

NOTES

A MAP OR A MAZE: JURISDICTION AND CHOICE OF LAW IN THE COURT OF APPEAL

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Rickshaw Investments Ltd and Seabed Explorations v Nicolai Baron von Uexkull is a textbook example of private international law in modern times. The exercise of jurisdiction by the Singapore courts required an investigation of choice of law. An employee, whose contract contained a governing law and jurisdiction clause for Germany (and in which country proceedings were already pending), was alleged to have committed various wrongs. Some of these, in domestic law, would be seen as torts, others as equitable wrongs. The Court dealt with choice of law for each aspect of the claim in exemplary fashion, but assembling these individual components into a comprehensive single structure raises more fundamental questions about methodology in private international law. It would have made an admirable examination question.

The recent decision of the Court of Appeal in *Rickshaw Investments Ltd and Seabed Explorations v Nicolai, Baron von Uexkull*¹ makes four significant contributions to the private international law of Singapore. First, it deals with the current choice of law rules as they apply to claims characterised as torts, and marks a clear departure from the previously-assumed state of the common law. Second, it examines choice of law as this applies to some claims which may domestically be seen as equitable in nature. Third, it refines the hierarchy of pointers which indicate whether an applicant for a stay of local proceedings has succeeded in showing another forum to be, clearly or distinctly, more appropriate than Singapore for the trial of the claim. But fourth, and perhaps unintentionally, it illustrates how the way a court comes to its conclusions is dependent on the way the case is put to it. The judgment of Phang JA is a pretty substantial piece of work, though not every reader of it will share the Court's view of what the eventual answer should have been. A commentator, not hamstrung by way the case is put to the court, has a freedom which the judge does not have; and in this Note, such disagreement as appears results wholly, so far as one can tell, from this difference in freedom and perspective.

The facts need not detain us long. The defendant, a German national and resident, but still enjoying the status of permanent resident in Singapore, had been retained by Seabed Explorations GbR, a German partnership, to market in Singapore, and maybe elsewhere, old crockery salvaged from a Tang dynasty shipwreck. The legal basis of his retainer was varied from time to time, but it was common ground that at some point he became employed under an agreement which contained a German law and jurisdiction clause. On the plaintiffs' view of the matter, the defendant did a pretty poor job; and when Seabed transferred its business to Rickshaw Investments Ltd (incorporated in the Cayman Islands), Rickshaw, which will be referred to as the employer, dismissed the defendant from his employment. The defendant took it on the chin, accepted that the contract had been terminated, and launched proceedings before the German courts. He claimed salary and expenses due under

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¹ [2006] SGCA 39; [2007] 1 Sing.L.R. 377 (Chan Sek Keong CJ, Andrew Phang Boon Leong JA).

the employment agreement, and pointed to the German law and jurisdiction clause as his justification for suing there. Judgment for a fraction of the sum claimed was by consent entered at an early stage; as to the remainder of the claim, which also sought a declaration that the termination by Rickshaw was unlawful, the German court set a case-management timetable for further conduct of the case.

Nine months after the German proceedings had been begun, Rickshaw brought proceedings of their own in Singapore. They evidently saw advantage in seeking to chart a course round the employment agreement, as they framed their claims as being for conversion of the crockery, breach of the defendant's equitable duties of loyalty and confidentiality, and deceit. The defendant applied for a stay of proceedings, succeeding before Woo Bih Li J.² But the judge's decision was reversed, and the order set aside, by the Court of Appeal. It concluded that the defendant had failed to show that Germany was a jurisdiction clearly more appropriate than Singapore for the trial of the claim, and that the judge had erred on one specific but important legal ground³ in the exercise of his discretion.

Though in the Court's final analysis it played a small part, the issues of choice of law were, as they are here, examined on the footing that they had the potential to be important to the point of being decisive. For it is frequently said that if a claim has to be disposed of by the application of foreign law, that is better done in the court whose domestic law this law is. Despite the view held by some that a Singapore court can apply foreign law—in some sense it obviously can—it does not *know* foreign law; and if the party who loses at first instance alleges that there was an error of (foreign) law as applied by the judge, there is no mechanism for a sensible appeal to a Court of Appeal which, being deprived of the mixed blessing of hearing the oral testimony of the witnesses, may be even less equipped to make rulings on such questions. A court sometimes has to do it, but no-one can pretend that the doing of it is easy or satisfactory. Foreign law belongs in foreign courts. It does not travel at all well.

A question which will immediately strike any reader of the judgment is why the Court of Appeal made no mention of the German jurisdiction clause. Part of the answer will, presumably, have to do with the manner in which the submissions were advanced on the appeal.⁴ But there was no serious challenge to the validity of the jurisdiction clause at any point. Instead, the first instance judge had been treated to conflicting evidence on the precise translation of a clause, conceived and written in German, and contained in a contract which all accepted as being governed by German law.⁵ The material question for the judge was whether this was to be seen as a clause giving exclusive jurisdiction to the German courts, or instead as identifying German courts as having a jurisdiction which was not exclusive of any other. This was, in principle at least, a matter of contractual construction, for German law to answer. The judge received testimony which conflicted; and he clearly formed the view that the defendant's expert, in giving evidence that the true German law meaning of the words used was "exclusive jurisdiction", had over-egged the pudding. This leads to two conclusions. First, one has to have some sympathy with the applications judge, who may sometimes have to do the best he can with sketchy and unconvincing material; and perhaps that was how it appeared to Woo Bih Li J. But secondly, the judge was plainly dissatisfied⁶ with the German evidence tendered for the defendant: his expert had purported to render in English the meaning of the clause. By contrast, the plaintiff's expert had advanced a simple linguistic translation. One would have thought it necessary for the judge to know what the clause meant as a matter of German law, rather than the literal translation of its words

² [2006] SGHC 70; [2006] 2 Sing.L.R. 850.

³ The judge had considered (at 57) that the location of the witnesses of fact was of small significance. The Court of Appeal disagreed: at 25.

⁴ This point will recur.

⁵ The real significance of this will appear later.

⁶ *Supra* note 2 at 12.

as a matter of the German language, for what is admissible in private international law is proof of foreign law, not proof of foreign language. The proper evidence to tender was, precisely as the defendant sought to do, evidence as to what the jurisdiction clause meant as a matter of German law. What legal effect it would then have in a Singapore court would then be entirely a matter for Singapore law to decide, an issue on which case-law is not in short supply.⁷ But the judgment suggests that the judge saw the matter quite differently. His brisk rejection of the defendant's evidence of what a German lawyer would construe the original German words to mean was not only misconceived, but illustrates brilliantly why the application of German law is done best when undertaken by German courts. The interpretation of jurisdiction clauses is a relatively small part of private international law. The fact that the cultural and jurisprudential bases of German and Singapore laws are so different means that there is always a risk that too much will get lost in translation, as it seems to have been here. Dealing with a jurisdiction clause which does not make explicit on its face whether it is exclusive or non-exclusive is problematic enough for a court when it is governed by the *lex fori*. The various common law jurisdictions have evolved quasi-rules of construction, of a slightly improbable character,⁸ designed to show that the question of interpretation is answered by science rather than impression.⁹ When the clause is drafted in a foreign language by lawyers from a foreign legal culture or cultures, the fact that evidence as to its meaning is in conflict is nothing to be surprised by. Nor would it have been useful to ask whether the German court would have regarded the bringing of proceedings in Singapore as a breach of the jurisdiction agreement. German law has to get by without the common law's power to grant anti-suit injunctions, and (in particular) orders to prevent a breach of agreement on jurisdiction. A German court will need to know whether it has jurisdiction but will rarely, if ever, be interested by whether that jurisdiction is exclusive or non-exclusive. This component of the High Court judgment is simply unsatisfactory, but as the judge had reached and expressed the firm conclusion that the jurisdiction agreement was non-exclusive, the defendant may have seen no realistic basis for submitting that the judge had erred in law. This is far from suggesting, never mind establishing, that the judge was right. It does suggest, and may even establish, that the application of German law in a Singapore court bristles with difficulty. Confidence in the excellence of the trial process in general and the judiciary in particular is all very well, but not when a court is applying what is, to it, a very foreign law. But as said above, none of this surfaced before the Court of Appeal.

So let us return to the issue of choice of law: what law would have to be applied to deal with the claims alleging conversion, deceit, and breach of variously pleaded equitable duties? Once we know that, the location of the natural forum may be clearer to see. Now, the common law choice of law rules for torts start by asking where in substance the tort was committed. That question was answered as being in Singapore: the conversion of the shipwrecked crockery was said to have taken place in Singapore. This would mean that Singapore's domestic law applied to the conversion claim: but on what precise basis was this conclusion to be rested? Under English common law, all torts committed within the territorial jurisdiction of the forum are, always and without exception, governed by the *lex fori*. *Metall & Rohstoff AG v Donaldson Lufkin & Jenrette*¹⁰ established this with the result

⁷ In England, see Dicey, Morris & Collins, *The Conflict of Laws*, 14th ed. (London: Sweet & Maxwell, 2006), paras. 12R-086 *et seq* and the cases there referred to. For Singapore, see *The Jian He* [2000] 1 Sing.L.R. 8, *The Hung Vuong 2* [2001] 3 Sing.L.R. 146; *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 Sing.L.R. 6; *The Hyundai Fortune* [2004] 4 Sing.L.R. 548; *The Rainbow Joy* [2005] 3 Sing.L.R. 719. And see also T.M. Yeo, "Party Autonomy in International Civil Litigation: Singapore Law" and Y.L. Tan, "Choice of Court Agreement: From a Viewpoint of Anglo Commonwealth Law" in Akira Saito, ed., *Evolution of Party Autonomy in International Civil Disputes* (Singapore: LexisNexis Singapore, 2005).

⁸ The English cases did draw a distinction between transitive and intransitive verbal forms. No rational person would be persuaded that it makes any sense to do so.

⁹ Dicey Morris & Collins, *supra* note 7 at paras. 12-092 *et seq*.

¹⁰ [1990] 1 QB 391 (CA).

that only the House of Lords could thereafter have taken¹¹ a different view. This means that the choice of law rule for foreign torts—double actionability, but subject to a double flexible exception¹²—cannot be applied. The Court of Appeal disagreed, making the reasonable point that one can imagine cases which, though undoubtedly taking place in Singapore, have no connection to Singapore which is sufficient to demand the application of Singapore law.¹³ A drunken brawl in the transit lounge at Changi Airport between passengers who have drunk to excess at Qantas's expense and who are just about to complete their journey back to Australia, is as a matter of evaluation¹⁴ an Australian tort even when committed in Singapore.¹⁵ Had this all taken place at Heathrow, the English common law would have applied English law, obstinately refusing the possibility of making an "Australian" exception to reflect the overwhelmingly Australian facts. This would have made no, or no sufficient, sense. The Court of Appeal, its hands unbound by troublesome authority, was right to admit the possibility of a flexible exception to the application of the *lex fori* to a locally-located tort. The need for a court to be able to make such exceptions is so obvious that it comes as a real shock to find that the stiff-necked tendency, which regards exceptions as unprincipled and disreputable, still prevails in parts of the commonwealth.¹⁶ This should not be the case, for the limitless and chaotic universe of torts will not squeeze into a one-size-fits-all straitjacket, no matter how devoutly the contrary is wished, or how severely the senior judiciary scold those who persist in thinking otherwise. The Court of Appeal got it right, and gave the right reasons for getting it right. In the circumstances, the conclusion that there was no basis in *Rickshaw Investments* for making such an exception did rather render the analysis marginal; but if one waits for the right case before one makes the right law, a state of unsatisfactory uncertainty may prevail for years, which will do no one any good. As to the claim alleging deceit, this too was governed by the same choice of law rule, and it also led to the application of Singapore law.

But having given itself elbow room, should the court not have made an exception in favour of the application of German law, exclusively, to govern the tort claims? The employment contract was governed by German law; and the deceit and conversions as were alleged all took place within the context of the employment relationship created by the employment contract.¹⁷ The alleged lies and thieving were said to be committed by an employee acting in or in connection with the duties of his employment. One may therefore have expected the law governing the claims in tort to have been overshadowed by the contractual choice of law. There were perhaps three routes to this conclusion. One would have relied on the "double flexibility" component of the newly-clarified rule for choice of law in tort, so as to apply the law of the contract in place of either or both limbs of the double actionability rule.

¹¹ But since the coming into force of the Private International Law (Miscellaneous Provisions) Act 1995 (c.42), this could only happen in relation to torts falling outside the material scope of this Act. That effectively confines the possibility to defamation; and the wait in England may therefore be a long one.

¹² The development of the common law is best seen from *Boys v Chaplin* [1971] AC 356 and *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190; adopted in Singapore in *Parno v SC Marine Pte Ltd* [1999] 4 Sing.L.R. 579.

¹³ Described, *supra* note 1 at 64, as "purely fortuitous".

¹⁴ For the use of the "value judgment" test, see Aikens J in *Trafigura Beheer BV v Kookmin Bank Co* [2006] EWHC 1450 (Comm); [2006] 2 Lloyd's Rep 455.

¹⁵ This was not a factual example given by the Court.

¹⁶ The Supreme Court of Canada was first off the mark in expressing hostility: *Tolofson v Jensen* [1994] 3 SCR 1022, though in the light of *Wong v Wei* [1999] 10 WWR 296 (BC) it cannot quite be claimed that argument on the point is now inadmissible. The High Court of Australia was considerably more hostile to the idea, appearing to regard any exception as perfidious. Take, as the most recent example, *Neilson v Overseas Projects Corp of Victoria* [2005] HCA 54; (2006) 79 ALJR 1736, where the following appears at 93: "What have come to be known as "flexible exceptions" to choice of law rules are necessarily uncertain. That is the inevitable consequence of their flexibility. Experience reveals that such rules generate a wilderness of single instances". Torts usually are single instances.

¹⁷ To use the helpful clarification at *supra* note 1 at 83.

A second would have been to challenge the proposition that the employer was entitled to choose to frame the claim in tort and thereby sidestep the choice of law made in the contract. And the third would be to observe that the express choice of law was in terms wide enough to govern a claim framed in tort. It is convenient to take these in reverse order.

The construction of choice of law clauses is one of those issues which have never quite arisen for judicial attention. To some¹⁸ it is a mystery why this is so. Some interesting authority is to be found in *The Jian He*.¹⁹ There, the Court of Appeal accepted that a jurisdiction clause drafted in sufficiently wide terms governed jurisdiction over claims framed in tort; and the court lined up with the mainstream of common law tribunals in deprecating the submissions of a claimant who sought to evade a choice of law clause, framed more or less by reference to the contract, by bringing a claim in tort.²⁰ It should also be observed that the clause in that case, in a very rare illustration of excellence in legal drafting, provided that all disputes were to be determined in accordance with Chinese law. The Court of Appeal in *The Jian He* had had no need to make any reference to this element of the parties' agreement, but almost everything which it said on the subject of their agreement on jurisdiction translates directly to the context of choice of law. Why should it not be said in *Rickshaw Investments*, therefore, that in seeking to frame their claims to tread around the edges of the employment contract, which had never been disavowed or rescinded by them, the employers were seeking to deprive the parties' agreement of part of its content? True, the wording of the contract was, in translation,²¹ rather bland, but "the Parties agree on German law for this contract..." still seems clear enough to be given legal effect. Unless the last three words are words of limitation rather than words of description, the choice of law may perfectly well be read as one which chooses German law for disputes arising from the contract, which this dispute did.

Now whether the parties are permitted to choose to formulate their claim in contract to avoid something undesired in the law of tort, or in tort to avoid something undesired in the law of contract, is still debatable. The present writer takes the view²² that whatever may be permitted in the domestic legal system,²³ such playing around has no proper role in private international law,²⁴ and even less so where it has the effect of giving the go-by to an express choice of law in an unimpugned contract. It is also correct to observe that argument to this effect did not receive the applause of the English Court of Appeal in *Base Metal Trading Ltd v Shamurin*,²⁵ and it fared little better before the Court of Appeal in *Rickshaw Investments*. So it is with the appearance of diffident unrepentance that it is advanced again. Where the parties have agreed that a particular law shall govern their consensually-created legal relationship, there is every reason to suppose that they intended this law to govern all causes of action reasonably connected to or arising from it. Suppose that the choice of law clause had been read and the parties to the employment contract had been asked "yes, but if the employee commits a wrong in the course of the employment, what law do you expect to govern a claim based on the contract?". Their response is almost bound to have been "German law, of course". If it had been pointed out to them that they had not said so in the clearest of terms, the response should have been that they chose and expressed their intentions economically and clearly enough; and that as reasonable commercial men it would have been ludicrous for one of them to have proposed that

¹⁸ Not to everyone: others believe that choice of law is validated by rules of law which do not enquire into what the parties actually intended.

¹⁹ [2000] 1 Sing.L.R. 8.

²⁰ See especially *supra* note 1 at 13-17.

²¹ Cited, *supra* note 1 at 4.

²² Advanced in Adrian Briggs, "Choice of Choice of Law?" (2003) 1 LMCLQ 12.

²³ Where *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145 decides that the claimant does have such a freedom.

²⁴ Which involves the conclusion that *Coupland v Arabian Gulf Oil Co* [1983] 1 WLR 1136 should not be followed.

²⁵ [2004] EWCA Civ 1316; [2005] 1 WLR 1157.

certain employer-employee claims be governed by German law at the same time as others, indissociable from the employment relationship, were governed by another law. Would sensible businessmen have agreed to any such thing? Of course they would not have. The law reports are increasingly littered with judicial statements which give a wide, sensible and all-embracing construction to jurisdiction agreements. We can take two, handed down even more recently than *Rickshaw Investments*, to show how and how hard the wind is blowing. In *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*,²⁶ the Full Court of the Federal Court of Australia dealt with and resolutely rejected a submission that a jurisdictional clause in an arbitration agreement applied to the contractual parts of a dispute between contracting parties, but not to a claim based on pre-contractual misrepresentation. As Allsop J put it:

This liberal approach is underpinned by the sensible commercial presumption that the parties did not intend the inconvenience of having possible disputes arising from their transaction being heard in two different places. This may be seen to be especially so in circumstances where disputes can be given different labels, or placed into different legal categories, possibly by reference to the approaches of different legal systems. The benevolent and encouraging approach to consensual alternative non-curial dispute resolution assists in the conclusion that words capable of broad and flexible meaning will be given liberal construction and content. This approach conforms with a common-sense approach to commercial agreements, in particular when the parties are operating in a truly international market and come from different countries and legal systems and it provides appropriate respect for party autonomy.

The same point, in the same context,²⁷ was made in the English Court of Appeal in *Fiona Trust & Holding Corp v Privalov*.²⁸ According to Longmore LJ:²⁹

One of the reasons given in the cases for a liberal construction of an arbitration clause is the presumption in favour of one-stop arbitration. It is not to be expected that any commercial man would knowingly create a system which required that the court should first decide whether the contract should be rectified or avoided or rescinded (as the case might be) and then, if the contract is held to be valid, required the arbitrator to resolve the issues that have arisen. This is indeed a powerful reason for a liberal construction... It cannot really be supposed that the businessmen negotiating these charterparties... intended that any claim suggesting the contract was invalid would have to be brought wherever the defending companies were incorporated (here the British Virgin Islands) while claims for breach of contract were brought in England.

Amen, Amen. And these sentiments translate to choice of law agreements, where they fit like a glove. What possible reason would there have been for the parties, when they were in a cooperative and constructive relationship with each other, to have conceived and arranged for a patchwork of choices of law? The law is sometimes an ass but, as Lord Reid once said, it is rarely as asinine as that.³⁰ By contrast, Woo Bih Li J seems to have seen the point,³¹ and it was a pity that the Court of Appeal was not persuaded, on this point, to affirm him. Commercial sense and legal reasoning missed the chance to reinforce each other.

But if this version of common sense is not to prevail, and the parties' choice of law is taken to be limited in legal scope (never mind the intention behind it) to claims characterised

²⁶ *Comandate Marine Corp v Pan Australia Shipping Pty Ltd* [2006] FCAFC 192 at 165. From the authorities relied on by His Honour for his conclusion, at 166-186, it is apparent that the reasoning was not intended to be confined to the construction of arbitration, as opposed to jurisdiction, agreements. Beyond that the judgment does not pretend to go, so its support for the submissions advanced herein is by the power of analogy.

²⁷ Except that the "non-contractual" element of the claim was bribery rather than fraud.

²⁸ [2007] EWCA Civ 20.

²⁹ *Ibid.* at 19.

³⁰ *Haughton v Smith* [1975] AC 476 at 500 (rejecting the theory that it was an indictable offence at common law to attempt the impossible).

³¹ [2006] 2 Sing.L.R. 850 at 42.

as contractual, there still remains the question of the impact of the flexible exception to the choice of law for claims characterised as torts. Even though the Court of Appeal was concerned not to allow the exception to swallow up the basic rule,³² so recently clarified, there was no such risk where the exception was to be made, well within the choice of law rules for torts, in favour of the law which had been expressly chosen to govern the contract. Those other common law traditions which have latterly rejected the flexible exception have seen in it confusion and uncertainty,³³ which is a Bad Thing, or a short cut to the application of the law of the forum, which is a Worse Thing Still. Not even they could rationally object to the application of the law expressly chosen by the parties, which suffers from none of the vices indicated. Indeed, in the distinct context of the English choice of law rule for claims in tort, which is now largely statutory, the Commercial Court in London recently concluded that it would be “bizarre” for a claim in tort, brought by the issuer of a letter of credit against its beneficiary, to be governed by something other than the *lex contractus* of the credit in question, even where the alleged tort was committed somewhere else. In *Trafigura Beheer BV v Kookmin Bank Co*³⁴ a Korean bank, which had issued a letter of credit governed by English law, sought to confect a claim in tort against the beneficiary of that credit. It endeavoured to do so by reference to Korean law; and sought to argue that this tort claim was not governed by English law. Even though he accepted that the alleged tort was committed in Singapore, Aikens J was not prepared to swallow the bait: even if³⁵ the claim may have been tortious in character, it was still governed by the law which governed the contract from which the duties, and hence the claims, arose. The writer is already on record³⁶ as holding the view that Aikens J was absolutely right and that, be it noted, in a case in which the *lex contractus* had not been expressly chosen. And in *Rickshaw Investments*, why would this not have been the answer: to make an exception, much more principled than “flexible” would suggest, in favour of the law the parties had actually chosen? We can dismiss the retort that no decided case allows the parties, ever, to choose the law to govern a tort, for if there is no such authority, then it is high time that there was, and the flexible exception makes it easy to vouch for. The answer in the case itself may have lain in the manner in which counsel deployed the submissions put before the court, but it must be said that, at this point, the refusal to apply the *lex contractus* to torts which were alleged to be associated with the contract is perplexing. All the Court of Appeal said in relation to the conversion claim was that the majority of connecting factors pointed to Singapore; in relation to deceit it simply said that the employer “has not adduced any evidence” as to why the exception to double actionability should apply.³⁷ Leaving aside the point that this was surely more a matter of submission than evidence, one wonders how well the argument was pushed that the *lex contractus* should have shown where the exception was to be found.

The claim for breach of various equitable duties alleged to be owed by the indiscreet and disloyal employee raised the question of choice of law in equity. Or rather, it raised the question whether this was a question at all. Here the Court was on much surer ground, treading in the footsteps of Dr Yeo,³⁸ who has shown why, in his opinion, “choice of law for equitable claims” is an inapt expression. The improbability of the reincarnation of a medieval curial jurisdiction as a characterisation category for choice of law is clear: claims may be equitable; they may be common law; they may be High Court or County Court; but none of these jurisdictional terms represents a category for the purposes of choice of

³² *Supra* note 1 at 65.

³³ See note 16 above.

³⁴ [2006] EWHC 1450 (Comm); [2006] 2 Lloyd’s Rep 455.

³⁵ Though there is little doubt that the judge had such doubt, seeing it as plainly tortious.

³⁶ Adrian Briggs, “The further consequences of a choice of law?” (2007) 123 LQR 18.

³⁷ See *supra* note 1 at 68-72.

³⁸ TM Yeo, *Choice of Law for Equitable Doctrines* (Oxford: Oxford University Press, 2004) is the source of much of all the published wisdom on the issue. At *supra* note 1 at 75 *et seq*, Phang JA paid the work a fitting and deserved tribute. The present writer, former supervisor and visiting colleague, declares an interest and agrees with Phang JA’s evaluation.

law. In cases where the equitable duties impinge on the parties because they are linked by a contract, the appropriate choice of law rule is to apply the *lex contractus*. Dicey Morris & Collins³⁹ has said so for a very long time; and Dr Yeo agrees. A harder question will arise when the relationship between the parties is not, or is not also, a contractual one or a near- or formerly-contractual one; and the Court of Appeal was wise to leave that for another day. The Court looked at length at what Dr Yeo had written, and liked what it found. Following where he pointed, it concluded that the claims for breach of confidence, and for breach of fiduciary duty, were to be governed by the law which governed the employment contract. In other words, the equitable claims were governed by German law.

For all that this was unquestionably the right answer, one should not lose sight of the many ironies in it. First, it makes it plain that we do well to speak of the claims for breach of confidentiality and for breach of fiduciary duty. These sound like claims which may be fitted into the framework of private international law and its characterisation of issues. It will simply mislead us if we continue to speak about equitable claims; it makes as little sense as to speak about choice of law for common law claims. Secondly, the result was that claims which are, in some sense, equitable were considered to be governed by German law, which understands nothing of equity: the German book of Equity is one of the shortest never written. And thirdly, this was because the equitable duties arose “from the Employment Agreement itself—or, more specifically, from the relationship established therein”.⁴⁰ How true this was: had there been no such relationship there would have been no factual basis for any such duties to arise. The Court’s view that German law governed the claims against the disloyal and the indiscreet employee was spot on.

And so it comes to this. The employee was the subject of complaint that he had, in diverse ways, done wrongs to his employer. Insofar as he was alleged to have been deceitful and stole his employer’s crockery, these allegations were to be governed by the law of Singapore; but insofar as he was disloyal and stole his employer’s information, the claims were to be governed by German law. One has to say that, even though the point-by-point analysis in the judgment of the Court is persistently admirable, the overall conclusion on choice of law is somehow less than the sum of its parts. The lesson it teaches is, perhaps, that where the parties to a contract have made an express agreement on choice of law, and the claims, no matter how formulated, derive from the relationship established by that contract, the law which governs that contract has the strongest claim to govern the claims which arise from or in relation to that contract. Matters may stand differently where the contract is impugned (though the law on jurisdiction clauses gives little encouragement to think so⁴¹), or where there are two contracts with two distinct governing laws,⁴² or where the contract did not contain an express choice of law which permits it to be said that what the parties expressly chose is surely what they expected to be given. Sooner or later, the common law will come to accept that where the parties make a contract, and the claims raised as between them are related to that contract, it takes a very persuasive set of facts to explain why the law which was chosen to govern the contract will not govern these as well. The conclusion will not be rested on some foreign or otherwise-exotic principle against the cumulation of remedies; it will have nothing to do with those who derive their legal thinking from Napoleon’s civil code. It will have everything to do with the simple and commercially-unanswerable proposition that if that is what the parties appear to have said they wanted in terms of choice of law to regulate their relationship, then unless public policy or illegality directs the court to take

³⁹ Dicey, Morris & Collins, *supra* note 7 at paras. 34-033 *et seq.*

⁴⁰ *Supra* note 1 at 83.

⁴¹ See in particular the cases cited in *supra* note 7.

⁴² As in *Base Metal Trading Ltd v Shamurin* [2005] 1 WLR 1517, where the defendant was an employee (*lex contractus* Russian law) and officer-holder in a company (*lex incorporationis / lex contractus* Guernsey law); and the decision of the court, no matter what it thought it was saying, was that the “equitable claims” were governed, according to their foundation, by the particular contract to which they related.

a different view, that is a full, perfect, and sufficient reason for a court in a common law jurisdiction to give it to them. From this perspective, the learning deployed in the judgment in *Rickshaw Investments* will be seen to be an important part of the process by which we got there. The only wonder will be why it ever took us as long as it did.

We must return to the case. In light of its conclusions on choice of law, the Court found itself faced with a case where a significant part of the claim would be governed (before a Singapore court) by Singapore law, and a significant part by German law. In reaching the conclusion that this left the arguments on choice of law in balance, the Court of Appeal appears to have assumed that the German court, were the claims raised before it instead by way of counter- or cross-claim, would see the choice of law matters in the same way. This seems an insecure conclusion, but in the absence of proper evidence of German rules for choice of law,⁴³ it was probably the only real view the Court could reach. That is a shame: surely the defendant, seeking a stay, would have done well to adduce evidence that a German court would not have found the need to struggle with the application of Singapore law; and if he had, the weight of the argument on choice of law would have helped the case for a stay of proceedings. To see whether the approaches to choice of law point to the naturalness of one court or another, one cannot simply assume that the contending courts will take a common view of choice of law: the appropriate question is a more careful one. The reasoning in this regard resembles that used by the Court in relation to the location of the witnesses. It does not matter where they are. What does matter is whether either court would be impaired in its trial of the issues by the absence of the witness for testimony *viva voce*. It is not for a Singapore court to “tell” the German court that it needs to hear particular witnesses. As the Court observed, the German court, in making its case-management order, had made that need apparent.⁴⁴ The Court was therefore in a position to make a correct assessment of the relevance of the witnesses and their compellability.

Given the deduced neutrality of the choice of law, and the fact that both courts would wish to have the same testimony, one might have expected that the fact that German proceedings were well under way would have tilted the balance in favour of a stay; but here the Court was rather less persuasive. Its suggestion⁴⁵ that, if weight were to be given to the fact that German proceedings had been started first, this would only encourage an ugly rush to seize a court before one’s opponent does, is a little unreal. When the litigation is truly international, this is exactly what competent lawyers do for their clients, and the judgment of the Court of Appeal will not do much to change it. More to the point was the fact that the defendants waited nine months after the German proceedings had been commenced to start proceedings in Singapore. If this was not an attempt to throw sand in the works, it is hard to know what it is: if it looks like a spoiling tactic, and works like a spoiling tactic, it is a safe bet that it is a spoiling tactic, impure and simple. For the Court of Appeal to licence it was, one says with the perspective of one watching from the grandstand only, a rather regrettable thing. The Court’s principal reason was that witnesses whose testimony was essential to the claims in the various courts were compellable in Singapore, but not compellable in Germany. While that is not a small point, one wonders whether it is quite as large as the Court took it to be. In line with what was submitted above it is not clear, for example, that the German court would have seen this as much of a problem for its process.

The judgment is, in many ways, a splendid piece of legal analysis. So why was the outcome as it was, and if anything is, what is wrong with it? One simply cannot know how the case was put to the Court, and the points made above which appear to question the approach taken are, in all probability, questions about the way the issues were presented. One would have expected the case to have been opened with the observation that there

⁴³ And there is no suggestion that the Court was treated to any at all.

⁴⁴ *Supra* note 1 at 29.

⁴⁵ *Supra* note 1 at 88.

were proceedings brought by an employee in his national *and* contractually-chosen court, where he would honour and obey the contractual promise as to the law chosen by the employment contract. These proceedings had run for almost a year before the employer brought proceedings in a distant land, ignoring the choice of court and pretending to ignore the choice of law. This kind of activity by vengeful employers against their employees is not a rarity, unfortunately. It happened a few years ago in England, in the case of *Turner v Grovit*.⁴⁶ An employee, bringing a claim in the English courts against the employer who had driven him to resign,⁴⁷ was well on the way to victory when the employer caused proceedings to be brought against the employee in the Spanish courts. These proceedings made all manner of improbable allegations but were, as the English Court of Appeal observed in a judgment of spectacular rhetorical force, designed to vex and oppress the employee, causing him to have to fight on two fronts at once when, by reason of the employer's original disgraceful conduct, he no longer had a salary to fund either. The English courts considered the approach of the employer to be so egregious that they issued an anti-suit injunction to reinforce the employee's right to sue in the court he had seised.⁴⁸ That, be it noted, was in a case in which there was no prior choice of court or law. In some ways, the position taken by the employer in *Rickshaw Investments* was even more outrageous, for it defied the agreements on jurisdiction and choice of law on which the employee relied in suing before his home courts. For the Court of Appeal to see this, at the end of a long and careful judgment, as a case where the Singapore action should not even be stayed, goes to illustrate the old truth that everything always depends on the way a case is presented. A good court can usually write a judgment to explain the basis for its conclusion, but in the adversarial system, it is frequently the case that the conclusion which has to be made comes first. Had that been the path of the argument in *Rickshaw Investments Ltd v. Nicolai, Baron von Uexkull*, the lines of the judgment would, perhaps, have been a little different from those which now appear in the reports.

⁴⁶ [2000] QB 345 (CA). For further proceedings, see [2002] 1 WLR 107 (HL), [2004] ECR I-3565.

⁴⁷ In English law, such a claim would be that of constructive dismissal.

⁴⁸ The principal relevance of the decision in England is that the Court of Justice of the European Communities subsequently ruled, on a reference to it from the House of Lords, that the English courts had no right to order an injunction to restrain the employer from suing before the courts of another Member State of the European Union. This was because the new European jurisdictional scheme, by which all states were bound alike, had to be interpreted as excluding this power otherwise possessed by the courts of the United Kingdom and Ireland. That conclusion, bitterly regretted by some, has no relevance to the appreciation that the conduct of the employer was exactly the kind of thing which ought to be restrained by injunction.