same question posed to the court in *Front Carriers*.[30] Prakash J answered this question in the negative whereas, as we have seen earlier, Ang J in *Front Carriers* had, after considering Prakash J's decision, took an opposing view.

On appeal, since both learned judges had turned their minds to Section 12(7) of the IAA and reached different conclusions, the Court of Appeal began by applying established principles of statutory interpretation to give effect to the intention of parliament. Without going into every detail of the court's interpretive process, the court opined that section 12(7) was intended to only apply to Singapore international arbitrations. Put another way, section 12(7) did not give power to the courts to grant a *Mareva* injunction to assist foreign arbitral proceedings.

The court did consider Ang J's alternative ground of section 4(10) of the CLA in *Front Carriers*. As the appeal before them was not an appeal from Ang J's decision in *Front Carriers*, the court chose not to comment on Ang J's extension of the scope of that section to foreign arbitrations. It did wonder however if such an extension was possible when read together with the powers conferred by Section 12(7) of the IAA.

As the court's power to grant a *Mareva* is subject to the principles in the *Siskina*, the inconsistency in results between *Front Carriers* and *Swift-Fortune* was reconciled by the fact that in *Front Carriers*, the plaintiff had a cause of action against the defendant which was justiciable in the Singapore courts whereas in *Swift-Fortune*, there was none. This was also the basis for reconciliation between the decision in *Front Carriers* and *Karaha Bodhas*.[31]

[27] In coming to their conclusions, the court drew extensively from the leading expert in the commonwealth on this topic; TM Yeo *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004).

[28] The court left open the possibility of future developments resulting in equitable obligations constituting a separate established category with its own choice of law rules.

[29] [2006] 2 Sing.L.R. 323; [2006] SGHC 36 (High Court: J Prakash J), [2006] SGCA 42 (Court of Appeal: SK Chan CJ, A BL Phang JA, YK Tay J).

[30] See text accompanying n 2.

[31] [2005] 2 Sing.L.R. 568; [2005] SGHC 57, [2006] 1 Sing.L.R. 112; [2005] SGCA 47. See J Lee "Private International Law in the Singapore Courts" (2006) 10 SYBIL 349, at 350 for a brief commentary on this case. Ang J in *Front Carriers* had distinguished *Karaha Bodhas* on the ground that the court there was not asked to grant a Mareva injunction in support of foreign arbitral proceedings. The Court of Appeal in *Swift-Fortune* acknowledges that this was a difficult distinction to defend.

At the end of the day, this is an uneasy reconciliation. As mentioned earlier,[32] it remains to be seen whether the Singapore courts will extend Ang J's analysis of section 4(10) of the CLA in *Front Carriers* to support foreign court proceedings. It also remains to be seen if the use of section 4(10) of the CLA to support foreign arbitral proceedings will remain good law in light of the Court of Appeal's observations in *Swift-Fortune*.[33]

VII. Foreign Judgment, Registration out of Time Under Reciprocal Enforcement of Commonwealth Judgments Act, whether just and Convenient: *Westacre Investments Inc v the State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR)*[34]

A common law action was commenced on an arbitration award and judgment was entered in 1998. 6 years later, the judgment creditor, Westacre, sought to register the English judgment in Singapore pursuant to the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed) ("RECJA"). The judgment debtor applied to set aside the registration and this application was dismissed by the Assistant Registrar. However, the Assistant Registrar restricted the execution of the judgment by way of garnishee proceedings.

On appeal, the judgement debtor argued that the English judgment should not have been registered as it was time-barred. It was argued in the alternative that it was for other reasons not just and convenient to register the judgment.

In determining this appeal, the court noted that Singapore law determined whether a judgment was time-barred from registration and that the judgment in question could not *prima facie* be registered as it was outside the 12 month period[35] within which a judgment could be registered under the RECJA. Judgments out of time could be registered if the judgment creditor could show that it was "just and convenient" to register the judgment despite the delay.

On this, the judgment creditor must provide a good reason for the delay. Merely showing that the judgment debtor would not suffer prejudice from registration is not sufficient. The court did not find the reasons put forward by the judgment creditor sufficient.[36] Further, as part of the consideration of whether the judgment debtor would suffer prejudice, they noted that a registered judgment would have the same force and effect as if it had been obtained upon the date of registration. This meant that if registration was allowed, the judgment creditor would not require leave to obtain a writ of execution on the registered judgment whereas leave would be needed in England to obtain the same on the original judgment. This, the court considered to be a prejudice to the judgment debtor.

On the restriction imposed by the Assistant Registrar, the court opined that it did not have the power to impose any restrictions and that a judgement deserving of registration should be registered with full effect.

[32] See text accompanying note 2.

[33] For the sake of completion, it is useful to note that this matter was subsequently considered in England where the court concluded that any order made would have been set aside on grounds of non-disclosure. See [2007] EWHC 1630 (Comm), online at http://www.bailii.org/ew/cases/EWHC/Comm/2007/1630.html.

[34] [2006] SGHC 210 (High Court: TC Kan J).

[35] Section 3(1) of the RECJA.

[36] The judgment creditor's reasons for the delay were that they had been deceived by the judgment debtor about its financial condition and that political instability in Yugoslavia made it impracticable to initiate recovery.