# THE CONTRACTUAL BASIS OF THE ENFORCEMENT OF EXCLUSIVE AND NON-EXCLUSIVE CHOICE OF COURT AGREEMENTS

This article argues that, although choice of court agreements can be viewed from a procedural or contractual perspective, the predominant approach in Singapore and English law in respect of the exclusive jurisdiction agreement has been to give primacy to the rationale of the enforcement of a contractual bargain, tempered by a judicial discretion in its enforcement within the procedural jurisdictional context. It is also argued that the only difference between exclusive and non-exclusive jurisdiction agreements lies in the content and scope of the agreement between the parties, so the same contractual approach (as tempered by procedural considerations) should be applied in so far as the court is enforcing a contractual agreement. The main difficulty lies in determining the promissory content within a non-exclusive jurisdiction agreement. The implications of this analysis go beyond questions relating to the exercise of the jurisdiction of the court. They also reach the contexts of anti-suit injunctions, damages for breach of contracts, and defences to foreign judgments.

**YEO** Tiong Min
*LLB (National University of Singapore), DPhil, BCL (Oxford);*
*Advocate & Solicitor, Singapore;*
*Associate Professor, Faculty of Law, National University of Singapore.*

## I. Introduction

1 Jurisdiction agreements perform a very significant channelling function in the adjudication of cross-border civil disputes. Many jurisdictions give effect, to varying degrees, to the parties' selection of venue for and mode of dispute resolution. The choice of court agreement is the most significant type of jurisdiction agreement as far as civil litigation is concerned. Its significance has in fact been underscored recently by the efforts of the Hague Conference on Private International

Law to gain worldwide support for a Draft Convention on Exclusive Choice of Court Agreements.[1]

2 In the common law, the distinction has been traditionally drawn between exclusive and non-exclusive choice of court agreements, a distinction that is also adopted by the Hague Conference. In an exclusive choice of court agreement, the parties agree that disputes falling within their dispute resolution agreement will be decided by, and only by, their chosen court. In the typical non-exclusive choice of court agreement, the parties agree that they can sue one another in the court of a particular state, but do not say they cannot bring proceedings in the courts of other states. The increasing use, and sophistication in the drafting, of non-exclusive jurisdiction clauses, as well as growing litigation in relation to such clauses, call for closer study of the effect of such agreements. There is much potential for confusion in the arena where non-exclusive jurisdiction agreements operate: they may give rise to the same effect[2] as (or even thought to have stronger effect[3] than) exclusive jurisdiction agreements; they may require a *sui generis* approach;[4] they may be given ordinary weight in the determination of the natural forum;[5] or they may be given effect to as a very strong factor in the natural forum calculus.[6] While considerable attention has been paid to the effect of exclusive

1 At the time of writing, the latest draft of the work-in-progress is as of April 2004, Annex II in M Dogauchi and T C Hartley, "Preliminary Draft Convention on Exclusive Choice of Court Agreements: Draft Report", December 2004, online: *Hague Conference on Private International Law* <http://hcch.e-vision.nl/upload/wop/jdgm_pd26e.pdf>.

2 See, *eg*, *JP Morgan Securities Asia Pte Ltd v Malaysian Newsprint Industries Sdn Bhd* [2001] 2 Lloyd's Rep 41 at [43]; *Breams Trustees Ltd v Upstream Downstream Simulation Services Inc* [2004] EWHC Ch 211 at [21]; *Bayerische Landesbank Girozentrale v Kong Kok Keong* [2002] 4 SLR 283; *Societe Generale v Tai Kee Sing* [2003] SGHC 139; *Import Export Metro Ltd v Compania Sud Americana de Vapores SA* [2003] 1 Lloyd's Rep 405 at [16].

3 In so far as some authorities suggest that a more restrictive approach be taken to the factors that may be taken into consideration in the non-exclusive jurisdiction agreement cases than in the case of exclusive jurisdiction agreements, a point that was discussed and dismissed in *Import Export Metro Ltd v Compania Sud Americana de Vapores SA*, *ibid*.

4 See the "modified *Spiliada* approach" in *British Aerospace Plc v Dee Howard Co* [1993] 1 Lloyd's Rep 368, where the burden is on the party seeking to take the action outside the contractual forum to show strong reasons for doing so, and without regard to factors foreseeable at the time of contracting.

5 See, *eg*, *Allied Irish Bank v Ashford Hotels Ltd* [1997] 3 All ER 309 at 320; *Lehman Brothers Special Financing Inc v Hartadi Angkosubroto* [1999] 2 SLR 427; *Yugiantoro v Budiono Widodo* [2002] 2 SLR 275.

6 See, *eg*, *Morin v Bonhams & Brooks Ltd* [2003] 2 All ER (Comm) 36 at [64]; affirmed in [2004] 1 All ER (Comm) 880; [2004] 1 Lloyd's Rep 702 without reference to this point.

jurisdiction agreements on the exercise of the jurisdiction of the court under the common law,[7] much less academic attention has been paid to the effect of non-exclusive jurisdiction agreements.[8]

3 The main thesis of this article is a simple one. It is that the same contractual basis that underlies the enforcement of the exclusive jurisdiction agreement should be applied to non-exclusive jurisdiction agreements. Consequently, the traditional distinction between exclusive and non-exclusive jurisdiction agreements in the common law is an illusory one, and while it remains practically useful to distinguish between the two, the real question in every case is the content and scope of the contractual bargain of the parties. Whereas the obligations are sharply defined in the typical exclusive jurisdiction agreement, the obligations attached to a non-exclusive jurisdiction can be more complex. They are often a matter of inference and should therefore be a question of the construction of the specific agreement in each case, in accordance with the proper law of the agreement (where it is proved).

4 The analysis will focus on the Singapore position, but frequent references will be made to English cases for guidance. The question is considered from the perspective of how a Singapore court will consider a choice of court agreement to affect the jurisdictional dispute before it. There may well be parallel jurisdictional disputes in foreign countries (whether in the chosen court or otherwise) in respect of the same subject matter, but this falls outside the scope of this study.

5 Part II of this article outlines the common law concept of jurisdiction, and Part III discusses some fundamental concepts relating to jurisdiction agreements. Together, they set out the background against which the argument will be made. Part IV sets out the common law basis

7 See, *eg*, A Bissett-Johnson, "The Efficacy of Choice of Jurisdiction Clauses in International Contracts in English and Australian Law" (1970) 19 ICLQ 541; Michael Pryles, "Comparative Aspects of Prorogation and Arbitration Agreements" (1976) 25 ICLQ 543; Otto Kahn-Freund, "Jurisdiction Agreements: Some Reflections" (1977) 26 ICLQ 825; Toh Kian Sing, "Stay of Actions Based on Exclusive Jurisdiction Clauses under English and Singapore Law" [1991] SJLS 103 at 410; Andrew S Bell, "Jurisdiction and Arbitration Agreements in Transnational Contracts" (1996) 10 JCL 53; Edwin Peel, "Exclusive Jurisdiction Agreements: Purity and Pragmatism in the Conflict of Laws" [1998] LMCLQ 182.

8 Only recent works tend to concentrate on this issue: James J Fawcett, "Non-Exclusive Jurisdiction Agreements in Private International Law" [2001] LMCLQ 234; Tan Seow Hon, "A New-Found Significance for Non-Exclusive Jurisdiction Agreements?" [2000] SJLS 298; Tan Seow Hon, "Treatment of Multi-Courts Jurisdiction Agreements" (2001) 12 SAcLJ 120; Joel Lee, "Non-Exclusive Jurisdiction Clauses – Changing Approaches?" [2003] SJLS 593.

of the contractual enforcement of exclusive jurisdiction agreements within a procedural context. Part V carries that argument further to examine its consequences in the context of exclusive jurisdiction agreements. Part VI explores the consequences of the contractual analysis for non-exclusive jurisdiction agreements.

## II. Outline of international civil jurisdiction

### *A. Jurisdiction: Nexus and exercise*

6 In general, in civil cases, whether the Singapore court has personal jurisdiction over the defendant, in the sense of having legal authority to bind the defendant to its decision, depends on the service of process on the defendant. Historically, under the common law rules, the court may assume jurisdiction over the defendant if the defendant has been properly served with process while physically present within the territory of the forum, or if the defendant has submitted to the jurisdiction of the forum. This rule is now statutorily endorsed in Singapore.[9] If the defendant is present, the claimant can serve the originating process on the defendant as a matter of right. Service within the jurisdiction in accordance with a valid agreement to submit to the jurisdiction of the Singapore court provides a legal basis of jurisdiction.[10] Submission can also occur during the conduct of legal proceedings by an act of the defendant demonstrating irrevocably that he has accepted the legal authority of the court to determine the merits of the case. In submitting to the jurisdiction, the defendant is estopped from arguing that the court has no jurisdiction.[11] This type of jurisdiction, derived from the common law, does not involve the discretion of the court and is commonly known as jurisdiction as of right.

7 The defendant may, however, challenge the exercise of the jurisdiction of the court. Today, this challenge is based on the doctrine of the natural forum.[12] Where jurisdiction is obtained as of right, in the absence of a jurisdiction agreement, the defendant may try to persuade the court to stay the proceedings on the basis that there is another

9 Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed), ss 16(1)(a)(i) and 16(1)(b). See also the Subordinate Courts Act (Cap 321, 1999 Rev Ed), s 19.

10 See Part III Section A of the main text below.

11 *The Messiniaki Tolmi* [1984] 1 Lloyd's Rep 266 at 270.

12 *Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)* [1987] AC 460, adopted in Singapore in numerous cases since *Brinkerhoff Maritime Drilling Corp v PT Airfast Services Indonesia* [1992] 2 SLR 776.

available forum that is the clearly and distinctly more appropriate forum to hear the case as a matter of convenience, and (if so) that there are no reasons of justice – that the claimant will not be deprived of substantial justice if the trial were to take place abroad – why the case should nevertheless be heard in the Singapore court.[13]

8 In addition, there is statutory discretionary jurisdiction in cases where the defendant cannot be served within the jurisdiction.[14] Under the Rules of Court,[15] the court may grant leave for service of process out of the jurisdiction. The grounds for the granting of such leave are generally based on connections between the forum and one of the following: the defendant, the subject matter of the dispute, or the cause of action. Before leave is granted, the court must be satisfied that there is a good arguable case that the situation falls within one of the provisions providing for service of process out of jurisdiction,[16] that there is a serious issue to be tried on the merits,[17] and that it is a proper case for leave to be granted.[18] The most important consideration to establish the proper case is that the Singapore court should be shown to be the most appropriate forum to hear the case.[19] The application for service out of jurisdiction is made in the first instance by the claimant alone. After the service of process has been effected on the defendant overseas, the defendant may apply to set aside the service of the writ. For the present purposes, the most important ground to support such an application is that the Singapore court is not the most appropriate forum to determine the merits of the case. This involves the same doctrine of natural forum discussed above, except that, in the absence of a jurisdiction agreement, it is up to the claimant to show why the Singapore court is the most appropriate forum

13 The defendant bears at least the initial legal burden. While the English position is that the claimant only has the evidential burden of proving the factors in favour of continuing the action (see, *eg*, *Charm Maritime Inc v Kyriakou* [1987] 1 Lloyd's Rep 433 at 444; *The Rothnie* [1996] 2 Lloyd's Rep 206 at 211), the position in Singapore is less clear and authorities suggest that it may be the legal burden that shifts: *PT Hutan Domas Raya v Yue Xiu Enterprises (Holdings) Ltd* [2001] 2 SLR 49 at [16]–[17] (the headnote assumes that it is the legal burden that shifts); *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd* [1996] SGHC 285 at [26] and [29]; *Perwira Habib Bank Malaysia Bhd v Soon Peng Yam* [1995] 1 SLR 783 at 789–790. But *cf The Owners of the Ming Galaxy v The Owners of the Herceg Novi* [1998] SGHC 303 ("*The Herceg Novi*") implying that the legal burden in a stay application rests on the defendant throughout.

14 Supreme Court of Judicature Act, *supra* n 9 above, s 16(1)(a)(ii).

15 Cap 322, R 5, O 11.

16 *Bradley Lomas Electrolok Ltd v Colt Ventilation East Asia Pte Ltd* [2000] 1 SLR 673.

17 *Ibid*.

18 O 11 r 2(2) of the Rules of Court.

19 *The Spiliada*, *supra* n 12.

to hear the case. The only distinction is a procedural one, and in fact it is not uncommon for the defendant to apply to stay the proceedings, instead of applying to set aside the service. The applicable principles of natural forum are the same, apart from the burden of proof.[20]

9 Thus, putting aside procedural complications, the personal jurisdiction of the Singapore court in general international civil litigation can be understood in terms of two concepts: the existence of the *nexus* for the jurisdiction, and the *exercise* of this jurisdiction. The former is supplied under the common law by the territorial presence or submission of the defendant, and expanded by statute to numerous grounds connecting the defendant, the subject matter of the action, or the cause of action, to the forum. The latter involves largely the consideration of the natural forum doctrine. Where there is no question of breach of a jurisdiction agreement, the question is which country's court should determine the merits of the dispute in the interests of the parties and the ends of justice.[21] The question can arise in the form of whether the Singapore court is *forum conveniens*, whether leave should be granted for service out of jurisdiction, or of whether the Singapore court is *forum non conveniens*, *ie*, whether the action should be stayed in favour of a more appropriate court elsewhere.[22] This question involves balancing the considerations of the interests of the parties involved (especially factors of costs and convenience), as well as wider concerns of convenience and justice to third parties involved in the litigation, wastage of resources, the risk of inconsistent judgments from different courts and justice in the broadest sense, as well as considerations of international comity, *ie*, the respect for the jurisdiction of the courts of other countries. In particular, while the claimant's advantages of having the trial in the forum have been downplayed in modern jurisprudence, the cumulative effect of the denial of the totality of such advantages could amount to a deprivation of substantial justice that would be a sufficient reason for the forum to hear the case even if another forum is the clearly more appropriate forum.

20 *The Spiliada*, *supra* n 12. *Oriental Insurance Co Ltd v Bhavani Stores Pte Ltd* [1998] 1 SLR 253. The actual connections and facts are more important than the legal procedure invoked: *Hindocha v Gheewala* [2004] 1 CLC 502 (PC Jersey) at [26].

21 See *supra* n 12.

22 This distinction translates, but only roughly, into the contexts of discretionary jurisdiction and jurisdiction as of right. See *Hindocha v Gheewala*, *supra* n 20.

### *B. Anti-suit injunctions*

10 Outside of international conventions, the allocation of jurisdiction in cross-border disputes is done on an *ad hoc* basis by the court to which an application is made to hear the case. The doctrine of natural forum is the most important technique developed in common law countries toward this end. Sometimes it may not be enough for the court to control its own jurisdiction. There may be cases where the court thinks that it is necessary and proper to try to stop proceedings in a foreign country, *eg*, Ruritania.

11 When the court grants an anti-suit injunction to restrain a person from commencing or continuing proceedings in Ruritania, the order is directed at the person, and not the Ruritanian court. Even so, the anti-suit injunction is recognised to be invasive, and, as a matter of international comity, greater caution is generally exercised before it will be granted. As a general rule, in the absence of breach of a jurisdiction agreement, an anti-suit injunction will only be granted if the forum is the natural forum for the substantive dispute on the merits, and the conduct of the party in commencing or continuing the proceedings in Ruritania is vexatious or oppressive or unconscionable, or amounts to an abuse of the process of the court of the forum.[23] The remedy is a discretionary one, and the courts are generally mindful of considerations of international comity in deciding whether to grant the injunction. It is clearly not enough to show that Singapore is the natural forum to persuade the court to grant an injunction.[24]

## III. Jurisdiction agreements: Fundamental distinctions

### *A. Prorogation and derogation of jurisdiction*

12 A jurisdiction agreement normally performs one or both of two functions. The first function is *prorogation*: it provides the legal

23 In English law, Lord Hobhouse had opined that the anti-suit injunction in non-contractual contexts *only* operates to protect the forum court's proceedings from abuse of process: *Turner v Grovit* [2002] 1 WLR 107 (HL). It is not clear to what extent this has changed the law in England (especially with respect to "single" forum cases where there are no proceedings in the forum). This restriction has not been argued under Singapore law.

24 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 (PC Brunei); *Bank of America National Trust & Savings Association v Djoni Widjaja* [1994] 2 SLR 816; *Koh Kay Yew v Inno-Pacific Holdings Ltd* [1997] 3 SLR 121.

justification for the chosen court hear the case. The second is *derogation*: it supplies reasons for *not* having the case decided in a court which the parties do not want to hear the case.

13 Theoretically, prorogation can apply at both levels of our understanding of common law jurisdiction. On the first level, it can provide a juridical basis for the court's jurisdiction. This operates under the law of Singapore in two ways:[25] first, a claimant can serve process in Singapore on an overseas defendant who has agreed to submit to the jurisdiction of the Singapore court, in accordance with the agreed mode of service;[26] second, if no mode of service has been agreed, or if the agreed mode of service requires the service of process out of the jurisdiction, then leave of the court may be obtained for service out of the jurisdiction.[27] On the second level, prorogation can supply, in addition to the legal basis of jurisdiction, reasons why the court should exercise its jurisdiction to hear the case. What these reasons are or should be will be discussed below.[28]

14 Similarly, in theory, derogation of jurisdiction can also operate on the same two levels. However, under Singapore law, parties cannot by their mutual agreement remove an existing juridical basis of the court's jurisdiction over the defendant. Derogation of jurisdiction therefore only works on the level of the exercise of the court's jurisdiction. It will be seen below[29] that the concept of derogation is analysed in the common law in terms of enforcing the parties' bargain.

15 An exclusive choice of court agreement performs both prorogation and derogation functions. Its prorogation function consists of giving the selected court a basis of jurisdiction. Its derogation function is the spelling out that other courts should not hear the case. Of course, by implication, it is also telling the chosen court to exercise its jurisdiction. In this respect, the prorogation effect in the selection of the court is usually overwhelmed by the derogation aspect of the agreement: the court will not generally allow a party to argue that it should breach its contract to commence proceedings in a non-chosen court. On the other

25 This is subject to the exception that the parties cannot by mutual agreement confer jurisdiction on the court in respect of non-justiciable matters, *eg*, disputes relating directly to title in foreign immovable property.
26 O 10 r 3 of the Rules of Court.
27 O 11 r 1(*r*) and O 11 r 1(*d*)(iv) of the Rules of Court.
28 See Parts IV to VI of the main text below.
29 See Part VI of the main text below.

hand, the primary effect of a non-exclusive jurisdiction agreement is to provide a basis for the chosen court to have jurisdiction. The agreement will usually go further to provide reasons for the chosen court to exercise its jurisdiction. Here it is important to distinguish between arguments why the case should be channelled to the chosen court (prorogation), and arguments why the case should not be channelled to any other court (derogation).

16 The concepts of prorogation and derogation of jurisdiction agreements also play an important role in anti-suit injunctions, because as will be seen below, the derogation effect is an extremely powerful one, while the prorogation effect may also have some influence.[30]

### *B. Substance and procedure*

17 An important distinction in the analysis of jurisdiction agreements is that between substance and procedure in the conflict of laws sense. Matters of substance are governed by choice of law rules of the forum, while matters of procedure are always governed by the law of the forum. The common law draws a distinction between the jurisdiction agreement as a contract, which is a matter of substance, and the effect of the contract on the jurisdiction of the forum, which is a matter of procedure. Thus, questions relating to the validity and interpretation of the jurisdiction agreement are subject to choice of law rules governing contracts.[31] Essentially, this is the law chosen by the parties to govern the agreement, either expressly or impliedly, provided such choice is made *bona fide*, and is not illegal or against public policy; and in the absence of such a choice, the agreement is governed by the legal system with the closest and most real connection with the transaction and the parties.[32] One important consequence of the substantive characterisation is that questions of validity and interpretation of jurisdiction agreements can be the subject of issue estoppel by foreign judgments.[33]

18 Although the jurisdiction agreement can be governed by its own law apart from the law governing the main contract, generally the courts would be slow to find that the parties intended a different law to apply to

30 See Part VI Section C(2) of the main text below.

31 *The Frank Pais* [1986] 1 Lloyd's Rep 529 at 530; *The Jian He* [2000] 1 SLR 8 at [16].

32 *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 (PC Nova Scotia); *Peh Teck Quee v Bayerische Landesbank Girozentrale* [2000] 1 SLR 148.

33 *Baiduri Bank Bhd v Dong Sui Hung* [2000] 4 SLR 212.

the jurisdiction clause from the rest of the contract. Thus, substantive questions may be subject to the application of foreign law, though at the stage of litigation where such disputes arise, it is not common for parties to lead evidence of foreign law, so in practically all cases, the court applies the law of the forum, if not as the law governing the jurisdiction agreement, then as the applicable law in default of proof of foreign law.

19 The effect of a jurisdiction agreement on the jurisdiction of the forum is a matter of procedure,[34] and is purely within the control of the law of the forum. Effectively, this means that the forum determines for itself how to give effect to the agreement of the parties (as interpreted in accordance with its governing law) in the light of its own rules of jurisdiction and judicial policies.

### *C. Exclusive and non-exclusive jurisdiction agreements*

20 A fundamental distinction is traditionally drawn in the cases and the literature[35] between exclusive and non-exclusive jurisdiction agreements. It is a matter of the construction of the particular jurisdiction agreement,[36] with such regard to surrounding circumstances at the time of the agreement,[37] whether a jurisdiction agreement is exclusive or non-exclusive. Since all choice of court agreements purport to *prorogate* jurisdiction, the defining characteristic of an *exclusive* jurisdiction agreement must be the *derogation* effect that it purports to have.[38] The key question is whether the parties have intended to create an *obligation* to have their disputes heard only in the chosen court and not elsewhere.[39]

34 *The Jarguh Sawit* [1998] 1 SLR 648 at [29]–[31] resolved any doubt that any question relating to the jurisdiction of the forum must ultimately be determined by the law of the forum.

35 See *supra* n 7.

36 This is a substantive choice of law question governed by the proper law of the jurisdiction agreement: *The Jian He*, *supra* n 31, at [10].

37 Whether or not subsequent conduct is relevant depends on the characterisation of this issue as substantive or procedural in the conflict of laws, a question that has not been resolved under the common law.

38 Kahn-Freund, *supra* n 7, at 826–827.

39 *Dicey and Morris on the Conflict of Laws* (Lawrence Collins gen ed) (Sweet & Maxwell, 13th Ed, 2000) at para 12-078; *Sinochem International Oil (London) Ltd v Mobil Sales and Supply Corp Ltd* [2000] 1 All ER (Comm) 758 at [32].

21 Whether the word "exclusive" is used or not is by itself not determinative.[40] Linguistic factors may be important: it is more likely that exclusive resort to the chosen court is intended if the parties use mandatory words like "shall" and if there has been a submission of all disputes, and not merely submission by the parties, to the chosen jurisdiction.[41] The circumstances may indicate that the parties intended the choice of jurisdiction to be an exclusive one. For example, where the chosen court would have had jurisdiction anyway,[42] and especially if the chosen court by its connections with the transaction would *prima facie* have jurisdiction,[43] it could be inferred that the parties intended more than just submission to the chosen jurisdiction.

22 Mutuality of right of recourse to the chosen court, in the sense that both parties agree to the choice of a relevant jurisdiction, does not by itself indicate an exclusive choice of jurisdiction; it is consistent with mere submission.[44] Lack of mutuality is also inconclusive. As Hobhouse J stated:[45]

> An exclusive jurisdiction clause is one which imposes a contractual obligation on *one or more* parties to litigate in the stated jurisdiction. [emphasis added]

Indeed, lack of mutuality may be evidence that one party is intended to be bound to the chosen jurisdiction – a unilateral exclusive jurisdiction agreement. This type of agreement is not uncommon. Such agreements may oblige one party to resort to a stated jurisdiction and to go to no other, while allowing the other party to commence actions in any

40 *Continental Bank NA v Aeakos Compania Naviera* [1994] 1 WLR 588 at 594; *Sohio Supply Co v Gatoil (USA) Inc* [1989] 1 Lloyd's Rep 588.
41 *British Aerospace Plc v Dee Howard Co*, *supra* n 4.
42 *Ibid*.
43 *Gem Plastics Pty Ltd v Satrex Maritime (Pty) Ltd*, (1995) 8 ANZ Insurance Cases 76,127.
44 *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association* (1997) 41 NSWLR 117 at 127.
45 *S & W Berisford Plc v New Hampshire Insurance Co* [1990] 2 QB 631 at 636.

jurisdiction without limitation.[46] It may make commercial sense, especially for a bank which wants a lender or guarantor to sue it, if at all, in its home jurisdiction, while retaining the right to sue the lender or guarantor wherever their assets may be found. One party is bound by the derogation effect; the other is not. The clause is exclusive as against one party, but non-exclusive as against the other. However, it has been suggested recently that the only meaningful distinction between an exclusive and a non-exclusive jurisdiction agreement is that in the former, both parties are bound to the chosen forum, while in the latter case, it is only the defendant who is bound.[47] This can be misleading.

23 The simplest type of exclusive jurisdiction agreement binds both parties to resort to a single stated jurisdiction for disputes falling within the jurisdiction agreement. It obliges the parties not to bring the dispute elsewhere. This may make commercial sense when the parties put a high premium on certainty of the dispute resolution forum.[48] Both parties are bound by the derogation effect of the clause. The simplest type of non-exclusive jurisdiction agreement confers jurisdiction on a court of a country in order that the chosen court will be available for either party to sue the other in it, but neither are obliged to sue only in that forum. This may make commercial sense where parties want to identify a primary forum for dispute resolution, but to retain the right to commence actions elsewhere,[49] or if they simply want to reserve the option to resort to the courts of one or more specified jurisdictions. In itself, such a clause is merely a prorogation of jurisdiction; there is no purported derogation effect as such.

24 The traditional distinction between exclusive and non-exclusive jurisdiction agreements concentrates on the general right of the parties to commence actions in courts of law other than the chosen court and how

46 *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588 at 594:

> The juxtaposition of a submission by the defendants to the jurisdiction of the English courts and the option reserved in favour of the bank to sue elsewhere … suggests that a similar option in favour of the defendants was deliberately omitted … [and] evinces a clear intention that the defendants, but not the bank, would be obliged to submit disputes in connection with the loan facility to the English courts.

See also *Ocarina Marine Ltd v Marcard Stein & Co* [1994] 2 Lloyd's Rep 524 and *Baiduri Bank Bhd v Dong Sui Hung*, *supra* n 33, at [12] and [21].

47 *JP Morgan Securities Asia Pte Ltd v Malaysian Newsprint Industries Sdn Bhd*, *supra* n 2, at [43]; *Breams Trustees Ltd v Upstream Downstream Services Inc*, *supra* n 2, at [21].

48 See, *eg*, *Sohio Supply Co v Gatoil (USA) Inc*, *supra* n 40, at 591–592.

49 *BAS Capital Funding Corp v Medfinco Ltd* [2004] 1 Lloyd's Rep 652 at [186].

the contract either restricts the right (exclusive) or it does not (non-exclusive). It will be argued below[50] that this fails to reflect the modern understanding of the concept of jurisdiction in terms of existence and exercise of jurisdiction, and it is the shift in the jurisdictional techniques from the existence to the exercise of jurisdiction that has made the non-exclusive jurisdiction agreement so important today.

### *D. Choice of court and other types of jurisdiction agreements*

25 The choice of court agreement is the classic jurisdiction agreement in the context of cross-border civil dispute resolution. Such agreements, which will form the focus of this article, have an important bearing on the question of the nexus and exercise of jurisdiction, as well as the issue of anti-suit injunctions. There are other types of jurisdictional agreements in the broader sense, like arbitration and mediation agreements, which perform important derogation functions.

26 The enforcement of arbitration agreements is well established in Singapore, but it raises different policy considerations from the enforcement of choice of court agreements. An important distinction lies in the chosen *mode* of dispute resolution. The jurisdiction of arbitration tribunals is almost purely a matter of contract between the parties, and there is an internationally-recognised regime for arbitration; these provide compelling reasons for the courts to enforce strictly a valid arbitration agreement. Where the arbitration does not fall within such an international regime and is regarded as a domestic matter, the law understandably allows the courts greater control over the displacement of the judicial process. Arbitration agreements do share one important common characteristic with choice of court agreements: the parties' *deselection* of the venue of dispute resolution by litigation. Unsurprisingly, the enforcement of contractual rights has featured very strongly in both situations. The consequences are different, reflecting the different policy considerations above. The court always retains a discretion to hear an action commenced in breach of a choice of court agreement, and will indeed exercise its jurisdiction to hear the case if strong cause is shown on the facts that it should hear the case. The court may stay legal proceedings in the case of an agreement for domestic arbitration,[51] and must stay legal proceedings in the case of an agreement

50 See Part VI Section A(2).
51 Arbitration Act (Cap 10, 2002 Rev Ed), s 7.

for international arbitration.[52] In addition, the contractual aspect of the enforcement is invariably emphasised when the court grants an anti-suit injunction to restrain a party from commencing or continuing foreign proceedings in breach of an arbitration agreement.[53]

27 The enforceability of mediation clauses has not reached the level of sophistication as that of arbitration agreements. It raises many questions of domestic law[54] as well as private international law[55] which are beyond the scope of this article. However, if such a clause is a valid and enforceable contractual agreement, a court in which legal proceedings are started may stay the proceedings in order to give effect to the agreement,[56] and in principle it may also be protected by an anti-suit injunction if foreign proceedings are started in breach of such a clause.[57]

## IV. The contractual analysis

28 There are two extreme perspectives from which one could consider a choice of court agreement. One is purely procedural. The agreement of the parties is no more than an indication by the contracting parties of their desire for trial in the chosen court. It is merely an appeal to the chosen court to adjudicate their dispute and to other courts to refrain from hearing the case. The focus is on the procedure of the courts in the allocation of jurisdiction in cross-border disputes, and questions of procedural justice will of course be the primary considerations, and only the procedural laws of the court to which the jurisdiction question is addressed will be relevant. On the other extreme, a choice of court agreement is a legally enforceable contract. The focus of analysis will be on the enforcement of a contract and on the contractual remedies available as a result. Choice of law questions will arise because substantive questions of contract law are raised, and the upholding of the parties'

52 International Arbitration Act (Cap 143A, 2002 Rev Ed), s 6.

53 *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603.

54 Under Singapore law, they may be too uncertain to be enforced: *United Artists Singapore Theatres Pte Ltd v Parkway Properties Pte Ltd* [2003] 1 SLR 791 at [214]; *Grossner Jens v Raffles Holdings Ltd* [2004] 1 SLR 202 at [43]. See further: Joel Lee, "The Enforceability of Mediation Clauses in Singapore" [1999] SJLS 229, Joel Lee, "Mediation Clauses at the Crossroads" [2001] SJLS 81; Joel Lee, "ADR Clauses and Enforcement" [2003] LMCLQ 164.

55 The question of which aspects of the agreement are substantive (and therefore subject to its governing law) and which aspects are procedural (and therefore subject to the law of the forum) has not been fully investigated.

56 See, *eg*, *Australian Power and Water Pty Ltd v Independent Public Business Corp of Papua New Guinea* [2003] NSWSC 1227.

57 Although the point has not been judicially tested to the knowledge of this writer.

bargain will be the primary consideration.[58] It is possible to find positions in between. The common law has indeed found such a position: the starting point of analysis is a contractual one, and the theme of contractual enforcement is a powerful one, tempered by a judicial discretion to determine the exercise of its own jurisdiction.

29 The contractual basis of the enforcement of jurisdiction agreements in the common law manifests itself in the use of the remedies of the forum for the breaches of jurisdiction agreements. Under Singapore law, the most important of the remedies for the prevention of breaches of contract is the injunction. This is an equitable remedy that originated historically in the court of Chancery dating back to the days when common law and equity were administered in different courts of law in England, which division of jurisdiction was reflected in the internal judicial divisions in the court established in the Straits Settlements when English law was first imported into Singapore. Contractual rights were ordinarily enforced in the common law courts by way of actions for the recovery of promised payments or damages for breach of contract. Occasionally, the innocent party would resort to the equitable jurisdiction to have the contract specifically performed, or more commonly outside the context of land transactions, to apply for an injunction to restrain a breach of contract. Although the injunction was a discretionary remedy, like specific performance, and given only when common law damages would be inadequate, it was more readily granted by the courts,[59] partly because it was seen as less of an imposition on a person's liberty that he should *not* do something than that he should be ordered to do something, and partly because it did not usually involve the same level of supervision that was required for an order of specific performance. The injunction was directed at the respondent (the party threatening to breach the contract) personally, and ordered the respondent not to enforce his legal rights. This was known as the "common injunction".

58 In the European Union, the *Convention on the Law Applicable to Contractual Obligations* (Rome Convention) [1998] OJ L266), Article 1(2)(d) exempts from its scope questions relating to jurisdiction agreements because some countries in the Union consider the issue to be a contractual one, while others did not.

59 *Doherty v Allman* (1878) LR 3 App Cas 709 at 719–720. An assumption that has yet to be challenged in the courts in common law countries is that the law of the forum governs the issue of both the availability of specific (injunctive) relief and its appropriateness in each case, including the question of inadequacy of common law damages. The availability of specific relief is arguably an issue of substantive contract law, being a question relating to the nature of the right being enforced by the forum.

30 When the administration of common law and equity were merged into a single court system,[60] it became infeasible for the equity division of the court to order someone not to resort to the common law division of the same court.[61] Instead, in cases where the applicable principles would have justified the issue of the common injunction before the merger of the courts, the court would now be asked to *stay* the proceedings.[62] This is the principle underlying cases not governed by statute,[63] where the court would ordinarily stay an action commenced in breach of a jurisdiction agreement. In *Racecourse Betting Control Board v Secretary for Air*, MacKinnon LJ explained that in such cases:[64]

> [T]hat power and duty [to stay proceedings] arose under a wider general principle, namely, that the court makes people abide by their contracts, and, therefore, will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them shall be otherwise determined.

31 What could no longer be done by an injunction because of changes to the court structure would now have to be achieved by the technique of stay. This remedy is tempered by the discretion of the court, a discretion which has developed a fair degree of sophistication to balance the agreement of the parties on the one hand, and the procedural aspects of jurisdiction allocation in international civil litigation on the other.

32 There is therefore a clear link between the stay of proceedings in cases of breach of jurisdiction agreement, and another important remedy available in the same context, the anti-suit injunction. While the court is prohibited from restraining parties from seeking justice from itself, it is not so constrained (except by considerations of comity) to restrain parties from resorting to courts of other jurisdictions. The common injunction of the equity court, intended to protect contractual rights, is thus the historical source of the two most important remedies for breaches of jurisdiction agreements today. This link is recognised in modern English authorities, which have observed that in cases of breach of jurisdiction agreements, the same test applies to applications for stay of proceedings and the anti-suit injunction, since they both serve the function of upholding the parties' agreement, even though the

60 In England: Supreme Court of Judicature Act 1873 (c 66). The equivalent also occurred in Singapore in the Courts Ordinance 1878, s 10.
61 Civil Law Act (Cap 43, 1999 Rev Ed), s 3(*e*).
62 *Ibid* s 3(*f*).
63 *Eg*, the International Arbitration Act, *supra* n 52.
64 [1944] Ch 114 at 126. See also *The Fehmarn* [1958] 1 WLR 159 at 163–164.

considerations of comity carry different weight because of the difference in the nature and effect of the two remedies.[65]

33 A third remedy for the breach of contract, monetary damages, is just beginning to manifest itself as a potential remedy for breaches of jurisdiction agreements. Recently, the English Court of Appeal decision has allowed a claim for wasted costs incurred in staying proceedings commenced in a foreign jurisdiction in breach of a jurisdiction agreement,[66] and the House of Lords has subsequently observed that it may additionally be possible to obtain substantial damages for such breaches.[67] If the common law courts continue to look at jurisdiction agreements through the analytical lens of contract law, it is difficult to see why damages should not be an available remedy for breaches of contract, provided it is available under the governing law of the contract. Indeed, it might give the court more flexibility if it should decide not to use the specific remedies of stay or anti-suit injunctions. But there is another view, stemming from the procedural perspective, which has not yet permeated to the judiciary, that the choice of court agreement is not like any other term of the contract.[68] It is merely a non-contractual expression of the parties' intention to the court of their choice of venue for trial; it has no independent substantive existence.[69] On the latter view, the court, when considering the effect of a jurisdiction agreement on its jurisdiction, would see only a purely procedural question, and there is no question of contractual damages.

65 *Donohue v Armco Inc* [2002] 1 Lloyd's Rep 425 at [24]; *Ultisol Transport Contractors Ltd v Bouygues Offshore SA* [1996] 2 Lloyd's Rep 140 at 149; *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90 at 105 (QBD).

66 *Union Discount Co Ltd v Zoller* [2002] 1 WLR 1517. See also *Maersk Sealand v Ali Hussein Akar* [2003] EWHC Comm 797.

67 *Donohue v Armco Inc*, *supra* n 65, at [48]. See also Daniel Tan, "Damages for Breach of Jurisdiction Clauses" (2002) 13 SAcLJ 342; Daniel Tan & Nik Yeo, "Breaking Promises to Litigate in a Particular Forum: Are Damages an Appropriate Remedy?" [2003] LMCLQ 435; *cf* Tham Chee Ho, "Damages for breach of English jurisdiction clauses: more than meets the eye" [2004] LMCLQ 46; Ho Look Chan, "Anti-suit injunctions in cross-border insolvency: A Restatement" (2003) 52 ICLQ 697, 707–709.

68 See Tham, *supra* n 67.

69 See Ho Look Chan, *supra* n 67.

## V. The effect of exclusive jurisdiction agreements

### *A. Exercise of jurisdiction*

34 The contractual basis of the enforcement of an exclusive jurisdiction agreement is clearly established under Singapore law. At the same time, there is also evidently much continuing tension with procedural considerations of where the trial ought to be held in spite of the agreement of the parties.

35 In an application to stay proceedings commenced in Singapore in breach of an exclusive foreign jurisdiction clause,[70] the courts will ordinarily[71] stay the proceedings to give effect to the agreement of the parties, unless the party commencing the action in breach of contract can show exceptional circumstances amounting to strong cause why the agreement should not be adhered to.[72] The law in Singapore was first comprehensively set out by the Court of Appeal in *Amerco Timbers Pte Ltd v Chatsworth Timber Corp Pte Ltd*:[73]

> ... Where a plaintiff sues in Singapore in breach of an agreement to submit their disputes to a foreign court, and the defendant applies to a stay, the Singapore Court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. The court in exercising its discretion should grant the stay and give effect to the agreement between the parties unless strong cause is shown by the plaintiff for not doing so, To put it in other words the plaintiff must show exceptional circumstances amounting to strong cause for him to succeed in resisting an application for a stay by the defendant. In exercising its discretion the court should take into account all the circumstances of the particular case. In particular, the court may have regard to the following matters, where they arise: -
>
> (a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative

70 In respect of arbitration agreements not falling within the International Arbitration Act, *supra* n 52, where the court has a discretion to stay proceedings, the party commencing proceedings in breach of agreement has to show "sufficient reason" why the court should not stay the action to give effect to the agreement: *SA Shee & Co (Pte) Ltd v Kaki Bukit Industrial Park Pte Ltd* [2000] 2 SLR 12 at [39].

71 Forum mandatory statutes may require the courts not to give effect to the jurisdiction agreement: *The Epar* [1984–1985] SLR 409.

72 The same principles generally apply where the claimant is seeking leave from the court for service of process out of the jurisdiction.

73 [1975–1977] SLR 258 ("*Amerco Timbers*") at 260, [11]. The test is adopted from the English case of *The El Amria* [1981] 2 Lloyd's Rep 119.

convenience and expense of trial as between the Singapore and foreign courts.

(b) Whether the law of the foreign court applies and, if so, whether it differs from Singapore law in any material respects.

(c) With what country either party is connected and, if so, how closely.

(d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages.

(e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would:

(i) be deprived of security for their claim;

(ii) be unable to enforce any judgment obtained;

(iii) be faced with a time-bar not applicable here; or

(iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

36 Although the factors considered are remarkably similar to those considered for determining the natural forum for the trial, it has been emphasised that the two tests are different. The standard applied is higher in breach of jurisdiction agreement cases than in *forum non conveniens* cases, because the objective of the test is not to determine the natural forum for the dispute but to determine whether there are sufficient grounds for allowing one of the parties to renege on the contract. The question is whether it would cause "unreasonableness and injustice" to enforce the agreement.[74] Thus, it is generally harder to convince the court that it should stay proceedings commenced in breach of a jurisdiction clause than it is to convince the court to stay proceedings because there is a more appropriate forum elsewhere.

37 The protection of the contractual agreement in the Singapore courts reached a high-water mark in the early 1990s, when it appeared that the burden of justifying the breach of contract was a very onerous one. Thus, in *The Asian Plutus*,[75] the High Court stayed an action commenced in Singapore in breach of an exclusive foreign jurisdiction clause in favour of Japan, stating that "contracts freely entered into must

74 *The Vishva Apurva* [1992] 2 SLR 175 at 182.

75 [1990] SLR 543 at 546–548, noted in Toh Kian Sing, "Staying an Action Commenced in Breach of a Jurisdiction Clause: A Note on *The Asian Plutus*" (1991) 3 SAcLJ 314.

be upheld and given full effect unless their enforcement would be unreasonable and unjust".[76] In *The Humulesti*,[77] the High Court suggested that in order to show strong cause, one had to look at very serious factors like paralysis of the court system, breakdown of law and order, unavailability of legal representation, unavailability of translation or interpretation services, or fundamental change in the legal system, in the chosen country. In *The Vishva Apurva*,[78] the Court of Appeal suggested that the strong cause needed was something equivalent to such grave difficulty and inconvenience of trial in the chosen foreign court that staying the proceedings in the non-contractual forum would amount to denying the claimant "his day in court"; apart from that, the parties should be held to their bargain.

38 This strict approach was reconsidered by the High Court in the mid-1990s in *The Eastern Trust*.[79] The court held that the degree of strong cause required in each case depended on the circumstances of the case. Important factors to take into account in determining the strength of exceptional circumstances included the nature of the agreement itself (the degree to which the jurisdiction clause represented the genuine agreement[80] of the parties), the degree of surprise on the party held bound to the jurisdiction clause, and the strength of the connections of the case to the chosen country compared to the connections with the forum. This sliding scale approach to "strong cause" has since been taken to represent the law in Singapore.[81]

39 While the strength of the exceptional circumstances may vary from case to case, it is nevertheless clear that breach of jurisdiction agreement cases will be treated differently from the natural forum cases for two reasons: first, the formal burden of proof in the former is always

76 *Id* at 547.

77 [1991] SGHC 161.

78 *Supra* n 74, at 189, noted in Adrian Briggs "Jurisdiction Clauses and Judicial Attitudes" (1993) 109 LQR 382.

79 [1994] 2 SLR 526, noted in Kenneth Tan, "*The Eastern Trust*: How *Exclusive* is an Exclusive Jurisdiction Clause?" (1994) 6 Asia Business Law Rev 48.

80 This is particularly important in the carriage of goods context where parties may not know the terms of the contract to which they become parties by operation of statutory law.

81 See, *eg*, *Bambang Sutrisno v Bali International Finance Ltd* [1999] 3 SLR 140 at [8]; *Baiduri Bank Bhd v Dong Sui Hung*, *supra* n 33, at [16]; *The Hyundai Fortune* [2004] 2 SLR 213 at [8], affirmed by the Court of Appeal in [2004] 4 SLR 548. In contrast, the English courts appear to apply the same standard so long as it can be said that the obligation contained in the jurisdiction agreement has been freely adopted: *Import Export Metro Ltd v Compania Sud Americana de Vapores SA*, *supra* n 2, at [14(iii)].

on the party seeking to justify a breach of agreement while in the latter case, it depends on how jurisdiction is invoked; and second, to the large extent that the factors considered are the same, a factor that may attract heavy weight in a straight natural forum approach may be given little or no weight when balanced against a breach of contract.

40 Logically, if the reason for staying an action commenced in the forum is to give effect to the parties' bargain, then it should follow that any delay in the stay application does not detract from the fact that the applicant is seeking to enforce the jurisdiction agreement. It should follow from the principle of bargain enforcement that any factor of convenience or juridical advantage pointing towards one forum or another that is foreseeable by the parties should be disregarded in determining whether exceptional circumstances amounting to strong cause have been shown to justify the breach of agreement.[82] It should also follow that the party who commences an action in Singapore in breach of contract should not be allowed to complain that the party who wants the jurisdiction agreement enforced is seeking procedural advantages in the chosen forum. Contracting parties must be taken to have known and accepted these considerations. However, the cases reveal that sometimes the courts steer closer to the natural forum test.

41 One area where the Singapore courts have held firmly to the contract-enforcement view is in respect of the delay in the stay application. In such cases, the delay is only a factor to be considered if it amounts to a waiver of the right to rely on the jurisdiction agreement.[83]

42 On the other hand, the Singapore Court of Appeal has held that in assessing whether strong cause has been made out to justify the bringing of proceedings in Singapore in breach of contract, all factors, whether foreseeable or not, will be taken into consideration, although foreseeable factors will be given little weight.[84] Although little weight may be given to the individual factors, the court will take a cumulative approach and it is the totality of the circumstances (and the aggregate of

82 An exception may be factors affecting third parties (*eg*, inconvenience to witnesses) and factors implicating wider policy considerations like inconsistency of judgments from multiple jurisdictions: Peel, *supra* n 7, at 223–224.

83 *The Vishva Apurva*, *supra* n 74, at 185; *The Jian He*, *supra* n 31, at [47]–[50]. Delay may be evidence of some other relevant consideration, *eg*, whether the party seeking to enforce the contract is genuinely seeking trial abroad: *The Kapitan Mezentsev* [1995] 3 SLR 55, noted in Tan Yock Lin, "Natural or Agreed Forum? – *The Kapitan Mezentsev*" [1995] SJLS 661; *The Hyundai Fortune*, *supra* n 81, at [27].

84 *The Hyundai Fortune*, *supra* n 81, at [30].

the weight given to each) that will be finally decisive.[85] In contrast, under English law, the parties are generally precluded from raising such foreseeable factors.[86] It is only in rare situations that the court will attach any weight to such factors.[87] It is not clear what these rare circumstances may be,[88] and it may be that the approach differs from the Singapore approach only by a matter of degree.

43 Be that as it may, the Singapore approach may be justified on two possible bases. First it may be argued that since the court takes into consideration the nature of the agreement in respect of the jurisdiction clause, so that some kinds of agreement require very strong countervailing factors and others less so, then it would be unfair to apply a bright-line test of foreseeability in deciding which factors to take into account in ascertaining the existence of strong cause. The second argument may be that as a matter of policy, the test of "unreasonableness and injustice" required to offset the enforcement of a jurisdiction agreement has been read very broadly to give greater weight to considerations of natural forum. On either view, the courts are moving the test a step farther away from the contractual analysis and closer to the natural forum analysis.

44 An ambiguous factor that is built into the test of strong cause is the sub-test of whether the party seeking to stay the proceedings in the forum is genuinely seeking trial abroad, or is merely seeking procedural advantages.[89] Whether the party is genuinely seeking trial abroad is surely a valid consideration, for the court must protect its processes from being abused by parties who are strategising not to have the trial held anywhere at all. The reference to "procedural advantages" is generally taken to mean advantages in the contractually chosen[90] jurisdiction.[91] It is difficult to see what is wrong with a party seeking the procedural advantages of a forum that has been chosen exclusively in the contract. That may be part of the circumstances from which the court draws an overall inference that the

85 *The Eastern Trust*, *supra* n 79, at 534; *The Hyundai Fortune*, *supra* n 81, at [24].
86 *The Nile Rhapsody* [1992] 2 Lloyd's Rep 399 at 414, affirmed by the English Court of Appeal in [1994] 1 Lloyd's Rep 382 at 391; *British Aerospace Plc v Dee Howard Co*, *supra* n 4, at 376.
87 *Breams Trustees Ltd v Upstream Downstream Services Inc*, *supra* n 2.
88 It may be confined to factors mentioned in *supra* n 82, or it may be wider.
89 A factor which greatly troubled at least one author: A Bell, *Forum Shopping and Venue in Transnational Litigation* (Oxford University Press, 2003) at para 5.89.
90 *The Jian He*, *supra* n 31; *The Hyundai Fortune*, *supra* n 81.
91 An abuse of process in the sense mentioned in the main text is clearly the taking of an unfair advantage of the procedure of the *forum* that should not be allowed.

party applying to stay the action is trying to abuse the jurisdictional rules of the forum. But it is difficult to infer an abusive objective merely from the fact that one party is seeking the procedural advantages of the chosen forum. These procedural advantages must surely include the rules of jurisdiction of the chosen forum, as well as the choice of law rules that are applied by that forum. These are major considerations when parties select an exclusive jurisdiction for dispute resolution.

45 Thus, parties may choose a jurisdiction because its rules of procedure or choice of law rules may give an outcome that the parties desired at the time of contracting, and that desired outcome may well be that under the choice of law rules of the chosen forum, issues of limitations are characterised as substantive and can give rise to substantive contractual rights. This is an increasingly likely scenario, as more jurisdictions move towards a substantive characterisation of time limitation laws.[92] On the other hand, Singapore conflict of law rules, unless revised judicially or legislatively, are likely to lead to the outcome that the limitations laws are procedural[93] and therefore no substantive rights are involved. This could have a distorting effect if the courts view the matter purely through their own choice of law rules.

46 The Singapore court has made abundantly clear its position on the relevance of the lapse of the time-bar in the contractually chosen jurisdiction in the strong cause test. If the party seeking trial in the forum in breach of agreement shows that the lapse (*eg*, in failing to take out a protective writ in the chosen forum) was a reasonable one in the circumstances, then he can rely on the time-bar to show exceptional circumstances why the trial should be held in the forum. However, if the party has acted unreasonably in allowing the time limitation to lapse in the chosen forum, then the time-bar is merely a neutral factor. Neither party can rely on it one way or the other, but the party seeking trial in the forum could still point to other factors against a stay of proceedings.[94] The assumption of the Singapore courts so far that limitations are

92 In English law: Foreign Limitation Periods Act 1984 (c 16): There has been a trend in the common law towards a functional characterisation of substance and procedure: *Harding v Wealands* [2005] 1 WLR 1539; *Tolofson v Jensen* [1994] 3 SCR 1022 at 1071–1072; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at [99].

93 See *Huber v Steiner* (1835) 2 Bing NC; 132 ER 80; *Ralli v Anguilla* (1915) 15 SSLR 33; Limitation Ordinance (Ord VI of 1896), s 11, which was operative from 1896–1959; *Star City Pty Ltd v Tan Hong Woon* [2002] 2 SLR 22 at [12]: "A distinction is drawn between the essential validity of a right and its enforceability."

94 *Golden Shore Transportation Pte Ltd v UCO Bank* [2004] 1 SLR 6 at [52]; *The Hyundai Fortune*, *supra* n 81, at [30].

procedural even in foreign systems has yet to be contradicted by counsel with any clear evidence of foreign law. However, if the chosen forum takes a substantive characterisation of time-limitation laws, then a failure to stay the proceedings would not merely countenance a breach of a jurisdictional agreement (here said to be justified by the strong cause argument on procedural grounds), but would also effectively deprive the party of a substantive pre-emptive right against being sued (on the same procedural justifications). This outcome is not necessarily reasonable without further justification for the deprivation of substantive rights which would have been conferred by the chosen forum. Even if limitation periods are regarded as procedural under the private international law of the chosen forum, it is still a viable argument that the parties have contractually bound themselves to accept the procedural law as defined by the chosen court – what else can they be doing in choosing that forum for litigation?[95] – and this is no less a substantive contractual right.

47 The treatment of lapse of time limitation arguably cannot be transposed without modification from the context of the natural forum to that of contract enforcement. From the perspective of contract, it is arguable that if the claimant had acted reasonably in letting the time lapse in the foreign jurisdiction, then by itself[96]this should only be a neutral factor between the parties; this is part of the package of the bargained-for forum that the claimant has to show strong cause to depart from. If the claimant had acted unreasonably,[97] it is a neutral factor to the extent that the defendant's advantage of trial in the chosen forum is already part of the established agreement the departure from which the strong cause test is applied to justify. But ultimately, all circumstances should be considered, and arguably, the unreasonable behaviour of the claimant in causing the advantage of the defendant to accrue in the chosen jurisdiction could push the "strong cause" up the sliding scale.

95 *The Asian Plutus*, *supra* n 75, at 551.

96 Particular circumstances may justify inferences of bad faith conduct on the part of the defendant that rendered the claimant's lapse a reasonable one; this goes to the different argument of whether the defendant is forum-shopping and possibly abusing the process of the court. See para 50 of the main text below.

97 Likewise in particular circumstances, the claimant's unreasonable behaviour could also be evidence of forum-shopping and possibly abusing the process of the court.

48 The conflict between contract enforcement and procedural considerations is found starkly in the related "no dispute" argument.[98] Here, the pattern of argument of the party seeking the court's permission to breach the jurisdiction agreement is that there is no real dispute in issue, and that the party seeking the enforcement of the jurisdiction agreement is not genuinely seeking trial abroad, and merely seeking procedural advantages. The argument is not a contractual one that there is no dispute falling within the terms of the jurisdiction clause. Instead, this argument is premised on the existence of a dispute to be resolved in accordance with the jurisdictional agreement in the contractual sense, but that the jurisdictional agreement is nevertheless not to be enforced because of strong cause, specifically, in this case, the lack of genuine desire for trial abroad.

49 It is curious to characterise these as cases where there is "effectively no defence to the claim".[99] This may well be so if the party seeking to enforce the jurisdiction agreement does not lead any evidence to show that a different result would have been obtained in the contractual forum.[100] In many of these cases,[101] it seems to have been accepted at least, that there is a real dispute whether the claimant should win in the forum where the action was commenced in breach of agreement (because of the forum's limitations rules as indicated by its own conflict of laws rules), or should lose in the contractually chosen forum (because the claims would be time-barred under the limitation laws applicable under its conflict of laws rules). But the court does not see that as a dispute between the parties. What the court sees as the dispute is the substantive question of liability – but that presupposes that limitation laws do not affect substantive rights, which is a clearly forum-centric view. However, the approach of the court cannot be faulted if no evidence is tendered to show that the contractually chosen forum would take a different conflict of laws approach.[102] If the evidence indicates otherwise,

98 See Christopher Tan, "Recent Developments in the Field of Jurisdiction Clauses: When is there a Dispute to be Tried in the Contractual Forum?" (2000) 11 SAcLJ 396 and Daniel Tan, "No Dispute Amounting to Strong Cause; Strong Cause for Dispute?" (2001) 12 SAcLJ 428.

99 *The Hyundai Fortune*, *supra* n 81, at [18].

100 As in, *eg*, *The Hung Vuong-2* [2001] 3 SLR 146.

101 *The Jian He*, *supra* n 31; *Golden Shore Transportation Pte Ltd v UCO Bank*, *supra* n 94, noted in Vincent Leow, "Exclusively Here to Stay: The Applicable Principles to Granting a Stay on the Basis of an Exclusive Jurisdiction Clause" [2004] SJLS 569; *The Hyundai Fortune*, *supra* n 81.

102 *Cf UCO Bank v Golden Shore Transportation Pte Ltd* [2003] SGHC 137, affirmed, *supra* n 94, where the High Court went so far as to suggest that it is only the forum's own view on the limitation defence that is relevant (at [70]).

then it would seem appropriate that the court should assess the matter from a broader global perspective taking into consideration the conflict of laws position of the chosen forum.

50 This suggested approach admittedly contains shades of *renvoi*. But there is nothing objectionable in principle about this recourse.[103] If there is a dispute about whether there is a dispute between the parties, and the parties have submitted all disputes to be determined exclusively by a jurisdiction, a defensible view is that the question whether there is a dispute to be resolved at all should be determined by the chosen jurisdiction, unless the party seeking to stay the action is seen to be abusing the process of the court. This appears to be the position for international arbitration,[104] and it is arguable that that position ought not to be too different for choice of court agreements; in both cases, the courts seek to respect and encourage party autonomy in the selection of dispute resolution venues. If the court thinks it can and should take the decision on the existence of the dispute in order to avoid unnecessary delay should it refuse to hear the case, then the next best thing to remitting the case abroad to the chosen jurisdiction is to decide the case as closely as it can in the way that the chosen jurisdiction would have done.[105]

51 There is no doubt that the genuineness of the desire for trial abroad is a very relevant factor, and it is necessarily a factor that operates outside the contractual framework in the sense that the forum being asked to stay the action must ultimately and necessarily decide whether the strategy of the party seeking the stay is a legitimate one or not. However, there have been a few distractions that have not appeared to take full consideration of the contractual basis of the application for stay. One is the seeking of procedural advantages in the chosen forum. Without exceptional facts, if the action is time-barred in the chosen forum and not time-barred in the non-contractual forum, one should not too readily assume that the party seeking trial in the non-contractual forum is the one illegitimately seeking procedural advantages in that

103 See, *eg*, the draft Hague Convention on Exclusive Choice of Court Agreements, Art 7(a) (*supra* n 1), which remits the question of whether the jurisdiction agreement is null and void to the law of the chosen court, including its choice of law rules. Thus, all courts before which the question of the enforcement of the jurisdiction agreement arises will apply the private international law rules of the chosen court.

104 See *Baltimar Aps Ltd v Nalder & Biddle Ltd* [1994] 3 NZLR 129 considering words in the New Zealand Arbitration (Foreign Agreements and Awards) Act 1982, s 4(1), that are *in pari materia* with the International Arbitration Act, *supra* n 52, s 6(2).

105 Adrian Briggs, "In Praise and Defence of Renvoi" (1998) 47 ICLQ 877.

forum. A related point is the "no dispute" debate which appears (thus far) to be conducted from the viewpoint of the non-contractual forum alone. This does not suggest that the cases were wrongly decided, for the court must review the totality of the evidence to determine whether the court thinks injustice would result from staying the proceedings and whether the party seeking to stay the action is actually engaging in undesirable inverse forum shopping in the sense of closing off the only forum effectively available to the party seeking to breach the contract.

52 The same principles should apply whether the jurisdiction agreement points to the court of the forum or a foreign country,[106] even though it has been suggested in an English case that in the former situation, the court has no discretion at all to stay such proceedings commenced in the forum on grounds of *forum non conveniens*.[107] It is probably more accurate to say that it will be very difficult to convince the court of the forum that substantial justice cannot be done in the forum even in a natural forum case,[108] let alone a case requiring strong cause.

53 The approach in Singapore law to the enforcement of exclusive jurisdiction agreements attempts to strike a balance between the enforcement of the contract and considerations of procedural justice. The study of the Singapore position has shown a judicial policy that is paying increasing attention to pragmatic considerations of justice. But it is clearly not in doubt that the starting point in exclusive jurisdiction agreement cases is that the enforcement of the jurisdiction agreement requires a different test from the normal principles of natural forum; the party who wants the court to assist in a breach of contract must show strong cause for the breach of agreement. Whatever the strength or content of the strong cause, the reason for the requirement is the need to justify the breach of contract. There are no doubt important policy considerations that impact on the degree of the strong cause required, and these include considerations discussed in *The Eastern Trust*[109] as well

106 *The Chaparral* [1968] 2 Lloyd's Rep 158 at 164.

107 *S & W Berisford Plc v New Hampshire Insurance Co*, *supra* n 45 (Hobhouse J in *obiter*). *Cf Bouygues Offshore SA v Caspian Shipping Co (No 2)* [1997] ILPr 472.

108 *Cf The Herceg Novi* , *supra* n 13, in the context of *forum non conveniens* (*per* Selvam J at [11]):

> I am not aware of a decision anywhere whereby a court has stayed an action legitimately brought before it on the ground that there is something wanting in its system of justice and that better justice will be done in another jurisdiction. For my part it would be wrong in principle to do so because I cannot accept that the law of Singapore is unjust to either party.

109 *Supra* n 79.

as those that underlie the doctrine of natural forum[110] generally. Unless these policy considerations that balance against the principle of contractual enforcement are clearly articulated, there is a risk that the courts may be perceived as merely paying "lip service" to the enforcement of the contract.[111]

### *B. Anti-suit injunctions*

54 In the absence of a jurisdiction agreement, an anti-suit injunction will only be granted if the forum is the natural forum for the substantive dispute and the conduct of the party in commencing or continuing foreign proceedings is vexatious or oppressive, and considerations of international comity play a significant role.[112] However, international comity plays a diminished role when the anti-suit injunction is sought to restrain a party from committing a breach of contract, whether a choice of court or an arbitration agreement.[113] In such cases, the presumption is in favour of enforcing the contract.[114] The remedy is still a discretionary one, but good reasons have to be shown why the breach of contract (or threat thereof) should not be restrained by an injunction. Millett LJ said in the English Court of Appeal in *The Angelic Grace*:[115]

> [I]n my judgment there is no good reason for diffidence in granting an injunction to restrain foreign proceedings on the clear and simple ground that the defendant has promised not to bring them.
>
> …
>
> The justification for the grant of the injunction in either case is that without it the plaintiff will be deprived of its contractual rights in a situation in which damages are manifestly an inadequate remedy. The jurisdiction is, of course, discretionary and is not exercised as a matter

110 J J Fawcett, "Trial in England and Abroad: The Underlying Policy Considerations" (1989) 9 OJLS 205.

111 See the cautions in *The Asian Plutus*, *supra* n 75, at 550 and *The Humulesti*, *supra* n 77.

112 See *supra* n 24.

113 The anti-suit injunction has yet to be applied to the breach of a mediation clause, although it is theoretically available since the underlying basis is the same: a contractual derogation agreement.

114 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334 at 342; *CSR Limited v Cigna Insurance Australia Limited* (1997) 189 CLR 345 at 392. As to the possible relevance of choice of law analysis in this context, see T M Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004) at paras 4.31–4.38.

115 [1995] 1 Lloyd's Rep 87 at 96.

of course, but good reason needs to be shown why it should not be exercised in any given case.

55 This approach has been qualified in the context of the Brussels I Regulation in England where it applies,[116] but remains the common law approach.[117] This common law approach has been adopted in Singapore in respect of the enforcement of an arbitration agreement,[118] but there is no reason to doubt that the same approach will be taken in respect of choice of court agreements.[119]

56 English law has recognised that an exclusive choice of court agreement gives rise to the same issue as to the enforcement of the agreement, whether the question before the court is one of stay of proceedings in the forum, or the grant of an anti-suit injunction to restrain foreign proceedings, subject to different considerations of international comity.[120] Although there have been statements in English cases as to how the English court uses the anti-suit injunction to perform a favour for foreign countries by keeping wasteful litigation out of their courts,[121] the more common attitude today is that the anti-suit injunction calls for much greater caution because of its indirect interference with the proceedings in other countries.[122] This is likely to represent Singapore law.

116 Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters [2001] OJ L12/1. The use of the anti-suit injunction has been held to be incompatible with the jurisdiction scheme of the Regulation: *Turner v Grovit* Case C-159/02 [2004] 2 Lloyd's 169 (ECJ). The English court cannot use breach of contract as a reason to override the jurisdictional allocation under the Regulation: *Erich Gasser GmbH v MISAT Srl* Case C-116/02 [2004] 1 Lloyd's Rep 222 (ECJ).

117 *Through Transport Mutual Insurance Association (Eurasia) Ltd v New India Assurance Association Co Ltd (The Hari Bhum)* [2005] 1 Lloyd's Rep 67; *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA (The Front Comor)* [2005] EWHC 454.

118 *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka*, *supra* n 53.

119 *Ibid* at [85], where the court approved of the statement of Millett LJ in *The Angelic Grace*, *supra* n 115, at 96, that in principle there is no distinction between the enforcement of arbitration and choice of court agreements by injunction.

120 *Donohue v Armco Inc*, *supra* n 65.

121 See, *eg*, *Amoco (UK) Exploration Co v Teesside Gas Transportation Ltd*, 26 June 1996, Queen's Bench ("*Amoco v TGTL*").

122 The German court reacted with grave indignation to an English anti-suit injunction: *Re Enforcement of an English Anti-Suit Injunction* [1997] ILPr 320, a reaction that appeared to come as something of a surprise to the English courts: *Phillip Alexander Securities and Futures Ltd v Bamberger* [1997] ILPr 73 at [48]. On the other hand, the English court reacted with similar indignation to a New York anti-suit injunction: *General Star International Indemnity Ltd v Stirling Cooke Brown Reinsurance Brokers Ltd* [2003] ILPr 19; [2003] Lloyd's Rep IR 719. The House of Lords acknowledged the indirect interference with the procedure of foreign courts in *Turner v Grovit*, *supra* n 23, at [22]–[29].

57 One important limitation appears to be that, as a matter of international comity, the court would only act to enforce the agreement if it is the contractually chosen forum. Otherwise, it would leave the parties to their remedies at the contractually chosen forum. In *Akai Pty Ltd v The People's Insurance Co Ltd*,[123] the High Court of Australia had, based on its own mandatory statutory rules, assumed jurisdiction to determine a dispute even though the contract in question had contained an exclusive choice of English court clause. The aggrieved party then sought an anti-suit injunction from the Singapore court to prevent the other party from continuing with the Australian proceedings in breach of contract.[124] The High Court refused to act, on the basis that "the Singapore court should not assume the role of an international busybody".[125] This position has yet to be considered at an appellate level in Singapore. It is arguable that, because the court is being asked to enforce a contract, assistance should be rendered to the contractual forum so long as the court of the forum is the natural forum for the enforcement of the *choice of court agreement*. This may be the case where the respondent's only substantial assets are in the forum (so that the respondent only has an incentive to obey an order from the forum and nowhere else), or where the applicant has substantial assets in the forum and legitimate reasons to pre-empt the potential enforcement of any foreign judgment, obtained in breach of agreement, in the forum. A foreign judgment obtained in breach of an anti-suit injunction granted by the court of the forum would not be recognised or enforced in the forum because the contempt of court involved in the process invokes a public policy defence in the forum.[126]

58 In conclusion, the basis of the anti-suit injunction in the contractual context is clearly the enforcement of the agreement. Although considerations of international comity are still important, it is also clear they are less weighty when the question before the court is the enforcement of an agreement.

123 (1996) 188 CLR 418.

124 *People's Insurance Co Ltd v Akai Pty Ltd* [1998] 1 SLR 206. It was not argued in the case, and no separate proceedings were taken elsewhere, on the basis that the commencement of anti-suit proceedings in Singapore was itself a breach of contract and therefore the subject of stay of proceedings (in the forum) or anti-suit proceedings (in the contractual forum).

125 *Ibid* at [12]. In a non-contractual context, the House of Lords had declined to act to issue an anti-suit injunction to protect a foreign natural forum on the same considerations: *Airbus Industrie GIE v Patel* [1999] 1 AC 119.

126 *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka*, *supra* n 53.

## VI. The effect of non-exclusive choice of court agreements

59 The effect of an exclusive choice of court clause can be easily stated, even if there are difficulties in the application of the test: *Prima facie*, parties will be held bound to their agreement, either by the stay of local proceedings commenced or continued in breach of an exclusive foreign jurisdiction clause, or by the restraint of foreign proceedings commenced or continued in breach of an exclusive forum[127] jurisdiction agreement, unless strong cause is (or strong reasons are)[128] shown why the party seeking to breach the jurisdiction agreement should not be held to its agreement. There is also no difficulty whether the exclusivity of the choice of court agreement is mutual or unilateral; the party bound has to justify the breach of contract.

60 It is more difficult, however, to state clearly the effect of a non-exclusive jurisdiction agreement.[129] On the face of it, there is no element of derogation in a non-exclusive jurisdiction agreement, so there is in principle no issue of breach of agreement, and no reason for any justification for strong cause based on the bargain of the parties. On one view, the only relevant test in theory is that of *forum conveniens* or *forum non conveniens*, and the only effect of a non-exclusive jurisdiction agreement would be as a factor to be weighed in such an exercise. The only relevant issues arising would be the weight to be given to the fact that a forum has been indicated by the parties, and other policy considerations which may be attached to such a choice of the parties. However, an examination of the cases reveals that there are many ways in which a non-exclusive jurisdiction agreement can be relevant, including several important reasons based on the contractual analysis of upholding bargains.

61 These reasons will first be examined in the contexts of applications for stay of proceedings and service out of jurisdiction, as these are where the bulk of the authorities occur. The implications of these lines of reasoning in other contexts will be considered after that.

127 Query whether this applies to exclusive foreign jurisdiction agreements in favour of a third country. See para 57 of the main text above.

128 The phrases "strong cause" and "strong reasons" are interchangeable: see *Donohue v Armco*, *supra* n 65, at [24].

129 See para 2 of the main text above.

## *A. Exercise of jurisdiction*

### *(1) Right to sue in the contractually chosen forum*

62 A non-exclusive choice of court agreement clearly confers a right on the contracting parties to have proceedings begun in the chosen forum. This is the effect of the submission by agreement. At least where the court of the forum is the non-exclusively chosen forum, there has been a tendency in the English court to see in this right to sue also a right not to have the suit heard elsewhere,[130] *ie*, an implied derogation. Thus, the fact that the parties have submitted themselves to the chosen court, or have contractually bargained for their disputes to be heard in that chosen court, implies that there is a right to have the dispute resolved *only* in that forum. The consequence is that the burden is always on the party seeking to have the action tried elsewhere to justify why the party who wishes the action to be tried in the forum should not be able to exercise the right to sue in the forum and to have the dispute resolved in the forum. As Hobhouse J saw it in an application to stay forum proceedings where there was a non-exclusive forum jurisdiction agreement:[131]

> If the contract says that [X] is entitled to sue [Y] in the English courts, then it requires a strong case for the courts of this country to say that that right shall not be recognised and that he must sue elsewhere.

63 In *Commercial Bank of the Near East Plc v A, B, C and D*,[132] Saville J said, in respect of a non-exclusive forum jurisdiction clause, in the context of an application for leave for service out of jurisdiction:

> [I]n the ordinary way and in the absence of strong reasons to the contrary, the Court will hold the parties to their bargain with regard to jurisdiction. … In the present case the jurisdiction clause in the guarantee did not … provide for the exclusive jurisdiction of the English Courts because it gave the bank the right to enforce the guarantee in any other competent jurisdiction. To my mind, however, this makes very little difference to the principle that the Court will hold

130 *The Standard Steamship Owners' Protection and Indemnity Association (Bermuda) Ltd v Gann* [1992] 2 Lloyd's Rep 528; *Gulf Bank KSC v Mitsubishi Heavy Industries Ltd* [1994] 1 Lloyd's Rep 323; *Cannon Screen Entertainment Ltd v Handmade Films (Distributors) Ltd* 11 July 1989, Queen's Bench; *S & W Berisford plc v New Hampshire Insurance Co*, *supra* n 45; *British Aerospace Plc v Dee Howard & Co*, *supra* n 4; *Commercial Bank of the Near East Plc v A B C and D* [1989] 2 Lloyd's Rep 319; *Amoco v TGTL*, *supra* n 121.

131 *S & W Berisford plc v New Hampshire Insurance Co*, *supra* n 45, at 638.

132 *Supra* n 130, at 321.

> the parties to their bargain in the absence of strong reasons to the contrary.

64 In *Standard Steamship Owners' Protection & Indemnity Association (Bermuda) Ltd v Gann*, Hirst J, in respect of an application for leave for service out of jurisdiction where there was an agreement by the parties to submit to the non-exclusive jurisdiction of the English court, said, citing exclusive jurisdiction clauses authorities:[133]

> [T]he Court will give effect to that submission, although still retaining a discretion to grant a stay if the defendants can show strong reasons against holding the parties to their bargain…

This contractual reasoning has been repeated in many cases,[134] and the reason why it is not seen even more often is probably because it is taken as a point too obvious to require stating. Thus, the English Court of Appeal in *Celltech R & D Ltd v Medimmune Inc* stated:[135]

> [T]here must be "strong reasons" for granting a stay where there is a contract giving jurisdiction to the court. That is for the obvious reason that jurisdiction is the parties' bargain.

This line of reasoning has also recently surfaced in Singapore.[136]

65 However, the rhetoric of the enforcement of a contractual bargain has not been matched by substantive explanation of the content of the agreement that is being enforced. In common law systems, there is a distinction between a right to commence proceedings (which depends on the existence of jurisdiction) and the right to have a dispute eventually resolved by the courts (which depends on the court exercising its jurisdiction).[137] If parties agree to have their disputes resolved in a particular court (as opposed to merely submitting themselves to the

133 *Supra* n 130, at 533, citing *The Chaparral*, *supra* n 106 and *The El Amria*, *supra* n 73 (both of which are exclusive jurisdiction agreement cases).

134 See, *eg*, *Mercury Communications Ltd v Communication Telesystems International* [1999] 2 All ER (Comm) 33 at 41; *UBS AG v OMNI Holding AG* [2000] 1 WLR 916 at 925; *JP Morgan Securities Asia Pte Ltd v Malaysian Newsprint Industries Sdn Bhd*, *supra* n 2, at 42–43; *Import Export Metro Ltd v Compania Sud Americana de Vapores SA*, *supra* n 2, at [16]; *Breams Trustees Ltd v Upstream Downstream Services Inc*, *supra* n 2, at [21] and [27].

135 [2004] EWCA Civ 1331 at [23].

136 *Asia-Pacific Ventures II Ltd and Others v PT Intimutiara Gasindo* [2002] 3 SLR 326; *Bayerische Landesbank Girozentrale v Kong Kok Keong*, *supra* n 2. Both are noted in Joel Lee "Non-Exclusive Jurisdiction Clauses – Changing Approaches?", *supra* n 8.

137 See Part II Section A of the main text above.

jurisdiction of the court), it may be a legitimate inference on appropriate facts that the parties had intended that no other court should adjudicate the case. In such an event, there is clearly an exclusive jurisdiction clause.[138]

66 However, if no such inference is drawn, and the conclusion is that it is a non-exclusive choice of court agreement, then it is difficult to see why it should necessarily follow from the agreement that the parties had also agreed not to bring any actions in other jurisdictions, or agreed not to do anything that will result in the chosen forum not hearing the case. It is the corollary of a non-exclusive jurisdiction agreement that the parties have reserved the right to have the dispute resolved in another jurisdiction. It has not been articulated what is the correlative *obligation* to the right to sue that is being enforced. So, refusal to accept service of a writ from the contractually chosen forum will usually be a breach of an agreement to submit to the jurisdiction. There will probably be a breach if one of the parties takes out an anti-suit injunction to restrain the other party from commencing action in the chosen forum; this is clearly in breach of the right to sue in the chosen court.[139] But a party, in asking the chosen court not to exercise its jurisdiction, does not by that action alone breach an agreement to submit to the jurisdiction of the forum.

67 The argument that an agreement to submit to the jurisdiction of the court giving the opposing party the right to sue in the forum implies a correlative obligation to accept the exercise of that court's jurisdiction for reasons of *forum conveniens* has been taken one step further: that actual submission is a good enough reason to imply that same correlative obligation. Thus, in *JP Morgan Securities Asia Pte Ltd v Malaysian Newsprint Industries Sdn Bhd*,[140] it was suggested that since the rationale for the enforcement of a non-exclusive jurisdiction agreement was that in such cases there was no need to protect the defendant against the unilateral exercise of a state's legal authority in assuming jurisdiction over the defendant, no distinction needs to be drawn between actual submission after the commencement of proceedings and prospective submission by agreement. A version of this reasoning was echoed in the Singapore case of *Societe Generale v Tai Kee Sing*,[141] where the court said that the defendant was not in a position to object to legal proceedings

138 *British Aerospace Plc v Dee Howard & Co*, *supra* n 4, at 375.
139 *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan* [2003] 2 Lloyd's Rep 571.
140 *Supra*, n 2, at [42].
141 *Supra*, n 2, at [7].

instituted in the Singapore court once he had acknowledged the jurisdiction of the court.

68 With respect, it is difficult to see the contractual logic in this argument. The submission of a party to the jurisdiction of the court is a matter between that party and the court.[142] In itself it is merely an acknowledgement of the court's jurisdiction; it does not necessarily connote any waiver of objection to the exercise of such jurisdiction, and it has nothing to do with the agreement between the parties. In so far as the submission may be pursuant to a non-exclusive jurisdiction, it is the contract, not the submission, that creates any rights or liabilities between the parties. Something more is required to draw the contractual inference.

69 It is submitted that, on a proper understanding of the contractual analysis, the critical question is whether there is a derogation agreement that can be inferred or implied from the right to sue in the chosen court, before one has recourse to the upholding of bargains as the basis for requiring strong cause. In other words, an independent contractual basis needs to be found. It is not good enough to say that because one party has a right to sue in the forum, the other therefore cannot start proceedings elsewhere. To the author's knowledge, this argument has not been applied to a right to start an action in a foreign court conferred by a choice of foreign court agreement. It is doubtful if this "submission to jurisdiction" or "right to sue" argument adds any substantive value to the current jurisprudence. Little is offered by way of explanation except the need to uphold the parties' contractual bargain. But what is the content of the bargain? This will be considered in the following three sections. In other words, while the right to commence proceedings in the chosen court has been conferred by the contract, whether or not there is a further right to have the dispute resolved *only* in that chosen court depends on whether the parties have agreed not to commence action elsewhere, or agreed to waive any objections to the non-exclusively chosen court exercising jurisdiction, or agreed not to argue that another forum should hear the case for reasons of *forum non conveniens*, or agreed not to do anything that will prevent the chosen court from trying the merits of the dispute.

142 Conversely, a defendant who acknowledges the jurisdiction of the court of the non-contractual forum by submission is not thereby precluded from arguing that the court should hold the claimant to an exclusive foreign jurisdiction agreement. There is no waiver of the breach of contract for the same reason; the fact of submission to the jurisdiction has nothing to do with the parties' contract.

*(2) Agreement to waive objection to jurisdiction*

70 An agreement to waive objection to jurisdiction bargain is increasingly becoming an express term of parties' agreement, but it may also be implied from a non-exclusive jurisdiction agreement. One or both parties agree to waive any objections to a chosen forum exercising jurisdiction. This clause is often seen with the choice of jurisdictions by one contracting party (which may amount to a unilateral exclusive jurisdiction clause by implication), where the other party agrees not to object to the jurisdiction of any court chosen by the first party.

71 Two versions of this waiver of objection agreement can be discerned. First, the agreement could be construed as one not to object to the chosen court exercising its jurisdiction on the principles of the natural forum. Second, it could be construed as an agreement not to object to any argument that the chosen forum should hear the case on the principles of the natural forum. The scope of the waiver (which is a further question of construction of the agreement) could theoretically include not only factors of convenience but also factors of justice (*ie*, at both stages of the natural forum test).[143] The first construction of waiver of objection to the exercise of jurisdiction by the chosen court is more specific; the promise only relates to proceedings before the chosen court. This will be referred to as the *narrow* waiver of objection clause. The second construction, a promise not to object to any argument that the chosen court should hear the case, is effectively the same argument pitched at a more general level of abstraction, not being tied to any particular forum. The second construction will be referred to as the *wide* waiver of objection clause.

72 If there is a non-exclusive choice of court clause selecting the court of the forum (Singapore), and one party has agreed not to object to the chosen court's exercise of its jurisdiction (the narrow waiver of objection clause), and proceedings are commenced in Singapore, that party, in asking the court to stay proceedings because, *eg*, Ruritania is the more appropriate forum, is acting in breach of contract, and is expected to show strong cause why the agreement should not be upheld.[144] However, if it is a non-exclusive choice of *foreign* court (Ruritania) clause coupled with the narrow waiver of objection clause, then if the

143 See Part II Section A of the main text above.

144 *Bambang Sutrisno v Bali International Finance Ltd*, *supra* n 81, noted in Aedit Abdullah, "Jurisdiction Clauses and Waiver of *Forum Non Conveniens*" [1999] SJLS 674.

proceedings are commenced in Singapore, the party who has agreed to the waiver but commences action in Singapore and seeks to persuade the court to exercise its jurisdiction is not acting in breach of contract. He has only promised not to object to the court in Ruritania exercising jurisdiction; his promise has nothing to do with what arguments he can raise in the Singapore forum. The party who wants to stay the action so that the court in Ruritania can hear the case cannot therefore put the party who commenced the action in Singapore to showing, to the level of strong cause, why the action should continue in Singapore. Thus, the narrow waiver of objection clause has the same effect as an exclusive jurisdiction clause, putting the burden on the party in breach of contract to the requirement of strong reasons, but only from the perspective of the (non-exclusively) chosen court.

73 If the wide waiver of objection clause is used, however, then it operates as an exclusive jurisdiction clause in both situations. If the court of the forum is selected, then the party asking the court of the forum not to exercise its jurisdiction is acting in breach of contract because he has agreed not to argue that any other court should hear the case on the principles of the natural forum. If the court of Ruritania is chosen, then the party who wants the Singapore court to exercise its jurisdiction is acting in breach of contract because he has agreed not to argue that any court other than the court in Ruritania should hear the case on principles of the natural forum. In both cases, the party in breach has to demonstrate the reasons to the standard of a strong cause to justify why he should be allowed to breach the agreement.

74 In both cases, the breach of agreement does not lie in the commencement of the proceedings, but in raising arguments based on the principles of the natural forum. But this has to be understood in the context of the two-pronged concept of jurisdiction in the common law: the existence and exercise of jurisdiction.[145] While the traditional choice of court clause attacks the first prong (commencement of proceedings to invoke the jurisdiction of the court), this new waiver of objection clause attacks the second (whether the jurisdiction having been invoked should be exercised). The latter is a relatively new phenomenon. But this is because the exercise of jurisdiction as a significant aspect of the concept of jurisdiction in the common law is barely 20 years old.[146] Technique should not obscure substance. Whether the agreement relates to the

145 See Part II Section A of the main text above.
146 See *supra* n 12.

commencement or the exercise of the jurisdiction, in both cases, so long as the element of derogation is clear, it should be seen as the selection of an exclusive[147] forum to determine a dispute.[148] In this context, the only relevant distinction lies in the scope of the agreement. In a simple traditional exclusive jurisdiction agreement, *any* argument to the effect that the chosen court should not hear the case is a breach of agreement. In a waiver of objection case, whether an argument is a breach of agreement depends on the scope of the waiver agreement: whether both parties are bound; and the scope of the arguments that the party so bound had agreed not to raise.

75 It follows from this argument that there is no bright-line distinction between exclusive and non-exclusive jurisdiction agreements. In every case it is a question of the scope of the parties' bargain. This conclusion should not be startling; it is a logical corollary of the contractual basis of the enforcement of jurisdiction agreement.

76 If a non-exclusive choice of court clause is accompanied by an express waiver of objection agreement, then it ought to be given effect to, even if it means practically giving effect to an exclusive or semi-exclusive choice of court agreement. However, in many cases, such waivers are implied. In England, the prevailing judicial view (though not yet tested by the House of Lords) is that the narrow waiver of objection clause is necessarily implied into every non-exclusive choice of court clause,[149] at least where the choice of court agreement is governed by English law.[150] This has the effect of turning all non-exclusive choice of court agreements

147 It may be mutually or unilaterally exclusive.

148 In a different context, English law has recognised the need to see common law jurisdiction as a composite of existence and exercise of jurisdiction. Thus, asking a court not to exercise its jurisdiction is no longer regarded as submission to the jurisdiction of the court to determine the merits of the case, even though such an application invariably involves acknowledgement of the existence of the jurisdiction to determine merits: UK Civil Jurisdiction and Judgments Act 1982 (c 27), s 33. Singapore law has come close to making the same move judicially, though it has not actually done so: *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka*, *supra* n 53.

149 *British Aerospace Plc v Dee Howard & Co*, *supra* n 4; *Commercial Bank of the Near East plc v A B C and D*, *supra* n 130; *Amoco v TGTL*, *supra* n 121; *Mercury Communications Ltd v Communication Telesystems International*, *supra* n 134; *Burrows v Jamaica Private Power Co Ltd* [2001] EWHC Comm 488; *JP Morgan Securities Asia Private Ltd v Malaysian Newsprint Industries Sdn Bhd*, *supra* n 2; *Credit Suisse First Boston (Europe) Ltd v Seagate Trading Co Ltd* [1999] 1 Lloyd's Rep 784, 801. See also Fawcett, *supra* n 8, at 234–235.

150 This must be so since the interpretation of the jurisdiction agreement is subject to its proper law.

(governed by English law by the choice of the parties or by default because no foreign law is proven) into exclusive jurisdiction clauses when proceedings are commenced in the chosen court, but not when commenced in another jurisdiction.[151] It has the practical result that a non-exclusive choice of forum court agreement has a much more powerful effect than a non-exclusive choice of foreign court agreement in the court of the forum; thus encouraging parties to go to the chosen court to enforce the jurisdiction agreement. There is some evidence that Singapore courts are following the same line of reasoning,[152] but the evidence is not conclusive.[153]

77 On the present state of authorities in Singapore, it is not clear when a waiver of objection agreement will be implied if it is not an express term. Further, it is also not clear, if such an inference is drawn, whether it will be the narrow or wide version. There is little guidance from the courts thus far. The English approach, which has been followed to some extent in Singapore, can be criticised. To say that a party, in agreeing to submit to a jurisdiction, has thereby agreed not to object to the exercise of the jurisdiction by the chosen court (the narrow waiver of objection agreement), as many English cases have done,[154] seems to be drawing the line somewhat narrowly and artificially between the court of a foreign country and the court of the forum. In this context, there does not appear to be any good reason in principle (apart from the parties' contractual intention) why non-exclusive foreign jurisdiction clauses should be treated differently from non-exclusive forum jurisdiction clauses.[155] Practically, the approach is beneficial to a country whose courts are frequently chosen even if it is on a non-exclusive basis, in channelling judicial business to that country, but it creates a potential problem of not treating like cases alike if the assumption is simply that parties always intend more when they choose (non-exclusively) the court of Singapore than if they choose the court of a foreign country.

151 *Amoco v TGTL*, *supra* n 121.

152 *Baiduri Bank Bhd v Dong Sui Hung*, *supra* n 33; *Societe Generale v Tai Kee Sing*, *supra* n 2.

153 See the cases in n 156 below, where no such inference had been drawn.

154 See especially *British Aerospace Plc v Dee Howard & Co*, *supra* n 4 and *Amoco v TGTL*, *supra* n 121.

155 *The Chapparal*, *supra* n 106, at 164; *Burrows v Jamaica Private Power Co Ltd*, *supra* n 149. *Cf The Rothnie*, *supra* n 13, at 211, where the wide version was apparently adopted, but this line of reasoning appears to have been marginalised since: see *Banque Francaise de l'Orient v Chesterbrook Financial Corp*, 25 October 2001.

*(3) Agreement as to appropriate forum*

78 The court is likely to infer from the non-exclusive choice of court clause at least that the parties had thought (but not in any contractual sense) that the chosen forum was an appropriate one to resolve their disputes. On this view, the clause is merely a factor to be weighed when the court determines where the natural forum for the dispute lies.[156] On the other hand, the court may go further.

79 A non-exclusive choice of court clause may be said to represent an agreement between the parties that the chosen court is an appropriate forum, or is the most appropriate forum,[157] to adjudicate the disputes arising within the jurisdiction clause. If the agreement has any promissory content at all, then it must mean that there is an undertaking not to argue otherwise. The former inference does not have much significance for courts like those in Singapore which determine the question of natural forum not by reference to whether it is an inappropriate forum,[158] but whether it is not the clearly more appropriate forum. In the case of the latter inference, it should follow that it would be a breach of contract to argue that any other forum is the more appropriate one to hear the parties' dispute. This means that the promissory content would be practically the same as the wide waiver of objection clause discussed in the previous section. Whether the subject matter of the agreement also extends beyond appropriateness to factors of justice is a question of construction.

80 Theoretically, whether any such agreement is to be implied from the non-exclusive choice of court clause, and whether such inferred agreement has any promissory content, and if so, what content, are all issues governed by the proper law of the jurisdiction agreement. It would be helpful if the intentions of the parties are clearly spelt out, but

156 *Industrial & Commercial Bank Ltd v Banco Ambrosiano Veneto SPA* [2000] SGHC 188; *Datuk Hamzah bin Mohd Noor v Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj* [2001] 4 SLR 396; *Yugiantoro v Budiono Widodo*, *supra* n 5; *Malayan Banking Bhd v Measurex Engineering Pte Ltd* [2001] SGHC 5. See also *The Rothnie*, *supra* n 13, at 211.

157 Not surprisingly, this inference is not usually drawn in cases where several jurisdictions are specified as possible venues for litigation: *Baiduri Bank Bhd v Dong Sui Hung*, *supra* n 33.

158 Compare the Australian approach based on the clearly inappropriate forum (*Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538), where an agreement that a forum is appropriate will have greater impact on the test for the exercise of jurisdiction. The Australian approach has been rejected in Singapore: *Eng Liat Kiang v Eng Bak Hern* [1995] 3 SLR 97.

unfortunately, in many cases it is up to the courts to draw their own inferences. Unfortunately, the cases reveal more conclusions than explanations, and sometimes even the conclusions are not very clear.

81 In *PT Jaya Putra Kundur Indah v Guthrie Overseas Investments Pte Ltd*,[159] the Singapore High Court inferred from a non-exclusive choice of foreign (Indonesian) court clause that the parties had agreed that it was an appropriate forum, and it was held that the claimants should not be heard to argue that Indonesia was not an appropriate forum. But the party seeking to have the case heard in Singapore was not put to argue on the basis of strong cause why the action should continue. If the agreement, though promissory, only related to *an* appropriate forum, it would not be a breach of contract for the claimants to argue that Singapore was the *more* appropriate forum. Thus, it was not surprising that the court considered that the jurisdiction clause was only one of the factors going to the question of appropriateness in determining the natural forum for the dispute; it had no further effect. Thus far, no case in Singapore has gone so far as to infer from the non-exclusive selection of a court that the parties have agreed that it is the most appropriate forum so that it would be a breach of contract to argue that any other court than the chosen court should adjudicate any substantive issues falling within the dispute resolution clause. Arguably, however, some English cases have taken that step,[160] although the authorities often do not make it clear which of the possible contractual inferences discussed in this article is being drawn.

82 If the inference is indeed drawn that the parties have agreed not to argue anything inconsistent with the proposition that the non-exclusively chosen court is the most appropriate forum, then the contractual analysis should follow logically, and a party should be allowed to argue, in breach of agreement, that a non-chosen forum is more appropriate, only by showing exceptional circumstances amounting to strong cause.

159 *Supra* n 13. Approved of in *Bambang Sutrisno v Bali International Finance Ltd*, *supra* n 81.

160 *S & W Berisford plc v New Hampshire Insurance Co*, *supra* n 45, at 638; *Cannon Screen Entertainment Ltd v Handmade Films (Distributors) Ltd*, *supra* n 130; *British Aerospace Plc v Dee Howard & Co*, *supra* n 4; *Amoco v TGTL*, *supra* n 121; *Marubeni Hong Kong and South China Ltd v The Mongolian Government acting through the Ministry of Finance of Mongolia* [2002] 2 All ER (Comm) 873 at [64]. There are few reported cases where such inferences have been drawn in respect of foreign jurisdiction agreements. *Cf The Rothnie*, *supra* n 13, at 210–211; *Ace Insurance SA-NV v Zurich Insurance Co* [2001] 1 Lloyd's Rep 618 at [62].

83 In the absence of explicit terms, there is little guidance on *when* any such contractual inferences are to be drawn. This is a question of construction of contract, and so it is probably difficult to go beyond the principle that it depends on the circumstances of individual cases. It is in this context that one has to understand the statement in *British Aerospace Plc v Dee Howard Co*,[161] that such inferences will be easily drawn in "freely negotiated" jurisdiction agreements. It is not possible to draw a bright-line between freely negotiated jurisdiction agreements and jurisdiction agreements found in contracts of adhesion. It is suggested that no such distinction was intended.[162] In deciding what the parties intended the non-exclusive jurisdiction agreement to mean, the court is entitled to consider the circumstances of the bargaining, including facts like whether the jurisdiction agreement is a standard term, the circumstances of its incorporation and the extent of the negotiations that went into the final wording of the clause. There is an unfortunate trend in both Singapore and English courts to extol the virtues of contractual enforcement, but with little explanation of the exact content of the agreement being enforced. This has the tendency to obfuscate the contractual rationale for requiring strong cause; and may obscure the need for careful scrutiny in every case of the content of the parties' agreement.

*(4) Agreement that the chosen forum is the primary forum for dispute resolution*

84 The contracting parties may have identified one forum as the "primary" forum for dispute resolution because of its neutrality, even if both parties may have reserved the right to sue in other jurisdictions. This may be achieved with the unilateral exclusive jurisdiction agreement with the right of one party to choose another jurisdiction for trial, in which case, it is just a one-sided exclusive jurisdiction agreement. Alternatively, neither party may choose to be (or one party may have enough bargaining power to resist being) so bound, yet they may choose to identify a primary forum among several non-exclusive jurisdictions. This may have important contractual consequences.

85 In *Royal Bank of Canada v Coöperative Centrale Raiffeisen-Boerenleenbank BA*,[163] it was argued, in an application for an anti-suit injunction to restrain the party who had commenced proceedings in a

161 *Supra* n 4, at 376.
162 *Import Export Metro Ltd v Compania Sud Americana de Vapores SA*, *supra* n 2, at [14(iii)]. *Cf Fawcett*, *supra* n 8, at 249–250.
163 [2004] 1 Lloyd's Rep 471.

foreign country, that it was an implied term in a contract containing a non-exclusive forum jurisdiction agreement that the parties had agreed that an English trial would take precedence over a foreign one (the applicant commenced English proceedings one day after the commencement of foreign proceedings). The argument was rejected on the basis that the court would not imply a term to contradict an express one, since both parties had expressly reserved the right to commence proceedings elsewhere. Parallel proceedings were therefore clearly within the contemplation of the parties, and there was no breach of contract in the commencement of foreign proceedings, even if there was a conflict of jurisdiction with the English court. This argument may, however, be taken more seriously by the court in the future in the absence of such an express term.

86 In the jurisdiction context, the argument would have to be slightly modified, that the parties have agreed that they would not argue that the case should be heard in any other forum once a case is commenced in the primary forum. If such an agreement is inferred or implied, it would be a breach of contract to argue in the primary forum that the case should be heard elsewhere, and strong cause would need to be shown to justify the breach. It would also be a breach of contract to argue before a non-chosen forum that it should exercise its jurisdiction to hear the case if proceedings are ongoing in the primary forum, with similar consequences for the breach of contract, unless the parties only agreed not to object to the court of the primary forum exercising its jurisdiction.[164]

*(5) Factor in natural forum test*

87 It is not in doubt that, whatever may be inferred or implied about the parties' intentions as to the scope of the agreement embodied in the jurisdiction agreement, the fact that a court has been chosen by the parties, albeit non-exclusively, is relevant in the application of the principles of the natural forum. The fact that the parties thought that the chosen forum was at least an appropriate forum to determine their disputes must surely carry some weight in the court's determination.[165] What weight this factor will carry must depend on all the circumstances of the case. In a number of Singapore cases, no particular weight was

164 Similar to the narrow waiver of objection agreement discussed in Part VI Section A(2) of the main text above.

165 *Bambang Sutrisno v Bali International Finance Ltd*, *supra* n 81, at [11].

given to the existence of a non-exclusive forum[166] or foreign[167] jurisdiction agreement, but this could be because the point had not been seriously pressed by counsel.

88 It goes too far, perhaps, to say that a non-exclusive jurisdiction agreement will never be accorded any more weight than any other connections in the case under consideration.[168] On the other hand, it may also go too far to say that a non-exclusive jurisdiction agreement will *always* be a strong indicator of the appropriate forum to hear the case.[169] The weight to be attributed to it ought to depend on the circumstances. It may make a difference whether the jurisdiction clause formed part of a closely negotiated contract or is a standard term in a contract of adhesion. Where the parties have clearly put their minds to the consideration of the clause, that will understandably be a very strong factor.[170] On the other hand, if the parties have indicated a list of possible countries for the disputes to be tried, then the choices may not mean very much in terms of comparative appropriateness, and the court may even be justified in not giving any particular weight to the clause.[171]

89 One very important consideration is that the parties may have chosen a non-exclusive but *primary* forum for dispute resolution because of its neutrality. Quite apart from the possible contractual implications,[172] this may be an important factor in itself. In *Attock Cement Co Ltd v Romanian Bank for Foreign Trade*,[173] Staughton LJ said:

> We should ... look with favour on a choice of our own jurisdiction, when it appears to have been made in order to find a court which is neutral rather than one that is convenient.

166 See *supra* n 156.

167 *Lehman Brothers Special Financing Inc v Hartadi Angkosubroto*, *supra* n 5; *Itochu Steel Asia Pte Ltd v CV Wira Mustika Indah* [1999] SGHC 321; *Yuk Wah Ho David v Gao Jia Ren* [1998] SGHC 101.

168 As the Hong Kong courts appear to have done: *Yu Lap Man v Good First Investment Ltd* [1998] HKLRD (Yrbk) 104; *T & K Electronics Ltd v Tai Ping Insurance Co Ltd* [1998] 1 HKLRD 172. See also *Morrison v Panic Link Ltd* 1993 SLT 602, affirmed in 1994 SLT 232; *Fawcett*, *supra* n 8, at 251–252.

169 *Fawcett*, *supra* n 8, at 259.

170 *S & W Berisford plc v New Hampshire Insurance Co*, *supra* n 45, at 463.

171 See, *eg*, *Baiduri Bank Bhd v Dong Sui Hung*, *supra* n 33. See also *BAS Capital Funding Corp v Medfinco*, *supra* n 49, at [192].

172 See Part VI Section A(4) of the main text above.

173 [1989] 1 WLR 1147 at 1161; *BAS Capital Funding Corp v Medfinco Ltd*, *supra* n 49, at [190]. The only relevant reference was an *obiter* one to the case of the enforcement of an exclusive jurisdiction agreement (at [191]).

This was considered to be a very important factor for the forum to hear the matter in the case of a non-exclusive forum jurisdiction agreement, quite apart from any contractual analysis, in *BAS Capital Funding Corp v Medfinco Ltd*.[174]

90 Thus, the existence of a non-exclusive jurisdiction agreement may be of significance in many cases in the court's determination of the exercise of its jurisdiction, and may consequently impose the *tactical* burden of showing strong factors in favour of trial elsewhere on the party arguing against the agreed forum, and may even require something close to the "strong cause" standard used in the contractual analysis to neutralise the existence of the non-exclusive jurisdiction agreement. This, however, should not be confused with the contractual analysis; there is no party in breach of agreement, and no cause for shifting the legal or evidential burden. However, there may also be justification beyond the rationale of the prevention of breach of contract for disregarding foreseeable factors of inconvenience, or at least the attachment of little weight to such factors. As noted by Rix LJ:[175]

> If a party agrees to submit to the jurisdiction of the courts of a state, it does not easily lie in its mouth to complain that it is inconvenient to conduct its litigation there (that is to assert that the agreed forum is a *forum non conveniens*).

91 The reason does not lie in the upholding of any "bargain" or the prevention of breach of contract. It lies simply in the commonsensical assessment of the persuasive force of the argument by such a person, especially if the evidence indicates that the parties had made a conscious choice of a neutral forum.

### *B. Summary*

92 The common law rationale for the enforcement of exclusive choice of court agreements is to uphold the bargain of the parties within a procedural context. Thus, while the court retains discretion to allow a breach of contract, it requires the party seeking not to be bound by the contract to show strong cause within the contra-indicating factors to justify the breach of agreement. In recent years, the rationale of upholding bargains – with its logical corollary of placing the burden of

174 *Supra* n 49, at [186]–[193]. See also *Egon Oldendorff v Libera Corp* [1995] 2 Lloyd's Rep 64 at 72.

175 *Ace Insurance SA-NV v Zurich Insurance Co*, *supra* n 160, at [62].

proof on the party arguing against the chosen forum and the imposition of the burden of strong cause on such a party – has been applied with equal force in the case of non-exclusive jurisdiction agreements, especially clauses in favour of the court of the forum. It has been argued that this approach is justified if, but only if, there is indeed an agreement and a breach or threatened breach of that agreement. This involves an exercise in the construction of the jurisdiction agreement, and possibly the implication of terms, in accordance with the law applicable to the jurisdiction agreement (which is usually the same as the law governing the contract in which the jurisdiction agreement is found, and in default of proof of which the contract law of the forum would apply).

93 The parties may have agreed to accept the exercise of the jurisdiction of the chosen court once one of the parties invokes its right to sue in that court. The parties may have agreed to waive any objection to the exercise of jurisdiction by the court chosen in the agreement (the narrow waiver of objection agreement). The parties may have agreed to waive any objection to any argument that the chosen forum should hear the case on principles of the natural forum (the wide waiver of objection agreement). The parties may have agreed that the chosen forum is clearly the most appropriate forum and not to argue against that proposition. The parties may have agreed that the chosen forum is the primary forum for dispute resolution, and that they would argue that any other forum is more appropriate once the jurisdiction of that forum has been invoked. But it is also possible that the parties may not have agreed to anything except to give the chosen court a basis for assuming jurisdiction (the strict sense of prorogation in respect of the existence of the jurisdiction). The contractual analysis requires the court to determine the content of the bargain of the parties in respect of the non-exclusive jurisdiction agreement.

94 Apart from any possible contractual bargain, the non-exclusive jurisdiction agreement could be of significance as a factor to be weighed in the application of the principles of the natural forum. The weight of this factor must depend on the circumstances of the case. Although the effect of this in a case of a closely negotiated contract selecting a neutral forum for dispute resolution can be very great and might even resemble that of the enforcement of a contractual bargain, the rationale is totally different. The two lines of reasoning should be kept distinct.

95 One important consequence of the analysis presented in this article is that there is no theoretical distinction between an exclusive jurisdiction agreement and a non-exclusive jurisdiction agreement. The

distinction is a practical one of the content and scope of the agreement of the parties. An exclusive jurisdiction agreement clearly implies an agreement not to argue that any other forum should hear the case on the basis of, at least, factors foreseeable at the time of the contracting. A non-exclusive jurisdiction agreement can bring with it a variety of promises in respect of different factors. The same governing principle is that the court will only allow a party to breach the contract upon proof of strong cause on the facts why he should be allowed to do so.

96 The second important consequence of this analysis is that it is erroneous to treat all non-exclusive jurisdiction agreements as if they have the same effect. In every case, the promissory content, if any, needs to be teased out. This may be seen to lead to uncertainty. However, it is suggested that this will be an improvement over the current situation where inferences are drawn, often by implication, about the parties' intentions in many cases without articulating the reasons for these inferences. A possible step to reduce uncertainty may be to use presumptions,[176] although that itself may present difficulties if the presumptions are applied too rigidly.[177] Neither is it a practical problem that the construction is a matter for the proper law of the jurisdiction agreement. If foreign law is not proved, the court will simply apply its own domestic contractual principles of construction and implied terms by default. The Singapore courts have acquired tremendous experience in the construction of contracts, especially commercial contracts. It should not be difficult for the courts to develop principles relating to the construction of non-exclusive jurisdiction agreements beyond the present state of uncertainty, once it is clear that this is what the courts are doing. Contracting parties can create greater certainty by being very clear about the obligations assumed in respect of the non-exclusive jurisdiction agreement.[178]

176 This is a partial solution only, as it is likely to be a substantive issue of construction governed by the proper law of the contract. A presumption of exclusivity to be applied as the law of the forum (see, *eg*, Brussels I Regulation, *supra* n 116, Art 23, and the draft Hague Convention on Exclusive Choice of Court Agreements, Art 3(b), *supra* n 1) is easier to justify if there is a broad measure of agreement of approach globally, or if it operates within a group of countries with similar rules.

177 *Cf* the rejection of the use of presumptions in the common law determination of the objective proper law of a contract noted in *Coast Lines Ltd v Hudig & Veder Chartering NV* [1972] 2 QB 34 at 44 and 47.

178 See, *eg*, *Royal Bank of Canada v Coöperatieve Centrale Raiffeisen-Boerenleenbank BA*, *supra* n 163, where the express reservation of rights to commence proceedings elsewhere was decisive.

97 A third consequence is that the "modified *Spiliada* approach"[179] is simply the application of the contractual analysis within the natural forum context, in respect of factors which the parties have agreed not to raise in arguments, just as the approach in *Amerco Timbers*[180] is the contractual analysis within the same natural forum context in respect of the totality of factors that fall within an exclusive jurisdiction agreement. There is still a strong element of judicial policy in the operation of the "strong cause" when giving effect to the promissory content of the non-exclusive choice of court agreement.

98 Further, quite apart from the contractual analysis, the weight to be accorded to the jurisdiction agreement must also depend on the facts. This, however, is simply a routine aspect of the judicial determination of the natural forum: the court must attach different weight to different factors depending on the individual circumstances of the case.

### *C. Other implications of the contractual analysis of non-exclusive jurisdiction agreements*

99 The significance of the contractual basis for the enforcement of non-exclusive jurisdiction agreements goes beyond the context of the exercise of jurisdiction. Because such agreements differ from exclusive jurisdiction agreements only in terms of what has been agreed, practically all issues in which exclusive jurisdiction agreements have been relevant will be germane to the enforcement of non-exclusive jurisdiction agreements. Four main issues are briefly discussed below.

#### *(1) The equality of forum and foreign jurisdiction agreements*

100 A contractual analysis would suggest that it should not matter whether the clause in question is a forum or foreign one. It has frequently been stated that forum and foreign jurisdiction clauses should be treated alike.[181] Indeed, any other attitude would be evidence of judicial chauvinism. Agreements should be construed in the same way whether they point towards a court of the forum or a foreign country. Thus, for example, any inference of an agreement as to the primacy of the court of the forum as a dispute resolution forum may be drawn whether the

179 *Supra* n 4; *Fawcett*, *supra* n 8, at 249–250.

180 *Supra* n 73.

181 See, *eg*, *The Chaparral*, *supra* n 106, at 164; *Import Export Metro Ltd v Compania Sud Americana de Vapores SA*, *supra* n 2, at [15(ii)]; *Akai Pty Ltd v People's Insurance Co Ltd* , *supra* n 65, at 104.

neutral court chosen is one that sits in the forum or a foreign state.[182] International comity also suggests that the narrow waiver of objection agreement[183] should not be inferred in the absence of clear indications of the parties' intention to this effect, for the result of this clause is that a foreign jurisdiction agreement contains no promissory content before a court in the forum, while a forum jurisdiction agreement can have the same effect as an exclusive jurisdiction agreement.

*(2) Anti-suit injunctions*

101 It has been seen above, in the context of the exclusive jurisdiction agreement, that the court will readily grant an anti-suit injunction[184] to prevent a breach of contract. In principle the position should be the same in respect of the breach or threatened breach of a non-exclusive jurisdiction agreement. Thus, the English court may grant an anti-suit injunction to restrain foreign proceedings taken to prevent the applicant from suing in England pursuant to a non-exclusive forum jurisdiction agreement.[185] The foreign action is intended to prevent the commencement of proceedings in the forum, which the applicant has a clear contractual right to do. In this context, any agreement or otherwise about the exercise of the jurisdiction of the English court is simply irrelevant. This is a special case because the foreign proceedings involve anti-suit proceedings.

102 In the ordinary case, the commencement or continuation of foreign proceedings will not amount to a breach of a non-exclusive forum jurisdiction in itself, as the parties have not expressly bound themselves to bring their disputes to the forum. However, the court may infer an intention not to bring or continue parallel proceedings in foreign countries when there is an action in the "primary" forum in the non-exclusive jurisdiction agreement, in the absence of exceptional

182 *Cf* the quote at para 89 of the main text above.
183 See Part VI Section A(2) of the main text above.
184 More accurately, an anti-anti-suit injunction.
185 *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan*, *supra* n 139. See Adrian Briggs, "Decisions of British Courts during 2003: Private International Law" (2003) 74 BYBIL 511 at 528.

circumstances.[186] In a stronger form of this argument, the commencement of foreign proceedings may be viewed as a breach of an agreement not to object to the agreed (non-exclusive) jurisdiction of the court of the forum.[187] The agreement in this sense must be read more broadly to preclude more than just the objecting to the exercise of the jurisdiction of the court of the forum or even the raising of arguments that the chosen forum is not the or an appropriate forum; it must mean objecting in the broad sense of doing anything anywhere that will prejudice the position of the chosen forum as the only forum that will adjudicate the dispute.[188]

103 In principle, the anti-suit injunction is intended to protect a contractual right, and it is only called an "anti-suit" injunction because in the context the injunction is intended to prevent a legal suit from being commenced or continued in breach of contract. A party's contractual right not to have certain arguments raised against it in foreign proceedings could in principle also be the subject of protection by an injunction from the court of the forum as well. Suppose that there is a non-exclusive Singapore jurisdiction agreement, and the court infers from it an agreement that neither party would raise any argument that the Singapore court should not hear the case on principles of the natural forum. Suppose that one of the parties commences an action in Ruritania and intends to argue in that court that it is the most appropriate forum to hear the case in spite of the jurisdiction agreement. This is an impending breach of contract, and following the reasoning in the anti-suit cases, could be the subject of an injunction from the Singapore forum unless strong cause can be shown why the party is right to want to make those arguments in breach of contract. The same issues could arise in the case of a non-exclusive foreign jurisdiction agreement in favour of the court of Ruritania, and one of the parties commences proceedings in Utopia

186 *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan*, *supra* n 139, at [36] and [52]. It is difficult to understand this case in any other way than as a case of construction or implication of term of non-derogation in this sense. The formal analysis that the foreign conduct was *prima facie* vexatious and oppressive because it was contrary to the "spirit" of the non-exclusive forum jurisdiction agreement (at [36]–[37]) seems rather disingenuous and irrelevant in the light of the court's view of the parties' (implied) contractual intention. See also *Royal Bank of Canada v Coöperatieve Raiffeisen-Boerenleenbank BA*, discussed at para 85 of the main text above.

187 In *Bankers Trust International plc v RCS Editori SpA* [1996] CLC 899 at 907, Longmore J, after finding "a promise that the defendant will not object to English jurisdiction", held that, in bringing foreign proceedings, "that is precisely what they are doing", and that was a good reason to grant an injunction. In the European context, this case must of course now be read subject to the developments discussed in *supra* n 116.

188 See also Part VI Section A(4) of the main text above.

intending to persuade the court in Utopia that it is the most appropriate forum to hear the case, with the complication discussed above whether the Singapore court would act where it is not the forum chosen to adjudicate the substantive dispute.[189]

104 Apart from any breach of contract, the existence of a non-exclusive forum jurisdiction agreement could be taken as a strong reason supporting the claim for an anti-suit injunction.[190] There is no doubt that the existence of such an agreement must be considered together with all other factors in weighing the facts to determine whether the conduct in bringing proceedings in the foreign court is vexatious or oppressive. The non-exclusive forum jurisdiction agreement affects the degree of appropriateness of the forum as the venue for the resolution of the dispute, and this has a bearing on the question whether the conduct abroad is vexatious or oppressive. But as in the case of the exercise of its own jurisdiction by the court of the forum, the weight to be accorded to such an agreement must vary with the circumstances of the case.

*(3) Defence to foreign judgment*

105 Under the Reciprocal Enforcement of Foreign Judgments Act,[191] it is a defence[192] to the registration of a judgment from a gazetted country[193] if "the bringing of the proceedings" in the foreign court is contrary to a dispute resolution agreement.[194] If the commencement of the foreign proceedings can be said to be a breach of the non-exclusive (forum or foreign) jurisdiction agreement in the ways discussed in previously,[195] then the foreign judgment will not be registered.

189 See para 57 of the main text above.

190 *UBS AG v OMNI Holding AG*, *supra* n 134, at 925. This is one interpretation of *Bankers Trust International plc v RCS Editori SpA*, *supra* n 187 at 907, and *Sabah Shipyard (Pakistan) Ltd v Islamic Republic of Pakistan*, *supra* n 139, discussed at *supra* n 186.

191 Cap 265, 2001 Rev Ed. This defence does not exist under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264, 1985 Rev Ed), and there is no evidence of its existence in the common law.

192 For an interesting discussion of the effect of *prorogation* of jurisdiction of the foreign court on the analysis of potential defences to the recognition or enforcement of foreign judgments, which is beyond the scope of this article, see Adrian Briggs, "Crossing the River by Feeling the Stones: Rethinking the Law on Foreign Judgments" (2004) 8 Singapore Year Book of International Law 1.

193 So far, only Hong Kong SAR has been gazetted under this legislation.

194 *Supra* n 191, s 5(3)(*b*), provided the judgment debtor has not submitted to the jurisdiction of the foreign court. The proviso appears to be a conflation of submission to jurisdiction with waiver of breach of agreement: see para 67 of the main above.

195 See Part VI Sections A(1) to A(4) of the main text above.

106 While the statutory defence clearly strikes at the *commencement* of proceedings in breach of agreement, it is less clear whether it applies in cases where all that can be said is that the parties had agreed not to argue against the appropriateness of the chosen forum, even though there has been a breach of agreement to channel the dispute to another jurisdiction. It may be that the statutory defence can also apply if the breach of agreement was a crucial part of the chain of events constituting the "bringing" of the proceedings in the foreign court. Moreover, in such cases, there is another potential defence. If an injunction had been sought beforehand from the forum to prevent such arguments from being raised in the foreign proceedings, and if it can be said that the foreign judgment was obtained as a result of the breach of the injunction, then it should follow that the party in contempt should not be able to enforce the fruits of its contempt in the court of the forum.[196]

*(4) Damages for breach*

107 To the extent that damages may be available for losses caused by the breach of an exclusive jurisdiction agreement,[197] in principle, such damages, sounding in contract, should also be available for breaches of non-exclusive jurisdiction agreements. It is comparatively straightforward if the express or implied agreement is one not to commence or continue foreign proceedings; in such cases, there would clearly be no foreign proceedings or judgment but for the breach of contract. Difficulties in showing causation may arise where the breach of contract is the making of prohibited arguments in foreign courts in order to persuade them to take jurisdiction. But this is a practical difficulty and should not affect the potential availability in principle of damages for losses properly recoverable within the limits imposed by the proper law of the jurisdiction agreement for the breach of contract.

## VII. Conclusion

108 The enforcement of exclusive choice of court agreements, where there is a clear obligation not to bring proceedings other than in the contractually specified court, is a highly significant aspect of international civil litigation. The common law learning in this respect is fairly clear. The starting point is the enforcement of a contractual agreement, even if the ending point is the balancing required by the procedural jurisdiction

196 See para 57 of the main text above.
197 See para 33 of the main text above.

context. There are still many questions that remain outstanding,[198] and the standards for allowing the parties to breach the agreement may not be the same in common law jurisdictions, but the basic contractual theme is clear. At a broader level, the respect for party autonomy in the selection of dispute resolution fora is fast gaining ground, beyond the realm of international arbitration, to that of cross-border litigation. The current project on choice of court agreements at the Hague Conference on Private International Law[199] is compelling testimony of the importance of such techniques in the channelling of cross-border disputes today, even if this may not translate to *contractual* enforcement of such agreements.

109 The contractual theme is very important in the analysis of the exclusive jurisdiction agreement. It provides the rationale for a test different from merely weighing the different factors in the natural forum doctrine. It explains why the burden is always on the party seeking to depart from the agreement to justify that departure, and why that justification must be based on exceptional circumstances amounting to strong cause, even if the same factors are being considered as in the natural forum doctrine. It explains why an exclusive jurisdiction agreement can sometimes be binding only unilaterally. It explains the parity of approach towards the enforcement of jurisdiction agreements in both the exercise of jurisdiction as well as the anti-suit injunction context. It provides the explanation for the nascent remedy of damages for losses caused by breaches of jurisdiction agreements. It has shown how arbitration agreements are enforced, and can show the way forward in respect of how other types of dispute resolution agreements can be enforced. Most importantly, in the context of this article, it shows how non-exclusive jurisdiction agreements can and should be approached.

110 Non-exclusive jurisdiction agreements are equally important as, if not more important than, exclusive jurisdiction agreements in cross-border civil litigation, not only because they are very frequently used today to engender greater flexibility in the choice of litigation forum, but also because they have not been subject to as close scrutiny as exclusive jurisdiction agreements. This article has argued that the contractual analysis of the exclusive jurisdiction agreement is equally applicable to the non-exclusive jurisdiction agreement. The only distinction between the two types of agreements lies in the content and scope of the bargain.

198 Many of these are choice of law questions, relating to issues like the capacity of the parties to enter into the agreement, the formation of the jurisdiction agreement, and the severability of the jurisdiction agreement.

199 *Supra* n 1.

In the context of the modern understanding of international civil jurisdiction in terms of the concepts of the existence and exercise of jurisdiction, agreements relating to the two aspects of a court's jurisdiction should not be treated differently.

111 The consequence of this contractual analysis is that the distinction between exclusive and non-exclusive agreement is not a theoretical one as such. It is still a useful practical distinction to make, as the exclusive jurisdiction agreement connotes certain clear obligations undertaken by the parties. But sometimes the obligations undertaken in a non-exclusive jurisdiction agreement, whether in respect of the commencement of proceedings or the exercise of the court's jurisdiction, can be equivalent to those found in exclusive jurisdiction agreements (unilateral or bilateral).[200]

112 In the case of the non-exclusive jurisdiction agreement, it has been argued that it is important to determine the content of the contractual bargain between the parties. There is no simple contractual analysis of the non-exclusive jurisdiction agreement apart from the agreement to submit to the jurisdiction of the chosen court; in every case it is a question of what the parties have agreed to beyond the simple submission, either as a matter of construction or as a matter of implication of terms, according to the proper law of the jurisdiction agreement where it is proved. And in so far as there is a bargain to be enforced, the same analysis as in the case of exclusive jurisdiction agreements should apply in respect of that bargain, but not beyond it. Beyond the contractual analysis, the non-exclusive jurisdiction agreement carries some weight in the determination of the natural forum. It is not possible to pre-assign weights to non-exclusive jurisdiction agreements. The weight to be attached to it must depend on the circumstances of individual cases.

113 The practical consequence of the analysis in this article is that more attention should be paid to the drafting of jurisdiction agreements, especially in the case of non-exclusive jurisdiction agreements. The effect of the agreement on the question whether a particular forum will

200 This may cause some complications in the context of the draft Hague Convention on Exclusive Choice of Court Agreements, *supra* n 1: Would any of the combination of obligations discussed in this article expressed, inferred from or implied into the non-exclusive jurisdiction agreements render it "exclusive" for the purpose of the Convention?

eventually exercise its jurisdiction to hear the substantive merits of the dispute is ultimately outside the control of the contracting parties because that is a question of that forum's procedural law in the conflict of laws sense. However, the strong emphasis given in this context to the enforcement of contractual rights in common law countries should provide enough incentive for contracting parties to spell out their respective rights and obligations in respect of the choice of litigation forum more explicitly, especially once the intention goes beyond the simple case of a mutually binding exclusive choice of court agreement.